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CPLR 214(5): Codling Modifies Mendel by Recognizing a Separate Cause of Action Based upon Strict Liability in Tort

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CPLR 214(5): Codling *modifies* Mendel *by recognizing a separate cause of action based upon strict liability in tort.*

In *Codling v. Paglia,*[19] the Court of Appeals has at least partially overturned its notorious decision of four years earlier in *Mendel v. Pittsburgh Plate Glass Co.*[20] In *Mendel,* the Court refused to recognize a new cause of action in tort in favor of an injured user of a defective product.[21] Instead, a manufacturer's liability for injury to a user of its product with whom it was not in contractual privity was held to arise from an extension of its implied sales warranties. Since the user's cause of action was deemed to be contractual in nature, the Court concluded that it accrued upon the manufacturer's original sale of the product and was governed by the contract statute of limitations.[22] The unfortunate result of this rule was that a plaintiff's action could be time-barred prior to any injury.

Authorities were quick to point out that additional injustices would flow from the *Mendel* decision when retailers and wholesalers sought recovery over from manufacturers.[23] If a sufficient interval of time had elapsed between the manufacturer's original sale of the defective product and its distribution to the consumer, retailers and various intermediate enterprises in the chain of distribution might find their warranty actions against the manufacturer time-barred by the time the defective product caused injury. In such a case, the manufacturer, who rightfully should have borne the loss, would escape liability.

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19 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

20 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969). The many ill effects of *Mendel* are discussed in *Symposium on* Mendel v. Pittsburgh Plate Glass Co., 45 ST. JOHN'S L. REV. 62 *et seq.* (1970).

21 Previously, in Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963), the Court of Appeals had held that "[a] breach of warranty . . . is not only a violation of the sales contract out of which the warranty arises but is a tortious wrong suable by a noncontracting party . . . ." *Id.* at 436, 191 N.E.2d at 82, 240 N.Y.S.2d at 594. In *Mendel,* however, the Court qualified this statement, explaining that:

> When *Goldberg* was before us, we were confronted with the issues of whether or not a cause of action other than in negligence should exist in favor of those persons not in privity with the contract of sale. After determining that the cause of action should exist, two avenues were open to us—either to establish, as other jurisdictions already had, a new action in tort, or to extend our concept of implied warranty by doing away with the requirement of privity. While there is language in the majority opinion in *Goldberg* approving of the phrase "strict tort liability," it is clear that *Goldberg* stands for the proposition that notwithstanding the absence of privity, the cause of action which exists in favor of third-party strangers to the contract is an action for breach of implied warranty.

25 N.Y.2d at 343-4, 253 N.E.2d at 209, 305 N.Y.S.2d at 493.

22 Under the Uniform Commercial Code, a cause of action in breach of warranty accrues upon the seller's "tender of delivery" and is governed by the four-year statute of limitations for sales. N.Y. U.C.C. § 2-725 (McKinney 1964).

23 *See, e.g.,* Siegel, *Procedure Catches Up—and Makes Trouble,* 45 ST. JOHN'S L. REV. 63, 69-70 (1970).

In *Codling*, the Court of Appeals overruled the premise upon which *Mendel* was based by recognizing a separate and independent cause of action in tort in favor of an innocent bystander injured by a defective product. The Court set out the elements of this new cause action as follows:

> 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 (whether by the person injured or damaged or by a third person) for the purposes and in the manner normally intended, (2) that if the person injured or damaged is himself the user of the product 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 or damaged would not otherwise have averted his injury or damages.[24]

While no statute of limitations issue was present in *Codling*, the Court's acceptance of a tort theory of liability appears to require that the newly recognized cause of action be deemed to accrue upon injury to the plaintiff and that the three-year personal injury statute of limitations be applied.[25] More difficult of assessment is *Codling's* effect on actions over against manufacurers by other enterprises held liable to injured plaintiffs. A lower New York court has recently had an opportunity to rule on both these issues.

In *Victorson v. Kaplan*,[26] the plaintiff was injured while operating an allegedly defective extractor purchased by its owner, Kaplan, from the manufacturer, Bock Laundry Machine Co. (Bock), in 1948. In 1970, less than three years after the injury, the plaintiff brought an action in the Supreme Court, Queens County, based upon negligence, "breach of warranty" and "strict liability in tort" against Kaplan and Bock. Kaplan cross-claimed against Bock on each of the three grounds relied upon by the plaintiff. Prior to the *Codling* decision, the court dismissed the breach of warranty causes of action in the complaint and cross-claim as time-barred under the *Mendel* rule. Also in accordance with *Mendel*, the court dismissed the claims in "strict liability in tort," holding that these stated no separate causes of action. After *Codling* was decided, the court granted reargument and, upon reargument, al-

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24 32 N.Y.2d at 342, 298 N.E.2d at 628-29, 345 N.Y.S.2d at 469-70.

25 It has long been established that a tort action accrues upon injury or the invasion of a legally protected interest. *See* Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936).

26 75 Misc. 2d 429, 347 N.Y.S.2d 666 (Sup. Ct. Queens County 1973).

lowed the plaintiff and Kaplan to replead their claims in "strict liability in tort," holding that these claims accrued upon injury to the plaintiff and applying the three-year statute of limitations for personal injury to them. The court adhered to that part of its earlier decision which held the "breach of warranty" actions time-barred.

Thus, the *Victorson* court treated "breach of warranty" and "strict liability in tort" as two distinct causes of action,[27] the former sounding in contract[28] and accruing upon sale of the product by the defendant, the latter sounding in tort and accruing upon injury to the plaintiff. The reluctance of the Court of Appeals in *Mendel* to accept the notion of two separate causes of action was founded partially on the assumption that the sole remedy of a plaintiff who was privy to the sale of an injury-causing product was an action based upon sales warranties. The Court reasoned that the recognition of a separate tort action in favor of other injured users would put a plaintiff in privity of contract at a disadvantage.[29] The latter might find his remedy barred due to the lapse of time between the sale and his injury while a plaintiff not in privity of contract but injured at the same time by the same defective product would have a full three years after injury to bring an action in "strict liability in tort." The Court in *Codling,* however, eliminated this objection to a dual theory of recovery by holding that a "strict liability in tort" action accrues to "any person injured."[30] The injured user who is in privity of contract should, therefore, have the choice of two alternative theories of recovery, each governed by its own statute of limitations and accrual rule. This reasoning is implicit in the *Victorson* court's separate treatment of the "breach of warranty" and "strict liability in tort" actions.

The approach adopted in *Victorson* also solves the problem which *Mendel* created in the area of claims over against manufacturers. The court appears to have assumed that, although defendant Kaplan's claim for indemnification based upon breach of warranty was barred before

[27] By allowing the parties to replead their claims in "strict liability in tort" while holding the "breach of warranty" claims time-barred, the court held contrary to the Court of Appeals' statement in *Mendel* 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." 25 N.Y.2d at 345, 253 N.E.2d at 210, 305 N.Y.S.2d at 494.

[28] Presumably the contractual action is governed by the Uniform Commercial Code provisions such as those concerning disclaimer of warranties, limitation of remedy and the scope of a seller's liability for personal injury. *See* N.Y. U.C.C. §§ 2-316, 2-719, 2-318 (McKinney 1964). A recent Court of Appeals case indicates that these provisions have no application to an action in "strict liability in tort." Velez v. Craine & Clark Lumber Corp., 33 N.Y.2d 117, 305 N.E.2d 750, 350 N.Y.S.2d 617 (1973) (disclaimer held ineffective as to strangers to sales contract).

[29] 25 N.Y.2d at 344, 253 N.E.2d at 209, 305 N.Y.S.2d at 493.

[30] 32 N.Y.2d at 342, 298 N.E.2d at 628, 345 N.Y.S.2d at 469.

he was sued, a similar claim based upon "strict liability in tort" could be asserted within three years of the plaintiff's injury.[31] Under this rule, a retailer or wholesaler held liable to an injured consumer would be assured at least a minimum of time to assert a claim over. An alternative means of securing indemnification from a manufacturer which the court in *Victorson* appears to have rejected[32] might be a claim under *Dole v. Dow Chemical Co.*[33] The *Dole* rule of equitable apportionment of damages among joint tortfeasors based upon relative responsibility has been held to apply to actions in "breach of warranty."[34] A claim for *Dole* indemnification accrues when the tortfeasor indemnitee suffers judgment and is timely if asserted within six years.[35]

Undoubtedly the Court of Appeals will soon have an opportunity to rule on the effect of the *Codling* case on statute of limitations problems in products liability cases. It is hoped that the Court will adopt the approach suggested in *Victorson,* thus giving the law in this area a rationality and fairness which was lacking under *Mendel.*

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

CPLR 327: Enforceability of the judgment deemed a factor in the application of the doctrine of forum non conveniens.

Under *Silver v. Great American Insurance Co.*[36] and its codification in CPLR 327,[37] a New York court is not required to accept jurisdiction where a lawsuit's only nexus to the state is the residence of one of the parties.[38] The present standard is based upon "considerations

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31 This is a reasonable extrapolation from the *Codling* language. The Court in *Codling* held that a cause of action in strict liability in tort accrues to any person "injured or damaged." *Id.* This would appear to be broad enough to encompass damage resulting from liability to an injured consumer.

32 Kaplan's claim over based upon "relative responsibility" was dismissed. 75 Misc. 2d at 43, 347 N.Y.S.2d at 668.

33 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

34 *See* Noble v. Desco Shoe Corp., 41 App. Div. 2d 908, 343 N.Y.S.2d 134 (1st Dep't 1973); Walsh v. Ford Motor Co., 70 Misc. 2d 1031, 335 N.Y.S.2d 110 (Sup. Ct. Nassau County 1972) (mem.).

35 *Cf.* Musco v. Conte, 22 App. Div. 2d 121, 125-26, 254 N.Y.S.2d 589, 595 (2d Dep't 1964).

36 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972).

37 CPLR 327 provides:

> When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

38 The former rule compelled the court to accept jurisdiction where either party was a resident. De la Bouillerie v. De Vienne, 300 N.Y. 60, 89 N.E.2d 15 (1949), *reargument denied,* 300 N.Y. 644, 90 N.E.2d 496 (1950) (defendant was a resident); Gregonis v. Phila-