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A COMPARATIVE ANALYSIS OF SELECTED NORTH CAROLINA CONTRACTUAL PROVISIONS

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INTRODUCTION

This article will examine selected North Carolina contractual doctrines and statutory provisions in relation to their relevant counterparts in other jurisdictions. Particular emphasis will be placed on those doctrinal and statutory applications that depart from the majority or prevailing view. Additionally, the article will focus on the significance of developments in the law in areas where the status of a particular doctrine is uncertain as a result of conflicting case law and interpretation. Included in this discussion will be the doctrines of promissory estoppel and employment "at will" which have been the subject of recent and past debate among the judiciary and the commentators with respect to the nature and scope of their application.

An in-depth examination of remedies and contractual principles governed by the Uniform Commercial Code (hereafter the "Code") is beyond the scope of this article. Provisions in Article 2 of the Code that regulate contracts for the sale of goods will be incorporated or referenced only to the extent necessary to expound upon related common law concepts. Additionally, Article 9 provisions governing assignment and delegation are omitted from the discussion of third party beneficiaries, and the discussion of contractual remedies is limited to an overview of general principles and significant departures in North Carolina law from the general application of those doctrines.

CONTRACT FORMATION

Offer and Acceptance Generally

Rules of law pertaining to contract formation in North Carolina are based primarily upon common law doctrines and are similar to those rules applied in a majority of the jurisdictions. The essence of contract formation traditionally has been characterized as a "meeting of the minds" of the parties which is most often expressed in the form of

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an offer/promise and acceptance/promise or performance.[1] Whether a party has made an offer or acceptance depends primarily on the party's intent as it is manifested by that party's expressions and conduct, and the totality of the circumstances. Moreover, once it is determined that a party has made an offer, the offeror is free to revoke the offer at any time prior to acceptance.[2] This is true even where the offeror states that the offer is to remain open for a stated period of time. There are, however, several circumstances under which an offer will become irrevocable such that the offeror is no longer free to revoke the offer, and must allow the offeree the opportunity to accept the offer either within the stated time or within a reasonable time.

One of the most widely recognized exceptions is the option contract which is created when consideration is given to have the offer left open for a stated period of time.[3] While the courts generally will not inquire into the adequacy of the consideration that is paid to have the option left open, most courts that have been presented with the question of whether consideration must, in fact, be paid in order to create an option contract, have responded in the affirmative.[4] The drafters of the Restatement (Second), however, take the position that a written recital of consideration may be sufficient to create an option con-

1. E. ALLAN FARNSWORTH, CONTRACTS §3.6 (3d ed. 1999); Yeager v. Dobbins, 114 S.E.2d 820, 823-24 (N.C. 1960) ("In the formation of a contract, an offer and acceptance are essential elements; they constitute the agreement of the parties. The offer must be communicated, must be complete, and must be accepted in its exact terms. . . . Mutuality of agreement is indispensable; the parties must assent to the same thing in the same sense . . . and their minds must meet as to all the terms."); Gregory v. Perdue, 267 S.E.2d 584 (N.C. Ct. App. 1980) ("To constitute a valid contract, parties must assent to the same thing in the same sense, and their minds must meet as to all the terms; if any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement.").

2. Winders v. Kenan, 77 S.E. 687, 689 (N.C. 1913) (citing Paddock v. Davenport, 12 S.E. 464 (N.C. 1890) ("If not based on a valuable consideration, the right to buy may be withdrawn at any time before acceptance . . . .").

3. *Id.* (citing Cummins v. Beavers, 48 S.E. 891, 894 (Va. 1904), where the court said: "[T]he distinction between an option given without consideration and an option given for a valuable consideration is that in the first case it is simply an offer to sell, and can be withdrawn at any time before acceptance upon notice to the vendee; but in the second, where a consideration is paid for the option, it cannot be withdrawn by the vendor before the expiration of the time specified in the option."; *see also* Ward v. Albertson, 81 S.E. 168, 169 (N.C. 1914).

4. *See, e.g.,* Samonds v. Cloninger, 127 S.E. 706, 707 (N.C. 1925) (The court generally noted that the recital of consideration in a contract was not conclusive regarding the establishment of a contract.). *See also* Lewis v. Fletcher, 617 P.2d 834, 835-36 (Idaho 1980) (Where $20.00 was recited as consideration to hold an offer open but was never paid, the court held that the option was invalid and unenforceable.); Hermes v. William F. Meyer Co., 382 N.E.2d 841, 844-45 (Ill. Ct. App. 1978) (There the court held that where $1.00 was recited as consideration but the plaintiff denied receipt of the money, the option was not supported by consideration and was a mere offer subject to withdrawal by the plaintiff at any time before acceptance.); Berryman v. Kmoch, 559 P.2d 790, 792 (Kan. 1977) (Where the parties' agreement recited consideration of $10.00 but the money was never paid, the court held that "[a]n option contract which is not supported by consideration is a mere offer to sell which may be withdrawn at any time prior to acceptance.").

tract even if the consideration is never paid.[5] Although there appears to be North Carolina case law in support of the Restatement position, the decision which held that the consideration was sufficient to create an irrevocable offer even though it was not paid was one in which the vendee had actually attempted payment by submitting a check for $5.00 to the vendor.[6] The vendor acknowledged receipt of the check but subsequently returned it to the vendee when he changed his mind about selling the property to the vendee. The court focused on the question of the adequacy of the $5.00 as consideration to have the offer left open and concluded that it was sufficient to bind the vendor. Moreover, the court referred to the $5.00 as having been paid and appeared to have disregarded the vendor's attempt to reject payment by returning the check.[7] Thus, *Ward* is not representative of the more typical case in which there is no attempt made to provide the consideration recited in the parties' instrument. In addition to a recital of the $5.00, the option in *Ward* was also under seal, and the court noted that an agreement to hold an offer open for the time specified, if supported by consideration *or* a seal, constitutes an irrevocable offer to sell.[8] Consequently, the court was possibly influenced by the presence of the seal being sufficient to hold the offer open in the absence of consideration. In general, the acceptance of the seal as a substitute for consideration for an option is widely recognized under North Carolina case law,[9] and while the courts will not inquire behind the seal in an action at law for damages, where the party is seeking equitable relief, the courts will go behind the seal and refuse to enforce the agreement unless the seal is supported by consideration.[10]

Oftentimes, instruments containing a recital of money as consideration to have an offer left open will also include a general recital in which the offeror agrees that she will hold the offer open based upon the money and "other valuable consideration." Accordingly, where the money has not been paid, the offeree will contend that some per-

5. RESTATEMENT (SECOND) OF CONTRACTS § 87 (1981) ("An offer is binding as an option contract if it. . .is in writing and signed by the offeror, recites a *purported* consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time . . . .") (emphasis added).

6. *Ward*, 81 S.E. at 169.

7. *See, e.g.*, Buffaloe v. Hart, 441 S.E.2d 172 (N.C. Ct. App. 1994) (The court disagreed with the defendant's contention that the plaintiff's delivery of a check to the defendant did not constitute partial payment because the defendant never legally accepted the plaintiff's check and held that where the plaintiff delivered a check to the defendant on October 22nd and the defendant did not return the check to plaintiff until October 26th, one could reasonably conclude that the defendant accepted payment under the terms and conditions of the parties' contract.).

8. *Id.*

9. Cruthis v. Steele, 131 S.E.2d 344, 346 (N.C. 1963); *Samonds*, 127 S.E. at 707; Craig v. Kessing, 244 S.E.2d 721, 723 (N.C. Ct. App. 1978).

10. *Craig*, 244 S.E.2d at 724.

formance on the part of the offeree serves as the "other valuable consideration." In *Craig v. Kessing* where the money recited in the instrument was not paid, and the plaintiff asserted that his efforts to obtain a buyer for the property constituted consideration for the defendant's promise to hold the offer, the court agreed that there was sufficient evidence in the record to support plaintiff's position that his efforts constituted consideration.[11] The outcome of these cases is largely dependent upon whether the court finds that the actions of the party seeking enforcement were sought by the other party, or whether the party's actions simply constituted unbargained-for reliance. Where the court finds that the actions were not bargained for, the enforcement of the parties' agreement will turn on the court's willingness to apply the doctrine of promissory estoppel.[12]

A second exception to the general rule that an offer is revocable at any time prior to acceptance applies to contracts for the sale of goods. This exception provides that where a merchant states in a signed writing that the offer will remain open, the merchant must hold the offer open for the time stated or for a reasonable time not to exceed three months.[13] A third exception which pertains to unilateral contracts provides that where the offeror seeks a performance from the offeree, the tender or beginning of performance by the offeree results in the creation of an option contract.[14] The offeror can no longer withdraw the offer, but must give the offeree the opportunity to complete the performance either within the time stated or within a reasonable time. Although this exception has generally met with approval,[15] there is no case law reflecting an explicit adoption of the Restatement provision by the North Carolina courts. On the contrary, the North Carolina Court of Appeals in *White v. Hugh Chatham Memorial Hospital* reiterated its position that an offeror is free to revoke her offer at any time where the offeror is seeking a performance from the offeree when it said: "As is deducible from the foregoing, the distinctive features of an [sic] unilateral contract are that the offeror is the master of

11. *Id.* at 723-24.

12. *See, e.g.*, Berryman v. Kmoch, 559 P.2d 790, 793-794 (Kan. 1977) (There the court rejected the appellant's argument that the option contract should be enforceable under the doctrine of promissory estoppel where the appellant had spent time, effort and money attempting to interest other investors in the property.).

13. N.C. GEN. STAT. § 25-2-205 (WESTLAW through 2004 Legis. Sess.). John D. Wladis, *The Contract Formation Sections of the Proposed Revisions to U.C.C. Article 2*, 54 SMU L. REV. 997, 1003 (2001) (2-205 revised to substitute "authenticated record" for "signed writing" and "form record" for "form" to reflect current electronic commerce.).

14. RESTATEMENT (SECOND) OF CONTRACTS § 45(1) (1981) ("Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it. . . .").

15. FARNSWORTH, *supra* note 1, § 3.24.

his offer and can withdraw it at any time before it is accepted by performance . . . ."[16] Under this application of the traditional view of a unilateral contract, however, North Carolina courts have held that where the offeree has fully performed prior to a revocation of the offer, the offeree is entitled to performance by the offeror.[17]

Employment "At Will" Doctrine

North Carolina is among those jurisdictions that continue to adhere to the employment "at will" doctrine which provides that in the absence of an employment contract for a definite period, the employee and employer are free to terminate their association at any time and for any reason.[18] The employment "at will" doctrine, however, is subject to certain state and federal statutes that prohibit retaliatory and discriminatory terminations.[19] The North Carolina Equal Employment Practices Act, for example, sets forth the following:

16. White v. Hugh Chatham Memorial Hosp., 387 S.E.2d 80, 81 (N.C. Ct. App. 1990).

17. *Id.* (The court held that the statement in defendant hospital's personnel handbook was evidence of an offer to make insurance available to employees who met the stated conditions and that the offer had not been withdrawn before the employee met those conditions.); *see also* Roberts v. Mays Mills, Inc., 114 S.E. 530 (N.C. 1922) (employer's promise to pay a bonus to all employees who remained continuously employed until Christmas held to be enforceable); Brooks v. Carolina Tel. & Tel. Co., 290 S.E.2d 370, 372 (N.C. Ct. App. 1982)(an employee's lawsuit for severance benefits was not dismissible because the employer did not withdraw its offer of the benefits before the employee met the conditions even though the employer could have done so).

18. Still v. Lance, 182 S.E.2d 403 (N.C. 1971).

19. *See, e.g.*, 42 U.S.C.A. § 2000e-2(a)(1) (WESTLAW through P.L. 108-444 approved Dec. 3, 2004) ("It shall be unlawful employment practice for an employer. . . to. . . discharge any individual. . .because of such individual's race, color, religion, sex, or national origin. . . ."); N.C. GEN. STAT. § 95-83 (WESTLAW through 2004 Legis. Sess.) ("Any person who may be. . .deprived of continuation of his employment in violation of G.S. 95-80, 95-81 or 95-82 [prohibiting an employer from denying an employee the opportunity to participate in organized labor activities or requiring an employee to participate in such activities as a condition of employment] . . . shall be entitled to recover from such employer . . . such damages as he may have sustained by reason of such . . . deprivation of employment. . . ."); N.C. GEN. STAT. § 168A-5 (WESTLAW through 2004 Legis. Sess.) ("It is a discriminatory practice for an employer to . . . discharge or otherwise discriminate against a qualified person with a disability on the basis of a disabling condition . . . . "); N.C. GEN. STAT. § 95-241(WESTLAW through 2004 Legis. Sess.) which provides, in part, as follows:

(a) No person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to do any of the following:
(1) File a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to any of the following:
a. Chapter 97 of the General Statutes
b. Article 2A or Article 16 of this chapter
c. Article 2A of Chapter 74 of the General Statutes
d. G.S. 95-28.1
e. Article 16 of Chapter 127A of the General Statutes
f. G.S. 95-128.1A
(2) Cause any of the activities listed in subdivision (1) of this subsection to be initiated on an employee's behalf

> It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees . . . .[20]

In addition to statutory restrictions on the employment "at will" relationship, employee handbooks may also potentially impose limitations on the relationship. In the absence of consideration independent from performance of the job by the employee, however, most courts historically have held that employee handbooks are unilateral statements by the employer that are unenforceable based on lack of consideration or lack of mutuality of obligation.[21] In recent years, some courts have begun to depart from this posture and decisions evince an inclination to take a more liberal approach towards the incorporation of the employee handbook into the "at will" employment contract. At least one North Carolina court has held that the application of the employment "at will" doctrine can be restricted by employee manuals which place limitations on the circumstances under which an employee may be terminated. In *Trought v. Richardson,* where the employee alleged that she was required to sign a statement at the beginning of her employment that she had read the hospital policy manual, the North Carolina Court of Appeals concluded the employee had sufficiently alleged that the policy manual was a part of her employment contract to survive a motion to dismiss.[22] The manual provided that she could be discharged only for cause, and set forth procedures that the hospital was required to follow.[23] The next year, however, the North Carolina Supreme Court in *Harris v. Duke Power* distinguished *Trought* and found that the employment manual in *Harris* provided rules of conduct that were directed towards management rather than the employees and that the employee in that case, unlike the employee in *Trought*, had not been told he could be discharged only "for cause."[24] In so doing, the court followed a line of decisions in the state in which the courts have refused to find that an employee

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(3) Exercise any right on behalf of the employee or any other employee afforded by Article 2A or Article 16 of this Chapter or by Article 2A of Chapter 74 of the General Statutes

(4) Comply with the provisions of Article 27 of Chapter 7B of the General Statutes . . . .

See also Andrew B. Cohen, *Wrongful Discharge and the North Carolina Equal Employment Practices Act: The Localization of Federal Discrimination Law*, 21 N.C. CENT. L.J. 54 (1995).

20. N.C. GEN. STAT. § 143-422.2 (WESTLAW through 2004 Legis. Sess.).

21. Richard Harrison Winters, *Employee Handbooks and Employment-at-Will Contracts*, 1985 DUKE L.J. 196, 201.

22. Trought v. Richardson, 338 S.E.2d 617 (N.C. Ct. App. 1986).

23. *Id.* at 619.

24. Harris v. Duke Power Co., 356 S.E.2d 357 (N.C. 1987), *overruled on other grounds*, 493 S.E.2d 420 (N.C. 1997).

handbook becomes part of an "at will" employment contract.[25] Although these courts have consistently held that the employee handbook must "expressly" be incorporated into the employment contract, the decisions provide no definitive guidance on the type of conduct that will satisfy the requirement of "express" incorporation.[26] In *Salt v. Applied Analytical, Inc.*, the North Carolina Court of Appeals appeared to retreat from the position it had taken in *Trought* when it found that the employee manual was "neither inflexible nor all-inclusive" with respect to termination procedures.[27] The court went on to conclude that although the manual was presented as the employee's "work bible" when he was hired, it was not expressly included within his "at will" contract.[28] The distinctions pointed out by the court, however, are unconvincing, and the decisions appear to be more reflective of a retrenchment by the court from its earlier inclination to align itself with the recent trends in this area.

Winters, for example, points out in his article that more courts, in general, are beginning to find that employee handbooks contain enforceable rights, and that the application of the unilateral contract rule is supportive of an outcome favoring the enforcement of employee handbooks.[29] Winters' position is premised on the analytical framework of a unilateral contract which accomplishes two objectives. In the first instance, the presumption under a unilateral contract analysis is that the employer is offering the handbook as an incentive for the employee to remain on the job. Thus the employee's continuation of employment would constitute the performance sought by the employer in exchange for the promises contained in the employee handbook; under this construct, consideration is no longer an issue. Moreover, since the unilateral contract is an exception to the requirement of mutuality of obligation, the argument that no enforceable contract results, because the employer is bound by the constraints in

25. *See generally,* Walker v. Westinghouse Elec. Corp., 335 S.E.2d 79 (N.C. Ct. App. 1985), *disc. review denied*, 341 S.E.2d 39 (N.C. 1986).; Smith v. Monsanto Corp., 322 S.E.2d 611 (N.C. Ct. App. 1984) (company policy manual was not incorporated into the employment contract); Griffin v. Housing Authority, 303 S.E.2d 200 (N.C. Ct. App. 1983); *see also* Winters, *supra* note 21.

26. *Walker*, 335 S.E.2d at 83-84 (Where the employee, shortly after beginning employment, received a copy of an employee handbook, the court said "[i]t is clear that unilaterally promulgated employment manuals or policies do not become part of the employment contract unless expressly included in it . . . ."); *Griffin*, 303 S.E.2d at 201 (employer's personnel manual was not expressly incorporated into the employment contract.).

27. *Walker*, 335 S.E.2d at 100.

28. *Id.* at 99-100 (The employee testified that she was given a copy of the personnel manual at the beginning of her employment and that she was required to sign a statement verifying receipt of the manual. She further stated that employees were required to sign periodic verifications acknowledging they had read revisions to the manual.).

29. Winters, *supra* note 21, at 205.

the handbook while the employee remains free to terminate the relationship at will, is greatly diminished.

Notwithstanding their restrictive treatment of employee handbooks, North Carolina courts, like those in other jurisdictions that continue to adhere to the employment "at will" doctrine, appear to have carved out other exceptions that lessen the impact the doctrine has on employment relationships. The courts' movement in this direction, however, has been fraught with difficulty and uncertainty. In *Coman v. Thomas Manufacturing Co.*, the North Carolina Supreme Court recognized wrongful discharge in an "at will" employment relationship when it said that discharging an employee for refusing to falsify driver records to show compliance with federal transportation regulations offended public policy.[30] Prior to *Coman*, the North Carolina Court of Appeals held that an employee had stated an enforceable claim against the defendant employer for wrongful discharge where she alleged that she was dismissed in retaliation for refusing to commit perjury on the employer's behalf.[31]

In *Sides* where the employee further alleged that assurances by the employer that she would only be discharged for incompetence induced her to move from Michigan to North Carolina to accept the position, the court also applied the "moving residence" exception to the employment "at will" relationship.[32] Earlier in *Burkhimer v. Gealy*, the North Carolina Court of Appeals, citing *Tuttle v. Kernersville Lumber Co.*, had said that "[w]here an employee gives some special consideration in addition to his services, such as . . . removing his residence from one place to another in order to accept employment . . . such a contract may be enforced . . . ."[33] In *Harris v. Duke Power*, the North Carolina Supreme Court had also recognized the "moving residence" exception although it did not apply it in that case.[34] Ten years after *Harris*, however, the North Carolina Supreme Court, in *Kurtzman v. Applied Analytical Industries, Inc.*, disavowed any adoption by that court of the "moving residence" exception to the employment "at will" doctrine.[35] The court acknowledged that while it had made mention of the "moving residence" exception in *Harris*, it was part of a background discussion, and not the basis upon which that case was decided. The court further clarified its current position by

30. Coman v. Thomas Mfg., 381 S.E.2d 445, 448 (N.C. 1989) ("Our decision today is in accord with the holdings of most jurisdictions. About four-fifths of the states now recognize some form of cause of action for wrongful discharge."); Cohen, *supra* note 19.

31. Sides v. Duke Univ., 328 S.E.2d 818, 826-27 (N.C. Ct. App. 1985).

32. *Id.* at 828.

33. Burkhimer v. Gealy, 250 S.E.2d 678, 682 (N.C. Ct. App. 1979).

34. Harris v. Duke Power Co., 356 S.E.2d 357, 359 (N.C. 1987), *overruled on other grounds*, 493 S.E.2d 420 (N.C. 1997).

35. Kurtzman v. Applied Analytical Indus., 493 S.E.2d 420 (N.C. 1997).

stating that it had neither approved nor disapproved the "moving residence" exception and that any language in *Harris* viewed as suggesting the contrary was expressly disapproved. It added that the pertinent language from the court of appeals' opinions in *Burkhimer* and *Sides* was also disapproved.[36] Krupnow's article, *Employee Beware—Relocation Does Not Remove the Presumption of Employment-at-Will: Kurtzman v. Applied Analytical Industries, Inc.,* provides a detailed history of the development of the "moving residence" exception and the author notes that while the court in *Kurtzman* claimed the "moving residence" exception was 'largely clear,' there has been disagreement among the courts on this exception.[37] She concludes, however, that the continued viability of the "moving residence" exception following *Kurtzman* is doubtful at best.[38]

Reliance on Offers in Bilateral Contracts

Although courts generally reacted favorably to the Restatement's provision creating an irrevocable offer based upon reliance on an offer seeking performance in the context of unilateral contracts, jurisdictions are split on the question of whether reliance on an offer seeking a return promise in the context of a bilateral contract should create an irrevocable offer.[39] Since both parties are bound under a bilateral contract upon their exchange of promises, these contracts, in general, do not give rise to the same concerns as unilateral contracts. Unlike the promisee under a unilateral contract for whom performance is acceptance, the promisee under the bilateral contract is (or can be) protected at the time she begins her performance. Nonetheless, there are certain circumstances that arise in the context of a bilateral contract when it is necessary for the offeree to rely upon the offer prior to acceptance. These circumstances most commonly involve construction contracts where a general contractor must rely upon the subcontractor's bid in submitting its own bid. Where the subcontractor attempts to revoke its bid after the general contractor has used the subcontractor's bid in its overall bid for a project, the general contrac-

36. *Id.* at 423.

37. Mary McCrory Krupnow, *Employee Beware—Relocation Does Not Remove the Presumption of Employment-at-Will*: Kurtzman v. Applied Analytical Industries, Inc., 76 N.C. L. REV. 2423, 2432 (1998).

38. *Id.* at 2438.

39. James Baird Co. v. Gimbel Bros., 64 F.2d 344 (2d Cir. 1933) (There the court enunciated the position that reliance of a general contractor on a bid submitted by a subcontractor does not result in the creation of an option contract, requiring the subcontractor to leave its offer open absent some agreement to the contrary by the parties.); *contra* Drennan v. Star Paving Co., 333 P.2d 757 (Cal. 1958) (In this case, the court held that reliance by a general contractor on a subcontractor's bid would result in making the subcontractor's offer irrevocable for a reasonable period of time following reliance by the general contractor.).

tor may argue that its reliance on the subcontractor's bid should result in an irrevocable offer. Under the application of this theory of promissory estoppel, the subcontractor would be unable to revoke the offer until the general contractor has had a reasonable opportunity to accept the offer. While the majority of the courts that have considered this question have held that under these circumstances an irrevocable offer is created,[40] North Carolina courts have taken the position that reliance under such circumstances does not form a basis for creating an irrevocable offer.[41] Although North Carolina courts accept promissory estoppel as a substitute for consideration under certain circumstances, in *Home Electric Co. v. Hall*, the court refused to recognize a cause of action based on promissory estoppel to bind a subcontractor to its bid based upon the general contractor's reliance on that bid.[42] The rationale for the court's decision was based partly upon its concern for the unfairness that would result where the application of promissory estoppel would bind the subcontractor while leaving the general contractor free to shop around for lower bids.

The "Mirror Image" Rule

North Carolina case law is consistent with the general rule of law with respect to acceptance of an offer in that it provides that the acceptance must be unequivocal.[43] It should be noted, however, that while the common law "mirror image" rule provides that any deviation from the offer results in a counteroffer, North Carolina is among those jurisdictions that interpret the "mirror image" rule as requiring that the change in the offer be material in order for the purported acceptance to result in a counteroffer. The court has held that a provision for the inclusion of additional details to be agreed upon by the parties at a later time will not prevent a response from constituting a valid acceptance. In *Carver v. Britt*, where the vendor of real property stated that he accepted an offer to purchase property "subject to details to be worked out" by the vendee and the vendor's attorney, the court held that such a provision did not result in a counteroffer.[44] On the other hand, where the offeree's response extends beyond the addition of mere details, the response results in a counteroffer and pre-

40. CALAMARI AND PERILLO, CONTRACTS § 6.5 (3d ed. 1987).
41. Home Elec. Co. v. Hall, 358 S.E.2d 539 (N.C. Ct. App. 1987).
42. *Id.* at 542 (The court noted that general contractors could protect themselves by securing a contract with the subcontractor at the outset conditioned on a successful bid.); Janine McPeters Murphy, Note, *Promissory Estoppel: Subcontractor's Liability in Construction Bidding Cases*, 63 N.C. L. REV. 387 (1985); Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLIAMETTE L. REV. 263 (1996).
43. Carver v. Britt, 85 S.E.2d 888 (N.C. 1955).
44. *Id.* at 890.

vents the formation of a contract.[45] Where the subject matter of the parties' transaction is goods, such that the transaction is governed by the provisions of the Code, the common law "mirror image" rule will not apply, and terms contained in the offeree's response that vary from the offer will not prevent the response from constituting an acceptance, provided that the requirements of Section 2-207 are met.[46]

Consideration

To the extent that a contract is said to consist of an agreement between parties that has a legal effect, a fundamental requirement for the legal effect is consideration.[47] Historically, the "benefit detriment" theory provided that the requirement of consideration for the formation of a contract was satisfied by a detriment by the promisee or a benefit to the promisor.[48] Today, however, most jurisdictions apply the "bargain" theory of consideration which states that the promisor must seek a promise or performance from the promisee in exchange for the promisor's promise, and the promisee, in turn, must provide a promise or return performance in exchange for the promisor's promise.[49] North Carolina case law appears to adopt the "bargain" theory of consideration while continuing to embrace the

45. Richardson v. Greensboro Warehouse and Storage Co., 26 S.E.2d 897, 898-89 (N.C. 1943); *See also* Rucker v. Sanders, 109 S.E. 857 (N.C. 1921).

46. N.C. GEN. STAT. § 25-2-207(1) (WESTLAW through 2004 Legis. Sess.) ("A definite and seasonable expression of acceptance . . . which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms."); Mark E. Roszkowski, *Revised Article 2 of the Uniform Commercial Code——Section-by-Section Analysis,* 54 SMU L. REV. 927, 932 (2001) (Revised § 2-207 provides that if (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed then the terms of the contract are: (1) terms that appear in the records of both parties; (2) terms, whether in a record or not, to which both parties agree; and (3) terms supplied or incorporated under any provision of the Uniform Commercial Code.).

47. *In re* Owen, 303 S.E.2d 351, 353 (N.C. Ct. App. 1983) ("Consideration is the glue that binds the parties to a contract together.").

48. Hamer v. Sidway, 27 N.E. 256 (N.Y. 1891) (A landmark case based on the "benefit detriment" theory of consideration in which an uncle promised to give his nephew $5,000 if the nephew refrained from drinking, smoking, swearing and participating in various other vices until the nephew was 21 years of age. The court held that the nephew suffered a legal detriment even if the nephew actually benefited from not engaging in these activities and therefore there was consideration for the uncle's promise of the $5,000.).

49. RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) ("[T]o constitute consideration, a performance or a return promise must be bargained for. . . .A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. . . .").

"benefit detriment" theory.[50] In *Chemical Realty Corp. v. Home Fed. Savings and Loan Ass'n,* the court had the following to say:

> [C]onsideration sufficient to support a contract . . . consists of any benefit right, or interest bestowed upon the promisor or any forbearance, detriment or loss undertaken by a promisee . . . . Moreover, the Restatement (Second) of Contracts § 71 (1979) provides, in pertinent part, that. . .to constitute consideration, a performance or a return promise must be bargained for . . . . "Bargained for" in this context means . . . the consideration induces the making of the promise and the promise induces the furnishing of the consideration. Both elements must be present or there is no bargain . . . .[51]

Practically speaking, there is no significant difference between the two theories in that the "benefit detriment" theory necessarily involves a bargaining element and the "bargain" theory, likewise, involves a detriment. Although, in *Hamer*, the landmark "benefit detriment" case, where the discussion focused on whether the nephew had suffered a detriment, the application of the "bargain" theory to *Hamer* would yield the same result inasmuch as the uncle had sought a performance from the nephew in exchange for his promise of the money, and the nephew in turn, had refrained from participating in the named activities, in exchange for the uncle's promise of the money.

A particular application of the doctrine of consideration in North Carolina is the non-compete agreement. Where an employee enters into an agreement with the employer at the beginning of the employment contract, courts generally do not have any difficulty finding that consideration exists for the non-compete agreement since the employer, in this instance, seeks a promise from the employee not to compete against the employer following termination of her employment in exchange for the employer's promise to hire the employee. However, where the employee enters into a covenant not to compete with the employer subsequent to the formation of the employment contract, courts differ on whether the employee's continued employment with the employer is consideration for the employee's promise

50. Clark Trucking v. Lee Paving Co., 426 S.E.2d 288 (N.C. Ct. App. 1993) (The court rationalized that the subcontractor suffers no detriment when it submits bids to the general contractor and therefore there is no consideration to support an implied promise between the two parties.); Chemical Realty Corp. v. Home Fed. Savings and Loan Ass'n, 351 S.E.2d 786 (N.C. Ct. App. 1987); *see also* Carolina Helicopter v. Cutter Realty Co., 139 S.E.2d 362, 368 (N.C. 1964) ("[C]onsideration consists of some benefit or advantage to the promisor, or some loss or detriment to the promisee. . . ."); Mills v. Bonin, 80 S.E.2d 365, 367 (N.C. 1954) ("As a general rule the term consideration as affecting the enforceability of contracts, consists of some benefit or advantage to the promisor or some loss or detriment to the promisee . . . ."); Wolfe v. Eaker, 272 S.E.2d 781 (N.C. Ct. App. 1980); Albemarle Educ. Found. v. Basnight, 167 S.E.2d 486 (N.C. Ct. App. 1969); Holmes, *supra* note 42, at 431-32.

51. *Chemical Realty Corp.* at 788-89.

not to compete. North Carolina courts have held that where the covenant not to compete is entered into after the employment contract, there is no consideration for the employee's promise not to compete unless the employee receives a new benefit such as a promotion or a raise.[52] Mere continuation of employment by the employee following the non-compete agreement is not consideration based on the court's assumption that the employment relationship would have continued absent the covenant not to compete.[53]

Promissory Estoppel

Where a party fails to establish the "bargain" or the "benefit detriment" necessary to support a finding of consideration, an alternate basis for relief may lie in the application of the doctrine of promissory estoppel. Historically, the most common application of promissory estoppel was in the family or social context where gratuitous promises were most often made. The common law development of the doctrine of promissory estoppel represented an expansion of the doctrine of equitable estoppel to apply to situations where a gratuitous promise was detrimentally relied upon and enforcement under the doctrine of consideration was unavailable because of a lack of the bargaining element. The Restatement later incorporated a promissory estoppel provision which essentially provides that where the promisor should reasonably expect that a promisee will detrimentally rely upon her promise, the promise will be enforceable to the extent that justice requires.[54] While the promissory estoppel doctrine had its inception in the family/social context, the courts later extended its application to the commercial setting. Although North Carolina, like most jurisdictions, recognizes the doctrine of promissory estoppel,[55] the North Carolina Court of Appeals expressly declined to adopt Section 90 of the

52. Mastrom, Inc. v. Warren, 196 S.E.2d 528 (N.C. Ct. App. 1973).

53. *Id.* at 530; Kadis v. Britt, 29 S.E.2d 543, 548 (N.C. 1944) (The court noted that while continued employment is ordinarily viewed as sufficient consideration for a covenant not to compete, it was unwilling to so find where the contract containing the negative covenant was extracted from the employee after the employee had been employed for several years and the nature of his duties and the business thereafter remained the same.); *see also* James C. Greene Co. v. Kelley, 134 S.E.2d 166, 167 (N.C. 1964) (*Citing* Kadis v. Brit with approval, the court held that when the relationship of employer/employee is established without a restrictive covenant, any agreement thereafter not to compete must be in the form of a new contract with new consideration.).

54. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981)("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise . . . .").

55. Holmes, *supra* note 42, at 430.

Restatement (Second) that permits a third party to assert her reliance on a gratuitous promise.[56]

Moreover, the manner and the extent to which the doctrine has evolved in North Carolina has been the subject of debate. In *Wachovia Bank & Trust v. Rubish*, the North Carolina Supreme Court held that the defendant in that case could use promissory estoppel as a defense to a summary ejectment action by proving the plaintiff's express or implied promise to waive a written notice provision of the lease and the defendant's reliance on that promise.[57] The Fourth Circuit Court of Appeals subsequently relied upon *Wachovia Bank & Trust* when it enunciated its holding in *Allen M. Campbell Co. v. Virginia Metal Industries, Inc.*[58] The court, relying upon the *Wachovia Bank and Trust* decision, opined that North Carolina courts would have applied traditional promissory estoppel on the facts of *Campbell.* However, in *Campbell*, the Fourth Circuit expanded the scope of promissory estoppel in that the doctrine had been applied *defensively* in *Wachovia Bank & Trust*, whereas the doctrine was used *affirmatively* in *Campbell.* Following the *Campbell* decision, the North Carolina Court of Appeals used *Home Electric Co. v. Hall & Underdown Heating & Air Conditioning Co.* as an opportunity to explicate its position on the application of promissory estoppel when it said:

> North Carolina Courts have recognized to a limited extent the doctrine of promissory estoppel, but have not expressly recognized it in all situations. Furthermore, our Courts have never recognized it as a substitute for consideration, either in construction bidding, or in any other context. The North Carolina cases which have applied the doctrine have done so in a defensive situation, where there has been an intended abandonment of an existing right by the promisee. North Carolina case law has not approved the doctrine of affirmative relief.[59]

The court emphasized that *Wachovia Bank and Trust* was distinguishable on its facts from *Home Electric.* It further concluded that *Campbell* was not binding precedent and therefore it was not obligated to rely upon that decision. As the case law now stands, a federal court applying what it construed to be North Carolina law permitted the affirmative application of promissory estoppel in a construction bidding context. The intermediate state court, however, has since lim-

56. Lee v. Paragon Group Contractors, Inc., 337 S.E.2d 132 (N.C. Ct. App.1985) (After comparing section 90 of the Restatement and the Restatement (Second), the court declined to adopt the "third party" provision in the Restatement (Second) and held that only the promisee may assert promissory estoppel as a substitute for consideration.).

57. Wachovia Bank & Trust Co. v. Rubish, 293 S.E.2d 749 (N.C. 1982).

58. Allen M. Campbell Co. v. Va. Metal Indus., 708 F.2d 930 (4th Cir. 1983).

59. Home Electric Co. v. Hall & Underdown Heating & Air Conditioning Co., 358 S.E.2d 539, 541 (N.C. Ct. App. 1987).

ited the doctrine to a defensive application in the context of construction bidding, with an indication that, contrary to the *Campbell* decision, North Carolina courts have not approved the affirmative use of the doctrine under any circumstances. Until the North Carolina Supreme Court addresses this issue, the matter will remain unresolved.[60]

The Seal and Restitution in the Absence of Consideration

Historically, another basis upon which a promise was enforceable in the absence of consideration was a promise made under seal. It was generally agreed that the formality of the seal served as an adequate substitute for consideration. However, as the formality of the seal was eroded, most jurisdictions abolished the use of the seal as a substitute for consideration, either by statute or by judicial decisions. Notably, there is no statute in North Carolina purporting to abolish the seal for all transactions and to make it inoperative.[61] To the contrary, there is case law that supports the continued efficacy of the seal.[62] Moreover, there is statutory law that speaks to sealed instruments.[63] Notwithstanding the preceding, with respect to contracts for the sale of goods, North Carolina enacted Section 2-203 of the Code which states that "[t]he affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer."[64] Additionally, in those instances in which the court continues to recognize the validity of the seal, the formality and import of the seal have been diminished to the point that the court has been able to find that the mere presence of the word "seal" is sufficient to qualify the contract as a sealed instrument.[65]

60. Murphy, *supra* note 42, at 402; Holmes, *supra* note 42, at 429-31.

61. Eric Mills Holmes, *Stature and Status of a Promise Under Seal as a Legal Formality*, 29 WILLIAMETTE L. REV. 617, 639-41 n.58 (1993); Joel S. Jenkins, Jr., Comment, *The Seal in North Carolina and the Need for Reform*, 15 WAKE FOREST L. REV. 251 (1979).

62. Cameron v. Martin Marietta Corp., 729 F. Supp. 1529 (E.D.N.C. 1990); Allsbrook v. Walston, 193 S.E. 151 (N.C. 1937); Garrison v. Blakeney, 246 S.E.2d 144 (N.C. Ct. App. 1978); Craig v. Kessing, 244 S.E.2d 721, 724 (N.C. Ct. App. 1978) (A seal raises a presumption of consideration that must be rebutted by clear and convincing evidence. If a party is seeking equitable relief, however, the court will go behind the seal and refuse to enforce the contract unless it is supported by actual consideration); Samonds v. Cloninger, 127 S.E. 706, 707 (N.C. 1925) ("[A]n option under seal requires no consideration to support it . . . .").

63. N.C. GEN. STAT. § 1-47(2) (WESTLAW through 2004 Legis. Sess.) (the statute of limitations for a sealed instrument is 10 years.).

64. N.C. GEN. STAT. § 25-2-203 (WESTLAW through 2004 Legis. Sess.); Roszkowski, *supra* note 46 at 931 (§ 2-203 substantially unchanged).

65. *Cameron*, 729 F. Supp. at 1530-31.

As with the doctrine of promissory estoppel, the doctrines of restitution and promissory restitution may be invoked where a promise or performance can give rise to questions of enforcement in a transaction that lacks the bargaining element required for the creation of a contract under the theory of consideration. The doctrine of restitution is premised upon the equitable principle that a party who is unjustly enriched by the services of another should be obligated to compensate that party for the reasonable value of her services even though the services were unrequested. In *Pilot Freight Carriers, Inc. v. David G. Allen Co.*, where the plaintiff delivered crushed stone to the defendant who used the stone in a construction project, the court determined that while there was no express contract between the parties, the actions of the parties gave rise to a quasi-contract.[66]

A particular application of the doctrine of restitution can arise in the context of a transaction where a subcontractor has contracted with a general contractor to supply goods or services to an owner of real property. Where the general contractor fails to pay the subcontractor, the subcontractor will often seek payment from the owner of the property. At common law, the subcontractor sought recovery on the grounds that the owner of the property would be unjustly enriched if allowed to retain the benefits of the services without compensating that party. The cases generally turned on whether the owner had paid the general contractor for the work since the owner, under those circumstances, would not be unjustly enriched even though the recipient of the payment was not the party who actually rendered the services.

The majority of jurisdictions, including North Carolina, have enacted mechanics' lien statutes which are intended to provide a remedy for subcontractors who comply with the statutory mandates.[67] While such statutes, in theory, are based upon the equitable doctrine of restitution, in actuality, the ability of the subcontractor to recover under such statutes depends, not upon whether the owner would otherwise be unjustly enriched, but upon whether the subcontractor complies with the procedural requirements of the statute. Consequently, under a mechanics' lien statute, an owner could be required to pay twice for services rendered. This potential liability has given rise to the use of lien waivers where the owner requires the general contractor to present waivers signed by subcontractors prior to the release of funds to the general contractor.

66. Pilot Freight Carriers, Inc. v. David G. Allen Co., 206 S.E.2d 750, 752 (N.C. Ct. App. 1974) (The court articulated the general rule that where services of a character usually charged for are rendered by one person for another and knowingly and voluntarily accepted, the law presumes the services were given with the expectation of payment and implies a promise to pay the reasonable value of the services.).

67. N.C. GEN. STAT. § 44A-13 (WESTLAW through 2004 Legis. Sess.).

Restitution can also arise where the recipient of an unrequested service subsequently promises to compensate the provider of the service but later reneges on the promise. The modern view as espoused in *Webb v. McGowin* is that the promisor may be legally liable on the subsequent promise if the promisor received a material benefit.[68] In that case, the owner of a company whose life was saved by an employee, subsequently promised to provide the employee financial assistance for the remainder of the employee's life. After the owner's death, the estate refused to pay the employee, and the court held that the estate was liable because of the material benefit that the owner received even though the act was done without the owner's request.[69] This decision was subsequently codified in the Restatement (Second) of Contracts which states that "[a] promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice . . . ."[70] The more traditional view, however, is that while the subsequent promise subjects the promisor to a moral obligation, it does not result in a legal obligation.[71] North Carolina's adherence to the traditional view was expressed in *Hatchell v. Odom*.[72] In that case, the vendor of a captive/enslaved African promised the vendee that if the captive/enslaved African was found to be unsound, he would either cure the individual or refund the purchase price that had been paid for him.[73] When the vendor was subsequently sued for refusing to repay the purchase price upon a determination that the captive/enslaved African was ill, the court ironically noted that while the vendor could not, in good conscience, keep the price paid for a person found to be unsound, the obligation of restitution resided only in the vendor's conscience, and not in the law:

> [A] promise, however, express, must be regarded as a *nude pact*, and not binding in law, if founded solely on consideration, which the law holds altogether insufficient to create a legal obligation . . . . If we

68. Webb v. McGowin, 168 So. 199 (Ala. 1936).

69. *Id.* at 199-200.

70. RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981) (This provision goes on to state that the promise is not binding if the promisee conferred the benefit as a gift or to the extent that the value of the promise is disproportionate to the benefit received.).

71. *See, e.g.*, Mills v. Wyman, 20 Mass.(3 Pick.) 207 (1825) (Where a father promised to compensate a person who provided unrequested medical assistance his adult child, the court held that the father was morally obligated on his gratuitous promise but that he was not legally obligated on the promise.).

72. Hatchell v. Odom, 19 N.C. 302, 1837 WL 441, at *1 (2 Dev. & Bat. Eq. 1837); *see also* Harrington v. Taylor, 36 S.E.2d 227 (N.C. 1945) (Where a party, in the process of deflecting an axe that was intended to strike another, was injured and subsequently promised by that party that he would pay for her injuries, the court held in a lawsuit brought by the injured party that, although the defendant should be compelled by a moral obligation to pay, there was no consideration that would require him to compensate the plaintiff.).

73. *Hatchell*, 19 N.C. at 305.

dismiss, as not constituting a sufficient consideration for the promise of the intestate, the supposed moral obligation incumbent upon him to remunerate the plaintiff for his unexpected loss, we can see in neither count of the declaration, any other matters averred constituting such a consideration.[74]

INTERPRETATION OF THE CONTRACT

The Parol Evidence Rule

Assuming that the basic requirements of the formation of a contract are satisfied, the nature of the parties' agreement can still be a source of dispute. Consequently, the courts may be called upon to interpret the parties' agreement in order to ascertain the inclusion and meaning of terms that relate to the parties' performance obligations. The extent to which certain terms are included in the parties' agreement may be impacted by the parol evidence rule, the application of which is occasioned by a writing. It is a commonly accepted view that, unless otherwise required, the parties' agreement may consist of both oral and written terms. However, where the parties' transaction is reduced to writing, the underlying rationale of the parol evidence rule, traditionally, is that a writing is a more reliable indicator of the parties' agreement and thus no prior or contemporaneous negotiations or agreements are admissible to contradict and/or supplement the writing, depending upon whether the writing is determined to be totally or partially integrated.[75]

If the writing is found to be totally integrated, the parties are deemed to have intended for the writing to constitute their entire agreement, and no extrinsic evidence is admissible to either supplement or contradict the writing. On the other hand, if the writing is determined to be partially integrated, the presumption is that the parties intended for the writing to "represent all their engagements as to the elements dealt with in the writing."[76] Thus, in order for a party to introduce any negotiations or agreements that took place prior to or contemporaneous with the writing, the party will be required to demonstrate that the extrinsic evidence was not dealt with in the writ-

74. *Id.* at 307.

75. 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 33:1 (R. Lord 4th ed. 1999); *see also* Jefferson Standard Life Ins. Co. v. Morehead, 183 S.E. 606, 607 (N.C. 1936) ("It is well-nigh axiomatic that no verbal agreement between the parties to a written contract, made by or at the time of the execution of such contract, is admissible to vary the terms or to contradict its provisions . . . ."); Neal v. Marrone, 79 S.E.2d 239 (N.C. 1953); Hall v. Hotel L'Europe, Inc., 318 S.E.2d 99 (N.C. Ct. App. 1984); John P. Dalzell, *Twenty-Five Years of Parol Evidence in North Carolina*, 33 N.C. L. REV. 420 (1955).

76. *Hall*, 318 S.E.2d at 101.

ing and would therefore supplement the writing.[77] North Carolina case law is in line with that of other jurisdictions in holding that promissory notes are not subject to the parol evidence rule to the same extent as other contracts.[78] The rationale is that since such contracts consist of a standardized format, collateral terms and conditions are likely to be omitted. Consequently, the courts generally have little difficulty concluding that promissory notes are partially integrated.[79] As a partially integrated writing, a promissory note can be supplemented but not contradicted. In this regard, however, North Carolina courts tend to have a fairly liberal construction of what constitutes a contradiction of the writing when the extrinsic evidence pertains to promissory notes. Although the language of the opinions is consistent with the view that would only permit the introduction of evidence that supplements rather than contradicts the writing, evidence that has been held admissible seemingly contradicts the terms of the promissory note.[80]

In determining whether the writing is totally or partially integrated, Williston's view favors the writing and would therefore limit the circumstances under which extrinsic evidence is admissible.[81] Corbin's view, on the other hand, supports taking into account all circumstances in ascertaining the nature and extent of the parties' agreement.[82] He maintains the completeness of an agreement cannot be determined without a consideration of these circumstances.[83]

77. *See, e.g.*, A & A Discount Center, Inc. v. Sawyer, 219 S.E.2d 532, 534 (N.C. Ct. App. 1975) (The court held that where a printed form contract was not intended to integrate and supersede all negotiations and agreements between the parties, representations that the pool would be suitable for commercial use was not excluded by the parol evidence rule.).

78. *See generally*, North Carolina Nat'l Bank v. Gillespie, 230 S.E.2d 375, 378-379 (N.C. 1976); DeHart v. R/S Fin. Corp., 337 S.E.2d 94, 97 (N.C. Ct. App. 1985) (promissory notes not generally subject to the parol evidence rule to the same extent as other contracts.).

79. Borden, Inc. v. Brower, 199 S.E.2d 414, 419 (N.C. 1973) (It is common for a promissory note to be considered partially integrated.); Powell v. Omli, 429 S.E.2d 774, 777 (N.C. Ct. App. 1993) (It is common for a promissory note to be intended only as a partial integration.).

80. Smith-Premier Typewriter Co. v. Rowan Hardware Co., 55 S.E. 417 (N.C. 1906) (The court held that when a promissory note is given payable in money, parol evidence may be received that establishes as a part of the contract, a contemporaneous agreement that a different method of payment should be accepted.); Evans v. Freeman, 54 S.E. 847 (N.C. 1906) (The court, in admitting oral evidence of a collateral agreement regarding how an instrument for payment of money should be paid even though the promise in writing was for payment of money, concluded that the evidence was competent because it did not conflict with the writing.); *see* Dalzell, *supra* note 73, at 432-435.

81. WILLISTON, *supra* note 53, § 33:39 ("[W]here there is no ambiguity in the contract, either in its literal sense, or when it is applied to the subject thereof, it must speak for itself, entirely unaided by extrinsic matter . . . .").

82. 3 A. CORBIN, CORBIN ON CONTRACTS § 579 (1960) ("No parol evidence that is offered can be said to vary or contradict a writing until by process of interpretation, it is determined what the writing means . . . .").

83. Arthur Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603, 608-609 (1944).

Corbin's approach is also reflected in the revised Restatement.[84] In addition, the Code's version of the Parol Evidence Rule as it applies to a contract for the sale of goods reflects Corbin's more liberal approach.[85] In an effort to limit the transaction to the writing, parties will routinely include a "merger clause" which essentially merges all prior negotiations and agreements into the writing and provides that the writing represents the complete agreement of the parties. While courts that favor Corbin's approach would look behind a merger clause, North Carolina courts generally refrain from varying or adding terms where a merger clause is present, absent some exception to the parol evidence rule that would generally permit the court to go beyond the writing.[86]

Approaches to Interpretation

While the parol evidence rule assists the court in ascertaining the *scope* of the parties' agreement, the *meaning* of the agreement can also be a source of disagreement. This is significant inasmuch as the court must determine the nature of the parties' obligations in order to make decisions regarding their respective rights and liabilities. Longstanding canons of interpretation utilized by the courts include such maxims as *noscitur a sociis* which provides that the meaning of a word may be affected by its immediate context. This maxim is illustrated in *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*.[87] In that case where the English word "chicken" was used in a contract that was written primarily in German, it was argued that the English word for chicken was used to specify "broilers" because the German word for chicken was inclusive of both broilers and stewing chickens.[88] Other maxims include *expressio unius est exclusio alterius*, under which the expression of one thing is deemed to be the exclusion of another; *ejusdem generis* which provides that a general term joined

84. RESTATEMENT (SECOND) OF CONTRACTS § 213 (1981) ("Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish . . . that the writing is or is not an integrated agreement . . . that the integrated agreement, if any, is completely or partially integrated [and] the meaning of the writing, whether or not integrated . . . .").

85. N.C. GEN. STAT. § 25-2-202 (WESTLAW through 2004 Legis. Sess.) ("Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented . . . by course of dealing or usage of trade . . . or by course of performance . . . and by evidence of consistent additional terms unless the court finds the wiring to have been intended also as a complete and exclusive statement of the terms of the agreement . . . .").

86. Dalzell, *supra* note 73, at 422.

87. Frigaliment Imp. Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (D.C.N.Y. 1960).

88. *Id.* at 118.

with a specific one will be deemed to include only things that are like the specific term; and *contra proferentem* which provides that where a document is subject to more than one interpretation, the court will construe the document against its drafter and prefer the interpretation of the non-drafting party.[89]

Although the parol evidence rule technically does not exclude extrinsic evidence that is offered for the purpose of explaining an integrated writing, when faced with an interpretation issue, the courts as well as the commentators have split on the circumstances that will warrant the admission of extrinsic evidence to explain or interpret the parties' agreement.[90] Courts that adhere to Williston's approach, which restricts the circumstances under which extrinsic evidence is admissible to interpret the document, will admit extrinsic evidence to explain or interpret the writing only if the disputed term is first determined to be ambiguous. If the meaning of the disputed term is deemed to be clear from the document itself under the "plain meaning" rule, the court will decline to interpret the parties' agreement. On the other hand, courts that are in agreement with Corbin's view that words are subject to more than one meaning, and therefore a term that appears to be clear on the face of a document, may have a meaning totally different from that which is normally ascribed to it, will admit extrinsic evidence absent a facial ambiguity. If the term in dispute is reasonably susceptible to the asserted meaning, courts favoring Corbin's view will admit any evidence that will assist in determining the meaning of the term in dispute. The language of the Code is reflective of the more expansive approach taken by Corbin in that there is no requirement that an ambiguity be established prior to introducing a trade usage to establish the meaning of a disputed term.

In an effort to ascertain the parties' intent, the courts historically followed the subjectivist approach which essentially provides that where the parties attach different meanings to the disputed term, no contract is formed. Courts later began to favor the objective theory which accorded to the parties' agreement that meaning which a reasonable person would attach to the disputed term. The application of the objective approach, however, could lead to the extreme outcome where parties were bound to terms that neither intended.[91] The modified objective approach represents the middle-ground approach and

89. FARNSWORTH, *supra* note 1, § 7.11.

90. CALAMARI, *supra* note 37, § 3-15; Roebuck v. Carson, 146 S.E. 708 (N.C. 1929).

91. E. Allan Farnsworth, *"Meaning" in the Law of Contracts*, 76 YALE L.J. 939, 951 (1967) (The author noted that the object of contract law is to protect the justifiable expectations of the contracting parties themselves, not those of third parties, including reasonable third parties. The author further surmised that a formula that does not take into account the actual expectations of either party is unlikely to yield a serviceable result.).

provides that where the parties attach different meanings to the terms and one party knows or has reason to know the meaning attached by the other party, the court will attach the meaning asserted by the so-called innocent party. If the parties attach different meaning to the terms and neither party either knows or has reason to know what the other party meant, there is no contract.

The modified objective approach was followed in *Joyner v. Adams* where the North Carolina Court of Appeals emphasized that whether the parties knew or had reason to know of the other's meaning of the disputed language was essential to a proper determination of the contract's enforceability.[92] In that case, the parties disagreed over the meaning of the term "develop." The court applied the modified objective theory when it stated that where one party knows or has reason to know what the other party means by certain language and the other party does not know or have reason to know of the meaning attached to the disputed language by the first party, the court will enforce the contract in accordance with the "innocent" party's meaning.[93]

ENFORCEMENT OF THE CONTRACT

Statute of Frauds

Apart from questions regarding contract formation and interpretation, various factual circumstances may give rise to issues of enforceability of the parties' contract. Circumstances impacting on the court's willingness or ability to enforce the parties' agreement can range from issues of procedure to matters of mistake, changed circumstances, and public policy. A procedural requirement that can impact the enforceability of the parties' agreement is the requirement that certain types of contracts be reduced to writing. This requirement has its origin in the English Statute of Frauds, some version of which was subsequently enacted in a majority of jurisdictions in the United States.[94] The Statute of Frauds enacted by the English Parliament set out the following circumstances under which the parties are required to reduce their agreement to writing:

1. A promise by an executor to pay the decedent's debts out of the executor's funds;
2. A promise to answer for the debt of another;
3. A promise made in consideration of marriage;
4. A promise to convey an interest in land; and

92. Joyner v. Adams, 361 S.E.2d 902 (N.C. Ct. App. 1987).
93. *Id.* at 906.
94. FARNSWORTH, *supra* note 1, § 6.1.

5. An agreement that cannot be performed within a year of its making.[95]

Provisions (1) and (2) of the English Statute of Frauds are codified in section 22-1 of the North Carolina General Statutes,[96] and provision (4) is codified in section 22-2 of the North Carolina General Statutes.[97] The requirement that a promise to convey an interest in land be in writing applies to lease agreements as well as options for the sale or lease of real property. Although all jurisdictions that adopted some version of the Statute of Frauds require a lease agreement to be in writing, most require a writing only where the lease agreement is considered long-term rather than short-term. North Carolina's statute, however, sets out categories of leases concerning real property and differentiates the writing requirement in accordance with the type of lease involved as set forth below:

> All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, and all leases and contracts for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration, and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith . . . .[98]

Many jurisdictions added writing requirements beyond those set out in the original Statute of Frauds. North Carolina, for example, requires a promise that limits a promisor's right to do business in the state to be in writing and signed by the party to be bound. These promises include territorial limitations on competition as well as promises by employees not to compete with a former employer.[99] Additionally, North Carolina statutorily requires that a lending institution's promise to make a commercial loan in an amount in excess of $50,000 be in writing.[100] Contracts involving the sale of goods are governed by the Code's writing requirement which specifies that contracts for the sale of goods for $500.00 or more must be in writing.[101] Moreover, North Carolina requires that a promise to pay a debt discharged

95. *Id.* § 6.2.

96. N.C. GEN. STAT. § 22-1 (WESTLAW through 2004 Legis. Sess.) (Contracts charging the representative personally and promises to pay the debt of another must be in writing and signed by the party to be charged.).

97. N.C. GEN. STAT. § 22-2 (WESTLAW through 2004 Legis. Sess.).

98. *Id.*

99. N.C. GEN. STAT. § 75-4 (WESTLAW through 2004 Legis. Sess.).

100. N.C. GEN. STAT. § 22-5 (WESTLAW through 2004 Legis. Sess.) (A loan commitment by a bank, savings & loan or credit union in excess of $50,000 must be in writing; however, offers, agreements, commitments or contracts to extend credit primarily for aquaculture, agricultural, or farming purposes are specifically exempted.).

101. N.C. GEN. STAT. § 25-2-201 (WESTLAW through 2004 Legis. Sess.).

by bankruptcy be in writing.[102] Although the one-year provision in the English Statute of Frauds is law in virtually all jurisdictions, North Carolina did not enact this provision.[103] Consequently, there is no requirement in North Carolina that contracts that cannot be performed within a year of their making be in writing.

Disputes frequently center around whether the transaction is one that is governed by the Statute of Frauds and whether the writing is sufficient to satisfy the writing requirement. Under the suretyship requirement that a promise to pay the debt of another be in writing, the North Carolina Court of Appeals held that the purchaser of property who agreed to discharge a debt due by the seller was not protected by the Statute of Frauds.[104] In that case, the defendant purchased a truck from a seller who had purchased tires for the truck on credit from the plaintiff.[105] The defendant orally promised the seller that he would pay the plaintiff for the tires.[106] When the seller declared bankruptcy and the plaintiff brought an action against the defendant, the latter asserted that his promise was one to pay the debt of another and was unenforceable since it had not been reduced to writing.[107] The court held that since the promise was made to the seller and not to the plaintiff, it did not come within the Statute of Frauds and was therefore enforceable even though it was an oral promise.[108] North Carolina has held that option contracts for the purchase of property are governed by the Statute of Frauds writing requirement,[109] and that a one-year lease agreement with a four-year renewal provision is, likewise, governed by the Statute of Frauds and required to be in writing.[110] The court reasoned that while the initial lease agreement was less than three years, the three-year renewal option obligated the party beyond the initial lease period, and therefore the agreement fell within the Statute of Frauds.

In general, the writing requirement is satisfied if the agreement or some memorandum thereof is in writing signed by the party being charged, and the writing identifies the parties to the contract, indicates the subject matter of the contract, and states the essential terms of the

102. N.C. GEN. STAT. § 22-4 (WESTLAW through 2004 Legis. Sess.) ("No promise to pay a debt discharged by any decree of a court of competent jurisdiction, in any proceeding in bankruptcy, shall be received in evidence unless such promise is in writing and signed by the party to be charged therewith.").

103. FARNSWORTH, *supra* note 1, § 6.4.

104. Brad Ragan, Inc. v. Callicutt Enters., 326 S.E.2d 62 (N.C. Ct. App. 1985).

105. *Id.* at 63.

106. *Id.*

107. *Id.* at 64.

108. *Id.* at 63-64; *in accord*, Satterfield v. Kindley, 57 S.E. 145 (N.C. 1907); Rice v. Carter, 33 N.C. 298 (11 Ired. 1850).

109. Craig v. Kessing, 244 S.E.2d 721, 723 (N.C. Ct. App. 1978).

110. Wright v. Allred, 37 S.E.2d 107, 108 (N.C. 1946).

agreement.[111] North Carolina statutory and case law are in agreement with these requirements.[112]

Where a transaction falls within the Statute of Frauds and the writing requirement is not satisfied, consequences vary. Although Section 22-2 of the North Carolina General Statutes, which sets out the writing requirements for conveyances of real property, states that a transaction that does not comply with the writing requirement is void,[113] the courts have construed this to mean that the transaction is voidable.[114] Moreover, the courts have held that the consequences are only applicable where the contract is executory.[115] In many jurisdictions, part performance of certain contracts that do not meet the writing requirements has been sufficient to remove the Statute of Frauds as a bar to enforcement of the parties' agreement. The rationale is that part performance furnishes a reliable indicator of the existence of a contract, notwithstanding the absence of a writing. For example, if the vendee in a transaction involving the transfer of interest in real estate that was not reduced to writing has paid part of the purchase price and made improvements, courts in many jurisdictions will permit enforcement of the transaction based upon the vendee's part performance.[116] North Carolina, however, is among a distinct minority of jurisdictions that have consistently refused to adopt this view, and the North Carolina Supreme Court reiterated its position in *Grantham v. Grantham* when it stated that "[t]he doctrine of part performance . . . has no place in our jurisprudence, and will not dispense with the necessity of a writing . . . ."[117] Consequently, in North Carolina, a vendee's payment of a portion of a purchase price and improvements to property will not result in the enforcement of an agreement that does not comply with the Statute of Frauds writing requirement.[118]

In general, failure to comply with the Statute of Frauds writing requirement will result in an agreement that is unenforceable. How-

111. FARNSWORTH, *supra* note 1, § 6.7.

112. N.C. GEN. STAT. § 22-2 (WESTLAW through 2004 Legis. Sess.) ("[The] contract, or some memorandum or note thereof, [must] be put in writing and signed by the party to be charged therewith. . . . ."); Kidd v. Early, 222 S.E.2d 392, 400 (N.C. 1976) (the court held that several writings taken together could satisfy the Statute of Frauds writing requirement); Rape v. Lyerly, 215 S.E.2d 737, 746 (N.C. 1975); Hurdle v. White, 239 S.E.2d 589, 592 (N.C. Ct. App. 1977) (check endorsed by the defendant held to be a sufficient memorandum under the Statute of Frauds).

113. N.C. GEN. STAT. § 22-2 (WESTLAW through 2004 Legis. Sess.).

114. Herring v. Volume Merch., Inc., 106 S.E.2d 197, 200 (N.C. 1958).

115. Keith Bros. v. Kennedy, 140 S.E. 721 (N.C. 1927); Durham Consol. Land & Improvement Co. v. Guthrie, 21 S.E. 952 (N.C. 1895) (purchaser was not permitted to recover deposit on money paid on grounds that the contract was void.).

116. FARNSWORTH, *supra* note 1, § 6.9.

117. Grantham v. Grantham, 171 S.E. 331, 333 (N.C. 1933), *disapproved on other grounds by* Doub v. Hauser, 123 S.E.2d 821, 825 (N.C. 1962).

118. *Id.*

ever, in addition to the doctrine of part performance which is recognized in a majority of jurisdictions,[119] the Code sets out circumstances under which a transaction involving the sale of goods may be enforced even though it does not meet the writing requirement. Specifically, the Code provides as follows:

> [A] contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable:
>
> (a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or
>
> (b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or
>
> (c) with respect to goods for which payment has been made and accepted or which have been received and accepted . . . .[120]

Historically, in North Carolina, a party's admission of a contract in a deposition or answer did not bar the party from pleading the Statute of Frauds as a defense.[121] This remains true for those transactions that are not governed by Section 25-2-201 of the North Carolina General Statutes.

Parties who fail to meet the Statute of Frauds writing requirements may also resort to the doctrines of restitution and estoppel as an alternative basis for relief. The doctrine of restitution may be available where the injured party has conferred a benefit on the other party by partial performance[122] or payment of money.[123] Although the drafters of the Restatement added a provision that speaks directly to reli-

119. Pickelsimer v. Pickelsimer, 127 S.E.2d 557, 562 (N.C. 1962).

120. N.C. GEN. STAT. § 25-2-201 (1999).

121. Weant v. McCanless, 70 S.E.2d 196, 198 (N.C. 1952); Pierce v. Gaddy, 257 S.E.2d 459, 462 (N.C. Ct. App. 1979).

122. "Partial performance" is to be distinguished from the "Part Performance Doctrine" in that the latter, as it applies to real property, generally requires some combination of possession, improvements, and part payment. "Partial performance," on the other hand, more broadly applies to any performance of a contract that is less than complete performance.

123. Pickelsimer, 127 S.E.2d at 560 (holding that "[w]here the promisor in an oral contract to convey or devise real property has received the purchase price in money or other valuable consideration and has failed to transfer title, the promisee may recover the consideration in an action of quasi-contract for money had and received or under the doctrine of unjust enrichment.").

ance in the context of the Statute of Frauds,[124] recognition by the courts of reliance as a basis for relief has been uneven, and jurisdictions are generally split on whether claims based upon promissory estoppel should be allowed in this context. Case law in North Carolina supports promissory estoppel as a basis for the enforcement of certain promises that fail to meet the Statute of Frauds writing requirement.[125]

Public Policy Considerations

In other instances, the court's refusal to enforce a contract may be based upon public policy considerations. One such contract is that which is entered into by a minor or a person who is mentally incapacitated. The rationale is that both categories of parties are in need of protection due to their status and therefore the contracts of such parties are voidable. With respect to minors, the general rule is that contracts entered into by minors are voidable and may not be enforced by the other party to the contract unless the contract is ratified by the minor. The minor's failure to disaffirm a contract within a reasonable time after reaching majority age is deemed to be ratification. Moreover, whether a minor has failed to disaffirm a contract within a reasonable time after reaching majority age has also been a source of disagreement. In *Bobby Floars Toyota, Inc. v. Smith*, the North Carolina Court of Appeals held that a minor who maintained possession of an automobile for ten months after reaching majority age had failed to disaffirm within a reasonable time.[126] North Carolina follows the general rule that a minor's misrepresentation of her age will not prevent her from disaffirming the contract.[127] Where a minor elects to disaffirm the contract, she can do so without restoring the other party to the contract to status quo. While a minor is required to return the subject matter of the contract if it remains in the minor's possession, the inability of the minor to do so will not preclude the minor from disaffirming the contract. Moreover, upon disaffirmance, minors are

124. RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. . . .").

125. Wachovia Bank & Trust v. Rubish, 293 S.E.2d 749, 759 (N.C. 1983). Murphy, *supra* note 26, at 387 (The author noted that the court in *Campbell* based its decision on the North Carolina Supreme Court's apparent approval of Restatement (Second) of Contracts § 139.); *see also* Holmes, *supra*, note 42, at 427-431 (the author expresses some ambivalence about the extent to which promissory estoppel is applied by North Carolina courts to bar the Statute of Frauds, but ultimately concludes that the history of North Carolina cases reveals an inclination to use promissory estoppel as an exception to the Statute of Frauds.).

126. Bobby Floars Toyota, Inc. v. Smith, 269 S.E.2d 320 (N.C. Ct. App. 1980).

127. Greensboro Morris Plan Co. v. Palmer, 116 S.E. 261 (N.C. 1923).

entitled to a return of the consideration provided. North Carolina courts, however, have construed the consideration to consist of the value of the property at the time the contract was entered into rather than the agreed contract price.[128] Unlike minors, persons who seek to disaffirm their contract on the grounds of mental incapacity must restore the other party to the transaction to status quo, or otherwise compensate that party as a prerequisite to disaffirmance.[129]

The "Doctrine of Necessaries" stands as an exception to the general rule and provides that where a minor contracts for goods or services that are deemed to be "necessaries," the minor will be liable for the reasonable value of the subject matter of the contract.[130] One question that may arise under an application of the "Doctrine of Necessaries" relates to what constitutes a "necessary." Generally, a "necessary" will depend upon the status of the minor as well as the minor's "rank and station" in life.[131] In one case, the North Carolina Supreme Court held that where a minor contracted with an employment agency, such services were deemed necessary, and the minor was therefore liable for the reasonable value of the services.[132] In addition to the "Doctrine of Necessaries," there are statutorily created exceptions under which minors may be held liable on their contracts. For example, Section 116-174.1 of the North Carolina General Statutes provides that minors age seventeen and over can enter into contracts to borrow money to pay for post-secondary education.[133]

Where a person seeks to avoid enforcement of a contract on the grounds of mental incapacity, the "cognitive" test has been applied in a majority of jurisdictions. Under the "cognitive" test, the court must determine whether the party lacked the ability to understand the nature and consequences of her actions at the time she entered into the

128. Collins v. Norfleet-Baggs, Inc., 150 S.E. 177 (N.C. 1929) (The court held that the minor upon disaffirmance of the contract was entitled to the $40.95 paid on the note plus the fair market value of the truck at that the time of the trade, but that the minor was not entitled, as a matter of law, to $250.00, the stipulated exchange value of the truck.).

129. *See, e.g.,* Wadford v. Gillette, 137 S.E. 314, 317 (N.C. 1927) ("[W]hen a contract with an insane person is executed and completed, and is fair and made in good faith, without notice of mental incapacity, and the parties cannot again be put in statu quo, such contract is valid and enforceable . . . .").

130. Hyman v. Cain, 48 N.C. 111 (3 Jones 1855) ("[I]nfants had better be held liable to pay for necessary food, clothing, etc. than for the want of credit, to be left to starve.").

131. Gastonia Personnel Corp. v. Rogers, 172 S.E.2d 19, 21 (N.C. 1970) (The court described the word "necessaries" to include not only those articles that are "absolutely necessary to support life, but it includes also such articles as are suitable to the state, station and degree in life of the person to whom they are furnished . . . .").

132. *Id.* at 24 (Where the minor was a 19-year old married high school graduate, the court enlarged the concept of "necessaries" to include "such articles of property and such services as are reasonably necessary to enable the infant to earn the money required to provide the necessities of life for himself and those who are legally dependent upon him . . . .").

133. N.C. GEN. STAT. § 116-174.1 (WESTLAW through 2004 Legis. Sess.).

contract. In *Matthews v. James*, the court of appeals set out that test as it is applied in North Carolina:

> [A] person has mental capacity sufficient to contract if he knows what he is about. . .and. . .the measure of capacity is the ability to understand the nature of the act in which he is engaged and its scope and effect, or its nature and consequences, not that he should be able to act wisely or discreetly, nor to drive a good bargain, but that he should be in such possession of his faculties as to enable him to know at least what he is doing and to contract understandingly . . . .[134]

A minority of jurisdictions also apply the "volitional" test under which the court must determine whether the party lacked the ability to act reasonably with respect to the transaction and whether the other party to the transaction had reason to know this. Thus, the "volitional" test differs from the "cognitive" test in that, under the "volitional" test, a party may be deemed to be mentally incapacitated for purposes of disaffirming the contract even though she was able to understand the nature and consequences of her conduct. The "volitional" test also differs from the "cognitive" test in that knowledge of the other party to the transaction is a key component of the "volitional" test while it is not a factor in the application of the "cognitive" test. In a long line of decisions, however, North Carolina courts depart from this general view and include knowledge of the other party as a factor in determining the enforceability of a contract under the "cognitive" test for mental incompetence. In *Hedgepeth v. Home Savings & Loan Ass'n,* the court, citing prior decisions, announced that:

> [T]he party contracting with an incompetent may nevertheless enforce the agreement if the following requirements can be established: (1) ignorance of the party's mental incapacity; (2) lack of notice of the incapacity such as could indicate to a reasonably prudent person that inquiry should be made of the party's mental condition; (3) payment of a full and fair consideration; (4) that no unfair advantage was taken of the incompetent; and (5) that the incompetent had not restored and could not restore consideration or make adequate compensation therefore. . . .[135]

Since the crucial point in time for determining a party's mental state is at the time she entered into the transaction, the party's mental state prior to that time or subsequent to that time is generally deemed not to have any relevance. Nonetheless, as illustrated in *Matthews*, the court, may under certain circumstances, reach a contrary result. In that case, the court noted that while evidence of a party's mental con-

134. Matthews v. James, 362 S.E.2d 594, 597 (N.C. Ct. App. 1987).

135. Hedgepeth v. Home Savings and Loan Ass'n, 361 S.E.2d 888, 889-90 (N.C. Ct. App. 1987); *see also* Chesson v. Pilot Life Ins. Co., 150 S.E.2d 40, 44 (N.C. 1966); Wadford v. Gillette, 137 S.E. at 317.

dition at a time remote from the execution of a document is generally not admissible, where the party has a progressive degenerative illness, evidence of the party's condition some years prior to and after the date of execution of the document could be admissible to show the onset of the disorder and the gradual deterioration of the party's mind and will.[136]

In addition to refusing to enforce a contract based upon a party's status, the court may also withhold enforcement based upon the circumstances under which a party entered into a contract. Such circumstances can relate to the requirements for the formation of a contract as well as considerations of public policy. Transactions which are characterized by these circumstances include those involving duress and undue influence, misrepresentation and unconscionability. Such transactions have in common the absence of informed voluntary acquiescence that serves as the basis for contract formation.

Moreover, elements of bad faith and unfairness tend to typify these types of transactions. North Carolina law is generally consistent with the majority view with respect to these transactions, and contracts that are entered into as a result of duress, undue influence and misrepresentation are voidable. Under North Carolina case law, in order to show undue influence, a party must show that "something operated in the mind of the person who was allegedly influenced that had 'a controlling effect sufficient to destroy the person's free agency and to render the instrument not properly an expression of the person's wishes, but rather the expression of the wishes of another or others.'"[137] The North Carolina Supreme Court enunciated the doctrine of duress in *Smithwick v. Whitley* when it stated that "[d]uress exists where one, by the unlawful act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will."[138] In its inception, duress was commonly said to be "of the person" and was manifested by imprisonment, threats, or force, or it was said to be "of goods" where a person was obliged to submit to an illegal extraction in order to obtain possession of unlawfully detained property.[139] While the initial focus under an application of duress was on an unlawful act, in *Link v. Link*, North Carolina case law was brought in line with the weight of authority when the court expressly adopted the rule that the act done or

136. *Matthews*, 362 S.E.2d. at 600; *see also* In re Daniels, 313 S.E.2d 269 (N.C. Ct. App. 1984) (evidence of mental deterioration due to arteriosclerosis nine years prior to the execution of a will was held admissible.).

137. *Matthews*, 362 S.E.2d at 598 (citing Hardee v. Hardee, 309 S.E.2d 243, 245 (N.C. 1983)).

138. Smithwick v. Whitley, 67 S.E. 913, 913 (N.C. 1910).

139. *Id.*

threatened may be wrongful even though not unlawful per se.[140] Today, the doctrine of duress has been broadened to include the concept of "economic duress," which is recognized by North Carolina courts.[141] The doctrine of misrepresentation generally requires a false and material representation that was reasonably relied upon. While North Carolina case law is consistent with the majority view with respect to these requirements,[142] the doctrine appears to have been applied primarily in cases involving insurance companies seeking to avoid payment under insurance policies.[143] Since the remedy for misrepresentation grounded in contract theory is rescission of the parties' agreement, parties seeking money damages raise negligent or fraudulent misrepresentation grounded in tort theory. Although expressed differently by various courts, contracts that are found to be unconscionable are generally contracts that involve some element of one-sidedness where there is a lack of meaningful choice on the part of one party and terms that unreasonably favor the other party.[144] Under North Carolina case law, a determination of unconscionability requires a finding of both substantive and procedural unfairness.[145] Contracts for the sale of goods are governed by the Code's provision

140. Link v. Link, 179 S.E.2d 697, 705 (N.C. 1971).

141. Reynolds v. Reynolds, 442 S.E.2d 133, 136 (N.C. Ct. App. 1994) (Where the plaintiff argued that the defendant was obligated by a Buy-Sell Agreement to sell his stock to plaintiff for book value, and therefore defendant's demand for a greater sum was a threat of breach of contract and constituted economic duress, the court held that a mere breach of the contract, without more, was insufficient to establish duress.).

142. *See, e.g.*, Tolbert v. Mut. Beneficial Life Ins. Co., 72 S.E.2d 915 (N.C. 1952) ("To avoid liability on the policy [the defendant] was only required to show that the representations were material and that they were untrue . . . .").

143. Hardy v. Integon Life Ins. Corp., 355 S.E.2d 241 (N.C. Ct. App. 1987) ("It is well settled in this State that an insurer may avoid his obligations under an insurance contract by showing that the insured made false representations in his application and that the misrepresentations were material . . . ."); *in accord*, Pittman v. First Prot. Life Ins. Co., 325 S.E.2d 287 (N.C. Ct. App. 1985) ("It is a basic principle of insurance law that the insurer may avoid his obligation under the insurance contract by a showing that the insured made representations on his application that were material and false . . . .").

144. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (A seminal case on unconscionability in which the United States Court of Appeals for the District of Columbia held that the trial court was empowered to find that an agreement between a recipient of public assistance and a furniture company which was manifested by a standardized document containing a "dragnet clause" was unconscionable.).

145. Lancaster v. Lancaster, 530 S.E.2d 82, 84 (N.C. Ct. App. 2000) (Where the court noted that unconscionability was both procedural in that it can consist of fraud, coercion, undue influence, misrepresentation, inadequate disclosure, duress and overreaching, and substantive, in that it involves contracts that are harsh, oppressive and one-sided.); *see also* King v. King, 442 S.E.2d 154, 157 (N.C. Ct. App. 1994) (The court noted that procedural unconscionability involves 'naughtiness' in the formation, and substantive unconscionability involves inequality of bargaining power. The court pointed out, however, that the inequality of the bargain must be so manifest as to shock the judgment of a person of common sense and the terms must be so oppressive that no reasonable person would make them and no fair person would accept them.).

on unconscionability.[146] Moreover, North Carolina is among those jurisdictions that have adopted the "Doctrine of Reasonable Expectations" which applies primarily to insurance contracts.[147] The doctrine has been described as "'the objectively reasonable [expectation] of applicants and intended beneficiaries [that] the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.'"[148]

While it is generally said that parties are free to contract, and in so doing, have wide latitude in shaping the terms of their agreement, this freedom is outweighed by considerations of public policy. As such, the court can refuse to enforce an agreement that violates some tenet of public policy. Contracts entered into in violation of a law would fall into this category. In *Cole v. Hughes*, where a dispute arose over ownership of Virginia lottery tickets, the court cited several statutory provisions to emphasize that North Carolina's public policy is against gambling and lotteries, and held that a claim to enforce a contract that was illegal and against public policy was properly dismissed by the trial court.[149]

Contracts entered into by parties who have failed to comply with relevant statutory requirements such as obtaining a license to operate or practice a trade or profession can also fall into the category of contracts that contravene public policy. The court's treatment of these contracts, however, will depend upon a number of factors. One consideration the court will take into account is protecting the justified expectations of the parties to the contract. Other considerations include the possible forfeiture that would result if enforcement is denied; the relative fault of the parties; the likelihood that refusal to enforce the contract will further the relevant public policy; and the remoteness of the relationship between the contract and the public policy.[150]

The courts, in deciding whether to enforce a contract entered into by a party who has failed to comply with a pertinent statute, may distinguish between a "revenue-raising" statute and a "regulatory" stat-

146. N.C. GEN. STAT. § 25-2-302 (WESTLAW through 2004 Legis. Sess.) ([I]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. . . ."); Roszkowski, *supra* note 43 at 933 (No significant change to 2-302 proposed).

147. Great Am. Ins. Co. v. C.G. Tate Constr. Co., 279 S.E.2d 769, 771 (N.C. 1981) ("Doctrine of Reasonable Expectations" adopted by the North Carolina Supreme Court.).

148. Stephen J. Ware, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461, 1461 (1989) (quoting Professor Robert Keeton).

149. Cole v. Hughes, 442 S.E.2d 86, 88-89 (N.C. Ct. App. 1994); *see also* Basnight v. Am. Mfg. Co., 93 S.E. 734 (N.C. 1917).

150. FARNSWORTH, *supra* note 1, § 5.1.

ute. The former type of statute is generally enacted for the purpose of raising revenue and is not directed at the protection of the public. Thus the party may be subject to sanctions for failing to comply with the statute, but the court will generally permit a party who enters into a contract without having complied with such a statute to enforce the contract. On the other hand, if the statute is determined to be regulatory, the court may refuse to allow the noncompliant party to enforce the contract. In *Bryan Builders Supply v. Midyette*, the North Carolina Supreme Court held that an unlicensed contractor could not recover either for breach of contract or in an action based on quantum meruit or unjust enrichment even though the statute did not expressly prohibit such a result.[151] The court reasoned that allowing recovery would defeat the legislative purpose of the statute which was to protect the public from incompetent contractors.[152] On the other hand, in *Marriott Financial Services, Inc. v. Capitol Funds*, the North Carolina Supreme Court refused to void a conveyance of land because of the seller's failure to comply with a city code requiring filing an approval of plats before property is sold.[153] The court held that the legislative bodies did not intend to invalidate conveyances because of failure to follow the provisions of the legislation even though the legislation was penal in nature.[154] The court reasoned that where the contract is not in itself immoral or criminal, it will not be voided on the basis that the statute imposes a penalty.[155] Rather, the penalty for violating the statute may be limited to that expressed in the statute itself.[156] It appears from a reading of North Carolina cases that the decision to enforce the contract of a party who has failed to comply with a related statute turns on the court's interpretation of the legislative intent rather than the nature of the statute. Thus, failure to comply with a penal statute would not, in itself, preclude enforcement of the parties' agreement.

Covenants not to compete also fall into the category of contracts that courts may refuse to enforce on grounds of public policy. Here, the policy is that of favoring the ability of parties to engage in free trade without any types of restraints. When examining covenants not to compete, the courts tend to categorize them as ancillary, meaning that they are associated with another contract between the parties, or

151. Bryan Builders Supply v. Midyette, 162 S.E.2d 507 (N.C. 1968); *But cf.* Sykes v. Thompson, 76 S.E. 252 (N.C. 1912) (where the court held that a father was entitled to restitution of money paid to prevent prosecution of his sons on charges that were later found to be false).

152. *Id.* at 510-511.

153. Marriott Fin. Serv. v. Capitol Funds, 217 S.E.2d 551 (N.C. 1975).

154. *Id.* at 560.

155. *Id.*

156. *Id.* at 557-560.

non-ancillary, meaning that the covenants stand alone as an agreement between the parties. The latter type of covenant is said to be a direct restraint on free trade, serves no justifiable purpose, and is therefore unenforceable. Unlike the non-ancillary covenant, the ancillary covenant, while also restraining free trade, can serve a legitimate purpose. Thus, the court's decision to enforce or not enforce the ancillary covenant will turn on a number of factors. The court will generally consider whether the nature of the restraint is reasonable; whether the geographic reach of the restraint serves a legitimate interest of the beneficiary of the covenant; whether the restraint places an undue hardship on the party whose conduct is being restrained; and whether the restraint is inimical to the public interest.

In *Farr Associates, Inc. v. Baskin*, the North Carolina Court of Appeals held that a non-compete agreement that limited an employee from contacting the employer's client base for five years was unreasonably broad.[157] In that case, the non-compete agreement prohibited the employee from providing services to any current client for three years following the termination.[158] It also stated that the employee could not have contact with any persons who had been clients of the company for the two years preceding the employee's termination.[159] The company provided consulting services in forty-two states and four other countries.[160] The court noted that the non-compete agreement was in writing, was part of an employment contract, and was based on valuable consideration.[161] The court focused its attention on whether the non-compete agreement was reasonable as to time and territory, and whether it was designed to protect the employer's legitimate business interest.[162] The court answered the latter question in the affirmative, but concluded that the covenant was unreasonable as to time and territory restrictions and held that the covenant was unenforceable.[163]

PERFORMANCE AND BREACH

Mistake, Impossibility/Impracticability and Frustration of Purpose

Where a party seeks to be relieved from the obligation to perform a contract on the grounds of mistake, the mistake can take the form of a

157. Farr Assoc. v. Baskin, 530 S.E.2d 878 (N.C. Ct. App. 2000).
158. *Id.* at 880.
159. *Id.*
160. *Id.* at 879.
161. *Id.* at 881.
162. *Id.* at 881-83.
163. *Id.* at 881; *see also* Nalle Clinic Co. v. Parker, 399 S.E.2d 363, 366 (N.C. Ct. App. 1991) (a covenant by a doctor not to practice medicine or surgery for two years in a particular county was unenforceable because of the harm to the public when the county had only one other pediatric endocrinologist).

unilateral mistake, where only one of the parties is mistaken, or a mutual mistake, where both parties are mistaken. If both parties are mistaken, a party is generally entitled to relief from performance if the mistake goes to a basic assumption on which the agreement was made, it materially affects the parties' performance, and the party seeking to be relieved from performance did not bear the risk of the mistake. If only one party is mistaken, the courts are generally unwilling to relieve that party of her obligations unless she can further show that it would be unconscionable to require her to perform, or that the other party knew or had reason to know of the mistake.[164] North Carolina case law is in accord,[165] and the courts have generally shown an unwillingness to relieve a party from contractual obligations on the basis of a unilateral mistake. [166]

Three additional related grounds upon which a party may seek to be relieved from the obligation to perform are impossibility, impracticability and frustration of purpose. Historically, a party was not relieved from the obligation to perform based upon impossibility unless the impossibility resulted from the death of a party necessary for performance of the contract, the destruction of a thing necessary for performance of the contract, or a supervening illegality.[167] The closely related doctrine of frustration of purpose is alleged where performance of the contract remains possible but a fortuitous event supervenes to cause failure of the consideration. In *Brenner v. Little Red School House, Ltd.*, the plaintiff argued that where he paid tuition in advance for the entire year but his wife refused to enroll his son in the

164. *See generally*, CALAMARI AND PERILLO, *supra* note 40, §§ 9-25 to 29; RESTATEMENT (SECOND) OF CONTRACTS § 152 (1981); RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981); Eric Rasmusen and Ian Ayres, *Mutual and Unilateral Mistake in Contract Law*, 22 J. LEGAL STUD. 309 (1993).

165. *See, e.g.*, Mullinax v. Fieldcrest Cannon, Inc., 395 S.E.2d 160, 162 (N.C. Ct. App. 1990) ("Our courts have long held that '[a] contract may be avoided on the ground of mutual mistake of fact where the mistake is common to both parties and by reason of it each has done what neither intended . . . however, in order to affect the binding force of a contract, the mistake must be of an existing or past fact which is material; it must be as to a fact which enters into and forms the basis of the contract. . .it must be of the essence of the agreement . . . .'"); *see also* Wake Stone Corp. v. Hargrove, 400 S.E.2d 464, 466 (N.C. Ct. App. 1991) ("A unilateral mistake, unaccompanied by fraud, imposition, undue influence, or like oppressive circumstances, is not sufficient to avoid a contract . . . .").

166. *See, e.g.*, Lowry v. Lowry, 393 S.E.2d 141 (N.C. Ct. App. 1990) (court held that a unilateral mistake was not such that it would warrant reformation of the parties' contract); Thompson-Arthur Paving Co. v. Lincoln Battleground Assoc., 382 S.E.2d 817 (N.C. Ct. App. 1989) (court held that a settlement agreement was not subject to rescission because of the plaintiff's unilateral mistake).

167. UNCC Props. v. Greene, 432 S.E.2d 699 (N.C. Ct. App. 1993) (a contract to convey an easement was discharged when the land was condemned by the government.); *see also* Steamboat Co. v. Trans. Co., 82 S.E. 956 (N.C. 1914) (Where defendant chartered plaintiff's steamboat for a set rate on Sundays, and the steamboat was destroyed by fire, the court held that the parties were discharged as to the executory portions of their contract.).

school, he was entitled to a refund on the grounds of impossibility and frustration of purpose.[168] The court held that since the child could have attended the school, performance was not impossible.[169] It went on to say that frustration of purpose would only apply where the frustrating event was not foreseeable and where the plaintiff had not assumed the risk of the occurrence of the event.[170] In this instance, the court found that neither of these criteria was met in that the plaintiff could have foreseen the possibility of his wife not enrolling the child in the school, and he assumed the risk that his child might not enroll when he signed a document which stated that the tuition payment was non-refundable.[171] The doctrine of impracticability, which is codified in the North Carolina General Statutes,[172] was at issue in *Alamance County Board. of Education v. Bobby Murray Chevrolet, Inc.*[173] In that case, the Environmental Protection Agency enacted new emission standards after the defendant had entered into a contract to provide parts to the plaintiff that were rendered out of compliance by the new regulations.[174] When the defendant informed the plaintiff the item could not be supplied, the plaintiff obtained the items from another supplier and brought an action against the defendant to recover the difference.[175] The plaintiff sought to be relieved on the grounds of impracticability resulting from the supervening governmental regulation, and the court held that the plaintiff had assumed the risk of the occurrence of the contingency, and therefore was not excused from performance.[176] Where a party is relieved from performance of a contract on the grounds of mistake, impracticability, impossibility, or frustration of purpose, the result is that the party will not be liable for breach of contract for her failure to perform. North Carolina courts have, however, imposed liability on the parties for performances rendered prior to the occurrence of the impracticability, impossibility, or

168. Brenner v. Little Red Sch. House, Ltd., 274 S.E.2d 206 (N.C. 1981).

169. *Id.* at 208.

170. *Id.* at 209-10.

171. *Id.*; *see also* Fraver v. North Carolina Farm Bureau Mut. Ins. Co., 318 S.E.2d 340 (N.C. Ct. App. 1984).

172. N.C. Gen. Stat. § 25-2-615 (WESTLAW through 2004 Legis. Sess.) ([D]elay in delivery or non-delivery in whole. . .is not a breach of [the seller's] duty if . . . performance as agreed has been made impracticable by the occurrence of a contingency, the non-occurrence of which was a basic assumption on which the contract was made . . . ."); Roszkowski, *supra* note 46 at 941 ("Revised Section 2-615 continues the impracticability principles of existing Section 2-615, but changes the language of Section 2-615(a) from "delay in delivery or nondelivery" to "delay in performance or nonperformance.").

173. Alamance County Bd. of Educ. v. Bobby Murray Chevrolet, Inc., 465 S.E.2d 306 (N.C. Ct. App. 1996).

174. *Id.* at 308.

175. *Id.* at 309.

176. *Id.* at 310.

frustration of purpose depending upon whether the contract was entire or severable.[177]

Anticipatory Repudiation, Material Breach and Express Conditions

The doctrines of anticipatory repudiation, material breach and express conditions pertain to nonperformance of the parties' contract and the resulting consequences. North Carolina case law is in accord with the general rule regarding anticipatory repudiation. The court of appeals laid out the requirements in *Dishner Developers, Inc. v. Brown*: "[I]n order to constitute anticipatory repudiation the words or conduct evidencing an intention to breach the contract must be a 'positive, distinct, unequivocal and absolute refusal' to perform the contract when the time fixed for performance arrives."[178]

The usual consequence of anticipatory repudiation is that it gives rise to a total breach.[179] North Carolina's rule regarding material breach is also in accord with the general rule that a material breach will excuse the other party from the obligation to perform further.[180] Whether the failure to perform contractual obligations is so material as to excuse the other party from performing is a question of fact.[181] In *Lacy J. Miller Machinery Co. v. Miller*, where the parties' agreement provided for payment within ten days and thirty days of specified occurrences, but also contained a provision that in no event would the payment be later than six months after the death of the stockholder, the court held that the parties contemplated possible delays and therefore payment of the proceeds within the six month period was not a material breach.[182] Although a material breach relieves the other party from the duty to perform, that party is required to make an election to cancel the contract within a reasonable time after knowledge of the material breach.[183] Moreover, where a party elects to cancel its performance on the erroneous belief that the other party to the contract has committed a material breach, the consequence is

177. Steamboat Co. v. Transp. Co., 82 S.E. 956, 956-957 (N.C. 1914).

178. Dishner Developers, Inc. v. Brown, 549 S.E.2d 904, 908 (N.C. Ct. App. 2001) (quoting Gordon v. Howard, 379 S.E.2d 674,676 (N.C. Ct. App. 1989)).

179. Starling v. Still, 485 S.E.2d 74, 78 (N.C. Ct. App. 1997) (The court noted, however, that the general rule does not apply to an installment contract which contains no acceleration clause.).

180. Lake Mary Ltd. v. Johnston, 551 S.E.2d 546, 555 (N.C. Ct. App. 2001).

181. Combined Ins. Co. of Am. v. McDonald, 243 S.E.2d 817, 819-20 (N.C. Ct. App. 1978) (The court held that the mere failure to give notice of termination under an employment contract did not constitute a material breach as a matter of law, but was a question of fact to be determined by the fact finders. In that case, the court found no evidence to sustain a finding that the parties intended the notice of termination provision to be a material part of their agreement.).

182. Lacy J. Miller Mach. Co. v. Miller, 293 S.E.2d 622, 625 (N.C. Ct. App. 1982).

183. Marantz Piano Co. v. Kincaid, 424 S.E.2d 671 (N.C. Ct. App. 1993).

that the non-breaching party's cancellation can constitute anticipatory repudiation and place that party in material breach.[184] Where parties describe express conditions in their contract, *Chemical Realty Corp. v. Home Federal Savings and Loan Ass'n* sets forth the longstanding rule that a party's failure to comply with a condition precedent to a contract relieves the other party of its duty to perform.[185]

REMEDIES FOR BREACH

Protection of Expectation, Reliance and Restitutionary Interests

The manner in which the court formulates relief for the injured party in a breach of contract cause of action varies depending upon whether the court seeks to address the party's expectation interest, reliance interest or restitutionary interest. If the court is seeking to protect a party's expectation interest, it will attempt to fashion a remedy that will put the party in the same position the party would have been in absent the breach. If, on the other hand, the purpose of the damages award is to protect the party's reliance interest, the effort is to put the injured party in the same position the party was in before she entered into the contract. Relief based on the party's restitutionary interest will focus on preventing the breaching party from benefiting at the expense of the injured party.[186]

Other Remedies & Limitations

What would seem to be the most logical form of relief for breach of a contract is, in fact, available only under limited circumstances. Specific performance, which has been described as a remedy, the sole function of which is to compel a party to do precisely what he ought to have done without being coerced by the court,[187] is an equitable remedy that is generally available only where an injured party's remedy at

184. Millis Constr. Co. v. Fairfield Sapphire Valley, Inc., 358 S.E.2d 566, 570 (N.C. Ct. App. 1987) (The court held that if no material breach had occurred, the other party was not excused from performance and that party's failure to perform constituted anticipatory repudiation which itself is a material breach.); *see also* Beeson v. McDonald, 347 S.E.2d 485, 487 (N.C. Ct. App. 1986).

185. Chemical Realty Corp. v. Home Fed. Savings and Loan Ass'n, 351 S.E.2d 786, 792 (N.C. Ct. App. 1987) (The court noted that conditions precedent are not favored and therefore provisions will not be construed as such in the absence of language clearly requiring such construction.); *See also* Stonewall Ins. Co. v. Fortress, 350 S.E.2d 131 (N.C. Ct. App. 1986).

186. FARNSWORTH, *supra* note 1, §§ 12.9 (expectation damages), 12.16 (reliance damages) and 12.19 (restitution damages); *see also* Meares v. Nixon Constr. Co., 173 S.E.2d 593 (N.C. Ct. App. 1970) (The court stated that an award of damages should put the injured party in as near the position he or she would have occupied absent the breach.); RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981).

187. McLean v. Keith, 72 S.E.2d 44 (N.C. 1952).

law is inadequate.[188] Factors generally considered by the courts, including those in North Carolina, in determining whether the remedy at law is inadequate include the difficulty and uncertainty in determining the amount of the damages; the difficulty and uncertainty in collecting the damages; and the insufficiency of the money damages to obtain a substantially equivalent performance.[189] Moreover, North Carolina law is in accord with the generally accepted principle that the violation of a legal right entitles a party to at least nominal damages.[190]

It is a basic principle of contract law that damages are compensatory and not punitive.[191] The most obvious application of this principle is the general exclusion of punitive damages in a breach of contract cause of action.[192] However, the doctrine of mitigation is also premised on this view. Consequently, an injured party who fails to take reasonable steps to mitigate following a breach of the contract will not be allowed to recover for any losses that could have been avoided. While scholars and commentators point out that the injured party is not required to mitigate, the language in the opinions commonly refers to mitigation as a requirement by the injured party.[193] As a practical matter, the outcome is the same whether the mitigation is characterized as mandatory or voluntary, in that the injured party will not be allowed to recover for losses that could have been avoided. The expectation interest, which is most commonly applied by the courts, falls short of its stated purpose to make the injured party whole due to the exclusion of certain types of damages from the recovery. Attorneys fees, for example, are generally not recoverable in a breach of contract cause of action unless specifically provided for by statute.[194] Additionally, the doctrines of certainty and foreseeability can also operate to limit the injured party's recovery. In *American Lumber Co. v. Quiett Mfg. Co.*, the court stated the generally recognized view with respect to the requirements of certainty and foresee-

188. RESTATEMENT (SECOND) OF CONTRACTS § 359; Moore v. Moore, 252 S.E.2d 735 (N.C. 1979).

189. Whalehead Props. v Coastland Corp., 261 S.E.2d 899, 908 (N.C. 1980); Bryson v. Peak, 43 N.C. 310 (1852) (The court enunciated the widely-recognized view that in a breach of contract for the sale of land, an injured party can elect for specific performance and is not bound to bring an action at law for damages.).

190. Delta Envtl. Consultants, Inc. v. Wysong & Miles Co., 510 S.E.2d 690, 698 (N.C. Ct. App. 1999).

191. Chapel Hill Cinemas, Inc. v. Robbins, 547 S.E.2d 462, 470 (N.C. Ct. App. 2001).

192. N.C. GEN. STAT. § 1D-15 (d) (WESTLAW through 2004 Legis. Sess.): "Punitive damages shall not be awarded against a person solely for breach of contract."

193. Harris & Harris Constr. Co. v. Crain & Denbo, Inc., 123 S.E.2d 590, 598 (N.C. 1962).

194. *Delta Envtl. Consultants, Inc.*, 510 S.E. 2d at 695 (The court stated that the principle was well-settled in North Carolina that no attorneys fees, whether as costs or as an item of damages, are recoverable in the absence of statutory authority.).

ability when it stated that damages which are certain and must have been reasonably contemplated, are recoverable for a breach of contract, but damages that are purely speculative are not recoverable.[195]

THIRD PARTY BENEFICIARIES

A contract, being voluntary and consensual by its nature, creates rights and obligations with respect to those parties who are bound by a contractual relationship. As a general matter, parties outside of that relationship acquire no rights with respect to the enforcement of the transaction, nor are they subject to obligations issuing from the transaction. The Third Party Beneficiary doctrine stands as a major exception to this principle. Although the leading case on the Third Party Beneficiary doctrine is a New York case, *Lawrence v. Fox*, which was decided in 1859,[196] the North Carolina Supreme Court had recognized the doctrine several years earlier in *Cox v. Skeen*.[197] Under the Third Party Beneficiary doctrine, parties outside the contractual relationship may acquire certain rights against parties within that relationship depending upon their status as an "intended" beneficiary or an "incidental" beneficiary.[198] An incidental beneficiary is, in essence, any beneficiary who is not an intended beneficiary, and acquires no right to performance from the contracting parties.[199] Traditionally, in North Carolina, third parties who were not in privity with a professional were treated as incidental beneficiaries and not permitted to recover in an action against the professional.[200] However, in *United Leasing Corp. v. Miller*, the court of appeals stated that it had re-examined its position since *Chicago Title* and held that a non-client could bring an action against an attorney for negligently certifying title to property.[201] Initially, the Restatement of Contracts further classified intended beneficiaries as "donee" beneficiaries where the purpose of the promisee in obtaining the promise of a performance was to make

195. American Lumber Co. v. Quiett Mfg., 78 S.E. 284 (N.C. 1913).

196. Lawrence v. Fox, 20 N.Y. 268 (1859) (The court upheld the promise by a debtor to the creditor to repay the debt to a party to whom the creditor was indebted even though that individual was not a party to the transaction between the debtor and the creditor.).

197. Cox v. Skeen, 24 N.C. 220 (2 Ired. 1842).

198. FARNSWORTH, *supra* note 1, § 10.1.

199. *See, e.g.*, Reidy v. Macauley, 290 S.E.2d 746, 748 (N.C. Ct. App. 1982) (The court held that a real estate broker was an incidental beneficiary to a contract between a vendor and purchaser and thus was not entitled to maintain an action for breach of contract against the purchaser.).

200. Chicago Title Ins. Co. v. Holt, 244 S.E.2d 177, 181 (Where a non-client general contractor brought legal action against an attorney for the attorney's alleged negligent certification of title, the court held that "[a]t most, [the appellant] was merely an incidental beneficiary who acquired no rights by virtue of the contract. . . .").

201. United Leasing Corp. v. Miller, 263 S.E.2d 313 (N.C. Ct. App. 1980); *see also* Title Ins. Co. of Minn. v. Smith, Debnam, Hibbert & Pahl, 459 S.E.2d 801 (N.C. Ct. App. 1995).

a gift to the beneficiary, and "creditor" beneficiaries where the promisor's performance satisfied a duty of the promisee to the beneficiary.[202] This classification was expressly adopted by the North Carolina Supreme Court in 1970 in *Vogel v. Reed Supply Co.*[203] Although the "donee" and "creditor" distinctions were eliminated in the Restatement (Second) of Contracts in favor of the use of the terms "intended" and "incidental" beneficiaries, the test for determining intended beneficiaries remained the same:

> [U]nless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance . . . .[204]

Consequently, the impact of the terminology change has been minimal.[205]

Courts have adopted different approaches with respect to specific applications of the Third Party Beneficiary doctrine. One recurrent area in which these differences are manifested is that of lawsuits against attorneys for malpractice by parties outside the attorney/client relationship. Courts differ on whether these causes of action should be based in tort or contract, and whether they should be permitted at all based upon concerns of imposing potentially unlimited liability on attorneys. The North Carolina Court of Appeals has since abandoned its position in *Chicago Title Ins. Co. v. Holt*, where it earlier rejected the view that such actions are grounded in tort and declined to permit an indemnitor to bring a breach of contract action against the attorney as a third party beneficiary of the contract.[206] Another recurrent area of disagreement among the courts centers on the liability of a party who contracts with a governmental entity. The typical case involves a recipient of services that were rendered improperly by a party who contracted with a governmental entity to deliver those services. A

202. RESTATEMENT OF CONTRACTS § 133 (1932).

203. Vogel v. Reed Supply, 177 S.E.2d 273 (N.C. 1970).

204. RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

205. Reidy v. Macauley, 290 S.E.2d 746, 747 ("Although the 1979 Restatement eliminates the 'donee' and 'creditor' categories in favor of a new designation–'intended beneficiaries'–it nevertheless classifies all other beneficiaries as 'incidental beneficiaries'. . . . Thus, the 1932 Restatement test for determining third party beneficiaries remains the same under the 1979 Restatement. Moreover, the *Vogel* test for determining if one other than the contracting parties has legally enforceable rights has not been changed by our courts . . . ."); *see generally*, Hoisington v. ZT-Winston-Salem Assoc., 516 S.E.2d 176 (N.C. Ct. App. 1999); Harry G. Prince, *Perfecting the Third Party Beneficiary Standing Rule under Section 302 of the Restatement (Second) of Contracts*, 25 B.C. L. REV. 919, 990-997 (1984).

206. *United Leasing Corp.*, 263 S.E.2d at 313.

leading case on this issue is *H.R. Moch Co. v. Rensselaer Water Co.*[207] In that case, a water company that had contracted with the city to furnish water at the hydrants was sued by the owner of a business that was destroyed by fire because of the company's failure to maintain adequate pressure at the hydrants. The owner of the business alleged that he was a third party beneficiary of the contract between the city and the water company. While the court in that case acknowledged that, in the broadest sense, every contract entered into by the city was for the benefit of its residents, it distinguished between services the city chose to provide and those the city was obligated to provide, and concluded that this service fell into the latter category. Consequently, the plaintiff in that case had no standing to bring the action against the water company as a third party beneficiary.[208]

The decisions in these cases are driven primarily by public policy considerations where the courts are concerned that imposing widespread liability on companies that do business with governmental entities would discourage them from doing so. Although the courts in a majority of the jurisdictions are in agreement with *Moch*, North Carolina cases depart from this view and hold that an action can be maintained. *Potter v. Carolina Water Company* is one such case. *Potter* was factually similar to *Moch* in that it also involved a company that failed to maintain adequate pressure at the fire hydrants in violation of its contract with the city. In *Potter*, however, the North Carolina Supreme Court cited a long line of cases giving injured citizens a right to maintain an action against a private company for its breach of contract to supply water to a municipality for fire protection.[209]

CONCLUSION

North Carolina case law and statutory provisions are generally in line with contractual principles as they are applied in a majority of jurisdictions. There are few areas in which the state's courts have clearly aligned themselves with a minority position. Where no distinct majority or minority view has emerged, the cases reflect a reluctance on the part of the courts to depart from their past positions. Relying on the principle of *stare decisis*, and citing the salutary need for certainty and stability, the courts prefer to reiterate their approval of principles enunciated in prior decisions. In those instances where the courts have evinced a willingness to depart from established case law, or where the courts are faced with a question of first impression, they tend to moderate their position through analogies and distinctions of

207. H.R. Moch Co. v. Rensselaer, 159 N.E. 896 (N.Y. 1928).
208. *Id.*
209. Potter v. Carolina Water Co., 116 S.E.2d 374, 377-378 (N.C. 1960).

prior decisions. Consequently, the current status of the law as it has evolved to date does not distinguish North Carolina in the emergence and transformation of contractual doctrines.