Hot Topics in Contract Litigation

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Table of Contents

I. Reciprocal Attorneys' Fees Clauses under General Statutes Section 6-21.6

For businesses in North Carolina long frustrated at the inability to recover attorneys' fees in contract disputes that go to court, a new day has dawned. A recently-enacted North Carolina statute broadly expands the opportunity to recover attorneys' fees incurred in business contract litigation. North Carolina's new law may dramatically alter the costs of litigating contract disputes and affect decisions to either litigate or settle.

A. How does the new law work?

The new law applies to all "business contracts" that are entered into on or after October 1, 2011. N.C. GEN. STAT. § 6-21.6. The full text of the statute follows this portion of the manuscript. The statute gives a judge or arbitrator the discretion to award attorneys' fees if the business contract at issue contains a "reciprocal attorneys' fees provision." The statute does not require an attorneys' fees provision, but if the parties elect to put such a provision into their business contract, it must state that each party agrees to pay the other party's attorneys' fees and expenses that were incurred by reason of any suit, action, proceeding or arbitration involving the business contract. Although attorneys' fees provisions are commonly inserted into business contracts, prior to this new law such a provisions typically could not be enforced in North Carolina unless the contract qualified as an "evidence of indebtedness" (e.g., a promissory note) under another statute. N.C. GEN. STAT. § 6-21.2.

Under the new law, the judge or the arbitrator has the discretion whether to award attorney fees at all, and the amount of fees to award. Decisions to award fees are to be based on "all relevant factors." The new law provides a list of thirteen non-exclusive factors, such as the extent to which the party asking for attorneys' fees prevailed in the action, the amount in controversy, the amount of damages awarded, the reasonableness of the amount of fees requested, the relative economic circumstances of the parties, and the timing and amount of settlement offers. Interestingly, it is not an absolute requirement that a party win the case in order to recover its attorneys' fees. Although the terms of the contract are another factor for the judge or arbitrator to consider, the statute is not clear on whether the parties have the freedom of contract to insist that only a prevailing party may recover attorneys' fees.

B. What types of contracts are subject to the recovery of attorneys' fees?

The new law applies to "a contract entered into primarily for business or commercial purposes." Certain types of agreements are explicitly excluded from the scope of the statute. Consumer contracts (involving individuals and which are primarily for personal, family and household purposes) are outside the statute. Also excluded are employment contracts, which are defined as personal services agreements made with an individual who performs services, either as an employee or independent contractor. Business contracts also do not include contracts made with the State or with any State agency.

Given the broad sweep of what constitutes a business contract, many types of agreements will now be subject to an award of attorneys' fees if they contain a reciprocal attorneys' fees

provision. These will include contracts between businesses for services, for the sale or lease of goods (products and equipment), commercial real estate contracts and leases, construction contracts, asset purchase agreements, stock agreements, corporate shareholder agreements and operating agreements for limited liability companies.

C. How will the new law affect businesses that are in a contract dispute?

After October 1, 2011, if parties enter into a business contract that includes a reciprocal attorneys' fees provision and later have a contract dispute that goes to court or arbitration, the parties will realize rather quickly that the stakes have been raised. Litigation and settlement strategies will need to evaluate the exposure to (or opportunity to recover) attorneys' fees, as well as the possibility that the new law may influence the opponent's litigation strategy. The new law places an even greater premium on careful case evaluation as early as possible once a dispute arises. Decisions to litigate or settle will be affected if the plaintiff has a meritorious claim and believes that its recovery of damages will *not* be reduced by the amount it spends on the litigation. Likewise, the defendant who is at a significant risk for paying damages will understand that its overall liability could be significantly higher if it is required to pay the attorneys' fees the plaintiff incurred in prosecuting the claim. Conversely, a plaintiff who has a case of doubtful merit runs the risk of not only losing the case but paying the defendants' attorneys' fees as well as its own. Therefore, depending on the relative merits of each claim and defense, the new statute may encourage some plaintiffs to file suit, may deter other plaintiffs from suing, and may put pressure on some defendants to settle early on to limit their exposure.

D. How is the new law different than an earlier statute?

For a business contract that contains a reciprocal attorneys' fees provision , all parties to the business contract will have the potential to recover attorneys' fees. This is a significant expansion of North Carolina law. Under an already existing statute, certain types of contracts can allow for the recovery of attorneys' fees. N.C. GEN. STAT. § 6-21.2. This earlier statute has not been repealed and remains a viable alternative for recovering attorneys' fees if the contract qualifies as an "evidence of indebtedness" and provides for the recovery of attorneys' fees. Promissory notes and commercial leases qualify as evidences of indebtedness, but the recovery of attorneys' fees is not reciprocal. For example, in a case involving the breach of a commercial lease, under the existing statute only the landlord may recover attorneys' fees; a tenant may not. By contrast, because of the new law's explicit requirement of mutuality, all parties to a business contract that contains a reciprocal attorneys' fees provision will be entitled to seek attorneys' fees.

E. What amount of attorneys' fees can be recovered?

The amount of attorneys' fees that can be recovered is not specified in the new law. For example, under the earlier statute, attorneys' fees can be based on a fixed percentage of 15% of the amount owed under the "evidence of indebtedness." By contrast, the new law prohibits recovery of fees based on any stated percentage. The only limit on fees is that, if the case involves primarily a claim for money damages (as opposed to an injunction), the amount that a court or arbitrator awards cannot exceed the amount of monetary damages that are awarded.

F. What are the advantages and disadvantages of the new law?

The new law has some quirks to it. Most notably, the statute says that the business contract must be "signed by hand" by all the parties to it. Consequently, it appears that an informal business contract that is entered into through an exchange of emails could not be the basis for recovering attorneys' fees even if the emails contained the necessary reciprocal attorneys' fees language. Even a formal electronic contract containing electronic signatures would prevent the parties from recovering attorneys' fees. The intent behind this provision is to prevent unfairness and surprise in "click accept" contracts—*i.e.*, contracts that are formed electronically by one party clicking onto a website button that requires consent to the other party's terms and conditions. The effect of this requirement of a handwritten signature is problematic; for more than a decade, by statute North Carolina has made electronic contracts and electronic signatures valid. The new law appears to undercut existing law regarding electronic contracting.

When compared to the earlier attorneys' fees statute limited to "evidences of indebtedness," the new law involves some trade-offs. The new law is much broader and will allow for recovery of attorneys' fees where no such recovery was permitted under the earlier statute. However, because there is no fixed percentage that can be awarded (as under the earlier statute), and because of the multiple factors that can be considered by a judge or arbitrator, a business seeking to recover attorneys' fees will not have a clear idea in advance as to the amount of fees that might be recovered or have to be paid. It will likely take several years operating under the new statute for attorneys and businesses to get a good sense for how the courts are applying the new statute.

Certain businesses will not have to worry about trade-offs in the new law. Because the new law does not repeal the earlier statute, if the business contract at issue also qualifies as an "evidence of indebtedness" under the earlier statute, the new law expressly gives a party entitled to recover attorneys' fees under either statute the option to choose which statute to proceed under. In some cases it might be more certain and more valuable to seek attorneys' fees under the earlier statute and recover fees based on 15% of the amount owed. For commercial lenders preparing promissory notes and other evidences of indebtedness, they can continue to rely exclusively on the earlier statute and thereby avoid reciprocal attorneys' fees provisions in their business contracts with borrowers.

G. Conclusion

Although the courts have not yet been called on to apply and enforce the new law, the language of the statute suggests that clients should carefully consider the following when drafting a business contract that contains a reciprocal attorneys' fees provision:

- If there is a dispute over the business contract, how expensive will litigation of that dispute likely be?
- How will the cost of litigation compare to the amount of damages that will likely be at issue?

- What is the company's risk tolerance for paying damages, its own attorneys' fees and the attorneys' fees of its opponent?
- Is reciprocity desirable? If the contract is likely to qualify as an evidence of indebtedness under the earlier statute, does the company give up its leverage if it agrees to a reciprocal attorneys' fees provision under the new law?
- Because the new law makes the terms of the contract a factor for a judge or arbitrator to consider when awarding attorneys' fees, businesses should consider including provisions to clarify the circumstances under which the parties intend attorneys' fees to be recoverable. Such provisions could include language that makes clear that only a prevailing party may recover attorneys' fees, and that a successful defense of a claim will entitle the defendant to recover its reasonable attorneys' fees.

As these points suggest, the new law hands businesses a powerful tool that may affect whether and how contract disputes are resolved. Therefore, new business contracts should be evaluated in light of this new law and drafted to either limit exposure or create greater leverage for resolving disputes that may arise. Businesses should also carefully consider the impact of the new attorneys' fees statute on their existing standard form contracts and revise them accordingly.

Text of General Statutes Section 6-21.6

The General Assembly of North Carolina enacts:

SECTION 1. The purpose of this act is to validate reciprocal attorneys' fees provisions in business contracts.

SECTION 2. Article 3 of Chapter 6 of the General Statutes is amended by adding a new section to read:

Section 6-21.6. Reciprocal attorneys' fees provisions in business contracts.

(a) As used in this section, the following definitions apply:

(1) Business contract. - A contract entered into primarily for business or commercial purposes. The term does not include a consumer contract, an employment contract, or a contract to which a government or a governmental agency of this State is a party.

(2) Consumer contract. - A contract entered into by one or more individuals primarily for personal, family, or household purposes.

(3) Employment contract. - A contract between an individual and another party to provide personal services by that individual to the other party, whether the relationship is in the nature of employee-employer or principal-independent contractor.

(4) Reciprocal attorneys' fees provisions. - Provisions in any written business contract by which each party to the contract agrees, in the manner set out in subsection (b) of this section, upon the terms and subject to the conditions set forth in the contract that are made applicable to all parties, to pay or reimburse the other parties for attorneys' fees and expenses incurred by reason of any suit, action, proceeding, or arbitration involving the business contract.

(b) Reciprocal attorneys' fees provisions in business contracts are valid and enforceable for the recovery of reasonable attorneys' fees and expenses only if all of the parties to the business contract sign by hand the business contract. In any suit, action, proceeding, or arbitration primarily for the recovery of monetary damages, the award of reasonable attorneys' fees may not exceed the monetary damages awarded.

(c) If a business contract governed by the laws of this State contains a reciprocal attorneys' fees provision, the court or arbitrator in any suit, action, proceeding, or arbitration involving the business contract may award reasonable attorneys' fees in accordance with the terms of the business contract. In determining reasonable attorneys' fees and expenses under this section, the court or arbitrator may consider all relevant facts and circumstances, including, but not limited to, the following:

(1) The amount in controversy and the results obtained.

(2) The reasonableness of the time and labor expended, and the billing rates charged, by the attorneys.

(3) The novelty and difficulty of the questions raised in the action.

(4) The skill required to perform properly the legal services rendered.

(5) The relative economic circumstances of the parties.

(6) Settlement offers made prior to the institution of the action.

(7) Offers of judgment pursuant to Rule 68 of the North Carolina Rules of Civil Procedure and whether judgment finally obtained was more favorable than such offers.

(8) Whether a party unjustly exercised superior economic bargaining power in the conduct of the action.

(9) The timing of settlement offers.

(10) The amounts of settlement offers as compared to the verdict.

(11) The extent to which the party seeking attorneys' fees prevailed in the action.

(12) The amount of attorneys' fees awarded in similar cases.

(13) The terms of the business contract.

(d) Reasonable attorneys' fees and expenses shall not be governed by (i) any statutory presumption or provision in the business contract providing for a stated percentage of the amount of such attorneys' fees or (ii) the amount recovered in other cases in which the business contract contains reciprocal attorneys' fees provisions.

(e) Nothing in this section shall in any way make valid or invalid attorneys' fees provisions in consumer contracts or in any note, conditional sale contract, or other evidence of indebtedness that is otherwise governed by G.S. 6-21.2. If the business contract is also a note, conditional sale contract, or other evidence of indebtedness that is otherwise governed by G.S. 6-21.2, then the parties that are entitled to recover attorneys' fees and expenses may elect to recover attorneys' fees and expenses either under this section or G.S. 6-21.2 but may recover only once for the same attorneys' fees and expenses.

(f) In any suit, action, proceeding, or arbitration primarily for the recovery of monetary damages, the award of reasonable attorneys' fees may not exceed the amount in controversy.

(g) Nothing in this section shall in any way make valid or invalid attorneys' fees provisions in a contract of insurance governed by Chapter 58 of the General Statutes.

SECTION 3. This act becomes effective October 1, 2011, and applies to business contracts entered into on or after that date.

II. What Commercial Litigators Should Know About Their Client's Conduct: Two Case Studies on What a Client Can Do to Negatively Affect a Breach of Contract Lawsuit

The following material examines two breach of contract lawsuits involving contracts for the sale of land. Both were ultimately decided by the North Carolina Court of Appeals, and in both the Court found that the conduct of one party, prior to the commencement of the lawsuit, was dispositive on key issues, allowing the Court to rule as a matter of law against that party. The first case study involves the opinion rendered in *Phoenix Limited Partnership of Raleigh v. Simpson*, 201 N.C. App. 493, 688 S.E.2d 717 (2009), and the material below is adapted from an article by Scott Miskimon that first appeared in the June 2011 issue of the NCBA's newsletter, *Real Property*. The second case study involves the opinion rendered in *Profile Investments No. 25, LLC v. Ammons East Corporation*, 2010 N.C. App. LEXIS 1856, 700 S.E.2d 232 (2010), *disc. rev. denied*, 365 N.C. 192, 707 S.E.2d 240 (2011), and the material below is adapted from an article by Scott Miskimon that first appeared in the October 2011 issue of the NCBA's newsletter, *Real Property*.

A. The Nine-Year Closing: How Your Client's Conduct Can Change Its Contractual Rights and Obligations

Buyer and seller agree to a sale of land. The land is contaminated. The buyer is unhappy. The closing is delayed. For nine years. What's a seller to do? The case of *Phoenix Limited Partnership of Raleigh v. Simpson*, 201 N.C. App. 493, 688 S.E.2d 717 (2009) offers a number of reasons why parties to a real estate contract have to carefully proceed when problems of performance arise. Counsel involved have to pay particular attention to issues of whether their client's conduct has profoundly changed what would otherwise be clear contractual language subject to well-settled rules. When the client's course of performance negates contract terms or expands an obligation, the rules are suddenly different. Assuming that the original contract terms remain unchanged is a dangerous assumption that can lead to lengthy and expensive litigation and increase the client's exposure to damages.

Exercising A Put Option—A Cautionary Tale

In *Phoenix*, the parties' relationship evolved over the course of fifteen years from landlord and tenant, to buyer and seller, to plaintiff and defendant and, finally, to grantor and grantee. In 1995, the plaintiff tenant/buyer entered into a five-year lease for a surface parking lot located in downtown Raleigh near the corner of McDowell and Davie streets. The lessors were individuals who had owned the land for many years and whose family members were their predecessors in title. The land was three-quarters of an acre and had once been the site on which a dry cleaner and an auto repair shop operated. The lease contained provisions that would ultimately determine how the parties' relationship would conclude: a put and call provision allowing each party to the lease to exercise an option requiring the other party to either buy or sell the land, as the case may be; a clause providing for environmental warranties and representations; and an indemnity clause.

In September 2000, just two weeks before the end of the lease term, the landlord exercised the put option requiring the tenant to purchase the property. Consequently, a bilateral contract of purchase and sale was then formed. The terms for the sale were set forth in the lease. The purchase price was to be based on the land's fair market value as of the date the put option was exercised and was to be determined by an appraisal process. Following the exercise of the put option, the tenant/buyer commissioned a Phase I environmental assessment. This report prompted the buyer to commission a Limited Phase II environmental site assessment. The appraisers were aware of this situation and stated in their report that their estimated value of $947,500 was subject to downward adjustment depending on the land's environmental condition.

Closing was supposed to take place within 180 days from the date when the put option was exercised. As to this closing date, the contract stated that "time is of the essence." Because of the environmental issues and the specter of a downward price adjustment, the sellers did not deliver a deed by the closing date. Instead, a few weeks after the time-critical deadline for closing, the sellers dropped off a photocopy of an executed deed, but the deed was not notarized. No other seller documents as required under the contract were delivered to the buyer.

A month after the deadline for closing, a Phase II environmental site assessment was completed that showed the property was contaminated. The groundwater contained traces of "VOCs exceeding the laboratory quantitation limits" and soil testing indicated "the presence of chlorinated VOCs and BTEX compounds." The degree and extent of the contamination and remedial measures necessary to correct the problem could not be determined without further assessment.

In the contract, the sellers made express environmental warranties and representations, including that no commercial operation involving hazardous materials (including petroleum products) ever operated on the property. Although there was no express obligation to clean up the property if it was found to be contaminated, the sellers backed their environmental warranties with an indemnity in which they promised to hold the buyer harmless if the sellers breached their warranties. The sellers also promised to indemnify for pre-existing hazardous conditions, as well as for related fines, penalties, and costs.

In light of the Phase II, the contract's environmental provisions, and the purchase price being reduced because of the property's value being negatively affected by the contamination, the sellers were in a position where they had to choose between cleaning up the property or reducing the purchase price. The sellers opted for the first choice, which they pursued for more than one year. The sellers hired their own environmental consultant who examined the land, prepared a report that confirmed the contamination, and recommended that the property be put into the North Carolina Dry-Cleaning Solvent Cleanup Act program (the "DSCA program"). The sellers' real estate agent sent the buyer this report and notified the buyer that the sellers intended to put the property into the DSCA program. Eight months later, the sellers submitted a petition to the State for that purpose.

The buyer was aware of the lengthy timeframe for environmental remediation and was awaiting the results of the sellers' cleanup efforts. During this time the buyer was also reserving funds needed to pay the full purchase price. The parties did not communicate with each other

from December 2001 until August 2004. During this time, the sellers were represented by an experienced attorney and an experienced real estate broker. Nevertheless, the sellers did not complete the process for putting the property into the DSCA program, and no environmental remediation was conducted. In 2003, the City of Raleigh decided to build its new Convention Center half a block away from the subject property. Soon thereafter, the sellers concluded that the buyer had abandoned the contract and that they were free to sell the property to someone else. In 2004, the buyer's counsel contacted the sellers about the property's environmental status. In response, he was informed that the property was back on the market. After the buyer's counsel warned the sellers that the buyer intended to enforce its rights under the contract, the sellers put the property under contract with a third party at a price $400,000 higher than the contract price with the buyer.

In January 2005, the buyer sued for breach of contract, requested specific performance and placed a notice of lis pendens on the property. The sellers asserted defenses based on the alleged abandonment of the contract, waiver, repudiation and laches, and counterclaimed for breach of contract. After extensive discovery, the buyer obtained a partial summary judgment that dismissed the sellers' affirmative defenses. After more discovery, the buyer obtained summary judgment on the issue of the sellers' liability for breach, and the trial court awarded specific performance on the condition that the purchase price would be the land's value as determined by the appraisal but without any off set based on the property's diminished value due to contamination or for the cost of any environmental remediation. The sellers appealed, and in an unpublished opinion, the Court of Appeals affirmed in part but reversed in part. The buyer petitioned for a rehearing, which was granted. In December 2009, the Court of Appeals issued a published opinion that superseded its first opinion, and affirmed in all respects the summary judgment rulings in favor of the buyer. The sellers did not appeal further, and in March 2010—fully nine years after the original closing date—the sale was consummated and the buyer became the owner of the property.

Time Is Of The Essence—Except When It's Not

In affirming the award of specific performance, the Court of Appeals first addressed the contract's time-is-of-the-essence clause. If it still applied, as the sellers argued, then the failure to close in March 2001 would have doomed the buyer's effort to enforce the contract nearly five years later. The sellers argued that, at a minimum, an issue of fact existed as to whether the sellers had waived the time-is-of-the-essence clause. The buyer argued, and the Court agreed, that the sellers impliedly waived the clause as a matter of law.

The admitted or undisputed facts showed that, prior to the original deadline for closing, the sellers did not tender a recordable deed and other necessary seller documents. Although the sellers and their closing attorney testified in deposition that, one month after the closing date, they believed the deal was dead, the sellers never told the buyer that they were insisting on the closing date specified in the contract. Nor did they inform the buyer that they deemed the contract terminated for failure to close. Instead, one of the sellers testified that, after the original closing date had passed, she expected the closing to occur a month or two later, *i.e.*, long after the contract's specified closing date.

In addition, once the Phase II environmental report was completed, the sellers sought permission for their environmental consultant to contact the buyer's consultant to discuss the condition of the property, and sellers' consultant performed its own tests on the property. The sellers' agent then wrote the buyer about "the sale and purchase of the property," discussed the efforts undertaken by the sellers' environmental consultant and promised that "We will communicate with you as time goes by." Nine months after the original closing deadline, the agent forwarded another letter to the buyer, again regarding "the sale and purchase of the property," in which he described the results of sellers' environmental investigation, promised a copy of their consultant's report in the near future, and stated that the sellers intended to put the property into the DSCA program.

Consequently, the Court of Appeals' ruled that waiver of the time-is-of-the-essence clause occurred as a matter of law: "These undisputed facts demonstrating that defendants not only never insisted on closing on the specified closing date, but made statements and took actions manifesting an intent that closing should occur at some unspecified later date establish that defendants waived the 'time is of the essence' clause. The undisputed facts establish conduct that naturally would lead [the buyer] to believe that [the sellers] had dispensed with their right to insist that time was of the essence with respect to closing on the property." *Phoenix*, 688 S.E.2d at 723 (citations omitted).

The Sellers' Decision to Undertake an Additional Performance—Why The Closing Clock Never Started Ticking

So, when did the parties have to close, and how could the buyer compel a closing nine years after the original closing date? The answer lies in the sellers' own conduct. Just as the sellers' conduct waived the time-is-of-the-essence clause, the sellers' conduct in undertaking to clean up the property extended the closing date. In the usual case, in the absence of a time-is-of-the-essence clause, the buyer and seller have a reasonable time after the closing date to complete performance. The sellers argued that the buyer, by waiting until August 2004 to seek a closing, had waited an unreasonably long time to close. The buyer argued, and the Court of Appeals agreed, that the land's contamination and the sellers' incomplete efforts at remediation meant that the "reasonable time doctrine" never even came into play.

Clearly, the contract did not expressly require the sellers to clean up the property. Just as clearly, however, the contract contained environmental warranties and an indemnification regarding the property's environmental condition. By their conduct, the sellers indicated to the buyer that they had elected to clean up the property rather than reduce the purchase price due to their liability for any contamination found on the property. It was undisputed that the sellers actually undertook, for a time, to address issues of remediation of the contamination. The sellers hired their own environmental consultant, told the buyer they were conducting an environmental investigation, notified the buyer of the results of the investigation, and stated they were enrolling the property in the State's DSCA program. All of this "coupled with the fact that an environmental cleanup could take years to complete, indicated to [the buyer] that [the sellers] still intended to perform under the contract despite the passing of the original closing date." *Id*. at 725.

The fatal flaw in the sellers' argument was that they presumed that the reasonable time for performance should be calculated from the original closing date. The Court of Appeals rejected this argument and, following a case from the Supreme Court, ruled that in order for the clock to start ticking on the reasonable time frame, the sellers were required to notify the buyer that they had completed their cleanup and were ready and able to perform. Because the evidence was undisputed that the sellers never notified the buyer that they were ready and able to perform, the reasonable time for the buyer's performance never began. *Id.* (following *Fletcher v. Jones*, 314 N.C. 389, 333 S.E.2d 731 (1985)).

A Seller Should Have Only One Buyer

Because of the unresolved issue of the cleanup of the property, neither the buyer nor the sellers were required to close in the summer of 2004. Nor were they free to walk away from each other—even though the parties had not communicated with each other in nearly three years. At this point, the buyer had not abandoned the contract and the sellers were not discharged from their obligation to deliver a deed. The sellers mistakenly concluded the opposite. Because the sellers informed the buyer that the property was back on the market at a higher price and then put the property under contract with a second buyer, the sellers anticipatorily repudiated the contract. At that point, the buyer was free to immediately sue and was not required to tender the purchase price. *Id.* The Court therefore affirmed the summary judgment as to the sellers' liability for breach of contract.

The Nine-Year Closing

The sellers also argued that their affirmative defense of laches should not have been dismissed, claiming that the buyer's three-year delay in asserting its claim constituted laches. As the Court noted, laches "requires proof of three elements: (1) the delay must result in some change in the property condition or relations of the parties, (2) the delay must be unreasonable and harmful, and (3) the claimant must not know of the existence of the grounds for the claim." *Id.* at 726. The mere passage of time will not support a finding of laches, and the sellers offered no evidence that the buyer's delay in filing suit resulted in a change in the property's condition or the relations of the parties. Instead, the sellers argued that they were prejudiced by delay because the property's value increased as a result of the Raleigh Convention Center being located across the street from the property. The Court rejected this argument because the "increase was fortuitous and not due to any action taken by [the sellers] during the delay that increased the value of the property. Any prejudice suffered by [the sellers] did not arise out of the delay in [the buyer's] bringing suit, but rather arose out of the contract's provision that the property would be valued as of the exercise date of the option." *Id.*

Because of the decision by the Court of Appeals, the buyer was entitled to specific performance. Several months after the decision, a closing occurred in which the sellers delivered a general warranty deed and the buyer delivered the purchase price of $947,500. Thus, because of the nine-year closing, the buyer was able to purchase the property in 2010 based on the property's fair market value in 2000.

So What's A Seller (And Its Counsel) To Do?

The combination of facts in the *Phoenix* case was unusual, but the actions taken by the parties, and the legal effect of those actions, offer several important points for real estate practitioners to consider whenever issues arise that could delay a closing:

- If the contract specifies that time is of the essence, the parties should act as if that is the case. In other words, if the parties do not treat deadlines as critical, do not expect a judge will do so.
- A course of performance that varies from the strict terms of the contract can result in a significant alteration of the parties' rights and obligations. Counsel needs to seriously study the legal effect of the course of performance and advise the client accordingly.
- Where environmental issues arise, counsel for the seller should advise his or her client to expect that the closing will be delayed, possibly for years, and to act accordingly.
- Undertaking a performance not expressly required by the contract can have important legal consequences. In *Phoenix*, the sellers could have opted to reduce the purchase price, which would have avoided the lengthy delay in closing, the mistaken assumption that the buyer had abandoned the contract, and the decision to sell the property to a second buyer while the land was still under contract with the first buyer.
- After issues arise that could lead to litigation, consider carefully the role of a real estate agent in communicating with the other party. Counsel may decide that all communications should go through him or her, and that no communications should be handled by the client's real estate agent without counsel's prior input.
- Do not assume that a failure of the parties to communicate, even for a long period of time, means that the contract has been abandoned. Abandonment requires clear and convincing evidence and it may not be possible to satisfy that higher evidentiary standard with only evidence of non-communication.
- Do not assume that a seller is free to sell the property to someone else merely because of the buyer's silence. The decision to sell the property to a second buyer should be made carefully, and preferably only upon written evidence of a buyer's unequivocal repudiation, a written agreement to terminate the first contract, or via a back up contract in which the sale to the second buyer is made expressly conditional upon the termination of the first contract.
- If a seller believes that it is truly ready and able to perform—and wishes to put the burden on the buyer to close and pay the purchase price—the seller's counsel should notify the seller's counsel that the seller is ready to perform, and then deliver to the buyer's counsel to hold in trust an original of a properly executed and notarized deed that can be recorded, along with all other seller documents that are customary or expressly required by the contract.
- If a buyer expects to close, but believes closing may be delayed for a considerable time or that litigation is possible, the buyer must ensure that the funds needed to pay the purchase price are reserved or are guaranteed to be available throughout the lengthy closing process and the life of the litigation.

One final thought occurs, perhaps due to a personal bias, but one still worth considering: when an issue arises that may signal a lengthy delay in closing and possibly litigation, the

transactional attorneys on each side of the deal would likely benefit from consulting with a litigator to assess the client's rights and obligations and assist in crafting a strategy that either results in a closing and avoids litigation altogether, or at least avoids pitfalls that can impair the client's case once litigation begins.

B. Buyer Beware: Determining Liability When the Deal Falls Apart

Closing is months away, and the buyer asks for a *fourth* extension of the closing date. The seller throws up his hands at the buyer's endless delays and indecision, and under a mistaken belief that the third extension of the closing date has expired, faxes a letter demanding a closing *now* or the deal is *off*. Should the buyer's closing attorney step in and try to coax the seller to close? Or should the buyer immediately file suit? And what should the seller's attorney do, particularly if in the meantime the seller agrees to sell the land to someone else?

North Carolina's appellate courts recently decided the case of *Profile Investments No. 25, LLC v. Ammons East Corporation*, 2010 N.C. App. LEXIS 1856, 700 S.E.2d 232 (2010), *disc. rev. denied*, 2011 N.C. LEXIS 247, 707 S.E.2d 240 (2011), and it illustrates the difficulties facing a buyer who believes the seller will not close. Although the plaintiff buyer sued claiming the seller had breached the agreement by reason of a written repudiation and by contracting to sell the property to someone else, the ultimate ruling was that, because of the *buyer's* conduct, as a matter of law the seller did *not* breach the contract. The case offers important lessons for counsel representing buyers and sellers, particularly regarding transactions that have been long delayed and where mutual trust no longer exists.

The Deal

In *Profile*, the seller was a North Carolina corporation that owned a seventeen-acre tract of undeveloped land located in southeast Raleigh. The buyer was a single-purpose limited liability company, owned by a Kentucky developer who is also a licensed attorney practicing commercial real estate law. In June 2005, the parties entered into a written purchase and sale agreement. The buyer wanted to develop the land into a strip shopping center anchored by a grocery store. The original closing date was set for December 2005, but the buyer repeatedly requested that the seller grant extensions of time, which it did, and the parties signed three written amendments to the agreement. Consequently, the closing date was extended to July 31, 2007.

The buyer's requests for extensions of the closing deadline were prompted because the buyer wanted more time to market its planned shopping center and line up buyers of outparcels, and most especially, an anchor tenant. In May 2007—two years after the agreement was first signed—the buyer's broker called the seller and asked for a fourth extension, claiming the buyer needed more time beyond the July 31, 2007 closing date. The seller did not grant this request.

The Seller Seeks a Closing

The seller had long been dealing with a buyer who was unready or indecisive, and who would soon prove inconsistent. Moreover, by mistake the seller believed that June 1, 2007—rather than July 31, 2007—was the buyer's deadline to close. In actuality, June 1 was the end of the buyer's due diligence period. Under this mistaken belief as to the closing date, the seller faxed a letter to the buyer's broker to prod the buyer to close. In this letter, the seller's president noted his understanding of the deadline for closing, expressed his frustration about not being able to get a definite date for a closing or confirmation that the seller would in fact close, and stated that "unless you make some other arrangements with me immediately I will consider this Contract null and void on June 1, 2007." The buyer did not respond to this fax and the seller's president sent the letter again one week later indicating that if the deal did not close by June 4, 2007, the seller would consider that the agreement with the buyer would "no longer exist." The parties then spoke and the buyer indicated that the seller was free to sell the property to someone else. Reasonably enough, the seller soon put the land under contract with a second buyer.

The Buyer's Conduct after the Seller's Purported "Repudiation"

The day after that, however, the original buyer reversed course and its broker told the seller that the original buyer would close. Caught by surprise due to the buyer's inconsistency, the seller reasonably reacted to the dilemma of having two buyers by promptly contacting the second buyer and requesting a termination of their contract. A termination was not immediately agreed to, and by mid-June, the deadline for closing with the original buyer was still six weeks away. With the buyer's knowledge, the buyer's closing attorney then sent a letter to the seller stating that "the Buyer is moving forward towards closing on or before July 31, 2007. The Buyer is ready, willing and able to proceed to Closing pursuant to the terms of the Contract." The closing attorney emphasized this point with a sentence that she underlined stating that "the Buyer is ready, willing and able to close the transaction . . . on or before July 31, 2007." The seller's closing attorney responded that the seller was going to write a letter to confirm that the parties' agreement was still in effect and that the seller would close.

The buyer then changed course again and requested that the seller sign a memorandum of contract that would be recorded in order to prevent the seller from selling the land to someone else. The seller rejected the document as drafted by the buyer because it did not merely re-state the terms of the purchase and sale agreement, but significantly altered the buyer's duty to close. The seller requested that the memorandum of contract be re-drafted to delete objectionable language. The buyer would not agree to do so. Instead, a few days later the buyer sued for breach of contract and requested specific performance and damages.

At this point the deadline for closing was still five weeks away. A few days after the lawsuit was filed, the seller's president obtained a written agreement with the second buyer to terminate their purchase and sale agreement, which was crucial in allowing the seller to go to closing. The seller's counsel then confirmed for the buyer via email that the seller would close. The buyer's closing attorney replied that she would contact her client and respond with a closing date; she also asked the seller to provide a draft of the deed and other seller documents. The seller complied, sent the draft documents, but also repeatedly asked for a closing date. None was

provided. On July 31, 2007—the deadline for closing—the seller delivered to the buyer's closing attorney an executed deed and other seller closing documents. The same day, the buyer rejected the deed and refused to close. One month later, the buyer amended its complaint as of right and dropped its request for specific performance. Thereafter, the buyer pursued its claim for breach but sought only money damages. The buyer originally estimated its damages at $2,700,000, but later revised its estimate to $6,900,000.

The Twists and Turns in Four Years of Litigation

Litigation over the buyer's claim for damages required extensive discovery and generated a host of motions. A few months after filing suit—and after the buyer and its brokers had been deposed—the buyer moved for summary judgment as to the seller's purported liability for anticipatorily repudiating the agreement. The seller then filed its own motion for partial summary judgment to dismiss the buyer's claim and to have the buyer found liable for breaching the agreement due to the buyer's rejection of the deed that was timely delivered to it. The trial court denied the cross-motions for summary judgment. The seller later moved for summary judgment on the issue of lack of proximate cause, which was also denied. The seller was successful in obtaining an order that compelled the buyer to fully explain its revised damages theory and calculation of $6,900,000. Plaintiff failed to comply with this order, however, and the trial court sanctioned the buyer by excluding the revised damages theory, limiting the buyer to its original $2,700,000 damages theory, and ordering the buyer to pay the seller $11,000 in attorneys' fees. The seller then filed a third motion for partial summary judgment on the grounds that, even assuming that the seller breached, all of the buyer's alleged damages could have been avoided if the buyer had closed when the seller timely delivered a deed to the buyer. This motion was granted, the buyer appealed, and the seller cross-appealed the denial of its first two motions for partial summary judgment.

The Buyer Loses its Lawsuit Because of its Own Conduct

On appeal, the seller won and the buyer lost—but not because of the buyer's failure to mitigate its alleged damages (the third motion for summary judgment). Instead, the North Carolina Court of Appeals ruled that the trial court erred in not granting the seller's first motion for partial summary judgment because, as a matter of law, the buyer had not treated the seller's conduct as a repudiation of the contract.

So what did the buyer do to lose its case? In order to prove anticipatory repudiation, a plaintiff must show an absolute and positive refusal to perform the contract prior to the date on which performance is due. Whether the letter from the seller's president was a repudiation or a mere mistake as to the actual deadline for closing turned out to be a moot point. The Court of Appeals expressly chose not to address that issue. Far more important was the fact that, after receiving the seller's letter, "the undisputed statements and actions of [the buyer] make it clear that [the buyer] did not treat the letter as a repudiation." The Court of Appeals then followed—and extensively quoted—a case from the North Carolina Supreme Court decided nearly a century ago. In particular, the Court of Appeals followed the rule that an anticipatory repudiation "is not a breach of the contract *unless it is treated as such by the adverse party*.' " *Profile*, 700 S.E.2d at 236 (quoting *Edwards v. Proctor*, 173 N.C. 41, 44, 91 S.E. 584, 585 (1917)) (emphasis added).

The Court of Appeals then summarized the reasons why the buyer lost. After receiving the letter that supposedly "repudiated" the contract, the buyer's closing attorney sent the seller a letter demanding that the seller proceed with the contract or be sued. In the buyer's letter, the buyer repeatedly emphasized that it was "ready, willing and able to close" by the stipulated closing date. Although the buyer sued for specific performance of the contract, it continued to inform the seller that it intended to close in accordance with the contract and requested that the seller provide closing documents. Consequently, the buyer's "actions and statements clearly demonstrated that [the buyer] was planning on proceeding with the contract and [it] did nothing to treat [the seller's letter] as a repudiation until [the seller] tendered the deed. Only upon tender of the deed did [the buyer] change its course, and after refusing to accept the deed it had demanded, dropped its claim for specific performance. As [the buyer] did not treat [the seller's] letter as a repudiation, the contract was never breached." *Profile*, 700 S.E.2d at 238.

In light of its ruling, the Court of Appeals remanded the case with orders that the trial court enter a summary judgment in favor of the seller. The buyer further appealed this decision, but the Supreme Court declined to hear the buyer's appeal.

Lessons for a Buyer

Cases like *Profile* involve difficult decisions for buyers and sellers, and their counsel. Where a buyer believes the seller will not or cannot close, but the closing date has not yet arrived, the key initial questions for the buyer are whether the seller has anticipatorily repudiated the contract, and if so, what proof of repudiation exists. Although anticipatory repudiation need only be proved by a preponderance of the evidence, for a statement or conduct to qualify as a repudiation, it must be a "positive, distinct, unequivocal, and absolute refusal to perform the contract." *Edwards*, 173 N.C. at 44. When an anticipatory repudiation occurs, the plaintiff must choose between two paths: either (1) elect to treat the repudiation as a breach and sue immediately, or (2) elect to ignore the repudiation and proceed with a performance of the contract. A plaintiff cannot do both. *Id*. at 44-45.

Given these choices, and the standard for proving anticipatory repudiation, a buyer faces several challenges and risks. A buyer who claims the seller repudiated and immediately sues the seller runs the risk of being wrong on the issue of repudiation, and putting itself in breach. If the buyer ignores the purported repudiation and instead demands that the seller close, or otherwise acts as if the buyer will perform, the buyer is no longer in a position to claim breach. Consequently, the buyer should not sue prior to the closing date, and must instead proceed with performing its obligations due at closing. If the seller does not deliver a deed at closing, and if the contract does not provide that time is of the essence, then the buyer still cannot claim the seller is in breach. Instead, the buyer must tender payment to the seller's closing attorney to be held in escrow, and give the seller some "reasonable" amount of time to perform. *Fletcher v. Jones*, 314 N.C. 389, 393, 333 S.E.2d 731, 734 (1985). What will constitute a reasonable time will not be known in advance, and will usually only be decided by a jury.

Thus, if a buyer wants to avoid this latter situation, and believes that the seller cannot or will not close, the buyer should either sue immediately after receiving evidence of the anticipatory repudiation or declare in writing that the contract is at an end and that the buyer no

longer has any obligation to perform. As to either course of action, however, the buyer should only do so if the seller's repudiation is crystal clear, is in writing, and the buyer and its closing attorney and broker have not taken any action or made any statement to suggest that the buyer is not treating the seller's statement or conduct as anything but a repudiation.

Lessons for a Seller

The seller and its counsel may also face hard choices depending on what actions the seller has taken. If the client has either repudiated the contract or made a statement that might be construed as a repudiation, seller's counsel should determine whether the client is willing to retract the statement and proceed with closing. Because a timely retraction will cut off the buyer's right to immediately sue the seller, the seller's counsel should immediately send a written retraction so that the buyer receives it before any lawsuit is filed. *See Nazarro v. Sagun*, 2009 N.C. App. LEXIS 986, at *15-16, 680 S.E.2d 270 (June 16, 2009) (unpublished) (citing RESTATEMENT (SECOND) OF CONTRACTS § 256), *disc. rev. denied*, 2009 N.C. LEXIS 790, 682 S.E.2d 385 (2009). The retraction should include clear and unconditional assurances that the seller intends to timely and properly perform his contract and close per the terms of the agreement. *See Homeland Training Ctr., LLC v. Summit Point Automotive Research Center*, 594 F.3d 285, 296 (4th Cir. 2010).

Providing an immediate and unequivocal retraction may not be possible, however, if the seller, under the belief he was free to sell the property to someone else, agreed to sell the land to a second buyer. Independent of any statement from the seller to the original buyer, the act of contracting to sell the property to a second buyer may be deemed to be an anticipatory repudiation of the original contract. *See, e.g., Phoenix Ltd. P'ship of Raleigh v. Simpson,* 201 N.C. App. 493, 505-06, 688 S.E.2d 717, 725 (2009). If the seller finds himself in the position of having contracts to sell the same land to two different buyers, the seller is at risk of being a defendant in two different lawsuits. Therefore, if the client desires to retract his purported repudiation and close with the original buyer, the seller's counsel will first need to negotiate a rescission of the second contract. Without such a rescission, a seller's retraction and assurances of closing under the first contract would not be credible or effective. Thus, the second contract must be nullified in order for the seller to be in a position to close with the original buyer as well as eliminate potential liability to the second buyer. If the seller has doubts that the original buyer will close, the seller should consider entering into a backup contract with the second buyer; this agreement would both rescind the contract with the second buyer and also preserve the relationship, albeit contingent upon the original buyer not closing by a stated deadline.

Conclusion

With the uncertainties facing a buyer and a seller when a deal starts to unravel, the closing attorney for each side has to carefully assess the client's rights and obligations. This analysis cannot be based solely on the language of the contract, but has to take into account the statements and conduct of the client, the other party, and of the brokers and closing attorneys themselves. Further, where an anticipatory repudiation is claimed, litigation could be imminent and may be necessary in order to preserve rights. Consequently, the client may well be best served by having the closing attorney immediately consult with a litigator to analyze the client's

situation and develop a strategy that avoids missteps, minimizes risks, and advances the client's objectives.

III. Illusory Safeguards: Why No-Oral-Modification and No-Oral-Waiver Clauses May Not Protect the Terms of a Written Contract

Business lawyers routinely draft contracts containing provisions that mandate modifications or waivers be set forth in a writing signed by the parties. This is a prudent means of trying to protect the transaction against a subsequent claim, falsely made by one of the parties, that the transaction had been altered or that certain terms in the contract were no longer operative and binding. Under North Carolina's common law, however, such clauses may prove to be ineffective to bar claims that the terms of a written contract were altered or dispensed with. Instead, a court will look at the parties' verbal statements and their conduct. Depending on the quality of the evidence, a court may override contractual provisions requiring only written modifications or written waivers.

The first part of this section discusses the well-settled law in North Carolina that a no-oral-modification clause in a common law contract (as opposed to a contract governed by the Uniform Commercial Code) is unenforceable. The second part of this section discusses a recent case in which, for the first time, a North Carolina appellate court has expressly approved the rule allowing parties to waive a contract term despite the fact the contract also contains a no-oral-waiver clause.

A. No-Oral-Modification Clauses

North Carolina's common law is well settled that a no-oral-modification clause is not enforceable. Thus, despite a clear intention by the parties that modifications be set forth in a signed writing, the terms of a common-law contract can be modified by either a verbal agreement or by the conduct of the parties. *See, e.g.*, *Childress v. C.W. Myers Trading Post, Inc.*, 247 N.C. 150, 100 S.E.2d 391 (1957); *Whitehurst & Reaves v. FCX Fruit & Vegetable Serv., Inc.*, 224 N.C. 628, 32 S.E.2d 34 (1944); *Son-Shine Grading, Inc. v. ADC Constr. Co.*, 68 N.C. App. 417, 422, 315 S.E.2d 346, 348-49 (1984); Martin H. Brinkley, *The Regulation of Contractual Change: A Guide to No Oral Modification Clauses for North Carolina Lawyers*, 81 N.C. L. REV. 2239 (2003).

Both transactional lawyers and litigators should not lose sight of the fact that the party claiming a parol modification of a written contract (the claimant) does not have an easy road to follow. First, if the contract at issue is governed by the statute of frauds, the modification will also be subject to the statute of frauds and the claimant will ordinarily need to prove that a writing exists which memorializes the modification and which is signed by the other party or his agent. *Carr v. Good Shepard Home*, 269 N.C. 241, 152 S.E.2d 85 (1967); JOHN N. HUTSON, JR. & SCOTT A. MISKIMON, NORTH CAROLINA CONTRACT LAW § 4-4 (Lexis, 2001). Second, the claimant must prove a meeting of the minds such that the parties mutually agreed to the terms of the modification. *Johnson v. Orell*, 231 N.C. 197, 56 S.E.2d 414 (1949); HUTSON & MISKIMON, NORTH CAROLINA CONTRACT LAW § 2-2**.** Third, the claimant must prove the modification was supported by consideration. *Brenner v. Little Red School House, Ltd.*, 302 N.C. 207, 274 S.E2d 206 (1981); HUTSON & MISKIMON, NORTH CAROLINA CONTRACT LAW § 3-26.

Finally, a parol modification (arising either expressly from a verbal agreement or impliedly from the conduct of the parties) must be proved by clear and convincing evidence.

See, e.g., *Ford Motor Credit Co. v. Jordan*, 5 N.C. App. 249, 253, 168 S.E.2d 229, 232 (1969). This higher standard of proof will not only apply at a trial but also on a motion for summary judgment, regardless of whether the case is pending in state or federal court. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986); *Proffitt v. Greensboro News & Record, Inc.*, 91 N.C. App. 218, 298, 371 S.E.2d 292, 297 (1998); *Varner v. Bryan*, 113 N.C. App. 697, 704-07, 404 S.E.2d 295, 299-301 (1994).

Thus, it is the claimant's ability to satisfy the demands of these substantive and procedural requirements, rather than the terms of the parties' original written contract, which will determine whether or not the claimed parol modification will be enforced.

B. No-Oral-Waiver Clauses

Similar to a no-oral-modification clause, a no-oral-waiver clause is a standard provision in commercial contracts. While the law in North Carolina is settled as to the general ineffectiveness of the no-oral-modification clause, until this year the enforceability of a no-oral-waiver clause has been an open question under North Carolina law. In 2012, the North Carolina Court of Appeals, for the first time, ruled that a no-oral-waiver clause is not necessarily enforceable such that it does not automatically preclude a party from seeking to prove a parol waiver of a contract term.

In *42 East, LLC v. D.R. Horton, Inc.*, 2012 N.C. App. LEXIS 201, 722 S.E.2d 1 (2012), the parties entered into a contract in which the defendant buyer agreed to purchase 273 fully developed residential lots from the plaintiff seller. The issue was whether the parties agreed to an amendment extending the closing date, and if they did not, whether the defendant waived the "time is of the essence" clause regarding the original closing date. The original contract contained both a no-oral-modification clause and a no-oral-waiver clause, which the defendant argued prevented any waiver of the time is of the essence provision. The no-oral-waiver clause stated that:

> Any failure or delay of [Defendant] or [Plaintiff] to enforce any term of this Agreement shall not constitute a waiver of such term, it being explicitly agreed that such a waiver must be specifically stated in a writing delivered to the other party in compliance with Section 16 above. Any such waiver by [Defendant] or [Plaintiff] shall not be deemed to be a waiver of any other breach or of a subsequent breach of the same or any other term.

In *42 East*, the Court of Appeals held that the time-is-of-the-essence provision could be waived despite the no-oral-modification clause and the no-oral-waiver clause. The Court of Appeals cited to a North Carolina Supreme Court decision in which the court stated that "[t]he provisions of a written contract may be modified *or waived* by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived. This principle has been sustained even where the instrument provides for any modification of the contract to be in writing." *Id.* (emphasis in original)

(quoting *Whitehurst v. FCX Fruit & Vegetable Serv., Inc.*, 224 N.C. 628, 636, 32 S.E.2d 34, 39 (1944)).

The Court of Appeals in *42 East* also relied on decisions from other jurisdictions—which in turn relied on national contract law treatises—that support a waiver despite the inclusion of a no waiver clause in a contract. This was permissible because " '[t]he general view is that a party to a written contract can waive a provision of that contract by conduct expressly or surrounding performance, despite the existence of a so-called anti-waiver or failure to enforce clause in the contract. This is based on the view that the nonwaiver clause itself, like any other term of the contract is subject to waiver by agreement or conduct during performance.' " *Id.* (quoting *ASC Utah, Inc. v. Wolf Mountain Resorts, L.C.*, 2010 UT 65, 245 P.3d 184, 196 n.8 (2010)).

The rationale for this view is that "[t]he freedom to contract includes the freedom to alter that contract. [Plaintiff] was free, after signing the initial contract, to waive a condition for which it had bargained. Parties to a contract cannot, even by an express provision in that contract, deprive themselves of the power to alter or vary or discharge it by subsequent agreement.' " *Id.* (quoting *Hovnanian Land Inv. Grp., LLC v. Annapolis Towne Ctr. at Parole, LLC*, 421 Md. 94, 121-22, 25 A.3d 967, 983 (2011).

Consequently, the *42 East* court ruled that the no-oral-waiver clause did not preclude a determination that the defendant waived the time-is-of-the-essence clause. Whether or not the defendant's conduct amounted to waiver was a question of fact, and the Court of Appeals remanded the case for the trial court to make findings of fact and conclusions of law as to whether the defendant waived the contract's time-is-of-the-essence clause.

IV. Settlement Agreements: Litigating the End of the Litigation

Few cases are taken to trial, especially breach of contract actions, and most lawsuits settle, either at mediation or in negotiations through counsel. Increasingly, however, litigators are finding that the case which they thought had been settled actually remains in dispute for one reason or another. In recent years, North Carolina's appellate courts have frequently been called upon to determine whether a disputed settlement agreement was valid, whether it was enforceable under the statute of frauds, and whether it was binding upon a litigant because of emails and letters from, or verbal statements by, counsel for that litigant.

The following case summaries of appellate decisions regarding settlement agreements are excerpted from the presenters' contract law treatise, and re-printed here with permission from the publisher, Lexis Publishing. *See* JOHN N. HUTSON, JR. AND SCOTT A. MISKIMON, NORTH CAROLINA CONTRACT LAW (Lexis, 2001 & 2012 Cumulative Supplement).

A. Settlement Agreement Found to Be Valid

The following cases are ones in which the appellate court determined that the disputed settlement agreement was valid.

Apple Tree Ridge Neighborhood Ass'n v. Grandfather Mountain Heights Prop. Owners Corp., 2010 N.C. App. LEXIS 1441, 697 S.E.2d 468 (2010) (reversing trial court's order reforming settlement agreement reached at mediation on the grounds of mutual mistake of law and enforcing it as reformed to expand the scope of the defendant's obligations regarding the construction of a road; because a settlement agreement is a contract, a court may not, under the guise of reformation, impose upon a party to the contract a liability which he has not assumed or an obligation which he has not undertaken)

Capps v. NW Sign Indus. of N.C., Inc., 2007 N.C. App. LEXIS 1816, 648 S.E.2d 577 (Aug. 21, 2007) (unpublished), *disc. rev. denied*, 362 N.C. 355, 661 S.E.2d 244 (2008) (affirming order enforcing "short form" settlement agreement reached at mediation of wage and hour dispute despite defendant employer's contention that it was not intended as the parties' final settlement because of the following: it did not state whether the compensation to be paid to plaintiff was in a lump sum or per a payment schedule; did not state when payment was due or where or how payment was to be made; did not provide for a full release; did not contain an enforcement mechanism regarding the confidentiality clause; and did not include a "carve-out" clause allowing disclosure of its terms to the parties' respective accountants and other professionals needed for tax return preparation).

Goodwin v. Cashwell, 102 N.C. App. 275, 401 S.E.2d 840 (1991) (settlement agreement in wrongful death action intended to be final expression of the parties' intent; parol evidence of defendant's mistake as to cost of annuity inadmissible).

Harris v. Ray Johnson Constr. Co., 139 N.C. App. 827, 534 S.E.2d 653 (2000) (affirming order enforcing an oral settlement agreement made between plaintiff's attorney and corporate defendant's insurance carrier and ruling that plaintiff's acceptance of defendants' offer created implied promise to dismiss lawsuit and execute a release of claims form).
J.H. Batten, Inc. v. Jonesboro United Methodist Church, 2003 N.C. App. LEXIS 1204, 581 S.E.2d 832 (June 17, 2003) (unpublished), *disc. rev. denied*, 357 N.C. 460, 585 S.E.2d 759 (2003) (affirming summary judgment entered in favor of plaintiff general contractor suing defendant church for breach of written settlement agreement that unambiguously confirmed terms the parties orally agreed to; letter drafted by defendant contained statement "Should this [settlement offer] meet your approval, please sign this and return it by fax" and plaintiff expressly indicated his acceptance by writing on the bottom of the letter "I agree that this is a complete settlement between J.H. Batten Inc. and Jonesboro United Methodist Church.").

Lemly v. Colvard Oil Co., 157 N.C. App. 99, 577 S.E.2d 712 (2003) (reversing Industrial Commission's ruling that agreement reached between employee and employer at mediation of workers' compensation claim was not an enforceable settlement agreement; at mediation parties agreed on compensation claimant would receive and that they would execute a clincher agreement setting out terms of the settlement; employer thereafter tendered clincher agreement containing standard terms required by Industrial Commission's rules, but employee refused to sign it even though it did not contain terms different than what was agreed to at mediation).

Norfolk So. Ry. Co. v. David Wilson Paint & Body Shop, Inc., 2004 N.C. App. LEXIS 2244, 605 S.E.2d 741 (Dec. 21, 2004) (unpublished) (affirming trial court's order enforcing settlement agreement against defendant reached between the parties' attorneys via telephone and correspondence; defendant refused to sign lease contemplated by settlement agreement, and court rejected defendant's claim that the fact that no lease was executed proved that the parties failed to reach a meeting of the minds).

Powell v. City of Newton, 2010 N.C. LEXIS 1078, 703 S.E.2d 723 (2010) (affirming order enforcing unsigned settlement agreement; assuming that approval of the settlement agreement by the city council for the defendant municipality was a condition precedent to contract formation, "that condition was satisfied when, before plaintiff refused to comply with the agreement, defendants' funds in the amount specified by the agreement were transferred into plaintiff's attorney's trust account, concretely indicating that the city council had approved the agreement").

Purcell Int'l Textile Group, Inc. v. Algemene AFW N.V., 185 N.C. App. 135, 647 S.E.2d 667 (2007) , *disc. rev. denied*, 362 N.C. 88, 655 S.E.2d 840 (2007) (agreement fraudulent signed by attorney enforceable by innocent third party--affirming judgment enforcing settlement agreement that plaintiff contended was fraudulently made on its behalf by its former attorney and order refusing to relieve plaintiff of that judgment).

Smith v. Young Moving & Storage, Inc., 167 N.C. App. 487, 606 S.E.2d 173 (2004) (confirming arbitrator's decision to enforce settlement agreement; court rejected plaintiff's contention she was not bound to settlement agreement despite fact her attorney sent a letter to opposing counsel confirming terms of verbal agreement to settle dispute; because there were no terms left

unresolved, agreement was not rendered unenforceable merely because plaintiff changed her mind and refused to execute formal settlement agreement).

Southern Bldg. Maint., Inc. v. Osborne, 127 N.C. App. 327, 489 S.E.2d 892 (1997) (release of certain claims in settlement agreement is sufficient consideration for non-compete--affirming judgment awarding damages to plaintiff former employer against defendant who breached noncompete set forth in a post-termination settlement agreement).

State v. Philip Morris USA Inc., 363 N.C. 623, 641-642, 685 S.E.2d 85 (2009) (ruling that defendant tobacco companies' promise to make payments under the National Tobacco Grower Settlement Trust was not rendered illusory by a Tax Offset Adjustment provision in that agreement that allowed them to offset their financial obligations under the Fair and Equitable Tobacco Reform Act of 2004 against all payments due the Trust).

Sutton v. Messer, 173 N.C. App. 521, 620 S.E.2d 19 (2005) (reversing judgment on the pleadings rendered in favor of defendant and ordering trial court to find that the settlement agreement at issue was not void for vagueness and, if either party requested a receiver, trial court was to appoint a receiver to sell one of two rubies that was subject to the settlement agreement).

Talton v. Mac Tools, Inc., 118 N.C. App. 87, 453 S.E.2d 563 (1995) (affirming summary judgment entered against plaintiffs, former distributors for defendant, who executed release in exchange for discharge on debt owed to defendant and then two years later sued defendant for fraud regarding distributorship).

Weaver v. St. Joseph of the Pines, Inc., 187 N.C. App. 198, 652 S.E.2d 701 (2007) (affirming summary judgment against plaintiff administrator of incompetent's estate bringing action for negligence and wrongful death; ruling that plaintiff's claims were barred by a release set forth in a settlement agreement executed by incompetent to settle a prior action that defendant brought to recover on a debt for nursing services provided to her; ratification of release occurred because, following incompetent's death, her heirs paid monthly payments to defendant as required under the settlement agreement).

Williamson v. Bullington, 139 N.C. App. 571, 534 S.E.2d 254 (2000), *aff'd*, 353 N.C. 363, 544 S.E.2d 221 (2001) (per curiam). In *Williamson*, the plaintiff sued the estate of her former husband for breach of a property settlement agreement. The trial court entered summary judgment in favor of the plaintiff, granting her specific performance of the agreement and requiring the husband's estate to transfer two golf course leases that the plaintiff claimed the former husband was contractually obligated to convey to her via his will. The court of appeals reversed. Construing the terms of the property settlement agreement, which gave the plaintiff the option to purchase the leasehold interests at their fair market value if the former husband did not transfer them by will, the court of appeals ruled the trial court granted the wrong remedy, vacated the summary judgment, and gave the plaintiff leave to amend her complaint to assert the proper remedy. The supreme court affirmed in a 3-3 per curiam decision, leaving the court of appeals' ruling undisturbed but without precedential value. *Id.*

Woods v. Mangum, 2009 N.C. App. LEXIS 1566, 682 S.E.2d 435 (2009), *aff'd*, 363 N.C. 827, 689 S.E.2d 858 (2010) (per curiam) (affirming summary judgment entered in favor of plaintiffs on their claim to quiet title to acreage purchased from defendant sellers who financed the purchase; court found as a matter of law that parties, through counsel, reached a settlement agreement in which defendant sellers agreed to give plaintiffs "clear title" and therefore ordered the note and deed of trust cancelled).

Zanone v. RJR Nabisco, Inc., 120 N.C. App. 768, 463 S.E.2d 584 (1995) (affirming summary judgment entered against plaintiff employee who claimed former employer breached severance relocation policy; action barred as a matter of law due to accord and satisfaction where evidence showed parties were, at time defendant tendered check "in full and final payment of [plaintiff's] benefits," in a dispute as to the amount of relocation expenses defendant was obligated to reimburse plaintiff).

B. Settlement Agreement Found to Be Invalid

The following cases are ones in which the appellate court determined that the disputed settlement agreement was not valid.

Cabarrus County v. Systel Bus. Equip. Co., 171 N.C. App. 423, 614 S.E.2d 596 , *disc. rev. denied*, 360 N.C. 61, 621 S.E.2d 177 (2005) (reversing trial court's order enforcing settlement agreement reached at a mediation and which plaintiff county's board of county commissioners first voted to approve but later rescinded its approval; contract did not include a signed pre-audit certificate and was therefore void such that no binding settlement agreement existed; dispute first arose between plaintiff and defendant concerning an equipment rental agreement, which also lacked a signed pre-audit certificate).

Chappell v. Roth, 353 N.C. 690, 548 S.E.2d 499, *reh'g denied*, 354 N.C. 75, 553 S.E.2d 36 (2001) (affirming trial court's denial of plaintiff's motion to enforce a mediated settlement agreement, where settlement agreement was void due to the parties' lack of mutual assent as to the terms of a proposed release).

Kalnen v. Kalnen, 162 N.C. App. 180, 590 S.E.2d 333 (Jan. 6, 2004) (unpublished) (reversing order enforcing settlement agreement purportedly reached between plaintiff executor and defendant beneficiary after plaintiff filed suit; plaintiff claimed a binding settlement had been reached, but letter from defendant's attorney "accepting" plaintiff's settlement offer also proposed additional material terms including agreement by plaintiff to pay defendant the full amount of her claim asserted against the estate and agreement that the lawsuit would be dismissed with prejudice).

Seawell v. Continental Cas. Co., 84 N.C. App. 277, 279, 352 S.E.2d 263 (1987) (ruling contract was void for indefiniteness where record showed parties' purported settlement agreement concerning contaminated tobacco fertilizer was at best an agreement to agree).

C. Settlement Agreements and the Statute of Frauds

The following cases are ones in which the appellate court determined that the disputed settlement agreement was enforceable, either because there was a signed writing that satisfied the statute of frauds, the defense of the statute of frauds was waived, or the party resisting enforcement was judicially stopped from asserting the statute of frauds.

Bass v. Siloam Baptist Church, 162 N.C. App. 547, 591 S.E.2d 599 (Feb. 3, 2004) (unpublished) (affirming order enforcing settlement agreement regarding disputed land that plaintiffs agreed to deed to defendant as part of settlement; plaintiffs' attorney sent letter proposing settlement terms but never prepared deed and court found that attorney's letter satisfied the statute of frauds where plaintiffs offered no evidence to rebut presumption of their attorney's authority).

The Currituck Assocs.— Residential P'ship v. Hollowell, 166 N.C. App. 17, 601 S.E.2d 256 (2004) (affirming order enforcing settlement agreement requiring defendant buyers to purchase parcels in development from plaintiff developer; terms of settlement agreement were set forth in letters and email exchanged between counsel for the parties) *aff'd*, 360 N.C. 160, 622 S.E.2d 493 (2005) (per curiam ruling, decided on a 3-3 vote).

Laing v. Lewis, 133 N.C. App. 172, 515 S.E.2d 40 (1999) (ruling that defendant's failure to assert General Statutes § 22-2 in the trial court was a waiver such that statute of frauds defense could not be raised for the first time on appeal; trial court erred, however, in specifically enforcing oral settlement agreement on terms that differed from what the litigants agreed).

Powell v. City of Newton, 2010 N.C. LEXIS 1078, 703 S.E.2d 723 (2010) (affirming order enforcing unsigned settlement agreement; judicial estoppel was used to prevent plaintiff from using the statute of frauds to escape his obligations to convey title to land to defendant in exchange for a settlement payment where plaintiff, while represented by an attorney, acknowledged his agreement in open court to settle with defendant).

D. Attorney as Agent Who Binds the Client to the Settlement Agreement

The following cases are ones in which the appellate court determined that the disputed settlement agreement was binding upon a litigant under an agency theory because of written or verbal statements made by that litigant's counsel in which the attorney approved the terms of the settlement agreement.

Bass v. Siloam Baptist Church, 162 N.C. App. 547, 591 S.E.2d 599 (Feb. 3, 2004) (unpublished) (affirming order enforcing settlement agreement regarding disputed land that plaintiffs agreed to deed to defendant as part of settlement; plaintiffs' attorney sent letter proposing settlement terms but never prepared deed and court found that attorney's letter satisfied the statute of frauds where plaintiffs offered no evidence to rebut presumption of their attorney's authority).

Chaisson v. Simpson, 195 N.C. App. 463**,** 472, 473, 673 S.E.2d 149 (2009) (affirming worker's compensation award by the Industrial Commission and ruling that defendant employer and its insurance carrier were bound by terms of settlement agreement which plaintiff signed but which defendants did not; defendants were bound where attorney for insurance carrier sent a letter to plaintiff stating "I understand that a settlement has been reached in the amount of $ 97,500," then drafted a settlement agreement and sent it to plaintiff along with a second letter stating "I have drafted [it] in accordance with the agreement you have reached with [the defendants] to settle your workers' compensation claim.").

The Currituck Assocs.— Residential P'ship v. Hollowell, 166 N.C. App. 17, 601 S.E.2d 256 (2004) (affirming order enforcing settlement agreement requiring defendant buyers to purchase parcels in development from plaintiff developer; terms of settlement agreement were set forth in letters and email exchanged between counsel for the parties) *aff'd*, 360 N.C. 160, 622 S.E.2d 493 (2005) (per curiam ruling, decided on a 3-3 vote)

Harris v. Ray Johnson Constr. Co., 139 N.C. App. 827, 534 S.E.2d 653 (2000) (affirming order enforcing an oral settlement agreement made between plaintiff's attorney and corporate defendant's insurance carrier and ruling that plaintiff's acceptance of defendants' offer created implied promise to dismiss lawsuit and execute a release of claims form).

Norfolk So. Ry. Co. v. David Wilson Paint & Body Shop, Inc., 2004 N.C. App. LEXIS 2244, 605 S.E.2d 741 (Dec. 21, 2004) (unpublished) (affirming trial court's order enforcing settlement agreement against defendant reached between the parties' attorneys via telephone and correspondence; defendant refused to sign lease contemplated by settlement agreement, and court rejected defendant's claim that the fact that no lease was executed proved that the parties failed to reach a meeting of the minds)

Purcell Int'l Textile Group, Inc. v. Algemene AFW N.V., 185 N.C. App. 135, 647 S.E.2d 667 (2007), *disc. rev. denied*, 362 N.C. 88, 655 S.E.2d 840 (2007) (affirming judgment enforcing settlement agreement that plaintiff contended was fraudulently made on its behalf by its former attorney, and enforcing order refusing to relieve plaintiff of that judgment).

Smith v. Young Moving & Storage, Inc., 167 N.C. App. 487, 606 S.E.2d 173 (2004) (confirming arbitrator's decision to enforce settlement agreement; court rejected plaintiff's contention she was not bound to settlement agreement despite fact her attorney sent a letter to opposing counsel confirming terms of verbal agreement to settle dispute; because there were no terms left unresolved, agreement was not rendered unenforceable merely because plaintiff changed her mind and refused to execute formal settlement agreement).

Woods v. Mangum, 2009 N.C. App. LEXIS 1566, 682 S.E.2d 435 (2009), *aff'd*, 363 N.C. 827, 689 S.E.2d 858 (2010) (per curiam) (affirming summary judgment entered in favor of plaintiffs on their claim to quiet title to acreage purchased from defendant sellers who financed the purchase; court found as a matter of law that parties, through counsel, reached a settlement agreement in which defendant sellers agreed to give plaintiffs clear title" and therefore ordered the note and deed of trust cancelled).

V. The Economic Loss Doctrine in Cases Involving Covenants Not to Compete And Trade Secrets Agreements

The Economic Loss Doctrine is often applied in products liability and construction cases to bar tort claims that are alleged to arise in connection with a breach of contract. Two recent trial court opinions, one from a federal district court applying North Carolina law and one from the North Carolina Business Court, have applied the Economic Loss Doctrine to bar tort claims arising out of alleged breaches of non-competition and trade secrets agreements. The reasoning used in these opinions is not limited to cases involving non-competition and trade secrets agreements and could be applied in other cases in which a party seeks to convert a breach of contract into a tort claim.

A. The History of the Economic Loss Doctrine in North Carolina

The origin of what is now known as the Economic Loss Doctrine in North Carolina is the ruling from the North Carolina Supreme Court in *North Carolina State Ports Authority v. Lloyd A. Fry Roofing Company*, 294 N.C. 73, 240 S.E.2d 345 (1978). In that case the Ports Authority complained that the defendant roofing company had improperly installed roofs on two of its buildings. The Ports Authority asserted causes of action for negligence and breach of contract. The North Carolina Supreme Court dismissed the negligence claim, saying that "[o]rdinarily a breach of contract does not give rise to a tort action by the promissee against the promissor." *Id*. at 81, 240 S.E.2d at 350. The Court explained:

> In the present case, according to the complaint, Dickerson contracted to construct buildings, including roofs thereon, in accordance with agreed plans and specifications. It is alleged that Dickerson did not do so construct the roofs. If that be true, it is immaterial whether Dickerson's failure was due to its negligence or occurred notwithstanding its exercise of great care and skill. In either event, the promissor would be liable in damages. Conversely, if the roofs, as constructed, conformed to the plans and specifications of the contract, the promissor having fully performed his contract, would not be liable in damages to the plaintiff even though he failed to use a degree of care customarily used in such construction by building contractors. Thus, the allegation of negligence by Dickerson and the second claim for relief set forth in the complaint is surplusage and should be disregarded.

Id. at 83, 240 S.E.2d at 351.

The Court also explained the instances in which it had recognized a tort action in the context of a breach of contract:

> "However, such decisions by this court, which have been brought to our attention, appear to fall into one of four general categories:
>
> (1) The injury, proximately caused by the promissor's negligent act or omission in the performance of his contract, was an injury to the person or property of someone other than the promissee.

(2) The injury, proximately caused by the promissor's negligent, or willful, act or omission in the performance of his contract, was to property of promissee other than the property which was the subject of the contract, or was a personal injury to the promissee.

(3) The injury, proximately caused by the promissor's negligent, or willful, act or omission in the performance of his contract, was loss or damage to the promissee's property, which was the subject of the contract, the promissor being charged by law, as a matter of public policy, with the duty to use care and safeguarding of the property from harm, as in the case of a common carrier, and innkeeper or other bailee.

(4) The injury so caused was a willful injury to or a conversion of the property of the promissee, which was the subject of the contract, by the promissory.

Id. at 82, 240 S.E.2d, at 350, 351 (citations omitted).

In *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 430 391 S.E. 2d 211, 217 (1990), the North Carolina Court of Appeals adopted the Economic Loss Doctrine in cases involving allegedly defective goods and which were governed by the Uniform Commercial Code ("UCC"). The Court of Appeals explained the rationale behind this rule:

> The U.C.C. is generally regarded as the exclusive source for ascertaining whether the seller is subject to liability for damages if the claim is based on an intangible economic loss and not attributable to physical injury to person or to a tangible thing other than the defective product itself. If intangible economic loss were actionable under a tort theory, the U.C.C.'s provisions permitting assignment of risk by means of warranties and disclaimers would be rendered meaningless. It would be virtually impossible to sell a product "as is" because if the product did not meet the economic expectation of the buyer, the buyer would have an action under tort law. The U.C.C. represents a comprehensive statutory scheme which satisfies the needs of the world of commerce and courts have been reluctant to extend judicial doctrines which might dislocate the legislative structure.

Reece v. Homette Corp., 110 N.C. App. 462, 466, 429, S.E.2d 768, 770 (1993) (citations omitted).

What is now called the Economic Loss Doctrine was first applied in a commercial context in *Broussard v. Meineke Discount Muffler Shops, Incorporated*, 155 F. 3d, 331 (1998). In *Broussard*, the plaintiffs brought claims of breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraud, unjust enrichment, negligence, negligent misrepresentations, intentional interference with contractual relations and unfair and deceptive business practices. However, the Fourth Circuit determined that the basis of all of the claims was a disagreement between the parties over Meineke's obligations under its Franchise Agreements. The Fourth Circuit stated:

> We think it unlikely that an independent tort could arise in the course of contractual performance, since those sorts of claims are most appropriately addressed by asking simply whether a party adequately fulfilled its contractual obligations. If Meineke has failed to perform its contractual obligations, the remedy is contract damages, not the blank check afforded to juries when they are authorized to return a punitive award.

Id. at 347 (citations omitted).

B. The Economic Loss Doctrine in Cases Involving Covenants Not to Compete and Trade Secrets Agreements.

In *Akzo Nobel Coatings v. Rogers*, 2011 N.C.B.C. 41, 2011 N.C.B.C. LEXIS 42 (2011) the plaintiff brought suit against five former employees who had allegedly violated non-compete, non-solicitation and confidentiality agreements. The plaintiff's claims against the individuals included fraud, or alternatively negligent misrepresentation, unfair and deceptive trade practices, tortuous interference with contract, and tortious interference with prospective economic advantage. The defendants moved for judgment on the pleadings. One of the grounds asserted for dismissal of the tort claims was North Carolina's Economic Loss Doctrine. The plaintiff contended that the Economic Loss Doctrine only applied to products liability cases. The Business Court disagreed, saying:

> A broader doctrine labeled as the "Economic Loss Rule" routinely operates to bar tort claims that "piggyback" breach of contract claims outside the products liability context.

Id. at * 91 (citations omitted).

In reaching this result the Business Court took guidance from *ACS Partners, LLC v. Americon Group, Inc.*, 2010 U.S. Dist. LEXIS 19906 (W.D.N.C. Mar. 5, 2010) (adopting recommendation of Magistrate Judge Cayer in *ACS Partners, LLC v. Americon Group, Inc.*, 2010 U.S. Dist. LEXIS 19907 (W.D.N.C. Feb.12, 2010), a federal court case decided under North Carolina law. As the Business Court explained:

> Citing *Broussard* and *Strum* the *ACS* court found that the Economic Loss Rule operated to bar the plaintiff's tort claims because like *Broussard*, the parties' dispute was contractually based and "Plaintiff failed to allege an independent reason for a tort based claim." In holding that "Plaintiff's tort claims arise out of the performance of the non-compete and confidential disclosure agreements and the alleged breach of those agreements" the court explained:
>
> > Plaintiff argues that [defendant] solicited its customers and prospects and made a bid to an ACS prospect on behalf of Americon, while still employed by [plaintiff]. At most, plaintiff may be able to prove that [defendant] did not carry out his contractual obligations. The mere failure to carry out an obligation in contract, however, does not support

> an action for tortious interference with contract and prospective advantage.
>
> Plaintiff's claim for tortious interference with contract is neither "identifiable" nor "distinct from" the breach of contract. . . Plaintiff's claim for tortious interference with prospective advantage may be "identifiable" but is not "distinct from" the primary breach of contract. The purpose of the non-compete agreement was to insure that [defendant] would not compete with [plaintiff] or solicit its customers. *Broussard* does not allow plaintiff double recovery from the same conduct alleged in the breach of contract claim.

Id. at * 93 (citations omitted).

The court summarized the Economic Loss Doctrine in this context:

> To overcome the Economic Loss Rule, a plaintiff must also allege a duty owed to him by the defendant separate and distinct from any duty owed under a contract.

Id. at 94 (citations omitted).

The court then examined each of the plaintiff's tort claims and found that they did not allege a duty separate and distinct from a duty alleged under the contract. It, therefore, granted the defendant's motion for judgment on the pleadings as to those claims.

Note that the Business Court's ruling in *Akzo Nobel* is not at odds with rulings in cases such as *United Laboratories, Inc. v. Kuykendall*, 335 N.C. 183, 437 S.E.2d 374 (1993), in which an entity that was not a party to the covenant not to compete in question was found liable for tortious interference with contractual relations and unfair and deceptive business practices. The Economic Loss Doctrine only applies to parties who are in privity of contract.

C. *Edgewater Services, Inc. v. Epic Logistics, Inc.*

A similar result was reached in *Edgewater Services., Incorporated v. Epic Logistics, Incorporated*, 2011 N.C. App. LEXIS 2494, 720 S.E.2d 30 (Dec. 6, 2011, unpublished). While a vice president of the plaintiff, the defendant Osgood allegedly took carrier files, rate information and customer files belonging to the plaintiff. The plaintiff brought a claim against Osgood for constructive fraud. The Court of Appeals upheld the trial court's dismissal of the constructive fraud claim saying:

> Here, there was evidence that Osgood was in a position of trust and confidence as vice president of ESI. Nevertheless, we fail to see how she took advantage of the parties' relationship to the hurt of plaintiff. Osgood's misappropriation of confidential information and breaching the non-disclosure clause of her employment contract were separate causes of action that did not require Osgood to be in a position of trust or confidence. Any employee could be found liable for those claims under those circumstances. ESI failed to show

> how Osgood specifically used her fiduciary relationship with ESI to harm the Company. In its brief, ESI merely claims that Osgood "took advantage of her fiduciary relationship", but fails to point out how she took advantage of the relationship and how ESI was harmed by such actions. We hold that, based on the evidence presented at trial, the trial court did not err in granting Epic's motion for a directed verdict as to the claim of constructive fraud.

Id. at * 26.

It is noteworthy that the Court did not cite to the Economic Loss Doctrine in support of this holding.

VI. Other Interesting Developments in Covenants Not to Compete and Confidential Information Cases

Two recent cases from the North Carolina Business Court deal with issues of frequent interest to commercial litigators and their clients: protecting the respective and competing interests of employers and employees. Once case involves covenants not to compete (and the law that governs them), while the other deals with the common situation of information, not arising to the level of a trade secret, but which an employer still desires to protect from misappropriation.

A. Applying the Law of Another State When Construing a Covenant Not to Compete

In *Akzo Nobel Coatings v. Rogers*, 2011 N.C.B.C. 41, 2011 N.C.B.C. LEXIS 42 (2011), two of the contracts containing covenants not to compete specified that they would be governed by Delaware law. *Id*. at *57 Unlike North Carolina law, Delaware law allows the court to alter restrictive covenants if it finds they are unreasonable. The defendants argued that the application of Delaware law to their covenants not to compete would violate the public policy of North Carolina. *Id.* at *33.

The Business Court disagreed. The court's ruling was based in part on the fact that one of the defendants, Rogers, received $9,500,000 for the purchase of his stock and the other defendant, Taylor, was a national marketing manager and sales director who was paid $304,000 per year under his contract. The Court concluded that the choice of law provisions were bargained for by sophisticated parties and should be honored. The Court noted that its ruling was based on the facts before it and the Court did not decide whether a public policy exception would exist if, for example, an unsophisticated party signed a covenant not to compete as a part of his or her employment agreement.

B. Misappropriation of Confidential Information

In *Edgewater Services, Inc. v. Epic Logistics, Inc.*, 2011 N.C. App. LEXIS 2494, 720 S.E.2d 30 (Dec. 6, 2011) (unpublished), the defendant Osgood misappropriated carrier files, files containing rate information and customer files. The matter was tried by Judge Jolly of the North Carolina Business Court. The jury found Osgood liable for both breach of the non-disclosure clause in her contract and for the tort of misappropriation of confidential information. On appeal, the defendant Osgood did not contest the validity of the trial court's jury instructions on the issue of misappropriation of confidential information. This appears to be a case of first impression in our state. North Carolina's appellate courts have not previously recognized a separate tort of misappropriation of confidential information as opposed to misappropriation of trade secrets.

VII. When Will Time Be of the Essence in Contracts for the Sale of Goods?

In common-law contracts, a time is of the essence provision is frequently inserted, particularly in contracts for the sale of land, and North Carolina's appellate courts have routinely enforced such provisions. But will our courts enforce a time is of the essence provision in a contract governed by North Carolina's Uniform Commercial Code ("UCC"), and if so, does such a provision have to be expressly stated, or can time be deemed of the essence based on factors other than a contract's express terms?

In *D.G. II, LLC v. Nix*, 2011 N.C. App. LEXIS 735, 712 S.E.2d 335 (2011) the Court of Appeals ruled that a specified deadline for delivery would be deemed to be a hard deadline which, if missed, will result in a breach, only if the language of the contract or the surrounding circumstances indicate that time is of the essence as to that deadline. Even though this ruling is dicta, future drafters of contracts for the sale of goods should include a provisions stating that time is of the essence if that is the intent of the parties.

Importantly, because the contract formation rules under the UCC are different from the contract formation rules under the common law, the absence of a time is of the essence clause will not necessarily be determinative in a particular case. There are situations under the UCC in which time limits are strictly enforced even when there is no time is of the essence provision in the agreement. For example, even where the contract is silent as to the time for performance, an agreement as to a definite time "may be found in a term implied from the contractual circumstances, usage of trade or course of dealing or performance. . ." N.C. GEN. STAT. § 25-2-309 Official Comment 1. In addition, "[N]othing is stronger evidence of a reasonable time than the fixing of such time by a fair agreement made between the parties." *Id*. § 25-1-302 Official Comment 1. Thus, in circumstances where there is a legitimate business need for strict compliance with a deadline, and a deadline is clearly stated, strict enforcement of the deadline may be obtained even in the absence of language stating that time is of the essence. *See id*.

VIII. Receivership

It is common for lenders to seek the appointment of receivers on an expedited basis in connection with the foreclosures of income-producing property. The receiver can make sure the property is properly maintained and that all of the income from the property is protected while the foreclosure action is pending. Often, one of the grounds for the imposition of a receivership is that the loan documents contain an agreement by the borrower to the appointment of a receiver in the event of a default. While litigation involving receiverships is common at the trial level, there are few receivership cases that reach the appellate level or which are otherwise the topic of written opinions. A recent opinion from the North Carolina Business Court touches on issues commonly encountered in such cases.

A. Jurisdiction to Appoint a Receiver Prior to the Service of Summons and Complaint.

In *FCC, LLC v. American Marine Holdings, LLC*, 11 CVS 1012 (N.C.B.C., OCTOBER, 20, 2011) (Gale, J.) (order granting emergency motion for appointment of a receivership), the North Carolina Business Court ruled that it had jurisdiction to appoint a receiver over entities which had not yet been served with a copy of the summons and complaint. The basis for the ruling was General Statutes section 1-501, which states:

> Any judge of the superior or district court with authority to grant restraining orders and injunctions has like jurisdiction to appoint receivers. . . .

Rule 65 of the North Carolina Rules of Civil Procedure clearly gives superior and district court judges the authority to issue temporary restraining orders on a ex parte basis. The superior and district courts have similar authority to appoint receivers on an ex parte basis. Note that a "temporary receivership" is not like a "temporary restraining order". Temporary restraining orders must expire within ten days under Rule 65. A receivership lasts "as long as the court thinks necessary." N.C. GEN. STAT. § 1-507.2 (2009). In *Lowder v. Allstar Mills*, 91 N.C. App. 621, 372 S.E.2d 739 (1988), *disc. rev. denied*, 324 N.C. 113, 377 S.E.2d 234 (1989), a temporary receivership lasted almost five years.

B. Effect of a Clause in Loan Documents Specifying Receivership as a Remedy Upon Default.

Also in *FCC, LLC v. American Marine Holdings, LLC*, the North Carolina Business Court enforced provisions in loan documents in which the defendants agreed to the imposition of a receivership upon default. The Court explained:

> The appointment of a receiver is equitable in nature and the court has certain inherent equitable powers to appoint a receiver where necessary. The court concludes that absent a significant countervailing equity, it is generally fair to bind sophisticated parties to the language in their written agreements. In reaching this conclusion, the court is mindful of the fact that plaintiff has advanced significant sums in reliance of the covenants contained in the Fountain Loan

Agreement and Deed of Trust and finds that there is good reason to hold the Fountain defendants accountable for their consent to the appointment of a receiver.

IX. Product Misuse Defense in the Products Liability Act

One of the provisions in North Carolina's Products Liability Act provides that no manufacturer or seller of a product shall be held liable where a proximate cause of the plaintiff's injury is an unauthorized modification or alteration of the product occurring after the product left the control of the manufacturer or seller. N.C. GEN. STAT. § 99B-3(a). This statute has been applied before in cases such as *Rich v. Shaw*, 98 N.C. App. 489, 391 S.E.2d 220, *cert. denied*, 327 N.C. 432, 395 S.E.2d 689 (1990), in which the manufacturer of a trenching machine was found not to be liable for personal injury caused by the unauthorized removal of a belt guard after the trenching machine left the manufacturer's control. A recent case from the North Carolina Supreme Court involved the unauthorized modification of a seat belt by an identified person who was not a party to the litigation.

In *Stark v. Ford Motor Company*, 2012 N.C. LEXIS 266, ___ S.E.2d ___ (2012). Cheyenne Stark, who was then five years old, was riding in the back seat of a Ford Taurus which suddenly accelerated and crashed into the concrete base of a light pole. Cheyenne became paralyzed as a result of injuries she suffered in the collision. Cheyenne alleged that defects in the Taurus's seat belt system caused her to suffer more enhanced injuries than she would have otherwise suffered in the accident. Ford's expert testified that in his opinion Cheyenne's shoulder belt was behind her back at the time of the collision. Ford's expert also opined that the failure to use the shoulder belt was the cause of Cheyenne's paralysis.

The trial court followed North Carolina's Pattern Jury Instruction on the defense of alteration or modification of a product under section 99B-3 of North Carolina's Products Liability Act and asked the jury to determine whether "[t]he enhanced injury to Cheyenne Stark [was] proximately caused by an alteration or modification made to the product by ***someone other than Ford Motor Company***. . . ." *Id.* at *13, ___ S.E.2d at ___ (emphasis added). The jury found for the plaintiff on the claim that Cheyenne's seatbelt was unreasonably designed. However, it also determined that Cheyenne's enhanced injuries were caused by a modification of the Taurus, which relieved Ford of liability.

The Court of Appeals reversed the trial court's judgment based on a very narrow interpretation of the word "party" found in Section 99B-3 of the Products Liability Act. *Stark ex rel. Jacobson v. Ford Motor Co.*, 204 N.C. App. 1, 693 S.E 2d 253 (2010). The Court of Appeals ruled that "party" does not simply mean anyone other than the manufacturer or seller. Instead, the Court ruled that Section 99B-3 gives a manufacturer or seller no defense based on a third party's misuse or alteration of the product when that third party is not a party to the action at the time of trial. *Id.* at 12, 693 S.E. 2d at 260. The Court of Appeals concluded that because the person who was alleged to have modified the seatbelt, Gordon Stark (Cheyenne's father), was not a party to the action at the time of trial, any modification by him could not support a defense under section 99B-3. *Id.*

The North Carolina Supreme Court granted the defendant's petition for discretionary review and reversed the Court of Appeals based upon a far more expansive interpretation of the statute's use of the word "party." The Supreme Court began its analysis by noting that the word

"party" is not defined in Chapter 99B. The court then looked to a dictionary and found that "[w]hen not being used in reference to a social event, the noun form of the word "party" is generally defined as a "person" or "group." *Stark v. Ford Motor Co.*, 2012 N.C. LEXIS ___ at *18, ___ S.E.2d at ___. The only limiting language in section 99B-3 pertaining to the word "party" is the phrase "other than the manufacturer or seller." *Id.* at *19 The Supreme Court could find no evidence to indicate that the General Assembly had intended to limit the use of the word "party" in the statute to a "party" in the action. It found support for its interpretation in the language of a pattern jury instruction which states that the defense applies when "someone other than the defendant made the alteration or modification." *Id*. at *21, 22, ___ S.E.2d at ___ (citing N.C.P.I. – Civil 744.07). It also found support from scholarly commentary, including John N. Hutson, Jr. & Scott A. Miskimon, *North Carolina Contract Law* § 16-3-1 at 775 (2001) ("The Products Liability Act provides a defense to production liability action where a proximate cause of the injury was an alteration or modification of the product by someone other than the manufacturer of seller.") (quoted in *Stark*, 2011 N.C. LEXIS at *23, ___ S.E.2d at ___.

As a result of the Supreme Court's ruling in *Stark*, it is now clear that if the proximate cause of a products liability injury is the alteration or misuse of the product by anyone other than the manufacturer or seller, then neither the manufacturer nor the seller will be liable for such injury.

X. Arbitration Clauses

Arbitration agreements have been the subject of much recent litigation, both at the trial and appellate levels. Frequently, the issue is whether a party seeking to compel arbitration is able to prove the existence of an agreement to arbitrate, and the outcome of the issue may depend on the ability of the movant to produce an arbitration agreement, in its entirety, that was executed many years in the past to prove assent to an arbitration clause, or the ability to show that the arbitration clause, while not part of the executed agreement, was memorialized in a separate document and incorporated by reference into the agreement at issue.

A. Failure to Prove Existence of an Agreement to Arbitrate

There are a number of reported appellate decisions involving agreements to arbitrate. This is due to the fact that although a trial court's order denying a motion to compel arbitration is interlocutory, the order is immediately appealable because it affects a substantial right of the litigant. *Carter v. T.D. Ameritrade Holding Corp.*, 212 N.C. App. LEXIS 50, **6, 721 S.E.2d 256, 260 (2012). If a party opposes a motion to compel arbitration, North Carolina's Revised Uniform Arbitration Act requires the trial court to proceed summarily to decide whether a valid arbitration agreement exists. *Id.* In reviewing the decision of the trial court, the trial court's findings of fact are conclusive on appeal where they are supported by any competent evidence. *Capps v. Blondeau*, 2011 N.C. App. LEXIS 2373, *6, 719 S.E.2d 256 (2011) (unpublished). Thus, the result of a motion to compel arbitration often depends on the trial court's determination of whether the party seeking arbitration has met its burden of proving the existence of an agreement to arbitrate.

In *Capps v. Blondeau*, the defendant Morgan Keegan sought to compel arbitration of the plaintiff's claims for fraud, negligent misrepresentation and breach of fiduciary duty. Morgan Keegan contended there were signed agreements requiring the plaintiff to arbitrate. As a part of its normal business practices, Morgan Keegan kept only a scan of the signature page of the alleged agreements. It sought to prove the existence of agreements to arbitrate through the use of what it called specimen forms of the agreements signed by the parties. There were, however, significant problems with Morgan Keegan's proof on this issue:

1. A comparison of the scanned signature pages to the purported specimen forms showed important differences. As to one agreement, the spacing and fonts used on the specimen document were different from those in the scanned document. On the other agreement, language appeared at the top of the scanned document which appeared at the bottom of the specimen form document. Thus, it appeared that the form of the agreements actually signed by the parties were different from the specimen forms produced by Morgan Keegan.
2. Morgan Keegan's broker, Mr. Blondeau, had already pleaded guilty to investment advisory fraud. The trial court found that his testimony was not credible.
3. The customer, Martha Capps, suffered from dementia and was not able to provide credible testimony.

The above factors were fatal to Morgan Keegan's ability to prove the existence of an agreement to arbitrate.

The *Capps* court also considered whether Morgan Keegan could prove an agreement to arbitrate in light of certain evidentiary rules. North Carolina Rule of Evidence 1003 provides that "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." The differences between the purported form specimens of the agreements and the signed signature pages meant that the alleged duplicate was not admissible as evidence.

North Carolina Evidence Rule 1004 allows oral proof of the contents of lost or destroyed instruments unless the proponent lost or destroyed them in bad faith. There was no concern that the original was lost or destroyed in bad faith. However, given Mr. Blondeau's plea of guilty to investment advisory fraud, the trial court found that his testimony was not credible. Thus, the court did not allow oral testimony of the contents of the original agreements. With all of its evidence excluded, Morgan Keegan was not able to meet its burden of proof on the existence of an agreement to arbitrate.

There was a time when it was common for large corporations to save a few cents on each transaction and only keep microfilmed copies of the signature pages of agreements. In every such case the lawyer attacking the agreement should carefully compare the alleged specimen agreement to the microfilmed copies. While it will be rare to have the witness on the other side to have pleaded guilty to fraud, it will not be unusual to find that the original parties to the agreement may have moved on to other jobs or are otherwise unavailable to testify. This may make it impossible to authenticate a partially scanned document if it does not conform to the proffered specimen agreement.

In *Slaughter v. Swicegood*, 162 N.C. App. 457, 591 S.E.2d 577 (2004), a motion to compel arbitration was also denied. An attorney, Robert Saunders, served as trustee of a charitable remainder trust. In December 1990, Saunders allegedly executed a Raymond James Customer Agreement which contained an arbitration clause. The defendants were not able to produce the original agreement. They did offer proof that the agreement was scanned into Raymond James's electronic filing system in December 2001, eleven years after the document was purportedly executed. However, the defendants did not offer the affidavit of anyone who witnessed the signing of the agreement, did not offer any explanation of Raymond James's business practices at the time the agreement was signed, and did not explain why the agreement was scanned and destroyed eleven years after its creation. Attorney Saunders was unavailable to testify because he had died. On these facts the Court of Appeals upheld the trial court's finding that the defendants had not met their burden of proving the existence of an agreement to arbitrate.

In *Britt v. May Davis Group, Inc.*, 2011 N.C. App. LEXIS 531, 641 S.E.2d 17 (March 6, 2007) (unpublished) the plaintiff signed the front page of an account application which contained the following language, "I hereby acknowledge that I understand and agree to the terms set forth in the customer statement (including the pre-dispute arbitration clause, a copy of which I have

received as found in paragraph 19 [on the back page of this agreement])." *Id.* at *2, 3, However, the trial court found that the defendant failed to prove that the faxed copy signed by the plaintiff contained the back side of the page. Based upon these findings, the Court of Appeals upheld the trial court's denial of the motion to compel arbitration.

In *McDonald v. Biltmore Homes, LLC*, 2009 N.C. App. LEXIS 1413, 687 S.E.2d 318 (May 19, 2009) (unpublished), the plaintiff signed an application for a new home warranty. The application contained the following statement, "Both purchaser(s) and the builder must sign this application acknowledging that: . . .(d) this warranty includes a provision for binding arbitration." *Id*. at *2. The plaintiffs claimed they did not receive a copy of the warranty until after they signed the application. *Id*. Further, a representative of the defendant described the warranty as "a cost-free extra." The trial court found this language to be deceptive because the warranty limited the defendant's warranties and obligations, it did not add to them. Based upon the trial court's finding that the defendant used deceptive language to describe the warranty and that the warranty was not supplied to the purchasers prior to the time they executed the application, the Court of Appeals upheld the trial court's refusal to enforce the arbitration agreement.

B. Incorporation by Reference for the Enforcement of an Arbitration Clause

Although an arbitration clause may not appear directly in the document signed by the parties, it may be part of their agreement because it exists in another document and that other document is incorporated by reference into the signed agreement. In *Canadian AM. Ass'n of Prof'l Baseball, LTD. v. Rapidz*, 2011 N.C. App. LEXIS 1171, 711 S.E.2d 834 (2001) the plaintiff and defendant entered into an Affiliation Agreement which did not include an arbitration clause. However, in the Affiliation Agreement the defendant "agreed to be bound by and comply with all of the League Agreements." *Id.* at *7, 711 S.E.2d at 837. The League's Bylaws stated:

> Any dispute or controversy between any Member and the League arising out of the League Agreement or the breach thereof shall be heard and decided by the Board . . . the Chairman of the Board will determine the schedule for a hearing which may be held in person or by telephone, in the Chairman's sole discretion. Rules of the hearing shall be set by the Chairman of the Board. The Commissioner and General Counsel shall act on behalf of the League. The Member may be represented by counsel. The Chairman of the Board shall conduct the hearing in the presence of the Board. The Board shall decide the dispute by majority vote. The Chairman shall be entitled to vote.

*Id. at **8, 711 S.E.2d at 837, 838.*

The Court of Appeals affirmed the trial court's determination that the League's Bylaws were incorporated by reference in the Affiliation Agreement. The Court of Appeals also rejected the defendant's argument that the above-quoted language was not an arbitration agreement because it did not use the word "arbitrate." The Court held that the intention of the parties to submit themselves to binding arbitration was ascertainable from the clear language and plain

words of the Agreement. *Id*. at *17, 711 S.E.2d at 840. The Court of Appeals also rejected the defendant's contention that the League could not serve as the arbitrator of the dispute because it was an interested party. The Court held that it is well settled that the parties, knowing the facts, may submit their differences to any person, whether he is interested in the matters involved or is related to one of them. *Id*. Thus, the Court of Appeals affirmed the trial court's enforcement of the arbitration agreement.

Using the doctrine of incorporation by reference as a way to enforce an arbitration clause has its limits, as demonstrated by a recent case involving personal guaranties. In *D.P. Solutions, Inc. v. Xplore-Tech Services Private LTD*, 211 N.C. App. LEXIS 900, 710 S.E.2d 297 (2011), the individual defendants executed personal guaranties of the obligations of the corporate defendant under a Share Purchase Agreement. The Share Purchase Agreement contained an arbitration clause. The personal guarantees did not. The individual defendants sought to compel arbitration of the dispute arising out of their personal guaranties. The Court of Appeals affirmed the trial court's denial of the motion to compel arbitration. The Court of Appeals reasoned that "[t]he obligation of the guarantor is separate and independent of the obligation of the principle debtor. *Id*. at *6, 7, 710 S.E.2d at 300. Thus, the arbitration clause in the underlying agreement between the creditor and the principal debtor was not incorporated by reference into the personal guaranties.

C. Ratification/Estoppel of Agreements to Arbitrate

In *Carter v. TD Ameritrade Holding Corp.*, 2012 N.C. App. LEXIS 50, 721 S.E.2d 256 (2012), Dr. and Mrs. Carter argued that they were not bound by the arbitration clause in their IRAs because their signatures on those documents were forged. The Court of Appeals held that it was immaterial whether the plaintiffs' signatures were forged for it found that they were bound by the provisions of the agreement as a matter of law.

The Court of Appeals first found that the plaintiffs had ratified the agreements. The plaintiffs knew that the IRA accounts had been created by the defendant, they received quarterly IRA statements from the defendants, thus they knew the IRAs were being managed by the defendants. Finally, the plaintiffs accepted the tax benefits of the IRAs. The court found that this conduct was, "consistent with an intent to affirm the unauthorized act and inconsistent with any other purpose." Thus, the plaintiffs ratified the IRA agreements, including the arbitration provision.

The Court of Appeals also examined the claims of the plaintiffs and found that they were dependent on duties arising from the contracts established in the IRAs. The court found that the assertion of claims that either literally or obliquely were based on a breach of a duty created under a contract estopped the plaintiff from denying the existence of the contract. Thus, it found the plaintiffs were estopped from denying the existence of the agreement to arbitrate found in the IRA agreements.

D. Compelling Arbitration in Foreclosure Actions

Seeking to enforce an arbitration clause in a foreclosure proceeding can be problematic and close attention must be paid to the foreclosure statutes and relevant case law. In *In re:*

Foreclosure of a N.C. Deed of Trust, 2012 N.C. App. LEXIS 336, ___ S.E.2d ___ (March 6, 2012) (unpublished), the Court of Appeals held that a motion to compel arbitration of a foreclosure proceeding cannot be brought in the foreclosure action under North Carolina General Statutes section 45-21.16. It must instead be brought in a motion to enjoin the foreclosure pursuant to General Statutes section 45-21.34. To make this determination the Court first looked at the issues to be addressed at a foreclosure hearing under a power of sale:

> If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b), or if the loan is a home loan under G.S. 45-101 (1b), that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by article 11 of this chapter have elapsed and (vi) that the sale is not barred by G.S. 45-21.12A, then the clerk shall authorize the mortgagee or trustee to proceed under the instrument . . . .

Id. at *5.

The Court noted that "the hearing [before the clerk] was not intended to settle all matters between the mortgagor and mortgagee." For all other matters, the parties must seek relief under General Statutes section 45-21.34 where the court's jurisdiction is much broader.

In *In re: Foreclosure of the Nine Deeds of Trust of Marshall & Madeline Cornblum*, 2012 N.C. App. LEXIS 524, ___ S.E.2d ___ (April 17, 2012) (unpublished), the Court of Appeals ruled that an action seeking to enjoin a foreclosure under General Statutes section 45-21.34 must be brought before the recording of the trustee's deed after the foreclosure sale, for at that time the party's rights to the real property become fixed, and any attempt to disturb the foreclosure sale is moot. Thus, after the recording of the trustees' deed, the parties lose their right to compel arbitration under the loan agreement.