

Nova Law Review

Volume 11, Issue 2

1987

Article 21

Products Liability Statute of Repose-A Florida Perspective

Linda D. Caldwell*

*

Copyright ©1987 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

Products Liability Statute of Repose-A Florida Perspective

Linda D. Caldwell

Abstract

On November 21, 1979, a seventeen-year-old boy, Dana Lamb, was a passenger in a 1967 Volkswagen.

KEYWORDS: pitfalls, courts, repose

Products Liability Statute of Repose—A Florida Perspective

I. INTRODUCTION	849
II. HISTORICAL FACTORS CONTRIBUTING TO FLORIDA'S ADOPTION OF THE STATUTE OF REPOSE	851
III. THE FLORIDA JUDICIAL APPROACH WITH THE STATUTE OF REPOSE	853
A. <i>The "Access to Courts" Argument</i>	854
B. <i>Guidance from the Architectural Statute of Repose</i>	854
C. <i>Florida's Application of the Products Liability Statute of Repose</i>	856
IV. THE AFTERMATH OF THE FLORIDA SUPREME COURT'S INTERPRETATION	860
V. SHOULD FLORIDA CONSIDER THE ENACTMENT OF ANOTHER STATUTE OF REPOSE?	862
A. <i>Inherent Problems with Florida's Statute of Repose</i>	863
B. <i>The Pitfalls of an Overbroad Statute of Repose</i>	864
C. <i>Faulty Reasoning which Justified the Enactment of the Statute of Repose</i>	865
D. <i>A Statute of Repose for Durable Goods</i>	867
VI. FEDERAL PREEMPTION	868
VII. CONCLUSION	871

I. Introduction

On November 21, 1979, a seventeen-year-old boy, Dana Lamb, was a passenger in a 1967 Volkswagen.¹ The car left the road and overturned, ejecting Lamb.² The accident rendered him a permanent quadriplegic.³

Lamb brought suit in the United States District Court for the

1. *Lamb v. Volkswagenwerk Aktiengesellschaft*, 631 F. Supp. 1144, 1146 (S.D. Fla. 1986).

2. *Id.*

3. *Id.*

Southern District of Florida against the car manufacturer, alleging that defects in the design — which resulted in a rollover propensity and easily-fracturable windshield — caused his injury.⁴ The allegations of the defect appeared viable at the time the plaintiff brought suit, and the defects certainly could not have appeared until an accident such as this occurred.

Nevertheless, the outcome of the lawsuit need not be discussed; the case did not go to trial.⁵ The Florida legislature had terminated Lamb's cause of action before it ever arose. Based on the enactment of section 91.031(2)⁶ of Florida's Limitations of Actions Statutes, commonly known as a "statute of repose," the court barred his action. This statute provided the following:

Actions for products liability and fraud under § 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of diligence, instead of running from any date prescribed elsewhere in § 95.11(3), but in any event *within twelve years after the date of delivery of the completed product* to its original purchaser regardless of the date the defect in the product was or should have been discovered.⁷

As a result, the trial court exonerated the automobile manufacturer, granting it summary judgment and effectively foreclosing Lamb's opportunity for redress.⁸

The irony of the situation is this: had the accident and filing of suit taken place just *days* before it did, the court would have permitted his action to proceed on the merits.⁹ Instead, the accident occurred eight days after the automobile reached its twelfth year after the date of its manufacture.¹⁰ Although the plaintiff brought suit three years after the accident, well within Florida's statute of limitations pertaining to personal injury which provided a claimant with *four years* from the time

4. *Id.*

5. *Id.* at 1152.

6. FLA. STAT. § 95.031(2) (1975), amended by 1986 FLA. SESS. LAW SERV. 86-271 (West).

7. *Id.* (emphasis added).

8. *Lamb*, 631 F. Supp. at 1152.

9. FLA. STAT. § 95.031(2) (1975), amended by 1986 FLA. SESS. LAW SERV. 86-271 (West).

10. *Lamb*, 631 F. Supp. at 1146-47.

of the injury to bring an action,¹¹ it was not controlling.¹² Because the plaintiff's misfortune resulted in a "product liability" claim, the statute of repose applied to bar his claim.¹³

Less than four months after the *Lamb* decision, the Florida legislature repealed the products liability statute of repose.¹⁴ While it has been temporarily put to rest in Florida, products liability statutes of repose are still a live issue in pending federal legislation.¹⁵ Manufacturing firms and defense attorneys understandably will favor such legislation.

This Note will examine Florida's ten-year experience with a products liability statute of repose prior to its repeal in 1986. It will investigate the reasons for its enactment and the problems encountered by the courts. Consideration will also be given to the feasibility and necessity of a future enactment of a statute of repose in Florida.

II. Historical Factors Contributing to Florida's Adoption of the Statute of Repose

Statutes of repose are legislation placing an outer time limit on negligence and related claims in contexts where the potential hardship to the defendant appears great.¹⁶ Contrasted with the customary statute of limitations, there is a fundamental difference. The traditional *statute of limitations* establishes a time period within which an action must be brought and generally begins to run when an injury occurs.¹⁷ By contrast, a products liability *statute of repose* is measured from a specified fixed date, such as the manufacture of a product.¹⁸ The significant difference is its limitation period begins to run whether an injury has occurred or not, and is thereby unaffected by the date on which the cause of action accrues.¹⁹ After the lapse of the specified period, the

11. FLA. STAT. § 95.11(3) (1985).

12. *Lamb*, 631 F. Supp. at 1144.

13. *Id.* at 1152.

14. FLA. STAT. § 95.031(2) (1975), amended by 1986 FLA. SESS. LAW SERV. 86-271 (West).

15. S. 2760, 99th Cong., 2d Sess. § 304 (1986).

16. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS, 167 (5th ed. 1984). [hereinafter W. KEETON]

17. *Id.* at 165 n. 9.

18. *Id.* at 168.

19. *Id.*

statute of repose terminates any right to bring an action.²⁰

Controversy has long surrounded repose statutes. Difficulty arises from the possibility that such a statute may *bar* an action before it arises.²¹ When this happens, the statute operates to deny the claimant a judicial forum simply because the product has attained the age specified in the statute.²²

Although legislative history is scarce concerning Florida's enactment of the products liability statute of repose, manufacturers' expanded liability appears to be the primary influence in its enactment.²³ Florida, as well as the rest of the country, experienced a "products liability revolution" in the past two decades.²⁴ Several factors have contributed to increased litigation in Florida.

At common law, courts required privity between a manufacturer and plaintiff in an action based upon the manufacturer's negligence.²⁵ The inequities of such a rule became obvious by the 1940's, however, when manufacturers began regularly selling products to wholesalers or retailers.²⁶ As a result, the Florida Supreme Court displaced the privity requirement with a duty to avoid "reasonable foreseeable injuries to those who might use the commodity."²⁷

The trend toward the adoption of the strict liability doctrine imposed an added burden on manufacturers.²⁸ Under this theory, a manufacturer became liable simply when it placed a product on the market, knowing that it was to be used without inspection for defects, and the product proved to have a defect which caused an injury.²⁹ The Florida Supreme Court expressly adopted this doctrine in 1976.³⁰

Another significant contribution to the expansion of liability of manufacturers was the judicial adoption of the "discovery rule" for

20. *Lamb*, 631 F. Supp. at 1147.

21. *Overland Constr. Co. v. Sirmons*, 369 So. 2d 572, 575 (Fla. 1979).

22. *Id.*

23. *Id.* at 576.

24. Martin, *A Statute of Repose for Products Liability Claims*, 50 *FORDHAM L. REV.* 745 (1982).

25. *Huset v. J. I. Case Threshing Mach. Co.*, 120 F. 865, 869 (8th Cir. 1903). Public policy traditionally required this rule, as "there would be no end to litigation" if manufacturers were held liable to third parties.

26. See generally *Hughes v. Miami Coca Cola Bottling Co.*, 155 Fla. 299, 19 So. 2d 862 (Fla. 1944).

27. *Tampa Drug Co. v. Wait*, 103 So. 2d 603, 607 (Fla. 1958).

28. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 88 (Fla. 1976).

29. *Id.* at 84.

30. *Id.* at 87.

statutes of limitations.³¹ Under this doctrine, the accrual of a cause of action begins when the facts giving rise to the action *are known*, or *should have been known*, with the exercise of due diligence.³² In essence, it rendered the defendant virtually "vulnerable to suit indefinitely, sometimes decades after the event."³³ The discovery rule became commonly used with regard to long-term effects of pharmaceuticals³⁴ or with regard to diseases acquired over a long period of time.³⁵

A perceived liability "crisis" in the 1970's appears to have also given credence to the idea of a statute of repose.³⁶ Because courts permitted a greater number of claims to be brought against manufacturers, as well as frequent and large recoveries, products liability litigation increased nationwide.³⁷ Authorities claimed that the increased litigation led to unaffordable insurance rates and, in some instances, unobtainable coverage at any price.³⁸ In response, legislative proposals advocated the enactment of statutes of repose to remedy the insurance market.³⁹ The Florida legislature undoubtedly reacted to all of these factors when it enacted its statute of repose in its 1975 legislative session.

III. The Florida Judicial Approach with the Statute of Repose

The application of a statute which simply placed a cap on products liability actions was not an easy task; the Florida courts were not receptive to a statute that would terminate a claimant's action before it arose, and they quickly questioned the statute's validity on state constitutional grounds.⁴⁰ The judiciary, in an effort to uphold the legislation,

31. *Urie v. Thompson*, 337 U.S. 163 (1949).

32. *Copeland v. Armstrong Cork Co.*, 447 So. 2d 922, 926 (Fla. 3d Dist. Ct. App. 1984) (emphasis added).

33. W.P. KEETON, *supra* note 16, at 167.

34. *Diamond v. E. R. Squibb and Sons, Inc.*, 397 So. 2d 671 (Fla. 1981).

35. *Copeland*, 447 So. 2d at 926.

36. Dennis, *Products Liability Statutes of Repose as Conflicting with State Constitutions: The Plaintiffs are Winning*, 26 ARIZ. L. REV. 363, 364 (1984).

37. Note, *Limiting Liability: Products Liability and a Statute of Repose*, 32 BAYLOR L. REV. 137, 139 (1980), citing *The Way to Ease Soaring Product Liability Costs*, BUS. WK., Jan. 17, 1977, at 62.

38. Proust, *Toward Reform in Product Liability Law*, 45 INS. COUNSEL J. 346 (1978).

39. *Id.* at 348.

40. See *Batilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874, (Fla. 1980) (Mc-

began weaving a piecemeal group of decisions on a case-by-case method. A brief look at Florida case law will illustrate the difficulties which faced the courts as they carved out exceptions and created an anomaly out of the products liability statute of repose.

A. *The "Access to Courts" Argument*

Plaintiffs whose cause of action would be terminated by the statute immediately attacked it, claiming an unconstitutional denial of their right of "access to the courts."⁴¹ The Florida Constitution provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."⁴² Claimants asserted that, according to this guarantee, their rights were unconstitutionally violated. In support of their argument plaintiffs cited *Kluger v. White*,⁴³ in which the Florida Supreme Court stated the following:

[W]here a right of access to the courts for redress for a particular injury has been provided . . . the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the right of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.⁴⁴

Based on this reasoning, the courts began their difficult struggle to interpret the statute of repose and its effect on the Florida Constitution.⁴⁵ This task was not easy, as the results discussed below will reveal.

B. *Guidance from the Architectural Statute of Repose*

Faced with a potential state constitution conflict in applying the products liability statute of repose and little legislative history concerning its enactment, the courts sought guidance from previous cases in-

Donald, J., dissenting); *but cf.* *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657 (Fla. 1985) (receding from *Batilla*).

41. *See Purk*, 387 So. 2d at 357.

42. FLA. CONST. art. I, § 21.

43. 281 So. 2d 1 (Fla. 1973).

44. *Id.* at 4.

45. *See Purk*, 387 So. 2d at 354.

volving an architectural statute of repose enacted in 1967.⁴⁶ This statute required that actions arising out of a deficiency in design would be barred if not brought "within twelve years after substantial completion of construction"⁴⁷ Two cases concerning this statute, *Bauld v. J.A. Jones Construction Co.*⁴⁸ and *Overland Construction Co. v. Sirmons*,⁴⁹ are of particular importance in a review of Florida's products liability statute.

In *Bauld*,⁵⁰ the Florida Supreme Court held that a twelve-year limit on bringing a cause of action was constitutional. Although the statute had the potential of barring Bauld's claim, a saving's clause in the statute prevented such a result.⁵¹ The court held that, because the statute technically granted her time to bring suit, it was not a denial of access to the courts if the plaintiff's statutory period had merely been "shortened."⁵²

The Florida Supreme Court handed down a holding with a different effect in *Overland Construction Co. v. Sirmons*,⁵³ when a plaintiff again challenged the architectural statute of repose on state constitutional grounds.⁵⁴ This time, however, the plaintiff brought his cause of action *fourteen years* after the completion of the building allegedly responsible for his injury.⁵⁵ Because the statute "absolutely barred" him from bringing an action rather than just curtailing the statutory period, the court held it unconstitutional as applied and allowed the action to proceed.⁵⁶

Applying the two-part test enunciated in *Kluger*, the *Overland* court first attempted to determine whether the Florida Constitution guaranteed the right of an injured person to bring suit against a contractor for damages resulting from alleged negligence in construction.⁵⁷

46. See *Purk*, 387 So. 2d at 357; *Loughan v. Firestone Tire & Rubber Co.*, 624 F.2d 726, 730 (5th Cir. 1980); *Batilla*, 392 So. 2d at 874; *Universal Eng'g Corp. v. Perez*, 451 So. 2d 463, 466 (Fla. 1984).

47. FLA. STAT. § 95.11(c) (1985).

48. 357 So. 2d 401 (Fla. 1978).

49. 369 So. 2d 572 (Fla. 1979).

50. 357 So. 2d at 401.

51. *Id.* at 403.

52. *Id.*

53. 369 So. 2d at 572.

54. *Id.*

55. *Id.*

56. *Id.* at 575.

57. *Id.* at 573. The constitutional provision under consideration was FLA. CONST. art. 1, § 21.

It noted that this basic common law was in effect in 1776 and when the "access to courts" mandate of the constitution was re-adopted in 1968, a right of redress for plaintiffs such as Sirmons existed.⁵⁸ Thus, the court held that the statute of repose, in this case, abolished the plaintiff's right to sue and provided no alternative right to redress.⁵⁹

In applying the next part of the test, the court attempted to find an indication that the legislature perceived a public necessity for the legislation.⁶⁰ Although it acknowledged that there are many problems associated with bringing suits after the "passage of time," it could not determine that a public necessity existed.⁶¹ The court's ultimate conclusion was that the statute "benefits only one class of defendants, at the expense of an injured party's right to sue."⁶²

From *Bauld* and *Overland*, two theories developed dealing with different factual situations. Courts would consider a statute of repose either "constitutional" or "unconstitutional," depending on the facts of the case.⁶³ In essence, if the construction had been completed over twelve years at the time of injury, the statute operated to bar the plaintiff's cause of action before it arose, thereby rendering the statute "unconstitutional" as applied.⁶⁴ This interpretation, however, conflicted with the ultimate purpose of the statute of repose, as expressed by its plain words, which was to bar precisely just such actions. Nevertheless, guided by this interpretation, the Florida courts embarked upon a case-by-case approach in interpreting the products liability statute.

C. Florida's Application of the Products Liability Statute of Repose

The Florida Supreme Court first addressed the validity of Florida's products liability statute in the 1980 case of *Purk v. Federal Press Co.*⁶⁵ The plaintiff alleged that a defect in a ten-year-old punch press machine had caused her injury, leaving her with only two years in

58. *Overland*, 369 So. 2d at 573-74.

59. *Id.* at 575.

60. *Id.* at 574.

61. *Id.*

62. *Id.*

63. *Id.* at 575.

64. *Id.* The court did not use the words "unconstitutional as applied." However, the author has used this phrase for purposes of clarity.

65. 387 So. 2d 354 (Fla. 1980).

which to bring suit.⁶⁶ Because the statute merely "shortened" her time period in which to bring an action rather than absolutely barring her action, the court held that the statute was constitutional.⁶⁷ There had not been an absolute denial of "access to the courts."

In another 1980 case, *Batilla v. Allis Chalmers Manufacturing Co.*,⁶⁸ the supreme court declared the products liability statute of repose unconstitutional as applied to the facts. The court did not discuss the specific facts of the case but stated its reliance on *Overland* and the statute "as applied to this case."⁶⁹ Later courts construed *Overland's* holding to be a declaration of invalidity as applied to products liability cases in general.⁷⁰

The *Purk*⁷¹ and *Batilla*⁷² holdings left the products liability statute declared unconstitutional as applied to certain factual situations only. Simply stated, if the plaintiff had time to bring suit before the expiration of the twelve year limit, the statute was constitutional as applied.⁷³ Ironically, in such instances, the statute had no effect, even though held constitutional, because the time period had not lapsed. On the other hand, if the twelve years had passed before the injury occurred, it was unconstitutional as applied.⁷⁴

The result was that the statute applied only to plaintiffs who were injured by a product between eight and twelve years old. This limited group merely had a reduced time period in which to bring suit. For example, a person injured by a product eleven years old had one year in which to bring an action. By contrast, a person injured by an eight year old product had a full four years in which to bring suit, confined only by the personal injury statute of limitations. Similarly, a person injured by a seven year old product had four years in which to bring suit.

The Florida courts' interpretation of the products liability statute of repose led to an incongruous situation. If the objective of the legislature was to avoid perpetual liability,⁷⁵ it clearly could not have intended for the plaintiff to bring suit when injured after the product was

66. *Id.* at 356-57.

67. *Id.* at 357.

68. 392 So. 2d 874 (Fla. 1980).

69. *Id.*

70. *See, e.g.,* *Ellison v. Northwest Eng'g Co.*, 521 F. Supp. 199 (S.D. Fla. 1981).

71. 387 So. 2d at 354.

72. 392 So. 2d at 874.

73. *E.g., Purk*, 387 So. 2d at 354.

74. *E.g., Batilla*, 392 So. 2d at 874.

75. *Id.* at 875 (McDonald, J., dissenting).

twelve years old. Therefore, the courts *re-established* "perpetual liability" by refusing to apply it when it would bar an action.⁷⁶

In the following years, the Florida legislature did not speak on the issue, and the courts continued in their struggle to apply the statute without violating the Florida Constitution. For example, in *Ellison v. Northwest Engineering Co.*,⁷⁷ the Third District Court of Appeal permitted an action to proceed in which a twenty-three year old machine mangled the plaintiff's arm. Similarly, in *Diamond v. E.R. Squibb and Sons, Inc.*,⁷⁸ a plaintiff brought an action against a drug company for effects resulting from medication given to her mother while the plaintiff was still a fetus.⁷⁹ Although the plaintiff discovered the deleterious effects twenty years later, the court allowed the action to proceed.⁸⁰

The courts continued to declare the statute constitutional only when "reasonable time" remained to file an action,⁸¹ and consequently were confronted with determining what constituted a "reasonable time." In *MacRae v. Cessna Aircraft Co.*,⁸² the First District Court of Appeal ruled that twenty months was a reasonable amount of time for a passenger of an airplane, which crashed due to an alleged defect, to bring suit.⁸³ The Fourth District Court of Appeal defined the "reasonable time period" further in *Feil v. Challenge-Cook Brothers, Inc.*,⁸⁴ in which a concrete chute at a construction site struck the plaintiff on the head just *four months* before the expiration of the twelve year period.⁸⁵ The court held that four months was a reasonable time in which to bring suit and declared the statute constitutional as applied to the facts.⁸⁶

76. Petitioner's Brief on the Merits at 1, *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657 (Fla. 1985).

77. 521 F. Supp. 199 (S.D. Fla. 1981).

78. 397 So. 2d 671 (Fla. 1981).

79. *Id.*

80. *Id.*

81. See generally *Cates v. Graham*, 427 So. 2d 290, 291 (Fla. 3d Dist. Ct. App. 1983) (the court may determine whether a party had a reasonable time in which to act, based on the "facts of the case."), *aff'd*, 451 So. 2d 475 (Fla. 1985).

82. 457 So. 2d 1073 (Fla. 1st Dist. Ct. App. 1984), *review denied*, 467 So. 2d 1000 (Fla. 1985).

83. *Id.* at 1095.

84. 473 So. 2d 1338 (Fla. 4th Dist. Ct. App. 1985), *review denied*, 486 So. 2d 596 (Fla. 1986).

85. *Id.* at 1339.

86. *Id.* at 1339.

Finally, in *Pullum v. Cincinnati Inc.*,⁸⁷ the First District Court of Appeal certified to the Florida Supreme Court the following question: "Does section 95.031(2), Florida Statutes, deny equal protection of the laws to persons such as appellant who are injured by products delivered to the original purchaser between eight and twelve years prior to the injury?"⁸⁸ While previous cases had generally challenged the right of access to the courts,⁸⁹ the plaintiff in *Pullum* argued that the statute irrationally applied to a very limited class of persons — specifically, "those persons injured during a time period of eight to twelve years after delivery of the completed product"⁹⁰

The supreme court avoided answering the specific question certified to it. Instead, it expressly receded from the *Batilla* decision in which it had declared the products liability statute of repose violative of the Florida Constitution.⁹¹ The *Pullum* court credited the dissenting opinion in *Batilla* as correctly reasoning that there is "a rational and legitimate basis for the legislature to take this action, particularly in view of the relatively recent developments in expanding the liability of manufacturers."⁹² The court thus declared Florida's products liability statute of repose constitutional, regardless of whether there is access to courts.⁹³

Less than one year after *Pullum*⁹⁴ came the decision in *Lamb*,⁹⁵ in which a car accident left the plaintiff a quadriplegic with no opportunity for redress.⁹⁶ *Lamb*'s injuries occurred after the twelve year limitation.⁹⁷ Nevertheless, because the Florida Supreme Court decided *Pullum* while *Lamb* was pending, the United States District Court for the Southern District applied *Pullum* retroactively.⁹⁸

87. 458 So. 2d 1136 (Fla. 1st Dist. Ct. App. 1984), *aff'd*, 476 So. 2d 657 (Fla. 1985).

88. *Id.* at 1140.

89. *See, e.g., Batilla*, 392 So. 2d at 874.

90. *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657, 659 (Fla. 1985), *aff'd*, 476 So. 2d 657 (Fla. 1985).

91. *Id.*

92. *Id.* at 660 (quoting *Batilla*, 392 So. 2d at 874-75 (McDonald, J., dissenting)).

93. *Id.* at 659.

94. *Id.* at 657.

95. *Lamb v. Volkswagenwerk*, 631 F. Supp. 1144 (S.D. Fla. 1986).

96. *Id.* *See supra* text accompanying notes 1 to 6.

97. *Id.*

98. *Id.* at 1152.

IV. The Aftermath of the Florida Supreme Court's Interpretation

After the Florida courts' ten-year struggle with the statute of repose, the legislature in effect repealed it by amending section 95.031; it simply deleted the words which had constituted the limitation upon the initiation of products liability actions.⁹⁹ The *Lamb*¹⁰⁰ result was the misfortune of being heard after *Pullum*,¹⁰¹ but before the repeal.

The abolition of Florida's statute of repose presents new problems for those cases that were pending at the time of the repeal. The question confronting the courts now is whether the repeal should be given retroactive or prospective effect. At this date, there has not been a decision reported. In examining several factors which the courts should consider in ruling on this question, it appears that the repeal should be applied retroactively.

In determining whether the legislation will apply retroactively, the primary factor to consider is legislative intent indicated in the language of the statute itself.¹⁰² In amending Florida Statutes section 95.031 and providing for an effective date, the legislature indicated an intent to apply the repeal retroactively.¹⁰³ The provision states the following: "Section 1 of this act shall take effect October 1, 1986, and shall apply to causes of action accruing after that date, and Section 2 of the act shall take effect July 1, 1986."¹⁰⁴ The legislature clearly states that section 1 (which applies to limitations other than recovery of real property) is to be prospective.¹⁰⁵ On the other hand, in reference to section 2 (which deletes the limitation on products liability cases) there is no expression of future application.¹⁰⁶

Recognizing that these two provisions were drafted together, the legislature clearly expressed the intention that only section 1 apply prospectively. The legislature's conscious omission of that same instruction on section 2 suggests that it knowingly intended the repeal to be ap-

99. FLA. STAT. § 95.031(2) (1975), amended by 1986 FLA. SESS. LAW SERV. 86-271 (West).

100. 631 F. Supp. at 1144.

101. 476 So. 2d at 657.

102. See FLA. STAT. § 95.031(2) (1985), amended by 1986 FLA. SESS. LAW SERV. 86-271 (West).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

plied retroactively. Had this not been the intention, the legislature would have constructed the provision so that the words "shall apply to causes of action accruing after that date" modified both section 1 and section 2. Also, an alternative means would have been to repeat that clause after each section's declared effective date. Having chosen neither of these methods, the reader of the act can only conclude that the legislature intended for section 2 (repealing the statute of repose) to be applied retroactively.

Although legislative intent indicates retroactive application, the courts will have to determine another factor: whether this legislation can be constitutionally applied. In 1985, the Florida Supreme Court held that statutes which are remedial in nature generally apply to all pending cases, whereas a substantive law is to be applied prospectively only.¹⁰⁷ The basis for this rule is that statutes should not apply retroactively when they interfere with vested rights.¹⁰⁸

Although statutes of repose have been held to be substantive in other jurisdictions,¹⁰⁹ the issue here is with respect to legislation constituting the *repeal* of a statute of repose. Legislation is considered remedial if it does not create new rights, and operates to further a remedy already in existence without taking away vested rights.¹¹⁰

New rights are not created through the abolition of the statute of repose because the remedy to a product liability action was recognized at common law prior to the statute's enactment. Also, the new legislation results in furthering the remedy by the removal of the twelve-year cap.

Furthermore, Florida case law appears settled that laws pertaining to limitations on time within which rights may be enforced are remedial in nature.¹¹¹ Arguably, the abolition of a law which had placed a cap on the enforcement of rights would be remedial. Nevertheless, should an argument be advanced that the repeal is substantive, the Florida Supreme Court has indicated that "an amendment to a statute of limitations *enlarging* the period of time within which an action can be brought as to pending causes of action is not retroactive legislation

107. *Young v. Altenhaus*, 472 So. 2d 1152, 1154 (citing *State v. Lavazolli*, 435 So. 2d 321 (Fla. 1983)).

108. *Young*, 472 So. 2d at 1154.

109. *Cheswold Vol. Fire Co. v. Lambertson Const. Co.*, 489 A.2d 413, 421 (Del. 1984).

110. *City of Lakeland v. Catinella*, 129 So. 2d 133, 136 (Fla. 1961).

111. *Walter Denson & Son v. Nelson*, 88 So. 2d 120 (Fla. 1956).

and does not impair any vested rights."¹¹² Since the repeal of the statute clearly operates to enlarge the plaintiff's period in which to bring suit by removing the cap of twelve years, applying it to pending cases would at the outset not seem to be rendering the repeal as retroactive legislation.

Furthermore, the repeal of the statute does not affect vested rights in pending actions. Defendants will most likely assert that their defense arising from the statute of repose previously in effect has vested. However, in 1986, the United States District Court for the Southern District of Florida declared a vested right to be "*more than a mere expectation based on an anticipation of the continuance of an existing law*"; it must have become a title, legal or equitable, to the present or future enforcement of a demand."¹¹³ Thus, the repeal of the statute of repose cannot deprive a defendant of a vested right in a products liability case because the defense never vested.

Given the legislature's implicit indication that the amended statute was to have retroactive effect,¹¹⁴ along with the absence of constitutional obstacles, the repeal will likely be applied to pending cases. Those claims which had not been adjudicated prior to the repeal will then be afforded the full four year statute of limitations applicable to personal injury claims without regard to the age of the product.

V. Should Florida Consider the Enactment of Another Statute of Repose?

Although the Florida courts' complex application of the statute would seem the most obvious reasons for the repeal, the Legislature stated simpler policy reasons. One of the grounds cited was that the statute was unfair to plaintiffs and in effect created a "penalty" for citizens in Florida by treating persons in the same position differently.¹¹⁵ Another contributing factor was that many products, such as machinery and aircraft, are intended to be used for long periods of time, and defects may not necessarily appear in the first twelve

112. *Corbett v. Gen. Eng'g & Mach. Co.*, 37 So. 2d 161, 162 (Fla. 1948) (en banc) (emphasis added).

113. *Lamb*, 631 F. Supp. at 1149 (citing *Division of Worker's Compensation v. Brevda*, 420 So. 2d 887, 891 (Fla. 1st Dist. Ct. App. 1982)) (emphasis added).

114. See FLA. STAT. § 95.031 (3)(1986).

115. Florida House debate on CS/HB 832 (June 6, 1986).

years.¹¹⁶ By repealing the statute of repose, all persons injured by a design defect have a full four years to bring suit from the time in which they learn of the defect or, with exercise of due diligence, could have discovered the defect.

Florida currently is without a products liability statute of repose.¹¹⁷ After ten years of the statute's incongruous application and the foreclosure of many plaintiffs' actions, a products liability claim can now be brought at any time before the personal injury statute of limitations has run. Undoubtedly manufacturers and defense attorneys will be urging the Florida legislature to enact a statute of repose again in the future. However, the many flaws with the now-repealed statute indicate that Florida will fare better without such a law.

A. *Inherent Problems with Florida's (Now-Repealed) Statute of Repose*

Florida's products liability statute of repose was "incurably defective."¹¹⁸ The statute was not comprehensive and failed to address key issues that arise in products liability litigation.¹¹⁹ One case that illustrates its procedural deficiencies was decided soon after the Florida Supreme Court declared the statute constitutional.¹²⁰ In *Phlieger v. Nissan Motor Co.*,¹²¹ the plaintiff brought a wrongful death action based on an alleged design defect of a truck.¹²² However, a separate statute of limitations which governed wrongful death actions and directly conflicted with the statute of repose complicated the decision.¹²³

The presence of these two competing statutes forced the *Phlieger* court to determine which statute applied to a combined wrongful death and products liability action.¹²⁴ It was able to avoid the issue, however, by acknowledging that at the moment of plaintiff's decedent's death,

116. *Id.*

117. FLA. STAT. § 95.031(2) (1975), amended by 1986 FLA. SESS. LAW SERV. 86-271 (West).

118. Brief of Amicus Curiae at 12, *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657 (Fla. 1985).

119. S. REP. NO. 99-422, 99th Cong., 2d Sess. 8 (1986).

120. *Phlieger v. Nissan Motor Co.*, 487 So. 2d 1096 (Fla. 5th Dist. Ct. App. 1986).

121. *Id.*

122. *Id.*

123. *Id.* at 1098.

124. *Id.* at 1096.

the twelve-year statute of repose had not run.¹²⁵ In dicta, the court stated that if he had been killed after the statute had run, his survivor's action would have been barred.¹²⁶ Nevertheless, the issue in this case remained clouded because the court had stated in the outset of its opinion that the lower court should have applied the "wrongful death statute of limitations."¹²⁷ This case illustrates the confusion that is created by the enactment of a statute without considering co-existing legislation.

B. *The Pitfalls of an Overbroad Statute of Repose*

Another flaw in Florida's oversimplified statute of repose was that it applied to all three theories of recovery: negligence, breach of warranty, and strict liability. Such a broad approach for the protection of manufacturers could only result in severe inequities for plaintiffs if applied as written. Other jurisdictions, however, have attempted to avoid this problem by creating alternatives for the benefit of the consumer as well. For example, Colorado has enacted a products liability statute that includes exceptions for "hidden defects, fraud, intentional misrepresentation, express warranties and prolonged exposure."¹²⁸ Kansas also excepts "injury causing aspects not discoverable . . . until after the statutory period."¹²⁹ Had Florida's statute offered similar provisions, the courts could have more easily granted the relief desired.¹³⁰

Along with Colorado and Kansas, Idaho¹³¹ and Arizona¹³² exclude express warranties from their repose statutes. Florida's statute ignored the fact that some manufacturers may warrant their product against defects for much longer than twelve years. Although a Florida statute did provide for the *shortening* of the limitations period by contract,¹³³ there was no express protection for those who may bargain to receive a warranty for longer than twelve years.

125. *Id.*

126. *Id.* at 1098-99.

127. *Id.* at 1098.

128. COLO. REV. STAT. § 13-80-127.6(b), (c), (d) (1985).

129. KAN. STAT. ANN. § 60-513(b) (1976); *cf.* FLA. STAT. § 95.11(3) (1975) (repealed 1986). Florida's products liability statute of repose contained no exception.

130. *Pullum*, 476 So. 2d at 659 (explanation in a footnote as to why relief granted in a previous pharmaceutical case: "it was a different factual context.").

131. IDAHO CODE § 6-1303 (1980).

132. ARIZ. REV. STAT. ANN. § 12-551 (1978).

133. FLA. STAT. § 95.031 (1975).

An example of a products liability statute that is equitable to consumers and manufacturers is one which provides that the expiration of a statutory period simply results in a "rebuttable presumption" that the product was not defective.¹³⁴ Colorado's statute includes the rebuttable presumption that the manufacturer "was not negligent and all warnings and instructions were proper and adequate."¹³⁵ This construction confers upon a manufacturer the advantage of a presumption in his favor but does not impose an absolute bar on the plaintiff's claim.¹³⁶

Minnesota has enacted a statute that allows the manufacturer to raise as a defense the fact that an injury occurred "following the expiration of the ordinary useful life of the product."¹³⁷ While this definition may be subject to interpretation problems, it does not absolutely bar plaintiffs in products liability actions.¹³⁸ Furthermore, it does not treat all products as being equivalent in their predetermined life spans, and thereby takes into account those products that have expected useful lives of great duration, such as heavy machinery and aircraft.¹³⁹

After a brief examination of other states' products liability statutes of repose, it is clear that there were many options available to the Florida legislature when it drafted its statute. Alternative foundations such as these which grant manufacturers some relief without providing an absolute bar to actions could have averted the "access to courts" issue that plagued the Florida courts. It is evident that Florida's statute of repose tried to solve too many problems too quickly.

C. *Faulty Reasoning which Justifies Enactment of Statutes of Repose*

In addition to the statute's broad implications, proponents of a statute of repose often lack sound reasoning to justify a statute of repose. The most common argument advanced concerns the expanded liability of manufacturers, with a statute of repose treated as a "trade-off." Since the erosion of the privity requirement, it appears logical to follow with a reprieve from liability for manufacturers.

In reality, however, the privity requirement had no place in a mod-

134. COLO. REV. STAT. § 13-21-403(3) (1985).

135. *Id.*

136. *Id.*

137. MINN. STAT. ANN. § 604.03 (West 1986).

138. *Id.*

139. *Id.*

ern consumer society. It was merely a vestige left over from an era when all members of society produced their own goods. As technology advanced and citizens began to rely on manufacturers for necessities, the privity requirement became totally unjustified. As Justice Cardozo stated in *MacPherson v. Buick Motor Co.*, "[p]recedents drawn from the days of travel by stage coach do not fit the conditions of travel today."¹⁴⁰ A trade-off was not necessary since consumers had only gained privileges to which they were entitled. Rather, increased responsibility furthers the public interest because it is the manufacturer who "stands in a superior position to recognize and cure defects."¹⁴¹

Another issue that has become clouded in justifying repose statutes is the misleading notion that simply because a products liability action is allowed to proceed, its success is guaranteed. Although claims initiated when a product is several years old do create difficulties for defendants, the problems with proof affect the plaintiff as well.¹⁴² Whether the claim is brought under the theory of strict liability, negligence, or warranty, the plaintiff must establish all of the elements of each cause of action. If the necessary elements can not be shown, the case fails.

For example, a "defect" must have existed at the time of delivery.¹⁴³ There must also be an injury and a causal relationship between the defect and the injury.¹⁴⁴

At the heart of each theory is the requirement that the plaintiff's injury must have been caused by some *defect* in the product. Generally, when the injury is in no way attributable to a defect, there is no basis for imposing product liability upon the manufacturer. It is not contemplated that a manufacturer should be made the insurer for *all* physical injuries caused by his products.¹⁴⁵

140. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 391, 111 N.E. 1050, 1053 (1916).

141. *Auburn Mach. Works, Co. v. Jones*, 366 So. 2d 1167, 1169 (Fla. 1979).

142. *Overland Constr. Co.*, 369 So. 2d at 574.

143. *Builders Shoring and Scaffolding Equip. Co. v. Schmidt*, 411 So. 2d 1004, 1006 (Fla. 5th Dist. Ct. App. 1982).

144. *Zyferman v. Taylor*, 444 So. 2d 1088, 1091 (Fla. 4th Dist. Ct. App. 1984); *review denied sub nom.*, *ITT Gen. Controls v. Zyferman*, 453 So. 2d 44 (Fla. 1984) (citing *Cassisi v. Maytag Co.*, 396 So. 2d 1140 (Fla. 1st Dist. Ct. App. 1981)). See also *Jimenez v. Gulf & Western Mfg. Co.*, 458 So. 2d 58, 60 (Fla. 3d Dist. Ct. App. 1984).

145. *Royal v. Black and Decker Mfg. Co.*, 205 So. 2d 307, 309 (Fla. 3d Dist. Ct. App. 1967), *cert. denied*, 211 So. 2d 214 (Fla. 1968).

In addition to these basic requirements of bringing a products liability action, the defendant has defenses under both common law and statute.¹⁴⁶ It is clear that the new found cause of action against the manufacturer was not intended to be absolute.

Before enacting a similar statute in the future, Florida must consider all aspects of products liability litigation in order to create effective legislation and equitable results. The short-sighted termination of a cause of action is not the answer.

D. *A Statute of Repose for Durable Goods*

Some commentators have suggested that statutes of repose should at least apply to capital goods or durable goods, such as aircraft and large machinery.¹⁴⁷ It is not uncommon for their "useful lives" to be several times that provided by a statute of repose.

There are obvious policy reasons which conflict with the justification of a statute of repose in the area of durable goods. However, if a manufacturer produces goods that are *intended* to last for long periods of time, he should be prepared to warrant these products against defects for that intended useful life. There is no logical basis for relieving a manufacturer of liability after *twelve* years when he has sold and received a profit for a product intended to be used for *fifty* years.

Another factor mitigating against a statute of repose for durable goods is that the persons injured by these products are generally "passive victims." These people usually are not purchasers of the product and are not in the position to know of their age or life expectancies. The injured persons are commonly employees working with the machinery¹⁴⁸ or passengers on aircraft.¹⁴⁹ Policy reasons mandate that these unsuspecting victims not be penalized and held accountable for knowledge they could not have easily obtained. Those who profited by the product and are responsible for the defect should continue to re-

146. See West, 336 So. 2d at 80.

147. See Martin, *A Statute of Repose for Products Liability Claims*, 50 FORDHAM L. REV. 745, 755 (1982). Commentators refer to these products as "durable" because they generally continue in use for long periods of time.

148. See generally Huset, 120 F. at 865-66, in which the plaintiff was a laborer who was employed to operate a threshing machine. To operate the machine, it was necessary for him to walk on its sheet-iron covering. However, the covering was so pliable and without support that it collapsed, causing the plaintiff's foot and leg to be crushed.

149. E.g., MacRae, 457 So. 2d at 1093.

main liable.

VI. Federal Preemption

By repealing section 95.031(2) of the Florida Statutes during the final days of the 1986 session,¹⁵⁰ the Florida legislature may have thought the products liability statute of repose issue was buried, only to discover someday that the United States Congress has resurrected it. Both houses of Congress have entertained the idea of a uniform products liability statute with statute of repose provisions.

The Consumer Subcommittee of the United States Senate Committee on Commerce, Science and Transportation has been soliciting public comment on a staff draft of a bill to reform products liability law.¹⁵¹ Senator Kasten, former chairman of the subcommittee, revised the draft bill and introduced it in 1983.¹⁵² This bill would have set a time limit of twenty-five years from the date of first sale on the liability of manufacturers of capital goods only such as machinery and commodities used to produce goods.¹⁵³ The limitations of twenty-five years would not apply if (1) the manufacturer intentionally misrepresented or (2) fraudulently concealed facts about the product or (3) the product caused harm within the twenty-five year period but the injury did not actually develop until after the expiration of that period.¹⁵⁴

The House Bill would limit actions for products liability to within ten years after the date of sale of the product.¹⁵⁵ The bar would apply to all products, rather than just capital goods.¹⁵⁶ The absolute ten year limit would be extended for three additional years if the manufacturer warranted the product for more than ten years, and five additional years if the product caused harm within the ten year period but the injury did not manifest itself until after the period expired.¹⁵⁷ Also, one could bring a claim within fifteen years of the first sale if the manufac-

150. Fla. House debate on CS/HB 832 (June 6, 1986) (tape recording).

151. Seiver, *Federal Product Liability Acts*, 11 THE BRIEF 2 (1982).

152. AMERICAN ENTERPRISE INSTITUTE, FEDERAL PRODUCTS LIABILITY PROPOSALS; 98TH CONG. 2D SESS. 9 (1984). Senator Kasten introduced the bill as Senate Bill 2631 (S. 2631) and as Senate Bill 44 (S. 44) in the 98th Congress.

153. AMERICAN ENTERPRISE INSTITUTE, FEDERAL PRODUCTS LIABILITY PROPOSALS; 98TH CONG. 2D SESS. 9-10.

154. *Id.*

155. *Id.* at 27.

156. *Id.*

157. *Id.*

turer's misrepresentations clearly caused the injury.¹⁵⁸ Neither the Senate or House bills were voted upon during the 98th Congress.¹⁵⁹

The Consumer Subcommittee of the U.S. Senate Commerce Committee on Commerce, Science and Transportation has continued to analyze the need for federal tort liability legislation. A Committee report on Senate Bill 2670, a bill introduced in the 99th Congress to regulate interstate commerce by providing for uniform liability law, was printed on August 15, 1986.¹⁶⁰ The Committee reported Bill 2670 favorably to the Senate on a 10-7 Committee vote.¹⁶¹ One section of the bill establishes uniform standards of limitations and repose.¹⁶² It provides a two year statute of limitations that runs from the time the claimant discovered or, in the exercise of reasonable care, should have discovered the harm and its cause.¹⁶³ A person with a legal disability has two years from the date the disability ceases to file suit.¹⁶⁴ A claim for harm caused by capital goods, except toxic harm, must be filed within twenty-five years of the time of delivery of the product or be barred.¹⁶⁵ Motor vehicles, vessels, aircraft, or railroads used primarily to transport passengers for hire are not, however, subject to the twenty year limit.¹⁶⁶ Non-capital goods are subject to a shorter time limitation.¹⁶⁷ A manufacturer of a non-capital good that has caused harm is not subject to liability if the harm caused by the product occurred after the product's "useful safe life."¹⁶⁸ The useful life of non-capital goods is presumed to be no more than ten years after the delivery of the product to its first purchaser or lessee.¹⁶⁹ The presumption can be rebutted by a preponderance of the evidence.¹⁷⁰ The useful safe life may be extended beyond ten years through a manufacturer's express warranty, or an intentional misrepresentation causing an injury, or exposure within a

158. *Id.*

159. S. REP. NO. 99-422, 99th Cong., 2d Sess. 11 (1986).

160. *Id.* at 1.

161. *Id.* at 117 (minority views of Senator Inouye).

162. S. 2760, 99th Cong., 2 Sess. § 304 (1986).

163. *Id.* at § 304(a).

164. *Id.*

165. *Id.* at § 304(b)(1).

166. *Id.* at § 304(3).

167. *Id.* at § 304(2)(A).

168. *Id.*

169. *Id.* at § 304(2)(C).

170. *Id.*

product's useful life resulting in the manifestation of injury later.¹⁷¹

Should a bill such as these be finally enacted, it will signal a significant encroachment on states sovereignty in an area of the law traditionally reserved to the states.¹⁷² This legislation would preempt the system of products liability in each state by a federal products liability law.¹⁷³

The arguments for and against such federal legislation are well documented. The justification which has most often been relied upon to enact similar legislation is the need to regulate interstate commerce.¹⁷⁴ The principle benefits suggested are the removal of the uncertainty and inconsistency facing manufacturers and plaintiffs by the differing statutes and judicial interpretations in the various states.¹⁷⁵

The Reagan administration favors federal legislation in this area.¹⁷⁶ Its policy is that "federal interference with traditional state rules should be kept to an absolute minimum to achieve its purpose."¹⁷⁷ The administration is looking at the various legislative proposals to see "which have impacts on interstate commerce and are susceptible only to federal treatment"¹⁷⁸ before deciding whether to lend administration support to specific legislative bills.¹⁷⁹

Inevitably, plaintiffs would challenge a federal statute of repose on constitutional grounds as well as the power of the federal government to usurp the states' power to develop their own tort law. Courts would undoubtedly question the validity of preempting a part of a state's tort law while leaving the rest intact.¹⁸⁰ An example of the latter is an automobile accident suit in which the plaintiff joins the manufacturer of the automobile and the negligent driver in the same action. Differing federal and state rules of negligence theory and defense would have to be applied by the state court.¹⁸¹

171. *Id.* at § 304(2)(B).

172. Ghiardi, *Products Liability: Federal Legislation? NO!*, 11 THE BRIEF, 5-6 (1982).

173. *Federal Products Liability Proposals*, 9, 98th Cong., 2d Sess. (1982).

174. Statement of Sherman E. Unger before the ABA 5-6, (Aug. 10, 1982) (available in Nova Law Center Library).

175. *Id.* at 5.

176. *Id.*

177. *Id.* at 10.

178. *Id.*

179. *Id.* at 5.

180. Ghiardi, *supra*, note 172 at 5-6.

181. *Id.* at 7-8.

The possible court challenges to a federal products liability statute containing a statute of repose indicate that for those states which, like Florida, have experience with a statute of repose and have decided through trial and error that such a provision does not serve the needs of its citizens, the federal legislation is meddlesome, unwarranted and necessarily expensive to challenge. "To impose a national statute of repose applicable to all product actions would be met with serious and constant challenge."¹⁸²

VII. Conclusion

Soon after the Florida Supreme Court finally determined that the products liability statute of repose was constitutional, the legislature repealed it. Currently, manufacturers can be held liable indefinitely for defective products that cause injuries. Although manufacturers will be adversely affected by this indefinite liability, another simplified version of a repose statute such as section 95.031(2) of the Florida Statutes would only do more harm than good.

Providing for an "absolute bar" based on a product's date of manufacture was a fatal flaw in Florida's products liability repose statute. Although statutes of limitations are upheld, it is fair to observe that they generally begin to run from the date of *injury* and one's action is not abolished before it has arisen. The United States Supreme Court has stated, "[A]ll statutes of limitations must proceed on the idea that the party has full opportunity afforded him to try his right in the courts"¹⁸³

A by-product of not enacting a statute of repose is the increased litigation as a result of fewer claimants having their actions cut off arbitrarily. Legislators must decide whether the protection afforded manufacturers by a statute of repose outweighs the public right to seek compensation for injuries caused by defective products. It is clear that any enacted law must strike an even balance between limiting the manufacturer's liability without completely abrogating the plaintiff's rights. If any legislation must be enacted to curtail manufacturer's liability, the most equitable statute to achieve this result would be one that grants a manufacturer a presumption of non-liability. A statute of repose is not the answer if the law must continue to deter defective products from being placed in the market stream, and, at the same

182. *Id.* at 6.

183. *Wilson v. Iseminger*, 185 U.S. 55, 62 (1902).

time, not interfere with the development and availability of worthwhile products.

Linda D. Caldwell