The Last Vestige of the Citadel

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THE LAST VESTIGE OF THE CITADEL

PRODUCTS LIABILITY: ACCRUAL TIME OF STATUTES OF LIMITATION UNDER STRICT LIABILITY IN TORT AND UNDER THE UNIFORM COMMERCIAL CODE

I. INTRODUCTION: OF CITADELS AND VESTIGES

Seizing the banner from Justice Cardozo, who in 1931 declared that "the assault upon the citadel of privity is proceeding in these days apace," William Prosser openly declared war in 1960. The critics' ultimate objective was greater protection for the consumer who, in a simple products liability case, was first confronted with the difficulties of proving negligence, and then further frustrated by privity requirements. While in many products liability actions the res ipsa loquitur doctrine was used to satisfy the three aspects of negligence, privity requirements often bequeathed to the consumer a suit against the financially least responsible person in the long chain of distribution that began with the manufacturer and ended with the user.

Two privity requirements had to be met. Vertical privity was the chain of transactions starting with the manufacturer, passing on to the wholesaler, who delivered to the retailer, who finally sold to the consumer. Horizontal privity was the relationship between the purchaser and the person who used the product. This user might be a spouse, a member of the household, a neighbor, or a stranger. Only the two parties who had immediate contact had privity and hence a valid cause of action. If privity was lacking, it was still possible to recover through "... a series of warranty actions, by the consumer against the retailer, who recovers from the distributor, and so on back to the manufacturer; but this [was] an expensive, time consuming and wasteful process."

In addition to possible legal considerations of fairness and unconscionability, the assault upon the privity requirement was based upon a policy consideration reflecting society's demand for

3. (1) That the injury was caused by a defect in the product (2) that the defect existed when the product left the hands of the defendant, and (3) that the defect was there because of the defendant's negligence. Id. at 1114.
5. Prosser, The Fall of the Citadel, 50 MInN. L. Rev. 791, 799 (1966) (hereinafter cited as The Fall). This article, combined with Prosser's The Assault Upon the Citadel (see
greater consumer protection. Cardozo made the earliest attempt to extend privity in *MacPherson v. Buick Motors*, where a negligence action against the manufacturer was permitted without direct privity: he explained that the manufacturer who sold the automobile to the retailer actually invited the consumer to use his product. Twenty-eight years later, Justice Traynor’s concurring opinion in *Escola v. Coca Cola Bottling Co.* raised the possibility of extending privity in a situation where a waitress was injured when a Coca-Cola bottle broke in her hand. The California jurist laid the foundation for the modern policy concept that the manufacturer is the best suited party in the chain of distribution to anticipate and guard against the hazards found in consumer goods:

*[I]t should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings . . . . [This] irrespective of privity.*

. . . The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trademarks.

As the assault progressed, case law generally modified the privity requirements vertically to ease the access to the manufacturer, and horizontally to permit actions by members of the family and those reasonably expected to use the product. This modification occurred first in food and drug [human consumption] cases, and was finally extended to any product in a defective condition. By 1966, ample case law could be cited in support of Dean Prosser’s contention that the citadel of privity had indeed

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footnote 2) provides a thorough discussion of the privity problem, a problem more prevalent in the sixties when the battle was raging, than today when the smoke is settling.

7. Id. at 393, 111 N.E. at 1054.
9. Id. at 461, 150 P. 2d at 440.
10. Id. at 467, 150 P. 2d at 443. Traynor’s views on “absolute liability” have mellowed since *Escola* in 1944. Seely v. White Motor Corp., 63 Cal. 2d 9, 403 P.2d 145, 46 Cal. Rptr. 17 (1965), discussed *infra*, illustrates how Traynor’s later view of strict liability was far from “absolute”.
fallen.\textsuperscript{12} However, if the objective was to give maximum protection to the helpless consumer, there might yet be found a vestige or two barring the way. To understand these lingering obstacles, an inspection of the weapons employed against the privity citadel must be made.

Originally, products liability actions were based upon negligence and common-law warranty theories. Two super-weapons were added to the arsenal during the mid-sixties. Prosser, as reporter for the American Law Institute, reinforced his own assault with the development of the notion of strict liability for manufacturers of defective products, through section 402A of the \textit{Restatement (Second) of Torts}.\textsuperscript{13} While the \textit{Restatement} was being formulated, the authors of the \textit{Uniform Commercial Code} designed special provisions to make its warranty sections available to non-merchant consumers and users.\textsuperscript{14}

The result of this concurrent and relatively recent growth of recovery theories has been the use by attorneys of multiple pleadings in order to protect their clients. It is a rare products liability action where allegations of negligence, strict liability in tort, express warranty, and implied warranty are not pleaded simultaneously. The use of multiple pleadings has been complicated by statutes of limitation and accrual times which vary depending upon whether a jurisdiction recognizes the consumer's interest as being founded in warranty or in tort. If warranty is used, the cause of action may begin to accrue on the date of sale before any injury to the consumer actually takes place, thus effectively barring the use of either of the super-weapons. If the cause of action is in tort, the time period begins to run from the moment of the injury, and one or the other of these super-weapons may be available. The statute of limitations, then, is the place where one of the last vestiges may remain, and the weapon of common sense might very well prove to be the most effective means of sweeping away the last barriers for the consumer.

In order to place the stated problem in proper perspective, the first section of this article will attempt a more detailed and critical explanation of the substance of the \textit{Restatement} and \textit{Uniform Commercial Code} approaches. The second part will proceed to illustrate how the vestige became situated within the statutes of limitation. Finally, an attempt will be made to harmo-

\begin{itemize}
\item\textsuperscript{12} Prosser, \textit{The Fall}, supra note 5, at 794-799.
\item\textsuperscript{13} \textit{RESTATEMENT (SECOND) OF TORTS}, § 402A.
\item\textsuperscript{14} \textit{UNIFORM COMMERCIAL CODE} § 2-318 (as amended 1966).
\end{itemize}
nize the theories at hand so that a uniform use of specific pleadings and limitation statutes will be realized, hopefully providing peace of mind for the consumer through what would appear to be a rational policy objective advocated by Cardozo, Traynor and Prosser.

II. WEAPONS OF THE ASSAULT

A. Strict Liability in Tort

On May 19, 1955, Mrs. Henningsen's Mother's Day present, a 1955 Plymouth, veered into a highway sign and a brick wall after the steering wheel failed to perform, with resultant injury to the driver. Although reaching its decision through a theory of implied warranty, the New Jersey Supreme Court in *Henningsen v. Bloomfield Motors*, expressed a reaction to Mrs. Henningsen's claim which was to spark the final push to get rid of privity. *Henningsen* held that "... when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser." [Emphasis added]. Privity, thus, became immaterial.

California's highest court, three years later, emphasized that if this new protection was to be extended to the consumer, the action should lie in tort. In *Escola*, Justice Traynor had described an action on a warranty as, "of its origin, a pure action in tort." Now, in 1963, Traynor, writing for the majority in *Greenman v. Yuba Power Products, Inc.* declared:

A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being . . . .

Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law [citations omitted], and the refusal to permit the manufacturer

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16. *Id.* at 384, 161 A. 2d at 84.
19. *Id.* at 63, 377 P. 2d at 900-901, 27 Cal. Rptr. at 700-701.
to define the scope of its own responsibility for defective prod-
ucts [citations omitted] make clear that the liability is not one
governed by the law of contract warranties but by the law of
strict liability in tort.

Justice Traynor then reiterated the enterprise liability argument
he originally presented in Escola:

The purpose of such liability is to insure that the costs of
injuries resulting from defective products are borne by the man-
ufacturers that put such products on the market rather than by
the injured persons who are powerless to protect themselves.

Trying to keep pace with the time, the American Law Insti-
tute sought, in three successive drafts, to include a strict liability
in tort action in the Restatement (Second). First they made the
section applicable to food and drink; then they revised it to in-
clude products intended for intimate body use (i.e., clothes, ciga-
rettes); and finally, in 1965, they widened it to include all prod-
ucts.

It would hardly be accurate to term § 402A a restatement of
the law in 1965, since only California and New Jersey appeared
to enunciate with clarity such a doctrine. What § 402A did was
to ensure and perpetuate its own existence by igniting an out-
burst of judicial opinions accepting the Restatement in their deci-
sions. Section 402A placed a duty on the seller and held him
liable for injury caused by any product sold in an unreasonably
dangerous or defective condition whether or not he exercised all
possible care, and regardless of whether the user or consumer
entered into a contractual relation with the seller. In one fell
swoop, the American Law Institute both uprooted the traditional
negligence defense of due care, and obviated the necessity of basic
contractual privity prerequisites.

Comment m of § 402A recognizes and warns that any men-
tion of “warranty” should not be identified with a contract of sale
between the plaintiff and the defendant. It specifically states that
§ 402A’s rule is not governed by the provisions of the UCC as to
warranties and, therefore is not limited by requirements to give
notice, does not depend on the validity of the contract with the
person supplying the user with the product, and is not affected

20. Id. at 63, 377 P. 2d at 901, 27 Cal. Rptr. at 701.
22. (1) One who sells any product in a defective condition unreasonably dangerous
to the user or consumer or to his property is subject to liability for physical harm thereby
by disclaimers. Since its inception in 1965, “strict liability in tort in the products liability field has become the majority rule.”

1. **Strict Liability Applied to Property Damage and Economic Loss.**

The application of strict liability stems from a desire to place the burden of the cost of personal injuries upon the most financially responsible party, who is assumed to be the manufacturer. With the continued acceptance of 402A, Professor Jaeger has observed that “[r]ecovery is gradually being allowed when there is no physical injury but only property damage.” The new direction had also attempted to encompass “economic loss.” Since this article will try to place warranty and tort theories in their proper prospective, it is worthwhile to digress and examine the relationship which strict liability has to economic loss and property damage in cases without accompanying personal injury.

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caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

**Restatement (Second) of Torts § 402A (1965).**

23. Id. § 402A, comment m at 356 (student ed.)

24. Carmichael, **Strict Liability in Tort — An Explosion in Products Liability Law,** 20 Drake L. Rev. 528, 530 (1971); See also list of cases in: R. Hirsch, 1 American Law of Products Liability § 5A:2 (1972 Supp.); see also Prosser, **Products Liability in Perspective,** supra note 21. In that article Prosser’s own footnote 20 states that at his last count only seven states had not applied strict liability either as a warranty or outright in tort, and names these states as Idaho, Maine, Maryland, Mississippi, New Mexico, Utah, and West Virginia. It is unfortunate that after stressing that this action should lie in tort, Prosser now mixes up jurisdictions, ignoring the respective jurisdictions sanctioned theory of recovery, in order to support his own hypothesis of the acceptance of strict liability. While it is often difficult to discern between tort and warranty theories, and many jurisdictions are ambiguous because of a tendency to mix up the two theories, (see Carmichael and Hirsch), this author’s comment above would indicate that there is only a slight majority (about 28 states) that clearly recognize the relief to lie in tort.

New Mexico was recently brought into the fold when Justice McManus wrote that just as most states had adopted strict liability through the judicial system, he saw nothing wrong with “following the leader” as long as the leader was “going in the right direction.” Stang v. Hertz Corp. 497 P. 2d 732, 737 (N.M. 1972).


26. If one were driving a delivery truck, and that truck’s tires blew out because of a defect in the tire causing the truck to swerve off the road causing damage to the vehicle, but fortunately no personal injury, the damage to the vehicle would be property damage, while lost profits due to the inability to make deliveries will be treated as economic loss. Are the policy considerations which encouraged the formulation of a strict liability action
Traynor, by now Chief Justice in California, attempted to limit strict liability's scope in *Seely v. White Motor Corp.*:27

The law of sales has been carefully articulated to govern the economic relations between suppliers and consumers of goods. The history of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the sales act or of the Uniform Commercial Code, but, rather, to govern the distinct problem of physical injuries.

The Oregon Supreme Court in *State ex rel. Western Seed Production Corp. v. Campbell*, 28 stressed this same point in holding that where there was only a loss of profits because of defective seeds and resultant crop losses, the purchaser had his remedy in breach of warranty against the immediate seller unless he could find some fault of the remote seller. Judge Goodwin explained the reasoning of the court:29

Because of social pressure to compensate innocent victims of personal injuries, and because remedies for such injuries have traditionally been provided by tort law . . . . [We] have assumed that such a cause of action sounds in tort and thus is unhampered by the statutory impediments to relief for breach of warranty.

To allow a non-privity warranty action to vindicate every disappointed consumer would unduly complicate the code's scheme, which recognizes the consensual elements of commerce. Disclaimers and limitations of certain warranties and remedies are matters for bargaining. Strict liability actions between buyers and remote sellers could lend themselves to the proliferation of unprovable claims by disappointed bargain hunters, with little discernible social benefit.

New Jersey rejected this view, taking it to task in *Santor v. A&M Karagheusian*, where the court permitted an action for economic loss against the manufacturer based on strict liability in tort.30 Obviously aware of the controversy, the court declared that "... although the doctrine has been applied principally in

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29. Id. at 266-267, 442 P. 2d at 217-218.
connection with personal injuries sustained by expected users from products which are dangerous when defective, . . . the responsibility of the maker should be no different where damage to the article sold or to other property of the consumer is involved." The court then proceeded to measure the damages in familiar contract terms as the "difference between the price paid by plaintiff and the actual market value of the defective carpeting at the time when plaintiff knew or should have known that it was defective. . . ."

The combination of the two super-weapons, § 402A and the UCC, has produced some strange mutations. In Kassab v. Central Soya, a Pennsylvania case involving defective feed supplement which caused the plaintiff's breeding bull to become sterile, Justice Roberts reasoned that in order to have symmetry between breach of warranty and § 402A, privity would no longer be necessary in a purchaser's action against a remote manufacturer. The result prompted Professor Herbert Titus to comment: "It is a topsy-turvy world when a rule of law based upon a statute must be changed in order to conform with a rule of common law, but one must expect such things when the 'storming' courts 'ascend over the corpses of the slain' in their assault upon the citadel."

B. Uniform Commercial Code: Protection Through Warranty

In declaring the fall of the citadel, Prosser observed that "[t]here are still courts which have continued to talk the language of 'warranty'; but the forty-year reign of the word is ending, and it is passing quietly down the drain." Since that statement, the warranty concept, despite the assault by judicial authorities advocating strict liability, has been reinforced by every state legislature except Louisiana through the adoption of the Uniform Commercial Code. Professor Titus observed that "[i]f section 402A, based on common law, conflicts with the statutory rules of the Code, there is a strong argument that the Code should prevail and that the courts cannot 'decide products cases on tort theories entirely independent of warranty'.” As will be illustrated in the following paragraphs, there have been many attempts to make

31. Id. at 66, 208 A. 2d at 312.
32. Id. at 68-69, 208 A. 2d at 314.
35. Prosser, The Fall, supra note 5, at 804.
36. Titus, supra note 34, at 751.
the UCC a flexible tool for the consumer. Those specially designed provisions would seem to strengthen the argument that the UCC’s warranty provisions are the latest legislative intent.

Section 2-318 of the UCC relating to third party beneficiaries of express and implied warranties was designed “to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to ‘privity’.” The drafters of the Code proposed three alternatives from which a state could choose. Alternative A extends the seller’s express and implied warranties, “to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty.” Alternative B extends the warranties to “any natural person who may reasonably be expected to use, consumer or be affected by the goods.” Alternative C officially recognizes “the trend of modern decisions as indicated by Restatement of Torts 2d § 402A,” and by omitting the words “injured-in-person”, extends the “rule beyond injuries to the person.”

To minimize the effect of disclaimers, all three of the alternatives contain clauses stating that a “seller may not exclude or limit the operation of this section.” Alternative C extends this limitation to the seller only with respect “to injury to the person,” and seems to indicate that any statutory intent to give special aid to beneficiaries in non-personal injury cases is not meant to go beyond extending privity to such beneficiaries.

Having obtained a right to bring a warranty action through § 2-318, the injured consumer might conceivably be barred by § 2-607(3)(a), which requires that a “buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.”

37. UNIFORM COMMERCIAL CODE, § 2-318, comment 2 (amended 1966). Note that § 2-318 applies to horizontal privity, not vertical privity. In order to satisfy vertical privity, the beneficiary of a warranty under § 2-318 is still limited in his action to either the party who issued the express warranty, or to the party to whom the court will impute the issuing of an implied warranty.
38. Id. § 2-318 (Alternative A).
39. Id. § 2-318 (Alternative B).
40. Id. § 2-318 (Alternative C) and comment 3 (amended 1966). See also, CODE OF ALABAMA tit. 7A § 2-318 (1966); CODE OF LAWS of S.C. § 10.2-318 (1966).
41. Id. § 2-318.
42. Id. § 2-318 (Alternative C) (amended 1966).
43. Id. § 2-607(3)(a).
ment "5" attempts to ease this burden by excluding those beneficiaries who were designated in § 2-318 by stating:

Such a beneficiary does not fall within the reason of the present section in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance.

The comment would still require the beneficiary to make a good faith notification upon becoming aware of his legal situation.

Section 2-719(3) is another example of the Code's attempt to provide the consumer with maximum protection from personal injuries. The section stipulates that:

Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

The UCC, through these modifications, has managed to discard most of the burdens of privity, notice and monetary recovery limitations. Its scope of protection would appear to be as great as if the action arose under strict liability in tort. These sections would also seem to lend credence to the contentions expressed in Seely v. White Motor Corp. and Western Seed Production Corp. v. Campbell that there is still a statutory intention not to take economic loss out of the commercial framework set up by the Code.

The similarities between the two recovery theories prompted the District of Columbia Court of Appeals to refuse to distinguish whether the liability was imposed in contract or in tort, in a case where a pallbearer was injured because of a faulty casket handle. Chief Judge Hood merely stated that there was "liability imposed for injury caused by placing a defective product in the stream of commerce," and that "the differences between strict liability in tort and implied warranty, if any, are conceptual."

A plaintiff who finds his action barred by a four year warranty statute of limitations running from the time of breach in-

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44. Id. § 2-607, comment 5.
45. Id. § 2-719.
47. Western Seed Production Corp. v. Campbell, 250 Ore. 262, 442 P. 2d 215 (1968).
49. Id. at 809.
50. Id. at 808.
stead of a tort limitations period running from the time of injury, might strongly disagree with the good judge.

III. STATUTES OF LIMITATION: ACCRUAL OF ACTION IN PRODUCTS LIABILITY

A. Introduction

Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of R.R. Telegraphers v. Railways Express Agency*, 321 U.S. 342, 349. They are by definition arbitrary, and their operation does not discriminate between the just and unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate . . . . He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

—Justice Robert H. Jackson

*Chase Securities Corp. v. Donaldson*

B. Accrual of Action under Strict Liability in Tort

A personal injury action arising in tort will be subject to a statute of limitations accruing from the time the injury occurs (complications surrounding discovery of the injury will be dealt with in Section III-D, infra.) The period, depending on the jurisdiction, usually runs for one, two, or three years.

Two examples of how the statute works in tort come from the Connecticut and Arizona courts. In *Giglio v. Connecticut Light and Power Co.*, 325 U.S. 304, 314 (1945), the plaintiff sought recovery for a personal injury suffered as a result of a gas explosion in his home. The defendant countered by claiming that if there was tortious conduct the statute of limitations should run from the time of sale. Ruling for the plaintiff, the court held that there could be no cause of action in “strict tort liability accruing to the user or consumer until a physical harm or injury occurred to him . . . . [T]he occurrence of such an element is a condition precedent to the accrual of the

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51. 325 U.S. 304, 314 (1945).
type of action here discussed." In Wetzel v. Commercial Chair Co., the plaintiff brought an action more than three years after he was injured when his chair broke. The plaintiff contended that a four year warranty limitations period should control. The Arizona Court of Appeals disagreed, held the state's two year personal injury statute applicable and granted a summary judgment for defendant. Citing Greenman v. Yuba Power Products, Inc., and § 402A, the court pronounced that "personal injuries caused by defective products should be based upon tort law," and thereby be governed by the tort statute of limitations.

One of the most progressive states in the field of products liability is New Jersey. In Rosenau v. City of New Brunswick, the state's Supreme Court confirmed the worst fears of those who had warned that accrual from time of injury, combined with strict liability theories, would leave potential defendants liable for indeterminate periods. A water meter that was first delivered to the city in 1942 broke in 1964 causing damage to the premises. The Court held "that the cause of action accrued not when the negligence itself took place but when the consequential injury or damage occurred." The court reasoned that only after the meter broke and the plaintiffs' property was damaged did the plaintiffs for the first time have a right to institute and maintain a suit. Justice Jacobs noted that "[t]o declare them barred by limitations before they had any cause of action on which they could

53. Id., 284 A. 2d at 309.
55. Id. at 316.
56. In addition to Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A. 2d 69 (1960); Santor v. A & M Karagheusian, 44 N.J. 52, 207 A. 2d 305 (1965), discussed supra; and Rosenau v. City of New Brunswick, 51 N.J. 130, 238 A. 2d 169 (1968), discussed infra, Newmark v. Gimbel's, 102 N.J. Super. 279, 246 A. 2d 11 (1968) concerned the proof required to establish that the injury reflected an actual defect in the product. In allowing the jury to determine whether the hair lotion was defective, even though it appeared that the injury may have been caused by an allergic reaction, the New Jersey court opened a Pandora's box according to author Daniel Rapson. See Rapson, Products Liability Under and Beyond the U.C.C., 2 U.C.C. L.J. 315, 320-321 (1970).
57. 51 N.J. 130, 238 A. 2d 169 (1968).
58. Id. at 137, 238 A. 2d at 172.
start legal proceedings would offend common sense and justice.” Divorcing itself from any influence of the UCC, the court proclaimed that “[i]t [UCC] explicitly relates to actions ‘for breach of any contract for sale’ and presumably was not intended to apply to tort actions between consumers and manufacturers who were never in any commercial relationship or setting.” This point was reiterated recently by the New Jersey Supreme Court in *Heaven v. Uniroyal.*

The court there held that the UCC statute of limitations provision “cannot apply to a consumer-user action against a manufacturer for consequential personal injury and property damage.” Rather, those actions are to be governed by the general statutes of limitations. The court reasoned that “no one has ever contended anywhere that adoption of the code did away with strict liability in tort.”

C. **Accrual of Action under the Uniform Commercial Code**

Section 2-725 of the UCC limits to four years the time in which an action may be brought. To this end, § 2-725(2) provides:

A cause of action accrues when the breach occurs, regardless of the aggrieved party’s knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

This four-year period, which is longer than most tort statutes of limitations, can provide fortuitous results. In *Sinka v. North-**

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59. *Id.* at 140, 238 A. 2d at 174.
60. *Id.* at 143, 238 A. 2d at 176.
61. 63 N.J. 130, 305 A. 2d 412 (1973). The court ultimately dismissed the case by applying the North Carolina statute of limitation, which had expired, in this action for personal injuries and contemporaneous damage to a vehicle allegedly caused by defendant’s truck tire. In the process the court examined its own statute of limitations in determining that the action would have been barred if governed by New Jersey law.
64. *Id.* at 157, 305 A. 2d at 427. If Heavner had been decided under New Jersey law, the controlling statutes of limitation would have been “two years for personal injury and six years for property damage, both computed from the date of the accident”. *Id.* at 156, 305 A. 2d at 426.
65. “An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.” *Uniform Commercial Code* § 2-725(1).
ern Commercial Co., the Alaska Supreme Court reversed the lower court’s decision that a plaintiff’s action to recover damages for personal injuries was barred by the two-year statute governing tort actions. In a decision based solely on the pleadings, the court held that the action was brought properly within the framework of the UCC and thus the four-year period applied.

In Gardiner v. Philadelphia Gas Works, the plaintiff brought a personal injury claim on a breach of warranty theory after injury resulted from escaping gas. The action had commenced two years and eight days after the alleged injury occurred, and it thus appeared that the action would be barred by Pennsylvania’s two year statute of limitations that “governed all actions for personal injuries, whether arising out of contract or tort.” The court, however, ruled that § 2-725 was the latest legislative intent and, therefore, there should be a “four-year period of limitation in all actions for breach of contract for sale, irrespective of whether the damages sought are for personal injuries or otherwise.” Two years later in Webb v. Zern, the state adopted the theory of strict liability in tort. Gardiner’s effect is thus to provide a bonus two-year period in which to bring an action if a plaintiff fails to meet the two-year tort deadline, and thus the rule of the case might act to defeat the legislature’s original intent of avoiding stale claims through enactment of a two-year statute.

This pattern in Pennsylvania case law may, under certain circumstances, give the plaintiff a second chance at the expense of the defendant’s statute of limitations defense; nevertheless, such an outcome would seem far more satisfactory than what resulted when New York’s highest court interpreted its statutes

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68. Id. at 420, 197 A. 2d at 613.
69. Id. at 420, 197 A. 2d at 614.
71. See Salvador v. I. H. English of Phila. Inc., 224 Pa. Super. 377, 307 A. 2d 398 (1973), where the Superior Court permitted an action on a breach of implied warranty after a steam boiler purchased from defendant exploded, merely reversing the court below. "The fact that the statute of limitations has run on his tort action thus becomes immaterial. A personal injury claim based upon a breach of warranty is distinct from a personal injury claim based on negligence and can be commenced within four years after the cause of action has occurred." Id., 307 A. 2d at 403. The presence of a valid warranty action will be critical to successfully taking advantage of the two-year bonus. But see, Heavner v. Uniroyal, 63 N.J. 130, 145, 305 A. 2d 412, 420 (1973), where the New Jersey Supreme Court states: "We had taken the clear position, as distinct from the view held in some
of limitations in 1969. Six years earlier, when the battle for the end of privity was at its most crucial stage, the New York Court of Appeals seemed to provide a powerful reinforcement. A decision on a wrongful death action against the manufacturer of an airplane, Goldberg v. Kollsman Instrument Corp., together with Henningsen and Greenman, supra, formed a powerful triumvirate in the assault upon the citadel. Holding that, despite lack of privity, there was a valid action for breach of implied warranty of fitness for the airplane's contemplated use, Chief Justice Desmond added:

A breach of warranty, it is now clear, is not only a violation of a sales contract out of which the warranty arises but is a tortious wrong suable by a non-contracting party whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer.

The Goldberg decision was and still is an often-cited support for the strict liability in tort theory, even though in those pre-402A days the court still spoke in terms of warranty. Whether in warranty or in tort, it was clear that New York intended to extend protection to the consumer and to place the burden upon the manufacturer. It thus came as a bombshell and an anomaly of policy when the Court of Appeals held that a plaintiff was barred by the statute of limitations before she was ever injured.

Judge Scileppi, writing for the 4-3 majority in this case, Mendel v. Pittsburgh Plate Glass Co., claimed that "while there is language in the majority opinion in Goldberg approving 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."

The cause of action arose in October 1965 when Cecile Mendel, while walking through an entrance door installed by the defendant, was struck by the door, causing her to fall to the ground and sustain injuries. The doors had been installed in October,
1958, and therefore, the court reasoned, the statute of limitations began to run at that time. Since the Code had not been enacted at the time of sale, the six-year contract limitations statute was applied instead of the UCC four-year period. The fact that this plaintiff had nothing to do with the sale, and had no opportunity to know of the breach, did not seem to concern the court. For after all, according to § 2-725, the action accrues “regardless of the aggrieved party’s lack of knowledge.”

The decision in Mendel was not devoid of policy reasons. The court first drew an analogy to an automobile accident caused by a manufacturer’s defect, which thereby caused injuries to the driver-purchaser and a stranger. The court reasoned that if an exception was to be made for those parties who were not signatories to the contract, the result might well be that the statute of limitations would relegate the driver’s action to one in negligence, “whereas the passenger could still sue and recover by merely showing the defect and the resulting injury.” The court then argued that it could not solve this problem by permitting a three year tort limitations period running from the time of injury, because this would be contrary to the legislative intent in passing § 2-725 of the Code.

The Court of Appeals did not consider that perhaps one purpose of the UCC may just be an attempt to provide some protection for the consumer in the absence of other safeguards, and it is not meant to inhibit the development of an independent source of consumer protection in tort. After all, Alternative C in § 2-318 of the Code was designed so that it could follow the trend of modern decisions “as indicated by Restatement of Torts Second § 402-A”, not to stop it. As for the argument that it would be unfair for the contracting party to be barred while the stranger could maintain the warranty action, one must ask: Does not the underlying purpose of the UCC “to simplify, clarify, and modernize the law governing commercial transactions,” make clear that the Code is designed for those actually involved in commercial transactions, and that it takes into account that certain parties have control over the elements of a bargain? A stranger-passenger certainly had no say over the original transaction and therefore should be distinguished.

77. Id. at 344, 253 N.E. 2d at 209, 305 N.Y.S. 2d at 493.
78. Id. at 344, 253 N.E. 2d at 209, 305 N.Y.S. 2d at 493.
79. UCC § 2-318, comment 3 (as amended 1969).
80. UCC §1-102(2) (a).
The Last Vestige

The majority also questioned the validity of permitting someone "to pick and choose between the code's four-year-from-the-time-of-the-sale, and our three-year-from-the-time-of-the-injury, limitations period, depending upon which, under the facts of a given case, would grant them the longest period of time to sue." Adding a policy statement, the court expressed that "[w]e are willing to sacrifice the small percentage of meritorious claims that might arise after the statutory period had run in order to prevent the many unfounded suits that would be brought and sustained against manufacturers ad infinitum." 2

In accepting the UCC statute of limitations, the court, in many cases, may be defeating its own purpose of discouraging unfounded suits. Should the tort statute of limitations be applicable, a potential plaintiff would have three years from the time of injury in which to bring his action. Thus, if the injury occurred shortly after the purchase in applying the four-year statute of limitations of Mendel the court may be awarding a fourth year in which to plan an unfounded suit.

The decision in Mendel is an open attempt to shift the trend of legal protection from the consumer back to the manufacturer. When the time period is measured from the point of the sale, four years is a relatively short and arbitrary period in which to protect the innocent user of a defective product who incurs a personal injury because of that defect. The Mendel decision runs counter to the national trend in products liability, and is a glaring example of the hidden danger in relying upon the UCC warranty theory in products liability.

Until just recently it seemed that Mendel's dictates were clear and would be followed. 3 But the vestige that had been uncovered by Mendel has not gone unchallenged. Judge Breitel opposed the court majority with an excellent dissent in favor of "strict tort liability." 4 Since this decision, lower courts in the

82. Id. at 346, 253 N.E. 2d at 210, 305 N.Y.S. 2d at 495.
83. In Ibach v. Grant Donaldson Service, Inc., 38 App. Div. 2d 39, 326 N.Y.S. 2d 720 (4th Dept. 1971), plaintiff filed an action in 1969, based on strict tort liability and implied warranty against the manufacturer of a 1961 Renault for recovery of damages sustained in an accident occurring in 1966. The Appellate Division upheld a determination that the action was barred by the statute of limitations which ran from the date of original sale. Citing Mendel as the basis, the Appellate Division said "that the Mendel court [had] made a policy decision," and "the decision [had] a reasonable basis in law . . ." Id. at 45, 326 N.Y.S. 2d at 726.
state have applied great imagination to save actions by plaintiffs which under Mendel would have been time-barred.

The Supreme Court, Albany County, in LeVine v. Isoserve,85 permitted plaintiff LeVine to bring a suit against a former employer for injuries due to radiation from a defective isotope, even though it had been six years since he had worked for the defendant. The court reasoned that the purpose of a statute of limitations is to prevent feigned or frivolous action, but because of the discovery of complications of radiation injuries, to bar a plaintiff before any manifestation of injury would be unwarranted. By contrast, Ms. Mendel had been barred before she ever sustained her injury!

Similarly, an appellate court in New York permitted an action to recover damages for breach of an express warranty connected with the purchase of a burial vault twelve years earlier.86 The defendant manufacturer had included with the sale of the vault a “certificate of assurance”, claiming that the burial vault “is free from material defects or faulty workmanship and will give satisfactory service at all times.”87 [emphasis added] The court distinguished this case from Mendel by calling this a prospective warranty and concluding therefore that “the cause of action accrues when the breach is or should have been discovered.”88

In the state’s highest court, the ghost of Goldberg continued its haunt, not content to rest until the spirit of that early case was revived. Finally, with the aid of three lower court decisions,89 and a shift in the composition of the court,90 the Court of Appeals rejoined the “storming” courts through its decision in Codling v. Paglia.91

Christino Paglia was driving south when his Chrysler, because of a defective steering wheel, crossed over the dividing line

85. 70 Misc. 2d 747, 334 N.Y.S. 2d 796 (Sup. Ct. Albany County 1972).
87. Id. at 573, 344 N.Y.S. 2d at 102.
88. Id. at 574, 344 N.Y.S. 2d at 102.
90. By 1973, two members of the Mendel majority, Scillepi (the author of the opinion) and Bergan were gone, along with one dissenter, Judge Gibson. Remaining were majority members Jasen and Burke, and dissenters Breitel and Chief Judge Fuld. The new members were Gabrielli, Wachtler and Jones.
and collided with the car driven by Frank Codling. In permitting an action by the Codlings against the manufacturer of Paglia's car, the court held that "the manufacturer of a defective product may be held liable to an innocent bystander, without proof of negligence, for damages sustained in consequence of the defect." 92 This protection for the innocent bystander was not to be based on strict liability in tort, but on the extension of New York's unique concept of strict products liability, which holds the manufacturer of a defective product liable to any person injured because of that defect, and adds the unique concept of contributory fault by the user. 93

The question of whether strict products liability sounds in contract, tort, or some hybrid of both, was possibly answered seven months later when the Court of Appeals explained, in Velez v. Crane Clark Lbr. Corp., 94 that "... strict products liability sounds in tort rather than in contract." 95 If the court's decision ended at this point, one might assume that the tort statute of limitations would be applicable and Mendel effectively overruled. But the court went on to say: "... 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." 96 Thus, with such a policy the buyer and seller under that law "cannot contract to limit the seller's exposure under strict products liability to an innocent user or bystander", 97 but their own relationship might be governed by contract law. If the relationship is governed by contract law, would a UCC statute of limitations commencing from the

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92. Id. at 335, 298 N.E. 2d at 624, 345 N.Y.S. 2d at 463.
93. The doctrine of strict products liability as annunciated in Codling states:

[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 by a third person) for the purpose 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 damages, (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages."

95. Id. at 124-5, 305 N.E. 2d at 754, 350 N.Y.S. 2d at 623.
96. Id. at 125, 305 N.E. 2d at 754, 350 N.Y.S. 2d at 623.
97. Id. at 126, 305 N.E. 2d at 754, 350 N.Y.S. 2d at 623.
date of the sale be applied to the contracting parties? Would such a statute be applied regardless of the nature of the damage? Would the statute of limitations governing the innocent bystander’s action commence from the time of injury? Would it therefore be possible for the innocent bystander to have an action against the manufacturer for an injury caused by the manufacturer’s defective product, while the purchaser’s action would be time barred? Should the court recognize strict products liability only as a device to discard privity and thereby permit a direct action by an innocent bystander? If the answer to this last question is yes, must they then apply § 2-725 as the appropriate statute of limitations, thereby giving recognition to the “legislature’s latest intent” and providing symmetry with Mendel?

A post-Codling, but pre-Velez, decision by a lower New York court, Victorson v. Kaplan,\textsuperscript{98} interprets Codling as overruling Mendel:

Unlike the cause of action for breach of warranty described in Mendel, . . . the gravamen of the cause of action established by the Court of Appeals in Codling is not the original sale by the manufacturer, but rather the subsequent injury caused by the product. Thus a “strict-liability-in-tort” claim accrues at the time of injury and inasmuch as the claims herein were asserted within three years of the injury (CPLR 214, subd. 5), they are not time barred.\textsuperscript{99}

But Victorson talks of “strict-liability-in-tort”, as compared to the “strict products liability”, espoused by the Codling court. The determination of which statute of limitations governs “strict products liability” can be made only by the Court of Appeals. “Strict products liability” is the court’s creation and only it can invent an appropriate statute of limitations. Public policy will be determinative for the Velez decision qualifies the ability of the parties “to contract, restrict or modify what would otherwise be a liability between them grounded in tort”,\textsuperscript{100} by requiring the absence of “some consideration of public policy”\textsuperscript{101} before they may so act. It seems safe to hazard a guess that the court, having

\textsuperscript{98} 75 Misc. 2d 429, 347 N.Y.S. 2d 666 (Sup. Ct. Queens County 1973).
\textsuperscript{99} 75 Misc. 2d 429, 432, 347 N.Y.S. 2d 666, 669 (Sup. Ct. Queens County 1973). Plaintiff was injured while operating an extractor manufactured by defendant Bock Laundry Machine Company. The original sale of the extractor took place in 1948.
\textsuperscript{101} Id. at 125, 305 N.E.2d at 754, 350 N.Y.S.2d at 623.
extended products liability causes of action to innocent bystanders, will ultimately hold that liability for all personal injuries is grounded in tort, and therefore any cause of action will accrue from the time of injury. 1

1. Different Warranty Action Approaches

(a) Judicial Intervention

Florida courts avoided a judicial conclusion similar to that of Mendel by adopting a “blameless ignorance” doctrine. The concept of “blameless ignorance” originated with Supreme Court Justice Rutledge’s opinion in Urie v. Thompson. 2 The preliminary question before the court was whether the plaintiff, who filed suit in 1941, was barred by a three year statute of limitations. The action concerned silicosis disease contracted by the plaintiff after continuous occupational inhalation of silica dust from about 1910 until 1940. Justice Rutledge considered the legislative purpose behind the statute of limitations: 3

We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statute of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights.

Creviston v. General Motors Corp. 4 involved an action for breach of implied warranty. Injuries were sustained in 1966 when the door of the plaintiff’s refrigerator fell off. A lower court had held that the cause of action for personal injuries arose when the refrigerator was bought, and the plaintiff’s action was therefore

101.1 In a recent Appellate Division case in the Second Department of New York, the court appeared to be taking this position. The infant plaintiff was injured in 1967 by an extractor which had been sold to a laundromat in 1959. In the 3 - 2 majority decision, the court reasoned that the Codling and Velez decisions provide an alternative remedy of “strict products liability” sounding in tort. This remedy would co-exist with the warranty remedy. However, whereas warranty would continue to be governed by the Mendel rule, “strict products liability” actions would have a three-year statute of limitations running from the time of injury.

In effect, this court would read Codling as overruling Mendel when personal injuries occur as a result of a defective product and “strict products liability” is pleaded. However, only the Court of Appeals can state whether in fact Mendel has been overruled, and this, the two dissenters would tell us, the Court of Appeals has not yet done. Rivera v. Berkeley Superwash, Inc., 171 N. Y. L. J. 75, April 18, 1974, at 1, col. 7 (App. Div. 2d Dept.).

102. 337 U.S. 163 (1949).
103. Id. at 170.
104. 225 S. 2d 331 (Fla. 1969).
barred by the three year personal injury statute of limitations. The Florida Supreme Court reversed, holding that the cause of action accrued when the defect constituting the breach of warranty was first discovered or should reasonably have been discovered. Chief Justice Ervin explained:\textsuperscript{105}

The purpose served generally by statutes placing a time limit on the right to assert claims is to prevent a stale assertion of such claims after an aggrieved party is placed on notice of an invasion of his legal rights. A blanket stereotype limitation applied as of the date of sale of any particular product can hardly foster the designed purpose of such statutory limitation in those instances where an aggrieved party had no notice of the invasion of his legal rights in the form of the latently defective condition of the product.

[S]uch a doctrine [blameless ignorance] is merely a recognition of the fundamental principle that regardless of the underlying nature of a cause of action, the accrual of the same must coincide with the aggrieved party's discovery or duty to discover the act constituting an invasion of his legal rights.\textsuperscript{106}

Although Florida has not accepted strict liability in tort,\textsuperscript{107} its adoption of the "blameless ignorance doctrine," in conjunction with its rejection of the privity requirement, provides a suitable alternative within warranty.

(b) Statutory Intervention

Justice Jackson in Chase Securities, supra, clearly announced that it is the role of the legislators to develop the statute of limitations. Legislation, however, is often vague and the courts must still interpret the enacting body's intent. If the legislature is content with resting while the courts perform its role, then confusion will reign as opposing sides argue over what the lawmakers intended to say. However, if the legislators are performing their role, they will watch how the courts are interpreting their statutes, and by merely doing their jobs they can end the controversy by restating their intent more clearly in subsequent amendments. Such legislative vigilance occurred in Tennessee.

The Tennessee courts had ruled that their statute of limitations should run from the date of the wrongful act or omission,

\textsuperscript{105} Id. at 333.
\textsuperscript{106} Id. at 334. See also Cowan v. Torchin, 270 So. 2d 449 (Fla. Dist. Ct. App. 1972).
\textsuperscript{107} Florida does have a policy of strict liability through warranty which combines implied warranty with the absence of a privity requirement. Manheim v. Ford Motor Co., 201 So. 2d 440 (Fla. 1967).
which they interpreted as the date of sale. In Hodge v. Service Machine Co., a federal diversity action, the Sixth Circuit overruled the district court's finding that the statute of limitations ran from the date of sale. Judge Celebrezze, attempting to interpret Tennessee law, felt that for the statute to run from the time of sale would be inimical to the purpose of the statute of limitations which was "to compel the exercise of a right of action within a reasonable time." To hold that the statute ran from the time of sale might compel that right to be exercised before the injury, that is, before the cause of action even existed. The Tennessee General Assembly had enacted an amendment in 1969 to permit actions to run from the time of injury, but it did not appear that this was to apply retroactively. If it did not apply retroactively, then Hodge, one author proclaimed, did not follow Tennessee law and was therefore contrary to the Erie Doctrine. The legislators saw the confusion, and endeavored to make their intent clear with the following 1972 amendment:

[I]nsofar as products liability cases are concerned, the cause of action for injury to the person shall accrue on the date of the personal injury . . . and . . . no person shall be deprived of his right to maintain his cause of action . . . before he sustains an injury. [emphasis added]

Alabama avoided the problem when it enacted the Uniform Commercial Code, superimposing its own words on § 2-725 so that the section read: "[a] cause of action for damages for injury to the person in the case of consumer goods shall accrue when the injury occurs." Other jurisdictions adjusted § 2-725 to provide for a longer period for the statute of limitations to run.

Those judicial and legislative interventions providing that products liability actions will accrue from the time of injury do make it difficult to distinguish between actions in warranty and in tort. But then, why hesitate to call a tort a tort?

109. 438 F. 2d 347 (6th Cir. 1971).
110. Id. at 351.
111. Id.
112. 38 TENN. L. REV. 608 (1971).
113. TENN. CODE ANN. § 28-304 (Com. Supp. 1973); see Beadley v. General Motors Corp., 463 F. 2d 239 (6th Cir. 1972) for a ruling which reflects this amendment.
115. Mississippi and Wisconsin substituted a 6 year period, while Oklahoma extended the standard from 4 years to 5. MISS. CODE ANN. § 41A:2-725(1) (1967); OKLA. STAT. ANN. tit. 12A, § 2-725(1) (1963); WIS. STAT. ANN. § 402.725(1) (1973).
D. Effect of Discovery on Accrual of Action

The problem of discovery was briefly alluded to in the LeVine, Urie, and Creviston decisions, supra. In medical malpractice this is a frequent dilemma. The tortious act and injury occur at the time of the malpractice. However, because of the nature of the human body, the injury does not manifest itself until many years later. Policy reasons of particular relevance to the medical profession, including greater difficulties in proof and a desire not to overburden an inherently risky profession, have discouraged complete acceptance of a discovery rule. Nevertheless the number of jurisdictions adopting this rule is steadily increasing. Other jurisdictions have accepted the rule only where objects are left in the body. The number of jurisdictions adopting either the former or latter rule now constitute a clear majority, and is further evidence of the desire to protect the innocent injured party.

The discovery dilemma is different in the products liability area. Since there is an assumption that the defect existed at the time the product was purchased, actual physical damage to the product and, therefore, the breach, occur at the time of sale. The moment a personal injury is sustained as a result of the defect is often the moment of discovery that the product when purchased was defective. It follows that strict liability in tort, where the appropriate statute of limitation runs from the time of personal injury, is compatible with the acceptance of a discovery rule. On the other hand, a rigid reading of § 2-725 which requires that the statute of limitations begins to run from the time of breach, i.e., when tender of delivery is made, could bar personal injury actions regardless of discovery considerations.

The problem becomes more difficult when drugs are the defective product. Technically the personal injury may have oc-
curred early in the transaction but, as seen in malpractice cases, the injury does not manifest itself until some years later. That time is often after the limitations period has run.

Again, one must conclude that it would be consistent with the concept of strict liability in tort not to bar someone before he is aware that a defective product has injured him. A Montana action brought in federal court, Hornung v. Richardson-Merrill Inc., is a good case in point. The plaintiff brought a products liability action against the manufacturer of a drug, MER/29, which he claimed caused cataracts with his wife sustaining a loss of consortium. The damage occurred some time prior to September 1963 and the action was filed in September 1968. The court first proceeded to recognize a strict liability rule in Montana and then applied a three year tort limitation period to the warranty action. Chief Judge Smith then denied the defendant’s request for summary judgment, alluding to Montana’s discovery policy:

The three year statute applicable to Counts I, II, and II does not contain language delaying the commencement of the action until discovery. The Montana rule however is: Where a person is ignorant of the fact that he has been damaged by the defendant, and consequently ignorant of his right of action, the cause does not accrue until the person learns, or in the exercise of reasonable care and diligence should have learned, the cause of his damage, subject however to the duty of the court to balance the diligence of the plaintiff as against the prejudice caused to the defendant by the delay.

Courts are still split on the issue of latent injuries. However, the trend has been slowly heading towards the adoption of sound policies, such as Montana’s, which allow the plaintiff to commence an action without forgetting the disputed legitimacy of a claim where there has been a substantial delay in discovering the injury.

IV. CONCLUSION

In many ways strict liability is a recognition of the modern development of insurance. By placing the burden upon the

120. Id. at 185.
121. Justice Traynor recognized this in 1944, citing the role of insurance to support his concurring opinion in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P. 2d 436 (1944):

The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can
manufacturer, regardless of fault, for personal injuries sustained as a result of a defective product, we are recognizing that the manufacturer does, or should, carry products liability insurance. While it is obvious that the cost of insurance is passed on to the consumer in the price of the product, it is nevertheless the simplest way in which to distribute the cost incurred by an injured person who is the innocent user of a product. This insurance theory reflects a broad social policy of caring for those victims who would be financially ruined and unable to care for themselves medically and economically if not for the distribution of cost.

The social policy is especially evident in personal injuries as distinguished from purely economic losses. Strict liability in tort, as put forth in section 402A of the *Restatement (Second) of Torts*, would seem the simplest, most direct means of compensating victims for personal injuries. Adoption of § 402A should supersede any references to the special provisions of the *UCC*. The respective tort limitations periods of the states should be honored, running from the time injury is, or reasonably should have been, discovered. The tort statute of limitations should take precedence even if the effect is to bar the action where it would not be barred under a four-year *UCC* limitations period.

The purpose of statutes of limitations is to avoid stale, fraudulent claims. Many fear results of cases such as *Rosenau v. City of New Brunswick*¹²² where the action was brought twenty-two years after the original dealings between the defendant and plaintiff, or their predeceasors, had been completed. To avoid this result a compromise might be constructed by borrowing an idea from certain malpractice statutes which are designed to allow some time to discover the injury, and yet place a limit on that period. California permits a person who alleges negligence to bring a malpractice suit “four years after the date of injury or one year after the plaintiff discovers, or through use of reasonable diligence should have discovered, the injury, whichever occurs first.”¹²³ Along these lines, a legislature might enact a statute to permit an action for strict liability in tort for nine years from the date of original purchase, or two years from the date of discovery.

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The Last Vestige of the defect, whichever occurs first. While these are admittedly arbitrary figures, the legislature, through committees and studies, can balance the interests, and make a policy decision as to what sliding time-scale to adopt.

There is a problem with compromises in that they detract from the originally desired objective. A person injured ten years after a purchase because of a defect which was present before the product left the manufacturer is just as helpless as one injured a month after purchase. It would seem better to lift the barriers completely, permitting some to try to sneak through a fraudulent claim as the cost for opening the courts to those who do not have the resources to bear the cost of physical injury.¹

The assault upon the citadel of privity produced § 402A and the warranty provisions of the UCC. The combination of these two weapons, where purely economic loss is concerned, may well be more lethal than was ever originally intended. When dealing with property and profit loss, the moral compulsion to aid the helpless is greatly diminished. Legitimate fears of stale, fraudulent claims, and indefinite periods of liability all come to the surface. Therefore, having already decided that actions for personal injuries should lie in tort, it would appear that the UCC would be a suitable instrument through which to attempt recovery for this property and profit loss.² The plaintiff, for four years, would have available an action directly against the manufacturer regardless of privity after which the plaintiff may still rely on bringing a negligence action if he can meet the burden of proof. In addition, just as manufacturers can be expected to protect themselves with insurance, those who risk large economic losses can cover themselves with their own first-party policies.

The lawmakers should be concerned with providing the best policy for society. This policy should take into account both consumers and those involved in the manufacturing process. The

¹24. Compare with Williams, Limitation: Periods on Personal Injury Claims, 48 NOTRE DAME LAWYER 881, 884 (1973): Although the interposition by the courts of doctrines such as those of “continuing negligence” and “discovery” may be beneficial in the individual cases to which they have been applied, they do have a harmful effect upon the law by distorting it. It is suggested that a mere national codification of the circumstances in which the running of time will be suspended is requisite in order to avoid further violence to legal principle.

²25. See also Redfield v. Mead, Johnson & Co., 512 P. 2d 776, 785 (Ore. 1973) O’Connell, C.J., dissenting:

It is my opinion that since our legislature has previously singled out per-
above suggestions are designed towards that end. This result should not have to come about through the courts. With fifty different jurisdictions, working primarily with two different theories that enjoyed concurrent development, judicial interpretation cannot help but result in anomalies. Legislators are elected to turn policy into law and they should fulfill their vital obligation. They are best suited, for the task of finally interring vestiges of old statutory provisions no longer reflective of society's needs.

Joel M. Scheer

subscription actions as deserving of a particular limitations period, where the real basis of a claim is injury to the person that statute should apply. I would confine the Code limitation period to the usual contractual actions for the recovery of economic losses such as loss of profits, loss of bargain and the like, and would exclude from its coverage actions for personal injury.