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The North Carolina Supreme Court Clarifies Rule 11 Methodology in *Bryson v. Sullivan*

Every lawyer with a litigation practice knows of Rule 11,[1] a sanctions provision in both federal and state rules of civil procedure. When the United States Supreme Court promulgated the current federal version of the rule in 1983 to provide a deterrent to frivolous lawsuits,[2] many states, including North Carolina, followed suit.[3] Inevitably, however, the lack of a developed body of precedent under the new rule has frequently left attorneys without clear guidelines for compliance. Courts, too, lacking the benefit of seminal case law from a jurisdiction's high court, often operate without an agreed-upon methodology for applying the rule.

North Carolina's practitioners and courts certainly did not escape the difficulties of an inchoate Rule 11. Prior to 1992, most fundamental North Carolina Rule 11 issues were addressed piecemeal in the court of appeals, which looked to key decisions under the Federal Rule 11 as guideposts for interpretation.[4] With its opinion in *Bryson v. Sullivan*,[5] the North Carolina Supreme Court overruled much of the interpretive doctrine created by the court of appeals and added a degree of finality to several unsettled areas of Rule 11 analysis.[6] Beyond the benefit of laying down a controlling decision on these issues, the *Bryson* opinion also

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1. FED. R. CIV. P. 11(a).
2. *See infra* notes 38-41 and accompanying text.
3. The North Carolina rule provides:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record . . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . .

N.C. R. CIV. P. 11(a) (1990).

4. *See infra* notes 37-62 and accompanying text.
5. 330 N.C. 644, 412 S.E.2d 327 (1992).
6. *See infra* notes 88-107 and accompanying text.

evinces a choice by the court to link the development of North Carolina's Rule 11 with that of the Federal Rule. Although *Bryson* does not resolve every issue of North Carolina Rule 11 jurisprudence,[7] the supreme court's opinion provides welcome definition for both lawyers and judges. In addition, *Bryson* sends a warning to parties that they too may bear responsibility for certain Rule 11 violations.

This Note summarizes *Bryson*'s course through the North Carolina courts, setting forth the interpretive methodology adopted by the supreme court for applying Rule 11.[8] This Note then recounts the brief history of both Federal Rule 11 and its North Carolina counterpart, emphasizing the five 1991 North Carolina Court of Appeals cases that precipitated the supreme court's review of *Bryson*.[9] Finally, this Note assesses the supreme court's analysis[10] and suggests several practical considerations for both lawyers and clients under the court's new interpretation of Rule 11.[11]

In February of 1990, plaintiffs Lois Bryson and her son Marc filed suit against Rachel Sullivan, both individually and as administratrix of her mother Millie's Bryson's estate.[12] Rachel responded in March with an answer, setting forth as defenses an April 1989 consent decree releasing parties of all claims against each other, the statute of limitations, and *res judicata*.[13] Rachel's answer included a motion for Rule 11 sanctions

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7. See *infra* note 27, for example.

8. *See infra* notes 12-36 and accompanying text.

9. *See infra* notes 37-87 and accompanying text.

10. *See infra* notes 88-107 and accompanying text.

11. *See infra* note 108 and accompanying text.

12. Bryson v. Sullivan, 102 N.C. App. 1, 5, 401 S.E.2d 645, 649 (1991), *rev'd*, 330 N.C. 644, 412 S.E.2d 327 (1992). Marc Bryson is Millie Bryson's grandson; Lois is the wife of Millie's son James, who is Rachel's brother. The *Bryson* case is the culmination of a series of disputes between the family concerning the estates of James and Millie Bryson. Lois was the administratrix of James' estate, who died in December 1986. *Id.* at 3-5, 401 S.E.2d at 649. Until his death, James, Lois and Marc had cared for Millie following her stroke in August 1983. *Id.* Millie continued to live with Marc and Lois until February 1987. *Id.* From February 1987 until her death intestate in May 1989, Millie lived with and was cared for by Rachel. *Id.* Rachel had been Millie's general guardian after she was found incompetent in December 1987. *Id.* Rachel was appointed administratrix of Millie's estate. *Id.*

13. *Id.* at 5, 401 S.E.2d at 650. The 1989 consent decree settled a June 1987 suit brought by Millie individually and as administratrix of her son James' estate against Marc and Lois alleging misappropriation and conversion of property. *Id.* at 4, 401 S.E.2d at 649. The decree provided:

> Any and all other claims, actions or causes of action which any of the parties might have had or might have against any of the other parties have been fully compromised, adjusted and settled; no party had admitted or been adjudged of any wrongdoing or fault on account of any matters alleged or which might have been alleged in the Complaint or Answer; and neither the plaintiff [Millie], her guardian [Rachel] or successor guardian, her representative or estate, nor any of the defendants [Marc,

to be levied against Marc and Lois,[14] who signed the complaint allegedly "in the face of obvious defenses in bar of plaintiffs' claims[,] . . . for no other purpose than to harass[,] . . . cause unnecessary delay in the administration of [Millie's] estate . . . and . . . needlessly increase[ ] the cost of administration of the estate."[15] On April 30, 1990, Marc and Lois entered a voluntary dismissal of their suit pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure.[16]

The trial court denied the defendant's Rule 11 motion.[17] The appeals court reversed and remanded, holding that the trial court had misapplied the law, and had therefore made insufficient findings of fact to rule on the motion.[18] The plaintiffs then filed a petition for discretionary

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Lois and others], his or her representatives, successors or assigns, individually or in any capacity, shall recover anything further of any other party on account of anything occurring before the date of this judgment.

Id.

14. On appeal, a controversy arose concerning whether the defendant's motion asked for sanctions against the plaintiffs' attorneys, or just the plaintiffs themselves. Sullivan's attorney stated during the motion hearing that "we are not asking of [Brysons' attorney]'s firm to be assessed with any legal fees." *Bryson*, 102 N.C. App. at 6, 401 S.E.2d at 650. The trial court and appeals court interpreted this statement to mean that the defendant was not seeking Rule 11 sanctions against the plaintiffs' lawyers (whereas one could construe it to indicate an intention not to seek fees against their firm, but against the lawyers individually). *Id.* In addition, the appeals court noted that "the written motion for sanctions only requested the court 'impose sanctions upon *plaintiffs* for violations of Rule 11.' " *Id.* at 11, 401 S.E.2d at 653 (emphasis added). The court further acknowledged that Rule 11 authorized the trial court to impose sanctions "upon its own initiative," but the trial court elected not to do so. *Id.*

15. *Id.* at 5, 401 S.E.2d at 650. Rachel also asked that she be granted attorney fees under § 6-21.5. *Id.* (citing N.C. GEN. STAT. § 6-21.5 (1990)).

16. *Id.* at 6, 401 S.E.2d at 650. The dismissal, however, had no bearing on the court's power to assess Rule 11 sanctions, since the rule creates a violation when the offending document is signed and filed with the court. *Id.* at 7, 401 S.E.2d at 651 (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 395 (1990)); *see* N.C. R. CIV. P. 41(a).

17. *Bryson*, 102 N.C. App. at 6, 401 S.E.2d at 650.

18. *Id.* at 14, 401 S.E.2d at 655. The defendant's motion alleged two bases for sanctions under Rule 11. First, the motion alleged that the plaintiffs had failed to conduct a sufficient inquiry into the legal sufficiency of their claim. *Id.* at 5, 401 S.E.2d at 650. Second, the defendant alleged that the plaintiffs brought the suit for an improper purpose. *Id.* The court of appeals held that the trial court incorrectly found plaintiffs' reliance on counsel to satisfy per se the legal inquiry strictures of Rule 11. *Id.* at 13, 401 S.E.2d at 654. The court remanded for an inquiry into whether "(1) the plaintiffs undertook a reasonable inquiry into the law, and (2) based upon the results of the inquiry, they reasonably believed that their complaint was 'warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.' " *Id.* at 13-14, 401 S.E.2d at 654 (quoting N.C. R. CIV. P. 11(a) (1990)). Concerning the improper purpose allegation, the court of appeals instructed the trial court that a finding of an adequate legal basis for the plaintiffs' complaint indicated as a matter of law that no improper purpose existed. *Id.* at 14, 401 S.E.2d at 655. If the trial court were required to reach the issue of improper purpose, "such purpose [should] be ascertained from the plaintiffs' objective behavior. The burden of proof for this issue is on the defendants." *Id.* at 14, 401 S.E.2d at 655.

review by the North Carolina Supreme Court, which was granted on June 12, 1990.[19]

Writing for the court, Justice Harry C. Martin identified two principal Rule 11 questions for review: whether good faith reliance on counsel insulates a party from liability under the legal sufficiency requirement of Rule 11; and whether, based upon the facts of the case, the plaintiffs could be sanctioned under the rule for bringing their complaint for an improper purpose.[20] In resolving the first question, the supreme court concluded that parties who rely in good faith upon their attorneys' advice concerning the legal sufficiency of their claims cannot be sanctioned under the legal sufficiency requirement of Rule 11.[21] In response to the second issue, the supreme court upheld the trial court's determination that the plaintiffs' claim was not tainted by an improper purpose.[22] En route to deciding these issues, however, the court addressed several important general "principles governing the interpretation of Rule 11."[23]

Justice Martin identified the three inquiries under a Rule 11(a) analysis as being whether the pleading is "well grounded in fact" (factual sufficency);[24] whether it is "warranted by existing law, 'or a good faith argument for extension, modification, or reversal of existing law' (legal sufficiency)"; and whether it is made with a proper purpose.[25] The court then established that the defendant's motion for sanctions implicated both the legal sufficiency and improper purpose clauses of the rule.[26] Justice Martin's opinion focused the inquiry further, concentrating on the identification of interpretive standards for assessing sanctions against parties who sign a pleading.[27]

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19. *Bryson*, 330 N.C. 644, 653, 412 S.E.2d 327, 331 (1992).

20. *Id.* at 654, 412 S.E.2d at 331-32. The other issue addressed by the court was whether the plaintiffs should pay the defendant's attorneys fees under § 6-21.5 of the North Carolina General Statutes. *Id.* at 654, 412 S.E.2d at 332 (citing N.C. GEN. STAT. § 6-21.5 (1986)).

21. *Id.* at 666, 412 S.E.2d at 339.

22. *Id.*, 412 S.E.2d at 338.

23. *Id.* at 654, 412 S.E.2d at 332; *see infra* notes 24-36 and accompanying text.

24. The adequacy of the plaintiff's inquiry into the factual sufficiency of the complaint was not challenged, and so was not at issue in *Bryson*. The North Carolina courts have previously articulated the factual sufficiency test as follows: 1) "whether the plaintiff undertook a reasonable inquiry into the facts"; and 2) "whether plaintiff, after viewing the results of the inquiry, reasonably believed that his position was well-grounded in fact." Higgins v. Patton, 102 N.C. App. 301, 306, 401 S.E.2d 854, 857 (1991) (citing GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 9, at 131 (1989)).

25. *Bryson*, 330 N.C. at 655, 412 S.E.2d at 332 (quoting N.C. R. CIV. P. 11(a)).

26. *Id.*

27. *Id.* at 652-53, 412 S.E.2d at 330-31. In this case, both the attorney and the plaintiffs signed the complaint. *Id.*; *see* Business Guides v. Chromatic Communications Ent., 111 S. Ct. 922, 928-29 (1991) (upholding sanctions against party who signed pleading, even though party was represented by counsel and, therefore, not required to sign pleading). The *Bryson* court

Rejecting the test developed by the court of appeals, Justice Martin defined the issue for a party's liability under the legal sufficiency portion of Rule 11 as "whether the client made a reasonable inquiry to determine the legal sufficiency of the document."[28] The supreme court further found that the court of appeals applied a flawed standard in addressing a party's liability under the improper purpose portion of the Rule. While the lower court held that the lawyer controlling the litigation bore the responsibility for an improper purpose, the supreme court declared, "Parties, as well as attorneys, may be subject to sanctions for violations of the improper purpose prong of Rule 11. Further, both are subject to an objective standard to determine the existence of such an improper purpose."[29]

Another methodological issue answered by the supreme court's opinion is whether a trial court ruling on a motion for sanctions should look at the defendant's responsive pleadings or other documents when examining the legal sufficiency of the plaintiffs' complaint.[30] Reversing the court of appeals and overruling several previous appeals court decisions,[31] the supreme court announced flatly, "Responsive pleadings are not to be considered."[32] Because the legal sufficiency analysis speaks

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did not reach the issue of the propriety of sanctions against a party who did not sign the pleadings. *Bryson*, 330 N.C. at 659, 412 S.E.2d at 334-35. Justice Martin observed that a split of opinion exists concerning this issue. *Id.* The United States Supreme Court, in *Business Guides*, 111 S. Ct. at 935, withheld judgment as to "whether or under what circumstances a nonsigning party may be sanctioned."

28. *Bryson*, 330 N.C. at 656, 412 S.E.2d at 333. The supreme court found that the court of appeals had erred in its formulation of the standard for parties under the legal sufficiency prong of the rule. *Id.* at 655-56, 412 S.E.2d at 332-33. The court of appeals, interpreting the rule to place the burden of determining legal sufficiency on the attorney, derived the following rule: "In the absence of proof that a reasonable person in the client's position would have been aware of the Rule 11 legal deficiencies, 'the attorney should bear sole responsibility for submitting a pleading or motion not warranted by law in violation of Rule 11.' " *Bryson*, 102 N.C. App. 1, 9, 401 S.E.2d 645, 652 (1991) (citations omitted). Justice Martin thus drew a distinction between a reasonable person standard and a reasonable inquiry standard. For an argument that the reasonable inquiry standard is both under- and overinclusive in scope, see *infra* note 92.

29. *Bryson*. 330 N.C. at 656, 412 S.E.2d at 333 (citing Turner v. Duke Univ., 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989)).

30. *Id.* The court of appeals in *Bryson* stated, "Under the first prong of the required [legal sufficiency] analysis, we determine whether the complaint, *when read in conjunction with the answer*, states a plausible legal argument . . . ." *Bryson*, 102 N.C. App. at 12, 401 S.E.2d at 654 (emphasis added).

31. *See, e.g.*, Higgins v. Patton, 102 N.C. App. 301, 306, 401 S.E.2d 854, 857 (1991); dePasquale v. O'Rahilly, 102 N.C. App. 240, 246, 401 S.E.2d 827, 830 (1991).

32. *Bryson*, 330 N.C. at 656, 412 S.E.2d at 333. As a result, the supreme court overruled another court of appeals case that found Rule 11 to create " 'a continuing duty to analyze the basis for a pleading, motion, or other paper signed pursuant to the rule and withdraw it when it becomes apparent, or should become apparent, that the pleading, motion, or other paper no

only to the moment at which a party signs the document, the supreme court opined, it carries no continuing obligation to conform past pleadings to new events.[33]

A final element of Rule 11 doctrine set forth in the supreme court's opinion deals with the relationship between the fact, law, and purpose requirements under the rule. In another reversal of the court of appeals, the supreme court held that a pleading compliant with both the factual and legal sufficiency requirements of Rule 11 could nevertheless be filed for an improper purpose.[34] Noting the conflicting treatment of this issue among the federal circuits, Justice Martin asserted that the "better-reasoned rule" conceptualizes the three requirements of Rule 11 as "separate and distinct."[35] Thus, in North Carolina courts, "the service or filing of a pleading, motion or other paper for an improper purpose violates . . . Rule [11(a)], even if the paper is well-grounded in fact and law."[36]

Because the language of North Carolina Rule 11(a) tracks the language of the federal rule, a brief history of the federal rule is important for an understanding of the development of its North Carolina counterpart.[37] As noted earlier, the United States Supreme Court amended the federal rule into its present form in 1983.[38] Prior to this amendment,

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longer comports with the rule.' " *Id.* at 657, 412 S.E.2d at 333 (quoting Tittle v. Case, 101 N.C. App. 346, 349, 399 S.E.2d 373, 375 (1991)). Justice Martin explained that the language of Rule 11 created a violation of the rule when a defective document was signed. *Id.* at 656, 412 S.E.2d at 333. Thus, he deduced, "the reasonableness of the belief that it is warranted by existing law should be judged as of the time the document was signed." *Id.* The test is one of "facial plausibility." *Id.* at 657, 412 S.E.2d at 333.

33. *Id.* at 658, 412 S.E.2d at 334. Justice Martin suggested, however, that such an ongoing duty exists under the improper purpose component of Rule 11, "under other rules, or pursuant to the inherent power of the court." *Id.* (citing Chambers v. Nasco, Inc., 111 S. Ct. 2123 (1991)).

34. *Id.* at 663, 412 S.E.2d at 337. The court of appeals maintained that if the "plaintiffs made a reasonable inquiry into the [facts and the] law and[,] based upon the inquiry[,] reasonably believed that the complaint was [factually and] legally sufficient, the filing of this complaint cannot be for an improper purpose." *Bryson*, 102 N.C. App. at 14, 401 S.E.2d at 655.

35. *Bryson*, 330 N.C. at 663-64, 412 S.E.2d at 337 (citing JOSEPH, *supra* note 24, § 13(C), at 184; 2(A) MOORE'S FEDERAL PRACTICE § 11.02(4) (1991)).

36. *Id.* at 664, 412 S.E.2d at 337. For early treatment of this issue in federal courts, *compare* Robinson v. National Cash Register Co., 808 F.2d 1119, 1130 (5th Cir. 1987) (holding that improper purpose is a Rule 11 violation) *with* Zaldivar v. City of Los Angeles, 780 F.2d 823, 832 (9th Cir. 1986) (explaining that defendant can not be harassed if complaint is "well grounded in fact and warranted by existing law).

37. *See* Turner v. Duke Univ., 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989) (declaring the policy of North Carolina courts to look to decisions under the federal rules "for guidance and enlightenment in developing the philosophy of the North Carolina rules").

38. *Amendments to Rules*, 97 F.R.D. 165, 165 (1983); *see also* J. Rich Leonard, *Rule 11 in the Federal Courts in North Carolina*, N.C. ST. B. Q., Summer 1987, at 33, 33 (discussing Rule 11's arrival in North Carolina courts). The original Rule 11 was promulgated in 1938. For a history of the rule, see Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 392 (1990).

Rule 11 lacked the teeth of a serious deterrent, allowing for a discretionary imposition of sanctions by the court only if a paper was signed and filed in "willful violation of this rule."[39] Moreover, the federal courts had no power under the rule to address any violation that was not at least intentional.[40] The practical results of the 1983 amendments in federal litigation practice were immediate and palpable:

> [A] federal practitioner who signs a document [now] certifies that it is "grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." Perhaps more importantly, he or she certifies that this belief was formed "after reasonable inquiry." Referred to by one North Carolina federal judge as the "stop and think" requirement, the new rule holds attorneys to an objective standard of reasonableness and directs the court to impose sanctions when this standard is violated.[41]

Similarly, in North Carolina prior to January 1, 1987, an attorney's signature on a pleading averred only that "he ha[d] read the pleading; that to the best of his knowledge, information and belief there [wa]s good ground to support it; and that it [wa]s not interposed for delay."[42] A violation under the old rule meant that the pleading might be "stricken as sham and false and the action may proceed as though the pleading had not been served."[43] In 1987, when North Carolina adopted much of the language of the Federal Rule 11 amendments, the new rule's requirement of mandatory sanctions under a standard of objective reasonableness imposed a "stop and think" requirement upon North Carolina

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39. *Amendments to Rules*, 97 F.R.D. 165, 197 (1983). The pre-1983 version of the rule provided only that an unsigned paper, or a paper "signed *with intent* to defeat the purpose of the rule, . . . *may* be stricken . . . and the action *may* proceed as though the pleading had not been served." *Id.* (emphasis added).

40. *Id.* The Advisory Committee indicated that the amendments were proposed because:

> Experience shows that in practice [the pre-1983] Rule 11 has not been effective in deterring abuses. . . . There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions. . . . The new language is intended to reduce the reluctance of courts to impose sanctions, . . . by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions.

Id. at 198 (citations omitted). The United States Supreme Court articulated the "central purpose of [the amended] Rule 11" as "deter[ring] baseless filings in district court and thus . . . streamlin[ing] the administration and procedure of the federal courts." *Cooter & Gell*, 496 U.S. at 393.

41. Leonard, *supra* note 38, at 33 (quoting FED. R. CIV. P. 11).

42. N.C. GEN. STAT. § 1A-1, Rule 11 (1983) (amended 1987).

43. *Id.*

practitioners.[44]

The most significant United States Supreme Court case under the amended Rule 11 is *Cooter & Gell v. Hartmarx Corp.*[45] In *Cooter & Gell*, the Court first held that a voluntary dismissal pursuant to Rule 41(a) of the Federal Rules of Civil Procedure did not protect an offending party against Rule 11 sanctions.[46] The Court went on to define the appropriate standard of appellate review for a Rule 11 decision, holding that "an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination."[47] Finally, the Court held that Rule 11 does not authorize penalizing a party who appeals Rule 11 sanctions.[48]

Another influential case under the federal rule was *Hays v. Sony Corp. of America*,[49] which introduced a negligence standard for determining Rule 11(a) violations.[50] Rule 11, the *Hays* court found, essen-

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44. James G. Middlebrooks, *The New Rule 11: Look Before Leaping*, N.C. ST. B. Q., Spring 1987, at 32, 33-34 (contrasting potential hazards of practice under the new rule with those of the old rule). Middlebrooks' initial assessment of the implications of the new rule—that it would "require[ ] each of us, as lawyers, *continually* to evaluate the positions—factual and legal—that we assert on behalf of our clients, [and would] . . . impos[e] a continuing duty to revise pleadings and other filings"—is, after *Bryson*, erroneous. *Id.* at 35 (emphasis added); *see infra* notes 98-103 and accompanying text.

45. 496 U.S. 384 (1990).

46. *Id.* at 398. The Court first established that a court "may consider collateral issues after an action is no longer pending." *Id.* at 395. The Court then reasoned that "the imposition of a Rule 11 sanction is not a judgment on the merits . . . . Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process . . . ." *Id.* at 396. Finally, the *Cooter & Gell* Court concluded that the policy of Rule 11 required a finding of liability despite a voluntary dismissal: "Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred." *Id.* at 398.

47. *Id.* at 405. The standard of appellate review is one remaining difference between Federal and North Carolina Rule 11 jurisprudence. North Carolina courts apply a *de novo* standard to issues of whether a party violated the rule, and an "abuse of discretion" standard in reviewing the sanction chosen by the trial court after a violation has been found. Turner v. Duke Univ., 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

48. *Cooter & Gell*, 496 U.S. at 407. The Court reasoned that Rule 38 of the Federal Rules of Civil Procedure "gives appellate courts ample authority to award expenses" for frivolous appeals. *Id.*

49. 847 F.2d 412 (7th Cir. 1988). *Hays* upheld a trial court's award of sanctions against a small-town general practitioner who brought a claim alleging state and federal copyright violations by defendant Sony. *Id.* at 413, 420. The court found the complaint to be a mixed bag of "the frivolous and the nonfrivolous" and assessed sanctions against the attorney in favor of the defendant. *Id.* at 414, 420. The court found that the common law copyright claim asserted was expressly preempted by federal law. Moreover, although the claim under federal law was nonfrivolous, the allegations of the defendant's profits and of damages thereby to the plaintiff were held to be frivolous, having absolutely no basis in fact. *Id.* at 415.

50. *Id.* at 418.

tially "defines a new form of legal malpractice" based upon a "failure to use reasonable care."[51] Unlike ordinary malpractice, however, where the victim is the lawyer's own client, negligence under Rule 11 victimizes "the lawyer's adversary, other litigants in the court's queue, and the court itself."[52]

Prior to the North Carolina Supreme Court's holding in *Bryson v. Sullivan*, the leading case on Rule 11 after the 1987 amendments was *Turner v. Duke University*.[53] In *Turner*, a malpractice action against Duke University Medical Center, the plaintiff filed a motion pursuant to Rule 11 seeking sanctions stemming from the defense counsel's failure, after receiving a court order, to provide the plaintiff with updated lists of witnesses and experts to be relied upon by the defendants at trial.[54] The trial court denied the plaintiff's motion for sanctions, and a panel of the court of appeals unanimously affirmed.[55] The North Carolina Supreme Court found that the court of appeals improperly used a "clearly erroneous" standard of review.[56] Weighing the various positions taken by circuit courts under the federal rules, the court adopted a *de novo* review

51. *Id.* The court elaborated that " 'the amount of investigation required by Rule 11 depends on both the time available to investigate and on the probability that more investigation will uncover important evidence; the Rule does not require steps that are not cost-justified.' " *Id.* (quoting Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987)). On the other hand, the court warned, Rule 11 "makes no allowance for the particular circumstances of particular practitioners. . . . [Thus,] the generalist acts at his peril if he brings a suit in a field or forum with which he is unacquainted." *Id.* at 419.

52. *Id.* at 418.

53. 325 N.C. 152, 381 S.E.2d 706 (1989). Indeed, before a recent spate of appeals court cases bearing on Rule 11 interpretation, reported case law on the amended North Carolina Rule was sparse, undoubtedly because the new Rule 11 applies only to cases filed after January 1, 1987. *See* Kohn v. Mug-a-Bug, 94 N.C. App. 594, 597, 380 S.E.2d 548, 550 (1989) (rejecting defendants' appeal for a "reasonable inquiry" standard under Rule 11(a) in a motion for sanctions against the plaintiffs because they had filed their complaint in October 1986).

54. *Turner*, 325 N.C. at 157, 381 S.E.2d at 709. The plaintiff made four chief allegations in his motion for sanctions against Duke University Medical Center:

> (1) [T]hat Duke failed to comply with an order instructing it, in answering a set of interrogatories, to provide the names and addresses of persons involved in the treatment of plaintiff's wife . . . ; (2) that Duke failed to comply with an order instructing Duke to identify all expert witnesses it would offer at trial *before* 17 June 1987; (3) that Duke failed to comply with an order instructing all parties to supplement outstanding interrogatories on or by 1 July 1987; and (4) that Duke noticed *post* 17 July 1987 depositions of two physicians who had treated Mrs. Turner [plaintiff's decedent] (one located in Florida, and one located in California), whom plaintiff classified as expert witnesses, for an improper purpose and with the intent to harass plaintiff's counsel in contravention of Rule 11(a).

Id.

55. Turner v. Duke Univ., 91 N.C. App. 446, 457, 372 S.E.2d 320, 327 (1988).

56. *Turner*, 325 N.C. at 165, 381 S.E.2d at 714. The court recognized, however, that the proper standard of review had not been previously established. *Id.* at 162, 381 S.E.2d at 712.

standard for the issue of whether or not to impose sanctions, and an "abuse-of-discretion" standard for review of the sanction awarded.[57]

In addition to establishing the standard of review for Rule 11 appeals, the *Turner* opinion iterated the North Carolina Supreme Court's policy of looking to decisions under the federal rule to inform its own decisions.[58] *Turner*'s examination of federal precedent under the 1983 amendments resulted in the finding that "subjective bad faith is no longer required to trigger the Rule's sanctions."[59] In addition, the court's analysis led to the adoption of an objective reasonableness standard for measuring conduct under the Rule.[60] In light of this reasonableness standard, the court, after reviewing the case *de novo*, reversed both the trial court and the court of appeals, ultimately finding the defendant's conduct sanctionable under Rule 11(a).[61]

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57. *Id.* at 165, 381 S.E.2d at 714. The court's *de novo* method of analysis consists of a three-part inquiry: "(1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence." *Id.* Interestingly, while the court deliberately sought to pattern its review after that of the federal courts, this standard is different from the uniform abuse of discretion standard adopted in *Cooter & Gell v. Hartmarx Corp.*, decided the same year as *Turner*. North Carolina has not since altered its standard of review. One commentator suggests that the justification for the deferential federal standard of appellate review may be the strained resources of the federal appellate courts, rather than actual substantive reasons—e.g., that Rule 11 inquiries are especially fact intensive, or that the trial judges are closer to the front lines of litigation, and thus are better suited to assess the propriety of litigation behavior. Martin B. Louis, *Discretion or Law: Appellate Review of Determinations that Rule 11 has been Violated or that Nonmutual Issue Preclusion Will Be Imposed Offensively*, 68 N.C. L. REV. 733, 742-53 (1990). Professor Louis argues for a more "flexible" appellate review standard, "responsive to the various component factors of the ultimate determination under appellate scrutiny." *Id.* at 759-61.

58. *Turner*, 325 N.C. at 164, 381 S.E.2d at 713.

59. *Id.*

60. *Id.*

61. *Id* at 171, 381 S.E.2d at 717. The court found that Duke had violated a court order of August 6, 1986, requiring Duke to give plaintiff's counsel the names and addresses of witnesses and " 'to provide this information as to specific individuals if requested at a later date by plaintiff's counsel.' " *Id.* at 169, 381 S.E.2d at 714. In May 1987, Duke received a request from the plaintiff's attorney for this information. *Id.* Duke's attorney did not respond until July 2, 1987, providing the names of several witnesses, but no addresses. *Id.* at 169, 381 S.E.2d at 714-15. In this letter, Dr. Havard, a physician in California, was listed as a witness for the first time. *Id.* On July 6, 1987, Duke gave notice of Dr. Havard's deposition in California on July 21, 1987, six days before the trial date. *Id.* at 169, 381 S.E.2d at 715. Duke also scheduled the deposition of Dr. Scheerer, who lived in Florida, for July 23, 1987. *Id.* at 171, 381 S.E.2d at 715. The court concluded:

> [A Rule 11] violation occurs when a pleading, motion or other paper is interposed for the improper purpose of causing unnecessary delay. We conclude that Duke's noticing and taking of the depositions of Dr. Havard and Dr. Scheerer so close to trial, subsequent to the failure to reveal the existence of Dr. Havard, as well as the duplicative and cumulative nature of Dr. Scheerer's testimony, threatened to increase plaintiff's litigation costs and cause unnecessary delay of the trial in violation of Rule

In 1991, the North Carolina Courts of Appeals issued several opinions interpreting Rule 11 under *Turner*'s framework of *de novo* review.[62] Because *Turner* reached only two methodological issues—standard of review on appeal and objective versus subjective reasonableness—the appeals courts were asked to answer many new interpretive questions, each case relying on those decided immediately before as precedent. The result is a group of opinions, most of which were contradicted at once by the North Carolina Supreme Court in *Bryson*. Given the supreme court's dismissal of the Rule 11 doctrine developed in these cases, their legacy may lie solely in compelling the court to overrule them and to articulate clear Rule 11 standards of its own formulation.

The first of these opinions, *Tittle v. Case*,[63] was an appeal from the trial court's denial of Rule 11 sanctions and attorney's fees to the defendant World Omni.[64] World Omni asserted that the plaintiffs had no reasonable factual basis for naming it as a defendant in a complaint arising from an automobile collision.[65] In the alternative, the defendant claimed that, even if the plaintiffs initially had a reasonable basis for its allegation, the "plaintiffs violated Rule 11 by failing to dismiss this claim after it should have been apparent that the claim was baseless."[66] The court of appeals upheld the trial court in finding a sufficient factual and legal basis

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11(a). . . . The inference that the noticing and taking of the depositions of Dr. Havard and Dr. Scheerer represents an attempt to harass plaintiff's counsel in violation of Rule 11(a) is not difficult to make.

Id. at 170-71, 381 S.E.2d at 717.

62. *See In re* Finnican, 104 N.C. App. 157, 163-64, 408 S.E.2d 742, 746-47 (1991), *cert. denied, review denied, appeal denied*, 330 N.C. 612, 413 S.E.2d 800 (1992); Bryson v. Sullivan, 102 N.C. App. 1, 8-11, 401 S.E.2d 645, 651-53 (1991), *modified*, 330 N.C. 644, 412 S.E.2d 327 (1992); Tittle v. Case, 101 N.C. App. 346, 348-50, 399 S.E.2d 373, 374-76 (1991).

63. 101 N.C. App. 346, 399 S.E.2d 373 (1991).

64. *Id.* at 347, 399 S.E.2d at 374. It is unclear whether the defendant asked for sanctions against the plaintiffs or plaintiffs' counsel.

65. *Id.* at 348-49, 399 S.E.2d at 375. The plaintiff named World Omni as a defendant based upon its purported ownership of the vehicle driven by the co-defendant Case. *Id.* at 349, 399 S.E.2d at 375. The trial court, in its findings of fact, determined that the plaintiff had relied on both the accident report and an inquiry to the Department of Motor Vehicles in naming World Omni as a defendant. *Id.* at 348-49, 399 S.E.2d at 374-75. The court of appeals found no evidence in the record indicating that plaintiff's counsel had in fact contacted the Division of Motor Vehicles. *Id.* at 348, 399 S.E.2d at 374. Nevertheless, the court held that the plaintiff's naming of World Omni as a defendant-owner was reasonable in light of the accident report's listing of World Omni as the owner. *Id.* The accident report itself, the court said, "would support the finding that the vehicle was listed by the Department of Motor Vehicles as owned by World Omni, and that the assignment of title asserted by World Omni had not been registered with the Department at the time of the accident." *Id.* at 349, 399 S.E.2d at 375.

66. *Id.*

for the plaintiffs' claim.[67] Addressing the issue of Rule 11's imposition of a continuing duty, the court noted an absence of North Carolina case law on point, but construed *Turner* as "impliedly recognizing that such a duty exists under our own Rule 11."[68] Although the court ultimately affirmed the trial court's finding of no sanctionable conduct, it suggested that the "failure to dismiss a case when irrefutable evidence has come to an attorney's attention that the case is meritless may require sanctions."[69]

The second court of appeals decision of this group was *Bryson*,[70] which proved to be—with *Turner*—the exclusive North Carolina authority relied upon by the court of appeals in the Rule 11 cases that followed.[71] As previously noted, the *Bryson* case required the court of appeals to define several aspects of Rule 11 doctrine.[72] Judge Greene, who wrote for the court in *Bryson*, also authored the *dePasquale v.*

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67. *Id.* at 350, 399 S.E.2d at 375-76.

68. *Id.* at 349, 399 S.E.2d at 375. Writing for the court, Judge Wells noted that the violation in *Turner* stemmed from the plaintiff's noncompliance with a discovery order. The very nature of the infraction, the court reasoned, was the "attorney's [mis]conduct of discovery, and not simply the improper signing of a pleading, motion, or other paper." *Id.* at 350, 399 S.E.2d at 375. Judge Wells also cited an earlier court of appeals decision, Shook v. Shook, 95 N.C. App. 578, 383 S.E.2d 405 (1989), *review denied, appeal dismissed*, 326 N.C. 50, 389 S.E.2d 94 (1990), that found Rule 11 liability in plaintiff's use of "inflated figures in a complaint, *after opportunity to amend*." *Id.* The court determined that these two cases bespoke a duty to "view Rule 11 broadly in viewing an attorney's conduct during the course of the litigation." *Id.* It is immediately apparent, however, that *Tittle* differs from these other cases, in that liability in *Turner* and *Shook* was based upon disregarding the explicit instructions of the court. A court order to update discovery information by definition brings a continuing duty, whereas Rule 11(a) speaks of the attorney's conduct of signing and filing the complaint. *See* Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). *But see* Herron v. Jupiter Transp. Co., 858 F.2d 332, 336 (6th Cir. 1988) (suggesting that the purpose of Rule 11 is undermined by a reading devoid of an ongoing obligation).

69. *Tittle*, 101 N.C. App. at 350, 399 S.E.2d at 375 (1991). The court agreed with the trial court that the plaintiffs' conduct in the case *sub judice* was reasonable. *Id.* The court did not specify whether the sanctions for failing to dismiss derived from the legal, factual or improper purpose prong of the rule. However, because *Higgins v. Patton* and *In re Finnican*, *infra* notes 76-83 and accompanying text, held that no improper purpose could be found without either factual or legal insufficiency first being found, such liability must hinge ultimately on either the factual or legal prong of the rule. This interpretation, therefore, seems to impose a continuing duty to scrutinize a complaint for factual and legal sufficiency, or risk sanctions.

70. For a summary of the court of appeals' decision in *Bryson*, see *supra* notes 12-18 and accompanying text.

71. *Bryson* itself relied upon only one North Carolina Rule 11 case, Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989).

72. These issues included: who bore the responsibility under the rule; what inquiry was proper in evaluating a party's behavior under the legal sufficiency element of the rule; whether responsive pleadings were incorporated into the Rule 11 analysis; and whether the improper purpose portion of the rule imposed a duty distinct from legal and factual adequacy. *See supra* notes 17-36 and accompanying text.

O'Rahilly[73] and *Higgins v. Patton*[74] opinions. In *dePasquale*, the court followed the methodology articulated in *Bryson*, reading the complaint together with the responsive pleadings to determine the legal sufficiency of the plaintiff's claim.[75] Similarly, Judge Greene's opinion in *Higgins* relied on a reading of the complaint in light of the responsive pleadings in order to determine legal sufficiency.[76] Moreover, *Higgins* held that a complaint could not be sanctioned under the improper purpose element of Rule 11(a) if it met the factual and legal adequacy requirements.[77] The court focused exclusively upon its opinion in *Bryson* for resolution of

73. 102 N.C. App. 240, 401 S.E.2d 827 (1991).

74. 102 N.C. App. 301, 401 S.E.2d 854 (1991).

75. *dePasquale*, 102 N.C. App. at 246, 401 S.E.2d at 831. "[T]he court must determine whether the pleading, when read in conjunction with the responsive pleadings, is facially plausible." *Id.* at 246, 401 S.E.2d at 830 (citing *Bryson*, 102 N.C. App. 1, 12, 401 S.E.2d 645, 653-54 (1991)). The movant in *dePasquale* asserted that the plaintiff's complaint, alleging civil conspiracy and conversion of property, violated the legal sufficiency requirement of Rule 11. *Id.* at 245, 401 S.E.2d at 830. The appeals court concluded that a "review of the complaint in conjunction with the answer, counterclaim, and reply reveals a complaint presenting facially plausible claims. Therefore, no inquiry into the attorneys' conduct is required, and the defendant is not entitled to sanctions under Rule 11." *Id.* at 246, 401 S.E.2d at 831. *DePasquale*, unlike *Bryson*, involved sanctions against the plaintiffs' attorneys only. *Id.* at 243, 401 S.E.2d at 830.

76. *Higgins*, 102 N.C. App. at 306, 401 S.E.2d at 857.

77. *Id.* The shaky logic of this reading is apparent in the court's explanation:

> To hold [that a complaint can be brought for an improper purpose even if well-grounded in fact and law] could deter the filing of valid claims which the parties have a right to have adjudicated by our courts regardless of their motivation. Therefore, to impose sanctions against a party for filing a complaint for an improper purpose, the complaint must fail either the Rule 11 legal or factual certification requirements. Furthermore if it is determined that the complaint is in violation of either the factual or legal certification requirements of Rule 11, there exists a basis for sanctions and it is therefore unnecessary to address the issue of improper purpose.

Id. Under this interpretation of the statute, the improper purpose prong of the Rule is a dead letter: if the complaint is not well-grounded in either law or fact, there is no need to reach the plaintiff's purpose in bringing the claim, because a violation is already established; if the complaint is well-grounded, there can be no improper purpose violation. Yet, under the court's reasoning, the improper purpose prong would have to be addressed *after* the fact and law prongs, because a court could not rule on the purpose without a finding of factual or legal insufficiency of the claim. The court's supposed policy argument—that a party should have access to bring valid claims regardless of her purpose—is undermined by the existence of the common law claim of abuse of process. Abuse of process, unlike malicious prosecution, is a tort based upon a party's assertion of a valid claim for an improper purpose. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 121, at 897 (5th ed. 1984). Keeton notes that liability under abuse of process exists where a "legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior purpose for which it was not designed." *Id.* The notion that the amended Rule 11 was crafted to afford less protection from improper litigation than does the common law is certainly suspect. Finally, the language of the rule plainly provides for a violation based on either an insufficient basis for the claim *or* an improper purpose in filing it.

the Rule 11 issues.[78]

The last court of appeals decision on Rule 11 that preceded the supreme court's consideration of *Bryson* was *In re Finnican*.[79] In *Finnican*, the trial court imposed sanctions independently upon James Garney—the natural father of Jimmy Finnican—and upon Gregory Finnican—Jimmy's adoptive father—who intervened in James Garney's suit challenging the validity of the adoption that ended Garney's parental rights.[80] The trial court found that Garney and Finnican filed their motions for "improper purposes, to harass Ms. Palumbo and Jimmy, and conducted themselves in a way calculated to harm the juvenile."[81] The court of appeals reversed the finding of a Rule 11 violation by Garney, relying on *Higgins*' notion that a party cannot have an improper purpose within the meaning or Rule 11 if his complaint has a sufficient legal and factual basis.[82] Because the court found that Finnican had no legal basis for challenging his own adoption of Jimmy, it affirmed the trial court's imposition of sanctions against him.[83]

Thus, prior to *Bryson*, the court of appeals established several methodological guidelines for interpreting Rule 11. Specifically, these cases declared that the court must read a complaint with the responsive pleadings to assess its legal sufficiency;[84] that the attorney is primarily responsible for legal sufficiency and improper purpose violations;[85] that Rule 11

78. *Higgins*, 102 N.C. App. at 305-307, 401 S.E.2d at 856-57.

79. 104 N.C. App. 157, 408 S.E.2d 742 (1991).

80. *Id.* at 159, 408 S.E.2d at 744. After divorcing James Garney, Roberta Palumbo married Finnican, who "sent [Palumbo] to an attorney to terminate Mr. Garney's parental rights, so that [Finnican] could adopt Jimmy." *Id.* When the Finnicans divorced, Mr. Finnican took Jimmy to see Garney, his biological father. *Id.* Garney appeared as a witness in Finnican's custody case against Palumbo. *Id.* After losing custody, Finnican "assisted Mr. Garney in moving to Charlotte, North Carolina . . . by locating a home for him a few houses removed from Ms. Palumbo's residence." *Id.* Garney then instituted suit to set aside the termination of his parental rights. *Id.* The court allowed Finnican to intervene on Garney's behalf. *Id.*

81. *Id.* at 163, 408 S.E.2d at 746.

82. *Id.* at 164, 408 S.E.2d at 746.

83. *Id.* at 164, 408 S.E.2d at 747.

84. Higgins v. Patton, 102 N.C. App. 301, 306, 401 S.E.2d 854, 857 (1991); dePasquale v. O'Rahilly, 102 N.C. App. 240, 246, 401 S.E.2d 827, 831 (1991); *Bryson*, 102 N.C. App. 1, 12, 401 S.E.2d 645, 653-54 (1991).

85. *Bryson*, 102 N.C. App. at 9, 12, 401 S.E.2d at 652. The court of appeals did not imply that a party was absolutely untouchable under the legal sufficiency and improper purpose prongs when an attorney files the complaint. The court's interpretation of the legal sufficiency prong of the rule resulted in a finding that "[i]n the absence of proof that a reasonable person in the client's position would have been aware of the Rule 11 legal deficiencies," liability rests solely with counsel. *Id.* at 9, 401 S.E.2d at 652. Concerning improper purpose, the court suggested that a party could be liable if she were the "moving force" behind the offensive conduct to such a degree that a sanction on the attorney would be an ineffective deterrent. *Id.*

imposes a continuing duty to conform a complaint to fact and law;[86] and that a court may find an improper purpose *only* after a finding that the paper fails either the factual or legal sufficiency requirements of the rule.[87]

It is against this sketchy backdrop of Rule 11's development in the court of appeals that the North Carolina Supreme Court rendered its opinion in *Bryson*. In *Bryson*, the North Carolina Supreme Court systematically rejected each of these rules. The supreme court found that Rule 11 confines the legal sufficiency inquiry to the complaint itself, rather than allowing the court to read the complaint in light of the answer and other responsive pleadings.[88] The court based its position upon the plain language of the statute, which describes the signing of the complaint as the moment of the violation.[89] This position, the court observed, is consistent with a majority of federal court decisions.[90] It is also the better rule in an adversarial system, in that it does not require the attorney for one party to do the work of the opposing counsel. For example, affirmative defenses such as the statute of limitations or immunity may render a plaintiff's complaint meritless. Requiring a plaintiff's attorney to refrain from filing the complaint would, in effect, require him to plead the affirmative defense for his opponent. Just as the plaintiff is limited by the legal bases for his complaint that he identifies and pleads to the court, so too is the defendant required to find and enumerate the defenses upon which he relies. The conscientious plaintiff's attorney,

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at 10, 401 S.E.2d at 652 (quoting United States v. Allen L. Wright Dev. Corp., 667 F. Supp. 1218, 1221 (N.D. Ill. 1987)).

86. Tittle v. Case, 101 N.C. App. 346, 349-50, 399 S.E.2d 373, 375 (1991).

87. *In re* Finnican, 104 N.C. App. at 163, 408 S.E.2d at 746; *Higgins*, 102 N.C. App. at 306, 401 S.E.2d at 857; *Bryson*, 102 N.C. App. at 11, 401 S.E.2d at 306. The court of appeals in *Bryson* also took notice of federal cases that created a distinction between a complaint and other papers filed with the court. *See, e.g.*, Aetna Life Ins. Co. v. Alla Medical Serv., Inc., 855 F.2d 1470, 1476 (9th Cir. 1988) (holding that while a "nonfrivolous *complaint* can never violate Rule 11, even if it was filed for an improper purpose," a well-grounded motion may nevertheless warrant sanctions if filed with an improper purpose). The North Carolina Supreme Court declined to establish this dichotomy, and found all papers—including complaints—subject to an independent purpose test. *See infra* notes 103-04 and accompanying text.

88. *Bryson*, 330 N.C. at 656, 412 S.E.2d at 333.

89. *Id.* at 657, 412 S.E.2d at 334; *see* N.C. R. Civ. P. 11(a) ("If a pleading, motion, or other paper is *signed* in violation of this rule, the court . . . shall impose . . . an appropriate sanction . . . ." (emphasis added)). In reality, however, no violation can occur until the document is either filed with a court or imposed upon a party. An attorney who signs, but never files, a baseless complaint cannot be held liable under Rule 11. The better conceptual rule may be to judge reasonableness at the moment of filing.

90. *See, e.g.*, Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1989); Sheets v. Yamaha Motors Corp., U.S.A., Inc. 891 F.2d 533, 536 (5th Cir. 1990); Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 874 (5th Cir. 1988); Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986), *cert. denied sub nom.*, County of Suffolk v. Graseck, 480 U.S. 918 (1987).

therefore, should not assume that the defendant will effectively identify his defenses. By limiting the legal sufficiency inquiry to the face of the pleading itself, the *Bryson* court acted consistently with the common law adversarial tradition and maintained the tenuous balance between deterring abuse and chilling zealous advocacy.

Justice Martin's opinion also took issue with the court of appeals' assertion that the onus of Rule 11's legal sufficiency and improper purpose tests falls primarily upon the attorney rather than the represented party.[91] In purporting to restructure the interpretive methodology so as to make parties who sign a pleading more accountable,[92] however, the supreme court adopted a less exacting standard by which to judge the party's conduct under the legal sufficiency arm of the test. The court of appeals held that a client's good faith reliance on his attorney's legal advice was merely some evidence of the reasonableness of the party's belief in the legal merit of the complaint.[93] Assigning error, the supreme court held, "[G]ood faith reliance of [plaintiffs], as represented parties, on their attorneys' advice that their claims were warranted under the law is sufficient to establish an objectively reasonable belief in the legal validity of their claims."[94] This standard, too, is sound given the justifiable expecta-

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91. *Bryson*, 330 N.C. at 655-56, 412 S.E.2d at 332-33 (quoting *Bryson*, 102 N.C. App. at 9-10, 401 S.E.2d at 652).

92. Justice Martin wrote:

> Th[e Court of Appeals's] statement [that attorneys are primarily responsible for legal insufficiency under Rule 11] was error: the language of Rule 11 explicitly holds a represented party who, as here, has signed the document subject to sanctions when the document is found to violate the rule. Moreover, the relevant inquiry is not whether a reasonable person in the client's position would have been aware of the legal deficiencies, but whether the client made a reasonable inquiry to determine the legal sufficiency of the document.

Id. at 656, 412 S.E.2d at 333 (citation omitted). One would expect that a "reasonable person in the client's position" would always make a "reasonable inquiry" before deciding that his document was well-grounded in law. Justice Martin's fine distinction is consistent with the language of the rule. It does not, however, account for the party who conducts an objectively reasonable legal inquiry, but then reaches an unreasonable conclusion based upon that inquiry. Presumably, this party should also be sanctioned under the Rule. Moreover, the supreme court's formulation is overinclusive in that it seems to subject sanctions upon a party who makes no effort to determine the legal sufficiency of his claim, but nevertheless states a valid legal argument.

93. *Bryson*, 102 N.C. App. at 13, 401 S.E.2d at 654.

94. *Bryson*, 330 N.C. at 662, 412 S.E.2d at 336-37. Justice Martin added a significant gloss to the court's standard of good faith reliance on counsel. He noted that a party's reliance on his attorney's legal analysis could not be held to be in good faith if the party "failed to disclose a material fact to counsel." *Id.* at 662, 412 S.E.2d at 336. By defining good faith as "honesty of intention, and freedom from knowledge of circumstances which ought to put [one] upon inquiry," the court apparently imported a subjective standard into its Rule 11 analysis for parties. *Id.* (quoting BLACK'S LAW DICTIONARY 693 (6th ed. 1990)).

The extent to which a court may entertain evidence of a party's subjective intentions,

tions of clients who hire attorneys for their supposed knowledge of the law.

That the party filing the complaint should also face scrutiny for his purpose is fitting and is consistent with the common law concepts of malicious prosecution and abuse of process.[95] Because the standard under Rule 11 is objective,[96] imposing an improper purpose test will not overly burden potential plaintiffs by requiring them to justify their motives for bringing suit. The supreme court reformulated a party's liability under the rule as follows: "Whereas a represented party may rely on his attorney's advice as to the legal sufficiency of his claims, he will be held responsible if his *evident* purpose is to harass, persecute, otherwise vex his opponents, or cause them unnecessary cost or delay."[97]

Justice Martin's opinion in *Bryson* also relied on the plain meaning of Rule 11(a) to overturn the court of appeals' holding that the rule imposed a continuing duty to conform the complaint to the rule.[98] "The text of the rule," Justice Martin wrote, "requires that whether the document complies with the legal sufficiency prong of the Rule is determined as of the time it was signed."[99] Noting that the court in *Tittle* relied upon an earlier North Carolina Supreme Court holding—*Turner v. Duke University*[100]—in imposing the continuing duty, the *Bryson* court rejected the court of appeals' interpretation of *Turner*.[101] In addition, the *Bryson*

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beyond the inferences gleaned from the questionable pleading itself, is not addressed by the court. The Fourth Circuit, however, has explained the extent to which it will examine the subjective intent of the signer under an otherwise objective improper purpose test:

> There is some paradox involved in this analysis, because it is appropriate to consider the *signer*'s subjective beliefs to determine the signer's purpose in filing suit, if such beliefs are revealed through an admission that the signer knew that the motion or pleading was baseless but filed it nonetheless. This evidence may be said to be "objective" in the sense that it can be viewed by a court without fear of misinterpretation; it does not involve difficult determinations of credibility. Circumstantial facts surrounding the filing may also be considered as evidence of the signer's purpose. Repeated filings, the outrageous nature of claims made, or a signer's experience in a particular area of law . . . are all appropriate indicators of an improper purpose.

In re Kunstler, 914 F.2d 505, 519 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1607 (1991). Although no North Carolina court has expressly adopted this analysis of a party's motive as objective evidence, the *Bryson* court's definition of good faith suggests that it would likely approve of the Fourth Circuit's position.

95. *See supra* note 77.

96. *Bryson*, 330 N.C. at 663, 412 S.E.2d at 337 (citing Turner v. Duke University, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989)). Moreover, the burden of proof of an improper purpose is on the party seeking sanctions under Rule 11. *Id.*

97. *Id.* (emphasis added) (citing *Kunstler*, 914 F.2d at 518).

98. *Id.* at 657, 412 S.E.2d at 334.

99. *Id.*

100. 325 N.C. 152, 381 S.E.2d 706 (1989).

101. *Bryson*, 330 N.C. at 657, 412 S.E.2d at 334.

court "also disavow[ed] *Tittle*'s statement based on the legal sufficiency prong of Rule 11, that . . . 'the failure to dismiss a case when irrefutable evidence has come to [one's] attention that the case is meritless may require sanctions.' "[102]

This conclusion, while consonant with the notion that a pleading is judged at signing for factual and legal sufficiency, is qualified by the court's following point:

> In light of our holding that subsequent papers will not be considered in evaluating the validity of a certification, we hold that subsequently filed documents cannot impose a duty on counsel or a party under the *legal sufficiency prong* of the Rule to seek dismissal. However, once responsive pleadings or other papers are filed and the case has become meritless [i.e., without a sufficient legal basis] failure to dismiss or further prosecution of the action may result in sanctions either under the *improper purpose prong* of the Rule, or under other rules, or pursuant to the inherent power of the Court.[103]

Justice Martin's distinction between the two elements of the rule is important. In effect, the supreme court adopts a middle ground between no continuing duty and a duty to amend if any factual or legal discrepancy is discovered after filing. It is highly likely that a court will find that any complaint which is not dismissed soon after becoming baseless in law fails an objectively-determined improper purpose test. Whether the court rightly interprets this decision as consonant with the general consensus among the federal courts that "Rule 11 imposes *no* continuing duty to conform past pleadings to new events" is less clear.[104]

The most significant methodological development of the *Bryson* court is the conceptualization of the improper purpose prong of Rule

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102. *Id.* (quoting Tittle v. Case, 101 N.C. App. 346, 349, 399 S.E.2d 373, 375 (1991)).

103. *Bryson*, 330 N.C. at 658, 412 S.E.2d at 334 (emphasis added) (citing Chambers v. Nasco, Inc., 111 S. Ct. 2123 (1991)). The court further explained in a footnote, "The situation in which one has an *improper purpose* in continuing litigation after subsequent developments in the case render it meritless requires sanctions under Rule 11, but such sanctions are not under the legal sufficiency prong of the Rule." *Id.* at 658 n.2, 412 S.E.2d at 334 n.2. Indeed, under this reading, a continuing duty under the improper purpose prong imposes a far more onerous obligation on parties than a similar duty under the legal sufficiency arm. Presumably, once facts or law comes to light rendering the complaint baseless, a party must amend or dismiss. In addition, because the court correctly holds that an improper purpose may exist even in a well-grounded complaint, *id.* at 663, 412 S.E.2d at 337, a party may conceivably challenge a complaint at any time during the litigation, even without revelations of fact or law, if evidence exists that the plaintiff's purpose in continuing the suit is improper.

104. *Id.* at 658-59, 412 S.E.2d at 334 (emphasis added). A subsequent case has followed the distinction between a one-time duty under the factual and legal sufficiency prongs of the rule and a continuing duty under the improper purpose arm. Taylor v. Taylor Prod., Inc., 105 N.C. App. 620, 628, 414 S.E.2d 568, 574-75 (1992).

11(a) as a separate and independent element.[105] The court again based its holding not on an analysis of scholarly exegesis, precedent or policy considerations, but on the words of the rule: "Certification under the Rule includes three things: That the subject person has read the document, that he or she believes it to be well-grounded in fact and law, '*and* that it is not interposed for any improper purpose.' "[106] Clearly, the improper purpose language is a tautology under the competing interpretation. Beyond the internal textual logic of the supreme court's reading, the holding recognized the potential for a party to file a pleading that, while technically having some minimal basis in law, is clearly imposed for no other reason than to harass the opposing party.[107] A clever attorney could probably formulate one thousand tenuously relevant interrogatories in a routine tort case, if she had an inclination to do so. Such conduct should fall within the prohibitions of Rule 11, as it is both frivolous and wasteful. On the other hand, the improper purpose prong should not be read to require a party to give up his rightful day in court—for instance, by finding an "improper purpose" in a party's refusal to accept a favorable settlement offer or to submit to binding arbitration in lieu of going to trial—if a trial is what he wants.

The North Carolina Supreme Court's opinion in *Bryson v. Sullivan* provides a workable interpretive methodology for Rule 11(a) that will result in a more consistent application of the rule in the North Carolina courts. Of equal significance, however, is the emphasis placed by the court on the responsibilities of parties under Rule 11. Because it cannot realistically be presumed that citizens are attuned to developments in state court civil procedure jurisprudence, it is incumbent upon North Carolina attorneys involved in litigation to inform their clients of the potential for party liability under Rule 11. Essentially, the duty of the client is twofold: first, to provide the attorney with a full and forthright depiction of the facts, so that the client's reliance on the attorney's legal judgment will be reasonable under Rule 11(a); and second, to refrain from filing a complaint or other document with the sole obvious purpose of annoying the adverse party. Certainly, ill feelings will often exist between parties to a lawsuit. The improper purpose element of Rule 11 takes aim not at embittered clients suing for what is rightfully theirs, but at those who use litigation as a tool to vex and harass.[108]

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105. *Bryson*, 330 N.C. at 663, 412 S.E.2d at 337.

106. *Id.* (quoting N.C. R. Civ. P. 11(a)).

107. *See, e.g., In re* Finnican, 104 N.C. App. 157, 163-64, 408 S.E.2d 742, 746 (1991).

108. While in no respect binding on North Carolina courts, the Fourth Circuit's explanation of improper purpose may be instructive:

> If a complaint is not filed to vindicate rights in court, its purpose must be improper.

In addition to new standards for clients under the rule, *Bryson* similarly prohibits attorneys from filing papers solely for the perceived tactical benefit of harassment, costliness, or delay. A separate and distinct improper purpose prong of Rule 11 requires an attorney's filings to actually further the process of the litigation rather than merely raising the blood pressure and fee of the adversary. Thus, the *Bryson* court's opinion enhances Rule 11's power to deter waste and lessen the burden of an already strapped legal system. By crafting these new interpretive principles carefully, the court was able to effect this additional deterrence without setting standards that threaten to dampen the ardor of zealous representation by North Carolina's attorneys.

The *Bryson* opinion should prove a welcome addition to a previously ambiguous area of law, benefiting all camps of the North Carolina judicial system—attorneys, clients, and courts. If the path of acceptable litigation practice in North Carolina has been straightened and narrowed a bit by the decision, litigants can take comfort in the fact that the contours of the path are now more easily discerned. After *Bryson*, cautious travelers will face few surprises from Rule 11 on their way through the North Carolina courts, and should in fact benefit from the courts' increased authority to remove and punish those who would abuse their access.

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However, if a complaint is filed to vindicate rights in court, and also for some other purpose, a court should not sanction counsel for an intention that the court does not approve, so long as the added purpose is not undertaken in bad faith and is not so excessive as to eliminate a proper purpose. Thus the purpose to vindicate rights in court must be central and sincere.

In re Kunstler, 914 F.2d 505, 518 (4th Cir. 1990).

M & M Medical Supplies v. Pleasant Valley Hospital: Has the Fourth Circuit Signaled the End of a "New Era"?

Greed, for the lack of a better word, is good.[1]

Fortunately, federal laws enacted on behalf of the American consumer have long tempered the influence that individual entities can exert in the marketplace.[2] Given the enormous liability generally associated with violations of federal antitrust laws,[3] proposals to extend the scope of these protective laws beyond their original intent elicit substantial concern. These concerns are amplified when coupled with the enormous amounts of time and money expended in defending antitrust claims. The potential exists for the filing of frivolous lawsuits simply to recover their settlement value.[4] Many courts have attempted to narrow the reach of these laws by limiting the types of conduct which cross the line distinguishing competition from violations of the substantive statutory antitrust provisions. While not entirely successful, these efforts have sent a strong message to antitrust plaintiffs that not all aggressive competition is illegal.

Developing in tandem with the substantive antitrust law, the use of summary judgment as a dispositive litigation tool has gained increased acceptance in the courts. In its early years, summary judgment merely represented an infrequently used method for disposing of clearly frivolous or unsubstantiated lawsuits. Courts consider it ill-suited for use in complex litigation and in cases in which one party's state of mind represented a crucial element.[5] This trend developed despite a lack of support in either the text of the rule itself or the Advisory Committee's Note.[6] However, judges, concerned with overcrowded dockets, have recently turned to summary judgment as a method of expediting the journey of meritless cases through our labyrinthine judicial system.[7]

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1. WALL STREET (Twentieth Century Fox 1987).

2. These anti-monopoly, anti-trade-restraint, and anti-price-discrimination laws are embodied in the Sherman Antitrust Act and the Clayton Act. 15 U.S.C. §§ 1-7, 12-27 (1988).

3. Parties injured by violations of the federal antitrust laws may recover attorney's fees and treble actual damages. *Id.* § 15(a).

4. Donald F. Turner, *Private Antitrust Enforcement: Policy Recommendations, in* PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING 407 (Lawrence J. White ed., 1988) ("[A] substantial number of private antitrust cases are ill-founded, brought in hopes of obtaining substantial cash settlements from defendants seeking to avoid the costs of litigation and the risk that bits of evidence will lead to adverse jury verdicts.").

5. *See infra* notes 75-76 and accompanying text.

6. FED. R. CIV. P. 56 & advisory committee's note. See *infra* notes 67-71 and accompanying text for discussion of rule and the supporting committee notes.

7. *Cf.* William W. Schwarzer, *Techniques for Identifying and Narrowing Issues in Anti-*

Inexplicably, the Fourth Circuit's recent decision in *M & M Medical Supplies and Service, Inc. v. Pleasant Valley Hospital, Inc.*[8] ignores these developments. In *M & M Medical Supplies*, the court, sitting en banc, vacated the district court's grant of summary judgment to an antitrust defendant with respect to claims of monopolization and attempted monopolization.[9] The court of appeals weighed heavily an expert affidavit that the plaintiff offered to characterize the defendants' conduct as monopolistic.[10] By limiting the use of summary judgment procedure in the face of an expert affidavit, the court's actions may signal a retreat from the "new era" of summary judgment.[11]

This Note examines both the Fourth Circuit's approach to these issues[12] in *M & M Medical Supplies* and the approaches suggested by the dissenting opinions in the case.[13] The Note also traces the development of the use of summary judgment as a dispositive tool with emphasis upon its application in the antitrust context and its interaction with the expert testimony rules.[14] Next, this Note criticizes the Fourth Circuit for its cursory disregard of these recent trends and expresses concern that the decision may restrict, rather than promote, competition.[15] Finally, the Note encourages other courts to reject the approach taken by the court in *M & M Medical Supplies* and, rather, to follow the logic and policy advocated by other circuits.[16]

The plaintiff in the action, M & M Medical Supplies and Service, Inc. (M & M) rented and sold durable medical equipment (DME)[17] in Point Pleasant, Mason County, West Virginia.[18] The defendant, Pleasant Valley Hospital, Inc. (Hospital), operated an acute-care hospital in

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trust Cases, 51 ANTITRUST L.J. 223, 226-27 (1982) (advocating the increased use of summary judgment in antitrust cases based on experiences by U.S. District Court Judge).

8. 981 F.2d 160 (4th Cir. 1992).

9. *Id.* at 169. Monopolization and attempted monopolization are prohibited by § 2 of the Sherman Act: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states . . . shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2 (1988).

10. *M & M Medical Supplies*, 981 F.2d at 168.

11. *See* Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476 (6th Cir. 1989); Steven A. Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183, 184, 194 (1987).

12. *See infra* notes 40-49 and accompanying text.

13. *See infra* notes 50-66 and accompanying text.

14. *See infra* notes 67-124 and accompanying text.

15. *See infra* notes 125-43 and accompanying text.

16. *See infra* notes 144-47 and accompanying text.

17. Durable medical equipment is a category of medical goods that includes beds, wheelchairs, walkers, and oxygen equipment. *M & M Medical Supplies*, 981 F.2d at 162.

18. *Id.*

the same town.[19] In 1985, the Hospital, seeking to expand, decided to enter the DME market.[20] To accomplish this goal, the Hospital created Pleasant Valley Home Medical Equipment Company, Inc. (Equipment Company) as a wholly owned subsidiary of the Hospital.[21] As a result of Hospital's expansion, M & M's DME sales declined by approximately seventy-five percent.[22]

Believing that the Hospital's allegedly illegal actions caused this decline in revenues, M & M filed a lawsuit in federal district court in 1988 that asserted six separate antitrust claims against the Hospital: restraint of trade, monopolization, attempted monopolization, leveraging of monopoly power, conspiracy to monopolize, and exclusive dealing.[23] The Hospital moved for summary judgment upon the conclusion of discovery; the district court granted summary judgment for the Hospital on all of the federal antitrust claims.[24]

Opposing the Hospital's motion for summary judgment, M & M

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19. *Id.*

20. The Hospital freely acknowledged that the driving force behind its expansion into the DME market was its desire to use DME profits to offset recent reductions in Medicare and Medicaid reimbursements. M & M Medical Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc., 738 F. Supp. 1017, 1019 (S.D. W. Va. 1990).

21. The decision to create the subsidiary resulted only after the Hospital failed to acquire M & M. When the parties could not come to agreeable terms, the Hospital created the Equipment Company. *M & M Medical Supplies*, 981 F.2d at 162.

22. *Id.*

23. *M & M Medical Supplies*, 738 F. Supp. at 1019. The complaint also included a state-law claim of tortious interference with business relations. Under West Virginia law, a claim for tortious interference with business relations consists of: (1) the existence of a business relationship, (2) intentional interference by a party outside that relationship, (3) causation, and (4) damages. Precision Piping & Instruments, Inc. v. E.I. du Pont de Nemours & Co., 951 F.2d 613, 621 (4th Cir. 1991).

24. *M & M Medical Supplies*, 738 F. Supp. at 1019-23. The district court dismissed the restraint of trade claim by holding that a parent and wholly owned subsidiary do not constitute separate entities for the purpose of entering into an agreement to restrain trade in violation of § 1 of the Sherman Act. In other words, an entity cannot enter into an agreement with itself to restrain trade; § 1 is, rather, intended to deter concerted efforts among separate entities. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 777 (1984); *M & M Medical Supplies*, 738 F. Supp. at 1019. Similarly, the district court determined that because it was not possible for the Hospital and the Equipment Company to conspire to restrain trade, it was likewise impossible for them to conspire to monopolize in violation of § 2 of the Sherman Act, *id.* at 1022, or to enter into an exclusive dealing arrangement in violation of § 3 of the Clayton Act. *Id.* at 1022-23.

Since the state-law claim had no independent basis for federal jurisdiction, it was dismissed without prejudice. *M & M Medical Supplies*, 738 F. Supp. at 1023. The state-law claim was properly brought in federal court under 28 U.S.C. § 1367, which gives federal courts supplemental jurisdiction over state law claims if they constitute part of the same case or controversy under Article III of the United States Constitution. 28 U.S.C.A. § 1367 (West Supp. 1992).

submitted the affidavit of Dr. Roger D. Blair[25] to establish the relevant market element of its claims of monopolization and attempted monopolization.[26] However, the district court refused to consider Dr. Blair's affidavit[27] because the affidavit failed to set forth specific facts as the district court interpreted Rule 56(e) of the Federal Rules of Civil Procedure to require.[28] The district court held that the expert testimony rules of the Federal Rules of Evidence did not alter Rule 56(e)'s "specific facts" requirement.[29] The district court thus refused to consider the Blair affidavit, concluded that M & M had failed to show the existence of the Hospital's monopoly power within the relevant market, and dismissed M & M's monopolization claim.[30]

Proof of the relevant market was essential to both the attempted monopolization claim and the monopolization claim;[31] as discussed above, M & M failed to introduce sufficient evidence of the relevant market.[32] Curiously, the district court supported its dismissal of the attempted monopolization claim not by noting the lack of evidence with

25. Dr. Blair is an experienced witness in antitrust lawsuits. The district court agreed to accept Dr. Blair as an expert in the field of economics for the purpose of deciding the summary judgment motion. *M & M Medical Supplies*, 738 F. Supp. at 1020.

26. Claims for monopolization and attempted monopolization are covered by § 2 of the Sherman Act. *See supra* note 9. The elements of a monopolization claim consist of: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

Justice Holmes outlined the elements of an attempted monopolization claim in the seminal case of Swift & Co. v. United States, 196 U.S. 375, 396 (1905): (1) a specific intent to monopolize within the relevant market, (2) predatory or anticompetitive conduct designed to implement such intent, and (3) a dangerous probability of success.

27. Dr. Blair's affidavit stated that he had reviewed case files and patient origin data for the Hospital and the Equipment Company and had made price comparisons between M & M Medical Supplies and the Equipment Company. *M & M Medical Supplies*, 981 F.2d at 164. Based on this information, Dr. Blair concluded that the relevant geographic market for DME in this case was Mason County, West Virginia, and that the Equipment Company was exercising monopoly power therein. *Id.* Apparently, the thrust of Dr. Blair's affidavit was to prove the existence of (1) the relevant market, and (2) the exercise of monopoly power within this market by the Equipment Company. Dr. Blair's affidavit was essential to M & M's case because proof of both monopolization and attempted monopolization are dependent upon the definition of the relevant market. *See supra* note 26.

28. *M & M Medical Supplies*, 738 F. Supp. at 1020. FED. R. CIV. P. 56(e) provides that an affidavit "must set forth specific facts showing that there is a genuine issue for trial."

29. *M & M Medical Supplies*, 738 F. Supp. at 1020. Rule 703 of the Federal Rules of Evidence allows an expert to base an opinion on inadmissible facts if the facts are of a type reasonably relied upon by experts in that field. Similarly, Rule 705 permits an expert to state an opinion without prior disclosure of the underlying facts unless the court orders otherwise.

30. *M & M Medical Supplies*, 738 F. Supp. at 1020, 1022.

31. *See supra* note 26.

32. *See supra* note 27 and accompanying text.

respect to the relevant market, but rather by referring to the lack of evidence of specific intent.[33] Specifically, the court found that M & M's evidence of the Hospital's desire to offset Medicare losses and Hospital's referral of its patients to the Equipment Company failed to support an inference of specific intent to monopolize the DME market.[34] The district court also dismissed M & M's monopoly leveraging claim.[35] The court determined that proof of monopoly leveraging was dependent on proving the elements of attempted monopolization.[36] Because the court had already concluded that M & M had failed to produce evidence sufficient to support an attempted monopolization claim, it was simple for the court to conclude that M & M's monopoly leveraging claim must also fail.[37] The plaintiff appealed the dismissal of the monopolization and attempted monopolization claims, and the Fourth Circuit Court of Appeals, in an unpublished opinion, affirmed in part and vacated in part and granted a rehearing en banc.[38] On rehearing, the court, in a seven to six decision, vacated the summary judgment entered on the monopolization and attempted monopolization claims.[39]

With respect to the monopolization claim, the Fourth Circuit concluded that the district court had erred in refusing to consider Dr. Blair's affidavit. Unlike the district court, the court of appeals decided that the expert testimony rules in the Federal Rules of Evidence, while not altering Rule 56(e)'s "specific facts" requirement, should be reconciled with Rule 56(e).[40] The court of appeals determined that reconciliation was possible because the affidavit did not fail to set forth specific facts, but rather failed to include the *data* supporting the underlying facts.[41] Not-

33. *M & M Medical Supplies*, 738 F. Supp. at 1021-22; *see supra* note 26 (enumerating the elements of an attempted monopolization claim).

34. *M & M Medical Supplies*, 738 F. Supp. at 1021. The court emphasized the fact that the evidence did not indicate that the Hospital patients were "coerced or forced" to use the Equipment Company in order to satisfy DME needs to the "exclusion of all of its competitors." *Id.* Apparently, the district court believed that such force or coercion was essential to a showing of specific intent.

35. *Id.* at 1022. The district court defined monopoly leveraging as the "use of monopoly power within one market with intent to harm competition in another market." *Id.* at 1021.

36. The district court reached this conclusion by noting that because § 2 of the Sherman Act does not provide a separate cause of action for monopoly leveraging, *see supra* note 9, a monopoly leveraging claim is nothing more than a rephrased claim for attempted monopolization. *Id.*

37. *M & M Medical Supplies*, 738 F. Supp. at 1022.

38. M & M Medical Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc., 946 F.2d 886 (4th Cir. 1991).

39. *M & M Medical Supplies*, 981 F.2d at 160.

40. *Id.* at 165. Rule 1101(b) of the Federal Rules of Evidence deems the evidence rules applicable in all civil actions, and thus the court decided that reconciliation was necessary. *Id.*

41. *Id.* Specifically, because only data and not facts were omitted, the court determined

ing that Rule 56 does not explicitly mandate the disclosure of such data, the court held that the affidavit satisfied the Rule 56 requirements.[42] The majority of the court held that the Blair affidavit presented a genuine issue of fact as to the monopolization claim and thus vacated the district court's entry of summary judgment on that claim.[43]

Turning to the attempted monopolization claim, the majority also concluded that the facts disclosed presented a genuine issue of material fact as to the Hospital's specific intent to monopolize the DME market. The appellate court held that the lower court had applied the wrong standard when it required M & M to show that the Hospital had "coerced or forced" its patients into purchasing DME from the Equipment Company.[44] Relying on the United States Supreme Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[45] the court of appeals stated that specific intent can be inferred from anti-competitive practices.[46] The court of appeals then found that M & M had satisfied this burden with affidavits asserting that the Hospital encouraged its employees to purchase DME from the Equipment Company, a memorandum suggesting that all DME referrals be directed toward the Equipment Company, and affidavits stating that the Hospital ordered DME from the Equipment Company without first consulting the patients.[47] The Hospital argued that *Aspen Skiing* was inapplicable because the Hospital's conduct had failed to produce a self-induced injury like the defendant's conduct in *Aspen Skiing*.[48] The court of appeals rejected this contention, however, and concluded that the Hospital had received a self-induced injury when it deliberately set its prices below those of its competitors

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that any need for such data could be achieved through Rule 705, which allows the court to require disclosure of the data. *Id.*

42. *Id.*

43. *Id.* at 166. The court of appeals' treatment of the monopolization claim assumed that the district court had premised its grant of summary judgment on its refusal to consider the Blair affidavit. Accordingly, the majority did not address the possibility that the district court might have granted summary judgment even in light of the Blair affidavit.

44. *Id.* at 166. The district court apparently found coercion or force necessary in order to satisfy the specific intent element. *See supra* note 34.

45. 472 U.S. 585 (1985).

46. *Id.* at 608 n.39.

47. *M & M Medical Supplies*, 981 F.2d at 167-68.

48. In *Aspen Skiing*, the Supreme Court stated that specific intent to monopolize could be found where one company was willing to "sacrifice short-run benefits and consumer goodwill" in order to drive a competitor from the market. 472 U.S. at 610-11. Specifically, one ski company with monopoly power refused to accept ski passes from a competitor, even though the company knew that such refusal would reduce its revenues. *Id.* The court found that these self-injurious actions lacked normal business justification, and thus supported a finding of specific intent. *Id.* at 608.

upon entering the market.[49]

Judge Hall filed a dissenting opinion, joined by four other judges, in which he opined that the district court correctly dismissed M & M's Sherman Act claims.[50] Judge Hall noted that proof of the relevant market was essential to both the monopolization and attempted monopolization claims.[51] With respect to evidence establishing the relevant market, Judge Hall stated that the District Court correctly refused to consider the Blair affidavit.[52] Conceding that some recent cases had taken the view that conclusory expert affidavits should be supplemented rather than excluded,[53] Judge Hall nevertheless argued that the correct interpretation of Rule 56(e) requires exclusion of affidavits that fail to set forth specific facts.[54] Judge Hall further maintained that summary judgment would have been proper even if the Blair affidavit had been admitted[55] and expressed concern that the Blair affidavit relied on improper data and reached erroneous conclusions in determining that Mason County constituted the relevant market.[56]

Judge Luttig also filed a dissenting opinion.[57] As to the monopolization claim, Judge Luttig took a different approach, focusing on the element of willful maintenance or acquisition of monopoly power. Judge

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49. *M & M Medical Supplies*, 981 F.2d at 167.

50. *Id.* at 169 (Hall, J., dissenting). Judge Hall was joined by Judge Russell, Judge Widener, Judge Wilkinson, and Judge Niemeyer. *Id.* at 170 (Hall, J., dissenting).

51. *Id.* (Hall, J., dissenting).

52. *Id.* at 169 (Hall, J., dissenting).

53. *See* Ambrosini v. Labarraque, 966 F.2d 1464, 1469 (D.C. Cir. 1992).

54. *M & M Medical Supplies*, 981 F.2d at 169 (Hall, J., dissenting).

55. *Id.* at 169-70 (Hall, J., dissenting). See *infra* note 130 for a discussion of the appropriate standard of review in an appeal from a grant of summary judgment.

56. *Id.* at 170 (Hall, J., dissenting). Judge Hall argued that consideration of the patient origin data from the Hospital was irrelevant to the determination of the relevant market for DME. He believed this data would be probative only if M & M had raised a "tie-in" claim asserting that the Hospital was using its hospital services monopoly to coerce its customers into purchasing DME from the Equipment Company. *Id.* (Hall, J., dissenting).

Furthermore, even assuming Dr. Blair relied solely on the Equipment Company's patient origin data, Judge Hall believed that it was erroneous to conclude that the residences of the purchasers should define the relevant market for DME. *Id.* (Hall, J., dissenting) (citing Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1490 (9th Cir. 1991)) ("Where [a company] competes does not define the market."). Instead, Judge Hall believed that additional evidence was necessary to support a conclusion that the relevant market did not extend beyond the residences of the purchasers. *Id.* (Hall, J., dissenting). Presumably, this evidence would consist of showing that Mason County was the "narrowest" market in which competitors could not enter "promptly enough and with large enough quantities to restore the old price or volume." Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc., 714 F.2d 351, 356 (4th Cir. 1983).

57. Judge Luttig was joined by Judge Russell and Judge Wilkinson. *M & M Medical Supplies*, 981 F.2d at 175. (Luttig, J., dissenting).

Luttig maintained that M & M's only evidence on this element was its claim that the Hospital referred its patients in need of DME to the Equipment Company. Judge Luttig concluded, given that a company has no obligation to refer prospective clients to competitors,[58] that the Hospital's referrals constituted lawful competition rather than illegal anti-competitive acts. Noting the lack of other evidence of anti-competitive acts,[59] Judge Luttig argued that summary judgment was proper on the monopolization claim.[60]

Addressing the attempted monopolization claim, Judge Luttig, like the district court judge, believed that M & M had not produced sufficient evidence of the Hospital's specific intent to monopolize.[61] Noting that the majority assumed that specific intent could be proven by anti-competitive acts, Judge Luttig expressed disappointment with the majority's determination that the Equipment Company's decision to set prices below those of its competitors upon entry into the DME market constituted an anti-competitive act.[62] Judge Luttig was careful to distinguish the Equipment Company's "competitive" pricing from predatory pricing, which has long been considered an anti-competitive act.[63] Judge Luttig further questioned the majority's determination that the Equipment Company's subsequent decision to fix its prices above those of its competitors constituted an antitrust violation.[64] Instead, he argued that Equip-

58. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600 (1985) ("[E]ven a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor.").

59. Judge Luttig noted that M & M had failed to produce any evidence that the Hospital had denied M & M access to its patients or that the Hospital had conditioned the supply of medical services on the purchase of DME from the Equipment Company. *M & M Medical Supplies*, 981 F.2d at 171 (Luttig, J., dissenting).

60. Judge Luttig argued that "[w]here challenged business activity is consistent with legal competition, courts will not presume an antitrust violation absent 'evidence that tends to exclude' the possibility of legitimate conduct." *Id.* at 172 (Luttig, J., dissenting) (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984)).

61. *Id.* at 172 (Luttig, J., dissenting).

62. Judge Luttig noted that this determination failed to perceive economic realities. In his view, a new entrant, not armed with an established reputation, is generally forced to lower its prices in order to attract customers. *Id.* at 173 (Luttig, J., dissenting).

63. *Id.* (Luttig, J., dissenting). Predatory pricing consists of pricing below some measure of cost with the goal of "eliminating competitors in the short run and reducing competition in the long run." Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 117 (1986). Here, the Equipment Company did not price below cost, but rather reduced its price below the prevailing market price "so as to compete with its more established competitors." *M & M Medical Supplies*, 981 F.2d at 174 (Luttig, J., dissenting).

64. In this regard, Judge Luttig disagreed with the majority's conclusion that pricing both below and above the competition could be anti-competitive acts. *M & M Medical Supplies*, 981 F.2d at 173-75 (Luttig, J., dissenting). The result of this novel holding, according to Judge Luttig, is that the only way to avoid antitrust liability is to set prices at levels maintained by

ment Company's ability to maintain such pricing without losing sales merely represented some evidence of an anti-competitive act.[65] Judge Luttig concluded that this evidence, standing alone, was insufficient to support an inference of specific intent to monopolize.[66]

The Advisory Committee that presided over the 1937 adoption of the Federal Rules of Civil Procedure described summary judgment as "a method for promptly disposing of actions in which there is no genuine issue as to any material fact"[67] and expressly stated that Rule 56 was applicable to *all* actions.[68] While earlier cases took the view that a motion for summary judgment could not overcome pleadings that were not conclusory and were "well-pleaded,"[69] a 1963 amendment to subdivision (e) was adopted to correct this misinterpretation[70] by adding the following language:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.[71]

Notwithstanding these committee notes and amendments, courts have generally considered summary judgment appropriate only in specific types of cases[72] and particularly inappropriate in others.[73] Even the

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competitors, an act that may itself violate the antitrust laws. *Id.* at 174 n.4 (Luttig, J., dissenting).

65. *Id.* at 174 (Luttig, J., dissenting).

66. *Id.* at 173-74 (Luttig, J., dissenting).

67. FED. R. CIV. P. 56 advisory committee's note. Subdivision (c), the most important provision of the rule, provides:

> The judgment sought *shall* be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law.

FED. R. CIV. P. 56(c) (emphasis added).

68. *Id.*

69. *See* United States *ex rel.* Kolton v. Halpern, 260 F.2d 590 (3rd Cir. 1958); Frederick Hart & Co., Inc. v. Recordgraph Corp., 169 F.2d 580 (3rd Cir. 1948); Levy v. Equitable Life Assurance Soc'y., 18 F.R.D. 164 (E.D. Pa. 1955).

70. FED. R. CIV. P. 56 advisory committee's note to the 1963 amendment.

71. FED. R. CIV. P. 56(e).

72. One commentator has noted four categories of cases in which summary judgment is likely to be used: "(1) small cases, where little is at stake, (2) cases involving simple facts, (3) cases turning on documents, rather than on witnesses, and (4) bench trials, where the traditional and constitutionally required deference to a jury is not a factor." Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1111-12 (1986).

73. Professor Calkins further noted that summary judgment is unlikely to be used where:

Supreme Court subscribed to the unfounded, yet then-prevailing, trend toward limiting the scope of the use of summary judgment. In *Poller v. Columbia Broadcasting System, Inc.*,[74] the Court expressed concern about the use of summary judgment in antitrust cases where motive and intent are critical factors.[75] The Court's focus on "state of mind" issues suggested that summary judgment is ill-suited for cases in which necessary elements are proven, not by direct evidence, but by inferences drawn from circumstantial evidence.[76] While this view garnered little support among commentators,[77] it nonetheless represented the Supreme Court's view on the subject until 1986, when the Court decided a triumvirate of cases that greatly expanded the scope of summary judgment.[78]

In *Anderson v. Liberty Lobby, Inc.*,[79] the Court, while not questioning or overruling any prior decisions,[80] nonetheless suggested a shift toward more liberal use of summary judgment.[81] *Anderson* involved a libel claim against columnist Jack Anderson. Under applicable First Amendment libel doctrine, plaintiffs could not recover unless they could prove reckless disregard for the truth by "clear and convincing" evidence.[82] Subsequently, the Court had to determine whether this higher standard should be used in the summary judgment context. Noting that the purpose of summary judgment is to determine the necessity of a trial,[83] the

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"(1) credibility is critical, (2) the nonmovant has unequal access to facts, (3) the legal issues are complicated, (4) court dockets are not crowded, so trial time need not be conserved, and (5) the court is in the Second Circuit." *Id.* at 1112.

74. 368 U.S. 464 (1962).

75. *Id.* at 473.

76. Justice Harlan filed a vigorous dissent in which he noted that nothing in the language of the Rule indicates that it should be used any more "sparingly" in antitrust cases than in other types of cases. *Id.* at 478 (Harlan, J., dissenting). Indeed, Justice Harlan opined that, given the susceptibility of antitrust litigation to "vexatious" lawsuits, and the excessive amounts of time required by antitrust cases, "there is good reason for giving the summary judgment rule its full legitimate sweep in this field." *Id.* (Harlan, J., dissenting).

77. *See* Calkins, *supra* note 72, at 1111; David A. Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 NW. U. L. REV. 774, 782 n.33 (1983); David P. Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72, 76-78 (1977).

78. *See infra* notes 79-100 and accompanying text.

79. 477 U.S. 242 (1986).

80. The Court's opinion acknowledged that its prior decisions had not "uniformly recited the same language," but implied that its previous cases all embodied the same standard. *Id.* at 249.

81. *Id.* at 249-50; *see* Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476, 1478 (6th Cir. 1989) (extolling a "salutary return to the original purpose of summary judgments" and the breathing of new life into summary judgment); Calkins, *supra* note 72, at 1111 (recognizing a "pruning" of misleading judicial additions to the summary judgment rule).

82. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

83. *Anderson*, 477 U.S. at 248; *cf.* FED. R. CIV. P. 56 advisory committee's note to 1963

Court held that this necessity can only be determined in light of the substantive law.[84] Not only did the Court consider the clear and convincing standard applicable to libel claims, but it also noted that evidence which is "merely colorable, or is not significantly probative" is insufficient to defeat a summary judgment motion.[85]

Furthermore, the Court expressly stated that, except for certain procedural differences, the summary judgment standard is identical to that of a directed verdict.[86] Perhaps the most revealing aspect of *Anderson*, however, is the Court's recognition that a plaintiff's mere contention that "state of mind" issues are presented is insufficient to defeat a summary judgment motion.[87] This recognition, especially when coupled with the other holdings in the triumvirate,[88] suggests the value of liberal use of summary judgment in all types of cases.[89]

The Court decided *Celotex Corp. v. Catrett*[90] in tandem with *Anderson* and addressed the burdens that Rule 56 places on the movant and the nonmovant. In *Celotex*, the defendant-movant simply pointed out that the plaintiff had failed to produce any evidence of exposure to the defendant's asbestos products. The lower courts had held that summary judgment was inappropriate because the defendant had not presented any evidence to support its motion;[91] the Supreme Court concluded, however, that the defendant had clearly satisfied its burden of informing the court of the absence of a factual dispute concerning a crucial element of plaintiff's case.[92] The Court's language, however, appeared to place a more stringent burden on the nonmovant than merely informing the court that it possesses evidence raising a genuine issue of material fact; the nonmovant must come forward with specific facts establishing the

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amendment ("The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.").

84. *Anderson*, 477 U.S. at 248.

85. *Id.* at 249-50 (citations omitted).

86. *Id.* at 250-51. FED. R. CIV. P. 50(a) requires a trial court to direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.

87. *Anderson*, 477 U.S. at 256.

88. *See infra* notes 90-100 and accompanying text.

89. *See supra* notes 72-78 and accompanying text.

90. 477 U.S. 317 (1986).

91. Catrett v. Johns-Manville Sales Corp., 756 F.2d 181, 184 (D.C. Cir. 1985).

92. *Celotex*, 477 U.S. at 324. As one commentator has suggested, and as Justice White's concurring opinion makes clear, *Celotex* should not be read to stand for the proposition that the moving party can file a motion without any support or with merely a declaration that the nonmovant lacks sufficient evidence to prove his case. *Id.* at 328 (White, J., concurring); Calkins, *supra* note 72, at 1115-16 (noting the limited nature of the holding). In all cases the movant must still discharge the burden Rule 56 places upon him. *Celotex*, 477 U.S. at 328 (White, J., concurring).

existence of a genuine issue of material fact.[93] Again, as with *Anderson*, the Court's language may be more significant than its holding because the opinion emphasized the importance of summary judgment in the judicial process.[94]

The final case of the triumvirate, *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*,[95] involved a complex factual record that, according to the Supreme Court, "would fill an entire volume of the *Federal Supplement*."[96] Accordingly, *Matsushita* will almost always be factually distinguishable and, like the other cases in the triumvirate, is most important for its illustration of the shift in the Supreme Court's view toward summary judgment. Notably, the Supreme Court affirmed the district court's grant of summary judgment in an antitrust case.[97] This should have dispelled any doubts lower courts may have had regarding the suitability of summary judgment in antitrust cases. More importantly, *Matsushita* introduced the language of "implausibility" into the summary judgment context.[98] Specifically, the Court stated that if the plaintiff's theory is economically implausible, the plaintiff must present more persuasive evidence than is usually required to sustain its claim.[99] While this language originated in an antitrust context, courts have applied it in other situations.[100]

This triumvirate signaled a new attitude toward summary judgment in the Supreme Court. Whether this attitude results from the current massive backlog of federal cases or from an increasing confidence in

93. *Id.* at 324. The specific facts should come from the list of sources found in FED. R. CIV. P. 56(c) excepting, of course, the pleadings. *Id.*

94. "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex*, 477 U.S. at 327 (citing FED. R. CIV. P. 1); *see also* Calkins, *supra* note 72, at 1114 (noting that summary judgment motions often turn on attitudes toward the motion).

95. 475 U.S. 574 (1986).

96. *Matsushita*, 475 U.S. at 577.

97. *Id.* at 598.

98. It is important to note that the Supreme Court's introduction of an "implausibility" standard did not represent a reformulation of summary judgment principles, but rather a rearticulation of existing principles. Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072, 2083 (1992).

99. *Id.* at 587. The Court's implausibility language has been carefully interpreted to prevent judges from supplanting the jury's role as a fact-finder. For example, some courts have held that considering the implausibility of a claim is only appropriate when the claim is supported by circumstantial rather than direct evidence. McLaughlin v. Liu, 849 F.2d 1205, 1207 (9th Cir. 1988); T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 631-32 (9th Cir. 1987).

100. *See* Knight v. Sharif, 875 F.2d 516, 522 (5th Cir. 1989) (breach of contract claim); Beard v. Whitley County REMC, 840 F.2d 405, 410 (7th Cir. 1988) (Title VII claim); *In re* Fortune Sys. Sec. Litig., 680 F. Supp. 1360, 1368 (N.D. Cal. 1987) (securities fraud claim).

judges' ability to distinguish questions of fact from questions of law, the viability of summary judgment with respect to both complex cases and "state of mind" cases cannot be questioned.

This new trend established by the triumvirate contrasts sharply with the Court's 1962 decision in *Poller*, which produced a particularly restrictive effect on the use of summary judgment in antitrust cases. Courts and commentators have interpreted Justice Clark's statement that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles"[101] as a blanket prohibition against summary judgment in antitrust cases.[102] A better reading of Justice Clark's statement is that summary judgment should be used sparingly in any case (including antitrust) where a determination of *motive* and *intent* are essential.[103] This interpretation is supported by the Supreme Court's holding in *First National Bank v. Cities Service Co.*,[104] decided six years after *Poller*, in which the Court refused to remove general summary judgment principles entirely from antitrust cases.[105]

The previous rejection of the summary judgment procedure in antitrust cases also stemmed from the generally liberal application of the antitrust laws.[106] In fact, as the attitude towards antitrust policy shifted, so did the view toward using summary judgment in antitrust cases. Courts began to recognize the potential misuse of antitrust actions given the great burden of defending such actions.[107] Accordingly, summary judg-

101. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962); *see supra* notes 74-78.

102. *See* Tiftarea Shopper, Inc. v. Georgia Shopper, Inc., 786 F.2d 1115, 1116 (11th Cir. 1986) (per curiam) (opining that the factual nature of antitrust cases calls for sparse use of summary judgment); 2 JULIAN O. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION DESK EDITION § 9.06[7], at 9-48 to 9-49 (1990) ("The Supreme Court has cautioned that . . . summary proceedings should be granted sparingly in antitrust litigation.").

103. Calkins, *supra* note 72, at 1119 ("Logic would suggest [this interpretation].").

104. 391 U.S. 253 (1968).

105. *Id.* at 289-90. The Court held that, "[t]o the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it." *Id.*

106. Judge Posner described the early emphasis of antitrust policy as "protection of competition as a process" and noted the "evolution" of antitrust policy over a period of forty years toward an emphasis on the "protection of competition as a means of promoting economic efficiency." Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986).

107. *See* Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1167 (7th Cir. 1978) ("The very nature of antitrust litigation would encourage summary disposition of such cases when permissible."), *cert. denied*, 440 U.S. 982 (1979); Ralph C. Wilson Indus., Inc. v. American Broadcasting Cos., 598 F. Supp. 694, 699 (N.D. Cal. 1984) (noting the need for proper consideration of the use of summary judgment in antitrust cases "[g]iven the enormous expenditure of time

ment had become an increasingly effective tool for both courts and defendants in dealing with antitrust cases even before the Supreme Court's decision in *Matsushita*.[108]

Whatever doubts remained in lower courts about the viability of summary judgment in antitrust cases should have been removed by the decision of the Supreme Court in *Matsushita*. While *Matsushita* involved a conspiracy claim under section 1 of the Sherman Act,[109] there seems to be no reason why the same test cannot be applied to other antitrust claims, including nonconspiracy actions.[110] As one commentator has noted, the *Matsushita* test is especially important because an antitrust plaintiff can almost always find an economist who will prepare an affidavit supporting plaintiff's theory, regardless of the soundness of the theory.[111] Rather than merely approving the use of summary judgment in antitrust cases, *Matsushita*, subject to the limitations discussed earlier,[112] actually encourages its use to dispose of unnecessary litigation.[113]

M & M Medical Supplies is representative of the vast majority of complex cases in which one party moves for summary judgment, and the nonmovant responds with an expert affidavit supporting the nonmoving party's theory. This factual scenario presents an important question regarding the interplay between Rule 56(e) and the expert testimony rules found in the Federal Rules of Evidence. As discussed previously,[114] Rule 56(e) requires the nonmoving party to "set forth *specific facts* showing that there is a genuine issue for trial,"[115] while Rule 705 of the Federal

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and other resources commonly necessary"). The foundation for this consideration can be traced to Justice Harlan's dissent in Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 474-86 (1962). See *supra* note 76 for a discussion of Justice Harlan's dissent in *Poller*.

108. *Cf.* Doctors Steuer & Latham, P.A. v. National Medical Enters., Inc., 672 F. Supp. 1489, 1502 n.6 (D.S.C. 1987) ("The recent trend, even before *Matsushita*, has been that Summary Judgment is an important tool for dealing with antitrust cases."), *aff'd*, 846 F.2d 70 (4th Cir. 1988).

109. Section 1 prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . ." 15 U.S.C. § 1 (1988).

110. *See* Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 815 (1987). As this author suggested, if *any* antitrust claim is supported solely by speculation, summary judgment is appropriate, since the plaintiff bears the burden of proof. *Id.* In this sense, *Matsushita* did not represent an alteration in prevailing summary judgment law, but rather more clearly defined the standard to be applied with respect to speculative claims. See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S. Ct. 2072, 2083 (1992).

111. Turner, *supra* note 110, at 815.

112. *See supra* note 99 and accompanying text.

113. This encouragement can be inferred from *Matsushita*'s express recognition of the close scrutiny to which speculative claims must be subjected. *See Matsushita*, 475 U.S. at 587.

114. *See supra* notes 67-71 and accompanying text.

115. FED. R. CIV. P. 56(e) (emphasis added). *Celotex* established that when the defendant

Rules of Evidence provides that an expert may give an opinion "without prior disclosure of the underlying facts or data, unless the court requires otherwise."[116] Similarly, Rule 703 provides that the facts or data supporting the expert's opinion need not be admissible in evidence.[117] These apparently conflicting rules engender the following question: When a nonmovant attempts to defeat a summary judgment motion by offering an expert affidavit that, in accordance with Rules 703 and 705, fails to provide the facts or data underlying the opinion contained in the affidavit, has he satisfied the demands of Rule 56(e)? Since the Federal Rules of Evidence are generally applicable to all civil actions,[118] it seems logical that the apparent conflict must be reconciled. Unfortunately, as one recent authority noted, the courts have not reached a definitive conclusion.[119]

Some courts have held that an affidavit offering conclusory allegations without specific facts to support them is not saved by reference to Rules 703 and 705.[120] These cases recognize that whatever the intended effect of the Federal Rules of Evidence on broadening the admissibility of expert opinions in general, the Rules were in no way intended to alter the evidentiary standard required to defeat a summary judgment motion. Indeed, as one commentator has noted, simply because a conclusory expert affidavit is admissible at trial does not mean that the same affidavit is sufficient to defeat a summary judgment motion.[121]

Other courts have concluded that the proper treatment for an expert affidavit that is too conclusory to satisfy Rule 56(e) is to require supplementation rather than exclusion.[122] However, these courts tend to cir-

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moves for summary judgment, the burden on the nonmoving party is greater than that placed on the moving party. *See supra* note 93 and accompanying text. Additionally, it would seem that Rule 56(e)'s "specific facts" requirement enhances the *Celotex* burden placed on the nonmoving plaintiff by requiring evidence that precisely addresses the issue at hand rather than evidence exhibiting general implications concerning the relevant issue.

116. FED. R. EVID. 705.

117. FED. R. EVID. 703.

118. FED. R. EVID. 1101(b).

119. *See* Anthony E. DiResta et al., *Rule 56 and the Use of Expert Affidavits*, C695 A.L.I.-A.B.A. COURSE OF STUDY 335 (1991) (noting that the issue was raised, but not decided, by the district court judge in *Matsushita*, 513 F. Supp. 1100, 1144 n.57 (E.D. Pa. 1981)).

120. Slaughter v. Southern Talc Co., 919 F.2d 304, 307 n.4 (5th Cir. 1990); Evers v. General Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985); United States v. Various Slot Machines on Guam, 658 F.2d 697, 700 (9th Cir. 1981); Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666, 673 (D.C. Cir. 1977).

121. William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 484 (1992) [hereinafter Schwarzer] (citing Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 877 F.2d 1333, 1339 (7th Cir. 1989)).

122. Ambrosini v. Labarraque, 966 F.2d 1464, 1469 (D.C. Cir. 1992); Bulthuis v. Rexall Corp., 789 F.2d 1315, 1317 (9th Cir. 1985). In *Ambrosini*, the D.C. Circuit attempted to

cumvent the real issue by distinguishing cases where the excluded affidavits, even if admitted, would have been insufficient to defeat a summary judgment motion.[123] It appears that the sufficiency of an affidavit to defeat a summary judgment motion if proper under Rule 56(e) is a separate and distinct issue from whether an affidavit satisfies the requirements of Rule 56(e). The rejoinder to this argument is that "the technical nature of the subject matter of such affidavits and the fluid state of the law governing their sufficiency and admissibility" justify supplementation rather than exclusion.[124]

The majority opinion in *M & M Medical Supplies* begins with a recitation of the principles enunciated by the Supreme Court in the aforementioned triumvirate of 1986 cases.[125] While restating these principles correctly, the appellate court's application misinterprets the Supreme Court's teaching. In reversing the district court's grant of summary judgment in favor of the Hospital on the monopolization claim, the court of appeals espoused its view of the interplay between Rule 56(e) and the expert testimony rules.[126] The court correctly recognized the primacy of Rule 56(e) over the expert testimony rules regarding expert affidavits offered to defeat a summary judgment motion, but ignored the conclusory nature of Dr. Blair's affidavit by drawing a semantic distinction between the necessity of specific *facts*, as required by Rule 56(e), and the lack of necessity of the *data* underlying the opinion.[127] The fact that the affidavit does not include supporting data may not require its exclusion under the expert testimony rules, but it does not necessarily follow that the affidavit satisfies the Rule 56(e) standard.[128] Nor is the court's determi-

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distinguish its earlier decision in *Merit Motors* by determining that its holding in *Merit Motors* was based on the expert's unfamiliarity with the record, as opposed to *Ambrosini*, in which the affidavit was simply too conclusory. *See Ambrosini*, 966 F.2d at 1471. This distinction ignores the fact that Rule 56(e) also requires affidavits to be based on personal knowledge. It seems that if one requirement of Rule 56(e) provides a basis for exclusion, a requirement contained in a later sentence of the Rule should carry the same weight.

123. *Ambrosini*, 966 F.2d at 1470.

124. Schwarzer et al., *supra* note 121, at 486.

125. *M & M Medical Supplies*, 981 F.2d at 163. See *supra* notes 79-100 and accompanying text for a discussion of the triumvirate of cases.

126. *See supra* notes 40-42 and accompanying text.

127. *See supra* notes 40-42 and accompanying text.

128. The fallacy in this reasoning can be expressed mathematically in the following form: Assume $O > A$ ("O" represents the expert opinion, "A" represents the evidentiary standard under the expert testimony rules). The question is whether it logically follows that $O > B$ ("B" represents the evidentiary standard under Rule 56(e)). This is true only if A is greater than or equal to B. For the purposes of this discussion, one may ignore the question of whether the evidentiary standard for Rule 56(e) is greater than the standard for the expert testimony rules (although logically it would seem so). It is enough for one to recognize that A is not greater than B. This conclusion follows from the recognition of Rule 56(e)'s primacy

nation saved by reference to Rule 705's provision permitting the judge to require supplementation of the affidavit with supporting data. Indeed, such a result ignores the express language of Rule 56(e): such affidavits "*must* set forth specific facts."[129] The permissive allowance in Rule 705 cannot trump such an express command. This approach would require courts to allow any conclusory affidavit to defeat a summary judgment motion by simply referring to its lack of specific facts as a lack of underlying data.

Unfortunately, the court's errors with respect to admitting the Blair affidavit were compounded by its refusal to consider whether summary judgment could be proper even if the Blair affidavit were included.[130] *Anderson v. Liberty Lobby, Inc.* established that the evidence offered to defeat a summary judgment motion must be "significantly probative" and not "merely colorable."[131] Clearly, this standard was not met because, as Judge Hall's dissent pointed out, the conclusions Dr. Blair reached were premised on improperly considered evidence and unsupported by the properly considered evidence.[132]

Turning to the court's reversal of summary judgment with respect to the attempted monopolization claim, the majority's approach, by failing to consider prevailing summary judgment attitudes, seems to extend the scope of attempted monopolization beyond its intended bounds. Regarding the first element of attempted monopolization, specific intent, the majority found that a company which enters a market with prices lower than its competition (but above predatory pricing levels) and later raises these prices has shown specific intent to monopolize.[133] This novel holding ignores the fact that in order to gain a substantial market share, the new entrant is often forced to offer lower prices in an effort to wrestle business away from its more established competitors.[134] The economic realities of the marketplace drive this practice, not an intent to monopolize.[135] As Judge Luttig's dissent points out, the majority condemns the

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with respect to summary judgment. Accordingly, a determination that O > A does not benefit the analysis of whether O > B.

129. FED. R. CIV. P. 56(e) (emphasis added).

130. Because an appellate court reviews a grant of summary judgment under a *de novo* standard, a court may affirm a grant of summary judgment on grounds different from those invoked by the lower court. Service & Training, Inc. v. Data Gen. Corp., 963 F.2d 680, 685 n.10 (4th Cir. 1992). It was thus improper for the Fourth Circuit not to address the sufficiency of the Blair affidavit.

131. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986).

132. *See supra* note 56.

133. *M & M Medical Supplies*, 981 F.2d at 167.

134. *See supra* notes 62-63 and accompanying text.

135. Indeed, as the Seventh Circuit recently stated, "We do not need an economist to tell us that if an entrant brings substantial new capacity into a market with already sufficient ca-

offering of lower prices *and* the subsequent offering of higher prices.[136] The company is, in effect, forced to set its prices at the level its competitors determine, a concept that appears to ignore an efficient marketplace.

In addition, the *M & M Medical Supplies* court's holding arguably disregards Fourth Circuit precedent. In 1990, in *Abcor Corp. v. AM International, Inc.*,[137] the court addressed the role of summary judgment in the antitrust context. In *Abcor*, the court found that the anti-competitive acts the plaintiff alleged did not support an inference of specific intent.[138] Furthermore, the court appeared to reject the argument that, although the individual acts did not support such an inference, an aggregation of the acts could support such an inference.[139] By contrast, the court in *M & M Medical Supplies* obviously accepted the argument that an aggregate of acts can support a finding of specific intent.[140] Surely the *M & M Medical Supplies* court did not believe that the individual acts it addressed could independently support such a finding.

Tying this argument into the summary judgment context, neither the conduct alleged in *Abcor*[141] nor, more importantly, the actions present in *M & M Medical Supplies*, "tend to exclude the possibility" of legitimate conduct.[142] It seems proper to require, when the plaintiff is attempting to prove specific intent with anti-competitive acts, that the plaintiff be allowed to rely only on those acts that have no possibility of economic or competitive utility.[143] Otherwise, in the summary judgment

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pacity, price competition is likely to ensue and prices are destined to fall." Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1416 (7th Cir. 1989).

136. *M & M Medical Supplies*, 981 F.2d at 172 n.4 (Luttig, J., dissenting).

137. 916 F.2d 924 (4th Cir. 1990).

138. In *Abcor*, the plaintiff could not establish specific intent to monopolize with direct evidence, so it attempted to support an inference of specific intent with evidence of anti-competitive acts. *Abcor*, 916 F.2d at 928-31. These alleged anti-competitive acts of the defendant consisted of: (1) discriminatory and deceptive pricing, (2) misuse of confidential financial and customer information, (3) denial of parts to selective customers, (4) spreading lies and misinformation, and (5) hiring of plaintiff's employees. *Id.* The court rejected the contention that each of these acts supported an inference of specific intent. *Id.*

139. *Id.* at 930-31 ("The 'sporadic activity' identified by the plaintiffs does not amount to an antitrust violation.").

140. *M & M Medical Supplies*, 981 F.2d at 167.

141. *See supra* note 138.

142. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984); *see also* William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1028 n.7 (9th Cir. 1981) (" 'The mere intention of [defendant] to exclude competition . . . is insufficient to establish specific intent to monopolize by some illegal means. . . . To conclude otherwise would contravene the very essence of a competitive marketplace which is to prevail against all competitors.' ") (citing Blair Foods, Inc. v. Ranchers Cotton Oil, 610 F.2d 665, 670 (9th Cir. 1980)).

143. *Cf.* RICHARD POSNER, ANTITRUST LAW—AN ECONOMIC PERSPECTIVE 190 (1976) (advocating allowing proof of intent by the elimination of all possibilities of legitimate intents).

context, acts that establish nothing more than aggressive competition will be sufficient to defeat a summary judgment motion—a result entirely contrary to the Supreme Court's recent summary judgment opinions.

The result in *M & M Medical Supplies* fails to consider the recent trends in antitrust and summary judgment law that had made reasonable steps to curb vexatious antitrust litigation. An improper refusal to grant summary judgment merely increases the settlement value of an otherwise frivolous claim. An innocent defendant may opt to settle rather than face the rigors and expenses of an antitrust trial. Such a result stifles rather than encourages competition; this is surely not the intended result of the Sherman Act.

Furthermore, judicial backlog and the burdens saddling judicial resources clamor for assistance. Summary judgment provides an unparalleled weapon to combat these evils.[144] As courts grow more confident in their abilities to distinguish questions of fact from questions of law, it is likely that the use of summary judgment will increase.

With respect to specific issues raised in this case, it is proper for courts to re-examine the interplay between the summary judgment rules and the expert testimony rules. As suggested above,[145] a workable solution is available, one that slights neither of these essential procedural components. Despite the provision for admission found in the expert testimony rules, the express requirement of "specific facts" found in Rule 56(e) must control the analysis of a summary judgment motion. A court, taking guidance from the Supreme Court, should also be careful in the inferences it draws from the actions of competing businesses. Today's economy yearns for competition. A court should hesitate before labeling hard-nosed, yet lawful, acts anti-competitive.

The effect of this case is uncertain. Will the Fourth Circuit continue to disregard precedent and conventional wisdom when considering motions for summary judgment in antitrust actions? Will other circuits blindly follow the Fourth Circuit and reverse recent trends? Will the Supreme Court, recognizing the erosion of its summary judgment principles, grant certiorari to Pleasant Valley Hospital, Inc. in an effort to pre-

144. Effective use of summary judgment provides the best alternative for disposing of frivolous claims while also assuring that meritorious claims get full consideration. Because lack of clarity may prevent courts from understanding a plaintiff's theory of recovery, motions to dismiss sometimes prevent meritorious, but unartfully pleaded, claims from reaching their full potential. Conversely, motions for a directed verdict often waste judicial resources because such claims could easily have been disposed of earlier without prejudice. Lying somewhere between these two extremes, summary judgment, after allowing full discovery, simply challenges the non-moving party to either "put up or shut up," a blunt yet well-designed approach.

145. *See supra* notes 131-32 and accompanying text.

vent this case from becoming a harbinger of future results?[146] Or will other courts, with wisdom and foresight, recognize this case as an anomaly, "an isolated deviation from the strong current of precedent—a derelict on the waters of the law"?[147] The latter approach is clearly appropriate. Otherwise, a grave danger exists that the approach taken in *M & M Medical Supplies* will be extended to cases outside the antitrust realm. The recent trends in summary judgment procedure and antitrust law have proven both essential and effective in reducing vexatious antitrust litigation, without removing the important protections of the Sherman Act. No logic supports a course deviant from current judicial wisdom.

KEVIN L. SINK

146. A recent conversation with the attorney for Pleasant Valley Hospital, Inc. revealed a strong probability that a petition for certiorari to the Supreme Court would be filed on behalf of the Hospital. Telephone Interview with John E. Jenkins, Jr., Attorney for Defendant (Jan. 25, 1993).

147. Lambert v. California, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting).

North Carolina's New Anti-Stalking Law: Constitutionally Sound, but Is It Really a Deterrent?

After a stormy relationship, Kim Hewett finally decided to stop seeing her boyfriend, Terry Lynn Jordan.[1] Unable to cope with the rejection, Terry went to "desperate lengths" to win Kim back. He repeatedly called, followed, and threatened her. He also threatened a young man she had been dating. Kim obtained restraining orders against Terry, but he ignored them and continued harassing her.[2] At one point he even "ambushed her on her way to church, pressed a pair of scissors to her throat and threatened her life."[3] The harassment culminated when Terry murdered Kim by shooting her five times with a .25 caliber handgun.[4]

This is not the story line from a made-for-television movie; rather it is a real-life fact pattern from High Point, North Carolina. It is an example of what happens in "stalking" situations. Stalking frequently occurs when relationships have ended unilaterally and one partner is unwilling to accept the reality that the relationship is over.[5] Until recently, stalking victims had little protection in such situations because often no actual crimes had been committed, and law enforcement officers were powerless to act.[6]

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1. Scott Sexton, *Stalking Law Came To [sic] Late to Save Life of Kim Hewett*, HIGH POINT ENTERPRISE, Jan. 24, 1993, at 10D.

2. *Id.* The article states that Kim took "several warrants" out on Terry to stay away from her. *Id.* From the context, however, it appears that restraining orders were issued rather than warrants.

3. *Id.*

4. *Id.*

5. In the first six and one-half months that Florida's anti-stalking statute was in effect, at least 468 people were charged with or suspected of harassing or threatening others under the statute. Bob Levenson & Sharon Mcbreen, *Law's Goal: Hunt Down Stalkers in Florida—So Far, Police Say, the Major Impact of the New Law Has Been to Stop Menacing Ex-Husbands and Boyfriends*, ORLANDO SENTINEL, Jan. 17, 1993, at A1 (discussing Fla. Stat. Ann. § 784.048 (West Supp. 1993)). The new law primarily has been used to stop stalking by ex-husbands and boyfriends. *Id.*

Additionally, some doctors in abortion clinics are attempting to use stalking laws to protect themselves. Bob Ortega, *Stalking Laws Used to Fight Abortion Foes*, WALL ST. J., Apr. 7, 1993, at B1.

6. Anti-stalking statutes have been described as filling a void in current law. Donna Hunzeker, *Stalking Laws*, 1 NCSL LEGISBRIEF No. 4 (Nat'l Conf. of St. Legis., Denver CO), Jan. 1993 at 1. "The police would get a call saying the guy's coming over, even though there's a restraining order, and they'd tell the woman there's nothing they can do until he gets there. And then the next call they'd get is the neighbor saying, 'He shot her.' " Tamar Lewin, *New Laws Address Old Problem: The Terror of a Stalker's Threats*, N.Y. TIMES, Feb. 8, 1993, at A1, A12 (quoting David Beatty, Director of Public Policy at the National Victim Center in Washington, D.C.).

In June 1992, the North Carolina Legislature passed an "anti-stalking" statute, making "stalking" a criminal offense in North Carolina for the first time.[7] The Anti-Stalking Act took effect on October 1, 1992.[8] This Note discusses the crime of stalking and the need for the legislation in North Carolina.[9] It examines the elements of North Carolina's statute and compares the statute to anti-stalking legislation in other states.[10] It explores the constitutionality of North Carolina's anti-stalking statute under the void-for-vagueness doctrine, determining that it is sufficiently narrow to pass constitutional muster.[11] In addition, the Note questions

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7. N.C. GEN. STAT. § 14-277.3 (1992). The full text of the statute reads:

(a) Offense. - A person commits the offense of stalking if the person willfully on more than one occasion follows or is in the presence of another person without legal purpose:

(1) With the intent to cause emotional distress by placing that person in reasonable fear of death or bodily injury;

(2) After reasonable warning or request to desist by or on behalf of the other person; and

(3) The acts constitute a pattern of conduct over a period of time evidencing a continuity of purpose.

(b) Classification. - A violation of this section is a misdemeanor punishable by imprisonment up to six months, a fine up to one thousand dollars ($1,000), or both. A person who commits the offense of stalking when there is a court order in effect prohibiting similar behavior is punishable by imprisonment up to two years, a fine up to two thousand dollars ($2,000), or both. A second or subsequent conviction for stalking occurring within five years of a prior conviction of the same defendant is punishable as a Class I felony.

Id.

8. There were no stalking convictions in 1992 and statistics were unavailable for 1993. Telephone Interview with Richard Little, Statistics Manager of the Administrative Office of the Courts (Feb. 17, 1993). Although no one was convicted, at least three people were charged with stalking in 1992 and there have been arrests for stalking in 1993. John Stevenson, *Man Puts Stalking Law to Second Test*, THE HERALD-SUN (Durham, N.C.), Jan. 24, 1993, at B1, B11. Angela Wright, *Women Wonder How Much Help Stalker Law Is*, CHARLOTTE OBSERVER, Oct. 25, 1992, at 1C.

It is believed that the first man charged with stalking in North Carolina was Shannon Lee Wheeler of Durham County, who pleaded no contest and agreed to move to Kentucky. Stevenson, *supra*, at B11. Brice Lee Long and Willie Darrell Harris, both of Mecklenburg County, were also charged with stalking in 1992. Wright, *supra*, at 1C. In 1993, Aretha Stephanie Jones of Durham County became the first woman to be charged under the new law. Stevenson, *supra*, at B1. Her case had not yet been resolved when this article was completed. *Id.*

Lawyers' plans to challenge the law's constitutionality were thwarted when charges were dropped against Henry Edward Harrelson of Hillsborough. Ann Heimberger, *Dismissal Thwarts Plans to Challenge Stalking Law*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 18, 1993, at 2B. Lawyers had planned to challenge the law in the case against Shannon Lee Wheeler, but were also disappointed. *Id.*

9. *See infra* notes 13-17, 21-29 and accompanying text.

10. *See infra* notes 18-20, 30-37 and accompanying text.

11. *See infra* notes 42-130 and accompanying text.

the statute's potential to curb violence and concludes that although the deterrence value is slight, the statute is nevertheless a step in the right direction.[12]

Stalking laws are designed to "punish people who repeatedly watch, follow, harass or threaten someone with physical harm or death."[13] Researchers predict that one in twenty adults will be stalked during his or her lifetime.[14] It is estimated that seventy to eighty percent of stalking cases occur in a domestic context, while ten to twenty percent involve strangers.[15] Furthermore, the available evidence reveals that many stalking situations, such as the one involving Kim Hewett,[16] culminate in the death or serious injury of the victim.[17]

Since 1992, a person can be convicted of stalking in North Carolina if he:

> [W]illfully on more than one occasion follows or is in the presence of another person without legal purpose:
>
> (1) with the intent to cause emotional distress by placing that person in reasonable fear of death or bodily injury;
>
> (2) after reasonable warning or request to desist by or on behalf of the other person; and
>
> (3) the acts constitute a pattern of conduct over a period of time evidencing a continuity of purpose.[18]

A first-time violation of the North Carolina law is a misdemeanor punishable by imprisonment for up to six months, a fine of up to $1,000, or both. If a court order is in effect when the violation occurs, the behavior

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12. *See infra* notes 131-44 and accompanying text.

13. Hunzeker, *supra* note 6, at 1.

14. Bill Kole, *Michigan Enacts Stalking Law with Toughest Sentence in Nation*, CHARLOTTE OBSERVER, Dec. 12, 1992, at 6A. While anti-stalking statutes are aimed at protecting both sexes, experts believe that the majority of stalking cases involve men stalking women. Lewin, *supra* note 6, at A12.

15. Lewin, *supra* note 6, at A12. The FBI Uniform Crime Reports indicate that 30% of female murder victims in 1990 were killed by husbands or boyfriends. Donna Hunzeker, *Stalking Laws*, 17 STATE LEGISLATIVE REPORT No. 19 (Nat'l Conf. Of St. Legis., Denver, CO), Oct. 1992, at 3 [hereinafter Legislative Report]. As many as 90% of those women were stalked before they were murdered. Melinda Beck et al., *Murderous Obsession*, NEWSWEEK, July 13, 1992, at 60, 61.

16. *See supra* notes 1-4 and accompanying text.

17. *See* Lewin, *supra* note 6, at A12. "It may start with phone calls that become harassing, then threatening, and then . . . the situation [escalates until] the guy shows up on the doorstep with a gun." *Id.* (quoting David Beatty, director of public policy at the National Victim Center in Washington). As a result, the victims in these situations never feel completely safe until their stalker is behind bars. *See generally* Frances Hopkins & Jane Ruffin, *Senate Moving to End Nightmare of Stalkings*, NEWS & OBSERVER (Raleigh, N.C.), June 17, 1992, at B1, B2 (recounting the plight of one stalking victim).

18. § 14-277.3.

is punishable by up to two years imprisonment, a fine of up to $2,000, or both. When a second or subsequent conviction occurs within five years, the offense is punishable as a Class I felony,[19] with the potential for a five-year prison term.[20]

The enactment of North Carolina General Statutes section 14-277.3 strengthened the legal protections available to stalking victims, particularly those who are victims of domestic violence.[21] Recognizing the seriousness of stalking and the fact that the outcome is often a death or a violent attack, the state legislature wanted to place "a tool in the hands of law enforcement before such a resolution could take place."[22] National and local media attention to the problem of stalking also may have

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19. A Class I felony is punishable by imprisonment of up to five years, a fine, or both. N.C. GEN. STAT. § 14-1.1(a)(9) (1992).

20. § 14-277.3.

21. Senator Helen Marvin, a major sponsor of North Carolina's anti-stalking legislation, wrote an editorial in the *Charlotte Observer* that sheds light on the reasons why the law was proposed, and ultimately, passed. Here are pertinent excerpts from her editorial:

> Violent crime against women in North Carolina is growing at an alarming rate. Under current state law, authorities can do little to prevent such incidents.
>
> In a recent 12-month period, 28,063 people sought help from domestic violence programs in North Carolina. This is only a fraction of the number of women in this state each year who are victims of ongoing abuse at the hands of husbands or boyfriends.
>
> When these women try to leave these abusive relationships, they are often threatened or harassed, even if they take out a restraining order. Indeed, 10 of the 62 women who were murdered by their spouses or boyfriends in North Carolina in 1989 had previously reported a history of battering.
>
> Under state law, if someone is threatened with death or violence, even if there is a restraining order, nothing can be done until the restraining order is violated or violence occurs. This is often too late.
>
> Bills enacted in other states, called "stalker laws," would allow for the arrest of a person who threatens another with death or some other form of violence, provided it can be shown that the person has the ability to carry out the threat.
>
> . . . .
>
> The law is gender neutral, defending both men and women. As a practical matter, of course, it would mostly protect women, who are the typical victims, from estranged boyfriends or husbands who threaten them in a credible way.
>
> A stalker law in North Carolina would shield victims from assailants with a propensity for, and often a history of, violence rather than waiting for the mayhem to occur.

Sen. Helen Marvin, *Stalker Law Would Help Protect North Carolinians*, CHARLOTTE OBSERVER, June 18, 1992, at 15A.

22. Scott Sexton, *Stopping the Stalker: New Law Provides Help Against Harassment*, HIGH POINT ENTERPRISE, Jan. 24, 1993, at D1 [hereinafter *Stopping the Stalker*] (quoting Senator Betsy Cochrane, another major sponsor of the legislation). Senator Sandy Sands, another sponsor, said, "It's very depressing to tell a lady who is in actual fear of bodily injury that there is nothing we can do, that there are no laws that have been broken." Hopkins & Ruffin, *supra* note 17, at 2B.

played a role in the passage of North Carolina's anti-stalking statute.[23]

Before the North Carolina legislature passed section 14-277.3, the legal protection available to victims was limited. While protective and restraining orders were available, such remedies were not particularly helpful because they provided inadequate deterrence to stalkers.[24] As one commentator notes, restraining orders are "notoriously hard to enforce, . . . all too often, the first violation [of such an order] is fatal."[25] Obtaining a civil protection order is also generally the responsibility of the victim, who is often too frightened of her assailant's response to take action.[26] Prior to the anti-stalking statute's enactment, a stalking victim

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23. Movies such as "Cape Fear," "Fatal Attraction," and "Sleeping with the Enemy," along with the July 1989 death of television actress Rebecca Schaeffer, star of "My Sister Sam," at the hands of an obsessed fan who had been stalking her, brought national attention to the problem of stalking. CAPE FEAR (Universal Studios, Inc. & Amblin Entertainment Inc. 1991); FATAL ATTRACTION (Paramount Pictures Corp. 1987); SLEEPING WITH THE ENEMY (Twentieth Century Fox Film Corp. 1991); Patricia Davis, *New Stalking Law Flushing the Crime Into the Open in Va.*, WASH. POST, Jan. 24, 1993, at B1, B4; Hunzeker, *supra* note 6, at 1.

Rebecca Schaeffer's death, along with the deaths of five Orange County, California, women who were murdered in one year by their former husbands or boyfriends, played a significant role in motivating California's legislature to enact the nation's first anti-stalking statute in 1990. *See* CAL. PENAL CODE § 646.9 (West Supp. 1993) (coining "stalking" as a crime); Hunzeker, *supra* note 6, at 1. In each of the five murders, the victim had been "stalked and threatened and had a temporary restraining order against her assailant." *Id.*

Articles in national magazines and made-for-television movies based on true stories, such as "I Can Make You Love Me: The Stalking of Laura Black," have also increased awareness of stalking. *I Can Make You Love Me: The Stalking of Laura Black* (CBS television broadcast, Feb. 9, 1993); *see also Another Fatal Attraction*, TIME, Feb. 29, 1988, at 49 (reporting that Richard Farley, who had stalked fellow worker Laura Black, blasted his way into their workplace killing seven people and wounding four others, including Black).

24. In drafting and considering laws, legislatures in many states heard about victims who were brutally attacked and sometimes killed after enduring months and even years of threats and intimidation. Civil restraining or protective orders were nearly always in place but [were] inadequate to deter the stalker from committing an act of violence.

Hunzeker, *supra* note 6, at 1. Stalking expert Dr. Park Dietz stated that stalkers "almost never respond to probation or a restraining order." Lolo Pendergrast & Patrick Scott, *The Mind of a Stalker: Mentally Ill or Just Obsessed, They Almost Always Strike Again*, CHARLOTTE OBSERVER, Jan. 10, 1993, at 1Y.

25. Beck et al., *supra* note 15, at 61. All but one of the five Orange County, California, women who were murdered by their former husbands or boyfriends had sought help from the authorities. *Id.* A restraining order was found in the purse of one of the murdered California women. *Id.* An art student from Massachusetts, Kristin Lardner, had also obtained restraining orders to keep her former boyfriend, Michael Cartier, away from her. *Id.* The orders did not deter him, however, and he murdered her. *Id.* These are just two examples of the numerous cases in which stalking victims who obtained restraining orders were killed or seriously injured.

26. *See generally* Kenneth R. Thomas, CONGRESSIONAL RESEARCH SERVICE, ANTI-STALKING STATUTES: BACKGROUND AND CONSTITUTIONAL ANALYSIS 4 (Sept. 26, 1992) (discussing the specifics of civil protection orders).

also had several other more general statutory remedies to use against her stalker. State laws prohibit a person from communicating threats,[27] mailing or transmitting anonymous or threatening letters,[28] and using the telephone to make harassing, profane, indecent, or threatening calls.[29] Many acts by stalkers did not come within the purview of these laws, however, thus additional legal protections were necessary. The anti-stalking legislation was designed to fill that need.

North Carolina's recent law is part of a strong national trend to pass anti-stalking legislation, as evidenced by the fact that legislatures in at least thirty-two states have enacted such legislation since 1990.[30] The

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27. N.C. GEN. STAT. § 14-277.1 (1992). The statute reads as follows:

(a) A person is guilty of a misdemeanor if without lawful authority:

(1) He willfully threatens to physically injure the person or damage the property of another; [and]

(2) The threat is communicated to the other person, ...

Id.

28. *Id.* § 14-394. This statute states that:

It shall be unlawful for any person . . . to write and transmit any letter, note, or writing, whether written, printed, or drawn, without signing his, her, their, or its true name thereto, threatening any person or persons, firm or corporation, or officers thereof with any personal injury or violence, or destruction of property of such individuals, firms, or corporations . . . .

Id.

29. *Id.* § 14-196. This statute provides:

(a) It shall be unlawful for any person:

(1) To use in telephonic communications any words or language of a profane, vulgar, lewd, lascivious or indecent character, nature or connotation;

(2) To use in telephonic communications any words or language threatening to inflict bodily harm to any person or physical injury to the property of any person, or for the purpose of extorting money or other things of value from any person;

(3) To telephone another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number;

(4) To make a telephone call and fail to hang up or disengage the connection with the intent to disrupt the service of another;

(5) To telephone another and to knowingly make any false statement concerning death, injury, illness, disfigurement, indecent conduct or criminal conduct of the person telephoned or of any member of his family or household with the intent to abuse, annoy, threaten, terrify, harass, or embarrass . . . .

Id.

30. The following states have enacted anti-stalking legislation: Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Utah, Virginia, Washington, West Virginia, and Wisconsin. *See* ALA. CODE § 13A-6-90 (Supp. 1992); 1992 Ariz. Legis. Serv. 241 (2d Reg. Sess.) (West); CAL. PENAL CODE § 646.9 (West Supp. 1993); COLO. REV. STAT. § 18-9-111 (Supp. 1992); 1992 Conn. Acts 237 (Reg. Sess.); DEL. CODE ANN. tit. 11, § 1312A (Supp. 1992); FLA. STAT. ANN. § 784.048 (West Supp. 1993); HAW. REV. STAT. § 711-1106.5 (Supp. 1992); IDAHO CODE § 18-7905 (Supp. 1992);

elements of North Carolina's statute are similar to those in other states. For example, most statutes require repeated acts, and an intent to place the victim in reasonable fear of death or serious bodily injury.[31] In addition to making it illegal to "follow," many states make it a crime to "harass" as well. This element is equivalent to North Carolina's requirement of a "pattern of conduct."[32] The definitional sections of such statutes typically define "harass" as "a knowing and willful *course of conduct* directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose."[33] "Course of conduct" is further defined as a "pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose."[34] This language mirrors that in North Carolina's statute.[35] Unlike North Carolina's statute, however, many state statutes require a

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ILL. ANN. STAT. ch. 720, para. 5/12-7.3 (Smith-Hurd 1992); IOWA CODE ANN. § 708.11 (West Supp. 1993); 1992 Kan. Sess. Laws 298; KY. REV. STAT. ANN. § 508.140 (Michie/Bobbs-Merrill Supp. 1992); LA. REV. STAT. ANN. § 14:40.2 (West Supp. 1993); MD. ANN. CODE art. 27, § 121A (1989); MASS. GEN. LAWS ANN. ch. 265, § 43 (West Supp. 1993); 1992 Mich. Pub. Acts 261; 1992 Miss. Laws 532; NEB. REV. STAT. § 28-311.02 (Supp. 1992); 1992 N.J. Sess. Law Serv. 209 (West); N.Y. PENAL LAW § 240.25 - .26 (McKinney Supp. 1993); N.C. GEN. STAT. § 14-277.3 (1992); OHIO REV. CODE ANN. § 2903.211 (Anderson 1993); OKLA. STAT. ANN. tit. 21, § 1173 (West Supp. 1993); R.I. GEN. LAWS § 11-59-2 (Supp. 1992); S.C. CODE ANN. § 16-3-1070 (Law. Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. § 22-19A-1 (Supp. 1992); TENN. CODE ANN. § 39-17-315 (Supp. 1992); UTAH CODE ANN. § 76-5-106.5 (Supp. 1992); VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1992); 1992 Wash. Legis. Serv. 186 (West); W. VA. CODE § 61-2-9a (1992); WIS. STAT. ANN. § 947.013 (West Supp. 1992).

Anti-stalking legislation has been introduced in Texas and Indiana. Hunzeker, *supra* note 6, at 1.

31. *See, e.g.*, ALA. CODE § 13A-6-90 (Supp. 1992) ("A person who . . . repeatedly follows or harasses another person . . . with the intent to place that person in reasonable fear of death or serious bodily harm is guilty of the crime of stalking."); CAL. PENAL CODE § 646.9 (West Supp. 1993) ("Any person who . . . repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear of death or great bodily injury is guilty of the crime of stalking."); DEL. CODE ANN. tit. 11, § 1312A (Supp. 1992) ("Any person who . . . repeatedly follows or harasses another person or who repeatedly makes a credible threat with the intent to place that person in reasonable fear of death or serious bodily injury is guilty of the crime of stalking . . . ."); VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1992) ("Any person who on more than one occasion engages in a course of threatening conduct with the intent to cause emotional distress to another person by placing that person in reasonable fear of death or bodily injury shall be guilty of a Class 2 misdemeanor.").

32. § 14-277.3.

33. *See, e.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1993); DEL. CODE ANN. tit. 11, § 1312A (Supp. 1992).

34. *See, e.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1993) ("Constitutionally protected activity is not included within the meaning of 'course of conduct.' "); DEL. CODE ANN. tit. 11, § 1312A (Supp. 1992).

35. See *supra* note 7 for the full text of the North Carolina law.

"credible threat."[36] " 'A credible threat' means a threat made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety."[37]

While the main purpose of North Carolina's statute is to provide additional help for stalking victims,[38] unfortunately the Act may fail to achieve this goal for several reasons. First, the statute may be challenged as unconstitutional under the void-for-vagueness doctrine.[39] In addition, the statute may not effectively deter stalkers because the punishment is relatively light and also because evidence suggests that many stalkers are mentally ill.[40] Finally, there may be administrative difficulties in enforcing the law.[41]

One potential challenge to North Carolina's anti-stalking statute is that its imprecise language makes it void for vagueness under Article 1, Section 19 of the North Carolina Constitution[42] and under the Due Process Clause of the Fourteenth Amendment to the United States Constitu-

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36. Seventeen states require a credible threat. *See, e.g.*, ALA. CODE § 13A-6-90 (Supp. 1992); CAL. PENAL CODE § 646.9 (West Supp. 1993); COLO. REV. STAT. § 18-9-111 (Supp. 1992); ILL. ANN. STAT. ch. 720, para. 5/12-7.3 (Smith-Hurd 1992); IOWA CODE ANN. § 708.11 (West Supp. 1993); LA. REV. STAT. ANN. § 14:40.2 (West Supp. 1993); NEB. REV. STAT. § 28-311.02 (Supp. 1992); OKLA. STAT. ANN. tit. 21, § 1173 (West Supp. 1993); R.I. GEN. LAWS § 11-59-2 (Supp. 1992); S.C. CODE ANN. § 16-3-1070 (Law. Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. § 22-19A-1 (Supp. 1992); TENN. CODE ANN. § 39-17-315 (Supp. 1992); UTAH CODE ANN. § 76-5-106.5 (Supp. 1992).

In Florida and Michigan, a misdemeanor does not require a threat, whereas a felony violation does. FLA. STAT. ANN. ch. 784.048 (West Supp. 1993); 1992 Mich. Pub. Acts 261.

Four states criminalize "follow or harass" *or* "credible threat." *See, e.g.*, DEL. CODE ANN. tit. 11, § 1312A (Supp. 1992); 1992 Miss. Laws 532; 1992 N.J. Sess. Law Serv. 209 (West); and W. VA. CODE § 61-2-9a (1992).

37. CAL. PENAL CODE § 646.9 (West Supp. 1993).

38. *See supra* notes 21-23 and accompanying text.

39. See *infra* notes 42-130 and accompanying text for a discussion of the void-for-vagueness doctrine and its application to North Carolina's statute. For an in-depth analysis of the void-for-vagueness doctrine, see Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). For a general discussion of the void-for-vagueness analysis, see WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 2.3, at 92-94 (2d ed. 1986).

40. See *infra* notes 131-35 and accompanying text for a discussion of the statute's deterrence value.

41. See *infra* notes 136-42 and accompanying text for a discussion of possible administrative problems with the law.

42. "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. CONST. art. I, § 19.

The term "law of the land," as used in the North Carolina Constitution, is synonymous with "due process" as used in the federal constitution. G.I. Surplus Stores, Inc. v. Hunter, 257 N.C. 206, 209, 125 S.E.2d 764, 767 (1962).

tion.[43] The void-for-vagueness doctrine is premised on the idea that fair notice should be given to the public as to what conduct is forbidden by the statute, and that arbitrary and discriminatory enforcement should be prevented.[44] Thus, to satisfy the void-for-vagueness doctrine, a statute must (1) allow a reasonable degree of certainty in applying the law; and (2) provide fair notice to those of ordinary intelligence of what conduct is illegal.[45]

In *In re Burrus*,[46] the North Carolina Supreme Court stated: "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."[47] Unclear statutory language has been upheld, though, "when the subject matter would not allow more exactness and when greater specificity would interfere with practical administration."[48] "[I]mpossible standards of statutory clarity are not required by the [North Carolina] constitution. When the language of a statute . . . prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met."[49]

Because all of the anti-stalking statutes were recently enacted, there are no published cases specifically challenging their constitutionality.[50]

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43. "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

44. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

45. Ricks v. District of Columbia, 414 F.2d 1097, 1101 (D.C. Cir. 1968).

46. 275 N.C. 517, 169 S.E.2d 879 (1969), *aff'd*, 403 U.S. 528, 551 (1971).

47. *Id.* at 531, 169 S.E.2d at 888 (quoting Cramp v. Board of Pub. Instruction, 368 U.S. 278, 287 (1961)). With regard to statutory construction, the North Carolina Supreme Court has held:

> [A]s was said in State v. Partlow [91 N.C. 550, 552 (1884)] "It is plainly the duty of the court to so construe a statute, ambiguous in its meaning, as to give effect to the legislative intent, if this be practicable." It is also well established that this Court will not adjudge an act of the General Assembly unconstitutional unless it is clearly so. Where a statute is susceptible of two interpretations, one of which will render it constitutional and the other will render it unconstitutional, the former will be adopted.

In re Moore, 289 N.C. 95, 106, 221 S.E.2d 307, 314 (1976) (quoting Hobbs. v. Moore County, 267 N.C. 665, 671, 149 S.E.2d 1, 5 (1966) (citations omitted)).

48. LAFAVE & SCOTT, *supra* note 39, at 95.

49. *Moore*, 289 N.C. at 107, 221 S.E.2d at 314-15 (citations omitted).

50. In 1992 the United States Congress enacted legislation requiring the National Institute of Justice to research the topic of stalking and to prepare a constitutionally sound model statute for states. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 102-395, § 109 (b), 106 Stat. 1842 (1992). Senator William S. Cohen introduced the bill that eventually could lead to the passage of federal legislation to prohibit stalking. Seth Schiesel, *Federal Measure Would Bar Stalking*, BOSTON

Despite the lack of case law directly on point, guidance for determining the validity of North Carolina's statute may be found by applying a plain meaning analysis[51] to the statute and by analogizing the statute to other statutes that have been challenged as void-for-vaguness in the North Carolina courts[52] and the United States Supreme Court.[53]

A void-for-vagueness challenge to the North Carolina anti-stalking statute could focus on several terms that are not statutorily defined. The passages that could be challenged include: "*follows* or is in the presence of another person *without legal purpose*";[54] "after *reasonable warning* or

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GLOBE, July 2, 1992, at 5. Senator Cohen drafted the bill to address concerns that state laws against stalking are either "overly restrictive or not strong enough." *Id.*

At least one unpublished case involved a challenge to the constitutionality of California's anti-stalking statute, CAL. PENAL CODE § 646.9 (West Supp. 1993). Defendant's Motion to Dismiss, California v. Casillas, Santa Clara County Sup. Ct. (Sept. 1992) (No. 157559) [hereinafter Casillas Motion]. In his constitutional challenge, the defendant argued that the law had the effect of improperly criminalizing speech; that the statute failed under the overbreadth doctrine; and that the terms "harass" and "repeatedly," along with the phrase "course of conduct" failed under a void-for-vagueness challenge. Casillas Motion, *supra* at 12, 23. The court decided the case on the sufficiency of the evidence, however, and did not reach the constitutional issues. Letter from Barbara B. Fargo, Deputy Public Defender of Santa Clara County, California, to Kristin Jackson, Paralegal in the Mecklenburg County, North Carolina, Public Defender's Office 1 (Dec. 15, 1992) (on file with the recipient).

51. A plain meaning interpretation requires looking first to the actual language of the statute. Reves v. Ernst & Young, 113 S. Ct. 1163, 1169 (1993). "[T]he words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing . . . ." Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404, 413 (1945). However, the plain meaning rule is not absolute; the legislative intent must be considered along with the literal meaning of the words. *Id.* "If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' " *Reves*, 113 S. Ct. at 1169 (citations omitted).

52. Some examples of North Carolina cases considering the void-for-vagueness doctrine include: State v. Rose, 312 N.C. 441, 444-45, 323 S.E.2d 339, 341 (1984) (upholding the constitutionality of N.C.G.S. § 20-138.1(a)(2), which criminalized impaired driving when one has a blood alcohol concentration of .10 or more); *In re* Clark, 303 N.C. 592, 603, 281 S.E.2d 47, 55 (1981) (ruling that the terms in North Carolina General Statutes § 7A-289, permitting the termination of parental rights in circumstances where the child was in custody of the Department of Social Services and the parent had failed to pay a *reasonable portion* of the cost of care for the child, were brief and plain in their meaning and therefore constitutionally sound); State v. Worthington, 89 N.C. App. 88, 89, 365 S.E.2d 317, 319, *dismissal allowed and temporary stay denied*, 322 N.C. 115, 367 S.E.2d 134 (1988) (holding that statute which criminalized failure to decrease speed to avoid an accident was not unconstitutionally vague); State v. Evans, 73 N.C. App. 214, 217, 326 S.E.2d 303, 306 (1985) (finding that "loitering" under the prostitution statute was not unconstitutionally vague or overbroad); Ellis v. Ellis, 68 N.C. App. 634, 635-36, 315 S.E.2d 526, 527 (1984) (holding that the equitable distribution statute was not unconstitutionally vague).

53. Vagrancy laws have frequently been challenged as void for vagueness. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Ricks v. District of Columbia, 414 F.2d 1097, 1102 (D.C. Cir. 1968).

54. § 14-277.3(a) (emphasis added).

request to desist";[55] and "acts constitute a *pattern of conduct* over a period of time evidencing a *continuity of purpose*."[56] Analysis under relevant case law and comparison to statutes of other states, however, indicates that the passages should survive a constitutional challenge.

The first questionable phrase in the North Carolina statute is "follows or is in the presence of another person without legal purpose."[57] The term "follows" could be considered ambiguous because "there is no indication as to how far, or how often, or in what context such a following is prohibited."[58] When the language of the statute is considered as a whole, however, the scope of the statute's coverage is narrowed considerably[59] by the requirements that the "following" must be "without legal purpose"[60] and with the "intent to cause emotional distress by placing that person in reasonable fear of death or bodily injury."[61] With the intent requirement, "mere following would not be the basis for a conviction without some evidence that the following was done as part of an intentional scheme to harm the victim."[62]

The other portion of the phrase, "without legal purpose,"[63] could also be challenged as vague. Under a plain meaning analysis,[64] "legal" is defined as "required or permitted by law,"[65] and "purpose" means "an end, intention, or aim, object, plan, project."[66] In *Ricks v. District of Columbia*,[67] the District of Columbia Circuit Court of Appeals, in considering the legitimacy of a vagrancy law, struck down the phrase "wanders without any visible or lawful business" as unconstitutionally vague.[68] The *Ricks* court held that "[t]he proscription against wandering [had] no built-in criteria whatever for ascertainment of the kind or degree of movement prohibited."[69] The additional requirement that the

55. § 14-277.3(a)(2) (emphasis added).
56. § 14-277.3(a)(3) (emphasis added).
57. § 14-277.3(a).
58. Thomas, *supra* note 26, at 9.
59. *Id.*
60. § 14-277.3(a).
61. § 14-277.3(a)(1).
62. Thomas, *supra* note 26, at 9.
63. § 14-277.3(a).
64. See *supra* note 51 for an explanation of the plain meaning analysis.
65. BLACK'S LAW DICTIONARY 892 (6th ed. 1990).
66. *Id.* at 1236.
67. 414 F.2d 1097 (D.C. Cir. 1968). The statute at issue in *Ricks* was a vagrancy law that made it criminal for any person to "wander about the streets at late or unusual hours of the night without any visible or lawful business and not giving a good account of himself." *Id.* at 1100.
68. *Id.* at 1107.
69. *Id.*

wandering be "without visible or lawful business" did not clarify the statute because it enabled law enforcement officers to make an "unassisted judgment as to whether the purpose is 'proper.' "[70] The court labelled this a grant of "unfettered discretion . . . to regulate movement on the public streets" that was, therefore, impermissible.[71] The clause at issue in *Ricks*, however, is distinguishable from the phrase "follows or is in the presence of another person without legal purpose" in North Carolina's statute. In addition to the literal difference in the language, the overall context of the statute in *Ricks* was different from the one at issue because an intent requirement was missing in *Ricks*, and the statute had inadequate criteria for determining when the wandering was illegal.[72] In *Ricks*, the only criteria listed was "without visible or lawful purpose." Under the statute in *Ricks*, a person could be arrested for merely strolling down the street if he did not give "a good account" of himself such that the arresting officer thought he had a "lawful purpose" for wandering. In contrast, the North Carolina anti-stalking statute provides extensive criteria for determining when following is illegal, and has an intent requirement.[73] The phrase "without legal purpose," as used in North Carolina's statute, acts as an additional restriction limiting the scope of behavior that can be criminalized as "stalking," whereas the phrase used in *Ricks* constituted the only limitation on wandering and, in effect, gave the police more, rather than less, discretion.

Some North Carolina cases are also useful in analyzing the constitutionality of section 14-277.3. The North Carolina Court of Appeals in *State v. Strickland*[74] considered the constitutionality of a "disorderly conduct" statute, that defined "disorderly conduct" generally as "a public disturbance."[75] The court upheld the definition because other subsections of the statute provided specific examples of disorderly conduct.[76] The court explained, "It is a rule of construction, that when words of general import are used, and immediately following and relating to the same subject words of a particular or restricted import are found, the

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70. *Id.*

71. *Id.*

72. *Id.* at 1100.

73. Following is not criminal unless it is (1) done repeatedly; (2) without legal purpose; (3) with the intent to cause emotional distress by placing that person in reasonable fear of death or bodily injury; (4) after reasonable warning or request to desist; and (5) the acts constitute a pattern of conduct over time evidencing a continuity of purpose. § 14-277.3.

74. 27 N.C. App. 40, 217 S.E.2d 758 (1975).

75. *Id.* at 43, 217 S.E.2d at 760. The court was considering the validity of N.C. GEN. STAT. § 14-288.4(a)(4) (1973).

76. *Strickland*, 27 N.C. App. at 43, 217 S.E.2d at 760.

latter shall operate to limit and restrict the former."[77] Like the phrase "disorderly conduct," the word "follows"[78] has a general meaning, but the subsections that come after it restrict its usage such that any vagueness in the term is diminished.

The second phrase of the anti-stalking statute, "reasonable warning or request to desist,"[79] may also be challenged as vague. For example, must the "reasonable warning" be given on every occasion a person is followed, or is one initial warning from the victim sufficient?[80] What *kind* of warning is reasonable enough to satisfy the statute?[81] Under the plain meaning rule,[82] "reasonable" is considered "[f]air, proper, just, moderate, suitable under the circumstances."[83] A "warning" is "[a] pointing out of danger."[84] "Request to desist" could easily be interpreted as simply asking someone to stop.[85] Aside from the anti-stalking statute, there are no criminal statutes in North Carolina that use the phrase "reasonable warning," nor are there any North Carolina criminal cases that have considered the phrase.

Although the phrase has not been considered in the criminal context, a look at its usage in other areas of North Carolina law sheds some light on its possible interpretation in the stalking context. The phrase "reasonable warning" has been considered in general negligence cases and also in determining the meaning of an "act of God." In *C.C.T. Equipment Company v. Hertz Corp.*,[86] the North Carolina Supreme Court discussed the duty of a contractor to exercise ordinary care and to provide reasonable warnings and safeguards against existing conditions.[87] With regard to the warning, the court stated:

> Actual notice of every special obstruction or defect in a . . . highway is not required to be given to a traveler, nor need the way be so barricaded as to preclude all possibility of injury, but it is sufficient if a plain warning of danger is given, and the

77. *Id.* (citations omitted).

78. See *supra* notes 57-62 and accompanying text for a discussion of the term "follows."

79. § 14-277.3(a)(2).

80. Defendant's Motion to Dismiss due to Unconstitutionally Vague and Overbroad Statute, State v. Harrelson (unfiled motion, on file with the author) [hereinafter Motion]. The defendant did not have the opportunity to present his motion to the court, since the case was dismissed for other reasons. *See* Heimberger, *supra* note 8, at 2B.

81. Heimberger, *supra* note 8, at 2B.

82. See *supra* note 51 for an explanation of the plain meaning rule.

83. BLACK'S LAW DICTIONARY 1265 (6th ed. 1990).

84. *Id.* at 1584.

85. "Request" means "to ask for something." *Id.* at 1304. To "desist" means "to stop"; "to cease to proceed or act." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 344 (1984).

86. 256 N.C. 277, 123 S.E.2d 802 (1962).

87. *Id.* at 284, 123 S.E.2d at 808.

> traveler has notice or knowledge of facts sufficient to put him on inquiry.[88]

Likewise, a North Carolina appellate court decision considering the issue stated that "[t]he test of the sufficiency of the warning . . . is whether the means employed, whatever they may be, are reasonably sufficient for the purpose."[89]

North Carolina courts have also used the phrase in considering the meaning of an "act of God." In *Lea Company v. North Carolina Board of Transportation*,[90] the supreme court defined an "act of God" as an "[event] in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them."[91] From prior use of the phrase in North Carolina, it appears that relatively little is required to constitute a "reasonable warning." As long as the stalker "has notice or knowledge of facts sufficient to put him on inquiry"[92] that his behavior is placing the victim in reasonable fear of bodily injury, and that, if continued, his acts will be considered criminal, arguably he has received "reasonable warning." Thus, this phrase should pass constitutional muster.

A third phrase of the anti-stalking statute that may be challenged as unconstitutionally vague is "the acts constitute a pattern of conduct over a period of time evidencing a continuity of purpose."[93] This requirement has been criticized as the "most indefinite and cryptic part of the statute."[94] "For instance, how many 'acts' evince a 'pattern of conduct' and in what time period must these 'acts' occur as contemplated by the subsection? Are two acts over two years enough to violate the statute? Furthermore, what forms a 'continuity of purpose'?"[95] The language "pattern of conduct" and "course of conduct" is used by many other states in their anti-stalking statutes, but the terms are no more explicitly defined than they are in North Carolina's statute.

North Carolina courts have used the phrase "pattern of conduct" synonymously with "systematic plan" in evidentiary questions considering the admissibility of prior acts to show proof of motive, opportunity,

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88. *Id.* (citations omitted).

89. Huss v. Thomas, 12 N.C. App. 692, 693, 184 S.E.2d 381, 382 (1971) (citations omitted).

90. 308 N.C. 603, 304 S.E.2d 164 (1983).

91. *Id.* at 615, 304 S.E.2d at 173 (quoting Midgett v. Highway Comm'n, 260 N.C. 241, 247, 132 S.E.2d 599, 606 (1963)).

92. C.C.T. Equip. Co. v. Hertz. Corp., 256 N.C. 277, 294, 123 S.E.2d 802, 808 (1962).

93. § 14-277.3(a)(3).

94. Motion, *supra* note 80.

95. *Id.*

intent, preparation, or plan.[96] In discussing whether the acts revealed an ongoing plan, the North Carolina Court of Appeals has stated that "the ultimate test for determining whether . . . evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial."[97] In considering the period of time involved, the court stated:

> While a lapse of time between instances of sexual misconduct slowly erodes the commonality between acts and makes the probability of an ongoing plan more tenuous, the continuous execution of similar acts throughout a period of time has the opposite effect. When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan.[98]

Examination of New York's harassment legislation may be helpful in analyzing the meaning and vagueness of North Carolina's statute. The phrase "course of conduct," as used in New York's harassment statute, is defined as:

> [M]ore than an isolated verbal or physical act. It is a pattern of conduct composed of same or similar acts repeated over a period of time, however short, which establishes a continuity of purpose in the mind of the actor. Thus, "The Boy Who Cried Wolf" persisted in a "course of conduct." So, too, would one who repeatedly dials a telephone number, only to hang up when it is answered.[99]

Thus, it appears that in order to establish a "pattern of conduct," the acts

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96. *See* State v. Shamsid-Deen, 324 N.C. 437, 447, 379 S.E.2d 842, 848 (1989); State v. Moore, 103 N.C. App. 87, 98, 404 S.E.2d 695, 701 (1991); State v. Goforth, 59 N.C. App. 504, 506, 297 S.E.2d 128, 129 (1982), *rev'd and remanded for resentencing on other grounds*, 307 N.C. 699, 307 S.E.2d 162 (1983).

97. *Moore*, 103 N.C. App. at 97, 404 S.E.2d at 701 (1991) (quoting State v. Roberson, 93 N.C. App. 83, 85, 376 S.E.2d 486, 487, *disc. rev. denied*, 324 N.C. 435, 379 S.E.2d 247 (1989)).

98. *Id.* at 97, 98, 404 S.E.2d at 701 (quoting State v. Shamsid-Deen, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989)).

99. People v. Hotchkiss, 59 Misc. 2d 823, 824-25, 300 N.Y.S.2d 405, 407 (1969). The court was examining N.Y. PENAL LAW § 240.25(5) (1965), which provided that "[a] person is guilty of harassment when, with intent to harass, annoy or alarm another person . . . [h]e engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose." *Id.* The court cited extra-jurisdictional decisions to support its definition. *Id.* (citing Aetna Casualty & Sur. Co. v. Industrial Comm'r, 127 Colo. 225, 229, 255 P.2d 961, 963 (1953) (stating that "to come within the classification of 'course of conduct,' it must be shown that such conduct is such a continuous practice as to constitute a regular course of conduct. An occasional instance . . . does not establish such a custom . . . ."); Warkentin v. Kleinwachter, 166 Okla. 218, 221, 27 P.2d 160, 164 (1933) (maintaining that a course of conduct cannot be shown by one particular transaction); Dyer v. Dyer, 166 Pa. Super. 520, 522-23, 72 A.2d 605, 606 (1950) (requiring an element of continuity).

must be the same or "sufficiently similar" over some period of time. This standard does not appear to be so vague that it could not be understood and applied by people of ordinary intelligence.

Like North Carolina, other states have not defined "continuity of purpose" in their anti-stalking statutes.[100] The failure to define "continuity of purpose" expressly may indicate that the legislatures viewed the phrase as clear on its face. Other sources define "continuity" as "uninterrupted connection, succession, or union";[101] and "purpose" is defined as "an end, intention, or aim, object, plan, project."[102] No other North Carolina statute uses the phrase "continuity of purpose." With respect to interpreting wills, a California case[103] described "continuity of purpose" as indicating "a settled intent or consistent state of mind."[104] Applying these principles to a stalking situation is relatively straightforward. Once a "pattern of conduct" exists, if those acts are in furtherance of a common goal, then a "continuity of purpose" exists and this prong of the test is satisfied.

A key factor under the void-for-vagueness analysis is whether the terms are sufficiently clear to be understood by people of ordinary intelligence. In *Burrus*,[105] the defendants argued that the terms "delinquent," "unruly," "wayward," "misdirected," and "disobedient"[106] were void for vagueness.[107] The North Carolina Supreme Court disagreed and relied upon language in *State v. Wiggins*:[108] "It is difficult to believe that the defendants are as mystified as to the meaning of these ordinary English words as . . . they profess to be in their brief. Clearly, they have grossly underestimated the powers of comprehension possessed by men of 'com-

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100. *See, e.g.*, DEL. CODE ANN. tit. 11, § 1312A (Supp. 1992); N.Y. PENAL CODE § 646.9 (West Supp. 1993).

101. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 284 (1984).

102. BLACK'S LAW DICTIONARY 1236 (6th ed. 1990).

103. *In re* Hart's Estate, 107 Cal. App. 2d 60, 67, 236 P.2d 884, 889 (1951).

104. *Id.*

105. *In re* Burrus, 275 N.C. 517, 531, 169 S.E.2d 879, 888 (1971).

106. These terms were used in N.C. GEN. STAT. § 7A-277, *repealed by* 1979 N.C. Sess. Laws 815 § 1, which treated delinquent children as wards of the state and not as criminals. *Id.* The challenged statutory language gave the state exclusive jurisdiction in all cases involving

> a child less than sixteen years of age residing in . . . their respective districts: (1) Who is delinquent or who violates any . . . State law . . . or who is truant, unruly, wayward, or misdirected, or who is disobedient to parents or beyond their control, or who is in danger of becoming so. . . .

Id.

107. *Burrus*, 275 N.C. at 531, 169 S.E.2d at 888.

108. 272 N.C. 147, 160, 158 S.E.2d 37, 47 (1967), *cert. denied*, 390 U.S. 1028 (1968). The court in *State v. Wiggins* upheld a statute prohibiting picketing in front of a school because such picketing disturbs classes. *Burrus*, 275 N.C. at 532, 169 S.E.2d at 888.

mon intelligence.' "[109]

To further bolster its decision, the *Burrus* court cited the United States Supreme Court decision in *Kovacs v. Cooper*.[110] In *Kovacs*, the Court upheld the constitutionality of an ordinance forbidding the use of sound trucks emitting a "loud and raucous" sound.[111] With regard to the terms "loud and raucous," the Court noted that "[w]hile these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden."[112] Finally, the *Burrus* court looked at the definition of "delinquent child" and concluded that "[t]his seems clear enough."[113] "The Supreme Court has recognized that '. . . words inevitably contain germs of uncertainty and . . . there may be disputes about the meaning of such terms . . . ,' but has reiterated that if they can be sufficiently understood and complied with, the statute will be upheld."[114] Like the language considered in *Burrus* and *Kovacs*,[115] the statutory terms at issue in North Carolina's anti-stalking statute,[116] while abstract, have developed, through daily usage, a meaning that people of ordinary intelligence could sufficiently understand.

Although the terms are sufficiently clear to be understood by people of ordinary intelligence, the statute may be more strictly scrutinized if it infringes upon First Amendment freedoms.[117] The First Amendment right arguably affected by the anti-stalking statute is the individual's freedom of movement. Freedom of movement was discussed by the United States Supreme Court in *Kent v. Dulles*.[118] In *Kent*, the Court stated that the freedom of movement is "deeply engrained in our history,"[119] and is "basic in our scheme of values."[120] In addition, the Court declared: "Our nation has thrived on the principle that, *outside areas of plainly harmful conduct*, every American is left to shape his own life as he thinks

109. *Burrus*, 275 N.C. at 532, 169 S.E.2d at 888.

110. *Id.* (citing Kovacs v. Cooper, 336 U.S. 77 (1949)).

111. *Kovacs*, 336 U.S. at 79, 89.

112. *Id.* at 79.

113. *Burrus*, 275 N.C. at 533, 169 S.E.2d at 889.

114. *In re* Moore, 289 N.C. 95, 107, 221 S.E.2d 307, 315 (1976) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973)).

115. See *supra* notes 105-14 and accompanying text for a discussion of the terms considered in *Burrus* and *Kovacs*.

116. See *supra* notes 54-56 and accompanying text for a discussion of the ambiguous terms in North Carolina's statute.

117. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.9, at 951 (4th ed. 1991).

118. 357 U.S. 116, 125 (1958).

119. *Id.* at 126.

120. *Id.*

best, do what he pleases, *go where he pleases.*"[121] Further, the Court stated that freedom of travel is an important aspect of the citizen's "liberty" which cannot be taken away without the due process of law.[122] "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue . . . ."[123]

Under *Kent*, it appears that a statute which interferes with an individual's freedom of movement would be found unconstitutional unless it also prevents "plainly harmful conduct."[124] Arresting someone for merely following another person would therefore be unconstitutional. North Carolina's statute, however, has been drafted such that freedom of movement is only curtailed when "plainly harmful conduct" is involved. Under the statute, movement itself is not criminal.[125] Rather, the criminal offense occurs only when a person's movement is accompanied by the intent to place another person in reasonable fear of death or serious bodily injury.[126] In addition, a warning is required before someone can be charged with the crime of stalking.[127] Finally, the addition of the disclaimer "without legal purpose"[128] clearly indicates that any constitutionally protected activity, such as freedom of movement or speech, is not contemplated as falling within the purview of the statute.

Arguably, the statute does include some vague terms,[129] and, as a result, may be challenged at the first opportunity. Under a plain meaning analysis, however, the terms appear sufficiently narrow to survive a constitutional challenge, and infringe upon no basic constitutional freedoms.[130] Further, the statute does not lend itself to arbitrary enforcement. If the North Carolina Supreme Court does invalidate the statute, the North Carolina legislature will probably respond with a more carefully drafted and constitutionally sound law because of the apparent necessity for and public approval of the anti-stalking measures.

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121. *Id.* (quoting Zechariah Chafee, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 197 (1956)) (emphasis added).

122. *Id.* at 125, 127.

123. Aptheker v. Secretary of State, 378 U.S. 500, 506 n.5 (1964) (quoting Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954)).

124. *See supra* notes 118-123 and accompanying text (describing the freedom of movement).

125. § 14-277.3.

126. See *supra* note 7 for the text of the statute.

127. See *supra* note 7 for the text of the statute.

128. See *supra* note 7 for the text of the statute.

129. See *supra* notes 42-116 and accompanying text.

130. See *supra* notes 117-28 and accompanying text.

In addition to its possible constitutional infirmities, the law's deterrent value is questionable. Research on stalking reveals that a high percentage of stalkers suffer from some form of mental disorder and may not be deterred by legal sanctions.[131] Therefore, criminalizing their behavior may not solve the problem.[132] In addition, evidence indicates that whether stalkers are mentally ill or merely obsessed, they usually strike again.[133] Also, the relatively light sentences imposed by North Carolina's anti-stalking statute lessen the statute's deterrent effect.[134] The North Carolina State Attorney General's office has noted that the law "needs more teeth."[135]

Aside from the questionable deterrence value of the statute, there are administrative problems with enforcing the law. One obstacle is that some law enforcement officers and some members of the judicial system do not take the crime seriously.[136] Stalking is an old problem that has just recently captured the attention of lawmakers.[137] " 'To deal with the

131. A study by the Los Angeles Police Department's Threat Management Unit, the first stalking unit in the country, suggests that between 60 and 70% of stalking suspects suffer from mental illness. Pendergrast & Scott, *supra* note 24, at 1Y. Some of the mental disorders stalkers suffer from include schizophrenia, delusions, narcissism, and erotomania. *Id.*

132. Dr. Park Dietz, a California forensic psychiatrist who studied stalking behavior for the United States Justice Department for seven years, is working with the Los Angeles police department analyzing ways to stop this behavior. *Id.* Possible methods include mental health counseling, restraining orders, and a combination of measures. *Id.* However, "mental health experts aren't even certain that treatment can stop stalkers. Their best advice for victims: Move." *Id.* For helpful guidelines for victims of stalking, contact the National Victim Center at 1-800-FYI-CALL. For additional information regarding self-protection from stalkers, see Pendergrast & Scott, *supra* note 24, at 1Y; Levenson & Mcbreen, *supra* note 5, at A1.

133. The first two defendants charged with stalking in Lancaster and York Counties in South Carolina pleaded guilty, were sentenced to probation, and were released from jail. Pendergrast & Scott, *supra* note 24, at 1Y. Both subsequently have been accused of stalking again. *Id.* In a study of 200 stalking cases conducted for the U.S. Justice Department, researchers found that only one in 200 stalkers abided by a court order and stayed away from the victim. *Id.*

134. See *supra* note 7 for the text of North Carolina's statute.

135. Scott Sexton, *Some Legal Officials Question the Statute's Potential Impact*, HIGH POINT ENTERPRISE, Jan. 24, 1993, at D1 [hereinafter *Legal Officials*].

136. "Improved public safety under stalking laws will depend on the degree to which all components of the criminal justice system and the public regard domestic violence and violence against women as serious and lethal problems." Legislative Report, *supra* note 15, at 3.

After Florida's anti-stalking statute was passed, the Osceola County Sheriff's Office adopted a policy of not arresting stalking suspects until they made *violent* threats. Levenson & Mcbreen, *supra* note 5, at A1. This policy was changed after the murder of Sharon Henderson on January 7, 1993—nine days after she filed a stalking complaint against the man charged with killing her. *Id.* Because Sharon's stalker had not made a *violent* threat against her, police had not contacted or arrested him. *Id.*

137. "[For years] women have been complaining to the police; they just haven't gotten any attention." Joanne Furio, *Can New State Laws Stop the Stalker?*, Ms., Jan./Feb. 1993, at 90, 91 (quoting Phil Gutis, spokesman for the American Civil Liberties Union) (alteration in origi-

problem effectively, we've got to change attitudes in the criminal justice system . . . .' "[138] If it is not taken seriously, an anti-stalking law is just "another piece of paper."[139] Further, the elements of the law may be difficult for prosecutors to prove.[140] Fear or lack of cooperation from the victims is yet another obstacle many prosecutors will face.[141] Additionally, some fear that the stalking laws may lead to false accusations by jilted lovers.[142]

Whether North Carolina's anti-stalking law actually will deter crime, the publicity surrounding its enactment has, at the very least, raised awareness about women's concerns, particularly the plight of domestic violence victims.[143] "As long as there was neither a name for it nor a legal remedy, stalking remained a largely hidden phenomenon, of concern only to the families involved and to those who ran shelters for victimized women."[144]

North Carolina General Statutes section 14-277.3 has been narrowly written to provide protection for victims without infringing upon individuals' mobility rights. Furthermore, its terms are sufficiently clear to be

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nal). "It's not new; its [sic] just got a new name." Davis, *supra* note 23, at B1 (quoting Cheryl Tyiska, Director of Victim Services for the National Organization for Victim Assistance in Washington, D.C.).

138. Furio, *supra* note 137, at 91 (quoting Phil Gutis).

139. *Id.* (quoting Phil Gutis).

140. *Legal Officials, supra* note 135, at D1; Gary Wireman, *To Hold Up in Court, Evidence Must Show Fears Are Founded,* CHARLOTTE OBSERVER, Oct. 4, 1992, at 4.

> Prosecutors, for instance, must prove that the stalker's actions are causing victims to fear for their safety — and that will be tricky if no threats have been made, says UNC-Chapel Hill criminologist Charles Warren. "What if it's just a creepy-looking guy that follows a good-looking girl?" Warren says. "Do you arrest that creepy-looking guy even if he hasn't communicated a threat?"

Id.

141. *See Legal Officials, supra* note 135, at D1; *Stopping the Stalker, supra* note 22, at 10D;

142. Gera-Lind Kolarik, *Stalking Laws Proliferate, But Critics Say Constitutional Flaws Abound,* A.B.A. J., Nov. 1992, at 35, 36. There is at least one known case of a Florida woman inventing a story about being stalked. The woman told police that someone was leaving threatening notes on her car, and that she was being followed. Levenson & Mcbreen, *supra* note 5, at A1. She later admitted that she had made up the story to get attention. *Id.*

143. Some women's rights advocates view anti-stalking laws as "part of the evolution of law to reflect women's concerns." Lewin, *supra* note 6, at A12.

> "Over the last 25 years, with the advent of the women's movement, we have begun the process of reshaping the law in ways that are more responsive to women's experience, of giving things names and defining them as part of a cultural pattern, rather than dismissing them as individual problems," said Elizabeth Schneider, who teaches at Brooklyn Law School. "That's what happened with sexual harassment, with battering and now with stalking."

Id.

144. *Id.* at A1.

understood and applied by people of ordinary intelligence. Because there may be no way to prevent the recurrence of all stalking incidents, or to "cure" those who stalk, the statute has questionable deterrence value. Nevertheless, the mere declaration of stalking as a criminal offense is a public recognition of the plight of stalking victims and is a significant step in the right direction.

MELISSA PERRELL PHIPPS

CRIMINAL LAW—IMPERFECT SELF-DEFENSE—*STATE V. MCAVOY*, 331 N.C. 583, 417 S.E.2d 489 (1992)

Defendant A, angry over an argument he had with Victim, waits for Victim to come out of his apartment, then shoots and kills him. Defendant B, in an argument with Victim, believes she sees Victim reach for a gun in his pocket. Acting hastily and unreasonably, Defendant B pulls out her own gun and shoots Victim in the belief that it is necessary to save her own life. Should a criminal justice system treat these two defendants as equally culpable? Defendant A acts out of vengeance and confronts Victim with the sole purpose of killing him. Defendant B, although not acting with due care and reason, has an honest belief that it is necessary to kill Victim in self-defense. In North Carolina these two defendants are equally blameworthy.

In *State v. McAvoy*[1] the North Carolina Supreme Court held that an honest but unreasonable belief in the necessity for self-defense will not reduce murder to manslaughter.[2] The *McAvoy* court confronted two lines of North Carolina Supreme Court cases concerning an honest but unreasonable belief in the necessity of deadly force: one group establishing that an honest belief (even though unreasonable) negated the element of malice required for murder; the other group holding that a genuine belief alone is insufficient for mitigation.[3] Disapproving of the contrary holdings in the former group, the court reasserted its faith in the "long line of well-reasoned decisions" establishing that a defendant's belief in the need for lethal self-defense has no mitigating effect, unless it is also a reasonable one.[4] This reasonableness requirement applies regardless of whether the defendant seeks complete exoneration ("perfect" self-defense) or mere reduction of the murder charge to manslaughter ("imperfect" self-defense).

On September 7, 1988, Steven McAvoy shot and killed Gary Gray after a heated argument in a Greensboro, North Carolina bar.[5] McAvoy

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1. 331 N.C. 583, 417 S.E.2d 489 (1992).

2. *Id.* at 601, 417 S.E.2d at 500-01.

3. *Id.* at 596-601, 417 S.E.2d at 497-501.

4. *Id.* at 601, 417 S.E.2d at 500.

5. *Id.* at 587-89, 417 S.E.2d at 492-93. On the night of the shooting, McAvoy was bartending when Gray entered the club. *Id.* at 587, 415 S.E.2d at 492. Gray told two witnesses he believed his wife and the defendant were "seeing each other." *Id.* When McAvoy went to a storage room behind the bar, Gray followed him and they exchanged words. *Id.* Although there were conflicting accounts at the trial as to what happened next, there was testimony that the defendant pulled out his gun, Gray slapped at it and then yelled, "Shoot me. Go ahead shoot me." *Id.* McAvoy then shot Gray in the head; Gray died five days later. *Id.*

claimed that he believed Gray was going to shoot him and he acted in self-defense.[6] McAvoy was convicted of first degree murder and sentenced to life imprisonment.[7] First degree murder is a killing committed with malice,[8] premeditation, and deliberation.[9] Voluntary manslaughter, on the other hand, is an unlawful killing without malice, premeditation, or deliberation.[10] Voluntary manslaughter usually occurs when a killing results from "heat of passion" or when the defendant is the aggressor or uses excessive force in self-defense.[11]

On appeal,[12] the defense argued that the trial court had made inconsistent statements in its instructions to the jury regarding the principles of self-defense. According to the North Carolina Supreme Court, the presence of four elements establishes a proper showing[13] of self-defense:

(1) it appeared to defendant and he believed it to be necessary

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6. *Id.* at 588, 417 S.E.2d at 493. The defendant testified that while in the storage room, Gray accused him of having a relationship with his wife and threatened to kill him. *Id.* McAvoy noticed Gray had a weapon at his side that looked like a pearl-handled pistol in a holster. *Id.* After McAvoy stepped out of the storage room, Gray went to the other side of the bar and yelled several times to him, "Shoot me or I'm going to kill you." *Id.* After McAvoy pulled out his gun, Gray reached back to his holster to grab what McAvoy believed to be a pistol, and McAvoy then shot Gray. *Id.* Gray, who was a carpet installer, was wearing a belt holster containing a double-edged razor blade. *Id.*

7. *Id.* at 587, 417 S.E.2d at 492.

8. Malice is "that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification, or to wantonly act in such a manner as to manifest depravity of mind, a heart devoid of social duty, and a callous disregard for human life." State v. Crawford, 329 N.C. 466, 481, 406 S.E.2d 579, 587 (1991); State v. Reynolds, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982). The use of a deadly weapon gives rise to a permissible inference of malice. State v. Turner, 330 N.C. 249, 262, 410 S.E.2d 847, 855 (1991); State v. Weeks, 322 N.C. 152, 172, 367 S.E.2d 895, 907 (1988).

9. *See* N.C. GEN. STAT. § 14-17 (1992); *see, e.g.*, State v. Franklin, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990); State v. Woodward, 324 N.C. 227, 230-31, 376 S.E.2d 753, 755 (1989).

> Premeditation means that the defendant formed the specific intent to kill, for some length of time, however short . . . . Deliberation means that the intent to kill was executed in a cool state of blood, without legal provocation, and in furtherance of a fixed design for revenge or to accomplish some unlawful purpose.

State v. Cummings, 323 N.C. 181, 188, 372 S.E.2d 541, 547 (1988).

10. *See* State v. Barts, 316 N.C. 666, 691, 343 S.E.2d 828, 845 (1986).

11. *See id.* In order to invoke the heat of passion defense, however, there must be "adequate and reasonable" provocation. State v. Forrest, 321 N.C. 186, 192, 362 S.E.2d 252, 256 (1987).

12. A sentence of life imprisonment entitles the defendant to an appeal as of right. N.C. GEN. STAT. § 7A-27(a) (1989).

13. The defendant has the burden of production to show the requisite elements of self-defense. When the burden is met, the State then carries the burden of disproving the elements beyond a reasonable doubt. *See, e.g.*, State v. Boone, 299 N.C. 681, 687, 263 S.E.2d 758, 761 (1980).

> to kill the deceased in order to save himself from death or great bodily harm; and
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
> (3) defendant was not the aggressor in bringing on the affray, and
> (4) defendant did not use excessive force.[14]

A "perfect" right of self-defense, or complete exoneration, exists when all four elements are present.[15] An "imperfect" right of self-defense arises when less than all four elements exist, and murder is mitigated to voluntary manslaughter.[16] The issue before the court in *McAvoy* was whether a defendant could claim the imperfect right as long as he had a genuine belief in the need for deadly force (element 1), regardless of whether he satisfied the reasonableness prong (element 2).[17]

The defendant claimed that there were two inconsistent lines of cases in North Carolina regarding the necessity of reasonableness (element 2) for a showing of self-defense. In one line of cases, if the defendant had an honest (element 1) and reasonable (element 2) belief in the need to use force to defend himself, but was the aggressor (element 3) or used excessive force (element 4), he has an imperfect right of self-defense.[18] In other words, the first two elements are threshold requirements for *any* claim of self-defense. The defendant contended that in another line of cases the court has treated the reasonableness prong (element 2) as equivalent to the excessive force element (element 4).[19] Thus, the defense argued, the trial court should have instructed the jury to return a verdict of voluntary manslaughter if it found that the defendant honestly believed in the need for deadly force but was unreasonable in his

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14. *McAvoy*, 331 N.C. at 595, 417 S.E.2d at 497 (citing State v. Norris, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981)).

15. *See id.* at 595-96, 417 S.E.2d at 497; State v. Bush, 307 N.C. 152, 158, 297 S.E.2d 563, 568 (1982).

16. *See McAvoy*, 331 N.C. at 596, 417 S.E.2d at 497; *Bush*, 307 N.C. at 159, 297 S.E.2d at 568.

17. Previously, the court has suggested some of the circumstances that the jury should consider in assessing the reasonableness of the defendant's belief: "the size, age, and strength of defendant's assailant in relation to that of defendant; the fierceness or persistence of the assault upon defendant; whether the assailant had or appeared to have a weapon in his possession; and the reputation of the assailant for danger and violence." State v. Clay, 297 N.C. 555, 563, 256 S.E.2d 176, 182 (1979). The jury should also take the number of assailants into consideration. State v. Pearson, 288 N.C. 34, 40, 215 S.E.2d 598, 603 (1975).

18. *McAvoy*, 331 N.C. at 596, 417 S.E.2d at 497; Defendant-Appellant's Brief at 40, *McAvoy* (No. 27A90); *see infra* notes 32-37 and accompanying text.

19. *McAvoy*, 331 N.C. at 596, 417 S.E.2d at 497; Defendant Appellant's Brief at 40, *McAvoy* (No. 27A90); *see infra* notes 38-41 and accompanying text.

determination.[20] In essence, because unreasonable belief had been merged into the concept of excessive force, it was no longer a threshold requirement under the second line of cases. Similarly, because they were legally equivalent elements, the State's proof of unreasonableness and the State's proof of excessive force should not result in different verdicts (murder versus voluntary manslaughter).[21] The defense asked the court to reconsider its first line of cases and, "in accord with sound moral analysis and well-considered decisions" by other jurisdictions, hold that the presence of a genuine but unreasonable belief in the necessity of self-defense reduces murder to voluntary manslaughter.[22]

The supreme court acknowledged that two of its opinions, *State v. Jones*[23] and *State v. Thomas*,[24] were consistent with the defendant's position.[25] In *Jones*, the court held that a "defendant who honestly believes that he must use deadly force to repel an attack but whose belief is . . . unreasonable . . . has by definition, used excessive force."[26] The court in *Thomas* required the judge to instruct the jury that an honest but unreasonable belief in the necessity of deadly force would reduce murder to manslaughter.[27] Despite this precedent, the *McAvoy* court held that the absence of a reasonable belief would result in a verdict of murder, whereas the use of excessive force would permit mitigation to manslaughter.[28]

In 1922 in *State v. Thomas*,[29] the North Carolina Supreme Court confronted the issue of first degree murder defendants who are not completely blameworthy and established that an honest belief by the slayer, even though "made hastily and without due care," would not absolve the

20. The trial court instructed the jury that the defendant should be excused if all four elements of self-defense were met but would be guilty of manslaughter if he were the initial aggressor or used excessive force. Record, Court's Charge at 11-12, 19, *McAvoy* (No. 27A90).

21. *McAvoy*, 331 N.C. at 597, 417 S.E.2d at 498.

22. Defendant-Appellant's Brief at 42-43, *McAvoy* (No. 27A90). One state court has lamented the "trend on the part of the defense bar to invoke this esoteric doctrine with inappropriate and promiscuous frequency." Cunningham v. State, 58 Md. App. 249, 253, 473 A.2d 40, 42 (1983).

23. 299 N.C. 103, 261 S.E2d 1 (1980).

24. 184 N.C. 757, 114 S.E. 838 (1922).

25. *McAvoy*, 331 N.C. at 597, 417 S.E.2d at 498. In addition, the court distinguished State v. Clay, 297 N.C. 555, 256 S.E.2d 176 (1979), and State v. Woods, 278 N.C. 210, 179 S.E.2d 358 (1971), also cited by the defendant, by explaining that these cases did not directly address the issue of an honest but unreasonable belief. *Id.* at 600-01, 417 S.E.2d at 500.

26. *McAvoy*, 331 N.C. at 598, 417 S.E.2d at 498-99 (quoting *Jones*, 299 N.C. at 113, 261 S.E.2d at 8)).

27. *Id.* at 601, 417 S.E.2d at 500 (citing *Thomas*, 184 N.C. at 762, 114 S.E. at 837)).

28. *Id.*

29. 184 N.C. 757, 114 S.E. 834 (1922).

defendant of responsibility, but could affect his culpability.[30] The court explained:

> Certainly fright or terror will not excuse the unnecessary taking of human life when there is no reasonable ground for apprehending death or enormous bodily harm, but in connection with other circumstances, it may serve to repel the inference of malice arising from the intentional killing with a deadly weapon, and to mitigate or reduce the homicide from murder in the second degree or manslaughter.[31]

After *Thomas*, however, North Carolina case law diverged in its treatment of imperfect self-defense.

One line of cases held that both an honest and a reasonable belief were threshold requirements for a claim of perfect or imperfect self-defense. In *State v. Potter*,[32] the court, synthesizing some of the prior cases involving self-defense, established the four-part test for perfect self-defense, which evolved into the test used in *McAvoy*.[33] The court held that an accused is guilty of manslaughter, not murder, when he is the aggressor and is otherwise entitled to a claim of self-defense.[34] In *State v. Norris*,[35] the court clarified the *Potter* approach and held that the trial judge had erred in requiring a finding of all four elements.[36] Rather, the right to an instruction on self-defense was established when the first two elements of the four-part test (an honest belief and a reasonable belief) were satisfied.[37]

As the defendant in *McAvoy* observed,[38] however, there is a second line of post-*Thomas* cases indicating that a defendant can claim the right to imperfect self-defense if he acts unreasonably as long as he actually believes in the necessity of deadly force. These decisions suggest that an honest but unreasonable belief is the legal equivalent of excessive force and that a showing of either one should reduce murder to manslaughter. A leading case in this line is *State v. Woods*.[39] In *Woods*, the trial court instructed the jury that imperfect self-defense was available where exces-

30. *Id.* at 761-62, 114 S.E. at 836-37 (quoting Allison v. State, 74 Ark. 444, 453, 86 S.W. 404, 413 (1904)).

31. *Id.* at 761, 114 S.E. at 836.

32. 295 N.C. 126, 244 S.E.2d 397 (1978).

33. *Id.* at 143-44, 244 S.E.2d at 408; *see supra* note 14 and accompanying text.

34. *Potter*, 295 N.C. at 144, 244 S.E.2d at 408-09.

35. 303 N.C. 526, 279 S.E.2d 570 (1981).

36. *Id.* at 531, 279 S.E.2d at 573.

37. *Id.* at 531-32, 279 S.E.2d at 573-74. The court reaffirmed this formula in State v. Bush, 307 N.C. 152, 158-61, 297 S.E.2d 563, 568-69 (1982).

38. *McAvoy*, 331 N.C. at 596-601, 417 S.E.2d at 497-501.

39. 278 N.C. 210, 179 S.E.2d 358 (1971).

sive force was used in shooting the deceased, but the defendant reasonably believed deadly force was necessary.[40] The court held that the charge "obviously . . . incorporates contradictions" because if the defendant had reasonable grounds to use deadly force, then the shooting could not be legally excessive.[41]

The *McAvoy* court conceded that the cases were irreconcilable and endorsed the line of cases requiring a reasonable belief for both perfect and imperfect self-defense.[42] The conclusory dismissal of the *Wood* line of decisions in *McAvoy*, however, failed to provide a distinction between an unreasonable belief in the need to use deadly force and the use of excessive force. Excessive force is the use of "*more force than was necessary* or reasonably appeared to [the defendant] to be necessary under the circumstances *to protect himself from death or great bodily harm.*"[43] Reasonableness depends on whether it appeared "*necessary to kill* the deceased in order *to save himself from death or great bodily harm.*"[44]

From the perspective of the defendant who is trying to raise a self-defense claim, these two elements create a false dichotomy. As the second line of decisions illustrates, if a defendant has the reasonable belief that it is "necessary to kill," then it is impossible for him to use excessive force when he commits the killing. Conversely, if the defendant is unreasonable in her determination that deadly force is necessary, then the use of lethal force must have been excessive because it was "more than necessary." The reason for the incongruency is that excessive force is defined only in terms of whether the defendant's response was appropriate in a situation where another is using deadly force against him.[45]

As the defendant in *McAvoy* contended, if the tests for reasonableness and excessive force are the same, it is internally inconsistent to find a

40. *Id.* at 217, 179 S.E.2d at 363.

41. *Id.* For other cases following this line of reasoning, see State v. Clay, 297 N.C. 555, 563, 256 S.E.2d 176, 182 (1979) (holding that an assault by the victim would justify the use of deadly self-defense only if there was a reasonable belief that the killing was necessary to protect the accused from death or great bodily harm) and State v. Jones, 299 N.C. 103, 112, 261 S.E.2d 1, 8 (1980) (holding that the reasonable belief and excessive force elements of the self-defense formula had effectively merged).

42. *McAvoy*, 331 N.C. at 601, 417 S.E.2d at 500.

43. *Id.* at 595, 417 S.E.2d at 497 (emphasis added); *see also* State v. Pearson, 288 N.C. 34, 39-42, 215 S.E.2d 598, 602-04 (1975); State v. Gladden, 279 N.C. 566, 571, 184 S.E.2d 249, 253 (1971).

44. *McAvoy*, 331 N.C. at 595, 417 S.E.2d at 497 (emphasis added).

45. *See, e.g.*, State v. Benge, 272 N.C. 261, 264, 158 S.E.2d 70, 72 (1967) (holding that defendant's continued shooting of his assailant was "disproportionate to the force it [was] intended to repel" when it became unnecessary for his self-defense); State v. Keeter, 206 N.C. 482, 483, 174 S.E. 298, 298 (1934) (holding that the defendant used excessive force in shooting the deceased when he had no belief that his life was in danger).

person guilty of murder if the reasonableness element was not met, but find him guilty of manslaughter if excessive force was used. In its rejection of the *Woods* line of decisions, the *McAvoy* court essentially eliminated the excessive force test.[46] Substantively, the excessive force test becomes unnecessary because by the time the jury considers it, it has already determined under the reasonableness prong (element 2) whether there was a reasonably apparent necessity to kill the deceased.

In addition, the *McAvoy* court failed to explain how an honest belief in the need to use deadly force in self-defense and a finding of malice are not mutually exclusive. Malice is the element of evil intent in the act of homicide and has been defined as:

> "[N]ot only hatred, ill-will, or spite . . . but . . . also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." . . . Circumstances immediately connected with the killing by defendant, the viciousness and depravity of his acts and conduct attending the killing, are evidence of malice.[47]

Thus, malice reflects conduct with a primary purpose "deliberately bent on mischief."[48] The actor who kills out of a belief in the need for self-defense, in contrast, is motivated primarily by the goal of self-preservation. However, because the intentional use of a deadly weapon raises a permissive inference of malice in North Carolina,[49] only provocation or imperfect self-defense can properly rebut its existence when a deadly weapon is used.[50] Thus, unless the defendant's belief in the need for self-defense is reasonable, the effect of an honest belief is essentially irrelevant to the jury's consideration of malice.[51]

Other jurisdictions have found that an honest belief in the need for deadly force cannot coexist with a finding of malice.[52] Some courts have

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46. Notably, the case that established the four-part formula used in *McAvoy* cited *Woods* for "defining what is meant by" excessive force. *See* State v. Potter, 295 N.C. 126, 143, 244 S.E.2d 397, 408 (1978).

47. State v. Fleming, 296 N.C. 559, 562-63, 251 S.E.2d 430, 432 (1979) (quoting State v. Moore, 275 N.C. 198, 206, 166 S.E.2d 652, 657 (1969)).

48. State v. Allen, 77 N.C. App. 142, 145, 334 S.E.2d 410, 412 (1985) (quoting State v. Wrenn, 279 N.C. 676, 686-87, 185 S.E.2d 129, 135 (1971) (Sharp, J., dissenting)).

49. *See supra* note 8.

50. *See* State v. Turner, 330 N.C. 249, 262-63, 410 S.E.2d 847, 855 (1991); *Fleming*, 296 N.C. at 563-64, 251 S.E.2d at 433.

51. "If the jury is *permitted* to infer malice from the assault and any other circumstances, it will certainly do so." William S. Geimer, *The Law of Homicide in North Carolina: Brand New Cart Before Tired Old Horse*, 19 WAKE FOREST L. REV. 331, 367-69 (1983).

52. *See, e.g.*, People v. Flannel, 160 Cal. Rptr. 84, 90, 25 Cal. 3d 668, 680, 603 P.2d 1, 7 (1979) (by judicial decision); People v. Lockett, 82 Ill. 2d 546, 549-50, 413 N.E.2d 378, 380 (Ill. 1980) (by statute); State v. Faulkner, 301 Md. 482, 500, 483 A.2d 759, 769 (Md. App.

apparently allowed fear to be considered a type of "passion," and thus have essentially equated unreasonable self-defense with the heat of passion provocation to mitigate murder to manslaughter.[53] Other courts, claiming the "analytically sound view," contend that it is illogical not to find that a defendant with an honest belief "lacks the requisite *mens rea* for the offense of murder."[54]

Allowing mitigation for a sincere but unreasonable belief is also consistent with the theoretical bases underlying self-defense. Although the actor is not completely blameless in his unreasonable actions and society has some interest in punishing him, he is not as culpable as the defendant who kills his victim out of motive or cold-bloodedness.[55] Mitigation would recognize the unique state of mind of the defendant who believed he was fighting for his life.[56]

The court in *McAvoy* declared unambiguously that both perfect and imperfect self-defense require that the actor be reasonable in his belief in the necessity for lethal force. In so doing, the court omitted an explanation of how a defendant can be reasonable in his belief that deadly force is necessary, but simultaneously use excessive force in the act. More significantly, the court declined the opportunity to re-examine the doctrine of imperfect self-defense in North Carolina in the context of a bona fide

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1984) (by judicial decision); People v. Colandro, 80 A. 571, 574-75 (Pa. 1911) (by judicial decision); State v. Ross, 211 N.W.2d 827, 830-31 (Wis. 1973) (by statute).

The *Model Penal Code* also justifies the use of self-defense when the actor has an honest belief that it is necessary, without the requirement of reasonableness. MODEL PENAL CODE § 3.04 (1985). The defendant could then be convicted of either negligent homicide or reckless manslaughter depending on the extent his belief deviated from the standard of care. *Id.* § 3.09(2). This approach is based on the belief that a negligent actor should not be convicted for an offense that requires a purposeful intent. *Id.*

53. *See, e.g., Colandro*, 80 A. at 574-75 ("[B]oth court and counsel appear to have overlooked the fact that under some circumstances a passion of fear would have the same effect in reducing the crime to manslaughter as a passion arising upon sudden 'heat of blood.' ").

54. *Faulkner*, 301 Md. 482, 490, 483 A.2d at 763, 769.

55. This treatment revives the distinction between justified and excused killings. A justification defense is defined by "objectively determinable external circumstances that render otherwise criminal acts acceptable." Cathryn J. Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 18 (1986). In the balance of alternatives, society actually encourages the justified act because the defendant has committed the less harmful act. *Id.* at 18-21; Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM L. & CRIMINOLOGY, 421, 452-55 (1982). Excused conduct, on the other hand, focuses on the subjective perceptions of the actor instead of the objective circumstances surrounding the act. Dressler, *supra*, at 446-67; Rosen, *supra*, at 22-24. Although society does not approve of the act itself, it refuses to punish the actor because some other force compelled him to act, and he is thus less morally responsible. Rosen, *supra*, at 22-24.

56. Presumably, this is why one authority has called this the "more humane view." WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 5.7 at 463 (2d ed. 1986).

belief to allow mitigation from murder to manslaughter. The result for future defendants is that their honest belief in the need for lethal self-defense at the time of the killing must also be a reasonable one as determined by the jurors in the courtroom.

DOUGLAS M. JARRELL

"You've Come a Long Way, Smokers":* North Carolina Preserves the Employee's Right to Smoke Off the Job in General Statutes Section 95-28.2

In the editorial cartoon,[1] a balding, obviously self-conscious man stands smoking a cigarette in an area marked "Official Smoking Section U.S.A." The punch line is that the delineated section is a square barely large enough for even one person to stand inside it—a square located in the center of a desolate, massive desert. Many American smokers share similar sentiments as legislators pass laws restricting their right to smoke in public areas,[2] public facilities,[3] and the private workplace.[4] Perhaps smokers' greatest fear is that smoking restrictions will effectively cross the threshold of the home, in the form of employment discrimination based on off-the-job[5] smoking.

Most employers who regulate employee smoking either restrict smokers to designated areas[6] or prohibit employee smoking on the employer's premises during work hours.[7] In fact, the number of employers who refuse to hire smokers solely on the basis of their off-duty smoking habits remains quite low.[8] Nevertheless, a few state legislatures have

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* This quotation refers to "You've Come A Long Way, Baby," Philip Morris, Inc.'s famous slogan for Virginia Slims cigarettes. *See, e.g.*, GLAMOUR, Feb. 1993, at 86.

1. Bob Gorrell, Editorial Cartoon, RICHMOND NEWS LEADER, Feb. 13, 1990.

2. At least 41 states (as well as the District of Columbia) have statutes that restrict smoking in public places. *See, e.g.*, ALASKA STAT. §§ 18.35.300-.365 (1991). For a comprehensive list of these state laws, see Donna S. Stroud, *When Two "Rights" Make a Wrong: The Protection of Nonsmokers' Rights in the Workplace*, 11 CAMPBELL L. REV. 339, 349 n.67 (1989).

3. *See, e.g.*, FLA. STAT. ANN. §§ 386.201-.211 (West 1986 & Supp. 1993) ("public places" and "public meetings"); OR. REV. STAT. §§ 243.345-.350 (1991) ("places of state employment").

4. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-40q (West Supp. 1993); FLA. STAT. ANN. § 386.205(3) (West Supp. 1993).

5. Throughout this Note, the phrase "off-the-job smoking" refers to smoking off-duty and off the employer's premises.

6. A majority of employers responding to a 1987 survey confined smoking to designated areas. Dale Feuer, *Workplace Issues: Testing, Training and Policy*, TRAINING, Oct. 1987, at 66, 72.

7. Only 11% of employers participating in a 1987 study banned smoking in the workplace. Feuer, *supra* note 6, at 72. In another survey, only 6% of employers with smoking policies (out of the 239 surveyed) banned all workplace smoking. BUREAU OF NAT'L AFFAIRS, INC., WHERE THERE'S SMOKE: PROBLEMS AND POLICIES CONCERNING SMOKING IN THE WORKPLACE 14 (1986) [hereinafter WHERE THERE'S SMOKE].

8. Fewer than 4% of respondents to a 1987 survey refused to hire smokers. Feuer, *supra* note 6, at 72. Another study found that 1% of employers hired only nonsmokers, while 5% had a nonsmoker preference in hiring. Jimmy Goh, Comment, *"Smokers Need Not Apply": Challenging Employment Discrimination Against Smokers Under the Americans with Disabilities Act*, 39 KAN. L. REV. 817, 817 & n.6 (1991). As of 1986, about 40 major employers—

sought to protect smokers' rights by passing statutes prohibiting employment discrimination based on smoking habits. These statutes vary in scope and focus. Some simply require employers to consider the needs of smokers (as well as those of nonsmokers) when drafting or implementing company policies.[9] Other state statutes prohibit employers from refusing to hire potential employees or from discriminating against present employees because of their off-the-job smoking.[10] The recently enacted North Carolina General Statutes section 95-28.2 falls into the latter category of laws preserving smokers' rights.[11]

Section 95-28.2 generally[12] outlaws discrimination against prospective or current employees on the basis of their "lawful use of lawful products" during non-working hours and off the employer's premises, so long as the "lawful use" does not "adversely affect" the employee's job per-

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primarily police and fire departments, health care providers, and insurance companies—had a policy of not hiring smokers. WHERE THERE'S SMOKE, *supra* note 7, at 137. These employers included the Manville Corporation, which employed 8,000 people, and the USG Acoustical Products Company, which employed 1,500 people. Mark A. Rothstein, *Refusing to Employ Smokers: Good Public Health or Bad Public Policy?*, 62 NOTRE DAME L. REV. 940, 952 (1987).

9. ARK. CODE ANN. § 25-1-102(b) (Michie 1992); R.I. GEN. LAWS §§ 23-20.7-3(b)(1), 23-20-7-5(1) (1989).

10. ARIZ. REV. STAT. ANN. § 36-601.02(F) (Supp. 1992); COLO. REV. STAT. § 24-34-402.5 (Supp. 1992); ILL. ANN. STAT. ch. 48, para. 2855 (Smith-Hurd Supp. 1992); LA. REV. STAT. ANN. § 23:966 (West Supp. 1993); NEV. REV. STAT. ANN. § 613.333 (Michie 1992); N.J. STAT. ANN. § 34:6B-1 (West Supp. 1992); N.M. STAT. ANN. § 50-11-3 (Michie Supp. 1992); N.D. CENT. CODE §§ 14-02.4-01, -02, -08 (1991); OKLA. STAT. ANN. tit. 40, § 500 (West Supp. 1993); R.I. GEN. LAWS § 23-20.7.1-1 (Supp. 1992); S.C. CODE ANN. § 41-1-85 (Law. Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. § 60-4-11 (Supp. 1992) (prohibits termination of employment only); TENN. CODE ANN. § 50-1-304(d) (1991); VA. CODE ANN. § 15.1-29.18 (Michie 1989); W. VA. CODE § 21-3-19 (Supp. 1992); WIS. STAT. ANN. § 111.321-.322 (West 1988 & Supp. 1992). Some of these statutes specifically refer to smokers, while others protect more general privacy rights of employees. *See infra* notes 100-08 and accompanying text.

11. N.C. GEN. STAT. § 95-28.2 (Supp. 1992) (effective October 1, 1992). The legislature enacted the statute on July 24, 1992. Act of July 24, 1992, 1991 N.C. Sess. Laws 1023.

12. Some discriminatory activities are specifically excluded from coverage under the statute. An employer may restrict its employees' off-duty "lawful" activity if (1) there is a bona fide reason for the restriction and it is reasonably related to the employment, or (2) the restriction relates to the fundamental objectives of the organization. § 95-28.2(c)(1), (2). The employer may also, without pain of suit under § 95-28.2, discipline an employee for failure to comply with a substance abuse or related program. § 95-28.2(c)(3). See *infra* notes 38-40, 145-55 and accompanying text for detailed discussions of these "exclusions." Furthermore, the statute permits employers to treat some employees (i.e., those who lawfully use lawful products) differently from others for purposes of health, disability, or life insurance rates and benefits, so long as the disparate treatment meets a three-prong test: (1) the differing treatment is actuarially justified, (2) the employer gives the employee written notice of the differential rates, and (3) the employer contributes an equal amount to the carrier of each employee's insurance. § 95-28.2(d). See *infra* notes 41-44, 179-83 and accompanying text for further discussion of the insurance exception.

formance, her ability to do her job, or the safety of other employees.[13] Thus, the protections of the new statute are not limited to smokers. Although section 95-28.2 contains broad language and many exceptions, it is most appropriately characterized as a smokers' rights statute.[14]

This Note first presents the language of section 95-28.2 in detail.[15] Next, the Note examines the legal context surrounding the General Assembly's enactment of section 95-28.2, including North Carolina common-law remedies for employment discrimination to which off-the-job smokers might have turned prior to the passage of section 95-28.2.[16] The Note also investigates federal remedies that might have been (or now may be) available to off-the-job smokers[17] and scrutinizes pro-smoker legislation in other states.[18] The Note then analyzes the likely interpretation of critical portions of section 95-28.2, noting the legislative history and intent of the statute.[19] Finally, this Note evaluates the significance of section 95-28.2 for employers and for employees. The Note discusses the effect that the statute will have on employers' hiring and management practices and suggests ways employers can protect themselves from liability under section 95-28.2.[20] The Note then explains how section 95-28.2 benefits employees, who previously had virtually no state remedies for this form of employment discrimination.[21]

Section 95-28.2 is organized into five parts: (1) the applicability provision,[22] (2) the prohibition,[23] (3) exclusions from the prohibition,[24] (4) the insurance exception,[25] and (5) the remedies provisions.[26] The first

13. § 95-28.2(b).

14. The new statute is a smokers' rights statute because the most obvious application of the "lawful use of lawful products" language is to the smoking employee. *See infra* notes 120, 129-30 and accompanying text. Moreover, the statute contains language similar or identical to other state statutes protecting smokers' rights in the workplace. *See infra* notes 103-108 and accompanying text.

15. *See infra* notes 27-50 and accompanying text.

16. *See infra* notes 55-59 and accompanying text.

17. *See infra* notes 62-76 and accompanying text.

18. *See infra* notes 100-08 and accompanying text. This portion of the Note outlines the development of the anti-smoking movement, *see infra* notes 85-90 and accompanying text; the enactment of anti-smoker legislation, *see infra* notes 91-98 and accompanying text; and the reaction of smokers as embodied in state legislation, *see infra* notes 100-03 and accompanying text.

19. *See infra* notes 112-61 and accompanying text.

20. *See infra* notes 162-83 and accompanying text.

21. *See infra* notes 184-95 and accompanying text.

22. § 95-28.2(a).

23. § 95-28.2(b).

24. § 95-28.2(c).

25. § 95-28.2(d).

26. § 95-28.2(e)-(f).

part of section 95-28.2—the applicability provision—identifies which employers may be sued for violations of its terms.[27] The word "employer," for purposes of section 95-28.2, refers to private employers with at least three "regularly employed employees,"[28] the state of North Carolina and its "political subdivisions," and all public or "quasi-public"[29] corporations, commissions, councils, bureaus, and boards.[30]

The heart of the statute—the prohibition[31]—contains three essential elements. The first element relates to the employer's actions; for the wronged party to have a valid claim, the employer must, for reasons prohibited by the statute, either fail to hire a prospective employee or discriminate against a current employee "with respect to [the employee's] compensation" or the "terms, conditions, or privileges" of the em-

27. The full text of the applicability provision reads: "As used in this section, 'employer' means the State and all political subdivisions of the State, public and quasi-public corporations, boards, bureaus, commissions, councils, and private employers with three or more regularly employed employees." § 95-28.2(a).

28. *Id.* The statute does not explain whether the phrase "regularly employed employees" refers only to full-time employees, or to part-time employees as well. Furthermore, the term "employee" is not defined. It is unclear whether the statute could refer to volunteers or paid members of boards of directors; because the statute prohibits discrimination with respect to "compensation" of employees, perhaps the statute contemplates that only paid employees fall within its protections. § 95-28.2(b); *see infra* note 126 and accompanying text.

29. Quasi-public "corporations" include "railroads, incorporated turnpike or toll roads, bridge companies, and the like, and also those corporations which[,] while having at times and to some extent powers appertaining to government[,] are in fact and in truth business corporations for the purpose principally of promoting private interests." Watts v. Lenoir & Blowing Rock Turnpike Co., 181 N.C. 129, 135, 106 S.E. 497, 500 (1921). Other examples of quasi-public entities include "street railways, telegraph, telephone or electric power or light companies," and water suppliers for public institutions. N.C. GEN. STAT. § 6-22(3) (1986).

30. § 95-28.2(a). Subsection (a) appears to divide the covered "employers" into three categories: the state and its subdivisions, public and quasi-public entities, and private employers with the requisite numbers of employees. If these are three discrete categories, then it follows that the phrase "public and quasi-public" modifies only the words "corporations, boards, bureaus, commissions, [and] councils." Further, it follows that the phrase "three or more regularly employed employees" modifies the words "private employers" but not the preceding words describing "public and quasi-public" entities. *Id.* The language is not entirely clear, however; one might convince a court that public and quasi-public entities are subject to the three-employee requirement, just as private employers are.

31. The full text of the prohibition portion follows:

> It is an unlawful employment practice for an employer to fail or refuse to hire a prospective employee, or discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the prospective employee or the employee engages in or has engaged in the lawful use of lawful products if the activity occurs off the premises of the employer during nonworking hours and does not adversely affect the employee's job performance or the person's ability to properly fulfill the responsibilities of the position in question or the safety of other employees.

§ 95-28.2(b).

ployee's position.[32] The second element of the prohibition addresses the employer's reasons for the foregoing actions; that is, the employer must discriminate against the employee or prospective employee based on the employee's past or current "lawful use of lawful products."[33] The third element of the prohibition carefully qualifies the broad language of the second element. Discrimination based on one's "lawful use of lawful products" is only prohibited if the use (1) takes place off the employer's premises, (2) occurs while the employee is off-duty, and (3) does not "adversely affect" (i) the employee's job performance, (ii) the employee's ability to fulfill his employment responsibilities, or (iii) the safety of other employees.[34] In short, employer discrimination against applicants or employees based on their off-the-job, lawful activities is only actionable under section 95-28.2 when those activities have no negative impact in the workplace.

The third part of section 95-28.2 identifies exclusions from the prohibition: situations in which employer discrimination based on the employee's "lawful use" does not constitute a violation of the statute.[35] The first two exclusions allow employers to "restrict"[36] their employees' lawful, off-the-job activities so long as these restrictions relate to either a "bona fide" requirement of the job or the "fundamental objectives" of the employer's organization.[37] With regard to the exclusion for restrictions

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32. *Id.*

33. *Id.*

34. *Id.*

35. The full text of the exclusions portion of the statute states:

> It is not a violation of this section for an employer to do any of the following:
>
> (1) Restrict the lawful use of lawful products by employees during nonworking hours if the restriction relates to a bona fide occupational requirement and is reasonably related to the employment activities. If the restriction reasonably relates to only a particular employee or group of employees, then the restriction may only lawfully apply to them.
>
> (2) Restrict the lawful use of lawful products by employees during nonworking hours if the restriction relates to the fundamental objectives of the organization.
>
> (3) Discharge, discipline, or take any action against an employee because of the employee's failure to comply with the requirements of the employer's substance abuse prevention program or the recommendations of substance abuse prevention counselors employed or retained by the employer.

§ 95-28.2(c).

36. It would seem logical that the power to "restrict" implies the power to restrict completely—that is, to prohibit. Thus, a covered employer should be able to fire an employee for smoking while away from work for her failure to comply with off-the-job smoking restrictions permitted under part (c) of the statute.

37. § 95-28.2(c)(1)-(2). Notably, one can read this language to mean that employers that meet the criteria of the bona-fide-requirement or fundamental-objectives exclusions are not authorized by the statute to refuse employment to persons based on their lawful, off-duty activities. Instead, the statute merely refers to the ability of those employers to restrict certain off-

based on bona fide job requirements, the statute makes two clear qualifications. First, the employer's restrictions must be reasonably related to the employee's employment activities.[38] Second, an employer may not apply the restriction to all employees of an organization simply because the requirement properly relates to a bona fide job requirement of some of the employees—the restriction is lawful only when applied to the latter workers.[39]

The third exclusion from the prohibition involves employer programs aimed at preventing substance abuse. Employers do not violate section 95-28.2 when they "take any action against an employee" (including firing or disciplining the employee) due to that employee's refusal to comply with the requirements of substance abuse programs or with the recommendations of counselors hired by the employer to deal with substance abuse.[40]

The fourth part of section 95-28.2 provides an exception for distinctions in insurance policies based on employees' off-the-job use of lawful products.[41] As long as they meet the three requirements of the statute's insurance exception,[42] employers may offer or utilize employee life, health, or disability insurance policies that distinguish between employees in type or coverage price, even if these distinctions are based on the employees' "use or nonuse of lawful products."[43] The requirements of the insurance exception are threefold: (1) varying rates must be "actuari-

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duty activities of *current* employees. Thus, unless the statute can be read to imply a power in employers to refuse to hire off-duty users of lawful products in the first place, § 95-28.2 imposes a significant burden on employers by limiting their ability to screen out smoking applicants, even though the employer knows she will have to restrict that employee's off-duty activities. See *infra* notes 167-77 and accompanying text for further discussion of this reading of the statute and the problems it entails. *See also infra* note 142 (construing the adverse-effects provision).

38. § 95-28.2(c)(1).

39. *Id.*

40. § 95-28.2(c)(3).

41. The insurance exception reads:

> This section shall not prohibit an employer from offering, imposing, or having in effect a health, disability, or life insurance policy distinguishing between employees for the type or price of coverage based on the use or nonuse of lawful products if each of the following is met:
>
> (1) Differential rates assessed employees reflect actuarially justified differences in the provision of employee benefits.
>
> (2) The employer provides written notice to employees setting forth the differential rates imposed by insurance carriers.
>
> (3) The employer contributes an equal amount to the insurance carrier on behalf of each employee of the employer.

§ 95-28.2(d).

42. See *infra* text accompanying note 44 for a list of the "requirements" part (d) imposes.

43. § 95-28.2(d).

ally justified," (2) employers must give their employees "written notice" of these varying rates, and (3) employers must contribute "an equal amount" for each employee to insurance carriers.[44]

The fifth and final part of section 95-28.2 consists of its remedial provisions: available remedies, the statute of limitations, and the attorneys' fees clause.[45] Three remedies are available for violations of the statute: (1) damages in the form of "any wages or benefits lost as a result of the violation,[46] (2) remedies of specific performance whereby a prospective employee who was refused employment in violation of section 95-28.2 may obtain a court order requiring the employer to offer him a job,[47] and (3) court-ordered reinstatement "without loss of position, seniority, or benefits" of an employee fired in contravention of the statute.[48] The statute of limitations for a section 95-28.2 action is one year, and it accrues from the date of the employer's "alleged violation."[49] The court also has the option to award "'reasonable costs, including court costs and attorneys' fees," to the prevailing party in a section 95-28.2 suit.[50]

Although section 95-28.2 might be dismissed as yet another manifestation of the power of the tobacco industry in North Carolina,[51] the statute is not at all anomalous. Section 95-28.2 is not the first state rem-

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44. § 95-28.2(d)(1)-(3).

45. The statute reads:

> An employee who is discharged or otherwise discriminated against, or a prospective employee who is denied employment in violation of this section, may bring a civil action within one year from the date of the alleged violation against the employer who violates the provisions of subsection (b) of this section and obtain any of the following:
>
> (1) Any wages or benefits lost as a result of the violation.
>
> (2) An order of reinstatement without loss of position, seniority, or benefits; or
>
> (3) An order directing the employer to offer employment to the prospective employee.

§ 95-28.2(e). The final subpart of the statute provides: "The court may award reasonable costs, including court costs and attorneys' fees, to the prevailing party in an action brought pursuant to this section." § 95-28.2(f).

46. § 95-28.2(e)(1).

47. § 95-28.2(e)(3).

48. § 95-28.2(e)(2).

49. § 95-28.2(e).

50. § 95-28.2(f).

51. North Carolina produces more tobacco than any other state. In 1990, North Carolina produced 640 million pounds of tobacco, 200 million pounds more than Kentucky, the next greatest producer. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 662 (112th ed. 1992) [hereinafter STATISTICAL ABSTRACT]. Due to the significant influence of the tobacco industry in this state, one commentator has argued that legislation favorable to nonsmokers "would be almost impossible to pass" in North Carolina. Stroud, *supra* note 2, at 343.

edy for discrimination based on off-the-job smoking,[52] nor is it the only remedy available to employees in North Carolina for such employment practices.[53] Indeed, as a careful analysis of North Carolina common law, federal remedies, and pro-smoker legislation in other states demonstrates, section 95-28.2 reflects basic principles already recognized in several jurisdictions.

Prior to the enactment of section 95-28.2, employees had no statutory remedy under the laws of North Carolina for discrimination based on their off-the-job smoking.[54] Although North Carolina does not prohibit smoking in public or at work, there were previously no statutes that specifically protected the employee's right to smoke off-duty.

The North Carolina common law also offered little help to smokers, even for employees fired for off-the-job smoking. Under the common law, an employer can fire a worker "at will"—that is, at any time and for any reason—unless the employment contract states otherwise.[55] North Carolina recognizes only one "very limited public policy exception" to the common law rule: the retaliatory termination doctrine.[56] To prove a

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52. *See infra* notes 100-08 and accompanying text.

53. *See infra* notes 55-59 and accompanying text.

54. *Cf. infra* notes 55-59 and accompanying text.

55. "When the duration of employment is not definitely specified, the contract is for an indefinite period, terminable at the will of either party." Mumford v. Hutton & Bourbonnais Co., 47 N.C. App. 440, 443, 267 S.E.2d 511, 513 (1980).

56. Stroud, *supra* note 2, at 351; *see* Sides v. Duke University, 74 N.C. App. 331, 342, 328 S.E.2d 818, 826, *disc. rev. denied*, 314 N.C. 331, 333 S.E.2d 490 (1985). In *Sides*, hospital administrators fired a nurse after she refused to give false testimony on the hospital's behalf in a negligence action brought against it. *Id.* at 333-34, 328 S.E.2d at 821-22. The court held that the employer's right to fire an employee at will does not encompass a right to terminate the employee for a reason that is illegal or against public policy. *Id.* at 342, 328 S.E.2d at 826. Thus, in *Sides*, there was a strong public policy, supported by criminal penalties, against firing someone for her unwillingness to perjure herself. *Id.* at 337-38, 328 S.E.2d at 823.

The court of appeals initially applied the retaliatory termination exception rather conservatively, insisting that the *Sides* rule applied only to perjury cases. *See* Coman v. Thomas Mfg. Co., Inc., 91 N.C. App. 327, 332, 371 S.E.2d 731, 735 (1988) (holding that truck driver allegedly fired for actions complying with federal regulations had no retaliatory discharge claim), *rev'd*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989); Trought v. Richardson, 78 N.C. App. 758, 762, 338 S.E.2d 617, 619 (holding that nurse fired for actions taken to comply with law and hospital regulations had no retaliatory discharge claim), *disc. rev. denied*, 316 N.C. 557, 344 S.E.2d 18 (1986). In *Coman*, however, the North Carolina Supreme Court read *Sides* more broadly. The court adopted *Sides'* language that retaliatory discharge occurs when one is fired for "an unlawful reason or purpose that contravenes public policy." Coman v. Thomas Mfg. Co., Inc., 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989) (quoting *Sides*, 74 N.C. App. at 342, 328 S.E.2d at 826).

The court of appeals continues to resist the state supreme court's liberal reading of *Sides*. The court of appeals has distinguished *Coman* by emphasizing that the "two North Carolina cases which have used public-policy grounds to find exceptions to the at-will doctrine have involved allegations of the employee's being affirmatively instructed to violate the law." McLaughlin v. Barclays Am. Corp., 95 N.C. App. 301, 306, 382 S.E.2d 836, 839-40 (holding that

claim for retaliatory termination, employees must prove causation; that is, they must demonstrate that they suffered "adverse employment action" as a result of their engagement in an activity protected by statute.[57] North Carolina courts have generally applied the retaliatory termination doctrine only when the public policy at issue is expressed very clearly in a statute or regulation.[58] Thus, the only potential common-law remedy in North Carolina for employees fired for off-the-job smoking—the retaliatory termination suit—probably was not available to smokers until section 95-28.2 created protections for off-the-job lawful activities.[59]

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employee fired after defending himself in fight with another worker had no claim for retaliatory discharge), *disc. rev. denied*, 325 N.C. 546, 385 S.E.2d 498 (1989).

57. Sparrow v. Piedmont Health Sys. Agency, Inc., 593 F. Supp. 1107, 1118 (M.D.N.C. 1984).

58. The law in this area is not altogether clear, however. For example, in 1978 the court of appeals held that an employee who was fired after bringing a worker's compensation claim against his employer had no claim for retaliatory termination. Dockery v. Lampart Table Co., 36 N.C. App. 293, 300, 244 S.E.2d 272, 277, *disc. rev. denied*, 295 N.C. 465, 246 S.E.2d 215 (1978). The court reasoned in *Dockery* that the legislature is the appropriate body to deal with these problems. *Id.* at 299-300, 244 S.E.2d at 276-77. The legislature responded to *Dockery* by amending the workers' compensation section of the North Carolina statutes. *See* N.C. GEN. STAT. § 97-6.1 (1991) (repealed 1992). Subsequent case law pointed out that *Sides* "eroded" the *Dockery* decision. Walker v. Westinghouse Elec. Corp., 77 N.C. App. 253, 263, 335 S.E.2d 79, 86 (1985), *disc. rev. denied*, 315 N.C. 597, 341 S.E.2d 39 (1986).

59. A court could conceivably have read the broadly-worded *Sides* rule, as adopted in *Coman*, to permit retaliatory termination suits by smokers. *Sides*, 74 N.C. App. at 342, 328 S.E.2d at 826 (stating that retaliatory discharge occurs when one is fired for "an unlawful reason or purpose that contravenes public policy"); *see supra* note 56. For example, a court could have found that such discrimination violates public policy because it is a substantial invasion of privacy or simply because it punishes an activity that is legal. *Cf.* S.E.T.A. UNC-CH, Inc. v. Huffines, 101 N.C. App. 292, 296, 399 S.E.2d 340, 343 (1991) (recognizing public interest in privacy of names, phone numbers, and addresses contained in applications for approval to use laboratory animals). Under this theory, however, a plaintiff still would have to convince a court that forbidding off-the-job smoking violates *public* policy. A smoking ban affects one's right to do something legal. While public policy may favor preserving such a right, the public policy may nonetheless be less compelling than that favoring the protection of those who comply with a legal mandate such as avoiding perjury. Consequently, the smoker's retaliatory discharge claim would be much harder to win than a situation like *Sides*, where perjury and punishment for compliance with the law were at issue. *See supra* note 56.

Section 95-28.2 is self-enforcing; that is, it contains built-in remedies for violations of its provisions. *See* § 95-28.2(e). Consequently, one need not determine whether it is enforceable under the retaliatory discharge doctrine. Nevertheless, it is interesting to note that by enacting § 95-28.2, the legislature has posed a challenging question to the courts: If legislative enactments generally represent a clear expression of public policy, *see supra* note 58, and if the legislature enacts a statute preserving certain individual rights, should the courts recognize a retaliatory termination cause of action for firings based on the employee's exercise of those rights, even if the common law probably would not have recognized such a claim? For some, the answer to that question is a simple yes. The court, these people argue, should never substitute its own ideas about what constitutes a compelling public policy for the judgment of the ultimate expression of public policy: legislation. Still, others would argue that when the public policy expressed in the statute is not compelling (or does not meet the regular common law test for providing an at-will exception), the court should not hold valid the retaliatory dis-

Federal law may provide another remedial source for employees who smoke. The Tenth Circuit has held that the United States Constitution does not protect a smoker's right to smoke while off duty and on the work premises.[60] The federal courts have not addressed the constitutionality of a smoking ban applied to at-home employee smoking, and the issue defies prediction.[61] Until the constitutional law on that issue is more developed, one can look to federal statutes as the primary remedies for discrimination against smoking employees.

Three federal statutes offer potential relief to persons who suffer employment discrimination based on their off-the-job smoking. One federal law, the National Labor Relations Act (NLRA),[62] has already proven helpful to smoking employees who are unionized. The NLRA prohibits an employer from changing the "terms and conditions of employment" without consulting the workers' union.[63] Courts have held that workplace smoking rules are "terms and conditions of employment";[64] thus, an employer with unionized workers cannot unilaterally impose a new

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charge claim. In such a case, the court should point out that the legislature could have created a remedy for violations of this "public policy" within the new statute itself. Under this theory, the existence of a statute recognizing a "right" continues to be just one element of the retaliatory discharge claim, rather than the only point the court considers. It thus remains to be seen whether the enactment of statutes that recognize certain rights, and that remedy violations of those rights, will cause the courts to apply the retaliatory termination doctrine more liberally or will simply be regarded by the courts as a relatively peripheral issue.

60. *See* Grusendorf v. City of Oklahoma City, 816 F.2d 539, 543 (10th Cir. 1987). In *Grusendorf*, a firefighter trainee brought suit under 42 U.S.C. § 1983 (1988), claiming that the city's termination of his employment, based on his violation of an on- and off-duty smoking ban during the training period, violated his Fourteenth Amendment rights to due process, liberty, property, and privacy. The court disagreed. *Grusendorf*, 816 F.2d at 540. Because the municipal regulation was not irrational (i.e., it promoted good health), and because the plaintiff had not raised an equal protection claim based on the fact that the regulation only applied to trainees, the Tenth Circuit upheld the restriction. *Id.* at 543.

61. "A ban on smoking at home would seem to be more difficult to sustain [than the *Grusendorf* restriction]—if for no other reason than the discovery of the conduct would raise substantial questions under the [F]ourth [A]mendment." Rothstein, *supra* note 8, at 955.

62. 29 U.S.C.A. §§ 151-187 (West 1973 & Supp. 1993).

63. Failure to consult with the union about these employment issues constitutes an unfair labor practice. 29 U.S.C. § 158(d) (1988). The National Labor Relations Board has the power to provide remedies for unfair labor practices. *See* 29 U.S.C.A. § 160 (West 1973 & Supp. 1993).

64. *See, e.g.*, Gallenkamp Stores Co. v. NLRB, 402 F.2d 525, 535 n.4 (9th Cir. 1968); Winter Garden Citrus Prod. Coop. v. NLRB, 238 F.2d 128, 129 (5th Cir. 1956). Unionized employees have won arbitration decisions upholding their right to be consulted before an employer unilaterally imposes smoking policies. Arbiters have found that such policies violated the employees' collective bargaining agreements. *See* Parker Pen U.S.A., Ltd. v. United Rubber, Cork, Linoleum & Plastic Workers Local 633, 90 Lab. Arb. (BNA) 489, 495-96 (1987) (Fleischli, Arb.). An employer's rule is valid only when it is "reasonable" in light of the circumstances and is not discriminatory as applied. *See* Union Sanitary Dist. v. United Pub. Employees Local 390, 79 Lab. Arb. (BNA) 193, 194 (1982) (Koven, Arb.); United Tel. Co. of

policy restricting off-the-job smoking unless the collective bargaining agreement contains a "broad management rights clause."[65]

Union membership in North Carolina is relatively low.[66] Consequently, the NLRA only safeguards the rights of a fairly small portion of the state's smoking workforce. The labor statute is nonetheless important because it is the sole federal remedy that employees have successfully used to protect their smoking rights.

Another federal statute that may prove useful to off-the-job smokers is the Americans With Disabilities Act of 1990 (ADA).[67] The ADA does not prohibit employers from restricting or barring smoking in the workplace;[68] however, if a smoker can demonstrate that he is a disabled individual as defined by the ADA,[69] an employer may not refuse to hire him based on his off-the-job smoking unless the employer can successfully assert one of the ADA's defenses to liability.[70] This legal theory is

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Fla. v. Int'l Brotherhood of Elec. Workers Local 199, 78 Lab. Arb. (BNA) 865, 870 (1982) (Clarke, Arb.).

65. Employers can insert a broad management rights clause permitting them greater discretion over various employment issues. NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 407-08 (1952); *see* John C. Fox, *Smoking in the Workplace: Who Has What Rights?*, 11 CAMPBELL L. REV. 311, 321-22 (1989). Still, no court has found that a management rights clause can encompass the right unilaterally to impose a smoking policy. *See, e.g.*, Commonwealth v. Pennsylvania Labor Relations Bd., 74 Pa. Commw. 1, 11, 459 A.2d 452, 457 (1983); Fox, *supra*, at 322 n.50.

66. In 1984, only 5% of North Carolinians employed in manufacturing were union members; that number had declined to 4.4% by 1989. Nationwide, 23.8% of those employed in manufacturing in 1989 belonged to unions. STATISTICAL ABSTRACT, *supra* note 51, at 421.

67. 42 U.S.C.A. §§ 12101-213 (West 1993).

68. *Id.* § 12201(b).

69. The ADA provides three definitions of "disability": A disabled individual is one who (1) suffers from a "physical or mental impairment that substantially limits one or more" of that person's "major life activities"; (2) has "a record of such an impairment"; or (3) is "regarded as having such an impairment," whether or not the impairment actually exists. *Id.* § 12102(2). The legislative history of the ADA indicates that the term "physical or mental impairment" includes "drug addiction." H.R. REP. No. 485(II), 101st Cong., 2d Sess. 51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 333. Consequently, smoking arguably meets the ADA's first-prong definition of disability. Goh, *supra* note 8, at 827-30. Furthermore, because many people (especially employers) perceive smokers in a negative light, smokers may also pass the ADA's third-prong test of what qualifies as "disabled." *Id.* at 830-32. This "disability" theory might also work for employees who can demonstrate that their alcoholism is a disability. *See id.* at 833-34. As a result, employees who drink alcohol off the job might have both a federal remedy in the ADA and a state remedy in § 95-28.2.

70. Employers can assert two defenses to ADA liability. First, employer discrimination against disabled persons is justified when the discriminatory practice relates to the job, is consistent with a business necessity, and is not avoidable through reasonable accommodation. 42 U.S.C.A. § 12113(a). Since the ADA does not require employers to accommodate on-the-job smoking, *id.* § 12201(b), these employers need show only the other two requirements of the business necessity defense. The second defense to ADA liability is the health and safety defense, which allows employers to discriminate against disabled persons when their disability

promising, if untried.[71] Interestingly, it mirrors the basic principle underlying an employee's claim under North Carolina's section 95-28.2: If an employee's health condition does not adversely affect her performance at work, her employer has no right to penalize her for that condition.[72]

Finally, the Civil Rights Act of 1964 provides a potential anti-discrimination remedy to certain smoking employees. Title VII of the Act provides a claim for persons who experience the "disparate impact" of an employment policy that is facially neutral.[73] When a plaintiff demonstrates that a generally neutral smoking policy has a disproportionately adverse impact on a racial minority to which he belongs, that plaintiff has established a prima facie Title VII case.[74] There is substantial evidence that the percentage of blacks who smoke is greater than the percentage of whites who smoke.[75] Consequently, black employees (and potential employees) might have success raising "disparate impact" claims against employers who do not hire smokers or who restrict their

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"pose[s] a direct threat to the health or safety of other individuals in the workplace." *Id.* § 12113(b). Of course, this defense would not excuse employer discrimination against off-duty smokers. Goh, *supra* note 8, at 836. For a comprehensive discussion of the application of these two defenses to employers who want to impose employee smoking bans, see *id.* at 834-36.

71. As of February 1993, federal courts had decided a few cases interpreting the ADA, but none of those had been brought by smokers asserting that they should be considered "disabled" under the new statute. *See* D'Amico v. New York State Bd. of Law Examiners, 813 F. Supp. 217, 218 (W.D.N.Y. 1993) (holding that board must grant plaintiff with severe visual disability four days to take the state bar, instead of the usual two); Kinney v. Yersusalim, 812 F. Supp. 547, 552 (E.D. Pa. 1993) (holding that city resurfacing street must install curb ramps at the same time); Anderson v. Little League Baseball, Inc., 794 F. Supp. 342, 345 (D. Ariz. 1992) (holding that Little League cannot prohibit a coach in a wheelchair from coaching in the coaching box on the field).

72. *See* § 95-28.2(b). Granted, the use of tobacco products may not always result in an identifiable health condition (such as lung cancer or loss of breath). Often, however, smoking over a period of years causes numerous health "conditions." *See infra* note 89.

73. 42 U.S.C.A. § 2000e-2(k) (West Supp. 1993). According to the "disparate impact" rule, employers may not promulgate a policy that, even though nondiscriminatory on its face, "operate[s] to 'freeze' the status quo of prior discriminatory employment practices." Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). Winning disparate impact claims is no longer as easy as *Griggs* made it sound, however. In these cases, plaintiffs must present no "less evidence than is required to prove intentional discrimination." Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988).

Employees may also have a claim under the "disparate treatment" rule, which holds employers liable for discrimination under the Civil Rights Act if they intend to treat persons differently because of their race, sex, religion, or national origin. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 796 n.4, 800-01 (1973). *But see* Moore v. Inmont Corp., 608 F. Supp. 919, 924-25 (W.D.N.C. 1985) (disallowing claim by a black employee fired for violating a smoking policy that was applied neutrally to all employees).

74. *See McDonnell Douglas*, 411 U.S. at 802.

75. "Studies uniformly report a greater incidence of smoking among blacks." Fox, *supra* note 65, at 324 n.67. In 1988, 32.3% of the black population in the U.S. smoked, while 27.5% of whites smoked. STATISTICAL ABSTRACT, *supra* note 51, at 129.

employees' off-the-job smoking habits.[76]

In sum, a handful of federal statutes may provide the same kinds of protections for off-the-job smokers that section 95-28.2 now offers to North Carolina employees.[77] The dearth of lawsuits that off-the-job smokers have brought under these federal statutes probably reflects the small number of employers who hire only nonsmokers[78] more than it reflects the implausibility of the federal claims. Thus, an attorney who represents smoking employees should monitor closely the development of these federal remedies.

While smoking employees can look to common law and federal statutes for possible remedies for discrimination, state statutes provide more concrete and explicit relief to smokers. Several states have enacted pro-smoker legislation; to understand why, one must begin at the beginning. Americans have been smoking tobacco for centuries.[79] Native Americans smoked tobacco at least as early as 1492,[80] and commercial production of the crop began in 1612.[81] When technological advantages in the 1880s[82] facilitated mass production of cigarettes, annual sales rose from 400 million cigarettes (about eight per person) in 1880 to 2.2 billion cigarettes (about 36 per person) in 1890.[83] Adult per capita cigarette consumption had risen to more than 4000 per annum by the mid-1960s.[84]

Although annual per capita cigarette consumption rose dramatically (with only two exceptions) from 1881 to 1960, that trend hardly reflected a consensus on the acceptability or health effects of smoking. As early as 1604, King James I of England described the habit as "[a] custome lothsome to the eye, hatefull to the Nose, harmefull to the braine, dangerous to the Lungs, and in the blacke stinking fume thereof, neerest resembling the horrible Stigian smoke of the pit that is bottomelesse."[85] Anti-smokers at the turn of the century, after trying unsuccessfully to convince smokers to quit for the sake of their own health, decided to focus on

76. *See* Fox, *supra* note 65, at 324-25; Rothstein, *supra* note 8, at 944-45, 957-58.

77. *See supra* notes 62-76 and accompanying text.

78. For evidence that only a handful of employers hire only nonsmokers, see *supra* note 8 and accompanying text.

79. C. BARR TAYLOR & JOEL D. KILLEN, CONSUMERS UNION, THE FACTS ABOUT SMOKING 4-5 (1991).

80. In 1492, Columbus recorded seeing Native Americans who "drank smoke." *Id.* at 4.

81. *Id.* at 5.

82. The year 1881 saw the invention of a machine that would eventually be able to produce 120,000 cigarettes daily. *Id.* at 6.

83. *Id.*

84. *Id.* at 7 (graph).

85. KING JAMES I OF ENGLAND, A COUNTERBLASTE TO TOBACCO (1604), *reprinted in* ENGLISH REPRINTS, vol. xix, at 99, 112 (Edward Arber ed., 1895).

what they saw as the basic right of nonsmokers: the "right of each person to breathe and enjoy fresh and pure air—air uncontaminated by unhealthful or disagreeable odors and fumes."[86] The anti-smoking movement was so strong before World War I that the tobacco industry had to fight for legislation to make smoking legal.[87]

As early as 1938, and since the Surgeon General's first report in 1964 on the hazards of smoking,[88] study after study has documented the damaging health effects of smoking. Research consistently indicates that smoking is a serious health hazard for both smokers[89] and "passive" smokers (nonsmokers exposed to tobacco smoke).[90] Advocates of the anti-smoking movement have used this scientific evidence to lobby for state legislation that prohibits smoking in public places,[91] public facilities,[92] and the private workplace.[93] Furthermore, a few private employers[94] and at least one state[95] have gone beyond at-work smoking bans by refusing to hire or retain any smoking employees.[96] Normally, these off-

86. TAYLOR & KILLEN, *supra* note 79, at 8 (quoting President of the Non-Smokers' Protective League of America, Letter, N.Y. TIMES, Nov. 10, 1991). See *id.* at 6-10 for an account of early anti-smoking movements.

87. *Id.* at 8.

88. *Id.* at 10-11.

89. Today, more than one of every six American deaths is the result of cigarette smoking. Smoking is responsible for an estimated 30[%] of all cancer deaths, including 87[%] of lung cancer, the leading cause of cancer mortality; 21[%] of deaths from coronary heart disease; 18[%] of stroke deaths; and 82[%] of deaths from chronic obstructive pulmonary disease.

U.S. DEPT. OF HEALTH & HUMAN SERVICES, REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS, REPORT OF THE SURGEON GENERAL 5 (1989) (Fed. Doc. # HE 20.7614:989).

90. The tobacco smoke to which nonsmokers are exposed is alternatively referred to as "environmental tobacco smoke, secondary smoke, involuntary smok[e], or passive smok[e]." Rothstein, *supra* note 8, at 942. For a detailed discussion of the affects of smoking on nonsmokers, see *id.* at 942-44.

91. *See supra* note 2.

92. *See supra* note 3.

93. *See supra* note 4.

94. *See supra* note 8.

95. Massachusetts prohibits some of its public agencies from hiring smoking employees and requires these agencies to fire certain employees who smoke. *See* MASS. ANN. LAWS ch. 22C, § 10 (Law. Co-op. Supp. 1993) (police officers), ch. 27, § 2 (Law. Co-op. Supp. 1993) (correctional officers).

96. In addition to noting the adverse health effects of smoking on the smoker, anti-smokers cite at least four reasons that justify an employer's decision not to employ people who smoke off-duty. The first argument is basic: smoking often adversely affects the employee's ability to do her job as well as a nonsmoking worker. "Smokers are purported to be frequently inattentive and lethargic due to chronic oxygen deprivation. This inattentiveness may translate not only into lost time but low quality of work as well." Goh, *supra* note 8, at 823. Because the employee who smokes misses work more often than the nonsmoker, and consequently is less productive, employers argue that they should have the choice either not to hire

the-job smoking bans apply only to persons for whom good health is an essential employment qualification or on whom society depends for safety and protection. Naturally, employers that typically impose such restrictions are police and fire departments, hospitals, and other health care providers.[97] Other employers have banned off-the-job employee

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smokers or to ban their employees from smoking off-the-job. Chwee Lye Chng, *The Smoking Policy in the Workplace: A Justification and a Model*, HEALTH EDUC., Apr.-May 1986, at 32, 33 (stating that some studies show that smokers are absent from work two days per year more than nonsmokers). For various points of view on the cost to employers of smoking employees, see generally *Do Puffing Employees Send Profits Up In Smoke?*, 49 BUS. & SOC'Y REV. 4 (1984) (including comments from then U.S. Surgeon General C. Everett Koop and representatives of the American Cancer Society, R.J. Reynolds Industries, the Cigar Association of America, Action on Smoking and Health, the National Cancer Institute, and The Tobacco Institute).

Second, advocates for the off-the-job smoking restrictions point to insurance costs. Rothstein, *supra* note 8, at 954. Life, health, and disability insurance cost more for smokers because they are sick more frequently, have recurring health problems, and die earlier than nonsmokers. *Id.* Consequently, when employers contribute their share of employee insurance plans, they must often pay higher insurance premiums for smokers. *Id.*

The third argument proponents of off-the-job smoking restrictions offer closely relates to this second point: the synergistic effects of smoking both threaten the employee's health and further burden the employer by increasing insurance and other costs. Rothstein, *supra* note 8, at 954. A synergistic effect of smoking is an adverse effect that smoking has when combined with the employee's work activity. For some types of employees, smoking "increases the probability of health impairments almost to a certainty." Goh, *supra* note 8, at 824. When combined with smoking, exposure to asbestos, gold, rubber substances, chlorine, cotton dust, and coal dust can result in significant synergistic health affects. *See* Gilbert S. Omenn, *Predictive Identification of Hypersusceptible Individuals*, 24 J. OCCUPATIONAL MED. 369, 373 (1982) (asbestos, gold, rubber); Rothstein, *supra* note 8, at 951-52 (chlorine, cotton dust, coal dust). By not hiring smokers, employers save money that they might have spent on higher insurance premiums, litigation costs, and disability payments due to the synergistic effects of employee smoking. Goh, *supra* note 8, at 824.

Finally, states with "heart and lung" statutes—a majority of the states—justify their off-the-job smoking policies by pointing to the enormous liability to which smokers can expose them and their resident employers. Typically, a "heart and lung" statute creates a presumption that the health problems of some workers—usually police officers, firefighters, and other public workers—result from the health risks posed by their work environment. Consequently the statute presumptively entitles these employees to compensation for heart- or lung-related health problems. For a list of heart and lung statutes, see Rothstein, *supra* note 8, at 952 n.113. The concern, then, is that smoking employees covered by the state's "heart and lung" statute will recover from the state even though the real source of their health problems is their off-the-job smoking. This result harms both the state and its taxpayers. Goh, *supra* note 8, at 825-26. For example, one fire department in Colorado does not hire smokers because there is no way to "differentiate between building smoke and cigarette smoke." *Colorado Fire District Prohibits Hiring Smokers*, 24 Gov't Empl. Rel. Rep. (BNA) 429, 429 (Mar. 31, 1986). The department worries that "[a] fire fighter with heart and lung problems may come to us in the future and say the illness is job-related, when in fact it may not be job[-]related." *Id.*

97. *See* WHERE THERE'S SMOKE, *supra* note 7, at 137. For example, the group most affected by the Massachusetts smoking ban, *see supra* note 95, is the police force. MASS. ANN. LAWS, ch. 22C, § 10 (Law. Co-op. Supp. 1993); *see* Elizabeth B. Thompson, Note, *The Constitutionality of an Off-Duty Smoking Ban for Public Employees: Should the State Butt Out?*, 43 VAND. L. REV. 491, 492 n.4 (1990).

smoking when it exposes them to substantial insurance costs or legal liability.[98]

Although the number of employers that refuse to hire smokers remains quite low,[99] smoking employees (and their proponents, such as the tobacco industry) have chosen not to rest on the assumption that this number will remain small forever. These pro-smoker advocates have persuaded several state legislatures to pass measures preserving—or in some cases, simply acknowledging—the employee's right to smoke off the job.

There are essentially three types of state legislation that preserve the rights of off-the-job smokers. The first two kinds of statutes specifically address the rights of smokers. A few states merely require employers to accommodate the needs of both non-smokers *and* smokers.[100] Several states, however, take a more activist approach; they specifically prohibit employers from discriminating against current or potential employees because they smoke off the job.[101] Many of these statutes contain provisions that explicitly bar an employer from making abstention from off-the-job smoking a condition of employment.[102]

The third kind of state legislation that serves to safeguard the rights of off-the-job smokers is the statute that preserves the employee's right to engage in lawful conduct, but does so without specific reference to smokers. North Carolina's section 95-28.2 falls into this category. These statutes outlaw discrimination against a potential or current employee based

98. USG Acoustical Products Company (formerly known as United States Gypsum) manufactures mineral and glass wool. In 1987, the company banned all employee smoking because of studies demonstrating that smoking increased the risk of lung disease from exposure to mineral and glass wool. Stephen Phillips, *Concern Warns It Will Dismiss All Who Smoke*, N.Y. TIMES, Jan. 21, 1987, at A16; *Employees of USG Unit Are Told To Stop Smoking*, WALL ST. J., Jan. 21, 1987, at 4. *But see Manufacturer Now Says Smoking Won't Mean Automatic Dismissal*, N.Y. TIMES, Jan. 29, 1987, at B7.

99. *See supra* note 8 and accompanying text.

100. ARK. CODE ANN. § 25-1-102(b) (Michie 1992) (state agencies must promulgate policies that take into consideration the rights of nonsmokers and smokers); R.I. GEN. LAWS §§ 23.20-7-3 (employers must adopt policies that accommodate the preferences of smokers and nonsmokers), 23.20-7-5 (employers must try to reach "reasonable accommodation" between wishes of smokers and nonsmokers) (1989).

101. ARIZ. REV. STAT. ANN. § 36-601.02(F) (Supp. 1992); LA. REV. STAT. ANN. § 23:966 (West Supp. 1993); N.J. STAT. ANN. § 34:6B-1 (West Supp. 1992); N.M. STAT. ANN. § 50-11-3 (Michie Supp. 1992); OKLA. STAT. ANN. tit. 40, § 500 (West Supp. 1993); R.I. GEN. LAWS § 23-20.7.1-1 (Supp. 1992); S.C. CODE ANN. § 41-1-85 (Law. Co-op. Supp. 1992) (protects current employees only); S.D. CODIFIED LAWS ANN. § 60-4-11 (Supp. 1992); VA. CODE ANN. § 15.1-29.18 (Michie 1989); W. VA. CODE § 21-3-19 (Supp. 1992).

102. LA. REV. STAT. ANN. § 23:966(A)(2) (West Supp. 1993); N.M. STAT. ANN. § 50-11-3(A)(2) (Michie Supp. 1992); OKLA. STAT. ANN. tit. 40, § 500(2) (West Supp. 1993); R.I. GEN. LAWS § 23-20.7.1-1(a) (Supp. 1992); VA. CODE ANN. § 15.1-29.18 (Michie 1991).

on that person's off-the-job use of lawful products[103] or engagement in "any lawful activity."[104] While a few of the statutes do not outline specific remedies for such discriminatory practices,[105] several authorize wronged parties to bring suit against the employer for damages, lost wages, reinstatement, or court orders requiring an offer an employment.[106]

Although statutes in the third group contain broad terminology, there is evidence that many of them were aimed at smokers. For example, the Colorado legislature specifically intended its protection of "any lawful activity" to preserve the rights of off-the-job smokers.[107] Similarly, Tennessee prohibits employment discrimination based on a person's "use of an agricultural product" that is "not otherwise proscribed by law" but excludes alcohol from that definition.[108] Thus, although several of these statutes do not explicitly refer to smokers, the most obvious beneficiaries of their protections are employees who smoke off-the-job.

Clearly, North Carolina is not alone in preserving the rights of the smoking employee. At least four states had, by 1989, enacted statutes protecting smokers' rights in some manner.[109] By 1993, North Carolina and fourteen other states had joined the fight.[110] Because North Caro-

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103. ILL. ANN. STAT. ch. 48, para. 2855 (Smith-Hurd Supp. 1992); NEV. REV. STAT. ANN. § 613.333 (Michie 1992); N.C. GEN. STAT. § 95-28.2 (Supp. 1992); TENN. CODE ANN. § 50-1-304(d) (1991); WIS. STAT. ANN. § 111.321-.322 (West 1988 & Supp. 1992).

104. COLO. REV. STAT. § 24-34-402.5(1) (Supp. 1992); N.D. CENT. CODE § 14-02.4-01, -02, -08 (1991).

105. *E.g.*, ILL. ANN. STAT. ch. 48, para. 2855 (Smith-Hurd Supp. 1992) (prohibition without remedy).

106. COLO. REV. STAT. § 24-34-402.5(2)(a) (Supp. 1992) (damages, including wages and benefits); NEV. REV. STAT. ANN. § 613.333(2) (Michie 1992) (lost wages and benefits, reinstatement, order to offer employment); N.C. GEN. STAT. § 95-28.2(e) (Supp. 1992) (wages and benefits, reinstatement, order to offer employment); N.D. CENT. CODE § 14-02.4-20 (1991) (injunctive relief, back pay).

107. *See Family and Health Care Top Labor Issues in 1990s, Labor Experts Say*, 247 Daily Lab. Rep. (BNA) A-2 (Dec. 24, 1990).

108. TENN. CODE ANN. § 50-1-304(d)(1) (1991).

109. ARIZ. REV. STAT. ANN. § 36-601.02(F) (Supp. 1992) (enacted 1986); ARK. CODE ANN. § 25-1-102 (Michie 1992) (enacted 1987); R.I. GEN. LAWS § 23-20.7-3(b)(1), -5(1) (1989) (enacted 1986); VA. CODE ANN. § 15.1-29.18 (Michie 1989) (enacted 1989).

110. COLO. REV. STAT. § 24-34-402.5 (Supp. 1992) (enacted 1990); ILL. ANN. STAT. ch. 48, para. 2855 (Smith-Hurd Supp. 1992) (enacted 1992); LA. REV. STAT. ANN. § 23:966 (West Supp. 1993) (enacted 1991); NEV. REV. STAT. ANN. § 613.333 (Michie 1992) (enacted 1991); N.J. STAT. ANN. § 34:6B-1 (West Supp. 1992) (enacted 1991); N.M. STAT. ANN. § 50-11-3 (Michie Supp. 1992) (enacted 1991); N.C. GEN. STAT. § 95-28.2 (Supp. 1992) (enacted 1992); N.D. CENT. CODE § 14-02.4-01, -02, -08 (1991) (enacted 1991); OKLA. STAT. ANN. tit. 40, § 500 (West Supp. 1993) (enacted 1991); R.I. GEN. LAWS § 23-20.7.1-1 (Supp. 1992) (enacted 1990); S.C. CODE ANN. § 41-1-85 (Law. Co-op. Supp. 1992) (enacted 1990); S.D. CODIFIED LAWS ANN. § 60-4-11 (Supp. 1992) (enacted 1991); TENN. CODE ANN. § 50-1-304(d) (1991)

lina is by far the largest producer of tobacco in the United States,[111] one might expect it to lead any pro-smoker legislative movement. On the contrary, it seems that by enacting section 95-28.2, North Carolina has merely jumped on a "bandwagon" that may have just begun to pick up steam.

If section 95-28.2 is primarily a "smoker's rights" statute, it did not start out that way. As State Senators Alexander Sands and Helen Marvin, the sponsors of Senate Bill 1032 (the bill that evolved into section 95-28.2), stated in an early committee meeting, the bill was inspired by a discrimination study of employees' rights to privacy.[112] This study demonstrated that an overwhelming majority of respondents[113] thought that it is inappropriate for an employer to deny or terminate a person's employment because the person smokes or drinks alcohol "after work hours," "[i]s overweight," "[d]rives a motorcycle," or "[g]ambles at a racetrack."[114] Senator Sands stated that the purpose of Senate Bill 1032 was "to strike a balance between the rights of the employer, and the rights of the employee."[115] The original draft of the bill reflects Senator Sands' original broad intent. That version of the bill prohibited discrimination based on "any lawful activity,"[116] rather than restricting the protected activity to "lawful use of lawful products."[117] One should not place too much emphasis on the language of this original draft, however, because it was Senator Sands who proposed amending the bill to read "lawful use of lawful products."[118] Furthermore, Senator Sands proposed this change at the same committee meeting during which he

(enacted 1990); W. VA. CODE § 21-3-19 (Supp. 1992) (enacted 1992); WIS. STAT. ANN. § 111.321-.322 (West 1988 & Supp. 1992) (enacted 1991).

111. *See supra* note 51.

112. Sen. Jud. II Comm. Mtg., June 18, 1992 ("Senator Sands read from a survey entitled 'Individual Privacy and Employment Rights in the United States.' ").

113. The portion of the study attached to the committee minutes does not explain who the respondents were (i.e., whether they were employees, employers, or random individuals). *See id.*

114. The percentages of respondents who thought that denying or terminating employment is inappropriate in given situations, as compared to the percentage who thought it is appropriate, were as follows (leftover percentages responded "don't know"): "[s]mokes after work hours," 93%-6%; "[d]rinks alcoholic beverages after work hours," 90%-9%; "[i]s overweight," 87%-10%; "[d]rives a motorcycle," 96%-3%; "[g]ambles at a racetrack," 92%-6%. Other activities addressed were "[d]ates a person of a different race," 97%-3%; "[o]pposes abortion," 96%-3%; "[s]upports abortion," 95%-3%; "[p]articipates in political demonstrations," 90%-6%; and "[h]olds an unusual second job," 75%-18%. *Id.*

115. *Id.*

116. S.B. 1032, 1991 sess. (Draft, May 28, 1992).

117. § 95-28.2.

118. Sen. Jud. II Comm. Mtg., June 18, 1992.

presented and explained the background of the bill.[119]

Regardless of the sponsoring senator's broad intent in proposing Senate Bill 1032, others apparently thought, from the beginning, that its most important impact would be on smokers. This fact is evident from the composition of the group of persons who testified at the committee meeting during which Senate Bill 1032 was first introduced. Representatives of the North Carolina Cancer Society and the American Heart Association voiced opposition to the bill, and a lobbyist recommended framing the bill so that it would apply only to tobacco products.[120]

With this limited legislative history in mind, one can turn to possible interpretations of the language in section 95-28.2. Some provisions of the statute are so unambiguous and specific that they do not warrant interpretation. For example, section 95-28.2's description of the remedies available for employer violations[121] and its exception for discrepancies in insurance treatment[122] are so straightforward that there is no need to discuss them in detail. There are, however, several aspects of the statute's language that demand closer attention, especially as there is no common law on smokers' rights to guide North Carolina courts in interpreting these provisions.

Of primary interpretative importance is the language of the applicability provision, or the definition of "employer" under the statute.[123] The language of this part of the statute is somewhat unclear. It purports to cover certain "public and quasi-public" entities, including corporations, boards, and commissions,[124] but the legislature did not precisely define the terms "public" or "quasi-public." North Carolina recognizes railroads, utility companies, and similar organizations as quasi-public entities.[125] Analogies to these traditionally quasi-public entities should aid the courts in classifying a given organization.

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119. *Id.*

120. *Id.* Those testifying were Lane Brown, a Director Volunteer for the N.C. Cancer Society; Dr. Robert A. Waugh, a Duke physician representing the American Heart Association; Sam Johnson, an attorney/lobbyist; and Linville Roach, an attorney representing Health Insurance of America. *Id.* Also in attendance at this committee hearing were representatives of Philip Morris, the American Civil Liberties Union, the Association of North Carolina Life Insurance Companies, the North Carolina Hospital Association, and the American Lung Association of North Carolina. *Id.* (attendance record).

121. § 95-28.2(e).

122. § 95-28.2(d).

123. § 95-28.2(a).

124. The statute refers to "public and quasi-public corporations, boards, bureaus, commissions, [and] councils." *Id.* For the full text of part (a), and a discussion of whether the words "public and quasi-public" modify only the word "corporations" or all of the words listed above, see *supra* notes 27, 30.

125. *See supra* note 29.

Another ambiguity in the applicability provision is its reference to employers who have at least three "regularly employed employees."[126] This phrase may refer only to full-time employees. On the other hand, it might encompass any employees, full- or part-time, who work year-round. One might even convince a court that seasonal employees who are always hired and utilized during specific portions of the year are "regularly employed." After all, if the local family hardware store is covered by section 95-28.2, why should a private pool with a summer staff of fifty escape liability under the statute?

The heart of the statute—the protection of an employee's off-the-job "lawful use of lawful products"[127]—is less difficult to interpret. A court applying section 95-28.2 need only look to the laws of North Carolina (or the United States, as applicable) to decide if a product or the use of a product is lawful.[128] Furthermore, it is not difficult to surmise which products will gain protection under section 95-28.2; both common sense and the legislative history[129] offer guidance on that point. Tobacco and alcohol quickly leap to mind as products of which employers might disapprove, but which people commonly use quite legally.[130] Even though some uses of tobacco and alcohol are not "lawful," it generally is not difficult to distinguish these unlawful uses from lawful ones, at least in the context of the alcohol scenario. For example, the illegalities of drunk driving,[131] being "drunk and disorderly" in public,[132] and under-age purchase, sale, and possession of alcoholic beverages[133] are widely recognized.

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126. § 95-28.2(a).

127. § 95-28.2(b).

128. *See id.*

129. Sen. Jud. II Comm. Mtg., June 18, 1992. At the Senate committee meeting during which Senator Sands introduced § 95-28.2, he presented a study that had analyzed whether it is appropriate for employers to fire (or not hire) employees on the basis of certain activities outside of work. For the results of the study, see *supra* note 114 and accompanying text.

130. In 1991, 32.2% of Americans between the ages of 18 and 25, and 28.8% of Americans over age 25 were "current" smokers (i.e., smoked cigarettes at least once within the month prior to the statistical study). STATISTICAL ABSTRACT, *supra* note 51, at 127. Alcohol use was far more prominent, totalling 63.6% of persons between 18 and 25, and 52.5% of those over 25. *Id.*

131. Driving while "under the influence of an impairing substance," or while one's blood alcohol level is at least 0.10 percent, is a misdemeanor in North Carolina. N.C. GEN. STAT. § 20-138.1 (1989).

132. Being drunk and "disruptive" (in specified ways) while in public is a misdemeanor in North Carolina. *Id.* § 14-444 (1986).

133. In North Carolina, persons under the age of 21 may not lawfully purchase or possess alcoholic beverages. *Id.* § 18B-302(b) (1989). Sale of alcoholic beverages to underage persons is illegal as well. *Id.* 18B-302(a) (1989). It is illegal in North Carolina to sell tobacco products to persons under 17, *id.* § 14-313 (Supp. 1992), but underage possession of such products is not specifically prohibited.

The study that the sponsor of section 95-28.2 presented in committee recognized a few other "lawful use[s] of lawful products" that the statute might cover.[134] While the study mentioned views on abortion, gambling at a racetrack, and holding an unusual job as activities for which an employer might fire an employee, two activities—other than drinking alcohol or smoking—would clearly fit into the "lawful product" rubric: driving a motorcycle and being overweight (assuming that being overweight entails "using" food).[135] Of course, it is conceivable that an employer would disapprove of other product uses. An employee's use of Valium, contraceptives, anti-depressants, or unhealthy foods arguably would be protected activities under section 95-28.2,[136] even though certain employers might not approve of such practices. Furthermore, even the most conservative employer could not, according to section 95-28.2, ban a male employee from cross-dressing or wearing an earring off the job, unless the employee qualifies for one of the statutory exemptions.[137] Thus, even though the "lawful use of lawful products" provision will probably most prominently affect smoking employees,[138] its potentially broad scope should not be ignored.

The protections that the lawful-use provision offers to smokers—and to all lawful "users"—are constrained by an important requirement of section 95-28.2. An employee or potential employee may only sue an employer for discrimination under the statute if his off-the-job activity does not "adversely affect [1] the employee's job performance or [2] the person's ability to properly fulfill the responsibilities of the position in question or [3] the safety of other employees."[139] The basic principle of section 95-28.2, then, is that if a person's off-the-job smoking does not impair his work or the work of others, his employer should not be able to discriminate against him because of it. The adverse-effects portion of the statute reflects this principle. Yet herein lies the potential downfall of section 95-28.2: it is precisely the adverse health affects of smoking that employers wish to avoid dealing with by firing or not hiring smokers.[140]

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134. *See supra* note 114 and accompanying text.

135. *See supra* note 114 and accompanying text.

136. Of course, these uses would have to meet § 95-28.2's three-prong test: the activity must truly take place off-the-job; it must not have an adverse effect on the employee's job performance or ability to complete the job, and it must not jeopardize the safety of other employees. § 95-28.2(b).

137. § 95-28.2(c). Generally, an employer may prohibit a lawful off-the-job activity if the activity conflicts with the employer's fundamental objectives or is reasonably related to the employee's job requirements. For further discussion of the exemptions, see *supra* notes 35-40 and accompanying text and *infra* notes 146-54 and accompanying text.

138. *See supra* notes 129-33 and accompanying text.

139. § 95-28.2(b).

140. *See supra* note 96 and accompanying text.

Employers will argue vehemently that smokers' demonstrated tendencies to have health problems, and consequent sickness and relatively frequent absences from work,[141] all have adverse effects on their job performance and abilities to do their jobs. This argument is not untenable. Nevertheless, it faces attack from employees on two fronts. First, employees will assert that an employer may only fire or otherwise discriminate against an employee if his off-the-job smoking *actually* affects his job performance, his ability to complete his duties, or the safety of other employees. For example, absences from work due to smoking-related illnesses may adversely affect the quality of an employee's work, thus exempting her smoking from the status of a protected activity under section 95-28.2(b). In contrast, employees will argue, employers may *not* lawfully fire, discriminate against, or refuse to hire smokers simply because those employers think the workers' off-the-job smoking *might* negatively affect their performance at work. The language of the statute appears to require evidence of an actual adverse effect; the possibility that such effects *might* result from the activity may not suffice to excuse a discriminatory employment practice.[142]

The second attack that employees can launch on a broad interpretation of the adverse-effects requirement—that is, an interpretation that considers the likelihood of smoking-related illness (or early death) sufficient to constitute an adverse effect on job performance—is a structural

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141. *See supra* notes 89, 96 and accompanying text.

142. This reading of the statute is based on a complex but arguably proper reading of § 95-28.2. The legislature specifically distinguished the "prospective employee" from the "employee" throughout the statute. *See* § 95-28.2(b) (stating that an employer may not "fail or refuse to hire a prospective employee, *or* discharge . . . any employee . . . because the prospective employee *or* the employee engages in . . . the lawful use of lawful products") (emphasis added); § 95-28.2(e) ("An employee who is discharged . . . *or* a prospective employee who is denied employment" has various remedies.) (emphasis added). The adverse-effects provision does not specifically mention the prospective employee, but stresses activities the current employee would be performing. § 95-28.2(b) (stating that lawful use of a lawful product must "not adversely affect the *employee*'s job performance or the person's ability to properly fulfill the responsibilities of the position in question") (emphasis added). Certainly, employers can argue that the word "person" refers to prospective employees and that the language regarding one's ability to "properly fulfill" the duties of the job is aimed at prospective employees. *See id.* Such a reading of the statute seems reasonable at first glance. Yet one wonders why the legislature would go to such pains to exempt certain employers from the provisions of the statute if those employers could simply use the adverse-effects provision to support a policy of not hiring smokers. After all, if one accepts these hypothetical employers' construction of the adverse-effects section, any employer covered by the narrowly tailored exemption for restrictions relating to a "bona fide occupational requirement" could simply use the broader adverse-effects language to avoid hiring smokers. In short, either the exclusions in part (c) are "safe harbors" intended to clarify the adverse-effects provision, or the adverse-effects provision applies only to current employees. Because the normally pointed reference to prospective employees is notably absent from the adverse-effects clause, this writer adopts the latter construction of the statute.

argument based on the insurance exception[143] included in section 95-28.2. The insurance exception allows employers to purchase employee life, health, or disability insurance policies that distinguish between smoking and nonsmoking employees as to type and price or coverage, so long as the employer meets the statutory requirements of actuarial justification for disparate rates, written notice to employees about varying rates, and equal contribution to carriers on behalf of each employee.[144] Employees will emphasize that this insurance exception grants the employer an opportunity to treat smoking employees differently from nonsmoking employees on the basis of their disparate levels of healthfulness. Because the insurance exception gives employers an adequate way to "cover the losses" imposed by smoking employees' health problems, workers will argue, employers should not be permitted to circumvent completely the statute's restrictions by discriminating against off-the-job smokers on the basis of those common health problems. A contrary reading of the adverse-effects provision would arguably render the insurance exception moot. Normally, courts strive to avoid interpreting statutory provisions in a way that would invalidate another portion of the law.

Perhaps the most controversial part of section 95-28.2, and the provision most likely to be litigated, is part (c), which excludes certain employers and employer practices from the statutory restriction.[145] The first exclusion permits employers to restrict employees' off-the-job smoking "if the restriction relates to a bona fide occupational requirement and is reasonably related to the employment activities."[146] This exemption will most likely apply to classes of employees who have been subject to off-duty smoking bans in other states: firefighters and police officers.[147] Police officers and firefighters would probably fall within the rubric of section 95-28.2's bona-fide-requirement exemption for the same reason

143. § 95-28.2(d). For discussions of the insurance rates exception to the statute, see *supra* notes 41-44 and accompanying text.

144. § 95-28.2(d).

145. § 95-28.2(c).

146. § 95-28.2(c)(1). Some may wonder why this provision is necessary, since the adverse-effects clause excludes from the statute's protections employees whose off-the-job product uses adversely affect their work. § 95-28.2(b). One could argue that any time an employee's smoking relates to a bona fide occupational requirement of the job, that habit necessarily results in an adverse effect. Yet there is at least one important distinction between the adverse-effects provision and the bona-fide-occupational-requirement section. The former should normally be applied to an individual whose lawful use has had a demonstrably adverse effect on her work. *See supra* notes 139-44 and accompanying text. The bona-fide-occupational-requirement exclusion, in contrast, can probably be applied to a class of employees, even when an individual in that class has not shown that his off-duty lawful use will actually prove detrimental to his work; the use merely has to "relate" to a job requirement.

147. *See supra* note 97 and accompanying text.

that states have previously subjected them to off-the-job smoking bans: the successful completion of these workers' job responsibilities (e.g., chasing criminals on foot and carrying persons from burning buildings) depends on the good health of their heart and lungs, organs that consistent smoking damages substantially.[148]

Employees other than public safety officers also might fall within the first exemption of section 95-28.2 A court might read the bona-fide-requirement exemption to allow employers of athletes (e.g., the Charlotte Hornets), ski instructors, or even construction workers to restrict these employees' off-duty smoking, because their respiratory health is essential to the effective completion of many of their job responsibilities. Regardless of which classes of employees are covered, however, there is an important limitation to the bona-fide-requirement exemption: When a restriction on off-the-job smoking relates only to a certain worker or group of workers, the restriction may apply only to those employees.[149] Thus, even if police officers may be banned from smoking, the police department could not lawfully subject its telecommunicators[150] or secretarial staff to the same ban.

The second section 95-28.2 exemption permits an employer to restrict its workers' off-the-job smoking when "the restriction relates to the fundamental objectives of the organization."[151] Of course, the scope of this exemption depends entirely upon how broadly employers may define their "fundamental objectives." Courts may not choose to apply this provision very narrowly because section 95-28.2 does not impose a strict standard. The statute does not say that an employer's restriction must "go to" the organization's fundamental purposes, but merely states that the restriction must "relate" to those goals.[152]

The fundamental-objectives exemption certainly should apply to employers like the American Cancer Society or the American Heart Association, organizations that discourage smoking because their primary objective is to promote good health.[153] The harder question is whether

148. *See supra* notes 96-97. States with heart and lung statutes have other reasons for not hiring smokers. *See supra* note 96.

149. § 95-28.2(c)(1).

150. Telecommunicators answer calls to the police station and dispatch police officers to respond to those calls. Telephone Interview with Aaron F. Garrison, Telecommunicator, Catawba County Sheriff's Dep't. (Apr. 1, 1993).

151. § 95-28.2(c)(2).

152. *Id.*

153. The "single goal" of the American Cancer Society is "the total control of cancer as a disease of humankind"; in working toward that goal, the Society has strongly denounced smoking. WALTER S. ROSS, CRUSADE: THE OFFICIAL HISTORY OF THE AMERICAN CANCER SOCIETY xiv, 61-63 (1987). Similarly, in fighting a "war . . . against cardiovascular diseases—

the exemption would apply to organizations whose primary objectives include promoting good health generally. Hospitals, health care facilities, or even small physician partnerships might fall into this exempted category of employers.[154]

The third employer exclusion, the provision permitting discharge or discipline based on an employee's failure to comply with a substance abuse program,[155] could be read as either a narrow exception to the statutory prohibition or a gaping hole in the statute's protections. The problem with the provision is that employers could completely circumvent the statute's protections by installing a substance abuse program, broadly defining "substance abuse," ordering almost all of its employees to comply with the program (i.e., stop smoking altogether), and then disciplining or firing employees who failed to comply with that program. Faced with such a situation, a court could certainly conclude that section 95-28.2 permits employers to define "substance abuse" broadly and thereby to bring large numbers of employees into its program; however, because that conclusion would render the statute's protections a dead letter, courts probably will not allow employers to define "substance abuse" in an unreasonably broad manner. Clearly, this is a portion of the statute ripe for judicial interpretation.

Due to the ambiguity of some terms in the applicability provision[156] and the substance-abuse exemption,[157] as well as the lack of specificity in the lawful-products clause,[158] the adverse-effects provision,[159] the bona-fide-occupational-requirement exemption,[160] and the fundamental-objectives exemption,[161] the courts will play a critical role in determining the scope of section 95-28.2. The statute is not clear enough about which employers and which employment practices are exempt from section 95-28.2's restrictions for most employers to avoid all litigation on the matter. Furthermore, it is not altogether clear what constitutes an adverse effect on the employee's work; again, the courts will have to establish

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those diseases that affect the heart, the brain, the kidney and the blood vessels," the American Heart Association has favored "an active campaign to discourage cigarette smoking." WILLIAM W. MOORE, FIGHTING FOR LIFE: THE STORY OF THE AMERICAN HEART ASSOCIATION 1911-1975 at vii, 133 (1983).

154. *See* N.C. HOSPITAL ASS'N, NORTH CAROLINA GENERAL ASSEMBLY 1992 LEGISLATIVE SUMMARY 10.

155. § 95-28.2(c)(3).

156. § 95-28.2(a); *see supra* notes 123-26 and accompanying text.

157. § 95-28.2(c)(3); *see supra* note 155 and accompanying text.

158. § 95-28.2(b); *see supra* notes 127-38 and accompanying text.

159. § 95-28.2(b); *see supra* notes 139-44 and accompanying text.

160. § 95-28.2(c)(1); *see supra* notes 146-50 and accompanying text.

161. § 95-28.2(c)(2); *see supra* notes 151-54 and accompanying text.

these parameters. The question, then, is whether litigation involving section 95-28.2 will ensue at all. Many cautious employers may choose simply to behave as if the statute applies to them and adjust their employment and hiring practices accordingly. The next section discusses what employers should do to comply with section 95-28.2 and then examines the benefits the statute confers on North Carolina employees.

For the employer, section 95-28.2 is significant for three important reasons. First, it will apply to a substantial number of North Carolina employers.[162] Second, the statute prohibits any anti-smoker discrimination in hiring and, consequently, places a substantial burden on the employer whose workers' smoking will inevitably be subject to restriction.[163] Finally, section 95-28.2 imposes several procedural requirements on employers whose employee insurance policies differentiate between smokers and nonsmokers.[164]

While the exact scope of the statute is not clear, section 95-28.2 certainly will apply to a significant number of North Carolina employers. The statute applies to the State of North Carolina, any employer whose services are somewhat "public" in nature, and any private employer with at least three full-time employees. Employers who maintain a part-time staff of at least three employees, or whose staff of at least three employees works only during a specific portion of the year, may not, however, fall within section 95-28.2's definition of "employer."[165] Nevertheless, such employers should err on the side of caution and abide by the mandates of section 95-28.2, lest they risk liability under the statute. Because the statute's insurance exception addresses most of the average employer's concerns about employing smokers,[166] section 95-28.2 is not so burdensome to employers that they cannot adopt a conservative approach to compliance.

Section 95-28.2's most significant impact on employers relates to the hiring practices of those who might prefer not to employ smokers. A reasonable reading of the adverse-effects provision, in light of its language and most logical relationship to the exclusions provided in part (c) of the statute, is that it applies only to current employees, not potential ones.[167] A potential employee's off-duty smoking cannot have had an adverse effect on that employee's work performance or the safety of other

162. *See infra* notes 165-66 and accompanying text.

163. *See infra* notes 167-78 and accompanying text.

164. *See infra* notes 179-83 and accompanying text.

165. *See supra* note 126 and accompanying text.

166. *See supra* notes 96, 143-44 and accompanying text.

167. See *supra* note 142 for a detailed explanation of this theory of statutory construction.

employees because the applicant has not even started the job yet.[168] Thus, employers will have trouble arguing, based on the adverse-effects provision, that they can refuse to hire someone on the basis of a prediction that the person's "lawful use of lawful products" will adversely affect his ability to do his job.[169] Furthermore, it is unlikely that courts will interpret the exemptions for certain employers and employment practices in section 95-28.2 in a manner that allows these exempted employers to refuse to hire smokers.[170] The statutory exemptions simply allow certain employers to restrict the off-the-job smoking of their employees. Although an employer should be able to enforce these restrictions through discipline or discharge, the right to restrict current employees' behavior probably does not encompass the right not to *hire* smokers.[171]

Section 95-28.2, then, places a significant burden on employers who prefer not to hire smokers, including those employers who might be exempt under part (c) of the statute. Even if the potential employee's off-the-job smoking will inevitably affect the person's work performance or will be subject to restriction because the employer falls within the bona-fide-requirement or fundamental-objectives exemption, the employer probably cannot refuse to hire that person solely on the basis of her smoking. Instead, the person must be given the chance to demonstrate either that her off-the-job smoking does not adversely affect her work, or that she can comply with an exempted employer's off-duty smoking bans, before the employer can lawfully discipline or discharge her.[172] Given the addictive nature of nicotine and the consequent difficulty most smokers have in quitting, section 95-28.2 works a rather wasteful result for exempted employers—they may hire employees who will eventually be fired because they are unable to comply with off-the-job smoking bans.

In light of the foregoing considerations, all employers covered by section 95-28.2 should refrain from asking potential employees if they smoke. Asking this question and then failing to hire the applicant could needlessly expose the employer to suit under section 95-28.2.[173] The em-

168. *See* § 95-28.2(b).

169. *Id.*

170. § 95-28.2(c).

171. *See id.* Some will counter that an employer could avoid liability by hiring the smoker and then discharging the person immediately. This argument misses the mark if one reads § 95-28.2 to allow discrimination under the adverse-effects provision only when an employer finds that an employee's lawful use actually affects her work, or ability to work, in a negative way. *See supra* notes 139-44 and accompanying text.

172. § 95-28.2(b), (c)(1)-(2).

173. § 95-28.2(f). Granted, hiring decisions are inherently subjective, and thus difficult for a court to review. The chances of success in § 95-28.2 suits, then, will depend on how much

ployer should, however, make its policies about smoking off the job clear to the applicant. Employers who want to avoid hiring smokers, and who are arguably covered by one of the statute's exemptions,[174] should explain to the applicant that employees are prohibited from smoking off the job, and that they can be disciplined or even fired for failing to comply with that requirement. Ideally, the employer will explain its smoking rules in the context of a general discussion about all its company policies. By explaining these policies to every applicant without questioning the applicant's own smoking habits, the employer does two worthwhile and efficient things: First, the employer gives the smoking employee a chance to evaluate, in light of his smoking habits, his own suitability for the job. Second, the employer ensures through such precautions that its actions will not be later perceived by a court as evidence of discrimination.

The suggestion that an employer inform applicants of its policy regarding off-the-job employee smoking raises another important issue: How does an employer deal with problems that arise from off-the-job employee smoking in a manner that complies with section 95-28.2? Essentially, employers have two options. First, the employer can approach the problem on an individual level. The employer can always discriminate against or even discharge an employee if that employee's smoking adversely affects the worker's job performance, his ability to fulfill his job responsibilities, or other employees' safety.[175] Employers who discipline or fire an employee based on one of the foregoing theories should, nevertheless, carefully document which adverse effect provided the basis for the employer's actions; the employer should record precisely how that adverse effect resulted from the employee's off-the-job smoking. The employer also should inform the employee of the reasons for the discipline or discharge and should keep a copy of all related documentation for its files.

The second method by which employers can deal with the problems caused by employee smoking is the off-the-job smoking ban for a group of employees. Of course, the only employers who can impose restrictions on off-the-job employee smoking are those that meet the requirements of

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evidence a plaintiff has that she was not hired because of her off-duty smoking habits. A common scenario might involve the smoking applicant who is asked about his smoking habits in the job interview and has qualifications equivalent to or better than the person who got the job. While a verdict in such a plaintiff's favor might be unlikely, given the possibly harmless nature of the employer's question, it would not be unreasonable for a court to find the employer's question itself to be evidence of discrimination.

174. The three exemptions are for employers that restrict smoking because of its relation to a "bona fide occupational requirement"; its conflict with "fundamental objectives" of the organization; or requirements of a substance abuse program. § 95-28.2(c).

175. *See* § 95-28.2(b).

one of the statutory exclusions.[176] An employer must be very cautious about considering itself excluded from section 95-28.2 under the theory that an off-duty smoking restriction relates to a "bona fide occupational requirement" of some of its employees or to the "fundamental objectives" of the employer's organization. Only those employers who find a smoking ban essential to their employees' work, or who are clear-cut examples of an exempt employer (e.g., the American Cancer Society),[177] should risk becoming a "test case" for section 95-28.2. If an employer feels that some sort of smoking ban is essential, the employer should, at the very least, document how and why it falls within either the bona-fide-requirement or fundamental-objectives exemption. Ideally, before implementing an off-the-job smoking ban, an employer will explain the justifications for that policy to all employees subject to it.

Employers should also avoid using a substance abuse program to achieve what they could not do otherwise under the statute.[178] The cautious and conscientious employer who manages a substance abuse program will maintain a policy that defines "substance abuse" in a reasonable manner and avoids overinclusiveness. Further, such an employer will not attempt to preclude the employee's off-the-job smoking; rather, the employer will intervene when the employee's use becomes abusive. Of course, this is quite a tightrope for the employer to walk, as some employers might consider *any* use of cigarettes "abusive." Nevertheless, the employer's best alternative is to encourage employees to quit smoking and monitor the progress of employees who decide to work for that goal, but never insist that employees abstain and never discipline them simply for failing to abstain completely. If an employer wants to discipline or fire an employee because her smoking is affecting her work, the employer should probably do so under authority of the adverse-effects provision of section 95-28.2 instead of relying on the substance abuse program exclusion.

The final reason section 95-28.2 is noteworthy for employers is that it imposes several procedural requirements on those whose employee insurance policies differentiate between smokers and nonsmokers.[179] If its employee health, disability, or life insurance plans distinguish between smokers and nonsmokers as to type of policy or cost of coverage, the employer must take three steps to comply with section 95-28.2.[180] The employer must first ensure that the varying rates are "actuarially justi-

176. § 95-28.2(c).

177. § 95-28.2(c)(1)-(2); *see supra* notes 153-54 and accompanying text.

178. *See supra* text accompanying note 155.

179. § 95-28.2(d).

180. *Id.*

fied," not arbitrary or penal.[181] Next, the employer must give workers a written notice of these differential rates.[182] Finally, the employer must contribute equal amounts on behalf of smokers and nonsmokers to insurance carriers.[183]

In summary, the significance of section 95-28.2 for North Carolina employers is that it applies to most of them, restricts their ability to ask job applicants about their smoking habits, makes it very risky for them to impose off-the-job smoking bans, and imposes certain obligations on those employers whose employee insurance plans treat smokers differently from nonsmokers. Some employers may opine that section 95-28.2 merely adds "one more question" they cannot ask of job applicants. For other employers, however, section 95-28.2 will accomplish precisely what the tobacco industry may have hoped for: preventing employers from restricting their employees' right to smoke off the job.

For workers who smoke, section 95-28.2 is both a symbolic and a pragmatic victory. Even though some North Carolina employers will still insist that employees smoke only in designated areas while at work,[184] section 95-28.2 represents a fundamental legislative recognition of the smoker's privacy rights. Even more important than this symbolic victory is the practical impact section 95-28.2 will have on most smokers' lives. The most fundamental benefit, of course, is that smoking employees can sue employers for unjustified discrimination against them on the basis of their off-the-job smoking.[185] Augmenting this benefit is the fact that winning plaintiffs may receive an award of attorney's fees and costs.[186]

Another important benefit smokers will reap from section 95-28.2 is that employers are likely to refrain from asking, in job interviews, if the applicant smokes.[187] Consequently, employers who might not have hired smokers before the enactment of section 95-28.2 will now be unable to separate the smoking applicants from the nonsmoking applicants. This may result in more job offers—and thus, more and better jobs—for smokers.[188] Furthermore, section 95-28.2 will preserve and perhaps even

181. § 95-28.2(d)(1).

182. § 95-28.2(d)(2).

183. § 95-28.2(d)(3).

184. *See* Rothstein, *supra* note 8, at 950.

185. *See* § 95-28.2(e).

186. § 95-28.2(f).

187. For reasons why this would be a wise employer policy, *see supra* notes 173-77 and accompanying text.

188. One of the policy concerns about off-the-job smoking bans is that they could severely restrict employment opportunities for those who cannot quit smoking. Rothstein, *supra* note

enhance the existence of a broad base of employers hiring off-the-job smokers. One of the criticisms of off-the-job smoking bans is that if they are permitted, one of two unwanted results will occur: either the smoking employees (and their accompanying health problems and costs) will be "dumped" onto the few employers willing to hire them, or all employers will join the anti-smoker policy and smokers will be left with no jobs at all.[189] While some would favor the latter result because it might force desirable health and social consequences, such an approach seems inappropriately Draconian. Further, that reasoning does not refute the argument that employers might continue to hire smokers, but eliminate their employer-provided insurance plans—an obviously undesirable result in light of the current health care crisis.[190]

Another way in which section 95-28.2 benefits employees is by putting them on a more equal footing with employers regarding the creation of smoking policies. With the passage of section 95-28.2, employers cannot simply ban off-the-job smoking without justifying that ban under the law. The employer's power to make policy is offset by the employee's power to bring suit for an unlawful policy.[191] Even police officers and firefighters, workers who have traditionally been subject to off-the-job smoking bans,[192] will have at least the opportunity to force their employers to prove, in court, that these policies are justifiable and that they meet the requirements of section 95-28.2.

Other benefits also flow to smokers as a result of section 95-28.2's enactment. Smokers can now insist that their employee insurance policies vary from nonsmoker policies only when a uniform system of evaluation justifies those variations. Section 95-28.2 will also provide smoking employees with more information about their insurance rates and coverage.[193] Yet another benefit to smoking employees resulting from section 95-28.2 relates to their assurance of privacy; when smokers are not subject to off-duty smoking bans, they need not worry that "Big Employer"[194] is watching everything they do after work. In short, section 95-28.2 creates or preserves smokers' rights and provides accessible rem-

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8, at 960. Negative results of this phenomenon would include lost income tax revenues and an increase in unemployment payment costs. *See id.*

189. Rothstein, *supra* note 8, at 960.

190. *Id.* In 1989, 13.9% of Americans—nearly 34 million people—did not have health insurance. STATISTICAL ABSTRACT, *supra* note 51, at 106.

191. § 95-28.2(e). In effect, the statute gives employees the same kinds of protections that collective bargaining normally would.

192. *See supra* notes 96-97 and accompanying text.

193. § 95-28.2(d) (Supp. 1992); *see supra* notes 179-83 and accompanying text.

194. This is, of course, a reference to the invasive "Big Brother" of George Orwell's *1984*. *See* GEORGE ORWELL, NINETEEN EIGHTY-FOUR 3 (1949).

edies to smokers when they are denied those rights.[195]

Miss Manners has said: "Smoking should be confined to certain parlors to which the smokers may retire from the sensible people and make their disgusting mess. . . . If you wish to smoke in the presence of clean people, you must ask their permission and be prepared to accept their refusal to grant it."[196] Miss Manners' basic point—the idea that if you are going to smoke, you must do it in private, where you will not bother nonsmokers—is the resounding theme of today's anti-smoking advocates.[197] Ironically, North Carolina's section 95-28.2 turns the corollary to that sentiment against its proponents: As long as I enjoy my tobacco habit at home, goes the smoker's response, you cannot take my job away from me *just because I smoke.*

Section 95-28.2 illustrates the age-old tension between individual autonomy (*viz.*, one's right to smoke) and the duty not to harm others (*viz.*, damage the health of nonsmokers through passive smoke). This debate sometimes becomes too heated for legislators or courts to reach a compromise on a given issue. Yet in section 95-28.2, North Carolina's General Assembly has addressed a volatile issue in an even-handed, rational manner. Section 95-28.2 is a well-balanced piece of legislation because it preserves employee privacy and liberty to a reasonable degree, while permitting employers to limit those freedoms in situations where employee protection would be inequitable or impractical. Of course, this evaluation of the statute's virtues rests on the premise that employers should not be free to fire or not hire someone for reasons unrelated to job performance. Some would argue that employers should have this discretion, especially when the employee's off-the-job activity is legal but is morally repulsive to the employer.[198] Still, in light of the employer's position of

195. These remedies include the right to bring suit for lost wages and benefits, for an order of reinstatement, or an order directing the employer to offer the plaintiff a job. § 95-28.2(e).

196. JUDITH MARTIN, MISS MANNERS' GUIDE TO EXCRUCIATINGLY CORRECT BEHAVIOR 637 (1982). Miss Manners has recently adopted a more moderate tone:

> [S]mokers should generally smoke privately and . . . areas should be designated in which they can comfortably do so. . . . [I]f they do want to smoke in front of a nonsmoker, they should ask, 'Do you mind if I smoke?' and cheerfully accept a negative reply. But . . . such a reply, or a request that an already lit cigarette be extinguished, [should] be made politely.

JUDITH MARTIN, MISS MANNERS' GUIDE FOR THE TURN-OF-THE-MILLENIUM 152 (1990).

197. *See, e.g.*, Stroud, *supra* note 2, at 360 (stating that nonsmokers should not be "forced by their fellow employees to become involuntary smokers" and "to risk their health because the smoker at the next desk wishes to exercise his personal choice and 'right' to smoke").

198. Just because an activity is legal does not mean an employer has to like it. Some employers may think, for example, that they should have the right to reject a job applicant who reads pornographic materials, or who is a member of a neo-Nazi group, when there is an equally qualified applicant who does not engage in such activities. Another example, with a historical bent, involves the abolitionist store owner who, all qualifications of two job appli-

power in relation to the employee generally,[199] the aim of "tipping the balance" toward employees appears valid.

The critical flaw of section 95-28.2 is that its protections should extend, in the interests of fairness, not just to "lawful use[s] of lawful products," but to "any lawful activity."[200] Granted, the legislature might have wanted, or even needed, to address the unique needs of the smoking employee. But if smokers—with all the health problems and associated costs they impose on society—deserve protection from employment discrimination, surely people engaging in other legal activities off the job should be entitled to the same rights and remedies.

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cants being equal, wants to hire the abolitionist rather than the slave owner. The response to these employers' arguments is that the legality of a certain activity implies its acceptance by the majority; as a result, employers must focus on changing the unjust law (or lack thereof) rather than punishing those who simply live within its letter.

199. *See, e.g., supra* notes 55-59 and accompanying text (discussing the at-will employment doctrine).

200. A few states take this approach. *See supra* note 104 and accompanying text.

A Call for Putting Standards Back into the Fair Labor Standards Act: *Wilson v. City of Charlotte*

When Congress enacted the 1985 amendments to the Fair Labor Standards Act (FLSA),[1] it was responding to a United States Supreme Court decision that would have forced state and local governments to pay millions of dollars in overtime compensation to public employees who formerly had received extra time off in lieu of monetary payments.[2] In an attempt to prevent an inevitable financial collapse for governments already struggling to survive on inadequate budgets, Congress declared that public employers could continue to give employees extra time off if they reached an agreement to that effect with their employees.[3] Their legislative duty done, members of Congress praised each other for their work and went on to other business.[4] Congress did not anticipate, however, that the law would generate litigation between employees and employers when they failed to agree on when these agreements were required. Ambiguous on its face, this amendment and its legislative history send confusing signals regarding how Congress intended employee representatives to reach agreements with their employers when some state statutes expressly prohibit such negotiations. Consequently, cases like *Wilson v. City of Charlotte*,[5] holding that state law should determine employees' bargaining power, allow states to circumvent the FLSA and, in the process, deprive public employees of the rights Congress arguably intended to grant them.

This Note traces the history of the Fair Labor Standards Act and the United States Supreme Court's attempts to reconcile FLSA regulations with state sovereignty.[6] In particular, the Note concentrates on the

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1. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, § 2, 99 Stat. 787 (codified at 29 U.S.C. § 207(o) (1988)).

2. *See* San Antonio Metro. Transit Auth. v. Garcia, 469 U.S. 528, 557 (1985).

3. 29 U.S.C. § 207(o)(2)(A) (1988).

4. *See* 131 CONG. REC. S14046-50 (daily ed. Oct. 24, 1985) (statement of Sen. Nickles). When introducing the bill, Senator Nickles stated:

> I really do wish to thank my colleagues who have had the williness [sic] to work with us in trying to resolve these issues. Senator Metzenbaum and his staff have worked long and hard. Senator Stafford and his staff have had a good deal of input. Senator Wilson was instrumental in bringing this issue to the forefront in the Senate. I compliment them. I believe, together, we have been able to come up with a positive package.

Id. at S14047.

5. 964 F.2d 1391 (4th Cir. 1992), *rev'g* 702 F. Supp. 1232 (W.D.N.C. 1988).

6. *See infra* notes 46-66 and accompanying text.

1985 Amendments to the FLSA[7] and the federal district and appellate courts' struggle to interpret an ambiguous statute to avoid a federal-state conflict of law.[8] The Note analyzes the three separate opinions in *Wilson*[9] and focuses on how the statute's language, legislative history, and precedent contribute to the different outcomes.[10] Although recognizing that each interpretation in *Wilson* is valid, the Note criticizes the majority for failing to recognize the public policy implications of its holding[11] and endorses the dissenting opinion as a step toward eliminating the inequities that courts' decisions have produced.[12] Finally, the Note concludes that the disagreement among the judges on the *Wilson* court is representative of the confusion created by section 207(o) of the FLSA, and it urges Congress to amend the Act to ensure that public employees in every state enjoy the same rights.[13]

In *Wilson*,[14] the members of Local Number 660 of the International Association of Fire Fighters (Local 660) alleged that their employer, the City of Charlotte (City), had violated section 207(o) of the FLSA[15] by giving them extra time off, commonly known as "comp time," instead of cash payments for overtime.[16] The FLSA states that public employers may provide comp time in lieu of monetary compensation if they have reached such an agreement with the employees' representative or with the individual employees if they do not have a representative.[17] The plaintiffs had advised the City, through a series of correspondences,[18]

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7. *See infra* notes 67-80 and accompanying text.

8. *See infra* notes 81-110 and accompanying text.

9. The majority found that state law prohibited the employees from designating a representative to negotiate an overtime agreement. *See infra* notes 30-34 and accompanying text. The concurring opinion found that the state's prohibition on collective bargaining would not preclude an employee representative from entering into some *other* type of agreement with the employer. *See infra* notes 35-39 and accompanying text. The dissent concluded that the rights public employees have under the FLSA should not hinge on state law; therefore, a collective bargaining statute does not prohibit public employers from entering into an agreement with an employee representative. *See infra* notes 40-45 and accompanying text.

10. *See infra* notes 111-36 and accompanying text.

11. *See infra* notes 122-32 and accompanying text.

12. *See infra* notes 134-67 and accompanying text.

13. *See infra* notes 168-72 and accompanying text.

14. Wilson v. City of Charlotte, 702 F. Supp. 1232, 1232 (W.D.N.C. 1988), *rev'd*, 964 F.2d 1391 (4th Cir. 1992).

15. 29 U.S.C. § 207(o) (1988).

16. *Wilson*, 702 F. Supp. at 1233. The plaintiffs sought a declaratory judgment that the City had violated § 207(o) of the FLSA, a permanent injunction to prevent the City from withholding monetary compensation, an order for the City to make an accounting of the plaintiffs' compensation, back pay, and attorney's fees. *Id.* at 1233-34.

17. *See infra* text accompanying notes 75-77 for the full text of the statute.

18. On December 3, 1985, Marvin Wilson, Jr., president of Local 660, sent a letter to Fire Chief R.L. Blackwelder in which he explained the provisions of § 207(o)(2)(A)(i), and he noti-

that they had chosen Local 660 as their representative to enter into an overtime compensation agreement, but the City refused to negotiate with them because North Carolina law prohibits government employers from contracting with labor associations.[19] Under the existing policy, City officials had sole discretion over whether to pay employees at the overtime rate of one and one-half times their regular rate of pay, or to give them one and one-half hours off for each hour of overtime worked.[20]

Local 660 argued that the FLSA required the City to provide monetary compensation unless it had entered into a contrary agreement with the employees' representative.[21] In its defense, the City relied on section 207(o)(2)(B) of the FLSA, which allows an employer to continue the "regular practice" of overtime compensation in effect on April 15, 1986 for employees hired before that date.[22] Because the plaintiffs had been hired before April 15, 1986, and because awarding comp time in lieu of monetary payments was the City's regular practice on that date, the City argued that it could continue that procedure without entering into an agreement with the employees' representative.[23] In addition, it contended that section 207(o) did not give the employees the power to select a representative because a North Carolina statute expressly prohibits the City from entering into an agreement with an employee representative.[24] Thus, the City asserted that it had no obligation to negotiate with Local 660.[25]

Chief Judge Robert D. Potter of the United States District Court for the Western District of North Carolina disagreed with the City's argu-

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fied the City that the employees had appointed Local 660 as their representative. *Wilson*, 702 F. Supp. at 1234. Wilson also sent a petition signed by all the fire fighters confirming that Local 660 was their representative. *Id.*

19. *Id.* N.C. GEN. STAT. § 95-98 (1985) states that contracts between government officials and labor organizations representing public employees are void. *See infra* text accompanying note 82. For a discussion of this statute and related litigation, see Michael G. Okun, Comment, *Public Employee Bargaining in North Carolina: From Paternalism to Confusion*, 59 N.C. L. REV. 214, 218-28 (1980).

20. *Wilson*, 702 F. Supp. at 1235.

21. *Id.* at 1238.

22. 29 U.S.C. § 207(o)(2)(B) (1988) provides that "in the case of employees . . . hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of receipt of overtime compensation, shall constitute an agreement or understanding." *See infra* notes 75-77 and accompanying text.

23. *Wilson*, 702 F. Supp. at 1238. Since April 15, 1986, the City has required all new employees to sign a statement declaring that they understand the City has complete discretion to award comp time or monetary payments as overtime compensation, and that they accept the policy as a condition of their employment. *Id.* at 1235.

24. *See* N.C. GEN. STAT. § 95-98 (1985); *supra* note 19.

25. *Wilson*, 702 F. Supp. at 1238.

ments. Granting Local 660's motion for partial summary judgment,[26] the court held that the City had violated the FLSA because it knew that the fire fighters had selected a representative to negotiate an agreement under section 207(o) but unilaterally decided to continue awarding comp time.[27] Drawing a distinction between collective bargaining and appointing a representative, Chief Judge Potter found that North Carolina's statute prohibited the former but not the latter.[28] Thus, the court concluded that section 207(o) gave the City the *option* to award comp time in lieu of monetary payments, but it could do so only after reaching an agreement with an employee representative.[29]

The Fourth Circuit Court of Appeals, sitting *en banc*, reversed the district court's ruling, but it split on its interpretation of section 207(o).[30] Writing for the majority, Judge William W. Wilkins, Jr. held that the City's regular practice of awarding comp time instead of cash payments to employees constituted an agreement under the FLSA.[31] In addition, the court found that even if this regular practice had *not* comprised an agreement, the state statute prohibiting agreements between public employers and bargaining agents precluded the plaintiffs from designating Local 660 as their representative to negotiate an overtime agreement with the City.[32] Noting that the U.S. Department of Labor intended for state law to determine whether employees had selected a representative,[33] the court found that the City could not recognize Local 660 as the employees' representative under state law.[34]

Judge J. Michael Luttig, in a concurring opinion, agreed that the City's regular practice on April 15, 1986, constituted an agreement for FLSA purposes because section 207(o) did not impose an affirmative

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26. Each party moved for summary judgment on the undisputed facts of the case with the damages issue reserved for trial. *Id.* at 1240.

27. *Id.* at 1238-39.

28. *Id.* at 1239. The court relied on Jacksonville Professional Fire Fighters Ass'n Local 2961 v. City of Jacksonville, 685 F. Supp. 513, 522-23 (E.D.N.C. 1987), which held that the City could enter into a comp time agreement with a labor organization in spite of N.C. GEN. STAT. § 95-98 (1985). *See infra* notes 84-91 and accompanying text.

29. *Wilson*, 702 F. Supp. at 1239.

30. Wilson v. City of Charlotte, 964 F.2d 1392, 1394-1404 (4th Cir. 1992).

31. *Id.* at 1394-95. Judge Wilkins noted that the fire fighters' letters to City officials merely expressed their dissatisfaction with the policy and "did not negate the existence of the regular practice." *Id.*

32. *Id.* at 1396.

33. 52 Fed. Reg. 2012, 2014-15 (Jan. 16, 1987) ("[T]he question of whether employees have a representative . . . shall be determined in accordance with State or local law and practices."). *But see* 29 C.F.R. § 553.23(b) (1992) ("In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees.").

34. *Wilson*, 964 F.2d at 1395-96.

duty on an employer to negotiate with employees, even if the employees had designated a representative.[35] However, he would not conclude that state law determines whether employees have designated a representative.[36] Judge Luttig argued that the statute's reference to a representative merely endorsed an efficient method of negotiating an overtime agreement, as opposed to requiring separate agreements with individual employees.[37] He reasoned that a state law prohibiting collective bargaining did not prevent employers from entering into agreements with employees because section 207(o) gave employers several options, including entering into a "collective bargaining agreement," a "memorandum of understanding," or "any other agreement."[38] Thus, while collective bargaining may be illegal under the North Carolina statute, some *other* kind of agreement would satisfy both state and federal law.[39]

In a dissenting opinion, Chief Judge Sam J. Ervin, III argued that the ambiguous language of section 207(o) required the court to examine the Secretary of Labor's statutory interpretation and accept that construction if the legislative history supported it.[40] Because the legislative history failed to indicate whether state law should affect an employer's recognition of a representative, the dissenting judge concluded that the Secretary's interpretation should determine the outcome.[41] Under the Secretary's interpretation, as codified in the Code of Federal Regulations,[42] the representative need not be recognized under state law; however, when employees have designated a representative, an employer may use comp time in lieu of cash payments for overtime pursuant only to an agreement between the employer and that representative.[43] Thus, Judge Ervin concluded, proper statutory interpretation requires the City to rec-

35. *Id.* at 1396-97 (Luttig, J., concurring in part).

36. *Id.* at 1397 (Luttig, J., concurring in part).

37. *Id.* at 1400 (Luttig, J., concurring in part).

38. *Id.* (Luttig, J., concurring in part).

39. *Id.* (Luttig, J., concurring in part).

40. *Id.* at 1400-01 (Ervin, C.J., dissenting).

41. *Id.* at 1403 (Ervin, C.J., dissenting).

42. 29 C.F.R. § 553.23 (1992); *see supra* note 33.

43. *Wilson*, 964 F.2d at 1402 (Ervin, C.J., dissenting). According to the Secretary of Labor,

> where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees.

29 C.F.R. § 553.23(b) (1992).

ognize Local 660 as the fire fighters' representative and to negotiate an agreement with Local 660 before it can award employees comp time instead of cash payments.[44] Otherwise, section 207(o) would discriminate against employees who live in states that prohibit collective bargaining with public agencies.[45]

As the *Wilson* decision suggests, legal controversies have surrounded the Fair Labor Standards Act since Congress passed it in 1938.[46] As originally enacted, the law required employers to pay hourly wages and overtime at one-and-one-half times the regular rate for hours worked in excess of forty per week, but it specifically excluded states and their political subdivisions from its provisions.[47] When challenged, the United States Supreme Court upheld the law's constitutionality under the Commerce Clause.[48]

In 1961, Congress extended the law to include public employees who engaged in commerce or the production of goods for commerce.[49] Five years later, another amendment broadened the definition of employer to include state hospitals, institutions, and schools.[50] This amendment prompted the states to sue, claiming that the federal government had begun making state and local policy.[51] Rejecting the states' federal-

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44. *Wilson*, 964 F.2d at 1402 (Ervin, C.J., dissenting).

45. *Id.* (Ervin, C.J., dissenting).

46. Fair Labor Standards Act of 1938, ch. 676, § 1, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (1988)). Some of the more notable provisions of the FLSA include: § 204, creating the Wage and Hour Division within the Department of Labor; § 206, setting minimum wages and prohibiting discrimination based on sex; § 207, setting 40 hours as the standard work week and requiring overtime compensation for hours worked in excess of 40; § 212, establishing regulations for child labor; and § 216, fixing penalties for non-compliance.

47. The FLSA provided:

> "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of an officer or agent of such labor organization.

Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (originally codified at 29 U.S.C. § 203(d) (1940)) (provisions repealed by Act of Apr. 8, 1974, Pub. L. No. 93-259, § 6(a)(1), 88 Stat. 58, 64).

48. United States v. Darby, 312 U.S. 100, 119 (1941); *see* U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

49. Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. §§ 203(r), 203(s), 206(b), 207(a)(2) (1964)).

50. The section defining "employer" was amended to add "except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school . . ., or (2) in the operation of a railway or carrier." Pub. L. No. 89-601, § 102(b), 80 Stat. 830, 831-32 (codified at 29 U.S.C. § 203(d) (1964 & Supp. II 1966)).

51. Maryland v. Wirtz, 392 U.S. 183, 187 (1968) *overruled by* National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469

ist arguments, the Court held that the amendment was a valid exercise of Congress's power under the Commerce Clause.[52]

In 1974, Congress swept the states and *all* of their political subdivisions within the Act's coverage by *expressly* including them in the definition of employer.[53] The National League of Cities challenged the amendment as an unconstitutional infringement on states' rights; this time, five justices on the United States Supreme Court agreed.[54] Declaring that the amendment "operate[d] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions," the Court expressly overruled prior case law when it held that Congress had exceeded its power to regulate the states under the Commerce Clause.[55] In particular, the Court recognized that states had sovereign power to determine the wages they would pay their employees.[56] Writing for the majority, Justice Rehnquist reasoned that allowing the federal government to dictate wage schedules for public employees would impose a heavy cost on state governments and could determine the manner in which states would deliver services to their citizens.[57]

Justice Brennan, in dissent, criticized the majority for discarding a long line of cases establishing that the Constitution restrained state action regulating commerce and vested that power in Congress.[58] Rather, Justice Brennan argued, the 1974 amendments were "an entirely legiti-

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U.S. 528 (1985). The plaintiffs in the lawsuit were Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Illinois, Iowa, Kansas, Maryland, Maine, Massachusetts, Mississippi, Missouri, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, Texas, Vermont, and Wyoming. *Id.*

52. *Id.* at 198 ("[T]he sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution."). The dissenting justices argued that the FLSA amendments violated the Tenth Amendment's reservation of rights to the states. *Id.* at 201 (Douglas and Stewart, JJ., dissenting).

53. Employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

Pub. L. No. 93-359, § 6(a)(1), 88 Stat. 58, 64 (codified at 29 U.S.C. § 203(d) (1988)).

54. National League of Cities v. Usery, 426 U.S. 833, 852 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985).

55. *Id.*

56. *Id.* at 851.

57. *Id.* at 845-47. Therefore, Congress had no power to interfere in "traditional governmental functions." *Id.* at 852. In a concurring opinion, Justice Blackmun explained that the majority had adopted a "balancing approach" to federal-state relations such that federal law would still control areas such as the environment, "where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." *Id.* at 856 (Blackmun, J., concurring).

58. *Id.* at 857-61 (Brennan, White, and Marshall, JJ., dissenting). "Today's repudiation of this unbroken line of precedents that firmly reject my Brethren's ill-conceived abstraction

mate exercise of the commerce power, not in the slightest restrained by any doctrine of state sovereignty."[59]

While the Court's holding in *National League of Cities* exempted states from the minimum wage and overtime provisions of the FLSA for employees engaged in "traditional governmental functions,"[60] that boundary came under attack nine years later. In *Garcia v. San Antonio Metropolitan Transit Authority*,[61] the employees of San Antonio's transportation system contended that *National League of Cities* required their employer to pay them for overtime in accordance with the FLSA regulations because their jobs were not "traditional governmental functions."[62] Acknowledging that this standard was inconsistent with federalist principles and characterizing it as "unsound in principle and unworkable in practice,"[63] the Court rejected the *National League of Cities* test for determining whether a state was subject to federal regulation.[64] Revisiting its analysis of the Commerce Clause, a divided Court overruled itself again, holding that Congress had not exceeded its power under the Commerce Clause by extending the FLSA's wage and hour provisions to states because such requirements did not destroy state sovereignty.[65] However, four dissenting justices, warning that federal overreaching via the Commerce Clause undermines the state-federal power balance, found a violation of state sovereignty under the Tenth Amendment.[66]

Garcia's holding generated concern among members of Congress that requiring monetary payments instead of comp time would put a fi-

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can only be regarded as a transparent cover for invalidating a congressional judgment with which they disagree." *Id.* at 867 (Brennan, White, and Marshall, JJ., dissenting).

59. *Id.* at 871 (Brennan, White and Marshall, JJ., dissenting). In a separate dissent, Justice Stevens noted that the states already were subject to numerous federal labor regulations, as the federal government requires states not to discriminate in hiring, to withhold taxes from employees' paychecks, and to comply with environmental regulations relating to commerce. Because he was unable to find any limitations that would prohibit Congress from regulating public employees' hours and overtime compensation, Justice Stevens found the FLSA extension to public employers valid. *Id.* at 880-81 (Stevens, J., dissenting).

60. *Id.* at 852.

61. 469 U.S. 528 (1985) (5-4 decision).

62. *Id.* at 533.

63. *Id.* at 546.

64. *Id.* at 546-47.

65. *Id.* at 554-55.

66. *Id.* at 558-72 (Powell, Burger, C.J., Rehnquist, and O'Connor, JJ., dissenting). The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Justice Rehnquist, in a separate dissent, predicted that the balancing test from *National League of Cities* would "in time again command the support of a majority of this Court." *Id.* at 579-80 (Rehnquist, J., dissenting).

nancial strain on the states.[67] In response, both houses of Congress proposed legislation to allow lead time for state and local governments to reorder budgetary priorities and to accommodate the widespread practice of awarding comp time in lieu of cash payments as overtime compensation.[68] Under Senate Bill 1570, states would have the option of using comp time or cash payments to compensate employees for overtime work if the public agency and an employee representative enter into a collective bargaining agreement, memorandum of understanding, or any other agreement.[69] If the employees do not have a *recognized* representative, employers and individual employees may enter into an agreement before work begins.[70] In regard to employees hired before April 15, 1986—the day the law was to take effect—a regular practice of awarding comp time instead of overtime pay would be deemed an agreement.[71] The House proposed a bill similar to the Senate's, but it differed on its interpretation of an employee representative.[72] According to its proposal, "[w]here employees have selected a representative, *which need not be a formal or recognized collective bargaining agent as long as it is a representative designated by the employees*, the agreement or understanding must be between the representative and the employer."[73] The Joint Conference Committee failed to address these differences,[74] and the following law was passed as section 207(o)[75] of the FLSA:

> (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate no less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

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67. S. REP. NO. 159, 99th Cong., 1st Sess. 7 (1985), *reprinted in* 1985 U.S.C.C.A.N. 655. The bill's sponsors estimated that the change would require state and local governments to pay three billion dollars in overtime compensation to its employees. Austin J. Murphy & Don Nickles, *The Fair Labor Standards Act Amendments of 1985*, 37 LAB. L.J. 67, 68 (1986).

68. S. REP. NO. 159, *supra* note 67, *reprinted in* 1985 U.S.C.C.A.N. at 656.

69. *Id.* at 664-65.

70. *Id.* at 658.

71. *Id.* at 659.

72. *See* H. R. 3530, *reprinted in* H.R. REP. NO. 331, 99th Cong., 1st Sess. 20 (1985).

73. H.R. REP. NO. 331, *supra* note 72, at 20 (emphasis added).

74. The committee was convened to work out disagreements between the House and Senate versions of the bill on payment for comp time upon termination of employment, comp time limits, and discrimination provisions. H.R. CONF. REP. NO. 357, 99th Cong., 1st Sess. 7 (1985), *reprinted in* 1985 U.S.C.C.A.N. 668, 668-71.

75. Although this section is officially designated as section 207, it is commonly referred to as "section 7."

> (2) A public agency may provide compensatory time under paragraph (1) only—
>
> (A) pursuant to—
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and the employee before the performance of the work;[76] . . .
>
> (B) In the case of employees . . . hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of receipt of overtime compensation, shall constitute an agreement or understanding.[77]

Pursuant to this statute, the Secretary of Labor published regulations stating that comp time may be used in lieu of overtime for employees who do not have a representative only if the public agency and the individual employees have come to such an agreement.[78] However, for employees hired before April 15, 1986, who do not have a representative, the regular practice in effect on that date constitutes an agreement.[79] The employee representative does not have to be a formal or recognized bargaining agent.[80]

While Congress designed the FLSA amendments to preserve state sovereignty and avoid financial collapse,[81] the law's language and legislative history failed to clarify the circumstances under which public employers must recognize an employee representative. If Congress intended to require public employers to recognize and negotiate with employee representatives, then the statute created a new state-federal conflict, be-

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76. 29 U.S.C. § 207(o)(1), (2)(A) (1988).

77. *Id.* § 207(o)(2)(B). Other changes in the law specifically exempted volunteers for public agencies from the wage and overtime requirements of the FLSA and prohibited employers from reducing employees' regular rate of compensation or fringe benefits to nullify the amendments' effect. Murphy & Nickles, *supra* note 67, at 73.

78. 29 C.F.R. § 553.23(a) (1992).

79. *Id.* § 553.23(b)(2).

80. *Id.* § 553.23(b)(1). The Secretary's regulations also provided that if the employees do not have a representative, any agreement relating to comp time must be reached between the employer and the individual employee before the work begins. *Id.* § 553.23(c). However, such an agreement is presumed if the employee has notice of the employer's practice of using comp time instead of overtime pay and does not protest the policy. *Id.* § 553.23(c)(1).

81. S. REP. NO. 159, *supra* note 67, *reprinted in* 1985 U.S.C.C.A.N. at 655.

cause a North Carolina statute expressly prohibits collective bargaining. Under section 95-98 of the General Statutes of North Carolina,

> [a]ny agreement, or contract, between the governing authority of any city, town, county, or other municipality, or between any agency, unit, or instrumentality thereof, or between any agency, instrumentality, or institution of the State of North Carolina, and any labor union, trade union, or labor organization, as bargaining agent for any public employees of such city, town, county or other municipality, or agency or instrumentality of government, is hereby declared to be against public policy of the State, illegal, unlawful, void and of no effect.[82]

Although the statute has been challenged on constitutional grounds, courts have upheld it.[83]

Since the FLSA amendments became law on April 15, 1986, courts have experienced considerable confusion in interpreting not only the amendments themselves, but also their relation to state law. In *Jacksonville Professional Fire Fighters Ass'n Local 2961 v. City of Jacksonville*,[84] the plaintiff fire fighters claimed the city had violated the FLSA when it adopted a policy of awarding comp time instead of cash payments for overtime work without making an agreement to that effect with their representative.[85] The fire fighters, all of whom had been hired before April 15, 1986, notified the city prior to that date that they had selected Local 2961 as their representative for overtime compensation negotia-

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82. N.C. GEN. STAT. § 95-98 (1985).

83. In Atkins v. City of Charlotte, 269 F. Supp. 1068 (W.D.N.C. 1969), Charlotte fire fighters challenged the validity of N.C. GEN. STAT. § 95-98 and other statutes prohibiting them from becoming members of trade or labor unions. *Atkins*, 269 F. Supp. at 1071. The fire fighters claimed that such statutes were overbroad and inhibited the exercise of their First Amendment free speech rights and Fourteenth Amendment's guarantee of due process and equal protection. *Id.* Although the court struck down statutes that prohibited the plaintiffs from joining unions, it upheld N.C. GEN. STAT. § 95-98, noting that no constitutional provision entitles a citizen to make a contract with a person who is unwilling to contract. *Atkins*, 269 F. Supp. at 1075-77. Similarly, in Hickory Fire Fighters Ass'n v. City of Hickory, 656 F.2d 917, (4th Cir. 1982), members of the local fire fighters' association, concerned about their wages, tried to discuss the issue at city council meetings. *Id.* at 919. The city manager refused to let them address the council as representatives of the association, but he allowed them to speak as individuals. *Id.* at 920. The fire fighters filed suit, alleging that the city had deprived them of their free speech rights. *Id.* The city argued that the speech constituted labor negotiation prohibited under N.C. GEN. STAT. § 95-98. *Hickory Fire Fighters Ass'n*, 656 F.2d at 921. Distinguishing between advocacy and negotiations, the court held that the city had infringed on the fire fighters' free speech rights, reasoning that the state's policy against negotiating with labor unions could not serve as a compelling state interest to restrict the association's right to advocate its position on wages. *Id.* at 921-22. For a discussion of the history of N.C. GEN. STAT. § 95-98, see Okun, *supra* note 19, at 218-21.

84. 685 F. Supp. 513 (E.D.N.C. 1987).

85. *Id.* at 515.

tions under section 207(o).[86] Nevertheless, the city proceeded to implement a comp time policy without consulting the group's representative.[87] The city argued that it had complied with the FLSA amendments because it had adopted the comp time policy before April 15, 1986, thereby making it a regular practice under section 207(o)(2)(B).[88] In addition, because state law prohibited the city from bargaining with representatives of labor organizations, the city contended that the fire fighters could not have a "representative" within the meaning of the FLSA regulations.[89] After examining the legislative history of the amendments, the court held that the federal statute does not require the employer to recognize the employee representative formally, and that the provision for regular practices applied only to employees *without* a representative.[90] Thus, the city could not substitute comp time for monetary pay without an agreement with the employee representative.[91]

At least one court has interpreted the 1985 amendments so strictly as to require a public agency to negotiate with the employees' representative rather than the employees themselves. In *Bleakly v. City of Aurora*,[92] city employees sought to have agreements regarding overtime compensation declared void because the city had negotiated with individual employees rather than the employees' union.[93] Recognizing that the Code of Federal Regulations stated expressly that an overtime agreement is "between the public agency and representatives of the employees,"[94] the court held that if a bargaining agent represented the employees, the FLSA amendments required the public agency to enter into a comp time

86. *Id.* at 516.

87. *Id.*

88. *Id.* at 521; *see supra* text accompanying note 77.

89. *Local 2961*, 685 F. Supp. at 521-22. The city relied on the Department of Labor's comment that state law should determine whether employees have a representative. *Id.* at 521 (citing 52 Fed. Reg. 2014 (1987)).

90. *Id.* at 522-23.

91. *Id.* at 523. The United States District Court for the Northern District of Georgia cited this case in reaching the same conclusion under similar facts. In Dillard v. Harris, 695 F. Supp. 565 (N.D. Ga. 1987), employees of state hospitals alleged that the state had violated section 207(o) by refusing to negotiate with their representative regarding overtime compensation. *Id.* at 566-67. The defendant asserted that state law prohibited it from negotiating with labor organizations and that using comp time was the regular practice when the amendments became effective. *Id.* at 568. The court held that the employees were represented, notwithstanding state law, within the meaning of the federal statute and that the state must pay the employees monetary compensation for overtime or enter into an agreement for comp time with the employees' representative. *Id.* at 569.

92. 679 F. Supp. 1008 (D. Colo. 1988).

93. *Id.* at 1009.

94. *Id.* at 1010 (quoting 29 C.F.R. § 553.22(a) (1991)).

agreement with that agent.[95]

However, in *Abbott v. City of Virginia Beach*,[96] the Fourth Circuit Court of Appeals reached a different conclusion. Under the city policy in *Abbott*, police officers had a choice between receiving overtime compensation in the form of money, comp time, or a combination of the two.[97] When the city refused to negotiate an overtime agreement with their employee representative, the officers brought suit alleging an FLSA violation.[98] The city, in defense, argued that state law prohibiting collective bargaining precluded negotiation with the representative.[99] The court recognized the confusing legislative history of the amendments, but it concluded that Congress did not intend to preempt state law.[100] Thus, the court reasoned that section 207(o) of the FLSA allowed public employers to enter into overtime compensation agreements with individual employees where state law prohibits the employer from entering into an agreement with employee representatives.[101] However, the court left unanswered the question of whether the city had an affirmative obligation to negotiate.

In *International Ass'n of Firefighters Local 2203 v. West Adams County Fire Protection District*,[102] the Tenth Circuit Court of Appeals again had to decide what Congress intended when it used the term "employee representative" in the statute. In *Local 2203*, fire fighters sought a declaratory judgment that their employer had violated the FLSA by providing employees with comp time instead of cash payments for overtime work because it had not entered into an agreement with the fire fighters' representative.[103] The court recognized that using comp time was a regular practice in the District, but it found the statute unclear as to whether that practice could continue once the employees had designated a representative.[104] After examining the legislative history, the court concluded that the Department of Labor's interpretation should control.[105] Therefore, the court held that the employees had properly desig-

95. *Id.* at 1010-11.

96. 879 F.2d 132 (4th Cir. 1989), *cert. denied*, 493 U.S. 1051 (1990).

97. *Id.* at 133.

98. *Id.*

99. *Id.* at 134; *see* Commonwealth v. County Bd. of Arlington County, 217 Va. 558, 561, 232 S.E.2d 30, 31 (1977).

100. *Abbott*, 879 F.2d at 135-37.

101. *Id.* at 137.

102. 877 F.2d 814 (10th Cir. 1989).

103. *Id.* at 816. The employees had designated their representative in a letter to the chief on November 19, 1985.

104. *Id.*

105. *Id.* at 819; *see supra* notes 78-80 and accompanying text.

nated a representative within the meaning of the statute, notwithstanding the fact that the employer did not recognize the representative, and the District was obligated to enter into an agreement with the representative before it could implement a comp time policy.[106]

The Ninth Circuit Court of Appeals came to a contrary conclusion in *Nevada Highway Patrol v. State of Nevada*.[107] In that case, the court held that section 207(a) required employers to negotiate with a representative of only those employees hired after April 15, 1986, reasoning that the practice of awarding comp time in lieu of payment before that date constituted an agreement regardless of whether the employees had designated a representative.[108] The court noted further that whether employees hired after that date have a representative should be determined by state law.[109] However, the court seemed to retreat from this strict approach several months later when it declared that whenever a state statute bars collective bargaining, employees may still designate a representative to enter into agreements with the state for FLSA purposes.[110]

With this confusing background of cases, the *Wilson* court confronted the issue of whether the City of Charlotte violated section 207(o) of the FLSA by continuing to award comp time in lieu of overtime pay without an agreement with an employee representative. Although the *Wilson* court held that the City had not violated the FLSA because its policy of awarding comp time in lieu of monetary payments for overtime constituted an agreement under the statute,[111] the judges disagreed on how to apply the statute.[112] Faced with a confusing legislative history[113] and contrary lines of case law,[114] the court had no definitive sources to guide it in making this decision. Thus, the *Wilson* court's decision cannot properly be characterized as right or wrong; rather, the separate opinions in *Wilson* represent the tension in this area of law.

The majority in *Wilson* rested its holding on the part of section 207(o) that allows employers to continue awarding comp time if it was a "regular practice" before this section was enacted.[115] In doing so, the

106. *Local 2203*, 877 F.2d at 820.
107. 899 F.2d 1549 (9th Cir. 1990).
108. *Id.* at 1552-53.
109. *Id.* at 1554.
110. State of Nevada Employees' Ass'n, Inc. v. Bryan, 916 F.2d 1384, 1390 (9th Cir. 1990).
111. *Wilson*, 964 F.2d at 1395.
112. *See supra* notes 31-45 and accompanying text.
113. *See supra* notes 68-80 and accompanying text.
114. *See supra* notes 84-110 and accompanying text.
115. *Wilson*, 964 F.2d at 1394-95; *see* 29 U.S.C. § 207(o)(2)(B) (1988).

court adopted a strict textual interpretation of the statute: because the plaintiffs were hired before April 15, 1986, and the City had adopted a comp time policy before April 15, 1986, an agreement was not required.[116] However, in dicta, the court relied on *Abbott v. City of Virginia Beach*[117] to conclude that state law controlled whether the employees may designate a representative.[118] Because North Carolina law prohibited employers from recognizing this kind of representative, the plaintiffs were, in effect, unrepresented.[119] Elaborating on its holding in *Abbott*,[120] a majority of the Fourth Circuit Court of Appeals explained that nothing in section 207(o) requires employers to enter into individual agreements with employees when the state's law prohibits collective bargaining.[121]

Although the majority offers one plausible interpretation of the statute on its face, it refuses to recognize that courts have not reached unanimous conclusions when interpreting this section.[122] Rather than addressing the plaintiffs' arguments and acknowledging that other constructions are possible, the court suggested that its interpretation was the only correct one without giving additional justification. Apparently satisfied with its conclusion based on the "regular practice" provision, the court reserved the central question of representation for dicta. Moreover, the majority failed to acknowledge that the Department of Labor had amended its original interpretation of section 207(o) to provide that the representative need not be formally recognized under state law.[123] Even when referring to the Secretary's interpretation, the court cited only cases supporting its contention that state law should control this inquiry[124] without recognizing that contrary case law exists.[125]

Judge Luttig correctly noted in his concurrence, however, that the

116. *Wilson*, 964 F.2d at 1395.

117. 879 F.2d 132 (4th Cir. 1989), *cert. denied*, 493 U.S. 1051 (1990); *see supra* notes 96-101 and accompanying text.

118. *Wilson*, 964 F.2d at 1395-96 (quoting *Abbott*, 879 F.2d at 136); *accord* Nevada Hwy. Patrol v. State of Nevada, 899 F.2d 1549, 1554 (9th Cir. 1990).

119. *Wilson*, 964 F.2d at 1395-96.

120. 879 F.2d at 137.

121. *Wilson*, 964 F.2d at 1395.

122. *See supra* notes 84-110 and accompanying text.

123. *Compare* 52 Fed. Reg. 2012, 2014-15 (Jan. 16, 1987) ("[T]he question of whether employees have a representative . . . shall be determined in accordance with State or local law and practices.") *with* 29 C.F.R. § 553.23(b) (1992) ("[T]he representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees.").

124. *Wilson*, 964 F.2d at 1395-96. The court characterized as misplaced the plaintiffs' reliance on *Abbott* for the proposition that a public employer who does not recognize the employees' representative must pay monetary compensation for overtime. *Id.*

125. *See supra* notes 84-91, 102-106 and accompanying text.

majority "offer[ed] no support" for its interpretation, and found that Local 660 was the fire fighters' representative even though the state's law prohibits collective bargaining.[126] Relying on the Code of Federal Regulations' provision that "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees,"[127] Judge Luttig reasoned that Local 660 was a legitimate representative under section 207(o).[128] Yet he did not find a conflict between the federal and state statutes because the federal law does not require an agreement between employers and employees to take the form of collective bargaining.[129] Because the statute allows "a memorandum of understanding or other type of oral or written agreement"[130] to satisfy section 207(o) provisions, Judge Luttig found that the state's prohibition on collective bargaining would not interfere with any other type of agreement.[131] However, he agreed with the majority that because the City had a regular practice of granting comp time prior to April 15, 1986, that practice constituted an agreement under the statute.[132]

While the concurring opinion recognizes the flaws in the majority's reasoning and offers an alternative interpretation that the regulations would support, it still skirts the conflict between federal and state law. Judge Luttig recognized correctly that Congress has permitted employers and employees to make overtime agreements outside of the collective bargaining process, but he overlooked the fact that section 95-98 of the General Statutes of North Carolina prohibits "*[a]ny* agreement, or contract" between public employers and labor organizations.[133] Thus, no matter what form the agreement takes, state law would invalidate *all* agreements between Local 660 and the City.

Only Chief Judge Ervin's dissenting opinion grasped the full impact of the FLSA on state law and appropriately undertook an analysis of section 207(o)'s legislative history and public policy to determine the statute's proper application. The dissent correctly recognized that whether a regular practice constitutes an agreement under section 207(o) depends on whether those employees lack an agreement or lack a repre-

126. *Wilson*, 964 F.2d at 1398 (Luttig, J., concurring in part).

127. 29 C.F.R. § 553.23(b)(1) (1992).

128. *Wilson*, 964 F.2d at 1398 (Luttig, J., concurring in part).

129. *Id.* at 1399 (Luttig, J., concurring in part).

130. 29 U.S.C. § 207(2)(A)(i) (1988).

131. *Wilson*, 964 F.2d at 1400 (Luttig, J., concurring in part). Some North Carolina public employees have entered into memoranda of understanding with their employers. Okun, *supra* note 19, at 227.

132. *Wilson*, 964 F.2d at 1400 (Luttig, J., concurring in part).

133. N.C. GEN. STAT. § 95-98 (1985) (emphasis added). See *supra* text accompanying note 82 for the full text of the statute.

sentative.[134] Because the FLSA's language does not indicate which interpretation is correct, Chief Judge Ervin turned to the regulations and legislative history to conclude that a regular practice can constitute an agreement only if the employees lacked a representative.[135] Although the dissenting judge acknowledged the possibility of alternative interpretations due to the unclear legislative history,[136] his interpretation is the most plausible based on the legislative history, prior case law, and public policy considerations.

When addressing a facially ambiguous statute, courts should accept the Secretary of Labor's interpretation if that construction is reasonable.[137] In the Code of Federal Regulations, the Secretary unambiguously declared that "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees."[138] The legislative history, although ambiguous on this point, offers some support for the Secretary's reading of the statute. The House Report on section 207(o) agreed with this construction, stating that employees need only select a representative to enter into an overtime agreement without requiring that the employer recognize the representative under state law.[139] Although the Senate Report seemed to imply that the employer must recognize the representative in some way,[140] Congress passed the House's version of the bill, which arguably could allow courts to give the House legislative history more weight.[141] Therefore, the fire fighters were "represented" under section 207(o).

Bolstering this interpretation of the legislative history is the fact that Chief Judge Ervin is not alone in finding the statute ambiguous. Although few courts have confronted this issue, those that have struggled with the same questions of statutory interpretation have reached in-

134. *Wilson*, 964 F.2d at 1401 (Ervin, C.J., dissenting).

135. *Id.* at 1401-02 (Ervin, C.J., dissenting); *see supra* notes 43-44 and accompanying text.

136. *Id.* at 1402 (Ervin, C.J. dissenting).

137. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

138. 29 C.F.R. § 553.23(b) (1992).

139. H.R. REP. No. 331, *supra* note 72, at 20-21 ("Where employees have selected a representative, which need not be a formal or recognized collective bargaining agent as long as it is a representative designated by the employees . . . .").

140. S. REP. No. 159, *supra* note 67, *reprinted in* 1985 U.S.C.C.A.N. at 658 ("Where employees have a recognized representative, the agreement or understanding must be between that representative and the employer. . . .").

141. *Wilson*, 964 F.2d at 1403 (Ervin, C.J., dissenting). *Contra* Todd D. Steenson, Note, *The Public Sector Compensatory Time Exception to the Fair Labor Standards Act: Trying to Compensate for Congress' Lack of Clarity*, 75 MINN. L. REV. 1807, 1838 (1991) (stating that courts should find the Senate reports more authoritative because the bill originated there).

consistent results.[142] For example, the Ninth Circuit has held that while state law should determine whether employers can enter into an agreement with employees, a prohibition on collective bargaining will not prevent employers and employees from negotiating;[143] furthermore, employers must make an agreement *only* with a designated bargaining agent, *not* with individual employees.[144] The Tenth Circuit does not require a formally recognized representative,[145] while the Fourth Circuit allows a statute prohibiting agreements between public employees and their employers to preclude an employer from recognizing a duly-elected employee representative.[146] If the statute were as clear as the majority and concurring opinions in *Wilson* declare, surely courts would have arrived at the same or similar conclusions in cases containing nearly identical facts.

Although the legislative history and case law provide some support for Chief Judge Ervin's argument, public policy furnishes the most compelling justification for his interpretation. As a result of the majority's holding, the City will be allowed to award comp time in lieu of monetary payments simply because it did so before April 15, 1986.[147] Because state law prohibits collective bargaining, this "regular practice" was the only kind of valid agreement the employees could have under section 207(o).[148] In reality, however, the employees never "agreed" to any such arrangement; rather, they voiced their disapproval of the City's policy through a series of letters to their supervisors and resorted to litigation in hopes of changing this procedure.[149] Applying the statute in this way contradicts the policy Congress intended to promote in enacting section 207(o). The drafters did not propose to eliminate employees' rights; rather, Congress intended to give local governments the *option*, not the *right*, to grant comp time to employees who would prefer it. As the House Report stated:

> [Section 207(o)] amends section 7 of the Act to provide flexibility to state and local government employers and an element of *choice* to their employees regarding compensation for statutory overtime hours worked by covered employees. . . . [I]t

142. *See supra* notes 84-110 and accompanying text.

143. *See* Nevada Hwy. Patrol v. State of Nevada, 899 F.2d 1549, 1554 (9th Cir. 1990); State of Nevada Employees' Ass'n v. Bryan, 916 F.2d 1384, 1390 (9th Cir. 1990).

144. *See* Bleakly v. City of Aurora, 679 F. Supp. 1008, 1010-11 (D. Colo. 1988).

145. *See* Int'l Ass'n of Firefighters, Local 2203 v. West Adams County Fire Protection Dist., 877 F.2d 814, 819-20 (10th Cir. 1989).

146. *See* Abbott v. City of Va. Beach, 879 F.2d 132, 137 (4th Cir. 1989).

147. *Wilson*, 964 F.2d at 1395.

148. *Id.*

149. *See supra* notes 18-25 and accompanying text.

> also recognizes the mutual benefits arising from a number of situations where state and local government employees and their employers have had agreements or longstanding arrangements where compensatory time off was provided for overtime hours worked by the employees.[150]

Thus, the bill, although enacted in response to a potential fiscal emergency for local governments,[151] was intended to alleviate the effects of *Garcia* pursuant to a *mutual* understanding between employers and employees.[152] Under *Wilson*, cities will be able to make *unilateral* decisions on the form of overtime compensation when state law prohibits agreements between employers and employees. In fact, the amendments to the bill actually encouraged employers to make these one-sided bargains by establishing "regular practices" before April 15, 1986, so that the law would deem them agreements. Without such a "regular practice," the employer would be forced to enter an overtime agreement with the employees, either individually or through a representative, to use comp time instead of monetary payments.

Chief Judge Ervin's interpretation strikes the proper balance between preservation of state autonomy and the need for uniform national legislation.[153] Although Congress did not intend for the FLSA to apply

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150. H.R. REP. No. 331, *supra* note 72, at 20-21 (emphasis added). Debates held on the bill also support this interpretation. *Compare* 131 CONG. REC. H9238 (daily ed. Oct. 28, 1985) (statement of Rep. Hawkins) ("The bill accommodates States and localities by allowing the continuation of a widespread practice of granting compensatory time off for overtime hours worked, *yet protects the preferences of employees regarding the utilization of the compensatory time.*") (emphasis added) *and* 131 CONG. REC. H9239 (daily ed. Oct. 28, 1985) (statement of Rep. Bartlett) ("[T]oday's bill . . . provides for a restoration of the rights of public employees who have been accustomed to traditional rights as public employees that would have been denied to them by *Garcia*. . . .") *with* 131 CONG. REC. S14,047 (daily ed. Oct. 24, 1985) (statement of Sen. Metzenbaum) ("[I]t is equally clear to me that 7 million State and local government employees deserve the protection of the FLSA. . . . State and local employees should not be treated as second class citizens.").

151. *See supra* notes 67-68 and accompanying text.

152. *Accord Wilson*, 964 F.2d at 1400 (Ervin, C.J., dissenting) ("Such an 'agreement' . . . is in reality a unilateral decision by the employer without employee consultation.").

153. *Contra* Steenson, *supra* note 141, at 1830-36. Steenson disagrees with courts that have imposed a duty on public employers to recognize any representative the employees designate. Rather, Steenson asserts, the representative requirement should be determined according to state law because

> the circumstances behind the passage of the amendments suggest that Congress intended to decrease state burdens, not increase them for choosing the compensatory time option. Second, problems peculiar to the public sector labor relations suggest that congressional action should not be read to change such relations unless Congress has clearly considered the ramifications. Finally, principles of federalism suggest that congressional action should not be read to affect important state interests absent clear congressional intent.

Id. at 1830-31.

to state and local governments when it enacted the legislation in 1938, the *Garcia* Court, forty-six years later, held that exempting state and local governments from the statute deprived public employees of their rights under the Equal Protection Clause.[154] Federal legislators perceived section 207(o) as a compromise that would allow state and local governments to comply with federal law, yet regain some control over their budgets and policy decisions with the comp time option.[155] However, federalism concerns prompted some members of Congress to argue that the compromise did not go far enough, because imposing wage and overtime requirements on state and local governments would dictate their policies. As Senator Wilson commented:

> I suggest that this compromise is going to come back to haunt those who have struck this hard bargain because they are going to find out that as State and local governments face the unpleasant fiscal reality of having to accommodate this legislation, it is going to result in . . . the unpleasant choice between reducing services and increasing taxes. . . . We simply cannot require the State and local governments and those whom they serve to experience the tremendous financial burden and the loss of services that would otherwise ensue if we were to go forward, allow the *Garcia* decision to become law, and to govern the operation of State and local governments. . . . [Collective bargaining] would work again if Congress would keep its hands off. We have no business intruding in this area. We should not have passed [in] the first instance that provision of the Fair Labor Standards Act that seeks to set wages by statute rather than by collective bargaining.[156]

Nevertheless, *Garcia* remains good law, and Congress cannot statutorily exempt state and local governments from the wage and overtime provisions of the FLSA without violating the Equal Protection Clause.[157]

Arguably, the majority in *Wilson* sought to do what Congress could

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154. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985); *see supra* notes 60-66 and accompanying text.

155. During debates on the 1985 Amendments, Senator Metzenbaum stated:

> It is significant that this compromise has been enthusiastically endorsed by the National League of Cities, the U.S. Conference of Mayors, the National Associations of Counties, and the National Conference of State Legislators. . . . The AFL-CIO has praised the bill . . . , stating that it "preserves the integrity of the Fair Labor Standard Act which is so vital to the interests of employees while addressing the concerns of public employers."

131 CONG. REC. S14,048 (daily ed. Oct. 24, 1985).

156. 131 CONG. REC. S14,049 (daily ed. Oct. 24, 1985) (statement of Sen. Wilson); *see id.* at S14,050 (statement of Sen. Kasten).

157. *See Garcia*, 469 U.S. at 554-55.

not. Refusing to look beyond the face of the statute and ignoring precedent,[158] the *Wilson* court judicially exempted the City of Charlotte from complying with section 207(o) simply because it found that a state statute prohibiting collective bargaining prevented the City from recognizing the employees' representative.[159] However, Chief Judge Ervin correctly realized that applying the FLSA in this way would vary its provisions according to "the idiosyncracies of state legislatures."[160]

> [E]mployees who reside in states [like North Carolina] that prohibit public agencies from engaging in collective bargaining have fewer rights under federal law than their counterparts who live in states with no such prohibition. I do not believe that Congress intended for employees' rights under the Act to hinge on the mere fortuity of geography.[161]

In the same way that the United States Supreme Court declared that the San Antonio Metropolitan Transit Authority had violated the Equal Protection Clause by refusing to pay its workers overtime merely because they worked for the government,[162] it is conceivable that North Carolina's statute prohibiting collective bargaining between public employers and employees could be held to violate the Equal Protection Clause in section 207(o) cases. Although Judge Ervin argued that Congress explicitly provided for agreements in forms other than collective bargaining to accommodate states that statutorily prohibit it,[163] he, like Judge Luttig,[164] failed to recognize that North Carolina has outlawed *all* agreements between public employers and labor unions as representatives of employees.[165] Under the Supremacy Clause, a direct conflict between state and federal law is resolved in favor of federal preemption.[166] Thus, public employers should be required to recognize employee representatives in the case of FLSA comp time agreements, and overtime compensation agreements between those employers and their employees should be valid in North Carolina.[167]

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158. *See supra* notes 115-32 and accompanying text.

159. *Wilson*, 964 F.2d at 1396.

160. *Id.* at 1400 (Ervin, C.J., dissenting).

161. *Id.* at 1403 (Ervin, C.J., dissenting).

162. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985); *see supra* notes 60-66 and accompanying text.

163. *Wilson*, 964 F.2d at 1402 (Ervin, C.J., dissenting).

164. *See supra* notes 126-32 and accompanying text.

165. N.C. GEN. STAT. § 95-98 (1985).

166. U.S. CONST. art. VI, § 2, cl. 2 states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

167. *Contra* Steenson, *supra* note 141, at 1841-42 (arguing that requiring overtime agree-

Wilson represents the ambiguity that exists in this area of law. The court split three ways on the proper interpretation of section 207(o), and each of those interpretations finds some support in the statute's language and legislative history, as well as precedent in case law.[168] Nevertheless, all three opinions cannot simultaneously honor Congressional intent.

If there is to be uniformity in the law, the solution lies within Congress. When drafting and debating the FLSA amendments, the House and Senate clearly shared the goal of giving the states a way to avoid the harsh financial effects of *Garcia*, but they differed on what means should be used to obtain this end.[169] The conference committee failed to resolve these differences, and the result was a poorly drafted law that leaves a court free to pick and choose among the pieces of legislative history supporting its interpretation. The time has come for Congress to address the ambiguities that courts have struggled with in the eight years since section 207(o)'s enactment. Congress should refine the law to clarify whether state law determines when an employer can recognize an employee representative. Although Congress acknowledged that many states have statutes prohibiting collective bargaining agreements and made provisions allowing other kinds of agreements to satisfy section 207(o) requirements,[170] this did not go far enough for North Carolina, where *all* agreements between public employers and employee representatives are invalid.[171] Therefore, Congress should declare explicitly that employers must negotiate with *any* representative the employees choose for this purpose and that the FLSA preempts any contrary provisions of state law. In restricting the preemption to FLSA agreements, Congress can preserve states' autonomy in defining contract law within their boundaries, yet ensure that public employees in North Carolina are not deprived of their overtime compensation. Only then will this legislation create a coherent body of law, rather than hinging employees' rights on "the mere fortuity of geography."[172]

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ments between employers and employee representatives in states that prohibit collective bargaining would force employers to bargain with non-exclusive representatives while not promoting any federal policy).

168. *See supra* notes 122-57 and accompanying text.

169. *See supra* notes 69-73 and accompanying text.

170. 29 U.S.C. § 207(o)(2)(A)(i) (1988).

171. N.C. GEN. STAT. § 95-98 (1985).

172. *Wilson*, 964 F.2d at 1403 (Ervin, C.J., dissenting).

The Unqualified Reopening of Final Awards to Allow Claims for Medical Compensation: *Hyler v. GTE Products Co.*

The original North Carolina Workmen's Compensation Act[1] ("the Act") was a compromise between employers and employees: employees injured in the course of employment forfeited tort claims against their employer in exchange for a guaranteed, statutorily defined recovery without the burden of proving that the employer was at fault.[2] This law benefited both employers and employees by providing "[r]emedies . . . directed toward quick recovery, limited litigation, and relatively ascertainable awards."[3] The North Carolina Supreme Court, in *Hyler v. GTE Products Co.*,[4] disrupted this balance by permitting delayed recovery of medical expenses, which makes ascertaining awards impossible.[5]

Two key sections of the Act, sections 97-25 and 97-47, define the employee's remedy while providing finality for the employer.[6] Section 97-25 allows an employee to collect certain medical expenses as part of the original workers' compensation award.[7] Section 97-47 governs the

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1. Workmen's Compensation Act of 1929, ch. 120, §§ 1-77, 1929 N.C. Sess. Laws 117-147 (codified as amended at N.C. GEN. STAT. §§ 97-1 to -122 (1991)).

2. 1 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 4.00, at 23, § 4.50, at 29, § 5.20, at 37 (1993). Workers' compensation makes fault irrelevant, but by requiring employers to obtain insurance,

> it retains incentives for the employer to perform better in the future. Although workers' compensation provides injured employees with only partial relief, it does so with more certainty than the tort system and with more efficiency and dignity for the claimant than either the tort or welfare systems. These characteristics make the workers' compensation system the compensation mechanism of choice for work-related health impairments.

Jordan H. Leibman & Terry M. Dworkin, *Time Limitations Under State Occupational Disease Acts*, 36 HASTINGS L.J. 287, 347-48 (1985).

3. J. Cameron Furr, Jr., Note, Whitley v. Columbia Lumber Manufacturing Co.: *Abolishing the Exclusive Remedy Requirement for the Scheduled Injuries Section of the North Carolina Workers' Compensation Act*, 66 N.C. L. REV. 1365, 1365 (1987) (footnotes omitted).

4. 333 N.C. 258, 425 S.E.2d 698 (1993).

5. *Id.* at 260, 425 S.E.2d at 700.

6. N.C. GEN. STAT. §§ 97-25, 97-47 (1991).

7. The relevant text of § 97-25 provides:

> Medical, surgical, hospital, nursing services, medicines, sick travel, rehabilitation services, and other treatment including medical and surgical supplies as may reasonably be required to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the period of disability, and in addition thereto such original artificial members as may be reasonably necessary at the end of the healing period shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.
>
> The Commission may at any time upon the request of an employee order a

reopening of cases, providing that once a final award has been made, a case may be reopened only if the employee brings a claim within two years of the final compensation payment and can show a change in his condition.[8] In the 1976 case of *Shuler v. Talon Division of Textron*,[9] the North Carolina Court of Appeals linked the two provisions when it held that employees seeking continuing medical expenses under section 97-25 must meet the "change of condition" and statute of limitations requirements of section 97-47.[10] In the seventeen years following *Shuler*, the decision represented a settled principle in North Carolina workers' compensation law.[11]

Early this year, however, the North Carolina Supreme Court overturned this well-settled principle.[12] In *Hyler v. GTE Products Co.*, the court held that cases closed by a final award can be reopened to continue awarding continuing medical expenses at any time and without proof of a change in condition.[13] This decision tips the employee/employer balance of the Workers' Compensation Act in favor of the employee, because permitting delayed recovery makes it impossible for the employer to ascertain her liability for an injury. This Note discusses the *Hyler* opinion,[14] presents prior relevant cases interpreting North Carolina workers'

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change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission, and in such a case the expense thereof shall be borne by the employer upon the same terms and conditions as hereinbefore provided in this section for medical and surgical treatment and attendance.

N.C. GEN. STAT. § 97-25 (1990) (amended 1991). The 1991 amendment to § 97-25 is merely a ministerial change. *See infra* note 51.

8. The relevant text of § 97-47 provides:

[U]pon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Article . . . . No such review shall affect such award as regards any moneys paid but no such review shall be made after two years from the date of the last payment of compensation pursuant to an award under this Article, except that in cases in which only medical or other treatment bills are paid, no such review shall be made after 12 months from the date of the last payment of bills for medical or other treatment, paid pursuant to this Article.

N.C. GEN. STAT. § 97-47 (1991). In North Carolina, a "change in condition" must either be a change in the employee's physical condition resulting from the original injury or a change in the employee's physical capacity to earn a living. *See* McLean v. Roadway Express, Inc., 307 N.C. 99, 103-04, 296 S.E.2d 456, 459 (1982).

9. 30 N.C. App. 570, 576-77, 227 S.E.2d 627, 631 (1976), *overruled by* Hyler v. GTE Products Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

10. *See infra* notes 80-87 and accompanying text.

11. *Hyler*, 333 N.C. at 276, 425 S.E.2d at 709 (Meyer, J., dissenting).

12. *Id.* at 267-68, 425 S.E.2d at 704.

13. *Id.* at 267, 425 S.E.2d at 704.

14. *See infra* notes 20-74 and accompanying text.

compensation statutes,[15] analyzes the reasons underlying the court's decision,[16] and predicts the impact of the decision on North Carolina workers' compensation law.[17] The Note concludes by observing that while other state courts have similarly interpreted their workers' compensation laws, they have managed to retain the delicate employee/employer balance of the workers' compensation system by simultaneously mitigating the burden on the employers.[18] The Note suggests that the North Carolina legislature should provide such a mechanism.[19]

On January 2, 1980, while in the employ of GTE Products, Hassell Hyler injured his left knee.[20] Hyler underwent knee surgery six times between 1980 and 1983;[21] the last operation, in June 1983, was to replace his knee with a prosthetic joint.[22] Following the surgery, doctors informed Hyler that he must have the knee monitored through annual orthopedic check-ups and that there was a substantial risk that the prosthetic knee would fail.[23] The orthopedist's reports presented to the supreme court, however, established that there had been no material deterioration of Hyler's knee since June 1984.[24]

In February 1985, the Industrial Commission approved the parties' final agreement that required GTE to pay Hyler for his temporary-total disability, his permanent-partial disability, and all medical expenses due him under the law.[25] This agreement did not mention Hyler's continuing medical expenses stemming from the injury.[26] GTE made its final payment to Hyler on February 25, 1985.[27] On February 19, 1986, Hyler

15. *See infra* notes 75-90 and accompanying text.

16. *See infra* notes 91-122 and accompanying text.

17. *See infra* notes 123-131 and accompanying text.

18. *See infra* notes 132-139 and accompanying text.

19. *See infra* notes 140-145 and accompanying text.

20. *Hyler*, 333 N.C. at 259, 425 S.E.2d at 699.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* When Hyler settled with GTE, the law was unclear regarding whether monitoring expenses were recoverable in an original award. *See infra* notes 88-90 and accompanying text.

27. *Hyler*, 333 N.C. at 259, 425 S.E.2d at 699. Two days later, GTE issued a Form 28B, as required by the Workers' Compensation Act, to serve notice to the employee of the statute of limitations on reopening claims. *Id.* at 268-69, 425 S.E.2d at 705 (Meyer, J., dissenting); *see* Watkins v. Central Motor Lines, Inc., 10 N.C. App. 486, 490, 179 S.E.2d 130, 133, *rev'd on other grounds*, 279 N.C. 132, 181 S.E.2d 588 (1971). This form stated "that upon receipt of this form your compensation stops. If you claim further benefits, you must notify the Commission in writing within two (2) years from the date of the receipt of your last compensation check." *Hyler*, 333 N.C. at 269, 425 S.E.2d at 705 (Meyer, J., dissenting).

notified the Commission of his desire to reopen his claim.[28] Hyler requested "additional compensation for his disability based on the grounds of a change of condition as provided in [section] 97-47."[29] In March 1987, Hyler added a request that the Commission order GTE Products and its insurance carrier, American Motorists Insurance Company, to pay his continuing medical expenses under section 97-25 of the North Carolina General Statutes.[30]

In August 1989, the Deputy Commissioner[31] filed an opinion concluding that there was no material change in Hyler's condition, and that Hyler had a right to future medical expenses insofar as the "treatment tended to effect a cure of, give relief from, or lessen his disability from the compensable knee injury."[32] In August 1990, the full Industrial Commission found that section 97-47 applied,[33] because when the parties' original agreement was finalized, section 97-25 had not been interpreted as allowing recovery for continuing medical expenses.[34] Because there was no evidence of a change of condition, Hyler was not entitled to future expenses unless he could produce new evidence that had not been available at the time of the final award to justify reopening his case under section 97-47.[35]

Hyler appealed to the North Carolina Court of Appeals. Relying on the commission's finding that there was no change in Hyler's condition, the court concluded that his claim was barred by section 97-47[36] but granted Hyler's request for future expenses on undisclosed equitable

28. *Hyler*, 333 N.C. at 259, 425 S.E.2d at 699.

29. *Id.* at 259-60, 425 S.E.2d at 699. The claim was filed within the statute of limitations under § 97-47. *See supra* note 8.

30. *Hyler*, 333 N.C. at 260, 425 S.E.2d at 699.

31. Under North Carolina's workers' compensation system, if the employer and the employee cannot reach an agreement concerning compensation, either party may request a hearing before the Industrial Commission. N.C. GEN. STAT. § 97-83 (1991). The Commission may appoint a Deputy Commissioner, *id.* § 97-79(b), to conduct the hearing. *Id.* § 97-84. Either party may appeal the Deputy Commissioner's award to the full Commission for de novo review. *Id.* § 97-85. The award of the full Commission is appealable to the North Carolina Court of Appeals; however, findings of fact made by the Commission are conclusive unless the evidence does not support them. *Id.* § 97-86.

32. *Hyler*, 333 N.C. at 270, 425 S.E.2d at 705 (Meyer, J., dissenting).

33. *Id.* at 260, 425 S.E.2d at 699-700.

34. It was not until 1986, in Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986), that the North Carolina Supreme Court found that § 97-25 provides a basis for a claim for continuing medical expenses. *See infra* notes 88-90 and accompanying text.

35. *Hyler*, 333 N.C. at 260, 425 S.E.2d at 699-700; *see* Hogan v. Cone Mills Corp., 315 N.C. 127, 138, 337 S.E.2d 477, 483 (1985).

36. *Hyler*, 333 N.C. at 270, 425 S.E.2d at 706 (Meyer, J., dissenting).

grounds.[37] The defendants petitioned the North Carolina Supreme Court for discretionary review,[38] and the supreme court, by a four-to-one vote,[39] affirmed the court of appeals' ruling. The court found that requests for medical expenses under section 97-25 are modifiable without regard to the "change of condition" requirement of section 97-47; Hyler was therefore entitled to the payment of these expenses.[40]

The *Hyler* court reached its conclusion by applying basic principles of statutory construction to sections 97-25 and 97-47.[41] Justice Mitchell, writing for the court, summarized his approach:

> "Legislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish. The statute's words should be given their natural and ordinary meaning unless the context requires them to be construed differently."[42]

The court also supported its position with a textual argument when it stated that "[n]othing in the language of [section] 97-25 implies that the 'change of condition' requirement of [section] 97-47 applies to any request by an employee for the payment of his medical expenses by his employer."[43] In fact, the court noted that, as early as 1936, section 97-25 had been interpreted to mean that "in case of a controversy arising relative to the continuance of any treatment the Industrial Commission may order such further treatment as may in its discretion be necessary, and . . . the Commission may change the treatment or designate other treatment suggested by the injured employee."[44] The court also pointed to the absence of any "change of condition" language in section 97-25—and to the express language allowing the Commission to review and change, upon request, the employee's treatment at any time—as conclusive proof that the legislature intended for an employer to pay for any medical services or treatment needed as a result of a compensable injury.[45]

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37. *Id.* (Meyer, J., dissenting). The opinion of the court of appeals is unpublished. *Id.* at 260, 425 S.E.2d at 700.

38. *Id.* at 260, 425 S.E.2d at 700.

39. Justices Webb and Parker did not participate in the decision. *Id.* at 268, 425 S.E.2d at 704.

40. *Id.* at 260, 425 S.E.2d at 700.

41. *Id.* at 262, 425 S.E.2d at 701.

42. *Id.* (quoting Shelton v. Morehead Memorial Hosp., 318 N.C. 76, 82, 347 S.E.2d 824, 828 (1986)).

43. *Id.* at 262, 425 S.E.2d at 701.

44. *Id.* at 263, 425 S.E.2d at 701 (quoting Hedgepeth v. Casualty Co., 209 N.C. 45, 47, 182 S.E. 704, 705 (1936)).

45. *Id.* at 263, 425 S.E.2d at 701.

The court asserted that its interpretation of section 97-25 was consistent with the text of section 97-47 as well.[46] The relevant portion of section 97-47 provides that "upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the *compensation* previously awarded."[47] Because distinguishing section 97-47 from section 97-25 hinged on the appropriate definition of "compensation," the court then turned to section 97-2 of the Act, which defines "compensation" as "the money allowance payable to an employee or to his dependents as provided for in this Article, and includ[ing] funeral benefits provided herein."[48] The court felt that precedent clearly established that medical expenses were not a part of this definition of "compensation":

> In many jurisdictions the payment of medical expenses is held to be tantamount to the payment of compensation. However, under the definition of the word "compensation" contained in . . . [section 97-2(11)], payment of medical or hospital expenses constitutes no part of compensation under the provisions of our Workmen's Compensation Act.[49]

As added support for the proposition that the legislature intended for "compensation" and "medical expenses" to be treated differently, the court examined legislative amendments to sections 97-25 and 97-2 that were not in effect when *Hyler* arose.[50] Justice Mitchell noted that the General Assembly chose, in these amendments, to define the expenses covered by section 97-25 in section 97-2(19), creating the new term "medical compensation" rather than adding the expenses to the existing definition of "compensation."[51]

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46. *Id.*

47. N.C. GEN. STAT. § 97-47 (1991) (emphasis added).

48. *Id.* § 97-2(11).

49. *Hyler*, 333 N.C. at 264, 425 S.E.2d at 702 (quoting Whitted v. Palmer-Bee Co., 228 N.C. 447, 453, 46 S.E. 109, 113 (1948)); *see* Morris v. Chevrolet Co., 217 N.C. 428, 432, 8 S.E.2d 484, 486 (1940). The court also noted that more recently, in *Ashley v. Rent-A-Car Co.*, 271 N.C. 76, 155 S.E.2d 755 (1967), it had held that medical expenses are not a part of "compensation" under the Act; rather, "compensation" is "based on the claimant's lost earning capacity." *Id.* at 83, 155 S.E.2d at 761 (quoting Hill v. DuBose, 234 N.C. 446, 447-48, 67 S.E.2d 371, 372 (1951)).

50. *Hyler*, 333 N.C. at 265, 425 S.E.2d at 702-03.

51. *Id.* "Compensation" is defined as "the money allowance payable to an employee or to his dependents as provided for in this Article, and includes funeral benefits provided herein." N.C. GEN. STAT. § 97-2(11) (1991). "Medical compensation" is defined as:

> medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any

Finally, recognizing that section 97-47 could be considered ambiguous, the court relied on a long-standing policy that "the legislature intends 'for the Workers' Compensation Act to be construed liberally in favor of the injured worker to the end that its benefits not be denied upon technical, narrow or strict interpretation.' "[52] Accordingly, the majority contended that its interpretation was appropriate.

Under the court's interpretation, Hyler may recover continuing medical expenses after reopening his claim under section 97-25, not section 97-47. Continuing medical expenses will be justified if, upon reopening, the Commission finds that treatment will lessen Hyler's period of disability, effect a cure, or give relief.[53] Thus, the court concluded that the Commission had the discretion to grant or deny Hyler's request based on the theory that monitoring a condition is a form of relief under the statute.[54]

In his dissent, Justice Meyer vehemently disagreed with the majority's analysis and result.[55] While he conceded that some precedent supported the majority's interpretation of "compensation" under the Act, he insisted that the inadequacy of the majority's interpretation becomes clear when the Act is read as a whole.[56] Justice Meyer listed nineteen provisions of the Act dealing with "compensation" that he argued were irreconcilable with the majority's narrow interpretation of the term.[57] In his opinion, inserting the majority's definition of "compensation" in these provisions "would wholly exclude medical treatment from employers'

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original artificial members as may reasonably be necessary at the end of the healing period.

Id. § 97-2(19). Prior to 1991, this definition was essentially the first sentence of § 97-25. *See supra* note 7.

52. *Hyler*, 333 N.C. at 266, 425 S.E.2d at 703 (quoting Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 578, 336 S.E.2d 47, 54 (1985)).

53. N.C. GEN. STAT. § 97-25 (1990) (amended 1991). The court noted that under Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986), "medical expenses incurred in monitoring the employee's condition would give 'relief' of the type that would require his employer to pay those expenses." *Hyler*, 333 N.C. at 261, 425 S.E.2d at 700 (citing *Little*, 317 N.C. at 213-14, 345 S.E.2d at 209-10).

54. *Hyler*, 333 N.C. at 261, 425 S.E.2d at 700.

55. *Id.* at 271, 425 S.E.2d at 706 (Meyer, J., dissenting).

56. *Id.* (Meyer, J., dissenting).

57. *Id.* at 271-73, 425 S.E.2d at 706-07 (Meyer, J., dissenting). These provisions include N.C. GEN. STAT. §§ 97-3 and 97-51 (1991). *Hyler*, 333 N.C. at 271-72, 425 S.E.2d at 706-07 (Meyer, J., dissenting). Section 97-3 establishes as the duties of employers and employees that they "respectively pay and accept 'compensation' for injury." *Id.* at 271, 425 S.E.2d at 706 (Meyer, J., dissenting). If "medical expenses" are not part of "compensation," then under § 97-3 the employer has no duty to pay these expenses. Similarly, § 97-51 provides that when an employee has multiple employers, they "all contribute to 'compensation' payable" to the employee, *id.* at 272, 425 S.E.2d at 707 (Meyer, J., dissenting); unless "medical expenses" are part of "compensation," multiple employers have no duty to share the cost of these expenses.

duties in many contexts."[58] Arguing that this approach clearly would violate the legislature's intent, Justice Meyer concluded that the converse instead must be true: the legislature must have intended to include medical expenses within the scope of compensation.[59]

Justice Meyer also relied on a second textual argument, based on the language of section 97-47.[60] First, he noted that section 97-47 "provides in the clearest terms that 'on the grounds of a change in condition the Industrial Commission may review *any award*,' "[61] not just one of "compensation" as indicated by the majority.[62] Therefore, Justice Meyer contended, an employee requesting additional medical expenses must meet the "change in condition" and statute of limitations requirements of section 97-47 to reopen his case.[63]

Next, Justice Meyer noted that section 97-47 allows the Industrial Commission, when reviewing a claim, to "make an award ending, diminishing, or increasing the compensation previously awarded" and that "in cases in which only medical or other treatment bills are paid, no such review shall be made after 12 months from the date of the last payment of bills for medical or other treatment, paid pursuant to this Article."[64] Justice Meyer felt that this language discredited the majority's interpretation. He asserted that if, as the majority contended, only a compensation award could be affected by review under section 97-47, then the language in the statute addressing cases in which the original award was limited to medical expenses becomes meaningless.[65] He based this conclusion on the fact that *granting* compensation is materially different from *ending*, *diminishing*, or *increasing* it and, consequently, was not contemplated by the legislature.[66]

Justice Meyer also questioned the fact that the majority did "away with any statutory time limitation . . . to file for additional benefits for [medical expenses]."[67] He argued that the legislature did not intend to omit a statute of limitations for reopening claims to recover additional medical expenses. Justice Meyer supported his argument by citing a stat-

58. *Hyler*, 333 N.C. at 271, 425 S.E.2d at 706 (Meyer, J., dissenting).

59. *Id.* (Meyer, J., dissenting).

60. *Id.* at 274, 425 S.E.2d at 708 (Meyer, J., dissenting).

61. *Id.* (Meyer, J., dissenting).

62. *Id.* (Meyer, J., dissenting).

63. *Id.* (Meyer, J., dissenting).

64. *Id.* (Meyer, J., dissenting) (quoting § 97-47).

65. *Hyler*, 333 N.C. at 274-75, 425 S.E.2d at 708-09 (Meyer, J., dissenting). The majority determined that granting an award is contemplated by the "ending, diminishing, or increasing" language. *Id.* at 266-67, 425 S.E.2d at 703-04.

66. *Id.* at 275, 425 S.E.2d at 708-09 (Meyer, J., dissenting).

67. *Id.* at 275, 425 S.E.2d at 709 (Meyer, J., dissenting).

ute providing that employers may destroy their claim records five years after a final award.[68] He explained that because section 97-47 allows cases to be reopened only during a two-year time period, the five-year limit allows the record to remain "available for a reasonable period beyond any possible reopening."[69]

Finally, Justice Meyer pointed to prior case law to support his position. He noted that, in 1976, the court of appeals, in *Shuler v. Talon Division of Textron*, stated:

> Therefore claimant's procedure was inextricably tied to [section] 97-47, which requires notice within [two years] of the last payment of compensation and a showing of change of condition. Where an award directs the payment of both compensation and medical expenses, then the injured employee has [two years] from the last payment of compensation pursuant to the award in which to file claim for further compensation upon an alleged change of condition. Where the award directs the payment of medical bills only, an extension of the award would not be permissible unless there is a showing of change of condition since the original award. If the legislature had intended that no showing of a change of condition was necessary where only additional medical expense payments are sought, it would have so provided.[70]

Justice Meyer observed that, since *Shuler*, "[e]mployees, employers, and the Commission have . . . constantly observed the change of condition and time limitations requirements of [section] 97-47 in reopening all cases where the final award has been entered, specifically including cases where the claimant sought only additional medical expenses."[71] Noting that even an inexperienced workers' compensation practitioner would recognize that the majority opinion is a change in the law,[72] Justice Meyer argued that "in *Hogan v. Cone Mills* . . . [this court] expressly and unequivocally held that the Industrial Commission was without power to reopen an otherwise final decision solely because of subsequent developments in the law."[73] Consequently, he claimed the majority opinion directly conflicted with these earlier holdings. In addition, Justice Meyer

68. *Id.* at 276, 425 S.E.2d at 709 (Meyer, J., dissenting) (referring to N.C. GEN. STAT. § 97-24(c) (1991)).

69. *Id.* (Meyer, J., dissenting).

70. *Id.* (Meyer, J., dissenting) (quoting Shuler v. Talon Div. of Textron, 30 N.C. App. 570, 576-77, 227 S.E.2d 627, 631 (1976)).

71. *Id.* (Meyer, J., dissenting).

72. *Id.* (Meyer, J., dissenting).

73. *Id.* at 271, 425 S.E.2d at 706 (Meyer, J., dissenting) (citing Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985)). *See infra* note 101 and accompanying text.

contended that such changes affecting the balance of interests between the employee and employer should be left to the legislature.[74]

Before analyzing the effect of the court's decision on the workers' compensation system, it is important to understand the relevant case law preceding *Hyler*. In *Morris v. Laughlin Chevrolet Co.*[75] and *Ashley v. Rent-A-Car Co.*,[76] the North Carolina Supreme Court addressed the issue of whether medical expenses are a part of "compensation" under the North Carolina Workers' Compensation Act. In *Morris*, the court was asked to determine if money the employer paid to cover the employee's medical expenses could be included in computing the total compensation for one injury.[77] The court held that because medical expenses were not a part of the statutory definition of compensation, they could not be included in the computation of total compensation.[78] Twenty-seven years later, in *Ashley*, the court upheld its decision in *Morris*. The *Ashley* court specifically stated that "medical and hospital expenses are not a part of and are not included in determining recoverable compensation."[79] Thus, the supreme court made it clear that medical expenses are distinctly different from compensation. With this issue clarified, the question became which statutes apply to compensation and which apply to medical expenses.

In *Shuler v. Talon Division of Textron*,[80] the court of appeals tackled this problem. In *Shuler*, the plaintiff was awarded compensation for disfigurement and all approved medical expenses.[81] Although final payment was made and a form 28B was filed two years after his injury, Shuler required continuing medical treatment for which the employer's insurance carrier refused to pay.[82] After Shuler contacted the carrier, payments resumed temporarily.[83] In May 1974, eighteen months after the form 28B was filed, Shuler requested that his claim be reopened.[84] Shuler argued that section 97-47 did not apply because he sought "only

74. *Hyler*, 333 N.C. at 277, 425 S.E.2d at 709-10 (Meyer, J., dissenting). He argued that the legislature was the more appropriate body to make such a decision because of its ability to consider broad, public policy concerns and to reduce the problems that the majority decision created. *Id.* at 277, 425 S.E.2d at 710 (Meyer, J., dissenting).

75. 217 N.C. 428, 8 S.E.2d 484 (1940).

76. 271 N.C. 76, 155 S.E.2d 755 (1967).

77. *Morris*, 217 N.C. at 430, 8 S.E.2d at 485.

78. *Id.* at 430, 8 S.E.2d at 485.

79. *Ashley*, 271 N.C. at 82, 155 S.E.2d at 760.

80. 30 N.C. App. 570, 227 S.E.2d 627 (1976), *overruled by* Hyler v. GTE Products Co., 333 N.C. 258, 268, 425 S.E.2d 698, 704 (1993).

81. *Id.* at 571, 227 S.E.2d at 628.

82. *Id.* See *supra* note 27 for a reference to the significance of filing a Form 28B.

83. *Shuler*, 30 N.C. App. at 571, 227 S.E.2d at 628.

84. *Id.*

continued payment of medical expenses, not additional compensation on the ground of change of condition."[85] The court of appeals found that Shuler's claim was barred because it was "inextricably tied to [section] 97-47, which requires notice within twelve months of the last payment of compensation and a showing of change of condition."[86] To justify its holding, the court reasoned that "[i]f the legislature had intended that no showing of a change of condition was necessary where only additional medical expense payments are sought, it would have so provided."[87]

Finally, in *Little v. Penn Ventilator Co.*,[88] the supreme court ruled on the status of monitoring expenses under the Act. In *Little*, the plaintiff, who had sustained an eye injury in the course of his employment, required periodic check-ups to guard against loss of vision or other problems with his eye.[89] The North Carolina Supreme Court held that "future services which will be incurred to monitor an employee's medical condition are reasonably required to give relief if there is a substantial risk that the employee's condition may take a turn for the worse."[90] *Little*, therefore, stands for the proposition that if an employee can prove prior to the final award that there is a substantial risk that her condition will worsen, then her claim for future expenses to cover the cost of monitoring her condition is valid under section 97-25.

Under *Little*, a claim like Hyler's, supported with adequate proof, would be valid prior to the final agreement. The validity of Hyler's claim raised the question: Can such a case be reopened? The court of appeals in *Shuler* had said "no,"[91] but the supreme court, seventeen years later in *Hyler*, answered this question in the affirmative.

Was the *Hyler* court correct in overturning the prevailing interpretation of the law after seventeen years?[92] A quick review of the facts and evidence casts doubt upon the legitimacy of the court's decision. The *Hyler* court's reliance on the 1991 amendments to the Workers' Compensation Act was inappropriate because those amendments were not in effect when the Commission decided the case. The court claimed that since its interpretation of the previous version of the statutes was consis-

85. *Id.* at 576, 227 S.E.2d at 631.

86. *Id.*

87. *Id.* at 577, 227 S.E.2d at 631.

88. 317 N.C. 206, 345 S.E.2d 204 (1986).

89. *Id.* at 207, 345 S.E.2d at 206.

90. *Id.* at 214, 345 S.E.2d at 209.

91. *See supra* notes 80-87 and accompanying text.

92. *Hyler*, 333 N.C. at 276, 425 S.E.2d at 709 (Meyer, J., dissenting).

tent with the amendments,[93] its interpretation must be correct.[94] The amendments are irrelevant because they do not give any insight into the intent of the legislators who enacted the original statutes; instead, the changes merely indicate the intent of present legislators. Furthermore, the statutes as amended do not clearly resolve this issue in the court's favor. The amendments define the "medical expenses" referred to in section 97-25 as "medical compensation;"[95] the court assumed this meant that "medical compensation" could not be a part of "compensation," but it seems more likely that the legislature intended just the opposite. The legislature probably chose the term "medical compensation," instead of "medical expenses or costs," because it intended to include these expenses as a subset of general "compensation." Therefore, instead of being evidence that the legislature intended to define distinctly separate categories, perhaps the amendments indicate that "compensation" and "medical compensation" are closely related. Because both the relevance and the meaning of the 1991 amendments are questionable, the court's reliance on them for support is unpersuasive.

In addition, when Hyler first sought to reopen his case, he did so under a "change in condition" theory while stipulating that there was no change in his condition.[96] His lawyers obviously believed that Hyler's only option under the Workers' Compensation Act was to request additional compensation under section 97-47. Because there was no change in condition, Hyler's request for reopening was denied.[97] Shortly after the Commission's denial of Hyler's claim, the North Carolina Supreme Court decided *Little*, and a few months later, Hyler amended his request to include a claim for "additional medical benefits as well as compensation."[98] Hyler attempted to take advantage of *Little*, which would have permitted his medical benefits claim in the original agreement.[99] Although the *Hyler* court was willing to reopen a case to consider such claims, the dissent pointed out that, in *Hogan v. Cone Mills Corp.*,[100] the supreme court had directly forbidden this type of action:

> We agree with defendant that the Industrial Commission cannot properly set aside its judgment dismissing Hogan's claim merely because its decision proved to be erroneous as a result of

93. *See supra* notes 50-51 and accompanying text. The 1991 amendment defined the types of expenses covered under § 97-25 as "medical compensation."

94. *Hyler*, 333 N.C. at 265, 425 S.E.2d at 702-03.

95. N.C. GEN. STAT. § 97-2(19) (1991) (amended 1991).

96. *Hyler*, 333 N.C. at 259, 425 S.E.2d at 699.

97. *Id.* at 260, 425 S.E.2d at 699-700.

98. *Id.* at 260, 425 S.E.2d at 699.

99. *See supra* note 90 and accompanying text.

100. 315 N.C. 127, 337 S.E.2d 477 (1985).

> a subsequent decision of this Court. The law would have no finality if disappointed claimants had the right to retry their claims after further development of the law shows that a decision barring their claims was erroneous. The remedy for these claimants is to appeal the denial of their claims.[101]

According to the *Hyler* dissent and the court in *Hogan*, the fact that Hyler did not pursue his medical benefits claim at the outset was effectively a bar to his raising the issue later, except under the "change of condition" provision of section 97-47.[102] Yet, the majority in *Hyler* allowed the claim without even acknowledging the existence of the *Hogan* precedent.[103]

Finally, the court's decision is problematic because its ramifications are so great that the legislature, not the court, should have made such a change in the law. In his dissent, Justice Meyer suggested that "[c]hanges of this magnitude in our state's workers' compensation plan require public policy considerations that fall within the exclusive province of the legislature."[104] While the judiciary has the power to rule on such issues, there are several reasons that the legislature may be better suited to render decisions with such far-reaching results. Unlike a court, the legislature is well-equipped to assess public policy matters and to debate issues involved in changes to the law, with interested parties able to voice their views. This results in a careful weighing of the "benefits and detriments of the change."[105]

In addition, unlike a court, which generally makes changes effective both prospectively and retrospectively,[106] the legislature's changes typically apply only prospectively.[107] This minimizes the disruption to those relying on the present system. A legislative approach to the issue raised in *Hyler* would have allowed carriers "to adjust premiums and set up

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101. *Id.* at 140-41, 337 S.E.2d at 485.

102. *See Hyler*, 333 N.C. at 271, 425 S.E.2d at 706 (Meyer, J., dissenting).

103. While this may seem like a glaring oversight on the part of the court, the absence of any reference to *Hogan* is legitimate. The court found that the decision in *Little* was not a change in the law. *Hyler*, 333 N.C. at 261, 425 S.E.2d at 700. Rather, they argued that it was the first time the court had interpreted § 97-25 since the 1973 amendment to the statute. *Id.* The 1973 amendment removed the language that limited recovery to medical treatment to effect a cure or give relief that was incurred within the ten weeks following the injury. *Id.* With the ten week limitation removed, the court found that the legislature meant that all medical treatment to effect a cure or give relief was covered under § 97-25. *Id.* Concluding that the court in *Little* merely interpreted § 97-25 for the first time, the *Hyler* court found that *Little* did not constitute a change in the law and *Hogan* was not applicable to Hyler's case. *Id.*

104. *Id.* at 277, 425 S.E.2d at 710 (Meyer, J., dissenting).

105. *Id.* (Meyer, J., dissenting).

106. David T. Watters, Note, *Retroactivity Refused: North Carolina Defies Supreme Court Precedent in* Swanson v. State, 70 N.C. L. REV. 2125, 2126-27 (1992).

107. *Hyler*, 333 N.C. at 277, 425 S.E.2d at 710 (Meyer, J., dissenting).

reserves to cover anticipated increases in payments to injured employees;"[108] instead, the court's decision may place losses on the carriers and on the Workers' Compensation Security Fund.[109]

The *Hyler* court also ignored this policy's potential effect on businesses in North Carolina. In his dissent, Justice Meyer pointed out that "[b]ecause of tough policy decisions made by our legislature through the years, North Carolina has traditionally been more conservative in the benefits provided and has had among the lowest workers' compensation premiums in the nation."[110] These low premiums have allowed North Carolina to recruit industry, thus increasing our job base and diversifying our economy.[111] While of little or no importance in the individual suit before the court, the legislature presumably would have given this fact great weight in the legislative decision-making process.

Allowing the reopening of cases many years after the initial award obviously creates problems for insurance carriers. For instance, insurance carriers will be liable for claims that they could not have anticipated and, consequently, did not charge premiums to cover. The court in *Hyler* should have considered that the power to alleviate this problem lies in the legislature, not the court.[112] Thus, while the judiciary has the power to make decisions such as the one in *Hyler*, compelling reasons exist for the judiciary to refer such a complex issue to the legislature.

In spite of these problems with the court's reasoning, substantial evidence supports the outcome. For instance, as both the majority and dissenting opinions in *Hyler* indicated, the language of sections 97-25 and 97-47 is ambiguous. The court argued that because section 97-25 does not refer to any change of condition requirement and section 97-47 governs reopening of awards to adjust "compensation" but not medical expenses, reopening of claims under section 97-25 does not require compliance with section 97-47.[113] The dissent contended that because section 97-47 does not specifically exclude section 97-25 claims and because it discusses review of awards for medical expenses only, section 97-25 claims must meet the requirements of section 97-47 in order to be reopened.[114] While both arguments have merit, the court resolved the

108. *Id.* (Meyer, J., dissenting).

109. *Id.* (Meyer, J., dissenting). The Workers' Compensation Security Fund covers claims against insolvent insurers.

110. *Id.* at 278, 425 S.E.2d at 710 (Meyer, J., dissenting).

111. *Id.* (Meyer, J., dissenting).

112. *Cf. infra* notes 138-145 and accompanying text (discussing how the New York legislature has established a reserve fund to cover reopened claims and suggesting that North Carolina do the same).

113. *Hyler*, 333 N.C. at 264, 425 S.E.2d at 702.

114. *Id.* at 274-75, 425 S.E.2d at 708-09 (Meyer, J., dissenting).

issue by finding that ambiguities in statutes should be interpreted in favor of the employee.[115] Because either interpretation is plausible, it was proper for the court to look to the long-standing policy surrounding statutory interpretation to support its holding.[116]

There also exists a constitutional issue of denying Hyler, and others similarly situated, a reasonable chance to claim continuing medical expenses. "Compulsory worker compensation statutes have long been considered a legitimate exercise of the states' police power, [so long as they are] exercised for the good of society by granting benefits to injured workers."[117] If the statute fails to achieve this purpose, however, then it may not be a legitimate exercise of the police power.[118] It has been noted that "[f]or workers injured by delayed manifestation occupational diseases, arguably there is no substantial relationship between the statute and its goal."[119] Therefore, excessively short statutes of limitation for such claims may be invalid under a substantial relationship test.[120] Applying section 97-47's statute of limitations to section 97-25 claims could be invalidated under such a test, because an inappropriately short statute of limitations on section 97-25 claims would produce results contrary to the purpose of the Act, including the goals of "ensur[ing] that an injured worker w[ould] be able to obtain redress for injuries"[121] and "compel[ling] industry to take care of its own wreckage."[122] The possibility that the statute of limitations in section 97-47 could be unconstitutional as applied to section 97-25 becomes even more likely when one considers the difficulty an injured employee would have collecting sufficient and accurate proof regarding his continuing medical expenses by the time of the final agreement.

Unless the legislature takes the initiative and passes legislation to counter the *Hyler* decision, attorneys representing employees and em-

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115. *Id.* at 266, 425 S.E.2d at 703.

116. *See supra* notes 41-52 and accompanying text.

117. Leibman & Dworkin, *supra* note 2, at 340 n.358; *see* New York Cent. R.R. v. White, 243 U.S. 188 (1917); Bailey v. State Workman's Compensation Comm'r, 296 S.E.2d 901, 904 (W. Va. 1982). "[E]arly workers' compensation statutes were conceptualized as consensual in nature. Thus, to satisfy standards of constitutionality, early compensation programs were meant to appear voluntary." Leibman & Dworkin, *supra* note 2, at 340 n.358. Over the years, however, workers' compensation systems have become compulsory instead of voluntary.

118. Leibman & Dworkin, *supra* note 2, at 355.

119. *Id.*; *see* Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 579 n.1 (1983).

120. Leibman & Dworkin, *supra* note 2, at 355.

121. Elizabeth Bradshaw, Note, *Administrative Res Judicata: Giving the Developer Another Bite of the Apple*, 16 FLA. ST. U. L. REV. 403, 408 (1988) (citing Trail Builders Supply Co. v. Reagan, 235 So. 2d 482 (Fla. 1970)).

122. Barber v. Minges, 223 N.C. 213, 216-17, 25 S.E.2d 837, 839 (1943).

ployers must understand what *Hyler* means to their clients. For injured employees whose cases were closed by a Form 26 agreement and who merely seek continued medical payments,[123] *Hyler* makes two major changes. First, no statute of limitations will bar reopening these types of claims.[124] Second, "no 'change of condition' showing is required to press a claim for continuing medical expenses."[125]

While *Hyler* is very favorable to injured employees, its effect on employers and their insurance carriers is not so beneficial. *Hyler* requires the establishment of open-ended reserves because it is no longer possible for employers to know how much a claim will be worth.[126] Furthermore, by holding that section 97-25 provides for the reopening of cases to adjust "medical compensation," thereby bypassing section 97-47, the court removed the statute of limitations for such reopenings.[127] In *Hyler*, the court did not acknowledge that the purpose of the two year limitation is "to protect the employer against claims too old to be successfully investigated and defended,"[128] or that prior case law held that "[a]lthough the Act should be liberally construed to effectuate its intent, the courts cannot judicially expand the employer's liability beyond the statutory parameters."[129] Under *Hyler*'s interpretation of sections 97-25 and 97-47, the balance sought under the Workers' Compensation Act tips decidedly

123. Attorneys should keep in mind that the *Hyler* decision not only allows injured employees who never received a medical compensation award to reopen their cases, but also allows modification of a previous medical compensation award.

124. *How To Handle* Hyler *Claims*, 5 N.C. LAW. WKLY. 1178, 1178 (1993).

125. *Id.* at 1178. Continuing medical expenses are those incurred for such treatments as are required to effect a cure or give relief. Little v. Penn Ventilator Co., 317 N.C. 206, 210, 345 S.E.2d 204, 207 (1986). "Relief" encompasses not only improvements in the worker's condition, but also prevention or mitigation of further decline in health. *Id.* at 213, 345 S.E.2d at 209. This broad definition of continuing medical expenses means that there are many potential *Hyler* claims.

126. *How To Handle* Hyler *Claims, supra* note 124, at 1178-79. Employers should be aware that a settlement will not preclude an employee from reopening to claim continuing medical expenses even if these expenses were specifically addressed in the agreement. *See also* 3 LARSON, *supra* note 2, § 82.52, at 1213-15 (noting that releases generally are not upheld because they are not in the employee's interest).

127. *Hyler*, 333 N.C. at 275, 425 S.E.2d at 709 (Meyer, J., dissenting).

128. Pennington v. Flame Refractories, Inc., 53 N.C. App. 584, 588, 281 S.E.2d 463, 466 (1981) (quoting 3 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 78.20, at 15-28 (1976)).

129. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 190, 345 S.E.2d 374, 381 (1986); *see* Gilmore v. Hoke County Bd. of Educ., 222 N.C. 358, 366, 23 S.E.2d 292, 297 (1942) (stating the rule from State v. Barksdale, 181 N.C. 621, 626, 107 S.E. 505, 508 (1921), that "[i]t is ours to construe the laws, and not to make them"); James D. Bishop, Note, *Worker's Compensation: Benefits without Proof: The North Carolina Supreme Court Creates a Presumption of Compensability in Workers' Compensation Death Benefits Actions*, 67 N.C. L. REV. 1522, 1522 (1989) (noting that "the rule of liberal construction [of the act] cannot be extended beyond the clearly expressed language of the act").

in favor of the employee. As a result, employers are left forever vulnerable to additional "medical compensation" claims and can never operate under the assumption that their obligation has been fulfilled. There is a real possibility that insurance carriers placed in a precarious position by *Hyler* may discontinue their relations with North Carolina businesses.[130] While one can only speculate what *Hyler's* effect on the workers' compensation system will be, the dissent pointed out that

> [a] strong adherence to the doctrine of finality is as essential to the sound economical and efficient operation of the Industrial Commission as it is to the operation of the courts. It is essential to the effective operation of the whole workers' compensation system that consensual resolutions of cases such as the one here be encouraged. A holding depriving such agreements of finality can only do great harm to the efficient functioning of the Industrial Commission and to the operation of the entire workers' compensation system.[131]

Yet other state courts have taken similar positions when faced with the same issue.[132] For instance, more than twenty jurisdictions permit the commission to retain jurisdiction over a worker's compensation case on a long-term basis,[133] and several other states lack any time limitation on modifying disability awards.[134] In the states that have no time limitation, the Commission "presumably retain[s] jurisdiction over a case until

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130. *Hyler*, 333 N.C. at 278, 425 S.E.2d at 710 (Meyer, J., dissenting). There is no question that the carriers are capable of excluding states from their workers' compensation coverage. Liberty Mutual, the nation's largest workers' compensation carrier, no longer does business in 17 states, including North Carolina. *Id.* (Meyer, J., dissenting).

131. *Id.* at 279, 425 S.E.2d at 711 (Meyer, J., dissenting).

132. As early as 1969, the North Dakota Supreme Court stated: "There appears to be nothing in our statute and no case law in our state which limits the Bureau to reopening an award only upon proof of a change in the claimant's condition." Haggart, Inc. v. North Dakota Workmen's Compensation Bureau, 171 N.W.2d 104, 108 (N.D. 1969). North Dakota's Commission, then, retains jurisdiction indefinitely. *See* Roberta R. Kwall, *Retained Jurisdiction in Damage Actions Based on Anticipatory Breach: A Missing Link in Landlord-Tenant Law*, 37 CASE W. RES. L. REV. 273, 318 (1987); *Haggart*, 171 N.W.2d at 107-08. The court in *Haggart* held that

> the 1962 award was not res judicata of any issue, and that therefore when the Workmen's Compensation Bureau . . . granted the [employer's] petition for a rehearing of a 1963 award of permanent total disability and permitted Haggart "to go into all the issues, not just that of whether the injury was temporary or permanent, the case was before the Bureau just as though those issues were being faced for the first time."

Haggart, 171 N.W.2d at 107-08. The North Carolina Supreme Court's holding in *Hyler* has the same effect. The operation of res judicata is thus precluded with respect to the Commission's decisions regarding continuing medical expenses in both states. Kwall, *supra*, at 318.

133. See 3 LARSON, *supra* note 2, § 81.53(a), at 1173-78, for a list of these jurisdictions.

134. Kwall, *supra* note 132, at 320.

the claimant's death."[135] Because long-term jurisdiction for modifying compensation awards is such a well-accepted principle, it should not be considered unusual for North Carolina to allow long-term jurisdiction for modification of a medical compensation award. In fact, most states place no time limitation on such claims, thereby requiring "that an employer pay all initial, as well as continuing, medical, surgical, supply, and retraining costs until the claimant is cured or ready to re-enter the work force either in his previous capacity or in a new position."[136] Retaining jurisdiction in these cases is critical; otherwise, the Commission must approximate the amount of the future award, without the ability to adjust an under- or over-estimated award. The fact that no time limitation exists on these awards permits a court to force an employer to live up to his end of the workers' compensation bargain and pay medical expenses whenever they occur.[137]

There are, however, ways to lessen the burden that a decision such as *Hyler* places on employers. In New York, for example, where the Commission retains jurisdiction for an extended period of time, the legislature created a special "fund for reopened cases."[138] This fund supplies the payments for any claim issuing from a case reopened seven or more years after the injury and three or more years after the last compensation payment.[139] A similar fund would alleviate the problem resulting from the *Hyler* decision, but only the legislature, not the court, can order that such a fund be created.

The North Carolina legislature should take the initiative and create

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135. *Id.*; *see, e.g.*, MINN. STAT. ANN. § 176.461 (West Supp. 1992) ("[T]he worker's compensation court of appeals, for cause, at any time after an award, upon application of either party . . . may set the award aside and grant a new hearing . . . ."); NEV. REV. STAT. § 616.545 (1985) ("If a change of circumstances warrants an increase or rearrangement of compensation during the life of an injured employee, application may be made therefor.").

136. Kwall, *supra* note 132, at 321; *see* CAL. LAB. CODE § 4600 (West 1991); ILL. ANN. STAT. ch. 48, para. 138.8(a) (Smith-Hurd 1986 & Supp. 1992); N.M. STAT. ANN. § 52-1-49 (Michie 1992); N.Y. WORK. COMP. LAW § 13 (McKinney 1992); *see also* Anderson v. Liberty Mut. Ins. Co., 138 So. 2d 181, 187 (La. 1962) (holding that "a compensation claimant is entitled to a reservation of his right to assert a claim in the future for whatever additional amount he may incur for treatment of his injuries").

137. In Andrews v. Decker, 245 Md. 459, 226 A.2d 241 (1967), the Maryland Court of Appeals upheld a claim for medical expenses made twelve years after the last compensation payment was made pursuant to the original award. The court noted that the employer's obligation to provide nursing services and treatment is not subject to a statute of limitations. Kwall, *supra* note 132, at 321; *see Andrews*, 245 Md. at 463, 226 A.2d at 243; *see also* Castellano's v. Industrial Comm'n, 15 Ariz. App. 319, 323, 488 P.2d 675, 679 (1971) (allowing reopening of medical award 18 years after injury); Workman's Compensation Dep't v. Niezwaag, 452 P.2d 214 (Wyo. 1969) (allowing reopening for further medical benefits 14 years after injury).

138. N.Y. WORK. COMP. LAW § 25-a (McKinney 1992).

139. *Id.*

a North Carolina Special Fund for Reopened Cases. The legislature could model this fund on the New York Special Fund.[140] Thus, the North Carolina Special Fund would be liable only for medical compensation claims reopened beyond a reasonable period of time, such as seven years after a final award and three years after the last compensation payment.[141] Claims reopened before these conditions are met would still be the responsibility of individual employers and their insurance carriers.[142] A fund similar to New York's Special Fund would help balance "the need for perpetual jurisdiction over claims, in order to insure fairness to injured workers, with the practical difficulties inherent in the administration of fifteen- or twenty-year-old cases."[143]

If the North Carolina legislature is reluctant to create a Special Fund, then it should at least consider amending section 97-25 to create a statute of limitations for reopening medical compensation claims. A statute of limitations, such as "no case shall be reopened for the purpose of awarding continuing medical compensation more than seven years after a final award and three years after the final compensation payment," would similarly allow the legislature to restore the employee/employer balance to the workers' compensation system. Again, the employers' remedy for the *Hyler* decision lies exclusively outside the province of the judiciary and within that of the legislature.

Only Justice Meyer recognized the repercussions that *Hyler* would have on North Carolina. The court ignored his request that it avoid this harm, so he concluded his dissent with a plea to the legislature: "In view of the drastic changes wrought by [*Hyler*], perhaps it is time for the legislature to review and reassess the delicate balance of interests between employee and employer under our Workers' Compensation Act."[144]

The court's decision in *Hyler* is a sound one. However, to preserve the balance associated with the workers' compensation system, some of the burden *Hyler* places on employers must be removed.[145] We should, therefore, join Justice Meyer in pleading with the legislature, not for a

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140. *See id.*

141. *Id.*

142. In New York, the Fund is no longer liable if a claim is not reopened until eighteen years after the date of injury or eight years from the last payment of compensation. *Id.* The North Carolina Special Fund would need to remain liable indefinitely so that the employer would gain the benefit of finality after the Fund became liable.

143. 3 LARSON, *supra* note 2, § 81.61, at 1186. The Fund alleviates much of the burden that the absence of a statute of limitations for reopening claims places on employers and insurance carriers because the Fund is supported by assessments against all carriers and employers, not just ones whose cases are reopened. *Id.* § 81.62, at 1187.

144. *Hyler*, 333 N.C. at 279, 425 S.E.2d at 711 (Meyer, J., dissenting).

145. *See supra* notes 110-112 and accompanying text.

reversal of the court's decision, but for a mechanism, such as a special fund or legislative amendment, that will reduce the burden on employers and their insurance carriers.

JENNIFER MARSICO

State v. Walker: The North Carolina Supreme Court's State of Mind Concerning the Admissibility of Evidence Under the Rule 803(3) Hearsay Exception in Criminal Cases

Commentators have noted that the mere mention of the word "hearsay" frightens law students and practitioners who work with the evidentiary rules dealing with the subject.[1] In North Carolina, criminal defendants have also recently experienced a similar but more compelling fear of the hearsay rules due to their liberalization by the North Carolina Supreme Court.[2] For a period following Congress's adoption of the Federal Rules of Evidence, judges and commentators alike focused their energies on identifying what statements or conduct qualified as "assertions" to be excluded under the definition of hearsay.[3] In the past decade, however, significant discussion has emerged regarding evidence that, although defined as hearsay, is nonetheless admissible.[4]

In 1992, in *State v. Walker*,[5] the North Carolina Supreme Court confronted the issue of whether hearsay statements concerning a criminal defendant's prior uncharged conduct from which the trier of fact may make an inference of the declarant victim's mental condition are admissible under the state of mind exception to the hearsay rule.[6] With conspic-

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1. *See, e.g.*, KENNETH S. BROUN & WALKER J. BLAKEY, EVIDENCE 37 (1984) (characterizing the hearsay rule as "a concept which brings fear and trembling to the hearts and minds of most law students and practicing lawyers. It has perhaps been the subject of more misunderstanding than any single legal principle of the law.").

2. Recently, the court has become increasingly generous, granting the admission of highly prejudicial hearsay testimony against the defendant in a criminal prosecution. *See infra* notes 75-114 and accompanying text. The court's liberalization of evidentiary rulings extends beyond the hearsay exceptions. *See, e.g.*, Douglas J. Brocker, Note, *Indelible Ink in the Milk: Adoption of the Inclusionary Approach to Uncharged Misconduct Evidence in* State v. Coffey, 69 N.C. L. REV. 1604, 1606-16 (1991) (discussing the North Carolina Supreme Court's approach to evidentiary issues under N.C. R. EVID. 404(b)).

The trend toward liberalization of the hearsay rules is not peculiar to North Carolina, and fear of its growth has led to significant sentiment in favor of Rules reform. *See, e.g.*, Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for A Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 592-612 (1992); Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 U.C.L.A. L. REV. 557, 558-622 (1988); Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto By Judicial Decision?*, 76 MINN. L. REV. 473, 477-90 (1992).

3. *See* Roger C. Park, *The Hearsay Reform Conference—Foreword: The New Wave of Hearsay Reform*, 76 MINN. L. REV. 363, 363 (1992). For example, scholars have particularly debated when nonverbal conduct constitutes an assertion under the hearsay rules. 4 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 414, at 81-87 (1980).

4. *See* 4 LOUISELL & MUELLER, *supra* note 3, § 441, at 533-40; Park, *supra* note 3, at 363-66.

5. 332 N.C. 520, 422 S.E.2d 716 (1992).

6. *Id.* at 534, 422 S.E.2d at 724; *see infra* notes 33-60 and accompanying text.

uously little discussion of the implications of its decision, a four-to-three majority rejected the defendant's claims of improper admission of hearsay statements and substantial prejudice. The court found the testimony admissible under the Rule 803(3) hearsay exception[7] and upheld the trial court's first-degree murder conviction.[8] Only the dissenting opinion discussed the effect of admitting hearsay testimony under the Rule 803(3) state of mind exception to show the victim's mental condition when such testimony includes statements regarding the prior bad acts of the defendant.[9] The dissent reasoned that the victim's state of mind was irrelevant to the issues of the case and that the statements admitted were highly prejudicial and should have been excluded under Rule 404(b)'s prohibition of evidence of prior uncharged conduct. Consequently, the dissent voted to reverse the conviction.[10]

This Note begins with an examination of the evidence introduced at the trial in *Walker* and the court's rationale for upholding its admission on appeal.[11] The Note then discusses previous North Carolina cases that address the issues presented by *Walker* under Rules 803(3)[12] and 404(b)[13] and analyzes the *Walker* decision in light of that precedent.[14] The Note also examines an emerging concern inherent in the court's lib-

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7. Federal Rule 803(3) has been adopted verbatim by North Carolina as Rule 803(3) of the North Carolina Rules of Evidence. The rule states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (3) *Then Existing Mental, Emotional, or Physical Condition.*—A statement of the declarant's then existing state of mind . . . (such as intent, plan, motive, design, mental feeling . . .), but not including a statement of memory or belief to prove the fact remembered or believed . . . .

N.C. R. EVID. 803(3).

8. *Walker*, 332 N.C. at 541, 422 S.E.2d at 728; *see infra* notes 47-60 and accompanying text.

9. *Walker*, 332 N.C. at 541-44, 422 S.E.2d at 728-30 (Webb, J., dissenting); *see infra* notes 61-71 and accompanying text.

Federal Rule 404(b), adopted by North Carolina as Rule 404(b) of the North Carolina Rules of Evidence, deals with statements and other evidence of prior misconduct. It states:

> b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident.

N.C. R. EVID. 404(b).

10. *Id.* at 542-44, 422 S.E.2d at 729-30 (Webb, J., dissenting).

11. *See infra* notes 18-60 and accompanying text.

12. *See infra* notes 75-112 and accompanying text.

13. *See infra* notes 115-42 and accompanying text.

14. *See infra* notes 143-64 and accompanying text.

eralization of Rule 803(3) in this context—the danger of allowing statements that merely suggest a declarant's state of mind but simultaneously implicate the defendant's prior conduct under Rule 404(b).[15] Commending the dissenters for recognizing this concern, the Note criticizes the majority's willingness to disregard the safeguards intended by the relevancy rules, as well as its failure to discuss the issue of prior uncharged conduct under Rule 404(b).[16] The Note concludes that the court should reevaluate its position and suggests that some attempt at reform be made in order to restore to criminal defendants the protections to which the Rules entitle them.[17]

Tony Allen Walker first became romantically involved with Mary Sue Whitaker during the summer of 1988.[18] As Whitaker knew, Walker was married at the time, and Walker's wife was aware of the affair.[19] In January and February of 1989, Whitaker repeatedly asked Walker to decide whether he wanted a relationship with her or with his wife, and the two talked about living together.[20] On February 10, 1989, the couple arranged to spend the night at a Greensboro Motel 6 and evaluate the status of their relationship. Following a conversation which, according to Walker, included his telling Whitaker of his decision to return to his wife, Mary Sue Whitaker was killed by a shot from Walker's .38 caliber handgun.[21]

At 9:45 p.m., Officer Sandra Jenkins of the Greensboro Police Department answered a call regarding a shooting at the Motel 6.[22] Once at the motel, Officer Jenkins spoke with Walker, who told her that Whitaker had shot herself with his handgun following an argument between them.[23] Whitaker was still breathing at 9:52 p.m. when Emergency Medical Services arrived.[24] She subsequently died, the victim of a single, contact gunshot wound to her right temple.[25]

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15. *See infra* notes 143-58 and accompanying text.

16. *See infra* notes 159-64 and accompanying text.

17. *See infra* note 165 and accompanying text.

18. *Walker*, 332 N.C. at 525, 422 S.E.2d at 719.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* The trial court found that the call for assistance was placed at 9:45 p.m. *Id.*

23. *Id.* Walker was standing on the balcony outside of Room 229 as Officer Jenkins approached. Whitaker was still alive, and Jenkins radioed Emergency Medical Services to "rush it up." *Id.*

24. *Id.* at 525-26, 422 S.E.2d. at 719. Considerable controversy arose at trial over the time of the shooting in relation to Whitaker's ability to breathe at 9:52 p.m. *See infra* note 32 and accompanying text.

25. *Walker*, 332 N.C. at 528, 422 S.E.2d. at 720-21. An autopsy indicated that at the moment the gun was fired, its muzzle was in contact with Whitaker's skin. The coroner's

On July 17, 1989, Walker was indicted for the first-degree murder of Whitaker.[26] Following the grant of a mistrial during the state's initial proceeding against him,[27] Walker was retried in October 1990 in Guilford County Superior Court.[28] The prosecution relied almost exclusively on circumstantial evidence,[29] including the testimony of two witnesses who placed the time of the shooting at between 8:00 and 9:00 p.m.[30] If their testimony was correct, Walker waited at least forty-five minutes before calling the police.[31] Physicians who testified, however, disagreed as to how long after the shooting Whitaker could have survived.[32]

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report also stated that contact gunshot wounds typically leave tissue or blood residue around the muzzle of the weapon. Because there was no such residue found on Walker's gun, the investigating officers concluded that it probably had been wiped clean by the defendant. *Id.*

26. *Id.* at 524, 422 S.E.2d at 718.

27. *Id.*, 422 S.E.2d at 719. Walker was originally tried on May 7, 1990 in Guilford County. He moved for a mistrial after the police department's evidence expert testified for the State that fingerprint test results from Walker's .38 caliber gun were negative, indicating the gun had been wiped clean. Prior to trial, the State's chief investigator and assistant district attorney had told defense counsel that no test other than a visual inspection had been performed on the murder weapon. Although the court found no prosecutorial misconduct, the court did find that Walker had been prejudiced and declared a mistrial. *Id.*

28. *Id.* at 525, 422 S.E.2d at 719. At retrial, Walker again moved for a mistrial, alleging that he had been prejudiced by the State's failure to disclose two additional tests during discovery: (1) a trace metal test of Walker's hands that returned negative, and (2) a test performed on Walker's belt buckle that exposed two small drops of blood. *Id.* With the same judge presiding, the court found no prosecutorial misconduct and no prejudice to the defendant by these discovery omissions. Walker's motion for mistrial was denied. *Id.*

29. *Id.* at 526-29, 422 S.E.2d at 720-21. The State introduced evidence of a large amount of blood on Walker's socks and inside his boots observed by investigators as he undressed at the police station. No blood was found on the outside of his boots or clothing. Tests for fingerprints on the gun and a trace metal test of Walker's hands yielded negative results. *Id.* at 526, 422 S.E.2d at 720.

30. *Id.* at 526-27, 422 S.E.2d at 720. Charles McCoy, a guest at the motel, testified that he was staying in the room directly beneath that of Walker and Whitaker. While watching a television show that aired from 8:00 to 9:00 p.m., he heard a disturbing noise from the room directly above him "as if people were fighting or throwing furniture around." *Id.* at 526, 422 S.E.2d at 720. McCoy stated that the noise continued for about fifteen or twenty minutes before he heard a sound "like someone 'had picked the bed up and dropped it on the ceiling.' " *Id.* at 527, 422 S.E.2d at 720. McCoy then called the front desk to ask the motel clerk to request that the people be quiet. *Id.* Subsequent to his complaint, McCoy stated that the only noise he heard from upstairs was "someone pacing back and forth the length of the room." *Id.*

Samuel Michael Kimbrough, the front desk clerk at the Motel 6 on the night of February 10, 1989, testified that he had arrived at the motel at 8:30 p.m. *Id.* "Almost immediately" after arriving, he received a call from a man complaining of a terrible disturbance coming from the room above, and requesting that Kimbrough call Room 229 to ask that its inhabitants keep the noise down. *Id.* Kimbrough further stated that he made the call, a man answered, he asked the man to please quiet down, and the man replied that " '[he would] take care of it.' " *Id.*

31. *See supra* note 22.

32. *Walker*, 332 N.C. at 527-28, 422 S.E.2d at 720. Two of three physicians indicated

Finally, the State introduced the testimony of several witnesses who made statements regarding Walker's previous physical abuse of Whitaker.[33] Whitaker's friend, Carl Sidney Amos, testified that he had noticed a cut under Whitaker's then swollen nose.[34] Amos further stated that Whitaker told him that she had sustained the injury after Walker pushed her into a door.[35] Bonnie Whitaker, the victim's sister-in-law, corroborated this testimony.[36] Amos additionally testified that, on another occasion, Whitaker had told him that Walker had caused some small bruises on her face and arm.[37]

Clyde Billings, another of the victim's friends, testified that he had seen bruises on her body and, when asked about them, she had replied that Walker had grabbed her and kicked her.[38] Billings also stated that Whitaker had told him that she wanted Walker to "leave her alone."[39] Bonnie Whitaker testified that she too had seen bruises on her sister-in-law, the result of Walker having "grabbed" Mary Sue "real tight."[40] In addition, Bonnie Whitaker stated that, just hours before the shooting, she overheard the victim on the phone with Walker, telling him "he would have to choose between her and his wife."[41] Bonnie stated that there were no bruises on her sister-in-law's arm when she left to meet Walker that night, but that she observed a bruise on the victim's arm at the funeral home.[42]

The defense countered with testimony from three witnesses regarding the victim's suicidal tendencies, two of whom testified specifically to incidents regarding her relationship with Walker. David Lee McKinney,

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that Whitaker could not have survived for over an hour. The State's associate chief medical examiner, who performed Whitaker's autopsy, estimated that it was highly likely that Whitaker would have survived five to ten minutes after suffering such a wound. *Id.* at 527, 422 S.E.2d at 720. A professor of pathology testified that the autopsy's failure to show any trace of pneumonia in the victim's lungs indicated that she had survived for less than an hour. *Id.* at 527-28, 422 S.E.2d at 720. The third physician testified that patients with wounds similar to Whitaker's "often survive well over an hour." *Id.* at 527, 422 S.E.2d at 720.

33. *Id.* at 528-29, 422 S.E.2d at 721. In addition, Jan Bruner, Walker's sister-in-law, testified that Walker called her between 9:30 and 10:00 p.m. on the night of the shooting, asking if his wife were there. Bruner stated that Walker asked her to find his wife and then told Bruner that he might be charged with murder. *Id.* at 527, 422 S.E.2d at 720.

34. *Id.* at 528, 422 S.E.2d at 721. The testimony was admitted over Walker's objection on hearsay grounds. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 528-29, 422 S.E.2d at 721.

42. *Id.* at 529, 422 S.E.2d at 721.

with whom Whitaker and Walker had lived for about three weeks, stated that he once witnessed Walker pleading with the victim to put down a gun she held to her head as she threatened to kill herself.[43] Linda Locklear, a friend of the victim, testified that, in early February, Whitaker emotionally told her that she would rather kill herself than live without Walker.[44] A psychologist testified about Whitaker's "borderline personality disorder" which presented a "high risk of suicide, [because of her] having seen her stepfather commit suicide by shooting himself when she was fourteen years old, after she had reported to her mother his physical and sexual abuse of her."[45] In addition, the defense introduced medical records indicating that Whitaker had been diagnosed as " 'chronically dysfunctional,' with 'depressive neurosis,' 'suicide ideation' and depression."[46]

Despite the uncontroverted medical evidence tending to support the theory that Whitaker had killed herself, the jury found compelling the circumstantial evidence presented by the State and convicted Tony Allen Walker of the first-degree murder of Mary Sue Whitaker.[47] Following the jury's recommendation, Walker was sentenced to imprisonment for life. He thereupon gave notice of direct appeal to the North Carolina Supreme Court.[48] The supreme court upheld Walker's conviction,[49] rejecting each of his numerous assignments of error,[50] including his contention that the trial court erred in admitting hearsay statements alleging Walker's prior physical abuse of Whitaker.[51]

The court's decision to uphold the admission of testimony including statements regarding prior uncharged misconduct of Walker is particularly significant. Writing for the majority, Justice Lake agreed that the testimony in question undoubtedly consisted of hearsay statements.[52] He explained, however, that although the trial court erred in admitting the testimony as evidence of Whitaker's then existing physical condition, it was admissible under Rule 803(3) as probative of Whitaker's then ex-

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 525, 422 S.E.2d at 719.

48. *Id.* Pursuant to N.C. GEN. STAT. § 7A-27(a) (1989), the defendant exercised his right to directly appeal the trial court's judgment imposing a life sentence upon his conviction of first-degree murder.

49. *Walker*, 332 N.C. at 541, 422 S.E.2d at 728.

50. *Id.* at 529-41, 422 S.E.2d at 721-28. None of the defendant's assignments of error, other than the hearsay complaint, are discussed in this Note.

51. *Id.* at 534-36, 422 S.E.2d at 724-25.

52. *Id.* at 534, 422 S.E.2d at 724.

isting state of mind.[53] Justice Lake pointed to several of the court's recent decisions defining the state of mind exception to include statements "made *by the victim* which *may* indicate the victim's mental condition by showing the victim's fears, feelings, impressions, or experiences."[54] These cases, according to the majority, provided support for the court's decision that an inference, and not a clear statement of emotion or mental condition, is all that is necessary for a statement to be admissible under Rule 803(3).[55]

Without discussing the possible applicability of the Rule 404(b) limitations on evidence of past acts[56] to the statements in question or addressing the relevancy questions raised by the case under Rule 403[57] in any depth, the majority justified its response exclusively under the court's prior Rule 803(3) jurisprudence. Specifically, the court cited three cases allowing the admission of hearsay statements from which an inference of the declarant's state of mind could be drawn.[58] The court concluded that evidence of Whitaker's statements regarding injuries allegedly suffered as a result of Walker's physical abuse was highly relevant and indicative of Whitaker's state of mind;[59] thus, there was no error in admitting the

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53. *Id.*

54. *Id.* at 535, 422 S.E.2d at 725 (emphasis added) (citing State v. Holder, 331 N.C. 462, 418 S.E.2d 197 (1992); State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991); State v. Meekins, 326 N.C. 689, 392 S.E.2d 346 (1990); State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990)).

55. *Id.* at 535-36, 422 S.E.2d. at 725. The majority stated, "[Whitaker's] statements about prior abuse by the defendant are highly relevant, *although not determinative in any clear way*, to the victim's state of mind at the time of the killing." *Id.* (emphasis added).

56. For the text of Rule 404(b), see *supra* note 9.

57. Federal Rule of Evidence 403, adopted by North Carolina as Rule 403 of the North Carolina Rules of Evidence, states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C. R. EVID. 403.

Although the majority arguably performed a cursory relevancy examination under Rule 403 of the testimony admitted under Rule 803(3), *see infra* note 59, its unexplained failure to analyze the admitted testimony under Rule 404(b)—despite use of the testimony for the purpose of proving the defendant's prior bad acts and showing his character and action in conformity therewith—likely prejudiced the defendant's case. *See infra* notes 149-65 and accompanying text.

58. *Walker*, 332 N.C. at 535-36, 422 S.E.2d at 725 (citing *Holder*, 331 N.C. at 485, 418 S.E.2d at 210; *Stager*, 329 N.C. at 315, 406 S.E.2d at 897; *Cummings*, 326 N.C. at 313, 389 S.E.2d at 74). For an in-depth discussion of these cases and the admissibility of hearsay statements under Rule 803(3), see *infra* notes 75-112 and accompanying text. For an evaluation of the court's decision in *Walker* in light of this precedent, see *infra* notes 149-63 and accompanying text.

59. *Walker*, 332 N.C. at 535-36, 422 S.E.2d at 725. In conclusory fashion and under an

evidence.[60]

In dissent,[61] Justice Webb vehemently opposed the admission of the hearsay statements.[62] Justice Webb did not agree that the statements were offered to prove Whitaker's then existing state of mind,[63] nor did he find that the victim's state of mind could reasonably be inferred from the testimony given.[64] He contended that even if Whitaker's state of mind could be inferred from the testimony, it was irrelevant to the elements the State had to prove in the case.[65] Furthermore, the dissent maintained that if the evidence had been probative, its value was clearly outweighed by the prejudicial effect on Walker's case.[66]

Justice Webb analyzed the applicable case law relied on by the majority[67] and distinguished the facts of each case from those of *Walker*.[68] He concluded that none of the prior cases "have gone as far [in liberalizing admission of hearsay statements under Rule 803(3)] as the majority does today."[69] In Justice Webb's view, the testimony was not admissible under Rule 803(3) and, in addition, should have been excluded by Rule 404(b), as it was really being offered to show action in conformity with the defendant's prior bad acts.[70] Because he believed that a different result might have been reached had the hearsay evidence not been admit-

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abuse of discretion standard, the court weighed the testimony's probative value against its potential prejudice, as required under Rule 403. *Id.* Justice Lake stated, "In this case, the victim's state of mind is obviously extremely relevant to the question of whether the victim was murdered or committed suicide." *Id.* at 536, 422 S.E.2d at 725.

60. *Id.*

61. *Id.* at 541, 422 S.E.2d. at 728 (Webb, J., dissenting). Chief Justice Exum and Justice Frye joined Justice Webb's dissent.

62. *Id.* at 541-44, 422 S.E.2d. at 728-30 (Webb, J., dissenting); *see also supra* notes 33-42 and accompanying text (citing the testimony in controversy).

63. *Walker*, 332 N.C. at 542, 422 S.E.2d. at 729 (Webb, J., dissenting). Justice Webb wrote, "I believe these statements were introduced for the purpose of proving the defendant had assaulted Mary Sue Whitaker on several previous occasions." *Id.* (Webb, J., dissenting).

64. *Id.* (Webb, J., dissenting). Justice Webb stated, "We could infer . . . that [Whitaker] was afraid of the defendant . . . that she was outraged by the assaults . . . that she hated defendant and was determined to seek revenge. There are other possibilities." *Id.* (Webb, J., dissenting).

65. *Id.* (Webb, J., dissenting). Justice Webb noted that "[w]hatever [Whitaker's] feelings at the time she was assaulted, it did not keep her from going into a motel room with the defendant. What she felt some time before did not bear on what the defendant or the deceased did in the motel room." *Id.* (Webb, J., dissenting).

66. *Id.* (Webb, J., dissenting).

67. *Id.* at 543-44, 422 S.E.2d. at 729-30 (Webb, J., dissenting); *see infra* notes 75-112 and accompanying text.

68. *Walker*, 332 N.C. at 543-44, 422 S.E.2d at 729-30 (Webb, J., dissenting).

69. *Id.* at 543, 422 S.E.2d. at 729 (Webb, J., dissenting).

70. *Id.* at 544, 422 S.E.2d. at 730 (Webb, J., dissenting). Justice Webb characterized the

ted, Justice Webb voted for a new trial.[71]

To appreciate *Walker*'s significance, it is necessary to place the court's decision within the context of prior North Carolina decisions enunciating the court's interpretation of the hearsay state of mind exception, as well as the court's liberal construction of Rule 404(b) in criminal cases. North Carolina is one of twenty-seven states that have adopted verbatim Federal Rule of Evidence 803(3).[72] Since its inception, the most litigated aspect of 803(3) has been the admissibility of a declarant's statement of intent to prove subsequent conduct.[73] The admissibility of statements tending to shed light on the declarant's mental condition, however, presents several concerns about which courts have also battled in recent years.[74]

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admitted testimony as "[h]earsay testimony . . . allowed to prove several instances of bad acts by the defendant." *Id.* (Webb, J., dissenting).

For a discussion of *Walker's* implications under Rule 404(b), see *infra* notes 155-64 and accompanying text.

71. *Walker*, 332 N.C. at 544, 422 S.E.2d. at 730 (Webb, J., dissenting).

72. *See* 2 GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES ch. 58, at 6-7 (Supp. 1989). Also adopting the Federal Rule are: Arizona, Arkansas, Colorado, Delaware, Hawaii, Idaho, Iowa, Maine, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* For the text of Rule 803(3), see *supra* note 7.

73. It has "long been settled" that the state of mind exception allows the introduction of statements showing the declarant's forward-looking intent to prove his subsequent conduct. 4 LOUISELL & MUELLER, *supra* note 3, § 442, at 540-47. In Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 295-96 (1892), the United States Supreme Court held that out of court statements of intent are admissible for the purpose of proving that the declarant later acted according to that prior intent. The Federal Advisory Committee to the Federal Rules of Evidence indicated, in the commentaries to the Rules, that Rule 803(3) was meant to codify the result in *Hillmon*, not dispute it. *See* FED. R. EVID. 803(3) advisory committee's note. The North Carolina Supreme Court explicitly adopted "the *Hillmon* doctrine" in State v. McElrath, 322 N.C. 1, 19, 366 S.E.2d. 442, 452 (1988). There has, however, been considerable disagreement about whether the declarant's statement of intent can be used to show the subsequent conduct of a third party. *See* 2 JOSEPH & SALTZBURG, *supra* note 72, at 45-53.

The primary purpose of this Note is to examine the admissibility of third-party testimony regarding a declarant's statements from which the declarant's then existing mental condition may be inferred. Further discussion of the *Hillmon* doctrine dealing with forward-looking intent is beyond this Note's scope. For further information on *Hillmon* and the line of cases proceeding from it, see, e.g., Glen Weissenberger, *Hearsay Puzzles: An Essay on Federal Evidence Rule 803(3)*, 64 TEMP. L. REV. 145, 147-62 (1991); Thomas A. Wiseman, III, Note, *Federal Rule of Evidence 803(3) and the Criminal Defendant: The Limits of the Hillmon Doctrine*, 35 VAND. L. REV. 659, 684-705 (1982).

74. *See, e.g.*, 2 JOSEPH & SALTZBURG, *supra* note 72, at 42-45; 4 LOUISELL & MUELLER, *supra* note 3, § 441, at 532-40. *Compare* United States v. Brown, 490 F.2d. 758, 764-67 (D.C. Cir. 1973) (stating that a principal danger is that the jury will consider the declarant's statement to be the truth about an out-of-court event, such as a prior threat by defendant; such inferences are improper and must be weighed against the probative value of the declarant's statement) *and* State v. Steffen, 31 Ohio St. 111, 119-20, 509 N.E.2d 383, 391-92 (1987) (hold-

In 1990, in *State v. Cummings*,[75] the North Carolina Supreme Court upheld the admission into evidence of a variety of hearsay testimony under the Rule 803(3) exception.[76] One witness testified about statements a murder victim made three weeks before her disappearance concerning past incidents of physical abuse perpetrated on her by the defendant.[77] Defendant Cummings was convicted of the first-degree murder of the mother of two of his children and sentenced to death.[78]

On appeal, Cummings claimed the admission of the testimony regarding his prior abuse of the victim and a conversation in which the victim stated that Cummings had threatened to kill her if she ever tried to take back her children from him was erroneous.[79] In addition, Cummings contested the admission of two additional witnesses' testimony concerning statements made by the victim. First, Cummings complained about statements made by a teacher at the nursery school the couple's two children attended. The teacher testified that the victim had told her that she had to go to the doctor because "he had hit her with the end of a gun."[80] Second, Cummings argued against the admissibility of testimony by the victim's mother recounting a conversation in which her daughter stated her intent to gain sole custody of the couple's children.[81] Cummings argued that the testimony of each of these witnesses was inadmissible hearsay.

Writing for the *Cummings* majority, Justice Meyer upheld the testi-

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ing statement of rape victim that she intended to remain a virgin admissible under Rule 803(3), but not under Rule 403, because the statement's probative value is outweighed by prejudicial effect upon defendant), *cert. denied*, 485 U.S. 916 (1988) *with* Re v. State, 540 A. 2d 423, 430 (Del. 1988) (holding that where defendant claimed the victim incited a stressful situation which ultimately led him to kill her, victim's statement that she feared defendant and believed that he was going to kill her was admissible under Rules 803(3) and 403).

75. 326 N.C. 298, 389 S.E.2d 66 (1990).

76. *Id.* at 312-14, 389 S.E.2d at 74-75.

77. *Id.*

78. *Id.* at 303-05, 389 S.E.2d at 68-70. Cummings was also charged with and convicted of the first-degree murder of the victim's sister. This appeal concerned only his conviction for the murder of victim Karen Puryear, as the trial had been bifurcated upon his request. *Id.* at 303, 389 S.E.2d at 69.

Cummings directly appealed both his conviction and his death sentence to the supreme court; while the court refused to overturn any of the lower court's rulings at the guilt phase, Cummings' case was remanded for resentencing. *Id.*

79. *Id.* at 312, 389 S.E.2d at 74.

80. *Id.* at 313, 389 S.E.2d at 74. The witness was allowed to testify about these statements because she did not speculate as to the identity of the "he" to whom the victim referred. *Id.* at 313-14, 389 S.E.2d at 74-75.

81. *Id.* at 314, 389 S.E.2d at 75. Specifically, the victim's mother testified that her daughter told her that she had already taken out a child support warrant against Cummings and that she had spoken with an attorney about obtaining custody of their two children. *Id.*

mony's admissibility under the 803(3) state of mind exception.[82] The court held that " '[e]vidence tending to show state of mind is admissible as long as the declarant's state of mind is a relevant issue and the possible prejudicial effect of the evidence does not outweigh its probative value.' "[83] Justice Meyer reasoned that the nature of the victim's conversations related directly to her state of mind and emotional condition.[84] Because of the defendant's claim that the victim had entrusted him with their children before she disappeared, the majority found that the testimony about the victim's state of mind concerning her relationship with Cummings was highly relevant to the case, and that its relevancy outweighed any potential prejudice to Cummings.[85] The court concluded that no error had occurred in the admission of this testimony.[86]

Similarly, the majority found the testimony about the victim's intent to visit a doctor admissible under Rule 803(3) as indicative of her emotional status and physical condition on the date of her disappearance.[87] "The jury was free to draw [from the testimony] whatever reasonable inferences it chose."[88] Furthermore, the court held that the victim's statements to her mother regarding her intent to obtain custody of her children and seek child support from Cummings directly contradicted the defendant's claims that the victim would have run off and left her children with him.[89]

Justice Webb dissented, challenging that portion of the majority's decision affirming the admission of the hearsay testimony regarding Cummings' alleged prior physical abuse of the victim.[90] He feared that the court's willingness to draw inferences about the victim's state of mind from such testimony "opened the door to any hearsay testimony the subject of which can be shown to have been upsetting to the declarant."[91] Justice Webb maintained that the Rule 803(3) exception should only apply to those hearsay statements that "say what is [the declarant's] mental or emotional state."[92]

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82. *Id.* at 312-14, 389 S.E.2d at 74-75.

83. *Id.* at 313, 389 S.E.2d at 74 (quoting Griffin v. Griffin, 81 N.C. App. 665, 669, 344 S.E.2d 828, 831 (1986)).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 313-14, 389 S.E.2d at 74-75.

88. *Id.* at 314, 389 S.E.2d at 75.

89. *Id.* These statements were also made on the day that the victim disappeared.

90. *Id.* at 326, 389 S.E.2d at 81-82 (Webb, J., dissenting).

91. *Id.* at 326, 389 S.E.2d at 82 (Webb, J., dissenting). Justice Webb further stated that the door opened by the court would be "a wide door indeed." *Id.* (Webb, J., dissenting).

92. *Id.* (Webb, J., dissenting).

In another 1990 case, *State v. Meekins*,[93] a unanimous court upheld the admission of testimony by a first-degree murder victim's niece. The niece testified about statements her aunt had made to her two weeks before the murder regarding the victim's fear of the defendant.[94] Writing for the court, Chief Justice Exum noted that, following the niece's testimony, the trial court instructed the jury that they should consider it only to the extent that it indicated the victim's emotions toward the defendant.[95] Citing *Cummings*, the court reiterated its view that such hearsay evidence tending to show the state of mind of the declarant is admissible as long as it is relevant to the case and not overly prejudicial. The court reasoned that, since Meekins had portrayed his relationship with the victim to be a caring one, the niece's testimony to the contrary was directly relevant to the issues of the case.[96] Acknowledging that the trial court had discretion to decide whether the probative value of relevant evidence outweighed its possible prejudicial effect, the court found that the lower court had not abused its discretion in admitting the niece's testimony.[97]

The court continued its trend of upholding the admissibility of victims' statements in *State v. Stager*.[98] Barbara Stager was convicted of the first-degree murder of her husband following a shooting in the bedroom of their home.[99] On appeal, the supreme court upheld the trial court's admission into evidence of an audiotape purportedly made by the victim three days before his death.[100] The tape recording included the victim's

93. 326 N.C. 689, 392 S.E.2d 346 (1990).

94. *Id.* at 694-96, 392 S.E.2d at 348-50. The considerable weight of the evidence presented pointed to defendant Meekins as the man responsible for the brutal stabbing death of 79-year-old widow Ethyl Owens. *Id.* at 692-94, 392 S.E.2d at 347-48. The State's evidence included the testimony of Owens' niece, who stated that, on more than one occasion, her Aunt had expressed her fear of Meekins. *Id.* at 695, 392 S.E.2d at 349. On appeal, Meekins argued that the statements were both irrelevant and highly prejudicial. *Id.*

95. *Id.* at 694-95, 392 S.E.2d at 349.

96. *Id.* at 695-96, 392 S.E.2d at 349-50.

97. *Id.* at 696, 392 S.E.2d at 350 (citing State v. Mason, 315 N.C. 724, 731, 340 S.E.2d 430, 434 (1986)). Furthermore, the court characterized the niece's testimony as evidence tending not to prejudice the defendant unfairly in light of the overwhelming evidence against him. *Id.* (citing State v. DeLeonardo, 315 N.C. 762, 771-72, 340 S.E.2d 350, 357 (1986)).

98. 329 N.C. 278, 406 S.E.2d 876 (1991).

99. *Id.* at 285, 406 S.E.2d at 880. She contended that her husband slept with a gun, cocked and loaded, under his pillow, and that, because she was afraid that he might mistake her son or herself for a burglar, she tried to pull the gun out from under his pillow when she got up on the morning of February 1, 1990. *Id.* at 286, 406 S.E.2d at 880. As she pulled the gun across the bed, she asserted that it accidentally fired, hitting her husband in the back of the head and killing him. *Id.*

100. *Id.* at 311-315, 406 S.E.2d at 895-97. The defendant had assigned error to the trial court's admission of the tape, arguing, among other points, that the recorded statements should have been excluded as inadmissible hearsay testimony. *Id.* at 314-17, 406 S.E.2d at 896-97. In addition, Barbara Stager asserted that the tape's admission into evidence operated

statement of his fears relating to the alleged suicide of his wife's first husband, as well as his recounting of the defendant's attempts to give him "medication" on several mornings just prior to his death.[101] Writing for the court, Justice Mitchell maintained that, because the defendant had portrayed her marriage as "normal" and "loving," the victim's state of mind regarding his relationship with his wife was directly relevant to the case.[102] Under an abuse of discretion standard, the court reviewed and upheld the lower court's determination of relevancy and lack of undue prejudice under Rule 403.[103]

In 1992, the court once again displayed an inclusive handling of Rule 803. In *State v. Holder*,[104] the defendant appealed his conviction of the first-degree murder of a woman who had tried unsuccessfully to end their dating relationship.[105] Holder claimed that the trial court improperly admitted hearsay statements asserting the victim's fear of the defendant after seeing a small handgun in his pocket and after he refused to leave her alone.[106] Writing for the majority, Justice Meyer maintained that the statements to which the defendant objected were not hearsay

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as a violation of her Sixth Amendment right to confront any witness brought against her. *Id.* at 317, 406 S.E.2d at 898.

The court disposed of the defendant's constitutional claims due, in part, to its finding that the tape was admissible under Rule 803(3). Justice Mitchell explained that both North Carolina and the United States Supreme Court have held that, if reliable, statements which fall within an exception to the general prohibition against hearsay may be admitted into evidence without violating the defendant's Sixth Amendment right to confrontation. *Id.* (citing Ohio v. Roberts, 448 U.S. 56, 66 (1980); State v. Porter, 303 N.C. 680, 697, 281 S.E.2d 377, 388 (1981)).

Continuing, Justice Mitchell noted that evidence may meet the reliability requirement by a showing that the challenged evidence " 'falls within a firmly rooted hearsay exception.' " *Id.* (quoting *Porter*, 303 N.C. at 697 n.1, 281 S.E.2d at 388 n.1 (quoting *Roberts*, 448 U.S. at 66)). The court reasoned that, as the tape's admissibility fell within an exception firmly rooted in North Carolina jurisprudence, no constitutional violation had occurred. *Id.* at 318, 406 S.E.2d at 899.

101. *Id.* at 311-14, 406 S.E.2d at 895-96. The defendant's former husband also died from a gunshot wound to the head inflicted in his bedroom. *Id.* at 296-302, 406 S.E.2d at 886-88.

102. *Id.* at 314, 406 S.E.2d at 893. In addition, the court noted that the recorded statement directly contradicted the defendant's assertion that her husband slept with a gun under his pillow on the evening of the murder due to a "fear of burglars." *Id.* at 314-15, 406 S.E.2d at 896.

103. *Id.* at 315, 406 S.E.2d at 896. For the text of Rule 403, see *supra* note 57. Because of the tape's mention of the defendant's former husband's death, the court also examined the admissibility of this portion of the tape, as well as the police records and other evidence of his death, under Rule 404(b), concluding that the probative value of the similar act outweighed its prejudice to the defendant. The court upheld the admission of all evidence relating to the death of her former husband. *Stager*, 329 N.C. at 302-311, 406 S.E.2d at 889-95.

104. 331 N.C. 462, 418 S.E.2d 197 (1992).

105. *Id.* at 468, 418 S.E.2d at 199-200.

106. *Id.* at 484-85, 418 S.E.2d at 209-10.

statements because they were not offered for the truth of the matter asserted, but to show that the statements were in fact made by the victim.[107] The court further reasoned that, were the statements considered hearsay, they nonetheless would be admissible under the state of mind exception.[108] Without elaboration, Justice Meyer stated that the statements were directly probative of the victim's state of mind at the time prior to the murder and concluded that the probative value of the statements outweighed any potential prejudice to Holder.[109]

In a concurring opinion, Justice Webb disagreed with the court's characterization of the controverted testimony as non-hearsay and reasoned that the victim's state of mind was not relevant to any issue in the case.[110] He asserted his view that the obvious motivation behind the State's offering of the testimony was to convince the jury that Holder carried a pistol, that the victim feared Holder, and that Holder had refused to leave the victim alone.[111] Because of the overwhelming evidence against Holder, however, and the resulting lack of undue prejudice to the defendant, Justice Webb voted with the majority to uphold his conviction.[112]

As the preceding discussion illustrates, prior to *Walker*, the North Carolina Supreme Court had adopted an increasingly inclusive approach to the admissibility of hearsay statements under the Rule 803(3) state of mind exception.[113] This position is consistent with the court's liberalized interpretation of other evidentiary rules—notably Rule 404(b)[114]— when applying them in the context of admitting or excluding evidence that may be prejudicial to defendants in criminal proceedings.

The most litigated area of evidence law is that which involves the

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107. *Id.* at 484, 418 S.E.2d at 209.

108. *Id.*

109. *Id.* at 485, 418 S.E.2d at 210. Again, the court examined relevancy under Rule 403 in a cursory fashion under an abuse of discretion standard of review.

110. *Id.* at 490-91, 418 S.E.2d at 213 (Webb, J., concurring).

111. *Id.* at 491, 418 S.E.2d at 213 (Webb, J., concurring).

112. *Id.* (Webb, J., concurring).

113. *See supra* notes 75-112 and accompanying text.

114. Rule 404(b) prohibits evidence of past misconduct for the purpose of proving the character of a person to show that he acted in conformity therewith. *See supra* note 9. However, an examination of North Carolina case law involving the Rule 803(3) hearsay exception demonstrates that the admission of evidence of the defendant's prior bad acts through the state of mind hearsay exception has emerged as an increasingly controversial point of litigation. The court's liberal construction of both Rules 803(3) and 404(b) has resulted in the worst possible scenario for criminal defendants, whose procedural rights are increasingly hampered. *See* Brocker, *supra* note 2, at 1607-13; *see also infra* notes 115-42 and accompanying text (discussing the court's recent adoption and implementation of Rule 404(b) as a rule of inclusion).

admission of evidence of a criminal defendant's independent misconduct pursuant to Rule 404(b).[115] Prior to the North Carolina General Assembly's adoption of Rule 404(b),[116] state courts cautiously examined the issue of whether to admit evidence of past acts, crimes or wrongs under a general rule of exclusion, admitting "other crimes evidence"[117] *only* under a calculable number of "certain well recognized exceptions."[118] The North Carolina Supreme Court first enunciated the rule and its exceptions in *State v. McClain*.[119] In this 1954 case, the court reversed the defendant's prostitution conviction after overturning the admission of evidence showing that the defendant had stolen cash from her "client" following their encounter.[120] Because the defendant's uncharged theft failed to satisfy any of its enumerated exceptions, the court held that the evidence should have been excluded.[121]

While the enactment of Rule 404(b) did little to substantively alter the *McClain* rule,[122] the North Carolina Supreme Court has since reversed its interpretive direction, abandoning the exclusionary approach to other crimes evidence in favor of an inclusion standard, which has greatly expanded the scope of evidence admitted under Rule 404(b). Rather than require the State to show that the controverted evidence fits

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115. State v. Morgan, 315 N.C. 626, 636, 340 S.E.2d 84, 90-91 (1986) (citations omitted).

116. *See* An Act to Simplify and Codify the Rules of Evidence, ch. 701, § 1, 1983 N.C. Sess. Laws 666, 668-69 (codified at N.C. R. EVID. 404(b)). For the text of the Rule, see *supra* note 9.

117. This term, which describes the type of evidence Rule 404(b) governs, is recognized as a "term of art" indicating "evidence relating to an act that is independent of the charged crime." Brocker, *supra* note 2, at 1608 n.35.

118. State v. McClain, 240 N.C. 171, 174, 81 S.E.2d 364, 366 (1954). The *McClain* court cited eight exceptions to the general rule against admissibility of prior uncharged misconduct. *Id.* at 174-76, 81 S.E.2d at 366-68. These exceptions mirror those enunciated by the North Carolina legislature in Rule 404(b). *See supra* note 9.

119. 240 N.C. 171, 173-76, 81 S.E.2d 364, 365-68 (1954).

120. *Id.* at 172-73, 81 S.E.2d at 365.

121. *Id.* at 177, 81 S.E.2d at 368. The court cited several policy justifications for the rule of exclusion, noting that

> "the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny. Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. Hence, if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected."

Id. (quoting State v. Gregory, 191 S.C. 212, 221, 4 S.E.2d 1, 4 (1939)).

122. *See supra* note 118; *see also* State v. Morgan, 315 N.C. 626, 637 n.2, 340 S.E.2d 84, 91 n.2 (1986) (noting Rule 404(b)'s similarity to the traditional North Carolina rule regarding defendant's extrinsic misconduct).

an exception, the court has instead decided to admit other crimes evidence whenever the prosecution can prove a correlating purpose.

State v. Weaver[123] was one of the first cases to interpret Rule 404(b). The court stated that "the purposes for which evidence of other crimes, wrongs or acts is admissible [are] not limited to those enumerated either in the Rule or in *McClain*."[124] In *Weaver*, the defendant was charged with breaking and entering and the theft of a chain saw and socket set.[125] After a witness for the defense claimed to have been the thief, the state offered evidence of the defendant's prior dealings with one of its witnesses to disprove the defense witness's claim.[126] In finding the proffered evidence admissible to show a scheme or common plan, the *Weaver* court held that "evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused."[127]

In *State v. Coffey*,[128] the court clarified its liberal approach to Rule 404(b) evidence. The *Coffey* court unequivocally rejected the *McClain* analysis and announced Rule 404(b) to be a "general rule of *inclusion*."[129] This interpretation, the court declared, superseded any language to the contrary in previous opinions.[130] Affirming the defendant's conviction for the murder of a ten-year-old girl,[131] the *Coffey* court upheld the admission of evidence concerning the defendant's prior sexual misconduct because it was indicative of motive and intent.[132] In so doing, the court enunciated the standard by which the rule continues to be adjudicated, stating that:

> Rule 404(b) state[s] a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.[133]

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123. 318 N.C. 400, 348 S.E.2d 791 (1986).

124. *Id.* at 402-03, 348 S.E.2d at 793.

125. *Id.* at 400, 348 S.E.2d at 792.

126. *Id.* at 402, 348 S.E.2d at 793.

127. *Id.* at 403-04, 348 S.E.2d at 793-94.

128. 326 N.C. 268, 389 S.E.2d 48 (1990).

129. *Id.* at 278-79, 389 S.E.2d at 54.

130. *Id.*

131. *Id.* at 274, 389 S.E.2d at 51. The court upheld the defendant's conviction, but overturned his death sentence because of procedural errors. *Id.*

132. *Id.* at 280-81, 389 S.E.2d at 55-56. Despite the lack of any substantive, extrinsic evidence supporting the prosecution's theory that the defendant had engaged in sexual misconduct with the victim, the court found that evidence alleging the defendant's similar acts in an independent incident supported the state's theory and admitted the other crimes evidence. *Id.*

133. *Id.* at 278-79, 389 S.E.2d at 54. Subsequent cases that have followed this rule have

Since its adoption of an inclusive approach to Rule 404(b) in *Coffey*, the court has consistently admitted other crimes evidence offered against criminal defendants. For example, in one recent decision,[134] the court upheld the admission of testimony regarding the defendant's drug dealings as tending to support the state's explanation of the murder victim's death.[135] In another case,[136] the court reiterated its view that, when a husband is charged with an attack upon his wife with the intent to kill, "the State may introduce evidence covering the entire period of his married life to show malice, intent and ill will toward the victim."[137]

In *State v. Mahaley*,[138] the court upheld the admission of testimony regarding the defendant's prior theft of cash and credit cards, and of her prior drug abuse, as indicative of motive in the murder of her husband,[139] of whom she had been convicted of conspiring to murder.[140] The court concluded that the evidence suggested that she needed money, which she would have received from the insurance proceeds resulting from her husband's death.[141] The *Mahaley* court also found that evidence of the defendant's extramarital relationship with a co-conspirator was admissible for purposes of showing motive.[142]

Since 1990, the North Carolina Supreme Court has significantly expanded the scope of Rules 803(3) and 404(b) to include the admission of evidence often prejudicial to criminal defendants. The danger inherent in the court's inclusive approach to these often overlapping rules is evident

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consistently ruled in favor of admitting other crimes evidence against criminal defendants. *See, e.g.*, State v. Mahaley, 332 N.C. 583, 595, 423 S.E.2d 58, 65 (1992); State v. Ligon, 332 N.C. 224, 234, 420 S.E.2d 136, 142 (1992); State v. Handy, 331 N.C. 515, 531, 419 S.E.2d 545, 553-54 (1992); State v. Agee, 326 N.C. 542, 549-50, 391 S.E.2d 171, 175-76 (1990); State v. Jeter, 326 N.C. 457, 460-62, 389 S.E.2d 805, 807-08 (1990); State v. Hunter, 107 N.C. App. 402, 412, 420 S.E.2d 700, 707 (1992), *cert. denied*, 333 N.C. 347, 426 S.E.2d 711 (1993).

134. State v. Ligon, 332 N.C. 224, 420 S.E.2d 136 (1992).

135. *Id.* at 234-35, 420 S.E.2d at 142. The prosecution alleged that the defendant shot and killed the victim after the victim had attempted to steal drugs from the defendant. *Id.*; *see also* State v. Handy, 331 N.C. 515, 531-32, 419 S.E.2d 545, 553 (1992) (admitting other crimes evidence as supportive of prosecution's theory of the case).

136. State v. Hill, 331 N.C. 387, 417 S.E.2d 765 (1992), *cert. denied*, 113 S.Ct 1293 (1993).

137. *Id.* at 405, 417 S.E.2d at 773 (quoting State v. Lynch, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990)); *see also* State v. Syriani, 333 N.C. 350, 376-78, 428 S.E.2d 118, 131-33 (1993).

138. 332 N.C. 583, 423 S.E.2d 58 (1992).

139. *Id.* at 595, 423 S.E.2d at 65.

140. *Id.* at 586-87, 423 S.E.2d at 60. While upholding the defendant's conviction, the court vacated Mahaley's death sentence. *Id.*

141. *Id.* at 595, 423 S.E.2d at 65.

142. *Id.* Again, the court cited motive as the admissible purpose for which the evidence was admitted. The prosecution's theory suggested that the defendant conspired with another man, her boyfriend, to kill her husband, in part to enable the two to be together after her husband's death. *Id.*

in *Walker*, a case that certainly could have been decided in favor of the defendant. Because the State depended almost entirely upon circumstantial evidence,[143] the highly prejudicial nature of the hearsay statements admitted against Walker under the Rule 803(3) state of mind exception severely affected his case at trial. The facts of *Walker* are more contentious than previous cases where the court analyzed the state of mind exception; thus, the danger of liberalizing Rule 803(3) is more apparent in this decision. Perhaps this is why Justice Webb was able to garner two allies in his dissent, where formerly he had waged a solo battle against the broadening of the Rule 803(3) state of mind exception in criminal cases.[144] Several aspects of the *Walker* decision are problematic: the court's apparent use of the evidence for improper purposes; a departure from precedent in applying Rule 803(3); and a failure to analyze the testimony under Rule 404(b).

The evidence of Walker's prior bad acts was supposedly admitted for the purpose of showing the victim's then existing state of mind. However, the *Walker* majority made several conspicuous statements pointing to the likelihood that not only had the jury misused the defendant's prior misconduct for the purpose of showing his physical abuse of the victim, but also that the court itself used the evidence for this purpose. Twice, in reasoning that the defendant did not deserve a new trial, the court cited the hearsay statements *as evidence* of Walker's prior abuse of the victim without discussing the applicability of Rule 404(b). The first of these instances occurred in that portion of the majority's opinion rejecting Walker's claim that his conviction should be vacated because of a lack of evidence sufficient to show that he killed Whitaker and because *all* the evidence established that she committed suicide.[145] Noting evidence supportive of Walker's guilt, Justice Lake wrote, "Defendant's lack of candor about his previous physical assaults on the victim further implicates his story concerning [the shooting]."[146] The second example of this phenomenon is when the court addressed Walker's claim that the trial court erred in finding sufficient evidence of premeditation and deliberation. The majority noted that "[s]ome of the circumstances which give rise to an inference of premeditation and deliberation are ill will or previous difficulty between the parties."[147] Justice Lake stated that although

143. *See supra* notes 29-46 and accompanying text.

144. Prior to *Walker*, where he was joined by Chief Justice Exum and Justice Frye, Justice Webb was the sole voice to take issue with the court's liberalization of the state of mind hearsay exception. *See supra* notes 75-112 and accompanying text.

145. *Walker*, 332 N.C. at 529, 422 S.E.2d at 721.

146. *Id.* at 531, 422 S.E.2d at 723.

147. *Id.* at 533, 422 S.E.2d at 724 (citing State v. Jones, 303 N.C. 500, 505, 279 S.E.2d 835, 839 (1981)).

the defendant denied ever having struck the victim, "[w]itnesses for the State testified that defendant had physically abused the victim on occasions prior to her death."[148] In this instance, even more so than in the first, the majority's reliance upon the hearsay statements as evidence of Walker's prior uncharged conduct may have prejudiced his case.

The dissent's characterization of the *Walker* decision as exceeding all precedent may not be entirely accurate, but there is a distinction between *Walker* and past Rule 803(3) cases. This difference lies not in the statements' admission, but in their undeniably prejudicial nature in the context of the other evidence presented[149] and in their ultimate use by the court.[150] For example, in *Stager*, the court allowed the admission of hearsay statements regarding the death of the defendant's first husband which, standing alone, might have been highly prejudicial.[151] Similarly, in *Cummings*, the admission of the victim's statements concerning the physical abuse inflicted on her by the defendant and his threats to kill her were undoubtedly, in isolation, highly prejudicial statements.[152] In light of the overwhelming evidence against the defendants in those two cases, however, the admission of the hearsay testimony did not unduly prejudice those defendants.[153] In *Walker*, by contrast, the admitted hearsay testimony undoubtedly contributed to the conviction of the defendant; the court twice cited the evidence of Walker's alleged prior physical abuse of the victim as indicative of his guilt.[154]

Similarly, the purpose for which the court ultimately used the evidence differs from that in previous cases involving both Rules 803(3)[155] and 404(b).[156] The court failed to discuss the victim's state of mind at any length in its opinion, an omission that calls into question the relevancy of the hearsay statements to the purpose for which they were admitted.[157] Although the majority failed to discuss Rule 404(b), this rule prohibits other crimes evidence indicating only the defendant's character

148. *Id.*

149. Compare the facts in *Walker*, *supra* notes 29-46 and accompanying text, with the facts of prior cases, *supra* notes 75-112 and accompanying text.

150. Compare the use of prior misconduct evidence in *Walker*, *supra* notes 145-48 and accompanying text, with cases applying Rule 404(b), *supra* notes 115-42 and accompanying text.

151. *See supra* notes 98-103 and accompanying text.

152. *See supra* notes 75-89 and accompanying text.

153. *See, e.g., supra* notes 110-12 and accompanying text (discussing Justice Webb's concurring opinion in State v. Holder, 331 N.C. 462, 490-91, 418 S.E.2d 197, 207 (1992) (Webb, J., concurring)).

154. *See supra* notes 145-48 and accompanying text.

155. *See supra* notes 75-112 and accompanying text.

156. *See supra* notes 115-42 and accompanying text.

157. *See Walker*, 332 N.C. at 543-44, 422 S.E.2d at 729-30 (Webb, J., dissenting).

or action in conformity therewith.[158] Clearly, Walker's conviction may have resulted, at least in part, from this hearsay testimony's having been admitted for one purpose and then used primarily for another. Without even addressing the Rule 404(b) concerns underlying the hearsay testimony of Walker's alleged prior physical abuse of the victim, the court twice cited that evidence as tending to prove the defendant's character and action in conformity therewith.

Perhaps in part because of the court's liberal view of admitting evidence of a defendant's prior bad acts under Rule 404(b),[159] the *Walker* majority felt no need to analyze the testimony in light of that provision. Although the case law illustrates the liberal interpretation the court has afforded Rule 404(b), a trial court is prohibited from admitting other crimes evidence solely for the purpose of showing a defendant's propensity for committing the crime.[160] The current rule of inclusion *excludes* evidence of extrinsic misconduct "if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged."[161] This aspect of the rule is particularly significant because of the *Walker* court's use of hearsay statements regarding the defendant's prior physical abuse of the victim, admitted under the Rule 803(3) exception, to show the defendant's character for truthfulness and propensity for violence.

In light of the current law,[162] the evidence likely would have been held inadmissible had the *Walker* court performed a Rule 404(b) analysis. On the other hand, the lack of any mention of Rule 404(b) may suggest that the court's liberalization of the Rule 803(3) hearsay exception is so broad as to make a Rule 404(b) analysis irrelevant, even where the evidence may be highly prejudicial to defendants. Under either theory, once it had determined that the testimony was admissible under Rule 803(3), the court's failure to consider whether the statements violated Rule 404(b) is notable because the court directly pointed to the admitted testimony as evidence of the defendant's prior abuse of the victim.[163]

The significance of the *Walker* decision, therefore, lies in the court's

158. *See supra* notes 9, 115-42 and accompanying text.

159. *See supra* notes 128-42 and accompanying text.

160. *See, e.g.*, State v. Mahaley, 332 N.C. 583, 595, 423 S.E.2d 58, 65 (1992) (stating that while evidence of independent bad acts is not admissible to prove that a person acted in conformity therewith, it is admissible for other purposes such as motive); State v. Hill, 331 N.C. 387, 405, 417 S.E.2d 765, 773 (1992) (same).

161. State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

162. *See supra* notes 128-42 and accompanying text.

163. *See supra* notes 144-48 and accompanying text.

failure to discuss the implications of admitting, under Rule 803(3), hearsay testimony indicative of both the declarant's state of mind and the defendant's prior uncharged conduct. The majority was not completely out of line with precedent in upholding the admissibility of such highly prejudicial hearsay testimony, for the statements themselves consisted of factual assertions from which a reasonable inference of state of mind could be drawn. However, because the court looked beyond the testimony's admitted purpose of proving state of mind and cited it as evidence of the defendant's character and action in conformity therewith, the absence of any discussion of Rule 404(b) inexplicably exceeds the bounds of precedent. Although the court reviews Rule 404(b) admissions under an inclusive standard, this approach *excludes* other crimes evidence offered solely for the purpose for which the *Walker* court cited the evidence—for proving one's character or action in conformity therewith.[164]

What the *Walker* decision means to future cases involving the nexus of Rules 803(3) and 404(b) depends largely upon the construction given to the majority's opinion. One interpretation is that, by omission, the court expanded the scope of Rule 404(b). Another construction might read the court's *Walker* ruling as eradicating a Rule 404(b) analysis so long as a Rule 803(3) inquiry is satisfied. Either interpretation indicates the need for the court to reexamine its position regarding the relationship between Rules 803(3) and 404(b). The court should recognize individually each evidentiary rule and independently analyze each piece of challenged evidence under each rule that applies. Similarly, the court should recognize that there are boundary lines to the inclusive approach of Rule 404(b) admissions and that those safeguards should not be circumvented by admitting evidence of prior uncharged conduct for the purpose of showing character or action in conformity therewith. In addition, the court should reemphasize the relevancy balancing test of Rule 403.[165] By taking a closer look at the relationship between the probability of a statement's substantial prejudicial effect and its probative value, the court can restore to criminal defendants some of the procedural protections that have been considerably eroded in recent years.

DIANA L. NELSON

164. *See supra* notes 128-42.

165. *See supra* note 57.

EVIDENCE—CROSS-EXAMINATION—IMPEACHMENT OF WITNESSES—*STATE V. WILLIAMS*, 330 N.C. 711, 412 S.E.2d 359 (1992)

The effect of a witness's history of mental illness on his capacity to recollect or observe has not been settled by the courts. Although such evidence was admissible in the past when "madness was regarded as an infliction sent from heaven,"[1] the adoption of the Rules of Evidence has limited this practice in many jurisdictions.

Prior to the adoption of the Rules of Evidence, North Carolina courts had consistently allowed litigants to impeach witnesses by introducing evidence of mental instability or substance abuse.[2] However, when the state legislature adopted the Rules of Evidence in 1983,[3] commentators thought the new rules, similar to the federal version, would significantly limit North Carolina's traditionally wide-open cross-examination.[4] Rule 608 was considered to be a drastic departure from prior North Carolina evidence practice because it limited the subject matter of cross-examination to issues probative of truthfulness or untruthfulness.[5]

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1. JOHN H. WIGMORE, 2 EVIDENCE IN TRIALS AT COMMON LAW § 492 (Chadbourn rev. 1979).

2. *See* State v. Newman, 308 N.C. 231, 253, 302 S.E.2d 174, 187 (1984) (stating that the defendant "was entitled to discredit the prosecuting witness's testimony by attempting to demonstrate through cross-examination that she suffered from a mental impairment which affected her powers of observation, memory or narration"); State v. Conrad, 275 N.C. 342, 349, 168 S.E.2d 39, 44 (1969) (holding that a witness's suicide attempt "conceivably might have some relevancy as to her mental balance and her recollection sufficient to be impeaching"); State v. Armstrong, 232 N.C. 727, 728, 62 S.E.2d 50, 51 (1950) (holding that "[i]t is always open to a defendant to challenge the credibility of the witnesses offered by the prosecution who testify against him").

3. Act of July 7, 1983, ch. 701, 1983 N.C. Sess. Laws 666 (codified as amended at N.C. GEN. STAT. § 8C-1 (1992)).

4. *See* ADRIENNE M. FOX, ADMISSIBILITY OF EVIDENCE IN NORTH CAROLINA 43 (1987) (stating that the new rules of evidence brought about a radical change in cross-examination); Daniel W. Fouts, *The Effect of Article 6 — Witnesses — on the Trial of Cases*, *in* THE NORTH CAROLINA EVIDENCE CODE: CURRENT DECISIONS AND TRIAL PRACTICE, at VI-10 (North Carolina Bar Found. Continuing Legal Educ. ed., 1986) (discussing the narrowing of permissible cross-examination material).

5. *See, e.g.*, Gordon Widenhouse, *Impeaching Witnesses Under the North Carolina Rules of Evidence*, *in* PRACTICAL EVIDENCE: WHAT THEY DIDN'T TEACH YOU IN LAW SCHOOL 11-13 (North Carolina Academy of Trial Lawyers ed., 1988). According to Widenhouse:

> One of the significant changes wrought by the adoption of a new evidence code is a limitation on the use of a witness's prior conduct to impeach his testimony. . . .
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> . . . .
>
> Rule 608 represented a positive and welcomed change in the permissible use of a witness's character or prior conduct to impeachment [sic] him. . . .
>
> . . . [T]he rule limits impeachment by specific instances of conduct to those acts

The North Carolina Supreme Court's decision in *State v. Williams*[6] may signal a retreat from the modern rules back to the state's common law practices.[7] In *Williams*, the supreme court provided an escape route from the limitations of Rule 608(b), allowing the introduction of a witness's past mental problems to discredit her testimony.[8] Rule 608(b) states that a cross-examiner may question a witness about specific incidents only if those prior occurrences will shed light on the witness's veracity.[9] While the court acknowledged that evidence of past psychological problems, suicide attempts, and drug use was not probative of truthfulness or untruthfulness, as required for admission under Rule 608(b), it held that such evidence was admissible under Rule 611(b), which retains the North Carolina courts' tradition of wide-open cross-examination.[10]

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which are probative of truthfulness or untruthfulness. Furthermore, evidence of prior conduct, even if probative of truthfulness, might be rendered inadmissible because of its unfairly prejudicial impact or its cumulative or attenuated nature.

Id.

The effect of Rule 608 may have been minimized, however, by the North Carolina General Assembly's alteration of Rule 611. In Rule 611, the legislature seems to have retained the state's policy of wide-open cross examination by adding a provision stating: "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. R. EVID. 611(b). No commentators, however, have considered the inherent conflict between Rules 611(b) and 608(b). For the text of Rule 608(b), see *infra* note 7.

6. 330 N.C. 711, 412 S.E.2d 359 (1992).

7. The two rules at issue in *Williams* are 608 and 611. Rule 608 deals with the admissibility of evidence of the conduct and character of witnesses. The rule states, in relevant part:

> (b) *Specific instances of conduct.*—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

N.C. R. EVID. 608(b).

Rule 611 governs the interrogation of witnesses. The rule states, in relevant part:

> (a) *Control by court.*—The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
>
> (b) *Scope of cross-examination.*—A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

N.C. R. EVID. 611.

8. *Williams*, 330 N.C. at 719, 412 S.E.2d at 364.

9. N.C. R. EVID. 608(b). Under this rule, inquiry into acts such as forgery or perjury is permissible.

10. *Williams*, 330 N.C. at 719, 412 S.E.2d at 364. At least 20 states have adopted the

In 1990, a jury found Waverly Williams guilty of the murder of his cousin, Marcie, and sentenced him to life imprisonment.[11] Williams appealed,[12] claiming that the court improperly restricted his cross-examination of the State's main witness, William Carroll.[13] Williams asserted that his primary defense strategy was to impeach the testimony of his accomplice, Carroll, by introducing evidence of Carroll's history of drug use, suicide attempts, and psychiatric counseling.[14] The trial court permitted Williams to examine Carroll about his drug use at the time of the crime, but not about his past drug habit, suicide attempts, or psychiatric counseling.[15] According to the trial court, Rule 608(b) allows cross-examination of a witness about specific instances only when such instances relate to truthfulness or untruthfulness of the witnesses.[16] Because Carroll's prior drug use and psychological difficulties had no bearing on his veracity, the trial court refused to allow Williams to inquire into them.[17]

The North Carolina Supreme Court held that a witness may be cross-examined about his past mental history and drug use under Rule

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Federal Rules of Evidence version of Rule 611(b) without significantly altering it. GREGORY P. JOSEPH ET AL., 2 EVIDENCE IN AMERICA § 45.2 (1987). Only nine states retain the practice of wide-open cross-examination. *Id.*

11. *Williams*, 330 N.C. at 712, 412 S.E.2d at 360. Marcelleta (Marcie) Williams was found dead of a gunshot wound in her aunt's trailer on January 19, 1989. *Id.* The prosecution witness, Carroll, testified that he and the defendant, Williams, had gone to the trailer that morning. According to Carroll, Williams pointed a shotgun at Marcie and demanded drugs and money from her. Marcie began screaming, and Carroll, in an effort to silence her, pushed her to the floor. Carroll testified that Williams then kicked Marcie and shot her in the head. *Id.* at 714, 412 S.E.2d at 361.

12. In North Carolina, defendants who are convicted of murder and sentenced to death or life imprisonment receive an automatic appeal to the state supreme court. N.C. GEN. STAT. § 7A-27 (1989).

13. *Williams*, 330 N.C. at 713, 412 S.E.2d at 360-61.

14. *Id.* Carroll attempted suicide twice in 1987: once in January by taking an overdose of pills, and again in June by dousing himself with rubbing alcohol and setting himself on fire. Carroll received two to three months of counseling for depression after his second suicide attempt. He admitted that he had regularly used marijuana and cocaine since 1987. *Id.* at 713, 412 S.E.2d at 361.

15. *Id.* at 713, 412 S.E.2d at 361. Williams sought to establish Carroll's history of mental illness to support his claim that a five-hour police interrogation pressured Carroll into falsely implicating Williams. According to Williams' brief:

> In these circumstances, the excluded evidence of Carroll's mental illness and fragile mental condition was relevant impeachment evidence because it showed that Carroll might not have had the mental fortitude to maintain the truth during grueling police interrogation, that Carroll might have abandoned his initial and truthful story because of official pressure, and that Carroll falsely came to implicate an innocent person.

Defendant-Appellant's Brief at 21, State v. Williams, 330 N.C. 711 (1992) (No. 384A91).

16. *Williams*, 330 N.C. at 717-18, 412 S.E.2d at 363-64; *see also* N.C. R. EVID. 608(b).

17. *Williams*, 330 N.C. at 713, 412 S.E.2d at 361 (1992).

611(b), which states that a "witness may be cross-examined on any matter relevant to any issue in the case, including credibility."[18] According to the court, such evidence is inadmissible under Rule 608(b), which requires subjects of cross-examination to be probative of truthfulness or untruthfulness.[19] The court further stated that credibility encompasses not only veracity, but also "the capacity of a witness to observe, recollect, and recount."[20] Therefore, the court reasoned, evidence of mental instability and chronic substance abuse are appropriate subjects for impeaching a witness's "ability to observe, retain or narrate."[21]

The court declared that a lapse of time between the event about which the witness is testifying and the mental illness or drug use does not justify disallowing the cross-examination.[22] While some jurisdictions do not permit cross-examination on such matters unless the witness was suffering from mental illness or drug addiction at the time of the event or of the testimony, the court stated that North Carolina and other jurisdictions impose no such time limit.[23] The court held that when the witness is the prosecution's key witness, the defendant may inquire into the witness's past mental instability and drug use since the witness's credibility has an "enhanced importance" when the testimony is the primary source of evidence against the defendant.[24]

The court's decision that Rule 611(b) supersedes Rule 608(b) conflicts with the legislative intent behind the rules. The commentary to Rule 611 states that the rule provides general guidelines for the courts and should not be interpreted as overriding "statutes relating to the mode and order of interrogating witnesses."[25] Furthermore, the decision is somewhat irreconcilable with Rule 611(a)(3), which seeks to "protect witnesses from harassment or undue embarrassment."[26] Allowing the defendant to question the witness about a depressive episode that occurred several years before trial quite possibly may have the effect of embarrassing or harassing the witness.

In addition, allowing cross-examination about mental problems or substance addictions occurring years before trial conflicts with the bal-

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18. N.C. R. EVID. 611(b).

19. *Williams*, 330 N.C. at 718, 412 S.E.2d at 364.

20. *Id.* at 719, 412 S.E.2d at 364 (quoting 3 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 305, at 236 (1977)).

21. *Id.*

22. *Id.* at 721-22, 412 S.E.2d at 365-66.

23. *Id.* at 721-22, 412 S.E.2d at 366.

24. *Id.* at 723-24, 412 S.E.2d at 367.

25. N.C. R. EVID. 611 commentary at 128.

26. N.C. R. EVID. 611(a)(3).

ancing test set forth in Rules 401 and 403.[27] Under these rules, evidence is not admissible if its probative value is substantially outweighed by the danger of undue prejudice.[28] Evidence of mental instability or drug use is most probative when it occurs simultaneously with the crime or the testimony. When the condition occurred years before the event or trial, however, its probative value is arguably outweighed by the danger of undue prejudice such evidence would cause.

The *Williams* court attempted to bolster its holding by showing that the decision was in accord with prior North Carolina decisions.[29] However, unlike *Williams*, those decisions were not decided under the *Rules of Evidence*.[30] The supreme court appeared to say that the adoption of the rules has made little difference in North Carolina evidence law.

The court also pointed to decisions of other state and federal courts to justify its holding. According to the court, several states allow admission of "evidence of mental defects and/or substance abuse—at times other than when the witness observed the offense or testified at trial."[31] Most of the cases the court cited, however, were decided between 1954 and 1977, when mental illness was arguably less understood than now.[32]

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27. N.C. R. EVID. 401, 403.

28. Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. R. EVID. 401.

Rule 403 states, in pertinent part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." N.C. R. EVID. 403.

29. *Williams*, 330 N.C. at 719-21, 412 S.E.2d at 364-65.

30. The court conceded this fact, but did not give it much significance. *Id.* at 719, 412 S.E.2d at 364. Earlier North Carolina cases differ in other ways from *Williams*. Some of the cited decisions deal not with mental illness, but mental incompetence. *Williams*, 330 N.C. at 719-20, 412 S.E.2d at 364 (citing State v. Armstrong, 232 N.C. 727, 728, 62 S.E.2d 50, 51 (1950) (allowing admission of evidence that witness was mentally retarded); Moyle v. Hopkins, 222 N.C. 33, 34, 21 S.E.2d 826, 827 (1942) (same)). Also, in the earlier cases, the witness was often suffering from the mental illness or drug habit at the time of the event or the testimony, not two years beforehand, as in *Williams*. *Id.* at 720-21, 412 S.E.2d at 365. *See* State v. Fields, 315 N.C. 191, 203-04, 337 S.E.2d 518, 525-26 (1978) (admitting testimony of witness who was using drugs at the time of crime); State v. Jones, 64 N.C. App. 505, 509, 307 S.E.2d 823, 826 (1983) (admitting testimony of accomplice who was drunk at time of crime); State v. Edwards, 37 N.C. App. 47, 49, 245 S.E.2d 527, 528 (1978) (allowing admission of evidence that witness used drugs at time of crime). Although the court cites these cases to show that drug or alcohol use may be inquired into on cross-examination, the decisions actually deal with the witness's *competency*, rather than credibility. Defendants sought to strike the witness's testimony because they had been intoxicated at the time of the crime. The appellate courts held that intoxication did not render a witness incompetent, but that the jury may consider such evidence when determining the witness's credibility.

31. *Williams*, 330 N.C. at 722, 412 S.E.2d at 366.

32. *See, e.g.*, People v. Crump, 5 Ill. 2d 251, 261-62, 125 N.E.2d 615, 621 (1955); People v. DiMaso, 100 Ill. App. 3d. 338, 342, 426 N.E.2d 972, 975 (1981); Reese v. State, 54 Md.

Furthermore, in many of these cases, either the time lapses were much shorter than the two-year gap in *Williams* or the witness was still suffering from the condition at the time of the event or the trial.[33]

A better resolution of the conflict between Rules 608(b) and 611(b) would have been to impose a time limitation on the admission of evidence of past mental illness and substance abuse. The court should have ruled that evidence of a witness's mental problems or drug addiction is admissible only when existing at the time of the crime or the time of the testimony.[34] This view is more logical because the condition is more likely to affect the witness's capacity in those circumstances.[35]

Protecting the rights of defendants seems to have been the primary motivation for the supreme court in *Williams*.[36] While the aim of giving defendants the fairest possible trial is a laudatory one, the court pursues this goal at the expense of unfair prejudice to competent testimony and unnecessary harassment of witnesses. The *Williams* decision will effectively put the witness on trial by inviting the jury to disbelieve her current statements because of her past problems.

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App. 281, 290-92, 458 A.2d 492, 497-98 (1983); State v. Hawkins, 260 N.W.2d 150, 158 (Minn. 1977); Walley v. State, 240 Miss. 136, 138, 126 So.2d 534, 535 (1961); State v. Browning, 98 Ohio App. 8, 14, 128 N.E.2d 173, 176 (1954).

33. *See DiMaso*, 100 Ill. App. 3d at 342-43, 426 N.E.2d at 975 (allowing the defendant to inquire into the witness's treatment for drug addiction two months before the battery); *Hawkins*, 260 N.W.2d at 158 (admitting evidence that the witness was drunk at the time of the crime and subsequently "blacked out"); *Browning*, 98 Ohio App. at 14, 128 N.E.2d at 176 (allowing evidence of past alcohol abuse and mental illness when the witness was still under the influence of both).

34. Many courts follow this practice. *See, e.g.*, State v. Dickerson, 531 So.2d 1085, 1087 (La. Ct. App. 1988) (refusing to admit evidence that the witness had been suicidal absent a showing of impaired capacity at the time of the crime), *cert. denied*, 537 So. 2d 1160 (La. 1989); Virts v. State, 739 S.W.2d 25, 30 (Tex. Crim. App. 1987) ("[I]f the witness's mental illness or mental disturbance occurred in the remote past, and there is no showing that such has revived, the fact that the witness has suffered in the remote past a mental illness or mental disturbance should not be admitted into evidence because such would probably be totally irrelevant and immaterial . . . .").

35. Arguably many forms of mental illness, unlike drugs and alcohol, have no effect on a witness's capacity to perceive events. The court's concern seems to stem from the defendant's allegation that Carroll's weakened mental state caused him to succumb to police pressure to implicate Williams. *See* Defendant-Appellant's Brief at 21, State v. Williams, 330 N.C. 711, 412 S.E.2d 359 (1992) (No. 384A91).

36. The defendant's Sixth Amendment right to confront the prosecution's witnesses is especially relevant to this situation. Some courts, most notably the Eleventh Circuit, have held that failing to allow the defendant the opportunity to cross-examine witnesses about their mental problems or drug addictions violates the Sixth Amendment right to confrontation. *See, e.g.*, United States v. Lindstrom, 698 F.2d 1154, 1163-64 (11th Cir. 1983).

Freeman v. Freeman: Adopting the Analytic Approach to Equitable Distribution of Workers' Compensation Awards

In light of estimates that four in ten marriages in the United States will fail,[1] it is not surprising that divorce has assumed a commonplace role in American society. For the judicial gatekeepers charged with managing the increased flow of divorce cases, however, the challenges posed by this area of family law are anything but routine. Illustrating that novel legal issues in divorce continue to confront courts, *Freeman v. Freeman*[2] presented the question: Should an injured spouse's workers' compensation award be classified as marital or separate property under the state's equitable distribution statute?[3]

The North Carolina Court of Appeals answered by declaring that this determination depends on what that award was designed to replace.[4] The court's adoption of this so-called "analytic approach" for treatment of workers' compensation benefits raises questions about the role of the partnership theory of marriage in North Carolina family law. The Note explores the statutory and case-law foundations of the court's holding, including influences exerted from other jurisdictions.[5] The Note also identifies problems that the decision poses for the workings of property classification under the equitable distribution statute.[6] The Note then considers the decision's broader implications for North Carolina's system of equitable distribution.[7] Finally, the Note concludes that, although *Freeman* may have unanticipated consequences beyond its immediate holding, it represents a sound and natural progression in North Carolina family law.

After nearly thirty-four years of marriage, the husband and wife in *Freeman* separated on May 24, 1989.[8] Four years earlier the husband had injured his right arm[9] in an on-the-job accident and filed for workers'

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1. Barbara Vobejda, *Baby-Boom Women Setting Divorce Record: Census Data Underscore Dramatic Social Change in Last 2 Decades*, WASH. POST, Dec. 9, 1992, at A1.

2. 107 N.C. App. 644, 421 S.E.2d 623 (1992).

3. *Id.* at 651, 421 S.E.2d at 627.

4. *Id.* at 652-53, 421 S.E.2d at 627.

5. *See infra* notes 58-126 and accompanying text.

6. *See infra* notes 127-43 and accompanying text.

7. *See infra* notes 144-47 and accompanying text.

8. *Freeman*, 107 N.C. App. at 647-48, 421 S.E.2d at 624.

9. Although the court of appeals stated the husband's right hand was injured, *id.* at 647, 421 S.E.2d at 624, the parties described the injury as one to his right arm. Defendant-Appellant's Brief at 3, *Freeman* (No. 9111DC822); Plaintiff-Appellee's Brief at 3, *Freeman* (No. 9111DC822).

compensation.[10] Under the accepted claim, he received payment of medical expenses and "benefits for temporary total disability while out of work."[11] When his physician concluded that his arm would improve no further and that he had a forty percent permanent disability, the husband negotiated a final compromise settlement agreement with his employer and its insurer to resolve the workers' compensation claim.[12] The agreement provided a lump-sum payment of $32,500 in compensation for the husband's permanent partial disability.[13] In addition, it provided for payment of injury-related medical expenses incurred between the date of maximum improvement in the arm and the date of the agreement.[14] In March 1989, three months before the couple separated, the husband received the lump-sum payment and deposited it in a bank certificate of deposit.[15]

On May 25, 1990, the husband filed for absolute divorce and restated[16] his claim for equitable distribution of marital property; the wife counterclaimed for the same relief.[17] At a consolidated trial on the parties' equitable distribution claims, the trial judge found that the lump-sum settlement was designed to compensate for the husband's pain and suffering, for the lost use of his arm, and for his permanent partial disa-

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10. *Freeman*, 107 N.C. App. at 647, 421 S.E.2d at 624.

11. *Id.*

12. *Id.*; Defendant-Appellant's Brief at 3, *Freeman* (No. 9111DC822). Compromise settlement agreements are permitted under the workers' compensation statute and the regulations of the North Carolina Industrial Commission. *See* N.C. GEN. STAT. § 97-82 (1991); NORTH CAROLINA INDUSTRIAL COMMISSION, *Workers' Compensation Rules of the North Carolina Industrial Commission*, Rule 502, Compromise Settlement Agreements, *in* THE GENERAL STATUTES OF NORTH CAROLINA, ANNOTATED RULES, 521-22 (1993) [hereinafter *Workers' Compensation Rules*]. Compromise settlement agreements are sometimes referred to as "clincher" agreements. *See* Defendant-Appellant's Brief at 3, *Freeman* (No. 9111DC822).

13. *Freeman*, 107 N.C. App. at 647, 421 S.E.2d at 624.

14. *Id.*

15. *Id.* Although acknowledging that the trial record did not show whether the certificate of deposit was in the husband's name alone, the court of appeals noted that the wife stated in her brief that her "[h]usband placed the funds in an 'individual account.'" *Id.* at 648, 421 S.E.2d at 624 (citing Defendant-Appellant's Brief at 3, *Freeman* (No. 9111DC822)).

16. In North Carolina a couple must be separated for a year before a court can grant an absolute divorce. N.C. GEN. STAT. § 50-6 (1991). An action for equitable distribution, on the other hand, may be filed "[a]t any time after a husband and wife begin to live separate and apart from each other." N.C. GEN. STAT. § 50-21 (Supp. 1992). The husband in *Freeman* originally filed an action for equitable distribution in September 1989, along with claims for divorce from bed and board and sole possession of the couple's house. *Freeman*, 107 N.C. App. at 648, 421 S.E.2d at 625. The wife counterclaimed for similar relief in November 1989. *Id.*

17. *Freeman*, 107 N.C. App. at 649, 421 S.E.2d at 625. An absolute divorce was granted on Aug. 20, 1990. The claims for equitable distribution were severed and consolidated for later resolution. *Id.*

bility.[18] As a result, the trial court classified the full $32,500 payment as separate property belonging to the husband.[19] After classifying and valuing the couple's belongings, the judge ordered an equal distribution of the marital property.[20] Because the value of property distributed to the wife exceeded that awarded to the husband, the court ordered the wife to pay the difference of $116,338.05.[21] Both the husband and wife appealed the equitable distribution order to the North Carolina Court of Appeals.[22]

The treatment of funds received under a workers' compensation settlement agreement was an issue of first impression for the North Carolina appellate courts.[23] The wife argued that the lump-sum payment was to compensate for the husband's lost wages and that, because it was received during the marriage and prior to separation, it should be considered marital property.[24] Emphasizing the trial court's finding that the settlement was for pain and suffering and for his permanent disability, the husband argued that his wife had failed to prove that any portion of the settlement was marital property.[25]

In an unanimous decision written by Judge Greene,[26] the court announced that North Carolina would "follow the growing number of jurisdictions"[27] that have adopted the "analytic approach,"[28] under which a workers' compensation award is classified as marital or separate property according to "what the award was intended to replace."[29] Finding a lack of evidence in the record to support the trial court's classification of the entire workers' compensation settlement as the husband's separate property, the court reversed and remanded the case to give the parties an

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18. *Id.*

19. *Id.* at 650, 421 S.E.2d at 626.

20. *Id.* For a discussion of the considerations a trial court must make when distributing property under the Equitable Distribution Act, see *infra* note 72 and accompanying text.

21. *Freeman*, 107 N.C. App. at 650, 421 S.E.2d at 626.

22. *Id.* As framed by the court, the appeal presented three broad issues: (1) whether the lump-sum payment under the workers' compensation settlement constituted separate or marital property; (2) whether the trial court erred in finding that the wife's expenses for a security system did not represent maintenance of the marital home; and (3) whether the trial court's ordering of an equal distribution of property was an abuse of its discretion. *Id.* at 650-51, 421 S.E.2d at 626.

23. *Id.* at 651, 421 S.E.2d at 627.

24. Defendant-Appellant's Brief at 7-11, *Freeman* (No. 9111DC822).

25. Plaintiff-Appellant's Brief at 2-4, *Freeman* (No. 9111DC822).

26. Serving on the panel with Judge Greene were Judge Wells and Judge Orr. *Freeman*, 107 N.C. App. at 658, 421 S.E.2d at 631.

27. *Id.* at 653, 421 S.E.2d at 627.

28. *Id.* at 652, 421 S.E.2d at 627. Some courts use the phrase "analytical approach" to describe this method of classification. *See, e.g.*, Dees v. Dees, 259 Ga. 177, 178, 377 S.E.2d 845, 846 (1989); Pauley v. Pauley, 771 S.W.2d 105, 109 (Mo. Ct. App. 1989).

29. *Freeman*, 107 N.C. App. at 652, 421 S.E.2d at 627.

opportunity to present evidence on the nature of the settlement.[30] The court approached this problem of first impression by analyzing: (1) the parties' evidentiary burdens under North Carolina's system of equitable distribution, (2) the options for treatment of workers' compensation awards under this system, (3) the nature of the workers' compensation statute, and (4) the evidence presented at trial.

As a starting point, the court noted that, under North Carolina's equitable distribution statute, a spouse claiming that property is marital must demonstrate "by a preponderance of the evidence that the property was acquired by either spouse or both spouses during the marriage and before separation and that the property is currently owned."[31] Assuming this initial burden is met, the spouse claiming the property is separate must bear the burden of proving that the statutory definition of separate property is satisfied.[32] The court explained that "[i]f both parties meet their respective burdens, then property is classified as separate property."[33]

In the second step of its analysis, the court referred to precedent in other jurisdictions and presented three methods by which to classify workers' compensation in an equitable distribution context: (1) the unitary approach, (2) the mechanistic approach, and (3) the analytic approach.[34] The court explained that under the unitary approach, a "workers' compensation award is treated as being uniquely personal to the injured spouse and is always characterized as his separate prop-

30. *Id.* at 655, 421 S.E.2d at 629. The court affirmed the trial judge's determination that the security system costs did not constitute maintenance of the marital home and also upheld the trial court's valuation of a car purchased by the husband with marital assets. *Id.* at 656-57, 421 S.E.2d at 629-30. In addition, the court found that the trial court did not abuse its discretion in calling for an equal distribution of marital property, noting that in reaching its conclusion the trial court considered evidence including the wife's education expenditures, the husband's health problems, and the husband's living expenses since the couple separated. *Id.* at 657-58, 421 S.E.2d at 630.

31. *Id.* at 651, 421 S.E.2d at 626 (citing Atkins v. Atkins, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787-88 (1991)). In 1991, the North Carolina General Assembly amended the equitable distribution statute to create a marital property presumption. The language added to the definition of marital property stipulates: "It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property under subdivision (2) of this subsection. This presumption may be rebutted by the greater weight of the evidence." N.C. GEN. STAT. § 50-20(b)(1) (Supp. 1992). In *Freeman*, the court of appeals noted that the burden-of-proof allocation it described is consistent with the amendment. *Freeman*, 107 N.C. App. at 654, 421 S.E.2d at 628 (citing Ciobanu v. Ciobanu, 104 N.C. App. 461, 466, 409 S.E.2d 749, 752 (1991)).

32. *Freeman*, 107 N.C. App. at 651, 421 S.E.2d at 626; *see infra* notes 71-72 and accompanying text.

33. *Freeman*, 107 N.C. App. at 651, 421 S.E.2d at 626.

34. *Id.* at 651-52, 421 S.E.2d at 627.

erty."[35] Under the mechanistic approach, an award made prior to separation to compensate for an injury that occurred during the marriage is marital property, while workers' compensation funds received after the couple separates are the injured spouse's separate property.[36] Finally, the court explained that the analytic approach considers the purpose of a workers' compensation award.[37] The court found that in most states which use the analytic approach, the share of an award designed to replace lost wages, lost earning capacity, and medical expenses suffered during the marriage is deemed marital property, while any share covering similar economic loss suffered after separation is classified as separate property, belonging to the injured spouse.[38]

The court selected the analytic approach, reasoning that it is the method "most consistent with the policy behind North Carolina's Equitable Distribution Act recognizing marriage as a shared enterprise, the assets and debts of which should be fairly distributed upon divorce."[39] The court also opined that use of the analytic approach for classification of workers' compensation benefits parallels North Carolina's treatment of personal injury awards in equitable distribution cases.[40]

Having determined that classification in cases like *Freeman* "depends upon the purpose of such awards under our workers' compensation law,"[41] the court moved to the third step of its analysis: examining the policy underlying North Carolina's workers' compensation statute.[42] The court stated that North Carolina case law demonstrates that the statute's goal is to replace economic loss such as medical expenses, lost wages, and lost earning capacity, rather than to compensate for pain and suffering.[43] With this finding in mind, the court established a formula for

35. *Id.* at 652, 421 S.E.2d at 627 (citing, as an example, Gloria B.S. v. Richard G.S., 458 A.2d 707 (Del. Fam. Ct. 1982)).

36. *Id.* at 651-52, 421 S.E.2d at 627 (citing, as an example, Orszula v. Orszula, 292 S.C. 264, 356 S.E.2d 114 (1987)).

37. *Id.* at 652, 421 S.E.2d at 627.

38. *Id.* The court cited several jurisdictions as having adopted the analytic approach: Miller v. Miller, 739 P.2d 163 (Alaska 1987); In Re Marriage of Smith, 817 P.2d 641 (Colo. Ct. App. 1991); Weisfeld v. Weisfeld, 545 So. 2d 1341 (Fla. 1989); Dees v. Dees, 259 Ga. 177, 377 S.E.2d 845 (1989); Cummings v. Cummings, 540 A.2d 778 (Me. 1988); Queen v. Queen, 308 Md. 574, 521 A.2d 320 (1987); Pauley v. Pauley, 771 S.W.2d 105 (Mo. Ct. App. 1989); Lentini v. Lentini, 236 N.J. Super. 233, 565 A.2d 701 (N.J. Super. Ct. App. Div. 1989); Crocker v. Crocker, 824 P.2d 1117 (Okla. 1991); Kirk v. Kirk, 577 A.2d 976 (R.I. 1990).

39. *Freeman*, 107 N.C. App. at 652-53, 421 S.E.2d at 627.

40. *Id.* at 653, 421 S.E.2d at 627; *see infra* notes 83-101 and accompanying text.

41. *Freeman*, 107 N.C. App. at 653, 421 S.E.2d at 628.

42. *See id.*

43. *Id.* at 654, 421 S.E.2d at 628.

classifying workers' compensation benefits when dividing property upon divorce. The court held:

> To the extent that an award replaces medical expenses, lost wages, or loss of earning capacity sustained during the marriage, it is marital property subject to equitable distribution. To the extent that the award replaces such economic loss occurring after separation, it is the separate property of the injured spouse.[44]

The court explained that the entire workers' compensation award is presumed to be marital property *if* the spouse asserting such designation can show by a preponderance of the evidence that the injured spouse received the award before separation.[45] The injured spouse can rebut this presumption by using the same preponderance-of-the evidence standard to prove "that the award, or some portion of it, was intended to compensate him for economic loss occurring after the date of separation and is therefore his separate property."[46] The non-injured spouse will lose the marital property presumption in those cases "where a spouse is injured during the marriage and prior to separation, but does not receive a workers' compensation award until *after* the date of separation."[47]

The court completed its analysis by applying the enunciated standard to the evidence presented in *Freeman*. The court found that the wife had offered evidence establishing that the husband received the settlement award prior to the couple's separation.[48] As a result, she satisfied her statutory burden of proving that the property was marital.[49] In contrast, the husband failed to present evidence indicating whether any portion of the award was designed to compensate him for economic loss suffered after the separation. The husband also did not assert at trial that the award was for pain and suffering.[50] Consequently, the court concluded that the trial judge erred—given the absence of "competent evidence in the record"—in finding that the lump-sum award was the husband's separate property.[51] Because *Freeman* was a North Carolina appellate court's first articulation of the standard for classification of

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44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* In such circumstances, however, the award can still be classified as marital property, but only if the non-injured spouse establishes by a preponderance of the evidence that the total award, or a portion of it, goes toward replacement of economic loss that occurred "during the marriage and before separation." *Id.* at 654, 421 S.E.2d at 628-29.

48. *Id.* at 655, 421 S.E.2d at 629.

49. *Id.*

50. *Id.*

51. *Id.*

workers' compensation awards, the court of appeals remanded the matter to the trial court to give the parties an opportunity to present evidence on what the award was designed to replace.[52]

Although, in reaching this result, the court did not have at its disposal North Carolina appellate precedent specifically addressing the treatment of workers' compensation benefits under equitable distribution, it was able to draw upon fundamental notions underlying the concept of equitable distribution,[53] the state's equitable distribution act,[54] North Carolina decisions on equitable distribution of other types of property,[55] applicable case law from other jurisdictions,[56] and the North Carolina workers' compensation statute.[57]

What equitable distribution contributes to divorce law in general, and the distribution of property in particular, is the principle that "marriage is a partnership or shared enterprise"[58] and "that both spouses contribute to the economic circumstances of a marriage."[59] This principle manifests itself in a wide assortment of statutes, including those that describe in detail how property should be distributed and those that simply instruct courts to distribute marital property equitably.[60] Despite differences in form, equitable distribution statutes stand in stark contrast to the traditional common-law system of distribution, which used title as the determining factor in the allocation of property upon divorce.[61] Theoretically, equitable distribution is more closely aligned with the community-property approach, which views spouses as equal partners who contribute in different ways to the economic survival of a "marital enterprise."[62] Today more than forty common-law states have enacted some

52. *Id.*

53. *See infra* notes 58-64 and accompanying text.

54. *See infra* notes 65-72 and accompanying text.

55. *See infra* notes 73-101 and accompanying text.

56. *See infra* notes 102-11 and accompanying text.

57. *See supra* notes 112-19 and accompanying text.

58. LAWRENCE J. GOLDEN, EQUITABLE DISTRIBUTION OF PROPERTY § 1.10, at 1-2 (1983).

59. *Id.* at 2.

60. *Id.*

61. *Id.*

62. *Id.* § 1.04, at 5-6. Golden comments that "equitable distribution has served as the vehicle whereby some of the policies of the community property regime have been transferred to the common law states." *Id.* § 1.02, at 3. *But see* Michelle Patterson, *What's Yours Is Mine and What's Mine is Mine: The Classification of the Home Upon Dissolution*, 28 UCLA L. REV. 1365, 1383 (1981) (arguing that classification-based jurisdictions are influenced by title almost as much as the traditional common law states are).

form of equitable distribution.[63] A slight minority of those consider all property to be eligible for equitable distribution, while a majority of them limit the judiciary's discretion to distribution of marital property.[64]

In 1981, North Carolina joined the states that have enacted equitable distribution statutes.[65] Before passage of the Equitable Distribution Act, North Carolina followed the common-law approach to distribution of property under which "each party kept that property which was titled in his or her name, in the absence of a successful claim that the property was being held in trust."[66] In contrast, under the equitable distribution act, the trial court must complete three steps: (1) classification, (2) valuation, and (3) distribution of property.[67] The Act defines marital property and separate property and vests the courts with authority to "provide for an equitable distribution of the *marital property* between the parties."[68] Marital property includes "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned."[69] In 1991, the North Carolina General Assembly amended this definition by creating a rebuttable presumption that property acquired after marriage and before separation is marital property.[70] Separate property, on the other hand, includes "all real and personal property ac-

63. Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 25 FAM. L. Q. 417, 445-46 (1992).

64. *Id.*

65. *See* An Act For Equitable Distribution of Marital Property, ch. 815, 1981 N.C. SESS. LAWS 1184 (1981) (codified as amended at N.C. GEN. STAT. §§ 50-20, 50-21 (Supp. 1992)).

66. 2 ROBERT E. LEE & RHODA B. BILLINGS, NORTH CAROLINA FAMILY LAW § 169.3, at 127 (Supp. 1991). Leatherman v. Leatherman, 297 N.C. 618, 256 S.E.2d 793 (1979), is often cited to illustrate the potentially egregious effects that accompanied North Carolina's strict adherence to the title-based approach to property distribution. *See* White v. White, 312 N.C. 771, 774, 324 S.E.2d 829, 831 (1985); Sally B. Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C. L. REV. 195, 196 n.4 (1987). In *Leatherman*, a wife who contributed extensive efforts to the development and operation of her husband's business, while also maintaining the marital home, was denied an interest in the stock of the closely held corporation after the couple divorced. *Leatherman*, 297 N.C. at 625-26, 256 S.E.2d at 798.

67. Cable v. Cable, 76 N.C. App. 134, 137, 331 S.E.2d 765, 767, *disc. rev. denied* 315 N.C. 182, 337 S.E.2d 856 (1985); *see also* GOLDEN, *supra* note 58, § 1.08, at 10 (explaining that each of the three components of equitable distribution "requires independent evidence and advocacy").

68. N.C. GEN. STAT. § 50-20(a) (Supp. 1992) (emphasis added). Because only marital property is within the courts' equitable distribution reach, some scholars have described North Carolina's statute as a " 'deferred community property law' system, under which property classified as separate is completely immune from distribution." Sally B. Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C. L. REV. 247, 249 (1983) [hereinafter *Equitable Distribution*].

69. N.C. GEN. STAT. § 50-20(b)(1) (Supp. 1992).

70. *See supra* note 31.

quired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage."[71] The Act compels the court to divide marital property equally based upon its net value *unless* the court concludes that an equal division would not be equitable, in which case the court is to divide marital property equitably.[72]

The *Freeman* case illustrates that more than ten years after enactment of the equitable distribution statute, the North Carolina courts' work of interpreting it continues. *White v. White*[73] presented one of the earliest challenges,[74] and the supreme court's decision provided insight into both the policy behind and the operation of the statute.[75] In *White*, the defendant-wife claimed that the trial court erred by giving both spouses equal shares in the marital property.[76] The wife maintained she should have received a larger share because she had contributed more to the marital estate.[77] The supreme court noted, however, that, absent a finding that equal division of property would be unfair, the statute mandates equal division.[78] The *White* court emphasized that trial courts possess broad discretion in distributing marital property, while appellate-court review is limited to an abuse-of-discretion standard.[79] The court found no abuse of discretion even though it admitted that the trial court, weighing the evidence differently, might have given the wife a greater

71. N.C. GEN. STAT. § 50-20(b)(2) (Supp. 1992).

72. *Id.* § 50-20(c). This subsection of the statute includes a list of distribution factors to be considered by the court, ranging from "the income, property and liabilities of each party at the time the division of property is to become effective," *id.* § 50-20(c)(1), to "[a]ny other factor which the court finds to be just and proper." *Id.* § 50-20(c)(12). Shortly after passage of the statute, Professor Sharp cautioned that "[i]t is unclear whether these factors are to be taken into account only in making the initial determination that an equal division would be inequitable, or in the determination of what would be equitable." *Equitable Distribution, supra* note 68, at 251. The supreme court has subsequently shed some light on Professor Sharp's questions about use of the factors. *See* White v. White, 312 N.C. 770, 776-77, 324 S.E.2d 829, 832-33 (1985) (explaining that the party calling for unequal division must present evidence on one or more of the factors and that the trial court must then assign weight to the factors in distributing the property equitably).

73. 312 N.C. 770, 324 S.E.2d 829 (1985).

74. The supreme court noted that the case was its "first opportunity to expressly address" the equitable distribution statute. *Id.* at 773, 324 S.E.2d at 831.

75. Confronted by fundamental issues about operation of the equitable distribution statute, the supreme court examined North Carolina family law history leading up to passage of the Act. The court held that the Act "reflects the idea that marriage is a partnership enterprise to which both spouses make vital contributions and which entitles the homemaker spouse to a share of the property acquired during the relationship." *Id.* at 775, 324 S.E.2d at 832.

76. *Id.* at 773, 324 S.E.2d at 831.

77. *Id.*

78. *Id.* at 776, 324 S.E.2d at 832.

79. *Id.* at 777, 324 S.E.2d at 833.

share of the marital property.[80]

While the *White* decision elucidates a court's role in the ultimate decision on distribution of property, other North Carolina appellate cases contribute to an understanding of the initial classification of property. Identifying property as either marital or separate is part of the statute's "threshold requirement"[81] and is particularly important because only marital property is subject to equitable distribution.[82] In deciding how to characterize workers' compensation awards, the *Freeman* court analogized the treatment of personal injury awards to the workers' compensation context.[83] The mechanistic approach and the analytic approach are the leading classification techniques in the context of personal injury awards.[84] The mechanistic approach "looks to the general statutory definition of individual and marital property, and concludes that since the personal injury award was acquired during the marriage and does not fall within the definition of individual property, it must be marital, or community, property."[85] The analytic approach, on the other hand, asks what the personal injury award is designed to supplant.[86]

Well established as the preferred method in community-property jurisdictions, the analytic approach has been growing in popularity in equitable distribution states as well[87]—including North Carolina. *Johnson v. Johnson*,[88] one of the state's most significant classification cases,[89] presented an issue of first impression in North Carolina: whether funds from a personal injury settlement recovered by a spouse for injuries suffered during the marriage constitute marital property or the injured spouse's separate property.[90] The husband in *Johnson*, who was injured in a motorcycle accident during the marriage, received a $95,000 settle-

80. *Id.* at 777-78, 324 S.E.2d at 833.

81. Alexander v. Alexander, 68 N.C. App. 548, 550, 315 S.E.2d 772, 775 (1984).

82. *See supra* note 68 and accompanying text.

83. *See Freeman*, 107 N.C. App. at 653, 421 S.E.2d at 627.

84. 2 VALUATION & DISTRIBUTION OF MARITAL PROPERTY § 23.08[1][a], at 23-110 (John P. McCahey et al. eds., 1991).

85. *Id.*

86. *Id.* There are two subsets to the analytic approach: "One establishes a general rule by reference to the usual content of personal injury awards; the other permits inquiry into the exact nature of the personal injury award before the court." *Id.* § 23.08, at 23-110.

87. *Id.* § 23.08[1][b], at 23-114.

88. 317 N.C. 437, 346 S.E.2d 430 (1986).

89. *See* Beth Herstein, Note, Johnson v. Johnson: *Personal Injury Awards in Divorce Actions*, 65 N.C. L. REV. 1332, 1333 (1987); Joel R. Rhine, Note, *Domestic Relations—The North Carolina Supreme Court Revokes the Marital Presumption and Adopts the Analytic Approach to the Classification of Personal Injury Settlements*—Johnson v. Johnson, 22 WAKE FOREST L. REV. 931, 931-32 (1987).

90. *Johnson*, 317 N.C. at 439, 346 S.E.2d at 431.

ment of his personal injury claim after the couple separated but before they were divorced.[91] While the wife listed the settlement proceeds as marital property, the husband claimed they were his separately.[92] The North Carolina Court of Appeals affirmed the trial court's finding that the settlement was the husband's separate property.[93] In reversing and remanding, the North Carolina Supreme Court adopted the analytic approach for treatment of personal injury awards, concluding that the approach was "consistent with the spirit and letter" of North Carolina's equitable distribution statute.[94] The court stipulated that on remand the injured spouse had the burden of establishing, by a preponderance of the evidence, what portion of the personal injury settlement compensated for injury to his separate property.[95] The court said that any portion of the personal injury settlement not proved to be the separate property of either spouse would be deemed marital property.[96]

In *Lilly v. Lilly*,[97] the North Carolina Court of Appeals relied upon *Johnson* in affirming a trial court's determination that the wife's insurance settlement did not compensate for economic loss and, therefore, was her separate property.[98] The wife in *Lilly* was injured in an automobile accident and received $25,000 from the tort-feasor's insurer in settlement of her personal injury claim.[99] Citing *Johnson*, the court stated, "[T]he characterization of a spouse's personal injury settlement as marital or separate property depends on what the award was intended to replace."[100] The court found "competent evidence" to support the wife's assertion that the award was for her pain and suffering and to support the allocation made pursuant to *Johnson*.[101]

Despite a fairly well-developed foundation of law on the use of the analytic approach in the personal injury context, before *Freeman* there were no North Carolina cases specifically addressing classification of

91. *Id.* at 440, 346 S.E.2d at 432.

92. *Id.*

93. *Id.* at 439-40, 346 S.E.2d at 431.

94. *Id.* at 451, 346 S.E.2d at 438.

95. *Id.* at 454, 346 S.E.2d at 439. The court added that if the wife claimed that any portion of the husband's settlement was to compensate for injury to *her* separate property, she could "attempt to so prove by a preponderance of the evidence." *Id.* at 454, 346 S.E.2d at 440.

96. *Id.*

97. 107 N.C. App. 484, 420 S.E.2d 492 (1992). Judge Greene, who wrote the *Freeman* opinion, also authored the opinion in *Lilly*.

98. *Id.* at 486-87, 420 S.E.2d at 494.

99. *Id.* at 485, 420 S.E.2d at 492.

100. *Id.* at 486, 420 S.E.2d at 493.

101. *Id.* at 487, 420 S.E.2d at 494. The court of appeals also held that the fact that the wife deposited the settlement in a joint account does not "constitute an expressly stated intention that the property be considered marital." *Id.*

workers' compensation settlements. Consequently, the *Freeman* court relied heavily upon case law from other jurisdictions when making its decision to apply the analytic technique to workers' compensation awards.[102] A case cited by the court of appeals was *Crocker v. Crocker*,[103] an Oklahoma decision based on facts similar to *Freeman*'s. In *Crocker*, a couple divorcing for the third time contested the trial court's distribution of the remainder of the husband's $32,000 lump-sum workers' compensation payment that he received prior to the couple's divorce.[104] The Supreme Court of Oklahoma embraced the analytic approach in part because it is consistent with that state's treatment of a workers' compensation award "as money in lieu of wages" rather than as reimbursement for injuries.[105] In addition, the court was influenced by its previous use of an analysis similar to the analytic approach in classifying proceeds from disability insurance.[106] Noting that Oklahoma calculates workers' compensation awards based on average weekly wages and that "the number of payments is computed on a weekly basis," the supreme court instructed the trial court on remand to "determine whether the award covered any week prior to the couple's divorce. If so, it is marital property. Any portion of the award which is for any weeks of compensation after the divorce is not marital property subject to property division."[107]

Florida provides another example of a jurisdiction that has adopted the analytic approach in classifying a lump-sum workers' compensation award. The husband in *Weisfeld v. Weisfeld*[108] was injured during the marriage and received a $150,000 workers' compensation settlement two years before he and his wife separated.[109] The wife, in claiming half of all marital assets, included funds from the workers' compensation settlement.[110] The Supreme Court of Florida remanded the case to the trial court for an evaluation of the wife's interest in the settlement proceeds, instructing the trial judge that the analytic approach "requires an under-

102. *See supra* notes 34-40 and accompanying text.

103. 824 P.2d 1117 (Okla. 1991).

104. *Id.* at 1118.

105. *Id.* at 1123.

106. *Id.*

107. *Id.* The Supreme Court of Oklahoma explained that "[b]ecause a former spouse has no inherent right to the salary earned by his/her former marriage partner after the marriage is terminated, there is no right to a disability award which is intended to replace future wages." *Id.*

108. 545 So. 2d 1341 (Fla. 1989).

109. *Id.* at 1342.

110. *Id.* at 1343.

standing . . . of the purpose of the damage award."[111]

Because the analytic approach focuses on what the award is designed to replace, North Carolina statutes and case law on the nature of workers' compensation assume particular significance. North Carolina's workers' compensation act[112] "provides compensation for an employee who suffers an injury by accident arising out of and in the course of his employment."[113] In addition to providing compensation rates for total incapacity and partial incapacity,[114] the Act stipulates rates and schedules of compensation for a list of specific injuries.[115] Rates of compensation under the statute typically are based on a percentage of average weekly wages.[116]

Fifty years ago the North Carolina Supreme Court provided important insight into the purpose of the workers' compensation statute in *Branham v. Denny Roll & Panel Co.*[117] The court stated that the objective of the Act is to compensate for loss of earning capacity and that the "diminution of the power or capacity to earn is the measure of compensability."[118] The court also explained that the Act does not provide for compensation of "physical pain or discomfort."[119]

Viewed in the light of the statutes and cases that preceded it, the *Freeman* decision to extend the analytic approach to workers' compensation awards represents a logical next step for North Carolina courts. The application of the analytic approach to personal injury settlements in the *Johnson* decision, and in the *Lilly* opinion which followed it, provided the North Carolina Court of Appeals with a rational and "consistent"[120]

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111. *Id.* at 1346.

112. The North Carolina Workmen's Compensation Act, ch. 120, 1929 N.C. SESS. LAWS 117 (1929) (codified as amended at N.C. GEN. STAT. §§ 97-1 to 97-143 (1991)).

113. Gray v. Carolina Freight Carriers, Inc., 105 N.C. App. 480, 483, 414 S.E.2d 102, 104 (1992).

114. N.C. GEN. STAT. §§ 97-29, 97-30 (1991).

115. *Id.* § 97-31(1)-(24). For example, the statute provides that if an employee loses a thumb, he or she shall receive 66 2/3 % of wages during the healing period, and the "disability shall be deemed to continue" for 75 weeks. *Id.* § 97-31(1).

116. *See id.* §§ 97-29 to 97-31.

117. 223 N.C. 233, 25 S.E.2d 865 (1943).

118. *Id.* at 237, 25 S.E.2d at 868; *see also* Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 190, 345 S.E.2d 374, 381 (1986) (holding that the workers' compensation statute "provides compensation for the loss of wage-earning *ability*"); Hill v. DuBose, 234 N.C. 446, 448, 67 S.E.2d 371, 372 (1951) (concluding that the statute compensates for "loss of earning capacity").

119. *Branham*, 223 N.C. at 236, 25 S.E.2d at 867; *see also* Jackson v. Fayetteville Area System of Transportation, 78 N.C. App. 412, 414, 337 S.E. 2d 110, 112 (1985) (finding that "pain is not in and of itself a compensable injury").

120. *Freeman*, 107 N.C. App. at 653, 421 S.E.2d at 628.

formula to follow in the case of workers' compensation benefits.[121] Although the *Freeman* court did not cite the *Johnson* decision extensively,[122] the influence of *Johnson*'s articulation of the analytic approach should not be underestimated. In *Johnson*, the North Carolina Supreme Court held that the classification of disputed assets "depend[s] upon the proof presented to the trial court of the nature of those assets."[123] This philosophy in turn underlies the court of appeals' holding in *Freeman*.[124] Supplementing the foundation laid in *Johnson*, persuasive case law from other jurisdictions[125] also simplified the *Freeman* court's task of extending the analytic technique from the personal injury context to workers' compensation. In fact, the Supreme Court of Florida, announcing its selection of the analytic approach for a lump-sum workers' compensation payment in *Weisfeld*, cited North Carolina's *Johnson* decision in support of its holding.[126]

Because North Carolina has followed the example of personal injury classification, however, many of the potential pitfalls that affect the use of the analytic approach in that context may puzzle courts applying the approach to workers' compensation cases as well. The analytic approach requires that an award be separated "into component parts and characterize[d] . . . according to its purpose."[127] Under North Carolina's equitable distribution statute,[128] and as reflected in the *Freeman* court's remand to the trial court,[129] the trial judge has responsibility for hearing evidence in this regard. In a personal injury case where recovery is sought for damage to both marital and personal property and "a general verdict rather than a special verdict is handed down,"[130] it may be impossible for a party in a later equitable distribution action to prove what

121. In the wake of the *Johnson* court's adoption of the analytic approach over the mechanistic approach for classification of personal injury awards, Professor Sharp predicted that "the court would adopt the same approach with, for example, workers' compensation or other disability awards." Sharp, *supra* note 66, at 206 n.64.

122. The court of appeals cited the *Johnson* decision only twice in *Freeman*. *See Freeman*, 107 N.C. App. at 653, 654-55, 421 S.E.2d at 627, 629.

123. Johnson v. Johnson, 317 N.C. 437, 454-55 n.4, 346 S.E.2d 430, 440 n.4 (1986).

124. *See Freeman*, 107 N.C. App. at 654-55, 421 S.E.2d at 628-29.

125. *See supra* notes 102-11 and accompanying text.

126. Weisfeld v. Weisfeld, 545 So. 2d 1341, 1346 (Fla. 1989). The Florida court said the *Johnson* "decision illustrates how the amount awarded for lost wages or lost earning capacity for the period during the marriage and medical and hospital expenses paid out of marital funds is separated from an amount awarded for lost wages and hospital and medical expenses incurred subsequent to the marriage." *Id.* at 1345.

127. Lynn F. Hendon, Note, *Classification of Personal Injury Awards In Divorce Actions*, 27 J. FAM. L. 453, 472 (1988-89).

128. *See supra* notes 65-72 and accompanying text.

129. *See supra* text accompanying note 52.

130. Rhine, *supra* note 89, at 956.

portion of the award represents separate property and what portion represents marital property.[131] Similarly, compromise settlement agreements under the workers' compensation statute may prove troublesome to break down into component parts. Jonathan Silverman, one of the attorneys who represented the defendant-wife in *Freeman*, explained the potential difficulty in analyzing workers' compensation settlement agreements:

> [The] classic clincher agreement doesn't break damages down. It just says your client will take a lump sum settlement in satisfaction of all future claims. How do you put a value on the release of future claims? You are going to have a tough time allocating damages, unless people start drafting clinchers with an eye toward the dissolution of their marriage.[132]

The provision of North Carolina's workers' compensation statute that allows an employer and injured employee to enter into an agreement for settlement of claims defers to the Industrial Commission on the form and content of such agreements.[133] The Commission's instructions on what must be included in a compromise settlement agreement do not contain a requirement that the parties explain whether an award is intended to replace economic loss occurring before or after separation.[134] Certainly one result of the *Freeman* decision is that a spouse negotiating a workers' compensation settlement may attempt to assure that the provisions of the agreement are detailed about the nature of the benefits conveyed so that classification in the event of a divorce is simplified. It may not always be feasible, however, to draft agreements with such specificity and with concern for circumstances that may or may not come to pass. Because the payor in such agreements is not likely to be concerned about specifying what the benefits are designed to replace, the responsibility will be on the injured spouse and his or her attorney.

The language in *Freeman* illustrates that the decision applies not only to compromise settlement agreements but also workers' compensation benefits generally.[135] Trial courts, therefore, face the task of applying the analytic approach to the classification of weekly benefits paid

131. *See id.*

132. Jay Reeves, *Decision Shows How Splitting Couple Should Split IC Award*, N.C. LAW. WKLY., Oct. 26, 1992, at 1, 4. The compromise settlement agreement negotiated between the husband in *Freeman* and his employer and its insurer did not stipulate what portion of the $32,500 workers' compensation settlement represented marital versus separate loss. *See* Defendant-Appellant's Brief at 18-26 app., *Freeman* (No. 9111DC822).

133. *See* N.C. GEN. STAT. § 97-82 (1991).

134. *See Workers' Compensation Rules*, *supra* note 12, at 521-22.

135. For example, the court stated broadly that it was adopting the analytic approach "for the purpose of classifying workers' compensation awards"; it did not indicate that the holding

under the statute as well as to lump-sum payments. Consequently, the parties and trial judges may look to other sections of the workers' compensation statute when determining what an award is designed to replace. One possibility is that a trial court may examine a particular provision of the workers' compensation statute, note the maximum period of coverage, and decide based upon the evidence presented whether an award—no matter when it was received—covered weeks during which the parties were together. The Supreme Court of Oklahoma apparently had such a methodology in mind when, after adopting the analytic approach, it instructed a trial court on remand to "determine whether the [workers' compensation] award covered any week prior to the couple's divorce."[136]

The outcome of such a calculation may vary, however, according to whether benefits under the statute are viewed as representing payment for the initial weeks after an injury or as representing payment over an injured person's lifetime. For example, in the case of a permanent partial incapacity, North Carolina's statute provides compensation of a percentage of the difference between average weekly wages before and after the injury—*for a maximum of three hundred weeks.*[137] If a spouse is injured during the marriage and the award is simply to compensate for lost earning capacity for the first three hundred weeks after the injury, the noninjured spouse should be entitled to a share of the award covering weeks between the injury and the couple's separation. If the maximum period stipulated by the statute, however, represents a cap on recovery for future or lifetime disability, a strong argument could be made that the share of the total award eligible for classification as marital property should be smaller because the award actually would be intended to cover disability extending beyond the three hundred-week limit.

Awards made under the scheduled benefits provision of the statute[138] at first glance may also appear troublesome to classify. This section of the Act stipulates amounts and periods of compensation for a list of specific injuries such as the loss of a finger or thumb.[139] These payments are made regardless of whether the claimant has resumed working and is earning the same or higher wages.[140] Consequently, an injured

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is limited to compromise settlement agreements or lump-sum payments. *Freeman*, 107 N.C. App. at 653, 421 S.E.2d at 627.

136. Crocker v. Crocker, 824 P.2d 1117, 1123 (Okla. 1991).

137. N.C. GEN. STAT. § 97-30 (1991).

138. *Id.* § 97-31 (1991).

139. *Id.*; *see supra* note 115 and accompanying text.

140. 1C ARTHUR LARSON, LARSON'S WORKMEN'S COMPENSATION LAW § 58.11, at 10-492.79, 10-492.85 (1993).

spouse might argue that these payments are for the physical injury itself and should be classified as separate property. However, the scheduled benefits provision adheres to the policy that workers' compensation benefits are for lost earning capacity; "the only difference is that the effect on earning capacity is a conclusively presumed one, instead of a specifically proved one based on the individual's actual wage-loss experience."[141] Arguably, therefore, scheduled benefits designed to compensate for economic loss during the marriage should be eligible for classification as marital property.

Complicating resolution of the potential classification problems raised by the decision is the *Freeman* court's scant guidance on how to determine what a given workers' compensation award replaces. Confronted by the task of ascertaining which share of an award constitutes marital property and which share is separate property, some jurisdictions utilizing the analytic approach have considered: (1) whether the award was made for "lost earnings, loss of future earning capacity, or some other purpose"; (2) "[t]he time period of any diminished earning potential or disability"; (3) "[t]he nature and date of the underlying injury"; and (4) "the terms of the award."[142] It is clear that an appellate court will defer to the trial court's findings on classification, provided those findings "are supported by any competent evidence, which in an equitable distribution case may include the parties' affidavits regarding classification as well as of value."[143] Regardless how a trial court applies the analytic approach, the outcome may depend on the persuasiveness of the evidence the parties muster to support their respective positions on whether the workers' compensation award was intended to address economic loss that occurred during the marriage or future economic loss of the injured spouse suffered after separation.

In addition to affecting the specific operation of the equitable distribution statute, *Freeman* contributes generally to the ongoing development of North Carolina's philosophy underlying equitable distribution. A significant part of the court's rationale is that the analytic approach best effectuates the policy goal that "the assets and debts of which [a marriage] should be fairly distributed upon divorce."[144] The extension of the analytic approach to classification of workers' compensation awards also supplies fresh evidence of the North Carolina courts' apparent reluc-

141. *Id.* § 58.11, at 10-492.91 to 10-492.92.

142. Crocker v. Crocker, 824 P.2d 1117, 1122 (Okla. 1991) (citing Wilk v. Wilk, 781 S.W.2d 217, 223 (Mo. App. 1989); *In re* Marriage of Blankenship, 210 Mont. 31, 682 P.2d 1354 (1984)).

143. 2 LEE & BILLINGS, *supra* note 66, § 169.8, at 186-87.

144. *Freeman*, 107 N.C. App. at 652-53, 421 S.E.2d at 627.

tance to restrict themselves to the statutory definitions of marital and separate property.[145] There is an inherent tension in the use of the analytic approach in jurisdictions like North Carolina that have adopted formal periods of demarcation in their statutory definitions of marital and separate property. In fact, the existence of such formal statutory definitions of property naturally lends itself to reliance on the more "literal" mechanistic approach to classification.[146] By instructing trial courts to uncover what a workers' compensation award is designed to replace, the North Carolina Court of Appeals arguably contradicts the statutory language that marital property is property "acquired by either spouse or both spouses during the course of the marriage and *before the date of the separation* of the parties."[147]

Given North Carolina's treatment of personal injury awards, it was not unimaginable that the state would recognize a party's potential interest in the workers' compensation benefits of a spouse who is injured during the course of the marriage—even if those benefits are received after separation. The question remains, though, how far North Carolina's courts are willing to extend the analytic approach. Expansive application of the approach in equitable distribution cases might eventually warrant legislative amendment of the Act's definitions of marital and separate property in order to incorporate into those definitions the approach's emphasis on the nature or purpose of property. Consequently, *Freeman*'s ultimate significance may not be in its actual holding but rather in the extent to which the decision serves as a launching pad for North Carolina's further application of the analytic approach to classification of property in equitable distribution.

Although *Freeman*'s broad implications for North Carolina's overall framework of equitable distribution may create some uncertainty, the decision viewed in its own right is a sound one. Its treatment of workers' compensation benefits represents a logical progression from North Carolina's handling of personal injury awards in the equitable distribution context. The potential evidentiary problems that parties may experience

145. *See* Hendon, *supra* note 127, at 473 (concluding that the analytic approach in personal injury classification "offers a viable alternative to a strict interpretation of the statutory definitions of marital or separate property"). The *Freeman* court appears to have recognized and avoided the dangers of the literal mechanistic approach by specifically assuring that a workers' compensation award received after the date of separation may still be classified as marital property. *See Freeman*, 107 N.C. App. at 654, 421 S.E.2d at 628-29 (explaining that the noninjured spouse must "prove by a preponderance of the evidence that all or some portion of the award is compensation for economic loss occurring during the marriage and before separation").

146. *See Crocker*, 824 P.2d at 1119-20.

147. N.C. GEN. STAT. § 50-20(b)(1) (Supp. 1992) (emphasis added).

in identifying the components of a workers' compensation award are outweighed by the opportunity the approach offers to ensure that property is distributed fairly upon divorce. The decision calls attention to the fact that when a spouse is injured on the job, the marital estate suffers. The use of the analytic approach to classify a workers' compensation award advances the policy behind North Carolina's equitable distribution statute recognizing marriage as a shared undertaking to which both partners contribute.

ERIC W. MACLURE

Watson v. Lowcountry Red Cross: The Fourth Circuit Speaks on Discovery Rights in Blood Transfusion Litigation

As of September 1992 there were an estimated 242,000 cases of Acquired Immunodeficiency Syndrome[1] (AIDS) in the United States: more than 160,000 had resulted in death.[2] Given the physical and mental suffering, the great expense associated with this disease,[3] and the unfortunate public reaction to AIDS victims,[4] it is not surprising that as of 1992 over one thousand legal actions connected with the disease had arisen.[5] About forty cases across the country are currently pending against the American Red Cross alone.[6]

Many of these actions involve blood transfusions from donors who are later diagnosed as carrying the human immunodeficiency (HIV) antibody.[7] Subsequently, the individuals infected with the HIV antibody via blood transfusions sue the Red Cross for negligence[8] in its blood-

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1. For a brief history of the disease see Roger N. Braden, *AIDS: Dealing with the Plague*, 19 N. KY. L. REV. 277, 278-80 (1992).

2. INSIDE REP. ON AIDS, Feb. 19, 1993, at 5.

3. Lifetime medical costs for an AIDS patient are estimated at about $75,000. Fred J. Hellinger, *Updated Forecasts of the Costs of Medical Care for Persons with AIDS, 1989-93*, 105 PUB. HEALTH REP. 1, 1 (1990).

4. *See* Robert J. Blendon et al., *Public Opinion and AIDS: Lessons for the Second Decade*, 267 JAMA 981, 982-83 (1992) (describing surveys of public reaction to AIDS victims). *See also* Nolley v. Erie County, 776 F. Supp. 715, 717 (W.D.N.Y. 1991) (involving an HIV-positive inmate placed in the prison area for mentally disturbed and suicidal patients); Doe v. Borough of Barrington, 729 F. Supp. 376, 379 (D.N.J. 1990) (involving parents who removed their children from school after discovering that another student's father had AIDS); Jasperson v. Jessica's Nail Clinic, 265 Cal. Rptr. 301, 302-03, 216 Cal. App. 3d 1099, 1103 (1989) (dealing with an HIV-positive customer who was denied a pedicure).

5. David Margolick, *Legal System is Assailed on AIDS Crisis*, N.Y. TIMES, Jan. 19, 1992, § 1, at 16. For more information on judicial treatment of AIDS litigation see Braden, *supra* note 1, at 281 n.34.

6. *Supreme Court Rules for Red Cross in AIDS Case*, Reuters, June 19, 1992, *available in* LEXIS, Nexis Library, REUTER File. The American Red Cross is responsible for 50% of the nation's blood supply. Brian Cox, *Courts Overturn Blood-Bank Shield*, PROP. & CASUALTY, Sept. 21, 1992, at 6. The Red Cross is self-insured for risks associated with AIDS-infected blood. *Id.*

7. By the time tennis star Arthur Ashe's HIV-infected blood transfusion became public, 4,476 people had contracted AIDS through blood transfusions. *Experts Say Blood Supply Safer Than Ever*, UPI, Apr. 9, 1992, *available in* LEXIS, Nexis Library, UPI File.

8. A purchase or sale of infected blood may also give rise to a products liability action against blood banks. *See, e.g.*, Doe v. Miles Labs., Inc., 927 F.2d 187, 193 (4th Cir. 1991) (holding that a blood clotting agent was not unreasonably unsafe within the meaning of Maryland's products liability statute). Many state statutes preclude such products liability actions. North Carolina has such a "blood shield" statute which provides in pertinent part that:

> The procurement, processing, distribution or use of whole blood, plasma, blood products, [or] blood derivatives is declared to be the rendition of a service. . . .

screening process.[9] Inevitably, issues arise in these cases as to the nature of discovery allowed the plaintiff: Should the plaintiff have the opportunity to discover the donor's identity or peripheral information concerning the donor's personal life and medical background?

Recently, the Fourth Circuit Court of Appeals addressed these issues in *Watson v. Lowcountry Red Cross*.[10] In an opinion written by Judge K. K. Hall, the court ultimately stated that denying the plaintiff limited access to the donor "would amount to a grant of virtual blanket immunity from donation-related liability."[11] Thus, the court affirmed a limited discovery order that withheld the implicated blood donor's identity but allowed the plaintiff to question the donor through a court appointed intermediary.[12]

This Note examines the reasoning behind the *Watson v. Lowcountry Red Cross* decision.[13] After exploring the various legal theories invoked by blood banks in attempting to bar donor discovery,[14] this Note argues that the court provided a strong endorsement of donee-plaintiff rights that will virtually foreclose the ability of future defendants within the circuit from barring any attempts at donor discovery.[15] Finally, this Note advocates a statutory solution to the situation which would require persons seeking discovery of an individual's HIV status or related information to establish a high standard of need for the information.[16]

The facts of *Watson* are understandably compelling. Cynthia Wat-

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> Whether or not any remuneration is paid, the service is not declared to be a sale . . . for any purpose. No person or institution shall be liable in warranty, express or implied . . . but nothing in this section shall alter or restrict the liability of a person or institution in negligence or tort in consequence of these services.

N.C. GEN. STAT. § 130A-410 (1992). For further discussion of such actions see Braden, *supra* note 1, at 286-89.

9. For a discussion of previous case law concerning blood transfusion litigation see *infra* notes 62-89 and accompanying text.

10. 974 F.2d 482 (4th Cir. 1992).

11. *Id.* at 489.

12. *Id.* The court set out the nature of the discovery order:

> The implicated donor's identity, already known to the Red Cross, would be revealed to only the court and to the lawyer appointed by the court. The revelation to the court . . . is to be made directly to the judge by the Red Cross, to be hand delivered in an envelope marked "Personal and Confidential." All answers are to be maintained in a sealed envelope marked "Confidential," and the answers provided by the donor must have the signature redacted prior to filing.

Id. at 487-88.

13. *See infra* notes 17-61 and accompanying text.

14. *See infra* notes 62-94 and accompanying text.

15. *See infra* notes 95-133 and accompanying text.

16. *See infra* notes 134-37 and accompanying text.

son gave birth to premature twins on February 10, 1985.[17] One of her babies, Trevor, received blood transfusions through April of 1985.[18] He tested positive for HIV in 1986 and died in 1988.[19] Cynthia Watson, the appointed administrator of Trevor's estate, filed a wrongful death action[20] against both the the American National Red Cross Blood Services, Carolina Lowcountry Region[21] (Red Cross) and the hospital where Trevor received his transfusions.[22] The complaint alleged that the Red Cross negligently[23] conducted the screening process used when the implicated donor[24] gave blood.[25] Watson sought to discover the donor's iden-

17. *Watson*, 974 F.2d at 483.

18. *Id.* The infected blood was donated on either February 26 or 27 of 1985. *Id.* at 484. Ironically, the Food and Drug Administration approved a chemical screening process for HIV-antibodies on March 2, 1985, which became available at blood banks soon thereafter. *See* Robert Pear, *AIDS Test To Be Available in 2 to 6 Weeks*, N.Y. TIMES, Mar. 3, 1985, § 1, at 23. However, the process is still not 100% accurate. *See infra* notes 123-25 and accompanying text.

19. *Watson*, 974 F.2d at 483.

20. The plaintiff originally filed the action in a South Carolina state court. *Id.* at 483 n.1. The Red Cross removed the case to federal court. *Id.*

21. This is a local branch of the American Red Cross.

22. *Watson*, 974 F.2d at 483.

23. The plaintiff set forth additional theories of liability in her complaint. *Id.* at 484. These theories were irrelevant to the discovery issues decided by the Fourth Circuit in *Watson*.

24. Trevor received blood from six separate donors. *Id.* at 484. The Red Cross determined that five of these donors could not have been HIV-positive at the time of the donation. *Id.* This fact separates the case from others in which multiple donors are involved and the plaintiff is unable to discern which donor(s) was HIV-positive when giving blood. *See* Rasmussen v. South Fla. Blood Serv., 500 So. 2d 533, 534 (Fla. 1987) (stating that the plaintiff received blood from among 51 donors). In a "multiple-donor" situation, a plaintiff cannot proceed on a negligence theory without enough discovery to enable identification of the HIV-positive donor. Without basic information regarding the infected donor, plaintiffs cannot determine either the source of the donated blood or the date of the screening process. For a discussion of multiple donor blood transfusion litigation see Peter B. Kunin, Note, *Transfusion-Related AIDS Litigation: Permitting Limited Discovery from Blood Donors in Single Donor Cases*, 76 CORNELL L. REV. 927, 934-36 (1991).

25. Not until 1984 did the medical community reach the consensus that AIDS was transmissible through blood. Kozup v. Georgetown Univ., 663 F. Supp. 1048, 1052 (D.D.C. 1987) (citing Curran et al., *Acquired Immuno Deficiency Syndrome (AIDS) Associated with Transfusions*, 310 NEW ENG. J. MED. 69, 70 (1984); *AIDS Transmission via Transfusion Therapy*, 8368 LANCET 102 (Jan. 14, 1984)). In the spring of 1985, chemical testing for HIV-infected blood became routine. Jay E. Menitove, *Current Risk of Transfusion-Associated Human Immunodeficiency Virus Infection*, 114 ARCHIVES OF PATHOLOGY & LABORATORY MED. 330, 331 (1990). Prior to that time prospective donors were questioned regarding their personal and medical background in order to ascertain whether they belonged to a group at high-risk of contracting AIDS. *Id.* at 330-31. The questioning processes varied. The *Watson* donor was given a pamphlet entitled "What You Should Know About Giving Blood" which he was instructed to read. Brief for Appellant at 13, *Watson*, 974 F.2d 482 (4th Cir. 1992) (No. 91-2053). The donor was asked to sign a statement affirming that he understood the pamphlet's contents. *Id.* The pamphlet's expressed purpose was to prevent the spread of certain illnesses, such as AIDS and hepatitis. *Id.* at 13-24. The pamphlet indicated groups at risk of developing

tity, or in the alternative, the opportunity to question the donor through a court-appointed intermediary.[26]

Prior to the filing of *Watson*, "extensive discovery" had already taken place.[27] The plaintiff was informed of the screening process to which the donor was subjected,[28] and both nurses on duty when the donor gave blood were deposed.[29] Additionally, the plaintiff was provided with "many" nonidentifying pieces of information about the donor,[30] including the questionnaire completed by the donor upon giving blood.[31]

The magistrate below ordered that the donor's identity be divulged to both the court and an attorney appointed to represent the donor's interests.[32] Watson could then submit the proposed interrogatories.[33] Any identifying information contained in the answers would be redacted before delivery to the plaintiffs.[34]

The Fourth Circuit[35] filed a divided decision[36] invoking various standards of review.[37] The interests represented by the *Watson* parties[38]

AIDS. *Id.* at 14. The donor was then asked to refrain from giving blood if he believed himself to belong to one of these groups. *Id.* at 15. The donor subsequently completed a health history questionnaire and a set of oral questions. *Id.* In addition to the questioning process, a "surrogate" test for the hepatitis-B core antibody was used because the antibody was found in a large percentage of individuals with AIDS. Robert K. Jenner, *Transfusion-Associated AIDS Cases*, TRIAL, May 1990, at 31. In 1988, the Food and Drug Administration mandated that each donated unit of blood be tested for the HIV-antibody. 21 C.F.R. § 610.45 (1992). Despite the chemical testing, the possibility of contracting AIDS from a blood transfusion remains. *See infra* notes 123-25 and accompanying text.

26. *Watson*, 974 F.2d at 484.

27. *Id.*

28. For a description of the screening process see *supra* note 25.

29. *Watson*, 974 F.2d at 484. Their depositions occurred five years after the donation date. *Id.* Neither nurse was able to remember the implicated donor. *Id.*

30. *Id.*

31. The name of the donor was redacted. *Id.*

32. *Id.*

33. *Id.* The proposed interrogatories are included in the court's reported opinion. *See id.* at 490-92.

34. *Id.* at 484.

35. The Red Cross filed an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1988).

36. Judge Widener wrote a concurring opinion in which he argued that the Red Cross lacked standing to raise the donor's constitutional rights. *Watson*, 974 F.2d at 492 (Widener, J., concurring). Judge Widener also emphasized that he did not believe that "a donor or seller of blood who has AIDS or any like disease which may be communicated by his blood, has any kind of a privacy right, constitutional or otherwise." *Id.* (Widener, J., concurring). Judge Russell filed a dissenting opinion in which he concluded that "any incremental information Watson might discover from deposing the donor is simply not worth placing the nation's blood supply at risk or offending the constitutional privacy protections." *Id.* at 493 (Russell, J., dissenting).

37. *Id.* at 485. The opinion stated that "[t]he threshold task throughout is to properly categorize the various aspects of the lower court's order as findings of fact, conclusions of law,

required the court to balance the plaintiff's interest in receiving compensation against both the donor's privacy interests and the nation's interest in a safe and adequate blood supply.[39] Ultimately, the Fourth Circuit upheld the discovery order stating that the plaintiff's interest outweighed those interests set forth by the defense.[40]

In attempting to bar any additional discovery, the Red Cross first asserted the nation's interest in preserving the blood supply. The Red Cross argued that publicity surrounding tort actions such as this one would decrease people's willingness to donate blood since they would fear resulting lawsuits.[41] The Red Cross also contended that donors might be deterred because such litigation would preclude the Red Cross from continuing to guarantee donor confidentiality as it currently does.[42] The parties provided conflicting expert testimony as to the probability that such predictions would be realized.[43]

The Fourth Circuit rejected the premise that allowing discovery would endanger the nation's blood supply.[44] In doing so, the court denounced the Red Cross' expert testimony as "couched in conclusory

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mixed fact-law rulings, or exercises of discretion." *Id.* The "clearly erroneous" standard, *see id.* at 486, and the "abuse of discretion" standard, *see id.* at 488-489, primarily guided the court. The court did not explicitly invoke the *de novo* standard exclusively to determine whether the Red Cross had standing to raise the donor's constitutional rights. *See id.* at 487.

38. See *infra* notes 72-74 for a discussion of this balancing test.

39. *Watson*, 974 F.2d at 485. The court also recognized the nation's stake in "seeing that victims of negligence are fully compensated by the responsible party." *Id.* at 486 n.7 (citing Belle Bonfils v. District Court, 763 P.2d 1003, 1012 (Colo. 1988)). It is important to note that third-party interests are relevant to such a balancing test. *See infra* note 73 and accompanying text.

40. *Watson*, 974 F.2d at 489.

41. *Id.* at 485-86 (citing Rasmussen v. South Fla. Blood Serv., 500 So. 2d 533, 538 (Fla. 1987) ("There is little doubt that the prospect of inquiry into one's private life and potential association with AIDS will deter blood donation . . . .")). The dissenting opinion set forth additional cases holding that the disincentive to give blood could have a serious adverse impact on the nation's supply of blood. *Id.* at 492-93 (citing Bradway v. American Nat'l Red Cross, 132 F.R.D. 78, 80 (N.D. Ga. 1990); Doe v. American Red Cross Blood Servs., 125 F.R.D. 646, 653 (D.S.C. 1989); Laburre v. East Jefferson Gen. Hosp., 555 So. 2d 1381, 1384-85 (La. 1990)).

42. *Id.* at 485.

43. *Id.* at 486. The Red Cross' expert, Dr. Cannon, testified that "donors would be much less likely to donate blood if they knew there was a risk, however small, that their identities, medical histories, and test result might be revealed to the recipients of the blood." *Id.* Conversely, the court summarized Dr. Eisenmann, president of the Association for Improvement of Volunteer Blood Donation, as concluding "that any effect on donors would be a salutary one because the safety of the blood supply might well be enhanced if potential donors at high risk for HIV were discouraged from donating out of fear of enmeshing themselves in litigation." *Id.*

44. *Id.*

terms"[45] because of the lack of "tangible evidence in the nature of hard statistical data" used to substantiate the risk of losing future donors.[46] In his dissent, Judge Russell opposed the court's "minimization of the interests asserted by the Red Cross."[47] He opined that the data required by the court "would only be available by actually subjecting donors to a threat of litigation and then documenting the effect on the blood supply."[48]

The Red Cross then argued that the constitutional privacy interests of the donor would be implicated by the requested discovery.[49] However, the court dismissed the donor's constitutional privacy rights as either nonexistent or insufficient to bar discovery.[50] In his concurrence, Judge Widener vehemently opposed the notion that a donor has any privacy rights, constitutional or otherwise.[51] Conversely, Judge Russell argued in his dissent that the decision offended constitutional privacy protections.[52] Given this ambiguous response,[53] it is somewhat unclear

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45. *Id.*

46. *Id.* at 485 (citing Watson v. Medical Univ., C/A No. 88-2844-18 (D.S.C. Feb. 7, 1991) (order)).

47. *Id.* at 492 (Russell, J., dissenting).

48. *Id.* at 493 (Russell, J., dissenting).

49. *Id.* at 487-88. Although the Constitution does not explicitly mention a right to privacy, a line of Supreme Court decisions beginning with Griswold v. Connecticut, 381 U.S. 479 (1965), recognizes such a right. For further discussion of constitutional privacy rights in the context of blood donor litigation see *infra* notes 67-71 and accompanying text.

50. *Watson*, 974 F.2d at 487. The Fourth Circuit relied heavily on Whalen v. Roe, 429 U.S. 589 (1977), in which the Supreme Court held that the potential for public disclosure of a patient's name in connection with legally prescribed drugs, which were also sold illegally, was an insufficient basis for finding a violation of the right to privacy. *Id.* at 598-602.

51. *Watson*, 974 F.2d at 492 (Widener, J., concurring). He stated, "I do not believe that a donor or seller of blood who has AIDS or any like disease which may be communicated by his blood, has any kind of privacy right, constitutional or otherwise." *Id.* (Widener, J., concurring).

52. *Id.* at 493 (Russell, J., dissenting). In support of this premise, he asserted that

> [t]he donor's identity and medical condition will be revealed involuntarily to several people, including the judge, the judge's staff, the attorney appointed to represent the donor's interests, and that attorney's staff. During the course of the litigation, the donor will receive correspondence and/or telephone calls regarding the litigation, will likely have to meet with the attorney appointed to represent the donor's interests, and will have to take time to respond to Watson's written questions. Such involvement will not escape notice by family, roommates, intimate acquaintances, and possibly even employers, and will risk further exposure of the donor's personal medical information.

Id. at 493. (Russell, J., dissenting).

53. Judge Widener described this ambiguity in his concurrence. He stated that:

> Especially in the first paragraph of Part III of the opinion, and perhaps elsewhere, the opinion may be read that a blood donor or seller of blood has some kind of a constitutionally or otherwise protected privacy right which must be outweighed by

whether a future court could recognize a donor's constitutional privacy right within the context of blood transfusion litigation.

Finally, the Red Cross asserted that the privacy rights afforded the donor under Federal Rule 26(c) barred discovery.[54] The court turned to this "*second* aspect of a purported violation of privacy rights"[55] and defined the analysis in language adopted by Rule 26(c): whether allowing discovery would tend to "harass and embarrass" the donor.[56] Strangely, the court seemed to revert to a continued analysis of the donor's *constitutional* rights. The opinion dismissed this "second aspect" of the donor's privacy protections by stating that "[t]o the extent that avoidance of embarrassment has a *constitutional* dimension in this context, it only involves the embarrassment and humiliation that might follow public disclosure that the donor is infected."[57] Thus, it is unclear whether the court took the donor's statutory privacy protections into account during its analysis.

The court concluded the balancing process by stating that "[a]t most, the invasion of the donor's privacy interest is minimal, and this interest is greatly outweighed by the plaintiff's need for the information and the related public interest in seeing that injuries are compensated."[58] In upholding the district court order allowing limited discovery,[59] the court purported to "leave for another day the question of whether court-approved disclosure to a larger universe might violate the donor's privacy rights."[60] The court also expressed hope (and perhaps belief) that this "future day" might never come.[61]

The *Watson* opinion accurately summarized the state of background law addressing blood transfusion issues. "[T]he arguments for each side have been honed before a score of courts and analyzed in numerous law review articles. Yet the courts have been unable to reach a consensus on

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the interest of the plaintiff in obtaining the information. I do not agree with any such implication.

Id. at 492 (Widener, J., concurring).

54. *Id.* at 488.

55. *Id.* (emphasis added).

56. *See infra* note 73.

57. *Watson*, 974 F.2d at 488 (emphasis added) (citing Belle Bonfils Memorial Blood Ctr. v. District Court, 763 P.2d 1003, 1012-13 (Colo. 1988)).

58. *Id.*

59. *Id.* at 489. For the nature of the discovery order see *supra* note 12.

60. *Watson*, 974 F.2d at 488 n.9.

61. *See id.* at 486 n.6. The court noted "that scientific advances in testing for the presence of the HIV antibody should serve to significantly reduce the number of donation-related cases in the future." *Id.*

any of the major issues involved in such actions."[62] The relative importance of the *Watson* decision was elevated recently by *American National Red Cross v. S.G.*,[63] in which the United States Supreme Court held that the federal courts have original jurisdiction over all cases in which the Red Cross is a party.[64] Currently, there is little case law at the federal appellate level that addresses blood transfusion issues. In 1992, the Second Circuit Court of Appeals vacated a limited discovery order, but its action was unpublished.[65]

Generally, blood banks have invoked three separate theories in attempting to bar donor discovery. First, they have rather unsuccessfully asserted the physician-patient privilege.[66] Second, blood banks have argued that the donor's constitutional right to privacy should bar discovery.[67] In response, some courts have declined to hold that federal or

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62. *Id.* at 484. For discussion of other commentators concerning the background law, see, e.g., Richard C. Bollow & Daryl J. Lapp, *Protecting the Confidentiality of Blood Donors' Identities in AIDS Litigation*, 37 DRAKE L. REV. 343, 346-74 (1987-1988); Kunin, *supra* note 24, at 934-42.

63. 112 S. Ct. 2465 (1992).

64. *Id.* at 2467. The Supreme Court concluded that 36 U.S.C. § 2 (1988) confers original federal jurisdiction in such cases. *Id.* Federal courts are still obligated to adhere to state policies regarding the issues presented pursuant to the *Erie* doctrine. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 79-80 (1938).

65. Borzillieri v. American Red Cross, No. 91-9328 (2d Cir. March 10, 1992). The Second Circuit granted the Red Cross an emergency stay pending an expedited appeal on whether the donor should be questioned at all. *See* Deborah Pines, *Discovery Stayed in AIDS-Tainted Blood Suit*, N.Y. L.J., Jan. 15, 1992, at 1, 1.

66. Most, if not all, states have statutes defining the scope of the physician-patient privilege. *See, e.g.*, N.C. GEN. STAT. § 8-53 (1986). This statutory privilege has failed to bar discovery for two main reasons. First, the donor is not a patient and is not receiving medical treatment. *See, e.g.*, Snyder v. Mekhjian, 125 N.J. 328, 337-38, 593 A.2d 318, 323 (1991); Belle Bonfils Memorial Blood Ctr. v. District Court, 763 P.2d 1003, 1009 (Colo. 1988). *But see* Krygier v. Airweld, Inc., 137 Misc. 2d 306, 308-09, 520 N.Y.S.2d 475, 476 (Sup. Ct. 1987) (holding that the statutory privilege is applicable). Second, even if such a privilege exists it does not extend beyond the communications between the patient and physician for purposes of treatment. *See, e.g.*, *Snyder*, 125 N.J. at 338, 593 A.2d at 322-23; *Belle Bonfils*, 763 P.2d at 1009. A federal district court construing North Carolina law held that no physician-patient relationship exists in the donor transfusion situation within the meaning of N.C. GEN. STAT. § 90-21.11 (1990). Doe v. American Nat'l Red Cross, 798 F. Supp. 301, 305 (E.D.N.C. 1992). Due to its widespread failure, the likelihood of future claims based upon this theory is rather small.

67. "The Constitution does not explicitly mention any right to privacy"; however, "[i]n a line of decisions . . . going back perhaps as far as [1891], the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." Roe v. Wade, 410 U.S. 113, 152 (1973) (citation omitted). This implied constitutional right to privacy has previously served to protect certain medical records. *See, e.g.*, Head v. Colloton, 331 N.W.2d 870, 876 (Iowa 1983) (applying federal constitutional privacy right to bar a leukemia patient's discovery of potential bone marrow donors' identities from a hospital's transplant registry). The Third Circuit Court of Appeals similarly denied a subpoena requesting employee medical records for the National Institute of Occupational Safety

state constitutional rights are implicated in the donor discovery situation,[68] while others have held that donor discovery is not an impermissible violation of any privacy right extending to the disclosure of personal information.[69] Still other courts have held that discovery of blood donor information "implicates constitutionally protected privacy interests."[70] However, no court has barred discovery based entirely on state or federal constitutional reasons.[71]

Finally, blood banks have invoked Rule 26(c) of the Federal Rules of Civil Procedure, or its state equivalent, in attempting to bar discovery. Although Rule 26(b) allows for an expansive scope of discovery,[72] Rule 26(c) enables courts to limit that scope and issue "any order which justice requires to protect a party or person from annoyance [or] embarrassment." The party opposing a discovery order must meet the burden of establishing "good cause" for barring discovery.[73] Courts have reached a consensus that the "good cause" analysis contemplates a balancing of

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and Health (NIOSH), holding that an individual's right to privacy outweighed NIOSH's desire to research and investigate a potential health hazard. United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3rd Cir. 1980). The court stated that "[t]here can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of personal materials entitled to privacy protection." *Id.* The Supreme Court had seemingly dismissed such an argument three years before *Westinghouse* in Whalen v. Roe, 429 U.S. 589, 602 (1977), by holding that "disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient." For further discussion of judicial interpretations of the constitutional right to privacy see Marla S. Kirsh, Note, *AIDS: Anonymity in Donation Situations—Where Public Benefit Meets Private Good*, 69 B.U. L. REV. 187, 195-206 (1989); Denise C. Anderson, Note, *AIDS-Related Litigation: The Competing Interests Surrounding Discovery of Blood Donor's Identities*, 19 IND. L. REV. 561, 575-86 (1986).

68. *See, e.g.*, Mason v. Regional Medical Ctr., 121 F.R.D. 300, 303 (W.D. Ky. 1988) (holding that the constitutional right to privacy does not extend to the disclosure of personal information).

69. *See, e.g.*, Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675, 679 (Tex. Ct. App. 1987).

70. Rasmussen v. South Fla. Blood Serv., 500 So. 2d 533, 537 (Fla. 1987). *See also* Doe v. University of Cincinnati, 42 Ohio App. 3d 227, 233, 538 N.E.2d 419, 425 (1988) ("The trial court erred in failing to find that disclosure of the identity of the donor is barred by a constitutional right to privacy, and/or by the donor's otherwise legitimate expectations of privacy.").

71. The courts have generally used the Constitution to define the scope of the donor's interest in barring discovery. *See, e.g., Rasmussen*, 500 So. 2d at 535-38 (holding that disclosure implicates constitutionally protected privacy rights, but denying discovery under Florida's equivalent of FED. R. CIV. P. 26(c)). For more on the treatment of federal and state constitutional rights in blood donation cases see Kunin, *supra* note 24, at 943-46.

72. Federal Rule 26(b) allows for a broad scope of discovery. FED. R. CIV. P. 26(b) advisory committee's note (1946), *reprinted in* FEDERAL CIVIL PROCEDURE AND RULES 78 (West 1989).

73. FED. R. CIV. P. 26(c).

both the parties' and third persons' interests.[74] The Rule 26(c) balancing test, therefore, provides blood banks another basis for arguing that discovery impermissibly encroaches upon the donor's privacy rights.[75] This approach also enables blood banks to assert the nation's interest in maintaining a safe and plentiful blood supply.

Rule 26(c) has proven to be the most successful mechanism used to block donor discovery.[76] Courts denying all discovery have used both the donor's privacy interests and society's interest in protecting the blood supply as justification for their decisions.[77] For instance, in *Doe v. American Red Cross Blood Services*,[78] the court first addressed the donor's privacy interests by stating that "disclosure of the donor's identity could literally devastate his life."[79] The court further opined that "[t]he erosion of confidentiality could negatively affect the quantity of the blood supply."[80]

In many instances, however, Rule 26(c) has only served to limit rather than bar discovery.[81] *Boutte v. Blood Systems*[82] illustrates how these courts have weighed the two relevant interests.[83] In *Boutte*, the court acknowledged that Federal Rule 26(c) protects a donor's privacy rights but also recognized that the plaintiffs required additional discovery in order to further their actions.[84] In contrast to the courts denying discovery, the *Boutte* court found that affirming the discovery order would not endanger the blood supply, but rather would "ensure that blood sup-

74. *See* Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985); *see also* Hickman v. Taylor, 329 U.S. 495, 497 (1947) (discussing the need to balance the interests of the litigants in determinations of discovery). Third party interests are relevant to such a balancing test. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 (1984).

75. Although these statutory privacy rights are different in nature from those argued to exist under the Constitution, some courts have used constitutional rights to define the scope of those appropriately afforded pursuant to Rule 26(c). *See supra* note 71.

76. *See, e.g.*, Coleman v. American Red Cross, 130 F.R.D. 360, 363 (E.D. Mich. 1990); Doe v. American Red Cross Blood Servs., 125 F.R.D. 646, 657 (D.S.C. 1989); Doe v. Univ. of Cincinnati, 42 Ohio App. 3d 227, 233, 538 N.E.2d 419, 425 (1988).

77. *See, e.g.*, *American Red Cross Blood Servs.* 125 F.R.D. at 652, 653; *University of Cincinnati*, 42 Ohio App. at 233, 538 N.E.2d at 425.

78. 125 F.R.D. 646 (D.S.C. 1989).

79. *Id.* at 652.

80. *Id.* at 653.

81. *See, e.g.*, Snyder v. Mekhjian, 125 N.J. 328, 341-42, 593 A.2d 318, 325 (1991) (allowing limited discovery in the form of written interrogatories or veiled deposition); Belle Bonfils Memorial Blood Ctr. v. District Court, 763 P.2d 1003, 1013-14 (Colo. 1988) (allowing discovery in the form of a deposition upon written questions through a court clerk intermediary).

82. 27 F.R.D. 122 (W.D. La. 1989).

83. These interests are the donor's privacy interests and society's interest in maintaining a healthful blood supply.

84. *Id.* at 125-26.

pliers establish and implement only the highest standards in collecting and selling blood."[85]

Rule 26(c) has also failed to bar or even limit discovery. Recently, the Washington Supreme Court affirmed a full discovery order that disclosed the donor's name, address, telephone number, and social security number.[86] The court claimed that inadequacies in the briefs submitted precluded it from considering the donor's privacy interests.[87] The public policy interest in maintaining the blood supply also failed to bar discovery. The court, much like the Fourth Circuit in *Watson*,[88] rejected expert testimony regarding the risks of losing future donors as "conclusory in nature and border[ing] on speculation."[89]

In addition to case law, state statutes guide courts in their analyses. Most states,[90] including North Carolina, have "blood-shield" statutes which protect blood banks from products liability actions.[91] States may also have various supplementary statutes. For instance, North Carolina has a statute subjecting blood banks to an ordinary standard of negligence, rather than the professional standard of negligence set forth in the medical malpractice statutes.[92] HIV-confidentiality statutes are another type of relevant statute.[93] West Virginia has a confidentiality statute that requires parties seeking to discover an individual's HIV status to demonstrate a "compelling need" for the information.[94]

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85. *Id.* at 126.

86. Doe v. Puget Sound Blood Ctr., 117 Wash. 2d 772, 788, 819 P.2d 370, 379 (1991).

87. *Id.* at 783, 819 P. 2d at 376. Although the donor had died during the period between the time of the discovery order and the action, the parties had briefed the issues as though the donor were living. *Id.*

88. *See supra* notes 44-46 and accompanying text.

89. *Puget Sound Blood Ctr.*, 117 Wash. 2d at 788, 819 P.2d at 379.

90. Ann M. LoGerfo, Note, *Protecting Donor Privacy in AIDS Related Blood Bank Litigation*, 67 WASH. L. REV. 981, 983 (1992) (citing Lawrence O. Gostin, *The AIDS Litigation Project: A National Review of Court and Human Rights Commission Decisions, Part I: The Social Impact of AIDS*, 263 JAMA 1961, 1962 (1990)).

91. N.C. GEN. STAT. § 130A-410 (1992). In Doe v. American Nat'l Red Cross, 798 F. Supp. 301, 305 n.12 (E.D.N.C. 1992), the court concluded that the "obvious purpose" of North Carolina's blood shield statute "is to prohibit the application of warranty or products liability claims against blood banks." For similar statutes in other Fourth Circuit states see MD. HEALTH-GEN. CODE ANN. § 18-402 (Supp. 1992); S.C. CODE ANN. § 44-43-10 (Law. Co-op. 1985); W. VA. CODE § 16-23-1 (1991).

92. N.C. GEN. STAT. § 90-220.13 (1971).

93. For examples of confidentiality statutes, see, e.g., MD. HEALTH-GEN. CODE ANN. § 18-338.1 (Supp. 1992) (dealing specifically with HIV confidentiality); N.C. GEN. STAT. § 130A-143 (1992) (dealing with the confidentiality of AIDS virus infection and other communicable diseases); S.C. CODE. ANN. § 44-29-135 (Law Co-op. Supp. 1992) (dealing with the confidentiality of records concerning sexually transmitted diseases).

94. The West Virginia statute provides that:

No court of this state may issue such order unless the court finds that the person

The various statutes and theories have resulted in an array of blood transfusion cases forming a wide continuum. At one end are courts placing a high premium on donor privacy rights and societal interests,[95] and, consequently, denying all discovery.[96] At the other end are those courts placing a high premium on the plaintiff-donee's right to compensation and allowing a range of discovery that includes the plaintiff's name, address, telephone number, and social security number.[97]

Along that continuum, the Fourth Circuit Court of Appeals positioned itself far toward the end favoring donee-plaintiff rights. Although the court indicated that the issues presented in *Watson* could only be "meaningfully analyzed by reference to the particular discovery scheme embodied in the protective order,"[98] the decision places a virtually insurmountable barrier in front of defendants attempting to bar discovery.

As evidence of this barrier, the court minimized the donor's privacy interests. The court accomplished this by not only quickly dismissing the notion of a donor's statutory privacy rights,[99] but also suggesting that donors might welcome the discovery.[100] Indeed, other courts have rejected a donor's privacy rights as insufficient to bar discovery.[101] However, the *Watson* court went further and stated that "[w]e cannot help but think that the very asking of the questions, because it involves contact with the donor by someone other than the Red Cross, may indeed lead to the revelation that the donor is willing to testify at trial."[102] In contrast, another court faced with issues similar to those in *Watson* labelled AIDS "the modern day equivalent of leprosy."[103] Courts deciding AIDS-related issues outside the context of blood transfusion litigation have also held that the donor's interests in precluding the exposure of

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seeking the test results has demonstrated a *compelling need* for the test results that cannot be accommodated by other means. In assessing compelling need, the court shall weigh the need for disclosure against the privacy interest of the test subject and the public interest.

W. VA. CODE § 16-3C-3(a)(8)(i)(1991) (emphasis added). *See also id.* § 16-3C-3(8) (providing additional safeguards to insure that the privacy of the test subject is protected).

95. In Doe v. American Red Cross Blood Servs., 125 F.R.D. 646, 657 (D.S.C. 1989), the court defined societal interests as encompassing both the nation's interest in maintaining a safe and adequate blood supply and the donor's right to privacy.

96. *See, e.g., id.*

97. Doe v. Puget Sound Blood Ctr., 117 Wash. 2d 772, 788, 819 P.2d 370, 379 (1991).

98. *Watson*, 974 F.2d at 485.

99. *See supra* notes 54-57 and accompanying text.

100. *Watson*, 974 F.2d at 488.

101. *See supra* notes 68-69, 81-89 and accompanying text.

102. *Watson*, 974 F.2d at 488.

103. Doe v. American Red Cross Blood Servs., 125 F.R.D. 646, 652 (D.S.C. 1989).

AIDS-related information is particularly compelling.[104]

The Fourth Circuit also minimized the nation's interest in maintaining a safe and adequate blood supply. The fragile nature of the blood supply seems beyond dispute.[105] Events such as the baseball playoffs or the World Cup soccer finals are estimated to have harmful effects on the blood supply.[106] The proposition that individuals may choose not to donate blood out of fear of becoming enmeshed in future litigation seems very plausible in light of recent cases allowing discovery of the donor's identity[107] and allowing a donee to bring an action against the donor.[108]

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104. *See Woods v. White*, 689 F. Supp. 874, 876 (W.D. Wis. 1988) (stating that the privacy rights of a prisoner testing positive for AIDS are particularly compelling because of "the most publicized aspect of the AIDS disease, namely that it is related more closely than most diseases to sexual activity and intravenous drug use"), *aff'd mem.*, 899 F.2d 17 (7th Cir. 1990); Doe v. Borough of Barrington, 729 F. Supp. 376, 384 (D.N.J. 1990) ("[T]he privacy interest in one's exposure to the AIDS virus is even greater than one's privacy interest in ordinary medical records because of the stigma that attaches with the disease."); Scheetz v. Morning Call, Inc., 747 F. Supp. 1515, 1533-34 (E.D. Pa. 1990) (stating that privacy rights of persons with AIDS are so compelling that they may outweigh even the first amendment rights of the press to publish their identities). *See also* Martinez v. Brazen, No. 91-7769, 1992 U.S. Dist. LEXIS 5613 (S.D.N.Y. April 22, 1992). In *Martinez*, the district court stated that

> [d]ue to the unfortunate societal stigma associated with HIV and AIDS, substantial embarrassment and discrimination may result from disclosure of the identity of persons infected with the virus. For this reason, discovery of information indicating that a person may be infected with HIV may be placed under restrictions that would not be present in ordinary civil litigation.

Id. at *4-5.

105. Blood levels seem to subsist at a precarious level. *See, e.g.*, Sandy Lutz, *Blood Shortages Put Some Surgeries on Hold*, MOD. HEALTHCARE, Jan. 13, 1992, at 4; Jon Nalick, *Orange County Focus: Countywide; Shortage Spurs Calls For Blood Donors*, L.A. TIMES, Jan. 7, 1992, at B2; *Red Cross Blood Supply Remains Critical, More Surgeries Postponed*, Business Wire, Jan. 3, 1992, *available in* LEXIS, Nexis Library, BWIRE File; Gordon Slovut, *Blood Bank Reserves Drop to a Critical Level in Minneapolis*, MINN. STAR TRIB., Dec. 10, 1992, at B3; Richard Wallace, *Red Cross Delivers Urgent Appeal for Blood*, MIAMI HERALD, Jan. 6, 1993, at B3.

106. *See German Blood Banks Low as Donors Watch Euro-Soccer Finals*, Reuter Library Report, June 15, 1992, *available in* LEXIS, Nexis Library, REUTER File; *Red Cross Has Drop In Number of People Giving Blood*, Business Wire, Oct. 19, 1992, *available in* LEXIS, Nexis Library, BWIRE File (reporting the statement of a Red Cross Donor Services Manager that "[w]e think this significant drop in the number of people donating blood is due to the baseball playoffs, and, now, the World Series").

107. *See supra* notes 86-89 and accompanying text.

108. Coleman v. American Red Cross, 979 F.2d 1135, 1141 (6th Cir. 1992). In *Coleman*, the plaintiffs sought discovery of the donor's name and address. *Id.* at 1136. Upon requesting the discovery, the plaintiffs indicated that they did not intend to bring an action against the donor. *Id.* at 1137. The district court denied the plaintiffs' motion to compel, granting the Red Cross' motion for a protective order. *Id.* The Red Cross was ordered to provide the plaintiffs with the donor information in their possession, with all identifying information redacted. *Id.* Unfortunately, the Red Cross neglected to redact the donor's social security number on one of the donor cards provided to the plaintiffs. *Id.* In violation of the original protective order, the plaintiffs hired a private investigator to determine the donor's identity.

After all, the current problems associated with donating blood, such as inconvenience and minor discomfort, already discourage ninety-five percent of eligible donors from donating;[109] these problems pale in comparison to threats of future litigation.

Other courts have sided with the *Watson* court and rejected the nation's interest in maintaining the nation's blood supply as insufficient to bar donor discovery.[110] However, the court of appeals joined the Washington State Supreme Court[111] in requiring statistical evidence in order to substantiate the nation's interest in a safe and adequate blood supply.[112] Judge Russell recognized that it may be impossible for future defendants to establish the nation's interest in precluding discovery because "such data . . . would only be available by actually subjecting donors to a threat of litigation and then documenting the effect on the blood supply."[113] Neither the opinion nor the concurrence addressed this concern. Judge Russell might have added that even if such data could be compiled, the process of compilation itself would cause irrevocable damage to the nation's blood supply.

Finally, as evidence of the difficulty future defendants will have in precluding donor discovery, the court placed a high premium on the plaintiff's need for the additional information at issue. The opinion acknowledged that "[e]xtensive discovery has already taken place in this case."[114] By the time of the action's filing, almost four years had elapsed since the donation in question occurred.[115] How much, then, can the donor's undoubtedly faint memory add to the factual picture of February 27, 1985?[116] Yet, the court opined that a denial of further discovery

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Id. As a sanction for violating the protective order, the district court barred the plaintiffs from using the donor's identity to bring a separate action against the donor. *Id.* The Sixth Circuit held that the district court abused its discretion in barring the plaintiffs from commencing suit against the donor. *Id.* at 1141.

109. *Answers to Commonly Asked Question About Donating Blood From the American Association of Blood Banks*, PR Newswire, July 21, 1992, *available in* LEXIS, Nexis Library, PRNEWS File.

110. *See supra* notes 81-89.

111. Doe v. Puget Sound Blood Ctr., 117 Wash. 2d 772, 785, 819 P.2d 370, 377 (1991).

112. *Watson*, 974 F.2d at 485-86.

113. *Id.* at 493. (Russell, J., dissenting).

114. *Watson*, 974 F.2d at 484; *see supra* notes 27-31 and accompanying text.

115. The action was filed in December of 1988. *Id.* at 483. There is some dispute as to whether the donation occurred February 26 or February 27 of 1985. *Id.* at 484 n.2. The court declined to take a position on the factual dispute and chose to refer to the donation date as February 27, 1985. *Id.*

116. Some of the questions set forward by the defense place great faith in the donor's recall ability. For instance, the donor indicated on his donor card that a trip to the Orient was discussed. *Id.* at 491. Pursuant to that fact, the plaintiff sought to ask the donor: "Do you recall how the topic of your travel to Japan and China came up?" *Id.*

would cloak the Red Cross with "virtual blanket immunity."[117]

In other cases in which courts have allowed donor discovery, the plaintiffs' need for the information was relatively greater than Watson's. For instance, in one case the infected donor had answered "yes" to four potentially disqualifying questions yet was neither rejected nor deferred by the technician.[118] Discovery was necessary to determine whether the technician had further questioned the donor about these answers. In another case, the hospital had made no effort to ascertain whether any of its donors had been identified as AIDS virus carriers.[119] Without discovery, this plaintiff would have been unable to go forward with her action.[120] Conversely, in *Watson*, the donor did not answer any screening question in a potentially disqualifying way and the plaintiff was already in possession of "extensive discovery" at the time the discovery order was affirmed.[121]

In addition, when laying down the decisional framework for future blood transfusion litigation, the court of appeals unduly discounted the implications of its decision by noting that "scientific advances in testing for the presence of the HIV antibody should serve to significantly reduce the number of donation-related cases in the future."[122] While the number of individuals contracting AIDS from blood transfusion should drop significantly in the future,[123] the possibility of this unfortunate occurrence remains.[124] Tests have not obviated this possibility because a window of time exists in which recently infected individuals might test falsely negative.[125]

There is some dispute as to how great the chance of contracting the HIV antibody from a blood transfusion remains today. According to the United States Center for Disease Control, only twenty-one cases of AIDS have been contracted through blood transfusions since chemical HIV screening began in the spring of 1985.[126] Similarly, an American Red

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117. *Id.* at 489.

118. Belle Bonfils Memorial Blood Ctr. v. District Court, 763 P.2d 1003, 1007 (Colo. 1988).

119. Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675, 680 (Tex. Ct. App. 1987).

120. *See* Doe v. American Red Cross Blood Servs., 125 F.R.D. 646, 655 (D.S.C. 1989) (citing *Tarrant*, 734 S.W.2d at 675).

121. *Watson*, 974 F.2d at 484.

122. *Id.* at 486 n.6.

123. The introduction of chemical testing in the spring of 1985 is responsible for that significant drop. *See supra* note 25.

124. *See* Menitove, *supra* note 25, at 331.

125. *Id.*

126. Nancy E. Roman, *Setback for Red Cross; HIV Donor Must be Named*, WASH. TIMES, Sept. 1, 1992, at 4.

Cross spokesperson estimates that the current odds of contracting the HIV antibody from a blood transfusion during surgery is one in 45,000.[127] However, given that about four million Americans need blood transfusions each year,[128] those odds would still generate about eighty-eight potential litigants a year. Moreover, some experts estimate that "each year as many as several hundred transfusions nation-wide may be infectious for HIV, despite negative HIV testing of the blood."[129]

Additionally, the dissent noted that "as science advances, so do diseases, ensuring a constant supply of blood transfusion cases."[130] For instance, cases of an AIDS-like disease have recently been reported.[131] Thus, the *Watson* decision will inevitably affect the course of future litigation.

Those effects will undoubtedly help future donee-plaintiffs. Although the court purported to analyze the blood donor litigation issues only in terms of the discovery scheme presented,[132] it laid down a welcome mat for donee-plaintiffs. The court gave little weight to both the donor's privacy rights and the nation's interest in maintaining a safe and adequate blood supply in conducting the Rule 26(c) balancing test. Furthermore, by requiring statistical data to substantiate the nation's interest in precluding discovery, the court virtually foreclosed the ability of future blood banks to raise this interest in attempting to bar discovery. Finally, the court placed an unwarranted premium on a donee-plaintiff's need for discovery by stating that denial would cloak blood banks with a "virtual blanket [of] immunity."[133]

Under the current situation, the social consequences of blood donor

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127. *See Experts Say Blood Supply Safer Than Ever*, UPI, April 9, 1992, *available in* LEXIS, Nexis Library, UPI File.

128. *January 1993 Named National Volunteer Blood Donor Month*, PR Newswire, Jan. 6, 1993, *available in* LEXIS, Nexis Library, PRNEWS File.

129. Steven E. Locke et al., *Computer-Based Interview for Screening Blood Donors for Risk of HIV Transmission*, 268 JAMA 1301, 1301 (1992).

130. *Watson*, 974 F.2d at 493 (Russell, J., dissenting).

131. *Id.* At this point it is unclear if the disease can be transmitted via blood transfusions. *Id.* (citing Donald G. McNeil, Jr., *Once Again, the Disease Confounds Science*, N.Y. TIMES, July 26, 1992, § 4, at 2). Given that it would cost between $78 and $145 to screen for the disease's transmissible agent, an advisory panel to the Food and Drug Administration voted against screening blood for this mysterious illness. *FDA Panel is Against Screening Blood for AIDS-like Illness*, PHARMACEUTICAL BUS. NEWS, October 9, 1992, *available in* LEXIS, Nexis Library, PBNEWS File. Experts state that a "high degree of protection" should be provided by the current HIV testing system. Elisabeth Rosenthal, *Blood Banks Vigilant But Vouch for Safety*, N.Y. TIMES, July 27, 1992, at B2. This protection is afforded despite the fact that individuals who have the AIDS-like illness do not have any trace of HIV in their blood. *FDA Panel is Against Screening Blood for AIDS-like Illness, supra.*

132. *Watson*, 974 F.2d at 485.

133. *Id.* at 489.

litigation will be decided in the courts. The case law demonstrates that when individual courts engage in balancing tests, it inevitably leads to inconsistent results.[134] Decisions allowing both full and limited discovery undermine the decisions of those courts wishing to protect both donor privacy interests and the nation's blood supply. Thus, state legislation is necessary to provide stability in the area of blood transfusion litigation.

North Carolina's current statutory scheme is insufficient to protect donor privacy interests and maintain a healthful blood supply. West Virginia's HIV confidentiality statute provides a worthy model by requiring a showing of "compelling need" before a party may discover an individual's HIV status.[135] An appropriate scheme should also be established for discovering peripheral information on HIV-infected persons, such as identity, address, and personal background.[136] Such a statute would protect donor privacy rights and the nation's blood supply. Moreover, the statute would encourage the expansion of HIV testing and thereby enable HIV-infected individuals to seek treatment and make appropriate behavioral decisions.[137]

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134. *See supra* notes 95-97 and accompanying text.

135. *See supra* note 94 and accompanying text.

136. For instance, a New York statute provides that "a court may grant an order for disclosure of confidential HIV related information upon an application showing . . . a compelling need for disclosure of the information for the adjudication of a criminal or civil proceeding." N.Y. PUB. HEALTH LAW § 2785(2)(a) (McKinney 1993).

137. *See* Martinez v. Brazen, No. 91-7769, 1992 U.S. Dist. LEXIS 5613, at *4-5 (S.D.N.Y. Apr. 22, 1992) (stating the policy behind Article 27-F of the New Public Health laws) (citation omitted).

Construction of "Expected or Intended Injury" Exclusions in North Carolina: *N.C. Farm Bureau Mutual Insurance Co. v. Stox*

Many homeowner's insurance policies cover losses extending far beyond damage to one's home. In particular, policies commonly cover personal liability arising out of bodily injury or property damage caused by the insured. For reasons of both public policy and impracticability, however, insurance companies uniformly exclude coverage for injuries or damage that the insured caused intentionally. The question of what "intent" means in these homeowner's policies has been the subject of much dispute and litigation in recent years. For example, should courts look to the common law of torts to construe intent, or instead confine their search to the four corners of the insurance policy? An additional factor that often informs these decisions is the rule of *contra proferentum*,[1] which compels the court to adopt any reasonable construction of the insurance policy that favors the insured.[2]

Last year, North Carolina joined the growing number of states that have definitively set forth the standards for construing clauses that exclude coverage for liability based on intentional conduct. In *North Carolina Farm Bureau Mutual Insurance Co. v. Stox*,[3] the North Carolina Supreme Court held that such exclusions apply only if the insured intended to cause the injury.[4] Merely showing that a volitional act, such as a push or shove, resulted in injury "will not suffice."[5] This Note examines the meaning of intent in insurance policies and illustrates how that meaning differs from the meaning of intent in tort law.[6] The Note also considers the significance of the *contra proferentum* rule for both insurers and insureds.[7]

The incident giving rise to the *Stox* litigation occurred at a Roscoe-

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1. This canon of construction (roughly translated, "against the offeror") is "[u]sed in connection with the construction of written documents to the effect that an ambiguous provision is construed most strongly against the person who selected the language." BLACK'S LAW DICTIONARY 327 (6th ed. 1990). For a discussion of the policies supporting this rule, see *infra* notes 99-105 and accompanying text.

2. State Capital Ins. Co. v. Nationwide Mut. Ins. Co., 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986); Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co., 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970); Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 266 N.C. 430, 435, 146 S.E.2d 410, 413 (1966); *see infra* notes 99-105 and accompanying text.

3. 330 N.C. 697, 412 S.E.2d 318 (1992).

4. *Id.* at 706, 412 S.E.2d at 324.

5. *Id.*

6. *See infra* notes 90-94 and accompanying text.

7. *See infra* notes 104-06 and accompanying text.

Griffin shoe store in Greenville, North Carolina.[8] Louise Stox, a sales clerk, was waiting on a customer when Gordon Owens, her coworker, approached them. Stox and Owens apparently worked on commission; thus, presumably, Owens's belief that Stox had "stolen" a customer led to a dispute between them. Owens pushed Stox on the left shoulder as he said to her, "Get away from here."[9] The shove knocked Stox to the floor, "severely fracturing her right arm."[10]

Alleging assault and battery, Stox sued Owens to recover for her injuries.[11] Owens carried a homeowner's policy with Farm Bureau Mutual Insurance Co. (Farm Bureau) that afforded liability coverage for personal injury caused by the insured. The litigation in *Stox* centered on an exclusion to this coverage for injury "which is expected or intended by the insured."[12] In response to Stox's tort action, plaintiff Farm Bureau brought a declaratory judgment action to determine whether Owens's policy covered his legal expenses and potential damages arising out of the incident.[13]

Because all parties waived trial by jury, the trial court made several findings of fact, including that Stox's injuries "were the unintended result

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8. *Stox*, 330 N.C. at 699, 412 S.E.2d at 320.

9. *Id.* at 700, 412 S.E.2d at 320.

10. *Id.*

11. *Id.* at 706, 412 S.E.2d at 324.

12. *Id.* at 700, 412 S.E.2d at 321. The relevant provisions of the policy were as follows:

COVERAGE E—Personal Liability

If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies, we will:

1. pay up to our limit of liability for the damages for which the insured is legally liable; and

2. provide a defense at our expense by counsel of our choice . . . .

. . . .

DEFINITIONS

. . . .

5. "occurrence" means an accident, including exposure to conditions, which results . . . in:

a. bodily injury; or

b. property damage.

. . . .

SECTION II—EXCLUSIONS

[Coverage does] not apply to bodily injury or property damage:

a. which is expected or intended by the insured;

b. arising out of business pursuits of an insured . . . .

This exclusion does not apply to:

(1) activities which are usual to non-business pursuits . . . .

Id. at 700-01, 412 S.E.2d at 320-21.

13. *Id.* at 699, 412 S.E.2d at 320.

of [Owens's] intentional act."[14] Based on these findings, the trial court concluded that the pushing incident was an "occurrence" for purposes of the policy and that none of the exclusions applied.[15] The court, therefore, directed Farm Bureau to pay any amount for which Owens became legally liable to Stox as a result of his shove.[16]

The North Carolina Court of Appeals reversed, construing the policy to exclude any injury which resulted from an intentional act.[17] Because ample evidence supported the trial court's finding that the push was intentional,[18] the court of appeals found that coverage under the policy was excluded.[19] The court relied on *Commercial Union Insurance Co. v. Mauldin*,[20] in which an "expected or intended injury" clause was held to exclude coverage. In that case, the insured fired a pistol into a car in which his wife and her friend, Pugh, were riding.[21] His wife was wounded and Pugh was killed.[22] The defendant stipulated that he had intended to shoot his wife, but had had no intention of injuring Pugh. He pled guilty to the second-degree murder of Pugh.[23]

The court in *Commercial Union* construed the insured's guilty plea as "an admission that he had the general intent to do the act" and held, therefore, that he was excluded from coverage.[24] The court also found that the likelihood of shooting Pugh was great enough for the court to infer that the insured "expected" the injury for purposes of the exclu-

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14. *Id.* at 701, 412 S.E.2d at 321. The findings of fact included the following:

> 2. [Owens] intentionally pushed Louise Stox, causing her to fall and receive injury.
>
> 3. The pushing . . . involved foreseeable consequences of significant bodily injury.
>
> 4. [Owens] had no specific intent to cause bodily injury to Louise Stox, and [her] injuries . . . were the unintended result of [Owens's] intentional act.
>
> 5. [The] incident did not occur as a result of Gordon Owens engaging in a business pursuit.
>
> 6. The "business pursuit" exclusion . . . and the exception to the exclusion are ambiguous.

Id.

15. *Id.* at 701-02, 412 S.E.2d at 321.

16. *Id.* at 702, 412 S.E.2d at 321.

17. N.C. Farm Bureau Mut. Ins. Co. v. Stox, 101 N.C. App. 671, 675, 401 S.E.2d 82, 85 (1991), *rev'd*, 330 N.C. 697, 412 S.E.2d 318 (1992).

18. *See* finding of fact 2, *supra* note 14.

19. *Stox*, 101 N.C. App. at 675, 401 S.E.2d at 85.

20. 62 N.C. App. 461, 303 S.E.2d 214 (1983).

21. *Id.* at 461, 303 S.E.2d at 215.

22. *Id.*

23. *Id.* at 464, 303 S.E.2d at 216.

24. *Id.* at 464, 303 S.E.2d at 217.

sion.[25] For the court of appeals, the dispositive issue in applying the exclusionary clause was whether the insured intended the original *act*—here, the shooting—and not the ultimate *result*.[26] Because he had intended to fire the gun, the court applied the exclusion to deny him coverage.[27]

The court of appeals in *Stox* considered *Commercial Union* as controlling authority for construction of Farm Bureau's exclusion. It declared that "[w]hile there might well have been no specific intent to injure [Stox], the focus must be on the intentional *act*[,] not the resulting consequence."[28] Under this standard, whether the insured intended to injure the victim is irrelevant, as long as he intended to make the contact that resulted in injury. The trial court's factual finding that the push was intentional, therefore, conclusively settled the matter for the court of appeals.

Judge Phillips, dissenting, argued that *Commercial Union* was not controlling precedent for *Stox* because the fact patterns in the two cases were inapposite.[29] He implied that the resulting injury in *Commercial Union* was much more likely to follow from the insured's intentional act than the action taken in *Stox*.[30] Because Owens did not expect or intend the injury itself, Judge Phillips would have affirmed the trial court's judgment that the exclusion did not apply.[31]

The North Carolina Supreme Court reversed. The court agreed with the thrust of Judge Phillips' dissent by concluding that the insured must intend the resulting injury for the exclusion to apply.[32] The court distinguished *Commercial Union* by focusing on the greater likelihood of injury flowing from the initial act:

> The insured [in *Commercial Union*] stipulated that he had the specific intent to shoot and injure his wife. . . . Thus, he obviously knew it was probable that he would injure Pugh when he fired four or five shots into her moving car. . . . [T]he injury to Pugh was established to have been "intended" within the meaning of [the exclusionary clause].[33]

In contrast, the evidence in Stox showed "a mere push to the left shoul-

25. *Id.*
26. *Id.* at 463, 303 S.E.2d at 216.
27. *Id.* at 464, 303 S.E.2d at 217.
28. *Stox*, 101 N.C. App. at 675, 401 S.E.2d at 85.
29. *Id.* at 676, 401 S.E.2d at 85 (Phillips, J., dissenting).
30. *Id.* (Phillips, J., dissenting).
31. *Id.* (Phillips, J., dissenting).
32. *Stox*, 330 N.C. at 703-04, 412 S.E.2d at 322-23.
33. *Id.* at 704, 412 S.E.2d at 322.

der which left no soreness or sign of injury—evidence entirely unlike the violent firing of bullets into an occupied car at close range."[34]

Finding no other North Carolina precedent on point, the court surveyed cases from other states construing the "expected or intended" exclusion. The court discussed several state court decisions involving similar fact patterns.[35] In each of these cases, a defendant's intentional act caused an unintentional injury. These courts found that such fact patterns did not invoke the exclusionary clause, because the exclusion "does not preclude liability for an expected or intended 'act,' but rather for an expected or intended 'injury.' "[36] The *Stox* court adopted the majority rule, as reflected in these cases, that an "insurer must prove that the injury itself was expected or intended by the insured"[37] for the exclusion to apply. Because the trial court found competent evidence that Stox's injuries were the unintended result of an intentional act,[38] and because that act was not of a nature which would raise an inference of intent to injure,[39] the exclusionary clause did not apply to shield Farm Bureau from liability.[40]

Farm Bureau argued that, regardless of the construction of the exclusionary clause, Stox should be able to recover damages from Owens only for intended injuries.[41] Because Stox alleged assault and battery as her sole theory of recovery in her tort action against Owens, she could recover damages only upon a showing that Owens intended to injure her.[42] Under North Carolina law, Farm Bureau reasoned, an intent to injure is "inherent" in the tort of assault and battery.[43] Therefore, in the declaratory judgment action, Stox was taking a position directly inconsistent with her claim in her tort action. If she prevailed in her tort action, she would in essence have proved that Owens was not covered under Farm Bureau's policy.[44] The court refused to adopt Farm Bureau's construction, holding that an intent to injure need not be present in the commission of assault and battery.[45] The court cited sources of fundamental

34. *Id.* at 704, 412 S.E.2d at 323.

35. *Id.* at 704-06, 412 S.E.2d at 323; *see infra* notes 75-80 and accompanying text.

36. *Stox*, 330 N.C. at 705, 412 S.E.2d at 323, citing Kling v. Collins, 407 So. 2d 478, 481 (La. Ct. App. 1981).

37. *Id.* at 706, 412 S.E.2d at 324.

38. *See* finding of fact 4, *supra* note 14.

39. *See infra* notes 64-80 and accompanying text.

40. *Stox*, 330 N.C. at 706, 412 S.E.2d at 324.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 707, 412 S.E.2d at 324.

North Carolina tort law[46] for the proposition that, although an intent to make unpermitted contact is an element of the tort, there is no requirement of injurious or hostile intent.[47]

After finding no error in the trial court's construction of the exclusionary clause, the court proceeded to Farm Bureau's other assignments of error, which the court of appeals had not considered. Farm Bureau contended that the incident between Stox and Owens was not an "occurrence" under the policy.[48] The policy defined occurrence as an "accident" resulting in "bodily injury," but it did not further define the term "accident."[49] In determining whether the pushing incident fell within this definition, the *Stox* court again cited, as its guide, the special canons of construction applicable to insurance policies.[50] That is, where it finds ambiguity in a policy, a court is bound to construe against the insurer.[51] The court surveyed other jurisdictions that had held unintended injuries resulting from intentional acts to be "accidents" or "occurrences"; it concluded that "where the term 'accident' is not specifically defined in an insurance policy, that term *does* include injury resulting from an intentional act, if the injury is not intentional or substantially certain to be the result of the intentional act."[52] Because Stox's broken arm was such an injury, it was a covered "accident" under Owens's policy.[53]

Farm Bureau also argued that Stox's injuries arose out of Owens's

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46. The court cited a fundamental assault and battery case, Dickens v. Puryear, 302 N.C. 437, 445, 276 S.E.2d 325, 330 (1981) (stating that the interest protected by an action for assault and battery is freedom from harmful or offensive contact). The court also cited W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 8-10 (5th ed. 1984): "The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm." *Id.* § 8.

47. *Stox*, 330 N.C. at 707, 412 S.E.2d at 324.

48. *Id.*

49. *See* policy provisions ("Definitions" § 5(a)), *supra* note 12.

50. *Stox*, 330 N.C. at 707, 412 S.E.2d at 324-25; *see supra* notes 1-2 and accompanying text.

51. *Id.* at 707, 412 S.E.2d at 325. For a discussion of the policies supporting this rule, see *infra* notes 99-105 and accompanying text.

52. *Id.* at 709, 412 S.E.2d at 325.

53. *Id.* Note that the court appeared to reach this conclusion by assuming that the "accident" under the policy was Stox's broken arm. If so, the court did not afford a plain meaning to the language in the policy, which defines occurrence as an "*accident* . . . which *results* . . . *in* bodily injury." *See* policy provisions ("Definitions" § 5(a)), *supra* note 12 (emphasis added). Clearly, the action that resulted in injury to Stox was Owens's push; therefore it is the *push*, not the broken arm, that the court should have required to meet the definition of "accident." *See Stox*, 330 N.C. at 707-09, 412 S.E.2d at 324-25. While it is easy to see why the court would conclude (as it did) that the injury itself was an "accident," it is harder to imagine how Owens's push could be considered an "accident." Certainly, the language of the insurance policy focuses on whether the act itself (the "accident") leads to injury ("results" in "bodily injury"), not whether the ultimate *injury* was intended.

"business pursuits" and were, therefore, excluded from coverage under the homeowner's policy.[54] The policy defined business as a "trade, profession or occupation."[55] This exclusion contained an exception for "activities which are usual to non-business pursuits."[56] The court agreed with the trial court's finding that both the exclusion and its exception were ambiguous and, thus, should be construed, wherever reasonable, in favor of the insured.[57] To support its conclusion of ambiguity, the court again turned to other states' constructions of the same or similar exclusions. It found that such "provisions [have] been the subject of extensive litigation," with " 'divergent results [having] been reached . . . . If reasonably intelligent people differ as to the meaning of a policy provision, ambiguity exists.' "[58] In accordance with the rules of construction governing insurance policies, the court found the business pursuits exclusion inapplicable.[59] The decision of the court of appeals was reversed and the case remanded for reinstatement of the trial court's judgment.[60]

Although the national body of law construing exclusions substantially similar to the one at issue in *Stox* has grown steadily in the last two decades, *Commercial Union Insurance Co. v. Mauldin*[61] was the only North Carolina case on point. The *Stox* court, therefore, turned to the case law of other states for guidance. It found that the exclusion had been a lightning rod for litigation in other states, as evidenced by the exhaustive collection of annotated cases.[62] These cases are primarily distinguished by the state of mind that each court requires for a finding of intentional injury. Few, if any, courts have adopted a *per se* rule treating an injury resulting from an intentional act as always intentional.[63] In many reported cases, however, courts have held that the trier of fact may infer intent to cause bodily injury from the nature of the initial act and the foreseeability of resulting harm.[64] If the foreseeability of harm rises

54. *Stox*, 330 N.C. at 709, 412 S.E.2d at 326. *See* policy provisions ("Exclusions" § b), *supra* note 12.

55. *Stox*, 330 N.C. at 709, 412 S.E.2d at 326.

56. *See* policy provisions ("Exclusions" § 1), *supra* note 12.

57. *Stox*, 330 N.C. at 709, 412 S.E.2d at 326.

58. *Id.* at 710, 412 S.E.2d at 326 (quoting Myrtil v. Hartford Fire Ins. Co., 510 F. Supp. 1198, 1202 (E.D. Pa. 1981)).

59. *Id.* at 711, 412 S.E.2d at 326; *see supra* notes 1-2 and accompanying text.

60. *Stox*, 330 N.C. at 711, 412 S.E.2d at 327.

61. 62 N.C. App. 461, 303 S.E.2d 214 (1983); *see supra* notes 20-27 and accompanying text.

62. *See* James L. Rigelhaupt, Jr., Annotation, *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected By Insured*, 31 A.L.R.4th 957, §§ 4-6 (1984).

63. *See id.*

64. *Id.* § 5(b); *see, e.g.*, Truck Ins. Exch. v. Pickering, 642 S.W.2d 113, 116 (Mo. Ct. App.

above a certain threshold, the factfinder must infer intent to injure as a matter of law.[65]

Just how foreseeable must a resulting injury be before a court will infer intent? The answer has assumed several forms, some of which do not differ substantially. Various courts have held that intent may be inferred if the injury was "substantially certain" to follow from the intentional act,[66] or if the injury was a "natural and probable consequence" of the act,[67] or if the insured acted with the specific intent to cause harm.[68]

In cases in which the intentional act was a push or shove, courts across the country have both excluded and allowed coverage based on an "expected or intended injury" clause.[69] In those cases in which courts have applied the exclusion to deny coverage,[70] however, the actor's state of mind generally has surpassed the level of mere foreseeability of injury.[71] Examples include an intentional push down a flight of stairs,[72] a push off a porch onto a cement walk,[73] and a push through a plate glass window.[74]

By contrast, courts deciding cases in which the shove was less aggressive and the foreseeability of injury was lower generally have found that the exclusion does not apply.[75] Such cases, some of which the *Stox* court discussed with approval, are much more similar on their facts to *Stox* than the pushing cases in which courts denied coverage. For exam-

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1982) (noting that intent to cause harm need not be proved by showing specific intent, but may be inferred from surrounding facts and circumstances).

65. *Pickering*, 642 S.W.2d at 116.

66. *See, e.g.*, Pachucki v. Republic Ins. Co., 89 Wis. 2d 703, 713, 278 N.W.2d 898, 903 (1979) (holding that if a reasonable person in insured's position would believe injury was substantially certain to result, intent will be inferred).

67. *See, e.g.*, Casualty Reciprocal Exch. v. Thomas, 7 Kan. App. 2d 718, 720-21, 647 P.2d 1361, 1364 (1982) ("[W]here an intentional act results in injuries [that] are a natural and probable result of the act, the injuries are intentional.").

68. *See, e.g.*, Phoenix Ins. Co. v. Helton, 298 So. 2d 177, 181 (Fla. Dist. Ct. App. 1974) (stating that if insured acted with specific intent to harm third party, injury is intentional for purposes of exclusion), *cert. discharged*, 330 So. 2d 724 (Fla. 1976).

69. *See* Rigelhaupt, *supra* note 62, § 9.

70. *See id.* § 9[a].

71. Stox's injuries were found to be "foreseeable" by Owens. *See* finding of fact 3, *supra* note 14.

72. Terrio v. McDonough, 16 Mass. App. 163, 165, 450 N.E.2d 190, 192, *appeal denied*, 390 Mass. 1102, 453 N.E.2d 1231 (1983).

73. Abbott v. Western Nat'l Indem. Co., 165 Cal. App. 2d 302, 303, 331 P.2d 997, 998 (1958).

74. Alabama Farm Bureau Mut. Casualty Ins. Co., Inc. v. Moore, 349 So. 2d 1113, 1114 (Ala. 1977).

75. *See* Rigelhaupt, *supra* note 62, § 9[b] (discussing pushing and shoving cases in which coverage was not excluded).

ple, in *Caspersen v. Webber*,[76] after a coatroom attendant refused him permission to enter the room to search for his coat, an insured pushed the attendant out of the way to get past her.[77] The push caused the attendant to lose her balance and fall, sustaining serious injuries.[78] The Minnesota Supreme Court held that "the exclusion does not relieve the insurer of liability unless the insured has acted with intent to cause a bodily injury. When the act itself is intended but the resulting injury is not, the insurance exclusion has no application."[79]

In short, the results in any given case appear to turn primarily on the reasonable likelihood that the act of the insured would cause injury. As the likelihood of injury approaches certainty, intent will more likely be inferred. Because this is a factual inquiry, it is not surprising that the *Stox* court discussed, in support of its holding, cases with substantially similar facts, such as *Caspersen*.[80]

Although the Court based its holding in part on a distinction between *Stox* and *Commercial Union*,[81] the controlling facts of each case appear, at first glance, to require the same legal construction. In both cases the actor lacked a conscious purpose to cause the injury that resulted from his intentional act. In *Stox*, Owens pushed Stox, but did not intend her to fall and break her arm; in *Commercial Union*, the insured shot at his wife without intending to injure Pugh.[82] Yet in *Commercial Union* the injury was held to be "expected or intended" by the insured, while in *Stox* it was not.[83] The court did not expressly state its grounds for distinguishing the two cases, remarking only that the evidence in *Stox* of "a mere push to the left shoulder" was "entirely unlike the violent

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76. 213 N.W.2d 327 (Minn. 1973).

77. *Id.* at 328.

78. *Id.* The attendant "struck her back against a metal message rack attached to the wall." *Id.*

79. *Id.* at 330.

80. The court did, however, discuss at least one case that appeared inconsistent with the result in *Stox*. *See Stox*, 330 N.C. at 705, 412 S.E.2d at 323 (citing Physicians Ins. Co. v. Swanson, 58 Ohio St. 3d 189, 569 N.E.2d 906 (1991)). In *Swanson*, an insured intentionally shot a BB gun toward a group of teenagers, intending to hit a sign near them. Instead, the BB hit a boy in the eye. 58 Ohio St. 3d at 189-90, 569 N.E.2d at 907. The *Swanson* court held that an intentional injury exclusion did not apply. *Id.* at 193-94, 569 N.E.2d at 911. The *Stox* court discusses *Swanson* as supportive of its holding, but the case seems more factually on point with *Commercial Union*, in which intent was inferred as a matter of law and coverage was denied. Compare the facts of *Commercial Union* and their legal interpretation by the *Stox* court, *supra* text accompanying notes 20-28, 32-34.

81. *See supra* text accompanying notes 32-34.

82. For the facts of *Stox*, see *supra* text accompanying notes 8-13. For the facts of *Commercial Union*, see *supra* text accompanying notes 21-23.

83. *See supra* notes 25-27 and accompanying text (*Commercial Union*) and notes 34-40 and accompanying text (*Stox*).

firing of bullets into an occupied car at close range."[84] The court was satisfied that the injury in *Commercial Union* "was established to have been 'intended' "[85] under the exclusionary clause. In other words, the court could reasonably infer the insured's intent to injure Pugh from his act of firing into the car, while no such inference arose from Owens's push of Stox. The key distinction, at which the Court only hinted, relates to the actors' states of mind: In *Commercial Union* the injury was substantially certain to follow from the insured's intentional act; in *Stox*, it was merely foreseeable.

Although the court nowhere expressly approved this distinction in *Stox*, it can be reasonably deduced from the holding of the case. The trial court found as a fact, and the supreme court accepted, that Stox's injuries were foreseeable from the push.[86] Thus, the holding in *Stox* requires the conclusion that mere foreseeability will not warrant an inference of intent so as to invoke an exclusionary clause. By the same token, it is clear from *Commercial Union* that something less than a full-blown conscious purpose to cause the injury can justify an inference of intent.[87] The insured in that case stipulated that he had no intent to injure Pugh and pled guilty to second degree murder, both of which are inconsistent with a mens rea of purpose or knowledge. It appears from *Stox*, therefore, that an intermediate state of mind, such as substantial certainty or recklessness, marks the threshold below which a court will not infer an intent to injure from a volitional act.

Such an intermediate standard finds support in the *Stox* court's construction of the term "accident" in the Farm Bureau policy.[88] The court quoted with approval the conclusion by the Supreme Judicial Court of Massachusetts that " 'the resulting injury which ensues from the volitional act of an insured is still an "accident" within the meaning of an insurance policy if the insured *does not specifically intend* to cause the resulting harm or *is not substantially certain* that such harm will occur.' "[89] An internally consistent reading of the policy as a whole would apply the converse state of mind to determine intent: A court will infer intent only upon a showing of conscious purpose or substantial certainty.

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84. *Stox*, 330 N.C. at 704, 412 S.E.2d at 323.

85. *Id.* at 704, 412 S.E.2d at 322.

86. *See* finding of fact 3, *supra* note 14.

87. The insured in *Commercial Union* "stipulated that he intended to shoot his wife but not Pugh. He pled guilty to second degree murder of Pugh." *Commercial Union*, 62 N.C. App. at 464, 303 S.E.2d at 216.

88. *See* policy provisions ("Definitions" § 5), *supra* note 12.

89. *Stox*, 330 N.C. at 709, 412 S.E.2d at 325 (quoting Quincy Mut. Fire Ins. Co. v. Abernathy, 393 Mass. 81, 84, 469 N.E.2d 797, 799 (1984) (emphasis added)). The *Stox* court expressly adopted this construction of "accident." *Id.*

An ironic result of the holding in *Stox* is that, even with the "expected or intended" exclusion, a policy can still cover an insured's intentional torts. This could occur only on facts similar to *Stox*, in which the insured intentionally makes contact but does not intend the injury that results. Allowing Stox to maintain an assault and battery tort claim may at first glance seem at odds with the finding, for purposes of the exclusionary clause defense, that Owens did not intend to injure her.[90] If Owens did not intend to injure Stox, how can her allegation of an *intentional* tort prevail? The court states that an intent to injure is not an inherent element of every assault or battery.[91] The court does not place enough emphasis on the key point, however—namely, that assault and battery does require *some* intentional act, but this act may be the initial contact, as distinguished from the resulting injury.[92] Thus, Stox can win her assault and battery action merely by showing that Owens intended to push her and that her injuries resulted from that intentional act.

The flaw in Farm Bureau's drafting was its assumption that courts would construe "intent" in the exclusionary clause identically to the common law tort meaning of intent. Because the policy did not specifically define the term in its technical legal sense, the court was free to read the clause as a layperson might. In fact, to be consistent with its rules of construction, it was *bound* to interpret the clause as it did.[93] Drafters of insurance policies cannot assume that the court will reflexively construe their words as legal terms of art. More likely, as in *Stox*, the court will presume that policy language carries its lay meaning if that construction benefits the insured.[94] For example, an "intent to injure" means exactly that, and not "intent to make contact which results in injury."

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90. *See* finding of fact 4, *supra* note 14.

91. *Stox*, 330 N.C. at 707, 412 S.E.2d at 324.

92. See the court's discussion of contact in assault and battery, *supra* notes 46-47 and accompanying text.

93. *See supra* notes 1-2 and accompanying text.

94. The North Carolina Supreme Court explicitly approved this "lay reading" corollary to the *contra proferentum* rule:

> In the construction of contracts, even more than in the construction of statutes, words which are used in common, daily, nontechnical speech, should, in the absence of evidence of a contrary intent, be given the meaning which they have for laymen in such daily usage, rather than a restrictive meaning which they may have acquired in legal usage. . . . Thus the definition of [a term] in the standard, nonlegal dictionaries may be a more reliable guide to the construction of an insurance contract than definitions found in law dictionaries.

Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 266 N.C. 430, 438, 146 S.E.2d 410, 416 (1966).

The court's ruling on the "business pursuits" exclusion[95] effectively spells the end of that language in policies in North Carolina. Without more explicit definition in the policy, the rules of construction favoring the insured will make it nearly impossible for an insurance company to avoid liability based on this exclusion. It is hardly a strained argument to contend, as Farm Bureau did, that Stox's broken arm, which presumably was the end result of his desire to protect his sales commissions, arose out of business pursuits. Nonetheless, there exists an alternative construction, arguably as compelling as Farm Bureau's, that pushing a coworker is not a business pursuit. Given the ambiguity of the phrase, the court was bound to reject Farm Bureau's construction, even if it was the better one, in favor of any reasonable interpretation which favored Owens. The phrase "business pursuits" is certainly susceptible to the court's narrow construction excluding a shove from another employee.[96]

The "business pursuits" clause is further weakened by its exception for "activities which are usual to non-business pursuits,"[97] which virtually swallows the exclusion itself. Given the presumption in favor of the insured, it is difficult to imagine any injurious act by the insured that could not reasonably be labelled as "usual to non-business pursuits." A court will always have the latitude to find that a broken arm, for example, did not arise out of business pursuits, or, alternatively, that it is usual to non-business pursuits. At any rate, once a phrase has been declared ambiguous for purposes of insurance policy construction, as was the case in *Stox* with "business pursuits," it is a foregone conclusion that it will be construed against the insurer.[98]

The North Carolina Supreme Court has repeatedly recited the rule of *contra proferentum* without much analysis of the policies that support the rule.[99] One colorful explanation, however, was offered by Justice Lake:

When an insurance company, in drafting its policy of insur-

95. *See* policy provisions ("Exclusions" § b), *supra* note 12. For a discussion of the court's construction of this exclusion, see *supra* notes 54-60 and accompanying text.

96. *See Stox*, 330 N.C. at 709-10, 412 S.E.2d at 326.

97. *See* policy provisions ("Exclusions" § 1), *supra* note 12.

98. The court states: "Applying established rules of construction, . . . ambiguities must be construed against the insurance company and in favor of coverage." *Stox*, 330 N.C. at 709, 412 S.E.2d at 326.

99. *See* State Capital Ins. Co. v. Nationwide Mut. Ins. Co., 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986); Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co., 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970); Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 266 N.C. 430, 435, 146 S.E.2d 410, 413 (1966); Mills v. State Life and Health Ins. Co., 261 N.C. 546, 553, 135 S.E.2d 586, 590 (1964); Roach v. Pyramid Life Ins. Co., 248 N.C. 699, 701, 104 S.E.2d 823, 824-25 (1958); Jones v. Pennsylvania Casualty Co., 140 N.C. 262, 264, 52 S.E. 578, 579 (1905).

> ance, uses a "slippery" word . . . , it is not the function of the court to sprinkle sand upon the ice by strict construction of the term. . . . If . . . the limits of coverage slide across the slippery area and the company falls into a coverage somewhat more extensive than it contemplated, the fault lies in its own selection of the words by which it chose to be bound.[100]

Put more prosaically, "[w]here one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party."[101] A related reason for the rule of *contra proferentum*, which other state courts sometimes cite, is that insurance policies are essentially contracts of adhesion, and thus, the insured had no opportunity to negotiate more favorable terms.[102] Yet another rationale supporting the rule is that it furthers the purpose of the insurance contract; that is, because the object of an insurance policy is to afford protection from loss, any ambiguity should be resolved so as to accomplish this goal.[103]

The *Stox* court cited the *contra proferentum* rule categorically but did not have occasion to consider whether it might be inapplicable in certain situations. The policy justifications supporting the rule are considerably weaker in some insurance contexts. For example, should a third party be allowed to invoke the rule to receive insurance proceeds, or should the rule be applied only when the insured alone suffers a loss? Certainly the contractual rationales discussed above do not apply to a third-party tort plaintiff like Stox—after all, she was a stranger to the contract.[104] Furthermore, should the rule apply with equal force to a commercial insured, which is presumably a sophisticated contracting partner?[105] Much of the policy justification for the rule rests on the insurer having drafted the policy, but if a client is large or powerful enough

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100. *Jamestown Mutual*, 266 N.C. at 437-38, 146 S.E.2d at 416.

101. RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. a (1979). As reflected in the Restatement, the rule is often applied beyond the insurance context to any contract drafted by one party. *See also* ARTHUR L. CORBIN, 3 CORBIN ON CONTRACTS § 559 (1960) (restating the rule and discussing its rationale and applicability); SAMUEL WILLISTON, 4 A TREATISE ON THE LAW OF CONTRACTS § 621 (Walter H.E. Jaeger, 3d ed. 1961) (same).

102. *See, e.g.*, Treasure Craft Jewelers v. Jefferson Ins. Co., 583 F.2d 650, 652 (3d Cir. 1978); Ranieli v. Mutual Life Ins. Co., 271 Pa. Super. 261, 270, 413 A.2d 396, 400 (1979).

103. GEORGE J. COUCH, 2 COUCH CYCLOPEDIA OF INSURANCE LAW § 15:81 (Mark S. Rhodes, rev. 2d ed. 1984).

104. It is true that Owens, the insured, stood to suffer a loss from a judgment in Stox's tort action, and so, as against Farm Bureau, his interests were aligned with Stox's. But this does not explain by what rationale a third party deserves a *contra proferentum* construction. Owens, as a homeowner, was presumably not judgment-proof. *See Stox*, 330 N.C. at 699, 412 S.E.2d at 699 (policy in question was a homeowners policy).

105. *See* H. K. H. Co. v. American Mortgage Ins. Co., 685 F.2d 315, 319 (9th Cir. 1982) (applying the rule where insured is a commercial party).

to negotiate the terms with the insurer, there would seem to be no logical reason to invoke the *contra proferentum* rule. Moreover, should the rule apply if the insured negotiated a few changes in the standard contract, but the disputed term appeared in the unaltered boilerplate? Although such questions may prove to be of little consequence in litigation, they are offered to suggest that the rule of construction in favor of the insured may not be as uniformly applicable as *Stox* implies. An insurer may be able to escape the rule's harsh result by arguing that the policy goals which support the rule will not be furthered by applying the rule to the facts of its particular case.

Because insurers would prefer never to reach the stage of having to argue against application of *contra proferentum*, however, cases like *Stox* serve as a warning for insurers to avoid ambiguity in drafting at all costs. Although precise drafting is always one's goal, it is especially critical with insurance policies. In other situations involving contract construction, a litigant can have some measure of confidence if he is arguing for what appears to be the most reasonable and likely interpretation of a disputed term or clause. But an insurer will be certain to prevail only if the term is so specifically defined or explained that it admits no alternative constructions. This is so because a court will not simply adopt the "best" or most likely construction; rather, it will prefer any reasonable reading—even a weak one—which favors the insured.[106] Thus, *Stox* also sends a clear signal to the insured: one can avoid an exclusion by making a colorable argument that a key term is ambiguous. The strategy for the insured is to seize on some term—like "intended"—that is susceptible to a reasonable interpretation affording coverage. *Stox* helps clarify some of these key factors on which construction of insurance provisions in North Carolina is likely to turn.

ROBERT BRYSON CARTER

106. *See supra* notes 1-2 and accompanying text.

Village of Pinehurst v. Regional Investments of Moore: Perpetuating the Rule Against Perpetuities in the Realm of Preemptive Rights—North Carolina Refuses to Accept an Exception to the Rule

> *No devise or grant of a future interest in property is valid unless the title thereto must vest, if at all, not later than twenty-one years, plus the period of gestation, after some life or lives in being at the time of the creation of the interest. If there is a possibility such future interest may not vest within the time prescribed, the gift or grant is void.*[1]

The rule against perpetuities may have originated more than three hundred years ago,[2] but much to the dismay of most who encounter it, the rule is far from dead. Indeed, it is very much alive, and may be applied to void transactions that, at first glance, seem well beyond its reach. In *Village of Pinehurst v. Regional Investments of Moore*,[3] the North Carolina Supreme Court considered the rule against perpetuities in assessing the validity of a right of first refusal in a governmental-commercial transaction. Refusing to distinguish the situation from one involving private individuals in a noncommercial context, the court held that in order to be valid, a preemptive right must be limited in duration to the period provided by the rule against perpetuities.[4] While this holding followed relevant North Carolina precedent, it did little to reflect either modern day commercial realities or the original intentions behind the common-law rule. In holding as it did, the North Carolina Supreme Court rejected an opportunity to progress into the future, choosing instead to maintain the status quo—no matter how historically or practically misguided it is.

This Note critiques the analyses of the majority[5] and dissenting[6] opinions in *Village of Pinehurst*, in light of the historical origins and

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1. Clarke v. Clarke, 253 N.C. 159, 161, 161 S.E.2d 449, 452-53 (1960). For the classic statement of the rule, see JOHN C. GRAY, THE RULE AGAINST PERPETUITIES (4th ed. 1942).

2. For more on the origins of the rule, see *infra* notes 53-55 and accompanying text.

3. 330 N.C. 725, 412 S.E.2d 645 (1992).

4. Compliance with the rule against perpetuities is not the sole requirement of a valid preemptive right. In addition, the right must contain a provision for determining price. *Smith v. Mitchell*, 301 N.C. 58, 65-66, 269 S.E.2d 608, 613 (1980). Because such a price provision was not at issue in *Village of Pinehurst*, however, discussion of this requirement is beyond the scope of this Note.

5. *See infra* notes 35-47 and accompanying text. Justice Webb, joined by Justices Mitchell, Frye, Whichard, and Martin, wrote the majority opinion.

6. *See infra* notes 48-52 and accompanying text. Justice Meyer, joined by Chief Justice Exum, wrote the dissenting opinion.

goals of the rule against perpetuities,[7] its traditional method of application,[8] and recent innovations designed to temper the rule's severity.[9] After addressing the majority[10] and minority[11] views regarding the rule's application to rights of first refusal, this Note traces the development of North Carolina case law on the validity of preemptive rights[12] and assesses the propriety of applying the rule to such rights using both historical[13] and practical[14] analyses. The Note suggests that the rule against perpetuities may not be an appropriate standard for evaluating the validity of rights of first refusal. Finally, the Note proposes several statutory amendments to effect more sensible and equitable results—particularly in the context of governmental or commercial dealings.[15]

In 1973, a class action lawsuit was brought on behalf of the residents of the then-unincorporated Village of Pinehurst to compel Diamondhead Corporation, the developer and principal land owner in the region, to alter various practices undertaken in the course of the area's development.[16] Rather than fully litigating the controversy, the parties settled their dispute out of court.[17] A consent judgment embodied this agreement, one provision of which granted the Pinehurst Village Council[18] a preemptive right[19] to purchase the water and sewer systems

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7. *See infra* notes 53-55 and accompanying text.
8. *See infra* notes 57-60 and accompanying text.
9. *See infra* notes 64-73 and accompanying text.
10. *See infra* notes 74-76 and accompanying text.
11. *See infra* notes 77-89 and accompanying text.
12. *See infra* notes 91-116 and accompanying text.
13. *See infra* notes 119-22 and accompanying text.
14. *See infra* notes 123-27 and accompanying text.
15. *See infra* notes 128-34 and accompanying text.
16. Erle G. Christian v. Diamondhead Corp., No. 73 CVS 594 (Super. Ct. of Moore County Sept. 17, 1973). The practice the residents sought to enjoin was the development of condominium units around and throughout the area's many golf courses. Plaintiff-Appellant's New Brief at 6-7, *Village of Pinehurst* (No. 69A90). Residents were particularly concerned about Diamondhead's development around the historic course known as Pinehurst Number 2. *Id.*
17. *Village of Pinehurst*, 330 N.C. at 727, 412 S.E.2d at 646.
18. The Village Council was to represent the interests of the residents of the unincorporated municipality. Following incorporation in July 1980, the Village of Pinehurst succeeded to all of the rights and interests formerly held by the Village Council. Plaintiff-Appellant's New Brief at 8, *Village of Pinehurst* (No. 69A90).
19. A preemptive right (also known as a right of first refusal) is similar to, yet quite distinct from an option. *See* Thomas W. Christopher, *Options to Purchase Real Property in North Carolina*, 44 N.C. L. REV. 63, 66 (1965). Whereas an option gives the holder a right to purchase property from the owner at a certain time and at a specified price—in effect, a right to force the owner to sell, a right of first refusal merely gives the holder the first opportunity to buy the property should the owner decide to sell. *Id.* at 63, 66. With a preemptive right, the property owner is under no obligation to sell the property, nor is the holder of the preemptive right under any duty to buy should the owner opt to sell. *Id.* at 66. If the property owner

being developed in the village from Diamondhead Corporation and Pinehurst, Inc., Diamondhead's wholly owned subsidiary.[20]

In 1986, Regional Investments of Moore approached Pinehurst Enterprises, Inc., the successor to the rights and interests of Pinehurst, Inc.,[21] and offered to buy the sewer and water systems for $2.5 million.[22] Acting pursuant to the right of first refusal contained in the 1973 consent judgment, the Village of Pinehurst entered a matching offer, but was prevented from purchasing the water and sewer facilities when Pinehurst Enterprises, Inc. consummated the sale of the utilities to Regional Investments of Moore.[23] Subsequently, the Village of Pinehurst brought an

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offers the holder of the preemtive right the opportunity to buy and that offer is refused, the owner is then free to sell the property to any other interested buyer. *Id.* For other authority on the distinction between preemptive rights and options, see Metro. Transp. Auth. v. Bruken Realty Corp., 67 N.Y.2d 156, 163, 492 N.E.2d 379, 382, 501 N.Y.S.2d 306, 309 (1986); LEWIS M. SIMES & ALLAN F. SMITH, THE LAW OF FUTURE INTERESTS § 1154, at 60-61 n.44 (2d ed. 1956).

20. This portion of the consent judgment provided:

> *Sale of Utilities*
>
> 13. *In the event* that the Defendants Pinehurst and Diamondhead shall receive a bona fide offer for the sale of said utilities, prior to accepting said offer, said Defendants shall give to the Village Council for a period of ninety (90) days a right of first refusal to purchase said utilities on behalf of the residents of the Village of Pinehurst at a price and on terms at least equal to the price and terms of the highest offer to said Defendants by a bona fide purchaser. This provision is conditioned upon adequate assurance on behalf of the Village Council that those services as then rendered by the said utilities shall be maintained at their then level, including rendering services or agreeing to render services to areas outside the Village Boundary if said service is then being rendered or has been provided or committed to said areas. It is agreed that the sale and purchase of said utilities shall be consummated within one hundred eighty (180) days of the Village Council exercising the right of first refusal.
>
> In the event that control of the Defendant Pinehurst, Inc. shall be transferred by a sale of the stock or the majority of the stock of said corporation, or in the event a majority of the assets of the Defendant Pinehurst, Inc. are sold or transferred, then in either event the right of first refusal to purchase said utilities shall survive said sale but shall not be exercisable as a result of said sale.

Village of Pinehurst v. Regional Inv. of Moore, 97 N.C. App. 114, 115, 387 S.E.2d 222, 223 (1990).

21. In 1982, Diamondhead Corp. suffered severe financial problems. Plaintiff-Appellant's New Brief at 9, *Village of Pinehurst* (No. 69A90). Accordingly, Diamondhead was forced to part with all of the assets of Pinehurst, Inc., to satisfy its debt to its creditors. *Id.* This deal effectively shifted full ownership of Pinehurst, Inc.'s assets to an entity known as Resort Holding Corp., a company owned by Diamondhead Corp.'s creditor banks. *Id.* Pinehurst Enterprises, Inc. was, in turn, a wholly owned subsidiary of the Resort Holding Corp.. *Id.* Pinehurst Enterprises, Inc. was the parent corporation of Pinehurst Water Co., Inc., and Pinehurst Sanitary Co., Inc., the owners and operators of the water and sewer systems at issue in this case. *Id.*

22. *Village of Pinehurst*, 330 N.C. at 727, 412 S.E.2d at 646.

23. *Id.*

action for a determination of its rights.[24]

The trial court granted the defendants' motion for summary judgment.[25] The Village appealed this ruling to the court of appeals, which affirmed the trial court's determination, holding that the Village of Pinehurst's right of first refusal under the 1973 consent judgment was void as a violation of the rule against perpetuities.[26]

Because the parties had not contested any of the material allegations contained in the pleadings, the majority applied the test established in *Smith v. Mitchell*[27] for determining the legitimacy of a preemptive right.[28]According to *Smith*,[29] a right of first refusal is valid only if it neither contains a fixed price provision nor violates the rule against perpetuities.[30] The Village's preemptive right was tied to the price offered by the highest bona fide purchaser. Therefore, the preemptive right satisfied the first condition.[31] Because the right was neither fixed in time nor limited in its duration,[32] however, Judge Greene, wiriting for the majority, opined that the right asserted by the Village of Pinehurst was invalid because its terms extended beyond the perpetuities period.[33]

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24. Specifically, the Village of Pinehurst brought the action under § 1-253 of the North Carolina General Statutes, seeking a declaratory judgment regarding its rights under the consent judgment vis-a-vis "certain deeds and deeds of trust between the defendants which transferred ownership of the water and sewer systems." Plaintiff-Appellant's New Brief at 2, *Village of Pinehurst* (No. 69A90).

25. Village of Pinehurst v. Regional Investments of Moore, 97 N.C. App. 114, 116, 387 S.E.2d 222, 223 (1990).

26. *Id.* at 116-18, 387 S.E.2d at 223-24. Application of the rule against perpetuities is not limited to transactions in real property. On the contrary, it may be applied to invalidate conveyances of both realty and personalty. Thus, applying the rule to a right of first refusal for a water and sewer system does not seem unusual.

27. 301 N.C. 58, 269 S.E.2d 608 (1980).

28. *Village of Pinehurst*, 97 N.C. App. at 117, 387 S.E.2d at 224. Judge Greene, with whom Judge Becton concurred, authored the opinion of the court. *Id.* at 115, 387 S.E.2d at 224. Judge Phillips dissented. *Id.* at 118, 387 S.E.2d at 224 (Phillips, J., dissenting).

29. For a more comprehensive account of *Smith*, see *infra* notes 95-105 and accompanying text.

30. *Smith*, 301 N.C. at 65-66, 269 S.E.2d at 613.

31. *See supra* note 20 for the specific terms of the Village of Pinehurst's preemptive right.

32. *Smith*, 301 N.C. at 65-66, 269 S.E.2d at 613. A contingent future interest violates the rule against perpetuities if it is either unlimited in duration, and therefore not guaranteed to vest within the perpetuities period, or if it is drafted so as to vest at a time after the termination of the perpetuities period. Ralph E. Boyer and Robert A. Spiegel, *Land Use Control: Preemptions, Perpetuities and Similar Restraints*, 20 U. MIAMI L. REV. 148, 164-65 (1966). In this case, the right granted to the Village of Pinehurst was not limited to any specific period of time. *See supra* note 20.

33. Village of Pinehurst v. Regional Investments of Moore, 97 N.C. App. 114, 117, 387 S.E.2d 222, 224 (1990). Thus, the court of appeals deemed a period extending beyond the perpetuity period as unreasonable within the meaning of *Smith*. *See id.* In a brief dissenting opinion, Judge Phillips asserted that the Village of Pinehurst's preemptive right was "valid and

With a divided panel in the court of appeals, Pinehurst appealed to the North Carolina Supreme Court,[34] where a divided court affirmed the holding below.[35] Unwilling to overrule precedent, the supreme court applied the two-prong test of *Smith*.[36] Because the unlimited duration of the preemptive right failed to comply with the rule against perpetuities, the court held that the right of first refusal was invalid and thus unenforceable.[37] While recognizing that the portion of the *Smith* opinion requiring a right of first refusal to terminate within the perpetuities period could be considered dictum, the court nonetheless asserted that the *Smith* court clearly intended to apply the perpetuities requirement to rights of first refusal.[38]

After plainly stating that the rule against perpetuities *does* apply to preemptive rights, and that such rights *are* subject to *Smith*'s two-stage test,[39] Justice Webb, writing for the majority, methodically rejected each of Pinehurst's arguments.[40] First, he addressed the plaintiff's broad assertion that the rule against perpetuities should not apply to a preemptive right in the context of a business transaction. The majority, after acknowledging that other jurisdictions recognized such an exception,[41] stated that "[i]f a restraint on alienation is bad, [this court] see[s] no reason why it is made good because it is part of a commercial transaction

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legally binding." *Id.* at 118, 387 S.E.2d at 224-25 (Phillips, J., dissenting). He reasoned that defendants' receipt and acceptance of benefits stemming from the consent judgment estopped them from denying the validity of the 1973 decree. *Id.* at 118, 387 S.E.2d at 224 (Phillips, J., dissenting). Without explaining his reasoning, Judge Phillips also said that the rule against perpetuities was not appropriately applied on these facts. *Id.* (Phillips, J., dissenting).

34. North Carolina law provides for appeal as of right when a there is a split decision in the Court of Appeals. N.C. GEN. STAT. § 7A-30 (2) (1989).

35. *Village of Pinehurst*, 330 N.C. at 731, 412 S.E.2d at 648.

36. *Id.* at 728, 412 S.E.2d at 646.

37. *Id.* at 728, 731, 412 S.E.2d at 646, 648.

38. *Id.* at 728, 412 S.E.2d at 646. It is questionable whether the court's intention in *Smith v. Mitchell*, 301 N.C. 58, 269 S.E.2d 608 (1980), was so clear. While *Smith* did hold that a preemptive right must be exercised within a reasonable time period, the court never explicitly required that a preemptive right comply on its face with the rule against perpetuities. *Id.*, at 66-67, 269 S.E.2d at 613. To discourage future litigants from battling over the meaning in individual cases of what period is reasonable, *Smith* merely stated that the perpetuities period is a reasonable amount of time for the exercise of a preemptive right. *Id.* at 66, 269 S.E.2d at 613. Although subsequent North Carolina cases have held that the *Smith* court did not intend for the wait-and-see doctrine, *see infra* notes 65-67 and accompanying text, to apply to preemptive rights, *see, e.g.*, Peele v. Wilson County Bd. of Educ., 56 N.C. App. 555, 560, 289 S.E.2d 890, 893, *review denied*, 306 N.C. 386, 294 S.E.2d 210 (1982), there is no indication in *Smith* that such was the case. So long as a preemptive right is ultimately exercised within the perpetuities period, the right would arguably comply with the *Smith* specifications.

39. *See supra* note 29-33 and accompanying text.

40. *Village of Pinehurst*, 330 N.C. at 728-31, 412 S.E.2d at 646-48.

41. *Id.* at 728-29, 412 S.E.2d at 646.

or the property is used for business purposes."[42]

The court next rejected the more narrow argument that the rule against perpetuities should not invalidate the preemptive right in this situation, because the power had been granted to a charitable or benevolent cause.[43] Maintaining that utility ownership is proprietary in nature, the court held that such an arrangement is not a beneficial use that North Carolina statutes exempt from the rule against perpetuities.[44]

The court also struck down the claim that the rule should not apply because the preemptive right was personal to the grantee.[45] Noting that a municipal corporation may exist in perpetuity, the court held that such an entity may not serve as the measuring life for determining the perpetuities period.[46] Rather, the court maintained that "[t]he measuring life or lives must be a human life or lives," stating that to hold otherwise would "eviscerate the rule."[47]

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42. *Id.* at 729, 412 S.E.2d at 646-47. Here, the court may have confused the issue in the case. Generally, where there has been a reasonable price provision but no time requirement, courts in other jurisdictions have held that there was no unreasonable restraint on alienation, regardless of whether they went on to invalidate the preemptive right as being in violation of the rule against perpetuities. *See, e.g.*, Cambridge Co. v. East Slope Inv. Corp., 700 P.2d 537, 543 n.8 (Colo. 1985) (citing cases from various jurisdictions exemplifying this position). By misconstruing the nature of the test, the court may have precluded accurate consideration of the merits of the Village of Pinehurst's argument.

43. *Village of Pinehurst*, 330 N.C. at 729, 412 S.E.2d at 647. Citing to § 36A-49 of the North Carolina General Statutes, which provides that "[n]o gift, grant, bequest or devise . . . to religious, educational, charitable or benevolent uses . . . shall be invalid . . . by reason of the . . . rule against perpetuities," the Village of Pinehurst maintained that municipal ownership of a water and sewer system was a benevolent use within the meaning of the statute. *See* N.C. GEN. STAT. § 36A-49 (1991).

44. *Village of Pinehurst*, 330 N.C. at 729, 412 S.E.2d at 647.

45. *Id.* This argument was based on the fact that if a right is made personal to a human grantee, it will be exercised, if at all, within the lifetime of that grantee. The inevitable consequence of such a personal right is that its vesting will be limited to the grantee's life, and thus fall well within the perpetuities period of a life in being plus twenty-one years.

46. *Id.* at 730, 412 S.E.2d at 647. The measuring life is not determined by the perpetuities period. Rather, the perpetuities period is determined by the measuring life. To be the measuring life for the purposes of ascertaining the perpetuities period, an individual must have some direct relationship to the right that may or may not vest. For a more thorough and comprehensive discussion of who may be the measuring life for the purposes of the rule, see Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CAL. L. REV. 1867, 1872-74 (1986).

47. *Village of Pinehurst*, 330 N.C. at 729, 412 S.E.2d at 647. In addition, the Village of Pinehurst also argued that the defendants should be estopped from denying the validity of the consent judgment. In particular, Pinehurst claimed that the defendants had benefited from the agreement in that it (a) led to a cessation of litigation and allowed development in the area to be furthered, (b) enabled the defendants to place three members on an architectural planning committee, and (c) provided a selling point for the defendants when offering developed property to potential buyers. *Id.* at 730, 412 S.E.2d at 647. Unpersuaded by these arguments, the court denied Pinehurst relief, stating that any benefit the defendants received under the consent judgment was insufficient to sustain an estoppel argument. *Id.* at 730-31, 412 S.E.2d at 647-48. Similar reasoning led the court to reject Village of Pinehurst's final claim that the

Justice Meyer, in his dissenting opinion, agreed that the rule against perpetuities should generally apply to rights of first refusal, but vigorously argued that the rule "should not be strictly applied against *all* preemptive rights."[48] Arguing that the majority's interpretation of *Smith* was erroneous, the dissent maintained that application of the rule is not mandatory in all situations.[49] Specifically, Justice Meyer quoted *Smith* for the proposition that "*restraints on alienation are premissible [sic] where the goal justifies the limit on the freedom to alienate or where the interference with alienation in a particular case is so negligible that the major policies furthered by freedom of alienation are not materially hampered.*"[50] Where, as in this case, the preemptive right serves the public good,[51] Justice Meyer insisted that the rule against perpetuities should not be invoked to invalidate the interest.[52]

Since 1682, when it was first implemented in the *Duke of Norfolk's Case*,[53] courts have experienced considerable confusion in applying the rule against perpetuities. As originally conceived, the rule was designed

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doctrine of elections should prevent Regional Investments of Moore and the other defendants from denying the validity of the consent judgment. *Id.* at 731, 412 S.E.2d at 648.

48. *Id.* at 735, 412 S.E.2d at 650 (Meyer, J., dissenting) (emphasis added).

49. *Id.* at 735-36, 412 S.E.2d at 650 (Meyer, J., dissenting).

50. *Id.* (Meyer, J., dissenting) (quoting Smith v. Mitchell, 301 N.C. 58, 62, 269 S.E.2d 608, 611 (1980)).

51. Justice Meyer stressed that a municipal water system, operated by the municipality, was "for the benefit of society at large." *Id.* at 736-37, 412 S.E.2d at 651 (Meyer, J., dissenting) (citing Anderson v. 72nd St. Condominium, 119 A.D.2d 73, 76, 505 N.Y.S.2d 101, 103 (1986)).

52. *Id.* at 737, 412 S.E.2d at 651 (Meyer, J., dissenting). Beginning with an historical overview of the rationale behind the rule, Justice Meyer noted the widespread criticisms of the rule and related several recently created exceptions—most notably the failure to apply the rule to rights of first refusal in the context of the sale of stock provisions in corporate charters, bylaws, or shareholders' agreements. *Id.* at 731-33, 412 S.E.2d at 648-49 (Meyer, J., dissenting).

The dissent next turned to the case law from other jurisdictions that have refused to apply the rule against perpetuities to preemptive rights. *Id.* at 733-37, 412 S.E.2d at 649-50 (Meyer, J., dissenting). Such courts have, for example, maintained that rights of first refusal are vested rights, and thus not subject to the rule; that preemptive rights are estates on condition subsequent, and therefore exempt from the rule's application; or that rights of first refusal do not create any interest in property, thus falling outside the purview of the rule against perpetuities. *See infra* notes 77-89 and accompanying text.

As a final point, Justice Meyer opined that at a minimum, the rule against perpetuities should not apply because the operation of a municipal water system by the Village of Pinehurst was clearly a benevolent use. Because of the exemption from the rule provided by North Carolina General Statute § 36A-49, the dissenting justice argued that the rule against perpetuities was inapplicable in this situation. *Village of Pinehurst*, 330 N.C. at 737, 412 S.E.2d at 652 (Meyer, J., dissenting).

53. 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682), *cited in* Dukeminier, *supra* note 46, at 1869. As this case points out, the rule against perpetuities is judge-made law. *Robroy Land Co., Inc. v. Prather*, 95 Wash.2d 66, 69, 622 P.2d 367, 369 (1980). For a more thorough treatment of

to promote "the utilization of wealth, the development of land by its current beneficial owners, and the assurance that society will be controlled by the living rather than from the grave."[54] By invalidating remotely vesting contingent future interests, the rule was intended to achieve these goals.[55]

Although not universally admired, the rule against perpetuities is a mainstay of property law.[56] As a matter of practical application, the rule is implemented to determine the validity of contingent future interests using a method known as the what-might-happen test.[57] Whether a given grant, bequest, or devise ultimately vests within the perpetuities period is immaterial.[58] Rather, the key to discerning whether the rule has been violated is analyzing whether, based on the face of the relevant instrument, the contingent right is certain to vest within the perpetuities period of a life in being plus twenty-one years.[59] With a few well established exceptions, all contingent future interests that are not certain to vest within this period are deemed void.[60]

Since its inception, the rule against perpetuities has received heavy

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the historical context of the *Duke of Norfolk's Case*, see Ronald C. Link, *The Rule Against Perpetuities in North Carolina*, 57 N.C. L. REV. 727, 734-35 (1979).

54. St. Regis Paper Co. v. Brown, 247 Ga. 361, 362, 276 S.E.2d 24, 25 (1981). Another statement of the rule's purpose is found in Metropolitan Transportation Auth. v. Bruken Realty Corp., 67 N.Y.2d 156, 492 N.E.2d 379, 501 N.Y.S.2d 306 (1986), where the New York Court of Appeals stated that the rule "ensure[s] the productive use and development of property by its current beneficial owners by simplifying ownership, facilitating exchange and freeing property from unknown or embarrassing impediments to alienability." *Id.* at 161, 492 N.E.2d at 381, 501 N.Y.S.2d at 308.

55. The rule arose in response to the problem of the landed gentry in feudal England creating long term encumbrances on property, which not only led to the inalienability of the land, but also discouraged the current possessors from either improving the property or utilizing it to its fullest potential. *See* Dukeminier, *supra* note 46, at 1869-70. By placing restrictions on the creation of remotely vesting interests, the rule against perpetuities has been largely successful in preventing the types of abuses against which it was designed to guard. *Id.* at 1869.

56. While widely criticized, the rule against perpetuities "is operative wherever the principles of common law prevail." 61 AM. JUR. 2D *Perpetuities* § 7, at 13 (1981).

57. *See* Dukeminier, *supra* note 46, at 1876-80.

58. *Id.*

59. *Id.*

60. Future interests that are not subject to the rule are chiefly those which existed at common law prior to the rule's recognition. Boyer & Spiegel, *supra* note 32, at 160 n.72. These interests are reversions (future interests that remain in the grantor when a lesser estate, such as a life estate, is conveyed away); vested remainders (interests that create present possessory estates upon the end of the immediately preceding estate, subject to no other conditions precedent); and estates subject to condition subsequent (future interest in the grantor providing for a power of termination, which allows the grantor to assume a present possessory interest on the occurrence of specific events). *Id.* at 160. *But see infra* note 80 and sources cited therein.

criticism[61] because of its high degree of technicality, its extreme rigidity, and its frequent misapplication.[62] In fact, many commentators have argued that the rule has no place in many modern transactions.[63]As a result, many jurisdictions have implemented innovative strategies to reduce its often severe effects.[64] One such tactic has been to discard the traditional what-might-happen test, and adopt instead what has come to be known as the wait-and-see doctrine.[65] Under wait-and-see, the validity of a contingent future interest is not evaluated until the end of the perpetuities period. Thus, a contingent interest of unspecified duration will be held invalid only if it actually does not vest within twenty-one years after the end of the appropriate measuring life.[66] If the interest does vest within the perpetuities period, its validity is not questioned.[67] Thus, the wait-and-see approach validates interests that would have otherwise been void under the traditional what-might-happen test.

Another method courts in several jurisdictions have followed to

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61. *See, e.g.*, David M. Becker, *A Methodology for Solving Perpetuities Problems Under the Common Law Rule: A Step-By-Step Process That Carefully Identifies All Testing Lives in Being*, 67 WASH. U. L.Q. 949, 950-51 (1989); W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 723 (1952) [hereinafter Leach, *Perpetuities in Perspective*].

62. *See supra* note 61.

63. *See, e.g.*, W. Barton Leach, *Perpetuities: New Absurdity, Judicial and Statutory Correctives*, 73 HARV. L. REV. 1318, 1322 (1960) [hereinafter Leach, *New Absurdity*] (asserting that "[t]he pressures which created the Rule do not exist with reference to arms-length contractual transactions, and neither lives in being nor twenty-one years are periods which are relevant to business men and their affairs."); Link, *supra* note 53, at 807 (arguing that the rule is inappropriate in modern business transactions because the perpetuities period is irrelevant in the context of nondonative transfers).

64. According to Professor Dukeminier, a wait-and-see approach has been adopted in one form or another in Alaska, Connecticut, Florida, Kentucky, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Mexico, Ohio, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia, and Washington. Dukeminier, *supra* note 46, at 1882-83 nn.49-50.

65. Professor Leach was the originator of the term "wait-and-see." Dukeminier, *supra* note 46, at 1880. The principle was previously known as the "actual events test." *Id.* Wait-and-see had been applied both statutorily and through case law. For a more comprehensive review of the approach, see Leach, *New Absurdity*, *supra* note 63, at 1323-24 (commending the statutory adoption of wait-and-see in Connecticut, Maine, New Hampshire, Pennsylvania, Vermont, and Washington); Dukeminier, *supra* note 46, at 1880-84. For a case applying wait-and-see to a specific fact pattern, see Great Bay Sch. & Training Ctr. v. Simplex Wire and Cable Co., 131 N.H. 682, 559 A.2d 1329 (1989). For a comparison of the adoption and use of limited wait-and-see with unlimited wait-and-see in a variety of different jurisdictions, see Verner F. Chaffin, *The Rule Against Perpetuities As Applied to Georgia Wills and Trusts: A Survey and Suggestions for Reform*, 16 GA. L. REV. 235, 346-47 nn.414-18 (1982).

66. Dukeminier, *supra* note 46, at 1881. The measuring life or lives under wait-and-see are the same as those under the what-might-happen test. *Id.*; *see supra* note 46. For a more thorough discussion of determining the measuring life or lives, see Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1654-59 (1985).

67. Dukeminier, *supra* note 46, at 1881.

prevent contingent interests from being held void because of incompatibility with the perpetuities period involves applying the *cy pres* doctrine.[68] Under *cy pres*, also known as equitable reformation, courts are given the power to reconstruct an otherwise invalid grant in order to effectuate the intentions of the grantor.[69] *Cy pres* thus allows a court to use its equitable power to revive a grant that might otherwise fail because of noncompliance with the rule against perpetuities.[70]

A final potential solution to problems caused by the common-law rule is the Uniform Statutory Rule Against Perpetuities.[71] Combining a fixed perpetuities period of ninety years with both the wait-and-see doctrine and the possibility of judicial reformation, the Uniform Rule creates an unambiguous standard for dealing with perpetuities problems.[72] In addition, the Uniform Rule excludes nondonative transfers from its scope, thus limiting perpetuities issues to the regulation of donative conveyances.[73]

Regardless of the rule's many criticisms, the majority of American

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68. Derived from French, *cy pres* literally means "as near as practicable." *Id.* at 1898. California, Connecticut, Florida, Illinois, Kentucky, Maine, Maryland, Massachusetts, Missouri, New York, Ohio, Oklahoma, Texas and Vermont are among the jurisdictions that have implemented *cy pres*, in one form or another, to reform otherwise invalid transfers. Chaffin, *supra* note 65, at 350-51 nn.432-35.

69. Dukeminier, *supra* note 46, at 1898.

70. *Id.*

71. UNIF. STATUTORY RULE AGAINST PERPETUITIES, 8A U.L.A. 350 (Supp. 1990). To date, the Uniform Rule has been adopted in California, Colorado, Connecticut, Florida, Georgia, Hawaii, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Oregon, South Carolina, Oklahoma and West Virginia. CAL. PROBATE CODE §§ 21200-21231 (West 1993); COLO. REV. STAT. ANN. §§ 15-11-1101 to 15-11-1107 (West 1992); CONN. GEN. STAT. §§ 45a-490 to 45a-496 (1990); FLA. STAT. ch. 689.225 (1992); GA. CODE ANN. §§ 44-6-200 to 44-6-206 (1992); HAW. REV. STAT. §§ 525-1 to 525-6 (Supp. 1992); IND. CODE §§ 32-1-4-1 to 32-1-4-6 (1976); KY. REV. STAT. ANN. §§ 381.216, 381.223 (Michie/Bobbs-Merrill 1992); MASS. GEN. LAWS ch. 184A, §§ 1-11 (1993); MICH. COMP. LAWS §§ 554.71-554.78 (1991); MINN. STAT. §§ 501A.01-501A.07 (1992); MONT. CODE ANN. §§ 70-1-801 to 70-1-807 (1992); NEB. REV. STAT. §§ 76-2001 to 76-2008 (1992); NEV. REV. STAT. §§ 111.103-111.1039 (1991); N.J. STAT. §§ 46:2F-1 to 46:2F-8 (1992); N.M. STAT. ANN. §§ 45-2-1001 to 45-2-1006 (Michie Supp. 1992); N.D. CENT. CODE §§ 47-02-27.1 to 47-02-27.5 (1991); OR. REV. STAT. §§ 105.950-105.975 (1991); S.C. CODE ANN. §§ 27-6-10 to 27-6-80 (Law. Co-op. 1991); W. VA. CODE §§ 36-1A-1 to 36-1A-8 (1992). While there are certainly variations between the adopting states as to the precise terms of the legislation, such an examination is beyond the scope of this Note.

72. UNIF. STATUTORY RULE AGAINST PERPETUITIES §§ 1 (a) (2), 3, 8A U.L.A. 351 (Supp. 1990). For a discussion of the rationale behind adopting a set ninety year perpetuities period, see UNIF. STATUTORY RULE AGAINST PERPETUITIES, Prefatory Note, 8A U.L.A. 348 (Supp. 1990) [hereinafter Prefatory Note].

73. UNIF. STATUTORY RULE AGAINST PERPETUITIES § 4 (1), 8A U.L.A. 377 (Supp. 1990). The Prefatory Note suggests that this position is in accord with the view taken by many commentators, i.e., that the period of a life in being plus twenty-one years is an appropriate restriction only on donative transfers. Prefatory Note, *supra note* 72, at 349.

jurisdictions nonetheless apply the rule against perpetuities when evaluating the validity of preemptive rights.[74] The view taken by the Restatement of Property embodies this position:

> A promissory restraint or forfeiture restraint on the alienation of a legal estate in land which is in the form of a provision that the owner of the estate shall not sell the same without first offering to a designated person the opportunity to meet, with reasonable expedition, any offer received, is valid, *unless it violates the rule against perpetuities.*[75]

Jurisdictions following the majority approach thus invalidate preemptive rights that violate the rule, regardless of whether they create unreasonable restraints on alienation.[76]

Notwithstanding the majority view, a number of jurisdictions refuse to apply the rule against perpetuities to rights of first refusal. Among the various means employed to avoid the rule's application are to categorize preemptive rights as creating vested interests,[77] estates on condition subsequent,[78] or interests which are purely personal to either the grantor or the grantee.[79] In addition, some jurisdictions simply maintain that pre-

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74. *See* Ferrero Constr. Co. v. Dennis Rourke Corp., 311 Md. 560, 565-66, 536 A.2d 1137, 1139-40 (1988).

75. RESTATEMENT OF THE LAW OF PROPERTY § 413(1) (1944) (emphasis added).

76. For a discussion of the majority view and those jurisdictions which accept it, see Dennis Rourke Corp. v. Ferrero Constr. Co., 64 Md. App. 694, 701-02, 498 A.2d 689, 693 (1985), *rev'd*, 311 Md. 560, 536 A.2d 1137 (1988).

77. Because the rule applies only to contingent interests that may not vest within the perpetuities period, by defining a right of first refusal as having already vested, the preemptive right is removed from the scope of the rule against perpetuities. *See, e.g.*, Greenshields v. Warren Petroleum Corp., 248 F.2d 61, 71 (10th Cir.) (holding that preemptive right vest immediately), *cert. denied*, 355 U.S. 907 (1957); Izzo v. Brooks, 106 Misc.2d 743, 753-54, 435 N.Y.S.2d 485, 492 (1980) (maintaining that a right of first refusal of unlimited duration "vest[s] at the creation of the instrument.").

78. *See* J. A. Bryant, Jr., Annotation, *Pre-emptive Rights to Realty as Violation of Rule Against Perpetuities or Rule Concerning Restraints on Alienation*, 40 A.L.R.3d 920, 929-31 (1971). Given that the rule has long been considered not to apply to such estates, *see supra* note 60, by interpreting preemptive rights in this fashion, such interests have been upheld. *See, e.g.*, Robertson v. Murphy, 510 So.2d 180, 183 (Ala. 1987) (holding valid a partnership agreement binding a deceased partner's heirs or assigns to a right of first refusal, on the grounds that such an arrangement creates a conditional fee); Dozier v. Troy Drive-In-Theaters, Inc., 265 Ala. 93, 103-04, 89 So. 2d 537, 546 (1956) (holding that a ninety-nine year lease agreement with option to buy during the term created an estate on condition subsequent in the lessee—the condition being the lessor's decision to sell); Chapman v. Mutual Life Ins. Co. of New York, 800 P.2d 1147, 1150 (Wyo. 1990) (maintaining that the owner's intention to sell is a condition precedent to the exercise of the option contained in a preemptive right).

79. If a preemptive right is personal to either the grantor or the grantee, the preemptive right is certain to vest, if at all, within the perpetuities period. *See, e.g.*, Stuart Kingston, Inc. v. Robinson, 596 A.2d 1378, 1384 (Del. 1991). While such interpretation is convincing when dealing with preemptive rights held by or against individuals, this argument is impossible to sustain in the case of a grant to a corporate or municipal entity, which by the nature of its

emptive rights do not create future interests,[80] or conclude that preemptive rights are not in the category of evils that the rule against perpetuities was designed to guard against.[81]

Most relevant to the facts of *Village of Pinehurst* is the view that a preemptive right held by a corporate or governmental body creates an exception to the rule.[82] This argument prevailed in *Metropolitan Transportation Authority v. Bruken Realty Corp.*,[83] decided by the New York Court of Appeals in 1986. The case involved a right of first refusal held by a corporation that was enforceable against a governmental entity.[84] When the corporation attempted to exercise its right, the government

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indefinite duration is incompatible with the common law perpetuities period. It is for this reason that Village of Pinehurst lost this argument before the North Carolina Supreme Court. *See supra* notes 45-47 and accompanying text.

80. This view asserts that preemptive rights merely produce contract rights exercisable in the future. *See, e.g.*, Gartley v. Ricketts, 107 N.M. 451, 453, 760 P.2d 143, 145 (1988) (maintaining simply that a right of first refusal is not a future interest, and consequently is not subject to the rule); Robroy Land Co. v. Prather, 95 Wash. 2d 66, 71, 622 P.2d 367, 370 (1980) (holding that a right of first refusal gives the holder the right to contract for a property interest in the future, when and if the owner decides to sell).

81. See, *e.g.*, Cambridge Co. v. East Slope Investment Corp., 700 P.2d 537, 542-43 (Colo. 1985); Shiver v. Benton, 251 Ga. 284, 286-87, 304 S.E.2d 903, 905-06 (1983); Anderson v. 72nd Street Condominium Association, 119 A.D.2d 73, 76-79, 505 N.Y.S.2d 101, 103-05, *appeal granted*, 123 A.D.2d 903, 506 N.Y.S.2d 661 (1986), *appeal dismissed*, 69 N.Y.2d 743, 504 N.E.2d 700, 512 N.Y.S.2d 1032 (1987). The Fifth Circuit Court of Appeals took this approach in Weber v. Texas Co., 83 F.2d 807 (5th Cir.), *cert. denied*, 299 U.S. 561 (1936). According to the Fifth Circuit:

> The rule against perpetuities springs from considerations of public policy. The underlying reason for and purpose of the rule is to avoid fettering real property with future interests dependent upon contingencies unduly remote which isolate the property and exclude it from commerce and development for long periods of time, thus working an indirect restraint upon alienation, which is regarded at common law as a public evil.
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> The option [of first refusal] under consideration is within neither the purpose of nor the reason for the rule. . . . It amounts to no more than a continuing and preferred right to buy at the market price whenever the lessor desires to sell. This does not restrain free alienation by the lessor. He may sell at any time, but must afford the lessee the prior right to buy. The lessee cannot prevent a sale. His sole right is to accept or reject as a preferred purchaser when the lessor is ready to sell. The option is therefore not objectionable as a perpetuity.

Id. at 808 (citations omitted).

82. *See* Southeastern Penn. Transp. Auth. v. Philadelphia Transp. Co., 426 Pa. 377, 385, 233 A.2d 15, 19 (1967) (dealing with a municipality's option to purchase the assets of a private railroad which was unlimited in duration), *cert. denied*, 390 U.S. 1011 (1968). According to the Pennsylvania Supreme Court, "[t]he historical purpose of the rule against perpetuities was to destroy serious hindrances to the beneficial and prosperous use of property . . . . In this case, the danger of fettering the free use of property is outweighed by considerations of public concern and welfare." *Id.*

83. 67 N.Y.2d 156, 492 N.E.2d 379, 501 N.Y.S.2d 306 (1986).

84. *Id.* at 160, 492 N.E.2d at 380, 501 N.Y.S.2d at 307.

resisted, claiming as a defense that the corporation's preemptive right was void as a violation of the rule against perpetuities.[85] In resolving the issue, the New York Court of Appeals first asserted that the term required by the perpetuities period has no relevance to commercial or governmental dealings.[86] Moreover, the court stated that strict application of such a rigid rule would fail the purposes and policies that the rule against perpetuities was designed to protect—particularly the goals of advancing the utilization and transferability of property.[87] While the court maintained that the rule prohibiting unreasonable restraints on alienation still applies to preemptive rights,[88] it went on to hold that the rule against perpetuities does not apply when interpreting rights of first refusal held by or against a governmental or corporate entity.[89]

While many states have adopted creative approaches to avoid applying the rule against perpetuities to preemptive rights, North Carolina, like the majority of American jurisdictions, still adheres to the common law rule.[90] The North Carolina Supreme Court first set forth its position regarding preemptive rights in *Hardy v. Galloway*, decided in 1892.[91] But the majority of the litigation on the rights of first refusal has occurred in the last fifteen years.

In *Hardy*, the supreme court held void a deed provision in which the grantor of a parcel of real property retained a right of first refusal in the event that the grantee ever decided to sell the land.[92] In reaching its decision, the court focused on two factors—first, that no system for determining the price was included in the grantor's right, and second, that the preemptive right was unlimited in duration.[93] In essence, *Hardy*

85. *Id.*

86. *Id.* at 165-66, 492 N.E.2d at 384, 501 N.Y.S.2d at 311. Commentators such as Professor Leach also support this position. *See, e.g.*, Leach, *New Absurdity*, *supra* note 63, at 1321-22.

87. *Metro. Transp. Auth.*, 67 N.Y.2d at 166, 432 N.E.2d at 384, 501 N.Y.S.2d at 311. For an analogous argument that the rule against perpetuities is an inappropriate standard for assessing the validity of business transactions, see Link, *supra* note 53, at 807.

88. A fixed price provision in a preemptive right would create an unreasonable restraint on alienation.

89. *Metro. Transp. Auth.*, 67 N.Y.2d at 168, 492 N.E.2d at 385, 501 N.Y.S.2d at 312. Other authorities support this position. *See, e.g.*, Link, *supra* note 53, at 807; 6 AMERICAN LAW OF PROPERTY § 24.56, at 142 (A. James Casner et. al. eds., 1952); Leach, *New Absurdity*, *supra* note 63, at 1321-22.

90. *See supra* notes 45-47 and accompanying text.

91. 111 N.C. 323, 15 S.E. 890 (1892).

92. *Id.* at 327, 15 S.E. at 890.

93. In this instance, the holder's right was truly unlimited in duration, as it was drafted to apply not only to grantor, but also to grantor's heirs and assigns. *Id.* It is interesting to note that the defendant in *Hardy* appeared *pro se*. What effect this lack of representation may have had for subsequent generations of North Carolinians will never be known with any degree of

stood "for the proposition that preemptive provisions which are unreasonable are void as imposing impermissible restraints on alienation."[94]

It was nearly ninety years before the court again addressed the validity of preemptive rights. In *Smith v. Mitchell*,[95] the court confronted a preemptive right contained in the restrictive covenants running with a piece of real property.[96] Specifically, the relevant section of the restrictive covenants granted the covenantor, his heirs or assigns "the option to repurchase said property at a price no higher than the lowest price [the covenantee] is willing to accept from any other purchaser."[97] The right was limited in duration to the life of the covenantor, plus twenty years.[98]

Following the covenantor's death, his son succeeded him in interest to the real property subject to the restrictive covenants.[99] The property was then sold to the defendant, who in turn conveyed the property to a third party, without first having offered the land to the covenantor's son.[100] The son then brought suit seeking either specific performance or monetary damages.[101] Citing *Hardy*, the court held that although the preemptive right contained in the restrictive covenant represented a restraint on alienation, it was not an unreasonable restraint.[102] The court maintained that the right of first refusal contained a reasonable price provision, and that the right was limited to a reasonable time.[103] In what has subsequently become quite controversial language,[104] the court stated that rather than allowing future litigants to argue about what is a "reasonable" period, the term provided by the rule against perpetuities should be the standard for determining what period is reasonable for a preemptive right.[105]

While *Smith* provided a broad outline for the North Carolina posi-

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certainty. However, it is possible that if J. B. Galloway had retained able counsel, a more convincing argument that the rule should not apply may have been mustered.

94. Smith v. Mitchell, 301 N.C. 58, 65, 269 S.E.2d 608, 613 (1980).

95. 301 N.C. 58, 269 S.E.2d 608 (1980). For a comprehensive treatment of *Smith*, see Douglas P. Arthurs, Note, *Property Law—The Preemptive Provision as a Valid Restraint on Alienation*—Smith v. Mitchell, 17 WAKE FOREST L. REV. 682 (1981).

96. *Smith*, 301 N.C. at 59, 269 S.E.2d at 610.

97. *Id.* at 60, 269 S.E.2d at 610.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 67, 269 S.E.2d at 614.

103. *Id.* at 66-68, 269 S.E.2d at 613-14.

104. As noted in *Village of Pinehurst*, 330 N.C. at 728, 412 S.E.2d at 646, the controversy surrounding this paragraph of the *Smith* opinion stems from the lack of clarity as to whether it is holding or dictum.

105. *Smith*, 301 N.C. at 66, 269 S.E.2d at 613.

tion, subsequent cases in the court of appeals have fleshed out the law on the issue of preemptive rights.[106] One particularly noteworthy decision was *Peele v. Board of Education*.[107] In *Peele*, the court of appeals addressed the validity of a reservation in a deed creating a right of first refusal in the grantor, his heirs or assigns.[108] Writing for the court, Judge (later Justice) Martin focused on whether the preemptive right violated the rule against perpetuities. Rejecting plaintiff's contention that the doctrine of wait-and-see should apply, Judge Martin asserted that the Supreme Court's intention in *Smith* had been to institute a "measurable standard" for evaluating the validity of preemptive rights, and that "[i]t would be anomalous to now hold that we should 'wait and see' if the duration of a preemptive right is reasonable."[109]

In addition to refusing to accept the applicability of wait-and-see in North Carolina, *Peele* expressly rejected the argument that preemptive rights create vested interests.[110] Rather than agreeing with the plaintiff's assertion that the preemptive right "vested immediately in the grantors and their heirs," the court maintained that a preemptive right is a contingent future interest, which does not vest until the right is used.[111] Because it was not certain that the right could or would be used within the perpetuities period, the court held the right of first refusal invalid as a violation of the rule against perpetuities.[112]

Nichols v. Lake Toxaway Co.,[113] further added to the development of the law regarding preemptive rights in North Carolina. *Nichols* involved a right of first refusal retained by a corporate grantor, its heirs or

106. In addition to the cases cited *infra*, *see* Levan v. Eidson, 86 N.C. App. 100, 103, 356 S.E.2d 396, 397-98 (1987) (holding invalid a preemptive right contained in a contract for failure to have a reasonable price provision); Coxe v. Wyatt, 83 N.C. App. 131, 134, 349 S.E.2d 75, 77 (1986) (invalidating a preemptive right contained in a deed for failure to comply with the rule against perpetuities), *disc. review denied*, 319 N.C. 103, 353 S.E.2d 107 (1987); Snipes v. Snipes, 55 N.C. App. 498, 504, 286 S.E.2d 591, 594 (upholding the validity of a preemptive right contained in a lease agreement), *aff'd per curiam*, 306 N.C. 373, 293 S.E.2d 187 (1982).

107. 56 N.C. App. 555, 289 S.E.2d 890, *disc. review denied*, 306 N.C. 386, 294 S.E.2d 210 (1982).

108. *Id.* at 556, 289 S.E.2d at 891. The right of first refusal was also limited as to price, although this restraint was not addressed by the court of appeals. *Id.* at 557, 289 S.E.2d at 891.

109. *Id.* at 560, 289 S.E.2d at 893-94; *see supra* notes 65-67 and accompanying text for a discussion of the wait-and-see doctrine.

110. *Id.* at 561, 289 S.E.2d at 893; *see supra* note 77 for a discussion of the assertion that preemptive rights create vested interests.

111. *Id.* at 561, 289 S.E.2d at 893.

112. *Id.* at 561, 289 S.E.2d at 893-94.

113. 98 N.C. App. 313, 390 S.E.2d 770, *disc. review denied*, 327 N.C. 141, 394 S.E.2d 178 (1990).

assigns on certain real property conveyed to an individual grantee.[114] Although the court readily recognized the perpetual nature of the preemptive right from the standpoint of the grantor, it concentrated instead on the right's application to the grantee.[115] Because the right was exercisable only against the individual grantee, and not against the grantee's heirs or assigns, the court determined that the right was personal, and consequently not in violation of the rule against perpetuities.[116] *Nichols* thus illustrates a scenario in which a corporate grantor, although retaining for itself a perpetual right of first refusal, avoided violating the rule.

In *Village of Pinehurst*, the court rigidly adhered to these preexisting standards for evaluating the validity of a right of first refusal.[117] Persuaded neither by the minimal nature of the restraint created by the Village of Pinehurst's preemptive right, nor by the fact that the right was held by a governmental entity for the purposes of a commercial transaction, the court reached conclusions falling well within the letter, but far outside of the spirit of the rule against perpetuities. In applying the rule to invalidate the Village of Pinehurst's preemptive right, the court overlooked both the rule's policy justifications and the language of *Smith*.[118] In *Village of Pinehurst* the court missed an excellent opportunity to interpret North Carolina law in a way that would be both truthful to the past, yet cognizant of the realities of the present.

One of the main policy rationales of the rule against perpetuities was to prevent the "dead hand" of the past from restricting the use and alienability of property in the present.[119] Because the right of first refusal is, at most, a mild restraint on alienation, it seems incongruous for the court to use the rule to invalidate this right. A right of first refusal may be considered a mild restraint on the alienability of property in that it has the potential to deter would-be buyers by creating uncertainty and unwillingness to invest time and energy into purchasing the burdened property. It may arguably have just the opposite effect.[120] Because a right of first refusal tied to the market price provides at least two potential purchasers if the property owner decides to sell, such a right may actually encourage the alienability of property.[121] Therefore, a right of first re-

114. *Id.* at 314, 390 S.E.2d at 771.

115. *Id.* at 317-18, 390 S.E.2d at 773-74.

116. *Id.* at 318, 390 S.E.2d at 773-74.

117. *See supra* notes 35-47.

118. 301 N.C. 58, 269 S.E.2d 608 (1980); *see supra* notes 95-105 and accompanying text.

119. Dukeminier, *supra* note 46, at 1868; *see supra* notes 53-55.

120. *See, e.g.*, Watergate Corp. v. Reagan, 321 So.2d 133, 136 (Fla. App. 1975) (standing for the proposition that a preemptive right "enhance[s] [marketability] because the seller has two potential buyers instead of one").

121. The two potential buyers are the bona fide purchaser and the holder of the preemptive

fusal, regardless of duration, does not appear to be an "unreasonable restraint on alienation." In maintaining that a preemptive right which violates the rule is an unreasonable restraint on alienation,[122] however, the North Carolina Supreme Court may have unnecessarily added further confusion to the rule against perpetuities.

Just as the court in *Village of Pinehurst* ignored the policy behind the rule against perpetuities, it also disregarded the sage advice of the *Smith* court.[123] While *Smith* did introduce the reasonable price-reasonable time analysis for determining the validity of a preemptive right, it also recognized that "some direct restraints on alienation are premissible [sic] where the goal justifies the limit on the freedom to alienate . . . or where the interference with alienation in a particular case is so negligible that the major policies furthered by freedom of alienation are not materially hampered."[124] By refusing to make an exception to the rigid common-law rule, the court in *Village of Pinehurst* clearly neglected to consider fully the merits of preemptive rights in many modern transactions.[125]

As a practical matter, *Village of Pinehurst* should serve as a warning to North Carolina practitioners. While many attorneys may believe that only trusts and estates lawyers need be aware of the rule's pitfalls, *Village of Pinehurst* makes clear that the rule against perpetuities is alive and well, even in the unlikely area of governmental and commercial transactions. As evidence from other jurisdictions indicates, the frequency of violations of the rule against perpetuities is significantly greater in commercial transactions than in the realm of donative transfers.[126] By limiting the term of a preemptive right to twenty-one years,[127] rights accruing

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right. Should the holder of the right of first refusal reject the offer to buy the property, the owner is left with an equally attractive buyer in the third-party bona fide purchaser.

122. *See Village of Pinehurst*, 330 N.C. at 729, 412 S.E.2d at 646-47.

123. *See* Smith v. Mitchell, 301 N.C. 58, 269 S.E.2d 608 (1980).

124. *Id.* at 62, 269 S.E.2d at 611 (citations omitted). *See supra* note 38 for a discussion of whether *Smith*'s reasonableness requirement mandates the use of the rule against perpetuities, or merely affirms that an interest vesting within the perpetuities period is valid.

125. For the proposition that preemptive rights "are a useful tool for creating planned and orderly development," see *Smith* 301 N.C. at 63-64, 269 S.E.2d at 612.

126. Ira Mark Bloom, *Perpetuities Refinement: There Is An Alternative*, 62 WASH. L. REV. 23, 76 (1987) (citing to a study conducted over the period 1978 to 1985). While application of the rule against perpetuities may seem more obvious when dealing with intra-family donative transactions, when creating preemptive rights that are to be held by a corporation or governmental body against a like entity, particular care should be taken to ensure that the perpetuities period is not violated.

127. *See* Mizell v. Greensboro Jaycees, 105 N.C. App. 284, 412 S.E.2d 904 (1992). Deciding the case only one month after *Village of Pinehurst*, the court of appeals held in *Mizell* that in order to be valid, a right of first refusal held by one corporation against another must be

to a business or municipality may be made to comport with the rule, and thus avoid both the rule's venom and costly malpractice liability.

Because the state supreme court opted to maintain the status quo, several options are available to the North Carolina legislature, should it desire to adopt a more enlightened view of the rule against perpetuities. A broad solution available to the General Assembly would be to adopt the wait-and-see doctrine,[128] either across the board, or specific to certain types of preemptive rights.[129] While the legislature could limit the situations to which the doctrine would apply (i.e., only to the government, only in commercial conveyances, etc.) such a step would alleviate the inequity which is wrought by a strict interpretation of the rule against perpetuities.

Another possible statutory response would be to codify the *cy pres* doctrine,[130] thereby allowing judicial review and reformation of inappropriately drafted rights of first refusal. By permitting reconstruction of the offending instruments to effect the likely intentions of the grantor, the legislature could prevent the rule against perpetuities from wreaking havoc with misdrafted but well-intentioned instruments.[131]

Alternatively, the General Assembly could adopt the Uniform Statutory Rule Against Perpetuities.[132] By enacting the Uniform Rule in whole or in part, North Carolina would not only be following a growing nationwide trend,[133] but would also be doing its citizens a great service by removing the onerous impediments that the unwieldy and antiquated common law rule places on conveyances.

Although each of the preceding solutions would cure the problems created by the rule against perpetuities, it may appear inappropriate for the General Assembly to alter all applications of the rule, thereby refuting hundreds of years of North Carolina case law in one hasty session.

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limited "to 21 years 'in gross' [as] no life in being is to be considered." *Id.* at 287, 412 S.E.2d at 906-07.

128. For a more thorough discussion of the wait-and-see doctrine, see *supra* notes 64-67 and accompanying text.

129. *See* Chaffin, *supra* note 65, at 345-47.

130. For a more comprehensive treatment of *cy pres* see *supra* notes 68-70 and accompanying text.

131. Although *cy pres* would be a powerful equitable remedy for the courts, it is not without its detractions. As pointed out by one commentator, a major drawback to *cy pres* is that "it gives courts broad discretionary power to rewrite instruments without providing formalistic guidelines." James S. Chase, Note, *Perpetuity Reform: How Much Do We Need?*, 11 PROB. L. J. 1, 10 (1992).

132. For a more thorough discussion of the Uniform Statutory Rule Against Perpetuities, see *supra* notes 71-73 and accompanying text.

133. See *supra* note 71 for a list of those states having adopted the Uniform Rule Against Perpetuities.

Perhaps, then, the best answer to the dilemma pointed out by *Village of Pinehurst* would be to adopt a more limited response, enacting legislation to take only those preemptive rights occurring in a commercial or governmental context out of the scope of the rule.[134] Such a measure would address the historical and practical incongruities created by applying the rule against perpetuities to preemptive rights in commercial or governmental dealings, while leaving unaffected rights of first refusal in private party transactions. In addition, this solution would create a bright-line test for determining when to apply the rule against perpetuities to preemptive rights, and would not require more complex judicial determinations as would be involved in applying the doctrines of *cy pres* or wait-and-see.

While *Village of Pinehurst* does not enunciate a new standard, it does highlight the rigidity with which North Carolina courts will apply the rule against perpetuities to invalidate preemptive rights. The case displays the unwillingness of the North Carolina bench to stray from old common law standbys, even when faced with modern commercial and governmental needs. By failing to recognize both the historical bases for the rule against perpetuities and modern day realities, the North Carolina Supreme Court passed over an opportunity to improve the law in this state. Favoring the security of precedent over the logic of a much deserved exception, the court reinforced the primacy of the past over a vision of the future.

WILLIAM L. O'QUINN, JR.

134. *See* Bloom, *supra* note 126, at 76 (advocating this approach in lieu of wait-and-see).

Symmetry or Antiquity—The North Carolina Supreme Court Adopts the *Ruark* Standard for Severe Emotional Distress in the Intentional Infliction Context: *Waddle v. Sparks*

Since the North Carolina Supreme Court first recognized a cause of action for mental anguish received as a result of the negligent delivery of a telegram in *Young v. Western Union Telegraph Co.*,[1] a tension has arisen between the desire of the court to recognize genuine claims of mental distress and the court's long-standing interest in keeping the "floodgates of litigation" closed.[2] In addition to this tension, the courts of North Carolina, along with courts in other jurisdictions, face pressure to expand the list of claims for which plaintiffs may recover for psychological harm.[3]

In this context, the North Carolina Supreme Court recently considered a claim of intentional infliction of emotional distress arising from alleged sexual harassment. In *Waddle v. Sparks*,[4] the court held that the plaintiff's forecast of evidence failed to show that she had suffered the requisite "severe emotional distress" required to sustain an action for intentional infliction of emotional distress.[5] In reaching this conclusion, the court adopted for *intentional* tort claims the definition of severe emotional distress first enunciated in *Johnson v. Ruark Obstetrics and Gynecology Associates, P.A.*[6] in the context of a claim for *negligent* infliction of emotional distress.[7] Although the *Waddle* court clearly demonstrated a desire to elevate the standard for severe emotional distress, the exact nature of the standard is unclear. Adopting the same definition of severe

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1. 107 N.C. 370, 386, 11 S.E. 1044, 1049 (1890).

2. *See* Robert G. Byrd, *Recovery for Mental Anguish in North Carolina*, 58 N.C. L. REV. 435, 435-42 (1980) (discussing sources of judicial reluctance to allow recovery for mental anguish and tracing the development of the law in this area despite that reluctance).

3. *See* Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 51 (1988) (urging litigation along with other measures to curb employer abuse of workers); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 181 (1982) (advocating an independent tort for injury resulting from racial epithets); Dean M. Richardson, *Racism: A Tort of Outrage*, 61 OR. L. REV. 267, 267 (1982) (analyzing the potential of intentional infliction of emotional distress as a means of recovery for persons harmed by racist conduct); Benson A. Wolman, *Verbal Sexual Harassment on the Job as Intentional Infliction of Emotional Distress*, 17 CAP. U. L. REV. 245, 271 (1988) ("[T]he future of sexual insult [will] be bound up with the more restrained but still evolving tort of intentional and reckless infliction of emotional distress." (citation omitted)).

4. 331 N.C. 73, 414 S.E.2d 22 (1992).

5. *Id.* at 85, 414 S.E.2d at 28. *See infra* note 52 and accompanying text.

6. 327 N.C. 283, 395 S.E.2d 85 (1990).

7. *See infra* notes 88-98 and accompanying text.

emotional distress for both the negligent and intentional contexts also raises several fundamental questions concerning the nature of the torts of intentional and negligent infliction of emotional distress.

This Note begins by analyzing the decision of the court.[8] The Note provides background information on the development of the tort of intentional infliction of emotional distress and the "severe emotional distress" element of that tort.[9] The Note then analyzes the implications of the holding and concludes that, while the definition of severe emotional distress adopted by the court in *Waddle* should make recovery for intentional infliction of emotional distress more difficult for plaintiffs, several ambiguities remain.[10] Finally, the Note examines the implications of adopting identical definitions of severe emotional distress in the context of both negligent and intentional infliction of emotional distress.[11]

Joann Waddle began working for defendant Guilford Mills, Inc. in 1970.[12] In 1983, defendant Jack Sparks became Waddle's supervisor in the Knitting Department of the Wendover plant.[13] From this time until Waddle was transferred to another shift in 1986, Waddle claimed that a series of events occurred that caused her to experience emotional distress.[14] Most of Waddle's forecast of evidence concerned the extreme and outrageous conduct element. Waddle claimed, for example, that Sparks touched her breasts on two occasions and frequently used "obscene language of a sexual nature."[15] Regarding the severe emotional distress element, however, Waddle had little more than conclusory allegations. In her complaint, Waddle alleged that she was continually upset and frequently cried; at her deposition, though, Waddle testified to only one unrelated crying incident.[16] Waddle also testified that her doctor had prescribed "nerve pills" in 1986, but that she took them on a regular basis only during episodes of family-related stress.[17] Finally, no evidence indicated that these incidents caused Waddle to fear or unreasonably dread going to work.[18]

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8. *See infra* notes 12-33 and accompanying text.

9. *See infra* notes 34-85 and accompanying text.

10. *See infra* notes 86-98 and accompanying text.

11. *See infra* notes 99-107 and accompanying text.

12. *Waddle*, 331 N.C. at 77, 414 S.E.2d at 24.

13. *Id.*

14. *Id.* at 80, 414 S.E.2d at 26.

15. *Id.* at 78-79, 414 S.E.2d at 24-25. Waddle also alleged that Sparks made suggestive remarks in her presence on three occasions. *Id.* at 78-79, 414 S.E.2d at 24-25.

16. *Id.* at 85, 414 S.E.2d at 28.

17. *Id.*

18. *Id.* The only times Waddle missed work during her employment at Guilford Mills were when her mother was hospitalized and when her daughter eloped. *Id.*

Waddle filed a complaint on April 20, 1988, alleging both intentional and negligent infliction of emotional distress against Sparks, as well as negligent hiring and retention of Sparks by Guilford Mills.[19] The defendants subsequently filed motions for summary judgment contending that Waddle had not forecast evidence sufficient to raise a material issue of fact.[20] The trial court granted the motions as to all counts and Waddle appealed.[21]

The North Carolina Court of Appeals reversed the trial court, holding that Waddle had alleged sufficient facts to raise a question whether Sparks' conduct was extreme and outrageous, his actions were intentional, and Waddle's distress was severe.[22] Judge Lewis dissented, disagreeing with the court's holding that the forecast of evidence supported the elements of extreme and outrageous conduct, intent, and severe emotional distress. Judge Lewis found "hardly a showing of distress at all, much less severe distress."[23]

The defendants appealed,[24] and the supreme court reversed the court of appeals, holding that the summary judgment against Waddle as to her claim for intentional infliction of emotional distress should have been affirmed.[25] In an unanimous opinion written by Chief Justice Exum, the court concentrated on the severe emotional distress element,[26]

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19. *Id.* at 76, 414 S.E.2d at 23. Jacqueline Simpson filed a joint complaint with Waddle bringing similar claims. The trial court granted the defendants' motions for summary judgment against Simpson's claims. Both the court of appeals and the supreme court affirmed, holding that the statute of limitations barred any claims brought by Simpson. *Id.* at 85, 414 S.E.2d at 28. As the supreme court observed, Simpson "was not able to state a date—even within a year—when any one of the various specific incidents she alleges against Sparks occurred." *Id.* at 87, 414 S.E.2d at 29.

20. *Id.*

21. Neither plaintiff appealed the negligent infliction of emotional distress claim against Sparks or the negligent hiring claim against Guilford Mills. *Id.* at 76, 414 S.E.2d at 23.

22. Waddle v. Sparks, 100 N.C. App. 129, 133, 394 S.E.2d 683, 686 (1990), *rev'd*, 331 N.C. 73, 414 S.E.2d 22 (1992).

23. *Id.* at 137, 394 S.E.2d at 688 (Lewis, J., dissenting).

24. The defendants appealed as of right on the basis of Judge Lewis' dissent concerning the intentional infliction of emotional distress issue. *Waddle*, 331 N.C. at 76, 414 S.E.2d at 23. North Carolina law provides for appeal as of right when there is a split panel in the court of appeals. N.C. GEN. STAT. § 7A-30(2) (1989). Both defendants and plaintiff Simpson petitioned for and were granted discretionary review of other issues. Waddle v. Sparks, 328 N.C. 97, 402 S.E.2d 429 (1991); Waddle v. Sparks, 328 N.C. 97, 402 S.E.2d 428 (1991).

25. *Waddle*, 331 N.C. at 85, 414 S.E.2d at 28. The supreme court also dismissed the negligent retention claim against defendant Guilford Mills. *Id.* at 87, 414 S.E.2d at 30.

26. The court refused to consider whether Sparks' conduct constituted extreme and outrageous conduct, stating: "Because we believe plaintiff Waddle has failed to produce a sufficient forecast of evidence on [the severe emotional distress] element of her claim, we need not, and therefore, do not address the remaining elements of this tort." *Id.* at 83, 414 S.E.2d at 27. By refusing to address the extreme and outrageous conduct element, the court left for another time the difficult question of determining when sexual harassment constitutes extreme and

noting that, although this was the first time the court had the opportunity to focus on this element of the tort of intentional infliction of emotional distress, it had considered "severe emotional distress" in the context of a claim for negligent infliction of emotional distress.[27] In *Johnson v. Ruark Obstetrics and Gynecology Associates, P.A.*,[28] the court clarified the requisite level of severity of emotional distress by stating:

> "[S]evere emotional distress" means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.[29]

The *Waddle* court adopted this definition as the standard for claims of intentional infliction of emotional distress, justifying the "high standard of proof" on the grounds of "symmetry."[30] The court further bolstered its argument for adopting this standard by citing the second Restatement of Torts, upon which North Carolina's tort of intentional infliction of emotional distress is primarily based.[31]

Applying the standard, the court found that Waddle had not forecast evidence that would show the degree of emotional distress needed to maintain a cause of action for intentional infliction of emotional distress.[32] There was no "medical documentation of plaintiff's alleged 'severe emotional distress' nor any other forecast of evidence of 'severe and disabling' psychological problems within the meaning of the test laid down in *Ruark*."[33] Accordingly, the court concluded that the plaintiff's forecast of evidence of severe emotional distress was insufficient to overcome the defendant's motion for summary judgment.[34]

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outrageous conduct. At present, the most authoritative statement from a North Carolina appellate court in this context was made in Hogan v. Forsyth County Country Club, Co., 79 N.C. App. 483, 340 S.E.2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 14 (1986). In *Hogan*, the court stated that "[n]o person should have to be subjected to non-consensual sexual touchings, constant suggestive remarks and on-going sexual harassment." *Id.* at 491, 340 S.E.2d at 121. For further discussion of *Hogan*, see *infra* notes 69-75.

27. *Waddle*, 331 N.C. at 83, 414 S.E.2d at 27.

28. 327 N.C. 283, 395 S.E.2d 85 (1990). In holding that the plaintiffs had stated a claim for negligent infliction of emotional distress, the North Carolina Supreme Court overruled well established precedents. First, the court held that physical injury or a physical manifestation was not necessary to recover for negligent infliction of emotional distress. *Id.* at 304, 395 S.E.2d at 97. Second, the Court held that the plaintiffs could recover for emotional distress arising from fear for the safety of others. *Id.* at 305-306, 395 S.E.2d at 97-98.

29. *Id.* at 304, 395 S.E.2d at 97.

30. *Waddle*, 331 N.C. at 83, 414 S.E.2d at 27 (1992).

31. *See infra* notes 42-58 and accompanying text.

32. *Id.* at 85, 414 S.E.2d at 28.

33. *Id.*

34. *Id.*

The North Carolina Supreme Court first explicitly recognized the separate tort of intentional infliction of emotional distress in the 1979 case, *Stanback v. Stanback*.[35] The plaintiff alleged that her husband willfully and maliciously breached their separation agreement, causing her to "suffer great embarrassment, humiliation, and degradation in the eyes of her friends and the public."[36] The court considered, *inter alia*, whether to award the plaintiff punitive damages for the defendant's willful breach of a separation agreement. It held that when an *identifiable tortious act* accompanies a breach of contract, the tort committed may be the grounds for recovery of punitive damages.[37] In considering whether an identifiable tortious act had been committed, the court found that the "[p]laintiff's allegations are sufficient to state a claim for what has become essentially the tort of intentional infliction of emotional distress."[38] The court then quoted with approval the statement from Dean Prosser[39] that liability arises when a "defendant's 'conduct exceeds all bounds usually tolerated by decent society' and the conduct 'causes mental distress

35. 297 N.C. 181, 254 S.E.2d 611 (1979). The law regarding recovery for emotional distress in North Carolina developed in several stages. The North Carolina Supreme Court first allowed a cause of action for recovery for "mental anguish" in Young v. Western Union Telegraph Co., 107 N.C. 370, 386, 11 S.E. 1044, 1049 (1890). In *Young*, the court held that the plaintiff could recover for mental anguish caused by the defendant's negligent delivery of a telegraph message. *Id.* The *Young* reasoning, however, was never extended beyond similar factual circumstances.

Another line of cases used a forcible trespass theory to allow recovery for mental anguish. *See, e.g.*, Freeman v. General Motors Acceptance Corp., 205 N.C. 257, 171 S.E. 63 (1933); Saunders v. Gilbert, 156 N.C. 463, 72 S.E. 610 (1911). In the watershed case of Kirby v. Jules Chain Stores Corp., 210 N.C. 188, 188 S.E. 625 (1936), the court rejected the contention that the plaintiff could only recover on the basis of forcible trespass. Instead, the court held that the plaintiff could recover for fright or fear which resulted in a physical manifestation of the distress. *Id.* at 812-13, 188 S.E. at 627. Although its holding required a physical injury or manifestation of the distress, the *Kirby* court recognized for the first time that the interest to be protected—freedom from mental or emotional distress—was separate from the interests protected by other torts.

For a more extensive examination of the development of the law regarding recovery for emotional distress in North Carolina, see Byrd, *supra* note 2, at 435-42, and Robert H. Sasser, III, Note, *Torts — Intentional Infliction of Emotional Distress: North Carolina and the Restatement*—Dickens v. Puryear, 18 WAKE FOREST L. REV. 624, 631-36 (1982).

36. *Stanback*, 297 N.C. at 186, 254 S.E.2d at 616.

37. *Id.* at 196, 254 S.E.2d at 621. The plaintiff alleged that because the defendant had breached their separation agreement, she had insufficient funds to pay a deficiency assessed by the Internal Revenue Service (I.R.S.). The deficiency was assessed when the I.R.S. disallowed the plaintiff's income tax deduction for her attorneys' fees. The I.R.S. filed a tax lien against her home, which became a matter of public record, and consequently humiliated the plaintiff. *Id.* at 186, 254 S.E.2d at 616.

38. *Id.*

39. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 56 (5th ed. 1984).

of a very serious kind.' "[40] While the language of the *Stanback* court paralleled the Restatement,[41] the court did not expressly adopt the Restatement's definition. Indeed, in reconciling the ruling with prior decisions, the court stated that, in North Carolina, physical injury was necessary to recover under the tort, a position expressly rejected by the Restatement.[42] Because the requirement of a physical injury was inconsistent with the Restatement, a tension arose between the definition of intentional infliction of emotional distress adopted by the court in *Stanback* and the definition propounded by the Restatement.

In *Dickens v. Puryear*,[43] the court resolved this conflict by adopting the Restatement position and overruling *Stanback* to the extent that it required physical injury or a physical manifestation of emotional distress.[44] In *Dickens*, the plaintiff, a thirty-one year-old male, allegedly had sexual relations with the defendant's seventeen year-old daughter.[45] Upon learning of the affair, the defendant lured the plaintiff to an isolated part of Johnston County and, together with four others, severely beat the plaintiff.[46] The defendant also allegedly brandished a knife and threatened to castrate the plaintiff.[47] When the beating stopped, the defendant admonished the plaintiff to "go home, pull his telephone off the wall, pack his clothes, and leave the state of North Carolina; otherwise he would be killed."[48]

Because the statute of limitations barred recovery for the battery and assault claims,[49] the court considered whether the plaintiff could recover for the emotional distress suffered as a result of the parting threat. The court held that the plaintiff had made a factual showing sufficient to overcome the motion for summary judgment.[50] In so holding, the court clarified the discrepancy between *Stanback* and the Restatement by over-

40. *Stanback*, 297 N.C. at 196, 254 S.E.2d at 622 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 56 (4th ed. 1971)).

41. *See infra* notes 51-58 and accompanying text.

42. *Stanback*, 297 N.C. at 198-99, 254 S.E.2d at 623. The Court held that the humiliation suffered by the plaintiff in *Stanback* satisfied the requirement of physical injury because "[t]he nerves are as much a part of the physical system as the limbs, and in some persons are very delicately adjusted and when 'out of tune' cause excruciating agony." *Id.* at 199 n.1, 254 S.E.2d 623 n.1 (quoting Kimberly v. Howland, 143 N.C. 398, 403-04, 55 S.E. 778, 780 (1906)).

43. 302 N.C. 437, 276 S.E.2d 325 (1981).

44. *Id.* at 448-49, 276 S.E.2d at 332-33.

45. *Id.* at 439, 276 S.E.2d at 327.

46. *Id.*

47. *Id.*

48. *Id.* at 440, 276 S.E.2d at 327.

49. *See id.* at 444, 276 S.E.2d at 330.

50. *Id.* at 455, 276 S.E.2d at 337.

ruling *Stanback*'s physical injury requirement,[51] and officially adopting the Restatement's definition as the basis of intentional infliction of emotional distress in North Carolina.

Section 46 of the Restatement provides that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."[52] Thus, the Restatement establishes four elements for the tort of intentional infliction of emotional distress: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress.[53]

The comments following section 46 further define and illustrate the requirements of each element of the tort. Extreme and outrageous conduct is conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[54] Comment (d) to section 46 states that "liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppression or other trivialities."[55] Finally, the comments note that "plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind."[56]

Concerning the severe emotional distress element, the Restatement explains that "[t]he law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it."[57] Among the factors to be considered when determining whether the emotional distress is severe are the intensity and duration of the distress; "in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed."[58] The Restate-

51. *Id.* at 448-49, 276 S.E.2d at 332-33. The court stated, "After revisiting *Stanback* . . . we are satisfied that the *dictum* in *Stanback* was not necessary to the holding and in some respects actually conflicts with the holding. We now disapprove it." *Id.* at 448, 276 S.E.2d at 332.

52. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

53. The courts of North Carolina often combine the element of intent with the element of causation. A typical formulation is as follows: "The elements of [intentional infliction of emotional distress] consist of: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress." Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 487-88, 340 S.E.2d 116, 119, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 14 (1986).

54. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

55. *Id.*

56. *Id.*

57. *Id.* § 46 cmt. j.

58. *Id.*

ment gives further guidance that "[i]t is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed."[59]

Armed with these principles, North Carolina appellate courts have considered a variety of cases involving claims of intentional infliction of emotional distress since *Dickens*.[60] In these cases, the courts have focused their analysis on the conduct of the defendant, without considering the severity of the plaintiff's distress.[61] As a result, before *Waddle*, no workable standard developed for determining whether severe emotional distress existed. In addition, courts have shown a tendency to let the jury decide whether the emotional distress was severe.[62]

Although in some cases the defendant had been held to have lacked the requisite intent or recklessness,[63] and in one case the court found a qualified privilege,[64] most of the cases since *Dickens* have stressed the outrageous conduct element.[65] Until *Waddle*, no case denied the plaintiff recovery based on a lack of severe emotional distress. The sole North Carolina Supreme Court case addressing intentional infliction of emotional distress since *Dickens*, *West v. King's Department Stores, Inc.*,[66] reflects this focus on the defendant's conduct. In *West*, a store manager detained the plaintiffs on suspicion of stealing two hand-trucks.[67] The court closely scrutinized the defendant's conduct, concluding that the conduct was sufficient to state a claim of emotional distress.[68] The court

59. *Id.*

60. For analysis of the tort of intentional infliction of emotional distress in North Carolina, see CHARLES E. DAYE & MARK M. MORRIS, NORTH CAROLINA LAW OF TORTS §§ 5.10-5.40 (1991), and 1 WILLIAM S. HAYNES, NORTH CAROLINA TORT LAW §§ 11-1 to 11-15 (1989).

61. *See infra* notes 62-75 and accompanying text.

62. *See infra* notes 76-80 and accompanying text.

63. *E.g.*, Mullis v. The Pantry, Inc., 93 N.C. App. 591, 594, 378 S.E.2d 578, 580, *disc. rev. denied*, 325 N.C. 272, 384 S.E.2d 517 (1989); Stack v. Mecklenburg Co., 86 N.C. App. 550, 555, 359 S.E.2d 16, 19, *disc. rev. denied*, 321 N.C. 121, 361 S.E.2d 597 (1987).

64. Troxler v. Charter Mandala Ctr., Inc., 89 N.C. App. 268, 272-73, 365 S.E.2d 665, 669 *disc. rev. denied* 322 N.C. 838, 371 S.E.2d 284 (1988).

65. *E.g.*, McKinney v. Avery Journal, Inc., 99 N.C. App. 529, 534, 393 S.E.2d 295, 298, *disc. rev. denied*, 327 N.C. 636, 399 S.E.2d 123 (1990); McKnight v. Simpson's Beauty Supply, 86 N.C. App. 451, 454, 358 S.E.2d 107, 109 (1987); Trought v. Richardson, 78 N.C. App. 758, 763, 338 S.E.2d 617, 620, *disc. rev. denied* 316 N.C. 557, 344 S.E.2d 18 (1986).

66. 321 N.C. 698, 365 S.E.2d 621 (1988).

67. *Id.* at 700, 365 S.E.2d 622-23.

68. *Id.* at 706, 365 S.E.2d 626. The court quoted approvingly from the dissent in the court of appeals:

> [F]ew things are more outrageous and more calculated to inflict emotional distress on innocent store customers that have paid their good money for merchandise and have in hand a document to prove their purchase than for the seller or his agent, disdaining to even examine their receipt, to repeatedly tell them in a loud voice in the pres-

then briefly addressed the severe emotional distress element, summarily noting that each of the plaintiffs required medical treatment.[69]

In the only case in which a North Carolina appellate court has addressed the question of intentional infliction of emotional distress arising out of sexual harassment, *Hogan v. Forsyth Country Club Co.*,[70] the court also focused its attention on the extreme and outrageous conduct element. In *Hogan*, the plaintiffs brought an action against their former employer for intentional infliction of emotional distress, alleging sexual advances, profanity, threats, and unreasonable physical demands.[71] The trial court granted the defendant's motion for summary judgment on all counts.[72] In affirming the trial court in all but one count, the court of appeals scrutinized the conduct element of intentional infliction of emotional distress.[73] According to the court, the only claim that forecast sufficient evidence to go to the jury involved the alleged sexual harassment. Regarding that claim the court declared: "No person should have to be subjected to non-consensual sexual touchings, constant suggestive remarks and on-going sexual harassment such as that testified to by Cornatzer . . . ."[74] Concerning the severe emotional distress element, the court noted that the plaintiff became "very nervous, anxious, humiliated and depressed, to the extent that she was required to seek medical treatment."[75]

A corollary to the North Carolina courts' emphasis on the outrageous conduct element has been the tendency of the court of appeals to let the jury decide the question of whether the emotional distress was severe. In *McKnight v. Simpson's Beauty Supply, Inc.*,[76] for example, the plaintiff attempted to recover for intentional infliction of emotional distress due to the defendant's breach of a contract.[77] On appeal,[78] the

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ence of others that they stole the merchandise and would be arrested if they did not return it.

Id. at 705, 365 S.E.2d at 625. The court also noted that, although physical injury and foreseeability of injury are not required for intentional infliction of emotional distress, "both of these factors go to the outrageousness of the store manager's conduct." *Id.*

69. *Id.* at 705, 365 S.E.2d at 626.

70. 79 N.C. App. 483, 340 S.E.2d 116 (1986).

71. *Id.* at 485-86, 340 S.E.2d at 118-19. The unreasonable physical demands were stringent physical tasks required of a pregnant woman. *Id.*

72. *Id.* at 486, 340 S.E.2d at 119.

73. *Id.* at 492-93, 340 S.E.2d at 122-23.

74. *Id.* at 491, 340 S.E.2d at 121.

75. *Id.* at 490, 340 S.E.2d at 121.

76. 86 N.C. App. 451, 358 S.E.2d 107 (1987).

77. *Id.* at 451, 358 S.E.2d at 108. The plaintiff claimed that the defendant breached a written contract to employ the plaintiff for two years, and that the defendant violated an oral contract to pay for moving expenses. The exact nature of the emotional distress the plaintiff

court held that the defendant's conduct was not outrageous, but the court observed that the plaintiff would have been allowed a jury trial on the severe emotional distress issue. The court stated that the plaintiff "only had to present competent evidence that he suffered emotional distress and that it resulted from defendant's conduct; and his evidence that he was 'shocked' and 'upset' following the abrupt, unexplained termination of his employment without cause met that requirement."[79]

The court of appeals decision in *Waddle* reflected this tendency to defer the question of severe emotional distress to the jury. The majority of a split panel would have allowed the severe emotional distress issue to go to the jury despite very little proof forecast by the plaintiff. Judge Orr, writing for the court, stated:

> Waddle alleged that she was humiliated and upset over the situation at work with Sparks' alleged sexual harassment and was intimidated. Viewing this evidence in the light most favorable to Waddle, it is not conclusive proof of emotional distress, *but it at least raises an issue of fact for the jury.*[80]

The emphasis in North Carolina on the defendant's extreme and outrageous conduct may have several explanations. First, as a comment from the Restatement explains, "in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed."[81] In addition, the case that clarified and defined the tort in North Carolina, *Dickens v. Puryear*,[82] could be viewed as an application of this Restatement maxim. In *Dickens*, the court spent much of the opinion discussing the outrageous conduct element. The *Dickens* court concluded by stating that the actions of the defendant "may be considered in determining . . . the *extent* of plaintiff's mental or emotional distress caused by it."[83] Finally, in *Stanback v. Stanback*,[84] the supreme court held that "humiliation" satisfied the requirement for "serious emotional distress."[85] In combination, these authorities may

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suffered is not clear from the record because the court of appeals did not squarely address the issue. *Id.* at 452, 358 S.E.2d at 108.

78. The trial court ordered a directed verdict against the plaintiff as to the claim for intentional infliction of emotional distress. *Id.* at 451, 358 S.E.2d at 108.

79. *Id.* at 454, 358 S.E.2d at 109.

80. Waddle v. Sparks, 100 N.C. App. 129, 133, 394 S.E.2d 693, 686 (emphasis added), *rev'd*, 331 N.C. 73, 414 S.E.2d 22 (1992).

81. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965).

82. 302 N.C. 437, 276 S.E.2d 325 (1981).

83. *Id.* at 455, 276 S.E.2d at 336 (emphasis added).

84. 297 N.C. 181, 254 S.E.2d 611 (1979).

85. *See id.* at 186, 254 S.E.2d at 616 (noting that the plaintiff suffered "great embarrassment, humiliation and degradation in the eyes of her friends and the public").

have signalled to lower courts that the requirement of severe emotional distress is not stringent, and that their analysis should focus on the extreme and outrageous conduct element.

An examination of the interests protected by the tort of intentional infliction of emotional distress also helps to explain why courts have focused on the outrageous conduct element. Intentional torts generally protect important interests and rights of individuals. As such, a cause of action arises under many traditional intentional torts regardless of actual damage. For example, a cause of action for assault arises as long as the plaintiff is put in apprehension of contact, regardless of whether contact actually occurs.[86] In contrast, for other types of torts, damage is a requisite element of the tort. Given the interest protected, it seems appropriate to focus on the conduct of the defendant to determine whether the conduct was intentional and outrageous, and to allow a cause of action with little showing of emotional distress, since a jury could infer the plaintiff's dignitary interest would be affected by sufficiently outrageous intentional conduct. Indeed, at least one commentator has noted that, in practice, many courts have collapsed the elements of outrageous conduct and severe emotional distress, analyzing only the defendant's conduct to determine whether it is sufficiently outrageous.[87]

The *Waddle* court departed from this reasoning, however, by adopting the *Ruark* definition of severe emotional distress in the context of intentional infliction of emotional distress. The language of the standard,[88] the intent of the court, and the court's application of the standard clearly imply that the court was attempting to significantly raise the standard for severe emotional distress in the intentional infliction context. The court referred to the definition as a "high standard of proof,"[89] and felt the need to bolster this standard by quoting extensively from the comments to Restatement section 46.[90] In addition, the court added emphasis to the words "severe and disabling" when quoting the *Ruark* definition.[91] When considered in the context of the tendency of North Carolina courts to focus on the outrageous conduct element, there can be little doubt that the court intended to reinvigorate the severe emotional distress requirement.

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86. *See* KEETON, ET AL., *supra* note 38, § 10, at 43.

87. *See* Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 47-51 (1982).

88. *See supra* note 28 and accompanying text.

89. *Waddle*, 331 N.C. at 83, 414 S.E.2d at 27.

90. *Id.* at 83-84, 414 S.E.2d at 27-28.

91. *Id.* at 83, 414 S.E.2d at 27.

The definition attempts to raise the standard for severe emotional distress by requiring an element of objectivity. The definition first lists, as examples of severe emotional distress, several psychological conditions which are generally recognized by professionals.[92] The standard requires that any other claimed distress be severe and disabling.[93] Requiring the condition to be disabling increases the degree of objectivity by forcing the plaintiff to allege and prove facts that demonstrate the plaintiff was somehow "disabled." Finally, the requirement that the emotional distress be a condition that is "generally recognized and diagnosed by professionals trained to do so,"[94] suggests that a plaintiff may be required to prove distress by expert medical testimony.

This raises the question of what type of evidence satisfies the proof requirement for severe emotional distress. The requirement that the condition be "generally recognized and diagnosed by professionals trained to do so" implies that the plaintiff must produce medical testimony from experts trained in the psychiatric field. When applying the standard, however, the court noted only that there was "no forecast of *any* medical documentation."[95] This could be read as indicating that any documentation of the condition, by any health care provider, may satisfy this requirement, at least at the summary judgment stage. Regardless of the exact requirement, it appears that the plaintiff must have some medical documentation of the severity of the emotional distress, which serves to ensure that the distress was genuine.

One could argue, though, that the definition does not significantly change the standard for emotional distress. In *Waddle*, there was so little forecast of evidence concerning severe emotional distress that the court could have found the requirement was not satisfied under any standard.[96] Thus, the holding is not particularly helpful in interpreting the definition. In addition, the definition itself arguably creates a loophole by allowing recovery for "any other type of severe and disabling emotional or mental condition."[97] The exact meaning of this phrase is unclear. Finally, when applying the standard, after stating that there was no medical documentation, the court went on to find that there was no "other forecast of evidence of 'severe and disabling' psychological problems."[98]

92. Those examples listed include neurosis, psychosis, chronic depression, and phobia. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 85, 414 S.E.2d at 28 (emphasis added).

96. *See supra* notes 16-18 and accompanying text.

97. *Id.* at 85, 414 S.E.2d at 28.

98. *Id.*

If the severe emotional distress element can only be satisfied by medical documentation, the court should have ended its analysis without looking for other evidence of severe emotional distress.

Assuming that the definition adopted by the *Waddle* court does raise the standard for severe emotional distress, several practical and theoretical concerns are implicated. First, if the standard enunciated in *Waddle* requires medical documentation or expert medical testimony, this will raise the cost of litigation and could deter genuine claims. Conversely, there may be a question of the effectiveness of the new standard in deterring frivolous lawsuits. After all, a requirement for *some kind* of medical documentation is not necessarily a stringent one.

A more fundamental question, however, is whether medical documentation is merely a threshold requirement, necessary only to overcome a motion for summary judgment, or whether the plaintiff will be required to prove the distress at the trial phase by expert medical testimony and medical documentation. That is, once the plaintiff has produced medical documentation that will overcome a motion for summary judgment, will the plaintiff only be allowed to recover for the distress the plaintiff is able to prove at trial by medical documentation and expert medical testimony, or may the plaintiff then introduce other evidence of the plaintiff's distress? The answer to this question has serious ramifications for the continued vitality of the tort of intentional infliction of emotional distress.

Perhaps the most troubling implication of the *Waddle* decision, though, is the court's willingness to treat intentional and negligent infliction of emotional distress similarly. The court justified its adoption of the *Ruark* definition by citing the desirability of symmetry between the intentional and the negligent infliction of emotional distress.[99] While there may be some legitimate reasons for desiring symmetry in this area of the law,[100] adopting the same definition in both contexts ignores important differences between the two torts. The first distinction between these torts is the culpability of the defendant. In the intentional infliction context, the defendant's conduct must be intentional or reckless. In addition, the conduct must be extreme and outrageous.[101] In contrast, the conduct in the negligence context need only be unreasonable. Commen-

99. *Waddle*, 331 N.C. at 83, 414 S.E.2d at 27.

100. In addition to providing clarity to this area of the law, the court is clearly attempting to limit recovery to plaintiffs with genuine claims. To the extent that this definition of severe emotional distress does limit recovery to deserving plaintiffs, this is an appropriate response, but there are countervailing interests which the court does not address in its opinion. *See infra* notes 101-107 and accompanying text.

101. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

tators have noted that a punitive element is inherent in the tort of intentional infliction of emotional distress, while torts involving negligence are not intended to stigmatize the defendant.[102]

The second difference between the torts is the interests the torts are designed to protect. Both torts attempt to protect the plaintiff's interest in freedom from mental disturbance.[103] But to the extent that intentional infliction of emotional distress is similar to traditional intentional torts, the tort of intentional infliction of emotional distress should be more protective of certain interests than negligent infliction of emotional distress. This difference is reflected in the elements of the torts: while in negligence actions the plaintiff must allege and prove damages,[104] for many intentional torts the plaintiff need not allege or prove actual damage.[105]

Many courts have recognized these differences and require a higher standard for severe emotional distress in the negligence context.[106] Making the standard symmetrical denudes the intentional infliction of emotional distress action of its punitive value and decreases its protection of the dignitary interest. By requiring the plaintiff to prove a higher level of severe emotional distress, the court blurs the differences between the two torts.

If the *Waddle* decision is read to require the plaintiff to prove damages by medical testimony, then the distinction between intentional and negligent infliction of emotional distress would be further eroded. Such a requirement would severely restrict the practicality of bringing an intentional infliction of emotional distress claim. Essentially the only remaining difference between the intentional and the negligent claim would be the requirements that the conduct be intentional, and extreme and outra-

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102. *See, e.g.*, Givelber, *supra* note 87, at 54.

103. *See* KEETON ET AL., *supra* note 38, § 12, at 57, § 54, at 361.

104. *See id.*, *supra* note 38, § 30, at 164-65.

105. *See, e.g., id.* § 10, at 43 ("The establishment of the technical cause of action [for assault], even without proof of any harm, entitles the plaintiff to vindication of the legal right by an award of nominal damages.").

106. *See* Blanchard v. Westview Cemetery, Inc., 133 Ga. App. 262, 269, 211 S.E.2d 135, 141 (1974), *modified*, 234 Ga. 540, 216 S.E.2d 776 (1975) (holding that a plaintiff may not recover for pain and suffering unless there is damage to the "purse or person" or the conduct was wanton and intentional); Friedman v. Mutual Broadcasting Sys., Inc., 380 So. 2d 1313, 1314 (Fla. Dist. Ct. App.) (requiring impact, independent tort, or willful or wanton conduct before recovery for emotional distress is allowed), *cert. denied*, 388 So. 2d 1112 (Fla. 1980); Kaiserman v. Bright, 61 Ill. App. 3d 67, 71-72, 377 N.E.2d 261, 264 (1978) ("In Illinois, if there is no physical impact, the right to recovery exists only in those cases where the infliction of severe emotional injuries was intentional."); Iseminger v. Holden, 585 S.W.2d 154, 157 (Mo. App. 1979) (holding that absent outrageous conduct *or* physical injury, recovery for mental distress is not allowed); Chisum v. Behrens, 283 N.W.2d 235, 240 (S.D. 1979) (stating that where an act is negligent, there must be accompanying physical injury, but where the conduct is intentional, recovery may be had for "mental pain" where no physical injury results).

geous.[107] Thus, it would be easier to recover for a negligent infliction claim than for an intentional infliction of emotional distress claim.

While it is uncertain whether the court intended for its decision to be read in that manner, and it is unclear whether the court is intending to require medical proof of damages, the ruling in *Waddle* does resuscitate the severe emotional distress element by adopting the same definition as that used in the negligence context. In adopting the standard, the court signals a retreat from the trend to allow recovery for dignitary interests in intentional infliction of emotional distress. The practical effect of this decision is to erect one more hurdle for plaintiffs to clear before recovering for intentional infliction of emotional distress. Only time and additional cases, however, will determine whether the long-term effects of this decision will banish intentional infliction of emotional distress to antiquity, or merely limit recovery to deserving plaintiffs.

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107. The elements of negligent infliction of emotional distress are: "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause severe emotional distress . . . , and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics and Gynecology Assoc., P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). While this requires that the injury have been reasonably foreseeable, intentional infliction of emotional distress essentially takes this into account by allowing recovery only if the defendant's conduct was extreme and outrageous. *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

Social Host Liability in North Carolina: Did the Supreme Court Get It Right in *Hart v. Ivey*?

In 1991, 561 North Carolinians died and 15,123 were injured in alcohol-related crashes.[1] The "carnage on our public highways caused by drivers . . . who have consumed intoxicating beverages"[2] has prompted the North Carolina courts and legislature in recent years to take steps towards reducing the number of alcohol-related casualties. These measures include the enactment of stiffer penalties for those convicted of driving while intoxicated[3] and the imposition of civil liability on commercial vendors serving alcoholic beverages to customers who subsequently injure others as a result of their intoxication.[4] In *Hart v. Ivey*,[5] the North Carolina Supreme Court extended this "trend to demand wider responsibility from those who drink or serve alcohol"[6] when it declared that party hosts who supply alcohol to guests can be held civilly liable for injuries those guests subsequently cause.[7]

This Note begins with an analysis of the majority and concurring opinions in *Hart*.[8] It chronicles the evolution of North Carolina law regarding imposition of civil liability on social hosts.[9] The Note then examines the wisdom of the court's reasoning in *Hart*[10] and suggests that the court ignored several important criteria in its analysis of the issues presented by the case.[11] Although agreeing with the court's decision under the facts, the Note argues that the standard enunciated by the *Hart* decision is too broad and further contends that policy concerns mandate

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1. Joseph Neff, *Party Hosts Can Be Sued*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 17, 1992, at A1, A17. Nationwide, 22,084 people died and 1.19 million were injured in alcohol-related vehicular accidents in 1990. *Id.*

2. Hart v. Ivey, 102 N.C. App. 583, 590, 403 S.E.2d 914, 919 (1991), *aff'd on other grounds*, 332 N.C. 299, 420 S.E.2d 174 (1992).

3. *See* N.C. GEN. STAT. § 20-138.5 (1992) (creating upon its enactment in 1989 a new offense known as "habitual impaired driving" in order to impose harsher penalties upon those repeatedly convicted of driving while impaired).

4. *See id.* § 18B-120, -121 (1989). Traditionally, no cause of action existed at common law against one furnishing liquor in favor of those injured by the intoxication of the person who consumed the liquor. Hutchens v. Hankins, 63 N.C. App. 1, 5, 303 S.E.2d 584, 587, *disc. rev. denied*, 309 N.C. 191, 305 S.E.2d 734 (1983); *see also infra* notes 46-53 and accompanying text (discussing the enactment of the North Carolina Dram Shop Act).

5. 332 N.C. 299, 420 S.E.2d 174 (1992).

6. Neff, *supra* note 1, at A17.

7. *Hart*, 332 N.C. at 304-05, 420 S.E.2d at 177-78.

8. *See infra* notes 13-35 and accompanying text.

9. *See infra* notes 36-79 and accompanying text.

10. *See infra* notes 80-87 and accompanying text.

11. *See infra* notes 88-112 and accompanying text.

that liability in North Carolina be limited to social hosts serving minor guests.[12]

Sandra Hart suffered injuries when a vehicle driven by John D. Little, Jr. crossed a double yellow line and collided with the vehicle she was driving.[13] Little, who was eighteen years old at the time, had just left a party at which he drank beer.[14] Hart and her husband filed suit alleging that the defendants, by hosting the party and providing beer to Little, were negligent.[15] They based their claims upon: (1) negligence per se pursuant to a violation of *North Carolina General Statutes* section 18B-302, which makes it unlawful to furnish alcoholic beverages to a minor,[16] and (2) common-law negligence arising out of furnishing alcohol to a person the hosts knew or should have known was both under the influence of alcohol and likely to be driving.[17]

The trial court granted defendants' motion to dismiss for failure to state a claim upon which relief could be granted.[18] A divided panel of the North Carolina Court of Appeals reversed the trial court's dismissal of plaintiffs' claims based on section 18B-302,[19] but affirmed the dismissal of the claim based on common-law negligence.[20]

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12. *See infra* notes 113-17 and accompanying text.

13. Hart v. Ivey, 102 N.C. App. 583, 584, 403 S.E.2d 914, 915 (1991), *aff'd on other grounds*, 332 N.C. 299, 420 S.E.2d 174 (1992). Hart suffered permanent leg injuries as a result of the accident. Neff, *supra* note 1, at A17.

14. *Id.* The party was held at the home of defendant Howard L. Ivey, Jr. Ivey and defendants John Rosenblatt, David King, and David Howell, all of whom were under the legal drinking age, purchased keg beer for the party and all invited guests. Brief of the Defendants-Appellees David Howell and David King at 1, *Hart* (No. 8926SC1192). Although the party hosts had charged each male guest two dollars to drink beer, *Hart*, 102 N.C. App. at 584, 403 S.E.2d at 915, all of the parties agreed that defendants were not selling beer and should therefore be treated as social hosts. *Hart*, 332 N.C. at 302, 420 S.E.2d at 176. This stipulation is in accord with the reasoning set forth in Childress v. Sams, 736 S.W.2d 48 (Mo. 1987), in which the Missouri Supreme Court ruled that although minor hosts collected money from their guests, they were social hosts because they collected it to reimburse the cost of the purchase, not to make a profit. The amount of beer Little consumed at the party is not mentioned in the record.

15. *Hart*, 102 N.C. App. at 584, 403 S.E.2d at 915.

16. Section 18B-302(a) provides:

It shall be unlawful for any person to:

(1) Sell or give malt beverages or unfortified wine to anyone less than 21 years old; or

(2) Sell or give fortified wine, spirituous liquor, or mixed beverages to anyone less than 21 years old.

N.C. GEN. STAT. § 18B-302(a) (1989).

17. *Hart*, 102 N.C. App. at 586, 403 S.E.2d at 917.

18. *Id.* at 585, 403 S.E.2d at 916.

19. *Id.* at 583, 403 S.E.2d at 914.

20. *Id.* at 594, 403 S.E.2d at 921.

The North Carolina Supreme Court agreed that the plaintiffs had a claim, albeit on very different grounds.[21] A majority of the court disagreed with the court of appeals' ruling on both issues, holding that the plaintiffs had not stated a claim under section 18B-302, but had stated a claim under common-law negligence.[22]

The court began its analysis by restating the general rule under which a violation of a public safety statute[23] constitutes negligence per se.[24] Generally, a private cause of action may arise against a person who violates a statute if the plaintiff is a member of the class whom the public safety statute is intended to protect and if the plaintiff's injuries are proximately caused by the violation of that statute.[25] Justice Webb, writing for five members of the court, stated that because the statute's sole purpose is to stop minors from consuming alcoholic beverages, section 18B-302 is not a public safety statute.[26] He reasoned that if the statute were designed for the protection of the driving public, it would be related more closely to being under the influence of alcohol and would not be limited to those under the statutory drinking age.[27] The court also noted that Chapter 18B includes no express language indicating that its purpose is to protect the public from intoxicated persons, except in the portion of the statute known as the Dram Shop Act,[28] which the court deemed to have "no application to this case."[29]

The *Hart* court did hold that a social host may be liable under common-law negligence principles, but only when alcoholic beverages are served to a person whom the host knew or should have known was both under the influence of alcohol and shortly thereafter would be driving an automobile.[30] In so holding, the court declared for the first time that

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21. *Hart*, 332 N.C. at 304-05, 420 S.E.2d at 177.

22. *Id.*

23. A public safety statute imposes a duty upon one party for the protection of others. *Id.* at 303, 420 S.E.2d at 177.

24. *Id.*

25. *Id.*; *see, e.g.*, Pasour v. Pierce, 76 N.C. App. 364, 368, 333 S.E.2d 314, 317 *disc. rev. denied*, 315 N.C. 589, 341 S.E.2d 28 (1985) (holding that the violation of a building code is negligence per se); Cowan v. Laughridge Constr. Co., 57 N.C. App. 321, 291 S.E.2d 287 (1982) (holding that when noncompliance with administrative safety regulations is criminal, violation constitutes negligence per se in civil trial).

26. *Hart*, 332 N.C. at 303-04, 420 S.E.2d at 177.

27. *Id.* This reasoning is based on the court's premise that "[a]n adult driver under the influence of alcohol can be as dangerous on the highway as a person under twenty-one years of age." *Id.*

28. N.C. GEN. STAT. §§ 18B-120 to -128. For a discussion of North Carolina's Dram Shop Act see *infra* notes 46-53 and accompanying text.

29. *Hart*, 332 N.C. at 304, 420 S.E.2d at 177.

30. *Id.* at 305, 420 S.E.2d at 178. Despite the potential ramifications of the holding and its own admission that the case was one of first impression in the State, the North Carolina

social hosts in North Carolina are "under a duty to the people who travel on the public highways not to serve alcohol to an intoxicated individual who was known to be driving."[31] It concluded that breach of this duty could constitute a proximate cause of the plaintiffs' injuries.[32]

Justice Mitchell, joined by Justice Lake, wrote a concurring opinion in which he argued that a social host's violation of section 18B-302 constituted negligence per se.[33] He asserted that earlier cases established that section 18B-302 is intended to protect both inexperienced youths and the general public from the dangers that arise when minors are served alcohol; it is therefore a public safety statute.[34] Such a conclusion is mandated, he wrote, when the statute's "obvious" premises are considered: minors are more likely to become intoxicated than adults, and minors who drink and drive will ordinarily be more dangerous than adults who do the same.[35]

The supreme court's decision in *Hart* marks a departure from previously well-settled law. Traditionally, one who furnished alcohol to a guest could not be held liable at common law for injuries caused by the intoxicated guest.[36] The reason most frequently given for the traditional rule is that the proximate cause of the injury is the consumption of the alcoholic beverage, not the furnishing of alcohol.[37] Although many states have abrogated the common-law rule of absolute immunity for social hosts,[38] some courts[39] and legislatures[40] continue to accept the rule.

Supreme Court insisted that it was "not recognizing a new claim," but merely "applying established negligence principles" to the facts before it. *Id.* at 305-06, 420 S.E.2d at 178.

31. *Id.* at 305, 420 S.E.2d at 178.

32. *Id.*

33. *Id.* at 307-09, 420 S.E.2d at 178-80 (Mitchell, J., concurring in the result). He also agreed with the majority's conclusion that the plaintiffs had stated a cognizable claim under common-law negligence principles. *Id.* at 309, 420 S.E.2d at 180 (Mitchell, J., concurring in the result).

34. *Id.* at 307, 420 S.E.2d at 179 (Mitchell, J., concurring in the result).

35. *Id.* at 307-08, 420 S.E.2d at 179-80 (Mitchell, J., concurring in the result).

36. Hutchens v. Hankins, 63 N.C. App. 1, 5, 303 S.E.2d 584, 587, *disc. rev. denied*, 309 N.C. 191, 305 S.E.2d 734 (1983).

37. *Id.* at 5, 303 S.E.2d at 587. This rationale was succinctly stated in Maryland *ex rel.* Joyce v. Hatfield, 197 Md. 249, 254, 78 A.2d 754, 756 (1951):

> Human beings, drunk or sober, are responsible for their own torts. The law (apart from statute) recognizes no relation of proximate cause between the sale of liquor and a tort committed by a buyer who has drunk the liquor.

Id.; *see also* Joel E. Smith, Annotation, *Common-Law Right of Action for Damage Sustained by Plaintiff in Consequence of Sale or Gift of Intoxicating Liquor or Habit-Forming Drug to Another*, 97 A.L.R.3d 528 § 10(b) at 568 (1980) (collecting cases applying this rationale and adhering to the common-law rule of nonliability).

38. *See, e.g.*, Ely v. Murphy, 207 Conn. 88, 97-98, 540 A.2d 54, 58 (1988); Sutter v. Hutchings, 254 Ga. 194, 195-96, 327 S.E.2d 716, 717-18 (1985); McGuiggan v. New England Tel. & Tel. Co., 398 Mass. 152, 160-61, 496 N.E.2d 141, 145 (1986); Kelly v. Gwinnell, 96 N.J.

Many of the courts that have continued to adhere to the common-law rule have argued that changes to it should be made only by the legislature, which is better suited to weighing the competing policy concerns of holding social hosts liable.[41]

Jurisdictions holding social hosts liable for the acts of their intoxicated guests have done so through a variety of means, including the application of common-law negligence principles,[42] as well as the imposition of a statutory duty.[43] Several states also have dram shop statutes establishing bases for claims against those who sell alcohol for injuries caused by persons to whom they illegally sold alcohol—usually minors and intoxicated persons. Often, the language of these statutes is worded to apply to anyone who sells or gives away alcoholic beverages.[44] Despite the broad language of the dram shop acts, courts generally have held that the acts apply only to commercial vendors.[45]

In 1983, the North Carolina General Assembly enacted a dram shop act that imposes civil liability on certain classes of "permittees" who sell

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538, 559, 476 A.2d 1219, 1230 (1978); Koback v. Crook, 123 Wis. 2d 259, 265-66, 366 N.W.2d 857, 865 (1985).

39. *See, e.g.*, Martin v. Watts, 513 So.2d 958, 963 (Ala. 1987) (refusing to abolish the common-law immunity of Alabama social hosts for the negligent acts of their intoxicated guests).

40. *See, e.g.*, CAL. BUS. & PROF. CODE § 25602(b) (West 1985) (overruling a series of cases in which the California Supreme Court imposed liability on social hosts and effectively reinstated the common-law rule of absolute social host immunity). Sixteen states—Alaska, Arizona, Arkansas, California, Florida, Illinois, Iowa, Kansas, Maryland, Minnesota, Missouri, New York, Oklahoma, South Dakota, Washington, and West Virginia—specifically provide, either by legislative action or judicial determination, that social hosts are not liable. James M. Goldberg, *Social Host Liability for Serving Alcohol*, 28 TRIAL, March 1992, at 31, 32.

41. *See, e.g.*, Bankston v. Brennan, 507 So.2d 1385, 1387 (Fla. 1987); Miller v. Moran, 96 Ill. App. 3d 596, 600-01, 421 N.E.2d 1046, 1048-49 (1981); Boutwell v. Sullivan, 469 So.2d 526, 529 (Miss. 1985); Childress v. Sams, 736 S.W.2d 48, 49 (Mo. 1987).

42. *See, e.g.*, Nazareno v. Urie, 638 P.2d 671, 674 (Alaska 1981) (holding that the violation of a criminal statute making it unlawful to serve alcohol to minors is negligence per se); Ely v. Murphy, 207 Conn. 88, 97-98, 540 A.2d 54, 58 (1988) (holding that a social host may be liable under common-law negligence principles for serving alcohol to a minor who the host knew was intoxicated and would be driving).

43. *See, e.g.*, *Nazareno*, 638 P.2d at 675.

44. Jon R. Erickson & Donna H. Hamilton, Comment, *Liability of Commercial Vendors, Employers, and Social Hosts for Torts of the Intoxicated*, 19 WAKE FOREST L. REV. 1013, 1015 (1983). Other jurisdictions, however, have more narrowly worded statutes which expressly limit liability to commercial vendors. *See, e.g.*, N.C. GEN. STAT. § 18B-121(1) (1989) (limiting claims to instances in which the "permittee or . . . the local [Alcohol Beverage Control] board . . . negligently sold or furnished an alcoholic beverage to an underage person").

45. Erickson & Hamilton, *supra* note 44, at 1015.

alcohol to minors.[46] For an "aggrieved party"[47] to succeed on a claim filed against a permittee[48] or local Alcohol Control Board[49] under the Act, he must show that "the permittee or his agent or the local board or its agent or employee negligently sold or furnished alcoholic beverages to an underage person";[50] the alcohol "caused or contributed to, in whole or in part,"[51] the "impairment" of the underage driver;[52] and that his injury was proximately caused by the underaged driver's negligent operation of a motor vehicle.[53]

Prior to the *Hart* decision, North Carolina cases addressing the liability of providers of alcohol were decided under pre-Dram Shop Act law. The first case to address these issues was *Chastain v. Litton Systems, Inc.*,[54] decided by the Fourth Circuit in 1982. In *Chastain*, the defendant corporation furnished alcohol to an employee at a Christmas party, allowed him to become intoxicated and drive home.[55] The employee, while intoxicated, ran a red light and struck another vehicle, killing its driver.[56] The administrator of the driver's estate brought a wrongful death claim, but the trial court granted summary judgment in favor of the defendant.[57] The Fourth Circuit Court of Appeals found that North Carolina law barred any recovery against a social host, but that an employer could be liable under common-law negligence principles as developed by the North Carolina courts.[58]

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46. Act of June 3, 1983, 1983 N.C. Sess. Laws ch. 435, sec. 37 (codified at N.C. GEN. STAT. §§ 18B-120 to -128 (1989)).

47. "Aggrieved party" is statutorily defined as "a person who sustains an injury as a consequence of the actions of the under-age person." N.C. GEN. STAT. § 18B-120(1) (1989). This definition expressly excludes "the underage person or a person who aided or abetted in the sale or furnishing of alcohol to the underage person." *Id.*

48. Commercial vendors are considered "permittees." *See* Hutchens v. Hankins, 63 N.C. App. 1, 16, 303 S.E.2d 584, 594, *disc. rev. denied.*, 309 N.C. 191, 305 S.E.2d 734 (1983).

49. In North Carolina, the sale of alcohol is regulated by local Alcoholic Beverage Control (ABC) Boards and "may be sold only in ABC stores operated by local boards." N.C. GEN. STAT. § 18B-800 (1989).

50. *Id.* § 18B-121(1).

51. *Id.* § 18B-121(2).

52. *Id.*

53. *Id.* § 18B-121(3). The North Carolina Dram Shop Act limits damages for a prevailing plaintiff to $500,000. *Id.* § 18B-123. In addition, § 18B-124 provides that the negligent driver or owner of the car who caused the injury and the permittee or ABC board which sold or furnished the alcohol shall be jointly and severally liable. The Act further provides that it does not abrogate or abridge any claims under the common law. *Id.* § 18B-128.

54. 694 F.2d 957 (4th Cir. 1982), *cert. denied*, 462 U.S. 1106 (1983).

55. *Id.* at 959.

56. *Id.*

57. *Id.*

58. *Id.* at 960-62.

The North Carolina Court of Appeals addressed liability of alcohol providers for the first time in *Hutchens v. Hankins*.[59] In *Hutchens*, a local tavern sold a patron several beers, which the customer consumed at the tavern over a period of several hours.[60] Fifteen minutes after leaving the bar, the customer drove his automobile head-on into an oncoming vehicle, killing one of its occupants and injuring two others.[61] At the time of the accident, the customer's blood alcohol content was 0.16%.[62] The estate and family of the decedent filed suit claiming negligence on the part of the tavern owners.[63] The plaintiffs' complaint relied on two theories of negligent conduct: common-law negligence and negligence per se based on the sale of alcoholic beverages to an obviously intoxicated person in violation of *North Carolina General Statutes* section 18A-34.[64] The North Carolina Court of Appeals held that defendant's conduct was negligence per se.[65] In view of this determination, the court deemed it unnecessary to decide whether common-law negligence principles also provided a basis for relief.[66]

According to the court, the legislature intended, through section 18A-34, to establish a statutory duty not to sell alcoholic beverages to an intoxicated person. The court said that in its view the dual purposes of the statute were "(1) the protection of the customer from the adverse consequences of intoxication and (2) the protection of the community at large from the possible injurious consequences of contact with an intoxicated person."[67] The *Hutchens* court expressly rejected the rationale behind the common-law rule of non-liability[68] when it held that a tavern's sale of alcohol to an already intoxicated customer can be a proximate cause of injuries to third persons when a customer subsequently operates

59. 63 N.C. App. 1, 303 S.E.2d 584, *disc. rev. denied*, 309 N.C. 191, 305 S.E.2d 734 (1983).

60. *Id.* at 3, 303 S.E.2d at 586.

61. *Id.*

62. *Id.* In North Carolina, a driver is guilty of "impaired driving" if his blood alcohol concentration is 0.10% or greater. N.C. GEN. STAT. § 20-138.1 (1989).

63. *Hart*, 63 N.C. App. at 3, 303 S.E.2d at 586.

64. *Id.* at 4, 303 S.E.2d at 587. Section 18A-34(a), in effect at the time of plaintiffs' injury, provided: No permittee shall "[k]nowingly sell such beverages to any person while such person is in an intoxicated condition." N.C. GEN. STAT. 18A-34(a) (repealed, 1981). In 1981, Chapter 18A was repealed, and in its place Chapter 18B, a similar provision, was substituted. *See* Act of May 18, 1981, 1981 N.C. Sess. Laws ch. 412 (codified as amended at N.C. GEN. STAT. §§ 18B-100-1308 (1989)). Section 18B-305(a) provides that it is unlawful for a "permittee . . . to knowingly sell or give alcoholic beverages to any person who is intoxicated." Such a violation is a misdemeanor. § 18B-102(b) (1989).

65. *Id.* at 25-26, 303 S.E.2d at 598-99.

66. *Id.* at 17, 303 S.E.2d at 594.

67. *Id.* at 16, 303 S.E.2d at 593.

68. *See supra* notes 36-37 and accompanying text.

an automobile while still intoxicated.[69]

In *Freeman v. Finney*,[70] the North Carolina Court of Appeals addressed the related question of whether furnishing alcohol to a minor is negligence per se. *Freeman* involved two cases consolidated on appeal,[71] both of which involved defendants selling beer to a minor in violation of section 18A-8 of the *North Carolina General Statutes*.[72] Both of the minor drivers in *Freeman* became intoxicated and wrecked their automobiles, causing the plaintiff severe injuries in one case and the death of the plaintiff's son in the other.[73]

The court in *Freeman* followed the rationale of the *Hutchens* court when it held that the purpose of section 18A-8 was to protect both the minor and the community at large from the possible adverse consequences of the minor's intoxication.[74] According to the *Freeman* court, the statute imposed upon the defendants a duty not to sell beer to minors, and, therefore, the defendants' violation of the statute was negligence per se.[75] It then found that *Chastain* and *Hutchens* supported the conclusion that a jury could reasonably find that the defendants' negligence was the proximate cause of the plaintiffs' injuries.[76] The court noted that the plaintiffs would have had a claim under North Carolina's Dram Shop

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69. *Hutchens*, 63 N.C. App. at 20, 303 S.E.2d at 596.

70. 65 N.C. App. 526, 309 S.E.2d 531 (1983), *disc. rev. denied*, 310 N.C. 744, 315 S.E.2d 702 (1984). The court issued its opinion in *Hutchens* June 21, 1983; the *Freeman* decision was issued on December 20, 1983.

71. *Id.* at 527, 309 S.E.2d at 531. The companion case was Zwigard v. Mobil Oil Corp.

72. *Id.* Section 18A-8, in effect at the time of both actions, made it a crime for any person, firm or corporation knowingly to sell or give malt beverages or unfortified wine to any person under eighteen years of age. N.C. GEN. STAT. § 18A-8 (repealed, 1981). Chapter 18A was repealed in 1981. *See* Act of May 18, 1981, 1981 N.C. Sess. Laws ch. 412 (codified as amended at N.C. GEN. STAT. §§ 18B-100 to -1308 (1989)). In its place the North Carolina General Assembly enacted Chapter 18B. *Id.* Section 18B-302 makes it unlawful for any person to sell or give malt beverages, unfortified wine, fortified wine, spirituous liquor, or mixed beverages to anyone less than twenty-one years old. N.C. GEN. STAT. § 18B-302 (1989).

73. *Freeman*, 65 N.C. App. at 527, 309 S.E.2d at 531. In one case, a store owned by one of the defendants sold beer to a minor. "The minor thereafter became intoxicated and drove his automobile into another vehicle, injuring plaintiff, an occupant therein." *Id.* In the second case, an employee of defendant Mobil Oil sold a six-pack of beer to a minor, who then gave some beer to her friend and driver, also a minor. *Id.* The minor driver became intoxicated, lost control of the car he was driving, and struck and killed the plaintiff's son, who was sitting on his bicycle at the curb. *Id.*

74. *Id.* at 529, 309 S.E.2d at 534.

75. *Id.*

76. *Id.* at 531, 309 S.E.2d at 535 ("We adopt and expand the reasoning from *Chastain* and *Hutchens* in finding that plaintiffs hereunder have alleged a common-law cause of action against defendants.").

Act[77] had it been in effect at the time of the accidents,[78] but emphasized that under its holding the plaintiffs had a claim "independent of this new statutory right."[79]

In *Hart*, the state's highest court, for the first time, addressed the question of whether to impose civil liability on any provider of alcohol.[80] The *Hart* court concluded that the sole purpose of section 18B-302 is to prevent minors from consuming alcoholic beverages.[81] The majority ignored, without explanation, the court of appeals' holding in *Freeman* that the precursor to the present statute was intended to protect both the minor and the community at large from the possible adverse consequences of a minor's consumption of alcoholic beverages.[82] Although the earlier decision involved the sale of beer to a minor by a commercial vendor, as opposed to a social host, the court did not base its holding on this distinction. Thus, the *Hart* decision implicitly overruled *Freeman* since a crucial basis for the court's decision to impose liability in *Freeman* was its holding regarding the purpose of the liquor control statute.[83]

The *Hart* court's interpretation of the statute, however, may have been flawed. In addition to the need to provide clear guidance to lower courts and the public,[84] the fact that the legislature left undisturbed the *Freeman* court's interpretation of the statute making it unlawful to serve minors may suggest that the *Hart* court should have followed the *Freeman* rationale. Legislatures in other states are often aware of the results of judicial considerations in this developing area of the law, and have been quick to enact corrective legislation when they believe that the courts had incorrectly interpreted their laws to impose social host liability.[85] These examples illustrate that legislatures are generally aware of

77. For a discussion of North Carolina's Dram Shop Act, see *supra* notes 46-53 and accompanying text.

78. *Freeman*, 65 N.C. App. at 531-32, 309 S.E.2d at 535-36.

79. *Id.* at 532, 309 S.E.2d at 536.

80. The North Carolina Supreme Court denied requests to review the court of appeals' decisions in *Hutchens* and *Freeman*. Hutchens v. Hankins, 309 N.C. 191, 305 S.E.2d 734 (1983) (denying discretionary review); Freeman v. Finney, 310 N.C. 744, 315 S.E.2d 702 (1984) (denying discretionary review).

81. *Hart*, 332 N.C. at 304, 420 S.E.2d at 177.

82. For a discussion of *Freeman*, see *supra* notes 70-79 and accompanying text. Section 18A-8, which was in effect at the time of *Freeman*, was virtually identical to § 18B-302 at issue in *Hart*.

83. For a discussion of the analysis of the *Freeman* court, see *supra* notes 70-79 and accompanying text.

84. By deciding as it did, the supreme court clearly changed the law in this area from the law as interpreted by the court of appeals in *Freeman*.

85. For example, the California Supreme Court initially held that violation of section 25602 of the California Business and Professions Code, which made it a misdemeanor to serve alcohol to an obviously intoxicated person, established a cause of action against the social host

what the courts are doing in this developing area of law. The North Carolina General Assembly has itself been very active in this area, and in 1981 it completely revamped its statutory framework.[86] The fact that the North Carolina General Assembly took no action to correct the court of appeals' interpretations of its liquor control statutes[87] may suggest that the legislature believed that the *Freeman* court properly construed the legislative intent of the statute making it unlawful to furnish alcohol to minors.

In determining that section 18B-302 was not intended to protect the public, the *Hart* court reasoned:

> If it was to protect the public, it should not be limited to persons under twenty-one years of age. An adult driver under the influence of alcohol can be as dangerous on the highway as a person under twenty-one years of age. We also believe if it were a public safety statute, it would be related more to being under the influence of alcohol. . . . In this state, we do not proscribe all driving by those who have drunk some alcoholic beverage, but only those who are under the influence of alcoholic beverage.[88]

This rationale seemingly ignores or disregards an important distinction recognized by Justice Mitchell's concurrence in *Hart*. Minors, who tend to be less experienced drinkers, fall under the influence of alcohol more

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for harm caused by the intoxicated guest. Coulter v. Superior Court, 21 Cal. 3d 144, 152, 577 P.2d 669, 673, 145 Cal. Rptr. 534, 538 (1978). The California legislature, however, was obviously displeased with the court's decision and shortly thereafter amended its statute, by reinstating the common-law rule that serving alcohol is not the proximate cause of harm caused by an intoxicated person and expressly abrogating the holdings in *Coulter*. *See* Sharon E. Conaway, Comment, *The Continuing Search for Solutions to the Drinking Driver Tragedy and the Problem of Social Host Liability*, 82 NW. U. L. REV. 403, 412 (1988). The amended statute states:

> The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as . . . Coulter v. Superior Court (21 Cal. 3d 144) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.

CAL. BUS. & PROF. CODE § 25602(b) (West 1985).

Similarly, the state legislatures in Iowa and Minnesota amended their dram shop acts to overrule state supreme court decisions in those states holding that the statutes were applicable to social hosts. *See* Conaway, *supra*, at 408-09.

86. *See* Act of May 18, 1981, 1981 N.C. Sess. Laws ch. 412 (codified as amended at N.C. GEN. STAT. §§ 18B-100-1308 (1989)) (repealing Chapter 18A of the North Carolina General Statutes and replacing it with Chapter 18B).

87. *See* Freeman v. Finney, 65 N.C. App. 526, 309 S.E.2d 531 (1983), *disc. rev. denied*, 310 N.C. 744, 315 S.E.2d 702 (1984); Hutchens v. Hankins, 63 N.C. App. 1, 303 S.E.2d 584, *disc. rev. denied*, 309 N.C. 191, 305 S.E.2d 734 (1983). For a complete discussion of the *Hutchens* and *Freeman* cases, see *supra* notes 60-79 and accompanying text.

88. *Hart*, 332 N.C. at 303-04, 420 S.E.2d at 177 (1992).

quickly than do adults, and, therefore, are likely to be more dangerous to themselves and to the general public than more experienced adults who drive under the influence.[89] Other courts have accepted these premises as well.[90] The *Hart* majority, though, failed to address these premises.

The *Hart* court unanimously held that social hosts may be held responsible for post-party accidents if (1) the hosts knew or should have known that they were serving alcohol to an intoxicated guest and (2) knew the guest would be driving.[91] This test, however, fails to distinguish between furnishing alcohol to minors and furnishing alcohol to adults. Other jurisdictions have noted this distinction, and have imposed liability more readily on the social host serving alcohol to minors.[92] For example, the Ohio Supreme Court recognized such a difference in two recent cases. In *Settlemeyer v. Wilmington Veterans Post No. 49*,[93] the court refused to recognize a claim against a social host who gratuitously provided an adult guest with liquor where the plaintiff alleged that defendant knew or should have known the guest was intoxicated.[94] Four years later, however, that same court held in *Mitseff v. Wheeler*[95] that a statute prohibiting the serving of alcohol to a minor[96] created a claim against the host for one injured by the minor who had been drinking alcohol.

In *Ely v. Murphy*,[97] the supreme court of Connecticut recognized a claim based on common-law negligence against party hosts who serve minors while continuing to adhere to the common-law rule of non-liability for adult guests.[98] In *Ely*, the court noted the existence of legislatively

89. *Id.* at 308, 420 S.E.2d at 180 (Mitchell, J., concurring in the result).

90. *See infra* notes 93-99 and accompanying text.

91. *Hart*, 332 N.C. at 309, 420 S.E.2d at 180 (Mitchell, J., concurring in the result).

92. *See infra* notes 93-99 and accompanying text; *see also* Montgomery v. Orr, 130 Misc. 2d 807, 812-13, 498 N.Y.S.2d 968, 973 (1986) (holding that despite the fact that New York does not recognize a claim against a social host for the negligent acts of intoxicated adult guests, a social host who serves alcohol to one under the statutory age in violation of statute may be liable under common-law negligence principles to a third party injured by the intoxicated minor). *But cf.* Wilson v. Steinbach, 98 Wash. 2d 434, 440, 656 P.2d 1030, 1034 (1982) (stating that the proper inquiry is whether there has been a breach of the standard of care and not whether the intoxicated tortfeasor is an adult or minor).

93. 11 Ohio St. 3d 123, 464 N.E.2d 521 (1984).

94. *Id.* at 127, 464 N.E.2d at 524. The Ohio Supreme Court distinguished this situation from one where a commercial vendor sells alcoholic beverages to an intoxicated patron in violation of a statute, and thus refused to extend its earlier holding in Mason v. Roberts, 33 Ohio St. 2d 29, 33, 294 N.E.2d 884, 887 (1973) (recognizing a claim against a commercial vendor), to the facts before it. *Wilson*, 11 Ohio St. 3d at 126-27, 464 N.E.2d at 523-24.

95. 38 Ohio St. 3d 112, 114, 526 N.E.2d 798, 800 (1988).

96. *See* OHIO REV. CODE ANN. § 4301.69(A) (Baldwin 1989).

97. 207 Conn. 88, 540 A.2d 54 (1988).

98. *Id.* at 92, 540 A.2d at 58.

imposed restrictions on the consumption of alcohol by minors and acknowledged the implication that minors are less able than adults to recognize the effects of alcohol consumption.[99]

In addition to ignoring the minor/adult distinction, the *Hart* court seemingly refused to recognize the costly impact its holding will have on society. Although the court noted that *Hart* was a case of first impression in North Carolina,[100] the court insisted that because it was "not recognizing a new claim,"[101] it was unnecessary to consider the many implications of establishing such a claim.[102]

Examination of the implications of this decision, though, reveals that they "are vast and far-reaching."[103] One problem resulting from the imposition of social host liability is that private hosts rarely have the expertise of commercial vendors to gauge the impairment of a guest.[104] Furthermore, experienced drinkers are often able to hide outward signs of intoxication, and some may not exhibit any symptoms at all.[105] Additionally, some guests who have reached their tolerance level may not exhibit outward signs of intoxication until after they have left the party.[106] Although one may argue that the presence of one or more of these factors in a particular case will result in nonliability, it is possible for a court to find that a host should have known that his guest was intoxicated.

Furthermore, charging a host with the duty to regulate the drinking habits of guests who are most frequently friends and colleagues of the host may inject a sense of uneasiness into social gatherings. As one jurist noted:

> It is easy to say that a social host can just refuse to serve the intoxicated person. However, due to a desire to avoid confron-

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99. *Id.*

100. *Hart*, 332 N.C. at 304, 420 S.E.2d at 177.

101. *Id.* at 305-06, 420 S.E.2d at 178.

102. *Id.*

103. Edgar v. Kajet, 84 Misc. 2d 100, 103, 375 N.Y.S.2d 548, 552 (Sup. Ct. 1975), *aff'd*, 55 A.D.2d 597, 389 N.Y.S.2d 631 (1976).

104. Kelly v. Gwinnell, 96 N.J. 538, 565, 476 A.2d 1219, 1233 (Garibaldi, J., dissenting); *see also* Hutchens v. Hankins, 63 N.C. App. 1, 19, 303 S.E.2d 584, 595 (recognizing a presumption of expertise on the part of tavern owners in such matters); Marc E. Odier, Note, *Social Host Liability: Opening a Pandora's Box*, 61 IND. L.J. 85, 108-09 (1985) ("A vendor . . . encounters alcohol-consuming people on a daily basis. . . . A private host, by contrast, generally will have neither the ability to recognize subtle degrees of impairment, nor the ready means by which to develop such ability.")

105. *See* Odier, *supra* note 104, at 109.

106. *Kelly*, 96 N.J. at 565, 476 A.2d at 1233-34 (Garibaldi, J., dissenting); *see also* Odier, *supra* note 104, at 109 ("[A] guest who has reached his tolerance level may not exhibit outward signs of intoxication until sometime much later. Indeed, experts estimate that it may take twenty to thirty minutes for alcohol to reach its highest level in the bloodstream.").

> tation in a social environment, this may become a very difficult task. . . . We should not ignore the social pressures of requiring a social host to tell a boss, client, friend, neighbor, or family member that he is not going to serve him another drink.[107]

Also, because certain benefits often result from social gatherings at which alcoholic drinks are served, guests may refuse to attend gatherings where a host may tell the guest that he will not continue to serve him.[108]

The *Hart* court also failed to address the economic impact of social host liability on private individuals. A social host, unlike a commercial vendor, is unable to spread the cost of liability.[109] Even if the host's homeowner's insurance covers the cost of potential liability, insurance companies will almost certainly raise premiums in response to the imposition of social host liability.[110] Additionally, some homeowners may not be able to afford homeowner's insurance, and others may not have sufficient insurance to cover social host liability.[111] Thus, economic circumstances may force an individual to refrain from serving drinks to guests—conduct previously accepted as common practice in our society.[112]

Many of the policy concerns that arise when social liability is imposed are simply not present where a host is charged only with the duty of monitoring his minor guests. Due to their inexperience, minors are more likely to become intoxicated than are adults,[113] and are less likely to be adept at hiding symptoms of intoxication. Thus, it is not as difficult to recognize impairment in minors as it is with adults. The dynamics of an adult-child relationship make a host's refusal to serve a minor a much easier task than a similar refusal to serve an adult guest, and this refusal does not create the uneasy social pressures that can arise when a host must refuse to oblige a boss, client, or relative. This reasoning also extends to situations in which both the host and the guest are minors. In that situation, refusing to serve alcohol does not have the same conse-

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107. *Kelly*, 96 N.J. at 567, 476 A.2d at 1234 (Garibaldi, J., dissenting); *see also* Odier, *supra* note 104, at 111 (echoing the concerns of Judge Garibaldi).

108. Odier, *supra* note 104, at 111.

109. *Kelly*, 96 N.J. at 568, 476 A.2d at 1234 (Garibaldi, J., dissenting); *see also* Odier, *supra* note 104, at 112 (explaining that a commercial vendor can spread the cost of liability among its customers through small price increases spread among a large group. The social host has no similar mechanism to spread costs and thus probably would have to bear the entire cost himself).

110. *Kelly*, 96 N.J. at 568, 476 A.2d at 1235 (Garibaldi, J., dissenting); Odier *supra* note 104, at 112.

111. *Kelly*, 96 N.J. at 568, 476 A.2d at 1235 (Garibaldi, J., dissenting); Odier, *supra* note 104, at 112.

112. Odier, *supra* note 104, at 112.

113. *See Hart*, 332 N.C. at 308, 420 S.E.2d at 179 (Mitchell, J., concurring in the result).

quences outside of the social context as an adult's refusal to serve a business associate.

Similarly, a rule that imposes civil liability only on those who serve minors is likely to have less of a pecuniary impact on private hosts than the broad rule announced by the court in *Hart*. Intuitively, any increase in homeowners' insurance premiums would be smaller under a more narrow rule.

While the legal effect of *Hart* is to extend liability to social hosts who knowingly provide alcohol to intoxicated individuals whom they know are going to drive,[114] its practical effects are much greater. Many hosts may now refrain from serving alcohol to all guests for fear of being found liable in a civil suit for the intoxicated guest's actions.

Given the enormous public policy questions and vast social and economic impact involved in recognizing a duty resulting from social host liability,[115] the *Hart* court may have imprudently failed to consider fully the implications of its holding. Because the scope of the decision places great burdens on society,[116] and because it was unnecessary to provide a remedy to the plaintiff, the court should have limited its holding. The *Hart* court should have followed precedent and affirmed the court of appeals' finding that violation of the statute making it unlawful to serve minors is negligence per se. Alternatively, it could have achieved a fairer result by restricting its holding to imposing a duty not to serve minors, or even intoxicated minors known to be driving, rather than finding a duty not to serve any intoxicated social guest. This distinction is warranted by the unambiguous legislative policy that minors should not drink alcoholic beverages,[117] and by the fact that the social and economic implications of recognizing social host liability are not as burdensome when civil liability may be imposed only on social hosts who serve minors.

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114. *See supra* notes 21-32 and accompanying text.

115. *See supra* notes 103-12 and accompanying text.

116. *See supra* notes 103-12 and accompanying text.

117. *See, e.g.*, N.C. GEN. STAT. § 18B-302(a) (1989) (making it unlawful to sell or give alcohol to a minor).

TORT LAW—PRODUCTS LIABILITY—IMPLIED WARRANTIES—FOODS—*GOODMAN V. WENCO FOODS, INC.*, 333 N.C. 1, 423 S.E.2d 444 (1992)

Consider the following scenario: A man walks into a fast-food restaurant and orders a hamburger. While eating, he suddenly feels intense pain as he hears his teeth breaking. This unfortunate man has just bitten into a bone fragment in his hamburger.

Naturally, as soon as he recovers, he calls his lawyer. He is in pain, his dental bills will be outrageous, and he will miss several days of work as a result of his injury. He wants someone to pay, and the likely targets are the restaurant and its meat supplier. Unfortunately, his lawyer tells him that he really does not have much of a case. In North Carolina, he can only prevail if he can establish that either the restaurant or the supplier was negligent.[1] Because this was, in all likelihood, an isolated occurrence, and because both the restaurant and the supplier probably exercised due care, the man will have to eat (figuratively speaking) his expenses.

Until recently, because the bone fragment was "natural"[2] to the hamburger meat, this hypothetical patron could not have recovered on a theory of breach of implied warranty of merchantability.[3] However, in *Goodman v. Wenco Foods, Inc.*,[4] the North Carolina Supreme Court cast aside this bar to liability based on the character of the injury-producing substance and instead joined a growing number of jurisdictions by adopting a "reasonable expectations" test.[5] Under this test, a merchant who sells food for human consumption may be held liable for breach of implied warranty[6] if the food contains an injury-causing substance which

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1. *See infra* notes 2-3 and accompanying text. Strict liability in tort has not been adopted in North Carolina. *E.g.*, Goodman v. Wenco Foods, Inc., 333 N.C. 1, 19 n.4, 423 S.E.2d 444, 453 n.4 (1992).

2. See *infra* note 15 and accompanying text for a discussion of the "foreign/natural" test.

3. *See* Adams v. Great Atl. & Pac. Tea Co., 251 N.C. 565, 572, 112 S.E.2d 92, 98 (1960). The implied warranty of merchantability is codified in North Carolina at N.C. GEN. STAT. § 25-2-314 (1986) (adopting without amendment U.C.C. § 2-314 (1986)). This codification is consistent with North Carolina common law. *Wenco Foods*, 333 N.C. at 9, 423 S.E.2d at 447 (citing Performance Motors, Inc. v. Allen, 280 N.C. 385, 394, 186 S.E.2d 161, 166 (1972)).

4. 333 N.C. 1, 423 S.E.2d 444 (1992).

5. *Id.* at 15-16, 423 S.E.2d at 451. See *infra* notes 35-41 and accompanying text for a discussion of the reasonable expectations test.

6. Breaches of many different types of implied warranties arise in the food sales context, including breach of the common-law warranty of fitness for human consumption, the warranty of fitness for a particular purpose, U.C.C. § 2-315 (1986), and the warranty of merchantability, U.C.C. § 2-314 (1986). Since U.C.C. § 2-314(1) now explicitly includes sales of food, that warranty is the one most frequently used today. The outcome of an adulterated food sales

"is of such a size, quality or quantity, or the food has been so processed, or both, that the substance's presence should not reasonably have been anticipated by the consumer."[7]

The controversy in this case arose on October 28, 1983, when Fred Goodman walked into a Wendy's restaurant in Hillsborough, North Carolina, and ordered a double hamburger.[8] While eating his hamburger, Mr. Goodman bit into an inflexible, triangular piece of bone, one-half inch long and one-quarter inch thick at its largest point.[9] One of Mr. Goodman's teeth was damaged and had to be extracted; two others were broken.[10] As a result of his injuries, Mr. Goodman incurred substantial dental expenses and missed work on at least one occasion.[11]

Mr. Goodman brought suit against both the restaurant operator, Wenco Foods, Inc., and its meat supplier, Greensboro Meat Supply Company, Inc. (GMSC), claiming negligence and a breach of the implied warranty of merchantability.[12] The trial court granted summary judgment for GMSC and directed a verdict for Wenco on both claims.[13]

The court of appeals reversed the trial court's decision as to the implied warranty of merchantability claim.[14] The court began its discussion by acknowledging that some courts apply the foreign/natural test to

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case, however, is the same regardless of the type of implied warranty applied. Therefore, implied warranties will be referred to generically; the particular type of implied warranty will be specified only when relevant.

7. *Wenco Foods*, 333 N.C. at 15-16, 423 S.E.2d at 451.

8. *Id.* at 8, 423 S.E.2d at 446.

9. *Id.* Mr. Goodman testified that although he did not know whether the bone was in the meat, the bun, or the condiments, the bite with the bone fragment was "mostly meat." *Id.*

10. Goodman v. Wenco Management, 100 N.C. App. 108, 111, 394 S.E.2d 832, 833 (1990), *aff'd in part and rev'd in part sub nom.* Goodman v. Wenco Foods, Inc., 333 N.C. 1, 423 S.E.2d 444 (1992).

11. *Id.*; *Wenco Foods*, 333 N.C. at 8, 423 S.E.2d at 446-47. To correct the damage to his teeth, Mr. Goodman required "root canal surgery, temporary and permanent crowns, and tooth extraction." *Wenco Management*, 100 N.C. App. at 111, 394 S.E.2d at 833.

12. *Wenco Foods*, 333 N.C. at 7, 423 S.E.2d at 446. Wenco Foods, Inc., doing business as Wendy's Old Fashioned Hamburgers, operated the restaurant involved in this case. *Id.* Although the original action included Wenco Management, Inc. and Wendy's International, Inc., Goodman took voluntary dismissals as to those defendants prior to the appeal before the supreme court. *Id.* at 1 n.1, 423 S.E.2d at 444 n.1. The other remaining defendant, Greensboro Meat Supply Company, Inc. (GMSC), allegedly supplied the hamburger meat used in Mr. Goodman's hamburger. *Id.* at 7, 423 S.E.2d at 446.

13. *Id.* at 7, 423 S.E.2d at 446. On the breach of implied warranty claim, the trial court found that the bone was natural to the hamburger meat and denied recovery. *Wenco Management*, 100 N.C. App. at 111-12, 394 S.E.2d at 834. On the negligence claim, the court concluded that the doctrine of *res ipsa loquitur* did not apply and that Goodman had failed to offer evidence to establish that the defendants had breached any duty of care, especially since the defendants' ground beef processing standards exceeded U.S.D.A. requirements. *Id.* at 111, 394 S.E.2d at 833-34.

14. *Wenco Management*, 100 N.C. App. at 115, 117, 394 S.E.2d at 836-37. The court of

bar liability when the injury-causing substance is natural to the food consumed.[15] Noting that the North Carolina Supreme Court had addressed this issue in *Adams v. Great Atlantic & Pacific Tea Co.*,[16] the court of appeals considered the defendants' argument that the *Adams* court had

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appeals affirmed the trial court's dismissal of the negligence claims against both defendants. *Id.* at 118, 394 S.E.2d at 837.

15. *Id.* at 113-14, 394 S.E.2d at 835. The foreign/natural test originated in California in 1936, when the California Supreme Court applied the test to deny recovery in Mix v. Ingersoll Candy Co., 6 Cal. 2d 674, 682-83, 59 P.2d 144, 148 (1936), to a plaintiff who had been injured by a bone fragment in a chicken pie. The *Mix* court found that food products liability had previously been imposed only when the food was unfit "either by reason of the presence of a foreign substance, or an impure and noxious condition of the food itself." *Id.* at 681, 59 P.2d at 148. The court held that the presence in food of a substance that is natural to that food does not render it unfit for human consumption. *Id.* at 681-82, 59 P.2d at 148. The *Mix* court's test initially met with a great deal of approval. *See, e.g.*, Shapiro v. Hotel Statler Corp., 132 F. Supp. 891, 893-94 (S.D. Cal. 1955); Maiss v. Hatch, 8 Cal. Rptr. 351, 352 (Cal. App. Dep't. Super. Ct. 1960); Silva v. F.W. Woolworth Co., 28 Cal. App. 2d 649, 650, 83 P.2d 76, 76 (1938); Brown v. Nebiker, 229 Iowa 1223, 1232, 296 N.W. 366, 371 (1941). *But see* Bonenberger v. Pittsburgh Mercantile Co., 345 Pa. 559, 563, 28 A.2d 913, 915 (1942) (holding that the seller of canned oysters that contained shell fragments could be held liable for breach of implied warranty, notwithstanding the fact that the shell was a natural part of the oyster).

16. 251 N.C. 565, 112 S.E.2d 92 (1960). This was the first opportunity for the North Carolina Supreme Court to confront the problem of injury-causing "natural" substances in food. In *Adams*, the plaintiff broke a tooth while eating a bowl of corn flakes. *Id.* at 565, 112 S.E.2d at 93. The plaintiff's injury was caused by a partially crystallized grain of corn in his cereal, a grain that was "as hard as a piece of quartz." *Wenco Foods*, 333 N.C. at 13-14, 423 S.E.2d at 449-50. After surveying the case law in other jurisdictions, the *Adams* court adopted the foreign/natural test, joining what was at the time the "overwhelming majority view" that injury-causing substances in food which are natural to it should be reasonably anticipated by consumers as a matter of law. *Id.* at 11-15, 423 S.E.2d 448-50 (citing *Adams*, 251 N.C. at 565, 112 S.E.2d at 93).

Prior to *Wenco Foods*, North Carolina's only other appellate consideration of the issue came in 1976. *Coffer v. Standard Brands, Inc.*, 30 N.C. App. 134, 226 S.E.2d 534 (1976). The case involved a plaintiff injured by an unshelled filbert in a jar of mixed nuts. *Id.* at 135, 226 S.E.2d at 535. Although the court of appeals applied the foreign/natural test, it implicitly recognized that, under certain circumstances, the presence of unshelled nuts in a batch of shelled nuts could render that batch unmerchantable notwithstanding the foreign/natural test. *See id.* at 140-41, 226 S.E.2d at 538. The court indicated that a larger quantity of unshelled nuts might cause the batch to be considered "adulterated" under § 106-129(1)(a) of the North Carolina General Statutes, which provides that food is adulterated:

> If it contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this paragraph if the *quantity* of such substance in such food does not ordinarily render it injurious to health.

Id. (citing N.C. GEN. STAT. § 106-129(1)(a) (1988)) (emphasis added). However, the court pointed out that federal and state regulations, as well as tolerances in the trade, would permit a limited number of unshelled nuts to be present without rendering the batch unmerchantable. *Id.* at 141, 226 S.E.2d at 538. In *Wenco Foods*, the supreme court recognized the *Coffer* court's dissatisfaction with the *Adams* rule, noting that "the [*Coffer*] court buttressed [its] conclusion with reasoning that seems by implication to be grounded in part on the 'reasonable expectation' doctrine." *Wenco Foods*, 333 N.C. at 14, 423 S.E.2d at 450.

adopted a foreign/natural test.[17] The court of appeals concluded that the *Adams* court had not adopted a true foreign/natural test but had instead created a two-part inquiry: "(1) whether the substance causing the injury is natural or foreign; and (2) if natural, whether 'a consumer of the product might be expected to anticipate the presence of [the] substance in the food.' "[18] Under this two-step approach, recovery would be allowed if the plaintiff "could show that the substance was foreign or if he could show it was a natural substance but one that a consumer might not expect or anticipate."[19] The court of appeals indicated that the same result would thus be reached under *Adams* as under a reasonable expectations test[20] and held that the plaintiff's implied warranty claims should have gone to the jury.[21]

The North Carolina Supreme Court, in a unanimous opinion authored by Chief Justice Exum,[22] used a different approach to affirm the decision of the court of appeals.[23] The supreme court's implied warranty analysis began with a discussion of section 2-314 of the Uniform Commercial Code (UCC), which provides in pertinent part that "a warranty that the goods[24] shall be merchantable is implied in a contract for their sale if the seller is a merchant[25] with respect to goods of that kind."[26]

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17. *Wenco Management*, 100 N.C. App. at 114, 394 S.E.2d at 835.

18. *Id.* (quoting *Adams*, 251 N.C. at 572, 112 S.E.2d at 98).

19. *Id.*

20. *Id.*

21. *Id.* at 115, 117, 394 S.E.2d at 836, 837.

22. *Wenco Foods*, 333 N.C. at 7, 423 S.E.2d at 446. Justice Lake did not participate in the case. *Id.* at 28, 423 S.E.2d at 458.

23. *Id.* at 7, 423 S.E.2d at 446. The supreme court upheld the directed verdict in favor of Wenco on the negligence claim, finding that Wenco had introduced substantial evidence at trial to support its contention that it had exercised due care in its preparation of hamburgers. *Id.* at 19-20, 423 S.E.2d at 453-54. The only evidence Mr. Goodman introduced was the presence of the bone fragment which, according to the court, "create[d] no inference that Wendy's was negligent in its inspection of the hamburger it served to plaintiff." *Id.* at 20, 423 S.E.2d at 453.

In contrast, the court allowed the negligence claim against GMSC to stand. In finding that the negligence claim against GMSC should have been decided by a jury, the court indicated that GMSC had failed to meet its burden of showing that plaintiff could not prove negligence at trial; in fact, GMSC had presented no evidence as to its exercise of due care at the time of its motion for summary judgment. *Id.* at 27-28, 423 S.E.2d at 458.

24. The UCC defines "goods" as "all things . . . which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid." N.C. GEN. STAT. § 25-2-105(1) (1986).

25. Under the UCC, a "merchant" is "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction." N.C. GEN. STAT. § 25-2-104(1) (1986).

26. *Id.* § 25-2-314(1). Wenco's admissions in its answer established that it is a "merchant," and that the food it sells constitutes "goods" within the meaning of the statute. *Wenco Foods*, 333 N.C. at 10, 423 S.E.2d at 448.

The court noted that to be "merchantable," goods must be "fit for the ordinary purposes for which such goods are used";[27] thus, in the case of food products, the food must be "fit for human consumption."[28] Accordingly, the court found that the key factual issue in the case was whether the bone in Goodman's hamburger made it unfit for human consumption.[29]

The court also considered its prior decision in *Adams* and the court of appeals' interpretation of that decision.[30] After tracing the history of the decisions leading up to *Adams*,[31] the court concluded that *Adams* did in fact adopt a foreign/natural test to determine whether food is unfit for human consumption and that the court of appeals had erred in reading *Adams* as adopting a two-part inquiry.[32] The court noted that *Adams* relied heavily on other cases employing the foreign/natural test[33] and that commentators, other states' courts, and the court of appeals itself had consistently regarded *Adams* as adopting the foreign/natural test.[34]

The supreme court then looked to other jurisdictions in which the question of whether a substance in food constituted a defect turned on the consumer's "reasonable expectations."[35] In those jurisdictions, the injury-causing substance renders the food unfit for consumption if, because of the nature of the substance or the manner in which the food was processed, the consumer should not have reasonably expected the substance to be present in the food.[36] The underlying rationale is that if a

27. N.C. GEN. STAT. § 25-2-314(2)(c) (1986).

28. RONALD A. ANDERSON, 3 ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-314:183, at 270 (3d ed. 1983).

29. *Wenco Foods*, 333 N.C. at 10, 423 S.E.2d at 448.

30. See *supra* notes 16-21 for a discussion of *Adams*.

31. *Id.* at 11-15, 423 S.E.2d at 448-50.

32. *Id.* at 15, 423 S.E.2d at 450.

33. *Id.* at 11-13, 423 S.E.2d at 448-49.

34. *Id.* at 13-14, 423 S.E.2d at 449-50. The court of appeals noted that many other courts have interpreted *Adams* as adopting the foreign/natural test. *Id.* at 13, 423 S.E.2d at 449-50 (citing Hochberg v. O'Donnell's Restaurant, 272 A.2d 846, 848 n.3 (D.C. 1971); Zabner v. Howard Johnson's, Inc., 201 So. 2d 824, 826 (Fla. 1967); Musso v. Picadilly Cafeterias, Inc., 178 So. 2d 421, *writ denied*, 248 La. 468, 179 So. 2d 641 (1965); Williams v. Braum Ice Cream Stores, Inc., 534 P.2d 700, 701 (Okla. 1974); Finocchiaro v. Ward Baking Co., 104 R.I. 5, 12 n.3, 241 A.2d 619, 623 n.3 (1968); Betehia v. Cape Cod Corp., 10 Wis. 2d 323, 328, 103 N.W.2d 64, 67 (1960)).

35. *Wenco Foods*, 333 N.C. at 15, 423 S.E.2d at 451 (citing Matthews v. Campbell Soup Co., 380 F. Supp. 1061 (S.D. Tex. 1974); Morrison's Cafeteria v. Haddox, 431 So. 2d 975 (Ala. 1983); Evart v. Suli, 211 Cal. App. 3d 605, 259 Cal. Rptr. 535 (1989); Zabner v. Howard Johnson's, Inc., 201 So. 2d 824 (Fla. Dist. Ct. App. 1967); Jackson v. Nestle-Beich, Inc., 212 Ill. App. 3d 296, 155 Ill. Dec. 508, 569 N.E.2d 1119 (1991), *aff'd*, 147 Ill. 2d 408, 168 Ill. Dec. 147, 589 N.E.2d 547 (1992); Loyacano v. Continental Ins. Co., 283 So. 2d 302 (La. Ct. App. 1973); Betehia v. Cape Cod Corp., 10 Wis. 2d 328, 103 N.W.2d 64 (1960)).

36. *Id.* at 15, 423 S.E.2d at 450-51.

consumer does not reasonably expect the substance to be present in the food, he cannot take precautions to avoid being injured by it; the food is thus unfit for consumption because it cannot be eaten without risk of injury.[37]

After examining the two tests, the supreme court discarded the foreign/natural test and explicitly adopted the reasonable expectations approach.[38] The court concluded that although a bone shaving is "natural" to beef, "whether it is so 'natural' to hamburger as to put a consumer on his guard . . . is, in most cases, a question for the jury."[39] The court further explained that it is not possible for consumers to guard against the presence of bones in a hamburger without taking extraordinary measures such as "breaking it apart and inspecting" it or "nibbl[ing] . . . along hunting for bones."[40] The court suggested that it would be unreasonable to expect a consumer to exercise this sort of care in eating a sandwich that is "meant to be eaten out of hand, without cutting, slicing, or even the use of a fork or knife."[41]

The policy goals underlying the implied warranty of merchantability support the supreme court's rejection of the foreign/natural test in *Wenco Foods*. As Donald Anderson stated in his 1983 treatise on the Uniform Commercial Code:

> The entire purpose behind UCC § 2-314 is to hold the seller reponsible when inferior goods are passed along to the unsuspecting buyer, and the evidence required is not that the defects could or should have been uncovered by the seller but only that the goods upon delivery were not of a merchantable quality . . . .[42]

According to Professors Charles Daye and Mark Morris, "Sources for guidance on the question of merchantability include usage in the trade, characteristics of similar goods manufactured by others, and applicable government standards and regulations with respect to such goods."[43] A strict application of the foreign/natural test disregards these considerations and treats foods with "natural" defects as merchantable by definition. By contrast, the reasonable expectations test encompasses

37. *See id.* at 15, 423 S.E.2d at 451.

38. *See id.* at 15-16, 423 S.E.2d at 450-51.

39. *Id.* at 16, 423 S.E.2d at 451 (citation omitted).

40. *Id.* (quoting Evart v. Suli, 211 Cal. App. 3d 605, 613-14, 259 Cal. Rptr. 535, 540 (1989); Jackson v. Nestle-Beich, Inc., 212 Ill. App. 3d 296, 304, 569 N.E.2d 1119, 1123 (1991), *aff'd*,147 Ill. 2d 408, 589 N.E.2d 547 (1992)).

41. *Id.* (quoting Evart v. Suli, 211 Cal. App. 3d at 613-14, 259 Cal. Rptr. at 540).

42. 3 ANDERSON, *supra* note 28, § 2-314:4, at 106.

43. CHARLES E. DAYE & MARK W. MORRIS, NORTH CAROLINA LAW OF TORTS § 26.32.21.4, at 469 (1991).

the factors listed by Daye and Morris, in that these factors are to be considered in determining whether the consumer should reasonably have expected the presence of an injury-causing substance.

Anderson further argues that "the Commercial Code is designed to protect the buyer from bearing the burden of loss where merchandise does not conform to normal commercial standards."[44] The implied warranty of merchantability is intended to place the risk of loss on the seller rather than the consumer, because the seller is in a better position to bear the cost of that risk by allocating it among all the goods she sells.[45] The reasonable expectations test accomplishes this goal by allowing recovery when a consumer is injured by an unforeseeable substance in his food.

In addition to being justifiable on policy grounds, the North Carolina Supreme Court's decision to adopt the reasonable expectations test in *Wenco Foods* is particularly laudable when compared to the course of action taken by the court of appeals in *Wenco Management*. The court of appeals, being unable to overrule *Adams* directly, was compelled to adopt a reading of *Adams* that was contrary to both existing case law and common sense.[46] While the result achieved by the court of appeals was desirable, the supreme court's more straightforward approach leaves North Carolina with a clear, comprehensible standard to apply in this area.

One concern that often accompanies the recognition of a new cause of action or, as in *Wenco Foods*, the adoption of a new legal standard that will allow more claims to proceed, is that the courts will be overwhelmed by the ensuing torrent of litigation. As Anderson has indicated, however:

> Product liability in a proper case is not to be denied for fear that it will open the courts to a flood of litigation for the reason that if there are wrongs to be redressed it is the duty of the courts to do so and the fact that there may be many wrongs is not a ground for refusing to take any action.[47]

With its decision in *Goodman v. Wenco Foods, Inc.*, the North Carolina Supreme Court has joined the ranks of jurisdictions that have cast off the arbitrary and capricious foreign/natural test in favor of a more principled approach. The time for *caveat emptor* has passed. The burden imposed by defective food products should be borne by the party best able to bear it—the seller.

BRENT R. ELLER

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44. 3 ANDERSON, *supra* note 28, § 2-314:4, at 105.

45. *See id.*

46. *See supra* notes 16, 31-34 and accompanying text.

47. 3 ANDERSON, *supra* note 28, § 2-314:3, at 104.

TORT LAW—CONTRIBUTION—VICARIOUS LIABILITY—*YATES V. NEW SOUTH PIZZA, LTD.*, 330 N.C. 790, 412 S.E.2d 666 (1992)

After running a stop sign, Donald Lee Powell, a driver for a local pizza delivery company, collided with another car and caused serious injuries to one of its passengers.[1] The injured party executed a covenant not to sue[2] Powell or his personal insurer in exchange for $25,000, the limit of Powell's insurance coverage.[3] Although this agreement extinguished the cause of action between the plaintiff and the driver, the plaintiff expressly retained the action against the pizza company[4] and pursued the claim under the principle of respondeat superior.[5]

These facts present the question of whether a principal can be vicariously liable for an agent's negligence when an agreement between the plaintiff and agent terminated the agent's liability. Under common law, the employer would not be liable.[6] In *Yates v. New South Pizza, Ltd.*,[7] the North Carolina Supreme Court, in a case of first impression,[8] reversed the lower courts[9] and held that the Uniform Contribution Among

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1. Yates v. New South Pizza, Ltd., 330 N.C. 790, 791, 412 S.E.2d 666, 667 (1992). New South Pizza, Ltd., a limited partnership doing business as Domino's Pizza, admitted that Powell was within the scope of employment at the time of the accident. *Id.* at 791, 412 S.E.2d at 668.

2. For a description of a covenant not to sue, see *infra* note 45.

3. *Yates*, 330 N.C. at 791, 412 S.E.2d at 667.

4. *Id.*

5. The doctrine of respondeat superior is a type of vicarious liability that holds an employer liable for an employee's torts when the employee is acting within the scope of employment. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69 at 500 (5th ed. 1984). Scope of employment typically refers to those methods used to carry out employment that are "closely connected with what the servant is employed to do, and . . . fairly and reasonably incidental to [the employment]." *Id.* § 70, at 502.

The law imputes the liability of the negligent employee onto the non-negligent employer for a variety of reasons, the most basic of which is risk allocation. *Id.* § 69, at 500. Under this rationale, the employee's torts "are placed upon th[e] enterprise itself, as a required cost of doing business." *Id.* Because most employees are judgment-proof in that they do not have the assets to pay for the torts they cause, it is decided that, as between the innocent injured plaintiff and the employer, the employer should be liable. *Id.*; *see also* Mamalis v. Atlas Van Lines, Inc., 522 Pa. 214, 220, 560 A.2d 1380, 1383 (1989) ("Upon a showing of agency, vicarious liability increases the likelihood that an injury will be compensated, by providing two funds from which a plaintiff may recover." (quoting Mamalis v. Atlas Van Lines, Inc., 364 Pa. Super 360, 365, 528 A.2d 198, 200 (1987), *aff'd*, 522 Pa. 214, 560 A.2d 1380 (1989))).

6. *See* Smith v. South & W. R.R., 151 N.C. 479, 482-83, 66 S.E. 435, 437 (1909), *abrogated by Yates*, 330 N.C. 790, 412 S.E.2d 666 (1992). For a discussion of the rule in *Smith*, see *infra* notes 58-61 and accompanying text.

7. 330 N.C. 790, 412 S.E.2d 666 (1992).

8. *Id.* at 792, 412 S.E.2d at 668.

9. *Id.* The trial court had granted Domino's motion for summary judgment, which an

Tort-Feasors Act[10] changes that outcome.[11] After *Yates*, a settlement with a negligent agent for less than the full amount of damages no longer bars an action against the non-negligent principal for the remainder of the value of the claim.[12] The vicariously liable principal may still collect indemnity[13] from the agent, however.[14]

The *Yates* majority focused on section 1B-4 of the Act,[15] which allows one "liable in tort" to settle with an injured party without affecting the rights and obligations of "the other tort-feasors" liable for the same injury.[16] The court examined the meaning of the phrase "other tort-feasors."[17] After stating that "for purposes of this Act, a 'tort-feasor' is one who is liable in tort,"[18] the majority found that a vicariously liable employer is a tort-feasor, thereby placing him within the Act. This definition extends the Act's reach beyond the traditional contribution situation[19] to include vicariously liable defendants.

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unanimous court of appeals had affirmed. Yates v. New South Pizza, Ltd., 102 N.C. App. 66, 67, 401 S.E.2d 380, 381 (1991), *rev'd*, 330 N.C. 790, 412 S.E.2d 666 (1992).

10. N.C. GEN. STAT. §§ 1B-1 to 1B-6 (1983). Throughout this analysis, North Carolina's Uniform Contribution Among Tort-Feasors Act will be referred to as "the Act."

11. *Yates*, 330 N.C. at 793-95, 412 S.E.2d at 669-70.

12. *Id.* at 795-96, 412 S.E.2d at 669-70.

13. Indemnification "requir[es] another to reimburse in full one who has discharged a common liability." KEETON ET AL., *supra* note 5, § 51 at 341. Indemnity is allowed, for example, in a vicarious liability situation. *See* Ingram v. Nationwide Mut. Ins. Co., 258 N.C. 632, 635, 129 S.E.2d 222, 225 (1963) ("[W]here liability has been imposed on the master because of the negligence of his servant, and the master did not participate in the wrong and incurs liability solely under the doctrine of *respondeat superior*, the master, having discharged the liability, may recover full indemnity from the servant.").

14. *Yates*, 330 N.C. at 795, 412 S.E.2d at 670.

15. Section 1B-4 states:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,
>
> (2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

N.C. GEN. STAT. § 1B-4 (1983).

16. *See id.*

17. *Yates*, 330 N.C. at 793, 412 S.E.2d at 669 (interpreting N.C. GEN. STAT. § 1B-4(1) (1983)).

18. *Id.* at 794, 412 S.E.2d at 669.

19. Contribution is available when one has discharged more than that person's proportionate share of a joint liability and can recover appropriate amounts from the other liable parties. KEETON ET AL., *supra* note 5, § 51 at 341; *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 470, 380 S.E.2d 100, 102 (1989) ("The statute expressly grants a right

In explaining its decision, the court referred to a prior version of the Uniform Act.[20] Unlike the version adopted by North Carolina,[21] it explicitly defined "joint tortfeasors" as "two or more persons jointly or severally liable in tort for the same injury."[22] Although this definition is absent from the North Carolina statute, the court, based on a broad reading of the Act, considered the definition "consistent" with the North Carolina Act.[23] Further, the court refuted the defendant's argument that section 1B-1(f) of the Act[24] removed all indemnity causes of action from its reach.[25] According to the court, this section simply preserves the right of indemnity and does nothing to "preclude[ ] application of the Act to situations involving vicarious liability."[26] The court's final rationale derives from the legislative intent to encourage settlements.[27] The court reasoned that because employers usually do not seek indemnity from employees, who are likely to be judgment proof, the "servant's settlement with the injured party fulfills the underlying policy of the Act."[28]

The three dissenting justices found the Act inapplicable and would have followed the common law rule.[29] They believed that the term, "tort-feasor," as used in section 1B-4, should be construed according to its "technical meaning," since the legislature used it in that manner.[30]

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of contribution to a joint tortfeasor who has paid more than his pro rata share of common liability to the injured party.").

20. *Yates*, 330 N.C. at 794, 412 S.E.2d at 669. For a discussion of the prior act, see *infra* notes 49-57 and accompanying text.

21. North Carolina adopted the 1955 version of the Act in 1967; it became effective January 1, 1968. *See* Act to Provide for Contribution Among Joint Tortfeasors and Joint Obligors, ch. 847, §§ 1-2, 4, 1967 N.C. Sess. Laws 1091, 1091-94 (codified at N.C. GEN. STAT. §§ 1B-1 to 1B-6 (1983)).

22. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT historical note, 12 U.L.A. 57, 57 (1975) (quoting § 1 of 1939 version of the Act).

23. *See Yates*, 330 N.C. at 794, 412 S.E.2d at 669. The court buttressed its finding by referring to § 1B-1(a) of the Act, which uses the "jointly or severally liable in tort for the same injury" language to describe a right of contribution. *See* N.C. GEN. STAT. § 1B-1(a) (1983).

24. Section 1B-1(f) provides:

> This Article does not impair any right of indemnity under existing law. Where one tort-feasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

N.C. GEN. STAT. § 1B-1(f) (1983).

25. *Yates*, 330 N.C. at 795, 412 S.E.2d at 670.

26. *Id.*

27. *Id.*; *see infra* notes 47-48 and accompanying text.

28. *Yates*, 330 N.C. at 795, 412 S.E.2d at 670. For further explanation of why this outcome serves to encourage settlements, see *infra* notes 78-82 and accompanying text.

29. *Id.* at 796-97, 412 S.E.2d at 670-71 (Meyer, J., dissenting). Chief Justice Exum and Justice Whichard joined Justice Meyer's dissent. *Id.* at 808, 412 S.E.2d at 677.

30. *Id.* at 796, 412 S.E.2d at 670 (Meyer, J., dissenting).

The dissent cited case law from North Carolina[31] and other jurisdictions[32] for the proposition that one must be directly at fault to be a tort-feasor, whether that fault is derived from active negligence or active participation in the wrongdoing.[33] The majority's holding that a vicariously liable defendant is a tort-feasor, the dissenters believed, "blurs the significant distinction between vicarious and joint liability and is completely unsupportable given our understanding of that term."[34] The dissent interpreted the use of "tort-feasor" in section 1B-4(1) as restricting the phrase "person liable in tort" found in the first sentence of the section.[35] They argued that the legislature would not have used two different terms if it did not intend two different meanings.[36] In addition, the dissent pointed to the title of the statute, the "Uniform Contribution Among Tort-Feasors Act," to show that the Act deals only with contribution and not matters involving indemnity.[37] The dissent refuted the majority's assertion that its holding would encourage settlements.[38] Because the master retains the ability to seek indemnity from the servant, the dissent insisted, the servant gains no advantage from settling.[39]

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31. *See* State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 470, 380 S.E.2d 100, 102-03 (1989) ("Two or more parties are joint tortfeasors when their negligent or wrongful acts are united in time or circumstance . . . or when two separate acts concur in point of time and place to cause a single injury."); Bowen v. Iowa Nat'l Mut. Ins. Co., 270 N.C. 486, 491-92, 155 S.E.2d 238, 242-43 (1967) (holding that for joint tort-feasor relationship, it is essential that there be "some wrong done by each tort-feasor contributing in some way to the wrong complained of" and that "[a]lthough the principal is responsible for the tort of his agent under the doctrine of *respondeat superior*, there was nothing in the present situation fairly comparable to that of joint tort-feasors"); Brown v. Louisburg, 126 N.C. 701, 703, 36 S.E. 166, 167 (1900) ("To make persons joint tort feasors they must actively participate in the act which causes the injury.").

32. *See, e.g.*, Elias v. Unisys Corp., 410 Mass. 479, 480-81, 573 N.E.2d 946, 947 (1991) (holding that liability based on respondeat superior does not make one a joint tort-feasor); Theophelis v. Lansing Gen. Hosp., 430 Mich. 473, 483, 424 N.W.2d 478, 483 (1988) ("The principal, having committed no tortious act, is not a 'tortfeasor' as that term is commonly defined.").

33. *Yates*, 330 N.C. at 796-803, 412 S.E.2d at 671-74 (Meyer, J., dissenting).

34. *Id.* at 803, 412 S.E.2d at 674 (Meyer, J., dissenting).

35. *Id.* at 804, 412 S.E.2d at 675 (Meyer, J., dissenting); *see* N.C. GEN. STAT. § 1B-4 (1983).

36. *Yates*, 330 N.C. at 804, 412 S.E.2d at 675 (Meyer, J., dissenting) ("If we do not give some meaning to the term 'tort-feasor' other than merely a 'person liable in tort,' the term becomes superfluous, and we have not given meaning to *all* the language used.").

37. *Id.* at 804, 412 S.E.2d at 675 (Meyer, J., dissenting) ("[W]hen [the] meaning of [a] statute is in doubt, reference may be had to title and context in order to ascertain legislative intent." (citing Equip. Fin. Corp. v. Scheidt, 249 N.C. 334, 106 S.E.2d 555 (1959))).

38. *See supra* note 28 and accompanying text.

39. *Yates*, 330 N.C. at 806, 412 S.E.2d at 676 (Meyer, J., dissenting). The dissent dismissed for lack of empirical evidence the majority's assertion that employers usually do not seek indemnity because the employees are judgment proof. *Id.* (Meyer, J., dissenting).

The North Carolina General Assembly passed the Uniform Contribution Among Tort-Feasors Act[40] in 1967,[41] replacing the prior North Carolina contribution statute.[42] The Act, among other provisions, "abolishes the distinction between a release and a covenant not to sue."[43] Under section 1B-4 a valid release[44] or covenant not to sue[45] discharges the contracting party from further liability and reduces the liability of the others by the amount of the consideration for the covenant.[46] This provision is designed to encourage settlements because a tort-feasor who settles will be discharged from further obligations.[47] "The justification for this discharge is the idea that a tort-feasor will be reluctant to settle if

40. The Uniform Contribution Among Tortfeasors Act, promulgated by the National Conference of Commissioners on Uniform State Laws, was designed to "distribute the burden of responsibility equitably among those who are jointly liable and thus avoid the injustice often resulting under the common law." UNIF. CONTRIBUTION AMONG TORTFEASORS ACT commissioners' prefatory note (1955 Revision), 12 U.L.A. 59, 59 (1975). This injustice arose because at common law, the plaintiff was allowed to choose which among two or more joint tort-feasors would be sued. After paying all of the plaintiff's damages, the parties sued had no recourse to collect from the other joint tort-feasors who were not sued. *See* Gregg v. Wilmington, 155 N.C. 18, 23, 70 S.E. 1070, 1072 (1911) ("It is a well-established rule of law that there can be no contribution or indemnity among mere tortfeasors."). *See generally* KEETON ET AL., *supra* note 5, § 50, at 336-41 (describing history of inequities that lead to development of contribution).

41. Act of June 21, 1967, 1967 N.C. Sess. Laws 1091 (codified at N.C. GEN. STAT. § 1B-1 to 1B-6 (1983)).

42. *See* Act of Feb. 27, 1929, 1929 N.C. Sess. Laws 54 (amending statute to permit contribution between joint tort-feasors and the joinder of joint tort-feasors not made parties) (codified at N.C. GEN. STAT. § 1-240 (1943) (repealed 1967)).

43. Note, *Recent Developments in North Carolina Statutory and Case Law—Torts*, 47 N.C. L. REV. 262, 275 (1968).

44. "[A] release is a surrender of the cause of action, which may be gratuitous, or given for inadequate consideration." KEETON ET AL., *supra* note 5, § 49 at 332. A release of any defendant released all defendants since the plaintiff was surrendering the single cause of action. *See* Braswell v. Morrow, 195 N.C. 127, 131, 141 S.E. 489, 491 (1928).

45. Because the law of releases was harsh and rigid, parties developed a contract constituting a "covenant not to sue." In return for consideration, the plaintiff agrees not to enforce the cause of action against a particular defendant, leaving the plaintiff with an action against the other defendants. *See* Kendrick v. Cain, 272 N.C. 719, 721, 159 S.E.2d 33, 35 (1968) ("[A] covenant not to sue, procured by one tort-feasor, does not release the other from liability . . . ."). Many courts accepted this arrangement on the logic that the plaintiff was not releasing or surrendering the claim, but simply refusing to enforce it against the contracting party. KEETON ET AL., *supra* note 5, § 49 at 334. *See generally* Roy M. Cole, Note, *Joint Tort-Feasors—Validity of Covenants Not To Sue*, 30 N.C. L. REV. 75, 76 (1951) (describing nature and interpretation of such covenants).

46. *See* N.C. GEN. STAT. § 1B-4 (1983). For the text of this statute, see *supra* note 15.

47. *See* UNIF. CONTRIBUTION AMONG TORTFEASORS ACT commissioners' comment, 12 U.L.A. 64, 65 (1975) ("The policy of the Act is to encourage rather than discourage settlements."); T. Merritt Bumpass, Jr., Comment, *North Carolina Legislation: An Act Providing for Contribution Among Joint Tort-Feasors and Joint Obligors*, 5 WAKE FOREST L. REV. 160, 175 (1968) ("The unexpressed objective of [§ 1B-4] is the encouragement of settlements."); Linda F. Rigsby, Note, *The Covenant Not to Sue: Virginia's Effort to Bury the Common Law*

afterwards he will remain liable for contribution in an uncertain amount based on a judgment against another tort-feasor in a suit to which the settling tort-feasor may not be a party."[48]

North Carolina adopted the 1955 version of the Act,[49] which differed from the version promulgated in 1939.[50] While both versions allow recovery among "joint tortfeasors," only the 1939 Act defined "joint tortfeasors" as "two or more persons jointly or severally liable in tort for the same injury."[51] The commentators offered this reason for the definition's removal from the 1955 version: "There are still a few jurisdictions in which those who act independently and not in concert . . . cannot always be joined as defendants in the same action. In these jurisdictions the tendency is to use 'joint tortfeasors' to refer only to those who can be joined."[52] Whether the removal of this definition favors the Act's application to vicariously liable defendants has been a matter of debate.[53] Most states that adopted the 1939 version of the Act, which explicitly defined "tort-feasor" as "liable in tort,"[54] hold that the Act applies to vicariously liable defendants.[55] The states that have provisions similar to North Carolina's version of the Act are split on the question. Many fol-

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Rule Regarding the Release of Joint Tortfeasors, 14 U. RICH. L. REV. 809, 825 n.84 (1980) (describing the Act's purpose to encourage settlements).

48. Bumpass, *supra* note 47, at 175-76. To avoid collusion or discrimination, the Act mandates that all settlements be offered in "good faith." *Id.* at 176 (referring to N.C. GEN. STAT. § 1B-4 (1983)).

49. The National Conference of Commissioners on Uniform State Laws first promulgated the Uniform Contribution Among Tortfeasors Act in 1939. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT historical note, 12 U.L.A. 57, 57 (1975). The Conference revised the Act in 1955 largely because the eight states that had adopted the 1939 version made changes that precluded uniformity and other states refused to adopt it. *See id.* commissioners' prefatory note, at 59 (1955 Revision).

50. *Id.* historical note, at 57.

51. *Id.* historical note, at 57 (quoting § 1 of 1939 version of the Act).

52. *Id.* § 1 cmt. a, at 63.

53. The Alaska Supreme Court persuasively relied upon the 1939 Act's definition, although Alaska's statute contained no such definition. Alaska Airlines, Inc. v. Sweat, 568 P.2d 916, 930 (Alaska 1977) ("While Alaska's Act does not have a definition of the term 'joint tortfeasors' as such, it nevertheless clearly uses the term in the same context as [the 1939 Act]."). The Michigan Supreme Court, in contrast, refused to consider the effect of the 1939 Act's definition because it was not adopted by the legislature. Theophelis v. Lansing Gen. Hosp., 430 Mich. 473, 481 n.7, 424 N.W.2d 478, 482 n.7 (1988).

54. *See supra* text accompanying note 51.

55. Blackshear v. Clark, 391 A.2d 747, 748 (Del. 1978); Smith v. Raparot, 101 R.I. 565, 567-68, 225 A.2d 666, 667 (1967) (holding that release of servant/car driver released master/car owner as well); Krukiewicz v. Draper, 725 P.2d 1349, 1352 (Utah 1986). *But see* Mamalis v. Atlas Van Lines, Inc., 522 Pa. 214, 220-21, 560 A.2d 1380, 1382-84 (1989) (holding that the 1939 version of the Act, including the definition, does not apply to a vicariously liable defendant, largely because the defendant is not a "tort-feasor").

low reasoning similar to the *Yates* majority,[56] but several jurisdictions agree with the dissent.[57]

Smith v. South & West Railroad[58] is the leading case interpreting the common law in this area.[59] In 1909, the *Smith* court dismissed a claim against an employer for liability arising out of the master and servant relationship when a covenant not to sue had extinguished the liability of the servant.[60] The court reasoned:

> If the relation of master and servant existed [and] the servant . . . did the careless and unskillful act which injured the plaintiff and was primarily liable for it, . . . the master . . . would be liable. If this principle is invoked to impose liability, can it not also be invoked for protection? If the master is bound through his agent, can he not be released through his agent? If an act of negligence imposes liability, ought not an act of fidelity bring relief? This would seem to be obvious, except in those cases where the master actively participates in the wrong and thereby makes himself a joint tort feasor.[61]

Contrary to the dissent's assertions and the *Smith* court's strong language, the *Yates* court appropriately found that the Uniform Act changed the common law rule regarding vicariously liable defendants. As the following discussion demonstrates, the court ignored formalistic distinctions among aging and perhaps outdated legal principles and avoided a hyper-technical interpretation of the statute's language.

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56. *See Alaska Airlines*, 568 P.2d at 929-30 (reasoning that definition of "tort-feasor" from 1939 version of Act is applicable to 1955 version, which Alaska had adopted); Brady v. Prairie Material Sales, Inc., 190 Ill. App. 3d 571, 583, 546 N.E.2d 802, 810 (1989), *appeal denied*, 129 Ill. 2d 561, 550 N.E.2d 553 (1990); Van Cleave v. Gamboni Constr. Co., 101 Nev. 524, 528, 706 P.2d 845, 848 (1985); *cf.* Thurston Metals & Supply Co., Inc. v. Taylor, 230 Va. 475, 483-84 & n.1, 339 S.E.2d 538, 543 & n.1 (1986) (concluding that statutory title, which stated "Effect of release or covenant not to sue in respect to liability and contribution among joint tortfeasors," had no impact on analysis; plaintiff was able to continue action against employer).

57. *See, e.g.*, Elias v. Unisys Corp., 410 Mass. 479, 481, 573 N.E.2d 946, 947 (1991) (finding statute inapplicable since vicariously liable employer is "not a joint tortfeasor with its employee"); Theophelis v. Lansing Gen. Hosp., 430 Mich. 473, 491, 424 N.W.2d 478, 486 (1988) (release by plaintiffs of nurse and doctor foreclosed liability for hospital under respondeat superior); Kinetics, Inc. v. El Paso Prods. Co., 99 N.M. 22, 28, 653 P.2d 522, 528 (Ct. App. 1982) ("Because the respondeat superior form of vicarious liability is imposed upon one party through a legal fiction, the parties are not joint tortfeasors. . . . [I]t is elementary that the Uniform Contribution Among Tortfeasors Act does not apply."); Craven v. Lawson, 534 S.W.2d 653, 655-57 (Tenn. 1976).

58. 151 N.C. 479, 66 S.E. 435 (1909).

59. If the North Carolina Supreme Court had declined to interpret the Act as applying to a vicariously liable defendant, then *Smith* would have controlled. *See Yates*, 330 N.C. at 793, 412 S.E.2d at 669.

60. *Smith*, 151 N.C. at 482-83, 66 S.E. at 436-37.

61. *Id.* at 482-83, 66 S.E. at 437.

The crux of the dissent's argument is that a vicariously liable defendant has committed no independent wrong, is liable only for public policy reasons, and therefore is not a "tort-feasor" under the wording of section 1B-4.[62] These arguments are not persuasive. The dissent's reliance on the "technical"[63] meaning of "tort-feasor" is too mechanical.[64] Although North Carolina cases contain language to the effect that a vicariously liable defendant is not a "tort-feasor,"[65] there are other scenarios in which non-actively negligent parties are labelled "tort-feasors." For example, a "passively negligent tortfeasor" has the right to demand indemnity from an "actively negligent tort-feasor,"[66] and a secondarily liable defendant[67] is a "tort-feasor."[68] Thus, the word "tort-feasor" cannot be said to apply only to the actively negligent parties. Consequently, the *Yates* majority crafted its holding to include all types of liable parties by extending the Act's scope beyond the vicarious liability context to any situation, such as a case involving active/passive negligence, in which the defendant is "liable in tort."[69]

The dissent's argument that the Act's title shows that it applies only to contribution (and not indemnity) is superficially appealing,[70] but further analysis demonstrates that this distinction is not crucial. Courts fre-

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62. *See supra* notes 30-36 and accompanying text.

63. *See supra* note 30 and accompanying text.

64. The dissent's focus on the difference between "tort-feasor" and "persons liable in tort" ignores the possibility that the latter is simply legislative shorthand for the former. *See* Theophelis v. Lansing Gen. Hosp., 430 Mich. 473, 511, 424 N.W.2d 478, 495 (1988) (Levin, J., concurring) ("Read as a whole, 'tortfeasor,' as used in [equivalent of N.C. GEN. STAT. § 1B-4], is shorthand for and means 'persons liable in tort.' ").

65. *See supra* note 31.

66. Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 563, 75 S.E.2d 768, 771 (1953).

67. Primary/secondary negligence exists when two or more defendants are jointly and severally liable to the plaintiff and "either (a) one has been passively negligent but is exposed to liability through the active negligence of the other or (b) one alone has done the act which produced the injury but the other is derivatively liable for the negligence of the former." Edwards v. Hamill, 262 N.C. 528, 531, 138 S.E.2d 151, 153 (1964).

68. Ingram v. Nationwide Mut. Ins. Co., 258 N.C. 632, 635, 129 S.E.2d 222, 225-26 (1963).

69. *Yates*, 330 N.C. at 794, 412 S.E.2d at 669 (holding that "*for purposes of this Act*, a 'tort-feasor' is one who is liable in tort"). At least one commentator believes that extending the reach beyond the vicarious liability context to active/passive negligence cases is improper. *See* Darrell L. West, Note, *Torts—Vicarious Liability—Covenant Not to Sue Servant or Agent as Affecting Liability of Master or Principal*, 44 TENN. L. REV. 188, 199-200 (1976) (extending the Act's scope to the active/passive context "would generate too much uncertainty . . . and greatly discourage settlements").

70. *See supra* note 37 and accompanying text. This argument finds support from Professor Keeton: "It is necessary first of all to distinguish between contribution and indemnity. In any case where there is a right to indemnity, contribution statutes and rules do not apply." KEETON ET AL., *supra* note 5, § 50, at 339.

quently state that "[t]he rights of contribution and indemnity are mutually inconsistent; the former assumes joint fault, the latter only derivative fault."[71] There are critical distinctions between these two concepts. Under indemnity principles, a party is entitled to full restitution; contribution, however, relates to an allocation based upon the degree of fault of the two parties.[72] Still, to the plaintiff dealing with the multiple tort-feasors, there is no difference. As Justice Sam J. Ervin, Jr. stated, "When the jargon of the *quasi*-contract is laid aside, it is obvious that there is no fundamental distinction between the right of contribution and the right of indemnity. Neither right is based on any theory of subrogation to the rights of the injured person."[73] The Act, in section 1B-1(f),[74] recognizes this distinction between rules that affect the relationship of plaintiff and defendants and the rules that affect the relationship among the various defendants.[75] The reference to contribution in the title and the inclusion of section 1B-1(f) do not foreclose the Act's application to indemnity situations.[76]

The *Smith* court offered the theory that if an employer is held liable and then seeks indemnity from the employee, the employee's subsequent liability would be "a complete destruction of the [employee's] rights under its contract [i.e., the covenant not to sue] with the plaintiff."[77]

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71. Edwards v. Hamill, 262 N.C. 528, 531, 138 S.E.2d 151, 153 (1964); *see also* Ingram v. Smith, 16 N.C.App. 147, 151, 191 S.E.2d 390, 393, *cert. denied*, 282 N.C. 304, 192 S.E.2d 195 (1972) (citing *Edwards* for the proposition that contribution and indemnity are inconsistent).

72. *Compare* the description of indemnity, *supra* note 13 (stating that indemnification requires another to fully reimburse one who has discharged a common liability), *with* the description of contribution, *supra* note 19 (describing contribution as being available when one party has discharged more than its proportionate share).

73. Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 570, 75 S.E.2d 768, 776 (1953).

74. For text of this section, see *supra* note 24.

75. *See* West, *supra* note 69, at 196 ("The provision in the Act that it 'does not impair any right of indemnity under existing law' could be construed as meaning only that the Act does not affect the rights of an indemnitor and an indemnitee *as between themselves.*" (interpreting equivalent of N.C. GEN. STAT. § 1B-1(f) (1983))). The official comment to § 1 of the Uniform Act states, "Where a master is vicariously liable for the tort of his servant, the servant has no possible claim to contribution from the master; and the master does not need contribution from the servant and will not seek it, since he is entitled to full indemnity." UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 1 cmt. f, 12 U.L.A. 57, 64 (1975). This statement does not resolve the Act's applicability to the vicarious liability context.

76. *See Yates*, 330 N.C. at 795, 412 S.E.2d at 670 ("[N]othing in this provision [§ 1B-1(f)] precludes application of the Act to situations involving vicarious liability."). *But see* Craven v. Lawson, 534 S.W.2d 653, 656-57 (Tenn. 1976) (treating the equivalent of § 1B-1(f) as entirely prohibiting the Act's application to an indemnity situation).

77. Smith v. South and W. R.R., 151 N.C. 479, 483, 66 S.E. 435, 437 (1909); *see also* Brown v. Louisburg, 126 N.C. 701, 704, 36 S.E. 166, 167 (1900) (expressing same concerns about "destruction" of covenantee's rights if action is allowed to proceed against vicariously liable principal).

This formalism is not persuasive. The employee, in entering the covenant, should understand the legal consequences of that action. The employee and the plaintiff are creating legal rights with one another, not with the employer. The employee will still be liable to the employer; all parties should recognize that fact. It is not a "destruction" of the covenant to hold the employee subsequently liable for indemnity because the covenant does not apply to that issue.

This point raises the question of whether the majority's holding fulfills the Act's objective of encouraging settlements.[78] If the employee is liable for indemnification of the employer, then why would the employee agree to the covenant? Since the employer still has a right to indemnity, the employee's act of settling with the plaintiff does not change the employee's overall liability. Consequently, some argue that the majority's holding would discourage settlements because the employee has nothing to gain.[79] In fact, however, these commentators ignore significant advantages that accrue to a settling employee. The *Yates* majority argues that most employers do not pursue an indemnity action due to the judgment-proof nature of an employee or the desire to avoid ill-will among employees.[80] This is especially true in situations—such as the one in *Yates*—where the employee's chief asset is his insurance policy, which is used as consideration for the covenant.[81] The fact that the plaintiff agrees to covenant with the employee may be an indication that the employee is judgment-proof. If the employee had assets adequate to satisfy the potential judgment, it is likely that the plaintiff would pursue litigation in conjunction with the respondeat superior action against the employer, rather than agree to the covenant. The employee settles for peace of mind, hoping to close the matter and avoid the significant time and emotional drain of a lawsuit. If there had been no settlement, the employer probably would seek the value of the employee's personal insurance policy through an indemnity action. The settlement avoids this extra suit. The plaintiff, who may need money to pay pressing medical bills or other obligations, benefits from the covenant by obtaining funds while the action against

78. *See Yates*, 330 N.C. at 795, 412 S.E.2d at 670. For a discussion of the Act's purpose to encourage settlements, see *supra* notes 47-48 and accompanying text.

79. *See Yates*, 330 N.C. at 806, 412 S.E.2d at 676 (Meyer, J., dissenting) ("Moreover, under the majority's view, incentives for settlement will be lessened: even if a servant and plaintiff enter into a covenant not to sue, the servant remains potentially liable as an indemnitor."); *see also* Elias v. Unisys Corp., 410 Mass. 479, 483, 573 N.E.2d 946, 948-49 (1991) ("An agent who might be inclined to settle with a plaintiff would not necessarily terminate litigation or buy peace with a settlement [because of the indemnity provision]."); West, *supra* note 69, at 198 ("Thus the servant or agent would have an incentive not to settle because he would not be relieved of the risk of further litigation and liability.").

80. *See Yates*, 330 N.C. at 795, 412 S.E.2d at 670.

81. *See id.*

the employer for the remainder of the damages is proceeding.[82] Settlements are thus encouraged.

The *Yates* court was correct in applying the Uniform Act to a vicariously liable defendant. Although the statute's use of "persons liable in tort" and "tort-feasor" in the same section is ambiguous, the two are synonymous within the meaning of the Act. The plaintiff should be able to execute a covenant with the employee and then continue the action against the employer, leaving the employer with a right of indemnity from the employee. When the public policy purposes of the Act are taken into account, it becomes clear that the Act trumps the eighty-four year-old rule of *Smith v. South & West Railroad*. Applying the Act in this manner brings clarity to a muddled area of the law.

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82. *See* Brief for North Carolina Academy of Trial Lawyers at 11-12, Yates v. New South Pizza, Ltd., 330 N.C. 790, 412 S.E.2d 666 (1992) (No. 176PA91). "If [the Act does not apply], the plaintiff could not settle with Powell because to do so forecloses his chance to receive full compensation for his injuries. Therefore any compensation would have to await . . . a full settlement with Domino's Pizza[,] something which may not occur without a trial." *Id.* at 11.