

The Products Liability Statute of Repose: Questioning the Constitutional Foundations

by Michael W. Patrick



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You have just put down the telephone after talking with a distraught mother whose child has died from burns three weeks after a school bus accident in which the school bus gasoline tank exploded. You already know from news reports that a car hit the bus, forcing the bus' leaf suspension into the adjacent gasoline tank and igniting an inferno. The same design killed twenty-seven children and adults in Kentucky in 1988 in another car/bus collision.¹ The mother is irate that the bus manufacturer failed to correct a known safety problem and now her child is dead. What do you tell her?

Chances are good that, after your initial investigation, you will tell the mother that there is nothing you can do to pursue her claim against the manufacturer because the bus was sold to the school district more than six years ago. Most school buses have been in use for more than six years.² Similarly, half the cars and trucks in the United States are older than seven years.³ In most cases in North Carolina, the manufacturers of defective vehicles will be protected by North Carolina's statute of repose, N.C. Gen. Stat. § 1-50(6), when their defective products cause injury or death.

Your investigation has confirmed that the bus was eight years old at the time of the accident, and you have just told the mother that there is nothing you can do to pursue the bus manufacturer because of the statute of repose.

How can this be? asks the mother. Why would North Carolina have a statute that protects school bus manufacturers who don't protect children against known hazards? You tell the mother that the 1979 General Assembly passed the statute of repose to end a supposed products liability insurance crisis by establishing a date after which a manufacturer could not be held

liable, and eliminating claims involving older products for which evidence of defective conditions can be difficult to produce.⁴

The mother is unimpressed. Why should the bus manufacturer be protected by this statute? There is no problem producing evidence of defective conditions. After all, the same defect killed twenty-seven in Kentucky six years before the manufacturer built and sold the bus to my child's school. Why should the manufacturer escape responsibility just because a car happened to hit the bus when it was eight years old rather than when it was four years old? The age of the bus had nothing to do with what happened. Buses are used for a lot longer than six years. Aren't there any exceptions?

You sadly tell her that there are no exceptions to the statute. The manufacturer is protected regardless of how negligent or reckless it was; regardless of the fact that it knew there was a serious safety problem; regardless of whether the injury or death was due to a defective design in the original product design, or if there were missing or inadequate warnings; regardless of the fact that the product's expected useful life is much longer than six years.⁵

Can such a statute be constitutional, asks the mother? You tell her that although courts in some other states have ruled products liability statutes of repose unconstitutional,⁶ in 1995, North Carolina's Supreme Court held that N.C. Gen. Stat. § 1-50(6) was constitutional.⁷

You mean, other states don't have this kind of statute? says the mother. You tell her that most states do not have statutes of repose at all. States that do have statutes of repose typically have longer ones. Many of the statutes of repose in other states are not as absolute as North Carolina's. For example, in some states, the manufacturer is not

liable beyond the product's useful safe life, and the statute creates a rebuttable presumption that the useful safe life of a product is a certain number of years. You tell her that, unfortunately, North Carolina's statute is the shortest and toughest in the nation.

The mother asks, Can we sue in Michigan where the bus was built? Does Michigan have a statute of repose? You tell her that Michigan does not have a statute of repose, but the appeals court in Michigan ruled in a case years ago that if North Carolina wanted to deprive its citizens of legal protections against manufacturers, Michigan would not let North Carolina citizens use the Michigan courts to sue Michigan manufacturers.⁸

The mother says, You mean North Carolina's statute protects manufacturers wherever they are located? Does that mean that North Carolina manufacturers cannot be sued in other states after six years? You tell her that out-of-state manufacturers are protected from being sued in North Carolina whenever the injuries happen in North Carolina, but North Carolina manufacturers are protected by North Carolina's statute only when the injuries or death occur in North Carolina.⁹

Once again, the mother asks: How could we have such an unfair law? How could the General Assembly pass a law that hurts North Carolina citizens more than it helps North Carolina manufacturers? You don't have a good answer, but you decide to take a harder look at the questions posed by the mother.

Background

Statutes of repose differ from statutes of limitation primarily in that they prescribe a period in which to bring an action that is calculated from some event having no relationship to the occurrence of injury or damage. The Products Liability Statute of Repose, N.C. Gen. Stat. §1-50(6), was part of the 1979 bill that enacted the Products Liability Act.¹⁰ That bill repealed an older statute of repose, N.C. Gen. Stat. § 1-15(c), and replaced it with §1-50(6), applicable to product liability actions, and with N.C. Gen. Stat. § 1-52(16), a more general provision which provides a discovery accrual provision and a ten-year statute of repose.

N.C. Gen. Stat. §1-50(6) simply states:

No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption.

The time available for filing a products liability claim will be determined by the interplay of the statute of repose and the applicable statute of limitation. The way the statute works in most cases is set out in Table I.

There are only a few recognized exceptions to N.C. Gen. Stat. § 1-50(6). In cases involving minors or others under disabilities, special rules may extend the deadline for filing claims beyond the period allowed by the statute of repose. The North Carolina Court of Appeals has held that the provisions of N.C. Gen. Stat. §1-17 will toll the running of the statute of repose in N.C. Gen. Stat. §1-50(6) where a minor is injured less than six years after the initial sale of the product.¹¹ If the product is older than six years when the minor is injured, the statute bars the minor's claims. Where an injured party dies shortly before the end of the six-year period, it may be possible to file a wrongful death action or a survival action for a brief time after the six-year period ends.¹²

The only major exception to the statute of repose applies where a disease has been caused by exposure to toxic products. In *Wilder v. Amatex Corp.*, the North Carolina Supreme Court held that N.C. Gen. Stat. § 1-15(c), a predecessor statute to the current products liability statute of repose, did not apply to claims for damages due to disease.¹³ *Wilder* involved a disease arising

out of a worker's inhalation of asbestos dust over many years. After *Wilder*, several federal decisions held that *Wilder's* rationale also applied to occupational disease claims arising under the current statute of repose.¹⁴ In 1996, the Fourth Circuit concluded that product liability claims for non-occupational diseases were also exempt from N.C. Gen. Stat. § 1-50(6).¹⁵ The North Carolina Court of Appeals and the North Carolina Supreme Court have never decided whether the disease exception recognized in *Wilder* applies to the current statute of repose.

History of Constitutional Assaults on the Statute of Repose

In *Tetterton v. Long Mfg. Co., Inc.*, the Supreme Court of North Carolina upheld N.C. Gen. Stat. § 1-50(6) against a multi-pronged attack on its constitutionality.¹⁶ In *Tetterton*, a farmer was killed the day after he bought a used tobacco harvester. The farm equipment was just over six years old. The farmer's widow challenged the constitutionality of the statute as (1) violating equal protection, (2) violating the "special emoluments" clause of the state constitution, (3) violating the "open courts" clause of the state constitution, and (4) being impermissibly vague under the due process clause.

In the equal protection challenge, the plaintiff contended that N.C. Gen. Stat. § 1-50(6) impermissibly gave manufacturers greater protection than retail sellers of products. The Tetterton Court sidestepped this equal protection argument by interpreting the statute of repose to protect both retail sellers and manufacturers. Using the same reasoning, the N.C. Supreme Court sidestepped the closely related argument

Table I Relationship of the Date of Injury and Date of Sale of the Product	Time Allowed for Filing Products Liability Claim
Injury or damage occurs within three years of the initial sale of the product for use or consumption;	➡ Deadline is determined solely by the applicable statute of limitations.
Injury or damage occurs between three and six years of the date of the initial sale of the product for use or consumption;	➡ Deadline is the date six years after the initial sale of the product for use or consumption.
Injury or damage occurs more than six years after the date of the initial sale for use or consumption;	➡ Action is barred by the statute of repose before the date of injury.

that N.C. Gen. Stat. § 1-50(6) violated the prohibition against “exclusive or separate emoluments or privileges” in Article I, Section 32 of the North Carolina Constitution.

The third constitutional challenge in *Tetterton* relied upon the “open courts” provision of Article I, Section 18 of the North Carolina Constitution. It states:

Court shall be open. All courts shall be open; every person for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial or delay.

In rejecting the “open courts” challenge, the North Carolina Supreme Court simply noted that there might be a problem with the statute of repose if it effectively abolished all potential claims. The court concluded that the products liability statute of repose avoided this problem by referring to a report accompanying the Model Uni-

form Product Liability Act published by the U.S. Department of Commerce in 1978. That report quoted a survey that indicated that “over 97 percent of product-related accidents occur within six years of the time the product was purchased.” The Tetterton Court found this reference sufficient basis to uphold the statute. It stated that the purpose of the statute of repose was to: (1) create an actuarially certain date after which no liability can be assessed; and (2) eliminate tenuous claims involving older products for which evidence of defective conditions may be difficult to produce.

The *Tetterton* plaintiff’s final constitutional argument was that the term “date of initial purchase” in the statute of repose was impermissibly vague. The court held that the term was sufficiently certain to avoid a due process challenge.

Tetterton was one of two cases in the mid-1980s in which the North Carolina Supreme Court rejected constitutional challenges to different statutes of repose in

North Carolina. In *Lamb v. Wedgewood South Corp.*, the N.C. Supreme Court upheld the constitutionality of the real property improvements statute of repose, N.C. Gen. Stat. § 1-50(5), against equal protection, “special emoluments,” and “open courts” clause challenges.¹⁷ Unlike *Tetterton*, the court in *Lamb* reached the merits of each constitutional challenge before rejecting them.

Taken as a set, these opinions form a bulwark to any renewed challenges to the statutes of repose for several reasons. First, each decision was unanimous, indicating there was little openness on the court to these challenges. Only in the short-lived court of appeals decision in *Bolick v. American Barmag*, has a North Carolina court struck down a statute of repose as unconstitutional.¹⁸ Secondly, in each decision, the N.C. Supreme Court used a lenient standard to judge the constitutionality of the statutes, regardless of the constitutional ground asserted. Finally, in each case, the

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court engaged in a superficial analysis of the issues and indicated little willingness to analyze the issues with a critical eye to the reasons proffered in support of the statutes.¹⁹

Questionable Constitutionality

Despite this history, there are reasons to believe that a renewed challenge could be mounted to the products liability statute of repose. First, in *Tetterton*, no evidence was presented to the trial or appellate court to support the constitutional challenges to the statutes of repose. The record in *Tetterton* contained no affidavits or testimony challenging the rationales proffered for the statute. Thus, the consideration given these issues in *Tetterton* was uninformed by the important and dramatic impact that the products liability statute of repose has in cases involving durable goods with useful lives greatly exceeding six years.

Real world information suggests that a six-year statute of repose operates arbitrarily when used in cases involving durable goods, and that the statute does not promote the legitimate purposes proffered in support of it. For example, vehicle manufacturers often tout the longevity of cars and trucks in advertising and would not dream of telling consumers that they don't stand behind the safety of their products after six years. Interestingly, John Deere, one of the largest farm equipment manufacturers, uses the Internet to promote the sale of its used farm equipment, much of it far older than six years.²⁰

One of the rationales suggested for the statute—that the statute eliminates tenuous claims in cases of older products where product information is no longer available

—likewise ignores real world practices. There is no evidence to suggest that manufacturers are prejudiced in defending cases by the unavailability of records. To the contrary, many manufacturers hold onto product data for much longer than six years. For example, automotive manufacturers routinely hold onto product design and testing information for decades to preserve “institutional learning” and to have it available for their own use in the future.

Another important avenue not pursued in previous North Carolina cases is historical research into the origins of the “open courts” or “right to remedy” state constitutional provisions.²¹ Neither the court's opinion nor the plaintiff's arguments addressed this issue in *Tetterton*. This is perhaps not surprising, for there is little case law in North Carolina interpreting this provision. In recent years, however, as tort “reform” battles have continued, greater attention has been devoted nationwide to these little-known state constitutional provisions. The resulting scholarship indicates that a strong argument can be made that the “open courts” and “right to remedy” provisions were intended to be real checks on the power of legislatures to restrict common law rights. History suggests that in the eighteenth century, these provisions were inserted into state constitutions as the founding fathers recognized that state legislatures represented real threats to important rights to legal redress recognized at common law.²²

Moreover, the *Tetterton* decision itself never addressed whether the products liability statute of repose violated the “special emoluments” clause or the equal protection clause of the state constitution.

Tetterton did not reach the merits of these issues because the court found the statute did not create the distinction challenged in the case: the alleged disparate treatment of manufacturers and retail sellers. Thus, *Tetterton* did not even involve the distinctions that go to the heart of the injustices promoted by the statutes—the distinction between sellers of durable and non-durable goods and the disparate treatment of persons injured by durable goods in the first six years of use and those injured by durable goods used for more than six years.

Finally, because the court did not reach the merits of two of the constitutional challenges in *Tetterton*, it did not have to confront the fact that the rationale used by the Lamb Court to uphold the constitutionality of N.C. Gen. Stat. § 1-50(5) argues against the constitutionality of N.C. Gen. Stat. § 1-50(6).

Like *Tetterton*, *Lamb* involved equal protection, open courts, and special emoluments challenges to the real property improvement statute of repose, N.C. Gen. Stat. § 1-50(5). The plaintiff in *Lamb* alleged that the real property improvement statute of repose created impermissible distinctions by granting special protection to architects and builders that were denied to building suppliers and materialmen. Without deciding whether or not the statute in fact created such distinctions, the N.C. Supreme Court in *Lamb* held that such distinctions would be warranted.

The rationale employed by the Lamb Court is particularly instructive when the products liability statute is considered. Citing decisions from other jurisdictions with approval, the court indicated that the General Assembly was justified in giving builders and architects greater protection because manufacturers and suppliers could more easily maintain quality control through mass production and testing in controlled factory environments. The court contrasted this situation to that of builders and architects, who had only a limited opportunity to test designs and construction and had to deal with unique conditions on each building site.

The very reasons used by the court in *Lamb* to justify the real property statute of repose argue against the validity of the products liability statute of repose, because N.C. Gen. Stat. § 1-50(6), in fact, gives manufacturers and sellers of products

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greater protection than builders and architects receive from N.C. Gen. Stat. § 1-50(5). Each statute creates a six-year statute of repose. The real property improvement statute of repose does not protect builders or designers who have committed fraud or who are guilty of willful and wanton conduct. In contrast, the products liability statute of repose protects manufacturers and sellers of products, regardless of fraud or willful and wanton conduct.

The greater protection granted to manufacturers is demonstrated by a case from the 1990s, *Forsyth Memorial Hospital v. Armstrong World Industries*.²³ In that case, Forsyth Memorial Hospital incurred substantial losses when flooring that contained asbestos was discovered during a renovation of the hospital. The hospital sued Armstrong, the manufacturer and supplier of the vinyl flooring, alleging that Armstrong was a “materialman” within the meaning of the real property improvement statute of repose, and that Armstrong was willfully and wantonly negligent in supplying vinyl asbestos flooring.

The North Carolina Supreme Court held

that if Armstrong was simply a remote manufacturer whose products found their way to the hospital through the stream of commerce, it was to be protected as a manufacturer under the products liability statute of repose. Only if Armstrong had produced the products specifically for the hospital job would it receive the lesser protections of the real property improvement statute of repose.

Ultimately, Armstrong was found to be a remote manufacturer and escaped liability under the protection of the products liability statute of repose, when it may have been liable if the real property improvement statute of repose applied to the case.²⁴

In conclusion, mounting a constitutional challenge to North Carolina’s products liability statute of repose can only be seen as an uphill battle, given the history of prior unsuccessful attempts. There are, however, strong arguments and much ammunition to bring to the fight. So what do you say? Do you call the mother back and tell her that you will take her case against the bus manufacturer? ■

¹ The worst accident in U.S. history involving a school bus occurred when a bus being used for church activities was hit by a small pickup on May 14, 1988. Several factors contributed to the death toll, including the inability of the sixty passengers to exit the one emergency exit before the bus was engulfed in flames. This accident was investigated by the National Transportation Safety Board, which made numerous recommendations for avoiding future accidents. See <www.nts.gov/publictn/1989/har8901.htm>.

² According to the “2001 School District Survey” published by *School Bus Fleet Magazine*, the current nationwide fleet replacement rate for school buses is six percent per year. See <www.schoolbusfleet.com/Stats/pdf/stats_0601_districtsurvey.pdf>.

³ The most recent data from the federal Bureau of Transportation Statistics indicate that the median age of vehicles in operation in the United States is 8.3 years for cars and 7.2 years for light trucks. See <http://www.bts.gov/btsprod/nts/Ch1_web/1_22.htm>.

⁴ *Tetterton v. Long Mfg. Co., Inc.*, 314 N.C. 44, 54, 332 S.E.2d 67, 73 (1985).

⁵ Many types of everyday consumer products have expected product lives that are much longer than six years. For example, the “Twenty Second Portrait of the U.S. Appliance Industry,” published in *Appliance Magazine*, indicates that many consumer products have an average life expectancy substantially exceeding six years, including all categories of major home appliances and all categories of portable and built-in heating and cooling equipment.

⁶ These include *Lankford v. Sullivan, Long & Hagerty*, 416 So.2d 996 (Ala. 1982); *Hazine v. Montgomery Elevator Co.*, 861 P.2d 624 (Ariz. 1993);

Telling the Story . . .

In 1981, Orlander B. Tetterton was a 51-year-old Pitt County farmer in excellent health. He and his wife, Jean, were the owner-operators of a large tobacco farm. They were making a decent income. They had three beautiful children. Life was good.

On July 8, 1981, all that changed. Mr. Tetterton had purchased a used tobacco harvester the previous day, and he was using it for the first time when the trailer filled with tobacco collapsed, killing him instantly. The farm equipment was just over six years old.

Jean Tetterton filed suit in October, alleging that the tractor was defective, unreasonably dangerous, and that the directions for operation were inaccurate, misleading and defectively labeled.

But Orlander Tetterton’s widow would get no recovery from the tobacco harvester manufacturer. Despite the fact that, in the real world, durable goods are designed to last much longer than six years, and most manufacturers wouldn’t think of telling consumers that they don’t stand behind the safety of their products after six

years, North Carolina enacted a bill in 1979 that shields manufacturers from liability for their older products.

The North Carolina Supreme Court dismissed the suit against the manufacturer. North Carolina’s product liability statute of repose, the harshest in the nation, lets manufacturers escape responsibility for their defective products—even when they severely injure or kill someone—if the incident occurs more than six years after the product is first sold.

North Carolina has erected a barrier to justice under which the manufacturer is protected—despite the fact that the expected useful life of the product is much longer than six years; regardless of missing or inadequate warnings; and regardless of how negligent or reckless the manufacturer was.

For Mrs. Tetterton, there would be no relief. For the manufacturer, there would be no punishment and nothing to deter continued production and sale of a dangerous product. It could all happen again.

—by Andrea Maron

Heath v. Sears, Roebuck & Co., 123 N.H. 512, 464 A.2d 288 (1983); Kennedy v. Cumberland Engineering Co., 471 A.2d 175 (R.I. 1985); Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985); Wood v. Eli Lilly Co. 723 F. Supp. 1456 (S.D. Fla. 1989)(addressing former Florida statute of repose); Hanson v. Williams County, 389 N.W.2d 319 (N.D. 1986); State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 86 Oh. St. 3d 451, 715 N.E.2d 1062 (1999); Best v. Taylor Machine Works, 689 N.E.2d 1057 (Ill. 1997); Dickie v. Farmers Union Oil Co., 611 N.W.2d 168 (N.D.); Zacher v. Budd Co., 396 N.W.2d 122 (S.D. 1986).

Other states have upheld statutes of repose against constitutional challenges. See e.g., Bowman v. Niagara Machine & Tool Works, Inc., 832 F.2d 1052 (7th Cir. 1987)(applying Indiana law); Eaton v. Jarvis Products corp. 965 F.2d 922 (10th Cir. 1992)(applying Colorado law); Branson v. O.F. Mossberg & Sons, Inc., 221 F.3d 1064 (8th Cir. 2000)(applying Iowa law); Spiker v. Lincoln, 238 Neb. 188, 469 N.W.2d 546 (1991); Daily v. New Britain Machine Co., 200 Conn. 562, 512 A.2d 893 (1986); Hatcher v. Allied Products Corp., 356 Ga. 100, 344 S.E.2d 418 (1986); Sealy v. Hicks, 309 Or. 387, 788 P.2d 435 (1990); Jones v. Five Star Engineering, Inc., 717 S.W.2d 882 (Tenn. 1986).

⁷ Tetterton, *supra*.

⁸ In *Farrell v. Ford Motor Company*, 501 N.W.2d 567 (Mich. App. 1993), the Michigan Court of Appeals held the North Carolina statute of repose

should be applied to bar a products liability claim against Ford by a North Carolina citizen. The court noted "Michigan has no interest in affording greater rights of tort recovery to a North Carolina resident than those afforded by North Carolina."

⁹ See *Boudreau v. Baughman*, 322 N.C. 331, 368 S.E.2d 849 (1988).

¹⁰ See 1979 Sessions Law, Chapter 654, section 2.

¹¹ *Bryant v. Adams, supra*.

¹² See N.C. Gen. Stat. § 1-22 and the case of *Dunn v. Pacific Employer Ins. Co.*, 332 N.C. 129, 418 S.E.2d 645 (1992), which involved somewhat analogous questions in applying the statute of limitations.

¹³ 314 N.C. 550, 336 S.E.2d 66 (1985).

¹⁴ *Silver v. Johns-Manville Sales Corp.*, 789 F.2d 1078(4th Cir. 1986); *Hyer v. Pittsburgh-Corning Corp.*, 790 F.2d 30(4th Cir. 1986); *Gardner v. Asbestos Corp.*, 634 F. Supp. 609 (W.D.N.C. 1986).

¹⁵ *Bullard v. Dalkon Shield Claimants Trust*, 74 F.3d 531(4th Cir. 1996).

¹⁶ *Tetterton v. Long Mfg. Co., Inc., supra*.

¹⁷ 308 N.C. 419, 302 S.E.2d 868 (1983).

¹⁸ 54 N.C. App. 588, 284 S.E.2d 188 (1981), *aff'd on other grounds*, 306 N.C. 364, 293 S.E.2d 415 (1982). In *Bolick*, the court of appeals held that § 1-50(6) violated the "open courts" clause of the state constitution. On appeal, the N.C. Supreme Court held that because the plaintiff in *Bolick* was injured prior to the effective date of § 1-50(5), the statute did not apply. Because the case was not barred by the older and longer statute of repose, no constitutional issue

was presented in the supreme court.

¹⁹ Six years ago, the N.C. Supreme Court declined to take another look at the "open courts" clause in a constitutional challenge to N.C. Gen. Stat. § 1-50(6) in *Mahoney v. Ronnie's Road Service*, 122 N.C.App. 150, 468 S.E.2d 279 (1996), *aff'd* 345 N.C. 631, 481 S.E.2d 85 (1997)(per curiam).

²⁰ See <http://customer.johndeere.com/en_US/ag/equipment/used/>.

²¹ In upholding the statute against the "open courts" challenge, the court again relied on its decision in *Lamb*, which had rejected an "open courts" provision challenge to § 1-50(5). In doing so, it cited the only prior decision of the North Carolina Supreme Court in *Osborne v. Leach*, 135 N.C. 628, 47 S.E. 811 (1904). *Osborne* involved statutory enactments now codified in N.C. Gen. Stat. § 99-1 and 99-2, which prohibited punitive damages being opposed in cases of libel. The Osborne Court indicated that the legislature could constitutionally abolish the common law right to recover punitive damages, so long as compensatory damages were preserved.

²² See e.g., Ned Miltenberg, *The Revolutionary "Right-to-a-Remedy": Common Sense About the Constitutionality of the Common Law*, 33 *Trial* 48 (March 1998).

²³ *Forsyth Memorial Hospital v. Armstrong World Industries*, 336 N.C. 438, 444 S.E.2d 423 (1994).

²⁴ *Forsyth Memorial Hospital, Inc. v. Armstrong World Industries, Inc.*, 122 N.C. App. 826, 470 S.E. 2d 826 (1996).



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