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Bolton Corp. v. T.A. Loving Co.: The Reservation of Rights Clause in Settlement Agreements

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Bolton Corp. v. T.A. Loving Co.: The Reservation of Rights Clause in Settlement Agreements

Because court dockets have become increasingly more congested[1] and litigation costs have risen,[2] potential litigants and their attorneys have turned to private settlement of disputes as an alternative to litigation. Although the vast majority of private settlements accomplish just what they are intended to achieve—the "[buying of] peace respecting any liability" between the parties[3]—courts still address disputes regarding the validity, interpretation, and effect of settlement agreements. In *Bolton Corp. v. T.A. Loving Co.*[4] the North Carolina Supreme Court faced such a dispute. The issue in *Bolton* was whether a construction contractor, whose insurer settled the claim of another contractor involved in the same project against the insured, and who thereafter ratified the settlement, should have been barred from maintaining an action against the releasor arising out of the same construction project.[5] In a decision that focused realistically on the nature of the relationship between the parties, the *Bolton* court held that plaintiff contractor's claim against the releasor was not barred by plaintiff's ratification of such a settlement, when the release contained a clause purporting to reserve plaintiff's rights against the releasor.[6] This Note traces the development of the doctrines of settlement and release, and accord and satisfaction in North Carolina and analyzes the *Bolton* decision in light of these doctrines. The Note concludes that in *Bolton* the supreme court consistently applied North Carolina law regarding settlements, and in the process preserved the ability of contracting parties to make their own bargains, free from unwarranted judicial interference.

Both plaintiff Bolton Corporation (Bolton) and defendant T.A. Loving Company (Loving) were prime contractors for the construction of the Walter R. Davis Library at the University of North Carolina at Chapel Hill.[7] Bolton was

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1. During 1983, new civil case filings increased 14.3% over 1982, totalling 255,546 in the United States district courts alone. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 7 (Dec. 1983). Former Chief Justice Burger has noted that the average case load per federal district judge increased from 190 cases in 1940 to 350 cases in 1981. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982).

2. One district court judge has taken note of a Texas case, involving the builder and designer of a nuclear plant, that was settled for $750 million. The case "might well be an indication of a new—or at least more pervasive—attitude in the corporate world. . . . These companies may be beginning to recognize that it is often better to settle than to battle . . . ." Noland, *Better to Settle Than to Battle?*, 24 JUDGES' J. 24, 24 (Summer 1985).

The cost of litigation is not measurable in monetary terms alone. "[L]itigation is not only stressful and frustrating but expensive and frequently unrewarding for litigants. A personal injury case, for example, diverts the claimant and entire families from their normal pursuits. Physicians increasingly take note of 'litigation neuroses' in otherwise normal, well-adjusted people." Burger, *supra* note 1, at 275.

3. Snyder v. Kenan Oil Co., 235 N.C. 119, 120, 68 S.E.2d 805, 806 (1952).

4. 317 N.C. 623, 347 S.E.2d 369 (1986).

5. *Id.* at 624-26, 347 S.E.2d at 370-71.

6. *Id.* at 627-29, 347 S.E.2d at 371-73.

7. *Id.* at 624, 347 S.E.2d at 369-70. A prime contractor is a contractor who enters into a direct contractual relationship with the owner of the project site. Although the terms "prime" and

responsible for installation of the heating, ventilating, and air conditioning systems. Loving served as general contractor and was responsible, under the terms of its contract with the State of North Carolina, for scheduling and coordinating all work on the project.[8] The library was finished 480 days past the completion date stipulated in each contractor's agreement with the State.[9]

One difficulty encountered in the process of construction was a water pipe rupture allegedly caused by Bolton's workmen.[10] Bolton's liability insurer, without Bolton's consent, later paid Loving $136,445 in consideration for a "Release in Full" that " 'release[d] and forever discharge[d]' " Bolton and its insurer " 'from all claims, demands, damages, actions, or causes of action' " relating to property damage arising out of this water pipe rupture, and " 'for all claims or demands whatsoever in law or in equity, which [Loving] shall or may have by reason of any matter . . . prior to [February 21, 1984].' "[11] The release further stated that it constituted " 'a full and final release of all claims of every nature and kind whatsoever, and release[d] claims that are known and unknown, suspected and unsuspected.' "[12] However, the last paragraph of the release expressly reserved to " 'any party hereby released . . . the right to assert any claim or cause of action such party may have against the undersigned or any others.' "[13]

Bolton sued Loving on contract and negligence theories for damages allegedly incurred as a result of Loving's failure to properly schedule work on the

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"general" contractor often are used interchangeably, the latter term technically refers to a specific type of prime contractor. The term "general contractor" was coined in the nineteenth century when entire building projects were completed by one contractor who employed many different kinds of tradesmen. Today, the general contractor normally does only the foundation and structural work, but is responsible to the owner for the entire project. Specialized work is subcontracted out by the general contractor. K. COLLIER, CONSTRUCTION CONTRACTS § 1.2.4, at 27-28 (2d ed. 1987).

8. *Bolton*, 317 N.C. at 624, 347 S.E.2d at 369-70. An arrangement whereby an owner contracts directly for general construction and other trades has been called a multiple prime contract. PRACTISING LAW INSTITUTE, CONSTRUCTION LITIGATION 261 n.1 (1981). Such an arrangement is an alternative to the owner entering into a contractual relationship with a general contractor, who in turn enters into subcontracts with various mechanical tradesmen. The multiple prime arrangement has been advanced as a means of eliminating the profit a general contractor earns on his or her subcontracts. *Id.* at 261-62. In addition, a developer's use of multiple prime contracts is suited to construction concepts, such as phase construction, that are aimed at efficient and swift completion of a project. *Id.* at 262. Critical to the success of a multiple prime arrangement, however, is clear and complete delineation of the rights and responsibilities of each contractor and of the owner. Scheduling of work, coordination among primes, and liability for delay damages, should all be provided for in the various contracts. *Id.* at 263.

North Carolina law requires a multiple prime arrangement for public building projects over $50,000. In general, state entities or representatives must prepare separate specifications and enter into separate contracts for (1) heating, ventilation, and air conditioning; (2) plumbing and gas fittings; (3) electrical wiring and installations; and (4) general construction. N.C. GEN. STAT. § 143-128 (1983).

9. *Bolton*, 317 N.C. at 624, 347 S.E.2d at 370.

10. Loving claimed that the ruptured pipe resulted in a 62-day delay. *Id.*

11. Bolton Corp. v. T.A. Loving Co., 77 N.C. App. 90, 92, 334 S.E.2d 495, 497 (1985) (quoting Release in Full dated Feb. 21, 1984, Record, *Bolton Corp.* at 18), *rev'd*, 317 N.C. 623, 347 S.E.2d 369 (1986).

12. *Id.* (quoting Release in Full dated Feb. 21, 1984, Record, *Bolton Corp.* at 18).

13. *Bolton*, 317 N.C. at 625, 347 S.E.2d at 370 (quoting Release in Full dated Feb. 21, 1984, Record, *Bolton Corp.* at 18).

library.[14] Loving filed a motion to dismiss and raised various defenses. Loving also counterclaimed against Bolton for breach of contract and negligent performance of Bolton's contract with the State.[15] Loving based its counterclaim on the allegation that Bolton's workers negligently had caused the water pipe rupture, an event that was specifically mentioned in the release executed by Loving.[16] Plaintiff replied that defendant's counterclaim was " 'barred by the doctrine of accord and satisfaction, settlement and release.' "[17] The trial judge

14. Bolton alleged that Loving had breached its contract with the State and that Bolton was a direct beneficiary of that contract. Bolton further alleged Loving had negligently breached a duty of care arising from the working relationship between the two contractors. Finally, Bolton claimed that Loving had breached its "duty of due care in the performance of its contract with the State." *Id.* at 624, 347 S.E.2d at 370.

One commentator has noted that "[o]wners frequently insert strict notice of claim provisions, no damage for delay clauses, and other exculpatory language in each of their prime contracts, which . . . protect them from delay claims by delayed primes . . . ." PRACTISING LAW INSTITUTE, *supra* note 8, at 270-71. Consequently, delayed primes often bypass a suit against the owner and instead assert a claim against the prime contractor allegedly responsible for the delay. *Id.*

In North Carolina there is statutory authority for one prime contractor to pursue a claim against another prime contractor arising out of a public building contract. N.C. GEN. STAT. § 143-128 (1983) provides that "[e]ach separate contractor shall be *directly liable* to the State of North Carolina . . . *and to the other separate contractors* for the full performance of all duties and obligations due respectively under the terms of the separate contracts . . . ." *Id.* (emphasis added).

Some courts also have permitted actions by one prime against another on a direct contractual theory. This "direct" theory is predicated on reciprocal provisions in the contracts of the prime contractors, "pursuant to which a prime agrees to pay another prime damages it causes by failing to coordinate properly its work in accordance with the construction schedule developed for the project." PRACTISING LAW INSTITUTE, *supra* note 8, at 294; *see, e.g.*, J. Louis Crum Corp. v. Alfred Lindgren, Inc., 564 S.W.2d 544 (Mo. Ct. App. 1978); Edwin J. Dobson, Jr., Inc. v. Rutgers, State Univ., 157 N.J. Super. 357, 384 A.2d 1121 (1978), *aff'd sub nom.* Broadway Maintenance Corp. v. Rutgers, State Univ., 180 N.J. Super. 350, 434 A.2d 1125 (1981), *aff'd*, 90 N.J. 253, 447 A.2d 906 (1982).

If the direct benefit theory is unavailable to a delayed prime, it must predicate its cause of action on a third-party beneficiary theory, because the delayed prime has no contract with the delaying prime. In general, a donee or creditor third-party beneficiary may enforce a promise made for his or her benefit, but one who is only an incidental beneficiary may not enforce the contract. 4 A. CORBIN, CORBIN ON CONTRACTS § 774, at 6 (1951). Plaintiff contractors have not always been successful in their attempts to base an action on a third-party beneficiary theory. *See, e.g.*, Brotherton v. Merritt-Chapman & Scott Corp., 213 F.2d 477 (2d Cir. 1954); Buchman Plumbing Co., Inc. v. Regents of the Univ. of Minn., 298 Minn. 328, 215 N.W.2d 479 (1974); Gherardi v. Board of Educ. of Trenton, 53 N.J. Super. 349, 147 A.2d 535 (App. Div. 1958). *Contra* M.T. Reed Constr. Co. v. Virginia Metal Prods. Corp., 213 F.2d 337 (5th Cir. 1954); Visintine & Co. v. New York, Chicago and St. Louis R.R. Co., 169 Ohio St. 505, 160 N.E.2d 311 (1959); Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Hartford Accident & Indem. Co., 98 Utah 297, 95 P.2d 736 (1939).

15. *Bolton*, 317 N.C. at 624, 347 S.E.2d at 370.

16. *Id.* at 624-25, 347 S.E.2d at 370.

17. *Id.* at 625, 347 S.E.2d at 370 (quoting Plaintiff's Reply). An accord and satisfaction is a discharge of a claim by performance different from that claimed to be due, in exchange for the claimant's acceptance of this substituted performance in satisfaction of the claim asserted. A. CORBIN, CORBIN ON CONTRACTS § 1276, at 1041 (1952). The original claim may be based on contract, quasi-contract, tort, or some other theory. *Id.* Compromise and settlement is one form of accord and satisfaction. "Any claim can be discharged and satisfied by some substituted performance that is agreed upon; but it is only doubts and disputes that are compromised. . . . [A] compromise [and settlement] is always an accord, but . . . an accord is not necessarily a compromise." *Id.* § 1278, at 1044-45. Finally, a release is a written manifestation of the releasor's present intention to discharge another from some duty. It is valid if supported by consideration or if reasonably relied upon by the person discharged. *Id.* § 1238, at 993-94. In *Bolton* a disputed claim for damages arising out of the rupture of the water pipe was compromised by the payment of a sum of money in exchange for the execution of a release. *Bolton*, 317 N.C. at 625, 347 S.E.2d at 370.

granted defendant's motion for summary judgment. The North Carolina Court of Appeals affirmed the summary judgment.[18] The court of appeals held that by pleading the doctrines of accord and satisfaction, and settlement and release, Bolton had ratified its insurer's settlement with the defendant.[19] The effect of the settlement was to bar all claims between the parties. As a result, both the original claim and the counterclaim were barred.[20]

In a split decision[21] the North Carolina Supreme Court reversed the court of appeals.[22] Although it agreed that plaintiff had ratified its insurer's settlement with defendant, the supreme court held that the reservation of rights clause in the settlement should be given effect.[23] The court noted that the parties had an ongoing contractual relationship involving multiple transactions and occurrences.[24] It followed, the court reasoned, that the settlement might have been intended to compromise certain claims only, rather than all potential claims between the parties. Thus, to preserve this intent, the court concluded that the reservation of rights clause should be given effect.[25] Finally, when plaintiff pleaded the release in its reply to defendant's counterclaim, it ratified the entire agreement, including the reservation of rights clause.[26]

North Carolina law on settlement agreements has developed largely in the context of automobile accident cases. In such cases settlements have been held to "[constitute] an acknowledgment, as between the parties, of the liability of the [payor/releasee] and the nonliability, or at least a waiver of the liability, of the [payee/releasor]."[27] Once a settlement has been reached, neither party may sue the other for negligence allegedly arising out of the collision giving rise to the settlement and release.[28]

The effect of a settlement becomes more complex when one party's insurance carrier, without the consent of the insured, negotiates and executes the settlement with the other party. The insurer's right to take such action depends on the terms of the insurance policy and any applicable statutory provisions.[29] Even if the carrier's action is authorized by policy or statute, however, the settlement does not preclude the insured from asserting a claim against the releasor when "the settlement was made without the knowledge or consent of the insured or over his protest, unless the insured in the meantime has ratified such

18. *Bolton*, 317 N.C. at 626, 347 S.E.2d at 371.

19. *Bolton*, 77 N.C. App. at 96, 334 S.E.2d at 499.

20. *Id.*

21. Justice Billings wrote for the majority. Justice Martin filed a dissenting opinion, in which Justice Mitchell joined. *Bolton*, 317 N.C. at 630, 347 S.E.2d at 373 (Martin, J., dissenting).

22. *Id.* at 623, 347 S.E.2d at 369.

23. *Id.* at 627-28, 347 S.E.2d at 371-72; *see supra* text accompanying note 13.

24. *Id.* at 627, 347 S.E.2d at 371.

25. *Id.*

26. *Id.* at 628, 347 S.E.2d at 372.

27. Snyder v. Kenan Oil Co., 235 N.C. 119, 120, 68 S.E.2d 805, 806 (1952).

28. *Id.*

29. In the case of motor vehicle liability policies, N.C. GEN. STAT. § 20-279.21(f)(3) (1983) grants the insurer "the right to settle any claim covered by the policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits of liability specified [by statute]." *Id.*

settlement."[30]

"Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him."[31] When the principal's actions evidence assent to the act of the agent, ratification is implied. One way such assent may be manifested is by instituting or defending against an action based on the unauthorized act, with knowledge of the material facts regarding that act.[32] Thus, the North Carolina Supreme Court has held that when a plaintiff/releasee pleads a settlement and release as a defense to the defendant/releasor's counterclaim for injuries sustained in an automobile accident, plaintiff has ratified the settlement and release. As a result, both the counterclaim and plaintiff's own claim are barred.[33]

Keith v. Glenn[34] dealt with such a factual situation. Plaintiff Keith sued for personal injuries and property damage arising out of an automobile accident. Defendant Glenn counterclaimed for personal injuries and property damage arising out of the same collision. Plaintiff's reply pleaded a settlement and release executed by defendant and plaintiff's liability insurer as a bar to the counterclaim.[35] The North Carolina Supreme Court held that plaintiff had ratified the settlement and, therefore, both the claim and counterclaim were barred.[36] In response to plaintiff's contention that "payment by his insurance carrier for injuries he inflicts should not impair his right to compensation for injuries he sustains," the court emphasized that plaintiff's insurance policy provided liability rather than accident insurance coverage.[37] Unless plaintiff was legally liable for the accident, the insurance carrier was not obligated to pay defendant. The court implied that in ratifying the settlement plaintiff essentially had concurred with the insurer and defendant that plaintiff was at fault in the collision. The court noted that in a state such as North Carolina, where contributory negligence bars any recovery by the plaintiff,[38] ratification necessarily bars a plaintiff's claim because an award of damages to a plaintiff would be inconsistent

30. Lampley v. Bell, 250 N.C. 713, 714, 110 S.E.2d 316, 317 (1959); *accord* Campbell v. Brown, 251 N.C. 214, 214, 110 S.E.2d 897, 897 (1959) (per curiam); Beauchamp v. Clark, 250 N.C. 132, 139-40, 108 S.E.2d 535, 539-40 (1959).

31. 1 RESTATEMENT (SECOND) OF THE LAW OF AGENCY § 82, at 210 (1958).

32. Patterson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 266 N.C. 489, 493, 146 S.E.2d 390, 393 (1966). Pleading the settlement as an affirmative defense, in reply to a counterclaim, or in a motion to strike all constitute ratification of the settlement. Bradford v. Kelly, 260 N.C. 382, 388, 132 S.E.2d 886, 890 (1963). If the insured has pleaded the release, he or she can revoke this ratification by withdrawing the pleading, but only if the releasor has not subsequently alleged the insured's ratification as a bar to the insured's claim. Once the releasor pleads the insured's ratification of the carrier's settlement, the insured's ratification becomes irrevocable. Fowler v. McLean, 30 N.C. App. 393, 394-95, 226 S.E.2d 867, 869, *cert. denied*, 290 N.C. 776, 229 S.E.2d 32 (1976); White v. Perry, 7 N.C. App. 36, 39, 171 S.E.2d 56, 58 (1969).

33. *See* Keith v. Glenn, 262 N.C. 284, 136 S.E.2d 665 (1964).

34. *Id.*

35. *Id.* at 286-87, 136 S.E.2d at 667-78.

36. *Id.*; *accord* Shields v. Del Rosario, 303 So. 2d 355 (Fla. Dist. Ct. App. 1974), *cert. denied*, 315 So. 2d 97 (Fla. 1975).

37. *Keith*, 262 N.C. at 286, 136 S.E.2d at 667.

38. *E.g.*, Smith v. Fiber Controls Corp., 300 N.C. 669, 268 S.E.2d 504 (1980); Clark v. Roberts, 263 N.C. 336, 139 S.E.2d 593 (1965).

with the settlement.[39]

Under the theory of ratification of settlement and release propounded by the court in *Keith*, a plaintiff is not absolutely deprived of an opportunity to contest the liability issue. The *Keith* court approved an analysis set out earlier in *Bradford v. Kelly*[40] that afforded plaintiff the option either to ratify the settlement, or in the alternative, to refrain from pleading the settlement and litigate the liability issue anew.[41] The *Bradford* court reasoned that ratification barred both parties' claims, for plaintiff "may not blow hot and cold."[42] If plaintiff instead declined to plead the settlement and release, plaintiff would be permitted to pursue his or her claim against defendant, but would also "personally assume the risk that a judgment in excess of the carrier's compromise payment to the defendant might be rendered against her on the counterclaim."[43] Whichever route plaintiff decides to take, plaintiff "must, when he accepts the benefits, . . . bear its burdens."[44]

If it is established that the insured has ratified the settlement and release, the release binds the insured to the same extent that it binds the insurance company.[45] To determine the effect of the settlement and release on those bound by it, the North Carolina courts have employed traditional contract interpretation and construction techniques.[46] Virtually any court construing a contract begins, either expressly or implicitly, with the proposition that the parties' intent is paramount.[47] "The heart of a contract is the intention of the parties. [This] intention . . . must be determined from the language of the contract, the purposes of the contract, the subject matter and the situation of the parties at the time the contract is executed."[48] Various specific rules of contract construction are ulti-

39. *See supra* text accompanying note 27.

40. 260 N.C. 382, 132 S.E.2d 886 (1963).

41. *Id.* at 387-88, 132 S.E.2d at 890.

42. *Id.* at 388, 132 S.E.2d at 890.

43. *Id.*

44. *Keith*, 262 N.C. at 287, 136 S.E.2d at 668. Regardless of whether the plaintiff/releasee decides to ratify the settlement, the insurance carrier is protected from further liability to the releasor. In *Bradford* the insurance carrier sought to intervene so that it could plead the release and thereby ensure that it would not be bound by any judgment that defendant might obtain against the insured plaintiff. *Bradford*, 260 N.C. at 384, 132 S.E.2d at 888. The court held that the carrier's petition to intervene was premature until a determination had been made whether plaintiff had ratified the settlement. *Id.* at 385, 132 S.E.2d at 888. At the carrier's request, however, the court addressed what effect defendant's counterclaim would have on the carrier if it were decided that plaintiff had not ratified the settlement and release. *Id.* at 385, 132 S.E.2d at 889. The court stated that the release would provide the carrier with a complete defense in any action the defendant/releasor might bring against it to enforce a judgment obtained on the counterclaim. "Having negotiated with the insurance company and taken its money as consideration for the release, a party would be estopped to make any further claim against the carrier for injuries growing out of the collision which was the subject matter of the settlement." *Id.* at 388, 132 S.E.2d at 890.

45. *See supra* text accompanying note 31.

46. Although construction and interpretation often are used synonymously, the two terms are distinguishable. Interpretation is "the process of applying the legal standard to expressions found in the agreement in order to determine their meaning." 4 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 602, at 320 (1961). In contrast, construction of a contract refers to the determination of the legal meaning of the entire agreement. *Id.*

47. *E.g.*, Adder v. Holman & Moody, Inc., 288 N.C. 484, 492, 219 S.E.2d 190, 196 (1975); Lane v. Scarborough, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973).

48. *Adder*, 288 N.C. at 492, 219 S.E.2d at 196. It is the contracting parties' objective expression

mately used by courts to give effect to the intention of the parties to the contract.

One such rule of construction long employed by virtually all jurisdictions, including North Carolina, is that every part of a contract must be given effect if this can be accomplished "by fair and reasonable intendment."[49] This guideline reflects a presumption that each part of a contract expresses an " 'intelligible intent, i.e., means something.' "[50] Each part must be considered in context with the remainder of the contract's provisions so that the meaning of both the particular provision and the entire contract can be discerned.[51] Courts in many jurisdictions have harmonized apparently conflicting clauses, one general in nature and the other more specific, on the theory that the specific clause was intended to limit the general clause.[52] However, when a given clause cannot be reconciled with a preceding clause and conflicts with the general purpose of the contract, the inconsistent clause will be set aside.[53]

In *Westinghouse Electric Supply Co. v. Burgess*[54] the North Carolina Supreme Court applied these rules of construction to a settlement agreement that contained words of general release, but also included seemingly inconsistent language purporting to reserve certain rights of the releasor.[55] The court ex-

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of intent, rather than their subjective intent, which the courts seek to give effect. "The juristic effect of a contract is of necessity governed by the expressed intention of the parties. We look for the operative meaning of the symbols of expression designed to affect their legal relations. Their unexpressed intention is immaterial . . . ." George M. Brewster & Son, Inc. v. Catalytic Constr. Co., 17 N.J. 20, 27-28, 109 A.2d 805, 809 (1954).

When a written contract is deemed unambiguous on its face, extrinsic evidence such as oral understanding, custom and usage, and prior negotiations is not admissible to show the intention of the parties to the contract. For a general discussion of the "parol evidence rule," see 4 S. WILLISTON, *supra* note 46, §§ 631-632.

49. *See* Westinghouse Elec. Supply Co. v. Burgess, 223 N.C. 97, 100, 25 S.E.2d 390, 392 (1943); *see also* Moyer v. Walker, 276 F.2d 681, 683 (10th Cir. 1960) (it is a "cardinal rule of construction" that, if possible, contracts must be construed to give effect to all their clauses); Central Ga. Elec. Membership Corp. v. Georgia Power Co., 217 Ga. 171, 121 S.E.2d 644 (1961) (construing a contract proviso to give all clauses reasonable, lawful, and effective meaning); Laevin v. St. Vincent De Paul Soc'y, 323 Mich. 607, 36 N.W.2d 163 (1949) (contract must be construed as a whole and all its parts harmonized if reasonably possible); Corhill Corp. v. S.D. Plants, Inc., 9 N.Y.2d 595, 176 N.E.2d 37, 217 N.Y.S.2d 1 (1961) (construing a "Release of Liens" so as to give meaning to all its provisions).

50. Westinghouse Elec. Supply Co. v. Burgess, 223 N.C. 97, 100, 25 S.E.2d 390, 392 (1943) (quoting Wooten v. Hobbs, 170 N.C. 211, 214, 86 S.E. 811, 812 (1915)).

51. *Id.*

52. A more particular clause also has been held to restrict a general clause when the specific provision is inconsistent with only a portion of the general clause. State Farm Fire & Casualty Co. v. Rowland, 111 Ga. App. 743, 747, 143 S.E.2d 193, 196-97 (1965); Mealey v. Kanealy, 226 Iowa 1266, 1277-78, 286 N.W. 500, 506 (1939).

53. *See Westinghouse*, 223 N.C. at 100, 25 S.E.2d at 392; Davis v. Frazier, 150 N.C. 447, 64 S.E. 200 (1909). Rather than straining to employ "hairline distinctions . . . [or] circuitous reasoning" to give effect to all contract provisions, courts favor a construction that will be consistent with the apparent purpose of the entire agreement. O'Neil Supply Co. v. Petroleum Heat & Power Co., 280 N.Y. 50, 56, 19 N.E.2d 676, 679 (1939); *accord* Capitol Bus Co. v. Blue Bird Coach Lines, Inc., 478 F.2d 556 (3d Cir. 1973); Hanson v. Stern, 102 Ga. App. 341, 116 S.E.2d 237 (1960).

54. 223 N.C. 97, 25 S.E.2d 390 (1943).

55. Plaintiff furnished material to defendant, who served as general contractor on a construction project. *Id.* at 99-101, 25 S.E.2d at 392. At some point, defendant was unable to fulfill its obligations under the construction contract, so defendant's surety became primarily responsible for meeting the contract's terms. *Id.* at 101, 25 S.E.2d at 393. Plaintiff and the surety executed a compromise agreement by which plaintiff completely discharged all its claims against the defendant and its surety for labor and material furnished in connection with the construction contract. *Id.* Another part of the compromise agreement reserved to plaintiff its rights against defendant " 'for

amined the circumstances surrounding the settlement and determined that the reservation of rights was intended to limit the general release language. Therefore, the reservation of rights was given effect.[56]

Although *Bolton* involved contract delay claims[57] rather than personal injury or property damage arising in tort, the execution of a release and the subsequent litigation of the release in *Bolton* mirror the sequence of events in *Keith*.[58] Because an exchange of a release from liability for a monetary payment constitutes a contractual agreement between the parties, contract principles play an important role in determining the construction and effect of such a settlement and release, regardless of whether the underlying claim arises in tort, contract, or otherwise.[59] Therefore, the rationale of *Keith*, *Bradford*, and other automobile accident settlement cases provided a natural starting point for the supreme court in *Bolton*.

The court of appeals in *Bolton* applied the rule of the automobile accident cases to bar the claims of both Bolton and Loving.[60] Relying on the benefit/burden language in *Bradford*,[61] the court held that by voluntarily choosing to plead the release as a bar to defendant's counterclaim, plaintiff had avoided the risk that it would have to pay a judgment without the help of its insurance carrier.[62] The court of appeals stated, however, that the "burden of such action is that plaintiff's claims are also barred."[63] The supreme court agreed with the court of appeals that plaintiff Bolton had ratified its insurer's agreement with defendant.[64] When the court considered the effects of this ratification, however, it diverged from both the analysis and holding of the court of appeals.[65]

The supreme court in *Bolton* first distinguished *Keith*, *Bradford*, and the other automobile collision cases on the basis of the nature of the claim underlying the release.[66] The court reasoned that the rule precluding an insured who

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items which the United States Casualty Company disclaim [sic] any and all liability under its respective bonds.'" *Id.* at 101, 25 S.E.2d at 392-93 (quoting release agreement).

56. *Id.* at 101, 25 S.E.2d at 393. The result reached in *Westinghouse* is contrary to that reached in cases involving joint tortfeasors. In such cases North Carolina courts have refused to give effect to settlement provisions purporting to release one joint tortfeasor while reserving the releasor's claim against the remaining joint tortfeasors. *See, e.g.*, Simpson v. Plyler, 258 N.C. 390, 128 S.E.2d 843 (1963); Ottinger v. Chronister, 13 N.C. App. 91, 185 S.E.2d 292 (1971). For a discussion of the rationale in the joint tortfeasor cases, see *infra* notes 78-79 and accompanying text.

57. *See supra* notes 7-14 and accompanying text.

58. In *Bolton* as well as in *Keith* the insured party, who was not originally a party to the settlement and release negotiated by the insurance carrier, sued the releasor. Upon the filing of a counterclaim by the releasor for the same damages that were the subject of the compromise agreement, the plaintiff insured in each case pleaded the doctrine of accord and satisfaction as a bar to the counterclaim. *See supra* text accompanying notes 10-17, 34-35.

59. *Bolton*, 317 N.C. at 632, 347 S.E.2d at 374 (Martin, J., dissenting).

60. *Bolton*, 77 N.C. App. at 96, 334 S.E.2d at 499.

61. *See supra* text accompanying notes 40-44.

62. *Bolton*, 77 N.C. App. at 95, 334 S.E.2d at 498.

63. *Id.*

64. *Bolton*, 317 N.C. at 628, 347 S.E.2d at 372. The supreme court did not expressly address whether plaintiff's actions constituted ratification of its insurer's actions. Instead, the supreme court's decision implicitly assumes that plaintiff had ratified the compromise agreement. *Id.*

65. *Id.* at 629, 347 S.E.2d at 373.

66. *Id.* at 626-27, 347 S.E.2d at 371.

has ratified a settlement from thereafter pursuing an action against the releasor makes sense in the context of a negligence action.[67] In North Carolina contributory negligence acts as a total bar to recovery. Therefore, "it would be factually inconsistent for the plaintiff . . . to be allowed to recover against the defendant" once plaintiff has ratified the compromise agreement calling for plaintiff's insurer to make payment to defendant, because the settlement acknowledges the liability of the party making payment in exchange for a release.[68] If plaintiff, through its insurer, has made payment to defendant, then plaintiff's liability has been acknowledged, and it is not entitled to recover in a court action.[69]

In contrast to *Keith* and *Bradford*, *Bolton* involved not "a single incident, an accident, [but] an ongoing contractual relationship and multiple transactions."[70] Moreover, the cost overruns alleged by plaintiff could have been caused by delays unrelated to the ruptured water line, the specified subject of the release.[71] It follows that the settlement made by plaintiff's insurer and later ratified by plaintiff was not necessarily dispositive of the issue of liability for all possible claims arising out of the parties' working relationship. The court concluded that the reservation of rights language in the release should not be overridden by mechanical application of the rule, laid down in cases such as *Keith*, that a ratified settlement bars an action by the insured.[72]

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67. *Id.* at 627, 347 S.E.2d at 371.

68. *Id.* The court cited Snyder v. Kenan Oil Co., 235 N.C. 119, 68 S.E.2d 805 (1952), for the proposition that settlement of automobile accident cases essentially decides the issue of liability. *See supra* text accompanying notes 27-28.

69. *Bolton*, 317 N.C. at 627, 347 S.E.2d at 371. The South Carolina Supreme Court also has interpreted *Keith* and *Bradford* as being predicated on the inseparability of the negligence claim underlying the settlement and release. Brazell Bros. Contractors v. Hill, 245 S.C. 69, 138 S.E.2d 835 (1964), involved an automobile collision. As in *Keith*, plaintiff's insurance carrier settled with defendant, and plaintiff later ratified the settlement by pleading it as a bar to defendant's counterclaim. *Id.* at 72, 138 S.E.2d at 836. Defendant contended that *Keith* and *Bradford* should be followed and plaintiff's action barred. *Id.* at 72-73, 138 S.E.2d at 837. The South Carolina Supreme Court responded that the North Carolina courts deem a ratified settlement to be a bar to an action by the insured, "without regard to the terms of the compromise and settlement or the intention of the parties." *Id.* at 73, 138 S.E.2d at 837. The apparent reason for such a mechanical application of the rule, the court continued, is that in North Carolina only one cause of action can arise out of a single car accident. *Id.* "When the claims of the opposing parties are viewed as a single cause of action, it is plausible to import mutuality to any settlement between them, thus barring the right of either party to pursue the other, even though the release is, by its terms, unilateral." *Id.* at 74, 138 S.E.2d at 837.

The *Brazell* court concluded that because in South Carolina opposing parties in a car collision have distinct causes of action, *Keith* and *Bradford* were inapposite. *Id.* Therefore, the parties' intent as evidenced by the release controlled. This intent was to settle defendant's claim alone, so plaintiff's claims should not be barred. *Id.* at 75-76, 138 S.E.2d at 838.

70. *Bolton*, 317 N.C. at 627, 347 S.E.2d at 371.

71. Indeed, the court noted that the targeted completion date had long passed by the time the water line broke. *Id.*

72. The court pointed out the end result should the rule be applied:

> By saying that the reservation of rights clause has no effect, we would be saying that for the price of settling the issue of its liability resulting from the broken waterpipe, the plaintiff gave up all of its own completely unrelated claims against the defendant, even though the settlement agreement did not so provide. There is no logical reason for making the rule in automobile accident cases apply to the situation here.

Id.

Implicit in the court's reasoning is the assumption that the reservation of rights clause reflected

The court also distinguished *Keith*, *Bradford*, and the other automobile accident cases on the basis that the releases executed in those cases did not contain language purporting to reserve the rights of the insured.[73] In doing so, the court implied that even if it applied the car accident rule to other situations in which the parties have an ongoing relationship, the plaintiff insured's claim should not be barred in this instance because the release executed by Loving contained language reserving the rights of the insured. This reservation of rights was preserved when Bolton ratified the settlement; the effect of ratification was that the insured adopted the entire settlement, including the reservation of rights.[74]

By drawing a distinction between releases that do include a reservation of rights and those that do not, the supreme court abandoned its earlier argument, which rationalized the rule in the car accident cases on the basis of the inseparable nature of the claim underlying the settlement and release.[75] In doing so, the court oversimplified the inquiry. Language in certain of the car accident cases indicates that the rule barring both parties' claims upon execution of a release is predicated on the inseparable nature of that claim.[76] As previously discussed, these cases have stated that a settlement effectively disposes of the question of liability.[77] In addition, settlements purporting to release one joint tortfeasor while reserving the releasor's claims against the remaining joint tortfeasors have been construed as releasing all tortfeasors.[78] In such cases courts do not give effect to the reservation of rights language. As in the cases involving only one tortfeasor, the reason North Carolina courts have offered for this rule is that the claim is single and inseparable.[79] The *Bolton* court's suggestion that the inclu-

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the parties' intent to limit the general release. Later in the opinion, the court expressly analyzed the parties' intent as embodied in the release. *See infra* text accompanying notes 81-86.

73. *Bolton*, 317 N.C. at 627, 347 S.E.2d at 371-72.

74. *Id.* at 628, 347 S.E.2d at 372. This analysis is consistent with the rule that a principal cannot ratify only part of a contract made by his or her agent. Patterson v. Merrill Lynch, Pierce, Fenner & Smith, 266 N.C. 489, 494, 146 S.E.2d 390, 394 (1966); *Keith*, 262 N.C. at 287, 136 S.E.2d at 668.

Because plaintiff did not consent to the settlement at the time it was executed, the court of appeals in *Bolton* interpreted the reservation of rights clause as simply "a restatement of the law concerning a nonconsenting insured's rights: that by not consenting to its insurer's settlement and release, it retained its right to pursue any claims it may have against the defendant." *Bolton*, 77 N.C. App. at 96, 334 S.E.2d at 499. When plaintiff later ratified the settlement, it relinquished this right. *Id.* The supreme court disagreed with this construction of the release: "The reservation of rights clause does not purport to reserve claims or causes of action only if the party released does not ratify the release; it reserves them completely." *Bolton*, 317 N.C. at 628, 347 S.E.2d at 372.

75. *See supra* notes 66-72 and accompanying text.

76. For example, the court in Snyder v. Kenan Oil Co., 235 N.C. 119, 68 S.E.2d 805 (1952), stated that upon settlement, "[n]either party thereafter had any right to pursue the other in respect to any liability arising out of any alleged negligence proximately causing the collision which is the subject matter of this suit." *Id.* at 120, 68 S.E.2d at 806.

77. *See id.*; *supra* text accompanying notes 27-28; *accord* Lyon v. Younger, 35 N.C. App. 408, 410-11, 241 S.E.2d 407, 408 (1978); Fowler v. McLean, 30 N.C. App. 393, 394, 226 S.E.2d 867, 869, *cert. denied*, 290 N.C. 776, 229 S.E.2d 32 (1976); McKinney v. Morrow, 18 N.C. App. 282, 284, 196 S.E.2d 585, 587, *cert. denied*, 283 N.C. 665, 197 S.E.2d 874 (1973).

78. *E.g.*, Simpson v. Plyler, 258 N.C. 390, 128 S.E.2d 843 (1963); Ottinger v. Chronister, 13 N.C. App. 91, 185 S.E.2d 292 (1971).

79. The inquiry in the joint tortfeasor cases centers on whether plaintiff/releasor's cause of action has been extinguished through the settlement instrument. "If it appears from the instrument that covenantor has discharged his cause of action against the covenantee, a joint tort-feasor, it is not

sion of a reservation of rights clause is, in and of itself, enough to preserve plaintiff's claim, ignores the rationale of past North Carolina Supreme Court decisions. The first argument made by the court, which recognized the "inseparable claim" rationale, correctly analyzed the case in light of past supreme court decisions.[80]

In holding that plaintiff was not barred from asserting its claim,[81] the court necessarily construed the release as reserving any of Bolton's claims that arose out of the working relationship of the parties. The court expressly recognized that the intention of the parties to the settlement was of primary importance in construing the release.[82] Citing with favor the *Westinghouse*[83] case, the *Bolton* court emphasized that releases are to be construed liberally so that this intention can be given full effect.[84] Because the reservation of rights clause applied " 'to any party hereby released,' " and the release specifically applied to Bolton as well as its insurer, the court concluded that the parties intended for Loving to surrender all its claims against Bolton in exchange for payment, and for Bolton to retain its claims against Loving.[85] The court also noted that the circumstances surrounding the execution of the release supported this interpretation. The release was not executed until after the claim and counterclaim were filed, so "[p]resumably defendant knew what the contract provided and was satisfied

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a matter for construction, all joint tort-feasors are released. . . . The cause of action is single, indivisible, and non-apportionable." *Simpson*, 258 N.C. at 394-95, 128 S.E.2d at 846.

80. *See supra* notes 66-72 and accompanying text. Dictum in Moore v. Young, 263 N.C. 483, 139 S.E.2d 704 (1965), also indicates that the automobile collision cases would not have been decided any differently had those releases contained language reserving the rights of the insured. In *Moore* plaintiff instituted an action for personal injury and property damage sustained in a collision. Record at 16, *Moore* (No. 522, Fall Term 1964). Defendant asserted a counterclaim, *id.* at 7, and plaintiff filed a reply alleging defendant's contributory negligence, *id.* at 9-10. Defendant's insurer then settled with plaintiff, and plaintiff executed a release. *Id.* at 10. Plaintiff took a voluntary nonsuit on his claim, and a consent judgment was entered dismissing plaintiff's claim without prejudice to defendant's counterclaim. *Id.* at 11-12. The supreme court held that plaintiff, having effectively "agreed that defendant should take the offensive in any future litigation," could not reinstate his claim. *Moore*, 263 N.C. at 486, 139 S.E.2d at 707.

The court went on to describe what would have occurred had the consent judgment dismissed not only the plaintiff/releasor's claim, but also the counterclaim of the defendant/releasee, without prejudice to defendant's cause of action. The court concluded that should the releasee later institute suit and the releasor interpose a counterclaim, the rules laid down in *Bradford* and *Keith* would apply. *Id.* It follows that in such a situation, if the releasee should plead the doctrine of accord and satisfaction in reply to the counterclaim, both claims would be barred, despite the "without prejudice" language of the consent judgment.

The *Moore* case can be rationalized on other grounds, however. The supreme court in *Moore* expressly stated that the words "without prejudice" have a special meaning. When used, the words "without prejudice" " 'import into any transaction that the parties have agreed that as between themselves the receipt of money by one and its payment by the other shall not . . . have any legal effect upon the rights of the parties . . . and that such rights will be . . . open to settlement by legal controversy . . . .' " *Id.* at 485-86, 139 S.E.2d at 706-07 (quoting Hinton v. Bogart, 79 Misc. 418, 420, 140 N.Y.S. 111, 113 (1913), *rev'd*, 166 A.D. 155, 151 N.Y.S. 796 (1915)). The "without prejudice" language thus preserves the issue of liability completely for each party. In contrast, a reservation of rights clause applies only to the rights of the party to whom it refers.

81. *Bolton*, 317 N.C. at 629-30, 347 S.E.2d at 373.

82. *Id.* at 628, 347 S.E.2d at 372; *see supra* notes 47-48 and accompanying text.

83. 223 N.C. 97, 25 S.E.2d 390 (1943). For a discussion of *Westinghouse*, see *supra* notes 54-56 and accompanying text.

84. *Bolton*, 317 N.C. at 628-29, 347 S.E.2d at 372.

85. *Id.* at 629, 347 S.E.2d at 372.

with its terms."[86]

The holding in *Bolton* is sound. It avoids the danger of courts essentially rewriting a settlement by barring both parties' claims, despite the parties' clear intention to reserve certain rights. The court's refusal to override—through rigid application of the rule applied in *Bradford*, *Keith*, and the other automobile accident cases—the contractual intent embodied in the release allows contracting parties to retain control of the contractual process. Freedom to enter into contractual relationships is so deeply engrained in our legal system that some jurisdictions consider it a violation of public policy for a court to attempt to "rewrite" a contract.[87] These jurisdictions have held that when the parties' intent was to settle only one component of the damage sustained, such as property damage, a subsequent legal action seeking to recover for physical injury sustained in the same incident should be permitted, despite the general prohibition against splitting one's cause of action.[88]

In addition to its tendency to preserve the integrity of the contractual process, the supreme court's decision in *Bolton* also encourages settlement. Contracting parties can settle discrete, individual disputes without fear that they are also jeopardizing other claims that may have arisen. The supreme court recognized this when it noted that uniform and rigid application of the rule in the automobile accident cases would render it "legally impossible for parties to settle only one aspect of a multifaceted dispute."[89] The dissent in *Bolton* replied that to limit the settlement to the broken water pipe claim, the parties simply could have executed a specific, rather than a general, release.[90] However, requiring the parties to execute a prescribed form of release to ensure the courts will preserve their intent reduces the parties' control over the contracting process. If the instrument evidences an intent to reserve either party's right to assert discrete claims, there is no reason to defeat that intent by imposing the rule that the insured's ratification of a settlement bars both parties' claims.

Bolton provides an excellent example of a situation in which the ability to negotiate freely and to settle individual claims is of central importance. In a large, complex building project involving a number of different contractors, it is no simple task to find the causes of delays, and to compute the damages incurred as the result of these delays.[91] It is even more difficult to determine what por-

86. *Id.* at 629, 347 S.E.2d at 372-73.

87. *E.g.*, Glover v. Southern Bell Tel. & Tel. Co., 229 Ga. 874, 195 S.E.2d 11 (1972).

88. *Id.*; *see also* Clemons v. Clark, 172 So. 2d 242 (Fla. Dist. Ct. App. 1965) (holding it proper to strike defendant's defense that there was a splitting of plaintiff's claim when a release for only property damage had been executed); Phillips v. State Farm Mut. Auto. Ins. Co., 121 Ga. App. 342, 173 S.E.2d 723 (1970) (noting that a defendant may waive the requirement that a plaintiff include all elements of his or her damage in one action); Frankel v. Quaker City Cab Co., 82 Pa. Super. 217 (1923) (settling personal injury component and litigating only property damage was within spirit of rule that one should not be subjected to two suits arising from one cause of action; ending litigation is in the public interest). *Contra* Thompson v. Kivett & Reel, Inc., 25 So. 2d 124 (La. Ct. App. 1946) (holding that acceptance of payment for property damage destroyed plaintiff's cause of action for any future claims based on the same accident).

89. *Bolton*, 317 N.C. at 627, 347 S.E.2d at 371.

90. *Id.* at 631-32, 347 S.E.2d at 374 (Martin, J., dissenting).

91. One commentator has stated:

tion of the damages is attributable to each causative factor.[92] Therefore, contractors should have the opportunity, free from legalistic constraints, to settle each claim as they gather adequate information about the cost overruns incurred and the reasons for the overruns.

The North Carolina Supreme Court's decision in *Bolton* is based on generally sound reasoning and is consistent with past decisions of the court. The *Bolton* decision also encourages settlement, which is normally less costly and time consuming than litigation. Most importantly, by recognizing the crucial differences between a compromise of claims arising out of an automobile accident and a settlement of a cause of action arising out of a lengthy, complex contractual relationship, the court has eliminated a potential source of unwarranted interference by courts in the contracting process. As a result, the parties to a contract will be better able to retain control over the legal effect of the bargains they make.

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> Construction delays reverse the typical balance in litigation. Normally, most efforts are directed toward proving liability rather than damages. In construction, the failure of one party to provide something necessary to the performance of the other party is relatively easy to prove and will suffice for proof of liability. Tying the breach directly to increased costs exclusively attributable to that breach can be quite another matter.

PRACTISING LAW INSTITUTE, *supra* note 8, at 126-27 (footnote omitted).

Even if it is established that a breach did cause some amount of damages, the extent of the delayed contractor's damages often is not easily proven. A delayed contractor can sustain damages in many different forms, such as labor overrun and other jobsite damages, increased material costs, inefficiency, idle equipment, home office overhead, prejudgment interest costs, and loss of profits. *See generally id.* at 158-78 (discussing cases in which the recoverability of various types of delay damages has been addressed).

92. "Apportioning damages is made difficult by the fact of concurrent delays and the problem of not being able to determine which costs are attributable to the delay. Courts will make no effort to apportion damages where both parties have contributed to the delays." A.B.A. SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW, CONSTRUCTION CONTRACT CLAIMS 138 (1978) (footnotes omitted). For a discussion of methodologies useful in apportioning and proving damages, see PRACTISING LAW INSTITUTE, *supra* note 8, at 150-57 (advocating the "critical path method," which "depicts the relationship of the various items of work over time and the dependence of one construction activity on the other activities").