

CPLR 213(2): Prospective Warranties and the Statute of Limitations

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hoped that the *Survey* nonetheless accomplishes its basic purpose, *viz.*, to key the practitioner to significant developments in the procedural law of New York.

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 213(2): Prospective warranties and the statute of limitations.

The Uniform Commercial Code prescribes a four-year statute of limitations for breach of a sales contract.¹ Generally, the cause of action is deemed to accrue upon tender of delivery of the goods.² However, where a prospective warranty is involved, *i.e.*, one which "explicitly extends to future performance of the goods," section 2-725(2) provides that the action accrues when the breach is or should have been discovered.

A recent case in the Appellate Division, Second Department, *Mittasch v. Seal Lock Burial Vault, Inc.*,³ examined the applicability of this exception to an express warranty by the manufacturer that a burial vault "is free from material defects or faulty workmanship and will give satisfactory service at all times."⁴ The casket was purchased in 1958 and in 1970 the plaintiff endeavored to remove her husband's body to another cemetery. Exhumation revealed that leakage had caused damage to the body and the casket. The court held that the warranty was prospective, and thus the statute of limitations ran from discovery of the defect.

Under pre-UCC case law, a prospective warranty arose only in the narrow category of cases in which the product was not in existence at the time of contract.⁵ Assurances relating to the condition of the goods at the time of sale were considered present warranties.⁶ For example,

¹ N.Y. U.C.C. § 2-275 (McKinney 1964). Under CPLR 213(2), a contract action must be commenced within six years, except as provided in the U.C.C.

² *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969); *Schwartz v. Heyden Newport Chem. Corp.*, 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963).

³ 42 App. Div. 2d 573, 344 N.Y.S.2d 101 (2d Dep't 1973) (mem.).

⁴ *Id.* at 573, 344 N.Y.S.2d at 102.

⁵ See *Woodworth v. Rice Bros. Co.*, 110 Misc. 158, 179 N.Y.S. 722 (Sup. Ct. Orleans County), *aff'd mem.*, 193 App. Div. 971, 184 N.Y.S. 958 (4th Dep't 1920), *aff'd mem.*, 233 N.Y. 577, 135 N.E. 925 (1922) (trees were sold to the plaintiff guaranteed to bear "Elbertas" and "Willetts," and five years later the trees bore a different fruit; *held*, the warranty extended to the time in the future when the trees would bear fruit). *But see Allen v. Todd*, 6 Lans. 222, 224 (4th Dep't 1872) (where apple trees bore a different variety of apples than promised, the warranty was held to extend only to the "species of the tree at the time the sale was made").

⁶ See *Schwartz v. Heyden Newport Chem. Corp.*, 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963) (thirteen years after being administered drug, plaintiff developed carcinoma causing removal of eye; *held*, cause of action accrues when harmful substance

in *Citizens Utilities Co. v. American Locomotive Co.*,⁷ the Court of Appeals held that a warranty that machinery would operate at full capacity for thirty years was a present one, and thus was breached on the date of sale. The Code now simply states that a warranty is prospective (*i.e.*, the discovery rule applies) if it "explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance. . . ."⁸

The Second Department in *Mittasch* did not consider itself bound by *Citizens Utilities* because of the alignment of judges on the warranty issue in that case.⁹ It is submitted, however, that irrespective of the precedential value to be accorded Judge Desmond's opinion, section 2-725(2) should be controlling, in light of the language of the warranty and the nature of the product. If this be the case, it is questionable how much is left of *Citizens Utilities*.¹⁰ The Court of Appeals should at first opportunity clear up the confusion in this area by defining the distinction between present and prospective warranties.

CPLR 207(3): Statute of limitations not tolled for defendant's absence where expedient service is available.

Where a potential defendant leaves the state after a cause of action has accrued against him, CPLR 207 suspends the statute of limitations for the period of his absence, provided it exceeds four months. Subdivi-

introduced into plaintiff's body, not when actual deterioration of body structure occurs); *Citizens Util. Co. v. American Locomotive Co.*, 11 N.Y.2d 409, 184 N.E.2d 171, 230 N.Y.S.2d 194 (1962) (sale of four electric generating sets with alleged implied warranty that they would operate for thirty years held to be warranty of present characteristics in 4-3 decision. Judge Fuld, dissenting, stated that a warranty could not be breached until the machine failed to function.); *Munn v. Security Controls Inc.*, 23 App. Div. 2d 813, 258 N.Y.S.2d 475 (4th Dep't 1965) (mem.); *W.T. Grant Co. v. Uneceda Doll Co.*, 19 App. Div. 2d 361, 243 N.Y.S.2d 428 (1st Dep't 1963) (per curiam), *aff'd mem.*, 15 N.Y.2d 571, 203 N.E.2d 299, 254 N.Y.S.2d 834 (1964); *Kakargo v. Grange Silo Co.*, 11 App. Div. 2d 796, 204 N.Y.S.2d 1010 (2d Dep't 1960) (mem.); *Outwater v. Miller*, 215 N.Y.S.2d 838 (Sup. Ct. Nassau County 1961); *Liberty Mut. Ins. Co. v. Sheila-Lynn Inc.*, 185 Misc. 689, 57 N.Y.S.2d 707 (App. T. 1st Dep't 1945), *aff'd mem.*, 270 App. Div. 835, 61 N.Y.S.2d 373 (1st Dep't 1946).

⁷ 11 N.Y.2d 409, 184 N.E.2d 171, 230 N.Y.S.2d 194 (1962), noted in 31 *FORDHAM L. REV.* 609 (1963).

⁸ N.Y. U.C.C. § 2-725(2) (McKinney 1964).

⁹ 42 App. Div. 2d at 574, 344 N.Y.S.2d at 103. Only two other judges concurred in the portion of Chief Judge Desmond's opinion dealing with the warranty question. Judge Froessel voted to affirm on a different ground, 11 N.Y.2d at 417-18, 184 N.E.2d at 175, 230 N.Y.S.2d at 199.

¹⁰ Doubt has been expressed about the present vitality of the *Citizens Utilities* rule outside the realm of implied warranties. H. PETERFREUND & J. McLAUGHLIN, *NEW YORK PRACTICE* 147 n.3 (3d ed. 1973). See 37 *FORDHAM L. REV.* 247 (1968), maintaining that an implied warranty can be prospective within the meaning of UCC 2-275(2). But see *Binkley Co. v. Teledyne Mid-America Corp.*, 333 F. Supp. 1183, 1186 (E.D. Mo. 1971), and authorities cited therein ("explicit" defined by *Webster* as "not implied").