Does a 20-Year Express Warranty Expire in Six Years in North Carolina?

By Scott C. Harris and Matthew D. Quinn

If a manufacturer/contractor provides an extended warranty of twenty or more years, common sense suggests the manufacturer/contractor should be required to stand behind its guaranty for that period of time. However, North Carolina law is currently murky as to whether a homeowner can recover monetary damages based upon a breach of express warranty that extends beyond six years. This problem arises because of a conflict between long-term warranties and the six-year statute of repose: Should a 20-year warranty be enforced notwithstanding the statute of repose, or should the legislatively enacted statute of repose trump the parties bargained for twenty-year warranty?

Unlike a statute of limitations, a statute of repose is a specific time period in which a plaintiff must file a claim against a manufacturer, contractor, subcontractor and/or architect. If the claim is filed after that period has elapsed, absent extenuating circumstances such as fraud or willful and wanton negligence, the claim will be forever barred. While many statutes of limitation contain discovery provisions, the statute of repose has none, and can effectively bar claims before a homeowner knows he/she may have been damaged.

Currently, there are two statutes of repose in North Carolina—N.C.G.S. § 1-50(a)(5) ("the Real Property Statute of Repose") and N.C.G.S. § 1-46.1 ("the Product Liability Statute of Repose"). Originally the Product Liability Statute of Repose was found in N.C.G.S. § 1-50(a)(6), which barred any claim after six years. It was replaced by N.C.G.S. § 1-46.1, effective Oct. 1, 2009, which provides a twelve-year statute of repose to any claim that accrued after the effective date.

Generally speaking, the Real Property Statute of Repose bars any claim that is filed more than six years from the date the home or improvement is completed for "use and occupancy." In most cases, this date corresponds with the date the city or county issues the certificate of occupancy or certificate of compliance regarding the improvement. The Product Liability Statute of Repose now bars any claim against a manufacturer/seller if the lawsuit is filed more than twelve years after the product is initially purchased for use or consumption.

This article discusses why neither the Real Property Statute of Repose nor the Product Liability Statute of Repose should bar express warranty claims that guaranty performance beyond the repose period. To follow this argument, we must first understand the goal behind both express warranties and the statutes of repose.

1. What is the purpose of a statute of repose?

The purpose of a statute of repose is to give a defendant a vested right not to be sued if the plaintiff fails to file within the prescribed period. **Colony Hill Condominium I Assoc. v. Colony Co.**, 70 N.C. App. 390, 394, 320 S.E.2d 273, 276 (1984), disc. rev. denied, 312 N.C. 796, 325 S.E.2d 485 (1985). When discussing the Product Liability Statute of Repose, the Court of Appeals stated it "is intended to be a substantive definition of rights which sets a fixed limit after the time of the product's manufacture beyond which the seller will not be held liable." **Bryant v. Adams**, 116 N.C. App. 448, 456, 448 S.E.2d 832 (1994), *rev. denied*, 339 N.C. 736, 454 S.E.2d 647 (1995).

In upholding the constitutionality of the Real Property Statute of Repose, the North Carolina Supreme Court held it was designed to limit the potential liability of architects, contractors, and others in the construction industry for improvements made to real property. **Lamb v. Wedgewood S. Corp**., 308 N.C. 419, 427-28, 302 S.E.2d 868, 873 (1983). In **Lamb**, the Supreme Court discussed why it applies to work performed by architects and contractors:

> In the late 1950's and early 1960's, many architects and contractors felt threatened by the abolition of the privity requirement and the advent of "discovery" provisions in tort statutes of limitation. In response, various architects' and contractors' trade associations sponsored legislation to curtail the time period during which an architect or contractor might be held liable for a negligent act. A total of 44 architects' and contractors' statutes of repose have been passed by various state legislatures.
>
> *Id.* (emphasis added).

The court continued:

> Suppliers and manufacturers, who typically supply and produce components in large quantities, make standard goods and develop standard processes. They can thus maintain high quality control standards in the controlled environment of the factory. On the other hand, the architect or contractor can pre-test and standardize construction designs and plans only in a limited fashion. In addition, the inspection, supervision and observation of construction by architects and contractors involves individual expertise not susceptible of the quality control standards of the factory.

Id. at 437, 302 S.E.2d at 878 (quoting **Burmaster v. Gravity Drainage Dist. No. 2 of the Parish of St. Charles**, 366 So. 2d 1381 (La. 1978)).

Following the above principles, the North Carolina Court of Appeals has described the legislative purpose of statutes of repose as protecting potential defendants *from stale negligence claims* against which they cannot defend due to lost or destroyed evidence. **Boudreau v. Baughman**, 86 N.C. App. 165, 172, 356 S.E.2d 907, 911 (1987), *rev'd on other grounds*, 322 N.C. 331, 368 S.E.2d 849 (1988).

2. What are express warranties?

An express warranty is an element in a sales contract and is contractual in nature. **Perfecting Serv. Co. v. Prod. Development & Sales Co**., 261 N.C. 660, 668, 136 S.E.2d 56, 62 (1964). Warranties address attributes such as character, quality, performance, durability, longevity, type, and title. *See* Peter J. Marino, *North Carolina Construction Law Deskbook* 285-86 (5th ed. 2010). These warranties are expressly set forth in the contract documents and usually spell out in

detail the duties and time limits involved. *Id*.; *see also* **Burke County Bd. of Educ. v. Juno Constr. Corp.**, 50 N.C. App. 238, 273 S.E.2d 504 (1981).

As stated by the North Carolina Supreme Court in a seminal express warranty case regarding the purchase of a tractor,

> Plaintiff here purchased both goods and a promise. He bought a new tractor, the performance of which was expressly guaranteed within the limits and upon the terms specified in the warranty contained in the owner's manual. Plaintiff could reasonably expect the author of the warranty to stand by its promise.

Kinlaw v. Long Mfg. N.C., Inc., 298 N.C. 494, 501-02, 259 S.E.2d 552, 557 (1979)

It is important to note that a seller's liability for breach of an express warranty does not depend upon proof of his negligence, but arises out of the contract. **Veach v. Bacon Am. Corp.**, 266 N.C. 542, 550, 146 S.E.2d 793, 799 (1966). Since express warranties are contractual in nature, under North Carolina law, interpretation of a written and unambiguous warranty is a question of law for the court. *See* **Briggs v. Am. & Efird Mills, Inc.**, 251 N.C. 642, 644, 111 S.E.2d 841, 843 (1960). When construing contractual terms, a contract's plain language controls. *See, e.g.,* **State v. Philip Morris USA Inc.**, 363 N.C. 623, 631-32, 685 S.E.2d 85, 90-91 (2009); **Hodgin v. Brighton**, 196 N.C. App. 126, 128-29, 674 S.E.2d 444, 446 (2009). The goal of contract interpretation is to ascertain the intention of the parties at the time the parties entered into the contract. *See* **Gould Morris Elec. Co. v. Atl. Fire Ins. Co**., 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948). Thus, as discussed below, parties should be free to contract around the statute of repose.

3. What are the applicable cases in North Carolina that address the tension between extended warranties and the statute of repose? Since express warranties arise out of contract, if an express warranty guaranteed future performance beyond the repose period, then North Carolina Courts would, pursuant to contract law, hold as a matter of law that the manufacturer/contractor must comply with its express representations and guarantees notwithstanding the statute of repose. To hold otherwise would permit the legislature to invalidate the bargained-for warranty term agreed to by the contracting parties. North Carolina courts have recognized this principle on a few occasions. For instance, in **Haywood St. Redevelopment Corp. v. Peterson Co.**, 120 N.C. App. 832, 463 S.E.2d 564 (1995), *disc. review denied*, 342 N.C. 655, 467 S.E.2d 712 (1996), while discussing the statute of limitations, the Court of Appeals held that a five-year warranty was in the nature of a prospective warranty because it guaranteed the future performance of waterproofing work for a stated period of time. The court noted a new cause of action accrued each day the work did not comply with the express warranty. *Id*. at 836-37, 463 S.E.2d at 566-67. Thus, the running of the statute of limitations was effectively tolled during the warranty period. The court stated, "[I]n other words, the warranty was a guarantee that the waterproofing would be free of defects through [the expiration of the warranty term] and on each day the waterproofing was not free of defects, there was a new breach of the agreement. With the occurrence of each breach, a new cause of action accrued." *Id*.

Even though it discusses the statute of limitations rather than the statute or repose, the Court of Appeals' holding in **Haywood Street** adheres to the precedent that express warranties are contractual in nature and should be enforced according to the parties' intent. After all, the parties to that case explicitly agreed to the long-term warranty. Moreover, the seller in **Haywood Street** possibly gained a marketing advantage over competitors by offering such a long-term warranty. If the statute of limitations defense had prevailed, then the warranty term would have been completely meaningless and would have only guaranteed that the waterproofing was free of defects on the date that the work was performed. Such a result would both void the parties' bargain and encourage deceptive marketing of long-term warranties. By avoiding these results, the Court of Appeals in **Haywood Street** recognized that an express warranty must be enforced as written. *See* Chris Williams, *The Statute of Limitations, Prospective Warranties, and Problems of Interpretation in Article Two of the UCC,* 52 Geo. Wash. L. Rev. 67, 104-10 (1983) (advocating in favor of enforcing the warranty term for similar reasons).

The Court of Appeals subsequently indicated, albeit subtly, that it was prepared to extend the intuitive logic of **Haywood Street** to statute of repose cases in **Coates v. Niblock Development Corp**., 161 N.C. App. 515, 588 S.E.2d 492 (2003) and **Jack H. Winslow Farms, Inc. v. Dedmon**, 171 N.C. App. 754, 615 S.E.2d 41 (2005). In **Coates**, the Court of Appeals upheld an award for money damages to a homeowner after the statute of repose ran but before a 10-year structural warranty provided by the contractor had expired. There, the plaintiffs experienced significant damage due to moisture intrusion through exterior cladding. The express structural warranty defined a structural defect as "actual physical damage to those load-bearing elements of the home that would cause it to become unsafe or otherwise unlivable." 161 N.C. App. at 517, 588 S.E.2d at 494. Based upon the finding that the contractor had breached the warranty, which resulted in damage to the load-bearing elements of the home, the jury awarded damages of $55,000.

On appeal, the Court of Appeals agreed that there was actual, physical damage to elements covered under the 10-year structural warranty and upheld the jury award of monetary damages. While the statute of repose was not explicitly discussed in the opinion, the defendant, in its brief, stated that the statute of repose had presumably expired for *any other claims* other than the express warranty claim because six years separated the closing date and the date on which the lawsuit was filed. Since the Court of Appeals did not discuss the statute of repose in its opinion, it implicitly agreed that a long-term warranty must be enforced and cannot be trumped by a conflicting statute of repose. Further, by upholding the jury award of monetary damages, the Court agreed that a plaintiff should be entitled to monetary damages if a defendant breaches an extended warranty resulting in significant damages.

In **Jack H. Winslow Farms, Inc. v. Dedmon**, the Court of Appeals upheld dismissal of a breach of warranty claim (among others) against a grain silo manufacturer brought more than 20 years after purchase of the silo. In dismissing the warranty claim, the court of Appeals noted that there was no evidence of a long-term warranty that would have permitted the buyer to bring his lawsuit after the expiration of the statute of repose. Specifically, the Court stated, *"Absent evidence of extended warranties, contracts, or otherwise upon which*

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to base an action, plaintiff had six years from the date of purchase to bring claims against the manufacturer for defects or failures arising from the product." 171 N.C. App. at 758, 615 S.E.2d at 45 (emphasis added). While possibly *dicta*, the court recognized that an agreement for a long-term warranty is not thwarted by a statute of repose defense.

The Court of Appeals has issued at least two other opinions that appear to directly conflict with the common sense holding in **Haywood Street**. In **Roemer v. Preferred Roofing, Inc.**, 190 N.C. App. 813, 660 S.E.2d 920 (2008) and **Whittaker v. Todd**, 176 N.C. App. 185, 625 S.E.2d 860 (2006), the court found that the applicable statute of repose trumped the terms of the sellers' warranties.

In **Roemer**, a roofer installed a roof and provided a lifetime warranty regarding the roof's installation. 190 N.C. App. at 813, 660 S.E.2d at 921. No other details about the warranty appear in the opinion. Approximately eight years after the roof was installed, the homeowner discovered defects in the roof and filed a lawsuit against the roofer asserting breach of the express lifetime warranty. The court dismissed the lawsuit, relying upon the six-year statute of repose. The court held that the homeowners' remedy for breach of an alleged lifetime warranty claim brought after the six-year repose period was specific performance rather than damages. *Id.* at 816-17, 660 S.E.2d at 923-24. Because no claim for specific performance was made in the homeowners' lawsuit, the lawsuit was dismissed.

The **Roemer** court did not offer any explanation as to why a claim for specific performance was justiciable, but a claim for damages was barred. Regardless, some have argued that, under **Roemer**, specific performance is the exclusive remedy for plaintiffs seeking to enforce a long-term warranty after the repose period expires. That interpretation is mistaken because the **Roemer** opinion did not discuss the terms of the warranty under discussion, and it did not provide reasons for its selection of specific performance as the sole remedy. Therefore, it is far more reasonable to assume that the warranty in **Roemer** was for "repair or replace" only. Consider the assessment of a leading North Carolina contract law treatise:

> The terms of the **Roemer** warranty were not set forth in the opinion. Presumably, the remedies under the warranty were limited to repair or replacement of the defective portions of the roof. The authors note that in a case involving an express warranty that exceeds the statute of repose and in which the buyer's remedies are limited to repair or replacement of defective parts, the buyer should still be entitled to recover monetary damages[.]

John N. Hutson & Scott A. Miskimon, *North Carolina Contract Law* § 16-7 (2009 Cum. Supp.).

In discussing **Roemer**, subsequent courts have agreed with the analysis set forth by Mr. Hutson and Mr. Miskimon. For instance, in a case from the United States District Court for the Eastern District of North Carolina, Judge Terrence W. Boyle ("Judge Boyle") was asked to dismiss a breach of warranty claim under the statute of repose. **Hart v. Louisiana-Pacific Corp.**, No. 2:08-CV-00047-BO (E.D.N.C.) (Order, Nov. 11, 2009). The warranty in **Hart** was for 10 years, and the plaintiffs-homeowners filed the lawsuit within 10 years but after the six-year repose period had expired. The defendant-manufacturer asserted the statute of repose as a defense, and argued that Roemer limited the plaintiffs-homeowners' recovery to only specific performance and, because the plaintiffs-homeowners did not request specific performance, the lawsuit must be dismissed.

After reading the express 10-year warranty, Judge Boyle held that because the warranty was not limited to "repair or replace," the plaintiffs-homeowners were permitted to sue for damages despite the expired statute of repose. In addressing **Roemer**, Judge Boyle stated that "**Roemer** is more properly read as holding that the remedy for breach of express warranty may be limited to specific performance *if the express warranty so provides and the statute of repose has expired*." *Id.* at 4 (emphasis added).

It is important to note that other federal judges have recently agreed with Judge Boyle's analysis. On January 16, 2013, Federal District Court Judge J. Michelle Childs, citing Judge Boyle's Order, refused to dismiss a claim for breach of express warranty brought after the expiration of the statute of repose. **Erickson v. Building Materials Corp. of America**, No. 8:11-CV-03085 (D.S.C.) (Order, Jan. 16, 2013). Judge Childs cited **Dedmon**, noting that "courts applying North Carolina law have acknowledged that a claimant may bring a cause of action for breach of express warranty beyond the statute of repose based upon evidence of waiver contained in an extended warranty or contract." *Id.* at 6.

In addition to **Roemer**, another puzzling case is **Whittaker v. Todd**, 176 N.C. App. 185, 625 S.E.2d 860 (2006). There, the homeowner filed suit in small claims court against his roofing contractor 12 years after his roof was replaced. The homeowner argued that the statute of repose did not bar the action because, despite the lack of an explicit breach of warranty claim, the contractor had provided an express warranty guaranteeing workmanship for as long as the homeowner owned the house. The court upheld the trial court's dismissal of the lawsuit because the homeowner's sole claim was for "money owed," without mention of specific performance or a breach of warranty claim. *Id.* at 187, 625 S.E.2d at 861-62. Being presented with **Haywood Street** as authority in favor of the homeowner, the court distinguished that opinion because it involved a breach of warranty claim, and since the homeowner did not assert a breach of warranty claim, **Haywood Street** was inapplicable. *Id.*

It is hard to know what to make of the **Whittaker** opinion. On the one hand, **Whittaker**'s holding is at odds with the parties' express warranty, thus putting the opinion at odds with the contract-driven analysis of **Haywood Street**. On the other hand, **Whittaker** can be read as simply a strict application of pleading rules: the homeowner failed to explicitly plead breach of warranty, and therefore, despite the existence of a long-term warranty, the homeowner could not avail himself of the **Haywood Street** opinion. Either way, the **Whittaker** case does not hold that specific performance is the sole remedy for plaintiffs suing after the repose period. Since the plaintiff did not file a claim for breach of express warranty, it is probably best not to draw any conclusions from **Whittaker**.

The uncertainty surrounding **Whittaker** is emblematic of this entire area of law. As discussed, several cases—such as **Haywood Street** and **Coates**—held that if the litigants agreed in their contract to a long-term warranty, the agreement must be enforced. But other cases, such as Roemer, the courts arguably ignored the parties' contract and limited plaintiffs to specific performance. Specific performance appears to be an inappropriate remedy when claims are brought within

the warranty period but outside the repose period.

4. What is Specific Performance?

"The remedy of specific performance is an equitable remedy of ancient origin. Its sole function is to compel a party to do precisely what he ought to have done without being coerced by the court." **Williams v. Habul**, 724 S.E.2d 104, 110 (N.C. Ct. App. 2012). "[S]pecific performance is *not used to rewrite a contract* or to create new contractual duties." **Kniep v. Templeton**, 185 N.C. App. 622, 631, 649 S.E.2d 425, 432 (2007) (emphasis added) (internal quotations omitted). "Even if a breach of a valid contract exists, specific performance will not be decreed unless the terms of the contract are so definite and certain that the acts to be performed can be ascertained and the court can determine whether or not the performance rendered is in accord with the contractual duty assumed." **McKinnon v. CV Indus.**, Inc., 713 S.E.2d 495, 500 (N.C. Ct. App. 2011).

From these principles, it seems to follow that there is no reason to limit plaintiffs to specific performance after the repose period has expired if the warranty term has not. This is because limiting a plaintiff to specific performance is the height of rewriting a contract and allowing the defendant to escape doing what should have been done in the first place. Where there is a long-term warranty, the parties agreed to the long-term warranty. This was the parties' intent, and to limit the available remedy to specific performance ignores this intent.

The inappropriateness of specific performance as a remedy is particularly acute in construction cases. It is often the case that the defective product causes damage to other portions of the home. Take as an example **Coates v. Niblock Development Corp.**, 161 N.C. App. 515, 588 S.E.2d 492 (2003), discussed *supra*, where synthetic stucco compromised the structural integrity of the home. Application of new cladding via specific performance would have resulted in a meaningless warranty because it would have merely provided the homeowners with the same defective cladding system that resulted in structural damage. To make the homeowners whole, money damages were necessary so that the home's structural issues could be repaired and a non-defective cladding system could be applied to the home.

Thus, specific performance is an ineffective remedy in cases involving an expired repose period and a still-active warranty period, unless the warranty is limited to specific performance as noted by Judge Boyle. This is especially true when one considers the negative consequences of allowing manufacturers/contractors to offer long-term warranties that are enforceable only within the six-year statute of repose.

5. There is no good reason to invalidate a long-term warranty agreed to by contracting parties.

As noted above, the guiding principle behind a contract is the parties' intent. **Stovall v. Stovall**, 205 N.C. App. 405, 410, 698 S.E.2d 680, 684 (2010). Barring enforcement of a bargained-for warranty of ten years (or more) amounts to using the statute of repose as an end-run around the parties' intent.

Barring such a lawsuit does not promote the goals of the statute of repose. As discussed *supra*, statutes of repose are designed to stop stale claims against which defendants cannot hope to defend. **Boudreau v. Baughman**, 86 N.C. App. 165, 172, 356 S.E.2d 907, 911 (1987), *rev'd on other grounds*, 322 N.C. 331, 368 S.E.2d 849 (1988). There is, however, no possibility of stale claims when a manufacturer/contractor has specifically guaranteed performance for an extended and definite period. Manufacturers/contractors are aware of the warranty terms that they offer—whether for ten years or for a lifetime, the manufacturer/contractor agreed to the warranty period and therefore should be expected retain their documents for that period. Hence, the purpose behind the statute of repose is not promoted if the statute of repose is applied to circumvent the parties' specific guarantees and representations. For this reason, thoughtful commentators encourage courts to enforce warranties that exceed a repose period. *See e.g.*, **Williams**, *supra* pp. 104-10.

Moreover, were courts to permit statute of repose defenses in the face of long-term warranties, it would serve as a blueprint for duping customers. Such a holding would signal that a "20-year" warranty is, in reality, merely a six-year warranty. Manufacturers/contractors would certainly learn that they may advertise and charge for apparent long-term warranties that are unenforceable and illusory. When the six-year repose period expires, the sellers would be able to decline to uphold their promises and instead assert a statute of repose defense. Unscrupulous manufacturers/contractors could make this practice an essential part of their business model, creating a race-to-the-bottom among competitors in the construction industry. One might argue that such a holding would constitute a court-approved unfair and deceptive trade practice. **Love v. Keith**, 95 N.C. App. 549, 383 S.E.2d 674 (1989) (unfair and deceptive trade practice for a builder to misrepresent warranty coverage), disapproved on other grounds, **Custom Molders, Inc. v. Am. Yard Prods., Inc.,** 342 N.C. 133, 463 S.E.2d 199 (1995).

6. Conclusion

While the law in North Carolina is currently murky about whether a 20-year warranty means 20 years or only six years, the **Roemer** and **Whittaker** opinions should be cited as anomalies and not in conformance with the principles of either applicable contract or warranty law. Good policy and sound logic require that a warranty term be enforced as the parties agreed. As noted above, the academic writings on North Carolina law concur that the written warranty should take precedence: "If the six year statute of repose were applied to 20-year warranties, it would extinguish claims under such warranties long before the warranty had expired. . . . . [T]he buyer should still be entitled to recover monetary damages[.]" **Hutson** & **Miskimon**, *supra* p. 4, § 16-7. Thus, disturbing an extended warranty provision deprives the parties of the fundamental quality and price factors bargained for, and mocks the long standing principle that "[t]he law regards the sanctity of contracts, and requires parties to do what they have agreed to do." **Indian Mount. Jellico Coal Co. v. Asheville Ice & Coal Co.**, 134 N.C. 574, 47 S.E. 116, 120 (1904). •

Scott C. Harris
is an attorney with Whitfield Bryson & Mason LLP in Raleigh. Scott's practice is focused on representing owners in construction defect and class action product liability litigation. He can be contacted at *scott@wbmllp.com.*

Matthew D. Quinn
is an associate attorney with the Law Offices of F. Bryan Brice, Jr. in Raleigh. Most of Matt's practice centers upon construction law, environmental law, and personal injury claims. A sizable number of Matt's construction law cases involve mold contamination. He can be contacted at *matt@attybryanbrice.com.*