To old friends, the Business Law Section welcomes you back. To new members, the Business Law Section welcomes you. We all, however, extend our gratitude to Anna Mills for her stewardship and leadership as our chair over the past two years. Anna brought thoughtfulness, insight, and diplomacy to the Business Law Section and will continue to serve the North Carolina Bar Association as a member of the Board of Governors.

It is an honor to write my initial column as chair and to further welcome Nick Bakatsias, Abbie Baynes, Ryan Coffield, and Brian Ferrell as new Council members, Ben Baldwin as vice chair, David Broughton as secretary, and Joseph Santaniello as treasurer. Emma Hodson joins us as co-chair of the Data Security and Privacy Committee, and Kristina Schwartz will chair the Membership Committee. I am fortunate to be able to lead a wonderfully qualified and dedicated team and appreciate their willingness to serve.

As we welcome new members, however, we say farewell and thank you to departing Council members Krista Bowen, George Brady, John Fleming, and William Joyner.

The state of the Business Law Section is strong. The section benefits from committed and engaged council and committee members as well as a large and active membership and a legacy of pioneering leadership on the section and North Carolina Bar Association levels. I attended the American Bar Association Business Bar Leaders Conference in May in Chicago, and, as we discussed programmatic and other enhancements

The Business Court Has New Rules. What Are the Key Points?

By Jennifer Van Zant, Stephen Feldman and Tim Lendino

If you practice business litigation in North Carolina, you’ve probably heard that the Business Court has amended its rules of practice. The amendments took effect on Jan. 1, 2017, under an order from the North Carolina Supreme Court.

The amendments are substantial. By way of background, the Court last amended its rules in 2006. A ten-year passage of time warranted a fresh look at the rules—including, and especially, how the rules can make Business Court practice more efficient for parties, lawyers, and the Court.

We had the privilege of leading an incredible committee of lawyers across North Carolina in developing the principles and ideas for the amended rules, and then effectuating those principles and ideas into rules. We express deep gratitude to the Business Court judges and to the members of the committee for their invaluable input, feedback, support, and leadership in generating the ideas for the proposed revisions. We can’t underscore this point enough.

This article reviews some key points from the amendments. We adapted this article from a manuscript that we presented at a CLE in 2016.

We note two disclaimers at the outset. First, this article contains our opinions; please do not construe those opinions as authoritative in connection with the Business Court Rules, current or future. Second, this article is no substitute for reading the amended rules from stem to stern. We encourage you to do so.

A. General themes

The proposed revisions reflect four general themes and guiding principles. We developed these themes and principles from the comments of the larger committee:

1. Approachability. We drafted and revised the rules with reader comprehension in mind. If the reader cannot understand the rules, they’ll have little utility.

2. Accessibility. We wanted the rules to make clear where a reader can find the specific guidance that the reader seeks.

3. Flexibility. We aimed to develop clear standards throughout the Rules. With that said, those standards sometimes needed to be sufficiently elastic.

Continued on page 3
to our sections, it was clear that the North Carolina Bar Association and our Business Law Section are—and are recognized as—national leaders.

We deliver timely and relevant continuing legal education programs, and our signature Business Law Institute and Annual Meeting will be held on February 15-16, 2018 in Pinehurst in conjunction with the International Law and Practice Section. Abbie Baynes and Vida Harvey are co-chairing the CLE planning committee, and, based on a sneak-peak of the schedule, it will be a valuable and time-efficient program.

We remain active supporters of NC LEAP (North Carolina Lawyers for Entrepreneurs Assistance Program), providing pro bono volunteers and funds, and this program inspired and serves as a model for similar efforts in other states. I hope that, if you have not been involved with NC LEAP, you will offer your talents to some impressive low-wealth entrepreneurs and that, if you have participated, you will continue to do so.

The section continues to be active and engaged in the legislative process in Raleigh, from advancing legislation that benefits our clients to advising our General Assembly members on bills that are relevant to business practice. For example, at the initiative of the Business Law Section and under the leadership of longtime members Kenny Greene and Rich Schell, state law was amended just three months ago to validate choice of North Carolina law and forum provisions in business contracts.

The sections are, collectively, one of the pillars of the North Carolina Bar Association and one of its sources of strength. Our section provides business law practitioners a chance to give back to the profession by promoting and offering input into updates and improvements to the law, by facilitating the provision of pro bono business law services, and by providing knowledge to our peers through CLE and the numerous projects undertaken by our section. The North Carolina Bar Association staff provides strong support, without which we could not function, but the section depends upon you, our volunteers, for a great deal of the work that we do.

One of the most rewarding aspects of involvement with the Business Law Section is the opportunity to work with so many lawyers committed to the advancement of business law and to see our profession—and our colleagues—at their best. I hope that you will remain—or become—actively involved in section activities, from serving on a committee to suggesting a project, and help us continue to serve our 1,667 members.
New Rules, continued from the front page

...to allow the parties and the Business Court judges enough flexibility to ensure that litigation is reasonably efficient.

4. Practicality. Finally, we wanted the Rules to cover topics of actual benefit to the Business Court judges, attorneys, and parties.

Rule 1(a) of the current draft summarizes these concepts: “These Business Court Rules should be construed and enforced to foster professionalism and civility; to permit the orderly, just, and prompt consideration and determination of all matters; and to promote the efficient administration of justice.”

B. Key points from the Revised Rules

1. The Rules clarify issues relating to notices of designation.

The revised Rules on notices of designation achieve several objectives.

First, the Rules clarify the designation procedures, particularly in light of amendments in 2014 to the well-known statutory framework in N.C. Gen. Stat. § 7A-45.4.

Second, the Rules remove outdated and extraneous references to the prior version of the statute.

Third, the Rules offer directions for designations of certain types of cases. For example, section 7A-45.4(a)(9) provides that contractual disputes between businesses over $1 million may be designated as mandatory complex business cases if both parties consent to the designation. Because the plaintiff might not be able to obtain the defendant’s consent when the plaintiff files the complaint and designation notice, the revised Rules instruct the filing party to submit a “conditional” notice of designation in these types of cases. Doing so gives the filing party a grace period to obtain the consent of defendant(s) needed to complete the notice of designation.

Fourth, the Rules provide more structure (e.g., a briefing schedule) for oppositions to notices of designation. The Rules also make clear that reply briefs are not allowed unless ordered by the Court. Moreover, the Rules create a safe-harbor extension of time for any deadlines that are running in a case before a party files a notice of designation. The safe-harbor extension of time is intended to aid a party who may oppose a notice of designation.

Finally, the revised Rules describe the circumstances in which amended pleadings can give rise to a mandatory complex business case designation. The Rules reflect the reasoning in Business Court decisions that conclude that an amended pleading cannot be used as a basis for designation if the case previously qualified for designation.

2. The Rules make changes to motion practice.

The revised Rules retain many of the current features of motion practice in the Business Court, while adding provisions designed to foster efficiency.

First, although most judges required a party filing a motion to consult with opposing counsel before filing any motions (except dispositive motions or motions for injunctive relief), this requirement has been added to the Rules.

Second, the list of motions that do not require briefs has been expanded. By way of example, the Rules clarify that consent motions and other perfunctory motions do not require a brief.

Third, although the briefing requirements remain largely the same (same schedule, page limits, certifications, etc.), the Rules now require supporting materials to motions and briefs to be organized, numbered, and indexed. Briefs also must contain pinpoint citations to supporting materials. To avoid congesting the docket, the Rules encourage the parties to avoid re-filing the same supporting materials twice and to avoid filing unnecessarily voluminous documents. In this regard, when a document is publicly available via the Internet, the Rules encourage the parties to cite to the document via hyperlink in lieu of attaching the document as an exhibit. With that said, the Rules still require the filing party to preserve or to archive the hyperlink or URL address material in the event the material is later inaccessible online.

Finally, the revised Rules make clear that all motions, including emergency motions, will be decided without live testimony unless the Court orders otherwise. While a party may file a motion to present live testimony at a motion hearing, that type of motion may not exceed five-hundred words, and a response is not required.

3. The Rules provide a framework for emergency motions.

The revised Rules provide a framework for how the Business Court will handle emergency motions, such as motions for temporary restraining orders and preliminary injunctions.

In particular, the Rules address the procedure for hearing emergency motions filed before a notice of designation is filed.

In the past, the issue of which judge would hear the motion (the judge in the county of venue or a Business Court judge) was decided on a case-by-case basis. The Rules now make clear that the Business Court judge will hear all emergency motions after the case has been designated to the Business Court, even if the motion was filed before designation. Similarly, the Rules provide instructions to the parties who wish to file and to schedule a hearing on an emergency motion simultaneously with the filing of a notice of designation. The Rules also set forth an expedited briefing schedule for emergency motions.

4. The Rules have streamlined the process for electronic filing.

As an initial matter, the Rules now make electronic filing mandatory. A party can seek relief from this mandate, but only on a showing of exceptional circumstances. Pro se parties can obtain relief on a good-faith showing.

The proposed revisions also give guidance about the format for filed documents. Anticipating that the range of acceptable file formats could change with evolving technology, the revised Rules say that the Business Court’s website will maintain a list of acceptable formats. The Court, then, will create and maintain that list.

Third, the revised Rules keep the current 5:00 p.m. deadline for electronic filing, but the revised Rules expressly acknowledge that the Court can modify the deadline. This revision reflects a balance between the regular state-court practice that filings must be finished by 5:00 p.m. and the preference of many lawyers to file electronically at any time before midnight. Lawyers who want that ability should
ask the Court for it in the case-management report.

Fourth, the revised Rules clarify the moment when an electronic filing is deemed to be complete. Under the revised Rules, an electronic filing is complete when an electronic notice of filing is issued. The time of the filing is the date and time stated on the notice of filing.

Finally, the revised Rules clarify which filings must also be filed with the clerk of court in the county of venue. The only filings that must be filed with the clerk of court in the county of venue are the materials listed in Civil Rule 5(d). Because it cannot be repeated enough, we want to remind you that a notice of appeal must be filed with the clerk of court in the county of venue before or on the deadline to appeal.

5. **The Rules give a procedure for resolving electronic-filing problems.**

The revised Rules contain a more simple process for filing materials when the Court’s electronic-filing system appears not to accept a filing. Under the revised Rules, if a person cannot file a document successfully, then the person must make a second attempt. If the second attempt also fails, then the person may continue to try to file electronically, or may (a) call the judicial assistant of the presiding Business Court judge to notify the Court of the technical failure, and (b) email the document to a designated email address: filinghelp@ncbusinesscourt.net. The email should give the date and times of the attempted filings and a brief explanation of the relevant technical failure(s). The party with a filing issue should copy all counsel on the email.

Although an e-mail sent to filinghelp@ncbusinesscourt.net does not constitute e-filing, it will serve as proof of an attempt to e-file in order to protect the filing party in the event of an imminent deadline and satisfies the deadline. In other words, even though the normal rule is that the filing is complete on the date and time of the notice of filing, the date and time of an e-mail sent to the “filinghelp” address will constitute timely filing if the Court does not issue a notice of filing until after the deadline passes.

For purposes of calculating briefing or response deadlines, a document filed electronically is deemed filed at the time and on the date stated in the notice of filing. Thus, even if a party relies on an email to the “filinghelp” address to meet a filing deadline, any briefing or response period does not begin to run until the notice of filing is issued.

6. **The Rules overhaul the case-management process.**

The revised Rules eliminate the notion that a case management meeting should be a forced march through the subsections of former Rule 17.1(a).

The Rules have several features that forward this goal:

- Rule 9.1(a) has a statement of general principles: The case-management process should be applied in a flexible, case-specific fashion.
- Rule 9.1(b) builds in more time for case management meetings. The meeting must occur no later than sixty days after the designation of an action as a mandatory complex business case or assignment to a Business Court judge under Rule 2.1. This additional time allows lawyers to get to know their cases before the meeting. It also allows more time for service of parties in multi-party cases and for pre-meeting coordination of aligned parties.

- Rule 9.1(b) allows the parties to ask the Court for a different schedule for the case management report and case management meeting.

- The list of required topics for the meeting is shorter and more focused.

The revised Rules also require that the parties meaningfully discuss discovery—including and especially electronic discovery—at the case management meeting. Significantly, the revised Rules recognize that engaging on discovery issues in some depth might require more than a single meeting. The Rules thus allow the parties to take an additional thirty days after the case management meeting to participate in a second meeting about discovery issues.

The parties should not, however, simply punt all discovery issues to that second meeting. The initial case management report, which is due fifteen days after the case management meeting, must explain the discovery issues upon which the parties have agreed and, if applicable, describe the discovery issues still left to discuss.

These revisions raise another question: when, if at all, should the Court conduct a case management conference? Under the revised Rules, the Court can convene a case management conference at a time of the Court’s choosing. In some cases, the Court might decide to wait until the parties complete their discovery discussions before holding a case management conference. In other cases, the Court might convene the case management conference at an early stage. In still other cases, the Court can issue a case management order without a conference.

Finally, the revised Rules contain a template case management report. The template lists topics that need to be covered in the report, but it does not force a rigid structure on the parties. The parties will therefore get significant control over what goes in the report.

7. **The Rules add a new process for discovery motions.**

Because of the potential for discovery motions to choke the Court’s docket, the revised Rules contain new procedures that require greater engagement between the parties, and with the Court, before anyone engages in full-blown discovery motion practice.

The new procedures, found in Rule 10.9, require the following steps before a party can file a discovery motion:

1. One party may submit a summary, not to exceed seven-hundred words, about the dispute. The party must attach a certification that the parties conferred about the dispute, plus the results of the conference.

2. Any opposing party has seven calendar days to file a responding summary, which also cannot exceed...
The revised Rules encourage a flexible approach to discovery, with emphasis on attorney cooperation and proportionality in the methods of discovery employed. The revised rule on discovery sets this tone at the outset, stating that “counsel should cooperate to ensure that discovery is conducted efficiently. Courtesy and cooperation among counsel aids, rather than hinders, the notion of zealous representation.”

The Rules require early identification of and discussion of issues likely to cause discovery disputes. At least seven days before the case management meeting, counsel must talk with their clients about the location, identification, and preservation of potentially discoverable ESI including assessing the burden and expense associated with collecting those materials.

The revised Rules also require the parties to engage in a discussion of discovery management. The parties may discuss discovery management at the case management meeting or within thirty days after that meeting. At that meeting, the parties should discuss every aspect of discovery including specifically, proportionality, whether discovery should be phased, and ESI.

Propportionality is a significant topic in the discussions surrounding the recent revisions to the Federal Rules of Civil Procedure. With the express inclusion of this concept into the proposed rules, parties will be able to draw on the likely growing body of case law in the federal courts applying the concept to specific disputes. North Carolina litigators might consider studying the proportionality matrix found in Hon. Elizabeth D. Laborte and Jonathan M. Redgrave, A Practical Guide to Achieving Proportionality under New Federal Rule of Civil Procedure 26, 9 The Fed. Cts. L. Rev. 20, 49-50 (2015) which offers a chart for analyzing proportionality with three columns: factor, factor assessment, and detailed explanation. The factors there are drawn from the Federal Rules but appear relevant and helpful to the analysis under the revised Business Court Rules. Examples include “importance of the issues at stake in the litigation,” “amount in controversy,” “parties’ resources,” and “whether the discovery sought is unreasonably cumulative or duplicative.”

Rule 10.3 of the revised Rules directs the parties to prepare a written discovery protocol to use to govern discovery going forward. That document would not ordinarily be filed with the Court.

The revised Rules contain a default seven-month discovery period. They also encourage parties to begin discovery early, though whether discovery should begin early, or perhaps be stayed pending a ruling on a dispositive motion, is a case-specific determination. These options allow parties to work together with the Court to fit the case schedule to the particular needs of the case. It is important to note that the revised Rules do not contain a provision that would allow for interruption of the case management timetable for an opposition to designation.

The parties will need to plan to complete discovery during the discovery period, and any motions to extend the period must be made before the deadline.

On another discovery front, the revised Rules encourage parties to confer in advance about privilege logs and suggest using broad categories in the privilege log. These revisions are designed to streamline the process of preparing a privilege log, while also ensuring that the party that receives the log can fairly ascertain the basis for the privilege's assertion.

Finally, on depositions, the revised Rules contain a presumptive seven-hour period for on-the-record testimony. The revised Rules do not contain the former rule that parties may not confer while a deposition is pending; rather, parties may not confer while a question is pending, other than to address a question of privilege. The revised Rules, however, warn of sanctions for conduct “that impedes, delays, or frustrates the fair examination of a deponent.”

For Rule 30(b)(6) depositions, the revised Rules establish a framework for negotiating disputes over topics. After a party serves a 30(b)(6) notice, the target organization should make objections within a reasonable time, and the parties should then confer about the topics in good faith. Any remaining disputes would be handled like other discovery disputes. In addition, the revised Rules provide that depositions in an individual capacity should be taken separately from a 30(b)(6) deposition unless agreed otherwise.

The revised Rules clarify the procedures for seeking a protective order and for filing materials under seal. The revisions recognize that both parties and third parties may need the Court’s assistance to protect certain materials against public disclosure. The revisions also encourage parties to avoid filing voluminous materials under seal.

In addition, the proposed revisions permit parties to agree among themselves about how materials will be handled during discovery, but they caution parties that any protective order that sets parameters for under-seal filing must contain certain requirements.

There are two potential paths to filing under seal: (1) following provisions for filing under seal stated in a Court-approved protective order, or (2) filing a motion to file under seal. Under either path, within five days after a document is filed under seal, the party filing the document must submit a public version of the document—usu-
ally a redacted version. The revised Rules require a party that seeks to file under seal to provide enough information so that the Court can assess whether the material should be filed under seal including a non-confidential description of the material, the circumstances warranting filing under seal, and the explanation for why no reasonable alternative to filing under seal exists. In addition, the motion must indicate if another party designated the material as confidential and thus would have an interest in the outcome of the motion to seal. This requirement will aid those practitioners who want to comply with a protective order but also may not have an interest in whether the material remains confidential.

Motions to seal do not need to be filed in advance of the filing of the sealed material. The motion to seal is due on the same day that the materials are submitted, and the material will be provisionally filed under seal until the Court rules on the motion. The rule applies equally to pleadings, briefs, and exhibits.

Because materials filed under seal are often produced or designated confidential by a different party than the filing party, the filing party must provide a copy of the motion for leave to the party that designated the material as confidential. That party may then file a supplemental brief supporting the motion. The party seeking to keep the material under seal will have the burden of establishing that the material should be filed under seal. That party could be a third party who produced the materials, and if no brief is filed, the Court may deny the motion summarily.

10. The Rules provide new guidelines for pretrial and trial.

The revised Rules provide more guidance to the parties on the pretrial preparation process. Similar to the revised rule on case management, the pretrial rule recognizes that each case is different, so any presumptive deadlines or requirements should be applied in a flexible, case-specific fashion. The former pretrial rule was largely silent on pretrial activities or expectations. Accordingly, the revised Rules provide clarity on various pretrial requirements, including the preparation of a proposed pretrial order, motions in limine, trial briefs, proposed jury instructions, and proposed stipulations.

The revised Rules also provide a chart that outlines the standard pretrial activity with presumptive time deadlines. This chart stages various pretrial requirements over time in advance of trial. For example, the chart sets the presumptive deadlines for exchanging exhibit and witness lists, filing motions in limine, and submitting proposed jury instructions. This will aid counsel by setting pretrial deadlines in a staggered fashion so that the trial preparation process is manageable and counsel are not caught chasing multiple deadlines in a short timeframe.

Moreover, the revised Rules establish a framework for the content the parties should include in a proposed pretrial order. In this regard, a form proposed pretrial order is attached as an appendix to the revised Rules, providing a helpful guide to counsel. The pretrial order covers items such as stipulations, proposed issues for trial, technology presentation, witness lists, exhibit lists, deposition designations, and any other case-specific issues needed to be addressed for trial.

The revised Rules also provide for the timing and briefing requirements of motions in limine. In particular, the presumptive timing sets the deadline for motions in limine well in advance of the final pretrial conference, allowing for a truncated briefing schedule so that such motions are ripe and can be ruled upon potentially at the final pretrial conference. The word limitation for briefing motions in limine is condensed as well. This new process will aid the parties in obtaining rulings on evidentiary issues more in advance of trial, rather than the day of trial, which can be typical.

The revised Rules create a framework for the preparation and submission of proposed jury instructions. The changes are designed to aid the Court and the parties by requiring the submission of jury instructions in a format that will allow the Court to efficiently craft a final set of instructions.

Lastly, the revised Rules make the filing of a trial brief optional. For parties that opt to file trial briefs, the Rules do not set a word limit. This rule extends the parties the discretion to decide if they want to submit trial briefs, and if so, how comprehensive or concise they want them to be.

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New Secretary of State Website Design is On the Way

Look for our new www.sosnc.gov website design this fall.

We are updating the look and feel of our website to improve your experience. The new website design, created under the statewide Digital Commons initiative, features:

- Improved navigation,
- Modern design,
- Mobile device optimization, and more!

We will provide additional information about the roll-out of the new design on our current website front page. We will also be supplying information about the roll-out in a variety of other ways over the coming months.

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News You Can Use From the Secretary of State: Our Corporations Division is Now Business Registration

On September 1, the Corporations Division began rebranding its name to the Business Registration Division. This improvement is in response to growing needs of the business community. Business Corporations now represent a minority of the entities we administer, given the growth of limited liability companies, nonprofit corporations, and partnerships.

The new title should minimize confusion about the name and make internet searches for information easier. This change will be spreading across all NC Secretary of State materials and platforms in the weeks ahead.

So please, make a note: The Business Registration Division is now your destination for your business registration needs in North Carolina. Your bookmarks do not need to change.
Winning Quickly: Defeating Contract Claims With a Motion to Dismiss (Part II of II)

By Scott A. Miskimon and Lauren H. Bradley

Part I of this article (published in the Summer 2016 issue of this newsletter) demonstrated that, compared to the last thirty years of the 20th century, in the last fifteen years there has been a dramatic increase in the number of appellate decisions affirming Rule 12(b)(6) dismissals of contract claims. Such dismissals have become so routine that they are now being affirmed in unpublished opinions. The increased judicial scrutiny of pleading defects in contract claims—and the courts’ receptiveness to motions to dismiss—should encourage defense counsel to consider filing a motion to dismiss if warranted, and should prompt plaintiff’s counsel to engage in careful analysis and drafting of complaints.

Rules of the Road: Other Fatal Defects in Contract Claims

As discussed in Part I, the lack of a valid contract is a common reason for dismissing a contract claim. There are other pleading pitfalls that counsel must avoid, including suing based on conduct that is not a breach of the contract, filing suit after the claim has been time barred, failing to sue in the name of the person who is in privity of contract with the defendant, or asserting claims for damages that are not available as a remedy for breach of contract. We discuss each of these potentially fatal defects below.

No Breach

Although a contract may exist, if the court determines that the contract is not a breach of that contract, then the complaint is properly dismissed. Valevais v. City of New Bern, 10 N.C. App. 215, 220, 178 S.E.2d 109, 113 (1970) (affirming dismissal of complaint alleging city breached contract to provide fire protection services; action of fire department was not a breach that could be imputed to city and was instead a negligent omission rather than a breach of contract).

Statute of Limitations and Statute of Repose

The statute of limitations is a defense that may be asserted in a Rule 12(b)(6) motion. Horton v. Carolina Medicorp., Inc., 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996). Both this century and last, a limitations defense has been one of the more frequent grounds for successful motions to dismiss contract claims. This is not surprising because a complaint will expressly allege facts showing when the breach allegedly occurred, or such facts from which it can be inferred when the breach must have occurred. In either case, the complaint is properly dismissed if it discloses a date of breach outside the limitations period. See Bissette v. Harrod, 226 N.C. App. 1, 11, 738 S.E.2d 792, 799-800, disc. rev. denied, 367 N.C. 219, 747 S.E.2d 251 (2013) (affirming dismissal where plaintiffs sued for breach of contract more than three years after the breach occurred); Barbee v. Transit Mgmt. of Charlotte, 2013 N.C. App. LEXIS 559, at *12-13, 227 N.C. App. 648, 745 S.E.2d 375 (June 4, 2013) (unpublished) (dismissing a breach of contract claim for failure to file the complaint within the three-year statute of limitations); Hardin v. York Mem'l Park, 221 N.C. App. 317, 323, 730 S.E.2d 768, 775, disc. rev. denied, 366 N.C. 571, 738 S.E.2d 376 (2013) (affirming dismissal of one of the breach of contract claims where the burial plot in question was resold more than a decade before plaintiffs filed suit); Birtha v. Stonemor, 220 N.C. App. 286, 295, 727 S.E.2d 1, 8-9 (2012), disc. rev. denied, 366 N.C. 570, 738 S.E.2d 373 (2013) (affirming dismissal of all but one of the contract claims where plaintiffs’ complaint averred that the cause of action arose on the date plaintiffs’ family members were interred, which was more than three years prior to the date of the complaint); Coderre v. Futrell, 224 N.C. App. 454, 458-59, 736 S.E.2d 784, 787 (2012) (affirming dismissal as to corporate plaintiff which had earlier filed for bankruptcy; statute of limitations had expired by the time the complaint was filed, and plaintiff’s bankruptcy did not toll the limitations period as plaintiff had argued).


Bissette demonstrates the high cost of missing the statute of limitations on a breach of contract claim. The plaintiffs bought a lot adjoining their home, subdivided the lot in violation of the neighborhood’s restrictive covenants, combined a portion of the subdivided lot with their original lot, and sold the remaining portion of the subdivided lot to the defendants. Bissette, 226 N.C. App. at 3, 738 S.E.2d at 795. In February 2008, a Superior Court judge determined that the plaintiffs had violated the restrictive covenants and reformed the deed from the plaintiffs to the defendants to vest title to the entirety of the formerly subdivided lot in the defendants. Id. at 4-5, 738 S.E.2d at 796. In December 2011, the plaintiffs sued for breach of contract based on the defendants’ failure to grant the plaintiffs an easement per an earlier agreement between the parties. Id. at 5, 738 S.E.2d at 796. Because the plaintiffs failed to enforce their rights within three years when title was given to the defendants (in February 2008), the Court of Appeals affirmed the trial court’s dismissal based on the statute of limitations. Id. at 11, 738 S.E.2d at 799-800.

LEXIS 155, at *8-9, 218 N.C. App. 454, 721 S.E.2d 764 (Feb. 7, 2012) (unpublished), the Court of Appeals affirmed a dismissal based the statute of limitations where the plaintiff’s complaint did not state when the claimed breach or breaches of contract occurred, thus demonstrating “the absence of facts sufficient to make a good claim.” Id. (internal quotation marks omitted). By contrast, in Walters v. Cole, 2002 N.C. App. LEXIS 1706, at *6-7, 148 N.C. App. 717, 562 S.E.2d 117 (Feb. 19, 2002) (unpublished), the Court of Appeals reversed a dismissal where the complaint was unclear as to the date of breach because “it cannot be determined from the face of the complaint that the statute of limitations has run.” Id.

In some cases, the parties have shortened the statute of limitations period by contract. Holmes & Dawson v. East Carolina Ry., 186 N.C. 58, 63, 118 S.E. 887, 890 (1923) (reducing limitations period to 2 years); Morgan v. Lexington Furniture Indus., Inc., 2006 N.C. App. LEXIS 2469, at *5, 180 N.C. App. 691, 639 S.E.2d 131 (Dec. 19, 2006) (unpublished) (providing 6 months for filing arbitration claim regarding employment agreement); N.C. GEN. STAT. § 25-2-725(1) (in a contract for the sale of goods, the normal 4-year limitations period may be shortened to as little as 1 year). Consequently, if a party fails to bring its action within the contractually-stipulated period, the claim will be dismissed. See Bob Timberlake Collection, Inc. v. Edwards, 176 N.C. App. 33, 43, 626 S.E.2d 315, 323-24, disc. rev. denied, 360 N.C. 531, 633 S.E.2d 674 (2006) (affirming dismissal of counterclaim where agreement limited the survival of representations and warranties to two years after contract execution and defendant's counterclaim for breach was brought more than two years after execution).


Statute of Frauds

The statute of frauds is one of the few bases for which a Rule 12(b)(6) motion is categorically unavailable. Green v. Harbour, 113 N.C. App. 280, 281, 437 S.E.2d 719, 720 (1994) (reversing dismissal of complaint under Rule 12(b)(6) based on the statute of frauds). This is appropriate because, even if the defendant asserts the statute of frauds as an affirmative defense, the plaintiff’s claim may survive depending on the outcome of discovery. The law does not require the signed writing that satisfies the statute of frauds to have been delivered as a pre-requisite to contract enforcement. Hutson & Miskimon, North Carolina Contract Law, § 4-14 at 313. Therefore, a document created by the defendant but retained in its records and never delivered to the plaintiff may satisfy the statute of frauds, and once obtained through discovery may cure defects in the plaintiff’s case. Id. at 314-15. Consequently, a Rule 12(b)(6) motion based on the statute of frauds is premature, and defense counsel must instead move for summary judgment to prevail on a statute of frauds defense.

Lack of Standing

Counsel for all parties should be mindful of whether the plaintiff has standing to sue for breach of contract. Where there is no privy of contract, a lack of standing may provide a basis for a Rule 12(b)(6) motion. Energy Investors Fund, L.P. v. Metric Constructors, Inc., 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000), aff’g 133 N.C. App. 522, 516 S.E.2d 399 (1999) (affirming dismissal of plaintiff’s complaint seeking damages for breach of implied warranty; plaintiff was a limited partner in a general partnership, was not in privity of contract with the defendant, and did not have standing to assert a claim); Coderre, 224 N.C. App. at 456-57, 736 S.E.2d at 787 (affirming dismissal of claim brought by an individual shareholder who sued to enforce a land purchase contract entered into by his corporation, which had filed for bankruptcy; because plaintiff lacked standing there was no valid complaint and the purported amendment to add the corporation as a plaintiff could therefore not relate back so as to avoid the statute of limitations); Woods, 2008 N.C. App. LEXIS 1773, at *16-17 (affirming dismissal of breach of contract claim where plaintiffs were not in privity of contract with defendant insurance company because plaintiffs failed to prove that defendant's insured was liable to plaintiffs); Mills, 2008 N.C. App. LEXIS 1331, at *5-7 (affirming dismissal for lack of standing where the suit on behalf of estate was brought by only one of four executors, and a majority of the executors was required to sue).

For example, dismissal was proper where the manager of a limited liability company lacked the authority to cause the company to sue. Crouse v. Mineo, 189 N.C. App. 232, 239, 658 S.E.2d 33, 37-38 (2008). In Crouse, however, the Court of Appeals held that the manager had standing to pursue a derivative action on behalf of the company. Id. at 245, 658 S.E.2d at 41. Dismissal is also proper where the complaint alleges that someone other than the plaintiff has the right to enforce the alleged contract. Fragale v. Hutchinson, 2013 N.C. App. LEXIS 113, at *5-6, 225 N.C. App. 530, 737 S.E.2d 192 (Feb. 5, 2013) (unpublished) (affirming dismissal of contract claim asserted between neighbors living in a golf course community; plaintiffs claimed the community's Architectural Design Guide was a valid and binding contract that defendants breached, but complaint alleged that the board of directors for the homeowners' association was responsible for enforcing the community's declaration of covenants and bylaws).

It is also important to sue in the exact name of the party to the contract. If there is a disconnect, however, between the plaintiff’s name and the contracting party’s name, then the pleading must include allegations that explain the disconnect. Such explanations could include that the plaintiff is the assignee of the contracting party; that the contracting party changed its name after the contract was signed; or that the contracting party signed the contract in its trade name or assumed name instead of its formal legal name. In American Oil Company v. AAN Real Estate, LLC, 232 N.C. App. 524, 754 S.E.2d 844 (2014), the underlying lease contract was between “American Oil Group” as lessee and the defendant as lessor. Id. at 524, 754 S.E.2d at 845. The plaintiff’s breach of lease claim failed because the plaintiff American Oil Company did not explain how it was in privity of contract or otherwise benefitted from a lease that was made between the defendant and American Oil Group. Id. at 527, 754 S.E.2d at 846-47.

In light of these decisions, counsel for the parties should scrutinize whether the correct person or entity is pursuing the contract claim.
Third-Party Beneficiaries

Even where privity of contract does not exist, a non-party to a contract suing for its breach may avoid dismissal for lack of standing if he alleges that he is a direct third-party beneficiary of the contract. Hoots v. Pryor, 106 N.C. App. 397, 408-09, 417 S.E.2d 269, 276-77, disc. rev. denied, 332 N.C. 345, 421 S.E.2d 148 (1992). The complaint must allege "(1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; and (3) that the contract was entered into for his direct, and not incidental, benefit." Id. at 408, 417 S.E.2d at 276 (citation and internal quotation marks omitted).

Where the complaint fails to demonstrate that the individual or entity suing for breach is either a party to a contract or a direct third-party beneficiary of the contract, the claim should be dismissed. Id. at 408-09, 417 S.E.2d at 276-77 (dismissing plaintiffs’ breach of contract claim for failure to allege that the contract was valid and enforceable and that they were the direct beneficiaries of the contract); Shaw v. PricewaterhouseCoopers, 2003 N.C. App. LEXIS 771, at *6-8, 157 N.C. App. 573, 579 S.E.2d 521 (March 6, 2003) (unpublished), disc. rev. denied, 357 N.C. 461, 586 S.E.2d 99 (2003) (affirming dismissal where plaintiffs’ complaint failed to show that they were third-party beneficiaries of a contract with an accounting firm); Wood v. Guilford County, 143 N.C. App. 507, 513-14, 546 S.E.2d 641, 646 (2001), revd and remanded on other grounds, 355 N.C. 161, 558 S.E.2d 490 (2002) (holding that trial court erred in failing to grant 12(b)(6) dismissal on contract claim where plaintiff did not allege that the contract was entered into for her direct benefit, which holding was not appealed); State ex rel. Long v. Interstate Cas. Ins. Co., 120 N.C. App. 743, 747-48, 464 S.E.2d 73, 75-76 (1995) (affirming dismissal of claims alleging breach of agreement where the attorney claimants were not parties to the agreement and were not third-party beneficiaries of the agreement); Raritan River Steel Co. v. Cherry, Bekaaert & Holland, 79 N.C. App. 81, 86, 339 S.E.2d 62, 66, disc. rev. denied on contract claim, disc. rev. allowed on other issues, 316 N.C. 734, 345 S.E.2d 392 (1986) (affirming dismissal of third-party beneficiary contract claim where plaintiff failed to allege that contract was valid and enforceable); FCX, Inc. v. Bailey, 14 N.C. App. 149, 151, 187 S.E.2d 381, 382 (1972) (holding that “mere conclusion” that the third-party plaintiff was a third-party beneficiary of a contract was insufficient to survive a motion to dismiss); cf. United Leasing Corp. v. Miller, 45 N.C. App. 400, 405-06, 263 S.E.2d 313, 317, disc. rev. denied, 300 N.C. 374, 267 S.E.2d 685 (1980) (ruling that plaintiff’s complaint lacking all three essential allegations failed to state a claim but reversing dismissal on other grounds); American Credit Co. v. Stuyvestant Ins. Co., 7 N.C. App. 663, 669, 173 S.E.2d 523, 527 (1970) (vacating default judgment where plaintiff’s complaint did not allege that it was a third-party beneficiary of the contract and hence failed to state a claim).”

Failure to Exhaust Administrative Remedies

Related to the concept of standing, counsel should be mindful of whether exhaustion of administrative remedies is required before seeking redress from the courts, particularly in cases involving state agencies or other political subdivisions. A contract claim is most frequently dismissed for failure to exhaust all administrative remedies under Rule 12(b)(1) for lack of subject matter jurisdiction; however, such a claim can also be dismissed under Rule 12(b)(6), as was the case in Kane v. N.C. Teachers’ & State Employees’ Comprehensive Major Medical Plan, 229 N.C. App. 386, 747 S.E.2d 420 (2013). If administrative remedies exist, the plaintiff must either exhaust those remedies or allege that the remedies are inadequate or futile to survive a Rule 12(b)(6) motion. Id. at 390-91, 747 S.E.2d at 423-24. Although the plaintiff “advanced eloquent and compelling arguments that exhaustion would have been futile,” she had not exhausted her administrative remedies or alleged that those remedies were inadequate or futile; thus, the Court of Appeals affirmed the dismissal of her complaint. Id. at 392, 747 S.E.2d at 424. Despite affirming the dismissal, this pleading requirement was roundly criticized by the panel as an “illogical” rule defeating judicial economy—the very purpose of the rule—and a “pedantic technicality” where all parties agreed that the plaintiff could not have obtained her requested relief by exhausting her administrative remedies. Id. at 392-93, 747 S.E.2d at 424-25.

Damages

Asserting a claim for damages that are not recoverable in a breach of contract action is another fatal pleading defect. Mental anguish damages are not recoverable in the vast majority of breach of contract cases, and when those damages are alleged, they are the proper subject of a motion to dismiss. Stanback v. Stanback, 297 N.C. 181, 194, 254 S.E.2d 611, 620 (1979) (affirming the Court of Appeals’ opinion, found at 37 N.C. App. 324, 246 S.E.2d 74 (1978)); Reis v. Hoots, 131 N.C. App. 721, 732, 509 S.E.2d 198, 205 (1998) (Greene, J., concurring), disc. rev. denied, 350 N.C. 595, 537 S.E.2d 481 (1999) (“[I]t is rarely the case that damages for mental anguish are recoverable under a breach of contract theory.”). In Stanback, the Supreme Court affirmed the dismissal of the plaintiff’s claim for consequential damages for “great mental anguish and anxiety” arising out of the defendant’s alleged breach of a separation agreement. Id. at 195, 254 S.E.2d at 620-21. Mental anguish damages are recoverable under very limited circumstances involving non-commercial contracts and where “the benefits contracted for relate directly to matters of dignity, mental concern or solicitude, or the sensibilities of the party to whom the duty is owed, and which directly involves interests and emotions recognized by all as involving great probability of resulting mental anguish if not respected.” Id. at 194, 254 S.E.2d at 620.

Punitive damages for breach of contract are also generally not recoverable. Murray v. Allstate Ins. Co., 51 N.C. App. 10, 14, 275 S.E.2d 195, 197 (1981) (treating motion to strike amended allegations in support of punitive damages claim as Rule 12(b)(6) motion to dismiss and affirming dismissal). The exceptions to circumvent these general rules are outside the scope of this Article, but claimant’s counsel must carefully plead the claim to survive a motion to dismiss, and defense counsel should closely scrutinize the allegations when mental anguish damages and punitive damages are sought.

The Multi-Car Pile-Up: Failed Contract Claims Affecting Other Claims

The benefit of attacking a contract claim with a motion to dismiss is that there may be a domino effect that wipes out other claims, much like a multi-car crash on a race track. Therefore, either when drafting the pleading or when moving to dismiss a contract claim, counsel should also be conscious of other claims that depend on or are intertwined with the contract claim. In the event the contract claim is dismissed, other related claims may also be ripe for dismissal.

Under the right circumstances, such other claims may include the following:

Where the Rubber Meets the Road: Using a Rule 12(b)(6) Motion Effectively

If your opponent's case suffers from one of the defects discussed above and a Rule 12(b)(6) motion to dismiss is appropriate, there are some practical guidelines worth keeping in mind. A motion to dismiss a contract claim should be considered even if some of the other claims do not lend themselves to being dismissed under Rule 12(b)(6). A motion for partial dismissal will narrow the scope of discovery, which should reduce costs going forward, and make it simpler to move for summary judgment down the road. A motion to dismiss for failure to state a claim can be filed "as late as trial upon the merits" under Rule 12(h). Dale v. Lattimore, 12 N.C. App. 348, 350, 183 S.E.2d 417, 418 (1971). Nevertheless, an early motion has the advantage of reducing the cost of litigation.

The motion to dismiss need not lay out every detailed reason for dismissal. Under Rule 7(b)(1), the motion must "state with particularity the grounds therefor, and shall set forth the relief or order sought." The motion to dismiss is sufficiently particular if it simply cites to Rule 12(b)(6) and states that the complaint fails to state a claim upon which relief can be granted. Austin Hatcher Realty, Inc. v. Arnold, 2008 N.C. App. LEXIS 1080, at *6-8, 190 N.C. App. 822, 662 S.E.2d 36 (June 3, 2008) (unpublished) (ruling that motion was sufficiently particular but reversing dismissal where plaintiff broker suing to enforce a listing agreement adequately alleged a valid contract existed and that defendants breached it); see also Lane v. Winn-Dixie Charlotte, Inc., 169 N.C. App. 180, 182-83, 609 S.E.2d 456, 458 (2005) (holding similarly with respect to a 12(b)(4) and (b)(5) motion).

Under this relaxed pleading standard, counsel for the non-moving party may not be aware of the exact deficiencies in the pleading until the hearing, unless the moving party chooses to submit a brief in support of the motion. If a brief is submitted, although the mem-

orandum of law will educate your opponent as to the defects in the pleading, it will also provide the trial judge with a full explanation of the basis for your motion and may make your oral argument more persuasive. Briefs must be served at least two days before the hearing on the motion. N.C. R. Crv. P. 5(a1), 6(a); Harrold v. Dowd, 149 N.C. App. 777, 786-87, 561 S.E.2d 914, 920-21 (2002) (finding that service of a brief on Thursday for a hearing on Monday was timely service).

If the plaintiff does not attach the contract to the complaint, then defense counsel may attach the contract to the motion to dismiss without converting the motion into one for summary judgment. Because the contract is necessarily the subject matter of the suit and is likely referred to in the complaint, attaching the contract to the motion to dismiss does not expand the scope of the motion beyond the pleadings. See Oberlin Capital, L.P. v. Slavin, 147 N.C. App. 52, 60-61, 554 S.E.2d 840, 847 (2001); Coley v. N.C. Nat'l Bank, 41 N.C. App. 121, 126-27, 254 S.E.2d 217, 220 (1979).

A hearing on a motion to dismiss can be an excellent opportunity for the non-moving party to become educated about the defects in its case. Counsel for the non-moving party should therefore make a motion at the hearing for leave to amend the pleading to cure the deficiencies in it. Waiting until later to make a motion to amend may prove to be fatal, since the trial judge may rule on the motion to dismiss before the motion to amend can be filed and brought to the Court's attention. In either case, if the trial court ultimately dismisses the pleading without ever ruling on the motion to amend, the order dismissing the complaint will be deemed to be an effective denial of the motion to amend. McGuire v. Riedle, 190 N.C. App. 785, 790 & n.2, 661 S.E.2d 754, 759 & n.2 (2008) (affirming dismissal of medical malpractice action; trial court effectively denied plaintiff's motion to amend complaint when it granted defendant's Rule 9(j) motion). If defense counsel has only filed a motion to dismiss in lieu of an answer, then an amended complaint can be filed as of right under Rule 15(a). Hardin, 221 N.C. App. at 320-21, 730 S.E.2d at 773.

The Checkered Flag

For the right contract claim, a party may be able to race to the finish line and the checkered flag with a Rule 12(b)(6) motion to dismiss. This motion can be a cost-effective way to terminate a case at the earliest possible stage. Even a partial motion to dismiss can be used to at least narrow the scope of a case by eliminating one of several claims. By prevailing on a motion to dismiss, counsel can do his or her client a great service by reducing the client's risk of exposure to damages, or at a minimum narrowing the scope of costly discovery. By contrast, counsel who prepares a complaint or counterclaim may do his or her client a great disservice by committing the pleading errors discussed in this article. Even with the liberal notice pleading standards under the Rules of Civil Procedure, given the increasing number of appellate decisions affirming dismissals of contract claims, it is essential that, before a pleading is filed, there is sufficient factual and legal analysis, claim evaluation, and proper drafting.

Scott A. Miskimon is a commercial litigation partner with the Smith Anderson law firm in Raleigh, North Carolina, and is the editor and co-author of NORTH CAROLINA CONTRACT LAW (Lexis, 2001 & 2016 Cum. Supp.). Lauren H. Bradley is legal counsel for PRA HealthSciences, and served as a law clerk to the Honorable Cheri Beasley at the North Carolina Court of Appeals and the North Carolina Supreme Court.
Big Changes to Business Annual Report Laws

By Ann B. Wall, Cheri Myers and Keith West

During the 2017 long session, the General Assembly enacted laws making two major changes to business Annual Reports filed with the Secretary of State (SOS). You can find details regarding the changes in two articles in this issue of Notes Bearing Interest. The short version is that effective on January 1, 2018:

- ALL corporate Annual Reports must now be filed directly with the Secretary of State’s office, and
- Annual Report forms will be changed to include voluntary reporting of small business ownership by veterans and service-disabled veterans.

First Change: No More Filing Business Annual Reports with the Department of Revenue

Have you been filing clients’ taxes and Annual Reports with the NC Department of Revenue?

Be Aware! The Annual Report law has changed. See Various Changes to the Revenue Laws, S.L. 2017-204.

If you file an Annual Report for a business corporation or LLC after January 1, 2018, you cannot file it with the NC Department of Revenue (DOR). In other words, you can no longer include an Annual Report with a client’s taxes when you file those taxes with DOR.

This change takes effect on January 1, 2018 for tax year 2017. Annual Reports filed after January 1, 2018 must be filed directly with the Business Registration Division (formerly Corporations Division) in the Office of the Secretary of State (SOS).

You may file with SOS either electronically or in a paper format. Go to www.sosnc.gov/annualreports to access the Secretary of State's convenient efiling tool and maintain a client's "good standing" status without delays or breaks.

There are definite advantages to efiling an Annual Report with SOS. You “submit” an annual report when you send it to us. We “file” it after we check to see that it is complete. Filing is our official government action. If you submit your Annual Report online, we file it almost immediately because our system is set up to ensure that it has all the required information. Therefore, efiling an Annual Report can really help a client, particularly if the client is dealing with a lender or other business that will review the client’s status with SOS.

In addition, efiling costs your clients less than filing in paper form. (A business corporation annual report filed online is $18 plus a $2 electronic transaction fee. If filed in paper form, the fee is $25. A Limited Liability Company and Limited Liability Partnership Annual Report fee is $200, plus the $2 electronic transaction fee.) Moreover, if you file several Annual Reports at the same time, you can put them in a shopping cart and only one electronic transaction fee will apply to the invoice total amount—a lower overall customer expense.

SOS does continue to accept Annual Reports in paper format. Please send paper Annual Reports by USPS or by courier.

By courier to: NC Secretary of State; Annual Reports Section; Business Registration Division; 2 South Salisbury Street; Raleigh, NC 27601.

We file Annual Reports in the order in which they are received. Because we have limited resources, if you use the paper based filing method, it can take up to 180 days from the day you submit the report until it is filed.

Thank you for helping the Secretary of State's Office keep business records accurate and up-to-date.

Second Change: Business Annual Reports for Veteran-Owned Small Businesses

Military bases and their populations are important to North Carolina’s economy. That has been well documented. The numbers of veterans who own businesses in North Carolina has been less clearly documented.

North Carolina’s responsiveness to the needs of the military and veterans can affect future Base Realignment and Closing (BRAC) efforts at the federal level. On the governmental side of things, a new State government Department of Military and Veterans Affairs has been established to deal with military and veterans’ issues. On the private sector side, the NCBA has also created a new Military & Veterans Law Section.

The General Assembly determined that more information is needed regarding veterans’ contributions to North Carolina’s economy. Annual Reports filed with the Secretary of State’s Business Registration Division will now collect data on small businesses owned by both veterans and service-disabled veterans. See Veteran-Owned Small Business/Annual Report, S.L. 2017-90.

If you file an Annual Report for a business corporation, LLC, or LLP with our Business Registration Division after January 1, 2018, you need to use the new Annual Report form. The new form will include space and instructions to voluntarily indicate that a business is a small business owned by a veteran or by a service-disabled veteran.

A business should check only one of the new blocks on the Annual Report form if: 1. Its net annual receipts do not exceed one million dollars ($1,000,000), and 2. More than fifty percent (50%) of the business is owned by one or more veterans or service-disabled veterans.

We will compile a summary of the numbers of voluntarily reported veteran owned and service-disabled veteran owned small businesses. Beginning on March 1, 2019, we will provide the summary annually to the North Carolina Department of Military and Veterans Affairs.

Ann B. Wall is the General Counsel of the office of the North Carolina Secretary of State. Cheri Myers is Director of the Business Registration Division of the office of the North Carolina Secretary of State. Keith West is the Annual Reports Supervisor of the office of the North Carolina Secretary of State.
Do you have a client purchasing a home? Are you purchasing a home? Or do you have a client who finances residential mortgages? Then you need to know about, and begin preparing for, changes to North Carolina mortgage closings for which the NC Department of the Secretary of State (SOS) is the catalyst.

Jason and Karen Boccardi made history in May 2017 when they refinanced the mortgage on their Winston-Salem property. It was not the home that was historical, or anything about the closing paperwork—just the opposite—it was that there was no paperwork. On that date, the Boccardis became the first people in North Carolina history, along with their lender, North State Bank, to execute a 100 percent electronic mortgage closing, called an “eClosing.” The eClosing event took place in a North State Bank office in Hickory for a property in Winston-Salem, with the Boccardis’ Hunoval Law Firm attorney participating via an interactive video link from Charlotte. The electronic, notarized mortgage was insured by Investors Title Insurance Company of Chapel Hill. DocMagic and World Wide Notary were the electronic solution providers.

A second eClosing took place in August, when homebuyer Jennifer Andrews sat in a realty office in Mooresville with an eNotary to sign the closing documents on her new home, while an attorney from Brady & Kosofsky Law Firm presided over the closing from Matthews via video connection. The eClosing was electronically filed with the Iredell County Register of Deeds Office in Statesville. The closing took 19 minutes and Andrews had the keys to her new home in hand in 46 minutes. Andrews, who has been through traditional mortgage closings, said the eClosing process was not only quicker, but less stressful. “I got the full packet days in advance and had the chance to go over the material and ask any questions I had beforehand,” said Andrews. “When I bought my first house 20 years ago I wasn’t even told how much money I would need at closing. With this eClosing, all of that was settled beforehand so there were no surprises.”

A few such totally electronic closings have been done around the nation. Government regulators say the North Carolina eClosing is different in that it was not done as just a one-time test, but as the start of a new 21st Century way to do mortgage closings.

These eClosings are the culmination of a years-long effort led by Secretary of State Elaine F. Marshall to modernize both SOS and traditional business practices in North Carolina to better compete at the national and international levels. Many North Carolina county Registers of Deeds have also worked to do more paper-free electronic recordings of government-required filings and land records. Secretary Marshall says that many government officials, digital service vendors, lenders and attorneys have worked for years to make sure that the way digital records are recorded in North Carolina is safe, secure, and reliable.

As the notary public regulator in North Carolina, the Secretary of State’s office has developed the standards and curriculum for the electronic notary status, often called eNotary. A notary public with this status can attach a digital version of their notary stamp to electronic legal transactions, making them legally the same as paper-based filings requiring a notarized document.

Secretary Marshall stresses that eClosings have all of the regular features and safeguards that people see when they execute a mortgage on paper. “For eClosings we require the physical presence of that notary plus the access to legal expertise—there is zero drop in standards for an eClosing—it is just faster, far more convenient and in my opinion more secure.”

The Secretary of State’s North Carolina Electronic Mortgage Closing Advisory Committee is working to develop a set of best practices to give other lenders across the State a road map to pursue electronic mortgage closings. The North Carolina Secretary of State’s Office and Advisory Committee brought together more than a hundred state and national mortgage industry stakeholders in August to discuss the future of electronic mortgage closings.

For more information about eClosings, contact:

Ozie Stallworth, Director
Notary Enforcement Division
NC Department of the Secretary of State
P.O. Box 29622
Raleigh, NC 27626-0622
ostallworth@sosnc.gov
919-814-5495.

Ann Wall is General Counsel of the office of the North Carolina Secretary of State. Liz Proctor is Public Information Officer of the office of the North Carolina Secretary of State. Ozzie Stallworth is Notary Enforcement Director of the office of the North Carolina Secretary of State.
By the Numbers: Updates from the N.C. Department of the Secretary of State

Statistics | Number of Creation filings* in State Fiscal Year**
2010-2011 = 54,619
2011-2012 = 55,823
2012-2013 = 58,574
2013-2014 = 61,965
2014-2015 = 67,865
2015-2016 = 72,813
2016-2017 = 79,245
2017-2018 = 20,896 (9/30/2017)


Current Processing Times
- The current processing time for the Corporations Division is approximately 2-3 business days. If you have time-sensitive filing requirements, you may want to consider an expedited filing, or at a minimum, an advisory review of the document.
- Statutory mandate for processing UCC-1 financing statements: 3 business days, presently the performance rate is 2 business days on average.

Online Submission of Documents
Please review the online submission process before using the online submission process for the first time by going to:

PRACTICE TIP: Before you start to submit a document, make sure you are using a version of Adobe which allows you to save both the information you enter and the form itself.

Online Submissions (Using SOSKB data) - data through 1/31/2017

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Not including annual reports, suspension or reinstatements

Email Notification Subscription Service
The subscription service allows you to subscribe to receive email notifications when changes are made to business entity information in our Corporations database. The chart below shows the number of subscribers and entities being monitored.

Email Notification Subscriptions

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* July 1, 2017 through September 30, 2017

Contributed by Cheri Myers, Director of the Business Registration Division of the office of the North Carolina Secretary of State.
It’s Time to Go Back to the Drawing Board
The North Carolina Business Court considered whether the parties to a shareholders’ agreement with respect to a North Carolina corporation have an implicit obligation to cause the corporation to comply with the agreement’s terms. Edwards v. PFA Architects, P.A., 2017 NCBC 55 (June 29, 2017). The court concluded that entering into a shareholders’ agreement does not give rise to an implied contract under which the parties must ensure that the corporation satisfies its obligations under the agreement.

In March 2017, Eugene Edwards filed a lawsuit against Scott Donald and Martha Carnevale with respect to PFA Architects, P.A., a North Carolina professional corporation. Edwards alleged that he, Donald, and Carnevale are PFA’s shareholders, and his complaint included direct claims against Donald and Carnevale for breach of an implied contract and derivative claims against them for breach of fiduciary duty. Donald and Carnevale moved to dismiss the claims, and assuming the truth of all of the facts recounted below, the Business Court agreed. According to the court, the allegations in Edwards’s complaint were insufficient to support his implied contract claims and he did not have standing to bring his derivative claims.

Edwards retired from the company at the end of 2016, and in connection with his retirement, PFA sent Edwards a letter that indicated that the corporation would redeem his stock as provided in a stockholders’ agreement to which Edwards, Donald, and Carnevale were parties. In his lawsuit, Edwards claimed that the corporation had not lived up to its obligations under the shareholders’ agreement and that, because Donald and Carnevale were parties to the agreement, they were subject to and had breached an underlying implied contract that required them to “take all necessary actions to ensure that the …. [a]greement is complied with.”

Rather than working in Edwards’s favor, however, the Business Court determined that the existence of the parties’ shareholders’ agreement militated against Edwards’s claim because “it is a well established principle that an express contract precludes an implied contract with reference to the same matter.” Moreover, according to the court, Edwards’s complaint contained nothing else that suggested an implied contract. Thus, the court concluded that Edwards’s breach of implied contract claims could not survive the defendants’ motion to dismiss.

Donald and Carnevale are officers of PFA, and Edwards’ derivative claims against them for breaching their fiduciary duties met the same fate as Edwards’s implied contract claims. In considering the derivative claims, the court observed that N.C. Gen. Stat. § 55-7-42 requires a shareholder of a North Carolina corporation to make a demand on the corporation before filing a lawsuit to enforce its rights. The court then explained that Edwards admitted in his complaint that he had not made a demand and contended instead that demand was excused because making a demand would have been futile. Stressing that the North Carolina Business Corporation Act no longer allows for demand to be excused, the court therefore concluded that Edwards did not have standing to sue derivatively.

Edwards highlights the importance of being specific when defining the parties’ obligations under a shareholders’ agreement. If the parties want to make each other responsible for the corporation’s compliance with the agreement, the agreement needs to say so.

Blaming the Officials
The North Carolina Business Court considered whether a person who has broad management rights and responsibilities with respect to a North Carolina limited liability company owes fiduciary duties to the company even though the person is not named as a manager of the company. Timbercreek Land & Timber Co. v. Robbins, 2017 NCBC 64 (July 28, 2017). The court concluded that a person with “permission to control and make decisions for [a limited liability company] and … vested with discretion and independent judgment in managing and operating its business” is a “company official” under the North Carolina Limited Liability Company Act (the “LLC Act”) and therefore owes fiduciary duties to the company.

Timbercreek Land & Timber Company, LLC and Myless Hooper, Jr. sued John Robbins in January 2017, claiming that Robbins breached fiduciary duties he owed in connection with his involvement in Timbercreek’s timber and lumber business. A few months later, Robbins moved to dismiss these claims, and assuming the truth of all of the facts detailed below, the Business Court granted the motion with respect to Hooper’s claim, but not Timbercreek’s. According to the court, the plaintiffs’ complaint adequately alleged that Robbins owed fiduciary duties to Timbercreek and that he had breached them, but Hooper could not sue directly for injuries sustained as a result of Robbins’s conduct.

Hooper formed Timbercreek as a North Carolina limited liability company and became the company’s sole member in 2009. The plaintiffs’ complaint alleged that Hooper was unfamiliar with the timber business at that time and that he decided to form Timbercreek only after Robbins, touting his own knowledge and experience, agreed to run the business.

Accordingly, while Timbercreek’s operating agreement contemplates that the company will be managed by Hooper as its sole member, in a resolution dated the same day as the operating agreement, Hooper named Robbins as a manager and granted him broad authority to operate the business.

Timbercreek, however, fired Robbins in August 2016. And in their lawsuit, the plaintiffs asserted that Robbins breached his fiduciary duties by taking actions to benefit himself at Timbercreek’s expense.

The Business Court refused to dismiss Timbercreek’s breach of fiduciary duty claim, noting that both managers and company officials of a North Carolina limited liability company owe fiduciary duties to the company. According to the court, the plaintiffs’ complaint sufficiently alleged that Robbins was either a manager or a company official. Rejecting Robbins’s argument that the resolution appointing him as a manager was invalid because it conflicted with the operating agreement provision specifying management by the company’s sole member, the court observed that the operating agreement also provided that it could be amended with Hooper’s written consent.

Moreover, the court decided that the plaintiffs’ complaint adequately alleged that Robbins was a company official. In reaching
that decision, the court noted that N.C. Gen. Stat. § 57D-1-03(5) "defines a 'company official' as [a]ny person exercising management authority over the limited liability company whether the person is a manager or referred to as a manager, director, or officer or given any other title." And to support Timbercreek's breach of fiduciary duty claim, the court found it sufficient that the plaintiffs asserted that Robbins had been "entrusted with the ... control and management of Timbercreek" and that he had been given and exercised the authority to perform a "broad range of duties" with respect to the company, including the right to issue checks, make deposits, execute contracts, supervise employees and contractors, and manage "day-to-day" operations.

Hooper's breach of fiduciary duty claim did not fare so well. In considering whether Hooper had standing to pursue his claim directly, the court indicated that a member of a North Carolina limited liability company is subject to a rule similar to the one set out in Barger v. McCoy Hillard & Parks, 346 N.C. 650, 488 S.E.2d 215 (1997), with respect to shareholder standing to bring direct claims. Under the "Barger rule," a shareholder of a North Carolina corporation does not have individual standing to pursue causes of action for injuries to the corporation unless the defendant owes a "special duty" to the shareholder or the shareholder suffers an injury that is "separate and distinct" from the injury to the corporation or the other shareholders.

Hooper argued that Robbins owed him a special duty because Robbins "induced [him] to form and become a member of Timbercreek" and because Hooper had guaranteed certain of Timbercreek's debts. The Business Court, however, concluded that the allegations in the complaint were not sufficient for the "special duty" exception. While acknowledging that Barger suggests that a special duty may exist when the defendant "induced [the] plaintiff to become a shareholder," the court pointed out that Timbercreek's and Hooper's complaint did not make any allegation that Robbins had induced Hooper to become a member or to guarantee Timbercreek's debts, but asserted that Hooper was not knowledgeable about the timber business and that he had planned to rely on Robbins. The court also rejected Hooper's argument that the facts in the complaint indicated that Robbins owed Hooper a special duty because the two were in a de facto fiduciary relationship. In disposing of this argument, the court pointed out that a de facto fiduciary relationship arises "[o]nly when one party figuratively holds all the cards—all the financial or technical information, for example," and the plaintiffs had alleged that Hooper had the power to appoint and remove employees and exercised this power when he put Robbins in charge of operating Timbercreek. Moreover, the court determined that, if Robbins's superior knowledge gave rise to a fiduciary duty, it was indistinct from the duties he owed to Timbercreek and therefore could not be considered "special.

Finally, the court concluded that the plaintiffs' complaint did not allege facts sufficient to satisfy the Barger rule's "separate and distinct" injury exception. According to the court, the plaintiffs' claim that Hooper suffered a "separate and distinct" injury by virtue of Hooper's guaranteeing certain Timbercreek obligations was not enough because the North Carolina Supreme Court has ruled that "consequential damages incurred as a result of personally guaranteeing corporate debts do not constitute a separate and distinct injury from that injury which was suffered by the corporation."

The Business Court's decision in Timbercreek is particularly noteworthy because of the court's broad interpretation of the term "company official" as used in the LLC Act. Practitioners certainly will want to keep this case in mind when considering the Act's provisions with respect to fiduciary obligations, but they also need to remember the case when dealing with other parts of the Act in which the term "company official" is used, including the provisions with respect to indemnification.

**Time for a New Strategy**

The North Carolina Business Court considered whether a member of a North Carolina limited liability company who owns a majority interest in the company owes fiduciary duties to those who own minority interests. Strategic Management Decisions, LLC v. Sales Performance International, LLC, 2017 NCBC 68 (Aug. 7, 2017). The court concluded that majority ownership alone is not enough to make a member subject to fiduciary duties in favor of the company's other members.

In January 2017, Strategic Management Decisions, LLC filed a lawsuit against Sales Performance International, LLC, claiming that Sales Performance had breached fiduciary duties it owed to Strategic Management in connection with Sales Talent Optimization, LLC ("STO"), a North Carolina limited liability company. Sales Performance denied that it owed duties to Strategic Management at all and moved to dismiss Strategic Management's breach of fiduciary duty claim. Assuming the truth of the following facts, the Business Court agreed.

Strategic Management and Sales Performance formed STO as a joint venture in March 2014, and although Strategic Management owns a 40% membership interest in the company and Sales Performance owns a 60% interest, STO's operating agreement generally contemplates that the parties will share power equally. STO has two managers, both of whom must be individuals. Strategic Management is entitled to appoint one, Sales Performance is entitled to appoint the other, and management decisions require unanimous consent. STO's operating agreement reserves to the members the right to approve certain matters (such as conversions and voluntary dissolution), but it otherwise grants the managers plenary authority to manage the company and requires unanimous consent for all member decisions except one—Sales Performance alone is entitled to the set the compensation for STO's managers.

Acknowledging the general rule that members of a North Carolina limited liability company do not owe fiduciary duties to each other or to the company, the Business Court noted that Strategic Management sought to hold Sales Performance liable based on an exception the court recently has recognized—that "a holder of a majority interest who exercises control over the LLC owes a fiduciary duty to minority interest members." The court warned, however, that the exception was "borrowed" from corporate law and that one must avoid slavish adherence to corporate principles in the limited liability company context where freedom of contract typically reigns supreme.

According to the court, Strategic Management was "simply wrong" that a member's mere ownership of a majority interest makes the member subject to fiduciary duties in favor of the owner of a minority interest. The court emphasized that, even in the corporate context, it is control—not majority ownership—that gives rise to fiduciary duties. Moreover, the court rejected Strategic Management's argument that a presumption of control applies when one owns a majority interest and stressed that STO's operating agreement would "conclusively rebut[] any [such] presumption" because each of Strategic Management and
Sales Performance is entitled to appoint one of STO’s managers, both managers must approve decisions, and unanimous consent is required for virtually all decisions reserved to the members. In addition, the court indicated that the plaintiff had not alleged anything that would support imposing broad fiduciary duties on Sales Performance based on its control over management compensation.

Finally, Strategic Management failed to convince the Business Court that Sales Performance, as a party to a joint venture, owed fiduciary duties in favor of Strategic Management. Because Strategic Management and Sales Performance chose to structure their joint venture as a limited liability company, the court explained, the law governing limited liability companies applied.

The Business Court’s decision in Strategic Management is significant because of the guidance the court provides regarding when a member becomes subject to fiduciary duties. The question is one of control, and not surprisingly given the contractual nature of the limited liability company, the terms of the operating agreement are key.

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**Legislative Update**

By Charles Marshall

The General Assembly has completed its long session for 2017, as well as special sessions to address legislative redistricting. During the long session, legislators considered a number of items of interest to the Business Law Section.

First and foremost, the General Assembly passed, and Governor Cooper signed, Senate Bill 621, which was sponsored by Senator Tamara Barringer. The new law validates North Carolina choice of law and forum selection provisions contained in business contracts. Broadly speaking, the law authorizes parties to a business contract the right to designate North Carolina law to govern their rights and duties under the contract. If (and only if) the parties so designate North Carolina as the governing law, the parties may also agree to litigate a dispute arising from the business contract in North Carolina courts. The new law applies only to “business contracts,” which are defined to include “a contract or undertaking, contingent or otherwise, entered into primarily for business or commercial purposes,” and it does not apply to “a consumer contract or an employment contract.” The new law applies to business contracts entered into before, on, or after the effective date of the law, which is July 18, 2017. The new law helps contracting parties avoid the previous uncertainty that often plagued the enforceability of contractual choice of law or forum selection provisions.

The Senate passed Senate Bill 622, also sponsored by Senator Barringer, which contains a package of revisions to the Business Corporations Act. The comprehensive bill includes, among other things, changes to laws regarding corporate governance, shareholders’ agreements, boards of directors, and mergers. Because the bill passed the Senate, it is eligible for further action next year during the short session. It currently sits in the House Rules Committee.

Several other items were of interest to the Section during the long session. The General Assembly passed legislation, signed by the Governor, which postponed until December 1, 2017, the implementation of a law enacted in 2016 to revise the law governing the filing certificates of assumed business names. The General Assembly rejected House Bill 616 to establish a North Carolina Public Benefit Corporation Act, and it took no action on House Bill 263 to modify provisions of the Uniform Commercial Code applicable to accord and satisfaction by use of an instrument.

The General Assembly’s “short session” begins in May 2018. The General Assembly drew new legislative districts this year to comply with a federal court order. The new districts will be in place for the 2018 election unless the court orders any further relief.

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