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CPLR 1007: Case Illustrates Mendel's Effect on Third-Party Claims

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unrelated sellers using the same written form."[84] In essence, the Court did not believe that this was the proper time to enlarge the scope of the class action in New York, primarily because many of the injustices inherent in the sales contracts before it were perfectly legal. Given this assumption, the need for a consumer class suit loses some of its apparent urgency and the need for legislative relief becomes more obvious.

CPLR 1007: Case illustrates Mendel's *effect on third-party claims.*

It has been projected that one of the more unfortunate ramifications of *Mendel v. Pittsburgh Plate Glass Co.*[85] would be its impact on third-party actions.[86] For example, if a retailer purchased an item in June of 1968 and sold it in August of the same year, an action for breach of warranty commenced by an injured plaintiff in July of 1972 would be timely.[87] But, the retailer's impleader claim for breach of warranty on the part of the manufacturer, accruing on the date of the original purchase by the retailer, would be barred by the statute of limitations.[88] A further illustration of the difficulty of dealing with third-party claims is provided by *Perez v. Chutick & Sudakoff.*[89]

In *Perez* plaintiff was injured when a ladder on which he was working slipped. He commenced a negligence action against the general contractor of the project on which he was employed and the subcontractor in charge of installing the floors, Circle Floor Co. (Circle). Subsequently, plaintiff sought leave to amend his complaint so as to assert a cause of action for breach of warranty against Circle, alleging that the excessively slippery nature of the floor caused his ladder to fall.

At this point, the court was faced with countervailing equities. Undoubtedly, plaintiff's claim related back to the service of the initial pleading since it arose out of the same occurrence set forth in the complaint.[90] Yet, Circle did not manufacture the floor and, under *Mendel,* the statute of limitations had already run on any breach of warranty claim that Circle might attempt to interpose against the manufacturer. This factor caused the court to deny plaintiff's motion on the ground that the amendment would result in substantial prejudice to defendant.

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84 26 N.Y.2d at 400, 259 N.E.2d at 721, 311 N.Y.S.2d at 282.

85 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

86 Siegel, *Procedure Catches Up—And Makes Trouble,* 45 ST. JOHN'S L. REV. 63, 69-70 (1970).

87 *See* N.Y. U.C.C. § 2-725 (McKinney 1964).

88 *See* C.K.S., Inc. v. Helen Borgenicht Sportwear, Inc., 22 App. Div. 2d 650, 253 N.Y.S.2d 56 (1st Dep't 1964); City & County Sav. Bank v. M. Kramer & Son, 43 Misc. 2d 731, 252 N.Y.S.2d 224 (Sup. Ct. Albany County 1964).

89 50 F.R.D. 1 (S.D.N.Y. 1970).

90 FED. R. CIV. P. 15(c) (1964).

In both the above hypothetical and *Perez*, the manufacturer, *i.e.*, the guilty party, has been immunized from liability at the expense of a party with a legitimate claim. In all fairness, *Mendel* is only partly responsible for this result inasmuch as earlier cases had labelled the defendant's claim as one for breach of warranty, rather than one for indemnification.[91] The latter construction could conceivably remedy much of the injustice inherent in this area;[92] the statute of limitations on the claim for indemnification would not begin to run until defendant paid a judgment secured by the injured party.[93] Regrettably, lower courts have not been willing to adopt this approach. Nonetheless, there could be little objection to thrusting ultimate liability on the actual wrongdoer.[94] Perhaps, judicial reaction to *Mendel* will result in a reappraisal of the earlier decisions which refused to compare the innocent retailer with a passive tortfeasor in negligence cases.

ARTICLE 30 — REMEDIES AND PLEADINGS

CPLR 3025(b): Practice of granting leave to amend pleadings without inquiry into the merits of the cause of action as amended ruled no longer tolerable.

Among those powers "inherent in the court as a part of its ordinary jurisdiction" is the power to amend pleadings.[95] The statutory declaration of this authority, contained in CPLR 3025(b), instructs that leave to amend shall be "freely given," but is silent as to what mode of inquiry should be made into the propriety of such amendment. Historically, the courts have applied a rule of strict non-inquiry into the merits of the proposed amended pleadings, save in instances where the allegations contained therein are patently without substance.[96] Recently, however, in *East Asiatic Co. v. Corash*,[97] the Appellate Division, First Department, characterized this practice as no longer tolerable, reasoning that "[t]he day when motion practice would be allowed to proliferate through avoiding coming to grips with the substantial question

91 *See* cases cited note 88 *supra*.

92 *See* Siegel, *Injury, Warranty and Time: Procedure Catches Up and Makes Trouble*, 164 N.Y.L.J. 103, Nov. 30, 1970, at 4, col. 5-7 (addendum).

93 Musco v. Conte, 22 App. Div. 2d 121, 254 N.Y.S.2d 589 (2d Dep't 1964).

94 *See* Note, *An Appraisal of Judicial Reluctance to Imply an Indemnity Contract in Time-Barred Breach of Warranty Suits*, 39 ST. JOHN'S L. REV. 361, 366-67 (1965).

95 Christal v. Kelly, 88 N.Y. 285, 290 (1882); *see also* Kalt Lumber Co. v. Dupignac, 150 App. Div. 400, 134 N.Y.S. 1098 (1st Dep't 1912).

96 *See* Martin v. Katz, 15 App. Div. 2d 767, 224 N.Y.S.2d 568 (1st Dep't 1962); Anderson v. New York Cent. R.R., 284 App. Div. 64, 130 N.Y.S.2d 308 (4th Dep't 1954); Cohen v. Dana, 273 App. Div. 1017, 79 N.Y.S.2d 261 (2d Dep't 1948); Warren v. Putnam, 263 App. Div. 474, 33 N.Y.S.2d 635 (3d Dep't 1942); *see also* 3 WK&M ¶ 3025.23; 7B MCKINNEY'S CPLR 3025, supp. commentary at 203 (1970).

97 34 App. Div. 2d 432, 312 N.Y.S.2d 311 (1st Dep't 1970).