

CPLR 214(5): Statute of Limitations Problems in Determining Whether Action for Strict Products Liability Sounds in Tort or Contract

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Additionally, federal courts in New York continue to pass on the validity of the various provisional remedies provided in the CPLR. The United States District Court for the Southern District of New York, in *Sugar v. Curtis Circulation Co.*, declared sections of the attachment statute unconstitutional as violative of procedural due process.

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 214(5): Statute of limitations problems in determining whether action for strict products liability sounds in tort or contract.

The dwindling importance of privity in the area of products liability and the resulting expansion in recovery for personal injury and property damage caused by defectively manufactured products have elicited substantial attention from courts¹ and commentators.² Nonetheless, the present state of the law in New York is far from definitive.³ Particularly vexing has been the ambiguity evidenced with respect to selection of the appropriate statute of limitations.⁴ In this area, more so than in others, the applicable limitation period can be crucial, since injury often occurs many years after the original sale of the defective commodity.⁵

¹ See, e.g., *Guarino v. Mine Safety Appliance Co.*, 25 N.Y.2d 460, 255 N.E.2d 173, 306 N.Y.S.2d 942 (1969) (manufacturer of defective oxygen mask held liable to rescuers); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963) (airplane manufacturer liable for passenger's death); *Randy Knitwear v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962) (manufacturer of chemical used to retard fabric shrinkage held liable to remote purchaser who sustained economic injury); *Greenberg v. Lorenz*, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961) (seller's warranty extended to members of purchaser's household).

Jurisdictions other than New York have also dealt with this issue. See, e.g., *Stang v. Hertz Corp.*, 83 N.M. 730, 497 P.2d 732 (1972) (strict liability in tort adopted); *Ritter v. Narragansett Elec. Co.*, 109 R.I. 176, 283 A.2d 255 (1971) (adoption of § 402A of *Restatement (Second) of Torts*, providing for strict liability in tort).

² See, e.g., Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Comment, *The Last Vestige of the Citadel, Symposium on Products Liability*, 2 HOFSTRA L. REV. 721 (1974); *The Survey*, 49 ST. JOHN'S L. REV. 170, 172 (1974).

³ See *The Survey*, 49 ST. JOHN'S L. REV. 170, 172 (1974).

⁴ It has been said that "[n]othing in the law of procedure has more sudden or substantive impact" than the statute of limitations. Siegel, *Procedure Catches Up—And Makes Trouble*, in *Symposium on Mendel v. Pittsburgh Plate Glass Company*, 45 ST. JOHN'S L. REV. 63 (1970) [hereinafter cited as Siegel]. The definitions of limitation periods in the CPLR are in themselves confusing, since some are based on a theory of liability, e.g., breach of contract (CPLR 213(2)), while others are in terms of the injury suffered, e.g., property damage or personal injury (CPLR 214(4), (5)). 7B MCKINNEY'S CPLR 214, commentary at 429 (1972).

⁵ Such a case was presented in *Rivera v. Berkeley Super Wash, Inc.*, 44 App. Div. 2d 316, 354 N.Y.S.2d 654 (2d Dep't 1974), discussed in *The Survey*, 49 ST. JOHN'S L. REV. 170, 172 (1974). The infant plaintiff was seriously injured by a defective product sold

In *Mendel v. Pittsburgh Plate Glass Co.*,⁶ the Court of Appeals refused to recognize an independent cause of action in strict tort liability,⁷ holding the contract statute of limitations applicable to all warranty theories of liability resulting from defective products.⁸ Several years later, the Court, in *Codling v. Paglia*,⁹ created a new cause of action denominated "strict products liability." While outlining several requirements which, if satisfied, would allow any person injured by a defective product to recover from the manufacturer,¹⁰ the Court failed to clearly define all of the contours of the action. Subsequently, theorists have attempted to determine whether *Codling* represents the final extension of the implied warranty of fitness for use to non-contracting third parties or a new tort action intended to foreclose any further broadening of warranty.¹¹

If the *Codling* action is contractual, the four-year statute of limitations¹² would apply, commencing from the date of sale; if its nature is tortious, the plaintiff would have three years¹³ from the time of injury¹⁴ within which to bring his action. In *Rivera v. Berkeley Super Wash, Inc.*,¹⁵ the Appellate Division, Second Department, took a stand

more than eight years prior to the injury. In evaluating the policy considerations involved, the court stated:

It is clearly unjust to deny an injured party the possibility of compensation on the wholly arbitrary basis of a lapse of a period of time, the inception of which period of time is in no way connected with him and the passage of which bears no relation to any laches on his part.

44 App. Div. 2d at 325, 354 N.Y.S.2d at 662.

⁶ 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969), discussed in *Symposium on Mendel v. Pittsburgh Plate Glass Company*, 45 ST. JOHN'S L. REV. 62 (1970).

⁷ See note 29 *infra*.

⁸ 25 N.Y.2d at 344, 253 N.E.2d at 209, 305 N.Y.S.2d at 493.

⁹ 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973), discussed in *The Survey*, 48 ST. JOHN'S L. REV. 611, 616 (1974).

¹⁰ The Court stated:

We accordingly hold that, under a doctrine of strict products liability, the manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages; provided: (1) that at the time of the occurrence the product is being used . . . in the manner normally intended, (2) that if the person injured . . . is himself the user . . . he would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured . . . would not otherwise have averted his injury or damages.

32 N.Y.2d at 342, 298 N.E.2d at 628-29, 345 N.Y.S.2d at 469-70.

¹¹ See, e.g., Murphy, *New Directions in Products Liability*, 612 INS. L.J. 40, 44-45 (1974); 43 FORDHAM L. REV. 322 (1974); *The Survey*, 48 ST. JOHN'S L. REV. 611, 616 (1974).

¹² N.Y. U.C.C. § 2-725 (McKinney 1964). This section applies prospectively to those sales made after September 27, 1964. CPLR 213(2), with its six-year period, applies to sales consummated prior to that date.

¹³ CPLR 214(5).

¹⁴ See *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936).

¹⁵ 44 App. Div. 2d 316, 354 N.Y.S.2d 654 (2d Dep't 1974), discussed in *The Survey*, 49 ST. JOHN'S L. REV. 170, 172 (1974).

in favor of the tort limitation, relying on a recent Court of Appeals decision¹⁶ in which the *Codling*-created action was described as "sound-[ing] in tort rather than in contract."¹⁷ Notwithstanding *Rivera*, until the Court of Appeals expressly determines the issue, the lower courts will continue to be faced with the problem of reconciling the various decisions.¹⁸

The resulting confusion was recently exemplified in *Lewis v. John Royle & Sons*.¹⁹ Plaintiff's hand and arm were crushed in an extruder manufactured and designed by the defendant. Based on *Mendel*, claims for breach of warranty and strict liability in tort were dismissed as untimely,²⁰ the action having been commenced more than six years from the date of sale.²¹ In effect, these actions were barred before plaintiff was injured. A third claim for negligence was dismissed on a motion for summary judgment.²² Subsequently, plaintiff sought to amend his complaint and reallege his strict liability claim pursuant to the intervening decisions of *Codling* and *Rivera*.

The Supreme Court, Broome County, avoided the problematic area of limitations by denying the motion on the merits.²³ In dicta, however, it distinguished the two causes of action discussed in *Mendel* and *Codling*. Viewing the *Codling* theory of "strict products liability"²⁴ as a tort cause of action, the court assigned to it the personal injury statute of limitations.²⁵ Furthermore, the court preserved *Mendel's* viability by considering its extended warranty cause of action to be a second avenue for bringing the same claim.²⁶ Understandably, the *Lewis* court applied the contract limitation period to the warranty action.²⁷ In itself, this analysis is not unique;²⁸ however, by adhering

¹⁶ *Velez v. Craine & Clark Lumber Corp.*, 33 N.Y.2d 117, 305 N.E.2d 750, 350 N.Y.S.2d 617 (1973).

¹⁷ *Id.* at 124-25, 305 N.E.2d at 754, 350 N.Y.S.2d at 623.

¹⁸ The *Rivera* court handled the conflict between *Mendel* and *Codling* by stating that *Mendel* is "still the law as to warranty causes of action . . ." 44 App. Div. 2d at 326, 354 N.Y.S.2d at 663.

¹⁹ 79 Misc. 2d 304, 357 N.Y.S.2d 601 (Sup. Ct. Broome County), *aff'd*, 46 App. Div. 2d 304, 362 N.Y.S.2d 262 (3d Dep't 1974).

²⁰ The trial term's order was affirmed by the Appellate Division, Third Department. 37 App. Div. 2d 639, 322 N.Y.S.2d 314 (3d Dep't 1971), *motion for leave to appeal denied*, 30 N.Y.2d 481, 280 N.E.2d 894, 330 N.Y.S.2d 1025 (1972).

²¹ The sale of the machine was consummated on June 6, 1963, before the Uniform Commercial Code went into effect. 37 App. Div. 2d at 639, 322 N.Y.S.2d at 316. Therefore, the six-year statute of limitations applied. CPLR 213(2). *See* note 12 *supra*.

²² *See* 79 Misc. 2d at 309, 357 N.Y.S.2d at 607.

²³ *Id.* at 308-09, 357 N.Y.S.2d at 606-07.

²⁴ *See* note 10 *supra*.

²⁵ 79 Misc. 2d at 307, 357 N.Y.S.2d at 604-05.

²⁶ *Id.* at 306-07, 357 N.Y.S.2d at 604.

²⁷ *Id.*

²⁸ *See* *Rivera v. Berkeley Super Wash, Inc.*, 44 App. Div. 2d 316, 321, 354 N.Y.S.2d

to the *Mendel* description of "strict liability in tort" as synonymous with implied warranty absent privity,²⁹ the court reached the curious result of applying contract rules to what it labeled a tort claim.³⁰

This unlikely interpretation is indicative of the confusion caused in part by the melange of contradictory labels used by the Court of Appeals in describing this cause of action. The problem originated in the extension of implied warranty to those not in privity.³¹ Since the action was based on contract but extended to noncontracting parties because of the injuries suffered, *i.e.*, torts, the action emerged as a hybrid, sounding in tort and contract.³² Yet, the Court, in a 1953 decision,³³ stated:

[A]lthough such a breach of duty may rest upon, or be associated with, a tortious act, it is independent of negligence, and so such a cause of action gets . . . the six-year limit . . . as being on an implied contract obligation or liability.³⁴

Mendel agreed that the theory involved was breach of warranty and accordingly was governed by the contract statute of limitations.³⁵ Nevertheless, the Court confounded the issue by equating this action with one for strict liability in tort.³⁶ *Codling* failed to clarify the

654, 659 (2d Dep't 1974). Apparently, the appellate division has been content to allow the two avenues to develop independently. Thus, in *Clark v. Bendix Corp.*, 42 App. Div. 2d 727, 345 N.Y.S.2d 662 (2d Dep't 1973), it brought the warranty concept a step further by extending *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963), to allow a breach of warranty claim by an injured purchaser against a component part manufacturer. This cause of action was considered a remedy additional to that provided by *Codling*, 42 App. Div. 2d at 727, 345 N.Y.S.2d at 663.

²⁹ 25 N.Y.2d at 345, 253 N.E.2d at 210, 305 N.Y.S.2d at 494. Specifically, the *Mendel* Court stated that "strict liability in tort and implied warranty in the absence of privity are merely different ways of describing the very same cause of action." *Id.* The Court apparently meant only to foreclose the existence of a separate action in tort. Unfortunately, however, this statement has led to the application of the "strict liability in tort" label to what *Mendel* put forth as strictly an "extended breach of warranty" action.

The *Mendel* Court went on to say:

Although it is true that a plaintiff may have two different theories of recovery involving the same wrong with different limitation periods (*e.g.*, negligence and breach of warranty), it would be absurd to have two different periods of limitation applicable to the same cause of action, with the same elements of proof, complaining of the very same wrong.

Id. at 345, 253 N.E.2d at 210, 305 N.Y.S.2d at 494-95.

³⁰ 79 Misc. 2d at 306-07, 357 N.Y.S.2d at 604.

³¹ See notes 1-2 *supra*.

³² Dean Prosser has stated that "[t]he seller's warranty is a curious hybrid, born of the illicit intercourse of tort and contract, unique in the law." W. PROSSER, *LAW OF TORTS* 634 (Hornbook ed. 1971) (footnote omitted).

³³ *Blessington v. McCrory Stores Corp.*, 305 N.Y. 140, 111 N.E.2d 421 (1953).

³⁴ *Id.* at 147, 111 N.E.2d at 422-23. See note 12 *supra*. It is interesting to note that "CPLR 214 eliminates the former separate provisions that turned upon whether or not the injury resulted from negligence." 1 WK&M ¶ 214.12.

³⁵ 25 N.Y.2d at 344, 253 N.E.2d at 209, 305 N.Y.S.2d at 493.

³⁶ See note 29 *supra*.

matter. While the Court therein termed the "new" cause of action "strict products liability," *i.e.*, tortious, its announcement was premised on an analysis of the case law extending breach of warranty.³⁷

In *Rivera v. Berkeley Super Wash, Inc.*,³⁸ the Appellate Division, Second Department, has offered a solution³⁹ by defining strict products liability as a tortious action and assigning to it the personal injury statute of limitations.⁴⁰ Additionally, the court restricted the applicability of *Mendel* to warranty causes.⁴¹ By so holding, the Second Department has offered the Court of Appeals an opportunity to resolve the important questions pertaining to the statute of limitations.⁴² As the *Survey* has urged, the Court of Appeals should affirm the holding in *Rivera*.⁴³ A simple affirmance is not sufficient, however; in so doing, the Court should carefully define the contours of this cause of action, both procedural and substantive.⁴⁴ Part of this definition includes establishing the terminology which most appropriately describes its nature. Only such a painstaking effort will prevent *Lewis*-type confusion from proliferating.

³⁷ 32 N.Y.2d at 338-42, 298 N.E.2d at 626-29, 345 N.Y.S.2d at 466-70.

³⁸ 44 App. Div. 2d 316, 354 N.Y.S.2d 654 (2d Dep't 1974).

³⁹ Speaking of the *Codling* creation of a strict products liability action, the *Rivera* court noted, "To be sure, the terms used to describe the cause of action which has evolved have caused their share of confusion . . ." *Id.* at 320, 354 N.Y.S.2d at 658. The court went on to say that "strict products liability" is "the term apparently preferred by our Court of Appeals . . ." *Id.*

⁴⁰ CPLR 214(5). See text accompanying notes 13-14 *supra*.

⁴¹ See note 18 *supra*. The *Rivera* court felt that "*Codling* overruled *Mendel's* reliance on the Uniform Commercial Code when it (*Codling*) provided an alternative remedy sounding in tort." 44 App. Div. 2d at 324, 354 N.Y.S.2d at 662.

⁴² In this regard, the counsel of Professor David D. Siegel should be followed:

What the Court of Appeals does have in any event to do is decide for itself just what its broad purposes are in this personal injury area and then go about the business of seeing to it that arguable procedural or other collateral matters not be permitted to obscure the aim.

Siegel, *supra* note 4, at 70. See note 5 *supra*.

⁴³ See *The Survey*, 49 ST. JOHN'S L. REV. 170, 180 (1974).

⁴⁴ There are numerous unsettled ramifications stemming from the nature of this cause of action. For example, assuming the strict products liability action is deemed purely tortious, the question arises whether liability can be disclaimed. The Court of Appeals, in *Velez v. Craine & Clark Lumber Corp.*, 33 N.Y.2d 117, 305 N.E.2d 750, 350 N.Y.S.2d 617 (1973), indicated that disclaimer was possible:

Although strict products liability sounds in tort rather than in contract, we see no reason why in the absence of some consideration of public policy parties cannot by contract restrict or modify what would otherwise be a liability between them grounded in tort.

Id. at 124-25, 305 N.E.2d at 754, 350 N.Y.S.2d at 623. This seems illogical, since preventing tortious conduct by holding liable the person responsible therefor is usually considered a mandate of public policy.

Another unresolved issue is that of retroactivity. In view of the line of cases illustrating the Court of Appeals' concern with the policy issues involved in products liability, see cases cited in note 1 *supra*, it would appear that the *Codling* action should have retroactive application. In *Lewis*, the Appellate Division, Third Department, affirming

ARTICLE 3 — JURISDICTION AND SERVICE,
APPEARANCE AND CHOICE OF COURT

CPLR 302(a)(3)(ii): Appellate Division vacillates in construction of foreseeability requirement of long-arm statute.

Where a nondomiciliary commits a tortious act outside New York which produces injury to persons or property within the state, CPLR 302(a)(3)(ii) may provide a jurisdictional predicate.⁴⁵ The provision, enacted in 1966, was intended to abrogate the rule of *Feathers v. McLucas*,⁴⁶ which had left a plaintiff, injured under such circumstances, without recourse.⁴⁷

the denial of plaintiff's motion to amend his complaint, refused to apply *Codling* because "the issue was completely litigated and the appeal process carried to its ultimate disposition . . ." 46 App. Div. 2d at 305, 362 N.Y.S.2d at 264. By so deciding, it avoided the question of retroactivity.

Finally, one must consider the position of the retailer. In extending warranty liability, the intent of the Court was to place the burden for the injuries caused by defective products on the manufacturer, *i.e.*, the one who controls production. *See Codling v. Paglia*, 32 N.Y.2d 330, 339-41, 298 N.E.2d 622, 626-28, 345 N.Y.S.2d 461, 467-69; Comment, *The Last Vestige of the Citadel*, in *Symposium on Products Liability*, 2 *HOFSTRA L. REV.* 721, 726 (1974). In light of this purpose, should the retailer be limited in any cross-claim against the manufacturer by a contract statute of limitations? The inequity of this situation is discussed in Siegel, *supra* note 4, at 69-70. The Appellate Division, Fourth Department, in a decision prior to *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), held that a middle-man would not be able to implead the original manufacturer when the contract statute of limitations had expired. The court cited *Mendel* as authority. *Ibach v. Grant Donaldson Serv., Inc.*, 38 App. Div. 2d 39, 45, 326 N.Y.S.2d 720, 725-26 (4th Dep't 1971).

A number of jurisdictions have resolved the question of products liability by legislation. *See* 43 *FORDHAM L. REV.* 322, 328-29 n.53 (1974). A legislative approach has been considered preferable in light of the potential complications that may be unforeseen in any single judicial decision. *See id.* at 328-29.

⁴⁵ CPLR 302(a)(3)(ii) allows for personal jurisdiction over a nondomiciliary if he commits a tortious act without the state causing injury to person or property within the state . . . if he

. . . .
(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

The limitations within subparagraph (ii) of subdivision (a)(3) were inserted, along with subparagraph (i), to keep CPLR 302 "well within constitutional bounds." Legislative Reports, N.Y. Sess. LAWS [1966], at 2749, 2786 (McKinney) [hereinafter cited as Leg. Reports]. *See A. Millner Co. v. Noudar*, 24 App. Div. 2d 326, 329, 266 N.Y.S.2d 289, 293 (1st Dep't 1966), ("[i]n the enactment of the CPLR the Legislature has not extended New York's jurisdiction to the utmost constitutional limit"). *But see Lewin v. Bock Laundry Mach. Co.*, 42 Misc. 2d 599, 601, 249 N.Y.S.2d 49, 51 (Sup. Ct. Kings County), *aff'd mem.*, 22 App. Div. 2d 854, 255 N.Y.S.2d 466 (2d Dep't 1964), *aff'd mem.*, 16 N.Y.2d 1070, 213 N.E.2d 686, 266 N.Y.S.2d 391 (1965) ("New York has committed itself to a full exploitation of jurisdiction over non-domiciliaries").

⁴⁶ 15 N.Y.2d 433, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

⁴⁷ Prior to amending the CPLR, it was stated:

In the light of the *Feathers* decision, it is clear that amendment of CPLR 302 (a)(2) is necessary if legal protection is to be accorded to New York residents who are injured within the state by foreign tort-feasors who cannot be reached through implementation of the transaction of business clause