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1992 SURVEY OF DEVELOPMENTS IN NORTH CAROLINA LAW
Transactions between a buyer and a seller can often be adversarial in nature. The buyer bargains for a low price while the seller hopes for a higher one. Similarly, the seller emphasizes the favorable qualities of the product or service, whereas the buyer attempts to discover its drawbacks. In today's market, individual buyers often may feel at a disadvantage when dealing with commercial sellers because of an inferior ability to negotiate price and limited access to information about the product. The buyer is at the seller's mercy. Consumers especially may worry about the forthrightness and good faith of a seller when purchasing a car from a dealer. Certainly everyone is familiar with the stereotype of the smooth-talking, unscrupulous car salesman who takes advantage of the unwitting consumer.\footnote{For example, imagine the stereotypical car salesman, Seller, who sells to Consumer a car that has a serious defect. Seller is aware of the defect but insists that the car is in good condition and induces Consumer to buy it.}

Today, consumer protection laws are supposed to provide remedies to injured consumers and deter unfair or deceitful sellers. One component of North Carolina's consumer protection scheme is North Carolina General Statutes section 75-1.1, which prohibits unfair methods of competition and unfair or deceptive trade practices.\footnote{N.C. GEN. STAT. § 75-1.1 (1988). For the text of the statute, see infra note 25.} Section 75-1.1\footnote{For Seller's actions to be prohibited under § 75-1.1, it is not necessary that the dealer's actions be intentional. See, e.g., Marshall v. Miller, 301 N.C. 539, 544, 276 S.E.2d 397, 400-01 (1981) (noting that whether or not the defendant acted in bad faith is not relevant).} forms the basis of protection for North Carolina's consumers and also supplements the federal antitrust laws.\footnote{See infra notes 67-69 and accompanying text.} In particular, section 75-1.1 prohibits Seller's misrepresentation to Consumer. Additionally, North Carolina General Statutes section 75-16 plays a role in the state's statutory scheme by establishing a private cause of action for persons injured by violations of Chapter 75.\footnote{N.C. GEN. STAT. § 75-16 (1988). For the full text of the statute, see infra note 24. This statute is discussed fully at infra notes 97-100 and accompanying text.} Under section 75-16, Consumer may bring suit against Seller because of Seller's misrepresentation about the car. The usefulness

\footnote{1. Stereotypes ought to be avoided; certainly this is an unfair characterization of many car dealers. Nevertheless, one North Carolina appellate court has made reference to the stereotypical car salesman, commenting that "the [sale and] distribution of motor vehicles is a business which easily could be conducted so as to become a medium of fraud and dishonesty." Butler v. Peters, 52 N.C. App. 357, 360, 278 S.E.2d 283, 285 (1981).}

\footnote{2. N.C. GEN. STAT. § 75-1.1(a) (1988). For the text of the statute, see infra note 25.}

\footnote{3. For Seller's actions to be prohibited under § 75-1.1, it is not necessary that the dealer's actions be intentional. See, e.g., Marshall v. Miller, 301 N.C. 539, 544, 276 S.E.2d 397, 400-01 (1981) (noting that whether or not the defendant acted in bad faith is not relevant).}

\footnote{4. See infra notes 67-69 and accompanying text.}

\footnote{5. N.C. GEN. STAT. § 75-16 (1988). For the full text of the statute, see infra note 24. This statute is discussed fully at infra notes 97-100 and accompanying text.}
of section 75-16 as an enforcement mechanism is bolstered by its automatic treble damage feature.\(^6\)

While section 75-1.1 is a general prohibition against unfair trade practices, numerous regulatory schemes for specific industries also exist.\(^7\) In particular, motor vehicle dealers are subject to detailed statutory regulation.\(^8\) Many of these statutory provisions are designed to protect the consumer.\(^9\) Recently, the North Carolina Supreme Court addressed how the state's general consumer protection scheme and the more specific regulations of motor vehicle dealers should interact.\(^10\) *Tomlinson v. Camel City Motors, Inc.*,\(^11\) a case of first impression in North Carolina, raised the issue of whether a motor vehicle dealer's surety is liable for a treble damage judgment against the dealer under section 75-16.\(^12\)

This Note explains the facts of *Tomlinson*\(^13\) and the majority's reasoning, as well as the arguments of the concurring and dissenting justices.\(^14\) The Note describes the three areas of law that interact in *Tomlinson*: North Carolina's unfair trade practice law,\(^15\) specific consumer protection provisions of North Carolina's motor vehicle dealers licensing laws,\(^16\) and the state's general law of suretyship.\(^17\) An analysis

\(^6\) The threat of treble damages deters would-be violators of Chapter 75 provisions; treble damages also serve as an incentive to injured consumers to pursue claims. *See infra* note 98 and accompanying text.


\(^9\) The particular statutes that this Note addresses are N.C. GEN. STAT. §§ 20-288(e) and 20-294 (Supp. 1991). For the text of these statutes, see *infra* note 29.

\(^10\) It is not clear whether the General Assembly intended for certain sections of the two schemes to interrelate. *See infra* notes 123-24 and accompanying text.


\(^12\) *Id.* at 78-79, 408 S.E.2d at 855. All motor vehicle dealers are required to post a surety or cash bond. An injured purchaser has a cause of action against the dealer and its surety. N.C. GEN. STAT. § 20-288(e) (Supp. 1991).

\(^13\) *See infra* notes 20-33 and accompanying text.

\(^14\) *See infra* notes 34-66 and accompanying text. Justice Martin wrote for the majority. *Tomlinson*, 330 N.C. at 78, 408 S.E.2d at 854. Justice Webb filed a concurring opinion in which Justice Meyer joined. *Id.* at 81-82, 408 S.E.2d at 857 (Webb, J., concurring). Justice Frye filed an opinion in which he dissented in part. *Id.* at 82, 408 S.E.2d at 857 (Frye, J., concurring in part and dissenting in part).

\(^15\) *See infra* notes 67-100 and accompanying text.

\(^16\) *See infra* notes 101-07 and accompanying text.

\(^17\) *See infra* notes 108-16 and accompanying text.
of whether the \textit{Tomlinson} holding is a consistent synthesis of these three areas of law then follows. Because the North Carolina General Assembly did not explicitly contemplate any interaction between these two consumer protection schemes, the extent to which a surety is liable for section 75-16 treble damages is not clear.\footnote{18} This Note suggests that the \textit{Tomlinson} court's solution was not the best choice from either a practical or a policy standpoint.\footnote{19}

The facts of \textit{Tomlinson} are similar to the transaction between Seller and Consumer.\footnote{20} The plaintiff, Ellen Tomlinson, purchased a car from the defendant, Camel City Motors (CCM).\footnote{21} The dealer's president, James "Babe" Johnson, Jr., promised to assume the remaining installment payments on Tomlinson's old car, which she traded in as part of the transaction.\footnote{22} The dealership failed to make any of the promised payments, however. Tomlinson brought suit\footnote{23} under North Carolina General Statutes section 75-16,\footnote{24} alleging that CCM had violated section 75-1.1(a) by committing an unfair or deceptive trade practice.\footnote{25} Both CCM and Johnson failed to answer the complaint, and Tomlinson obtained a default judgment against them.\footnote{26} Tomlinson was awarded $3,459.72 in actual damages (the total amount of the unpaid car payments) which was trebled according to section 75-16 to $10,379.16.\footnote{27} She also was awarded attorney's fees in the amount of $2,563.00 pursuant to section 75-16.1.\footnote{28}

\footnote{18} See infra notes 122-54 and accompanying text.\footnote{19} See infra notes 155-61 and accompanying text.\footnote{20} See supra text accompanying notes 1-2.\footnote{21} \textit{Tomlinson}, 330 N.C. at 78, 408 S.E.2d at 855.\footnote{22} \textit{Id.} at 76, 78, 408 S.E.2d at 853, 855.\footnote{23} In 1988, Tomlinson sued Camel City Motors, Johnson, Barclays American/Financial, and Lawyers Surety Corporation. Plaintiff Appellee's New Brief at 2, \textit{Tomlinson} (No. 93PA91).\footnote{24} Section 75-16 provides that

\begin{quote}
[i]f any person shall be injured ... by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person ... so injured shall have a right of action on account of such injury done, and if damages are assessed ... judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.
\end{quote}

\textit{N.C. GEN. STAT.} § 75-16 (1988).\footnote{25} Section 75-1.1 provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." \textit{Id.} § 75-1.1(a).\footnote{26} Plaintiff Appellee's New Brief at 2, \textit{Tomlinson} (No. 93PA91). Tomlinson filed suit on January 29, 1988, in Forsyth County. The default judgment against CCM and Johnson was entered on October 23, 1989 by Judge Loretta C. Brigg. \textit{Id.}\footnote{27} \textit{Tomlinson}, 330 N.C. at 78, 408 S.E.2d at 855.\footnote{28} \textit{Id.} Section 75-16.1 states that
North Carolina General Statutes section 20-288(e) requires all motor vehicle dealers to post a surety bond and establishes a cause of action for injured purchasers against the surety. Pursuant to this statute, Tomlinson moved for summary judgment against CCM's surety, Lawyers Surety Corporation (Lawyers Surety), for the amount of the default judgment. Tomlinson's motion was granted, and Lawyers Surety appealed, claiming that it should not be held liable for more than compensatory damages. The North Carolina Court of Appeals affirmed, stating that "[t]he only limit in [section 20-288(e)] is the principal amount of the bond ($15,000.00), which was not exceeded in this case."

On review, the North Carolina Supreme Court reversed in part and

The defendant car dealership failed to answer Tomlinson's complaint. Id.

32. Tomlinson v. Camel City Motors, Inc., 101 N.C. App. 419, 421, 399 S.E.2d 147, 148, aff'd in part, rev'd in part, 330 N.C. 76, 408 S.E.2d 853 (1991). Lawyers Surety admitted that it was the surety for CCM and that it was liable for actual damages in the amount of $3,459.72. See id. at 421, 399 S.E.2d at 149.

33. Id. at 421, 399 S.E.2d at 149. For a discussion of the requirements of § 20-288(e), see supra note 29.
affirmed in part the court of appeals’ decision.\textsuperscript{34} The majority noted initially that "two hurdles" must be overcome before a motor vehicle purchaser is eligible to proceed under section 20-288(e): the consumer must show that the dealer violated a provision of either Article 12 or Article 15 of Chapter 20,\textsuperscript{35} and also prove that the consumer suffered damage or loss because of that violation.\textsuperscript{36} The court found that CCM violated section 20-294(4) and that Tomlinson suffered damages in the form of the unpaid car payments,\textsuperscript{37} enabling Tomlinson to proceed against Lawyers Surety.\textsuperscript{38}

The court further interpreted section 20-288(e) as limiting the damages recoverable by the plaintiff to "those that are 'suffered;" \textsuperscript{39} the court explained that Tomlinson actually "suffered" damages of only $3,459.72, the amount of the unpaid car payments.\textsuperscript{40} Because the trebled portion of the damages awarded by the trial court represented more than "the damages [Tomlinson] actually 'suffered,'" \textsuperscript{41} the court held that the surety was not liable for the additional amount of the award.\textsuperscript{41} According to the majority, section 20-288(e) effectively protects a surety from liability for the trebled portion of damages where the trebled portion represents an amount over and above the plaintiff's actual loss.\textsuperscript{42}

The court observed that although in this case the treble damages did not compensate the plaintiff, in other situations the surety might be liable

\begin{itemize}
\item \textsuperscript{34} \textit{Tomlinson}, 330 N.C. at 78, 408 S.E.2d at 855.
\item \textsuperscript{36} \textit{Tomlinson}, 330 N.C. at 79, 408 S.E.2d at 855.
\item \textsuperscript{37} \textit{Id.} at 79-80, 408 S.E.2d at 856. The court explained that the dealer induced plaintiff to purchase a car and defrauded the purchaser by telling her that the dealer would make the remaining installment payments on the old car if the purchaser would trade it in with the dealer for another car, and these promised payments were not made. This fraudulent inducement by the dealer violated N.C.G.S. § 20-294(4).
\item \textsuperscript{38} \textit{Id.} at 80, 408 S.E.2d at 856.
\item \textsuperscript{39} The court emphasized that § 20-294 does not expand the category of persons eligible to bring a cause of action against the dealer's surety. The surety bond is available only to purchasers as a source of indemnity. \textit{Id.} at 79-80, 408 S.E.2d at 856 (citing NCNB Nat'l Bank v. Western Surey Co., 88 N.C. App. 705, 364 S.E.2d 675 (1988)); \textit{see also} Triplett v. James, 45 N.C. App. 96, 99, 262 S.E.2d 374, 376, \textit{cert. denied}, 300 N.C. 202, 296 S.E.2d 621 (1980) (holding that under § 20-280(e) only the purchaser is authorized to collect from the surety).
\item \textsuperscript{40} \textit{Tomlinson}, 330 N.C. at 80, 408 S.E.2d at 856.
\item \textsuperscript{41} \textit{Id.} at 80-81, 408 S.E.2d at 856.
\item \textsuperscript{42} \textit{Id.}
\end{itemize}
for damages trebled under section 75-16.\textsuperscript{43} According to the court, section 75-16 serves three functions as a consumer protection measure: deterring undesirable business practices, encouraging private enforcement, and providing a remedy for the injured or aggrieved consumer.\textsuperscript{44} The court believed that the statute's deterrence policy would not be served if the surety were liable for the trebled portion of the damages,\textsuperscript{45} but suggested that sometimes the statute's compensatory goal would be achieved by imposing liability on the surety for treble damages.\textsuperscript{46} If the consumer "'suffered' more than just the initial damages," these additional damages could "transform the trebled portion of the award from a punitive to a compensatory award" and justify holding the surety liable for the trebled portion.\textsuperscript{47}

Justice Webb concurred in the court's holding, but believed that the majority elaborated unnecessarily on the issue of a surety's liability for treble damages.\textsuperscript{48} He stated that the court should limit its holding to the factual situation before it.\textsuperscript{49} Additionally, Justice Webb argued that a surety should never be liable under section 20-288(e) for damages trebled according to section 75-16.\textsuperscript{50} He interpreted section 20-288(e) as creating liability for the surety for claims arising only under Articles 12 and 15 of Chapter 20.\textsuperscript{51} Tomlinson's claim was brought under Chapter 75. Justice Webb believed that the two consumer protection schemes were

\textsuperscript{43} Id. at 80, 408 S.E.2d at 856 (noting that "'[i]n other cases, trebling against the surety may be appropriate'").

\textsuperscript{44} Id. The court previously described the hybrid nature of § 75-16 in Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981), and the Tomlinson court cited that description with approval. Tomlinson, 330 N.C. at 80, 408 S.E.2d at 856.

\textsuperscript{45} Tomlinson, 330 N.C. at 80, 408 S.E.2d at 856. "Because the surety had no knowledge that the dealer was operating in a fraudulent manner, enforcing the exemplary and punitive damages against the surety would not produce the deterrent effect that is the purpose behind the statute." Id.

\textsuperscript{46} Id. at 80-81, 408 S.E.2d at 856.

\textsuperscript{47} Id. "In situations where the injured consumer has lost a great deal more than the initial damages by spending extra money and time to gain a modicum of satisfaction, the trebled portion of the award is seen as compensating the consumer for those losses rather than as punitive in nature." Id. at 80, 408 S.E.2d at 856. Here, according to the court, Tomlinson had not proved that she suffered any damages other than the unpaid car installment payments, and so the treble damages were primarily punitive in nature. Id. at 81, 408 S.E.2d at 856.

The majority also found that Lawyers Surety failed to raise before the court of appeals the issue of whether it should be held liable for attorney's fees under § 75-16. Id. For that reason, the issue was not properly before the supreme court; the judgment against Lawyers Surety for attorney's fees was affirmed. Id.

\textsuperscript{48} Id. at 81-82, 408 S.E.2d at 857 (Webb, J., concurring).

\textsuperscript{49} Id. at 82, 408 S.E.2d at 857 (Webb, J., concurring).

\textsuperscript{50} Id. (Webb, J., concurring).

\textsuperscript{51} Id. at 81-82, 408 S.E.2d at 857 (Webb, J., concurring). See supra note 35 and accompanying text for an explanation of the sections included in these statutory articles.
not intended to interact and, therefore, that the majority improperly stated that a surety might be held liable for treble damages on different facts.\textsuperscript{52}

Justice Frye dissented in part from the majority opinion.\textsuperscript{53} He disagreed with the majority's finding that Lawyers Surety was not liable for the trebled portion of the damages,\textsuperscript{54} and declared that a surety always should be liable for treble damages as a matter of statutory interpretation.\textsuperscript{55} He characterized the majority's opinion as "recogniz[ing] a well-established public policy exception to the general rule that a surety is liable for the debts and obligations of its principal."\textsuperscript{56} This well-established public policy exception exempts a surety from liability for punitive, exemplary, or statutory penal damages because the deterrent purpose of these damages would not be achieved by imposing liability on the surety.\textsuperscript{57}

Justice Frye did not disagree with the public policy exception or its rationale. Instead, he believed that treble damages under section 75-16 are not of a purely punitive nature and, therefore, that the public policy exception simply does not apply to the statute.\textsuperscript{58} He gave two reasons for this conclusion. First, punitive damages usually are a tool available at a court's discretion to punish intentional wrongdoers, but section 75-16 automatically trebles any damages found pursuant to section 75-1.1.\textsuperscript{59} Furthermore, he noted that neither section 75-1.1 nor section 75-16 requires a finding of intentional wrongdoing by the defendant.\textsuperscript{60} Justice Frye explained that other states that apply the public policy exception require a

\textsuperscript{52} Tomlinson, 330 N.C. at 82, 408 S.E.2d at 857 (Webb, J., concurring).

\textsuperscript{53} See id. (Frye, J., concurring in part and dissenting in part).

\textsuperscript{54} Id. (Frye, J., concurring in part and dissenting in part).

\textsuperscript{55} Id. at 84, 408 S.E.2d at 859 (Frye, J., concurring in part and dissenting in part).

\textsuperscript{56} Id. at 82-83, 408 S.E.2d at 857 (Frye, J., concurring in part and dissenting in part).

\textsuperscript{57} Id. at 83, 408 S.E.2d at 857-58 (Frye, J., concurring in part and dissenting in part).

Justice Frye explained that unless the surety "is somehow relieved of its duty by statute, contract or other legally enforceable limitation," the surety must be liable for the entire judgment against its principal. Id. at 82, 408 S.E.2d at 857 (Frye, J., concurring in part and dissenting in part). He noted that the only limitation on the surety's liability in § 20-288(e) is the $15,000 required bond amount. Following the lead of other state courts, the majority made an exception to the general rule of liability based on the punitive nature of § 75-16. Id. at 82-83, 408 S.E.2d at 857-58 (Frye, J., concurring in part and dissenting in part).

\textsuperscript{58} Id. at 83, 408 S.E.2d at 858 (Frye, J., concurring in part and dissenting in part). Justice Frye wrote that "[t]he issue in this case . . . is whether the disputed portion of the damage award . . . is an award for exemplary and punitive damages, and therefore within the public policy exception. I do not believe it is." Id. (Frye, J., concurring in part and dissenting in part).

\textsuperscript{59} Id. (Frye, J., concurring in part and dissenting in part) (citing Newton v. Standard Fire Ins. Co., 291 N.C. 105, 113, 229 S.E.2d 297, 301 (1976)).

\textsuperscript{60} Id. at 83-84, 408 S.E.2d at 858 (Frye, J., concurring in part and dissenting in part).
finding of intent in order to treble damages for unfair trade practices. Because North Carolina's statutory scheme deems the actor's intent irrelevant, he found the deterrence rationale of the public policy exception unpersuasive. Second, Justice Frye noted that the North Carolina Supreme Court has described section 75-16 as serving both remedial and deterrent purposes. It would be judicially inconsistent, he said, to characterize section 75-16 as a primarily penal statute and within the public policy exception to the general rule of surety liability.

The contrary conclusions reached by the supreme court justices can be explained as a result of the interaction of three overlapping areas of North Carolina law: North Carolina's unfair trade practice law, specific consumer protection provisions of North Carolina's motor vehicle dealers licensing laws, and the general law of suretyship. The following discussion of legislative history and case law provides some guidance as to how these three areas ought to interact and what the outcome of the Tomlinson issue should have been.

The first area of law at issue in Tomlinson, North Carolina's unfair trade practice law, consists primarily of sections 75-1.1 and 75-16. In 1969, the North Carolina General Assembly enacted section 75-1.1 to provide statutory protection to consumers from unfair methods of com-

61. Id. at 82-83, 408 S.E.2d at 857-58 (Frye, J., concurring in part and dissenting in part). Justice Frye cited Darr v. Long, 210 Neb. 57, 313 N.W.2d 215 (1981), and Butler v. United Pacific Ins. Co., 265 Or. 473, 509 P.2d 1184 (1973) (en banc), as two cases that have applied this public policy exception. Tomlinson, 330 N.C. at 82-83, 408 S.E.2d at 857-58 (Frye, J., concurring in part and dissenting in part). The Butler court stated that "[p]unitive damages were a penalty assessed against a fraudulent automobile dealer for the purpose of deterring ... fraudulent conduct." Butler, 265 Or. at 477, 509 P.2d at 1186 (emphasis added).


63. Tomlinson, 330 N.C. at 83-84, 408 S.E.2d at 858 (Frye, J., concurring in part and dissenting in part).

64. Id. at 83, 408 S.E.2d at 858 (Frye, J., concurring in part and dissenting in part). "The statute is partially punitive in nature in that it clearly serves as a deterrent to future violations. But it is also remedial for other reasons, among them the fact that it encourages private enforcement and the fact that it provides a remedy for aggrieved parties." Id. (Frye, J., concurring in part and dissenting in part) (quoting Marshall, 302 N.C. at 546, 276 S.E.2d at 402).

65. Often a distinction is made in statutes and by courts between "penal" and "punitive" measures of damages. See Thomas H. Ainsworth, III, Hightower's N.C. Law of Damages § 6-1 (2d ed. 1988) [hereinafter Hightower's]. "The amount of a penalty is specified in the statute authorizing it.... In contrast, the jury... determines whether punitive damages in any amount should be awarded and, if so, the amount of the award." Id. The outrageousness of the defendant's conduct determines the amount of the punitive damage award. Id. Ainsworth explains that treble damages are an example of a hybrid of penal and punitive damages. Id. "[T]he amount [of actual damages] assessed by the jury varies, but the fact that it will be tripled is established by statute." Id.

66. Tomlinson, 330 N.C. at 83-84, 408 S.E.2d at 858 (Frye, J., concurring in part and dissenting in part).
petition and unfair or deceptive trade practices. The language of the statute was borrowed in part from federal law. The 1969 legislation followed a national trend of increased state consumer protection which supplemented and paralleled federal laws.

The definition of "unfair or deceptive trade practices" has been


68. See Aycock, supra note 67, at 247. The statute, as enacted, read:

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade of commerce are hereby declared unlawful.

(b) The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.

. . . .

(d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.


The North Carolina Supreme Court has recognized the supplemental role that § 75-1.1 is intended to play by observing that "commentators agree that state statutes such as ours were enacted to supplement federal legislation, so that local business interests could not proceed with impunity, secure in the knowledge that the dimensions of their transgression would not merit federal action." Marshall v. Miller, 302 N.C. 539, 549, 276 S.E.2d 397, 403 (1981).

70. This Note focuses on the development of the law of unfair and deceptive trade prac-
refined gradually since 1969 through case law and legislative amendment.\textsuperscript{71} The North Carolina Supreme Court first interpreted section 75-1.1 in \textit{Hardy v. Toler}.\textsuperscript{72} In \textit{Hardy}, the plaintiff alleged that the defendant car dealer misrepresented the condition of the car that he sold to her.\textsuperscript{73} The court stated that "[p]roof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts; however, the converse is not always true."\textsuperscript{74} The dealer's actions amounted to fraud and thereby violated section 75-1.1.\textsuperscript{75}

In 1977, the North Carolina Supreme Court narrowly interpreted
the scope of section 75-1.1 to exclude debt collection practices.76 In State ex rel. Edmisten v. J.C. Penney,77 the court determined that the legislature intended to limit the scope of section 75-1.1 by using the phrase “in the conduct of any trade or commerce.”78 After comparing the language of section 75-1.1 to the language of the Federal Trade Commission Act,79 the court concluded that the General Assembly intended to limit the statute to practices in a “bargain, sale, barter, exchange or traffic;” therefore, according to the court, debt collection practices were not within the purview of the statute.80

The North Carolina General Assembly rejected the J.C. Penney court’s narrow interpretation of section 75-1.1 and responded with the Consumer Protection Act of 1977.81 The 1977 amendments eliminated the word “trade” from section 75-1.1 and defined commerce to “include[ ] all business activities, however denominated.”82

Section 75-

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77. Id. J.C. Penney was the supreme court’s second opportunity to interpret § 75-1.1. See Susan W. Mason, Comment, Trade Regulation — The North Carolina Consumer Protection Act of 1977, 56 N.C. L. REV. 547, 547 n.5 (1978).

78. J.C. Penney, 292 N.C. at 314-16, 233 S.E.2d at 897-99. For the text of the statute in force at the time of the J.C. Penney decision, see supra note 68.

79. As enacted in 1969, § 75-1.1(a) was intended to parallel and complement section five of the FTC Act. See supra note 68 and accompanying text.

80. J.C. Penney, 292 N.C. at 316-17, 233 S.E.2d at 899. The court noted that the federal legislation used the word “commerce” but not the word “trade.” Because the supreme court believed that “trade” was narrower in meaning than “commerce,” it concluded that the word “trade” was intended to limit the scope of the statute. Id. at 316, 233 S.E.2d at 898-99. The court also emphasized that § 75-1.1(b) spoke of “buyers” and “sellers.” Aycock, supra note 67, at 214. Professor Aycock states that “it is highly likely that the drafter of G.S. 75-1.1 incorporated the word ‘trade’ in order to conform to the language of G.S. 75-1.” Id. at 214 n.56. The J.C. Penney court’s narrow construction was short-lived. See infra notes 81-83 and accompanying text.


82. One commentator summarized the provisions of the Consumer Protection Act of 1977 as follows:

(1) the text of the basic unfair trade practices provision, section 75-1.1(a), was amended so that the language of that section is now precisely the same as section 5 of the Federal Trade Commission (FTC) Act; (2) section 75-1.1(b) was rewritten to preclude the application of the North Carolina unfair trade practices law to the rendering of professional services; (3) section 75-15.2 was added to provide for the imposition of civil penalties in suits brought by the attorney general under the unfair trade practices law; and (4) sections 75-50 to 75-56 were added prohibiting certain debt collection practices and providing limited remedies for that type of unfair trade practice.

Mason, supra note 77, at 548 (citations omitted).
1.1(a), as amended, is almost identical to section five of the Federal Trade Commission Act. Through the 1977 legislation, the General Assembly clearly expressed its intention that section 75-1.1 be applied broadly.

Since 1977, judicial decisions have continued to define the scope of section 75-1.1. Johnson v. Phoenix Mutual Life Insurance Co. extended the scope of section 75-1.1 to include a mortgage broker's activities. In Johnson, the plaintiffs alleged that the defendant, a mortgage broker, attempted to thwart their efforts to develop a shopping center and that his actions constituted fraud and an unfair or deceptive trade practice. The court defined an unfair practice as one that is "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers," a deceptive act was defined as "having the capacity or tendency to deceive." The North Carolina Supreme Court found that a commercial mortgage broker's activities are within the scope of the statute, but held that the defendant's actions did not constitute an unfair or deceptive trade practice.

In 1981, the North Carolina Supreme Court revisited section 75-1.1

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83. Id. at 548.
84. Ainsworth comments that since the 1977 amendments, "North Carolina has followed closely the FTC Act and the federal decisions in determining the scope and meaning of G.S. 75-1.1." HIGHTOWER'S, supra note 65, § 29-5, at 444.
85. 300 N.C. 247, 266 S.E.2d 610 (1980).
86. Id. at 249-51, 266 S.E.2d at 613-14.
87. Id. at 263, 266 S.E.2d at 621 (citing Spiegel, Inc. v. F.T.C., 540 F.2d 287 (7th Cir. 1976)).
88. Id. at 265, 266 S.E.2d at 622. Ainsworth notes that this is the same language that was used in federal cases decided under section five of the Federal Trade Commission Act. HIGHTOWER'S, supra note 65, § 29-5, at 445.
89. Johnson, 300 N.C. at 261-66, 266 S.E.2d at 619-22.

in *Marshall v. Miller*, which involved the rental of mobile homes. The subject matter of the suit was clearly within the scope of section 75-1.1. The issue presented to the court was whether bad faith was an essential element of a violation of that section. Rejecting the court of appeals' distinction between public and private actions, the supreme court stated that "the question of whether the defendant acted in bad faith is not pertinent;" rather, "[w]hat is relevant is the effect of the actor's conduct on the consuming public." The court expressly overruled any cases which implied that bad faith was an essential element of a private cause of action based on a violation of section 75-1.1.

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91. *Id.* at 540, 276 S.E.2d at 398.
92. *See id.* The plaintiffs, residents of a mobile home park owned by the defendants, alleged that the defendants led them to believe they would be provided certain services and amenities. *Id.* At trial, the jury found that the defendants failed to provide these services for the residents of the park, and the judge determined that the defendants' actions constituted an unfair or deceptive trade practice. *Id.* at 540-41, 276 S.E.2d at 398-99. The court of appeals reversed because the "defendants could be adjudged to have committed unfair or deceptive acts without a showing that they acted in bad faith." *Id.* at 542, 276 S.E.2d at 399.


93. The Attorney General is authorized to prosecute persons violating the provisions of Chapter 75. See N.C. GEN. STAT. §§ 75-14 to -15.2, -56 (1988); *id.* § 75B-4 (1985). A statutory private cause of action is also authorized. *Id.* § 75-16 (1988).

94. *Marshall*, 302 N.C. at 544, 276 S.E.2d at 400-01. To decide the issue of the relevance of bad faith, the *Marshall* court used federal decisions interpreting the FTC Act as a guide. *Id.* at 542, 276 S.E.2d at 399. Examining the federal consumer protection laws and decisions, the court noted that the FTC could issue a cease and desist order under section five of the FTC Act, regardless of the good or bad faith of the offending party. *Id.* at 542-43, 276 S.E.2d at 399-400. The court recognized that the federal scheme did not provide for a private cause of action for section five violations, but refused to draw a distinction on the basis of this difference between North Carolina law and federal law. *Id.*

*Marshall's* expansive interpretation of § 75-1.1 has been criticized as unconstitutionally vague. See Thomas A. Farr, *Unfair and Deceptive Legislation: The Case for Finding North Carolina General Statutes Section 75-1.1 Unconstitutionally Vague as Applied to an Alledged [sic] Breach of a Commercial Contract*, 8 CAMPBELL L. REV. 421, 426-29 (1986); see also *Hammers v. Lowe's Cos.*, 48 N.C. App. 150, 154, 268 S.E.2d 257, 259-60 (1980) (questioning the validity of § 75-1.1 because of its broad language); Dinita L. James, Note, *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.: A Lesson in Reading Between the Lines*, 67 N.C. L. REV. 1225, 1239, 1243 (1989) (arguing that the North Carolina Supreme Court's decision in Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 374 S.E.2d 385 (1988), "can be interpreted as a silent concession that its *Marshall* decision impermissibly extended the reach of the statute" and can be read to "apply different standards to the determination of section 75-1.1 violations in consumer and commercial contexts").

96. *Id.* at 545-46, 276 S.E.2d at 401.
In its analysis, the Marshall court also commented on the nature of section 75-16. The Marshall court affirmed the automatic trebling feature of section 75-16 and described the statute by noting that it is an oversimplification to characterize G.S. 75-16 as punitive. The statute is partially punitive in nature in that it clearly serves as a deterrent to future violations. But it is also remedial for other reasons, among them the fact that it encourages private enforcement and that it provides a remedy for aggrieved parties. It is, in effect, a hybrid.

The court recognized that many other states require a finding of intentional wrongdoing in order for exemplary or treble damages to be awarded, but warned that "[a]s [section 75-16] is a hybrid, . . . analogies to other rules of common law governing the imposition of punitive damages should not control."

The second area of law at issue in Tomlinson was North Carolina's regulatory scheme for motor vehicle dealers. This regulatory scheme was important to the Tomlinson case because it provided the basis for Tomlinson's cause of action against CCM's surety. The two consumer protection features of Article 12 at issue in Tomlinson were sections 20-288(e) and 20-294.


99. E.g., GA. CODE ANN. § 10-1-399(c) (Michie 1989) (treble damages awarded for intentional violations of Georgia's deceptive or unfair practices law); MASS. GEN. LAWS ANN. ch. 93(A), § 11 (West Supp. 1992) (double or treble damages awarded if the violation of unfair competition or unfair trade practices provisions is willfully or knowingly committed); S.C. CODE ANN. § 39-5-140(a) (Law. Co-op. 1985) (treble damages awarded for willful or knowing violation).

100. Marshall, 320 N.C. at 546-47, 276 S.E.2d at 402.


The General Assembly finds and declares that the distribution of motor vehicles in the State of North Carolina vitally affects the general economy of the State and the public interest and public welfare, and in the exercise of its police power, it is necessary to regulate and license motor vehicle manufacturers, distributors, dealers, salesmen, and their representatives doing business in North Carolina, in order to prevent frauds, impositions and other abuses upon its citizens and to protect and preserve the investments and properties of the citizens of this State.

Id. § 20-285 (1989).
Section 20-288(e) of Article 12102 protects consumers by requiring each motor vehicle dealer to post a $25,000 surety bond. In addition, section 20-288(e) states that "[a]ny purchaser of a motor vehicle who shall have suffered any loss or damage by any act of a [licensed motor vehicle dealer] ... that constitutes a violation of [Article 12] or Article 15 shall have the right to institute an action to recover against the [dealer] and the surety." By establishing a cause of action against the surety, section 20-288(e) protects the injured consumer from an insolvent or thinly capitalized dealership.

The combination of section 20-288(e) with section 20-294 creates a potentially strong measure of protection for the consumer. Section 20-294 enumerates specific grounds for denying, suspending, or revoking a motor vehicle dealer's license, several of which are directed toward protecting the consumer. Because of section 20-288(e), an injured consumer has a cause of action against a dealer who violates the conditions of section 20-294.

The third general area of law at issue in Tomlinson, the law of suretyship, was involved by virtue of section 20-288(e)'s surety bond requirement. "A surety is a person who is primarily liable for the payment of

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102. Id. § 20-288(e) (Supp. 1991).
103. Id. The statute provides that each "motor vehicle dealer, manufacturer, factory branch, distributor, distributor branch, or wholesaler shall furnish a corporate surety bond or cash bond or fixed value equivalent." Id. The required amount of the bond at the time of the Tomlinson case was $15,000. Act of June 14, 1977, ch. 560, 1977 N.C. Sess. Laws, 1st Sess. 660 (current version at N.C. GEN. STAT. § 20-288(e) (Supp. 1991)).
104. N.C. GEN. STAT. § 20-288(e) (emphasis added).
105. Id. § 20-294.
106. Among the conditions of § 20-294 intended to protect the consumer are:
   (4) [w]illfully defrauding any retail buyer, to the buyer's damage, or any other person in the conduct of the licensee's business;
   
   (6) [h]aving used unfair methods of competition or unfair deceptive acts or practices;
   (7) [k]nowingly advertising by any means, any assertion, representation or statement of fact which is untrue, misleading or deceptive in any particular relating to the conduct of the business licensed or for which a license is sought; [and]
   (8) [k]nowingly advertising a used motor vehicle for sale as a new motor vehicle.

Id.

107. Section 20-288(e) establishes a cause of action only for the injured consumer. See N.C. GEN. STAT. § 20-288(e). Section 20-294 provides that a dealer can have its license revoked for injuring or defrauding any person. See id. § 20-294. Section 20-294 has been interpreted as not enlarging the scope of § 20-288(e), however. See NCNB Nat'l Bank v. Western Sur. Co., 88 N.C. App. 705, 709, 364 S.E.2d 675, 677-78 (1988) (section 20-294(4) does not extend the coverage of § 20-288(e) to any parties other than the purchaser); Triplett v. James, 45 N.C. App. 96, 99, 262 S.E.2d 374, 375-76, cert. denied, 300 N.C. 202, 296 S.E.2d 621 (1980) (same).
the debt or the performance of the obligation of another.”

When property is pledged, the surety is liable for the debt of the principal, but only to the extent of the property that was pledged. “A judgment against the principal constitutes prima facie evidence” of the surety’s liability.

Before Tomlinson, the North Carolina Supreme Court had not considered the issue of a surety’s liability for treble damages under sections 75-1.1 and 75-16. Other state courts, however, had considered whether a surety should be liable under similar statutory provisions. These decisions held that absent an express statutory provision, a surety is not liable for punitive or exemplary damages.

The courts reasoned that a


110. HIGHTOWER'S, supra note 65, § 24-4. The surety has available to him all the defenses of the principal. Id. § 24-2. The surety can also “attack the judgment for fraud or collusion,” or establish an independent defense. Id. § 24-4.


In Butler, the plaintiff obtained a judgment for fraud against an automotive dealer and was awarded actual and punitive damages. Butler, 265 Or. at 474, 509 P.2d at 1185. When the dealer defaulted on the judgment, the plaintiff sued the dealer’s surety. Id. Like North Carolina, Oregon state law requires an automobile dealer to post a surety bond. Or. REV. STAT. § 822.030 (1) (1991). The statute also establishes a private cause of action for persons injured by “reason of the vehicle dealer’s fraud, fraudulent representations or violations of provisions of the vehicle code [relating to the sale of a vehicle].” Id. § 822.030(2). The Oregon Supreme Court found that the surety was not liable for the punitive damages. Butler, 265 Or. at 480, 509 P.2d at 1188.

The Nebraska Supreme Court has determined similarly that a surety is not liable for punitive damages. See Darr, 210 Neb. at 67, 313 N.W.2d at 220-21. In Darr, consumers injured by the fraudulent acts of a motor vehicle dealer brought a cause of action against the dealer’s surety. Id. at 58-59, 313 N.W.2d at 217. Nebraska law also requires a motor vehicle dealer to post a surety bond. Suns Ins. Co. v. Aetna Ins. Co., 169 Neb. 94, 105-06, 98 N.W.2d 692, 699 (1959). The statute does not establish a private cause of action for the injured consumer, but courts have determined that an implied cause of action exists. See id.

112. Harper, 23 Ariz. App. at 350, 533 P.2d at 561; Darr, 210 Neb. at 67, 313 N.W.2d at 220-21; Butler, 265 Or. at 474-75, 509 P.2d at 1185-86.

surety's liability is limited to actual damages and that punitive damages are not designed to compensate the plaintiff.\footnote{113} Also, imposing liability upon the surety for punitive damages does not further the deterrent purpose of the statute.\footnote{114} Although these decisions involve statutes similar to sections 75-1.1 and 75-16 and therefore provide guidance in resolving the \textit{Tomlinson} issue, none of the statutes' elements mirror the elements of North Carolina law.\footnote{115} In particular, none of these statutes shares section 75-16's hybrid character; instead, the statutes are purely punitive.\footnote{116}

Whether North Carolina's motor vehicle licensing laws are intended to limit the surety's liability to actual damages is unclear. The \textit{Tomlinson} court concluded that the surety's liability is dependent upon whether treble damages awarded under section 75-16 can be characterized as compensating the injured consumer.\footnote{117} The question presented to the \textit{Tomlinson} court can be separated into two issues. First, the court considered whether the legislature intended the motor vehicle licensing laws to be an independent regulatory scheme or, alternatively, one that interacts with Chapter 75. Second, if the motor vehicle licensing laws are not

\begin{itemize}
\item \footnote{Gaston v. Gibson, 328 F. Supp. 3, 6 (E.D. Tenn. 1969) (noting that a sheriff's bond surety is liable for punitive damages under Tennessee law); Breeding v. Jordan, 115 Iowa 566, 568, 88 N.W. 1090, 1090-91 (1902) (holding that a surety is liable for punitive damages on a bond issued to a saloon operator); Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 647-49, 383 S.W.2d 1, 5 (1964) (holding that an automobile insurance company is liable for punitive damages in a drunken driving case).

\item \footnote{See Darr, 210 Neb. at 67, 313 N.W.2d at 220-21 (a penal or treble damage "award under [the statute] is a penalty and a reward for bringing the action successfully, and is not limited or designed to compensate [an injured consumer] for a 'loss suffered'"); Butler, 265 Or. at 474-75, 509 P.2d at 1185 (citing 11 \textsc{John A. Appleman, Insurance Law and Practice} \S 6361, at 86 (1944)) ("The general rule is . . . 'a surety is liable only for payment of actual damages caused by the principal, and may not be held for exemplary or punitive damages, in the absence of any statutory provision imposing such liability.'").}

\item \footnote{Butler, 265 Or. at 478, 509 P.2d at 1187 ("The purpose of punitive damages is to deter. Requiring the surety to pay a judgment for punitive damages likely will not be a deterrent to automobile dealers.").}

\item \footnote{The relevant elements of §§ 75-1.1 and 75-16 are the automatic trebling provision, the hybrid nature of § 75-16, and the absence of a bad faith requirement.}

\item \footnote{In fact, the \textit{Butler} court clearly rejected characterizing the Oregon statute as a hybrid, noting that the "punitive damages were not awarded both as a penalty and to compensate the plaintiff for any expenses, inconvenience, or other injury he suffered." 265 Or. at 477, 509 P.2d at 1186.}

\item \footnote{\textit{Darr} is distinguishable from \textit{Tomlinson} because the statute at issue in \textit{Darr} required an element of intentional wrongdoing. \textit{See Darr}, 210 Neb. at 58-59, 313 N.W.2d at 216 (noting that the Nebraska statute provides: " '[T]he licensed dealer will fully indemnify any person . . . by reason of any loss suffered because of . . . false or fraudulent representations or deceitful practices.'" (emphasis added)). North Carolina's statutory scheme does not require a finding of bad faith. \textit{See supra} notes 94-95 and accompanying text.}

\item \footnote{\textit{Tomlinson}, 330 N.C. at 80, 408 S.E.2d at 856; \textit{see also supra} notes 34-47 and accompanying text (discussing this point further).}
\end{itemize}
a self-contained regulatory scheme, the court had to decide whether the surety should be held liable for damages under section 75-16.

Neither the statutes nor their legislative histories provide a clear answer to the first question, but the Tomlinson court apparently assumed that the two regulatory schemes were intended to interact. \(^{118}\) The answer to the second question is unclear because, as a matter of public policy, a surety is generally not held liable for punitive damages absent express statutory authority. \(^{119}\) However, the North Carolina Supreme Court has characterized section 75-16 as only partially punitive in nature. \(^{120}\) Thus, it is not entirely appropriate to exclude punitive damages from a surety's liability under a statute that is both punitive and compensatory. The North Carolina General Assembly failed to indicate its intent with respect to both the interaction of the two consumer protection schemes and the applicability of the public policy exception. \(^{121}\)

Because of the lack of guidance from the legislature, three different solutions to the Tomlinson issue could be reached logically: (1) the surety never is liable for treble damages awarded under section 75-16; (2) the surety always is liable for treble damages awarded under section 75-16; or (3) the surety sometimes will be liable for treble damages awarded under section 75-16, depending on whether the treble damages are compensatory as to the plaintiff. \(^{122}\) Two arguments support the conclusion that a surety never should be liable for treble damages awarded under section 75-16. First, one can interpret section 20-288(e) of the Motor Vehicle Act, establishing a private right of action against a motor vehicle dealer's surety, as limiting the plaintiff's remedy to losses or damages suffered because of the dealer's violation of a provision of Article 12 or 15 of North Carolina's motor vehicle laws. \(^{123}\) Arguably, because the events which trigger the surety's liability are limited to violations of Articles 12 and 15, the remedies available to the plaintiff also should be limited to those provided under these same Articles. \(^{124}\)

\(^{118}\) See generally Tomlinson, 330 N.C. 76, 408 S.E.2d 853 (analyzing both sections of the general statutes together). For an argument that the motor vehicles laws are an independent regulatory scheme, see infra notes 123-24 and accompanying text.

\(^{119}\) See supra notes 111-14 and accompanying text.

\(^{120}\) Marshall v. Miller, 302 N.C. 539, 546, 274 S.E.2d 397, 402 (1981); see supra notes 98-100 and accompanying text for a discussion of the hybrid nature of § 75-16.

\(^{121}\) See discussion infra notes 123-24.

\(^{122}\) In Tomlinson, the concurring justice chose the first conclusion, the dissenting justice reached the second conclusion, and the majority held that the third solution was correct. See supra notes 43-66 and accompanying text.

\(^{123}\) See supra note 29 for the text of § 20-288(e).

\(^{124}\) This argument was the essence of Justice Webb's concurring opinion. See Tomlinson, 330 N.C. at 81-82, 408 S.E.2d at 857 (Webb, J., concurring). The language of the statute fails to state whether a plaintiff's remedies are limited to those available under the particular statu-
If the injured consumer's remedies are interpreted not to be exclusively limited to Articles 12 and 15, another argument exists to support limiting the surety's liability to actual damages. Courts in other jurisdictions have found implicit limitations in statutes similar to North Carolina General Statutes section 20-288(e). Section 20-288(e) provides that "[a]ny purchaser of a motor vehicle who shall have suffered any loss or damage by any act of a [motor vehicle dealer] . . . that constitutes a violation of [Article 12] or Article 15 shall have the right to institute an action to recover against . . . the surety." The phrase "suffered any loss or damage" suggests that the purpose of the surety is to insure that an injured consumer will be compensated for his actual damages. Further, because section 75-16 is partially punitive in nature, the treble damages awarded pursuant to that section are not consistent with the purpose of the right of action against the surety.

The conclusion that the surety is not liable for treble damages awarded under section 75-16 seems satisfactory because the plaintiff recovers his actual damages and the deterrent purpose of the statute is not violated. Nevertheless, this same conclusion can be criticized as inconsistent with the court's prior characterization of section 75-16, and a more persuasive argument can be made that the second solution, generally holding the surety liable for treble damages awarded under section 75-16, is the correct one. Unlike many other state supreme courts, the North Carolina Supreme Court has described treble damages awarded pursuant to section 75-16 as serving three functions: deterrence, compensation, and incentive for private enforcement. In Marshall v. Miller, the court explained that the statute is partially punitive in nature because it is intu

125. See, e.g., Harper v. Home Ins. Co., 23 Ariz. App. 348, 533 P.2d 559 (1975) (holding that the surety for a motor vehicle dealer is not liable for punitive damages awarded against the dealer); Darr v. Long, 210 Neb. 57, 313 N.W.2d 215 (1981) (en banc) (same); Butler v. United Pac. Ins. Co., 265 Or. 473, 509 P.2d 1184 (1973) (en banc) (same); these cases are discussed supra at notes 111-16 and accompanying text.


127. See supra note 98 and accompanying text.

128. This is essentially an argument for the application of the public policy exception that does not hold a surety liable for punitive, exemplary, or statutory penal damages. See supra notes 111-16 and accompanying text. Application of the public policy exception would emphasize that the purpose of the punitive damages (deterrence) will not be achieved by imposing liability upon the surety.

This same line of reasoning can be used to hold the surety liable for treble damages awarded under § 75-16. See infra notes 129-48 and accompanying text.

tended to deter violations of Chapter 75.130 Marshall further characterized section 75-16 as remedial because it encourages private enforcement and provides a remedy for aggrieved parties.131 As a result of the hybrid nature of section 75-16, the court warned that "analogies to other rules of common law governing the imposition of punitive damages should not control."132

The Marshall court's caveat seems especially pertinent to the resolution of the Tomlinson issue. The public policy exception is essentially a common law exception to the general rule of surety liability and is based on the idea that the goal of punitive damages is deterrence. The Marshall court determined that bad faith is not necessary to establish a violation of section 75-1.1.133 Also, upon a determination that section 75-1.1 has been violated, section 75-16 mandates the imposition of treble damages.134 It is hard to reconcile the absence of a bad faith requirement with the application of a public policy exception based on deterrence.135

Because of the hybrid nature of section 75-16, a good argument also can be made that the public policy exception should not apply to the facts of Tomlinson and that the general rule of surety liability should apply.136 Referring to a section 75-1.1 violation, the Marshall court emphasized that "[w]hat is relevant is the effect of the actor's conduct on the consuming public."137 This seemingly shifts the focus of section 75-16 from deterrence to compensation.138 Surety liability is also consistent with providing a remedy for aggrieved consumers, one of the three purposes of section 75-16.139

130. Id. at 546, 276 S.E.2d at 402. See supra note 98 and accompanying text.
132. Id. at 546-67, 276 S.E.2d at 402.
133. Id. at 546, 276 S.E.2d at 402.
134. Id. at 547, 276 S.E.2d at 402.
136. This is true if one accepts that the motor vehicle licensing laws were not intended to be an exclusive and comprehensive consumer protection scheme. What triggers the injured consumer's right to a cause of action arguably does not have to be coextensive in coverage with what the consumer's remedies are. In this way, the consumer would not be limited to remedies provided under Articles 12 and 15. But see supra notes 123-24 and accompanying text.
137. Marshall, 302 N.C. at 548, 276 S.E.2d at 403.
138. Although the Marshall court was referring to § 75-1.1, id., its statement is relevant to § 75-16 because of the automatic trebling characteristic of the statute.
139. See supra note 98 and accompanying text.
Other jurisdictions have held that a surety is not liable for treble damages under statutes similar to section 20-288(e). Nevertheless, these cases can be distinguished from the facts of Tomlinson. In Butler v. United Pacific Insurance Co., the Oregon court held that the surety was not liable for punitive damages according to the general rule that a surety is only liable for actual damages and not for punitive or exemplary damages. The court’s reasoning, however, focused on the deterrent purpose of punitive damages and emphasized that the “punitive damages were not awarded both as a penalty and to compensate the plaintiff for any expenses, inconvenience, or other injury he suffered.”

Darr v. Long also involved a statute similar to section 20-288(e) and held that the surety was not liable for penal damages. As in Butler, the Nebraska court found that the statute at issue was “not meant to compensate for actual damages suffered but, rather, [was] designed to punish or deter.” Section 75-16 is intended, in part, to compensate the injured consumer. Thus, despite the similarity of the cases, the reasoning of the Darr and Butler courts does not apply to Tomlinson.

The third possible solution to the issue presented in Tomlinson was the one chosen by the North Carolina Supreme Court. The court resolved the dilemma created by the hybrid nature of section 75-16 by developing a hybrid solution. The court’s conclusion was that the surety’s liability for the trebled portion of damages awarded under section 75-16 depended on whether the treble damages could be characterized as compensating the injured consumer. Recognizing the several purposes of


142. Id. at 478, 509 P.2d at 1185.

143. Id. at 477, 509 P.2d at 1186.


146. Darr, 210 Neb. at 65, 313 N.W.2d at 220.

147. See supra note 98 and accompanying text.

148. The majority cited Darr to support its holding that the surety in Tomlinson was not liable for the trebled portion of the damages. Tomlinson, 330 N.C. at 80, 403 S.E.2d at 856. Justice Frye criticized the majority for relying on Darr because the Nebraska statute at issue was purely punitive in nature. See id. at 84, 408 S.E.2d at 858-59 (Frye, J., concurring in part and dissenting in part).

149. See id. at 80, 408 S.E.2d at 856.
section 75-16, the court essentially developed a solution based on whether the compensatory or punitive nature of the statute dominated.

A two-part argument was used by the Tomlinson court in reaching its hybrid solution. First, the court determined that "the damages allowable [under section 20-288(e)] are those that are 'suffered.'"\(^{150}\) This conclusion limited the surety's liability under section 20-288(e) to compensatory damages.\(^{151}\) Next, the court examined whether the plaintiff had established that the trebled portion of the damage award represented compensation for her.\(^{152}\) If the trebled portion of the award was primarily punitive in nature, then the public policy exception applied and the surety was not liable for the trebled portion of the damages. But if the plaintiff proved that the treble damages were compensatory in nature,\(^{153}\) the surety would be liable because section 20-288(e) was designed to compensate the plaintiff.\(^{154}\)

The Tomlinson court's hybrid solution to the issue of surety liability is most satisfactory from a theoretical standpoint,\(^{155}\) from a practical and policy perspective, however, it is laden with problems. First, the court failed to provide a workable standard for determining when a plaintiff has suffered damages beyond "initial" damages. Second, because the court chose not to establish a bright line rule, the incentive to litigate the issue of a surety's liability under section 75-16 seems guaranteed. The plaintiff will be motivated by the potential reward of treble damages; the surety will seek to limit its liability to actual damages. A bright line rule possibly would have encouraged the parties to settle. Third, from a policy perspective, the Tomlinson decision has created uncertainty as to the potential liability of a corporate surety.\(^{156}\) Rates on surety bonds will

\(^{150}\) Id.


\(^{152}\) Tomlinson, 330 N.C. at 80-81, 408 S.E.2d at 856. The court started with the presumption that the trebled portion of the damages was primarily punitive in nature, noting: "[t]he plaintiff has not alleged further actual damages that would transform the trebled portion of the award from a punitive to a compensatory award." \(^{153}\) Id. at 80, 408 S.E.2d at 856.

\(^{154}\) The court stated that "[i]n situations where the injured consumer has lost a great deal more than the initial damages by spending extra money and time to gain a modicum of satisfaction, the trebled portion of the award is seen as compensating the consumer for those losses." \(^{155}\) Id.

\(^{155}\) This third solution could be viewed as interpreting § 75-16 to be discretionary in nature when it is a surety who will be held liable. In effect, the court is directed to consider the extent of the consumer's injury in order to determine whether to hold the surety liable for the trebled portion of the damages.

\(^{156}\) The court's solution can be criticized for transforming a mandatory trebling provision into a discretionary one when a surety is involved. See supra note 154.

\(^{156}\) See Petition for Discretionary Review Under G.S. 7A-31 at 7, Tomlinson (No.
probably be raised based on the assumption that the surety is liable for treble damages. The resulting higher costs for dealers are likely to be passed on to consumers although there is no assurance that the consumer can collect treble damages from the surety.

The Tomlinson court was faced with a multitude of problems. The statutes at issue provide no guidance as to whether or how they are intended to interact. Further, the public policy exception that normally governs a surety's liability for treble damages awards is ill-suited to the facts of Tomlinson because of the hybrid nature of section 75-16. Since Marshall v. Miller clearly held that section 75-16 was partially remedial in nature, Marshall restrained the court's ability to find that the surety was not liable for treble damages awarded under section 75-16. The challenge faced by the Tomlinson court was to develop a solution consistent with prior case law and legislative intent.

Because of the confusion in this area of the law, a bright line rule regarding a surety's liability for treble damages is preferred to the hybrid solution of the Tomlinson court. The simplest resolution to the dilemma revealed by Tomlinson would be a clear expression by the General Assembly of its intent. The General Assembly could amend section 20-288(e) to state expressly whether the surety is liable for treble damages under section 75-16, or amend section 75-16 to require a finding of intentional wrongdoing. Alternatively, the next time the question presented by Tomlinson arises, the North Carolina Supreme Court could reject a hybrid solution and clearly hold the surety either liable or not liable. Obviously, the legislature or the court must determine first which purpose of section 75-16 it wishes to emphasize: deterrence or compen-

93PA91). In its petition to the supreme court for discretionary review, Lawyers Surety stated that the court of appeals' decision "judicially alter[ed] existing contractual obligations by increasing the potential liability contractually assumed by corporate sureties." Id. Although Lawyers Surety was referring to the court of appeals' decision that held the surety liable for treble damages, the same criticism can be made of the supreme court's hybrid solution.

157. One option for the court would have been to overrule Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981), insofar as it held that bad faith was not required for a § 75-1.1 violation. Trebled damages awarded under § 75-16 could then have been characterized as primarily punitive in nature and the public policy exception applied.


159. The decision of the Tomlinson court could be interpreted as reluctance by the court to make an absolute rule of law. The court preserved the opportunity to clarify the issue of a surety's liability for § 75-16 damages without having to overrule Tomlinson expressly.

160. By requiring a finding of intentional wrongdoing, the General Assembly would alter the character of § 75-16. Section 75-16 would be essentially punitive in nature, and the public policy exception would apply.

One commentator has previously argued that § 75-16 should be amended. See Stout, supra note 92, at 150 (suggesting an amendment that would "specifically limit treble damages to violations committed in bad faith").
Whether by legislative amendment or judicial decision, the hybrid solution created by the Tomlinson court needs to be discarded and a practical, bright-line rule established.

CHRISTINA L. GOSHAW

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161. This statement assumes that the General Assembly intended for Chapters 20 and 75 to interact. See supra notes 123-24 and accompanying text. If the remedy of the injured consumer is limited under § 20-288(e) to those available under Articles 12 and 15, then the General Assembly should amend § 20-288(e) to state expressly this limitation on the consumer's remedy.

When making the choice between deterrence and compensation, the court or legislature should recognize that denying the consumer the ability to collect the actual and trebled portion of the damages from the surety may frustrate the goal of consumer protection. The consumer would have to (1) obtain a judgment under § 75-16 against the dealer; (2) collect the part of the damages representing actual damages from the surety; and (3) proceed against the (presumably) insolvent dealer for the remaining part of her judgment. Requiring this of the consumer seems burdensome and judicially inefficient. The better public policy choice might be to require the surety, instead of the consumer, to proceed against the insolvent dealer.
Undermining the Usury Statutes: *Swindell v. Federal National Mortgage Association*

This kindness I will show
Go with me to a notary, seal me there
Your single bond; and in a merry sport
If you repay me not on such a day,
In such a place, such sum or sums as are
Express'd in the condition, let the forfeit
Be nominated for an equal pound
Of your fair flesh, to be cut off and taken
In what part of your body pleaseth me.\(^1\)

The regulation of interest rates to protect borrowers against unscrupulous lenders is by no means a recent legal development.\(^2\) North Carolina, through its intricate usury laws,\(^3\) regulates both traditional "interest" and late payment fees on loans.\(^4\) North Carolina General Statutes section 24-10.1 states that the maximum fee a lender can charge for a late payment is four percent of the amount past due.\(^5\) The statute, however, contains no express remedy for charging a late fee higher than four percent. In fact, the only express remedy for any violation of the usury statutes is found in section 24-2.\(^6\) That remedy, however, will be invoked only by the "charging of a greater rate of interest."\(^7\) In *Swindell v. Federal National Mortgage Ass’n*,\(^8\) the North Carolina Supreme Court stated that a late payment fee on a note is a transaction in and of itself and, in reality, compensation for the lender's loss of the money's use during the period of delay.\(^9\) Accordingly, charging a usurious late fee will

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4. Id. § 24-10.1.
5. Id. § 24-10.1(b).
6. Id. § 24-2. The statute provides:

   The taking, receiving, reserving or charging a greater rate of interest than permitted by this chapter . . . shall be a forfeiture of the entire interest which the note . . . carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person . . . by whom it has been paid, may recover twice the amount of interest paid in an action in the nature of action for debt.

*Id.*
7. *Id.*
9. *Id.* at 158-59, 409 S.E.2d at 895.
result, under the usury penalty statute, in the forfeiture of only the late fee.

Furthermore, a "usury savings clause," by which a lender agrees to reduce any charge determined as usurious to the maximum rate allowed by law, cannot protect a lender from a violation of the usury statutes.

This Note discusses the North Carolina courts' prior treatment of the relationship between borrower and lender and the remedies that have been invoked for violations of the usury statutes. The Note analyzes the rationale used by the Swindell court to support its result, and discusses the possible future consequences of the court's reasoning and its consistency with the concerns underlying the statutes. The Note contends that the court's holding regarding the controversial "usury savings clause" was decided correctly in light of North Carolina precedent but concludes that the result reached in Swindell failed to provide economic incentives for private enforcement, and therefore, is too weak to deter lenders from drafting usurious notes.

On March 22, 1985, Gary and Lillian Swindell together with Epic Mortgage, Inc., using a Federal National Mortgage Association (FNMA) Uniform Instrument Form, executed a note for $112,500 secured by a deed of trust on a home. In a blank on the form, Epic had typed five percent as the late charge to be assessed on an overdue payment of principal and interest. Also in the note, a usury savings clause

12. Id.
13. See infra notes 58-90 and accompanying text.
14. See infra notes 95-116 and accompanying text.
15. See infra notes 91-94 and accompanying text.
16. See infra notes 117-18 and accompanying text.
17. The note was on Form 3501, the "MULTISTATE ADJUSTABLE RATE NOTE—ARM S-1—Single Family—Fannie Mae Uniform Instrument." See Record at 21, Swindell v. Federal National Mortgage Ass'n, 97 N.C. App. 126, 387 S.E.2d 220 (1990) (No. 8926SC617).
19. Id. The note provided the required fifteen days before the assessment of any late charges. Record at 21, Swindell (No. 8926SC617); see N.C. GEN. STAT. § 24-10.1(b)(3). The maximum late fee on a note at the time the parties executed the note was four percent. Id. § 24-10(e) (Supp. 1983), repealed by Act of July 15, 1985, ch. 755, § 2, 1985 N.C. Sess. Laws 1023, 1023 (codified as amended at N.C. GEN. STAT. § 24-10.1 (1991)). The terms of the late fee statute now in place are substantially similar to those in § 24-10(e). See id. § 24-10.1. North Carolina courts generally test a loan for usury against the laws that existed when the loan was made. See e.g., Kessing v. National Mortgage Corp., 278 N.C. 523, 530-31, 180 S.E.2d 823, 827-28 (1971); Rosenthal's Bootery, Inc. v. Shavitz, 48 N.C. App. 170, 173, 268 S.E.2d 250, 251-52 (1980). The Swindell court, however, analyzed the transaction under § 24-10.1. Swindell, 330 N.C. at 157, 409 S.E.2d at 894. Because there is no material difference between the two statutes, using § 24-10.1 rather than § 24-10(e) had no influence upon the court's decision.
stated that if the interest rate or "other loan charges" ever exceeded that allowed by the law, the loan charge in the note would be reduced to the maximum lawful amount.  

In October 1987, Skyline Mortgage Corporation, the new servicer of the note, sent the Swindells notice of uncollected late charges. Upon discovery that the five percent late payment fee violated the applicable statute, Skyline reduced the charge to the maximum legal rate of four percent. 

The Swindells, rather than pay the amount due, brought an action for declaratory judgment against both FNMA and Skyline, claiming that the late payment fee was usurious. They sought both a declaration that the note was usurious and an order that the defendants forfeit all the interest due under the note. The trial court granted summary judgment to the defendants. The North Carolina Court of Appeals affirmed in part and reversed in part, holding that while the late fee was in excess of the legal maximum, the penalties imposed by section 24-2 applied only when there was a "taking, receiving, reserving or charging a greater rate of interest." Because a late payment fee was not interest, according to the court, the penalty statute did not apply. The court, however, held that public policy and the spirit of the usury statutes required that the defendants forfeit the late fee. On review, the North Carolina Supreme Court reached the identical result but based its conclusion directly on the usury statutes. 

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20. Swindell, 330 N.C. at 155, 409 S.E.2d at 893. The provision also provided for the return of any amount already paid that exceeded the legal maximum. Id. Such a provision is commonly called a "usury savings clause." See id. at 160, 409 S.E.2d at 896.  

21. FNMA bought the note from Epic and used Skyline to service the note. Id. at 155, 409 S.E.2d at 893.  

22. Id.  


25. Id. The Swindells also claimed that the reduction to four percent was a "fraudulent and material alteration" discharging them from the obligations of the note under N.C. GEN. STAT. § 25-3-407 (1986). Swindell, 330 N.C. at 156, 409 S.E.2d at 894. Neither the trial court nor the supreme court gave this claim much weight. See id. at 160-61, 409 S.E.2d at 897; see infra note 33.  


27. Id. at 156, 409 S.E.2d at 894.  


29. Swindell, 97 N.C. App. at 129, 387 S.E.2d at 221-22.  

30. Id. Otherwise, the court reasoned, there would be nothing to discourage violations of the statute. Id.  

31. Swindell, 330 N.C. at 156, 409 S.E.2d at 894.
The supreme court prefaced its decision by stating that the court's only power with regard to usury statutes is "'to interpret and execute the legislative will'" and, therefore, it must find a basis for its holding in the statutes.\textsuperscript{32} The remainder of the opinion focused on two issues: (1) the remedy for violating the late fee statute, and (2) the effect of the usury savings clause.\textsuperscript{33}

Chief Justice Exum, writing for the court, began the discussion of the remedy for violations of section 24-10.1 by defining "'interest'" as "'the compensation . . . for the use or forbearance or detention of money.'"\textsuperscript{34} The court said that the note executed by the Swindells and Epic "'contemplated interest'" in two separate transactions: (1) the stated interest on the loan for $112,500,\textsuperscript{35} and (2) the money to compensate the defendants for the delayed payment.\textsuperscript{36} The court reasoned that the two purposes behind a late payment fee were to encourage prompt payment and to compensate the lender for its loss of the use of the money during the period of delay.\textsuperscript{37} Thus, the court concluded that the use of the late payment fee as compensation for delayed payment constituted "'interest.'"\textsuperscript{38}

In addition to its decision that the late payment fee was interest, the court also found that the charge possessed the traits of usury. The court stated that, in North Carolina, the four elements of usury are: (1) A loan or forbearance of money, (2) an understanding that the money owed will be paid,\textsuperscript{39} (3) payment or agreement to pay interest greater than the maximum allowed by law, and (4) the lender's corrupt intent to receive more interest than the legal rate permits.\textsuperscript{40} According to the court, all the usury elements were present in the late payment fee. First, the individual

\textsuperscript{32} Id. (quoting Smith v. Old Dominion Bldg. & Loan Ass'n, 119 N.C. 249, 256, 26 S.E. 41, 42 (1896)).

\textsuperscript{33} The court also addressed the claim that reducing the late fee was a material and fraudulent alteration of the contract that would discharge the Swindells from the contract under N.C. GEN. STAT. § 25-3-407 (1986). It concluded, however, that the required fraudulent intent was not present.\textsuperscript{34} Swindell, 330 N.C. at 160-61, 409 S.E.2d at 896-97.

\textsuperscript{34} Swindell, 330 N.C. at 158, 409 S.E.2d at 895 (quoting BLACK'S LAW DICTIONARY 729 (5th ed. 1979)).

\textsuperscript{35} The parties to a home loan greater than $10,000 may agree to any interest rate. N.C. GEN. STAT. § 24-1.1A(a)(1) (1991). Thus, the interest rate on the loan itself was not at issue.\textsuperscript{36} Swindell, 330 N.C. at 158, 409 S.E.2d at 895.

\textsuperscript{36} Id.

\textsuperscript{37} Id.

\textsuperscript{38} Id.

\textsuperscript{39} The description of this element differs slightly from the way the court had previously characterized it. See infra notes 107-08 and accompanying text.

payment of principal and interest due was a "loan." Second, the schedule for the payments on the note demonstrates that the parties expected each payment to be paid. Third, the late payment charge was greater than the four percent allowed by law. Finally, there was the showing of an "intentional charging of more for money lent than the law allows." Thus, despite the contract's label for the charge, the court held that the late payment fee was interest and the four elements of usury were present in the late fee transaction.

In North Carolina, the penalty for charging an unlawful rate of interest is the "forfeiture of the entire interest which the . . . evidence of debt carries with it." The court, however, stated the "entire interest" in a late fee transaction "can only signify any and all penalty fees for late payments" because the interest on the note itself and the compensation for delayed payment are separate transactions. Thus, the court forced the defendants to forfeit only their right to receive the late fee rather than the entire interest on the note.

The court also addressed whether the usury savings clause could save the defendants from liability under usury laws by lowering the late payment fee to a legal level. Looking to the spirit of the usury statutes, the court stated that the usury statutes exist to protect the borrower and to relieve him of "the necessity for expertise and vigilance regarding the legality of rates he must pay." According to the court, a usury savings clause would shift the burden of knowing the laws to the borrower, contradicting the concern underlying the usury statutes. The court concluded that a lender cannot escape liability for usurious charges by

41. Id. at 159, 409 S.E.2d at 896.
42. Id.
43. Id.
44. Id. at 159, 409 S.E.2d at 895. (quoting Kessing v. National Mortgage Corp., 278 N.C. 523, 530, 180 S.E.2d 823, 827 (1971)).
45. "[A]ny charges . . . in excess of the lawful rate of interest, whether called fines, charges, dues or interest are, in fact, interest and usurious." Id. at 158, 409 S.E.2d at 895 (quoting Hollowell v. Southern Bldg. & Loan Ass'n, 120 N.C. 286, 287, 26 S.E. 781, 781 (1897)).
46. Id. at 159, 409 S.E.2d at 896.
48. Swindell, 330 N.C. at 160, 409 S.E.2d at 896. The alternative would have been to interpret "entire interest" to mean the interest under the note together with the late fee. See infra notes 95-99 and accompanying text.
49. Swindell, 330 N.C. at 158, 409 S.E.2d at 895; see supra text accompanying notes 35-36.
50. Swindell, 330 N.C. at 161, 409 S.E.2d at 897.
51. The court of appeals did not consider the effect of the usury savings clause.
52. Swindell, 330 N.C. at 160, 409 S.E.2d at 896.
53. Id.
providing for a subsequent reduction in the interest rate or late payment charge.\textsuperscript{54}

Before \textit{Swindell}, the North Carolina courts had not addressed either the issue of whether a late payment fee is "interest" so as to fit within the penalty provision of the usury statutes or the proper penalty for charging a late payment fee above the legal maximum. Three areas that the courts previously have addressed are helpful in understanding \textit{Swindell}: (1) the role and method of the courts in their construction of the usury statutes;\textsuperscript{55} (2) the differences between interest and fees;\textsuperscript{56} and (3) the remedies given without express statutory authorization for violations of other usury statutes.\textsuperscript{57}

It is well-settled in North Carolina that usury regulation is the province of the legislature; the court's role is limited to interpreting and applying the " legislative will."\textsuperscript{58} North Carolina courts consistently have held that the penalty provisions must be construed strictly and that a court may not grant relief other than that provided by the statutes.\textsuperscript{59} There is disparity, however, over whether certain transactions should be included within the usury statutes. Some cases indicate that courts should construe the statutes strictly to ensure that sanctions are levied only for the "extraction or reception of more than a specified legal rate for the hire of money, and not for anything else."\textsuperscript{60} Other cases, in contrast, have enlarged the scope of the usury laws\textsuperscript{61} out of concern for the borrower.\textsuperscript{62}

\textsuperscript{54} Id.

\textsuperscript{55} See infra notes 58-62 and accompanying text.

\textsuperscript{56} See infra notes 63-78 and accompanying text.

\textsuperscript{57} See infra notes 79-90 and accompanying text.

\textsuperscript{58} Swindell, 330 N.C. at 156, 409 S.E.2d at 894 (quoting Smith v. Old Dominion Bldg. & Loan Ass'n, 119 N.C. 249, 256, 26 S.E. 41, 42 (1896)).

\textsuperscript{59} See Auto Fin. Co. v. Simmons, 247 N.C. 724, 728, 102 S.E.2d 119, 122-23 (1958) (stating that the court cannot give more relief than the forfeiture that the statute prescribes); Argo Air, Inc. v. Scott, 18 N.C. App. 506, 512, 197 S.E.2d 256, 259 (1973) (same).


\textsuperscript{61} See e.g., Western Auto Supply Co. v. Vick, 303 N.C. 30, 37, 277 S.E.2d 360, 366 (noting that when a transaction involving chattel paper is "structured in such a manner that its essential character is masked" the court will "look beneath the formality of the activity to determine whether . . . it is, in fact, usurious"), aff'd on reh'g, 304 N.C. 191, 283 S.E.2d 181 (1981); See also Susan P. McAllister, Note, \textit{Judicially Imposed Penalties in the Absence of Statutory Penalties: Can Freedom of Contract Co-Exist with Public Policy After Merrit v. Knox?}, 68 N.C. L. Rev. 1021, 1026 n.53 (1990) (stating that courts have looked beyond the nomenclature to bring essentially usurious transactions within the statutes).

\textsuperscript{62} Courts have viewed the usury statutes as designed to protect the borrower who is a "'victim of the rapacious lender.' " Carolina Indus. Bank v. Merrimon, 260 N.C. 335, 340,
The second issue addressed by the courts is the difference between interest and fees. Prior to the enactment of specific statutes regulating maximum late payment fees and origination fees, courts often classified fees as interest in order to bring them within the existing usury statutes. In *Smith v. Old Dominion Building & Loan Ass'n*, the lender had collected $20 in fines for nonpayment. The court stated that "[a] penalty or fine for nonpayment is interest." Likewise, in *Henderson v. Security Mortgage & Finance Co.*, the court held that if a lender charges the borrower a flat fee for making the loan, then that charge is interest no matter what "‘disguise it may assume.’"

In 1982, the North Carolina Supreme Court in *In re Foreclosure of Bonder* seemed to state that the statutory section entitled "Maximum fees on loans secured by real property" did not extend to "the separate and different issue of interest rates." In *Bonder*, the borrower and lender executed a $50,000 home loan containing a due-on-sale clause. The lender stated that it would agree to a sale of the home and note only with an interest rate increase. After the borrower sold the house, the lender refused payment from the new owners and initiated foreclosure proceedings. The borrower defended partly on the ground that the interest rate increase would be more than the $400 maximum alienation fee.

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132 S.E.2d 692, 695 (1963) (quoting GMAC v. Weinrich, 218 Mo. App. 68, 70, 262 S.W. 425, 428 (1924)). But see Moore, supra note 2, at 763 ("This justification . . . has little basis in fact.").

63. 119 N.C. 257, 26 S.E. 41 (1896).

64. Id. at 258, 26 S.E. at 42.

65. Id. at 259, 26 S.E. at 42 (quoting Meroney v. Atlanta Bldg. & Loan Ass'n, 116 N.C. 882, 922, 21 S.E. 924, 937 (1895)). The common law in most jurisdictions, however, did not consider such a fee to be included in interest because the borrower could avoid the fee simply by paying promptly. William N. Eskridge, Jr., *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Psychological Dynamics of the Home Sale and Loan Transactions*, 70 Va. L. Rev. 1083, 1095 (1984).


67. Id. at 263, 160 S.E.2d at 46 (quoting Doster v. English, 152 N.C. 339, 341, 67 S.E. 754, 755 (1910)).


69. N.C. Gen. Stat. § 24-10 (1991). The late fee statute, before the general assembly switched it to section 24-10.1, was embodied by § 24-10(e). See supra note 19.

70. *Bonder*, 306 N.C. at 462, 293 S.E.2d at 805.

71. Id. at 452, 293 S.E.2d at 799.

72. Id. at 459, 293 S.E.2d at 803. A "due-on-sale clause" is a "provision . . . whereby the entire debt becomes due and payable at mortgagee's option upon sale of mortgaged property." *Black's Law Dictionary* 261 (6th ed. 1990).

73. The lender wanted to increase the rate from 7.75% to 12%. *Bonder*, 306 N.C. at 452-53, 293 S.E.2d at 799.

74. Id. at 453, 293 S.E.2d at 800.
allowed under statute. The court noted, however, that since the parties could agree to any interest rate, the lender legally could use a due-on-sale clause to obtain a higher interest rate from potential buyers. The court simply stated that an alienation fee and the increase in interest rate in this case were distinct; it never held that a "fee" could not be considered "interest" so as to invoke section 24-2.

The third area the North Carolina courts have examined is the availability of the remedy prescribed in section 24-2 of the North Carolina General Statutes without express statutory authorization. In Kessing v. National Mortgage Corp., the lender, in order to execute a $250,000 loan at the maximum legal rate of eight percent, required the borrower to enter into a partnership agreement naming the lender as a limited partner with a one-quarter interest. The lender also required that the borrower convey the property secured by the deed of trust pursuant to the loan to the partnership. The court found that the transfer of the partnership share violated a statute prohibiting, on a loan of less than $300,000, the transfer of a "thing of value or other consideration" other than the pledged security, fees, and interest. As with a late payment fee violation, an express remedy for the additional transfer did not exist. The court, however, held without debate that the partnership share was "interest" on the loan and that the lender, under the penalty statute, must forfeit the entire interest carried by the note, which included both the usurious partnership share and the eight percent stated.

75. Id. at 462, 293 S.E.2d at 804. The statute states that a lender "may charge to [one] ... that assumes a loan, secured by real property, ... [w]here the ... deed of trust contains a due on sale clause, a fee not to exceed four hundred dollars." N.C. GEN. STAT. § 24-10(d)(1) (1991).
76. Parties may agree on any interest rate for a home loan greater than $10,000. N.C. GEN. STAT. § 24-1.1A(a) (1991).
78. To hold otherwise would be contrary to prior law. See supra notes 63-67 and accompanying text. The facts of Swindell are different from those of Bonder in that the restriction on late payment fees was expressly applicable to the Swindells' loan. See N.C. GEN. STAT. § 24-10.1 (1991).
80. The legal rate for a loan of $300,000 or less is eight percent. See N.C. GEN. STAT. § 24-8 (1991).
81. Kessing, 278 N.C. at 526, 180 S.E.2d at 825. The lender paid only $25 for this share. Id.
82. Id.
83. Id. at 531, 180 S.E.2d at 828 (quoting N.C. GEN. STAT. § 24-8 (1991)).
84. The lender's president testified that, with the expected profits from the partnership, the expected rate of return on the note would be between 16% and 20%. Id. at 531, 180 S.E.2d at 828.
In *State Wholesale Supply, Inc. v. Allen*, a seller of goods charged past due accounts a two percent per month "service charge" that was above the legal maximum for the unpaid balance in open-end credit transactions. After concluding that the charge was not actually a higher credit price, the court held that the service charge was the cost of seller's forbearance of collecting the payment. Thus, the charge was interest and the seller had to forfeit the entire two percent under section 24-2.

In light of these prior decisions, the *Swindell* court's holding that the usury savings clause could not shield the note from the usury statutes is not surprising. The North Carolina courts and legislature consistently have viewed usury statutes as protection for borrowers from lenders' oppression. As the *Swindell* court reasoned, a usury savings clause would permit a lender to intentionally draft usurious contracts, and a borrower's only protection would be his own knowledge of the usury statutes. The clause would bring the interest and charges on the note within the limits set by the legislature only if the borrower were to bring it to the lender's attention. If the borrower did not know that the charge was in violation of the law, the illegal charge would never be challenged. Furthermore, even if the borrower were to discover the statutory violation, there would be no penalty imposed upon the overreaching lender. Enforcing such a clause would undercut directly the protection that the legislature has provided for the borrower by forgiving lenders for

85. *Id.* at 532, 180 S.E.2d at 829. "It becomes simply a loan which in law bears no interest." *Id.*

86. 30 N.C. App. 272, 227 S.E.2d 120 (1976).

87. *Id.* at 274, 227 S.E.2d at 122. The statute states that the maximum charge of "interest, finance charges or other fees" is a total of one and one-half percent. N.C. GEN. STAT. § 24-11 (1991).


89. *Allen*, 30 N.C. App. at 280, 227 S.E.2d at 126.

90. *Id.* at 280-81, 227 S.E.2d at 126.


93. The majority of borrowers never know there is a violation of the usury statutes. Amicus Curiae Brief for the North Carolina Clients Counsel at 12, *Swindell* (No. 70PA90).
their overreaching.\textsuperscript{94} Thus, finding the usury savings clause to be invalid conforms with existing law and policy by deterring lenders from taking advantage of borrowers.

The \textit{Swindell} court's requirement that the lender forfeit only the late payment fee, however, does not further the policy concerns underlying the usury statutes. Section 24-2 provides the teeth of the general assembly’s protection for borrowers.\textsuperscript{95} \textit{Kessing} and \textit{Allen} provide precedent for finding charges similar to the late fee to be interest for the purposes of invoking the penalty statute.\textsuperscript{96} The \textit{Swindell} court then, by holding that the late payment fee, once invoked, became part of the "entire interest" on the loan itself, could have required the forfeiture of both the stated interest on the $112,500 principal and the five percent late payment fee.\textsuperscript{97} The court instead divided the loan into two transactions, the loan and the late payment fee.\textsuperscript{98} After finding the late payment charge to be usurious interest itself, the court required forfeiture of the late fee only.\textsuperscript{99} The \textit{Swindell} holding, as compared with \textit{Kessing}, provides less deterrence to a lender.

For example, the remedy for usury is either a forfeiture of the interest on a loan or the return of double the interest already paid.\textsuperscript{100} If after executing a note with monthly payments of $1500 and a late fee of five percent, a borrower discovers the late fee is usurious, she would have three avenues to challenge the usurious charge under the \textit{Swindell} holding. First, the borrower could sue the lender for violating the late fees

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\textsuperscript{94} The legislature has gone so far as to say that any usury statute that would interfere with the protection of the borrower should not be enforced. N.C. GEN. STAT. § 24-2.1 (1991).
\textsuperscript{95} Id. § 24-2 (1991). The forfeiture provision is "intended to induce an observance of the statute." Moore v. Woodward, 83 N.C. 531, 533 (1880).
\textsuperscript{96} Section 24-2 provides a remedy for the "taking, receiving, reserving or charging a greater rate of interest" than permitted by law. N.C. GEN. STAT. § 24-2 (1991) (emphasis added). For the text of § 24-2, see \textit{supra} note 6. The "interest" in \textit{Kessing} was a requirement that the borrower sell the lender a partnership share at a favorable price. Kessing v. National Mortgage Corp., 278 N.C. 522, 531, 180 S.E.2d 823, 828 (1971); see \textit{supra} notes 79-85 and accompanying text. The "interest" in \textit{Allen} was a service charge on past due accounts in open-ended credit transactions. State Wholesale Supply v. Allen, 30 N.C. App. 272, 280, 227 S.E.2d 120, 126 (1976); see \textit{supra} notes 86-90 and accompanying text. Neither differs greatly from the late payment fee in \textit{Swindell}.
\textsuperscript{97} The remedy for charging a rate of interest greater than that allowed by law is "a forfeiture of the entire interest" on the note. N.C. GEN. STAT. § 24-2 (1991). In \textit{Kessing}, the lender was forced to forfeit both the usuriously gained partnership share and the stated interest on the loan. Kessing, 278 N.C. at 532, 180 S.E.2d at 829.
\textsuperscript{98} \textit{Swindell}, 330 N.C. at 158, 409 S.E.2d at 895; see \textit{supra} notes 35-36 and accompanying text.
\textsuperscript{99} \textit{Swindell}, 330 N.C. at 161, 409 S.E.2d at 897; see \textit{supra} note 50 and accompanying text.
\textsuperscript{100} N.C. GEN. STAT. § 24-2 (1991). For the text of § 24-2, see \textit{supra} note 6.
\end{flushleft}
statute. If the borrower had never paid a late payment fee, her remedy would be the lender's forfeiture of the right to collect such fees in the future. Thus, the borrower, assuming she makes prompt payments, would pay attorneys' fees to receive a useless remedy.

Second, the borrower could withhold a monthly payment and defend against an action brought by the lender, on the grounds that the late fee violates the statute. In this case, a court would rule that the lender must forfeit the right to the late fee, but is entitled to the principal and interest under the note. In other words, the borrower would be in the same position as if she paid on time.

The third possible course of action for the borrower would be to submit a late payment with the five percent fee. The borrower then could sue to obtain double the interest paid. Under these facts, however, the court could only award the borrower $150 and order the forfeiture of the lender's right to future late payments. After subtracting attorneys' fees, such an action is not likely to be profitable enough for a borrower to challenge the late payment charge. Thus, under the holding of Swindell, few borrowers, once discovering a usurious late charge, will take advantage of the protection provided by the statutes because there is little economic incentive to do so. Without vigorous private enforcement, the late fee statute will not deter a lender from charging a usurious rate.

Furthermore, the court's classification may have created a problem separate from the lack of deterrence. In support of its position that the late payment fee was a separate transaction, the court demonstrated that the fee met the four elements of usury. The elements of usury, before Swindell, were clearly established as: "[1] a loan or forbearance of money, [2] an understanding that the money loaned will be returned, [3] payment or agreement to pay a rate of interest greater than that allowed by law, and [4] a corrupt intent to take a greater" rate than legally allowed. Swindell broadened the first element's concept of forbearance and loosened the required understanding in the second element from one

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102. If the loan were secured pursuant to a mortgage or deed of trust, the borrower would face the possibility of foreclosure as well.
103. Five percent of $1500 is $75, doubled to $150.
104. "On an incremental basis, a challenge to excessive late charges is too expensive for individual borrowers to maintain." Amicus Curiae Brief for the North Carolina Clients Counsel at 13, Swindell (No. 70PA90).
105. The majority of borrowers never know that there is a violation of the usury statutes. Id. at 12. This coupled with lack of economic justification to sue will result in little private enforcement.
that the "money loaned will be returned"\textsuperscript{107} to one that "the money owed will be paid."\textsuperscript{108} By subtly changing the second element, the court, contrary to the general assembly's intent, may have opened the door for attacks of late payment charges not connected with notes.

Most jurisdictions have held that late payment fees on bills of any sort are not subject to usury statutes.\textsuperscript{109} Even the North Carolina Court of Appeals in \textit{State ex. rel. Utilities Commission v. North Carolina Consumers Council}\textsuperscript{110} held that a late fee on a public utility was not subject to usury laws because the charge was not to compensate forbearance but to avoid discrimination among customers by forcing the delinquent ones to bear collection costs.\textsuperscript{111} Outside this regulated area, however, the justifications for the fee are not as strong. For example, were a case to appear in North Carolina with a contract between a customer and a health club, calling for $10 per month dues with a $10 fee on each late payment,\textsuperscript{112} the elements of usury as applied by the \textit{Swindell} court might be broad enough to subject the contract to the usury statutes.\textsuperscript{113} First, the late payment fee, while not a loan as in \textit{Swindell}, is not solely a penalty to encourage prompt payment but also compensation for the forbearance of the party owed. Second, it is likely that a customer and health club who sign a contract understand that the dues will be paid. Third, a $10 late fee on $10 dues equals 100% interest, well above the

\textsuperscript{107} Id. (emphasis added).

\textsuperscript{108} \textit{Swindell}, 330 N.C. at 159, 409 S.E.2d at 895 (emphasis added). It is uncertain whether the court in \textit{Swindell} intentionally changed the second requirement. By relaxing the element, though, the late payment fee fits more tightly into the requirement. Because the court divided the loan into two separate transactions including the home loan for $112,500 and the money to compensate for delayed payments, the lenders technically never loaned money to the Swindells in the second transaction. \textit{Swindell}, 330 N.C. at 158, 409 S.E.2d at 895. Therefore, the Swindells could not return the late fee.


\textsuperscript{111} Id. at 721, 198 S.E.2d at 101 (citing \textit{Coffet v. Arkansas Power & Light Co.}, 248 Ark. 313, 317, 451 S.W.2d 881, 883-84 (1970)).

\textsuperscript{112} These facts are based on Smith v. Figure World Plus, Inc., 288 Ark. 355, 705 S.W.2d 432 (1986); \textit{see supra} note 109.

\textsuperscript{113} Such a scenario would not be governed by the late payment fee statute, which governs such fees only on loans or notes. \textit{See N.C. GEN. STAT.} § 24-10.1 (1991). The transaction would be under the statute setting the maximum rate for contract and fees. \textit{See N.C. GEN. STAT.} § 24-1.1 (1991).
maximum legal rate. Fourth, the only corrupt intent that would have to be shown is that the health club knew it was charging a $10 late fee. Thus, by calling a late payment fee "compensation" and stretching the second of the four usury elements, the court quite possibly has brought more transactions under the usury statutes than the general assembly intended.

While the Swindell court did not alter the decision of the court of appeals, it furnished a statutory justification for the lower court's holding. Both the supreme court's methodology and its final decision, however, appear to be inconsistent with the concerns underlying the statutes. In its reasoning, the court possibly enlarged the scope of transactions covered by the usury laws beyond that intended by the legislature. In its result, the court failed to deter the "rapacious lender." If the court wanted to grant a small penalty for charging a usurious late fee, it simply should have affirmed the court of appeals' decision. To provide true protection for the borrower, as the North Carolina courts and legislature have done in the past, the better result would have been to include the late fee, when invoked, in the "entire interest" on the loan. Charging a late payment fee above the legal maximum rate would then result in the forfeiture of all the loan's interest. Such a rule would encourage both enforcement by borrowers and compliance by lenders.

S. Graham Robinson

114. The maximum legal rate where the principal is less than $25,000 will roughly be the noncompetitive rate for the six-month U.S. Treasury Bill plus six percent as of the fifteenth of the previous calendar month or 16%, whichever is greater. N.C. GEN. STAT. § 24-1.1 (1991).

115. See supra text accompanying note 39.

116. Leases and rental agreements on property are already governed by another statute requiring that the late payment fee be less than five percent of the payment due. N.C. GEN. STAT. § 42-46 (Supp. 1991). There are other fees, however, that now may be open to attack through use of the usury laws.

117. See supra notes 28-30 and accompanying text.

Electric Supply Co. v. Swain Electrical Co.: The North Carolina Supreme Court Rewrites Subcontractors' Statutory Lien Rights*

Traditionally, North Carolina property owners have assumed that the law required them to pay for construction work only once. That assumption was based on the prevailing interpretation of the North Carolina statutes that provide for subcontractors' mechanic's liens. According to that interpretation, a subcontractor could not obtain a lien against the owner's real property if the owner had already paid the contractor for the work. In Electric Supply Co. v. Swain Electric Co., however, the North Carolina Supreme Court abandoned tradition and interpreted those statutes as providing such a lien; as a result, property owners may have to pay twice for the same construction work.

To illustrate the application of the statutes at issue in Electric Supply, assume the following hypothetical: Owner hires Contractor to build a concert hall. Contractor in turn contracts with Subcontractor to perform all of the plumbing work on the construction project for $20,000. Subcontractor buys the required plumbing supplies from Materialman on credit, amassing a bill of $10,000. The parties in this hypothetical can secure their debts via various chapter 44A sections. First, section 44A-18 of the North Carolina General Statutes grants to each subcontractor "who furnished labor or materials at the site of the improvement...a lien on funds which are owed to [the party] with whom the...subcontractor dealt and which arise out of the improvement on which

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* After this Note was written, the statute which the Electric Supply court interpreted was amended by the North Carolina General Assembly in an attempt to prevent some of the negative consequences which this Note suggests will result from the Electric Supply holding. Act of July 22, 1992, ch. 1010, §__, 1992 N.C. Sess. Laws __. The amendment leaves the holding intact but requires the North Carolina General Statutes Commission to study the statute, including the recent amendment and the issues involved in the Electric Supply case, and make a recommendation to the 1993 North Carolina General Assembly. Id.

1. A mechanic's lien is "a claim created by state statutes for the purpose of securing priority of payment of the price or value of work performed and materials furnished in erecting, improving, or repairing a building or other structure." BLACK'S LAW DICTIONARY 981 (6th ed. 1990).


5. This example will be used throughout this Note for illustrative purposes and will be referred to as the "Concert Hall" example.
the . . . subcontractor worked or furnished materials." Section 44A-18 also provides a lower-tier subcontractor the right by subrogation to enforce the lien rights of the parties above him in the construction chain so that each subcontractor can obtain a lien on funds in the hands of the owner. To perfect this lien, the subcontractor must give written notice to the "obligor." If the obligor still owes funds when he receives the notice, he must retain those funds, up to the amount claimed in the notice, for the benefit of the claiming subcontractor, but if the obligor already has paid the total amount due when he receives notice, the subcontractor will not have a lien on funds.

To secure his debts, a subcontractor also may rely on section 44A-23, the statute in question in Electric Supply. It provides that a subcontractor "may, to the extent of his claim, enforce the lien of the contractor." The contractor's lien, to which the subcontractor is subrogated under section 44A-23, is a lien on the owner's real property "to the extent of his claim" at the time the claim of lien is filed.

For twenty years, the construction industry has construed section 44A-23's "to the extent of his claim" provision to mean to the extent of the claiming subcontractor's claim of lien on funds against the owner,

6. N.C. Gen. Stat. § 44A-18(1) (1989). Section 44A-18 allows Materialman to obtain a lien on funds that Contractor owes to Subcontractor. It also enables Subcontractor to obtain a lien on funds that Owner owes to Contractor. This Note will refer to the lien provided in N.C. Gen. Stat. § 44A-18 as a "lien on funds." For a more thorough discussion of a subcontractor's lien rights, see infra notes 70-84 and accompanying text.

7. N.C. Gen. Stat. § 44A-18(2), (3) (1989). Subrogation is the "substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies or securities." Black's Law Dictionary 1427 (6th ed. 1990). This right of subrogation allows Materialman, to the extent of his lien on funds against Contractor, to enforce Subcontractor's lien against funds which Owner owes Contractor.

8. "'Obligor' means an owner, contractor or subcontractor in any tier who owes money to another as a result of the other's partial or total performance of a contract to improve real property." N.C. Gen. Stat. § 44A-17(3) (1989). The obligor for Materialman's lien is Contractor, and the obligor for Subcontractor's lien is Owner.

9. Id. § 44A-20(a) (1989). If Contractor receives from Materialman a notice of lien stating that Subcontractor owes Materialman $10,000 when Contractor still owes any amount to Subcontractor, Contractor must withhold for the benefit of Materialman $10,000 from any future payment to Subcontractor.


rather than to the extent that the claiming subcontractor is owed money by the contractor with whom he dealt regardless of whether the contractor is still owed any money for the project. In other words, section 44A-23 merely provides a method for a subcontractor to enforce his lien on funds against the owner's real property, as provided by 44A-18(6), not a lien separate and independent from the lien on funds.

The construction industry, according to the North Carolina Supreme Court, has been operating under a false assumption. In Electric Supply the supreme court held that section 44A-23 in fact provides subcontractors a lien on the owner's real property separate and independent from a lien on funds provided in section 44A-18. Thus, a subcontractor's section 44A-23 lien is limited only by the amount the owner owes the contractor.

So before the Electric Supply decision, Materialman in the foregoing hypothetical could not obtain a lien against Contractor or Owner if Contractor did not owe Subcontractor. This was true even if Owner owed Contractor. A party's lien rights only extended so far up the construction chain as payments were owing down the construction chain. Therefore, the fact that Contractor did not owe Subcontractor created a break in the chain of payments, preventing Materialman from obtaining a lien against Contractor or any party above Contractor in the chain. Under the Electric Supply court's interpretation of the statute, a break in the payment chain does not affect a lien against Owner's real property. Materialman may obtain such a lien even if Owner already has paid Contractor for the work Materialman provided.

This Note examines the development of subcontractors' lien rights in North Carolina and the policy behind the 1971 enactment of sections 44A-17 through 44A-23 of the North Carolina General Statutes. It argues that the Electric Supply court reached the incorrect result by failing to consider important legislative history and by failing to analyze thoroughly the uncertainty and the increase in construction costs that

13. See infra note 89 and accompanying text.
14. The construction industry's interpretation means that if a subcontractor is not able to obtain a lien on funds against the owner, he will not be able to enforce the contractor's lien against the owner's real property. For a discussion of how the construction industry construed the statutes, see infra note 89 and accompanying text.
15. Electric Supply, 328 N.C. at 660, 403 S.E.2d at 297.
16. According to the Electric Supply court's interpretation, even though a subcontractor is not able to obtain a lien on funds against the owner, he still can obtain a lien on the owner's real property. In some circumstances, this interpretation may require an owner to pay for the same work twice. For an illustration, see infra note 86 and accompanying text.
17. See supra notes 3-5 and accompanying text.
18. See infra notes 57-102 and accompanying text.
may result from its interpretation. The Note asserts that the legislative history the court neglected to consider strongly supports the construction industry's interpretation and shows that the negative consequences of the court's decision are the very ills that the statutory scheme was designed to cure. Finally, this Note recommends that the legislature revise the statute to conform to the industry's longstanding interpretation.

In 1986, Winstons Venture I (Venture) hired Davidson and Jones Construction Company (Davidson and Jones) to build a Comfort Inn motel in Durham. Davidson and Jones hired Swain Electric Company, Inc. (Swain) to install electrical systems, and Swain in turn contracted with Electric Supply Company of Durham, Inc. (Electric Supply) to supply electrical materials. From December 9, 1986 to May 5, 1987, Electric Supply supplied materials valued at $20,718.11 to Swain. On May 18, after receiving no payment for these materials, Electric Supply filed and served on Swain, Davidson and Jones, and Venture a notice of claim of lien and a claim of lien. At this time, Davidson and Jones did not owe any money to Swain, and Swain abandoned the job. On October 2, 1987, Electric Supply, enforcing its claim of lien, filed suit against Venture and Davidson and Jones, claiming all liens available to it under chapter 44A of the North Carolina General Statutes.

Because Davidson and Jones did not owe Swain any money at or after the time that Electric Supply gave notice of claim of lien, Electric Supply had no lien rights under section 44A-18. Nevertheless, Electric Supply asserted that it had the right to enforce Davidson and Jones' lien pursuant to section 44A-23, regardless of the lack of a lien on funds. It read section 44A-23 as providing a subcontractor a lien separate and independent from a lien on funds, and not limiting a subcontractor's lien rights to section 44A-18. Rejecting this interpretation, the trial court adopted Davidson and Jones' interpretation that a subcontractor's lien under section 44A-23 was dependent upon his having a lien on funds against the owner, and consequently, that Electric Supply had no lien

19. See infra notes 103-34 and accompanying text.
20. See infra notes 106-11, 126-27 and accompanying text.
21. See infra notes 135-38 and accompanying text.
23. Id. at 653, 403 S.E.2d at 293.
24. Id.
25. Id.
26. Id. Swain later filed bankruptcy. Id.
27. Id.
29. The trial court's interpretation was in line with industry understanding, as discussed infra note 89 and accompanying text.
The court of appeals, however, reversed,\textsuperscript{30} and a five-justice majority of the supreme court affirmed, holding that subcontractors have a right of subrogation to the contractor's lien on property independent of a lien on funds provided by section 44A-18.\textsuperscript{32}

Justice Meyer, writing for the majority, initially recognized that prior to the enactment of sections 44A-17 through 44A-23 in 1971, subcontractors had a right to a lien by subrogation to the contractor's lien on the owner's real property, regardless of whether the party with whom the subcontractor dealt was owed funds for the subcontractor's work.\textsuperscript{33}

In analyzing whether the 1971 General Assembly intended to maintain this "well-settled right" in addition to providing the new lien on funds, the court found inconclusive the arguments of both parties with respect to the plain meaning and the structure of the legislation\textsuperscript{34} and declined to give any weight to legislative history presented in the amicus curiae Carolinas AGC, Inc. brief.\textsuperscript{35} The court instead relied on an analysis of the

\begin{itemize}
  \item \textsuperscript{30} Electric Supply, 328 N.C. at 654, 403 S.E.2d at 293.
  \item \textsuperscript{32} Electric Supply, 328 N.C. at 660-68, 403 S.E.2d at 296-301.
  \item \textsuperscript{33} Id. at 655 n.2, 403 S.E.2d at 294 n.2 (citing Parnell-Martin Supply Co. v. High Point Motor Lodge, 277 N.C. 312, 316, 177 S.E.2d 392, 394 (1970); Atlas Powder Co. v. Denton, 176 N.C. 426, 432-33, 97 S.E. 372, 374-75 (1918); Powell v. King Lumber Co., 168 N.C. 632, 638, 84 S.E. 1032, 1035 (1915); Borden Brick & Tile Co. v. Pulley, 168 N.C. 371, 375, 84 S.E. 513, 514 (1915)).
  \item \textsuperscript{34} Id. at 655 n.2, 403 S.E.2d at 294 n.2 (citing N.C. GEN. STAT. § 44A-18 (1989)).
  \item \textsuperscript{35} Id. at 656-67, 403 S.E.2d at 295. Amicus curiae Carolinas AGC, Inc. urged the court to consider a memorandum written by the attorney who drafted the 1985 amendment to § 44A-23. Id. The memorandum, which explained the amendment, was presented to the House Judiciary Committee that considered the amendment. Minutes, North Carolina House Comm. on Judiciary III dated June 11, 1985. Section 44A-23 was amended as follows:

Sec. 4. G.S. 44A-23 is amended by adding after the second sentence of that section a
policy objectives that the legislature intended the lien provisions to achieve.36

First, the court focused on the North Carolina Constitution's provision for lien laws:37 "The General Assembly shall provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject-matter of their labor." Justice Meyer emphasized that because the construction industry operates on credit, an adequate lien is essential to the health of the industry to encourage the extension of credit.39 The court also placed great weight on the constitutional provision specifying that the lien should be on "the subject-matter of [his] labor." According to Justice Meyer, the defendant's interpretation of legislative intent as providing a lien system based largely on funds would not achieve

new sentence to read: "The lien is perfected as of the time set forth in G.S. 44A-10 upon filing of claim of lien pursuant to G.S. 44A-12."

Act of July 11, 1985, ch. 702, § 4, 1985 N.C. Sess. Laws 929. The memorandum explained the effect of the amendment on section 44A-23 as follows:

The subcontractor may enforce [his] lien on funds by enforcing the lien of the contractor who dealt directly with the owner against the property. Thus, the lien of the subcontractor against funds owed to the contractor creates a second lien, against the owner's property. Unlike the lien in favor of the contractor, however, this lien can be perfected at any time whether or not the work has been performed and whether or not the owner owes anything for the work. By filing the notice of lien, the subcontractor can create a cloud on the owner's title at any time. In practice, many subcontractors file this lien notice whenever they begin work on a project.

House Bill 1144 would provide that the notice of lien filed by the subcontractor perfects the subcontractor's lien against any funds owed to the contractor but does not perfect a lien against the landowner's property. A subcontractor could only perfect the lien against the owner's property in the same way as a contractor: by filing a claim of lien after the owner's obligation to the contractor becomes mature. The lien would then relate back to the time the subcontractor first furnished labor or materials at the site.

Memorandum from Martha Harris, staff attorney for the North Carolina Legislative Services Office, to Representative Boyd 1-2 (May 28, 1985) [hereinafter Harris Memorandum] (explaining the effect of the § 44A-23 amendment).

The majority admitted that the memorandum supported amicus curiae Carolinas AGC, Inc.'s interpretation of the statute, but refused to consider the memorandum for two reasons. First, the court would not consider the "internal deliberations of committees of the legislature considering proposed legislation." Electric Supply, 328 N.C. at 657, 403 S.E.2d at 295 (citing North Carolina Milk Comm'n v. National Food Stores, Inc., 270 N.C. 323, 332-33, 154 S.E.2d 548, 555 (1967)). Second, the court stated that the "memorandum, submitted nearly fourteen years after the passage of the statute under review, would be [in]sufficiently persuasive to overturn what, prior to 1971, was a well-settled right of the subcontractor of subrogation to the contractor's lien." Id. at 657, 403 S.E.2d at 295.

37. Id. at 659, 403 S.E.2d at 296.
40. Id. (quoting N.C. CONST. art. X, § 3) (emphasis in original).
this constitutional mandate.\textsuperscript{41}

The majority then considered the practical consequences of both interpretations.\textsuperscript{42} Defendants and amicus curiae Carolinas AGC, Inc. argued that since construction contracts commonly require the contractor to indemnify the owner, Swain's interpretation of the statute would place the costs of a defaulting subcontractor on the contractor.\textsuperscript{43} They also argued that contractors would be forced to protect themselves by requiring first-tier subcontractors to post payment bonds, which in turn would raise construction costs and drive smaller subcontractors out of the industry.\textsuperscript{44}

Swain, on the other hand, argued that contractors are in the best position to bear the burden of defaulting subcontractors.\textsuperscript{45} The court, rejecting the defendants' argument, seemed to adopt plaintiff's theory: "by exercising greater supervisory responsibility over the first-tier subcontractor [whom he hired], the contractor can avert or at least minimize losses [and] the need for payment bonds."\textsuperscript{46} The court added that the use of lien waivers also can lessen the contractor's liability.\textsuperscript{47} In light of these policy considerations, the court held that section 44A-23 provides first-, second-, and third-tier subcontractors a lien on real property separate and distinct from a lien on funds,\textsuperscript{48} despite the possibility that the

\textsuperscript{41} Id. at 659-69, 403 S.E.2d at 296.
\textsuperscript{42} Id. at 659-60, 403 S.E.2d at 296-97.
\textsuperscript{43} Id. An expansion of the Concert Hall facts, see supra notes 3-5 and accompanying text, illustrates this burden. Assume that the contract between Owner and Contractor contains an indemnity clause that requires Contractor to pay Owner any amounts that Owner is forced to pay on the construction project above the amount of the contract. Suppose Owner pays Contractor for all of the plumbing work, Contractor in turn pays Subcontractor in full, and then Subcontractor goes out of business before paying Materialman. Allowing Materialman to obtain a lien on Owner's property after Owner already paid Contractor for all the plumbing work forces Owner to pay for the plumbing supplies twice, because he would have to pay Materialman directly in order to discharge the lien, but the indemnity clause requires that Contractor pay that amount back to Owner; thus Contractor ultimately pays for the plumbing supplies twice.

\textsuperscript{44} Electric Supply, 328 N.C. at 660, 403 S.E.2d at 297. "[A] payment bond is an undertaking by [a] surety to pay unpaid subcontractors and suppliers." \textsc{Justin Sweet}, \textsc{Legal Aspects of Architecture, Engineering, and the Construction Process} § 37.07 (3d ed. 1985); see also \textsc{Steven M. Siegfried}, \textsc{Introduction to Construction Law} § 4.09 (1987) (discussing the use of payment bonds to protect against subcontractors' liens). If a subcontractor is a bad credit risk, and therefore cannot obtain payment bonds, it may be impossible for him to stay in operation. Others will have higher operating costs that will raise construction costs. See Electric Supply, 328 N.C. at 660, 403 S.E.2d at 297 (conceding that payment bonds raise construction costs).

\textsuperscript{45} Electric Supply, 328 N.C. at 660, 403 S.E.2d at 297.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
owner may have to pay the same debt twice.\textsuperscript{49}

To support his position that a section 44A-23 is dependent on a section 44A-18 lien, Justice Martin, joined in his dissent by Justice Webb, argued that the statutory requirement that a subcontractor give actual written notice of a claim of lien to the parties above him in the construction chain\textsuperscript{50} suggests a legislative purpose to establish a tiered lien system that would "limit[ ] a subcontractor's lien rights to those of the parties above him."\textsuperscript{51} Justice Martin also asserted that the plain meaning of section 44A-23 clearly supports this interpretation, apparently taking the position that section 44A-23's "to the extent of his claim" means "to the extent of his claim of lien."\textsuperscript{52} Unlike the majority, the dissent was persuaded by the legislative history cited in amicus curiae Carolinas AGC, Inc.'s brief.\textsuperscript{53} Justice Martin interpreted the legislative history as a clear indication that section 44A-23 requires a subcontractor to perfect a lien on funds as a condition to obtaining a lien on the owner's property by subrogation.\textsuperscript{54} Justice Martin then contended that, in addition to the plain meaning and legislative history of the statute, policy considerations

\begin{itemize}
\item \textsuperscript{49} The majority stated:
\begin{quote}
Therefore, even if the owner has specifically paid the contractor for the labor or materials supplied by the specific unpaid subcontractor who is claiming the lien, that subcontractor retains a right of subrogation, to the extent of his claim, to whatever lien rights the contractor otherwise has in the project.
\end{quote}
\textit{Id.} at 661, 403 S.E.2d at 298. Whether Venture will be subject to double liability depends on the timing of Venture's final payment to Davidson in relation to the commencement of the lawsuit. The court remanded the case to the trial court for a finding on the timing question. \textit{Id.} at 662, 403 S.E.2d at 297. Because § 44A-23 provides that the lien is not perfected until the lien claimant commences the enforcement action, N.C. GEN. STAT. § 44A-23 (1989), Electric Supply will have a lien only if the trial court determines on remand that Electric Supply commenced the action before Venture made its final payment to Davidson and Jones. \textit{Electric Supply}, 328 N.C. at 661, 403 S.E.2d at 297. If the trial court so finds that Electric Supply has a lien on Venture's property after Venture already paid Davidson and Jones for the supplies that Swain provided, Venture will have to pay that amount again, directly to Electric Supply, in order to discharge the lien.
\item \textsuperscript{50} \textit{Electric Supply}, 328 N.C. at 662-63, 403 S.E.2d at 298 (Martin, J., dissenting) (citing N.C. GEN. STAT. §§ 44A-18, -19, -20, -23 (1989)).
\item \textsuperscript{51} \textit{Id.} at 662-63, 403 S.E.2d at 298 (Martin, J., dissenting).
\item \textsuperscript{52} \textit{Id.} at 664, 403 S.E.2d at 299 (Martin, J., dissenting) (quoting N.C. GEN. STAT. § 44A-23 (1989)). If § 44A-23 means that a subcontractor can enforce a contractor's lien on the owner's property only to the extent of the subcontractor's claim of lien on funds, he would not be able to obtain a lien on the property unless he is able to obtain a lien on funds.
\item \textsuperscript{53} \textit{Id.} at 664-66, 403 S.E.2d at 299-300 (Martin, J., dissenting). Justice Martin reasoned that a court should consider any legislative history in determining the intent of a statute, and that the \textit{Harris Memorandum, supra} note 35, is relevant because the statute under review is the current version of § 44A-23, not the 1971 version. \textit{Electric Supply}, 328 N.C. at 664-66, 403 S.E.2d at 299 (Martin, J., dissenting) (citing Burgess v. Your House, Inc., 326 N.C. 205, 209, 338 S.E.2d 134, 136-37 (1990)).
\item \textsuperscript{54} \textit{Electric Supply}, 328 N.C. at 666-67, 403 S.E.2d at 300-01 (Martin, J., dissenting).
\end{itemize}
mandate that the court adopt the defendant's interpretation.\(^{55}\) According to Justice Martin, the claiming subcontractor is in a better position to protect his interest by promptly filing a notice of claim of lien.\(^{56}\) The contrast between the opinion held by the majority and that held by the dissent reflects differing interpretations of statutory language, policy, and legislative history.

In analyzing a subcontractor's lien rights under section 44A-23, the *Electric Supply* court interpreted a right that began with the 1880 enactment of North Carolina General Statutes section 44-6.\(^{57}\) As the majority noted,\(^{58}\) the North Carolina Supreme Court consistently interpreted section 44-6 as providing subcontractors lien rights by subrogation on the owner's property, regardless of a break in the chain of payments.\(^{59}\) This original statutory scheme also required that the contractor, before receiv-

\(^{55}\) *Id.* at 667, 403 S.E.2d at 301 (Martin, J., dissenting).

\(^{56}\) Justice Martin reasoned:

Public policy dictates that the party who has the ability to protect himself from loss should do so, and if he fails to so act in his own behalf it is not appropriate to require an innocent party to pay twice in order to make the negligent party whole. So here, where the second tier subcontractor fails to properly file his claim of lien against funds owed to the first tier subcontractor or the general contractor it would be inequitable to require the owner or the general contractor to again pay the amount claimed by the plaintiff, that sum already having been paid to the defaulting first tier subcontractor. Plaintiff here delayed some five months, from December until May, before giving notice of its unpaid claim. The law as well as equity protects the general contractor and the owner in this instance and does not require either to again pay in order to benefit the negligent second tier subcontractor.

*Id.* (Martin, J., dissenting).


All subcontractors and laborers who are employed to furnish or who do furnish labor or material for the building, repairing or altering of any house or other improvement on real estate, have a lien on said house and real estate for the amount of such labor done or material furnished, which lien shall be preferred to the mechanic's lien now provided by law, when notice thereof shall be given as hereinafter provided, which may be enforced as other liens in this chapter, except where it is otherwise provided; but the sum total of all the liens due subcontractors and materialmen shall not exceed the amount due the original contractor at the time of notice given.

N.C. GEN. STAT. § 44-6 (1965) (repealed 1971). The legislature enacted this statute, explicitly granting lien rights to subcontractors, in response to the harsh decision in Wilkie v. Bray, 71 N.C. 205 (1874), that a subcontractor had no lien rights under the general lien statute unless he could prove a contract with the owner. *Id.* at 206-07. *See* Charles S. Mangum, Jr., *Mechanic's Liens in North Carolina*, 41 N.C. L. REV. 173, 186 n.75 (1963); Urban & Miles, *supra* note 12, at 352.

\(^{58}\) *Electric Supply*, 328 N.C. at 655 n.2, 403 S.E.2d at 294 n.2.

ing payment from the owner, furnish the owner an itemized statement of amounts he owed to any subcontractor he employed. After receiving such notice, the owner had to withhold those amounts from any payment to the contractor and pay them directly to the subcontractors. This requirement was intended to protect the owner from the double liability that would result from a subcontractor’s enforcing a lien on the owner’s land after the owner, unaware of the unpaid subcontractor, already had paid the contractor in full.

In *Atlas Powder Co. v. Denton* the North Carolina Supreme Court applied section 44-6 to facts similar to those in *Electric Supply*. When a second-tier subcontractor gave notice of lien, the first-tier subcontractor owed the plaintiff second-tier subcontractor $1,526.67; the contractor owed the first-tier subcontractor $1,028.69; and the owner owed the contractor $75,830.43. The supreme court held that the extent of the second-tier subcontractor’s lien rights should be determined by the amount the owner owed the contractor without regard to whether the first-tier subcontractor owed funds to the second-tier subcontractor. Because the owner’s debt to the contractor exceeded the amount the first-tier subcontractor owed the second-tier subcontractor, the second-tier subcontractor had a lien for the full $1,526.67. As a result, the owner was twice liable for the sum of $497.98 (the difference between $1,526.67 and $1,028.69): once for the payment to the contractor before the second-tier subcontractor filed notice, and once for the direct payment to the second-tier subcontractor to satisfy the lien.

With the adoption of North Carolina General Statute sections 44A-17 through 44A-24 in 1971, the legislature completely rewrote subcontractors’ lien laws in order to clarify ambiguities and to correct problems resulting from the development of construction contracts into compli-

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61. Id.
62. 176 N.C. 426, 97 S.E. 372 (1918).
63. Id. at 430-33, 97 S.E. at 374-75.
64. Id.
65. Id. at 433, 97 S.E.2d at 375. The supreme court reversed the trial court’s holding that the second-tier subcontractor’s lien rights were limited to the rights of the first-tier subcontractor, which equaled $1,028.69. *See id.* at 429, 97 S.E.2d at 373.
66. Id.
67. *See Urban & Miles, supra* note 12, at 359. Urban states that the 1971 statutory scheme eliminates these kinds of inequities by limiting a subcontractor’s lien rights to the rights of the party with whom he dealt. *Id.* If a court decided *Atlas Powder Co.* under the current statute, he notes, the second-tier subcontractor’s lien would have been limited to $1,028.69. *Id.*
cated transactions involving several tiers of subcontractors. Section 44A-18(1) grants to first-tier subcontractors a lien on funds owed by the owner to the contractor that arise out of the project on which the first-tier subcontractor worked. Section 44A-18(2) grants to second-tier subcontractors a lien on funds owed by the contractor to the first-tier subcontractor that arise out of the project on which the second-tier subcontractor worked. Section 44A-18(2) also grants to the second-tier subcontractor the right to be subrogated to the first-tier subcontractor's lien on funds. Section 44A-18(3) provides similar rights to third-tier subcontractors. In essence, the structure of section 44A-18 insures that each subcontractor's lien on funds is limited by the rights of each party standing between himself and the obligor against whom the subcontractor is asserting his lien.

To perfect this lien, the subcontractor must file written notice to the obligor. If the obligor makes a payment before he receives the notice, the subcontractor will not have a lien on funds. If the obligor receives notice while still owing funds, however, he has the obligation to retain any funds subject to the lien.


70. "First tier subcontractor' means a person who contracts with a contractor to improve real property." N.C. GEN. STAT. § 44A-17(2) (1989).

71. Id. § 44A-18(1) (1989). For explanations of how the current statute works, see JOHN R. MILLER ET AL., NORTH CAROLINA CONSTRUCTION LAW 205-10 (1990); Urban & Miles, supra note 12, at 356-58.


73. Id. § 44A-18(2) (1989).

74. Id.

75. Id. § 44A-18(3) (1989).

76. "'Obligor' means an owner, contractor or subcontractor in any tier who owes money to another as a result of the other's partial or total performance of a contract to improve real property." Id. § 44A-17(3) (1989).

77. Suppose in the Concert Hall example, see supra notes 3-5 and accompanying text, Materialman serves Contractor and Owner with a notice of claim of lien on funds in the amount of $10,000. When Contractor receives the notice, she owes Subcontractor only $8000. When Owner receives notice, it owes Contractor only $6000. Materialman's lien against Contractor is for $8000 since that is the amount that Contractor owes Subcontractor. Materialman also can be subrogated to Subcontractor's right to a lien on funds against Owner. Subcontractor's lien against Owner is for only $6000 since that is the amount that Owner owes Contractor. Thus, Materialman is entitled to be subrogated to a lien on funds against Owner in the amount of $6000.


79. Id.

Section 44A-23 also permits certain subcontractors to secure a lien on the owner's real property by subrogation to the contractor's lien:

A first, second or third tier subcontractor, who gives notice as provided in this article, may, to the extent of his claim, enforce the lien of the contractor created by Part I of Article 2 of this Chapter. The manner of such enforcement shall be as provided by G.S. 44A-7 through 44A-16. The lien is perfected as of the time set forth in G.S. 44A-10 upon filing of claim of lien pursuant to G.S. 44A-12. Upon the filing of the notice and claim of lien and the commencement of the action, no action by the contractor shall be effective to prejudice the rights of the subcontractor without his written consent.\(^8\)

The contractor has lien rights against the owner's real property only to the extent that the owner owes the contractor for work performed on the property.\(^8\) The contractor can file a claim of lien up to 120 days after the last work is performed on the project.\(^8\) The subcontractor is subject to the same time limitation in filing his claim of lien, because section 44A-23 subrogates the subcontractor to the lien rights of the contractor.\(^8\)

As previously discussed,\(^8\) section 44A-23 is subject to two possible interpretations. As in the Electric Supply result, one may read section 44A-23's provision "to the extent of his claim" to mean to the extent that the claiming subcontractor is owed money by the person with whom he dealt, regardless of a break in the payment chain. Electric Supply illustrates that this position can subject the owner to potential double liability.\(^8\) The court refused to interpret "to the extent of his claim" as

\(^{81}\) N.C. GEN. STAT. § 44A-23 (1989).

\(^{82}\) N.C. GEN. STAT. § 44A-8 (1989). For a discussion of the contractor's lien, see Urban & Miles, supra note 12, at 287-351.

\(^{83}\) N.C. GEN. STAT. § 44A-12(b) (1989).


\(^{85}\) See supra notes 13-16 and accompanying text.

\(^{86}\) Electric Supply, 328 N.C. at 660-61, 403 S.E.2d at 297.

An expansion of the Concert Hall facts, see supra notes 3-5 and accompanying text, illustrates this possibility. Suppose Owner pays Contractor for all of the plumbing work, Contractor in turn pays Subcontractor in full, and then Subcontractor goes out of business before paying Materialman. Materialman will not be able to obtain a lien on funds against Owner because of the break in the payment chain between Contractor and Subcontractor. N.C. GEN. STAT. § 44A-18(2) (1989).

Under the interpretation that § 44A-23 provides a separate and independent lien from the § 44A-18 lien on funds, Materialman could obtain a lien on Owner's property to the extent that Owner still owes Contractor for other work on the project. Owner would then have to
meaning to the extent of the claiming subcontractor's claim of lien on funds, an interpretation that the construction industry had held since 1971 when the statute was enacted. Under this interpretation, the amount for which a subcontractor could obtain a section 44A-23 lien was limited by the extent to which the subcontractor could secure by subrogation up the construction chain a lien on funds in the hands of the owner.

Although North Carolina courts had applied section 44A-23 in several cases, no case resolved the issue of whether a section 44A-23 lien is dependent on a section 44A-18 lien. In *Lewis-Brady Builders Supply v. Bedros*, for example, the owner owed no funds to the contractor when the first-tier subcontractor filed his notice; therefore, the first-tier subcontractor had no right to a lien on funds. In addition, the first-tier subcontractor was not entitled to a lien on the owner's real property pursuant to section 44A-23. This holding suggests that the lien on real property is dependent on the existence of a lien on funds, but it is compatible also with the theory that section 44A-23 is independent from section 44A-18, because the contractor's lien to which a subcontractor is subrogated under section 44A-23 also depends on the owner's owing pay Materialman directly to discharge the lien, and would thereby pay twice for the plumbing materials.

88. See supra note 13 and accompanying text.
89. See MILLER, supra note 84, at 188-90 ("No funds-no lien"); Edmund T. Urban, Future Advances and Title Insurance Coverage, 15 WAKE FOREST L. REV. 329, 339-40 n.35 (1979) (observing that the legislature "intended . . . that lien rights against real property be limited in amount to amounts lienable under N.C.G.S. § 44A-18(2) & (3) although § 44A-23 doesn't literally read that way"); Urban & Miles, supra note 12, at 359 (citing Atlas Powder Co. v. Denton, 176 N.C. 426, 97 S.E. 372 (1918)) (noting that "Powder would be decided differently under the present statute"); Martha Retchin, Attorneys Analyze Impact of Subcontractor's Lien Ruling, N.C. LAW WkLY., June 3, 1991, at 1, 4 (noting that a subcontractor's lien by subrogation is limited to the liens available to those above him).

The Concert Hill facts, see supra notes 3-5 and accompanying text, as previously developed, supra note 86, illustrates the significance of this distinction.

Under the interpretation that § 44A-23 provides a lien separate and independent from the § 44A-18 lien on funds, Materialman could obtain a lien on Owner's property to the extent that Owner still owes Contractor. But the interpretation that § 44A-23 requires a lien on funds and is merely a way of enforcing that lien precludes Materialman from obtaining a § 44A-23 lien on Owner's property.

92. Id.
money to the contractor.94 Builders Supply, therefore, did not hold explicitly that a subcontractor’s right of subrogation under section 44A-23 depends on his possession of rights under section 44A-18.95

In another decision interpreting these statutes, Mace v. Bryant Construction Corp.,96 the first-tier subcontractor filed a claim of lien on the owner’s real property on August 26, 1974, and provided notice of this claim of lien to the owner on October 4, 1974.97 In examining the plaintiff’s possible lien rights under section 44A-23, the court found that on April 17, 1973, the contractor waived his lien rights against the owner.98 Since the contractor waived his lien rights prior to the subcontractor’s filing his claim of lien under section 44A-23, there was no lien to which the subcontractor could be subrogated.99

Similarly, when the Mace court analyzed the plaintiff’s possible lien rights under section 44A-18, it found that the owner owed no funds to the contractor at the time the plaintiff filed his notice of claim of lien with the owner, and no funds became due thereafter.100 This finding led to the conclusion that the first-tier subcontractor plaintiff also had no lien rights under section 44A-18.101 The Mace holding can be read consistently with both the majority’s and the dissent’s interpretations in Electric Supply. If section 44A-23 subrogation is dependent upon a valid lien on funds pursuant to section 44A-18 (the losing argument in Electric Supply), the plaintiff in Mace could not assert a lien pursuant to section 44A-23 because he did not have a lien on funds.102 If, on the other hand, the Mace court viewed section 44A-23 as providing a lien independent and separate from a lien on funds (the holding in Electric Supply), the lien waiver executed by the contractor would prevent the plaintiff from obtaining a lien pursuant to section 44A-23.

94. See supra notes 81-84 and accompanying text.
95. Since the Builders Supply court did not decide squarely the issue involved in Electric Supply, it neither helps nor hurts the dissent’s argument.
96. 48 N.C. App. 297, 269 S.E.2d 191 (1980). Both the majority and the dissent in Electric Supply cite Mace in support of their respective interpretations. Electric Supply, 328 N.C. at 659, 403 S.E.2d at 296 (citing Mace, 48 N.C. App. 297, 269 S.E.2d 191 (1980)); Id. at 663, 403 S.E.2d at 298 (Martin, J., dissenting) (citing Mace, 48 N.C. App. 297, 269 S.E.2d 191 (1980)).
97. Mace, 48 N.C. App. at 305, 269 S.E.2d at 195-96.
98. Id. at 304, 269 S.E.2d at 195.
100. Mace, 48 N.C. App. at 305-06, 269 S.E.2d at 195-96.
102. Mace, 48 N.C. App. at 305-06, 269 S.E.2d at 195-96. The Mace court rested its holding regarding the lack of a § 44A-23 lien on the contractor’s waiver of his lien rights, id. at 304, 269 S.E.2d at 195, but this does not necessarily mean that the court might not have rested its holding on the lack of a lien on funds had there been no lien waiver.
Although prior case law had not resolved the issue the Electric Supply court faced, other factors that the court either considered insufficiently or not at all suggest that the court reached the wrong result. These factors include legislative history,\textsuperscript{103} higher construction costs,\textsuperscript{104} and uncertainty in the law.\textsuperscript{105} First, the court neglected to examine important legislative history of section 44A-23. A 1971 memorandum written by the General Statutes Commission to the General Assembly explaining the new statutory scheme under consideration strongly suggests that the legislative intent conformed to the industry's understanding rather than to the Electric Supply court's interpretation.\textsuperscript{106}

Explaining section 44A-23, the memorandum states: "This section provides a first, second, or third tier subcontractor who has given notice as provided in the article may, to the extent of his lien, enforce the lien of the contractor."\textsuperscript{107} The use of the word "lien" instead of "claim" suggests that the drafters intended to limit a subcontractor's rights under section 44A-23 to the extent of his ability to perfect a lien on funds.\textsuperscript{108} The General Statutes Commission, however, seems to use the words "claim" and "lien" interchangeably throughout the memorandum. In another section the memorandum describes these same subrogation rights as being "to the extent of [the subcontractor's] claim."\textsuperscript{109} The Drafter's Memorandum's\textsuperscript{110} use of the word "lien" instead of "claim" to explain the extent of the subcontractor's section 44A-23 lien supports the argument that the General Assembly intended a section 44A-23 lien to depend on a section 44A-18 lien.\textsuperscript{111}

In addition to its failure to consider legislative history, the Electric

\textsuperscript{103} See infra notes 106-11 and accompanying text.
\textsuperscript{104} See infra notes 112-17 and accompanying text.
\textsuperscript{105} See infra notes 122-34 and accompanying text.
\textsuperscript{106} Drafter's Memorandum, supra note 69, at 13-14. No party to the Electric Supply case cited this memorandum in its brief to the supreme court and there is no evidence in the opinion that the court considered it.
\textsuperscript{107} Id. (emphasis added).
\textsuperscript{108} Dudley Humphrey, one of the authors of the statute, has commented that the Electric Supply "decision is contrary to the intent" of the statute. Retchin, supra note 89, at 4 (quoting Dudley Humphrey).
\textsuperscript{109} Drafter's Memorandum, supra note 69, at 8-9. Since a lien is sometimes referred to as "claim of lien," it is conceivable that one might refer to a lien as a "claim," but it is unlikely that someone would use "lien" to refer to a claim that was not secured by a lien.
\textsuperscript{110} See supra note 69.
\textsuperscript{111} Other § 44A-23 legislative history is the Harris Memorandum, supra note 35, which the Electric Supply court acknowledged as in accord with the industry interpretation but refused to consider because it relates to a 1985 amendment. Electric Supply, 328 at 656-67, 403 S.E.2d at 295. That amendment concerned the timing of enforcement, not the relationship to § 44A-18, see supra note 35, so the court was correct in holding the memorandum irrelevant to the issue in Electric Supply.
Supply court’s analysis of the construction-cost issue was inadequate. A negative consequence of the holding in all likelihood will be higher construction costs resulting from contractors’ requiring payment bonds more frequently.112 The court’s suggestion that greater supervision by contractors will minimize the need for payment bonds113 is shortsighted and unsound. In fact, the most practical way obligors can protect themselves is to require a payment bond.114 The other solution would require supervision at a level that would make it impossible for many subcontractors to operate because the supervision necessary to protect obligors, in the absence of a bond, probably would require proof from subcontractors that all of their debts related to the project have been paid before payment is made.115 One problem with requiring subcontractors to prove payment to their creditors is that most subcontractors do not have the liquidity that would allow them to pay their own subcontractors before receiving payment themselves;116 thus this form of supervision would make it almost impossible for the subcontractor to stay in business. Additionally, supervising subcontractors to the extent necessary to prevent double liability would raise an obligor’s job cost, thereby raising construction costs.117

In addition to payment bonds and increased supervision, the court suggests the use of lien waivers as a means for contractors to protect themselves against double liability,118 but this, too, fails to provide an effective method to offset the additional risk the Electric Supply holding places on contractors. Although a lien waiver executed by a contractor forfeiting his lien rights against the owner also would cut off a subcontractor’s section 44A-23 rights,119 it will be unenforceable in many circumstances. To be enforceable, a lien waiver must be in exchange for

112. See Retchin, supra note 89, at 4; Electric Supply, 328 N.C. at 660, 403 S.E.2d at 297 (conceding that an increased use of payment bonds would cause construction costs to rise).
113. Electric Supply, 328 N.C. at 660, 403 S.E.2d at 297.
114. Many subcontractors are not bondable because of an undeveloped credit record. Telephone Interview with Greg C. Ahlum, Attorney at Johnston, Taylor, Allison & Hord (Sept. 26, 1991). For a discussion of payment bonds, see supra note 44.
115. Telephone Interview with Greg C. Ahlum, supra note 114; see also SWEET, supra note 44, § 26.02(c) (discussing the practice of requiring proof of payment).
116. In analyzing the need for an adequate lien, the majority recognized this lack of liquidity, Electric Supply, 328 N.C. at 659-60, 403 S.E.2d at 296-97, but failed to consider it in relation to problems associated with forcing the obligors to exercise supervision sufficient to protect themselves from double liability.
117. See SWEET, supra note 44, § 26.02(c) (recognizing the administrative burden involved in requiring proof of payment).
118. Electric Supply, 328 N.C. at 660, 403 S.E.2d at 297.
payment of a disputed claim.\textsuperscript{120} If a contractor gives an owner a lien waiver solely to prejudice a subcontractor’s rights, therefore, it will be unenforceable for lack of consideration.\textsuperscript{121}

The \textit{Electric Supply} court also failed to evaluate the inevitable uncertainty that the construction industry will suffer due to the court’s interpretation of section 44A-23 and its suggestion that a contractor protect himself by exercising greater supervision. For twenty years, the industry interpretation allowed an obligor, if he had not received a notice of claim of lien, to pay his debt in full without concern that there may be unpaid subcontractors.\textsuperscript{122} After \textit{Electric Supply}, a subcontractor who has not performed work on the construction site for months could enforce a lien against the owner’s real property by subrogation 120 days after the contractor has completed the project, even though the owner and the contractor did not know there were any unpaid subcontractors.\textsuperscript{123} This possibility creates uncertainty for owners and contractors concerning potential liabilities to unknown subcontractors which did not exist under the more predictable system operating before \textit{Electric Supply}. Moreover, monitoring an obligee’s activities in an attempt to prevent double liability, in addition to being impractical and expensive,\textsuperscript{124} cannot assure that an obligor knows of all the subcontractors to whom the obligee owes money. Therefore, an obligor remains open to double liability because of subcontractors of which he is unaware. Instead of considering the benefits of preventing such uncertainty, the court’s policy analysis favors the importance of protecting subcontractors.\textsuperscript{125} If the court had looked into the purpose behind the enactment of the legislation, however, it would have discovered that the legislation was enacted to make the law of construction liens more certain,\textsuperscript{126} while also providing a method for

\begin{footnotesize}

\textsuperscript{121} Id.

\textsuperscript{122} This system was based on the premise that the best party to notify others of a debt due him is the party himself, the obligee. Prior to the enactment of the current subcontractor’s lien laws, before a party could be paid, he was required to inform his obligor of the identity of all creditors, and the amounts of indebtedness, for all debts related to the project. See N.C. GEN. STAT. § 44-8 (1965) (repealed 1971); United States v. Durham Lumber Co., 257 F.2d 570, 572 (4th Cir. 1958), aff’d, 363 U.S. 522 (1960). This system relied on the obligor to look after the obligee’s interests. The \textit{Electric Supply} court’s suggestion that contractors exercise more supervision marks a return to a system that places on the obligor the responsibility to protect the obligee. As between an obligee and an obligor, the better person to look after the obligee’s interests is probably the obligee. See \textit{Electric Supply}, 328 N.C. at 667, 403 S.E.2d at 301 (Martin, J., dissenting); \textit{supra} note 56.

\textsuperscript{123} See \textit{supra} notes 83-89 and accompanying text.

\textsuperscript{124} See \textit{supra} notes 112-17 and accompanying text.

\textsuperscript{125} \textit{Electric Supply}, 328 N.C. at 660, 403 S.E.2d at 297.

\textsuperscript{126} See \textit{supra} notes 68-69 and accompanying text.
\end{footnotesize}
subcontractors to protect themselves.127

The Electric Supply court also created uncertainty in the law of subcontractors' liens by failing adequately to limit its holding. The majority's reasoning rests largely on its belief that a lien system based solely on funds would not fulfill the state constitution's requirement of an "'adequate lien.'"128 Using this analysis, a subcontractor who has perfected a lien on the owner's property arguably could contend that it is not a constitutionally adequate lien unless it has priority over the deed of trust on the property.129 Although it is highly unlikely that a trial court would reach this ridiculous result,130 the opinion is not limited so as to preclude it. Moreover, nothing in the court's holding prevents a subcontractor from arguing that the time limits set forth in the statute for the perfection and enforcement of his lien unfairly limit his constitutional right to an adequate lien.

Further, after dispelling the perceived link between sections 44A-23 and 44A-18, the Electric Supply court failed to articulate the limits of a subcontractor's section 44A-23 lien. This leaves uncertain the implications of several lower-tier subcontractors attempting simultaneously to enforce a section 44A-23 lien. It is unclear whether the court limited the amount of section 44A-23 liens by the amount the owner owes the contractor or only by the amount of each subcontractor's individual claim.131 The latter alternative may subject an owner's property to liens in excess of his liability to the contractor, as illustrated in the following example:

Three second-tier subcontractors, each owed $40,000 by the first-tier subcontractor, could each get liens on the owner's real property for the full amount ($120,000 total) if the owner only owes the contractor $50,000. Therefore the owner would have to pay $70,000 more than he should under the contract.132

The statute in effect prior to 1971 specifically guarded against this result by providing that "the sum total of all the liens due subcontractors and materialmen shall not exceed the amount due the original contractor at

127. Subcontractors can protect themselves by filing a notice and a claim of lien on all parties above themselves in the construction chain. See N.C. GEN. STAT. § 44A-18(6) (1989).
128. Electric Supply, 328 N.C. at 659, 403 S.E.2d at 296 (quoting N.C. CONST. art. X, § 3).
130. No bank would loan money on a project if it knew that a court could subrogate its security to that of a subcontractor.
131. The question is whether the "his" in section 44A-23's language "to the extent of his claim" refers to the claiming subcontractor or the contractor.
the time of notice given."133 Through the pro rata provision in section 44A-21,134 the current statute also guards against the possibility that the total amount of several liens on funds will exceed the total amount due. Had the court interpreted the subrogation rights provided for in section 44A-23 as dependent on a lien on funds, the pro-rata provision would have prevented entirely the possibility of this type of excess liability. The ambiguity in the court's decision, however, renders section 44A-21 ineffective in most circumstances because a subcontractor arguably could obtain full payment by section 44A-23 subrogation, instead of a pro rata share under section 44A-21.

Soon after the North Carolina Supreme Court decided Electric Supply, the General Statutes Commission received mail expressing concern about the potential problems created by the court's holding and began planning to review the decision.135 Because the previously discussed policy considerations and section 44A-23's legislative history suggest that, properly interpreted, section 44A-23 is dependent on section 44A-18,136 the commission should suggest to the North Carolina General Assembly an amendment to section 44A-23 to adopt explicitly that interpretation.137 Such an amendment would return clarity to the law of subcontractors' liens by assuring an obligee written notice of any future debts for which he may become liable. This added certainty would not come at the expense of inadequate security for subcontractors, however, because a subcontractor can obtain a lien against the owner through subrogation by providing notice to all of the parties standing above the subcontractor in the payment chain.138

Without such an amendment, Electric Supply will force property owners to provide written notice of their future liabilities. This written notice is necessary to ensure that subcontractors are aware of the obligations that may arise. The amendment would clarify the process of subrogation and ensure that subcontractors are protected against potential liabilities.

134. Id. Section 44A-21 provides:
   In the event that the funds in the hands of the obligor and the obligor's personal liability, if any, under the previous section [G.S. 44A-20] are less than the amount of valid lien claims that have been filed with the obligor under this Article the parties entitled to liens shall share the funds on a pro rata basis.
   Id. § 44A-21 (1989).
136. See supra notes 106-34 and accompanying text.
137. The following amendment would achieve this result: Section 44A-23 is amended by adding after the word "claim" in the first sentence the words: "of lien against the owner pursuant to section 44A-18." The first sentence of the amended version would read: "A first, second, and third tier subcontractor, who gives notice as provided in this article, may, to the extent of his claim of lien against the owner pursuant to section 44A-18, enforce the lien of the contractor created by Part I of Article 2 of this Chapter."
owners and general contractors to face the possibility of paying twice for the same work because a lower-tier subcontractor, with whom neither dealt directly, can enforce a lien against the owner’s property without giving notice of a lien while the owner still owes for the work. Although the court’s decision, by enhancing a subcontractor’s ability to secure its debts, is consistent with the mechanic’s lien’s purpose of protecting subcontractors, it fails to balance adequately the competing interests of the owners and contractors. The North Carolina General Assembly must erect again the tiered system of liens that existed prior to Electric Supply to restore stability to the construction industry in North Carolina and to prevent our state’s property owners from bearing inequitable uncertainty and unforeseeable risks.

Christopher J. Brady
Edwards v. Edwards and the Award of Attorneys’ Fees for Breach of a Separation Agreement

It is now the policy in most states that parties may contract with regard to virtually all issues incident to divorce, "so long as those agreements . . . are basically just and reasonable, and are largely free from fraud, duress, undue influence, and other . . . 'bargaining naughtiness.'" In accordance with this majority rule, North Carolina's General Statutes authorize a married couple to execute a separation agreement that is legal and binding in all respects so long as it is "not inconsistent with public policy." Contractual indemnification clauses providing for the payment of attorneys' fees traditionally have been declared void as against public policy in North Carolina, except where statutory authority existed to impose them. Recently, however, the North Carolina Court of Appeals in Edwards v. Edwards held that such a clause, executed pursuant to a separation agreement, was not inconsistent with public policy and thus was binding on the parties. This decision, because it so surprisingly contradicts prior case law, introduces new questions for judicial and legislative consideration.

This Note discusses past judicial treatment of recovery of attorneys' fees, particularly pursuant to indemnification clauses, and identifies statutory exceptions to the general rule prohibiting recovery. It highlights the courts' previously limited opportunities to rule on the issue with regard to separation agreements and analyzes the court's decision in Edwards. The Note focuses on the possible existence of statutory authorization and public policy considerations accompanying the decision. Moreover, it examines the implications of the decision on practice in North Carolina and concludes that while Edwards may be a good decision on its facts, the opinion creates confusion as to the status of traditional North Carolina contract law.

3. See infra notes 30-41 and accompanying text.
5. See infra notes 30-41 and accompanying text.
6. See infra notes 42-54 and accompanying text.
7. See infra notes 71-75 and accompanying text.
8. See infra notes 76-82 and accompanying text.
9. See infra notes 83-87 and accompanying text.
Catherine Edwards and her husband Robert executed a separation agreement on September 21, 1986. The defendant husband agreed to pay the plaintiff wife rehabilitative alimony of $300 per month.\textsuperscript{10} Payments were to begin October 1, 1986, and were to continue for six years or until plaintiff’s death or remarriage, whichever occurred first.\textsuperscript{11} In addition, under a paragraph entitled “Indemnity,” the parties specifically contracted for attorneys’ fees:

If either party . . . for any reason fails to perform his or her financial or other obligations to the other party or their child, and as a result thereof incurs any expense, including reasonable attorneys’ fees, . . . the defaulting party shall indemnify and hold the other harmless from any such expense.\textsuperscript{12}

The defendant stopped making alimony payments in April 1989, and the plaintiff initiated an action, seeking specific performance of the separation agreement.\textsuperscript{13} The trial court entered judgment in the plaintiff’s favor, awarding her partial payment of defendant’s arrearage in alimony and ordering specific performance of the $300 per month alimony payments until defendant’s obligation under the agreement was satisfied.\textsuperscript{14} The trial court found that the defendant had the present ability to pay an additional $100 per month and ordered him to do so until the alimony arrearage plus interest was paid and satisfied in full.\textsuperscript{15} Finally, the trial court held that, under the terms of the separation agreement, the plaintiff was entitled to indemnification and recovery of reasonable attorneys’ fees.\textsuperscript{16}

The defendant assigned three errors on appeal.\textsuperscript{17} First, he argued that the trial court had not made appropriate findings of fact as required by law concerning his present ability to pay alimony arrearage before entering its order for specific performance.\textsuperscript{18} The North Carolina Court of Appeals declined to reverse the trial court’s judgment, holding that proper procedure had been followed.\textsuperscript{19}

\textsuperscript{11} Edwards, 102 N.C. App. at 708, 403 S.E.2d at 531.
\textsuperscript{12} Id. at 712, 403 S.E.2d at 533.
\textsuperscript{13} Id. at 707-08, 403 S.E.2d at 530-31.
\textsuperscript{14} Plaintiff Appellee’s Brief at 3, Edwards (No. 89 CvD 2319).
\textsuperscript{15} Id.
\textsuperscript{16} Edwards, 102 N.C. App. at 713, 403 S.E.2d at 533.
\textsuperscript{17} Id. at 708, 403 S.E.2d at 531.
\textsuperscript{18} Id.
\textsuperscript{19} Id. at 709, 403 S.E.2d at 531. When a defendant offers evidence tending to show his inability to fulfill his obligations under a separation agreement or other contract, the trial judge must make findings of fact concerning the defendant’s ability to pay before ordering specific
Second, defendant argued that the trial court’s finding that he had the present ability to pay alimony arrearage and prospective alimony was in error because it underestimated his itemized monthly expenses by $426.20 Although plaintiff countered that the mistake was purely clerical and thus correctable under Rule 60 of the North Carolina Rules of Civil Procedure without affecting the judgment, the court of appeals disagreed. The court reasoned that the mistake was of a substantial nature and thus could not be permitted because it might have an effect on the amount defendant reasonably could afford to pay.

Finally, the defendant asserted trial court error in awarding attorneys’ fees to the plaintiff because such costs are not allowable unless expressly authorized by statute. The court of appeals, in affirming the trial court’s judgment, focused on North Carolina General Statutes section 52-10.1, which states that separation agreements are “‘binding in all respects’” so long as they are “‘not inconsistent with public policy.’” The court found the indemnity clause of the separation agreement not inconsistent with public policy; thus, the agreement, executed pursuant to the statute, was “binding in all respects,” and the general rule disallowing attorneys’ fees unless statutorily authorized did not apply in this performance. Cavenaugh v. Cavenaugh, 317 N.C. 652, 657, 347 S.E.2d 19, 23 (1986). In Edwards, although the trial court stated that it would order specific performance prior to hearing any evidence of defendant’s present ability to pay, it then had a “lengthy exchange” with both parties’ attorneys concerning evidence it would hear to determine the issue. Edwards, 102 N.C. App. at 709, 403 S.E.2d at 531. After hearing that evidence, the court ordered specific performance. Id. According to the court of appeals, the trial court’s procedure complied with prior case law because it heard all evidence and made all findings of fact before ordering specific performance. Id.

20. Edwards, 102 N.C. App. at 709, 403 S.E.2d at 532.
22. Edwards, 102 N.C. App. at 710, 403 S.E.2d at 532.
24. Edwards, 102 N.C. App. at 710, 403 S.E.2d at 532. The court of appeals noted that “the trial court’s miscalculation of defendant’s expenses relative to his monthly income is a prejudicial error and therefore must be addressed by the trial court.” Id. at 710-11, 403 S.E.2d at 532.
25. Id. at 712, 403 S.E.2d at 533. The defendant also maintained that the trial court specifically ordered him to take a home equity loan in order to make partial payment on his alimony arrearage, an action which would impose liability on defendant’s new wife for an obligation that was his alone. Id. at 711, 403 S.E.2d at 533. The court of appeals concluded that the trial court made only findings of the amount of defendant’s assets and available credit and then ordered defendant to pay certain sums based upon its findings. Id. at 712, 403 S.E.2d at 533 (“Although defendant may choose to use a home equity loan for the lump sum payment of arrearages, defendant is not prevented by the trial court’s order from obtaining that amount from other sources.”).
26. Id. at 713, 403 S.E.2d at 533 (quoting N.C. Gen. Stat. § 52-10.1 (1991)).
situation. The court explained its decision by stating that “[i]f to hold otherwise would . . . [be to say] that parties cannot [voluntarily] contract for indemnification for attorneys’ fees unless specifically authorized to do so by statute.”

Prior to the Edwards decision, the issue of attorneys’ fees recovery in civil actions or in special proceedings seemingly was well settled in North Carolina jurisprudence: a successful litigant could not recover attorneys’ fees, whether as costs or as damages, unless such a recovery was authorized expressly by statute. More notably, North Carolina courts consistently had refused to sustain an award of attorneys’ fees absent statutory authority, even in the face of a “carefully drafted contractual provision indemnifying a party for such attorneys’ fees as may be necessitated by a successful action on the contract itself.”

This longstanding prohibition against attorneys’ fees recovery in civil actions originated in Tinsley v. Hoskins, an 1892 North Carolina Supreme Court decision. In Tinsley, the court held void as against public policy a promissory note provision imposing an obligation for “collection fees” (i.e., attorneys’ fees) in the event of collection of the note by legal process. The court viewed the provision as an oppressive penalty, a “cover” for usury, and a promoter of litigation. That rationale was applied subsequently to similar provisions found in other promissory notes, deeds of trust, and other security instruments. More recently,
the courts have indicated that such clauses, absent statutory authorization, are unenforceable without regard to the type of instrument in which they appear.\textsuperscript{36}

The North Carolina General Statutes provide several exceptions to the established rule against recovering attorneys' fees and authorize such costs in many situations.\textsuperscript{37} One far-reaching exception is found in North Carolina General Statutes section 6-21.2, which allows attorneys' fees in cases of "obligations to pay attorneys' fees upon any note, conditional sale contract, or other evidence of indebtedness."\textsuperscript{38} The courts have interpreted "evidence of indebtedness" to mean "any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money."\textsuperscript{39} The North Carolina Supreme Court has stated that, based on this section's legislative history,\textsuperscript{40} it believes the statute was intended to supplement legal principles applicable to commercial transactions.\textsuperscript{41}

In the area of family law, the right of a spouse to recover attorneys' fees in a divorce or alimony action is "so strongly entrenched in [North Carolina's] practice as to be considered an established legal right."\textsuperscript{42} North Carolina General Statutes section 6-21(4) states that costs (including reasonable attorneys' fees) shall be levied against either party or apportioned among parties, in the discretion of the court, in actions for divorce or alimony.\textsuperscript{43} However, before the Edwards decision, no court in North Carolina had ruled specifically on one party's right to attorneys'

\begin{footnotes}
\footnote{35. See Turner v. Boger, 126 N.C. 300, 302, 35 S.E. 592, 593 (1900); Williams v. Rich, 117 N.C. 235, 240, 23 S.E. 257, 259 (1895).}
}
\footnote{37. See, e.g., N.C. GEN. STAT. § 6-21 (1986) (allowing costs, in the court's discretion, to be levied against parties in such matters as actions for surviving spousal or child support; construction of a will or trust agreement; habeas corpus; application for the establishment, alteration, or discontinuance of a public road, cartway, or ferry; compensation of referees and commissioners for taking depositions; and for expenses incurred under various chapters of the General Statutes).
}
\footnote{38. Id. § 6-21.2 (1986) (emphasis added).
}
\footnote{39. Stillwell Enters., 300 N.C. at 294, 266 S.E.2d at 817-18; see also State Wholesale Supply v. Allen, 30 N.C. App. 272, 277, 227 S.E.2d 120, 124 (1976) (stating that the phrase signifies a written agreement or acknowledgment of debt).
}
\footnote{40. Section 6-21.2 was enacted to amend certain provisions of the state's Uniform Commercial Code and similar statutes. Stillwell Enters. 300 N.C. at 293, 266 S.E.2d at 816-17.
}
\footnote{41. Id.
}
}
\footnote{43. See N.C. GEN. STAT. § 6-21(4) (1986); see also id. § 50-16.4 (1987) (stating that if a
}
fees for the other’s breach of a separation agreement.\textsuperscript{44}

A 1987 case, \textit{Baird v. Baird},\textsuperscript{45} presented the issue for review, but the court of appeals declined to disrupt the trial court’s denial of such an award based on the trial court’s interpretation of the agreement in question.\textsuperscript{46} In \textit{Baird}, the plaintiff wife and defendant husband executed a separation agreement containing a provision wherein a party finding it necessary to sue for enforcement and prevailing in the action could exact reasonable attorneys’ fees from the defaulting party.\textsuperscript{47} When the plaintiff brought suit seeking enforcement of the agreement, the parties agreed to waive a jury trial and to permit the trial judge to make findings of fact.\textsuperscript{48} Because the matter subsequently was resolved by declaratory judgment, the trial court declined to award plaintiff attorneys’ fees, stating that the matter was resolved “by construction of the agreement, not enforcement of the agreement . . . and [therefore] there [was] not a ‘prevailing party’ within the meaning of the Separation Agreement.”\textsuperscript{49} The court of appeals agreed with the trial court’s reasoning.\textsuperscript{50}

A year later in \textit{Brown v. Brown},\textsuperscript{51} the court of appeals again upheld a trial court’s denial of the plaintiff’s request for attorneys’ fees based upon an indemnification provision in a separation agreement.\textsuperscript{52} Because the trial court dismissed the plaintiff’s cause of action (alleging a material breach by the defendant) for rescission of the agreement, there was no basis, according to the court of appeals, to hold that the defendant had
violated the agreement.\textsuperscript{53} No attorneys' fees were awarded, since neither party was found to be in default, as required by the agreement.\textsuperscript{54} Thus, as in Baird, Brown did not afford the appellate court with an opportunity to rule on the issue. Both decisions, however, left open the possibility for a court to grant attorneys' fees under a separation agreement clause in the proper circumstances.

In order to understand the attorneys' fees decision in Edwards, it is important to note that North Carolina courts consider a valid separation agreement to be an enforceable contract between husband and wife.\textsuperscript{55} The rules governing the interpretation of contracts also generally apply to separation agreements: Where the terms of such agreements are plain and explicit, the court will enforce them as written.\textsuperscript{56} Furthermore, "a court can properly order specific performance of only part of a contract if it deems another portion unworkable."\textsuperscript{57}

Some scholars feel, however, that separation agreements are fundamentally different from other bargained-for exchanges, and that treating spouses as strangers is not the answer to the inadequacies of the system.\textsuperscript{58} One commentator asserts that "the marketplace mentality is antithetical to the partnership concept of marriage, the husband-wife relationship, and the interests of society in fair results."\textsuperscript{59} Particularly in the area of family law, courts must strike a balance between allowing parties to settle their differences amicably and protecting those who cannot preserve their own rights.\textsuperscript{60}

Tradition, the interests of the affected groups, and the perceived incentive effects of fee-shifting rules all should play a role in determining who should bear the costs of litigation.\textsuperscript{61} The general rule in this country

\textsuperscript{53} Id. Because the action was dismissed, the trial court made no findings of fact concerning whether the agreement had in fact been violated. Id. at 338, 371 S.E.2d at 754.

\textsuperscript{54} Id. at 340, 371 S.E.2d at 755.


\textsuperscript{56} Id.; see also Lee, supra note 42, § 201, at 423 (stating that a valid separation agreement will be enforced as written, just like a contract).


\textsuperscript{59} Id. at 1460.

\textsuperscript{60} See Carol S. Hebert, Note, Domestic Relations—Enforcement of Contractual Separation Agreements by Specific Performance—Moore v. Moore, 16 Wake Forest L. Rev. 117, 129 (1980).

This rule is based upon three theories: one should not be penalized for defending or prosecuting a lawsuit; the poor might be discouraged from filing lawsuits if they faced the threat of having to bear their opponent's attorneys' fees; and determining reasonable fees would prove to be too difficult. Many of these arguments work both ways, however, and several rationales have been suggested which justify fee-shifting. Among them are the ideas that fee-shifting does not punish the loser but that it indemnifies the winner and makes her whole, that fee-shifting makes socially desirable litigation economical, that it evens out the relative economic strength of the parties, encouraging those who might not feel they could afford litigation to pursue their rights, and that it compensates for legal injury.

The court in Edwards affirmed the lower court's award of attorneys' fees to the plaintiff because it found that "the general rule disallowing attorneys' fees unless statutorily authorized does not encompass [the] situation where the parties voluntarily contracted for indemnification." The separation agreement at issue, the court maintained, was valid under North Carolina General Statutes section 52-10.1, and thus binding in all respects because the agreement's indemnity clause was not inconsistent with public policy. Arguably, the decision was an equitable one because the parties freely negotiated the indemnity clause. Courts should strive to uphold contracts as written. Many states hold that attorneys' fees may be awarded to a successful litigant in the presence of a statute or an enforceable contract providing for them. In addition, the defendant easily could have avoided incurring such costs had he performed his part of the bargain. Although the court's logic makes sense, the holding does

62. Fleischmann Corp. v. Maier Brewing, 386 U.S. 714, 717-18 (1967) (discussing the "American Rule" that attorneys' fees are not generally taxable against the losing party).
63. Id. at 718.
64. See Rowe, supra note 61, at 653-66.
65. Edwards, 102 N.C. App. at 713, 403 S.E.2d at 534.
66. Section 52-10.1 provides in pertinent part: "[a]ny married couple is . . . authorized to execute a separation agreement not inconsistent with public policy which shall be legal, valid, and binding in all respects; provided, that the separation agreement must be in writing and acknowledged by both parties before a certifying officer." N.C. GEN. STAT. § 52-10.1 (1991).
67. Edwards, 102 N.C. App. at 713, 403 S.E.2d at 533.
69. Fleischmann Corp. v. Maier Brewing, 386 U.S. 714, 717-18 (1967); see supra note 30 and accompanying text. In the area of family law, one recent Missouri Court of Appeals' decision held that in a proceeding for the dissolution of marriage or for legal separation, the terms of a separation agreement (except terms providing for custody, support, or visitation of the children) are binding on the court unless unconscionable. Obermiller v. Obermiller, 795 S.W.2d 624, 625-26 (Mo. Ct. App. 1990).
not follow from North Carolina precedent.\textsuperscript{70}

North Carolina's courts have held consistently that in the absence of a statute authorizing the award of attorneys' fees, contract provisions which indemnify parties against such costs are invalid.\textsuperscript{71} As yet, separation agreements do not fall under a specific statutory exemption to this well-established rule, and if courts are to consider them to be contracts, separation agreements arguably should be treated like contracts under prior case law.\textsuperscript{72}

Plaintiff, in her appellate brief in \textit{Edwards}, argued that the separation agreement fell within the "broad construction" given to North Carolina General Statutes section 6-21.2 (authorizing attorneys' fees provisions in notes and other evidence of indebtedness),\textsuperscript{73} but the court of appeals declined to adopt this rationale, and by its silence on the proposition, indicated that it did not agree with the characterization of a separation agreement as evidence of indebtedness. The statutory authorization the court suggested was that of section 52-10.1: If the separation agreement was valid, whatever it contained was to be enforced, including the indemnity clause. One problem with the court's argument, however, is that legislation pertaining to similar family law actions expressly stipulates that attorneys' fees are recoverable and within the court's discretion.\textsuperscript{74} It is therefore questionable whether the legislature intended the language of section 52-10.1 to imply an exception to the prohibition on attorneys' fees as costs properly awarded to a successful litigant. In other jurisdictions, divorce and separation statutes are drawn broadly to allow the court to provide for attorneys' fees in any proceeding seeking relief under their provisions.\textsuperscript{75} While such language definitely would help the North Carolina Court of Appeals' argument, North Carolina statutes are drafted more narrowly.

Moreover, although the court held that indemnity clauses in sepa-

\textsuperscript{70} See supra notes 30-41 and accompanying text.


\textsuperscript{72} In a recent Ohio Court of Appeals decision, a separation agreement clause purporting to require payment of attorneys' fees in an action for breach was held unenforceable because of public policy. Snyder v. Snyder, 27 Ohio App. 3d 1, 4, 499 N.E.2d 320, 323-24 (1985) ("Ohio . . . prohibits the enforcement of express agreements for recovery of attorney's fees for breach of a simple contract."") (quoting Federal Deposit Ins. Corp. v. Timbalier Towing Co., 497 F. Supp. 912, 929 (N.D. Ohio 1980)).

\textsuperscript{73} Plaintiff Appellee's Brief at 9-10, \textit{Edwards} (No. 89 CvD 2319).

\textsuperscript{74} See N.C. GEN. STAT. 50-16.4 (1987) (regarding attorneys' fees in divorce and alimony proceedings); id. § 6-21(4) (1986) (same); id. § 50-13.6 (1987) (regarding attorneys' fees in child custody and support proceedings).

\textsuperscript{75} See supra note 44 and accompanying text.
ration agreement contracts are not inconsistent with public policy,\textsuperscript{76} North Carolina courts, when analyzing contracts outside the family law context, traditionally have held otherwise.\textsuperscript{77} The courts generally view such provisions as oppressive penalties that promote litigation.\textsuperscript{78} As has been suggested, those concerns have come under recent criticism and should be examined more closely, especially in the area of family law where the contracts involved are negotiated under somewhat different circumstances.\textsuperscript{79}

Traditionally, attorneys' fees have been allowed in divorce and alimony proceedings in order to place dependent spouses (normally wives) on substantially even terms with adverse parties to the litigation.\textsuperscript{80} Separation agreements, which are "the vehicle by which the distributional consequences of the overwhelming majority of divorces . . . are concluded,"\textsuperscript{81} arguably spawn proceedings quite similar to those pertaining to divorce and alimony. A separation agreement may be considered an arm's-length transaction by the North Carolina courts, but it is surrounded with emotions not generally part of other personal contracts. A wife who signs a separation agreement usually does so in reliance on her husband's promise to support her.\textsuperscript{82} She needs a method for enforcement, and the fear of attorneys' fees might encourage her husband's compliance with the agreement or, if nothing else, settlement without heavy involvement in the legal system. In addition, a spouse whose rights were being violated might gain courage to fight in court if she knew that her costs could be defrayed. On the other hand, as the North Carolina courts have commented, the promise of attorneys' fees might entice a party without a valid complaint who otherwise could not afford to sue to seek judicial intervention as a means of harassment.

The implications of \textit{Edwards} on the legal system are unclear. Indemnification clauses appear in many types of contracts and agreements outside of domestic relations.\textsuperscript{83} The language the court uses to rationalize its decision is broad enough to be applied to virtually any situation:

\begin{itemize}
\item \textsuperscript{76} \textit{Edwards}, 102 N.C. App. at 713, 403 S.E.2d at 533.
\item \textsuperscript{77} See \textit{supra} notes 30-41 and accompanying text.
\item \textsuperscript{78} Stillwell Enters. v. Interstate Equip. Co., 300 N.C. 286, 290, 266 S.E.2d 812, 815 (1980).
\item \textsuperscript{79} See \textit{supra} notes 58-60 and accompanying text.
\item \textsuperscript{80} Lee, \textit{supra} note 42, § 148, at 205.
\item \textsuperscript{81} Sharp, \textit{supra} note 1, at 320.
\item \textsuperscript{82} Cf. Mitchell v. Mitchell, 270 N.C. 253, 258, 154 S.E.2d 71, 74-75 (1967) (holding that where a wife withdraws her defense to a divorce action in reliance on a consent judgment, the husband cannot later assert lack of power to enforce by contempt).
\item \textsuperscript{83} Some examples include lease agreements, employment contracts, and contracts for the sale of property.
\end{itemize}
"To hold [that the indemnification clause is inconsistent with public policy] would, in effect, hold that parties cannot [voluntarily] contract for indemnification for attorneys' fees unless specifically authorized to do so by statute." Such language in effect overrules established precedent in all sorts of contract cases and renders North Carolina's statutes specifying exceptions to the general prohibition against attorneys' fees meaningless. The court's sudden embrace of freedom of contract is not necessarily bad, nor is it out of line with other jurisdictions in the country. It is, however, unanticipated by recent decisions and contradictory to the precedent established in jurisdictions with case law and narrow statutory provisions similar to those of North Carolina.

Although the court made no attempt to do so, if the Edwards decision is limited to its facts by subsequent panels, the decision signals a recognition that separation agreements are by their nature quite distinct from traditional arm's-length transactions. The decision brings North Carolina law in line with those jurisdictions that consider separation agreements and the proceedings they generate to be part and parcel of divorce laws in general. Unless the North Carolina General Assembly modifies the General Statutes or the courts limit the decision to its facts, however, Edwards will create confusion and provide a convincing argument for those seeking to enforce indemnification clauses in all types of contracts.

The decision in Edwards makes a good deal of common sense. The parties negotiated and executed an agreement which provided indemnification for both in the event of breach. The core demands of the agreement were equitable and placed no undue burden on either party; Mr. Edwards, therefore, easily could have avoided the indemnification clause. Nonetheless, the decision to enforce the indemnification clause in the absence of express statutory authorization was without precedent and without clear justification. The result can only be confusion in other areas of traditional contract law, until and unless the General Assembly or the courts clarify the ruling.

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84. Edwards, 102 N.C. App. at 713, 403 S.E.2d at 534.
85. See supra note 30 and accompanying text.
86. See supra notes 30 and 72 and accompanying text.
87. See supra note 44 and accompanying text.
Imagine a situation in which a man and a woman have been involved in a consensual sexual relationship for six months, throughout which the man occasionally beats the woman. After the woman attempts to break off the relationship, the man meets her on the street, grabs her arm, and threatens to “fix” her face. The woman then follows the man to an apartment where they talk about their troubled relationship. While at the apartment the man leaves the room several times; the woman does not leave. After talking for approximately an hour, the man has sex with the woman after she has expressed her lack of consent. The woman cries throughout the act. Upon leaving the apartment, the woman notifies the police that the man has raped her. On a subsequent day, the man and the woman engage in consensual sexual intercourse, which the woman does not report initially because she is “embarrassed.” Is this man guilty of second-degree rape?  

First, what is second-degree rape? To convict a person of second-degree rape in North Carolina, the State must show that the accused has engaged in vaginal intercourse with another person by force and against the will of the other person. North Carolina courts have determined that the terms “by force” and “against the will” of the female are synonymous because any attempted distinction would be meaningless and could confuse a jury. They have acknowledged, moreover, that the force required for second-degree rape need not be physical; constructive force is sufficient. The force requirement may be met, in other words, if a victim submits to intercourse due to her fear of the accused, duress, or mental coercion.

2. N.C. GEN. STAT. § 14-27.3(a)(1) (1986). The statute also defines second-degree rape as vaginal intercourse with a person who is “mentally defective, mentally incapacitated, or physically helpless” when the person performing the act knows or should reasonably know of the defect, incapacity, or helplessness. Id. § 14-27.3(a)(2). This Note, however, will address only § 14-27.3(a)(1).
4. Thus, when a victim was raped in the backseat of a car by three men and decided that it was futile to resist due to their “superior strength,” the supreme court held that constructive force was present. State v. Hines, 286 N.C. 377, 379, 211 S.E.2d 201, 203 (1975). When a victim did not physically resist simultaneous vaginal and oral intercourse with two defendants because of her fear for the life of her daughter, who was in the next room, the supreme court held that constructive force was present. State v. Yancey, 291 N.C. 656, 663, 231 S.E.2d 637, 642 (1977).
Next arises the question of how to define constructive force. Determining when an accused has used constructive force to overcome a victim's lack of consent is difficult. A court must try to peer into the victim's mind to determine whether she felt compelled to submit to intercourse. It is not surprising that a so-called bright-line rule would emerge in North Carolina for the purposes of defining constructive force.

What happens, however, when the North Carolina Supreme Court, in an effort to define constructive force, creates a bright-line rule that severs the symbiotic relationship between the two supposedly synonymous elements of second-degree rape—"by force" and "against the will" of the female? The hypothetical facts discussed above are those of State v. Alston, in which the supreme court established such a bright-line rule.

In Alston, the supreme court stated that although the intercourse was against the will of the woman, it was not by force. In an effort to determine what constitutes constructive force, the court fashioned a rule stating that a woman must have more than a general fear of her attacker, and that the attacker must instill this fear in the woman immediately prior to the alleged rape so that her fear directly causes her to submit to the intercourse alleged to be rape. Only then is constructive force present. In other words, it is not enough that the woman generally was afraid of the man due to his past violence toward her. The court, by creating this new rule, separated the "by force" and "against the will" requirements with the presumable intent of creating a more uniform definition of constructive force.

This Note discusses the supreme court's reasoning in Alston as well as four subsequent cases construing Alston. This discussion includes

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5. The requirement that sexual intercourse be accompanied by force or threat of force to constitute rape provides a man with some protection against mistakes as to consent. A man who uses a gun or knife against his victim is not likely to be in serious doubt as to her lack of consent. Susan Estrich, Rape, 95 YALE L.J. 1087, 1098-99 (1986).


7. Id. at 408, 312 S.E.2d at 476.

8. Id. at 409, 312 S.E.2d at 476.

9. Alston fits the pattern of what Susan Estrich would call the "non-traditional" rape. Unlike the "traditional" rape (a stranger jumping out of the bushes, for example, putting a gun to the victim's head, and raping her), the "non-traditional" rape is:

[where less force is used or no other physical injury is inflicted, where threats are inarticulate, where the two know each other, where the setting is not an alley but a bedroom, where the initial contact was not a kidnapping but a date, where the woman says no but does not fight.

Estrich, supra note 5, at 1092.

10. See infra notes 15-75 and accompanying text.
State v. Hardy, the most recent appellate court decision to discuss constructive force. The Note demonstrates the negative, and at times disastrous, consequences of the Alston rule, hereinafter referred to as the "more than a general fear" rule. The Note asserts that the supreme court could have avoided the adverse effects of the "more than a general fear" rule by adopting a different one. The better rule would recognize that, while a victim of constructive force must have more than a general fear of her attacker, this fear may be a product of all the defendant's past actions toward her, and not simply a product of his actions immediately prior to the alleged rape.

A substantive discussion of second-degree rape law in North Carolina must begin with Alston; the Alston facts are set out above. The defendant contended in Alston that the State did not show that the intercourse was by force and against the victim's will. The supreme court determined first that the State had shown sufficiently that the intercourse was against the victim's will. Although she had not resisted the defendant physically, physical resistance is not necessary to prove lack of consent. The victim's testimony that she had told the defendant she did not want to have intercourse with him and that she had submitted only because she was afraid of the defendant was sufficient to show that the intercourse was against her will, according to the court.

The supreme court determined, however, that the State had not offered enough evidence to show constructive force. The threat by the defendant to "fix" the victim's face and the act of grabbing her arm on the street, "although they may have induced fear, appeared to have been unrelated to the act of sexual intercourse between [the victim] and the defendant." The court made the distinction that the victim's fear of the defendant was based on her experiences with him prior to the time of the alleged rape. The court stated that only if the "totality of the circumstances gives rise to a reasonable inference that the unspoken purpose of

12. See infra notes 76-80 and accompanying text.
13. See infra note 81 and accompanying text.
14. See infra notes 82-93 and accompanying text.
15. See supra note 1 and accompanying text.
17. Id. at 408, 312 S.E.2d at 475.
18. Id.
19. Id.
20. Id. at 408, 312 S.E.2d at 476.
21. Id.
22. Id. at 408-09, 312 S.E.2d at 476.
the [defendant's] threat was to force the victim to submit to unwanted sexual intercourse" could a jury find constructive force.\textsuperscript{23} Here the facts gave rise to no such inference.\textsuperscript{24}

The "more than a general fear" rule grew out of the court's decision in \textit{Alston} which suggested that if a defendant's actions prior to sexual intercourse caused only a "general fear" in the victim, a fear that did not directly cause the victim to submit to the unwanted intercourse, constructive force necessary to constitute second-degree rape was not present. The rule presumably would apply only when a defendant does not use physical force. The court reasoned as follows:

Under the peculiar facts of this case, there was no substantial evidence that threats or force by the defendant on [the day of the alleged rape] were sufficiently related to sexual conduct to cause [the victim] to believe that she had to submit to sexual intercourse with him or suffer harm. Although [her] general fear of the defendant may have been justified by his conduct on prior occasions, absent evidence that the defendant used force or threats to overcome the will of the victim \textit{to resist the sexual intercourse alleged to have been rape}, such general fear was not sufficient to show that the defendant used the force required to support a conviction of rape.\textsuperscript{25}

As a result of the State's failure to show the element of force required in second-degree rape, the court remanded the case for the entry of a directed verdict in favor of the defendant.\textsuperscript{26}

Seven months later the North Carolina Court of Appeals applied the "more than a general fear" rule to a very different set of facts. In \textit{State v. Lester},\textsuperscript{27} the defendant was charged with the second-degree rape of his daughter, with whom he had been engaging in intercourse since she was eleven years old.\textsuperscript{28} On the day in question, the defendant and his daughter were alone in their trailer. The defendant told his daughter to remove her clothes, but she refused. When the daughter "'could tell on his face that he was getting angrier,' " she complied with his demand, after which the defendant had intercourse with her.\textsuperscript{29} On a later date, the defendant told his daughter to disrobe while parked on the side of a road. She initially refused, but when the defendant became angry, she complied.

\textsuperscript{23.} \textit{Id.} at 409, 312 S.E.2d at 476.
\textsuperscript{24.} \textit{Id.}
\textsuperscript{25.} \textit{Id.}
\textsuperscript{26.} \textit{Id.} at 410, 312 S.E.2d at 476.
\textsuperscript{28.} \textit{Id.} at 759, 321 S.E.2d at 167.
\textsuperscript{29.} \textit{Id.}
After intercourse, the defendant slapped his daughter, claiming that she was involved with other boys.\textsuperscript{30}

The defendant argued that the State had failed to prove that the intercourse with his daughter had been by force.\textsuperscript{31} The court of appeals first determined that the State had presented sufficient evidence showing the intercourse between the defendant and his daughter was against the daughter’s will.\textsuperscript{32} Citing Alston’s "more than a general fear" language, however, the court of appeals claimed that "[t]here is no evidence . . . that defendant used either actual or constructive force to accomplish the acts with which he is charged."\textsuperscript{33} The court of appeals agreed that the daughter would fear her father based on his previous behavior (which included having intercourse with all of his other daughters, beating his wife in the presence of the children, and pointing a gun at his children on one occasion),\textsuperscript{34} but at the time of the intercourse, her fear was "insufficient to show that defendant forcibly raped his daughter."\textsuperscript{35} The court did not offer any further explanation for its decision. The supreme court summarily affirmed the court of appeals’ holding.\textsuperscript{36}

\begin{itemize}
  \item \textsuperscript{30} Id.
  \item \textsuperscript{31} Id.
  \item \textsuperscript{32} Id. at 761, 321 S.E.2d at 168.
  \item \textsuperscript{33} Id.
  \item \textsuperscript{34} Id. at 758-59, 321 S.E.2d at 167.
  \item \textsuperscript{35} Id. at 761, 321 S.E.2d at 168. Cases like \textit{Lester} are not unique to North Carolina. A year before \textit{Lester}, the Pennsylvania appellate court decided \textit{Commonwealth v. Biggs}, 320 Pa. Super. 265, 467 A.2d 31 (1983), in which a father engaged in intercourse with his seventeen-year-old daughter. The defendant told his daughter that the Bible instructed her to provide for his needs because her mother no longer could. The defendant also threatened his daughter that he would show nude pictures of her to people if she told anyone. \textit{Id.} at 267, 467 A.2d at 32. The appellate court reversed the defendant’s conviction, stating that he had never used or threatened force against his daughter. He obtained his daughter’s consent through humiliation, not force. \textit{Id.} at 268, 467 A.2d at 32 (quoted in Estrich, \textit{ supra} note 5, at 1110-11).
  \item \textsuperscript{36} State v. \textit{Lester}, 313 N.C. 595, 330 S.E.2d 205 (1985).

In \textit{Lester}, the State could have charged the defendant under North Carolina General Statute § 14-27.7, which states:

\begin{quote}
  [if a] defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home . . . the defendant is guilty of a Class G felony [punishable by not less than two nor more than fifteen years in prison]. \textit{Consent is not a defense to a charge under this section.}
\end{quote}

N.C. GEN. STAT. § 14-27.7 (1986) and editor’s notes (emphasis added). The State instead chose to charge the defendant with second-degree rape, presumably with the hope of obtaining a longer prison term; second-degree rape is punishable for a term of not more than forty years in prison. \textit{Id.} § 14-27.3, editor’s note. The State's plan obviously backfired. The results of \textit{Lester} suggest that the North Carolina General Assembly should create more equality in the maximum prison terms for second-degree rape and intercourse with minors in the care of the defendant. The latter arguably is not a less severe offense.
In *State v. Strickland*, the defendant used physical force to have intercourse with the victim, and the supreme court refused to apply the "more than a general fear" rule. In *Strickland*, the defendant and the victim were neighbors for about nine years. The defendant came to the victim's house one evening and asked to be let in, but the victim told him to leave. When she tried to close the door, the defendant broke the screen-door latch and forcibly entered the victim's house. He grabbed the victim, put his hand over her mouth, dragged her into a bedroom, and had intercourse with her.

On appeal, the defendant argued that the State had not presented sufficient evidence of force. Relying on *Alston*’s "more than a general fear" rule, he asserted that the victim had merely a general fear of the defendant. The court disagreed, stating without any further explanation that the "general fear" theory is applicable only to fact situations similar to those in *Alston*. The Court then distinguished *Alston* on the grounds that in *Strickland*, the defendant had no prior sexual relationship with the victim, forced his way into the victim's home, and grabbed the victim and placed his hand over her mouth. Although, as in *Alston*, the *Strickland* victim did not scream or fight, the court noted the victim's testimony that she "couldn't fight with him" because the defendant "[had] a hold of [her] at the time."

Justice Webb stated in dissent that he would concur with the majority only if the court overturned *Alston*. Instead of distinguishing the two cases, as the majority did, Justice Webb drew parallels. For example, Justice Webb asserted that in neither case did the defendant use more force than was necessary to have intercourse with the victim or specifically say what he would do if the victim did not submit; and in neither case did the victim physically resist. On this evidence, however, *Strickland* could go to the jury while *Alston* could not.

One month later, the North Carolina Supreme Court further attempted to clarify its "more than a general fear" rule in *State v. Etheridge*. The defendant in *Etheridge* was convicted of a second-degree

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38. *Id.* at 654, 351 S.E.2d at 282.
39. *Id.* at 655, 351 S.E.2d at 282.
40. *Id.* at 656, 351 S.E.2d at 283.
41. *Id.*
42. *Id.* at 657, 351 S.E.2d at 283.
43. *Id.* at 662, 351 S.E.2d at 286 (Webb, J., dissenting).
44. *Id.* (Webb, J., dissenting).
sexual offense for engaging in anal intercourse with his son. A second-degree sexual offense is similar to second-degree rape in that it requires the offense to be by force and against the will of the victim; the force may be constructive. The State showed that the defendant began engaging in sexual activity with his son when the boy was eight. On the day in question, when the boy was thirteen, the defendant went to his son’s bedroom and told him to disrobe. When the boy refused, the defendant answered that he should “‘[d]o it anyway.’” The defendant then engaged in anal intercourse with the boy. Afterward, the defendant told his son that he would hurt him if the boy told anyone about the incident.

The defendant, relying on Alston’s “more than a general fear” rule, asserted on appeal that both actual and constructive force were absent from the encounter at issue. The supreme court disagreed, stating “that Lester [involving intercourse between a father and daughter] carried Alston far beyond its intended scope and that [the] defendant’s reliance on the two decisions is inappropriate under the facts of this case.”

In reaching its decision, the court stated that although it had summarily affirmed the court of appeals, holding in Lester, it now “disavowed” Lester’s misapplication of the Alston ‘general fear’ rationale to a case of intrafamilial sexual abuse.” The court distinguished sexual activity between a parent and a child, as in Etheridge, and sexual activity between two adults who had been engaged in a consensual sexual relationship, as in Alston. Asserting that the “youth and vulnerability of children, coupled with the power inherent in a parent’s position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the

46. Id. at 37, 352 S.E.2d at 675.
47. North Carolina General Statute § 14-27.5(a) states that
[a] person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person (1) by force and against the will of the other person; or (2) Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know [this].
N.C. GEN. STAT. § 14-27.5(a) (1986). A “sexual act” is defined as “cunnilingus, fellatio, anal- ingus, or anal intercourse.” Id. § 14-27.1(4). As to why the State did not charge the defendant under North Carolina General Statute § 14-27.7, which concerns a sexual act with a minor residing in the same home and allows no defense for consent, see supra note 36.
49. Id. at 37, 352 S.E.2d at 675.
50. Id.
51. Id. at 45, 352 S.E.2d at 680.
52. Id.
53. Id. at 47, 352 S.E.2d at 681.
54. Id.
abuser's purpose,” the court expressly overruled *Lester*.\(^5\)

Again, as in *Strickland*, Justice Webb dissented. He asserted that I do not see how we could have a clearer holding [than *Alston*] that, although a victim may be justifiably afraid of a person and may testify that she only submitted because of a fear of what he might do if she did not submit, there still must be evidence of force or of a specific threat if she does not submit in order for the jury to find there was force. *I do not believe this is consistent with reality* but it is the way I believe *Alston* has to be read.\(^6\)

Justice Webb criticized the majority for distinguishing between the son's fear in *Lester* and the fear of the victim in *Alston*. While he agreed that a parent is an authority figure for a child, and a child often may fear disobeying his parent's will, Justice Webb found it incongruous that the "victim in *Alston* had an equal fear [of her attacker] and yet this Court held there had to be a specific threat."\(^5\)\(^7\) According to Justice Webb, there was no difference between the victim's situation in *Alston* and the son's situation in *Etheridge*.\(^5\)\(^8\)

The most recent case attempting to define constructive force as an element of second-degree rape in North Carolina is *State v. Hardy*.\(^5\)\(^9\) During the summer of 1989, the defendant in *Hardy* lived with his wife and stepchildren, including his fifteen-year-old stepdaughter.\(^6\)\(^0\) The defendant approached his stepdaughter one night while she was walking to the store with her sister and told her that he "wanted" her.\(^6\)\(^1\) He next asked the victim "‘would [she] tell,’” but she did not respond.\(^6\)\(^2\) No intercourse occurred at this time. The victim testified at trial that she ignored the defendant’s statement because he was "‘kind of high.’”\(^6\)\(^3\)

Later in the summer, the defendant went into the victim's bedroom at night on five or six different occasions after he had been drinking alcohol. He would climb into bed with her without speaking, except to say "shh," and would have intercourse with her.\(^6\)\(^4\) The victim would not say anything to the defendant, nor would she fight him.\(^6\)\(^5\) When asked at

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55. *Id.*
56. *Id.* at 51-52, 352 S.E.2d at 684 (Webb, J., dissenting) (emphasis added).
57. *Id.* at 52, 352 S.E.2d at 684 (Webb, J., dissenting).
58. *Id.* (Webb, J., dissenting).
60. *Id.* at 228, 409 S.E.2d at 97.
61. *Id.*
62. *Id.* (alteration in original).
63. *Id.* The defendant also walked into his stepdaughter's bedroom one night, but nothing transpired because her mother awoke. *Id.* at 228-29, 409 S.E.2d at 97.
64. *Id.* at 229, 409 S.E.2d at 97.
trial why she did not fight, she responded, "Well, I figured he would hurt me."66 When asked if the defendant had ever hurt her before, the victim responded, "Not that I know of."67

The victim further testified that she had seen the defendant fight with her mother, but that she never had seen him hit anyone in a violent manner.68 She also testified that the defendant had told her that her mother would throw her out and not believe her if she told anyone about the intercourse. The defendant gave the victim money to remain silent, instructing her not to tell her mother how she got the money.69

The jury convicted the defendant of three counts of rape in the second degree.70 On appeal, the defendant contended that the State had failed to show that the alleged intercourse was by force.71 He attempted to distinguish his case from Etheridge by stating that the son in Etheridge was only eight when sexual abuse began, and the abuse continued for a number of years. Moreover, the Etheridge defendant threatened to hurt his son if he told anyone.72 The defendant in Hardy, however, never said anything to the victim except "shh," nor did the victim ever explicitly reject the defendant's advances. While admitting the father-stepdaughter relationship between himself and the victim, the defendant contended that Etheridge did not stand for the proposition that this relationship in itself was enough to establish rape by force and against the will of the victim.73

The court of appeals, relying on Etheridge, disagreed, stating that "constructive force can be reasonably inferred from the circumstances surrounding the parent-child relationship."74 By viewing the totality of the circumstances, the court asserted that it was "reasonable to conclude that by removing her underwear and physically climbing in on top of the victim, either silently or with a 'Shh,' the defendant's actions 'carried a great deal more menace than is apparent on the surface.'"75

66. Id. at 9.
67. Id.
68. Id. at 5.
69. Hardy, 104 N.C. App. at 229, 409 S.E.2d at 97.
70. Defendant-Appellant's Brief at 3, Hardy (No. 90 CRS 1783-1788). The state could not have brought a charge of statutory rape against the defendant because the victim was not under thirteen years of age. N.C. GEN. STAT. § 14-27.2 (1986). See also supra note 36 (explaining why the State did not charge the defendant with having intercourse with a minor residing in his home).
71. Hardy, 104 N.C. App. at 231, 409 S.E.2d at 98.
72. Defendant-Appellant's Brief at 8, Hardy (No. 90 CRS 1783-1788).
73. Id.
74. Hardy, 104 N.C. App. at 232, 409 S.E.2d at 99.
75. Id. (quoting State v. Etheridge, 319 N.C. 34, 48, 352 S.E.2d 673, 681 (1987)).
In examining how the supreme court and court of appeals have attempted to define constructive force in this line of cases, it is evident that the "more than a general fear" rule is flawed. There are three problems in particular with the rule. First, due to its limited scope which considers only those actions by a defendant immediately prior to the intercourse alleged to be rape, it requires courts to exclude many factual situations from coverage by the rule.\textsuperscript{76} As new fact situations arise, courts will have to make more exceptions until they eventually swallow the rule. Would not a new rule, one that could apply equally to \textit{Alston} and \textit{Etheridge}, work better?

A second problem is that the supreme court has limited the "more than a general fear" rule to the facts in \textit{Alston}.\textsuperscript{77} This raises the pressing question of how similar to \textit{Alston} the facts of a case must be for the rule to apply. Does the court intend to apply \textit{Alston} only to substantially similar fact patterns, to any situation where a consensual relationship existed prior to the alleged rape, or to any case not involving child-victims? This ambiguity brings the courts back to the original problem—how to define constructive force. Ironically, the reason the supreme court created the "more than a general fear" rule was to establish a consistently applicable bright-line rule. This purpose is subverted by the latent ambiguities surrounding the rule.

The final and most significant problem is that the \textit{Alston} rule is vulnerable to attack on traditional doctrinal grounds. Susan Estrich, a noted commentator and victim of rape, asserts that

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[i]he court's unwillingness to credit the victim's past experience of violence at the hands of the defendant stands in sharp contrast to the black letter law that a defendant's knowledge of his attacker's reputation for violence or ownership of a gun is relevant to the reasonableness of his use of deadly force in self-defense.\textsuperscript{78}
\end{quote}

Estrich criticized the \textit{Alston} court for failing to recognize what is perhaps the most common reaction of women to rape. It is not difficult to understand, according to Estrich, why a woman such as the \textit{Alston} victim, who was beaten repeatedly during a "consensual" relationship, and finally attempted to leave the defendant, only to be threatened by him and told that he had a "right" to intercourse, would not fight.\textsuperscript{79} To say that the

\begin{footnotes}
\item[76] The flaw is exemplified in \textit{Etheridge}, where the supreme court stated that the "more than a general fear" rule would not apply to intrafamilial sexual intercourse. \textit{Etheridge}, 319 N.C. 34, 47, 352 S.E.2d 673, 681 (1987).
\item[78] Estrich, \textit{supra} note 5, at 1111.
\item[79] Id.
\end{footnotes}
defendant did not use force against the victim is to "create a gulf between power and force, and to define the latter solely in schoolboy terms."\(^\text{80}\)

Because of the weaknesses inherent in the "more than a general fear" rule, the subsequent cases have produced some strained reasoning at best, and disastrous results at worst. All of the cases construing Alston—Lester, Strickland, Etheridge, and Hardy—could have been decided correctly had the supreme court initially stated the rule as to constructive force differently.

In fashioning a better rule, it is reasonable for the court to require that, when constructive force is at issue, a victim have more than a general fear of her alleged rapist. This requirement would assure that the victim felt truly overcome by her attacker.\(^\text{81}\) The problem, however, with the Alston rule as stated by the supreme court, is not the requirement that the victim have more than a general fear. The flaw, rather, lies in requiring that the victim's fear be based upon only the defendant's actions immediately prior to the intercourse alleged to be rape. A better rule would allow a fact-finder to find constructive force if the victim could have more than a general fear of the defendant based upon all of his previous actions toward the victim.

This suggested rule's utility is illustrated by applying it to the cases discussed above. The Alston defendant had beaten the victim on previous occasions, and several hours before the alleged rape, grabbed her arm and threatened to "fix" her face. The supreme court, however, suggested that, because the defendant beat the victim in the past and grabbed her arm several hours before the intercourse took place, a fact-finder was not to consider such actions in determining whether the victim felt more than a general fear of the defendant. The new rule would permit a fact-finder to consider all of the defendant's prior actions toward the victim. Regardless of whether this would produce a different result, the fact-finder would be better able to reach a just result were it armed with such information.

The new rule could also have avoided the tragic result which the "more than a general fear" rule produced in Lester. The defendant had engaged in sexual intercourse with all of his daughters for years, and had been having intercourse with the victim in the case since she was eleven years old. The victim had seen her father beat her mother with such force that, on one occasion, the defendant knocked out his wife's false

\textit{80.} \textit{Id.} at 1112. Justice Webb appeared to agree with this assessment when he stated in his dissent in Etheridge that he did "not believe [Alston] is consistent with reality." 319 N.C. at 52, 352 S.E.2d at 684 (Webb, J., dissenting).

\textit{81.} See supra note 5.
teeth. On another occasion, the defendant threatened to kill his wife if she ever told anyone about his sexual intercourse with his children.\(^{82}\) He did not, however, use physical force to have sex with his daughter on the day of the intercourse in question.\(^{83}\) If the appellate court had been able to apply the revised rule—that more than a general fear on the part of the victim could be based on all of the defendant's prior actions—the court would likely have affirmed the defendant's conviction in *Lester*.

Presumably, had the defendant in *Lester* slapped his daughter once before having intercourse with her, or grabbed her, for example, the court would have ruled differently. That such incidental facts could so affect a case's outcome suggests a weakness in the "more than a general fear" rule.

Two years later in *Strickland* (where the defendant broke into the victim's apartment, put his hand over her mouth, and dragged her into a bedroom, and then claimed on appeal that the victim had no more than a "general fear" of the defendant),\(^{84}\) the supreme court stated that the "[more than a] 'general fear' theory is applicable only to fact situations similar to those in *Alston.*"\(^{85}\) The new rule similarly would not apply to *Strickland* because the defendant used physical force against his victim.

*Strickland*, however, serves to illustrate the second problem with *Alston*'s "more than a general fear" rule—the problem of deciding how similar a case must be to the facts of *Alston* before a court can apply the *Alston* rule. Because the court distinguished *Strickland* from *Alston* in two ways—that no consensual sexual relationship existed between the parties and that the defendant used physical force\(^{86}\)—it is ambiguous as to how much emphasis the court placed on either factor.

The supreme court could have decided *Strickland* by stating simply that, since the defendant used physical force, the *Alston* "more than a general fear" rule did not apply. Instead it added that no prior sexual history existed between the parties. This suggests that, if a woman allegedly is raped by a man with whom she has or had a sexual relationship, the State will always have a more difficult time proving the required force. *Strickland* represents the notion that courts are uncomfortable permitting a fact-finder to find constructive force in a case involving two adults who have had a consensual sexual relationship. The danger of

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83. Id. at 759, 321 S.E.2d at 167.
85. *Strickland*, 318 N.C. at 656, 351 S.E.2d at 283.
86. Id. at 656-57, 351 S.E.2d at 283.
convicting an innocent defendant is considered a more viable possibility. The court’s line-drawing in *Strickland* illustrates the court’s desire and need for a bright-line rule. The rule, however, must be better articulated than the one established in *Alston*.

In *Etheridge*, the supreme court created a separate category of intrafamilial sexual abuse, in which the State’s burden to prove constructive force would be lessened. The court created an exception to the “more than a general fear” rule rather than overruling *Alston* and creating a new, more liberal definition of constructive force. Here, as in all of the previously discussed cases, the new rule would have better served the court’s purpose by permitting a fact-finder to reach the correct result without the need of an exception.

It is important to recognize that, without a revised rule, lower courts may themselves take the lead in liberalizing the “more than a general fear” rule, and perhaps even force the supreme court to follow suit or face creating grave inconsistencies. The North Carolina Court of Appeals’ holding in *Hardy* may exemplify this possibility. It is clear that on one level, the court of appeals was simply following instructions from *Etheridge* to treat intrafamilial sexual abuse as a class distinct from other situations involving rape, and to interpret more liberally what acts constitute constructive force.

On a different level, however, the court of appeals expanded the definition of constructive force. Even though both *Hardy* and *Etheridge* involved intrafamilial sexual abuse, there were factual differences between the two cases. In *Hardy*, for example, the victim was fifteen when intercourse transpired; the abuse occurred over one summer only; the victim never resisted the defendant, either verbally or physically; the defendant never spoke to the victim immediately prior to intercourse except to say “shh;” the victim never saw the defendant behaving violently; she accepted money from the defendant to keep quiet; and she was not related by blood to the defendant.

In *Etheridge*, the son was eight when abuse began; the abuse continued for five years; and the defendant was abusive toward his family.

Perhaps guided by such distinctions, the court of appeals in *Hardy* found constructive force between the defendant and his step-daughter, arguably performing the most liberal application of the constructive force

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90. *Hardy*, 104 N.C. App. at 231-32, 409 S.E.2d at 99.
requirement to date.\textsuperscript{92} In the future, absent a revised rule, the appellate courts may decide to extend even further this liberal definition of constructive force to include non-intrafamilial sexual abuse. This in turn revives the problem of inconsistency in defining constructive force, precisely what the supreme court tried to prevent when it laid down the “more than a general fear” rule in \textit{Alston}.

Justice Webb’s vehement dissents in \textit{Strickland} and \textit{Etheridge} offer additional support for changing \textit{Alston}’s “more than a general fear” rule, albeit in an indirect manner. In \textit{Strickland}, for example, Justice Webb focused on the factual similarities in \textit{Alston} and \textit{Strickland} while the majority focused on the differences. It is true that \textit{Strickland} involved physical force, and the victim had not been engaged in a consensual sexual relationship with the defendant. But, according to Justice Webb, in neither case did the defendant use more force than was necessary to have intercourse with the victim; in neither case did the victim physically resist; and in neither case did the defendant say what he would do to the victim if she resisted.\textsuperscript{93}

Such parallels are both tenuous and ambiguous. What did Justice Webb mean, for example, when he stated that in neither case did the defendant use more force than was necessary to have intercourse? Perhaps Justice Webb was aware that his parallels were tenuous, and perhaps he intended them to be so in order to illustrate that the “more than a general fear” rule is not consistent with reality. Taken literally, Justice Webb said that if the court is going to let the \textit{Alston} defendant go free, it should also let the \textit{Lester, Strickland,} and \textit{Etheridge} defendants go free. It seems unlikely Justice Webb advocates this result. By suggesting such disagreeable results, however, he draws sharp attention to his view of the “more than a general fear” rule: it cannot produce results consistent with reality.

The “more than a general fear” rule developed in \textit{Alston} is problematic. It forces a court to create distinctions that are arbitrary at best, and completely inconsistent with reality at worst. The supreme court attempted to achieve consistency in defining the elusive concept of constructive force in second-degree rape cases when it created the “more than a general fear” rule. The rule, however, is so limited as to make consistent application impossible. It is unclear at this point when a lower court should apply the rule. It is also unclear how the rule works. Which actions by the defendant, for example, should be taken into aco-

\textsuperscript{92} \textit{Hardy}, 104 N.C. App. at 232, 409 S.E.2d at 99.

count when determining if constructive force may be present—actions that occurred one day before the intercourse, one hour before, five minutes before? All the cases addressed in this Note would have been decided correctly had the court created a new rule sooner—one that permits courts to look at all of a defendant’s past actions toward his victim.

MARY LUNDERGAN HAHN
The Truth About Polygraph Evidence in Criminal Trials: The Implications of State v. Mitchell

For the truth is a terrible thing. You dabble your foot in it and it is nothing. But you walk a little farther and you feel it pull you like an undertow or a whirlpool. First there is the slow pull so steady and gradual you scarcely notice it, then the acceleration, then the dizzy whirl and plunge to blackness. For there is a blackness of truth, too.¹

Our legal system engages partially in the search for truth.² One component of the system's search for truth is the evaluation of witness credibility. Perhaps this concern prompted Professor Wigmore's noted statement: "If there is ever devised a psychological test for the valuation of witnesses, the law will run to meet it."³

The law, however, has not run to meet the polygraph. Polygraph evidence has been one of the most controversial forms of evidence in criminal and civil trials.⁴ Many doubt the reliability of polygraph examinations.⁵ Coupling this reliability concern with the possibility for jury misuse of polygraph evidence, many courts and scholars have concluded that polygraph evidence should be excluded.⁶ At least one commentator

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2. See, e.g., Howard T. Markey, Jurisprudence or "Juriscience"?, 25 WM. & MARY L. REV. 525, 526-27 (1984) ("Both science and law seek truth, but they seek different truths in different ways."). The ascertainment of truth is not, however, an exclusive goal of the system. Ultimately, "[l]aw seeks justice," a quest which involves more than a scientific search for truth. See id. at 527.
3. JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 875, at 237 (2d ed. 1923).
4. MCCORMICK ON EVIDENCE § 206, at 628 (Edward Cleary et al. eds., 3d ed. 1984) ("The courts have not greeted the modern methods of lie detection with enthusiasm."). For a general discussion of the controversies surrounding polygraph evidence, see id. at 625-31.
5. See, e.g., Brown v. Darcy, 783 F.2d 1389, 1395-96 (9th Cir. 1986) (noting that estimates of accuracy of polygraph examinations "range from seventy percent to ninety-five percent," and noting that other factors complicate those estimates); MCCORMICK, supra note 4, § 206, at 626-29; Michael Abbell, Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials, 15 AM. CRIM. L. REV. 29, 33-50 (1977); Note, Lie Detectors in the Workplace: The Need for Civil Actions Against Employers, 101 HARV. L. REV. 806, 807-13 (1988) (noting inaccuracy of the polygraph). But see Barry Tarlow, Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System, 26 HASTINGS L.J. 917, 974 (1975) ("The reliability and validity of the polygraph technique and its probative value as evidence of credibility can no longer be doubted.").
6. See Brown, 783 F.2d at 1395-97; MCCORMICK, supra note 4, § 206, at 630 (describing a "two-pronged" attack on polygraph evidence); Abbell, supra note 5, at 50-59 (noting the danger of misleading a jury); Jerome H. Skolnick, Scientific Theory and Scientific Evidence: An Analysis of Lie Detection, 70 YALE L.J. 694, 727-28 (1961) (concluding that polygraph evidence should be excluded); but see Note, The Emergence of the Polygraph at Trial, 73
would reject polygraph evidence regardless of its probative force or accuracy because of due process and moral concerns, echoing the concern that the truth may have a dark side.

The Supreme Court of North Carolina appeared to lay to rest the issue of admissibility of polygraph evidence in 1983, when it held that polygraph evidence would not be admissible in any trial under any circumstances. Yet the 1991 decision of *State v. Mitchell* makes it abundantly clear that the bright line drawn by the court in 1983 has not eliminated controversy. In *Mitchell* the Supreme Court of North Carolina decided that references to polygraph exams taken by the defendant and two prosecution witnesses in a criminal trial were not a basis for overturning the defendant's convictions for murder and conspiracy to murder.

An understanding of *Mitchell* is vitally important to trial courts, prosecutors, and the criminal defense bar in North Carolina. This Note will examine *Mitchell* against the backdrop of the court's prior rulings regarding the admissibility of polygraph evidence. It will then assess the significance of *Mitchell* with an eye toward delineating the proper scope that *Mitchell* should be given at criminal trials. The Note concludes that although *Mitchell* was decided properly by the court, the overly-broad reasoning in *Mitchell* creates the potential for further erosion of the court's decision to exclude polygraph results from evidence, and dramatically illustrates the dangers of engaging in unnecessary, alternative holdings.

In early 1987, Robert Mitchell began an extramarital affair with Karen Jones, who was married to John Jones. In August 1988, Mitchell approached Dennis Davis and asked Davis to kill John Jones because

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COLUM. L. REV. 1120, 1144 (1973) (concluding that polygraph evidence should be admitted "under strict court supervision").


8. See supra note 1 and accompanying text.


11. Id. at 708-12, 403 S.E.2d at 289-91.

12. Of course, *Mitchell* will have some impact upon the use of polygraphs in civil trials, as did *Grier*. See *Grier*, 307 N.C. at 645, 300 S.E.2d at 361 (prohibiting polygraph evidence at civil and criminal trials). But references to polygraph examinations usually arise in the criminal context, because *Grier* endorsed the use of polygraphs in criminal investigations. Id.

13. See infra notes 47-71 and accompanying text.

14. See infra notes 72-97 and accompanying text.

15. See infra notes 98-103 and accompanying text.

Mitchell was in love with Karen Jones. Davis agreed to kill John Jones for a price, and he carried out the murder on October 15, 1988. After the killing, Mitchell became concerned that he would be a prime suspect. Mitchell enlisted the aid of Walker McCollum, a co-worker, by asking him to "cover" Mitchell for $2,000. The SBI interviewed McCollum, and he told the agents that he had borrowed money from Mitchell to pay child support. The SBI learned from McCollum's mother, however, that she had provided McCollum with the money to pay his child support. When confronted by the SBI, McCollum agreed to cooperate in their investigation of Mitchell. McCollum subsequently wore a recording device to two meetings with Mitchell at which Mitchell made incriminating statements. On January 23, 1989, the State indicted Mitchell for murder and conspiracy to commit murder. A jury convicted Mitchell on both the conspiracy and the first-degree murder charges; he received a life sentence.

During the course of Mitchell's trial, three references were made to polygraph examinations administered by the SBI. Karen Jones made the first of these references. Under cross-examination by defense counsel, she testified as follows:

Q: You have also talked with the SBI, have you not?

17. Id.

18. Id. Davis originally quoted Mitchell a price of $10,000 for killing John Jones. Id. Although the opinion is not clear about the final price for the murder, see id. at 706-07, 403 S.E.2d at 288-89, Davis apparently ultimately agreed to do the job for $4,700 plus a saddle worth approximately $1,200. See id; see also Brief for the State at 3, Mitchell (No. 26A90) (discussing the price negotiations between Davis and Mitchell); Defendant-Appellant’s Brief at 2-3, Mitchell (No. 26A90) (same).

19. Mitchell, 328 N.C. at 706-07, 403 S.E.2d at 288. The circumstances surrounding the murder were as follows: Davis's girlfriend, Connie Singletary, went to the Jones's house around midnight on October 15. Id. Singletary told Mr. Jones that she was having car trouble and requested his assistance. Id. Mr. Jones drove Singletary to her car in his truck. Id. at 707, 403 S.E. 2d at 288. Upon arrival at her car, Jones got out of the truck and Davis shot him. Id. Jones managed to get back in the truck, whereupon Davis shot him again through the driver's side window. Id. Davis then ignited the truck with a jar of gasoline. Id. The next day, a county sheriff's detective and an SBI agent discovered the burned body and truck. Id.

20. Id. at 707, 403 S.E.2d at 289.

21. Id. Mitchell wanted McCollum to "tell anybody who asked that he had borrowed money from" Mitchell. Brief for the State at 5, Mitchell (No. 26A90). The State characterized this phase of the crime as "The Cover-Up." Id.

22. Mitchell, 328 N.C. at 707, 403 S.E.2d at 289.

23. Id. at 707-08, 403 S.E.2d at 289.

24. Id. at 708, 403 S.E.2d at 289.

25. Id.

26. Id. at 706, 403 S.E.2d at 288.

27. Id.
A: Yes.
Q: And the SBI accused you of being involved in this, did they not?
A: No.
Q: Didn't you tell Mr. Mitchell that they were telling you that you were involved?
A: I took a polygraph.\(^{28}\)

In addition, when questioned by the judge concerning events following her husband's death, Jones twice mentioned that she had taken a polygraph examination.\(^{29}\) Jones never explicitly mentioned the results of that examination.

The other two references to polygraph examinations involved taped conversations between McCollum and Mitchell. In one taped conversation played in open court, McCollum stated both that he had taken an examination and that he had failed that examination while disseminating Mitchell's cover story.\(^{30}\) The third occasion was another recording played in open court in which the defendant referred to having taken a polygraph exam and stated that the SBI wanted him to take another.\(^{31}\)

\(^{28}\) Id. at 709-10, 403 S.E.2d at 290.
\(^{29}\) Id. at 710, 403 S.E.2d at 290.
\(^{30}\) Id. at 709, 403 S.E.2d at 289. The pertinent portion of the taped conversation contained the following exchange:

McCOLLUM: Boy, what in the hell are you doing?
MITCHELL: What you say?
McCOLLUM: Chicken, them mother fuckers been back to the house. . . . I got off work and they was there. They coming down hard, Cat. They been down there, they been to Mama's, wanted to know what she had done with the money that she borrowed the day I went to court. I don't know what the hell I'm going to do. Trying to say David, David is trying to say that I'm the one that carried you down there and set it up, and Cat, you know.
MITCHELL: I don't believe David said that. I swear I don't.
McCOLLUM: Man, god damn, man that ain't right to start with you know.
MITCHELL: Well, I know that.
McCOLLUM: But, you know, I don't know what in the hell—I don't know what is coming up. They are talking about the grand jury because I failed my damned polygraph. Wanting to get the grand jury, trying to throw it up to me. I don't know if they are trying to scare me or what.

\(^{31}\) Id. at 708-09, 403 S.E.2d at 289 (emphasis added) (expletives deleted in opinion restored per Defendant-Appellant's Brief at 14-15, Mitchell (No. 26A90)).
Mitchell appealed to the Supreme Court of North Carolina, arguing that it was reversible error for the trial court to have admitted the references to polygraph examinations. The supreme court unanimously disagreed with Mitchell's contention and affirmed his convictions.

Writing for the court, Justice Frye determined that the appropriate standard for appellate review in the case was the plain error rule because the defendant had failed to object to any of the polygraph references at trial. Under the plain error rule, "the appellate court must be convinced that absent the alleged error, the jury probably would have reached a different verdict."

Given the court's decision to apply the plain error rule, Justice Frye forecast the court's ultimate disposition:

The State contends that it presented direct evidence at trial that

MITCHELL: Uh-huh.

McCOLLUM: Boy, they threwed that son of a bitch in —

MITCHELL: Just tell them — just tell them, god dammit, that I apologized to you for having to go through all that shit. (inaudible). I heard that a good while and then they ain't said a fucking word about it. Well, they did. The last thing they said about it, asked me would I be willing to take another one. I said yes. I told the truth on the first one and I'll tell it on the next one.

Id. at 709, 403 S.E.2d at 289-90 (emphasis added) (expletives deleted in opinion restored per Defendant-Appellant's Brief at 15-16, Mitchell (No. 26A90)).

32. Mitchell was allowed to bypass the court of appeals on the appeal of his conspiracy conviction, id. at 706, 403 S.E.2d at 288, because he was entitled to seek direct review of his first-degree murder conviction in the supreme court as a matter of right. See N.C. GEN. STAT. 7A-27(a) (1989).

33. Mitchell, 328 N.C. at 708, 403 S.E.2d at 289.

34. Id. at 712, 403 S.E.2d at 291.

35. Id. at 711, 403 S.E.2d at 290. The plain error rule establishes an exception to North Carolina Rule of Appellate Procedure 10(b), which bars appellate claims that are not based on an objection or motion to strike at trial. N.C. R. APP. P. 10(b); see State v. Black, 308 N.C. 736, 740-41, 303 S.E.2d 804, 806-07 (1983). The exception found in the plain error rule is derived from Federal Rule of Criminal Procedure 52(b), which provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. CRIM. P. 52(b); see Black, 308 N.C. at 740, 303 S.E.2d at 806.

36. Mitchell, 328 N.C. at 711, 403 S.E.2d at 290. Justice Frye also quoted extensively from Black in defining the standard:

[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

Id. (quoting Black, 308 N.C. at 740-41, 303 S.E.2d at 806-07 (citations omitted)).
established that Dennis Davis was hired by defendant to commit the murder in question and that Davis killed John Jones. Neither the State nor defendant offered any evidence to the contrary. The State argues that the evidence complained of by defendant merely involved statements of peripheral witnesses and did not have any effect upon the outcome of the trial. We are inclined to agree.\footnote{37}

The court manifested more than a mere inclination when it concluded that, "considering the evidence in its entirety and assuming error arguendo, we are not convinced, absent the alleged error, that the jury probably would have reached a different verdict. Thus, plain error has not been shown."\footnote{38} The court was satisfied that the evidence against Mitchell was so overwhelming that, even if it was error to have admitted the references to polygraph examinations, Mitchell still would have been convicted.\footnote{39} But the court was not content to rest its holding solely on plain error grounds; it alternatively found no error in admitting the references to polygraph examinations.\footnote{40}

Considering Jones's testimony concerning her polygraph examination, the court noted that the prohibition of evidence of polygraph results in \textit{State v. Grier}\footnote{41} did not preclude use of polygraph examinations during the investigation of a crime.\footnote{42} Moreover, the court believed that "the mere mention of polygraph testing does not necessitate appellate relief."\footnote{43} With respect to the tape in which McCollum admitted that he failed a polygraph examination, the court could not "see how the admission prejudiced defendant. \textit{The apparent effect of McCollum's admission would be to cast doubt upon his veracity as a witness for the State, thus weakening, rather than strengthening, the State's case against defendant.}"\footnote{44} Curiously, although noting that Mitchell had made reference to taking a polygraph examination, the court failed to discuss the defendant's own reference to having taken a polygraph test.\footnote{45} Apparently, the court believed this reference was no more onerous than that of Jones,

\footnote{37. \textit{Id.} at 710, 403 S.E.2d at 290. Interestingly, this statement was made before the court settled on the plain error rule, which may suggest that the court intuitively decided the outcome and then backtracked into the rationale.}

\footnote{38. \textit{Id.} at 712, 403 S.E.2d at 291.}

\footnote{39. \textit{See supra} notes 37-38 and accompanying text (discussing application of plain error rule to facts of \textit{Mitchell}).}

\footnote{40. \textit{See infra} notes 41-46 (discussing the \textit{Mitchell} court's alternative holding).}

\footnote{41. 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983).}

\footnote{42. \textit{Mitchell}, 328 N.C. at 711, 403 S.E.2d at 291 (citing \textit{Grier}, 307 N.C. at 645, 300 S.E.2d at 361 (1983)).}

\footnote{43. \textit{Id.} (citing State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988)).}

\footnote{44. \textit{Id.} at 712, 403 S.E.2d at 291 (emphasis added).}

\footnote{45. \textit{See id.} at 709, 403 S.E.2d at 289.}
which the court appeared to view as a "mere mention" of an investigatory polygraph with no prejudicial effect.46

The court's decision to rest its disposition of the case on more than plain error grounds provides some insight into the justices' interpretation of Grier's absolute prohibition against the introduction of polygraph results in evidence. In order to understand whether Mitchell alters Grier, and, if so, to what extent, one must examine the history of polygraphs in North Carolina trials.

Before 1975 North Carolina courts traditionally refused to admit any polygraph results into evidence.47 In 1975, however, the law began to change with the court of appeals' decision in State v. Steele.48 In Steele, the court of appeals held that polygraph evidence could be admitted if the parties stipulated to its admissibility and certain conditions were met.49 In 1979 the supreme court approvingly cited Steele.50 Thus, North Carolina began to flirt with the idea that polygraph results might be admissible under some circumstances.51

This flirtation ended abruptly with the Grier decision in 1983. In Grier the supreme court ruled that "in North Carolina, polygraph evidence is no longer admissible in any trial."52 The court found two com-

46. See id. at 711, 403 S.E.2d at 291.
49. Id. at 499-502, 219 S.E.2d at 543-44. The other conditions included the trial judge's discretion to refuse to admit such results in evidence because of doubt regarding the examiner's qualifications or concerns about the conditions surrounding the examination; the ability of the party ultimately opposing admission to cross-examine the examiner; and the requirement that the judge issue a cautionary instruction. Id. at 500, 219 S.E.2d at 543; see also Grier, 307 N.C. at 638-39, 300 S.E.2d at 357 (discussing Steele).
52. Grier, 307 N.C. at 645, 300 S.E.2d at 361. Grier involved an appeal from first-degree rape and first-degree burglary convictions. Id. at 629, 300 S.E.2d at 351. The defendant took two polygraph examinations, the first of which was deemed inconclusive, the second of which he failed. Id. at 630-31, 300 S.E.2d at 352-53. Defense counsel sought to cross-examine the polygraph examiner on the inconclusive results of the first test, but the trial judge refused to allow the line of questioning because the judge held that the stipulation entered into by the parties "provided that inconclusive results would not be admissible for any purpose." Id. at 631, 300 S.E.2d at 353. The supreme court differed with the trial judge's interpretation of the stipulation, id. at 634-35, 300 S.E.2d at 355, but went on to address whether such evidence should ever be admitted. See id. at 637-45, 300 S.E.2d at 356-61.

An interesting issue related to Grier is the constitutionality of excluding polygraph evidence introduced by the defendant in a criminal trial. See Debra S. Katz, Note, State v. Dean:
pelling reasons justifying its flat prohibition of polygraph evidence. First, the court was concerned with the inherent unreliability of the polygraph examination in accurately measuring deception.\(^{53}\) Indeed, the court noted that "we have never retreated from our basic position that polygraph evidence is inherently unreliable."\(^{54}\) Any attempt either to explore the defects of polygraph examinations at trial or to require the trial judge to police the polygraph proceedings would be too burdensome or it would invite the "spectre of trial by polygraph."\(^{55}\) Second, the court believed that polygraph results might be misused by a jury; for too many jurors the result of a polygraph examination would be conclusive as to the guilt or innocence of the defendant.\(^{56}\) The court approvingly cited a federal court opinion that noted "[w]hen polygraph evidence is offered in evidence at trial, it is likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi. . . . [T]he jurors' traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted."\(^{57}\) The court did not feel that even a cautionary instruction by the judge could cure polygraph evidence of its possible prejudicial effect on the jury.\(^{58}\)

The \textit{Grier} court thus relied upon the unreliability of polygraph examinations and the likelihood of jury misuse of such examination results in prohibiting the introduction of polygraph results into evidence. This approach parallels that of many commentators.\(^{59}\) More important, this approach follows the structure of the North Carolina Rules of


54. \textit{Id.} at 642, 300 S.E.2d at 359; \textit{see also} DiGiovanni & Puryear, \textit{supra} note 51, at 1145 (noting the pre-\textit{Grier} "court's continuing skepticism of the trustworthiness of polygraph tests and consequent reluctance to find such evidence admissible").


56. \textit{See id.} at 643-45, 300 S.E.2d at 360.

57. \textit{Id.} at 643-44, 300 S.E.2d at 360 (citing United States v. Alexander, 526 F.2d 161, 168 (8th Cir. 1975)). Interestingly, the \textit{Grier} decision also quoted language in \textit{Alexander} which indicated that the Eighth Circuit explicitly rejected the \textit{Steele} holding. \textit{Id.} at 644, 300 S.E.2d at 360.

58. \textit{Id.}

59. \textit{See supra} note 6 and accompanying text (describing "two-pronged" attack on polygraph evidence).
Evidence.\textsuperscript{60}

Despite the strong language and bright-line prohibition in \textit{Grier}, the issue of polygraph evidence in criminal cases has not disappeared in North Carolina. Because \textit{Grier} allowed investigatory polygraph examinations,\textsuperscript{61} references to polygraph examinations made during the investigation phase of a criminal proceeding become likely as investigators or witnesses who were subjected to polygraph examinations testify. The supreme court faced such a reference in the 1988 case \textit{State v. Harris}.\textsuperscript{62} \textit{Harris} involved a failure to declare a mistrial after an investigator mentioned that he had asked the defendant to take a polygraph examination.\textsuperscript{63} The court found the investigator's statement ("I asked both of them if they would agree to take a — polygraph test")\textsuperscript{64} to be "neutral on its face" because it did not imply whether the test was ever given, and if so, what the results were.\textsuperscript{65} The court refused to indulge the defendant's "bald assertion" that a jury would likely infer that he must have failed his polygraph examination because he was on trial.\textsuperscript{66} Moreover, the court noted that defense counsel then cross-examined the witness, revealing that the defendant had volunteered to take the polygraph examination but did not because the investigator did not set up the test.\textsuperscript{67} Also, the trial judge issued a cautionary instruction to the jury.\textsuperscript{68}

Thus, \textit{Harris} held that a neutral reference to an investigatory polygraph that the jury later learned was never administered to the defendant

\textsuperscript{60} The Rules of Evidence were not effective in their current form until July 1, 1984. See Act of July 7, 1983, ch. 701, § 3, 1983 N.C. Sess. Laws 666, 684. Although the rules were not effective until after \textit{Grier}, the court's opinion closely tracks the structure of those rules. For example, the court's evident concern with the unreliability of polygraph examinations implies that the court did not believe that polygraph evidence would "assist" the jury in determining the truthfulness of a witness, a belief which would render such evidence inadmissible under Rule 702. See N.C. R. Evid. 702 (predicating admission of expert or scientific testimony upon the ability of the expert or scientist to "assist the trier of fact to understand the evidence or to determine a fact in issue"). Similarly, the court's focus on the likelihood of jury misuse of such evidence would raise concerns under Rule 403, which excludes otherwise relevant evidence if it tends to mislead the jury, to create prejudice or confusion, or to waste time. See N.C. R. Evid. 403. Indeed, federal courts have availed themselves of the similar Federal Rules of Evidence in addressing the admissibility of polygraph examination results. See, e.g., United States v. Piccinonna, 885 F.2d 1529, 1531, 1535-37 (11th Cir. 1989) (en banc); \textit{id.} at 1541-42 (Johnson, J., concurring in part and dissenting in part); Brown v. Darcy, 783 F.2d 1389, 1394-97 (9th Cir. 1986).

\textsuperscript{63} \textit{id.} at 124, 371 S.E.2d at 697.
\textsuperscript{64} \textit{id.} at 125, 371 S.E.2d at 697.
\textsuperscript{65} \textit{id}.
\textsuperscript{66} \textit{id}.
\textsuperscript{67} \textit{id}.
\textsuperscript{68} \textit{id.} at 126, 371 S.E.2d at 697.
(despite his willingness to take the examination), coupled with a curative instruction from the trial judge regarding the irrelevancy of polygraph examinations, was not adequate grounds for a mistrial. The court did not purport to announce any broad rule relating to references to investigatory polygraphs; instead, the court seemed concerned solely with references to polygraph examinations from which the jury might draw an inference regarding the results. This conclusion is consistent with both Grier, which prohibited the introduction of polygraph examination results into evidence, and with several other state court decisions in jurisdictions that prohibit the introduction of polygraph examination results. The conclusion is also consistent with North Carolina law before 1975. Moreover, the Harris court's conclusion finds some support in the Rules of Evidence.

At first glance, the Mitchell court's holding that the references to Jones's and Mitchell's polygraph examinations did not constitute error

69. Several jurisdictions that prohibit the introduction of polygraph examination results into evidence have found no error where evidence that the accused or a witness had taken a polygraph examination was admitted, provided the results of such a polygraph were not revealed. Johnson v. State, 166 So. 2d 798, 804-05 (Fla. Dist. Ct. App. 1964); People v. Sammons, 17 Ill. 2d 316, 320, 161 N.E.2d 322, 324 (1959); McQueen v. Commonwealth, 669 S.W.2d 519, 523 (Ky.), cert. denied, 469 U.S. 893 (1984); Lusby v. State, 217 Md. 191, 194-95, 141 A.2d 893, 894-95 (1958); Pittman v. State, 236 Miss. 592, 597-98, 111 So. 2d 415, 417 (1959); Commonwealth v. Garland, 475 Pa. 389, 397, 380 A.2d 777, 781 (1977); Commonwealth v. Upchurch, 355 Pa. Super. 425, 433, 513 A.2d 995, 998-99 (1986), appeal denied, 514 Pa. 630, 522 A.2d 558 (1987); State v. Collins, 60 Ohio App. 2d 116, 123, 396 N.E.2d 221, 226 (1977). Nevertheless, some courts in jurisdictions prohibiting the introduction of polygraph examination results have found it error to admit references to polygraph examinations, because of the danger that a jury will infer that the defendant's trial is partially the result of his failing the polygraph examination. See Stack v. State, 234 Ga. 19, 23-25, 214 S.E.2d 514, 517-18 (1975), overruled by State v. Chambers, 240 Ga. 76, 239 S.E.2d 324 (1977); State v. Perry, 274 Minn. 1, 13, 142 N.W.2d 573, 580 (1966).

70. See, e.g., State v. Williams, 279 N.C. 515, 524, 184 S.E.2d 282, 288 (1971) ("There was no evidence, before the jury, as to . . . the result of the [polygraph] test . . . . There is no merit in this assignment of error.").

71. Recall the similarities between the current Rules of Evidence and the Grier opinion. See supra note 60 and accompanying text. In Harris, the polygraph reference could not be categorized as expert or scientific evidence offered for the purpose of determining a witness's truthfulness. Instead, Harris involved an uninvited, non-expert opinion, placing the reference outside of the scope of Rule 702. See N.C. R. Evid. 702; see also supra note 60 (discussing relationship of Rule 702 to Grier). Still, the testimony in Harris does not seem to be relevant under Rule 401, and thus should not be admitted under Rule 402. See N.C. R. Evid. 401, 402. The Harris court sidestepped the issue of relevance (probably because the judge issued a curative instruction, see supra note 68 and accompanying text), and focused on an analysis comparable to Rule 403, which excludes evidence likely to mislead a jury or cause prejudice. See N.C. R. Evid. 403. By noting that the reference was "neutral," see supra note 65 and accompanying text, and possibly beneficial to the defendant, see supra note 67 and accompanying text, the court apparently believed that the evidence hardly could mislead the jury to the prejudice of the defendant. Thus, Rule 403 concerns would not justify reversal of the trial judge.
seems to be dictated by *Harris*. Neither the defendant nor Karen Jones explicitly stated the results of the polygraph examinations, and the court cannot indulge in the "bald assertion" that, because the defendant happens to be on trial, he must have failed his examination while the prosecution witness must have passed hers.\(^7\) Nevertheless, this assertion is stronger in *Mitchell* than in *Harris*. First, Mitchell indicated that the SBI asked him to submit to another polygraph examination,\(^3\) which could imply that he failed the first test, or, at a minimum, that the results were inconclusive.\(^7\) Second, and more important, Jones's first statement that she took a polygraph came in response to defense counsel's questions concerning whether the SBI thought she was involved in the murder conspiracy.\(^7\) In this context, Jones's statement appears less neutral and more exculpatory of her own possible involvement in the crime. As a witness for the prosecution, such a possible exculpatory inference obviously would benefit her credibility.\(^7\) Thus, the statements in *Mitchell* contained possible inferences; they were not as neutral as the statement in *Harris*.\(^7\) Moreover, because defense counsel failed to object to the evidence, there was no opportunity for a curative instruction in *Mitchell*.\(^7\) Additionally, unlike *Harris*, one could not infer that the polygraph references in *Mitchell* exculpated the defendant.\(^7\) Indeed, the critical distinction between *Harris* and *Mitchell* is that in *Harris* the jury learned no polygraph was ever given, whereas the jury in *Mitchell* learned that two polygraph examinations were given, and could infer their results from the context of the questioning.

If Jones's and Mitchell's statements raised possible inferences about the results of polygraph examinations, the recording of McCollum's admission that he failed a polygraph examination\(^8\) provided the results

\(^72\). *See Harris*, 323 N.C. at 125, 371 S.E.2d at 697.

\(^73\). *Mitchell*, 328 N.C. at 709, 403 S.E.2d at 290.

\(^74\). Alternatively, the request could merely imply that the SBI wished to double-check the defendant's prior examination; however, the ultimate conclusion, that there is more to Mitchell's argument than the "bald assertion" of *Harris*, still seems relatively uncontroversial.

\(^75\). *See Mitchell*, 328 N.C. at 709-10, 403 S.E.2d at 290.

\(^76\). The Supreme Judicial Court of Maine reached a similar conclusion, finding prejudicial error when a victim in a rape and sodomy prosecution stated during direct examination that she had undergone a polygraph examination, because the statement could have been perceived as corroborative of her testimony. State v. Edwards, 412 A.2d 983, 984-86 (Me. 1980). The court reached this conclusion despite having held, much as the *Harris* court did, that "[a] reference to a lie detector test in a criminal trial is not ground for reversal if the result of the test cannot be inferred . . . ." *Id.* at 985; *see Harris*, 323 N.C. at 125, 371 S.E.2d at 697.

\(^77\). For a discussion of *Harris*, see *supra* notes 62-71 and accompanying text.

\(^78\). Naturally, the trial judge could have issued a curative instruction *sua sponte*.

\(^79\). *See Harris*, 323 N.C. at 125, 371 S.E.2d at 697.

\(^80\). *Mitchell*, 328 N.C. at 708-09, 403 S.E.2d at 289.
outright. The *Mitchell* court explained away this problem by contending that McCollum’s failure could only “cast doubt upon his veracity as a witness for the state.”\(^8\) The court, however, ignored the context of McCollum’s testimony. McCollum made the statement about failing the polygraph when discussing the cover story Mitchell had created. His failure would not impeach his own credibility as a witness as much as it would make his prior cover-up statements appear to be part of a fabric of deception woven by the defendant.\(^8\) Thus, McCollum’s failure would *strengthen*, not impeach, his credibility as a witness: it would make his allegations that Mitchell had concocted a cover-up *more* believable. To assert that the evidence of McCollum’s polygraph examination failure\(^3\) really prejudiced the State is to indulge in a fanciful re-creation of the context in which the jury heard those polygraph results.

In sum, *Mitchell* involved evidence, such as Jones’s and Mitchell’s statements, which on its face appears to meet *Harris’s* limitation of *Grier*.\(^4\) But when viewed in the proper context, and when contrasted with the exculpatory inferences that the *Harris* jurors could have made, these statements lose much of their facial neutrality. Moreover, McCollum’s testimony revealed to the jury polygraph examination results, which, given their context, raised probable inferences prejudicial to the defendant. *Mitchell* seriously undercuts *Grier* by taking the *Harris* exception to an extreme: polygraph evidence that *Grier* barred may be brought in through the back doors of *Harris* and *Mitchell*.

This interpretation may be unduly pessimistic. The tone of the *Mitchell* opinion strongly suggests that the application of the plain error standard of review had more to do with the disposition of the case than any active hostility toward *Grier*.\(^5\) The court voiced little concern that

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81. Id. at 712, 403 S.E.2d at 291.
82. *Mitchell* advanced this argument before the court when he contended that McCollum’s polygraph failure reinforced “McCollum’s testimony that [Mitchell] had in fact gotten him to lie about having borrowed money to explain funds missing from the redeposit of [Mitchell]’s large withdrawal of funds from savings.” Defendant-Appellant’s Brief at 19, *Mitchell* (No. 26A90).
83. Whether McCollum ever did in fact fail a polygraph examination is not stated in the opinion or the briefs filed by the parties. Whether McCollum ever took a polygraph exam is, however, immaterial. When the jury was informed, via the recordings, that McCollum had failed a polygraph examination purportedly administered while McCollum was disseminating Mitchell’s cover story to the SBI, the consideration under *Grier*, which concerned jury misuse of polygraph evidence, arose. See *State v. Grier*, 307 N.C. 628, 643-45, 300 S.E.2d 351, 360 (1983).
84. *See supra* notes 62-71 and accompanying text (discussing *Harris’s* articulation of the limits of *Grier*).
85. In this respect, *Mitchell* is in accord with many cases in which a defendant failed to object at trial to a polygraph reference in a jurisdiction that otherwise bars the admission of polygraph results. Such errors are routinely found not to be prejudicial or reversible. *See*
the references to the polygraph examinations incriminated the defendant. From the removed perspective of an appellate court bench, the facts of *Mitchell* do not create obvious prejudice toward the defendant: two people indicated they had taken polygraphs but neither made the results of that examination explicit, and a witness for the State admitted to having failed a polygraph examination. Only when inquiring into the context in which the references were made is the error of *Mitchell* apparent.

In light of the incorrect result in *Mitchell*, are the limitations on *Grier* enunciated in *Harris* and *Mitchell* valid? On the one hand, limitations on *Grier* may not be in the long-term interest of justice. On the other hand, it is impractical to overturn a conviction whenever a reference to a polygraph examination occurs. Additionally, many such references do not raise problems for a defendant; indeed, some references, such as those in *Harris*, may actually exculpate the defendant. To create an automatic rule overturning any conviction obtained when there was reference to a polygraph examination would be unwarranted. Indeed, while some states that exclude polygraph examination results from evidence find error when any reference to a polygraph examination is made, most do not.

Accepting that we must tolerate some polygraph references, could *Mitchell* have been decided differently so as to make the limitation on *Grier* clearer and more just? Of course, the court could have altered the

People v. Parrella, 158 Cal. App. 2d 140, 147, 322 P.2d 83, 88 (1958) (refusing to find prejudicial error in a case involving error said to be invited by the defense because the other evidence of guilt was overwhelming); *see also* State v. Temple, 192 Neb. 442, 442-44, 222 N.W.2d 356, 357-58 (1974) (finding reference to a polygraph test not reversible error); State v. Williams, 279 N.C. 515, 524, 184 S.E.2d 282, 288 (1971) (same).

86. *See Mitchell,* 328 N.C. at 711-12, 403 S.E.2d at 290-91.

87. *Mitchell* did, however, suggest that the evidence might have been interpreted differently had McColllum's polygraph examination failure — which tended to reinforce his story that he was helping Mitchell cover up the murder — not been admitted. Defendant-Appellant's Brief at 19, *Mitchell* (No. 26A90). Given that the supreme court unanimously decided against Mitchell, and given its particular emphasis on the plain error rule, it seems that the court found no substance to this argument.

88. This view also assumes that Grier's hostility toward polygraph evidence is an appropriate concern for justice. Justice is not necessarily promoted by the absence of polygraph evidence for those who do not believe that it is a "loose cannon on the deck" of a trial. *See* Defendant-Appellant's Brief at 19, *Mitchell* (No. 26A90).

89. Given the court's endorsement of investigatory polygraphs, *see* State v. Grier, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983), it is likely that polygraphs often will be used in criminal investigations. As witnesses inadvertently may make reference to such examinations, such references may be frequent.

90. *See supra* note 67 and accompanying text.

91. *See supra* note 69 and accompanying text.
plain error rule in light of the Grier holding, as the defense suggested.\(^{92}\) Apparently, such an alteration was unpalatable to the court. The court may have found it illogical to alter the standard of review for a particular type of error; such an asymmetrical holding might confuse the law regarding appropriate standards for appellate review. Moreover, without protection of the plain error rule, the court might have been forced to overturn the convictions of a party it thought was clearly guilty.

Another option would have allowed the court to dispose of the case in the same manner while ensuring that Grier was not undercut. The court simply could have assumed error arguendo under Grier and still have found no plain error. This result would have preserved the spirit of Grier without altering the defendant's convictions.

If the court felt compelled to address the Grier issue despite the availability of an easy affirmance under the plain error rule, the least it could have done was decide that issue with some clarity and logic. The simplest, most obvious way for the court to have addressed the polygraph evidence issue in Mitchell would have been to address the error in light of the Rules of Evidence. As noted earlier, the Grier and Harris rulings paralleled the structure of the Rules of Evidence. By explicitly applying the structure of those rules to Mitchell, the court could have started its inquiry by focusing on the type of references involved. Since the polygraph references did not involve expert testimony offered to establish the truthfulness of a witness or party, the interaction of Rules 702 and 403, to which Grier implicitly spoke,\(^{93}\) would not be the focus of inquiry. Rather, a standard analysis of Rules 401-403, which was implicitly involved in Harris,\(^{94}\) should have guided the court's inquiry. Under Rule 401, the testimony received in Mitchell would be of minimal relevance at best.\(^{95}\) Conversely, the possibility for misleading the jury in

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92. Defendant-Appellant's Brief at 19, Mitchell (No. 26A90) ("Whatever the standard of review applicable to the instant issue, surely that standard must be modified where the evidence in question is so unreliable that parties may not stipulate to its introduction.").

93. See supra note 60.

94. See supra note 71.

95. One may contend that the references were relevant to the context of events involved in the trial. For example, McCollum and Mitchell's references were part of conspiratorial conversations. See supra notes 30-31. Similarly, Jones's references to polygraph examinations could be slightly relevant to the timing of investigatory events. See Mitchell, 328 N.C. at 711, 403 S.E.2d at 291. Yet it would be very difficult to contend that those references could not be redacted or stricken without sacrificing the jury's ability to understand the facts of the case. Thus, whatever contextual relevance these references possess is slight. Moreover, if the unreliability of the polygraph renders its results inadmissible when offered by an expert because of a failure to "assist" the jury, see supra note 60, it can hardly be contended that any possible implication that a jury might draw from a lay witness's reference to such examinations becomes more relevant.
Mitchell did exist. Thus, the court should have found error by following the logic of Rule 403, or at least recognized the countervailing interests involved in admitting the evidence.

Unfortunately, the court, by finding both no error in admitting the evidence and no plain error, may have painted with too broad a brush. Yet Mitchell defines the law as it now stands in North Carolina: references to polygraph examinations, when not offered by experts to prove the truthfulness of a witness, are not erroneously admitted if such references do not prejudice the defendant. Although this holding may be relatively non-controversial, what is disturbing is the court's lack of rigor in examining the possibility of prejudice to the defendant. Hopefully, trial courts will not misinterpret the supreme court's carelessness in Mitchell as a major retreat from Grier. The court's holding in Mitchell should be interpreted as a confusing overlap between the application of the plain error rule and Grier's prohibition of polygraph evidence. Given that Grier has not been overruled explicitly by the court, trial courts should continue to rely on its existence in deciding cases, and may find it fruitful to view Grier and its progeny as structurally similar to the Rules of Evidence.

Similarly, defense counsel should never, without making a timely objection in the familiar language of the Rules of Evidence, allow the admission of evidence regarding the administration of a polygraph examination to any witness or the defendant. By lodging a timely objection, the plain error rule will be inapplicable and the defendant's opportunity for reversal will be enhanced greatly.

96. See supra notes 72-83 and accompanying text (discussing possibility for misleading jury to prejudice defendant).
97. See N.C. R. EVID. 403 (excluding evidence likely to mislead a jury, confuse issues, create prejudice, or waste time).
98. One may view Harris and Mitchell as two prongs of a single limitation on Grier. While Harris states that a reference to a polygraph examination that does not implicitly or explicitly divulge the results of the examination is not error, see supra notes 62-71 and accompanying text (discussing Harris), Mitchell goes further, holding that the results must prejudice the defendant before error exists. See Mitchell, 328 N.C. at 712, 403 S.E.2d at 291.
99. Indeed, the Mitchell court speaks favorably of Grier, reinforcing the notion that the court was not attempting to alter Grier substantially. See Mitchell, 328 N.C. at 711, 403 S.E.2d at 291.
100. See supra notes 60, 71, & 93-97.
101. The objection obviously should be couched both in terms of relevancy and danger of misleading the jury.
102. See supra notes 35-36.
103. In addition to objecting to the introduction of any evidence referencing polygraph testing, defense counsel, if aware of polygraph examinations during the investigation of the crime, should consider filing a motion in limine to prevent the prosecution from asking any questions directly calling on a witness to mention a polygraph examination. Similarly, defense
Notwithstanding the confusion introduced by Mitchell, Grier remains good law. The supreme court should clarify the confusion Mitchell injects into the law at the earliest possible moment, taking advantage of settled principles found in the Rules of Evidence. More important, the court should be careful about engaging in unnecessary, alternative holdings in the future lest it create confusion in other areas of the law. Too much of this carelessness risks plunging lawyers and judges into a blackness in which no one can discern the law.

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counsel may ask the trial judge to remind the prosecutor to admonish any witness from mentioning polygraph testing. Prosecutors seeking such a motion or admonition may be treated less favorably because of constitutional concerns. See supra note 52 (discussing possible constitutional infirmities surrounding blanket prohibition of defense-introduced polygraph examinations).
Hands Off! New North Carolina General Statutes
Section 115C-390 Allows Local School Boards to Ban
Corporal Punishment

[A first-grade teacher] hit 6-year-old Jerry . . . more than 100
times Thursday with a yardstick on the backs of his legs, bottom,
and hands . . . . "[The teacher] told them she would give them
five licks for each problem they got wrong. . . . He doesn't want to
go [to school]. . . . He thinks because the other children were
cheering and telling where to spank him . . . [that] the other kids
hate him."" 1

Corporal punishment in public schools is an American tradition. 2
Grounded in social and religious norms and permitted by the common-
law doctrine of in loco parentis, 3 corporal punishment in schools is a
commonly practiced method of discipline, 4 and persists despite the gen-

1. 1 Wrong Math Answer = 5 Spanks, MORNING STAR (Wilmington, N.C.), May 21,
2. Irwin A. Hyman & Eileen McDowell, An Overview, in CORPORAL PUNISHMENT IN
AMERICAN EDUCATION 3, 5 (Irwin A. Hyman & James H. Wise eds., 1979) (noting that a
schoolhouse built in 1793 in Sunderland, Massachusetts had a whipping post built into the
schoolhouse floor). See generally John Manning, Discipline in the Good Old Days (1959), re-
printed in CORPORAL PUNISHMENT IN AMERICAN EDUCATION, supra, at 50-61 (an anecdotal
history of corporal punishment in America).

This Note deals with the issue of corporal punishment in schools. The appropriateness of
parental use of this form of punishment is outside the scope of this Note. Any reference in this
Note to corporal punishment is intended to apply only to its use in schools.
3. See infra notes 26-35 and accompanying text.
4. The Department of Education's Office for Civil Rights estimates that nearly 900,000
students received corporal punishment in the 1987-88 school year. DEPARTMENT OF
EDUCATION, OFFICE FOR CIVIL RIGHTS, 1988 ELEMENTARY AND SECONDARY SCHOOL CIVIL
RIGHTS SURVEY app. b, at 1. Twenty-two thousand of those incidents occurred in North
Carolina. 20 School Systems Ban Corporal Punishment, CHILDREN FIRST (N.C. Child Advo-
cacy Inst., Raleigh, N.C.) Fall 1991, at 1, 3 [hereinafter 20 School Systems] (noting a signifi-
cant decline from 66,000 incidents in 1983-84).

On a local level in North Carolina, the Charlotte/Mecklenburg school system recorded
228 paddlings during the 1990-91 school year. Id. at 1. Wake County schools reported about
1,500 incidents of corporal punishment in 1986, but after the implementation of a stringent
reporting policy, that number decreased to just seven cases in 1990-91. Id. at 3. Of the school
systems sampled in the federal survey, several systems reported rates higher than the state
average of 2.7%: Tyrrell, 11.7%; Haywood and Elkin, 7.3%; Lincoln, 5.7%; Robeson, 5.5%;
Stokes, 4.8%; Avery, 5.4%; Madison, 4.2%; Yadkin and Harnett, 3.7%; Winston-Salem/For-
syth and Jones, 3.3%; Goldsboro, 3.2%; Caswell, 3%; and Orange, 2.7%. Id.

While the statistics reflect the magnitude of the situation, anecdotal evidence reveals the
personal danger posed by the use of corporal punishment in schools. In Charlotte, North
Carolina, a ten-year-old boy required medical attention after a principal spanked him in a
boiler room while an assistant held the boy's hands. Id. at 1. A first-grade teacher in New
Hanover, North Carolina, punished six students for giving wrong answers in class by whipping
them with a yardstick; some students received over a hundred licks. See supra note 1 and
eral belief that it is an ineffective and often harmful method of discipline.\(^5\)

Over the last five years, however, the trend in America has moved toward statutory bans on corporal punishment in public schools. Currently, twenty-three states have statutes prohibiting corporal punishment in public schools.\(^6\) This represents a dramatic increase from only six jurisdictions in 1987.\(^7\) Additionally, by the summer of 1991, all but one of the states that did not ban corporal punishment allowed local education boards to prohibit the practice in their districts.\(^8\) Many large districts nationwide have taken advantage of this authority to enact local bans.\(^9\)

The one state not allowing local boards to prohibit the use of reasonable force to maintain discipline was North Carolina.\(^10\) In June 1991, however, the North Carolina General Assembly amended section 115C-390 of the North Carolina General Statutes to give local school boards the autonomy to “restrict or prohibit” corporal punishment.\(^11\)


5. While many opponents view the use of corporal punishment as harmful per se, others base their opposition on the high number of instances of abuse and unintentional physical or emotional harm that often results. See infra note 79 and accompanying text.


11. The full text of the amended statute reads:

Except as restricted or prohibited by rules adopted by the local boards of education, principals, teachers, substitute teachers, voluntary teachers, and teacher assistants
This Note will discuss briefly the statutory change and its legislative history. After reviewing the social and legal justifications for corporal punishment in schools, the Note will discuss the case law concerning corporal punishment, first reviewing North Carolina cases, followed by a brief review of federal case law. The Note then will address the issue of local versus state control of public education, suggesting that, although section 115C-390 may be an appropriate first step, a statewide ban should be enacted in North Carolina. Finally, the Note will discuss the significance of the statute to local school boards, state school children, and litigation in the field.

The statutory change is rather straightforward. Reflecting established common law originally codified in 1959, former section 115C-390 permitted the use of reasonable force to "restrain or correct pupils and maintain order." While the General Assembly could have banned the use of corporal punishment as a disciplinary tool, it opted instead to delegate the issue to local school boards. Thus, the amended version of section 115C-390 does not prohibit the use of corporal punishment; it merely permits local school boards to do so.

This was not the first effort to change North Carolina's reasonable force provision, but prior legislative attempts to ban corporal punishment in the state's public schools proved unsuccessful. In 1975 Representative Margaret Keesee introduced a bill proposing a corporal punishment ban in schools. A House committee, however, rejected the proposal. Similarly, in 1985 a local option bill failed in the House by three votes. Rather than allow the corporal punishment issue to die, how-

and student teachers in the public schools of this State may use reasonable force in the exercise of lawful authority to restrain or correct pupils and maintain order.


12. See infra notes 36-43 and accompanying text.


14. Id.

15. N.C. GEN. STAT. § 115C-390 (1991). The amendment deleted the last sentence in the old statute prohibiting local school boards from banning the use of reasonable force and added an introductory clause expressly permitting prohibitions by local boards. Id. For the full text of the amended statute, see supra note 11.


17. Id.


ever, the House approved a study committee. The study committee considered recommending a total ban or a local control option, but it concluded that teachers and school officials needed adequate discipline alternatives before corporal punishment “as a last resort” could be eliminated. The study committee nonetheless officially recommended due process safeguards substantially similar to the amendments to section 115C-391 passed in 1987.

Then in 1991, at the request of an undergraduate class at the University of North Carolina at Chapel Hill, Senator Howard Lee of Chapel Hill introduced a bill calling for local control. Although many of the proposal’s supporters opposed corporal punishment in general, none of the legislative history suggests the measure was intended to circumvent the General Assembly’s past reluctance to ban corporal punishment. In fact, Senator Lee made it clear in committee that “the intent of the bill was to provide flexibility to local school units.” While such attempts to eliminate corporal punishment are not new to North Carolina, change is difficult for a practice so ingrained through social, religious, and legal traditions. Early colonial schools prided themselves on the strict discipline required for developing character and morality.

22. Id. at 13. The committee reported that it would like to consider a total ban of corporal punishment and recommended that local boards and state education authorities work to train school personnel in alternative discipline methods. Id. at 14.
24. Major professional organizations opposing corporal punishment include the National Education Association, the American Medical Society, the American Bar Association, the National PTA, the North Carolina PTA, the North Carolina Medical Society, the North Carolina Pediatrics Society, and the North Carolina Child Advocacy Institute. Niblock, supra note 16, at 1, 2; see also American Psychological Association, A Statement on Corporal Punishment (1975), reprinted in CORPORAL PUNISHMENT IN THE SCHOOLS: ITS USE IS ABUSE, supra note 9, at 5 (noting the ineffectiveness and counterproductivity of corporal punishment and stating its opposition to its use).
25. Minutes, North Carolina House Committee on Education (June 6, 1991) (statement of Sen. Howard Lee). Counsel to the Senate Committee on Education summarized the bill by saying it would allow local school boards to make their own decisions regarding corporal punishment. Minutes, North Carolina Senate Committee on Education (May 8, 1991) (statement of Mary Thompson, legal counsel to the committee).
focus reflected values rooted firmly in the Judeo-Christian religious tradition. Along with Old Testament teachings encouraging the use of corporal punishment, the Christian teaching of total depravity further bolstered the practice.

Legal traditions reinforced these societal and religious norms through the doctrine of *in loco parentis*. Although several state statutes rely on the doctrine, its application to the teacher-student relationship in modern public schools is of questionable validity. Today, the mandatory nature of public education and the decreased likelihood that a given parent would corporally punish her child, or choose to delegate that authority to a school official, suggest that a teacher may not stand in the place of a parent and administer corporal punishment. Modern justification for using force to discipline rests on the state's interest in maintaining the control necessary to educate children properly. Former Section 115C-390 of the North Carolina General Statutes, authorizing the use of reasonable force to maintain discipline, reflected this shift.

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28. *See Proverbs* 13:24 (“He that spareth his rod hateth his son: but he that loveth him chasteneth him betimes.”) (King James).
29. *Hyman & Lally, supra* note 26, at 9. The term “beating the devil” out of children arises from this Calvinistic concept of total depravity, that humankind is born into sin. *Id.* Indeed, Christian Fundamentalists are often zealous supporters of corporal punishment. *Id.; see Maurer, Paddles Away, supra* note 4, at 69-70.
30. Cynthia D. Sweeney, *Comment, Corporal Punishment in Public Schools: A Violation of Substantive Due Process?*, 33 HASTINGS L.J. 1245, 1246 (1982) (“For over two hundred years, Anglo-American law has allowed school officials to punish disobedient students with physical force.”).
31. 1 WILLIAM BLACKSTONE, *Commentaries* *453*. The doctrine originated in England as legal justification for teachers who used corporal punishment to discipline student behavior in and out of school. Perry A. Zirkel & Henry F. Reichner, *Is the “In Loco Parentis” Doctrine Dead?*, 15 J.L. & EDUC. 271, 273-76 (1986). Literally translated, *in loco parentis* means “in place of the parent.” EDWARD C. BOLMEIER, LEGALITY OF STUDENT DISCIPLINARY PRACTICES 9 (1976). With regard to teacher liability for injuries to a student, the prevailing view limited liability to situations where the actions constituted willful or wanton conduct or where the teacher was negligent. *Id.* at 10-11; *see also* Drum v. Miller, 135 N.C. 205, 216-17, 47 S.E. 421, 426 (1904) (following the prevailing view).
33. BOLMEIER, supra note 31, at 29; *cf.* State v. Pittard, 45 N.C. App. 701, 703, 263 S.E.2d 809, 811 (holding that *in loco parentis* is not a defense for a day-care worker charged with corporal punishment), disc. rev. denied, 300 N.C. 378, 267 S.E.2d 682 (1980).
away from the common-law doctrine to reliance on codified state interests.

Early North Carolina case law, dating back to 1837, focused on setting the limits for reasonable corporal punishment. In State v. Pendergrass the lower court convicted a schoolmaster of assault and battery for whipping a "six or seven"-year-old girl with a switch. The North Carolina Supreme Court, applying a two-part test, determined that a teacher may be held criminally liable for corporal punishment where (1) its use causes or was intended to cause permanent injury, or (2) the punishment was inflicted with malice.

While Pendergrass established the standard for criminal actions, in Drum v. Miller the North Carolina Supreme Court addressed the applicable standard for damages in a civil suit stemming from a teacher's use of corporal punishment. The defendant in Drum, a public school teacher, threw a pencil at a student who turned his head from his lesson book. The pencil struck the student in the eye, causing permanent sight loss. The Drum court followed the malicious intent or permanent injury standard set forth in Pendergrass, but expanded the permanent injury prong to include liability where a teacher failed to use ordinary care and permanent injury was the foreseeable result. The negligence language in Drum suggests a subtle shift toward the reasonable force standard eventually codified in 1959.

privileged to apply such reasonable force... as he reasonably believes to be necessary for [the child's] proper control, training or education, [unless the parent prohibits the use of force]."

Addressing the doctrine of in loco parentis as adopted expressly in the state's corporal punishment statute, the West Virginia Supreme Court of Appeals held that "in light of the present day standards and legislative enactments in the child abuse area [the doctrine] cannot be interpreted as permitting corporal punishment of public school children by means of a paddle, whip, stick or other mechanical devices." Smith v. West Virginia State Bd. of Educ., 170 W. Va. 593, 599, 295 S.E.2d 680, 687 (1982).

36. 19 N.C. (3 & 4 Dev. & Bat.) 365 (1837) (per curiam).

37. Id. at 365. The North Carolina Supreme Court reversed the conviction because of faulty jury instructions. Id. at 367-68.

38. Id.

39. 135 N.C. 205, 47 S.E. 421 (1904).

40. Id.

41. Id. at 205, 47 S.E. at 422.

42. Id. at 216-17, 47 S.E. at 426. Utilizing this standard, the court reversed the trial court's finding that the teacher was not liable. Id. at 218, 47 S.E. at 426.

43. The reasonableness language in Drum was substantially adopted in Gaspersohn v. Harnett County Board of Education, 75 N.C. App. 23, 28-29, 330 S.E.2d 489, 493-94, disc. rev. denied, 314 N.C. 539, 335 S.E.2d 315 (1985). In Gaspersohn, a student requested corporal punishment in lieu of an in-school suspension. After initially refusing, the assistant principal cut the number of licks from nine to six, and asked the student after three licks if she wanted to continue. Id. at 25, 330 S.E.2d at 491. The court rejected a proposed instruction that "corporal punishment should never be used as a first line of punishment except in cases in which the
Although substantially codifying the Pendergrass and Drum standards, former section 115C-390 also precluded expressly local rules or regulations "which prohibit[] the use of [reasonable] force." The North Carolina Court of Appeals held in *Kurtz v. Winston-Salem/Forsyth County Board of Education* that this provision did not preclude stringent regulations concerning the administration of corporal punishment. The school board in *Kurtz* fired a teacher for repeatedly administering corporal punishment in violation of the board's regulations. The court of appeals affirmed the school board's action and its right to regulate the use of corporal punishment. In the hands of a principal opposed to corporal punishment, regulations such as those in *Kurtz* may provide a *de facto* ban on the practice.

The North Carolina reasonable force standard survived federal constitutional scrutiny in *Baker v. Owen*. The *Baker* court held that, although "the Fourteenth Amendment concept of liberty embraces the right of a parent to determine and choose between means of discipline of act of the student is so antisocial or disruptive in nature as to shock the conscience." *Id.* at 29, 330 S.E.2d at 494.

The *Gaspersohn* court, while understandably ruling against a plaintiff who repeatedly requested corporal punishment, indicated that punitive damages may be appropriate for the malicious administration of corporal punishment. *Id.* at 34-35, 330 S.E.2d at 497.


46. *Id.* at 418, 250 S.E.2d at 722. Although *Kurtz* was decided before passage of the 1987 amendment to § 115C-391, which provided due process requirements in accord with *Baker v. Owen*, 395 F. Supp. 294, 302-03 (M.D.N.C.), aff'd, 423 U.S. 907 (1975) (mem.), the Winston-Salem/Forsyth County School Board had an extensive policy concerning the administration of corporal punishment. The policy provided: "(1) [Corporal punishment should only be administered in] the principal's office by the principal or teacher with an adult witness present; (2) Pupils may not be struck or slapped about the face or head; (3) The parents of the child shall be notified." *Kurtz*, 39 N.C. App. at 417, 250 S.E.2d at 721. A second board regulation further provided that: (1) corporal punishment should be used only after other disciplinary methods have failed; (2) students must be told beforehand that certain conduct could result in corporal punishment; (3) the punishment should not be administered when the official is angry or upset; and (4) a paddle is the only acceptable means of administering corporal punishment. *Id.* at 418, 250 S.E.2d at 722.

47. *Kurtz*, 39 N.C. App. at 412, 250 S.E.2d at 719 (the official charges were inadequate performance, insubordination, and failure to comply with board-prescribed corporal punishment guidelines).

48. *Id.* at 418-19, 250 S.E.2d at 722.


children," the compelling state interest in maintaining order in the classroom outweighs the parent’s interest. Finding, however, that a “child has a legitimate interest in avoiding unnecessary or arbitrary infliction of [corporal punishment,]” the court set forth minimum procedural due process rights for students. The court also held that this particular application of corporal punishment (the child was paddled twice) did not violate the Eighth Amendment’s prohibition of cruel and unusual punishment.

The United States Supreme Court’s definitive decision concerning corporal punishment came in Ingraham v. Wright, where the Court addressed the issue of whether the Eighth Amendment applies to the practice of corporal punishment in schools. The Ingraham Court determined that the Eighth Amendment only applies to criminals. The Court also held that, although students have a Fourteenth Amendment right to be free from unjustified intrusions of bodily integrity, state common-law civil and criminal remedies protect this due process right.

51. Id. at 299; cf. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (holding that a state statute requiring public school attendance violated Fourteenth Amendment substantive due process rights); Meyer v. Nebraska, 262 U.S. 390, 400-01 (1923) (striking a state law prohibiting foreign language instruction).

52. Baker, 395 F. Supp. at 300-301. The holding in Baker enabled school officials to use corporal punishment even if a parent asked the school not to use it on her child. Id.

53. Id. at 302.

54. Id. at 302-03. The minimum requirements, subsequently incorporated into the North Carolina statute, see supra note 22 and accompanying text, are: (1) corporal punishment should not be used as a first line of discipline, or without prior notice that certain action could result in corporal punishment (unless the behavior “shocks the conscience”), (2) corporal punishment must be administered in the presence of another school official, who should be informed of the reason for the punishment, and (3) a parent is entitled, upon request, to a written explanation of the reasons for the punishment and the name of the witness. Baker, 395 F. Supp. at 302-03.

55. Baker, 395 F. Supp. at 303 (declining to decide whether the Eighth Amendment actually applies to the punishment of school children).


58. Ingraham, 430 U.S. at 677. The Court’s holding rested largely on its belief that corporal punishment is rarely severe. Id. Justice Powell, author of the Ingraham opinion, believed from his personal experience that any real abuse of corporal punishment would be corrected quickly by parental pressure on local school authorities. Michael B. Mushlin, Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect, 23 Harv. C.R.-C.L. L. Rev. 199, 243 n.234 (1988) (citing The Search for the Constitution, Interview with Justice Lewis Powell (PBS broadcast, June 25, 1987)).

did not address whether egregious instances of corporal punishment could violate substantive due process rights. 59

Several circuits, however, including the Fourth Circuit, recognize a federal substantive due process claim for instances of corporal punishment that “shock the conscience.” 60 While these actions remain popular because they yield higher damages than common-law remedies and provide for the recovery of attorneys’ fees under section 1983 claims, it often proves difficult to show that the punishment “shocks the conscience.” 61

Against this backdrop of legislative and judicial reluctance to infringe on corporal punishment in schools, new section 115C-390 affords local school boards the opportunity to act on their own. Only seven months after the passage of new section 115C-390, over one-third of North Carolina’s school children live in school districts where corporal punishment is banned. 62 The increase in local regulations signals a decreasing use of corporal punishment; 63 local bans also will assist certain victims seeking civil remedies or criminal penalties and facilitate termi-

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59. Ingraham, 430 U.S. at 679 n.47.

60. Metzger v. Osbeck, 841 F.2d 518, 520 (3d Cir. 1988) (holding that where a teacher caused a cut lip, broken nose and fractured teeth, a jury might find the discipline was intended to cause harm, but dismissing all claims against the principal and school board); Garcia v. Miera, 817 F.2d 650, 653 (10th Cir. 1987) (finding potential violation of substantive due process where the teacher held nine-year-old girl upside down by the ankles while the principal hit her on the legs with a paddle), cert. denied, 485 U.S. 959 (1988); Hall v. Tawney, 621 F.2d 607, 613-15 (4th Cir. 1980) (applying the “shocks the conscience” test to the punisher, but denying any vicarious liability claims).

61. See, e.g., Brooks v. School Bd. of Richmond, 569 F. Supp. 1534, 1536 (E.D. Va. 1983) (requiring that the punishment be “inspired by malice or sadism rather than a merely careless or unwise excess of zeal” to sustain a substantive due process claim).

62. Paddling Ban Protects 33%, CHILDREN FIRST (N.C. Child Advocacy Inst., Raleigh, N.C.), Winter 1992, at 3. Twenty-four of 134 school districts have corporal punishment bans, but these include several of the largest districts in the state, so that approximately 360,000 of the state’s 1,100,000 school children are protected. Id.

63. See infra notes 81-82 and accompanying text.
nation actions against abusive teachers.\(^6^4\) Hopefully, the decision to adopt a local autonomy statute represents a first step toward a statewide ban in North Carolina.\(^6^5\)

The trend in both federal and state government is toward increasing local autonomy.\(^6^6\) Many argue that schools under local control are more responsive to the concerns of parents and that involved parents create better schools.\(^6^7\) On a federal-state level, this belief in the value of local control led Justice Powell to deny a federal claim in *Ingraham*.\(^6^8\) Unlike the state-federal government relationship, however, the state does not have only those powers given to it by local units. On the contrary, local boards "have only those powers expressly conferred by the General Assembly or implied from . . . express grants of authority."\(^6^9\)

The policy of allowing local authorities to decide for themselves suggests the General Assembly believes each locality either knows what is best for itself or is the best agency to make the sensitive corporal punish-

\(^{64}\) See infra notes 84-92 and accompanying text.

\(^{65}\) It is not entirely clear that § 115C-390 was intended as an initial step toward a statewide ban. Although the Legislative Research Committee saw this as the ultimate goal when considering the proposed local option bill in 1986, see supra notes 21-22, a 1989 proposal to allow 16 local school districts to ban corporal punishment as "pilot projects" failed a House vote. Niblock, supra note 16, at 2.


Recent North Carolina legislation provides for increased autonomy of local boards. E.g., N.C. GEN. STAT. § 115C-98(b) (1991) (giving local boards exclusive authority over the selection and procurement of supplementary instructional materials); see also Michele L. Harrington, Note, State v. Whittle Communications: *Allowing Local Boards to Turn On "Channel One"*, 70 N.C. L. Rev. 1929 (1992) (analyzing a recent supreme court decision allowing local school authorities to decide whether or not to subscribe to controversial news program).


\(^{67}\) See Christopher, supra note 66, at 634.

\(^{68}\) In a television interview, Justice Powell said that his experience with local school systems convinced him that local school officials and parents groups were better able to deal with corporal punishment abuses. See supra note 58.

ment decision. While the former does not provide a sufficient rationale for instituting a local autonomy option, the latter suggests that local autonomy may be appropriate. Local authorities may not know what is best for their district. Studies show that education authorities who strongly support corporal punishment soon become strong opponents of the practice themselves once a ban is implemented. But the argument that local boards are better situated to make the decision has greater merit. In addition to a long tradition of local autonomy, local school boards are generally more responsive to local concerns since they are members of the local citizenry and are elected through popular elections.

Although corporal punishment cannot be separated from discipline, arguably a purely local concern, the element of student safety should bring the issue under the supervision of the General Assembly. Thus, the corporal punishment issue is not one that should be delegated blindly to local school boards. Instead, the General Assembly should monitor both systems that do not prohibit corporal punishment and those that have passed local bans. If those districts under local bans do not show a corresponding increase in discipline problems, or if those districts that continue the practice rate worse than districts which have banned it in academic or vandalism statistics, the General Assembly should consider enacting a statewide ban.

It is also possible that the effects of corporal punishment bans will be inconclusive. Nevertheless, many would argue that a statewide ban is the next logical step in the protection of North Carolina's school children. The reasonable force provision of section 115C-390, still in effect

70. See Pamela Tobin, Casenote, Expanding the State Secretary of Education's Review of Local School Boards' Decisions to Dismiss Employees—Belasco v. Pittsburgh Board of Education, 60 TEMP. L.Q. 361, 362 (1987) (noting that corporal punishment is a sensitive issue between school boards and parents groups); cf. Marjorie Morris, Capps Members to Fight Paddling, THE SANFORD HERALD (Sanford, N.C.), Nov. 19, 1991, at 1A, 10A (describing the fight by a group of Lee County parents to get the school board to ban corporal punishment).

71. Education professionals in systems where the practice is prohibited rarely agree that corporal punishment is required as a last resort, a position advanced often by principals and teachers. See Maurer, The Case Against, supra note 9, at 16 (noting that teachers in Ottawa, Canada, overwhelmingly favored corporal punishment before its prohibition, but five years later not one educator in the system favored the practice).

72. See Goldstein, supra note 69, at 384.

73. Id.

74. This approach analyzes corporal punishment under the rubric of student safety and the right to bodily integrity rather than treating it as a local disciplinary issue.

75. If the rationale behind corporal punishment is that the risk of harm is outweighed by the benefit of improved discipline, then if eliminating corporal punishment does not cause a decline in discipline, the "benefit" does not outweigh the risk. Of course, this simple equation may not be dispositive due to the many other factors that affect discipline.
in those local districts that have not passed a local ban, was upheld in Baker because the state's interest in maintaining discipline outweighed the constitutional right to bodily integrity.\textsuperscript{76} Even if the state interest outweighs the constitutional right, permitting corporal punishment, even through a local option statute, does not further that state interest.\textsuperscript{77}

Many commentators argue today that corporal punishment is an ineffective disciplinary tool, causing more behavioral problems than it cures.\textsuperscript{78} Second, corporal punishment may produce many harmful side-effects—physical, sexual, emotional, and racial—that result even from its judicious application.\textsuperscript{79} Many believe that the application of corporal punishment is not and never could be judicious.\textsuperscript{80}

Whether local or statewide, the effect that a corporal punishment ban will have on the amount of corporal punishment, either directly as a prophylactic rule or indirectly through its effect on litigation, must be

\textsuperscript{76} See Baker v. Owen, 395 F. Supp. 294, 300-02 (M.D.N.C.), aff'd, 423 U.S. 907 (1975) (mem.).

\textsuperscript{77} This analysis is similar to the rational-relationship test used by the Baker court in analyzing the student's due process claim. The state statute in this minimum scrutiny test almost always is found to be reasonably related to the state interest. That there may be a possible basis for the state's decision to authorize corporal punishment, however, is not the issue; rather, one should determine whether corporal punishment is an effective disciplinary tool and, if it is, whether its harmful side-effects outweigh any benefit it may provide. While a minimum scrutiny analysis may be the proper judicial approach, certainly the General Assembly should focus on the best, rather than the minimally acceptable, alternative.

\textsuperscript{78} Maurer, Paddles Away, supra note 4, at 20-21; Hyman & Lally, supra note 26, at 8.

\textsuperscript{79} In Paddles Away, Maurer discusses in depth each of the alleged side-effects of corporal punishment: painful and lasting physical damage to young children, especially to the bottom, Maurer, Paddles Away, supra note 4, at 31-37; sexual abnormalities in both the punisher and recipient, id. at 45-50; reinforcement of institutionalized racism, id. at 51-68; and violence and vandalism, id. at 82-92; see also Maurer, The Case Against, supra note 9, at 16, 18-24 (arguing that corporal punishment increases aggression and sexual aberrations while decreasing the possibility of effective discipline and learning); John Lamberth, The Effects of Punishment on Academic Achievement: A Review of Recent Research, in Corporal Punishment in American Education, supra note 2, at 384, 391 (finding that “extreme punishment in any form is counterproductive to good academic achievement and the development of positive attitudes toward school”).


examined. The impact that permitting local bans will have on the number of instances of corporal punishment is unclear. Even before the recent amendment of section 115C-390 local school boards were able to restrict its use severely. Following Kurtz, local school officials clearly possessed the authority to regulate stringently corporal punishment to the point of a de facto ban. Thus, those local boards concerned about the problems of corporal punishment had already virtually abolished its use. Even so, the statistics suggest the use of corporal punishment in schools remains substantial. Thus, a statewide ban would have the largest impact on those districts that have not enacted restrictive regulations such as those approved in Kurtz.

Additionally, a corporal punishment ban, local or statewide, not only will provide a remedy for victims of corporal punishment who cannot overcome the current "reasonable force" standard, but also will provide a deterrent effect against teachers who use corporal punishment, either moderately or abusively. In the absence of a corporal punishment ban, victims of unreasonable force who can prove their case already have a remedy in state tort law, criminal law, and even federal law. A corporal punishment ban, although having no effect on federal claims or state law claims where the victim can prove unreasonable force, will assist two types of victims: 1) victims of excessive force who cannot

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81. For a discussion of Kurtz, see supra notes 45-49 and accompanying text; see also 20 School Systems, supra note 4, at 3 (noting that the Wake County school system had 1,500 reported incidents of corporal punishment in 1986, but the district reported only seven incidents in the 1990-91 school year after the board passed stringent regulations in 1988).

82. Although such regulations may not assist persons bringing civil or criminal actions against a teacher, they are effective in a board's termination proceeding against a teacher. See Baxter v. Poe, 42 N.C. App. 404, 416, 257 S.E.2d 71, 78, disc. rev. denied, 298 N.C. 293, 259 S.E.2d 298 (1979); Kurtz v. Winston-Salem/Forsyth County Bd. of Educ., 39 N.C. App. 412, 418, 250 S.E.2d 718, 722 (1979).

83. See supra note 4.

84. The benefit of eliminating even moderate use is twofold: many feel that any use of corporal punishment is ineffective and harmful, see supra note 79 and accompanying text, and even if moderate use is not harmful, eliminating its use as an option will prevent possible escalation into abuse. See Maurer, The Case Against, supra note 9, at 22-23 (arguing that a certain percentage of corporal punishment escalates inevitably into abuse).

85. While those seeking redress in state law must only show the punishment was unreasonable, those seeking federal relief in North Carolina's federal district courts and the Fourth Circuit must show the punishment "shocks the conscience." See supra note 60 and accompanying text.

86. The federal standard, if a particular circuit recognizes one, is not affected by local rules or regulations for administering corporal punishment, so a federal claim is not enhanced when a teacher violates local procedural rules. Metzger v. Osbeck, 841 F.2d 518, 522 (3d Cir. 1988) (Weis, J., concurring and dissenting) ("Constitutional standards do not vary from school district to school district[.]"); Woodard v. Los Fresnos Indep. Sch. Dist., 732 F.2d 1243, 1245 (5th Cir. 1984). Additionally, a local ban does not have a substantial impact on a school board's liability for federal claims, since federal substantive due process claims against school...
prove that the force was unreasonable; and 2) victims of reasonable force.

State tort and criminal actions against teachers for unreasonable force are rarely successful. The definition of "unreasonableness" in North Carolina presents a high hurdle for plaintiffs seeking redress. A corporal punishment ban, however, will eliminate the defense of reasonable force. Thus, victims of excessive force who cannot prove the force was unreasonable only need to show (1) the punishment took place and (2) damages. While a victim of reasonable force has the same opportunity to prove the same two elements, it appears unlikely that such a victim can prove recoverable damages. Nevertheless, a ban also will deter corporal punishment by eliminating the reasonable force defense in criminal prosecutions.

Additionally, a local or statewide ban will assist school board termination proceedings against teachers who use corporal punishment. Indeed, the threat of termination may be the most effective deterrent against a school official's use of corporal punishment. The increased likelihood of a civil, criminal, or termination action will provide an effective deterrent against the use of corporal punishment.

Corporal punishment's use cannot be separated from its abuse.

boards are dismissed consistently. Metzger, 841 F.2d at 521; Hall v. Tawney, 621 F.2d 607, 615 (4th Cir. 1980).

State legislation can open the door to more federal claims only if it denies traditional common law tort remedies. See Ingraham v. Wright, 430 U.S. 651, 672-82 (1977).


88. See supra note 43.

89. Under § 115C-391 a teacher may still use the defense that force was used reasonably to quell a disturbance, to obtain possession of weapons or other dangerous objects, or to protect persons or property. N.C. GEN. STAT. § 115C-391 (1991). While affording this defense to teachers is necessary for their protection and the protection of students, it was not necessary to provide expressly for this in § 115C-391. The common-law defenses of self-defense and justification protect the use of reasonable force in these situations.

90. This makes a corporal punishment action a simple assault and battery claim without the defense of reasonableness.

91. See N.C. GEN. STAT. § 14-33(a) (1986 & Supp. 1991) (simple assault and battery); id. § 14-33(b)(3) (assault and battery against a child under age of twelve); id. § 14-318.2, - 318.4 (1986) (child abuse).

Over one-third of the state's school children attend school systems that have banned corporal punishment. All North Carolina school students, however, are entitled to protection from this harmful practice.

Jon M. Bylsma
McCormick v. A T & T Technologies, Inc. and Section 301
Preemption: The Fourth Circuit Makes a Federal Case
Out of Workplace Torts

Where should unionized employees turn when their employer's conduct causes injury? An evolving reversal of jurisdictional roles in the legal resolution of labor-management disputes has confused the choice of legal forums. Ever since the Depression, union members faced with employer wrongdoing rejected unfavorable state tort laws in favor of arbitration, established by collective bargaining agreements, and the federal courts. In the last ten years, however, state tort law has grown more sympathetic to workers. State law also offers several advantages over federal labor law: the right to jury trial, longer statutes of limitations, and the availability of punitive and emotional distress damages. Because of these key differences, when both federal and state law are available for resolution of an employee's claim the question of which law applies bears heavily on the outcome of the suit.

Section 301 of the Labor Management Relations Act established federal jurisdiction over suits for breach of a collective bargaining agreement. This grant of jurisdiction has been expanded judicially into a preemptive force. State contract law may not be applied in the area covered by section 301. This preemptive power is "complete," converting a state law contract claim into one arising under federal law. In other words, section 301 preemption not only invalidates state law contract claims,

2. See Gomez, supra note 1, at 46-47.
4. In McCormick v. AT & T Technologies, Inc., 934 F.2d 531 (4th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 912 (1992), the disposition of the plaintiff's case turned solely on the question of whether the statute of limitations from federal labor law or state tort law should apply. Id. at 534 (en banc).
7. Id. at 560. For discussions of "complete" preemption, see Eric J. Moss, Note, The Breadth of Complete Preemption: Limiting the Doctrine to Its Roots, 76 VA. L. REV. 1601, 1611-18 (1990); see infra notes 44 & 59-61 and accompanying text.
but also controls the forum by giving the defendant the power to remove a state law claim to federal court. These principles of preemption are well-established when state contract law and section 301 conflict, but are less clear when the plaintiff brings a tort claim. When two parties' working relationship is defined thoroughly, as in a collective bargaining agreement, is aberrant conduct by the employer a basis for a tort suit or is it solely a breach of contract? If the conduct may be covered by the agreement, is the agreement then the only yardstick by which the conduct may be measured in determining the employee's relief?

The United States Court of Appeals for the Fourth Circuit in *McCormick v. AT & T Technologies, Inc.* tried to define the scope of section 301 complete preemption of tort claims. The Fourth Circuit held that "wrongful or negligent" employer conduct alleged in an employee's state law tort action could be evaluated only in light of the power given the employer by the collective bargaining agreement. Once contract interpretation is implicated, section 301 preempts the state law tort claim. The *McCormick* court, however, did not indicate the limits of this logic. It remains unclear whether a union-member plaintiff now can allege a tort claim that does not implicate the terms of the collective bargaining agreement and thereby avoid section 301 complete preemption.

This Note surveys the United States Supreme Court's development of section 301 preemption law, focusing on the doctrine's effect on litigation strategy and its still-uncertain application in lower courts. The Note analyzes the impact of the *McCormick* decision on state law tort claims, and concludes that the *McCormick* court's view of a tort claim's dependence on interpretation of a collective bargaining agreement is disconcertingly broad and is inconsistent with the United States Supreme Court's approach to section 301 preemption.

In mid-September of 1986, William McCormick left his job at AT & T Technologies, Inc., purportedly because of illness. When he did not

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10. Id. at 535-37 (en banc). In effect, the court held that "wrongful or negligent" equals "wrongful or negligent under the circumstances, including the agreement," and therefore the employee's claim can be resolved only by interpreting the collective bargaining agreement. Id. (en banc).
11. Id. (en banc).
12. See infra notes 57-95 and accompanying text.
13. See infra notes 96-104 and accompanying text.
14. See infra note 96.
15. See infra notes 32-56 and accompanying text.
16. See infra notes 105-15 and accompanying text.
17. McCormick, 934 F.2d at 533 (en banc).
return to work for two weeks, the Richmond, Virginia company notified him that unless he reported for work by September 30 his employment would be terminated. McCormick did not return and, in a letter dated October 1, AT & T terminated his employment retroactively to September 22. The next day a supervisor, Cameron Allen, cleaned out McCormick's locker, retrieving company-issued tools and disposing of personal items. Allen was informed later that day that AT & T employees had found and read a personal letter of McCormick's that Allen had discarded. On October 3, McCormick returned to work and was reinstated, only to leave that evening, this time permanently, when a co-worker made a "personal remark" about the discarded letter.

McCormick was a member of the Communications Workers of America, and a collective bargaining agreement between the union and AT & T governed his employment. Although the agreement provided for grievance hearings and dispute arbitration, McCormick did not exercise those rights. Instead, he filed suit fourteen months later in a Virginia court, alleging that AT & T had violated state tort law in its conduct toward him. AT & T removed the suit to federal court. The district court, finding that section 301 preempted McCormick's state law claims and that removal was proper, denied McCormick's motion to remand. Accordingly, AT & T's motion for summary judgment was granted.

On appeal, the United States Court of Appeals for the Fourth Circuit, sitting en banc, narrowly affirmed the finding of preemption. Relying on the United States Supreme Court's decision in Lingle v. Norge

18. Id. (en banc).
19. Id. (en banc).
20. Id. (en banc).
21. Id. (en banc).
22. Id. (en banc).
23. Id. (en banc).
24. Id. (en banc).
25. Id. (en banc). McCormick's complaint alleged the disposal of his personal effects constituted intentional infliction of emotional distress, negligent infliction of emotional distress, conversion, and negligent care of a bailment. Id. (en banc).
26. Id. at 533-34 (en banc).
27. Id. at 534 (en banc).
28. Id. (en banc). The statute of limitations on § 301 claims was established in DelCostello v. International Board of Teamsters, 462 U.S. 151, 169 (1983).
29. McCormick, 934 F.2d at 534 (en banc).
30. Seven circuit judges participated in the decision of the case. Id. at 533 (en banc).
31. Id. (en banc).
Division of Magic Chef, Inc., the Fourth Circuit declared that federal law under section 301 preempted a state law claim whose resolution would require interpretation of a collective bargaining agreement. The court first pointed out that black-letter law underlying each of McCormick's tort claims revealed that the plaintiff would be required to prove AT & T's conduct was wrongful or negligent. The court then delivered the fatal blow to McCormick's case: "Virginia follows the general rule that plaintiff bears the burden of demonstrating wrongfulness. . . . To prove conduct wrongful, a plaintiff must thus demonstrate not that the conduct was wrongful in some abstract sense, but wrongful under the circumstances." AT & T's duty toward McCormick could be defined only by interpreting the agreement.

The McCormick court then briefly examined the collective bargaining agreement in question, apparently to support the holding that "wrongfulness" could be defined only through contract interpretation. The court further buttressed its analysis by citing prior Fourth Circuit

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33. McCormick, 934 F.2d at 534-35 (en banc). The United States Supreme Court in Lingle had stated expressly that such a tort action should be preempted by section 301. See Lingle, 486 U.S. at 413.
35. See id. at 535 (en banc) (citing Virginia law).
36. Id. at 535-36 (en banc) (citations omitted).
37. Id. at 536 (en banc). The court held that:

The circumstances that must be considered in examining management's conduct are not merely factual, but contractual . . . . Cleaning out a locker is not a matter of intrinsic moral import but a question of legal authority—whether management had the lawful right to proceed as it did. . . . State tort claims are preempted where reference to a collective bargaining agreement is necessary to determine whether a "duty of care" exists or to define "the nature and scope of that duty . . . ." Whether the actions of management personnel . . . were in any way wrongful simply cannot be determined without examining the collective bargaining agreement . . . .

Id. (en banc) (quoting International Bhd. of Elec. Workers v. Hechler, 481 U.S. 851, 862 (1987)).
38. Id. at 536 (en banc). The court found no contract terms directly related to disposal of an employee's property, but cited clauses that "appl[ied] generally to the conditions of employment . . . ." Id. (en banc).
39. Id. at 538 (en banc). The court cited Willis v. Reynolds Metals Co., 840 F.2d 254, 255 (4th Cir. 1988) (privacy, slander, and intentional infliction of emotional distress claims preempted) and Kirby v. Allegheny Beverage Corp., 811 F.2d 253, 255-56 (4th Cir. 1987) (invasion of privacy claim preempted). Although Willis and Kirby were decided prior to the Supreme Court's decision in Lingle, the McCormick court found them consistent with Lingle
The court emphasized the general policy goals of section 301 and federal labor law: encouraging smooth negotiation and administration of collective bargaining agreements, insuring uniform interpretation of those agreements, and maintaining bargained-for grievance procedures as the primary means of dispute resolution. Preemption of state tort claims requiring contract interpretation was necessary to prevent undercutting the policies supporting section 301, the court held, because "[t]here are few workplace quarrels that could not be framed as some form of tortious conduct." Additionally, a multitude of conflicting state-court interpretations of collective bargaining agreements would undermine the goals of uniformity severely.

The dissenting opinion, authored by Judge Phillips, argued that none of McCormick’s tort claims were "‘completely’ preempted" and therefore should have been remanded to the state court for resolution of the tort claims.

Judge Phillips discussed at length the line of Supreme Court cases that developed section 301 jurisprudence. These cases, he argued, did not support the majority’s broad preemption analysis. Rather, section 301 complete preemption applies only to those state law claims that either are expressly, or are in substance, for breach of contract. If a plaintiff has stated a claim that in substance alleges violation of a right created not by the contract, but by a state’s tort law, section 301 complete preemption should not apply and the claim should not be removable.

and therefore persuasive, if not expressly controlling. See McCormick, 934 F.2d at 538 (en banc).

40. McCormick, 934 F.2d at 537-38 (en banc) (citing Douglas v. American Info. Technologies Corp., 877 F.2d 565, 568-73 (7th Cir. 1989); Newberry v. Pacific Racing Ass’n, 854 F.2d 1142, 1148-50 (9th Cir. 1988)).

41. See McCormick, 934 F.2d at 535, 538 (en banc).

42. Id. at 538 (en banc).

43. Id. (en banc)

44. Id. at 538, 545 (Phillips, J., dissenting). Judges Murnaghan and Sprouse joined the dissent. Judge Phillips distinguished, as the majority did not, “ordinary” preemption from “complete” preemption. Id. at 538-39 (Phillips, J., dissenting). The former, while voiding otherwise applicable state law, will not support removal unless the plaintiff’s pleadings raise a federal question. See Moss, supra note 7, at 1607-08. Complete preemption, however, recharacterizes a facially valid state claim as a federal question claim that is removable. See id. at 1611-14. Section 301 has been interpreted since Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968), to preempt completely some state law; the crucial question that remains is which state law. McCormick, 934 F.2d at 539 (Phillips, J., dissenting).

45. McCormick, 934 F.2d at 539-42 (Phillips, J., dissenting).

46. Id. at 538-39, 542 (Phillips, J., dissenting).

47. Id. at 543 (Phillips, J., dissenting).
ble to federal court. The dissent argued that the Supreme Court’s decision in *Caterpillar, Inc. v. Williams* established that only the plaintiff’s complaint should be examined in deciding whether resolving the allegations required contract interpretation. Judge Phillips asserted that defenses requiring contract interpretation should not be considered in deciding section 301 complete preemption and removal.

The dissent accused the majority of incorrectly reading *Lingle* as a mandate to look beyond the plaintiff’s pleadings to determine if the suit implicated contract interpretation. Focusing only on McCormick’s complaint, the dissent argued that none of his tort claims should be completely preempted. The “wrongful conduct” alleged in each claim was based on violations of duties imposed by Virginia tort law, not the collective bargaining agreement. An argument by the defendant that the conduct was “not wrongful” because the agreement permitted it might be a viable defense, but, as a defense, would not support a finding of complete preemption and removal. The dissent advocated finding no preemption and remanding to the state court for decision of the tort claims, with any defenses requiring contract interpretation to be evaluated by the state court applying federal labor contract law.

Supreme Court decisions in the 1950s and 1960s gave federal courts the power to develop federal common law interpreting and enforcing labor contracts, and held that this federal common law must preempt

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48. *Id.* (Phillips, J., dissenting).
52. *Id.* at 543 n.2, 544 (Phillips, J., dissenting). The dissent cited language in *Lingle* implied federal defenses could give rise to complete preemption and removal, and then disarmed this implication by arguing: (1) preemption arising from a defense would in effect overrule *Caterpillar*, and the *Lingle* decision expressly recognized *Caterpillar’s* continuing viability; (2) the language was dicta; and (3) the implication would be inconsistent with all other Supreme Court decisions on § 301 preemption before and after *Lingle*. *Id.* at 543 n.2 (Phillips, J., dissenting).
53. *Id.* at 545 (Phillips, J., dissenting).
54. *Id.* at 545-47 (Phillips, J., dissenting).
55. *Id.* at 538-39, 545-47 (Phillips, J., dissenting).
56. *Id.* at 538, 545 (Phillips, J., dissenting). Judge Phillips also characterized his analysis as nonthreatening to the goals of labor policy put forth in the majority opinion. *Id.* at 547-48 (Phillips, J., dissenting). State courts would be bound to federal law in contract interpretations implicated by defenses, thus insuring uniform labor contract law. *Id.* at 547 n.5 (Phillips, J., dissenting).
conflicting state contract law.58 The Court's decision in Avco Corp. v. Aero Lodge No. 73559 was critical to the still-developing concepts of federal jurisdiction over labor law. The Avco Court created the doctrine of "complete preemption," holding that section 301 preemption was so powerful that labor-management claims based only on state contract law were not only preempted but were transformed into federal question claims—claims "arising under federal law" that could be removed to federal court.60 Before Avco the "well-pleaded complaint" rule had limited removal to claims that on their face stated a federal question.51

In the 1980s, the Supreme Court addressed the question of how far section 301 complete preemption extends. The plaintiff in Avco had sued under state law to enjoin a strike allegedly forbidden by a collective bargaining agreement, and the Court easily found complete preemption.62 Suits that explored the border between tort and contract actions, however, were not to be as clear-cut. In Allis-Chalmers Corp. v. Lueck,63 the Court found complete preemption of a state law action for tortious breach of contract,64 and established a test for section 301 complete preemption: If resolution of a state tort claim will be "inextricably intertwined" with interpretation of a collective bargaining agreement, the state law is preempted.65 The Court characterized the state tort claim in Lueck as nothing more than "a way to plead a certain kind of contract violation in tort" and "firmly rooted in the expectations of the parties that must be evaluated by federal contract law."66 The Court limited its holding, albeit ambiguously, to contract claims.67

The Supreme Court next acted on section 301 in International

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58. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 102 (1962). State courts were allowed to retain concurrent jurisdiction over § 301 claims, applying the federal common law and contributing to it, with new law created by state courts absorbed by the federal common law. Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 511-14 (1962).


60. Avco, 390 U.S. at 560; see also 28 U.S.C. § 1441(b) (1988) (statutory removal of federal question cases). The question that remains after Avco is how to apply the tests for complete preemption later put forth by the Supreme Court. See infra notes 65 & 87 and accompanying text.

61. See supra note 50; infra notes 77-80 and accompanying text.


64. Id. at 220-21. The plaintiff alleged bad-faith handling of his insurance claims by his employer after being subjected to repeated medical examinations and periodic denial of benefits. Id. at 205-06.

65. Id. at 213.

66. Id. at 217 (citation omitted).

67. Id. at 212-13, 220. The Court said:

Nor do we hold that every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement . . . necessarily is pre-empted by
Brotherhood of Electrical Workers v. Hechler. The Hechler Court found that section 301 preempted a claim by a union member against the union for negligent failure to provide a safe workplace. Under state law the union had no duty to provide a safe workplace. Therefore, the only duty owed the plaintiff that the union could have violated was one assumed in the collective bargaining agreement. Definition of this duty was a matter of contract law subject to section 301 preemption.

Two weeks after Hechler, the Court first dealt with removal power arising under section 301 complete preemption. In Caterpillar, Inc. v. Williams, plaintiffs had filed suit in state court alleging breach of individual contracts entered into outside of the collective bargaining agreement. Caterpillar removed the action to federal court, where it was dismissed when the plaintiffs refused to amend their claim to allege a section 301 violation. Applying the Lueck test for preemption, the Supreme Court held that the plaintiffs' complaint, on its face, did not depend on a violation of a duty arising from the collective bargaining agreement. The plaintiffs' "well-pleaded complaint" rested on state law independent of the agreement, and, therefore, removal to federal court was improper.

§ 301. The full scope of the preemptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis.

Id. at 220.
69. Id. at 862.
70. Id. at 859-60.
71. Id. at 860-62. Hechler is distinguishable from cases like McCormick because Sally Hechler expressly alleged in the lower courts that the duty the union owed her arose from the agreement. Id. at 861. She later attempted to argue before the Supreme Court that the union owed her a duty of care arising from its relationship with its members, independent of the agreement. Id. at 862 n.5. The Court did not reach this argument since it had not been raised below. Id.
72. Id. at 861-62.
74. Id. at 390.
75. Id. The United States Court of Appeals for the Ninth Circuit reversed the district court, see Williams v. Caterpillar Tractor Co., 786 F.2d 928, 937-38 (9th Cir. 1986), and the Supreme Court affirmed the Ninth Circuit's decision. Caterpillar, 482 U.S. at 391.
76. See supra note 65 and accompanying text.
77. Caterpillar, 482 U.S. at 394-95.
78. Id. The Caterpillar Court referred to complete preemption as an "independent corollary" to the well-pleaded complaint rule. Id. at 393. This classification marks an important distinction. Since complete preemption appears to be an exception to the well-pleaded complaint rule in that it converts a facially valid state claim into a federal claim, it is important to note that the Supreme Court did not deem it to be an exception. Therefore, the well-pleaded complaint rule's focus on the complaint, rather than defenses, remains valid in applying complete preemption doctrine.
requiring interpretation of the collective bargaining agreement by asserting that the agreement superseded the individual contracts. Without discussing the merits of this defense, the Court rejected it as a basis for removal:

[A] federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.\(^7\)

In *Lingle v. Norge Division of Magic Chef, Inc.*,\(^8\) the plaintiff asserted a claim under state law for retaliatory discharge when her employer allegedly fired her for filing a worker's compensation claim.\(^9\) The defendant properly removed the suit,\(^10\) and the federal court dismissed the state claim as preempted by section 301.\(^11\) The United States Court of Appeals for the Seventh Circuit affirmed, applying the *Lueck* "inevitably intertwined" test.\(^12\) The Supreme Court reversed, holding that the Seventh Circuit had misapplied the preemption test.\(^13\) Furthermore, the Court held that, under a proper application of the test, the state claim could be defined in a way that did not require contract interpretation for its resolution, and therefore was not preempted.\(^14\) The *Lingle* Court pro-

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79. *Id.* at 395-96.
80. *Id.* at 398-99. In applying *Caterpillar* the Fourth Circuit in *McCormick* was divided on the question of whether the "wrongfulness" of an employer's conduct under the collective bargaining agreement is an element for the plaintiff to establish in his tort claim or if the defendant may show the conduct was "not-wrongful" as a defense. *See infra* notes 111-12 and accompanying text. Clearly, the *Caterpillar* Court intended tort actions to survive § 301 complete preemption, since it quoted Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 25 n.28 (1983), for the proposition that a battery suit resulting from a violent strike would not be preempted simply because the legitimacy of the strike under the collective bargaining agreement might be at issue. *Caterpillar*, 482 U.S. at 396 n.10.
82. *Id.* at 402.
83. Removal was not an issue in *Lingle*; the defendant removed the suit to federal court on the basis of diversity. *Id.*
86. The Seventh Circuit based its decision on a finding that resolution of the state claim would require evaluating the same facts as would a hypothetical claim under § 301 for breach of the collective bargaining agreement's prohibition of discharge without just cause. *Lingle*, 823 F.2d at 1046. The Supreme Court rejected the "same facts" test as an incorrect preemption analysis. *Lingle*, 486 U.S. at 408-10.
87. State law defined retaliatory discharge as: (1) the discharge or threatened discharge of
ceeded to say that the defense of a nonretaliatory reason for plaintiff’s discharge also did not require interpretation of the agreement.\textsuperscript{88}

In 1990 the Supreme Court split for the first time in deciding a section 301 preemption case. In \textit{United Steelworkers of America v. Rawson},\textsuperscript{89} the Court overturned the Idaho Supreme Court’s finding of no preemption of a state tort claim for negligent inspection and wrongful death.\textsuperscript{90} The Idaho court had found that once the union actually undertook an inspection of the workplace, a duty to inspect properly arose not from the union’s responsibilities defined by the collective bargaining agreement, but from general tort principles.\textsuperscript{91} The \textit{Rawson} Court disagreed, holding that the claim was not independent of the collective bargaining agreement because the union’s conduct under the circumstances could be measured only by the agreement,\textsuperscript{92} and, therefore, the state claims were preempted.\textsuperscript{93} Three justices dissented, arguing that the Court had presumed to interpret Idaho law over the state’s highest court.\textsuperscript{94} The Idaho Supreme Court had found that the elements of the plaintiff’s tort claim could be proven without recourse to the collective bargaining agreement; reversing that decision, the dissenters argued, was effectively a reinterpretation of Idaho’s tort law.\textsuperscript{95}

Given the Supreme Court’s patchwork approach to section 301 preemption jurisprudence, it is small wonder that recent decisions in the federal circuit courts have been jumbled.\textsuperscript{96} Nevertheless, the basic skele-
ton of section 301 preemption doctrine is relatively clear and can be discussed in light of its effects on litigation strategy. First, a plaintiff wishing to maintain a state tort action must not implicate the collective bargaining agreement expressly in her pleadings. Reference to a duty owed by the employer as arising from contractual obligations will result in preemption. If a plaintiff does not invoke the contract expressly in her allegations, she must avoid allegations that are “inextricably intertwined” with contractual duties. If plaintiff’s “well-pleaded complaint” does not raise issues requiring contract interpretation in one of the two manners listed above, it has not implicated section 301 and should not be preempted or removable.

If a plaintiff has framed a state law complaint that is preempted under section 301, why should a defendant seek removal to federal court when he could move for dismissal in the state court? The answer is that the federal forum carries many advantages for the defendant. The federal court may be more likely than the state court to find that federal law preempts state law. Once preemption is found, the plaintiff may then be foreclosed from formally alleging a cause of action under section 301 for a number of reasons: failure to amend or denial of a motion to amend his pleadings, refusal to pay disability benefits preempted, claim for intentional infliction of emotional distress assumed not preempted for purposes of appeal; Krashna v. Oliver Realty, Inc., 895 F.2d 111, 114-15 (3d Cir. 1990) (claims for interference with worker's compensation rights, intentional infliction of emotional distress, and tortious interference with contract not preempted); O'Shea v. Detroit News, 887 F.2d 683, 687 (6th Cir. 1989) (claims for age and handicap discrimination, constructive discharge, and intentional infliction of emotional distress not preempted); Douglas v. American Info. Technologies Corp., 877 F.2d 565, 573 (7th Cir. 1989) (claim for intentional infliction of emotional distress preempted); Johnson v. Anheuser Busch, Inc., 876 F.2d 620, 624-25 (8th Cir. 1989) (claims for slander, intentional infliction of emotional distress, and tortious interference with a contract preempted); Newberry v. Pacific Racing Ass'n, 854 F.2d 1142, 1149-50 (9th Cir. 1988) (claim for intentional infliction of emotional distress preempted).

97. See supra note 71.

98. Clearly, “inextricably intertwined” claims include those that are for breach of contract in substance, if not in form. See supra notes 65-66 and accompanying text. Beyond the clear cases, however, courts are left to define claims “case-by-case.” See supra note 67.

99. See supra notes 77-80 and accompanying text. The dissenting opinion in McCormick accused the Fourth Circuit of violating this rule by looking to the defenses raised, as well as the complaint, for questions requiring contract interpretation. McCormick, 934 F.2d at 543-45 (Phillips, J., dissenting). As the dissent pointed out, in light of the Supreme Court's holding in Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987), such an analysis would be unquestionably wrong. McCormick, 934 F.2d at 543-45 (Phillips, J., dissenting). Actually, the majority and dissent in McCormick agreed that the plaintiff must raise a need for contract interpretation before a tort claim is preempted, but disagreed on the extent to which a plaintiff can avoid raising a contract question in making out a tort claim. See infra notes 111-12 and accompanying text.

100. See, e.g., Caterpillar, 482 U.S. at 390.
bargaining agreement, 101 or the expiration of the six-month statute of limitations applicable to section 301 claims. 102 Even a viable section 301 claim may prove less damaging to the defendant, because punitive or emotional harm damages will be unavailable. 103 It also should be noted that if a plaintiff has asserted several tort claims and the suit is properly removed under complete preemption of one or more of those claims, under the doctrine of pendant jurisdiction the federal court can elect to retain jurisdiction over the state claims that were not preempted. 104

With so many issues turning upon the question of whether section 301 preempts state tort law, the Fourth Circuit in McCormick advocated a straightforward preemption analysis: A court should look to state law to determine the essential elements of the tort alleged, and then decide if proof of any of those elements requires interpretation of the collective bargaining agreement between the employer and employee. 105 Although conceptually simple and appealing, this approach paints with a very broad brush. If proof of wrongful or negligent conduct by the employer can be evaluated only by interpreting the collective bargaining agreement to see if the conduct was permitted or forbidden under the terms of the agreement, few, if any, tort actions can survive section 301 preemption. 106 This result overreaches, and is inconsistent with, Supreme Court precedent. 107

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102. See, e.g., McCormick, 934 F.2d at 534 (en banc).
103. See supra note 3 and accompanying text.
105. See McCormick, 934 F.2d at 535-37 (en banc). The second prong of this test is taken from Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988), see McCormick, 934 F.2d at 534 (en banc), and is essentially a simple restatement of the Lueck "inextricably intertwined" test. See supra notes 65-66 and accompanying text.
106. Pushed to its logical limits, the Fourth Circuit's analysis completely preempts tort suits alleging conduct in no way controlled by a collective bargaining agreement unless the lack of a relationship between the conduct and the contract is obvious. The only tort claims that would survive preemption are those based on rights that under state law could not be waived by contract, such as the right to file a worker's compensation claim or the right not to be discriminated against because of race, age, or handicap. Cf. White, supra note 1, at 432-34 (arguing that broad preemption of negotiable and even non-negotiable claims is required by § 301).
107. For example, the plaintiffs in Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987), clearly would be required by a state court to prove the validity of their individual contracts. The McCormick court's analysis could lead to the deduction that the plaintiffs could prove the contracts valid only if the collective bargaining agreement did not supersede them. Thus, the plaintiffs' case would require interpretation of the agreement and § 301 would preempt the suit, a decision contrary to the Supreme Court's actual result in Caterpillar. See supra notes 73-80 and accompanying text.
The dissent in *McCormick* would allow a plaintiff to allege wrongful or negligent conduct measured by a general tort duty to act as a reasonable, prudent person. The defendant may then argue that her conduct was reasonable when viewed in light of powers or duties arising from the collective bargaining agreement, but that argument should be considered a negating defense or an affirmative defense similar to the defense of privilege to act by consent. Defenses, even though clearly requiring contract interpretation for evaluation, are irrelevant to the question of preemption and removal.

Thus, the fundamental disagreement between the factions of the Fourth Circuit expressed in *McCormick* concerns burden allocation. Is a plaintiff required to prove "wrongful under the circumstances of the contract," or can a plaintiff prove "wrongful under general tort law" with "not wrongful under the circumstances of the contract" then available as a defense? Since state tort law seldom offers a clear-cut answer to this question, the problem of burden allocation is unlikely to be solved easily. This leaves courts to make a choice between the two views, which ultimately comes down to policy. The *McCormick* court sided with ensuring that dispute resolution between employer and employee remains in the forum of federal law. The dissent favored an approach giving

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109. *Id.* (Phillips, J., dissenting).
110. *Id.* (Phillips, J., dissenting).
111. Obviously an employer's conduct can be so egregious that it bears no relationship to powers under the collective bargaining agreement; flagrant battery provides one example. Drawing that distinction may result only in the intentional torts remaining valid while the negligence-based torts are preempted—hardly a desirable result. There may be no other way, however, to reconcile the Eighth Circuit's decisions in *Hanks* v. General Motors Corp., 906 F.2d 341 (8th Cir. 1990) and *Johnson* v. Anheuser Busch, Inc., 876 F.2d 620 (8th Cir. 1989). The *Johnson* court found a claim for intentional infliction of emotional distress resulting from the plaintiff's discharge to be preempted, see *Johnson*, 876 F.2d at 624, but the *Hanks* court did not preempt a claim for the same tort based on the truly outrageous conduct of an employer who refused to transfer a worker away from a supervisor who had sexually molested her daughter. See *Hanks*, 906 F.2d at 344-45. In both cases, however, the employer could plausibly justify its conduct under the collective bargaining agreement; indeed, transfer of workers seems clearly to be a power of the employer that the agreement would define.
112. The *McCormick* court relied on the proposition that "Virginia follows the general rule that plaintiff bears the burden of demonstrating wrongfulness." *McCormick*, 934 F.2d at 535 (en banc) (citing *Hoffner* v. Kreh, 227 Va. 48, 52, 313 S.E.2d 656, 658 (1984)). The court also said, "[W]rongfulness cannot be determined in a vacuum," and held that the context in which the "wrongfulness" of the conduct must be proved is that of the employer-employee contract. *Id.* at 535-36 (en banc). The dissenting opinion countered with case law to support the proposition that the duty owed by the employer could be independent of the contract, citing a duty not to engage in tortious conduct that was "imposed by [Virginia tort law] upon all persons, running to society in general and not dependent upon any employment relationships . . . ." *Id.* at 545 (Phillips, J., dissenting).
union workers the state tort law protection enjoyed by nonunion employees.

After McCormick, unionized employees face a nearly insurmountable task in framing a negotiable tort claim that will not be preempted by section 301.\textsuperscript{113} This hurdle preserves uniformity in federal labor law, but carries the high price of foreclosing state-granted rights to organized labor. This judicial expansion of congressional policy\textsuperscript{114} may in the long run actually discourage entry into collective bargaining agreements,\textsuperscript{115} and kill the golden goose it seeks to protect.

\textit{William L. Christopher}

\textsuperscript{113} See \textit{supra} notes 105-06 and accompanying text.

\textsuperscript{114} See \textit{McCormick}, 934 F.2d at 547-48 (Phillips, J., dissenting). Though silent on the issue, Congress may approve of expanded preemption, not intending for state law to control the scope of § 301 preemption. Theoretically, a state could define any tort so that a plaintiff could state a cause of action without implicating her employment contract, simply by establishing a tort duty independent of contract. It is doubtful that either Congress or the Supreme Court would approve, beyond the well-established examples of worker's compensation or antidiscrimination statutes. \textit{Cf. supra} note 106 (§ 301 preemption does not extend to non-negotiable rights protected by state law).

Salt v. Applied Analytical, Inc.: Clarifying the Confusion in North Carolina’s Employment-at-Will Doctrine

Throughout the history of employment law in North Carolina, state courts have subscribed rigidly to the employment-at-will doctrine, which governs in both breach of employment contract and wrongful discharge tort actions. North Carolina courts consider the very relationship between employee and employer to be contractual in nature. Historically, “[w]here a contract of employment does not fix a definite term, it is terminable at the will of either party, with or without cause. . . .” Several exceptions to this rule have developed under a contract action, wrongful discharge tort action, or an action for statutorily-protected employment. In reference to the contract action, if an employee has furnished additional consideration, such as changing residences or dropping a suit against the employer, North Carolina courts except the contract from the employment-at-will doctrine. Also, where the contract expressly incorporates an employment manual providing that termination will be only for cause, the terminable-at-will rule no longer applies. Another exception to the employment-at-will doctrine is

6. Trought v. Richardson, 78 N.C. App. 758, 762, 338 S.E.2d 617, 619-20, disc. rev. denied, 316 N.C. 557, 344 S.E.2d 18 (1986). In Trought, the court of appeals found Trought’s allegation that the manual was incorporated into the employment contract sufficient to survive a motion to dismiss for failure to state a claim under North Carolina Rule of Civil Procedure 12(b)(6). Trought was required to sign a statement verifying receipt of the manual when she began employment, and the manual provided for termination only for cause. Id. at 760, 338 S.E.2d at 618; cf. Rucker v. First Union Nat’l Bank, 98 N.C. App. 100, 102-03, 389 S.E.2d 622, 624-25 (finding manuals not part of employment contract where plaintiff received manuals only after five and one half years of work), disc. rev. denied, 326 N.C. 801, 393 S.E.2d 899 (1990).

In Walker v. Westinghouse Electric Corp., 77 N.C. App. 253, 335 S.E.2d 79 (1985), disc. rev. denied, 315 N.C. 597, 341 S.E.2d 39 (1986), the court of appeals construed this exception narrowly. Plaintiff Walker was fired for relaxing after completing his rounds. Id. at 254, 335 S.E.2d at 81. He contended that a handbook he received shortly after he began employment,
made for statutorily-protected employment. Finally, the tort of wrongful discharge in North Carolina has been broadened by a public policy exception to the employment-at-will doctrine. Until recently, discharge in bad faith also may have constituted an exception to employment-at-will and established an action for wrongful discharge.

7. See, e.g., N.C. GEN. STAT. § 97-6.1 (1991) (requiring that employee cannot be discharged for filing worker compensation claims); id. § 95-83 (1989) (requiring that employee cannot be discharged for engaging in labor union activities); id. § 95-130 (8) (1989) (requiring that employee cannot be discharged for instituting an OSHA proceeding).


9. See Coman, 325 N.C. at 176, 381 S.E.2d at 448. The bad faith exception to employment-at-will, like the public policy exception, is a component of a wrongful discharge tort action. Confusion exists in this area because courts often refer to "bad faith discharge" as if it were a separate cause of action in tort. Salt v. Applied Analytical, Inc., 104 N.C. App. 652, 661-62, 412 S.E.2d 97, 102 (1991), disc. rev. denied, 331 N.C. 119, 415 S.E.2d 200 (1992). Thus, an employee may prove the tort of wrongful discharge by establishing discharge in violation of the law or public policy or, until Salt, by discharge in bad faith. Id. at 662, 412 S.E.2d at 103.
Despite the strong foundation of employment-at-will, employment law in North Carolina often has been confusing, largely due to courts' failure to define the contours of the exceptions to the doctrine. The area of wrongful discharge has remained especially unsettled\(^\text{10}\) while contract exceptions have generated little controversy. Federal courts have also rendered varied constructions of North Carolina's wrongful discharge law.\(^\text{11}\) In *Salt v. Applied Analytical, Inc.*,\(^\text{12}\) however, the North Carolina Court of Appeals attempted to clarify the boundaries of the employment-at-will exceptions, particularly for wrongful discharge actions.\(^\text{13}\) Dismissing the North Carolina Supreme Court's recognition of a "bad faith discharge claim" in *Coman v. Thomas Manufacturing*\(^\text{14}\) as "mere dictum," a unanimous North Carolina Court of Appeals concluded that "no independent tort action for wrongful discharge of an at-will employee based solely on allegations of discharge in bad faith" existed.\(^\text{15}\) Leaving contract law virtually unaltered, the *Salt* decision clarified and raised the prerequisites for a successful wrongful discharge action in North Carolina.

This Note presents an overview of North Carolina law regarding the status of the employment-at-will doctrine. The Note examines *Salt v. Applied Analytical, Inc.*, comparing it with prior employment-at-will case law and exploring future implications of the case.\(^\text{16}\) The Note also discusses federal cases applying North Carolina law in order to demonstrate the confusion presently inhering in the employment-at-will doctrine in North Carolina and *Salt*'s possible resolution of the conflict.\(^\text{17}\) The Note concludes that, although North Carolina's rigid adherence to the doctrine of employment-at-will has relaxed in recent years, the pendulum is swinging back toward strict interpretation.\(^\text{18}\)

In 1985, Sylvia Salt worked as a chemist testing pharmaceutical products at Burroughs Wellcome Company in Greenville, North Carolina,\(^\text{19}\) when defendant AAI, another pharmaceutical testing company, approached her with an employment offer: a chemist's position in Wil-

\(^{10}\) *Coman*, 325 N.C. at 176, 381 S.E.2d at 447.

\(^{11}\) See infra notes 67-108 and accompanying text for a discussion of the federal cases.


\(^{13}\) *Id.* at 662-63, 412 S.E.2d 102-03.


\(^{15}\) *Salt*, 104 N.C. App. at 662, 412 S.E.2d at 103.

\(^{16}\) See infra text accompanying notes 19-65, 109-167.

\(^{17}\) See infra text accompanying notes 66-108.

\(^{18}\) See infra text accompanying notes 109-167.

\(^{19}\) *Salt*, 104 N.C. App. at 654, 412 S.E.2d at 98. Holding eleven and a half years of seniority, Salt had an annual salary of $22,000 and received numerous company benefits. *Id.*
mington, North Carolina, with a starting salary of between $17,500 and $18,500. After rejecting AAI's first two offers, Salt accepted, but only after bargaining for promises of "continued career growth" in the company. The main topic during these negotiations was Salt's need for job security. Salt made clear to her prospective employer that if the job at AAI ended prematurely, she would be unable either to return to Burroughs Wellcome or to work for another pharmaceutical company because she lacked a four-year chemistry degree. Salt moved herself and her child to Wilmington, North Carolina, and began working in August 1985. AAI presented Salt with an employment manual on her first day of work and required her to sign a statement verifying its receipt.

On November 14, 1986, AAI's president summarily terminated Salt, presenting her with a letter which justified her discharge on grounds of low productivity and bothering other employees. Salt sued, alleging breach of contract and wrongful discharge based on a violation of an implied covenant of good faith and fair dealing. The trial court granted summary judgment for the defendant, and Salt appealed. The North Carolina Court of Appeals affirmed, basing its decision on the employment-at-will doctrine. Rejecting all three arguments advanced by the plaintiff, the court first found no breach of contract. In typical fashion, the court reasoned that the employment manual was not part of the contract. The Salt court also refused to acknowledge...

20. Id. The opinion gives no reason why Salt considered an offer at a lower starting salary. Id.
21. Id. (quoting letter from AAI's general manager confirming job offer).
22. Id.
23. Id. at 655-56, 412 S.E.2d at 99. AAI also required employees periodically to sign verifications acknowledging they had read revisions to the manual. Id. at 656, 412 S.E.2d at 99. The manual provided for classification of employees as "probationary" for the first six months of employment, or "tenured" following six months of satisfactory employment. Id. The manual contained disciplinary guidelines: If a tenured employee committed a severe violation (illustrations of which included blatant safety rule violations or misappropriation of corporate assets), AAI could terminate the employee without warning. Id. Less severe violations by a "tenured" employee required various warnings—the first warning was verbal and the second and third were written. After a fourth nonsevere violation, a tenured employee could be terminated. Id. For an in-depth discussion of the effect of employee manuals on the doctrine of employment-at-will, see Richard H. Winters, Note, Employee Handbooks & Employment-at-Will Contracts, 1985 DUKE L.J. 196, 196-220 (1985).
24. Salt, 104 N.C. App. at 655, 412 S.E.2d at 98. Salt received no warnings before her dismissal. In fact she had received early tenure in January 1986 along with a $2,000 per year salary increase. Her supervisors gave her positive evaluations in August 1986. Id. at 654, 412 S.E.2d at 98.
25. Id. at 655, 412 S.E.2d at 98.
26. Id. at 664, 412 S.E.2d at 104.
27. Id. at 655-60, 412 S.E.2d at 99-101; see infra notes 28-30 and accompanying text.
28. Although the court set out several cases involving employment manuals, the court...
the employee handbook as part of a unilateral contract between Salt and AAI. Striking down Salt’s final argument alleging breach of contract, the court found that Salt provided no additional consideration to create a relationship more permanent than employment-at-will.

Turning to the issue of wrongful discharge, the Salt court held that no tort for mere discharge in bad faith—outside of the exception created for discharge in contravention of public policy—existed in North Carolina. Although the North Carolina Supreme Court in Coman v. Thomas Manufacturing had previously discussed the idea that an employer could not discharge an employee in bad faith, the Salt court characterized this language as “pure dicta.” It concluded that Coman was grounded “solely on the premise that North Carolina has created a

neither distinguished Salt from these cases nor advanced any reasons why Salt’s manual was not part of the contract. Salt, 104 N.C. App. at 656-58, 412 S.E.2d at 99-100. Using Rosby v. General Baptist State Convention, 91 N.C. App. 77, 81, 370 S.E.2d 605, 608, disc. rev. denied, 323 N.C. 626, 374 S.E.2d 590 (1988), as an example, the court said a manual did not become part of a contract unless expressly included within the terminable-at-will contract. Salt, 104 N.C. App. at 656-57, 412 S.E.2d at 99-100. In Rosby, the plaintiff employee had an oral contract, and his manual simply was presented to him as his “work bible.” Rosby, 91 N.C. App. at 81, 370 S.E.2d at 608. The court also referred to Trought v. Richardson, 78 N.C. App. 758, 338 S.E.2d 617, disc. rev. denied, 316 N.C. 557, 344 S.E.2d 18 (1986), in which the North Carolina Court of Appeals found that the plaintiff sufficiently had alleged the manual to have been included in the employment contract to survive a 12(b)(6) motion. Id. at 762, 338 S.E.2d at 619-20. In Trought, the employee was required to sign a statement, at the commencement of her job, verifying receipt of the manual, which provided that she could be terminated only for cause. Id. The Salt court also noted that in Harris v. Duke Power, 319 N.C. 627, 631, 356 S.E.2d 357, 360 (1987), the North Carolina Supreme Court failed to extend the Trought rationale to a situation where the manual did not provide for discharge only for cause and consisted of guidelines directed at management. Salt, 104 N.C. App. at 657, 412 S.E.2d at 100.

29. Salt, 104 N.C. App. at 658, 412 S.E.2d at 100. A unilateral contract is one in which there is a promise on one side only: “the offeror makes the promise contained in the offer, and the offeree renders some performance as acceptance.” E. Allan Farnsworth, Contracts § 3.4 (2d ed. 1990). Under this theory, the handbook and the employee’s act of working create a contract on their own; the employee would not have to incorporate a manual into a preexisting employment contract.

30. Salt, 104 N.C. App. at 658-59, 412 S.E.2d at 100-01. The court distinguished Sides v. Duke University, 74 N.C. App. 331, 345, 328 S.E.2d 818, 828, disc. rev. denied, 314 N.C. 331, 333 S.E.2d 490 (1985), where the North Carolina Court of Appeals held that a move from Michigan to Durham demonstrated sufficient additional consideration to remove the employee from employment-at-will, from the instant case, reasoning that Duke University assured Sides of discharge only for incompetence whereas Salt received no comparable assurances. Id.

31. Salt, 104 N.C. App. at 662, 412 S.E.2d at 103.


33. Id. at 176-78, 381 S.E.2d at 448-49. The Coman court stated specifically, “[N]umerous courts have recognized wrongful discharge theories characterized either as the bad faith exception to the at-will doctrine or under the implied covenant of good faith and fair dealing.” Id. at 177, 381 S.E.2d at 448.

34. Salt, 104 N.C. App. at 662, 412 S.E.2d at 103.
public policy exception to the employment-at-will doctrine."\textsuperscript{35} The \textit{Salt} court, further supporting its decision, noted that the North Carolina Supreme Court in \textit{Burgess v. Your House}\textsuperscript{36} commented that employment-at-will had been "narrowly eroded" by statutory and public policy exceptions.\textsuperscript{37} The \textit{Salt} court thus eliminated any opening in the North Carolina doctrine of employment-at-will that the \textit{Coman} decision may have provided for bad faith discharge.

\textit{Salt} rests on a large foundation of North Carolina cases interpreting the traditional employment-at-will doctrine. In \textit{Sides v. Duke University},\textsuperscript{38} Sides, a nurse, was discharged after she refused to commit perjury in a malpractice action against one of the doctors with whom she worked.\textsuperscript{39} The North Carolina Court of Appeals held that "while there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy."\textsuperscript{40} Noting the great public interest in preventing the obstruction of justice and characterizing the crime of perjury as "an affront to the integrity of our judicial system,"\textsuperscript{41} the court upheld Sides's wrongful discharge action.\textsuperscript{42}

The same year in \textit{Walker v. Westinghouse Electric Corp.},\textsuperscript{43} the North Carolina Court of Appeals affirmed summary judgment for the defendant on Walker's wrongful discharge claim.\textsuperscript{44} Walker alleged that his discharge for raising workplace safety concerns fit under the public

\begin{itemize}
\item 326 N.C. 205, 388 S.E.2d 134 (1990).
\item \textit{Id.} at 333-35, 328 S.E.2d at 821-22.
\item \textit{Id.} at 342, 328 S.E.2d at 826. \textit{Sides} illustrates the public policy exception to the employment-at-will doctrine. \textit{See supra} note 8 and accompanying text.
\item \textit{Sides}, 74 N.C. App. at 343, 328 S.E.2d at 848. \textit{See also} \textit{Williams v. Hillhaven Corp.}, 91 N.C. App. 35, 39, 370 S.E.2d 423, 425 (1988) (finding the \textit{Sides} public policy exception applicable to discharge for refusing to commit perjury).
\item \textit{Sides}, 74 N.C. App. at 343, 328 S.E.2d at 826-27.
\item \textit{Id.} at 262, 335 S.E.2d at 85.
\end{itemize}
policy exception to employment-at-will established in *Sides*.\(^{45}\) The court, however, distinguished *Sides* on the ground that Sides was asked to violate a law, and her termination was obviously for reasons counter to the state's public policy. Using *Sides* as an example, the court dictated a standard requiring a "clear violation of express public policy."\(^{46}\)

The court of appeals continued to interpret the public policy exception narrowly. In *Hogan v. Forsyth Country Club*,\(^{47}\) a chef sexually harassed the plaintiff employee. The plaintiff contended that she was discharged in retaliation for her complaints against him.\(^{48}\) Affirming summary judgment for the defendant, the court framed the test for successfully invoking the public policy exception as facing a choice between violation of the law and retaining one's job.\(^{49}\)

Three years later, the North Carolina Supreme Court significantly expanded the public policy exception created by *Sides* in *Coman v. Thomas Manufacturing Co.*\(^{50}\) Mark Coman was fired for refusing to falsify driving logs to bring them into compliance with the United States Department of Transportation's regulations.\(^{51}\) Although the supreme court upheld Coman's wrongful discharge action against a 12(b)(6) motion on the grounds that Coman's discharge might have violated public policy, the court also discussed the bad faith exception. The court held that Coman's claim fell within the reasoning of *Sides*: perjury and operating a truck in violation of federal law both "offend the public policy of North Carolina."\(^{52}\) Because North Carolina had adopted these driving regulations, forcing an employee to violate them represents an evident affront to state public policy. Coman, according to the court, faced the Hobson's choice required in successful wrongful discharge claims: violating public policy and risking imprisonment\(^{53}\) or complying with public

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45. *Id.* at 262-63, 335 S.E.2d at 85.
46. *Id.* at 263, 335 S.E.2d at 86.
48. *Id.* at 500, 340 S.E.2d at 126.
49. *Id.* Two years later, in *Burrow v. Westinghouse Electric Corp.*, 88 N.C. App. 347, 363 S.E.2d 215, *disc. rev. denied*, 322 N.C. 111, 367 S.E.2d 910 (1988), the court held that no wrongful discharge action will lie for failure to perform an unsafe act: Violation of a federal regulation did not in itself create an exception to employment-at-will, absent some policy concerns. *Id.* at 354, 363 S.E.2d at 220; see Alford, *supra* note 8, at 1186.
51. *Id.* at 173-74, 381 S.E.2d at 446. The regulations prohibit a shift of more than ten hours without a minimum rest period of eight hours. *Id.*
52. *Id.* at 175, 381 S.E.2d at 447.
policy and losing his job.\textsuperscript{54}

After discussing the public policy issues, the court devoted two pages of its opinion to bad faith discharge, essentially recognizing a bad faith exception to employment-at-will in North Carolina.\textsuperscript{55} The court declared, "This court has never held that an employee at will could be discharged in bad faith. . . . Bad faith conduct should not be tolerated in employment relations, just as it is not accepted in other commercial relationships."\textsuperscript{56} The court never clarified, however, the contours of the bad faith exception—specifically whether the bad faith exception was a component of the public policy exception or if bad faith discharge could be alleged as a separate cause of action.

Subsequent court of appeals decisions attempted to define the boundaries of the bad faith discharge. In \textit{McLaughlin v. Barclays American Corp.},\textsuperscript{57} the court of appeals construed a separate bad faith exception from \textit{Coman}.\textsuperscript{58} McLaughlin was fired after hitting an employee in self-defense to fend off an attack.\textsuperscript{59} Refusing to accept McLaughlin's argument that his discharge violated public policy, the court stressed that \textit{Sides} and \textit{Coman} presented statutory and regulatory evidence of public policy which were lacking here.\textsuperscript{60} While the court found no evidence of bad faith to justify an exception to at-will employment in this case,\textsuperscript{61} it unequivocally stated "that our analysis of these facts does not close doors to plaintiffs who are able to show bad faith by the employer in situations similar to this one."\textsuperscript{62} Thus, although the extent of the bad faith exception remained vague after \textit{McLaughlin}, some sort of exception appeared to exist.\textsuperscript{63}

\textsuperscript{54} \textit{Coman}, 325 N.C. at 176, 381 S.E.2d at 447. On remand, the jury, deciding that no public policy violation was implicated, declined to support the wrongful discharge claim. \textit{Coman v. Thomas Mfg.}, 105 N.C. App. 88, 89, 411 S.E.2d 626, 627 (1992).

\textsuperscript{55} \textit{Coman}, 325 N.C. at 176-78, 381 S.E.2d at 448-49.

\textsuperscript{56} \textit{Id. at} 176-77, 381 S.E.2d at 448. The \textit{Coman} court noted that many courts recognized wrongful discharge theories using a bad faith exception to the at-will doctrine and that the decision in \textit{Coman} was in accord with most jurisdictions. \textit{Id. at} 177, 381 S.E.2d at 448; see \textit{Malever v. Kay Jewelry Co.}, 223 N.C. 148, 25 S.E.2d 436 (1943); \textit{Haskins v. Royster}, 70 N.C. 601 (1874).


\textsuperscript{58} \textit{Id. at} 306, 382 S.E.2d at 840.

\textsuperscript{59} \textit{Id. at} 303, 382 S.E.2d at 838.

\textsuperscript{60} \textit{Id. at} 306, 382 S.E.2d at 839-40.

\textsuperscript{61} \textit{Id. at} 306, 382 S.E.2d at 840. McLaughlin himself did not even raise this issue.

\textsuperscript{62} \textit{Id. at} 306, 382 S.E.2d at 840.

\textsuperscript{63} \textit{Id; but see} \textit{Burgess v. Your House}, 326 N.C. 205, 210, 388 S.E.2d 134, 137 (1990) (asserting that employment-at-will has only been narrowly eroded).
Finally, in Amos v. Oakdale Knitting Co., the court of appeals held that, in order to establish a claim for wrongful discharge, a two-step test applies. First, the discharge must violate some well-established public policy; further, "there must be no North Carolina statutory remedy to protect the interests of the aggrieved employee or society."

In the course of its opinion, the Salt court noted the confusing state of the employment-at-will doctrine in North Carolina, as demonstrated above, especially in the area of wrongful discharge. Discord among federal district courts interpreting North Carolina law was also pervasive, particularly in construing bad faith discharge in the wrongful discharge area. The middle and western districts have found that such a principle exists in North Carolina. For example, in Iturbe v. Wandell & Goltermann Technologies, the middle district court upheld a claim for bad faith discharge. In Iturbe, Blanca Iturbe sued in federal court for discrimination based on national origin under Title VII of the Civil Rights Act of 1964 when she was discharged; she also attached pendent state claims of breach of contract and wrongful discharge. Blanca had worked for Wandel & Goltermann in New Jersey, but moved her family to North Carolina when the company offered her a "continuing job" at its new North Carolina facility. Her husband was also hired by Wandel & Goltermann, although he had not worked for them in New Jersey. Five years later, after Blanca's husband protested when his manager told him that he would be laid off, the manager told him that either he or Blanca would be fired. Blanca was fired four days later, while a male of American birth, who worked in the same department and had no better job performance and less seniority than she, was retained. Blanca sued, stating that the contract was not employment-at-will and alleging wrongful discharge based both on bad faith and violation of public policy.

Consistent with North Carolina law, the middle district court concluded that Blanca had not supplied additional consideration to remove the contract from the at-will doctrine because she had moved within the

65. Id. at 785, 403 S.E.2d at 568. A statutory remedy would guard adequately the interests of the employee and public policy. Id.
66. Salt, 104 N.C. App. 662-63, 412 S.E.2d at 102-03.
67. See supra note 8.
69. Id. at 960.
70. Id.
71. Id.
72. Id. at 961.
company and had not foregone other job opportunities. The court, however, found that Blanca met the public policy exception under the wrongful discharge claim. The court presented the two-part test for the public policy exception: "(1) the discharge must violate some well-established public policy and (2) there must be no North Carolina statutory remedy to protect the interest of the aggrieved employee or society." Because Title VII was established public policy in North Carolina but afforded no state statutory remedy, the court held that Blanca met the criteria to maintain a wrongful discharge in contravention of public policy action. Regarding Blanca's allegation of bad faith discharge, the Iturbe court held that "discharge from employment in bad faith can state a claim in North Carolina" and that Wandel & Goltermann's failure to follow written procedure for termination based on seniority as outlined in its employment manual constituted bad faith discharge.

The United States District Court for the Western District of North Carolina has followed an approach similar to that of the middle district by recognizing bad faith as a relevant issue in wrongful discharge claims. In Mayse v. Protective Agency, the plaintiff sued a Charlotte insurance agency which circulated a memo stating that it did not want to hire a black person to fill its job vacancy. Mayse, a black insurance agent, was fired for refusing to implement the company's discriminatory policy; she included both a wrongful discharge claim and Title VII claims in her complaint. At trial, the jury found that Mayse had not been discharged in bad faith in violation of public policy.

73. Id. In Buffaloe v. United Carolina Bank, 89 N.C. App. 693, 366 S.E.2d 918 (1988), the North Carolina Court of Appeals declined to remove the contract from at-will status for a similar intracompany move. Id. at 696-97, 366 S.E.2d at 921.


75. Iturbe, 774 F. Supp. at 963.

76. Id. at 963-64. The middle district court, in Riley v. Dow Corning Corp., 767 F. Supp. 735 (M.D.N.C. 1991), again upheld a bad faith wrongful discharge action by denying the defendant's motion for summary judgment on that claim. Id. at 742. In Riley, defendant Dow Corning terminated Riley after an internal investigation concluded that he had falsified records. Id. at 737. Riley contended that he acted at the behest of his employers. The court held that a reasonable person could believe that the defendant acted in bad faith and in contravention of public policy if it fired the plaintiff for falsifying records at its command. Id. at 742. The Riley court did not differentiate between the bad faith and public policy claims as did the court in Iturbe.


78. Id. at 269-70.

79. Id. at 275.

80. Id.
dict against Mayse was contrary to the weight of the evidence, the court followed the two-part test delineated in *Iturbe*. Finding that section 143-422.2 of the North Carolina General Statutes established North Carolina’s public policy against racially-motivated hiring decisions, the court held that Mayse satisfied the first prong. The court concluded that, although Title VII proffered a federal remedy for employment discrimination, no state statutory remedy existed, and therefore the second part of the *Iturbe* test was satisfied. Unlike the *Iturbe* court, however, the *Mayse* court inexplicably framed the issue as whether the discharge was “in bad faith in contravention of public policy” rather than delineating “bad faith” and “public policy” as two separate tort exceptions to employment-at-will.

The eastern district court remains diametrically opposed to the other two federal districts on the wrongful discharge issue. In *English v. General Electric Co.*, the court held that North Carolina did not recognize a bad faith exception to employment-at-will under a wrongful discharge cause of action. English alleged that she had been discharged for her attempts to alert supervisors to deficiencies in the clean-up of contaminated nuclear material. Responding to the plaintiff’s claim of bad faith wrongful discharge, the *English* court held that any language in *Coman* concerning bad faith discharge was dicta. Moreover, the *Coman* court’s claim that it was following the majority of jurisdictions in its decision referred to the public policy exception rather than to bad faith discharge, the *English* court reasoned, because the majority of jurisdictions do not recognize an action for bad faith discharge.

Then, in *Percell v. IBM*, the eastern district went one step further by narrowly reading the public policy exception. Percell brought an action under 42 U.S.C. § 1981 and a pendent state claim under wrongful discharge. Percell worked for IBM as a machine tool operator from 1974 until 1989. IBM maintained an open-door policy under which an employee could appeal the decision of immediate supervisors to higher-

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81. This statute legislatively declares that North Carolina has a public policy to eliminate discriminatory practices in employment. N.C. GEN. STAT. § 143-422.2 (1990).
83. Id. at 275-76.
85. Id. at 294. English added a claim of wrongful discharge in bad faith on appeal because she failed to appeal the dismissal of her public policy violation claim. Id. at 295.
86. Id. at 295-96.
87. Id. at 296.
89. The claim was for racially discriminatory discharge in a Title VII action. Id. at 298.
90. Id.
level management. When Percell's supervisor refused to transfer him to another department, Percell appealed the decision under the open-door policy. Percell contended that after he exercised his rights under the policy, he began receiving numerous negative evaluations, which ultimately resulted in his termination. Plaintiff's wrongful discharge claim alleged that he was discharged in violation of public policy and in bad faith for exercising his rights under the company's open-door policy.

Responding to the public policy argument, the court first held that retaliatory discharge for an employee's pursuit of employer-sanctioned avenues of intracompany relief did not implicate a matter of general public concern sufficient to invoke the public policy exception. Unlike the Iturbe and Mayse court, the Percell court did not find an established public policy exception under the North Carolina Equal Employment Practices Act. The court held that, because the North Carolina statute "acknowledged a public policy against employment discrimination but chose not to provide aggrieved employees with a private right of action beyond that already afforded by federal discrimination statutes," approval of a wrongful discharge action for contravening public policy against racial discrimination would result in a state claim for wrongful discharge being attached to every employment discrimination claim. The Percell court also emphasized that plaintiffs successfully invoking the public policy exception had been faced with a choice between performing an act injurious to the public interest or losing their jobs, and that Percell had not faced this choice. Finally, addressing Percell's alternative complaint of bad faith discharge, the court held that such a cause of action was not recognized under North Carolina law.

The Fourth Circuit Court of Appeals also has exhibited uncertainty about employment-at-will in North Carolina. In Harrison v. Edison

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91. Id.
92. Id.
93. Id. at 298-99.
94. Id. at 299.
95. Id. at 300. The court found that potential harm to the public at large, present in both Sides and Coman, was not present here. For a discussion of Sides and Coman, see supra notes 38-42, 50-56 and accompanying text.
97. Id.
98. Id. The court also was concerned about allowing remedies beyond those currently afforded statutorily. Id.
99. Id. at 301. The court noted that the only alleged violation of public policy here was the discharge itself. Id.
100. Id. at 302.
Brothers Apparel Stores, Inc., the plaintiff Harrison worked at Edison's store. Her manager "made sexually suggestive remarks to her, touched her without her consent, and requested sex." On December 11, 1986, Harrison reported the conduct to the regional manager, and on December 18, she was terminated. In response to Harrison's allegation of wrongful discharge, the United States Court of Appeals for the Fourth Circuit determined that her complaint stated a valid claim. The Harrison court noted that successful wrongful discharge plaintiffs in North Carolina "have had to choose between their jobs and violating the criminal law." Finding that Harrison was forced to choose between prostitution—an illegal act—and retaining her job, the Fourth Circuit upheld Harrison's claim. The court also admitted its uncertainty about the contours of the bad faith exception in North Carolina, thereby implicitly recognizing the existence of some sort of bad faith exception. Thus, even at the federal appellate level, wrongful discharge remains a garbled concept.

101. 924 F.2d 530 (4th Cir. 1991). The district court denied Harrison's claim because a federal remedy existed. Id. at 531.
102. Id.
103. Id.
104. Id. at 534.
105. Id. at 533. The Harrison court stated that in Hogan v. Forsyth Country Club, 79 N.C. App. 483, 340 S.E.2d 116, disc. rev. denied, 317 N.C. 334, 346 S.E.2d 140 (1986), the North Carolina Court of Appeals did not extend the public policy exception to a sexually-harassed employee. The Harrison court distinguished Hogan, however, on the grounds that Hogan involved employee-to-employee rather than the management-to-employee harassment present in Harrison, and because it antedated Coman. Harrison, 924 F.2d at 533.
106. Harrison, 924 F.2d at 534. The Harrison court also explicitly cautioned that a federal court remedy was irrelevant to the existence of a remedy in state court. Id. at 533.
107. Id. The United States Court of Appeals for the Fourth Circuit recently addressed a breach of contract and wrongful discharge claim in Smith v. Piedmont Aviation, 898 F.2d 147 (4th Cir. 1991) (text in Westlaw). Smith transferred from Myrtle Beach, South Carolina, where he was a Piedmont employee to Winston-Salem, North Carolina, for a trainee position as a flight attendant. Id. at *2. Piedmont terminated Smith for displaying an unacceptable attitude. Smith in turn alleged breach of contract and wrongful discharge in breach of an implied covenant of good faith. Addressing the contract claim, the fourth circuit determined that even if Smith's move constituted additional consideration, he had received no assurances of termination only for cause. Id. at *3. Neither did Piedmont's employment manual contain any "termination only for cause" provisions. Thus, the court concluded, no action for breach of contract would lie. Id. at *4. The court neither recognized nor rejected the bad faith discharge claim. Instead, the court held that such an implied covenant was not breached in Smith itself. Id.
108. The United States Supreme Court's most recent opinion on the Employee Retirement Income Security Act (ERISA) preemption of wrongful discharge claims also raises doubts about state wrongful discharge claims. Ingersoll-Rand Co. v. McLendon, 111 S. Ct. 478 (1990). Holding that ERISA preempts "a state common law claim that an employee was unlawfully discharged to prevent his attainment of benefits under a plan covered by ERISA," id. at 481, the Court reasoned that the preemption clause in ERISA covered the instant case.
Employment-at-will has remained a confused doctrine in recent years. While exceptions to employment-at-will pursuant to a contract theory have not changed greatly in North Carolina, exceptions under wrongful discharge have met with vague and confusing interpretations. Courts have disagreed about what constitutes evidence of public policy sufficient to invoke the public policy exception to employment-at-will: For example, the federal district courts split on the question of whether the North Carolina statute prohibiting racial discrimination evidences the state's policy against discrimination. The possibility of proving wrongful discharge merely by establishing discharge in bad faith was preferred only vaguely by the North Carolina courts; the conflicting interpretations by the federal courts illustrate the confusion in this area. Salt v. Applied Analytical Inc. has contributed to the resolution of the confusing state of the employment-at-will doctrine, especially regarding the bad faith exception for a wrongful discharge action.

The Salt court continued the strict interpretation of exceptions to employment-at-will in a breach of contract action and defined the boundaries of wrongful discharge tort by holding that proof of bad faith discharge could not establish wrongful discharge in North Carolina. The court of appeals' treatment of Salt's breach of contract argument does not diverge significantly from previous North Carolina cases; employment-at-will contracts remain the rule, subject to a small number of well-defined and uniformly applied exceptions. Although the court recognized that Salt signed a statement acknowledging receipt of an employee

because the state law here "related" to ERISA as intended by Congress. Id. at 483. The Court cited an interest in uniformity as the impetus behind the preemption clause. Id. at 482. Thus, an employee does not have to bring an action under ERISA for the federal statute to apply. In McLendon, the existence of a pension plan was critical to proving employer liability under wrongful discharge law. Id. at 483. Finally, the Court held that a wrongful discharge action may be impliedly preempted by conflicting with § 510 of ERISA, which makes it unlawful to discharge an employee for exercising his rights under an ERISA pension plan, and § 502 of ERISA, which reserves remedies for ERISA violations to federal district courts. Id. at 484-85.

Because the United States Court of Appeals for the Fourth Circuit has yet to deal with this issue, and because Ingersoll was based largely on statutory interpretation, id. at 482, the effect of the Supreme Court's opinion on North Carolina plaintiffs in federal court remains unclear. Any filing of a state wrongful discharge action, in which any element may be related to ERISA, appears eligible for preemption. To protect against removal, the employee should remain cautious about framing the issue of the case around the existence of pension benefits.

113. Id. at 662, 412 S.E.2d at 102-03.
manual as did the plaintiff in *Trought v. Richardson*, the court followed the rationale upheld by the supreme court in *Harris v. Duke Power*. In *Harris*, the court suggested that, in addition to signing for the manual, the manual must provide for termination only for cause in order for a breach of contract claim to survive. But even though the *Salt* court reached a result consistent with precedent, it did not explain adequately its rationale; instead, the *Salt* court simply set forth three examples of "manual" cases and concluded in one sentence that the manual was not part of the contract.

The *Salt* court's treatment of the additional consideration exception, however, was illogical in comparison with previous cases. The *Salt* court established a rule that additional consideration exists only when an employee changes residences and receives assurances of termination only for cause. This rule is inconsistent with the precedent on which *Salt* relied because the court of appeals had not yet recognized the "termination only for cause" element when it first accepted the additional consideration argument years earlier. In *Sides v. Duke University*, the plaintiff received assurances of termination only for cause, but the decision did not turn on this point—rather, it turned on her moving from Michigan to North Carolina. Furthermore, the *Salt* court disregarded *Buffaloe v. United Carolina Bank*, in which the court held that a move from Charlotte to Lumberton did not constitute additional consideration because the move was within the same company. The *Buffaloe* court did not mention termination only for cause. Thus, by requiring change of residence and termination-only-for-cause guarantees, the *Salt* court established a stricter test for the additional consideration exception, thereby buttressing the employment-at-will doctrine.

The *Salt* court also narrowed and clarified the scope of wrongful discharge in the employment-at-will doctrine in North Carolina. While the analysis in *Salt* itself departs somewhat from North Carolina cases

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116. *Id.* at 630-31, 356 S.E.2d at 630.
117. *Salt*, 104 N.C. App. at 658, 412 S.E.2d at 100.
118. *Id.* at 658-59, 412 S.E.2d at 100-01.
121. 89 N.C. App. 693, 366 S.E.2d 918 (1988).
122. *Id.* at 696-97, 366 S.E.2d at 920.
123. *Id.*
immediately preceding it, the result is in keeping with prior cases. Expressly disregarding the Coman court's discussion of bad faith discharge, the Salt court characterized Coman's analysis of discharge in bad faith as "dicta." Despite the Coman dissent's contention that the Coman majority overemphasized North Carolina's past concern with discharge in good faith, the Coman court sent the message, which the Salt court ignored, that employers should not be allowed to discharge employees in bad faith. The Salt court also perceived the McLaughlin court's discussion of bad faith discharge as mere dictum; however, the Salt court failed to address why the McLaughlin court lent separate consideration to the plaintiff's bad faith claim, apart from his public policy claim.

Despite Salt's failure to examine adequately the possibility of a separate tort of bad faith discharge, Salt's result conforms with the intent underlying Coman. First, the supreme court, in Burgess v. Your House, recently commented on the narrow statutory and public policy erosion of employment-at-will, but failed to mention a separate bad faith exception. Moreover, the Coman court's declaration that its holding was in accord with the majority of jurisdictions must refer to the public policy exception because the majority of states do not recognize a separate bad faith discharge claim. Even the Coman dissent phrased the question addressed in that case in terms of a bad-faith exception based on public policy grounds. The Salt court thus defines more clearly the boundaries of wrongful discharge for the North Carolina courts and for federal courts applying North Carolina law.

124. The Salt court abrogates completely the existence of a bad faith discharge claim in North Carolina. Salt, 104 N.C. App. at 662, 412 S.E.2d at 103.
125. Id. Salt is the first state case which expressly disregards the bad faith discharge language in Coman.
127. Id. at 176-78, 381 S.E.2d at 448-49; see supra note 56 and accompanying text for the precise language used by the Coman court. The Iturbe court recognized this language as dictum, but "powerful dictum." Iturbe v. Wandel & Goltermann Technologies, 774 F. Supp. 959, 963 (M.D.N.C. 1991).
129. Salt, 104 N.C. App. at 662, 412 S.E.2d at 103.
131. Id. at 210, 388 S.E.2d at 138.
132. Id.
133. 325 N.C. 172, 177, 381 S.E.2d 445, 448 (1989).
135. Coman, 325 N.C. at 185, 381 S.E.2d at 452 (Meyer, J., dissenting).
Employment-at-will doctrine implicates various policy considerations. A broad or narrow interpretation of the doctrine may affect the employer financially, by requiring costly "document[ation of] just cause of termination" and "production of evidence that an at-will employee was not terminated for a particular improper reason." Employment-at-will doctrine implicates various policy considerations. A broad or narrow interpretation of the doctrine may affect the employer financially, by requiring costly "document[ation of] just cause of termination" and "production of evidence that an at-will employee was not terminated for a particular improper reason." 136 Employers may be less willing to hire marginal employees and give them a chance under an employment-at-will system with many exceptions. This argument may lack substance, however, because employers rarely hire "marginal" employees or fire people unless a legitimate "cause" or business reason exists. Finally, courts must consider the probable logistical results of any expansion of breach of contract or wrongful discharge actions: How will companies of different sizes be treated? What damages are appropriate? What can be done to prevent unduly sympathetic juries from granting disproportionately large awards? 137

Although Salt's narrow construction of the doctrine may curb some of these costs, various deleterious consequences may also flow from the decision. Because Salt represents a return to a stricter view of employment at will, a significant reduction of wrongful discharge actions is a likely result. 138 Although excessive jury awards may also decline, the jury's decision in the remanded Coman case 139 illustrates that Salt's fears of large verdicts were misguided. Finally, the decision in Salt proliferates the trend permitting employers to promulgate meaningless manuals; not only does the plaintiff face an uphill battle in proving a manual to be part of an employment contract, but Salt now abrogates any possibility of claiming a breach of an implied covenant of good faith based on a manual. 140

For legal practitioners, Salt will have varied effects. In order to remove employment from at-will status in North Carolina, an employee may now show in several ways that an employment contract that is more than terminable-at-will existed. The employee may prove that the contract was for a definite duration. 141 An employee can use oral evidence to establish duration if the essential elements are not in the written contract. 142

136. Id. at 183, 381 S.E.2d at 452 (Meyer, J., dissenting).
137. Id. at 183-84, 381 S.E.2d at 452 (Meyer, J., dissenting).
138. Salt, 104 N.C. App. at 664-65, 412 S.E.2d at 104. Such an action would require any bad faith claim to be coupled with a public policy violation. Id.
139. 105 N.C. App. 88, 89, 411 S.E.2d 626, 627 (1992). The jury found no public policy violation and made no award. Id.
140. Salt, 104 N.C. App. at 664-65, 412 S.E.2d at 104.
An employee may remove a contract from employment-at-will status by showing that she furnished additional consideration beyond her services. Additional examples of additional consideration include moving in order to obtain a job, or sacrificing a tort claim. A change of residence encompassing a significant distance coupled with foregoing another job opportunity constitute reliable proof of additional consideration. After Salt, however, it seems as if an employee also must prove that, before her move, she received assurances that she would be terminated only for cause.

By proving that an employment manual was part of an employment contract, an employee also may evade employment-at-will status. Several factors indicate that an employment manual has been included in a contract: a requirement that the employee review the manual and sign a statement verifying receipt when she begins work and a provision that the employee can only be terminated for cause. It should be noted that any attempt to prove that the manual was a unilateral contract, thereby requiring adherence to its terms, has met with harsh treatment. The North Carolina courts have consistently asserted that "unilaterally promulgated employment manuals or policies do not become part of the employment contract unless expressly included in it."
Hence, proof of an employment contract eliminating at-will status in North Carolina is, if anything, slightly more difficult in the wake of Salt.

Moreover, an action for wrongful discharge, aside from statutorily-protected employment,\footnote{151} can be based only on an abridgment of a well-established public policy implicating general public concern. Discharge for failure to commit perjury consistently has been held to come within the purview of a public policy violation.\footnote{152} Agreements to violate highway safety regulations provide another possible illustration of a well-established public policy,\footnote{153} although the jury on the remanded Coman case determined that discharge for failure to violate such rules did not violate public policy.\footnote{154} To prove a "well-established" public policy, the employee ideally should show statutes or state regulations furthering this policy.\footnote{155} The courts have refused to extend the public policy exception to any act other than an instruction to violate a law or state regulations,\footnote{156} and have occasionally refused to extend it even to that situation.\footnote{157}

Besides alleging a well-established public policy, the employee must prove that no state statutory remedy exists to protect his grievance.\footnote{158} Any specific state remedy provided by statute preempts a wrongful discharge claim.\footnote{159}

North Carolina does not presently recognize a wrongful discharge action based on a separate bad faith exception.\footnote{160} Likewise, no cause of action exists for a breach of the covenant of good faith and fair dealing unless the employment contract had a definite duration.\footnote{161} Hence, any

\footnote{151}{See supra note 74 and accompanying text.}
\footnote{153}{Coman v. Thomas Mfg., 325 N.C. 172, 176, 381 S.E.2d 445, 447 (1989).}
\footnote{154}{Coman v. Thomas Mfg., 105 N.C. App. 88, 411 S.E.2d 626 (1992).}
\footnote{155}{Coman, 325 N.C. at 176, 381 S.E.2d at 447; Sides, 74 N.C. App. at 342, 328 S.E.2d at 326.}
\footnote{156}{Hogan v. Forsyth Country Club, 69 N.C. App. 483, 485, 340 S.E.2d 116, 118 (holding that exception applied only when an employee was fired in retaliation for "his refusal to perform an act prohibited by law or his performance of an act required by law"), \textit{disc. rev. denied}, 317 N.C. 334, 346 S.E.2d 140 (1986).}
\footnote{159}{Id.}
\footnote{160}{\textit{Salt}, 104 N.C. App. at 662, 412 S.E.2d at 103.}
attempt to allege bad faith discharge appears to be fruitless.

Employees filing wrongful discharge actions in federal courts in North Carolina may now face fewer obstacles. The treatment of the public policy exception in federal courts conforms to the treatment in North Carolina courts. Because federal courts in the western and middle districts have recognized the existence of a separate bad faith exception to employment-at-will, any action based on wrongful discharge in violation of public policy should also include a separate bad faith claim. The bad faith exception is most likely to find recognition where the employer has violated either the terms of a manual or some oral agreement. Because the eastern district has specifically declined to recognize a claim of wrongful discharge in bad faith, any such action there most likely will be futile. It would, however, be prudent for an employee to raise the claim anyway since the Fourth Circuit has implicitly recognized a bad faith exception in North Carolina. As a consequence of Salt and conflicting federal district court interpretations, employees will have to work harder in the state and federal courts to establish any case—breach of contract or wrongful discharge—against their employer.

The employment-at-will doctrine has resumed, to a large extent, its traditional status as guardian of the employer's interests. The Salt court resolved the conflict in state and federal courts over the contours of the wrongful discharge action, particularly the bad faith exception, by interpreting Coman to suit its own policy goals and departing from recent employment cases to affect a realignment with North Carolina's historical position on employment-at-will. Perhaps, the court of appeals was responding to a fear of excessive suits and jury verdicts, such as those faced by other states with a separate bad faith exception. At any rate, the Salt court should have dealt more thoroughly with its reasons for abrogating the Coman bad faith exception. To establish a breach of a covenant of good faith, the court should have required that an employment manual be incorporated into the employment contract, rather than totally abandoning bad faith discharge. A firm stance by the supreme court on bad faith discharge appears to be fruitless.

164. Iturbe, 774 F. Supp. at 964.
court on whether a bad faith exception may exist in the future would also prove helpful; at the same time, the court should clarify the fact that a bad faith claim is an exception to employment-at-will and a component of a wrongful discharge action rather than a separate cause of action itself.

Even in the wake of *Salt*, the future of the public policy exception to employment-at-will is far from certain. The Supreme Court of North Carolina should develop a more clearly defined limitation of public policy, for example by requiring evidence of violation of a statute or regulations, in order to establish uniform law. By clarifying the boundaries of the bad faith exception under wrongful discharge and reiterating the requirements for a breach of contract action, however, *Salt* has begun to dispel some of the confusion over the employment-at-will doctrine in North Carolina.

*Kimberly Anne Huffman*
Exercising the Right to Die: North Carolina’s Amended Natural Death Act and the 1991 Health Care Power of Attorney Act

North Carolina’s amended Natural Death Act,1 endorsing living wills,2 and the newly enacted Health Care Power of Attorney Act3 offer greater choice, as well as greater complexity, to those individuals who wish to make their health care decisions known should they become unable to communicate their preferences in the future. Under the 1991 amendments, those who execute a living will now may indicate that if they reach a persistent vegetative state (PVS),4 they authorize the withdrawal or withholding of medical treatment, including artificial nutrition and hydration.5 For those who wish to name someone to make health care decisions for them should they become incompetent or incapacitated, the health care power of attorney (HCPoA) is now expressly available.6 In addition, a patient in PVS who has not executed a living will or an HCPoA still may be removed from medical treatment, including artificial nutrition and hydration, if persons designated in North Carolina’s family consent statute concur.7 North Carolinians are not alone in confronting these new developments; almost half of the states have made


2. A living will is a document by which a competent person, usually at least eighteen years old, declares that should he become incompetent due to illness or accident, with no predicted hope for recovery, certain medical treatments are to be withheld or withdrawn.


4. A persistent vegetative state is “a medical condition whereby in the judgment of the attending physician the patient suffers from a sustained complete loss of self-aware cognition and, without the use of extraordinary means or artificial nutrition or hydration, will succumb to death within a short period of time.” N.C. GEN. STAT. § 90-321(a)(4) (Special Supp. 1992).

5. Id. § 90-321(b).


similar changes to their statutes.8

The General Assembly's impetus for these changes was the United States Supreme Court's galvanizing decision in *Cruzan v. Director, Missouri Department of Health.*9 The *Cruzan* Court tentatively recognized for the first time that a competent person has the constitutional right to refuse medical treatment.10 The Court also upheld as constitutional Missouri's requirement that an individual's wishes to forego artificial nutrition and hydration11 be demonstrated by clear and convincing evidence when that individual is unable to communicate health care decisions.12 Though *Cruzan* dealt solely with Missouri's evidentiary standard,13 the decision alerted all states to reexamine their statutes and consider what options they should make available to their citizens.14 States that heeded the Court's decision were likely to offer more possibilities for prior consent expressions through the written living will document, because the Court implicitly approved this method.15 *Cruzan* also highlighted the importance of the HCPoA, because appointing an agent16 through the

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8. See, e.g., CAL. CIV. CODE §§ 2430-2444, CAL. HEALTH & SAFETY CODE §§ 7185-7194.5 (West Supp. 1992) (HCPoA and living will statutes, respectively); FLA. STAT. ANN. §§ 745.41-.52, 765.05(1) (West Supp. 1992) (HCPoA and living will statutes, respectively); GA. CODE ANN. §§ 31-36-1 to -13 (Michie 1991) (HCPoA statute); N.Y. PUB. HEALTH LAW §§ 2980-2994 (McKinney Supp. 1992) (HCPoA statute); VA. CODE ANN. §§ 37.1-134.4, 54.1-2981 to -2992 (Michie Supp. 1991) (HCPoA and living will statutes, respectively).


11. Five of the Justices in *Cruzan* recognized artificial nutrition and hydration as a medical treatment. *Id.* at 2857 (O'Connor, J., concurring); *id.* at 2866 (Brennan, J., dissenting) (joined by Justice Marshall and Justice Blackmun); *id.* at 2879 (Stevens, J., dissenting). It is not known whether Justice Thomas or Justice Souter would agree with this crucial determination. Writing for the majority, Chief Justice Rehnquist gave no direct opinion on this issue.

12. *Id.* at 2852.

13. Justice O'Connor noted that Missouri's standard was not the only constitutional way to protect the incompetent patient's rights in medical treatment decisions. *Id.* at 2858-59 (O'Connor, J., concurring).

14. Legislatures were not the only ones to take notice of the decision. The Society for the Right to Die reported "thousands of calls" from people who wanted to know how to make their health care choices known. Ellen E. Schultz, *Ruling Draws the Worried to "Living Wills,"* WALL ST. J., June 29, 1990, at C1 (quoting Fenella Rouse, executive director of Concern for Dying/Society for the Right to Die).

15. Overton, *supra* note 9, at 1329, 1329 n.270 (noting the Court's implicit approval of writings through its reading of Missouri's clear and convincing standard as calling for written documents).

HCPoA may cover more medical situations than does the living will.\textsuperscript{17} The agent can consider the present facts of the patient’s situation in making health care decisions, whereas the living will only incorporates expressions of a patient’s prior preferences. The North Carolina General Assembly considered these possibilities, and on July 11th, 1991, answered the call of \textit{Cruzan} by ratifying statutes with expanded protections for incompetent patients.\textsuperscript{18} This Note reviews the history of the living will statute in North Carolina and the use of health care powers of attorney prior to the 1991 statutory authorization.\textsuperscript{19} The Note then discusses the amendments to the living will statute and analyzes the issues raised but not resolved by those amendments.\textsuperscript{20} It next examines the requirements for the new HCPoA and examines the issues raised by this statute, including specific areas of concern for those executing or drafting HCPoAs.\textsuperscript{21} Finally, this Note highlights those areas of the statutes that need clarification from the General Assembly.\textsuperscript{22}

North Carolina always has been in the forefront of natural death legislation. In 1977 the General Assembly was among the first state legislatures to enact a natural death act.\textsuperscript{23} The original act was a response to the technological advances made in life-sustaining treatments and to \textit{In re Quinlan},\textsuperscript{24} the New Jersey case that focused the nation’s attention on the right to die.

North Carolina’s original Natural Death Act “recognize[d] that an individual’s rights as a citizen of this State include the right to a peaceful and natural death.”\textsuperscript{25} By recognizing this right rather than conferring it, the legislature avoided the implication that the living will was the only

\textsuperscript{17} Justice O’Connor explicitly endorsed the appointment of health care agents as “a valuable additional safeguard of the patient’s interest in directing his medical care.” 110 S. Ct. at 2857-58 (O’Connor, J., concurring).

\textsuperscript{18} \textit{See supra} notes 1 & 3 and accompanying text.

\textsuperscript{19} \textit{See infra} notes 23-41 and accompanying text.

\textsuperscript{20} \textit{See infra} notes 42-68 and accompanying text.

\textsuperscript{21} \textit{See infra} notes 69-114 and accompanying text.

\textsuperscript{22} \textit{See infra} notes 115-17 and accompanying text.


method by which the right to a natural death could be exercised. The legislature emphasized the nonexclusivity of the living will by its 1979 amendment to the general purpose section of the Act: "Nothing in this Article shall impair or supersede any legal right or legal responsibility which any person may have to effect the withholding or withdrawal of life-sustaining procedures in any lawful manner." Though the statute does not delineate how one might exercise the right to die through a method other than the living will, it does not foreclose the effectuation of the right through other forms of expression, both oral and written. From the beginning, then, North Carolina has shown clearly that its citizens have broad powers to protect their right to die.

The statutory living will form set forth in the original Natural Death Act has remained virtually unchanged for fourteen years. Under the terms of the original statute, a person with capacity can declare that should his condition be diagnosed by the attending physician and another physician as terminal and incurable, extraordinary means "may be withheld or discontinued upon the direction and under the supervision of the attending physician." The statute also provides that a physician will not be subject to civil or criminal liability or charges of unprofessional conduct if he relies on and acts according to a properly executed living will. To be properly executed, the living will must express the declarant’s desires as set forth above, state that the declarant is aware of the action authorized by the document, be witnessed by two people, and proved by a clerk or notary. The witnesses must know the declarant

29. For a discussion of the 1991 amendment to this requirement, see infra notes 49-51 and accompanying text.
30. Since its enactment the statute has defined "extraordinary means" as "any medical procedure or intervention which in the judgment of the attending physician would serve only to postpone artificially the moment of death by sustaining, restoring, or supplanting a vital function." Act of June 29, 1977, ch. 815, § 1, 1977 N.C. Sess. Laws 1101, 1102 (codified at N.C. GEN. STAT. § 90-321 (Special Supp. 1992)).
31. Id. For a discussion of this discretionary language of the statute, see infra notes 64-68 and accompanying text.
well enough to be able to judge him of sound mind,\textsuperscript{34} but they cannot be related to the declarant or the declarant's spouse within the third degree, entitled to any portion of the declarant's estate either by will or intestacy, employed by or acting as a medical provider for the declarant, or hold a claim against the declarant.\textsuperscript{35}

Health care powers of attorney played a lesser role than the living will in North Carolina's legislation prior to the 1991 amendments. Though the durable power of attorney statutes do not prohibit the use of durable\textsuperscript{36} health care powers of attorney, they do not expressly authorize them. The principal, however, may authorize the attorney-in-fact, who is known as the agent under the new HCPoA statute, to act for the principal in the area of "personal relationships and affairs,"\textsuperscript{37} thus permitting her "to provide medical, dental, and surgical care, hospitalization and custodial care for the principal."\textsuperscript{38} This provision may be interpreted to include health care decisions for the incompetent.

Other factors support the validity of the HCPoA prior to its statutory authorization. Under the law of agency, a person may delegate to another the power to perform certain acts, as long as those acts are not ones that depend upon the particular individual's "character, skill or discretion," because such a delegation might harm those who rely on that particular person's performance of the acts.\textsuperscript{39} North Carolina's enactment of a family consent statute suggests, however, that in North Carolina health care decisions for the incompetent do not depend on such individual traits and therefore may be delegated.\textsuperscript{40} Furthermore, the legislature recognized that the citizens of North Carolina have the right to a


\textsuperscript{36} The power is durable because it survives the incompetence of the principal. N.C. GEN. STAT. § 32A-8 (1991).

\textsuperscript{37} Id. § 32A-1(9) (1991).

\textsuperscript{38} Id. § 32A-2(9) (1991).

\textsuperscript{39} Francis J. Collin, Jr., Planning and Drafting Durable Powers of Attorney, 15 A.C.P.C. PROB. NOTES 27, 49 (1989).

\textsuperscript{40} The General Assembly enacted the family consent statute at the same time as the first living will statute. Act of June 29, 1977, ch. 815, § 1, 1977 N.C. Sess. Laws 1101, 1104 (codified as amended at N.C. GEN. STAT. § 90-322 (Supp. 1991)). Under the family consent statute, the attending physician, with confirmation from another physician, diagnoses the patient. If the patient's condition is terminal, incurable, or PVS, then with the concurrence of either the health care agent, guardian, spouse of the patient, or a majority of relatives of the first degree (in that order of preference), medical treatment may be withheld or withdrawn. N.C. GEN. STAT. § 90-322 (Supp. 1991).
natural death and made clear that the living will was not the only way to exercise that right. Though no case law exists in North Carolina as to the validity of the HCPoA prior to the 1991 Act, it is likely that such a power would have been operative without the express statutory authorization. Nonetheless, the General Assembly wisely made such a delegation expressly possible.

The 1991 amendments to the living will statute expand the conditions under which medical treatment may be withheld or withdrawn. Prior to the amendments, a competent person could declare only that should her condition be terminal and incurable, treatment should cease. Now, PVS may trigger the removal of medical treatment, including artificial nutrition and hydration. The statutory living will form provides a checklist of conditions for the declarant to mark as those under which she would consent to the removal of treatment. The exculpatory clause protecting the provider has been amended to include removal of artificial nutrition and hydration in reliance on a valid living will. The amended statute also provides that the living will “may be combined with or incorporated into a health care power of attorney form” if the document is executed according to the living will provisions. Finally, the statute retains a provision recognizing as valid living wills properly executed prior to July 1, 1979.

The statute raises, but fails to resolve, several important issues, none of which the North Carolina appellate courts have considered.

41. The HCPoA statute states that “it shall not be construed to invalidate a power of attorney that authorizes an agent to make health care decisions for the principal, which was executed prior to October 1, 1991.” N.C. GEN. STAT. § 32A-19(e) (1991). Retroactively, then, the General Assembly endorses the validity of HCPoAs executed prior to the express statutory authorization.

42. See N.C. GEN. STAT. § 90-321(b) (1990), amended by N.C. GEN. STAT. § 90-321(b) (Special Supp. 1992).

43. N.C. GEN. STAT. § 90-321(b) (Special Supp. 1992). The family consent statute was amended in similar ways. See id. § 90-322 (Supp. 1991). Prior to the amendments, only terminal and incurable conditions were covered. PVS is now included as a condition. Those who may concur in the removal of treatment now include the health care agent, who is first in order of preference for concurrence. Id.

44. Id. § 90-321(d).

45. Id. § 90-321(h).

46. Id. § 90-321(j).

47. Id. § 90-321(i).

48. One district court case that upheld a 1983 living will was decided before the newly enacted amendments took effect. See Rettinger v. Littlejohn, No. 91-CVD-4155, Forsyth County, Dist. Ct. (N.C. Sept. 12, 1991); see infra notes 56-63 and accompanying text. The lack of case law in North Carolina may reflect the medical community’s willingness to work with patients and their families in effectuating their wishes. For example, University of North Carolina Hospitals have a policy that living wills should be respected, and so far doctors purportedly have complied with that policy. Laird Harrison, A Time to Live or A Time to Die?
addition of PVS to the statute's list of conditions triggering application of a declarant's living will prompts the question of what the word "or" limits: Must a patient be terminal and incurable or diagnosed as PVS, or is the choice between "terminal and incurable" and "terminal and PVS?"\textsuperscript{49} The statutory definition of PVS indicates that without the specified medical treatment, the patient will die "within a short period of time."\textsuperscript{50} Though "short period of time" is not defined, this sounds like a definition of "terminal," a term the statute also fails to define. Therefore, reading the statute to require "terminal and diagnosed as PVS" would render the amended language duplicative.\textsuperscript{51} The more likely interpretation of the statute's definition of PVS is that while the patient is receiving medical treatment, his condition may remain viable, but without the treatment, his condition becomes terminal. Thus, the statute should be interpreted as requiring that the patient's condition be "terminal and incurable" or "diagnosed as PVS."

The 1991 version of the statute retains an old provision protecting the validity of living wills executed prior to July 1, 1979.\textsuperscript{52} The newly amended statute does not recognize expressly as valid living wills executed prior to 1991 but after 1979. Arguably, living wills executed during the uncovered years may not be valid, though the lack of statutory validation may be simply a legislative oversight.\textsuperscript{53}

\begin{footnotesize}
\footnote{CAROLINA ALUMNI REV., Winter 1991, at 13, 19 (quoting Benjamin Gilbert, director of hospital legal affairs). But see Marion Danis et al., \textit{A Prospective Study of Advance Directives for Life-Sustaining Care}, 324 NEW ENG. J. MED. 882, 884 (1991) (study performed in a North Carolina hospital and in a nursing home revealed that the health care provider did not follow advance directives in 25\% of the cases).}
\footnote{49. The relevant section of the statute provides for cessation of medical treatment:
\begin{itemize}
\item[(b)] If a person has declared . . . a desire that his life not be prolonged by extraordinary means or by artificial nutrition or hydration, and the declaration has not been revoked . . . and
\begin{itemize}
\item[(1)] It is determined by the attending physician that the declarant's present condition is
\begin{itemize}
\item[(a)] Terminal; and
\item[(b)] Incurable; or
\item[(c)] Diagnosed as a persistent vegetative state; and
\end{itemize}
\end{itemize}
[there is confirmation from a second physician of the diagnosis, then the medical treatment may be stopped].}
\footnote{N.C. GEN. STAT. \textsection 90-321(b)(1) (Special Supp. 1992).}
\footnote{50. \textit{Id.} \textsection 90-321(a)(4).}
\footnote{51. As one North Carolina court has held, "If a strict literal interpretation of the language of a statute contravenes the manifest purpose of the Legislature, the reason and purpose of the law should control and the strict letter thereof should be disregarded." \textit{In re Hardy}, 294 N.C. 90, 95, 240 S.E.2d 367, 371 (1978) (citation omitted).}
\footnote{52. N.C. GEN. STAT. \textsection 90-321(i) (Special Supp. 1992).}
\footnote{53. In 1979, the legislature amended the statute to allow a notary as well as a clerk to prove the document, perhaps justifying a statutory validation for earlier living wills. \textit{See Act
Other problems may plague living wills executed prior to the 1991 amendments. Unless the declarant's expressed preferences deviated from the statutory provisions, pre-1991 living wills will not include an indication of the desired action if the patient is in PVS and on artificial nutrition and hydration. Should an attending physician remove artificial nutrition and hydration without such an indication? This lack of stipulation may be viewed as evidence that the patient wants the artificial nutrition and hydration to continue. In this situation, the patient without a pre-amendment living will may be better protected, because the family consent statute would allow the removal of artificial nutrition and hydration, whereas the pre-amendment living will may not specifically request such termination. The case of Rettinger v. Littlejohn, however, illustrates one North Carolina district court's willingness to allow the removal of artificial nutrition and hydration under a 1983 living will that did not express consent to its termination.

Lawrence Rettinger suffered from incurable Parkinson's disease that left him in a permanent fetal position and rendered him incompetent to make health care decisions. He lived in a convalescent home and was fed and given water by artificial means. In 1983, while competent to do so, Mr. Rettinger had executed a living will complying with the then-existing statutory form; therefore, his living will gave no indication of his decisions regarding artificial nutrition and hydration. Concerned about possible liability, the home refused to discontinue food and water at the request of Mr. Rettinger's wife because Mr. Rettinger's condition was not definitely terminal and the home was uncertain that "extraordinary means," as defined in the statute, included artificial nutrition and hydration. After visiting the patient, Judge William Reingold ruled that the living will was enforceable and that artificial nutrition and hydration

of March 6, 1979, ch. 112, §§ 1-6, 1979 N.C. Sess. Laws 76, 76-77 (codified as amended at N.C. GEN. STAT. § 90-321 (Special Supp. 1992)); supra note 33 and accompanying text. Other amendments, such as the witness requirements, have been made since July 1, 1979, however, and yet no express validations were made for living wills executed prior to the later amendments.

55. Id.
58. Id. at 1.
59. Id. at 2.
60. Id. at 3.
could be terminated. The court may have taken notice that the statutory inclusion of artificial nutrition and hydration had been passed by the legislature and soon would become effective. For those competent persons who fail to execute new living wills under the amended statute, however, the possibility remains that their inaction may be considered evidence of a desire for continued maintenance via artificial nutrition and hydration.

The amendments leave unchanged the language of the statutory living will that authorizes the physician to withhold or withdraw medical treatment. The declarant does not direct the physician to stop treatment; rather, the declarant states that under the specified medical conditions, "I authorize [that] my physician may withhold or discontinue" designated medical treatments. This language is very permissive in comparison with that of the forty-five other states that have living will forms. Arguably, the physician may refuse to follow the living will even if the medical condition of the patient falls within the living will's prescriptions. The American Medical Association, however, has stated that "[t]he preference of the individual should prevail when determining whether extraordinary life-prolonging measures should be undertaken in the event of a terminal illness." To ensure that the patient's preferences are followed, some states provide that if a physician refuses to act on a valid living will, she must transfer the patient to another physician who is willing to do so. North Carolina lacks such a provision.

The liability of a physician who refuses to act on a valid living will remains unclear. Presumably, the risk of liability to a North Carolina

61. Id. at 4.
63. Schwab, supra note 54, at 3. A related problem confronts those who executed HCPoAs prior to the newly enacted statute. Old HCPoAs may not cover those areas that the statute now allows. Though an old HCPoA may not work against the principal in the way a pre-amendment living will may, the principal should consider executing a new HCPoA in order to take full advantage of the statute's coverage.
64. N.C. GEN. STAT. § 90-321(d) (Special Supp. 1992) (emphasis added).
65. Only Mississippi's statute contains similarly permissive language. See Miss. CODE ANN. § 41-41-107(1) (Supp. 1988) ("I desire that the mechanisms be withdrawn so that I may die naturally.") (emphasis added).
67. See, e.g., Ariz. Rev. Stat. Ann. § 36-3204(C) (Supp. 1991) (directing the physician to transfer the patient promptly to another physician who "will effectuate the declaration"); Fla. Stat. Ann. § 765.09 (West 1986) (providing that if a physician refuses to comply then he "shall make reasonable efforts to transfer" the patient); Haw. Rev. Stat. § 327D-11 (Supp. 1991) (requiring doctor to transfer the patient if the doctor will not comply with the living will).
physician would be less than that of a physician who refuses to act on a living will that contains directive language, but no federal or state cases address this precise issue. One state court discussing the enforcement of a valid living will has suggested that if “a competent patient has expressly refused to receive some form of medical care, a doctor would be acting tortiously if he insisted on providing the treatment against his patient’s will.” Thus, if the living will serves as an expression of the patient’s refusal of specific medical treatments in certain situations, an action for battery may lie against a physician who maintains life support in the face of a valid living will. Again, however, North Carolina’s permissive statutory language may preclude such a result.

The new HCPoA statute covers more medical situations than does the living will. The principal who executes the power appoints an agent to make decisions regarding medical treatment should the principal become incapacitated, including decisions not permitted under the living will. An agent may make not only decisions involving “life-sustaining procedures,” but also those affecting “any care, treatment, service, or procedure to maintain, diagnose, treat, or provide for the principal’s physical or mental health or personal care or comfort.” The appointment of an agent, therefore, would prevent the tragic situation of a person who, like Mr. Rettinger, has executed a living will, but whose situation is not specifically covered by the terms of the document. The agent can act as a surrogate decisionmaker and direct that treatment be withdrawn so that death can come naturally. The principal also may authorize the agent to make decisions about organ donation, autopsy, and the disposition of the body. It should be noted that the principal is not required to grant such broad powers; instead, he may specifically limit the agent’s authority in the document.

Anyone who is at least eighteen years old may execute an HCPoA if he has the capacity and understanding required “to make and communicate health care decisions.” The principal may appoint as her agent anyone who is at least eighteen years old and who is not providing health care to the principal in return for payment. The HCPoA must be

69. Though the statute is in a separate chapter from the living will statute, the HCPoA provisions are to be consistent with those of the Natural Death Act, and if they conflict, the Natural Death Act controls. N.C. GEN. STAT. § 32A-15 (1991). For a discussion of the potential overlap and conflict of these two Acts, see infra notes 96-104 and accompanying text.
71. Id. § 32A-19(b) (1991).
72. Id. § 32A-19(c).
73. Id. § 32A-17 (1991).
witnessed by two persons who meet the same criteria as those for the living will, and the document must be notarized. The principal may combine the health care power with a general power of attorney. If, however, these two powers are in separate documents, and an overlap regarding health care decisions exists, the agent’s powers are superior to those of the general attorney-in-fact.

The HCPoA vests decisionmaking authority in two people: one who serves as the principal’s agent and one who determines the incapacity of the principal. The HCPoA becomes effective when the physician or physicians named by the principal determine in writing that the principal is incapable of making health care decisions. If the named physician is not available or is unwilling to act, an attending physician may make the determination. Should the principal not wish to name a physician, he may designate someone else to make the incapacity determination, but only if religious or moral reasons for doing so are stated in the document. If a named nonphysician makes the incapacity determination, she must do so in a notarized writing. This person cannot be the agent, must be at least eighteen years old and competent, and must not be providing health care to the principal for payment.

The HCPoA is effective until the death of the principal or until the principal communicates his intent to revoke to each named agent and to the attending physician. This communication may take the form of an executed revocation, a subsequently executed HCPoA, or “any other manner” of communication by the principal. The HCPoA also may become ineffective if all the named agents are unable or unwilling to act or if a court appoints a guardian for the patient. The HCPoA statutory form permits the principal to nominate the agent to be guardian should the court appoint one, and the court must accept the nomination except

75. Id. § 32A-16(6) (1991); see supra notes 34-35 and accompanying text.
77. Id. § 32A-22(d) (1991); see also id. §§ 32A-1 to -14 (1991) (providing requirements for general powers of attorney).
78. Id. § 32A-22(c).
80. Id.
81. Id.
82. Id.
83. Id.
84. Id. § 32A-20(b) (1991).
85. Id.
86. Id. § 32A-21(b) (1991).
for "good cause shown." An HCPoA that names the spouse of the principal as agent is revoked by the entry of a court decree of divorce or separation, unless an alternate agent has been named.

The General Assembly has provided a form that satisfies the HCPoA's requirements, though the statute states that the form is an optional, nonexclusive method for creating an HCPoA. The statute does not indicate whether co-agents may be named, but the form provides for the appointment of only one named agent at a time, "each to act alone and successively," with named alternate agents assuming the power should the first named be unavailable, unable, or unwilling to serve. The statutory form provides that a physician or physicians be named or the attending physician designated to determine the capacity of the principal. Upon a determination of incapacity, the named agent receives broad powers to make health care decisions, and the form cautions the principal to be aware of this, noting, however, that the agent must "use due care to act in [the principal's] best interests." The principal may alter the due care standard through inclusion of a miscellaneous exculpatory provision dictating that the agent will be liable only for acts of "willful misconduct or gross negligence."

The new HCPoA is an important tool for those who wish to ensure that their preferences will be followed in situations that are not covered by the living will. There are, however, several problems presented by this new legislation. The first issue confronting those who execute an HCPoA is its operation in conjunction with a living will. The HCPoA statute maintains that in a conflict between the two documents, the living will provisions control. Nonetheless, it remains unclear how the conflict provision in the HCPoA is intended to operate, and it is not difficult to imagine situations where the two documents might conflict. The HCPoA form, for example, contains a provision allowing a grant of authority to an agent to make decisions regarding the cessation of life-sus-

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88. Id. § 32A-22(b).
89. Id. § 32A-20(c) (1991).
91. Id. § 32A-25(1); see Ill. Ann. Stat. ch. 110, para. 804-10 (Smith-Hurd Supp. 1991) (expressly disallowing co-agents). If more than one person has authority to act for the principal, the likely result is disagreement among the agents about health care decisions.
93. Id. § 32A-25(2); see supra note 81 and accompanying text.
95. Id. § 32A-25(7)(C).
taining procedures if the principal becomes "terminally ill, permanently in a coma, suffer[s] severe dementia, or [is] in a persistent vegetative state," but severe dementia is not a condition covered by the living will statute. It is unlikely, however, that the General Assembly intended to cancel an HCPoA containing a statutorily authorized provision for severe dementia in the event of a conflict with a living will that does not contain this provision. Rather, the legislature's likely intent in enacting the HCPoA statutes was to offer a method for people to exercise their right to make their health care wishes known in situations not covered by the living will.

A person who considers executing both a living will and an HCPoA might choose instead to execute only the HCPoA, because it contains provisions for medical situations not covered by the living will. The advantage of having both is that the living will would serve as a statement of the patient's health care choices should the HCPoA become ineffective because the named agents are unavailable or unwilling to act. Should the court appoint a guardian to the principal and thereby revoke the health care agent's power, the living will may serve as a guide for the guardian in effectuating the patient's wishes.

One advantage to the living will is accessibility. Under the terms of the statute, an HCPoA may not be available to all who wish to execute one. An HCPoA becomes effective "when and if the physician or phys-

98. Severe dementia is "a general designation for mental deterioration." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 367 (W.B. Saunders ed., 24th ed. 1965) Examples of this condition are progressed Alzheimer's disease, dementia praecox, which results from schizophrenia, and toxic dementia, which results from the abuse of poisonous drugs such as alcohol. Id.
99. In addition, unlike the living will, the HCPoA does not require that the patient's condition be incurable.
100. Although the principal may nominate his health care agent to be his guardian, it would seem wise to nominate another trusted individual. This nomination would protect the principal if the agent's decisionmaking capabilities become impaired through grief or sudden moral indecision in implementing the principal's desires for a natural death. The statute does provide a safeguard in such a situation by allowing the agent who is nominated to become guardian unless there is "good cause shown." N.C. GEN. STAT. § 32A-22(b) (1991). After a guardian is appointed, the ineffective HCPoA would still provide evidence of the patient's wishes.
101. Id. § 32A-22(a). The HCPoA statute, however, dictates that when there is a conflict between the statutes in Article 23 of Chapter 90, which include the family consent statute, and those of the HCPoA, Chapter 90 controls. Id. § 32A-15(c). In the absence of a living will, the amended family consent statute ranks the parties who must concur with the doctor in deciding to withhold treatment: The health care agent is listed first, followed by the guardian. Id. § 90-322 (Supp. 1991). This leads to the argument that, applying § 32A-15(c), the hierarchy under the family consent statute controls, and the agent retains power over a subsequently appointed guardian when the patient has not executed a living will.
cians designated by the principal determine in writing that the principal lacks sufficient understanding or capacity” to make health care decisions.102 Such a requirement necessitates that to execute a valid HCPoA one must have a physician whom one can name. If a physician is not designated and a lay person is named instead, the statute requires that the moral or religious reasons for not designating a physician must be given.103 Requiring the designation of a named physician may make it difficult for many people to execute the HCPoA, because not everyone has a regular physician whom they could name or religious or moral reasons for not naming one.104

An HCPoA naming alternate agents may prove problematic for the health care provider. The statute offers no guidelines for the physician who must determine when the first-named agent is unavailable. May the physician rely on the alternate’s word as to the first-named’s unavailability, or does the physician have to take steps to locate the first-named agent?105 A health care provider faced with such an ambiguity may choose to ignore an HCPoA. In drafting the HCPoA, guidelines for the physician in determining an agent’s authority may be helpful in ensuring its enforcement.

A related problem for the health care provider arises in determining the effectiveness of the HCPoA. The revocation standards for HCPoA are low.106 The principal may revoke the power in any manner that communicates her intent to revoke, but the statute limits this type of revocation by requiring that the principal alert the attending physician and each agent named in the HCPoA of her desire to revoke.108 This limitation protects the principal from the desire of a concerned party, such as a relative, to prolong the principal’s life by falsifying a revocation and thereby undermining the power of the agent to decide to withhold treat-

102. Id. § 32A-20(a) (1991). The statutory form, however, provides that the declarant “may include . . . a designation of [his] choice [of physician].” Id. § 32A-25(2) (1991) (emphasis added). See supra note 93 and accompanying text.
103. Id. § 32A-20(a).
104. Similarly, many declarants may hesitate to execute an HCPoA because they feel unable to name an appropriate person as their agent. See Nancy M.P. King, The Natural Death Act: A Philosophical Context for a Practical Problem, N.C. ST. B.Q., Winter 1992, at 12, 13-14.
105. Schwab, supra note 54, at 5.
106. The General Assembly likely believes that it is better to maintain the principal’s life than to terminate treatment if there is any indication from the principal that the termination is not desired.
107. N.C. GEN. STAT. § 32A-20(b) (1991). The living will contains a similar provision that allows revocation to be communicated “in any manner” to the attending physician, regardless of the declarant’s mental or physical condition. Id. § 90-321(e) (Special Supp. 1992).
108. Id. § 32A-20(b). Arguably, notification to either the agent or the attending physician might suffice as “any other manner.”
ment. Requiring that the doctor be notified by the principal helps ensure that a revocation will be genuine.

The revocation of the HCPoA upon the entry of a court decree of divorce or separation raises further questions. If a spouse is designated as the agent and the couple separates without a court decree, the HCPoA can be a powerful weapon. Often couples with marital problems are unable to think clearly regarding their partner. Although the requirement of a court decree offers certainty for the provider in determining the lack of authority of the spouse-agent, this bright-line rule may lead to harmful consequences for the incompetent patient. A provision for a cut-off of the spouse-agent’s power upon separation with or without a court decree, though more ambiguous than the present rule, would provide more protection for the principal. Attorneys who draft HCPoAs should suggest to their clients who are separated from their spouse-agents that they consider executing a new HCPoA.

The statute allows the principal to restrict his agent’s powers, and the physician must determine whether the agent is authorized to make the given decision. The physician will not be held liable for following the agent’s instructions as long as the physician relies “in good faith on the authority of the . . . agent.”

The physician, therefore, needs to be certain as to the extent of the HCPoA’s authority. To aid in the physician’s determination, the principal should clearly outline any limitation, or lack thereof, on the agent’s power.

The principal should consider carefully the amount of authority he wishes to give his agent. Unless he places restrictions on the power, the agent will be able “to consent to and authorize [the principal’s] admission to and discharge from a hospital, nursing or convalescent home, or other institution.” A person who does not want her agent to be able to commit her to a mental institution should say so in the document. Also, the types of life-sustaining treatments covered by the HCPoA statute are much broader than those in the living will. Under an unrestricted HCPoA, an agent can request the withholding of “dialysis, antibiotics, artificial nutrition and hydration, and other forms of medical treatment which sustain, restore or supplant vital bodily functions.”

110. Schwab, supra note 54, at 4 (suggesting a bold, capitalized statement regarding the unlimited nature of the agent’s authority at the beginning of the HCPoA or grouping restrictions and guidelines together in one part of the document).
112. Id. § 32A-25(3)(E); see also id. § 32A-16(4) (defining “life-sustaining procedures”). The agent also has the power to make decisions regarding organ donation and autopsies. Id. § 32A-19(b) (1991). The power of the agent, however, is revoked at the principal’s death. Id.
ple, a principal who is incapacitated due to severe dementia brought on by alcohol use and who contracts pneumonia might be denied antibiotics at the request of the agent. Obviously, there are many hypotheticals that may concern a principal in dictating the agent's authority. The best solution is for the principal to choose his agent with care and, if desired, place well-considered limitations on the agent's power. The principal must keep in mind, however, that a doctor may be wary of relying on an agent with restricted power. The advice of counsel and a discussion with a physician about various medical procedures would be helpful in addressing these issues.

Another area of concern is the standard of care to which an agent will be held in making the decisions for the principal. Although the statute does not discuss a standard, the statutory form notes that the agent must exercise due care. The form, however, also offers a miscellaneous provision allowing the principal to relieve the agent from liability except for willful misconduct or gross negligence. This provision may be viewed as a bargaining chip between the principal and the agent who is unlikely to take on the responsibility of making the health care decisions without the assurance that liability will be limited. If the principal does not limit the liability via the miscellaneous provision, it would seem that although the statute provides no standard, the "due care" language of the form would hold the agent to an ordinary negligence standard.

Both the living will and the HCPoA significantly expand North Carolina's citizens' choices in planning for future health care, yet improvement is needed. The General Assembly should clarify the living will statute by endorsing the validity of all living wills executed prior to the 1991 amendments, instead of only those executed prior to 1979. The statute should expressly outline the interaction of the living will with the HCPoA. The Legislature should rewrite the "or" provision in the conditions that trigger the enforcement of the living will. If the doctor's role in following the living will is to remain discretionary, then a provision directing the physician to transfer the patient if he refuses to act on a
valid living will is needed. Finally, some additional definitions would clarify the statute. Defining "attending physician" and "terminal" in connection with "persistent vegetative state" would aid those who execute these documents.

The HCPoA statute should delineate a standard of care for the appointed agent. This improvement would aid those who are considering accepting the designation. The statute also should allow the principal to name the attending physician as the person to make the incapacity determination. Co-agents should be expressly disallowed. The agent who is the spouse of the patient should lose his power if the principal is separated from her spouse, even without a court decree. The HCPoA's provisions that conflict with the living will should be expressly endorsed by the statute as valid. Finally, some indication of the steps a doctor should take to locate alternate agents would be helpful.

The problematic areas of the statutes need to be addressed, especially in light of the federal Patient Self-Determination Act, which mandates that hospitals participating in Medicare and Medicaid inform all patients about their rights to make health care choices under state law. The increased availability of information resulting from this Act no doubt will cause a great proliferation of both living wills and HCPoAs. More people will become aware of the benefits of living wills and HCPoAs and may be inclined simply to follow the statutory forms. Therefore, unless the statutes are free of ambiguity, North Carolinians who prepare for the possibility of exercising their right to die will be confronted not only by hard, futuristic choices but also by needlessly confusing ones.

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117. See King, supra note 104, at 14.

118. One study of 405 patients found that when the patients learned about living wills and HCPoAs, 57% of the patients wanted a living will and 78% wanted an HCPoA. Linda L. Emanuel et al., Advance Directives for Medical Care: A Case for Greater Use, 324 NEW ENG. J. MED. 889, 891 (1991).

119. Individuals who want treatment to continue or be provided in spite of the low odds of recovery should exercise the broad rights to control health care choices that North Carolina recognizes by executing a document to that effect. At least one state expressly allows for this possibility. See HAW. REV. STAT. § 327D-1 (Supp. 1991) (adult has right to execute declaration instructing physician "to provide [or] continue . . . life-sustaining procedures").
For any government, a tax refund is a nuisance in even the best of financial times. In more troubled times, such refunds can become a nightmare. During the difficult recession that has gripped the United States in the early 1990s, states burdened by budget deficits have spent most tax revenues as soon as the dollars reached state coffers. Under such conditions, refunds to taxpayers have forced state officials to make the difficult choice between the Scylla of increased taxes and the Charybdis of reduced services.

The state of North Carolina faced such a predicament in the wake of Davis v. Michigan Department of Treasury, a 1989 United States Supreme Court decision that held unconstitutional a Michigan tax law similar to North Carolina's and found that the taxpayer was entitled to a refund. The offending Michigan statute provided preferential treatment to state employees over federal employees, thereby violating the doctrine of intergovernmental tax immunity. The North Carolina General Assembly quickly amended its tax laws to comply with the decision, providing prospective relief. The revenue department balked at providing retroactive relief, partly because the estimate for refunds for tax years not barred by statutes of limitation was $140,000,000.

The conflict over refunds reached the North Carolina Supreme

† Editor's Note: On May 18, 1992, as this issue was going to print, the United States Supreme Court granted certiorari to Harper v. Virginia Department of Taxation, 242 Va. 322, 410 S.E.2d 629 (1991), cert. granted, 112 S. Ct. 863 (1992), a case that presents the retroactivity issue in a factual situation that is practically identical to Swanson v. State. On June 1, 1992, the Court modified its May 18 order granting certiorari by restricting Harper to the retroactivity issue addressed in Swanson. 112 S. Ct. 2298 (1992).

2. Id. at 817.
3. Id. at 806. The Michigan statute exempted from its definition of taxable income all retirement benefits from the state or its political subdivisions, but the state did not exempt retirement benefits of federal employees. Id.
4. The doctrine's purpose is to protect each sovereign government from undue interference from other governments. Id. at 810. It protects federal employees from discriminatory state taxes by prohibiting inconsistent taxation based upon the source of the income unless there are significant differences between the two classes. Id. at 815-16 (citing Phillips Chem. Co. v. Dumas Indep. Sch. Dist., 361 U.S. 376, 383 (1960)).
6. To put this figure in perspective, North Carolina received individual income tax reve-
Court in *Swanson v. State*. Although the case raised several difficult questions, the court's first hurdle was to decide whether the Supreme Court's *Davis* decision should apply retroactively to North Carolina. If the decision applied retroactively, the state possibly owed refunds to some 100,000 potential litigants in a related class action suit. If *Davis* were not retroactive, then compliance would require nothing more than what already had been done by amending the statutes.

The retroactivity question was complicated by the fact that the United States Supreme Court was in the process of modifying its rules on prospective versus retroactive application. Under normal circumstances, American jurisprudence requires that any new judicial decision apply retroactively so that all other potential litigants not barred by statutes of $3,002,300,000 during fiscal year 1988-89. N.C. STATE BUDGET, 1989-91 BIENNIIUM: POST-LEGISLATIVE BUDGET SUMMARY 9 (1989).

7. 329 N.C. 576, 407 S.E.2d 791, aff'd on other grounds on reh'g, 330 N.C. 390, 410 S.E.2d 490 (1991), petition for cert. filed, 60 U.S.L.W. 3641, 3655-56 (U.S. Mar. 4, 1992) (No. 91-1436). The complex issues of *Swanson* are best explained by example: If Sam State and Fran Federal both received $10,000 in retirement benefits, then under pre-*Davis* North Carolina law, Sam State incurred no state tax liability on his state benefits while Fran Federal was exempted only from the first $3,000 of her federal benefits. At North Carolina's beginning tax rate of 6%, N.C. GEN. STAT. § 105-134.2 (1989 & Supp. 1991), the difference cost Fran $420 ($7,000 x .06) per year. While prospective application of *Davis* requires elimination of this disparate treatment, retroactive application might force a state to refund the extra payments Fran made during the three tax years not foreclosed by statutes of limitation.

Swanson also raised the issue of the limitations period for filing a refund demand. The state contended that North Carolina General Statutes § 105-267 limited the demand period to 30 days after payment. Defendant-Appellants' Brief at 24-25, *Swanson* (No. 64PA91). Petitioners claimed that published revenue department materials allowed demands for refunds applied for within three years of the due date of a tax return. Plaintiff-Appellees' Brief at 6-7, *Swanson* (No. 64PA91). The revenue department refunded taxes on federal pensions for the 1988 tax year to the 12,404 federal retirees who filed demand letters within thirty days. Id. at 3.

8. When a court announces a new rule of law, that law may apply in one of three ways. At one end of the spectrum, prospective application restricts application of the new law to cases arising from situations that occur after the new rule is announced. At the other end, retroactive application permits the new rule to apply to all cases that are either already in the court system or else not barred by final judgment, statutes of limitation, or repose. Between these two positions is modified prospectivity, which restricts the new rule to prospective application, except as to litigants who bring the challenging suits. The rationale for the litigant exception is that it provides an incentive to challenge existing laws. See infra notes 85-88 and accompanying text.


utes of limitation or final decision\textsuperscript{11} can benefit from the new rule. To avoid undesirable results, however, the Warren Court created narrow exceptions that allowed certain decisions to apply only prospectively.\textsuperscript{12} The Rehnquist Court has modified the retroactivity doctrine over the past three terms,\textsuperscript{13} moving it back toward its status prior to the Warren Court's decisions.\textsuperscript{14} The Rehnquist Court's modifications meant that if the facts of \textit{Swanson} did not fit the newly narrowed exceptions to the general rule of retroactive application, then North Carolina would be required to provide a retroactive remedy to the taxpayer plaintiffs.

In a four-to-three decision, the \textit{Swanson} court ruled that \textit{Davis} did not apply retroactively, based upon the equitable analysis established in \textit{Chevron Oil Co. v. Huson}\textsuperscript{15} that allows consideration of the results in determining how to apply new rules.\textsuperscript{16} Taking judicial notice of North Carolina's poor financial condition, the \textit{Swanson} court determined that refunds would burden blameless citizens unfairly.\textsuperscript{17} The dissenting justices argued that the majority erred in its \textit{Chevron Oil} analysis because withholding refunds represented a greater wrong than depleting the treasury.\textsuperscript{18} The dissenters also contended that a recent Supreme Court decision\textsuperscript{19} removed \textit{Swanson} from the exceptions to retroactivity, thereby requiring North Carolina to apply the \textit{Davis} rule retroactively in \textit{Swanson}.\textsuperscript{20} The plaintiffs, encouraged by the narrow margin of defeat and bolstered by references in the dissenting opinion to recent United States Supreme Court cases, subsequently petitioned the Supreme Court for re-

\begin{itemize}
\item \textsuperscript{11} A case is final after judgment is rendered, appeal is exhausted, and the time for petition for certiorari has elapsed or such petition has been denied: \textit{Linkletter}, 381 U.S. at 622 n.5.
\item \textsuperscript{12} See infra notes 75-78 and accompanying text for a description of these exceptions.
\item \textsuperscript{13} See, e.g., \textit{Beam}, 111 S. Ct. at 2448 (Souter, J., joined by Stevens, J., announcing the judgment of the Court) (holding that new judicial rules applied to litigants in one case must apply to litigants in all other cases not barred by statutes of limitation or final judgment); McKesson Corp. v. Florida Alcoholic Beverages & Tobacco Div., 496 U.S. 18, 51 (1990) (requiring certain remedy for constitutional violations).
\item \textsuperscript{14} \textit{Beam} essentially removed the equitable analysis announced in \textit{Chevron Oil Co. v. Huson}, 404 U.S. 97, 106-07 (1971), from cases involving what is known as "modified" or "selective" prospectivity. See infra notes 120-25 and accompanying text. The \textit{Beam} Court did not address the issue of \textit{Chevron Oil}'s viability in cases of pure prospectivity. \textit{Beam}, 111 S. Ct. at 2448 (Souter, J., joined by Stevens, J.).
\item \textsuperscript{15} 404 U.S. 97 (1971).
\item \textsuperscript{16} Id. at 108.
\item \textsuperscript{17} \textit{Swanson}, 329 N.C. at 583, 407 S.E.2d at 794.
\item \textsuperscript{18} Id. at 588, 407 S.E.2d at 797 (Mitchell, J., dissenting). The dissenting justices argued that this was particularly unfair in light of government's power to tax the citizens. \textit{Id.} (Mitchell, J., dissenting).
\item \textsuperscript{19} James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991).
\item \textsuperscript{20} \textit{Swanson}, 329 N.C. at 588, 407 S.E.2d at 797.
\end{itemize}
This Note traces how *Davis* prompted North Carolina litigants to seek tax refunds through retroactive application of *Davis* in North Carolina. The Note discusses how the possible cost of applying *Davis* retroactively helped convince the North Carolina Supreme Court to eschew retroactive application. The Note also describes the ascent of retroactivity under the Warren Court and its subsequent retraction in recent years, and it examines several signals that should have indicated to the *Swanson* court that the United States Supreme Court intended that *Davis* apply retroactively. The Note concludes that the *Swanson* court erred in refusing to apply *Davis* retroactively and briefly considers one method by which the court could have satisfied constitutional requirements and Supreme Court precedent without impoverishing North Carolina.

Understanding *Swanson* requires an appreciation of the Supreme Court's decision in *Davis v. Michigan Department of Treasury*. The plaintiff in *Davis* was a retired federal employee who challenged a Michigan tax law that exempted retirement benefits of former state employees but did not exempt retirement benefits of former federal employees. *Davis* asserted that such inconsistent treatment violated a federal law that allowed states to tax a federal employee's compensation only so long as the tax did not discriminate on the basis of the source of the compensation. The United States Supreme Court held that Michigan's inconsistent tax treatment violated the constitutional principle of intergovernmental tax immunity by favoring state and local retirees over federal retirees. Absent proof that there was a rational reason to discriminate between similarly situated state and federal retirees, the Court determined that the tax scheme violated the Constitution.

The *Davis* Court remanded the case to the Michigan courts for de-

22. See infra notes 27-44 and accompanying text.
23. See infra notes 45-57 and accompanying text.
24. See infra notes 68-125 and accompanying text.
25. See infra notes 126-54 and accompanying text.
26. See infra notes 157-58 and accompanying text.
28. *Id.* at 805-06.
termination of one remedial issue. This spawned great confusion about the precedential effect of Davis; as some courts interpreted Davis as failing to decide any remedial issues. The source of this confusion can be traced to a concession by the State of Michigan that a refund would be the appropriate remedy if the Court found the tax unconstitutional. Significantly for Swanson, however, the Davis Court held that the plaintiff was entitled to a refund, indicating its intent that the rule of that case apply retroactively to the plaintiff. The Court remanded Davis to the Michigan courts only for consideration of the appropriate prospective relief from the offending taxes. The Davis Court asserted that although its decision mandated equal treatment, the Michigan courts were in a better position to decide whether the tax preference should be withdrawn from state and local retirees or extended to federal retirees.

In North Carolina, the seeds of Swanson were sown in the confusion surrounding the state’s response to Davis, which was decided only three weeks before North Carolina income tax returns were due. The decision surprised North Carolina officials, because Davis overturned a tax policy effective in North Carolina since the state enacted its retirement system in 1941. With the tax deadline approaching, there was confusion.

32. Id. at 817-18. The remedial issue concerned prospective relief: whether the state would withdraw the preferential treatment from state retirees or extend it to federal retirees. See infra notes 143-49 and accompanying text.
33. For example, the South Carolina Supreme Court has held that the Davis Court did not intend to apply Davis retroactively. Bass v. State, 302 S.C. 250, 252, 395 S.E.2d 171, 172 (1990), judgment vacated and remanded, 111 S. Ct. 2881 (1991) (per curiam), aff’d on remand, 414 S.E.2d 110, 115 (S.C. 1992) (alternative holding).
34. Davis, 489 U.S. at 817.
35. See infra notes 135-42 and accompanying text.
36. Davis, 489 U.S. at 817.
37. When Davis was decided, 23 states had similar tax policies favoring state employees. Swanson, 329 N.C. at 582, 407 S.E.2d at 794. Although most states responded to Davis by amending their laws to comply with the doctrine of intergovernmental tax immunity, such prospective relief did not address the contention of many federal retirees that they were entitled to refunds. For a thorough discussion, see Plaintiff-Appellees’ Brief, Appendix A, Swanson (No. 64PA91) (listing the status, as of April 17, 1990, of state court litigation of Davis-type cases).
38. The purpose of North Carolina’s pre-Davis law, which exempted the pensions of retired teachers and state employees from state income tax, was to give state officials an additional inducement in recruiting employees. Act of February 17, 1941, ch. 25, § 9, 1941 N.C. Sess. Laws 20, 36 (codified as amended at N.C. GEN. STAT. § 105-134.6(b) & (c) (1989 & Supp. 1991)). The state extended a similar benefit in 1979 to active members of the North Carolina National Guard, excluding the first $1500 of National Guard pay from state taxes. Act of June 6, 1979, ch. 801, § 37, 1979 N.C. Sess. Laws 927, 935 (repealed 1990). In comparison, state laws exempted only the first $3000 of pension benefits paid to retired federal employees and provided no exemptions for beneficiaries of private pensions. Act of July 2, 1969, ch. 1272, § 1, 1969 N.C. Sess. Laws 1494, 1494 (repealed 1989). The laws also did not provide comparable deductions to active duty members of the military, who are the federal counter-
sion within the revenue department over how to respond to *Davis*.

Shortly before the deadline, a group of federal retirees sought to establish a class action for refunds, with one goal being to preserve an ability to demand refunds for a tax year on which the three-year limitation was rapidly approaching. The trial court certified *Swanson* as a class action.

With no disputed facts, the trial court determined on a motion for partial summary judgment that *Davis* should apply retroactively and ordered the state to refund the excess taxes. The State appealed, petitioning for direct review by the North Carolina Supreme Court. The State requested direct review because of the potential impact on the state's financial status, characterizing the dollar amount of refunds as "staggering," with interest expenses alone running into the tens of millions of dollars.

The North Carolina Supreme Court determined *Swanson*’s retroactivity issue by using the United States Supreme Court test enunciated in *Chevron Oil Co. v. Huson* that allows equitable considerations to prevent the retroactive application of a new rule. In *Chevron Oil* the Court declined to apply a new rule retroactively because it determined that a party reasonably relying upon earlier law would be deprived of its rights if the new law were applied to that case. *Chevron Oil* espoused a three-pronged test consisting of novelty, purpose, and equity. If the parts of the North Carolina National Guard. Defendant-Appellants' Brief at 6, *Swanson* (No. 64PA91).

39. Plaintiff-Appellees' Brief at 6, *Swanson* (No. 64PA91). The response was to instruct federal retirees to report and pay taxes on all benefits and to petition for a refund within thirty days. *Id.* at 9. However, the state so poorly communicated this message to the public that many accountants did not know what income to report or how to file protests for earlier years. *Id.* at 10. Although 12,404 retirees complied and received refunds, 9,627 federal retirees were denied relief because they missed the 30 day deadline. *Id.* at 3. The remaining federal retirees, thought to number approximately 80,000, made no claims other than the class action demand made on their behalf. *Id.*

40. *Swanson*, 329 N.C. at 580, 407 S.E.2d at 793. The class action consisted of two classes, federal retirees and active federal military employees. *Id.*

41. *Id.* at 580-81, 407 S.E.2d at 793.

42. *Id.* at 581, 407 S.E.2d at 793.

43. *Id.* at 580, 407 S.E.2d at 792. The North Carolina Supreme Court can certify a case for review prior to determination by the court of appeals. N.C. GEN. STAT. § 7A-31 (1989).

44. Petition for Discretionary Review at 3-4, *Swanson* (No. 64PA91).


47. *Chevron Oil*, 404 U.S. at 108.

48. *Id.* at 106-07. The novelty prong is a threshold question, requiring that the new law establish an original principle of law by either directly overruling clear precedent or by creating a new law whose result was not foreshadowed. *Id.* at 106. The second prong examines the purpose of the new rule and asks whether retroactive application would impede the new rule's operation. *Id.* at 106-07.
novelty and purpose prongs are met, *Chevron Oil* permits a court to weigh the potential effects of retroactive versus prospective application.\(^49\) If retroactive application would result in extreme hardship or injustice, a court may limit the rule to prospective application.\(^50\)

Applying the *Chevron Oil* test, the *Swanson* court decided that the *Davis* decision passed the novelty test because it was a case of first impression not foreshadowed by earlier decisions.\(^51\) The court noted that twenty-two other states had similar tax schemes and that North Carolina's retiree tax laws went unchallenged for almost fifty years.\(^52\) As to the second prong, the court determined that retroactive application would not advance the purpose of *Davis* because the North Carolina General Assembly already had fully accomplished that purpose by repealing the unconstitutional tax provisions.\(^53\) For the third prong, the court accepted the state's argument that retroactive application of *Davis* would have a "devastating financial impact"\(^54\) on a state that was in "dire financial straits."\(^55\) Without discussing the weight it gave to the unconstitutionality of the tax laws, the court reasoned that exposing the state to even the possibility of such massive refunds was simply inequitable.\(^56\) Claiming that the state had acted reasonably under pre-*Davis* law, the *Swanson* court held that *Davis* should not be applied retroactively, thereby limiting petitioners' relief to the prospective relief offered by the amended tax laws.\(^57\)

The *Swanson* court also rejected the taxpayers' contention that the Supreme Court's recent decision in *James B. Beam Distilling Co. v. Georgia*\(^58\) required that it apply *Davis* retroactively.\(^59\) In *Beam* the Supreme Court decided that retroactive application of a new rule to one litigant required that courts apply the rule retroactively to all other similarly situated parties.\(^60\) If *Beam* applied to *Swanson*, it would require North Carolina courts to apply the *Davis* rule retroactively to the benefit of the *Swanson* taxpayers, because the United States Supreme Court had re-

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\(^49\) *Id.* at 107.

\(^50\) *Id.*

\(^51\) *Swanson*, 329 N.C. at 582-83, 407 S.E.2d at 794.

\(^52\) *Id.*

\(^53\) *Id.* at 583, 407 S.E.2d at 794.

\(^54\) Defendant-Appellants' Brief at 18, *Swanson* (No. 64PA91).

\(^55\) *Swanson*, 329 N.C. at 583, 407 S.E.2d at 794.

\(^56\) *Id.*

\(^57\) *Id.* at 586, 407 S.E.2d at 796.


\(^59\) *Id.* at 2448 (Souter, J., joined by Stevens, J., announcing the judgment of the Court) (Souter, J., joined by Stevens, J.). *See infra* notes 107-25 and accompanying text.

\(^60\) *Id.* (Souter, J., joined by Stevens, J.).
quired Michigan to apply the *Davis* rule retroactively. The *Swanson* majority distinguished *Davis* from *Swanson*, thereby concluding that *Beam* did not require such a result because *Davis* did not address remedial issues.

*Swanson*’s three dissenting justices came to the opposite conclusion on each prong of the *Chevron Oil* test. Justice Mitchell contended that *Swanson* did not pass the novelty test because *Davis* clearly was foreshadowed, that retroactive application would further the purpose of *Davis*, and that the equities weighed heavily in favor of refunding the taxes. The dissenting justices further maintained that *Beam* might trump the *Chevron Oil* analysis and require the state to give *Davis* retroactive application.

The *Swanson* court’s confusion over retroactivity is representative of the problems American courts have encountered throughout the Supreme Court’s “experiment” with prospectivity during the last three decades. Although the jurisprudence of prospectivity is widely debated today, there was no question in early American law that new rules had full retroactive effect. Early common law was based upon Blackstone’s concept of natural law, which allowed judges only to “declare” a law from a pre-existing body of law. This “declaratory theory” denied

61. *See infra* notes 149-52 and accompanying text.

62. The *Swanson* court distinguished the two cases because it apparently interpreted Michigan’s concession of a refund as removing the remedial issues from the *Davis* Court. *Swanson*, 329 N.C. at 584, 407 S.E.2d at 795.

63. *See supra* notes 33-36 and accompanying text.

64. Justice Mitchell believed that the novelty test was not met because *Davis* cited several cases that foreshadowed the *Davis* rule. *Swanson*, 329 N.C. at 587, 407 S.E.2d 796-97 (Mitchell, J., dissenting). *See Davis*, 489 U.S. 803, 814-16 (1989). For example, the *Davis* Court cited *Graves v. New York ex rel. O’Keefe*, 306 U.S. 446 (1939), for the proposition that state tax laws may not discriminate against federal employees based on the source of compensation. *Davis*, 489 U.S. at 811. The *Davis* Court also cited Phillips Chem. Co. v. Dumas Indep. Sch. Dist., 361 U.S. 376 (1960), for the proposition that heavier taxes must be justified by “significant differences between the two classes.” *Davis*, 489 U.S. at 812.


66. The dissenters were particularly critical of the majority’s reliance on the state’s financial problems. *Id.* at 588, 407 S.E.2d at 797 (Mitchell, J., dissenting).

67. *Id.* at 588, 407 S.E.2d at 797 (Mitchell, J., dissenting).

68. *See generally* Frances X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1557 (1975) (suggesting that the numerous unanticipated problems that arose as prospectivity was expanded demonstrated the complexities of the emerging doctrine). Professor Beytagh described prospectivity as one of the Court’s “most fascinating jurisprudential experiments.” *Id.* Recent modifications demonstrate that the doctrine remains in transition.

69. Blackstone believed that the judicial role was not to “pronounce a new law, but to
courts the authority to limit the effect of a decision. Such jurisprudence provided no legal rights or protections for those who relied upon a law subsequently declared invalid. Applied to *Swanson*, the declaratory theory would compel the North Carolina Supreme Court to order a refund because *Davis* was the law in effect when *Swanson* was decided.

American jurisprudence shifted in the nineteenth century to accept the concept that some laws were "created" by legislators and judges. This shift provided a rationale for allowing overruled laws to retain some effect in cases arising under them. Prospectivity did not fully develop until the mid-1960s, however, when it became an essential component in the Warren Court's revision of criminal procedure. Prior to the 1965 decision of *Linkletter v. Walker*, all Supreme Court decisions were retroactive, so that a new rule applied to pending cases as well as those arising after a new rule was announced. Retroactive application posed a dilemma for a Court that, under the guidance of Chief Justice Earl Warren, wanted to create new rules of criminal procedure "without concern that prison doors would be opened as a result." Armed with the authority of an opinion by Justice Cardozo, the Warren Court held in *Linkletter* that it possessed the authority to decide whether a new rule

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70. "For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such sentence was bad law, but that it was not law." 1 WILLIAM BLACKSTONE, COMMENTARIES *69. Under this view, a "new" rule is nothing more than a preexisting law: a judge need only identify the law, then declare what she has found. See Beryl H. Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 2 (1960).


72. Justice Cardozo, concerned with retroactivity's potential for unjust results, wrote an important 1932 Supreme Court opinion, *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932), which enabled later courts to develop the doctrine of prospectivity. In that decision, Justice Cardozo stated that the Constitution does not prohibit a state from choosing prospective application of a new law. *Id.* at 364. One commentator has suggested that Justice Cardozo's interest in prospective application arose during his studies at Columbia Law School. After he enrolled in the two-year curriculum, the faculty extended it to three years. He refused to submit to retroactive application of the new curriculum and never received his law degree. See Levy, supra note 69, at 10 n.31.

73. 381 U.S. 618 (1965).

74. James B. Haddad, "Retroactivity Should be Re-Thought": A Call for the End of the *Linkletter* Doctrine, 60 J. CRIM. L., CRIMINOLOGY & POL. SCI. 417, 417 (1969). *Linkletter* marked "the first time the Supreme Court had held that it and the courts it reviews possess the power to deny the benefit of a constitutional right to a person equipped with a procedural remedy for challenging the lawfulness of present incarceration attributable to a denial of that constitutional right." *Id.*

75. Beytagh, supra note 68, at 1562.

applied retroactively or only prospectively. The Court ruled that determining whether a law was retroactive required consideration of the purpose of the new rule, the actual reliance upon the old rule by the parties and the effect upon the administration of justice if a new rule were applied retroactively.

The Court expanded prospectivity into civil cases and subsequently refined its standards for prospectivity in *Chevron Oil Company v. Huson*, in which the Court declined to apply a new rule retroactively. The Court determined that the new rule reflected an unanticipated change and that retroactive application would not further its purpose. The *Chevron Oil* Court also weighed the equities of retroactive and prospective application and decided that it would be unfair to allow the new rule to invalidate the plaintiff's cause of action. Therefore, the Court held that the new rule was not retroactive. The *Chevron Oil* analysis proved to be an effective and resilient test and was the standard for retroactivity questions in civil cases for more than two decades.

This shift toward prospectivity in American jurisprudence had its critics, particularly after the emerging doctrine created a hybrid application known as "modified" or "selective" prospectivity. Modified prospectivity is similar to pure prospectivity in that it does not require a new rule to apply to all pending cases. The difference is that modified prospectivity, in addition to applying a new rule to future cases, also allows a

77. *Linkletter*, 381 U.S. at 629. *Linkletter* held that a new rule would not apply retroactively to cases that were final when the new rule was announced. *Id.* at 639-40. The Court extended *Linkletter* in *Stovall v. Denno*, 388 U.S. 293 (1967), by holding that a new rule could apply to the defendants who brought a challenge but not to cases still at trial or pending direct review. *Stovall*, 388 U.S. at 300-01.

78. *Linkletter*, 381 U.S. at 636. The *Linkletter* Court established the three considerations without indicating the weight that each factor should carry. *Id.*

79. The doctrine of prospective application was expanded into civil law in *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (per curiam), which involved a violation of the Equal Protection Clause. The *Cipriano* Court held that retroactive application of a rule invalidating bond elections would impose significant hardships on holders and issuers of bonds created in reliance on pre-*Cipriano* law. *Id.* at 706. The Court decided that "substantial inequitable results" provided an adequate basis for the Court to limit a new rule to prospective application. *Id.*


81. *Id.* at 107-08.

82. *Id.* at 108-09.

83. *Id.*

84. See, e.g., Haddad, *supra* note 74, at 429 ("Having damned the old rule, how can the Court continue to give it effect in cases where a proper remedy exists to correct the wrong?").

85. James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2444 (1991) (Souter, J., joined by Stevens, J., announcing the judgment of the Court) ("[A] court may apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement.").
new rule to apply to the case that raised the challenge. Thus, modified prospectivity was well suited to criminal cases, because the Court could apply a new rule to the party who brought the challenge, but not to others whose appeals were final. This meant, for example, that the named defendants in *Miranda v. Arizona* benefitted from the new warning rule while other similarly situated petitioners did not.

While concerns about the fairness of prospective application focused on criminal cases, the emerging doctrine also held special significance for tax decisions, because the Supreme Court typically allowed state courts to determine whether a new rule applied retroactively. This gave state courts the option of denying refunds in many cases and providing only prospective relief for unconstitutional taxes. The Court modified this policy in *McKesson Corp. v. Florida Alcoholic Beverages & Tobacco Division*, in which a unanimous Court held that certain cases will require "meaningful backward-looking relief to rectify any unconstitutional deprivation." In *McKesson*, such meaningful relief required refunds of unconstitutional taxes that the taxpayer felt obligated to pay to avoid penalties while challenging the statute.

In *McKesson* a liquor distributor challenged a Florida excise tax as a

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86. In *Mackey v. United States*, 401 U.S. 667 (1971), Justice Harlan argued that modified prospectivity was "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting the stream of similar cases to flow by unaffected by that new rule." *Id.* at 679 (Harlan, J., dissenting).
88. Even original supporters of prospectivity criticized the Court for extending the doctrine too far and creating disparate results among indistinguishable litigants. For example, Justice Harlan voted with the *Linkletter* majority but soon decided that *Linkletter*‘s progeny violated a basic judicial tradition by selecting only certain litigants to benefit from new constitutional rules. *Desist v. United States*, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting). Justice Douglas, who joined in the *Linkletter* dissent, subsequently cited *Miranda* as the “most notorious example” of the evils of modified prospectivity. *Desist*, 394 U.S. at 255 (Douglas, J., dissenting). Justice Douglas complained that "sheer coincidence" determined which four cases out of eighty similar petitions were selected for *Miranda*, yet the Supreme Court subsequently applied the new *Miranda* rule to only those four cases while denying relief to the others. *Id.* (Douglas, J., dissenting).
89. See Philip M. Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues under the Commerce Clause*, 41 TAX L. 103, 117-18 (1987) ("With growing success, states are increasingly relying on the so-called prospectivity doctrine, among other strategies, to deny refunds.").
90. *Id.* at 117. This allows a state to retain taxes collected under laws later determined to violate the Constitution.
92. *Id.* at 31.
violation of the Commerce Clause. The trial court agreed with the corporation that the taxes violated the Constitution, but it refused to order a refund. The Florida Supreme Court affirmed, partly due to its belief that such a refund would be a windfall to the corporation because the unconstitutional taxes had been passed on to consumers. The Supreme Court reversed, holding that the Fourteenth Amendment's Due Process Clause requires a state to provide meaningful relief to restore any unconstitutional deprivation.

In the companion case of American Trucking Ass'ns v. Smith, however, a divided Court upheld a state decision denying retroactive relief for taxation in violation of the Commerce Clause. The four-Judge Smith plurality employed a Chevron Oil analysis to determine that the state did not owe refunds. The plurality emphasized that the rule at issue was a new one, so the state was entitled to rely in good faith on its belief that the rule existing prior to the change was valid.

The Smith dissenters, in an opinion written by Justice Stevens, argued that constitutional rules cannot be limited to prospective application, because no court should enforce an interpretation of the Constitution that has been overruled. Justice Stevens wrote that retroactivity questions should be divided into two parts: first, determining the current state of the law and, second, determining the appropriate rem-

94. McKesson, 496 U.S. at 22. An earlier version of the Florida tax was similar to the one deemed to be unconstitutional in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984). See infra notes 109-10 and accompanying text. The McKesson Court determined that amendments intended to comply with Bacchus were merely cosmetic, so that even the amended statutes violated the Constitution. McKesson, 496 U.S. at 46.


96. Id. at 1010.

97. McKesson, 496 U.S. at 51.


99. Three Justices joined Justice O'Connor's plurality opinion. Id. at 171. Three other Justices joined Justice Stevens's dissenting opinion. Id. at 205 (Stevens, J., dissenting). Justice Scalia cast the deciding vote. Id. at 200 (Scalia, J., concurring in judgment).

100. The facts of Smith are almost identical to the case of American Trucking Ass'n s v. Scheiner, 483 U.S. 266 (1987), which established the new rule that flat-rate use taxes discriminated against out-of-state drivers. Id. at 298. The Smith petitioners sought retroactive application of their earlier success in Scheiner in order to recover taxes paid prior to the Scheiner decision. Smith, 496 U.S. at 176.

101. Smith, 496 U.S. at 179-82.

102. Id. at 182. Justice Scalia's opinion demonstrated the frailty of the Smith decision. Though he agreed with much of Justice Stevens's dissenting opinion, Justice Scalia felt compelled to concur with the plurality's result because he dissented in the case that established the new rule of law for Smith. Id. at 204-05 (Scalia, J., concurring in judgment).

103. Id. at 212 (Stevens, J., dissenting).
Justice Stevens emphasized that on constitutional issues litigants are entitled to a resolution based upon the best current understanding of the law. In the context of *Swanson*, this first step would require a court to apply *Davis* retroactively. The second step, however, would provide a court latitude to consider the equities of the case before determining the appropriate remedy.

While the North Carolina Supreme Court was considering the *Swanson* case, the United States Supreme Court announced significant restrictions on prospectivity in *James B. Beam Distilling Co. v. Georgia*. The history of *Beam* is analogous to *Swanson*, except that the tax in *Beam* was an excise tax that favored liquor produced from Georgia-grown products. Similar laws had been challenged as violating the Commerce Clause, but until 1984 the Supreme Court had held that such discriminatory laws fell within the broad powers that the Twenty-first Amendment gave the states in matters concerning liquor. The Supreme Court overruled this line of cases in *Bacchus Imports, Ltd. v. Dias*, prompting *Beam* to sue the state of Georgia for retroactive application of *Bacchus* and a refund of $2,400,000.

The trial court rejected *Beam*'s claim based upon a *Chevron Oil* analysis, and the Georgia Supreme Court affirmed. The state courts agreed with *Beam* that the tax violated the Constitution, but they denied a refund because the legislature reasonably relied on pre-*Bacchus* decisions. Claiming that retroactive application of *Bacchus* would be inequitable, the supreme court noted that Georgia was in poor financial condition and that a ruling for refunds in *Beam* would expose the state to

104. *Id.* at 205 (Stevens, J., dissenting). This analysis was adopted by Justice Souter in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2443 (1991) (Souter, J., joined by Stevens, J., announcing the judgment of the Court) (holding that once a rule is found to apply retroactively, a second step concerning remedial issues may be governed by state law).


106. For example, a court could determine that refunding all tax payments might be unfair to a state, thereby allowing the state to provide tax credits, spread the refunds over several years, or provide some other form of remedy. *See infra* notes 155-58 and accompanying text.


109. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274-76 (1984). Although the Constitution does not explicitly limit state interference with interstate commerce, the Supreme Court has developed the dormant commerce clause doctrine, which prohibits discriminatory treatment among states. LAURENCE A. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-2, at 403 (2d ed. 1988).


111. *Beam*, 111 S. Ct. at 2442 (Souter, J., joined by Stevens, J.).


113. *Id.* at 364-65, 382 S.E.2d at 96.
liability in similar claims valued at $28,000,000.\textsuperscript{114}

The United States Supreme Court reversed the Georgia decision, holding that Beam was entitled to retroactive application of Bacchus.\textsuperscript{115} Writing for the Court in an opinion in which he was joined only by Justice Stevens,\textsuperscript{116} Justice Souter argued that modified prospectivity violated the concept of equality because it resulted in disparate treatment of indistinguishable litigants.\textsuperscript{117} Justice Souter's opinion represented an intermediate position on the Court, with the extremes being three dissenting Justices who wanted to retain the equitable test of Chevron Oil,\textsuperscript{118} and three concurring Justices who argued for elimination of prospectivity in all constitutional decisions.\textsuperscript{119}

Justice Souter based his opinion on principles of equality and stare decisis and argued that these prevail over the Chevron Oil analysis.\textsuperscript{120} Once a new rule (in the Beam case, the Bacchus rule) was applied retroactively to one party (as it was to the Hawaiian importer in Bacchus), then, according to Justice Souter, the new rule also must apply to all cases not barred by statutes of limitation or final judgment when the new rule is announced.\textsuperscript{121} Justice Souter reached this conclusion by focusing on what constituted "similarly situated" litigants.\textsuperscript{122} First, he eliminated cases in which the operative facts arose after a new rule was announced, because the new rule obviously applied to such cases.\textsuperscript{123} He likewise eliminated cases barred by res judicata or statutes of limitation or repose, because such cases are final.\textsuperscript{124} This analysis left only litigants or potential litigants with causes of action that arose before a new rule was announced, but not so long before the rule that the actions were barred.

\textsuperscript{114} Id. at 365, 382 S.E.2d at 97.
\textsuperscript{115} Beam, 111 S. Ct. at 2448 (Souter, J., joined by Stevens, J., announcing the judgment of the Court).
\textsuperscript{116} Four other Justices concurred in the narrow holding that Beam was retroactive. Justice White wrote separately to note that several rationales supported the same conclusion. Id. at 2448-49 (White, J., concurring in judgment). Justices Blackmun and Scalia wrote separate opinions, signed by Justices Blackmun, Scalia, and Marshall, that criticized the limited scope of Justice Souter's opinion. Id. at 2449-50 (Blackmun, J., concurring in judgment); id. at 2450 (Scalia, J., concurring in judgment).
\textsuperscript{117} Id. at 2446. (Souter, J., joined by Stevens, J.).
\textsuperscript{118} The dissent argued that Chevron Oil's equitable test is the best method for determining whether a specific rule should apply retroactively. Id. at 2451 (O'Connor, J., dissenting).
\textsuperscript{119} Justices Scalia and Blackmun argued that failure to apply "new" constitutional rules to pending cases violated the traditions of constitutional adjudication. Id. at 2450 (Blackmun, J., concurring in judgment); id. at 2451 (Scalia, J., concurring in judgment).
\textsuperscript{120} Id. at 2446 (Souter, J., joined by Stevens, J.).
\textsuperscript{121} Id. at 2448 (Souter, J., joined by Stevens, J.).
\textsuperscript{122} Id. at 2443-44 (Souter, J., joined by Stevens, J.).
\textsuperscript{123} Id. (Souter, J., joined by Stevens, J.).
\textsuperscript{124} Id. at 2446-47 (Souter, J., joined by Stevens, J.).
Justice Souter stated that it offended the Court's notions of equality to allow one litigant (such as Bacchus Imports) to benefit from a new rule while denying an identical party (such as Beam) relief.\textsuperscript{125}

The timing of Beam was unfortunate for the Swanson court, as Beam was decided after Swanson was argued but before the North Carolina Supreme Court announced its decision.\textsuperscript{126} The state court was forced, therefore, to confront Beam's multiple opinions and arguably murky holding without hearing the two parties present their respective interpretations. The state justices took careful notice of Beam, as evidenced by Beam's prominence in the majority and dissenting opinions.\textsuperscript{127} Nonetheless, given that retroactivity was the central question in the case and three state justices agreed that Beam cast new light upon the issue,\textsuperscript{128} the court should have requested reargument on the issue of Beam's application to Swanson. Several factors should have indicated to the court that the Supreme Court intended for Beam to require lower courts to apply newly announced rules, such as the rule of Davis, retroactively.\textsuperscript{129} Presumably, reargument would have emphasized these factors.

The Swanson majority concluded with little discussion that Davis did not apply retroactively,\textsuperscript{130} despite Beam's emphasis on this question. In Beam six Justices agreed that if a new rule of law applied retroactively to one litigant, then it must be made available to all other similarly situated litigants.\textsuperscript{131} Although these six Justices signed four opinions, the three concurring opinions agreed with Justice Souter's conclusion that providing different treatment for identical litigants offended a basic notion of American jurisprudence.\textsuperscript{132} Applied to Swanson, the Beam deci-
sion means that if the Supreme Court intended the *Davis* rule to apply to the Michigan litigants, then *Davis* also must apply to the similarly situated litigants in North Carolina.

The *Swanson* court's fundamental error was in summarily dismissing a *Beam* analysis. The court distinguished *Beam* from *Davis* on the ground that the *Davis* Court did not intend to apply its holding to the parties at bar. It is on this critical issue that reargument by the *Swanson* parties might have assisted the North Carolina Supreme Court's analysis. The *Swanson* court apparently assumed that *Davis* remanded all questions of remedy to the Michigan courts, so that the *Davis* Court did not intend that *Davis* would apply its own rule.

Had the *Davis* Court not determined retroactivity, then the North Carolina Supreme Court would have been free to decide, as it did in *Swanson*, whether *Davis* should apply retroactively in North Carolina. As Justice Webb noted, if *Davis* were not retroactive then it would not provide the precedent that, under a *Beam* analysis, would require a court to apply *Davis* retroactively to other cases. However, a careful review of *Davis* demonstrates that the Supreme Court settled one issue of remedy and therefore determined that *Davis* applied retroactively.

The strongest evidence that the Supreme Court intended the rule of *Davis* to apply retroactively to that case is found in the *Davis* opinion. In its brief to the Supreme Court, the State of Michigan had conceded that a refund to Davis was the appropriate remedy if the tax were held unconstitutional, which led some courts, including the North Carolina Supreme Court, to maintain that the *Davis* Court did not resolve the issue of retroactivity. Justice Kennedy's language in *Davis* concerning...
retroactivity was ambiguous, when he stated that Michigan "conceded that a refund is appropriate for these circumstances, [therefore] to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund." This sentence can be read to mean that it was Michigan's concession that entitled Davis to a refund for the unconstitutional taxes. However, the ambiguity is clarified somewhat by Justice Kennedy's subsequent citation to a 1931 Supreme Court decision, Iowa-Des Moines Bank v. Bennett, which required refunds of an unconstitutional tax. The Bennett Court determined that higher tax rates for banks violated the Equal Protection Clause of the Fourteenth Amendment, and that the petitioners were entitled to refunds of the excess taxes. This citation to Bennett supports the argument that Davis was entitled to a refund because of the constitutional violation, not the Michigan concession; therefore, the Davis rule must have applied to the Michigan petitioner.

A second indication of the Davis Court's retroactive intent requires an appreciation of the analogy that Beam dictates between the Bacchus and Beam decisions on alcohol taxes and the Davis and Swanson decisions on retiree taxes. The central question in Beam was whether the Bacchus rule must be applied retroactively to the benefit of the Beam plaintiff. To resolve that question, the Court had to return to its Bacchus analysis to determine whether it intended that the Bacchus rule apply to the Bacchus litigants. Although the Bacchus Court remanded the case to the Hawaiian courts, it did so only for evaluation of whether the pass-through defense should have been considered. Justice Souter argued that because Bacchus was remanded only to determine the pass-through defense, the Bacchus Court must have intended for Bacchus to apply its own rule. Since the Beam petitioner was iden-


138. Davis, 489 U.S. at 817.
139. 284 U.S. 239 (1931).
140. Id. at 247.
141. Id. at 245-46.
142. Id. at 247.
145. Id. at 277. The state's pass-through defense was that refunds would constitute windfall profits for the importer, because the extra tax was simply passed on to consumers. Id.
146. Beam, 111 S. Ct. at 2445 (Souter, J., joined by Stevens, J.).
147. Further evidence of the Supreme Court's retroactive intent for Davis is found in Beam, in which the Court cited Davis to support the proposition that if Bacchus were remanded only
tical to the *Bacchus* petitioner and *Bacchus* was retroactive, the *Beam* Court held that the *Bacchus* rule must apply retroactively to *Beam*.\(^{148}\) This analogy, applied to *Swanson*, would have required the North Carolina Supreme Court to determine whether the *Davis* Court intended that the *Davis* rule apply to the *Davis* litigants. It is apparent that the *Davis* Court intended that *Davis* receive the benefit of the Court’s decision, meaning not only that Michigan’s scheme violated the Constitution but also that *Davis* was entitled to a refund. The Court remanded *Davis* to the Michigan courts, but only for consideration of prospective remedies because it already had determined *Davis*’s entitlement to retroactive remedies in the form of refunds.\(^{149}\) Therefore, just as the Supreme Court intended that *Bacchus* apply retroactively because it only remanded a portion of the decision to the Hawaiian courts, it also intended that *Davis* apply retroactively because the case was remanded only for consideration of prospective remedies.

The Supreme Court further evidenced its intention that *Davis* apply retroactively by reference to *Davis* in *Beam*.\(^{150}\) Justice Souter reasoned that because *Bacchus* was remanded only for discussion of the pass-through defense, the Supreme Court intended that the new rule apply retroactively to *Bacchus*.\(^{151}\) He supported this proposition with the citation, “cf. *Davis v. Michigan Department of Treasury*.\(^{152}\) This strong indication that *Davis* was retroactive went unchallenged by the dissenting and concurring opinions.

Finally, the Supreme Court provided substantial, albeit indirect, notice that it considered *Beam* relevant to a *Swanson*-type decision by remanding denial of claims similar to those in *Swanson* in a South Carolina case and two Virginia cases.\(^{153}\) In these cases, the respective

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\(^{148}\) *Id.* at 2445-46 (Souter, J., joined by Stevens, J.).

\(^{149}\) *Id.* at 2446 (Souter, J., joined by Stevens, J.).

\(^{149}\) *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 817 (1989). The Supreme Court left unanswered the question of prospective relief because *Davis* mandated only equal treatment for federal and state retirees. *Id.* at 817-18. The state could achieve such equal treatment either by extending the benefits to federal retirees or by withdrawing them from state retirees. *Id.* at 818. The Court said that the Michigan courts were in a better position to decide which of these two courses to pursue and remanded *Davis* for that determination. *Id.* Therefore, since *Davis* applied retroactively to provide Davis with the refund to which he was entitled, *Beam* would require state courts to apply *Davis* retroactively to their decisions.

\(^{150}\) *Beam*, 111 S. Ct at 2445-46 (Souter, J., joined by Stevens, J.).

\(^{151}\) *Id.* at 2445 (Souter, J., joined by Stevens, J.).

\(^{152}\) *Id.* at 2446 (Souter, J., joined by Stevens, J.).

state supreme courts denied refunds by ruling that *Davis* did not apply retroactively. Shortly after the *Beam* decision, the Supreme Court vacated those judgments and remanded the cases to the respective supreme courts for reconsideration in light of *Beam*.154

The obvious reluctance of state courts to apply *Davis* retroactively is understandable in light of the amounts of money at stake. State courts, which often are accused of being protectionist,155 are understandably reluctant to disgorge millions of dollars from the same treasury that provides for the courts’ operating expenses. Courts that adopt the belief that *Davis* is not retroactive, however, are destined to clash with a Supreme Court determined to roll back the prospectivity doctrine at least to the point at which modified prospectivity is eliminated. This conflict will force state courts to find a compromise that satisfies constitutional requirements while not depleting their state treasuries.

The most promising avenue for compromise would involve Justice Stevens’s two-step analysis that separates the issue of retroactivity from the issue of remedy.156 In cases like *Davis* involving the Constitution, the first step requires that a court determine the interpretation of the Constitution in effect at the time a court renders a decision, instead of the interpretation that was in effect when the facts of the case occurred.157 This step would meet the requirements set out in Justice Blackmun’s and Justice Scalia’s concurring opinions in *Beam*, in which they properly argued that it is patently wrong for any court to apply an outdated interpretation of the Constitution to any case, regardless of the reliance interests of the various parties. Applied to *Swanson*, this first step would require the North Carolina Supreme Court to apply the *Davis* rule retroactively for the benefit of taxpayer plaintiffs, because *Davis* represented the current interpretation of the Constitution when the North Carolina court decided *Swanson*.

The second step, however, would permit a court to take into account

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155. See, e.g., CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 108. 760-61 (4th ed. 1983) (suggesting that state courts are more likely than federal courts to refuse to comply with Supreme Court decisions).

156. Justice Stevens outlined this approach in his dissenting opinion in *Smith*, see supra notes 104-06 and accompanying text, and Justice Souter adopted it in his opinion for the Court in *Beam*. See supra notes 120-25 and accompanying text.

157. American Trucking Ass’n v. *Smith*, 496 U.S. 167, 206 (1990) (Stevens, J., dissenting). Justice Stevens argued, “Our disposition left the state court room to apply its own remedy . . . but not to avoid the force of our mandate and declare the taxes under challenge constitutional ‘in the first place.’” Id. at 211 (Stevens, J., dissenting).
equitable considerations in its determination of an appropriate remedy. Although *McKesson* demonstrated that courts must provide at least a sufficient remedy to provide a party with meaningful relief, it does not require a full refund. In *Swanson*, for example, this step would allow a court to consider the fiscal interests of the state when selecting the appropriate remedy. Under the right circumstances, this test might lead a state court to require a full refund. In more difficult times, however, a court would have the flexibility to stretch out refunds over several years or even to return part of the excess taxes through credits instead of cash. While such remedies would have to meet the minimum level as set out in *McKesson*, the added flexibility might allow a court to lessen the negative effect of the remedy on the state's budget.

In *Swanson*, the North Carolina Supreme Court allowed the magnitude of a potential refund to influence its decision as to how to apply a constitutional rule. The *Swanson* decision is unfortunate from a constitutional standpoint but understandable when viewed in light of the apparent "all-or-nothing" quality of the remedy. If the Supreme Court will incorporate Justice Stevens's analysis into an opinion carrying more precedential effect than *Beam*, it would allow a state court to meet constitutional requirements without drowning the treasury in a sea of red ink.

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