2003-2004

SENATE
JUDICIARY II

COMMITTEE
MINUTES

MEMBERSHIP

Senate Judiciary II Committee
2003-2004 Biennium

Senator Fletcher Hartsell, Chairman
Room 518, LOB
733-7223

Senator Austin Allran, Vice Chair
Room 516, LOB
733-5876

Senator Scott Thomas, Vice Chair
Room 300-D, LOB
715-8363

Senator Hugh Webster, Ranking Minority
Room 1419, LB
715-0706

Senator Tom Apodaca
Room 1119, LB
733-5745

Senator Stan Bingham
Room 2117, LB
733-5665

Senator Walter Dalton
Room 523, LOB
715-3038

Senator Katie Dorsett
Room 2106, LB
715-3042

Senator Kay Hagan
Room 410, LOB
733-5856

Senator Robert Holloman
Room 522, LOB
715-3032

Senator John Kerr
Room 526, LOB
733-5621

Senator Eleanor Kinnaird
Room 2115, LB
733-5804

Senator Tony Moore
Room 622, LOB
733-6275

Senator Joe Queen
Room 2111, LB
733-3460

Senator Robert Rucho
Room 1113, LB
733-5650

Senator Fern Shubert
Room 1414, LB
733-7659

Senator R. B. Sloan
Room 406, LOB
715-7823

Research Staff:

Linda Attarian
Drupti Chauhan
Kory Goldsmith

Committee Assistant:

Gerry Johnson

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Research Staff:

Kory Goldsmith
Robin Johnson
Sandra Alley

Committee Assistant:

Gerry Johnson

2003-2004 Biennium

Leg. Day: H-084/S-084

Bill	Introducer	Short Title		Latest Action	In Date	Out Date
H0024	McCombs	VETERANS ADMINISTRATION POLICE OFFICERS.	SR	Ch. SL 2003-36	03-17-03	05-06-03
H0058	C. Wilson	VALIDATE CERTAIN NOTARIAL ACTS.	SR	Ch. SL 2003-38	03-10-03	05-06-03
H0147	Gulley	LEFT TURN ON RED.	*S	Cal Pursuant Rule 36(b)	05-05-03	05-08-03
H0147	Gulley	LEFT TURN ON RED.	*S	Cal Pursuant Rule 36(b)	05-12-03	06-04-03
H0281=	Culpepper	TECHNICAL CORRECTIONS ACT.	*S	Re-ref Com On Judiciary I	04-28-03	06-02-03
H0304	Setzer	STALKING/SUPERVISED PROBATION IS MINIMUM.	*SR	Ch. SL 2003-181	03-25-03	05-29-03
H0352	Haire	DRUG SCREENING & ASSESSMENT.-AB	SR	Ch. SL 2003-141	04-23-03	05-27-03
H0636	Munford	MODERNIZE JUDGMENT DOCKETING LAWS.	*SR	Ch. SL 2003-59	04-09-03	05-13-03
H0637	Munford	AMEND POWERS/SETTLOR OF REVOCABLE TRUST.	*SR	Ch. SL 2003-225	04-10-03	06-03-03
H0656	Culpepper	AMEND TRUST ADMINISTRATION ACT.	*S	Pres. To Gov. 6/19/2003	05-05-03	06-03-03
H0689	Glazier	CONFORM EVIDENCE RULE 103.	SR	Ch. SL 2003-101	04-24-03	05-15-03
H0785	Haire	RULES OF CIVIL PROC/ REWRITE RULE 45.	*S	Pres. To Gov. 6/19/2003	05-01-03	06-09-03
H0798=	Moore	SECURITIES TRANSFER ON DEATH.	S	Re-ref Com On Finance	04-23-03	05-06-03
H0824	Allred	TWIN LAKES COOK ROAD BRIDGE.	*S	Pres. To Gov. 6/19/2003	06-04-03	06-09-03
H0826=	Insko	AMEND MH CONFIDENTIALITY STATUTES.	*S	Cal Pursuant Rule 36(b)	04-29-03	06-09-03
H0925	Luebke	COUNTY APPEALS OF CERTAIN JUVENILE ORDERS.	SR	Ch. SL 2003-171	05-01-03	06-03-03
H0950	Hackney	JUVENILE COMMITMENT TO DJJDP.	*SR	Ch. SL 2003-53	05-05-03	05-13-03
H0963	Warner	HIT AND RUN - 2 YEAR LICENSE REVOCATION.	*S	Conf Com Appointed	05-05-03	06-03-03
H0965	Hill	FAILURE TO YIELD CAUSING DEATH OR INJURIES.	*S	Re-ref Com On Judiciary II	05-05-03	06-05-03
H0965	Hill	FAILURE TO YIELD CAUSING DEATH OR INJURIES.	*S	Re-ref Com On Judiciary II	06-09-03	
H1037	Luebke	AMEND JUVENILE LAW.	*S	Ratified	05-05-03	06-09-03
H1047	Hackney	ABOLISH ALIENATION OF AFFECTION/CRIM. CONV.	S	Re-ref Com On Rules and Operations of the Senate	05-05-03	05-12-03
H1048	Ross	JUVENILE CODE REVISIONS/CT. IMPROVEMENT PROJ.	*SR	Ch. SL 2003-140	05-01-03	05-27-03
H1123	Farmer-Butterfie	GUARDIANSHIP AMENDMENTS.	*SR	Ch. SL 2003-236	05-05-03	06-04-03
H1151	Nesbitt	IMPROVE RULE-MAKING	*SR	Ch. SL 2003-229	05-05-03	05-27-03

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Bill	Introducer	Short Title		Latest Action	In Date	Out Date
		PROCESS.				
H1175	Michaux	FAIR HOUSING COMPLAINTS.	*SR	Ch. SL 2003-136	04-29-03	05-21-03
H1219	Hackney	CLARIFY DEF. OF DIVISIBLE PROPERTY/ EQU. DIST.	S	Ref To Com On Judiciary II	05-05-03	
S0020	Stan Bingham	REGULATE PROFESSIONAL EMPLOYER ORGANIZATION.	S	Re-ref Com On Finance	02-10-03	06-12-03
S0033	Scott Thomas	CONCEALED HANDGUN RECIPROCITY.	*SR	Ch. SL 2003-199	02-13-03	03-18-03
S0057	Patrick J. Balla	MUNICIPAL WHEEL LOCK AUTHORIZATION.	*S	Concurred On 3rd Reading	02-17-03	03-26-03
S0117=	Tom Apodaca	THE LARRY T. JUSTUS WESTERN JUSTICE ACADEMY.	*S	Ratified	02-20-03	03-25-03
S0135=	Eric Miller Reev	CRIMINAL UNAUTHORIZED RECORDINGS.	S	Ref To Com On Judiciary II	02-24-03	
S0145	James Forrester	PHYSICIAN-ASSISTED SUICIDE.	S	Re-ref Com On Judiciary II	02-26-03	
S0226=	William R. Purce	UNAUTHORIZED ADMIN. MEDS. BY CHILD CARE FAC.	*S	Re-ref Com On Appropriations	03-05-03	04-08-03
S0230=	Fletcher L. Hart	REPEAL UCC ARTICLE ON BULK SALES.	*S	Placed On Cal For 6/24/2003	02-26-03	03-25-03
S0251	Austin M. Allran	PROHIBIT REBIRTHING.	*SR	Ch. SL 2003-205	03-19-03	04-01-03
S0263	Andrew C. Brock	DRIVERS LICENSE EXPIRES WHEN VISA EXPIRES.	S	Ref To Com On Judiciary II	03-03-03	
S0275=	Fletcher L. Hart	SECURITIES TRANSFER ON DEATH.	S	Re-ref Com On Finance	03-04-03	03-26-03
S0293	Scott Thomas	SALES REPRESENTATIVE COMMISSIONS REVISIONS.	*S	Placed On Cal For 6/24/2003	03-05-03	04-02-03
S0323	Fletcher L. Hart	GEN. CONTRS/PROTECT INFO/CLARIFY INJ. RELIEF.	*SR	Ch. SL 2003-97	03-06-03	04-16-03
S0331	Austin M. Allran	FAMILY PROTECTION ACT.	S	Ref To Com On Judiciary II	03-10-03	
S0353=	Stan Bingham	CHARITABLE SOLICITATIONS/REQUIRE DISCLOSURE.	*S	Ref To Com On Ways and Means	03-11-03	03-26-03
S0354=	Fletcher L. Hart	TECHNICAL CORRECTIONS ACT.	S	Ref To Com On Judiciary II	03-11-03	
S0390	Fletcher L. Hart	MODERNIZE JUDGMENT DOCKETING LAWS.	S	Ref To Com On Judiciary I	03-12-03	04-09-03
S0421	Scott Thomas	AMEND CHILD WELFARE LAWS.-AB	*S	Placed On Cal For 6/24/2003	03-17-03	04-14-03
S0422	Scott Thomas	ADVANCE HEALTH CARE DIRECTIVE REGISTRY.	SR	Ch. SL 2003-70	03-17-03	04-09-03
S0423=	Scott Thomas	AMEND CHILD SUPPORT ENFORCEMENT LAWS.-AB	*S	Ratified	03-17-03	04-07-03
S0424	Fletcher L. Hart	TUITION WAIVER CORRECTION.	*SR	Ch. SL 2003-230	03-17-03	04-16-03
S0449	Joe Sam Queen	PRESUMPTION-DWI BLOOD WITHDRAWAL VALID.	*SR	Ch. SL 2003-95	03-18-03	04-23-03
S0460	Robert Lee Hollo	EXTEND SUNSET/PRIVATE CORRECTIONAL OFFICERS.	S	Ref To Com On Judiciary III	03-19-03	04-14-03

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2003-2004 Biennium

Leg. Day: H-084/S-084

Bill	Introducer	Short Title		Latest Action	In Date	Out Date
S0468	Fletcher L. Hart	CLARIFY IRREVOCABLE TRUST LAW.	SR	Ch. SL 2003-93	03-20-03	04-22-03
S0470	Fletcher L. Hart	COMPENSATION OF TRUSTEES/OTHER FIDUCIARIES.	*S	Ref To Com On Judiciary IV	03-20-03	04-14-03
S0471	Fletcher L. Hart	AMEND SELF-INSURANCE GUARANTY ASSOC. LAWS.	*SR	Ch. SL 2003-115	03-20-03	04-24-03
S0486=	Joe Sam Queen	AMBER ALERT.	*S	Ref To Com On Ways and Means	03-20-03	04-14-03
S0502	Scott Thomas	ACCESS TO DECEDENT'S SAFE-DEPOSIT BOX.	*S	Pres. To Gov. 6/ 18/2003	03-24-03	04-16-03
S0527	Fletcher L. Hart	DEATH BY VEHICLE.	S	Ref To Com On Judiciary II	03-25-03	
S0528	Fletcher L. Hart	AMEND POST-RELEASE SUPERVISION LAWS.	S	Re-ref Com On Judiciary I	03-25-03	03-25-03
S0549	Kay R. Hagan	UNIFORM PRINCIPAL AND INCOME ACT.	*SR	Ch. SL 2003-232	03-27-03	04-22-03
S0563	Kay R. Hagan	UNIFORM ATHLETE AGENTS ACT.	*S	Ref To Com On Rules, Calendar, and Operations of the House	03-27-03	04-16-03
S0619=	Tom Apodaca	DWI BLOOD TEST RESULT- DIRECTLY TO CLERK.	*SR	Ch. SL 2003-104	03-31-03	04-16-03
S0659	Stan Bingham	CHARITABLE SOLICITATIONS/INFORM THE PUBLIC.	*S	Ref To Com On Ways and Means	04-01-03	04-16-03
S0687	Scott Thomas	FELONY DEATH/SERIOUS INJURY BY VEHICLE.	S	Re-ref Com On Appropriations/ Base Budget	04-02-03	04-24-03
S0692	Scott Thomas	TERROR RESPONSE PLANS.	*SR	Ch. SL 2003-180	04-02-03	04-24-03
S0693	Scott Thomas	AMEND ENHANCED SENTENCES LAWS.	*S	Conf Com Appointed	04-02-03	04-23-03
S0694=	Scott Thomas	ANALOGUES/SCHEDULE I CONTROLLED SUBSTANCE.	*S	Pres. To Gov. 6/ 17/2003	04-02-03	04-30-03
S0707	Fern Shubert	REPEAT MISD. LARCENY.	S	Re-ref Com On Appropriations/ Base Budget	04-02-03	04-23-03
S0708	Fern Shubert	FIRE DEPT. CRIM. BACKGROUND CHECKS.	*SR	Ch. SL 2003-182	04-02-03	04-23-03
S0716	Fletcher L. Hart	REVISED UNIFORM ARBITRATION ACT.	*S	Ref To Com On Judiciary IV	04-02-03	04-24-03
S0718	Kay R. Hagan	AMEND DOMESTIC VIOLENCE LAWS/TEMP. CUSTODY.	*S	Ref To Com On Judiciary I	04-03-03	04-30-03
S0721	Eleanor Kinnaird	POST-ADOPTION PRIVILEGES.	*S	Ref To Com On Judiciary II	04-03-03	04-30-03
S0722	Eleanor Kinnaird	DISPLAY OF AMERICAN FLAG.	*S	Re-ref Com On Rules, Calendar, and Operations of the House	04-03-03	04-23-03
S0748	R. B. Sloan, Jr.	ONLY EASEMENTS.	S	Ref To Com On Judiciary II	04-03-03	
S0766	Scott Thomas	PRETRIAL RELEASE PROGRAM/STATEWIDE UNIFORMITY.	S	Ref To Com On Judiciary II	04-03-03	
S0774	Walter H. Dalton	LIABILITY AT PUBLIC	*S	Postponed To 6/25/	04-03-03	04-16-03

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Bill	Introducer	Short Title		Latest Action	In Date	Out Date
		SKATEBOARD PARKS.		2003		
S0784	Fletcher L. Hart	JUDGMENT BONDING LEGISLATION.	*SR	Ch. SL 2003-19	04-03-03	04-08-03
S0798	Eleanor Kinnaird	CITY/COUNTY ANTIDISCRIMINATION ORDINANCES.	S	Ref To Com On Judiciary II	04-03-03	
S0867	Kay R. Hagan	ARSON/SERIOUS INJURY TO FIREFIGHTER.	*S	Re-ref Com On Appropriations	04-03-03	04-30-03
S0868=	Kay R. Hagan	ASSAULT IN THE PRESENCE OF A CHILD.	*S	Ref To Com On Judiciary III	04-03-03	04-24-03
S0881	Fletcher L. Hart	PERMIT TOBACCO PAYMENT W/O REOPENING ESTATE.	*S	Concurred In H/ com Sub	04-03-03	04-22-03
S0882=	Fletcher L. Hart	DUE PROCESS FOR PHYSICIANS.	S	Ref To Com On Judiciary II	04-03-03	
S0901	Hugh Webster	PROTECT RIGHTS/MOTION TO STRIKE.	S	Ref To Com On Judiciary II	04-03-03	
S0925	Tony Rand	STRENGTHEN SECURITY FRAUD ENFORCEMENT LAWS.	*S	Placed On Cal For 6/25/2003	04-03-03	04-23-03
S0956	Fletcher L. Hart	IMPROVE RULEMAKING PROCESS.	S	Ref To Com On Judiciary II	04-03-03	
S0962	A. B Swindell	REQUIRE AFFIDAVITS OF BAIL BONDSMEN.	SR	Ch. SL 2003-148	04-03-03	04-16-03
S0965	Walter H. Dalton	AMEND CONSTITUTION/ SCH. FINES & FORFEITURES.	*S	Ref To Com On Rules, Calendar, and Operations of the House	04-03-03	04-16-03
S0969	Eleanor Kinnaird	SEXUAL PRIVACY ACT.	S	Ref To Com On Judiciary II	04-03-03	

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Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **JUDICIARY II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	March 11, 2003	10:00 AM	1124

The following will be considered:

	BILL NO.	SHORT TITLE	SPONSOR
•	SB 33	Concealed Handgun Reciprocity	Sen. Thomas

Senator Hartsell, Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
March, 11, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. Welcome and Opening Remarks

II. Bills to be Considered
- SB 33 Concealed Handgun Reciprocity — Sen. Thomas

III. Other Business

IV. Adjournment

SENATE JUDICIARY II COMMITTEE

Minutes

March 11, 2003

The Senate Judiciary II Committee was called to order on March 11, 2003, by Senator Fletcher L. Hartsell, Chairman, with fourteen members present.

Senator Hartsell appointed a sub-committee for Senate Bill 226. Senator Allran was appointed chair with Senators Kinnaird and Thomas as members.

Senator Kerr noted that this meeting was an historical event and was pleased that Senator Hartsell, Republican from Cabarrus County, had been named chair of the committee. Senator Kerr asked that his remarks be placed in the record.

SB 33 (Concealed Handgun Reciprocity) Senator Kinnaird moved to continue the bill until the next meeting. This motion failed. Senator Webster then moved to adopt the Committee Substitute for purposes of discussion. The motion carried. Senator Thomas was recognized to explain the Committee Substitute. The questions of Senators Rucho, Allran, Kinnaird, Shubert, Webster, Kerr, Bingham, Dorsette and Holloman were answered by Senators Thomas and Hartsell, Kory Goldsmith, staff attorney and Greg McLeod of the Attorney General's office.

Persons speaking on the bill were: Mr. F. Paul Valone II, Grass Roots North Carolina, Mr. Lorin Mueller, NC Coalition of Police and Sheriffs and Ms. Henri McClees, Lobbyist.

Senator Hartsell adjourned the meeting at 11:00 am with no action taken, to continue the Committee Substitute Bill 33 at the next meeting.

Sen. Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 33

Short Title:	Concealed Handgun Reciprocity.	(Public)
Sponsors:	Senators Thomas; Albertson, Allran, Apodaca, Ballantine, Berger, Bingham, Brock, Carpenter, Dalton, Forrester, Foxx, Garwood, Hoyle, Jenkins, Kerr, Lucas, Moore, Pittenger, Queen, Rucho, Shubert, Sloan, Smith, Swindell, and Webster.	
Referred to:	Judiciary II.	

February 13, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE RECIPROCAL CONCEALED HANDGUN RIGHTS TO CONCEALED HANDGUN PERMIT HOLDERS OF OTHER STATES.

The General Assembly of North Carolina enacts:

SECTION 1. Article 54B of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-415.24. Reciprocity; out-of-state handgun permits.**

(a) A valid concealed handgun permit or license issued by another state is valid in North Carolina if that state both:

(1) Grants permits pursuant to requirements substantially equal to the requirements set forth in G.S. 14-415.12.

(2) Grants the same right to residents of North Carolina who have valid concealed handgun permits issued pursuant to this Article in their possession while carrying concealed weapons in that state.

(b) The Attorney General shall determine which states meet the requirements of this section, maintain a registry of such states on the North Carolina Criminal Information Network, and make the registry available to law enforcement officers for investigative purposes.

(c) The provisions of G.S. 14-415.11(a) and (c) apply to a nonresident whose concealed handgun permit or license from another state is honored by North Carolina in accordance with the reciprocity provisions of this section.

(d) The Department of Justice shall, not later than 30 days after July 15, 2003, and not less than once every six months thereafter, make written inquiry of the concealed handgun permitting authorities in each other state as to: (i) whether a North Carolina resident may carry a concealed handgun in their state based upon having a valid North Carolina concealed handgun permit, and (ii) whether a North Carolina

resident may apply for a concealed handgun permit in that state based upon having a valid North Carolina concealed handgun permit. The Department of Justice shall attempt to secure from each state permission for North Carolina residents who hold a valid North Carolina concealed handgun permit to carry a concealed handgun in that state, either on the basis of the North Carolina permit or on the basis that the North Carolina permit is sufficient to permit the issuance of a similar license or permit by the other state."

SECTION 2. G.S. 14-415.24(b), as enacted by this act, is effective when this act becomes law. The Attorney General shall implement G.S. 14-415.24(b), as enacted by Section 1 of this act, within 60 days after this act becomes law. The remainder of this act becomes effective 60 days after this act becomes law.

SENATE BILL 33:
Concealed Handgun Reciprocity

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Thomas
Date:	March 11, 2003	**Summary by:**	Kory Goldsmith/Drupti Chauhan Committee Counsel
Version:	Proposed Committee Substitute S33-CSRC-1[v.3]		

SUMMARY: ***Senate Bill 33 would provide that a valid concealed handgun permit issued by another state is valid in North Carolina if that state grants permits according to the stated requirements in the bill and recognizes concealed handgun permits issued by North Carolina. It directs the Attorney General to determine which states meet the requirements of the bill and to maintain a registry of such states.***

The PCS differs from the original bill in that it specifies the criteria another state's concealed carry law must meet in order for reciprocity to be granted rather than allowing "substantially equal" requirements. It also directs the Attorney General to make reciprocity determinations every 12 months rather than every six months and makes the Attorney General's determination on reciprocity conclusive and not subject to appeal.

CURRENT LAW: Under current law, a person must carry a concealed handgun permit issued by a sheriff in this State and valid identification when the person is carrying a concealed handgun. A sheriff will issue a permit to carry a concealed handgun to a person who:

- Is a citizen of the United States and has been a resident of North Carolina for 30 or more days.
- Is 21 years of age or older.
- Does not suffer from a physical or mental infirmity that prevents the safe handling of a handgun.
- Has successfully completed an approved firearms safety and training course.
- Is not disqualified from receiving a permit under the provisions of G.S. 14-425.12, which provides that a sheriff will deny a permit for a number of reasons, including the applicant:
  - Has been found guilty of a felony.
  - Is an unlawful user of controlled substances.
  - Has been found to be mentally ill.
  - Has been discharged from the armed forces under conditions other than honorable.
  - Has ~~been~~ convicted of impaired driving within 3 years prior to the date of application.

The permit is valid statewide for a period of four years from the date of issuance except for permits issued or renewed on or after August 1, 2000, which are valid for five years.

BILL ANALYSIS: Senate Bill 33 would provide that a valid concealed handgun permit issued by another state is valid in North Carolina if that state meets the requirements set forth in the bill and recognizes concealed handgun permits issued by North Carolina. The other state must require at least the following of a person before it grants permits:

- Is a U.S. Citizen
- Is 21 years of age or older

- Has completed a firearms safety and training course that includes the actual firing of a handgun
- The permit-granting authority must complete some type of background check as to an applicant's mental health or mental capacity
- Is eligible under federal law to own a handgun
- Has not be adjudicated guilty in any court of a felony or of a misdemeanor offense that constitutes a crime of violence

The bill would require the Attorney General to determine which states meet the requirements of the act, maintain a registry of such states, and make the registry available to law enforcement officers for investigative purposes. This determination would not be subject to appeal. Every twelve months the Attorney General would also be required to make written inquiries to each other state as to whether a North Carolina resident can carry a concealed handgun in that state based on the person's valid North Carolina concealed handgun permit and whether a North Carolina resident may apply for a concealed handgun permit in that other state based on his or her valid North Carolina concealed handgun permit.

EFFECTIVE DATE: The Attorney General must implement the reciprocity determination and registry requirements of the bill within 60 days of when the act becomes law. The rest of the provisions of the bill become effective 60 days after the act becomes law.

BACKGROUND: Currently, nine states including Alaska, Idaho, Indiana, Kentucky, Michigan, Montana, Utah, Vermont, and Virginia recognize North Carolina concealed handgun permits. North Carolina does not recognize permits from any other states. Therefore it is unlawful for anyone without a North Carolina permit to carry a concealed weapon in this state and that person could be found guilty of a Class 2 misdemeanor for a first offense or a Class I felony for a second or subsequent offense.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 33

Proposed Senate Committee Substitute

PROPOSED COMMITTEE SUBSTITUTE S33-CSRC-1 [v.3]

3/10/2003 7:31:55 PM

Short Title: Concealed Handgun Reciprocity. (Public)

Sponsors:

Referred to:

February 13, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE RECIPROCAL CONCEALED HANDGUN RIGHTS TO CONCEALED HANDGUN PERMIT HOLDERS OF OTHER STATES.

The General Assembly of North Carolina enacts:

SECTION 1. Article 54B of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-415.24. Reciprocity; out-of-state handgun permits.**

(a) A valid concealed handgun permit or license issued by another state is valid in North Carolina if that state both:

(1) Grants permits under the following or more stringent requirements:

a. An applicant must be a citizen of the United States;

b. An applicant must be 21 years of age or older;

c. An applicant must complete a firearms safety and training course that includes the actual firing of a handgun;

d. The permit granting authority undertakes some background check as to an applicant's mental health or mental capacity;

e. The applicant is eligible to own or receive a firearm under federal law;

f. The applicant has not been adjudicated guilty in any court of a felony;

g. The applicant has not been adjudicated guilty in any court of a misdemeanor offense that constitutes a crime of violence.

(2) Grants the same right to residents of North Carolina who have valid concealed handgun permits issued pursuant to this Article in their possession while carrying concealed weapons in that state.

(b) The Attorney General shall determine which states meet the requirements of this section, maintain a registry of such states on the North Carolina Criminal Information Network, and make the registry available to law enforcement officers for investigative purposes. The Attorney General's determination whether a state meets the requirements of this section shall be conclusive.

(c) The provisions of G.S. 14-415.11(a) and (c) apply to a nonresident whose concealed handgun permit or license from another state is honored by North Carolina in accordance with the reciprocity provisions of this section. The Department of Justice shall post on its website or shall otherwise make available information regarding the laws of self defense in North Carolina and the requirements of G.S. 14-415.11(a) and (c).

(d) Every twelve months after the effective date of this subsection, the Department of Justice shall make written inquiry of the concealed handgun permitting authorities in each other state as to: (i) whether a North Carolina resident may carry a concealed handgun in their state based upon having a valid North Carolina concealed handgun permit, and (ii) whether a North Carolina resident may apply for a concealed handgun permit in that state based upon having a valid North Carolina concealed handgun permit. The Department of Justice shall attempt to secure from each state permission for North Carolina residents who hold a valid North Carolina concealed handgun permit to carry a concealed handgun in that state, either on the basis of the North Carolina permit or on the basis that the North Carolina permit is sufficient to permit the issuance of a similar license or permit by the other state."

SECTION 2. G.S. 14-269(a1) reads as rewritten:

"(a1) It shall be unlawful for any person willfully and intentionally to carry concealed about his person any pistol or gun except in the following circumstances:

(1) The person is on the person's own premises.

(2) The deadly weapon is a handgun, and the person has a concealed handgun permit issued in accordance with Article 54B of this ~~Chapter.~~ Chapter or considered valid under G.S. 14-415.24."

SECTION 3. G.S. 14-415.24(b), as enacted by this act, is effective when this act becomes law. The Attorney General shall implement G.S. 14-415.24(b), as enacted by Section 1 of this act, within 60 days after this act becomes law. The remainder of this act becomes effective 60 days after this act becomes law.

GRNC

GRASS ROOTS NORTH CAROLINA / FORUM FOR FIREARMS EDUCATION
P.O. BOX 10684, RALEIGH, NC 27605 (919) 664-8565, www.grnc.org

Talking Points:
SB 33: "Concealed Handgun Reciprocity"

- A large number of North Carolinians who live here but work in South Carolina and elsewhere need to be able to protect themselves with the concealed handgun permits they have earned.

- At present, North Carolinians are unable to protect themselves in other states because most states (e.g. South Carolina) require reciprocal arrangements, and North Carolina has no reciprocity provision in its concealed handgun statute. SB 33 will create a means for the state Attorney General to establish reciprocal agreements.

- Twenty-five states currently have mechanisms for recognizing out-of-state concealed handgun permits. In Vermont, no permit is required.

- Two concealed handgun reciprocity bills similar to SB 33 (HB 1065 and HB 442) passed overwhelmingly through the North Carolina House in recent sessions of the General Assembly.

- North Carolina's concealed handgun law works. **Only 0.3% of concealed handgun permits applied for have been revoked for any reason**, and the vast majority of these were for offenses unrelated to firearms. A study of our law by Freedom Newspapers revealed only one case in which a permit-holder was arrested for gun-related crime. Even North Carolinians Against Gun Violence has repeatedly stated that their fears about the law have not been realized. NCGV lobbyist Al Adams once called it "a good law."

- This bill is non-controversial: It changes nothing in North Carolina law except to provide the same right-to-carry to residents of other states who have gone through similar background checks and training to obtain concealed handgun permits.

- Thirty-two states have concealed handgun laws. In none of those states have traffic light shootings and crimes by concealed handgun permit-holders been a problem - despite doomsday predictions by gun control organizations.

- A controlled, multi-variate study of all 3,054 counties in the United States by John Lott of Yale University reveals that **concealed handgun laws deter rape, murder, and aggravated assault.** Indeed, states which have adopted such laws experience drops of 8.5% in homicide, 5% in rape, and 7% in aggravated assault.

Grass Roots North Carolina strongly urges you to support SB 33: "Concealed Handgun Reciprocity"

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 11 March 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Kevin V. Howell	Intern
Richard Whitehead	UTU
TOM BEATTIE	GRNC
Randy Lewis	GRNC
Derald Hafner	GRNC
LORIN MUELLER	NC Coalition of Police
C W TAYLOR	GRNC
Gary McLeod	AG
Michelle Frazier	NC Bar Ass'n
Jennifer H. Palmer	National Rifle Association
Joe McClees + Joni McClees	McClees Consulting, Inc

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II 3-11-03

Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Robbie Robbins	NC Fraternal Order of Police
Jeff Gray	" "
Eddie Caldwell	NC Sheriffs Assn / NC Law Enf Off Assn
Bob Carpenter	N.C. Senate
Dan Clodfelter	N.C. Senate
Jane Pinsky	NCCAJ
Paula A. Wolf	Covenant w/NC's Children
[illegible]	Capitol Drugs
BRUCE THOMPSON	PARKER POE ADAMS & BERNSTEIN, LLP
Audrey A. Galloway	Strategic Influences
Chad Hinton	Intern

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 11 March 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Jeff Rau	Grass Roots NC
Paul Valone	GRNC
Judy Collins	GRNCC
John Powell	GRNC

Principal Clerk
Reading Clerk

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **JUDICIARY II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	March 13, 2003	9:00 AM	1124

The following will be considered:

	BILL NO.	SHORT TITLE	SPONSOR
•	SB 33	Concealed Handgun Reciprocity	Sen. Thomas

Senator HARTSELL, Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
March, 13, 2003 at 9:00 a.m.
Room 1124, Legislative Building

I. Welcome and Opening Remarks

II. Bills to be Considered

- **SB 33 Concealed Handgun Reciprocity** **Sen. Thomas**

III. Other Business

IV. Adjournment

SENATE JUDICIARY II COMMITTEE

Minutes

March 13, 2003

The Senate Judiciary II Committee was called to order on March 13, 2003, by Senator Fletcher L. Hartsell, Chairman, with eleven members present.

Senate Bill 33, discussion continued from March 11, 2003. Senator Hartsell introduced Senator Thomas to present his amendment to the Committee Substitute to Senate Bill 33. After explaining the amendment, Senator Thomas recommended adoption of the amendment. The amendment passed.

Senator Kinnaird was recognized to explain her amendment and requested that the members vote to include the amendment in the bill. Senator Thomas, Mr. Paul Valone, Grass Roots North Carolina and Mr. Joe McClees, Lobbyist spoke against the amendment and Mr. Bruce Thompson of Parker, Poe, Adams and Bernstein spoke for the amendment. After much discussion, a vote was called and the amendment failed.

Senator Rucho moved for a favorable report for the Committee Substitute as amended. The motion carried.

There being no further business the meeting was adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 33

Short Title:	Concealed Handgun Reciprocity.	(Public)
Sponsors:	Senators Thomas; Albertson, Allran, Apodaca, Ballantine, Berger, Bingham, Brock, Carpenter, Dalton, Forrester, Foxx, Garwood, Hoyle, Jenkins, Kerr, Lucas, Moore, Pittenger, Queen, Rucho, Shubert, Sloan, Smith, Swindell, and Webster.	
Referred to:	Judiciary II.	

February 13, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE RECIPROCAL CONCEALED HANDGUN RIGHTS TO CONCEALED HANDGUN PERMIT HOLDERS OF OTHER STATES.

The General Assembly of North Carolina enacts:

SECTION 1. Article 54B of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-415.24. Reciprocity; out-of-state handgun permits.**

(a) A valid concealed handgun permit or license issued by another state is valid in North Carolina if that state both:

(1) Grants permits pursuant to requirements substantially equal to the requirements set forth in G.S. 14-415.12.

(2) Grants the same right to residents of North Carolina who have valid concealed handgun permits issued pursuant to this Article in their possession while carrying concealed weapons in that state.

(b) The Attorney General shall determine which states meet the requirements of this section, maintain a registry of such states on the North Carolina Criminal Information Network, and make the registry available to law enforcement officers for investigative purposes.

(c) The provisions of G.S. 14-415.11(a) and (c) apply to a nonresident whose concealed handgun permit or license from another state is honored by North Carolina in accordance with the reciprocity provisions of this section.

(d) The Department of Justice shall, not later than 30 days after July 15, 2003, and not less than once every six months thereafter, make written inquiry of the concealed handgun permitting authorities in each other state as to: (i) whether a North Carolina resident may carry a concealed handgun in their state based upon having a valid North Carolina concealed handgun permit, and (ii) whether a North Carolina

resident may apply for a concealed handgun permit in that state based upon having a valid North Carolina concealed handgun permit. The Department of Justice shall attempt to secure from each state permission for North Carolina residents who hold a valid North Carolina concealed handgun permit to carry a concealed handgun in that state, either on the basis of the North Carolina permit or on the basis that the North Carolina permit is sufficient to permit the issuance of a similar license or permit by the other state."

SECTION 2. G.S. 14-415.24(b), as enacted by this act, is effective when this act becomes law. The Attorney General shall implement G.S. 14-415.24(b), as enacted by Section 1 of this act, within 60 days after this act becomes law. The remainder of this act becomes effective 60 days after this act becomes law.

SENATE BILL 33:
Concealed Handgun Reciprocity

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Thomas
Date:	March 11, 2003	**Summary by:**	Kory Goldsmith/Drupti Chauhan Committee Counsel
Version:	Proposed Committee Substitute S33-CSRC-1[v.3]		

SUMMARY: ***Senate Bill 33 would provide that a valid concealed handgun permit issued by another state is valid in North Carolina if that state grants permits according to the stated requirements in the bill and recognizes concealed handgun permits issued by North Carolina. It directs the Attorney General to determine which states meet the requirements of the bill and to maintain a registry of such states.***

The PCS differs from the original bill in that it specifies the criteria another state's concealed carry law must meet in order for reciprocity to be granted rather than allowing "substantially equal" requirements. It also directs the Attorney General to make reciprocity determinations every 12 months rather than every six months and makes the Attorney General's determination on reciprocity conclusive and not subject to appeal.

CURRENT LAW: Under current law, a person must carry a concealed handgun permit issued by a sheriff in this State and valid identification when the person is carrying a concealed handgun. A sheriff will issue a permit to carry a concealed handgun to a person who:

- Is a citizen of the United States and has been a resident of North Carolina for 30 or more days.
- Is 21 years of age or older.
- Does not suffer from a physical or mental infirmity that prevents the safe handling of a handgun.
- Has successfully completed an approved firearms safety and training course.
- Is not disqualified from receiving a permit under the provisions of G.S. 14-425.12, which provides that a sheriff will deny a permit for a number of reasons, including the applicant:
    - Has been found guilty of a felony.
    - Is an unlawful user of controlled substances.
    - Has been found to be mentally ill.
    - Has been discharged from the armed forces under conditions other than honorable.
    - Has been convicted of impaired driving within 3 years prior to the date of application.

The permit is valid statewide for a period of four years from the date of issuance except for permits issued or renewed on or after August 1, 2000, which are valid for five years.

BILL ANALYSIS: Senate Bill 33 would provide that a valid concealed handgun permit issued by another state is valid in North Carolina if that state meets the requirements set forth in the bill and recognizes concealed handgun permits issued by North Carolina. The other state must require at least the following of a person before it grants permits:

- Is a U.S. Citizen
- Is 21 years of age or older

- Has completed a firearms safety and training course that includes the actual firing of a handgun
- The permit-granting authority must complete some type of background check as to an applicant's mental health or mental capacity
- Is eligible under federal law to own a handgun
- Has not be adjudicated guilty in any court of a felony or of a misdemeanor offense that constitutes a crime of violence

The bill would require the Attorney General to determine which states meet the requirements of the act, maintain a registry of such states, and make the registry available to law enforcement officers for investigative purposes. This determination would not be subject to appeal. Every twelve months the Attorney General would also be required to make written inquiries to each other state as to whether a North Carolina resident can carry a concealed handgun in that state based on the person's valid North Carolina concealed handgun permit and whether a North Carolina resident may apply for a concealed handgun permit in that other state based on his or her valid North Carolina concealed handgun permit.

EFFECTIVE DATE: The Attorney General must implement the reciprocity determination and registry requirements of the bill within 60 days of when the act becomes law. The rest of the provisions of the bill become effective 60 days after the act becomes law.

BACKGROUND: Currently, nine states including Alaska, Idaho, Indiana, Kentucky, Michigan, Montana, Utah, Vermont, and Virginia recognize North Carolina concealed handgun permits. North Carolina does not recognize permits from any other states. Therefore it is unlawful for anyone without a North Carolina permit to carry a concealed weapon in this state and that person could be found guilty of a Class 2 misdemeanor for a first offense or a Class I felony for a second or subsequent offense.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 33

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S33-ARC-2 [v.2]

Date _____,2003

Comm. Sub. [YES]
Amends Title [NO]

Senator Thomas

moves to amend the bill on page 2, line 6, by inserting after the period the following:

"If the Attorney General determines that another state's laws fail to meet the requirements of G.S. 14-215.24(a), the Attorney General shall submit a report within 30 days to the Joint Legislative Commission on Governmental Operations specifying the criteria under which the determination was made.".

SIGNED Scott Thomas
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 33

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S33-ARC-4 [v.1]

Date _____,2003

Comm. Sub. [YES]
Amends Title [YES]
S33-CSRC-1 [v.3]

Senator Kinnaird

moves to amend the bill on page 1, line 3, by deleting the word "STATES." and inserting:
"STATES AND TO AMEND THE LAW REGARDING CONCEALED HANDGUN PERMIT FEES, AND TO INCREASE ENFORCEMENT OF GUN LAWS AT GUN SHOWS.";

and on page 2, lines 29 and 30, by inserting between those lines the following:

"**SECTION 3.** Chapter 14 of the General Statutes is amended by adding a new Article to read:

"Article 54C.
"Gun Shows.

"**§ 14-415.30. Definitions.**

The following definitions apply in this Article:

(1) Firearm. – The term 'firearm' means: (i) a weapon, by whatever name known, that is designed to expel a projectile by the action of powder and that is readily capable of use as a weapon; (ii) the frame or receiver of any such weapon; or (iii) any firearm muffler or firearm silencer.

(2) Flea market. – A bazaar or sale that is organized for the purpose of selling new or used merchandise and at which more than one vendor is displaying or selling merchandise.

(3) Gun show. – Any event: (i) at which 25 or more firearms or other weapons as defined in G.S. 14-269(a) are offered or exhibited for sale, transfer, or exchange; and (ii) at which two or more persons are offering or exhibiting firearms for sale, transfer, or exchange. The term 'gun show' includes, but is not limited to, any area near the location of the gun show that is used for parking for the gun show. The term 'gun show' also includes flea markets where firearms are sold.

(4) Gun show promoter. – A person who organizes, promotes, or otherwise sponsors a gun show. The term 'gun show promoter' also included the employees of the promoter.

(5) Vendor – A person who exhibits a firearm for sale, transfer, or exchange at a gun show.

"**§ 14-415.31. Gun shows; registration; promoter must apply for permit with sheriff; inspection of books and records.**

(a) No person shall organize, promote, or otherwise sponsor a gun show in any county unless the person has first obtained a permit as a gun show promoter from the sheriff of that county. One permit shall be required for each gun show and the permit expires at the conclusion of the gun show for which it was obtained.

(b) Upon application, the sheriff shall determine whether the applicant satisfies the criteria set out in G.S. 14-404. If the sheriff is satisfied that the person does qualify for a permit under G.S. 14-404, the sheriff shall issue a gun show promoter permit to the person. At the time the gun show promoter permit application is submitted to the sheriff, the applicant shall also submit a fee of one hundred dollars ($100.00). The sheriff shall transmit this fee to the county finance officer. The amount of this fee shall be used by the sheriff to pay the costs of administering this Article and for other law enforcement purposes. The county shall expend the restricted funds for these purposes only and these funds shall not be used to supplant other funds available to the sheriff.

(c) Notwithstanding G.S. 14-404, a person does not have to be a resident of the county in which the person applies for a permit as a gun show promoter.

(d) To procure evidence of violations of this Article, the sheriff, deputy sheriff, and other employees of the sheriff may investigate the operation of each gun show for which a gun show permit has been issued, may make inspections that include viewing

the entire premises, and may examine the books and records of the gun show promoter, the vendors, and the licensed dealer whose services are provided pursuant to G.S. 14-415.32(b)(2).

(e) Refusal by a gun show promoter or any employee of a gun show promoter to allow officers to enter the gun show to make an inspection authorized by subsection (d) of this section shall be cause for the revocation or suspension of the gun show permit.

"**§ 14-415.32. Gun show promoter; duties.**

(a) At least 30 days before the date of the gun show, the gun show promoter shall file an application with the sheriff and notify the sheriff of the time and location of the gun show, provide the sheriff with a list of the vendors at the show that includes the name, business address, home address, and taxpayer ID number for each vendor, and indicate whether the vendors are federal firearms licensees. The gun show promoter shall also inform the vendors in writing of their legal obligations regarding the sale and display of firearms at the gun show and require as a condition of participation in the gun show that the vendors acknowledge receipt of the information in writing. If a gun show promoter fails to satisfy the requirement of this subsection, the sheriff may revoke the permit for the gun show.

(b) A gun show promoter shall do all of the following:

(1) Ensure that any person who, while at the gun show, displays a firearm for purposes of sale or sells, leases, or otherwise transfers a firearm to another person complies with the requirements of G.S. 14-415.33 and G.S. 14-402(a).

(2) Provide the services of a person licensed as a dealer under 18 U.S.C. § 923 to conduct the transactions described in G.S. 14-415.33.

(3) Ensure that all employees of the promoter comply with the requirements of this Article.

"**§ 14-415.33. Display and sale of firearms at gun show.**

(a) A person may display a firearm for sale while at a gun show without complying with subsection (b) of this section. However, a person who displays a firearm for sale under this subsection may not sell, lease, or otherwise transfer a firearm unless the transaction is conducted through a person licensed as a dealer under 18 U.S.C. § 923.

(b) Except as otherwise provided by this section, a person who, while at a gun show, displays a firearm for purposes of sale or sells, leases, or otherwise transfers a firearm to another person must be licensed as a dealer under 18 U.S.C. § 923 and must post the license in accordance with 27 C.F.R. 178.91 and 178.100(a). A transfer of a handgun must comply with Article 52A of this Chapter.

(c) This section shall not apply to the sale of antique firearms as defined in G.S. 14-409.11 and historic-edged weapons as defined in G.S. 14-409.12.

"**§ 14-415.34. Violation punishable as a misdemeanor.**

(a) A violation of this Article is a Class 1 misdemeanor.

(b) It is an affirmative defense for a gun show promoter under this section that both of the following conditions are met:

(1) The gun show promoter made a good faith effort to ensure that persons displaying, selling, leasing, or otherwise transferring firearms complied with the requirements of this Article; and

(2) The display, sale, lease, or transfer by a noncomplying person occurred in an area of the gun show other than the primary area sued for displaying, selling, leasing, or otherwise transferring firearms.";

and on page 2, line 30, by renumbering "SECTION 3" as "SECTION 4";

and on page 2, line 32, by inserting the following after the period:
"Sections 3 of this act become effective December 1, 2001, and apply to fees assessed and gun shows occurring on or after that date. ".

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 33

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S33-ARC-4 [v.1]

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED ✓ TABLED _____

VISITOR REGISTRATION SHEET

Senate Judiciary II — March 13, 2003

Name of Committee — Date

VISITORS: Please sign below and return to Committee Clerk.

NAME	FIRM OR STATE AGENCY AND ADDRESS
Susan Lane	staff - Kinnaird
Anne Wiser	
Chad Hinton	Intern
RH Westbrook	UTU
John Powell	GRNC
Kim Stibbard	NCLM
Greg McLeod	AG of NC
Lorin Freeman	AG of NC
Jeff Rau	GRNC
Roger Eckerod	GRNC
LORIN MUELLER	NC COALITION of POLICE
BRUCE THOMSON	PARKER POE
Audrey Galloway	Strategic Influences
Tom BEATTIE	GRNC
[illegible]	GRNC
Joe McClees & Demi McClees	McClees Consulting, Inc.
C L Tyler	GRNC
Charles R Stroud	GRNC
JOE McCLEES	NRA + NC Gun Dealers

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, March 18, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **33** Concealed Handgun Reciprocity.

Draft Number:	PCS 75113
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 1

Committee Clerk Comments:

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **JUDICIARY II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	March 18, 2003	10:00 AM	1124

The following will be considered:

	BILL NO.	SHORT TITLE	SPONSOR
•	SB 230	Revised UCC Article on Bulk Transfers	Sen. Hartsell
•	SB 275	Securities Transfer on Death	Sen. Hartsell

Senator HARTSELL, Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
March, 18, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. **Welcome and Opening Remarks**

II. **Bills to be Considered:**
- **SB 230 Revised UCC Article on Bulk Transfers Sen. Hartsell**
- **SB 275 Securities Transfer on Death**

III. **Other Business**

IV. **Adjournment**

SENATE JUDICIARY II COMMITTEE

Minutes

March 18, 2003

The Senate Judiciary II Committee was called to order on March 18, 2003, by Senator Fletcher L. Hartsell, Chairman, with thirteen members present.

Senator Hartsell invited Senator Austin Allran, Vice Chair, to preside during discussion of Senate Bill 230 by Senator Hartsell, bill sponsor.

SB 230 (Revised UCC Article on Bulk Transfers) Senator Allran recognized Senator Hartsell to speak on the bill and also noted there would be a guest speaker.

Senator Hartsell recommended the adoption of a technical amendment. Members voted yes, and the motion carried. Senator Hartsell spoke on the bill and explained the proposed changes. Senator Allran recognized Mrs. Bray, former Chair of the General Statutes Commission and invited her give further explanation of the bill. Mrs. Bray, Senator Hartsell, Kory Goldsmith, staff attorney, Bly Hall and Floyd Lewis, of the Office of the Attorney General, responded to questions from Senators Bingham, Kinnaird, Webster, Shubert, Dorsett and Allran.

The meeting adjourned with no action taken on the bill.

Senator Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 230*

Short Title:	Revise UCC Article on Bulk Transfers.	(Public)
Sponsors:	Senators Hartsell; and Clodfelter.	
Referred to:	Judiciary II.	

February 26, 2003

A BILL TO BE ENTITLED

AN ACT TO ENACT REVISED ARTICLE 6 OF THE UNIFORM COMMERCIAL CODE, BULK SALES, AND CONFORMING AMENDMENTS TO OTHER ARTICLES OF THE UNIFORM COMMERCIAL CODE, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

PART I. REVISED ARTICLE 6 OF THE UNIFORM COMMERCIAL CODE.

SECTION 1. Article 6 of Chapter 25 of the General Statutes is rewritten to read:

"Article 6.

"Bulk Sales.

"**§ 25-6-101. Short title.**

This Article shall be known and may be cited as Uniform Commercial Code–Bulk Sales.

"**§ 25-6-102. Definitions and index of definitions.**

(a) In this Article:

(1) 'Assets' means the inventory that is the subject of a bulk sale and any tangible and intangible personal property used or held for use primarily in, or arising from, the seller's business and sold in connection with that inventory, but the term does not include:

a. Fixtures (G.S. 25-9-102(a)(41)) other than readily removable factory and office machines;

b. The lessee's interest in a lease of real property; or

c. Property to the extent it is generally exempt from creditor process under nonbankruptcy law.

(2) 'Auctioneer' means a person whom the seller engages to direct, conduct, control, or be responsible for a sale by auction.

(3) 'Bulk sale' means:
a. In the case of a sale by auction or a sale or series of sales conducted by a liquidator on the seller's behalf, a sale or series of sales not in the ordinary course of the seller's business of more than half of the seller's inventory, as measured by value on the date of the bulk-sale agreement, if on that date the auctioneer or liquidator has notice, or after reasonable inquiry would have had notice, that the seller will not continue to operate the same or a similar kind of business after the sale or series of sales; and
b. In all other cases, a sale not in the ordinary course of the seller's business of more than half the seller's inventory, as measured by value on the date of the bulk-sale agreement, if on that date the buyer has notice, or after reasonable inquiry would have had notice, that the seller will not continue to operate the same or a similar kind of business after the sale.

(4) 'Claim' means a right to payment from the seller, whether or not the right is reduced to judgment, liquidated, fixed, matured, disputed, secured, legal, or equitable. The term includes costs of collection and attorneys' fees only to the extent that the laws of this State permit the holder of the claim to recover them in an action against the obligor.

(5) 'Claimant' means a person holding a claim incurred in the seller's business other than:
a. An unsecured and unmatured claim for employment compensation and benefits, including commissions and vacation, severance, and sick-leave pay;
b. A claim for injury to an individual or to property, or for breach of warranty, unless:
1. A right of action for the claim has accrued;
2. The claim has been asserted against the seller; and
3. The seller knows the identity of the person asserting the claim and the basis upon which the person has asserted it; and
c. A claim for taxes owing to a governmental unit.

(6) 'Creditor' means a claimant or other person holding a claim.

(7) 'Date of the bulk sale' means (i) if the sale is by auction or is conducted by a liquidator on the seller's behalf, the date on which more than ten percent (10%) of the net proceeds is paid to or for the benefit of the seller and (ii) in all other cases, the later of the date on which more than ten percent (10%) of the net contract price is paid to or for the benefit of the seller or the date on which more than ten percent (10%) of the assets, as measured by value, are transferred to the buyer. For purposes of this subdivision:

a. Delivery of a negotiable instrument (G.S. 25-3-104(a)) to or for the benefit of the seller in exchange for assets constitutes payment of the contract price pro tanto;

b. To the extent that the contract price is deposited in an escrow, the contract price is paid to or for the benefit of the seller when the seller acquires the unconditional right to receive the deposit or when the deposit is delivered to the seller or for the benefit of the seller, whichever is earlier; and

c. An asset is transferred when a person holding an unsecured claim can no longer obtain through judicial proceedings rights to the asset that are superior to those of the buyer arising as a result of the bulk sale. A person holding an unsecured claim can obtain those superior rights to a tangible asset at least until the buyer has an unconditional right, under the bulk-sale agreement, to possess the asset, and a person holding an unsecured claim can obtain those superior rights to an intangible asset at least until the buyer has an unconditional right, under the bulk-sale agreement, to use the asset.

(8) 'Date of the bulk-sale agreement' means:

a. In the case of a sale by auction or conducted by a liquidator (subdivision (a)(3)a. of this section), the date on which the seller engages the auctioneer or liquidator; and

b. In all other cases, the date on which a bulk-sale agreement becomes enforceable between the buyer and the seller.

(9) 'Debt' means liability on a claim.

(10) 'Liquidator' means a person who is regularly engaged in the business of disposing of assets for businesses contemplating liquidation or dissolution.

(11) 'Net contract price' means the new consideration the buyer is obligated to pay for the assets less:

a. The amount of any proceeds of the sale of an asset, to the extent the proceeds are applied in partial or total satisfaction of a debt secured by the asset; and

b. The amount of any debt to the extent it is secured by a security interest or lien that is enforceable against the asset before and after it has been sold to a buyer. If a debt is secured by an asset and other property of the seller, the amount of the debt secured by a security interest or lien that is enforceable against the asset is determined by multiplying the debt by a fraction, the numerator of which is the value of the new consideration for the asset on the date of the bulk sale and the denominator of which is the value of all property securing the debt on the date of the bulk sale.

(12) 'Net proceeds' means the new consideration received for assets sold at a sale by auction or a sale conducted by a liquidator on the seller's behalf less:
a. Commissions and reasonable expenses of the sale;
b. The amount of any proceeds of the sale of an asset, to the extent the proceeds are applied in partial or total satisfaction of a debt secured by the asset; and
c. The amount of any debt to the extent it is secured by a security interest or lien that is enforceable against the asset before and after it has been sold to a buyer. If a debt is secured by an asset and other property of the seller, the amount of the debt secured by a security interest or lien that is enforceable against the asset is determined by multiplying the debt by a fraction, the numerator of which is the value of the new consideration for the asset on the date of the bulk sale and the denominator of which is the value of all property securing the debt on the date of the bulk sale.

(13) A sale is 'in the ordinary course of the seller's business' if the sale comports with usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices.

(14) 'United States' includes its territories and possessions and the Commonwealth of Puerto Rico.

(15) 'Value' means fair market value.

(16) 'Verified' means signed and sworn to or affirmed.

(b) The following definitions in other Articles of this Chapter apply to this Article:

'Buyer'	G.S. 25-2-103(l)(a).
'Equipment'	G.S. 25-9-102(a)(33).
'Inventory'	G.S. 25-9-102(a)(48).
'Sale'	G.S. 25-2-106(l).
'Seller'	G.S. 25-2-103(l)(d).

(c) In addition, Article 1 of this Chapter contains general definitions and principles of construction and interpretation applicable throughout this Article.

"**§ 25-6-103. Applicability of Article.**

(a) Except as otherwise provided in subsection (c) of this section, this Article applies to a bulk sale if:

(1) The seller's principal business is the sale of inventory from stock; and

(2) On the date of the bulk-sale agreement, the seller is located in this State.

(b) A seller is deemed to be located at the seller's place of business. If a seller has more than one place of business, the seller is deemed located at the seller's chief executive office.

(c) This Article does not apply to:

(1) A transfer made to secure payment or performance of an obligation;
(2) A transfer of collateral to a secured party pursuant to G.S. 25-9-609;
(3) A disposition of collateral pursuant to G.S. 25-9-610;
(4) Retention of collateral pursuant to G.S. 25-9-620;
(5) A sale of an asset encumbered by a security interest or lien if (i) all the proceeds of the sale are applied in partial or total satisfaction of the debt secured by the security interest or lien or (ii) the security interest or lien is enforceable against the asset after it has been sold to the buyer and the net contract price is zero;
(6) A general assignment for the benefit of creditors or to a subsequent transfer by the assignee;
(7) A sale by an executor, administrator, receiver, trustee in bankruptcy, or any public officer under judicial process;
(8) A sale made in the course of judicial or administrative proceedings for the dissolution or reorganization of an organization;
(9) A sale to a buyer whose principal place of business is in the United States and who:
a. Not earlier than 21 days before the date of the bulk sale, (i) obtains from the seller a verified and dated list of claimants of whom the seller has notice three days before the seller sends or delivers the list to the buyer or (ii) conducts a reasonable inquiry to discover the claimants;
b. Assumes in full the debts owed to claimants of whom the buyer has knowledge on the date the buyer receives the list of claimants from the seller or on the date the buyer completes the reasonable inquiry, as the case may be;
c. Is not insolvent after the assumption; and
d. Gives written notice of the assumption not later than 30 days after the date of the bulk sale by sending or delivering a notice to the claimants identified in sub-subdivision (c)(9)b. of this section;
(10) A sale to a buyer whose principal place of business is in the United States and who:
a. Assumes in full the debts that were incurred in the seller's business before the date of the bulk sale;
b. Is not insolvent after the assumption; and
c. Gives written notice of the assumption not later than 30 days after the date of the bulk sale by sending or delivering a notice to each creditor whose debt is assumed;
(11) A sale to a new organization that is organized to take over and continue the business of the seller and that has its principal place of business in the United States if:
a. The buyer assumes in full the debts that were incurred in the seller's business before the date of the bulk sale;

b. The seller receives nothing from the sale except an interest in the new organization that is subordinate to the claims against the organization arising from the assumption; and

c. The buyer gives written notice of the assumption not later than 30 days after the date of the bulk sale by sending or delivering a notice to each creditor whose debt is assumed;

(12) A sale of assets having:

a. A value, net of liens and security interests, of less than ten thousand dollars ($10,000). If a debt is secured by assets and other property of the seller, the net value of the assets is determined by subtracting from their value an amount equal to the product of the debt multiplied by a fraction, the numerator of which is the value of the assets on the date of the bulk sale and the denominator of which is the value of all property securing the debt on the date of the bulk sale; or

b. A value of more than twenty-five million dollars ($25,000,000) on the date of the bulk-sale agreement; or

(13) A sale required by, and made pursuant to, statute.

(d) The notice under sub-subdivision (c)(9)d. of this section must state: (i) that a sale that may constitute a bulk sale has been or will be made; (ii) the date or prospective date of the bulk sale; (iii) the individual or entity names and the addresses of the seller and buyer; (iv) the address to which inquiries about the sale may be made, if different from the seller's address; and (v) that the buyer has assumed or will assume in full the debts owed to claimants of whom the buyer has knowledge on the date the buyer receives the list of claimants from the seller or completes a reasonable inquiry to discover the claimants.

(e) The notice under sub-subdivisions (c)(10)c. and (c)(11)c. of this section must state: (i) that a sale that may constitute a bulk sale has been or will be made; (ii) the date or prospective date of the bulk sale; (iii) the individual or entity names and the addresses of the seller and buyer; (iv) the address to which inquiries about the sale may be made, if different from the seller's address; and (v) that the buyer has assumed or will assume the debts that were incurred in the seller's business before the date of the bulk sale.

(f) For purposes of subdivision (c)(12) of this section, the value of assets is presumed to be equal to the price the buyer agrees to pay for the assets. However, in a sale by auction or a sale conducted by a liquidator on the seller's behalf, the value of assets is presumed to be the amount the auctioneer or liquidator reasonably estimates the assets will bring at auction or upon liquidation.

"**§ 25-6-104. Obligations of buyer.**

In a bulk sale as defined in G.S. 25-6-102(a)(3)b. the buyer shall:

(1) Obtain from the seller a list of all business names and addresses used by the seller within three years before the date the list is sent or delivered to the buyer;

(2) Obtain from the seller a verified and dated list of claimants of whom the seller has notice three days before the seller sends or delivers the list to the buyer and including, to the extent known by the seller, the address of and the amount claimed by each claimant;

(3) Obtain from the seller or prepare a schedule of distribution (G.S. 25-6-106(a));

(4) Give notice of the bulk sale in accordance with G.S. 25-6-105;

(5) Unless excused under G.S. 25-6-106(d), distribute the net contract price in accordance with the undertakings of the buyer in the schedule of distribution; and

(6) Make available the list of claimants (subdivision (2) of this section) by:

a. Promptly sending or delivering a copy of the list without charge to any claimant whose written request is received by the buyer no later than six months after the date of the bulk sale; or

b. Permitting any claimant to inspect and copy the list at any reasonable hour upon request received by the buyer no later than six months after the date of the bulk sale.

"**§ 25-6-105. Notice to claimants.**

(a) To comply with G.S. 25-6-104(4), the buyer shall send or deliver written notice of the bulk sale to each claimant on the list of claimants (G.S. 25-6-104(2)) and to any other claimant of whom the buyer has knowledge at the time the notice of the bulk sale is sent or delivered.

(b) The written notice of the bulk sale must be accompanied by a copy of the schedule of distribution (G.S. 25-6-106(a)) and state at least:

(1) That the seller and buyer have entered into an agreement for a sale that may constitute a bulk sale under the laws of the State of North Carolina;

(2) The date of the agreement;

(3) The date on or after which more than ten percent (10%) of the assets were or will be transferred;

(4) The date on or after which more than ten percent (10%) of the net contract price was or will be paid, if the date is not stated in the schedule of distribution;

(5) The name and a mailing address of the seller;

(6) Any other business name and address listed by the seller pursuant to G.S. 25-6-104(1);

(7) The name of the buyer and an address of the buyer from which information concerning the sale can be obtained;

(8) A statement indicating the type of assets or describing the assets item by item;

(9) The manner in which the buyer will make available the list of claimants (G.S. 25-6-104(6)); and

(10) If the sale is in total or partial satisfaction of an antecedent debt owed by the seller, the amount of the debt to be satisfied and the name of the person to whom it is owed.

(c) For purposes of subdivisions (b)(5) and (b)(7) of this section, the name of a person is the person's individual or entity name.

(d) The buyer shall give notice of the bulk sale not less than 15 days before the date of the bulk sale and not more than 10 days after obtaining the list of claimants.

(e) A written notice substantially complying with the requirements of subsection (b) of this section is effective even though it contains minor errors that are not seriously misleading.

(f) A form substantially as follows is sufficient to comply with subsection (b) of this section:

"Notice of Sale

(1) _____, whose address is _____, is described in this notice as the "seller."

(2) _____, whose address is _____, is described in this notice as the "buyer."

(3) The seller has disclosed to the buyer that within the past three years the seller has used other business names, operated at other addresses, or both, as follows: _____.

(4) The seller and the buyer have entered into an agreement dated _____, for a sale that may constitute a bulk sale under the laws of the State of North Carolina.

(5) The date on or after which more than ten percent (10%) of the assets that are the subject of the sale were or will be transferred is _____, and [if not stated in the schedule of distribution] the date on or after which more than ten percent (10%) of the net contract price was or will be paid is _____.

(6) The following assets are the subject of the sale: _____.

(7) The buyer will make available to claimants of the seller a list of the seller's claimants in the following manner: _____.

(8) [If applicable] The sale is to satisfy $ _____ of an antecedent debt owed by the seller to _____.

(9) A copy of the schedule of distribution of the net contract price accompanies this notice."

"**§ 25-6-106. Schedule of distribution.**

(a) The seller and buyer shall agree on how the net contract price is to be distributed and set forth their agreement in a written schedule of distribution.

(b) The schedule of distribution may provide for distribution to any person at any time, including distribution of the entire net contract price to the seller.

(c) The buyer's undertakings in the schedule of distribution run only to the seller. A buyer who fails to distribute the net contract price in accordance with the buyer's

undertakings in the schedule of distribution is liable to a creditor only as provided in G.S. 25-6-107(a).

(d) If the buyer undertakes in the schedule of distribution to distribute any part of the net contract price to a person other than the seller, and, after the buyer has given notice in accordance with G.S. 25-6-105, some or all of the anticipated net contract price is or becomes unavailable for distribution as a consequence of the buyer's or seller's having complied with an order of court, legal process, statute, or rule of law, the buyer is excused from any obligation arising under this Article or under any contract with the seller to distribute the net contract price in accordance with the buyer's undertakings in the schedule if the buyer:

(1) Distributes the net contract price remaining available in accordance with any priorities for payment stated in the schedule of distribution and, to the extent that the price is insufficient to pay all the debts having a given priority, distributes the price pro rata among those debts shown in the schedule as having the same priority;

(2) Distributes the net contract price remaining available in accordance with an order of court;

(3) Commences an interpleader action in a court of competent jurisdiction against all persons who would otherwise be entitled to a distribution under the schedule and is discharged from the action; or

(4) Reaches a new agreement with the seller for the distribution of the net contract price remaining available, sets forth the new agreement in an amended schedule of distribution, gives notice of the amended schedule, and distributes the net contract price remaining available in accordance with the buyer's undertakings in the amended schedule.

(e) The notice under subdivision (d)(4) of this section must identify the buyer and the seller, set forth the amended schedule, and be given in accordance with G.S. 25-6-105(a) at least 10 days before the buyer distributes any part of the net contract price remaining available.

(f) If the seller undertakes in the schedule of distribution to distribute any part of the net contract price, and, after the buyer has given notice in accordance with G.S. 25-6-105, some or all of the anticipated net contract price is or becomes unavailable for distribution as a consequence of the buyer's or seller's having complied with an order of court, legal process, statute, or rule of law, the seller and any person in control of the seller are excused from any obligation arising under this Article or under any agreement with the buyer to distribute the net contract price in accordance with the seller's undertakings in the schedule if the seller:

(1) Distributes the net contract price remaining available in accordance with any priorities for payment stated in the schedule of distribution and, to the extent that the price is insufficient to pay all the debts having a given priority, distributes the price pro rata among those debts shown in the schedule as having the same priority;

(2) Distributes the net contract price remaining available in accordance with an order of court;

(3) Commences an interpleader action in a court of competent jurisdiction against all persons who would otherwise be entitled to a distribution under the schedule and is discharged from the action; or

(4) Prepares a written amended schedule of distribution of the net contract price remaining available for distribution, gives notice of the amended schedule, and distributes the net contract price remaining available in accordance with the amended schedule.

(g) The notice under subdivision (f)((4) of this section must identify the buyer and the seller, set forth the amended schedule, and be given in accordance with G.S. 25-6-105(a) at least 10 days before the seller distributes any part of the net contract price remaining available.

"**§ 25-6-107. Liability for noncompliance.**

(a) Except as provided in subsection (c) of this section, and subject to the limitation in subsection (d) of this section:

(1) A buyer who fails to comply with the requirements of G.S. 25-6-104(5) with respect to a creditor is liable to the creditor for damages in the amount of the claim, reduced by any amount that the creditor would not have realized if the buyer had complied; and

(2) A buyer who fails to comply with the requirements of any other subdivision of G.S. 25-6-104 with respect to a claimant is liable to the claimant for damages in the amount of the claim, reduced by any amount that the claimant would not have realized if the buyer had complied.

(b) In an action under subsection (a) of this section, the creditor has the burden of establishing the validity and amount of the claim, and the buyer has the burden of establishing the amount that the creditor would not have realized if the buyer had complied.

(c) A buyer is not liable to creditors for failure to comply with the requirements of G.S. 25-6-104 if the buyer:

(1) Made a good faith and commercially reasonable effort to comply with the requirements of G.S. 25-6-104 or to exclude the sale from the application of this Article under G.S. 25-6-103(c); or

(2) On or after the date of the bulk-sale agreement, but before the date of the bulk sale, held a good faith and commercially reasonable belief that this Article does not apply to the particular sale.

The buyer has the burden of establishing the good faith and commercial reasonableness of the effort or belief under this subsection.

(d) In a single bulk sale the cumulative liability of the buyer for failure to comply with the requirements of G.S. 25-6-104 shall not exceed an amount equal to:

(1) If the assets consist only of inventory and equipment, the net contract price; or

(2) If the assets include property other than inventory and equipment, the net value of the inventory and equipment.

(e) For the purposes of subdivision (d)(2) of this section, the 'net value' of an asset is the value of the asset less (i) the amount of any proceeds of the sale of an asset, to the extent the proceeds are applied in partial or total satisfaction of a debt secured by the asset and (ii) the amount of any debt to the extent it is secured by a security interest or lien that is enforceable against the asset before and after it has been sold to a buyer. If a debt is secured by an asset and other property of the seller, the amount of the debt secured by a security interest or lien that is enforceable against the asset is determined by multiplying the debt by a fraction, the numerator of which is the value of the asset on the date of the bulk sale and the denominator of which is the value of all property securing the debt on the date of the bulk sale. The portion of a part of the net contract price paid to or applied for the benefit of the seller or a creditor that is 'allocable to the inventory and equipment' is the portion that bears the same ratio to that part of the net contract price as the net value of the inventory and equipment bears to the net value of all of the assets.

(f) A payment made by the buyer to a person to whom the buyer is, or believes the buyer is, liable under subsection (a) of this section reduces pro tanto the buyer's cumulative liability under subsection (d) of this section.

(g) No action shall be brought under subdivision (a)(2) of this section by or on behalf of a claimant whose claim is unliquidated or contingent.

(h) A buyer's failure to comply with the requirements of G.S. 25-6-104 does not (i) impair the buyer's rights in or title to the assets, (ii) render the sale ineffective, void, or voidable, (iii) entitle a creditor to more than a single satisfaction of the creditor's claim, or (iv) create liability other than as provided in this Article.

(i) Payment of the buyer's liability under subsection (a) of this section discharges pro tanto the seller's debt to the creditor.

(j) Unless otherwise agreed, a buyer has an immediate right of reimbursement from the seller for any amount paid to a creditor in partial or total satisfaction of the buyer's liability under subsection (a) of this section.

(k) If the seller is an organization, a person who is in direct or indirect control of the seller, and who knowingly, intentionally, and without legal justification fails, or causes the seller to fail, to distribute the net contract price in accordance with the schedule of distribution is liable to any creditor to whom the seller undertook to make payment under the schedule for damages caused by the failure.

"**§ 25-6-108. Bulk sales by auction, bulk sales conducted by liquidator.**

(a) G.S. 25-6-104, 25-6-105, 25-6-106, and 25-6-107 apply to a bulk sale by auction and a bulk sale conducted by a liquidator on the seller's behalf with the following modifications:

(1) 'Buyer' refers to auctioneer or liquidator, as the case may be;

(2) 'Net contract price' refers to net proceeds of the auction or net proceeds of the sale, as the case may be;

(3) The written notice required under G.S. 25-6-105(b) must be accompanied by a copy of the schedule of distribution (G.S. 25-6-106(a)) and state at least:

a. That the seller and the auctioneer or liquidator have entered into an agreement for auction or liquidation services that may constitute an agreement to make a bulk sale under the laws of the State of North Carolina;
b. The date of the agreement;
c. The date on or after which the auction began or will begin or the date on or after which the liquidator began or will begin to sell assets on the seller's behalf;
d. The date on or after which more than ten percent (10%) of the net proceeds of the sale were or will be paid, if the date is not stated in the schedule of distribution;
e. The name and a mailing address of the seller;
f. Any other business name and address listed by the seller pursuant to G.S. 25-6-104(l);
g. The name of the auctioneer or liquidator and an address of the auctioneer or liquidator from which information concerning the sale can be obtained;
h. A statement indicating the type of assets or describing the assets item by item;
i. The manner in which the auctioneer or liquidator will make available the list of claimants (G.S. 25-6-104(6)); and
j. If the sale is in total or partial satisfaction of an antecedent debt owed by the seller, the amount of the debt to be satisfied and the name of the person to whom it is owed; and

(4) In a single bulk sale the cumulative liability of the auctioneer or liquidator for failure to comply with the requirements of this section shall not exceed the amount of the net proceeds of the sale allocable to inventory and equipment sold.

(b) A payment made by the auctioneer or liquidator to a person to whom the auctioneer or liquidator is, or believes the auctioneer or liquidator is, liable under this section reduces pro tanto the auctioneer's or liquidator's cumulative liability under subdivision (a)(4) of this section.

(c) A form substantially as follows is sufficient to comply with subdivision (a)(3) of this section:

"Notice of Sale

(1) _____, whose address is _____, is described in this notice as the "seller."

(2) _____, whose address is _____, is described in this notice as the "auctioneer" or "liquidator."

(3) The seller has disclosed to the auctioneer or liquidator that within the past three years the seller has used other business names, operated at other addresses, or both, as follows: _____.

(4) The seller and the auctioneer or liquidator have entered into an agreement dated _____ for auction or liquidation services that

may constitute an agreement to make a bulk sale under the laws of the State of North Carolina.

(5) The date on or after which the auction began or will begin or the date on or after which the liquidator began or will begin to sell assets on the seller's behalf is _____, and [if not stated in the schedule of distribution] the date on or after which more than ten percent (10%) of the net proceeds of the sale were or will be paid is _____.

(6) The following assets are the subject of the sale: _____.

(7) The auctioneer or liquidator will make available to claimants of the seller a list of the seller's claimants in the following manner: _____.

(8) [If applicable] The sale is to satisfy $ _____ of an antecedent debt owed by the seller to _____.

(9) A copy of the schedule of distribution of the net proceeds accompanies this notice."

(d) A person who buys at a bulk sale by auction or conducted by a liquidator need not comply with requirements of G.S. 25-6-104 and is not liable for the failure of an auctioneer or liquidator to comply with the requirements of this section.

"**§ 25-6-109. Reserved for future codification purposes.**

"**§ 25-6-110. Limitation of actions.**

(a) Except as provided in subsection (b) of this section, an action under this Article against a buyer, auctioneer, or liquidator must be commenced within one year after the date of the bulk sale.

(b) If the buyer, auctioneer, or liquidator conceals the fact that the sale has occurred, the limitation is tolled and an action under this Article may be commenced within the earlier of (i) one year after the person bringing the action discovers that the sale has occurred or (ii) one year after the person bringing the action should have discovered that the sale has occurred, but no later than two years after the date of the bulk sale. Complete noncompliance with the requirements of this Article does not of itself constitute concealment.

(c) An action under G.S. 25-6-107(k) must be commenced within one year after the alleged violation occurs."

PART II. CONFORMING AMENDMENTS TO OTHER ARTICLES OF THE UNIFORM COMMERCIAL CODE.

SECTION 2. G.S. 25-1-105(2) reads as rewritten:

"(2) Where one of the following provisions of this Chapter specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. (G.S. 25-2-402).

Applicability of the article on bank deposits and collections. (G.S. 25-4-102).

Governing law in the article on Funds Transfers. (G.S. 25-4A-507).

Letters of Credit. (G.S. 25-5-116).

Bulk ~~transfers~~ sales subject to the article on bulk ~~transfers. (G.S. 25-6-102).~~ sales. (G.S. 25-6-103).

Applicability of the article on investment securities. (G.S. 25-8-110).

Law governing perfection, the effect of perfection or nonperfection, and the priority of security interests and agricultural liens. (G.S. 25-9-301 through G.S. 25-9-307)."

SECTION 3. G. S. 25-2-403(4) reads as rewritten:

"(4) The rights of other purchasers of goods and of lien creditors are governed by the articles on secured transactions (article 9), bulk ~~transfers~~ sales (article 6) and documents of title (article 7)."

PART III. DIRECTION AND EFFECTIVE DATE.

SECTION 4. The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the official comments to the Uniform Commercial Code, Revised Article 6 and all explanatory comments of the drafters of this act as the Revisor deems appropriate.

SECTION 5. This act becomes effective January 1, 2004.

SENATE BILL 230:
Revise UCC Article on Bulk Transfers

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Hartsell
Date:	March 17, 2003	**Summary by:**	Drupti Chauhan
Version:	1st Edition		Committee Counsel

SUMMARY: ***Senate Bill 230 would replace the current Article 6(Bulk Transfers) of the Uniform Commercial Code (UCC) and would enact revised Article 6 (Bulk Sales) in its place as recommended by the Uniform Law Commissioners. This bill comes to the General Assembly as a recommendation of The General Statutes Commission.***

CURRENT LAW: Article 6 of Chapter 25 of the General Statutes regulates bulk transfers (that are not made in the ordinary course of the transferor's business) of a major part of the materials, supplies, merchandise or other inventory of the business. The purpose of the current Article 6 of the UCC is to provide protection for creditors of these businesses. Creditors of these businesses can be susceptible to a bulk transfer where the business owner may sell a large part of the inventory of the business to a any buyer for any price outside the ordinary course of business, pockets the proceeds and disappears without paying his creditors. The current Article 6 requires bulk sale buyers to provide notice to the seller's creditors of the impending bulk transfer and to maintain a list of the creditors along with a schedule of property obtained in the bulk transfer for six months after the sale takes place. This notice must be sent 10 days before paying for or taking possession of the goods, whichever comes first. If these procedures are not followed, the creditors can void the sale. Auctioneers must follow a similar procedure of notice and listing of creditors. Article 6 requires compliance even when there is no reason to believe that a fraudulent transfer is going to occur.

BILL ANALYSIS: This bill would enact revised Article 6 and makes the following major substantive changes to current Article 6.

- The revised article applies only to sales of inventory from stock and not to other transfers (§ 25-6-102(a)(3)).
- The revised article applies only when the buyer has notice, or after reasonable inquiry would have had notice, that the seller will not continue to operate the same or a similar kind of business after the sale (§ 25-6-102(a)(3)).
- The revised article does not apply to a sale in which the seller's equity is less than $10,000 or a sale having a value of more than $25,000,000 (§ 25-6-103(c)(12)).
- The notice period to the seller's creditors is increased from 10 days to 15 days (§ 25-6-105(d)), and the statute of limitations is extended from six months to one year (§ 25-6-110).
- The notice to creditors must include a copy of a schedule of distribution setting forth how the net contract price is to be distributed (§§ 25-6-105(b) and 25-6-106(a)).
- A buyer who makes a good faith effort to comply with the requirements of the revised article or to exclude the sale from the application of the article, or who acts on the good faith belief that the article does not apply to the sale, is not liable for noncompliance (§ 25-6-107(c)).

- A buyer's noncompliance no longer renders the sale ineffective but rather gives rise to a claim for damages, which are essentially capped at an amount no greater than the contract price (§ 25-6-107(a), (d), and (h)).
- The revised article applies to a bulk sale conducted by a liquidator on the seller's behalf, as well as to a bulk sale conducted by an auctioneer, by imposing upon liquidators and auctioneers duties and liabilities that are similar, but not always identical, to those of a buyer (§ 25-6-108).
- The revised article applies when the seller's place of business is located in this State, rather than when the goods are located in this State. Where the seller has more than one place of business, the seller is deemed to be located at the seller's chief executive office (§ 25-6-103(a) and (b)).
- The revised article imposes liability on a person in direct or indirect control of a seller that is an organization if that person knowingly, intentionally, and without legal justification fails or causes the seller to fail to distribute the net contract price in accordance with the schedule of distribution (§ 25-6-107(k)).

Revised Article 6 lessens the burden on the bulk sale buyer and provides definitions for terms such as "assets", "bulk sale", 'date of sale" etc. which the current Article 6 does not do. For example, "bulk sale" is defined as a "sale of more than half the seller's inventory" outside the ordinary course of business and under conditions in which the "buyer has notice...that the seller will not contribute to operate the same or a similar kind of business after the sale." The risk to creditors arises from sales in which the seller goes out of business so provisions of revised Article 6 apply specifically to those situations.

Sections 2 and 3 of the bill make conforming changes to references to Article 6 in other statutes.

Section 4 of the bill authorizes the Revisor of Statutes to include the official comments to the UCC Revised Article 6 and all explanatory comments of the drafters of the act as the Revisor deems appropriate.

EFFECTIVE DATE: This act becomes effective January 1, 2004.

BACKGROUND: Approximately 41 states have repealed Article 6 of the UCC and have not adopted the revised version. Four states and the District of Columbia have adopted revised Article 6. Because the business environment has changed since Article 6 was first promulgated, in 1988 the Uniform Law Commissioners encouraged those states that enacted Article 6 to repeal it. The arguments set forth are that creditors are able to make more informed decisions about extending credit through technology and credit reporting services. Creditors have better opportunities to collect their debts through revised jurisdiction laws that allow creditors to bring actions against debtors that flee to other states. Article 9 of the UCC, Secured Transactions, provides creditors other avenues to retain security interests in their inventory. If the bulk transfer is a fraud and the buyer is party to the fraud, then the creditor may have remedies under the Uniform Fraudulent Transfer Act, G.S. 39-23.1 et. seq. Many have also described the original Article 6 as a practice trap for the unwary because it creates an exception to normal commercial rules where good faith purchasers are protected against claims by a seller's creditors, rather than having to give the notice as they do in Article 6.

The General Statutes Commission supports the repeal of Article 6. However, bills to repeal it failed to be enacted in the 1997, 1999, and 2001 sessions of the North Carolina General Assembly, and the GSC believes that enactment of Revised Article 6 is a better alternative to retaining existing Article 6. Therefore, the GSC recommends the above-referenced bill for enactment in North Carolina.

STATE OF NORTH CAROLINA
GENERAL STATUTES COMMISSION
POST OFFICE BOX 629
RALEIGH, NORTH CAROLINA 27602
(919) 716-6800

MEMORANDUM

TO: Senate Judiciary II Committee

FROM: General Statutes Commission

DATE: March 17, 2003

RE: Senate Bill 230 (Revise UCC Article on Bulk Transfers)

General Comments

This bill replaces Article 6 of Chapter 25 of the General Statutes with a revised article.

Chapter 25 contains North Carolina's version of the Uniform Commercial Code (UCC). Article 6 regulates bulk transfers, i.e. any transfer in bulk and not in the ordinary course of the transferor's business of a major part of the materials, supplies, merchandise or other inventory of an enterprise. The Article makes a bulk transfer ineffective against any creditor of the transferor unless the buyer gives a 10-day advance notice of the transfer to these creditors and keeps a list of the creditors and a schedule of property obtained in the bulk transfer for six months after the bulk transfer takes place.

The National Conference of Commissioners on Uniform State Laws and the American Law Institute are in the process of revising the entire UCC. When they revisited Article 6, they concluded that it has become obsolete and that changes in the business and legal contexts in which sales are conducted have made regulation of bulk sales unnecessary. Both bodies withdrew their support for the Article and encourage states to repeal it. At the same time, however, for those states that wish to continue to regulate bulk sales, the Conference and the Institute promulgated Revised Article 6 (Bulk Sales) as an alternative. To date, 41 states have repealed Article 6 outright, and four states (Arizona, California, Indiana, and Virginia) and the District of Columbia have enacted Revised Article 6. Only five states (Georgia, Maryland, Missouri, North Carolina, and Wisconsin) retain the original Article 6 or a version of it.

The General Statutes Commission (GSC) fully agrees with the Conference and the Institute that Article 6 should be repealed. However, bills to repeal it failed to be enacted in the 1997, 1999, and 2001 sessions of the North Carolina General Assembly, and the GSC believes that enactment of Revised Article 6 is a better alternative than retaining existing Article 6. Therefore, the GSC recommends the above-referenced bill for enactment in North Carolina.

The bill consists of three parts: Part I is based on Revised Article 6, Part II makes conforming amendments to other articles of Chapter 25, and Part III authorizes the printing of official and drafters' comments and provides an effective date of January 1, 2004.

Changes from Current Law

The bill makes the following major substantive changes to current Article 6:

- The revised article applies only to sales of inventory from stock and not to other transfers (§ 25-6-102(a)(3)).

- The revised article applies only when the buyer has notice, or after reasonable inquiry would have had notice, that the seller will not continue to operate the same or a similar kind of business after the sale (§ 25-6-102(a)(3)).

- The revised article does not apply to a sale in which the seller's equity is less than $10,000 or a sale having a value of more than $25,000,000 (§ 25-6-103(c)(12)).

- The notice period to the seller's creditors is increased from 10 days to 15 days (§ 25-6-105(d)), and the statute of limitations is extended from six months to one year (§ 25-6-110).

- The notice to creditors must include a copy of a schedule of distribution setting forth how the net contract price is to be distributed (§§ 25-6-105(b) and 25-6-106(a)).

- A buyer who makes a good faith effort to comply with the requirements of the revised article or to exclude the sale from the application of the article, or who acts on the good faith belief that the article does not apply to the sale, is not liable for noncompliance (§ 25-6-107(c)).

- A buyer's noncompliance no longer renders the sale ineffective but rather gives rise to a claim for damages, which are essentially capped at an amount no greater than the contract price (§ 25-6-107(a), (d), and (h)).

- The revised article applies to a bulk sale conducted by a liquidator on the seller's behalf, as well as to a bulk sale conducted by an auctioneer, by imposing upon

liquidators and auctioneers duties and liabilities that are similar, but not always identical, to those of a buyer (§ 25-6-108).

- The revised article applies when the seller's place of business is located in this State, rather than when the goods are located in this State. Where the seller has more than one place of business, the seller is deemed to be located at the seller's chief executive office (§ 25-6-103(a) and (b)).

- The revised article imposes liability on a person in direct or indirect control of a seller that is an organization if that person knowingly, intentionally, and without legal justification fails or causes the seller to fail to distribute the net contract price in accordance with the schedule of distribution (§ 25-6-107(k)).

Differences Between this Bill and the Revised Uniform Act

The GSC made the following major changes to the Uniform text of Revised Article 6 in preparing this bill:

- The GSC eliminated Revised Article 6's provison for public filing of bulk sale notices in a single filing office, such as the office of the Secretary of State, because the expense appeared to outweigh the benefits.

- Revised Article 6 requires the buyer to give creditors notice of the bulk sale not less than 45 days before the date of the bulk sale and not more than 30 days after obtaining the list of claimants. The GSC was of the opinion that this 45-day period was commercially unreasonable and reduced it to 15 days, which is still longer than the current 10-day period. It reduced the 30-day period to 10 days. Also, Revised Article 6's period for giving notice of an amended schedule of distribution (new agreement between the buyer and the seller on how the net contract price is to be distributed) has been reduced from 14 days to 10 days.

- Revised Article 6's applicability provisions permitting the article to apply to a foreign buyer in a foreign transaction have been omitted.

Specific Comments

§ 25-6-101. This section changes the short title of Article 6 from "Uniform Commercial Code–Bulk Transfers" to "Uniform Commercial Code–Bulk Sales" because Revised Article 6 applies only to sales and not to other transfers.

§ 25-6-102. This section defines key terms used in Revised Article 6. Some of the more notable terms are "assets," "bulk sale," "claim," "claimant," "date of the bulk sale," "date of the bulk-sale agreement," "net contract price," and "net proceeds."

The definition of "bulk sale" is more specific than the existing definition of "bulk transfer" in that a bulk sale is defined as a sale of more than half of the seller's inventory, as opposed to the current "major part" of materials, supplies, merchandise, or other inventory. The buyer must also know, or be able to know after reasonable inquiry, that the seller is not going to continue to operate the business or a similar business.

§ 25-6-103. This section provides that Revised Article 6 applies to a bulk sale if the seller's principal business is the sale of inventory from stock and the seller is located in this State on the date of the bulk-sale agreement. This section also lists transactions that are excluded from the scope of the Article. These now include a sale to a buyer who assumes specified debts of the seller and gives written notice of the assumption, a sale of assets having a value, net of liens and security interests, of either less than $10,000 or more than $25,000,000 on the date of the bulk-sale agreement, and a sale required by, and made pursuant to, statute. Section 25-6-103 also sets forth the required contents of a notice of assumption and certain presumptions as to the value of assets for purposes of determining whether a sale of assets having a value of either less than $10,000 or more than $25,000,000 is excluded.

§ 25-6-104. This section sets forth the buyer's obligations in a bulk sale conducted by the seller, e.g. obtaining from the seller a list of claimants, making the list available to claimants, obtaining from the seller or preparing a schedule of distribution, and giving notice of the bulk sale.

§ 25-6-105. This section sets requirements for notice to claimants and the contents of the notice, including a statutory form for the notice of sale. The buyer must give notice of the bulk sale by sending or delivering written notice of the bulk sale to each claimant on the list of claimants and to any other claimant of whom the buyer has knowledge at the time the notice is sent or delivered. The notice must be given not less than 15 days before the date of the bulk sale and not more than 10 days after obtaining the list of claimants and must be accompanied by a copy of the schedule of distribution.

§ 25-6-106. This section imposes on the buyer and seller the obligation to agree on how the net contract price is to be distributed and to set forth their agreement in a written schedule of distribution. This section also lists circumstances under which the buyer or seller is excused from complying with the buyer's or seller's undertakings in the schedule of distribution and also sets forth notice requirements for an amended schedule of distribution.

§ 25-6-107. This section sets forth the buyer's liability for noncompliance with the buyer's obligations in a bulk sale conducted by the seller. In a single bulk sale the buyer's maximum cumulative liability to the seller's creditors is an amount equal to the "net contract price" (defined in § 25-6-102(a)(11)) of the inventory and equipment. When the assets sold include property other than inventory and equipment, the maximum cumulative liability to the creditors is an amount equal to the "net value" (defined in § 25-6-107(e)) of the inventory and

equipment. The wording in the bill differs from the wording in the Uniform text, but the change is intended to be a clarifying change.

The buyer's failure to comply with the buyer's obligations does not (1) impair the buyer's rights in or title to the assets, (2) render the sale ineffective, void, or voidable, (3) entitle a creditor to more than a single satisfaction of the creditor's claim, or (4) create liability other than as provided in Revised Article 6. Section 25-6-107 also imposes liability on a person in direct or indirect control of a seller that is an organization if that person knowingly, intentionally, and without legal justification fails or causes the seller to fail to distribute the net contract price in accordance with the schedule of distribution.

§ 25-6-108. This section imposes upon auctioneers and liquidators obligations and liabilities that are similar, but not always identical, to those of a buyer. This section also sets forth notice requirements and a statutory form for the notice of sale.

§ 25-6-109. This section is shown as reserved for future codification purposes due to the omission of Revised Article 6's provision for public filing of bulk sale notices in a single filing office.

§ 25-6-110. This section provides that an action under Revised Article 6 must be commenced within one year after the date of the bulk sale. However, if the buyer, auctioneer, or liquidator conceals the fact that the bulk sale has occurred, an action may be commenced within one year after the bulk sale is discovered or should have been discovered, but no case later than two years after the date of the bulk sale.

REVISED ARTICLE 6 OF THE UCC

PURPOSE:
To provide states with the option of repealing or revising current Article 6 of the UCC.

ORIGIN:
Completed by the Uniform Law Commissioners, in conjunction with the American Law Institute, in 1989.

APPROVED BY:
American Bar Association

ADOPTIONS OF REVISED UCC6:
Arizona
California
District of Columbia
Indiana
Virginia

REPEALS OF UCC6:

Alabama	Maine	Oklahoma
Alaska	Massachusetts	Oregon
Arkansas	Michigan	Pennsylvania
Colorado	Minnesota	Puerto Rico
Connecticut	Mississippi	Rhode Island
Delaware	Montana	South Carolina
Florida	Nebraska	South Dakota
Hawaii	Nevada	Tennessee
Idaho	New Hampshire	Texas
Illinois	New Jersey	U.S. Virgin Islands
Iowa	New Mexico	Utah
Kansas	New York	Vermont
Kentucky	North Dakota	Washington
Lousiana	Ohio	West Virginia
		Wyoming

2003 INTRODUCTIONS TO REPEAL UCC6:

2003 INTRODUCTIONS TO REVISE UCC6:
North Carolina

For any further information regarding Article 6 of the Uniform Commercial Code, please contact John McCabe or Katie Robinson at 312-915-0195.

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — March 18, 2003
Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
STEVE ROBERTS	AARP
Amy Dobson	NC StateWatch.
Dick Carlton	Securities Ind. Assn.
Erin Culbreth	LBA
Richard C Hatch	AARP
Paul Stock	NC Bankers Assn.
Betty Turner	Bank of America
John McHugh	GOV OFFICE
Camille Steele	Kennedy Covington
Dina DiMaio	NC Bar Association
~~Sen~~. Virginia Hebert	Sen. Kinnaird

Gerry Johnson (Sen. Hartsell)

From: Gerry Johnson (Sen. Hartsell)
Sent: Tuesday, March 18, 2003 3:43 PM
Subject: SENATE JUDICIARY II COMMITTEE MEETING 03-20-03

Principal Clerk _____
Reading Clerk _____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **JUDICIARY II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	March 20, 2003	10:00 AM	1124

The following will be considered:

	BILL NO.	SHORT TITLE	SPONSOR
•	SB 230	Revise UCC Article on Bulk Transfers	Sen. Hartsell
•	SB 275	Securities Transfer on Death	Sen. Hartsell
•	SB 117	The Larry T. Justus Western Justice Academy	Sen. Apodaca

Senator HARTSELL, Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
March, 20, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. Welcome and Opening Remarks

II. Bills to be Considered

- **SB 230** **Revise UCC Article on Bulk Transfer** — **Sen. Hartsell**
- **SB 275** **Securities Transfer on Death** — **Sen. Hartsell**
- **SB 117** **The Larry T. Justus Western Justice Academy** — **Sen. Apodaca**

III. Other Business

IV. Adjournment

SENATE JUDICIARY II COMMITTEE

Minutes

March 20, 2003

The Senate Judiciary II Committee was called to order on March 20, 2003, by Senator Fletcher L. Hartsell, Chairman, with eleven members present.

SB 117 (The Larry T. Justus Western Justice Academy) was introduced by Senator Hartsell. He invited Senator Tom Apodaca, bill sponsor, to discuss the bill. Senators Shubert and Dorsett spoke on the bill. Senator Shubert moved for a favorable report and the motion passed.

SB 230 (Revised UCC Article on Bulk Transfers) Senator Hartsell invited Senator Thomas, Vice Chair, to preside while the discussion of Senate Bill 230, sponsored by Senator Hartsell, was continued from the March 18, 2003, meeting. Senator Hartsell answered question from Senators Kerr and Bingham. Senator Kinnaird moved for a favorable report as amended. Senator Thomas called for a vote to roll the motion into a committee substitute. The members voted yes, and the motion carried.

SB 275 (Securities Transfer on Death) Senator Thomas recognized Senator Hartsell to discuss Senate Bill 275. Senator Hartsell and Kory Goldsmith, staff attorney, answered questions from Senators Kinnaird, Allran, Shubert, Kerr and Bingham. Members of the audience were recognized to speak on the bill. Mr. Richard Hatch, of AARP, Lobbyists Dick Carlton of Securities Industries Association, Paul Stock of North Carolina Bankers Association and Michelle Frazier of the North Carolina Bar Association all spoke in favor of the bill.

No action was taken on the bill.

With no further business, the meeting was adjourned

Senator Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Monday, March 24, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B. **117** The Larry T. Justus Western Justice Academy.
Sequential Referral: None
Recommended Referral: None

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **230** Revise UCC Article on Bulk Transfers.
Draft Number: PCS75129
Sequential Referral: None
Recommended Referral: None
Long Title Amended: No

TOTAL REPORTED: 2

Committee Clerk Comments:

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 117*

Short Title:	The Larry T. Justus Western Justice Academy.	(Public)
Sponsors:	Senators Apodaca; Allran, Carpenter, Dalton, Forrester, Foxx, Garwood, Hargett, Horton, Metcalf, Rand, Smith, and Thomas.	
Referred to:	Judiciary II.	

February 20, 2003

A BILL TO BE ENTITLED

AN ACT TO NAME THE WESTERN JUSTICE ACADEMY IN HONOR OF REPRESENTATIVE LARRY T. JUSTUS.

The General Assembly of North Carolina enacts:

SECTION 1. The Western Justice Academy located at Edneyville in Henderson County is part of the North Carolina Department of Justice and provides training programs for criminal justice personnel and technical assistance to criminal justice agencies to aid them in the discharge of their responsibilities. The Western Justice Academy is hereby designated the Larry T. Justus Western Justice Academy in recognition of Representative Larry T. Justus' dedicated leadership in the North Carolina General Assembly on justice and public safety issues and his commitment to the safety and well-being of the citizens of this State.

SECTION 2. This act is effective when it becomes law.

SENATE BILL 117:
The Larry T. Justus Western Justice Academy

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Sen. Apodaca
Date:	March 19, 2003	**Summary by:**	Kory J. Goldsmith
Version:	1st Edition		Committee Counsel

SUMMARY: ***SB 117 would designate the Western Justice Academy the "Larry T. Justus Western Justice Academy".***

CURRENT LAW: Chapter 17D of the General Statutes governs the North Carolina Justice Academy, but does not designate names for either the eastern (Salemburg) or western (Edneyville) campuses. Session law refers to the Western Justice Academy.

BILL ANALYSIS: The bill would designate the Western Justice Academy as the Larry T. Justus Western Justice Academy. The designation would be made in recognition of Representative Larry T. Justus' dedicated leadership in the North Carolina General Assembly on justice and public safety issues and his commitment to the safety and well-being of the citizens of the State.

BACKGROUND: The North Carolina Justice Academy (Chapter 17D of the General Statutes) was created in 1973 as a division of the North Carolina Department of Justice. The academy's duties include providing training programs for criminal justice personnel, providing technical assistance to criminal justice agencies and developing, publishing and distributing educational and training materials. G.S. 17D-1(2) defines "Academy property" [redacted] as property owned or leased by the NC Department of Justice and located in Salemburg, or at any other location dedicated to the North Carolina Justice Academy.

In 1995 and 1996, the General Assembly appropriated funds to purchase and renovate property in Edneyville, Henderson County, North Carolina to create a western campus of the Justice Academy, known as the Western Justice Academy. Located on the former site of the Edneyville High School, the campus consists of about 23 acres including classrooms, office space, a gymnasium and a cafeteria. Future plans include an additional dormitory, firearms range and a driving track.

The act is effective when it becomes law.

S117-SMRC-001

AARP North Carolina

Testimony of Richard C. Hatch supporting S-275
Securities Transfer on Death

My name is Richard C. Hatch. I reside in Cary, and, as an unpaid volunteer, I am Chair of AARP's North Carolina Capital City Advocacy Team. In that capacity I act as an advocate on legislative issues in the North Carolina General Assembly on behalf of AARP's over 930 thousand members in our state.

AARP supports Senate Bill 275, titled " Securities Transfer on Death", because it should simplify, expedite and reduce the cost of probate. The bill provides for transfer-on-death (TOD) of investment securities, such as stocks, bonds, mutual fund shares, security accounts, and the like. The bill enables such securities to be transferred on death to named beneficiaries without going through probate.

The transfers provided for in S-275 are like pay-on-death bank savings and checking accounts, which the General Assembly authorized some years ago.

S-275 is very close to the provisions of Article VI of the Uniform Probate Code, including the model Transfer on Death Registration Act. Forty seven other states have adopted laws allowing for securities transfer on death.

Thank you for allowing me to present the views of AARP and its North Carolina State Advocacy Council.

225 Hillsborough Street, Suite 440 | Raleigh, NC 27603 | 919-755-9757 | 919-755-9684 fax | 1-877-434-7598 TTY
James G. Parkel, President | William D. Novelli, Executive Director and CEO | www.aarp.org

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 230*

Short Title:	Revise UCC Article on Bulk Transfers.	(Public)
Sponsors:	Senators Hartsell; and Clodfelter.	
Referred to:	Judiciary II.	

February 26, 2003

A BILL TO BE ENTITLED

AN ACT TO ENACT REVISED ARTICLE 6 OF THE UNIFORM COMMERCIAL CODE, BULK SALES, AND CONFORMING AMENDMENTS TO OTHER ARTICLES OF THE UNIFORM COMMERCIAL CODE, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

PART I. REVISED ARTICLE 6 OF THE UNIFORM COMMERCIAL CODE.

SECTION 1. Article 6 of Chapter 25 of the General Statutes is rewritten to read:

"Article 6.
"Bulk Sales.

"**§ 25-6-101. Short title.**

This Article shall be known and may be cited as Uniform Commercial Code–Bulk Sales.

"**§ 25-6-102. Definitions and index of definitions.**

(a) In this Article:

(1) 'Assets' means the inventory that is the subject of a bulk sale and any tangible and intangible personal property used or held for use primarily in, or arising from, the seller's business and sold in connection with that inventory, but the term does not include:

a. Fixtures (G.S. 25-9-102(a)(41)) other than readily removable factory and office machines;

b. The lessee's interest in a lease of real property; or

c. Property to the extent it is generally exempt from creditor process under nonbankruptcy law.

(2) 'Auctioneer' means a person whom the seller engages to direct, conduct, control, or be responsible for a sale by auction.

(3) 'Bulk sale' means:
a. In the case of a sale by auction or a sale or series of sales conducted by a liquidator on the seller's behalf, a sale or series of sales not in the ordinary course of the seller's business of more than half of the seller's inventory, as measured by value on the date of the bulk-sale agreement, if on that date the auctioneer or liquidator has notice, or after reasonable inquiry would have had notice, that the seller will not continue to operate the same or a similar kind of business after the sale or series of sales; and
b. In all other cases, a sale not in the ordinary course of the seller's business of more than half the seller's inventory, as measured by value on the date of the bulk-sale agreement, if on that date the buyer has notice, or after reasonable inquiry would have had notice, that the seller will not continue to operate the same or a similar kind of business after the sale.

(4) 'Claim' means a right to payment from the seller, whether or not the right is reduced to judgment, liquidated, fixed, matured, disputed, secured, legal, or equitable. The term includes costs of collection and attorneys' fees only to the extent that the laws of this State permit the holder of the claim to recover them in an action against the obligor.

(5) 'Claimant' means a person holding a claim incurred in the seller's business other than:
a. An unsecured and unmatured claim for employment compensation and benefits, including commissions and vacation, severance, and sick-leave pay;
b. A claim for injury to an individual or to property, or for breach of warranty, unless:
1. A right of action for the claim has accrued;
2. The claim has been asserted against the seller; and
3. The seller knows the identity of the person asserting the claim and the basis upon which the person has asserted it; and
c. A claim for taxes owing to a governmental unit.

(6) 'Creditor' means a claimant or other person holding a claim.

(7) 'Date of the bulk sale' means (i) if the sale is by auction or is conducted by a liquidator on the seller's behalf, the date on which more than ten percent (10%) of the net proceeds is paid to or for the benefit of the seller and (ii) in all other cases, the later of the date on which more than ten percent (10%) of the net contract price is paid to or for the benefit of the seller or the date on which more than ten percent (10%) of the assets, as measured by value, are transferred to the buyer. For purposes of this subdivision:

a. Delivery of a negotiable instrument (G.S. 25-3-104(a)) to or for the benefit of the seller in exchange for assets constitutes payment of the contract price pro tanto;

b. To the extent that the contract price is deposited in an escrow, the contract price is paid to or for the benefit of the seller when the seller acquires the unconditional right to receive the deposit or when the deposit is delivered to the seller or for the benefit of the seller, whichever is earlier; and

c. An asset is transferred when a person holding an unsecured claim can no longer obtain through judicial proceedings rights to the asset that are superior to those of the buyer arising as a result of the bulk sale. A person holding an unsecured claim can obtain those superior rights to a tangible asset at least until the buyer has an unconditional right, under the bulk-sale agreement, to possess the asset, and a person holding an unsecured claim can obtain those superior rights to an intangible asset at least until the buyer has an unconditional right, under the bulk-sale agreement, to use the asset.

(8) 'Date of the bulk-sale agreement' means:

a. In the case of a sale by auction or conducted by a liquidator (subdivision (a)(3)a. of this section), the date on which the seller engages the auctioneer or liquidator; and

b. In all other cases, the date on which a bulk-sale agreement becomes enforceable between the buyer and the seller.

(9) 'Debt' means liability on a claim.

(10) 'Liquidator' means a person who is regularly engaged in the business of disposing of assets for businesses contemplating liquidation or dissolution.

(11) 'Net contract price' means the new consideration the buyer is obligated to pay for the assets less:

a. The amount of any proceeds of the sale of an asset, to the extent the proceeds are applied in partial or total satisfaction of a debt secured by the asset; and

b. The amount of any debt to the extent it is secured by a security interest or lien that is enforceable against the asset before and after it has been sold to a buyer. If a debt is secured by an asset and other property of the seller, the amount of the debt secured by a security interest or lien that is enforceable against the asset is determined by multiplying the debt by a fraction, the numerator of which is the value of the new consideration for the asset on the date of the bulk sale and the denominator of which is the value of all property securing the debt on the date of the bulk sale.

(12) 'Net proceeds' means the new consideration received for assets sold at a sale by auction or a sale conducted by a liquidator on the seller's behalf less:
a. Commissions and reasonable expenses of the sale;
b. The amount of any proceeds of the sale of an asset, to the extent the proceeds are applied in partial or total satisfaction of a debt secured by the asset; and
c. The amount of any debt to the extent it is secured by a security interest or lien that is enforceable against the asset before and after it has been sold to a buyer. If a debt is secured by an asset and other property of the seller, the amount of the debt secured by a security interest or lien that is enforceable against the asset is determined by multiplying the debt by a fraction, the numerator of which is the value of the new consideration for the asset on the date of the bulk sale and the denominator of which is the value of all property securing the debt on the date of the bulk sale.

(13) A sale is 'in the ordinary course of the seller's business' if the sale comports with usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices.

(14) 'United States' includes its territories and possessions and the Commonwealth of Puerto Rico.

(15) 'Value' means fair market value.

(16) 'Verified' means signed and sworn to or affirmed.

(b) The following definitions in other Articles of this Chapter apply to this Article:

'Buyer'	G.S. 25-2-103(l)(a).
'Equipment'	G.S. 25-9-102(a)(33).
'Inventory'	G.S. 25-9-102(a)(48).
'Sale'	G.S. 25-2-106(l).
'Seller'	G.S. 25-2-103(l)(d).

(c) In addition, Article 1 of this Chapter contains general definitions and principles of construction and interpretation applicable throughout this Article.

"**§ 25-6-103. Applicability of Article.**

(a) Except as otherwise provided in subsection (c) of this section, this Article applies to a bulk sale if:

(1) The seller's principal business is the sale of inventory from stock; and

(2) On the date of the bulk-sale agreement, the seller is located in this State.

(b) A seller is deemed to be located at the seller's place of business. If a seller has more than one place of business, the seller is deemed located at the seller's chief executive office.

(c) This Article does not apply to:

(1) A transfer made to secure payment or performance of an obligation;
(2) A transfer of collateral to a secured party pursuant to G.S. 25-9-609;
(3) A disposition of collateral pursuant to G.S. 25-9-610;
(4) Retention of collateral pursuant to G.S. 25-9-620;
(5) A sale of an asset encumbered by a security interest or lien if (i) all the proceeds of the sale are applied in partial or total satisfaction of the debt secured by the security interest or lien or (ii) the security interest or lien is enforceable against the asset after it has been sold to the buyer and the net contract price is zero;
(6) A general assignment for the benefit of creditors or to a subsequent transfer by the assignee;
(7) A sale by an executor, administrator, receiver, trustee in bankruptcy, or any public officer under judicial process;
(8) A sale made in the course of judicial or administrative proceedings for the dissolution or reorganization of an organization;
(9) A sale to a buyer whose principal place of business is in the United States and who:
a. Not earlier than 21 days before the date of the bulk sale, (i) obtains from the seller a verified and dated list of claimants of whom the seller has notice three days before the seller sends or delivers the list to the buyer or (ii) conducts a reasonable inquiry to discover the claimants;
b. Assumes in full the debts owed to claimants of whom the buyer has knowledge on the date the buyer receives the list of claimants from the seller or on the date the buyer completes the reasonable inquiry, as the case may be;
c. Is not insolvent after the assumption; and
d. Gives written notice of the assumption not later than 30 days after the date of the bulk sale by sending or delivering a notice to the claimants identified in sub-subdivision (c)(9)b. of this section;
(10) A sale to a buyer whose principal place of business is in the United States and who:
a. Assumes in full the debts that were incurred in the seller's business before the date of the bulk sale;
b. Is not insolvent after the assumption; and
c. Gives written notice of the assumption not later than 30 days after the date of the bulk sale by sending or delivering a notice to each creditor whose debt is assumed;
(11) A sale to a new organization that is organized to take over and continue the business of the seller and that has its principal place of business in the United States if:
a. The buyer assumes in full the debts that were incurred in the seller's business before the date of the bulk sale;

b. The seller receives nothing from the sale except an interest in the new organization that is subordinate to the claims against the organization arising from the assumption; and

c. The buyer gives written notice of the assumption not later than 30 days after the date of the bulk sale by sending or delivering a notice to each creditor whose debt is assumed;

(12) A sale of assets having:

a. A value, net of liens and security interests, of less than ten thousand dollars ($10,000). If a debt is secured by assets and other property of the seller, the net value of the assets is determined by subtracting from their value an amount equal to the product of the debt multiplied by a fraction, the numerator of which is the value of the assets on the date of the bulk sale and the denominator of which is the value of all property securing the debt on the date of the bulk sale; or

b. A value of more than twenty-five million dollars ($25,000,000) on the date of the bulk-sale agreement; or

(13) A sale required by, and made pursuant to, statute.

(d) The notice under sub-subdivision (c)(9)d. of this section must state: (i) that a sale that may constitute a bulk sale has been or will be made; (ii) the date or prospective date of the bulk sale; (iii) the individual or entity names and the addresses of the seller and buyer; (iv) the address to which inquiries about the sale may be made, if different from the seller's address; and (v) that the buyer has assumed or will assume in full the debts owed to claimants of whom the buyer has knowledge on the date the buyer receives the list of claimants from the seller or completes a reasonable inquiry to discover the claimants.

(e) The notice under sub-subdivisions (c)(10)c. and (c)(11)c. of this section must state: (i) that a sale that may constitute a bulk sale has been or will be made; (ii) the date or prospective date of the bulk sale; (iii) the individual or entity names and the addresses of the seller and buyer; (iv) the address to which inquiries about the sale may be made, if different from the seller's address; and (v) that the buyer has assumed or will assume the debts that were incurred in the seller's business before the date of the bulk sale.

(f) For purposes of subdivision (c)(12) of this section, the value of assets is presumed to be equal to the price the buyer agrees to pay for the assets. However, in a sale by auction or a sale conducted by a liquidator on the seller's behalf, the value of assets is presumed to be the amount the auctioneer or liquidator reasonably estimates the assets will bring at auction or upon liquidation.

"**§ 25-6-104. Obligations of buyer.**

In a bulk sale as defined in G.S. 25-6-102(a)(3)b. the buyer shall:

(1) Obtain from the seller a list of all business names and addresses used by the seller within three years before the date the list is sent or delivered to the buyer;

(2) Obtain from the seller a verified and dated list of claimants of whom the seller has notice three days before the seller sends or delivers the list to the buyer and including, to the extent known by the seller, the address of and the amount claimed by each claimant;
(3) Obtain from the seller or prepare a schedule of distribution (G.S. 25-6-106(a));
(4) Give notice of the bulk sale in accordance with G.S. 25-6-105;
(5) Unless excused under G.S. 25-6-106(d), distribute the net contract price in accordance with the undertakings of the buyer in the schedule of distribution; and
(6) Make available the list of claimants (subdivision (2) of this section) by:
a. Promptly sending or delivering a copy of the list without charge to any claimant whose written request is received by the buyer no later than six months after the date of the bulk sale; or
b. Permitting any claimant to inspect and copy the list at any reasonable hour upon request received by the buyer no later than six months after the date of the bulk sale.

"**§ 25-6-105. Notice to claimants.**

(a) To comply with G.S. 25-6-104(4), the buyer shall send or deliver written notice of the bulk sale to each claimant on the list of claimants (G.S. 25-6-104(2)) and to any other claimant of whom the buyer has knowledge at the time the notice of the bulk sale is sent or delivered.

(b) The written notice of the bulk sale must be accompanied by a copy of the schedule of distribution (G.S. 25-6-106(a)) and state at least:

(1) That the seller and buyer have entered into an agreement for a sale that may constitute a bulk sale under the laws of the State of North Carolina;
(2) The date of the agreement;
(3) The date on or after which more than ten percent (10%) of the assets were or will be transferred;
(4) The date on or after which more than ten percent (10%) of the net contract price was or will be paid, if the date is not stated in the schedule of distribution;
(5) The name and a mailing address of the seller;
(6) Any other business name and address listed by the seller pursuant to G.S. 25-6-104(l);
(7) The name of the buyer and an address of the buyer from which information concerning the sale can be obtained;
(8) A statement indicating the type of assets or describing the assets item by item;
(9) The manner in which the buyer will make available the list of claimants (G.S. 25-6-104(6)); and

(10) If the sale is in total or partial satisfaction of an antecedent debt owed by the seller, the amount of the debt to be satisfied and the name of the person to whom it is owed.

(c) For purposes of subdivisions (b)(5) and (b)(7) of this section, the name of a person is the person's individual or entity name.

(d) The buyer shall give notice of the bulk sale not less than 15 days before the date of the bulk sale and not more than 10 days after obtaining the list of claimants.

(e) A written notice substantially complying with the requirements of subsection (b) of this section is effective even though it contains minor errors that are not seriously misleading.

(f) A form substantially as follows is sufficient to comply with subsection (b) of this section:

"Notice of Sale

(1) _____, whose address is _____, is described in this notice as the "seller."

(2) _____, whose address is _____, is described in this notice as the "buyer."

(3) The seller has disclosed to the buyer that within the past three years the seller has used other business names, operated at other addresses, or both, as follows: _____.

(4) The seller and the buyer have entered into an agreement dated _____, for a sale that may constitute a bulk sale under the laws of the State of North Carolina.

(5) The date on or after which more than ten percent (10%) of the assets that are the subject of the sale were or will be transferred is _____, and [if not stated in the schedule of distribution] the date on or after which more than ten percent (10%) of the net contract price was or will be paid is _____.

(6) The following assets are the subject of the sale: _____.

(7) The buyer will make available to claimants of the seller a list of the seller's claimants in the following manner: _____.

(8) [If applicable] The sale is to satisfy $ _____ of an antecedent debt owed by the seller to _____.

(9) A copy of the schedule of distribution of the net contract price accompanies this notice."

"**§ 25-6-106. Schedule of distribution.**

(a) The seller and buyer shall agree on how the net contract price is to be distributed and set forth their agreement in a written schedule of distribution.

(b) The schedule of distribution may provide for distribution to any person at any time, including distribution of the entire net contract price to the seller.

(c) The buyer's undertakings in the schedule of distribution run only to the seller. A buyer who fails to distribute the net contract price in accordance with the buyer's

undertakings in the schedule of distribution is liable to a creditor only as provided in G.S. 25-6-107(a).

(d) If the buyer undertakes in the schedule of distribution to distribute any part of the net contract price to a person other than the seller, and, after the buyer has given notice in accordance with G.S. 25-6-105, some or all of the anticipated net contract price is or becomes unavailable for distribution as a consequence of the buyer's or seller's having complied with an order of court, legal process, statute, or rule of law, the buyer is excused from any obligation arising under this Article or under any contract with the seller to distribute the net contract price in accordance with the buyer's undertakings in the schedule if the buyer:

(1) Distributes the net contract price remaining available in accordance with any priorities for payment stated in the schedule of distribution and, to the extent that the price is insufficient to pay all the debts having a given priority, distributes the price pro rata among those debts shown in the schedule as having the same priority;

(2) Distributes the net contract price remaining available in accordance with an order of court;

(3) Commences an interpleader action in a court of competent jurisdiction against all persons who would otherwise be entitled to a distribution under the schedule and is discharged from the action; or

(4) Reaches a new agreement with the seller for the distribution of the net contract price remaining available, sets forth the new agreement in an amended schedule of distribution, gives notice of the amended schedule, and distributes the net contract price remaining available in accordance with the buyer's undertakings in the amended schedule.

(e) The notice under subdivision (d)(4) of this section must identify the buyer and the seller, set forth the amended schedule, and be given in accordance with G.S. 25-6-105(a) at least 10 days before the buyer distributes any part of the net contract price remaining available.

(f) If the seller undertakes in the schedule of distribution to distribute any part of the net contract price, and, after the buyer has given notice in accordance with G.S. 25-6-105, some or all of the anticipated net contract price is or becomes unavailable for distribution as a consequence of the buyer's or seller's having complied with an order of court, legal process, statute, or rule of law, the seller and any person in control of the seller are excused from any obligation arising under this Article or under any agreement with the buyer to distribute the net contract price in accordance with the seller's undertakings in the schedule if the seller:

(1) Distributes the net contract price remaining available in accordance with any priorities for payment stated in the schedule of distribution and, to the extent that the price is insufficient to pay all the debts having a given priority, distributes the price pro rata among those debts shown in the schedule as having the same priority;

(2) Distributes the net contract price remaining available in accordance with an order of court;

(3) Commences an interpleader action in a court of competent jurisdiction against all persons who would otherwise be entitled to a distribution under the schedule and is discharged from the action; or

(4) Prepares a written amended schedule of distribution of the net contract price remaining available for distribution, gives notice of the amended schedule, and distributes the net contract price remaining available in accordance with the amended schedule.

(g) The notice under subdivision (f)((4) of this section must identify the buyer and the seller, set forth the amended schedule, and be given in accordance with G.S. 25-6-105(a) at least 10 days before the seller distributes any part of the net contract price remaining available.

"**§ 25-6-107. Liability for noncompliance.**

(a) Except as provided in subsection (c) of this section, and subject to the limitation in subsection (d) of this section:

(1) A buyer who fails to comply with the requirements of G.S. 25-6-104(5) with respect to a creditor is liable to the creditor for damages in the amount of the claim, reduced by any amount that the creditor would not have realized if the buyer had complied; and

(2) A buyer who fails to comply with the requirements of any other subdivision of G.S. 25-6-104 with respect to a claimant is liable to the claimant for damages in the amount of the claim, reduced by any amount that the claimant would not have realized if the buyer had complied.

(b) In an action under subsection (a) of this section, the creditor has the burden of establishing the validity and amount of the claim, and the buyer has the burden of establishing the amount that the creditor would not have realized if the buyer had complied.

(c) A buyer is not liable to creditors for failure to comply with the requirements of G.S. 25-6-104 if the buyer:

(1) Made a good faith and commercially reasonable effort to comply with the requirements of G.S. 25-6-104 or to exclude the sale from the application of this Article under G.S. 25-6-103(c); or

(2) On or after the date of the bulk-sale agreement, but before the date of the bulk sale, held a good faith and commercially reasonable belief that this Article does not apply to the particular sale.

The buyer has the burden of establishing the good faith and commercial reasonableness of the effort or belief under this subsection.

(d) In a single bulk sale the cumulative liability of the buyer for failure to comply with the requirements of G.S. 25-6-104 shall not exceed an amount equal to:

(1) If the assets consist only of inventory and equipment, the net contract price; or

(2) If the assets include property other than inventory and equipment, the net value of the inventory and equipment.

(e) For the purposes of subdivision (d)(2) of this section, the 'net value' of an asset is the value of the asset less (i) the amount of any proceeds of the sale of an asset, to the extent the proceeds are applied in partial or total satisfaction of a debt secured by the asset and (ii) the amount of any debt to the extent it is secured by a security interest or lien that is enforceable against the asset before and after it has been sold to a buyer. If a debt is secured by an asset and other property of the seller, the amount of the debt secured by a security interest or lien that is enforceable against the asset is determined by multiplying the debt by a fraction, the numerator of which is the value of the asset on the date of the bulk sale and the denominator of which is the value of all property securing the debt on the date of the bulk sale. The portion of a part of the net contract price paid to or applied for the benefit of the seller or a creditor that is 'allocable to the inventory and equipment' is the portion that bears the same ratio to that part of the net contract price as the net value of the inventory and equipment bears to the net value of all of the assets.

(f) A payment made by the buyer to a person to whom the buyer is, or believes the buyer is, liable under subsection (a) of this section reduces pro tanto the buyer's cumulative liability under subsection (d) of this section.

(g) No action shall be brought under subdivision (a)(2) of this section by or on behalf of a claimant whose claim is unliquidated or contingent.

(h) A buyer's failure to comply with the requirements of G.S. 25-6-104 does not (i) impair the buyer's rights in or title to the assets, (ii) render the sale ineffective, void, or voidable, (iii) entitle a creditor to more than a single satisfaction of the creditor's claim, or (iv) create liability other than as provided in this Article.

(i) Payment of the buyer's liability under subsection (a) of this section discharges pro tanto the seller's debt to the creditor.

(j) Unless otherwise agreed, a buyer has an immediate right of reimbursement from the seller for any amount paid to a creditor in partial or total satisfaction of the buyer's liability under subsection (a) of this section.

(k) If the seller is an organization, a person who is in direct or indirect control of the seller, and who knowingly, intentionally, and without legal justification fails, or causes the seller to fail, to distribute the net contract price in accordance with the schedule of distribution is liable to any creditor to whom the seller undertook to make payment under the schedule for damages caused by the failure.

"**§ 25-6-108. Bulk sales by auction, bulk sales conducted by liquidator.**

(a) G.S. 25-6-104, 25-6-105, 25-6-106, and 25-6-107 apply to a bulk sale by auction and a bulk sale conducted by a liquidator on the seller's behalf with the following modifications:

(1) 'Buyer' refers to auctioneer or liquidator, as the case may be;

(2) 'Net contract price' refers to net proceeds of the auction or net proceeds of the sale, as the case may be;

(3) The written notice required under G.S. 25-6-105(b) must be accompanied by a copy of the schedule of distribution (G.S. 25-6-106(a)) and state at least:

a. That the seller and the auctioneer or liquidator have entered into an agreement for auction or liquidation services that may constitute an agreement to make a bulk sale under the laws of the State of North Carolina;
b. The date of the agreement;
c. The date on or after which the auction began or will begin or the date on or after which the liquidator began or will begin to sell assets on the seller's behalf;
d. The date on or after which more than ten percent (10%) of the net proceeds of the sale were or will be paid, if the date is not stated in the schedule of distribution;
e. The name and a mailing address of the seller;
f. Any other business name and address listed by the seller pursuant to G.S. 25-6-104(l);
g. The name of the auctioneer or liquidator and an address of the auctioneer or liquidator from which information concerning the sale can be obtained;
h. A statement indicating the type of assets or describing the assets item by item;
i. The manner in which the auctioneer or liquidator will make available the list of claimants (G.S. 25-6-104(6)); and
j. If the sale is in total or partial satisfaction of an antecedent debt owed by the seller, the amount of the debt to be satisfied and the name of the person to whom it is owed; and

(4) In a single bulk sale the cumulative liability of the auctioneer or liquidator for failure to comply with the requirements of this section shall not exceed the amount of the net proceeds of the sale allocable to inventory and equipment sold.

(b) A payment made by the auctioneer or liquidator to a person to whom the auctioneer or liquidator is, or believes the auctioneer or liquidator is, liable under this section reduces pro tanto the auctioneer's or liquidator's cumulative liability under subdivision (a)(4) of this section.

(c) A form substantially as follows is sufficient to comply with subdivision (a)(3) of this section:

"Notice of Sale

(1) _____, whose address is _____, is described in this notice as the "seller."

(2) _____, whose address is _____, is described in this notice as the "auctioneer" or "liquidator."

(3) The seller has disclosed to the auctioneer or liquidator that within the past three years the seller has used other business names, operated at other addresses, or both, as follows: _____.

(4) The seller and the auctioneer or liquidator have entered into an agreement dated _____ for auction or liquidation services that

may constitute an agreement to make a bulk sale under the laws of the State of North Carolina.

(5) The date on or after which the auction began or will begin or the date on or after which the liquidator began or will begin to sell assets on the seller's behalf is _____, and [if not stated in the schedule of distribution] the date on or after which more than ten percent (10%) of the net proceeds of the sale were or will be paid is _____.

(6) The following assets are the subject of the sale: _____.

(7) The auctioneer or liquidator will make available to claimants of the seller a list of the seller's claimants in the following manner: _____.

(8) [If applicable] The sale is to satisfy $ _____ of an antecedent debt owed by the seller to _____.

(9) A copy of the schedule of distribution of the net proceeds accompanies this notice."

(d) A person who buys at a bulk sale by auction or conducted by a liquidator need not comply with requirements of G.S. 25-6-104 and is not liable for the failure of an auctioneer or liquidator to comply with the requirements of this section.

"**§ 25-6-109. Reserved for future codification purposes.**

"**§ 25-6-110. Limitation of actions.**

(a) Except as provided in subsection (b) of this section, an action under this Article against a buyer, auctioneer, or liquidator must be commenced within one year after the date of the bulk sale.

(b) If the buyer, auctioneer, or liquidator conceals the fact that the sale has occurred, the limitation is tolled and an action under this Article may be commenced within the earlier of (i) one year after the person bringing the action discovers that the sale has occurred or (ii) one year after the person bringing the action should have discovered that the sale has occurred, but no later than two years after the date of the bulk sale. Complete noncompliance with the requirements of this Article does not of itself constitute concealment.

(c) An action under G.S. 25-6-107(k) must be commenced within one year after the alleged violation occurs."

PART II. CONFORMING AMENDMENTS TO OTHER ARTICLES OF THE UNIFORM COMMERCIAL CODE.

SECTION 2. G.S. 25-1-105(2) reads as rewritten:

"(2) Where one of the following provisions of this Chapter specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. (G.S. 25-2-402).

Applicability of the article on bank deposits and collections. (G.S. 25-4-102).

Governing law in the article on Funds Transfers. (G.S. 25-4A-507).

Letters of Credit. (G.S. 25-5-116).

Bulk ~~transfers~~ sales subject to the article on bulk ~~transfers. (G.S. 25-6-102).~~ sales. (G.S. 25-6-103).

Applicability of the article on investment securities. (G.S. 25-8-110).

Law governing perfection, the effect of perfection or nonperfection, and the priority of security interests and agricultural liens. (G.S. 25-9-301 through G.S. 25-9-307)."

SECTION 3. G. S. 25-2-403(4) reads as rewritten:

"(4) The rights of other purchasers of goods and of lien creditors are governed by the articles on secured transactions (article 9), bulk ~~transfers~~ sales (article 6) and documents of title (article 7)."

PART III. DIRECTION AND EFFECTIVE DATE.

SECTION 4. The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the official comments to the Uniform Commercial Code, Revised Article 6 and all explanatory comments of the drafters of this act as the Revisor deems appropriate.

SECTION 5. This act becomes effective January 1, 2004.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 230*

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S230-ARQ-1 [v.1]

Date _____,2003

Comm. Sub. [NO]
Amends Title [NO]
First Edition

Senator _____

moves to amend the bill on page 14, line 16 by deleting "2004." and inserting:
"2004, and applies to bulk sales for which the date of the bulk sales agreement occurs on or after January 1, 2004.".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

SENATE BILL 230:
Revise UCC Article on Bulk Transfers

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Hartsell
Date:	March 17, 2003	**Summary by:**	Drupti Chauhan
Version:	1st Edition		Committee Counsel

SUMMARY: ***Senate Bill 230 would replace the current Article 6(Bulk Transfers) of the Uniform Commercial Code (UCC) and would enact revised Article 6 (Bulk Sales) in its place as recommended by the Uniform Law Commissioners. This bill comes to the General Assembly as a recommendation of The General Statutes Commission.***

CURRENT LAW: Article 6 of Chapter 25 of the General Statutes regulates bulk transfers (that are not made in the ordinary course of the transferor's business) of a major part of the materials, supplies, merchandise or other inventory of the business. The purpose of the current Article 6 of the UCC is to provide protection for creditors of these businesses. Creditors of these businesses can be susceptible to a bulk transfer where the business owner may sell a large part of the inventory of the business to a any buyer for any price outside the ordinary course of business, pockets the proceeds and disappears without paying his creditors. The current Article 6 requires bulk sale buyers to provide notice to the seller's creditors of the impending bulk transfer and to maintain a list of the creditors along with a schedule of property obtained in the bulk transfer for six months after the sale takes place. This notice must be sent 10 days before paying for or taking possession of the goods, whichever comes first. If these procedures are not followed, the creditors can void the sale. Auctioneers must follow a similar procedure of notice and listing of creditors. Article 6 requires compliance even when there is no reason to believe that a fraudulent transfer is going to occur.

BILL ANALYSIS: This bill would enact revised Article 6 and makes the following major substantive changes to current Article 6.

- The revised article applies only to sales of inventory from stock and not to other transfers (§ 25-6-102(a)(3)).
- The revised article applies only when the buyer has notice, or after reasonable inquiry would have had notice, that the seller will not continue to operate the same or a similar kind of business after the sale (§ 25-6-102(a)(3)).
- The revised article does not apply to a sale in which the seller's equity is less than $10,000 or a sale having a value of more than $25,000,000 (§ 25-6-103(c)(12)).
- The notice period to the seller's creditors is increased from 10 days to 15 days (§ 25-6-105(d)), and the statute of limitations is extended from six months to one year (§ 25-6-110).
- The notice to creditors must include a copy of a schedule of distribution setting forth how the net contract price is to be distributed (§§ 25-6-105(b) and 25-6-106(a)).
- A buyer who makes a good faith effort to comply with the requirements of the revised article or to exclude the sale from the application of the article, or who acts on the good faith belief that the article does not apply to the sale, is not liable for noncompliance (§ 25-6-107(c)).

- A buyer's noncompliance no longer renders the sale ineffective but rather gives rise to a claim for damages, which are essentially capped at an amount no greater than the contract price (§ 25-6-107(a), (d), and (h)).
- The revised article applies to a bulk sale conducted by a liquidator on the seller's behalf, as well as to a bulk sale conducted by an auctioneer, by imposing upon liquidators and auctioneers duties and liabilities that are similar, but not always identical, to those of a buyer (§ 25-6-108).
- The revised article applies when the seller's place of business is located in this State, rather than when the goods are located in this State. Where the seller has more than one place of business, the seller is deemed to be located at the seller's chief executive office (§ 25-6-103(a) and (b)).
- The revised article imposes liability on a person in direct or indirect control of a seller that is an organization if that person knowingly, intentionally, and without legal justification fails or causes the seller to fail to distribute the net contract price in accordance with the schedule of distribution (§ 25-6-107(k)).

Revised Article 6 lessens the burden on the bulk sale buyer and provides definitions for terms such as "assets", "bulk sale", 'date of sale" etc. which the current Article 6 does not do. For example, "bulk sale" is defined as a "sale of more than half the seller's inventory" outside the ordinary course of business and under conditions in which the "buyer has notice...that the seller will not contribute to operate the same or a similar kind of business after the sale." The risk to creditors arises from sales in which the seller goes out of business so provisions of revised Article 6 apply specifically to those situations.

Sections 2 and 3 of the bill make conforming changes to references to Article 6 in other statutes.

Section 4 of the bill authorizes the Revisor of Statutes to include the official comments to the UCC Revised Article 6 and all explanatory comments of the drafters of the act as the Revisor deems appropriate.

EFFECTIVE DATE: This act becomes effective January 1, 2004.

BACKGROUND: Approximately 41 states have repealed Article 6 of the UCC and have not adopted the revised version. Four states and the District of Columbia have adopted revised Article 6. Because the business environment has changed since Article 6 was first promulgated, in 1988 the Uniform Law Commissioners encouraged those states that enacted Article 6 to repeal it. The arguments set forth are that creditors are able to make more informed decisions about extending credit through technology and credit reporting services. Creditors have better opportunities to collect their debts through revised jurisdiction laws that allow creditors to bring actions against debtors that flee to other states. Article 9 of the UCC, Secured Transactions, provides creditors other avenues to retain security interests in their inventory. If the bulk transfer is a fraud and the buyer is party to the fraud, then the creditor may have remedies under the Uniform Fraudulent Transfer Act, G.S. 39-23.1 et. seq. Many have also described the original Article 6 as a practice trap for the unwary because it creates an exception to normal commercial rules where good faith purchasers are protected against claims by a seller's creditors, rather than having to give the notice as they do in Article 6.

The General Statutes Commission supports the repeal of Article 6. However, bills to repeal it failed to be enacted in the 1997, 1999, and 2001 sessions of the North Carolina General Assembly, and the GSC believes that enactment of Revised Article 6 is a better alternative to retaining existing Article 6. Therefore, the GSC recommends the above-referenced bill for enactment in North Carolina.

SOME REASONS TO REPEAL UCC ARTICLE 6

WHAT UCC ARTICLE 6 DOES: Article 6 requires the buyer in a "bulk sale" to send notice of the sale to the seller's creditors 10 days before paying for or taking possession of the goods, whichever comes first. If Article 6 applies and is not followed, the seller's creditor can claim the goods from the buyer up to the amount of the debt owed by the seller.

WHY THE GSC RECOMMENDS REPEAL:

- **Article 6 is grossly unfair to the innocent buyer who is a good faith purchaser for value (BFP) who is either unaware of it or does not realize it applies. The BFP has already paid the seller for the goods up front yet can lose them to the seller's creditors.**

- **Article 6 is a trap for the unwary.** The Article creates an exception to normal commercial rules, under which BFPs are protected against claims by a seller's creditors, and it is not always clear when it applies. As an example, take a shoe store that sells its winter shoes as a lot to a discount store at the end of the season to make room for its summer shoes, not a scenario Article 6 was enacted to cover. In a similar case in another state, the buyer was sued under Article 6 by one of the seller's creditors. The buyer won but only after the trouble of litigation.

- **Article 6 is not even-handed.** It only applies to a "bulk sale" (transfer in bulk to one buyer, not in the ordinary course of business, of a major part of the inventory of an enterprise whose principal business is the sale of merchandise from inventory). **It does not apply to any other sale or any other type of business, and creditors of these businesses receive NO protection from it. For example:**

  - A mom and pop grocery store decides to close. It sells its inventory and equipment to a single buyer. The egg farmer who supplies it is entitled to notice of the sale.

  - The grocery store instead holds an "everything must go - name your price" sale and sells all its inventory and equipment to walk-in customers. The same egg farmer **is not** entitled to notice, since this is not a "bulk sale".

  - The egg farmer also supplies a local restaurant. The restaurant closes and sells its current food stock and its equipment to a single buyer. The egg farmer **is not** entitled to notice, since a restaurant is a service business not covered by Article 6.

  While abuses after the panic of 1893 justified carving out an exception for "bulk sales" to the usual buyer/seller rules, no good reason exists any longer for singling out these sales.

- **The "protection" for the seller's creditors if Article 6 is followed is minuscule compared to the red tape, delay, and expense borne by the complying BFP.** A creditor only gets 10 days notice of the sale - a creditor gets NO other protection from Article 6 in collecting a debt.

- **Article 6 is no longer Uniform law.** The Uniform Law Commissioners, who originated it, recommend repeal, and at least 38 states have repealed it.

FYI, the plaintiff's (seller's creditor's) attorney in the last Article 6 case to reach the NC Court of Appeals believes Article 6 should be repealed (and he won).

5/6/99

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GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 275

Short Title:	Securities Transfer on Death.	(Public)
Sponsors:	Senators Hartsell; and Carpenter.	
Referred to:	Judiciary II.	

March 4, 2003

A BILL TO BE ENTITLED

AN ACT TO ENACT THE UNIFORM TRANSFER ON DEATH (TOD) SECURITY REGISTRATION ACT.

The General Assembly of North Carolina enacts:

SECTION 1. The General Statutes are amended by rewriting the title of Chapter 41 to read "Estates and Interests in Property", and Chapter 41 of the General Statutes is amended by adding a new Article to read:

"Article 4.

"The Uniform Transfer on Death (TOD) Security Registration Act.

"**§ 41-40. Definitions.**

In this Article, unless the context otherwise requires:

(1) 'Beneficiary form' means a registration of a security which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.

(2) 'Devisee' means any person designated in a will to receive a disposition of real or personal property.

(3) 'Heirs' means those persons, including the surviving spouse, who are entitled under Chapter 29 of the General Statutes or the statutes of intestate succession of other states to take the property of a decedent by intestate succession.

(4) 'Person' means an individual, a corporation, an organization, or other legal entity.

(5) 'Personal representative' includes executor, administrator, collector, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.

(6) 'Property' includes both real and personal property or any interest in real or personal property and means anything that may be the subject of ownership.

(7) 'Register', including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of securities.

(8) 'Registering entity' means a person who originates or transfers a security title by registration and includes a broker maintaining security accounts for customers and a transfer agent or other person acting for or as an issuer of securities.

(9) 'Security' means a share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security, a security account, and a security entitlement as defined in G.S. 25-8-102.

(10) 'Security account' means (i) a reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, whether or not credited to the account before the owner's death, or (ii) a cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner's death.

(11) 'State' includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

"**§ 41-41. Registration in beneficiary form; sole or joint tenancy ownership.**

Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more individuals with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entireties, or as owners of community property held in survivorship form, and not as tenants in common.

"**§ 41-42. Registration in beneficiary form; applicable law.**

A security may be registered in beneficiary form if the form is authorized by this or a similar statute of the state of organization of the issuer or registering entity, the location of the registering entity's principal office, the office of its transfer agent or its office making the registration, or by this or a similar statute of the law of the state listed as the owner's address at the time of registration. A registration governed by the law of a jurisdiction in which this or similar legislation is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law.

"**§ 41-43. Origination of registration in beneficiary form.**

A security, whether evidenced by certificate or account, is registered in beneficiary form when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners.

"**§ 41-44. Form of registration in beneficiary form.**

Registration in beneficiary form may be shown by the words 'transfer on death' or the abbreviation 'TOD', or by the words 'pay on death' or the abbreviation 'POD', after the name of the registered owner or owners and before the name of a beneficiary.

"**§ 41-45. Effect of registration in beneficiary form.**

The designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership of the security until the owner's death. A registration of a security in beneficiary form may be cancelled or changed at any time by the sole owner or all then-surviving owners, without the consent of the beneficiary.

"**§ 41-46. Ownership on death of owner.**

On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survive the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

"**§ 41-47. Protection of registering entity.**

(a) A registering entity is not required to offer or to accept a request for security registration in beneficiary form. If a registration in beneficiary form is offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by this Article.

(b) By accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented on death of the deceased owner as provided in this Article.

(c) A registering entity is discharged from all claims to a security by the estate, creditors, heirs, or devisees of a deceased owner if it registers a transfer of a security in accordance with G.S. 41-46 and does so in good faith reliance (i) on the registration, (ii) on this Article, and (iii) on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity. The protections of this Article do not extend to a reregistration or payment made after a registering entity has received written notice from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under this Article.

(d) The protection provided by this Article to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds.

"**§ 41-48. Nontestamentary transfer on death.**

(a) A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this Article and is not testamentary.

(b) The interest of a deceased owner when there are one or more surviving owners remains liable for the debts of the decedent in the same manner as the personal property included in the decedent's estate, and recovery of that interest shall be made from the surviving owner or owners when the decedent's estate is insufficient to satisfy the debts. The interest of a deceased sole owner, or the last to die of several owners, remains liable for the debts of the decedent in the same manner as the personal property included in the decedent's estate, and recovery of that interest shall be made from the TOD beneficiary when the decedent's estate is insufficient to satisfy the debts.

(c) This Article does not repeal or modify any provision of law relating to estate taxes.

"**§ 41-49. Terms, conditions, and forms for registration.**

(a) A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests (i) for registrations in beneficiary form, and (ii) for implementation of registrations in beneficiary form, including requests for cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary. The terms and conditions established may provide for proving death, avoiding or resolving any problems concerning fractional shares, and designating primary or contingent beneficiaries. Forms of identifying beneficiaries who are to take on one or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities regarding conditions and identities relevant to accurate implementation of registrations in beneficiary form, may be contained in a registering entity's terms and conditions.

(b) The following are illustrations of registrations in beneficiary form which a registering entity may authorize:

(1) Sole owner-sole beneficiary: 'John S. Brown TOD (or POD) John S. Brown, Jr.'

(2) Multiple owners-sole beneficiary: 'John S. Brown, Mary B. Brown JT TEN WROS TOD John S. Brown, Jr.'

(3) Multiple owners-primary and secondary (substituted) beneficiaries: 'John S. Brown, Mary B. Brown JT TEN WROS TOD John S. Brown, Jr. SUB BENE Peter O. Brown'.

"**§ 41-50. Short title; rules of construction.**

(a) This Article shall be known as and may be cited as the 'Uniform TOD Security Registration Act'.

(b) This Article shall be applied and construed to effectuate its general purposes and to make uniform the laws with respect to the subject of this Article among states enacting it.

(c) This Article does not repeal G.S. 41-2.2. G.S. 41-2.2 applies in determining whether a right of survivorship exists among multiple owners of a security interest in beneficiary form.

"**§ 41-51. Application of Article.**

This Article applies to registrations of securities in beneficiary form made before, on, or after the effective date of this Article, by decedents dying on or after the effective date of this Article."

SECTION 2. G.S. 28A-15-10(a) reads as rewritten:

"(a) When needed to satisfy claims against a decedent's estate, assets may be acquired by a personal representative or collector from the following sources:

(1) Tentative trusts created by the decedent in savings accounts for other ~~persons;~~ persons.

(2) Gifts causa mortis made by the ~~decedent;~~decedent.

(3) Joint deposit accounts with right of survivorship created by decedent pursuant to the provisions of G.S. 41-2.1 or otherwise; and joint tenancies with right of survivorship created by decedent in corporate stocks or other investment securities.

(4) An interest in a security passing to a beneficiary pursuant to the provisions of Article 4 of Chapter 41 of the General Statutes.

Such assets shall be acquired solely for the purpose of satisfying such claims, however, and shall not be available for distribution to heirs or devisees."

SECTION 3. G.S. 41-2.2 is amended by adding a new subsection to read:

"(e) As used in this section, "securities" has the same meaning as in G.S. 41-40(9) and includes "security account" as that term is defined in G.S. 41-40(10)."

SECTION 4. The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform TOD Security Registration Act and all explanatory comments of the drafters of this act as the Revisor may deem appropriate.

SECTION 5. This act becomes effective October 1, 2003.

SENATE BILL 275:
Securities Transfer on Death.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Sen. Hartsell
Date:	March 14, 2003	**Summary by:**	Kory J. Goldsmith, Committee Co-Counsel
Version:	First Edition		

SUMMARY: ***Senate Bill 275 would amend Chapter 41 - Estates, to allow owners of securities to register their title in transfer-on-death (TOD) form. This would allow the transfer of securities, including stocks, bonds, mutual funds, and security accounts, to a beneficiary upon death based on a prior beneficiary designation by registration. The Bill has previously come to the General Assembly as a recommendation of the General Statutes Commission and is modeled after the Uniform Transfer on Death (TOD) Securities Registration Act. The Uniform Act has been adopted in 47 other states.***

CURRENT LAW:

Under current law securities can only be passed upon death by probate or by joint tenancy with right of survivorship.

BILL ANALYSIS:

Senate Bill 41 proposes to add a new Article 4 to Chapter 41 of the General Statutes, entitled "The Uniform Transfer on Death (TOD) Security Registration Act". This act would allow the owner of securities to designate a beneficiary of the securities to be received upon the death of the owner. The owner may revoke or modify this designation at any time up until death. Also this designation does not convey any right or interest in the beneficiary until the time of death. Title to the securities would be transferred as a matter of contract (like life insurance policies or individual retirement accounts), not as a testamentary bequest, and as such would not be part of the probate estate.

Some of the advantages provided by the bill appear to be: 1) provides an alternative to joint ownership with right of survivorship, avoiding the complications and restrictions of dealing with a co-owner but effecting the same transfer upon death; 2) avoids probate and probate fees; and 3) simplifies the process of changing names on securities after death. The bill makes it clear that this act does not affect claims creditors, who can still claim these securities if necessary to satisfy claims against the decedent's estate in the same ways as with joint bank accounts with right of survivorship. The bill also makes it clear that this form of ownership does not affect estate or inheritance tax collection and that these securities would be counted as part of the taxable estate.

One change that would result from this bill would be a reduction in the collection of probate fees by the clerks of court. Probate fees are collected on all personal property that passes through the probate estate. Because these changes would transfer these securities outside the probate estate, probate fees would not be collected on the value of the securities transferred by this method.

Section 2 of this bill makes a conforming change to the statute governing the rights of creditors to collect estate debts from assets passing outside the estate. This statute is only triggered when other assets of the estate are insufficient to satisfy all claims.

Section 3 authorizes the Revisor of Statutes to include the Official Comments to the Uniform Act from the Uniform Commissioners with the published statutes.

EFFECTIVE DATE: The bill would take effect October 1, 2003, and would apply to persons dying on or after that date who had registered such a designation on their securities at anytime prior to their death. This will ratify the designations made by people before October 1, 2003, including people who may have made such designations under the laws of other states.

BACKGROUND:

Similar bills were introduced in the 1997, 1999, and the 2001 Sessions of the General Assembly. In 2001, House Bill 41, which was virtually identical to this bill, passed the House and was given a favorable report by the Senate Commerce Committee.

This summary was contributed to by Karen Cochrane-Brown, Robin Johnson and Walker Reagan.

S275-SMRC-001

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — March 20, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Betty Turner	Bank of America
Paul Stock	NC Bankers Assn.
Richard C. Hatch	AARP
Michelle Frazier	NC Bar Ass'n
Steve Woodson	NC Farm Bureau
Dick Carlton	Carlton & Alexander PLLC
John Mattyz	GAO OFFICE
JAMES FRANKLIN	THE INSIDER
Camille Stell	Kennedy Covington
Bill Scoggin	"
Greg McLeod	DOT

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
L Beverly	SIA
Jim Blackburn	N.C Assoc. of County Commissioners

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — March 20, 2003

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Dick Carlton	Carlton & Alexander PLLC
John Mattox	Gov Office
James Franklin	The Insider
Camille Stell	Kennedy Covington
Bill Scoggin	"
Greg McLeod	DOT

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
L Bewley	SIA
Jim Blackburn	N.C. Assoc. of County Commissioners

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **JUDICIARY II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	March 25, 2003	10:00 AM	1124

The following will be considered:

	BILL NO.	SHORT TITLE	SPONSOR
•	SB 57	Carolina Beach Wheel Lock Authorization	Sen. Ballantine
•	SB 275	Securities Transfer on Death	Sen. Hartsell
•	SB 323	Gen. Contrs/Protect Info/Clarify Inj. Relief	Sen. Hartsell
•	SB 353	Charitable Solicitations/Require Disclosure	Sen. Bingham

Senator HARTSELL, Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
March, 25, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. **Welcome and Opening Remarks**

II. **Bills to be Considered**

- **SB 57 Carolina Beach Wheel Lock Authorization — Sen. Ballantine**
- **SB 275 Securities Transfer on Death — Sen. Hartsell**
- **SB 323 Gen. Contrs/Protect Info/Clarify Inj. Relief — Sen. Hartsell**
- **SB 353 Charitable Solicitations/Require Disclosure — Sen. Bingham**

III. **Other Business**

IV. **Adjournment**

SENATE JUDICIARY II COMMITTEE

Minutes

March 25, 2003

The Senate Judiciary II Committee was called to order on March 25, 2003, by Senator Fletcher L. Hartsell, Chairman, with thirteen members present.

SB 57 (Carolina Beach Wheel Lock Authorization) Senator Hartsell called for a motion to accept the Proposed Committee Substitute. Senator Allran did so move and the motion carried. Senator Hartsell then called on Senator Ballantine to explain the committee substitute. After the discussion, Senator Allran moved for an unfavorable report as to the original bill, favorable to the Proposed Committee Substitute. Members voted yes and the motion carried.

SB 353 (Charitable Solicitations/Require Disclosure) Senator Hartsell recognized Senator Bingham to discuss the bill. Questions by Senators Dorsett, Kinnaird, Allran, Webster and Kerr were answered by Senator Bingham and Kory Goldsmith, staff attorney. A member of the audience, Mr. Richard L. O'Brien, representing the Professional Fire Fighters and Paramedics of North Carolina spoke on the bill. After the discussion and questions, Senator Shubert moved for a favorable report. Members voted yes, and the motion carried.

SB 275 (Securities Transfer on Death) continued from March 20, 2003. Senator Hartsell invited Senator Allran to chair the committee during the discussion of Senator Hartsell's bill. After discussion of the bill and fiscal note, Senator Shubert moved for a favorable report with referral to the Finance Committee.

There being no further business the meeting was adjourned.

Senator Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 57

Short Title:	Carolina Beach Wheel Lock Authorization.	(Local)
Sponsors:	Senator Ballantine.	
Referred to:	Judiciary II.	

February 17, 2003

A BILL TO BE ENTITLED

AN ACT TO ALLOW THE TOWN OF CAROLINA BEACH TO USE WHEEL LOCKS ON ILLEGALLY PARKED VEHICLES.

The General Assembly of North Carolina enacts:

SECTION 1. Section 2 of Chapter 291 of the 1993 Session Laws, as amended by Chapter 381 of the 1995 Session Laws and S.L. 1997-218, reads as rewritten:

"Sec. 2. This act applies to the Cities of Durham, Greensboro, Lenoir, Monroe, Raleigh, and Winston-Salem only. This act shall also apply to the City of ~~Wilmington,~~ Wilmington and the Town of Carolina Beach, but only as to the area in the central business district as defined in that City's zoning ordinance as of June 1, 1997."

SECTION 2. This act is effective when it becomes law.

SENATE BILL 57:
Carolina Beach Wheel Lock Authorization

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Ballentine
Date:	March 24, 2003	**Summary by:**	Drupti Chauhan Committee Counsel
Version:	PCS to First Edition, S57-CSRQ-5 [v.5]		

SUMMARY: ***The PCS to the bill would allow the towns of Carolina Beach and Wrightsville Beach to use wheel locks on any illegally parked vehicle that has three or more outstanding, unpaid and overdue parking tickets for that vehicle.***

CURRENT LAW: A number of local bills passed over the past several years allow local governments to provide by ordinance for the use of wheel locks on illegally parked vehicles that have 3 or more unpaid parking tickets for 90 days or more. The ordinance has to provide for notice or warning to be put on the vehicle, immobilization through the wheel locks and an immobilization fee of not more than $50.00. The ordinance shall also provide for towing, impoundment, and an appeal hearing. The cities are not responsible for any damage that may occur to immobilized illegally parked vehicles that results from unauthorized attempts to free or move the vehicle.

BILL ANALYSIS: This bill allows the towns of Carolina Beach and Wrightsville Beach to pass an ordinance to allow for the use of wheel locks as several other cities have already done. Wheel locks can be used on illegally parked vehicles that have three or more unpaid and overdue parking tickets for 90 days or more.

BACKGROUND: Several cities and towns throughout North Carolina have had this local legislation passed for them over the past several years. The cities include Durham, Greensboro, Lenoir, Monroe, Raleigh, Winston-Salem, and Wilmington. Wilmington uses wheel locks in its central business district as defined by its zoning ordinance. Cities have found wheel locks to be effective, inexpensive and the risk of damage to be minimal.

EFFECTIVE DATE: This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 57
PROPOSED COMMITTEE SUBSTITUTE S57-CSRQ-5 [v.5]

3/25/2003 9:35:30 AM

Short Title: Municipal Wheel Lock Authorization. (Local)

Sponsors:

Referred to:

February 18, 2003

A BILL TO BE ENTITLED

AN ACT TO ALLOW THE TOWNS OF CAROLINA BEACH AND WRIGHTSVILLE BEACH TO USE WHEEL LOCKS ON ILLEGALLY PARKED VEHICLES.

The General Assembly of North Carolina enacts:

SECTION 1. Section 2 of Chapter 291 of the 1993 Session Laws, as amended by Chapter 381 of the 1995 Session Laws, S.L. 1997-218, and S.L. 2002-127, reads as rewritten:

"Sec. 2. This act applies to the Cities of Durham, Greensboro, Lenoir, Monroe, Raleigh, ~~and Winston-Salem~~ Winston-Salem, and the Towns of Carolina Beach and Wrightsville Beach only. This act shall also apply to the City of Wilmington, but only as to the area in the central business district as defined in that City's zoning ordinance as of June 1, 1997."

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 275

Short Title:	Securities Transfer on Death.	(Public)
Sponsors:	Senators Hartsell; and Carpenter.	
Referred to:	Judiciary II.	

March 4, 2003

A BILL TO BE ENTITLED

AN ACT TO ENACT THE UNIFORM TRANSFER ON DEATH (TOD) SECURITY REGISTRATION ACT.

The General Assembly of North Carolina enacts:

SECTION 1. The General Statutes are amended by rewriting the title of Chapter 41 to read "Estates and Interests in Property", and Chapter 41 of the General Statutes is amended by adding a new Article to read:

"Article 4.

"The Uniform Transfer on Death (TOD) Security Registration Act.

"**§ 41-40. Definitions.**

In this Article, unless the context otherwise requires:

(1) 'Beneficiary form' means a registration of a security which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.

(2) 'Devisee' means any person designated in a will to receive a disposition of real or personal property.

(3) 'Heirs' means those persons, including the surviving spouse, who are entitled under Chapter 29 of the General Statutes or the statutes of intestate succession of other states to take the property of a decedent by intestate succession.

(4) 'Person' means an individual, a corporation, an organization, or other legal entity.

(5) 'Personal representative' includes executor, administrator, collector, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.

"**§ 41-48. Nontestamentary transfer on death.**

(a) A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this Article and is not testamentary.

(b) The interest of a deceased owner when there are one or more surviving owners remains liable for the debts of the decedent in the same manner as the personal property included in the decedent's estate, and recovery of that interest shall be made from the surviving owner or owners when the decedent's estate is insufficient to satisfy the debts. The interest of a deceased sole owner, or the last to die of several owners, remains liable for the debts of the decedent in the same manner as the personal property included in the decedent's estate, and recovery of that interest shall be made from the TOD beneficiary when the decedent's estate is insufficient to satisfy the debts.

(c) This Article does not repeal or modify any provision of law relating to estate taxes.

"**§ 41-49. Terms, conditions, and forms for registration.**

(a) A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests (i) for registrations in beneficiary form, and (ii) for implementation of registrations in beneficiary form, including requests for cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary. The terms and conditions established may provide for proving death, avoiding or resolving any problems concerning fractional shares, and designating primary or contingent beneficiaries. Forms of identifying beneficiaries who are to take on one or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities regarding conditions and identities relevant to accurate implementation of registrations in beneficiary form, may be contained in a registering entity's terms and conditions.

(b) The following are illustrations of registrations in beneficiary form which a registering entity may authorize:

(1) Sole owner-sole beneficiary: 'John S. Brown TOD (or POD) John S. Brown, Jr.'

(2) Multiple owners-sole beneficiary: 'John S. Brown, Mary B. Brown JT TEN WROS TOD John S. Brown, Jr.'

(3) Multiple owners-primary and secondary (substituted) beneficiaries: 'John S. Brown, Mary B. Brown JT TEN WROS TOD John S. Brown, Jr. SUB BENE Peter O. Brown'.

"**§ 41-50. Short title; rules of construction.**

(a) This Article shall be known as and may be cited as the 'Uniform TOD Security Registration Act'.

(b) This Article shall be applied and construed to effectuate its general purposes and to make uniform the laws with respect to the subject of this Article among states enacting it.

(c) This Article does not repeal G.S. 41-2.2. G.S. 41-2.2 applies in determining whether a right of survivorship exists among multiple owners of a security interest in beneficiary form.

"**§ 41-51. Application of Article.**

This Article applies to registrations of securities in beneficiary form made before, on, or after the effective date of this Article, by decedents dying on or after the effective date of this Article."

SECTION 2. G.S. 28A-15-10(a) reads as rewritten:

"(a) When needed to satisfy claims against a decedent's estate, assets may be acquired by a personal representative or collector from the following sources:

(1) Tentative trusts created by the decedent in savings accounts for other ~~persons;~~ persons.

(2) Gifts causa mortis made by the ~~decedent;~~decedent.

(3) Joint deposit accounts with right of survivorship created by decedent pursuant to the provisions of G.S. 41-2.1 or otherwise; and joint tenancies with right of survivorship created by decedent in corporate stocks or other investment securities.

(4) An interest in a security passing to a beneficiary pursuant to the provisions of Article 4 of Chapter 41 of the General Statutes.

Such assets shall be acquired solely for the purpose of satisfying such claims, however, and shall not be available for distribution to heirs or devisees."

SECTION 3. G.S. 41-2.2 is amended by adding a new subsection to read:

"(e) As used in this section, "securities" has the same meaning as in G.S. 41-40(9) and includes "security account" as that term is defined in G.S. 41-40(10)."

SECTION 4. The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform TOD Security Registration Act and all explanatory comments of the drafters of this act as the Revisor may deem appropriate.

SECTION 5. This act becomes effective October 1, 2003.

SENATE BILL 275:
Securities Transfer on Death.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Sen. Hartsell
Date:	March 14, 2003	**Summary by:**	Kory J. Goldsmith, Committee Co-Counsel
Version:	First Edition		

SUMMARY: ***Senate Bill 275 would amend Chapter 41 - Estates, to allow owners of securities to register their title in transfer-on-death (TOD) form. This would allow the transfer of securities, including stocks, bonds, mutual funds, and security accounts, to a beneficiary upon death based on a prior beneficiary designation by registration. The Bill has previously come to the General Assembly as a recommendation of the General Statutes Commission and is modeled after the Uniform Transfer on Death (TOD) Securities Registration Act. The Uniform Act has been adopted in 47 other states.***

CURRENT LAW:

Under current law securities can only be passed upon death by probate or by joint tenancy with right of survivorship.

BILL ANALYSIS:

Senate Bill 41 proposes to add a new Article 4 to Chapter 41 of the General Statutes, entitled "The Uniform Transfer on Death (TOD) Security Registration Act". This act would allow the owner of securities to designate a beneficiary of the securities to be received upon the death of the owner. The owner may revoke or modify this designation at any time up until death. Also this designation does not convey any right or interest in the beneficiary until the time of death. Title to the securities would be transferred as a matter of contract (like life insurance policies or individual retirement accounts), not as a testamentary bequest, and as such would not be part of the probate estate.

Some of the advantages provided by the bill appear to be: 1) provides an alternative to joint ownership with right of survivorship, avoiding the complications and restrictions of dealing with a co-owner but effecting the same transfer upon death; 2) avoids probate and probate fees; and 3) simplifies the process of changing names on securities after death. The bill makes it clear that this act does not affect claims creditors, who can still claim these securities if necessary to satisfy claims against the decedent's estate in the same ways as with joint bank accounts with right of survivorship. The bill also makes it clear that this form of ownership does not affect estate or inheritance tax collection and that these securities would be counted as part of the taxable estate.

One change that would result from this bill would be a reduction in the collection of probate fees by the clerks of court. Probate fees are collected on all personal property that passes through the probate estate. Because these changes would transfer these securities outside the probate estate, probate fees would not be collected on the value of the securities transferred by this method.

Section 2 of this bill makes a conforming change to the statute governing the rights of creditors to collect estate debts from assets passing outside the estate. This statute is only triggered when other assets of the estate are insufficient to satisfy all claims.

Section 3 authorizes the Revisor of Statutes to include the Official Comments to the Uniform Act from the Uniform Commissioners with the published statutes.

EFFECTIVE DATE: The bill would take effect October 1, 2003, and would apply to persons dying on or after that date who had registered such a designation on their securities at anytime prior to their death. This will ratify the designations made by people before October 1, 2003, including people who may have made such designations under the laws of other states.

BACKGROUND:

Similar bills were introduced in the 1997, 1999, and the 2001 Sessions of the General Assembly. In 2001, House Bill 41, which was virtually identical to this bill, passed the House and was given a favorable report by the Senate Commerce Committee.

This summary was contributed to by Karen Cochrane-Brown, Robin Johnson and Walker Reagan.

S275-SMRC-001

NORTH CAROLINA GENERAL ASSEMBLY

LEGISLATIVE FISCAL NOTE

BILL NUMBER: SB 275 1st Edition

SHORT TITLE: Securities Transfer on Death

SPONSOR(S): Senators Hartsell and Carpenter

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2003-04	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08
REVENUES	**There will be a decrease in General Fund revenues due to loss of court fees collected on estates. The amount of annual loss is estimated as between $5.1 million and $5.5 million, if all parties take advantage of this option.**				
EXPENDITURES	-				
POSITIONS: (cumulative)	-				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Judicial Branch and Department of Revenue

EFFECTIVE DATE: October 1, 2003

BILL SUMMARY: Changes the title of Chapter 41 of the General Statutes to "Estates and Interests in Property" and enacts new Article 4, Chapter 41, to provide for the transfer of securities in "beneficiary form" upon the death of the owner. The beneficiary form is defined as registration that indicates the present owner of the security and his or her intention regarding the person to become the owner when the present owner dies. Upon death of a sole owner or last to die of multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. Transfer on death is effective by virtue of the contract between the owner and the registering entity and this statute and is not testamentary. However, the interest of the decedent remains liable for his or her debts in the same manner as personal property included in the decedent's estate. The law does not affect estate or inheritance tax laws and has no effect on ownership of the security until the owner's death. Limits registration to securities in sole ownership or in tenancy in common.

ASSUMPTIONS AND METHODOLOGY: A change in the handling of securities transfers upon death could affect General Fund revenues either through its impact on estate taxes or through its impact on court fees collected related to estates.

According to the Department of Revenue, the addition of a new article to Chapter 41 to allow a change in ownership of a security resulting from a "transfer on death" will **not** affect inheritance or estate taxes. The provisions of G. S. 105-2 (taxation of assets) and G. S. 105-24 (tax waiver requirements) are clear, and the new section G. S. 41-48 (c) preserves the requirements of the two provisions.

However, this legislation would change the way some securities and security accounts are handled during the administration of estates. Specifically, it would allow the owner of a security or account to pass the security or account directly to the named beneficiary without passing under the owner's will or under the laws of intestacy. As a result, the value of the securities or accounts would not be included as part of the state for probate.

This would result in some cases in a reduction in revenues to the General Fund from the General Court of Justice Fees dealing with estates [G. S. 7A-307(a)(2)]. Currently, the clerk collects a flat $30 fee, other fees pursuant to G. S. 7A-307, and forty cents per $100 of the gross value of personal property in the estate (referred to as ad valorem fee), up to $3,000. To the extent that securities currently owned by a single individual are subsequently registered in accordance with this bill, they would not be included in the value of the estate, and the forty cents per $100 in value that is collected under current law would not be collected. If the security is already owned by multiple individuals with rights of survivorship, their value is already excluded from the ad valorem fee.

There are several reasons why it is difficult to precisely estimate the fiscal impact of the bill. Fiscal Year 2001-2002 data shows that a total of 59,136 estate cases were filed statewide and $12.34 million was collected in estate costs. However, it is not known how much of this is from the ad valorem fee.

Data is not collected on the amount derived from each type of property in the estate so it cannot be determined how much of the $10.14 million is fees paid on securities. Because the ad valorem fee is capped at $3,000, if other assets exceed $750,000, the removal of securities from the base would have no impact on the fees due. Thus, estimating the impact of the bill requires detailed information on each estate.

Even if it were possible to estimate the amount in court costs being collected from the ad valorem fee on securities, it would be difficult to estimate the extent to which the owners of the securities would take advantage of the provisions of the bill and avoid those costs. Since these court fees are only one factor in the many issues involved in estate planning, it is not possible to project how many people will choose this option.

Study of Estate Fees; the Sample

The Administrative Office of the Courts (AOC) conducted a study in July 2001 to estimate the impact of the bill. They sampled 400 estates settled throughout Calendar Year 1999 in five counties (200 cases in Wake and 50 each in Guilford, Polk, Wayne and Johnston). These counties together represent 12.5% of estate files docketed that year and 16.2% of the state's population but 19.3% of intangible wealth (based on reimbursement amounts), so this sample was somewhat biased towards higher wealth populations. The total value of property itemized in these files included $59.9 million subject to the ad valorem levy. A total of $160,413 was collected from the ad valorem fee.

The sample included $41.6 million in securities with 10.4% of those jointly owned and not subject to the ad valorem fee. In addition, there was $22.6 million of property other than securities (e.g. bank accounts, personal property) subject to the 40cents/$100.

Of the 400 cases in the sample, there were 93 estates including solely owned securities totaling $37,325,091. The total value of property subject to the ad valorem fee in these 93 cases was $47,331,088; securities represented 79% of the assets.

If the bill had been law, and securities owners in each case had taken advantage of the securities transfer on death option, court fees collected on these 400 cases would have been decreased by $71,850. Of the sample, 23.25% of the cases would be potentially affected. The amount of lost fees per estate varied from $1 to $2,947.

The sample also indicated a substantial impact from the $3,000 cap on the ad valorem fee. In 16 of the cases, the total value of property subject to probate exceeded $750,000 so that the $3,000 cap was effective, lowering ad valorem fees by $78,091. In Polk County alone, 7 of the 50 cases sampled had estates exceeding $750,000, reducing the ad valorem fee by $29,189.

Projecting Annualized Loss Statewide

In Calendar Year 1999, there were 59,290 estate files docketed. However, not all of these files involved settling of an estate or payment of probate fees. (e.g. this number includes appointments of guardian, inventory of lock boxes, etc). In that same year, AOC data indicates 23,904 cases where there was an itemization of assets for the purpose of assessing fees. Using this number as a base, the sample of 400 cases represents 1.67% (400/23904) of the annual number of estates potentially paying ad valorem fees. Extrapolating from the $71,850 loss found in the sample, the estimated annual loss statewide would be $5,132,143. *This is a conservative estimate (e.g. higher potential revenue loss) because it assumes all affected individuals would choose to register their securities to allow security transfer on death. It is not possible to project the percentage of people who will choose to do this.*

An alternative method to estimate the impact is to note that in the sample, the potential loss in court fees ($71,850) was 44.8% of fees collected ($160,431) in those 400 estates. Applying this 44.8% figure to the estimated $12,336,543 million in ad valorem fees in 1999-2000, the potential loss is $5,526,771. This is the higher estimate in the box on page 1.

Because of the difficulty of extrapolating from this sample and of predicting how many people would take advantage of securities transfer on death, Fiscal Research cannot assign a specific dollar amount to the fiscal impact of this bill. However, based on the analysis above, there will be a significant fiscal impact because of lost court fees.

SOURCES OF DATA: Judicial Branch; Department of Revenue

TECHNICAL CONSIDERATIONS:

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Douglas R. Holbrook, Jr.

Douglas R. Holbrook, Jr.

APPROVED BY: James D. Johnson, Director Fiscal Research Division

James D. Johnson

DATE: March 24, 2003

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 323

Short Title:	Gen. Contrs/Protect Info/Clarify Inj. Relief.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 6, 2003

A BILL TO BE ENTITLED

AN ACT TO PROTECT THE CONFIDENTIALITY OF INFORMATION RECEIVED BY THE LICENSING BOARD FOR GENERAL CONTRACTORS WHILE CONDUCTING AN INVESTIGATION OF A LICENSEE AND TO CLARIFY WHEN THE BOARD MAY SEEK INJUNCTIVE RELIEF.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 87-11(c) reads as rewritten:

"(c) The Board shall establish and maintain a system whereby detailed records are kept regarding complaints against each licensee. This record shall include, for each licensee, the date and nature of each complaint, investigatory action taken by the Board, any findings by the Board, and the disposition of the matter. Complaints, records, papers, or other documents containing information received, collected, or compiled by the Board, its members, or its employees as part of or as a result of investigations, inquiries, or interviews conducted in connection with a licensing or disciplinary matter shall not be considered public records within the meaning of Chapter 132 of the General Statutes. However, any notice to a licensee of a hearing pursuant to Chapter 150B of the General Statutes shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of an investigation, inquiry, or interview. If any record, paper, or other document containing information collected and compiled by the Board is received and admitted into evidence in a public hearing before the Board, it is then considered a public record within the meaning of Chapter 132 of the General Statutes."

SECTION 2. G.S. 87-13.1 reads as rewritten:

"**§ 87-13.1. Board may seek injunctive relief.**

Whenever ~~it appears to~~ the Board determines that any person, firm or corporation has, within the past three years, violated or is violating any of the provisions of this Article or ~~of the~~ rules and regulations of the Board promulgated under this Article, the Board may apply to the superior court for a restraining order and injunction to restrain the violation; and the superior courts have jurisdiction to grant the requested relief,

irrespective of whether or not criminal prosecution has been instituted or administrative sanctions imposed by reason of the violation."

SECTION 3. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 353

Short Title:	Charitable Solicitations/Require Disclosure.	(Public)
Sponsors:	Senators Bingham; Apodaca, Garwood, and Smith.	
Referred to:	Judiciary II.	

March 11, 2003

A BILL TO BE ENTITLED

AN ACT TO REQUIRE SOLICITORS OF CHARITABLE SOLICITATIONS THAT REQUEST CONTRIBUTIONS BY TELEPHONE TO, WHEN REQUESTED BY THE PERSON BEING SOLICITED ON THE TELEPHONE, CLEARLY DISCLOSE TO THAT PERSON AT THE TIME OF THE REQUEST THE FIXED PERCENTAGE OF THE GROSS REVENUES THAT THE CHARITABLE ORGANIZATION OR SPONSOR WILL RECEIVE AS A BENEFIT FROM THE SOLICITATION CAMPAIGN AND SEND THAT PERSON A COPY OF THE SOLICITOR'S MOST RECENT FINANCIAL REPORT, TO REQUIRE THIS PERCENTAGE TO BE INCLUDED IN THE SOLICITOR'S FINANCIAL REPORT, AND TO PROHIBIT A PERSON FROM MISREPRESENTING THIS REQUESTED INFORMATION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 131F-17(a) reads as rewritten:

"(a) General Disclosures. – A solicitor shall comply with the following disclosures:

(1) Prior to orally requesting a contribution or along with a written request for a contribution, a solicitor shall clearly disclose:

a. The name of the solicitor as on file with the Department.

b. If the individual acting on behalf of the solicitor identifies himself by name, the individual's legal name.

c. That the caller is a paid ~~solicitor.~~solicitor by unequivocally making the following statements in substantially the following form: 'I am paid to make this solicitation by (name of solicitor). (Name of solicitor) is paid by (name of charitable organization or sponsor, as appropriate) to make this solicitation. You are free to ask me questions about the use of funds pledged.'

(2) In the case of a solicitation campaign conducted orally, whether by telephone or otherwise, any written confirmation, receipt, or reminder

sent to any person who has contributed or has pledged to contribute, shall include a clear disclosure of the information required under subdivision (1) of this subsection.

(3) In addition to the information required by subdivision (1) of this subsection, any written confirmation, receipt, or reminder of contribution made pursuant to an oral solicitation and any written solicitation shall conspicuously state in type of a minimum of nine points:

'Financial information about the solicitor and a copy of its license are available from the State Solicitation Licensing Branch at [telephone number]. The license is not an endorsement by the State.'

The statement shall be made conspicuous by use of one or more of the following: underlining, a border, or bold type. When the solicitation materials consist of more than one piece, the statement shall be displayed prominently in the solicitation materials, but not necessarily on every page.

(4) If requested by the person being solicited, the solicitor shall inform that ~~person, in writing, within 14 days of the request, person~~ immediately, at the time of the request, of the fixed percentage of the gross revenue or the reasonable estimate of the percentage of the gross revenue that the charitable organization or sponsor will receive as a benefit from the solicitation ~~campaign.~~campaign, and the solicitor shall send that person within 14 days a copy of the solicitor's most recent financial report under G.S. 131F-16(h).

(5) If requested by the person being solicited, the solicitor shall inform that person, in writing, within 14 days of the request, of the percentage of the contribution which may be deducted as a charitable contribution under federal income tax laws."

SECTION 2. G.S. 131F-16(h) reads as rewritten:

"(h) Financial Report. – Within 90 days after a solicitation campaign has been completed and on the anniversary of the commencement of a solicitation campaign lasting more than one year, the solicitor shall provide to the charitable organization or sponsor and file with the Department a financial report of the campaign, including the gross revenue ~~received and~~ received, an itemization of all expenses ~~incurred.~~incurred, and the fixed percentage of the gross revenue that the charitable organization or sponsor received as a benefit from the solicitation campaign. The report shall be completed on a form provided by the Department and shall be signed by an authorized official of the solicitor who shall certify under oath that the report is true and correct."

SECTION 3. G.S. 131F-20 reads as rewritten:

"**§ 131F-20. Prohibited acts.**

It is unlawful for any person to:

...

(10) Represent that a charitable organization or sponsor will receive a fixed or estimated percentage of the gross revenue from a solicitation

campaign greater than that disclosed under G.S. 131F-17(a) or that identified in filings with the Department under this Chapter, or that a charitable organization or sponsor will receive an actual or estimated dollar amount or percentage per unit of goods or services purchased or used in the charitable or sponsor sales promotion that is greater than that agreed to by the coventurer and the charitable organization or sponsor.

..."

SECTION 4. This act is effective when it becomes law and applies to any charitable solicitation subject to Chapter 131F of the General Statutes that is conducted on or after that date.

SENATE BILL 353:
Charitable Solictions/Require Disclosure

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Bingham
Date:	March 24, 2003	**Summary by:**	Kory J. Goldsmith
Version:	1st Edition		Committee Counsel

SUMMARY: ***SB 353 would require that a solicitor who is paid to make charitable solicitations must disclose the organization that is paying him or her to make the solicitation, that the charitable organization is paying to have the solicitation made, and that the person being solicited may ask questions about the use of the funds being pledged. If requested, the solicitor must also disclose at that the time of the solicitation the fixed percentage of the gross revenue or a reasonable estimate of the amount of the gross revenues that the charitable organization will receive as a result of the solicitation campaign.***

CURRENT LAW: Chapter 131E governs the solicitation of contributions by or on behalf of charitable organizations in North Carolina. A charitable organization is any person who holds out as having 501(c)(3) tax exempt status and operates for a charitable purpose or a person who holds himself out or employs a charitable or civic appeal as the basis of a solicitation and includes a chapter, branch, or area office for a charitable organization with a principle office outside North Carolina. Chapter 131F does not apply to any person who solicits contributions for a religious institution; the solicitation of charitable contributions by the federal, State or local government; any person who receives less than $25,000 in contributions in any calendar year and does not provide compensation to any officer or solicitor; most colleges or schools; hospitals licensed under Chapters 131E or 122C of the General Statutes; noncommercial radio or television stations; a bona fide volunteer or bona fide employee or salaried officer of a charitable organization or sponsor; the YMCA or YWCA; or a nonprofit continuing care facility.

Unless exempted from the statute, charitable organizations, fund-raising consultants, solicitors, and coventurers who intend to solicit funds or to have funds solicited on their behalf in North Carolina must first obtain a license from the Secretary of State. A solicitor is any person who, for compensation, performs any service (including the employment of other persons or services) to solicit contributions for a charitable organization or plans or manages the solicitation of contributions for a charitable organization. At least 5 days prior to beginning a solicitation campaign, a solicitor must file with the Secretary a notice that describes the solicitation event or campaign, each location and phone number from which the solicitation is to be conducted, the legal name of each person responsible for supervising the campaign, the account number where donations will be deposited, a description of the charitable program for which the solicitation campaign is being carried-out, the fund-raising methods to be used, and a copy of the contract between the solicitor and the charitable organization. Within 90 days after the campaign has ended, the solicitor must file with the Secretary a report that includes the gross revenue received and an itemization of all expenses incurred.

Prior to orally requesting a contribution, a solicitor must disclosure:

- The name of the solicitor and the legal name of the individual acting on behalf of the solicitor if that person gives their name.
- That the caller is a paid solicitor.

If requested, a solicitor must also provide in writing the fixed percentage of the gross revenue or the reasonable estimate of the percentage of the gross revenue that the charitable organization or sponsor will receive as a benefit from the solicitation campaign. This information must be provided within 14 days of the solicitation.

BILL ANALYSIS: The bill amends G.S. 131F-17(a) regarding the disclosures a solicitor is required to make prior to the solicitation. A solicitor would be required to state unequivocally that he or she is paid to make the solicitation, that the charitable organization is paying a solicitor to make the solicitation, and that the potential donor is free to ask any questions about the use of the funds pledged. It also requires that if requested, the solicitor must provide at the time of the request information regarding the fixed percentage of the gross revenue or the reasonable estimate of the percentage of the gross revenue that the charitable organization or sponsor will receive as a benefit from the solicitation campaign. It also requires that the financial statement filed with the Secretary of State include the fixed percentage of the gross revenue or the reasonable estimate of the percentage of the gross that the charitable organization or sponsor received as a benefit from the solicitation program. Finally, it makes it illegal to represent that a charitable organization will receive a greater proportion of solicited funds than the amount that is disclosed at the time the solicitation is made.

BACKGROUND: During the 1980's, North Carolina adopted the "Charitable Solicitation Licensure Act" (Chapter 131C of the General Statutes). The act included statutory limitations on the percentage of revenue that a for-profit organization could receive from funds pledged to a charitable organization. The act also compelled the solicitor to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations. These provisions were challenged and found to violate the First Amendment under the U.S. Supreme Court decision of Riley v. National Federation of the Blind of North Carolina, 108 S.Ct. 2667 (1988). Subsequent to that decision, the General Assembly repealed Chapter 131C and replaced it with the current Chapter 131F – Solicitation of Charitable Contributions.

CONSTITUTIONAL ISSUES: Under the Riley decision, the solicitation of charitable contributions is protected speech and any restriction, including required speech, is subject to the strict scrutiny standard. This means there must be a compelling state interest in regulating the speech and the regulation must be narrowly tailored to protect the interest. SB 353 would require the solicitor to provide additional, and more specific information prior to the solicitation. However, in Riley, the Supreme Court noted that North Carolina may constitutionally require fundraisers to disclose certain financial information to the State. The Court also noted that its opinion should not be interpreted to prohibit the State from requiring a fundraiser to disclose "unambiguously" his or her professional status. "[S]uch a narrowly tailored requirement would withstand First Amendment scrutiny." Riley, 108 S.Ct. at 2679, fn. 11

The act is effective when it becomes law and would apply to charitable solicitations conducted on and after that date.

S353-SMRC-001

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — March 25, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Richard C Hatch	AARP
R. Paul Wilms.	NCHBA
MARK SELPH	GENERAL CONTRACTORS BOARD
Kristi A. Rushing	Secretary of State
Dina DiMaio	NCBA
Abby Emanuelson	Nat'l MS Society
Charles Marshall	N.C. Press Assoc.
Carol Cole	BPM HL
Camille Stell	Kennedy Covington
CARSON CARMICHAEL	Bailey & Dixon LLP
Virginia Hebert	Sen. Kinnaird

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — March 25, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Sarah Toney	Sen. Kerr
Carla Lofty	Sen. Purcell
Mary Robertson	Associated Press
	NCRA
Dick Carlton	Carlton + Alexander
	PFPNC
Lorin Mueller	NC Coalition of Police

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Wednesday, March 26, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B. **275** Securities Transfer on Death.
Sequential Referral: None
Recommended Referral: Finance

S.B. **353** Charitable Solicitations/Require Disclosure.
Sequential Referral: None
Recommended Referral: None

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **57** Carolina Beach Wheel Lock Authorization.
Draft Number: PCS 85118
Sequential Referral: None
Recommended Referral: None
Long Title Amended: Yes

TOTAL REPORTED: 3

Committee Clerk Comments:

MARCH 27, 2003

DID NOT MEET

Gerry Johnson (Sen. Hartsell)

From: Gerry Johnson (Sen. Hartsell)
Sent: Thursday, March 27, 2003 11:49 AM
Subject: SENATE JUDICIARY II COMMITTEE MEETING (Date)

Principal Clerk _____
Reading Clerk _____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **JUDICIARY II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	April 1, 2003	10:00 AM	1124

The following will be considered:

	BILL NO.	SHORT TITLE	SPONSOR
•	SB 251	Prohibit Rebirthing	Sen. Allran
•	SB 293	Sales Representative Commissions Revisions	Sen. Thomas
•	SB 323	Gen. Contrs/Protect Info/Clarify Inj. Relief	Sen. Hartsell
•	SB 421	Amend Child Welfare Laws.-AB	Sen. Thomas
•	SB 423	Amend Child Support Enforcement Laws.-AB	Sen. Thomas

Senator HARTSELL, Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
April 1, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. **Welcome and Opening Remarks**

II. **Bills to be Considered**

•	SB 251	Prohibit Rebirthing	Sen. Allran
•	SB 293	Sales Representative Commissions Revisions	Sen. Thomas
•	SB 323	Gen. Contrs/Protect Info/Clarify Inj. Relief	Sen. Hartsell
•	SB 421	Amend Child Welfare Laws.-AB	Sen. Thomas
•	SB 423	Amend Child Support Enforcement Laws.-AB	Sen. Thomas

III. **Other Business**

IV. **Adjournment**

SENATE JUDICIARY II COMMITTEE

Minutes

April 1, 2003

The Senate Judiciary II Committee was called to order on April 1, 2003, by Senator Fletcher L. Hartsell, Chairman, with twelve members present.

SB 293 (Sales Representative Commissions Revisions) Senator Hartsell introduced the Proposed Committee Substitute. He then recognized Senator Thomas, bill sponsor, to discuss the bill.

Senator Allran moved to adopt the Committee Substitute. After explanation of the PCS by Kory Goldsmith, staff attorney, Bill Scogging, lobbyist for Manufacturers Agents National Association, introduced Mr. Mark Motsinger, of Wallace Electronic Sales and Mr. Joseph Cook, of Eastern Technologies Inc., to speak on the bill and to answer questions of Senators Webster and Bingham. A technical amendment to the Committee Substitute was offered by Senator Thomas and explained by Kory Goldsmith. Senator Thomas moved for adoption of the amendment. Senator Hartsell called for a vote and the amendment passed. Senator Shubert then moved for an unfavorable report to the original bill, but favorable to the Committee Substitute as amended and rolled into a new Committee Substitute. All members voted yes and the motion carried.

SB 251 (Prohibit Rebirthing) Senator Allran, bill sponsor, was recognized to explain the bill which was referred to Judiciary II from the Health and Human Services Commission. Mary and David Davis, grandparents of Candace Newmaker, the ten year old who was killed during a therapy session called "rebirthing" in April, 2000, were introduced. Senator Shubert moved for a favorable report. All members voted yes and the motion carried.

SB 423 (Amend Child Support Enforcement Laws - AB) Senator Hartsell introduced the Proposed Committee Substitute and noted there was a technical amendment to the Committee Substitute. Drupti Chauhan, staff attorney, explained the amendment. Senator Hartsell called for a motion to proceed. Senator Sloan so moved and the motion passed. Senator Thomas was introduced to discuss the bill. He then called on Drupti Chauhan, to explain the Committee Substitute. Mr. Barry Miller from Child Support Program of the Department of Health and Human Services Division of Social Services and Gerald K. Robbins of the Department of Justice answered questions by Senators Kinnaird, and Webster.

The meeting adjourned with no action taken on the bill.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 2

SENATE BILL 251

Health and Human Resources Committee Substitute Adopted 3/19/03

Short Title: Prohibit Rebirthing. (Public)

Sponsors:

Referred to:

February 27, 2003

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT THE PRACTICE OF THE "REBIRTHING" TECHNIQUE.

Whereas, United States Representative Sue Myrick, a member of the North Carolina congressional delegation, introduced House Concurrent Resolution 435 in Congress encouraging states to outlaw "rebirthing"; and

Whereas, the United States Congress adopted House Concurrent Resolution 435, which passed the House of Representatives by a vote of 397-0; and

Whereas, in House Concurrent Resolution 435, the United States Congress expressed the sense that the technique known as "rebirthing", a form of "attachment therapy", is a dangerous and harmful practice and should be prohibited; and

Whereas, Candace Newmaker, a child from North Carolina, died from use of the "rebirthing technique", and four other children have died from other forms of "attachment therapy"; and

Whereas, the American Psychological Association does not recognize "rebirthing" as proper treatment; Now, therefore,

The General Assembly of North Carolina enacts:

SECTION 1. Article 52 of Chapter 14 of the General Statutes is amended by adding the following new section to read:

"**§ 14-401.21. Practicing "rebirthing technique"; penalty.**

(a) It is unlawful for a person to practice the technique of "rebirthing". As used in this section, "rebirthing" means a technique to reenact the birthing process in a manner that includes restraint and creates a situation in which a patient may suffer physical injury or death.

(b) A violation of this section is punishable as follows:

(1) For a first offense under this section, the person is guilty of a Class A1 misdemeanor.

(2) For a second or subsequent offense under this section, the person is guilty of a Class I felony."

SECTION 2. G.S. 122C-60(a) reads as rewritten:

"(a) Physical restraint or seclusion of a client shall be employed only when there is imminent danger of abuse or injury to the client or others, when substantial property damage is occurring, or when the restraint or seclusion is necessary as a measure of therapeutic treatment. For purposes of this section, "rebirthing" as defined by G.S. 14-401.21 is not a measure of therapeutic treatment. All instances of restraint or seclusion and the detailed reasons for such action shall be documented in the client's record. Each client who is restrained or secluded shall be observed frequently, and a written notation of the observation shall be made in the client's record."

SECTION 3. Section 1 of this act becomes effective December 1, 2003, and applies to offenses committed on and after that date. The remainder of this act is effective when it becomes law.

SENATE BILL 251: Prohibit Rebirthing

BILL ANALYSIS

Committee:	Senate JII	**Introduced by:**	Sen. Austin Allran
Date:	April 1, 2003	**Summary by:**	Dianna Jessup
Version:	Second		Staff Attorney

SUMMARY: ***Senate Bill 251 would make it a criminal offense to practice the technique of "rebirthing", meaning a technique to reenact the birthing process in a manner that includes restraint and creates a situation in which a patient may suffer physical injury or death. A criminal charge would be punishable as a Class A1 misdemeanor for the first offense (resulting up to 150 days' community/intermediate/active punishment) and a Class I felony for subsequent offenses (resulting in a minimum of 3 months' community punishment and a maximum of 12 months' intermediate/active punishment). This section of the bill would become effective December 1, 2003.***

The bill would also specify that the rebirthing technique is not a permissible form of physical restraint under the mental health statutes. This section of the bill would become effective when it becomes law.

CURRENT LAW: Criminal law currently does not specifically prohibit "rebirthing", but depending on the circumstances and whether injury or death occurs, conducting "rebirthing" could result in criminal charges.

Child abuse: Any parent of a child less than 16, or any other person providing care to or supervision of a child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to the child by other than accidental means is guilty of **misdemeanor child abuse**. Misdemeanor child abuse is a Class 1 misdemeanor offense, punishable by up to 45 days' community punishment. Intentional infliction of serious physical injury, or an intentional assault on a child which results in serious physical injury[1], is **felony child abuse**, a Class E felony punishable by 15-74 months' intermediate/active punishment. If serious bodily injury[2] to the child occurs, it is a Class C felony punishable by 44 to 210 months' active punishment.

Assault: A **simple assault**, i.e., an overt act or attempt, or the unequivocal appearance of attempt, with force and violence, to immediately physically injury another person, with the show of force or menace of violence being sufficient to put a reasonable person in fear of immediate physical injury, is a Class 2 misdemeanor, punishable by up to 60 days' community/intermediate/active punishment. If the assault is on a child under 12, or if serious injury is inflicted, it is a Class A1 misdemeanor, punishable by up to 150 days' community/intermediate/active punishment.

Manslaughter/Murder: A person is guilty of **involuntary manslaughter** even though an act that caused death is lawful, if the act was carried out in a reckless and careless manner with respect to the rights and safety of others. Involuntary manslaughter is a Class F felony, punishable by 10 months' intermediate/active to 49 months' active punishment. If a death results from cruel and reckless acts that indicate a total disregard for human life, a person could be charged with **second degree murder**, which is a Class B2 felony, punishable by 94-392 months' active punishment.

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[1] "Serious physical injury" may be physical injury that causes great pain and suffering or serious mental injury.

[2] "Serious bodily injury" is bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

Other: Under the mental health statutes[3], if an employee of or a volunteer at a facility, who other than as part of generally accepted medical or therapeutic procedure, knowingly causes pain or injury to a client, that person is guilty of a Class 1 misdemeanor (punishable by up to 120 days' community/intermediate/active punishment.

The **use of physical restraint** on a client under the mental health statutes is limited to circumstances when there is imminent danger of abuse or injury to the client or others, when substantial property damage is occurring, or when the restraint is necessary as a measure of therapeutic treatment. All instances of restraint must be documented and must be employed only by staff that have been trained and have demonstrated competence in the proper use of and alternatives to restraint.

BILL ANALYSIS: If enacted, it would be a specific criminal offense to practice rebirthing, whether or not a patient is actually injured during the therapy. A criminal charge would be punishable as a Class A1 misdemeanor for the first offense (resulting up to 150 days' community/intermediate/active punishment) and a Class I felony for subsequent offenses (resulting in a minimum of 3 months' community punishment and a maximum of 12 months' intermediate/active punishment). The bill would not change current law as it relates to child abuse, assault, manslaughter, and murder, so if circumstances warranted, a person practicing rebirthing could still be charged with one of these offenses.

The bill would also specify that rebirthing is not an acceptable form of mental health therapeutic treatment that would permit the use of restraint on a client.

BACKGROUND: Candace Newmaker, a 10-year old girl from Durham, North Carolina, died on April 19, 1999, a day after a rebirthing session in the home of an unlicensed therapist in Colorado. During the session, the child was wrapped in a sheet, made to lie in the fetal position, and then huge pillows were placed over her. Four adults pushed against her while her mother urged the child to be "born" to her, to come out of the "womb" and start a new and better life. During the procedure, the child screamed and begged for air, telling them she would die, to which the therapists replied, "Go ahead and die". When the child was unwrapped 70 minutes later, she wasn't breathing, and she died the next day. The therapy was supposed to help cure the child's attachment disorder, characterized by violent behavior towards her mother.

The two unlicensed therapists were convicted of child abuse resulting in death and received 16 years in prison as punishment. The child's mother pled guilty to negligent child abuse resulting in death and was given a four-year deferred sentence and 400 hours of community service.

In 2001, Colorado enacted legislation, known as "Candace's Law" that outlaws rebirthing therapy.

S251-SMSW-001

[3] G.S. 122C-66(a).

NORTH CAROLINA GENERAL ASSEMBLY
LEGISLATIVE FISCAL NOTE
(INCARCERATION NOTE G.S. 120-36.7)

BILL NUMBER: SB 251 2nd Edition

SHORT TITLE: Prohibit Rebirthing

SPONSOR(S): Senator Allran

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2003-04	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08
GENERAL FUND					
Correction					
Recurring	Unable to determine exact amount; no substantial impact anticipated.				
Nonrecurring					
Judicial					
Recurring	Unable to determine exact amount; no substantial impact anticipated.				
Nonrecurring					
TOTAL EXPENDITURES:	Unable to determine exact amount; no substantial impact anticipated.				
ADDITIONAL PRISON BEDS*	Unable to determine exact number of beds; no substantial impact anticipated				
POSITIONS: (cumulative)	Unable to determine exact amount; additional positions not anticipated.				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction (DOC); Judicial Branch

EFFECTIVE DATE: December 1, 2003

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY: SB 251 amends article 52 of Chapter 14 of the General Statutes by adding a new section, G.S. 14-401.21, to prohibit the practice of rebirthing, defined as a technique to reenact the birthing process in a manner that includes restraint and creates a situation in which a patient may suffer physical injury or death. A first offense for violation of G.S. 14-401.21 is punishable as a Class A1 misdemeanor; a second or subsequent offense is punishable as a Class I felony. The bill also adds amends G.S. 122C-60(a) to specify that rebirthing is not a measure of therapeutic treatment.

ASSUMPTIONS AND METHODOLOGY:

Department of Correction

The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes and fiscal memos are based on January 2003 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory board, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five-year Fiscal Note horizon and beyond.* The number of beds needed will always be equal to the projected number of inmates due to a bill.

Since the proposed bill creates a new offense, the Sentencing Commission does not have any historical data from which to estimate the impact of this bill on the prison population. It is not known how many offenders might be sentenced under this bill. In FY 2001-2002, 20% of Class A1 misdemeanor convictions resulted in active sentences. The average estimated time served was 55.1 days. It is likely that misdemeanants sentenced under this bill would be housed in local jails but paid for by the State at a cost of $18/day. (Active sentences between 1-90 days are served in local jails; the DOC reimburses counties for active sentences between 30-90 days). Because only A1 offenders falling in Prior Record Level III receive active sentences that might be served in the state prison system, convictions for this proposed offense would not be expected to have a significant impact on the prison population.

In addition, it is not known how many offenders might be sentenced under the Class I felony for a second or subsequent offense. For example, if there were 10 Class I convictions for this offense per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and three additional prison beds the second year. In 2001-2002, 9 percent of Class I felony offenders were sentenced to active sentences, 37 percent were sentenced to intermediate sanctions, and 54 percent were sentenced to community punishment. On average, offenders served between seven and nine months. In 2001-2002, the statewide average operating cost for one inmate was $62.43/day or $22,786.95 a year.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts (AOC) provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks and prosecutors. This

increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

Because the bill creates a new offense, AOC is unable to estimate the number of new felony or misdemeanor charges that could arise from this bill. For offenses that are brought to trial as Class A1 misdemeanors, the estimated court cost per trial is $2,594. For Class A1 misdemeanor offenses not brought to trial, and where a guilty plea is entered, AOC estimates the cost per guilty plea at $214. While the number of Class I felony cases that could result under the bill is relatively low, trials would be jury trials in superior court rather than misdemeanor cases in district court, and total processing and position costs would also increase. For offenses that are brought to trial as Class I felonies, the estimated court cost per trial is $4,637. For Class I felony offenses not brought to trial and where a guilty plea is entered, AOC estimates the cost per guilty plea at $255.

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission.

TECHNICAL CONSIDERATIONS:

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Nicole Kreiser
and
Jim Mills

APPROVED BY: James D. Johnson, Director Fiscal Research Division

DATE: March 25, 2003

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 293

Short Title:	Sales Representative Commissions Revisions.	(Public)
Sponsors:	Senators Thomas; Carpenter, Horton, and Reeves.	
Referred to:	Judiciary II.	

March 5, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW GOVERNING SALES REPRESENTATIVE COMMISSIONS.

The General Assembly of North Carolina enacts:

SECTION 1. Article 27 of Chapter 66 of the General Statutes reads as rewritten:

"Article 27.

"Sales Representative Commissions.

"§ 66-190. Definitions.

The following definitions apply in this Article:

(1) "Commission" means compensation accruing to a sales representative for payment by a principal, the rate of which is expressed as a percentage of the amount of ~~orders or sales~~ orders, sales, or profits or as a specified amount per order or per sale.

(2) "Person" means an individual, corporation, limited liability company, partnership, unincorporated association, estate, ~~or trust.~~ trust, or other entity.

(3) "Principal" means a person ~~who does not have a permanent or fixed place of business in this State and~~ who:

a. Manufactures, produces, imports, or distributes a ~~tangible~~ product ~~for sale at wholesale;~~ or service;

b. Contracts with a sales representative to solicit orders for the product; and

c. Compensates the sales representative, in whole or in part, by commission.

(4) "Sales representative" means a person who:

a. Contracts with a principal to solicit ~~wholesale orders;~~ orders for products or services;

b. Is compensated, in whole or in part, by ~~commission;~~ commission; and

~~c. Does not place orders or purchase for his own account or for resale;~~

~~d. Does not sell or take orders for the sale of products at retail; and~~

e. Is not an employee of the principal.

(5) "Terminate" and "termination" mean the end of the business relationship between the sales representative and the principal, whether by agreement, by expiration of time, or by exercise of a right of termination of either party.

"**§ 66-190.1. Written contracts.**

The agreement or contract between a sales representative and a principal shall be in writing. The absence of a written agreement or contract shall not bar a cause of action by, or any remedy available to, a sales representative pursuant to this Article.

"**§ 66-191. ~~Payment of commissions.~~ Termination; definition.**

When a contract between a sales representative and a principal is terminated for any reason other than malfeasance on the part of the sales representative, the principal shall pay the sales representative all commissions ~~accrued under the contract to the sales representative within 45 days after the effective date of the termination.~~ due under the contract at the effective date within 30 days after the effective date of the termination and all commissions that become due after the effective date of termination within 14 days after they become due. When a sales representative sends a written demand for payment of commissions to a principal by certified mail, the principal shall respond in writing to the demand within 30 days after the principal receives the written demand.

"**§ 66-192. Civil liability.**

(a) A principal who fails to comply with the provisions of G.S. 66-191 is liable to the sales representative in a civil action for (i) all amounts due the sales representative plus exemplary damages in an amount not to exceed three times the amount of commissions due the sales representative, (ii) attorney's fees actually and reasonably incurred by the sales representative in the action, and (iii) court costs.

(a1) A principal who fails to respond to a sales representative in writing within 30 days after the principal receives a written demand pursuant to G.S. 66-191 shall be presumed to have acted willfully and in bad faith.

(b) Where the court determines that an action brought by a sales representative against a principal under this Article is frivolous, the sales representative is liable to the principal for court costs and for attorney's fees actually and reasonably incurred by the principal in defending the action.

(c) A principal who is not a resident of this State who contracts with a sales representative to solicit orders in this State shall be subject to personal jurisdiction as provided in G.S. 1-75.4.

(d) Nothing in this Article shall invalidate or restrict any other or additional right or remedy available to a sales representative or preclude a sales representative from seeking to recover in one action on all claims against a principal.

"**§ 66-192.1. Revocable offers of commission; entitlement.**

If a principal makes a revocable offer of a commission to a sales representative, the sales representative is entitled to the commission agreed upon if:

(1) The principal revokes the offer of commission and the sales representative establishes that the revocation was for the purpose of avoiding payment of the commission;

(2) The revocation occurs after the principal has obtained a written order for the principal's product or service because of the efforts of the sales representative; and

(3) The principal's product or service that is the subject of the order is provided to and paid for by a customer.

"**§ 66-193. Contracts void.**

A provision in any contract between a sales representative and a principal purporting to waive any provision of this Article, whether by expressed waiver or by a contract subject to the laws of another state, is void."

SECTION 2. This act becomes effective October 1, 2003.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 293
Senate Proposed Committee Substitute
PROPOSED COMMITTEE SUBSTITUTE S293-CSRC-6 [v.2]

3/31/2003 8:20:33 PM

Short Title: Sales Representative Commissions Revisions. (Public)

Sponsors:

Referred to:

March 5, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW GOVERNING SALES REPRESENTATIVE COMMISSIONS.

The General Assembly of North Carolina enacts:

SECTION 1. Article 27 of Chapter 66 of the General Statutes reads as rewritten:

"Article 27.

"Sales Representative Commissions.

"**§ 66-190. Definitions.**

The following definitions apply in this Article:

(1) "Commission" means compensation accruing to a sales representative for payment by a principal, the rate of which is expressed as a percentage of the amount of ~~orders or sales~~ orders, sales, or profits or as a specified amount per order or per sale.

(2) "Person" means an individual, corporation, limited liability company, partnership, unincorporated association, estate, ~~or trust.~~ trust, or other entity.

(3) "Principal" means a person ~~who does not have a permanent or fixed place of business in this State and~~ who:

a. Manufactures, produces, imports, or distributes a ~~tangible~~ product ~~for sale at wholesale;~~ or service;

b. Contracts with a sales representative to solicit orders for the ~~product;~~ product or service and

c. Compensates the sales representative, in whole or in part, by commission.

(4) "Sales representative" means a person who:

a. Contracts with a principal to solicit ~~wholesale orders;~~ orders for products or services;

b. Is compensated, in whole or in part, by ~~commission;~~ commission; and

c. ~~Does not place orders or purchase for his own account or for resale;~~ Is not a seller who complies with:

i. G.S. 25A-39 and G.S. 25A-40; or

ii. 16 C.F.R.429; and

~~d. Does not sell or take orders for the sale of products at retail; and~~

e. Is not an employee of the principal.

(5) "Terminate" and "termination" mean the end of the business relationship between the sales representative and the principal, whether by agreement, by expiration of time, or by exercise of a right of termination of either party.

"**§ 66-190.1. Written contracts.**

The agreement or contract between a sales representative and a principal shall be in writing. The absence of a written agreement or contract shall not bar a cause of action by, or any remedy available to, a sales representative pursuant to this Article.

"**§ 66-191. Payment of ~~commissions.~~ Commissions; termination.**

When a contract between a sales representative and a principal is terminated for any reason other than malfeasance on the part of the sales representative, the principal shall pay the sales representative all commissions ~~accrued under the contract to the sales representative within 45 days after the effective date of the termination.~~ due under the contract within 30 days after the effective date of the termination and all commissions that become due after the effective date of termination within 14 days after they become due. When a sales representative sends a written demand for payment of commissions to a principal by certified mail, the principal shall respond in writing to the demand within 30 days after the principal receives the written demand.

"**§ 66-192. Civil liability.**

(a) A principal who fails to comply with the provisions of G.S. 66-191 is liable to the sales representative in a civil action for (i) all amounts due the sales representative plus exemplary damages in an amount not to exceed three times the amount of commissions due the sales representative, (ii) attorney's fees actually and reasonably incurred by the sales representative in the action, and (iii) court costs.

(a1) A principal who fails to respond to a sales representative in writing within 30 days after the principal receives a written demand pursuant to G.S. 66-191 shall be presumed to have acted willfully and in bad faith.

(b) Where the court determines that an action brought by a sales representative against a principal under this Article is frivolous, the sales representative is liable to the principal for court costs and for attorney's fees actually and reasonably incurred by the principal in defending the action.

(c) A principal who is not a resident of this State who contracts with a sales representative to solicit orders in this State shall be subject to personal jurisdiction as provided in G.S. 1-75.4.

(d) Nothing in this Article shall invalidate or restrict any other or additional right or remedy available to a sales representative or preclude a sales representative from seeking to recover in one action on all claims against a principal.

"**§ 66-192.1. Revocable offers of commission; entitlement.**

If a principal makes a revocable offer of a commission to a sales representative, the sales representative is entitled to the commission agreed upon if:

(1) The principal revokes the offer of commission;

(2) The sales representative establishes that the revocation was for the purpose of avoiding payment of the commission;

(3) The revocation occurs after the principal has obtained a written order for the principal's product or service because of the efforts of the sales representative; and

(4) The principal's product or service that is the subject of the order is provided to and paid for by a customer.

"**§ 66-193. Contracts void.**

A provision in any contract between a sales representative and a principal purporting to waive any provision of this Article, whether by expressed waiver or by a contract subject to the laws of another state, is void."

SECTION 2. This act becomes effective October 1, 2003 and applies to causes of action accruing on or after that date.

SENATE BILL 293:
Sales Representative Commissions Revisions

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Thomas
Date:	March 31, 2003	**Summary by:**	Kory J. Goldsmith
Version:	Proposed Committee Substitute S293-CSRC-6[v.2]		Committee Counsel

SUMMARY: ***SB 293 amends Article 27 of Chapter 66 of the General Statutes to expand its coverage to in-state principals and to principals who contract for the sale of services as well as products. It shortens the time frame for commission payments where the business relationship between a sales representative and a principal has been terminated. It increases the amount of punitive damages a sales representative may receive where a principal has refused to pay commissions that are due. It also creates a cause of action by a sales representative where the principal has revoked a revocable offer of commission for the purpose of avoiding payment of the commission.***

CURRENT LAW: Article 27 of Chapter 66 is loosely modeled after the Model Commission Protection Act (drafted by the Manufacturers' Agents national Association). It currently only applies to principals who do not have a permanent or fixed place of business within North Carolina. A principal is a person or business entity that manufactures, produces, imports, or distributes a tangible product; contracts with a sales representative to solicit orders for the product, and compensates the sales representative by a commission. A sales representative is not an employee of the principal, but does contract to solicit orders for a principal's products and is compensated by commission. A sales representative does not include a person who takes orders for sale of a product at retail, such as a door-to-door sales person.

Within 45 days of the termination of a commission contract (for any reason other than malfeasance by the sales representative) the principal is supposed to pay any commissions due. If the principal refuses to pay the commissions, the sales representative my recover the amount due plus punitive damages not to exceed the amount of commissions owed. If the sales representative brings a frivolous action to recover sales commissions, the court may charge the sales representative with court costs and attorney fees. The provisions of Article 27 may not be waived.

BILL ANALYSIS:

G.S. 66-190. Definitions is amended to:

- Expand the coverage of the act to principals with offices inside North Carolina. Previously, the law only applied to out-of-state principals.
- Expand the definition of "principal" to include a business that sells services.
- Modify the definition of "sales representative" too more closely conform to the Model Commission Protection Act. It would not apply to door-to-door sales representatives who must provide consumers with a 3 day right to terminate a sales contract.
- Define "termination" and "terminate" to mean the end of the business relationship between the sales representative and the principal, whether by agreement, by expiration of time, or by exercise of a right of termination of either party.

G.S. 66-109.1 - Written Contracts is added. It provides that contracts between sales representatives and principals shall be in writing. However, the lack of a written contract would not be a bar to a cause of action or remedy to a sales representative.

G.S. 66-191 is amended to shorten the timeframe for payment of commissions where a contract for compensation has been terminated between a sales representative and a principal. Currently, the principal has 45 days to pay the commissions. Under the bill, the principal would have 30 days from the date of termination to pay commissions that were due as of the termination date. The principal would have to pay all commissions that come due after the termination date within 14 days after they become due. The act would also require that if the sales representative sends a written demand for payment to a principal by certified mail, the principal must respond in writing within 30 days of receipt of the demand.

G.S. 66-192 is the civil liability section. It is amended to allow up to three times the amount of commissions due the sales representative as punitive damages. It also provides that if the principal has failed to respond in writing to the sales representative's written demand for payment, the principal shall be presumed to have acted willfully and in bad faith. Given this presumption, a court would have to award punitive damages unless the principal rebutted the presumption.

G.S. 66-192.1 – Revocable offers of commission; entitlement is added as a new section. It creates a cause of action on behalf of the sales representative where a principal makes a revocable offer of commission and revokes the offer for the purpose of avoiding payment of the commission. In order to prevail, the sales representative would have to show:

- That the principal revoked the offer of commission;
- That the revocation was for the purpose of avoiding the payment of the commission;
- That the revocation occurred after the principal obtained a written order for the principal's product or service because of the efforts of the sales representative; and
- The principal's product or service is provided to and paid for by the customer.

The act becomes effective October 1, 2003 and applies to causes of action accruing on or after that date.

S293-SMRC-001(Senate Proposed Committee Substitute)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 323

Short Title:	Gen. Contrs/Protect Info/Clarify Inj. Relief.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 6, 2003

A BILL TO BE ENTITLED

AN ACT TO PROTECT THE CONFIDENTIALITY OF INFORMATION RECEIVED BY THE LICENSING BOARD FOR GENERAL CONTRACTORS WHILE CONDUCTING AN INVESTIGATION OF A LICENSEE AND TO CLARIFY WHEN THE BOARD MAY SEEK INJUNCTIVE RELIEF.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 87-11(c) reads as rewritten:

"(c) The Board shall establish and maintain a system whereby detailed records are kept regarding complaints against each licensee. This record shall include, for each licensee, the date and nature of each complaint, investigatory action taken by the Board, any findings by the Board, and the disposition of the matter. Complaints, records, papers, or other documents containing information received, collected, or compiled by the Board, its members, or its employees as part of or as a result of investigations, inquiries, or interviews conducted in connection with a licensing or disciplinary matter shall not be considered public records within the meaning of Chapter 132 of the General Statutes. However, any notice to a licensee of a hearing pursuant to Chapter 150B of the General Statutes shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of an investigation, inquiry, or interview. If any record, paper, or other document containing information collected and compiled by the Board is received and admitted into evidence in a public hearing before the Board, it is then considered a public record within the meaning of Chapter 132 of the General Statutes."

SECTION 2. G.S. 87-13.1 reads as rewritten:

"**§ 87-13.1. Board may seek injunctive relief.**

Whenever ~~it appears to~~ the Board determines that any person, firm or corporation has, within the past three years, violated or is violating any of the provisions of this Article or ~~of the~~ rules and regulations of the Board promulgated under this Article, the Board may apply to the superior court for a restraining order and injunction to restrain the violation; and the superior courts have jurisdiction to grant the requested relief,

irrespective of whether or not criminal prosecution has been instituted or administrative sanctions imposed by reason of the violation."

SECTION 3. This act is effective when it becomes law.

SENATE BILL 323:
Gen. Contrs./Protect Info/Clarify Inj. Relief

BILL ANALYSIS

Committee:	Judiciary II	**Introduced by:**	Sen. Hartsell
Date:	March 23, 2003	**Summary by:**	Linda Attarian
Version:	Introduced		Committee Co-Counsel

SUMMARY: Senate Bill 323 amends the licensing laws governing the practice of persons engaged in the business of general contracting. The bill excludes information collected or compiled by the State Licensing Board for General Contractors (Board) in connection with an investigation of a licensing or disciplinary matter from public access under the State's public record laws.

The bill also amends the Board's authority to seek injunctive relief against a licensed or unlicensed person, firm or corporation by changing the Board's standing threshold from "an appearance" of a violation to a "determination" of a violation; and by expanding the Board's the authority to seek injunctive relief for not only a current violation of the licensing laws, but also a past violation of the laws. The act is effective when it becomes law.

CURRENT LAW:

Establishment of the NC Licensing Board for General Contractors: In 1925 the North Carolina General Assembly established the North Carolina Licensing Board for General Contractors and specified its regulatory authority over general contractors in Article 1 of Chapter 87. The purpose of the Board is to "safeguard life, health and property and to promote public welfare" by prescribing practice standards for persons, firms and corporations who enter into contracts for construction work in this state. Under these provisions, general contractors are defined as persons, firms or corporations who enter into construction projects costing $30,000 or more.

Investigation of complaints against contractors: Any person may file a complaint against a general contractor. All complaints received by the Board are reviewed and assigned to a field investigator for an investigation. Once a complaint is received, written notice of the complaint and the charges are then forwarded to the licensee or general contractor for a response. Following a preliminary review of the complaint the investigator may gather additional evidence by making an inspection of the construction project or the work in question. Field investigators also may interview the contractor, witnesses or other individuals who are familiar with the case. When an investigation is completed the case is forwarded to the Board's Review Committee, which then determines whether probable cause exists to recommend that the case be presented to the full Board for a disciplinary hearing. The Board may impose discipline by revoking or suspending the license of the general contractor based on a finding of fraud or deceit in obtaining license, gross negligence, incompetence, misconduct, or willful violations of the licensing laws.

If the general contractor is not licensed to practice general contracting, the Board may seek a permanent injunction against the contractor in Superior Court.

Record keeping: The Board is required to keep detailed records regarding complaints against each licensee, including the date and nature of each complaint, investigatory actions, findings and the disposition of the matter. These records are currently available to the public under North Carolina public record laws.

Public record law: Pursuant to G.S. 132-1, public records and public information compiled by governmental agencies, including occupational licensing boards, are the "property of the people", and it is the policy of this State that the people may obtain copies of such information free or at minimal cost *unless otherwise specifically provided by law.*

Exclusion for privileged communications: G.S. 132-1.2 provides that public records do not include "written communications made within the scope of the attorney-client relationship by any attorney-at-law serving any such governmental agency that concerns the prosecution, defense, settlement or litigation of any judicial action or any administration or other type of proceed to which the governmental agency is a party or by which it is or may be direct affected". The exclusion expires three years from the date of the communication.

BILL ANALYSIS: **Section 1** amends subsection (c) of G.S. 87-11, to provide that records compiled in connection with the investigation and disposition of complaints against licensees are not public records and are not freely available to the public. Exceptions to this exclusion are: (1) written notices of the hearing on the complaint and charges to licensees that are provided to the licensee under to G.S. 150B-38, *even if* the notice contains information compiled during the investigation; and (2) any document containing disciplinary information that is admitted into evidence in a public hearing before the Board.

The bill does not make the information confidential because the Board may still release it *voluntarily*. Note that if a record is confidential then it may not be released except as permitted by law.

Section 2 amends G.S. 87-13.1 to provide the Board with standing to seek an injunction or an order to restrain a violation of the licensing laws when the Board *determines* that any person, firm or corporation, (licensed or unlicensed), is presently violating, or *has violated within the past three years,* a provision of the licensing laws or rules adopted by the Board. Under current law, the Board must show that it *appears* that a person, firm, or corporation is *violating*, in order to have standing to seek injunctive remedies.

BACKGROUND:

The General Assembly has, in prior Sessions, enacted licensure acts that include specific provisions protecting records collected in connection with disciplinary matters from public access. These include: Board of Law Examiners, North Carolina State Bar, NC State Board of Refrigeration Examiners, NC Medical Board, Medical Review Committee, NC State Board of Dental Examiners, Substance Abuse Professionals Certification Board, NC Psychology Board and the NC State Board of Examiners of Fee-Based Practicing Pastoral Counselors.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 421*

Short Title:	Amend Child Welfare Laws.-AB	(Public)
Sponsors:	Senators Thomas, Metcalf, and Rand.	
Referred to:	Judiciary II.	

March 17, 2003

A BILL TO BE ENTITLED

AN ACT TO CLARIFY AND MAKE TECHNICAL CORRECTIONS TO THE CHILD WELFARE LAWS AND TO ENHANCE THE STATE'S ABILITY TO PROTECT CHILDREN.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 7B-407 reads as rewritten:

"**§ 7B-407. Service of summons.**

The summons shall be personally served in accordance with G.S. 1A-1, Rule 4(j) upon the parent, guardian, custodian, or caretaker, not less than five days prior to the date of the scheduled hearing. The time for service may be waived in the discretion of the court.

If the parent, guardian, custodian, or caretaker entitled to receive a summons cannot be found by a diligent effort, the court may authorize service of the summons and petition by mail or by publication. The cost of the service by publication shall be advanced by the petitioner and may be charged as court costs as the court may direct.

If the parent, guardian, custodian, or caretaker is personally served as herein provided and fails without reasonable cause to appear and to bring the juvenile before the court, the parent, guardian, custodian, or caretaker may be proceeded against as for contempt of court."

SECTION 2. G.S. 7B-1109(d) reads as rewritten:

"(d) The court may for good cause shown continue the hearing for such time as is reasonably required ~~for receiving~~to receive additional evidence, any reports or assessments which the court has requested, or any other information needed in the best interests of the ~~juvenile.~~juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interest of the juvenile. If the court, pursuant to this subsection, continues the hearing to a time that is more than 90 days from the filing of the initial petition or

motion, the court shall reduce its order to writing and state in the written order its reason for granting the continuance."

SECTION 3. G.S. 110-132(a) reads as rewritten:

"(a) In lieu of or in conclusion of any legal proceeding instituted to establish paternity, the written affidavits of parentage executed by the putative father and the mother of the dependent child shall constitute an admission of paternity and shall have the same legal effect as a judgment of ~~paternity for the purpose of establishing a child support obligation,~~ paternity, subject to the right of either signatory to rescind within the earlier of:

(1) 60 days of the date the document is executed, or

(2) The date of entry of an order establishing paternity or an order for the payment of child support."

SECTION 4. G.S. 115C-378 reads as rewritten:

"**§ 115C-378. Children required to attend.**

Every parent, guardian or other person in this State having charge or control of a child between the ages of seven and 16 years shall cause such child to attend school continuously for a period equal to the time which the public school to which the child is assigned shall be in session. Every parent, guardian, or other person in this State having charge or control of a child under age seven who is enrolled in a public school in grades kindergarten through two shall also cause such child to attend school continuously for a period equal to the time which the public school to which the child is assigned shall be in session unless the child has withdrawn from school. No person shall encourage, entice or counsel any such child to be unlawfully absent from school. The parent, guardian, or custodian of a child shall notify the school of the reason for each known absence of the child, in accordance with local school policy.

The principal, superintendent, or teacher who is in charge of such school shall have the right to excuse a child temporarily from attendance on account of sickness or other unavoidable cause which does not constitute unlawful absence as defined by the State Board of Education. The term "school" as used herein is defined to embrace all public schools and such nonpublic schools as have teachers and curricula that are approved by the State Board of Education.

All nonpublic schools receiving and instructing children of a compulsory school age shall be required to keep such records of attendance and render such reports of the attendance of such children and maintain such minimum curriculum standards as are required of public schools; and attendance upon such schools, if the school refuses or neglects to keep such records or to render such reports, shall not be accepted in lieu of attendance upon the public school of the district to which the child shall be assigned: Provided, that instruction in a nonpublic school shall not be regarded as meeting the requirements of the law unless the courses of instruction run concurrently with the term of the public school in the district and extend for at least as long a term.

The principal or his designee shall notify the parent, guardian, or custodian of his child's excessive absences after the child has accumulated three unexcused absences in a school year. After not more than six unexcused absences, the principal shall notify the parent, guardian, or custodian by mail that he may be in violation of the Compulsory

Attendance Law and may be prosecuted if the absences cannot be justified under the established attendance policies of the State and local boards of education. Once the parents are notified, the school attendance counselor shall work with the child and his family to analyze the causes of the absences and determine steps, including adjustment of the school program or obtaining supplemental services, to eliminate the problem. The attendance counselor may request that a law-enforcement officer accompany him if he believes that a home visit is necessary.

After 10 accumulated unexcused absences in a school ~~year~~ year, the principal shall review any report or investigation prepared under G.S. 115C-381 and shall confer with the student and his parent, guardian, or ~~custodian~~ custodian, if ~~possible~~ possible, to determine whether the parent, guardian, or custodian has received notification pursuant to this section and made a good faith effort to comply with the law. If the principal determines that the parent, guardian, or custodian has ~~not,~~ not made a good faith effort to comply with the law, ~~he~~ the principal shall notify the district ~~attorney.~~attorney and the director of social services of the county or city where the case arose. After the principal has made a determination based on the report or investigation prepared pursuant to G.S. 115C-381, the director shall then decide whether to undertake a protective services assessment against the parent, guardian, or custodian for educational neglect. If ~~he~~ the principal determines that the parent, guardian, or custodian ~~has,~~made a good faith effort to comply with the law, ~~he~~ the principal may file a complaint with the juvenile court counselor pursuant to Chapter 7B of the General Statutes that the child is habitually absent from school without a valid excuse. Evidence that shows that the parents, guardian, or custodian were notified and that the child has accumulated 10 absences which cannot be justified under the established attendance policies of the local board shall establish a prima facie case that the child's parent, guardian, or custodian is responsible for the absences."

SECTION 5. G.S. 131D-10.6B reads as rewritten:

"**§ 131D-10.6B. ~~Report of death.~~Maintaining a register of applicants by the Division of Social Services.**

~~(a) A facility licensed under this Article shall notify the Department immediately upon the death of any resident of the facility that occurs within seven days of physical restraint of the resident, and shall notify the Department within three days of the death of any resident of the facility resulting from violence, accident, suicide, or homicide. The Department may assess a civil penalty of not less than five hundred dollars ($500.00) and not more than one thousand dollars ($1,000) against a facility that fails to notify the Department of a death and the circumstances surrounding the death known to the facility. Chapter 150B of the General Statutes governs the assessment of a penalty under this section. A civil penalty owed under this section may be recovered in a civil action brought by the Department or the Attorney General. The clear proceeds of the penalty shall be remitted to the State Treasurer for deposit in accordance with State law.~~

(a1) The Division of Social Services shall keep a register of all family foster and therapeutic foster home applicants. The register shall be available to the public upon request and upon payment of a reasonable fee for copying as established by the Division of Social Services. The register shall state all of the following:

(1) The name, age, and address of each applicant.
(2) The date of the application.
(3) The applicant's supervising agency.
(4) Any mandated training completed by the applicant and the dates of training.
(5) Whether the applicant was licensed and the date of the initial licensure.
(6) The current licensing period.
(7) Any adverse licensing actions.
(8) Any other information deemed necessary by the Division of Social Services.

~~(b) Upon receipt of notification from a facility in accordance with subsection (a) of this section, the Department shall notify the Governor's Advocacy Council for Persons With Disabilities that a person with a disability has died. The Department shall provide the Council access to the information about each death reported to the Council pursuant to subsection (a) of this section, including information resulting from any investigation of the death by the Department, and from reports received from the Chief Medical Examiner pursuant to G.S. 130A-385. The Council shall use the information in accordance with its powers and duties under G.S. 143B-403.1 and applicable federal law and regulations.~~

(b1) Applications of family foster and therapeutic foster home applicants and all other related materials, including letters of reference, mutual home assessments, or medical, psychological, financial, or other personal background information or history of applicants, the applicants' family, or members of the applicants' household, shall be treated as confidential and not as 'public records' subject to disclosure pursuant to Chapter 132 of the General Statutes.

~~(c) If the death of a resident of the facility occurs within seven days of the use of physical restraint, the Department shall initiate immediately an investigation of the death.~~

~~(d) Nothing in this section abrogates State or federal law or requirements pertaining to the confidentiality, privilege, or other prohibition against disclosure of information provided to the Department or the Council. In carrying out the requirements of this section, the Department and the Council shall adhere to State and federal requirements of confidentiality, privilege, and other prohibitions against disclosure and release applicable to the information received under this section. A facility or provider that makes available confidential information in accordance with this section and with State and federal law is not liable for the release of the information.~~

~~(e) The Secretary shall establish a standard reporting format for reporting deaths pursuant to this section and shall provide to facilities subject to this section a form for the facility's use in complying with this section.~~"

SECTION 6. G.S. 143B-150.20 reads as rewritten:

"**§ 143B-150.20. State Child Fatality Review Team; establishment; purpose; powers; duties; report by Division of Social Services.**

(a) There is established in the Department of Health and Human Services, Division of Social Services, a State Child Fatality Review Team to conduct in-depth

reviews of any child fatalities which have occurred involving children and families involved with local departments of social services child protective services in the 12 months preceding the fatality. Steps in this in-depth review shall include interviews with any individuals determined to have pertinent information as well as examination of any written materials containing pertinent information.

(b) The purpose of these reviews shall be to implement a team approach to identifying factors which may have contributed to conditions leading to the fatality and to develop recommendations for improving coordination between local and State entities which might have avoided the threat of injury or fatality and to identify appropriate remedies. The Division of Social Services shall make public the findings and recommendations developed for each fatality reviewed relating to improving coordination between local and State entities. These findings shall not be admissible as evidence in any civil or administrative proceedings against individuals or entities that participate in child fatality reviews conducted pursuant to this section. The State Child Fatality Review Team shall consult with the appropriate district attorney in accordance with G.S. 7B-2902(d) prior to the public release of the findings and recommendations.

(c) The State Child Fatality Review Team shall include representatives of the local departments of social services and the Division of Social Services, a member of the local Community Child Protection Team, a member of the local child fatality prevention team, a representative from local law enforcement, a prevention specialist, and a medical professional.

(d) The State Child Fatality Review Team shall have access to all medical records, hospital records, and records maintained by this State, any county, or any local agency as necessary to carry out the purposes of this subsection, including police investigative data, medical examiner investigative data, health records, mental health records, and social services records. The State Child Fatality Review Team may receive a copy of any reviewed materials necessary to the conduct of the fatality review. Any member of the State Child Fatality Review Team may share, only in an official meeting of the State Child Fatality Review Team, any information available to that member that the State Child Fatality Review Team needs to carry out its duties.

(d1) Pursuant to subsection (d) of this section, if a request for records by the State Child Fatality Review Team is denied or a response to its request is not immediately forthcoming, the State Child Fatality Review Team may apply for an order compelling disclosure. The application shall state, with reasonable particularity, factors supporting the need for an order compelling disclosure. The State Child Fatality Review Team shall file the application in Wake County Superior Court and the Court shall have jurisdiction to issue any orders compelling disclosure. Actions brought pursuant to this section shall be scheduled for immediate hearing, and subsequent proceedings in these actions shall be given priority by the appellate courts. After a hearing, the Court shall issue an order compelling disclosure unless the court finds that the disclosure of the requested records is not permitted by federal law and regulations.

(e) Meetings of the State Child Fatality Review Team are not subject to the provisions of Article 33C of Chapter 143 of the General Statutes. However, the State Child Fatality Review Team may hold periodic public meetings to discuss, in a general

manner not revealing confidential information about children and families, the findings of their reviews and their recommendations for preventive actions. Minutes of all public meetings, excluding those of closed sessions, shall be kept in compliance with Article 33C of Chapter 143 of the General Statutes. Any minutes or any other information generated during any executive session shall be sealed from public inspection.

(f) All otherwise confidential information and records acquired by the State Child Fatality Review Team, in the exercise of its duties are confidential; are not subject to discovery or introduction into evidence in any proceedings except pursuant to an order of the court; and may only be disclosed as necessary to carry out the purposes of the State Child Fatality Review Team. In addition, all otherwise confidential information and records created by the State Child Fatality Review Team in the exercise of its duties are confidential; are not subject to discovery or introduction into evidence in any proceedings; and may only be disclosed as necessary to carry out the purposes of the State Child Fatality Review Team. No member of the State Child Fatality Review Team, nor any person who attends a meeting of the State Child Fatality Review Team, may testify in any proceeding about what transpired at the meeting, about information presented at the meeting, or about opinions formed by the person as a result of the meetings. This subsection shall not, however, prohibit a person from testifying in a civil or criminal action about matters within that person's independent knowledge.

(g) Each member of the State Child Fatality Review Team and invited participant shall sign a statement indicating an understanding of and adherence to confidentiality requirements, including the possible civil or criminal consequences of any breach of confidentiality.

~~(h) The Division of Social Services, Department of Health and Human Services, shall report to the members of the Senate Appropriations Committee on Human Resources, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division on the activities of the State Child Fatality Review Team including recommendations for changes in the statewide child protection system no later than October 1 of each year.~~"

SECTION 7. G.S. 153A-257 is amended by adding a new subsection to read:

"(d) If two or more county departments of social services differ regarding the legal residence of a minor in a child abuse, neglect, or dependency case, either county department of social services may refer the factual situation to the Department of Health and Human Services, Division of Social Services. After reviewing the pertinent background facts of the case, the Director of the Division of Social Services or the Director's designee shall determine which county department of social services shall be responsible for providing protective services and financial support for the minor in question. Since the Department of Health and Human Services is the supervising agency under Chapter 108A of the General Statutes for the county-administered programs, the determination of the Director or the Director's designee regarding the minor's legal residence for social services purposes is binding upon the county departments of social services and counties and is not subject to judicial review."

SECTION 8. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 423*

Short Title:	Amend Child Support Enforcement Laws.-AB	(Public)
Sponsors:	Senators Thomas, Metcalf, Rand; and Swindell.	
Referred to:	Judiciary II.	

March 17, 2003

A BILL TO BE ENTITLED

AN ACT TO CLARIFY AND ENHANCE CHILD SUPPORT ENFORCEMENT LAWS.

The General Assembly of North Carolina enacts:

PART 1. LIQUIDATION
PART 2. LICENSING BOARDS
PART 3. PAY RECORDS
PART 4. FINANCIAL INSTITUTIONS
PART 5. EFFECTIVE DATES

PART 1. LIQUIDATION

SECTION 1. G.S. 50-13.4(c) reads as rewritten:

"(c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case. Payments ordered for the support of a minor child shall be on a monthly basis, due and payable on the first day of each month. The requirement that orders be established on a monthly basis does not affect the availability of garnishment of disposable earnings based on an obligor's pay period.

The court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1) of this section. However, upon request of any party, the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support. If, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines. If the court orders an amount other than the amount

determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered.

Payments ordered for the support of a child shall terminate when the child reaches the age of 18 except:

(1) If the child is otherwise emancipated, payments shall terminate at that time;

(2) If the child is still in primary or secondary school when the child reaches age 18, support payments shall continue until the child graduates, otherwise ceases to attend school on a regular basis, fails to make satisfactory academic progress towards graduation, or reaches age 20, whichever comes first, unless the court in its discretion orders that payments cease at age 18 or prior to high school graduation.

In the case of graduation, or attaining age 20, payments shall terminate without order by the court, subject to the right of the party receiving support to show, upon motion and with notice to the opposing party, that the child has not graduated or attained the age of 20.

If an arrearage for child support or fees due exists at the time that a child support obligation terminates for any reason, payments shall continue in the same total amount that was due under the terms of the previous court order or income withholding in effect at the time of the support obligation. The total amount of these payments is to be applied to the arrearage until all arrearages and fees are satisfied or until further order of the court."

PART 2. LICENSING BOARDS

SECTION 2. G.S. 93B-13(a) reads as rewritten:

"(a) Upon receipt of a court order, pursuant to G.S. 50-13.12, revoking the occupational license of a licensee under its jurisdiction, an occupational licensing board shall note the revocation in its ~~records~~ records, report the action within 30 days to the Department of Health and Human Services, and follow the normal postrevocation rules and procedures of the board as if the revocation had been ordered by the board. The revocation shall remain in effect until the board receives certification by the clerk of superior court that the licensee is no longer delinquent in child support payments, or, as applicable, that the licensee is in compliance with or is no longer subject to the subpoena that was the basis for the revocation."

PART 3. PAY RECORDS

SECTION 3.1. G.S. 110-132(a) reads as rewritten:

"(a) In lieu of or in conclusion of any legal proceeding instituted to establish paternity, the written affidavits of parentage executed by the putative father and the mother of the dependent child shall constitute an admission of paternity and shall have the same legal effect as a judgment of paternity for the purpose of establishing a child support obligation, subject to the right of either signatory to rescind within the earlier of:

(1) 60 days of the date the document is executed, or

(2) The date of entry of an order establishing paternity or an order for the payment of child support.

In order to rescind, a challenger must request the district court to order the rescission and to include in the order specific findings of fact that the request for rescission was filed with the clerk of court within 60 days of the signing of the document. The court must also find that all parties, including the child support enforcement agency, if appropriate, have been served in accordance with Rule 4 of the North Carolina Rules of Civil Procedure. In the event the court orders rescission and the putative father is thereafter found not to be the father of the child, then the clerk of court shall send a copy of the order of rescission to the State Registrar of Vital Statistics. Upon receipt of an order of rescission, the State Registrar shall remove the putative father's name from the birth certificate. In the event that the putative father defaults or fails to present or prosecute the issue of paternity, the trial court shall find the putative father to be the biological father as a matter of law.

After 60 days have elapsed, execution of the document may be challenged in court only upon the basis of fraud, duress, mistake, or excusable ~~neglect.~~ neglect pursuant to Rule 60 of the North Carolina Rules of Civil Procedure. The burden of proof shall be on the challenging party, and the legal responsibilities, including child support obligations, of any signatory arising from the executed documents may not be suspended during the challenge except for good cause shown.

A written agreement to support the child by periodic payments, which may include provision for reimbursement for medical expenses incident to the pregnancy and the birth of the child, accrued maintenance and reasonable expense of prosecution of the paternity action, when acknowledged as provided herein, filed with, and approved by a judge of the district court at any time, shall have the same force and effect as an order of support entered by that court, and shall be enforceable and subject to modification in the same manner as is provided by law for orders of the court in such cases. The written affidavit shall contain the social security number of the person executing the affidavit. Voluntary agreements to support shall contain the social security number of each of the parties to the agreement. The written affidavits and agreements to support shall be sworn to before a certifying officer or notary public or the equivalent or corresponding person of the state, territory, or foreign country where the affirmation, acknowledgment, or agreement is made, and shall be binding on the person executing the same whether the person is an adult or a minor. The child support enforcement agency shall ensure that the mother and putative father are given oral and written notice of the legal consequences and responsibilities arising from the signing of an affidavit of parentage and of any alternatives to the execution of an affidavit of parentage. The mother shall not be excused from making the affidavit on the grounds that it may tend to disgrace or incriminate her; nor shall she thereafter be prosecuted for any criminal act involved in the conception of the child as to whose paternity she attests."

SECTION 3.2. G.S. 110-139(b) reads as rewritten:

"(b) In order to carry out the responsibilities imposed under this Article, the Department may request from any governmental department, board, commission, bureau or agency information and assistance. All State, county and city agencies,

officers and employees shall cooperate with the Department in the location of parents who have abandoned and deserted children with all pertinent information relative to the location, income and property of such parents, notwithstanding any provision of law making such information confidential. Except as otherwise stated in this subsection, all ~~All~~ nonjudicial records maintained by the Department pertaining to child-support enforcement shall be confidential, and only duly authorized representatives of social service agencies, public officials with child-support enforcement and related duties, and members of legislative committees shall have access to these records. The payment history of an obligor pursuant to a support order may be examined by or released to the court, the obligor, or the person on whose behalf enforcement actions are being taken or that person's designee. Income and expense information of either parent may be released to the other parent for the purpose of establishing or modifying a support order."

SECTION 3.3. G.S. 50-13.11(a1) reads as rewritten:

"(a1) The court shall order the parent of a minor child or other responsible party to maintain health insurance for the benefit of the child when health insurance is available at a reasonable cost. If health insurance is not presently available at a reasonable cost, the court shall order the parent of a minor child or other responsible party to maintain health insurance for the benefit of the child when health insurance becomes available at a reasonable cost. As used in this subsection, health insurance is considered reasonable in cost if it is employment related or other group health insurance, regardless of service delivery mechanism. The court may require one or both parties to maintain dental insurance."

PART 4. FINANCIAL INSTITUTIONS

SECTION 4. G.S. 110-139.2 is amended by adding a new subsection to read:

"(b1) The Department of Health and Human Services Child Support Enforcement Agency may notify any financial institution doing business in this State that a person who maintains an account with the financial institution has a delinquent child support obligation that may be eligible for levy on the account in an amount that satisfies some or all of the delinquency. To qualify for levy, the child support obligation must have: (i) arrears in an amount not less than the amount of support owed for three months or five hundred dollars ($500.00), whichever is less; and (ii) an identified account with the financial institution.

Upon certification of the arrears amount, the Child Support Agency shall notify the financial institution to initiate a lien on the account of the delinquent obligor and inform the institution of the certified amount of arrears. Within five business days of receipt of the notice, the financial institution shall proceed in the following manner:

(1) Immediately attach a lien to the identified account.

(2) Notify the Child Support Agency of the balance of the account and date of the attachment or that the account does not meet the requirement for attachment.

Within five business days following receipt of the notice of attachment, the Child Support Agency shall notify the obligor of the action. The notice must inform the obligor of the opportunity for removal of the lien through compliance with the child

support order or contest of the action. The Child Support Agency shall establish procedures for review and contest of the action. If no satisfactory response is received within 15 days of the date of the notice, the Child Support Agency shall notify the financial institution to submit payment, up to the total amount of the child support arrears, if available, to the North Carolina Child Support Enforcement Centralized Collections. This amount is to be applied to the debt of the delinquent obligor.

This levy procedure is to be available for direct use by all states' child support programs to financial institutions in this State."

PART 5. EFFECTIVE DATES

SECTION 5. Part 3 of this act becomes effective July 1, 2003. The remainder of this act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 423*
PROPOSED COMMITTEE SUBSTITUTE S423-CSRQ-6 [v.4]

4/1/2003 8:48:47 AM

Short Title: Amend Child Support Enforcement Laws.-AB (Public)

Sponsors:

Referred to:

March 17, 2003

A BILL TO BE ENTITLED

AN ACT TO CLARIFY AND ENHANCE CHILD SUPPORT ENFORCEMENT LAWS.

The General Assembly of North Carolina enacts:

PART 1. LIQUIDATION
PART 2. LICENSING BOARDS
PART 3. PAY RECORDS
PART 4. FINANCIAL INSTITUTIONS
PART 5. EFFECTIVE DATES

PART 1. LIQUIDATION

SECTION 1. G.S. 50-13.4(c) reads as rewritten:

"(c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case. Payments ordered for the support of a minor child shall be on a monthly basis, due and payable on the first day of each month. The requirement that orders be established on a monthly basis does not affect the availability of garnishment of disposable earnings based on an obligor's pay period.

The court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1) of this section. However, upon request of any party, the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support. If, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may

vary from the guidelines. If the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered.

Payments ordered for the support of a child shall terminate when the child reaches the age of 18 except:

(1) If the child is otherwise emancipated, payments shall terminate at that time;

(2) If the child is still in primary or secondary school when the child reaches age 18, support payments shall continue until the child graduates, otherwise ceases to attend school on a regular basis, fails to make satisfactory academic progress towards graduation, or reaches age 20, whichever comes first, unless the court in its discretion orders that payments cease at age 18 or prior to high school graduation.

In the case of graduation, or attaining age 20, payments shall terminate without order by the court, subject to the right of the party receiving support to show, upon motion and with notice to the opposing party, that the child has not graduated or attained the age of 20.

If an arrearage for child support or fees due exists at the time that a child support obligation terminates for any reason except for the death of the obligor, payments shall continue in the same total amount that was due under the terms of the previous court order or income withholding in effect at the time of the support obligation. The total amount of these payments is to be applied to the arrearage until all arrearages and fees are satisfied or until further order of the court."

PART 2. LICENSING BOARDS

SECTION 2. G.S. 93B-13(a) reads as rewritten:

"(a) Upon receipt of a court order, pursuant to G.S. ~~50-13.12~~, 50-13.12 and G.S. 110-142.1, revoking the occupational license of a licensee under its jurisdiction, an occupational licensing board shall note the revocation in its ~~records~~ records, report the action within 30 days to the Department of Health and Human Services, and follow the normal postrevocation rules and procedures of the board as if the revocation had been ordered by the board. The revocation shall remain in effect until the board receives certification by the clerk of superior court or the Department of Health and Human Services in an IV-D case, that the licensee is no longer delinquent in child support payments, or, as applicable, that the licensee is in compliance with or is no longer subject to the subpoena that was the basis for the revocation."

PART 3. PAY RECORDS

SECTION 3.1. G.S. 110-132(a) reads as rewritten:

"(a) In lieu of or in conclusion of any legal proceeding instituted to establish paternity, the written affidavits of parentage executed by the putative father and the mother of the dependent child shall constitute an admission of paternity and shall have the same legal effect as a judgment of paternity for the purpose of establishing a child support obligation, subject to the right of either signatory to rescind within the earlier of:

(1) 60 days of the date the document is executed, or
(2) The date of entry of an order establishing paternity or an order for the payment of child support.

In order to rescind, a challenger must request the district court to order the rescission and to include in the order specific findings of fact that the request for rescission was filed with the clerk of court within 60 days of the signing of the document. The court must also find that all parties, including the child support enforcement agency, if appropriate, have been served in accordance with Rule 4 of the North Carolina Rules of Civil Procedure. In the event the court orders rescission and the putative father is thereafter found not to be the father of the child, then the clerk of court shall send a copy of the order of rescission to the State Registrar of Vital Statistics. Upon receipt of an order of rescission, the State Registrar shall remove the putative father's name from the birth certificate. In the event that the putative father defaults or fails to present or prosecute the issue of paternity, the trial court shall find the putative father to be the biological father as a matter of law.

After 60 days have elapsed, execution of the document may be challenged in court only upon the basis of fraud, duress, mistake, or excusable ~~neglect.~~ neglect pursuant to Rule 60 of the North Carolina Rules of Civil Procedure. The burden of proof shall be on the challenging party, and the legal responsibilities, including child support obligations, of any signatory arising from the executed documents may not be suspended during the challenge except for good cause shown.

A written agreement to support the child by periodic payments, which may include provision for reimbursement for medical expenses incident to the pregnancy and the birth of the child, accrued maintenance and reasonable expense of prosecution of the paternity action, when acknowledged as provided herein, filed with, and approved by a judge of the district court at any time, shall have the same force and effect as an order of support entered by that court, and shall be enforceable and subject to modification in the same manner as is provided by law for orders of the court in such cases. The written affidavit shall contain the social security number of the person executing the affidavit. Voluntary agreements to support shall contain the social security number of each of the parties to the agreement. The written affidavits and agreements to support shall be sworn to before a certifying officer or notary public or the equivalent or corresponding person of the state, territory, or foreign country where the affirmation, acknowledgment, or agreement is made, and shall be binding on the person executing the same whether the person is an adult or a minor. The child support enforcement agency shall ensure that the mother and putative father are given oral and written notice of the legal consequences and responsibilities arising from the signing of an affidavit of parentage and of any alternatives to the execution of an affidavit of parentage. The mother shall not be excused from making the affidavit on the grounds that it may tend to disgrace or incriminate her; nor shall she thereafter be prosecuted for any criminal act involved in the conception of the child as to whose paternity she attests."

SECTION 3.2. G.S. 110-139(b) reads as rewritten:

"(b) In order to carry out the responsibilities imposed under this Article, the Department may request from any governmental department, board, commission,

bureau or agency information and assistance. All State, county and city agencies, officers and employees shall cooperate with the Department in the location of parents who have abandoned and deserted children with all pertinent information relative to the location, income and property of such parents, notwithstanding any provision of law making such information confidential. Except as otherwise stated in this subsection, all ~~All~~ nonjudicial records maintained by the Department pertaining to child-support enforcement shall be confidential, and only duly authorized representatives of social service agencies, public officials with child-support enforcement and related duties, and members of legislative committees shall have access to these records. The payment history of an obligor pursuant to a support order may be examined by or released to the court, the obligor, or the person on whose behalf enforcement actions are being taken or that person's designee. Income and expense information of either parent may be released to the other parent for the purpose of establishing or modifying a support order."

SECTION 3.3. G.S. 50-13.11(a1) reads as rewritten:

"(a1) The court shall order the parent of a minor child or other responsible party to maintain health insurance for the benefit of the child when health insurance is available at a reasonable cost. If health insurance is not presently available at a reasonable cost, the court shall order the parent of a minor child or other responsible party to maintain health insurance for the benefit of the child when health insurance becomes available at a reasonable cost. As used in this subsection, health insurance is considered reasonable in cost if it is employment related or other group health insurance, regardless of service delivery mechanism. The court may require one or both parties to maintain dental insurance."

PART 4. FINANCIAL INSTITUTIONS

SECTION 4. G.S. 110-139.2 is amended by adding a new subsection to read:

"(b1) The Department of Health and Human Services Child Support Enforcement Agency may notify any financial institution doing business in this State that a person who maintains an account with the financial institution has a delinquent child support obligation that may be eligible for levy on the account in an amount that satisfies some or all of the delinquency. To qualify for levy, the child support obligation must have: (i) arrears in an amount not less than the amount of support owed for six months or one thousand dollars ($1000.00), whichever is less; and (ii) an identified account with the financial institution.

Upon certification of the arrears amount in accordance with G.S. 44-86(c), the Child Support Agency shall serve or cause to be served upon the obligor and the financial institution, a notice as provided by this subsection. The notice may be served in any manner provided in Rule 4 of the North Carolina Rules of Civil Procedure and shall include the name of the obligor, the financial institution where the account is located, the account number of the account to be levied, the certified arrears amount, information for the obligor on how to remove the lien or contest the lien, and a copy of the applicable law, G.S. 110-139.2. Upon service of the notice, the financial institution shall proceed in the following manner:

(1) Immediately attach a lien to the identified account.

(2) Notify the Child Support Agency of the balance of the account and date of the attachment or that the account does not meet the requirement for attachment.

Within 10 days of service of the notice, the obligor must contest the lien in writing to the Child Support Agency, request a hearing before the district court in the county where the support order was entered, and give notice to the Child Support Agency of the basis for the contest upon which the request for the hearing is based. The lien may be contested only on the basis that the obligation is an amount less than the amount of support owed for six months, or is less than one thousand dollars ($1000.00), or the obligor is not the person subject to the court order of support. The district court may assess court costs against the losing party. If no response is received from the obligor within 10 days of the service of the notice, the Child Support Agency shall notify the financial institution to submit payment, up to the total amount of the child support arrears, if available. This amount is to be applied to the debt of the delinquent obligor.

This levy procedure is to be available for direct use by all states' child support programs to financial institutions in this State."

PART 5. EFFECTIVE DATES

SECTION 5. Part 3 of this act becomes effective July 1, 2003. The remainder of this act is effective when it becomes law.

SENATE BILL 423:
Amend Child Support Enforcement Laws-AB

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Thomas
Date:	March 29, 2003	**Summary by:**	Drupti Chauhan
Version:	PCS to First Edition		Committee Counsel

SUMMARY: ***This bill is requested by DHHS to amend the child support laws regarding payment of arrears after support obligations terminate; reporting the revocation of licenses to DHHS for those who do not pay ordered child support; allowing child support payment information to be released prior to establishing or modifying support orders; and allowing DHHS to require financial institutions to levy the bank accounts of those who have delinquent child support obligations. The PCS to the first edition makes several changes to the bill as requested by DHHS including an additional statutory reference in Section 2, changing the amount of the arrears required before DHHS can for a levy of a financial account in Section 4 from three months and $500.00 to six months and $1000.00, changes the procedure that DHHS must follow in order to garnish bank accounts, and deletes the requirement in Section 4 that the financial institution make payment specifically to the North Carolina Child Support Enforcement Centralized Collections.***

SECTION-BY-SECTION BILL ANALYSIS BETWEEN CURRENT LAW, BILL and PCS

PART 1. Liquidation

SECTION 1

CURRENT LAW: Courts are to order child support payments in an amount to meet the reasonable needs of the child for health, education, and maintenance with regard to the estates, earnings, conditions and accustomed standard of living for the child and the parties involved. Payments continue until the child reaches 18 unless the child becomes emancipated or if the child is still in primary or secondary school when the child reaches 18. If the child is still in primary or secondary school when the child turns 18, the support payments will continue until the child graduates, stops attending school on a regular or does not make progress towards graduation, or reaches age 20, whichever comes first. A court may also order in its discretion that payments stop at age 18 or prior to high school graduation.

BILL ANALYSIS: The bill would add a requirement that if there are any arrearages for child support or fees due when the child support obligation terminates for any reason, payments would have to continue in the same total amount that was due under the terms of the court order or incoming withholding that is in effect at the time of the support obligation. The payments would continue until all the arrearages and fees are satisfied or the court order otherwise.

PCS CHANGES: The PCS adds language that would create an exception for the death of the obligor so that if the child support obligation terminates because of the death of the obligor, then arrearage payments would not continue.

PART 2. Licensing Boards

SECTION 2

CURRENT LAW: Under G.S. 50-13.12, a court may revoke some or all licensing privileges if there is a finding that the obligor is willfully delinquent in child support payments equal to at least one month's

child support or that the person has willfully failed to comply with a subpoena regarding child support or paternity establishments. These licensing privileges include privileges to hunt, fish, trap, drive, or engage in an occupation or profession. G.S. 93B-13 requires that when an occupational licensing board receives a court order that revokes an occupational license due to child support delinquency or failing to comply with a subpoena, the occupational licensing board must note that revocation in its records and follow the postrevocation rules and procedures that the board has in place just as if the board had ordered the revocation. The revocation is in effect until the board gets certification from the court clerk that the licensee is no longer delinquent or is in compliance with or no longer subject to the court's orders.

BILL ANALYSIS: The bill would add a requirement that when an occupational licensing board notes the revocation in its order and must also report that notation to DHHS within 30 days of the notation.

PCS CHANGES: The PCS would add a statutory reference to G.S. 110-142.1 so that the occupational licensing board would also have to note the revocation in its records of a license pursuant to a court order under G.S. 110-142.1 and report that notation to DHHS within 30 days of the notation. G.S. 110-142.1 authorizes a court to revoke occupational licenses for IV-D cases. (IV-D cases are child support cases where the custodial parent is receiving some sort of benefit such as TANF (AFDC) an is therefore required by law to seek child support and establish parentage.) The PCS would also add language that the revocation remains in effect for IV-D cases until DHHS certifies that the licensee is no longer delinquent or is in compliance with or no longer subject to the court's orders.

PART 2. Pay Records

SECTION 3.1

CURRENT LAW: Instead of legal proceedings to establish paternity, written affidavits executed by a father and mother of a dependent child can constitute as an admission of paternity and have the same legal effect as a judgment of paternity for purposes of child support obligations. Either signatory, however can rescind the affidavit within 60 days of signing it or before the entry of a court order establishing paternity or child support (whichever comes first). After 60 days, the affidavit can be challenged in court only on the basis of fraud, duress, mistake or excusable neglect.

BILL ANALYSIS: The bill adds language that the affidavit can only be challenged in court on the basis of fraud, duress, mistake or excusable neglect pursuant to Rule 60 of the North Carolina Rules of Civil Procedure. Rule 60 allows a party to seek relief form judgment or orders based on mistake, excusable neglect, fraud or newly discovered evidence within one year of the date of the entry of the judgment or order. That one year limit would now apply for the paternity affidavits so that they could not even be challenged in court after 1 year.

SECTION 3.2

CURRENT LAW: DHHS is charged with attempting to locate absent parents for the purposes of establishing paternity and/or securing child support and is to serve as a registry for receipt of information and assist other agencies in locating absent parents, answer interstate inquires and develop guidelines to coordinate with other agencies about information about finding absent parents. To carry out these responsibilities, DHHS can request information and assistance from any governmental agency, board, etc. and all State, county and local agencies must cooperate with DHHS and provide pertinent information. All nonjudicial records maintained by DHHS relating to child support enforcement is confidential and

only duly authorized representatives of agencies that have child-support enforcement and related duties and members of legislative committees have access to these records.

BILL ANALYSIS: The bill adds language to allow the release of an obligor's payment history pursuant to a child support order so that it may examined by a court, the obligor, or the person on whose behalf enforcement actions are being taken or that person's designee (such as an attorney). Income and expense information of one parent may be released to the other parent for the purpose of establishing or modifying a support order.

BACKGROUND: Currently, there is no exchange of information between parties before the court hearing and therefore, there can be no review of the payment history to verify if there have been any mistakes made etc. This allows the parties to review the information and possibly cut back on court appearances.

SECTION 3.3

CURRENT LAW: A court must order the parent of minor child or other responsible party to maintain health insurance for a child when health insurance is available at a reasonable cost. It is considered to be reasonable in cost if it is employment related or other is from some other group health insurance.

BILL ANALYSIS: The bill adds language that if health insurance is not presently available to a parent or other responsible party at a reasonable cost, then court must order that the parent or other party maintain health insurance when it becomes available at a reasonable cost.

BACKGROUND: In *Bucombe County, on behalf of Angelia A, Frady, v. Rogers*, 148, N.C. App. 401, 559, S.E.2d 227 (2002), the NC Court of Appeals overturned a lower court's order that stated a parent was to maintain health insurance when it became available at a reasonable cost because that left the determination of when it became available at a reasonable cost to the parent even though this was the trial court's responsibility to make this determination.

PART 4 Financial Institutions

SECTION 4

CURRENT LAW: The current law allows garnishment of wages and income withholding from delinquent parents, however there is no provision for liens on bank accounts. Currently, DHHS and financial institutions are required to enter into agreements that provide for a data match system where the financial institutions provide DHHS with the full name, social security number, address, telephone number, account numbers, and other identifying data for any person who maintains an account at the financial institution if DHHS certifies that the information is needed to locate a parent to collect child support.

BILL ANALYSIS: The bill adds a new subsection that allows DHHS to place a lien on the bank account of a person who has delinquent child support obligations. DHHS may to notify any financial institution doing business in the State that a person with an account at that institution has delinquent child support obligations and that person's account may be subject to a levy. An account would be subject to a lien if the person who maintains the account has either a three-month arrears or an arrears amount of $500.00, whichever is less. After the arrearage is certified, the Child Support Agency notifies the bank to institute a lien for the certified amount. The bank is then required within five business days of the receipt of this notice to:

- Attach a lien to the account
- Notify the Child Support Agency of the balance on the account and the date of the attachment OR that the account does not have the money for the attachment

Within five business days of the receipt of the notice of the attachment from the bank, the Child Support Agency notifies the obligor of the attachment and this notice has to contain information on how to remove the lien through compliance with the child support order or how to contest the action. The bill requires the Child Support Agency to establish procedures for review and contest of the lien. If the Agency does not receive a "satisfactory" response within 15 days of the date of the notice, then the Agency must notify the bank to submit payment of up to the total amount of the arrears, if available to the North Carolina Child Support Enforcement Centralized Collections and the payment is to be applied to the debt of the delinquent party.

PCS CHANGES: The PCS adds that the certification of the amount must be done in accordance with G.S. 44-86(c) which provides for a verified statement and determination of the arrearage as of the date of that statement and changes the amount and age of the arrearage so that an account would be subject to a lien if there is a six-month arrearage or an arrears amount of $1000.00, whichever is less. The procedure for obtaining a lien on bank accounts is modified in the PCS to include notice to both the bank and the obligor at the same and the notice is served in accordance with Rule 4 of the North Carolina Rules of Civil Procedure. The notice must include the name of the obligor, the financial institution where the account is located, the account number of the account to be levied, the certified arrears amount, information on how to remove or contest the lien, and a copy of the statute. The obligor must contest the lien in writing within 10 days of service of the notice and state the reason for the contest. The only reasons that can be the basis of the contest are that the obligor is not the right person, the obligor is not behind for six months or that the arrearage amount is less than $1000.00. The contest would be heard before the district court in the county where the original child support order was entered and the court is given discretion to assess court costs against the losing party.

The PCS also deletes the requirement that the financial institution specifically submit payment of any available funds up the amount of the total arrears to the North Carolina Child Support Enforcement Centralized Collections.

CONSTITUTIONAL ISSUES: There were possible constitutional due process issues with the bank account levy procedure in the original bill because it provides for the seizure of property without a prior notice or hearing. While the statute could possibly still be challenged, the procedure in the PCS does provide notice to the obligor at the same time that the bank is notified to place a lien on the account. In *Town of Hudson v. Martin-Kahil Ford Lincoln Mercury,* Inc., 54 N.C. App. 272, 283 S.E.2d 417 (1981), the North Carolina Court of Appeals upheld the bank account levy procedure that is provided for in G.S. 105-366 and G.S. 105-368 for the collection of property taxes. G.S. 105-368 provides notice to all parties at the same time and the Court held because there are statutory safeguards by allowing a judicial determination in the case of contest, the seizure of the property before a hearing was constitutional due to the governmental interests involved.

EFFECTIVE DATE: Sections 3.1, 3.2, and 3.3 become effective July, 1, 2003 and the remainder of the bill becomes effective when it is enacted.

5

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — April 1, 2003
Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
[illegible]	AACPD
[signature]	DHHS/DSS/Child Support Enforcement
Gerald K. Robbins	DOJ
[signature]	MAWA
Mark Motsinger	Wallace Flee, Sales/ERA
Rob Dasbach	NC State Watch
Charles Marshall	NC Press Assn
[signature]	DHHS/DSS/Child Support Enforcement
[signature]	AOC
[signature]	NCAECT
Amy Dixon	NC State Watch

Visitors

Name	Firm or Agency and Address
Julia Tuchen	Pres. Chapel Hill Assoc. of Realtors
Terry Crook → 405 Lorax Lane CH 27517	Chapel Hill Assoc'n of Realtors
Megan Gallagher	Chapel Hill Board of Realtors
Lee Mullagen	" " "
Nancy McKenzie	CHAPEL HILL BOARD of Realtors
MARK W. HILL	CHRON

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Don Willis	MH DDSAS
Jeff Horton	DHHS- DFS
Sarah Young	Sen. Kerr
Thomas V. Bennett	NCCFJF
Paul Stock	NC Bankers Assn
Mike Olsen	NC State AFL-CIO
Dave Simpson	Carolinas AGC
	NCFPC
FRAN PRESTON	
Rob Lamm	NC DHHS
Roz Sawitt	NCAJ

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Lu-Ann Coe	NC Psychiatric
Sally Cameron	NC Psychological
Robin Huffman	NC Psychiatric
[signature]	NCDHHS
[signature]	NCDSS/DHHS
Chris Sinna	NC DSS/DHHS
Mary E. Davis & David	Grandparents of Candace
Michelle Frazier	NC Bar Ass'n
USA W. Reynolds	Family Law Council / NC Bar Ass'n
Sheila McKinney	NC DHHS
Jo McCants	AOC

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, April 01, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B.(CS #1) **251** Prohibit Rebirthing.
Sequential Referral: None
Recommended Referral: None

TOTAL REPORTED: 1

Committee Clerk Comments:

UBLIC BILL

[redacted] Hum. Res.
~~Proposed~~ Committee Substitute For
S.B. 251

SESSION LAW _____

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT THE PRACTICE OF THE "REBIRTHING" TECHNIQUE.

Introduced by Senator(s) Allran

Principal Clerk's Use Only

Committee Substitute
Adopted
Pursuant to Rule 45.1
MAR 19 2003

CHANGES TITLE

[redacted]

RE-REFERRED TO
Judiciary II

FISCAL NOTE ATTACHED MAR 26 2003

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Wednesday, April 02, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **293** Sales Representative Commissions Revisions.

Draft Number:	PCS 55154
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 1

Committee Clerk Comments:

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **JUDICIARY II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	April 3, 2003	10:00 AM	1124

The following will be considered:

	BILL NO.	SHORT TITLE	SPONSOR
•	SB 421	Amend Child Welfare Laws.-AB	Sen. Thomas
•	SB 423	Amend Child support Enforcement	
•		Laws.-AB	Sen. Thomas
•	SB 486	Amber Alert	Sen. Queen
•	SB 449	Presumption-DWI Blood Withdrawal	
•		Valid	Sen. Queen

Senator HARTSELL, Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
April 3, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. Welcome and Opening Remarks

II. Bills to be Considered

• SB 421	Amend Child Welfare Laws.-AB	Sen. Thomas
• SB 423	Amend Child Support Enforcement Laws.-AB	Sen. Thomas
SB 486	Amber Alert	Sen. Queen
SB 449	Presumption-DWI Blood Withdrawal Valid	Sen. Queen

III. Other Business

IV. Adjournment

SENATE JUDICIARY II COMMITTEE

Minutes

April 3, 2003

The Senate Judiciary II Committee was called to order on April 3, 2003, by Senator Fletcher L. Hartsell, Chairman, with thirteen members present.

SB 423 (Amend Child Support Enforcement Laws – AB) Senator Thomas was recognized to continue the discussion of the Proposed Committee Substitute. Questions from Senators Webster, Apodaca, and Shubert were answered by Senator Thomas and Mr. Barry Miller, Chief of Child Support Program. Senator Shubert presented an amendment and moved that it be adopted. Kory Goldsmith, staff attorney, explained the amendment. After discussion and questions, Senator Hartsell called for a vote and the amendment passed. Senator Thomas presented an amendment which was explained by Drupti Chauhan, staff attorney. Senator Sloan moved that the amendment be adopted. Senator Hartsell called for a vote and the amendment passed. Questions by Senators Webster, Allrand, Kinnaird and Kerr were answered by Senators Hartsell and Thomas along with Mr. Miller and Mr. Gerald Robbins of the Department of Justice who was serving as counsel for the Department of Health and Human Services. Senator Kerr presented an amendment and moved that it be adopted. Senator Hartsell called for a vote and the motion passed. Senator Thomas moved to adopt the Proposed Committee Substitute as amended, unfavorable as to the original bill, to be rolled into a new committee substitute. Senator Hartsell called for a vote and the motion carried.

There being no further business, the meeting adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 423*

Short Title:	Amend Child Support Enforcement Laws.-AB	(Public)
Sponsors:	Senators Thomas, Metcalf, Rand; and Swindell.	
Referred to:	Judiciary II.	

March 17, 2003

A BILL TO BE ENTITLED

AN ACT TO CLARIFY AND ENHANCE CHILD SUPPORT ENFORCEMENT LAWS.

The General Assembly of North Carolina enacts:

PART 1. LIQUIDATION
PART 2. LICENSING BOARDS
PART 3. PAY RECORDS
PART 4. FINANCIAL INSTITUTIONS
PART 5. EFFECTIVE DATES

PART 1. LIQUIDATION

SECTION 1. G.S. 50-13.4(c) reads as rewritten:

"(c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case. Payments ordered for the support of a minor child shall be on a monthly basis, due and payable on the first day of each month. The requirement that orders be established on a monthly basis does not affect the availability of garnishment of disposable earnings based on an obligor's pay period.

The court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1) of this section. However, upon request of any party, the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support. If, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines. If the court orders an amount other than the amount

determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered.

Payments ordered for the support of a child shall terminate when the child reaches the age of 18 except:

(1) If the child is otherwise emancipated, payments shall terminate at that time;

(2) If the child is still in primary or secondary school when the child reaches age 18, support payments shall continue until the child graduates, otherwise ceases to attend school on a regular basis, fails to make satisfactory academic progress towards graduation, or reaches age 20, whichever comes first, unless the court in its discretion orders that payments cease at age 18 or prior to high school graduation.

In the case of graduation, or attaining age 20, payments shall terminate without order by the court, subject to the right of the party receiving support to show, upon motion and with notice to the opposing party, that the child has not graduated or attained the age of 20.

If an arrearage for child support or fees due exists at the time that a child support obligation terminates for any reason, payments shall continue in the same total amount that was due under the terms of the previous court order or income withholding in effect at the time of the support obligation. The total amount of these payments is to be applied to the arrearage until all arrearages and fees are satisfied or until further order of the court."

PART 2. LICENSING BOARDS

SECTION 2. G.S. 93B-13(a) reads as rewritten:

"(a) Upon receipt of a court order, pursuant to G.S. 50-13.12, revoking the occupational license of a licensee under its jurisdiction, an occupational licensing board shall note the revocation in its ~~records~~ records, report the action within 30 days to the Department of Health and Human Services, and follow the normal postrevocation rules and procedures of the board as if the revocation had been ordered by the board. The revocation shall remain in effect until the board receives certification by the clerk of superior court that the licensee is no longer delinquent in child support payments, or, as applicable, that the licensee is in compliance with or is no longer subject to the subpoena that was the basis for the revocation."

PART 3. PAY RECORDS

SECTION 3.1. G.S. 110-132(a) reads as rewritten:

"(a) In lieu of or in conclusion of any legal proceeding instituted to establish paternity, the written affidavits of parentage executed by the putative father and the mother of the dependent child shall constitute an admission of paternity and shall have the same legal effect as a judgment of paternity for the purpose of establishing a child support obligation, subject to the right of either signatory to rescind within the earlier of:

(1) 60 days of the date the document is executed, or

(2) The date of entry of an order establishing paternity or an order for the payment of child support.

In order to rescind, a challenger must request the district court to order the rescission and to include in the order specific findings of fact that the request for rescission was filed with the clerk of court within 60 days of the signing of the document. The court must also find that all parties, including the child support enforcement agency, if appropriate, have been served in accordance with Rule 4 of the North Carolina Rules of Civil Procedure. In the event the court orders rescission and the putative father is thereafter found not to be the father of the child, then the clerk of court shall send a copy of the order of rescission to the State Registrar of Vital Statistics. Upon receipt of an order of rescission, the State Registrar shall remove the putative father's name from the birth certificate. In the event that the putative father defaults or fails to present or prosecute the issue of paternity, the trial court shall find the putative father to be the biological father as a matter of law.

After 60 days have elapsed, execution of the document may be challenged in court only upon the basis of fraud, duress, mistake, or excusable ~~neglect.~~ neglect pursuant to Rule 60 of the North Carolina Rules of Civil Procedure. The burden of proof shall be on the challenging party, and the legal responsibilities, including child support obligations, of any signatory arising from the executed documents may not be suspended during the challenge except for good cause shown.

A written agreement to support the child by periodic payments, which may include provision for reimbursement for medical expenses incident to the pregnancy and the birth of the child, accrued maintenance and reasonable expense of prosecution of the paternity action, when acknowledged as provided herein, filed with, and approved by a judge of the district court at any time, shall have the same force and effect as an order of support entered by that court, and shall be enforceable and subject to modification in the same manner as is provided by law for orders of the court in such cases. The written affidavit shall contain the social security number of the person executing the affidavit. Voluntary agreements to support shall contain the social security number of each of the parties to the agreement. The written affidavits and agreements to support shall be sworn to before a certifying officer or notary public or the equivalent or corresponding person of the state, territory, or foreign country where the affirmation, acknowledgment, or agreement is made, and shall be binding on the person executing the same whether the person is an adult or a minor. The child support enforcement agency shall ensure that the mother and putative father are given oral and written notice of the legal consequences and responsibilities arising from the signing of an affidavit of parentage and of any alternatives to the execution of an affidavit of parentage. The mother shall not be excused from making the affidavit on the grounds that it may tend to disgrace or incriminate her; nor shall she thereafter be prosecuted for any criminal act involved in the conception of the child as to whose paternity she attests."

SECTION 3.2. G.S. 110-139(b) reads as rewritten:

"(b) In order to carry out the responsibilities imposed under this Article, the Department may request from any governmental department, board, commission, bureau or agency information and assistance. All State, county and city agencies,

officers and employees shall cooperate with the Department in the location of parents who have abandoned and deserted children with all pertinent information relative to the location, income and property of such parents, notwithstanding any provision of law making such information confidential. Except as otherwise stated in this subsection, all ~~All~~ nonjudicial records maintained by the Department pertaining to child-support enforcement shall be confidential, and only duly authorized representatives of social service agencies, public officials with child-support enforcement and related duties, and members of legislative committees shall have access to these records. The payment history of an obligor pursuant to a support order may be examined by or released to the court, the obligor, or the person on whose behalf enforcement actions are being taken or that person's designee. Income and expense information of either parent may be released to the other parent for the purpose of establishing or modifying a support order."

SECTION 3.3. G.S. 50-13.11(a1) reads as rewritten:

"(a1) The court shall order the parent of a minor child or other responsible party to maintain health insurance for the benefit of the child when health insurance is available at a reasonable cost. If health insurance is not presently available at a reasonable cost, the court shall order the parent of a minor child or other responsible party to maintain health insurance for the benefit of the child when health insurance becomes available at a reasonable cost. As used in this subsection, health insurance is considered reasonable in cost if it is employment related or other group health insurance, regardless of service delivery mechanism. The court may require one or both parties to maintain dental insurance."

PART 4. FINANCIAL INSTITUTIONS

SECTION 4. G.S. 110-139.2 is amended by adding a new subsection to read:

"(b1) The Department of Health and Human Services Child Support Enforcement Agency may notify any financial institution doing business in this State that a person who maintains an account with the financial institution has a delinquent child support obligation that may be eligible for levy on the account in an amount that satisfies some or all of the delinquency. To qualify for levy, the child support obligation must have: (i) arrears in an amount not less than the amount of support owed for three months or five hundred dollars ($500.00), whichever is less; and (ii) an identified account with the financial institution.

Upon certification of the arrears amount, the Child Support Agency shall notify the financial institution to initiate a lien on the account of the delinquent obligor and inform the institution of the certified amount of arrears. Within five business days of receipt of the notice, the financial institution shall proceed in the following manner:

(1) Immediately attach a lien to the identified account.

(2) Notify the Child Support Agency of the balance of the account and date of the attachment or that the account does not meet the requirement for attachment.

Within five business days following receipt of the notice of attachment, the Child Support Agency shall notify the obligor of the action. The notice must inform the obligor of the opportunity for removal of the lien through compliance with the child

support order or contest of the action. The Child Support Agency shall establish procedures for review and contest of the action. If no satisfactory response is received within 15 days of the date of the notice, the Child Support Agency shall notify the financial institution to submit payment, up to the total amount of the child support arrears, if available, to the North Carolina Child Support Enforcement Centralized Collections. This amount is to be applied to the debt of the delinquent obligor.

This levy procedure is to be available for direct use by all states' child support programs to financial institutions in this State."

PART 5. EFFECTIVE DATES

SECTION 5. Part 3 of this act becomes effective July 1, 2003. The remainder of this act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 423*
PROPOSED COMMITTEE SUBSTITUTE S423-CSRQ-6 [v.4]

4/1/2003 8:48:47 AM

Short Title: Amend Child Support Enforcement Laws.-AB (Public)

Sponsors:

Referred to:

March 17, 2003

A BILL TO BE ENTITLED

AN ACT TO CLARIFY AND ENHANCE CHILD SUPPORT ENFORCEMENT LAWS.

The General Assembly of North Carolina enacts:

PART 1. LIQUIDATION
PART 2. LICENSING BOARDS
PART 3. PAY RECORDS
PART 4. FINANCIAL INSTITUTIONS
PART 5. EFFECTIVE DATES

PART 1. LIQUIDATION

SECTION 1. G.S. 50-13.4(c) reads as rewritten:

"(c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case. Payments ordered for the support of a minor child shall be on a monthly basis, due and payable on the first day of each month. The requirement that orders be established on a monthly basis does not affect the availability of garnishment of disposable earnings based on an obligor's pay period.

The court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1) of this section. However, upon request of any party, the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support. If, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may

vary from the guidelines. If the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered.

Payments ordered for the support of a child shall terminate when the child reaches the age of 18 except:

(1) If the child is otherwise emancipated, payments shall terminate at that time;

(2) If the child is still in primary or secondary school when the child reaches age 18, support payments shall continue until the child graduates, otherwise ceases to attend school on a regular basis, fails to make satisfactory academic progress towards graduation, or reaches age 20, whichever comes first, unless the court in its discretion orders that payments cease at age 18 or prior to high school graduation.

In the case of graduation, or attaining age 20, payments shall terminate without order by the court, subject to the right of the party receiving support to show, upon motion and with notice to the opposing party, that the child has not graduated or attained the age of 20.

If an arrearage for child support or fees due exists at the time that a child support obligation terminates for any reason except for the death of the obligor, payments shall continue in the same total amount that was due under the terms of the previous court order or income withholding in effect at the time of the support obligation. The total amount of these payments is to be applied to the arrearage until all arrearages and fees are satisfied or until further order of the court."

PART 2. LICENSING BOARDS

SECTION 2. G.S. 93B-13(a) reads as rewritten:

"(a) Upon receipt of a court order, pursuant to G.S. ~~50-13.12~~, 50-13.12 and G.S. 110-142.1, revoking the occupational license of a licensee under its jurisdiction, an occupational licensing board shall note the revocation in its ~~records~~ records, report the action within 30 days to the Department of Health and Human Services, and follow the normal postrevocation rules and procedures of the board as if the revocation had been ordered by the board. The revocation shall remain in effect until the board receives certification by the clerk of superior court or the Department of Health and Human Services in an IV-D case, that the licensee is no longer delinquent in child support payments, or, as applicable, that the licensee is in compliance with or is no longer subject to the subpoena that was the basis for the revocation."

PART 3. PAY RECORDS

SECTION 3.1. G.S. 110-132(a) reads as rewritten:

"(a) In lieu of or in conclusion of any legal proceeding instituted to establish paternity, the written affidavits of parentage executed by the putative father and the mother of the dependent child shall constitute an admission of paternity and shall have the same legal effect as a judgment of paternity for the purpose of establishing a child support obligation, subject to the right of either signatory to rescind within the earlier of:

(1) 60 days of the date the document is executed, or
(2) The date of entry of an order establishing paternity or an order for the payment of child support.

In order to rescind, a challenger must request the district court to order the rescission and to include in the order specific findings of fact that the request for rescission was filed with the clerk of court within 60 days of the signing of the document. The court must also find that all parties, including the child support enforcement agency, if appropriate, have been served in accordance with Rule 4 of the North Carolina Rules of Civil Procedure. In the event the court orders rescission and the putative father is thereafter found not to be the father of the child, then the clerk of court shall send a copy of the order of rescission to the State Registrar of Vital Statistics. Upon receipt of an order of rescission, the State Registrar shall remove the putative father's name from the birth certificate. In the event that the putative father defaults or fails to present or prosecute the issue of paternity, the trial court shall find the putative father to be the biological father as a matter of law.

After 60 days have elapsed, execution of the document may be challenged in court only upon the basis of fraud, duress, mistake, or excusable ~~neglect.~~ neglect pursuant to Rule 60 of the North Carolina Rules of Civil Procedure. The burden of proof shall be on the challenging party, and the legal responsibilities, including child support obligations, of any signatory arising from the executed documents may not be suspended during the challenge except for good cause shown.

A written agreement to support the child by periodic payments, which may include provision for reimbursement for medical expenses incident to the pregnancy and the birth of the child, accrued maintenance and reasonable expense of prosecution of the paternity action, when acknowledged as provided herein, filed with, and approved by a judge of the district court at any time, shall have the same force and effect as an order of support entered by that court, and shall be enforceable and subject to modification in the same manner as is provided by law for orders of the court in such cases. The written affidavit shall contain the social security number of the person executing the affidavit. Voluntary agreements to support shall contain the social security number of each of the parties to the agreement. The written affidavits and agreements to support shall be sworn to before a certifying officer or notary public or the equivalent or corresponding person of the state, territory, or foreign country where the affirmation, acknowledgment, or agreement is made, and shall be binding on the person executing the same whether the person is an adult or a minor. The child support enforcement agency shall ensure that the mother and putative father are given oral and written notice of the legal consequences and responsibilities arising from the signing of an affidavit of parentage and of any alternatives to the execution of an affidavit of parentage. The mother shall not be excused from making the affidavit on the grounds that it may tend to disgrace or incriminate her; nor shall she thereafter be prosecuted for any criminal act involved in the conception of the child as to whose paternity she attests."

SECTION 3.2. G.S. 110-139(b) reads as rewritten:

"(b) In order to carry out the responsibilities imposed under this Article, the Department may request from any governmental department, board, commission,

bureau or agency information and assistance. All State, county and city agencies, officers and employees shall cooperate with the Department in the location of parents who have abandoned and deserted children with all pertinent information relative to the location, income and property of such parents, notwithstanding any provision of law making such information confidential. Except as otherwise stated in this subsection, all ~~All~~ nonjudicial records maintained by the Department pertaining to child-support enforcement shall be confidential, and only duly authorized representatives of social service agencies, public officials with child-support enforcement and related duties, and members of legislative committees shall have access to these records. The payment history of an obligor pursuant to a support order may be examined by or released to the court, the obligor, or the person on whose behalf enforcement actions are being taken or that person's designee. Income and expense information of either parent may be released to the other parent for the purpose of establishing or modifying a support order."

SECTION 3.3. G.S. 50-13.11(a1) reads as rewritten:

"(a1) The court shall order the parent of a minor child or other responsible party to maintain health insurance for the benefit of the child when health insurance is available at a reasonable cost. If health insurance is not presently available at a reasonable cost, the court shall order the parent of a minor child or other responsible party to maintain health insurance for the benefit of the child when health insurance becomes available at a reasonable cost. As used in this subsection, health insurance is considered reasonable in cost if it is employment related or other group health insurance, regardless of service delivery mechanism. The court may require one or both parties to maintain dental insurance."

PART 4. FINANCIAL INSTITUTIONS

SECTION 4. G.S. 110-139.2 is amended by adding a new subsection to read:

"(b1) The Department of Health and Human Services Child Support Enforcement Agency may notify any financial institution doing business in this State that a person who maintains an account with the financial institution has a delinquent child support obligation that may be eligible for levy on the account in an amount that satisfies some or all of the delinquency. To qualify for levy, the child support obligation must have: (i) arrears in an amount not less than the amount of support owed for six months or one thousand dollars ($1000.00), whichever is less; and (ii) an identified account with the financial institution.

Upon certification of the arrears amount in accordance with G.S. 44-86(c), the Child Support Agency shall serve or cause to be served upon the obligor and the financial institution, a notice as provided by this subsection. The notice may be served in any manner provided in Rule 4 of the North Carolina Rules of Civil Procedure and shall include the name of the obligor, the financial institution where the account is located, the account number of the account to be levied, the certified arrears amount, information for the obligor on how to remove the lien or contest the lien, and a copy of the applicable law, G.S. 110-139.2. Upon service of the notice, the financial institution shall proceed in the following manner:

(1) Immediately attach a lien to the identified account.

(2) Notify the Child Support Agency of the balance of the account and date of the attachment or that the account does not meet the requirement for attachment.

Within 10 days of service of the notice, the obligor must contest the lien in writing to the Child Support Agency, request a hearing before the district court in the county where the support order was entered, and give notice to the Child Support Agency of the basis for the contest upon which the request for the hearing is based. The lien may be contested only on the basis that the obligation is an amount less than the amount of support owed for six months, or is less than one thousand dollars ($1000.00), or the obligor is not the person subject to the court order of support. The district court may assess court costs against the losing party. If no response is received from the obligor within 10 days of the service of the notice, the Child Support Agency shall notify the financial institution to submit payment, up to the total amount of the child support arrears, if available. This amount is to be applied to the debt of the delinquent obligor.

This levy procedure is to be available for direct use by all states' child support programs to financial institutions in this State."

PART 5. EFFECTIVE DATES

SECTION 5. Part 3 of this act becomes effective July 1, 2003. The remainder of this act is effective when it becomes law.

SENATE BILL 423:
Amend Child Support Enforcement Laws-AB

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Thomas
Date:	March 29, 2003	**Summary by:**	Drupti Chauhan
Version:	PCS to First Edition		Committee Counsel

SUMMARY: ***This bill is requested by DHHS to amend the child support laws regarding payment of arrears after support obligations terminate; reporting the revocation of licenses to DHHS for those who do not pay ordered child support; allowing child support payment information to be released prior to establishing or modifying support orders; and allowing DHHS to require financial institutions to levy the bank accounts of those who have delinquent child support obligations. The PCS to the first edition makes several changes to the bill as requested by DHHS including an additional statutory reference in Section 2, changing the amount of the arrears required before DHHS can for a levy of a financial account in Section 4 from three months and $500.00 to six months and $1000.00, changes the procedure that DHHS must follow in order to garnish bank accounts, and deletes the requirement in Section 4 that the financial institution make payment specifically to the North Carolina Child Support Enforcement Centralized Collections.***

SECTION-BY-SECTION BILL ANALYSIS BETWEEN CURRENT LAW, BILL and PCS

PART 1. Liquidation

SECTION 1

CURRENT LAW: Courts are to order child support payments in an amount to meet the reasonable needs of the child for health, education, and maintenance with regard to the estates, earnings, conditions and accustomed standard of living for the child and the parties involved. Payments continue until the child reaches 18 unless the child becomes emancipated or if the child is still in primary or secondary school when the child reaches 18. If the child is still in primary or secondary school when the child turns 18, the support payments will continue until the child graduates, stops attending school on a regular or does not make progress towards graduation, or reaches age 20, whichever comes first. A court may also order in its discretion that payments stop at age 18 or prior to high school graduation.

BILL ANALYSIS: The bill would add a requirement that if there are any arrearages for child support or fees due when the child support obligation terminates for any reason, payments would have to continue in the same total amount that was due under the terms of the court order or incoming withholding that is in effect at the time of the support obligation. The payments would continue until all the arrearages and fees are satisfied or the court order otherwise.

PCS CHANGES: The PCS adds language that would create an exception for the death of the obligor so that if the child support obligation terminates because of the death of the obligor, then arrearage payments would not continue.

PART 2. Licensing Boards

SECTION 2

CURRENT LAW: Under G.S. 50-13.12, a court may revoke some or all licensing privileges if there is a finding that the obligor is willfully delinquent in child support payments equal to at least one month's

child support or that the person has willfully failed to comply with a subpoena regarding child support or paternity establishments. These licensing privileges include privileges to hunt, fish, trap, drive, or engage in an occupation or profession. G.S. 93B-13 requires that when an occupational licensing board receives a court order that revokes an occupational license due to child support delinquency or failing to comply with a subpoena, the occupational licensing board must note that revocation in its records and follow the postrevocation rules and procedures that the board has in place just as if the board had ordered the revocation. The revocation is in effect until the board gets certification from the court clerk that the licensee is no longer delinquent or is in compliance with or no longer subject to the court's orders.

BILL ANALYSIS: The bill would add a requirement that when an occupational licensing board notes the revocation in its order and must also report that notation to DHHS within 30 days of the notation.

PCS CHANGES: The PCS would add a statutory reference to G.S. 110-142.1 so that the occupational licensing board would also have to note the revocation in its records of a license pursuant to a court order under G.S. 110-142.1 and report that notation to DHHS within 30 days of the notation. G.S. 110-142.1 authorizes a court to revoke occupational licenses for IV-D cases. (IV-D cases are child support cases where the custodial parent is receiving some sort of benefit such as TANF (AFDC) an is therefore required by law to seek child support and establish parentage.) The PCS would also add language that the revocation remains in effect for IV-D cases until DHHS certifies that the licensee is no longer delinquent or is in compliance with or no longer subject to the court's orders.

PART 2. Pay Records

SECTION 3.1

CURRENT LAW: Instead of legal proceedings to establish paternity, written affidavits executed by a father and mother of a dependent child can constitute as an admission of paternity and have the same legal effect as a judgment of paternity for purposes of child support obligations. Either signatory, however can rescind the affidavit within 60 days of signing it or before the entry of a court order establishing paternity or child support (whichever comes first). After 60 days, the affidavit can be challenged in court only on the basis of fraud, duress, mistake or excusable neglect.

BILL ANALYSIS: The bill adds language that the affidavit can only be challenged in court on the basis of fraud, duress, mistake or excusable neglect pursuant to Rule 60 of the North Carolina Rules of Civil Procedure. Rule 60 allows a party to seek relief form judgment or orders based on mistake, excusable neglect, fraud or newly discovered evidence within one year of the date of the entry of the judgment or order. That one year limit would now apply for the paternity affidavits so that they could not even be challenged in court after 1 year.

SECTION 3.2

CURRENT LAW: DHHS is charged with attempting to locate absent parents for the purposes of establishing paternity and/or securing child support and is to serve as a registry for receipt of information and assist other agencies in locating absent parents, answer interstate inquires and develop guidelines to coordinate with other agencies about information about finding absent parents. To carry out these responsibilities, DHHS can request information and assistance from any governmental agency, board, etc. and all State, county and local agencies must cooperate with DHHS and provide pertinent information. All nonjudicial records maintained by DHHS relating to child support enforcement is confidential and

only duly authorized representatives of agencies that have child-support enforcement and related duties and members of legislative committees have access to these records.

BILL ANALYSIS: The bill adds language to allow the release of an obligor's payment history pursuant to a child support order so that it may examined by a court, the obligor, or the person on whose behalf enforcement actions are being taken or that person's designee (such as an attorney). Income and expense information of one parent may be released to the other parent for the purpose of establishing or modifying a support order.

BACKGROUND: Currently, there is no exchange of information between parties before the court hearing and therefore, there can be no review of the payment history to verify if there have been any mistakes made etc. This allows the parties to review the information and possibly cut back on court appearances.

SECTION 3.3

CURRENT LAW: A court must order the parent of minor child or other responsible party to maintain health insurance for a child when health insurance is available at a reasonable cost. It is considered to be reasonable in cost if it is employment related or other is from some other group health insurance.

BILL ANALYSIS: The bill adds language that if health insurance is not presently available to a parent or other responsible party at a reasonable cost, then court must order that the parent or other party maintain health insurance when it becomes available at a reasonable cost.

BACKGROUND: In *Bucombe County, on behalf of Angelia A, Frady, v. Rogers*, 148, N.C. App. 401, 559, S.E.2d 227 (2002), the NC Court of Appeals overturned a lower court's order that stated a parent was to maintain health insurance when it became available at a reasonable cost because that left the determination of when it became available at a reasonable cost to the parent even though this was the trial court's responsibility to make this determination.

PART 4 Financial Institutions

SECTION 4

CURRENT LAW: The current law allows garnishment of wages and income withholding from delinquent parents, however there is no provision for liens on bank accounts. Currently, DHHS and financial institutions are required to enter into agreements that provide for a data match system where the financial institutions provide DHHS with the full name, social security number, address, telephone number, account numbers, and other identifying data for any person who maintains an account at the financial institution if DHHS certifies that the information is needed to locate a parent to collect child support.

BILL ANALYSIS: The bill adds a new subsection that allows DHHS to place a lien on the bank account of a person who has delinquent child support obligations. DHHS may to notify any financial institution doing business in the State that a person with an account at that institution has delinquent child support obligations and that person's account may be subject to a levy. An account would be subject to a lien if the person who maintains the account has either a three-month arrears or an arrears amount of $500.00, whichever is less. After the arrearage is certified, the Child Support Agency notifies the bank to institute a lien for the certified amount. The bank is then required within five business days of the receipt of this notice to:

- Attach a lien to the account
- Notify the Child Support Agency of the balance on the account and the date of the attachment OR that the account does not have the money for the attachment

Within five business days of the receipt of the notice of the attachment from the bank, the Child Support Agency notifies the obligor of the attachment and this notice has to contain information on how to remove the lien through compliance with the child support order or how to contest the action. The bill requires the Child Support Agency to establish procedures for review and contest of the lien. If the Agency does not receive a "satisfactory" response within 15 days of the date of the notice, then the Agency must notify the bank to submit payment of up to the total amount of the arrears, if available to the North Carolina Child Support Enforcement Centralized Collections and the payment is to be applied to the debt of the delinquent party.

PCS CHANGES: The PCS adds that the certification of the amount must be done in accordance with G.S. 44-86(c) which provides for a verified statement and determination of the arrearage as of the date of that statement and changes the amount and age of the arrearage so that an account would be subject to a lien if there is a six-month arrearage or an arrears amount of $1000.00, whichever is less. The procedure for obtaining a lien on bank accounts is modified in the PCS to include notice to both the bank and the obligor at the same and the notice is served in accordance with Rule 4 of the North Carolina Rules of Civil Procedure. The notice must include the name of the obligor, the financial institution where the account is located, the account number of the account to be levied, the certified arrears amount, information on how to remove or contest the lien, and a copy of the statute. The obligor must contest the lien in writing within 10 days of service of the notice and state the reason for the contest. The only reasons that can be the basis of the contest are that the obligor is not the right person, the obligor is not behind for six months or that the arrearage amount is less than $1000.00. The contest would be heard before the district court in the county where the original child support order was entered and the court is given discretion to assess court costs against the losing party.

The PCS also deletes the requirement that the financial institution specifically submit payment of any available funds up the amount of the total arrears to the North Carolina Child Support Enforcement Centralized Collections.

CONSTITUTIONAL ISSUES: There were possible constitutional due process issues with the bank account levy procedure in the original bill because it provides for the seizure of property without a prior notice or hearing. While the statute could possibly still be challenged, the procedure in the PCS does provide notice to the obligor at the same time that the bank is notified to place a lien on the account. In *Town of Hudson v. Martin-Kahil Ford Lincoln Mercury,* Inc., 54 N.C. App. 272, 283 S.E.2d 417 (1981), the North Carolina Court of Appeals upheld the bank account levy procedure that is provided for in G.S. 105-366 and G.S. 105-368 for the collection of property taxes. G.S. 105-368 provides notice to all parties at the same time and the Court held because there are statutory safeguards by allowing a judicial determination in the case of contest, the seizure of the property before a hearing was constitutional due to the governmental interests involved.

EFFECTIVE DATE: Sections 3.1, 3.2, and 3.3 become effective July, 1, 2003 and the remainder of the bill becomes effective when it is enacted.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 423*

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S423-ARC-10 [v.1]

Date April 3 ,2003

Comm. Sub. [YES]
Amends Title [NO]
S423-CSRQ-6[v.4]

Senator Shubert

moves to amend the bill on page 2, line 20, by rewriting the line to read:
"obligation terminates, payments shall";

and on page 2, by inserting between lines 24 and 25 the following:
"**SECTION 1.1.** G.S. 110-135 reads as rewritten:
'**§ 110-135. Debt to State created.**
Acceptance of public assistance by or on behalf of a dependent child creates a debt, in the amount of public assistance paid, due and owing the State by the responsible parent or parents of the child. Provided, however, that in those cases in which child support was required to be paid incident to a court order during the time of receipt of public assistance, the debt shall be limited to the amount specified in such court order. This liability shall attach only to public assistance granted subsequent to June 30, 1975, and only with respect to the period of time during which public assistance is granted, and only if the responsible parent or parents were financially able to furnish support during this period.
The United States, the State of North Carolina, and any county within the State which has provided public assistance to or on behalf of a dependent child shall be entitled to share in any sum collected under this section, and their proportionate parts of such sum shall be determined in accordance with the matching formulas in use during the period for which assistance was paid.
No action to collect such debt shall be commenced after the expiration of five years subsequent to the receipt of the last grant of public assistance. The county attorney or an attorney retained by the county and/or State shall represent the State in all proceedings brought under this section.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 423*

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S423-ARC-10 [v.1]

Upon the termination of a child support obligation due to the death of the obligor, the Department shall determine whether the obligor's estate contains sufficient assets to satisfy any child support arrearages. If sufficient assets are available, the Department shall attempt to collect the arrearage.'".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED ✓ FAILED _____ TABLED _____

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. _____ DATE 4/3/03

S. B. No. 423 Amendment No. _____ (to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE S423 CSRG-6 [v.4]

Rep.) Sen.) Kerr

1 moves to amend the bill on page p. 2 ~~3~~, line 35

2 ( ) WHICH CHANGES THE TITLE

3 ~~by~~ through p. 3 line 41 by deleting the

4 remaining [illegible] the remaining [illegible]

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SIGNED _____

ADOPTED _____ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 423*

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S423-ARQ-5 [v.3]

Date _____,2003

Comm. Sub. [YES]
Amends Title [NO]
S423-CSRQ-6[v.4]

Senator Thomas

moves to amend the bill on page 5, lines 18-19 by rewriting those lines to read:
"**SECTION 5.** Part 3 of this act becomes effective July 1, 2003. The remainder of this act is effective when it becomes law, except for Part 4 which becomes effective 90 days after this act becomes law.".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 421*

Short Title:	Amend Child Welfare Laws.-AB	(Public)
Sponsors:	Senators Thomas, Metcalf, and Rand.	
Referred to:	Judiciary II.	

March 17, 2003

A BILL TO BE ENTITLED

AN ACT TO CLARIFY AND MAKE TECHNICAL CORRECTIONS TO THE CHILD WELFARE LAWS AND TO ENHANCE THE STATE'S ABILITY TO PROTECT CHILDREN.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 7B-407 reads as rewritten:

"**§ 7B-407. Service of summons.**

The summons shall be personally served in accordance with G.S. 1A-1, Rule 4(j) upon the parent, guardian, custodian, or caretaker, not less than five days prior to the date of the scheduled hearing. The time for service may be waived in the discretion of the court.

If the parent, guardian, custodian, or caretaker entitled to receive a summons cannot be found by a diligent effort, the court may authorize service of the summons and petition by mail or by publication. The cost of the service by publication shall be advanced by the petitioner and may be charged as court costs as the court may direct.

If the parent, guardian, custodian, or caretaker is personally served as herein provided and fails without reasonable cause to appear and to bring the juvenile before the court, the parent, guardian, custodian, or caretaker may be proceeded against as for contempt of court."

SECTION 2. G.S. 7B-1109(d) reads as rewritten:

"(d) The court may for good cause shown continue the hearing for such time as is reasonably required ~~for receiving~~to receive additional evidence, any reports or assessments which the court has requested, or any other information needed in the best interests of the ~~juvenile.~~juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interest of the juvenile. If the court, pursuant to this subsection, continues the hearing to a time that is more than 90 days from the filing of the initial petition or

motion, the court shall reduce its order to writing and state in the written order its reason for granting the continuance."

SECTION 3. G.S. 110-132(a) reads as rewritten:

"(a) In lieu of or in conclusion of any legal proceeding instituted to establish paternity, the written affidavits of parentage executed by the putative father and the mother of the dependent child shall constitute an admission of paternity and shall have the same legal effect as a judgment of ~~paternity for the purpose of establishing a child support obligation,~~ paternity, subject to the right of either signatory to rescind within the earlier of:

(1) 60 days of the date the document is executed, or

(2) The date of entry of an order establishing paternity or an order for the payment of child support."

SECTION 4. G.S. 115C-378 reads as rewritten:

"**§ 115C-378. Children required to attend.**

Every parent, guardian or other person in this State having charge or control of a child between the ages of seven and 16 years shall cause such child to attend school continuously for a period equal to the time which the public school to which the child is assigned shall be in session. Every parent, guardian, or other person in this State having charge or control of a child under age seven who is enrolled in a public school in grades kindergarten through two shall also cause such child to attend school continuously for a period equal to the time which the public school to which the child is assigned shall be in session unless the child has withdrawn from school. No person shall encourage, entice or counsel any such child to be unlawfully absent from school. The parent, guardian, or custodian of a child shall notify the school of the reason for each known absence of the child, in accordance with local school policy.

The principal, superintendent, or teacher who is in charge of such school shall have the right to excuse a child temporarily from attendance on account of sickness or other unavoidable cause which does not constitute unlawful absence as defined by the State Board of Education. The term "school" as used herein is defined to embrace all public schools and such nonpublic schools as have teachers and curricula that are approved by the State Board of Education.

All nonpublic schools receiving and instructing children of a compulsory school age shall be required to keep such records of attendance and render such reports of the attendance of such children and maintain such minimum curriculum standards as are required of public schools; and attendance upon such schools, if the school refuses or neglects to keep such records or to render such reports, shall not be accepted in lieu of attendance upon the public school of the district to which the child shall be assigned: Provided, that instruction in a nonpublic school shall not be regarded as meeting the requirements of the law unless the courses of instruction run concurrently with the term of the public school in the district and extend for at least as long a term.

The principal or his designee shall notify the parent, guardian, or custodian of his child's excessive absences after the child has accumulated three unexcused absences in a school year. After not more than six unexcused absences, the principal shall notify the parent, guardian, or custodian by mail that he may be in violation of the Compulsory

Attendance Law and may be prosecuted if the absences cannot be justified under the established attendance policies of the State and local boards of education. Once the parents are notified, the school attendance counselor shall work with the child and his family to analyze the causes of the absences and determine steps, including adjustment of the school program or obtaining supplemental services, to eliminate the problem. The attendance counselor may request that a law-enforcement officer accompany him if he believes that a home visit is necessary.

After 10 accumulated unexcused absences in a school ~~year~~ year, the principal shall review any report or investigation prepared under G.S. 115C-381 and shall confer with the student and his parent, guardian, or ~~custodian~~ custodian, if ~~possible~~ possible, to determine whether the parent, guardian, or custodian has received notification pursuant to this section and made a good faith effort to comply with the law. If the principal determines that the parent, guardian, or custodian has ~~not,~~ not made a good faith effort to comply with the law, ~~he~~ the principal shall notify the district ~~attorney.~~ attorney and the director of social services of the county or city where the case arose. After the principal has made a determination based on the report or investigation prepared pursuant to G.S. 115C-381, the director shall then decide whether to undertake a protective services assessment against the parent, guardian, or custodian for educational neglect. If ~~he~~ the principal determines that the parent, guardian, or custodian ~~has,~~ made a good faith effort to comply with the law, ~~he~~ the principal may file a complaint with the juvenile court counselor pursuant to Chapter 7B of the General Statutes that the child is habitually absent from school without a valid excuse. Evidence that shows that the parents, guardian, or custodian were notified and that the child has accumulated 10 absences which cannot be justified under the established attendance policies of the local board shall establish a prima facie case that the child's parent, guardian, or custodian is responsible for the absences."

SECTION 5. G.S. 131D-10.6B reads as rewritten:

"**§ 131D-10.6B. ~~Report of death.~~Maintaining a register of applicants by the Division of Social Services.**

~~(a) A facility licensed under this Article shall notify the Department immediately upon the death of any resident of the facility that occurs within seven days of physical restraint of the resident, and shall notify the Department within three days of the death of any resident of the facility resulting from violence, accident, suicide, or homicide. The Department may assess a civil penalty of not less than five hundred dollars ($500.00) and not more than one thousand dollars ($1,000) against a facility that fails to notify the Department of a death and the circumstances surrounding the death known to the facility. Chapter 150B of the General Statutes governs the assessment of a penalty under this section. A civil penalty owed under this section may be recovered in a civil action brought by the Department or the Attorney General. The clear proceeds of the penalty shall be remitted to the State Treasurer for deposit in accordance with State law.~~

(a1) The Division of Social Services shall keep a register of all family foster and therapeutic foster home applicants. The register shall be available to the public upon request and upon payment of a reasonable fee for copying as established by the Division of Social Services. The register shall state all of the following:

(1) The name, age, and address of each applicant.
(2) The date of the application.
(3) The applicant's supervising agency.
(4) Any mandated training completed by the applicant and the dates of training.
(5) Whether the applicant was licensed and the date of the initial licensure.
(6) The current licensing period.
(7) Any adverse licensing actions.
(8) Any other information deemed necessary by the Division of Social Services.

~~(b) Upon receipt of notification from a facility in accordance with subsection (a) of this section, the Department shall notify the Governor's Advocacy Council for Persons With Disabilities that a person with a disability has died. The Department shall provide the Council access to the information about each death reported to the Council pursuant to subsection (a) of this section, including information resulting from any investigation of the death by the Department, and from reports received from the Chief Medical Examiner pursuant to G.S. 130A-385. The Council shall use the information in accordance with its powers and duties under G.S. 143B-403.1 and applicable federal law and regulations.~~

(b1) Applications of family foster and therapeutic foster home applicants and all other related materials, including letters of reference, mutual home assessments, or medical, psychological, financial, or other personal background information or history of applicants, the applicants' family, or members of the applicants' household, shall be treated as confidential and not as 'public records' subject to disclosure pursuant to Chapter 132 of the General Statutes.

~~(c) If the death of a resident of the facility occurs within seven days of the use of physical restraint, the Department shall initiate immediately an investigation of the death.~~

~~(d) Nothing in this section abrogates State or federal law or requirements pertaining to the confidentiality, privilege, or other prohibition against disclosure of information provided to the Department or the Council. In carrying out the requirements of this section, the Department and the Council shall adhere to State and federal requirements of confidentiality, privilege, and other prohibitions against disclosure and release applicable to the information received under this section. A facility or provider that makes available confidential information in accordance with this section and with State and federal law is not liable for the release of the information.~~

~~(e) The Secretary shall establish a standard reporting format for reporting deaths pursuant to this section and shall provide to facilities subject to this section a form for the facility's use in complying with this section.~~"

SECTION 6. G.S. 143B-150.20 reads as rewritten:

"**§ 143B-150.20. State Child Fatality Review Team; establishment; purpose; powers; duties; report by Division of Social Services.**

(a) There is established in the Department of Health and Human Services, Division of Social Services, a State Child Fatality Review Team to conduct in-depth

reviews of any child fatalities which have occurred involving children and families involved with local departments of social services child protective services in the 12 months preceding the fatality. Steps in this in-depth review shall include interviews with any individuals determined to have pertinent information as well as examination of any written materials containing pertinent information.

(b) The purpose of these reviews shall be to implement a team approach to identifying factors which may have contributed to conditions leading to the fatality and to develop recommendations for improving coordination between local and State entities which might have avoided the threat of injury or fatality and to identify appropriate remedies. The Division of Social Services shall make public the findings and recommendations developed for each fatality reviewed relating to improving coordination between local and State entities. These findings shall not be admissible as evidence in any civil or administrative proceedings against individuals or entities that participate in child fatality reviews conducted pursuant to this section. The State Child Fatality Review Team shall consult with the appropriate district attorney in accordance with G.S. 7B-2902(d) prior to the public release of the findings and recommendations.

(c) The State Child Fatality Review Team shall include representatives of the local departments of social services and the Division of Social Services, a member of the local Community Child Protection Team, a member of the local child fatality prevention team, a representative from local law enforcement, a prevention specialist, and a medical professional.

(d) The State Child Fatality Review Team shall have access to all medical records, hospital records, and records maintained by this State, any county, or any local agency as necessary to carry out the purposes of this subsection, including police investigative data, medical examiner investigative data, health records, mental health records, and social services records. The State Child Fatality Review Team may receive a copy of any reviewed materials necessary to the conduct of the fatality review. Any member of the State Child Fatality Review Team may share, only in an official meeting of the State Child Fatality Review Team, any information available to that member that the State Child Fatality Review Team needs to carry out its duties.

(d1) Pursuant to subsection (d) of this section, if a request for records by the State Child Fatality Review Team is denied or a response to its request is not immediately forthcoming, the State Child Fatality Review Team may apply for an order compelling disclosure. The application shall state, with reasonable particularity, factors supporting the need for an order compelling disclosure. The State Child Fatality Review Team shall file the application in Wake County Superior Court and the Court shall have jurisdiction to issue any orders compelling disclosure. Actions brought pursuant to this section shall be scheduled for immediate hearing, and subsequent proceedings in these actions shall be given priority by the appellate courts. After a hearing, the Court shall issue an order compelling disclosure unless the court finds that the disclosure of the requested records is not permitted by federal law and regulations.

(e) Meetings of the State Child Fatality Review Team are not subject to the provisions of Article 33C of Chapter 143 of the General Statutes. However, the State Child Fatality Review Team may hold periodic public meetings to discuss, in a general

manner not revealing confidential information about children and families, the findings of their reviews and their recommendations for preventive actions. Minutes of all public meetings, excluding those of closed sessions, shall be kept in compliance with Article 33C of Chapter 143 of the General Statutes. Any minutes or any other information generated during any executive session shall be sealed from public inspection.

(f) All otherwise confidential information and records acquired by the State Child Fatality Review Team, in the exercise of its duties are confidential; are not subject to discovery or introduction into evidence in any proceedings except pursuant to an order of the court; and may only be disclosed as necessary to carry out the purposes of the State Child Fatality Review Team. In addition, all otherwise confidential information and records created by the State Child Fatality Review Team in the exercise of its duties are confidential; are not subject to discovery or introduction into evidence in any proceedings; and may only be disclosed as necessary to carry out the purposes of the State Child Fatality Review Team. No member of the State Child Fatality Review Team, nor any person who attends a meeting of the State Child Fatality Review Team, may testify in any proceeding about what transpired at the meeting, about information presented at the meeting, or about opinions formed by the person as a result of the meetings. This subsection shall not, however, prohibit a person from testifying in a civil or criminal action about matters within that person's independent knowledge.

(g) Each member of the State Child Fatality Review Team and invited participant shall sign a statement indicating an understanding of and adherence to confidentiality requirements, including the possible civil or criminal consequences of any breach of confidentiality.

~~(h) The Division of Social Services, Department of Health and Human Services, shall report to the members of the Senate Appropriations Committee on Human Resources, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division on the activities of the State Child Fatality Review Team including recommendations for changes in the statewide child protection system no later than October 1 of each year.~~"

SECTION 7. G.S. 153A-257 is amended by adding a new subsection to read:

"(d) If two or more county departments of social services differ regarding the legal residence of a minor in a child abuse, neglect, or dependency case, either county department of social services may refer the factual situation to the Department of Health and Human Services, Division of Social Services. After reviewing the pertinent background facts of the case, the Director of the Division of Social Services or the Director's designee shall determine which county department of social services shall be responsible for providing protective services and financial support for the minor in question. Since the Department of Health and Human Services is the supervising agency under Chapter 108A of the General Statutes for the county-administered programs, the determination of the Director or the Director's designee regarding the minor's legal residence for social services purposes is binding upon the county departments of social services and counties and is not subject to judicial review."

SECTION 8. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 449

Short Title:	Presumption-DWI Blood Withdrawal Valid.	(Public)
Sponsors:	Senator Queen.	
Referred to:	Judiciary II.	

March 18, 2003

A BILL TO BE ENTITLED

AN ACT TO MAKE IT A REBUTTABLE PRESUMPTION THAT THE PERSON WITHDRAWING BLOOD IN AN IMPAIRED DRIVING CASE IS A LICENSED PHYSICIAN, NURSE, OR AN OTHERWISE QUALIFIED PERSON.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-139.1(c) reads as rewritten:

"(c) Withdrawal of Blood for Chemical Analysis. – When a blood test is specified as the type of chemical analysis by the charging officer, only a physician, registered nurse, or other qualified person may withdraw the blood sample. If the person withdrawing the blood requests written confirmation of the charging officer's request for the withdrawal of blood, the officer shall furnish it before blood is withdrawn. When blood is withdrawn pursuant to a charging officer's request, neither the person withdrawing the blood nor any hospital, laboratory, or other institution, person, firm, or corporation employing that person, or contracting for the service of withdrawing blood, may be held criminally or civilly liable by reason of withdrawing that blood, except that there is no immunity from liability for negligent acts or omissions. Upon the introduction of any evidence at trial that the person withdrawing the blood was a qualified person under this subsection, a rebuttable presumption shall be raised that the person withdrawing the blood was qualified."

SECTION 2. This act becomes effective October 1, 2003.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 486

Short Title:	Amber Alert.	(Public)
Sponsors:	Senators Queen; Albertson, Apodaca, Berger, Brock, Carpenter, Dalton, Forrester, Foxx, Garrou, Hagan, Hargett, Hartsell, Holloman, Jenkins, Kerr, Kinnaird, Lucas, Metcalf, Moore, Purcell, Rand, Reeves, Shubert, Smith, Stevens, Swindell, Thomas, and Tillman.	
Referred to:	Judiciary II.	

March 20, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW REGARDING THE N.C. CHILD ALERT NOTIFICATION (NC CAN) SYSTEM AND TO RENAME THAT SYSTEM THE AMBER ALERT SYSTEM.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 143B-499.1 reads as rewritten:

"**§ 143B-499.1. Dissemination of missing persons data by law-enforcement agencies.**

A law-enforcement agency, upon receipt of a missing person report by a parent, spouse, guardian, or legal custodian, shall immediately make arrangements for the entry of data about the missing person or missing child into the national missing persons file in accordance with criteria set forth by the FBI/NCIC, immediately inform all of its on-duty law-enforcement officers of the missing person report, initiate a statewide broadcast to all appropriate law-enforcement agencies to be on the lookout for the individual, and transmit a copy of the report to the Center.

If the report involves a missing child and the report meets the criteria established in G.S. 143B-499.7(b), as soon as practicable after receipt of the report, the law enforcement agency shall notify the Center and the National Center for Missing and Exploited Children of the relevant data about the missing child."

SECTION 2. G.S. 143B-499.2 reads as rewritten:

"**§ 143B-499.2. Responsibilities of Center.**

The Center shall:

(1) Assist local law-enforcement agencies with entering data about missing persons or missing children into the national missing persons file, ensure that proper entry criteria have been met as set forth by the

FBI/NCIC, and confirm entry of the data about the missing persons or missing children;

(2) Gather and distribute information and data on missing children and missing persons;

(3) Encourage research and study of missing children and missing persons, including the prevention of child abduction and the prevention of the exploitation of missing children;

(4) Serve as a statewide resource center to assist local communities in programs and initiatives to prevent child abduction and the exploitation of missing children;

(5) Continue increasing public awareness of the reasons why children are missing and vulnerability of missing children;

(6) Achieve maximum cooperation with other agencies of the State, with agencies of other states and the federal government and with the National Center for Missing and Exploited Children in rendering assistance to missing children and missing persons and their parents, guardians, spouses, or legal custodians; and cooperate with interstate and federal efforts to identify deceased individuals;

(6a) Develop and maintain the ~~North Carolina Child Alert Notification System (NC CAN)~~ AMBER Alert System as created by G.S. 143B-499.7;

(7) Forward the appropriate information to the Police Information Network to assist it in maintaining and publishing a bulletin of currently missing children and missing persons;

(8) Maintain a directory of existing public and private agencies, groups, and individuals that provide effective assistance to families in the areas of prevention of child abduction, location of missing children and missing persons, and follow-up services to the child or person and family, as determined by the Secretary of Crime Control and Public Safety;

(9) Annually compile and publish reports on the actual number of children and persons missing each year, listing the categories and causes, when known, for the disappearances;

(10) Provide follow-up referrals for services to missing children or persons and their families;

(11) Maintain a toll-free 1-800 telephone service that will be in service at all times; and

(12) Perform such other activities that the Secretary of Crime Control and Public Safety considers necessary to carry out the intent of its mandate."

SECTION 3. G.S. 143B-499.7 reads as rewritten:

"**§ 143B-499.7. North Carolina Child Alert Notification System established.**

(a) There is established within the North Carolina Center for Missing Persons the ~~North Carolina Child Alert Notification System (NC CAN).~~ AMBER Alert System. The

purpose of ~~NC CAN~~ AMBER Alert is to provide a statewide system for the rapid dissemination of information regarding abducted children.

(b) The ~~NC CAN~~ AMBER Alert System shall make every effort to disseminate information on missing children as quickly as possible when the following criteria are met:

(1) The child is ~~12~~15 years of age or younger;

~~(2) The child is believed to have been abducted;~~

~~(3) The child is believed to be in danger of injury or death;~~

(2) The child is believed:

a. To have been abducted, or

b. To be in danger of injury or death;

~~(4)~~(3) The abduction is not known or suspected to be by a parent of the ~~child;~~child, unless the child's life is suspected to be in danger;

~~(5)~~(4) The child is not a runaway or voluntarily missing; and

~~(6)~~(5) The abduction has been reported to and investigated by a law enforcement agency.

The ~~NC CAN~~ AMBER Alert System may disseminate information on missing children who are ages ~~13~~16 to 17 on a case-by-case basis, if all other criteria in subdivisions (2) through ~~(6)~~(5) of this subsection have been met, if the Center believes the dissemination of the information to be beneficial in the possible recovery of the missing child.

If the abduction of the child is known or suspected to be by a parent of the child, the Center, in its discretion, may disseminate information through the ~~NC CAN~~ AMBER Alert System if the child is believed to be in danger of injury or death.

(c) The Center shall adopt guidelines and develop procedures for the statewide implementation of the ~~NC CAN~~ AMBER Alert System and shall provide education and training to encourage radio and television broadcasters to participate in the System. The Center shall work with the Department of Justice in developing training material regarding the ~~NC CAN~~AMBER Alert System for law enforcement, broadcasters, and community interest groups.

(d) The Center shall consult with the Department of Transportation and develop a procedure for the use of overhead permanent changeable message signs to provide information on the abduction of a child meeting the criteria established in subsection (b) of this section, when information is available that would enable motorists to assist law enforcement in the recovery of the missing child. The Center and the Department of Transportation shall develop guidelines for the content, length, and frequency of any message to be placed on an overhead permanent changeable message sign.

(e) The Center shall consult with the Division of Emergency Management, in the Department of Crime Control and Public Safety, to develop a procedure for the use of the Emergency Alert System to provide information on the abduction of a child meeting the criteria established in subsection (b) of this section.

(f) The Department of Crime Control and Public Safety, on behalf of the Center, may accept grants, contributions, devises, bequests, and gifts, which shall be kept in a

separate fund, which shall be nonreverting, and shall be used to fund the operations of the Center and the ~~NC CAN~~ AMBER Alert System."

SECTION 4. This act is effective when it becomes law.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 423*

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S423-ARC-10 [v.1]

Date _____,2003

Comm. Sub. [YES]
Amends Title [NO]
S423-CSRQ-6[v.4]

Senator Shubert

moves to amend the bill on page 2, line 20, by rewriting the line to read:
"obligation terminates, payments shall";

and on page 2, by inserting between lines 24 and 25 the following:

"**SECTION 1.1.** G.S. 110-135 reads as rewritten:

'**§ 110-135. Debt to State created.**

Acceptance of public assistance by or on behalf of a dependent child creates a debt, in the amount of public assistance paid, due and owing the State by the responsible parent or parents of the child. Provided, however, that in those cases in which child support was required to be paid incident to a court order during the time of receipt of public assistance, the debt shall be limited to the amount specified in such court order. This liability shall attach only to public assistance granted subsequent to June 30, 1975, and only with respect to the period of time during which public assistance is granted, and only if the responsible parent or parents were financially able to furnish support during this period.

The United States, the State of North Carolina, and any county within the State which has provided public assistance to or on behalf of a dependent child shall be entitled to share in any sum collected under this section, and their proportionate parts of such sum shall be determined in accordance with the matching formulas in use during the period for which assistance was paid.

No action to collect such debt shall be commenced after the expiration of five years subsequent to the receipt of the last grant of public assistance. The county attorney or an attorney retained by the county and/or State shall represent the State in all proceedings brought under this section.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 423*

AMENDMENT NO. _____
(to be filled in by
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S423-ARC-10 [v.1]

Upon the termination of a child support obligation due to the death of the obligor, the Department shall determine whether the obligor's estate contains sufficient assets to satisfy any child support arrearages. If sufficient assets are available, the Department shall attempt to collect the arrearage.'".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 423*

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S423-ARQ-5 [v.3]

Date _____,2003

Comm. Sub. [YES]
Amends Title [NO]
S423-CSRQ-6[v.4]

Senator Thomas

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"**SECTION 5.** Part 3 of this act becomes effective July 1, 2003. The remainder of this act is effective when it becomes law, except for Part 4 which becomes effective 90 days after this act becomes law.".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — April 3, 2003
Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Barry Miller	NCDHHS/DCS/Child Support Enforcement
David Daughtry	NCDHHS/DSS/Child Support Enforcement
Rob Dussellier	NC State Auditor
Chris Sinha	NCDHHS/DSS/Children's Services
JoAnn Lamm	DHHS/DSS
Esther High	DHHS/DSS
Dina DiMaio	NCBA
Casandra Skinner	CCPS
Perry F Stewart	NC Ctr for MP
Jay Chaudhuri	DOJ
Greg McLeod	DOJ

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Jon Williams	CCPS
Gerald K. Robbins	DOJ
Starla McKenney	NCDHHS
PAUL Stock	NC Bankers

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Monday, April 07, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **423** Amend Child Support Enforcement Laws.-AB

Draft Number:	PCS55171
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 1

Committee Clerk Comments:

BILL ADDED

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **JUDICIARY II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	April 8, 2003	10:00 AM	1124

The following will be considered:

	BILL NO.	SHORT TITLE	SPONSOR
•	SB 421	AmendCh8ld Welfare Laws – AB	Sen. Thomas
•	SB 449	Presumption-DWI Blood Withdrawal Valid	Sen. Queen
•	SB 486	Amber Alert	Sen. Queen
•	SB 226	Unauthorized Admin. Med. By Child	
•		Care Facility	Sen. Purcell
•	SB 323	Gen. Contrs/Protect Info/Clarify Inj. Relief	Sen. Hartsell
•	SB 390	Modernize Judgment Docketing Laws	Sen. Hartsell
•	SB 422	Advance Health Care Directive Registry	Sen. Thomas
•	SB 784	Judgment Bonding Legislation	Sen. Hartsell

Senator HARTSELL, Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
April 8, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. **Welcome and Opening Remarks**

II. **Bills to be Considered**

•	SB 421	Amend Child Welfare Laws – AB	Sen. Thomas
•	SB 449	Presumption-DWI Blood Withdrawal	
•		Valid	Sen. Queen
•	SB 486	Amber Alert	Sen. Queen
•	SB 226	Unauthorized Admin. Meds. By Child	
•		Care Facility	Sen. Purcell
•	SB 323	Gen. Contrs/Protect Info/Clarify Inj.	
•		Relief	Sen. Hartsell
•	SB 390	Modernize Judgment Docketing Laws	Sen. Hartsell
•	SB 422	Advance Health Care Directive Registry	Sen. Thomas
•	SB 784	Judgment Bonding Legislation	Sen. Hartsell

III. **Other Business**

IV. **Adjournment**

JBLIC BILL

Health and Human Res.
~~Proposed~~ Committee Substitute For
S.B. 226

SESSION LAW _____

H109

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT THE ADMINISTRATION OF MEDICATION TO A CHILD IN A LICENSED OR UNLICENSED CHILD CARE FACILITY WITHOUT PROPER AUTHORIZATION FROM THE CHILD'S PARENT OR GUARDIAN.

Introduced by Senator(s) Purcell

Principal Clerk's Use Only

Committee Substitute
Adopted
Pursuant to Rule 45.1
MAR 5 2003
CHANGES TITLE

RE-REFERRED TO
Judiciary II

AL NOTE ATTACHED MAR 2 6 2003

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, April 08, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **784** Judgment Bonding Legislation.

Draft Number:	PCS 35233
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 1

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

CORRECTED REPORT

Tuesday, April 08, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 2

S.B.(CS #1) **226** Unauthorized Admin. Meds. By Child Care Fac.

Draft Number:	PCS 75230
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 1

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Wednesday, April 09, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B. **390** Modernize Judgment Docketing Laws.
Sequential Referral: None
Recommended Referral: None

S.B. **422** Advance Health Care Directive Registry.
Sequential Referral: None
Recommended Referral: None

TOTAL REPORTED: 2

Committee Clerk Comments:

Judiciary II Committee

Minutes – Morning Meeting

April 8, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with sixteen members present.

SB 486 (Amber Alert) Bill sponsor, Senator Queen, was introduced by Senator Hartsell to explain the bill. Senator Sloan moved for consideration of the Committee Substitute. All voted and the motion passed. Senator Queen then explained the Committee Substitute. Mr. Perry Stewart, of the North Carolina Center for Missing Persons, spoke on the bill. Senator Sloan moved that the bill be reported unfavorable to the original bill, favorable to the Committee Substitute. All voted yes and the motion passed.

SB 784 (Judgment Bonding Legislation) Senator Queen moved for adoption of the Committee Substitute. All voted yes and the motion passed. Senator Hartsell recognized Senator Allran to chair the meeting while Senator Hartsell, bill sponsor, explained the bill. Kory Goldsmith, staff attorney, gave additional explanation. Questions by Senators Rucho, Kinnaird, and Queen were answered by Senator Hartsell. Senator Rucho moved for unfavorable to original bill, favorable to Committee Substitute. A vote on the motion was call. All voted yes and the motion carried.

SB 226 (Unauthorized Administration of Medication by Child Care Facilities) Senator Hartsell introduced Senator Purcell, bill sponsor, to discuss the bill. Senator Queen moved to adopt the Committee Substitute. All voted yes, and the motion carried. The bill was referred to J II from Health and Human Services Committee and studied in Judiciary II sub-committee chaired by Senator Allran, who was invited to explain the sub-committee action. Questions by Senators Shubert, Hagan, Rucho and Kerr were answered by Senator Allran and Linda Attarian, staff attorney. Mr. Rob Johnson, District Attorney for Alamance County spoke on the bill and introduced Richard and Barbara Shevlin, parents of the child who died after being drugged in the day care center operated by Josephine Burke. Ms. Peggy Ball, Director, Division of Child Development was recognized to speak on the bill. Senator Kinnaird moved for a report unfavorable to original bill, favorable to Committee Substitute. All voted yes, and the motion passed.

There being no further business, the meeting was adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

Judiciary II Committee

Minutes – Afternoon Meeting

April 8, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with fifteen members present.

SB 421 (Amend Child Welfare Laws) The Committee Substitute was introduced by Senator Hartsell. Senator Allran moved that the Committee Substitute be adopted. All members voted and the motion passed. Senator Hartsell recognized Senator Thomas to discuss the bill. Senator Thomas called on Kory Goldsmith, staff attorney to explain the bill. Questions by Senators Kinnard, Thomas Allran and Rucho were answered by Kory Goldsmith and Ms. Jo Ann Lamb of the Division of Social Services and Children's Services. After discussion, Senator Thomas moved that the bill be amended. Senator Hartsell called for a vote. All members voted yes, and the amendment passed. Senator Queen moved for a report unfavorable to the original bill, favorable to the committee substitute as amended and rolled into a new committee substitute. All members voted yes, and the motion carried.

SB 449 (Presumption-DWI Blood Withdrawal Valid) Senator Queen was recognized by the Chair to discuss an amendment to the original bill. Kory Goldsmith, staff attorney explained the amendment. After discussion, Senator Allran requested a perfecting amendment. Senator Hartsell called for a vote on the amendment as amended. All members voted yes, and the amendment passed. Senator Hartsell then called on Senator Queen to explain the bill. Questions by Senators Rucho, Kinnaird, Kerr, Holloman, Sloan, and Dorsett were answered by Senators Hartsell, Thomas, Allran and Queen. Senator Allran moved to adopt the bill as amended and roll it into a committee substitute. Senator Hartsell called for a vote. All members voted and the motion carried.

SB 422 (Advance Health Care Directive Registry) The Chair recognized Senator Thomas to discuss the original bill. Questions by Senators Bingham, Hagan and Kerr were answered by Senators Thomas, Hartsell and Hagan and Michelle Frazier, of the North Carolina Bar Association. Senator Shubert called for a favorable report. Senator Hartsell called for a vote. All members voted yes and the motion carried.

SB 390 (Modernize Judgment Docketing Laws) Senator Thomas was recognized to chair the committee while Senator Hartsell, the bill sponsor presented the original bill. Pamela Best of the North Carolina Administrative Office of the Courts, was asked to explain the bill. Questions by Senators Kinnaird, Kerr, and Allran were answered by Pamela Best and Brad Cranford of the North Carolina Administrative Office of the Courts. Senator Bingham moved for a favorable report. Senator Thomas called for a vote. All voted yes and the motion carried.

SB 323 Gen. Contrs/Protect Info/Clarify Inj. Relief) Chairman Thomas, recognized Senator Hartsell, bill sponsor, to discuss the bill. Paul Wilms, representing the North Carolina Home Builders Association, was invited to speak on the bill. Mr. Carson Carmichael, attorney representing the North Carolina Home Builders Association, also spoke on the bill. Senator Kinnaird moved to adopt the Committee Substitute for discussion. Senator Thomas called for a vote and the motion passed. Questions by Senators Kerr and Sloan were answered by Paul Wilms and Carson Carmichael. No action was taken on the bill.

With no further business, the meeting adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 2

SENATE BILL 226

Health and Human Resources Committee Substitute Adopted 3/5/03

Short Title: Unauthorized Admin. Meds. by Child Care Fac. (Public)

Sponsors:

Referred to:

February 26, 2003

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT THE ADMINISTRATION OF MEDICATION TO A CHILD IN A LICENSED OR UNLICENSED CHILD CARE FACILITY WITHOUT PROPER AUTHORIZATION FROM THE CHILD'S PARENT OR GUARDIAN.

The General Assembly of North Carolina enacts:

SECTION 1. This act shall be known as "Kaitlyn's Law".

SECTION 2. Chapter 110 of the General Statutes is amended by adding a new section to read:

"**§ 110-102.1A. Unauthorized administration of medication.**

(a) It is unlawful for an employee, owner, household member, volunteer, or operator of a licensed or unlicensed child care facility to administer prescription or over-the-counter medications to a child attending the child care facility without written authorization from the child's parent or guardian in accordance with rules adopted by the North Carolina Child Care Commission.

(b) In the event of an emergency medical condition and the child's parent or guardian is unavailable, it shall not be unlawful to administer medication to a child attending the child care facility without written authorization from the child's parent or guardian if the medication is administered with the authorization and in accordance with instructions from a bona fide medical care provider. For purposes of this subsection, the following definitions apply:

(1) A bona fide medical care provider means an individual who is licensed, certified, or otherwise authorized to prescribe the medication.

(2) An emergency medical condition means circumstances where a prudent layperson acting reasonably would have believed that an emergency medical condition existed.

(c) A violation of this section that results in serious injury to the child shall be punished as a Class F felony.

(d) Any other violation of this section shall be punished as a Class H felony.

SECTION 3. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

SENATE BILL 226: Unauthorized Administration of Medication by Child Care Facilities

BILL ANALYSIS

Committee:	Senate JII	**Introduced by:**	Sen. William Purcell
Date:	April 8, 2003	**Summary by:**	Linda Attarian
Version:	S226-PCS-7530		Committee Counsel

SUMMARY: ***The Second Edition would make the administration of medication to a child attending a licensed or an unlicensed child care facility without written authorization from the child's parent or guardian unlawful. A violation of the statute is a Class H felony (resulting in up to 30 months of active punishment), except that a violation that results in serious injury to the child would be punishable as a Class F felony (resulting in up to 59 months of active punishment). The bill provides an exception for circumstances in which an emergency medical condition presents itself and the child's parent is unavailable. The bill is effective December 1, 2003 and applies to offenses committed on or after that date.***

The PCS (S226- PCS-75230) was adopted by the Subcommittee and makes the following changes to the Second Edition:

- ***Adds a reference to the statutory definition of "child care facility";***
- ***Deletes "in accordance with rules adopted by the Child Care Commission" which would determine what is meant by "written authorization" and replaces the reference with a specific, more limited, definition of written authorization for the purposes of the act;***
- ***Inserts "intentionally" to provide that the criminal act must be done intentionally; and***
- ***Adds a limited exception for oral authorization if the child arrives at the facility with the medication but without the written authorization.***

CURRENT LAW: Current regulations adopted by the NC Child Care Commission prohibits a drug or medication to be administered to any child in a licensed child care facility without specific written instructions from the child's parent or guardian.

- No drug or medication may be administered for a non-medical purpose, including inducing sleep.
- Prescribed medication may be administered only with parent's written authorization and the medication must be in its original container with proper labeling, including directions for dosage, or the parent must provide written instructions that must be signed and dated by the prescribing physician or health professional.
- Over-the-counter medication may be administered only with the parent's written authorization and only in accordance with written dosage instructions of the parent, physician or other authorized health professional.
- A parent may provide written authorization that is valid for up to six months to authorize the administration of medication to treat the symptoms of asthma and allergic reactions, and up to

one year to administer sunscreen and over-the-counter diapering creams. The authorization must be specific as to the symptoms or conditions for which the medication may be administered.

- A parent may provide written authorization for the administration of a one-time, weight appropriate dose of acetaminophen in the event the child has a fever and the parent cannot be reached.

Administrative penalties: A violation of the regulation may result in issue a written warning and a request for compliance; issue an official reprimand; place a licensee on probation; suspend the license for a period not to exceed one year; or permanently revoke the license. The Division of Child Development does not have jurisdiction over unlicensed facilities.

Civil penalties: G.S. 110-103.1 authorizes the Secretary to impose a civil penalty, not to exceed $1,000 for each violation documented on any given date, against an operator of a child care facility who violates NC law governing child care facilities. In determining the amount of the penalty, the Secretary must consider the threat of or extent of harm to children and the consistency of violations.

BILL ANALYSIS:

The Second Edition does the following:

- Makes the administration of medication to a child attending a licensed or an unlicensed child care facility without written authorization in accordance with rules adopted by the Child Care Commission from the child's parent or guardian unlawful.
- An employee, owner, household member, volunteer or operator who violates the statute would be punishable as a Class H felony.
- Provides for an enhanced penalty (Class F felony) for violations resulting in serious injury to a child.
- Provides an exception for emergency medical conditions when the child's parent is unavailable. The medication must be administered with the authorization of a bona fide medical care provider and in accordance with the provider's instructions.

Penalties:

Class H felony: Punishable by an absolute minimum of 4 months Community Service Punishment and an absolute maximum of 30 months Active Punishment, depending on prior convictions and aggravating factors.

Class F felony: Punishable by an absolute minimum of 10 months Intermediate Punishment (e.g. supervised probation) or Active Punishment to an absolute maximum of 59 months of Active Punishment, depending on prior convictions and aggravating factors.

Effective December 1, 2003.

BACKGROUND:

Incarceration Note:

Unable to determine exact fiscal impact.

Consistency with the NC Sentencing Commission's Offense Classification Criteria:

Yes; with a recommendation to amend the bill to provide for oral authorization exception.

Inspiration for the legislation:

Senate Bill 226 is a recommendation of the NC Child Fatality Task Force. The Task Force was inspired to recommend the bill after hearing the story of Kaitlyn Shevlin, a 5-month-old who died in an unlicensed day-care home in Alamance County in 2001. According to Mr. Rob Johnson, District Attorney for Alamance County, although medical examiners could not find a definitive cause of death and as a result ruled that the child died from Sudden Infant Death Syndrome, law enforcement investigators suspect her day-care provider gave the child a generic form of the medicine Benadryl to make her sleepy. The day care provider was unlicensed and had numerous complaints of child neglect filed against her in the 20 years she operated her unlicensed facility. She was convicted of misdemeanor charges of child abuse and neglect served four months in prison.

Definition of child care facility:

Child care. - A program or arrangement where three or more children less than 13 years old, who do not reside where the care is provided, receive care on a regular basis of at least once per week for more than four hours but less than 24 hours per day from persons other than their guardians or full-time custodians, or from persons not related to them by birth, marriage, or adoption.

- **Child care facility**. - Includes child care centers, family child care homes, and any other child care arrangement not excluded by G.S. 110-86(2), that provides child care, regardless of the time of day, wherever operated, and whether or not operated for profit.

a. **A child care center** is an arrangement where, at any one time, there are three or more preschool-age children or nine or more school-age children receiving child care.

b. **A family child care home** is a child care arrangement located in a residence where, at any one time, more than two children, but less than nine children, receive child care.

- **Child care does not include the following**:

a. Arrangements operated in the home of any child receiving care if all of the children in care are related to each other and no more than two additional children are in care;

b. Recreational programs operated for less than four consecutive months in a year;

c. Specialized activities or instruction such as athletics, dance, art, music lessons, horseback riding, gymnastics, or organized clubs for children, such as Boy Scouts, Girl Scouts, 4-H groups, or boys and girls clubs;

d. Drop-in or short-term care provided while parents participate in activities that are not employment related and where the parents are on the premises or otherwise easily accessible, such as drop-in or short-term care provided in health spas, bowling alleys, shopping malls, resort hotels, or churches;

e. Public schools;

f. Nonpublic schools described in Part 2 of Article 39 of Chapter 115C of the General Statutes that are accredited by the Southern Association of Colleges and Schools and that operate a child care facility as defined in subdivision (3) of this section for less than six and one-half hours per day either on or off the school site;

g. Bible schools conducted during vacation periods;

h. Care provided by facilities licensed under Article 2 of Chapter 122C of the General Statutes;

i. Cooperative arrangements among parents to provide care for their own children as a convenience rather than for employment; and

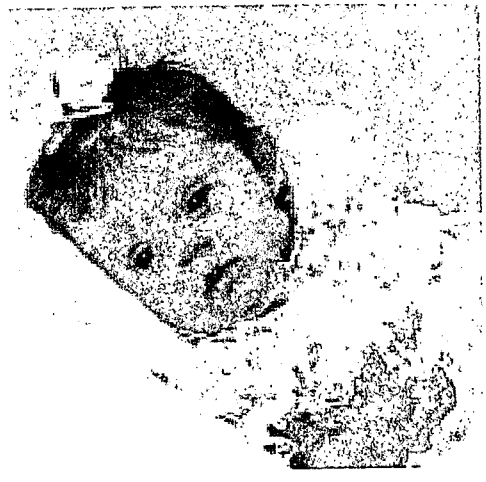
j. Any child care program or arrangement consisting of two or more separate components, each of which operates for four hours or less per day with different children attending each component.

- **"Household member"** to mean: "member of the household in a family child care home or nonlicensed child care home and is over 15 years old and is present when children are in care." (G.S. 110-90.2)
- **"Volunteer"** to mean "a person who works in a child care facility and is not monetarily compensated by the facility" (NCAC 10-3U.0102).

Please join us in supporting passage of

Kaitlyn's Law

On July 18, 2001, Kaitlyn Shevlin, a five-month-old baby girl, died in the home of a woman running an unlicensed, illegally operated daycare business in Alamance County, NC. While Kaitlyn's death was attributed to SIDS (Sudden Infant Death Syndrome, a diagnosis of exclusion of other causes), tests later done at the request of Alamance County District Attorney Rob Johnson showed the presence of diphenhydramine hydrochloride, the active ingredient in over-the-counter antihistamines and sleep-inducing drugs. Subsequent investigation revealed that Kaitlyn had been given a generic version of Benedryl, without permission of her parents and without any medical need for that drug. Further investigation showed that children in this particular daycare home were regularly given diphenhydramine, so they would be sedated and sleep, and thus require less care.



A **huge gap** in current law treats unauthorized administration of medicine to infants no differently than if the perpetrator had slapped a child on the wrist and caused no visible injury (common law battery). Yet the effects of many over-the-counter drugs and prescription drugs on infants and small children are largely unknown, because no one volunteers his or her children for such studies. According to the former Chief Toxicologist for NC, Dr. Andrew Mason, **every administration of such drugs to infants is, in effect, an experiment.**

Despite the presence of diphenhydramine, the Office of the Medical Examiner never changed its attribution of Kaitlyn's death to SIDS. Without a causal link, the only options open to charge the daycare operator in Kaitlyn's death were **misdemeanors** (misdemeanor child abuse due to neglect, misdemeanor assault on a child under 12, and violation of the State's daycare regulations). "Kaitlyn's Law" (SB 226, HB 109) would make the unauthorized administration of medicine to children in licensed or unlicensed daycares, except in limited emergency situations as directed by a prescribing authority, a class H felony, much like the existing laws concerning distribution of adulterated foods at Halloween (G.S. 14-401.11) and contaminating food or drink to render one mentally or physically helpless (G.S. 14-401.16). Kaitlyn's Law also provides a Class F felony in cases that involve serious injury to the child. The law would also be a safety statute that, in extreme cases that involve death, allow prosecution for manslaughter or even murder.

The resulting requirements that Kaitlyn's Law might place on existing daycares would be no more burdensome than that now in effect for the public school system, with regard to authorization for medication. The language of the bill is not finalized, so please join the Conference of District Attorneys and the NC Child Fatality Task Force in support of a bill that has as a goal, the protection of the health and safety of **children**.

Robert F. Johnson, District Attorney, Alamance County

Anand P. Ramaswamy, Assistant D.A. 336-438-1015

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 323

Short Title:	Gen. Contrs/Protect Info/Clarify Inj. Relief.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 6, 2003

A BILL TO BE ENTITLED

AN ACT TO PROTECT THE CONFIDENTIALITY OF INFORMATION RECEIVED BY THE LICENSING BOARD FOR GENERAL CONTRACTORS WHILE CONDUCTING AN INVESTIGATION OF A LICENSEE AND TO CLARIFY WHEN THE BOARD MAY SEEK INJUNCTIVE RELIEF.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 87-11(c) reads as rewritten:

"(c) The Board shall establish and maintain a system whereby detailed records are kept regarding complaints against each licensee. This record shall include, for each licensee, the date and nature of each complaint, investigatory action taken by the Board, any findings by the Board, and the disposition of the matter. Complaints, records, papers, or other documents containing information received, collected, or compiled by the Board, its members, or its employees as part of or as a result of investigations, inquiries, or interviews conducted in connection with a licensing or disciplinary matter shall not be considered public records within the meaning of Chapter 132 of the General Statutes. However, any notice to a licensee of a hearing pursuant to Chapter 150B of the General Statutes shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of an investigation, inquiry, or interview. If any record, paper, or other document containing information collected and compiled by the Board is received and admitted into evidence in a public hearing before the Board, it is then considered a public record within the meaning of Chapter 132 of the General Statutes."

SECTION 2. G.S. 87-13.1 reads as rewritten:

"**§ 87-13.1. Board may seek injunctive relief.**

Whenever ~~it appears to~~ the Board determines that any person, firm or corporation has, within the past three years, violated or is violating any of the provisions of this Article or ~~of the~~ rules and regulations of the Board promulgated under this Article, the Board may apply to the superior court for a restraining order and injunction to restrain the violation; and the superior courts have jurisdiction to grant the requested relief,

irrespective of whether or not criminal prosecution has been instituted or administrative sanctions imposed by reason of the violation."

SECTION 3. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 390

Short Title:	Modernize Judgment Docketing Laws.	(Public)
Sponsors:	Senators Hartsell; and Clodfelter.	
Referred to:	Judiciary II.	

March 12, 2003

A BILL TO BE ENTITLED

AN ACT TO GIVE EFFECT TO ELECTRONIC JUDGMENT DOCKETS BY MODERNIZING LAWS REGARDING JUDGMENTS AND CHANGING THE EFFECTIVE DATE OF CIVIL JUDGMENT LIENS AND THE DATE FROM WHICH INTEREST ACCRUES ON JUDGMENTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 1-232 reads as rewritten:

"**§ 1-232. Judgment roll.**

Unless the party or ~~his~~ the party's attorney furnishes a judgment ~~roll,~~roll or the documents referred to in subdivision (1) of this section or the documents referred to in subdivision (2) of this section, whichever applies, are already on file, the clerk, immediately after entering the judgment, shall attach together and file the following papers which constitute the judgment roll:

(1) In case the complaint is not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.

(2) In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment."

SECTION 2. G.S. 1-233 reads as rewritten:

"**§ 1-233. Docketed and indexed; held as of first day of session.**

Every judgment of the superior or district court, affecting ~~the right~~title to real property, or requiring in whole or in part the payment of money, shall be ~~entered~~ indexed and recorded by the clerk of ~~said~~ that superior court on the judgment docket of the court. The docket entry must contain the file number for the case in which the judgment was entered, the names of the parties, the address, if known, of each party against whom judgment is rendered, ~~and~~ the relief granted, ~~date of judgment, and~~ the date, ~~hour~~ hour, and minute of ~~docketing; and~~ the entry of judgment under G.S. 1A-1,

Rule 58, and the date, hour, and minute of the indexing of the judgment. The clerk shall keep a cross-index of the whole, with the dates and file numbers thereof; however, error or omission in the entry of the address or addresses shall in no way affect the validity, ~~finality~~ finality, or priority of the judgment docketed. ~~In all cases affecting the title to real property the clerk shall enter upon the judgment docket the number and page of the minute docket where the judgment is recorded, and if the judgment does not contain particular description of the lands, but refers to a description contained in the pleadings, the clerk shall enter upon the minute docket, immediately following the judgment, the description so referred to.~~

~~All judgments rendered in any county by the superior or district court, during a session of the court, and docketed during the same session, or within 10 days thereafter, are held and deemed to have been rendered and docketed on the first day of said session, for the purpose only of establishing equality of priority as among such judgments.~~"

SECTION 3. G.S. 1-234 reads as rewritten:

"**§ 1-234. Where and how docketed; lien.**

(a) Upon ~~filing a judgment roll upon~~the entry of a judgment under G.S. 1A-1, Rule 58, affecting the title of real property, or directing in whole or in part the payment of money, ~~it shall be docketed~~the clerk of superior court shall index and record the judgment on the judgment docket of the court of the county where the judgment ~~roll~~ was ~~filed, and~~entered. The judgment may be docketed on the judgment docket of the court of any other county upon the filing with the clerk thereof of a transcript of the original ~~docket, and~~docket. The judgment lien is effective as against third parties from and after the indexing of the judgment as provided in G.S. 1-233. The judgment is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter, for 10 years from the date of the ~~rendition~~ entry of the ~~judgment.~~judgment under G.S. 1A-1, Rule 58, in the county where the judgment was originally entered. But the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, does not constitute any part of the 10 years aforesaid, as against the defendant in such judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor or mortgagee in good faith.

(b) A judgment docketed pursuant to G.S. 15A-1340.38 shall constitute a lien against the property of a defendant as provided for under subsection (a) of this section."

SECTION 4. G.S. 24-5 reads as rewritten:

"**§ 24-5. Interest on judgments.**

(a) Actions on Contracts. – In an action for breach of contract, except an action on a penal bond, the amount awarded on the contract bears interest from the date of breach. The fact finder in an action for breach of contract shall distinguish the principal from the interest in the award, and the judgment shall provide that the principal amount bears interest until the judgment is satisfied. If the parties have agreed in the contract

that the contract rate shall apply after judgment, then interest on an award in a contract action shall be at the contract rate after judgment; otherwise it shall be at the legal rate. On awards in actions on contracts pursuant to which credit was extended for personal, family, household, or agricultural purposes, however, interest shall be at the lower of the legal rate or the contract rate. As used in this subsection, 'after judgment' means after the date of entry of judgment under G.S. 1A-1, Rule 58.

(a1) Actions on Penal Bonds. – In an action on a penal bond, the amount of the judgment, except the costs, shall bear interest at the legal rate from the date of ~~docketing~~ entry of judgment under G.S. 1A-1, Rule 58, until the judgment is satisfied.

(b) Other Actions. – In an action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied. Any other portion of a money judgment in an action other than contract, except the costs, bears interest from the date of entry of judgment under G.S. 1A-1, Rule 58, until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate."

SECTION 5. This act becomes effective September 1, 2003, and applies to all judgments that are entered, indexed, or docketed on and after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 486

Short Title:	Amber Alert.	(Public)
Sponsors:	Senators Queen; Albertson, Apodaca, Berger, Brock, Carpenter, Dalton, Forrester, Foxx, Garrou, Hagan, Hargett, Hartsell, Holloman, Jenkins, Kerr, Kinnaird, Lucas, Metcalf, Moore, Purcell, Rand, Reeves, Shubert, Smith, Stevens, Swindell, Thomas, and Tillman.	
Referred to:	Judiciary II.	

March 20, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW REGARDING THE N.C. CHILD ALERT NOTIFICATION (NC CAN) SYSTEM AND TO RENAME THAT SYSTEM THE AMBER ALERT SYSTEM.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 143B-499.1 reads as rewritten:

"**§ 143B-499.1. Dissemination of missing persons data by law-enforcement agencies.**

A law-enforcement agency, upon receipt of a missing person report by a parent, spouse, guardian, or legal custodian, shall immediately make arrangements for the entry of data about the missing person or missing child into the national missing persons file in accordance with criteria set forth by the FBI/NCIC, immediately inform all of its on-duty law-enforcement officers of the missing person report, initiate a statewide broadcast to all appropriate law-enforcement agencies to be on the lookout for the individual, and transmit a copy of the report to the Center.

If the report involves a missing child and the report meets the criteria established in G.S. 143B-499.7(b), as soon as practicable after receipt of the report, the law enforcement agency shall notify the Center and the National Center for Missing and Exploited Children of the relevant data about the missing child."

SECTION 2. G.S. 143B-499.2 reads as rewritten:

"**§ 143B-499.2. Responsibilities of Center.**

The Center shall:

(1) Assist local law-enforcement agencies with entering data about missing persons or missing children into the national missing persons file, ensure that proper entry criteria have been met as set forth by the

FBI/NCIC, and confirm entry of the data about the missing persons or missing children;

(2) Gather and distribute information and data on missing children and missing persons;

(3) Encourage research and study of missing children and missing persons, including the prevention of child abduction and the prevention of the exploitation of missing children;

(4) Serve as a statewide resource center to assist local communities in programs and initiatives to prevent child abduction and the exploitation of missing children;

(5) Continue increasing public awareness of the reasons why children are missing and vulnerability of missing children;

(6) Achieve maximum cooperation with other agencies of the State, with agencies of other states and the federal government and with the National Center for Missing and Exploited Children in rendering assistance to missing children and missing persons and their parents, guardians, spouses, or legal custodians; and cooperate with interstate and federal efforts to identify deceased individuals;

(6a) Develop and maintain the ~~North Carolina Child Alert Notification System (NC CAN)~~ AMBER Alert System as created by G.S. 143B-499.7;

(7) Forward the appropriate information to the Police Information Network to assist it in maintaining and publishing a bulletin of currently missing children and missing persons;

(8) Maintain a directory of existing public and private agencies, groups, and individuals that provide effective assistance to families in the areas of prevention of child abduction, location of missing children and missing persons, and follow-up services to the child or person and family, as determined by the Secretary of Crime Control and Public Safety;

(9) Annually compile and publish reports on the actual number of children and persons missing each year, listing the categories and causes, when known, for the disappearances;

(10) Provide follow-up referrals for services to missing children or persons and their families;

(11) Maintain a toll-free 1-800 telephone service that will be in service at all times; and

(12) Perform such other activities that the Secretary of Crime Control and Public Safety considers necessary to carry out the intent of its mandate."

SECTION 3. G.S. 143B-499.7 reads as rewritten:

"**§ 143B-499.7. North Carolina Child Alert Notification System established.**

(a) There is established within the North Carolina Center for Missing Persons the ~~North Carolina Child Alert Notification System (NC CAN).~~ AMBER Alert System. The

purpose of ~~NC CAN~~ AMBER Alert is to provide a statewide system for the rapid dissemination of information regarding abducted children.

(b) The ~~NC CAN~~ AMBER Alert System shall make every effort to disseminate information on missing children as quickly as possible when the following criteria are met:

(1) The child is ~~12~~15 years of age or younger;

~~(2) The child is believed to have been abducted;~~

~~(3) The child is believed to be in danger of injury or death;~~

(2) The child is believed:

a. To have been abducted, or

b. To be in danger of injury or death;

~~(4)~~(3) The abduction is not known or suspected to be by a parent of the ~~child;~~child, unless the child's life is suspected to be in danger;

~~(5)~~(4) The child is not a runaway or voluntarily missing; and

~~(6)~~(5) The abduction has been reported to and investigated by a law enforcement agency.

The ~~NC CAN~~ AMBER Alert System may disseminate information on missing children who are ages ~~13~~16 to 17 on a case-by-case basis, if all other criteria in subdivisions (2) through ~~(6)~~(5) of this subsection have been met, if the Center believes the dissemination of the information to be beneficial in the possible recovery of the missing child.

If the abduction of the child is known or suspected to be by a parent of the child, the Center, in its discretion, may disseminate information through the ~~NC CAN~~ AMBER Alert System if the child is believed to be in danger of injury or death.

(c) The Center shall adopt guidelines and develop procedures for the statewide implementation of the ~~NC CAN~~ AMBER Alert System and shall provide education and training to encourage radio and television broadcasters to participate in the System. The Center shall work with the Department of Justice in developing training material regarding the ~~NC CAN~~AMBER Alert System for law enforcement, broadcasters, and community interest groups.

(d) The Center shall consult with the Department of Transportation and develop a procedure for the use of overhead permanent changeable message signs to provide information on the abduction of a child meeting the criteria established in subsection (b) of this section, when information is available that would enable motorists to assist law enforcement in the recovery of the missing child. The Center and the Department of Transportation shall develop guidelines for the content, length, and frequency of any message to be placed on an overhead permanent changeable message sign.

(e) The Center shall consult with the Division of Emergency Management, in the Department of Crime Control and Public Safety, to develop a procedure for the use of the Emergency Alert System to provide information on the abduction of a child meeting the criteria established in subsection (b) of this section.

(f) The Department of Crime Control and Public Safety, on behalf of the Center, may accept grants, contributions, devises, bequests, and gifts, which shall be kept in a

separate fund, which shall be nonreverting, and shall be used to fund the operations of the Center and the ~~NC CAN~~ AMBER Alert System."

SECTION 4. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 486
PROPOSED COMMITTEE SUBSTITUTE S486-CSRQ-8 [v.1]

4/2/2003 6:46:05 PM

Short Title: Amber Alert. (Public)

Sponsors:

Referred to:

March 20, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW REGARDING THE N.C. CHILD ALERT NOTIFICATION (NC CAN) SYSTEM AND TO RENAME THAT SYSTEM THE AMBER ALERT SYSTEM.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 143B-499.1 reads as rewritten:

"**§ 143B-499.1. Dissemination of missing persons data by law-enforcement agencies.**

A law-enforcement agency, upon receipt of a missing person report by a parent, spouse, guardian, or legal custodian, shall immediately make arrangements for the entry of data about the missing person or missing child into the national missing persons file in accordance with criteria set forth by the FBI/NCIC, immediately inform all of its on-duty law-enforcement officers of the missing person report, initiate a statewide broadcast to all appropriate law-enforcement agencies to be on the lookout for the individual, and transmit a copy of the report to the Center.

If the report involves a missing child and the report meets the criteria established in G.S. 143B-499.7(b), as soon as practicable after receipt of the report, the law enforcement agency shall notify the Center and the National Center for Missing and Exploited Children of the relevant data about the missing child."

SECTION 2. G.S. 143B-499.2 reads as rewritten:

"**§ 143B-499.2. Responsibilities of Center.**

The Center shall:

(1) Assist local law-enforcement agencies with entering data about missing persons or missing children into the national missing persons file, ensure that proper entry criteria have been met as set forth by the FBI/NCIC, and confirm entry of the data about the missing persons or missing children;

(b) The ~~NC CAN~~ AMBER Alert System shall make every effort to disseminate information on missing children as quickly as possible when the following criteria are met:

(1) The child is ~~12~~17 years of age or younger;

~~(2) The child is believed to have been abducted;~~

~~(3) The child is believed to be in danger of injury or death;~~

(2) The child is believed:

a. To have been abducted, or

b. To be in danger of injury or death;

~~(4)~~(3) The abduction is not known or suspected to be by a parent of the ~~child;~~child, unless the child's life is suspected to be in danger;

~~(5)~~(4) The child is not believed to be a runaway or voluntarily missing; and

~~(6)~~(5) The abduction has been reported to and investigated by a law enforcement agency.

~~The NC CAN System may disseminate information on missing children who are ages 13~~16 to 17 ~~on a case by case basis, if all other criteria in subdivisions (2) through (6)(5) of this subsection have been met, if the Center believes the dissemination of the information to be beneficial in the possible recovery of the missing child.~~

If the abduction of the child is known or suspected to be by a parent of the child, the Center, in its discretion, may disseminate information through the ~~NC CAN~~ AMBER Alert System if the child is believed to be in danger of injury or death.

(c) The Center shall adopt guidelines and develop procedures for the statewide implementation of the ~~NC CAN~~ AMBER Alert System and shall provide education and training to encourage radio and television broadcasters to participate in the System. The Center shall work with the Department of Justice in developing training material regarding the ~~NC CAN~~AMBER Alert System for law enforcement, broadcasters, and community interest groups.

(d) The Center shall consult with the Department of Transportation and develop a procedure for the use of overhead permanent changeable message signs to provide information on the abduction of a child meeting the criteria established in subsection (b) of this section, when information is available that would enable motorists to assist law enforcement in the recovery of the missing child. The Center and the Department of Transportation shall develop guidelines for the content, length, and frequency of any message to be placed on an overhead permanent changeable message sign.

(e) The Center shall consult with the Division of Emergency Management, in the Department of Crime Control and Public Safety, to develop a procedure for the use of the Emergency Alert System to provide information on the abduction of a child meeting the criteria established in subsection (b) of this section.

(f) The Department of Crime Control and Public Safety, on behalf of the Center, may accept grants, contributions, devises, bequests, and gifts, which shall be kept in a separate fund, which shall be nonreverting, and shall be used to fund the operations of the Center and the ~~NC CAN~~ AMBER Alert System."

SECTION 4. This act is effective when it becomes law.

(2) Gather and distribute information and data on missing children and missing persons;

(3) Encourage research and study of missing children and missing persons, including the prevention of child abduction and the prevention of the exploitation of missing children;

(4) Serve as a statewide resource center to assist local communities in programs and initiatives to prevent child abduction and the exploitation of missing children;

(5) Continue increasing public awareness of the reasons why children are missing and vulnerability of missing children;

(6) Achieve maximum cooperation with other agencies of the State, with agencies of other states and the federal government and with the National Center for Missing and Exploited Children in rendering assistance to missing children and missing persons and their parents, guardians, spouses, or legal custodians; and cooperate with interstate and federal efforts to identify deceased individuals;

(6a) Develop and maintain the ~~North Carolina Child Alert Notification System (NC CAN)~~ AMBER Alert System as created by G.S. 143B-499.7;

(7) Forward the appropriate information to the Police Information Network to assist it in maintaining and publishing a bulletin of currently missing children and missing persons;

(8) Maintain a directory of existing public and private agencies, groups, and individuals that provide effective assistance to families in the areas of prevention of child abduction, location of missing children and missing persons, and follow-up services to the child or person and family, as determined by the Secretary of Crime Control and Public Safety;

(9) Annually compile and publish reports on the actual number of children and persons missing each year, listing the categories and causes, when known, for the disappearances;

(10) Provide follow-up referrals for services to missing children or persons and their families;

(11) Maintain a toll-free 1-800 telephone service that will be in service at all times; and

(12) Perform such other activities that the Secretary of Crime Control and Public Safety considers necessary to carry out the intent of its mandate."

SECTION 3. G.S. 143B-499.7 reads as rewritten:

"**§ 143B-499.7. North Carolina Child Alert Notification System established.**

(a) There is established within the North Carolina Center for Missing Persons the ~~North Carolina Child Alert Notification System (NC CAN).~~ AMBER Alert System. The purpose of ~~NC CAN~~ AMBER Alert is to provide a statewide system for the rapid dissemination of information regarding abducted children.

SENATE 486:
Amber Alert

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Queen
Date:	April 2, 2003	**Summary by:**	Drupti Chauhan
Version:	PCS to First Edition S486-CSRQ-8 [v.1]		Committee Counsel

SUMMARY: ***Senate Bill 486 renames the North Carolina Child Alert Notification System as the AMBER Alert System. It requires that law enforcement send notice of missing children to the National Center for Missing and Exploited Children, and makes changes to the criteria that will determine when an AMBER Alert is triggered.***

The PCS makes the following changes: It amends the criteria for AMBER Alert by raising the age limit to 17 from 12, includes children that are not believed to be runaways, and eliminates language providing that information regarding children age 13 to 17 may be disseminated through the system as determined on a case-by-case basis.

CURRENT LAW: Chapter 143B of the General Statutes, in Article 11, Part 5A, provides for establishment of the North Carolina Center for Missing Persons within the Department of Crime Control and Public Safety. The Center serves as a central repository for information regarding missing persons and missing children, with special emphasis on missing children. Upon receipt of a missing person report by a parent, spouse, guardian or legal custodian, a law enforcement agency provides for the entry of data about the missing person into the national missing persons file in accordance with criteria set forth by the Federal Bureau of Investigation/National Crime Information Center (FBI/NCIC). The North Carolina Child Alert Notification System (NC CAN) provides a statewide system for the rapid dissemination of information regarding abducted children. When a law-enforcement agency receives a missing person report involving a child 12 years of age or younger, the child is believed to have been abducted and in danger of injury or death, the abduction is not know or suspected to be by a parent of the child, the child is not a runaway or voluntarily missing and the abduction has been reported to and investigated by a law enforcement agency, the NC Can System is required to make every effort to disseminate information on that missing child. On a case-by-case basis, when other criteria are met, NC CAN may disseminate information regarding missing children who are ages 13 to 17. The Center for Missing Persons has statutory authority to adopt guidelines and develop procedures for statewide implementation of the NC CAN System, including education and training to encourage radio and television broadcasters to participate in the System, and development of a plan in cooperation with the Department of Transportation to use overhead changeable highway message signs to provide information regarding the abducted child to motorists.

BILL ANALYSIS: ***Section 1*** of the bill provides that when a law enforcement agency receives a missing person report involving a child, and the report meets the criteria governing the AMBER Alert System, the law enforcement agency must notify the National Center for Missing and Exploited Children as well as the North Carolina Center for Missing Persons. The National Center for Missing and Exploited Children is a private, nonprofit agency that serves as a focal point in providing assistance to parents, children, law enforcement, schools, and the community in recovering missing children and raising public awareness about ways to help prevent child abduction, molestation, and sexual exploitation.

Section 2 of the bill directs the North Carolina Center for Missing Persons within the Department of Crime Control and Public Safety to develop and maintain the AMBER Alert System (currently known as NC CAN). It provides for the name change to AMBER Alert System from NC CAN.

Section 3 of the bill changes statutory references to NC CAN by substituting AMBER Alert.

The PCS also amends the criteria for AMBER Alert to raise the age limit from 12 to 17 years; includes children that are not believed to be runaways, and eliminates language providing that information regarding children age 13 to 17 may be disseminated through the system as determined on a case-by-case basis.

Section 4 provides that the bill would be effective when it becomes law.

BACKGROUND: According to information available from the National Center for Missing & Exploited Children (NCMEC), the AMBER Plan was created in 1996 as a legacy to 9-year-old Amber Hagerman, who was kidnapped and brutally murdered while riding her bicycle in Arlington, Texas. In the Fall of 2001 the NCMEC launched the AMBER Plan - **A**merica's **M**issing: **B**roadcast **E**mergency **R**esponse nationwide.

Once law enforcement has been notified about an abducted child, they must first determine if the case meets the AMBER Plan's criteria for triggering an alert. Each program establishes its own AMBER Plan criteria; however, the National Center for Missing & Exploited Children suggests three criteria that should be met before an Alert is activated.

- law enforcement confirms a child has been abducted
- law enforcement believes the circumstances surrounding the abduction indicate that the child is in danger of serious bodily harm or death
- there is enough descriptive information about the child, abductor, and/or suspect's vehicle to believe an immediate broadcast alert will help

If these criteria are met, alert information must be put together for public distribution. This information can include descriptions and pictures of the missing child, the suspected abductor, a suspected vehicle, and any other information available and valuable to identifying the child and suspect.

The information is then faxed to radio stations designated as primary stations under the Emergency Alert System (EAS). The primary stations send the same information to area radio and television stations and cable systems via the EAS, and it is immediately broadcast by participating stations to potentially millions of listeners. Radio stations interrupt programming to announce the Alert, and television stations and cable systems run a "crawl" on the screen along with a picture of the child.

Some states are also incorporating electronic highway billboards in their Plans. The billboards, typically used to disseminate traffic information to drivers, now alert the public of abducted children, displaying pertinent information about the child, abductor or suspected vehicle that drivers might look for on highways.

(Source: National Center for Missing & Exploited Children at http://www.missingkids.com)

Brenda Carter contributed significantly to this summary.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 784

Short Title:	Judgment Bonding Legislation.	(Public)
Sponsors:	Senators Hartsell, Garrou, Berger, Hagan, Horton; and Rand.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT CONCERNING BONDING OF CERTAIN JUDGMENTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 1-289 reads as rewritten:

"**§ 1-289. Undertaking to stay execution on money judgment.**

(a) If the appeal is from a judgment directing the payment of money, under any legal theory, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages which shall be awarded against the appellant upon the ~~appeal.~~appeal, except that the total bond or undertaking that is required of all appellants shall not exceed twenty-five million dollars ($25,000,000) regardless of the value of the judgment. Whenever it is satisfactorily made to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file and serve a new undertaking, as above. In case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring it, the appeal may, on motion to the court, be dismissed with costs. Whenever it is necessary for a party to an action or proceeding to give a bond or an undertaking with surety or sureties, he may, in lieu thereof, deposit with the officer into court money to the amount of the bond or undertaking to be given. The court in which the action or proceeding is pending may direct what disposition shall be made of such money pending the action or proceeding. In a case where, by this section, the money is to be deposited with an officer, a judge of the court, upon the application of either party, may, at any time before the deposit is made, order the money deposited in court instead of with the officer; and a deposit made pursuant to such order is of the same effect as if made with the officer. The perfecting of an appeal by giving the undertaking mentioned in this section stays proceedings in the court below upon the judgment appealed from;

except when the sale of perishable property is directed, the court below may order the property to be sold and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court.

~~(b) If the appellee in a civil action obtains a judgment that includes an award of noncompensatory damages of twenty-five million dollars ($25,000,000) or more, and the appellant seeks a stay of execution of the judgment within the period of time during which the appellant has the right to pursue appellate review, including discretionary review and certiorari, the amount of the undertaking for noncompensatory damages that the appellant is required to execute to stay execution of the judgment during the period of the appeal shall be twenty-five million dollars ($25,000,000). For the purposes of this subsection, the term "noncompensatory damages" means that portion of money damages other than compensatory damages or in excess of compensatory damages. Except as expressly provided in this subsection, this subsection shall not affect or limit the amount of the undertaking otherwise required by subsection (a) of this section.~~

(c) If the appellee proves by a preponderance of the evidence that the appellant for whom the undertaking has been limited under subsection ~~(b)~~(a) of this section is, for the purpose of evading the judgment, (i) dissipating its assets, (ii) secreting its assets, or (iii) diverting its assets outside the jurisdiction of the courts of North Carolina or the federal courts of the United States other than in the ordinary course of business, then the limitation in subsection ~~(b)~~(a) of this section shall not apply and the appellant shall be required to make an undertaking in the full ~~amount otherwise required by this section.~~amount."

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 784
PROPOSED COMMITTEE SUBSTITUTE S784-CSRC-14 [v.2]

4/8/2003 9:40:23 AM

Short Title: Judgment Bonding Legislation. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT CONCERNING BONDING OF CERTAIN JUDGMENTS.

The General Assembly of North Carolina enacts:

SECTION 1. Article 17A of Chapter 1C of the General Statutes is repealed.

SECTION 2. G.S. 1C-1705 is rewritten to read:

"**§ 1C-1705. Defenses; ~~procedure.~~ procedure; stay.**

(a) The judgment debtor may file a motion for relief from, or notice of defense to, the foreign judgment on the grounds that the foreign judgment has been appealed from, or enforcement has been stayed by, the court which rendered it, or on any other ground for which relief from a judgment of this State would be allowed. Notwithstanding subsection (b) of this section, the court shall stay enforcement of the foreign judgment for an appropriate period if the judgment debtor shows that:

(1) The foreign judgment has been stayed by the court that rendered it; or

(2) An appeal from the foreign judgment is pending or the time for taking an appeal has not expired and the judgment debtor executes a written undertaking in the same manner and amount as would be required in the case of a judgment entered by a court of this State under G.S. 1-289.

(b) If the judgment debtor has filed a motion for relief or notice of defenses then the judgment creditor may move for enforcement of the foreign judgment as a judgment of ~~this State.~~this State, unless the court stays enforcement of the judgment under subsection (a) of this section. The judgment creditor's motion shall be heard before a judge of the trial division which would be the proper division for the trial of an action in which the amount in controversy is the same as the amount remaining unpaid on the foreign judgment. The Rules of Civil Procedure (G.S. 1A-1) shall apply. The judgment creditor shall have the burden of proving that the foreign judgment is entitled to full faith and credit."

SECTION 3. G.S. 1-289 reads as rewritten:

"**§ 1-289. Undertaking to stay execution on money judgment.**

(a) If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages which shall be awarded against the appellant upon the ~~appeal.~~appeal, except as provided in subsection (b) of this section. Whenever it is satisfactorily made to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file and serve a new undertaking, as above. In case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring it, the appeal may, on motion to the court, be dismissed with costs. Whenever it is necessary for a party to an action or proceeding to give a bond or an undertaking with surety or sureties, he may, in lieu thereof, deposit with the officer into court money to the amount of the bond or undertaking to be given. The court in which the action or proceeding is pending may direct what disposition shall be made of such money pending the action or proceeding. In a case where, by this section, the money is to be deposited with an officer, a judge of the court, upon the application of either party, may, at any time before the deposit is made, order the money deposited in court instead of with the officer; and a deposit made pursuant to such order is of the same effect as if made with the officer. The perfecting of an appeal by giving the undertaking mentioned in this section stays ~~proceedings~~ inproceedings in the court below upon the judgment appealed from; except when the sale of perishable property is directed, the court below may order the property to be sold and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court.

(b) If the appellee in a civil action brought under any legal theory obtains a judgment ~~that includes an award of noncompensatory damages~~ directing the payment or expenditure of money in the amount of twenty five million dollars ($25,000,000) or more, and the appellant seeks a stay of execution of the judgment within the period of time during which the appellant has the right to pursue appellate review, including discretionary review and certiorari, the amount of the undertaking ~~for noncompensatory damages~~ that the appellant is required to execute to stay execution of the judgment during the entire period of the appeal shall be twenty five million dollars ($25,000,000). ~~For the purposes of this subsection, the term "noncompensatory damages" means that portion of money damages other than compensatory damages or in excess of compensatory damages. Except as expressly provided in this subsection, this subsection shall not affect or limit the amount of the undertaking otherwise required by subsection (a) of this section.~~

(c) If the appellee proves by a preponderance of the evidence that the appellant for whom the undertaking has been limited under subsection (b) of this section is, for the purpose of evading the judgment, (i) dissipating its assets, (ii) secreting its assets, or (iii) diverting its assets outside the jurisdiction of the courts of North Carolina

or the federal courts of the United States other than in the ordinary course of business, then the limitation in subsection (b) of this section shall not apply and the appellant shall be required to make an undertaking in the full amount otherwise required by this section."

SECTION 4. This act is effective when it becomes law and applies to judgments filed or entered in this State on or after the effective date, without regard to the date on which the foreign judgment was rendered in the foreign state.

SENATE BILL 784:
Judgment Bonding Legislation

BILL ANALYSIS

Committee: Senate Judiciary II
Date: April 7, 2003
Version: Proposed Comm. Substitute S784-CSRC-14[v.1]

Introduced by: Senator Hartsell
Summary by: Kory J. Goldsmith, Committee Counsel

SUMMARY: ***SB 784 allows the unsuccessful party ("judgment debtor") in an out-of-State civil action to post a bond in North Carolina to stay (i.e., postpone) the execution of a judgment for money damages. The act limits to $25 million the maximum amount of a bond needed to stay execution of an out-of-State or in-State judgment.***

CURRENT LAW: Currently, judgment debtors are not allowed to post a bond in North Carolina to stay enforcement of a foreign judgment (i.e., one that originates in a court of another state or in a federal court) for money damages, except for that portion of the judgment that involves punitive (non-compensatory) damages. If the judgment is for punitive damages of $25 million or more, then the judgment debtor may post a bond of $25 million to stay execution.

North Carolina Judgments: A judgment debtor has 30 days from the entry of a civil judgment in North Carolina to file an appeal from that judgment. The trial court may issue a stay of the enforcement of a judgment pending appeal provided that a bond in an amount equal to the amount of judgment is posted, unless the damage award is for punitive damages. Bonds to stay enforcement of the punitive damages portion of a North Carolina judgment are limited to a maximum amount of $25 million. The limitation of the bond for punitive damages is not applicable if the judgment creditor proves by the preponderance of the evidence that the judgment debtor, for the purpose of evading the judgment, is dissipating assets, secreting assets, or diverting assets other than in the ordinary course of business outside the jurisdiction of North Carolina courts or the federal courts.

When a stay is not otherwise allowable by the trial court, the appellate court may grant a writ of supersedeas to allow a stay pending appeal without the required bond when "extraordinary circumstances make it impracticable to obtain a stay by deposit of security."

Foreign Judgments: North Carolina has adopted a modified version of the Uniform Enforcement of Foreign Judgments Act ("Uniform Act"), which provides that a final, unsatisfied foreign judgment is treated as any other judgment entered in this State (i.e., it constitutes a judgment lien). However, the enforcement or execution of the foreign judgment is stayed without bond for at least 30 days after notice of the filing is served on the judgment debtor in order to allow the debtor to raise defenses against the enforcement of the judgment in North Carolina. These defenses include (i) the judgment debtor has appealed from the foreign judgment; (ii) the foreign court that rendered the judgment has stayed enforcement of the foreign judgment; or (iii) other grounds exist, including that the issues in the underlying case were not fully and fairly litigated, for which relief from the judgment would be allowed in North Carolina. The judgment creditor (i.e., the successful party in the underlying civil action) has the burden of proving that the foreign judgment is entitled to full faith and credit. Except for the $25 million cap on the bond for punitive damage awards, North Carolina does not require the posting of a bond in the foreign state or in this state to stay the execution of a foreign judgment in North Carolina pending an appeal in the other state. Nevertheless, there is caselaw that requires the posting of a bond to stay enforcement of a foreign judgment pending an appeal in the foreign court.

In 2000, the General Assembly adopted Article 17A as an exception to the Uniform Act. Article 17A directs courts to stay enforcement of the foreign judgments for non-compensatory damages in North Carolina until all available appeals in the foreign state are concluded or the time for taking all appeals has expired, upon the posting of a bond as required under G.S. 1-289.

As an alternative to enforcing a judgment under the Uniform Act, the judgment creditor also has a common law right to bring a civil action in North Carolina to enforce the foreign judgment here. Presumably, the decision of

the North Carolina court in this process may be appealed and a supersedeas bond posted to stay execution pending the appeal of the North Carolina court's decision to enforce the judgment.

BILL ANALYSIS:

Section 1 repeals Article 17A of Chapter 1C of the General Statutes (see Page 3 for copy of Article 17A). This is the exception to the Uniform Act adopted in 2000 and only applied to that portion of a foreign judgment that involved punitive (non-compensatory) damages. It required that the court stay enforcement of the appeal upon the posting of a bond by the judgment debtor under G.S. 1-289.

Section 2 amends G.S. 1C-1705 of the Uniform Act. It provides that the North Carolina court shall stay enforcement of the foreign judgment if:

- The judgment has been stayed by the court that rendered it; or
- The appeal is pending or the time for appeal has not expired and the judgment debtor posted a bond in the amount required under G.S. 1-289.

Section 3 amends G.S. 1-289 to provide if a party may stay execution of a judgment of any sort that is in excess of $25 million dollars (including a foreign judgment) by posting a bond in an amount not to exceed $25 million.

CONSTITUTIONAL ISSUES:

Full Faith and Credit: Query whether a maximum amount on the bond that is posted to stay execution of a money damages foreign judgment would violate the Full Faith and Credit clause of the U.S. Constitution. Article IV, Section 1, of the U.S. Constitution provides that "Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." The U.S. Supreme Court has said this clause demands that a final judgment in one state, if rendered by a court that had both jurisdiction and competence, is preclusive on all substantive claims and issues in all other states. However, the enforcement of a foreign judgment depends upon the procedural laws[1] of the state in which the judgment is being enforced. The act establishes procedural rules, applicable to all litigants, for the enforcement of judgments in this State. Those rules provide for the enforcement of judgments to assure that litigants' due process rights are protected while the enforcement actions are being pursued in North Carolina. The act does not deny recognition to the substantive effect of the final judgment from the foreign state.

Equal Protection: Query whether the act unconstitutionally treats wealthy litigants and large enterprises differently than smaller ones. The 14th Amendment of the U.S. Constitution prohibits a state from denying any person within its jurisdiction the equal protection of the laws. To determine when discrimination violates the Equal Protection clause, the U.S. Supreme Court has set up a two-tiered system of scrutiny for alleged discrimination. It will employ *strict scrutiny* where the alleged discrimination involves either a "suspect class" [2] or a "fundamental right". [3] If strict scrutiny applies, the discrimination can be justified only if it is narrowly tailored to satisfy a compelling State interest. Discrimination not involving a suspect class or a fundamental right will be given ordinary scrutiny and can be justified if it has a rational relation to a public purpose. The U.S. Supreme Court has rejected the idea that wealth or lack thereof is a suspect class. In the case of this act, there does not appear to be a suspect class or fundamental right, so the rational relation test would apply. It could be argued that a good public policy reason for the $25 million limitation on money judgments bonds is that businesses large enough to be protected by the limitation are likely to have a large impact on the workforce and economy of the State.

EFFECTIVE DATE: The act is effective when it becames law. It applies to judgments filed or entered in North Carolina on or after that date, without regard to the date on which a foreign judgment is rendered in the foreign state.

S784-SMRC-001 *This summary was substantially contributed to by former and current Research Division attorneys including Erika Churchill, Bill Gilkeson, Wendy Graf, Trina Griffin, and Barbara Riley.*

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[1] *In the 1998 case of Baker v. General Motors, 522 U.S. 222, (1998), Justice Ginsburg cited an earlier decision by saying, "Full faith and credit does not require that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments."*

[2] *Those involving race and national origin. Gender is treated as almost a suspect class, perhaps subject to a middle level of scrutiny.*

[3] *Fundamental rights include the rights to vote, to interstate travel, and to be free of wealth distinction in the criminal process.*

ARTICLE 17A.

Enforcement of Foreign Judgments for Noncompensatory Damages.

§ 1C-1750. Definitions.

As used in this Article:

(1) "Action" means (i) an action under Article 17 of this Chapter or (ii) any civil action in this State to enforce a foreign judgment in this State.

(2) "Foreign judgment" means any judgment, decree, or order of a court of the United States or any other state.

§§ 1C-1751 through 1C-1759. Reserved for future codification purposes.

§ 1C-1760. Enforcement of foreign judgments for noncompensatory damages.

In any action in this State to enforce a foreign judgment directing the payment of money damages other than compensatory damages, or in excess of the compensatory damages, if the judgment debtor shows the court that an appeal from the foreign judgment is pending or that the time for taking an appeal has not expired, the court shall stay enforcement of the foreign judgment until all available appeals are concluded or the time for taking all appeals has expired, upon requiring the same undertaking by the judgment debtor as would be required in the case of a judgment entered by a court of this State, subject to G.S. 1-289.

§§ 1C-1761 through 1C-1799. Reserved for future codification purposes.

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — **Name of Committee**

April 8, 2003 morning — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Richard Shevlin	father of Kaitlyn Shevlin
Barbara Shevlin	mother of Kaitlyn Shevlin
Steve Lynch	Investigator for District 14H. Ala. Co
ROB JOHNSON	DISTRICT ATTORNEY. ALAMANCE
ANAND P. RAMASWAMY	ASST. D.A, ALAMANCE CO.
Roz Sawitt	NC Child Care Coalition
Rev. Mark Mofield	FBC Elon 216 Lawrence Ave. Elon, NC 27244
Gwynn Lewis	Alamance County DA's office 212 W. Elm St, Graham, NC 27253
Gwendolyn Gibson	Alamance Cty Dist. Atty Staff
LINDA GARRICK	FAMILY ABUSE SERVICES 142 S. LEXINGTON AVE. BURLINGTON 27215
Glenda C. Carden	Alamance County D.A.'s office 212 W. Elm St, Graham, NC. 27253

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Susan G. Osborne	Director Alamance Co. Dept. of Social Services
Brad Crawford	AOC
[signature]	AOC
Esther High	DHHS/DSS
JoAnn Lamm	DHHS/DSS
Chris Z. Sinha	DHHS/DSS (A.G.)
Charles Marshall	Brooks Pierce
Michelle Frazier	NC Bar Ass'n
John Mellon	Gov Office
Steve Shaw	NC Pediatric Society
Bill Morton	Phelps Dunbar

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Mark Sigh	NCLBGC
Peter Young	Physician — GSO
Tim Ward	Greensboro
James Wyatt	Greensboro / Music Legend
Byron Barber	Greensboro Health Access
Dan Ramquist	NCIMS

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Jane Smith	NCDHHS
Elizabeth Dalton	Bain & Associates
AL DEITCH	DOA/YATO
Gene Ainsworth	RJR
Charlene Aarkins	SOS
David Barnes	Poyner Spruill
[illegible]	HJW
Kevin G. Leonard	WCSR
[illegible]	WCSR
[illegible]	NCHBA
Curson Carmichael	Bailey & Dixon, LLP

April 8, 2003

AFTERNOON MEETING

AGENDA

SENATE JUDICIARY II COMMITTEE
April 8, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. **Welcome and Opening Remarks**

II. **Bills to be Considered**

•	SB 421	Amend Child Welfare Laws – AB	Sen. Thomas
•	SB 449	Presumption-DWI Blood Withdrawal Valid	Sen. Queen
•	SB 323	Gen. Contrs/Protect info/Clarify Inj. Relief	Sen. Hartsell
•	SB 390	Modernize Judgment Docketing Laws	Sen. Hartsell
•	SB 422	Advance Health Care Directive Registry	Sen. Thomas

III. **Other Business**

IV. **Adjournment**

ATTENDANCE

Committee: **Senate Judiciary II Committee** April 8, 2003 Afternoon

DATES / NAMES																
Senator Hartsell, Chairman	✓															
Senator Thomas, Vice Chair	✓															
Senator Allran, Vice Chair	✓															
Senator Webster, Ranking Minority																
Senator Apodaca	✓															
Senator Bingham	✓															
Senator Dalton																
Senator Dorsett	✓															
Senator Hagan	✓															
Senator Holloman	✓															
Senator Kerr	✓															
Senator Kinnaird	✓															
Senator Moore	✓															
Senator Queen	✓															
Senator Rucho	✓															
Senator Shubert	✓															
Senator Sloan	✓															

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 323

Short Title:	Gen. Contrs/Protect Info/Clarify Inj. Relief.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 6, 2003

A BILL TO BE ENTITLED

AN ACT TO PROTECT THE CONFIDENTIALITY OF INFORMATION RECEIVED BY THE LICENSING BOARD FOR GENERAL CONTRACTORS WHILE CONDUCTING AN INVESTIGATION OF A LICENSEE AND TO CLARIFY WHEN THE BOARD MAY SEEK INJUNCTIVE RELIEF.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 87-11(c) reads as rewritten:

"(c) The Board shall establish and maintain a system whereby detailed records are kept regarding complaints against each licensee. This record shall include, for each licensee, the date and nature of each complaint, investigatory action taken by the Board, any findings by the Board, and the disposition of the matter. Complaints, records, papers, or other documents containing information received, collected, or compiled by the Board, its members, or its employees as part of or as a result of investigations, inquiries, or interviews conducted in connection with a licensing or disciplinary matter shall not be considered public records within the meaning of Chapter 132 of the General Statutes. However, any notice to a licensee of a hearing pursuant to Chapter 150B of the General Statutes shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of an investigation, inquiry, or interview. If any record, paper, or other document containing information collected and compiled by the Board is received and admitted into evidence in a public hearing before the Board, it is then considered a public record within the meaning of Chapter 132 of the General Statutes."

SECTION 2. G.S. 87-13.1 reads as rewritten:

"**§ 87-13.1. Board may seek injunctive relief.**

Whenever ~~it appears to~~ the Board determines that any person, firm or corporation has, within the past three years, violated or is violating any of the provisions of this Article or ~~of the~~ rules and regulations of the Board promulgated under this Article, the Board may apply to the superior court for a restraining order and injunction to restrain the violation; and the superior courts have jurisdiction to grant the requested relief,

irrespective of whether or not criminal prosecution has been instituted or administrative sanctions imposed by reason of the violation."

SECTION 3. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 323
PROPOSED COMMITTEE SUBSTITUTE S323-PCS65251-RM-14

Short Title: Gen. Contrs/Protect Info/Clarify Inj. Relief. (Public)

Sponsors:

Referred to:

March 6, 2003

A BILL TO BE ENTITLED

AN ACT TO PROTECT THE CONFIDENTIALITY OF INFORMATION RECEIVED BY THE LICENSING BOARD FOR GENERAL CONTRACTORS WHILE CONDUCTING AN INVESTIGATION AND TO CLARIFY WHEN THE BOARD MAY SEEK INJUNCTIVE RELIEF.

The General Assembly of North Carolina enacts:

SECTION 1. Article 1 of Chapter 87 is amended by adding the following new section to read:

"**§ 87-15.3. Investigative material not public.**

Records, papers, or other documents containing information received, collected, or compiled by the Board, its members, or its employees as part of or as a result of investigations, inquiries, or interviews conducted in connection with a complaint shall not be considered public records within the meaning of Chapter 132 of the General Statutes. However, any notice to a licensee of a hearing pursuant to Chapter 150B of the General Statutes shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of an investigation, inquiry, or interview. If any record, paper, or other document containing information collected and compiled by the Board is received and admitted into evidence in a public hearing before the Board, it is then considered a public record within the meaning of Chapter 132 of the General Statutes. A complaint shall become a public record two years after it is received by the Board."

SECTION 2. G.S. 87-13.1 reads as rewritten:

"**§ 87-13.1. Board may seek injunctive relief.**

Whenever ~~it appears to~~ the Board determines that any person, firm or corporation has violated or is violating any of the provisions of this Article or ~~of the~~ rules and regulations of the Board promulgated under this Article, the Board may apply to the superior court for a restraining order and injunction to restrain the violation; and the superior courts have jurisdiction to grant the requested relief, irrespective of whether or

not criminal prosecution has been instituted or administrative sanctions imposed by reason of the violation."

SECTION 3. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 390

Short Title:	Modernize Judgment Docketing Laws.	(Public)
Sponsors:	Senators Hartsell; and Clodfelter.	
Referred to:	Judiciary II.	

March 12, 2003

A BILL TO BE ENTITLED

AN ACT TO GIVE EFFECT TO ELECTRONIC JUDGMENT DOCKETS BY MODERNIZING LAWS REGARDING JUDGMENTS AND CHANGING THE EFFECTIVE DATE OF CIVIL JUDGMENT LIENS AND THE DATE FROM WHICH INTEREST ACCRUES ON JUDGMENTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 1-232 reads as rewritten:

"**§ 1-232. Judgment roll.**

Unless the party or ~~his~~ the party's attorney furnishes a judgment ~~roll,~~roll or the documents referred to in subdivision (1) of this section or the documents referred to in subdivision (2) of this section, whichever applies, are already on file, the clerk, immediately after entering the judgment, shall attach together and file the following papers which constitute the judgment roll:

(1) In case the complaint is not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.

(2) In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment."

SECTION 2. G.S. 1-233 reads as rewritten:

"**§ 1-233. Docketed and indexed; held as of first day of session.**

Every judgment of the superior or district court, affecting ~~the right~~title to real property, or requiring in whole or in part the payment of money, shall be ~~entered~~ indexed and recorded by the clerk of ~~said~~ that superior court on the judgment docket of the court. The docket entry must contain the file number for the case in which the judgment was entered, the names of the parties, the address, if known, of each party against whom judgment is rendered, ~~and~~ the relief granted, ~~date of judgment, and~~ the date, ~~hour~~ hour, and minute of ~~docketing; and~~ the entry of judgment under G.S. 1A-1,

Rule 58, and the date, hour, and minute of the indexing of the judgment. The clerk shall keep a cross-index of the whole, with the dates and file numbers thereof; however, error or omission in the entry of the address or addresses shall in no way affect the validity, ~~finality~~ finality, or priority of the judgment docketed. ~~In all cases affecting the title to real property the clerk shall enter upon the judgment docket the number and page of the minute docket where the judgment is recorded, and if the judgment does not contain particular description of the lands, but refers to a description contained in the pleadings, the clerk shall enter upon the minute docket, immediately following the judgment, the description so referred to.~~

~~All judgments rendered in any county by the superior or district court, during a session of the court, and docketed during the same session, or within 10 days thereafter, are held and deemed to have been rendered and docketed on the first day of said session, for the purpose only of establishing equality of priority as among such judgments.~~"

SECTION 3. G.S. 1-234 reads as rewritten:

"**§ 1-234. Where and how docketed; lien.**

(a) Upon ~~filing a judgment roll upon~~the entry of a judgment under G.S. 1A-1, Rule 58, affecting the title of real property, or directing in whole or in part the payment of money, ~~it shall be docketed~~the clerk of superior court shall index and record the judgment on the judgment docket of the court of the county where the judgment ~~roll~~ was ~~filed, and~~entered. The judgment may be docketed on the judgment docket of the court of any other county upon the filing with the clerk thereof of a transcript of the original ~~docket, and~~docket. The judgment lien is effective as against third parties from and after the indexing of the judgment as provided in G.S. 1-233. The judgment is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter, for 10 years from the date of the ~~rendition~~ entry of the ~~judgment.~~judgment under G.S. 1A-1, Rule 58, in the county where the judgment was originally entered. But the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, does not constitute any part of the 10 years aforesaid, as against the defendant in such judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor or mortgagee in good faith.

(b) A judgment docketed pursuant to G.S. 15A-1340.38 shall constitute a lien against the property of a defendant as provided for under subsection (a) of this section."

SECTION 4. G.S. 24-5 reads as rewritten:

"**§ 24-5. Interest on judgments.**

(a) Actions on Contracts. – In an action for breach of contract, except an action on a penal bond, the amount awarded on the contract bears interest from the date of breach. The fact finder in an action for breach of contract shall distinguish the principal from the interest in the award, and the judgment shall provide that the principal amount bears interest until the judgment is satisfied. If the parties have agreed in the contract

that the contract rate shall apply after judgment, then interest on an award in a contract action shall be at the contract rate after judgment; otherwise it shall be at the legal rate. On awards in actions on contracts pursuant to which credit was extended for personal, family, household, or agricultural purposes, however, interest shall be at the lower of the legal rate or the contract rate. As used in this subsection, 'after judgment' means after the date of entry of judgment under G.S. 1A-1, Rule 58.

(a1) Actions on Penal Bonds. – In an action on a penal bond, the amount of the judgment, except the costs, shall bear interest at the legal rate from the date of ~~docketing~~ entry of judgment under G.S. 1A-1, Rule 58, until the judgment is satisfied.

(b) Other Actions. – In an action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied. Any other portion of a money judgment in an action other than contract, except the costs, bears interest from the date of entry of judgment under G.S. 1A-1, Rule 58, until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate."

SECTION 5. This act becomes effective September 1, 2003, and applies to all judgments that are entered, indexed, or docketed on and after that date.

SENATE BILL 390:
Modernize Judgment Docketing Laws.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Hartsell
Date:	April 7, 2003	**Summary by:**	Kory J. Goldsmith/Drupti Chauhan Committee Counsel
Version:	1st Edition		

SUMMARY: ***Senate Bill 390 modernizes the laws governing judgments by giving effect to electronic judgment dockets and by reestablishing the effective date of civil judgment liens and the date from which interest accrues on judgments.***

CURRENT LAW: Once a civil judgment has been rendered, G.S. 1-232 requires the clerk of superior court to attach several documents, such as the complaint, the summons, the pleadings, the verdict, and all other papers related to the merits of the case or affecting the judgment, to a copy of the judgment, which constitutes the judgment roll.

G.S. 1-233 requires the clerk to docket all judgments entered by the court. The recording of a judgment is a three-step process. First, the judgment is entered. Rule 58 of the NC Rules of Civil Procedure provides that a judgment is rendered or entered in a case when it is reduced to writing, signed by the judge, and filed with the court. Second, the judgment is indexed by the clerk. Third, the judgment is docketed, which involves abstracting certain information, such as the names of the parties, the address of the party against whom the judgment is rendered, the relief granted, the date of the judgment, and the date, hour, and minute of docketing, onto the physical Judgment Docket Books. In cases affecting the title to real property, the clerk must enter upon the judgment docket the number and page of the minute docket where the judgment is recorded. If the judgment does not contain a property description, the clerk must also enter the description upon the minute docket immediately following the judgment.

Once a judgment is docketed, a lien is established as against third parties. In those instances where multiple judgments are rendered during the same session of court, they are deemed to have been rendered and docketed on the first day of the session. The lien is effective for 10 years from the date of the rendition of the judgment.

The point at which interest begins to accrue on a money judgment depends on the nature of the underlying action. For contract actions, the legal rate of interest (8%) will apply after judgment, unless the parties agreed that the contract rate will apply. In an action on a penal bond, the amount of the judgment bears the legal rate of interest from the date of docketing. In all other judgments, the amount of the judgment, other than that portion designated as compensatory damages, bears interest from the date of entry of judgment.

BILL ANALYSIS:

Section 1 – Judgment roll

Section 1 of the bill provides that if all of the named documents are already on file, then the clerk need not provide additional copies for purposes of creating the judgment roll. This language more accurately reflects current practice.

Section 2 – Docketing judgments

Section 2 of the bill requires clerk of superior court to record in the docket the date, hour, and minute of both the entry of judgment and the indexing of the judgment. Section 2 also deletes the language (i) requiring the clerk to record the number and page of the minute docket where a judgment affecting title to real property is recorded, and (ii) deeming all judgments rendered during the same session of court as docketed on the first day of the session.

Section 3 – Creation of lien

Section 3 of the bill changes the point at which a judgment becomes a lien from the time it is docketed to the time at which it is indexed. This section also clarifies that a judgment is a lien on real property for 10 years from the date of the entry of the judgment in the county where the judgment was originally entered.

Section 4 – Interest on judgments

Section 4 of the bill provides that post-judgment interest in all types of actions begins to accrue after the date of entry of the judgment under G.S. 1A-1, Rule 58. Under Rule 58, a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.

Section 5 – Effective Date

The act would become effective on September 1, 2003 and apply to all judgments entered, indexed, and docketed on or after that date.

BACKGROUND: Because of the inefficiencies and inherent difficulties of the current manual docketing process, the Administrative Office of the Courts is seeking to automate and streamline the process through the Judgment Abstracting Project, part of a broader effort to further develop the Civil Case Processing System. This Project will provide an automated method for abstracting judgments, applying payments to judgments, calculating judgment payoff, and gathering forms related to processing judgments. Senate Bill 390 is designed to facilitate and advance the goals of the Project.

Trina Griffin contributed substantially to this summary.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 421*

Short Title:	Amend Child Welfare Laws.-AB	(Public)
Sponsors:	Senators Thomas, Metcalf, and Rand.	
Referred to:	Judiciary II.	

March 17, 2003

A BILL TO BE ENTITLED

AN ACT TO CLARIFY AND MAKE TECHNICAL CORRECTIONS TO THE CHILD WELFARE LAWS AND TO ENHANCE THE STATE'S ABILITY TO PROTECT CHILDREN.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 7B-407 reads as rewritten:

"**§ 7B-407. Service of summons.**

The summons shall be personally served in accordance with G.S. 1A-1, Rule 4(j) upon the parent, guardian, custodian, or caretaker, not less than five days prior to the date of the scheduled hearing. The time for service may be waived in the discretion of the court.

If the parent, guardian, custodian, or caretaker entitled to receive a summons cannot be found by a diligent effort, the court may authorize service of the summons and petition by mail or by publication. The cost of the service by publication shall be advanced by the petitioner and may be charged as court costs as the court may direct.

If the parent, guardian, custodian, or caretaker is personally served as herein provided and fails without reasonable cause to appear and to bring the juvenile before the court, the parent, guardian, custodian, or caretaker may be proceeded against as for contempt of court."

SECTION 2. G.S. 7B-1109(d) reads as rewritten:

"(d) The court may for good cause shown continue the hearing for such time as is reasonably required ~~for receiving~~to receive additional evidence, any reports or assessments which the court has requested, or any other information needed in the best interests of the ~~juvenile.~~juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interest of the juvenile. If the court, pursuant to this subsection, continues the hearing to a time that is more than 90 days from the filing of the initial petition or

motion, the court shall reduce its order to writing and state in the written order its reason for granting the continuance."

SECTION 3. G.S. 110-132(a) reads as rewritten:

"(a) In lieu of or in conclusion of any legal proceeding instituted to establish paternity, the written affidavits of parentage executed by the putative father and the mother of the dependent child shall constitute an admission of paternity and shall have the same legal effect as a judgment of ~~paternity for the purpose of establishing a child support obligation,~~ paternity, subject to the right of either signatory to rescind within the earlier of:

(1) 60 days of the date the document is executed, or

(2) The date of entry of an order establishing paternity or an order for the payment of child support."

SECTION 4. G.S. 115C-378 reads as rewritten:

"**§ 115C-378. Children required to attend.**

Every parent, guardian or other person in this State having charge or control of a child between the ages of seven and 16 years shall cause such child to attend school continuously for a period equal to the time which the public school to which the child is assigned shall be in session. Every parent, guardian, or other person in this State having charge or control of a child under age seven who is enrolled in a public school in grades kindergarten through two shall also cause such child to attend school continuously for a period equal to the time which the public school to which the child is assigned shall be in session unless the child has withdrawn from school. No person shall encourage, entice or counsel any such child to be unlawfully absent from school. The parent, guardian, or custodian of a child shall notify the school of the reason for each known absence of the child, in accordance with local school policy.

The principal, superintendent, or teacher who is in charge of such school shall have the right to excuse a child temporarily from attendance on account of sickness or other unavoidable cause which does not constitute unlawful absence as defined by the State Board of Education. The term "school" as used herein is defined to embrace all public schools and such nonpublic schools as have teachers and curricula that are approved by the State Board of Education.

All nonpublic schools receiving and instructing children of a compulsory school age shall be required to keep such records of attendance and render such reports of the attendance of such children and maintain such minimum curriculum standards as are required of public schools; and attendance upon such schools, if the school refuses or neglects to keep such records or to render such reports, shall not be accepted in lieu of attendance upon the public school of the district to which the child shall be assigned: Provided, that instruction in a nonpublic school shall not be regarded as meeting the requirements of the law unless the courses of instruction run concurrently with the term of the public school in the district and extend for at least as long a term.

The principal or his designee shall notify the parent, guardian, or custodian of his child's excessive absences after the child has accumulated three unexcused absences in a school year. After not more than six unexcused absences, the principal shall notify the parent, guardian, or custodian by mail that he may be in violation of the Compulsory

Attendance Law and may be prosecuted if the absences cannot be justified under the established attendance policies of the State and local boards of education. Once the parents are notified, the school attendance counselor shall work with the child and his family to analyze the causes of the absences and determine steps, including adjustment of the school program or obtaining supplemental services, to eliminate the problem. The attendance counselor may request that a law-enforcement officer accompany him if he believes that a home visit is necessary.

After 10 accumulated unexcused absences in a school ~~year~~ year, the principal shall review any report or investigation prepared under G.S. 115C-381 and shall confer with the student and his parent, guardian, or ~~custodian~~ custodian, if ~~possible~~ possible, to determine whether the parent, guardian, or custodian has received notification pursuant to this section and made a good faith effort to comply with the law. If the principal determines that the parent, guardian, or custodian has ~~not,~~ not made a good faith effort to comply with the law, ~~he~~ the principal shall notify the district ~~attorney.~~attorney and the director of social services of the county or city where the case arose. After the principal has made a determination based on the report or investigation prepared pursuant to G.S. 115C-381, the director shall then decide whether to undertake a protective services assessment against the parent, guardian, or custodian for educational neglect. If ~~he~~ the principal determines that the parent, guardian, or custodian ~~has,~~made a good faith effort to comply with the law, ~~he~~ the principal may file a complaint with the juvenile court counselor pursuant to Chapter 7B of the General Statutes that the child is habitually absent from school without a valid excuse. Evidence that shows that the parents, guardian, or custodian were notified and that the child has accumulated 10 absences which cannot be justified under the established attendance policies of the local board shall establish a prima facie case that the child's parent, guardian, or custodian is responsible for the absences."

SECTION 5. G.S. 131D-10.6B reads as rewritten:

"**§ 131D-10.6B. ~~Report of death.~~Maintaining a register of applicants by the Division of Social Services.**

~~(a) A facility licensed under this Article shall notify the Department immediately upon the death of any resident of the facility that occurs within seven days of physical restraint of the resident, and shall notify the Department within three days of the death of any resident of the facility resulting from violence, accident, suicide, or homicide. The Department may assess a civil penalty of not less than five hundred dollars ($500.00) and not more than one thousand dollars ($1,000) against a facility that fails to notify the Department of a death and the circumstances surrounding the death known to the facility. Chapter 150B of the General Statutes governs the assessment of a penalty under this section. A civil penalty owed under this section may be recovered in a civil action brought by the Department or the Attorney General. The clear proceeds of the penalty shall be remitted to the State Treasurer for deposit in accordance with State law.~~

(a1) The Division of Social Services shall keep a register of all family foster and therapeutic foster home applicants. The register shall be available to the public upon request and upon payment of a reasonable fee for copying as established by the Division of Social Services. The register shall state all of the following:

(1) The name, age, and address of each applicant.
(2) The date of the application.
(3) The applicant's supervising agency.
(4) Any mandated training completed by the applicant and the dates of training.
(5) Whether the applicant was licensed and the date of the initial licensure.
(6) The current licensing period.
(7) Any adverse licensing actions.
(8) Any other information deemed necessary by the Division of Social Services.

~~(b) Upon receipt of notification from a facility in accordance with subsection (a) of this section, the Department shall notify the Governor's Advocacy Council for Persons With Disabilities that a person with a disability has died. The Department shall provide the Council access to the information about each death reported to the Council pursuant to subsection (a) of this section, including information resulting from any investigation of the death by the Department, and from reports received from the Chief Medical Examiner pursuant to G.S. 130A-385. The Council shall use the information in accordance with its powers and duties under G.S. 143B-403.1 and applicable federal law and regulations.~~

(b1) Applications of family foster and therapeutic foster home applicants and all other related materials, including letters of reference, mutual home assessments, or medical, psychological, financial, or other personal background information or history of applicants, the applicants' family, or members of the applicants' household, shall be treated as confidential and not as 'public records' subject to disclosure pursuant to Chapter 132 of the General Statutes.

~~(c) If the death of a resident of the facility occurs within seven days of the use of physical restraint, the Department shall initiate immediately an investigation of the death.~~

~~(d) Nothing in this section abrogates State or federal law or requirements pertaining to the confidentiality, privilege, or other prohibition against disclosure of information provided to the Department or the Council. In carrying out the requirements of this section, the Department and the Council shall adhere to State and federal requirements of confidentiality, privilege, and other prohibitions against disclosure and release applicable to the information received under this section. A facility or provider that makes available confidential information in accordance with this section and with State and federal law is not liable for the release of the information.~~

~~(e) The Secretary shall establish a standard reporting format for reporting deaths pursuant to this section and shall provide to facilities subject to this section a form for the facility's use in complying with this section.~~"

SECTION 6. G.S. 143B-150.20 reads as rewritten:

"**§ 143B-150.20. State Child Fatality Review Team; establishment; purpose; powers; duties; report by Division of Social Services.**

(a) There is established in the Department of Health and Human Services, Division of Social Services, a State Child Fatality Review Team to conduct in-depth

reviews of any child fatalities which have occurred involving children and families involved with local departments of social services child protective services in the 12 months preceding the fatality. Steps in this in-depth review shall include interviews with any individuals determined to have pertinent information as well as examination of any written materials containing pertinent information.

(b) The purpose of these reviews shall be to implement a team approach to identifying factors which may have contributed to conditions leading to the fatality and to develop recommendations for improving coordination between local and State entities which might have avoided the threat of injury or fatality and to identify appropriate remedies. The Division of Social Services shall make public the findings and recommendations developed for each fatality reviewed relating to improving coordination between local and State entities. These findings shall not be admissible as evidence in any civil or administrative proceedings against individuals or entities that participate in child fatality reviews conducted pursuant to this section. The State Child Fatality Review Team shall consult with the appropriate district attorney in accordance with G.S. 7B-2902(d) prior to the public release of the findings and recommendations.

(c) The State Child Fatality Review Team shall include representatives of the local departments of social services and the Division of Social Services, a member of the local Community Child Protection Team, a member of the local child fatality prevention team, a representative from local law enforcement, a prevention specialist, and a medical professional.

(d) The State Child Fatality Review Team shall have access to all medical records, hospital records, and records maintained by this State, any county, or any local agency as necessary to carry out the purposes of this subsection, including police investigative data, medical examiner investigative data, health records, mental health records, and social services records. The State Child Fatality Review Team may receive a copy of any reviewed materials necessary to the conduct of the fatality review. Any member of the State Child Fatality Review Team may share, only in an official meeting of the State Child Fatality Review Team, any information available to that member that the State Child Fatality Review Team needs to carry out its duties.

(d1) Pursuant to subsection (d) of this section, if a request for records by the State Child Fatality Review Team is denied or a response to its request is not immediately forthcoming, the State Child Fatality Review Team may apply for an order compelling disclosure. The application shall state, with reasonable particularity, factors supporting the need for an order compelling disclosure. The State Child Fatality Review Team shall file the application in Wake County Superior Court and the Court shall have jurisdiction to issue any orders compelling disclosure. Actions brought pursuant to this section shall be scheduled for immediate hearing, and subsequent proceedings in these actions shall be given priority by the appellate courts. After a hearing, the Court shall issue an order compelling disclosure unless the court finds that the disclosure of the requested records is not permitted by federal law and regulations.

(e) Meetings of the State Child Fatality Review Team are not subject to the provisions of Article 33C of Chapter 143 of the General Statutes. However, the State Child Fatality Review Team may hold periodic public meetings to discuss, in a general

manner not revealing confidential information about children and families, the findings of their reviews and their recommendations for preventive actions. Minutes of all public meetings, excluding those of closed sessions, shall be kept in compliance with Article 33C of Chapter 143 of the General Statutes. Any minutes or any other information generated during any executive session shall be sealed from public inspection.

(f) All otherwise confidential information and records acquired by the State Child Fatality Review Team, in the exercise of its duties are confidential; are not subject to discovery or introduction into evidence in any proceedings except pursuant to an order of the court; and may only be disclosed as necessary to carry out the purposes of the State Child Fatality Review Team. In addition, all otherwise confidential information and records created by the State Child Fatality Review Team in the exercise of its duties are confidential; are not subject to discovery or introduction into evidence in any proceedings; and may only be disclosed as necessary to carry out the purposes of the State Child Fatality Review Team. No member of the State Child Fatality Review Team, nor any person who attends a meeting of the State Child Fatality Review Team, may testify in any proceeding about what transpired at the meeting, about information presented at the meeting, or about opinions formed by the person as a result of the meetings. This subsection shall not, however, prohibit a person from testifying in a civil or criminal action about matters within that person's independent knowledge.

(g) Each member of the State Child Fatality Review Team and invited participant shall sign a statement indicating an understanding of and adherence to confidentiality requirements, including the possible civil or criminal consequences of any breach of confidentiality.

~~(h) The Division of Social Services, Department of Health and Human Services, shall report to the members of the Senate Appropriations Committee on Human Resources, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division on the activities of the State Child Fatality Review Team including recommendations for changes in the statewide child protection system no later than October 1 of each year.~~"

SECTION 7. G.S. 153A-257 is amended by adding a new subsection to read:

"(d) If two or more county departments of social services differ regarding the legal residence of a minor in a child abuse, neglect, or dependency case, either county department of social services may refer the factual situation to the Department of Health and Human Services, Division of Social Services. After reviewing the pertinent background facts of the case, the Director of the Division of Social Services or the Director's designee shall determine which county department of social services shall be responsible for providing protective services and financial support for the minor in question. Since the Department of Health and Human Services is the supervising agency under Chapter 108A of the General Statutes for the county-administered programs, the determination of the Director or the Director's designee regarding the minor's legal residence for social services purposes is binding upon the county departments of social services and counties and is not subject to judicial review."

SECTION 8. This act is effective when it becomes law.

SENATE BILL 421:
Amend Child Welfare Laws - AB

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Thomas
Date:	April 2, 2003	**Summary by:**	Kory J. Goldsmith Committee Counsel
Version:	Proposed Committee Substitute S421-CSRC-5[v.4]		

SUMMARY: ***SB421 is an Agency Bill introduced at the request of the Department of Health and Human Services. The Proposed Committee Substitute expands the permissible methods of service in an action for abuse, neglect or dependency; puts time limits on continuances in actions terminating parental rights; expands the purposes for which voluntary affidavits of paternity may be used; specifies when schools must notify county social services that a student has 10 accumulated unexcused absences; creates a register of applicants for family foster and therapeutic foster homes; creates a procedure by which a State Child Fatality Review Team may compel the disclosure of records; and creates a statutory mechanism for resolving disagreements between counties regarding the provision of social services to children.***

BILL ANALYSIS:

Section 1 amends G.S. 7B-407 regarding the methods by which a parent, guardian, custodian, or caretaker may be served with a summons in an action to establish abuse, neglect or dependency. Under current law, the only mechanism is personal service. Service by mail is allowed only if the person cannot be personally served. However, the mail service does not have to be by registered or certified mail. Under the proposed changes, service could be obtained by any method otherwise permitted for a civil action. These include service by registered mail, or by organizations such as UPS or Federal Express.

Section 2 amends G.S. 7B-1109(d) to require a termination of parental rights hearing be conducted within 90 days unless the court finds that it is in the best interests of the juvenile or extraordinary circumstances necessary for the proper administration of justice exist. The change is intended to comply with the provisions of the Adoption and Safe Families Act P.L. 105-89. The ninety-day timeframe is not a specific requirement of the federal law. Federal law requires that the state plan provide for reasonable efforts to place the child in a "timely manner". A Federal Requirement Certification will be required prior to the bill being heard by the Senate.

Section 3 amends G.S. 110-132(a) to provide that voluntary affidavits of paternity executed by a putative father and the mother of a dependent child constitute an admission of paternity and have the same legal effect as a judicial determination of paternity. This change would apply unless the affidavit itself limits its terms. The general practice has been to consider these affidavits as applicable to any matter that might involve issues of paternity, such as custody and visitation. However, a recent, unreported opinion by the North Carolina Court of Appeals has cast doubt upon that practice.

Section 4 amends the compulsory attendance laws regarding when the department of social services should be notified that a student has 10 unexcused absences. Under current law, the school social worker is supposed to notify the student's parent, guardian or custodian when the student has three unexcused absences. Another notification is required when there are six unexcused absences. Finally, when a student has 10 unexcused absences, the principal must determine whether the parent, guardian or custodian is making a good faith effort to comply with the compulsory attendance laws. If not, the

principal must notify the district attorney. The proposed change would also require the principal to notify the director of social services in the county where the student resides and the director would then determine whether to initiate an investigation of neglect.

Section 5 amends G.S. 141D-10.3A(b) regarding the frequency with which the Department must obtain criminal history checks on foster parents. Previously, relicensure occurred annually. Currently, relicensure occurs every two years. The change would confirm the frequency of criminal history checks with the relicensure process.

Section 6 creates a register for applicants for family foster and therapeutic foster homes. The register would make public the same sort of information that is public for adoptive parents. The information on the register would be a public record, but any other information would be confidential.

Section 7 would amend G.S. 143B-150.20(d) to allow a State Child Fatality Review Team to compel the disclosure of records related to a child fatality review. Current law provides that the Team shall have access to all medical and hospital records, and other records maintained by a State or local agency. This proposed legislation would require that the information be provided within 30 days of the request and allows the Team to apply for an order compelling disclosure.

Section 8 codifies a current practice. The Department currently determines which county must provide services to a child where there is a dispute between counties on that matter.

The act is effective when it becomes law.

S421-SMRC-001 (Senate Proposed Committee Substitute)

Session 2003

FEDERAL REQUIREMENT CERTIFICATION

Authorized by G.S. 120-36.8

SENATE BILL 421

Amend Child Welfare Laws

Bill Primary Sponsor(s):	Senator Thomas	S421-CSRC-5 v.4
Relevant Federal Law:	*Adoption and Safe Families Act, P.L. 105-89*	
☒ Required by or Necessary for Compliance with Federal Law		☐ Exceeds Federal Law
☒ Federal Funds Conditioned upon Passage of Law		☐ Implements Federal Law

SUMMARY OF BILL PROVISIONS ALLEGEDLY REQUIRED BY FEDERAL LEGISLATION

Section 2 of the proposed committee substitute for Senate Bill 421 amends G.S. 7B-1109(d) to comply with the provisions of the Adoption and Safe Families Act P.L. 105-89. The bill would require a termination of parental rights hearing be conducted within 90 days of the initial filing of the petition unless the court finds that is in the best interests of the juvenile or extraordinary circumstances make a continuance necessary for the proper administration of justice. The federal law requires that states submit and implement a plan in order for the State to continue to receive federal funding for child protective services under Title IV-E and IV-D of the Social Security Act. The state plan is to provide for reasonable efforts to be made to place a child in a timely manner in accordance with the permanency plan. 42 USC 671(a)(15)(C). The permanency plan may include a termination of parental rights, which without the amendment in Section 2 of S421-CSRC-5 v. 4 does not have a time frame in which such action must be heard by the courts.

COMPLIANCE CONSIDERATIONS

The ninety days in the time frame set forth in Section 2 of S421-CSRC-5 v.4 is not a specific requirement of the federal law. Rather, the federal law requires the placement of a child in a "timely manner". In other juvenile code provisions previously enacted by the North Carolina General Assembly, the courts are directed to conduct a hearing within a certain time frame or enter an order as to why a longer time should be granted. (G.S. 7B-801, Adjudicatory hearing, 60 days; G.S. 7B-906, Review hearings, 90 days.)

REVIEW AND APPROVAL

Prepared By: Kory J. Goldsmith — **Date:** 4/2/03
Kory J. Goldsmith
Committee Counsel

Approved By: Terrence D. Sullivan — **Date:** 4/2/03
Terrence D. Sullivan
Director of Research

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. _____ DATE 4/8/03

S. B. No. 421-CSLL-5[v.4] Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE _____

Rep.)
) Thomas
Sen.)

moves to amend the bill on page 5, line 9

( ) WHICH CHANGES THE TITLE

by substituting the word "District" for "Superior".

SIGNED Scott Thomas

ADOPTED ✓ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 422

Short Title: Advance Health Care Directive Registry. (Public)

Sponsors: Senator Thomas.

Referred to: Judiciary II.

March 17, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE ADVANCE HEALTH CARE DIRECTIVE REGISTRY LAW TO EXEMPT FROM NOTARY REQUIREMENTS ANATOMICAL GIFT INSTRUMENTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 130A-466 reads as rewritten:

"**§ 130A-466. Filing requirements.**

(a) A person may submit any of the following documents and the revocations of these documents to the Secretary of State for filing in the Advance Health Care Directive Registry established pursuant to this Article:

(1) A health care power of attorney under Article 3 of Chapter 32A of the General Statutes.

(2) A declaration of a desire for a natural death under Article 23 of Chapter 90 of the General Statutes.

(3) An advance instruction for mental health treatment under Part 2 of Article 3 of Chapter 122C of the General Statutes.

(4) A declaration of an anatomical gift under Part 3 of Article 16 of Chapter 130A of the General Statutes.

(b) Any document and any revocation of a document submitted for filing in the registry shall be notarized regardless of whether notarization is required for its validity. This subsection does not apply to the document described in subdivision (a)(4) of this section.

(c) The document may be submitted for filing only by the person who executed the document.

(d) The person who submits the document shall supply a return address.

(e) The document shall be accompanied by any fee required by this Article."

SECTION 2. This act is effective when it becomes law.

SENATE BILL 422:
Advance Health Care Directive Registry

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Thomas
Date:	April 7, 2003	**Summary by:**	Drupti Chauhan
Version:	1st Edition		Committee Counsel

SUMMARY: ***This bill amends the filing requirements for a declaration of an anatomical gift when that declaration is submitted to the statewide, on-line central registry for Advance Health Care Directives that is maintained by the Secretary of State.***

CURRENT LAW: In 2001, a statewide, on-line, central Registry of Advance Health Care Directives was established. Pursuant to G.S. 130A-465, the Secretary of State's office is responsible for establishing and maintaining this Registry. Advance Health Care Directives are legal documents that allow individuals to give written instructions about their health care if there comes a time when they are unable to speak for themselves. A person may submit any of the following documents and the revocations of these documents to the Registry:

- Health care power of attorney
- Declaration of a desire for a natural death
- An advance instruction for mental health treatment
- A declaration of an anatomical gift

The filing requirements under G.S. 130A-466 currently require that any of these documents or any revocations of these documents that are submitted to the Registry for filing must be notarized regardless of whether notarization is required for the validity of the documents. In addition, the documents can be submitted for filing to the Registry only by the individual who executes the documents. That person must supply a return address along with any fee required by law.

BILL ANALYSIS: This bill would remove the notarization requirement of G.S. 130A-466(b) for declarations of anatomical gifts. Individuals would be able send these declarations to the registry for filing even if they had not been notarized.

BACKGROUND: A declaration of an anatomical gift allows an individual over the age of 18 to make a gift by will, organ donor card, or other document such as the declaration provided for here. Pursuant to G.S. 130A-406, the document declaring the anatomical gift must be signed by the donor in the presence of two witnesses who must sign the document in the donor's presence as well. If the donor cannot sign, then the document may be signed for the donor in the presence of the donor and in the presence of two witnesses who must sign the document in the donor's presence.

Currently, the statutes require the health care power of attorney and the advance instruction for mental health treatment to be notarized. The declaration of a desire for a natural death either has to be notarized or executed in front of the clerk of court. However, the statutes do not mandate that a declaration of an anatomical gift has to be notarized.

EFFECTIVE DATE: This act would become effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 449

Short Title:	Presumption-DWI Blood Withdrawal Valid.	(Public)
Sponsors:	Senator Queen.	
Referred to:	Judiciary II.	

March 18, 2003

A BILL TO BE ENTITLED

AN ACT TO MAKE IT A REBUTTABLE PRESUMPTION THAT THE PERSON WITHDRAWING BLOOD IN AN IMPAIRED DRIVING CASE IS A LICENSED PHYSICIAN, NURSE, OR AN OTHERWISE QUALIFIED PERSON.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-139.1(c) reads as rewritten:

"(c) Withdrawal of Blood for Chemical Analysis. – When a blood test is specified as the type of chemical analysis by the charging officer, only a physician, registered nurse, or other qualified person may withdraw the blood sample. If the person withdrawing the blood requests written confirmation of the charging officer's request for the withdrawal of blood, the officer shall furnish it before blood is withdrawn. When blood is withdrawn pursuant to a charging officer's request, neither the person withdrawing the blood nor any hospital, laboratory, or other institution, person, firm, or corporation employing that person, or contracting for the service of withdrawing blood, may be held criminally or civilly liable by reason of withdrawing that blood, except that there is no immunity from liability for negligent acts or omissions. Upon the introduction of any evidence at trial that the person withdrawing the blood was a qualified person under this subsection, a rebuttable presumption shall be raised that the person withdrawing the blood was qualified."

SECTION 2. This act becomes effective October 1, 2003.

SENATE BILL 449:
Presumption-DWI Blood Withdrawal Valid

BILL ANALYSIS

Committee:	Senate JII	**Introduced by:**	Sen. Queen
Date:	April 3, 2003	**Summary by:**	Linda Attarian/Kory Goldsmith
Version:	Introduced		Committee Co-Counsel

SUMMARY: ***Senate Bill 449 would create a rebuttable presumption that the person who withdrew blood for chemical analysis for a DWI was either a doctor, registered nurse, or otherwise qualified. The presumption would be created upon the introduction at trial of any evidence as to the person's qualifications.***

CURRENT LAW: G.S 20-139.1(c) provides that when a charging officer has blood drawn for analysis , only a physician, registered nurse, or other qualified person may withdraw the blood sample.

BILL ANALYSIS: SB 449 provides that upon the introduction of any evidence at trial that the person withdrawing the blood is a qualified person, there would be a rebuttable presumption that the person was qualified to withdraw blood. The types of evidence that might be offered would include testimony of the charging officer or an affidavit by the person withdrawing blood.

A rebuttable presumption is a legal presumption of validity of the evidence unless and until the opposing party presents evidence to the contrary. There are several instances of rebuttable presumptions in criminal law. These include G.S. 14-113.16 – Presumption of criminal receipt of goods and services fraudulently obtained and G.S. 14-399(b) – presumption that litter blown from a boat was caused by the operator of the boat.

The act would become effective October 1, 2003.

S449-SMRC-001

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. 1st

H. B. No. _____

S. B. No. 449

COMMITTEE SUBSTITUTE _____

DATE 4/8/04

Amendment No. _____
(to be filled in by Principal Clerk)

Rep.) Queen
)
Sen.)

moves to amend the bill on page 1, line 17 JSQ

( ) WHICH CHANGES THE TITLE

by substituting the word "credible" for the word "any";

and on page 1, line 19, by inserting after the period and before the quotation marks the following:

"JSQ Credible evidence ~~shall~~ may include testimony of the charging officer or an affidavit by the person who withdrew the blood sample.".

SIGNED _____

ADOPTED ✓ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — April 5, 2003 afternoon
Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
JoAnn Lamm	DHHS/DSS
Chris Z. Sinha	DHHS/DSS (A.G.)
Jane Smith	NCDHHS
Esther High	DHHS/DSS
AL DEITCH	DOA/YAID
Pamela Best	AOC
Brad Crawford	AOC
Charles Marshall	Boost Pierce
Carson Carmichael	Bailey & Dixon
Michelle Frazier	NC Bar Ass'n
R. Paul Wilms	NCHBA

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **JUDICIARY II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	April 10, 2003	10:00 AM	1124

The following will be considered:

	BILL NO.	SHORT TITLE	SPONSOR
•	SB 323	Gen. Contrs/Protect Info.Clarify Inj. Relief	Senator Hartsell
•	SB 460	Extend Sunset/Private Correctional Officers	Senator Holloman
•	SB 468	Clarify Irrevocable Trust Law	Senator Hartsell
•	SB 470	Compensation of Trustees/Other Fiduciaries	Senator Hartsell
•	SB 471	Amend Self-Insurance Guaranty Assoc.	
•		Laws	Senator Hartsell

Senator HARTSELL, Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
April 10, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. **Welcome and Opening Remarks**

II. **Bills to be Considered**

•	**SB 323**	**Gen. Contrs/Protect Info. Clarify Inj. Relief**	**Sen. Hartsell**
•	**SB 460**	**Extend Sunset/Private Correctional Officers**	**Sen. Holloman**
•	**SB 468**	**Clarify Irrevocable Trust Law**	**Sen. Hartsell**
•	**SB 470**	**Compensation of Trustees/Other Fiduciaries**	**Sen. Hartsell**
•	**SB 471**	**Amend Self-Insurance Guaranty Assoc. Laws**	**Sen. Hartsell**

III. **Other Business**

IV. **Adjournment**

Judiciary II Committee

Minutes

April 10, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Austin Allran, Vice Chairman, with thirteen members attending.

SB 460 (Extend Sunset/Private Correctional Officers) Senator Holloman, bill sponsor, was introduced to explain the bill. Senator Apodaca moved for a favorable report. All members voted yes, and the motion carried.

SB 470 (Compensation of Trustees/Other Fiduciaries) Senator Allran recognized Michelle Frazier of the North Carolina Bar Association. Ms. Frazier introduced Mr. Michael H. Godwin of the North Carolina Bar Association to explain the bill. After the explanation, Mr. Godwin answered questions by Senators Kinnaird Webster and Allran. Senator Kinnaird moved for adoption of a technical amendment, members voted and the amendment passed. Senator Kinnaird moved for a favorable report as amended and rolled into a new Committee Substitute. All voted yes, and the motion carried.

SB 323 (General Contrs/Protect Info/Clarify Inj. Relief) Senator Allran recognized Senator Hartsell to explain the bill. Mr. Charles Marshall, representing the Press Association spoke on the bill. Senator Kerr moved to send the bill to a sub-committee and have it withdrawn from the calendar. All members voted yes and the motion carried. Senator Hartsell appointed Senator Kinnaird as chair of the sub-committee with Senators Shubert and Kerr as members. Senator Hartsell requested a report be made to the committee by Thursday, April 17, 2003.

SB 471 (Amend Self Assurance Guaranty Association Laws) Senator Allran recognized Senator Hartsell to present the bill. Mr. John McMillan, representing the Guaranty Association was introduced to explain the bill. He and Mr. James Stuart, also representing the Guaranty Association, answered question from Senators Allran, Apodaca, Shubert, Webster, Kerr and Dorsett. The recommendation was made to continue work on the bill.

With no further business, the meeting was adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 323

Short Title:	Gen. Contrs/Protect Info/Clarify Inj. Relief.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 6, 2003

A BILL TO BE ENTITLED

AN ACT TO PROTECT THE CONFIDENTIALITY OF INFORMATION RECEIVED BY THE LICENSING BOARD FOR GENERAL CONTRACTORS WHILE CONDUCTING AN INVESTIGATION OF A LICENSEE AND TO CLARIFY WHEN THE BOARD MAY SEEK INJUNCTIVE RELIEF.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 87-11(c) reads as rewritten:

"(c) The Board shall establish and maintain a system whereby detailed records are kept regarding complaints against each licensee. This record shall include, for each licensee, the date and nature of each complaint, investigatory action taken by the Board, any findings by the Board, and the disposition of the matter. Complaints, records, papers, or other documents containing information received, collected, or compiled by the Board, its members, or its employees as part of or as a result of investigations, inquiries, or interviews conducted in connection with a licensing or disciplinary matter shall not be considered public records within the meaning of Chapter 132 of the General Statutes. However, any notice to a licensee of a hearing pursuant to Chapter 150B of the General Statutes shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of an investigation, inquiry, or interview. If any record, paper, or other document containing information collected and compiled by the Board is received and admitted into evidence in a public hearing before the Board, it is then considered a public record within the meaning of Chapter 132 of the General Statutes."

SECTION 2. G.S. 87-13.1 reads as rewritten:

"**§ 87-13.1. Board may seek injunctive relief.**

Whenever ~~it appears to~~ the Board determines that any person, firm or corporation has, within the past three years, violated or is violating any of the provisions of this Article or ~~of the~~ rules and regulations of the Board promulgated under this Article, the Board may apply to the superior court for a restraining order and injunction to restrain the violation; and the superior courts have jurisdiction to grant the requested relief,

irrespective of whether or not criminal prosecution has been instituted or administrative sanctions imposed by reason of the violation."

SECTION 3. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 323
PROPOSED COMMITTEE SUBSTITUTE S323-PCS65251-RM-14

Short Title: Gen. Contrs/Protect Info/Clarify Inj. Relief. (Public)

Sponsors:

Referred to:

March 6, 2003

A BILL TO BE ENTITLED

AN ACT TO PROTECT THE CONFIDENTIALITY OF INFORMATION RECEIVED BY THE LICENSING BOARD FOR GENERAL CONTRACTORS WHILE CONDUCTING AN INVESTIGATION AND TO CLARIFY WHEN THE BOARD MAY SEEK INJUNCTIVE RELIEF.

The General Assembly of North Carolina enacts:

SECTION 1. Article 1 of Chapter 87 is amended by adding the following new section to read:

"**§ 87-15.3. Investigative material not public.**

Records, papers, or other documents containing information received, collected, or compiled by the Board, its members, or its employees as part of or as a result of investigations, inquiries, or interviews conducted in connection with a complaint shall not be considered public records within the meaning of Chapter 132 of the General Statutes. However, any notice to a licensee of a hearing pursuant to Chapter 150B of the General Statutes shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of an investigation, inquiry, or interview. If any record, paper, or other document containing information collected and compiled by the Board is received and admitted into evidence in a public hearing before the Board, it is then considered a public record within the meaning of Chapter 132 of the General Statutes. A complaint shall become a public record two years after it is received by the Board."

SECTION 2. G.S. 87-13.1 reads as rewritten:

"**§ 87-13.1. Board may seek injunctive relief.**

Whenever ~~it appears to~~ the Board determines that any person, firm or corporation has violated or is violating any of the provisions of this Article or ~~of the~~ rules and regulations of the Board promulgated under this Article, the Board may apply to the superior court for a restraining order and injunction to restrain the violation; and the superior courts have jurisdiction to grant the requested relief, irrespective of whether or

not criminal prosecution has been instituted or administrative sanctions imposed by reason of the violation."

SECTION 3. This act is effective when it becomes law.

SENATE BILL 323:
Gen. Contrs./Protect Info/Clarify Inj. Relief

BILL ANALYSIS

Committee:	Judiciary II	**Introduced by:**	Sen. Hartsell
Date:	March 23, 2003	**Summary by:**	Linda Attarian
Version:	Introduced		Committee Co-Counsel

SUMMARY: ***Senate Bill 323 amends the law governing persons engaged in the business of general contracting. The bill exempts from the definition of "public record" under Chapter 132 of the General Statute, information collected or compiled by the State Licensing Board for General Contractors (Board) in connection with an investigation of a licensing or disciplinary matter.***

The bill also amends the provision that provides the Board with the authority to seek injunctive relief against a licensed or unlicensed person, firm or corporation by changing the Board's standing threshold from "an appearance" of a violation to a "determination" of a violation; and by giving the Board the authority to seek injunctive relief for a past violation of Article 1 of Chapter 87 or rules adopted by the Board. The act is effective when it becomes law.

The Proposed Committee Substitute deletes Section 1 and replaces it with a provision that adds a new section to the licensure laws that will apply the public record exception provision to investigations of complaints concerning non-licensed contractors as well as licensed contractors. The original provision was limited to investigations of complaints concerning licensees. It also amends Section 2 to delete the three year look-back period for violations upon which the Board would be authorized to base injunctive actions.

CURRENT LAW:

Jurisdiction of NC Licensing Board for General Contractors: In 1925 the North Carolina General Assembly established the North Carolina Licensing Board for General Contractors and specified its regulatory authority over general contractors in Article 1 of Chapter 87. The purpose of the Board is to "safeguard life, health and property and to promote public welfare by prescribe certain standards for persons, firms and corporations who enter into contracts for construction work in this state. G.S. 87-1 defines general contractors as persons, firms or corporations who enter into construction projects costing $30,000 or more.

Investigation of complaints: Any person may file a complaint against a general contractor. All complaints received by the Board office are reviewed and assigned to a field investigator for an investigation. Once a complaint is received, written notice of the complaint and the charges are then forwarded to the licensee or general contractor for a response. Following a preliminary review of the complaint the investigator may gather additional evidence by making an inspection of the construction project or the work in question. Field investigators also may interview the contractor, witnesses or other individuals who are familiar with the case. When an investigation is completed the case is forwarded to the Board's Review Committee, which then determines whether probable cause exists to recommend that the case be presented to the full Board for a disciplinary hearing. The Board may impose discipline by revoking or suspending the license of the general contractor based on a finding of fraud or deceit in obtaining license, or gross negligence, incompetence, misconduct, or willful violations of the licensing laws.

If the general contractor is not licensed to practice general contracting, the Board may seek a permanent injunction against the contractor in Superior Court.

Record keeping: The Board is required to keep detailed records regarding complaints against each licensee, including the date and nature of each complaint, investigatory actions, findings and the disposition of the matter. These records are available to the public under North Carolina public record laws.

Public record law: Pursuant to G.S. 132-1, public records and public information compiled by governmental agencies, including occupational licensing boards, are the "property of the people", and it is the policy of this State that the people may obtain copies of such information free or at minimal cost *unless otherwise specifically provided by law.* However, G.S. 132-1.2 provides that public records do not include "written communications made within the scope of the attorney-client relationship by any attorney-at-law serving any such governmental agency that concerns the prosecution, defense, settlement or litigation of any judicial action or any administration or other type of proceed to which the governmental agency is a party or by which it is or may be direct affected" –but for only for three years from the date of the communication, at which time the exclusion expires.

BILL ANALYSIS: **Section 1** amends subsection (c) of G.S. 87-11, to provide that records compiled in connection with the investigation and disposition of complaints against licensees are not public records and are not freely available to the public. Exceptions to this exclusion: (1) written notices of the hearing on the complaint and charges to licensees pursuant to G.S. 150B-38, even if the notice contains information compiled during the investigation; and (2) any document containing disciplinary information that is admitted into evidence in a public hearing before the Board.

The provision does not make the information confidential because the custodian may still release it *voluntarily*. If a record is "confidential" then it may not be released except as permitted by law.

Section 2 amends G.S. 87-13.1 to provide the Board with standing to seek an injunction or an order to restrain a violation when the Board *determines* that any person, firm or corporation, (licensed or unlicensed), is presently violating, or *has violated within the past three years,* a provision of the licensing laws or rules adopted by the Board. Under current law, the Board must show that it *appears* that a person, firm, or corporation is *violating*, to seek injunctive remedies.

BACKGROUND:

The changes made under Section 1 are not unprecedented. A number of other licensure acts include specific provisions protecting records regarding complaints and investigation from public access. These include: Board of Law Examiners, North Carolina State Bar, NC State Board of Refrigeration Examiners, NC Medical Board, Medical Review Committee, NC State Board of Dental Examiners, Substance Abuse Professionals Certification Board, NC Psychology Board and the NC State Board of Examiners of Fee-Based Practicing Pastoral Counselors.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 460

Short Title:	Extend Sunset/Private Correctional Officers.	(Public)
Sponsors:	Senator Holloman.	
Referred to:	Judiciary II.	

March 19, 2003

A BILL TO BE ENTITLED

AN ACT TO EXTEND THE SUNSET ON THE AUTHORIZATION FOR CERTAIN PRIVATE CORRECTIONAL OFFICERS TO USE FORCE AND MAKE ARRESTS CONSISTENT WITH NORTH CAROLINA LAW.

The General Assembly of North Carolina enacts:

SECTION 1. Section 7 of S.L. 2001-378 reads as rewritten:

"**SECTION 7.** This act is effective when it becomes law, applies to private correctional facilities and the employees of those correctional facilities constructed and contracted to be operated by the effective date of this act, and expires ~~two~~ four years after the effective date."

SECTION 2. This act is effective when it becomes law.

SENATE BILL 460:
Extend Sunset/Private Correctional Officers.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Sen. Holloman
Date:	April 10, 2003	**Summary by:**	Robin Johnson
Version:	First		Committee Counsel

SUMMARY: ***Senate Bill 460 would extend the sunset by two years on the authorization for private correctional officers to have powers similar to correctional officers of the Department of Correction. The bill is effective when it becomes law.***

CURRENT LAW: In 2001, the General Assembly enacted S.L. 2001-378 (SB 137) *(see attached)*, which authorized correctional officers and security supervisors in private facilities under contract to the Federal Bureau of Prisons to have the power to use force and make arrests the same as employees of the North Carolina Department of Correction (DOC). Prior to enactment of this act, there was no State law granting police powers to correctional officers working for private corporations that operate federal prisons in the State. The act took effect August 18, 2001, and expires August 18, 2003.

In order for private correctional officers to have the powers granted under the act, a number of requirements were imposed:

- DOC must determine that the private companies' employment practices meet the minimum standards followed by DOC in hiring its own personnel.
- The private officers and supervisors must (i) be certified as correctional officers under Chapter 17C of the General Statutes, which provides for oversight by the North Carolina Criminal Justice Education and Training Standards Commission, or (ii) have completed a training curriculum that meets or exceeds those of the Commission for correctional personnel.
- The private corporation must maintain liability insurance with a minimum level of $10,000,000 per occurrence, and $25,000,000 aggregate per occurrence.
- The private corporation must defend, indemnify, and hold harmless the State from any claims arising out of the operation of the private correctional facility or the granting of the powers under the act.
- The corporation must follow certain procedures if an escape occurs and must reimburse the State and any county or other law enforcement agency for the full cost of additional expenses incurred due to an escape.
- The corporation must bear the reasonable costs of services provided by DOC.
- DOC was directed to adopt rules to implement the act.

BILL ANALYSIS: Senate Bill 460 would change the date of expiration of this act from August 18, 2001, to August 18, 2003.

S460-SMRH-001:Steve Rose, Research Division Attorney, contributed to this summary.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2001

SESSION LAW 2001-378
SENATE BILL 137

AN ACT TO AUTHORIZE CERTAIN PRIVATE CORRECTIONAL OFFICERS TO USE FORCE AND MAKE ARRESTS CONSISTENT WITH NORTH CAROLINA LAW.

The General Assembly of North Carolina enacts:

SECTION 1. Correctional officers and security supervisors employed at private correctional facilities pursuant to a contract between their employer and the Federal Bureau of Prisons may, in the course of their employment as correctional officers or security supervisors, use necessary force and make arrests consistent with the laws applicable to the North Carolina Department of Correction, which force shall not exceed that authorized to Department of Correction officers, provided that the Department of Correction determines that as of the effective date of this act, the employment policies of such private corporations meet the same minimum standards and practices followed by the Department of Correction in employing its correctional personnel, and if:

(1) Those correctional officers and security supervisors have been certified as correctional officers as provided under Chapter 17C of the General Statutes; or

(2) Those correctional officers and security supervisors employed by the private corporation at the facility have completed a training curriculum that the Department of Correction has determined meets or exceeds the standards required by the North Carolina Criminal Justice Education and Training Standards Commission for correctional personnel. The Department may require that it be notified of the names and positions of such persons prior to such persons beginning duties at the correctional facility, and the names and positions of those persons already employed at the correctional facility on the effective date of this act and that the Department be notified when any such person is no longer employed in such duties at the correctional facility.

SECTION 2. Any private corporation described in Section 1 of this act shall without limit defend, indemnify, and hold harmless the State, its officers, employees, and agents from any claims arising out of the operation of the private correctional facility, or the granting of the powers authorized under this act, including any attorneys' fees or other legal costs incurred by the State, its officers, employees, or agents as a result of such claims.

SECTION 2.1. Any private corporation described in Section 1 of this act shall reimburse the State and any county or other law enforcement agency for the full cost of any additional expenses incurred by the State or the county or other law enforcement agency in connection with the pursuit and apprehension of an escaped inmate from the facility.

In the event of an escape from the facility, any private corporation described in Section 1 of this act shall immediately notify the sheriff in the county in which the facility is located and shall notify the Department of Correction which shall cause an immediate entry into the State Bureau of Investigation Division of Criminal Information network. The sheriff of the county in which the facility is located shall be the lead law

enforcement officer in connection with the pursuit and apprehension of an escaped inmate from the facility.

SECTION 3. Any private corporation described in Section 1 of this act must maintain in force liability insurance to satisfy any final judgment rendered against the private corporation or the State, its officers, employees, and agents that arises out of the operation of the correctional facility or the indemnification requirements in Section 2 of this act. The minimum amount of liability insurance that will be required under this section is ten million dollars ($10,000,000) per occurrence, and twenty-five million dollars ($25,000,000) aggregate per occurrence. The private corporation shall ensure that its insurance company shall provide the Department of Correction with a current Certificate of Insurance evidencing compliance with the requirements of this section within 10 days of the effective date of this act and annually thereafter.

SECTION 4. The Department of Correction shall adopt rules to implement the provisions of this act.

SECTION 5. The authority set forth in this act to use necessary force and make arrests shall be in addition to any existing authority set forth in the statutory or common law of the State, but shall not exceed the authority to use necessary force and make arrests set out in Section 1 of this act.

SECTION 6. A private corporation described in Section 1 of this act shall bear the reasonable costs of services provided by the Department of Correction for the corporation. The amount of the costs shall be determined by the Secretary of the Department.

SECTION 7. This act is effective when it becomes law, applies to private correctional facilities and the employees of those correctional facilities constructed and contracted to be operated by the effective date of this act, and expires two years after the effective date.

In the General Assembly read three times and ratified this the 7th day of August, 2001.

s/ Beverly E. Perdue
President of the Senate

s/ James B. Black
Speaker of the House of Representatives

s/ Michael F. Easley
Governor

Approved 11:30 a.m. this 18th day of August, 2001

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 468

Short Title:	Clarify Irrevocable Trust Law.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 20, 2003

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THE LAW GOVERNING THE MODIFICATION AND TERMINATION OF IRREVOCABLE TRUSTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 36A-125.4(b) reads as rewritten:

"(b) Where the beneficiaries of an irrevocable trust seek to compel a termination of the trust ~~or modify it in a manner that affects its continuance according to its terms,~~ and ~~if~~ the continuance of the trust is necessary to carry out a material purpose of the trust, or where the beneficiaries seek to compel a modification of the trust in a manner that is inconsistent with its material purpose, the trust cannot be modified or terminated unless the court in its discretion determines that the reason for modifying or terminating the trust under the circumstances substantially outweighs the interest in accomplishing a material purpose of the trust."

SECTION 2. G.S. 36A-125.11 reads as rewritten:

"**§ 36A-125.11. Procedure.**

(a) A proceeding under this Article may be brought under the Uniform Declaratory Judgment Act, Article 26 of Chapter 1 of the General Statutes, the provisions of which shall apply to that proceeding to the extent not inconsistent with this Article.

(b) A proceeding under this Article to approve or disapprove a proposed modification or termination under the provisions of G.S. 36A-125.3, 36A-125.4, 36A-125.6(a), and 36A-125.7 may be commenced by a trustee or beneficiary. The trustee shall be a necessary party to all proceedings under this Article commenced by a beneficiary."

SECTION 3. This act is effective when it becomes law.

SENATE BILL 468:
Clarify Irrevocable Trust Law

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Hartsell
Date:	April 9, 2003	**Summary by:**	Kory J. Goldsmith
Version:	1st Edition		Committee Counsel

SUMMARY: ***SB468 makes clear that an irrevocable trust may not be modified in a manner that is inconsistent with the trust's material purpose unless the court determines the circumstances substantially outweigh the interest in accomplishing the purpose of the trust. It also specifies when a beneficiary and/or a trustee must be a party to an action to terminate or modify an irrevocable trust.***

CURRENT LAW: Generally, an irrevocable trust may not be revoked or its terms materially modified after its creation. However, Article 11A of Chapter 36A specifies the circumstances and procedures that apply to a modification or termination of an irrevocable trust.

G.S. 36A-125.4 allows the beneficiaries of a trust to all agree to modify or terminate a trust in an action before a court. However, if the modification is inconsistent with the material purpose of the trust, the court can not order the modification unless it finds that the circumstances in favor of the modification substantially outweigh the interest in continuing to accomplish the material purpose of the trust.

G.S. 36A-125.11 provides that an action to modify or terminate an irrevocable trust may be brought under the Uniform Declaratory Judgment Act, but it does not specify who may commence an action or who are necessary parties to the action. (Necessary parties are those persons who must be made part of a legal action because any action by the court regarding the issue at trial would impact that party's interests.)

BILL ANALYSIS:

Section 1 clarifies an ambiguity in the language of G.S. 36A-125.4(b). The current language is subject to the construction that a modification may be made if it does not affect the continuance of the trust even though it may be inconsistent with the material purpose of the trust.

Section 2 specifies that either a beneficiary or a trustee may commence a termination or modification action where:

- The settler (creator of the trust) and the beneficiaries agree (G.S. 36A-125.3)
- The beneficiaries agree (G.S. 36A-125.4)
- The trust is a small trust (G.S. 36A-125.6)
- There are changed circumstances (G.S. 36A-125.7)

It also specifies that the trustee must be made a party to any proceeding under this Article.

BACKGROUND: This bill is a request of the North Carolina Bar Association.

The act is effective when it becomes law.

S468-SMRC-001

SENATE BILL 470:
Compensation of Trustees/Other Fiduciaries.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Hartsell
Date:	April 10, 2003	**Summary by:**	Robin Johnson
Version:	First		Committee Counsel

*SUMMARY: **Senate Bill 470 rewrites the law dealing with the compensation of trustees and other fiduciaries when the terms of certain trusts do not specify the compensation. The bill would eliminate the minimum fee schedule and prior approval by the clerk of superior court. Instead, trustees and fiduciaries would be entitled to compensation that is reasonable under the circumstances. They would be required to provide annual written notice to all interested parties of all compensation, expense reimbursement, professional fees, counsel fees, and distributions or payments. Interested parties would be allowed to initiate a proceeding by the clerk of court for a review of the reasonableness of the compensation or expense reimbursement. The bill also would allow an attorney-in-fact under a power of attorney that does not contain the amount of compensation to be entitled to reasonable compensation. The act would be effective January 1, 2004, and apply to payments made to a fiduciary on or after that date.***

CURRENT LAW: Currently, trustees of certain trusts receive annual compensation for serving as trustees based on a minimum fee schedule set out in G.S. 32-50. The trusts must be silent as to the amount of compensation. In addition to the minimum compensation, the clerk of superior court at the written request of the trustee may in the clerk's discretion allow additional compensation (subject to a cap) when the trustee has rendered services beyond the routine services expected of a trustee. The clerk of court may also authorize compensation for fiduciaries other than the trustee and for counsel fees for attorneys who serve as a fiduciary or trustee where the attorney renders professional services, as an attorney, that are beyond the ordinary routine of management and that would reasonably justify the retention of legal counsel.

SECTION-BY-SECTION ANALYSIS:

Section 1 would repeal Article 5 of Chapter 32 of the General Statutes, which governs compensation of trustees and fiduciaries (see attached).

Section 2 would create a new Article 5A of Chapter 32 of the General Statutes to be entitled, "Compensation of Trustees and Other Fiduciaries."

- G.S. 32-53 would define "interested person" as (i) the grantor, if living; (ii) all living persons who are currently receiving or eligible to receive distributions of income or principal; (iii) all living persons entitled to trust income or principal, or both, upon the trust's termination; and (iv) any special trustee, trust protector or advisor named in the trust who is entitled to receive notices under the terms of the trust. This term does not include all persons who may have a future interest in the trust.
- G.S. 32-53 also would define "trust" to have the same meaning as it has in Article 3 of Chapter 36A of the General Statutes (see attached definition).
- G.S. 32-54 would specify that, if the trust does not specify the compensation, then the trustee is entitled to receive compensation that is reasonable under the circumstances. Prior approval of the

clerk of court is not required; however, there are enumerated factors that must be considered in determining "reasonableness". The clerk of court must consider these factors if an interested party challenges the reasonableness of the compensation.

- G.S. 32-55 would authorize the reimbursement of expenses.
- G.S. 32-56 would require a trustee to give annual written notice to all interested persons that identifies all compensation, expense reimbursement, professional fee, counsel fees, distribution or payment of any kind. This notice must be given within a reasonable period of time after the end of each fiscal year of the trust. This section provides for notice when an interested person is under a legal disability.
- G.S. 32-57 would authorize an interested person or guardian, parent, or agent of an interested person to initiate a proceeding for the clerk of court to review the reasonableness of any compensation or expense reimbursement. The terms of the trust document may specifically prohibit this. The proceeding must be initiated within one year from the date the written notice was given to the interested parties or it is presumed that the compensation and expense reimbursement was reasonable. The clerk, upon review, may order the trustee to make appropriate refunds.
- G.S. 32-58 would authorize the clerk of court, upon written request by a fiduciary other than the trustee, to determine reasonable compensation for that fiduciary, unless prohibited by the trust or where there is a statute that authorizes compensation for that fiduciary.
- G.S. 32-59 would specify that when the instrument that created the trust uses certain phrases to define the compensation to which the fiduciary is entitled, the language is to be construed as an intention that the fiduciary receive reasonable compensation under this act. However, the instrument may provide that the fiduciary is not entitled to any compensation.
- G.S. 32-60 would authorize clerks of courts to allow attorney fees to a fiduciary who is an attorney where the attorney has rendered professional services as an attorney that are beyond routine trustee services and would justify the retention of legal counsel if the trustee were not an attorney.
- G.S. 32-61 would make the new Article apply to payments made to a fiduciary after January 1, 2004, with respect to all trusts and fiduciary relationships existing on that date or created on or after that date.

Section 3 would amend G.S. 32A-11(c) to allow an attorney-in-fact under a power of attorney to seek reasonable compensation, to be determined by the clerk of court. Currently, the attorney-in-fact is subject to the minimum fee schedule used for trustee compensation.

Section 4 would amend G.S. 36A-23.1(a) to grant clerks of court original jurisdiction over proceedings to review trustees' fees and expenses under the new Article.

Section 5 would provide that the act would be effective January 1, 2004, and would apply to payments made to a fiduciary on or after that date.

S470-SMRH-001

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 470

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S470-ARH-8 [v.1]

Date _____,2003

Comm. Sub. [NO]
Amends Title [NO]
First Edition

Senator _____

moves to amend the bill on page 4, lines 40-41, by inserting between the lines the following new section to read:

"**SECTION 5.** G.S. 36A-63(d) reads as rewritten:

`(d) In addition to any other compensation to which it may be entitled under G.S. 28A-23-3, ~~32-50,~~ 34-12, 35A-1269, or under any other authority, a corporation acting in a fiduciary capacity shall be allowed to charge a fee for the temporary investment of funds held awaiting investment or distribution, which fee may be calculated upon the amount of such funds actually invested and upon the income produced thereby. The fee authorized by this subsection shall not exceed twelve percent (12%) of the income produced by such investment. A corporation acting in a fiduciary capacity has complied with its duty to disclose fees and practices in connection with the investment of fiduciary funds awaiting investment or distribution if the corporation's periodic statements set forth the method of computing such fees.'";

and by renumbering the remaining section.

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 470

Short Title:	Compensation of Trustees/Other Fiduciaries.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 20, 2003

A BILL TO BE ENTITLED

AN ACT TO MODERNIZE THE LAW AFFECTING THE COMPENSATION OF TRUSTEES AND OTHER FIDUCIARIES.

The General Assembly of North Carolina enacts:

SECTION 1. Article 5 of Chapter 32 of the General Statutes is repealed.

SECTION 2. Chapter 32 of the General Statutes is amended to add a new Article to read:

"Article 5A.

"Compensation of Trustees and Other Fiduciaries.

"**§ 32-53. Definitions.**

As used in this Article:

(1) "Interested person" includes (i) the grantor of the trust, if living; (ii) all living persons who are currently receiving or eligible to receive distributions of income or principal of the trust; (iii) all living persons who would be entitled to income and/or principal of the trust (without regard to the exercise of any power of appointment) if the trust terminated on that date; and (iv) any special trustee, trust protector, or advisor named in the trust instrument who is entitled to receive similar notices pursuant to the terms of the trust.

(2) "Trust" has the same meaning as contained in G.S. 36A-22.1(5).

"**§ 32-54. Compensation of trustees.**

(a) If the terms of the trust do not specify the trustee's compensation, the trustee is entitled to receive compensation that is reasonable under the circumstances and shall be empowered to pay such compensation from the assets of the trust without prior approval of the clerk of superior court.

(b) Factors to be considered in determining reasonableness of compensation:

(1) The degree of difficulty and novelty of the tasks required of the trustee;

(2) The responsibilities and risks involved;

(3) The amount and character of the trust assets;
(4) The skill, experience, expertise, and facilities of the trustee;
(5) The quality of the trustee's performance;
(6) Comparable charges for similar services;
(7) Time devoted to administering the trust;
(8) Time constraints imposed upon the trustee in administering the trust;
(9) Nature and costs of services delegated to others by the trustee;
(10) Where more than one trustee is serving, the reasonableness of the total fees paid to all trustees; and
(11) Other factors which the trustee or the clerk of superior court deems to be relevant.

"**§ 32-55. Reimbursement for expenses incurred.**

In addition to the compensation referred to in G.S. 32-54, the trustee shall be entitled to reimbursement out of the assets of the trust for expenses properly incurred in the administration of the trust.

"**§ 32-56. Notice of compensation and other payments.**

Within a reasonable period of time after the end of each fiscal year of the trust, regardless of whether an accounting is otherwise required by law or by the trust instrument, the trustee shall give written notice to all interested persons of any compensation, expense reimbursement, professional fee, counsel fees allowed under G.S. 32-60, distribution or payment of any kind made to the trustee in such fiscal year from the assets of the trust. If any interested person is then under a legal disability, such notice shall be given to such person's guardian or agent under a durable power of attorney or to a parent of such person if such person is then a minor; and such notice shall have the same effect as if given directly to the interested person while not under a legal disability so long as the person receiving the notice is not also the trustee. An annual accounting provided by the trustee to all interested persons who are not then under a legal disability and to the guardian, agent or parent of any interested person who is then under a legal disability within a reasonable time after the end of the fiscal year of the trust shall be deemed sufficient notice under this section provided that it sets forth and clearly identifies all compensation, expense reimbursements, professional fees, counsel fees allowed under G.S. 32-60, distributions and other payments of any kind to the trustee during such fiscal year from the assets of the trust.

"**§ 32-57. Judicial review of compensation and other payments to trustee.**

(a) Unless specifically prohibited by the trust instrument, any interested person, or the guardian, agent or parent of any interested person who is then under a legal disability, may initiate a proceeding under Article 3 of Chapter 36A of the General Statutes for the review of the reasonableness of any compensation or expense reimbursement paid under this Article. The provisions of Article 3 of Chapter 36A shall govern that proceeding and any appeal from that proceeding, except that:

(1) The definition of "interested person" contained in G.S. 32-53(1) shall control in all matters relating to such review, including the determination of who may initiate a proceeding under G.S 36A-23.1

and the determination of when an interested person may be represented by others under G.S. 36A-26.3(2).

(2) For purposes of G.S. 36A-26.1, it shall be necessary that all interested persons not joined as petitioners be joined as respondents, but it shall not be necessary that all known beneficiaries be joined as respondents unless they are interested persons.

(3) In addition to other powers of the clerk of superior court acting under Article 3 of Chapter 36A, if the clerk of superior court determines upon review that a trustee has received excessive compensation or expense reimbursement, the clerk may order such trustee to make appropriate refunds.

(b) Notwithstanding the foregoing, if a proceeding for review of the reasonableness of compensation or expense reimbursement paid to a trustee is not initiated within one year from the date when notice of such payment is given pursuant to G.S. 32-56, then it shall be presumed that such compensation or expense reimbursement was reasonable.

"**§ 32-58. Compensation of other fiduciaries.**

In the case of a fiduciary other than a trustee under a trust, where the instrument creating the fiduciary relationship does not contain a provision relating to compensation and where there is no provision in the General Statutes providing for compensation for such fiduciary, such fiduciary shall be entitled to reasonable compensation determined in writing by the clerk of superior court in its discretion and for reimbursement of expenses properly incurred in the administration of the fiduciary relationship. Upon written request by the fiduciary, the clerk of superior court may allow the reimbursement of such expenses and such reasonable compensation after taking into account the factors set forth in G.S. 32-54(b).

"**§ 32-59. Effect of provisions in instrument.**

In those instances where the instrument creating the trust or other fiduciary relationship provides that the compensation of the fiduciary shall be the amount "provided by law", the "maximum amount provided by law" or other similar language, or references former G.S. 32-50, such language shall be construed as an intention that the trustee or other fiduciary shall receive reasonable compensation as allowed under this Article. In those instances where the instrument creating the trust or other fiduciary relationship provides that the trustee or other fiduciary shall serve without compensation, such language shall be construed as being a provision relating to compensation and the trustee or other fiduciary shall not be entitled to receive reasonable compensation as allowed under this Article.

"**§ 32-60. Counsel fees allowable to attorneys serving as fiduciaries.**

The clerk of superior court may exercise discretion to allow counsel fees to an attorney serving as a fiduciary or trustee (in addition to the compensation allowed to the attorney as a fiduciary or trustee) where such attorney, on behalf of the trust or fiduciary relationship, renders professional services as an attorney that are different from the services normally performed by a fiduciary or trustee and of a type which would

reasonably justify the retention of legal counsel by any fiduciary or trustee who is not licensed to practice law.

"**§ 32-61. Applicability.**

The provisions of this Article shall apply to all payments made to a fiduciary after the enactment of this Article, including fiduciary compensation earned or paid after the enactment of this Article, with respect to trusts and fiduciary relationships created on or after January 1, 2004, and with respect to all trusts and fiduciary relationships existing on January 1, 2004."

SECTION 3. G.S. 32A-11(c) reads as rewritten:

"(c) In the event that any power of attorney executed pursuant to the provisions of this Article does not contain the amount of ~~commissions~~ compensation that the attorney-in-fact is entitled to receive or the way such ~~commissions are~~ compensation is to be determined, and the principal should thereafter become incapacitated or mentally incompetent, ~~the commissions such attorney-in-fact shall receive subsequent to the principal's incapacity or mental incompetence shall be fixed in the discretion of the clerk of superior court pursuant to the provisions of G.S. 32-50(c).~~ then subsequent to the principal's incapacity or mental incompetence, the attorney-in-fact shall be entitled to receive such reasonable compensation as determined by the clerk of superior court after considering the factors set forth in G.S. 32-54(b)."

SECTION 4. G.S. 36A-23.1(a) reads as rewritten:

"(a) The clerks of superior court of this State have original jurisdiction over all proceedings initiated by interested persons concerning the internal affairs of trusts except proceedings to modify or terminate trusts. Except as provided in subdivision (3) of this subsection, the clerk's jurisdiction is exclusive. Proceedings that may be maintained under this subsection are those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and trust beneficiaries, to the extent that those matters are not otherwise provided for in the governing instrument. These include proceedings:

(1) To appoint or remove a trustee;

(2) To review trustees' fees ~~pursuant to G.S. 32-50~~ and expenses pursuant to Article 5A of Chapter 32 of the General Statutes and to review and settle interim or final accounts; and

(3) To ascertain beneficiaries, to determine any question arising in the administration or distribution of any trust, including questions of construction of trust instruments, and to determine the existence or nonexistence of trusts created other than by will and the existence or nonexistence of any immunity, power, privilege, duty, or right. The clerk, on the clerk's own motion, may determine that a proceeding to determine an issue listed in this subdivision shall be originally heard by a superior court judge."

SECTION 5. This act becomes effective January 1, 2004, and applies to payments made to a fiduciary on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 471

Short Title:	Amend Self-Insurance Guaranty Assoc. Laws.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 20, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAWS GOVERNING THE SELF-INSURANCE GUARANTY ASSOCIATION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 97-133(a)(2) reads as rewritten:

"(2) Assess each member of the Association as follows:

a. Each individual member self-insurer shall be annually assessed an amount equal to ~~one-quarter of one percent (0.25%)~~ two percent (2%) of the annual gross premiums, as determined under G.S. 105-228.5(b), (b1), and (c), that would have been paid by that member self-insurer for workers' compensation insurance during the prior calendar year; and payment to the Association shall be made no later than ~~September 15~~ May 15 following the close of that calendar year. Where any such assessment is paid based in whole or in part upon estimates of annual gross premiums for the prior calendar year, there shall be made in the next year's assessment an adjustment of the assessment of such prior year based on actual audited annual gross premiums. Each group member self-insurer shall be annually assessed an amount equal to ~~one-quarter of one percent (0.25%)~~ two percent (2%) of the annual gross premiums, as determined under G.S. 105-228.5(b), (b1), and (c), of the group member self-insurer during the prior calendar year; and payment to the Association shall be made no later than ~~September 15~~ May 15 following the close of that calendar year. Regardless of the size of the Fund, during its first 12 months of membership, no member self-insurer may discount or reduce this ~~one-quarter of one percent (0.25%) assessment. Assessments paid by members pursuant to this subdivision shall~~

~~be credited toward the tax paid by self-insurers under Article 8B of Chapter 105 of the General Statutes.~~ two percent (2%) assessment. For the purpose of making the assessments authorized by this subsection and subsections (c) and (d) of this section, the Secretary of Revenue shall provide to the Association the self-insurer premium and payroll information as determined under G.S. 105-228.5(b), (b1) and (c), and the Commissioner shall provide to the Association the group self-insurer premium information reported to the Commissioner under G.S. 58-47-75 and G.S. 58-2-165.

b. Each member self-insurer shall be notified of the assessment no later than 30 days before it is due.

c. If a self-insurer is a member of the Association for less than a full calendar year, the annual gross premiums shall be adjusted by that portion of the year the self-insurer is not a member of the Association.

d. If application of the contribution rates referenced in sub-subdivision a. of this subdivision would produce an amount in excess of the five million dollar ($5,000,000) limits of the fund, an equitable proration may be made; provided that every self-insurer that becomes a member of the Association shall pay an initial assessment, in an amount established by the Board, regardless of the size of the fund at the time the member joins the Association."

SECTION 2. G.S. 97-133(a)(4) reads as rewritten:

"(4) Be obligated to the extent of covered claims occurring prior to the determination of the member self-insurer's insolvency, or occurring after such determination but prior to the obtaining by the self-insurer of workers' compensation insurance as otherwise required under this Chapter. ~~The Association shall pay claims against a self-insurer that are not or have not been paid as a result of a determination of insolvency or the institution of bankruptcy or receivership proceedings that occurred prior to the effective date of this Article.~~"

SECTION 3. G.S. 97-185 reads as rewritten:

"**§ 97-185. ~~Deposits or surety bond.~~Deposits; surety bonds; letters of credit.**

(a) Every self-insurer shall deposit with the Commissioner an amount equal to ~~twenty-five percent (25%)~~ fifty percent (50%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer.

~~(b) A self-insurer organized and authorized before the effective date of this section shall have 24 months from the effective date of this section to comply with this section.~~

(c) Deposits received, changes to existing deposits, or deposits exchanged after the effective date of this section, shall comprise one or more of the following:

(1) Interest-bearing bonds of the United States of America.

(2) Interest-bearing bonds of the State of North Carolina, or of its cities or counties.

(3) Certificates of deposit issued by any solvent bank domesticated in the State of North Carolina that have a maturity of one year or greater.

(4) Surety bonds in a form acceptable to the Commissioner and issued by a corporate surety. A surety bond deposited pursuant to this subsection shall require that the surety reimburse the Commissioner, or his successors, assigns, or transferees, from the proceeds of the surety bond, for any costs incurred in the collection of the proceeds of the surety bond, including reasonable attorneys' fees, and any costs incurred in administering the workers' compensation claims against the insolvent self-insurer that deposited the surety bond.

(4a) Irrevocable letters of credit in a form acceptable to the Commissioner issued by a bank acceptable to the Commissioner.

(5) Any other investments that are approved by the Commissioner.

(d) All bonds or securities that are posted as a security deposit shall be valued annually at market value. If market value is less than face value, the Commissioner may require the self-insurer to post additional securities. In making this determination, the Commissioner shall consider the self-insurer's financial condition, the amount by which market value is less than face value, and the likelihood that the securities will be needed to provide benefits.

(e) Securities deposited under this section shall be assigned to the Commissioner, the Commissioner's successors, assigns, or trustees, on a form prescribed by the Commissioner in a manner that renders the securities negotiable by the Commissioner. If a self-insurer is deemed by the Commissioner to be in a hazardous financial condition, the Commissioner may sell or collect, or both, such amounts that will yield sufficient funds to meet the self-insurer's obligations under the Act. In the case of a letter of credit, the Commissioner may draw the full amount of a letter of credit if the letter of credit is not renewed within 90 days prior to its expiration or at any time that the bank issuing the letter of credit is no longer acceptable to the Commissioner. Interest accruing on any negotiable security deposited under this Article shall be collected and transmitted to the self-insurer if the self-insurer is not in a hazardous financial condition.

(f) No judgment creditor, other than a claimant entitled to benefits under the Act, may levy upon any deposits made under this section.

(g) Securities held by the Commissioner under this section may be exchanged or replaced by the self-insurer with other securities of like nature and amount as long as the self-insurer is not in a hazardous financial condition. No release shall be effectuated until replacement securities or bonds of an equal value have been substituted. Any surety bond may be exchanged or replaced with another surety bond that meets the requirements of this section if 90 days' advance written notice is given to the Commissioner. If a self-insurer ceases to self-insure or desires to replace securities with

an acceptable surety bond or bonds, the self-insurer shall notify the Commissioner, and may recover all or a portion of the securities deposited with the Commissioner upon posting instead an acceptable special release bond issued by a corporate surety in an amount equal to the total value of the securities. The special release bond shall cover all existing liabilities under the Act plus an amount to cover future loss development and shall remain in force until all obligations under the Act have been discharged fully.

(h) If a self-insurer ceases to self-insure, no deposits shall be released by the Commissioner until the self-insurer has discharged fully all of the self-insurer's obligations under the Act.

(i) An endorsement to a surety bond shall be filed with the Commissioner within 90 days after the effective date of the endorsement."

SECTION 4. Effective January 1, 2005, G.S. 97-185(a), as amended in Section 3 of this act, reads as rewritten:

"(a) Every self-insurer shall deposit with the Commissioner an amount equal to ~~fifty percent (50%)~~ seventy-five percent (75%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer."

SECTION 5. Effective January 1, 2006, G.S. 97-185(a), as amended in Sections 3 and 4 of this act, reads as rewritten:

"(a) Every self-insurer shall deposit with the Commissioner an amount equal to ~~seventy-five percent (75%)~~ one hundred percent (100%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer."

SECTION 6. Effective January 1, 2007, G.S. 97-185(a), as amended in Sections 3, 4, and 5 of this act, reads as rewritten:

"(a) Every self-insurer shall deposit with the Commissioner an amount equal to ~~one hundred percent (100%)~~ one hundred twenty-five percent (125%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer."

SECTION 7. G.S. 97-141 reads as rewritten:

"**§ 97-141. Stay of proceedings.**

All claims or proceedings under this Chapter to which the insolvent member self-insurer is a party either before the Industrial Commission or a court in this State and the running of all time periods against either the insolvent member self-insurer or the Association under this Chapter shall be stayed for 60 days from the later of the date of notice to the Association of the insolvency or the date the Association is notified of a

claim or proceeding under this Chapter in order to permit the Association to investigate, prosecute, or defend properly any petition, claim, or appeal under this Chapter, provided that the payment of weekly compensation for incapacity is made whenever time periods or proceedings affecting the payment of weekly compensation are stayed."

SECTION 8. Section 3 of this act becomes effective January 1, 2004. Section 4 of this act becomes effective January 1, 2005. Section 5 of this act becomes effective January 1, 2006. Section 6 of this act becomes effective January 1, 2007. Section 7 of this act is effective when this act becomes law and applies to claims filed on or after that date. The remainder of this act is effective when this act becomes law and applies to assessments made on or after that date.

SENATE BILL 471:
Amend Self-Insurance Guaranty Assoc. Laws.

BILL ANALYSIS

Committee:	Senate JII	**Introduced by:**	Sen. Hartsell
Date:	April 10, 2003	**Summary by:**	Linda Attarian
Version:	Introduced		Committee Co-Counsel

SUMMARY: House Bill 471 amends the laws governing the North Carolina Self-Insurance Guaranty Association (NCSIGA) to

- *Amend G.S. 97-185 governing security deposits made by self-insurers with the Commissioner of Insurance by progressively increasing the minimum amount of the deposit required under the statute. The bill spans the increases over a four year period to 2007, whereby the amount of the deposit will have increased from 25% to 125% of the self-insurer's total outstanding claim liability;*
- *Allow the Commissioner to accept irrevocable letters of credit in lieu of cash or a surety bond to meet the deposit requirement under G.S. 97-185;*
- *Require that surety bonds deposited with the Commissioner are sufficient to allow the NCSIGA to recover its administrative costs and any costs related to the collection of the proceeds of the surety bond;*
- *Amend the statute governing the NCSIGA's authority to make assessments against the self-insurer's annual gross premiums by increasing these assessments back to their pre-1997 levels;*
- *Eliminates the NCSIGA's statutory duty to pay claims against self-insurers that became insolvent before the NCSIGA was created; and*
- *Amends G.S. 97-141 to allow a 60 day-stay against the running of all time periods pursuant to any proceedings in which an insolvent member of the NCSIGA is a party to begin on the later of the date of notice to the NCSIGA of the insolvency of the member or the date the NCSIGA receives notice of a claim or proceeding after the original notice of the insolvency.*

BILL ANALYSIS:

Section 1. G.S. 58-6-25 requires insurance companies to pay a charge at a percentage rate of the company's premium tax liability for the taxable year. This section amends G.S. 97-133(a)(2) to restore the NCSIGA's authority to collect annual assessments from one-quarter of one percent (0.25%) to two percent (2%) of the annual gross workers compensation premiums.

The NCSIGA's rationale for this increase: In 1997 a tax credit was enacted against members' premium tax bills for annual assessments collected to increase the NCSIGA's Guaranty Fund from $1,000,000 to $5,000,000. The tax credit was only available for the two years of assessments that were necessary to increase the Guaranty Fund to $5,000,000. To offset the tax credit, the amount of allowable assessment was reduced from 2% to 0.25%. Now that the tax credit is no longer available, the amount of the annual assessments available to the NCSIGA is still at the reduced levels and they should be increased to pre-1997 levels.

Section 1 also changes the deadline for annual assessment payments to be made to the NCSIGA from September 1 to May 1. The statute provides that members' assessments must be paid by September 15 of the year in which the assessments are billed. Assessments are for the prior year but cannot be billed until April, after the self-insurers' premium tax returns are filled.

Section 2. G.S. 97-133(a) requires the NCSIGA to pay claims against self-insurers that became insolvent before the NCSIGA was created in 1986. Prior to 1997, the provision included a tax credit for assessments against premiums to pay such claims. This tax credit was deleted in 1997 with the enactment of S.L. 1997-475. SB 471 deletes the requirement to pay the claims since the tax credit is no longer available.

Section 3. Every insurer is required to post a security deposit with the Department of Insurance (DOI) in the form of cash, securities or a surety bond. The deposit or bond is assigned to the NCSIGA by the Department upon the self-insurer's insolvency and is used to pay worker's compensation claims against the insolvent self-insurer before claims are paid from the Guaranty Fund. Any claims paid from the Guaranty Fund result in assessments against all of the other self-insurers in North Carolina that are required, by law to belong to the Guaranty Association. The DOI does not currently accept letters of credit as security deposits. Other states do accept letters of credit.

SB 471 amends G.S. 97-185 to make letters of credit an acceptable form of a security deposit.

G.S. 97-185 currently requires self-insurers to make a security deposit of 25% of outstanding undiscounted claims liability, as determined by an actuary, or a minimum of $500,000. The Commissioner is authorized to require a higher deposit depending upon the financial condition of the self-insurer and the self-insurer's outstanding and potential claims liability. According to the NCSIGA, self-insurers that are in financial difficulty have taken advantage of the discretionary nature of the Commissioner's authority and have challenged deposit increases by requesting administrative hearings to delay the loss of their self-insurance authority. Apparently, in some instances the resulting delay has extended into the self-insurer's bankruptcy filing, resulting in more claims to be paid with an inadequate deposit and greater demands on the NCSIGA and remaining self-insurers.

SB 471 would require every self-insurer to post a deposit of 125% of its outstanding claims liability as determined by an actuary. The increase will be phased in over a four-year period. The Commissioner is allowed to require a deposit of more than 125% in the event that the self-insurer is found to be in "hazardous financial condition", which means that, based on its present or reasonably anticipated financial condition an insurer is insolvent or, although not financially impaired or insolvent, is unlikely to be able to meet obligations for known claims and reasonably anticipated claims; or to pay other obligations in the normal course of business.

Sections 4 through 6 provide for the progressive increases in the percent of claims liability required as a security deposit as explained in Section 3. See Section 8 for explanation of effective dates.

Section 7. G.S. 97-141 provides for a 60-day stay of proceedings in claims against self-insured member employers of the NCSIGA. The 60-day stay begins when the NCSIGA receives notice of insolvency. The purpose of the stay is to suspend pending time deadlines while the NCSIGA investigates, prosecutes, or defend against claims or appeals. Throughout the stay, the NCSIGA is obligated to make weekly compensation payments. According to the NCSIGA, the statute does not adequately address the situation where a claim is asserted against an insolvent former self-insurer long after the NCSIGA was given notice of the insolvency. SB 471 amends G.S. 97-141 to allow the stay to begin on the later of the date of notice

of the insolvency or the time the NCSIGA receives notice of a claim after the original notice of the insolvency.

Section 8. This section makes Section 3 (increase in security deposit and letter of credit allowance) effective January 1, 2004. Section 4 is effective January 1, 2005. Section 5 is effective January 1, 2006. Section 6 is effective January 1, 2007. Section 7 (Stay of proceedings) is effective when the bill becomes law and applies to claims filed on or after that date. Section 1 and 2 become effective when the bill becomes law and applies to assessments made on or after that date.

BACKGROUND:

The North Carolina Self-Insurance Guaranty Association (Association) was created by the General Assembly in 1986 to provide mechanisms for the payment of covered claims under self-insurance coverage, to avoid excessive delay in payment, to avoid financial loss to claimants because of insolvency of a self-insurer, and to assist in the detection of self-insurer insolvencies. All self-insurers are required by law to be members of the Association.

Since it was created, the NCSIGA has processed claims from 37 insolvent self-insured companies and 3 insolvent self-insured groups. In 18 of the 20 individual company insolvencies that the NCSIGA considers to be closed, the self-insurer's claim liability exceeded the self-insurers statutory deposit with the DOI.

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — April 10th
Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Mark Seipt	NCLBGC
R. Randall Wilkins	NCHBA
Carson Carmichael	Bailey & Dixon, LLP
Tim Minton	NC Home Builders
Bill Scoggin	KCCA
David Barnes	Poyner Spruill
John Alman	NC Statewaters
ANN LORE	DWHS
C Porter	Smith Anderson
Tom Sr.	NCRMA
Andy Ellen	IA

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Tom Coley	CWA
Paul Crawfill	Crawfill, Sumner + Hartzog Raleigh
John McAlister	Duke Energy
Lori Ann Harkins	L.A Harkins + Assoc Inc
John McMillan	MFAS
Jim Stuart	Stuart Law Firm, Bgk, NC
Cathy Stuart	" "
Charles Marshall	Brooks, Pierce
Michelle Frazier	NC Bar Ass'n
Mike Godwin	Sherrill Bray Aycock Abel + Livingston
Pamela Best	AOC

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Monday, April 14, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B. **460** Extend Sunset/Private Correctional Officers.
Sequential Referral: None
Recommended Referral: None

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **421** Amend Child Welfare Laws.-AB
Draft Number: PCS 65256
Sequential Referral: None
Recommended Referral: None
Long Title Amended: No

S.B. **470** Compensation of Trustees/Other Fiduciaries.
Draft Number: PCS 55173
Sequential Referral: None
Recommended Referral: None
Long Title Amended: No

S.B. **486** Amber Alert.
Draft Number: PCS 40001
Sequential Referral: None
Recommended Referral: None
Long Title Amended: Yes

TOTAL REPORTED: 4

Committee Clerk Comments:

AGENDA

SENATE JUDICIARY II COMMITTEE
April 15, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. Welcome and Opening Remarks

II. Bills to be Considered

• SB 965	Amend Constitution/Sch. Fines & Forfeitures	Senator Dalton
• SB 549	Uniform Principal and Income Act	Senator Hagan
• SB 424	Tuition Waiver Technical Correction	Senator Hartsell
• SB 468	Clarify Irrevocable Trust Law	Senator Hartsell
• SB 563	Uniform Athlete Agents Act	Senator Hagan
• SB 471	Amend Self-Insurance Guaranty Assoc. Laws	Senator Hartsell
• SB 502	Access to Decedent's Safe-Deposit Box	Senator Thomas
• SB 774	Liability at Public Skateboard Parks	Senator Dalton
•		

III. Other Business

IV. Adjournment

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **JUDICIARY II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	April 15, 2003	10:00 AM	1124
		1:00-2:00 PM	1124
		15 min. after session	1124

The following will be considered: Bills to be heard in following order:

	BILL NO.	SHORT TITLE	SPONSOR
•	SB 965	Amend Constitution/Sch. Fines & Forfeitures	Senator Dalton
•	SB 549	Uniform Principal and Income Act	Senator Hagan
•	SB 424	Tuition Waiver Technical Correction	Senator Hartsell
•	SB 468	Clarify Irrevocable Trust Law	Senator Hartsell
•	SB 563	Uniform Athlete Agents Act	Senator Hagan
•	SB 471	Amend Self-Insurance Guaranty Assoc. Laws	Senator Hartsell
•	SB 502	Access to Decedent's Safe-Deposit Box	Senator Thomas
•	SB 774	Liability at Public Skateboard Parks	Senator Dalton

Senator HARTSELL, Chair

Judiciary II Committee

Minutes – Morning Meeting

April 15, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with fourteen members present.

SB 549 (Uniform Principal and Income Act) Senator Hartsell recognized Senator Kinnaird who moved to adopt the Proposed Committee Substitute for purposes of discussion. All members voted and the motion carried. Senator Hartsell then introduced Senator Hagan, bill sponsor, to discuss the Proposed Committee Substitute. She introduced Mr. William McPherson, Jr., member of the Legislative Committee of the Estate and Fiduciary Laws Section of the North Carolina Bar Association, to explain the bill and answer questions by Senators Allran, Hartsell Dorsett, Kerr and Shubert. Michelle Frazier, representing the Bar Association was also recognized to speak on the bill. Senator Hartsell displaced the bill temporarily while language in the bill was corrected.

SB 965 (Amend Constitution/Sch. Fines & Forfeitures) Senator Allran moved to adopt the Committee Substitute for purposes of discussion. All members voted and the motion carried. Senator Dalton was introduced to explain the bill. After his explanation, he answered questions by Senators Sloan, Dorsett, Kerr, and Holloman. Senator Holloman moved for an unfavorable report to the original bill, favorable to the Proposed Committee Substitute. All members voted and the motion carried.

SB 549 (Uniform Principal and Income Act) Recalled. Senator Hagan was recognized to continue discussion of the Proposed Committee Substitute. Senator Shubert moved for an unfavorable report to the original bill, favorable to Committee Substitute. All members voted and the motion carried.

SB 774 (Liability at Public Skateboard Parks) The Chair recognized Senator Dalton, bill sponsor, to explain the bill and he answered the question by Senator Kerr. Senator Kinnaird moved for a favorable report. All members voted and the motion carried.

SB 502 (Access to Decedent's Safe-Deposit Box) Senator Hartsell introduced Mr. William McPherson to explain the bill. Senator Sloan moved for a favorable report. All members voted and the motion carried.

SB 563 Uniform Athlete Agents Act) Senator Hartsell recognized Senator Hagan to discuss the bill. Senator Hagan introduced two amendments. She moved to adopt the first amendment. All members voted yes and the motion carried. Senator Hagan, explained the second amendment and moved for adoption. All members voted yes and the motion carried. Mr. Clyde Holt, of the Legislative section of the Sports Law Division

of the North Carolina Bar Association, was introduced to explain the bill. He answered a question by Senator Kerr. The bill was continued.

The meeting recessed until 1:00 PM.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

Judiciary II Committee

Minutes – 1:00 PM Meeting

April 15, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with ten members present.

SB 563 (Uniform Athlete Agents Act) Continuation of bill from the morning Session. Senator Hagan, bill sponsor, requested that amendment number two be withdrawn. Senator Kinnaird moved to withdraw the second amendment. All voted and the motion carried. Mr. Clyde Holt , representing the Bar Association, continued explanation of the bill and answered questions by Senators Kinnaird, Shubert and Bingham. Senator Kinnaird moved to report the bill unfavorable to the original but favorable as amended and rolled into a Committee Substitute. Senator Hartsell called for a vote. All members voted and the motion carried.

SB 424 (Tuition Waiver Technical Correction) Senator Allran was recognized to chair the meeting. Senator Hartsell, bill sponsor, was invited to explain the Proposed Committee Substitute. Senator Bingham moved to adopt the Proposed Committee Substitute for purposes of discussion. Senator Allran called for a vote. All members voted and the motion carried. Senator Kinnaird moved for an unfavorable report to the original bill but favorable to the Committee Substitute. All voted and the motion carried.

SB 468 (Clarify Irrevocable Trust Law) Senator Allran invited Senator Hartsell, bill sponsor, to discuss the original bill. Senator Hartsell requested that Mr. McPherson, representing the Bar Association, explain the bill. He then answered Senator Bingham's question. Senator Kinnaird moved for a favorable report. All voted and the motion carried.

SB 471 (Amend Self-Insurance Guaranty Association Laws) Senator Allran called for a motion to adopt the Proposed Committee Substitute. Senator Kinnaird so moved, all voted and the motion carried. Senator Hartsell, bill sponsor, was then invited to discuss the bill. Linda Attarian, staff attorney, explained the bill. Senator Hartsell answered a question by Senator Shubert. Mr. Bob Kaylor, representing the North Carolina Association of Self Insured and Duke Energy spoke on the bill. Questions by Senators Bingham, Kinnaird, Shubert and Queen were answered by Senator Hartsell and Mr. Kaylor. Senator Hartsell moved to place the bill in a sub-committee. Senator Allran called for a vote. All members voted and the motion carried. Senators Sloan, Shubert and Queen were named to the sub-committee with Senator Shubert serving as chairman. They were asked to report back on Tuesday, April 22, 2003.

The meeting recessed until 4:30 PM.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

Judiciary II Committee

Minutes – 4:30 Meeting

April 15, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with eleven members present.

SB 323 Senator Hartsell invited Senator Apocaca to chair the meeting during the presentation of SB 323 by Senator Hartsell, bill sponsor. Senator Webster moved to adopt the Committee Substitute for purposes of discussion. Linda Attarian, staff attorney, explained the report from the sub-committee (Senators Kinnaird, Shubert and Kerr). Senator Sloan moved to adopt the Proposed Committee Substitute as amended and rolled into a new Committee Substitute. All voted and the motion carried.

SB 659 Senator Hartsell recognized Senator Bingham, bill sponsor, to discuss the bill. After asking a question, Senator Webster moved for a favorable report. Questions by Senators Moore and Sloan were answered by Senators Bingham and Hartsell. Senator Bingham submitted an amendment and asked Kory Goldsmith, staff attorney, to explain the amendment. Senator Rucho's question was answered by Senator Bingham. Senator Allran moved to adopt the bill as amended and roll into a Committee Substitute. All voted and the motion carried.

With no further business, the meeting adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 965

Short Title:	Amend Constitution/Sch. Fines & Forfeitures.	(Public)
Sponsors:	Senator Dalton.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE NORTH CAROLINA CONSTITUTION TO PROVIDE THAT CLEAR PROCEEDS OF ALL CIVIL PENALTIES, CIVIL FORFEITURES, AND CIVIL FINES COLLECTED BY A STATE AGENCY ARE REMITTED TO THE CIVIL PENALTY AND FORFEITURE FUND AND FAITHFULLY USED EXCLUSIVELY FOR MAINTAINING FREE PUBLIC SCHOOLS.

The General Assembly of North Carolina enacts:

SECTION 1. Section 7 of Article IX of the North Carolina Constitution reads as rewritten:

"**Sec. 7. County school fund.**

All moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all criminal penalties and criminal forfeitures and of all criminal fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools."

SECTION 2. Article IX of the North Carolina Constitution is amended by adding a new section to read:

"**Sec. 7A. Civil Penalty and Forfeiture Fund.**

All monies belonging to the Civil Penalty and Forfeiture Fund and the clear proceeds of all civil penalties, civil forfeitures, and civil fines collected by a State agency shall belong to and remain in the Civil Penalty and Forfeiture Fund and shall be faithfully appropriated by the General Assembly to the counties and used exclusively for maintaining free public schools as provided by statute."

SECTION 3. G.S. 115C-457.1 reads as rewritten:

"**§ 115C-457.1. Creation of Fund; administration.**

(a) There is created the Civil Penalty and Forfeiture Fund. The Fund shall consist of the clear proceeds of all civil ~~penalties and civil forfeitures~~penalties, civil forfeitures, and civil fines that are collected by a State agency and are payable to the ~~County School~~

~~Fund~~ Civil Penalty and Forfeiture Fund pursuant to Article IX, ~~Section 7~~ Section 7A of the Constitution.

(b) The Fund shall be administered by the Office of State Budget and Management. The Fund and all interest accruing to the Fund shall be faithfully used exclusively for maintaining free public schools."

SECTION 4. G.S. 115C-457.2 reads as rewritten:

"**§ 115C-457.2. Remittance of ~~moneys~~ monies to the Fund.**

The clear proceeds of all civil ~~penalties and civil forfeitures~~penalties, civil forfeitures, and civil fines that are collected by a State agency and are payable to the ~~County School Fund~~ Civil Penalty and Forfeiture Fund pursuant to Article IX, ~~Section 7~~ Section 7A of the Constitution shall be remitted to the Office of State Budget and Management by the officer having custody of the funds within 10 days after the close of the calendar month in which the revenues were received or collected. Notwithstanding any other law, all funds which are civil penalties or civil forfeitures within the meaning of Article IX, ~~Section 7~~Section 7A of the Constitution shall be deposited in the Civil Penalty and Forfeiture Fund. The clear proceeds of such funds include the full amount of all such penalties and forfeitures collected under authority conferred by the State, diminished only by the actual costs of collection, not to exceed ten percent (10%) of the amount collected."

SECTION 5. The amendments set out in Section 1 and Section 2 of this act shall be submitted to the qualified voters of the State at a statewide general election on November 4, 2003, which election shall be conducted under the laws then governing elections in the State. Ballots, voting systems, or both may be used in accordance with Chapter 163 of the General Statutes. The question to be used in the voting systems and ballots shall be:

"[ ] FOR [ ] AGAINST

Constitutional amendments to provide that clear proceeds of all civil penalties, civil forfeitures, and civil fines collected by a State agency are remitted to the Civil Penalty and Forfeiture Fund and faithfully used exclusively for maintaining free public schools as provided by statute."

SECTION 6. If a majority of votes cast on the question are in favor of the amendment set out in Section 1 of this act, the State Board of Elections shall certify the amendments to the Secretary of State. The Secretary of State shall enroll the amendments so certified among the permanent records of that office. The amendments set out in Section 1 of this act shall become effective July 1, 2004.

SECTION 7. Sections 3 and 4 of this act become effective only if the voters approve the constitutional amendments set out in Section 1 and Section 2 of this act. If the voters approve the constitutional amendments, Sections 3 and 4 of this act shall become effective July 1, 2004.

SECTION 8. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 549

Short Title:	Uniform Principal and Income Act.	(Public)
Sponsors:	Senator Hagan.	
Referred to:	Judiciary II.	

March 27, 2003

A BILL TO BE ENTITLED

AN ACT TO ADOPT THE REVISED UNIFORM PRINCIPAL AND INCOME ACT.

The General Assembly of North Carolina enacts:

SECTION 1. The General Statutes are amended by adding a new Chapter to read:

"**Chapter 37A.**

"**Uniform Principal and Income Act.**

"Article 1.

"Definitions and Fiduciary Duties; Conversion to Unitrust; Judicial Control of Discretionary Power.

"Part 1. Definitions.

"**§ 37A-1-101. Short title.**

This Chapter may be cited as the Uniform Principal and Income Act.

"**§ 37A-1-102. Definitions.**

In this [Act]:

(1) "Accounting period" means a calendar year unless another 12-month period is selected by a fiduciary. The term includes a portion of a calendar year or other 12-month period that begins when an income interest begins or ends when an income interest ends.

(2) "Beneficiary" includes, in the case of a decedent's estate, an heir, legatee, and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary.

(3) "Fiduciary" means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, and a person performing substantially the same function.

(4) "Income" means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts

from a sale, exchange, or liquidation of a principal asset, to the extent provided in Article 4.

(5) "Income beneficiary" means a person to whom net income of a trust is or may be payable.

(6) "Income interest" means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to be distributed or authorize it to be distributed in the trustee's discretion.

(7) "Mandatory income interest" means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

(8) "Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under this Chapter to or from income during the period.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(10) "Principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates.

(11) "Remainder beneficiary" means a person entitled to receive principal when an income interest ends.

(12) "Terms of a trust" means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.

(13) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

"**§ 37A-1-103. Fiduciary duties; general principles.**

(a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of Articles 2 and 3, a fiduciary:

(1) Shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this Chapter;

(2) May administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this Chapter;

(3) Shall administer a trust or estate in accordance with this Chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

(4) Shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this Chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) In exercising the power to adjust under G.S. 37A-1-104(a) or a discretionary power of administration regarding a matter within the scope of this Chapter, whether granted by the terms of a trust, a will, or this Chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this Chapter is presumed to be fair and reasonable to all of the beneficiaries.

"**§ 37A-1-104. Trustee's power to adjust.**

(a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in G.S. 37A-1-103(a), that the trustee is unable to comply with G.S. 37A-1-103(b). In lieu of exercising the power to adjust, the trustee may convert the trust to a unitrust as permitted under Part 2 of this Article, in which case the unitrust amount shall become the net income of the trust.

(b) In deciding whether and to what extent to exercise the power conferred by subsection (a) of this section, a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

(1) The nature, purpose, and expected duration of the trust;

(2) The intent of the grantor or settlor;

(3) The identity and circumstances of the beneficiaries;

(4) The needs for liquidity, regularity of income, and preservation and appreciation of capital;

(5) The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;

(6) The net amount allocated to income under the other sections of this Chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;

(7) Whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;

(8) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

(9) The anticipated tax consequences of an adjustment.

(c) A trustee may not make an adjustment:

(1) That diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;

(2) That reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(3) That changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) From any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;

(5) If possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) If possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(7) If the trustee is a beneficiary of the trust;

(8) If the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly; or

(9) If the trust has been converted to, and is then operating as, a unitrust under Part 2 of this Article.

(d) If subdivision (c)(5), (6), (7), or (8) applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(e) A trustee may release the entire power conferred by subsection (a) of this section or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in subdivisions (c)(1) through (6) or (c)(8) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (c) of this section. The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection (a).

"Part 2. Conversion to Unitrust.

"§ 37A-1-104.1. Definitions.

For purposes of this Part:

(1) "Code" means the Internal Revenue Code of 1986, as amended from time to time, and any statutory enactment successor thereto; reference to a specific section of the Code in this Part shall be deemed a reference also to any successor provision dealing with the subject matter of such section of the Code.

(2) "Competent beneficiary" includes:

a. A beneficiary who has attained his or her majority and is not otherwise under a legal disability;

b. A court-appointed guardian of an incompetent beneficiary;

c. An attorney-in-fact or agent under a durable power of attorney for an incompetent beneficiary;

d. A court-appointed guardian of a minor beneficiary's estate; and

e. In the case of a minor beneficiary for whom no guardian has been appointed, a parent of the minor beneficiary, but only if such parent does not have an interest in the estate or trust that conflicts with the interest of the minor beneficiary.

(3) "Grantor" means an individual who created an inter vivos trust.

(4) "Disinterested person" means a person who is not a "related or subordinate party" as defined in section 672(c) of the Code with respect to the person then acting as trustee of the trust and excludes the grantor of the trust and any interested trustee.

(5) "Income trust" means a trust, created by either an inter vivos or a testamentary instrument, which directs or permits the trustee to distribute the net income of the trust to one or more persons, either in fixed proportions or in amounts or proportions determined by the trustee. Notwithstanding the foregoing, no trust that may be subject to taxation under section 2001 or section 2501 of the Code shall be an income trust for purposes of this Part, until the expiration of the period for filing the return therefor, including all extensions for such filing.

(6) "Interested distributee" means a person to whom distributions of income or principal can currently be made who has the power to remove the existing trustee and designate as successor a person who may be a "related or subordinate party" (as defined in section 672(c) of the Code) with respect to such distributee.

(7) "Interested trustee" means (i) an individual trustee to whom the net income or principal of the trust can currently be distributed or would be distributed if the trust were then to terminate and be distributed, (ii) any trustee who may be removed and replaced by an interested distributee or (iii) an individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the trust.

(8) "Total return unitrust" means an income trust which has been converted under and meets the provisions of this Part.

(9) "Trustee" means any person acting as trustee of the trust (except as otherwise expressly provided in this Part), whether acting in such person's discretion or on the direction of one or more persons acting in a fiduciary capacity.

(10) "Unitrust amount" means an amount computed as a percentage of the fair market value of the trust.

"**§ 37A-1-104.2. Conversion in trustee's discretion without court approval.**

(a) Any trustee, other than an interested trustee, or, where two or more persons are acting as trustees, a majority of the trustees who are not interested trustees (in either case hereafter "trustee"), may, in the trustees' sole discretion and without court approval, (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if:

(1) The trustee adopts a written policy for the trust providing (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income, (ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income rather than unitrust amounts, or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy.

(2) The trustee sends written notice of its intention to take such action, along with copies of such written policy and this Part, to (i) the grantor of the trust, if living, (ii) all the competent beneficiaries who are currently receiving or eligible to receive distributions of income of the trust, (iii) all the competent beneficiaries who would receive principal of the trust if the trust were to terminate at the time of the giving of such notice (without regard to the exercise of any power of appointment), and (iv) all persons acting as advisor or protector of the trust.

(3) There is at least one competent beneficiary who is currently receiving or eligible to receive distributions of income of the trust, and there is at least one competent beneficiary who would receive principal of the trust if the trust were to terminate at the time of the giving of such notice.

(4) No person receiving notice of the trustee's intention to take the proposed action of the trustee objects to such action within 60 days of receipt of such notice by written instrument delivered to the trustee.

(b) If there is no trustee of the trust other than an interested trustee, the interested trustee or, where two or more persons are acting as trustee and are interested trustees, a majority of such interested trustees may, in its sole discretion and without court approval, (i) convert an income trust to a total return unitrust, (ii) reconvert a total return

unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if:

(1) The trustee adopts a written policy for the trust providing (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income as determined under Chapter 37A of the General Statutes of North Carolina, (ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income as determined under Chapter 37A of the General Statutes of North Carolina rather than unitrust amounts, or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy.

(2) The trustee appoints a disinterested person who, in its sole discretion but acting in a fiduciary capacity, determines for the trustee (i) the percentage to be used to calculate the unitrust amount, (ii) the method to be used in determining the fair market value of the trust, and (iii) which assets, if any, are to be excluded in determining the unitrust amount.

(3) The trustee sends written notice of its intention to take such action, along with copies of such written policy and this Part, and the determinations of the disinterested person to (i) the grantor of the trust, if living, (ii) all the competent beneficiaries who are currently receiving or eligible to receive distributions of income of the trust, (iii) all the competent beneficiaries who would receive principal of the trust if the trust were to terminate at the time of the giving of such notice (without regard to the exercise of any power of appointment), and (iv) all persons acting as advisor or protector of the trust.

(4) There is at least one competent beneficiary who is currently receiving or eligible to receive distributions of income of the trust, and there is at least one competent beneficiary who would receive principal of the trust if the trust were to terminate at the time of the giving of such notice.

(5) No person receiving notice of the trustee's intention to take the proposed action of the trustee objects to such action or to the determination of the disinterested person within 60 days of receipt of such notice by written instrument delivered to the trustee, the trustee may take such action without court approval.

"**§ 37A-1-104.3. Conversion with court approval.**

(a) If any trustee desires to (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust but does not have the ability to or elects not to do it under the provisions of G.S. 36A-1-104.2, the trustee may petition the court for such order as the

trustee deems appropriate. In the event, however, there is only one trustee of such trust and such trustee is an interested trustee or in the event there are two or more trustees of such trust and a majority of them are interested trustees, the court, in its own discretion or on the petition of such trustee or trustees or any person interested in the trust, may appoint a disinterested person who, acting in a fiduciary capacity, shall present such information to the court as shall be necessary to enable the court to make its determinations under this Part.

(b) A competent beneficiary may request the trustee to (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust. If the trustee does not take the action requested, the competent beneficiary may petition the court to order the trustee to take such action.

(c) All proceedings under this section shall be conducted as provided in Article 3 of Chapter 36A of the General Statutes.

"**§ 37A-1-104.4. Determination of unitrust amount.**

(a) The fair market value of the trust shall be determined at least annually, using such valuation date as selected by the trustee in its discretion. The trustee, in its discretion, may use an average of the fair market value on the same valuation date for the current fiscal year and not more than three preceding fiscal years, if the use of such average appears desirable to reduce the impact of fluctuations in market value on the unitrust amount. Assets for which a fair market value cannot be readily ascertained shall be valued using such valuation methods as are deemed reasonable and appropriate by the trustee. Such assets may be excluded from valuation, provided all income received with respect to such assets is distributed to the extent distributable in accordance with the terms of the governing instrument.

(b) The percentage to be used in determining the unitrust amount shall be a reasonable current return from the trust, in any event not less than three percent (3%) nor more than five percent (5%), taking into account the intentions of the grantor of the trust as expressed in the governing instrument, the needs of the beneficiaries, general economic conditions, projected current earnings and appreciation for the trust, and projected inflation and its impact on the trust.

(c) In the case of a trust, (i) for which a marital deduction has been taken for federal tax purposes under section 2056 or section 2523 of the Code (during the lifetime of the spouse for whom the trust was created), or (ii) a trust to which the generation-skipping transfer tax due under section 2601 of the Code does not apply by reason of any effective date or transition rule, the unitrust amount in any taxable year shall not be less than the net income of the trust, determined without regard to the provisions of subsection (d) of this section.

(d) Following the conversion of an income trust to a total return unitrust, the trustee:

(1) Shall treat the unitrust amount as if it were net income of the trust for purposes of determining the amount available, from time to time, for distribution from the trust; and

(2) May allocate to trust income for each taxable year of the trust (or portion thereof) (i) net short-term capital gain described in section 1222(5) of the Code for such year (or portion thereof) but only to the extent that the amount so allocated together with all other amounts allocated to trust income for such year (or portion thereof) does not exceed the unitrust amount for such year (or portion thereof); and (ii) net long-term capital gain described in section 1222(7) of the Code for such year (or portion thereof) but only to the extent that the amount so allocated together with all other amounts, including amounts described in clause (i) above, allocated to trust income for such year (or portion thereof) does not exceed the unitrust amount for such year (or portion thereof).

"**§ 37A-1-104.5. Matters in trustee's discretion.**

In administering a total return unitrust, the trustee may, in its sole discretion but subject to the provisions of the governing instrument, determine:

(1) The effective date of the conversion;

(2) The timing of distributions (including provisions for prorating a distribution for a short year in which a beneficiary's right to payments commences or ceases);

(3) Whether distributions are to be made in cash or in kind or partly in cash and partly in kind;

(4) If the trust is reconverted to an income trust, the effective date of such reconversion; and

(5) Such other administrative issues as may be necessary or appropriate to carry out the purposes of this Part.

"**§ 37A-1-104.6. No effect on principal distributions.**

Conversion to a total return unitrust under the provisions of this Part shall not affect any other provision of the governing instrument, if any, regarding distributions of principal; for purposes of this Part, the distribution of a unitrust amount shall be considered a distribution of income and not of principal.

"**§ 37A-1-104.7. Marital deduction trusts.**

In the case of any trust for which a marital deduction has been taken, in whole or in part, for federal tax purposes under sections 2056 or section 2523 of the Code, the spouse otherwise entitled to receive the net income of the trust shall have the right, by written instrument delivered to the trustee, to compel for his or her lifetime (i) the conversion of the trust from an income trust to a total return unitrust, or (ii) the reconversion of the trust from a total return unitrust to an income trust, notwithstanding anything in this Part to the contrary.

"**§ 37A-1-104.8. No liability on part of trustee or disinterested person acting in good faith.**

No trustee or disinterested person who in good faith takes or fails to take any action under this Part shall be liable to any person affected by such action or inaction, regardless of whether such person received written notice as provided in this Part and regardless of whether such person was under a legal disability at the time of the delivery

of such notice. The exclusive remedy for any person affected by such action or inaction shall be to obtain an order of the court directing the trustee (i) to convert an income trust to a total return unitrust, (ii) to reconvert from a total return unitrust to an income trust, or (iii) to change the percentage used to calculate the unitrust amount.

"**§ 37A-1-104.9. Applicability.**

This Part shall apply to all trusts in existence on, or created after January 1, 2004, unless (i) the governing instrument contains a provision clearly expressing the grantor's intention that the current beneficiary or beneficiaries are to receive an amount other than a reasonable current return from the trust, (ii) the trust is a trust described in section 170(f)(2)(B), section 664(d), section 2702(a)(3) or section 2702(b) of the Code, (iii) one or more persons to whom the trustee could distribute income has a power of withdrawal over the trust that is not subject to an ascertainable standard under section 2041 or section 2514 of the Code, or the power of withdrawal can be exercised to discharge a duty of support the person possesses, or (iv) the governing instrument expressly prohibits use of this Part by specific reference to the Part.

"Part 3. Judicial Control of Discretionary Power.

"**§ 37A-1-105. Judicial control of discretionary power.**

(a) The court may not order a fiduciary to change a decision to exercise or not to exercise a discretionary power conferred by this Chapter unless it determines that the decision was an abuse of the fiduciary's discretion. A fiduciary's decision is not an abuse of discretion merely because the court would have exercised the power in a different manner or would not have exercised the power.

(b) The decisions to which subsection (a) of this section applies include:

(1) A decision under G.S. 37A-1-104(a) as to whether and to what extent an amount should be transferred from principal to income or from income to principal.

(2) A decision regarding the factors that are relevant to the trust and its beneficiaries, the extent to which the factors are relevant, and the weight, if any, to be given to those factors, in deciding whether and to what extent to exercise the discretionary power conferred by G.S. 37A-1-104(a).

(c) If the court determines that a fiduciary has abused the fiduciary's discretion, the court may place the income and remainder beneficiaries in the positions they would have occupied if the discretion had not been abused, according to the following rules:

(1) To the extent that the abuse of discretion has resulted in no distribution to a beneficiary or in a distribution that is too small, the court shall order the fiduciary to distribute from the trust to the beneficiary an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary's appropriate position.

(2) To the extent that the abuse of discretion has resulted in a distribution to a beneficiary which is too large, the court shall place the beneficiaries, the trust, or both, in whole or in part, in their appropriate positions by ordering the fiduciary to withhold an amount from one or more future distributions to the beneficiary who received the

distribution that was too large or ordering that beneficiary to return some or all of the distribution to the trust.

(3) To the extent that the court is unable, after applying subdivisions (1) and (2) of this subsection, to place the beneficiaries, the trust, or both, in the positions they would have occupied if the discretion had not been abused, the court may order the fiduciary to pay an appropriate amount from its own funds to one or more of the beneficiaries or the trust or both.

(d) Upon petition by the fiduciary, the court having jurisdiction over a trust or estate shall determine whether a proposed exercise or nonexercise by the fiduciary of a discretionary power conferred by this Chapter will result in an abuse of the fiduciary's discretion. If the petition describes the proposed exercise or nonexercise of the power and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the fiduciary relies, and an explanation of how the income and remainder beneficiaries will be affected by the proposed exercise or nonexercise of the power, a beneficiary who challenges the proposed exercise or nonexercise has the burden of establishing that it will result in an abuse of discretion.

"Article 2.

"Decedent's Estate or Terminating Income Interest.

"**§ 37A-2-201. Determination and distribution of net income.**

After a decedent dies, in the case of an estate, or after an income interest in a trust ends, the following rules apply:

(1) A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in Articles 3 through 5 which apply to trustees and the rules in subdivision (5) of this section. The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

(2) A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in Articles 3 through 5 which apply to trustees and by:

a. Including in net income all income from property used to discharge liabilities;

b. Paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction; and

c. Paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the

winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

(3) Unless the will or trust instrument otherwise provides, or the court otherwise directs, a fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright interest computed as provided in G.S. 24-1 from the date that is one year following the date of death of the person whose death gives rise to the payment of the pecuniary bequest or the happening of the contingency which causes the income interest to end, from net income determined under subdivision (2) of this section or from principal to the extent that net income is insufficient; provided, that this subdivision shall not apply to a pecuniary bequest:

a. To or for the benefit of a decedent's surviving spouse which is, or can be, qualified for the federal estate tax marital deduction; or

b. To or for the benefit of charitable organizations which are qualified for the federal estate tax charitable deduction, including a charitable remainder trust.

(4) A fiduciary shall distribute the net income remaining after distributions required by subdivision (3) of this section in the manner described in G.S. 37A-2-202 to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

(5) A fiduciary may not reduce principal or income receipts from property described in subdivision (1) of this section because of a payment described in G.S. 37A-5-501 or G.S. 37A-5-502 to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

"**§ 37A-2-202. Distribution to residuary and remainder beneficiaries.**

(a) Each beneficiary described in G.S. 37A-2-201(4) is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in undistributed

principal assets, using values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

(b) In determining a beneficiary's share of net income, the following rules apply:

(1) The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date, including assets that later may be sold to meet principal obligations.

(2) The beneficiary's fractional interest in the undistributed principal assets must be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust.

(3) The beneficiary's fractional interest in the undistributed principal assets must be calculated on the basis of the aggregate value of those assets as of the distribution date without reducing the value by any unpaid principal obligation.

(4) The distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.

(c) If a fiduciary does not distribute all of the collected but undistributed net income to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

(d) A fiduciary may apply the rules in this section, to the extent that the fiduciary considers it appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this section applies to the income from the asset.

"Article 3.

"Apportionment at Beginning and End of Income Interest.

"**§ 37A-3-301. When right to income begins and ends.**

(a) An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(b) An asset becomes subject to a trust:

(1) On the date it is transferred to the trust in the case of an asset that is transferred to a trust during the transferor's life;

(2) On the date of a testator's death in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the testator's estate; or

(3) On the date of an individual's death in the case of an asset that is transferred to a fiduciary by a third party because of the individual's death.

(c) An asset becomes subject to a successive income interest on the day after the preceding income interest ends, as determined under subsection (d) of this section, even if there is an intervening period of administration to wind up the preceding income interest.

(d) An income interest ends on the day before an income beneficiary dies or another terminating event occurs or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income.

"**§ 37A-3-302. Apportionment of receipts and disbursements when decedent dies or income interest begins.**

(a) A trustee shall allocate an income receipt or disbursement, other than one to which G.S. 37A-2-201(1) applies to principal, if its due date occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

(b) A trustee shall allocate an income receipt or disbursement to income if its due date occurs on or after the date on which a decedent dies or an income interest begins and it is a periodic due date. An income receipt or disbursement must be treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins must be allocated to principal, and the balance must be allocated to income.

(c) An item of income or an obligation is due on the date the payer is required to make a payment. If a payment date is not stated, there is no due date for the purposes of this Chapter. Distributions to shareholders or other owners from an entity to which G.S. 37A-4-401 applies are deemed to be due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration date for the distribution. A due date is periodic for receipts or disbursements that must be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes distributions at regular intervals.

"**§ 37A-3-303. Apportionment when income interest ends.**

(a) In this section, "undistributed income" means net income received before the date on which an income interest ends. The term does not include an item of income or expense that is due or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

(b) When a mandatory income interest ends, the trustee shall pay to a mandatory income beneficiary who survives that date, or to the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary's share of the undistributed income that is not disposed of under the terms of the trust unless the beneficiary has an unqualified power to revoke more than five percent (5%) of the trust immediately before the income interest ends. In the latter case, the undistributed income from the portion of the trust that may be revoked must be added to principal.

(c) When a trustee's obligation to pay a fixed annuity or a fixed fraction of the value of the trust's assets ends, the trustee shall prorate the final payment if and to the extent required by applicable law to accomplish a purpose of the trust or its settlor relating to income, gift, estate, or other tax requirements.

"Article 4.

"Allocation of Receipts During Administration of Trust.

"Part 1. Receipts From Entities.

"**§ 37A-4-401. Character of receipts.**

(a) In this section, "entity" means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a trustee has an interest other than a trust or estate to which G.S. 37A-4-402 applies, a business or activity to which G.S. 37A-4-403 applies, or an asset-backed security to which G.S. 37A-4-415 applies.

(b) Except as otherwise provided in this section, a trustee shall allocate to income money received from an entity.

(c) A trustee shall allocate the following receipts from an entity to principal:

(1) Property other than money;

(2) Money received in one distribution or a series of related distributions in exchange for part or all of a trust's interest in the entity;

(3) Money received in total or partial liquidation of the entity; and

(4) Money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

(d) Money is received in partial liquidation:

(1) To the extent that the entity, at or near the time of a distribution, indicates that it is a distribution in partial liquidation; or

(2) If the total amount of money and property received in a distribution or series of related distributions is greater than twenty percent (20%) of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt.

(e) Money is not received in partial liquidation, nor may it be taken into account under subdivision (d)(2) of this section, to the extent that it does not exceed the amount of income tax that a trustee or beneficiary must pay on taxable income of the entity that distributes the money.

(f) A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors.

"**§ 37A-4-402. Distribution from trust or estate.**

A trustee shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest and shall allocate to principal an amount received as a distribution of principal from such a trust or estate. If a trustee purchases an interest in a trust that is an investment

entity, or a decedent or donor transfers an interest in such a trust to a trustee, G.S. 37A-4-401 or G.S. 37A-4-415 applies to a receipt from the trust.

"**§ 37A-4-403. Business and other activities conducted by trustee.**

(a) If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the trust's general accounting records, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

(b) A trustee who accounts separately for a business or other activity may determine the extent to which its net cash receipts must be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the trust's general accounting records to the extent the trustee determines that the amount received is no longer required in the conduct of the business.

(c) Activities for which a trustee may maintain separate accounting records include:

(1) Retail, manufacturing, service, and other traditional business activities;
(2) Farming;
(3) Raising and selling livestock and other animals;
(4) Management of rental properties;
(5) Extraction of minerals and other natural resources;
(6) Timber operations; and
(7) Activities to which G.S. 37A-4-414 applies.

"Part 2. Receipts Not Normally Apportioned.

"**§ 37A-4-404. Principal receipts.**

A trustee shall allocate to principal:

(1) To the extent not allocated to income under this Chapter, assets received from a transferor during the transferor's lifetime, a decedent's estate, a trust with a terminating income interest, or a payer under a contract naming the trust or its trustee as beneficiary;
(2) Money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to this Article;
(3) Amounts recovered from third parties to reimburse the trust because of disbursements described in G.S. 37A-5-502(a)(7) or for other reasons to the extent not based on the loss of income;
(4) Proceeds of property taken by eminent domain, but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income;

(5) Net income received in an accounting period during which there is no beneficiary to whom a trustee may or must distribute income; and

(6) Other receipts as provided in Part 3 of this Article.

"**§ 37A-4-405. Rental property.**

To the extent that a trustee accounts for receipts from rental property pursuant to this section, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods, must be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the trustee's contractual obligations have been satisfied with respect to that amount.

"**§ 37A-4-406. Obligation to pay money.**

(a) An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, must be allocated to income without any provision for amortization of premium.

(b) A trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee more than one year after it is purchased or acquired by the trustee, including an obligation whose purchase price or value when it is acquired is less than its value at maturity. If the obligation matures within one year after it is purchased or acquired by the trustee, an amount received in excess of its purchase price or its value when acquired by the trust must be allocated to income.

(c) This section does not apply to an obligation to which G.S. 37A-4-409, 37A-4-410, 37A-4-411, 37A-4-412, 37A-4-414, or. 37A-4-415 applies.

"**§ 37A-4-407. Insurance policies and similar contracts.**

(a) Except as otherwise provided in subsection (b) of this section, a trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its trustee is named as beneficiary, including a contract that insures the trust or its trustee against loss for damage to, destruction of, or loss of title to a trust asset. The trustee shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income, and to principal if the premiums are paid from principal.

(b) A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income, or, subject to G.S. 37A-4-403, loss of profits from a business.

(c) This section does not apply to a contract to which G.S. 37A-4-409 applies.

"Part 3. Receipts Normally Apportioned.

"**§ 37A-4-408. Insubstantial allocations not required.**

If a trustee determines that an allocation between principal and income required by G.S. 37A-4-409, 37A-4-410, 37A-4-411, 37A-4-412, or 37A-4-415 is insubstantial, the trustee may allocate the entire amount to principal unless one of the circumstances described in G.S. 37A-1-104(c) applies to the allocation. This power may be exercised by a cotrustee in the circumstances described in G.S. 37A-1-104(d) and may be released

for the reasons and in the manner described in G.S. 37A-1-104(e). An allocation is presumed to be insubstantial if:

(1) The amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than ten percent (10%); or

(2) The value of the asset producing the receipt for which the allocation would be made is less than ten percent (10%) of the total value of the trust's assets at the beginning of the accounting period.

"**§ 37A-4-409. Deferred compensation, annuities, and similar payments.**

(a) In this section, "payment" means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer, including a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(b) To the extent that a payment is characterized as interest or a dividend or a payment made in lieu of interest or a dividend, a trustee shall allocate it to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(c) If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income ten percent (10%) of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection, a payment is not "required to be made" to the extent that it is made because the trustee exercises a right of withdrawal.

(d) If, to obtain an estate tax marital deduction for a trust, a trustee must allocate more of a payment to income than provided for by this section, the trustee shall allocate to income the additional amount necessary to obtain the marital deduction.

(e) This section does not apply to payments to which G.S. 37A-4-410 applies.

"**§ 37A-4-410. Liquidating asset.**

(a) In this section, "liquidating asset" means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration. The term includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of more than one year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not include a payment subject to G.S. 37A-4-409, resources subject to G.S. 37A-4-411, timber subject to G.S. 37A-4-412, an activity subject to G.S. 37A-4-414, an asset subject to G.S. 37A-4-415, or any asset for which the trustee establishes a reserve for depreciation under G.S. 37A-5-503.

(b) A trustee shall allocate to income ten percent (10%) of the receipts from a liquidating asset and the balance to principal.

"**§ 37A-4-411. Minerals, water, and other natural resources.**

(a) To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources pursuant to this section, the trustee shall allocate them as follows:

(1) If received as nominal delay rental or nominal annual rent on a lease, a receipt must be allocated to income.

(2) If received from a production payment, a receipt must be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance must be allocated to principal.

(3) If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal ninety percent (90%) must be allocated to principal and the balance to income.

(4) If an amount is received from a working interest or any other interest not provided for in subdivisions (1), (2), or (3) of this subsection, ninety percent (90%) of the net amount received must be allocated to principal and the balance to income.

(b) An amount received on account of an interest in water that is renewable must be allocated to income. If the water is not renewable, ninety percent (90%) of the amount must be allocated to principal and the balance to income.

(c) This Chapter applies whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.

(d) If a trust owns an interest in minerals, water, or other natural resources on January 1, 2004, the trustee may allocate receipts from the interest as provided in this Chapter or in the manner used by the trustee before January 1, 2004. If the trust acquires an interest in minerals, water, or other natural resources after January 1, 2004, the trustee shall allocate receipts from the interest as provided in this Chapter.

"**§ 37A-4-412. Timber.**

(a) To the extent that a trustee accounts for receipts from the sale of timber and related products pursuant to this section, the trustee shall allocate the net receipts:

(1) To income to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest;

(2) To principal to the extent that the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;

(3) To or between income and principal if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust, by determining the amount of timber removed from the land

under the lease or contract and applying the rules in subdivisions (1) and (2) of this subsection; or

(4) To principal to the extent that advance payments, bonuses, and other payments are not allocated pursuant to subdivisions (1), (2), or (3) of this subsection.

(b) In determining net receipts to be allocated pursuant to subsection (a), a trustee shall deduct and transfer to principal a reasonable amount for depletion.

(c) This Chapter applies whether or not a decedent or transferor was harvesting timber from the property before it become subject to the trust.

(d) If a trust owns an interest in timberland on January 1, 2004, the trustee may allocate net receipts from the sale of timber and related products as provided in this Chapter or in the manner used by the trustee before January 1, 2004. If the trust acquires an interest in timberland after January 1, 2004, the trustee shall allocate net receipts from the sale of timber and related products as provided in this Chapter.

"**§ 37A-4-413. Property not productive of income.**

(a) If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income under G.S. 37A-1-104 and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power conferred by G.S. 37A-1-104(a). The trustee may decide which action or combination of actions to take.

(b) In cases not governed by subsection (a) of this section, proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period.

"**§ 37A- 4-414. Derivatives and options.**

(a) In this section, "derivative" means a contract or financial instrument or a combination of contracts and financial instruments which gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

(b) To the extent that a trustee does not account under G.S. 37A-4-403 for transactions in derivatives, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions.

(c) If a trustee grants an option to buy property from the trust, whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option must be allocated to principal. An amount paid to acquire the option must be paid from principal. A gain or loss realized upon the exercise of an option, including an

option granted to a settlor of the trust for services rendered, must be allocated to principal.

"**§ 37A-4-415. Asset-backed securities.**

(a) In this section, "asset-backed security" means an asset whose value is based upon the right it gives the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. The term includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceeds other than interest or current return. The term does not include an asset to which G.S. 37A-4-401 or G.S. 37A-4-409 applies.

(b) If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee shall allocate to income the portion of the payment which the payer identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

(c) If a trust receives one or more payments in exchange for the trust's entire interest in an asset-backed security in one accounting period, the trustee shall allocate the payments to principal. If a payment is one of a series of payments that will result in the liquidation of the trust's interest in the security over more than one accounting period, the trustee shall allocate ten percent(10%) of the payment to income and the balance to principal.

"Article 5.

"Allocation of Disbursements During Administration of Trust.

"**§ 37A-5-501. Disbursements from income.**

A trustee shall make the following disbursements from income to the extent that they are not disbursements to which G.S. 37A-2-201(2)b. or c. applies:

(1) One-half of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee;

(2) One-half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests;

(3) All of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest; and

(4) Recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

"**§ 37A-5-502. Disbursements from principal.**

(a) A trustee shall make the following disbursements from principal:

(1) The remaining one-half of the disbursements described in G.S. 37A-5-501(1) and (2);

(2) All of the trustee's compensation calculated on principal as a fee for acceptance, distribution, or termination, and disbursements made to prepare property for sale;

(3) Payments on the principal of a trust debt;

(4) Expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property;

(5) Premiums paid on a policy of insurance not described in G.S. 37A-5-501(4) of which the trust is the owner and beneficiary;

(6) Estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust; and

(7) Disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common-law claims by third parties, and defending claims based on environmental matters.

(b) If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

"**§ 37A-5-503. Transfers from income to principal for depreciation.**

(a) In this section, "depreciation" means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one year.

(b) A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

(1) Of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

(2) During the administration of a decedent's estate; or

(3) Under this section if the trustee is accounting under G.S. 37A-4-403 for the business or activity in which the asset is used.

(c) An amount transferred to principal need not be held as a separate fund.

"**§ 37A-5-504. Transfers from income to reimburse principal.**

(a) If a trustee makes or expects to make a principal disbursement described in this section, the trustee may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.

(b) Principal disbursements to which subsection (a) of this section applies include the following, but only to the extent that the trustee has not been and does not expect to be reimbursed by a third party:

(1) An amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs;

(2) A capital improvement to a principal asset, whether in the form of changes to an existing asset or the construction of a new asset, including special assessments;

(3) Disbursements made to prepare property for rental, including tenant allowances, leasehold improvements, and broker's commissions;

(4) Periodic payments on an obligation secured by a principal asset to the extent that the amount transferred from income to principal for depreciation is less than the periodic payments; and

(5) Disbursements described in G.S. 37A-5-502(a)(7).

(c) If the asset whose ownership gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a trustee may continue to transfer amounts from income to principal as provided in subsection (a) of this section.

"**§ 37A-5-505. Income taxes.**

(a) A tax required to be paid by a trustee based on receipts allocated to income must be paid from income.

(b) A tax required to be paid by a trustee based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

(c) A tax required to be paid by a trustee on the trust's share of an entity's taxable income must be paid proportionately:

(1) From income to the extent that receipts from the entity are allocated to income; and

(2) From principal to the extent that:

a. Receipts from the entity are allocated to principal; and

b. The trust's share of the entity's taxable income exceeds the total receipts described in subdivision (1) and sub-subdivision (2)a. of this subsection.

(d) For purposes of this section, receipts allocated to principal or income must be reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax.

"**§ 37A-5-506. Adjustments between principal and income because of taxes.**

(a) A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries which arise from:

(1) Elections and decisions, other than those described in subsection (b) of this section, that the fiduciary makes from time to time regarding tax matters;

(2) An income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust; or

(3) The ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate, trust, or a beneficiary.

(b) If the amount of an estate tax marital deduction or charitable contribution deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate tax purposes, and as a result estate taxes paid from principal are increased and income taxes paid by an estate, trust, or beneficiary are decreased, each estate, trust, or beneficiary that benefits from the decrease in income tax shall reimburse the principal from which the increase in estate tax is paid. The total reimbursement must equal the increase in the estate tax to the extent that the principal used to pay the increase would have qualified for a marital deduction or charitable contribution deduction but for the payment. The proportionate share of the reimbursement for each estate, trust, or beneficiary whose income taxes are reduced must be the same as its proportionate share of the total decrease in income tax. An estate or trust shall reimburse principal from income.

"Article 6.

"Miscellaneous Provisions.

"**§ 37-A-6-601. Uniformity of Application and Construction.**

In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

"**§ 37-A-6-602. Severability Clause.**

If any provision of this Chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are severable."

SECTION 2. Chapter 37 of the General Statutes is repealed.

SECTION 3. This act becomes effective January 1, 2004, and applies to every trust or decedent's estate existing on that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A, as enacted in this act.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

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SENATE BILL 424

Short Title:	Tuition Waiver Technical Correction.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 17, 2003

A BILL TO BE ENTITLED

AN ACT TO MAKE TECHNICAL CORRECTIONS IN A 1997 LAW CONCERNING TUITION WAIVERS, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. It is the intent of this act to codify the provisions of Section 6 of S.L. 1997-505, which stated that law became effective October 1, 1997, and applies to deaths or disabilities occurring on or after that date.

SECTION 2. G.S. 115B-2 reads as rewritten:

"**§ 115B-2. Tuition waiver authorized.**

State-supported institutions of higher education, community colleges, industrial education centers and technical institutes, shall permit the following persons to attend classes for credit or noncredit purposes without the required payment of tuition; provided, however, that such persons meet admission and other standards deemed appropriate by the educational institution, and provided further that such persons shall be accepted by the constituent institutions of the University of North Carolina only on a spaces-available basis:

(1) Legal residents of North Carolina who have attained the age of 65.

(2) Any person who is the survivor of a law enforcement officer, firefighter, volunteer firefighter, or rescue squad worker killed on or after October 1, 1997, as a direct result of a traumatic injury sustained in the line of duty.

(3) The spouse of a law enforcement officer, firefighter, volunteer firefighter, or rescue squad worker who ~~is~~ becomes permanently and totally disabled on or after October 1, 1997, as a direct result of a traumatic injury sustained in the line of duty.

(4) Any child, if the child is at least 17 years old but not yet 23 years old, whose parent is a law enforcement officer, firefighter, volunteer firefighter, or rescue squad worker who ~~is~~ becomes permanently and

totally disabled on or after October 1, 1997, as a direct result of a traumatic injury sustained in the line of duty. However, a child's eligibility for a waiver of tuition under this Chapter shall not exceed: (i) 48 months, if the child is seeking a baccalaureate degree, or (ii) if the child is not seeking a baccalaureate degree, the number of months required to complete the educational program to which the child is applying."

SECTION 3. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

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SENATE BILL 424
PROPOSED COMMITTEE SUBSTITUTE S424-CSRC-22 [v.1]

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Short Title: Tuition Waiver Technical Correction. (Public)

Sponsors:

Referred to:

March 17, 2003

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(1) Legal residents of North Carolina who have attained the age of 65.

(2) Any person who is the survivor of a law enforcement officer, firefighter, volunteer firefighter, or rescue squad worker killed on or after October 1, 1997, as a direct result of a traumatic injury sustained in the line of duty.

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firefighter, or rescue squad worker who ~~is~~ becomes permanently and totally disabled on or after October 1, 1997, as a direct result of a traumatic injury sustained in the line of duty. However, a child's eligibility for a waiver of tuition under this Chapter shall not exceed: (i) 48 months, if the child is seeking a baccalaureate degree, or (ii) if the child is not seeking a baccalaureate degree, the number of months required to complete the educational program to which the child is applying."

SECTION 3. G.S. 115B-5(b) reads as rewritten:

"(b) The officials of the institutions charged with administration of this Chapter shall require the following proof to insure that a person applying to the institution and who requests a tuition waiver under G.S. 115B-2(2), (3), or (4) is eligible for the benefits provided by this Chapter.

(1) The parent-child relationship shall be verified by a birth certificate, legal adoption papers, or other documentary evidence deemed appropriate by the institution.

(2) The marital relationship shall be verified by a marriage certificate or other documentary evidence deemed appropriate by the institution.

(3) The cause and date of death of the law enforcement officer, firefighter, volunteer firefighter, or rescue squad worker shall be verified by certification from the records of the Department of State Treasurer, the appropriate city or county law enforcement agency that employed the deceased, the administrative agency for the fire department or fire protection district recognized for funding under the Department of State Auditor, or the administrative agency having jurisdiction over any paid firefighters of all counties and cities.

(4) The permanent and total disability and the date the disability occurred shall be verified by documentation deemed necessary by the institution from the North Carolina Industrial Commission."

SECTION 4. This act is effective when it becomes law.

SENATE BILL 424:
Tuition Waiver Technical Correction

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Hartsell
Date:	April 12, 2003	**Summary by:**	Kory J. Goldsmith
Version:	Proposed Committee Substitute S424-CSRC-22[v.1]		Committee Counsel

SUMMARY: ***HB424 codifies language that previously appeared in the effective date of legislation adopted in 1997. Codifying the language does not change the effect of the current law. It does make it easier to read the statutes and understand who is eligible to receive certain tuition waivers.***

CURRENT LAW: Chapter 115B allows tuition waivers for

- legal residents of North Carolina who are 65 years old and older, and
- the spouses and children of law enforcement officers, firefighters and volunteer firefighters who are killed or permanently and totally disabled in the line of duty, or die of a service-connected disability, if the death or disability occurred on or after October 1, 1997.

The tuition waivers apply at all State-supported institutions of higher education, community colleges, industrial education centers and technical institutes.

BILL ANALYSIS: SB 242 codifies (places in the body of the statute) the eligibility criteria, that the death or disability must have occurred on or after October 1, 1997, for receiving the tuition waiver. The original bill placed this language in the effective date that is not codified.

The Proposed Committee Substitute makes clarifying changes to the statutory provision regarding proof of the date of death and date of disability.

The act is effective when it becomes law.

S424-SMRC-001

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 468

Short Title:	Clarify Irrevocable Trust Law.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 20, 2003

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THE LAW GOVERNING THE MODIFICATION AND TERMINATION OF IRREVOCABLE TRUSTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 36A-125.4(b) reads as rewritten:

"(b) Where the beneficiaries of an irrevocable trust seek to compel a termination of the trust ~~or modify it in a manner that affects its continuance according to its terms,~~ and ~~if~~ the continuance of the trust is necessary to carry out a material purpose of the trust, or where the beneficiaries seek to compel a modification of the trust in a manner that is inconsistent with its material purpose, the trust cannot be modified or terminated unless the court in its discretion determines that the reason for modifying or terminating the trust under the circumstances substantially outweighs the interest in accomplishing a material purpose of the trust."

SECTION 2. G.S. 36A-125.11 reads as rewritten:

"**§ 36A-125.11. Procedure.**

(a) A proceeding under this Article may be brought under the Uniform Declaratory Judgment Act, Article 26 of Chapter 1 of the General Statutes, the provisions of which shall apply to that proceeding to the extent not inconsistent with this Article.

(b) A proceeding under this Article to approve or disapprove a proposed modification or termination under the provisions of G.S. 36A-125.3, 36A-125.4, 36A-125.6(a), and 36A-125.7 may be commenced by a trustee or beneficiary. The trustee shall be a necessary party to all proceedings under this Article commenced by a beneficiary."

SECTION 3. This act is effective when it becomes law.

SENATE BILL 563

Short Title:	Uniform Athlete Agents Act.	(Public)
Sponsors:	Senator Hagan.	
Referred to:	Judiciary II.	

March 27, 2003

A BILL TO BE ENTITLED

AN ACT TO REPEAL THE LAWS REGULATING ATHLETE AGENTS AND TO ADOPT THE UNIFORM ATHLETE AGENTS ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 8 of Chapter 78C of the General Statutes is repealed.

SECTION 2. Chapter 78C of the General Statutes is amended by adding a new Article to read:

"Article 8A.

"Uniform Athlete Agents Act.

"**§ 78C-85. Title.**

This Article may be cited as the 'Uniform Athlete Agents Act'.

"**§ 78C-86. Definitions.**

The following definitions apply in this Article:

(1) Agency contract. – An agreement in which a student-athlete authorizes a person to negotiate or solicit on behalf of the student-athlete a professional-sports-services contract or an endorsement contract.

(2) Athlete agent. – An individual who enters into an agency contract with a student-athlete or, directly or indirectly, recruits or solicits a student-athlete to enter into an agency contract. The term includes an individual who represents to the public that the individual is an athlete agent. The term does not include a spouse, parent, sibling, or guardian of the student-athlete or an individual acting solely on behalf of a professional sports team or professional sports organization.

(3) Athletic director. – An individual responsible for administering the overall athletic program of an educational institution or, if an educational institution has separately administered athletic programs for male students and female students, the athletic program for males or the athletic program for females, as appropriate.

(4) Contact. – A communication, direct or indirect, between an athlete agent and a student-athlete to recruit or solicit the student-athlete to enter into an agency contract.

(5) Endorsement contract. – An agreement under which a student-athlete is employed or receives consideration to use on behalf of the other party any value that the student-athlete may have because of publicity, reputation, following, or fame obtained because of athletic ability or performance.

(6) Intercollegiate sport. – A sport played at the collegiate level for which eligibility requirements for participation by a student-athlete are established by a national association for the promotion or regulation of collegiate athletics.

(7) Person. – An individual, company, corporation, partnership, association, or any other legal or commercial entity.

(8) Professional-sports-services contract. – An agreement under which an individual is employed or agrees to render services as a player on a professional sports team, with a professional sports organization, or as a professional athlete.

(9) Record. – Information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(10) Registration. – A certificate issued by the Secretary of State evidencing that a person has satisfied the requirements of an athlete agent pursuant to this Article.

(11) Student-athlete. – An individual who engages in, is eligible to engage in, or may be eligible in the future to engage in any intercollegiate sport. If an individual is permanently ineligible to participate in a particular intercollegiate sport, the individual is not a student-athlete for purposes of that sport.

"**§ 78C-87. Service of process; subpoenas.**

(a) By acting as an athlete agent in this State, a nonresident individual appoints the Secretary of State as the individual's agent for service of process in any civil action in this State related to the individual's acting as an athlete agent in this State.

(b) The Secretary of State may issue subpoenas for any material that is relevant to the administration of this Article.

"**§ 78C-88. Athlete agents; registration required; void contracts.**

(a) Except as otherwise provided in subsection (b) of this section, an individual may not act as an athlete agent in this State without holding a certificate of registration under G.S. 78C-90 or G.S. 78C-92.

(b) Before being issued a certificate of registration, an individual may act as an athlete agent in this State for all purposes except signing an agency contract if: (i) a student-athlete or another person acting on behalf of the student-athlete initiates communication with the individual; and (ii) within seven days after an initial act as an

athlete agent, the individual submits an application for registration as an athlete agent in this State.

(c) An agency contract resulting from conduct in violation of this section is void, and the athlete agent shall return any consideration received under the contract.

"**§ 78C-89. Registration as athlete agent; form; requirements.**

(a) An individual seeking registration as an athlete agent shall submit an application for registration to the Secretary of State in a form prescribed by the Secretary of State. The application must be in the name of an individual and, except as otherwise provided in subsection (b) of this section, signed or otherwise authenticated by the applicant under penalty of perjury and must state or contain the following:

(1) The name of the applicant and the address of the applicant's principal place of business.

(2) The name of the applicant's business or employer, if applicable.

(3) Any business or occupation engaged in by the applicant for the five years immediately preceding the date of submission of the application.

(4) A description of the applicant's:

a. Formal training as an athlete agent.

b. Practical experience as an athlete agent.

c. Educational background relating to the applicant's activities as an athlete agent.

(5) The names and addresses of three individuals not related to the applicant who are willing to serve as references.

(6) The name, sport, and last known team for each individual for whom the applicant acted as an athlete agent during the five years immediately preceding the date of submission of the application.

(7) The names and addresses of all persons who are:

a. With respect to the athlete agent's business if it is not a corporation, the partners, members, officers, managers, associates, or profit-sharers of the business.

b. With respect to a corporation employing the athlete agent, the officers, directors, and any shareholder of the corporation having an interest of five percent (5%) or greater.

(8) Whether the applicant or any person named under subdivision (7) of this section has been convicted of a crime that, if committed in this State, would be a crime involving moral turpitude or a felony and identify the crime.

(9) Whether there has been any administrative or judicial determination that the applicant or any person named under subdivision (7) of this section has made a false, misleading, deceptive, or fraudulent representation.

(10) Any instance in which the conduct of the applicant or any person named under subdivision (7) of this section resulted in the imposition of a sanction, suspension, or declaration of ineligibility to participate

in an interscholastic or intercollegiate athletic event on a student-athlete or educational institution.

(11) Any sanction, suspension, or disciplinary action taken against the applicant or any person named under subdivision (7) of this section arising out of occupational or professional conduct.

(12) Whether there has been any denial of an application for, suspension or revocation of, or refusal to renew the registration or licensure of the applicant or any person named under subdivision (7) of this section as an athlete agent in any state.

(b) An individual who has submitted an application for registration or licensure as an athlete agent in another state or who holds a certificate of registration or licensure as an athlete agent in another state may submit a copy of the application and certificate in lieu of submitting an application in the form prescribed pursuant to subsection (a) of this section. The Secretary of State shall accept the application and the certificate from the other state as an application for registration in this State if the application to the other state satisfied all of the following criteria:

(1) Was submitted in the other state within six months immediately preceding the submission of the application in this State and the applicant certifies that the information contained in the application is current.

(2) Contains information substantially similar to or more comprehensive than that required in an application submitted in this State.

(3) Was signed by the applicant under penalty of perjury.

(c) An application filed under this section is a 'public record' within the meaning of Chapter 132 of the General Statutes.

"**§ 78C-90. Certificate of registration; issuance or denial; renewal.**

(a) Except as otherwise provided in subsection (b) of this section, the Secretary of State shall issue a certificate of registration to an individual who complies with G.S. 78C-89(a) or whose application has been accepted under G.S. 78C-89(b).

(b) The Secretary of State may refuse to issue a certificate of registration if the Secretary of State determines that the applicant has engaged in conduct that has a significant adverse effect on the applicant's fitness to act as an athlete agent. In making the determination, the Secretary of State may consider whether the applicant has:

(1) Been convicted of a crime that, if committed in this State, would be a crime involving moral turpitude or a felony.

(2) Made a materially false, misleading, deceptive, or fraudulent representation in the application or as an athlete agent.

(3) Engaged in conduct that would disqualify the applicant from serving in a fiduciary capacity.

(4) Engaged in conduct prohibited by G.S. 78C-98.

(5) Had a registration or licensure as an athlete agent suspended, revoked, or denied or been refused renewal of registration or licensure as an athlete agent in any state.

(6) Engaged in conduct the consequence of which was that a sanction, suspension, or declaration of ineligibility to participate in an interscholastic or intercollegiate athletic event was imposed on a student-athlete or educational institution.

(7) Engaged in conduct that significantly adversely reflects on the applicant's credibility, honesty, or integrity.

(c) In making a determination under subsection (b) of this section, the Secretary of State shall consider: (i) how recently the conduct occurred; (ii) the nature of the conduct and the context in which it occurred; and (iii) any other relevant conduct of the applicant.

(d) An athlete agent may apply to renew a registration by submitting an application for renewal in a form prescribed by the Secretary of State. The application for renewal must be signed by the applicant under penalty of perjury and must contain current information on all matters required in an original registration.

(e) An individual who has submitted an application for renewal of registration or licensure in another state, in lieu of submitting an application for renewal in the form prescribed pursuant to subsection (d) of this section, may file a copy of the application for renewal and a valid certificate of registration or licensure from the other state. The Secretary of State shall accept the application for renewal from the other state as an application for renewal in this State if the application to the other state satisfied the following:

(1) Was submitted in the other state within six months immediately preceding the filing in this State and the applicant certifies the information contained in the application for renewal is current.

(2) Contains information substantially similar to or more comprehensive than that required in an application for renewal submitted in this State.

(3) Was signed by the applicant under penalty of perjury.

(f) A certificate of registration or a renewal of a registration is valid for two years.

(g) An application filed under this section is a 'public record' within the meaning of Chapter 132 of the General Statutes.

"**§ 78C-91. Suspension; revocation; refusal to renew registration.**

(a) The Secretary of State may suspend, revoke, or refuse to renew a registration for conduct that would have justified denial of registration under G.S. 78C-90(b).

(b) The Secretary of State may deny, suspend, revoke, or refuse to renew a certificate of registration or licensure only after proper notice and an opportunity for a hearing in accordance with the Administrative Procedures Act pursuant to Article 3 of Chapter 150B of the General Statutes.

"**§ 78C-92. Temporary registration.**

The Secretary of State may issue a temporary certificate of registration while an application for registration or renewal of registration is pending.

"**§ 78C-93. Registration; renewal of fees.**

An application for registration or renewal of registration must be accompanied by a fee in the following amount:

(1) Application for registration.....$200.00
(2) Application for registration based upon a certificate of registration or licensure issued by another state.....200.00
(3) Application for renewal of registration.....200.00
(4) Application for renewal of registration based upon an application for renewal of registration or licensure submitted in another state...200.00.

"**§ 78C-94. Required form of contract.**

(a) An agency contract must be in a record, signed or otherwise authenticated by the parties.

(b) An agency contract must state or contain the following:

(1) The amount and method of calculating the consideration to be paid by the student-athlete for services to be provided by the athlete agent under the contract and any other consideration the athlete agent has received or will receive from any other source for entering into the contract or for providing the services.

(2) The name of any person not listed in the application for registration or renewal of registration who will be compensated because the student-athlete signed the agency contract.

(3) A description of any expenses that the student-athlete agrees to reimburse.

(4) A description of the services to be provided to the student-athlete.

(5) The duration of the contract.

(6) The date of execution.

(c) An agency contract must contain, in close proximity to the signature of the student-athlete, a conspicuous notice in boldface type in capital letters stating:

WARNING TO STUDENT-ATHLETE

IF YOU SIGN THIS CONTRACT:

(1) YOU MAY LOSE YOUR ELIGIBILITY TO COMPETE AS A STUDENT-ATHLETE IN YOUR SPORT;

(2) IF YOU HAVE AN ATHLETIC DIRECTOR, WITHIN 72 HOURS AFTER ENTERING INTO THIS CONTRACT, BOTH YOU AND YOUR ATHLETE AGENT MUST NOTIFY YOUR ATHLETIC DIRECTOR; AND

(3) YOU MAY CANCEL THIS CONTRACT WITHIN 14 DAYS AFTER SIGNING IT. CANCELLATION OF THIS CONTRACT MAY NOT REINSTATE YOUR ELIGIBILITY.

(d) An agency contract that does not conform to this section is voidable by the student-athlete. If a student-athlete voids an agency contract, the student-athlete is not required to pay any consideration under the contract or to return any consideration received from the athlete agent to induce the student-athlete to enter into the contract.

(e) The athlete agent shall give a record of the signed or otherwise authenticated agency contract to the student-athlete at the time of execution.

"**§ 78C-95. Notice to educational institution.**

(a) Within 72 hours after entering into an agency contract or before the next scheduled athletic event in which the student-athlete may participate, whichever occurs

first, the athlete agent shall give notice in a record of the existence of the contract to the athletic director of the educational institution at which the student-athlete is enrolled or the athlete agent has reasonable grounds to believe the student-athlete intends to enroll.

(b) Within 72 hours after entering into an agency contract or before the next athletic event in which the student-athlete may participate, whichever occurs first, the student-athlete shall inform the athletic director of the educational institution at which the student-athlete is enrolled that he or she has entered into an agency contract.

"**§ 78C-96. Student-athlete's right to cancel.**

(a) A student-athlete may cancel an agency contract by giving notice of the cancellation to the athlete agent in a record within 14 days after the contract is signed.

(b) A student-athlete may not waive the right to cancel an agency contract.

(c) If a student-athlete cancels an agency contract, the student-athlete is not required to pay any consideration under the contract or to return any consideration received from the athlete agent to induce the student-athlete to enter into the contract.

"**§ 78C-97. Required records.**

(a) An athlete agent shall retain the following records for a period of five years:

(1) The name and address of each individual represented by the athlete agent.

(2) Any agency contract entered into by the athlete agent.

(3) Any direct costs incurred by the athlete agent in the recruitment or solicitation of a student-athlete to enter into an agency contract.

(b) Records required to be retained by subsection (a) of this section are open to inspection by the Secretary of State during normal business hours.

"**§ 78C-98. Prohibited conduct.**

(a) An athlete agent, with the intent to induce a student-athlete to enter into an agency contract, shall not:

(1) Give any materially false or misleading information or make a materially false promise or representation.

(2) Furnish anything of value to a student-athlete before the student-athlete enters into the agency contract.

(3) Furnish anything of value to any individual other than the student-athlete or another registered athlete agent.

(b) An athlete agent shall not intentionally:

(1) Initiate contact with a student-athlete unless the athlete agent is registered under this Article.

(2) Refuse or fail to retain or permit inspection of the records required to be retained by G.S. 78C-97.

(3) Fail to register as required by G.S. 78C-88.

(4) Provide materially false or misleading information in an application for registration or renewal of registration.

(5) Predate or postdate an agency contract.

(6) Fail to notify a student-athlete before the student-athlete signs or otherwise authenticates an agency contract for a particular sport that

the signing or authentication may make the student-athlete ineligible to participate as a student-athlete in that sport.

"**§ 78C-99. Criminal penalties.**

An athlete agent who violates any provision under G.S. 78C-98 is guilty of a Class I felony.

"**§ 78C-100. Civil remedies.**

(a) An educational institution has a right of action against an athlete agent or a former student-athlete for damages caused by a violation of this Article. In an action under this section, the court may award costs and reasonable attorneys' fees to the prevailing party.

(b) Damages suffered by an educational institution under subsection (a) of this section include losses and expenses incurred because, as a result of the conduct of an athlete agent or former student-athlete, the educational institution was injured by a violation of this Article or was penalized, disqualified, or suspended from participation in athletics by: (i) a national association for the promotion and regulation of athletics; (ii) an athletic conference; or (iii) reasonable self-imposed disciplinary action taken to mitigate sanctions likely to be imposed by an athletic organization.

(c) A right of action under this section does not accrue until the educational institution discovers, or by the exercise of reasonable diligence would have discovered, the violation by the athlete agent or former student-athlete.

(d) Any liability of the athlete agent or the former student-athlete under this section is several and not joint.

(e) This Article does not restrict rights, remedies, or defenses of any person under law or equity.

"**§ 78C-101. Administrative penalty.**

The Secretary of State may assess a civil penalty against an athlete agent not to exceed twenty-five thousand dollars ($25,000) for a violation of this Article.

"**§ 78C-102. Uniformity of application and construction.**

In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

"**§ 78C-103. Electronic Signatures in Global and National Commerce Act.**

The provisions of this Article governing the legal effect, validity, or enforceability of electronic records or signatures, and of contracts formed or performed with the use of those records or signatures, conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (2000), and supersede, modify, and limit the Electronic Signatures in Global and National Commerce Act.

"**§ 78C-104. Severability.**

If any provision of this Article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are severable.

"**§ 78C-105. Rules.**

The Secretary of State may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out the provisions of this Article."

SECTION 2. This act is effective when it becomes law.

SENATE BILL 563:
Uniform Athlete Agents Act

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Hagan
Date:	April 12, 2003	**Summary by:**	Kory J. Goldsmith
Version:	1st Edition		Committee Counsel

SUMMARY: ***SB563 repeals Article 8 of Chapter 78C, Regulation of Athlete Agents and replaces it with Article 8A, Uniform Athlete Agents Act. This bill comes at the request of the North Carolina Bar Association.***

CURRENT LAW: Article 8 of Chapter 78C regulates the relationships between athletic agents and student athletes.

Definitions: An athlete ("student athlete") is a person who seeks to be employed as a professional athlete and is enrolled in a North Carolina high school or has been admitted to an institution of higher education in North Carolina. An agent is a person who, for remuneration, solicits a student athlete to represent the athlete in either an agent contract or a financial services contract. An agent contract authorizes the agent to receive compensation in exchange for attempting to obtain employment for the student athlete with a professional sports team. A financial services contract is an agreement between the parties that allows the agent to make financial and investment decisions for a student athlete. An agent must post a bond of $100,000 with the Secretary of State when the agent enters into a financial services contract with an athlete.

Registration with Secretary of State: Athletic agents must register with the Secretary of State **before** the agent has any contact with a student athlete. The agent must provide its principal place of business, the agent's occupation for the last 5 years, the names and addresses of any financially interested partners or profit sharers, and if requested by the Secretary, five professional references. The registration fee is $200 and is good for one year. A North Carolina licensed and resident attorney is not required to register if the attorney does not advertise directly or solicit student athletes and does not represent more than 2 student athletes. The Secretary of State may suspend, revoke or deny a certificate of registration of an agent who fails to comply with Article 8, and may investigate any suspected violations.

Content of Contracts: Contracts with student athletes must contain a notice that the agent is registered with the Secretary of State, that the student athlete should read the contract before signing it and should not sign the contract if it contains blank spaces, and that the student athlete may cancel the contract within 16 days of signing it. The agent must file a memorandum of contract with the Secretary and the student athlete's high school principal or the athletic director of the student's college within 5 days of the signing of a contract.

Prohibited Acts: An agent may not make any false, fraudulent or misleading statements. An agent may not have an agreement to provide anything of value to any employee of the student athlete's high school or college in return for the referral of any clients to the agent. The agent may not offer anything of value to induce a student athlete to enter into a contract, EXCEPT the agent may expend "reasonable entertainment expenses and transportation expenses" to and from the agent's place of business. An agent may not contact the student athlete until after the completion of the athlete's last high school or intercollegiate contest, including post-season games.

Criminal and Civil Penalties: It is a Class I Felony to fail to register with the Secretary of State or to engage in any of the prohibited acts listed above. Contracts with agents who do not comply with the law are voidable at the discretion of the injured party. The Secretary of State may impose a civil penalty of between $2500 and $25,000 for willful violations.

BILL ANALYSIS: SB563 differs from current law as follows:

- Contains revised and additional definitions but generally does not expand or contract the scope of who is covered.
- Appoints the Secretary of State as the individual's agent for service of process for non-resident athlete agents.
- Requires more specific registration information, including information regarding the agent's expertise, prior felony convictions or convictions for crimes of moral turpitude.
- The registration application must contain a sworn statement that the information is true under penalty of perjury.
- No bonding requirements.
- Creates reciprocity of registration and renewal if the applicant has applied within the last 6 months in another state that has similar registration requirements.
- Makes registration good for 2 years instead of 1 year.
- Shortens the contract cancellation period from 16 days to 14 days.
- Contract warning language no longer warns the student to read the contract before signing it, but does includes a notice that by signing the contract, the student may lose eligibility to compete as a student athlete in their sport.
- The right of cancellation may not be waived.
- Requires the agent and athlete to notify the student's athletic director within 72 hours of signing a contract.
- Makes it a Class I felony for the agent to:
    - furnish anything of value to the student athlete prior to signing a contract if it is furnished with the intent to induce the student to sign the contract
    - furnish anything of value to anyone who isn't the student athlete or another agent if it is furnished with the intent to induce the student to sign the contract.
- Creates a civil cause of action by the high school or college against the agent or student athlete for damages caused by a violation of the law.

BACKGROUND: In 2000, at least 28 states had adopted laws regulating athlete or sports agents. Although most states required registration, the laws differed in other manners. In the late 1990s, the NCAA and several universities asked the National Conference of Commissioners on Uniform Laws (Conference) to draft a uniform law.

The act is effective when it becomes law.

S563-SMRC-001

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. 1

H. B. No. _____ DATE _____

S. B. No. 563 Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE _____

Rep.)
) Hagan
Sen.)

1 moves to amend the bill on page 8, line 4
2 ( ) WHICH CHANGES THE TITLE
3 by ~~inserting after the~~ deleting the
4 phrase "G.S. 78C-98" and substituting
5 "G.S. 78C-98(a)(1) or G.S. 78C-98(6)".
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SIGNED K. L. Hagan

ADOPTED _____ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 563

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S563-ARC-11 [v.2]

Date _____,2003

Comm. Sub. [NO]
Amends Title [NO]
First Edition

Senator Hagan

moves to amend the bill on page 5, line 28-29 by substituting the phrase "one year." For the phrase "two years.";

and on page 9, line 3, but rewriting Section 2 to read:

"**SECTION 2.** G.S. 78C-99 becomes effective December 1, 2003 and applies to acts committed on and after that date. The rest of the act is effective when it becomes law.".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 471

Short Title:	Amend Self-Insurance Guaranty Assoc. Laws.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 20, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAWS GOVERNING THE SELF-INSURANCE GUARANTY ASSOCIATION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 97-133(a)(2) reads as rewritten:

"(2) Assess each member of the Association as follows:

a. Each individual member self-insurer shall be annually assessed an amount equal to ~~one-quarter of one percent (0.25%)~~ two percent (2%) of the annual gross premiums, as determined under G.S. 105-228.5(b), (b1), and (c), that would have been paid by that member self-insurer for workers' compensation insurance during the prior calendar year; and payment to the Association shall be made no later than ~~September 15~~ May 15 following the close of that calendar year. Where any such assessment is paid based in whole or in part upon estimates of annual gross premiums for the prior calendar year, there shall be made in the next year's assessment an adjustment of the assessment of such prior year based on actual audited annual gross premiums. Each group member self-insurer shall be annually assessed an amount equal to ~~one-quarter of one percent (0.25%)~~ two percent (2%) of the annual gross premiums, as determined under G.S. 105-228.5(b), (b1), and (c), of the group member self-insurer during the prior calendar year; and payment to the Association shall be made no later than ~~September 15~~ May 15 following the close of that calendar year. Regardless of the size of the Fund, during its first 12 months of membership, no member self-insurer may discount or reduce this ~~one-quarter of one percent (0.25%) assessment. Assessments paid by members pursuant to this subdivision shall~~

~~be credited toward the tax paid by self-insurers under Article 8B of Chapter 105 of the General Statutes.~~ two percent (2%) assessment. For the purpose of making the assessments authorized by this subsection and subsections (c) and (d) of this section, the Secretary of Revenue shall provide to the Association the self-insurer premium and payroll information as determined under G.S. 105-228.5(b), (b1) and (c), and the Commissioner shall provide to the Association the group self-insurer premium information reported to the Commissioner under G.S. 58-47-75 and G.S. 58-2-165.

b. Each member self-insurer shall be notified of the assessment no later than 30 days before it is due.

c. If a self-insurer is a member of the Association for less than a full calendar year, the annual gross premiums shall be adjusted by that portion of the year the self-insurer is not a member of the Association.

d. If application of the contribution rates referenced in sub-subdivision a. of this subdivision would produce an amount in excess of the five million dollar ($5,000,000) limits of the fund, an equitable proration may be made; provided that every self-insurer that becomes a member of the Association shall pay an initial assessment, in an amount established by the Board, regardless of the size of the fund at the time the member joins the Association."

SECTION 2. G.S. 97-133(a)(4) reads as rewritten:

"(4) Be obligated to the extent of covered claims occurring prior to the determination of the member self-insurer's insolvency, or occurring after such determination but prior to the obtaining by the self-insurer of workers' compensation insurance as otherwise required under this Chapter. ~~The Association shall pay claims against a self-insurer that are not or have not been paid as a result of a determination of insolvency or the institution of bankruptcy or receivership proceedings that occurred prior to the effective date of this Article.~~"

SECTION 3. G.S. 97-185 reads as rewritten:

"**§ 97-185. ~~Deposits or surety bond.~~Deposits; surety bonds; letters of credit.**

(a) Every self-insurer shall deposit with the Commissioner an amount equal to ~~twenty-five percent (25%)~~ fifty percent (50%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer.

~~(b) A self-insurer organized and authorized before the effective date of this section shall have 24 months from the effective date of this section to comply with this section.~~

(c) Deposits received, changes to existing deposits, or deposits exchanged after the effective date of this section, shall comprise one or more of the following:

(1) Interest-bearing bonds of the United States of America.

(2) Interest-bearing bonds of the State of North Carolina, or of its cities or counties.

(3) Certificates of deposit issued by any solvent bank domesticated in the State of North Carolina that have a maturity of one year or greater.

(4) Surety bonds in a form acceptable to the Commissioner and issued by a corporate surety. A surety bond deposited pursuant to this subsection shall require that the surety reimburse the Commissioner, or his successors, assigns, or transferees, from the proceeds of the surety bond, for any costs incurred in the collection of the proceeds of the surety bond, including reasonable attorneys' fees, and any costs incurred in administering the workers' compensation claims against the insolvent self-insurer that deposited the surety bond.

(4a) Irrevocable letters of credit in a form acceptable to the Commissioner issued by a bank acceptable to the Commissioner.

(5) Any other investments that are approved by the Commissioner.

(d) All bonds or securities that are posted as a security deposit shall be valued annually at market value. If market value is less than face value, the Commissioner may require the self-insurer to post additional securities. In making this determination, the Commissioner shall consider the self-insurer's financial condition, the amount by which market value is less than face value, and the likelihood that the securities will be needed to provide benefits.

(e) Securities deposited under this section shall be assigned to the Commissioner, the Commissioner's successors, assigns, or trustees, on a form prescribed by the Commissioner in a manner that renders the securities negotiable by the Commissioner. If a self-insurer is deemed by the Commissioner to be in a hazardous financial condition, the Commissioner may sell or collect, or both, such amounts that will yield sufficient funds to meet the self-insurer's obligations under the Act. In the case of a letter of credit, the Commissioner may draw the full amount of a letter of credit if the letter of credit is not renewed within 90 days prior to its expiration or at any time that the bank issuing the letter of credit is no longer acceptable to the Commissioner. Interest accruing on any negotiable security deposited under this Article shall be collected and transmitted to the self-insurer if the self-insurer is not in a hazardous financial condition.

(f) No judgment creditor, other than a claimant entitled to benefits under the Act, may levy upon any deposits made under this section.

(g) Securities held by the Commissioner under this section may be exchanged or replaced by the self-insurer with other securities of like nature and amount as long as the self-insurer is not in a hazardous financial condition. No release shall be effectuated until replacement securities or bonds of an equal value have been substituted. Any surety bond may be exchanged or replaced with another surety bond that meets the requirements of this section if 90 days' advance written notice is given to the Commissioner. If a self-insurer ceases to self-insure or desires to replace securities with

an acceptable surety bond or bonds, the self-insurer shall notify the Commissioner, and may recover all or a portion of the securities deposited with the Commissioner upon posting instead an acceptable special release bond issued by a corporate surety in an amount equal to the total value of the securities. The special release bond shall cover all existing liabilities under the Act plus an amount to cover future loss development and shall remain in force until all obligations under the Act have been discharged fully.

(h) If a self-insurer ceases to self-insure, no deposits shall be released by the Commissioner until the self-insurer has discharged fully all of the self-insurer's obligations under the Act.

(i) An endorsement to a surety bond shall be filed with the Commissioner within 90 days after the effective date of the endorsement."

SECTION 4. Effective January 1, 2005, G.S. 97-185(a), as amended in Section 3 of this act, reads as rewritten:

"(a) Every self-insurer shall deposit with the Commissioner an amount equal to ~~fifty percent (50%)~~ seventy-five percent (75%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer."

SECTION 5. Effective January 1, 2006, G.S. 97-185(a), as amended in Sections 3 and 4 of this act, reads as rewritten:

"(a) Every self-insurer shall deposit with the Commissioner an amount equal to ~~seventy-five percent (75%)~~ one hundred percent (100%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer."

SECTION 6. Effective January 1, 2007, G.S. 97-185(a), as amended in Sections 3, 4, and 5 of this act, reads as rewritten:

"(a) Every self-insurer shall deposit with the Commissioner an amount equal to ~~one hundred percent (100%)~~ one hundred twenty-five percent (125%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer."

SECTION 7. G.S. 97-141 reads as rewritten:

"**§ 97-141. Stay of proceedings.**

All claims or proceedings under this Chapter to which the insolvent member self-insurer is a party either before the Industrial Commission or a court in this State and the running of all time periods against either the insolvent member self-insurer or the Association under this Chapter shall be stayed for 60 days from the later of the date of notice to the Association of the insolvency or the date the Association is notified of a

claim or proceeding under this Chapter in order to permit the Association to investigate, prosecute, or defend properly any petition, claim, or appeal under this Chapter, provided that the payment of weekly compensation for incapacity is made whenever time periods or proceedings affecting the payment of weekly compensation are stayed."

SECTION 8. Section 3 of this act becomes effective January 1, 2004. Section 4 of this act becomes effective January 1, 2005. Section 5 of this act becomes effective January 1, 2006. Section 6 of this act becomes effective January 1, 2007. Section 7 of this act is effective when this act becomes law and applies to claims filed on or after that date. The remainder of this act is effective when this act becomes law and applies to assessments made on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 502

Short Title:	Access to Decedent's Safe-Deposit Box.	(Public)
Sponsors:	Senator Thomas.	
Referred to:	Judiciary II.	

March 24, 2003

A BILL TO BE ENTITLED

AN ACT TO AUTHORIZE A DEPUTY TO GAIN ACCESS TO THE CONTENTS OF A DECEDENT'S SAFE-DEPOSIT BOX.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 28A-15-13(a) reads as rewritten:

"(a) Definitions. – The following definitions apply to this section:

(1) Institution. – Any entity or person having supervision or possession of a safe-deposit box to which a decedent had access.

(2) Letter of authority. – Letters of administration, letters testamentary, an affidavit of collection of personal property, an order of summary administration, or a letter directed to the institution designating a person entitled to receive the contents of a safe-deposit box to which the decedent had access. The letter of authority must be signed by the clerk of superior court or by the clerk's representative.

(3) Qualified person. – A person possessing a letter of authority or a person named as a deputy, lessee or cotenant of the safe-deposit box to which the decedent had access."

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 323

Short Title:	Gen. Contrs/Protect Info/Clarify Inj. Relief.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 6, 2003

A BILL TO BE ENTITLED

AN ACT TO PROTECT THE CONFIDENTIALITY OF INFORMATION RECEIVED BY THE LICENSING BOARD FOR GENERAL CONTRACTORS WHILE CONDUCTING AN INVESTIGATION OF A LICENSEE AND TO CLARIFY WHEN THE BOARD MAY SEEK INJUNCTIVE RELIEF.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 87-11(c) reads as rewritten:

"(c) The Board shall establish and maintain a system whereby detailed records are kept regarding complaints against each licensee. This record shall include, for each licensee, the date and nature of each complaint, investigatory action taken by the Board, any findings by the Board, and the disposition of the matter. Complaints, records, papers, or other documents containing information received, collected, or compiled by the Board, its members, or its employees as part of or as a result of investigations, inquiries, or interviews conducted in connection with a licensing or disciplinary matter shall not be considered public records within the meaning of Chapter 132 of the General Statutes. However, any notice to a licensee of a hearing pursuant to Chapter 150B of the General Statutes shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of an investigation, inquiry, or interview. If any record, paper, or other document containing information collected and compiled by the Board is received and admitted into evidence in a public hearing before the Board, it is then considered a public record within the meaning of Chapter 132 of the General Statutes."

SECTION 2. G.S. 87-13.1 reads as rewritten:

"**§ 87-13.1. Board may seek injunctive relief.**

Whenever ~~it appears to~~ the Board determines that any person, firm or corporation has, within the past three years, violated or is violating any of the provisions of this Article or ~~of the~~ rules and regulations of the Board promulgated under this Article, the Board may apply to the superior court for a restraining order and injunction to restrain the violation; and the superior courts have jurisdiction to grant the requested relief,

irrespective of whether or not criminal prosecution has been instituted or administrative sanctions imposed by reason of the violation."

SECTION 3. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 323
PROPOSED COMMITTEE SUBSTITUTE S323-CSRM-19 [v.3]

4/15/2003 8:22:38 AM

Short Title: Gen. Contrs/Protect Info/Clarify Inj. Relief. (Public)

Sponsors:

Referred to:

March 6, 2003

A BILL TO BE ENTITLED

AN ACT TO PROTECT THE IDENTITY OF A COMPLAINING PARTY AGAINST A LICENSEE OR AN UNLICENSED GENERAL CONTRACTOR BY THE LICENSING BOARD FOR GENERAL CONTRACTORS PRIOR TO A HEARING BY THE BOARD AND TO CLARIFY WHEN THE BOARD MAY SEEK INJUNCTIVE RELIEF.

The General Assembly of North Carolina enacts:

SECTION 1. Article 1 of Chapter 87 is amended by adding the following new section to read:

"**§ 87-15.3. Identity of complaining party confidential.**

"Once a complaint has been filed with the Board against a licensee or an unlicensed general contractor, the Board may, in its discretion, keep the identity of a complaining party confidential and not a public record within the meaning of Chapter 132 of the General Statutes until the time no later than the receipt of the complaint by the Full Board for a disciplinary hearing."

SECTION 2. G.S. 87-13.1 reads as rewritten:

"**§ 87-13.1. Board may seek injunctive relief.**

Whenever ~~it appears to~~ the Board determines that any person, firm or corporation has violated or is violating any of the provisions of this Article or ~~of the~~ rules and regulations of the Board promulgated under this Article, the Board may apply to the superior court for a restraining order and injunction to restrain the violation; and the superior courts have jurisdiction to grant the requested relief, irrespective of whether or not criminal prosecution has been instituted or administrative sanctions imposed by reason of the violation."

SECTION 3. This act is effective when it becomes law.

SENATE BILL 323:
Gen. Contrs./Protect Info/Clarify Inj. Relief

BILL ANALYSIS

Committee:	Judiciary II	**Introduced by:**	Sen. Hartsell
Date:	March 23, 2003	**Summary by:**	Linda Attarian
Version:	Introduced		Committee Co-Counsel

SUMMARY: ***Senate Bill 323 amends the law governing persons engaged in the business of general contracting. The bill exempts from the definition of "public record" under Chapter 132 of the General Statute, information collected or compiled by the State Licensing Board for General Contractors (Board) in connection with an investigation of a licensing or disciplinary matter.***

The bill also amends the provision that provides the Board with the authority to seek injunctive relief against a licensed or unlicensed person, firm or corporation by changing the Board's standing threshold from "an appearance" of a violation to a "determination" of a violation; and by giving the Board the authority to seek injunctive relief for a past violation of Article 1 of Chapter 87 or rules adopted by the Board. The act is effective when it becomes law.

The Proposed Committee Substitute deletes Section 1 and replaces it with a provision that adds a new section to the licensure to authorize the Board to keep the identity of a complaining party against a licensee or a non-licensed general contractor confidential and not a public record until the Full Board receives the complaint for a disciplinary hearing. It also amends Section 2 to delete the three year look-back period for violations upon which the Board would be authorized to base injunctive actions.

CURRENT LAW:

Jurisdiction of NC Licensing Board for General Contractors: In 1925 the North Carolina General Assembly established the North Carolina Licensing Board for General Contractors and specified its regulatory authority over general contractors in Article 1 of Chapter 87. The purpose of the Board is to "safeguard life, health and property and to promote public welfare by prescribe certain standards for persons, firms and corporations who enter into contracts for construction work in this state. G.S. 87-1 defines general contractors as persons, firms or corporations who enter into construction projects costing $30,000 or more.

Investigation of complaints: Any person may file a complaint against a general contractor. All complaints received by the Board office are reviewed and assigned to a field investigator for an investigation. Once a complaint is received, written notice of the complaint and the charges are then forwarded to the licensee or general contractor for a response. Following a preliminary review of the complaint the investigator may gather additional evidence by making an inspection of the construction project or the work in question. Field investigators also may interview the contractor, witnesses or other individuals who are familiar with the case. When an investigation is completed the case is forwarded to the Board's Review Committee, which then determines whether probable cause exists to recommend that the case be presented to the full Board for a disciplinary hearing. The Board may impose discipline by revoking or suspending the license of the general contractor based on a finding of fraud or deceit in obtaining license, or gross negligence, incompetence, misconduct, or willful violations of the licensing laws.

If the general contractor is not licensed to practice general contracting, the Board may seek a permanent injunction against the contractor in Superior Court.

Record keeping: The Board is required to keep detailed records regarding complaints against each licensee, including the date and nature of each complaint, investigatory actions, findings and the disposition of the matter. These records are available to the public under North Carolina public record laws.

Public record law: Pursuant to G.S. 132-1, public records and public information compiled by governmental agencies, including occupational licensing boards, are the "property of the people", and it is the policy of this State that the people may obtain copies of such information free or at minimal cost *unless otherwise specifically provided by law.* However, G.S. 132-1.2 provides that public records do not include "written communications made within the scope of the attorney-client relationship by any attorney-at-law serving any such governmental agency that concerns the prosecution, defense, settlement or litigation of any judicial action or any administration or other type of proceed to which the governmental agency is a party or by which it is or may be direct affected" –but for only for three years from the date of the communication, at which time the exclusion expires.

BILL ANALYSIS: **Section 1** amends subsection (c) of G.S. 87-11, to provide that records compiled in connection with the investigation and disposition of complaints against licensees are not public records and are not freely available to the public. Exceptions to this exclusion: (1) written notices of the hearing on the complaint and charges to licensees pursuant to G.S. 150B-38, even if the notice contains information compiled during the investigation; and (2) any document containing disciplinary information that is admitted into evidence in a public hearing before the Board.

The provision does not make the information confidential because the custodian may still release it *voluntarily.* If a record is "confidential" then it may not be released except as permitted by law.

Section 2 amends G.S. 87-13.1 to provide the Board with standing to seek an injunction or an order to restrain a violation when the Board *determines* that any person, firm or corporation, (licensed or unlicensed), is presently violating, or *has violated within the past three years,* a provision of the licensing laws or rules adopted by the Board. Under current law, the Board must show that it *appears* that a person, firm, or corporation is *violating*, to seek injunctive remedies.

BACKGROUND:

The changes made under Section 1 are not unprecedented. A number of other licensure acts include specific provisions protecting records regarding complaints and investigation from public access. These include: Board of Law Examiners, North Carolina State Bar, NC State Board of Refrigeration Examiners, NC Medical Board, Medical Review Committee, NC State Board of Dental Examiners, Substance Abuse Professionals Certification Board, NC Psychology Board and the NC State Board of Examiners of Fee-Based Practicing Pastoral Counselors.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 774

Short Title:	Liability at Public Skateboard Parks.	(Public)
Sponsors:	Senators Dalton; and Lucas.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO ESTABLISH THE DUTIES OF OPERATORS OF SKATEBOARD PARKS, TO ESTABLISH THE DUTIES OF PERSONS WHO ENGAGE IN CERTAIN HAZARDOUS RECREATIONAL ACTIVITIES, AND TO LIMIT THE LIABILITY OF GOVERNMENTAL ENTITIES FOR DAMAGE OR INJURIES THAT ARISE OUT OF A PERSON'S PARTICIPATION IN CERTAIN HAZARDOUS RECREATIONAL ACTIVITIES AND THAT OCCUR IN AN AREA DESIGNATED FOR CERTAIN HAZARDOUS RECREATIONAL ACTIVITIES.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 99E of the General Statutes is amended by adding a new Article to read:

"Article 3.

"Hazardous Recreation Parks Safety and Liability.

"**§ 99E-21. Purpose.**

The purpose of this Article is to encourage governmental owners or lessees of property to make land available to a governmental entity for hazardous recreational activities. It is recognized that governmental owners or lessees of property have failed to make property available for such activities because of the exposure to liability from lawsuits and the prohibitive cost of insurance, if insurance can be obtained for such activities. It is also recognized that risks and dangers are inherent in these activities, which risks and dangers should be assumed by those participating in the activities.

"**§ 99E-22. Definitions.**

The following definitions apply in this Article:

(1) Governmental entity. –

a. The State, any county or municipality, or any department, agency, or other instrumentality thereof.

b. Any school board, special district, authority, or other entity exercising governmental authority.

(2) Hazardous recreational activity. – Skateboarding, inline skating, or freestyle bicycling.

(3) Inherent risk. – Those dangers or conditions that are characteristic of, intrinsic to, or an integral part of skateboarding, inline skating, and freestyle bicycling.

"**§ 99E-23. Duties of operators of skateboard parks.**

(a) No operator of a skateboard park shall permit any person to ride a skateboard therein, unless that person is wearing a helmet, elbow pads, and knee pads.

(b) For any facility, owned or operated by a governmental entity, that is designed and maintained for the purpose of recreational skateboard use, and that is not supervised on a regular basis, the requirements under subsection (a) of this section are satisfied when all of the following occur:

(1) The governmental entity adopted an ordinance requiring any person riding a skateboard at the facility to wear a helmet, elbow pads, and knee pads.

(2) Signs are posted at the facility affording reasonable notice that any person riding a skateboard in the facility must wear a helmet, elbow pads, and knee pads, and that any person failing to do so will be subject to citation under the ordinance under subdivision (1) of this subsection.

"**§ 99E-24. Duties of persons engaged in hazardous recreational activities.**

(a) Any person who participates in or assists in hazardous recreational activities assumes the known and unknown inherent risks in these activities, irrespective of age, and is legally responsible for all damages, injury, or death to himself or herself or other persons or property that result from these activities. Any person who observes hazardous recreational activities assumes the known and unknown inherent risks in these activities, irrespective of age, and is legally responsible for all damages, injury, or death to himself or herself that result from these activities. No public entity that sponsors, allows, or permits skateboarding, inline skating, or freestyle bicycling on its property is required to eliminate, alter, or control the inherent risks in these activities.

(b) While engaged in hazardous recreational activities, irrespective of where such activities occur, a participant is responsible for doing all of the following:

(1) Acting within the limits of his or her ability and the purpose and design of the equipment used.

(2) Maintaining control of his or her person and the equipment used.

(3) Refraining from acting in any manner that may cause or contribute to death or injury of himself or herself, or other persons.

(c) Failure to comply with the requirement of subsection (b) of this section constitutes negligence.

"**§ 99E-25. Liability of governmental entities.**

(a) This section does not grant authority or permission for a person to engage in hazardous recreational activities on property owned or controlled by a governmental entity unless such governmental entity has specifically designated such area for these activities.

(b) No governmental entity or public employee shall be liable to any person who voluntarily participates in hazardous recreation activities for any damage or injury to property or persons that arises out of a person's participation in the activity and that takes place in an area designated for the activity.

(c) This section does not limit liability that would otherwise exist for any of the following:

(1) The failure of the governmental entity or public employee to guard against or warn of a dangerous condition of which a participant does not and cannot reasonably be expected to have notice.

(2) An act of gross negligence by the governmental entity or public employee that is the proximate cause of the injury.

(d) Nothing in this section creates a duty of care or basis of liability for death, personal injury, or damage to personal property. Nothing in this section shall be deemed to be a waiver of sovereign immunity under any circumstances.

(e) Nothing in this section limits the liability of an independent concessionaire, or any person or organization other than a governmental entity or public employee, whether or not the person or organization has a contractual relationship with a governmental entity to use the public property, for injuries or damages suffered in any case as a result of the operation of equipment for hazardous recreational activities on public property by the concessionaire, person, or organization.

(f) The fact that a governmental entity carries insurance that covers any activity subject to this Article does not constitute a waiver of the liability limits under this section, regardless of the existence or limits of the coverage."

SECTION 2. This act becomes effective January 1, 2003, and applies to activities engaged in on or after that date and to actions that arise on or after that date.

Morning

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 4-15-03

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Kay Mastin	NC DOT
Mike Watts	NCRPS
Jim Stuart	Stuart Law Firm - NCSBA
Jamal Muhammad	DOT
John McMillan	MF&S
Pamela Best	AOC
Jason Blaff	H/SG
Susan Harris	WCPSS
Andy Ellen	NCRMA
Tom Sri	NCRMA

Morning 2

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II April 15, 2003
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
William V. McPherson	NC Bar Assn McPherson & Rocamora PLLC 3211 Shannon Rd Ste 620 Durham, NC 27707
Hal Miller	NCACCT
Ann Lee	OUAJ
Cathy Stuart	Stu Law Firm,
Michelle Frazier	NC Bar Ass'n
Andy Romanet	NCLM
Clyde Holt	NC Bar - Sports Law Section
[illegible]	Dept State
Dan Sgro	CAEC
Leanne Winner	NCSBA
[illegible]	AIA North Carolina

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — April 15, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Tom Sr.	NCAMP
Colleen Kochanek	Hafer & Caldwell, P.A.
Beth Turner	BAC
Paul Stock	NC Bankers

afternoon
1:00

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — April 15, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
ANN WALL	DOJ
Phil Kaylor	Kaylor Law Firm
Scott Templeton	Sec State
Nick Fountain	Young Moore
John McAlister	Duke Energy
Joan Hackney	Duke Energy
Jan Woodward	Progress Energy
Lori Mayer	AOC
Rob Dasablon	NC statewatch

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — April 15, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Clyde Holt	NC Bar Assoc,

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Wednesday, April 16, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B. **502** Access to Decedent's Safe-Deposit Box.
Sequential Referral: None
Recommended Referral: None

S.B. **774** Liability at Public Skateboard Parks.
Sequential Referral: None
Recommended Referral: None

S.B. **962** Require Affidavits of Bail Bondsmen.
Sequential Referral: None
Recommended Referral: None

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **323** Gen. Contrs/Protect Info/Clarify Inj. Relief.
Draft Number: PCS 65263
Sequential Referral: None
Recommended Referral: None
Long Title Amended: Yes

S.B. **965** Amend Constitution/Sch. Fines & Forfeitures.
Draft Number: PCS 75238
Sequential Referral: None
Recommended Referral: None
Long Title Amended: No

TOTAL REPORTED: 5

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Wednesday, April 16, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **424** Tuition Waiver Technical Correction.

Draft Number:	PCS 85211
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

S.B. **563** Uniform Athlete Agents Act.

Draft Number:	PCS 35237
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

S.B. **619** DWI Blood Test Result-Directly to Clerk.

Draft Number:	PCS 35239
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

S.B. **659** Charitable Solicitations/Inform the Public.

Draft Number:	PCS 75239
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 4

Committee Clerk Comments:

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **JUDICIARY II** will meet at the following time:

DAY	DATE	TIME	ROOM
Wednesday	April 16, 2003	8:30 – 10:00 A	1124
		15 min. after Session	1124

The following will be considered: Bills to be heard in following order:

	BILL NO.	SHORT TITLE	SPONSOR
•	SB 619	DWI Blood Test Result – Directly to Clerk	Senator Apodaca
•	SB 766	Pretrial Release Programs/Statewide Uniformity	Senator Thomas
•	SB 962	Bail Require Affidavits of Bail Bondsmen	Senator Swindell
•	SB 323	Gen. Contrs/Protect Info/Clarify Inj. Relief	Senator Hartsell
•	SB 659	Charitable Solicitations/Inform the Public	Senator Bingham
•	SB 708	Volunteer Fire Dept. Crim. Background Checks	Senator Shubert
•	SB 716	Revised Uniform Arbitration Act	Senator Hartsell
•	SB 722	Display of American Flag	Senator Kinnaird
•	SB 748	Only Easements	Senator Sloan
•	SB 925	Strengthen Security Fraud Enforcement Laws	Senator Rand

Senator HARTSELL, Chair

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — April 16, 2003 - Morning
Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Scott Templeton	State Dept
Matt Osborne	AOC
Steve Woodson	NCFB
J Blackburn	County Commissioners Assoc.
John Madler	NC Sentencing Comm.
Bill Scoggin	ICCLA
John Mallon	Governor's
Chuck Johnson	Re-Entry Inc, PO Box 724 Raleigh NC 27602
Harry Lyle	ABC
Dianne Jones	Judicial Res. Ctr
Angie Hair	Margie Taylor

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Richard Webster	Sheriff Chatham County
Kathie Young	
Judy Chrisco	Sen. Stan Bingham

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Andy Romanet	NCLM
Chris Nichols	Hunton + Williams
John McAlister	Duke Energy
Hugh Tilson	NCHA
DAVID BARNES	PAS

Judiciary II Committee

Minutes – Morning Meeting

April 16, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with fourteen members present.

SB 962 (Require Affidavits of Bail Bondsmen) Senator Swindell, bill sponsor, was invited to explain the bill and answered questions by Senators Hartsell, Bingham, Hagan, Rucho, Apodaca and Kerr. Mr. Mark Black, representating the North Carolina Bail Agents Association, spoke on the bill. Senator Rucho moved for a favorable report. All voted and the motion carried.

SB 708 (Volunteer Fire Dept. Crim. Background Checks) Senator Shubert was invited to explain the bill. Questions by Senators Dorsett, Moore, Bingham, Kerr, Queen, Allran, Hagan and Kerr were answered by Senators Shubert, Hartsell, Thomas and by Robin Johnson, staff attorney. Senator Dorsett submitted an amendment and moved for adoption. Senator Hartsell called for a vote, all voted and the motion carried. Senator Hartsell displaced the bill until the afternoon session.

SB 619 (DWI Blood Test Result-Directly to Clerk) Senator Apodaca, bill sponsor was invited to explain the bill. Senator Thomas' question was answered by Mr. Matt Osborne of the Administrative Office of the Courts. Senator Apodaca submitted a clarifying amendment and moved for adoption. Senator Hartsell called for a vote. All members voted and the motion carried. Senator Sloan moved for a favorable report as amended and rolled into a Committee Substitute.

SB 722 (Display of the American Flag) Senator Kinnaird, bill sponsor, was invited to discuss the bill. Questions by Senators Allran, Dorsett, Kerr and Bingham were answered by Senator Kinnaird. The bill was continued.

SB 716 (Revised Uniform Arbitration Act) Senator Thomas was invited to chair the meeting while Senator Hartsell, bill sponsor, explained the bill. Senator Apodaca moved to adopt the Committee Substitute for purposes of discussion. All voted and the motion carried. Senator Hartsell and Mr. David Robinson, of the Bar Association, answered questions by Senators Rucho, Queen, Apodaca and Kerr. The bill was continued.

The meeting recessed until the afternoon meeting.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

Judiciary II Committee

Minutes – Afternoon Meeting

April 16, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with thirteen members present.

SB 925 (Strengthen Security Fraud Enforcement Laws) Senator Rand, bill sponsor, was introduced to explain the bill. Senator Thomas submitted an amendment and moved that it be adoption. All voted and the motion carried. Senators Rand and Hartsell and Mr. David Massey, Deputy Securities Administrator, Department of the Secretary of State, answered questions by Senators Dorsett, Webster, Kerr, Bingham and Allran. Senator Dalton moved for a favorable report as amended, and rolled into a Committee Substitute – unfavorable to the original bill. All members voted yes and the motion carried.

SB 881 Permit Tobacco Payment w/o Reopening Estate) Senator Thomas was invited to chair the meeting while Senator Hartsell, bill sponsor, explained the bill. Questions by Senators Kerr, Hagan, Shubert, Dalton, Webster and Kinnaird were answered by Ms. Pamela Best from the North Carolina Administrative Office of the Courts and Floyd Lewis from the Office of the Attorney General and Kory Goldsmith, staff attorney. Senator Dalton moved for a favorable report. All members voted and the motion carried.

With no further business, the meeting was adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 965

Short Title:	Amend Constitution/Sch. Fines & Forfeitures.	(Public)
Sponsors:	Senator Dalton.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE NORTH CAROLINA CONSTITUTION TO PROVIDE THAT CLEAR PROCEEDS OF ALL CIVIL PENALTIES, CIVIL FORFEITURES, AND CIVIL FINES COLLECTED BY A STATE AGENCY ARE REMITTED TO THE CIVIL PENALTY AND FORFEITURE FUND AND FAITHFULLY USED EXCLUSIVELY FOR MAINTAINING FREE PUBLIC SCHOOLS.

The General Assembly of North Carolina enacts:

SECTION 1. Section 7 of Article IX of the North Carolina Constitution reads as rewritten:

"**Sec. 7. County school fund.**

All moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all criminal penalties and criminal forfeitures and of all criminal fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools."

SECTION 2. Article IX of the North Carolina Constitution is amended by adding a new section to read:

"**Sec. 7A. Civil Penalty and Forfeiture Fund.**

All monies belonging to the Civil Penalty and Forfeiture Fund and the clear proceeds of all civil penalties, civil forfeitures, and civil fines collected by a State agency shall belong to and remain in the Civil Penalty and Forfeiture Fund and shall be faithfully appropriated by the General Assembly to the counties and used exclusively for maintaining free public schools as provided by statute."

SECTION 3. G.S. 115C-457.1 reads as rewritten:

"**§ 115C-457.1. Creation of Fund; administration.**

(a) There is created the Civil Penalty and Forfeiture Fund. The Fund shall consist of the clear proceeds of all civil ~~penalties and civil forfeitures~~penalties, civil forfeitures, and civil fines that are collected by a State agency and are payable to the ~~County School~~

~~Fund~~ Civil Penalty and Forfeiture Fund pursuant to Article IX, ~~Section 7~~ Section 7A of the Constitution.

(b) The Fund shall be administered by the Office of State Budget and Management. The Fund and all interest accruing to the Fund shall be faithfully used exclusively for maintaining free public schools."

SECTION 4. G.S. 115C-457.2 reads as rewritten:

"**§ 115C-457.2. Remittance of ~~moneys~~ monies to the Fund.**

The clear proceeds of all civil ~~penalties and civil forfeitures~~penalties, civil forfeitures, and civil fines that are collected by a State agency and are payable to the ~~County School Fund~~ Civil Penalty and Forfeiture Fund pursuant to Article IX, ~~Section 7~~ Section 7A of the Constitution shall be remitted to the Office of State Budget and Management by the officer having custody of the funds within 10 days after the close of the calendar month in which the revenues were received or collected. Notwithstanding any other law, all funds which are civil penalties or civil forfeitures within the meaning of Article IX, ~~Section 7~~Section 7A of the Constitution shall be deposited in the Civil Penalty and Forfeiture Fund. The clear proceeds of such funds include the full amount of all such penalties and forfeitures collected under authority conferred by the State, diminished only by the actual costs of collection, not to exceed ten percent (10%) of the amount collected."

SECTION 5. The amendments set out in Section 1 and Section 2 of this act shall be submitted to the qualified voters of the State at a statewide general election on November 4, 2003, which election shall be conducted under the laws then governing elections in the State. Ballots, voting systems, or both may be used in accordance with Chapter 163 of the General Statutes. The question to be used in the voting systems and ballots shall be:

"[ ] FOR [ ] AGAINST

Constitutional amendments to provide that clear proceeds of all civil penalties, civil forfeitures, and civil fines collected by a State agency are remitted to the Civil Penalty and Forfeiture Fund and faithfully used exclusively for maintaining free public schools as provided by statute."

SECTION 6. If a majority of votes cast on the question are in favor of the amendment set out in Section 1 of this act, the State Board of Elections shall certify the amendments to the Secretary of State. The Secretary of State shall enroll the amendments so certified among the permanent records of that office. The amendments set out in Section 1 of this act shall become effective July 1, 2004.

SECTION 7. Sections 3 and 4 of this act become effective only if the voters approve the constitutional amendments set out in Section 1 and Section 2 of this act. If the voters approve the constitutional amendments, Sections 3 and 4 of this act shall become effective July 1, 2004.

SECTION 8. This act is effective when it becomes law.

SENATE BILL 965:
Amend Constitution/Sch. Fines & Forfeitures.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Dalton
Date:	April 12, 2003	**Summary by:**	Robin Johnson Robin
Version:	S965-CSRH-7[v.1]		Committee Counsel

SUMMARY: ***Senate Bill 965 would amend the NC Constitution and statutes to clarify (i) that the clear proceeds of all criminal penalties, criminal forfeitures, and criminal fines collected in the several counties must be appropriated for the exclusive use of maintaining free public schools and (ii) that the clear proceeds of all civil penalties, civil forfeitures, and civil fines collected by a State agency are to remain in the Civil Penalty and Forfeiture Fund for use by the public schools as provided by statute. The bill also would provide that the question of the constitutional amendments would be submitted to the voters at a statewide general election on November 4, 2003. If voters approve the amendments, they become effective July 1, 2004, as do the corresponding statutory changes. The act would take effect when it becomes law.***

The proposed committee substitute would make technical corrections: amends Sec. 1 to clarify all items are criminal, adds new Sec. 3 to make conforming changes to the statute that interprets the disbursement of criminal penalties, forfeitures and fines, corrects omissions from effective date language, and makes a few grammatical/technical changes..

CURRENT LAW/BACKGROUND: The relevant portion of Section 7 of Article IX of the NC Constitution states, "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools." This Section has been subject to much litigation over the years. The NC Supreme Court and G.S. 115C-437 (see attached) have interpreted this phrase to mean that there are two distinct categories of revenue that must be used to maintain the public schools[1]: (i) the clear proceeds of ALL penalties and forfeitures, both civil and criminal (and regardless of what they are labeled by statute), that accrue to the State and are punitive in nature, and (ii) the clear proceeds of ALL fines collected under authority conferred by the State for a breach of a criminal law and accruing to the State or a local government.

The revenue collected under the second category above has been governed historically by G.S. 115C-437, which provides that the board of county commissioners are to appropriate these funds to the local school administrative unit(s) in the county where collected. Before 1996, however, it was unclear whether the Constitution (and G.S. 115C-437) applied to civil penalties, forfeitures, and fines. In 1996, the NC Supreme Court definitely answered that question in the affirmative.[2] The Court also emphasized that it does not matter what label (fine, forfeiture, penalty, fee, etc.) the statutes use – the question is whether they are punitive in nature. In 1997, the General Assembly enacted legislation[3] that created the Civil Penalty and Forfeiture Fund (the Fund), into which is to be placed the clear proceeds[4] of all civil penalties and forfeitures collected by a State agency. The funds must be remitted to the Office of State Budget and

[1] The courts recently held that public schools under this provision include charter schools.
[2] *Craven County Board of Education v. Boyles, 343 N.C. 87 (1996).*
[3] S.L. 1997-443, Sec. 8.20.
[4] The term "clear proceeds" is defined in that statute to be the full amount that is collected minus the actual costs of collection, which cannot exceed 10% of the collected amount.

Management (OSBM) within 10 days after the end of the month in which the revenue is collected or received. The OSBM must first deposit the funds into the Fund and then transfer the funds to the State School Technology Fund where they are allocated to school systems on the basis of average daily membership (ADM).

At this time, several school boards and the NC School Boards Association (NCSBA) are involved in pending litigation that raises two questions concerning this constitutional provision: (i) what statutory fines, forfeitures, and penalties are governed by the provision, and (ii) what is meant by the phrase "remain in the several counties". At issue are numerous revenue sources (not addressed by this bill). In addition, the litigation challenges allocation of funds to school systems on the basis of ADM, rather than to the school systems in the counties where the revenue is collected. The school boards and NCSBA prevailed on summary judgment in Wake County Superior Court in December 2001. The State appealed, and the case was recently argued before the NC Court of Appeals.

SECTION-BY-SECTION BILL ANALYSIS:

Section 1 would amend Section 7 of Article IX of the NC Constitution to clarify that it applies only to criminal penalties, forfeitures, and fines.

Section 2 would create a new Section 7A of Article IX of the NC Constitution (Section 7A), entitled *Civil Penalty and Forfeiture Fund*, which would specify that the clear proceeds of all civil penalties, forfeitures, and fines collected by a State agency are payable to the Civil Penalty and Forfeiture Fund and are to be used to maintain free public schools as provided by statute.

Section 3 would amend G.S. 115C-437 by clarifying that it applies only to the allocation of the clear proceeds of criminal penalties, forfeitures, and fines under Sec. 7 of Article IX of the NC Constitution.

Sections 4 and 5 would amend G.S. 115C-457.1 and G.S. 115C-457.2 by clarifying that the Civil Penalty and Forfeiture Fund consists only of the clear proceeds of civil penalties, forfeitures and fines collected by a State agency and payable to the Fund under the new Section 7A.

Section 6 would prescribe the form of the constitutional amendments to be submitted to the voters at a statewide general election on November 4, 2003.

Section 7 would specify that if a majority of votes approve the proposed constitutional amendments, then they would become effective July 1, 2004.

Section 8 would provide that Sections 3-5 become effective July 1, 2004, but only if the amendments are approved by a majority of votes.

Section 9 would make the act effective when it becomes law.

§ 115C-437. Allocation of revenues to the local school administrative unit by the county.

Revenues accruing to the local school administrative unit by virtue of Article IX, Sec. 7, of the Constitution and taxes levied by or on behalf of the local school administrative unit pursuant to a local act or G.S. 115C-501 to 115C-511 shall be remitted to the school finance officer by the officer having custody thereof within 10 days after the close of the calendar month in which the revenues were received or collected. The clear proceeds of all penalties and forfeitures and of all fines collected for any breach of the penal laws of the State, as referred to in Article IX, Sec. 7 of the Constitution, shall include the full amount of all penalties, forfeitures or fines collected under authority conferred by the State, diminished only by the actual costs of collection, not to exceed ten percent (10%) of the amount collected. Revenues appropriated to the local school administrative unit by the board of county commissioners from general county revenues shall be made available to the school finance officer by such procedures as may be mutually agreeable to the board of education and the board of county commissioners, but if no such agreement is reached, these funds shall be remitted to the school finance officer by the county finance officer in monthly installments sufficient to meet its lawful expenditures from the county appropriation until the county appropriation to the local school administrative unit is exhausted. Each installment shall be paid not later than 10 days after the close of each calendar month. When revenue has been appropriated to the local school administrative unit by the board of county commissioners from funds which carry specific restrictions binding upon the county as recipient, the board of commissioners must inform the local school administrative unit in writing of those restrictions. (1975, c. 437, s. 1; 1981, c. 423, s. 1; 1985, c. 779.)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 965
PROPOSED COMMITTEE SUBSTITUTE S965-CSRH-7 [v.1]

4/12/2003 11:48:49 AM

Short Title: Amend Constitution/Sch. Fines & Forfeitures. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE NORTH CAROLINA CONSTITUTION TO PROVIDE THAT CLEAR PROCEEDS OF ALL CIVIL PENALTIES, CIVIL FORFEITURES, AND CIVIL FINES COLLECTED BY A STATE AGENCY ARE REMITTED TO THE CIVIL PENALTY AND FORFEITURE FUND AND FAITHFULLY USED EXCLUSIVELY FOR MAINTAINING FREE PUBLIC SCHOOLS.

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SECTION 2. Article IX of the North Carolina Constitution is amended by adding a new section to read:

"**Sec. 7A. Civil Penalty and Forfeiture Fund.**

All monies belonging to the Civil Penalty and Forfeiture Fund and the clear proceeds of all civil penalties, civil forfeitures, and civil fines collected by a State agency shall belong to and remain in the Civil Penalty and Forfeiture Fund and shall be faithfully appropriated by the General Assembly to the counties and used exclusively for maintaining free public schools as provided by statute."

SECTION 3. G.S. 115C-437 reads as rewritten:

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Revenues accruing to the local school administrative unit by virtue of Article IX, Sec. 7, of the Constitution and taxes levied by or on behalf of the local school administrative unit pursuant to a local act or G.S. 115C-501 to 115C-511 shall be remitted to the school finance officer by the officer having custody thereof within 10 days after the close of the calendar month in which the revenues were received or collected. The clear proceeds of all ~~penalties and forfeitures and of all~~ criminal penalties, criminal forfeitures, and criminal fines collected for any breach of the penal laws of the State, as referred to in Article IX, Sec. 7 of the Constitution, shall include the full amount of all criminal penalties, criminal forfeitures or criminal fines collected under authority conferred by the State, diminished only by the actual costs of collection, not to exceed ten percent (10%) of the amount collected. Revenues appropriated to the local school administrative unit by the board of county commissioners from general county revenues shall be made available to the school finance officer by ~~such~~ procedures ~~as may be~~ that are mutually agreeable to the board of education and the board of county commissioners, but if no ~~such~~ agreement is reached, these funds shall be remitted to the school finance officer by the county finance officer in monthly installments sufficient to meet its lawful expenditures from the county appropriation until the county appropriation to the local school administrative unit is exhausted. Each installment shall be paid not later than 10 days after the close of each calendar month. When revenue has been appropriated to the local school administrative unit by the board of county commissioners from funds ~~which~~ that carry specific restrictions binding upon the county as recipient, the board of commissioners ~~must~~ shall inform the local school administrative unit in writing of those restrictions."

SECTION 4. G.S. 115C-457.1 reads as rewritten:

"**§ 115C-457.1. Creation of Fund; administration.**

(a) There is created the Civil Penalty and Forfeiture Fund. The Fund shall consist of the clear proceeds of all civil ~~penalties and civil forfeitures~~penalties, civil forfeitures, and civil fines that are collected by a State agency and are payable to the ~~County School Fund~~ Civil Penalty and Forfeiture Fund pursuant to Article IX, ~~Section 7~~ Section 7A of the Constitution.

(b) The Fund shall be administered by the Office of State Budget and Management. The Fund and all interest accruing to the Fund shall be faithfully used exclusively for maintaining free public schools."

SECTION 5. G.S. 115C-457.2 reads as rewritten:

"**§ 115C-457.2. Remittance of ~~moneys~~ monies to the Fund.**

The clear proceeds of all civil ~~penalties and civil forfeitures~~penalties, civil forfeitures, and civil fines that are collected by a State agency and are payable to the ~~County School Fund~~ Civil Penalty and Forfeiture Fund pursuant to Article IX, ~~Section 7~~ Section 7A of the Constitution shall be remitted to the Office of State Budget and Management by the officer having custody of the funds within 10 days after the close of the calendar month in which the revenues were received or collected. Notwithstanding any other law, all funds which are civil penalties or civil forfeitures within the meaning of Article IX, ~~Section 7~~Section 7A of the Constitution shall be deposited in the Civil Penalty and Forfeiture Fund. The clear proceeds of ~~such~~ these funds include the full

amount of all ~~such penalties and~~ ~~forfeitures~~ civil penalties, civil forfeitures, and civil fines collected under authority conferred by the State, diminished only by the actual costs of collection, not to exceed ten percent (10%) of the amount collected."

SECTION 6. The amendments set out in Section 1 and Section 2 of this act shall be submitted to the qualified voters of the State at a statewide general election on November 4, 2003, which election shall be conducted under the laws then governing elections in the State. Ballots, voting systems, or both may be used in accordance with Chapter 163 of the General Statutes. The question to be used in the voting systems and ballots shall be:

"[ ] FOR [ ] AGAINST

Constitutional amendments to provide that clear proceeds of all civil penalties, civil forfeitures, and civil fines collected by a State agency are remitted to the Civil Penalty and Forfeiture Fund and faithfully used exclusively for maintaining free public schools as provided by statute."

SECTION 7. If a majority of votes cast on the question are in favor of the amendments set out in Section 1 and Section 2 of this act, the State Board of Elections shall certify the amendments to the Secretary of State. The Secretary of State shall enroll the amendments so certified among the permanent records of that office. The amendments set out in Section 1 and Section 2 of this act shall become effective July 1, 2004.

SECTION 8. Sections 3, 4 and 5 of this act become effective only if the voters approve the constitutional amendments set out in Section 1 and Section 2 of this act. If the voters approve the constitutional amendments, Sections 3, 4 and 5 of this act shall become effective July 1, 2004.

SECTION 9. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 549

Short Title:	Uniform Principal and Income Act.	(Public)
Sponsors:	Senator Hagan.	
Referred to:	Judiciary II.	

March 27, 2003

A BILL TO BE ENTITLED

AN ACT TO ADOPT THE REVISED UNIFORM PRINCIPAL AND INCOME ACT.

The General Assembly of North Carolina enacts:

SECTION 1. The General Statutes are amended by adding a new Chapter to read:

"**Chapter 37A.**

"**Uniform Principal and Income Act.**

"Article 1.

"Definitions and Fiduciary Duties; Conversion to Unitrust; Judicial Control of Discretionary Power.

"Part 1. Definitions.

"**§ 37A-1-101. Short title.**

This Chapter may be cited as the Uniform Principal and Income Act.

"**§ 37A-1-102. Definitions.**

In this [Act]:

(1) "Accounting period" means a calendar year unless another 12-month period is selected by a fiduciary. The term includes a portion of a calendar year or other 12-month period that begins when an income interest begins or ends when an income interest ends.

(2) "Beneficiary" includes, in the case of a decedent's estate, an heir, legatee, and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary.

(3) "Fiduciary" means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, and a person performing substantially the same function.

(4) "Income" means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts

from a sale, exchange, or liquidation of a principal asset, to the extent provided in Article 4.

(5) "Income beneficiary" means a person to whom net income of a trust is or may be payable.

(6) "Income interest" means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to be distributed or authorize it to be distributed in the trustee's discretion.

(7) "Mandatory income interest" means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

(8) "Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under this Chapter to or from income during the period.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(10) "Principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates.

(11) "Remainder beneficiary" means a person entitled to receive principal when an income interest ends.

(12) "Terms of a trust" means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.

(13) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

"**§ 37A-1-103. Fiduciary duties; general principles.**

(a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of Articles 2 and 3, a fiduciary:

(1) Shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this Chapter;

(2) May administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this Chapter;

(3) Shall administer a trust or estate in accordance with this Chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

(4) Shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this Chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) In exercising the power to adjust under G.S. 37A-1-104(a) or a discretionary power of administration regarding a matter within the scope of this Chapter, whether granted by the terms of a trust, a will, or this Chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this Chapter is presumed to be fair and reasonable to all of the beneficiaries.

"**§ 37A-1-104. Trustee's power to adjust.**

(a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in G.S. 37A-1-103(a), that the trustee is unable to comply with G.S. 37A-1-103(b). In lieu of exercising the power to adjust, the trustee may convert the trust to a unitrust as permitted under Part 2 of this Article, in which case the unitrust amount shall become the net income of the trust.

(b) In deciding whether and to what extent to exercise the power conferred by subsection (a) of this section, a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

(1) The nature, purpose, and expected duration of the trust;

(2) The intent of the grantor or settlor;

(3) The identity and circumstances of the beneficiaries;

(4) The needs for liquidity, regularity of income, and preservation and appreciation of capital;

(5) The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;

(6) The net amount allocated to income under the other sections of this Chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;

(7) Whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;

(8) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

(9) The anticipated tax consequences of an adjustment.

(c) A trustee may not make an adjustment:

(1) That diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;

(2) That reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(3) That changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) From any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;

(5) If possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) If possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(7) If the trustee is a beneficiary of the trust;

(8) If the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly; or

(9) If the trust has been converted to, and is then operating as, a unitrust under Part 2 of this Article.

(d) If subdivision (c)(5), (6), (7), or (8) applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(e) A trustee may release the entire power conferred by subsection (a) of this section or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in subdivisions (c)(1) through (6) or (c)(8) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (c) of this section. The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection (a).

"Part 2. Conversion to Unitrust.

"§ 37A-1-104.1. Definitions.

For purposes of this Part:

(1) "Code" means the Internal Revenue Code of 1986, as amended from time to time, and any statutory enactment successor thereto; reference to a specific section of the Code in this Part shall be deemed a reference also to any successor provision dealing with the subject matter of such section of the Code.

(2) "Competent beneficiary" includes:

a. A beneficiary who has attained his or her majority and is not otherwise under a legal disability;

b. A court-appointed guardian of an incompetent beneficiary;

c. An attorney-in-fact or agent under a durable power of attorney for an incompetent beneficiary;

d. A court-appointed guardian of a minor beneficiary's estate; and

e. In the case of a minor beneficiary for whom no guardian has been appointed, a parent of the minor beneficiary, but only if such parent does not have an interest in the estate or trust that conflicts with the interest of the minor beneficiary.

(3) "Grantor" means an individual who created an inter vivos trust.

(4) "Disinterested person" means a person who is not a "related or subordinate party" as defined in section 672(c) of the Code with respect to the person then acting as trustee of the trust and excludes the grantor of the trust and any interested trustee.

(5) "Income trust" means a trust, created by either an inter vivos or a testamentary instrument, which directs or permits the trustee to distribute the net income of the trust to one or more persons, either in fixed proportions or in amounts or proportions determined by the trustee. Notwithstanding the foregoing, no trust that may be subject to taxation under section 2001 or section 2501 of the Code shall be an income trust for purposes of this Part, until the expiration of the period for filing the return therefor, including all extensions for such filing.

(6) "Interested distributee" means a person to whom distributions of income or principal can currently be made who has the power to remove the existing trustee and designate as successor a person who may be a "related or subordinate party" (as defined in section 672(c) of the Code) with respect to such distributee.

(7) "Interested trustee" means (i) an individual trustee to whom the net income or principal of the trust can currently be distributed or would be distributed if the trust were then to terminate and be distributed, (ii) any trustee who may be removed and replaced by an interested distributee or (iii) an individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the trust.

(8) "Total return unitrust" means an income trust which has been converted under and meets the provisions of this Part.

(9) "Trustee" means any person acting as trustee of the trust (except as otherwise expressly provided in this Part), whether acting in such person's discretion or on the direction of one or more persons acting in a fiduciary capacity.

(10) "Unitrust amount" means an amount computed as a percentage of the fair market value of the trust.

"**§ 37A-1-104.2. Conversion in trustee's discretion without court approval.**

(a) Any trustee, other than an interested trustee, or, where two or more persons are acting as trustees, a majority of the trustees who are not interested trustees (in either case hereafter "trustee"), may, in the trustees' sole discretion and without court approval, (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if:

(1) The trustee adopts a written policy for the trust providing (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income, (ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income rather than unitrust amounts, or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy.

(2) The trustee sends written notice of its intention to take such action, along with copies of such written policy and this Part, to (i) the grantor of the trust, if living, (ii) all the competent beneficiaries who are currently receiving or eligible to receive distributions of income of the trust, (iii) all the competent beneficiaries who would receive principal of the trust if the trust were to terminate at the time of the giving of such notice (without regard to the exercise of any power of appointment), and (iv) all persons acting as advisor or protector of the trust.

(3) There is at least one competent beneficiary who is currently receiving or eligible to receive distributions of income of the trust, and there is at least one competent beneficiary who would receive principal of the trust if the trust were to terminate at the time of the giving of such notice.

(4) No person receiving notice of the trustee's intention to take the proposed action of the trustee objects to such action within 60 days of receipt of such notice by written instrument delivered to the trustee.

(b) If there is no trustee of the trust other than an interested trustee, the interested trustee or, where two or more persons are acting as trustee and are interested trustees, a majority of such interested trustees may, in its sole discretion and without court approval, (i) convert an income trust to a total return unitrust, (ii) reconvert a total return

unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if:

(1) The trustee adopts a written policy for the trust providing (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income as determined under Chapter 37A of the General Statutes of North Carolina, (ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income as determined under Chapter 37A of the General Statutes of North Carolina rather than unitrust amounts, or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy.

(2) The trustee appoints a disinterested person who, in its sole discretion but acting in a fiduciary capacity, determines for the trustee (i) the percentage to be used to calculate the unitrust amount, (ii) the method to be used in determining the fair market value of the trust, and (iii) which assets, if any, are to be excluded in determining the unitrust amount.

(3) The trustee sends written notice of its intention to take such action, along with copies of such written policy and this Part, and the determinations of the disinterested person to (i) the grantor of the trust, if living, (ii) all the competent beneficiaries who are currently receiving or eligible to receive distributions of income of the trust, (iii) all the competent beneficiaries who would receive principal of the trust if the trust were to terminate at the time of the giving of such notice (without regard to the exercise of any power of appointment), and (iv) all persons acting as advisor or protector of the trust.

(4) There is at least one competent beneficiary who is currently receiving or eligible to receive distributions of income of the trust, and there is at least one competent beneficiary who would receive principal of the trust if the trust were to terminate at the time of the giving of such notice.

(5) No person receiving notice of the trustee's intention to take the proposed action of the trustee objects to such action or to the determination of the disinterested person within 60 days of receipt of such notice by written instrument delivered to the trustee, the trustee may take such action without court approval.

"**§ 37A-1-104.3. Conversion with court approval.**

(a) If any trustee desires to (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust but does not have the ability to or elects not to do it under the provisions of G.S. 36A-1-104.2, the trustee may petition the court for such order as the

trustee deems appropriate. In the event, however, there is only one trustee of such trust and such trustee is an interested trustee or in the event there are two or more trustees of such trust and a majority of them are interested trustees, the court, in its own discretion or on the petition of such trustee or trustees or any person interested in the trust, may appoint a disinterested person who, acting in a fiduciary capacity, shall present such information to the court as shall be necessary to enable the court to make its determinations under this Part.

(b) A competent beneficiary may request the trustee to (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust. If the trustee does not take the action requested, the competent beneficiary may petition the court to order the trustee to take such action.

(c) All proceedings under this section shall be conducted as provided in Article 3 of Chapter 36A of the General Statutes.

"**§ 37A-1-104.4. Determination of unitrust amount.**

(a) The fair market value of the trust shall be determined at least annually, using such valuation date as selected by the trustee in its discretion. The trustee, in its discretion, may use an average of the fair market value on the same valuation date for the current fiscal year and not more than three preceding fiscal years, if the use of such average appears desirable to reduce the impact of fluctuations in market value on the unitrust amount. Assets for which a fair market value cannot be readily ascertained shall be valued using such valuation methods as are deemed reasonable and appropriate by the trustee. Such assets may be excluded from valuation, provided all income received with respect to such assets is distributed to the extent distributable in accordance with the terms of the governing instrument.

(b) The percentage to be used in determining the unitrust amount shall be a reasonable current return from the trust, in any event not less than three percent (3%) nor more than five percent (5%), taking into account the intentions of the grantor of the trust as expressed in the governing instrument, the needs of the beneficiaries, general economic conditions, projected current earnings and appreciation for the trust, and projected inflation and its impact on the trust.

(c) In the case of a trust, (i) for which a marital deduction has been taken for federal tax purposes under section 2056 or section 2523 of the Code (during the lifetime of the spouse for whom the trust was created), or (ii) a trust to which the generation-skipping transfer tax due under section 2601 of the Code does not apply by reason of any effective date or transition rule, the unitrust amount in any taxable year shall not be less than the net income of the trust, determined without regard to the provisions of subsection (d) of this section.

(d) Following the conversion of an income trust to a total return unitrust, the trustee:

(1) Shall treat the unitrust amount as if it were net income of the trust for purposes of determining the amount available, from time to time, for distribution from the trust; and

(2) May allocate to trust income for each taxable year of the trust (or portion thereof) (i) net short-term capital gain described in section 1222(5) of the Code for such year (or portion thereof) but only to the extent that the amount so allocated together with all other amounts allocated to trust income for such year (or portion thereof) does not exceed the unitrust amount for such year (or portion thereof); and (ii) net long-term capital gain described in section 1222(7) of the Code for such year (or portion thereof) but only to the extent that the amount so allocated together with all other amounts, including amounts described in clause (i) above, allocated to trust income for such year (or portion thereof) does not exceed the unitrust amount for such year (or portion thereof).

"**§ 37A-1-104.5. Matters in trustee's discretion.**

In administering a total return unitrust, the trustee may, in its sole discretion but subject to the provisions of the governing instrument, determine:

(1) The effective date of the conversion;

(2) The timing of distributions (including provisions for prorating a distribution for a short year in which a beneficiary's right to payments commences or ceases);

(3) Whether distributions are to be made in cash or in kind or partly in cash and partly in kind;

(4) If the trust is reconverted to an income trust, the effective date of such reconversion; and

(5) Such other administrative issues as may be necessary or appropriate to carry out the purposes of this Part.

"**§ 37A-1-104.6. No effect on principal distributions.**

Conversion to a total return unitrust under the provisions of this Part shall not affect any other provision of the governing instrument, if any, regarding distributions of principal; for purposes of this Part, the distribution of a unitrust amount shall be considered a distribution of income and not of principal.

"**§ 37A-1-104.7. Marital deduction trusts.**

In the case of any trust for which a marital deduction has been taken, in whole or in part, for federal tax purposes under sections 2056 or section 2523 of the Code, the spouse otherwise entitled to receive the net income of the trust shall have the right, by written instrument delivered to the trustee, to compel for his or her lifetime (i) the conversion of the trust from an income trust to a total return unitrust, or (ii) the reconversion of the trust from a total return unitrust to an income trust, notwithstanding anything in this Part to the contrary.

"**§ 37A-1-104.8. No liability on part of trustee or disinterested person acting in good faith.**

No trustee or disinterested person who in good faith takes or fails to take any action under this Part shall be liable to any person affected by such action or inaction, regardless of whether such person received written notice as provided in this Part and regardless of whether such person was under a legal disability at the time of the delivery

of such notice. The exclusive remedy for any person affected by such action or inaction shall be to obtain an order of the court directing the trustee (i) to convert an income trust to a total return unitrust, (ii) to reconvert from a total return unitrust to an income trust, or (iii) to change the percentage used to calculate the unitrust amount.

"**§ 37A-1-104.9. Applicability.**

This Part shall apply to all trusts in existence on, or created after January 1, 2004, unless (i) the governing instrument contains a provision clearly expressing the grantor's intention that the current beneficiary or beneficiaries are to receive an amount other than a reasonable current return from the trust, (ii) the trust is a trust described in section 170(f)(2)(B), section 664(d), section 2702(a)(3) or section 2702(b) of the Code, (iii) one or more persons to whom the trustee could distribute income has a power of withdrawal over the trust that is not subject to an ascertainable standard under section 2041 or section 2514 of the Code, or the power of withdrawal can be exercised to discharge a duty of support the person possesses, or (iv) the governing instrument expressly prohibits use of this Part by specific reference to the Part.

"Part 3. Judicial Control of Discretionary Power.

"**§ 37A-1-105. Judicial control of discretionary power.**

(a) The court may not order a fiduciary to change a decision to exercise or not to exercise a discretionary power conferred by this Chapter unless it determines that the decision was an abuse of the fiduciary's discretion. A fiduciary's decision is not an abuse of discretion merely because the court would have exercised the power in a different manner or would not have exercised the power.

(b) The decisions to which subsection (a) of this section applies include:

(1) A decision under G.S. 37A-1-104(a) as to whether and to what extent an amount should be transferred from principal to income or from income to principal.

(2) A decision regarding the factors that are relevant to the trust and its beneficiaries, the extent to which the factors are relevant, and the weight, if any, to be given to those factors, in deciding whether and to what extent to exercise the discretionary power conferred by G.S. 37A-1-104(a).

(c) If the court determines that a fiduciary has abused the fiduciary's discretion, the court may place the income and remainder beneficiaries in the positions they would have occupied if the discretion had not been abused, according to the following rules:

(1) To the extent that the abuse of discretion has resulted in no distribution to a beneficiary or in a distribution that is too small, the court shall order the fiduciary to distribute from the trust to the beneficiary an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary's appropriate position.

(2) To the extent that the abuse of discretion has resulted in a distribution to a beneficiary which is too large, the court shall place the beneficiaries, the trust, or both, in whole or in part, in their appropriate positions by ordering the fiduciary to withhold an amount from one or more future distributions to the beneficiary who received the

distribution that was too large or ordering that beneficiary to return some or all of the distribution to the trust.

(3) To the extent that the court is unable, after applying subdivisions (1) and (2) of this subsection, to place the beneficiaries, the trust, or both, in the positions they would have occupied if the discretion had not been abused, the court may order the fiduciary to pay an appropriate amount from its own funds to one or more of the beneficiaries or the trust or both.

(d) Upon petition by the fiduciary, the court having jurisdiction over a trust or estate shall determine whether a proposed exercise or nonexercise by the fiduciary of a discretionary power conferred by this Chapter will result in an abuse of the fiduciary's discretion. If the petition describes the proposed exercise or nonexercise of the power and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the fiduciary relies, and an explanation of how the income and remainder beneficiaries will be affected by the proposed exercise or nonexercise of the power, a beneficiary who challenges the proposed exercise or nonexercise has the burden of establishing that it will result in an abuse of discretion.

"Article 2.

"Decedent's Estate or Terminating Income Interest.

"**§ 37A-2-201. Determination and distribution of net income.**

After a decedent dies, in the case of an estate, or after an income interest in a trust ends, the following rules apply:

(1) A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in Articles 3 through 5 which apply to trustees and the rules in subdivision (5) of this section. The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

(2) A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in Articles 3 through 5 which apply to trustees and by:

a. Including in net income all income from property used to discharge liabilities;

b. Paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction; and

c. Paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the

winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

(3) Unless the will or trust instrument otherwise provides, or the court otherwise directs, a fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright interest computed as provided in G.S. 24-1 from the date that is one year following the date of death of the person whose death gives rise to the payment of the pecuniary bequest or the happening of the contingency which causes the income interest to end, from net income determined under subdivision (2) of this section or from principal to the extent that net income is insufficient; provided, that this subdivision shall not apply to a pecuniary bequest:

a. To or for the benefit of a decedent's surviving spouse which is, or can be, qualified for the federal estate tax marital deduction; or

b. To or for the benefit of charitable organizations which are qualified for the federal estate tax charitable deduction, including a charitable remainder trust.

(4) A fiduciary shall distribute the net income remaining after distributions required by subdivision (3) of this section in the manner described in G.S. 37A-2-202 to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

(5) A fiduciary may not reduce principal or income receipts from property described in subdivision (1) of this section because of a payment described in G.S. 37A-5-501 or G.S. 37A-5-502 to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

"**§ 37A-2-202. Distribution to residuary and remainder beneficiaries.**

(a) Each beneficiary described in G.S. 37A-2-201(4) is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in undistributed

principal assets, using values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

(b) In determining a beneficiary's share of net income, the following rules apply:

(1) The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date, including assets that later may be sold to meet principal obligations.

(2) The beneficiary's fractional interest in the undistributed principal assets must be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust.

(3) The beneficiary's fractional interest in the undistributed principal assets must be calculated on the basis of the aggregate value of those assets as of the distribution date without reducing the value by any unpaid principal obligation.

(4) The distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.

(c) If a fiduciary does not distribute all of the collected but undistributed net income to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

(d) A fiduciary may apply the rules in this section, to the extent that the fiduciary considers it appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this section applies to the income from the asset.

"Article 3.

"Apportionment at Beginning and End of Income Interest.

"§ 37A-3-301. When right to income begins and ends.

(a) An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(b) An asset becomes subject to a trust:

(1) On the date it is transferred to the trust in the case of an asset that is transferred to a trust during the transferor's life;

(2) On the date of a testator's death in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the testator's estate; or

(3) On the date of an individual's death in the case of an asset that is transferred to a fiduciary by a third party because of the individual's death.

(c) An asset becomes subject to a successive income interest on the day after the preceding income interest ends, as determined under subsection (d) of this section, even if there is an intervening period of administration to wind up the preceding income interest.

(d) An income interest ends on the day before an income beneficiary dies or another terminating event occurs or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income.

"**§ 37A-3-302. Apportionment of receipts and disbursements when decedent dies or income interest begins.**

(a) A trustee shall allocate an income receipt or disbursement, other than one to which G.S. 37A-2-201(1) applies to principal, if its due date occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

(b) A trustee shall allocate an income receipt or disbursement to income if its due date occurs on or after the date on which a decedent dies or an income interest begins and it is a periodic due date. An income receipt or disbursement must be treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins must be allocated to principal, and the balance must be allocated to income.

(c) An item of income or an obligation is due on the date the payer is required to make a payment. If a payment date is not stated, there is no due date for the purposes of this Chapter. Distributions to shareholders or other owners from an entity to which G.S. 37A-4-401 applies are deemed to be due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration date for the distribution. A due date is periodic for receipts or disbursements that must be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes distributions at regular intervals.

"**§ 37A-3-303. Apportionment when income interest ends.**

(a) In this section, "undistributed income" means net income received before the date on which an income interest ends. The term does not include an item of income or expense that is due or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

(b) When a mandatory income interest ends, the trustee shall pay to a mandatory income beneficiary who survives that date, or to the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary's share of the undistributed income that is not disposed of under the terms of the trust unless the beneficiary has an unqualified power to revoke more than five percent (5%) of the trust immediately before the income interest ends. In the latter case, the undistributed income from the portion of the trust that may be revoked must be added to principal.

(c) When a trustee's obligation to pay a fixed annuity or a fixed fraction of the value of the trust's assets ends, the trustee shall prorate the final payment if and to the extent required by applicable law to accomplish a purpose of the trust or its settlor relating to income, gift, estate, or other tax requirements.

"Article 4.

"Allocation of Receipts During Administration of Trust.

"Part 1. Receipts From Entities.

"**§ 37A-4-401. Character of receipts.**

(a) In this section, "entity" means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a trustee has an interest other than a trust or estate to which G.S. 37A-4-402 applies, a business or activity to which G.S. 37A-4-403 applies, or an asset-backed security to which G.S. 37A-4-415 applies.

(b) Except as otherwise provided in this section, a trustee shall allocate to income money received from an entity.

(c) A trustee shall allocate the following receipts from an entity to principal:

(1) Property other than money;

(2) Money received in one distribution or a series of related distributions in exchange for part or all of a trust's interest in the entity;

(3) Money received in total or partial liquidation of the entity; and

(4) Money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

(d) Money is received in partial liquidation:

(1) To the extent that the entity, at or near the time of a distribution, indicates that it is a distribution in partial liquidation; or

(2) If the total amount of money and property received in a distribution or series of related distributions is greater than twenty percent (20%) of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt.

(e) Money is not received in partial liquidation, nor may it be taken into account under subdivision (d)(2) of this section, to the extent that it does not exceed the amount of income tax that a trustee or beneficiary must pay on taxable income of the entity that distributes the money.

(f) A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors.

"**§ 37A-4-402. Distribution from trust or estate.**

A trustee shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest and shall allocate to principal an amount received as a distribution of principal from such a trust or estate. If a trustee purchases an interest in a trust that is an investment

entity, or a decedent or donor transfers an interest in such a trust to a trustee, G.S. 37A-4-401 or G.S. 37A-4-415 applies to a receipt from the trust.

"**§ 37A-4-403. Business and other activities conducted by trustee.**

(a) If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the trust's general accounting records, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

(b) A trustee who accounts separately for a business or other activity may determine the extent to which its net cash receipts must be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the trust's general accounting records to the extent the trustee determines that the amount received is no longer required in the conduct of the business.

(c) Activities for which a trustee may maintain separate accounting records include:

(1) Retail, manufacturing, service, and other traditional business activities;
(2) Farming;
(3) Raising and selling livestock and other animals;
(4) Management of rental properties;
(5) Extraction of minerals and other natural resources;
(6) Timber operations; and
(7) Activities to which G.S. 37A-4-414 applies.

"Part 2. Receipts Not Normally Apportioned.

"**§ 37A-4-404. Principal receipts.**

A trustee shall allocate to principal:

(1) To the extent not allocated to income under this Chapter, assets received from a transferor during the transferor's lifetime, a decedent's estate, a trust with a terminating income interest, or a payer under a contract naming the trust or its trustee as beneficiary;
(2) Money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to this Article;
(3) Amounts recovered from third parties to reimburse the trust because of disbursements described in G.S. 37A-5-502(a)(7) or for other reasons to the extent not based on the loss of income;
(4) Proceeds of property taken by eminent domain, but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income;

(5) Net income received in an accounting period during which there is no beneficiary to whom a trustee may or must distribute income; and

(6) Other receipts as provided in Part 3 of this Article.

"**§ 37A-4-405. Rental property.**

To the extent that a trustee accounts for receipts from rental property pursuant to this section, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods, must be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the trustee's contractual obligations have been satisfied with respect to that amount.

"**§ 37A-4-406. Obligation to pay money.**

(a) An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, must be allocated to income without any provision for amortization of premium.

(b) A trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee more than one year after it is purchased or acquired by the trustee, including an obligation whose purchase price or value when it is acquired is less than its value at maturity. If the obligation matures within one year after it is purchased or acquired by the trustee, an amount received in excess of its purchase price or its value when acquired by the trust must be allocated to income.

(c) This section does not apply to an obligation to which G.S. 37A-4-409, 37A-4-410, 37A-4-411, 37A-4-412, 37A-4-414, or 37A-4-415 applies.

"**§ 37A-4-407. Insurance policies and similar contracts.**

(a) Except as otherwise provided in subsection (b) of this section, a trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its trustee is named as beneficiary, including a contract that insures the trust or its trustee against loss for damage to, destruction of, or loss of title to a trust asset. The trustee shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income, and to principal if the premiums are paid from principal.

(b) A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income, or, subject to G.S. 37A-4-403, loss of profits from a business.

(c) This section does not apply to a contract to which G.S. 37A-4-409 applies.

"Part 3. Receipts Normally Apportioned.

"**§ 37A-4-408. Insubstantial allocations not required.**

If a trustee determines that an allocation between principal and income required by G.S. 37A-4-409, 37A-4-410, 37A-4-411, 37A-4-412, or 37A-4-415 is insubstantial, the trustee may allocate the entire amount to principal unless one of the circumstances described in G.S. 37A-1-104(c) applies to the allocation. This power may be exercised by a cotrustee in the circumstances described in G.S. 37A-1-104(d) and may be released

for the reasons and in the manner described in G.S. 37A-1-104(e). An allocation is presumed to be insubstantial if:

(1) The amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than ten percent (10%); or

(2) The value of the asset producing the receipt for which the allocation would be made is less than ten percent (10%) of the total value of the trust's assets at the beginning of the accounting period.

"**§ 37A-4-409. Deferred compensation, annuities, and similar payments.**

(a) In this section, "payment" means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer, including a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(b) To the extent that a payment is characterized as interest or a dividend or a payment made in lieu of interest or a dividend, a trustee shall allocate it to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(c) If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income ten percent (10%) of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection, a payment is not "required to be made" to the extent that it is made because the trustee exercises a right of withdrawal.

(d) If, to obtain an estate tax marital deduction for a trust, a trustee must allocate more of a payment to income than provided for by this section, the trustee shall allocate to income the additional amount necessary to obtain the marital deduction.

(e) This section does not apply to payments to which G.S. 37A-4-410 applies.

"**§ 37A-4-410. Liquidating asset.**

(a) In this section, "liquidating asset" means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration. The term includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of more than one year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not include a payment subject to G.S. 37A-4-409, resources subject to G.S. 37A-4-411, timber subject to G.S. 37A-4-412, an activity subject to G.S. 37A-4-414, an asset subject to G.S. 37A-4-415, or any asset for which the trustee establishes a reserve for depreciation under G.S. 37A-5-503.

(b) A trustee shall allocate to income ten percent (10%) of the receipts from a liquidating asset and the balance to principal.

"**§ 37A-4-411. Minerals, water, and other natural resources.**

(a) To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources pursuant to this section, the trustee shall allocate them as follows:

(1) If received as nominal delay rental or nominal annual rent on a lease, a receipt must be allocated to income.

(2) If received from a production payment, a receipt must be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance must be allocated to principal.

(3) If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal ninety percent (90%) must be allocated to principal and the balance to income.

(4) If an amount is received from a working interest or any other interest not provided for in subdivisions (1), (2), or (3) of this subsection, ninety percent (90%) of the net amount received must be allocated to principal and the balance to income.

(b) An amount received on account of an interest in water that is renewable must be allocated to income. If the water is not renewable, ninety percent (90%) of the amount must be allocated to principal and the balance to income.

(c) This Chapter applies whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.

(d) If a trust owns an interest in minerals, water, or other natural resources on January 1, 2004, the trustee may allocate receipts from the interest as provided in this Chapter or in the manner used by the trustee before January 1, 2004. If the trust acquires an interest in minerals, water, or other natural resources after January 1, 2004, the trustee shall allocate receipts from the interest as provided in this Chapter.

"**§ 37A-4-412. Timber.**

(a) To the extent that a trustee accounts for receipts from the sale of timber and related products pursuant to this section, the trustee shall allocate the net receipts:

(1) To income to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest;

(2) To principal to the extent that the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;

(3) To or between income and principal if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust, by determining the amount of timber removed from the land

under the lease or contract and applying the rules in subdivisions (1) and (2) of this subsection; or

(4) To principal to the extent that advance payments, bonuses, and other payments are not allocated pursuant to subdivisions (1), (2), or (3) of this subsection.

(b) In determining net receipts to be allocated pursuant to subsection (a), a trustee shall deduct and transfer to principal a reasonable amount for depletion.

(c) This Chapter applies whether or not a decedent or transferor was harvesting timber from the property before it become subject to the trust.

(d) If a trust owns an interest in timberland on January 1, 2004, the trustee may allocate net receipts from the sale of timber and related products as provided in this Chapter or in the manner used by the trustee before January 1, 2004. If the trust acquires an interest in timberland after January 1, 2004, the trustee shall allocate net receipts from the sale of timber and related products as provided in this Chapter.

"**§ 37A-4-413. Property not productive of income.**

(a) If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income under G.S. 37A-1-104 and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power conferred by G.S. 37A-1-104(a). The trustee may decide which action or combination of actions to take.

(b) In cases not governed by subsection (a) of this section, proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period.

"**§ 37A- 4-414. Derivatives and options.**

(a) In this section, "derivative" means a contract or financial instrument or a combination of contracts and financial instruments which gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

(b) To the extent that a trustee does not account under G.S. 37A-4-403 for transactions in derivatives, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions.

(c) If a trustee grants an option to buy property from the trust, whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option must be allocated to principal. An amount paid to acquire the option must be paid from principal. A gain or loss realized upon the exercise of an option, including an

option granted to a settlor of the trust for services rendered, must be allocated to principal.

"**§ 37A-4-415. Asset-backed securities.**

(a) In this section, "asset-backed security" means an asset whose value is based upon the right it gives the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. The term includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceeds other than interest or current return. The term does not include an asset to which G.S. 37A-4-401 or G.S. 37A-4-409 applies.

(b) If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee shall allocate to income the portion of the payment which the payer identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

(c) If a trust receives one or more payments in exchange for the trust's entire interest in an asset-backed security in one accounting period, the trustee shall allocate the payments to principal. If a payment is one of a series of payments that will result in the liquidation of the trust's interest in the security over more than one accounting period, the trustee shall allocate ten percent(10%) of the payment to income and the balance to principal.

"Article 5.

"Allocation of Disbursements During Administration of Trust.

"**§ 37A-5-501. Disbursements from income.**

A trustee shall make the following disbursements from income to the extent that they are not disbursements to which G.S. 37A-2-201(2)b. or c. applies:

(1) One-half of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee;

(2) One-half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests;

(3) All of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest; and

(4) Recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

"**§ 37A-5-502. Disbursements from principal.**

(a) A trustee shall make the following disbursements from principal:

(1) The remaining one-half of the disbursements described in G.S. 37A-5-501(1) and (2);

(2) All of the trustee's compensation calculated on principal as a fee for acceptance, distribution, or termination, and disbursements made to prepare property for sale;

(3) Payments on the principal of a trust debt;

(4) Expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property;

(5) Premiums paid on a policy of insurance not described in G.S. 37A-5-501(4) of which the trust is the owner and beneficiary;

(6) Estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust; and

(7) Disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common-law claims by third parties, and defending claims based on environmental matters.

(b) If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

"**§ 37A-5-503. Transfers from income to principal for depreciation.**

(a) In this section, "depreciation" means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one year.

(b) A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

(1) Of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

(2) During the administration of a decedent's estate; or

(3) Under this section if the trustee is accounting under G.S. 37A-4-403 for the business or activity in which the asset is used.

(c) An amount transferred to principal need not be held as a separate fund.

"**§ 37A-5-504. Transfers from income to reimburse principal.**

(a) If a trustee makes or expects to make a principal disbursement described in this section, the trustee may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.

(b) Principal disbursements to which subsection (a) of this section applies include the following, but only to the extent that the trustee has not been and does not expect to be reimbursed by a third party:

(1) An amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs;

(2) A capital improvement to a principal asset, whether in the form of changes to an existing asset or the construction of a new asset, including special assessments;

(3) Disbursements made to prepare property for rental, including tenant allowances, leasehold improvements, and broker's commissions;

(4) Periodic payments on an obligation secured by a principal asset to the extent that the amount transferred from income to principal for depreciation is less than the periodic payments; and

(5) Disbursements described in G.S. 37A-5-502(a)(7).

(c) If the asset whose ownership gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a trustee may continue to transfer amounts from income to principal as provided in subsection (a) of this section.

"**§ 37A-5-505. Income taxes.**

(a) A tax required to be paid by a trustee based on receipts allocated to income must be paid from income.

(b) A tax required to be paid by a trustee based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

(c) A tax required to be paid by a trustee on the trust's share of an entity's taxable income must be paid proportionately:

(1) From income to the extent that receipts from the entity are allocated to income; and

(2) From principal to the extent that:

a. Receipts from the entity are allocated to principal; and

b. The trust's share of the entity's taxable income exceeds the total receipts described in subdivision (1) and sub-subdivision (2)a. of this subsection.

(d) For purposes of this section, receipts allocated to principal or income must be reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax.

"**§ 37A-5-506. Adjustments between principal and income because of taxes.**

(a) A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries which arise from:

(1) Elections and decisions, other than those described in subsection (b) of this section, that the fiduciary makes from time to time regarding tax matters;

(2) An income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust; or

(3) The ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate, trust, or a beneficiary.

(b) If the amount of an estate tax marital deduction or charitable contribution deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate tax purposes, and as a result estate taxes paid from principal are increased and income taxes paid by an estate, trust, or beneficiary are decreased, each estate, trust, or beneficiary that benefits from the decrease in income tax shall reimburse the principal from which the increase in estate tax is paid. The total reimbursement must equal the increase in the estate tax to the extent that the principal used to pay the increase would have qualified for a marital deduction or charitable contribution deduction but for the payment. The proportionate share of the reimbursement for each estate, trust, or beneficiary whose income taxes are reduced must be the same as its proportionate share of the total decrease in income tax. An estate or trust shall reimburse principal from income.

"Article 6.

"Miscellaneous Provisions.

"**§ 37-A-6-601. Uniformity of Application and Construction.**

In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

"**§ 37-A-6-602. Severability Clause.**

If any provision of this Chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are severable."

SECTION 2. Chapter 37 of the General Statutes is repealed.

SECTION 3. This act becomes effective January 1, 2004, and applies to every trust or decedent's estate existing on that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A, as enacted in this act.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 549
PROPOSED COMMITTEE SUBSTITUTE S549-CSRH-9 [v.1]

4/14/2003 5:51:42 PM

Short Title: Uniform Principal and Income Act. (Public)

Sponsors:

Referred to:

March 27, 2003

A BILL TO BE ENTITLED

AN ACT TO ADOPT THE REVISED UNIFORM PRINCIPAL AND INCOME ACT.

The General Assembly of North Carolina enacts:

SECTION 1. The General Statutes are amended by adding a new Chapter to read:

"**Chapter 37A.**

"**Uniform Principal and Income Act.**

"Article 1.

"Definitions and Fiduciary Duties; Conversion to Unitrust; Judicial Control of Discretionary Power.

"Part 1. Definitions.

"**§ 37A-1-101. Short title.**

This Chapter may be cited as the Uniform Principal and Income Act.

"**§ 37A-1-102. Definitions.**

The following definitions apply in this Chapter:

(1) "Accounting period" means a calendar year unless another 12-month period is selected by a fiduciary. The term includes a portion of a calendar year or other 12-month period that begins when an income interest begins or ends when an income interest ends.

(2) "Beneficiary" includes, in the case of a decedent's estate, an heir, legatee, and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary.

(3) "Fiduciary" means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, and a person performing substantially the same function.

(4) "Income" means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts

from a sale, exchange, or liquidation of a principal asset, to the extent provided in Article 4 of this Chapter.

(5) "Income beneficiary" means a person to whom net income of a trust is or may be payable.

(6) "Income interest" means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to be distributed or authorize it to be distributed in the trustee's discretion.

(7) "Mandatory income interest" means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

(8) "Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under this Chapter to or from income during the period.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(10) "Principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates.

(11) "Remainder beneficiary" means a person entitled to receive principal when an income interest ends.

(12) "Terms of a trust" means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.

(13) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

"**§ 37A-1-103. Fiduciary duties; general principles.**

(a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of Articles 2 and 3 of this Chapter, a fiduciary:

(1) Shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this Chapter;

(2) May administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this Chapter;

(3) Shall administer a trust or estate in accordance with this Chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

(4) Shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this Chapter do not provide a rule for

allocating the receipt or disbursement to or between principal and income.

(b) In exercising the power to adjust under G.S. 37A-1-104(a) or a discretionary power of administration regarding a matter within the scope of this Chapter, whether granted by the terms of a trust, a will, or this Chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this Chapter is presumed to be fair and reasonable to all of the beneficiaries.

"**§ 37A-1-104. Trustee's power to adjust.**

(a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or shall be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in G.S. 37A-1-103(a), that the trustee is unable to comply with G.S. 37A-1-103(b). In lieu of exercising the power to adjust, the trustee may convert the trust to a unitrust as permitted under Part 2 of this Article, in which case the unitrust amount shall become the net income of the trust.

(b) In deciding whether and to what extent to exercise the power conferred by subsection (a) of this section, a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

(1) The nature, purpose, and expected duration of the trust;

(2) The intent of the grantor or settlor;

(3) The identity and circumstances of the beneficiaries;

(4) The needs for liquidity, regularity of income, and preservation and appreciation of capital;

(5) The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;

(6) The net amount allocated to income under the other sections of this Chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;

(7) Whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;

(8) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

(9) The anticipated tax consequences of an adjustment.

(c) A trustee may not make an adjustment:

(1) That diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;

(2) That reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(3) That changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) From any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;

(5) If possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) If possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(7) If the trustee is a beneficiary of the trust;

(8) If the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly; or

(9) If the trust has been converted to, and is then operating as, a unitrust under Part 2 of this Article.

(d) If subdivision (5), (6), (7), or (8) of subdivision (c) of this section applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(e) A trustee may release the entire power conferred by subsection (a) of this section or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in subdivisions (1) through (6) or (8) of subsection (c) of this section or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (c) of this section. The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection (a) of this section.

"Part 2. Conversion to Unitrust.

"**§ 37A-1-104.1. Definitions.**

For purposes of this Part:

(1) "Code" means the Internal Revenue Code of 1986, as amended from time to time, and any statutory enactment successor thereto; reference to a specific section of the Code in this Part shall be deemed a reference also to any successor provision dealing with the subject matter of that section of the Code.

(2) "Competent beneficiary" includes:

a. A beneficiary who has attained his or her majority and is not otherwise under a legal disability;

b. A court-appointed guardian of an incompetent beneficiary;

c. An attorney-in-fact or agent under a durable power of attorney for an incompetent beneficiary;

d. A court-appointed guardian of a minor beneficiary's estate; and

e. In the case of a minor beneficiary for whom no guardian has been appointed, a parent of the minor beneficiary, but only if the parent does not have an interest in the estate or trust that conflicts with the interest of the minor beneficiary.

(3) "Grantor" means an individual who created an inter vivos trust.

(4) "Disinterested person" means a person who is not a related or subordinate party with respect to the person then acting as trustee of the trust and excludes the grantor of the trust and any interested trustee.

(5) "Income trust" means a trust, created by either an inter vivos or a testamentary instrument, which directs or permits the trustee to distribute the net income of the trust to one or more persons, either in fixed proportions or in amounts or proportions determined by the trustee. Notwithstanding the foregoing, no trust that may be subject to taxation under section 2001 or section 2501 of the Code shall be an income trust for purposes of this Part, until the expiration of the period for filing the return therefor, including all extensions for the filing.

(6) "Interested distributee" means a person to whom distributions of income or principal can currently be made who has the power to remove the existing trustee and designate as successor a person who may be a related or subordinate party with respect to that distributee.

(7) "Interested trustee" means (i) an individual trustee to whom the net income or principal of the trust can currently be distributed or would be distributed if the trust were then to terminate and be distributed, (ii) any trustee who may be removed and replaced by an interested distributee or (iii) an individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the trust.

(8) "Related or subordinate party" means a related or subordinate party as defined in section 672(c) of the Code.

(9) "Total return unitrust" means an income trust which has been converted under and meets the provisions of this Part.

(10) "Trustee" means any person acting as trustee of the trust, except as otherwise expressly provided in this Part, whether acting in that person's discretion or on the direction of one or more persons acting in a fiduciary capacity.

(11) "Unitrust amount" means an amount computed as a percentage of the fair market value of the trust.

"**§ 37A-1-104.2. Conversion in trustee's discretion without court approval.**

(a) Any trustee, other than an interested trustee, or, where two or more persons are acting as trustees, a majority of the trustees who are not interested trustees (in either case hereafter "trustee"), may, in the trustee's sole discretion and without court approval, (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if:

(1) The trustee adopts a written policy for the trust providing (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income, (ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income rather than unitrust amounts, or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy.

(2) The trustee sends written notice of its intention to take such action, along with copies of such written policy and this Part, to (i) the grantor of the trust, if living, (ii) all the competent beneficiaries who are currently receiving or eligible to receive distributions of income of the trust, (iii) all the competent beneficiaries who would receive principal of the trust if the trust were to terminate at the time of the giving of such notice (without regard to the exercise of any power of appointment), and (iv) all persons acting as advisor or protector of the trust.

(3) There is at least one competent beneficiary who is currently receiving or eligible to receive distributions of income of the trust, and there is at least one competent beneficiary who would receive principal of the trust if the trust were to terminate at the time of the giving of such notice.

(4) No person receiving notice of the trustee's intention to take the proposed action of the trustee objects to such action within 60 days of receipt of such notice by written instrument delivered to the trustee.

(b) If there is no trustee of the trust other than an interested trustee, the interested trustee or, where two or more persons are acting as trustee and are interested trustees, a

majority of such interested trustees may, in its sole discretion and without court approval, (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if:

(1) The trustee adopts a written policy for the trust providing (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income as determined under this Chapter 37A, (ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income as determined under this Chapter rather than unitrust amounts, or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy.

(2) The trustee appoints a disinterested person who, in its sole discretion but acting in a fiduciary capacity, determines for the trustee (i) the percentage to be used to calculate the unitrust amount, (ii) the method to be used in determining the fair market value of the trust, and (iii) which assets, if any, are to be excluded in determining the unitrust amount.

(3) The trustee sends written notice of its intention to take such action, along with copies of such written policy and this Part, and the determinations of the disinterested person to (i) the grantor of the trust, if living, (ii) all the competent beneficiaries who are currently receiving or eligible to receive distributions of income of the trust, (iii) all the competent beneficiaries who would receive principal of the trust if the trust were to terminate at the time of the giving of such notice (without regard to the exercise of any power of appointment), and (iv) all persons acting as advisor or protector of the trust.

(4) There is at least one competent beneficiary who is currently receiving or eligible to receive distributions of income of the trust, and there is at least one competent beneficiary who would receive principal of the trust if the trust were to terminate at the time of the giving of such notice.

(5) No person receiving notice of the trustee's intention to take the proposed action of the trustee objects to such action or to the determination of the disinterested person within 60 days of receipt of such notice by written instrument delivered to the trustee, the trustee may take such action without court approval.

"**§ 37A-1-104.3. Conversion with court approval.**

(a) If any trustee desires to (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust but does not have the ability to or elects not to do it under G.S. 36A-1-104.2, the trustee may petition the court for such order as the trustee deems appropriate.

In the event, however, there is only one trustee of such trust and such trustee is an interested trustee or in the event there are two or more trustees of such trust and a majority of them are interested trustees, the court, in its own discretion or on the petition of such trustee or trustees or any person interested in the trust, may appoint a disinterested person who, acting in a fiduciary capacity, shall present such information to the court as shall be necessary to enable the court to make its determinations under this Part.

(b) A competent beneficiary may request the trustee to (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust. If the trustee does not take the action requested, the competent beneficiary may petition the court to order the trustee to take such action.

(c) All proceedings under this section shall be conducted as provided in Article 3 of Chapter 36A of the General Statutes.

"**§ 37A-1-104.4. Determination of unitrust amount.**

(a) The fair market value of the trust shall be determined at least annually, using such valuation date as selected by the trustee in its discretion. The trustee, in its discretion, may use an average of the fair market value on the same valuation date for the current fiscal year and not more than three preceding fiscal years, if the use of such average appears desirable to reduce the impact of fluctuations in market value on the unitrust amount. Assets for which a fair market value cannot be readily ascertained shall be valued using such valuation methods as are deemed reasonable and appropriate by the trustee. Such assets may be excluded from valuation, provided all income received with respect to such assets is distributed to the extent distributable in accordance with the terms of the governing instrument.

(b) The percentage to be used in determining the unitrust amount shall be a reasonable current return from the trust, in any event not less than three percent (3%) nor more than five percent (5%), taking into account the intentions of the grantor of the trust as expressed in the governing instrument, the needs of the beneficiaries, general economic conditions, projected current earnings and appreciation for the trust, and projected inflation and its impact on the trust.

(c) In the case of a trust, (i) for which a marital deduction has been taken for federal tax purposes under section 2056 or section 2523 of the Code (during the lifetime of the spouse for whom the trust was created), or (ii) a trust to which the generation-skipping transfer tax due under section 2601 of the Code does not apply by reason of any effective date or transition rule, the unitrust amount in any taxable year shall not be less than the net income of the trust, determined without regard to subsection (d) of this section.

(d) Following the conversion of an income trust to a total return unitrust, the trustee:

(1) Shall treat the unitrust amount as if it were net income of the trust for purposes of determining the amount available, from time to time, for distribution from the trust; and

(2) May allocate to trust income for each taxable year of the trust (or portion thereof) (i) net short-term capital gain described in section 1222(5) of the Code for that year or portion of that year but only to the extent that the amount so allocated together with all other amounts allocated to trust income for that year or portion of that year does not exceed the unitrust amount for that year or portion of that year; and (ii) net long-term capital gain described in section 1222(7) of the Code for that year or portion of that year but only to the extent that the amount so allocated together with all other amounts, including amounts described in clause (i) above, allocated to trust income for that year or portion of that year does not exceed the unitrust amount for that year or portion of that year.

"**§ 37A-1-104.5. Matters in trustee's discretion.**

In administering a total return unitrust, the trustee may, in its sole discretion but subject to the provisions of the governing instrument, determine:

(1) The effective date of the conversion;

(2) The timing of distributions, including provisions for prorating a distribution for a short year in which a beneficiary's right to payments commences or ceases;

(3) Whether distributions are to be made in cash or in kind or partly in cash and partly in kind;

(4) If the trust is reconverted to an income trust, the effective date of such reconversion; and

(5) Any other administrative issues as may be necessary or appropriate to carry out the purposes of this Part.

"**§ 37A-1-104.6. No effect on principal distributions.**

Conversion to a total return unitrust under this Part shall not affect any other provision of the governing instrument, if any, regarding distributions of principal. For purposes of this Part, the distribution of a unitrust amount is considered a distribution of income and not of principal.

"**§ 37A-1-104.7. Marital deduction trusts.**

In the case of any trust for which a marital deduction has been taken, in whole or in part, for federal tax purposes under sections 2056 or section 2523 of the Code, the spouse otherwise entitled to receive the net income of the trust shall have the right, by written instrument delivered to the trustee, to compel for his or her lifetime (i) the conversion of the trust from an income trust to a total return unitrust, or (ii) the reconversion of the trust from a total return unitrust to an income trust, notwithstanding anything in this Part to the contrary.

"**§ 37A-1-104.8. No liability on part of trustee or disinterested person acting in good faith.**

No trustee or disinterested person who in good faith takes or fails to take any action under this Part shall be liable to any person affected by the action or inaction, regardless of whether the person received written notice as provided in this Part and regardless of whether the person was under a legal disability at the time of the delivery of the notice.

The exclusive remedy for any person affected by an action or inaction shall be to obtain an order of the court directing the trustee (i) to convert an income trust to a total return unitrust, (ii) to reconvert from a total return unitrust to an income trust, or (iii) to change the percentage used to calculate the unitrust amount.

"**§ 37A-1-104.9. Applicability.**

This Part shall apply to all trusts in existence on, or created after January 1, 2004, unless (i) the governing instrument contains a provision clearly expressing the grantor's intention that the current beneficiary or beneficiaries are to receive an amount other than a reasonable current return from the trust, (ii) the trust is a trust described in section 170(f)(2)(B), section 664(d), section 2702(a)(3) or section 2702(b) of the Code, (iii) one or more persons to whom the trustee could distribute income has a power of withdrawal over the trust that is not subject to an ascertainable standard under section 2041 or section 2514 of the Code, or the power of withdrawal can be exercised to discharge a duty of support the person possesses, or (iv) the governing instrument expressly prohibits use of this Part by specific reference to the Part.

"Part 3. Judicial Control of Discretionary Power.

"**§ 37A-1-105. Judicial control of discretionary power.**

(a) The court may not order a fiduciary to change a decision to exercise or not to exercise a discretionary power conferred by this Chapter unless it determines that the decision was an abuse of the fiduciary's discretion. A fiduciary's decision is not an abuse of discretion merely because the court would have exercised the power in a different manner or would not have exercised the power.

(b) The decisions to which subsection (a) of this section applies include:

(1) A decision under G.S. 37A-1-104(a) as to whether and to what extent an amount should be transferred from principal to income or from income to principal.

(2) A decision regarding the factors that are relevant to the trust and its beneficiaries, the extent to which the factors are relevant, and the weight, if any, to be given to those factors, in deciding whether and to what extent to exercise the discretionary power conferred by G.S. 37A-1-104(a).

(c) If the court determines that a fiduciary has abused the fiduciary's discretion, the court may place the income and remainder beneficiaries in the positions they would have occupied if the discretion had not been abused, according to the following rules:

(1) To the extent that the abuse of discretion has resulted in no distribution to a beneficiary or in a distribution that is too small, the court shall order the fiduciary to distribute from the trust to the beneficiary an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary's appropriate position.

(2) To the extent that the abuse of discretion has resulted in a distribution to a beneficiary that is too large, the court shall place the beneficiaries, the trust, or both, in whole or in part, in their appropriate positions by ordering the fiduciary to withhold an amount from one or more future distributions to the beneficiary who received the distribution that was

too large or ordering that beneficiary to return some or all of the distribution to the trust.

(3) To the extent that the court is unable, after applying subdivisions (1) and (2) of this subsection, to place the beneficiaries, the trust, or both, in the positions they would have occupied if the discretion had not been abused, the court may order the fiduciary to pay an appropriate amount from its own funds to one or more of the beneficiaries or the trust or both.

(d) Upon petition by the fiduciary, the court having jurisdiction over a trust or estate shall determine whether a proposed exercise or nonexercise by the fiduciary of a discretionary power conferred by this Chapter will result in an abuse of the fiduciary's discretion. If the petition describes the proposed exercise or nonexercise of the power and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the fiduciary relies, and an explanation of how the income and remainder beneficiaries will be affected by the proposed exercise or nonexercise of the power, a beneficiary who challenges the proposed exercise or nonexercise has the burden of establishing that it will result in an abuse of discretion.

"Article 2.

"Decedent's Estate or Terminating Income Interest.

"**§ 37A-2-201. Determination and distribution of net income.**

After a decedent dies, in the case of an estate, or after an income interest in a trust ends, the following rules apply:

(1) A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in Articles 3 through 5 of this Chapter that apply to trustees and the rules in subdivision (5) of this section. The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

(2) A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in Articles 3 through 5 of this Chapter that apply to trustees and by:

a. Including in net income all income from property used to discharge liabilities;

b. Paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction; and

c. Paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the

winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

(3) Unless the will or trust instrument otherwise provides, or the court otherwise directs, a fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright interest computed as provided in G.S. 24-1 from the date that is one year following the date of death of the person whose death gives rise to the payment of the pecuniary bequest or the happening of the contingency which causes the income interest to end, from net income determined under subdivision (2) of this section or from principal to the extent that net income is insufficient. However, this subdivision shall not apply to a pecuniary bequest:

a. To or for the benefit of a decedent's surviving spouse that is, or can be, qualified for the federal estate tax marital deduction; or

b. To or for the benefit of charitable organizations that are qualified for the federal estate tax charitable deduction, including a charitable remainder trust.

(4) A fiduciary shall distribute the net income remaining after distributions required by subdivision (3) of this section in the manner described in G.S. 37A-2-202 to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

(5) A fiduciary may not reduce principal or income receipts from property described in subdivision (1) of this section because of a payment described in G.S. 37A-5-501 or G.S. 37A-5-502 to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

"**§ 37A-2-202. Distribution to residuary and remainder beneficiaries.**

(a) Each beneficiary described in G.S. 37A-2-201(4) is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than

one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

(b) In determining a beneficiary's share of net income, the following rules apply:

(1) The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date, including assets that later may be sold to meet principal obligations.

(2) The beneficiary's fractional interest in the undistributed principal assets shall be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust.

(3) The beneficiary's fractional interest in the undistributed principal assets shall be calculated on the basis of the aggregate value of those assets as of the distribution date without reducing the value by any unpaid principal obligation.

(4) The distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.

(c) If a fiduciary does not distribute all of the collected but undistributed net income to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

(d) A fiduciary may apply the rules in this section, to the extent that the fiduciary considers it appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this section applies to the income from the asset.

"Article 3.

"Apportionment at Beginning and End of Income Interest.

"**§ 37A-3-301. When right to income begins and ends.**

(a) An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(b) An asset becomes subject to a trust:

(1) On the date it is transferred to the trust in the case of an asset that is transferred to a trust during the transferor's life;

(2) On the date of a testator's death in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the testator's estate; or

(3) On the date of an individual's death in the case of an asset that is transferred to a fiduciary by a third party because of the individual's death.

(c) An asset becomes subject to a successive income interest on the day after the preceding income interest ends, as determined under subsection (d) of this section, even if there is an intervening period of administration to wind up the preceding income interest.

(d) An income interest ends on the day before an income beneficiary dies or another terminating event occurs or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income.

"**§ 37A-3-302. Apportionment of receipts and disbursements when decedent dies or income interest begins.**

(a) A trustee shall allocate an income receipt or disbursement, other than one to which G.S. 37A-2-201(1) applies to principal, if its due date occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

(b) A trustee shall allocate an income receipt or disbursement to income if its due date occurs on or after the date on which a decedent dies or an income interest begins and it is a periodic due date. An income receipt or disbursement shall be treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins shall be allocated to principal, and the balance shall be allocated to income.

(c) An item of income or an obligation is due on the date the payer is required to make a payment. If a payment date is not stated, there is no due date for the purposes of this Chapter. Distributions to shareholders or other owners from an entity to which G.S. 37A-4-401 applies are deemed to be due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration date for the distribution. A due date is periodic for receipts or disbursements that shall be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes distributions at regular intervals.

"**§ 37A-3-303. Apportionment when income interest ends.**

(a) In this section, "undistributed income" means net income received before the date on which an income interest ends. The term does not include an item of income or expense that is due or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

(b) When a mandatory income interest ends, the trustee shall pay to a mandatory income beneficiary who survives that date, or to the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary's share of the undistributed income that is not disposed of under the terms of the trust unless the beneficiary has an unqualified power to revoke more than five percent (5%) of the trust immediately before the income interest ends. In the latter case, the undistributed income from the portion of the trust that may be revoked shall be added to principal.

(c) When a trustee's obligation to pay a fixed annuity or a fixed fraction of the value of the trust's assets ends, the trustee shall prorate the final payment if and to the extent required by applicable law to accomplish a purpose of the trust or its settlor relating to income, gift, estate, or other tax requirements.

"Article 4.

"Allocation of Receipts During Administration of Trust.

"Part 1. Receipts From Entities.

"**§ 37A-4-401. Character of receipts.**

(a) In this section, "entity" means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a trustee has an interest other than a trust or estate to which G.S. 37A-4-402 applies, a business or activity to which G.S. 37A-4-403 applies, or an asset-backed security to which G.S. 37A-4-415 applies.

(b) Except as otherwise provided in this section, a trustee shall allocate to income money received from an entity.

(c) A trustee shall allocate the following receipts from an entity to principal:

(1) Property other than money;

(2) Money received in one distribution or a series of related distributions in exchange for part or all of a trust's interest in the entity;

(3) Money received in total or partial liquidation of the entity; and

(4) Money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

(d) Money is received in partial liquidation:

(1) To the extent that the entity, at or near the time of a distribution, indicates that it is a distribution in partial liquidation; or

(2) If the total amount of money and property received in a distribution or series of related distributions is greater than twenty percent (20%) of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt.

(e) Money is not received in partial liquidation, nor may it be taken into account under subdivision (2) of subsection (d) of this section, to the extent that it does not exceed the amount of income tax that a trustee or beneficiary shall pay on taxable income of the entity that distributes the money.

(f) A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors.

"**§ 37A-4-402. Distribution from trust or estate.**

A trustee shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest and shall allocate to principal an amount received as a distribution of principal from such a trust or estate. If a trustee purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in such a trust to a trustee, G.S. 37A-4-401 or G.S. 37A-4-415 applies to a receipt from the trust.

"**§ 37A-4-403. Business and other activities conducted by trustee.**

(a) If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the trust's general accounting records, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

(b) A trustee who accounts separately for a business or other activity may determine the extent to which its net cash receipts shall be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the trust's general accounting records to the extent the trustee determines that the amount received is no longer required in the conduct of the business.

(c) Activities for which a trustee may maintain separate accounting records include:

(1) Retail, manufacturing, service, and other traditional business activities;
(2) Farming;
(3) Raising and selling livestock and other animals;
(4) Management of rental properties;
(5) Extraction of minerals and other natural resources;
(6) Timber operations; and
(7) Activities to which G.S. 37A-4-414 applies.

"Part 2. Receipts Not Normally Apportioned.

"**§ 37A-4-404. Principal receipts.**

A trustee shall allocate to principal:

(1) To the extent not allocated to income under this Chapter, assets received from a transferor during the transferor's lifetime, a decedent's estate, a trust with a terminating income interest, or a payer under a contract naming the trust or its trustee as beneficiary;
(2) Money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to this Article;
(3) Amounts recovered from third parties to reimburse the trust because of disbursements described in G.S. 37A-5-502(a)(7) or for other reasons to the extent not based on the loss of income;
(4) Proceeds of property taken by eminent domain, but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income;
(5) Net income received in an accounting period during which there is no beneficiary to whom a trustee may or shall distribute income; and
(6) Other receipts as provided in Part 3 of this Article.

"**§ 37A-4-405. Rental property.**

To the extent that a trustee accounts for receipts from rental property under this section, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods, shall be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the trustee's contractual obligations have been satisfied with respect to that amount.

"**§ 37A-4-406. Obligation to pay money.**

(a) An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, shall be allocated to income without any provision for amortization of premium.

(b) A trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee more than one year after it is purchased or acquired by the trustee, including an obligation whose purchase price or value when it is acquired is less than its value at maturity. If the obligation matures within one year after it is purchased or acquired by the trustee, an amount received in excess of its purchase price or its value when acquired by the trust shall be allocated to income.

(c) This section does not apply to an obligation to which G.S. 37A-4-409, 37A-4-410, 37A-4-411, 37A-4-412, 37A-4-414, or 37A-4-415 applies.

"**§ 37A-4-407. Insurance policies and similar contracts.**

(a) Except as otherwise provided in subsection (b) of this section, a trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its trustee is named as beneficiary, including a contract that insures the trust or its trustee against loss for damage to, destruction of, or loss of title to a trust asset. The trustee shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income, and to principal if the premiums are paid from principal.

(b) A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income, or, subject to G.S. 37A-4-403, loss of profits from a business.

(c) This section does not apply to a contract to which G.S. 37A-4-409 applies.

"Part 3. Receipts Normally Apportioned.

"**§ 37A-4-408. Insubstantial allocations not required.**

If a trustee determines that an allocation between principal and income required by G.S. 37A-4-409, 37A-4-410, 37A-4-411, 37A-4-412, or 37A-4-415 is insubstantial, the trustee may allocate the entire amount to principal unless one of the circumstances described in G.S. 37A-1-104(c) applies to the allocation. This power may be exercised by a cotrustee in the circumstances described in G.S. 37A-1-104(d) and may be released for the reasons and in the manner described in G.S. 37A-1-104(e). An allocation is presumed to be insubstantial if:

(1) The amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than ten percent (10%); or

(2) The value of the asset producing the receipt for which the allocation would be made is less than ten percent (10%) of the total value of the trust's assets at the beginning of the accounting period.

"**§ 37A-4-409. Deferred compensation, annuities, and similar payments.**

(a) In this section, "payment" means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer, including a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(b) To the extent that a payment is characterized as interest or a dividend or a payment made in lieu of interest or a dividend, a trustee shall allocate it to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(c) If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income ten percent (10%) of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection, a payment is not "required to be made" to the extent that it is made because the trustee exercises a right of withdrawal.

(d) If, to obtain an estate tax marital deduction for a trust, a trustee shall allocate more of a payment to income than provided for by this section, the trustee shall allocate to income the additional amount necessary to obtain the marital deduction.

(e) This section does not apply to payments to which G.S. 37A-4-410 applies.

"**§ 37A-4-410. Liquidating asset.**

(a) In this section, "liquidating asset" means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration. The term includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of more than one year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not include a payment subject to G.S. 37A-4-409, resources subject to G.S. 37A-4-411, timber subject to G.S. 37A-4-412, an activity subject to G.S. 37A-4-414, an asset subject to G.S. 37A-4-415, or any asset for which the trustee establishes a reserve for depreciation under G.S. 37A-5-503.

(b) A trustee shall allocate to income ten percent (10%) of the receipts from a liquidating asset and the balance to principal.

"**§ 37A-4-411. Minerals, water, and other natural resources.**

(a) To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources under this section, the trustee shall allocate them as follows:

(1) If received as nominal delay rental or nominal annual rent on a lease, a receipt shall be allocated to income.

(2) If received from a production payment, a receipt shall be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance shall be allocated to principal.

(3) If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal ninety percent (90%) shall be allocated to principal and the balance to income.

(4) If an amount is received from a working interest or any other interest not provided for in subdivisions (1), (2), or (3) of this subsection, ninety percent (90%) of the net amount received shall be allocated to principal and the balance to income.

(b) An amount received on account of an interest in water that is renewable shall be allocated to income. If the water is not renewable, ninety percent (90%) of the amount shall be allocated to principal and the balance to income.

(c) This Chapter applies whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.

(d) If a trust owns an interest in minerals, water, or other natural resources on January 1, 2004, the trustee may allocate receipts from the interest as provided in this Chapter or in the manner used by the trustee before January 1, 2004. If the trust acquires an interest in minerals, water, or other natural resources after January 1, 2004, the trustee shall allocate receipts from the interest as provided in this Chapter.

"**§ 37A-4-412. Timber.**

(a) To the extent that a trustee accounts for receipts from the sale of timber and related products pursuant to this section, the trustee shall allocate the net receipts:

(1) To income to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest;

(2) To principal to the extent that the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;

(3) To or between income and principal if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust, by determining the amount of timber removed from the land under the lease or contract and applying the rules in subdivisions (1) and (2) of this subsection; or

(4) To principal to the extent that advance payments, bonuses, and other payments are not allocated pursuant to subdivisions (1), (2), or (3) of this subsection.

(b) In determining net receipts to be allocated pursuant to subsection (a) of this section, a trustee shall deduct and transfer to principal a reasonable amount for depletion.

(c) This Chapter applies whether or not a decedent or transferor was harvesting timber from the property before it become subject to the trust.

(d) If a trust owns an interest in timberland on January 1, 2004, the trustee may allocate net receipts from the sale of timber and related products as provided in this Chapter or in the manner used by the trustee before January 1, 2004. If the trust acquires an interest in timberland after January 1, 2004, the trustee shall allocate net receipts from the sale of timber and related products as provided in this Chapter.

"**§ 37A-4-413. Property not productive of income.**

(a) If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income under G.S. 37A-1-104 and distributes to the spouse from principal under the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power conferred by G.S. 37A-1-104(a). The trustee may decide which action or combination of actions to take.

(b) In cases not governed by subsection (a) of this section, proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period.

"**§ 37A- 4-414. Derivatives and options.**

(a) In this section, "derivative" means a contract or financial instrument or a combination of contracts and financial instruments which gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

(b) To the extent that a trustee does not account under G.S. 37A-4-403 for transactions in derivatives, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions.

(c) If a trustee grants an option to buy property from the trust, whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option shall be allocated to principal. An amount paid to acquire the option shall be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a settlor of the trust for services rendered, shall be allocated to principal.

"**§ 37A-4-415. Asset-backed securities.**

(a) In this section, "asset-backed security" means an asset whose value is based upon the right it gives the owner to receive distributions from the proceeds of financial

assets that provide collateral for the security. The term includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceeds other than interest or current return. The term does not include an asset to which G.S. 37A-4-401 or G.S. 37A-4-409 applies.

(b) If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee shall allocate to income the portion of the payment which the payer identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

(c) If a trust receives one or more payments in exchange for the trust's entire interest in an asset-backed security in one accounting period, the trustee shall allocate the payments to principal. If a payment is one of a series of payments that will result in the liquidation of the trust's interest in the security over more than one accounting period, the trustee shall allocate ten percent(10%) of the payment to income and the balance to principal.

"Article 5.

"Allocation of Disbursements During Administration of Trust.

"**§ 37A-5-501. Disbursements from income.**

A trustee shall make the following disbursements from income to the extent that they are not disbursements to which G.S. 37A-2-201(2)b. or G.S. 37A-2-201(2)c. applies:

(1) One-half of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee;

(2) One-half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests;

(3) All of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest; and

(4) Recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

"**§ 37A-5-502. Disbursements from principal.**

(a) A trustee shall make the following disbursements from principal:

(1) The remaining one-half of the disbursements described in G.S. 37A-5-501(1) and G.S. 37A-5-501(2);

(2) All of the trustee's compensation calculated on principal as a fee for acceptance, distribution, or termination, and disbursements made to prepare property for sale;

(3) Payments on the principal of a trust debt;

(4) Expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property;

(5) Premiums paid on a policy of insurance not described in G.S. 37A-5-501(4) of which the trust is the owner and beneficiary;

(6) Estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust; and

(7) Disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common-law claims by third parties, and defending claims based on environmental matters.

(b) If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

"**§ 37A-5-503. Transfers from income to principal for depreciation.**

(a) In this section, "depreciation" means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one year.

(b) A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

(1) Of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

(2) During the administration of a decedent's estate; or

(3) Under this section if the trustee is accounting under G.S. 37A-4-403 for the business or activity in which the asset is used.

(c) An amount transferred to principal under this section need not be held as a separate fund.

"**§ 37A-5-504. Transfers from income to reimburse principal.**

(a) If a trustee makes or expects to make a principal disbursement described in this section, the trustee may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.

(b) Principal disbursements to which subsection (a) of this section applies include the following, but only to the extent that the trustee has not been and does not expect to be reimbursed by a third party:

(1) An amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs;

(2) A capital improvement to a principal asset, whether in the form of changes to an existing asset or the construction of a new asset, including special assessments;

(3) Disbursements made to prepare property for rental, including tenant allowances, leasehold improvements, and broker's commissions;
(4) Periodic payments on an obligation secured by a principal asset to the extent that the amount transferred from income to principal for depreciation is less than the periodic payments; and
(5) Disbursements described in G.S. 37A-5-502(a)(7).

(c) If the asset whose ownership gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a trustee may continue to transfer amounts from income to principal as provided in subsection (a) of this section.

"**§ 37A-5-505. Income taxes.**

(a) A tax required to be paid by a trustee based on receipts allocated to income shall be paid from income.

(b) A tax required to be paid by a trustee based on receipts allocated to principal shall be paid from principal, even if the tax is called an income tax by the taxing authority.

(c) A tax required to be paid by a trustee on the trust's share of an entity's taxable income shall be paid proportionately:
(1) From income to the extent that receipts from the entity are allocated to income; and
(2) From principal to the extent that:
a. Receipts from the entity are allocated to principal; and
b. The trust's share of the entity's taxable income exceeds the total receipts described in subdivision (1) and sub-subdivision (2)a. of this subsection.

(d) For purposes of this section, receipts allocated to principal or income shall be reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax.

"**§ 37A-5-506. Adjustments between principal and income because of taxes.**

(a) A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries that arise from:
(1) Elections and decisions, other than those described in subsection (b) of this section, that the fiduciary makes from time to time regarding tax matters;
(2) An income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust; or
(3) The ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate, trust, or a beneficiary.

(b) If the amount of an estate tax marital deduction or charitable contribution deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate tax purposes, and as a result estate taxes paid from principal are increased and income taxes paid by an estate, trust, or

beneficiary are decreased, each estate, trust, or beneficiary that benefits from the decrease in income tax shall reimburse the principal from which the increase in estate tax is paid. The total reimbursement shall equal the increase in the estate tax to the extent that the principal used to pay the increase would have qualified for a marital deduction or charitable contribution deduction but for the payment. The proportionate share of the reimbursement for each estate, trust, or beneficiary whose income taxes are reduced shall be the same as its proportionate share of the total decrease in income tax. An estate or trust shall reimburse principal from income.

"Article 6.

"Miscellaneous Provisions.

"**§ 37-A-6-601. Uniformity of Application and Construction.**

In applying and construing this Chapter, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

"**§ 37-A-6-602. Severability Clause.**

If any provision of this Chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are severable."

SECTION 2. Chapter 37 of the General Statutes is repealed.

SECTION 3. G.S. 160A-234(a) reads as rewritten:

"(a) Assessments upon real property in the possession or enjoyment of a tenant for life, or a tenant for a term of years, shall be paid ~~in accordance with G.S. 37-36(b).~~by the holder of the remainder or reversion, as the case may be."

SECTION 4. This act becomes effective January 1, 2004, and applies to every trust or decedent's estate existing on that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A, as enacted in this act.

SENATE BILL 549:
Uniform Principal and Income Act.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Hagan
Date:	April 15, 2003	**Summary by:**	Robin Johnson
Version:	S549-CSRH-9[v.1]		Committee Counsel

SUMMARY: ***Senate Bill 549 would repeal Chapter 37 of the General Statutes, entitled "Allocation of Principal and Income," and would create a new Chapter 37A to be entitled "Uniform Principal and Income Act." The act would become effective January 1, 2004, and apply to trusts and decedents' estates existing on that date, unless the instrument provides otherwise.***

The proposed committee substitute makes only technical and conforming changes.

CURRENT LAW: Chapter 37, enacted in 1973, is based on the Uniform Principal and Income Act of 1962. It provides procedures for trustees (administering trusts) and personal administrators (of a decedent's estate) in allocating property as principal and income. Generally, property that is considered principal is distributed to the persons who are entitled to receive the principal when the income interest ends. Assets considered income meet the requirements of income beneficiaries during the life of a trust or of beneficiaries who are paid out of the income derived during an estate's administration.

BILL ANALYSIS: The bill would create a new Chapter 37A, which is based on the Uniform Principal and Income Act of 1997. The National Conference of Commissioners on Uniform State Laws approved and recommended this new act for enactment by the states. To date it has been adopted in 30 states. According to the prefatory notes of the 1997 act, it has two primary purposes:

- To take into account the use of the revocable living trust, to alter rules that experience has been shown to need change and to establish new rules to cover situations not covered by the previous acts, such as financial instruments that did not exist in 1962.
- To provide a transition to the "investment regime" based on the principles embodied in the Prudent Investor Rule and the Uniform Prudent Investor Act.

Attached to this summary are supporting documents prepared by the Uniform Law Commissioners.

S549-SMRH-001

Uniform Law Commissioners
The National Conference of Commissioners on Uniform State Laws

> A Few Facts About The...

UNIFORM PRINCIPAL AND INCOME ACT

PURPOSE:

This act revises the Uniform Principal and Income Act of 1931 and 1962, which has been adopted in 41 states. The purpose of the new act, like its predecessors, is to provide procedures for trustees administering an estate in separating principal from income, and to ensure that the intention of the trust creator is the guiding principle for trustees. A revision is necessary so that principal and income allocation rules can function with modern trust investment practices.

ORIGIN:

Completed by the Uniform Law Commissioners in 1997.

APPROVED BY:

American Bar Association

STATE ADOPTIONS:

Alabama	Missouri
Arizona	Nebraska
Arkansas	New Jersey
California	New Mexico
Colorado	New York

Connecticut	North Dakota
District of Columbia	Ohio *
Florida	Oklahoma
Hawaii	Pennsylvania
Idaho	South Carolina
Indiana	Tennessee
Iowa	Virginia
Kansas	Washington
Maine	West Virginia
Maryland	Wyoming

** 2003 Enactment*

2003 INTRODUCTIONS:

Alaska

Montana

Nevada

North Carolina

Ohio

Oregon

Texas

For any further information regarding the Uniform Principal and Income Act (1997), please contact Michelle Clayton, John McCabe or Katie Robinson at 312-915-0195.

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UNIFORM PRINCIPAL AND INCOME ACT (1997)

The Uniform Principal and Income Act, originally promulgated by the Uniform Law Commissioners in 1931, revised in 1962, and adopted in 41 states, provides procedures for trustees administering an estate in separating principal from income. The basic purpose of the new act, like the 1931 and 1962 versions, is to ensure that the intention of the trust creator is the guiding principle for trustees. Like its predecessors, this revision distinguishes between property that is principal, which will be distributed to remainder beneficiaries (persons entitled to receive principal when an income interest ends), and property that is income, distributed to income beneficiaries.

The Uniform Act has always provided the default rules for such allocations in the event the trust investment is silent.

There are many reasons why every state should adopt the Revised Uniform Principal and Income Act (1997).

- The law of trust investment has been modernized. It is now time to update the traditional income and allocation rules so that it can work with the doctrine of modern investment theory.
- The new act provides a means for implementing the transition to an investment regime based on principles embodied in the Uniform Prudent Investor Act, especially the principle for investing for total return instead of for a certain level of income.
- The new act better clarifies allocations of acquired assets, such as those from corporate distributions.
- An "unincorporated entity" concept has been introduced to deal with businesses operated by a trustee, including farming and livestock operations, and investment activities in rental real estate, natural resources, and timber.
- The new act provides for investment modalities that were not in existence in 1962, such as derivatives, options, deferred payment obligations, and synthetic financial assets.
- There is a new provision which deals with the problem of disbursements made because of environmental laws.
- New provisions which deal with the imbalances as a result of tax laws are also included. The act provides the power to make adjustments between principal and

income to correct inequities caused by tax elections or peculiarities in the way the fiduciary income tax rules apply.

UNIFORMITY

This act will provide uniformity of law, necessary in an interstate investment environment. The Revised Uniform Principal and Income Act provides answers to long-standing problems in reconciling modern portfolio management with traditional rules of income allocation. It is important that every state adopt this act as soon as possible.

UNIFORM PRINCIPAL AND INCOME ACT (1997)

A trustee of a trust and the personal representative of a decedent's estate are called fiduciaries. They have special duties toward those who benefit from their administration. A trustee of a trust has a fiduciary obligation to satisfy both the interests of the trust's income beneficiaries during the life of the trust, and the interests of the remainder beneficiaries at the trust's termination. A personal representative may be required to allocate net income to certain individuals during the administration of the estate and to assure that certain expenses are paid out of an appropriate category of interests before finally distributing the assets of the decedent's estate to the heirs or devisees (heirs if there is no will, devisees if there is a will).

The trustee and the personal representative satisfy their obligations by making the proper allocations of assets to either principal or to income. Generally, assets allocated to principal serve the interests of remainder beneficiaries of a trust, and the interests of the final distributees of the assets in an estate. Assets allocated to income meet the requirements of income beneficiaries during the life of a trust, and those beneficiaries who must be paid out of the income derived during administration of an estate.

But the identification of principal and income, its allocation, and apportionment of assets between income and principal have always been a very tricky business. Distinguishing income from principal is not always self-evident. Therefore, the law has provided trustees with statutory help for a very long period of time. The Uniform Law Commissioners promulgated the first Uniform Principal and Income Act in 1931. A revision was promulgated in 1962. Almost all of the states in the United States have adopted one or the other of these earlier acts by 1997, when a new revision once again has been promulgated.

In 1997, 35 years after the 1962 revision, the Uniform Law Commissioners have promulgated the Uniform Principal and Income Act (1997) (UPIA 1997).

Obsolescence over time is not the only stimulus for promulgating UPIA 1997. In the 1990's and especially since the promulgation of the Uniform Prudent Investor Act in 1994, a trustee's obligation to invest the assets of a trust as a prudent investor would invest them, has substantially altered the fiduciary obligations of a trustee. There is a strong relationship between the obligation to invest as a prudent investor and the obligation to satisfy income and remainder beneficiaries. The earlier Uniform Principal and Income Acts do not accommodate prudent investor rules. UPIA 1997 does, as will be discussed a little later in this summary.

UPIA 1997 provides some basic answers to questions that any trustee must ask in dealing with trust assets, and that personal representatives need to ask in the administration of an estate. The first question is whether an asset that becomes a trust or estate asset is either principal or income? Once established as either principal or income, the next question is, when is a beneficiary entitled to receive that asset?

The answers to these questions are strongly affected by the time at which the question is asked. There are three relevant times to consider -- the time before creation of an income interest, the time during which an income interest is current and the time after the income interest ends (an income interest is merely the interest of the income beneficiary -- the right to receive current payment). The time influences allocation of assets to principal or to income, and ultimately the rights of income and remainder beneficiaries.

The beginning and the end of the income interest are key, because (1) sometimes assets that would otherwise be income are allocated to principal if there is no current income interest; and (2) even if assets are allocated to income, when there is no current income interest, remainder beneficiaries will be entitled to a share of that income.

INITIAL RULE

The express language of the trust instrument, will or other applicable document will govern, notwithstanding conflict with any statutory rule. UPIA 1997 is entirely a default statute that operates only when the governing instrument is silent.

ALLOCATION TO PRINCIPAL OR INCOME

Principal is fundamentally defined as the property held in trust for distribution to a remainder beneficiary when the trust terminates. Income is the current return that any fiduciary receives from an asset that is principal. It has never been sufficient to provide a bare general definition in any of the Uniform Principal and Income Acts. There is, therefore, a group of rules that establish what is principal and what is income with respect to specific kinds of assets.

UPIA 1997 refines old rules and provides specific rules for assets that are not accounted for in the earlier acts. An example of the refinement of old rules concerns receipts from an entity. The earlier uniform acts provide for corporate distributions, generally allocating ordinary dividends to income and any other distribution in the form of additional equity to principal. UPIA 1997 addresses the broader category of receipts from an entity. A corporation is an entity, but so is a partnership, a limited liability company, a regulated investment company and a real estate investment trust. UPIA 1997 allocates the receipts from all entities in the same manner.

UPIA 1997 then simplifies the allocation question. Any money received by a fiduciary is regarded as income, unless it fits certain categories. For example, if money is received as part of a liquidation of the entity, it is principal. If money is received from an investment company (mutual fund) that labels a distribution as capital gain, the receipt is principal. All property received that is not money, i.e., a stock distribution, is principal. In addition, UPIA 1997 establishes what qualifies as a partial or complete liquidation of an entity. Fiduciaries will, thus, be better able to make judgments about receipts that are part of a liquidation. This is a

more precise and logical set of rules for making allocations than exists in the earlier uniform acts, making fiduciaries' decisions easier and more certain.

There are certain kinds of assets that UPIA 1997 provides for that are just not within the scope of consideration in the earlier acts. One of them is derivatives. Another is asset-based securities. Receipts from derivatives, unless a trustee exercises powers available in the conduct of a business held in trust, are principal. Receipts from asset-based securities are either income or principal, depending upon the categorization of the asset backed security's payor.

APPORTIONMENT ISSUES

The beginning point and the ending point of an income interest in an estate or a trust provide particular problems, even though the incoming assets would clearly be income under the rules applied during the life of the income interest. Depending upon the time of receipt, an asset that is otherwise classified as income may have to be apportioned at least in part to principal to balance beneficiary interests. UPIA 1997 more precisely and simply provides for that apportionment than the earlier acts did.

UPIA 1997 provides, generally, that an income receipt is principal if it is due before a decedent dies in the case of an estate or before an income interest begins in the case of a trust. After death or after an income interest begins, it is classified as income. If there is income that is not distributed at the time the income interest ends, generally it is paid to income beneficiaries. But if the trust is revocable by an income beneficiary at an amount more than five percent of the trust's corpus immediately before the income interest ends, the undistributed income allocable to the revocable part, must be added to principal.

RIGHT TO PAYMENT

UPIA 1997 expressly requires distribution of net income and principal receipts to the appropriate beneficiaries when a decedent dies or when an income interest ends. There is discretion given to pay certain expenses out of either principal or income unless there is an adverse effect on estate tax marital deductions or income tax charitable deductions. General expenses of an estate are paid from principal. A specific pecuniary amount required to be paid, is paid from income unless insufficient. The deficiency is paid from principal. If there is any net income after the fact, it is distributed to remainder beneficiaries according to share in principal.

These rules assure orderly distribution of income when the decedent dies or an income interest ends. The earlier uniform acts make no attempt to deal with this distribution problem.

ADJUSTMENT POWERS

For Prudent Investment

A trustee must use prudent investment rules in any state that has adopted the Uniform Prudent Investor Act or equivalent statute, and in any case governed by the Restatement of the Law of Trusts III. The investment policy governing a trust's assets depends upon making the appropriate risk/return analysis and investing accordingly. Asset growth can be as significant an objective as income in setting the investment policy for a specific trust. Because a trustee may weight either growth or income significantly in making investment decisions, and because either may be greater or less than anticipated, the trustee may have to rebalance the interests of remainder and income beneficiaries as a result.

UPIA 1997 allows the trustee to adjust principal and income to the extent made necessary by prudent investment when a trust provides for a fixed income for the income beneficiary. This must be a careful decision before which a trustee shall consider all of the factors relevant to the trust and its beneficiaries. The express

list of factors includes the nature, purpose, and expected duration of the trust; and the intent of the settlor. This is not a decision to be taken lightly -- the list of express factors to consider is long. Adjustments are forbidden in certain circumstances, such as when they diminish the income interest in a trust that requires all of the income to be paid at least annually to a surviving spouse and for which an estate tax or gift tax marital deduction would be allowed..., or if the trustee is a beneficiary of the trust... This list of forbidden situations, also, must be read with some care before a trustee decides to adjust allocations.

The earlier Uniform Acts did not deal with adjustment as a result of prudent investment. The whole notion of prudent investment, modern portfolio theory and total return came later than either of the two earlier acts. UPIA 1997 is absolutely necessary to making prudent investment work to its full capacity.

For Disbursements during the Administration of a Trust

Expenses and taxes must be paid during the administration of a trust. From which side of the ledger are they to be paid? Generally, UPIA 1997 provides for payment of ordinary expenses out of income, for payment of compensation to the trustee and legal proceedings from principal and income, dividing expenses in two, and payment of expenses peculiar to the remainder interest to principal. A trustee may transfer income to principal to make up for depreciation of an asset or to reimburse principal for disbursements that enhance income, i.e., repairs to assets that are necessary to maintain income. A trustee may make adjustments to principal and income to offset shifting of economic interests or tax benefits between income and remainder beneficiaries in certain instances.

During the Conduct of a Business Held in Trust

Under UPIA 1997, a trustee who conducts a business held in a trust may separate out the accounting for the business from that for other trust assets. The trustee, also, has the power to allocate net cash receipts to working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable

needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records.

The earlier uniform acts treated net profit from a business as income, and losses as principal. There is no flexibility.

For Tax Purposes

UPIA 1997 allows a fiduciary to make adjustments between principal and income for tax purposes. Tax liabilities may accrue to either income or remainder beneficiaries. A fiduciary may have to make elections under the tax laws. Imbalances of interests that arise because of taxes can be remedied by the fiduciary.

The earlier uniform acts did not provide such discretion to the fiduciary.

CONCLUSION

It is essential for the drafting and administration of wills and trusts that UPIA 1997 be adopted in every state and jurisdiction as soon as possible. Drafting of instruments becomes considerably harder without a modern set of rules that, among other things, allows adjustment because of prudent investment decisions and because of tax laws. If an instrument is not adequately drafted, trustees will not be able to meet fiduciary obligations. The result will be, higher costs for setting up trusts, more conflict between trustees and beneficiaries and excessive litigation. UPIA 1997 will make life much easier for personal representatives, trustees and beneficiaries alike.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 424

Short Title:	Tuition Waiver Technical Correction.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 17, 2003

A BILL TO BE ENTITLED

AN ACT TO MAKE TECHNICAL CORRECTIONS IN A 1997 LAW CONCERNING TUITION WAIVERS, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. It is the intent of this act to codify the provisions of Section 6 of S.L. 1997-505, which stated that law became effective October 1, 1997, and applies to deaths or disabilities occurring on or after that date.

SECTION 2. G.S. 115B-2 reads as rewritten:

"**§ 115B-2. Tuition waiver authorized.**

State-supported institutions of higher education, community colleges, industrial education centers and technical institutes, shall permit the following persons to attend classes for credit or noncredit purposes without the required payment of tuition; provided, however, that such persons meet admission and other standards deemed appropriate by the educational institution, and provided further that such persons shall be accepted by the constituent institutions of the University of North Carolina only on a spaces-available basis:

(1) Legal residents of North Carolina who have attained the age of 65.

(2) Any person who is the survivor of a law enforcement officer, firefighter, volunteer firefighter, or rescue squad worker killed on or after October 1, 1997, as a direct result of a traumatic injury sustained in the line of duty.

(3) The spouse of a law enforcement officer, firefighter, volunteer firefighter, or rescue squad worker who ~~is~~ becomes permanently and totally disabled on or after October 1, 1997, as a direct result of a traumatic injury sustained in the line of duty.

(4) Any child, if the child is at least 17 years old but not yet 23 years old, whose parent is a law enforcement officer, firefighter, volunteer firefighter, or rescue squad worker who ~~is~~ becomes permanently and

totally disabled on or after October 1, 1997, as a direct result of a traumatic injury sustained in the line of duty. However, a child's eligibility for a waiver of tuition under this Chapter shall not exceed: (i) 48 months, if the child is seeking a baccalaureate degree, or (ii) if the child is not seeking a baccalaureate degree, the number of months required to complete the educational program to which the child is applying."

SECTION 3. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 424
PROPOSED COMMITTEE SUBSTITUTE S424-CSRC-22 [v.1]

4/12/2003 1:44:27 PM

Short Title: Tuition Waiver Technical Correction. (Public)

Sponsors:

Referred to:

March 17, 2003

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(2) Any person who is the survivor of a law enforcement officer, firefighter, volunteer firefighter, or rescue squad worker killed on or after October 1, 1997, as a direct result of a traumatic injury sustained in the line of duty.

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firefighter, or rescue squad worker who ~~is~~ becomes permanently and totally disabled on or after October 1, 1997, as a direct result of a traumatic injury sustained in the line of duty. However, a child's eligibility for a waiver of tuition under this Chapter shall not exceed: (i) 48 months, if the child is seeking a baccalaureate degree, or (ii) if the child is not seeking a baccalaureate degree, the number of months required to complete the educational program to which the child is applying."

SECTION 3. G.S. 115B-5(b) reads as rewritten:

"(b) The officials of the institutions charged with administration of this Chapter shall require the following proof to insure that a person applying to the institution and who requests a tuition waiver under G.S. 115B-2(2), (3), or (4) is eligible for the benefits provided by this Chapter.

(1) The parent-child relationship shall be verified by a birth certificate, legal adoption papers, or other documentary evidence deemed appropriate by the institution.

(2) The marital relationship shall be verified by a marriage certificate or other documentary evidence deemed appropriate by the institution.

(3) The cause and date of death of the law enforcement officer, firefighter, volunteer firefighter, or rescue squad worker shall be verified by certification from the records of the Department of State Treasurer, the appropriate city or county law enforcement agency that employed the deceased, the administrative agency for the fire department or fire protection district recognized for funding under the Department of State Auditor, or the administrative agency having jurisdiction over any paid firefighters of all counties and cities.

(4) The permanent and total disability and the date the disability occurred shall be verified by documentation deemed necessary by the institution from the North Carolina Industrial Commission."

SECTION 4. This act is effective when it becomes law.

SENATE BILL 424:
Tuition Waiver Technical Correction

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Hartsell
Date:	April 12, 2003	**Summary by:**	Kory J. Goldsmith
Version:	Proposed Committee Substitute S424-CSRC-22[v.1]		Committee Counsel

SUMMARY: ***HB424 codifies language that previously appeared in the effective date of legislation adopted in 1997. Codifying the language does not change the effect of the current law. It does make it easier to read the statutes and understand who is eligible to receive certain tuition waivers.***

CURRENT LAW: Chapter 115B allows tuition waivers for

- legal residents of North Carolina who are 65 years old and older, and
- the spouses and children of law enforcement officers, firefighters and volunteer firefighters who are killed or permanently and totally disabled in the line of duty, or die of a service-connected disability, if the death or disability occurred on or after October 1, 1997.

The tuition waivers apply at all State-supported institutions of higher education, community colleges, industrial education centers and technical institutes.

BILL ANALYSIS: SB 242 codifies (places in the body of the statute) the eligibility criteria, that the death or disability must have occurred on or after October 1, 1997, for receiving the tuition waiver. The original bill placed this language in the effective date that is not codified.

The Proposed Committee Substitute makes clarifying changes to the statutory provision regarding proof of the date of death and date of disability.

The act is effective when it becomes law.

S424-SMRC-001

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 468

Short Title:	Clarify Irrevocable Trust Law.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 20, 2003

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THE LAW GOVERNING THE MODIFICATION AND TERMINATION OF IRREVOCABLE TRUSTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 36A-125.4(b) reads as rewritten:

"(b) Where the beneficiaries of an irrevocable trust seek to compel a termination of the trust ~~or modify it in a manner that affects its continuance according to its terms,~~ and ~~if~~ the continuance of the trust is necessary to carry out a material purpose of the trust, or where the beneficiaries seek to compel a modification of the trust in a manner that is inconsistent with its material purpose, the trust cannot be modified or terminated unless the court in its discretion determines that the reason for modifying or terminating the trust under the circumstances substantially outweighs the interest in accomplishing a material purpose of the trust."

SECTION 2. G.S. 36A-125.11 reads as rewritten:

"**§ 36A-125.11. Procedure.**

(a) A proceeding under this Article may be brought under the Uniform Declaratory Judgment Act, Article 26 of Chapter 1 of the General Statutes, the provisions of which shall apply to that proceeding to the extent not inconsistent with this Article.

(b) A proceeding under this Article to approve or disapprove a proposed modification or termination under the provisions of G.S. 36A-125.3, 36A-125.4, 36A-125.6(a), and 36A-125.7 may be commenced by a trustee or beneficiary. The trustee shall be a necessary party to all proceedings under this Article commenced by a beneficiary."

SECTION 3. This act is effective when it becomes law.

SENATE BILL 468:
Clarify Irrevocable Trust Law

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Hartsell
Date:	April 9, 2003	**Summary by:**	Kory J. Goldsmith
Version:	1st Edition		Committee Counsel

SUMMARY: ***SB468 makes clear that an irrevocable trust may not be modified in a manner that is inconsistent with the trust's material purpose unless the court determines the circumstances substantially outweigh the interest in accomplishing the purpose of the trust. It also specifies when a beneficiary and/or a trustee must be a party to an action to terminate or modify an irrevocable trust.***

CURRENT LAW: Generally, an irrevocable trust may not be revoked or its terms materially modified after its creation. However, Article 11A of Chapter 36A specifies the circumstances and procedures that apply to a modification or termination of an irrevocable trust.

G.S. 36A-125.4 allows the beneficiaries of a trust to all agree to modify or terminate a trust in an action before a court. However, if the modification is inconsistent with the material purpose of the trust, the court can not order the modification unless it finds that the circumstances in favor of the modification substantially outweigh the interest in continuing to accomplish the material purpose of the trust.

G.S. 36A-125.11 provides that an action to modify or terminate an irrevocable trust may be brought under the Uniform Declaratory Judgment Act, but it does not specify who may commence an action or who are necessary parties to the action. (Necessary parties are those persons who must be made part of a legal action because any action by the court regarding the issue at trial would impact that party's interests.)

BILL ANALYSIS:

Section 1 clarifies an ambiguity in the language of G.S. 36A-125.4(b). The current language is subject to the construction that a modification may be made if it does not affect the continuance of the trust even though it may be inconsistent with the material purpose of the trust.

Section 2 specifies that either a beneficiary or a trustee may commence a termination or modification action where:

- The settler (creator of the trust) and the beneficiaries agree (G.S. 36A-125.3)
- The beneficiaries agree (G.S. 36A-125.4)
- The trust is a small trust (G.S. 36A-125.6)
- There are changed circumstances (G.S. 36A-125.7)

It also specifies that the trustee must be made a party to any proceeding under this Article.

BACKGROUND: This bill is a request of the North Carolina Bar Association.

The act is effective when it becomes law.

S468-SMRC-001

SENATE BILL 563

Short Title: Uniform Athlete Agents Act. (Public)

Sponsors: Senator Hagan.

Referred to: Judiciary II.

March 27, 2003

A BILL TO BE ENTITLED

AN ACT TO REPEAL THE LAWS REGULATING ATHLETE AGENTS AND TO ADOPT THE UNIFORM ATHLETE AGENTS ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 8 of Chapter 78C of the General Statutes is repealed.

SECTION 2. Chapter 78C of the General Statutes is amended by adding a new Article to read:

"Article 8A.

"Uniform Athlete Agents Act.

"**§ 78C-85. Title.**

This Article may be cited as the 'Uniform Athlete Agents Act'.

"**§ 78C-86. Definitions.**

The following definitions apply in this Article:

(1) Agency contract. – An agreement in which a student-athlete authorizes a person to negotiate or solicit on behalf of the student-athlete a professional-sports-services contract or an endorsement contract.

(2) Athlete agent. – An individual who enters into an agency contract with a student-athlete or, directly or indirectly, recruits or solicits a student-athlete to enter into an agency contract. The term includes an individual who represents to the public that the individual is an athlete agent. The term does not include a spouse, parent, sibling, or guardian of the student-athlete or an individual acting solely on behalf of a professional sports team or professional sports organization.

(3) Athletic director. – An individual responsible for administering the overall athletic program of an educational institution or, if an educational institution has separately administered athletic programs for male students and female students, the athletic program for males or the athletic program for females, as appropriate.

(4) Contact. – A communication, direct or indirect, between an athlete agent and a student-athlete to recruit or solicit the student-athlete to enter into an agency contract.

(5) Endorsement contract. – An agreement under which a student-athlete is employed or receives consideration to use on behalf of the other party any value that the student-athlete may have because of publicity, reputation, following, or fame obtained because of athletic ability or performance.

(6) Intercollegiate sport. – A sport played at the collegiate level for which eligibility requirements for participation by a student-athlete are established by a national association for the promotion or regulation of collegiate athletics.

(7) Person. – An individual, company, corporation, partnership, association, or any other legal or commercial entity.

(8) Professional-sports-services contract. – An agreement under which an individual is employed or agrees to render services as a player on a professional sports team, with a professional sports organization, or as a professional athlete.

(9) Record. – Information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(10) Registration. – A certificate issued by the Secretary of State evidencing that a person has satisfied the requirements of an athlete agent pursuant to this Article.

(11) Student-athlete. – An individual who engages in, is eligible to engage in, or may be eligible in the future to engage in any intercollegiate sport. If an individual is permanently ineligible to participate in a particular intercollegiate sport, the individual is not a student-athlete for purposes of that sport.

"**§ 78C-87. Service of process; subpoenas.**

(a) By acting as an athlete agent in this State, a nonresident individual appoints the Secretary of State as the individual's agent for service of process in any civil action in this State related to the individual's acting as an athlete agent in this State.

(b) The Secretary of State may issue subpoenas for any material that is relevant to the administration of this Article.

"**§ 78C-88. Athlete agents; registration required; void contracts.**

(a) Except as otherwise provided in subsection (b) of this section, an individual may not act as an athlete agent in this State without holding a certificate of registration under G.S. 78C-90 or G.S. 78C-92.

(b) Before being issued a certificate of registration, an individual may act as an athlete agent in this State for all purposes except signing an agency contract if: (i) a student-athlete or another person acting on behalf of the student-athlete initiates communication with the individual; and (ii) within seven days after an initial act as an

athlete agent, the individual submits an application for registration as an athlete agent in this State.

(c) An agency contract resulting from conduct in violation of this section is void, and the athlete agent shall return any consideration received under the contract.

"**§ 78C-89. Registration as athlete agent; form; requirements.**

(a) An individual seeking registration as an athlete agent shall submit an application for registration to the Secretary of State in a form prescribed by the Secretary of State. The application must be in the name of an individual and, except as otherwise provided in subsection (b) of this section, signed or otherwise authenticated by the applicant under penalty of perjury and must state or contain the following:

(1) The name of the applicant and the address of the applicant's principal place of business.

(2) The name of the applicant's business or employer, if applicable.

(3) Any business or occupation engaged in by the applicant for the five years immediately preceding the date of submission of the application.

(4) A description of the applicant's:

a. Formal training as an athlete agent.

b. Practical experience as an athlete agent.

c. Educational background relating to the applicant's activities as an athlete agent.

(5) The names and addresses of three individuals not related to the applicant who are willing to serve as references.

(6) The name, sport, and last known team for each individual for whom the applicant acted as an athlete agent during the five years immediately preceding the date of submission of the application.

(7) The names and addresses of all persons who are:

a. With respect to the athlete agent's business if it is not a corporation, the partners, members, officers, managers, associates, or profit-sharers of the business.

b. With respect to a corporation employing the athlete agent, the officers, directors, and any shareholder of the corporation having an interest of five percent (5%) or greater.

(8) Whether the applicant or any person named under subdivision (7) of this section has been convicted of a crime that, if committed in this State, would be a crime involving moral turpitude or a felony and identify the crime.

(9) Whether there has been any administrative or judicial determination that the applicant or any person named under subdivision (7) of this section has made a false, misleading, deceptive, or fraudulent representation.

(10) Any instance in which the conduct of the applicant or any person named under subdivision (7) of this section resulted in the imposition of a sanction, suspension, or declaration of ineligibility to participate

in an interscholastic or intercollegiate athletic event on a student-athlete or educational institution.

(11) Any sanction, suspension, or disciplinary action taken against the applicant or any person named under subdivision (7) of this section arising out of occupational or professional conduct.

(12) Whether there has been any denial of an application for, suspension or revocation of, or refusal to renew the registration or licensure of the applicant or any person named under subdivision (7) of this section as an athlete agent in any state.

(b) An individual who has submitted an application for registration or licensure as an athlete agent in another state or who holds a certificate of registration or licensure as an athlete agent in another state may submit a copy of the application and certificate in lieu of submitting an application in the form prescribed pursuant to subsection (a) of this section. The Secretary of State shall accept the application and the certificate from the other state as an application for registration in this State if the application to the other state satisfied all of the following criteria:

(1) Was submitted in the other state within six months immediately preceding the submission of the application in this State and the applicant certifies that the information contained in the application is current.

(2) Contains information substantially similar to or more comprehensive than that required in an application submitted in this State.

(3) Was signed by the applicant under penalty of perjury.

(c) An application filed under this section is a 'public record' within the meaning of Chapter 132 of the General Statutes.

"**§ 78C-90. Certificate of registration; issuance or denial; renewal.**

(a) Except as otherwise provided in subsection (b) of this section, the Secretary of State shall issue a certificate of registration to an individual who complies with G.S. 78C-89(a) or whose application has been accepted under G.S. 78C-89(b).

(b) The Secretary of State may refuse to issue a certificate of registration if the Secretary of State determines that the applicant has engaged in conduct that has a significant adverse effect on the applicant's fitness to act as an athlete agent. In making the determination, the Secretary of State may consider whether the applicant has:

(1) Been convicted of a crime that, if committed in this State, would be a crime involving moral turpitude or a felony.

(2) Made a materially false, misleading, deceptive, or fraudulent representation in the application or as an athlete agent.

(3) Engaged in conduct that would disqualify the applicant from serving in a fiduciary capacity.

(4) Engaged in conduct prohibited by G.S. 78C-98.

(5) Had a registration or licensure as an athlete agent suspended, revoked, or denied or been refused renewal of registration or licensure as an athlete agent in any state.

(6) Engaged in conduct the consequence of which was that a sanction, suspension, or declaration of ineligibility to participate in an interscholastic or intercollegiate athletic event was imposed on a student-athlete or educational institution.

(7) Engaged in conduct that significantly adversely reflects on the applicant's credibility, honesty, or integrity.

(c) In making a determination under subsection (b) of this section, the Secretary of State shall consider: (i) how recently the conduct occurred; (ii) the nature of the conduct and the context in which it occurred; and (iii) any other relevant conduct of the applicant.

(d) An athlete agent may apply to renew a registration by submitting an application for renewal in a form prescribed by the Secretary of State. The application for renewal must be signed by the applicant under penalty of perjury and must contain current information on all matters required in an original registration.

(e) An individual who has submitted an application for renewal of registration or licensure in another state, in lieu of submitting an application for renewal in the form prescribed pursuant to subsection (d) of this section, may file a copy of the application for renewal and a valid certificate of registration or licensure from the other state. The Secretary of State shall accept the application for renewal from the other state as an application for renewal in this State if the application to the other state satisfied the following:

(1) Was submitted in the other state within six months immediately preceding the filing in this State and the applicant certifies the information contained in the application for renewal is current.

(2) Contains information substantially similar to or more comprehensive than that required in an application for renewal submitted in this State.

(3) Was signed by the applicant under penalty of perjury.

(f) A certificate of registration or a renewal of a registration is valid for two years.

(g) An application filed under this section is a 'public record' within the meaning of Chapter 132 of the General Statutes.

"**§ 78C-91. Suspension; revocation; refusal to renew registration.**

(a) The Secretary of State may suspend, revoke, or refuse to renew a registration for conduct that would have justified denial of registration under G.S. 78C-90(b).

(b) The Secretary of State may deny, suspend, revoke, or refuse to renew a certificate of registration or licensure only after proper notice and an opportunity for a hearing in accordance with the Administrative Procedures Act pursuant to Article 3 of Chapter 150B of the General Statutes.

"**§ 78C-92. Temporary registration.**

The Secretary of State may issue a temporary certificate of registration while an application for registration or renewal of registration is pending.

"**§ 78C-93. Registration; renewal of fees.**

An application for registration or renewal of registration must be accompanied by a fee in the following amount:

(1) Application for registration.....$200.00
(2) Application for registration based upon a certificate of registration or licensure issued by another state.....200.00
(3) Application for renewal of registration.....200.00
(4) Application for renewal of registration based upon an application for renewal of registration or licensure submitted in another state...200.00.

"**§ 78C-94. Required form of contract.**

(a) An agency contract must be in a record, signed or otherwise authenticated by the parties.

(b) An agency contract must state or contain the following:

(1) The amount and method of calculating the consideration to be paid by the student-athlete for services to be provided by the athlete agent under the contract and any other consideration the athlete agent has received or will receive from any other source for entering into the contract or for providing the services.

(2) The name of any person not listed in the application for registration or renewal of registration who will be compensated because the student-athlete signed the agency contract.

(3) A description of any expenses that the student-athlete agrees to reimburse.

(4) A description of the services to be provided to the student-athlete.

(5) The duration of the contract.

(6) The date of execution.

(c) An agency contract must contain, in close proximity to the signature of the student-athlete, a conspicuous notice in boldface type in capital letters stating:

WARNING TO STUDENT-ATHLETE

IF YOU SIGN THIS CONTRACT:

(1) YOU MAY LOSE YOUR ELIGIBILITY TO COMPETE AS A STUDENT-ATHLETE IN YOUR SPORT;

(2) IF YOU HAVE AN ATHLETIC DIRECTOR, WITHIN 72 HOURS AFTER ENTERING INTO THIS CONTRACT, BOTH YOU AND YOUR ATHLETE AGENT MUST NOTIFY YOUR ATHLETIC DIRECTOR; AND

(3) YOU MAY CANCEL THIS CONTRACT WITHIN 14 DAYS AFTER SIGNING IT. CANCELLATION OF THIS CONTRACT MAY NOT REINSTATE YOUR ELIGIBILITY.

(d) An agency contract that does not conform to this section is voidable by the student-athlete. If a student-athlete voids an agency contract, the student-athlete is not required to pay any consideration under the contract or to return any consideration received from the athlete agent to induce the student-athlete to enter into the contract.

(e) The athlete agent shall give a record of the signed or otherwise authenticated agency contract to the student-athlete at the time of execution.

"**§ 78C-95. Notice to educational institution.**

(a) Within 72 hours after entering into an agency contract or before the next scheduled athletic event in which the student-athlete may participate, whichever occurs

first, the athlete agent shall give notice in a record of the existence of the contract to the athletic director of the educational institution at which the student-athlete is enrolled or the athlete agent has reasonable grounds to believe the student-athlete intends to enroll.

(b) Within 72 hours after entering into an agency contract or before the next athletic event in which the student-athlete may participate, whichever occurs first, the student-athlete shall inform the athletic director of the educational institution at which the student-athlete is enrolled that he or she has entered into an agency contract.

"**§ 78C-96. Student-athlete's right to cancel.**

(a) A student-athlete may cancel an agency contract by giving notice of the cancellation to the athlete agent in a record within 14 days after the contract is signed.

(b) A student-athlete may not waive the right to cancel an agency contract.

(c) If a student-athlete cancels an agency contract, the student-athlete is not required to pay any consideration under the contract or to return any consideration received from the athlete agent to induce the student-athlete to enter into the contract.

"**§ 78C-97. Required records.**

(a) An athlete agent shall retain the following records for a period of five years:

(1) The name and address of each individual represented by the athlete agent.

(2) Any agency contract entered into by the athlete agent.

(3) Any direct costs incurred by the athlete agent in the recruitment or solicitation of a student-athlete to enter into an agency contract.

(b) Records required to be retained by subsection (a) of this section are open to inspection by the Secretary of State during normal business hours.

"**§ 78C-98. Prohibited conduct.**

(a) An athlete agent, with the intent to induce a student-athlete to enter into an agency contract, shall not:

(1) Give any materially false or misleading information or make a materially false promise or representation.

(2) Furnish anything of value to a student-athlete before the student-athlete enters into the agency contract.

(3) Furnish anything of value to any individual other than the student-athlete or another registered athlete agent.

(b) An athlete agent shall not intentionally:

(1) Initiate contact with a student-athlete unless the athlete agent is registered under this Article.

(2) Refuse or fail to retain or permit inspection of the records required to be retained by G.S. 78C-97.

(3) Fail to register as required by G.S. 78C-88.

(4) Provide materially false or misleading information in an application for registration or renewal of registration.

(5) Predate or postdate an agency contract.

(6) Fail to notify a student-athlete before the student-athlete signs or otherwise authenticates an agency contract for a particular sport that

the signing or authentication may make the student-athlete ineligible to participate as a student-athlete in that sport.

"**§ 78C-99. Criminal penalties.**

An athlete agent who violates any provision under G.S. 78C-98 is guilty of a Class I felony.

"**§ 78C-100. Civil remedies.**

(a) An educational institution has a right of action against an athlete agent or a former student-athlete for damages caused by a violation of this Article. In an action under this section, the court may award costs and reasonable attorneys' fees to the prevailing party.

(b) Damages suffered by an educational institution under subsection (a) of this section include losses and expenses incurred because, as a result of the conduct of an athlete agent or former student-athlete, the educational institution was injured by a violation of this Article or was penalized, disqualified, or suspended from participation in athletics by: (i) a national association for the promotion and regulation of athletics; (ii) an athletic conference; or (iii) reasonable self-imposed disciplinary action taken to mitigate sanctions likely to be imposed by an athletic organization.

(c) A right of action under this section does not accrue until the educational institution discovers, or by the exercise of reasonable diligence would have discovered, the violation by the athlete agent or former student-athlete.

(d) Any liability of the athlete agent or the former student-athlete under this section is several and not joint.

(e) This Article does not restrict rights, remedies, or defenses of any person under law or equity.

"**§ 78C-101. Administrative penalty.**

The Secretary of State may assess a civil penalty against an athlete agent not to exceed twenty-five thousand dollars ($25,000) for a violation of this Article.

"**§ 78C-102. Uniformity of application and construction.**

In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

"**§ 78C-103. Electronic Signatures in Global and National Commerce Act.**

The provisions of this Article governing the legal effect, validity, or enforceability of electronic records or signatures, and of contracts formed or performed with the use of those records or signatures, conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (2000), and supersede, modify, and limit the Electronic Signatures in Global and National Commerce Act.

"**§ 78C-104. Severability.**

If any provision of this Article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are severable.

"**§ 78C-105. Rules.**

The Secretary of State may, in accordance with Chapter 150B of the General Statutes, adopt rules necessary to carry out the provisions of this Article."

SECTION 2. This act is effective when it becomes law.

SENATE BILL 563:
Uniform Athlete Agents Act

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Hagan
Date:	April 12, 2003	**Summary by:**	Kory J. Goldsmith
Version:	1st Edition		Committee Counsel

SUMMARY: ***SB563 repeals Article 8 of Chapter 78C, Regulation of Athlete Agents and replaces it with Article 8A, Uniform Athlete Agents Act. This bill comes at the request of the North Carolina Bar Association.***

CURRENT LAW: Article 8 of Chapter 78C regulates the relationships between athletic agents and student athletes.

Definitions: An athlete ("student athlete") is a person who seeks to be employed as a professional athlete and is enrolled in a North Carolina high school or has been admitted to an institution of higher education in North Carolina. An agent is a person who, for remuneration, solicits a student athlete to represent the athlete in either an agent contract or a financial services contract. An agent contract authorizes the agent to receive compensation in exchange for attempting to obtain employment for the student athlete with a professional sports team. A financial services contract is an agreement between the parties that allows the agent to make financial and investment decisions for a student athlete. An agent must post a bond of $100,000 with the Secretary of State when the agent enters into a financial services contract with an athlete.

Registration with Secretary of State: Athletic agents must register with the Secretary of State **before** the agent has any contact with a student athlete. The agent must provide its principal place of business, the agent's occupation for the last 5 years, the names and addresses of any financially interested partners or profit sharers, and if requested by the Secretary, five professional references. The registration fee is $200 and is good for one year. A North Carolina licensed and resident attorney is not required to register if the attorney does not advertise directly or solicit student athletes and does not represent more than 2 student athletes. The Secretary of State may suspend, revoke or deny a certificate of registration of an agent who fails to comply with Article 8, and may investigate any suspected violations.

Content of Contracts: Contracts with student athletes must contain a notice that the agent is registered with the Secretary of State, that the student athlete should read the contract before signing it and should not sign the contract if it contains blank spaces, and that the student athlete may cancel the contract within 16 days of signing it. The agent must file a memorandum of contract with the Secretary and the student athlete's high school principal or the athletic director of the student's college within 5 days of the signing of a contract.

Prohibited Acts: An agent may not make any false, fraudulent or misleading statements. An agent may not have an agreement to provide anything of value to any employee of the student athlete's high school or college in return for the referral of any clients to the agent. The agent may not offer anything of value to induce a student athlete to enter into a contract, EXCEPT the agent may expend "reasonable entertainment expenses and transportation expenses" to and from the agent's place of business. An agent may not contact the student athlete until after the completion of the athlete's last high school or intercollegiate contest, including post-season games.

Criminal and Civil Penalties: It is a Class I Felony to fail to register with the Secretary of State or to engage in any of the prohibited acts listed above. Contracts with agents who do not comply with the law are voidable at the discretion of the injured party. The Secretary of State may impose a civil penalty of between $2500 and $25,000 for willful violations.

BILL ANALYSIS: SB563 differs from current law as follows:

- Contains revised and additional definitions but generally does not expand or contract the scope of who is covered.
- Appoints the Secretary of State as the individual's agent for service of process for non-resident athlete agents.
- Requires more specific registration information, including information regarding the agent's expertise, prior felony convictions or convictions for crimes of moral turpitude.
- The registration application must contain a sworn statement that the information is true under penalty of perjury.
- No bonding requirements.
- Creates reciprocity of registration and renewal if the applicant has applied within the last 6 months in another state that has similar registration requirements.
- Makes registration good for 2 years instead of 1 year.
- Shortens the contract cancellation period from 16 days to 14 days.
- Contract warning language no longer warns the student to read the contract before signing it, but does includes a notice that by signing the contract, the student may lose eligibility to compete as a student athlete in their sport.
- The right of cancellation may not be waived.
- Requires the agent and athlete to notify the student's athletic director within 72 hours of signing a contract.
- Makes it a Class I felony for the agent to:
    - furnish anything of value to the student athlete prior to signing a contract if it is furnished with the intent to induce the student to sign the contract
    - furnish anything of value to anyone who isn't the student athlete or another agent if it is furnished with the intent to induce the student to sign the contract.
- Creates a civil cause of action by the high school or college against the agent or student athlete for damages caused by a violation of the law.

BACKGROUND: In 2000, at least 28 states had adopted laws regulating athlete or sports agents. Although most states required registration, the laws differed in other manners. In the late 1990s, the NCAA and several universities asked the National Conference of Commissioners on Uniform Laws (Conference) to draft a uniform law.

The act is effective when it becomes law.

S563-SMRC-001

PLEASE PRESS HARD - 5 COPIES

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. 1

H. B. No. _____ DATE _____

S. B. No. 563 Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE _____

Rep.)
) Hagan
Sen.)

1 moves to amend the bill on page 8, line 4
2 ( ) WHICH CHANGES THE TITLE
3 by ~~inserting after the~~ deleting the
4 phrase "G.S. 78C-98" and substituting
5 "G.S. 78C-98(a)(1) or G.S. 78C-98(b)".
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SIGNED K. R. Hagan

ADOPTED _____ FAILED _____ TABLED _____

ILLUSTRATION OF UNITRUST CONCEPT

Assume:

1	Dividend Return on Common Stocks		1.50%
2	Growth Return on Common Stocks		5.50%
3	Interest on Bonds		3.50%
4	Growth on Bonds		0.00%
5	Amount under Investment	$	1,000,000.00

	Distribution to Income Beneficiary	*Principal for Remaindermen*
Invested for Growth (80/20 stocks to bonds)		
End of Year 1	$ 19,000.00	$ 1,044,000.00
End of Year 2	$ 19,660.00	$ 1,090,420.00
End of Year 3	$ 20,356.30	$ 1,139,393.10
End of Year 4	$ 21,090.90	$ 1,191,059.72
End of Year 5	$ 21,865.90	$ 1,245,568.01
Totals	**$ 101,973.09**	**$ 1,245,568.01**
Invested for Income (20/80 stocks to bonds)		
End of Year 1	$ 31,000.00	$ 1,011,000.00
End of Year 2	$ 31,165.00	$ 1,022,605.00
End of Year 3	$ 31,339.08	$ 1,034,848.28
End of Year 4	$ 31,522.72	$ 1,047,764.93
End of Year 5	$ 31,716.47	$ 1,061,392.00
Totals	**$ 156,743.27**	**$ 1,061,392.00**
Invested Toward Income (40/60 stocks to bonds)		
End of Year 1	$ 27,000.00	$ 1,022,000.00
End of Year 2	$ 27,330.00	$ 1,045,210.00
End of Year 3	$ 27,678.15	$ 1,069,696.55
End of Year 4	$ 28,045.45	$ 1,095,529.86
End of Year 5	$ 28,432.95	$ 1,122,784.00
Totals	**$ 138,486.55**	**$ 1,122,784.00**
3.5% Unitrust		
End of Year 1	$ 35,000.00	$ 1,031,500.00
End of Year 2	$ 36,102.50	$ 1,083,362.50
End of Year 3	$ 37,917.69	$ 1,137,425.39
End of Year 4	$ 39,809.89	$ 1,194,484.56
End of Year 5	$ 41,806.96	$ 1,254,681.18
Totals	**$ 190,637.04**	**$ 1,254,681.18**

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 471

Short Title:	Amend Self-Insurance Guaranty Assoc. Laws.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 20, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAWS GOVERNING THE SELF-INSURANCE GUARANTY ASSOCIATION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 97-133(a)(2) reads as rewritten:

"(2) Assess each member of the Association as follows:

a. Each individual member self-insurer shall be annually assessed an amount equal to ~~one-quarter of one percent (0.25%)~~ two percent (2%) of the annual gross premiums, as determined under G.S. 105-228.5(b), (b1), and (c), that would have been paid by that member self-insurer for workers' compensation insurance during the prior calendar year; and payment to the Association shall be made no later than ~~September 15~~ May 15 following the close of that calendar year. Where any such assessment is paid based in whole or in part upon estimates of annual gross premiums for the prior calendar year, there shall be made in the next year's assessment an adjustment of the assessment of such prior year based on actual audited annual gross premiums. Each group member self-insurer shall be annually assessed an amount equal to ~~one-quarter of one percent (0.25%)~~ two percent (2%) of the annual gross premiums, as determined under G.S. 105-228.5(b), (b1), and (c), of the group member self-insurer during the prior calendar year; and payment to the Association shall be made no later than ~~September 15~~ May 15 following the close of that calendar year. Regardless of the size of the Fund, during its first 12 months of membership, no member self-insurer may discount or reduce this ~~one-quarter of one percent (0.25%) assessment. Assessments paid by members pursuant to this subdivision shall~~

~~be credited toward the tax paid by self-insurers under Article 8B of Chapter 105 of the General Statutes.~~ two percent (2%) assessment. For the purpose of making the assessments authorized by this subsection and subsections (c) and (d) of this section, the Secretary of Revenue shall provide to the Association the self-insurer premium and payroll information as determined under G.S. 105-228.5(b), (b1) and (c), and the Commissioner shall provide to the Association the group self-insurer premium information reported to the Commissioner under G.S. 58-47-75 and G.S. 58-2-165.

b. Each member self-insurer shall be notified of the assessment no later than 30 days before it is due.

c. If a self-insurer is a member of the Association for less than a full calendar year, the annual gross premiums shall be adjusted by that portion of the year the self-insurer is not a member of the Association.

d. If application of the contribution rates referenced in sub-subdivision a. of this subdivision would produce an amount in excess of the five million dollar ($5,000,000) limits of the fund, an equitable proration may be made; provided that every self-insurer that becomes a member of the Association shall pay an initial assessment, in an amount established by the Board, regardless of the size of the fund at the time the member joins the Association."

SECTION 2. G.S. 97-133(a)(4) reads as rewritten:

"(4) Be obligated to the extent of covered claims occurring prior to the determination of the member self-insurer's insolvency, or occurring after such determination but prior to the obtaining by the self-insurer of workers' compensation insurance as otherwise required under this Chapter. ~~The Association shall pay claims against a self-insurer that are not or have not been paid as a result of a determination of insolvency or the institution of bankruptcy or receivership proceedings that occurred prior to the effective date of this Article.~~"

SECTION 3. G.S. 97-185 reads as rewritten:

"**§ 97-185. ~~Deposits or surety bond.~~Deposits; surety bonds; letters of credit.**

(a) Every self-insurer shall deposit with the Commissioner an amount equal to ~~twenty-five percent (25%)~~ fifty percent (50%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer.

~~(b) A self-insurer organized and authorized before the effective date of this section shall have 24 months from the effective date of this section to comply with this section.~~

(c) Deposits received, changes to existing deposits, or deposits exchanged after the effective date of this section, shall comprise one or more of the following:

(1) Interest-bearing bonds of the United States of America.

(2) Interest-bearing bonds of the State of North Carolina, or of its cities or counties.

(3) Certificates of deposit issued by any solvent bank domesticated in the State of North Carolina that have a maturity of one year or greater.

(4) Surety bonds in a form acceptable to the Commissioner and issued by a corporate surety. A surety bond deposited pursuant to this subsection shall require that the surety reimburse the Commissioner, or his successors, assigns, or transferees, from the proceeds of the surety bond, for any costs incurred in the collection of the proceeds of the surety bond, including reasonable attorneys' fees, and any costs incurred in administering the workers' compensation claims against the insolvent self-insurer that deposited the surety bond.

(4a) Irrevocable letters of credit in a form acceptable to the Commissioner issued by a bank acceptable to the Commissioner.

(5) Any other investments that are approved by the Commissioner.

(d) All bonds or securities that are posted as a security deposit shall be valued annually at market value. If market value is less than face value, the Commissioner may require the self-insurer to post additional securities. In making this determination, the Commissioner shall consider the self-insurer's financial condition, the amount by which market value is less than face value, and the likelihood that the securities will be needed to provide benefits.

(e) Securities deposited under this section shall be assigned to the Commissioner, the Commissioner's successors, assigns, or trustees, on a form prescribed by the Commissioner in a manner that renders the securities negotiable by the Commissioner. If a self-insurer is deemed by the Commissioner to be in a hazardous financial condition, the Commissioner may sell or collect, or both, such amounts that will yield sufficient funds to meet the self-insurer's obligations under the Act. In the case of a letter of credit, the Commissioner may draw the full amount of a letter of credit if the letter of credit is not renewed within 90 days prior to its expiration or at any time that the bank issuing the letter of credit is no longer acceptable to the Commissioner. Interest accruing on any negotiable security deposited under this Article shall be collected and transmitted to the self-insurer if the self-insurer is not in a hazardous financial condition.

(f) No judgment creditor, other than a claimant entitled to benefits under the Act, may levy upon any deposits made under this section.

(g) Securities held by the Commissioner under this section may be exchanged or replaced by the self-insurer with other securities of like nature and amount as long as the self-insurer is not in a hazardous financial condition. No release shall be effectuated until replacement securities or bonds of an equal value have been substituted. Any surety bond may be exchanged or replaced with another surety bond that meets the requirements of this section if 90 days' advance written notice is given to the Commissioner. If a self-insurer ceases to self-insure or desires to replace securities with

an acceptable surety bond or bonds, the self-insurer shall notify the Commissioner, and may recover all or a portion of the securities deposited with the Commissioner upon posting instead an acceptable special release bond issued by a corporate surety in an amount equal to the total value of the securities. The special release bond shall cover all existing liabilities under the Act plus an amount to cover future loss development and shall remain in force until all obligations under the Act have been discharged fully.

(h) If a self-insurer ceases to self-insure, no deposits shall be released by the Commissioner until the self-insurer has discharged fully all of the self-insurer's obligations under the Act.

(i) An endorsement to a surety bond shall be filed with the Commissioner within 90 days after the effective date of the endorsement."

SECTION 4. Effective January 1, 2005, G.S. 97-185(a), as amended in Section 3 of this act, reads as rewritten:

"(a) Every self-insurer shall deposit with the Commissioner an amount equal to ~~fifty percent (50%)~~ seventy-five percent (75%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer."

SECTION 5. Effective January 1, 2006, G.S. 97-185(a), as amended in Sections 3 and 4 of this act, reads as rewritten:

"(a) Every self-insurer shall deposit with the Commissioner an amount equal to ~~seventy-five percent (75%)~~ one hundred percent (100%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer."

SECTION 6. Effective January 1, 2007, G.S. 97-185(a), as amended in Sections 3, 4, and 5 of this act, reads as rewritten:

"(a) Every self-insurer shall deposit with the Commissioner an amount equal to ~~one hundred percent (100%)~~ one hundred twenty-five percent (125%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer."

SECTION 7. G.S. 97-141 reads as rewritten:

"**§ 97-141. Stay of proceedings.**

All claims or proceedings under this Chapter to which the insolvent member self-insurer is a party either before the Industrial Commission or a court in this State and the running of all time periods against either the insolvent member self-insurer or the Association under this Chapter shall be stayed for 60 days from the later of the date of notice to the Association of the insolvency or the date the Association is notified of a

claim or proceeding under this Chapter in order to permit the Association to investigate, prosecute, or defend properly any petition, claim, or appeal under this Chapter, provided that the payment of weekly compensation for incapacity is made whenever time periods or proceedings affecting the payment of weekly compensation are stayed."

SECTION 8. Section 3 of this act becomes effective January 1, 2004. Section 4 of this act becomes effective January 1, 2005. Section 5 of this act becomes effective January 1, 2006. Section 6 of this act becomes effective January 1, 2007. Section 7 of this act is effective when this act becomes law and applies to claims filed on or after that date. The remainder of this act is effective when this act becomes law and applies to assessments made on or after that date.

SENATE BILL 471:
Amend Self-Insurance Guaranty Assoc. Laws.

BILL ANALYSIS

Committee:	Senate JII	**Introduced by:**	Sen. Hartsell
Date:	April 10, 2003	**Summary by:**	Linda Attarian
Version:	Introduced/PCS		Committee Co-Counsel

SUMMARY: House Bill 471 amends the laws governing the North Carolina Self-Insurance Guaranty Association (NCSIGA) to

- *Amend G.S. 97-185 governing security deposits made by self-insurers of workers compensation liability with the Commissioner of Insurance by progressively increasing the minimum amount of the deposit required under the statute. The bill spans the increases over a four year period to 2007, whereby the amount of the deposit will have increased from 25% to 125% of the self-insurer's total outstanding claim liability;*
- *Allow the Commissioner to accept irrevocable letters of credit in lieu of cash or a surety bond to meet the deposit requirement under G.S. 97-185;*
- *Require that surety bonds deposited with the Commissioner are sufficient to allow the NCSIGA to recover its administrative costs and any costs related to the collection of the proceeds of the surety bond;*
- *Amend the statute governing the NCSIGA's authority to make assessments against the self-insurer's annual gross premiums by increasing these assessments back to their pre-1997 levels;*
- *Eliminates the NCSIGA's statutory duty to pay claims against self-insurers that became insolvent before the NCSIGA was created; and*
- *Amends G.S. 97-141 to allow a 60 day-stay against the running of all time periods pursuant to any proceedings in which an insolvent member of the NCSIGA is a party to begin on the later of the date of notice to the NCSIGA of the insolvency of the member or the date the NCSIGA receives notice of a claim or proceeding after the original notice of the insolvency.*

THE PROPOSED COMMITTEE SUBSTITUTE:

- *Deletes Section 6. The effect of the deletion is that the bill would progressively increase the minimum amount of the deposit to an amount not less than 100% instead of an amount equal to 125% of the self-insurer's total outstanding claim liability over a three-year period instead of a four-year period. The Commissioner could require the self-insurer to deposit an amount greater than the minimum based on the financial condition of the self insurer and the risk retained by the self-insurer.*

BILL ANALYSIS:

Section 1. G.S. 58-6-25 requires insurance companies to pay a charge at a percentage rate of the company's premium tax liability for the taxable year. This section amends G.S. 97-133(a)(2) to restore the NCSIGA's authority to collect annual assessments from one-quarter of one percent (0.25%) to two percent (2%) of the annual gross workers compensation premiums.

The NCSIGA's rationale for this increase: In 1997 a tax credit was enacted against members' premium tax bills for annual assessments collected to increase the NCSIGA's Guaranty Fund from $1,000,000 to $5,000,000. The tax credit was only available for the two years of assessments that were necessary to increase the Guaranty Fund to $5,000,000. To offset the tax credit, the amount of allowable assessment was reduced from 2% to 0.25%. Now that the tax credit is no longer available, the amount of the annual assessments available to the NCSIGA is still at the reduced levels and they should be increased to pre-1997 levels.

Section 1 also changes the deadline for annual assessment payments to be made to the NCSIGA from September 1 to May 1. The statute provides that members' assessments must be paid by September 15 of the year in which the assessments are billed. Assessments are for the prior year but cannot be billed until April, after the self-insurers' premium tax returns are filled.

Section 2. G.S. 97-133(a) requires the NCSIGA to pay claims against self-insurers that became insolvent before the NCSIGA was created in 1986. Prior to 1997, the provision included a tax credit for assessments against premiums to pay such claims. This tax credit was deleted in 1997 with the enactment of S.L. 1997-475. SB 471 deletes the requirement to pay the claims since the tax credit is no longer available.

Section 3. Every insurer is required to post a security deposit with the Department of Insurance (DOI) in the form of cash, securities or a surety bond. The deposit or bond is assigned to the NCSIGA by the Department upon the self-insurer's insolvency and is used to pay worker's compensation claims against the insolvent self-insurer before claims are paid from the Guaranty Fund. Any claims paid from the Guaranty Fund result in assessments against all of the other self-insurers in North Carolina that are required, by law to belong to the Guaranty Association. The DOI does not currently accept letters of credit as security deposits. Other states do accept letters of credit.

SB 471 amends G.S. 97-185 to make letters of credit an acceptable form of a security deposit.

G.S. 97-185 currently requires self-insurers to make a security deposit of 25% of outstanding undiscounted claims liability, as determined by an actuary, or a minimum of $500,000. The Commissioner is authorized to require a higher deposit depending upon the financial condition of the self-insurer and the self-insurer's outstanding and potential claims liability. According to the NCSIGA, self-insurers that are in financial difficulty have taken advantage of the discretionary nature of the Commissioner's authority and have challenged deposit increases by requesting administrative hearings to delay the loss of their self-insurance authority. Apparently, in some instances the resulting delay has extended into the self-insurer's bankruptcy filing, resulting in more claims to be paid with an inadequate deposit and greater demands on the NCSIGA and remaining self-insurers.

SB 471 would require every self-insurer to post a deposit of 125% of its outstanding claims liability as determined by an actuary. The increase will be phased in over a four-year period.

Sections 4 through 6 provide for the progressive increases in the percent of claims liability required as a security deposit as explained in Section 3. See Section 8 for explanation of effective dates.

Section 7. G.S. 97-141 provides for a 60-day stay of proceedings in claims against self-insured member employers of the NCSIGA. The 60-day stay begins when the NCSIGA receives notice of insolvency. The purpose of the stay is to suspend pending time deadlines while the NCSIGA investigates, prosecutes, or defend against claims or appeals. Throughout the stay, the NCSIGA is obligated to make weekly compensation payments. According to the NCSIGA, the statute does not adequately address the situation

where a claim is asserted against an insolvent former self-insurer long after the NCSIGA was given notice of the insolvency. SB 471 amends G.S. 97-141 to allow the stay to begin on the later of the date of notice of the insolvency or the time the NCSIGA receives notice of a claim after the original notice of the insolvency.

Section 8. This section makes Section 3 (increase in security deposit and letter of credit allowance) effective January 1, 2004. Section 4 is effective January 1, 2005. Section 5 is effective January 1, 2006. Section 6 is effective January 1, 2007. Section 7 (Stay of proceedings) is effective when the bill becomes law and applies to claims filed on or after that date. Section 1 and 2 become effective when the bill becomes law and applies to assessments made on or after that date.

BACKGROUND:

The North Carolina Self-Insurance Guaranty Association (Association) was created by the General Assembly in 1986 to provide mechanisms for the payment of covered claims under self-insurance coverage, to avoid excessive delay in payment, to avoid financial loss to claimants because of insolvency of a self-insurer, and to assist in the detection of self-insurer insolvencies. All self-insurers are required by law to be members of the Association.

Since it was created, the NCSIGA has processed claims from 37 insolvent self-insured companies and 3 insolvent self-insured groups. In 18 of the 20 individual company insolvencies that the NCSIGA considers to be closed, the self-insurer's claim liability exceeded the self-insurers statutory deposit with the DOI.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

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SENATE BILL 471
PROPOSED COMMITTEE SUBSTITUTE S471-CSRM-20 [v.2]

4/15/2003 12:08:05 PM

Short Title: Amend Self-Insurance Guaranty Assoc. Laws. (Public)

Sponsors:

Referred to:

March 20, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAWS GOVERNING THE SELF-INSURANCE GUARANTY ASSOCIATION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 97-133(a)(2) reads as rewritten:

"(2) Assess each member of the Association as follows:

a. Each individual member self-insurer shall be annually assessed an amount equal to ~~one-quarter of one percent (0.25%)~~ two percent (2%) of the annual gross premiums, as determined under G.S. 105-228.5(b), (b1), and (c), that would have been paid by that member self-insurer for workers' compensation insurance during the prior calendar year; and payment to the Association shall be made no later than ~~September 15~~ May 15 following the close of that calendar year. Where any such assessment is paid based in whole or in part upon estimates of annual gross premiums for the prior calendar year, there shall be made in the next year's assessment an adjustment of the assessment of such prior year based on actual audited annual gross premiums. Each group member self-insurer shall be annually assessed an amount equal to ~~one-quarter of one percent (0.25%)~~ two percent (2%) of the annual gross premiums, as determined under G.S. 105-228.5(b), (b1), and (c), of the group member self-insurer during the prior calendar year; and payment to the Association shall be made no later than ~~September 15~~ May 15 following the close of that calendar year. Regardless of the size of the Fund, during its first 12 months of membership, no member self-insurer may discount or reduce this ~~one-quarter of one percent (0.25%) assessment.~~

~~Assessments paid by members pursuant to this subdivision shall be credited toward the tax paid by self-insurers under Article 8B of Chapter 105 of the General Statutes.~~ two percent (2%) assessment. For the purpose of making the assessments authorized by this subsection and subsections (c) and (d) of this section, the Secretary of Revenue shall provide to the Association the self-insurer premium and payroll information as determined under G.S. 105-228.5(b), (b1) and (c), and the Commissioner shall provide to the Association the group self-insurer premium information reported to the Commissioner under G.S. 58-47-75 and G.S. 58-2-165.

b. Each member self-insurer shall be notified of the assessment no later than 30 days before it is due.

c. If a self-insurer is a member of the Association for less than a full calendar year, the annual gross premiums shall be adjusted by that portion of the year the self-insurer is not a member of the Association.

d. If application of the contribution rates referenced in sub-subdivision a. of this subdivision would produce an amount in excess of the five million dollar ($5,000,000) limits of the fund, an equitable proration may be made; provided that every self-insurer that becomes a member of the Association shall pay an initial assessment, in an amount established by the Board, regardless of the size of the fund at the time the member joins the Association."

SECTION 2. G.S. 97-133(a)(4) reads as rewritten:

"(4) Be obligated to the extent of covered claims occurring prior to the determination of the member self-insurer's insolvency, or occurring after such determination but prior to the obtaining by the self-insurer of workers' compensation insurance as otherwise required under this Chapter. ~~The Association shall pay claims against a self-insurer that are not or have not been paid as a result of a determination of insolvency or the institution of bankruptcy or receivership proceedings that occurred prior to the effective date of this Article.~~"

SECTION 3. G.S. 97-185 reads as rewritten:

"**§ 97-185. ~~Deposits or surety bond.~~Deposits; surety bonds; letters of credit.**

(a) Every self-insurer shall deposit with the Commissioner an amount ~~equal to twenty-five percent (25%)~~ not less than fifty percent (50%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer.

~~(b) A self-insurer organized and authorized before the effective date of this section shall have 24 months from the effective date of this section to comply with this section.~~

(c) Deposits received, changes to existing deposits, or deposits exchanged after the effective date of this section, shall comprise one or more of the following:

(1) Interest-bearing bonds of the United States of America.

(2) Interest-bearing bonds of the State of North Carolina, or of its cities or counties.

(3) Certificates of deposit issued by any solvent bank domesticated in the State of North Carolina that have a maturity of one year or greater.

(4) Surety bonds in a form acceptable to the Commissioner and issued by a corporate surety. A surety bond deposited pursuant to this subsection shall require that the surety reimburse the Commissioner, or his successors, assigns, or transferees, from the proceeds of the surety bond, for any costs incurred in the collection of the proceeds of the surety bond, including reasonable attorneys' fees, and any costs incurred in administering the workers' compensation claims against the insolvent self-insurer that deposited the surety bond.

(4a) Irrevocable letters of credit in a form acceptable to the Commissioner issued by a bank acceptable to the Commissioner.

(5) Any other investments that are approved by the Commissioner.

(d) All bonds or securities that are posted as a security deposit shall be valued annually at market value. If market value is less than face value, the Commissioner may require the self-insurer to post additional securities. In making this determination, the Commissioner shall consider the self-insurer's financial condition, the amount by which market value is less than face value, and the likelihood that the securities will be needed to provide benefits.

(e) Securities deposited under this section shall be assigned to the Commissioner, the Commissioner's successors, assigns, or trustees, on a form prescribed by the Commissioner in a manner that renders the securities negotiable by the Commissioner. If a self-insurer is deemed by the Commissioner to be in a hazardous financial condition, the Commissioner may sell or collect, or both, such amounts that will yield sufficient funds to meet the self-insurer's obligations under the Act. In the case of a letter of credit, the Commissioner may draw the full amount of a letter of credit if the letter of credit is not renewed within 90 days prior to its expiration or at any time that the bank issuing the letter of credit is no longer acceptable to the Commissioner. Interest accruing on any negotiable security deposited under this Article shall be collected and transmitted to the self-insurer if the self-insurer is not in a hazardous financial condition.

(f) No judgment creditor, other than a claimant entitled to benefits under the Act, may levy upon any deposits made under this section.

(g) Securities held by the Commissioner under this section may be exchanged or replaced by the self-insurer with other securities of like nature and amount as long as the self-insurer is not in a hazardous financial condition. No release shall be effectuated until replacement securities or bonds of an equal value have been substituted. Any

surety bond may be exchanged or replaced with another surety bond that meets the requirements of this section if 90 days' advance written notice is given to the Commissioner. If a self-insurer ceases to self-insure or desires to replace securities with an acceptable surety bond or bonds, the self-insurer shall notify the Commissioner, and may recover all or a portion of the securities deposited with the Commissioner upon posting instead an acceptable special release bond issued by a corporate surety in an amount equal to the total value of the securities. The special release bond shall cover all existing liabilities under the Act plus an amount to cover future loss development and shall remain in force until all obligations under the Act have been discharged fully.

(h) If a self-insurer ceases to self-insure, no deposits shall be released by the Commissioner until the self-insurer has discharged fully all of the self-insurer's obligations under the Act.

(i) An endorsement to a surety bond shall be filed with the Commissioner within 90 days after the effective date of the endorsement."

SECTION 4. Effective January 1, 2005, G.S. 97-185(a), as amended in Section 3 of this act, reads as rewritten:

"(a) Every self-insurer shall deposit with the Commissioner an amount ~~equal to fifty percent (50%)~~ not less than seventy-five percent (75%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer."

SECTION 5. Effective January 1, 2006, G.S. 97-185(a), as amended in Sections 3 and 4 of this act, reads as rewritten:

"(a) Every self-insurer shall deposit with the Commissioner an amount ~~equal to seventy-five percent (75%)~~ not less than one hundred percent (100%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer."

SECTION 6. G.S. 97-141 reads as rewritten:

"**§ 97-141. Stay of proceedings.**

All claims or proceedings under this Chapter to which the insolvent member self-insurer is a party either before the Industrial Commission or a court in this State and the running of all time periods against either the insolvent member self-insurer or the Association under this Chapter shall be stayed for 60 days from the later of the date of notice to the Association of the insolvency or the date the Association is notified of a claim or proceeding under this Chapter in order to permit the Association to investigate, prosecute, or defend properly any petition, claim, or appeal under this Chapter, provided that the payment of weekly compensation for incapacity is made whenever time periods or proceedings affecting the payment of weekly compensation are stayed."

SECTION 7. Section 3 of this act becomes effective January 1, 2004. Section 4 of this act becomes effective January 1, 2005. Section 5 of this act becomes effective January 1, 2006. Section 6 of this act is effective when this act becomes law and applies to claims filed on or after that date. The remainder of this act is effective when this act becomes law and applies to assessments made on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 502

Short Title:	Access to Decedent's Safe-Deposit Box.	(Public)
Sponsors:	Senator Thomas.	
Referred to:	Judiciary II.	

March 24, 2003

A BILL TO BE ENTITLED

AN ACT TO AUTHORIZE A DEPUTY TO GAIN ACCESS TO THE CONTENTS OF A DECEDENT'S SAFE-DEPOSIT BOX.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 28A-15-13(a) reads as rewritten:

"(a) Definitions. – The following definitions apply to this section:

(1) Institution. – Any entity or person having supervision or possession of a safe-deposit box to which a decedent had access.

(2) Letter of authority. – Letters of administration, letters testamentary, an affidavit of collection of personal property, an order of summary administration, or a letter directed to the institution designating a person entitled to receive the contents of a safe-deposit box to which the decedent had access. The letter of authority must be signed by the clerk of superior court or by the clerk's representative.

(3) Qualified person. – A person possessing a letter of authority or a person named as a <u>deputy,</u> lessee or cotenant of the safe-deposit box to which the decedent had access."

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 774

Short Title:	Liability at Public Skateboard Parks.	(Public)
Sponsors:	Senators Dalton; and Lucas.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO ESTABLISH THE DUTIES OF OPERATORS OF SKATEBOARD PARKS, TO ESTABLISH THE DUTIES OF PERSONS WHO ENGAGE IN CERTAIN HAZARDOUS RECREATIONAL ACTIVITIES, AND TO LIMIT THE LIABILITY OF GOVERNMENTAL ENTITIES FOR DAMAGE OR INJURIES THAT ARISE OUT OF A PERSON'S PARTICIPATION IN CERTAIN HAZARDOUS RECREATIONAL ACTIVITIES AND THAT OCCUR IN AN AREA DESIGNATED FOR CERTAIN HAZARDOUS RECREATIONAL ACTIVITIES.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 99E of the General Statutes is amended by adding a new Article to read:

"Article 3.

"Hazardous Recreation Parks Safety and Liability.

"**§ 99E-21. Purpose.**

The purpose of this Article is to encourage governmental owners or lessees of property to make land available to a governmental entity for hazardous recreational activities. It is recognized that governmental owners or lessees of property have failed to make property available for such activities because of the exposure to liability from lawsuits and the prohibitive cost of insurance, if insurance can be obtained for such activities. It is also recognized that risks and dangers are inherent in these activities, which risks and dangers should be assumed by those participating in the activities.

"**§ 99E-22. Definitions.**

The following definitions apply in this Article:

(1) Governmental entity. –

a. The State, any county or municipality, or any department, agency, or other instrumentality thereof.

b. Any school board, special district, authority, or other entity exercising governmental authority.

(2) Hazardous recreational activity. – Skateboarding, inline skating, or freestyle bicycling.

(3) Inherent risk. – Those dangers or conditions that are characteristic of, intrinsic to, or an integral part of skateboarding, inline skating, and freestyle bicycling.

"**§ 99E-23. Duties of operators of skateboard parks.**

(a) No operator of a skateboard park shall permit any person to ride a skateboard therein, unless that person is wearing a helmet, elbow pads, and knee pads.

(b) For any facility, owned or operated by a governmental entity, that is designed and maintained for the purpose of recreational skateboard use, and that is not supervised on a regular basis, the requirements under subsection (a) of this section are satisfied when all of the following occur:

(1) The governmental entity adopted an ordinance requiring any person riding a skateboard at the facility to wear a helmet, elbow pads, and knee pads.

(2) Signs are posted at the facility affording reasonable notice that any person riding a skateboard in the facility must wear a helmet, elbow pads, and knee pads, and that any person failing to do so will be subject to citation under the ordinance under subdivision (1) of this subsection.

"**§ 99E-24. Duties of persons engaged in hazardous recreational activities.**

(a) Any person who participates in or assists in hazardous recreational activities assumes the known and unknown inherent risks in these activities, irrespective of age, and is legally responsible for all damages, injury, or death to himself or herself or other persons or property that result from these activities. Any person who observes hazardous recreational activities assumes the known and unknown inherent risks in these activities, irrespective of age, and is legally responsible for all damages, injury, or death to himself or herself that result from these activities. No public entity that sponsors, allows, or permits skateboarding, inline skating, or freestyle bicycling on its property is required to eliminate, alter, or control the inherent risks in these activities.

(b) While engaged in hazardous recreational activities, irrespective of where such activities occur, a participant is responsible for doing all of the following:

(1) Acting within the limits of his or her ability and the purpose and design of the equipment used.

(2) Maintaining control of his or her person and the equipment used.

(3) Refraining from acting in any manner that may cause or contribute to death or injury of himself or herself, or other persons.

(c) Failure to comply with the requirement of subsection (b) of this section constitutes negligence.

"**§ 99E-25. Liability of governmental entities.**

(a) This section does not grant authority or permission for a person to engage in hazardous recreational activities on property owned or controlled by a governmental entity unless such governmental entity has specifically designated such area for these activities.

(b) No governmental entity or public employee shall be liable to any person who voluntarily participates in hazardous recreation activities for any damage or injury to property or persons that arises out of a person's participation in the activity and that takes place in an area designated for the activity.

(c) This section does not limit liability that would otherwise exist for any of the following:

(1) The failure of the governmental entity or public employee to guard against or warn of a dangerous condition of which a participant does not and cannot reasonably be expected to have notice.

(2) An act of gross negligence by the governmental entity or public employee that is the proximate cause of the injury.

(d) Nothing in this section creates a duty of care or basis of liability for death, personal injury, or damage to personal property. Nothing in this section shall be deemed to be a waiver of sovereign immunity under any circumstances.

(e) Nothing in this section limits the liability of an independent concessionaire, or any person or organization other than a governmental entity or public employee, whether or not the person or organization has a contractual relationship with a governmental entity to use the public property, for injuries or damages suffered in any case as a result of the operation of equipment for hazardous recreational activities on public property by the concessionaire, person, or organization.

(f) The fact that a governmental entity carries insurance that covers any activity subject to this Article does not constitute a waiver of the liability limits under this section, regardless of the existence or limits of the coverage."

SECTION 2. This act becomes effective January 1, 2003, and applies to activities engaged in on or after that date and to actions that arise on or after that date.

SENATE BILL 774:
Liability at Public Skateboard Parks

BILL ANALYSIS

	Committee: Senate JII	**Introduced by:**	Sen. Dalton
Date:	April 15, 2003	**Summary by:**	Linda Attarian
Version:	Introduced		Committee Co-Counsel

SUMMARY: ***Senate Bill 774 adds a new Article to Chapter 99E of the General Statutes to limit the liability of governmental entities that make public property available for skateboard parks and to establish duties and responsibilities for operators of skateboard parks and persons who engage in inline skating, skateboarding or freestyle bicycling. The bill becomes effective January 1, 2003 and applies to activities engaged in on or after that date and to lawsuits that arise on or after that date.***

CURRENT LAW: Currently, no laws exist that specifically address these recreational activities. Chapter 99E contains Article 2 governing the safety and liability of roller skating rinks. Currently, liability for injuries resulting from inline skating, skateboarding, or freestyle bicycling would be determined under basic tort law analysis.

BILL ANALYSIS:

Immunity from liability: The act provides limited immunity from liability for governmental entities (includes schools) that make land available or designate public property for activities defined by the bill as "hazardous recreational activities" from personal injury or property damage liability arising out of a person's participation in the activity at the location or area that has been designated for the activity. Hazardous recreational activities exclusively include skateboarding, inline skating, and freestyle bicycling. The fact that the governmental entity carries liability insurance does not constitute a waiver of the immunity provided under the act.

The immunity from liability does not attach if the governmental entity or employee fails to warn of the participants of a dangerous condition existing in the skateboard park that the participant does not know about and cannot reasonably be expected to know about. Nor does the bill shield governmental entities or employees from gross negligence.

The act does not limit the liability of an independent concessionaire or any person or organization other than a governmental entity or public employee.

Assumption of risk: The bill provides that all persons who engage in skateboarding, inline skating, or freestyle bicycling, (irrespective of age) are legally responsible for all damages, injuries or death to themselves or to others. Further, the bill provides that observers or spectators assume the known or unknown risks inherent in these activities, irrespective of age and are also legally responsible for all damages, injuries or death to themselves.

Duties of operators: Operators of skateboard parks are required to:

- Prohibit skateboarders from using the skateboard park unless the skateboarder is wearing a helmet, elbow pads, and knee pads, however, if the skateboard park is owned or operated by a governmental entity, then this requirement is met if the governmental entity:
  - Adopts an ordinance requiring skateboarders to wear helmets and pads; and
  - Posts signs that provide reasonable notice to skateboarders of the helmet and pads ordinance and the penalty for failure to comply with the ordinance.

Duties of participants: Participants are required to do the following. Those who fail to do comply are negligent as a matter of law:

- Act within the limits of his or her ability and the purpose and design of the equipment.
- Maintain control of the equipment and his or her person.
- Refrain from acting "in any manner that may cause or contribute to death or injury of himself, herself, or other persons".

Section 2 makes the act effective January 1, 2003 and applies to activities engaged in on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 323

Short Title:	Gen. Contrs/Protect Info/Clarify Inj. Relief.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 6, 2003

A BILL TO BE ENTITLED

AN ACT TO PROTECT THE CONFIDENTIALITY OF INFORMATION RECEIVED BY THE LICENSING BOARD FOR GENERAL CONTRACTORS WHILE CONDUCTING AN INVESTIGATION OF A LICENSEE AND TO CLARIFY WHEN THE BOARD MAY SEEK INJUNCTIVE RELIEF.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 87-11(c) reads as rewritten:

"(c) The Board shall establish and maintain a system whereby detailed records are kept regarding complaints against each licensee. This record shall include, for each licensee, the date and nature of each complaint, investigatory action taken by the Board, any findings by the Board, and the disposition of the matter. Complaints, records, papers, or other documents containing information received, collected, or compiled by the Board, its members, or its employees as part of or as a result of investigations, inquiries, or interviews conducted in connection with a licensing or disciplinary matter shall not be considered public records within the meaning of Chapter 132 of the General Statutes. However, any notice to a licensee of a hearing pursuant to Chapter 150B of the General Statutes shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of an investigation, inquiry, or interview. If any record, paper, or other document containing information collected and compiled by the Board is received and admitted into evidence in a public hearing before the Board, it is then considered a public record within the meaning of Chapter 132 of the General Statutes."

SECTION 2. G.S. 87-13.1 reads as rewritten:

"**§ 87-13.1. Board may seek injunctive relief.**

Whenever ~~it appears to~~ the Board determines that any person, firm or corporation has, within the past three years, violated or is violating any of the provisions of this Article or ~~of the~~ rules and regulations of the Board promulgated under this Article, the Board may apply to the superior court for a restraining order and injunction to restrain the violation; and the superior courts have jurisdiction to grant the requested relief,

irrespective of whether or not criminal prosecution has been instituted or administrative sanctions imposed by reason of the violation."

SECTION 3. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 323
PROPOSED COMMITTEE SUBSTITUTE S323-PCS65251-RM-14

Short Title: Gen. Contrs/Protect Info/Clarify Inj. Relief. (Public)

Sponsors:

Referred to:

March 6, 2003

A BILL TO BE ENTITLED

AN ACT TO PROTECT THE CONFIDENTIALITY OF INFORMATION RECEIVED BY THE LICENSING BOARD FOR GENERAL CONTRACTORS WHILE CONDUCTING AN INVESTIGATION AND TO CLARIFY WHEN THE BOARD MAY SEEK INJUNCTIVE RELIEF.

The General Assembly of North Carolina enacts:

SECTION 1. Article 1 of Chapter 87 is amended by adding the following new section to read:

"**§ 87-15.3. Investigative material not public.**

Records, papers, or other documents containing information received, collected, or compiled by the Board, its members, or its employees as part of or as a result of investigations, inquiries, or interviews conducted in connection with a complaint shall not be considered public records within the meaning of Chapter 132 of the General Statutes. However, any notice to a licensee of a hearing pursuant to Chapter 150B of the General Statutes shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of an investigation, inquiry, or interview. If any record, paper, or other document containing information collected and compiled by the Board is received and admitted into evidence in a public hearing before the Board, it is then considered a public record within the meaning of Chapter 132 of the General Statutes. A complaint shall become a public record two years after it is received by the Board."

SECTION 2. G.S. 87-13.1 reads as rewritten:

"**§ 87-13.1. Board may seek injunctive relief.**

Whenever ~~it appears to~~ the Board determines that any person, firm or corporation has violated or is violating any of the provisions of this Article or ~~of the~~ rules and regulations of the Board promulgated under this Article, the Board may apply to the superior court for a restraining order and injunction to restrain the violation; and the superior courts have jurisdiction to grant the requested relief, irrespective of whether or

not criminal prosecution has been instituted or administrative sanctions imposed by reason of the violation."

SECTION 3. This act is effective when it becomes law.

SENATE BILL 323:
Gen. Contrs./Protect Info/Clarify Inj. Relief

BILL ANALYSIS

Committee:	Judiciary II	**Introduced by:**	Sen. Hartsell
Date:	March 23, 2003	**Summary by:**	Linda Attarian
Version:	Introduced		Committee Co-Counsel

SUMMARY: ***Senate Bill 323 amends the law governing persons engaged in the business of general contracting. The bill exempts from the definition of "public record" under Chapter 132 of the General Statute, information collected or compiled by the State Licensing Board for General Contractors (Board) in connection with an investigation of a licensing or disciplinary matter.***

The bill also amends the provision that provides the Board with the authority to seek injunctive relief against a licensed or unlicensed person, firm or corporation by changing the Board's standing threshold from "an appearance" of a violation to a "determination" of a violation; and by giving the Board the authority to seek injunctive relief for a past violation of Article 1 of Chapter 87 or rules adopted by the Board. The act is effective when it becomes law.

The Proposed Committee Substitute deletes Section 1 and replaces it with a provision that adds a new section to the licensure laws that will apply the public record exception provision to investigations of complaints concerning non-licensed contractors as well as licensed contractors. The original provision was limited to investigations of complaints concerning licensees. It also amends Section 2 to delete the three year look-back period for violations upon which the Board would be authorized to base injunctive actions.

CURRENT LAW:

Jurisdiction of NC Licensing Board for General Contractors: In 1925 the North Carolina General Assembly established the North Carolina Licensing Board for General Contractors and specified its regulatory authority over general contractors in Article 1 of Chapter 87. The purpose of the Board is to "safeguard life, health and property and to promote public welfare by prescribe certain standards for persons, firms and corporations who enter into contracts for construction work in this state. G.S. 87-1 defines general contractors as persons, firms or corporations who enter into construction projects costing $30,000 or more.

Investigation of complaints: Any person may file a complaint against a general contractor. All complaints received by the Board office are reviewed and assigned to a field investigator for an investigation. Once a complaint is received, written notice of the complaint and the charges are then forwarded to the licensee or general contractor for a response. Following a preliminary review of the complaint the investigator may gather additional evidence by making an inspection of the construction project or the work in question. Field investigators also may interview the contractor, witnesses or other individuals who are familiar with the case. When an investigation is completed the case is forwarded to the Board's Review Committee, which then determines whether probable cause exists to recommend that the case be presented to the full Board for a disciplinary hearing. The Board may impose discipline by revoking or suspending the license of the general contractor based on a finding of fraud or deceit in obtaining license, or gross negligence, incompetence, misconduct, or willful violations of the licensing laws.

If the general contractor is not licensed to practice general contracting, the Board may seek a permanent injunction against the contractor in Superior Court.

Record keeping: The Board is required to keep detailed records regarding complaints against each licensee, including the date and nature of each complaint, investigatory actions, findings and the disposition of the matter. These records are available to the public under North Carolina public record laws.

Public record law: Pursuant to G.S. 132-1, public records and public information compiled by governmental agencies, including occupational licensing boards, are the "property of the people", and it is the policy of this State that the people may obtain copies of such information free or at minimal cost *unless otherwise specifically provided by law.* However, G.S. 132-1.2 provides that public records do not include "written communications made within the scope of the attorney-client relationship by any attorney-at-law serving any such governmental agency that concerns the prosecution, defense, settlement or litigation of any judicial action or any administration or other type of proceed to which the governmental agency is a party or by which it is or may be direct affected" –but for only for three years from the date of the communication, at which time the exclusion expires.

BILL ANALYSIS: **Section 1** amends subsection (c) of G.S. 87-11, to provide that records compiled in connection with the investigation and disposition of complaints against licensees are not public records and are not freely available to the public. Exceptions to this exclusion: (1) written notices of the hearing on the complaint and charges to licensees pursuant to G.S. 150B-38, even if the notice contains information compiled during the investigation; and (2) any document containing disciplinary information that is admitted into evidence in a public hearing before the Board.

The provision does not make the information confidential because the custodian may still release it *voluntarily.* If a record is "confidential" then it may not be released except as permitted by law.

Section 2 amends G.S. 87-13.1 to provide the Board with standing to seek an injunction or an order to restrain a violation when the Board *determines* that any person, firm or corporation, (licensed or unlicensed), is presently violating, or *has violated within the past three years,* a provision of the licensing laws or rules adopted by the Board. Under current law, the Board must show that it *appears* that a person, firm, or corporation is *violating*, to seek injunctive remedies.

BACKGROUND:

The changes made under Section 1 are not unprecedented. A number of other licensure acts include specific provisions protecting records regarding complaints and investigation from public access. These include: Board of Law Examiners, North Carolina State Bar, NC State Board of Refrigeration Examiners, NC Medical Board, Medical Review Committee, NC State Board of Dental Examiners, Substance Abuse Professionals Certification Board, NC Psychology Board and the NC State Board of Examiners of Fee-Based Practicing Pastoral Counselors.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 659

Short Title:	Charitable Solicitations/Inform the Public.	(Public)
Sponsors:	Senators Bingham; and Carpenter.	
Referred to:	Judiciary II.	

April 1, 2003

A BILL TO BE ENTITLED

AN ACT TO DIRECT THE DEPARTMENT OF THE SECRETARY OF STATE TO INCLUDE IN ITS ANNUAL REPORT INFORMATION REGARDING SOLICITATIONS OF CHARITABLE CONTRIBUTIONS THAT INFORMS THE PUBLIC OF THE PERCENTAGES OF THE SOLICITORS' REVENUES THAT CHARITABLE ORGANIZATIONS OR SPONSORS WILL RECEIVE AS BENEFITS FROM SOLICITATION CAMPAIGNS AND TO PROVIDE FOR WIDER DISSEMINATION OF THE ANNUAL REPORT TO THE PUBLIC.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 131F-30 reads as rewritten:

"**§ 131F-30. Public information; annual report.**

(a) Public Information Program. – The Department shall develop a public information program to further the purposes of this Chapter. The purpose of the program is to help the public recognize unlawful, misleading, deceptive, or fraudulent solicitations and make knowledgeable, informed decisions concerning contributions.

(b) Information to Be Included. – The program shall include information concerning:

(1) The laws governing solicitations, including licensing and disclosure requirements, prohibited acts, and penalties.

(2) The means by which the public can report suspected violations or file a complaint.

(3) Any other information the Department believes will assist the public in making knowledgeable and informed decisions concerning contributions.

(c) Annual Report. – The Department shall prepare an annual report to be submitted to the Governor, the President of the Senate, and the Speaker of the House of Representatives and to be made available to the public by publishing it on the Department's web site, summarizing the information filed under this Chapter which the

Department determines will assist the public in making informed and knowledgeable decisions concerning contributions. The report shall include the following:

(1) A list of complaints filed for which violations were found to have occurred in each of the following categories: charitable organizations, sponsors, solicitors, and fund-raising consultants.

(2) A list of the number of investigations by the Department, enforcement actions commenced under this Chapter, and the disposition of those actions.

(3) A list of those charitable organizations and sponsors that have voluntarily submitted an audited financial statement pursuant to G.S. 131F-6(a)(10) or an audit with an opinion prepared by an independent certified public accountant.

(4) A list of all solicitors licensed under this Chapter and the fixed percentage of the gross revenue that the charitable organization or sponsor will receive as a benefit from the solicitation campaign, the reasonable estimate of the percentage of the gross revenue that the charitable organization or sponsor will receive as a benefit from the solicitation campaign, or the guaranteed minimum percentage of the gross revenue that the charitable solicitation or sponsor will receive as a benefit from the solicitation campaign as provided in the contract between the solicitor and the charitable organization or sponsor, whichever of these three amounts is least. This list shall appear in order of percentages, from lowest to highest.

(d) Each year immediately following the submission of the report under subsection (c) of this section, the Secretary of State shall issue that report as a press release to all print and electronic news media that provide general coverage."

SECTION 2. This act becomes effective January 1, 2004.

SENATE BILL 659:
Charitable Solicitaions/Inform the Public.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Bingham
Date:	April 15, 2003	**Summary by:**	Kory J. Goldsmith
Version:	1st Edition		Committee Counsel

SUMMARY: ***SB 659 requires that the Secretary of State must place on its website certain information regarding charitable solicitors. The annual report would also include information regarding the percentage of the gross revenue charities receive as a result of charitable solicitation campaigns. The act is effective when it becomes law.***

CURRENT LAW: Within 90 days after a solicitation campaign has been completed and on the anniversary of the commencement of a solicitation campaign lasting more than one year, the solicitor shall provide to the charitable organization or sponsor and file with the Department a financial report of the campaign, including the gross revenue received and an itemization of all expenses incurred. The report shall be completed on a form provided by the Department and shall be signed by an authorized official of the solicitor who shall certify under oath that the report is true and correct.

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. 1st

H. B. No. ~~SB~~ 659 DATE _____

S. B. No. _____ Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE _____

Rep.) Bingham
Sen.)

moves to amend the bill on page 20, ~~line~~ by inserting between line 26 & 27

( ) WHICH CHANGES THE TITLE

~~or~~ ~~as~~ the following:

~~"(1)~~ "Section 2. G.S. 131F-16(h) reads as rewritten:

'(h) Financial Report. – Within 90 days after a solicitation campaign has been completed and on the anniversary of the commencement of a solicitation campaign lasting more than one year, the solicitor shall provide to the charitable organization or sponsor and file with the Department a financial report of the campaign, including the gross revenue ~~received and~~ received, an itemization of all expenses ~~incurred~~ incurred, and the fixed percentage of the gross revenue that the charitable organization or sponsor received as a benefit from the solicitation campaign. The report

SIGNED _____

ADOPTED _____ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. _____ DATE _____

S. B. No. _____ Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE _____

Rep.)
) _____
Sen.)

moves to amend the bill on page _____, line _____

( ) WHICH CHANGES THE TITLE

by _____

shall be completed on a form provided by the Department and shall be signed by an authorized ~~out~~ official of the solicitor who shall certify under oath that the report is true and correct. ";

and by renumbering the remain section accordingly.

SIGNED Stan Bingham

ADOPTED ✓ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

April 16, 2003

AFTERNOON MEETING

NOTE: SENATE BILL 881added to agenda

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **JUDICIARY II** will meet at the following time:

DAY	DATE	TIME	ROOM
Wednesday	April 16, 2003	8:30 – 10:00 A	1124
		15 min. after Session	1124

The following will be considered: Bills to be heard in following order:

	BILL NO.	SHORT TITLE	SPONSOR
•	SB 619	DWI Blood Test Result – Directly to Clerk	Senator Apodaca
•	SB 766	Pretrial Release Programs/Statewide	Senator Thomas
•		Uniformity	
•	SB 962	Bail Require Affidavits of Bail Bondsmen	Senator Swindell
•	SB 323	Gen. Contrs/Protect Info/Clarify Inj. Relief	Senator Hartsell
•	SB 659	Charitable Solicitations/Inform the Public	Senator Bingham
•	SB 708	Volunteer Fire Dept. Crim. Background	Senator Shubert
•		Checks	
•	SB 716	Revised Uniform Arbitration Act	Senator Hartsell
•	SB 722	Display of American Flag	Senator Kinnaird
•	SB 748	Only Easements	Senator Sloan
•	SB 925	Strengthen Security Fraud Enforcement	Senator Rand
•		Laws	

Senator HARTSELL, Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
April 16, 2003 at afternoon
Room 1124, Legislative Building

I. Welcome and Opening Remarks

II. Bills to be Considered

SB 619	DWI Blood Test Result – Directly to Clerk	Senator Apodaca
SB 766	Pretrial Release Programs/Statewide Uniformity	Senator Thomas
SB 962	Bail Require Affidavits of Bail Bondsmen	Senator Swindell
SB 708	Volunteer Fire Dept. Crim. Background Checks	Senator Shubert
SB 716	Revised Uniform Arbitration Act	Senator Hartsell
SB 722	Display of American Flag	Senator Kinnaird
SB 748	Only Easements	Senator Sloan
SB 925	Strengthen Security Fraud Enforcement Laws	Senator Rand
SB 881	Permit Tobacco Payment W/O Reopening Estate	Senator Hartsell

III. Other Business

IV. Adjournment

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Andy Lomont	NCLM
Michelle Frazier	NC Bar Assn
Floyd Lewis	General Statutes Commission
Joe Diab	NC Bar Assoc. Sect'n on Int'l. Law
[illegible]	CAA
P. Bay Hall	GSC
Jennifer Cook	None
Pamela Bee	AOC
David Lassiter	Sec of State
Allan Ross	Sec of State
R. Reed Williams	NCHBA

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II

Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Sara Templeton	State Rep

ATTENDANCE

Committee: **Senate Judiciary II Committee** April 16, 2003 Thursday

DATES / NAMES																
Senator Hartsell, Chairman	✓															
Senator Thomas, Vice Chair	✓															
Senator Allran, Vice Chair	✓															
Senator Webster, Ranking Minority	✓															
Senator Apodaca	✓															
Senator Bingham	✓															
Senator Dalton	✓															
Senator Dorsett	✓															
Senator Hagan	✓															
Senator Holloman																
Senator Kerr	✓															
Senator Kinnaird	✓															
Senator Moore																
Senator Queen																
Senator Rucho																
Senator Shubert	✓															
Senator Sloan	✓															

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 619

Short Title:	DWI Blood Test Result-Directly to Clerk.	(Public)
Sponsors:	Senators Apodaca; Ballantine, Bingham, Carpenter, Forrester, Foxx, Metcalf, Pittenger, Rand, Rucho, Shubert, Sloan, Smith, Tillman, and Weinstein.	
Referred to:	Judiciary II.	

March 31, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT A BLOOD ANALYSIS REPORT SENT DIRECTLY TO THE CLERK OF SUPERIOR COURT MAY BE USED AS THE BASIS FOR THE CIVIL REVOCATION OF A DRIVERS LICENSE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-16.5(f) reads as rewritten:

"(f) Procedure if Report Filed with Clerk of Court When Person Not Present. – When a clerk receives a properly executed report under subdivision (d) (3) and the person named in the revocation report is not present before the clerk, the clerk shall determine whether there is probable cause to believe that each of the conditions of subsection (b) has been met. <u>For purposes of this subsection, a properly executed report under subdivision (d)(3) may include a sworn statement by the charging officer along with an affidavit received directly by the Clerk from the chemical analyst.</u> If he determines that there is such probable cause, he shall mail to the person a revocation order by first-class mail. The order shall direct that the person on or before the effective date of the order either surrender his license to the clerk or appear before the clerk and demonstrate that he is not currently licensed, and the order shall inform the person of the time and effective date of the revocation and of its duration, of his right to a hearing as specified in subsection (g), and that the revocation remains in effect pending the hearing. Revocation orders mailed under this subsection become effective on the fourth day after the order is deposited in the United States mail. If within five working days of the effective date of the order, the person does not surrender his license to the clerk or appear before the clerk to demonstrate that he is not currently licensed, the clerk shall immediately issue a pick-up order. The pick-up order shall be issued and served in the same manner as specified in subsection (e) for pick-up orders issued pursuant to that subsection. A revocation under this subsection begins at the date specified in the order and continues until the person's license has been revoked for the period specified in this

subsection and the person has paid the applicable costs. If the person has no pending offenses for which his license had been or is revoked under this section, the period of revocation under this subsection is:

(1) Thirty days from the time the person surrenders his license to the court, if the surrender occurs within five working days of the effective date of the order; or

(2) Thirty days after the person appears before the clerk and demonstrates that he is not currently licensed to drive, if the appearance occurs within five working days of the effective date of the revocation order; or

(3) Forty-five days from the time:

a. The person's drivers license is picked up by a law-enforcement officer following service of a pick-up order; or

b. The person demonstrates to a law-enforcement officer who has a pick-up order for his license that he is not currently licensed; or

c. The person's drivers license is surrendered to the court if the surrender occurs more than five working days after the effective date of the revocation order; or

d. The person appears before the clerk to demonstrate that he is not currently licensed, if he appears more than five working days after the effective date of the revocation order.

If at the time of the current offense, the person has one or more pending offenses for which his license had been or is revoked under this section, the revocation shall remain in effect until a final judgment, including all appeals, has been entered for the current offense and for all pending offenses. In no event may the period of revocation for the current offense be less than the applicable period of revocation in subdivision (1), (2), or (3) of this subsection. When a pick-up order is issued, it shall inform the person of his right to a hearing as specified in subsection (g), and that the revocation remains in effect pending the hearing. An officer serving a pick-up order under this subsection shall return the order to the court indicating the date it was served or that he was unable to serve the order. If the license was surrendered, the officer serving the order shall deposit it with the clerk within three days of the surrender."

SECTION 2. G.S. 20-139.1(c) reads as rewritten:

"(c) Withdrawal of Blood for Chemical Analysis. – When a blood test is specified as the type of chemical analysis by the charging officer, only a physician, registered nurse, or other qualified person may withdraw the blood sample. If the person withdrawing the blood requests written confirmation of the charging officer's request for the withdrawal of blood, the officer shall furnish it before blood is withdrawn. When blood is withdrawn pursuant to a charging officer's request, neither the person withdrawing the blood nor any hospital, laboratory, or other institution, person, firm, or corporation employing that person, or contracting for the service of withdrawing blood, may be held criminally or civilly liable by reason of withdrawing that blood, except that there is no immunity from liability for negligent acts or omissions.

The chemical analyst who analyzes the blood shall complete an affidavit on a form developed by the Department of Health and Human Services and provide the affidavit to the charging officer and the clerk of superior court in the county in which the criminal charges are pending."

SECTION 3. This act is effective when it becomes law.

SENATE BILL 619:
DWI Blood Test Result-Directly to Clerk

BILL ANALYSIS

Committee:	Senate JII	**Introduced by:**	Senator Apodaca
Date:	April 15, 2003	**Summary by:**	Linda Attarian
Version:	Introduced		Committee Co-Counsel

SUMMARY: ***Senate Bill 619 amends the Uniform Driver's License Act governing the procedures that must be followed by the Clerk of Court when a driver's license revocation report is filed with the clerk of court's office. The bill would allow the revocation report to include a sworn statement by the charging officer along with an affidavit from the chemical analyst who performed the blood screen.***

CURRENT LAW: Any person who drives a vehicle on a highway or public vehicular area gives consent to a chemical analysis if charged with an implied consent offense. An implied consent offense is an offense involving impaired driving or an alcohol-related offense.

A person's driver's license is subject to revocation under G.S. 20-16.5(b) if all of the following facts are present:

(1) A charging officer has reasonable grounds to believe that the person has committed an offense subject to the implied-consent provisions of G.S. 20-16.2;
(2) The person is charged with that offense as provided in G.S. 20-16.2(a);
(3) The charging officer and the chemical analyst comply with the procedures of G.S. 20-16.2 and G.S. 20-139.1 in requiring the person's submission to or procuring a chemical analysis; and
(4) The person:
  a. Willfully refuses to submit to the chemical analysis;
  b. Has an alcohol concentration of 0.08 or more within a relevant time after the driving;
  c. Has an alcohol concentration of 0.04 or more at any relevant time after the driving of a commercial motor vehicle; or
  d. Has any alcohol concentration at any relevant time after the driving and the person is under 21 years of age.

If the person's driver's license is subject to revocation, the charging officer and the chemical analyst must execute a revocation report. It is the specific duty of the charging officer to make sure that the report is expeditiously filed with a judicial official. In the event the person is not present in court for an initial appearance or some other proceeding relating to the criminal charge, the charging officer must file the revocation report with the Clerk of Court in the county where the offense occurred.

G.S. 20-16.5(f) sets forth the procedure that the clerk must follow when the report is filed with the clerk's office. The clerk must:

- Determine whether there is probable cause to believe that each of the conditions in G.S. 20-16.5(b) has been met (see outline above).
- If probable cause if found, the clerk must mail the person a revocation order. The order directs the person to surrender his or her license to the clerk or appear before the clerk and demonstrate the he or she is not currently licensed. The order shall also specify that

the person has a right to a hearing, and that the revocation is in effect pending the hearing.

- If the person does not surrender his or her license pursuant to the order within five days of the effective date of the order, the clerk must immediately issue a pick-up order.
- A revocation order begins at the date specified in the order and continues until the person's license has been revoked for a specified period of time as provided by law and the person has paid the applicable costs.

If the person whose license is revoked requests a hearing to contest the validity of the revocation, the request must be made within ten days of the effective date of the revocation order. The hearing must be held within three to five working days of the request, depending on whether the hearing is before a magistrate or a district court judge. The request must specify the grounds upon which the validity of the revocation is challenged and the hearing must be limited to the grounds specified in the request. A witness may submit evidence by affidavit unless the witness is subpoenaed to appear. Any person who appears and testifies is subject to questioning by the judicial official conducting the hearing, and the judicial official may adjourn the hearing to seek additional evidence if the official is not satisfied with the accuracy or completeness of evidence. Unless contested by the person requesting the hearing, the judicial official may accept as true any matter stated in the revocation report.

At the conclusion of the hearing, the judicial official must enter an order sustaining or rescinding the revocation. The decision is final and may not be appealed in the General Court of Justice

BILL ANALYSIS: **Section 1** of Senate Bill 619 amends G.S. 20-16.5(f), governing the procedures that must be followed by the Clerk of Court when the revocation report is filed with that office. The bill would allow the revocation report to include a sworn statement by the charging officer along with an affidavit from the chemical analyst. The result of the amendment is that if the person requests a hearing to contest the validity of the revocation report, the charging officer's sworn statement would be considered as evidence for the purposes of the hearing. Unless subpoenaed to appear, the charging officer and the chemical analyst would not need to appear at the hearing or submit affidavits with the judicial officer.

Section 2 amends G.S. 20-139.1(c), to require the person conducting the chemical analysis of the blood sample to complete an affidavit and provide the affidavit to the charging officer and the clerk of superior court in the county in which the criminal charges are pending.

Section 3 makes the act effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 766

Short Title:	Pretrial Release Program/Statewide Uniformity.	(Public)
Sponsors:	Senator Thomas.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO ESTABLISH A UNIFORM STATEWIDE PRETRIAL RELEASE PROGRAM.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-535 is amended by adding a new subsection to read:

(c) Any pretrial release program established under this section shall include all of the following guidelines:

(1) Except as provided in subdivision (2) of this subsection, any defendant who has been incarcerated in a local confinement facility for at least 72 hours shall be screened for consideration for release prior to the disposition of the defendant's case.

(2) A defendant is not eligible for pretrial release if any of the following conditions exist:

a. The defendant has failed to appear in court previously when released prior to trial.

b. The defendant is a detainee from another jurisdiction.

c. The defendant is charged with a felony that is a Class A through G felony.

d. The defendant is charged with driving while impaired.

e. The defendant is charged with civil contempt.

d. The defendant is charged with assault on a female.

f. The defendant is charged with a crime in which the defendant is alleged to have used a weapon.

g. The defendant is charged with a probation violation.

(3) A defendant who is accepted by a pretrial release program shall provide the following information to the program supervisor:

a. Any personal information required by the program.

b. A criminal record check.

c. Any probation and parole information regarding the defendant.

d. Any other relevant information required under the program guidelines.

(4) A provision that if a defendant is approved for pretrial release by the pretrial release interview, the presiding judge in district or superior court, as appropriate, may specify and order any condition of release deemed appropriate in the discretion of the presiding judge.

(5) A provision that the pretrial release authority place a copy of the release in the defendant's court file along with a pretrial release agreement upon full approval of a defendant's release by the pretrial release authority and the court. The pretrial release authority shall also be required to notify the appropriate supervisor of the local confinement facility of the defendant's release and to meet with the defendant before the defendant is released to discuss the pretrial release conditions and monitoring.

(6) A provision that the defendant shall contact the appropriate pretrial release supervisor on a weekly basis and shall comply with the pretrial release court order when the defendant is released and that failure to comply with this condition shall result in the immediate incarceration of the defendant."

SECTION 2. This act becomes effective December 1, 2003.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 962

Short Title:	Require Affidavits of Bail Bondsmen.	(Public)
Sponsors:	Senators Swindell; Gulley, Metcalf, and Thomas.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO REQUIRE BAIL BONDSMEN TO SUBMIT AFFIDAVITS STATING THAT THERE ARE NO PREMIUMS OWED TO FORMER INSURERS AND THAT ALL FORFEITURES OR JUDGMENTS ARE SATISFIED OR DISCHARGED.

The General Assembly of North Carolina enacts:

SECTION 1. Article 71 of Chapter 58 of the General Statutes is amended by adding a new section to read:

"**§ 58-71-141. Appointment of bail bondsmen; affidavit required.**

(a) Prior to receiving an appointment, a surety bondsman shall submit to the Commissioner an affidavit, signed under oath, by the surety bondsman and by any former insurer, stating that the surety bondsman does not owe any premium or unsatisfied judgment to any insurer and that the bondsman agrees to discharge all outstanding forfeitures and judgments on bonds previously written. The affidavit shall be in a form prescribed by the Commissioner. If the surety bondsman does not satisfy or discharge all forfeitures or judgments, the former insurer shall submit a notice, with supporting documents, to the appointing insurer, the surety bondsman, and the Commissioner, which states, under oath, that the surety bondsman has failed to satisfy, in a timely manner, the forfeitures and judgments on bonds written by the surety bondsman and that the former insurer has satisfied the forfeiture or judgment from its own funds. Upon receipt of the notification and supporting documents, the appointing insurer shall immediately cancel the surety bondsman's appointment. The surety bondsman may be reappointed only upon certification by the former insurer that all forfeitures and judgments on bonds written by the surety bondsman have been discharged. The appointing insurer or surety bondsman may, within 10 days of the receipt of notice from the former insurer, appeal to the Commissioner.

(b) The Commissioner shall adopt rules, including rules regarding the process of appeals and stays of the requirements of this section, to implement this section.

(c) As used in this section, "former insurer" means the insurer with whom the surety bondsman had a prior appointment and who is responsible for any outstanding bonds written by the surety bondsman."

SECTION 2. This act becomes effective October 1, 2003, and applies to all appointments of bondsmen on or after that date.

SENATE BILL 962:
Require Affidavits of Bail Bondsmen

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Swindell
Date:	April 15, 2003	**Summary by:**	Kory J. Goldsmith
Version:	1st Edition		Committee Counsel

SUMMARY: ***SB 962 requires a surety bondsman to submit a sworn affidavit to the Commissioner of Insurance stating the bondsman does not owe any premium or unsatisfied judgment to any insurer before the bondsman may receive an appointment to a new insurer.***

CURRENT LAW: A "surety bondsman" is a person who is licensed by the Commissioner, and is appointed by an insurer to execute bail bonds for the insurer. Insurers are required to provide the Commissioner annually with a list of the surety bondsmen appointed by the insurer. Upon terminating an appointment, the insurer must file a written notice with the Commissioner as well as the clerk of superior court of any county in the State in which the insurer has been obligated on bail bonds through the surety bondsman. The surety bondsman is required to register his or her current license with the clerk of superior court in the county where the bondsman resides as well as any county where he or she writes bail bonds. The Commissioner may suspend, revoke or refuse to renew a bondsman license for, among other things, failing to pay any judgment or decree rendered on any forfeited undertaking and any fraudulent or dishonest practice in the conduct of business.

BILL ANALYSIS: SB962 adds a new section to Article 71 of Chapter 58. It provides that a surety bondsman must file an affidavit with the Commissioner before being appointed by a new insurer. The affidavit must state that the bondsman does not owe any premium or unsatisfied judgment to any insurer and the bondsman agrees to discharge all outstanding forfeitures and judgments on bonds previously written. If those obligations are not satisfied, the former insurer shall notify the Commissioner and the new appointing insurer that the bondsman has failed to satisfy the outstanding obligations. The new insurer is supposed to revoke any appointment until the former insurer certifies that the obligations have been satisfied.

The Commissioner is directed to adopt rules to implement the act.

"Former insurer" means the insurer with whom the surety bondsman had a prior appointment and who is responsible for any outstanding bonds written by the surety bondsman.

The act is effective October 1, 2003 and applies to appointments of surety bondsmen made on and after that date.

S962-SMRC-001

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 708

Short Title: Volunteer Fire Dept. Crim. Background Checks. (Public)

Sponsors: Senators Shubert; Blake, Carpenter, Forrester, Foxx, and Pittenger.

Referred to: Judiciary II.

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO AUTHORIZE LOCAL LAW ENFORCEMENT AGENCIES TO ACCESS THE CRIMINAL INFORMATION NETWORK TO RUN CRIMINAL BACKGROUND CHECKS ON PROSPECTIVE MEMBERS OF VOLUNTEER FIRE DEPARTMENTS.

The General Assembly of North Carolina enacts:

SECTION 1. Article 4 of Chapter 114 of the General Statutes is amended by adding a new section to read:

"**§ 114-19.12. Criminal record checks of applicants to volunteer fire departments.**

(a) Authority. – The Department of Justice and the Federal Bureau of Investigation may provide to any local law enforcement agency a criminal record check of any individual who applies for a position with a volunteer fire department in that unit of local government and a criminal record check of all persons 18 years of age or older who live in the applying household. The North Carolina criminal record check may also be done by a certified DCI operator within the local law enforcement agency.

(b) Procedure. – A criminal record check shall be conducted by using an individual's fingerprints and all identification information required by the Department of Justice to identify that individual. A criminal record check shall be provided only if: (i) the individual whose record is checked consents to the record check, and (ii) every individual who is 18 years of age or older who lives in the household also consents to the record check. Refusal to give consent is considered withdrawal of the application. The information shall be kept confidential by the local law enforcement agency that receives the information. If the confidential information is disclosed under this section, the Department may refuse to provide further criminal record checks to that local law enforcement agency."

SECTION 2. This act is effective when it becomes law.

SENATE BILL 708:
Volunteer Fire Dept. Crim. Background Checks.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Shubert
Date:	April 16, 2003	**Summary by:**	Robin Johnson
Version:	First		Committee Counsel

SUMMARY: ***Senate Bill 708 would authorize local law enforcement agencies to run criminal background checks on any applicant for a position with a volunteer fire department and on all adults who live in the same household with the applicant. The check may be conducted only if the applicant and adults living in the same household each consent to the check. A refusal to consent is considered a withdrawal of the application.***

Information from the record check must be kept confidential by the law enforcement agency that receives the information. If it is not kept confidential, the Department of Justice may refuse to provide further criminal record checks to that law enforcement agency.

The bill is effective when it becomes law.

CURRENT LAW: Criminal background checks are authorized for the following:

- School personnel.
- Providers of treatment for or services to children, the elderly, mental health patients, the sick, and the disabled.
- Foster and adoptive parents.
- Employees and job applicants with the Departments Health and Human Services and Juvenile Justice and Delinquency Prevention.
- Applicants for an auctioneer's license.
- Applicants for volunteers for the McGruff House Program.
- Applicants for licensure as registered nurses and licensed practical nurses.
- Nursing homes, adult care homes, home care agencies, area mental health, developmental disabilities, and substance abuse services authorities.

BILL ANALYSIS: The bill would create a new G.S. 114-19.12 by authorizing criminal background checks for volunteers for positions with a volunteer fire department and for all adults who live in the same households with those volunteers. The language is identical to the statute that authorizes criminal background checks for applicants for volunteers for the McGruff House Program.

S708-SMRH-001

Eddie Cathey
Sheriff of Union County

3344 Presson Road
Monroe, North Carolina 28112

Telephone: (704) 283-3789
FAX: (704) 292-2700
Email: eddiecathey@co.union.nc.us

March 9, 2003

The Honorable Senator Fern Shubert
North Carolina Senate
106 East Main Street
Marshville, NC 28103

Dear Madam Senator:

I have been in contact with Mr. Don Gaddy, president of the Union County Fire Chiefs' Association in regard to the issue of criminal background checks for volunteer firefighter applicants. Indeed, the issue is a serious one, and I would be happy to support any initiative to lawfully provide the chiefs with this information.

Whereas N.C. General Statutes provide for criminal record checks on healthcare workers, teachers and law enforcement officers, there exists no statutory provision that permits fire and rescue squad chiefs to obtain nationwide criminal record checks on firefighter candidates. Because the criminal history information maintained by the State Bureau of Investigation's DCI system is confidential (by statute,) fire and rescue squad chiefs cannot obtain this information directly from their local law enforcement agencies.

I believe that the number of requests that we might receive would not place undue hardship on ours staff. Details surrounding confidentiality issues with potential firefighter candidates can be worked out internally with my attorney, the individual fire departments and the Fire Chiefs' Association.

Thank you for the job that you do for us. It is my sincere hope that together, we can help our emergency services organizations recruit good, solid volunteers.

Sincerely,

Eddie Cathey

Sheriff Eddie Cathey

EC/bb

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 716

Short Title:	Revised Uniform Arbitration Act.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO REPEAL THE UNIFORM ARBITRATION ACT AND TO ENACT THE REVISED UNIFORM ARBITRATION ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 45A of Chapter 1 of the General Statutes is repealed.

SECTION 2. Chapter 1 of the General Statutes is amended by adding a new Article to read:

"Article 45C.

"Revised Uniform Arbitration Act.

"**§ 1-569.1. Definitions.**

The following definitions apply in this Article:

(1) 'Arbitration organization' means an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator.

(2) 'Arbitrator' means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.

(3) 'Court' means a court of competent jurisdiction in this State.

(4) 'Knowledge' means actual knowledge.

(5) 'Person' means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(6) 'Record' means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

"**§ 1-569.2. Notice.**

(a) Except as otherwise provided in this Article, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice.

(b) A person has notice if the person has knowledge of the notice or has received notice.

(c) A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business or at another location held out by the person as a place of delivery of such communications.

"**§ 1-569.3. When Article applies.**

(a) This Article governs an agreement to arbitrate made on or after January 1, 2004.

(b) This Article governs an agreement to arbitrate made before January 1, 2004, if all parties to the agreement or to the arbitration proceeding so agree in a record.

(c) On or after January 1, 2006, this Article governs an agreement to arbitrate whenever made.

"**§ 1-569.4. Effect of agreement to arbitrate; nonwaivable provisions.**

(a) Except as otherwise provided in subsections (b) and (c) of this section, a party to an agreement to arbitrate or to an arbitration proceeding may waive, or the parties may vary the effect of, the requirements of this Article to the extent provided by law.

(b) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(1) Waive or agree to vary the effect of the requirements of G.S. 1-569.5(a), 1-569.6(a), 1-569.8, 1-569.17(a), 1-569.17(b), 1-569.26, or 1-569.28;

(2) Agree to unreasonably restrict the right under G.S. 1-569.9 to notice of the initiation of an arbitration proceeding;

(3) Agree to unreasonably restrict the right under G.S. 1-569.12 to disclosure of any facts by a neutral arbitrator; or

(4) Waive the right under G.S. 1-569.16 of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under this Article, but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.

(c) A party to an agreement to arbitrate or to an arbitration proceeding may not waive, or the parties shall not vary the effect of, the requirements of this section or G.S 1-569.3(a), 1-569.3(c), 1-569.7, 1-569.14, 1-569.18, 1-569.20(d), 1-569.20(e), 1-569.22, 1-569.23, 1-569.24, 1-569.25(a), 1-569.25(b), 1-569.29, 1-569.30, 1-569.31, or 1-569.32.

"**§ 1-569.5. Application for judicial relief.**

(a) Except as otherwise provided in G.S. 1-569.28, an application for judicial relief under this Article must be made by motion to the court and heard in the manner provided by law or rule of court for making and hearing motions.

(b) Unless a civil action involving the agreement to arbitrate is pending, notice of an initial motion to the court under this Article must be served in the manner provided by law for the service of a summons in a civil action. Otherwise, notice of the motion

must be given in the manner prescribed by law or rule of court for serving motions in pending cases.

"**§ 1-569.6. Validity of agreement to arbitrate.**

(a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revocation of a contract.

(b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(c) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(d) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

"**§ 1-569.7. Motion to compel or stay arbitration.**

(a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

(1) If the refusing party does not appeal or does not oppose the motion, the court shall order the parties to arbitrate; and

(2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

(b) On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate.

(c) If the court finds that there is no enforceable agreement to arbitrate, it may not, pursuant to subsection (a) or (b) of this section, order the parties to arbitrate.

(d) The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or because grounds for the claim have not been established.

(e) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in a court, a motion under this section must be made in that court. Otherwise a motion under this section may be made in any court as provided in G.S. 1-569.27.

(f) If a party makes a motion to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

(g) If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.

"**§ 1-569.8. Provisional remedies.**

(a) Before an arbitrator is appointed and is authorized and able to act, the court, upon motion of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.

(b) After an arbitrator is appointed and is authorized and able to act:

(1) The arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action; and

(2) A party to an arbitration proceeding may move the court for a provisional remedy if the matter is urgent and the arbitrator is not able to act in a timely manner or the arbitrator cannot provide an adequate remedy.

(c) A party does not waive a right of arbitration by making a motion under subsection (a) or (b) of this section.

"**§ 1-569.9. Initiation of arbitration.**

(a) A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by certified or registered mail, return receipt requested, and obtained, or by service as authorized for the commencement of a civil action. The notice must describe the nature of the controversy and the remedy sought.

(b) Unless a person objects for lack or insufficiency of notice under G.S. 1-569.15(c) no later than the beginning of the arbitration hearing, the person, by appearing at the hearing, waives any objection to lack or insufficiency of notice.

"**§ 1-569.10. Consolidation of separate arbitration proceedings.**

(a) Except as otherwise provided in subsection (c) of this section, upon motion of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:

(1) There are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration with a third person;

(2) The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

(3) The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and

(4) Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

(b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

(c) The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.

"**§ 1-569.11. Appointment of arbitrator; service as a neutral arbitrator.**

(a) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

(b) An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral.

"**§ 1-569.12. Disclosure by arbitrator.**

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) A financial or personal interest in the outcome of the arbitration proceeding; and

(2) An existing or past relationship with any of the parties to the agreement to arbitrate or to the arbitration proceeding, their counsel or representatives, a witness, or other arbitrators.

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or (b) of this section to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under G.S. 1-569.23(a)(2) for vacating an award made by the arbitrator.

(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b) of this section, upon timely objection by a party, the court under G.S.-1-569.23(a)(2) may vacate an award.

(e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under G.S. 1-569.23(a)(2).

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under G.S. 1-569.23(a)(2).

"**§ 1-569.13. Action by majority.**

If there is more than one arbitrator, the powers of an arbitrator must be exercised by a majority of the arbitrators, but all of them shall conduct the hearing under G.S. 1-569.15(c).

"**§ 1-569.14. Immunity of arbitrator; competency to testify; attorney's fees and costs.**

(a) An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.

(b) The immunity afforded by this section supplements any immunity under other law.

(c) The failure of an arbitrator to make a disclosure required by G.S. 1-569.12 does not cause any loss of immunity under this section.

(d) In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify, and may not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding, to the same extent as a judge of a court of this State acting in a judicial capacity. This subsection does not apply:

(1) To the extent necessary to determine the claim of an arbitrator, arbitration organization, or representative of the arbitration organization against a party to the arbitration proceeding; or

(2) To a hearing on a motion to vacate an award under G.S. 1-569.23(a)(1) or (a)(2) if the movant establishes prima facie that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from the services of the arbitrator, organization, or representative, or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of subsection (d) of this section, and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not competent to testify, the court shall award to the arbitrator, organization, or representative reasonable attorney's fees, costs, and other reasonable expenses of litigation.

(f) Immunity under this section does not apply to acts or omissions that occur with respect to the operation of a motor vehicle.

"**§ 1-569.15. Arbitration process.**

(a) An arbitrator may conduct an arbitration in such a manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.

(b) An arbitrator may decide a request for summary disposition of a claim or particular issue:

(1) If all interested parties agree; or

(2) Upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the proceeding and the other parties have a reasonable opportunity to respond.

(c) If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than five days before the hearing begins. Unless a party to the arbitration proceeding makes an objection to lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but may not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified did not appear. The court, upon request, may direct the arbitrator to conduct the hearing promptly and render a timely decision.

(d) At a hearing under subsection (c) of this section, a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(e) If an arbitrator ceases to or is unable to act during the arbitration proceeding, a replacement arbitrator must be appointed in accordance with G.S. 1-569.11 to continue the proceeding and to resolve the controversy.

(f) The rules of evidence do not apply in arbitration proceedings, except as to matters of privilege or immunities.

"**§ 1-569.16. Representation by lawyer.**

A party to an arbitration proceeding may be represented by a lawyer or lawyers.

"**§ 1-569.17. Witnesses; subpoenas; depositions; discovery.**

(a) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena must be served in the manner for service of subpoenas in a civil action and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.

(b) In order to make the proceedings fair, expeditious, and cost-effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

(c) An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost-effective.

(d) If an arbitrator permits discovery under subsection (c) of this section, the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take action

against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this State.

(e) An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State.

(f) All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition, or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this State.

(g) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the protection of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another state upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost-effective. A subpoena or discovery-related order issued by an arbitrator in another state must be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this State.

(h) An arbitrator does not have the authority to hold a party in contempt of any order the arbitrator makes under this section. A court may hold parties in contempt for failure to obey an arbitrator's order, or an order made by the court, pursuant to this section, among other sanctions imposed by the arbitrator or the court.

"**§ 1-569.18. Judicial enforcement of preaward ruling by arbitrator.**

(a) If an arbitrator makes a preaward ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award under G.S. 1-569.19. A prevailing party may make a motion to the court for an expedited order to confirm the award under G.S. 1-569.22, in which case the court shall summarily decide the motion. The court shall issue an order to confirm the award unless the court vacates, modifies, or corrects the award under G.S. 1-569.23 or G.S. 1-569.24.

(b) An arbitrator's ruling under G.S. 1-569.18 that denies a request for a preaward ruling is not subject to trial court review; a party whose request under G.S. 1-569.18 for a preaward ruling has been denied by an arbitrator retains the right to seek relief under G.S. 1-569.20 and G.S. 1-569.21 from any final award the arbitrator renders.

(c) There is no right of appeal from trial court orders and judgments on preaward rulings by an arbitrator after a trial court award under this section, G.S. 1-569.19, and G.S. 1-569.28.

"**§ 1-569.19. Award.**

(a) An arbitrator shall make a record of an award. The record must be signed or otherwise authenticated as authorized by federal or State law by any arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.

(b) An award must be made within the time specified by the agreement to arbitrate or, if not specified therein, within the time ordered by the court. The court may

extend or the parties to the arbitration proceeding may agree in a record to extend the time. The court or the parties may do so within or after the time specified or ordered. A party waives any objection that an award was not timely made unless that party gives notice of the objection to the arbitrator before receiving notice of the award.

"**§ 1-569.20. Change of award by arbitrator.**

(a) On motion to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

(1) Upon a ground stated in G.S. 1-569.24(a)(1) or (a)(3);

(2) Because the arbitrator had not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) To clarify the award.

(b) A motion under subsection (a) of this section must be made and notice given to all parties within 20 days after the movant receives notice of the award.

(c) A party to the arbitration proceeding must give notice of any objection to the motion within 10 days after receipt of the notice.

(d) If a motion to the court is pending under G.S. 1-569.22, 1-569.23, or 1-569.24, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

(1) Upon a ground stated in G.S. 1-569.24(a)(1) or (a)(3);

(2) Because the arbitrator had not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) To clarify the award.

(e) An award modified or corrected pursuant to this section is subject to G.S. 1-569.19(a), 1-569.22, 1-569.23, and 1-569.24.

"**§ 1-569.21. Remedies; fees and expenses of arbitration proceeding.**

(a) An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.

(b) An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

(c) As to all remedies other than those authorized by subsections (a) and (b) of this section, an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under G.S. 1-569.22 or for vacating an award under G.S. 1-569.23.

(d) An arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award.

(e) If an arbitrator awards punitive damages or other exemplary relief under subsection (a) of this section, the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief.

"**§ 1-569.22. Confirmation of award.**

After a party to an arbitration receives notice of an award, the party may make a motion to the court for an order confirming the award, at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to G.S. 1-569.20 or G.S. 1-569.24 or is vacated pursuant to G.S. 1-569.23.

"**§ 1-569.23. Vacating award.**

(a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(1) The award was procured by corruption, fraud, or other undue means;

(2) There was:

a. Evident partiality by an arbitrator appointed as a neutral arbitrator;

b. Corruption by an arbitrator; or

c. Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) An arbitrator refused to postpone the hearing upon a showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to G.S. 1-569.15 so as to prejudice substantially the rights of a party to the arbitration proceeding;

(4) An arbitrator exceeded the arbitrator's powers;

(5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under G.S. 1-569.15(c) no later than the beginning of the arbitration hearing; or

(6) The arbitration was conducted without proper notice of the initiation of an arbitration as required in G.S. 1-569.9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

(b) A motion under this section must be filed within 90 days after the movant receives notice of the award pursuant to G.S. 1-569.19 or within 90 days after the movant receives notice of a modified or corrected award pursuant to G.S. 1-569.20, unless the movant alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion must be made within 90 days after the ground is known or by the exercise of reasonable care would have been known by the movant.

(c) If the court vacates an award on a ground other than that set forth in subdivision (a)(5) of this section, it may order a rehearing. If the award is vacated on a ground stated in subdivision (1) or (2) of subsection (a) of this section, the rehearing must be before a new arbitrator. If the award is vacated on a ground stated in subdivision (3), (4), or (6) of subsection (a) of this section, the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in G.S. 1-569.19(5) for an award.

(d) If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award pursuant to G.S. 1-569.24 is pending.

"**§ 1-569.24. Modification or correction of award.**

(a) Upon motion made within 90 days after the movant receives notice of the award pursuant to G.S. 1-569.19 or within 90 days after the movant receives notice of a modified or corrected award pursuant to G.S. 1-569.20, the court shall modify or correct the award if:

(1) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

(2) The arbitrator has made an award on a claim not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the claims submitted; or

(3) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

(b) If a motion made under subsection (a) of this section is granted, the court shall modify and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the court shall confirm the award.

(c) A motion to modify or correct an award pursuant to this section may be joined with a motion to vacate the award.

"**§ 1-569.25. Judgment on award; attorney's fees and litigation expenses.**

(a) Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment in conformity therewith. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.

(b) A court may allow reasonable costs of the motion and subsequent judicial proceedings.

(c) On motion of a prevailing party to a contested judicial proceeding under G.S. 1-569.22, 1-569.23, or 1-569.24, the court may add reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award.

"**§ 1-569.26. Jurisdiction.**

(a) A court of this State having jurisdiction over the controversy and the parties may enforce the agreement to arbitrate.

(b) An agreement to arbitrate providing for arbitration in this State confers exclusive jurisdiction on the court to enter judgment on an award under this Article.

"**§ 1-569.27. Venue.**

A motion pursuant to G.S. 1-569.5 must be made in the court of the county in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the court of the county in which it was held. Otherwise, the motion may be made in the court of any county in which an adverse party resides or has a place of business or, if no adverse party has a residence or place of business in this State, in the court of any county in this State. All subsequent motions must be made in the court hearing the initial motion unless the court otherwise directs.

"**§ 1-569.28. Appeals.**

(a) An appeal may be taken from:

(1) An order denying a motion to compel arbitration;
(2) An order granting a motion to stay arbitration;
(3) An order confirming or denying confirmation of an award;
(4) An order modifying or correcting an award;
(5) An order vacating an award without directing a rehearing; or
(6) A final judgment entered pursuant to this Article.

(b) An appeal under this section must be taken as from an order or a judgment in a civil action.

"**§ 1-569.29. Uniformity of application and construction.**

In applying and construing this Article, the Revised Uniform Arbitration Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

"**§ 1-569.30. Relationship to federal Electronic Signatures in Global and National Commerce Act.**

The provisions of this Article governing the legal effect, validity, and enforceability of electronic records or electronic signatures, and of contracts performed with the use of such records or signatures, conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, et seq., or as otherwise authorized by federal or State law governing such electronic records or electronic signatures.

"**§ 1-569.31. Short title.**

This Article may be cited as the Revised Uniform Arbitration Act."

SECTION 3. This act does not affect an action or proceeding that commences or accrues before Article 45C, as enacted in Section 2 of this act, becomes effective. Subject to G.S. 1-569.3, as enacted in Section 2 of this act, an arbitration agreement made before the effective date of this act is governed by Article 45A of Chapter 1 of the General Statutes.

SECTION 4. Section 1 of this act becomes effective January 1, 2006. The remainder of this act becomes effective January 1, 2004.

SENATE BILL 716:
Revised Uniform Arbitration Act

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Hartsell
Date:	April 15, 2003	**Summary by:**	Kory J. Goldsmith
Version:	1ST Edition		Committee Counsel

SUMMARY: ***SB 716 repeals the current Uniform Arbitration Act, adopted in 1973 and replaces it with the Revised Uniform Arbitration Act (RUAA). The bill comes at the request of the North Carolina Bar Association.***

BILL ANALYSIS: The bill rewrites Article 45A of Chapter 1 of the General Statutes. It clarifies the following:

(1) A court decides whether a dispute is subject to an agreement to arbitrate

(2 Allows both a court and an arbitrator to issue provisional remedies, depending upon when the application for a provisional remedy is requested.

(3) Specifies that arbitration is initiated when a party gives written notice to the other party of the nature of the controversy and the remedy sought. Notice must be as provided in the agreement, or if the agreement is silent, by registered or certified mail or by service otherwise authorized in a civil action.

(4) Allows a court to consolidate arbitration proceedings.

(5) Requires arbitrators to disclose facts reasonably likely to affect their impartiality.

(6) Makes an arbitrator or arbitration organizations immune from civil actions to the same extent as a judge. However, if an arbitrator failed to disclose facts reasonable likely to affect the arbitrator's impartiality, the award may be vacated.

(7) Makes arbitrators or representatives of arbitration organizations incompetent to testify in another proceeding.

(8) Grants arbitrators or representatives of arbitration organizations discretion to order discovery, issue protective orders, decide motions for summary dispositions, hold prehearing conferences and otherwise manage the arbitration process.

(9) Allows a court to enforce a preaward ruling by an arbitrator unless the court vacates, modifies, or corrects the award for statutory reasons such as corruption, fraud, undue duress, mathematical miscalculation or evident mistake.

(10) Specifies the remedies an arbitrator may award. **The PCS removes the language that would allow an award of attorney fees and punitive damages. Attorney fees and punitive damages would be allowed if provided for in the arbitration agreement, the evidence justifies a claim for the award, and the award would be allowed in a civil action involving the same claim.**

(11) Allows a court to award attorneys' fees and costs to a prevailing party in court review of an arbitrator's award.

(12) Makes many sections of the RUAA not be waivable.

The RUAA would apply to agreements to arbitrate entered into on and after January 1, 2004, but would apply to any arbitration agreement after January 1, 2006 regardless of when the agreement was made.

BACKGROUND: The RUAA is a model act promulgated by the National Conference of Commissioners on Uniform State Laws. According to the Commissioners website, 5 states have adopted

the RUAA (Hawaii, Nevada, New Mexico, North Dakota and Utah) and 14 states are considering legislation to adopt it.

S716-SMRC-001

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 716
PROPOSED COMMITTEE SUBSTITUTE S716-CSRC-26 [v.1]

4/15/2003 9:07:39 PM

Short Title: Revised Uniform Arbitration Act. (Public)

Sponsors:

Referred to:

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO REPEAL THE UNIFORM ARBITRATION ACT AND TO ENACT THE REVISED UNIFORM ARBITRATION ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 45A of Chapter 1 of the General Statutes is repealed.

SECTION 2. Chapter 1 of the General Statutes is amended by adding a new Article to read:

"Article 45C.

"Revised Uniform Arbitration Act.

"**§ 1-569.1. Definitions.**

The following definitions apply in this Article:

(1) 'Arbitration organization' means an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator.

(2) 'Arbitrator' means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.

(3) 'Court' means a court of competent jurisdiction in this State.

(4) 'Knowledge' means actual knowledge.

(5) 'Person' means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(6) 'Record' means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

"**§ 1-569.2. Notice.**

(a) Except as otherwise provided in this Article, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice.

(b) A person has notice if the person has knowledge of the notice or has received notice.

(c) A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business or at another location held out by the person as a place of delivery of such communications.

"**§ 1-569.3. When Article applies.**

(a) This Article governs an agreement to arbitrate made on or after January 1, 2004.

(b) This Article governs an agreement to arbitrate made before January 1, 2004, if all parties to the agreement or to the arbitration proceeding so agree in a record.

(c) On or after January 1, 2006, this Article governs an agreement to arbitrate whenever made.

"**§ 1-569.4. Effect of agreement to arbitrate; nonwaivable provisions.**

(a) Except as otherwise provided in subsections (b) and (c) of this section, a party to an agreement to arbitrate or to an arbitration proceeding may waive, or the parties may vary the effect of, the requirements of this Article to the extent provided by law.

(b) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(1) Waive or agree to vary the effect of the requirements of G.S. 1-569.5(a), 1-569.6(a), 1-569.8, 1-569.17(a), 1-569.17(b), 1-569.26, or 1-569.28;

(2) Agree to unreasonably restrict the right under G.S. 1-569.9 to notice of the initiation of an arbitration proceeding;

(3) Agree to unreasonably restrict the right under G.S. 1-569.12 to disclosure of any facts by a neutral arbitrator; or

(4) Waive the right under G.S. 1-569.16 of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under this Article, but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.

(c) A party to an agreement to arbitrate or to an arbitration proceeding may not waive, or the parties shall not vary the effect of, the requirements of this section or G.S 1-569.3(a), 1-569.3(c), 1-569.7, 1-569.14, 1-569.18, 1-569.20(d), 1-569.20(e), 1-569.22, 1-569.23, 1-569.24, 1-569.25(a), 1-569.25(b), 1-569.29, 1-569.30, 1-569.31.

"**§ 1-569.5. Application for judicial relief.**

(a) Except as otherwise provided in G.S. 1-569.28, an application for judicial relief under this Article must be made by motion to the court and heard in the manner provided by law or rule of court for making and hearing motions.

(b) Unless a civil action involving the agreement to arbitrate is pending, notice of an initial motion to the court under this Article must be served in the manner provided by law for the service of a summons in a civil action. Otherwise, notice of the motion

must be given in the manner prescribed by law or rule of court for serving motions in pending cases.

"**§ 1-569.6. Validity of agreement to arbitrate.**

(a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revocation of a contract.

(b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(c) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(d) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

"**§ 1-569.7. Motion to compel or stay arbitration.**

(a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

(1) If the refusing party does not appeal or does not oppose the motion, the court shall order the parties to arbitrate; and

(2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

(b) On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate.

(c) If the court finds that there is no enforceable agreement to arbitrate, it may not, pursuant to subsection (a) or (b) of this section, order the parties to arbitrate.

(d) The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or because grounds for the claim have not been established.

(e) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in a court, a motion under this section must be made in that court. Otherwise a motion under this section may be made in any court as provided in G.S. 1-569.27.

(f) If a party makes a motion to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

(g) If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.

"**§ 1-569.8. Provisional remedies.**

(a) Before an arbitrator is appointed and is authorized and able to act, the court, upon motion of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.

(b) After an arbitrator is appointed and is authorized and able to act:

(1) The arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action; and

(2) A party to an arbitration proceeding may move the court for a provisional remedy if the matter is urgent and the arbitrator is not able to act in a timely manner or the arbitrator cannot provide an adequate remedy.

(c) A party does not waive a right of arbitration by making a motion under subsection (a) or (b) of this section.

"**§ 1-569.9. Initiation of arbitration.**

(a) A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by certified or registered mail, return receipt requested, and obtained, or by service as authorized for the commencement of a civil action. The notice must describe the nature of the controversy and the remedy sought.

(b) Unless a person objects for lack or insufficiency of notice under G.S. 1-569.15(c) no later than the beginning of the arbitration hearing, the person, by appearing at the hearing, waives any objection to lack or insufficiency of notice.

"**§ 1-569.10. Consolidation of separate arbitration proceedings.**

(a) Except as otherwise provided in subsection (c) of this section, upon motion of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:

(1) There are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration with a third person;

(2) The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

(3) The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and

(4) Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

(b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

(c) The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.

"**§ 1-569.11. Appointment of arbitrator; service as a neutral arbitrator.**

(a) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

(b) An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral.

"**§ 1-569.12. Disclosure by arbitrator.**

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) A financial or personal interest in the outcome of the arbitration proceeding; and

(2) An existing or past relationship with any of the parties to the agreement to arbitrate or to the arbitration proceeding, their counsel or representatives, a witness, or other arbitrators.

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or (b) of this section to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under G.S. 1-569.23(a)(2) for vacating an award made by the arbitrator.

(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b) of this section, upon timely objection by a party, the court under G.S.-1-569.23(a)(2) may vacate an award.

(e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under G.S. 1-569.23(a)(2).

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under G.S. 1-569.23(a)(2).

"**§ 1-569.13. Action by majority.**

If there is more than one arbitrator, the powers of an arbitrator must be exercised by a majority of the arbitrators, but all of them shall conduct the hearing under G.S. 1-569.15(c).

"**§ 1-569.14. Immunity of arbitrator; competency to testify; attorney's fees and costs.**

(a) An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.

(b) The immunity afforded by this section supplements any immunity under other law.

(c) The failure of an arbitrator to make a disclosure required by G.S. 1-569.12 does not cause any loss of immunity under this section.

(d) In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify, and may not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding, to the same extent as a judge of a court of this State acting in a judicial capacity. This subsection does not apply:

(1) To the extent necessary to determine the claim of an arbitrator, arbitration organization, or representative of the arbitration organization against a party to the arbitration proceeding; or

(2) To a hearing on a motion to vacate an award under G.S. 1-569.23(a)(1) or (a)(2) if the movant establishes prima facie that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from the services of the arbitrator, organization, or representative, or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of subsection (d) of this section, and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not competent to testify, the court shall award to the arbitrator, organization, or representative reasonable attorney's fees, costs, and other reasonable expenses of litigation.

(f) Immunity under this section does not apply to acts or omissions that occur with respect to the operation of a motor vehicle.

"**§ 1-569.15. Arbitration process.**

(a) An arbitrator may conduct an arbitration in such a manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.

(b) An arbitrator may decide a request for summary disposition of a claim or particular issue:

(1) If all interested parties agree; or

(2) Upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the proceeding and the other parties have a reasonable opportunity to respond.

(c) If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than five days before the hearing begins. Unless a party to the arbitration proceeding makes an objection to lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but may not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified did not appear. The court, upon request, may direct the arbitrator to conduct the hearing promptly and render a timely decision.

(d) At a hearing under subsection (c) of this section, a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(e) If an arbitrator ceases to or is unable to act during the arbitration proceeding, a replacement arbitrator must be appointed in accordance with G.S. 1-569.11 to continue the proceeding and to resolve the controversy.

(f) The rules of evidence do not apply in arbitration proceedings, except as to matters of privilege or immunities.

"**§ 1-569.16. Representation by lawyer.**

A party to an arbitration proceeding may be represented by a lawyer or lawyers.

"**§ 1-569.17. Witnesses; subpoenas; depositions; discovery.**

(a) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena must be served in the manner for service of subpoenas in a civil action and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.

(b) In order to make the proceedings fair, expeditious, and cost-effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

(c) An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost-effective.

(d) If an arbitrator permits discovery under subsection (c) of this section, the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take action

against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this State.

(e) An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State.

(f) All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition, or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this State.

(g) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the protection of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another state upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost-effective. A subpoena or discovery-related order issued by an arbitrator in another state must be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this State.

(h) An arbitrator does not have the authority to hold a party in contempt of any order the arbitrator makes under this section. A court may hold parties in contempt for failure to obey an arbitrator's order, or an order made by the court, pursuant to this section, among other sanctions imposed by the arbitrator or the court.

"**§ 1-569.18. Judicial enforcement of preaward ruling by arbitrator.**

(a) If an arbitrator makes a preaward ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award under G.S. 1-569.19. A prevailing party may make a motion to the court for an expedited order to confirm the award under G.S. 1-569.22, in which case the court shall summarily decide the motion. The court shall issue an order to confirm the award unless the court vacates, modifies, or corrects the award under G.S. 1-569.23 or G.S. 1-569.24.

(b) An arbitrator's ruling under subsection (a) of this section that denies a request for a preaward ruling is not subject to trial court review; a party whose request under subsection (a) of this section for a preaward ruling has been denied by an arbitrator retains the right to seek relief under G.S. 1-569.20 and G.S. 1-569.21 from any final award the arbitrator renders.

(c) There is no right of appeal from trial court orders and judgments on preaward rulings by an arbitrator after a trial court award under this section, G.S. 1-569.19, and G.S. 1-569.28.

"**§ 1-569.19. Award.**

(a) An arbitrator shall make a record of an award. The record must be signed or otherwise authenticated as authorized by federal or State law by any arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.

(b) An award must be made within the time specified by the agreement to arbitrate or, if not specified therein, within the time ordered by the court. The court may extend or the parties to the arbitration proceeding may agree in a record to extend the time. The court or the parties may do so within or after the time specified or ordered. A party waives any objection that an award was not timely made unless that party gives notice of the objection to the arbitrator before receiving notice of the award.

"**§ 1-569.20. Change of award by arbitrator.**

(a) On motion to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

(1) Upon a ground stated in G.S. 1-569.24(a)(1) or (a)(3);

(2) Because the arbitrator had not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) To clarify the award.

(b) A motion under subsection (a) of this section must be made and notice given to all parties within 20 days after the movant receives notice of the award.

(c) A party to the arbitration proceeding must give notice of any objection to the motion within 10 days after receipt of the notice.

(d) If a motion to the court is pending under G.S. 1-569.22, 1-569.23, or 1-569.24, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

(1) Upon a ground stated in G.S. 1-569.24(a)(1) or (a)(3);

(2) Because the arbitrator had not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) To clarify the award.

(e) An award modified or corrected pursuant to this section is subject to G.S. 1-569.19(a), 1-569.22, 1-569.23, and 1-569.24.

"**§ 1-569.21. Remedies; fees and expenses of arbitration proceeding.**

(a) An arbitrator may award punitive damages or other exemplary relief if:

(1) the arbitration agreement provides for an award of punitive damages or exemplary relief;

(2) an award for punitive damages or other exemplary relief is authorized by law in a civil action involving the same claim;

(3) the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.

(b) An arbitrator may award reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding. An arbitrator may award reasonable attorney's fees if:

(1) the arbitration agreement provides for an award of attorney's fees; and

(2) an award of attorney's fees is authorized by law in a civil action involving the same claim.

(c) As to all remedies other than those authorized by subsections (a) and (b) of this section, an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a

remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under G.S. 1-569.22 or for vacating an award under G.S. 1-569.23.

(d) An arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award.

(e) If an arbitrator awards punitive damages or other exemplary relief under subsection (a) of this section, the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief.

"**§ 1-569.22. Confirmation of award.**

After a party to an arbitration receives notice of an award, the party may make a motion to the court for an order confirming the award, at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to G.S. 1-569.20 or G.S. 1-569.24 or is vacated pursuant to G.S. 1-569.23.

"**§ 1-569.23. Vacating award.**

(a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(1) The award was procured by corruption, fraud, or other undue means;

(2) There was:

a. Evident partiality by an arbitrator appointed as a neutral arbitrator;

b. Corruption by an arbitrator; or

c. Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) An arbitrator refused to postpone the hearing upon a showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to G.S. 1-569.15 so as to prejudice substantially the rights of a party to the arbitration proceeding;

(4) An arbitrator exceeded the arbitrator's powers;

(5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under G.S. 1-569.15(c) no later than the beginning of the arbitration hearing; or

(6) The arbitration was conducted without proper notice of the initiation of an arbitration as required in G.S. 1-569.9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

(b) A motion under this section must be filed within 90 days after the movant receives notice of the award pursuant to G.S. 1-569.19 or within 90 days after the movant receives notice of a modified or corrected award pursuant to G.S. 1-569.20, unless the movant alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion must be made within 90 days after the ground is known or by the exercise of reasonable care would have been known by the movant.

(c) If the court vacates an award on a ground other than that set forth in subdivision (a)(5) of this section, it may order a rehearing. If the award is vacated on a ground stated in subdivision (1) or (2) of subsection (a) of this section, the rehearing

must be before a new arbitrator. If the award is vacated on a ground stated in subdivision (3), (4), or (6) of subsection (a) of this section, the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in G.S. 1-569.19(5) for an award.

(d) If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award pursuant to G.S. 1-569.24 is pending.

"**§ 1-569.24. Modification or correction of award.**

(a) Upon motion made within 90 days after the movant receives notice of the award pursuant to G.S. 1-569.19 or within 90 days after the movant receives notice of a modified or corrected award pursuant to G.S. 1-569.20, the court shall modify or correct the award if:

(1) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

(2) The arbitrator has made an award on a claim not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the claims submitted; or

(3) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

(b) If a motion made under subsection (a) of this section is granted, the court shall modify and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the court shall confirm the award.

(c) A motion to modify or correct an award pursuant to this section may be joined with a motion to vacate the award.

"**§ 1-569.25. Judgment on award; attorney's fees and litigation expenses.**

(a) Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment in conformity therewith. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.

(b) A court may allow reasonable costs of the motion and subsequent judicial proceedings.

(c) On motion of a prevailing party to a contested judicial proceeding under G.S. 1-569.22, 1-569.23, or 1-569.24, the court may add reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award.

"**§ 1-569.26. Jurisdiction.**

(a) A court of this State having jurisdiction over the controversy and the parties may enforce the agreement to arbitrate.

(b) An agreement to arbitrate providing for arbitration in this State confers exclusive jurisdiction on the court to enter judgment on an award under this Article.

"**§ 1-569.27. Venue.**

A motion pursuant to G.S. 1-569.5 must be made in the court of the county in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the court of the county in which it was held. Otherwise, the motion may be made in the court of any county in which an adverse party resides or has a place of business or, if no adverse party has a residence or place of business in this State, in the court of any county in this State. All subsequent motions must be made in the court hearing the initial motion unless the court otherwise directs.

"**§ 1-569.28. Appeals.**

(a) An appeal may be taken from:

(1) An order denying a motion to compel arbitration;

(2) An order granting a motion to stay arbitration;

(3) An order confirming or denying confirmation of an award;

(4) An order modifying or correcting an award;

(5) An order vacating an award without directing a rehearing; or

(6) A final judgment entered pursuant to this Article.

(b) An appeal under this section must be taken as from an order or a judgment in a civil action.

"**§ 1-569.29. Uniformity of application and construction.**

In applying and construing this Article, the Revised Uniform Arbitration Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

"**§ 1-569.30. Relationship to federal Electronic Signatures in Global and National Commerce Act.**

The provisions of this Article governing the legal effect, validity, and enforceability of electronic records or electronic signatures, and of contracts performed with the use of such records or signatures, conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, et seq., or as otherwise authorized by federal or State law governing such electronic records or electronic signatures.

"**§ 1-569.31. Short title.**

This Article may be cited as the Revised Uniform Arbitration Act."

SECTION 3. This act does not affect an action or proceeding that commences or accrues before Article 45C, as enacted in Section 2 of this act, becomes effective. Subject to G.S. 1-569.3, as enacted in Section 2 of this act, an arbitration agreement made before the effective date of this act is governed by Article 45A of Chapter 1 of the General Statutes.

SECTION 4. Section 1 of this act becomes effective January 1, 2006. The remainder of this act becomes effective January 1, 2004.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 722

Short Title:	Display of American Flag.	(Public)
Sponsors:	Senators Kinnaird; Apodaca, Ballantine, Berger, Carpenter, Foxx, Gulley, Hagan, Hartsell, Horton, Kerr, Metcalf, and Webster.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT PERTAINING TO THE DISPLAY OF THE UNITED STATES FLAG.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 144 of the General Statutes is amended by adding a new section to read:

"**§ 144-7. Display of American flag.**

(a) No covenant, condition, or restriction set forth in a deed, and no rule, regulation, bylaw, or other governing document or agreement of a homeowners, neighborhood, civic, or other association, shall prohibit or be construed to prohibit the placement on any property of a flagpole that is to be used for the purpose of displaying, or shall prohibit or be construed to prohibit the display on any property of, the flag of the United States if the flag is displayed in accordance with any of the following:

(1) The patriotic customs set forth in 4 U.S.C.A. §§ 5-10, as amended, governing the display and use of the flag of the United States.

(2) The consent of the property's owner or of any person having lawful control of the property.

(3) The recommended flagpole standards set forth in "Our Flag," published pursuant to S.C.R. 61 of the 105th Congress, 1st Session (1998).

(4) Any federal law, proclamation of the President of the United States or the Governor, section of the Revised Code, or local ordinance or resolution.

(b) A covenant, condition, restriction, rule, regulation, bylaw, governing document, or agreement or a construction of any of these items that violates subsection (a) of this section is against public policy and unenforceable in any court of this State to the extent it violates subsection (a) of this section.

(c) No declaration, bylaw, rule, regulation, or agreement of a condominium property or construction of any of these items by the board of managers of its unit

owners' association shall prohibit the placement of a flagpole that is to be used for the purpose of displaying, or shall prohibit the display of, the flag of the United States on or within the limited common areas and facilities of a unit owner or on the immediately adjacent exterior of the building in which the unit of a unit owner is located, if the flag is displayed in accordance with any of the following:

(1) The patriotic customs set forth in 4 U.S.C.A. §§ 5-10, as amended, governing the display and use of the flag of the United States.

(2) The recommended flagpole standards set forth in "Our Flag," published pursuant to S.C.R. 61 of the 105th Congress, 1st Session (1998).

(3) Any federal law, proclamation of the President of the United States or the Governor, section of the General Statutes, or local ordinance or resolution.

(d) A declaration, bylaw, rule, regulation, or agreement or the construction of any of these items that violates subsection (c) of this section is against public policy and unenforceable in any court of this State to the extent it violates subsection (c) of this section."

SECTION 2. The title of Chapter 144 of the General Statutes reads as rewritten:

"**STATE FLAG, AMERICAN FLAG, ~~MOTTO~~ MOTTO, AND COLORS.**"

SECTION 3. This act is effective when it becomes law.

SENATE BILL 722:
Display of American Flag.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Kinnaird
Date:	April 16, 2003	**Summary by:**	Robin Johnson
Version:	First		Committee Counsel

SUMMARY: Senate Bill 722 would nullify, by declaring against public policy, any covenant, condition, restriction, declaration, rule, regulation, or agreement of a homeowners association or condominium association that prohibits the placement of a flagpole on any property for the purpose of displaying the United States flag or prohibits the display of the United States flag on any property, so long as the flag is displayed in accordance with certain conditions and requirements.

BILL ANALYSIS: The bill would creates a new **G.S. 144-7, Display of American Flag**, which provides that no covenant, condition, restriction, declaration, rule, regulation, or agreement of a homeowners, neighborhood, civic, condominium, or other association may prohibit the placement of a flagpole on any property for the purpose of displaying the United States flag or prohibit the display of the United States flag on any property, if the flag is displayed with the consent of the real property's owner or person having lawful control of the property and in accordance with any of the following conditions:

- Customs set forth 4 U.S.C.A. §§ 5-10 governing the display of the American flag.
- Flagpole standards set forth in S.C.R. 61, 105th Congress.
- Any federal law or proclamation of the President or Governor, or local ordinance or resolution.

EFFECTIVE DATE: Senate Bill 722 is effective when it becomes law.

S722-SMRH-001: Tim Hovis, Staff Attorney, contributed to this summary.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 748

Short Title:	Only Easements.	(Public)
Sponsors:	Senators Sloan; Brock, Shubert, and Tillman.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT A CONDEMNOR MAY TAKE ONLY THE MINIMUM INTEREST IN PROPERTY NECESSARY FOR THE PURPOSE FOR WHICH IT IS BEING TAKEN.

The General Assembly of North Carolina enacts:

SECTION 1. Article 1 of Chapter 40A of the General Statutes is amended by adding a new section to read:

"**§ 40A-7.1. Minimum interest only may be taken.**

Except with the consent of the condemnee, in any condemnation action under this Chapter, the condemnor may take only the minimum interest in the property necessary for the purpose for which the property is being taken, and specifically, an interest in fee simple may not be taken if an easement will satisfy the purpose."

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 748
PROPOSED COMMITTEE SUBSTITUTE S748-CSRC-27 [v.2]

4/15/2003 10:33:37 PM

Short Title: Only Easements. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT A CONDEMNOR MAY TAKE ONLY THE MINIMUM INTEREST IN PROPERTY NECESSARY FOR THE PURPOSE FOR WHICH IT IS BEING TAKEN.

The General Assembly of North Carolina enacts:

SECTION 1. Article 1 of Chapter 40A of the General Statutes is amended by adding a new section to read:

"**§ 40A-7.1. Minimum interest only may be taken.**

Except with the consent of the owner, in any condemnation action under this Chapter, the condemnor may take only the minimum interest in the property necessary for the purpose for which the property is being taken, and specifically, an interest in fee simple may not be taken if an easement will satisfy the purpose."

SECTION 2. This act is effective when it becomes law and applies to condemnation actions commenced on and after that date.

SENATE BILL 748:
Only Easements

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Sloan
Date:	April 15, 2003	**Summary by:**	Kory J. Goldsmith
Version:	Proposed Committee Substitute		Committee Counsel

SUMMARY: ***SB 748 would prohibit a condemnor from obtaining an interest property interest that exceeded the minimum interest necessary to effectuate the purpose for which the property was being condemned.***

CURRENT LAW: Chapter 40A governs how public and private condemnors may exercise the right of eminent domain. Eminent domain means the power to divest right, title or interest from the owner of property and vest it in the possessor of the power upon the payment of just compensation. An "owner" is any person having an interest or estate in property. "Property" means any right, title, or interest land, including leases, rights of access, rights-of-way, and easements.

The courts have generally declined to review the extent or limit of the rights being acquired absent a showing of bad faith or oppressive or manifest abuse of discretion. See Yadkin River Power co. v. Wissler, 76 S.E. 267 (1912).

Upon motion and 10 days notice, a court may hear and determine any and all issues raised by the pleadings other than the issue of compensation, including the issue of the interest taken. G.S. 40A-47.

BILL ANALYSIS: SB 748 would appear to revise existing case law regarding the standard a court would apply to determine whether a condemnor has taken a greater interest than needed for the purpose of the condemnation. Currently, a court would not limit the interest taken absent a showing of bad faith, oppression, manifest abuse of discretion.

TECHNICAL ISSUES: The bill does not specify what the new standard of review would be. It also does not specify which party would have the burden of proving what interest is necessary for the purpose of the condemnation.

The Proposed Committee Substitute substitutes the defined term "owner" for "condemnee".

- **The act is effect when it becomes law.**

S748-SMRC-001

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 925

Short Title:	Strenghten Security Fraud Enforcement Laws.	(Public)
Sponsors:	Senators Rand and Hartsell.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO STRENGTHEN THE LAWS TO PREVENT SECURITIES FRAUD AND TO CLARIFY THE PROHIBITION ON STATE CONTRACTS WITH VENDORS THAT ARE INCORPORATED IN A TAX HAVEN COUNTRY BUT THE UNITED STATES IS THE PRINCIPAL MARKET FOR THE PUBLIC TRADING OF THEIR CORPORATION'S STOCK.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 78A-12 reads as rewritten:

"**§ 78A-12. Manipulation of market.**

(a) In addition to the prohibitions of G.S. 78A-8, it is unlawful for any person ~~to:~~to do any of the following:

(1) Willfully quote a fictitious price with respect to a ~~security;~~security.

(2) Effect a transaction in a security which involves no change in the beneficial ownership of the security, for the purpose of creating a false or misleading appearance of active trading in a security, or a false or misleading appearance of activity with respect to the market for the ~~security;~~security.

(3) Enter an order for the purchase of a security with the knowledge that, at substantially the same time, an order of substantially the same size, and at substantially the same price, for the sale of the security has been, or will be, entered by or for the same person, or an affiliated person, for the purpose of creating a false or misleading appearance of active trading in a security, or a false or misleading appearance of activity with respect to the market for the ~~security;~~security.

(4) Enter an order for the sale of a security with knowledge that, at substantially the same time, an order of substantially the same size, and at substantially the same price, for the purchase of the security has been, or will be, entered by or for the same person, or an affiliated person, for the purpose of creating a false or misleading appearance of

active trading in a security, or a false or misleading appearance of activity with respect to the market for the ~~security; or~~security.

(5) Employ any other deceptive or fraudulent device, scheme, or artifice to manipulate the market in a ~~security.~~security, including the issuance, with the intent to deceive or defraud, of analyses, reports, or financial statements that are false or misleading in any material respect.

(b) A transaction effected in compliance with the applicable provisions of the Securities Exchange Act of 1934 and the rules and regulations of the Securities and Exchange Commission thereunder is not manipulation of the market under subsection (a) of this section."

SECTION 2. G.S. 78A-25(a)(1)b. reads as rewritten:

"b. The issuer and any predecessors during the past three fiscal years have had average net earnings, determined in accordance with generally accepted accounting ~~practices,~~principles, (i) which are applicable to all securities without a fixed maturity or a fixed interest or dividend or distribution provision outstanding at the date the registration statement is filed and equal at least five percent (5%) of the amount of such outstanding securities (as measured by the maximum offering price or the market price on a day, selected by the registrant, within 30 days before the date of filing the registration statement, whichever is higher, or book value on a day, selected by the registrant, within 90 days of the date of filing the registration statement to the extent that there is neither a readily determinable market price nor a cash offering price), or (ii) which, if the issuer and any predecessors have not had any security of the type specified in clause (i) outstanding for three full fiscal years, equal at least five percent (5%) of the amount (as measured in clause (i)) of all securities which will be outstanding if all the securities being offered or proposed to be offered (whether or not they are proposed to be registered or offered in this State) are issued;".

SECTION 3. G.S. 78A-37(a) reads as rewritten:

"(a) A dealer or salesman may obtain an initial or renewal registration by filing with the Administrator an application together with a consent to service of process pursuant to G.S. 78A-63(f). The application shall contain whatever information the Administrator by rule requires concerning such matters as (i) the applicant's form and place of organization; (ii) the applicant's proposed method of doing business; (iii) the qualifications and business history of the applicant; in the case of a dealer, the qualifications and business history of any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the dealer, and a representation that the applicant dealer is duly registered as a dealer under the Securities Exchange Act of 1934; (iv) any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony; and (v) the applicant's

financial condition and history. If no denial order is in effect and no proceeding is pending under G.S. 78A-39, registration becomes effective at noon of the thirtieth day after an application is filed. The Administrator may by rule or order specify an earlier effective ~~date,~~date and ~~he~~ may by order defer the effective date until noon of the thirtieth day after the filing of any amendment. Registration of a dealer automatically constitutes registration of any salesman who is a partner, executive officer, or director, or a person occupying a similar status or performing similar functions. After the Administrator institutes a proceeding under G.S. 78A-39 to postpone or deny an application for registration, withdrawal of the application shall be allowed only at such time and under such conditions as the Administrator may by order determine."

SECTION 4. G.S. 78A-49(c) reads as rewritten:

"(c) The Administrator may by rule or order prescribe (i) the form and content of financial statements required under this Chapter, (ii) the circumstances under which consolidated financial statements shall be filed, and (iii) whether any required financial statements shall be certified by independent or certified public accountants. All financial statements required to be filed with the Administrator shall be audited and shall be prepared in accordance with generally accepted accounting ~~practices.~~principles, except where the Administrator may by rule or order provide otherwise. In determining whether to permit the filing of financial statements that have not been audited, the Administrator shall consider all of the following factors:

(1) Whether lesser standards for financial statements will impair investor protection.

(2) The cost of preparation of audited financial statements relative to the proposed offering amount.

(3) Whether recently audited financial statements of the issuer are available in addition to current interim statements.

(4) Whether the issuer has commenced significant business operations.

(5) Any other factors that are relevant to the protection of the investing public."

SECTION 5. G.S. 78A-56(a) reads as rewritten:

"(a) Any person who:

(1) Offers or sells a security in violation of G.S. 78A-8(1), 78A-8(3), 78A-10(b), ~~78A-12,~~78A-13, 78A-14, 78A-24, or 78A-36(a), or of any rule or order under G.S. 78A-49(d) which requires the affirmative approval of sales literature before it is used, or of any condition imposed under G.S. 78A-27(d) or 78A-28(g), or

(2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission,

is liable to the person purchasing the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at the legal rate from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if ~~he~~ the purchaser no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it and interest at the legal rate as provided by G.S. 24-1 from the date of disposition."

SECTION 6. G.S. 78A-56(b) reads as rewritten:

"(b) Any person who purchases a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the seller not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, shall be liable to the person selling the security to him, who may sue either at law or in equity to recover the security, plus any income received by the purchaser thereon, upon tender of the consideration received, or for damages if the purchaser no longer owns the security. Damages are the excess of the value of the security when the purchaser disposed of it, plus interest at the legal rate as provided by G.S. 24-1 from the date of disposition, over the consideration paid for the security."

SECTION 7. G.S. 78A-56 is amended by adding a new subsection to read:

"(b1) A person who willfully violates G.S. 78A-12 is liable to a person who purchases or sells a security, other than a security traded on a national securities exchange or quoted on a national automated quotation system administered by a self-regulatory organization, at a price that was affected by the act or transaction for the damages sustained as a result of the act or transaction. Damages are the difference between the price at which the securities were purchased or sold and the value the securities would have had at the time of the person's purchase or sale in the absence of the act or transaction, plus interest at the legal rate as provided by G.S. 24-1 from the date of the purchase or sale, costs, and reasonable attorneys' fees determined by the court."

SECTION 8. G.S. 78A-56(c) reads as rewritten:

"(c)

(1) Every person who directly or indirectly controls a person liable under subsection ~~(a) or (b),~~ (a), (b), or (b1) of this section, every partner, officer, or director of ~~such a~~the person, every person occupying a similar status or performing similar functions, ~~every employee of such a person who materially aids in the act or transaction,~~ and every ~~dealer or salesman~~dealer, salesman, or other person excluding an employee subject to subdivision (2) of this subsection, who materially aids in the sale ~~are~~ is also liable jointly and severally with and to the same extent as ~~such~~ the person, unless ~~the person who is so liable sustains~~ able to sustain the burden of proof that ~~he~~ the person did not know, and in the

exercise of reasonable care ~~should~~ could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

(2) Unless liable under subdivision (1) of this subsection, every employee of a person liable under subsection (a), (b), or (b1) of this section who materially aids in the act or transaction is also liable jointly and severally with and to the same extent as the person if the employee actually knew of the existence of the facts by reason of which the liability is alleged to exist.

(3) There is contribution ~~as in cases of contract~~ among the several persons ~~so liable.~~ liable under subdivisions (1) and (2) of this subsection as provided among tort-feasors pursuant to Chapter 1B of the General Statutes."

SECTION 9. G.S. 78A-56(f) reads as rewritten:

"(f) No person may sue under this section for a violation of G.S. 78A-24 or G.S. 78A-36 more than two years after the sale or contract of sale.

No person may sue under this section for any other violation of this Chapter more than three years after the person discovers facts constituting the violation, but in any case no later than five years after the sale or contract of sale, except that if a person who may be liable under this section engages in any fraudulent or deceitful act that conceals the violation or induces the person to forego or postpone commencing an action based upon the violation, the suit may be commenced not later than three years after the person discovers or should have discovered that the act was fraudulent or deceitful."

SECTION 10. G.S. 78A-56(j) reads as rewritten:

"(j) The rights and remedies provided by this Chapter are in addition to any other rights or remedies that may exist at law or in equity, but this Chapter does not create any cause of action not specified in this section or G.S. 78A-37(d). If the requirements of Chapter 1D of the General Statutes are met, punitive damages are available to the extent provided in that Chapter."

SECTION 11. G.S. 78A-57 reads as rewritten:

"**§ 78A-57. Criminal penalties.** (a) Any person who willfully violates any provision of this Chapter except G.S. 78A-8, 78A-9, 78A-11, 78A-12, 78A-13, or 78A-14 is guilty of a Class I felony.

(a1) Any person ~~or~~ who willfully violates any rule or order under this ~~Chapter, or who willfully violates G.S. 78A-9 knowing the statement made to be false or misleading in any material respect, shall upon conviction be punished as a Class I felon; but no~~ Chapter is guilty of a Class I felony. No person may be imprisoned for the violation of any rule ~~or order~~ if ~~he~~ the person proves that ~~he~~ the person had no knowledge of the ~~rule or order.~~ rule. It is an affirmative defense to a charge of violating an order under this Chapter that the person had no knowledge of the order.

(a2) Any person who willfully violates G.S. 78A-8, 78A-11, ~~78A-12,~~ 78A-13, or 78A-14 ~~shall, upon conviction be punished as a Class H felon.~~ is guilty of a felony. If the losses caused by a single act or a series of related acts in a common scheme or plan are one hundred thousand dollars ($100,000) or more, the person is guilty of a Class C

felony. If the losses caused by a single act or a series of related acts in a common scheme or plan are less than one hundred thousand dollars ($100,000), the person is guilty of a Class H felony.

(a3) Any person who willfully violates G.S. 78A-9 knowing the statement made to be false or misleading in any material respect is guilty of a Class H felony. Any other willful violation of G.S. 78A-9 constitutes a Class 2 misdemeanor.

(a4) Any person who willfully violates G.S. 78A-12 is guilty of a Class H felony.

(b) The Administrator may refer such evidence as is available concerning violations of this Chapter or of any rule or order hereunder to the proper district attorney, who may, with or without such a reference, institute the appropriate criminal proceedings under this Chapter. Upon receipt of ~~such~~ a reference, the district attorney may request that a duly employed attorney of the Administrator prosecute or assist in the prosecution of ~~such~~ the violation or violations on behalf of the State. Upon approval of the Administrator, ~~such~~ the employee may be appointed a special prosecutor for the district attorney to prosecute or assist in the prosecution of ~~such~~ the violations without receiving compensation from the district attorney. Such a special prosecutor shall have all the powers and duties prescribed by law for district attorneys and such other powers and duties as are lawfully delegated to ~~such~~ the special prosecutor by the district attorney for violations of this Chapter.

(c) Nothing in this Chapter limits the power of the State to punish any person for any conduct which constitutes a crime by statute or at common law."

SECTION 12. Article 7 of Chapter 78A of the General Statutes is amended by adding a new section to read:

"**§ 78A-58. Obstruction of investigation.**

A person is guilty of a Class H felony if the person willfully does any of the following for the purpose of interfering with the performance of any audit, examination, or investigation by the Administrator under this Chapter:

(1) Makes or causes to be made to the Administrator or the Administrator's designated representative any false or misleading oral or written statement.

(2) Creates, causes to be made, or delivers any record, report, or document knowing that it is false or misleading in any material respect.

(3) Destroys or alters any record, report, or document.

(4) Conceals or secretes any record, report, or document."

SECTION 13. G.S. 78A-63(a) reads as rewritten:

"(a) ~~Sections~~ G.S. 78A-8, 78A-10, 78A-13, 78A-14, 78A-24, 78A-31, 78A-36(a), and 78A-56 apply to persons who sell or offer to sell when (i) an offer to sell is made in this State, or (ii) an offer to buy is made and accepted in this State."

SECTION 14. G.S. 78A-63(b) reads as rewritten:

"(b) ~~Sections~~ G.S. 78A-8, 78A-10, 78A-36(a) and 78A-56(b) apply to persons who buy or offer to buy when (i) an offer to buy is made in this State, or (ii) an offer to sell is made and accepted in this State."

SECTION 15. G.S. 78A-63 is amended by adding a new subsection to read:

"(b1) G.S. 78A-12 applies when any act instrumental to effecting prohibited conduct is done in this State."

SECTION 16. G.S. 78C-2(1) reads as rewritten:

"(1) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. "Investment adviser" also includes financial planners and other persons who, as an integral component of other financially related services, provide the foregoing investment advisory services to others for compensation and as a part of a business or who hold themselves out as providing the foregoing investment advisory services to others for compensation. "Investment adviser" does not include:

a. An investment adviser representative or a person excluded from the definition of investment adviser representative pursuant to ~~G.S. 78C-2(3)c.;~~G.S. 78C-2(3)c.

b. A bank, savings institution, or trust ~~company;~~company.

c. A lawyer, accountant, engineer, or teacher whose performance of any such services is solely incidental to the practice of his ~~profession;~~profession.

d. A dealer or its salesman whose performance of these services is solely incidental to the conduct of its business as a dealer and who receives no special compensation for ~~them;~~them.

e. A publisher of any newspaper, news column, newsletter, news magazine, or business or financial publication or service, whether communicated in hard copy form, or by electronic means, or otherwise, that does not consist of the rendering of advice on the basis of the specific investment situation of each ~~client;~~client.

f. A person solely by virtue of such person's services to or on behalf of any "business development company" as defined in Section 202(a)(22) of the Investment Advisers Act of 1940 provided the business development company is not an "investment company" by reason of Section 3(c)(1) of the Investment Company Act of 1940, as both acts were in effect on ~~June 1, 1988;~~June 1, 1988.

g. A personal representative of a decedent's estate, guardian, conservator, receiver, attorney in fact, trustee in bankruptcy, trustee of a testamentary trust, or a trustee of an inter vivos trust, not otherwise engaged in providing investment advisory services, and the performance of these services is not a part of a

plan or scheme to evade registration or the substantive requirements of this ~~Chapter;~~Chapter.

h. A licensed real estate agent or broker whose only compensation is a commission on real estate ~~sold;~~sold.

i. An individual or company primarily engaged in acting as a business broker whose only compensation is a commission on the sale of a ~~business;~~business.

j. An individual who, as an employee, officer or director of, or general partner in, another person and in the course of performance of his duties as such, provides investment advice to such other person, or to entities that are affiliates of such other person, or to employee benefit plans of such other person or its affiliated entities, or, with respect to such employee benefit plans, to employees of such other person or its affiliated ~~entities;~~entities.

~~k. Any person who is exempt from registration under the Investment Advisers Act of 1940 by operation of Section 203(b)(3) of said act or by operation of any rule or regulation promulgated by the United States Securities and Exchange Commission under or related to said Section 203(b)(3) provided that any reference in this sub-subsection to any statute, rule or regulation shall be deemed to incorporate said statute, rule or regulation (and any statute, rule or regulation referenced therein) as in effect on June 1, 1988;~~

l. An employee of a person described in subdivision b., e., f., g., h., or j. of G.S. 78C-2(1) acting on behalf of such person within the scope of his ~~employment;~~employment.

l 1. An investment adviser who is covered under federal law as defined in subdivision (4) of this section.

m. Such other persons not within the intent of this subsection as the Administrator may by rule or order designate."

SECTION 17. G.S. 78C-16(a) reads as rewritten:

"(a) It is unlawful for any person to transact business in this State as an investment adviser unless:

(1) The person is registered under this Chapter;

(2) The person's only clients in this State are investment companies as defined in the Investment Company Act of 1940, other investment advisers, investment advisers covered under federal law, dealers, banks, trust companies, savings institutions, savings and loan associations, insurance companies, employee benefit plans with assets of not less than one million dollars ($1,000,000), and governmental agencies or instrumentalities, whether acting for themselves or as trustees with investment control, or other institutional investors as are designated by rule or order of the Administrator; ~~or~~

(3) The person has no place of business in this State, and during the preceding 12-month period has had not more than five clients, other than those specified in subdivision (2) of this subsection, who are residents of the ~~State.~~State; or

(4) The person is exempt from registration under the Investment Advisers Act of 1940 by operation of section 203(b)(3) of that act or by operation of any rule or regulation promulgated by the United States Securities and Exchange Commission under or related to section 203(b)(3) provided that any reference in this subdivision to any statute, rule, or regulation shall be deemed to incorporate the statute, rule, or regulation (and any statute, rule, or regulation referenced therein) as in effect June 1, 1988."

SECTION 18. G.S. 78C-16(a1) reads as rewritten:

"(a1) It is unlawful for any person to transact business in this State as an investment adviser representative unless:

(1) The person is registered under this Chapter; or

(2) The person is an investment adviser representative employed by or associated with an investment adviser exempt from registration under ~~subdivision (2) or (3)~~ subdivision (2), (3), or (4) of subsection (a) of this section; or

(3) The person is an investment adviser representative employed by or associated with an investment adviser covered under federal law that is exempt from the notice filing requirements of G.S. 78C-17(a1)."

SECTION 19. G.S. 78C-17(a) reads as rewritten:

"(a) An investment adviser, or investment adviser representative may obtain an initial or renewal registration by filing with the Administrator or the Administrator's designee an application together with a consent to service of process pursuant to G.S. 78C-46(b) and paying any reasonable costs charged by the designee for processing the filings. The application shall contain whatever information the Administrator by rule requires concerning such matters as:

(1) The applicant's form and place of organization;

(2) The applicant's proposed method of doing business;

(3) The qualifications and business history of the applicant; in the case of an investment adviser, the qualifications and business history of any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the investment adviser;

(4) Any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony;

(5) The applicant's financial condition and history; and

(6) Any information to be furnished or disseminated to any client or prospective client.

If no denial order is in effect and no proceeding is pending under G.S. 78C-19, registration becomes effective at noon of the 30th day after an application is filed. The Administrator may by rule or order specify an earlier effective ~~date,~~date and ~~he~~ may by order defer the effective date until noon of the 30th day after the filing of any amendment. Registration of an investment adviser automatically constitutes registration of any investment adviser representative who is a partner, executive officer, or director, or a person occupying a similar status or performing similar functions. After the Administrator institutes a proceeding under G.S. 78C-19 to postpone or deny an application for registration, withdrawal of the application shall be allowed only at such time and under such conditions as the Administrator may by order determine."

SECTION 20. G.S. 78C-30(c) reads as rewritten:

"(c) The Administrator may by rule or order prescribe (i) the form and content of financial statements required under this Chapter, (ii) the circumstances under which consolidated financial statements shall be filed, and (iii) whether any required financial statements shall be certified by independent or certified public accountants. All financial statements required to be filed with the Administrator shall be audited and shall be prepared in accordance with generally accepted accounting ~~practices.~~principles, except where the Administrator shall by rule or order provide otherwise."

SECTION 21. G.S. 78C-38(a) reads as rewritten:

"(a) Any person who:

(1) Engages in the business of advising others, for compensation, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities, in violation of G.S. 78C-8(b), ~~G.S. 78C-16(a)~~G.S. 78C-16(a), (a1), or (b) (an action pursuant to a violation of G.S. 78C-16(b) may not be maintained except by those persons who directly received advice from the unregistered investment adviser representative), G.S. 78C-10(b), or of any rule or order under G.S. 78C-30(d) which requires the affirmative approval of sales literature before it is used, or

(2) Receives, directly or indirectly, any consideration from another person for advice as to the value of securities or their purchase or sale, whether through the issuance of analyses, reports or otherwise and employs any device, scheme, or artifice to defraud such other person or engages in any act, practice or course of business which operates or would operate as a fraud or deceit on such other person, in violation of G.S. 78C-8(a)(1) or (2),

is liable to any person who is given such advice in such violation, who may sue either at law or in equity to recover (i) the consideration paid for such advice together with interest thereon at the legal rate as provided in G.S. 24-1 from the date of payment of the consideration, plus (ii) the actual damages to such person proximately caused by such violation, plus (iii) costs of the action and reasonable attorneys' fees. An action

based on violation of G.S. 78C-8(b) may not prevail where the person accused of the violation sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known of the existence of the facts by reason of which the liability is alleged to exist."

SECTION 22. G.S. 78C-38(b) reads as rewritten:

"(b)

(1) Every person who directly or indirectly controls a person liable under subsection (a) of this section, including every partner, officer, or director of ~~such a~~the person, every person occupying a similar status or performing similar functions, ~~every employee or associate of such a person who materially aids in the conduct giving rise to the liability,~~ and every ~~dealer or salesman~~dealer, salesman, or other person excluding an employee subject to subdivision (2) of this subsection, who materially aids in such conduct is liable jointly and severally with and to the same extent as ~~such~~ the person, unless able to sustain the burden of proof that ~~he~~ the person did not know, and in the exercise of reasonable care ~~should~~ could not have ~~known~~ known, of the existence of the facts by reason of which the liability is alleged to exist.

(2) Unless liable under subdivision (1) of this subsection, every employee or associate of a person liable under subsection (a) of this section who materially aids in the conduct giving rise to the liability is liable jointly and severally with and to the same extent as the person if the employee or associate actually knew of the existence of the facts by reason of which the liability is alleged to exist.

(3) There is contribution ~~as in cases of contract~~ among the several persons ~~so~~ liable under subdivision (1) and (2) of this subsection ~~and~~ as provided among tort-feasors pursuant to Chapter 1B of the General Statutes."

SECTION 23. G.S. 78C-38(d) reads as rewritten:

"(d) No person may sue under this section more than three years after the rendering of investment advice in violation of ~~this Chapter, except that in the case of a violation of G.S. 78C-8(a)(1) or (2) a person may sue under this section within two years after such person discovers or should have discovered, the facts constituting the violation.~~ G.S. 78C-16.

No person may sue under this section for any other violation of this Chapter more than three years after the person discovers facts constituting the violation, but in any case no later than five years after the rendering of investment advice, except that if a person who may be liable under this section engages in any fraudulent or deceitful act that conceals the violation or induces the person to forego or postpone commencing an action based upon the violation, the suit may be commenced not later than three years after the person discovers or should have discovered that the act was fraudulent or deceitful."

SECTION 24. G.S. 78C-38(g) reads as rewritten:

"(g) The rights and remedies provided by this Chapter are in addition to any other rights or remedies that may exist at law or in equity, but this Chapter does not create any cause of action not specified in this section or G.S. 78C-17(e). If the requirements of Chapter 1D of the General Statutes are met, punitive damages are available to the extent provided in that Chapter."

SECTION 25. G.S. 78C-39 reads as rewritten:

"**§ 78C-39. Criminal penalties.**

(a) Any person who willfully violates any provision of this Chapter except G.S. 78C-8(a)(1), 78C-8(a)(2), 78C-8(b), or 78C-9 is guilty of a Class I felony. ~~or who willfully violates G.S. 78C-9 knowing the statement made to be false or misleading in any material respect, shall upon conviction be punished as a Class I felon.~~

(a1) Any person who willfully violates any rule or order under this Chapter is guilty of a Class I felony. No person may be imprisoned for the violation of any rule if the person proves that the person had no knowledge of the rule. It is an affirmative defense to a charge of violating an order under this Chapter that the person had no knowledge of the order.

(a2) Any person who willfully violates G.S. 78C-8(a)(1), 78C-8(a)(2), or 78C-8(b) ~~shall, upon conviction, be punished as a Class H felon.~~is guilty of a felony. If the losses caused, directly or indirectly, by the violator for a single act or for a series of related acts in a common scheme or plan is one hundred thousand dollars ($100,000) or more, the person is guilty of a Class C felony. If the losses caused, directly or indirectly, by the violator for a single act or for a series of related acts in a common scheme or plan is less than one hundred thousand dollars ($100,000), the person is guilty of a Class H felony.

(a3) Any person who willfully violates G.S. 78C-9 knowing the statement made to be false or misleading in any material respect is guilty of a Class H felony. Any other willful violation of G.S. 78C-9 constitutes a Class 2 misdemeanor.

(a4) A person is guilty of a Class H felony if the person willfully does any of the following for the purpose of interfering with the performance of any audit, examination, or investigation by the Administrator under this Chapter:

(1) Makes or causes to be made to the Administrator or the Administrator's designated representative any false or misleading oral or written statement.

(2) Creates, causes to be made, or delivers any record, report, or document knowing that it is false or misleading in any material respect.

(3) Destroys or alters any record, report, or document.

(4) Conceals or secretes any record, report, or document.

(b) The Administrator may refer such evidence as is available concerning violations of this Chapter or of any rule or order hereunder to the proper district attorney, who may, with or without such a reference, institute the appropriate criminal proceedings under this Chapter. Upon receipt of ~~such~~ a reference, the district attorney may request that a duly employed attorney of the Administrator prosecute or assist in the prosecution of ~~such~~ the violation or violations on behalf of the State. Upon approval of the Administrator, ~~such~~ the employee may be appointed a special prosecutor for the

district attorney to prosecute or assist in the prosecution of ~~such~~ the violations without receiving compensation from the district attorney. Such a special prosecutor shall have all the powers and duties prescribed by law for district attorneys and such other powers and duties as are lawfully delegated to ~~such~~ the special prosecutor by the district attorney for violations of this Chapter.

(c) Nothing in this Chapter limits the power of the State to punish any person for any conduct which constitutes a crime by statute or at common law."

SECTION 26. G.S. 78D-24(a) reads as rewritten:

"(a) Any person who willfully violates any provision of this Chapter ~~shall, upon conviction, be punished as a Class I felon.~~is guilty of a felony. If the losses caused by the violation or violations are one hundred thousand dollars ($100,000) or more, the person is guilty of a Class C felony. If the losses caused by the violation or violations are less than one hundred thousand dollars ($100,000), the person is guilty of a Class H felony."

SECTION 27. G.S. 150B-21.1(a2) reads as rewritten:

"(a2) Notwithstanding the provisions of subsection (a) of this section, the Secretary of State may adopt temporary rules to implement the certification technology provisions of Article 11A of Chapter 66 of the General ~~Statutes and~~ Statutes, to adopt uniform Statements of Policy that have been officially adopted by the North American Securities Administrators ~~Association~~ Association, Inc., for the purpose of promoting uniformity of state securities ~~regulation.~~regulation, and to adopt rules governing the conduct of hearings pursuant to this Chapter. After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall:

(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule;

(2) Accept oral and written comments on the proposed temporary rule; and

(3) Hold at least one public hearing on the proposed temporary rule.

When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary must submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.

Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection."

SECTION 28. G.S. 143-59.1(a) reads as rewritten:

"(a) Ineligible Vendors. – The Secretary of Administration and other entities to which this Article applies shall not contract for goods or services with either of the following:

(1) A vendor if the vendor or an affiliate of the vendor meets one or more of the conditions of G.S. 105-164.8(b) but refuses to collect the use tax levied under Article 5 of Chapter 105 of the General Statutes on its sales delivered to North Carolina. The Secretary of Revenue shall

provide the Secretary of Administration periodically with a list of vendors to which this section applies.

(2) A vendor if the vendor or an affiliate of the vendor ~~that is incorporated~~ incorporates or reincorporates in a tax haven country after December 31, 2001, but the United States is the principal market for the public trading of the ~~corporation's stock.~~stock of the corporation incorporated in the tax haven country."

SECTION 29. Sections 11, 12, 25, and 26 of this act become effective December 1, 2003, and apply to acts committed on or after that date. Section 28 of this act becomes effective October 1, 2003, and applies to contracts entered into on or after that date. The remainder of this act is effective when it becomes law.

SENATE BILL 925:
Strengthen Securities Fraud Enforcement Laws.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Sens. Rand & Hartsell
Date:	April 16, 2003	**Summary by:**	Robin Johnson
Version:	First Edition		Committee Counsel

SUMMARY: ***Senate Bill 925 would strengthen various laws prohibiting fraud in securities transactions and dealings by increasing criminal punishment for large-scale securities fraud, expanding civil remedies to recover damages arising from securities fraud, strengthening administrative and criminal powers of securities administrators, and authorizing additional securities investigators.***

Additionally the bill would prohibit the State from contracting with vendors that incorporate or reincorporate in a tax haven country after December 31, 2001, but the United States is the principal market for the public trading of the stock of the corporation incorporated in the tax haven country.

CURRENT LAW: Securities fraud committed in North Carolina by any person or any company is subject to both criminal and civil actions, whether or not the company is chartered in NC, and whether or not the security is registered in NC. Criminal violations of the securities fraud laws are punished as Class H felonies, regardless of the amount involved. In civil actions, the statute of limitations for securities fraud is two years and punitive damages are not allowed to be imposed.

BILL ANALYSIS:

Section 1 of the bill clarifies that the issuance of false or misleading securities analyses, reports or financial statements constitutes a deceptive or fraudulent manipulation of the market.

Sections 2 and 20 correct an incorrect reference to GAAP (generally accepted accounting principles) accounting standards and allow the Securities Administrator to require audited financial statements, except when waived by the Administrator by rule or order.

Sections 3 and 19 amend the securities dealers and investment advisors registration laws to prevent the withdrawal of an application after investigation of a person's qualifications for registration has begun by the Securities Administrator. This will permit the Administrator to make an administrative determination that the person is not qualified for registration or is subject to revocation of registration which helps prevent a disqualified person from later registering or registering in another state.

Section 4 corrects an incorrect reference to GAAP and adds factors that the Securities Administrator must consider in the determination as to whether to permit the filing of unaudited financial statements.

Sections 5 and 7 specify the civil liabilities for market manipulation in violation of G.S. 78A-12 and defines the measure of damages, including punitive damages.

Section 6 clarifies that the legal rate of interest under G.S. 24-1 applies to interest paid as damages.

Sections 8 and 22 conform and expand the liability of a person who controls another person who violates the Securities Act and the Investment Advisor Act and sets the standard as "in the exercise of reasonable care could have known."

Section 9 extends the civil statute of limitations under the securities law from two years after the date of the sale of the securities to three years after the discovery of a violation, but in no event more than five years, except for liability arising from a fraudulent or deceitful act committed to induce a person to postpone bringing an action, in which case the statute of limitations shall be three years from discovery.

Sections 10 and 24 amend the civil damages remedies sections to authorize the recovery of punitive damages consistent with Chapter 1D of the General Statutes in addition to actual damages arising from securities fraud.

Sections 11, 25, and 26 increase the punishment for criminal violations of the Securities Act, the Investment Act and the Commodities Act where total consideration lost totals $100,000 or more from a Class H felony to a Class C felony. This change makes the punishment for these types of white-collar crimes consistent with the punishment for other similar white-collar crimes including embezzlement and obtaining property by false pretenses.

Section 12, and the new G.S. 78C-39(a3) in Section 25, make it a Class H felony to willfully interfere with an investigation by the Securities Administrator, including the destruction of records. This statute is similar to the statute that makes it a crime to willfully interfere with an audit by the State Auditor that is punished as a Class 2 misdemeanor. (G.S. 147-64.7A).

Sections 13 and 14 correct the jurisdiction section of the Securities Act to subject unlawful manipulation of the markets under G.S. 78A-12 to sanctions under the Act.

Section 15 specifies that market manipulation applies when any act instrumental to effecting prohibited conduct is done in North Carolina.

Sections 16-17 recodify an exception for registration as an investment advisor of a person registered under federal law.

Section 23 amends the statute of limitations under the Investment Advisers Act to correspond to the changes made in Section 9 to the Securities Act. Here, the three-year statute of limitations from the date of the rendering of the investment advice in violation of the law would be replaced by a period of three years after the discovery of a violation, but in no event more than five years, except for liability arising from a fraudulent or deceitful act committed to induce a person to postpone bringing an action, in which case the statute of limitations shall be three years from discovery.

Section 27 amends a limited provision of the Administrative Procedures Act to authorize the Secretary of State to adopt temporary rules governing the conduct of administrative hearings.

Section 28 prohibits the Secretary of Administration from entering into a contract with a vendor or an affiliate of a vendor if the vendor or affiliate is incorporated or reincorporates in a tax haven country after December 31, 2001, but the United States is the principal market for the public trading of the stock of the corporation incorporated in the tax haven country. The definition of "tax haven country" is identical to the definition of the same term found in federal legislation currently before Congress that would prohibit the federal government from using defense-spending funds as payment on any new contracts with "corporate expatriates."

EFFECTIVE DATE: The criminal provisions of the bill become effective December 1, 2003. The State contracting provision is effective October 1, 2003. The remainder of the bill is effective when it becomes law.

S925-SMRH-001: O. Walker Reagan, Staff Attorney, contributed substantially to this summary.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 925

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S925-ARH-11 [v.1]

Date _____,2003

Comm. Sub. [NO]
Amends Title [NO]
First Edition

Senator _____

moves to amend the bill on page 13, line 37, through page 14, line 7, by rewriting the lines to read:

"**SECTION 28.** G.S. 143-59.1 reads as rewritten:

'**§ 143-59.1. Contracts with certain foreign vendors.**

(a) Ineligible Vendors. – The Secretary of Administration and other entities to which this Article applies shall not contract for goods or services with either of the following:

(1) A vendor if the vendor or an affiliate of the vendor meets one or more of the conditions of G.S. 105-164.8(b) but refuses to collect the use tax levied under Article 5 of Chapter 105 of the General Statutes on its sales delivered to North Carolina. The Secretary of Revenue shall provide the Secretary of Administration periodically with a list of vendors to which this section applies.

(2) A vendor if the vendor or an affiliate of the vendor ~~that is incorporated~~ incorporates or reincorporates in a tax haven country after December 31, 2001, but the United States is the principal market for the public trading of the ~~corporation's stock.~~stock of the corporation incorporated in the tax haven country.

(b) Vendor Certification. – The Secretary of Administration shall require each vendor submitting a bid or contract to certify that the vendor is not an ineligible vendor as set forth in subsection (a) of this section. Any person who submits a certification required by this subsection known to be false shall be guilty of a Class I felony.

(c) Definitions. – The following definitions apply in this section:

(1) Affiliate. – As defined in G.S. 105-163.010.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 925

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S925-ARH-11 [v.1]

(2) Tax haven country. – Means each of the following: Barbados, Bermuda, British Virgin Islands, Cayman Islands, Commonwealth of the Bahamas, ~~Cyprus,~~ Gibraltar, Isle of Man, the Principality of Liechtenstein, the Principality of Monaco, and the Republic of the Seychelles.'".

SIGNED Scott Thomas
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 881

Short Title:	Permit Tobacco Payment w/o Reopening Estate.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO PERMIT PHASE II PAYMENTS UNDER THE NATIONAL TOBACCO GROWER SETTLEMENT TRUST TO BE PAID WITHOUT REOPENING A DECEDENT'S ESTATE, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. Article 15 of Chapter 28A of the General Statutes is amended by adding a new section to read:

"**§ 28A-15-9.1. Phase II payments.**

A Phase II payment as defined in G.S. 28A-21-3.1 shall be the property of the distributees paid in accordance with that section."

SECTION 2. Article 21 of Chapter 28A of the General Statutes is amended by adding a new section to read:

"**§ 28A-21-3.1. Phase II tobacco grower and quota owner payments; list of Phase II distributees.**

(a) The following definitions apply in this section:

(1) "National Tobacco Grower Settlement Trust" means the trust established by tobacco companies to provide payments to tobacco growers and tobacco quota owners in 14 states for the purposes of ameliorating potential adverse economic consequences of likely reduction in demand, sales, and prices for tobacco as an agricultural product as a result of the Master Settlement Agreement incorporated in the consent decree entered in the action of State of North Carolina vs. Philip Morris, Incorporated, et al., 98 CVS 14377, in the General Court of Justice, Superior Court Division, Wake County, North Carolina.

(2) "Phase II payment" means an amount certified by the North Carolina Phase II Tobacco Certification Entity, Inc., to be paid to a tobacco grower or a tobacco quota owner as defined pursuant to section 4.01 of

the trust agreement establishing the National Tobacco Grower Settlement Trust.

(b) A personal representative or collector of the estate of a decedent who, during 1993 or any subsequent year, was a tobacco grower or a tobacco quota owner as defined pursuant to Section 4.01 of the trust agreement establishing the National Tobacco Grower Settlement Trust may file, along with a final account, a list of Phase II distributees for Phase II payments if all of the following conditions are met:

(1) There are no unsatisfied creditors.

(2) There are no unsatisfied general monetary bequests.

(3) All assets other than any potential Phase II payments have been distributed.

(c) A list of Phase II distributees, signed under oath, must contain the following information:

(1) The name and address of the personal representative or collector.

(2) The name and social security number of the decedent.

(3) The name and address, if known, of each devisee or heir entitled to receive Phase II payments and the percentage of Phase II payments to be received by each.

(d) The clerk of superior court must review the list of Phase II distributees to determine if the list of distributees and their share of potential Phase II payments are in accordance with the will or, if there is no will, in accordance with the Intestate Succession Act. If the clerk accepts the list of Phase II distributees for filing, the clerk must endorse the clerk's approval thereon, which shall be prima facie evidence of correctness.

(e) Upon determination by the North Carolina Phase II Tobacco Certification Entity, Inc., that the estate of a decedent entitled to any Phase II payment covering a time period when the decedent was alive has been closed, the payment may be paid directly to those distributees and in those shares set forth on a list of Phase II distributees filed under this section without the estate's having to be reopened under G.S. 28A-23-5.

(f) The estate of a decedent who is entitled to any Phase II payment may be reopened, if necessary, in accordance with G.S. 28A-23-5 in order to file a list of Phase II distributees under this section.

(g) For purposes of this section, Phase II payments are deemed cash and shall not pass by virtue of any devise or inheritance of the decedent's real property."

SECTION 3. This act is effective when it becomes law and applies to payments made on or after that date.

Judiciary II Committee

Minutes

April 17, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with fourteen members present.

SB 145 (Physician-Assisted Suicide) Senator Apodaca moved to adopt the Proposed Committee Substitute for purposes of discussion. All members voted and the motion carried. Sentor Hartsell recognized Senator Jim Forrester, bill sponsor, to explain the bill. Questions by Senators Kerr, Allran, Dalton, Hagan and Webster were answered by Senator Forrester and Linda Attarian, staff attorney. Mr. David Wickham, representing Life Tree Organization, spoke on the bill. Mr. David Burton also spoke on the bill. The bill was continued.

SB 868 (Assault in the Presence of a Child) Senator Hartsell invited Senator Hagan to explain the bill. Senator Hagan presentated a portion of a video concerning a 911 call from a child. She then introduced Attorney General Roy Cooper who spoke on the bill. Questions by Senators Thomas, Webster, Allran, Kerr and Dorsett were answered by Senator Hagan and Kory Goldsmith, staff attorney. Mr. Will Polk, from the Office of the Attorney General, also spoke on the bill. Senator Webster moved for a favorable report. All members voted and the motion carried.

With no further business, the meeting was adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

Corrected Notice

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **JUDICIARY II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	April 17, 2003	10:00 AM	1124

The following will be considered:

	BILL NO.	SHORT TITLE	SPONSOR
•	SB 145	Physician-Assisted Suicide	Senator Forrester
•	SB 471	Amend Self-Insurance Guaranty Assoc. Laws	Senator Hartsell
•	SB 693	Amend Enhanced Sentences Laws	Senator Thomas
•	SB 707	Repeat Misd. Larceny	Senator Shubert
•	SB 708	Volunteer Fire Dept. Crim. Background Checks	Senator Shubert
•	SB 716	Revised Uniform Arbitration Act	Senator Hartsell
•	SB 722	Display American Flag	Senator Kinnaird
•	SB 868	Assault in the Presence of a Child	Senator Hagan

Senator HARTSELL, Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
April 17 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. Welcome and Opening Remarks

II. Bills to be Considered

BILL NO.	SHORT TITLE	SPONSOR
SB 145	Physician-Assisted Suicide	Senator Forrester
SB 471	Amend Self-Insurance Guaranty Assoc. Laws	Senator Hartsell
SB 693	Amend Enhanced Sentences Laws	Senator Thomas
SB 707	Repeat Misd. Larceny	Senator Shubert
SB 708	Volunteer Fire Dept. Crim. Background Checks	Senator Shubert
SB 716	Revised Uniform Arbitration Act	Senator Hartsell
SB 722	Display American Flag	Senator Kinnaird
SB 868	Assault in the Presence of a Child	Senator Hagan

III. Other Business

IV. Adjournment

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — April 17, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Will Polk	DOJ
Tom Sri	NCRMA
Andy Allen	NCRMA
Fran Preston	NCRMA
Elizabeth Wicklam	Life Tree
John Madler	NC Sentencing Commission
Tommy Hamer	NCSDA
PERRI MORGAN	NFIB
[signature]	PFFPNC
[signature]	AAC
R. Paul Wilms	NCHBA

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — April 17, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Douglas Wickham	Lefler 351-A West Hargett St. Raleigh, NC 27601
David Robinson	NC Bar Assoc., Cary, NC
Michelle Frazier	NC Bar Assoc.
AL DE ITCH	DOA/YATO
TOM YOUNG	NC Chiefs of Police SB 707
Melanie Phelps	NC Medical Society
Steve Keene	✓ ✓
Bill Brooks	NCFPC
	NCFPC
	NCSIEA
ANN LEE	DHHS

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Cathy Stout	Stout Law Firm
MT Burnett	GACPD

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 471

Short Title:	Amend Self-Insurance Guaranty Assoc. Laws.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 20, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAWS GOVERNING THE SELF-INSURANCE GUARANTY ASSOCIATION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 97-133(a)(2) reads as rewritten:

"(2) Assess each member of the Association as follows:

a. Each individual member self-insurer shall be annually assessed an amount equal to ~~one-quarter of one percent (0.25%)~~ two percent (2%) of the annual gross premiums, as determined under G.S. 105-228.5(b), (b1), and (c), that would have been paid by that member self-insurer for workers' compensation insurance during the prior calendar year; and payment to the Association shall be made no later than ~~September 15~~ May 15 following the close of that calendar year. Where any such assessment is paid based in whole or in part upon estimates of annual gross premiums for the prior calendar year, there shall be made in the next year's assessment an adjustment of the assessment of such prior year based on actual audited annual gross premiums. Each group member self-insurer shall be annually assessed an amount equal to ~~one-quarter of one percent (0.25%)~~ two percent (2%) of the annual gross premiums, as determined under G.S. 105-228.5(b), (b1), and (c), of the group member self-insurer during the prior calendar year; and payment to the Association shall be made no later than ~~September 15~~ May 15 following the close of that calendar year. Regardless of the size of the Fund, during its first 12 months of membership, no member self-insurer may discount or reduce this ~~one-quarter of one percent (0.25%) assessment. Assessments paid by members pursuant to this subdivision shall~~

~~be credited toward the tax paid by self-insurers under Article 8B of Chapter 105 of the General Statutes.~~ two percent (2%) assessment. For the purpose of making the assessments authorized by this subsection and subsections (c) and (d) of this section, the Secretary of Revenue shall provide to the Association the self-insurer premium and payroll information as determined under G.S. 105-228.5(b), (b1) and (c), and the Commissioner shall provide to the Association the group self-insurer premium information reported to the Commissioner under G.S. 58-47-75 and G.S. 58-2-165.

b. Each member self-insurer shall be notified of the assessment no later than 30 days before it is due.

c. If a self-insurer is a member of the Association for less than a full calendar year, the annual gross premiums shall be adjusted by that portion of the year the self-insurer is not a member of the Association.

d. If application of the contribution rates referenced in sub-subdivision a. of this subdivision would produce an amount in excess of the five million dollar ($5,000,000) limits of the fund, an equitable proration may be made; provided that every self-insurer that becomes a member of the Association shall pay an initial assessment, in an amount established by the Board, regardless of the size of the fund at the time the member joins the Association."

SECTION 2. G.S. 97-133(a)(4) reads as rewritten:

"(4) Be obligated to the extent of covered claims occurring prior to the determination of the member self-insurer's insolvency, or occurring after such determination but prior to the obtaining by the self-insurer of workers' compensation insurance as otherwise required under this Chapter. ~~The Association shall pay claims against a self-insurer that are not or have not been paid as a result of a determination of insolvency or the institution of bankruptcy or receivership proceedings that occurred prior to the effective date of this Article.~~"

SECTION 3. G.S. 97-185 reads as rewritten:

"**§ 97-185. ~~Deposits or surety bond.~~Deposits; surety bonds; letters of credit.**

(a) Every self-insurer shall deposit with the Commissioner an amount equal to ~~twenty-five percent (25%)~~ fifty percent (50%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer.

~~(b) A self-insurer organized and authorized before the effective date of this section shall have 24 months from the effective date of this section to comply with this section.~~

(c) Deposits received, changes to existing deposits, or deposits exchanged after the effective date of this section, shall comprise one or more of the following:

(1) Interest-bearing bonds of the United States of America.

(2) Interest-bearing bonds of the State of North Carolina, or of its cities or counties.

(3) Certificates of deposit issued by any solvent bank domesticated in the State of North Carolina that have a maturity of one year or greater.

(4) Surety bonds in a form acceptable to the Commissioner and issued by a corporate surety. A surety bond deposited pursuant to this subsection shall require that the surety reimburse the Commissioner, or his successors, assigns, or transferees, from the proceeds of the surety bond, for any costs incurred in the collection of the proceeds of the surety bond, including reasonable attorneys' fees, and any costs incurred in administering the workers' compensation claims against the insolvent self-insurer that deposited the surety bond.

(4a) Irrevocable letters of credit in a form acceptable to the Commissioner issued by a bank acceptable to the Commissioner.

(5) Any other investments that are approved by the Commissioner.

(d) All bonds or securities that are posted as a security deposit shall be valued annually at market value. If market value is less than face value, the Commissioner may require the self-insurer to post additional securities. In making this determination, the Commissioner shall consider the self-insurer's financial condition, the amount by which market value is less than face value, and the likelihood that the securities will be needed to provide benefits.

(e) Securities deposited under this section shall be assigned to the Commissioner, the Commissioner's successors, assigns, or trustees, on a form prescribed by the Commissioner in a manner that renders the securities negotiable by the Commissioner. If a self-insurer is deemed by the Commissioner to be in a hazardous financial condition, the Commissioner may sell or collect, or both, such amounts that will yield sufficient funds to meet the self-insurer's obligations under the Act. In the case of a letter of credit, the Commissioner may draw the full amount of a letter of credit if the letter of credit is not renewed within 90 days prior to its expiration or at any time that the bank issuing the letter of credit is no longer acceptable to the Commissioner. Interest accruing on any negotiable security deposited under this Article shall be collected and transmitted to the self-insurer if the self-insurer is not in a hazardous financial condition.

(f) No judgment creditor, other than a claimant entitled to benefits under the Act, may levy upon any deposits made under this section.

(g) Securities held by the Commissioner under this section may be exchanged or replaced by the self-insurer with other securities of like nature and amount as long as the self-insurer is not in a hazardous financial condition. No release shall be effectuated until replacement securities or bonds of an equal value have been substituted. Any surety bond may be exchanged or replaced with another surety bond that meets the requirements of this section if 90 days' advance written notice is given to the Commissioner. If a self-insurer ceases to self-insure or desires to replace securities with

an acceptable surety bond or bonds, the self-insurer shall notify the Commissioner, and may recover all or a portion of the securities deposited with the Commissioner upon posting instead an acceptable special release bond issued by a corporate surety in an amount equal to the total value of the securities. The special release bond shall cover all existing liabilities under the Act plus an amount to cover future loss development and shall remain in force until all obligations under the Act have been discharged fully.

(h) If a self-insurer ceases to self-insure, no deposits shall be released by the Commissioner until the self-insurer has discharged fully all of the self-insurer's obligations under the Act.

(i) An endorsement to a surety bond shall be filed with the Commissioner within 90 days after the effective date of the endorsement."

SECTION 4. Effective January 1, 2005, G.S. 97-185(a), as amended in Section 3 of this act, reads as rewritten:

"(a) Every self-insurer shall deposit with the Commissioner an amount equal to ~~fifty percent (50%)~~ seventy-five percent (75%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer."

SECTION 5. Effective January 1, 2006, G.S. 97-185(a), as amended in Sections 3 and 4 of this act, reads as rewritten:

"(a) Every self-insurer shall deposit with the Commissioner an amount equal to ~~seventy-five percent (75%)~~ one hundred percent (100%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer."

SECTION 6. Effective January 1, 2007, G.S. 97-185(a), as amended in Sections 3, 4, and 5 of this act, reads as rewritten:

"(a) Every self-insurer shall deposit with the Commissioner an amount equal to ~~one hundred percent (100%)~~ one hundred twenty-five percent (125%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer."

SECTION 7. G.S. 97-141 reads as rewritten:

"**§ 97-141. Stay of proceedings.**

All claims or proceedings under this Chapter to which the insolvent member self-insurer is a party either before the Industrial Commission or a court in this State and the running of all time periods against either the insolvent member self-insurer or the Association under this Chapter shall be stayed for 60 days from the later of the date of notice to the Association of the insolvency or the date the Association is notified of a

claim or proceeding under this Chapter in order to permit the Association to investigate, prosecute, or defend properly any petition, claim, or appeal under this Chapter, provided that the payment of weekly compensation for incapacity is made whenever time periods or proceedings affecting the payment of weekly compensation are stayed."

SECTION 8. Section 3 of this act becomes effective January 1, 2004. Section 4 of this act becomes effective January 1, 2005. Section 5 of this act becomes effective January 1, 2006. Section 6 of this act becomes effective January 1, 2007. Section 7 of this act is effective when this act becomes law and applies to claims filed on or after that date. The remainder of this act is effective when this act becomes law and applies to assessments made on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

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SENATE BILL 145
PROPOSED COMMITTEE SUBSTITUTE S145-CSRM-23 [v.3]

4/17/2003 9:09:48 AM

Short Title: Physician-Assisted Suicide. (Public)

Sponsors:

Referred to:

February 24, 2003

A BILL TO BE ENTITLED

AN ACT REQUIRING THE NORTH CAROLINA MEDICAL BOARD TO IMPLEMENT POLICIES TO TRAIN AND EDUCATE PERSONS LICENSED TO PRACTICE OR PERSONS DESIRING TO PRACTICE MEDICINE IN THIS STATE ON ISSUES RELATED TO PAIN MANAGEMENT AND PALLIATIVE CARE AND CREATING THE CRIMINAL OFFENSE OF PHYSICIAN-ASSISTED SUICIDE.

The General Assembly of North Carolina enacts:

SECTION 1. The North Carolina Medical Board shall implement the following policies:

(1) Encourage persons licensed to practice medicine in this State to continue to emphasize continuing education from the North Carolina Medical Society or any other appropriate accredited medical organization on the topic of pain management.

(2) Encourage all schools of medicine in this State to develop a curriculum and train students regarding pain management, palliative care, and the use of hospice care.

(3) Advise persons licensed to practice medicine in this State of the Board's policies relating to pain management to patients with terminal diseases.

SECTION 2. Article 6 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-17.2. Physician-assisted suicide.**

(a) The following definitions apply in this section:

(1) Licensed health care professional. – A duly licensed physician, surgeon, podiatrist, osteopath, osteopathic physician, osteopathic surgeon, optometrist, chiropractor, physician assistant, nurse, nurse practitioner, dentist, veterinarian or pharmacist.

(2) Physician-assisted suicide. – The intentional, direct, active, and physical participation or involvement of a licensed health care professional in the act of suicide which is carried out free of any threat, force, duress, or deception and with the understanding of the consequences of the conduct.

(b) It is unlawful for any licensed health care professional to commit the offense of physician-assisted suicide.

(c) Any licensed health care professional who violates this section is guilty of a Class D felony.

(d) None of the following shall be construed as a violation of this section:

(1) Carrying out the provisions of advance directives or living wills.

(2) The withholding or withdrawing of a life-sustaining procedure or compliance with any other State or federal law authorizing withdrawal or refusal of medical treatments or procedures.

(3) The administering, prescribing, or dispensing of medications or procedures, by or at the direction of a licensed health care professional, for the purpose of alleviating another person's pain or discomfort, even if the medication or procedure may increase the risk of death as long as the medication or procedure is not also intentionally administered, prescribed, or dispensed for the purpose of causing death or the purpose of assisting in causing death for any reason.

(4) The administering, prescribing, or dispensing of medications or procedures to a patient diagnosed with a medical condition or mental illness that includes an element of suicidal ideation, even if the medication or procedure may increase the risk of death, as long as the medication or procedure is not also intentionally administered, prescribed, or dispensed for the purpose of causing death or the purpose of assisting in causing death for any reason."

SECTION 3. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

NCMB

END-OF-LIFE RESPONSIBILITIES AND PALLIATIVE CARE

Assuring Patients

Death is part of life. When appropriate processes have determined that the use of life-sustaining or invasive interventions will only prolong the dying process, it is incumbent on physicians to accept death "not as a failure, but the natural culmination of our lives."*

It is the position of the North Carolina Medical Board that patients and their families should be assured of competent, comprehensive palliative care at the end of their lives. Physicians should be knowledgeable regarding effective and compassionate pain relief, and patients and their families should be assured such relief will be provided.

Palliative Care

There is no one definition of palliative care, but the Board accepts that found in the Oxford Textbook of Palliative Medicine: "The study and management of patients with active, progressive, far advanced disease for whom the prognosis is limited and the focus of care is the quality of life." This is not intended to exclude remissions and requires that the management of patients be comprehensive, embracing the efforts of medical clinicians and of those who provide psychosocial services, spiritual support, and hospice care.

A physician who provides palliative care, encompassing the full range of comfort care, should assess his or her patient's physical, psychological, and spiritual conditions. Because of the overwhelming concern of patients about pain relief, special attention should be given the effective assessment of pain. It is particularly important that the physician frankly but sensitively discuss with the patient and the family their concerns and choices at the end of life. As part of this discussion, the physician should make clear that, in some cases, there are inherent risks associated with effective pain relief in such situations.

Opioid Use

The Board will assume opioid use in such patients is appropriate if the responsible physician is familiar with and abides by acceptable medical guidelines regarding such use, is knowledgeable about effective and compassionate pain relief, and maintains an appropriate medical record that details a pain management plan. (See the Board's position statement on the Management of Chronic Non-Malignant Pain for an outline of what the Board expects of physicians in the management of pain.) Because the Board is aware of the inherent risks associated with effective pain relief in such

situations, it will not interpret their occurrence as subject to discipline by the Board.

Selected Guides

To assist physicians in meeting these responsibilities, the Board recommends Cancer Pain Relief: With a Guide to Opioid Availability, 2nd ed (1996), Cancer Pain Relief and Palliative Care (1990), Cancer Pain Relief and Palliative Care in Children (1999), and Symptom Relief in Terminal Illness (1998), (World Health Organization, Geneva); Management of Cancer Pain (1994), (Agency for Health Care Policy and Research, Rockville, MD); Principles of Analgesic Use in the Treatment of Acute Pain and Cancer Pain, 4th Edition (1999)(American Pain Society, Glenview, IL); Hospice Care: A Physician's Guide (1998) (Hospice for the Carolinas, Raleigh); and the Oxford Textbook of Palliative Medicine (1993) (Oxford Medical, Oxford).

(Adopted 10/1999)

***Steven A. Schroeder, MD, President, Robert Wood Johnson Foundation.**

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RELATED STATEMENT

Joint Statement on Pain Management in End-of-Life Care

(Adopted by the North Carolina Medical, Nursing, and Pharmacy Boards)

Through dialogue with members of the healthcare community and consumers, a number of perceived regulatory barriers to adequate pain management in end-of-life care have been expressed to the Boards of Medicine, Nursing, and Pharmacy. The following statement attempts to address these misperceptions by outlining practice expectations for physicians and other health care professionals authorized to prescribe medications, as well as nurses and pharmacists involved in this aspect of end-of-life care. The statement is based on:

- **the legal scope of practice for each of these licensed health professionals;**
- **professional collaboration and communication among health professionals providing palliative care; and**
- **a standard of care that assures on-going pain assessment, a therapeutic plan for pain management interventions; and evidence of adequate symptom management for the dying patient.**

It is the position of all three Boards that patients and their families should be assured of competent, comprehensive palliative care at the end of their lives. Physicians, nurses and pharmacists should be knowledgeable regarding effective and compassionate pain relief, and patients and their families should be assured such relief will be provided.

Because of the overwhelming concern of patients about pain relief, the physician needs to give special attention to the effective assessment of pain. It is particularly important that the physician frankly but sensitively discuss with the patient and the family their concerns and choices at the end of life. As part of this discussion, the physician should make clear that, in some end of life care situations, there are inherent risks associated with effective pain relief. The Medical Board will assume opioid use in such patients is appropriate if the responsible physician is familiar with and abides by acceptable medical guidelines regarding such use, is knowledgeable about effective and compassionate pain relief, and maintains an appropriate medical record that details a pain management plan. Because the Board is aware of the inherent risks associated with effective pain relief in such situations, it will not interpret their occurrence as subject to discipline by the Board.

With regard to pharmacy practice, North Carolina has no quantity restrictions on dispensing controlled substances including those in Schedule II. This is significant when utilizing the federal rule that allows the partial filling of Schedule II prescriptions for up to 60 days. In these situations it would minimize expenses and unnecessary waste of drugs if the prescriber would note on the prescription that the patient is terminally ill and specify the largest anticipated quantity that could be needed for the next two months. The pharmacist could then dispense smaller quantities of the prescription to meet the patient's needs up to the total quantity authorized. Government-approved labeling for dosage level and frequency can be useful as guidance for patient care. Health professionals may, on occasion, determine that higher levels are justified in specific cases. However, these occasions would be exceptions to general practice and would need to be properly documented to establish informed consent of the patient and family.

Federal and state rules also allow the fax transmittal of an original prescription for Schedule II drugs for hospice patients. If the prescriber notes the hospice status of the patient on the faxed document, it serves as the original. Pharmacy rules also allow the emergency refilling of prescriptions in Schedules III, IV, and V. While this does not apply to Schedule II drugs, it can be useful in situations where the patient is using drugs such as Vicodin for pain or Xanax for anxiety.

The nurse is often the health professional most involved in on-going pain assessment, implementing the prescribed pain management plan, evaluating the patient's response to such interventions and adjusting medication levels based on patient status. In order to achieve adequate pain management, the prescription must provide dosage ranges and frequency parameters within which the nurse may adjust (titrate) medication in order to achieve adequate pain control. Consistent with the licensee's scope of practice, the RN or LPN is accountable for implementing the pain management plan utilizing his/her knowledge base and documented assessment of the patient's needs. The nurse has the authority to adjust medication levels within the dosage and frequency ranges stipulated by the prescriber and according to the agency's established protocols. However, the nurse does not have the authority to change the medical pain management plan. When adequate pain management is not achieved under the currently prescribed treatment plan, the nurse is responsible for reporting such findings to the prescriber and documenting this communication. Only the physician or other health professional with authority to prescribe may change the medical pain management plan.

Communication and collaboration between members of the healthcare team, and the patient and family are essential in achieving adequate pain management in end-of-life care. Within this interdisciplinary framework for end of life care, effective pain management should include:

- **through documentation of all aspects of the patient's assessment and care;**
- **a working diagnosis and therapeutic treatment plan including pharmacologic and non-pharmacologic interventions;**
- **regular and documented evaluation of response to the interventions and, as appropriate, revisions to the treatment plan;**
- **evidence of communication among care providers;**
- **education of the patient and family; and**
- **a clear understanding by the patient, the family and healthcare team of the treatment goals.**

It is important to remind health professionals that licensing boards hold each licensee accountable for providing safe, effective care. Exercising this standard of care requires the application of knowledge, skills, as well as ethical principles focused on optimum patient care while taking all appropriate measures to relieve suffering. The healthcare team should give primary importance to the expressed desires of the patient tempered by the judgement and legal responsibilities of each licensed health professional as to what is in the patient's best interest.

(10/1999)

Position Statements
NCMB Home Page

SENATE BILL 145:
Physician-Assisted Suicide

BILL ANALYSIS

Committee:	Senate JII	**Introduced by:**	Sen. Forrester
Date:	April 17, 2003	**Summary by:**	Linda Attarian
Version:	Introduced/PCS		Committee Co-Counsel

SUMMARY: ***Senate Bill 145 creates a criminal offense of physician-assisted suicide and requires the North Carolina Medical Board to implement policies to train and educate medical doctors students on issues related pain management and palliative care. A violation of the offense is a Class D felony, which is punishable for up to 229 months of incarceration, depending on prior convictions. The act is effective December 1, 2003, and applies to offenses committed on or after that date.***

CURRENT LAW: There is no current provision making physician-assisted suicide unlawful.

BILL ANALYSIS: **Section 1** directs the NC Medical Board to implement policies regarding the training of medical doctors and students on issues related to end of life care.

Section 2 creates a criminal offense of physician-assisted suicide. A violation of the act is a Class D felony.

The bill provides that the following are not to be construed to be a violation of the act:

1. Withholding or discontinuing life sustaining "extraordinary means or artificial nutrition or hydration" pursuant to a living will or advance directives or State or federal law.
2. Prescribing, dispensing or administering prescription medications or procedures for the purposes of palliative care, even if the procedure or the medication may increase the risk of death.
3. Prescribing, dispensing or administering prescription medications or procedures to a patient with a medical condition that puts that person at a greater risk of suicide and even if the procedure or the medication may increase the risk of death.

Section 3 makes the bill effective December 1, 2003.

THE PROPOSED COMMITTEE SUBSTITUTE:

- Revises the definition of physician-assisted suicide with a new, more narrowly defined definition.
- Makes minor changes to Section 1 to conform the section to current policies and practices of the NC Medical Board.
- Adds "nurse practitioner" and "veterinarian" to list of health care professionals subject to the provisions of the criminal offense.
- Makes a clarifying addition to page 2, line 23, to clarify that medical condition or mental illness that includes an element of suicidal ideation, is within the scope of the exception.

BACKGROUND:

Current state laws: According to NCSL, 38 states have enacted laws that explicitly criminalize assisted suicide through statute. Nine states criminalize assisted suicide through common law. Virginia does not criminalize assisted suicide, instead, that state imposes civil sanctions on persons assisting suicide. Only Oregon has a law that specifically permits physician-assisted suicide. Ohio is unique in that the Ohio Supreme Court ruled in October of 1996 that assisted suicide is not a crime. The Ohio legislature has attempted to make assisted suicide a crime, but to date, no bill has passed both chambers.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

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SENATE BILL 145

Short Title:	Physician-Assisted Suicide.	(Public)
Sponsors:	Senators Forrester, Purcell; Allran, Bingham, Blake, Carpenter, Garwood, Shubert, and Sloan.	
Referred to:	Judiciary I.	

February 24, 2003

A BILL TO BE ENTITLED

AN ACT REQUIRING THE NORTH CAROLINA MEDICAL BOARD TO IMPLEMENT POLICIES TO TRAIN AND EDUCATE PERSONS LICENSED TO PRACTICE OR PERSONS DESIRING TO PRACTICE MEDICINE IN THIS STATE ON ISSUES RELATED TO PHYSICIAN-ASSISTED SUICIDE AND CREATING THE CRIMINAL OFFENSE OF PHYSICIAN-ASSISTED SUICIDE.

The General Assembly of North Carolina enacts:

SECTION 1. The North Carolina Medical Board shall implement the following policies:

(1) Encourage persons licensed to practice medicine in this State to receive continuing education from the North Carolina Medical Society on the topic of pain management.

(2) Encourage all schools of medicine in this State to develop a curriculum and train students regarding pain management, palliative care, and the use of hospice care.

(3) Advise persons licensed to practice medicine in this State of the Board's policies relating to prescribing adequate amounts of medicine to patients with terminal diseases.

SECTION 2. Article 6 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-17.2. Physician-assisted suicide.**

(a) The following definitions apply in this section:

(1) Licensed health care professional. – A duly licensed physician, surgeon, podiatrist, osteopath, osteopathic physician, osteopathic surgeon, optometrist, chiropractor, physician assistant, nurse, dentist, or pharmacist.

(2) Physician-assisted suicide. – The act of a licensed health care professional participating in a medical procedure or willfully

prescribing any drug, compound, or substance for the express purpose of assisting a patient to intentionally end the patient's life. The term does not include a person's participating in the execution of a person sentenced by a court to death by lethal injection.

(b) It is unlawful for any licensed health care professional to commit the offense of physician-assisted suicide.

(c) Any licensed health care professional who violates this section is guilty of a Class D felony.

(d) None of the following shall be construed as a violation of this section:

(1) Carrying out the provisions of advanced directives or living wills.

(2) The withholding or withdrawing of a life-sustaining procedure or compliance with any other State or federal law authorizing withdrawal or refusal of medical treatments or procedures.

(3) The administering, prescribing, or dispensing of medications or procedures, by or at the direction of a licensed health care professional, for the purpose of alleviating another person's pain or discomfort, even if the medication or procedure may increase the risk of death as long as the medication or procedure is not also intentionally administered, prescribed, or dispensed for the purpose of causing death or the purpose of assisting in causing death for any reason.

(4) The administering, prescribing, or dispensing of medications or procedures to a patient diagnosed with a medical condition that includes an element of suicidal ideation, even if the medication or procedure may increase the risk of death, as long as the medication or procedure is not also intentionally administered, prescribed, or dispensed for the purpose of causing death or the purpose of assisting in causing death for any reason."

SECTION 3. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

National Hospice Organization

Resolution on Assisted Suicide

WHEREAS, The National Hospice Organization is considered the voice of the nation's hospice community; and,

WHEREAS, The National Hospice Organization is often requested to provide comment to the Congress, the Administration, the Courts, the media and the general public; and,

WHEREAS, The National Hospice Organization is on record as supporting a patient's right to choose palliative care and a patient's right to refuse unwanted medical intervention including the provision of artificially supplied hydration and nutrition; and,

WHEREAS, There has been increased public attention and focus on the issue of voluntary euthanasia and assisted suicide; and,

WHEREAS, The proponents of change in the legal status of these practices often paint a stark picture in which a patient's choice is between painful existence devoid of value on the one hand and voluntary euthanasia or assisted suicide on the other; and,

WHEREAS, We believe hospice care is a better choice than voluntary euthanasia and assisted suicide; therefore,

RESOLVED, That the National Hospice Organization reaffirms its commitment to the value of the end of life and to the philosophy that hospice care neither hastens nor postpones death.

RESOLVED, That the National Hospice Organization does not support the legalization of voluntary euthanasia or assisted suicide in the care of the terminally ill.

RESOLVED, That the National Hospice Organization supports improved access to hospice care for terminally ill patients and their families, including those who have expressed a desire for assistance with suicide.

Adopted by the Membership
November, 1996

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PolicyFinder

H-270.965 Physician-Assisted Suicide

Our AMA strongly opposes any bill to legalize **physician-assisted suicide** or euthanasia, as these practices are fundamentally inconsistent with the **physician**'s role as healer. (Sub. Res, 5, I-98)

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PolicyFinder

H-140.952 Physician Assisted Suicide

It is the policy of the AMA that: (1) **Physician assisted suicide** is fundamentally inconsistent with the **physician**'s professional role. (2) It is critical that the medical profession redouble its efforts to ensure that dying patients are provided optimal treatment for their pain and other discomfort. The use of more aggressive comfort care measures, including greater reliance on hospice care, can alleviate the physical and emotional suffering that dying patients experience. Evaluation and treatment by a health professional with expertise in the psychiatric aspects of terminal illness can often alleviate the suffering that leads a patient to desire **assisted suicide**. (3) Physicians must resist the natural tendency to withdraw physically and emotionally from their terminally ill patients. When the treatment goals for a patient in the end stages of a terminal illness shift from curative efforts to comfort care, the level of **physician** involvement in the patient's care should in no way decrease. (4) Requests for **physician assisted suicide** should be a signal to the **physician** that the patient's needs are unmet and further evaluation to identify the elements contributing to the patient's suffering is necessary. Multidisciplinary intervention, including specialty consultation, pastoral care, family counseling and other modalities, should be sought as clinically indicated. (5) Further efforts to educate physicians about advanced pain management techniques, both at the undergraduate and graduate levels, are necessary to overcome any shortcomings in this area. Physicians should recognize that courts and regulatory bodies readily distinguish between use of narcotic drugs to relieve pain in dying patients and use in other situations. (CEJA Rep. I-93-8; Reaffirmed by BOT Rep. 59, A-96; Reaffirm: Res. 237, A-99)

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Beverly LaHaye
Chairman

Mary Frances Forrester
State Director

CWA-NC
Physician Assisted Suicide
HB 390

Distinguished members of the House Judiciary I Committee: Thank you for reading this information from Concerned Women For America and Concerned Women For America of North Carolina on House Committee Substitute Bill 390 banning Physician Assisted Suicide.

Concerned Women for America is the largest women's public policy organization in the nation with over 500,000 women (and like minded men) who are committed to Judeo-Christian cultural values. **Concerned Women For America of North Carolina (CWA-NC) has over 14,000 at large bi-partisian supporters**.

As the State Director of CWA-NC since 1999, I am here to speak in favor of HB390 banning physician- assisted suicide in North Carolina.

According to medical ethics, physician assisted suicide is diametrically opposed to the Hippocratic Oath in which most physicians vow. It states the physician will " do no harm" or "give no deadly medicine to anyone if asked." That oath dates to 400 B.C. and formed the basis of the practice of medicine because it gave the profession its sense of duty to mankind. It applied logic and reason to medicine and made the practice of medicine honorable. Keeping the oath promised the physician the clear conscience to enjoy life as a healer and be respected by all men at all times.

Just as significant, physician assisted suicide also breaks the 6th Commandment of God as given to Moses, "Thou Shalt Not Kill."

If the physician is released from these oaths, it gives him an open door policy to help patients die. He is an indirect *stealth killer* with impunity; promoting death without legal consequences, and, above the law.

As reported in the New England Journal of Medicine, Netherland statistics reveal in Dutch deaths involving medical intervention to assist ending life, an astounding 76% did not involve an explicit patient request for death. How did that come to be? Because the practice of physician assisted suicide ever so gradually progressed to a secular approach that went from *patient "choice"*, to *expedient "choice", to predetermined "choice."* I refer you to the January- February 2001 Issue of CWA *FAMILY VOICE*, for further information on the practice of Dutch "bedrooming", a euphanism for making beds ***available*** from time to time.

CONCERNED WOMEN FOR AMERICA
OF NORTH CAROLINA

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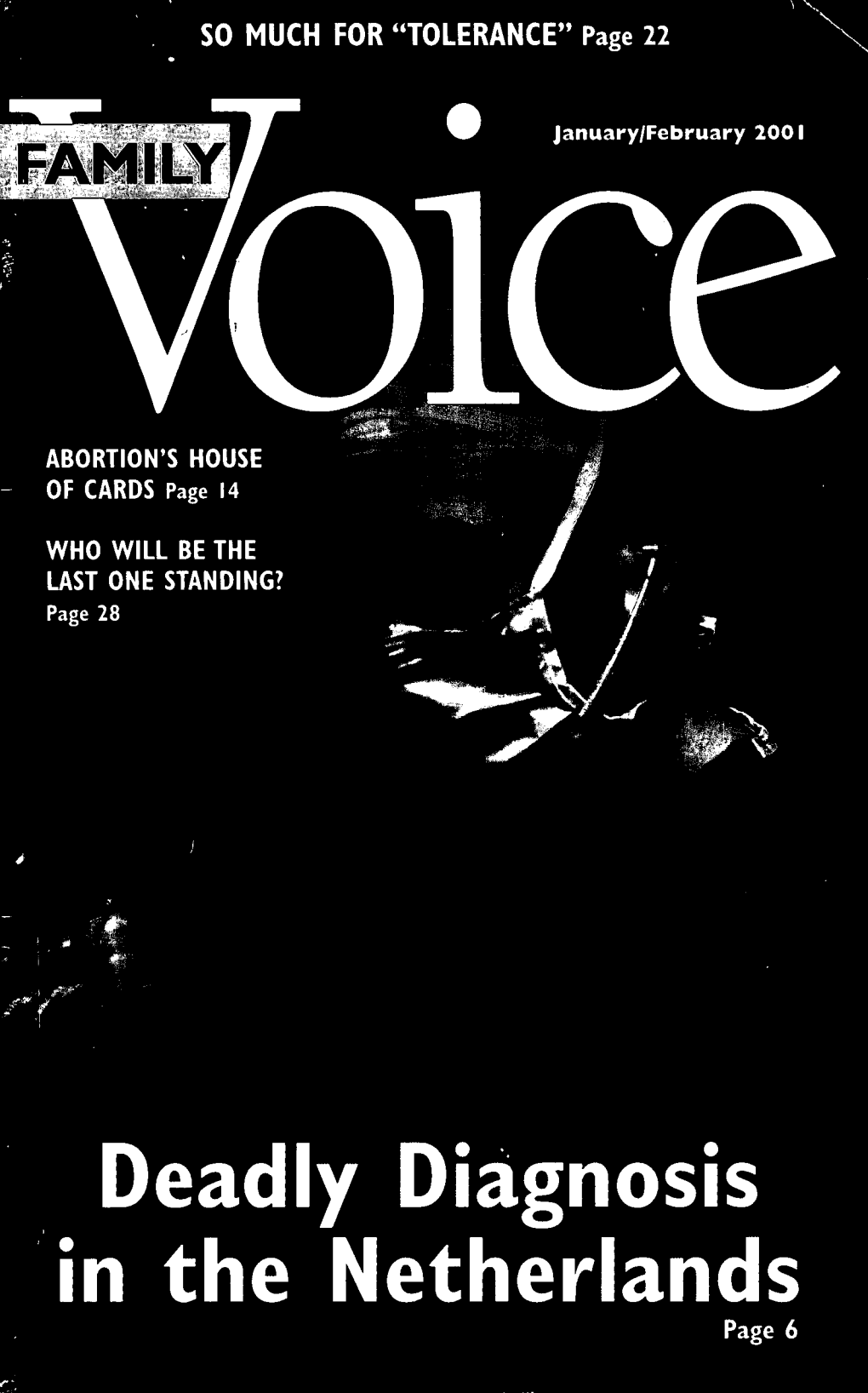

Deadly Diagnosis in the Netherlands

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"CWA's teaming up with Bee-Alive to improve America's health!"

Beverly

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January/February 2001

FAMILY Voice

CWA

The mission of Concerned Women for America is to protect and promote Biblical values among all citizens — first through prayer, then education, and finally by influencing our society — thereby reversing the decline in moral values in our nation.

Family Voice is published by Concerned Women for America six times per year. Twelve issues are available for a donation of $20 to Concerned Women for America.
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Unless indicated otherwise, Scripture references come from the New King James Version.

CWA is indebted to its many members who have made special donations including cash, securities, life insurance, property or bequests. Such gifts offer significant income and tax advantages and further the work of CWA. For information on giving opportunities, please contact the Finance office at the CWA National Office.

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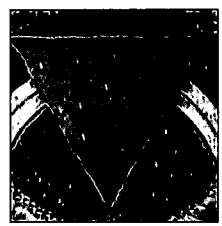

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ECFA

Chairman's Desk

Beverly LaHaye is Founder and Chairman of Concerned Women for America

Your Vote and Voice: They Count!

Before long, George W. Bush will be inaugurated as our 43rd president, and a new Congress will open the 107th session. Election 2000 was quite eventful, wasn't it? Few expected one of the closest races in history, or that one man would win the popular vote, but another man would win the presidency with the electoral vote. Election 2000 certainly gained a place in history.

As I thought about the year ahead, and what we hope to accomplish, I kept thinking about the lesson of this presidential election. Think about this: Months of intense campaigning, millions of dollars spent, and numerous debates by commentators, activists and columnists took place. But the decision of the next leader of our nation hinged on a few hundred votes in one state.

The Importance of One

Every vote does count. And as we begin this new year and new political season, we must remember this lesson. Every letter, every phone call, every meeting counts. Your action in our political process matters!

I am thrilled it looks like we have a pro-life president in office. I believe President-elect Bush will support us and work with us as we strive to protect the unborn. I am also excited he has pledged to cut taxes, reduce the marriage penalty, and push for school choice and other educational reforms.

But despite Mr. Bush's pro-family agenda, this new Congress promises to be difficult at best. In the House, Republicans hold a majority—but only by a handful of seats. The Senate is even more difficult: It is split 50-50. As you well know, not all of those in the majority are pro-family on issues of concern to us, and some Democrats and Independents may be. Battles over the sanctity of life, stopping pornography, the protection of marriage, education, religious freedom and others will undoubtedly continue.

The Coming Debate

For instance, when Congress debated legislation to ban partial-birth abortion, retiring Sen. Daniel Patrick Moynihan (D-New York) compared partial-birth abortion to infanticide. I hardly think we can expect incoming Sen. Hillary Clinton to make the same comparison. Because both houses of

Congress are so closely divided, we can expect to hear calls for "moderation" and "compromise." The liberals may not see their agenda furthered, but do not expect a conservative agenda to prevail easily either.

Through it all, CWA will be on Capitol Hill laboring for your families. And, in His perfect timing, God has provided a new leader for this effort. Michael Schwartz became our Vice President for Government Affairs last month. In this role, he leads our lobbying efforts. He is also passionate about building up our local and national grassroots lobbying.

Mike comes to us from the office of former Rep. Tom Coburn (R-Oklahoma), where he served as administrative director. I have known Mike for more than 15 years, and he is tireless in his efforts to promote family-friendly policies in accord with Scripture.

We Need You!

God has blessed us with a free nation that depends upon the involvement of its citizens. So I cannot stress enough the importance of your active support! We need you to stand with us each day to protect and empower families—primarily through prayer—but also through your letters and e-mails to local, state and national leaders; through phone calls; and through letters to the media or local businesses.

This is the perfect time for you to participate in CWA at the state level. Why not join one of CWA's 500 Prayer/Action Chapters, located nationwide? To find one near you, contact our field department at 1-800-458-8797.

If you are not a member of CWA, I encourage you to join today. And encourage others to join us. We'll even be happy to send your family members and friends three trial issues of *Family Voice*. We need a strong grassroots constituency for the days ahead.

Friends, our culture has misunderstood and misrepresented the beliefs of conservative Christians for so many years. My fear is that few in the new Congress will stand up and fight for your beliefs or your families. Many in Congress will cast us aside as the "religious right," believing they need to be "moderate." We must make our voices heard and our actions seen, so our leaders will recognize we represent the desires and beliefs of millions of Americans.

Remember: Your vote does count! And so does your voice. The elections are over. Now we need to ensure the newly elected Congress will strongly support families, just as they campaigned. I hope you will join us and help families across America be counted! FV

You may hear more from Beverly LaHaye on her daily radio program, "Beverly LaHaye Today." To locate a station in your area, visit http://radio.cwfa.org/stations, or call 1-800-458-8797.

TAKE ACTION!

To request three trial issues of Family Voice *for your friends or relatives, visit www.cwfa.org, or call* ***1-800-458-8797.***

Deadly Diagnosis in the Netherlands

"Involuntary euthanasia" takes hold. Will the United States follow suit?

By Jonathan Imbody

Slumped in a chair surrounded by books on philosophy, religion and sociology, Henk Reitsema still cannot fathom the tragedy that four years ago robbed his family of their grandfather.

A Christian thinker in the mold of Dr. Francis Schaeffer, the articulate young leader of the L'Abri Fellowship in Holland struggles with words. How do you describe your feelings after learning that your grandfather, like thousands of others in the Netherlands, had become a victim of *involuntary euthanasia*—medical killing without the patient's consent?

"Numb was the first response, just not knowing what to feel," Henk explains. "You imagined, 'What was the doctor thinking in making this kind of decision? How do you view him? Did he murder your Granddad?' Those feelings—you don't know what to do with them. It's very, very strange."

"You imagined, 'What was the doctor thinking in making this kind of decision? How do you view him? Did he murder your Granddad?'"

Henk remembers, "This may have been something that was becoming normal in the Netherlands. But for our family, it was not even an option."

The Reitsema family's story illustrates the tragedy euthanasia has rained upon the Netherlands. But it also speaks to Americans. In 1996, the U.S. Supreme Court ruled assisted suicide did not fall into the ever-expanding category of constitutional rights. Then it effectively sent the issue to the individual states for "experimentation."

As a result, more than 40 individuals have already died through a secretive, state-sanctioned assisted-suicide program in Oregon. Michigan voters, by contrast, roundly rejected assisted suicide in 1998. Last November, Maine voters narrowly rejected a misnomer, a "death with dignity" measure, and a cadre of California legislators currently plans to introduce an assisted-suicide measure.

As the Reitsema family's story shows, reality tends to rust the rhetoric of "death with dignity."

Discovered Too Late

Henk's grandfather had contracted non-Hodgkin's lymphoma, which would have naturally taken his life within a few years. He also had developed a painful thrombosis in his leg, so he asked the nursing-home physician for help with the pain.

Instead, the doctor quietly ordered nurses to administer overdoses of morphine and withhold food and water. Rather than providing healing or comfort, and without consulting Grandfather Reitsema or his loved ones, this doctor aimed to kill.

Henk's soft-spoken wife, Riana, had been regularly visiting Grandfather Reitsema. She relates that one of Henk's aunts stumbled upon the plan—but too late. The day before he died, she tried to give him water, but the nurse didn't allow it.

Horrified, the family realized the nursing home was euthanizing Grandfather Reitsema. Henk explains, "My family tried to reverse it, but he died from pneumonia"—a common result of heavy morphine dosing.

With time, Henk Reitsema and his wife Riana have come to terms with their granddad's death at the hand of a doctor.

Suspicions Arise

Shocked by the killing, some family members accused other family members of complicity. Like most Dutch, they naively believed euthanasia is always a matter of consent.

"Instead of being able to mourn together in the first place," Henk laments, "they were having a slinging match as to who would have given permission. Nobody believed it could be possible that a doctor could make this decision single-handedly."

Dutch politicians and health officials carefully emphasizé a system of controls designed to ensure patient autonomy. In practice, however, those controls are a fairy tale. Dutch medical surveys reveal that in three out of four cases where doctors intervened to hasten death, the patient did not give permission [see sidebar, p.11].

"After talking to each other and getting the emotions calmed down," Henk explains, "everybody realized that not even my grandmother had as much as given an insinuation that it was okay. One never would have imagined him not wanting to hold on to life. He respected the fact that God had given him life."

No Remorse, No Recourse

One day outside the nursing home, Henk's aunt waited for the physician who had killed her brother. When she confronted him, Henk recalls, "[The doctor's] response was, 'But he was sick! Don't you understand? I was just helping him out.'"

Henk points to that conversation as an illustration of the philosophical chasm between the Christian view of the intrinsic, sacred value of human life and the utilitarian secular view.

"The framework is radically different," Henk explains. "The whole connectedness with other people was totally absent from his mind. The doctor thinks, 'This guy's standard of life isn't worth living, so let's just save them all the effort.'"

The family considered legal action against the doctor.

"But it proved to be a no-win situation," Henk explains. "Only the most extremely harsh cases ever come to court, and even then, the court always favors the doctors."

Systematic "Bed-Clearing"

Not long after the incident with Henk's grandfather, Dutch media began to uncover the tragedy at the nursing home.

Henk recalls, "The newspaper reported that they practiced 'bed-

rooming'—making space in the beds from time to time—by putting in what the Dutch call *versterving*. It's a sort of humanistic Dutch word for letting somebody starve. It's an official term that makes active killing of people sound like a treatment.

"When they needed beds for new patients, they would 'clean out' some beds. Make a checklist, and in a week, ten people would die. The records showed that this kind of administrative

Holland "legalizes" euthanasia: "This is a very dark week in our history."

So said André Rouvoet, a member of the Dutch Parliament. He spoke after the Netherlands took another step in its dance with death. Last November, the lower house of the Dutch Parliament passed a bill that "legalizes" doctor-assisted suicide.

"Everybody told me, 'This is common practice in Holland. We're only putting it into legal rules and regulations. ...,'" Rouvoet told international pro-life leaders, including the Christian Medical Association, gathered at The Hague. "But we are legalizing the killing of one human being by another. We will have that in the criminal code."

Still, Rouvoet insists it is not too late for Holland to turn back.

Holland's law will be the first national law to legalize euthanasia, although the practice has been recognized there since 1993 and carried out years before that. The Dutch law even enables children aged 12 to15 to seek euthanasia with parental consent. Those aged 16 and older can decide on their own.

According to the Dutch pro-life organization Cry for Life (Schreeuw om Leven), proponents hope the law will cause more doctors to report their euthanasia cases, something 60 percent fail to do. It also states the patient must make the decision voluntarily. But in recent research, doctors admitted to killing *most* patients *without the patient's request or consent* [see page 11].

"The real reason for the dramatic attack on life and morals in Holland is because of the apathy and secularization of many Christians here," said Dr. Bert P. Dorenbos, president of Cry for Life. "Holland is a warning signal for the world."

The Dutch Senate is expected to approve the bill early this year; the law would take effect soon after.

—*Pamela Pearson Wong*

For more information:

Read CWA's in-depth policy paper: *"Euthanasia: The Myth of Mercy Killing." It traces the roots of the pro-euthanasia movement to Hitler's Germany and shows its growing influence in our country. Call 1-800-323-2200 to request a free copy.*

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President-elect George W. Bush opposes euthanasia measures for the United States.

pressure had started to play a role in the diagnosis of the doctors. They become little lords over life and death."

Absolute Power Corrupts

Once trusted to "do no harm," as stated in the Hippocratic oath, a Dutch medical autocracy now kills with impunity. Euthanasia and assisted suicide, originally promoted by Dutch physicians, have yielded staggering power to physicians while placing them above the law. Now, thousands of wary Dutch citizens have resorted to carrying documents stressing that they do not want euthanasia.

Unlike the impressive dams keeping the sea from flooding the Netherlands, euthanasia regulations have proven to be more of a breach than a barrier. Thousands of patients have drowned in a flood of exceptions and abuses. Last October 30, for example, a Dutch court acquitted a doctor who assisted with suicide for a depressed patient who was not even physically suffering—a clear flouting of the regulations.

The Dutch have now moved to officially legalize euthanasia, just as they have legalized drug use and prostitution, believing that legalization will somehow curb abuses [see page 9].

Oregon Goes Dutch

Like their Dutch counterparts, American suicide activists spread their propaganda with stories of patients suffering unbearable pain. They realize if they frame the debate in these terms, many Americans—especially younger ones—will approve of assisted suicide. However, the tide tends to turn when the public learns the truth about the abuses of assisted suicide and compassionate alternatives of hospice and pain relief.

In Oregon, state bureaucrats have trotted out statistics to bolster public faith in their new assisted-suicide system. The scrubbed-clean reports have offered no trace of the problems one would naturally expect in the nation's first foray into institutionalized suicide.

The law shields the details of assisted suicides from public access. Despite this, some of the truth has gotten out. Stories have surfaced of suicide slipping into suspected homicide. In one instance, a family member suspected of murder had the supposed suicide victim cremated within 24 hours.

In an unguarded moment, an Oregon suicide advocate revealed a botched assisted suicide. The event landed its victim in the emergency room and eventually in a nursing home. Yet this case didn't show up in the annual report.

Out of the Noose

Last November's ballot measure in Maine included a carefully crafted "Death with Dignity" statement. "Should a terminally ill adult who is of sound mind be allowed to ask for and receive a doctor's help to die?" it asked. Thanks to a campaign by pro-life groups, churches and the Christian Medical Association, Maine voters said no.

Nationally, Vice President Al Gore had waffled on assisted suicide, attempting to frame the matter as one between patient and doctor. Last June 15 on MSNBC's Web site, Gore said, "When a family member is in extremis at the very end of life, and there is a lot of pain, **there is no quality of life**, and there are very subtle judgments that have to be made. ... Common sense dictates that ought to be left to the family in consultation with the physician."

In contrast, President-elect George W. Bush went on record opposing assisted suicide and upholding the Pain Relief Promotion Act, which

Whose Choice?

Assisted Death in the Netherlands[1]

Method	With clear patient request		With no clear patient request		Total Assisted Death
	#	%	#	%	#
Physician-Assisted Suicide	271	100%	—	0%	271
Lethal Injection	3,253	77%	949	23%	4,202
Opioid Overdose Intending Death	4,919	19%	20,970	81%	25,889
Withholding/Withdrawing Treatment	5,476	20%	21,904	80%	27,380
TOTAL	13,919	24%	42,874	76%	57,742

DATA 1995

Suicide activists claim that assisted suicide and euthanasia promote autonomy—choosing one's own destiny. Reality shows the opposite.

In a survey that promised anonymity and immunity, Dutch euthanasia practitioners admitted to committing 1,000 involuntary deaths by injection a year. Even so, they represent only a fraction of all medically induced deaths. Statistics published in the Netherlands and reported in the *New England Journal of Medicine* reveal that in Dutch deaths involving medical intervention with the intent to end life (i.e., physician-assisted suicide, lethal injection, opioid overdose and withdrawing or withholding treatment), **an astounding 76 percent did not involve an explicit *patient request for death.***

[1] *P.J. vander Maas, G vander Wal, I. Haverkate, et al. "Euthanasia physician-assisted suicide and other medical practices involving the end of life in the Netherlands 1990-1995," New England Journal of Medicine 355(1996):1699—1705.*

At Westerbork, a former Nazi concentration camp in Holland, are the words "never again." But the Dutch have forgotten the Nazi roots of euthanasia.

passed in the House of Representatives but died in the Senate. That legislation would fund training in pain management and prevent physicians from using federally regulated narcotics in physician-assisted suicides.

"First of all, in principle, I'm against physician-assisted suicide," Bush explained in the Portland *Oregonian*. "And secondly, ... the idea of using a controlled substance to end somebody's life is something I don't agree with."

Shaping a Culture of Life

In pre-war Nazi Germany, physicians collaborated with Hitler in euthanasia initiatives. This paved the way for the Holocaust. Philosophers and physicians helped convince the public that killing the handicapped and mentally ill by euthanasia was actually compassionate.

Dr. J. C. Willke is a euthanasia expert and president of the International Right to Life Federation. He aptly notes in his book, *Assisted Suicide and Euthanasia*, "History can repeat. Today we are living, once again, in the midst of a 'culture of death.'"

As assisted suicide activists take their lethal campaign state by state, will Americans embrace life or slide down the slippery slope toward death? The answer depends largely upon Christians proclaiming the truth and demonstrating compassionate alternatives. Above all, each believer can help meet the deepest need of suffering patients, which is to know the One who makes life worth living. FV

Jonathan Imbody, Senior Policy Analyst in the Washington Bureau of the Christian Medical Association (CMA), recently spent two months researching euthanasia in the Netherlands. The CMA Web site (www.cmdahome.org) offers information and resources on medical ethics issues and helps patients locate Christian doctors.

How You Can Help

Pray that Dutch Christians will actively oppose their country's position on euthanasia.

Praise God that Maine voters overturned a euthanasia measure in their state.

Act Write President-elect Bush to express your support for his stand *against* euthanasia.

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TYNDALE

Abortion's House of Cards

Victims of rape and incest speak out

By Pamela Pearson Wong

They're called the "hard cases": those situations that may cause even "pro-life" people to waffle on their opposition to abortion. A 12-year-old is the victim of incest by her brother. A 16-year-old, the only child of a hard-working single parent, is brutally raped by a stranger. A man overpowers a recent high school graduate on their first date.

Abortion supporters abuse tragic circumstances like these to gain sympathy for abortion-on-demand. When a woman or girl is the victim of sexual abuse, they say abortion is a way of escape. They claim that "forcing her" to give birth in these situations will cause more trauma than she can handle. What could be crueler, they ask, than insisting a girl or woman must bear the child of her rapist or abuser?

Pro-life supporters counter that, while they are tragedies, rape and incest should not be automatic grounds for abortion. A child conceived in abuse is still an innocent bystander who does not deserve to suffer for her father's sins. Further, they say, abortion *harms* rather than helps women.

Manipulating the "Exception"

These arguments for the hard cases are far from new. In fact, they were some of the first when the modern pro-abortion movement began in the United States in the 1960s.

In fact, "rape" was even manipulated into *Roe v. Wade*, the case through which the U.S. Supreme Court attempted to decriminalize abortion. In this case, "Jane Roe" claimed to seek an abortion when she became pregnant in a gang rape—a story Norma McCorvey, the real "Jane Roe," later acknowledged her lawyers invented.

"I think it's safe to say that the entire abortion industry is based on a lie," Miss McCorvey said in *The Washington Times* in 1998.

Further, *Doe v. Bolton*, the companion case to *Roe*, overturned a Georgia law that permitted abortion only in cases of rape or incest. The abortion proponents argued it was unjust to allow abortion only in those cases. Thus, the door wedged open by rape and incest was flung wide to abortion for any reason, at any stage of pregnancy, by any procedure.

Today, the rape and incest clause is the standard for nearly all abortion laws and regulations. Pregnancies under such difficult circumstances need an extra measure of compassion and support. However, it is flawed—at best—to base all abortions on these cases. They are the foundation for abortion's house of cards in the United States.

The Truth Comes Out

Now the pro-life movement has even more support from a leading researcher on abortion's effects on women. He points out the basis for abortion-on-demand in the United States, the "hard cases," was built—surprise!—on falsehoods.

"People are jumping to conclusions about rape and incest pregnancies that are based on fear and

bias," says Dr. David Reardon, biomedical ethicist, researcher and director of the Elliott Institute for Social Sciences Research.

The Elliot Institute recently released research that shows not only is abortion *unwanted* by these victims, it *hinders* rather than helps them to recover. The Institute gathered testimony over a nine-year period from 192 women who became pregnant as a result of rape or incest, as well as from 55 children conceived in these ways.

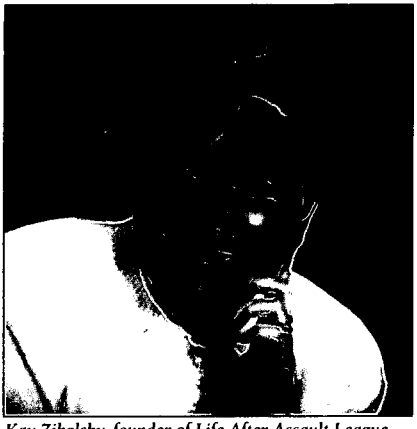
Published in a book, *Victims and Victors* (Acorn Books), which Reardon edited with Julie Makimaa and Amy Sobie, the research reveals:

★ These pregnancies are more common than previously thought.

For years, the pro-life movement has accepted studies that say only one or two pregnancies result from every 1,000 assault rapes. Based on figures from the U.S. Department of Justice, that means only 170 to 340 pregnancies a year, or 1 percent. Many attribute this low number to a combination of factors, such as prior contraceptive use by the women, infertility or sterility of the man or the woman, the trauma of rape, and timing of the woman's cycle.

However, the latest statistics point to a far greater problem. In 1996, research published in the *American Journal of Obstetrics and Gynecology* estimated that as many as 32,000 pregnancies may result from sexual assault each year—with about half occurring in teenagers under age 18.

Kay Zibolsky agrees that the number is much higher than generally thought. As founder of the Life After Assault League, she has counseled



Kay Zibolsky, founder of Life After Assault League, says pregnancy resulting from assault is more common than generally thought.

more than 2,000 victims of rape or incest.

"You cannot have statistics on unreported cases. Most of the women I counsel do not report [the rape or incest]," she says, "[Although] I always urge them to.

"From date rape to drug rape to stranger rape, when there is a pregnancy, families and young women just deal with it. It's a lie ... of the devil that few babies are conceived this way. Even if it is just one, it's too many that are aborted."

★ Most of these women do not choose abortion.

Abortion proponents would have us believe victims of sexual assault are rushing into abortion clinics. However, despite the tragic, abusive and often violent ways their children were conceived, most of these women chose to give them life [see sidebar, page 17]. They usually gave in to abortion only through pressure from the abuser and/or other family members.

The Elliott Institute found 73 percent of rape victims chose to give birth to their babies. In 1981, Dr.

Hear What They Say

The Elliott Institute gathered data from 192* women who had become pregnant through incidents of rape (164) or incest (28).

Women who had abortions (56):

★ 44 (88 percent) regretted the decision and said it was the wrong one.

★ 19 of the 44 rape victims said they had been pressured by others to abort.

★ 6 didn't provide information on their feelings about the abortion.

★ 1 rape victim reported no regrets.

★ 1 incest victim said abortion was correct for her.

"Of those who expressed an opinion, over 90 percent stated they would discourage other sexual assault victims from having an abortion." Victims and Victors, *page 21.*

Women who carried to term (133):

★ 82 women expressed an explicit opinion about abortion; 77 (94 percent) of them "rejected abortion as a good option for pregnancies resulting from sexual assault."

★ All 14 incest victims were happy they carried to term.

★ Not one of these women expressed regret over giving birth to their children.

"Over 80 percent explicitly expressed happiness that they had chosen to give birth to their child." Victims and Victors, *page 22.*

* *Three pregnancies ended in miscarriage.*

Sandra Mahkorn conducted the only previous major research of pregnant rape victims. Similarly, she found 75 to 85 percent of rape victims chose life.

★ Women who chose abortion wish they had not.

The research shows that nearly all the women who ended the pregnancy with abortion regretted that decision. Conversely, those who gave birth to their child were *all* happy they did. "I thank God for the strength He gave me to go through the bad times and for all the joy in the good times," said Mary Murray, who gave birth to a child conceived in rape. "I will never regret that I chose to give life to my daughter."

Likewise, children conceived through rape and incest praise their mothers for giving them life.

"[Christ] loves all of His children, even those conceived in the worst of circumstances. ...," says Julie Makimaa, whose birth resulted from her mother's rape, in *Victims and Victors*. "After all, it does not matter how we began in life. What matters is what we will do with our lives."

★ Abortion increases the trauma of sexual assault or abuse.

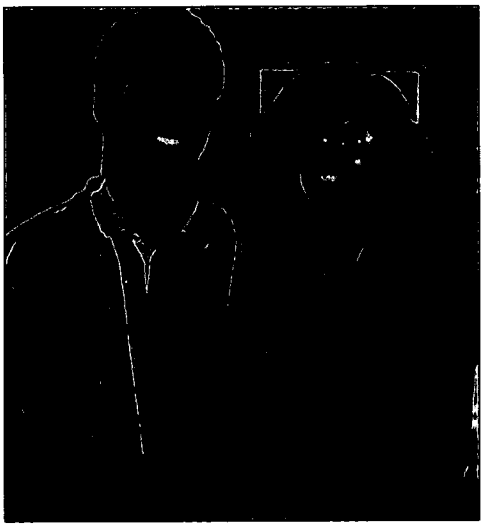
"Rather than easing the psychological burdens of the sexual assault victim, abortion adds to them," reports *Victims and Victors*.

"The evidence shows abortion increases traumatization and risk of suicide," says Reardon, an expert on post-abortion issues. "But childbirth

reduces these risks."

The book reports that "even researchers who support abortion-on-demand have confirmed that sexual assault is a 'predictor' of post-abortion trauma." Indeed, the very experience of abortion, physically and emotionally, is similar to rape. However, the woman feels more responsible for the abortion, even if she agrees to it under pressure.

Pregnant incest victims are often young girls, frequently unaware they are pregnant. This especially sets them up for "retraumatization," Reardon says. Years later, they realize what happened and are vulnerable to more psychological problems.



When Sheryle Bowers looks at her son, Christopher, age 21, she knows that God does bring good out of tragedy. Sheryle married a pastor, and Chris now has two sisters.

★ Giving birth is a critical step in the victim's recovery and healing.

Sheryle Bowers didn't take part in research for *Victims and Victors*, but her testimony tells the same story. She was just turning 12, and her family was in turmoil. Sheryle's mother, Mary, was doing her best to care for her five children after her alcoholic husband left them. Then a suitor entered her life. She was attracted to him and appreciated the attention he gave her children. But unknown to Mary, the 29-year-old man, whom she would eventually marry, began a sexual relationship with Sheryle.

"He told me we needed to be very careful not to tell anyone," Sheryle recalls, "or we would get in big trouble." Sheryle's childish desire to protect her mother from further pain caused her to keep the terrible secret.

Undetected, the abuser continued the incest for years, even through his marriage and divorce from Sheryle's mother. Desperately wanting to escape, Sheryle tried again to end it when she was 18. In return, he caused her to become pregnant, hoping to force her to marry and go away with him.

The pregnancy finally revealed the awful truth, and the abuser left. Sheryle's family rallied around her. Her mother, in Sheryle's words, "scooped me up." Though dealing with shame, guilt and embarrassment, Sheryle's Christian beliefs kept her from abortion, and she gave birth to Christopher, who is now 21.

"I cried for two days in the hospital," she recalls. "It's not your ideal way to have a baby. But does that mean, for our convenience, we take his life?"

Overcoming the abuse took years, but Sheryle attributes her healing to God, and she credits Christopher's

birth as the beginning. "Finally God fulfilled a promise He had given me: 'The LORD has taken away your judgments, He has cast out your enemy. The King of Israel, the LORD, is in your midst; You shall see disaster no more' (Zephaniah 3:15).

"My son was really a gift from God because he created a way of escape," Sheryle says. "The natural thing is to stay in the dark, to cover [the incest] up. Abortion is another way [for abuse] to stay hidden."

How Life Heals

Not only does Kay Zibolsky's work as a counselor support the research in *Victims and Victors*; so does her personal experience. The 16-year-old daughter of a single mother, Kay was raped on a cold, dark night by a stranger she couldn't even see. She kept the rape a secret, even when she learned she was pregnant.

"[My mother] helped me through the rape, without even knowing it was a rape, accepting my pregnancy and helping all she could," writes Kay in *Healing Hidden Hurts*, the book that tells her story. The U.S. Supreme Court hadn't yet ruled on abortion. But even if it had, "I might have questioned whether the violent cruel act of rape justified a violent cruel act of destruction of an innocent baby.

"I chose to think of the part [of my baby] that was of me, not of him," Kay says. She gave birth to a daughter and named her Robin. Working alternate shifts, Kay and her mother loved and reared Robin for 18 months. Then Kay's mother became ill and was hospitalized. Kay struggled to earn a living while caring for Robin. Finally, she realized she couldn't manage alone. She found a couple to adopt Robin and, with broken heart, let her go.

Kay married and had other children. By God's grace, she was able to recover from the rape—even though she didn't yet have a personal relationship with Christ. In 1979, Kay received Christ. Eventually, she was re-united with Robin and became involved in pro-life ministry. She has used her own experience to counsel literally thousands of women who are the victims of rape and incest, including many who have become pregnant.

"I tell them it is not a sin to be raped. It is a sin to rape. That puts the blame where it is supposed to be," Kay says. "I say that it is a sin to kill the child who was conceived in rape [or incest]. If you have an abortion, you will eventually have to deal with that sin."

Listen to the Women

What is the answer to the pain of pregnancies conceived in brutality or abuse? We would love to move back the clock before *Roe v. Wade* turned law and justice on its head. As the last 28 years have shown, that will be a slow process. But we can begin by *listening to the women.*

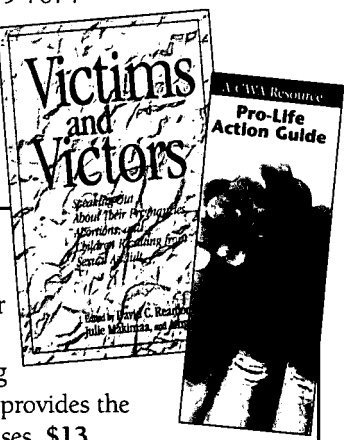
"I, having lived through rape and also having raised a child 'conceived in rape,' feel personally assaulted and

For more information:

☆ **Elliott Institute**
P.O. Box 7348
Springfield, IL 62791-7348
217-525-8202
www.afterabortion.com

☆ **Life After Assault League**
Kay Ziblosky
1336 W. Lindbergh
Appleton, WI 54914
920-739-4489

☆ **The Living Stone House of Worship**
Pastor Richard and Sheryle Bowers
8291 Old Montgomery Road
Columbia, MD 21045
410-799-7674



CWA has the resources you need to make your voice heard in the battle against abortion!!

Read *Victims and Victors* (Acorn Books). In their own words, women who are victims of rape or incest tell of the heartache of abortion. Others tell what giving birth has meant to them–and to their child. This book provides the truth you need to refute abortion–especially in these cases. **$13.**

CWA's *Pro-Life Action Guide* contains up-to-the-minute articles detailing abortion's history, types, risks—and more. The *Guide* contains the information you need to expose pro-abortion lies. In addition, you'll receive *How to Lobby From Your Home*, a practical brochure on how to influence your legislators. **$5.**

To order, call 1-800-323-2200 today, or use the form on page 34. (This is a purchase, not a donation, and is not tax-deductible.) Purchasing through *Family Voice* helps support the work of CWA.

insulted every time I hear that abortion should be legal because of rape and incest," says Kathleen DeZeeuw in *Victims and Victors*. "I feel we're being used to further the abortion issue, even though we've not been asked to tell *our side* of the story."

We can begin by educating the public and legislators on what the women themselves—the victims of rape and incest—say about abortion.

"Get *Victims and Victors* to legislators. Ask them to call for congressional hearings," says Dr. Reardon. "Urge them not to provide money for abortions resulting from rape or incest until they hear what the women say."

It's time for this house of cards to come tumbling down.

How You Can Help

Pray If you know a victim of sexual abuse or assault, pray for her recovery.

Praise God for women who, despite difficulties, choose life.

Act Send this article and *Victims and Victors* to your state and national legislators.

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Mary Lou Retton

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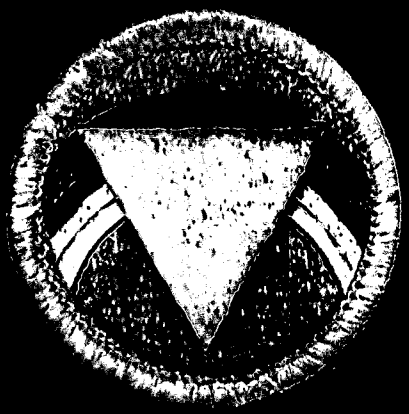
So Much For "Tolerance"

By Catherina Hurlburt



No. The Boy Scouts don't have a new merit badge for "gay pride" and "tolerance." But if militant homosexual-rights activists have their way, the Scouts will either accept homosexuals in leadership—or disappear from American culture. The latest action (as *Family Voice* went to press) is the Los Angeles City Council's unanimous decision to cut all ties with the Scouts. And Scout detractors continue their campaign

Enjoying God's creation as they hike is part of the Boy Scout program.

Los Angeles, Democratic National Convention, August 15, 2000: The air is thick with cheering. Eagle Scouts with an adult leader take the stage. Somewhere amid the crowd, a faint but distinctive booing rises above the din. Delegates jeer the boys and hold a sign that reads, "We Support Gay Boy Scouts." Fortunately, the boys don't hear the heckling. But their leader does, and so does the rest of America when the news reaches the papers.

The Battle Begins

That faint booing represents the meager opposition to the Boy Scouts' oath "to do my duty to God and my country and to obey the Scout Law; to help other people at all times; to keep myself physically strong, mentally awake, and *morally straight* [emphasis added]." The Boy Scouts of America (BSA) has held this oath since its inception in 1910. It is nothing new. What's new is the campaign against the Scouts, which culminated in the U.S. Supreme Court's decision last summer. It ruled BSA has the right to set its own standards for leadership.

Gay-rights activists want their way in every venue possible, regardless of who—including young boys—gets in their way. They hoped to advance their cause through the courts. Former Scout leader James Dale was supposed to be their man. When the BSA denied Dale an assistant scoutmaster position because of his declared homosexuality, he sued. The New Jersey Supreme Court ruled in his favor. The next stop was the U.S. Supreme Court. CWA filed an amicus brief in support of BSA. The Court narrowly ruled in BSA's favor with a 5-4 vote.

Some media claimed the public and corporate America widely disagreed with the decision. Actually, opposition to the Scouts is minimal, but vocal. "When you boo the policy," said the Los Angeles BSA council spokesman, "you're booing the kids."

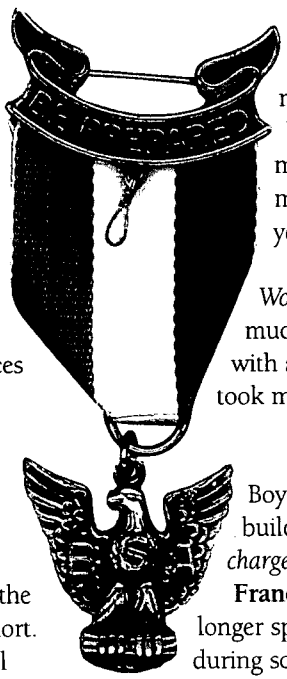
The battle had only just begun.

On to Plan B

Failing to get their way through litigation, gay-rights advocates decided to go after BSA's wallet. First, activists are using cities' anti-discrimination policies to discriminate against the Scouts by forbidding use of public property. Second, they are targeting corporations [see sidebar, page 26] and charities to withhold donations. Third, they are urging local troops to adopt

anti-discrimination policies and telling leaders and members to quit the Scouts. The Piedmont Council, a California troop, is the only one that has rebelled.

Scouting for All (SFA), a group that wants to force the Scouts to accept homosexuality, is behind the mayhem. Scott Cozza and his son, Steven, an Eagle Scout, started SFA. It has received support from Parents and Friends of Lesbians and Gays (PFLAG), the Gay, Lesbian, Straight Education Network (GLSEN) and the American Civil Liberties Union (ACLU).



Last August, SFA staged protests at BSA offices nationwide. Although 36 protests were planned, at least six offices witnessed no protesters. Few had more than a handful. In Dallas, a search for a homosexual youth to join the demonstration came up short. But they did find a colorful leader for the Toledo, Ohio, protest.

John Hemstreet led the protest in front of the Erie Shores Council. A convicted child molester and former Scout leader, he pled guilty in 1992 to sexual assault on a 10-year-old boy. Though admitting what he did was "horrendous," he believes "an organization, like the Scouts, needs to be concerned with who [individuals] are as a person, not what they might be."

Protests moved from the streets to school boards and city councils.

News Not "Fit to Print"

On August 29, *The New York Times* claimed, "Chicago, San Francisco and San Jose, California, have told local Scout troops that they can no longer use parks, schools and other municipal sites. Companies like Chase Manhattan Bank and Textron Inc. have withdrawn hundreds of thousands of dollars in support to local and national scouting groups nationwide. Dozens of United Ways ... have cut off money amounting to millions of dollars each year."

However, a *WorldNetDaily* reporter proved much of the *Times* article false with a few phone calls. But it took more than a week for the *Times* to run a correction: "**Chicago** no longer lets the Boy Scouts use parks, city buildings and schools *without charge* [emphasis added]." **San Francisco** public schools no longer sponsor recruitment drives during school hours, but the Scouts may still use public property. These decisions occurred *before* the Court's ruling. The **San Jose** elementary school district does not allow recruiting during school hours because of tight schedules, not the Court's decision.

In **Framingham, Massachusetts,** school superintendent Mark Smith decided the local troop may no longer distribute information or recruit members on school grounds. "My hope would be that the local or national chapter would change [its] policy," said Smith in *The MetroWest*

Daily News.

In **San Diego, California**, the ACLU is threatening a lawsuit to prevent the Scouts from renewing its Balboa Park lease. The current lease allows the Desert Pacific Council to pay $1 a year. At the same time, the ACLU is defending the North American Man-Boy Love Association (NAMBLA) in a lawsuit brought by parents of a 10-year-old boy who was sexually assaulted and brutally murdered by two men—one a NAMBLA member.

In **New York City**, activists are using the city's anti-discrimination policy to end association with the Scouts. The New York City school system also pulled support.

An effort to ban a Cub Scout troop in **Cape St. Claire, Maryland**, failed soundly. Several hundred supporters attended a press conference backing the Scouts and heard nationally known conservatives, such as Alan Keyes.

Florida and **Minnesota** school districts have also restricted Scout activities. Cities in **Arizona, Connecticut** and **Florida** have also restricted support for and land use by Scout troops.

United Way's Divided Ways

United Way spokesman Tony DeCristofaro told *Human Events* (September 22, 2000) that "since the Supreme Court decision, three [United Way chapters] have stopped grants to the Boy Scouts," including Providence, Rhode Island; Fall River, Massachusetts; and Ithaca, New York. The United Way of Monroe County, Indiana, also ended support. United Way's 1,400 individual chapters are free to decide whom to fund.

AP PHOTO/TIM SHARP

A small group of anti-Boy Scout protesters is gaining media attention.

In the past decade, confirmed Cristofaro, eight others have dropped funding due to the Scouts' oath. Gay-rights groups continue to target United Way chapters to eliminate Scout funding.

CWA-Washington State Director Anne Ball helped persuade United Way of King County not to withdraw BSA funding. "Too many Americans still believe in what [the Scouts] stand for," said Mrs. Ball. "We encourage individuals to bypass the United Way and give directly to the Boy Scouts."

Why the Oath is Important

"If gay-rights activists succeed in changing the Scout oath, it will signal the death knell of the Boy Scouts of America as we know it," said Stan Jarvis, a long-time Scout leader. Stan began scouting at age 11 and has registered for more than 30 years. Since age 18, he's been involved in various levels of leadership.

For or Against the Scouts?

- **Chase Manhattan Bank:** reportedly withdrew funds, but announced it "will continue to fund Scout programs. We do not want to withdraw funding from those programs because doing so would be harmful to thousands of children."
- **Bank of America:** briefly banned funding in 1992 but has no current ban.
- **Wells Fargo:** banned donations from 1992 to 1998; currently allows local bank presidents to decide.
- **First Interstate Bank:** never banned donations.
- **Textron, Inc.:** first donated in 1999, when it gave $3,000 to a Rhode Island council; permits subsidiary companies to donate individually.
- **AMICA (insurance holding company):** continues to support the Scouts.
- **First Union bank:** continues support. "First Union believes that the Boy Scouts offers programs to America's youth that are meaningful and positive."
- **Knight-Ridder (news agency):** followed United Way of Santa Clara County's decision not to donate to BSA; its 32 individual newspapers may decide independently.
- **Levi Strauss & Company:** stopped supporting the Scouts in 1992 because of its policy on homosexuality.
- **Medtronic, Inc. (medical devices manufacturer):** excluded BSA from share of United Way contribution.

Religious groups, notably the Mormons, Roman Catholics and Protestants, represent nearly 50 percent of the Boy Scouts' support. Even denominations that support special rights for homosexuals have surprisingly chosen to respect BSA's policy. If the oath were sabotaged, BSA would lose much of this base.

"Parents choose BSA for their boys today because they need support and unchanging values they can count on," said Stan. He said he learned to respect diversity in the Scouts, where he met Jewish, Catholic and Protestant mentors.

That's an important point. Before they founded the gay-rights group Scouting for All, the Cozzas were deeply involved with the Scouts. Clearly, BSA didn't indoctrinate them with hatred toward homosexuals. Its purpose is to develop responsible young men, not engage in a political battle.

"The boys in my troops have helped clean up a canyon suffering from trashed neglect, fed the homeless outdoors in a winter storm, built and maintained trails and planted trees in parks, helped an orphanage, and shoveled snow for the elderly," said Stan. "The Scout oath's admonishment to 'help other people at all times' embodies service to others over self-gratification."

Eagle Scout Jacob Riker took "helping others" to another level on May 21, 1998. Little did he know that would be the day everything he learned in scouting would save fellow students' lives. When 15-year-old Kip Kinkel brandished a gun at Thurston High School in Springfield, Oregon,

Jacob tackled him, getting shot in the scuffle. His younger brother and three other students helped Jacob subdue Kinkel. "Scouting prepared me," Jacob told *Family Voice*. "It taught me skills in common sense and good judgment."

Protecting the Boys

BSA has clear-cut safety guidelines, including the presence of two adult leaders at all times. It also has devised rules to prevent molestation. But BSA national spokesman Gregg Shields emphasizes its policy against homosexuals in leadership and its guidelines for protecting against molestation are two separate issues.

"We do remove leaders on suspicion," Shields said. "We don't need a criminal conviction to remove someone." If the policy changed, preventive measures could be hindered because of fear of accusations of "hate speech."

"Scouting ... taught me skills in common sense and good judgment" **— Jacob Riker, who apprehended gunman Kip Kinkel**

Support the Scouts

While support for BSA remains strong, its detractors are gaining ground. The controversy has forced discussion between parents and children about the oath. Gay-rights advocates have hijacked the situation to teach youth to speak their language. The more youth buy in to their rhetoric, the greater the threat to BSA's future.

Citizens and communities can take actions to help the Scouts, Shields said. He recommended they:

★ **Volunteer.** "That's where scouting takes place," said Shields. This includes time-consuming paperwork that takes away from scoutmasters' time with children. Volunteers can help in many ways.

★ **Start a troop.** Churches, community and fraternal groups can charter troops. It's a natural extension of a church's youth ministry, noted Shields. These groups can provide much needed land and facilities to local troops.

No other group offers the set of values and programs the Boy Scouts provide. If gay-rights activists have their way, they will destroy a group voluntarily chosen by 6.2 million members. There's nothing "tolerant" about that.

For information:
Boy Scouts of America
1325 W. Walnut Hill Lane
Irving, TX 75015
972-580-2000
www.bsa.scouting.org

How You Can Help

Pray young men today would have hearts of conviction to stand against the tide of immorality and become men of character.

Praise for the continuing widespread support for the Scouts.

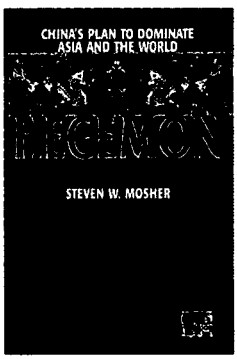
Act Volunteer for a local Scout troop and encourage your church to sponsor a troop.

PHOTO PROVIDED BY STEVEN MOSHER

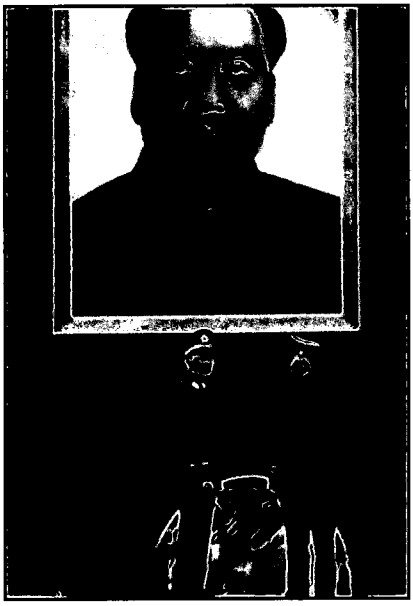
Steven Mosher (fifth from left) with Communist Party officials in Shunde county (Guangdong province) in 1980.

Who will be the LAST ONE STANDING?

In 1979, Steven W. Mosher became the first American social scientist to conduct research in China. He thought he would find the communists had done good things for the people. Instead, he was unpleasantly surprised, and the truth he brought back has forever colored the way we view the People's Republic of China (PRC).



In an interview with Family Voice *senior writer Catherina Hurlburt, Mr. Mosher discusses this rising superpower and his newest book,* Hegemon: China's Plan to Dominate Asia and the World *(Encounter Books). To purchase Hegemon, call 1-800-323-2200 or use the form on page 34.*



REUTERS

Policemen stand guard in front of image of Mao, who brought communism to China.

FV: What were your initial impressions of China?

Mosher: In 1979, the people were worse off than they had been in 1949 when the Chinese Communist Party came to power. They're better off [today] because the Chinese government has turned to the West. But it's not producing any political benefits.

The citizens were kind, gregarious and friendly, but the government regarded me with a great deal of suspicion.

What hostility did you experience?

I had been given permission to go on a trip to the interior of China. I travelled about 500 miles when I was stopped by the police. They put me under house arrest [and] said they would hold me until I wrote a confession. "Let me call the U.S. embassy," I said. They said, "No." So there I was stranded in the belly of the beast. I realized for the first time how precious the liberties are that so many Americans take for granted.

"Tell me what you want me to write," I said. The police official who had been bullying me in Chinese smiled widely. He dictated the confession, and I wrote the opposite ... in English.

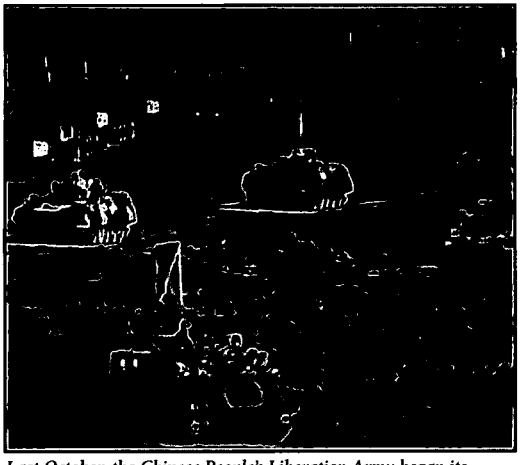
Why did you choose the term "hegemon" to describe China?

"Hegemon" means a single, all-powerful country. China is rising. It will soon be a military and economic superpower. But it doesn't want to merely be a superpower. It wants to dominate Asia and wider parts of the world.

Does the current U.S. appeasement policy toward China pose the same dangers as Great Britain's appeasement policy toward Hitler?

Oh, absolutely. Chamberlain, before World War II, continued to make concessions toward Hitler, thinking giving him more territory would satisfy his ambitions. It merely whet his appetite.

We're making the same mistake now. Clinton appeased China when he declared that Taiwan was a part of the PRC, fought for "normal trade relations" without conditions, consistently ignored the advice of his security specialists about China's growing threat, and sold supercomputers which China's military use to test and design nuclear weapons. We are simply encouraging China to be more demanding and more aggressive in the future. They view us as a power in decline.



AP Photo/Xinhua, Wang Jianmin

Last October, the Chinese People's Liberation Army began its largest military training since 1964.

What makes them think this?

In Asia, they've seen our military presence decline dramatically since the 1980s. They think the United States will be out of Asia in 2020. We've got to change this misperception by a targeted, modest increase in our military forces.

How likely is it that we will go to war?

The Hong Kong press reported Chinese President Jiang Zemin told his military to plan for war with the United States on or before 2008—a limited war in Asia, perhaps over Taiwan. [Last summer], the PRC minister of defense Chi Haotian said, "War with the United States is inevitable." The Chinese press shows the government believes war with the United States is inevitable sometime over the next few years. They believe they can win. They believe that at the end of the day only one country will be left standing: a Hegemon. They intend for that hegemon to be China.

As long as China is a one-party dictatorship that doesn't respect human rights or international agreements, it's dangerous to pretend we can be "strategic partners." The only thing "strategic" about our relationship with China is its missiles pointed at our cities.

In the late 1980s, many hoped the democracy activists would elicit significant change. Why has that not happened?

Young people at the time of the Tiananmen Square massacre were rejecting communism, looking to the West, and holding signs with quotations from Lincoln, Jefferson and Washington. The Chinese Communist Party put down that rebellion by deadly force and tightened police controls.

[The Communist Party] also initiated a patriotic education system where from kindergarten through college, every day, Chinese kids [hear] about the glories of China's long imperial history. They're told about China's "long night" of national humiliation. They're told all of China's troubles arose because the Western powers invaded China and made it into a semi-colony. The communists have raised up a generation of young ultranationalists—who want to recover the glories of China's lost empire.

Will trade help improve human rights?

We believe political and economic freedom go hand-in-hand because that's our history. It hasn't worked that way in Asia. There, you have free-market economies in many countries

AP Photo/Chien-min Chung

In its biggest military show in 35 years and a new defense policy paper, Beijing has made clear it views the United States as China's potential enemy No.1.

that have been and remain authoritarian. In China, it may take a long time for economic freedom to produce political change. We don't have a long time. China is going to be a military superpower in the next few years.

The ruling elite, of course, resents our suggestions to improve their human-rights situation. When we criticize, the Chinese people secretly applaud and hope we will continue to pressure China.

What fuels the Chinese government's animosity toward religion?

It fears Christians. After the fall of communism in Central and Eastern Europe, Chinese communists set up commissions to study what happened. They saw the role that Christians played. Dissidents used these groups to spread the word about protests and organize other activities against the state. Beginning in the early '90s, the Chinese government has engaged in severe persecution of the underground Church movement. The Chinese government views any group that has a national network of supporters as a threat.

What impact will China's one-child policy have on its future?

This is going to cause all sorts of social pathologies over time. One is the "little emperor" syndrome—the spoiled only-children, mostly boys because so many little girls have been killed by sex-selective abortion, female infanticide or abandonment. Parents spoil their little boys because they know they will only have one child. [The government has] pruned away all the branches from the family tree.

Twenty-five million young men will not be able to find brides. There's already increased prostitution and the buying and selling of women who have been bribed or kidnapped from poor areas continues. There's cross-border trafficking in girls sold as brides or into sexual slavery. There are also growing rates of homosexuality and crime.

These young men will also make excellent "cannon fodder," because they will not have families. The government will be tempted to take large numbers of men off the streets, enlisting them in the army.

If you could design a new policy for U.S.-Sino relations, what would be the foundation of your plan?

I would abandon the notion that our foreign policy should revolve around China. We should, first of all, have good relations with our allies. Then we can insist China play by the rules internationally and at home. *Human rights are universal standards*

that come from the fundamental dignity of man as a creature of God. We should encourage human rights, expand broadcasting through Radio-Free Asia, and support dissident groups. We should also strengthen our own defenses: a missile defense system, closer ties with allies in Asia, and a modest military buildup to correct the misperception that we're a power in decline.

This would go a long way toward convincing the Chinese government that its interests lie not in challenging the United States and its allies, but in working with us toward the goal of peaceful economic development. We have to buy time for the Chinese people to democratize China.

At CWA's 2000 Convention, Lady Thatcher, Great Britain's former prime minister, said China will not give up communism voluntarily. Why should Americans be concerned?

Our own national security depends on the ability of the Chinese people to wrest control of their government and to install democratic governance. We need to promote human rights so democracy will have a chance to flourish. It is a pre-condition for peaceful relations between China and the United States. A dictatorial China will attempt to solve differences through military force.

China has to overcome its dark totalitarian past. We have to help the

Regardless of the Consequences

A Chinese women receives a "poison shot" to force an abortion of her child.

In 1958, Mao ordered children to kill birds in China because they ate too much grain. The birds died, but the bumper crop of bugs caused far greater damage than the birds would have. This story reflects a penchant for "solutions," regardless of consequences, that we also see in China's one-child policy, which aimed to limit population growth. In *A Mother's Ordeal* (Harcourt Brace & Company), Steven Mosher illustrates the one-child policy's deception and brutality.

In 1979, China began opening to the West. Deng Xiaoping dialogued with the United Nations (U.N.) and International Planned Parenthood Federation (IPPF). "The Chinese government had to be convinced of the need for population control," says Mosher. The policy contradicts traditional Chinese respect for family, but it was a convenient excuse for the Communist leaders who "began blaming the people for China's poverty."

We should hold the U.N. and IPPF accountable "for encouraging this one-party dictatorship, which had a history for brutalizing its people, to embark upon a draconian population-control program," Mosher charges.

Mosher was doing doctoral research in rural China as population

Chinese people do that, for the sake of our own national security and that of other democratic countries. [Our Asian allies] are very concerned about China's growing military power and are looking to us to be a counterweight. They don't want to offend China by speaking out publicly. They are hoping we will rise to the occasion.

Steven Mosher is the president of Population Research Institute, dedicated to presenting the truth about population issues. (Population Research Institute, P.O. Box 1559, Front Royal, Virginia 22630; www.pop.org; E-mail: pri@pop.org; Phone: 540-622-5240)

How You Can Help

Pray for the persecuted Christians, democracy dissidents, and for the end to China's brutal one-child policy.

Praise God for the Christians in China-whose faith increases daily as they spread the Gospel.

Act Urge your representative and senators to continue training the spotlight on China's human rights abuses.

control began. The "technical policy on birth control" mandated birth control after the birth of a woman's first child, abortion for women who became pregnant without permission, and sterilization for couples with two children. Mosher witnessed the one-child policy in action. He accompanied coerced women into clinics for abortions or sterilization. He saw others arrested and subjected to "mind-bending psychological torture" to convince them to abort.

In *A Mother's Ordeal*, Mosher skillfully tells the true story of one woman and China's one-child policy. A nurse, Chi An performed abortions and sterilization and inserted abortifacient birth control devices. Later she became a population control agent. The atrocities repulsed her, such as late abortions performed by injecting formaldehyde into a baby's skull during delivery. She regretted her involvement, but after 20 years under communism, Chi An felt she had no choice.

In 1986, while with her student-husband in America, Chi An became pregnant. A second child would mean severe fines, social stigma, loss of status and jobs. But she refused to abort her baby. An incredulous, judge rejected her plea for asylum. Thanks to Mosher's efforts, which stirred an American outcry, Chi An and her husband were allowed to remain in the United States with their two children.

When Mosher left China, he became the first to expose the one-child policy. For that, China declared him *persona non grata*, and Stanford University refused to read his doctoral dissertation. Through the Population Research Institute, Mosher continues to crusade against the one-child policy and population control. "People cause prosperity; they don't cause problems," he says.

—*Rebecca L. Riggs*

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Assisted Suicide & Euthanasia		$11.00	
Hegemon		$25.00	
The Mark		$16.00	
Victims and Victors		$13.00	
Pro-Life Action Guide		$5.00	
		Subtotal:	
		My tax-deductible gift to CWA:	
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BLI Forum
Women and Election 2000: Their vote was crucial

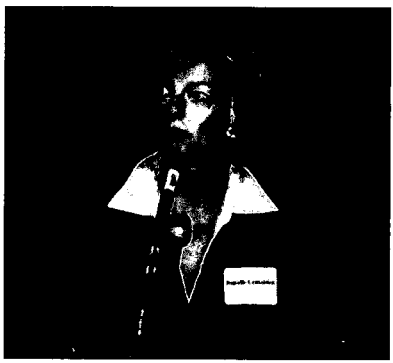
Policy makers, staff and media attended the Beverly LaHaye Institute's second Veritas *Forum on Capitol Hill.*

Capitol Hill staffer Greg Van Tatenhove introduced speakers.

The Beverly LaHaye Institute (BLI) held its second annual *Veritas* Policy Forum, "Women and Election 2000," on October 18 at the U.S. Capitol. Attorney Greg Van Tatenhove, chief of staff for Rep. Ron Lewis (R-Kentucky), introduced speakers Betty Aukerman, Jana Novak and Danielle Crittenden.

Crittenden is author of *What Our Mothers Didn't Tell Us: Why Happiness Eludes the Modern Women.* So fierce was the competition for women's vote that she likened it to "a contest between two suitors competing for the same woman's hand in marriage." Further, Election 2000 showed women constituted the swing voters that decided this strikingly close election.

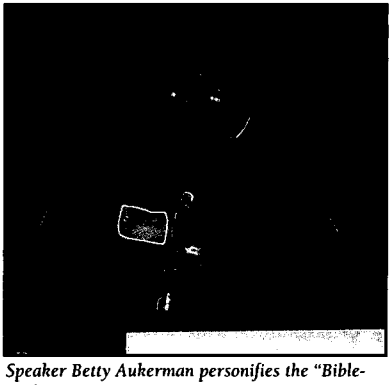
"The election results substantiated the BLI-sponsored Wirthlin Worldwide poll—that Bible-Study Moms would be a pivotal swing vote in the



Danielle Crittenden is a respected and author commentator on women's issues.

election," said Dr. Janice Shaw Crouse, BLI's senior fellow. "These evangelical married mothers were predominantly for Gov. Bush, and Florida was a stronghold for the Bible-Study Mom vote. Without their strong, unwavering support, this election might not have been so close."

At the BLI forum, speaker Betty Aukerman personified the "Bible-Study Mom." She is a married mother of nine, a born-again Christian and strongly pro-life. For her, the primary issue was the role of government in



Speaker Betty Aukerman personifies the "Bible-study Mom."

our lives.

"A government that seeks to become greater than the people represented fails to become a government of the people," she stated.

Crittenden talked about how differences among women influence how they vote. These differences arise from various understandings of a woman's duty to her family.

"Married women's interests are intertwined with the family and children," she said. "[They] tend to vote for candidates who'll protect those interests." In contrast, women who have "tenuous and insecure"

Author Jana Novak presented the Generation-X perspective.

relationships with men (i.e., single mothers on welfare, working mothers receiving child-care subsidies, divorced women without alimony, and widowed and single elderly women depending on Social Security and Medicare) tend to vote for candidates who favor government programs.

Jana Novak viewed women's issues from a Generation-X perspective. She co-authored with her father, Michael Novak, the highly praised and widely reviewed book *Tell Me Why*: A Daughter Questions Her Father About God and Morals.

Novak's generation is concerned about morality. "While we don't expect leaders to be perfect, we expect them to be role models," she said, and Dr. Crouse agrees.

"Most women are tired of 'reproductive rights'–such as abortion and sexual orientation–being pushed as 'women's issues,' "she said. "They are deeply concerned about America's moral decline, about the violence on America's streets, and the decline of standards in the public schools. They voted for George W. Bush believing he will address those issues." FV

—Tanya L. Green

CWA @ Work . . .
In The States

Rachel Anglin (left) presents a framed copy of the Ten Commandments to Pat Carnathan, legal aide to Senator Melissa Hart.

Ten Commandments Crusade

CWA of **Pennsylvania** joined State Director Brenda Anglin on a trip to their capitol on a "Ten Commandments Crusade." Brenda and local Prayer/Action Leaders presented pro-family and pro-life legislators with a framed copy of the Ten Commandments to say thank you for their efforts.

Encourage a Legislator

1 Timothy 2:1-4 says, *"Therefore I exhort first of all that supplications, prayers, intercessions, and giving of thanks be made for all men, for kings and all who are in authority, that we may lead a quiet and peaceable life in all godliness and reverence. For this is good and acceptable in the sight of God our Savior, who desires all men to be saved and to come to the knowledge of the truth."*

Prayer for our legislators is vital to CWA's mission to protect and promote Biblical values. That's why several of CWA's State and Area Directors have implemented the "Encourage a Legislator" program.

Iowa State Director Kim Gordon says, "This project is a great way for sharing God's love, activating God's power and getting Christians involved with their local government." Christian legislators have said that after receiving the encouraging notes, Scriptures and prayer from their Adopt-a-Legislator volunteer, they felt a relief in their difficulties and experienced their best year.

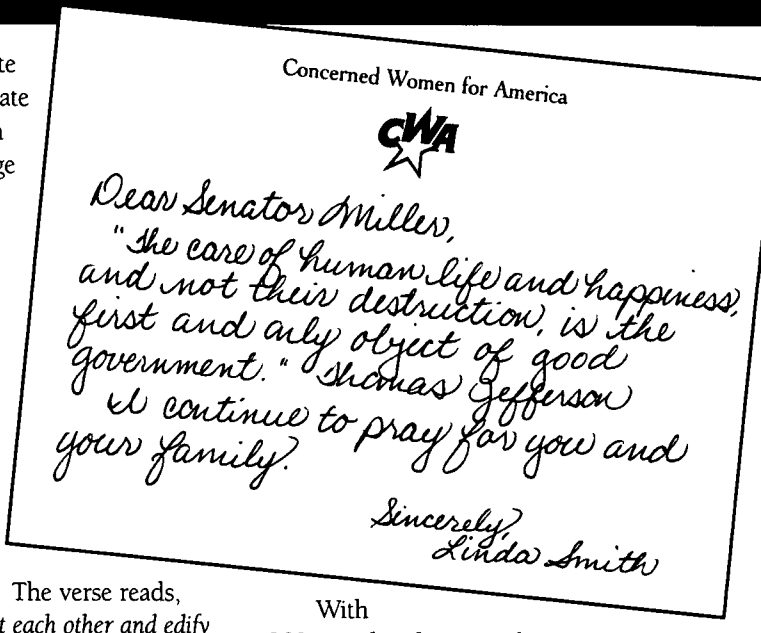
Colorado State Director Vanita Warren believes "prayer is crucial to revival and the restoration of our nation." She is "excited to see what God is going to do in the hearts and

minds of our state legislators and state officials" through CWA's "Encourage a Legislator" program in the upcoming legislative session.

Kansas State Director Judy Smith invites CWA members in her state to put 1 Thessalonians 5:11 into action. The verse reads, *"Therefore comfort each other and edify one another, just as you also are doing."* Those who participate in this program send their adopted legislators handwritten notes with Scripture verses, expressions of appreciation for service in the legislature and quotes from our Founders.

South Dakota State Director Linda Schauer has prepared a short biography on each legislator, including a photo. She gives this information to each volunteer who agrees to encourage a legislator with daily prayer and weekly encouraging notes with Scripture verses or quotes from our Founding Fathers.

During South Dakota's last legislative session, many legislators sent thank-you notes to their "encourager." One representative carried the notes he received in his suit pocket during the session. During the debate on the state's Ten Commandments bill, another legislator photocopied one of the quotes he had received and placed it on the desk of each representative.


Concerned Women for America

CWA

Dear Senator Miller,

"the care of human life and happiness, and not their destruction, is the first and only object of good government." Thomas Jefferson

I continue to pray for you and your family.

Sincerely,
Linda Smith

With 181 state legislators in their state, Barbara Salisbury, Area Director in **Texas-Northeast,** is working with State Director Becky Farrar and Area Director in **Texas-Southeast** Pat Hanson to ensure that their legislators are part of the program. These Texas leaders are also planning a "Legislative Day" in Austin, when volunteers may visit their assigned legislator and perhaps bring a batch of homemade cookies. FV

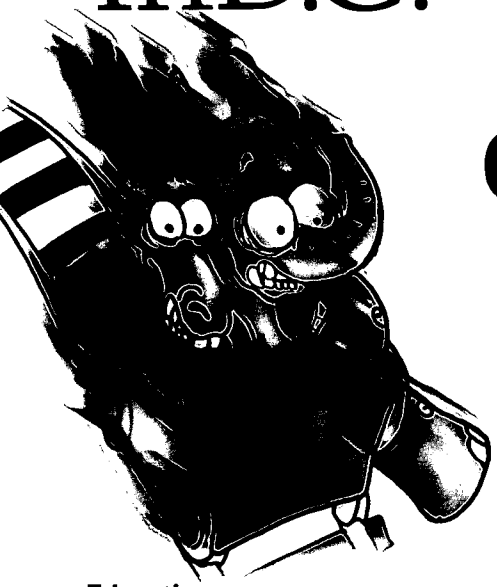
To learn how you can join this important effort to impact legislators in your state, contact the national Field Department.

CWA @ work ... in the States highlights accomplishments of CWA members and affiliates around the country. For more information on getting involved with a CWA group in your state or community, call 1-800-458-8797.

CWA @ Work . . .

InD.C.

The 106th Congress Had Its Ups and Downs



Education

The time is now to shift the focus of federal education programs from Washington bureaucrats to parents, teachers and local education officials. More tax dollars for education should reach the classrooms, where teachers know each student and her needs individually.

The **Dollars to the Classroom Resolution** requires at least 95 percent of federal education funding to go directly to the classroom. CWA worked diligently in support of this bill. Although it passed the House, it did not reach the Senate. Look for action on Dollars to the Classroom Act in the 107th Congress.

HOUSE PASSED

Family

During the next 10 years, working Americans will dole out $4.56 trillion more than is needed to fund the federal government, according to "Securing America's Future," a document released by House Majority Leader Dick Armey (R-Texas). This tax overpayment is the budget surplus. We believe that part of this tax overpayment should be returned to the American people who work hard to pay their bills and care for their families.

The **Marriage Penalty Tax Relief** bill eliminates the marriage penalty. Couples pay on average $1400 more per year simply because they are married. The bill passed in both the House and the Senate but was vetoed by President Clinton. CWA will continue to lobby for passage of this legislation in the 107th Congress.

VETOED

International Issues

The **Trafficking Victims Protection Act** combats the trafficking of persons, especially into the sex trade and slavery-like conditions, into the United States and other countries. We celebrate the victory that the bill was signed into law! Although we disagree with certain legislation attached to it, we believe it is a step in the right direction.

SIGNED INTO LAW

Sanctity of Life

CWA successfully lobbied Congress on the **Born-Alive Infants Protection Act**, which "gives the legal right of personhood to babies who are born, including those who survive botched abortions." Although the House overwhelmingly passed the bill 380-15, the Senate failed to vote on it before the election. However, this bill had strong congressional support; it will be a CWA priority in the 107th Congress. We look forward to educating House and Senate members on how this bill strengthens the "right to life."

HOUSE PASSED

Both houses of Congress passed the **Partial-Birth Abortion Ban Act** *for the third time*, only to have it vetoed again by President Clinton.

VETOED

However, in June the U.S. Supreme Court stepped in to rule on Nebraska's right to protect partially delivered babies from infanticide. While several states have adopted the Partial-Birth Abortion Ban, one of Nebraska's abortionists, Leroy Carhart, M.D., appealed the legislation, and it ultimately went before the Supreme Court. The majority of the judges ignored the First Amendment right to life and overruled the ban in *Stenberg v. Carhart*. CWA will continue to oppose the Supreme Court's decision to allow the killing of innocent babies and urge our new president to act.

CWA @ work ... in D.C. focuses on CWA's efforts on behalf of the family in the nation's capital. Watch this space for important updates from our Legislative Department.

Executive Director George Tryfiates presented Capitol Hill staffers Michael Schwartz (left) and Michele DeKonty (far right) the Defender of Truth awards at CWA's Convention 2000. Formerly administrative director to Rep. Tom Coburn (R-Oklahoma), Mike is now CWA's Vice President for Government Affairs. Michele works as legislative assistant in the office of Sen. Jesse Helms (R-North Carolina).

MailBox

E-mail Pornography

... We just received *Family Voice* with the article on pornography ["Blind to the Law," Nov./Dec.]. After reading it, [we found] a pornographic solicitation in our e-mail inbox. I have forwarded it to my Internet provider, which tries to track and block addresses that send out SPAM (unsolicited e-mail advertisements). Hopefully the next administration will try to prosecute these people.

Julie Gardiner, via e-mail

Here Comes the Judge (Florida!)

... A photo of me standing next to Chief Justice Charles Wells of the Florida Supreme Court appeared in *Family Voice* [Nov./Dec., "In the States"]. Since the Florida court ruled regarding the presidential election, some of our members have asked about Justice Wells' presence at a CWA event. So I would like to explain the background.

The photo was taken last summer at CWA of Florida's Red, White and Blue Luncheon, an event when our members have a chance to meet the candidates running for office in our state government. Our intent is not to endorse any individual or party, but to provide a chance for the candidates to express their views and our members a chance to listen. In accord with our mission statement, this event is an opportunity to educate voters and officials on CWA's issues. It is our hope that interacting with officials with viewpoints different from our own allows us to present our positions.

This year we asked all our guests to speak on the separation of powers. We invited top officials from each of the three branches of government: the governor, Senate president and House speaker, and chief justice of the Supreme Court. In addition to Chief Justice Wells, we were pleased to have Toni Jennings, the Florida Senate President, and House Speaker-Elect Tom Feeney with us. These two individuals, who were also in the photo, have been true champions for the family and the unborn.

Despite the disappointment we may feel in the Florida Supreme Court's decision to legislate from the bench, it is important that we continue to respect our leaders and pray daily for all those in authority. Please join with CWA's efforts to encourage leaders in your state, and join me in prayer that my state's judges will do what is just despite the political pressures they face.

Cathy Boyer, State Director, CWA of Florida

Editor's Note: You too can join CWA at the state level [see pages 38 & 39]. We need women who care enough to get involved and to meet candidates for state office. During their campaigns we can perhaps have the greatest influence.

Electoral College

... Thank you very much for the information posted on your site about the Electoral College. We must do

something now, quickly, vigilantly and steadily, to maintain this vital part of our Constitution. Already proposals have been made to do away with the Electoral College. I feel compelled to do something.
Rose Sewell, New Jersey

Editor's Note: You may read articles about the Electoral College on CWA's Web site at http://fv.cwfa.org/electoral and http://fv.cwfa.org/republic. We'll keep you informed of efforts to do away with this important element of our republican form of government.

True Empowerment

... I just read your article "Stiletto Conservatives" [http://fv.cwfa.org/stiletto], and I thought it made many excellent points. "We understand the significance of sexual empowerment. However, we realize that it only comes in its restraint. Our empowerment comes from controlling our sexuality, rather than letting it control us–as the Steinem-era feminists did to their, and our, generation's detriment." Succinctly put and on target.
Eileen M. Ciesla, via e-mail

Moral and Right

... Just want you to know how much I appreciate receiving *Family Voice*. Thanks for all your hard work. Together, we can and will make a difference through consistent prayer and letting our voices be heard for what's moral and right.
Mrs. Nola Holmes, Kentucky

Back to the Bible

... We must bring our citizens back to realize that we do indeed have an authority, that God's Word is the living Word of the living God. As Paul Harvey puts it, "The human race came with a Book of instructions." Abortion, homosexuality, pornography, violence, profanity, drug abuse, alcohol consumption, discipline [problems], all sin begins with an ignorance or a refusal of God's Word. America was once a nation of the Bible. [Its citizens] would have never tolerated what is happening to our beloved land today.
Hugh F. Pyle, via e-mail

School Prayer and Religious Liberty

... I want to commend you on your Web site. Your message is informative, necessary, and very much appreciated. It is gratifying and uplifting to know there are people out there who love and respect God, our nation and the truth. I particularly appreciate the article on school prayer and religious liberty [http://fv.cwfa.org/schoolprayer]. Nowhere else have I read such a clear, powerful and scholarly argument on the subject. Thank you for your thorough work. I intend to share the article with many people.
Richard V. Wallace, Texas, via e-mail FV

We welcome letters from our readers. They may be sent via mail, e-mail or fax. (See page 3.) Letters may be edited for length and clarity.

CWA and FamilyCLICK Offer Safe Internet to Families

Is your family experiencing only the best of the Internet? Are you comfortable allowing your children to access the Internet without looking over their shoulders? CWA introduces *FamilyCLICK*, a new Internet filter that works with your own Internet (ISP) to block objectionable online content and even predatory activity. CWA and *FamilyCLICK* have partnered to educate parents about protecting kids online.

The Alarming Truth About Kids and the Internet

The National Center for Missing and Exploited Children reported that one in four youths ages 10-17 experienced unwanted exposure to online pornography in the past year. Sixty percent did not tell a parent. Additionally, one in five youths received a sexual solicitation online in the past year; 75 percent also did not tell a parent *(Online Victimization Report, June 2000)*.

Internet filtering products are available, but the search is often confusing and time-consuming.

FamilyCLICK Offers Freedom to Explore

Developed by the creators of The Family Channel cable TV network, *FamilyCLICK* protects families against pornography, hate, violence, illegal drugs and online predators. *FamilyCLICK*'s two-step filtering solution and webguide, www.familyclick.com, help parents take control of the Internet. The two-step solution combines **Human Website Review** with new "smart technology," **CLICKReview**,℠ to provide multi-layered protection unavailable through other filter products. *FamilyCLICK* downloads easily and works with your current ISP.

CLICKReview℠ advanced technology. "Reads" Web pages in real time, analyzing the context of words by sentence and paragraph to determine if the content is pornographic, hate, violence, etc., (e.g., sex education vs. sex toys). Providing access to 95 percent of the Web without the 5 percent families don't want, CLICKReview reduces over-blocking and under-blocking. *FamilyCLICK* is always on and automatically updated.

Accommodates every age and stage of your family. Every member of the family can have separate log-on accounts and age-specific filter settings. What's appropriate for a 6-year-old differs for a 15-year-old. Unfiltered Access is available for parents. Also, Web site www.familyclick.com recommends pre-approved, family-friendly Web sites for the whole family.

MailBlock (FREE option). Scans e-mail for objectionable material and blocks it before reaching your PC. A startling 30 percent of all unsolicited e-mails are pornographic *(Choose Your Mail.com Study, Oct. 99)*.

Protect your family and benefit CWA. Download *FamilyCLICK* for only $4.95/month or $49.95/year. A portion of the fee supports CWA's own efforts to protect families. Try *FamilyCLICK* FREE for 30 Days at **www.familyclick.com** or **www.cwfa.org. Use Product Code: CWA.**

They're 2 innocent clicks away from images we can't even print.

Take *Control* of the Internet with FAMILYCLICK

- *ClickReview℠: The most advanced "smart" technology available to block pornography, hate, and violence.*
- *Unlimited accounts with age-specific filter settings.*
- *Full Access for parents.*
- *MailBlock Filtered E-Mail Option.*
- *Works with your current ISP! * Fast. Easy. Maintenance-free.*

(*Excludes AOL)

Protect Your Family for only $4.95/Month or $49.95 a Year!
FAMILYCLICK contributes a percentage of the fee to CWA

Come to www.familyclick.com to download
Use Product Code: CWA

FAMILYCLICK™

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Registration costs start at only $30.00 per person.

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A CWA member who makes a difference

CloseUp

Carole Denner is Caring for Life Coordinator, National Project 535 Volunteer and a registered nurse in Springfield, Virginia.

How did you become involved with CWA?

Several friends in 1989 were members. One had been lobbying with Project 535, CWA's volunteer lobbying program on Capitol Hill. She asked me to be her partner, and I was introduced to CWA. I am still lobbying with 535.

What are your duties as Caring for Life Coordinator for the CWA of Virginia steering committee?

I deal with life issues from conception until natural death [through] education, research and legislation at the state level on fetal-tissue research, abortion, euthanasia and everything in between. We track legislation and educate legislators about CWA's positions. We generate calls and letters from members to the legislators.

We ... educate as much as possible. We go to different churches to speak. You'd be surprised at how many Christians talk about wanting to end their lives early because of fear of pain, of being a burden and out of control.

As a nurse, how much progress have you seen in pain management in the last 10 years?

Many medical advances [have occurred that] provide much more effective pain control and control of distressing symptoms for those who are severely or terminally ill. My husband has had a severe pain problem for more than 13 years. Some of these advances have helped him continue to maintain a fuller life than he would otherwise.

What should be our response to pain and suffering?

God promises that even if there's suffering in our days, there is a purpose. As Christians, we've lost that and need to come back to it. Many people, like my husband, continue to have a successful life in spite of severe pain or severe disability. They can still minister to others. My children and grandchild would be greatly at loss without my husband. There's purpose to all of life if we look to God to give that purpose. But we also have to be willing to help one another. That's what we are called to do as a church.

Carole was presented the Project 535 Capitol Hill Liaison Achievement Award at CWA's Convention 2000.

CWA of Virginia has many opportunities for you to make a difference! Call State Director Patricia Phillips at 1-703-444-1740. For information about other areas, call 1-800-458-8797.

High School Seniors

Get a Head Start on College!

Two students will start college this autumn with $1000 CWA Scholarships! Perhaps you or someone you know will be one of them. For details and an application, send a business-sized, self-addressed, stamped envelope to Darlene Nelson at CWA's national office or go to http://fv.cwfa.org/scholarship.

Your completed application, a letter of acceptance to a conservative Christian college, a 150-word testimony of faith, college placement scores, and a 1200-word essay will put you in the race.

APPLICATION DUE BY APRIL 1 AT MIDNIGHT. WINNERS SELECTED BY MAY 22.

CONCERNED WOMEN FOR AMERICA
1015 Fifteenth Street, NW, Suite 1100
Washington, DC 20005

College Students,

Let CWA point you in the right direction! **INTERNSHIPS** are available year-round to **college students and recent graduates**. You will gain hands-on experience in legislation/public policy, grassroots coordination, broadcast/media or research/publications. Contact Darlene Nelson at **1-800-458-8797** (dnelson@cwfa.org). Fax: 202-488-0806 or check out our Web page at:

www.cwfa.org

Holland is the warning signal for the rest of the world. It is a warning for North Carolina.

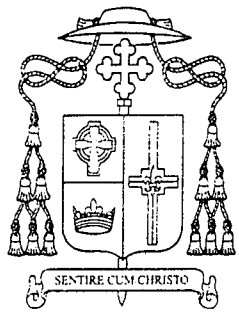
I raise another question, *if the physician places the the lethal dose of medicine in the hands of the patient or family members, who is to say who will admininster it?* In Oregon, the law shields these details from public access. But some truths have leaked out, including assisted suicides slipping into homicides. In one instance, the family member suspected of murder had the ***supposed*** suicide victim cremated within 24 hours to eliminate questions of circumstance. In an unguarded moment, one Oregon (physician assisted suicide) advocate revealed a botched assisted suicide. The victim landed in the Emergency Room and finally a nursing home. This case never showed up in the report of more than 40 Oregonians who have so far died through this secretive state- sanctioned program.

On a very personal level, suppose you or your spouse is diagnosed with a disease, maybe a terminal one. Depression follows, which can be a natural consequence. Would you want the added agony of wondering about the mindset of your physician? And could you really trust his counsel through treatment if he was free to dispense deadly doses with impunity? Over time, could a suicide request be merely *perceived?* Last Oct. 30, a Dutch Court acquitted a doctor who assisted with suicide for a depressed patient who was not physically suffering. The Dutch moved to officially legalize euthanasia (April 11, 2001) hoping to curb abuses. Dutch families NEVER leave family members in the hospital unattended. As of April 11th, I believe that fear will only intensify.

In 1977, the U.S. Supreme Court ruled physician assisted suicide was **not** a constitutional right. **It is illegal in 40 states.** With the continued secularization of society, this is a slippery slope incongruous with the North Carolina motto, "To be rather than to seem."

Concerned Women for America encourages you to give this bill a favorable report.

Thank you for your time.
Mary F. Forrester
Mary Frances Forrester



OFFICE OF THE BISHOP

April 3, 2001

Senator Robert C. Carpenter
North Carolina General Assembly
Legislative Office Building, Room 517
Raleigh, NC 27601-2808

RE: Senate Bill 389
Create the Criminal Offense of Physician Assisted Suicide

Dear Senator Carpenter,

Thank you for your co-sponsorship of Senate Bill 389, an Act to Create the Criminal Offense of Physician Assisted Suicide. The people this legislation would protect are some of the most defenseless in our society.

Many people with disabilities have long experience with prejudicial attitudes on the part of able-bodied people, including some physicians, who say they would "rather be dead than disabled." Such prejudices could easily lead families, physicians and society to encourage death for people who are depressed and emotionally vulnerable as they adjust to life with a serious illness or disability.

In November of 1998 the National Council of Catholic Bishops spoke of the need to honor and respect individuals with disabilities. In this letter titled "Welcome and Justice for Persons with Disabilities," we the Catholic Bishops of the U.S.A. spoke as one voice proclaiming: *Our defense of life and rejection of the culture of death requires that we acknowledge the dignity and positive contributions of our brothers and sisters with disabilities. We unequivocally oppose negative attitudes toward disability, which often lead to euthanasia, medical rationing and abortion.*

The American Medical Association has also taken a stand against Physician Assisted Suicide. In a November 8, 2000 press release among others, the AMA "...endorsed physicians' fundamental obligation to 'do no harm'...". They said physician assisted suicide introduces, "(a) deep ambiguity into the very definition of medical care."

Please continue to give the Act to Create the Criminal Offense of Physician Assisted Suicide your full support.

I am with sentiments of respect,

warm personal regards

Sincerely,

+ William G. Curlin

William G. Curlin
Bishop of Charlotte

Diocese of Charlotte • 1123 S. Church Street • Charlotte, NC 28203 • (704) 377-6871

Recycled Paper

Physician-Assisted Suicide

RESOLVED, That the North Carolina Medical Society promote physician awareness of their patients' overwhelming need to be adequately and effectively relieved of the physical and psychological pain that can accompany terminal and incurable illness; and be it further

RESOLVED, That the North Carolina Medical Society oppose physician-assisted suicide.

(Substitute Report PP-1992, adopted 11/8/92)

SMITH, ANDERSON, BLOUNT,
DORSETT, MITCHELL & JERNIGAN, L.L.P.

LAWYERS

B. Davis Horne, Jr.

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Raleigh, North Carolina 27601

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MAILING ADDRESS
P.O. Box 2611
Raleigh, North Carolina
27602-2611

TELEPHONE: (919) 821-6680
FACSIMILE: (919) 821-6800

June 18, 2001

The Honorable James S. Forrester
North Carolina Senate
1121 Legislative Building
Raleigh, North Carolina 27601

Re: S 390 – Physician Assisted Suicide

Dear Sen. Forrester:

The North Carolina Medical Society's house of delegates adopted policy in 1992 opposing physician assisted suicide. A copy of that policy in its entirety is restated below:

> RESOLVED, That the North Carolina Medical Society promote physician awareness of their patients' overwhelming need to be adequately and effectively relieved of the physical and psychological pain that can accompany terminal and incurable illness; and be it further
>
> RESOLVED, That the North Carolina Medical Society oppose physician-assisted suicide.
>
> *(Substitute Report PP-1992, adopted 11/8/92)*

As you can see from the reference, the policy is based upon an executive council report. The report dealt largely with the problems arising from extraordinary pain and the need to manage it aggressively. Accordingly, the House of Delegates chose to include a reference to patient suffering and the need for physician sensitivity to physical and psychological pain that may accompany terminal and incurable illness.

The North Carolina Medical Society supports your efforts to make physicians more aware of their over-riding obligation to do no harm and to prevent physician assisted suicide.

With highest regards, I am

Very truly yours,

B. Davis Horne, Jr.

MAR 27 2001

Diocese of Raleigh — Office of the Bishop
715 Nazareth Street • Raleigh, North Carolina 27606-2187 • (919) 821-9702 • Fax: (919) 821-9705

March 23, 2001

The Honorable James Forrester
North Carolina General Assembly
Legislative Building, Room 1121
Raleigh, NC 27601-2808

RE: Senate Bill 389
Create the Criminal Offense of Physician-Assisted Suicide

Dear Senator Forrester,

I would like to thank you for your co-sponsorship of Senate Bill 389, an Act to Create the Criminal Offense of Physician-Assisted Suicide. I find this to be a potentially life saving piece of legislation that deserves your support.

Protecting innocent human life is one of the primary purposes of law in an ordered society. Allowing assisted suicide would demean the lives of vulnerable patients and expose them to exploitation by those who feel they are better off dead. The voiceless or marginalized in our society – the poor, the frail elderly, racial minorities, millions of people who lack health insurance – would be the first to feel pressure to die. This bill will give protection to these people.

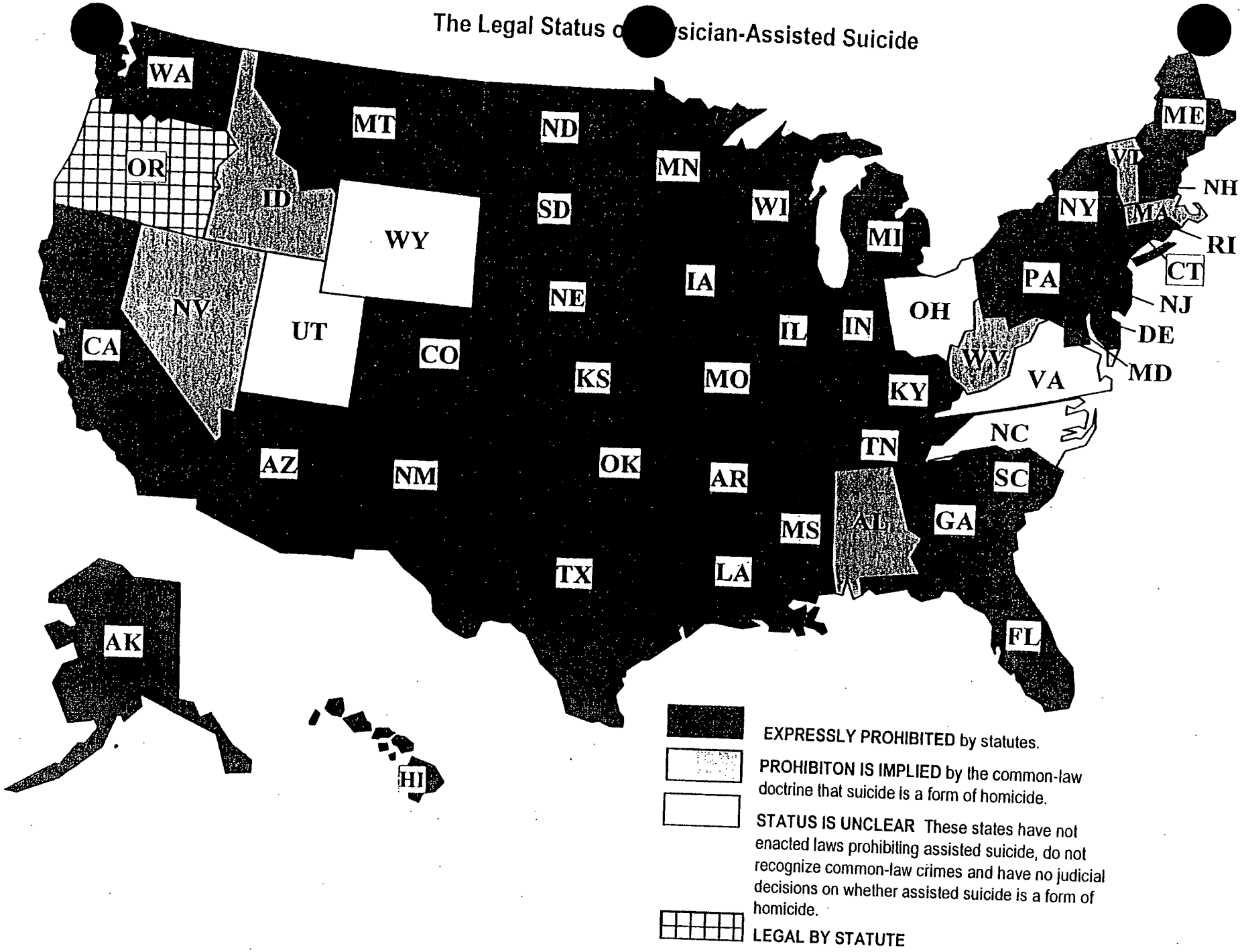
Suicidal wishes among the terminally ill are no less due to treatable depression than the same wishes among the able-bodied. When their pain, depression and other problems are addressed, there is generally no more talk of suicide. If we respond to a death wish in one group of people by offering them lethal drugs, we have made our own tragic choice as a society that some people's lives are objectively not worth protecting. This bill sends the clear message that North Carolina wants to safeguard all her citizens.

Please continue to give the Act to Create the Criminal Offense of Physician-Assisted Suicide your full support.

Sincerely,

F. Joseph Gossman

F. Joseph Gossman
Bishop of Raleigh


The Legal Status of Physician-Assisted Suicide
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EXPRESSLY PROHIBITED by statutes.
PROHIBITON IS IMPLIED by the common-law doctrine that suicide is a form of homicide.
STATUS IS UNCLEAR These states have not enacted laws prohibiting assisted suicide, do not recognize common-law crimes and have no judicial decisions on whether assisted suicide is a form of homicide.
LEGAL BY STATUTE

EDITORIALS

Dutch doctors given a license to kill

The Dutch have just appointed their physicians doctors of death. The Senate in the Netherlands voted to pass a law two weeks ago allowing hysicians to end patients' lives if they ave terminal "unbearable suffering." In o doing, the Netherlands has become the rst country to legalize assisted suicide nd to turn medicine from the purpose of ealing to one of killing.

According to the new law, a patient has request that they want to be killed, and ien have two doctors prescribe the same solution." How does the doctor know that ie patient qualifies? If the doctor deems iere is no other medical treatment, then he doctor will have to try to imagine what e patient is feeling . . ." to determine hether his suffering is unbearable, cording to the embassy of the Nether-nds. The "right to die" now becomes a atter of the doctor's ability, or lack there-, to get inside the patient's body to feel his ain.

But isn't the doctor just following rough on the patient's own informed sire to die? Not necessarily. Doctors can cide to kill willing patients aged 12 and ove, those suffering from psychological nesses and those suffering from demen-a, the most common form of which is lzheimer's disease. The doctor decides whether to kill the patient on a case by case basis "in light of prevailing medical opinion." What has been the history of prevailing medical opinion in the Netherlands? In many cases, the patient's "willingness" to be killed has not been a precondition. For instance, the Dutch's government's 1991 euthanasia report cites 1,040 people who were killed by doctors who did not have a request from the patient. Another 8,100 deaths were not reported as assisted suicide, but resulted from doctors prescribing drug overdoses to bring death. It is estimated that around 3,500 patients have been killed a year for the past decade through euthanasia. For the past 20 years, doctors could not be charged for what was on the books as a criminal offense because of an arrangement with prosecutors that prevented the jail time as long as they followed certain guidelines.

So why go to the trouble of legalizing a common practice? The new law, a Dutch embassy official said, makes the doctors innocent until proven guilty, while the old arrangement assumed the doctor's guilt until proven otherwise. The embassy's web site explained further: "The aim of exempting doctors from prosecution is to ensure that they no longer feel like criminals and can act openly and honestly in relation to requests for euthanasia, provided that their decision-making and medical procedures satisfy the statutory due care criteria."

> If the doctor deems there is no other medical treatment, then "the doctor will have to try to imagine what the patient is feeling . . ." to determine whether his suffering is unbearable. The "right to die" becomes a matter of the doctor's ability, or lack thereof, to get inside the patient's body to feel his pain.

All this killing was, so to speak, giving a few doctors indigestion. They were killing, and felt like murderers. So the Dutch legislators wrote up a little guilt-free prescription for more of the same. Now, the new law's advocates argue, the euthanasia review committees (appointed by the minister of justice and the minister of health, welfare and sport) will make sure the doctors only kill patients matching all the due care criteria put forth by the new law. The only problem is, the patient is long dead by the time the review committee would notify the Public Prosecution Service.

For Europe, all this has haunting implications. From the religious community to politicians to the press, there was an outcry in Germany against a government-approved euthanasia practice. While the Nazis secretly eliminated 100,000 men, women and children who were physically or mentally handicapped between 1939 and 1941, the Dutch are now openly embracing the killing of children, the aged, and the psychologically challenged. Among the victims of the Nazi regime were the Dutch themselves.

Dutch parliamentarians have shown they have decided not to remember those lessons. With this new law, life in the Netherlands has been cheapened.

mens on sovereign states. Naturally, France was the prime mover. It and other European tax-happy, welfare nations have long cast a jaundiced eye on those who don't squeeze their citizens' pocketbooks sufficiently. Look at the European Union's constant berating of Ireland for its policies of cutting taxes.

O'Neill made clear the U.S. would vigorously pursue genuine tax cheats and fight criminal money-laundering efforts. But he rightly saw the distinction between those laudable goals and the less-than-laudable efforts to force low-tax countries to impose more exactions on their citizens.

DUTCH DEATH

A COUPLE OF MONTHS AGO THE NETHERLANDS BECAME THE first democracy in history to allow its doctors to kill their patients. The law codifies what has been going on in that country for a generation. There are rules that are supposed to be observed before a physician can snuff out a patient's life—i.e., children must be at least 12; patients must request to die; a second doctor must independently verify the request. But in practice half the victims are murdered without having requested death, ostensibly because the physician believes the patient's quality of life to be suffering, but often it is to reduce health care expenses. Why work to prolong the life of someone who will die in a few months anyway? Many people who are doctor-killed are suffering from depression; they're not souls undergoing insufferable physical agony. No wonder a growing number of elderly Dutch fear going to the hospital. Their country is developing an environment in which the will to live is increasingly being labeled as selfish.

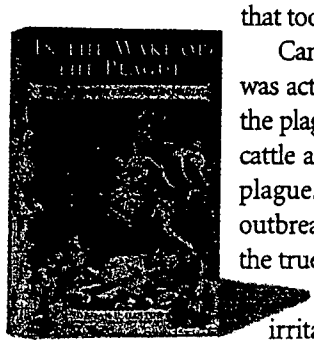
Not only the elderly are at risk. Babies born with physical or mental handicaps, even treatable ones, are being killed shortly after birth. Doctors are also "euthanizing" terminally ill children and mental patients. A decade ago the Dutch government estimated that nearly one in ten of its citizens who died were killed by their doctors. The ratio is probably higher now.

The chairman of the conference of Germany's Roman Catholic bishops, Cardinal Karl Lehmann, rightly accused the Netherlands of adopting a "culture of death." German physicians vigorously denounced the Dutch move. They know all too well from their own country's history what the implications of their neighbor's actions are. Before WWII, Nazi Germany secretly killed thousands of mentally or physically handicapped people. What a murderous irony it is that during WWII Dutch doctors heroically resisted Nazi pressures to practice euthanasia. Now the heirs of those physicians are doing it to a degree that would have won the applause of the Gestapo and the SS.

May the rest of us avoid the bleak, antilife society the Dutch are creating.

BLACK DEATH

In the Wake of the Plague—by Norman F. Cantor (The Free Press, $25). In the late 1340s Europe suffered a catastrophe the equivalent of a nuclear war. Within months, a third to half of the population died from the "Black Death." This wee book examines the impact of the plague on European civilization, most particularly England, whose population did not reach preplague levels for another 400 years. The pandemic greatly accelerated the already-unraveling system of serfdom; labor became critically short, emboldening peasants to shuck off their manorial servitude and demand a stiff increase in their compensation. England's dream of forging a major European continental empire was fatally undermined; its military machine depended on infantry, which in the aftermath of the plague became prohibitively costly. The plague led to a fatal split in England's ruling Plantagenet family, resulting in the War of the Roses. And Jews, scapegoated for the disaster, were hideously massacred in numerous parts of Europe.



Land, of course, was at the heart of medieval economics. Land disputes were enormously exacerbated by families fighting from within over who owned what, when many heirs suddenly died. Complex land litigation lead to the property law that today dominates Britain and much of the West.

Cantor cites growing evidence that the plague was actually two diseases raging simultaneously—the plague and deadly anthrax, which originates in cattle and at onset has the same symptoms as the plague. He also discusses possible causes of the outbreak, underscoring how little we know about the true sources of sudden, devastating epidemics. This book, alas, is marred by the author's irritating, snide asides.

RESTAURANTS: GO, CONSIDER, STOP

Here is the distilled wisdom of brothers Bob, Kip and Tim, and other FORBES *eatery experts Tom Jones, Patrick Cooke and Monie Begley.*

Chez Josephine—414 West 42nd St. (Tel.: 594-1925). Perfect for out-of-towners—a bordello-interiored homage to Josephine Baker that's sort of French, sort of soul food. Favorite: Elvira's fried chicken with sweet potato fries and red pepper corn bread.

Métisse—239 West 105th St. (Tel.: 666-8825). Unpretentious, charming, friendly bistro with efficient service. The food, however, is not up to the charm.

Seo—249 East 49th St. (Tel.: 355-7722). Tranquil Japanese setting with a garden. The menu is wonderfully varied and creative. The fare is delicious, especially the udon and soba noodles. F

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So why go to the trouble of legalizing a common practice? The new law, a Dutch embassy official said, makes the doctors innocent until proven guilty, while the old arrangement assumed the doctor's guilt until proven otherwise. The embassy's web site explained further: "The aim of exempting doctors from prosecution is to ensure that they no longer feel like criminals and can act openly and honestly in relation to requests for euthanasia, provided that their decision-making and medical procedures satisfy the statutory due care criteria."

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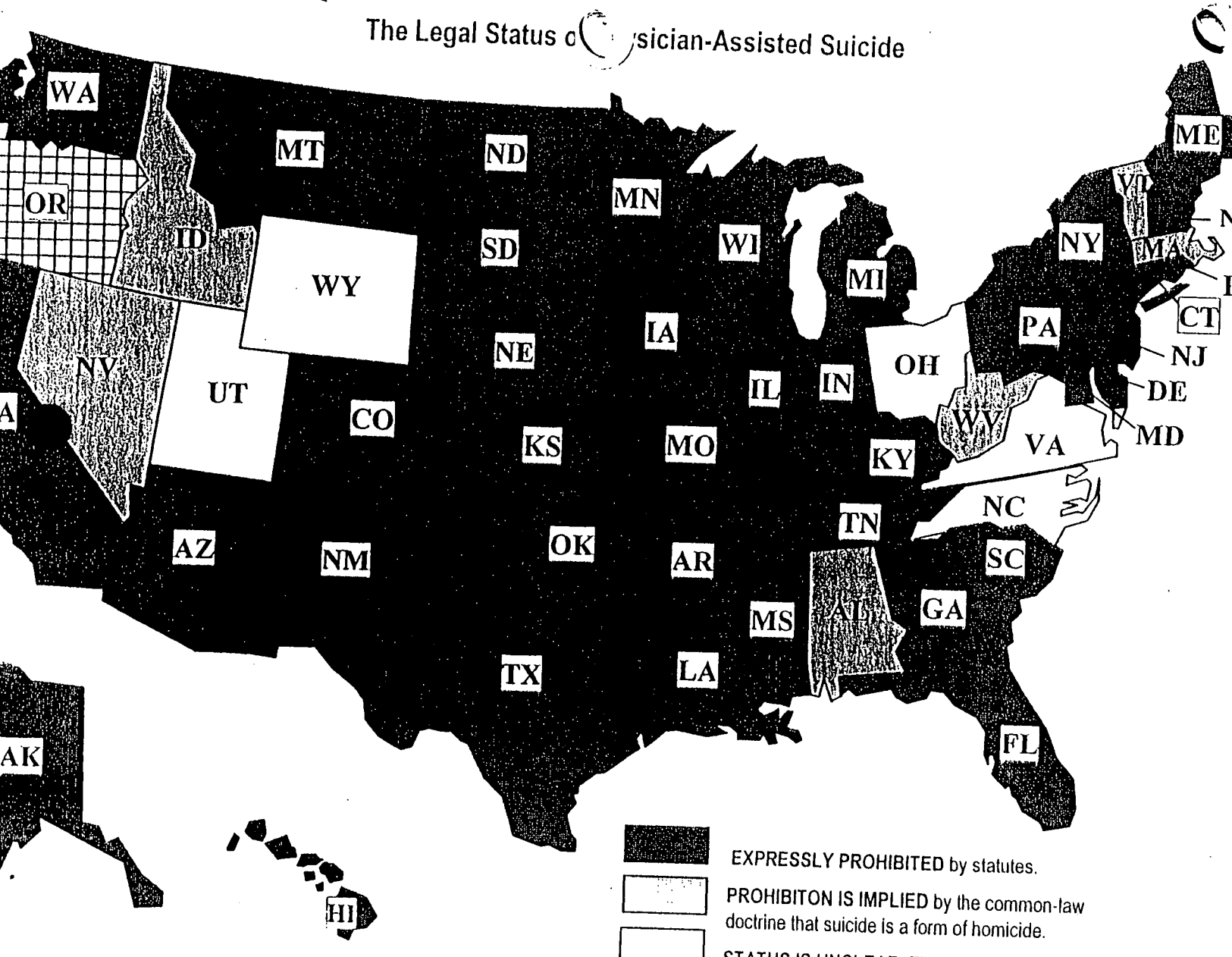
The Legal Status o sician-Assisted Suicide
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EXPRESSLY PROHIBITED by statutes.
PROHIBITON IS IMPLIED by the common-law doctrine that suicide is a form of homicide.
STATUS IS UNCLEAR These states have not enacted laws prohibiting assisted suicide, do not recognize common-law crimes and have no judicial decisions on whether assisted suicide is a form of homicide.
LEGAL BY STATUTE

The Christian Physician's Oath

With gratitude to God, faith in Christ Jesus, and dependence on the Holy Spirit, I publicly profess my intent to practice medicine for the glory of God.

With humility, I will seek to increase my skills, I will respect those who teach me and who broaden my knowledge. In turn, I will freely impart my knowledge and wisdom to others.

With God's help, I will strive to love those who come to me for healing and comfort. I will honor and care for each patient as a person, putting aside selfish interests.

With God's guidance, I will convey God's love in my relationships with family, friends, and community. I will endeavor to be a good steward of my skills and of society's resources. I will aspire to reflect God's mercy in caring for the lonely, the poor, the suffering, and the dying.

With God's blessing, I will respect the sanctity of human life. I will care for all my patients, rejecting those interventions which either intentionally destroy or actively end the lives of the unborn, the infirm, and the terminally ill.

With God's grace, I will live according to this profession.

Passed by the CMDS
House of Delegates

May 3, 1991, Chicago, Illinois

The Christian Physician's Oath

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Passed by the CMDS
House of Delegates

May 3, 1991, Chicago, Illinois

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 693

Short Title:	Amend Enhanced Sentences Laws.	(Public)
Sponsors:	Senator Thomas.	
Referred to:	Judiciary II.	

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW REGARDING ENHANCED SENTENCES AS RECOMMENDED BY THE SENTENCING COMMISSION AND TO MAKE CONFORMING CHANGES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-2.2 is repealed.

SECTION 2. G.S. 15A-1340.16A reads as rewritten:

"**§ 15A-1340.16A. Enhanced sentence if defendant is convicted of a Class A, B1, B2, C, D, or E felony and the defendant used, displayed, or threatened to use or display a firearm during the commission of the felony.**

~~(a) If a person is convicted of a Class A, B1, B2, C, D, or E felony and the court finds that the person used, displayed, or threatened to use or display a firearm at the time of the felony, the court shall increase the minimum term of imprisonment to which the person is sentenced by 60 months. The court shall not suspend the 60-month minimum term of imprisonment imposed as an enhanced sentence under this section and shall not place any person sentenced under this section on probation for the enhanced sentence.~~

~~(b) Subsection (a) of this section does not apply in any of the following circumstances:~~

~~(1) The person is not sentenced to an active term of imprisonment.~~

~~(2) The evidence of the use, display, or threatened use or display of a firearm is needed to prove an element of the underlying Class A, B1, B2, C, D, or E felony.~~

~~(3) The person did not actually possess a firearm about his or her person.~~

(a) If a person is convicted of a Class A, B1, B2, C, D, or E felony and it is found as provided in this section that: (i) the person committed the felony by using, displaying, or threatening the use or display of a firearm, and (ii) the person actually possessed the firearm about his or her person, then the person shall have the minimum term of imprisonment to which the person is sentenced for that felony increased by 60

months. The maximum term of imprisonment shall be the maximum term that corresponds to the minimum term after it is increased by 60 months, as specified in G.S. 15A-1340.17(e) and (e1).

(b) An indictment or information for the Class A, B1, B2, C, D, or E felony shall allege in that indictment or information the facts set out in subsection (a) of this section. The pleading is sufficient if it alleges that the defendant committed the felony by using, displaying, or threatening the use or display of a firearm and the defendant actually possessed the firearm about the defendant's person. One pleading is sufficient for all Class A, B1, B2, C, D, or E felonies that are tried at a single trial.

(c) The State shall prove the issue set out in subsection (a) of this section beyond a reasonable doubt during the same trial in which the defendant is tried for the felony unless the defendant pleads guilty or no contest to that issue. If the defendant pleads guilty or no contest to the felony but pleads not guilty to the issue set out in subsection (a) of this section, then a jury shall be impaneled to determine that issue.

(d) Subsection (a) of this section does not apply if the evidence of the use, display, or threatened use or display of the firearm is needed to prove an element of the felony or if the person is not sentenced to an active term of imprisonment."

SECTION 3. G.S. 15A-1340.16B reads as rewritten:

"**§ 15A-1340.16B. Life imprisonment without parole for a second or subsequent conviction of a Class B1 ~~felony.~~felony if the victim was 13 years of age or younger and there are no mitigating factors.**

(a) ~~Notwithstanding the sentencing dispositions in G.S. 15A-1340.17,~~If a person is convicted of a Class B1 felony ~~shall be sentenced to life imprisonment without parole if:~~ and it is found as provided in this section that: (i)

~~(1)~~ ~~The offense was committed~~ the person committed the felony against a victim who was 13 years of age or younger at the time of the ~~offense;~~ offense, and

~~(2)~~ ~~The~~(ii) the person has one or more prior convictions of a Class B1 ~~felony; and~~

~~(3)~~ ~~The court finds that there are no mitigating factors in accordance with G.S. 15A-1340.16(e).~~felony, then the person shall be sentenced to life imprisonment without parole.

~~(b) If the sentencing court finds that there are mitigating circumstances, then the court shall sentence the person in accordance with G.S. 15A-1340.17.~~

~~(c) A prior conviction of a Class B1 felony shall be proved in accordance with G.S. 15A-1340.14.~~

(b) An indictment or information for the Class B1 felony shall allege in that indictment or information or in a separate indictment or information the facts set out in subsection (a) of this section. The pleading is sufficient if it alleges that the defendant committed the felony against a victim who was 13 years of age or younger at the time of the felony and had one or more prior convictions of a Class B1 felony. One pleading is sufficient for all Class B1 felonies that are tried at a single trial.

(c) The State shall prove the issue set out in subsection (a) of this section beyond a reasonable doubt during the same trial in which the defendant is tried for the felony

unless the defendant pleads guilty or no contest to that issue. The issue shall be presented in the same manner as provided in G.S. 15A-928(c). If the defendant pleads guilty or no contest to the felony but pleads not guilty to the issue set out in subsection (a) of this section, then a jury shall be impaneled to determine that issue.

(d) Subsection (a) of this section does not apply if there are mitigating factors present under G.S. 15A-1340.16(e)."

SECTION 4. G.S. 15A-1340.16C reads as rewritten:

"**§ 15A-1340.16C. Enhanced sentence if defendant is convicted of a felony and the defendant was wearing or had in his or her immediate possession a bullet-proof vest during the commission of the felony.**

(a) If a person is convicted of a felony and ~~the court finds that~~ it is found as provided in this section that the person ~~was wearing~~wore or had in his or her immediate possession a bullet-proof vest at the time of the felony, then the person is guilty of a felony that is one class higher than the underlying felony for which the person was convicted.

~~(b) This section does not apply if the evidence that the person possessed a bullet-proof vest is needed to prove an element of the underlying felony for which the person was convicted. This section does not apply to law enforcement officers.~~

(b) An indictment or information for the felony shall allege in that indictment or information or in a separate indictment or information the facts set out in subsection (a) of this section. The pleading is sufficient if it alleges that the defendant committed the felony while wearing or having in the defendant's immediate possession a bulletproof vest. One pleading is sufficient for all felonies that are tried at a single trial.

(c) The State shall prove the issue set out in subsection (a) of this section beyond a reasonable doubt during the same trial in which the defendant is tried for the felony unless the defendant pleads guilty or no contest to that issue. If the defendant pleads guilty or no contest to the felony but pleads not guilty to the issue set out in subsection (a) of this section, then a jury shall be impaneled to determine that issue.

(d) Subsection (a) of this section does not apply if the evidence that the person wore or had in the person's immediate possession a bulletproof vest is needed to prove an element of the felony."

SECTION 5. This act is effective when it becomes law and applies to offenses committed on or after that date. Prosecutions for offenses occurring before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable before this act remain applicable to those prosecutions.

SENATE BILL 693:
Amend Enhanced Sentences Law.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Thomas
Date:	April 17, 2003	**Summary by:**	Robin S. Johnson*
Version:	First		Committee Counsel

SUMMARY: ***Senate Bill 693 would amend the enhanced sentencing laws to conform to a recent United States Supreme Court case and a North Carolina Court of Appeals case by requiring that (1) the facts supporting an enhanced sentence be alleged in the indictment, and (2) a jury determine the enhancement issues beyond a reasonable doubt.***

The Sentencing Commission recommends this bill. It also was recommended and introduced last Session. It was amended several times and passed the Senate, but the House failed to pass it.

The act would become effective when it becomes law and apply to offenses committed on or after that date. The current statutes would be applicable to prosecutions for offenses occurring before the act becomes effective.

BACKGROUND: Currently, there are three North Carolina statutes that require a sentencing judge, upon finding certain facts by a preponderance of the evidence, to increase a defendant's sentence beyond the ranges authorized by structured sentencing: These statutes are (i) firearm enhancement; (ii) enhancement for Class B1 felonies involving young victims; and (iii) bulletproof vest enhancement.

A recent United States Supreme Court decision, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), called into question the constitutionality of these sentencing enhancements. The Court held that **any fact, other than a prior conviction, that increases the punishment for a crime beyond the statutory maximum for that crime must be submitted to the jury and proven beyond a reasonable doubt.**

Following *Apprendi*, the NC Court of Appeals initially ruled that the State's firearm enhancement statute is unconstitutional as violative of procedural due process under the 14th Amendment of the United States Constitution. The NC Supreme Court then addressed this particular statute and held that "in every instance where the State seeks an enhanced sentence [under the firearm enhancement statute], it must allege the statutory factors supporting the enhancement in an indictment, which may be the same indictment that charges the underlying offense, and submit those factors to the jury. If the jury returns a guilty verdict that includes these factors, the trial judge shall make the finding set out in the statute and impose an enhanced sentence." After that decision, the Court of Appeals withdrew its finding that the firearm enhancement statute is facially unconstitutional.

BILL ANALYSIS: The bill would modify the three enhanced sentencing statutes to conform with the recent *Apprendi* and *Guice* decisions by requiring that a jury determine beyond a reasonable doubt the facts supporting an enhanced sentence.

I. Firearm Enhancement (Secs. 1 & 2)

Under current law, G.S. 15A-1340.16A requires that an additional 60 months be added to a defendant's sentence ***if the judge finds*** that the defendant (1) used, displayed, or threatened to use or display a firearm during the commission of a Class A through E felony and (2) actually possessed a firearm about his or her person.

Under the bill, a defendant will be subject a 60-month enhancement ***if a jury finds beyond a reasonable doubt*** that the defendant (i) used, displayed, or threatened to use or display a firearm during the commission of a Class A through E felony and (ii) actually possessed a firearm about his or her person.

Under current law and under the bill, the enhancement will not apply if evidence of the use, display, or threatened use or display of a firearm is needed to prove an element of the underlying felony or if the person is not sentenced to an active term of imprisonment.

II. Enhancement for Class B1 Felonies Involving Young Victims (Sec. 3)

Currently, G.S. 15A-1340.16B requires that a defendant who is convicted of a Class B1 felony be sentenced to life imprisonment without parole ***if the judge finds*** that (1) the victim was 13 years of age or younger at the time of the offense, (2) the defendant has one or more prior convictions of a Class B1 felony, and (3) there are no mitigating factors present.

B1 felonies are: 1st degree rape, 1st degree sexual offense, and statutory rape or a sexual offense of a person who is 13, 14, or 15 years old and the defendant is at least 6 years older than the victim.

Under the bill, a defendant who is convicted of a Class B1 felony shall be sentenced to life imprisonment without parole ***if a jury determines beyond a reasonable doubt*** (1) the victim was 13 years of age or younger at the time of the offense, and (2) the defendant has one or more prior convictions of a Class B1 felony. The enhanced sentence will not apply if there are mitigating factors present.

III. Bulletproof Vest Enhancement (Sec. 4)

Under current law, G.S. 15A-1340.16C requires that a defendant who is convicted of a felony ***where the judge finds*** that the person wore or had in the person's immediate possession a bulletproof vest at the time of the felony be guilty of a felony that is one class higher than the underlying felony for which the person was convicted. This enhancement does not apply to law enforcement officers.

Under the bill, a defendant who is convicted of a felony ***where the jury determines beyond a reasonable doubt*** that the person wore or had in his immediate possession a bulletproof vest at the time of the felony, shall be guilty of a felony that is one class higher than the underlying felony for which the person was convicted. The exception for law enforcement officers is removed under the bill.

Under current law and under the bill, the enhanced sentence will not apply if evidence that the person wore or had in his immediate possession a bulletproof vest is needed to prove an element of the felony.

For all enhancements, the bill would require indictments to allege the facts necessary to support an enhanced sentence.

Changes that are not necessarily required by Apprendi:

Currently, prior convictions are proven by the preponderance of the evidence. Sec. 3 would require that the indictment allege prior convictions and that this be proven beyond a reasonable doubt.

Sec. 4 deletes the exemption for law enforcement officers under the bulletproof vest enhancement statute.

S693-SMRH-001: Trina Griffin, staff attorney, contributed significantly to this summary.*

Section 1 would repeal this statute:

§ 14-2.2. Sentencing of a person convicted of a Class A, B, B1, B2, C, D, or E felony who used, displayed, or threatened to use or display a firearm during the commission of the crime; confiscation and disposition of a firearm used in a felony.

(a) If a person is convicted of a Class A, B, B1, B2, C, D, or E felony and the person used, displayed, or threatened to use or display a firearm during the commission of the felony, the person shall, in addition to the punishment for the underlying felony, be sentenced to a minimum term of imprisonment for 60 months as provided by G.S. 15A-1340.16A.

The court shall not suspend any sentence imposed under this section and shall not place a person sentenced under this section on probation for the sentence imposed under this section. Sentences imposed pursuant to this section shall be consecutive to all other sentences imposed and shall begin at the expiration of any other sentence being served by the person.

(b) Subsection (a) of this section does not apply in any of the following circumstances:

(1) The person is not sentenced to an active term of imprisonment.

(2) The evidence of the use, display, or threatened use or display of a firearm is needed to prove an element of the underlying Class A, B, B1, B2, C, D, or E felony.

(3) The person did not actually possess a firearm about his or her person.

(c) When a person is found to have personally used a firearm in the commission or attempted commission of a felony and the firearm is owned by that person, or the serial number on the firearm has been defaced such that ownership is not traceable, the court shall order that the firearm be confiscated and disposed of in any of the ways provided by G.S. 14-269.1 that the court in its discretion deems appropriate.

(d) Repealed by Session Laws 1994, Extra Session, c. 22, s. 19(b). (1979, c. 760, s. 2; 1979, 2nd Sess., c. 1316, ss. 34, 47, 48; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 538, s. 4; 1994, Ex. Sess., c. 22, ss. 18, 19(a), (b).)

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 693

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S693-ARH-13 [v.1]

Date _____,2003

Comm. Sub. [NO]
Amends Title [NO]
First Edition

Senator _____

moves to amend the bill on page 2, lines 10, 13, and 43, and on page 3, line 3, by deleting the word "issue" everywhere it appears on those lines and by substituting the word "issues" in those places;

and on page 2, lines12 and 14, and on page 3, line 4, by deleting the phrase "that issue" everywhere it appears on those lines and by substituting the phrase "the issues" in those places;

and on page 2, line 41, by inserting between the words "and" and "had" the following new phrase: "that the defendant";

and on page 3, line 1, by rewriting the line to read:
"unless the defendant pleads guilty or no contest to the issues. The issues shall be".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S **1**

SENATE BILL 707

Short Title:	Repeat Misd. Larceny.	(Public)
Sponsors:	Senators Shubert; Apodaca, Blake, Brock, Carpenter, Forrester, Foxx, Garwood, Pittenger, Rucho, and Stevens.	
Referred to:	Judiciary II.	

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO INCREASE THE CRIMINAL PENALTY FOR CERTAIN REPEAT OFFENSES OF MISDEMEANOR LARCENY OR SHOPLIFTING.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-72 reads as rewritten:

"**§ 14-72. Larceny of property; receiving stolen goods or possessing stolen goods.**

(a) Larceny of goods of the value of more than one thousand dollars ($1,000) is a Class H felony. The receiving or possessing of stolen goods of the value of more than one thousand dollars ($1,000) while knowing or having reasonable grounds to believe that the goods are stolen is a Class H felony. Larceny as provided in subsection (b) of this section is a Class H felony. Receiving or possession of stolen goods as provided in subsection (c) of this section is a Class H felony. Except as provided in subsections ~~(b)~~(a1), (b), and (c) of this section, larceny of ~~property, or the receiving or possession of stolen goods knowing or having reasonable grounds to believe them to be stolen,~~ property where the value of the property or goods is not more than one thousand dollars ($1,000), is a Class 1 misdemeanor. Except as provided in subsections (b) and (c) of this section, a person receiving or possessing stolen goods knowing or having reasonable grounds to believe them to be stolen where the value of the goods is not more than one thousand dollars ($1,000) is guilty of a Class 1 misdemeanor. In all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen.

(a1) A person convicted within three years of a fifth or subsequent offense of larceny of property where the value of the property is not more than one thousand dollars ($1,000) is guilty of a Class H felony.

(b) The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is:

(1) From the person; or

(2) Committed pursuant to a violation of G.S. 14-51, 14-53, 14-54 or 14-57; or

(3) Of any explosive or incendiary device or substance. As used in this section, the phrase "explosive or incendiary device or substance" shall include any explosive or incendiary grenade or bomb; any dynamite, blasting powder, nitroglycerin, TNT, or other high explosive; or any device, ingredient for such device, or type or quantity of substance primarily useful for large-scale destruction of property by explosive or incendiary action or lethal injury to persons by explosive or incendiary action. This definition shall not include fireworks; or any form, type, or quantity of gasoline, butane gas, natural gas, or any other substance having explosive or incendiary properties but serving a legitimate nondestructive or nonlethal use in the form, type, or quantity stolen.

(4) Of any firearm. As used in this section, the term "firearm" shall include any instrument used in the propulsion of a shot, shell or bullet by the action of gunpowder or any other explosive substance within it. A "firearm," which at the time of theft is not capable of being fired, shall be included within this definition if it can be made to work. This definition shall not include air rifles or air pistols.

(5) Of any record or paper in the custody of the North Carolina State Archives as defined by G.S. 121-2(7) and 121-2(8).

(c) The crime of possessing stolen goods knowing or having reasonable grounds to believe them to be stolen in the circumstances described in subsection (b) is a felony or the crime of receiving stolen goods knowing or having reasonable grounds to believe them to be stolen in the circumstances described in subsection (b) is a felony, without regard to the value of the property in question.

(d) Where the larceny or receiving or possession of stolen goods as described in subsection (a) of this section involves the merchandise of any store, a merchant, a merchant's agent, a merchant's employee, or a peace officer who detains or causes the arrest of any person shall not be held civilly liable for detention, malicious prosecution, false imprisonment, or false arrest of the person detained or arrested, when such detention is upon the premises of the store or in a reasonable proximity thereto, is in a reasonable manner for a reasonable length of time, and, if in detaining or in causing the arrest of such person, the merchant, the merchant's agent, the merchant's employee, or the peace officer had, at the time of the detention or arrest, probable cause to believe that the person committed an offense under subsection (a) of this section. If the person being detained by the merchant, the merchant's agent, or the merchant's employee, is a minor under the age of 18 years, the merchant, the merchant's agent, or the merchant's employee, shall call or notify, or make a reasonable effort to call or notify the parent or guardian of the minor, during the period of detention. A merchant, a merchant's agent, or a merchant's employee, who makes a reasonable effort to call or notify the parent or guardian of the minor shall not be held civilly liable for failing to notify the parent or guardian of the minor."

SECTION 2. G.S. 14-72.1 is amended by adding a new subsection to read:

"(d2) Notwithstanding subsection (e) of this section, any person convicted of a fifth or subsequent violation of subsection (a) or (d) of this section within three years is guilty of a Class H felony."

SECTION 3. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

REPEAT MISDEMEANOR LARCENY: Senate Bill 707

BILL ANALYSIS

Committee:	Judicary II	**Introduced by:**	Sen. Shubert
Date:	April 17, 2003	**Summary by:**	Sandra Alley
Version:	First Edition		Committee Counsel

SUMMARY: ***Senate Bill 707 increases the criminal penalty for persons convicted of larceny within three years of a fifth or subsequent offense of larceny where the value of the property is not more than one thousand dollars ($1,000) and for persons convicted of shoplifting within three years of a fifth or subsequent offense of shoplifting from Class 1 misdemeanor to a Class H felony.***

CURRENT LAW:

Larceny:

Under current law initial and subsequent convictions of larceny of goods with a value of less than one thousand dollars ($1,000) are Class 1 misdemeanors. A person convicted of larceny of goods with a value of more than one thousand dollars ($1,000) is guilty of a Class H felony.

Shoplifting

Under current law a person convicted of shoplifting is guilty of a Class 3 misdemeanor for a first conviction, a Class 2 misdemeanor for a second conviction within three years after the date of a subsequent conviction for shoplifting, and for a third or subsequent offense committed within five years after the date the defendant was convicted of two other shoplifting offenses the defendant is guilty of a Class 1 misdemeanor.

BILL ANALYSIS:

Senate Bill 707 increases the criminal penalty for persons who repeat the crime of larceny of goods valued at less than one thousand dollars ($1,000) where the person convicted repeats the crime within three years of a fifth or subsequent offense of larceny of goods valued at less than one thousand dollars ($1000). The bill thus changes the penalty for a repeat larceny within three years of a fifth or subsequent offense of larceny of goods from a Class 1 misdemeanor to a Class H felony.

Similarly, Senate Bill 707 increases the penalty for persons convicted of shoplifting for a fifth or subsequent time to a Class H felony.

BACKGROUND: Senate Bill 707 will not be reviewed by The North Carolina Sentencing and Policy Advisory Commission until April 24, 2003.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 708

Short Title:	Volunteer Fire Dept. Crim. Background Checks.	(Public)
Sponsors:	Senators Shubert; Blake, Carpenter, Forrester, Foxx, and Pittenger.	
Referred to:	Judiciary II.	

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO AUTHORIZE LOCAL LAW ENFORCEMENT AGENCIES TO ACCESS THE CRIMINAL INFORMATION NETWORK TO RUN CRIMINAL BACKGROUND CHECKS ON PROSPECTIVE MEMBERS OF VOLUNTEER FIRE DEPARTMENTS.

The General Assembly of North Carolina enacts:

SECTION 1. Article 4 of Chapter 114 of the General Statutes is amended by adding a new section to read:

"**§ 114-19.12. Criminal record checks of applicants to volunteer fire departments.**

(a) Authority. – The Department of Justice and the Federal Bureau of Investigation may provide to any local law enforcement agency a criminal record check of any individual who applies for a position with a volunteer fire department in that unit of local government and a criminal record check of all persons 18 years of age or older who live in the applying household. The North Carolina criminal record check may also be done by a certified DCI operator within the local law enforcement agency.

(b) Procedure. – A criminal record check shall be conducted by using an individual's fingerprints and all identification information required by the Department of Justice to identify that individual. A criminal record check shall be provided only if: (i) the individual whose record is checked consents to the record check, and (ii) every individual who is 18 years of age or older who lives in the household also consents to the record check. Refusal to give consent is considered withdrawal of the application. The information shall be kept confidential by the local law enforcement agency that receives the information. If the confidential information is disclosed under this section, the Department may refuse to provide further criminal record checks to that local law enforcement agency."

SECTION 2. This act is effective when it becomes law.

SENATE BILL 708:
Volunteer Fire Dept. Crim. Background Checks.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Shubert
Date:	April 16, 2003	**Summary by:**	Robin Johnson
Version:	First		Committee Counsel

SUMMARY: ***Senate Bill 708 would authorize local law enforcement agencies to run criminal background checks on any applicant for a position with a volunteer fire department and on all adults who live in the same household with the applicant. The check may be conducted only if the applicant and adults living in the same household each consent to the check. A refusal to consent is considered a withdrawal of the application.***

Information from the record check must be kept confidential by the law enforcement agency that receives the information. If it is not kept confidential, the Department of Justice may refuse to provide further criminal record checks to that law enforcement agency.

The bill is effective when it becomes law.

CURRENT LAW: Criminal background checks are authorized for the following:

- School personnel.
- Providers of treatment for or services to children, the elderly, mental health patients, the sick, and the disabled.
- Foster and adoptive parents.
- Employees and job applicants with the Departments Health and Human Services and Juvenile Justice and Delinquency Prevention.
- Applicants for an auctioneer's license.
- Applicants for volunteers for the McGruff House Program.
- Applicants for licensure as registered nurses and licensed practical nurses.
- Nursing homes, adult care homes, home care agencies, area mental health, developmental disabilities, and substance abuse services authorities.

BILL ANALYSIS: The bill would create a new G.S. 114-19.12 by authorizing criminal background checks for volunteers for positions with a volunteer fire department and for all adults who live in the same households with those volunteers. The language is identical to the statute that authorizes criminal background checks for applicants for volunteers for the McGruff House Program.

S708-SMRH-001

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March 9, 2003

The Honorable Senator Fern Shubert
North Carolina Senate
106 East Main Street
Marshville, NC 28103

Dear Madam Senator:

I have been in contact with Mr. Don Gaddy, president of the Union County Fire Chiefs' Association in regard to the issue of criminal background checks for volunteer firefighter applicants. Indeed, the issue is a serious one, and I would be happy to support any initiative to lawfully provide the chiefs with this information.

Whereas N.C. General Statutes provide for criminal record checks on healthcare workers, teachers and law enforcement officers, there exists no statutory provision that permits fire and rescue squad chiefs to obtain nationwide criminal record checks on firefighter candidates. Because the criminal history information maintained by the State Bureau of Investigation's DCI system is confidential (by statute,) fire and rescue squad chiefs cannot obtain this information directly from their local law enforcement agencies.

I believe that the number of requests that we might receive would not place undue hardship on ours staff. Details surrounding confidentiality issues with potential firefighter candidates can be worked out internally with my attorney, the individual fire departments and the Fire Chiefs' Association.

Thank you for the job that you do for us. It is my sincere hope that together, we can help our emergency services organizations recruit good, solid volunteers.

Sincerely,

Eddie Cathey

Sheriff Eddie Cathey

EC/bb

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 716

Short Title:	Revised Uniform Arbitration Act.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO REPEAL THE UNIFORM ARBITRATION ACT AND TO ENACT THE REVISED UNIFORM ARBITRATION ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 45A of Chapter 1 of the General Statutes is repealed.

SECTION 2. Chapter 1 of the General Statutes is amended by adding a new Article to read:

"Article 45C.

"Revised Uniform Arbitration Act.

"**§ 1-569.1. Definitions.**

The following definitions apply in this Article:

(1) 'Arbitration organization' means an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator.

(2) 'Arbitrator' means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.

(3) 'Court' means a court of competent jurisdiction in this State.

(4) 'Knowledge' means actual knowledge.

(5) 'Person' means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(6) 'Record' means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

"**§ 1-569.2. Notice.**

(a) Except as otherwise provided in this Article, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice.

(b) A person has notice if the person has knowledge of the notice or has received notice.

(c) A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business or at another location held out by the person as a place of delivery of such communications.

"**§ 1-569.3. When Article applies.**

(a) This Article governs an agreement to arbitrate made on or after January 1, 2004.

(b) This Article governs an agreement to arbitrate made before January 1, 2004, if all parties to the agreement or to the arbitration proceeding so agree in a record.

(c) On or after January 1, 2006, this Article governs an agreement to arbitrate whenever made.

"**§ 1-569.4. Effect of agreement to arbitrate; nonwaivable provisions.**

(a) Except as otherwise provided in subsections (b) and (c) of this section, a party to an agreement to arbitrate or to an arbitration proceeding may waive, or the parties may vary the effect of, the requirements of this Article to the extent provided by law.

(b) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(1) Waive or agree to vary the effect of the requirements of G.S. 1-569.5(a), 1-569.6(a), 1-569.8, 1-569.17(a), 1-569.17(b), 1-569.26, or 1-569.28;

(2) Agree to unreasonably restrict the right under G.S. 1-569.9 to notice of the initiation of an arbitration proceeding;

(3) Agree to unreasonably restrict the right under G.S. 1-569.12 to disclosure of any facts by a neutral arbitrator; or

(4) Waive the right under G.S. 1-569.16 of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under this Article, but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.

(c) A party to an agreement to arbitrate or to an arbitration proceeding may not waive, or the parties shall not vary the effect of, the requirements of this section or G.S 1-569.3(a), 1-569.3(c), 1-569.7, 1-569.14, 1-569.18, 1-569.20(d), 1-569.20(e), 1-569.22, 1-569.23, 1-569.24, 1-569.25(a), 1-569.25(b), 1-569.29, 1-569.30, 1-569.31, or 1-569.32.

"**§ 1-569.5. Application for judicial relief.**

(a) Except as otherwise provided in G.S. 1-569.28, an application for judicial relief under this Article must be made by motion to the court and heard in the manner provided by law or rule of court for making and hearing motions.

(b) Unless a civil action involving the agreement to arbitrate is pending, notice of an initial motion to the court under this Article must be served in the manner provided by law for the service of a summons in a civil action. Otherwise, notice of the motion

must be given in the manner prescribed by law or rule of court for serving motions in pending cases.

"**§ 1-569.6. Validity of agreement to arbitrate.**

(a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revocation of a contract.

(b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(c) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(d) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

"**§ 1-569.7. Motion to compel or stay arbitration.**

(a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

(1) If the refusing party does not appeal or does not oppose the motion, the court shall order the parties to arbitrate; and

(2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

(b) On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate.

(c) If the court finds that there is no enforceable agreement to arbitrate, it may not, pursuant to subsection (a) or (b) of this section, order the parties to arbitrate.

(d) The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or because grounds for the claim have not been established.

(e) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in a court, a motion under this section must be made in that court. Otherwise a motion under this section may be made in any court as provided in G.S. 1-569.27.

(f) If a party makes a motion to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

(g) If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.

"**§ 1-569.8. Provisional remedies.**

(a) Before an arbitrator is appointed and is authorized and able to act, the court, upon motion of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.

(b) After an arbitrator is appointed and is authorized and able to act:

(1) The arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action; and

(2) A party to an arbitration proceeding may move the court for a provisional remedy if the matter is urgent and the arbitrator is not able to act in a timely manner or the arbitrator cannot provide an adequate remedy.

(c) A party does not waive a right of arbitration by making a motion under subsection (a) or (b) of this section.

"**§ 1-569.9. Initiation of arbitration.**

(a) A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by certified or registered mail, return receipt requested, and obtained, or by service as authorized for the commencement of a civil action. The notice must describe the nature of the controversy and the remedy sought.

(b) Unless a person objects for lack or insufficiency of notice under G.S. 1-569.15(c) no later than the beginning of the arbitration hearing, the person, by appearing at the hearing, waives any objection to lack or insufficiency of notice.

"**§ 1-569.10. Consolidation of separate arbitration proceedings.**

(a) Except as otherwise provided in subsection (c) of this section, upon motion of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:

(1) There are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration with a third person;

(2) The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

(3) The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and

(4) Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

(b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

(c) The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.

"**§ 1-569.11. Appointment of arbitrator; service as a neutral arbitrator.**

(a) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

(b) An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral.

"**§ 1-569.12. Disclosure by arbitrator.**

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) A financial or personal interest in the outcome of the arbitration proceeding; and

(2) An existing or past relationship with any of the parties to the agreement to arbitrate or to the arbitration proceeding, their counsel or representatives, a witness, or other arbitrators.

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or (b) of this section to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under G.S. 1-569.23(a)(2) for vacating an award made by the arbitrator.

(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b) of this section, upon timely objection by a party, the court under G.S.-1-569.23(a)(2) may vacate an award.

(e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under G.S. 1-569.23(a)(2).

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under G.S. 1-569.23(a)(2).

"**§ 1-569.13. Action by majority.**

If there is more than one arbitrator, the powers of an arbitrator must be exercised by a majority of the arbitrators, but all of them shall conduct the hearing under G.S. 1-569.15(c).

"**§ 1-569.14. Immunity of arbitrator; competency to testify; attorney's fees and costs.**

(a) An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.

(b) The immunity afforded by this section supplements any immunity under other law.

(c) The failure of an arbitrator to make a disclosure required by G.S. 1-569.12 does not cause any loss of immunity under this section.

(d) In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify, and may not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding, to the same extent as a judge of a court of this State acting in a judicial capacity. This subsection does not apply:

(1) To the extent necessary to determine the claim of an arbitrator, arbitration organization, or representative of the arbitration organization against a party to the arbitration proceeding; or

(2) To a hearing on a motion to vacate an award under G.S. 1-569.23(a)(1) or (a)(2) if the movant establishes prima facie that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from the services of the arbitrator, organization, or representative, or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of subsection (d) of this section, and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not competent to testify, the court shall award to the arbitrator, organization, or representative reasonable attorney's fees, costs, and other reasonable expenses of litigation.

(f) Immunity under this section does not apply to acts or omissions that occur with respect to the operation of a motor vehicle.

"**§ 1-569.15. Arbitration process.**

(a) An arbitrator may conduct an arbitration in such a manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.

(b) An arbitrator may decide a request for summary disposition of a claim or particular issue:

(1) If all interested parties agree; or

(2) Upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the proceeding and the other parties have a reasonable opportunity to respond.

(c) If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than five days before the hearing begins. Unless a party to the arbitration proceeding makes an objection to lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but may not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified did not appear. The court, upon request, may direct the arbitrator to conduct the hearing promptly and render a timely decision.

(d) At a hearing under subsection (c) of this section, a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(e) If an arbitrator ceases to or is unable to act during the arbitration proceeding, a replacement arbitrator must be appointed in accordance with G.S. 1-569.11 to continue the proceeding and to resolve the controversy.

(f) The rules of evidence do not apply in arbitration proceedings, except as to matters of privilege or immunities.

"**§ 1-569.16. Representation by lawyer.**

A party to an arbitration proceeding may be represented by a lawyer or lawyers.

"**§ 1-569.17. Witnesses; subpoenas; depositions; discovery.**

(a) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena must be served in the manner for service of subpoenas in a civil action and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.

(b) In order to make the proceedings fair, expeditious, and cost-effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

(c) An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost-effective.

(d) If an arbitrator permits discovery under subsection (c) of this section, the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take action

against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this State.

(e) An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State.

(f) All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition, or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this State.

(g) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the protection of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another state upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost-effective. A subpoena or discovery-related order issued by an arbitrator in another state must be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this State.

(h) An arbitrator does not have the authority to hold a party in contempt of any order the arbitrator makes under this section. A court may hold parties in contempt for failure to obey an arbitrator's order, or an order made by the court, pursuant to this section, among other sanctions imposed by the arbitrator or the court.

"**§ 1-569.18. Judicial enforcement of preaward ruling by arbitrator.**

(a) If an arbitrator makes a preaward ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award under G.S. 1-569.19. A prevailing party may make a motion to the court for an expedited order to confirm the award under G.S. 1-569.22, in which case the court shall summarily decide the motion. The court shall issue an order to confirm the award unless the court vacates, modifies, or corrects the award under G.S. 1-569.23 or G.S. 1-569.24.

(b) An arbitrator's ruling under G.S. 1-569.18 that denies a request for a preaward ruling is not subject to trial court review; a party whose request under G.S. 1-569.18 for a preaward ruling has been denied by an arbitrator retains the right to seek relief under G.S. 1-569.20 and G.S. 1-569.21 from any final award the arbitrator renders.

(c) There is no right of appeal from trial court orders and judgments on preaward rulings by an arbitrator after a trial court award under this section, G.S. 1-569.19, and G.S. 1-569.28.

"**§ 1-569.19. Award.**

(a) An arbitrator shall make a record of an award. The record must be signed or otherwise authenticated as authorized by federal or State law by any arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.

(b) An award must be made within the time specified by the agreement to arbitrate or, if not specified therein, within the time ordered by the court. The court may

extend or the parties to the arbitration proceeding may agree in a record to extend the time. The court or the parties may do so within or after the time specified or ordered. A party waives any objection that an award was not timely made unless that party gives notice of the objection to the arbitrator before receiving notice of the award.

"**§ 1-569.20. Change of award by arbitrator.**

(a) On motion to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

(1) Upon a ground stated in G.S. 1-569.24(a)(1) or (a)(3);

(2) Because the arbitrator had not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) To clarify the award.

(b) A motion under subsection (a) of this section must be made and notice given to all parties within 20 days after the movant receives notice of the award.

(c) A party to the arbitration proceeding must give notice of any objection to the motion within 10 days after receipt of the notice.

(d) If a motion to the court is pending under G.S. 1-569.22, 1-569.23, or 1-569.24, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

(1) Upon a ground stated in G.S. 1-569.24(a)(1) or (a)(3);

(2) Because the arbitrator had not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) To clarify the award.

(e) An award modified or corrected pursuant to this section is subject to G.S. 1-569.19(a), 1-569.22, 1-569.23, and 1-569.24.

"**§ 1-569.21. Remedies; fees and expenses of arbitration proceeding.**

(a) An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.

(b) An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

(c) As to all remedies other than those authorized by subsections (a) and (b) of this section, an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under G.S. 1-569.22 or for vacating an award under G.S. 1-569.23.

(d) An arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award.

(e) If an arbitrator awards punitive damages or other exemplary relief under subsection (a) of this section, the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief.

"**§ 1-569.22. Confirmation of award.**

After a party to an arbitration receives notice of an award, the party may make a motion to the court for an order confirming the award, at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to G.S. 1-569.20 or G.S. 1-569.24 or is vacated pursuant to G.S. 1-569.23.

"**§ 1-569.23. Vacating award.**

(a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(1) The award was procured by corruption, fraud, or other undue means;

(2) There was:

a. Evident partiality by an arbitrator appointed as a neutral arbitrator;

b. Corruption by an arbitrator; or

c. Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) An arbitrator refused to postpone the hearing upon a showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to G.S. 1-569.15 so as to prejudice substantially the rights of a party to the arbitration proceeding;

(4) An arbitrator exceeded the arbitrator's powers;

(5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under G.S. 1-569.15(c) no later than the beginning of the arbitration hearing; or

(6) The arbitration was conducted without proper notice of the initiation of an arbitration as required in G.S. 1-569.9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

(b) A motion under this section must be filed within 90 days after the movant receives notice of the award pursuant to G.S. 1-569.19 or within 90 days after the movant receives notice of a modified or corrected award pursuant to G.S. 1-569.20, unless the movant alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion must be made within 90 days after the ground is known or by the exercise of reasonable care would have been known by the movant.

(c) If the court vacates an award on a ground other than that set forth in subdivision (a)(5) of this section, it may order a rehearing. If the award is vacated on a ground stated in subdivision (1) or (2) of subsection (a) of this section, the rehearing must be before a new arbitrator. If the award is vacated on a ground stated in subdivision (3), (4), or (6) of subsection (a) of this section, the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in G.S. 1-569.19(5) for an award.

(d) If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award pursuant to G.S. 1-569.24 is pending.

"**§ 1-569.24. Modification or correction of award.**

(a) Upon motion made within 90 days after the movant receives notice of the award pursuant to G.S. 1-569.19 or within 90 days after the movant receives notice of a modified or corrected award pursuant to G.S. 1-569.20, the court shall modify or correct the award if:

(1) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

(2) The arbitrator has made an award on a claim not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the claims submitted; or

(3) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

(b) If a motion made under subsection (a) of this section is granted, the court shall modify and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the court shall confirm the award.

(c) A motion to modify or correct an award pursuant to this section may be joined with a motion to vacate the award.

"**§ 1-569.25. Judgment on award; attorney's fees and litigation expenses.**

(a) Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment in conformity therewith. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.

(b) A court may allow reasonable costs of the motion and subsequent judicial proceedings.

(c) On motion of a prevailing party to a contested judicial proceeding under G.S. 1-569.22, 1-569.23, or 1-569.24, the court may add reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award.

"**§ 1-569.26. Jurisdiction.**

(a) A court of this State having jurisdiction over the controversy and the parties may enforce the agreement to arbitrate.

(b) An agreement to arbitrate providing for arbitration in this State confers exclusive jurisdiction on the court to enter judgment on an award under this Article.

"**§ 1-569.27. Venue.**

A motion pursuant to G.S. 1-569.5 must be made in the court of the county in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the court of the county in which it was held. Otherwise, the motion may be made in the court of any county in which an adverse party resides or has a place of business or, if no adverse party has a residence or place of business in this State, in the court of any county in this State. All subsequent motions must be made in the court hearing the initial motion unless the court otherwise directs.

"**§ 1-569.28. Appeals.**

(a) An appeal may be taken from:

(1) An order denying a motion to compel arbitration;
(2) An order granting a motion to stay arbitration;
(3) An order confirming or denying confirmation of an award;
(4) An order modifying or correcting an award;
(5) An order vacating an award without directing a rehearing; or
(6) A final judgment entered pursuant to this Article.

(b) An appeal under this section must be taken as from an order or a judgment in a civil action.

"**§ 1-569.29. Uniformity of application and construction.**

In applying and construing this Article, the Revised Uniform Arbitration Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

"**§ 1-569.30. Relationship to federal Electronic Signatures in Global and National Commerce Act.**

The provisions of this Article governing the legal effect, validity, and enforceability of electronic records or electronic signatures, and of contracts performed with the use of such records or signatures, conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, et seq., or as otherwise authorized by federal or State law governing such electronic records or electronic signatures.

"**§ 1-569.31. Short title.**

This Article may be cited as the Revised Uniform Arbitration Act."

SECTION 3. This act does not affect an action or proceeding that commences or accrues before Article 45C, as enacted in Section 2 of this act, becomes effective. Subject to G.S. 1-569.3, as enacted in Section 2 of this act, an arbitration agreement made before the effective date of this act is governed by Article 45A of Chapter 1 of the General Statutes.

SECTION 4. Section 1 of this act becomes effective January 1, 2006. The remainder of this act becomes effective January 1, 2004.

SENATE BILL 716:
Revised Uniform Arbitration Act

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Hartsell
Date:	April 15, 2003	**Summary by:**	Kory J. Goldsmith
Version:	1ST Edition		Committee Counsel

SUMMARY: ***SB 716 repeals the current Uniform Arbitration Act, adopted in 1973 and replaces it with the Revised Uniform Arbitration Act (RUAA). The bill comes at the request of the North Carolina Bar Association.***

BILL ANALYSIS: The bill rewrites Article 45A of Chapter 1 of the General Statutes. It clarifies the following:

(1) A court decides whether a dispute is subject to an agreement to arbitrate

(2 Allows both a court and an arbitrator to issue provisional remedies, depending upon when the application for a provisional remedy is requested.

(3) Specifies that arbitration is initiated when a party gives written notice to the other party of the nature of the controversy and the remedy sought. Notice must be as provided in the agreement, or if the agreement is silent, by registered or certified mail or by service otherwise authorized in a civil action.

(4) Allows a court to consolidate arbitration proceedings.

(5) Requires arbitrators to disclose facts reasonably likely to affect their impartiality.

(6) Makes an arbitrator or arbitration organizations immune from civil actions to the same extent as a judge. However, if an arbitrator failed to disclose facts reasonable likely to affect the arbitrator's impartiality, the award may be vacated.

(7) Makes arbitrators or representatives of arbitration organizations incompetent to testify in another proceeding.

(8) Grants arbitrators or representatives of arbitration organizations discretion to order discovery, issue protective orders, decide motions for summary dispositions, hold prehearing conferences and otherwise manage the arbitration process.

(9) Allows a court to enforce a preaward ruling by an arbitrator unless the court vacates, modifies, or corrects the award for statutory reasons such as corruption, fraud, undue duress, mathematical miscalculation or evident mistake.

(10) Specifies the remedies an arbitrator may award. **The PCS removes the language that would allow an award of attorney fees and punitive damages. Attorney fees and punitive damages would be allowed if provided for in the arbitration agreement, the evidence justifies a claim for the award, and the award would be allowed in a civil action involving the same claim.**

(11) Allows a court to award attorneys' fees and costs to a prevailing party in court review of an arbitrator's award.

(12) Makes many sections of the RUAA not be waivable.

The RUAA would apply to agreements to arbitrate entered into on and after January 1, 2004, but would apply to any arbitration agreement after January 1, 2006 regardless of when the agreement was made.

BACKGROUND: The RUAA is a model act promulgated by the National Conference of Commissioners on Uniform State Laws. According to the Commissioners website, 5 states have adopted

the RUAA (Hawaii, Nevada, New Mexico, North Dakota and Utah) and 14 states are considering legislation to adopt it.

S716-SMRC-001

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 716
PROPOSED COMMITTEE SUBSTITUTE S716-CSRC-26 [v.1]

4/15/2003 9:07:39 PM

Short Title: Revised Uniform Arbitration Act. (Public)

Sponsors:

Referred to:

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO REPEAL THE UNIFORM ARBITRATION ACT AND TO ENACT THE REVISED UNIFORM ARBITRATION ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 45A of Chapter 1 of the General Statutes is repealed.

SECTION 2. Chapter 1 of the General Statutes is amended by adding a new Article to read:

"Article 45C.

"Revised Uniform Arbitration Act.

"**§ 1-569.1. Definitions.**

The following definitions apply in this Article:

(1) 'Arbitration organization' means an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator.

(2) 'Arbitrator' means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.

(3) 'Court' means a court of competent jurisdiction in this State.

(4) 'Knowledge' means actual knowledge.

(5) 'Person' means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(6) 'Record' means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

"**§ 1-569.2. Notice.**

(a) Except as otherwise provided in this Article, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice.

(b) A person has notice if the person has knowledge of the notice or has received notice.

(c) A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business or at another location held out by the person as a place of delivery of such communications.

"**§ 1-569.3. When Article applies.**

(a) This Article governs an agreement to arbitrate made on or after January 1, 2004.

(b) This Article governs an agreement to arbitrate made before January 1, 2004, if all parties to the agreement or to the arbitration proceeding so agree in a record.

(c) On or after January 1, 2006, this Article governs an agreement to arbitrate whenever made.

"**§ 1-569.4. Effect of agreement to arbitrate; nonwaivable provisions.**

(a) Except as otherwise provided in subsections (b) and (c) of this section, a party to an agreement to arbitrate or to an arbitration proceeding may waive, or the parties may vary the effect of, the requirements of this Article to the extent provided by law.

(b) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(1) Waive or agree to vary the effect of the requirements of G.S. 1-569.5(a), 1-569.6(a), 1-569.8, 1-569.17(a), 1-569.17(b), 1-569.26, or 1-569.28;

(2) Agree to unreasonably restrict the right under G.S. 1-569.9 to notice of the initiation of an arbitration proceeding;

(3) Agree to unreasonably restrict the right under G.S. 1-569.12 to disclosure of any facts by a neutral arbitrator; or

(4) Waive the right under G.S. 1-569.16 of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under this Article, but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.

(c) A party to an agreement to arbitrate or to an arbitration proceeding may not waive, or the parties shall not vary the effect of, the requirements of this section or G.S 1-569.3(a), 1-569.3(c), 1-569.7, 1-569.14, 1-569.18, 1-569.20(d), 1-569.20(e), 1-569.22, 1-569.23, 1-569.24, 1-569.25(a), 1-569.25(b), 1-569.29, 1-569.30, 1-569.31.

"**§ 1-569.5. Application for judicial relief.**

(a) Except as otherwise provided in G.S. 1-569.28, an application for judicial relief under this Article must be made by motion to the court and heard in the manner provided by law or rule of court for making and hearing motions.

(b) Unless a civil action involving the agreement to arbitrate is pending, notice of an initial motion to the court under this Article must be served in the manner provided by law for the service of a summons in a civil action. Otherwise, notice of the motion

must be given in the manner prescribed by law or rule of court for serving motions in pending cases.

"**§ 1-569.6. Validity of agreement to arbitrate.**

(a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revocation of a contract.

(b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(c) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(d) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

"**§ 1-569.7. Motion to compel or stay arbitration.**

(a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

(1) If the refusing party does not appeal or does not oppose the motion, the court shall order the parties to arbitrate; and

(2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

(b) On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate.

(c) If the court finds that there is no enforceable agreement to arbitrate, it may not, pursuant to subsection (a) or (b) of this section, order the parties to arbitrate.

(d) The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or because grounds for the claim have not been established.

(e) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in a court, a motion under this section must be made in that court. Otherwise a motion under this section may be made in any court as provided in G.S. 1-569.27.

(f) If a party makes a motion to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

(g) If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.

"**§ 1-569.8. Provisional remedies.**

(a) Before an arbitrator is appointed and is authorized and able to act, the court, upon motion of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.

(b) After an arbitrator is appointed and is authorized and able to act:

(1) The arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action; and

(2) A party to an arbitration proceeding may move the court for a provisional remedy if the matter is urgent and the arbitrator is not able to act in a timely manner or the arbitrator cannot provide an adequate remedy.

(c) A party does not waive a right of arbitration by making a motion under subsection (a) or (b) of this section.

"**§ 1-569.9. Initiation of arbitration.**

(a) A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by certified or registered mail, return receipt requested, and obtained, or by service as authorized for the commencement of a civil action. The notice must describe the nature of the controversy and the remedy sought.

(b) Unless a person objects for lack or insufficiency of notice under G.S. 1-569.15(c) no later than the beginning of the arbitration hearing, the person, by appearing at the hearing, waives any objection to lack or insufficiency of notice.

"**§ 1-569.10. Consolidation of separate arbitration proceedings.**

(a) Except as otherwise provided in subsection (c) of this section, upon motion of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:

(1) There are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration with a third person;

(2) The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

(3) The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and

(4) Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

(b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

(c) The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.

"**§ 1-569.11. Appointment of arbitrator; service as a neutral arbitrator.**

(a) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

(b) An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral.

"**§ 1-569.12. Disclosure by arbitrator.**

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) A financial or personal interest in the outcome of the arbitration proceeding; and

(2) An existing or past relationship with any of the parties to the agreement to arbitrate or to the arbitration proceeding, their counsel or representatives, a witness, or other arbitrators.

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or (b) of this section to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under G.S. 1-569.23(a)(2) for vacating an award made by the arbitrator.

(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b) of this section, upon timely objection by a party, the court under G.S.-1-569.23(a)(2) may vacate an award.

(e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under G.S. 1-569.23(a)(2).

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under G.S. 1-569.23(a)(2).

"**§ 1-569.13. Action by majority.**

If there is more than one arbitrator, the powers of an arbitrator must be exercised by a majority of the arbitrators, but all of them shall conduct the hearing under G.S. 1-569.15(c).

"**§ 1-569.14. Immunity of arbitrator; competency to testify; attorney's fees and costs.**

(a) An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.

(b) The immunity afforded by this section supplements any immunity under other law.

(c) The failure of an arbitrator to make a disclosure required by G.S. 1-569.12 does not cause any loss of immunity under this section.

(d) In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify, and may not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding, to the same extent as a judge of a court of this State acting in a judicial capacity. This subsection does not apply:

(1) To the extent necessary to determine the claim of an arbitrator, arbitration organization, or representative of the arbitration organization against a party to the arbitration proceeding; or

(2) To a hearing on a motion to vacate an award under G.S. 1-569.23(a)(1) or (a)(2) if the movant establishes prima facie that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from the services of the arbitrator, organization, or representative, or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of subsection (d) of this section, and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not competent to testify, the court shall award to the arbitrator, organization, or representative reasonable attorney's fees, costs, and other reasonable expenses of litigation.

(f) Immunity under this section does not apply to acts or omissions that occur with respect to the operation of a motor vehicle.

"**§ 1-569.15. Arbitration process.**

(a) An arbitrator may conduct an arbitration in such a manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.

(b) An arbitrator may decide a request for summary disposition of a claim or particular issue:

(1) If all interested parties agree; or

(2) Upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the proceeding and the other parties have a reasonable opportunity to respond.

(c) If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than five days before the hearing begins. Unless a party to the arbitration proceeding makes an objection to lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but may not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified did not appear. The court, upon request, may direct the arbitrator to conduct the hearing promptly and render a timely decision.

(d) At a hearing under subsection (c) of this section, a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(e) If an arbitrator ceases to or is unable to act during the arbitration proceeding, a replacement arbitrator must be appointed in accordance with G.S. 1-569.11 to continue the proceeding and to resolve the controversy.

(f) The rules of evidence do not apply in arbitration proceedings, except as to matters of privilege or immunities.

"**§ 1-569.16. Representation by lawyer.**

A party to an arbitration proceeding may be represented by a lawyer or lawyers.

"**§ 1-569.17. Witnesses; subpoenas; depositions; discovery.**

(a) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena must be served in the manner for service of subpoenas in a civil action and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.

(b) In order to make the proceedings fair, expeditious, and cost-effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

(c) An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost-effective.

(d) If an arbitrator permits discovery under subsection (c) of this section, the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take action

against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this State.

(e) An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State.

(f) All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition, or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this State.

(g) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the protection of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another state upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost-effective. A subpoena or discovery-related order issued by an arbitrator in another state must be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this State.

(h) An arbitrator does not have the authority to hold a party in contempt of any order the arbitrator makes under this section. A court may hold parties in contempt for failure to obey an arbitrator's order, or an order made by the court, pursuant to this section, among other sanctions imposed by the arbitrator or the court.

"**§ 1-569.18. Judicial enforcement of preaward ruling by arbitrator.**

(a) If an arbitrator makes a preaward ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award under G.S. 1-569.19. A prevailing party may make a motion to the court for an expedited order to confirm the award under G.S. 1-569.22, in which case the court shall summarily decide the motion. The court shall issue an order to confirm the award unless the court vacates, modifies, or corrects the award under G.S. 1-569.23 or G.S. 1-569.24.

(b) An arbitrator's ruling under subsection (a) of this section that denies a request for a preaward ruling is not subject to trial court review; a party whose request under subsection (a) of this section for a preaward ruling has been denied by an arbitrator retains the right to seek relief under G.S. 1-569.20 and G.S. 1-569.21 from any final award the arbitrator renders.

(c) There is no right of appeal from trial court orders and judgments on preaward rulings by an arbitrator after a trial court award under this section, G.S. 1-569.19, and G.S. 1-569.28.

"**§ 1-569.19. Award.**

(a) An arbitrator shall make a record of an award. The record must be signed or otherwise authenticated as authorized by federal or State law by any arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.

(b) An award must be made within the time specified by the agreement to arbitrate or, if not specified therein, within the time ordered by the court. The court may extend or the parties to the arbitration proceeding may agree in a record to extend the time. The court or the parties may do so within or after the time specified or ordered. A party waives any objection that an award was not timely made unless that party gives notice of the objection to the arbitrator before receiving notice of the award.

"**§ 1-569.20. Change of award by arbitrator.**

(a) On motion to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

(1) Upon a ground stated in G.S. 1-569.24(a)(1) or (a)(3);

(2) Because the arbitrator had not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) To clarify the award.

(b) A motion under subsection (a) of this section must be made and notice given to all parties within 20 days after the movant receives notice of the award.

(c) A party to the arbitration proceeding must give notice of any objection to the motion within 10 days after receipt of the notice.

(d) If a motion to the court is pending under G.S. 1-569.22, 1-569.23, or 1-569.24, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

(1) Upon a ground stated in G.S. 1-569.24(a)(1) or (a)(3);

(2) Because the arbitrator had not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) To clarify the award.

(e) An award modified or corrected pursuant to this section is subject to G.S. 1-569.19(a), 1-569.22, 1-569.23, and 1-569.24.

"**§ 1-569.21. Remedies; fees and expenses of arbitration proceeding.**

(a) An arbitrator may award punitive damages or other exemplary relief if:

(1) the arbitration agreement provides for an award of punitive damages or exemplary relief;

(2) an award for punitive damages or other exemplary relief is authorized by law in a civil action involving the same claim;

(3) the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.

(b) An arbitrator may award reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding. An arbitrator may award reasonable attorney's fees if:

(1) the arbitration agreement provides for an award of attorney's fees; and

(2) an award of attorney's fees is authorized by law in a civil action involving the same claim.

(c) As to all remedies other than those authorized by subsections (a) and (b) of this section, an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a

remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under G.S. 1-569.22 or for vacating an award under G.S. 1-569.23.

(d) An arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award.

(e) If an arbitrator awards punitive damages or other exemplary relief under subsection (a) of this section, the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief.

"**§ 1-569.22. Confirmation of award.**

After a party to an arbitration receives notice of an award, the party may make a motion to the court for an order confirming the award, at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to G.S. 1-569.20 or G.S. 1-569.24 or is vacated pursuant to G.S. 1-569.23.

"**§ 1-569.23. Vacating award.**

(a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(1) The award was procured by corruption, fraud, or other undue means;

(2) There was:

a. Evident partiality by an arbitrator appointed as a neutral arbitrator;

b. Corruption by an arbitrator; or

c. Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) An arbitrator refused to postpone the hearing upon a showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to G.S. 1-569.15 so as to prejudice substantially the rights of a party to the arbitration proceeding;

(4) An arbitrator exceeded the arbitrator's powers;

(5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under G.S. 1-569.15(c) no later than the beginning of the arbitration hearing; or

(6) The arbitration was conducted without proper notice of the initiation of an arbitration as required in G.S. 1-569.9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

(b) A motion under this section must be filed within 90 days after the movant receives notice of the award pursuant to G.S. 1-569.19 or within 90 days after the movant receives notice of a modified or corrected award pursuant to G.S. 1-569.20, unless the movant alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion must be made within 90 days after the ground is known or by the exercise of reasonable care would have been known by the movant.

(c) If the court vacates an award on a ground other than that set forth in subdivision (a)(5) of this section, it may order a rehearing. If the award is vacated on a ground stated in subdivision (1) or (2) of subsection (a) of this section, the rehearing

must be before a new arbitrator. If the award is vacated on a ground stated in subdivision (3), (4), or (6) of subsection (a) of this section, the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in G.S. 1-569.19(5) for an award.

(d) If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award pursuant to G.S. 1-569.24 is pending.

"**§ 1-569.24. Modification or correction of award.**

(a) Upon motion made within 90 days after the movant receives notice of the award pursuant to G.S. 1-569.19 or within 90 days after the movant receives notice of a modified or corrected award pursuant to G.S. 1-569.20, the court shall modify or correct the award if:

(1) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

(2) The arbitrator has made an award on a claim not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the claims submitted; or

(3) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

(b) If a motion made under subsection (a) of this section is granted, the court shall modify and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the court shall confirm the award.

(c) A motion to modify or correct an award pursuant to this section may be joined with a motion to vacate the award.

"**§ 1-569.25. Judgment on award; attorney's fees and litigation expenses.**

(a) Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment in conformity therewith. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.

(b) A court may allow reasonable costs of the motion and subsequent judicial proceedings.

(c) On motion of a prevailing party to a contested judicial proceeding under G.S. 1-569.22, 1-569.23, or 1-569.24, the court may add reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award.

"**§ 1-569.26. Jurisdiction.**

(a) A court of this State having jurisdiction over the controversy and the parties may enforce the agreement to arbitrate.

(b) An agreement to arbitrate providing for arbitration in this State confers exclusive jurisdiction on the court to enter judgment on an award under this Article.

"**§ 1-569.27. Venue.**

A motion pursuant to G.S. 1-569.5 must be made in the court of the county in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the court of the county in which it was held. Otherwise, the motion may be made in the court of any county in which an adverse party resides or has a place of business or, if no adverse party has a residence or place of business in this State, in the court of any county in this State. All subsequent motions must be made in the court hearing the initial motion unless the court otherwise directs.

"**§ 1-569.28. Appeals.**

(a) An appeal may be taken from:

(1) An order denying a motion to compel arbitration;

(2) An order granting a motion to stay arbitration;

(3) An order confirming or denying confirmation of an award;

(4) An order modifying or correcting an award;

(5) An order vacating an award without directing a rehearing; or

(6) A final judgment entered pursuant to this Article.

(b) An appeal under this section must be taken as from an order or a judgment in a civil action.

"**§ 1-569.29. Uniformity of application and construction.**

In applying and construing this Article, the Revised Uniform Arbitration Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

"**§ 1-569.30. Relationship to federal Electronic Signatures in Global and National Commerce Act.**

The provisions of this Article governing the legal effect, validity, and enforceability of electronic records or electronic signatures, and of contracts performed with the use of such records or signatures, conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, et seq., or as otherwise authorized by federal or State law governing such electronic records or electronic signatures.

"**§ 1-569.31. Short title.**

This Article may be cited as the Revised Uniform Arbitration Act."

SECTION 3. This act does not affect an action or proceeding that commences or accrues before Article 45C, as enacted in Section 2 of this act, becomes effective. Subject to G.S. 1-569.3, as enacted in Section 2 of this act, an arbitration agreement made before the effective date of this act is governed by Article 45A of Chapter 1 of the General Statutes.

SECTION 4. Section 1 of this act becomes effective January 1, 2006. The remainder of this act becomes effective January 1, 2004.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 722

Short Title:	Display of American Flag.	(Public)
Sponsors:	Senators Kinnaird; Apodaca, Ballantine, Berger, Carpenter, Foxx, Gulley, Hagan, Hartsell, Horton, Kerr, Metcalf, and Webster.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT PERTAINING TO THE DISPLAY OF THE UNITED STATES FLAG.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 144 of the General Statutes is amended by adding a new section to read:

"**§ 144-7. Display of American flag.**

(a) No covenant, condition, or restriction set forth in a deed, and no rule, regulation, bylaw, or other governing document or agreement of a homeowners, neighborhood, civic, or other association, shall prohibit or be construed to prohibit the placement on any property of a flagpole that is to be used for the purpose of displaying, or shall prohibit or be construed to prohibit the display on any property of, the flag of the United States if the flag is displayed in accordance with any of the following:

(1) The patriotic customs set forth in 4 U.S.C.A. §§ 5-10, as amended, governing the display and use of the flag of the United States.

(2) The consent of the property's owner or of any person having lawful control of the property.

(3) The recommended flagpole standards set forth in "Our Flag," published pursuant to S.C.R. 61 of the 105th Congress, 1st Session (1998).

(4) Any federal law, proclamation of the President of the United States or the Governor, section of the Revised Code, or local ordinance or resolution.

(b) A covenant, condition, restriction, rule, regulation, bylaw, governing document, or agreement or a construction of any of these items that violates subsection (a) of this section is against public policy and unenforceable in any court of this State to the extent it violates subsection (a) of this section.

(c) No declaration, bylaw, rule, regulation, or agreement of a condominium property or construction of any of these items by the board of managers of its unit

owners' association shall prohibit the placement of a flagpole that is to be used for the purpose of displaying, or shall prohibit the display of, the flag of the United States on or within the limited common areas and facilities of a unit owner or on the immediately adjacent exterior of the building in which the unit of a unit owner is located, if the flag is displayed in accordance with any of the following:

(1) The patriotic customs set forth in 4 U.S.C.A. §§ 5-10, as amended, governing the display and use of the flag of the United States.

(2) The recommended flagpole standards set forth in "Our Flag," published pursuant to S.C.R. 61 of the 105th Congress, 1st Session (1998).

(3) Any federal law, proclamation of the President of the United States or the Governor, section of the General Statutes, or local ordinance or resolution.

(d) A declaration, bylaw, rule, regulation, or agreement or the construction of any of these items that violates subsection (c) of this section is against public policy and unenforceable in any court of this State to the extent it violates subsection (c) of this section."

SECTION 2. The title of Chapter 144 of the General Statutes reads as rewritten:

"**STATE FLAG, AMERICAN FLAG, ~~MOTTO~~ MOTTO, AND COLORS.**"

SECTION 3. This act is effective when it becomes law.

SENATE BILL 722:
Display of American Flag.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Kinnaird
Date:	April 16, 2003	**Summary by:**	Robin Johnson
Version:	First		Committee Counsel

SUMMARY: Senate Bill 722 would nullify, by declaring against public policy, any covenant, condition, restriction, declaration, rule, regulation, or agreement of a homeowners association or condominium association that prohibits the placement of a flagpole on any property for the purpose of displaying the United States flag or prohibits the display of the United States flag on any property, so long as the flag is displayed in accordance with certain conditions and requirements.

BILL ANALYSIS: The bill would creates a new **G.S. 144-7, Display of American Flag**, which provides that no covenant, condition, restriction, declaration, rule, regulation, or agreement of a homeowners, neighborhood, civic, condominium, or other association may prohibit the placement of a flagpole on any property for the purpose of displaying the United States flag or prohibit the display of the United States flag on any property, if the flag is displayed with the consent of the real property's owner or person having lawful control of the property and in accordance with any of the following conditions:

- Customs set forth 4 U.S.C.A. §§ 5-10 governing the display of the American flag.
- Flagpole standards set forth in S.C.R. 61, 105th Congress.
- Any federal law or proclamation of the President or Governor, or local ordinance or resolution.

EFFECTIVE DATE: Senate Bill 722 is effective when it becomes law.

S722-SMRH-001: Tim Hovis, Staff Attorney, contributed to this summary.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

S

SENATE BILL 868

Short Title:	Assault in the Presence of a Child.	(Public)
Sponsors:	Senator Hagan.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO CREATE THE CRIMINAL OFFENSE OF ASSAULT IN THE PRESENCE OF A CHILD.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-33(c) is amended by adding a new subdivision to read:

"(c) Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:

...

(7) Commits an assault with a deadly weapon or an assault that inflicts serious injury on a person with whom he or she has a personal relationship in the presence of a minor who is residing with or in the custody of the person assaulted. The following definitions shall apply in this subdivision:

a. "In the presence of a minor" means:

1. In the physical presence of the minor; or

2. Having knowledge that a child is present and may see or hear the offense.

b. "Minor" is as defined in G.S. 48A-2.

c. "Personal relationship" is as defined in G.S. 50B-1(b)."

SECTION 2. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

SENATE BILL 868:
Assualt in the Presence of a Child

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Hagan
Date:	April 16, 2003	**Summary by:**	Kory J. Goldsmith
Version:	1st Edition		Committee Counsel

SUMMARY: ***SB 868 makes it a Class A1 misdemeanor to commit an assault with a deadly weapon or assault with intent to inflict serious injury on another person with whom the defendant has a personal relationship if the assault is committed in the presence of a child.***

BILL ANALYSIS: The bill creates a new misdemeanor assault. A person would be guilty of the crime if he or she:

- Commits an assault
  - with a deadly weapon; or
  - that inflicts serious injury;
- On a person with whom the defendant has a personal relationship
- In the presence of a minor
- If the minor:
  - resides with the person who is assaulted; or
  - is in the custody of the person who is assaulted.

A "minor" is a person under 18 years of age.

"Personal relationship" means:

- current or former spouses
- persons of the opposite sex who are living together or have lived together
- related parents and children, or persons acting in loco parentis to a minor child such as grandparents and grandchildren
- persons who have a child in common
- current or former household members
- persons of the opposite sex who are in a dating relationship or have been in a dating relationship

An assault is committed "in the presence of a minor" if:

- the minor is physically present; or
- the defendant has knowledge that the child is present and may see or hear the offense.

As a Class A1 misdemeanor, a defendant could be sentenced from 1 to 150 days of active, intermediate, or community punishment.

CURRENT LAW: An assault is defined as an overt act or attempt, or the unequivocal appearance of an attempt, with force and violence, to immediately physically injure another person. An assault with a deadly weapon is an assault with a weapon likely to cause death or serious bodily injury. Serious bodily injury is a physical injury that causes great pain and suffering or serious mental injury.

It is currently a Class A1 misdemeanor to assault a child under 12. If the child is over 12, but under 16, misdemeanor child abuse may be charged.

Misdemeanor child abuse is a Class 1 misdemeanor. It occurs when:

- a parent of a child less than 16 years of age or a person providing care or supervision of a child less than 16 years of age;
- inflicts physical injury on, or allows physical injury to be inflicted on, or creates or allows a substantial risk of physical injury to
- the child
- other than by accident.

The act becomes effective December 1, 2003 and applies to offenses committed on or after that date.

S868-SMRC-001

Judiciary II Committee

Minutes – 10:00 AM Meeting

April 22, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with fourteen members present.

SB 693 (Amend Enhanced Sentences Laws) Senator Hartsell recognized Senator Thomas, bill sponsor, to discuss the bill. Senator Thomas submitted an amendment and moved for adoption. Senator Hartsell called for a vote. All members voted and the motion carried. Senator Thomas gave an explanation and introduced Mr. John H. Madler, from the Sentencing and Policy Advisory Commission, who spoke on the bill. Senator Thomas presented a technical amendment and moved for adoption. All voted and the motion carried. Questions by Senators Allran, Rucho, Webster and Kinnaird were answered by Senators Thomas and Hartsell, Mr. Madler and Robin Johnson, staff attorney. Senator Queen moved for a report unfavorable to the original bill, favorable to the bill as amended and rolled into a new Committee Substitute. All members voted and the motion carried.

SB 708 (Volunteer Fire Dept. Criminal Background Checks) The Chair invited Senator Shubert, bill sponsor to discuss the bill. Senator Kinnaird moved to adopt the Proposed Committee Substitute for purposes of discussion. Senator Hartsell called for a vote. All members voted and the motion carried. Senator Shubert explained the committee substitute. Questions by Senators Rucho, Dorsett, Holloman, Webster, Moore and Kerr were answered by Senators Shubert and Hartsell. Senator Rucho moved for a report unfavorable to the original bill, favorable to the Committee Substitute. All members voted and the motion carried.

SB 722 (Display the American Flag) Senator Hartsell recognized Senator Kinnaird, bill sponsor, to discuss the bill. Senator Kinnaird presented an amendment to the original bill and moved for adoption. Robin Johnson, staff attorney, explained the amendment. All members voted and the motion carried. Questions by Senators Allran and Rucho were answered by Senator Kinnaird and Robin Johnson. Senator Shubert moved for a report unfavorable to the original bill, favorable to the bill as amended and rolled into a new Committee Substitute. All members voted and the motion carried.

The meeting recessed until fifteen minutes after session.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

Judiciary II Committee

Minutes – 6:00 PM Meeting

April 22, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with 13 members present.

SB 471 (Amend Self-Insurance Guaranty Assoc. Law) Senator Hartsell invited Senator Allran to chair the meeting. Senator Hartsell, bill sponsor, noted there was a Proposed Committee Substitute. Senator Sloan moved to adopt the Committee Substitute for discussion. All members voted and the motion carried. Senator Hartsell invited Senator Shubert, who chaired the sub-committee (Senators Shubert, Queen and Sloan) for Senate Bill 471, to explain the findings of the sub-committee. Senator Shubert submitted an amendment to the Proposed Committee Substitute. She then moved to adopt the amendment and Senator Allran called for a vote. All members voted and the motion carried. Senator Allran called for discussion of the Proposed Committee Substitute as amended. Senators Shubert, Sloan and Hartsell answered questions by Senators Webster and Allran. Senator Queen moved for a favorable report to the Proposed Committee Substitute as amended, unfavorable to the original bill, and rolled into a new committee substitute. All members voted and the motion carried.

SB 707 (Repeat Misd. Larceny) Senator Hartsell recognized Senator Shubert, bill sponsor, to explain the bill. Questions by Senators Holloman, Moore, Kinnaird Thomas, and Bingham were answered by Senator Shubert and Chloe Gossage from Fiscal Research. Senator Webster moved for a favorable report. All members voted and the motion carried.

SB 716 (Revised Uniform Arbitration Act) Senator Thomas was invited to chair the meeting while Senator Hartsell, bill sponsor discussed the bill. Senator Apodaca moved to adopt the Proposed Committee Substitute for purposes of discussion. All members voted and the motion carried. Senator Hartsell submitted a technical amendment and moved for adoption. All members voted and the motion carried. Senator Hartsell explained the bill. Senator Apodaca moved to adopt the Proposed Committee Substitute as amended and rolled into a new committee substitute.

SB 449 (Presumption-DWI Blood Withdrawal Valid) Senator Queen – bill sponsor. The bill was recalled for reconsideration. Senator Holloman moved to adopt the Proposed Committee Substitute for purposes of discussion. All members voted and the motion carried. Senator Hartsell and Senator Queen discussed the changes. Senator Bingham moved for a favorable report as to the Proposed Committee, unfavorable as to the original bill. All members voted and the motion carried.

SB 868 (Assault in the Presence of a Child) Senator Hagan, bill sponsor. Senator Hartsell explained that an amendment to the bill was needed for clarification purposes. Senator Hartsell called for a motion by a member who voted with the majority when the bill passed to reconsider the vote by which a favorable report was given to Senate Bill 868. Senator Thomas so moved. All voted and the motion carried. Senator Webster moved to adopt the new Committee Substitute which had been reviewed by Senator Hagan. All voted and the motion carried. Kory Goldsmith, staff attorney, explained the Proposed Committee Substitute. Questions by Senators Webster and Queen were answered by Senator Hartsell and Kory Goldsmith. Mr. Will Polk, of the Attorney General's office spoke on the bill. Senator Hartsell decided to displace the bill until Thursday to give time to correct the language.

With no further business, the meeting adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, April 22, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B. **468** Clarify Irrevocable Trust Law.
Sequential Referral: None
Recommended Referral: None

S.B. **881** Permit Tobacco Payment w/o Reopening Estate.
Sequential Referral: Finance
Recommended Referral: None

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **549** Uniform Principal and Income Act.
Draft Number: PCS75237
Sequential Referral: Finance
Recommended Referral: None
Long Title Amended: No

TOTAL REPORTED: 3

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Wednesday, April 23, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B. **707** Repeat Misd. Larceny.
- Sequential Referral: None
- Recommended Referral: None

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **449** Presumption-DWI Blood Withdrawal Valid.
- Draft Number: PCS 65273
- Sequential Referral: None
- Recommended Referral: None
- Long Title Amended: Yes

S.B. **693** Amend Enhanced Sentences Laws.
- Draft Number: PCS40027
- Sequential Referral: None
- Recommended Referral: None
- Long Title Amended: No

S.B. **708** Volunteer Fire Dept. Crim. Background Checks.
- Draft Number: PCS 55181
- Sequential Referral: None
- Recommended Referral: None
- Long Title Amended: Yes

S.B. **722** Display of American Flag.
- Draft Number: PCS 65270
- Sequential Referral: None
- Recommended Referral: None
- Long Title Amended: No

S.B. **925** Strengthen Security Fraud Enforcement Laws.
- Draft Number: PCS 40017
- Sequential Referral: None
- Recommended Referral: None
- Long Title Amended: No

TOTAL REPORTED: 6

Committee Clerk Comments:

Corrected Notice – SB 449 added

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **JUDICIARY II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	April 22, 2003	10:00 AM	1124
Tuesday	April 22, 2003	15 min. after session	1124

The following will be considered:

	BILL NO.	SHORT TITLE	SPONSOR
•	SB 471	Amend Self-Insurance Guaranty Assoc. Law	Senator Hartsell
•	SB 707	Repeat Misd. Larceny	Senator Shubert
•	SB 708	Volunteer Fire Dept. Crim. Background Check	Senator Shubert
•	SB 716	Revised Uniform Arbitration Act	Senator Hartsell
•	SB 722	Display of the American Flag	Senator Kinnaird

Senator HARTSELL, Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
April 22, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. Welcome and Opening Remarks

II. Bills to be Considered

• SB 471	Amend Self-Insurance Guaranty Assoc. Law	Senator Hartsell
○		
• SB 707	Repeat Misd. Larceny	Senator Shubert
• SB 708	Volunteer Fire Dept. Crim. Background Check	Senator Shubert
○		
SB 716	Revised Uniform Arbitration Act	Senator Hartsell
SB 722	Display of the American Flag	Senator Kinnaird
SB 449	Presumption-DWI Blood Withdrawal Valid	Senator Queen

III. Other Business

IV. Adjournment

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — April 22 morning
Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Courtney Crowder	DOI
Frank Folger	NC DOT
John McMillan	MFOS
Jim Stuart	Stuart Law Firm
Cathy Stuart	" "
Melanese Blanchard	Page Observing.
Don McCorquodale	SAS
Barbara Hart	NCRTR, GSO
Laura Harper	SEANC

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **JUDICIARY II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	April 22, 2003	15 min. after Session	1124

The following will be considered:

	BILL NO.	SHORT TITLE	SPONSOR
•	SB 471	Amend Self-Insurance Guaranty Assoc. Laws	Senator Hartsell
•	SB 707	Repeat Misd. Larceny	Senator Shubert
•	SB 716	Revised Uniform Arbitration Act	Senator Hartsell
•	SB 449	Presumption-DWI Blood Withdrawal Valid	Senator Queen
•	SB 868	Assault in the Presence of a Child	Senator Hagan

Senator HARTSELL, Chair

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 23rd Tuesday 6:00 pm

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
David Robinson	Bar Assoc., Cary, NC
ANN LORE	DUNS
Richard O'Brien	PFPNC
Daschiel Rogers	NC DOT
FRANK FOLGER	"
BILL HAZLE	JORDAN PRICE LAW FIRM
Cathy Stuart	Stuart Law Firm
John McMillan	MF+S

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 4-22-03

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Ann Lore	DHHS
Elizabeth Dalton	Bond & Assoc.
John Madler	NC Sentencing Commission
Elizabeth Wickham	Lifetree
Fran Piercy	Duke Energy
Ken Kaylan	Kaylan Law Firm
Matt Osborne	AOC
Tom Sri	NCRMA
Fran Preston	NCRMA
Dawn Johnson	atty
Paul Stock	NC Bankers

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 693

Short Title:	Amend Enhanced Sentences Laws.	(Public)
Sponsors:	Senator Thomas.	
Referred to:	Judiciary II.	

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW REGARDING ENHANCED SENTENCES AS RECOMMENDED BY THE SENTENCING COMMISSION AND TO MAKE CONFORMING CHANGES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-2.2 is repealed.

SECTION 2. G.S. 15A-1340.16A reads as rewritten:

"**§ 15A-1340.16A. Enhanced sentence if defendant is convicted of a Class A, B1, B2, C, D, or E felony and the defendant used, displayed, or threatened to use or display a firearm during the commission of the felony.**

~~(a) If a person is convicted of a Class A, B1, B2, C, D, or E felony and the court finds that the person used, displayed, or threatened to use or display a firearm at the time of the felony, the court shall increase the minimum term of imprisonment to which the person is sentenced by 60 months. The court shall not suspend the 60-month minimum term of imprisonment imposed as an enhanced sentence under this section and shall not place any person sentenced under this section on probation for the enhanced sentence.~~

~~(b) Subsection (a) of this section does not apply in any of the following circumstances:~~

~~(1) The person is not sentenced to an active term of imprisonment.~~

~~(2) The evidence of the use, display, or threatened use or display of a firearm is needed to prove an element of the underlying Class A, B1, B2, C, D, or E felony.~~

~~(3) The person did not actually possess a firearm about his or her person.~~

(a) If a person is convicted of a Class A, B1, B2, C, D, or E felony and it is found as provided in this section that: (i) the person committed the felony by using, displaying, or threatening the use or display of a firearm, and (ii) the person actually possessed the firearm about his or her person, then the person shall have the minimum term of imprisonment to which the person is sentenced for that felony increased by 60

months. The maximum term of imprisonment shall be the maximum term that corresponds to the minimum term after it is increased by 60 months, as specified in G.S. 15A-1340.17(e) and (e1).

(b) An indictment or information for the Class A, B1, B2, C, D, or E felony shall allege in that indictment or information the facts set out in subsection (a) of this section. The pleading is sufficient if it alleges that the defendant committed the felony by using, displaying, or threatening the use or display of a firearm and the defendant actually possessed the firearm about the defendant's person. One pleading is sufficient for all Class A, B1, B2, C, D, or E felonies that are tried at a single trial.

(c) The State shall prove the issue set out in subsection (a) of this section beyond a reasonable doubt during the same trial in which the defendant is tried for the felony unless the defendant pleads guilty or no contest to that issue. If the defendant pleads guilty or no contest to the felony but pleads not guilty to the issue set out in subsection (a) of this section, then a jury shall be impaneled to determine that issue.

(d) Subsection (a) of this section does not apply if the evidence of the use, display, or threatened use or display of the firearm is needed to prove an element of the felony or if the person is not sentenced to an active term of imprisonment."

SECTION 3. G.S. 15A-1340.16B reads as rewritten:

"**§ 15A-1340.16B. Life imprisonment without parole for a second or subsequent conviction of a Class B1 ~~felony.~~felony if the victim was 13 years of age or younger and there are no mitigating factors.**

(a) ~~Notwithstanding the sentencing dispositions in G.S. 15A-1340.17,~~If a person is convicted of a Class B1 felony ~~shall be sentenced to life imprisonment without parole if:~~ and it is found as provided in this section that: (i)

~~(1)~~ ~~The offense was committed~~ the person committed the felony against a victim who was 13 years of age or younger at the time of the ~~offense;~~ offense, and

~~(2)~~ ~~The~~(ii) the person has one or more prior convictions of a Class B1 ~~felony; and~~

~~(3)~~ ~~The court finds that there are no mitigating factors in accordance with G.S. 15A-1340.16(e).~~felony, then the person shall be sentenced to life imprisonment without parole.

~~(b) If the sentencing court finds that there are mitigating circumstances, then the court shall sentence the person in accordance with G.S. 15A-1340.17.~~

~~(c) A prior conviction of a Class B1 felony shall be proved in accordance with G.S. 15A-1340.14.~~

(b) An indictment or information for the Class B1 felony shall allege in that indictment or information or in a separate indictment or information the facts set out in subsection (a) of this section. The pleading is sufficient if it alleges that the defendant committed the felony against a victim who was 13 years of age or younger at the time of the felony and had one or more prior convictions of a Class B1 felony. One pleading is sufficient for all Class B1 felonies that are tried at a single trial.

(c) The State shall prove the issue set out in subsection (a) of this section beyond a reasonable doubt during the same trial in which the defendant is tried for the felony

unless the defendant pleads guilty or no contest to that issue. The issue shall be presented in the same manner as provided in G.S. 15A-928(c). If the defendant pleads guilty or no contest to the felony but pleads not guilty to the issue set out in subsection (a) of this section, then a jury shall be impaneled to determine that issue.

(d) Subsection (a) of this section does not apply if there are mitigating factors present under G.S. 15A-1340.16(e)."

SECTION 4. G.S. 15A-1340.16C reads as rewritten:

"**§ 15A-1340.16C. Enhanced sentence if defendant is convicted of a felony and the defendant was wearing or had in his or her immediate possession a bullet-proof vest during the commission of the felony.**

(a) If a person is convicted of a felony and ~~the court finds that~~ it is found as provided in this section that the person ~~was wearing~~wore or had in his or her immediate possession a bullet-proof vest at the time of the felony, then the person is guilty of a felony that is one class higher than the underlying felony for which the person was convicted.

~~(b) This section does not apply if the evidence that the person possessed a bullet-proof vest is needed to prove an element of the underlying felony for which the person was convicted. This section does not apply to law enforcement officers.~~

(b) An indictment or information for the felony shall allege in that indictment or information or in a separate indictment or information the facts set out in subsection (a) of this section. The pleading is sufficient if it alleges that the defendant committed the felony while wearing or having in the defendant's immediate possession a bulletproof vest. One pleading is sufficient for all felonies that are tried at a single trial.

(c) The State shall prove the issue set out in subsection (a) of this section beyond a reasonable doubt during the same trial in which the defendant is tried for the felony unless the defendant pleads guilty or no contest to that issue. If the defendant pleads guilty or no contest to the felony but pleads not guilty to the issue set out in subsection (a) of this section, then a jury shall be impaneled to determine that issue.

(d) Subsection (a) of this section does not apply if the evidence that the person wore or had in the person's immediate possession a bulletproof vest is needed to prove an element of the felony."

SECTION 5. This act is effective when it becomes law and applies to offenses committed on or after that date. Prosecutions for offenses occurring before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable before this act remain applicable to those prosecutions.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 693

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S693-ARH-13 [v.1]

Date _____,2003

Comm. Sub. [NO]
Amends Title [NO]
First Edition

Senator _____

moves to amend the bill on page 2, lines 10, 13, and 43, and on page 3, line 3, by deleting the word "issue" everywhere it appears on those lines and by substituting the word "issues" in those places;

and on page 2, lines12 and 14, and on page 3, line 4, by deleting the phrase "that issue" everywhere it appears on those lines and by substituting the phrase "the issues" in those places;

and on page 2, line 41, by inserting between the words "and" and "had" the following new phrase: "that the defendant";

and on page 3, line 1, by rewriting the line to read:
"unless the defendant pleads guilty or no contest to the issues. The issues shall be".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

SENATE BILL 693:
Amend Enhanced Sentences Law.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Thomas
Date:	April 17, 2003	**Summary by:**	Robin S. Johnson*
Version:	First		Committee Counsel

SUMMARY: ***Senate Bill 693 would amend the enhanced sentencing laws to conform to a recent United States Supreme Court case and a North Carolina Court of Appeals case by requiring that (1) the facts supporting an enhanced sentence be alleged in the indictment, and (2) a jury determine the enhancement issues beyond a reasonable doubt.***

The Sentencing Commission recommends this bill. It also was recommended and introduced last Session. It was amended several times and passed the Senate, but the House failed to pass it.

The act would become effective when it becomes law and apply to offenses committed on or after that date. The current statutes would be applicable to prosecutions for offenses occurring before the act becomes effective.

BACKGROUND: Currently, there are three North Carolina statutes that require a sentencing judge, upon finding certain facts by a preponderance of the evidence, to increase a defendant's sentence beyond the ranges authorized by structured sentencing: These statutes are (i) firearm enhancement; (ii) enhancement for Class B1 felonies involving young victims; and (iii) bulletproof vest enhancement.

A recent United States Supreme Court decision, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), called into question the constitutionality of these sentencing enhancements. The Court held that **any fact, other than a prior conviction, that increases the punishment for a crime beyond the statutory maximum for that crime must be submitted to the jury and proven beyond a reasonable doubt.**

Following *Apprendi*, the NC Court of Appeals initially ruled that the State's firearm enhancement statute is unconstitutional as violative of procedural due process under the 14th Amendment of the United States Constitution. The NC Supreme Court then addressed this particular statute and held that "in every instance where the State seeks an enhanced sentence [under the firearm enhancement statute], it must allege the statutory factors supporting the enhancement in an indictment, which may be the same indictment that charges the underlying offense, and submit those factors to the jury. If the jury returns a guilty verdict that includes these factors, the trial judge shall make the finding set out in the statute and impose an enhanced sentence." After that decision, the Court of Appeals withdrew its finding that the firearm enhancement statute is facially unconstitutional.

BILL ANALYSIS: The bill would modify the three enhanced sentencing statutes to conform with the recent *Apprendi* and *Guice* decisions by requiring that a jury determine beyond a reasonable doubt the facts supporting an enhanced sentence.

I. Firearm Enhancement (Secs. 1 & 2)

Under current law, G.S. 15A-1340.16A requires that an additional 60 months be added to a defendant's sentence ***if the judge finds*** that the defendant (1) used, displayed, or threatened to use or display a firearm during the commission of a Class A through E felony and (2) actually possessed a firearm about his or her person.

Under the bill, a defendant will be subject a 60-month enhancement ***if a jury finds beyond a reasonable doubt*** that the defendant (i) used, displayed, or threatened to use or display a firearm during the commission of a Class A through E felony and (ii) actually possessed a firearm about his or her person.

Under current law and under the bill, the enhancement will not apply if evidence of the use, display, or threatened use or display of a firearm is needed to prove an element of the underlying felony or if the person is not sentenced to an active term of imprisonment.

II. Enhancement for Class B1 Felonies Involving Young Victims (Sec. 3)

Currently, G.S. 15A-1340.16B requires that a defendant who is convicted of a Class B1 felony be sentenced to life imprisonment without parole ***if the judge finds*** that (1) the victim was 13 years of age or younger at the time of the offense, (2) the defendant has one or more prior convictions of a Class B1 felony, and (3) there are no mitigating factors present.

B1 felonies are: 1st degree rape, 1st degree sexual offense, and statutory rape or a sexual offense of a person who is 13, 14, or 15 years old and the defendant is at least 6 years older than the victim.

Under the bill, a defendant who is convicted of a Class B1 felony shall be sentenced to life imprisonment without parole ***if a jury determines beyond a reasonable doubt*** (1) the victim was 13 years of age or younger at the time of the offense, and (2) the defendant has one or more prior convictions of a Class B1 felony. The enhanced sentence will not apply if there are mitigating factors present.

III. Bulletproof Vest Enhancement (Sec. 4)

Under current law, G.S. 15A-1340.16C requires that a defendant who is convicted of a felony ***where the judge finds*** that the person wore or had in the person's immediate possession a bulletproof vest at the time of the felony be guilty of a felony that is one class higher than the underlying felony for which the person was convicted. This enhancement does not apply to law enforcement officers.

Under the bill, a defendant who is convicted of a felony ***where the jury determines beyond a reasonable doubt*** that the person wore or had in his immediate possession a bulletproof vest at the time of the felony, shall be guilty of a felony that is one class higher than the underlying felony for which the person was convicted. The exception for law enforcement officers is removed under the bill.

Under current law and under the bill, the enhanced sentence will not apply if evidence that the person wore or had in his immediate possession a bulletproof vest is needed to prove an element of the felony.

For all enhancements, the bill would require indictments to allege the facts necessary to support an enhanced sentence.

Changes that are not necessarily required by Apprendi:

Currently, prior convictions are proven by the preponderance of the evidence. Sec. 3 would require that the indictment allege prior convictions and that this be proven beyond a reasonable doubt.

Sec. 4 deletes the exemption for law enforcement officers under the bulletproof vest enhancement statute.

S693-SMRH-001: Trina Griffin, staff attorney, contributed significantly to this summary.*

Section 1 would repeal this statute:

§ 14-2.2. Sentencing of a person convicted of a Class A, B, B1, B2, C, D, or E felony who used, displayed, or threatened to use or display a firearm during the commission of the crime; confiscation and disposition of a firearm used in a felony.

(a) If a person is convicted of a Class A, B, B1, B2, C, D, or E felony and the person used, displayed, or threatened to use or display a firearm during the commission of the felony, the person shall, in addition to the punishment for the underlying felony, be sentenced to a minimum term of imprisonment for 60 months as provided by G.S. 15A-1340.16A.

The court shall not suspend any sentence imposed under this section and shall not place a person sentenced under this section on probation for the sentence imposed under this section. Sentences imposed pursuant to this section shall be consecutive to all other sentences imposed and shall begin at the expiration of any other sentence being served by the person.

(b) Subsection (a) of this section does not apply in any of the following circumstances:

(1) The person is not sentenced to an active term of imprisonment.

(2) The evidence of the use, display, or threatened use or display of a firearm is needed to prove an element of the underlying Class A, B, B1, B2, C, D, or E felony.

(3) The person did not actually possess a firearm about his or her person.

(c) When a person is found to have personally used a firearm in the commission or attempted commission of a felony and the firearm is owned by that person, or the serial number on the firearm has been defaced such that ownership is not traceable, the court shall order that the firearm be confiscated and disposed of in any of the ways provided by G.S. 14-269.1 that the court in its discretion deems appropriate.

(d) Repealed by Session Laws 1994, Extra Session, c. 22, s. 19(b). (1979, c. 760, s. 2; 1979, 2nd Sess., c. 1316, ss. 34, 47, 48; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 538, s. 4; 1994, Ex. Sess., c. 22, ss. 18, 19(a), (b).)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 471

Short Title:	Amend Self-Insurance Guaranty Assoc. Laws.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 20, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAWS GOVERNING THE SELF-INSURANCE GUARANTY ASSOCIATION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 97-133(a)(2) reads as rewritten:

"(2) Assess each member of the Association as follows:

a. Each individual member self-insurer shall be annually assessed an amount equal to ~~one-quarter of one percent (0.25%)~~ two percent (2%) of the annual gross premiums, as determined under G.S. 105-228.5(b), (b1), and (c), that would have been paid by that member self-insurer for workers' compensation insurance during the prior calendar year; and payment to the Association shall be made no later than ~~September 15~~ May 15 following the close of that calendar year. Where any such assessment is paid based in whole or in part upon estimates of annual gross premiums for the prior calendar year, there shall be made in the next year's assessment an adjustment of the assessment of such prior year based on actual audited annual gross premiums. Each group member self-insurer shall be annually assessed an amount equal to ~~one-quarter of one percent (0.25%)~~ two percent (2%) of the annual gross premiums, as determined under G.S. 105-228.5(b), (b1), and (c), of the group member self-insurer during the prior calendar year; and payment to the Association shall be made no later than ~~September 15~~ May 15 following the close of that calendar year. Regardless of the size of the Fund, during its first 12 months of membership, no member self-insurer may discount or reduce this ~~one-quarter of one percent (0.25%) assessment. Assessments paid by members pursuant to this subdivision shall~~

~~be credited toward the tax paid by self-insurers under Article 8B of Chapter 105 of the General Statutes.~~ two percent (2%) assessment. For the purpose of making the assessments authorized by this subsection and subsections (c) and (d) of this section, the Secretary of Revenue shall provide to the Association the self-insurer premium and payroll information as determined under G.S. 105-228.5(b), (b1) and (c), and the Commissioner shall provide to the Association the group self-insurer premium information reported to the Commissioner under G.S. 58-47-75 and G.S. 58-2-165.

b. Each member self-insurer shall be notified of the assessment no later than 30 days before it is due.

c. If a self-insurer is a member of the Association for less than a full calendar year, the annual gross premiums shall be adjusted by that portion of the year the self-insurer is not a member of the Association.

d. If application of the contribution rates referenced in sub-subdivision a. of this subdivision would produce an amount in excess of the five million dollar ($5,000,000) limits of the fund, an equitable proration may be made; provided that every self-insurer that becomes a member of the Association shall pay an initial assessment, in an amount established by the Board, regardless of the size of the fund at the time the member joins the Association."

SECTION 2. G.S. 97-133(a)(4) reads as rewritten:

"(4) Be obligated to the extent of covered claims occurring prior to the determination of the member self-insurer's insolvency, or occurring after such determination but prior to the obtaining by the self-insurer of workers' compensation insurance as otherwise required under this Chapter. ~~The Association shall pay claims against a self-insurer that are not or have not been paid as a result of a determination of insolvency or the institution of bankruptcy or receivership proceedings that occurred prior to the effective date of this Article.~~"

SECTION 3. G.S. 97-185 reads as rewritten:

"**§ 97-185. ~~Deposits or surety bond.~~Deposits; surety bonds; letters of credit.**

(a) Every self-insurer shall deposit with the Commissioner an amount equal to ~~twenty-five percent (25%)~~ fifty percent (50%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer.

~~(b) A self-insurer organized and authorized before the effective date of this section shall have 24 months from the effective date of this section to comply with this section.~~

(c) Deposits received, changes to existing deposits, or deposits exchanged after the effective date of this section, shall comprise one or more of the following:

(1) Interest-bearing bonds of the United States of America.

(2) Interest-bearing bonds of the State of North Carolina, or of its cities or counties.

(3) Certificates of deposit issued by any solvent bank domesticated in the State of North Carolina that have a maturity of one year or greater.

(4) Surety bonds in a form acceptable to the Commissioner and issued by a corporate surety. A surety bond deposited pursuant to this subsection shall require that the surety reimburse the Commissioner, or his successors, assigns, or transferees, from the proceeds of the surety bond, for any costs incurred in the collection of the proceeds of the surety bond, including reasonable attorneys' fees, and any costs incurred in administering the workers' compensation claims against the insolvent self-insurer that deposited the surety bond.

(4a) Irrevocable letters of credit in a form acceptable to the Commissioner issued by a bank acceptable to the Commissioner.

(5) Any other investments that are approved by the Commissioner.

(d) All bonds or securities that are posted as a security deposit shall be valued annually at market value. If market value is less than face value, the Commissioner may require the self-insurer to post additional securities. In making this determination, the Commissioner shall consider the self-insurer's financial condition, the amount by which market value is less than face value, and the likelihood that the securities will be needed to provide benefits.

(e) Securities deposited under this section shall be assigned to the Commissioner, the Commissioner's successors, assigns, or trustees, on a form prescribed by the Commissioner in a manner that renders the securities negotiable by the Commissioner. If a self-insurer is deemed by the Commissioner to be in a hazardous financial condition, the Commissioner may sell or collect, or both, such amounts that will yield sufficient funds to meet the self-insurer's obligations under the Act. In the case of a letter of credit, the Commissioner may draw the full amount of a letter of credit if the letter of credit is not renewed within 90 days prior to its expiration or at any time that the bank issuing the letter of credit is no longer acceptable to the Commissioner. Interest accruing on any negotiable security deposited under this Article shall be collected and transmitted to the self-insurer if the self-insurer is not in a hazardous financial condition.

(f) No judgment creditor, other than a claimant entitled to benefits under the Act, may levy upon any deposits made under this section.

(g) Securities held by the Commissioner under this section may be exchanged or replaced by the self-insurer with other securities of like nature and amount as long as the self-insurer is not in a hazardous financial condition. No release shall be effectuated until replacement securities or bonds of an equal value have been substituted. Any surety bond may be exchanged or replaced with another surety bond that meets the requirements of this section if 90 days' advance written notice is given to the Commissioner. If a self-insurer ceases to self-insure or desires to replace securities with

an acceptable surety bond or bonds, the self-insurer shall notify the Commissioner, and may recover all or a portion of the securities deposited with the Commissioner upon posting instead an acceptable special release bond issued by a corporate surety in an amount equal to the total value of the securities. The special release bond shall cover all existing liabilities under the Act plus an amount to cover future loss development and shall remain in force until all obligations under the Act have been discharged fully.

(h) If a self-insurer ceases to self-insure, no deposits shall be released by the Commissioner until the self-insurer has discharged fully all of the self-insurer's obligations under the Act.

(i) An endorsement to a surety bond shall be filed with the Commissioner within 90 days after the effective date of the endorsement."

SECTION 4. Effective January 1, 2005, G.S. 97-185(a), as amended in Section 3 of this act, reads as rewritten:

"(a) Every self-insurer shall deposit with the Commissioner an amount equal to ~~fifty percent (50%)~~ seventy-five percent (75%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer."

SECTION 5. Effective January 1, 2006, G.S. 97-185(a), as amended in Sections 3 and 4 of this act, reads as rewritten:

"(a) Every self-insurer shall deposit with the Commissioner an amount equal to ~~seventy-five percent (75%)~~ one hundred percent (100%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer."

SECTION 6. Effective January 1, 2007, G.S. 97-185(a), as amended in Sections 3, 4, and 5 of this act, reads as rewritten:

"(a) Every self-insurer shall deposit with the Commissioner an amount equal to ~~one hundred percent (100%)~~ one hundred twenty-five percent (125%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer."

SECTION 7. G.S. 97-141 reads as rewritten:

"**§ 97-141. Stay of proceedings.**

All claims or proceedings under this Chapter to which the insolvent member self-insurer is a party either before the Industrial Commission or a court in this State and the running of all time periods against either the insolvent member self-insurer or the Association under this Chapter shall be stayed for 60 days from the later of the date of notice to the Association of the insolvency or the date the Association is notified of a

claim or proceeding under this Chapter in order to permit the Association to investigate, prosecute, or defend properly any petition, claim, or appeal under this Chapter, provided that the payment of weekly compensation for incapacity is made whenever time periods or proceedings affecting the payment of weekly compensation are stayed."

SECTION 8. Section 3 of this act becomes effective January 1, 2004. Section 4 of this act becomes effective January 1, 2005. Section 5 of this act becomes effective January 1, 2006. Section 6 of this act becomes effective January 1, 2007. Section 7 of this act is effective when this act becomes law and applies to claims filed on or after that date. The remainder of this act is effective when this act becomes law and applies to assessments made on or after that date.

SENATE BILL 471:
Amend Self-Insurance Guaranty Assoc. Laws.

BILL ANALYSIS

Committee:	Senate JII	**Introduced by:**	Sen. Hartsell
Date:	April 10, 2003	**Summary by:**	Linda Attarian
Version:	Introduced		Committee Co-Counsel

SUMMARY: House Bill 471 amends the laws governing the North Carolina Self-Insurance Guaranty Association (NCSIGA) to

- *Amend G.S. 97-185 governing security deposits made by self-insurers with the Commissioner of Insurance by progressively increasing the minimum amount of the deposit required under the statute. The bill spans the increases over a four year period to 2007, whereby the amount of the deposit will have increased from 25% to 125% of the self-insurer's total outstanding claim liability;*
- *Allow the Commissioner to accept irrevocable letters of credit in lieu of cash or a surety bond to meet the deposit requirement under G.S. 97-185;*
- *Require that surety bonds deposited with the Commissioner are sufficient to allow the NCSIGA to recover its administrative costs and any costs related to the collection of the proceeds of the surety bond;*
- *Amend the statute governing the NCSIGA's authority to make assessments against the self-insurer's annual gross premiums by increasing these assessments back to their pre-1997 levels;*
- *Eliminates the NCSIGA's statutory duty to pay claims against self-insurers that became insolvent before the NCSIGA was created; and*
- *Amends G.S. 97-141 to allow a 60 day-stay against the running of all time periods pursuant to any proceedings in which an insolvent member of the NCSIGA is a party to begin on the later of the date of notice to the NCSIGA of the insolvency of the member or the date the NCSIGA receives notice of a claim or proceeding after the original notice of the insolvency.*

BILL ANALYSIS:

Section 1. G.S. 58-6-25 requires insurance companies to pay a charge at a percentage rate of the company's premium tax liability for the taxable year. This section amends G.S. 97-133(a)(2) to restore the NCSIGA's authority to collect annual assessments from one-quarter of one percent (0.25%) to two percent (2%) of the annual gross workers compensation premiums.

The NCSIGA's rationale for this increase: In 1997 a tax credit was enacted against members' premium tax bills for annual assessments collected to increase the NCSIGA's Guaranty Fund from $1,000,000 to $5,000,000. The tax credit was only available for the two years of assessments that were necessary to increase the Guaranty Fund to $5,000,000. To offset the tax credit, the amount of allowable assessment was reduced from 2% to 0.25%. Now that the tax credit is no longer available, the amount of the annual assessments available to the NCSIGA is still at the reduced levels and they should be increased to pre-1997 levels.

Section 1 also changes the deadline for annual assessment payments to be made to the NCSIGA from September 1 to May 1. The statute provides that members' assessments must be paid by September 15 of the year in which the assessments are billed. Assessments are for the prior year but cannot be billed until April, after the self-insurers' premium tax returns are filled.

Section 2. G.S. 97-133(a) requires the NCSIGA to pay claims against self-insurers that became insolvent before the NCSIGA was created in 1986. Prior to 1997, the provision included a tax credit for assessments against premiums to pay such claims. This tax credit was deleted in 1997 with the enactment of S.L. 1997-475. SB 471 deletes the requirement to pay the claims since the tax credit is no longer available.

Section 3. Every insurer is required to post a security deposit with the Department of Insurance (DOI) in the form of cash, securities or a surety bond. The deposit or bond is assigned to the NCSIGA by the Department upon the self-insurer's insolvency and is used to pay worker's compensation claims against the insolvent self-insurer before claims are paid from the Guaranty Fund. Any claims paid from the Guaranty Fund result in assessments against all of the other self-insurers in North Carolina that are required, by law to belong to the Guaranty Association. The DOI does not currently accept letters of credit as security deposits. Other states do accept letters of credit.

SB 471 amends G.S. 97-185 to make letters of credit an acceptable form of a security deposit.

G.S. 97-185 currently requires self-insurers to make a security deposit of 25% of outstanding undiscounted claims liability, as determined by an actuary, or a minimum of $500,000. The Commissioner is authorized to require a higher deposit depending upon the financial condition of the self-insurer and the self-insurer's outstanding and potential claims liability. According to the NCSIGA, self-insurers that are in financial difficulty have taken advantage of the discretionary nature of the Commissioner's authority and have challenged deposit increases by requesting administrative hearings to delay the loss of their self-insurance authority. Apparently, in some instances the resulting delay has extended into the self-insurer's bankruptcy filing, resulting in more claims to be paid with an inadequate deposit and greater demands on the NCSIGA and remaining self-insurers.

SB 471 would require every self-insurer to post a deposit of 125% of its outstanding claims liability as determined by an actuary. The increase will be phased in over a four-year period. The Commissioner is allowed to require a deposit of more than 125% in the event that the self-insurer is found to be in "hazardous financial condition", which means that, based on its present or reasonably anticipated financial condition an insurer is insolvent or, although not financially impaired or insolvent, is unlikely to be able to meet obligations for known claims and reasonably anticipated claims; or to pay other obligations in the normal course of business.

Sections 4 through 6 provide for the progressive increases in the percent of claims liability required as a security deposit as explained in Section 3. See Section 8 for explanation of effective dates.

Section 7. G.S. 97-141 provides for a 60-day stay of proceedings in claims against self-insured member employers of the NCSIGA. The 60-day stay begins when the NCSIGA receives notice of insolvency. The purpose of the stay is to suspend pending time deadlines while the NCSIGA investigates, prosecutes, or defend against claims or appeals. Throughout the stay, the NCSIGA is obligated to make weekly compensation payments. According to the NCSIGA, the statute does not adequately address the situation where a claim is asserted against an insolvent former self-insurer long after the NCSIGA was given notice of the insolvency. SB 471 amends G.S. 97-141 to allow the stay to begin on the later of the date of notice

of the insolvency or the time the NCSIGA receives notice of a claim after the original notice of the insolvency.

Section 8. This section makes Section 3 (increase in security deposit and letter of credit allowance) effective January 1, 2004. Section 4 is effective January 1, 2005. Section 5 is effective January 1, 2006. Section 6 is effective January 1, 2007. Section 7 (Stay of proceedings) is effective when the bill becomes law and applies to claims filed on or after that date. Section 1 and 2 become effective when the bill becomes law and applies to assessments made on or after that date.

BACKGROUND:

The North Carolina Self-Insurance Guaranty Association (Association) was created by the General Assembly in 1986 to provide mechanisms for the payment of covered claims under self-insurance coverage, to avoid excessive delay in payment, to avoid financial loss to claimants because of insolvency of a self-insurer, and to assist in the detection of self-insurer insolvencies. All self-insurers are required by law to be members of the Association.

Since it was created, the NCSIGA has processed claims from 37 insolvent self-insured companies and 3 insolvent self-insured groups. In 18 of the 20 individual company insolvencies that the NCSIGA considers to be closed, the self-insurer's claim liability exceeded the self-insurers statutory deposit with the DOI.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

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SENATE BILL 471
PROPOSED COMMITTEE SUBSTITUTE S471-CSRC-36 [v.1]

4/22/2003 5:14:32 PM

Short Title: Amend Self-Insurance Guaranty Assoc. Laws. (Public)

Sponsors:

Referred to:

March 20, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAWS GOVERNING THE SELF-INSURANCE GUARANTY ASSOCIATION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 97-133(a)(2) reads as rewritten:

"(2) Assess each member of the Association as follows:

a. Each individual member self-insurer shall be annually assessed an amount equal to ~~one-quarter of one percent (0.25%)~~ two percent (2%) of the annual gross premiums, as determined under G.S. 105-228.5(b), (b1), and (c), that would have been paid by that member self-insurer for workers' compensation insurance during the prior calendar year; and payment to the Association shall be made no later than ~~September 15~~ May 15 following the close of that calendar year. Where any such assessment is paid based in whole or in part upon estimates of annual gross premiums for the prior calendar year, there shall be made in the next year's assessment an adjustment of the assessment of such prior year based on actual audited annual gross premiums. Each group member self-insurer shall be annually assessed an amount equal to ~~one-quarter of one percent (0.25%)~~ two percent (2%) of the annual gross premiums, as determined under G.S. 105-228.5(b), (b1), and (c), of the group member self-insurer during the prior calendar year; and payment to the Association shall be made no later than ~~September 15~~ May 15 following the close of that calendar year. Regardless of the size of the Fund, during its first 12 months of membership, no member self-insurer may discount or reduce this ~~one-quarter of one percent (0.25%) assessment.~~

~~Assessments paid by members pursuant to this subdivision shall be credited toward the tax paid by self-insurers under Article 8B of Chapter 105 of the General Statutes.~~ two percent (2%) assessment. For the purpose of making the assessments authorized by this subsection and subsections (c) and (d) of this section, the Secretary of Revenue shall provide to the Association the self-insurer premium and payroll information as determined under G.S. 105-228.5(b), (b1) and (c), and the Commissioner shall provide to the Association the group self-insurer premium information reported to the Commissioner under G.S. 58-47-75 and G.S. 58-2-165.

b. Each member self-insurer shall be notified of the assessment no later than 30 days before it is due.

c. If a self-insurer is a member of the Association for less than a full calendar year, the annual gross premiums shall be adjusted by that portion of the year the self-insurer is not a member of the Association.

d. If application of the contribution rates referenced in sub-subdivision a. of this subdivision would produce an amount in excess of the five million dollar ($5,000,000) limits of the fund, an equitable proration may be made; provided that every self-insurer that becomes a member of the Association shall pay an initial assessment, in an amount established by the Board, regardless of the size of the fund at the time the member joins the Association."

SECTION 2. G.S. 97-133(a)(4) reads as rewritten:

"(4) Be obligated to the extent of covered claims occurring prior to the determination of the member self-insurer's insolvency, or occurring after such determination but prior to the obtaining by the self-insurer of workers' compensation insurance as otherwise required under this Chapter. ~~The Association shall pay claims against a self-insurer that are not or have not been paid as a result of a determination of insolvency or the institution of bankruptcy or receivership proceedings that occurred prior to the effective date of this Article.~~"

SECTION 3. G.S. 97-185 reads as rewritten:

"**§ 97-185. ~~Deposits or surety bond.~~Deposits; surety bonds; letters of credit.**

(a) Every self-insurer shall deposit with the Commissioner an amount ~~equal to twenty-five percent (25%)~~ not less than fifty percent (50%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other greater amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer.

~~(b) A self-insurer organized and authorized before the effective date of this section shall have 24 months from the effective date of this section to comply with this section.~~

(b1) Notwithstanding subsection (a) of this section, member self-insurers with a debt rating of BBB or better from Standard and Poor's Rating Service, a division of McGraw Hill, Inc. or an equivalent rating from another national rating agency shall deposit with the Commissioner an amount not less than twenty-five percent (25%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000). The Commissioner shall consider, in the Commissioner's discretion whether to increase or to reduce the deposit to a greater or lesser percentage of the member self insurer's claims liability based on the financial strength of the self-insurer and other financial information submitted by the self insurer.

(c) Deposits received, changes to existing deposits, or deposits exchanged after the effective date of this section, shall comprise one or more of the following:

(1) Interest-bearing bonds of the United States of America.

(2) Interest-bearing bonds of the State of North Carolina, or of its cities or counties.

(3) Certificates of deposit issued by any solvent bank domesticated in the State of North Carolina that have a maturity of one year or greater.

(4) Surety bonds in a form acceptable to the Commissioner and issued by a corporate surety. A surety bond deposited pursuant to this subsection shall require that the surety reimburse the Commissioner, or his successors, assigns, or transferees, for any costs incurred in the collection of the proceeds of the surety bond, including reasonable attorneys' fees, and any costs incurred in administering the insolvent self-insurer's workers' compensation claims.

(4a) Irrevocable letters of credit in a form acceptable to the Commissioner issued by a bank acceptable to the Commissioner. An irrevocable letter of credit deposited pursuant to this subsection shall require that the bank reimburse the Commissioner, or his successor, assigns, or transferees for any costs incurred in the collection of the proceeds of the letter of credit, including reasonable attorneys' fees.

(4b) The reimbursement of attorneys' fees and collections cost provided for in subsection (4) and (4a) shall be no greater than fifteen percent (15%) of the penal amount of the bond and shall not come from the proceeds of the bond or the letter of credit but shall be in addition to the proceeds of the bond or the letter of credit.

(5) Any other investments that are approved by the Commissioner.

(d) All bonds or securities that are posted as a security deposit shall be valued annually at market value. If market value is less than face value, the Commissioner may require the self-insurer to post additional securities. In making this determination, the Commissioner shall consider the self-insurer's financial condition, the amount by which

market value is less than face value, and the likelihood that the securities will be needed to provide benefits.

(e) Securities deposited under this section shall be assigned to the Commissioner, the Commissioner's successors, assigns, or trustees, on a form prescribed by the Commissioner in a manner that renders the securities negotiable by the Commissioner. If a self-insurer is deemed by the Commissioner to be in a hazardous financial condition, the Commissioner may sell or collect, or both, such amounts that will yield sufficient funds to meet the self-insurer's obligations under the Act. In the case of a letter of credit, the Commissioner may draw the full amount of a letter of credit if the letter of credit is not renewed within 90 days prior to its expiration or at any time that the bank issuing the letter of credit is no longer acceptable to the Commissioner. Interest accruing on any negotiable security deposited under this Article shall be collected and transmitted to the self-insurer if the self-insurer is not in a hazardous financial condition.

(f) No judgment creditor, other than a claimant entitled to benefits under the Act, may levy upon any deposits made under this section.

(g) Securities held by the Commissioner under this section may be exchanged or replaced by the self-insurer with other securities of like nature and amount as long as the self-insurer is not in a hazardous financial condition. No release shall be effectuated until replacement securities or bonds of an equal value have been substituted. Any surety bond may be exchanged or replaced with another surety bond that meets the requirements of this section if 90 days' advance written notice is given to the Commissioner. If a self-insurer ceases to self-insure or desires to replace securities with an acceptable surety bond or bonds, the self-insurer shall notify the Commissioner, and may recover all or a portion of the securities deposited with the Commissioner upon posting instead an acceptable special release bond issued by a corporate surety in an amount equal to the total value of the securities. The special release bond shall cover all existing liabilities under the Act plus an amount to cover future loss development and shall remain in force until all obligations under the Act have been discharged fully.

(h) If a self-insurer ceases to self-insure, no deposits shall be released by the Commissioner until the self-insurer has discharged fully all of the self-insurer's obligations under the Act.

(i) An endorsement to a surety bond shall be filed with the Commissioner within 90 days after the effective date of the endorsement."

SECTION 4. Effective January 1, 2005, G.S. 97-185(a), as amended in Section 3 of this act, reads as rewritten:

"(a) Every self-insurer shall deposit with the Commissioner an amount ~~not less than fifty percent (50%)~~ not less than seventy-five percent (75%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other greater amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer."

SECTION 5. Effective January 1, 2006, G.S. 97-185(a), as amended in Sections 3 and 4 of this act, reads as rewritten:

"(a) Every self-insurer shall deposit with the Commissioner an amount ~~not less than seventy-five percent (75%)~~ not less than one hundred percent (100%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other greater amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer."

SECTION 6. G.S. 97-141 reads as rewritten:

"**§ 97-141. Stay of proceedings.**

All claims or proceedings under this Chapter to which the insolvent member self-insurer is a party either before the Industrial Commission or a court in this State and the running of all time periods against either the insolvent member self-insurer or the Association under this Chapter shall be stayed for 60 days from the later of the date of notice to the Association of the insolvency or the date the Association is notified of a claim or proceeding under this Chapter in order to permit the Association to investigate, prosecute, or defend properly any petition, claim, or appeal under this Chapter, provided that the payment of weekly compensation for incapacity is made whenever time periods or proceedings affecting the payment of weekly compensation are stayed."

SECTION 7. Section 3 of this act becomes effective January 1, 2004. Section 4 of this act becomes effective January 1, 2005. Section 5 of this act becomes effective January 1, 2006. Section 6 of this act is effective when this act becomes law and applies to claims filed on or after that date. The remainder of this act is effective when this act becomes law and applies to assessments made on or after that date.

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. _____

S. B. No. 471

COMMITTEE SUBSTITUTE ✓

DATE 4/22/03

Amendment No. _____
(to be filled in by Principal Clerk)

Rep.)
) Shubert
Sen.)

moves to amend the bill on page 3, line 10-11

( ) WHICH CHANGES THE TITLE

by rewriting the lines to read:

~~(Commissioner's fee~~

five hundred thousand dollars ($500,000). The Commissioner shall consider, and may in the Commissioner's discretion, increase or reduce the deposit to a greater or .

SIGNED Ken Hislett

ADOPTED ✓ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S **1**

SENATE BILL 707

Short Title:	Repeat Misd. Larceny.	(Public)
Sponsors:	Senators Shubert; Apodaca, Blake, Brock, Carpenter, Forrester, Foxx, Garwood, Pittenger, Rucho, and Stevens.	
Referred to:	Judiciary II.	

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO INCREASE THE CRIMINAL PENALTY FOR CERTAIN REPEAT OFFENSES OF MISDEMEANOR LARCENY OR SHOPLIFTING.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-72 reads as rewritten:

"**§ 14-72. Larceny of property; receiving stolen goods or possessing stolen goods.**

(a) Larceny of goods of the value of more than one thousand dollars ($1,000) is a Class H felony. The receiving or possessing of stolen goods of the value of more than one thousand dollars ($1,000) while knowing or having reasonable grounds to believe that the goods are stolen is a Class H felony. Larceny as provided in subsection (b) of this section is a Class H felony. Receiving or possession of stolen goods as provided in subsection (c) of this section is a Class H felony. Except as provided in subsections ~~(b)~~(a1), (b), and (c) of this section, larceny of ~~property, or the receiving or possession of stolen goods knowing or having reasonable grounds to believe them to be stolen,~~ property where the value of the property or goods is not more than one thousand dollars ($1,000), is a Class 1 misdemeanor. Except as provided in subsections (b) and (c) of this section, a person receiving or possessing stolen goods knowing or having reasonable grounds to believe them to be stolen where the value of the goods is not more than one thousand dollars ($1,000) is guilty of a Class 1 misdemeanor. In all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen.

(a1) A person convicted within three years of a fifth or subsequent offense of larceny of property where the value of the property is not more than one thousand dollars ($1,000) is guilty of a Class H felony.

(b) The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is:

(1) From the person; or

(2) Committed pursuant to a violation of G.S. 14-51, 14-53, 14-54 or 14-57; or

(3) Of any explosive or incendiary device or substance. As used in this section, the phrase "explosive or incendiary device or substance" shall include any explosive or incendiary grenade or bomb; any dynamite, blasting powder, nitroglycerin, TNT, or other high explosive; or any device, ingredient for such device, or type or quantity of substance primarily useful for large-scale destruction of property by explosive or incendiary action or lethal injury to persons by explosive or incendiary action. This definition shall not include fireworks; or any form, type, or quantity of gasoline, butane gas, natural gas, or any other substance having explosive or incendiary properties but serving a legitimate nondestructive or nonlethal use in the form, type, or quantity stolen.

(4) Of any firearm. As used in this section, the term "firearm" shall include any instrument used in the propulsion of a shot, shell or bullet by the action of gunpowder or any other explosive substance within it. A "firearm," which at the time of theft is not capable of being fired, shall be included within this definition if it can be made to work. This definition shall not include air rifles or air pistols.

(5) Of any record or paper in the custody of the North Carolina State Archives as defined by G.S. 121-2(7) and 121-2(8).

(c) The crime of possessing stolen goods knowing or having reasonable grounds to believe them to be stolen in the circumstances described in subsection (b) is a felony or the crime of receiving stolen goods knowing or having reasonable grounds to believe them to be stolen in the circumstances described in subsection (b) is a felony, without regard to the value of the property in question.

(d) Where the larceny or receiving or possession of stolen goods as described in subsection (a) of this section involves the merchandise of any store, a merchant, a merchant's agent, a merchant's employee, or a peace officer who detains or causes the arrest of any person shall not be held civilly liable for detention, malicious prosecution, false imprisonment, or false arrest of the person detained or arrested, when such detention is upon the premises of the store or in a reasonable proximity thereto, is in a reasonable manner for a reasonable length of time, and, if in detaining or in causing the arrest of such person, the merchant, the merchant's agent, the merchant's employee, or the peace officer had, at the time of the detention or arrest, probable cause to believe that the person committed an offense under subsection (a) of this section. If the person being detained by the merchant, the merchant's agent, or the merchant's employee, is a minor under the age of 18 years, the merchant, the merchant's agent, or the merchant's employee, shall call or notify, or make a reasonable effort to call or notify the parent or guardian of the minor, during the period of detention. A merchant, a merchant's agent, or a merchant's employee, who makes a reasonable effort to call or notify the parent or guardian of the minor shall not be held civilly liable for failing to notify the parent or guardian of the minor."

SECTION 2. G.S. 14-72.1 is amended by adding a new subsection to read:

"(d2) Notwithstanding subsection (e) of this section, any person convicted of a fifth or subsequent violation of subsection (a) or (d) of this section within three years is guilty of a Class H felony."

SECTION 3. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

REPEAT MISDEMEANOR LARCENY: Senate Bill 707

BILL ANALYSIS

Committee:	Senate Judicary II	**Introduced by:**	Sen. Shubert
Date:	April 22, 2003	**Summary by:**	Sandra Alley
Version:	First Edition		Committee Counsel

SUMMARY: ***Senate Bill 707 increases the criminal penalty for persons convicted of larceny within three years of a fifth or subsequent offense of larceny where the value of the property is not more than one thousand dollars ($1,000) and for persons convicted of shoplifting within three years of a fifth or subsequent offense of shoplifting from Class 1 misdemeanor to a Class H felony.***

CURRENT LAW:

Larceny:

Under current law initial and subsequent convictions of larceny of goods with a value of less than one thousand dollars ($1,000) are Class 1 misdemeanors. A person convicted of larceny of goods with a value of more than one thousand dollars ($1,000) is guilty of a Class H felony.

Shoplifting

Under current law a person convicted of shoplifting is guilty of a Class 3 misdemeanor for a first conviction, a Class 2 misdemeanor for a second conviction within three years after the date of a subsequent conviction for shoplifting, and for a third or subsequent offense committed within five years after the date the defendant was convicted of two other shoplifting offenses the defendant is guilty of a Class 1 misdemeanor.

BILL ANALYSIS:

Senate Bill 707 increases the criminal penalty for persons who repeat the crime of larceny of goods valued at less than one thousand dollars ($1,000) where the person convicted repeats the crime within three years of a fifth or subsequent offense of larceny of goods valued at less than one thousand dollars ($1000). The bill thus changes the penalty for a repeat larceny within three years of a fifth or subsequent offense of larceny of goods from a Class 1 misdemeanor to a Class H felony.

Similarly, Senate Bill 707 increases the penalty for persons convicted of shoplifting for a fifth or subsequent time to a Class H felony.

BACKGROUND: Senate Bill 707 will be reviewed by The North Carolina Sentencing and Policy Advisory Commission on April 24, 2003.

REPEAT MISDEMEANOR LARCENY: Senate Bill 707

BILL ANALYSIS

Committee:	Judicary II	**Introduced by:**	Sen. Shubert
Date:	April 17, 2003	**Summary by:**	Sandra Alley
Version:	First Edition		Committee Counsel

SUMMARY: ***Senate Bill 707 increases the criminal penalty for persons convicted of larceny within three years of a fifth or subsequent offense of larceny where the value of the property is not more than one thousand dollars ($1,000) and for persons convicted of shoplifting within three years of a fifth or subsequent offense of shoplifting from Class 1 misdemeanor to a Class H felony.***

CURRENT LAW:

Larceny:

Under current law initial and subsequent convictions of larceny of goods with a value of less than one thousand dollars ($1,000) are Class 1 misdemeanors. A person convicted of larceny of goods with a value of more than one thousand dollars ($1,000) is guilty of a Class H felony.

Shoplifting

Under current law a person convicted of shoplifting is guilty of a Class 3 misdemeanor for a first conviction, a Class 2 misdemeanor for a second conviction within three years after the date of a subsequent conviction for shoplifting, and for a third or subsequent offense committed within five years after the date the defendant was convicted of two other shoplifting offenses the defendant is guilty of a Class 1 misdemeanor.

BILL ANALYSIS:

Senate Bill 707 increases the criminal penalty for persons who repeat the crime of larceny of goods valued at less than one thousand dollars ($1,000) where the person convicted repeats the crime within three years of a fifth or subsequent offense of larceny of goods valued at less than one thousand dollars ($1000). The bill thus changes the penalty for a repeat larceny within three years of a fifth or subsequent offense of larceny of goods from a Class 1 misdemeanor to a Class H felony.

Similarly, Senate Bill 707 increases the penalty for persons convicted of shoplifting for a fifth or subsequent time to a Class H felony.

BACKGROUND: Senate Bill 707 will not be reviewed by The North Carolina Sentencing and Policy Advisory Commission until April 24, 2003.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 708

Short Title:	Volunteer Fire Dept. Crim. Background Checks.	(Public)
Sponsors:	Senators Shubert; Blake, Carpenter, Forrester, Foxx, and Pittenger.	
Referred to:	Judiciary II.	

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO AUTHORIZE LOCAL LAW ENFORCEMENT AGENCIES TO ACCESS THE CRIMINAL INFORMATION NETWORK TO RUN CRIMINAL BACKGROUND CHECKS ON PROSPECTIVE MEMBERS OF VOLUNTEER FIRE DEPARTMENTS.

The General Assembly of North Carolina enacts:

SECTION 1. Article 4 of Chapter 114 of the General Statutes is amended by adding a new section to read:

"**§ 114-19.12. Criminal record checks of applicants to volunteer fire departments.**

(a) Authority. – The Department of Justice and the Federal Bureau of Investigation may provide to any local law enforcement agency a criminal record check of any individual who applies for a position with a volunteer fire department in that unit of local government and a criminal record check of all persons 18 years of age or older who live in the applying household. The North Carolina criminal record check may also be done by a certified DCI operator within the local law enforcement agency.

(b) Procedure. – A criminal record check shall be conducted by using an individual's fingerprints and all identification information required by the Department of Justice to identify that individual. A criminal record check shall be provided only if: (i) the individual whose record is checked consents to the record check, and (ii) every individual who is 18 years of age or older who lives in the household also consents to the record check. Refusal to give consent is considered withdrawal of the application. The information shall be kept confidential by the local law enforcement agency that receives the information. If the confidential information is disclosed under this section, the Department may refuse to provide further criminal record checks to that local law enforcement agency."

SECTION 2. This act is effective when it becomes law.

SENATE BILL 708:
Volunteer Fire Dept. Crim. Background Checks.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Shubert
Date:	April 22, 2003	**Summary by:**	Robin Johnson
Version:	S708-CSRM-21[V.3]		Committee Counsel

SUMMARY: ***Senate Bill 708 would authorize local Homeland Security agencies to request criminal background checks on any applicant for a paid or volunteer position with a volunteer fire department. The check may be conducted only if the applicant consents to the check. A refusal to consent is considered a withdrawal of the application***

The Department of Justice may charge a reasonable fee for conducting these checks.

The local Homeland Security agency that receives the information must keep information from the record check confidential. If it is not kept confidential, the Department of Justice may refuse to provide further criminal record checks to agency.

The bill is effective when it becomes law.

CURRENT LAW: Criminal background checks are authorized for the following: school personnel; providers of treatment for or services to children, the elderly, mental health patients, the sick, and the disabled; foster and adoptive parents; employees and job applicants with the Departments Health and Human Services and Juvenile Justice and Delinquency Prevention; applicants for volunteers for the McGruff House Program; nursing homes, adult care homes, home care agencies, area mental health, developmental disabilities, and substance abuse services authorities; and applicants for a variety of licenses (such as attorneys, nurses, auctioneers; mortgage bankers, physicians, realtors, etc.).

S708-SMRH-002

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 708
PROPOSED COMMITTEE SUBSTITUTE S708-CSRM-21 [v.3]

4/17/2003 9:21:54 AM

Short Title: Volunteer Fire Dept. Crim. Background Checks. (Public)

Sponsors:

Referred to:

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO REQUIRE CRIMINAL BACKGROUND CHECKS ON PROSPECTIVE MEMBERS OF VOLUNTEER FIRE DEPARTMENTS.

The General Assembly of North Carolina enacts:

SECTION 1. Article 4 of Chapter 114 of the General Statutes is amended by adding a new section to read:

"**§ 114-19.12. Criminal history record checks of applicants to volunteer fire departments.**

(a) Definitions. – As used in this section, the term:

(1) "Applicant" means an applicant for a paid or volunteer position with a volunteer fire department in a unit of local government.

(2) "Criminal history" means a State or federal history of conviction of a crime, whether a misdemeanor or felony, that bears upon a covered person's fitness for holding a paid or volunteer position with a volunteer fire department. The crimes include, but are not limited to, criminal offenses as set forth in any of the following Articles of Chapter 14 of the General Statutes: Article 5, Counterfeiting and Issuing Monetary Substitutes; Article 5A, Endangering Executive and Legislative Officers; Article 6, Homicide; Article 7A, Rape and Other Sex Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 14, Burglary and Other Housebreakings; Article 15, Arson and Other Burnings; Article 16, Larceny; Article 17, Robbery; Article 18, Embezzlement; Article 19, False Pretenses and Cheats; Article 19A, Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means; Article 19B, Financial Transaction Card Crime Act; Article 20, Frauds; Article 21, Forgery; Article 26, Offenses Against Public

Morality and Decency; Article 26A, Adult Establishments; Article 27, Prostitution; Article 28, Perjury; Article 29, Bribery; Article 31, Misconduct in Public Office; Article 35, Offenses Against the Public Peace; Article 36A, Riots and Civil Disorders; Article 39, Protection of Minors; Article 40, Protection of the Family; Article 59, Public Intoxication; and Article 60, Computer-Related Crime. The crimes also include possession or sale of drugs in violation of the North Carolina Controlled Substances Act, Article 5 of Chapter 90 of the General Statutes, and alcohol-related offenses such as sale to underage persons in violation of G.S. 18B-302, or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5.

(b) When requested by a local Homeland Security agency, the North Carolina Department of Justice may provide to the requesting agency an applicant's criminal history from the State and National Repository of Criminal Histories. The local Homeland Security agency shall provide to the North Carolina Department of Justice the fingerprints of the applicant to be checked, any additional information required by the Department of Justice, and a form signed by the applicant to be checked consenting to the check of the criminal record and to the use of fingerprints and other identifying information required by the State or National Repositories. The fingerprints of the individual shall be forwarded to the State Bureau of Investigation for a search of the State criminal history record file and the State Bureau of Investigation shall forward a set of fingerprints to the Federal Bureau of Investigation for a national criminal history record check. The local Homeland Security agency shall keep all information pursuant to this section confidential. The Department of Justice shall charge a reasonable fee for conducting the checks of the criminal history records authorized by this section.

(c) All releases of criminal history information to the local Homeland Security agency shall be subject to, and in compliance with, rules governing the dissemination of criminal history record checks as adopted by the North Carolina Division of Criminal Information. All of the information the local Homeland Security agency receives through the checking of the criminal history is privileged information and for the exclusive use of that agency.

(d) If the applicant's verified criminal history record check reveals one or more convictions covered under subsection (a) of this section, then the conviction shall constitute just cause for not selecting the applicant for the position, or for dismissing the person from a current position with the local volunteer fire department. The conviction shall not automatically prohibit volunteering or employment; however, the following factors shall be considered by the local Homeland Security agency in determining whether the position shall be denied:

(1) The level and seriousness of the crime;

(2) The date of the crime;

(3) The age of the person at the time of the conviction;

(4) The circumstances surrounding the commission of the crime, if known;

(5) The nexus between the criminal conduct of the person and the duties of the person;

(6) The prison, jail, probation, parole, rehabilitation, and employment records of the person since the date the crime was committed; and

(7) The subsequent commission by the person of a crime listed in subsection (a) of this section.

(e) The local volunteer fire department may deny the applicant the position or dismiss an applicant who refuses to consent to a criminal history record check or use of fingerprints or other identifying information required by the State or National Repositories of Criminal Histories. This refusal constitutes just cause for the denial of the position or the dismissal from the position.

(f) The local volunteer fire department may extend a conditional offer of the position pending the results of a criminal history record check authorized by this section."

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 708
PROPOSED COMMITTEE SUBSTITUTE S708-CSRM-21 [v.3]

4/17/2003 9:21:54 AM

Short Title: Volunteer Fire Dept. Crim. Background Checks. (Public)

Sponsors:

Referred to:

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO REQUIRE CRIMINAL BACKGROUND CHECKS ON PROSPECTIVE MEMBERS OF VOLUNTEER FIRE DEPARTMENTS.

The General Assembly of North Carolina enacts:

SECTION 1. Article 4 of Chapter 114 of the General Statutes is amended by adding a new section to read:

"**§ 114-19.12. Criminal history record checks of applicants to volunteer fire departments.**

(a) Definitions. – As used in this section, the term:

(1) "Applicant" means an applicant for a paid or volunteer position with a volunteer fire department in a unit of local government.

(2) "Criminal history" means a State or federal history of conviction of a crime, whether a misdemeanor or felony, that bears upon a covered person's fitness for holding a paid or volunteer position with a volunteer fire department. The crimes include, but are not limited to, criminal offenses as set forth in any of the following Articles of Chapter 14 of the General Statutes: Article 5, Counterfeiting and Issuing Monetary Substitutes; Article 5A, Endangering Executive and Legislative Officers; Article 6, Homicide; Article 7A, Rape and Other Sex Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 14, Burglary and Other Housebreakings; Article 15, Arson and Other Burnings; Article 16, Larceny; Article 17, Robbery; Article 18, Embezzlement; Article 19, False Pretenses and Cheats; Article 19A, Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means; Article 19B, Financial Transaction Card Crime Act; Article 20, Frauds; Article 21, Forgery; Article 26, Offenses Against Public

Morality and Decency; Article 26A, Adult Establishments; Article 27, Prostitution; Article 28, Perjury; Article 29, Bribery; Article 31, Misconduct in Public Office; Article 35, Offenses Against the Public Peace; Article 36A, Riots and Civil Disorders; Article 39, Protection of Minors; Article 40, Protection of the Family; Article 59, Public Intoxication; and Article 60, Computer-Related Crime. The crimes also include possession or sale of drugs in violation of the North Carolina Controlled Substances Act, Article 5 of Chapter 90 of the General Statutes, and alcohol-related offenses such as sale to underage persons in violation of G.S. 18B-302, or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5.

(b) When requested by a local Homeland Security agency, the North Carolina Department of Justice may provide to the requesting agency an applicant's criminal history from the State and National Repository of Criminal Histories. The local Homeland Security agency shall provide to the North Carolina Department of Justice the fingerprints of the applicant to be checked, any additional information required by the Department of Justice, and a form signed by the applicant to be checked consenting to the check of the criminal record and to the use of fingerprints and other identifying information required by the State or National Repositories. The fingerprints of the individual shall be forwarded to the State Bureau of Investigation for a search of the State criminal history record file and the State Bureau of Investigation shall forward a set of fingerprints to the Federal Bureau of Investigation for a national criminal history record check. The local Homeland Security agency shall keep all information pursuant to this section confidential. The Department of Justice shall charge a reasonable fee for conducting the checks of the criminal history records authorized by this section.

(c) All releases of criminal history information to the local Homeland Security agency shall be subject to, and in compliance with, rules governing the dissemination of criminal history record checks as adopted by the North Carolina Division of Criminal Information. All of the information the local Homeland Security agency receives through the checking of the criminal history is privileged information and for the exclusive use of that agency.

(d) If the applicant's verified criminal history record check reveals one or more convictions covered under subsection (a) of this section, then the conviction shall constitute just cause for not selecting the applicant for the position, or for dismissing the person from a current position with the local volunteer fire department. The conviction shall not automatically prohibit volunteering or employment; however, the following factors shall be considered by the local Homeland Security agency in determining whether the position shall be denied:

(1) The level and seriousness of the crime;
(2) The date of the crime;
(3) The age of the person at the time of the conviction;
(4) The circumstances surrounding the commission of the crime, if known;

(5) The nexus between the criminal conduct of the person and the duties of the person;

(6) The prison, jail, probation, parole, rehabilitation, and employment records of the person since the date the crime was committed; and

(7) The subsequent commission by the person of a crime listed in subsection (a) of this section.

(e) The local volunteer fire department may deny the applicant the position or dismiss an applicant who refuses to consent to a criminal history record check or use of fingerprints or other identifying information required by the State or National Repositories of Criminal Histories. This refusal constitutes just cause for the denial of the position or the dismissal from the position.

(f) The local volunteer fire department may extend a conditional offer of the position pending the results of a criminal history record check authorized by this section."

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 716

Short Title:	Revised Uniform Arbitration Act.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO REPEAL THE UNIFORM ARBITRATION ACT AND TO ENACT THE REVISED UNIFORM ARBITRATION ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 45A of Chapter 1 of the General Statutes is repealed.

SECTION 2. Chapter 1 of the General Statutes is amended by adding a new Article to read:

"Article 45C.

"Revised Uniform Arbitration Act.

"**§ 1-569.1. Definitions.**

The following definitions apply in this Article:

(1) 'Arbitration organization' means an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator.

(2) 'Arbitrator' means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.

(3) 'Court' means a court of competent jurisdiction in this State.

(4) 'Knowledge' means actual knowledge.

(5) 'Person' means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(6) 'Record' means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

"**§ 1-569.2. Notice.**

(a) Except as otherwise provided in this Article, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice.

(b) A person has notice if the person has knowledge of the notice or has received notice.

(c) A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business or at another location held out by the person as a place of delivery of such communications.

"**§ 1-569.3. When Article applies.**

(a) This Article governs an agreement to arbitrate made on or after January 1, 2004.

(b) This Article governs an agreement to arbitrate made before January 1, 2004, if all parties to the agreement or to the arbitration proceeding so agree in a record.

(c) On or after January 1, 2006, this Article governs an agreement to arbitrate whenever made.

"**§ 1-569.4. Effect of agreement to arbitrate; nonwaivable provisions.**

(a) Except as otherwise provided in subsections (b) and (c) of this section, a party to an agreement to arbitrate or to an arbitration proceeding may waive, or the parties may vary the effect of, the requirements of this Article to the extent provided by law.

(b) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(1) Waive or agree to vary the effect of the requirements of G.S. 1-569.5(a), 1-569.6(a), 1-569.8, 1-569.17(a), 1-569.17(b), 1-569.26, or 1-569.28;

(2) Agree to unreasonably restrict the right under G.S. 1-569.9 to notice of the initiation of an arbitration proceeding;

(3) Agree to unreasonably restrict the right under G.S. 1-569.12 to disclosure of any facts by a neutral arbitrator; or

(4) Waive the right under G.S. 1-569.16 of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under this Article, but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.

(c) A party to an agreement to arbitrate or to an arbitration proceeding may not waive, or the parties shall not vary the effect of, the requirements of this section or G.S 1-569.3(a), 1-569.3(c), 1-569.7, 1-569.14, 1-569.18, 1-569.20(d), 1-569.20(e), 1-569.22, 1-569.23, 1-569.24, 1-569.25(a), 1-569.25(b), 1-569.29, 1-569.30, 1-569.31, or 1-569.32.

"**§ 1-569.5. Application for judicial relief.**

(a) Except as otherwise provided in G.S. 1-569.28, an application for judicial relief under this Article must be made by motion to the court and heard in the manner provided by law or rule of court for making and hearing motions.

(b) Unless a civil action involving the agreement to arbitrate is pending, notice of an initial motion to the court under this Article must be served in the manner provided by law for the service of a summons in a civil action. Otherwise, notice of the motion

must be given in the manner prescribed by law or rule of court for serving motions in pending cases.

"**§ 1-569.6. Validity of agreement to arbitrate.**

(a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revocation of a contract.

(b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(c) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(d) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

"**§ 1-569.7. Motion to compel or stay arbitration.**

(a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

(1) If the refusing party does not appeal or does not oppose the motion, the court shall order the parties to arbitrate; and

(2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

(b) On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate.

(c) If the court finds that there is no enforceable agreement to arbitrate, it may not, pursuant to subsection (a) or (b) of this section, order the parties to arbitrate.

(d) The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or because grounds for the claim have not been established.

(e) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in a court, a motion under this section must be made in that court. Otherwise a motion under this section may be made in any court as provided in G.S. 1-569.27.

(f) If a party makes a motion to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

(g) If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.

"**§ 1-569.8. Provisional remedies.**

(a) Before an arbitrator is appointed and is authorized and able to act, the court, upon motion of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.

(b) After an arbitrator is appointed and is authorized and able to act:

(1) The arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action; and

(2) A party to an arbitration proceeding may move the court for a provisional remedy if the matter is urgent and the arbitrator is not able to act in a timely manner or the arbitrator cannot provide an adequate remedy.

(c) A party does not waive a right of arbitration by making a motion under subsection (a) or (b) of this section.

"**§ 1-569.9. Initiation of arbitration.**

(a) A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by certified or registered mail, return receipt requested, and obtained, or by service as authorized for the commencement of a civil action. The notice must describe the nature of the controversy and the remedy sought.

(b) Unless a person objects for lack or insufficiency of notice under G.S. 1-569.15(c) no later than the beginning of the arbitration hearing, the person, by appearing at the hearing, waives any objection to lack or insufficiency of notice.

"**§ 1-569.10. Consolidation of separate arbitration proceedings.**

(a) Except as otherwise provided in subsection (c) of this section, upon motion of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:

(1) There are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration with a third person;

(2) The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

(3) The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and

(4) Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

(b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

(c) The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.

"**§ 1-569.11. Appointment of arbitrator; service as a neutral arbitrator.**

(a) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

(b) An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral.

"**§ 1-569.12. Disclosure by arbitrator.**

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) A financial or personal interest in the outcome of the arbitration proceeding; and

(2) An existing or past relationship with any of the parties to the agreement to arbitrate or to the arbitration proceeding, their counsel or representatives, a witness, or other arbitrators.

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or (b) of this section to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under G.S. 1-569.23(a)(2) for vacating an award made by the arbitrator.

(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b) of this section, upon timely objection by a party, the court under G.S.-1-569.23(a)(2) may vacate an award.

(e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under G.S. 1-569.23(a)(2).

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under G.S. 1-569.23(a)(2).

"**§ 1-569.13. Action by majority.**

If there is more than one arbitrator, the powers of an arbitrator must be exercised by a majority of the arbitrators, but all of them shall conduct the hearing under G.S. 1-569.15(c).

"**§ 1-569.14. Immunity of arbitrator; competency to testify; attorney's fees and costs.**

(a) An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.

(b) The immunity afforded by this section supplements any immunity under other law.

(c) The failure of an arbitrator to make a disclosure required by G.S. 1-569.12 does not cause any loss of immunity under this section.

(d) In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify, and may not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding, to the same extent as a judge of a court of this State acting in a judicial capacity. This subsection does not apply:

(1) To the extent necessary to determine the claim of an arbitrator, arbitration organization, or representative of the arbitration organization against a party to the arbitration proceeding; or

(2) To a hearing on a motion to vacate an award under G.S. 1-569.23(a)(1) or (a)(2) if the movant establishes prima facie that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from the services of the arbitrator, organization, or representative, or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of subsection (d) of this section, and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not competent to testify, the court shall award to the arbitrator, organization, or representative reasonable attorney's fees, costs, and other reasonable expenses of litigation.

(f) Immunity under this section does not apply to acts or omissions that occur with respect to the operation of a motor vehicle.

"**§ 1-569.15. Arbitration process.**

(a) An arbitrator may conduct an arbitration in such a manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.

(b) An arbitrator may decide a request for summary disposition of a claim or particular issue:

(1) If all interested parties agree; or

(2) Upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the proceeding and the other parties have a reasonable opportunity to respond.

(c) If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than five days before the hearing begins. Unless a party to the arbitration proceeding makes an objection to lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but may not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified did not appear. The court, upon request, may direct the arbitrator to conduct the hearing promptly and render a timely decision.

(d) At a hearing under subsection (c) of this section, a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(e) If an arbitrator ceases to or is unable to act during the arbitration proceeding, a replacement arbitrator must be appointed in accordance with G.S. 1-569.11 to continue the proceeding and to resolve the controversy.

(f) The rules of evidence do not apply in arbitration proceedings, except as to matters of privilege or immunities.

"**§ 1-569.16. Representation by lawyer.**

A party to an arbitration proceeding may be represented by a lawyer or lawyers.

"**§ 1-569.17. Witnesses; subpoenas; depositions; discovery.**

(a) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena must be served in the manner for service of subpoenas in a civil action and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.

(b) In order to make the proceedings fair, expeditious, and cost-effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

(c) An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost-effective.

(d) If an arbitrator permits discovery under subsection (c) of this section, the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take action

against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this State.

(e) An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State.

(f) All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition, or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this State.

(g) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the protection of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another state upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost-effective. A subpoena or discovery-related order issued by an arbitrator in another state must be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this State.

(h) An arbitrator does not have the authority to hold a party in contempt of any order the arbitrator makes under this section. A court may hold parties in contempt for failure to obey an arbitrator's order, or an order made by the court, pursuant to this section, among other sanctions imposed by the arbitrator or the court.

"**§ 1-569.18. Judicial enforcement of preaward ruling by arbitrator.**

(a) If an arbitrator makes a preaward ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award under G.S. 1-569.19. A prevailing party may make a motion to the court for an expedited order to confirm the award under G.S. 1-569.22, in which case the court shall summarily decide the motion. The court shall issue an order to confirm the award unless the court vacates, modifies, or corrects the award under G.S. 1-569.23 or G.S. 1-569.24.

(b) An arbitrator's ruling under G.S. 1-569.18 that denies a request for a preaward ruling is not subject to trial court review; a party whose request under G.S. 1-569.18 for a preaward ruling has been denied by an arbitrator retains the right to seek relief under G.S. 1-569.20 and G.S. 1-569.21 from any final award the arbitrator renders.

(c) There is no right of appeal from trial court orders and judgments on preaward rulings by an arbitrator after a trial court award under this section, G.S. 1-569.19, and G.S. 1-569.28.

"**§ 1-569.19. Award.**

(a) An arbitrator shall make a record of an award. The record must be signed or otherwise authenticated as authorized by federal or State law by any arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.

(b) An award must be made within the time specified by the agreement to arbitrate or, if not specified therein, within the time ordered by the court. The court may

extend or the parties to the arbitration proceeding may agree in a record to extend the time. The court or the parties may do so within or after the time specified or ordered. A party waives any objection that an award was not timely made unless that party gives notice of the objection to the arbitrator before receiving notice of the award.

"**§ 1-569.20. Change of award by arbitrator.**

(a) On motion to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

(1) Upon a ground stated in G.S. 1-569.24(a)(1) or (a)(3);

(2) Because the arbitrator had not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) To clarify the award.

(b) A motion under subsection (a) of this section must be made and notice given to all parties within 20 days after the movant receives notice of the award.

(c) A party to the arbitration proceeding must give notice of any objection to the motion within 10 days after receipt of the notice.

(d) If a motion to the court is pending under G.S. 1-569.22, 1-569.23, or 1-569.24, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

(1) Upon a ground stated in G.S. 1-569.24(a)(1) or (a)(3);

(2) Because the arbitrator had not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) To clarify the award.

(e) An award modified or corrected pursuant to this section is subject to G.S. 1-569.19(a), 1-569.22, 1-569.23, and 1-569.24.

"**§ 1-569.21. Remedies; fees and expenses of arbitration proceeding.**

(a) An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.

(b) An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

(c) As to all remedies other than those authorized by subsections (a) and (b) of this section, an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under G.S. 1-569.22 or for vacating an award under G.S. 1-569.23.

(d) An arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award.

(e) If an arbitrator awards punitive damages or other exemplary relief under subsection (a) of this section, the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief.

"**§ 1-569.22. Confirmation of award.**

After a party to an arbitration receives notice of an award, the party may make a motion to the court for an order confirming the award, at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to G.S. 1-569.20 or G.S. 1-569.24 or is vacated pursuant to G.S. 1-569.23.

"**§ 1-569.23. Vacating award.**

(a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(1) The award was procured by corruption, fraud, or other undue means;

(2) There was:

a. Evident partiality by an arbitrator appointed as a neutral arbitrator;

b. Corruption by an arbitrator; or

c. Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) An arbitrator refused to postpone the hearing upon a showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to G.S. 1-569.15 so as to prejudice substantially the rights of a party to the arbitration proceeding;

(4) An arbitrator exceeded the arbitrator's powers;

(5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under G.S. 1-569.15(c) no later than the beginning of the arbitration hearing; or

(6) The arbitration was conducted without proper notice of the initiation of an arbitration as required in G.S. 1-569.9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

(b) A motion under this section must be filed within 90 days after the movant receives notice of the award pursuant to G.S. 1-569.19 or within 90 days after the movant receives notice of a modified or corrected award pursuant to G.S. 1-569.20, unless the movant alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion must be made within 90 days after the ground is known or by the exercise of reasonable care would have been known by the movant.

(c) If the court vacates an award on a ground other than that set forth in subdivision (a)(5) of this section, it may order a rehearing. If the award is vacated on a ground stated in subdivision (1) or (2) of subsection (a) of this section, the rehearing must be before a new arbitrator. If the award is vacated on a ground stated in subdivision (3), (4), or (6) of subsection (a) of this section, the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in G.S. 1-569.19(5) for an award.

(d) If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award pursuant to G.S. 1-569.24 is pending.

"**§ 1-569.24. Modification or correction of award.**

(a) Upon motion made within 90 days after the movant receives notice of the award pursuant to G.S. 1-569.19 or within 90 days after the movant receives notice of a modified or corrected award pursuant to G.S. 1-569.20, the court shall modify or correct the award if:

(1) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

(2) The arbitrator has made an award on a claim not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the claims submitted; or

(3) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

(b) If a motion made under subsection (a) of this section is granted, the court shall modify and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the court shall confirm the award.

(c) A motion to modify or correct an award pursuant to this section may be joined with a motion to vacate the award.

"**§ 1-569.25. Judgment on award; attorney's fees and litigation expenses.**

(a) Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment in conformity therewith. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.

(b) A court may allow reasonable costs of the motion and subsequent judicial proceedings.

(c) On motion of a prevailing party to a contested judicial proceeding under G.S. 1-569.22, 1-569.23, or 1-569.24, the court may add reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award.

"**§ 1-569.26. Jurisdiction.**

(a) A court of this State having jurisdiction over the controversy and the parties may enforce the agreement to arbitrate.

(b) An agreement to arbitrate providing for arbitration in this State confers exclusive jurisdiction on the court to enter judgment on an award under this Article.

"**§ 1-569.27. Venue.**

A motion pursuant to G.S. 1-569.5 must be made in the court of the county in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the court of the county in which it was held. Otherwise, the motion may be made in the court of any county in which an adverse party resides or has a place of business or, if no adverse party has a residence or place of business in this State, in the court of any county in this State. All subsequent motions must be made in the court hearing the initial motion unless the court otherwise directs.

"**§ 1-569.28. Appeals.**

(a) An appeal may be taken from:

(1) An order denying a motion to compel arbitration;
(2) An order granting a motion to stay arbitration;
(3) An order confirming or denying confirmation of an award;
(4) An order modifying or correcting an award;
(5) An order vacating an award without directing a rehearing; or
(6) A final judgment entered pursuant to this Article.

(b) An appeal under this section must be taken as from an order or a judgment in a civil action.

"**§ 1-569.29. Uniformity of application and construction.**

In applying and construing this Article, the Revised Uniform Arbitration Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

"**§ 1-569.30. Relationship to federal Electronic Signatures in Global and National Commerce Act.**

The provisions of this Article governing the legal effect, validity, and enforceability of electronic records or electronic signatures, and of contracts performed with the use of such records or signatures, conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, et seq., or as otherwise authorized by federal or State law governing such electronic records or electronic signatures.

"**§ 1-569.31. Short title.**

This Article may be cited as the Revised Uniform Arbitration Act."

SECTION 3. This act does not affect an action or proceeding that commences or accrues before Article 45C, as enacted in Section 2 of this act, becomes effective. Subject to G.S. 1-569.3, as enacted in Section 2 of this act, an arbitration agreement made before the effective date of this act is governed by Article 45A of Chapter 1 of the General Statutes.

SECTION 4. Section 1 of this act becomes effective January 1, 2006. The remainder of this act becomes effective January 1, 2004.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 716

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S716-ARC-12 [v.1]

Date _____,2003

Comm. Sub. [NO]
Amends Title [NO]
S716-SMRC-26[v.1]

Senator Hartsell

moves to amend the bill on page 2, by deleting lines 14 and 15.

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED ✓ FAILED _____ TABLED _____

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 716
PROPOSED COMMITTEE SUBSTITUTE S716-CSRC-26 [v.1]

4/15/2003 9:07:39 PM

Short Title: Revised Uniform Arbitration Act. (Public)

Sponsors:

Referred to:

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO REPEAL THE UNIFORM ARBITRATION ACT AND TO ENACT THE REVISED UNIFORM ARBITRATION ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 45A of Chapter 1 of the General Statutes is repealed.

SECTION 2. Chapter 1 of the General Statutes is amended by adding a new Article to read:

"Article 45C.

"Revised Uniform Arbitration Act.

"**§ 1-569.1. Definitions.**

The following definitions apply in this Article:

(1) 'Arbitration organization' means an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator.

(2) 'Arbitrator' means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.

(3) 'Court' means a court of competent jurisdiction in this State.

(4) 'Knowledge' means actual knowledge.

(5) 'Person' means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(6) 'Record' means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

"**§ 1-569.2. Notice.**

(a) Except as otherwise provided in this Article, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice.

(b) A person has notice if the person has knowledge of the notice or has received notice.

(c) A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business or at another location held out by the person as a place of delivery of such communications.

"**§ 1-569.3. When Article applies.**

(a) This Article governs an agreement to arbitrate made on or after January 1, 2004.

(b) This Article governs an agreement to arbitrate made before January 1, 2004, if all parties to the agreement or to the arbitration proceeding so agree in a record.

(c) On or after January 1, 2006, this Article governs an agreement to arbitrate whenever made.

"**§ 1-569.4. Effect of agreement to arbitrate; nonwaivable provisions.**

(a) Except as otherwise provided in subsections (b) and (c) of this section, a party to an agreement to arbitrate or to an arbitration proceeding may waive, or the parties may vary the effect of, the requirements of this Article to the extent provided by law.

(b) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(1) Waive or agree to vary the effect of the requirements of G.S. 1-569.5(a), 1-569.6(a), 1-569.8, 1-569.17(a), 1-569.17(b), 1-569.26, or 1-569.28;

(2) Agree to unreasonably restrict the right under G.S. 1-569.9 to notice of the initiation of an arbitration proceeding;

(3) Agree to unreasonably restrict the right under G.S. 1-569.12 to disclosure of any facts by a neutral arbitrator; or

(4) Waive the right under G.S. 1-569.16 of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under this Article, but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.

(c) A party to an agreement to arbitrate or to an arbitration proceeding may not waive, or the parties shall not vary the effect of, the requirements of this section or G.S 1-569.3(a), 1-569.3(c), 1-569.7, 1-569.14, 1-569.18, 1-569.20(d), 1-569.20(e), 1-569.22, 1-569.23, 1-569.24, 1-569.25(a), 1-569.25(b), 1-569.29, 1-569.30, 1-569.31.

"**§ 1-569.5. Application for judicial relief.**

(a) Except as otherwise provided in G.S. 1-569.28, an application for judicial relief under this Article must be made by motion to the court and heard in the manner provided by law or rule of court for making and hearing motions.

(b) Unless a civil action involving the agreement to arbitrate is pending, notice of an initial motion to the court under this Article must be served in the manner provided by law for the service of a summons in a civil action. Otherwise, notice of the motion

must be given in the manner prescribed by law or rule of court for serving motions in pending cases.

"**§ 1-569.6. Validity of agreement to arbitrate.**

(a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revocation of a contract.

(b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(c) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(d) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

"**§ 1-569.7. Motion to compel or stay arbitration.**

(a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

(1) If the refusing party does not appeal or does not oppose the motion, the court shall order the parties to arbitrate; and

(2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

(b) On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate.

(c) If the court finds that there is no enforceable agreement to arbitrate, it may not, pursuant to subsection (a) or (b) of this section, order the parties to arbitrate.

(d) The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or because grounds for the claim have not been established.

(e) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in a court, a motion under this section must be made in that court. Otherwise a motion under this section may be made in any court as provided in G.S. 1-569.27.

(f) If a party makes a motion to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

(g) If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.

"**§ 1-569.8. Provisional remedies.**

(a) Before an arbitrator is appointed and is authorized and able to act, the court, upon motion of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.

(b) After an arbitrator is appointed and is authorized and able to act:

(1) The arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action; and

(2) A party to an arbitration proceeding may move the court for a provisional remedy if the matter is urgent and the arbitrator is not able to act in a timely manner or the arbitrator cannot provide an adequate remedy.

(c) A party does not waive a right of arbitration by making a motion under subsection (a) or (b) of this section.

"**§ 1-569.9. Initiation of arbitration.**

(a) A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by certified or registered mail, return receipt requested, and obtained, or by service as authorized for the commencement of a civil action. The notice must describe the nature of the controversy and the remedy sought.

(b) Unless a person objects for lack or insufficiency of notice under G.S. 1-569.15(c) no later than the beginning of the arbitration hearing, the person, by appearing at the hearing, waives any objection to lack or insufficiency of notice.

"**§ 1-569.10. Consolidation of separate arbitration proceedings.**

(a) Except as otherwise provided in subsection (c) of this section, upon motion of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:

(1) There are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration with a third person;

(2) The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

(3) The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and

(4) Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

(b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

(c) The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.

"**§ 1-569.11. Appointment of arbitrator; service as a neutral arbitrator.**

(a) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

(b) An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral.

"**§ 1-569.12. Disclosure by arbitrator.**

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) A financial or personal interest in the outcome of the arbitration proceeding; and

(2) An existing or past relationship with any of the parties to the agreement to arbitrate or to the arbitration proceeding, their counsel or representatives, a witness, or other arbitrators.

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or (b) of this section to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under G.S. 1-569.23(a)(2) for vacating an award made by the arbitrator.

(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b) of this section, upon timely objection by a party, the court under G.S.-1-569.23(a)(2) may vacate an award.

(e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under G.S. 1-569.23(a)(2).

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under G.S. 1-569.23(a)(2).

"**§ 1-569.13. Action by majority.**

If there is more than one arbitrator, the powers of an arbitrator must be exercised by a majority of the arbitrators, but all of them shall conduct the hearing under G.S. 1-569.15(c).

"**§ 1-569.14. Immunity of arbitrator; competency to testify; attorney's fees and costs.**

(a) An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.

(b) The immunity afforded by this section supplements any immunity under other law.

(c) The failure of an arbitrator to make a disclosure required by G.S. 1-569.12 does not cause any loss of immunity under this section.

(d) In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify, and may not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding, to the same extent as a judge of a court of this State acting in a judicial capacity. This subsection does not apply:

(1) To the extent necessary to determine the claim of an arbitrator, arbitration organization, or representative of the arbitration organization against a party to the arbitration proceeding; or

(2) To a hearing on a motion to vacate an award under G.S. 1-569.23(a)(1) or (a)(2) if the movant establishes prima facie that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from the services of the arbitrator, organization, or representative, or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of subsection (d) of this section, and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not competent to testify, the court shall award to the arbitrator, organization, or representative reasonable attorney's fees, costs, and other reasonable expenses of litigation.

(f) Immunity under this section does not apply to acts or omissions that occur with respect to the operation of a motor vehicle.

"**§ 1-569.15. Arbitration process.**

(a) An arbitrator may conduct an arbitration in such a manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.

(b) An arbitrator may decide a request for summary disposition of a claim or particular issue:

(1) If all interested parties agree; or

(2) Upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the proceeding and the other parties have a reasonable opportunity to respond.

(c) If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than five days before the hearing begins. Unless a party to the arbitration proceeding makes an objection to lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but may not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified did not appear. The court, upon request, may direct the arbitrator to conduct the hearing promptly and render a timely decision.

(d) At a hearing under subsection (c) of this section, a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(e) If an arbitrator ceases to or is unable to act during the arbitration proceeding, a replacement arbitrator must be appointed in accordance with G.S. 1-569.11 to continue the proceeding and to resolve the controversy.

(f) The rules of evidence do not apply in arbitration proceedings, except as to matters of privilege or immunities.

"**§ 1-569.16. Representation by lawyer.**

A party to an arbitration proceeding may be represented by a lawyer or lawyers.

"**§ 1-569.17. Witnesses; subpoenas; depositions; discovery.**

(a) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena must be served in the manner for service of subpoenas in a civil action and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.

(b) In order to make the proceedings fair, expeditious, and cost-effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

(c) An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost-effective.

(d) If an arbitrator permits discovery under subsection (c) of this section, the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take action

against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this State.

(e) An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State.

(f) All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition, or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this State.

(g) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the protection of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another state upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost-effective. A subpoena or discovery-related order issued by an arbitrator in another state must be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this State.

(h) An arbitrator does not have the authority to hold a party in contempt of any order the arbitrator makes under this section. A court may hold parties in contempt for failure to obey an arbitrator's order, or an order made by the court, pursuant to this section, among other sanctions imposed by the arbitrator or the court.

"**§ 1-569.18. Judicial enforcement of preaward ruling by arbitrator.**

(a) If an arbitrator makes a preaward ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award under G.S. 1-569.19. A prevailing party may make a motion to the court for an expedited order to confirm the award under G.S. 1-569.22, in which case the court shall summarily decide the motion. The court shall issue an order to confirm the award unless the court vacates, modifies, or corrects the award under G.S. 1-569.23 or G.S. 1-569.24.

(b) An arbitrator's ruling under subsection (a) of this section that denies a request for a preaward ruling is not subject to trial court review; a party whose request under subsection (a) of this section for a preaward ruling has been denied by an arbitrator retains the right to seek relief under G.S. 1-569.20 and G.S. 1-569.21 from any final award the arbitrator renders.

(c) There is no right of appeal from trial court orders and judgments on preaward rulings by an arbitrator after a trial court award under this section, G.S. 1-569.19, and G.S. 1-569.28.

"**§ 1-569.19. Award.**

(a) An arbitrator shall make a record of an award. The record must be signed or otherwise authenticated as authorized by federal or State law by any arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.

(b) An award must be made within the time specified by the agreement to arbitrate or, if not specified therein, within the time ordered by the court. The court may extend or the parties to the arbitration proceeding may agree in a record to extend the time. The court or the parties may do so within or after the time specified or ordered. A party waives any objection that an award was not timely made unless that party gives notice of the objection to the arbitrator before receiving notice of the award.

"**§ 1-569.20. Change of award by arbitrator.**

(a) On motion to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

(1) Upon a ground stated in G.S. 1-569.24(a)(1) or (a)(3);

(2) Because the arbitrator had not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) To clarify the award.

(b) A motion under subsection (a) of this section must be made and notice given to all parties within 20 days after the movant receives notice of the award.

(c) A party to the arbitration proceeding must give notice of any objection to the motion within 10 days after receipt of the notice.

(d) If a motion to the court is pending under G.S. 1-569.22, 1-569.23, or 1-569.24, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

(1) Upon a ground stated in G.S. 1-569.24(a)(1) or (a)(3);

(2) Because the arbitrator had not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) To clarify the award.

(e) An award modified or corrected pursuant to this section is subject to G.S. 1-569.19(a), 1-569.22, 1-569.23, and 1-569.24.

"**§ 1-569.21. Remedies; fees and expenses of arbitration proceeding.**

(a) An arbitrator may award punitive damages or other exemplary relief if:

(1) the arbitration agreement provides for an award of punitive damages or exemplary relief;

(2) an award for punitive damages or other exemplary relief is authorized by law in a civil action involving the same claim;

(3) the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.

(b) An arbitrator may award reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding. An arbitrator may award reasonable attorney's fees if:

(1) the arbitration agreement provides for an award of attorney's fees; and

(2) an award of attorney's fees is authorized by law in a civil action involving the same claim.

(c) As to all remedies other than those authorized by subsections (a) and (b) of this section, an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a

remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under G.S. 1-569.22 or for vacating an award under G.S. 1-569.23.

(d) An arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award.

(e) If an arbitrator awards punitive damages or other exemplary relief under subsection (a) of this section, the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief.

"**§ 1-569.22. Confirmation of award.**

After a party to an arbitration receives notice of an award, the party may make a motion to the court for an order confirming the award, at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to G.S. 1-569.20 or G.S. 1-569.24 or is vacated pursuant to G.S. 1-569.23.

"**§ 1-569.23. Vacating award.**

(a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(1) The award was procured by corruption, fraud, or other undue means;

(2) There was:

a. Evident partiality by an arbitrator appointed as a neutral arbitrator;

b. Corruption by an arbitrator; or

c. Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) An arbitrator refused to postpone the hearing upon a showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to G.S. 1-569.15 so as to prejudice substantially the rights of a party to the arbitration proceeding;

(4) An arbitrator exceeded the arbitrator's powers;

(5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under G.S. 1-569.15(c) no later than the beginning of the arbitration hearing; or

(6) The arbitration was conducted without proper notice of the initiation of an arbitration as required in G.S. 1-569.9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

(b) A motion under this section must be filed within 90 days after the movant receives notice of the award pursuant to G.S. 1-569.19 or within 90 days after the movant receives notice of a modified or corrected award pursuant to G.S. 1-569.20, unless the movant alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion must be made within 90 days after the ground is known or by the exercise of reasonable care would have been known by the movant.

(c) If the court vacates an award on a ground other than that set forth in subdivision (a)(5) of this section, it may order a rehearing. If the award is vacated on a ground stated in subdivision (1) or (2) of subsection (a) of this section, the rehearing

must be before a new arbitrator. If the award is vacated on a ground stated in subdivision (3), (4), or (6) of subsection (a) of this section, the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in G.S. 1-569.19(5) for an award.

(d) If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award pursuant to G.S. 1-569.24 is pending.

"**§ 1-569.24. Modification or correction of award.**

(a) Upon motion made within 90 days after the movant receives notice of the award pursuant to G.S. 1-569.19 or within 90 days after the movant receives notice of a modified or corrected award pursuant to G.S. 1-569.20, the court shall modify or correct the award if:

(1) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

(2) The arbitrator has made an award on a claim not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the claims submitted; or

(3) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

(b) If a motion made under subsection (a) of this section is granted, the court shall modify and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the court shall confirm the award.

(c) A motion to modify or correct an award pursuant to this section may be joined with a motion to vacate the award.

"**§ 1-569.25. Judgment on award; attorney's fees and litigation expenses.**

(a) Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment in conformity therewith. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.

(b) A court may allow reasonable costs of the motion and subsequent judicial proceedings.

(c) On motion of a prevailing party to a contested judicial proceeding under G.S. 1-569.22, 1-569.23, or 1-569.24, the court may add reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award.

"**§ 1-569.26. Jurisdiction.**

(a) A court of this State having jurisdiction over the controversy and the parties may enforce the agreement to arbitrate.

(b) An agreement to arbitrate providing for arbitration in this State confers exclusive jurisdiction on the court to enter judgment on an award under this Article.

"**§ 1-569.27. Venue.**

A motion pursuant to G.S. 1-569.5 must be made in the court of the county in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the court of the county in which it was held. Otherwise, the motion may be made in the court of any county in which an adverse party resides or has a place of business or, if no adverse party has a residence or place of business in this State, in the court of any county in this State. All subsequent motions must be made in the court hearing the initial motion unless the court otherwise directs.

"**§ 1-569.28. Appeals.**

(a) An appeal may be taken from:

(1) An order denying a motion to compel arbitration;

(2) An order granting a motion to stay arbitration;

(3) An order confirming or denying confirmation of an award;

(4) An order modifying or correcting an award;

(5) An order vacating an award without directing a rehearing; or

(6) A final judgment entered pursuant to this Article.

(b) An appeal under this section must be taken as from an order or a judgment in a civil action.

"**§ 1-569.29. Uniformity of application and construction.**

In applying and construing this Article, the Revised Uniform Arbitration Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

"**§ 1-569.30. Relationship to federal Electronic Signatures in Global and National Commerce Act.**

The provisions of this Article governing the legal effect, validity, and enforceability of electronic records or electronic signatures, and of contracts performed with the use of such records or signatures, conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, et seq., or as otherwise authorized by federal or State law governing such electronic records or electronic signatures.

"**§ 1-569.31. Short title.**

This Article may be cited as the Revised Uniform Arbitration Act."

SECTION 3. This act does not affect an action or proceeding that commences or accrues before Article 45C, as enacted in Section 2 of this act, becomes effective. Subject to G.S. 1-569.3, as enacted in Section 2 of this act, an arbitration agreement made before the effective date of this act is governed by Article 45A of Chapter 1 of the General Statutes.

SECTION 4. Section 1 of this act becomes effective January 1, 2006. The remainder of this act becomes effective January 1, 2004.

SENATE BILL 716:
Revised Uniform Arbitration Act

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Hartsell
Date:	April 15, 2003	**Summary by:**	Kory J. Goldsmith
Version:	1ST Edition		Committee Counsel

SUMMARY: ***SB 716 repeals the current Uniform Arbitration Act, adopted in 1973 and replaces it with the Revised Uniform Arbitration Act (RUAA). The bill comes at the request of the North Carolina Bar Association.***

BILL ANALYSIS: The bill rewrites Article 45A of Chapter 1 of the General Statutes. It clarifies the following:

(1) A court decides whether a dispute is subject to an agreement to arbitrate

(2 Allows both a court and an arbitrator to issue provisional remedies, depending upon when the application for a provisional remedy is requested.

(3) Specifies that arbitration is initiated when a party gives written notice to the other party of the nature of the controversy and the remedy sought. Notice must be as provided in the agreement, or if the agreement is silent, by registered or certified mail or by service otherwise authorized in a civil action.

(4) Allows a court to consolidate arbitration proceedings.

(5) Requires arbitrators to disclose facts reasonably likely to affect their impartiality.

(6) Makes an arbitrator or arbitration organizations immune from civil actions to the same extent as a judge. However, if an arbitrator failed to disclose facts reasonable likely to affect the arbitrator's impartiality, the award may be vacated.

(7) Makes arbitrators or representatives of arbitration organizations incompetent to testify in another proceeding.

(8) Grants arbitrators or representatives of arbitration organizations discretion to order discovery, issue protective orders, decide motions for summary dispositions, hold prehearing conferences and otherwise manage the arbitration process.

(9) Allows a court to enforce a preaward ruling by an arbitrator unless the court vacates, modifies, or corrects the award for statutory reasons such as corruption, fraud, undue duress, mathematical miscalculation or evident mistake.

(10) Specifies the remedies an arbitrator may award. **The PCS removes the language that would allow an award of attorney fees and punitive damages. Attorney fees and punitive damages would be allowed if provided for in the arbitration agreement, the evidence justifies a claim for the award, and the award would be allowed in a civil action involving the same claim.**

(11) Allows a court to award attorneys' fees and costs to a prevailing party in court review of an arbitrator's award.

(12) Makes many sections of the RUAA not be waivable.

The RUAA would apply to agreements to arbitrate entered into on and after January 1, 2004, but would apply to any arbitration agreement after January 1, 2006 regardless of when the agreement was made.

BACKGROUND: The RUAA is a model act promulgated by the National Conference of Commissioners on Uniform State Laws. According to the Commissioners website, 5 states have adopted

the RUAA (Hawaii, Nevada, New Mexico, North Dakota and Utah) and 14 states are considering legislation to adopt it.

S716-SMRC-001

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 722

Short Title:	Display of American Flag.	(Public)
Sponsors:	Senators Kinnaird; Apodaca, Ballantine, Berger, Carpenter, Foxx, Gulley, Hagan, Hartsell, Horton, Kerr, Metcalf, and Webster.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT PERTAINING TO THE DISPLAY OF THE UNITED STATES FLAG.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 144 of the General Statutes is amended by adding a new section to read:

"**§ 144-7. Display of American flag.**

(a) No covenant, condition, or restriction set forth in a deed, and no rule, regulation, bylaw, or other governing document or agreement of a homeowners, neighborhood, civic, or other association, shall prohibit or be construed to prohibit the placement on any property of a flagpole that is to be used for the purpose of displaying, or shall prohibit or be construed to prohibit the display on any property of, the flag of the United States if the flag is displayed in accordance with any of the following:

(1) The patriotic customs set forth in 4 U.S.C.A. §§ 5-10, as amended, governing the display and use of the flag of the United States.

(2) The consent of the property's owner or of any person having lawful control of the property.

(3) The recommended flagpole standards set forth in "Our Flag," published pursuant to S.C.R. 61 of the 105th Congress, 1st Session (1998).

(4) Any federal law, proclamation of the President of the United States or the Governor, section of the Revised Code, or local ordinance or resolution.

(b) A covenant, condition, restriction, rule, regulation, bylaw, governing document, or agreement or a construction of any of these items that violates subsection (a) of this section is against public policy and unenforceable in any court of this State to the extent it violates subsection (a) of this section.

(c) No declaration, bylaw, rule, regulation, or agreement of a condominium property or construction of any of these items by the board of managers of its unit

owners' association shall prohibit the placement of a flagpole that is to be used for the purpose of displaying, or shall prohibit the display of, the flag of the United States on or within the limited common areas and facilities of a unit owner or on the immediately adjacent exterior of the building in which the unit of a unit owner is located, if the flag is displayed in accordance with any of the following:

(1) The patriotic customs set forth in 4 U.S.C.A. §§ 5-10, as amended, governing the display and use of the flag of the United States.

(2) The recommended flagpole standards set forth in "Our Flag," published pursuant to S.C.R. 61 of the 105th Congress, 1st Session (1998).

(3) Any federal law, proclamation of the President of the United States or the Governor, section of the General Statutes, or local ordinance or resolution.

(d) A declaration, bylaw, rule, regulation, or agreement or the construction of any of these items that violates subsection (c) of this section is against public policy and unenforceable in any court of this State to the extent it violates subsection (c) of this section."

SECTION 2. The title of Chapter 144 of the General Statutes reads as rewritten:

"**STATE FLAG, AMERICAN FLAG, ~~MOTTO~~ MOTTO, AND COLORS.**"

SECTION 3. This act is effective when it becomes law.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 722

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S722-ARH-14 [v.1]

Date _____,2003

Comm. Sub. [NO]
Amends Title [NO]
First Edition

Senator Kinnaird

moves to amend the bill on page 1, line 12, by deleting the word "any" and by substituting the word "all";

and on page 1, line 20, by inserting after the word "federal" the phrase "or State";

and on page 1, line 21, by deleting the phrase "section of the Revised Code,";

and on page 2, line 3, by deleting the phrase "limited common areas and";

and on page 2, line 5, by deleting the word "any" and by substituting the word "all";

and on page 2, line 11, by inserting after the word "federal" the phrase "or State";

and on page 2, line 12, by deleting the phrase "section of the General Statutes,".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 722

Short Title:	Display of American Flag.	(Public)
Sponsors:	Senators Kinnaird; Apodaca, Ballantine, Berger, Carpenter, Foxx, Gulley, Hagan, Hartsell, Horton, Kerr, Metcalf, and Webster.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT PERTAINING TO THE DISPLAY OF THE UNITED STATES FLAG.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 144 of the General Statutes is amended by adding a new section to read:

"**§ 144-7. Display of American flag.**

(a) No covenant, condition, or restriction set forth in a deed, and no rule, regulation, bylaw, or other governing document or agreement of a homeowners, neighborhood, civic, or other association, shall prohibit or be construed to prohibit the placement on any property of a flagpole that is to be used for the purpose of displaying, or shall prohibit or be construed to prohibit the display on any property of, the flag of the United States if the flag is displayed in accordance with any of the following:

(1) The patriotic customs set forth in 4 U.S.C.A. §§ 5-10, as amended, governing the display and use of the flag of the United States.

(2) The consent of the property's owner or of any person having lawful control of the property.

(3) The recommended flagpole standards set forth in "Our Flag," published pursuant to S.C.R. 61 of the 105th Congress, 1st Session (1998).

(4) Any federal law, proclamation of the President of the United States or the Governor, section of the Revised Code, or local ordinance or resolution.

(b) A covenant, condition, restriction, rule, regulation, bylaw, governing document, or agreement or a construction of any of these items that violates subsection (a) of this section is against public policy and unenforceable in any court of this State to the extent it violates subsection (a) of this section.

(c) No declaration, bylaw, rule, regulation, or agreement of a condominium property or construction of any of these items by the board of managers of its unit

owners' association shall prohibit the placement of a flagpole that is to be used for the purpose of displaying, or shall prohibit the display of, the flag of the United States on or within the limited common areas and facilities of a unit owner or on the immediately adjacent exterior of the building in which the unit of a unit owner is located, if the flag is displayed in accordance with any of the following:

(1) The patriotic customs set forth in 4 U.S.C.A. §§ 5-10, as amended, governing the display and use of the flag of the United States.

(2) The recommended flagpole standards set forth in "Our Flag," published pursuant to S.C.R. 61 of the 105th Congress, 1st Session (1998).

(3) Any federal law, proclamation of the President of the United States or the Governor, section of the General Statutes, or local ordinance or resolution.

(d) A declaration, bylaw, rule, regulation, or agreement or the construction of any of these items that violates subsection (c) of this section is against public policy and unenforceable in any court of this State to the extent it violates subsection (c) of this section."

SECTION 2. The title of Chapter 144 of the General Statutes reads as rewritten:

"**STATE FLAG, AMERICAN FLAG, ~~MOTTO~~ MOTTO, AND COLORS.**"

SECTION 3. This act is effective when it becomes law.

SENATE BILL 722:
Display of American Flag.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Kinnaird
Date:	April 16, 2003	**Summary by:**	Robin Johnson
Version:	First		Committee Counsel

SUMMARY: Senate Bill 722 would nullify, by declaring against public policy, any covenant, condition, restriction, declaration, rule, regulation, or agreement of a homeowners association or condominium association that prohibits the placement of a flagpole on any property for the purpose of displaying the United States flag or prohibits the display of the United States flag on any property, so long as the flag is displayed in accordance with certain conditions and requirements.

BILL ANALYSIS: The bill would creates a new **G.S. 144-7, Display of American Flag**, which provides that no covenant, condition, restriction, declaration, rule, regulation, or agreement of a homeowners, neighborhood, civic, condominium, or other association may prohibit the placement of a flagpole on any property for the purpose of displaying the United States flag or prohibit the display of the United States flag on any property, if the flag is displayed with the consent of the real property's owner or person having lawful control of the property and in accordance with any of the following conditions:

- Customs set forth 4 U.S.C.A. §§ 5-10 governing the display of the American flag.
- Flagpole standards set forth in S.C.R. 61, 105th Congress.
- Any federal law or proclamation of the President or Governor, or local ordinance or resolution.

EFFECTIVE DATE: Senate Bill 722 is effective when it becomes law.

S722-SMRH-001: Tim Hovis, Staff Attorney, contributed to this summary.

§ 5. Display and use of flag by civilians; codification of rules and customs; definition

The following codification of existing rules and customs pertaining to the display and use of the flag of the United States of America is established for the use of such civilians or civilian groups or organizations as may not be required to conform with regulations promulgated by one or more executive departments of the Government of the United States. The flag of the United States for the purpose of this chapter [4 U.S.C.A. § 1 et seq.] shall be defined according to sections 1 and 2 of this title [4 U.S.C.A. § § 1 and 2] and Executive Order 10834 issued pursuant thereto.

§ 6. Time and occasions for display

(a) It is the universal custom to display the flag only from sunrise to sunset on buildings and on stationary flagstaffs in the open. However, when a patriotic effect is desired, the flag may be displayed 24 hours a day if properly illuminated during the hours of darkness.

(b) The flag should be hoisted briskly and lowered ceremoniously.

(c) The flag should not be displayed on days when the weather is inclement, except when an all weather flag is displayed.

(d) The flag should be displayed on all days, especially on New Year's Day, January 1; Inauguration Day, January 20; Martin Luther King Jr.'s birthday, third Monday in January; Lincoln's Birthday, February 12; Washington's Birthday, third Monday in February; Easter Sunday (variable); Mother's Day, second Sunday in May; Armed Forces Day, third Saturday in May; Memorial Day (half-staff until noon), the last Monday in May; Flag Day, June 14; Independence Day, July 4; Labor Day, first Monday in September; Constitution Day, September 17; Columbus Day, second Monday in October; Navy Day, October 27; Veterans Day, November 11; Thanksgiving Day, fourth Thursday in November; Christmas Day, December 25; and such other days as may be proclaimed by the President of the United States; the birthdays of States (date of admission); and on State holidays.

(e) The flag should be displayed daily on or near the main administration building of every public institution.

(f) The flag should be displayed in or near every polling place on election days.

(g) The flag should be displayed during school days in or near every schoolhouse.

§ 7. Position and manner of display

The flag, when carried in a procession with another flag or flags, should be either on the marching right; that is, the flag's own right, or, if there is a line of other flags, in front of the center of that line.

(a) The flag should not be displayed on a float in a parade except from a staff, or as provided in subsection (i) of this section.

(b) The flag should not be draped over the hood, top, sides, or back of a vehicle or of a railroad train or a boat. When the flag is displayed on a motorcar, the staff shall be fixed firmly to the chassis or clamped to the right fender.

(c) No other flag or pennant should be placed above or, if on the same level, to the right of the flag of the United States of America, except during church services conducted by naval chaplains at sea, when the church pennant may be flown above the flag during church services for the personnel of the Navy. No

person shall display the flag of the United Nations or any other national or international flag equal, above, or in a position of superior prominence or honor to, or in place of, the flag of the United States at any place within the United States or any Territory or possession thereof: *Provided*, That nothing in this section shall make unlawful the continuance of the practice heretofore followed of displaying the flag of the United Nations in a position of superior prominence or honor, and other national flags in positions of equal prominence or honor, with that of the flag of the United States at the headquarters of the United Nations.

(d) The flag of the United States of America, when it is displayed with another flag against a wall from crossed staffs, should be on the right, the flag's own right, and its staff should be in front of the staff of the other flag.

(e) The flag of the United States of America should be at the center and at the highest point of the group when a number of flags of States or localities or pennants of societies are grouped and displayed from staffs.

(f) When flags of States, cities, or localities, or pennants of societies are flown on the same halyard with the flag of the United States, the latter should always be at the peak. When the flags are flown from adjacent staffs, the flag of the United States should be hoisted first and lowered last. No such flag or pennant may be placed above the flag of the United States or to the United States flag's right.

(g) When flags of two or more nations are displayed, they are to be flown from separate staffs of the same height. The flags should be of approximately equal size. International usage forbids the display of the flag of one nation above that of another nation in time of peace.

(h) When the flag of the United States is displayed from a staff projecting horizontally or at an angle from the window sill, balcony, or front of a building, the union of the flag should be placed at the peak of the staff unless the flag is at half-staff. When the flag is suspended over a sidewalk from a rope extending from a house to a pole at the edge of the sidewalk, the flag should be hoisted out, union first, from the building.

(i) When displayed either horizontally or vertically against a wall, the union should be uppermost and to the flag's own right, that is, to the observer's left. When displayed in a window, the flag should be displayed in the same way, with the union or blue field to the left of the observer in the street.

(j) When the flag is displayed over the middle of the street, it should be suspended vertically with the union to the north in an east and west street or to the east in a north and south street.

(k) When used on a speaker's platform, the flag, if displayed flat, should be displayed above and behind the speaker. When displayed from a staff in a church or public auditorium, the flag of the United States of America should hold the position of superior prominence, in advance of the audience, and in the position of honor at the clergyman's or speaker's right as he faces the audience. Any other flag so displayed should be placed on the left of the clergyman or speaker or to the right of the audience.

(l) The flag should form a distinctive feature of the ceremony of unveiling a statue or monument, but it should never be used as the covering for the statue or monument.

(m) The flag, when flown at half-staff, should be first hoisted to the peak for an instant and then lowered to the half-staff position. The flag should be again raised to the peak before it is lowered for the day. On Memorial Day the flag should be displayed at half-staff until noon only, then raised to the top of the staff. By order of the President, the flag shall be flown at half-staff upon the death of principal figures of the United States Government and the Governor of a State, territory, or possession, as a mark of respect to their memory. In the event of the death of other officials or foreign dignitaries, the flag is to be displayed at half-staff according to Presidential instructions or orders, or in accordance with recognized customs or practices not inconsistent with law. In the event of the death of a present or former official of the government of any State, territory, or possession of the United States, the Governor of that State, territory, or possession may proclaim that the National flag shall be flown at half-staff. The flag shall be flown at

half-staff 30 days from the death of the President or a former President; 10 days from the day of death of the Vice President, the Chief Justice or a retired Chief Justice of the United States, or the Speaker of the House of Representatives; from the day of death until interment of an Associate Justice of the Supreme Court, a Secretary of an executive or military department, a former Vice President, or the Governor of a State, territory, or possession; and on the day of death and the following day for a Member of Congress. The flag shall be flown at half-staff on Peace Officers Memorial Day, unless that day is also Armed Forces Day. As used in this subsection--

(1) the term "half-staff" means the position of the flag when it is one-half the distance between the top and bottom of the staff;

(2) the term "executive or military department" means any agency listed under sections 101 and 102 of title 5 [5 U.S.C.A. § § 101 and 102], United States Code; and

(3) the term "Member of Congress" means a Senator, a Representative, a Delegate, or the Resident Commissioner from Puerto Rico.

(n) When the flag is used to cover a casket, it should be so placed that the union is at the head and over the left shoulder. The flag should not be lowered into the grave or allowed to touch the ground.

(o) When the flag is suspended across a corridor or lobby in a building with only one main entrance, it should be suspended vertically with the union of the flag to the observer's left upon entering. If the building has more than one main entrance, the flag should be suspended vertically near the center of the corridor or lobby with the union to the north, when entrances are to the east and west or to the east when entrances are to the north and south. If there are entrances in more than two directions, the union should be to the east.

§ 8. Respect for flag

No disrespect should be shown to the flag of the United States of America; the flag should not be dipped to any person or thing. Regimental colors, State flags, and organization or institutional flags are to be dipped as a mark of honor.

(a) The flag should never be displayed with the union down, except as a signal of dire distress in instances of extreme danger to life or property.

(b) The flag should never touch anything beneath it, such as the ground, the floor, water, or merchandise.

(c) The flag should never be carried flat or horizontally, but always aloft and free.

(d) The flag should never be used as wearing apparel, bedding, or drapery. It should never be festooned, drawn back, nor up, in folds, but always allowed to fall free. Bunting of blue, white, and red, always arranged with the blue above, the white in the middle, and the red below, should be used for covering a speaker's desk, draping the front of the platform, and for decoration in general.

(e) The flag should never be fastened, displayed, used, or stored in such a manner as to permit it to be easily torn, soiled, or damaged in any way.

(f) The flag should never be used as a covering for a ceiling.

(g) The flag should never have placed upon it, nor on any part of it, nor attached to it any mark, insignia, letter, word, figure, design, picture, or drawing of any nature.

(h) The flag should never be used as a receptacle for receiving, holding, carrying, or delivering anything.

(i) The flag should never be used for advertising purposes in any manner whatsoever. It should not be embroidered on such articles as cushions or handkerchiefs and the like, printed or otherwise impressed on paper napkins or boxes or anything that is designed for temporary use and discard. Advertising signs should not be fastened to a staff or halyard from which the flag is flown.

(j) No part of the flag should ever be used as a costume or athletic uniform. However, a flag patch may be affixed to the uniform of military personnel, firemen, policemen, and members of patriotic organizations. The flag represents a living country and is itself considered a living thing. Therefore, the lapel flag pin being a replica, should be worn on the left lapel near the heart.

(k) The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning.

§ 9. Conduct during hoisting, lowering or passing of flag

During the ceremony of hoisting or lowering the flag or when the flag is passing in a parade or in review, all persons present except those in uniform should face the flag and stand at attention with the right hand over the heart. Those present in uniform should render the military salute. When not in uniform, men should remove their headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Aliens should stand at attention. The salute to the flag in a moving column should be rendered at the moment the flag passes.

§ 10. Modification of rules and customs by President

Any rule or custom pertaining to the display of the flag of the United States of America, set forth herein, may be altered, modified, or repealed, or additional rules with respect thereto may be prescribed, by the Commander in Chief of the Armed Forces of the United States, whenever he deems it to be appropriate or desirable; and any such alteration or additional rule shall be set forth in a proclamation.

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FLAG PRESENTATION

Presentation of the flag during a ceremony should be preceded by a brief talk emphasizing the importance of the occasion. Following the presentation all present should salute the flag, recite the pledge of allegiance, and sing the national anthem.

FOLDING THE FLAG

1. Two persons, facing each other, hold the flag waist high and horizontally between them.
2. The lower striped section is folded, lengthwise, over the blue field. Hold bottom to top and edges together securely.
3. Fold the flag again, lengthwise, folded edge to open edge.
4. A triangular fold is started along the length of the flag, from the end to the heading by bringing the striped corner of the folded edge to meet the open edge.
5. The outer point is turned inward parallel with the open edge, forming a second triangle.
6. Repeat the triangular folding until the entire length of the flag is folded.
7. When the flag is completely folded only the triangular blue field should be visible.

CARE OF YOUR FLAG

The life of your flag depends on your care. Dirt can cut fabrics, dull colors, and cause wear. Most outdoor flags can be washed in mild detergent and thoroughly rinsed. Indoor and parade flags should be dry-cleaned. Many dry cleaners offer free cleaning of U.S. flags during the months of June and July. Damaged flags can be repaired and utilized as long as the overall dimensions are not noticeably altered. American Legion Posts and local governments often have facilities to dispose of unserviceable flags. Store your flags in a well ventilated area away from any harsh chemicals or cleaning compounds. If your flag gets wet, never store it until it is completely dry. Wet folds cause permanent creases. Dampness ruins fabric and causes mildew. Pole care is also related to flag care. Rust and scale cause permanent stains and some metallic oxides actually eat holes in fabric.

SIZES OF FLAGS

The size of the flag is determined by the exposed height of the flagpole from which it is flying. The only consideration is for the flag to be in proper proportion to its pole. Flags which fly from angled poles on homes and those which are displayed on standing poles in offices and other indoor displays are usually either 3' x 5' or 4' x 6'. Color guards usually carry flags measuring 4' x 6'. Other recommended sizes are shown in the following table:

Flagpole Height (ft.)	Flag Size (ft.)	
20	4 x 6	24 sq ft
25	5 x 8	40 sq ft
40	6 x 10	60 sq ft
50	8 x 12	96 sq ft

60	10 x 15
70	12 x 18
90	15 x 25
125	20 x 30
200	30 x 40
250	40 x 50

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GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 449

Short Title:	Presumption-DWI Blood Withdrawal Valid.	(Public)
Sponsors:	Senator Queen.	
Referred to:	Judiciary II.	

March 18, 2003

A BILL TO BE ENTITLED

AN ACT TO MAKE IT A REBUTTABLE PRESUMPTION THAT THE PERSON WITHDRAWING BLOOD IN AN IMPAIRED DRIVING CASE IS A LICENSED PHYSICIAN, NURSE, OR AN OTHERWISE QUALIFIED PERSON.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-139.1(c) reads as rewritten:

"(c) Withdrawal of Blood for Chemical Analysis. – When a blood test is specified as the type of chemical analysis by the charging officer, only a physician, registered nurse, or other qualified person may withdraw the blood sample. If the person withdrawing the blood requests written confirmation of the charging officer's request for the withdrawal of blood, the officer shall furnish it before blood is withdrawn. When blood is withdrawn pursuant to a charging officer's request, neither the person withdrawing the blood nor any hospital, laboratory, or other institution, person, firm, or corporation employing that person, or contracting for the service of withdrawing blood, may be held criminally or civilly liable by reason of withdrawing that blood, except that there is no immunity from liability for negligent acts or omissions. Upon the introduction of any evidence at trial that the person withdrawing the blood was a qualified person under this subsection, a rebuttable presumption shall be raised that the person withdrawing the blood was qualified."

SECTION 2. This act becomes effective October 1, 2003.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 449
PROPOSED COMMITTEE SUBSTITUTE S449-CSRC-30 [v.5]

4/22/2003 3:47:23 PM

Short Title: Evidence -DWI Blood Withdrawal Valid. (Public)

Sponsors:

Referred to:

March 18, 2003

A BILL TO BE ENTITLED

AN ACT TO CLARIFY ADMISSIBLE EVIDENCE THAT THE PERSON WITHDRAWING BLOOD IN AN IMPAIRED DRIVING CASE IS A LICENSED PHYSICIAN, NURSE, OR AN OTHERWISE QUALIFIED PERSON.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-139.1(c) reads as rewritten:

"(c) Withdrawal of Blood for Chemical Analysis. – When a blood test is specified as the type of chemical analysis by the charging officer, only a physician, registered nurse, or other qualified person may withdraw the blood sample. If the person withdrawing the blood requests written confirmation of the charging officer's request for the withdrawal of blood, the officer shall furnish it before blood is withdrawn. When blood is withdrawn pursuant to a charging officer's request, neither the person withdrawing the blood nor any hospital, laboratory, or other institution, person, firm, or corporation employing that person, or contracting for the service of withdrawing blood, may be held criminally or civilly liable by reason of withdrawing that blood, except that there is no immunity from liability for negligent acts or omissions.

Evidence regarding the qualifications of the person who withdrew the blood sample may be provided at trial by testimony of the charging officer or by an affidavit of the person who withdrew the blood sample and shall be sufficient to constitute prima facie evidence regarding the person's qualifications.."

SECTION 2. This act becomes effective December 1, 2003.

SENATE BILL 449:
Presumption-DWI Blood Withdrawal Valid

BILL ANALYSIS

Committee:	Senate JII	**Introduced by:**	Sen. Queen
Date:	April 3, 2003	**Summary by:**	Kory Goldsmith Committee Counsel
Version:	Proposed Committee Substitute S449-CSRC-30[v.5]		

SUMMARY: ***Senate Bill 449 would clarify the type of evidence that may be introduced regarding the qualifications of the person who withdrew blood for chemical analysis for a DWI charge. Testimony by the charging officer or an affidavit by the person who withdrew the blood would be sufficient to constitute prima facie evidence as to those qualifications.***

CURRENT LAW: G.S 20-139.1(c) provides that when a charging officer has blood drawn for analysis , only a physician, registered nurse, or other qualified person may withdraw the blood sample.

BILL ANALYSIS: SB 449 provides that evidence regarding the qualifications of the person who withdrew a blood sample may be provided at trial by testimony of the charging officer or by an affidavit of the person who withdrew the blood and evidence of this nature shall be sufficient to be prima facie evidence regarding the person's qualifications.

Prima facie evidence is evidence that is sufficient on its face and unless challenged to establish a given fact.

The act would become effective December 1, 2003.

S449-SMRC-001

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

S **D**

SENATE BILL 868
PROPOSED COMMITTEE SUBSTITUTE S868-CSRC-34 [v.1]

4/22/2003 9:44:40 AM

Short Title: Assault in the Presence of a Child. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO CREATE THE CRIMINAL OFFENSE OF ASSAULT IN THE PRESENCE OF A CHILD.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-33(c) is amended by adding a new subdivision to read:

"(c) Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:

...

(7) Commits an assault on a minor by committing an assault with a deadly weapon or an assault that inflicts serious injury on a person with whom he or she has a personal relationship in the presence of a minor who is residing with or is under the car and supervision of the person assaulted and the minor has a personal relationship with the person assaulted. The following definitions shall apply in this subdivision:

a. "In the presence of a minor" means:

1. In the physical presence of the minor; or

2. Having knowledge that a child is present and may see or hear the offense.

b. "Minor" is as defined in G.S. 48A-2.

c. "Personal relationship" is as defined in G.S. 50B-1(b)."

SECTION 2. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

Judiciary II Committee

Minutes

April 24, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with fifteen members present.

SB 687 (Felony Death/Serious Injury by Vehicle) Senator Hartsell recognized Senator Thomas, bill sponsor, to discuss the bill. Senator Thomas invited Wake County District Attorney Colon Willoughby, to speak on the bill. Questions by Sentors Rucho, Kerr, Webster and Hagan were answered by Senator Thomas and District Attorney Willoughby. Senator Apodaca moved for a favorable report with serial referral to appropriations. All members voted and the motion carried.

SB 868 (Assault in the Presence of a Child) Senator Hagan, bill sponsor, was introduced to discuss the bill. Senator Kinnaird moved to adopt the current Proposed Committee Substitute for purposes of discussion. All members voted and the motion carried. Senator Hagan explained the bill and identified the clarifying language. Senator Kinnaird moved for a favorable report to the Proposed Committee Substitute, unfavorable to the original bill. All members voted and the motion carried.

SB 692 (Terror Response Plans) Senator Sloan moved to adopt the Proposed Committee Substitute for purposes of discussion. All members voted and the motion carried. Senator Thomas, bill sponsor, was invited to discuss the bill. Robin Johnson, staff attorney, explained the changes in the Committee Substitute. Casandra Skinner, representing Crime Control and Public Safety, spoke on the bill. Senator Kinnaird submitted an amendment and moved for adoption. All members voted and the motion carried. Questions by Senators Kinnaird, Rucho, Kerr, Hartsell, Webster and Bingham were answered by Senator Thomas, Ms. Skinner and Robin Johnson. Senator Kerr moved for a favorable report to the Proposed Committee Substitute as amended, unfavorable to the original bill and rolled into a new Committee Substitute.

SB 694 (Analogues/Schedule I Controlled Substance) Senator Thomas, bill sponsor, was recognized to discuss the original bill. Mr. Colon Willoughby, Wake County District Attorney, spoke on the bill. Questions by Senators Kerr, Webster and Kinnaird were answered by Senator Thomas and District Attorney Willoughby. The bill was removed from the calendar for language clarification and will be heard again next week.

With no further business, the meeting was adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Wednesday, April 23, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B. **707** Repeat Misd. Larceny.
Sequential Referral: None
Recommended Referral: None

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **449** Presumption-DWI Blood Withdrawal Valid.
Draft Number: PCS 6573
Sequential Referral: None
Recommended Referral: None
Long Title Amended: Yes

S.B. **693** Amend Enhanced Sentences Laws.
Draft Number: PCS 40027
Sequential Referral: None
Recommended Referral: None
Long Title Amended: No

S.B. **708** Volunteer Fire Dept. Crim. Background Checks.
Draft Number: PCS 55181
Sequential Referral: None
Recommended Referral: None
Long Title Amended: Yes

S.B. **722** Display of American Flag.
Draft Number: PCS 65270
Sequential Referral: None
Recommended Referral: None
Long Title Amended: No

S.B. **925** Strengthen Security Fraud Enforcement Laws.
Draft Number: PCS 40017
Sequential Referral: None

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Thursday, April 24, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B. **687** Felony Death/Serious Injury by Vehicle.
Sequential Referral: Appropriations/Base Budget
Recommended Referral: None

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **471** Amend Self-Insurance Guaranty Assoc. Laws.
Draft Number: PCS 65274
Sequential Referral: None
Recommended Referral: None
Long Title Amended: No

S.B. **692** Terror Response Plans.
Draft Number: PCS 85223
Sequential Referral: None
Recommended Referral: None
Long Title Amended: No

S.B. **716** Revised Uniform Arbitration Act.
Draft Number: PCS 65275
Sequential Referral: None
Recommended Referral: None
Long Title Amended: No

S.B. **868** Assault in the Presence of a Child.
Draft Number: PCS 85224
Sequential Referral: None
Recommended Referral: None
Long Title Amended: No

TOTAL REPORTED: 5

Committee Clerk Comments:

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **JUDICIARY II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	April 24, 2003	10:00 AM	1124

The following will be considered:

	BILL NO.	SHORT TITLE	SPONSOR
•	SB 527	Death by Vehicle	Senator Hartsell
•	SB 687	Felon Death/Serious Injury by Vehicle	Senator Thomas
•	SB 692	Terror Response Plans	Senator Thomas
•	SB 694	Analogues/Schedule I Controlled	Senator Thomas
•		Substance	
•	SB 867	Arson/Serious Injury to Firefighter	Senator Hagan
•	SB 868	Assault in the Presence of a Child	Senator Hagan

Senator HARTSELL, Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
April 24, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. Welcome and Opening Remarks

II. Bills to be Considered

SB 527	Death by Vehicle	Senator Hartsell
SB 687	Felon Death/Serious Injury by Vehicle	Senator Thomas
SB 692	Terror Response Plans	Senator Thomas
SB 694	Analogues/Schedule I Controlled Substance	Senator Thomas
SB 867	Arson/Serious Injury to Firefighter	Senator Hagan
SB 868	Assault in the Presence of a Child	Senator Hagan

III. Other Business

IV. Adjournment

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 4-24-03

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Casandra Skinner	CCPS
Pat Bowen	Conference of DAs
John Phelps	NCLM
Matt Osborne	AOC
Colon Willoughby	DA 10th Dist
Walt Pollard	DOJ
Jeff Welch	AP
Bill Walden	NCATL
Rick O'Donnell	PFPNC
Bobby Bell	PFPNC
Vic McBride	[illegible]
Paul Meyer	NCAFC

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 4-24-03

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Jim Blackburn	County Commissioners Association
Susan Coward	NCDOT
Barbara Hoey	NCRTA GSO
Jon Williams	COPS
Leonard Reid	REID
[illegible]	TRC
[illegible]	NCAA

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 527

Short Title:	Death by Vehicle.	(Public)
Sponsors:	Senator Hartsell.	
Referred to:	Judiciary II.	

March 25, 2003

A BILL TO BE ENTITLED

AN ACT TO CREATE THE OFFENSE OF "DEATH BY VEHICLE" AND TO PROVIDE THAT THE OFFENSE SHALL BE PUNISHED AS A CLASS I FELONY.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-141.4 reads as rewritten:

"**§ 20-141.4. Felony and misdemeanor death by vehicle.**

(a) Repealed by Session Laws 1983, c. 435, s. 27.

(a1) Felony Death by Vehicle. – A person commits the offense of felony death by vehicle if he unintentionally causes the death of another person while engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2 and commission of that offense is the proximate cause of the death.

(a2) Death by Vehicle. – A person commits the offense of death by vehicle if he unintentionally causes the death of another person while engaged in any of the following offenses and the commission of that offense is the proximate cause of death:

(1) Passing a stopped school bus.

(2) Reckless driving.

(3) Driving on the wrong side of the road.

(4) Running through a stop sign or a red light.

(5) Speeding of 15 miles per hour or more over the speed limit.

(6) Speeding in a school zone.

~~(a2)~~(a3) Misdemeanor Death by Vehicle. – A person commits the offense of misdemeanor death by vehicle if he unintentionally causes the death of another person while engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic, other than impaired driving under G.S. 20-138.1, and commission of that violation is the proximate cause of the death.

(b) Punishments. – Felony death by vehicle is a Class G felony. Death by vehicle is a Class I felony. Misdemeanor death by vehicle is a Class 1 misdemeanor.

(c) No Double Prosecutions. – No person who has been placed in jeopardy upon a charge of death by vehicle may be prosecuted for the offense of manslaughter arising out of the same death; and no person who has been placed in jeopardy upon a charge of manslaughter may be prosecuted for death by vehicle arising out of the same death."

SECTION 2. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 687

Short Title:	Felony Death/Serious Injury by Vehicle.	(Public)
Sponsors:	Senator Thomas.	
Referred to:	Judiciary II.	

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO STRENGTHEN THE LAWS AGAINST IMPAIRED DRIVING BY INCREASING THE PUNISHMENT FOR FELONY DEATH BY VEHICLE AND CREATING THE OFFENSE OF FELONY SERIOUS INJURY BY VEHICLE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-141.4 reads as rewritten:

"**§ 20-141.4. Felony and misdemeanor death by vehicle.**

(a) Repealed by Session Laws 1983, c. 435, s. 27.

(a1) Felony Death by Vehicle. – A person commits the offense of felony death by vehicle if he unintentionally causes the death of another person while engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2 and commission of that offense is the proximate cause of the death.

(a2) Misdemeanor Death by Vehicle. – A person commits the offense of misdemeanor death by vehicle if he unintentionally causes the death of another person while engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic, other than impaired driving under G.S. 20-138.1, and commission of that violation is the proximate cause of the death.

(a3) Felony Serious Injury by Vehicle. – A person commits the offense of felony serious injury by vehicle if he unintentionally causes serious injury to another person while engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2, and commission of that offense is the proximate cause of the serious injury.

(b) Punishments. – Felony death by vehicle is a Class ~~G~~ D felony. Felony serious injury by vehicle is a Class E felony. Misdemeanor death by vehicle is a Class 1 misdemeanor.

(c) No Double Prosecutions. – No person who has been placed in jeopardy upon a charge of death by vehicle may be prosecuted for the offense of manslaughter arising out of the same death; and no person who has been placed in jeopardy upon a charge of manslaughter may be prosecuted for death by vehicle arising out of the same death."

SECTION 2. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

SENATE BILL 687:
Felony Death/Serious Injury by Vehicle

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Thomas
Date:	April 23, 2003	**Summary by:**	Kory J. Goldsmith
Version:	1st Edition		Committee Counsel

SUMMARY: ***SB 687 creates the new crime of felony serious injury by vehicle that would be a Class E felony. It applies when a person unintentionally causes serious injury to another person while engaged in the offense of impaired driving and the impaired driving is the proximate cause of the serious injury. The bill also increases the penalty for felony death by vehicle from a Class G to a Class D felony.***

CURRENT LAW: G.S. 20-141.4 contains two offenses: felony death by vehicle and misdemeanor death by vehicle.

The elements of felony death by vehicle are:

- The defendant causes the death
- Of another human being
- Unintentionally
- While engaged in the offense of impaired driving or impaired driving of a commercial vehicle; and
- The commission of impaired driving is the proximate cause of the death.

This is a Class G felony with a minimum sentence of 8 months intermediate or active punishment and a maximum sentence of 44 months active punishment.

The elements of misdemeanor death by vehicle are:

- The defendant causes the death
- Of another human being
- Unintentionally
- While committing a violation of any state law or local ordinance applying to the operation of a motor vehicle or the regulation of traffic, other than impaired driving; and
- The commission of that offense is the proximate cause of death.

This is a Class 1 misdemeanor with a minimum sentence of 1 day community punishment to 120 days community, intermediate to active punishment.

G.S. 20-138.1 is impaired driving. **The elements are:**

- The person drives
- A vehicle
- On a highway or public vehicular area

- While under the influence of an impairing substance, or
- After consuming a sufficient quantity of alcohol that the person has an alcohol concentration of 0.08 or more at any relevant time after the driving.

There are multiple levels of punishment, based upon the weigh of certain aggravating and mitigating factors. The punishments range from a minimum imprisonment of 30 days to a maximum imprisonment of 60 days. Fines may range from $200 to $4,000.

G.S. 20-138.2 is impaired driving of a commercial vehicle. The elements are the same as impaired driving except the defendant was operating a commercial vehicle. The sentences are the same as impaired driving.

BILL ANALYSIS: The new offense of felony serious injury by vehicle would have the following elements:

- The defendant
- Unintentionally causes
- Serious injury
- To another person
- While engaged in the offense of impaired driving or impaired driving of a commercial vehicle; and
- The commission of that offense is the proximate cause of the serious injury.

The offense would be a Class E felony with a minimum sentence of 15 months intermediate or active punishment and a maximum sentence of 98 months active punishment.

The bill also increases felony death by vehicle from a Class G felony to a Class D felony. A Class D felony has a minimum sentence of 38 months active punishment and a maximum sentence of 229 months active punishment.

BACKGROUND: An analysis of this bill by the North Carolina Sentencing Commission was not available at the time this summary was prepared.

S687-SMRC-001

NORTH CAROLINA GENERAL ASSEMBLY
LEGISLATIVE FISCAL NOTE
(INCARCERATION NOTE G.S. 120-36.7)

BILL NUMBER: SB 687 1st Edition

SHORT TITLE: Felony Death/Serious Injury by Vehicle

SPONSOR(S): Senator Scott Thomas

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2003-04	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08
EXPENDITURES					
HIGHWAY FUND					
Transportation	$18,388	-	-	-	-
GENERAL FUND					
Correction+					
Recurring (min.)	-	$79,680+	$379,928+	$759,835+	$1,395,466+
Judicial (Recurring)	$200,343	$360,617	$378,647	$397,580	$417,459
TOTAL EXPENDITURES:	$218,731+	$440,297+	$758,575+	$1,157,415+	$1,812,925+
ADDITIONAL PRISON BEDS+*	-	**2+**	**14+**	**28+**	**48+**
POSITIONS:	-	0+	6+	11+	19+

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction (DOC); Judicial Branch; Department of Transportation

EFFECTIVE DATE: December 1, 2003

+This analysis can only project a partial impact from SB 687. There will be additional prison beds and Correction expenditures of an undetermined amount.

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY: This bill would increase the offense class for Felony Death by Vehicle (G.S. 20-141.4) from a Class G felony to a Class D felony and create a new offense class, Felony Serious Injury by Vehicle (G.S. 20-141.4(a3)), punishable as a Class E felony.

ASSUMPTIONS AND METHODOLOGY:

Department of Transportation/Highway Fund

This bill would create a new offense, Serious Injury by Vehicle. The State Automated Driver License System (SADLS) will require modifications to implement this offense. The following changes and additions will be required:

- Logic for new conviction codes and Business rules to enforce these new codes.
- New AOC code process logic.
- New suspension codes and the business rules to enforce these new codes.
- Changes to the correspondence system for new correspondence produced.
- Alcohol Restriction for new codes and business rules to enforce these new codes.

The Drivers License Section estimates 206 hours of programming, testing, and implementation at $80/hour for a total of $16,720, plus ITS charges totaling $1,668. Total nonrecurring expenditures for the Drivers License Section are estimated to be $18,388.

Department of Correction

The Sentencing Commission uses historical data and AOC offense codes to project the impact on the prison population. The Commission cannot estimate the potential impact of new offenses or of changes in prosecutorial behavior. This bill, SB 687, has the potential to increase the number of prison beds needed by three different means, only one of which is quantifiable. The potential for additional, unquantifiable beds is signified by the (+) following each prison bed estimate.

Increased offense class. The penalty for felony death by vehicle is increased from a Class G felony to a Class D felony. While a judge may impose an intermediate punishment for a Class G felony, he must impose an active sentence for a Class D felony, and the average active sentence is longer for Class D felony convictions. In 2001-02, there were 21 convictions for Felony Death by Vehicle. The projected impact of increasing the offense class to Class D is to increase the number of prison beds needed each year, resulting in the need for 48 new prison beds by 2007-08.

Changes in prosecutorial behavior. Under current law, punishment for felony death by vehicle is a lower offense class than that for involuntary manslaughter (G.S. 14-18). This bill would raise felony death by vehicle to a higher offense class than involuntary manslaughter, and it is possible that some of the convictions for involuntary manslaughter would instead be convictions for felony death by vehicle. The Sentencing Commission cannot project the extent to which this would occur.

Creation of a new offense. This bill also creates a new offense, felony serious injury by vehicle, punishable as a Class E felony. The Sentencing Commission cannot estimate the potential impact on the prison population. We do know from DMV data that there were 875 alcohol related crashes with serious injury in 2001, a decline from past years. If there were two Class E convictions for this offense per year, there would be the need for one additional prison bed the first year and three additional prison beds the second year, due to active sentences and post-release sentencing revocations. The average annual operating cost for each additional prison bed in FY 2004-05 will be $24,175.

The chart below compares the projected inmate population to prison bed capacity and shows whether there is adequate bed capacity for any population increases caused by a specific bill. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five year Fiscal Note horizon and beyond.* That means the number of beds needed (Row 5) is always equal to the projected additional inmates due to a bill (Row 4).

Rows 4 and 5 in the chart show the impact of this specific bill. As shown in bold in the chart below, the Sentencing Commission estimates this specific legislation will add *at least* 48 inmates to the prison system by the end of FY 2007-08. There will be additional beds required by the creation of a new Class E offense, but the number of additional beds cannot be determined.

	June 30 2004	June 30 2005	June 30 2006	June 30 2007	June 30 2008
1. Projected No. of Inmates Under Current Structured Sentencing Act[1]	35,851	36,787	37,739	38,687	39,557
2. Projected No. of Prison Beds (DOC Expanded Capacity)[2]	34,561	34,729	34,729	34,729	34,729
3. No. of Beds Over/Under No. of Inmates Under Current Structured Sentencing Act	-1,290	-2,058	-3,010	-3,958	-4,828
4. No. of Projected Additional Inmates **Due to this Bill**[3]	-	**2+**	**14+**	**28+**	**48+**
5. No. of Additional Beds Needed Each Fiscal Year Due to this Bill[3] -	-	2+	14+	28+	48+

[1] The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes are based on January 2003 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory board, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts.

[2] Projected number of prison beds is based on beds completed or funded and under construction as of 12/14/02. The number of beds assumes the Department of Correction will operate at an Expanded Operating Capacity (EOC), which is the number of beds above 100% or Standard Operating Capacity. The EOC is authorized by previous court consent decrees or departmental policy. ***These bed capacity figures do not include the potential loss in bed capacity due to any proposals in the 2003 Session to eliminate prison beds or close prisons. Figures include three new prisons due to open in 2003-04.***

[3] Criminal Penalty bills effective December 1, 2002 will only affect inmate population for one month of FY 2002-03, June 2003, due to the lag time between when an offense is committed and an offender is sentenced. This analysis can only project a partial impact from SB 687. There will be additional prison beds needed due to the creation of a new Class E felony.

POSITIONS: It is anticipated that at least 19 positions by 2007-08 would be needed to supervise the additional inmates housed under this bill. These position totals include security, program, and administrative personnel at a ratio of one employee for every 2.5 inmates. This ratio is the combined average of the last three prisons opened by DOC and the three new prisons under construction.

FISCAL IMPACT BEYOND FIVE YEARS: Fiscal notes look at the impact of a bill through the year 2008. However, there is information available on the impact of this bill in later years. The chart below shows the additional inmates due to this bill, the projected available beds, and required beds due only to this bill each year.

	2008-09	2009-10	2010-11	2011-12
Inmates Due to This Bill*	67^{+}	76^{+}	81^{+}	84^{+}
Available Beds (over/under)	-5,616	-6,339	-7,039	-7,684
New Beds Needed (Minimum)*	-5,683	-6,415	-7,120	-7,768

*Only part of the impact is quantifiable.

DISTRIBUTION OF BEDS: After analyzing the proposed legislation, the Department of Correction estimates the following distribution of beds as needed under the quantifiable portion of this bill:

24% Close Custody
65% Medium Custody
10% Minimum Custody

CONSTRUCTION: Construction costs for new prison beds, as listed in the following chart, are based on estimated 2002-03 costs for each custody level as provided by the Office of State Construction and an assumed inflation rate of 5% per year.

Custody Level	Minimum	Medium	Close
Construction Cost Per Bed 2002-03	$38,595	$73,494	$85,444

Construction costs, where applicable, are shown as non-recurring costs in the Fiscal Impact Table on Page 1 of this note. These costs assume that funds to construct prison beds should be budgeted in advance. Based on previous prison construction projects we are assuming it will typically require three years for planning, design and construction of new beds.

OPERATING: Operating costs are based on actual 2001-02 costs for each custody level as provided by the Department of Correction. These costs include security, inmate programs, inmate costs (food, medical etc.) and administrative overhead costs for the Department and the Division of Prisons. A 3% annual inflation rate will be added each year to the base costs for FY 2002 shown

below and included in the recurring costs estimated in the Fiscal Impact Table on Page 1. **Only operating costs are included in the fiscal analysis of this bill.**

Using Department of Correction projections for custody levels, the projected operating costs for the first year (2004-05) are approximately $79,680 for two new beds (two additional beds in close custody, three beds shifted from minimum to medium custody). The projected operating costs for 2011-12 are approximately $2.7 million for 81 new beds (26 close, 49 medium, and 6 minimum custody).

Daily Inmate Operating Cost 2001-02

Custody Level	Minimum	Medium	Close	Statewide Average
Daily Cost Per Inmate (2001-02)	$50.04	$65.17	$80.19	$62.43

Only operating costs of new prison beds, not construction costs, will be included in the fiscal estimate under the following circumstances: (1) when a bill increases the inmate population in the first two years of the fiscal note horizon, FY 2004 and 2005, this assumes that Correction cannot build prisons quickly enough to house additional offenders before 2005-06 and, (2) if the number of beds is anticipated to be less than 400 beds total since it is not practical to assume DOC would construct a general population prison with fewer than 400 beds.

In practice under these circumstances, DOC will have to take all or one of several actions: purchase additional beds out of state or in county jails; pay counties to increase jail backlog; or, establish temporary beds in the State system. For these circumstances, the Fiscal Research Division (FRD) will use the DOC statewide average operating cost, plus 3% annually, to calculate the prison bed cost.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts (AOC) provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

Class D Offense. This bill increases the penalty for felony death by vehicle from a Class G to a Class D felony. AOC data indicate that in calendar year 2002, there were 112 charges of this felony, of which three were disposed of by jury trial and 78 by plea. Using data from 2002 on methods of disposition for these cases, AOC estimates that 2.7% were disposed of by jury trial and 69.4% by plea. Applying these percentages to the year 2002 charges yields 3 trials and 78 pleas. Also based on this data, the AOC estimates an indigency rate of 39%. At the present Class G felony, these cases would have cost the court system approximately $29,327. At the proposed Class D level, they would cost the system about $45,758, an increase of **$16,432.** This increase is

due to an assumed increase in trial times (from 2.15 days to 2.77 days) and time involved in handling pleas (.53 hrs to .75 hrs). This figure is conservative in that it does not include the costs for processing dismissals, for any additional appeals that could result from the enhancement in punishment, nor any increase in prosecution under violent habitual felony. Furthermore, this figure assumes the current rates of disposition types would remain the same despite the increase in penalty. It is possible that a defendant facing the higher punishment would be less likely to plea and increase the chances that there would be more trials and fewer pleas.

Class E Offense. This bill also adds a new Class E felony for inflicting serious injury if the injury is caused during the commission of the offense of driving while impaired. North Carolina DMV data reveal that in 2001, there were 875 alcohol-related crashes involving serious injury. During approximately the same time period, AOC data indicate there were 380 alcohol-related fatalities, of which 112 (29.5%) resulted in charges for felony death by vehicle. Applying this same percentage to the 875 alcohol-related serious injury crashes would result in approximately 258 charges of this new Class E felony to be handled by the court system. (An informal poll by AOC of District Attorneys across the state indicates that currently no charges, in addition to the DWI, are currently being lodged against these defendants. Class E penalties are considerably stiffer than all but the most serious DWI charges and carry with them the risk of receiving prior record points).

Assuming the same trial rates as the felony death by vehicle charge, these new serious injury charges would result in seven jury trials, 179 pleas and 72 dismissals. Each jury trial on averages lasts 2.46 days at a cost of $1,728 for the first day and $1,536 for the second and third days. Based on these averages, the new trials resulting from this bill would cost **$47,075** per year. Processing 179 Class E felony pleas at .64 hours per plea costs approximately **$49,394**. These costs assume an indigency rate of 39 percent. Thus, the total additional cost to the court system for this Class E felony is projected to be 218 additional hours of court time, for a total of **$96,469 per year.** To the extent that more cases are disposed of via trials and fewer pleas are accepted at the Class E level, the costs would be proportionally higher.

SOURCES OF DATA: Department of Transportation; Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission; and Office of State Construction.

TECHNICAL CONSIDERATIONS: None

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Chloe Gossage and Bob Weiss

APPROVED BY: James D. Johnson

DATE: April 23, 2002

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 692

Short Title:	Terror Response Plans.	(Public)
Sponsors:	Senator Thomas.	
Referred to:	Judiciary II.	

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT CERTAIN INFORMATION CONCERNING PLANS TO RESPOND TO TERRORIST ACTIVITY ARE NOT SUBJECT TO THE PUBLIC RECORDS OR OPEN MEETINGS LAWS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 132-1.7 reads as rewritten:

"**§ 132-1.7. Sensitive public security information.**

(a) Public records, as defined in G.S. 132-1, shall not include information containing specific details of public security plans and arrangements or the detailed plans and drawings of public buildings and infrastructure facilities.

(b) Public records as defined in G.S. 132-1 do not include plans to prevent or respond to terrorist activity, to the extent such records set forth specific tactics, or specific security or emergency procedures, the disclosure of which would jeopardize the safety of governmental personnel or the general public, or the security of any governmental facility, building, structure, or information storage system.

(c) Information relating to the general adoption of public security plans and arrangements, and budgetary information concerning the authorization or expenditure of public funds to implement public security plans and arrangements, or for the construction, renovation, or repair of public buildings and infrastructure facilities shall be public records."

SECTION 2. G.S. 143-318.11(a) reads as rewritten:

"(a) Permitted Purposes. – It is the policy of this State that closed sessions shall be held only when required to permit a public body to act in the public interest as permitted in this section. A public body may hold a closed session and exclude the public only when a closed session is required:

(1) To prevent the disclosure of information that is privileged or confidential pursuant to the law of this State or of the United States, or not considered a public record within the meaning of Chapter 132 of the General Statutes.

(2) To prevent the premature disclosure of an honorary degree, scholarship, prize, or similar award.

(3) To consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged. General policy matters may not be discussed in a closed session and nothing herein shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant. The public body may consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure. If the public body has approved or considered a settlement, other than a malpractice settlement by or on behalf of a hospital, in closed session, the terms of that settlement shall be reported to the public body and entered into its minutes as soon as possible within a reasonable time after the settlement is concluded.

(4) To discuss matters relating to the location or expansion of industries or other businesses in the area served by the public body, including agreement on a tentative list of economic development incentives that may be offered by the public body in negotiations. The action approving the signing of an economic development contract or commitment, or the action authorizing the payment of economic development expenditures, shall be taken in an open session.

(5) To establish, or to instruct the public body's staff or negotiating agents concerning the position to be taken by or on behalf of the public body in negotiating (i) the price and other material terms of a contract or proposed contract for the acquisition of real property by purchase, option, exchange, or lease; or (ii) the amount of compensation and other material terms of an employment contract or proposed employment contract.

(6) To consider the qualifications, competence, performance, character, fitness, conditions of appointment, or conditions of initial employment of an individual public officer or employee or prospective public officer or employee; or to hear or investigate a complaint, charge, or grievance by or against an individual public officer or employee. General personnel policy issues may not be considered in a closed session. A public body may not consider the qualifications, competence, performance, character, fitness, appointment, or removal of a member of the public body or another body and may not consider or fill a vacancy among its own membership except in an open meeting. Final action making an appointment or discharge or removal by a public body having final authority for the appointment or discharge or removal shall be taken in an open meeting.

(7) To plan, conduct, or hear reports concerning investigations of alleged criminal misconduct.

(8) To formulate plans by a local board of education relating to emergency response to incidents of school violence.

(9) To discuss plans to protect public safety as it relates to terrorist activity and briefings by staff members, legal counsel, or law enforcement or emergency service officials concerning actions taken to respond to such activity or a related threat to public safety."

SECTION 3. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 692
PROPOSED COMMITTEE SUBSTITUTE S692-CSRH-22 [v.1]

4/23/2003 3:38:41 PM

Short Title: Terror Response Plans. (Public)

Sponsors:

Referred to:

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT CERTAIN INFORMATION CONCERNING PLANS TO RESPOND TO TERRORIST ACTIVITY ARE NOT SUBJECT TO THE PUBLIC RECORDS OR OPEN MEETINGS LAWS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 132-1.7 reads as rewritten:

"**§ 132-1.7. Sensitive public security information.**

(a) Public records, as defined in G.S. 132-1, shall not include information containing specific details of public security plans and arrangements or the detailed plans and drawings of public buildings and infrastructure facilities.

(b) Public records as defined in G.S. 132-1 do not include plans to prevent or respond to terrorist activity, to the extent such records set forth vulnerability and risk assessments, potential targets, specific tactics, or specific security or emergency procedures, the disclosure of which would jeopardize the safety of governmental personnel or the general public, or the security of any governmental facility, building, structure, or information storage system.

(c) Information relating to the general adoption of public security plans and arrangements, and budgetary information concerning the authorization or expenditure of public funds to implement public security plans and arrangements, or for the construction, renovation, or repair of public buildings and infrastructure facilities shall be public records."

SECTION 2. G.S. 143-318.11(a) reads as rewritten:

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(1) To prevent the disclosure of information that is privileged or confidential pursuant to the law of this State or of the United States, or

not considered a public record within the meaning of Chapter 132 of the General Statutes.

(2) To prevent the premature disclosure of an honorary degree, scholarship, prize, or similar award.

(3) To consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged. General policy matters may not be discussed in a closed session and nothing herein shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant. The public body may consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure. If the public body has approved or considered a settlement, other than a malpractice settlement by or on behalf of a hospital, in closed session, the terms of that settlement shall be reported to the public body and entered into its minutes as soon as possible within a reasonable time after the settlement is concluded.

(4) To discuss matters relating to the location or expansion of industries or other businesses in the area served by the public body, including agreement on a tentative list of economic development incentives that may be offered by the public body in negotiations. The action approving the signing of an economic development contract or commitment, or the action authorizing the payment of economic development expenditures, shall be taken in an open session.

(5) To establish, or to instruct the public body's staff or negotiating agents concerning the position to be taken by or on behalf of the public body in negotiating (i) the price and other material terms of a contract or proposed contract for the acquisition of real property by purchase, option, exchange, or lease; or (ii) the amount of compensation and other material terms of an employment contract or proposed employment contract.

(6) To consider the qualifications, competence, performance, character, fitness, conditions of appointment, or conditions of initial employment of an individual public officer or employee or prospective public officer or employee; or to hear or investigate a complaint, charge, or grievance by or against an individual public officer or employee. General personnel policy issues may not be considered in a closed session. A public body may not consider the qualifications, competence, performance, character, fitness, appointment, or removal of a member of the public body or another body and may not consider or fill a vacancy among its own membership except in an open meeting. Final action making an appointment or discharge or removal

by a public body having final authority for the appointment or discharge or removal shall be taken in an open meeting.

(7) To plan, conduct, or hear reports concerning investigations of alleged criminal misconduct.

(8) To formulate plans by a local board of education relating to emergency response to incidents of school violence.

(9) To discuss and take action regarding plans to protect public safety as it relates to existing or potential terrorist activity and to receive briefings by staff members, legal counsel, or law enforcement or emergency service officials concerning actions taken or to be taken to respond to such activity or a related threat to public safety."

SECTION 3. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 694

Short Title:	Analogues/Schedule I Controlled Substance.	(Public)
Sponsors:	Senator Thomas.	
Referred to:	Judiciary II.	

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE IN THE SAME MANNER AS FEDERAL LAW THAT A CONTROLLED SUBSTANCE ANALOGUE SHALL, TO THE EXTENT INTENDED FOR HUMAN CONSUMPTION, BE TREATED AS A CONTROLLED SUBSTANCE IN SCHEDULE I OF THE NORTH CAROLINA CONTROLLED SUBSTANCES ACT, AND TO PROVIDE THAT THUS MAE 1, 4-BUTANDEDIOL, AN ANALOGUE OF GAMMA-HYDROXYBUTRIC ACID (GHB), IS A SCHEDULE I CONTROLLED SUBSTANCE WHEN THE SUBSTANCE IS INTENDED FOR HUMAN CONSUMPTION.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 90 of the General Statutes is amended by adding the following new section to read:

"**§ 90-89.1. Treatment of controlled substance analogues.**

A controlled substance analogue shall, to the extent intended for human consumption, be treated for the purposes of any State law as a controlled substance in Schedule I."

SECTION 2. G.S. 90-87 is amended by adding the following new subdivision to read:

"(5a) 'Controlled substance analogue' is as defined in subdivision 802(32) of Title 21 of the United States Code."

SECTION 3. This act becomes effective December 1, 2003, and applies to offenses committed on or after December 1, 2003.

ANALOGUES/SCHEDULE I CONTROLLED SUBSTANCE: Senate Bill 694

BILL ANALYSIS

Committee:	Senate Judiciary	**Introduced by:**	Sen. Thomas
Date:	April 22, 2003	**Summary by:**	Sandra Alley
Version:	First Edition		Committee Counsel

SUMMARY: Senate Bill 694 would make substances that are intended for human consumption and that either have a chemical structure substantially similar to a controlled substance or that produce an effect substantially similar to that of a controlled substance ("analogues") schedule I offenses under Chapter 90. The Act would become effective December 1, 2003.

CURRENT LAW: Under current state law, the manufacture, sale, delivery, or possession with intent to sell or deliver a scheduled controlled substance is a felony. Analogues of controlled substances are not scheduled offenses unless specified, as is the case for gamma-butyrolactone (GBL), an analogue to Gamma Hydroxybutyrate or "GHB" (known as the "date rape drug").

Section 813 Title 21 of the United States Code states that analogues intended for human consumption will be treated as schedule I controlled substances for the purpose of any Federal law.

BILL ANALYSIS: Senate Bill 694 would amend the North Carolina Controlled Substances Act to make substances intended for human consumption and that either have a chemical structure substantially similar to a controlled substance or that produce an effect substantially similar to that of a controlled substance ("analogues") schedule I offenses under Chapter 90. The bill would make state law consistent with federal law that treats controlled substance analogues are treated as Schedule I controlled substances.

The bill defines "controlled substance analogue" by reference to the definition in §802(32) Title 21 of the United States Code which reads:

> **(32)(A)** Except as provided in subparagraph (C), the term "controlled substance analogue" means a substance--
>
> **(i)** the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;
>
> **(ii)** which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
>
> **(iii)** with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.
>
> **(B)** The designation of gamma butyrolactone or any other chemical as a listed chemical pursuant to paragraph (34) or (35) does not preclude a finding pursuant to subparagraph (A) of this paragraph that the chemical is a controlled substance analogue.
>
> **(C)** Such term does not include--

(i) a controlled substance;
(ii) any substance for which there is an approved new drug application;
(iii) with respect to a particular person any substance, if an exemption is in effect for investigational use, for that person, under section 355 of this title to the extent conduct with respect to such substance is pursuant to such exemption; or
(iv) any substance to the extent not intended for human consumption before such an exemption takes effect with respect to that substance.

Possession of a schedule I or II controlled substance is a Class I felony. The minimum penalty for a Class I felony is 3 months of community punishment. The maximum penalty is 15 months of active incarceration. The level of punishment imposed depends on the defendant's prior record.

The manufacture or delivery of or possession with intent to manufacture, sell or deliver a schedule I controlled substance is a Class H felony. The minimum penalty for a Class H felony is 4 months of community punishment. The maximum penalty is 30 months of active incarceration. The level of punishment imposed depends on the defendant's prior record.

The sale of a schedule I or II controlled substance is a Class G felony. The minimum penalty for a Class G felony is 8 months of intermediate level punishment. The maximum penalty is 36 months of active incarceration. The level of punishment imposed depends on the defendant's prior record.

BACKGROUND: There are many types of controlled substance analogues, including MAE-1and 1,4 butanediol, which are both analogues of Gamma Hydroxybutyrate or "GHB" (also known as the "date rape drug"). As of 1996, most controlled substance analogues identified in the illicit traffic are produced by modification of phenethylamine and amphetamine molecule. These modifications can lead to substances with pure central nervous system stimulant activity (e.g., Methcathinone), hallucinogenic activity (e.g. 4-bromo-s, 5-dimethoxyphenethylamine (2C-B) or a combination of both depending on the dose (e.g. 3, 4-methylenedioxyamphetamine (MDA)).

This Act becomes effective December 1, 2003.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 694

Short Title:	Analogues/Schedule I Controlled Substance.	(Public)
Sponsors:	Senator Thomas.	
Referred to:	Judiciary II.	

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE IN THE SAME MANNER AS FEDERAL LAW THAT A CONTROLLED SUBSTANCE ANALOGUE SHALL, TO THE EXTENT INTENDED FOR HUMAN CONSUMPTION, BE TREATED AS A CONTROLLED SUBSTANCE IN SCHEDULE I OF THE NORTH CAROLINA CONTROLLED SUBSTANCES ACT, AND TO PROVIDE THAT THUS MAE 1, 4-BUTANDEDIOL, AN ANALOGUE OF GAMMA-HYDROXYBUTRIC ACID (GHB), IS A SCHEDULE I CONTROLLED SUBSTANCE WHEN THE SUBSTANCE IS INTENDED FOR HUMAN CONSUMPTION.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 90 of the General Statutes is amended by adding the following new section to read:

"**§ 90-89.1. Treatment of controlled substance analogues.**

A controlled substance analogue shall, to the extent intended for human consumption, be treated for the purposes of any State law as a controlled substance in Schedule I."

SECTION 2. G.S. 90-87 is amended by adding the following new subdivision to read:

"(5a) 'Controlled substance analogue' is as defined in subdivision 802(32) of Title 21 of the United States Code."

SECTION 3. This act becomes effective December 1, 2003, and applies to offenses committed on or after December 1, 2003.

NORTH CAROLINA GENERAL ASSEMBLY
LEGISLATIVE FISCAL NOTE
(INCARCERATION NOTE G.S. 120-36.7)

BILL NUMBER: SB 694 1st Edition

SHORT TITLE: Analogues/Schedule I Controlled Substance

SPONSOR(S): Senator Thomas

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2003-04	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08
GENERAL FUND					
Correction					
Recurring		Unable to determine exact amount.			
Nonrecurring					
Judicial					
Recurring		Unable to determine exact amount.			
Nonrecurring					
TOTAL EXPENDITURES:		Unable to determine exact amount.			
ADDITIONAL PRISON BEDS*		Unable to determine exact number of beds.			
POSITIONS: (cumulative)		Unable to determine exact amount.			

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction (DOC); Judicial Branch

EFFECTIVE DATE: December 1, 2003

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY: The bill add new section G.S. 90-89.1 to provide that controlled substance analogues, intended for human consumption, be treated as controlled substances in Schedule I under state law. The bill also amends G.S. 90-87 to clarify that the definition of controlled substance analogues is the same as that under federal law.

ASSUMPTIONS AND METHODOLOGY:

Currently, state drug laws do not specifically address the treatment of controlled substance analogues, which may be similar in structure to or produce similar effects as controlled substances. However, federal law does provide that controlled substance analogues, intended for human consumption, be treated as controlled substances in Schedule I. *According to a DEA pharmacologist, of the seven to ten controlled substance analogues detected in the last few years, only a couple appear on any schedule for controlled substances under federal law.*[1]

General

The Sentencing and Policy Advisory Commission prepares prison population projections for each criminal penalty bill. The Commission assumes for each bill that increasing criminal penalties does not have a deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division (FRD) does not assume savings due to deterrent effects for this bill or other criminal penalty bills.

Department of Correction

The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes and fiscal memos are based on January 2003 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory board, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five year Fiscal Note horizon and beyond.* The number of beds needed will always be equal to the projected number of inmates due to a bill.

The Sentencing Commission notes that the addition of controlled substance analogues as Schedule I controlled substances could create additional violations of manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance (G.S. 90-95(a)(1)) and possess a controlled substance (G.S. 90-95(a)(3)). Assuming these substances are not currently classified as controlled substances, there is no historical data from which to estimate impact on the prison population. It is not known how many offenders might be convicted under this proposed bill.

While there is no historical data from which to estimate impact on the prison population, data is available concerning the number of convictions for offenses involving Schedule I controlled substances. In FY 2001-2002 there were 188 convictions for offenses involving Schedule I controlled substances (excluding convictions for LSD and heroin, as indicated by specific offense codes for these controlled substances).

[1] AOC Research and Planning Division

The Sentencing Commission notes:

- If the addition of these controlled substances resulted in two additional convictions for sale of a Schedule I controlled substance, which is currently a Class G offense, this would result in the need for one additional prison bed the first year and two additional prison beds the second year.

- If the addition of these controlled substances resulted in three additional convictions for possession with intent to manufacture, sell or deliver a Schedule I controlled substance, which is currently a Class H offense, this would result in the need for one additional prison bed the first year and two additional prison beds the second year.

- If the addition of these controlled substances resulted in ten additional convictions for simple possession of a Schedule I controlled substance, which is currently a Class I offense, this would result in the need for 1 prison bed the first year and three prison beds the second year.

The addition of controlled substances as Schedule I controlled substances would likely create the need for additional prison beds, but an exact amount cannot be determined. Under the structured sentencing grid, Class G felons receive intermediate or active sentences. In FY 2001-2002, 59 percent of Class G felons received intermediate punishment and 41 percent received active sentences. On average, offenders were sentenced to a minimum of 15 and a maximum of 19 months. Class H and I felons are eligible to receive community punishment, intermediate sanctions, or active sentences under the structured sentencing grid. In FY 2001-2002, Class H felons, on average, were sentenced to a minimum of 10 and a maximum of 12 months. Class I felons, on average, were sentenced to a minimum of nine and a maximum of 10 months.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts (AOC) provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

Although SBI indicates that no data are available on how often controlled substance analogues are detected for Schedule I drugs, the AOC suggests there may be a substantial impact on the courts as a result of the bill. They note, there could be additional defendants charged under the state law with violations of the drug laws due to the addition of controlled substance analogues to Schedule I. (The penalties in Chapter 90 are most severe for Schedule I drugs.) As a result they would expect an increase in trials and court time. Additionally, to the extent that commonly used drug analogues result in drug charges that are not being filed now, the impact could be substantial.

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission.

TECHNICAL CONSIDERATIONS: None

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Nicole Kreiser and Jim Mills

Nicole Kreiser

APPROVED BY: James D. Johnson, Director, Fiscal Research Division

DATE: April 23, 2003

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 867

Short Title:	Arson/Serious Injury to Firefighter.	(Public)
Sponsors:	Senator Hagan.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO CREATE THE OFFENSE OF ARSON OR OTHER UNLAWFUL BURNINGS THAT RESULT IN SERIOUS INJURY TO A FIREFIGHTER.

The General Assembly of North Carolina enacts:

SECTION 1. Article 15 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-69.3. Arson or other unlawful burning that results in serious injury to a firefighter.**

A person is guilty of a Class C felony if the person commits an offense under Article 15 of Chapter 14 of the General Statutes and a firefighter suffers serious bodily injury while discharging or attempting to discharge the firefighter's duties as a result of the criminal offense."

SECTION 2. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

S

SENATE BILL 868

Short Title:	Assault in the Presence of a Child.	(Public)
Sponsors:	Senator Hagan.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO CREATE THE CRIMINAL OFFENSE OF ASSAULT IN THE PRESENCE OF A CHILD.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-33(c) is amended by adding a new subdivision to read:

"(c) Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:

...

(7) Commits an assault with a deadly weapon or an assault that inflicts serious injury on a person with whom he or she has a personal relationship in the presence of a minor who is residing with or in the custody of the person assaulted. The following definitions shall apply in this subdivision:

a. "In the presence of a minor" means:

1. In the physical presence of the minor; or

2. Having knowledge that a child is present and may see or hear the offense.

b. "Minor" is as defined in G.S. 48A-2.

c. "Personal relationship" is as defined in G.S. 50B-1(b)."

SECTION 2. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 868
PROPOSED COMMITTEE SUBSTITUTE S868-CSRC-41 [v.2]

4/23/2003 5:28:58 PM

Short Title: Assault in the Presence of a Child. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO CREATE THE CRIMINAL OFFENSE OF ASSAULT IN THE PRESENCE OF A CHILD.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-33(c) is amended by adding a new subdivision to read:

"(c) Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:

...

(7) Commits an assault on a minor by committing, in the presence of the minor, an assault with a deadly weapon or an assault that inflicts serious injury on a person with whom the person committing the assault has a personal relationship. The following definitions shall apply in this subdivision:

a. "In the presence of a minor" means:

1. In the physical presence of the minor; or

2. Having knowledge that a child is present and may see or hear the offense.

b. "Minor" is any person under the age of 18 years who is residing with or is under the care and supervision of, and who has a personal relationship with, the person assaulted or the person committing the assault.

c. "Personal relationship" is as defined in G.S. 50B-1(b)."

SECTION 2. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

NORTH CAROLINA GENERAL ASSEMBLY
LEGISLATIVE FISCAL NOTE
(INCARCERATION NOTE G.S. 120-36.7)

BILL NUMBER: SB 868 1st Edition

SHORT TITLE: Assault in the Presence of a Child

SPONSOR(S): Senator Hagan

FISCAL IMPACT

	Yes (X)	No ( )	No Estimate Available ( )		
	FY 2003-04	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08
GENERAL FUND					
Correction					
Recurring		Unable to determine exact amount.			
Nonrecurring					
Judicial					
Recurring		Unable to determine exact amount.			
Nonrecurring					
TOTAL EXPENDITURES:		Unable to determine exact amount.			
ADDITIONAL PRISON BEDS*	It is likely that most A1 misdemeanants sentenced to an active sentence under this bill would be housed in local jails at a cost of $18/day. The exception is A1 misdemeanor offenders falling in Prior Record Level III who may receive active sentences that might be served in the state prison system.				
POSITIONS: (cumulative)	Unable to determine exact amount; additional positions not anticipated.				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch

EFFECTIVE DATE: December 1, 2003

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY[1]: The bill amends G.S. 14-33(c) to make it a Class A1 misdemeanor if a person commits an assault with a deadly weapon or an assault that inflicts serious injury on a person with whom he or she has had a personal relationship in the presence of a minor who is residing with or in the custody of the person assaulted, unless the conduct is covered under some other provision of law providing greater punishment. The bill provides definitions for "in the presence of a minor", "minor", and "personal relationship".

ASSUMPTIONS AND METHODOLOGY:

General

The Sentencing and Policy Advisory Commission prepares prison population projections for each criminal penalty bill. The Commission assumes for each bill that increasing criminal penalties does not have a deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division (FRD) does not assume savings due to deterrent effects for this bill or other criminal penalty bills.

Department of Correction

The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes and fiscal memos are based on January 2003 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory board, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five year Fiscal Note horizon and beyond.* The number of beds needed will always be equal to the projected number of inmates due to a bill.

The NC Sentencing and Policy Advisory Commission reports that in 2001-2002, there were 1,676 convictions for Assault with a Deadly Weapon and 969 convictions for Assault Inflicting Serious Injury. **It is not known how many of these convictions were for offenses that were committed in the presence of a minor who resides with the victim of the assault and in which the offender and victim have a personal relationship with each other. Therefore, it is not known how many offenders might be sentenced for the proposed offense.**

In FY 2001-2002, 20 percent of Class A1 misdemeanor convictions resulted in active sentences. The average estimated time served was 55.1 days. It is likely that misdemeanants sentenced under this bill would be housed in local jails but paid for by the State at a cost of $18/day. (Active sentences between 1-90 days are served in local jails; the DOC reimburses counties for active sentences between 30-90 days). **Because only A1 offenders falling in Prior Record Level III may receive active sentences that might be served in the state prison system, convictions for this proposed offense would not be expected to have a significant impact on the prison population**. The impact on local jail populations is unknown.

[1] AOC Research and Planning Division

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts (AOC) provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

AOC data for calendar year 2002 show 9,823 defendants charged with G.S.14-33(c)(1) of which 7,482 were charged with a Class A1 misdemeanor for assault with a deadly weapon and 2,341 were charged for inflicting serious injury.

Data also show 29,737 defendants charged under G.S. 14-33(c)(2) with Class A1 misdemeanor assault on a female, 761 defendants charged under G.S. 14-32.4 with Class F felony assault inflicting serious injury, 2,082 defendants charged under G.S. 14-32(b) with Class E felony assault with a deadly weapon, and 1,466 defendants charged under G.S. 14-32(a) with Class C felony assault with a deadly weapon or inflicting serious injury. The AOC states that all of these offenses are at least as serious as the new offense created by the bill. Data are not available on the number of defendants charged for assault with a deadly weapon or an assault that inflicts serious injury that occur in the context of a personal relationship in the presence of a minor.

The AOC anticipates a large number of defendants charged with assault could also be charged with assault in the presence of a child under the bill. Thus, the AOC expects a significant number of additional charges but an exact number cannot be determined. For A1 misdemeanor offenses that are brought to trial, the estimated court cost per trial is $2,594. For A1 misdemeanor offenses not brought to trial, and where a guilty plea is entered, AOC estimates the cost per guilty plea at $214.

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission.

TECHNICAL CONSIDERATIONS: The AOC notes that current G.S. 14-33.2 makes a person guilty of a Class H felony if the person violates any of the provisions of G.S. 14-33(c) or G.S. 14-34 and has been convicted of five or more prior misdemeanor convictions, two of which were assaults. By creating a new misdemeanor assault offense under G.S. 14-33(c), the AOC states that the bill increases the likelihood of defendants having five or more prior misdemeanor convictions and at least two misdemeanor assault convictions. Thus, a defendant could more quickly accumulate five prior misdemeanor convictions due to the fact that a defendant could be charged with assault in the presence of a child as well as other assault offenses under the bill. As a result, more defendants could be charged with Class H felonies for habitual misdemeanor assault.

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Nicole Kreiser and Jim Mills

APPROVED BY: James D. Johnson, Director, Fiscal Research Division

DATE: April 17, 2003

Judiciary II Committee

Minutes –10:00 AM Meeting

April 29, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Scott Thomas, Vice-Chairman, with fifteen members present.

SB 867 (Arson/Serious Injury to Firefighter) Senator Thomas invited Senator Hagan, bill sponsor, to discuss the bill. Senator Holloman moved to adopt the Proposed Committee Substitute for purposes of discussion. All voted and the motion carried. Michael E. Levins, Fire Marshall for the City of High Point Fire Department, spoke on the bill. Senator Moore moved for a favorable report to the Committee Substitute, unfavorable to the original bill. All members voted and the motion carried.

SB 901 (Protect Rights/Motion to Strike) Senator Webster, bill sponsor, was recognized to explain the bill. Senator Apadoca moved to adopt the bill for purposes of discussion. It was accepted without objection. Senator Webster introduced Mr. Tom Boney, Editor of the Alamance News and Mr. John Bussian, representing the North Carolina Press Association and invited them to speak on the bill. Questions by Senators Dorsett, Dalton, Rucho, Hartsell, Kerr, Apodaca, Shubert,Kinnaird and Hagan were answered by Mr. Boney, Mr. Bussian and Senator Hartsell. Senator Rucho moved for a favorable report. All members voted and the motion carried.

SB 694 (Analogues/Schedule I Controlled Substance) Senator Hartsell recognized Senator Thomas, bill sponsor, to discuss the Committee Substitute. Senator Moore moved for adoption of the Committee Substitute for the purpose of discussion. Sandra Alley, staff attorney, explained the bill. Senator Thomas answered the question by Senator Rucho. Senator Moore moved for a favorable report, unfavorable to the original bill, favorable to the Committee Substitute. All voted and the motion carried.

SB 721 (Post-Adoption Privileges) Senator Kinnaird, bill sponsor, was recognized to discuss the bill. Senator Hagan moved for adoption of the Committee Substitute for purposes of discussion. Senator Kinnaird explained an amendment. Mr. James T. Bryan, Attorney and Certified Mediator, spoke on the bill. Paula Wolfe representing Covenant with North Carolina's Children also spoke on the bill. Questions by Senators Kerr and Hartsell were answered by Senator Kinnaird and Mr. Bryan.

The meeting recessed to be continued at 1:00 PM.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

Judiciary II Committee

Minutes –1:00 PM Meeting

April 29, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with ten members present.

SB 721 (Post-Adoption Privileges) The Chair recognized Senator Kinnaird, bill sponsor, to continue the discussion of the Committee Substitute. Senator Kinnaird submitted an amendment and moved for adoption. All members voted and the motion carried. Senator Moore moved for a favorable report to the Proposed Committee Substitute as amended, unfavorable to the original bill, and rolled into a new Committee Substitute. All voted and the motion carried.

SB 718 (Amend Domestic Violence Laws/Temp. Custody) Senator Hagan was recognized by Senator Hartsell to explain the bill. Senator Hagan moved to adopt the Proposed Committee Substitute. All voted and the motion carried. Senator Hagan introduced Ms. Leslie Starsoneck of the North Carolina Council for Women/Domestic Violence Commission of the North Carolina Department of Administration, to speak on the bill. Ms. Lisa M. Angel, Family Law Specialist and Ms. Elizabeth Froehling of the North Carolina Coalition Against Domestic Violence also spoke on the bill. Questions by Senators Apodaca, Hartsell and Bingham were answered by Ms. Angel, Senators Hagan and Hartsell. Senator Apodaca moved for a favorable report to the Proposed Committee Substitute, unfavorable to the original bill. All voted and the motion carried.

With no further business, the meeting was adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Wednesday, April 30, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B. **901** Protect Rights/Motion to Strike.
Sequential Referral: None
Recommended Referral: None

TOTAL REPORTED: 1

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Wednesday, April 30, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **694** Analogues/Schedule I Controlled Substance.

Draft Number:	PCS 85227
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	Yes

S.B. **718** Amend Domestic Violence Laws/Temp. Custody.

Draft Number:	PCS 35267
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	Yes

S.B. **721** Post-Adoption Privileges.

Draft Number:	PCS 35266
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

S.B. **867** Arson/Serious Injury to Firefighter.

Draft Number:	PCS 35268
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 4

Committee Clerk Comments:

Gerry Johnson (Sen. Hartsell)

From: Gerry Johnson (Sen. Hartsell)
Sent: Thursday, April 24, 2003 4:35 PM
Subject: SENATE JUDICIARY II COMMITTEE MEETING April 29, 2003

Principal Clerk _____
Reading Clerk _____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **JUDICIARY II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	April 29, 2003	10:00 AM	1124

The following will be considered:

	BILL NO.	SHORT TITLE	SPONSOR
•	SB 867	Arson/Serious Injury to Firefighter	Senator Hagan
•	SB 694	Analogues/Schedule I Controlled Substance	Senator Thomas
•	SB 721	Post-Adoption Privileges	Senator Kinnaird
•	SB 901	Protect Rights/Motion to Strike	Senator Webster
•	SB 718	Amend Domestic Violence Laws/Temp. Custody	Senator Hagan

Senator HARTSELL, Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
April 29, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. Welcome and Opening Remarks

II. Bills to be Considered

SB 867	Arson/Serious Injury to Firefighter	Senator Hagan
SB 694	Analogues/Schedule I Controlled Substance	Senator Thomas
SB 721	Post-Adoption Privileges	Senator Kinnaird
SB 901	Protect Rights/Motion to Strike	Senator Webster
SB 718	Amend Domestic Violence Laws/Temp. Custody	Senator Hagan

III. Other Business

IV. Adjournment

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Julie Allen	NC Statewatch
Tori Saylor	NCPA
Barbara Hott	NCRTL GSO

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 4-29-03

Name of Committee — **Date** afternoon

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Jo McCants	AOC
Jane Volland	GAL/AOC
Beth Froehling	NCCADV
Lisa Angel	NC DV Commission

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 694

Short Title:	Analogues/Schedule I Controlled Substance.	(Public)
Sponsors:	Senator Thomas.	
Referred to:	Judiciary II.	

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE IN THE SAME MANNER AS FEDERAL LAW THAT A CONTROLLED SUBSTANCE ANALOGUE SHALL, TO THE EXTENT INTENDED FOR HUMAN CONSUMPTION, BE TREATED AS A CONTROLLED SUBSTANCE IN SCHEDULE I OF THE NORTH CAROLINA CONTROLLED SUBSTANCES ACT, AND TO PROVIDE THAT THUS MAE 1, 4-BUTANDEDIOL, AN ANALOGUE OF GAMMA-HYDROXYBUTRIC ACID (GHB), IS A SCHEDULE I CONTROLLED SUBSTANCE WHEN THE SUBSTANCE IS INTENDED FOR HUMAN CONSUMPTION.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 90 of the General Statutes is amended by adding the following new section to read:

"**§ 90-89.1. Treatment of controlled substance analogues.**

A controlled substance analogue shall, to the extent intended for human consumption, be treated for the purposes of any State law as a controlled substance in Schedule I."

SECTION 2. G.S. 90-87 is amended by adding the following new subdivision to read:

"(5a) 'Controlled substance analogue' is as defined in subdivision 802(32) of Title 21 of the United States Code."

SECTION 3. This act becomes effective December 1, 2003, and applies to offenses committed on or after December 1, 2003.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 694
PROPOSED COMMITTEE SUBSTITUTE S694-CSSP-4 [v.1]

4/28/2003 7:29:31 PM

Short Title: Analogues/Schedule I Controlled Substance. (Public)

Sponsors:

Referred to:

April 2, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE IN THE SAME MANNER AS FEDERAL LAW THAT A CONTROLLED SUBSTANCE ANALOGUE SHALL, TO THE EXTENT INTENDED FOR HUMAN CONSUMPTION, BE TREATED AS A CONTROLLED SUBSTANCE IN SCHEDULE I OF THE NORTH CAROLINA CONTROLLED SUBSTANCES ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 90 of the General Statutes is amended by adding the following new section to read:

"**§ 90-89.1. Treatment of controlled substance analogues.**

A controlled substance analogue shall, to the extent intended for human consumption, be treated for the purposes of any State law as a controlled substance in Schedule I."

SECTION 2. G.S. 90-87 is amended by adding the following new subdivision to read:

"(5a) "Controlled substance analogue" means a substance (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in Schedule I or II; (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or II; or (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or II; and does not include (i) a controlled substance; (ii) any substance for which there is an approved new drug

application; (iii) with respect to a particular person any substance, if an exemption is in effect for investigational use, for that person, under §355 of Title 21 of the United States Code to the extent conduct with respect to such substance is pursuant to such exemption; or (iv) any substance to the extent not intended for human consumption before such an exemption takes effect with respect to that substance. The designation of gamma butyrolactone or any other chemical as a listed chemical pursuant to subdivision 802(34) or 802(35) of Title 21 of the United States Code does not preclude a finding pursuant to paragraph (5a) of this section that the chemical is a controlled substance analogue."

SECTION 3. This act becomes effective December 1, 2003, and applies to offenses committed on or after December 1, 2003.

ANALOGUES/SCHEDULE I CONTROLLED SUBSTANCE:
Senate Bill 694

BILL ANALYSIS

Committee:	Senate Judiciary	**Introduced by:**	Sen. Thomas
Date:	April 28, 2003	**Summary by:**	Sandra Alley
Version:	S694-CSSP-4 [v.1]		Committee Counsel

SUMMARY: ***Senate Bill 694 would make substances that are intended for human consumption and that either have a chemical structure substantially similar to a controlled substance or that produce an effect substantially similar to that of a controlled substance ("analogues") schedule I offenses under Chapter 90. The Act would become effective December 1, 2003.***

THE PROPOSED COMMITTEE SUBSTITUTE adds a definition of "controlled substance analogues" rather than incorporating it by reference to the federal statute, and changes the title by eliminating reference to specific substances.

CURRENT LAW: Under current state law, the manufacture, sale, delivery, or possession with intent to sell or deliver a scheduled controlled substance is a felony. Analogues of controlled substances are not scheduled offenses unless specified, as is the case for gamma-butyrolactone (GBL), an analogue to Gamma Hydroxybutyrate or "GHB" (known as the "date rape drug").

Section 813 Title 21 of the United States Code states that analogues intended for human consumption will be treated as schedule I controlled substances for the purpose of any Federal law.

BILL ANALYSIS: Senate Bill 694 would amend the North Carolina Controlled Substances Act to make substances intended for human consumption and that either have a chemical structure substantially similar to a controlled substance or that produce an effect substantially similar to that of a controlled substance ("analogues") schedule I offenses under Chapter 90. The bill would make state law consistent with federal law that treats controlled substance analogues are treated as Schedule I controlled substances.

The bill defines "controlled substance analogue" as a substance:

- the chemical structure of which is *substantially similar* to the chemical structure of a controlled substance in Schedule I or II;
- which has a stimulant, depressant, or hallucinogenic *effect* on the central nervous system that is *substantially similar* to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or II; or
- with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

Under SB 694 "controlled substance analogue" *does not include*:

- a controlled substance;
- any substance for which there is an approved new drug application;
- with respect to a particular person any substance, if an exemption is in effect for investigational

use, for that person, under section 355 of this title to the extent conduct with respect to such substance is pursuant to such exemption; or

- any substance to the extent not intended for human consumption before such an exemption takes effect with respect to that substance.

Possession of a schedule I or II controlled substance is a Class I felony. The minimum penalty for a Class I felony is 3 months of community punishment. The maximum penalty is 15 months of active incarceration. The level of punishment imposed depends on the defendant's prior record.

The manufacture or delivery of or possession with intent to manufacture, sell or deliver a schedule I controlled substance is a Class H felony. The minimum penalty for a Class H felony is 4 months of community punishment. The maximum penalty is 30 months of active incarceration. The level of punishment imposed depends on the defendant's prior record.

The sale of a schedule I or II controlled substance is a Class G felony. The minimum penalty for a Class G felony is 8 months of intermediate level punishment. The maximum penalty is 36 months of active incarceration. The level of punishment imposed depends on the defendant's prior record.

BACKGROUND: There are many types of substances treated controlled substance analogues under federal law, including MAE-1and 1,4 butanediol, which are both analogues of Gamma Hydroxybutyrate or "GHB" (also known as the "date rape drug"). As of 1996, most controlled substance analogues identified in the illicit traffic are produced by modification of phenethylamine and amphetamine molecule. These modifications can lead to substances with pure central nervous system stimulant activity (e.g., Methcathinone), hallucinogenic activity (e.g. 4-bromo-s, 5-dimethoxyphenethylamine (2C-B) or a combination of both depending on the dose (e.g. 3, 4-methylenedioxyamphetamine (MDA)).

This Act becomes effective December 1, 2003.

S694-SMSP-001

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 867

Short Title:	Arson/Serious Injury to Firefighter.	(Public)
Sponsors:	Senator Hagan.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO CREATE THE OFFENSE OF ARSON OR OTHER UNLAWFUL BURNINGS THAT RESULT IN SERIOUS INJURY TO A FIREFIGHTER.

The General Assembly of North Carolina enacts:

SECTION 1. Article 15 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-69.3. Arson or other unlawful burning that results in serious injury to a firefighter.**

A person is guilty of a Class C felony if the person commits an offense under Article 15 of Chapter 14 of the General Statutes and a firefighter suffers serious bodily injury while discharging or attempting to discharge the firefighter's duties as a result of the criminal offense."

SECTION 2. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 867
PROPOSED COMMITTEE SUBSTITUTE S867-CSRH-26 [v.1]

4/28/2003 9:56:56 AM

Short Title: Arson/Serious Injury to Firefighter. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO CREATE THE OFFENSE OF ARSON OR OTHER UNLAWFUL BURNINGS THAT RESULT IN SERIOUS INJURY TO A FIREFIGHTER.

The General Assembly of North Carolina enacts:

SECTION 1. Article 15 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-69.3. Arson or other unlawful burning that results in serious injury to a firefighter.**

A person is guilty of a Class D felony if the person commits an offense under Article 15 of Chapter 14 of the General Statutes and a firefighter suffers serious bodily injury while discharging or attempting to discharge the firefighter's duties as a result of the criminal offense."

SECTION 2. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

SENATE BILL 867:
Arson/Serious Injury to Firefighter

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Hagan
Date:	April 29, 2003	**Summary by:**	Robin Johnson
Version:	S867-CSRH-26[v.1]		Committee Counsel

SUMMARY: ***Senate Bill 867 would create the offense of arson or other unlawful burnings that result in serious injury to a firefighter. Punishment would be a Class D felony.***

The PCS changes the punishment from a Class C to a Class D felony.

BILL ANALYSIS: Offenses of arson and other unlawful burnings currently are classified as Class D through Class H felonies. If the burned building is occupied at the time of the burning, the offense is a Class D felony. The minimum presumptive punishment, assuming no prior convictions, for convictions of these felonies range from 5-6 months of community, intermediate, or active punishment (for a Class H felony) through 51-64 months of active punishment (for a Class D felony).

The new offense would treat the crime as if the building was occupied at the time of the burning. It would be a Class D felony. The minimum presumptive punishment, assuming no prior convictions, for convictions of these felonies would be 51-64 months of active punishment.

EFFECTIVE DATE: The bill would become effective December 1, 2003, and would apply to offenses committed on or after that date.

S867-SMRH-002

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 721

Short Title:	Post-Adoption Privileges.	(Public)
Sponsors:	Senators Kinnaird; and Lucas.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO ALLOW AN ADOPTIVE PARENT AND A BIRTH RELATIVE TO ENTER INTO A WRITTEN AGREEMENT TO PROVIDE FOR POST-ADOPTION CONTACT AND COMMUNICATION.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 48 of the General Statutes is amended by adding a new Article to read:

"Article 11.

"Post-Adoption Privileges.

"**§ 48-11-100. Definitions.**

For purposes of this Article, the following definitions apply:

(1) Birth relative. – A biological parent, grandparent, sibling, or any other member of the child's biological family related to the child by blood or marriage.

(2) Post-adoption privileges agreement. – A written agreement between an adoptive parent, a birth relative, and a child, if the child is 12 years of age or older, to allow specifically described post-adoption privileges.

(3) Post-adoption privileges. – Visitation, communication, or any other contact or conveyance of information regarding a child who has been adopted.

"**§ 48-11-101. Post-adoption privileges agreement; terms; conditions.**

(a) An adoptive parent, a birth relative, and a child, if the child is 12 years of age or older, may enter into a post-adoption privileges agreement before or at the time a decree of adoption is granted.

(b) A post-adoption privileges agreement shall include the following:

(1) Provisions for visitation between the child and a birth relative.

(2) Provisions for other forms of communication including the exchange of letters and telephone contact between the child and a birth relative.

(3) Provisions for sharing information about the child by parties to the agreement.

(4) The following warnings in bold type:

a. After the adoption petition has been granted by the court, the adoption shall not be set aside due to the failure of an adoptive parent, birth relative, or the child to follow the terms of this agreement or modifications to the agreement.

b. A disagreement between the parties or litigation brought to enforce, modify, or terminate this agreement shall not affect the validity of the adoption or serve as a basis for orders affecting the custody of the child.

c. A court will not act on a petition to modify, enforce, or terminate this agreement unless the petitioner has participated or attempted to participate in good faith in mediation or other appropriate dispute resolution proceedings to resolve any dispute.

(c) The court may approve a post-adoption privileges agreement only if all of the following conditions are satisfied:

(1) The court finds that there is a significant emotional attachment between the child and the person or persons to whom the agreement gives post-adoption privileges.

(2) The child, if the child is 12 years of age or older, consents to the post-adoption privileges agreement. However, the court may waive the requirement for the child's consent if the court finds that the child is not capable of consenting or that the child should not be required to consent because consenting would not be in the child's best interest.

(3) The county department of social services or the licensed agency placing the child for adoption or in the case of a direct placement adoption, the agency making the report to the court pursuant to G.S. 48-2-501 recommends the granting of post-adoption privileges.

(4) The child is represented by a court-appointed guardian ad litem and the guardian recommends the granting of post-adoption privileges unless the court finds that the appointment of a guardian ad litem is not necessary to protect the child's best interest.

(5) Each adoptive parent consents to the granting of post-adoption privileges.

(6) The adoptive parent and the birth relative execute a post-adoption privileges agreement and file the agreement with the court.

(7) The post-adoption privileges agreement includes an acknowledgment by the birth relative that the adoption is irrevocable regardless of whether the adoptive parent fails to abide by the post-adoption privileges agreement.

(8) The post-adoption privileges agreement includes an acknowledgment by the adoptive parent that the agreement, when approved by the court,

grants the birth relative the right to seek enforcement in court of the post-adoption privileges specified in the agreement.

(9) Any other factors the court deems appropriate in determining whether the child's best interests would be served by granting post-adoption privileges.

(d) A post-adoption privileges agreement is enforceable only if it is approved by the court and signed by a district court judge.

"**§ 48-11-102. Modification, enforcement, and termination.**

(a) A birth relative or an adoptive parent may file a new civil action in district court for the purpose of modifying, enforcing, or terminating a post-adoption privileges agreement.

(b) In an action under this section, the court may modify, enforce, or terminate a post-adoption privileges agreement if the court finds that the party seeking relief has participated or attempted to participate in good faith in mediating the dispute giving rise to the action or the court determines that the modification or termination is necessary to serve the best interests of the adopted child.

(c) The court shall not award monetary damages.

"**§ 48-11-103. Effect of failure to comply.**

The court shall not set aside a decree of adoption, revoke a written consent to an adoption, rescind a relinquishment, or modify an order to terminate parental rights or any other prior court order for failure of a birth relative, an adoptive parent, or a child to comply with any or all of the original terms of or subsequent modifications to the post-adoption privileges agreement."

SECTION 2. G.S. 48-1-100 reads as rewritten:

"**§ 48-1-100. Legislative findings and intent; construction of Chapter.**

(a) The General Assembly finds that it is in the public interest to establish a clear judicial process for adoptions, to promote the integrity and finality of adoptions, to encourage prompt, conclusive disposition of adoption proceedings, and to structure services to adopted children, biological parents, and adoptive parents that will provide for the needs and protect the interests of all parties to an adoption, particularly adopted minors.

(b) With special regard for the adoption of minors, the General Assembly declares as a matter of legislative policy that:

(1) The primary purpose of this Chapter is to advance the welfare of minors by (i) protecting minors from unnecessary separation from their original parents, (ii) facilitating the adoption of minors in need of adoptive placement by persons who can give them love, care, security, and support, (iii) protecting minors from placement with adoptive parents unfit to have responsibility for their care and rearing, and (iv) assuring the finality of the adoption; and

(2) Secondary purposes of this Chapter are (i) to protect biological parents from ill-advised decisions to relinquish a child or consent to the child's adoption, (ii) to protect adoptive parents from assuming responsibility for a child about whose heredity or mental or physical condition they

know nothing, (iii) to protect the privacy of the parties to the adoption, and (iv) to discourage unlawful trafficking in minors and other unlawful placement activities.

(c) In construing this Chapter, the needs, interests, and rights of minor adoptees are primary. Any conflict between the interests of a minor adoptee and those of an adult shall be resolved in favor of the minor.

(d) This Chapter shall be liberally construed and applied to promote its underlying purposes and policies.

(e) Nothing in this Chapter shall be construed to prevent an adoptive parent, a birth relative, and a child, if the child is 12 years of age or older, from entering into a post-adoption privileges agreement as provided in Article 11 of this Chapter."

SECTION 3. G.S. 7B-1100 reads as rewritten:

"**§ 7B-1100. Legislative intent; construction of Article.**

(a) The General Assembly hereby declares as a matter of legislative policy with respect to termination of parental rights:

(1) The general purpose of this Article is to provide judicial procedures for terminating the legal relationship between a juvenile and the juvenile's biological or legal parents when the parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the juvenile.

(2) It is the further purpose of this Article to recognize the necessity for any juvenile to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all juveniles from the unnecessary severance of a relationship with biological or legal parents.

(3) Action which is in the best interests of the juvenile should be taken in all cases where the interests of the juvenile and those of the juvenile's parents or other persons are in conflict.

(4) This Article shall not be used to circumvent the provisions of Chapter 50A of the General Statutes, the Uniform Child-Custody Jurisdiction and Enforcement Act.

(b) Nothing in this Article shall be construed to prevent the court in a proceeding under this Article for termination of parental rights from approving a post-adoption privileges agreement as provided in Article 11 of Chapter 48 of the General Statutes."

SECTION 4. This act is effective when it becomes law.

SENATE BILL 721:
Post-Adoption Privileges.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Sen. Kinnaird
Date:	April 29, 2003	**Summary by:**	Robin Johnson Robin
Version:	S721-CSRH-29[v.1]		Committee Counsel

SUMMARY: ***Senate Bill 721 would allow adoptive parents and members of an adoptee's biological family to enter into an enforceable written agreement that allows specifically authorized post-adoption privileges, including visitation, communication, or other contact regarding the adoptee. The parties must enter into the agreement before or at the time the decree of adoption is granted, and the agreement must satisfy enumerated conditions and be approved by the court.***

The act is effective when it becomes law.

The PCS clarifies that the agreement is between the adoptive parent and biological relative. It also substitutes the term "adoptee" for the term "child".

CURRENT LAW: Currently, identifying information may be shared between birth parents and adopting parents only if the parties agree to do so before the adoption. There is nothing that authorizes or prohibits an agreement between adoptive parents and members of the adoptee's birth family. However, it is questionable as to whether an agreement would be enforceable.

BILL ANALYSIS: Senate Bill 721 would add a new Article 11 (*Post-Adoption Privileges*) to Chapter 48 (*Adoptions*) of the General Statutes. The bill would allow an adoptive parent and a birth relative to enter into a written post-adoption privileges agreement before or at the time the adoption decree is granted. The agreement is enforceable if it is approved by the court and signed by a district court judge.

A birth relative would include the adoptee's biological parent, grandparent, sibling, or other member of the adoptee's birth family related by blood or marriage. The agreement must include provisions for visitation, other forms of contact, and the sharing of information about the adoptee. It also must meet all of the following conditions:

- The court must find a significant emotional attachment between the adoptee and the birth relative.
- Both adoptive parents must consent.
- If the adoptee is at least 12, the adoptee must consent – unless the court waives this requirement.
- The county department of social services or specified child placing agency must recommend the granting of post-adoption privileges.
- If a guardian ad litem is appointed, the guardian must recommend the granting of post-adoption privileges.
- The adoptive parent and birth relative must execute the agreement and file it with the court.
- The agreement must include the birth relative's acknowledgment that the adoption is irrevocable regardless of whether the adoptive parent abides by the agreement.
- The agreement also must include the adoptive parent's acknowledgement that the agreement grants the birth relative the right to seek enforcement in court.

- Any other factors the court considers to be in the adoptee's best interests.

If a dispute arises subsequent to entering into the agreement, the parties must participate or attempt to participate in good faith in mediation or other appropriate dispute resolution proceedings. Either party may file an action in district court for the purpose of modifying, enforcing, or terminating the agreement. The court may modify, enforce, or terminate the agreement if the court finds (i) the petitioning party had participated or attempted to participate in good faith in mediating the dispute or (ii) it would be in the adoptee's best interests.

The court shall not award monetary damages. Nor shall the court set aside an adoption decree, revoke a written consent to adoption, rescind a relinquishment, or modify an order to terminate parental rights for any party's failure to comply with the agreement.

EFFECTIVE DATE: The act is effective when it becomes law.

S721-SMRH-001

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 721
PROPOSED COMMITTEE SUBSTITUTE S721-CSRH-29 [v.1]

4/28/2003 8:03:24 PM

Short Title: Post-Adoption Privileges. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO ALLOW AN ADOPTIVE PARENT AND A BIRTH RELATIVE TO ENTER INTO A WRITTEN AGREEMENT TO PROVIDE FOR POST-ADOPTION CONTACT AND COMMUNICATION.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 48 of the General Statutes is amended by adding a new Article to read:

"Article 11.

"Post-Adoption Privileges.

"**§ 48-11-100. Definitions.**

For purposes of this Article, the following definitions apply:

(1) Birth relative. –The biological parent, grandparent, sibling, or any other member of an adoptee's biological family related to the adoptee by blood or marriage.

(2) Post-adoption privileges agreement. – A written agreement that allows specifically described post-adoption privileges.

(3) Post-adoption privileges. – Visitation, communication, or any other contact or conveyance of information regarding an adoptee.

"**§ 48-11-101. Post-adoption privileges agreement; terms; conditions.**

(a) An adoptive parent and a birth relative may enter into a post-adoption privileges agreement before or at the time a decree of adoption is granted.

(b) A post-adoption privileges agreement shall include the following:

(1) Provisions for visitation between the adoptee and a birth relative.

(2) Provisions for other forms of communication including the exchange of letters and telephone contact between the adoptee and a birth relative.

(3) Provisions for sharing information about the adoptee by parties to the agreement.

(4) The following warnings in bold type:

a. After the court grants the adoption petition, the adoption shall not be set aside due to the failure of an adoptive parent, birth relative, or the adoptee to follow the terms of this agreement or modifications to the agreement.

b. A disagreement between the parties or litigation brought to enforce, modify, or terminate this agreement shall not affect the validity of the adoption or serve as a basis for orders affecting the custody of the adoptee.

c. A court will not act on a petition to modify, enforce, or terminate this agreement unless the petitioner has participated or attempted to participate in good faith in mediation or other appropriate dispute resolution proceedings to resolve any dispute.

(c) The court may approve a post-adoption privileges agreement only if all of the following conditions are satisfied:

(1) The court finds that there is a significant emotional attachment between the adoptee and the birth relative to whom the agreement gives post-adoption privileges.

(2) The adoptee, if the adoptee is 12 years of age or older, consents to the post-adoption privileges agreement. However, the court may waive the requirement for the adoptee's consent if the court finds that the adoptee is not capable of consenting or that the adoptee should not be required to consent because consenting would not be in the adoptee's best interest.

(3) The county department of social services or the licensed agency placing the adoptee for adoption or in the case of a direct placement adoption, the agency making the report to the court under G.S. 48-2-501 recommends the granting of post-adoption privileges.

(4) The adoptee is represented by a court-appointed guardian ad litem and the guardian recommends the granting of post-adoption privileges unless the court finds that the appointment of a guardian ad litem is not necessary to protect the adoptee's best interest.

(5) Each adoptive parent consents to the granting of post-adoption privileges.

(6) The adoptive parent and the birth relative execute a post-adoption privileges agreement and file the agreement with the court.

(7) The post-adoption privileges agreement includes an acknowledgment by the birth relative that the adoption is irrevocable regardless of whether the adoptive parent fails to abide by the post-adoption privileges agreement.

(8) The post-adoption privileges agreement includes an acknowledgment by the adoptive parent that the agreement, when approved by the court,

grants the birth relative the right to seek enforcement in court of the post-adoption privileges specified in the agreement.

(9) Any other factors the court deems appropriate in determining whether the adoptee's best interests would be served by granting post-adoption privileges.

(d) A post-adoption privileges agreement is enforceable only if it is approved by the court and signed by a district court judge.

"**§ 48-11-102. Modification, enforcement, and termination.**

(a) A birth relative or an adoptive parent may file a new civil action in district court for the purpose of modifying, enforcing, or terminating a post-adoption privileges agreement.

(b) In an action under this section, the court may modify, enforce, or terminate a post-adoption privileges agreement if the court finds that the party seeking relief has participated or attempted to participate in good faith in mediating the dispute giving rise to the action or the court determines that the modification or termination is necessary to serve the best interests of the adoptee.

(c) The court shall not award monetary damages.

"**§ 48-11-103. Effect of failure to comply.**

The court shall not set aside a decree of adoption, revoke a written consent to an adoption, rescind a relinquishment, or modify an order to terminate parental rights or any other prior court order for failure of a birth relative, an adoptive parent, or an adoptee to comply with any or all of the original terms of or subsequent modifications to the post-adoption privileges agreement."

SECTION 2. G.S. 48-1-100 reads as rewritten:

"**§ 48-1-100. Legislative findings and intent; construction of Chapter.**

(a) The General Assembly finds that it is in the public interest to establish a clear judicial process for adoptions, to promote the integrity and finality of adoptions, to encourage prompt, conclusive disposition of adoption proceedings, and to structure services to adopted children, biological parents, and adoptive parents that will provide for the needs and protect the interests of all parties to an adoption, particularly adopted minors.

(b) With special regard for the adoption of minors, the General Assembly declares as a matter of legislative policy that:

(1) The primary purpose of this Chapter is to advance the welfare of minors by (i) protecting minors from unnecessary separation from their original parents, (ii) facilitating the adoption of minors in need of adoptive placement by persons who can give them love, care, security, and support, (iii) protecting minors from placement with adoptive parents unfit to have responsibility for their care and rearing, and (iv) assuring the finality of the adoption; and

(2) Secondary purposes of this Chapter are (i) to protect biological parents from ill-advised decisions to relinquish a child or consent to the child's adoption, (ii) to protect adoptive parents from assuming responsibility for a child about whose heredity or mental or physical condition they

know nothing, (iii) to protect the privacy of the parties to the adoption, and (iv) to discourage unlawful trafficking in minors and other unlawful placement activities.

(c) In construing this Chapter, the needs, interests, and rights of minor adoptees are primary. Any conflict between the interests of a minor adoptee and those of an adult shall be resolved in favor of the minor.

(d) This Chapter shall be liberally construed and applied to promote its underlying purposes and policies.

(e) Nothing in this Chapter shall be construed to prevent an adoptive parent and a birth relative from entering into a post-adoption privileges agreement as provided in Article 11 of this Chapter."

SECTION 3. G.S. 7B-1100 reads as rewritten:

"**§ 7B-1100. Legislative intent; construction of Article.**

(a) The General Assembly hereby declares as a matter of legislative policy with respect to termination of parental rights:

(1) The general purpose of this Article is to provide judicial procedures for terminating the legal relationship between a juvenile and the juvenile's biological or legal parents when the parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the juvenile.

(2) It is the further purpose of this Article to recognize the necessity for any juvenile to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all juveniles from the unnecessary severance of a relationship with biological or legal parents.

(3) Action which is in the best interests of the juvenile should be taken in all cases where the interests of the juvenile and those of the juvenile's parents or other persons are in conflict.

(4) This Article shall not be used to circumvent the provisions of Chapter 50A of the General Statutes, the Uniform Child-Custody Jurisdiction and Enforcement Act.

(b) Nothing in this Article shall be construed to prevent the court in a proceeding under this Article for termination of parental rights from approving a post-adoption privileges agreement as provided in Article 11 of Chapter 48 of the General Statutes."

SECTION 4. This act is effective when it becomes law.

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April 29, 2003

Fletcher Hartsell, Jr., Chair
and Members of Judiciary II

Dear Senator Hartsell:

I am an attorney who has had a general practice in Orange and Chatham Counties for 24 years. I tried my first Termination of Parental Rights case in the early 1980's. In the last three years, I represented over 70 parents who are accused of neglect and abuse or whose rights have been petitioned to be terminated. I also serve as a civil guardian ad litem for children in custody cases, I am a parent coordinator helping parents in civil custody cases to reduce the effects of anger on their children, and I am a civil superior court mediator.

Cases involving the termination of parental rights are very emotional, painful and difficult, for biological parents, their children and potential adoptive parents. Parents, no matter how neglectful their actions, deeply love their children, and almost never want to relinquish their rights. Children, while wanting stability in a home, feel ambivalence toward not being able to see not only their parents but also their siblings, grandparents and other relatives who were never involved in the parent's negligence. Adoptive parents are worried about the future.

This bill addresses a need that has existed for many years, the need to legally allow biological and adoptive parents to reach an agreement to allow contact between biological parents and their children. This bill allows this arrangement to be an option that is only possible with the approval of the Court.

My understanding is that adopted children can spend their entire lives wondering about their biological parents and at some point, usually try to find them. They experience unnecessary feelings of abandonment and being unwanted and unworthy. They want to see their brothers and sisters but can't because once a termination is entered, the adoptive parent has every legal right to prevent any such contact. This bill can reduce these feelings by allowing ongoing contact.

Currently it is my understanding that a significant number of Termination of Parental Rights cases are being appealed. Two of mine have been appealed in the last year. Parents will

never voluntarily give up their rights and if there is a chance that the trial court was wrong, they will appeal. These appeals keep the lives of these children and the adoptive parents on hold for years, tie up the district and appellate court system and end up costing the State significantly in terms of time and monies.

This bill allows parents to give up their rights in return for the contact they so desperately desire to have. It eliminates the painful and wrenching trials in these matters and reduces the anger that parents can carry with them and can affect their own lives.

Post-adoption privileges are an option - they are not mandatory. There is a fair and effective mechanism under the bill that protects the biological and adoptive parents and the children, and no agreement can be approved by the Court without the consent of the Department of Social Services, the biological and adoptive parents and the Court. The original adoption consented to by the biological parents cannot be undone. The privacy rights of adoptive parents are protected.

Several states, including Indiana, Minnesota, Nebraska, New Mexico, Ohio, Oregon, Florida, California, New York, Rhode Island and Washington, have approved similar legislation.

It is time for North Carolina to have this option for these children and their families. I appreciate your support.

Sincerely yours,

James T. Bryan III

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 901

Short Title:	Protect Rights/Motion to Strike.	(Public)
Sponsors:	Senator Webster.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT TO PROTECT THE RIGHT OF FREEDOM OF SPEECH, TO PETITION GOVERNMENT, AND ENSURE ACCESS TO PUBLIC DELIBERATIONS BY PUBLIC BODIES BY CREATING A SPECIAL MOTION TO STRIKE IN CIVIL PROCEEDINGS.

The General Assembly of North Carolina enacts:

SECTION 1. Section 1A-1 of Chapter 1A of the General Statutes is amended by adding a new Rule 56.1 to read:

"**Rule 56.1. Special motion to strike.**

(a) Motion and proceedings thereon. – A cause of action against a person arising from any act of that person in furtherance of the person's right of petition, free speech, or access to public deliberations under the United States or North Carolina Constitution, or federal or State law and in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established a probability of success on the claim. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based. If the court determines that the plaintiff has established a probability of success on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the proceeding, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

(b) Attorney fees, costs. – In any action brought under subsection (a) of this Rule, a prevailing defendant shall be entitled to recover reasonable attorneys' fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award reasonable attorneys' fees and costs to a plaintiff prevailing on the motion.

(c) Time of filing. – The special motion may be filed within 60 days of service of the complaint or, in the court's discretion, at any later time upon terms the court deems

proper. The motion shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing.

(d) Discovery. – All discovery proceedings in the action shall be stayed upon the filing of a notice of motion under this Rule. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. Notwithstanding this subsection of this Rule, the court for good cause shown may order that specified discovery be conducted.

(e) Definitions. – As used in this Rule, an act in furtherance of the person's right of petition, free speech, or access to public deliberations includes:

(1) Any written or oral statement or writing made before a legislative, executive, or judicial proceeding or any other official proceeding authorized by law.

(2) Any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body or any other official body authorized by law.

(3) Any written or oral statement or writing made in a place open to the public or at a public forum in connection with an issue of public interest.

(4) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

SECTION 2. This act is effective when it becomes law.

SENATE BILL 901:
Protect Rights/Motion to Strike

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Webster
Date:	April 25, 2003	**Summary by:**	Kory J. Goldsmith
Version:	First Edition		Committee Counsel

SUMMARY: ***SB901 creates a new rule under the Rules of Civil Procedure. It would allow the defendant in a civil action to require the plaintiff to establish that the plaintiff has a probably of succeeding on its claim against the defendant. The procedure would only be available if the defendant is being sued as a result of the defendant having exercised its right of petition, free speech, or access to public deliberations.***

CURRENT LAW: The Rules of Civil Procedure provide several methods to resolve claims prior to trial. Rule 12(b)(6) allows one party to make a motion that the other party's allegations do not amount to a legal basis for a claim. Under a motion to dismiss, the party that brings the motion has the burden of convincing the court that the other party's allegations do not state a legal claim for relief. The court makes its determination based solely on the pleadings submitted by the parties.

Under Rule 56, a party can ask the court to review the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits. If the court finds that there is no genuine issue as to any material fact and that either party is entitled to judgment based upon the law, the court may render summary judgment for either party. Generally, the party that moves for summary judgment has the burden of proving that it is appropriate.

BILL ANALYSIS: SB901 creates a new rule of civil procedure. It would apply in the following situations:

- Party X exercises its right of freedom or speech, right of petition, or right to gain access to public deliberations in regard to Party Y.
- Party Y retaliates against Party X by bring suit against Party X. The suit by Party Y may or may not be directly related to Party X's initial behavior.
- In the civil suit, Party X (as the defendant) brings a motion to strike alleging that Party Y brought suit because of Party X's protected behavior.
- Party Y has the burden of establishing that there is a probability he or she will succeed on the claim.
- If Party Y (the plaintiff) is not able to show a probably of success, Party X (the defendant) may recover reasonable attorney fees and costs.
- If the court determines Party X's motion to strike was frivolous or made solely to cause unnecessary delay, the court may award reasonable attorney fees and costs to the plaintiff.
- A determination that the plaintiff is likely to succeed is not admissible as evidence at any later stage of the trail.

BACKGROUND: SB901 is based upon a similar law adopted in Louisiana in 1999. Although Louisiana bases its state law on the Napoleonic Code, its rules of civil procedure include a motion to dismiss for failure to state a claim for relief and a motion for summary judgment

H9646-SMRC-001

Timeline of City of Burlington vs. Boney Publishers, Inc. (*The Alamance News)*

July 15, 2002 – During a monthly "work session" of the Burlington city council, the council make a motion to go into closed session for the purpose of consulting with an attorney – section 143-318.11(a)(3) – over five pending lawsuits, which were properly identified as required by the law, and one matter of potential litigation.

Reporters for two newspapers were asked to leave the meeting room. However, the president of the Alamance County Area Chamber of Commerce, Mr. Sonny Wilburn, stayed in the meeting room with the council for what turned out to be an hour-and-a-half closed session. The council recessed for a break and then returned to closed session. Mr. Wilburn did not attend the second portion of the meeting which lasted another 15-20 minutes.

Our newspaper's reporter, Jay Ashley, asked city attorney Bob Ward why Mr. Wilburn was allowed to be present in a meeting called pursuant to the attorney-client privilege. Citing a guidebook published by the UNC Institute of Government, Mr. Ward replied that outside parties are permitted to participate in closed sessions if there is a "logical reason" to include them in the meeting.

July 30, 2002 – At the Council's next regular meeting, I appeared before the city council to express my concerns about Mr. Wilburn's inclusion in the July 15 closed session. Mr. Ward repeated his assertion that the Council had a "logical reason" to include Mr. Wilburn in the closed session but did not, and would not, elaborate.

[**August 6, 2002** – The North Carolina Court of Appeals issues a unanimous 3-0 decision in an earlier case brought by our newspaper against the Burlington city council for having violated the portions of the Open Meetings Law which permit a closed session when giving instructions on negotiating the price and other materials terms of a land acquisition. While the earlier case was entirely separate, it may explain some of the city council's hostility to our persistent requests for information on another occasion when we considered that they had violated the law.]

August 14, 2002 – I sent a letter to city attorney Ward and members of the city council again challenging Mr. Wilburn's presence in a closed session called for the purpose of meeting with an attorney. Mr. Wilburn is neither an attorney, nor an employee of the city. Among our requests, we asked to have access to the minutes of the improperly closed portion of the meeting, as well as any documents reviewed or discussed during that portion of the closed session when Mr. Wilburn was present. In a meeting with the city attorney, he repeated his position that outside individuals may be included in a closed session if there is a "logical reason" for them to be present. Mr. Ward did not articulate what "logical reason" justified Mr. Wilburn's presence, but provided citations to two cases – one from South Carolina and another from Texas – purporting to substantiate his position.

August 19, 2002 – After having found the two cases cited by Mr. Ward, I sent a second letter to the city attorney, outlining the distinctions between the two cases – neither of which involved attorney-client privilege – amplifying on the reasons we felt Mr. Wilburn's presence had been improper, and reiterating our view that his attendance at the meeting was improper and had effectively eliminated the attorney-client privilege.

August 20, 2002 – I appeared before the city council a second time, making many of the same points as contained in the letters.

August 21, 2002 – The city responds in writing, now stating that Mr. Wilburn's presence had been "essential" to the closed session. The city refuses to provide minutes or any other materials from the meeting, and does not explain how his presence was "essential."

August 22, 2002 – The city filed suit against Boney Publishers, Inc. and claimed, for the first time, that it paid the chamber of commerce for Mr. Wilburn's services to assist with its economic development issues and that his presence had been needed to "determine the feasibility of whether certain tracts of property [involved in the lawsuits which had been discussed in the closed session] are amendable to development and marketing by the City of Burlington as industrial property."

[**September 25, 2002** – Superior Court judge rules that Mr. Wilburn had been an "agent" of the city of Burlington and thus his inclusion in a closed session under attorney-client privilege was allowable.

[**November 20, 2002** – Superior Court judge rules that neither North Carolina's Open Meetings or Public Records Law prohibits governments from suing citizens/newspapers.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 718

Short Title:	Amend Domestic Violence Laws/Temp. Custody.	(Public)
Sponsors:	Senators Hagan; and Garrou.	
Referred to:	Judiciary II.	

April 3, 2003

A BILL TO BE ENTITLED

AN ACT AMENDING THE DOMESTIC VIOLENCE LAWS TO REMOVE THE CURRENT LIMITATIONS UNDER WHICH COURTS MAY ADDRESS THE ISSUE OF CUSTODY EX PARTE, REQUIRING COURTS TO CONSIDER CUSTODY AS PART OF AN EX PARTE OR PERMANENT ORDER HEARING, AND CREATING A PRESUMPTION THAT IT IS IN THE BEST INTEREST OF THE CHILD TO BE PLACED IN THE CUSTODY OF THE NONOFFENDING CAREGIVER.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 50B-2 reads as rewritten:

"**§ 50B-2. Institution of civil action; motion for emergency relief; ~~temporary orders.~~temporary orders; temporary custody.**

(a) Any person residing in this State may seek relief under this Chapter by filing a civil action or by filing a motion in any existing action filed under Chapter 50 of the General Statutes alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person. Any aggrieved party entitled to relief under this Chapter may file a civil action and proceed pro se, without the assistance of legal counsel. The district court division of the General Court of Justice shall have original jurisdiction over actions instituted under this Chapter. No court costs shall be assessed for the filing, issuance, registration, or service of a protective order or petition for a protective order or witness subpoena in compliance with the Violence Against Women Act, 42 U.S.C. § 3796gg-5.

(b) Emergency Relief. – A party may move the court for emergency relief if he or she believes there is a danger of serious and immediate injury to himself or herself or a minor child. A hearing on a motion for emergency relief, where no ex parte order is entered, shall be held after five days' notice of the hearing to the other party or after five days from the date of service of process on the other party, whichever occurs first, provided, however, that no hearing shall be required if the service of process is not completed on the other party. If the party is proceeding pro se and does not request an

ex parte hearing, the clerk shall set a date for hearing and issue a notice of hearing within the time periods provided in this subsection, and shall effect service of the summons, complaint, notice, and other papers through the appropriate law enforcement agency where the defendant is to be served.

(c) Ex Parte Orders. – Prior to the hearing, if it clearly appears to the court from specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party or a minor child, the court may enter such orders as it deems necessary to protect the aggrieved party or minor children from ~~such acts provided, however, that a temporary order for custody ex parte and prior to service of process and notice shall not be entered unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse.~~those acts. Upon the issuance of an ex parte order under this subsection, a hearing shall be held within 10 days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later. If an aggrieved party acting pro se requests ex parte relief, the clerk of superior court shall schedule an ex parte hearing with the district court division of the General Court of Justice within 72 hours of the filing for said relief, or by the end of the next day on which the district court is in session in the county in which the action was filed, whichever shall first occur. If the district court is not in session in said county, the aggrieved party may contact the clerk of superior court in any other county within the same judicial district who shall schedule an ex parte hearing with the district court division of the General Court of Justice by the end of the next day on which said court division is in session in that county. Upon the issuance of an ex parte order under this subsection, if the party is proceeding pro se, the Clerk shall set a date for hearing and issue a notice of hearing within the time periods provided in this subsection, and shall effect service of the summons, complaint, notice, order and other papers through the appropriate law enforcement agency where the defendant is to be served.

Upon the request of either party, the court shall consider temporary custody as part of an ex parte or permanent order hearing. However, where there is evidence of domestic violence, there shall be a presumption that it is in the best interest of the child to be placed in the custody of the nonoffending primary caregiver.

(c1) Ex Parte Orders by Authorized Magistrate. – The chief district court judge may authorize a magistrate or magistrates to hear any motions for emergency relief ex parte. Prior to the hearing, if the magistrate determines that at the time the party is seeking emergency relief ex parte the district court is not in session and a district court judge is not and will not be available to hear the motion for a period of four or more hours, the motion may be heard by the magistrate. If it clearly appears to the magistrate from specific facts shown that there is a danger of acts of domestic violence against the aggrieved party or a minor child, the magistrate may enter such orders as it deems necessary to protect the aggrieved party or minor children from ~~such acts, except that a temporary order for custody ex parte and prior to service of process and notice shall not be entered unless the magistrate finds that the child is exposed to a substantial risk of bodily injury or sexual abuse.~~those acts. An ex parte order entered under this subsection shall expire and the magistrate shall schedule an ex parte hearing before a district court judge by the end of the next day on which the district court is in session in the county in

which the action was filed. Ex parte orders entered by the district court judge pursuant to this subsection shall be entered and scheduled in accordance with subsection (c) of this section.

Upon the request of either party, the magistrate shall consider temporary custody as part of an ex parte hearing. However, where there is evidence of domestic violence, there shall be a presumption that it is in the best interest of the child to be placed in the custody of the nonoffending primary caregiver.

(c2) The authority granted to authorized magistrates to award temporary child custody to pursuant subsection (c1) of this section and pursuant to G.S. 50B-3(a)(4) is granted subject to custody rules to be established by the supervising chief district judge of each judicial district.

(d) Pro Se Forms. – The clerk of superior court of each county shall provide to pro se complainants all forms which are necessary or appropriate to enable them to proceed pro se pursuant to this section. The Clerk shall provide a supply of pro se forms to authorized magistrates who shall make the forms available to complainants seeking relief under subsection (c1) of this section."

SECTION 2. G.S. 50-13.2(a) reads as rewritten:

"(a) An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child. Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child. However, where there is evidence of domestic violence, there shall be a presumption that it is in the best interest of the child to be placed in the custody of the nonoffending primary caregiver.

Joint custody to the parents shall be considered upon the request of either parent."

SECTION 3. This act is effective when it becomes law.

911

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 718
PROPOSED COMMITTEE SUBSTITUTE S718-CSRH-28 [v.2]

4/28/2003 6:18:50 PM

Short Title: Amend Domestic Violence Laws/Temp. Custody. (Public)

Sponsors:

Referred to:

April 3, 2003

A BILL TO BE ENTITLED

AN ACT AMENDING THE DOMESTIC VIOLENCE LAWS TO REMOVE THE CURRENT LIMITATIONS UNDER WHICH COURTS MAY ADDRESS THE ISSUE OF CUSTODY EX PARTE, REQUIRING COURTS TO CONSIDER CUSTODY AS PART OF AN EX PARTE OR PERMANENT ORDER HEARING, AND CREATING A REBUTTABLE PRESUMPTION THAT IT IS IN THE BEST INTEREST OF THE CHILD TO BE PLACED IN THE CUSTODY OF THE NONOFFENDING CAREGIVER.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 50B-2 reads as rewritten:

"**§ 50B-2. Institution of civil action; motion for emergency relief; ~~temporary orders.~~temporary orders; temporary custody.**

(a) Any person residing in this State may seek relief under this Chapter by filing a civil action or by filing a motion in any existing action filed under Chapter 50 of the General Statutes alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person. Any aggrieved party entitled to relief under this Chapter may file a civil action and proceed pro se, without the assistance of legal counsel. The district court division of the General Court of Justice shall have original jurisdiction over actions instituted under this Chapter. No court costs shall be assessed for the filing, issuance, registration, or service of a protective order or petition for a protective order or witness subpoena in compliance with the Violence Against Women Act, 42 U.S.C. § 3796gg-5.

(b) Emergency Relief. – A party may move the court for emergency relief if he or she believes there is a danger of serious and immediate injury to himself or herself or a minor child. A hearing on a motion for emergency relief, where no ex parte order is entered, shall be held after five days' notice of the hearing to the other party or after five days from the date of service of process on the other party, whichever occurs first, provided, however, that no hearing shall be required if the service of process is not

completed on the other party. If the party is proceeding pro se and does not request an ex parte hearing, the clerk shall set a date for hearing and issue a notice of hearing within the time periods provided in this subsection, and shall effect service of the summons, complaint, notice, and other papers through the appropriate law enforcement agency where the defendant is to be served.

(c) Ex Parte Orders. – Prior to the hearing, if it clearly appears to the court from specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party or a minor child, the court may enter such orders as it deems necessary to protect the aggrieved party or minor children from ~~such acts provided, however, that a temporary order for custody ex parte and prior to service of process and notice shall not be entered unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse.~~those acts. Upon the issuance of an ex parte order under this subsection, a hearing shall be held within 10 days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later. If an aggrieved party acting pro se requests ex parte relief, the clerk of superior court shall schedule an ex parte hearing with the district court division of the General Court of Justice within 72 hours of the filing for said relief, or by the end of the next day on which the district court is in session in the county in which the action was filed, whichever shall first occur. If the district court is not in session in said county, the aggrieved party may contact the clerk of superior court in any other county within the same judicial district who shall schedule an ex parte hearing with the district court division of the General Court of Justice by the end of the next day on which said court division is in session in that county. Upon the issuance of an ex parte order under this subsection, if the party is proceeding pro se, the Clerk shall set a date for hearing and issue a notice of hearing within the time periods provided in this subsection, and shall effect service of the summons, complaint, notice, order and other papers through the appropriate law enforcement agency where the defendant is to be served.

Upon the request of either party, the court shall consider temporary custody as part of an ex parte order hearing. However, where there is evidence of domestic violence, there is a rebuttable presumption that it is in the best interest of the child to be placed in the custody of the nonoffending primary caregiver.

(c1) Ex Parte Orders by Authorized Magistrate. – The chief district court judge may authorize a magistrate or magistrates to hear any motions for emergency relief ex parte. Prior to the hearing, if the magistrate determines that at the time the party is seeking emergency relief ex parte the district court is not in session and a district court judge is not and will not be available to hear the motion for a period of four or more hours, the motion may be heard by the magistrate. If it clearly appears to the magistrate from specific facts shown that there is a danger of acts of domestic violence against the aggrieved party or a minor child, the magistrate may enter such orders as it deems necessary to protect the aggrieved party or minor children from ~~such acts, except that a temporary order for custody ex parte and prior to service of process and notice shall not be entered unless the magistrate finds that the child is exposed to a substantial risk of bodily injury or sexual abuse.~~those acts. An ex parte order entered under this subsection shall expire and the magistrate shall schedule an ex parte hearing before a district court

judge by the end of the next day on which the district court is in session in the county in which the action was filed. Ex parte orders entered by the district court judge pursuant to this subsection shall be entered and scheduled in accordance with subsection (c) of this section.

Upon the request of either party, the magistrate shall consider temporary custody as part of an ex parte hearing. However, where there is evidence of domestic violence, there is a rebuttable presumption that it is in the best interest of the child to be placed in the custody of the nonoffending primary caregiver.

(c2) The authority granted to authorized magistrates to award temporary child custody to pursuant subsection (c1) of this section and pursuant to ~~G.S. 50B-3(a)(4)~~ G.S. 50B-3 is granted subject to custody rules to be established by the supervising chief district judge of each judicial district.

(d) Pro Se Forms. – The clerk of superior court of each county shall provide to pro se complainants all forms which are necessary or appropriate to enable them to proceed pro se pursuant to this section. The Clerk shall provide a supply of pro se forms to authorized magistrates who shall make the forms available to complainants seeking relief under subsection (c1) of this section."

Joint custody to the parents shall be considered upon the request of either parent."

SECTION 2. G.S. 50B-3(a)(4) is repealed.

SECTION 3. G.S. 50B-3 is amended by adding the following new subsection to read:

"(a1) Upon the request of either party, the court shall consider and may award temporary custody and establish temporary visitation rights. However, there is a rebuttable presumption that it is in the best interest of the child to be placed in the custody of the nonoffending primary caregiver."

SECTION 4. G.S. 50-13.2(a) reads as rewritten:

"(a) An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child. Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child. However, where there is evidence of domestic violence, there is a rebuttable presumption that it is in the best interest of the child to be placed in the custody of the nonoffending primary caregiver.

SECTION 5. This act is effective when it becomes law.

SENATE BILL 718:
Amend Domestic Violence Laws/Temp. Custody.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Hagan
Date:	April 29, 2003	**Summary by:**	Robin Johnson
Version:	S718-CSRH-28[v.2]		Committee Counsel

SUMMARY: ***Senate Bill 718 would remove the current limitations under which a court may address the issue of custody ex parte and would require the court to consider, if requested by either party, a temporary custody order as part of an ex parte order hearing or at any time during a domestic violence case. The bill also would create a rebuttable presumption that it is in the child's best interest to be placed in the custody of the nonoffending primary caregiver when the court is considering (i) temporary custody of a minor child as part of a domestic violence case or (ii) permanent or temporary custody when there is evidence of domestic violence.***

The PCS changes the presumption to a rebuttable one and adds Sections 2 and 3 to clarify that these requirements apply to all domestic case hearings, not just ex parte hearings.

The bill would take effect when it becomes law.

CURRENT LAW: Currently, a court[1] may issue an ex parte order of temporary custody when it finds there is a danger of acts of domestic violence against an aggrieved party or a minor child. When an aggrieved party believes there is a danger of serious and immediate danger to that party or a minor child, the party may move the court for emergency relief. In that case, the court may, before service of process and notice to the aggrieving party, issue any ex parte order it considers necessary to protect the party or minor child. The court shall not issue an ex parte order of temporary custody unless the court finds the child is exposed to a substantial risk of bodily injury or sexual abuse. The court also may grant other relief in domestic violence cases, including a protective or consent order that awards temporary custody and establishes temporary visitation rights. Orders issued in domestic violence cases are for a specified period of time, not exceeding one year.

In other cases when there is or has been a danger of acts of domestic violence, a court may issue a permanent or temporary custody order.

There are no presumptions concerning who should be granted temporary or permanent custody; however, the court must consider, in addition to issues related to the safety of the child, what is in the best interest and welfare of the child.

BILL ANALYSIS: Section 1 would amend G.S. 50B-2, which governs ex parte orders in domestic violence actions, by directing the court to consider temporary custody as part of an ex parte order hearing, if requested by either party. It would create the rebuttable presumption that it is in the child's best interest to be placed in the temporary custody of the nonoffending primary caregiver. Also, it would remove the limitation that specifies ex parte orders of temporary custody shall only be ordered where the court finds the child is exposed to a substantial risk of bodily injury or sexual abuse.

Section 2 would repeal G.S. 50B-3(a)(4), which allows the court, in a domestic violence case, to grant a protective or consent order that awards temporary custody and establishes temporary visitation rights.

[1] *A magistrate may be authorized to issue an ex parte order of temporary custody.*

Section 3 would amend G.S. 50B-3 to add a new subsection requiring the court, in a domestic violence case and upon the request of either party, to consider temporary custody, including visitation rights. This would create a rebuttable presumption that it is in the best interest of the child to be placed in the custody of the nonoffending primary caregiver.

Section 4 would amend G.S. 50-13.2 (see attached), which governs custody orders, by creating a rebuttable presumption, when there is evidence of domestic violence, that it is in a child's best interest to be placed in the custody of the nonoffending primary caregiver.

Section 5 provides that the act is effective when it becomes law.

S718-SMRH-001

§ 50B-1. Domestic violence; definition.

(a) Domestic violence means the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:

(1) Attempting to cause bodily injury, or intentionally causing bodily injury; or

(2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3, that rises to such a level as to inflict substantial emotional distress; or

(3) Committing any act defined in G.S. 14-27.2 through G.S. 14-27.7.

(b) For purposes of this section, the term "personal relationship" means a relationship wherein the parties involved:

(1) Are current or former spouses;

(2) Are persons of opposite sex who live together or have lived together;

(3) Are related as parents and children, including others acting in loco parentis to a minor child, or as grandparents and grandchildren. For purposes of this subdivision, an aggrieved party may not obtain an order of protection against a child or grandchild under the age of 16;

(4) Have a child in common;

(5) Are current or former household members;

(6) Are persons of the opposite sex who are in a dating relationship or have been in a dating relationship. For purposes of this subdivision, a dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship. A casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship.

§ 50B-3. Relief.

(a) The court, including magistrates as authorized under G.S. 50B-2(c1), may grant any protective order or approve any consent agreement to bring about a cessation of acts of domestic violence. The orders or agreements may:

(1) Direct a party to refrain from such acts;
(2) Grant to a party possession of the residence or household of the parties and exclude the other party from the residence or household;
(3) Require a party to provide a spouse and his or her children suitable alternate housing;
(4) Award temporary custody of minor children and establish temporary visitation rights;
(5) Order the eviction of a party from the residence or household and assistance to the victim in returning to it;
(6) Order either party to make payments for the support of a minor child as required by law;
(7) Order either party to make payments for the support of a spouse as required by law;
(8) Provide for possession of personal property of the parties;
(9) Order a party to refrain from doing any or all of the following:
    a. Threatening, abusing, or following the other party,
    b. Harassing the other party, including by telephone, visiting the home or workplace, or other means, or
    c. Otherwise interfering with the other party;
(10) Award attorney's fees to either party;
(11) Prohibit a party from purchasing a firearm for a time fixed in the order;
(12) Order any party the court finds is responsible for acts of domestic violence to attend and complete an abuser treatment program if the program is approved by the Domestic Violence Commission; and
(13) Include any additional prohibitions or requirements the court deems necessary to protect any party or any minor child.

§ 50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State.

(a) An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child. Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child. Joint custody to the parents shall be considered upon the request of either parent.

(b) An order for custody of a minor child may grant joint custody to the parents, exclusive custody to one person, agency, organization, or institution, or grant custody to two or more persons, agencies, organizations, or institutions. Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child. If the court finds that domestic violence has occurred, the court shall enter such orders that best protect the children and party who were the victims of domestic violence. Such orders may include a designation of time and place for the exchange of children away from the abused party, the participation of a third party, or supervised visitation. If a party is absent or relocates with or without the children because of an act of domestic violence, the absence or relocation shall not be a factor that weighs against the party in determining custody or visitation. Absent an order of the court to the contrary, each parent shall have equal access to the records of the minor child involving the health, education, and welfare of the child.

(b1) An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate. As used in this subsection, "grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights.

(c) An order for custody of a minor child may provide for such child to be taken outside of the State, but if the order contemplates the return of the child to this State, the judge may require the person, agency, organization or institution having custody out of this State to give bond or other security conditioned upon the return of the child to this State in accordance with the order of the court.

(d) If, within a reasonable time, one parent fails to consent to adoption pursuant to Chapter 48 of the General Statutes or parental rights have not been terminated, the consent of the other consenting parent shall not be effective in an action for custody of the child.

MAY 1, 2003

DID NOT MEET

Judiciary II Committee

Minutes

May 6, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with twelve members present.

HB 24 (Veterans Administration Police Officers) Senator Hartsell recognized Representative Gene McCombs, bill sponsor, to explain the bill. Questions by Senators Kinnaird and Dorsett were answered by Representative McCombs. Senator Sloan moved for a favorable report. All members voted and the motion carried.

HB 58 (Validate Certain Notarial Acts) Representative Wilson, bill sponsor, was recognized by Senator Hartsell to explain the bill. Questions by Senator Webster were answered by Representative Wilson. Senator Kinnaird moved for a favorable report. All members voted and the motion carried.

HB 798 (Securities Transfer on Death) Senator Hartsell recognized Representative Moore, bill sponsor, to discuss the bill. The House bill was identical to the Senate Bill which had already been heard and passed by Judiciary II. Senator Apodaca moved for a favorable report. All members voted and the motion carried.

There being no further business, the meeting was adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, May 06, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B.	**24**	Veterans Administration Police Officers.	
		Sequential Referral:	None
		Recommended Referral:	None
H.B.	**58**	Validate Certain Notarial Acts.	
		Sequential Referral:	None
		Recommended Referral:	None
H.B.	**798**	Securities Transfer on Death.	
		Sequential Referral:	None
		Recommended Referral:	None

TOTAL REPORTED: 3

Committee Clerk Comments:

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **JUDICIARY II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	May 6, 2003	10:00 AM	1124

The following will be considered:

	BILL NO.	SHORT TITLE	SPONSOR
•	HB 24	Veterans Administration Police Officers	Rep. McCombs
•	HB 58	Validate Certain Notarial Acts	Rep. Wilson
•	HB 798	Securities Transfer on Death	Rep. Moore
•			Rep. Munford

Senator HARTSELL, Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
May 6, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. Welcome and Opening Remarks

II. Bills to be Considered

•	HB 24	Veterans Administration Police Officers	Rep. McCombs
•	HB 58	Validate Certain Notarial Acts	Rep. Wilson
•	HB 798	Securities Transfer on Death	Rep. Moore
•			Rep. Munford

III. Other Business

IV. Adjournment

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — May 6, 2003
Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
JOHN WITHROW	NC STATEWATCH
Richard C. Hatch	AARP
John Mattox	Gen Off
Eddie Caldwell	NC Sheriffs Assn/NC Law Enf Off Assn
Hal Miller	NCACCT
John Cyrus	NC State Troopers
Camille Steel	KCLH
Betty Turner	BAC
Bill Scoggin	KCLH
Jamy Bewley	LBA
Ken Melton	Alley Associates

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II

Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Durward Laughinghouse	DHS
	√

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 24

Short Title:	Veterans Administration Police Officers.	(Public)
Sponsors:	Representatives McCombs; Barbee, Barnhart, Coates, Gillespie, Mitchell, Rayfield, and Rhodes.	
Referred to:	Judiciary III.	

February 17, 2003

A BILL TO BE ENTITLED

AN ACT TO AUTHORIZE VETERANS ADMINISTRATION POLICE OFFICERS TO PROVIDE ASSISTANCE TO STATE AND LOCAL LAW ENFORCEMENT AGENCIES IN THE SAME MANNER AS OTHER FEDERAL LAW ENFORCEMENT OFFICERS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-406(a) reads as rewritten:

"(a) For purposes of this section, "federal law enforcement officer" means any of the following persons who are employed as full-time law enforcement officers by the federal government and who are authorized to carry firearms in the performance of their duties:

(1) United States Secret Service special agents;
(2) Federal Bureau of Investigation special agents;
(3) Bureau of Alcohol, Tobacco and Firearms special agents;
(4) United States Naval Investigative Service special agents;
(5) Drug Enforcement Administration special agents;
(6) United States Customs Service officers;
(7) United States Postal Service inspectors;
(8) Internal Revenue Service special agents;
(9) United States Marshals Service marshals and deputies;
(10) United States Forest Service officers;
(11) National Park Service officers;
(12) United States Fish and Wildlife Service officers;
(13) Immigration and Naturalization Service officers; ~~and~~
(14) Tennessee Valley Authority ~~officers.~~ officers; and
(15) Veterans Administration police officers."

SECTION 2. This act is effective when it becomes law.

HOUSE BILL 24:
Veterans Administration Police Officers

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Rep. McCombs
Date:	May 6, 2003	**Summary by:**	Sandra Alley
Version:	First Edition		Committee Counsel

SUMMARY: ***House Bill 24 would add Veterans Administration police officers to the list of federal law enforcement officers who, when asked to assist State or local law enforcement agencies acting within the scope of their subject matter and territorial jurisdiction, are empowered with the same authority as is given to North Carolina law enforcement officers.***

CURRENT LAW: G.S. 15A-406 authorizes specified federal law enforcement officers to enforce criminal laws anywhere within this State under two limited circumstances:

- If the federal officer is asked by the head of a state or local law enforcement agency to provide temporary assistance, and the request is within the scope of the state or local law enforcement agency's subject matter and territorial jurisdiction; or
- If the federal officer is asked by a state or local law enforcement officer to provide temporary assistance when at the time of the request the officer is acting within the scope of his subject matter and territorial jurisdiction.

When acting pursuant to G.S. 15A-406, a federal law enforcement officer has the same powers as those invested in a North Carolina law enforcement officer, however, the statute does not expand the authority of federal officers to initiate or conduct an independent investigation into violation of North Carolina law. A federal law enforcement officer who acts pursuant to the statute acts within the scope of his employment as a federal officer and is not considered an officer, employee, or agent of any state or local law enforcement agency.

BILL ANALYSIS: G.S. 15A-406 applies to specified persons who are employed by the federal government as full-time law enforcement officers authorized to carry firearms in the performance of their duties. House Bill 24 adds Veterans Administration police officers to the list of federal law enforcement officers who may enforce criminal laws in this State when asked to assist State or local law enforcement agencies or officers acting within the scope of their subject matter and territorial jurisdiction. The statute was last amended in 2001, when Tennessee Valley Authority (TVA) officers were added to the list.

BACKGROUND: Title 38, Section 902 of the U.S. Code provides that with respect to acts occurring on property of the Department of Veterans Affairs, the Department's police officers are authorized to enforce state and local traffic and motor vehicle laws in addition to enforcing violations of federal laws/rules that occur on Departmental property.

The bill would be effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H **1**

HOUSE BILL 58

Short Title:	Validate Certain Notarial Acts.	(Public)
Sponsors:	Representative C. Wilson.	
Referred to:	Judiciary III.	

February 24, 2003

A BILL TO BE ENTITLED

AN ACT TO VALIDATE CERTAIN NOTARIAL ACTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 10A-16(d) reads as rewritten:

"(d) This section applies to notarial acts performed on or before ~~July 1, 2002.~~March 1, 2003."

SECTION 2. This act is effective when it becomes law.

HOUSE BILL 58:
Validate Certain Notarial Acts

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Representative C. Wilson
Date:	May 5, 2003	**Summary by:**	Kory J. Goldsmith
Version:	1st Edition		Committee Counsel

SUMMARY: ***House Bill 58 would validate certain notarial acts if they were performed on or before March 1, 2003.***

CURRENT LAW: G.S. 10A-16 is a curative statute that validates acts of notaries public that include any of the flowing errors:

- The instrument was notarized by a person prior to qualification but after commissioning as a notary public, or by a person whose notary commission has expired.
- The notarial seal contains any of the following errors:
  - The date of expiration of the notary's commission is stated, whether correctly or erroneously.
  - A readable impression of the notary's name is not included, or the name is misspelled or incorrect.
  - The notary's signature does not comport exactly with the name on the seal.
  - The seal contains additional material or does not contain the words "North Carolina" or the abbreviation "N.C."

Notarial acts that contain theses errors are validated and have the same legal effect as ifthe errors had not occurred it they were performed on or before July 1, 2002.

BILL ANALYSIS: House Bill 58 would extend application of G.S. 10A-16 to notarial acts that were performed on or before March 1, 2003.

The act is effective when it becomes law.

H58-SMRC-002

Wendy Graf Ray contributed substantially to this summary.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 1

HOUSE BILL 798*

Short Title:	Securities Transfer on Death.	(Public)
Sponsors:	Representatives Moore, Munford (Primary Sponsors); Blust, Gorman, Holmes, Insko, and McHenry.	
Referred to:	Judiciary II.	

March 31, 2003

A BILL TO BE ENTITLED

AN ACT TO ENACT THE UNIFORM TRANSFER ON DEATH (TOD) SECURITY REGISTRATION ACT.

The General Assembly of North Carolina enacts:

SECTION 1. The General Statutes are amended by rewriting the title of Chapter 41 to read "Estates and Interests in Property", and Chapter 41 of the General Statutes is amended by adding a new Article to read:

"Article 4.

"The Uniform Transfer on Death (TOD) Security Registration Act.

"**§ 41-40. Definitions.**

In this Article, unless the context otherwise requires:

(1) 'Beneficiary form' means a registration of a security which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.

(2) 'Devisee' means any person designated in a will to receive a disposition of real or personal property.

(3) 'Heirs' means those persons, including the surviving spouse, who are entitled under Chapter 29 of the General Statutes or the statutes of intestate succession of other states to take the property of a decedent by intestate succession.

(4) 'Person' means an individual, a corporation, an organization, or other legal entity.

(5) 'Personal representative' includes executor, administrator, collector, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.

(6) 'Property' includes both real and personal property or any interest in real or personal property and means anything that may be the subject of ownership.

(7) 'Register', including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of securities.

(8) 'Registering entity' means a person who originates or transfers a security title by registration and includes a broker maintaining security accounts for customers and a transfer agent or other person acting for or as an issuer of securities.

(9) 'Security' means a share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security, a security account, and a security entitlement as defined in G.S. 25-8-102.

(10) 'Security account' means (i) a reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, whether or not credited to the account before the owner's death, or (ii) a cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner's death.

(11) 'State' includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

"**§ 41-41. Registration in beneficiary form; sole or joint tenancy ownership.**

Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more individuals with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entireties, or as owners of community property held in survivorship form, and not as tenants in common.

"**§ 41-42. Registration in beneficiary form; applicable law.**

A security may be registered in beneficiary form if the form is authorized by this or a similar statute of the state of organization of the issuer or registering entity, the location of the registering entity's principal office, the office of its transfer agent or its office making the registration, or by this or a similar statute of the law of the state listed as the owner's address at the time of registration. A registration governed by the law of a jurisdiction in which this or similar legislation is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law.

"**§ 41-43. Origination of registration in beneficiary form.**

A security, whether evidenced by certificate or account, is registered in beneficiary form when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners.

"**§ 41-44. Form of registration in beneficiary form.**

Registration in beneficiary form may be shown by the words 'transfer on death' or the abbreviation 'TOD', or by the words 'pay on death' or the abbreviation 'POD', after the name of the registered owner or owners and before the name of a beneficiary.

"**§ 41-45. Effect of registration in beneficiary form.**

The designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership of the security until the owner's death. A registration of a security in beneficiary form may be cancelled or changed at any time by the sole owner or all then-surviving owners, without the consent of the beneficiary.

"**§ 41-46. Ownership on death of owner.**

On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survive the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

"**§ 41-47. Protection of registering entity.**

(a) A registering entity is not required to offer or to accept a request for security registration in beneficiary form. If a registration in beneficiary form is offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by this Article.

(b) By accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented on death of the deceased owner as provided in this Article.

(c) A registering entity is discharged from all claims to a security by the estate, creditors, heirs, or devisees of a deceased owner if it registers a transfer of a security in accordance with G.S. 41-46 and does so in good faith reliance (i) on the registration, (ii) on this Article, and (iii) on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity. The protections of this Article do not extend to a reregistration or payment made after a registering entity has received written notice from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under this Article.

(d) The protection provided by this Article to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds.

"**§ 41-48. Nontestamentary transfer on death.**

(a) A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this Article and is not testamentary.

(b) The interest of a deceased owner when there are one or more surviving owners remains liable for the debts of the decedent in the same manner as the personal property included in the decedent's estate, and recovery of that interest shall be made from the surviving owner or owners when the decedent's estate is insufficient to satisfy the debts. The interest of a deceased sole owner, or the last to die of several owners, remains liable for the debts of the decedent in the same manner as the personal property included in the decedent's estate, and recovery of that interest shall be made from the TOD beneficiary when the decedent's estate is insufficient to satisfy the debts.

(c) This Article does not repeal or modify any provision of law relating to estate taxes.

"**§ 41-49. Terms, conditions, and forms for registration.**

(a) A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests (i) for registrations in beneficiary form, and (ii) for implementation of registrations in beneficiary form, including requests for cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary. The terms and conditions established may provide for proving death, avoiding or resolving any problems concerning fractional shares, and designating primary or contingent beneficiaries. Forms of identifying beneficiaries who are to take on one or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities regarding conditions and identities relevant to accurate implementation of registrations in beneficiary form, may be contained in a registering entity's terms and conditions.

(b) The following are illustrations of registrations in beneficiary form which a registering entity may authorize:

(1) Sole owner-sole beneficiary: 'John S. Brown TOD (or POD) John S. Brown, Jr.'

(2) Multiple owners-sole beneficiary: 'John S. Brown, Mary B. Brown JT TEN WROS TOD John S. Brown, Jr.'

(3) Multiple owners-primary and secondary (substituted) beneficiaries: 'John S. Brown, Mary B. Brown JT TEN WROS TOD John S. Brown, Jr. SUB BENE Peter O. Brown'.

"**§ 41-50. Short title; rules of construction.**

(a) This Article shall be known as and may be cited as the 'Uniform TOD Security Registration Act'.

(b) This Article shall be applied and construed to effectuate its general purposes and to make uniform the laws with respect to the subject of this Article among states enacting it.

(c) This Article does not repeal G.S. 41-2.2. G.S. 41-2.2 applies in determining whether a right of survivorship exists among multiple owners of a security interest in beneficiary form.

"**§ 41-51. Application of Article.**

This Article applies to registrations of securities in beneficiary form made before, on, or after the effective date of this Article, by decedents dying on or after the effective date of this Article."

SECTION 2. G.S. 28A-15-10(a) reads as rewritten:

"(a) When needed to satisfy claims against a decedent's estate, assets may be acquired by a personal representative or collector from the following sources:

(1) Tentative trusts created by the decedent in savings accounts for other ~~persons;~~ persons.

(2) Gifts causa mortis made by the ~~decedent;~~decedent.

(3) Joint deposit accounts with right of survivorship created by decedent pursuant to the provisions of G.S. 41-2.1 or otherwise; and joint tenancies with right of survivorship created by decedent in corporate stocks or other investment securities.

(4) An interest in a security passing to a beneficiary pursuant to the provisions of Article 4 of Chapter 41 of the General Statutes.

Such assets shall be acquired solely for the purpose of satisfying such claims, however, and shall not be available for distribution to heirs or devisees."

SECTION 3. G.S. 41-2.2 is amended by adding a new subsection to read:

"(e) As used in this section, "securities" has the same meaning as in G.S. 41-40(9) and includes "security account" as that term is defined in G.S. 41-40(10)."

SECTION 4. The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform TOD Security Registration Act and all explanatory comments of the drafters of this act as the Revisor may deem appropriate.

SECTION 5. This act becomes effective October 1, 2003.

HOUSE BILL 798:
Securities Transfer on Death.

BILL ANALYSIS

Committee: House Judiciary II
Date: May 6, 2003
Version: First

Introduced by: Reps. Moore & Munford
Summary by: Robin Johnson
Committee Counsel

SUMMARY: ***House Bill 798 would amend Chapter 41 - Estates, to allow owners of securities to register their title in transfer-on-death (TOD) form. This would allow the transfer of securities, including stocks, bonds, mutual funds, and security accounts, to a beneficiary upon death based on a prior beneficiary designation by registration. The bill previously came to the General Assembly as a recommendation of the General Statutes Commission and is modeled after the Uniform Transfer on Death (TOD) Securities Registration Act. The Uniform Act has been adopted in 46 states and the District of Columbia.***

CURRENT LAW: Under current law securities can only be passed upon death by probate or by joint tenancy with right of survivorship.

BILL ANALYSIS: The bill would rename Chapter 41 of the General Statutes as "Estates and Interests in Property" and would add a new Article 4 to that Chapter, entitled "The Uniform Transfer on Death (TOD) Security Registration Act". This act would allow the owner of securities to designate a beneficiary of the securities to be received upon the death of the owner. The owner may revoke or modify this designation at any time up until death. Also, this designation does not convey any right or interest in the beneficiary until the time of death. Title to the securities would be transferred as a matter of contract (like life insurance policies or individual retirement accounts), not as a testamentary bequest, and as such would not be part of the probate estate.

Some of the advantages provided by the bill appear to be: 1) provides an alternative to joint ownership with right of survivorship, avoiding the complications and restrictions of dealing with a co-owner but effecting the same transfer upon death; 2) avoids probate and probate fees; and 3) simplifies the process of changing names on securities after death. The bill would does not affect claims creditors, who would still be able to claim these securities if necessary to satisfy claims against the decedent's estate in the same ways as with joint bank accounts with right of survivorship. This form of ownership would not affect estate or inheritance tax collection, and these securities would be counted as part of the taxable estate.

One change that would result from this bill would be a reduction in the collection of probate fees by the clerks of court. Probate fees are collected on all personal property that passes through the probate estate. Because these changes would transfer these securities outside the probate estate, probate fees would not be collected on the value of the securities transferred by this method.

Section 2 of this bill would make a conforming change to the statute governing the rights of creditors to collect estate debts from assets passing outside the estate. This statute is only triggered when other assets of the estate are insufficient to satisfy all claims.

Section 3 would authorize the Revisor of Statutes to include the Official Comments to the Uniform Act from the Uniform Commissioners with the published statutes.

EFFECTIVE DATE: The bill would take effect October 1, 2003, and would apply to persons dying on or after that date who had registered such a designation on their securities at anytime prior to their death. This will ratify the designations made by people before October 1, 2003, including people who may have made such designations under the laws of other states.

BACKGROUND: Similar bills were introduced in the 1997, 1999, and the 2001 Sessions of the General Assembly. In 2001, House Bill 41, which was virtually identical to this bill, passed the House and was given a favorable report by the Senate Commerce Committee.

H798-SMRH-001: Karen Cochrane-Brown, Kory Goldsmith, and Walker Reagan contributed to this summary.

MAY 8, 2003

DID NOT MEET

Judiciary II Committee

Minutes

May 13, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Scott Thomas, Vice-Chairman, with twelve members present.

HB 636 (Modernize Judgment Docketing Laws) Senator Thomas asked for a motion to adopt the House Bill 636 for purposes of discussion. Senator Apodaca so moved, all members voted and the motion carried. Senator Thomas then introduced Representative Munford, bill sponsor, to explain the bill. The question by Senator Bingham was answered by Representative Munford. Senator Bingham moved for a favorable report. All members voted and the motion carried.

HB 950 (Juvenile Commitment to DJJDP) Senator Thomas asked for a motion to adopt the House Bill 950 for purposes of discussion. Senator Dorsett so moved, all members voted and the motion carried. Representative Hackney was recognized to explain the bill. Questions by Senators Bingham, Thomas, Holloman, Rucho and Kerr were answered by Representative Hackney. Mr. Larry Dix from the Department of Juvenile Justice and Delinquency Prevention spoke on the bill. Senator Shubert moved for a favorable report. All members voted and the motion carried.

There being no further business, the meeting adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

CORRECTED REPORT

Tuesday, May 13, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B.(CS #1) **636** Modernize Judgment Docketing Laws.
Sequential Referral: None
Recommended Referral: None

H.B.(CS #1) **950** Juvenile Commitment to DJJDP.
Sequential Referral: None
Recommended Referral: None

TOTAL REPORTED: 2

Committee Clerk Comments:

Revised Notice – House Bill 1219 Removed

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **JUDICIARY II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	May 13, 2003	10:00 AM	1124

The following will be considered:

	BILL NO.	SHORT TITLE	SPONSOR
•	HB 636	Modernize Judgment Docketing Laws	Rep. Munford
•	HB 950	Juvenile Commitment to DJJDP	Rep. Hackney

Senator HARTSELL, Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
May 13, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. Welcome and Opening Remarks

II. Bills to be Considered

- HB 636 Modernize Judgment Docketing Laws Rep Munford
- HB 950 Juvenile Commitment to DJJDP Rep. Hackney

III. Other Business

IV. Adjournment

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 5-13-03

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Brad Crawford	AOC
Marion Pharen	DJJDP
Kathey Dudley	DJJDP
Tom Andrews	AOC

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 2

HOUSE BILL 636

Committee Substitute Favorable 4/7/03

Short Title: Modernize Judgment Docketing Laws. (Public)

Sponsors:

Referred to:

March 25, 2003

A BILL TO BE ENTITLED

AN ACT TO GIVE EFFECT TO ELECTRONIC JUDGMENT DOCKETS BY MODERNIZING LAWS REGARDING JUDGMENTS AND REESTABLISHING THE EFFECTIVE DATE OF CIVIL JUDGMENT LIENS AND THE DATE FROM WHICH INTEREST ACCRUES ON JUDGMENTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 1-232 reads as rewritten:

"**§ 1-232. Judgment roll.**

Unless the party or his attorney furnishes a judgment ~~roll,~~ roll or the documents referred to in this section are already on file, the clerk, immediately after entering the judgment, shall attach together and file the following papers which constitute the judgment roll:

(1) In case the complaint is not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.

(2) In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment."

SECTION 2. G.S. 1-233 reads as rewritten:

"**§ 1-233. Docketed and ~~indexed; held as of first day of session.~~indexed.**

Every judgment of the superior or district court, affecting ~~the right~~ title to real property, or requiring in whole or in part the payment of money, shall be ~~entered~~ indexed and recorded by the clerk of said superior court on the judgment docket of the court. The docket entry must contain the file number for the case in which the judgment was entered, the names of the parties, the address, if known, of each party and against whom judgment is rendered, ~~and~~ the relief granted, ~~date of judgment, and~~ the date, ~~hour~~ hour, and minute of ~~docketing; and the~~ the entry of judgment under G.S. 1A-1, Rule 58, and the date, hour, and minute of the indexing of the judgment. The clerk shall keep a

cross-index of the whole, with the dates and file numbers thereof; however, error or omission in the entry of the address or addresses shall in no way affect the validity, finality or priority of the judgment docketed. ~~In all cases affecting the title to real property the clerk shall enter upon the judgment docket the number and page of the minute docket where the judgment is recorded, and if the judgment does not contain particular description of the lands, but refers to a description contained in the pleadings, the clerk shall enter upon the minute docket, immediately following the judgment, the description so referred to.~~

~~All judgments rendered in any county by the superior or district court, during a session of the court, and docketed during the same session, or within 10 days thereafter, are held and deemed to have been rendered and docketed on the first day of said session, for the purpose only of establishing equality of priority as among such judgments.~~"

SECTION 3. G.S. 1-234 reads as rewritten:

"**§ 1-234. Where and how docketed; lien.**

Upon ~~filing a judgment roll upon a judgment~~ the entry of a judgment under G.S. 1A-1, Rule 58, affecting the title of real property, or directing in whole or in part the payment of money, ~~it shall be docketed~~ the clerk of superior court shall index and record the judgment on the judgment docket of the court of the county where the judgment ~~roll~~ was ~~filed, and~~ entered. The judgment may be docketed on the judgment docket of the court of any other county upon the filing with the clerk thereof of a transcript of the original ~~docket, and~~ docket. The judgment lien is effective as against third parties from and after the indexing of the judgment as provided in G.S. 1-233. The judgment is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter, for 10 years from the date of the ~~rendition~~ entry of the ~~judgment.~~ judgment under G.S. 1A-1, Rule 58, in the county where the judgment was originally entered. But the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, does not constitute any part of the 10 years aforesaid, as against the defendant in such judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor or mortgagee in good faith.

A judgment docketed pursuant to G.S. 15A-1340.38 shall constitute a lien against the property of a defendant as provided for under this section."

SECTION 4. G.S. 24-5 reads as rewritten:

"**§ 24-5. Interest on judgments.**

(a) Actions on Contracts. – In an action for breach of contract, except an action on a penal bond, the amount awarded on the contract bears interest from the date of breach. The fact finder in an action for breach of contract shall distinguish the principal from the interest in the award, and the judgment shall provide that the principal amount bears interest until the judgment is satisfied. If the parties have agreed in the contract that the contract rate shall apply after judgment, then interest on an award in a contract

action shall be at the contract rate after judgment; otherwise it shall be at the legal rate. On awards in actions on contracts pursuant to which credit was extended for personal, family, household, or agricultural purposes, however, interest shall be at the lower of the legal rate or the contract rate. For purposes of this section, "after judgment" means after the date of entry of judgment under G.S. 1A-1, Rule 58.

(a1) Actions on Penal Bonds. – In an action on a penal bond, the amount of the judgment, except the costs, shall bear interest at the legal rate from the date of ~~docketing of judgment~~ entry of judgment under G.S. 1A-1, Rule 58, until the judgment is satisfied.

(b) Other Actions. – In an action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied. Any other portion of a money judgment in an action other than contract, except the costs, bears interest from the date of ~~entry of judgment~~ entry of judgment under G.S. 1A-1, Rule 58, until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate."

SECTION 5. This act becomes effective September 1, 2003, and applies to all judgments entered, indexed, and docketed on or after that date.

HOUSE BILL 636:
Modernize Judgment Docketing Laws

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Rep. Munford
Date:	May 13, 2003	**Summary by:**	Robin Johnson*
Version:	2nd Edition		Committee Counsel

SUMMARY: ***House Bill 636 would modernize the laws governing judgments by giving effect to electronic judgment dockets and by reestablishing the effective date of civil judgment liens and the date from which interest accrues on judgments.***

The bill would take effect September 1, 2003, and would apply to all judgments entered, indexed, and docketed on or after that date.

BILL ANALYSIS:

Judgment roll: Once a civil judgment has been rendered, G.S. 1-232 requires the clerk of superior court to attach several documents, such as the complaint, the summons, the pleadings, the verdict, and all other papers related to the merits of the case or affecting the judgment, to a copy of the judgment, which constitutes the judgment roll.

Section 1 of House Bill 636 would amend G.S. 1-232 to provide that if all of the named documents are already on file, then the clerk need not provide additional copies for purposes of creating the judgment roll. This language more accurately reflects current practice.

Docketing judgments: G.S. 1-233 requires the clerk to docket all judgments entered by the court. The recording of a judgment is a three-step process. First, the judgment is entered. Rule 58 of the NC Rules of Civil Procedure provides that a judgment is rendered or entered in a case when it is reduced to writing, signed by the judge, and filed with the court. Second, the judgment is indexed by the clerk. Third, the judgment is docketed, which involves abstracting certain information, such as the names of the parties, the address of the party against whom the judgment is rendered, the relief granted, the date of the judgment, and the date, hour, and minute of docketing, onto the physical Judgment Docket Books. In cases affecting the title to real property, the clerk must enter upon the judgment docket the number and page of the minute docket where the judgment is recorded. If the judgment does not contain a property description, the clerk must also enter the description upon the minute docket immediately following the judgment.

Section 2 of the bill would amend G.S. 1-233 by requiring the clerk of superior court to record in the docket the date, hour, and minute of both the entry of judgment and the indexing of the judgment. Section 2 also would delete the language (i) requiring the clerk to record the number and page of the minute docket where a judgment affecting title to real property is recorded, and (ii) deeming all judgments rendered during the same session of court as docketed on the first day of the session.

Creation of lien: Once a judgment is docketed, a lien is established as against third parties. In those instances where multiple judgments are rendered during the same session of court, they are deemed to

have been rendered and docketed on the first day of the session. The lien is effective for 10 years from the date of the rendition of the judgment.

Section 3 would amend G.S. 1-234 by changing the point at which a judgment becomes a lien from the time it is docketed to the time at which it is indexed. This section also would clarify that a judgment is a lien on real property for 10 years from the date of the entry of the judgment in the county where the judgment was originally entered.

Interest on judgments: The point at which interest begins to accrue on a money judgment depends on the nature of the underlying action. For contract actions, the legal rate of interest (8%) will apply after judgment, unless the parties agreed that the contract rate will apply. In an action on a penal bond, the amount of the judgment bears the legal rate of interest from the date of docketing. In all other judgments, the amount of the judgment, other than that portion designated as compensatory damages, bears interest from the date of entry of judgment.

Section 4 of the bill would amend G.S. 24-5 to provide that post-judgment interest in all types of actions begins to accrue after the date of entry of the judgment under G.S. 1A-1, Rule 58. Under Rule 58, a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.

BACKGROUND: Because of the inefficiencies and inherent difficulties of the current manual docketing process, the Administrative Office of the Courts is seeking to automate and streamline the process through the Judgment Abstracting Project, part of a broader effort to further develop the Civil Case Processing System. This Project will provide an automated method for abstracting judgments, applying payments to judgments, calculating judgment payoff, and gathering forms related to processing judgments. House Bill 636 is designed to facilitate and advance the goals of the Project.

**H636-SMRH-002: Ms. Trina Griffin, Staff Attorney, substantially prepared this summary.*

Rule 58. Entry of judgment.

Subject to the provisions of Rule 54(b), a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. Service and proof of service shall be in accordance with Rule 5. If service is by mail, three days shall be added to the time periods prescribed by Rule 50(b), Rule 52(b), and Rule 59. All time periods within which a party may further act pursuant to Rule 50(b), Rule 52(b), or Rule 59 shall be tolled for the duration of any period of noncompliance with this service requirement, provided however that no time period under Rule 50(b), Rule 52(b), or Rule 59 shall be tolled longer than 90 days from the date the judgment is entered. Consent for the signing and entry of a judgment out of term, session, county, and district shall be deemed to have been given unless an express objection to such action was made on the record prior to the end of the term or session at which the matter was heard.

Notwithstanding any other law to the contrary, any judgment entered by a magistrate in a small claims action pursuant to Article 19 of Chapter 7A shall be entered in accordance with this Rule except judgments announced and signed in open court at the conclusion of a trial are considered to be served on the parties, and copies of any judgment not announced and signed in open court at the conclusion of a trial shall be served by the magistrate on all parties in accordance with this Rule, within three days after the judgment is entered. If service is by mail, three days shall be added to the time periods prescribed by G.S. 7A-228. All time periods within which a party may further act pursuant to G.S. 7A-228 shall be tolled for the duration of any period of noncompliance of this service requirement, provided that no time period shall be tolled longer than 90 days from the date judgment is entered. (1967, c. 954, s. 1; 1993 (Reg. Sess., 1994), c. 594, s. 1.)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 2

HOUSE BILL 950

Committee Substitute Favorable 4/29/03

Short Title: Juvenile Commitment to DJJDP. (Public)

Sponsors:

Referred to:

April 8, 2003

A BILL TO BE ENTITLED

AN ACT TO REQUIRE THE DEPARTMENT OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION TO OBTAIN THE APPROVAL OF THE COURT BEFORE PLACING A JUVENILE COMMITTED TO THE DEPARTMENT IN A PROGRAM NOT LOCATED IN A YOUTH DEVELOPMENT CENTER OR DETENTION FACILITY.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 7B-2513(e) reads as rewritten:

"(e) A commitment order accompanied by information requested by the Department shall be forwarded to the Department. The Department shall place the juvenile in the youth development center that would best provide for the juvenile's needs and shall notify the committing court. The Department may assign a juvenile committed for delinquency to any institution ~~or other program~~ of the Department or licensed by the Department, which program is appropriate to the needs of the juvenile.

The Department, after assessment of the juvenile, may provide commitment services to the juvenile in a program not located in a youth development center or detention facility. If the Department recommends that commitment services for the juvenile are to be provided in a setting that is not located in a youth development center or detention facility, the Department shall file a motion, along with information about the recommended services for the juvenile, with the committing court prior to placing the juvenile in the identified commitment program. The Department shall send notice of the motion to the District Attorney, the juvenile, and the juvenile's attorney. Upon receipt of the motion filed by the Department, the court may enter an order without the appearance of witnesses and without hearing if the court determines that the identified commitment program is appropriate and a hearing is not necessary. The court must hold a hearing if the juvenile or the juvenile's attorney requests a hearing. If the court notifies the Department of its intent to hold a hearing, the date for that hearing shall be set by the court and the Department shall place the juvenile in a youth development center or detention facility until the determination of the court at that hearing."

SECTION 2. This act becomes effective October 1, 2003, and applies to dispositions entered on or after that date.

HOUSE BILL 950:
Juvenile Commitment to DJJDP

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Rep. Hackney
Date:	May 12, 2003	**Summary by:**	Sandra Alley
Version:	Second Edition		Committee Counsel

SUMMARY: ***House Bill 950 would require the Department of Juvenile Justice and Delinquency Prevention to notify the committing court before placing a juvenile committed to a youth development center in an alternative off-campus program.***

BILL ANALYSIS: House Bill 950 would amend G.S. 7B-2513(e) to allow the Department of Juvenile Justice and Delinquency Prevention (Department) to place a juvenile committed to the Department in a program not located in a youth development center. If the Department recommends placement in a program not located in a youth development center, the Department must file a motion with the committing court, along with information on the specific placement recommended. The Department must also notify the District Attorney, the juvenile and the juvenile's attorney of the motion. The court may enter an order without the appearance of witnesses and without hearing if the court determines that the identified commitment program is appropriate and a hearing is not necessary. The court must hold a hearing if the juvenile or the juvenile's attorney requests a hearing. If the court notifies the Department of its intent to hold a hearing, the court shall set the date for the hearing and the Department shall place the juvenile in a youth development center until the determination by the court at that hearing.

This act becomes effective October 1, 2003 and applies to dispositions entered on or after that date.

Susan Sitze, Staff Attorney, contributed significantly to this report.

Judiciary II Committee

Minutes

May 15, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Austin Allran, Vice Chairman, with eleven members present.

HB 689 (Conform Evidence Rule 103) Senator Allran recognized Representative Glazier, bill sponsor, to explain the bill. Representative Glazier answered Senator Shubert's question. Senator Queen moved for a favorable report. All voted and the motion carried.

HB 1175 (Fair Housing Complaints) Senator Allran introduced Representative Michaux, bill sponsor, to explain the bill. Questions by Senators Queen, Bingham,Webster, Allran, Hartsell and Kerr were answered by Representative Michaux, Stephan Bowen, Executive Director of Land Loss Prevention Project, Ms. Patricia A.Yancey, Lobbyiest and Kory Goldsmith, Staff Attorney. Senator Hartsell moved to continue the bill until the next meeting and have a sub-committee define the term "fair housing organization" in the bill. All members voted and the motion carried. Senator Hartsell named Senators Kerr, Dorsett and Holloman as the sub-committee and asked that they report back to the committee on Tuesday, May 20th.

There being no further business, the meeting was adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Thursday, May 15, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B. **689** Conform Evidence Rule 103.
Sequential Referral: None
Recommended Referral: None

TOTAL REPORTED: 1

Committee Clerk Comments:

Revised Notice HB 785 removed

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	May 15, 2003	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 689	Conform Evidence Rule 103.	Representative Goodwin Representative Glazier
HB 826	Amend MH Confidentiality Statutes.	Representative Insko
HB 1175	Fair Housing Complaints.	Representative Michaux, Jr.

Senator Fletcher L. Hartsell, Jr., Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
May 15, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. Welcome and Opening Remarks

II. Bills to be Considered

HB 689	Conform Evidence Rule 103.	Representative Goodwin Representative Glazier
HB 826	Amend MH Confidentiality Statutes.	Representative Insko
HB 1175	Fair Housing Complaints.	Representative Michaux, Jr.

III. Other Business

IV. Adjournment

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 5-15-03

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
David Crawford	AIA North Carolina
Paul Pulley	Pulley. watson
Robin A. Young	LLPP
JOHN WITHROW	NC STATEWATCH
R. Paul Wilms	NCHBA
Nancy Thompson	MCIC
DAVID BARNES	PTS
Mary Thomsen	RESIC
Dirk Taylor	NCATA

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 689

Short Title:	Conform Evidence Rule 103.	(Public)
Sponsors:	Representatives Glazier, Goodwin (Primary Sponsors); and Munford.	
Referred to:	Judiciary IV.	

March 26, 2003

A BILL TO BE ENTITLED

AN ACT CONFORMING RULE 103 OF THE NORTH CAROLINA RULES OF EVIDENCE TO THE CORRESPONDING FEDERAL RULE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 8C-1, Rule 103(a), reads as rewritten:

"(a) Effect of erroneous ruling. – Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. – In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record. No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court;

(2) Offer of proof. – In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."

SECTION 2. This act becomes effective October 1, 2003, and applies to rulings on evidence made on or after that date.

HOUSE BILL 689:
Conform Evidence Rule 103

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Reps. Glazier and Goodwin
Date:	May 15, 2003	**Summary by:**	Robin Johnson*
Version:	1st Edition		Committee Counsel

SUMMARY: ***House Bill 689 conforms Rule 103 of the North Carolina Rules of Evidence to the corresponding federal rule by providing that once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer proof to preserve a claim of error for appeal.***

CURRENT LAW & BACKGROUND: When a judge sustains an objection excluding evidence at trial, the proponent of the evidence must normally make an "offer of proof" if he or she wishes to be able to contend on appeal that the exclusion was reversible error. The offer of proof normally consists of two parts: (1) a description of the evidence being proposed; and (2) an explanation of how that evidence relates to the case, if its relevance is not clear from context. The main rationale for the rule is that only by an offer of proof can the appellate court be completely informed of what the offered evidence would have been and how it would have been significant to the trial. Rule 103 of the Federal Rules of Evidence codifies this requirement. Specifically, FRE 103(a)(2) provides that an appellate court will be permitted to consider a ruling excluding evidence only if the substance of the evidence was made known to the court by offer or was apparent from the context within which the questions were asked.

Prior to 2000, North Carolina's Rule of Evidence 103 was substantially similar to FRE 103. In 2000 Congress amended Rule 103(a)(2) of the Federal Rules of Evidence. The amendment was intended to resolve the conflict in the cases and the confusion in practice about whether an objection or offer of proof must be renewed at trial if there has been an *in limine* ruling on the point. The amended rule provides that when a court makes a definitive ruling on an objection prior to or at trial, a party does not need to renew that objection at trial in order to preserve a claim of error on appeal. To date, at least five states have conformed to the amended rule: Colorado, Kentucky, Pennsylvania, Utah, and West Virginia.

BILL ANALYSIS: House Bill 689 conforms Rule 103 of the North Carolina Rules of Evidence to the recently revised corresponding federal rule by providing that once a court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

The act would become effective October 1, 2003, and would apply to rulings on evidence made on or after that date.

H689-SMRH-002: Trina Griffin, Staff Attorney, substantially prepared this summary.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 1175

Short Title:	Fair Housing Complaints.	(Public)
Sponsors:	Representative Michaux.	
Referred to:	Ways and Means.	

April 10, 2003

A BILL TO BE ENTITLED

AN ACT ALLOWING FAIR HOUSING ORGANIZATIONS TO FILE COMPLAINTS WITH THE STATE HUMAN RELATIONS COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 41A-7(a) reads as rewritten:

"(a) Any person or fair housing organization that provides assistance to any person who claims to have been injured by an unlawful discriminatory housing practice or who reasonably believes that he will be irrevocably injured by an unlawful discriminatory housing practice may file a complaint with the North Carolina Human Relations Commission. Complaints shall be in writing, shall state the facts upon which the allegation of an unlawful discriminatory housing practice is based, and shall contain such other information and be in such form as the Commission requires. Commission employees shall assist complainants in reducing complaints to writing and shall assist in setting forth the information in the complaint as may be required by the Commission. Within 10 days after receipt of the complaint, the Director of the Commission shall serve on the respondent a copy of the complaint and a notice advising the respondent of his procedural rights and obligations under this Chapter. Within 10 days after receipt of the complaint, the Director of the Commission shall serve on the complainant a notice acknowledging the filing of the complaint and informing the complainant of his time limits and choice of forums under this Chapter.

No complaint may be filed with the Commission under this section during any period in which the Commission is not certified by the Secretary of the United States Department of Housing and Urban Development in accordance with 42 U.S.C. § 3610(f) to have jurisdiction over the subject matter of the complaint. Provided, however, that during any such period in which the Commission is not certified, any person who claims to have been injured by an unlawful discriminatory practice or who reasonably believes that he will be irrevocably injured by an unlawful discriminatory housing practice may bring a civil action directly in superior court in accordance with the provisions of subsection (j) of this section, except that any such civil action shall be

commenced within one year after the occurrence or termination of the alleged unlawful discriminatory housing practice."

SECTION 2. This act is effective when it becomes law.

HOUSE BILL 1175:
Fair Housing Complaints

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Rep. Michaux
Date:	May 14, 2003	**Summary by:**	Kory J. Goldsmith
Version:	1ST Edition		Committee Counsel

SUMMARY: HB1175 allows fair housing organizations that provide assistance to persons who believe they have experienced discriminatory housing practices to file complaints with the North Carolina Human Relations Commission.

CURRENT LAW: Both Federal law (Chapter 42 of the Federal Code) and State law (Chapter 41A of the General Statutes) prohibits unlawful discriminatory housing practices against persons based upon their race, color, religion, sex, national origin, handicapping condition, or familial status. Discriminatory housing practices include:

- Refusal to engage in a real estate transaction.
- Refusing to permit reasonable accommodations to be made at the expense of a handicapped person.
- Refusing to negotiate a real estate transaction.
- Representing that real estate is not available for inspection, sale, or rental.
- Discriminating against a protected person or class of persons in the making of a loan for the purchase or refinance of residential real estate.
- Inducing others to enter into real estate transactions by representing that a changes has occurred or is going to occur in the composition of block or neighborhood.

A person who believes he or she has been injured by a discriminatory housing practice, or who believes he or she will be injured by a discriminatory housing practice may file a complaint with the North Carolina Human Relations Commission. Upon receipt of a complaint, the Commission must begin an investigation to determine whether there are reasonable grounds to believe that an unlawful discriminatory housing practice has occurred or is about to occur. The Commission shall commence a conciliation process if it finds there are reasonable grounds to believe a discriminatory practice has occurred or is about to occur. If the conciliation process is not successful, the complaining party may request and the Commission must issue a right to sue letter that allows the complaining party to file a civil action in federal court.

BILL ANALYSIS: HB 1175 amends subsection (a) of G.S. 41A-7 to permit fair housing organizations that provide assistance to persons who believe they have been injured by a discriminatory housing practice to file a complaint with the North Carolina Human Relations Commission. The bill does not define the term "fair housing organization", nor is that term defined in Federal law or regulation. It also is not clear whether the fair housing organization is filing the complaint on behalf of the person who believes they have been discriminated against, or for injuries the fair housing organization has received by providing assistance to the person who has been discriminated against.

H1175-SMRC-002

Judiciary II Committee

Minutes

May 20, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with twelve members present.

HB 1048 (Juvenile Code Revisions/Ct Improvement Proj.) Senator Hartsell introduced Representative Ross, bill sponsor, to explain the bill. Questions by Senators Kerr, Allran and Shubert were answered by Repressentative Ross, Erica Churchill, Staff Attorney and Senator Hartsell. Senator Queen moved for a favorable report. All members voted and the motion carried.

HB 1175 (Fair Housing Complaints) Senator Hartsell recognized Representative Michaux, bill sponsor. A Proposed Committee Substitute was distributed and Senator Dorsett moved to adopt the PCS for purposes of discussion. All members voted and the motion carried. Kory Goldsmith, Staff Attorney, explained the PCS. Questions by Senators Allran and Kerr were answered by Kory Goldsmith. Senator Holloman moved for a favorable report, unfavorable to the original bill, favorable to the Committee Substitute. All members voted and the motion carried.

HB 1151 (Improve Rule-Making Process) Representative Nesbitt, bill sponsor, was introduced to explain the Proposed Committee Substitute. Senator Allran moved to adopt the PCS for purposes of discussion. All members voted and the motion carried. Karen Cochrane-Brown, Staff Attorney, explained the changes and clarifications in the PCS. Questions by Senators Kinnaird, Dorsett, Kerr, Queen and Allran were answered by Representative Nesbitt and Karen Cochrane-Brown. The bill was continued to the Thursday Committee meeting.

There being no further business, the meeting was adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 1151

Committee Substitute Favorable 4/28/03

PROPOSED SENATE COMMITTEE SUBSTITUTE H1151-CSRO-20 [v.1]

5/19/2003 9:38:43 PM

Short Title: Improve Rule-Making Process. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE ADMINISTRATIVE PROCEDURE ACT TO REVISE THE PROCEDURE FOR ADOPTING PERMANENT AND TEMPORARY RULES, TO CREATE A PROCEDURE FOR THE ADOPTION OF EMERGENCY RULES, TO CLARIFY THE ROLE OF THE RULES REVIEW COMMISSION AND TO EXCLUDE THE STATE MEDICAL FACILITIES PLAN FROM THE DEFINITION OF A RULE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 150B-20(c) reads as rewritten:

"(c) Action. – If an agency denies a rule-making petition, it must send the person who submitted the petition a written statement of the reasons for denying the petition. If an agency grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings. When an agency grants a rule-making petition, the ~~notice of rule-making proceedings~~ notice of text it publishes in the North Carolina Register may state that the agency is initiating ~~rule-making proceedings~~ rule making as the result of a rule-making petition and state the name of the person who submitted the rule-making petition. If the rule-making petition requested the creation or amendment of a rule, the notice of text the agency publishes ~~after the notice of rule-making proceedings~~ may set out the text of the requested rule change submitted with the rule-making petition and state whether the agency endorses the proposed text."

SECTION 2. G.S. 150B-21.1 reads as rewritten:

"**§ 150B-21.1. Procedure for adopting a temporary rule.**

(a) Adoption. – An agency may adopt a temporary rule ~~without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical~~ when it finds that adherence to the notice and hearing requirements of ~~this Part~~G.S. 150B-21.2

would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

(1) A serious and unforeseen threat to the public health, safety, or welfare.

(2) The effective date of a recent act of the General Assembly or the United States Congress.

(3) A recent change in federal or State budgetary policy.

(4) A recent federal regulation.

(5) A recent court order.

(6) The need for the rule to ~~become effective the same date as~~ be made consistent with the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan.

~~An agency must prepare a written statement of its findings of need for a temporary rule. If the temporary rule establishes a new fee or increases an existing fee, the agency shall include in the written statement that it has complied with the requirements of G.S. 12-3.1. The statement must be signed by the head of the agency adopting the rule.~~

~~(a1) Notwithstanding the provisions of subsection (a) of this section, the Wildlife Resources Commission may adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical to protect the public health, safety, or welfare, conserve wildlife resources, or provide for the orderly and efficient operation of game lands by establishing any of the following:~~

(7) The need for the Wildlife Resources Commission to establish any of the following:

~~(1)~~a. No wake zones;

~~(2)~~b. Hunting or fishing seasons;

~~(3)~~c. Hunting or fishing bag limits;

~~(4)~~d. Management of public game lands as defined in G.S. 113-129(8a).

~~When the Wildlife Resources Commission adopts a temporary rule pursuant to this subsection, it must submit the reference to this subsection as its statement of need to the Codifier of Rules.~~

~~(a2) Notwithstanding the provisions of subsection (a) of this section, the Secretary of State may adopt temporary rules~~

(8) The need for the Secretary of State to implement the certification technology provisions of Article 11A of Chapter 66 of the General Statutes and to adopt uniform Statements of Policy that have been officially adopted by the North American Securities Administrators Association for the purpose of promoting uniformity of state securities regulation. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule;~~

~~(2) Accept oral and written comments on the proposed temporary rule; and~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary must submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection.~~

~~(a3) Notwithstanding the provisions of subsection (a) of this section, the Commissioner of Insurance may adopt a temporary rule~~

(9) The need for the Commissioner of Insurance to implement the provisions of ~~G.S. 58-2-205~~ G.S. 58-2-205.~~after prior notice or hearing or upon any abbreviated notice or hearing. When the Commissioner adopts a temporary rule pursuant to this subsection, the Commissioner must submit the reference to this subsection as the Commissioner's statement of need to the Codifier of Rules.~~

~~(a4) Notwithstanding the provisions of subsection (a) of this section, the State Chief Information Officer may adopt temporary rules~~

(10) The need for the Chief Information Officer to implement the information technology procurement provisions of Article 3D of Chapter 147 of the General Statutes. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Officer shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule;~~

~~(2) Accept oral and written comments on the proposed temporary rule; and~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Officer adopts a temporary rule pursuant to this subsection, the Officer must submit a reference to this subsection as the Officer's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Officer in accordance with this subsection.~~

~~(a5) Notwithstanding the provisions of subsection (a) of this section,~~

(11) The need for the State Board of Elections ~~may~~ to adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical for one or more of the following:

~~(1)~~a. In accordance with the provisions of G.S. 163-22.2.

~~(2)~~b. To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules.

~~(3)~~c. The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.

~~When the State Board of Elections adopts a temporary rule pursuant to this subsection, it must submit the reference to this subsection as its statement of need to the Codifier of Rules.~~

~~(a6) Expiration by Session Laws 2001, ch. 421, s. 5.3, effective June 30, 2002.~~

~~(a7) Notwithstanding the provisions of subdivision (a)(2) of this section,~~

(12) The need for an agency ~~may~~ to adopt a temporary rule to implement the provisions of any of the following acts until all rules necessary to implement the provisions of the act have become effective as either temporary or permanent rules:

a. Repealed by Session Laws 2000, ch. 148, s. 5, effective July 1, 2002.

b. **(Repealed effective July 1, 2003)** Article 34B of Chapter 115C of the General Statutes, relating to qualified zone academy bonds.

~~(a8) (Expires on June 30, 2003) Notwithstanding the provisions of subsection (a) of this section,~~

(13) The need for the Secretary of Transportation ~~may~~ to adopt temporary rules concerning the permitted height of mobile and modular homes. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule.~~

~~(2) Accept oral and written comments on the proposed temporary rule.~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary must submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection.~~

~~(a9) (Expires June 30, 2003) Notwithstanding the provisions of subsection (a) of this section,~~

(14) The need for the Secretary of Transportation ~~may~~ to adopt temporary rules pursuant to G.S. 113A-11(b) to establish a class of minimum criteria projects.

~~After having the proposed temporary rule published in the North Carolina Register, and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall do all of the following:~~

~~(1) Notify persons on its mailing list, maintained pursuant to G.S. 150B-21.2(d), and any other interested parties, of his intent to adopt a temporary rule.~~

~~(2) Accept oral and written comments on the proposed temporary rule.~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary shall submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection.~~

~~(a10) (Expires on October 1, 2004) Notwithstanding the provisions of subsection (a) of this section,~~

(15) The need for the Department of Health and Human Services ~~may~~ to adopt temporary rules concerning the placement of individuals in facilities licensed under Article 2 of Chapter 122C of the General Statutes and the enrollment of providers of services to such individuals in the Medicaid program. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Department shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule.~~

~~(2) Accept oral and written comments on the proposed temporary rule.~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Department adopts a temporary rule pursuant to this subsection, the Department shall submit a reference to this subsection as the Department's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Department in accordance with this subsection.~~

A recent act, change, regulation, or order as used in subdivisions (2) through (5) of this subsection means an act, change, regulation, or order occurring or made effective no more than 210 days prior to the submission of a temporary rule to the Rules Review Commission. Upon written request of the agency, the Commission may waive the 210-day requirement upon consideration of the degree of public benefit, whether the agency had control over the circumstances that required the requested waiver, notice to and opposition by the public, the need for the waiver, and previous requests for waivers submitted by the agency.

(a1) Unless otherwise provided by law, at least 30 business days prior to adopting a temporary rule, the agency shall:

(1) Submit the rule to the Codifier of Rules, and the Codifier of Rules shall publish the proposed temporary rule on the Internet to be posted within five business days.

(2) Notify persons on the mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule.

(3) Accept written comments on the proposed temporary rule for at least 15 business days prior to adoption of the temporary rule.

(4) Hold at least one public hearing on the proposed temporary rule.

An agency must also prepare a written statement of its findings of need for a temporary rule stating why adherence to the notice and hearing requirements in G.S. 150B-21.2 would be contrary to the public interest and why the immediate adoption of the rule is required. The statement must be signed by the head of the agency adopting the temporary rule.

(b) Review. – When an agency adopts a temporary rule it must submit the rule and the agency's written statement of its findings of the need for the rule to the ~~Codifier of Rules.~~ Rules Review Commission. ~~Within one business day after an agency submits a temporary rule, the Codifier of Rules must review the agency's written statement of findings of need for the rule to determine whether the statement of need meets the criteria listed in subsection (a) or (a1) of this section.~~ Within 15 business days after receiving the proposed temporary rule, the Commission shall review the agency's written statement of findings of need for the rule and the rule to determine whether the statement meets the criteria listed in subsection (a) of this section and the rule meets the standards in G.S. 150B-21.9. The Commission shall direct a member of its staff who is an attorney licensed to practice law in North Carolina to review the statement of findings of need and the rule. The staff member shall make a recommendation to the Commission, which must be approved by the Commission or its designee. The Commission's designee shall be a member of the Commission. In reviewing the statement, the ~~Codifier of Rules~~Commission or its designee may consider any information submitted by the agency or another person. If the ~~Codifier of Rules~~ Commission or its designee finds that the statement meets the ~~criteria,~~criteria listed in subsection (a) of this section and the rule meets the standards in G.S. 150B-21.9, the ~~Codifier of Rules must notify the head of the agency and enter the rule in the North Carolina Administrative Code.~~Commission or its designee must approve the temporary rule and deliver the rule to the Codifier of Rules within two business days of approval. The Codifier of Rules must enter the rule into the North Carolina Administrative Code on the sixth business day following receipt from the Commission or its designee.

If the ~~Codifier of Rules~~Commission or its designee finds that the statement does not meet the ~~criteria,~~ criteria listed in subsection (a) of this section or that the rule does not meet the standards in G.S. 150B-21.9, the ~~Codifier of Rules~~Commission or its designee must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the ~~Codifier of Rules~~Commission or its designee must review the additional findings or new statement

within ~~one business day~~five business days after the agency submits the additional findings or new statement. If the ~~Codifier of Rules~~Commission or its designee again finds that the statement does not meet the criteria listed in subsection (a) ~~or (a1)~~ of this ~~section,~~ section or that the rule does not meet the standards in G.S. 150B-21.9, the ~~Codifier of Rules~~Commission or its designee must immediately notify the head of the ~~agency.~~agency and return the rule to the agency.

If an agency decides not to provide additional findings or submit a new statement when notified by the ~~Codifier of Rules~~ Commission or its designee that the agency's findings of need for a rule do not meet the required ~~criteria,~~ criteria or that the rule does not meet the required standards, the agency must notify the ~~Codifier of Rules~~Commission or its designee of its decision. ~~The Codifier of Rules must then enter the rule in the North Carolina Administrative Code on the sixth business day after receiving notice of the agency's decision.~~ The Commission or its designee shall then return the rule to the agency. When the Commission returns a rule to an agency in accordance with this subsection, the agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. Notwithstanding any other provision of this subsection, if the agency has not complied with the provisions of G.S. 12-3.1, the Codifier of Rules shall not enter the rule into the Code.

(c) Standing. – A person aggrieved by a temporary rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) ~~or (a1)~~ of this section and whether the rule meets the standards in ~~G.S. 150B-21.9 that apply to review of a permanent rule.~~ G.S. 150B-21.9. The court shall not grant an ex parte temporary restraining order.

Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) Effective Date and Expiration. – A temporary rule becomes effective on the date specified in G.S. 150B-21.3. A temporary rule expires on the earliest of the following dates:

(1) The date specified in the rule.

(2) The effective date of the permanent rule adopted to replace the temporary rule, if the Commission approves the permanent rule.

(3) The date the Commission returns to an agency a permanent rule the agency adopted to replace the temporary rule.

(4) The effective date of an act of the General Assembly that specifically disapproves a permanent rule adopted to replace the temporary rule.

(5) 270 days from the date the temporary rule was published in the North Carolina Register, unless the permanent rule adopted to replace the temporary rule has been submitted to the Commission.

(e) Publication. – When the Codifier of Rules enters a temporary rule in the North Carolina Administrative Code, the Codifier must publish the rule in the North Carolina Register. ~~Publication of a temporary rule in the North Carolina Register serves as a notice of rule making proceedings for a permanent rule if the permanent rule is substantially the same as the published temporary rule, unless the agency published a notice of rule making proceedings at least 60 days before it adopted the temporary rule.~~"

SECTION 3. Part 2 of Article 2A of Chapter 150B of the General Statutes is amended by adding a new section to read:

"**§ 150B-21.1A. Adoption of an emergency rule.**

(a) Adoption. – An agency may adopt an emergency rule without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical when it finds that adherence to the notice and hearing requirements of this Part would be contrary to the public interest and that the immediate adoption of the rule is required by a serious and unforeseen threat to the public health or safety. When an agency adopts an emergency rule, it must simultaneously commence the process for adopting a temporary rule by submitting the rule to the Codifier of Rules for publication on the Internet in accordance with G.S. 150B-21.1(a1). The Department of Health and Human Services or the appropriate rule-making agency within the Department may adopt emergency rules in accordance with this section when a recent act of the General Assembly or the United States Congress or a recent change in federal regulations authorizes new or increased services or benefits for children and families and the emergency rule is necessary to implement the change in State or federal law.

(b) Review. – An agency must prepare a written statement of its findings of need for an emergency rule. The statement must be signed by the head of the agency adopting the rule. When an agency adopts an emergency rule, it must submit the rule and the agency's written statement of its findings of the need for the rule to the Codifier of Rules. Within two business days after an agency submits an emergency rule, the Codifier of Rules must review the agency's written statement of findings of need for the rule to determine whether the statement of need meets the criteria in subsection (a) of this section. In reviewing the statement, the Codifier of Rules may consider any information submitted by the agency or another person. If the Codifier of Rules finds that the statement meets the criteria, the Codifier of Rules must notify the head of the agency and enter the rule in the North Carolina Administrative Code on the sixth business day following approval by the Codifier.

If the Codifier of Rules finds that the statement does not meet the criteria in subsection (a) of this section, the Codifier of Rules must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the Codifier of Rules must review the additional findings or new statement within one business day after the agency submits the additional findings or new statement. If the Codifier of Rules again finds that the statement does not meet the criteria in subsection (a) of this section, the Codifier of Rules must immediately notify the head of the agency.

If an agency decides not to provide additional findings or submit a new statement when notified by the Codifier of Rules that the agency's findings of need for a rule do not meet the required criteria, the agency must notify the Codifier of Rules of its decision. The Codifier of Rules must then enter the rule in the North Carolina Administrative Code on the sixth business day after receiving notice of the agency's decision. Notwithstanding any other provision of this subsection, if the agency has not complied with the provisions of G.S. 12-3.1, the Codifier of Rules shall not enter the rule into the Code.

(c) Standing. – A person aggrieved by an emergency rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) of this section and whether the rule meets the standards in G.S. 150B-21.9. The court shall not grant an ex parte temporary restraining order.

Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) Effective Date and Expiration. – An emergency rule becomes effective on the date specified in G.S. 150B-21.3. An emergency rule expires on the earliest of the following dates:

(1) The date specified in the rule.

(2) The effective date of the temporary rule adopted to replace the emergency rule, if the Commission approves the temporary rule.

(3) The date the Commission returns to an agency a temporary rule the agency adopted to replace the emergency rule.

(4) Sixty days from the date the emergency rule was published in the North Carolina Register, unless the temporary rule adopted to replace the emergency rule has been submitted to the Commission.

(e) Publication. – When the Codifier of Rules enters an emergency rule in the North Carolina Administrative Code, the Codifier of Rules must publish the rule in the North Carolina Register."

SECTION 4. G.S. 150B-21.2 reads as rewritten:

"**§ 150B-21.2. Procedure for adopting a permanent rule.**

(a) Steps. – Before an agency adopts a permanent rule, it must take the following actions:

(1) Publish a notice of ~~rule-making proceedings~~ text in the North Carolina ~~Register, unless the proposed rule is substantially the same as a temporary rule published in the North Carolina~~ Register.

(2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.

~~(3) Publish the text of the proposed rule in the North Carolina Register.~~

(4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.

(5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.

~~(b) Notice of Rule-Making Proceedings. – A notice of rule-making proceedings published in the North Carolina Register must include all of the following:~~

~~(1) A statement of the subject matter of the proposed rule making.~~

~~(2) A short explanation of the reason for the proposed action.~~

~~(3) A citation to the law that gives the agency the authority to adopt a rule on the subject matter of the proposed rule making.~~

~~(4) The person to whom questions or written comments may be submitted on the subject matter of the proposed rule making.~~

~~Publication in the North Carolina Register of an agency's rule-making agenda satisfies the requirements of this subsection if the agenda includes the information required by this subsection.~~

(c) ~~Text After Notice of Rule-Making Proceedings. –~~Notice of Text. – A notice of the proposed text of a rule must include all of the following:

(1) The text of the proposed rule.

(2) A short explanation of the reason for the proposed rule.

(3) A citation to the law that gives the agency the authority to adopt the rule.

(4) The proposed effective date of the rule.

(5) The date, time, and place of any public hearing scheduled on the rule.

(6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.

(7) The period of time during which and the person to whom written comments may be submitted on the proposed rule.

(8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.

(9) The procedure by which a person can object to a proposed rule and the requirements for subjecting a proposed rule to the legislative review process.

~~An agency shall not publish the proposed text of a rule until at least 60 days after the date the notice of rule-making proceedings for the proposed rule was published in the North Carolina Register.~~

(d) Mailing List. – An agency must maintain a mailing list of persons who have requested notice of rule making. When an agency publishes in the North Carolina Register a notice of ~~rule-making proceedings or the~~ text of a proposed rule, it must mail a copy of the notice or text to each person on the mailing list who has requested notice ~~of rule-making proceedings~~ on the subject matter described in the notice or the rule affected. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.

(e) Hearing. – An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and ~~all the following apply:~~

~~(1) The notice of text does not schedule a public hearing on the proposed rule.~~

~~(2)~~ ~~The~~ the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published.

~~(3) The proposed text is not a changed version of proposed text the agency previously published in the course of rule-making proceedings but did not adopt.~~

An agency may hold a public hearing on a proposed rule in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published. If notice of a public hearing has been published in the North Carolina Register and that public hearing has been cancelled, the agency shall publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.

(f) Comments. – ~~An agency must accept comments on a notice of proposed rule-making proceedings published in the North Carolina Register until the text of the proposed rule that results from the notice is published.~~ An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register ~~and that requires a fiscal note under G.S. 150B-21.4(b1)~~ for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. ~~An agency must accept comments on the text of any other proposed rule published in the North Carolina Register for at least 30 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer.~~ An agency must consider fully all written and oral comments received.

(g) Adoption. – An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

(1) Affects the interests of persons who, based on ~~either the notice of rule-making proceedings or~~ the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.

(2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.

(3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part. An agency must submit an adopted rule to the Rules Review Commission within 30 days of the agency's adoption of the rule.

(h) Explanation. – An agency must issue a concise written statement explaining why the agency adopted a rule if, within ~~30~~ 15 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule. The agency must issue the explanation within 15 days after receipt of the request for an explanation.

(i) Record. – An agency must keep a record of a rule-making proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, and any written explanation made by the agency for adopting the rule."

SECTION 5. G.S. 150B-21.3 reads as rewritten:

"**§ 150B-21.3. Effective date of rules.**

(a) Temporary and Emergency ~~Rule.~~ Rules. – A temporary rule or an emergency rule becomes effective on the date the Codifier of Rules enters the rule in the North Carolina Administrative Code.

(b) Permanent Rule. – A permanent rule approved by the Commission becomes effective on the first day of the month following the month the rule is approved by the Commission, unless the Commission received written objections to the rule in accordance with subsection (b2) of this section.

(b1) Delayed Effective Dates. – If the Commission received written objections to the rule in accordance with subsection (b2) of this section, the rule becomes effective on the earlier of the thirty-first legislative day or the day of adjournment of the next regular session of the General Assembly that begins at least 25 days after the date the Commission approved the rule, unless a different effective date applies under this section. If a bill that specifically disapproves the rule is introduced in either house of the General Assembly before the thirty-first legislative day of that session, the rule becomes effective on the earlier of either the day an unfavorable final action is taken on the bill or the day that session of the General Assembly adjourns without ratifying a bill that specifically disapproves the rule. If the agency adopting the rule specifies a later effective date than the date that would otherwise apply under this subsection, the later date applies. A permanent rule that is not approved by the Commission or that is specifically disapproved by a bill enacted into law before it becomes effective does not become effective.

A bill specifically disapproves a rule if it contains a provision that refers to the rule by appropriate North Carolina Administrative Code citation and states that the rule is disapproved. Notwithstanding any rule of either house of the General Assembly, any member of the General Assembly may introduce a bill during the first 30 legislative

days of any regular session to disapprove a rule that has been approved by the Commission and that either has not become effective or has become effective by executive order under subsection (c) of this section.

(b2) Objection. – Any person who objects to the adoption of a permanent rule may submit written comments to the agency. If the objection is not resolved prior to adoption of the rule, a person may submit written objections to the Commission. If the Commission receives written objections from 10 or more persons clearly requesting review by the legislature in accordance with instructions contained in the notice pursuant to G.S. 150B-21.2(c)(9) and the Commission approves the rule, the rule will become effective as provided in subsection (b1) of this section. When the requirements of this subsection have been met and a rule is subject to legislative disapproval, the agency may adopt the rule as a temporary rule if the rule would have met the criteria listed in G.S. 150B-21.1(a) at the time the notice of text for the permanent rule was published in the North Carolina Register.

(c) Executive Order Exception. – The Governor may, by executive order, make effective a permanent rule that has been approved by the Commission ~~and has not become effective under subsection (b)~~ but the effective date of which has been delayed in accordance with subsection (b1) of this section upon finding that it is necessary that the rule become effective in order to protect public health, safety, or welfare. A rule made effective by executive order becomes effective on the date the order is issued or at a later date specified in the order. When the Codifier of Rules enters in the North Carolina Administrative Code a rule made effective by executive order, the entry must reflect this action.

A rule that is made effective by executive order remains in effect unless it is specifically disapproved by the General Assembly in a bill enacted into law on or before the day of adjournment of the regular session of the General Assembly that begins at least 25 days after the date the executive order is issued. A rule that is made effective by executive order and that is specifically disapproved by a bill enacted into law is repealed as of the date specified in the bill. If a rule that is made effective by executive order is not specifically disapproved by a bill enacted into law within the time set by this subsection, the Codifier of Rules must note this in the North Carolina Administrative Code.

(c1) Fees. – Notwithstanding any other provision of this section, a rule that establishes a new fee or increases an existing fee shall not become effective until the agency has complied with the requirements of G.S. 12-3.1.

(d) Legislative Day and Day of Adjournment. – As used in this section:

(1) A "legislative day" is a day on which either house of the General Assembly convenes in regular session.

(2) The "day of adjournment" of a regular session held in an odd-numbered year is the day the General Assembly adjourns by joint resolution for more than 10 days.

(3) The "day of adjournment" of a regular session held in an even-numbered year is the day the General Assembly adjourns sine die.

(e) OSHA Standard. – A permanent rule concerning an occupational safety and health standard that is adopted by the Occupational Safety and Health Division of the Department of Labor and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor becomes effective on the date the Division delivers the rule to the Codifier of Rules, unless the Division specifies a later effective date. If the Division specifies a later effective date, the rule becomes effective on that date.

(f) Technical Change. – A permanent rule for which no notice or hearing is required under G.S. 150B-21.5(a)(1) through (a)(5) or G.S. 150B-21.5(b) becomes effective on the first day of the month following the month the rule is approved by the Rules Review Commission."

SECTION 6. G.S. 150B-21.4(b1) reads as rewritten:

"(b1) Substantial Economic Impact. – Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would have a substantial economic impact and that is not identical to a federal regulation that the agency is required to adopt, the agency must obtain a fiscal note for the proposed rule change from the Office of State Budget and Management or prepare a fiscal note for the proposed rule change and have the note approved by that Office. If an agency requests the Office of State Budget and Management to prepare a fiscal note for a proposed rule change, that Office must prepare the note within 90 days after receiving a written request for the note. If the Office of State Budget and Management fails to prepare a fiscal note within this time period, the agency proposing the rule change may prepare a fiscal note. A fiscal note prepared in this circumstance does not require approval of the Office of State Budget and Management.

If an agency prepares the required fiscal note, the agency must submit the note to the Office of State Budget and Management for review. The Office of State Budget and Management must review the fiscal note within 14 days after it is submitted and either approve the note or inform the agency in writing of the reasons why it does not approve the fiscal note. After addressing these reasons, the agency may submit the revised fiscal note to that Office for its review. If an agency is not sure whether a proposed rule change would have a substantial economic impact, the agency may ask the Office of State Budget and Management to determine whether the proposed rule change has a substantial economic impact.

As used in this subsection, the term "substantial economic impact" means an aggregate financial impact on all persons affected of at least ~~five million dollars ($5,000,000)~~ three million dollars ($3,000,000) in a 12-month period."

SECTION 7. G.S. 150B-21.5 reads as rewritten:

"**§ 150B-21.5. Circumstances when notice and rule-making hearing not required.**

(a) Amendment. – An agency is not required to publish a notice of ~~rule-making proceedings or a notice of~~ text in the North Carolina Register or hold a public hearing when it proposes to amend a rule to do one of the following:

(1) Reletter or renumber the rule or subparts of the rule.

(2) Substitute one name for another when an organization or position is renamed.

(3) Correct a citation in the rule to another rule or law when the citation has become inaccurate since the rule was adopted because of the repeal or renumbering of the cited rule or law.

(4) Change information that is readily available to the public, such as an address or a telephone number.

(5) Correct a typographical error in the North Carolina Administrative Code.

(6) Change a rule in response to a request or an objection by the ~~Commission.~~ Commission, unless the Commission determines that the change is substantial.

(b) Repeal. – An agency is not required to publish a notice of ~~rule-making proceedings or a notice of~~ text in the North Carolina Register or hold a public hearing when it proposes to repeal a rule as a result of any of the following:

(1) The law under which the rule was adopted is repealed.

(2) The law under which the rule was adopted or the rule itself is declared unconstitutional.

(3) The rule is declared to be in excess of the agency's statutory authority.

(c) OSHA Standard. – The Occupational Safety and Health Division of the Department of Labor is not required to publish a notice of ~~rule-making proceedings or a notice of~~ text in the North Carolina Register or hold a public hearing when it proposes to adopt a rule that concerns an occupational safety and health standard and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor. The Occupational Safety and Health Division is not required to submit to the Commission for review a rule for which notice and hearing is not required under this subsection.

(d) State Building Code. – The Building Code Council is not required to publish a notice of text in the North Carolina Register when it proposes to adopt a rule that concerns the North Carolina State Building Code. The Building Code Council is required to publish a notice ~~of rule-making proceeding~~ in the North Carolina Register when it proposes to adopt a rule that concerns the North Carolina State Building Code. The notice must include all of the following:

(1) A statement of the subject matter of the proposed rule making.

(2) A short explanation of the reason for the proposed action.

(3) A citation to the law that gives the agency the authority to adopt a rule on the subject matter of the proposed rule making.

(4) The person to whom questions or written comments may be submitted on the subject matter of the proposed rule making.

The Building Code Council is required to submit to the Commission for review a rule for which notice ~~and hearing~~ of text is not required under this subsection. In adopting a rule, the Council shall comply with the procedural requirements of G.S. 150B-21.3."

SECTION 8. G.S. 150B-21.8 reads as rewritten:

"**§ 150B-21.8. Review of rule by Commission.**

(a) ~~Temporary~~ Emergency Rule. – The Commission does not review ~~a temporary~~an emergency rule.

(b) Temporary and Permanent ~~Rule.~~ Rules. – An agency must submit ~~a~~ temporary and permanent ~~rule~~ rules adopted by it to the Commission before the rule can be included in the North Carolina Administrative Code. The Commission reviews a temporary or permanent rule in accordance with the standards in G.S. 150B-21.9 and follows the procedure in this Part in its review of a ~~permanent~~ rule.

(c) Scope. – When the Commission reviews an amendment to a permanent rule, it may review the entire rule that is being amended. The procedure in G.S. 150B-21.12 applies when the Commission objects to a part of a permanent rule that is within its scope of review but is not changed by a rule amendment.

(d) Judicial Review. – When the Commission returns a permanent rule to an agency in accordance with G.S. 150B-21.12(d), the agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes."

SECTION 9. G.S. 150B-21.9 reads as rewritten:

"**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. – The Commission must determine whether a rule meets all of the following criteria:

(1) It is within the authority delegated to the agency by the General Assembly.

(2) It is clear and unambiguous.

(3) It is reasonably necessary to ~~fulfill a duty delegated to the agency by~~ implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. ~~when considered in light of~~ The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is ~~proposed and the legislative intent of the General Assembly in delegating the duty.~~proposed.

(4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

~~The Commission may determine if a rule submitted to it was adopted in accordance with Part 2 of this Article.~~ The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

~~The Commission must notify the agency that adopted the rule if it determines that a rule was not adopted in accordance with Part 2 of this Article and must return the rule to the agency.~~ Entry of a rule in the North Carolina Administrative Code after review by

the Commission ~~is conclusive evidence~~ creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. – The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1."

SECTION 10. G.S. 150B-21.12(c) reads as rewritten:

"(c) Changes. – When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission shall use the standards set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.1(a1) and (b)."

SECTION 11. G.S. 150B-21.17(a) reads as rewritten:

"(a) Content. – The Codifier of Rules must publish the North Carolina Register. The North Carolina Register must be published at least two times a month and must contain the following:

(1) Temporary rules entered in the North Carolina Administrative Code.

(1a) ~~Notices of rule-making proceedings, the~~ The text of proposed ~~rules,~~ rules and the text of permanent rules approved by the Commission. ~~Except with regard to notices of rule-making proceedings, this subdivision does not apply to the North Carolina State Building Code.~~

(1b) Emergency rules entered into the North Carolina Administrative Code.

(2) Notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165.

(3) Executive orders of the Governor.

(4) Final decision letters from the United States Attorney General concerning changes in laws that affect voting in a jurisdiction subject to section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H.

(5) Orders of the Tax Review Board issued under G.S. 105-241.2.

(6) Other information the Codifier determines to be helpful to the public."

SECTION 12. G.S. 150B-2(8a) reads as rewritten:

"(8a) "Rule" means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:

a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.

b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, by an occupational licensing board, as defined by G.S. 93B-1, or by the State Board of Elections.

c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

d. A form, the contents or substantive requirements of which are prescribed by rule or statute.

e. Statements of agency policy made in the context of another proceeding, including:

1. Declaratory rulings under G.S. 150B-4.
2. Orders of establishing or fixing rates or tariffs.

f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.

g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.

h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Personnel Commission.

j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.1 and the variable component of the excise tax on motor fuel under G.S. 105-449.80.

k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission, and approved by the Governor."

SECTION 13. G.S. 131E-176(25) reads as rewritten:

"(25) "State Medical Facilities Plan" means the plan prepared by the Department of Health and Human Services and the North Carolina State Health Coordinating Council, and approved by the Governor. In preparing the Plan, the Department and the State Health Coordinating Council shall maintain a mailing list of persons who have requested notice of public hearings regarding the Plan. Not less than 15 days prior to a scheduled public hearing, the Department shall notify persons on its mailing list of the date, time, and location of the hearing. The Department shall hold at least one public hearing prior to the adoption of the proposed Plan and at least six public hearings after the adoption of the proposed Plan by the State Health Coordinating Council. The Council shall accept oral and written comments from the public concerning the Plan."

SECTION 14. Nothing in this act shall be construed to limit or repeal any specific grant of temporary rule-making authority to an agency enacted by the General Assembly prior to the effective date of this act.

SECTION 15. This act becomes effective July 1, 2003, and applies to temporary and emergency rules adopted on or after that date, and to permanent rules adopted on or after October 1, 2003.

HOUSE BILL 1151:
Improve Rule-Making Process.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Rep. Nesbitt
Date:	May 20, 2003	**Summary by:**	Karen Cochrane Brown
Version:	Proposed Committee Substitute H1151-CSRO-20[v.1]		Staff Attorney

SUMMARY: ***House Bill 1151 amends the Administrative Procedure Act (APA) to reduce the time required make a permanent rule effective in most cases. The bill changes the procedure for adopting temporary rules and makes them subject to review by the Rules Review Commission. It also creates a procedure for adopting emergency rules and clarifies the role of the Rules Review Commission. The bill further excludes the State Medical Facilities Plan from the definition of a rule and provides notice and hearing requirements for the adoption of the Plan.***

The Proposed Committee Substitute makes clarifying changes to the provision relating to temporary rules; authorizes the Department of Health and Human Services to adopt emergency rules when necessary to increase services and benefits to children and families; and clarifies that when an agency changes a rule substantially in response to an objection by the Rules Review Commission, the agency must republish the rule using the procedure for temporary rules.

CURRENT LAW: Article 2A of the APA establishes the procedures for an agency to adopt a rule. The APA authorizes the adoption of temporary and permanent rules. A temporary rule can be adopted very quickly if the agency has a statutory basis to adopt it. Temporary rules are not reviewed by the Rules Review Commission (RRC) and may go into effect as soon as they are entered into the Administrative Code.

Permanent rules have a more lengthy process. In order to adopt a permanent rule an agency must first publish a notice of rulemaking proceeding, which is a statement of the subject matter of the rule, in the North Carolina Register for at least 60 days. The agency must also determine whether the rule has a State or local fiscal impact, or a substantial economic impact, and if it does the agency must prepare or obtain from OSBM a fiscal note. The agency must then publish the notice of text of the rule and accept public comment for at least 30 days. In some cases the agency must also hold at least one public hearing on the rule. The agency may then adopt the rule. The rule is then reviewed by the RRC. Once the rule is approved by the RRC it may not become effective until the 31st legislative day of the next regular session of the General Assembly that occurs not less than 25 days after approval by the RRC. However, if any member of the General Assembly introduces a bill to disapprove the rule within the first 31 legislative days, it cannot go into effect until an unfavorable action is taken on the bill, or adjournment of the session without enacting the bill.

BILL ANALYSIS: House Bill 1151 revises the temporary and permanent rulemaking process and creates a new category of emergency rule.

Temporary Rules. - The bill makes the following changes regarding temporary rules:

1. Defines the term "recent" to mean 210 days prior to the submission of the temporary rule to the RRC.
2. Requires that prior to adoption the agency give notice to interested parties, accept written comments, and hold at least one public hearing.
3. Requires that temporary rules be reviewed by the RRC, using the same standards used for permanent rules. The Commission must conduct the review within 15 days of receipt.
4. Authorizes judicial review when a rule is rejected by the RRC.

The PCS clarifies that the Commission must review both the statement of need and the rule. It also provides that a member of the Commission's staff who is a licensed attorney shall initially review the statement and rule and make a recommendation. The Commission may then designate one of its members to approve the staff recommendation.

Emergency Rules. - The bill creates a new category of rule called emergency rules for cases of serious and unforeseen threat to public health or safety. These rules can be adopted using the same procedure currently in effect for temporary rules. The rules will be reviewed by the Codifier of rules and are entered into the Administrative Code by the sixth day after approval. When an agency adopts an emergency rule it must simultaneously commence the process for adopting a temporary rule. Emergency rules become effective when they are entered into the Code and expire after 60 days unless a temporary rule adopted to replace it has been submitted to the Commission.

The PCS adds a provision authorizing the Department of Health and Human Services to adopt an emergency rule when a recent act of the General Assembly or Congress or a recent federal regulation provides new or increased services or benefits to children and families and the emergency rule is necessary to implement the change in law.

Permanent Rules. - The bill makes the following changes regarding permanent rules:

1. Eliminates the requirement of publishing a notice of rulemaking proceeding to begin the process for adopting a permanent rule.
2. Provides that permanent rules go into effect on the first day of the month following the month they are approved by the RRC, unless the Commission receives written objections from ten or more people. If objections are received, the rules are delayed and become subject to legislative disapproval, as under current law. If this occurs, the agency may adopt the rule as a temporary rule if the rule would have qualified as a temporary rule when the process began.
3. The threshold to trigger the substantial economic impact fiscal note is reduced from $5,000,000 to $3,000,000.
4. Authorizes judicial review when a rule is rejected by the RRC.

The PCS clarifies that the RRC may review the entire rule when a rule is being amended only with regard to permanent rules.

Rules Review Commission. - The bill makes the following changes regarding the RRC:

1. Gives the Commission authority to review temporary rules using the same standard applied to permanent rules.
2. Adds a fourth standard requiring the Commission to determine whether the rule was adopted in accordance with Part 2 of Article 2A of the APA.

3. Clarifies the standard of reasonable necessity to provide that the rule must be necessary to interpret or implement a State or federal statute or federal regulation.
4. Provides that approval by RRC creates a rebuttable presumption that the rule was adopted properly.

The PCS adds a clarification that when an agency changes a rule in response to an objection by the RRC, the Commission must determine whether the change is substantial using the existing standard for changes made by an agency prior to adoption. If the change is substantial, the rule must be republished and reviewed in accordance with the temporary rule procedure.

The bill also excludes the State Medical Facilities Plan from the definition of a rule and sets notice and hearing requirements in the law governing the State Medical Facilities Plan.

Finally, the bill "grandfathers" any temporary rulemaking authority granted to an agency prior to the effective date of this act.

The act would become effective July 1, 2003, and apply to temporary and emergency rules adopted on or after that date, and to permanent rules adopted on or after October 1, 2003.

H1151-SMRO-003

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Wednesday, May 21, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B. **1175** Fair Housing Complaints.

Draft Number:	PCS 60352
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 1

Committee Clerk Comments:

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	May 20, 2003	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 1175	Fair Housing Complaints.	Representative Michaux, Jr.
HB 1048	Juvenile Code Revisions/Ct. Improvement Proj.	Representative Ross
HB 1151	Improve Rule-Making Process.	Representative Wilson Representative Nesbitt, Jr. Representative Culpepper, III

Senator Fletcher L. Hartsell, Jr., Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
May 20, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. Welcome and Opening Remarks

II. Bills to be Considered

HB 1175	Fair Housing Complaints.	Representative Michaux, Jr.
HB 1048	Juvenile Code Revisions/Ct. Improvement Proj.	Representative Ross
HB 1151	Improve Rule-Making Process.	Representative Wilson Representative Nesbitt, Jr. Representative Culpepper, III

III. Other Business

IV. Adjournment

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — May 20, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Danielle Adams	NCFHC
Rick Zechini	NC Assoc. of REALTORS
R. Paul Wilms	NCMBA
Stella Adams	NCFHC
JOE DELUCA	NC RRC
Marc Wedge	AG
Terri L. Bailey	A.G
Preston Howard	MCIC
Michael July	Young Moore Henderson
Nicky Fountain	" " "
Jo McCants	AOC

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 5/20/03

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Jane Smith	NCDSS
Bobby Bryan	RRC
Peter Anne Mumford	NCPC
Grady McLellan	N.C. CoNet.
Steve Wall	Conservation Council
Patsy Hall	General Statutes Commission
Sheryl Stephens	DENR
Kari Barsness	NCDENR
Dan Oakley	DENR
Kathie Austin	FRD
Molly Mavich	DAP

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II 5/20/03

Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
David Knight	NC Sierra Club
Stephen Burns	LLPP
Carl Dorbrin	OSP
Greg Styers	Kilpatrick Stockton
Sara Compton	Dept St Ed
David Crawford	AIA NC
Isa Peay	Capital Hwy
Eliz Ausley	NCPIRG
[illegible]	[illegible]
Dina DiMaio	NCBA
Gary McLaughlin	NC AGO

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 5/20/03

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Ricky Harrison	CRC
[illegible]	Gov's office
Amy Dobson	NC State Ethics
Chris Brown	NCFA
[illegible]	NCPC
John Phelps	NCCCJ
Lisa D [illegible]	NC Home Builders Assn
[illegible]	CAPF
[illegible]	ASK
Hugh Tilson	NCBA
Kim Hibbard	NCLM

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 5/20/03

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
R. Ro & Hs	DEM
[illegible]	CAS
Reginald Johnson	CRL

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 1175

Short Title:	Fair Housing Complaints.	(Public)
Sponsors:	Representative Michaux.	
Referred to:	Ways and Means.	

April 10, 2003

A BILL TO BE ENTITLED

AN ACT ALLOWING FAIR HOUSING ORGANIZATIONS TO FILE COMPLAINTS WITH THE STATE HUMAN RELATIONS COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 41A-7(a) reads as rewritten:

"(a) Any person or fair housing organization that provides assistance to any person who claims to have been injured by an unlawful discriminatory housing practice or who reasonably believes that he will be irrevocably injured by an unlawful discriminatory housing practice may file a complaint with the North Carolina Human Relations Commission. Complaints shall be in writing, shall state the facts upon which the allegation of an unlawful discriminatory housing practice is based, and shall contain such other information and be in such form as the Commission requires. Commission employees shall assist complainants in reducing complaints to writing and shall assist in setting forth the information in the complaint as may be required by the Commission. Within 10 days after receipt of the complaint, the Director of the Commission shall serve on the respondent a copy of the complaint and a notice advising the respondent of his procedural rights and obligations under this Chapter. Within 10 days after receipt of the complaint, the Director of the Commission shall serve on the complainant a notice acknowledging the filing of the complaint and informing the complainant of his time limits and choice of forums under this Chapter.

No complaint may be filed with the Commission under this section during any period in which the Commission is not certified by the Secretary of the United States Department of Housing and Urban Development in accordance with 42 U.S.C. § 3610(f) to have jurisdiction over the subject matter of the complaint. Provided, however, that during any such period in which the Commission is not certified, any person who claims to have been injured by an unlawful discriminatory practice or who reasonably believes that he will be irrevocably injured by an unlawful discriminatory housing practice may bring a civil action directly in superior court in accordance with the provisions of subsection (j) of this section, except that any such civil action shall be

commenced within one year after the occurrence or termination of the alleged unlawful discriminatory housing practice."

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 1175
PROPOSED SENATE COMMITTEE SUBSTITUTE H1175-CSRC-55 [v.2]

5/17/2003 3:05:03 PM

Short Title: Fair Housing Complaints. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT ALLOWING FAIR HOUSING ORGANIZATIONS TO FILE COMPLAINTS WITH THE STATE HUMAN RELATIONS COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 41A-7(a) reads as rewritten:

"(a) Any person who claims to have been injured by an unlawful discriminatory housing practice or who reasonably believes that he will be irrevocably injured by an unlawful discriminatory housing practice may file a complaint with the North Carolina Human Relations Commission. A fair housing enforcement organization, as defined in regulations adopted under 42 U.S.C. §3602 (1968), may file a complaint with the Commission on behalf of a person who claims to have been injured by or reasonably believes he will be irrevocably injured by an unlawful discriminatory housing practice. Complaints shall be in writing, shall state the facts upon which the allegation of an unlawful discriminatory housing practice is based, and shall contain such other information and be in such form as the Commission requires. Commission employees shall assist complainants in reducing complaints to writing and shall assist in setting forth the information in the complaint as may be required by the Commission. Within 10 days after receipt of the complaint, the Director of the Commission shall serve on the respondent a copy of the complaint and a notice advising the respondent of his procedural rights and obligations under this Chapter. Within 10 days after receipt of the complaint, the Director of the Commission shall serve on the complainant a notice acknowledging the filing of the complaint and informing the complainant of his time limits and choice of forums under this Chapter.

No complaint may be filed with the Commission under this section during any period in which the Commission is not certified by the Secretary of the United States Department of Housing and Urban Development in accordance with 42 U.S.C. § 3610(f) to have jurisdiction over the subject matter of the complaint. Provided, however, that during any such period in which the Commission is not certified, any

person who claims to have been injured by an unlawful discriminatory practice or who reasonably believes that he will be irrevocably injured by an unlawful discriminatory housing practice may bring a civil action directly in superior court in accordance with the provisions of subsection (j) of this section, except that any such civil action shall be commenced within one year after the occurrence or termination of the alleged unlawful discriminatory housing practice."

SECTION 2. This act is effective when it becomes law.

HOUSE BILL 1175:
Fair Housing Complaints

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Rep. Michaux
Date:	May 20, 2003	**Summary by:**	Kory J. Goldsmith
Version:	Proposed Committee Substitute H1175-CSRC-55[v.2]		Committee Counsel

SUMMARY: ***The Proposed Committee Substitute to HB1175 allows fair housing enforcement organizations to file complaints with the North Carolina Human Relations Commission on behalf of persons who claim to have been injured or believe they will be irrevocably injured by a discriminatory housing practice.***

CURRENT LAW: Both Federal law (Chapter 42 of the Federal Code) and State law (Chapter 41A of the General Statutes) prohibits unlawful discriminatory housing practices against persons based upon their race, color, religion, sex, national origin, handicapping condition, or familial status. Discriminatory housing practices include:

- Refusal to engage in a real estate transaction.
- Refusing to permit reasonable accommodations to be made at the expense of a handicapped person.
- Refusing to negotiate a real estate transaction.
- Representing that real estate is not available for inspection, sale, or rental.
- Discriminating against a protected person or class of persons in the making of a loan for the purchase or refinance of residential real estate.
- Inducing others to enter into real estate transactions by representing that a changes has occurred or is going to occur in the composition of block or neighborhood.

A person who believes he or she has been injured by a discriminatory housing practice, or who believes he or she will be injured by a discriminatory housing practice may file a complaint with the North Carolina Human Relations Commission. Upon receipt of a complaint, the Commission must begin an investigation to determine whether there are reasonable grounds to believe that an unlawful discriminatory housing practice has occurred or is about to occur. The Commission shall commence a conciliation process if it finds there are reasonable grounds to believe a discriminatory practice has occurred or is about to occur. If the conciliation process is not successful, the complaining party may request and the Commission must issue a right to sue letter that allows the complaining party to file a civil action in federal court.

Many federal courts have held that a fair housing enforcement organization has standing due to "injury in fact" to file suit against a person who is alleged to have engaged in unlawful discriminatory housing practices where the organization has devoted significant resources to identifying and counteracting the discrimination. However, in Ray Bergman Real Estate Rentals v. North Carolina Fair Housing Center, 568 S.E.2d (2002), the North Carolina Court of Appeals held that the North Carolina Fair Housing Center did not have standing to bring suit for discriminatory practices against Hispanic tenants because the only

injury claimed by the organization was financial and as a result of a voluntary investigation. North Carolina courts have previously held that a plaintiff must show the following:

(1) "injury in fact", or injury that is concrete and particularized, and actual or imminent;

(2) causation between the challenged action of the defendant and the injury; and

(3) likelihood that the injury will be redressed by a favorable decision.

BILL ANALYSIS: HB 1175 amends subsection (a) of G.S. 41A-7 to permit a "fair housing enforcement organization" to file a complaint with the North Carolina Human Relations Commission on behalf of persons who believe they have been injured by a discriminatory housing practice or believe they will be irrevocably injured by an unlawful discriminatory housing practice.

A "fair housing enforcement organization" is defined in federal regulations (24 C.F.R. Sec. 125.103) as any organization, whether or not it is solely engaged in fair housing enforcement activities, that:

(1) Is organized as a private, tax-exempt, nonprofit, charitable organization;

(2) Is currently engaged in complaint intake, complaint investigation, testing for fair housing violations and enforcement of meritorious claims; and

(3) Upon the receipt of Federal funds, the organization will continue to be engaged in complaint intake, complaint investigation, testing for fair housing violations and enforcement of meritorious claims.

H1175-SMRC-002

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 2

HOUSE BILL 1048

Committee Substitute Favorable 4/24/03

Short Title: Juvenile Code Revisions/Ct. Improvement Proj. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO MAKE REVISIONS TO THE JUVENILE CODE AS RECOMMENDED BY THE NORTH CAROLINA JUVENILE COURT IMPROVEMENT PROJECT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 7B-304 is repealed.

SECTION 2. G.S. 7B-808 reads as rewritten:

"**§ 7B-808. Predisposition ~~investigation and~~ report.**

(a) The court shall proceed to the dispositional hearing upon receipt of sufficient social, medical, psychiatric, psychological, and educational information. No predisposition report shall be submitted to or considered by the court prior to the completion of the adjudicatory hearing. The court may proceed with the dispositional hearing without receiving a predisposition report if the court makes a written finding that a report is not necessary.~~The court shall permit the guardian ad litem or juvenile to inspect any predisposition report to be considered by the court in making the disposition unless the court determines that disclosure would seriously harm the juvenile's treatment or would violate a promise of confidentiality. Opportunity to offer evidence in rebuttal shall be afforded the guardian ad litem or juvenile, and the juvenile's parent, guardian, or custodian at the dispositional hearing. The court may order counsel not to disclose parts of the report to the guardian ad litem or juvenile, or the juvenile's parent, guardian, or custodian if the court finds that disclosure would seriously harm the treatment of the juvenile or would violate a promise of confidentiality given to a source of information.~~

(b) The director of the department of social services shall prepare the predisposition report for the court containing the results of any mental health evaluation of a juvenile under G.S. 7B-503, a placement plan, and a treatment plan the director deems appropriate to meet the juvenile's needs.

(c) The chief district court judge may adopt local rules or make an administrative order addressing the sharing of the reports among parties, including an order that prohibits disclosure of the report to the juvenile if the court determines that disclosure

would not be in the best interest of the juvenile. Such local rules or administrative order may not:

(1) Prohibit a party entitled by law to receive confidential information from receiving that information.

(2) Allow disclosure of any confidential source protected by statute."

SECTION 3. G.S. 7B-1111(a)(6) reads as rewritten:

"(a) The court may terminate the parental rights upon a finding of one or more of the following:

...

(6) That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other ~~similar~~ cause or ~~condition.~~condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

...."

SECTION 4. G.S. 7B-1101 reads as rewritten:

"**§ 7B-1101. Jurisdiction.**

The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. The parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right. The fees of appointed counsel shall be borne by the Office of Indigent Defense Services. In addition to the right to appointed counsel set forth above, a guardian ad litem shall be appointed in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent in the following cases:

(1) Where it is alleged that a parent's rights should be terminated pursuant to ~~G.S. 7B-1111(6); or~~G.S. 7B-1111(6), and the incapability to provide proper care and supervision pursuant to that provision is the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or another similar cause or condition.

(2) Where the parent is under the age of 18 years.

The fees of the guardian ad litem shall be borne by the Office of Indigent Defense Services when the court finds that the respondent is indigent. In other cases the fees of the court-appointed guardian ad litem shall be a proper charge against the respondent if the respondent does not secure private legal counsel. Provided, that before exercising jurisdiction under this Article, the court shall find that it would have jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or

50A-204. Provided, further, that the clerk of superior court shall have jurisdiction for adoptions under the provisions of G.S. 48-2-100 and Chapter 48 of the General Statutes generally."

SECTION 5. G.S. 7B-100 is amended by adding the following new subdivision to read:

"This Subchapter shall be interpreted and construed so as to implement the following purposes and policies:

...

(5) To provide standards, consistent with the Adoption and Safe Families Act of 1997, P.L. 105-89, for ensuring that the best interests of the juvenile are of paramount consideration by the court and that when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a safe, permanent home within a reasonable amount of time."

SECTION 6. Article 4 of Chapter 7B of the General Statutes is amended by adding a new section to read:

"**§ 7B-408. Copy of petition and notices to guardian ad litem.**

Immediately after a petition has been filed alleging that a juvenile is abused or neglected, the clerk shall provide a copy of the petition and any notices of hearings to the local guardian ad litem office."

SECTION 7. G.S. 7B-1108(b) reads as rewritten:

"(b) If an answer or response denies any material allegation of the petition or motion, the court shall appoint a guardian ad litem for the juvenile to represent the best interests of the juvenile, unless the petition or motion was filed by the guardian ad litem pursuant to G.S. 7B-1103, or a guardian ad litem has already been appointed pursuant to G.S. 7B-601. A licensed attorney shall be appointed to assist those guardians ad litem who are not attorneys licensed to practice in North Carolina. The appointment, duties, and payment of the guardian ad litem shall be the same as in G.S. 7B-601 and ~~G.S. 7B-603.~~G.S. 7B-603, but in no event shall a guardian ad litem who is trained and supervised by the guardian ad litem program be appointed to any case unless the juvenile is or has been the subject of a petition for abuse, neglect, or dependency or with good cause shown the local guardian ad litem program consents to the appointment. The court shall conduct a special hearing after notice of not less than 10 days nor more than 30 days given by the petitioner or movant to the respondent who answered or responded, and the guardian ad litem for the juvenile to determine the issues raised by the petition and answer or motion and response.

Notice of the hearing shall be deemed to have been given upon the depositing thereof in the United States mail, first-class postage prepaid, and addressed to the respondent, and guardian ad litem or their counsel of record, at the addresses appearing in the petition or motion and responsive pleading."

SECTION 8. G.S. 7B-1003 reads as rewritten:

"**§ 7B-1003. Disposition pending appeal.**

Pending disposition of an appeal, the return of the juvenile to the custody of the parent or guardian of the juvenile, with or without conditions, may issue unless the court

orders otherwise. When the court has found that a juvenile has suffered physical abuse and that the individual responsible for the abuse has a history of violent behavior, the court shall consider the opinion of the mental health professional who performed the evaluation under G.S. 7B-503(b) before returning the juvenile to the custody of that individual. For compelling reasons which must be stated in writing, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State. The provisions of subsections ~~(b), (c), and (d)~~(b) and (c) of G.S. 7B-905 shall apply to any order entered under this section which provides for the placement or continued placement of a juvenile in foster care."

SECTION 9.(a) G.S. 7B-600 is amended by adding a new subsection to read:

"(c) If the court appoints an individual guardian of the person pursuant to this section, the court shall verify that the person being appointed as guardian of the juvenile understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile."

SECTION 9.(b) G.S. 7B-903 is amended by adding a new subsection to read:

"(c) If the court determines that the juvenile shall be placed in the custody of an individual other than the parents, the court shall verify that the person receiving custody of the juvenile understands the legal significance of the placement and will have adequate resources to care appropriately for the juvenile."

SECTION 9.(c) G.S. 7B-906 is amended by adding a new subsection to read:

"(g) If the court determines that the juvenile shall be placed in the custody of an individual other than the parents or appoints an individual guardian of the person pursuant to G.S. 7B-600, the court shall verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile."

SECTION 9.(d) G.S. 7B-907 is amended by adding a new subsection to read:

"(f) If the court determines that the juvenile shall be placed in the custody of an individual other than the parents or appoints an individual guardian of the person pursuant to G.S. 7B-600, the court shall verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile."

SECTION 10. G.S. 14-16.10(1) reads as rewritten:

"The following definitions apply in this Article:

(1) Court officer. – Magistrate, clerk of superior court, acting clerk, assistant or deputy clerk, judge, or justice of the General Court of Justice; district attorney, assistant district attorney, or any other attorney designated by the district attorney to act for the State or on behalf of the district attorney; public defender or assistant defender;

court reporter; juvenile court counselor as defined in ~~G.S. 7B-1501(18a).~~G.S. 7B-1501(18a); any attorney or other individual employed by or acting on behalf of the department of social services in proceedings pursuant to Subchapter I of Chapter 7B of the General Statutes; any attorney or other individual appointed pursuant to G.S. 7B-601 or G.S. 7B-1108 or employed by the Guardian ad Litem Services Division of the Administrative Office of the Courts."

SECTION 11. Section 10 of this act becomes effective December 1, 2003, and applies to offenses committed on or after that date. The remainder of this act is effective when it becomes law.

HOUSE BILL 1048:
Juvenile Code Revisions/Ct. Improvement Proj.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Rep. Ross
Date:	May 20, 2003	**Summary by:**	R. Erika Churchill
Version:	Second Edition		Staff Attorney

SUMMARY: House Bill 1048, recommended by the Juvenile Code Revision Committee of the North Carolina Court Improvement Project, would make various changes to Subchapter 1 of Chapter 7B (Juvenile Code - Abuse, Neglect, and Dependency).

CURRENT LAW and BILL ANALYSIS:

Sections 1 and 2. Current law requires the DSS director to prepare for the court a report, which is to be made available to the court immediately following adjudication and which contains the results of any mental health evaluations, a home placement plan and a treatment plan for the juvenile. G.S. 7B-304. In a separate statute, DSS also is required to prepare for the court a predisposition report, which is also to be available to the court following adjudication. The bill would merge the two statutes into one, making both clearly applicable to abuse, neglect and dependency proceedings. Both current statutes were enacted prior to the revision of the Juvenile Code that separated out undisciplined and delinquency proceedings.

Section 3. The bill would amend the wording of the ground for termination of parental rights based upon dependency as defined in G.S. 7B-101 to conform the wording of that definition of dependency.

Section 4. The bill would conform the requirement for the appointment of a guardian ad litem for the parent in a termination of parental rights proceeding to the stated reasons of incapability to parent in the grounds for termination of parental rights. Without the clarification, a guardian ad litem for the parent technically would have to be appointed in every case alleging dependency as a ground for termination of parental rights, including cases where the parent is not alleged to be incompetent.

Section 5. The bill would add to the enumerated policies and purposes of the Juvenile Code. This addition would state the purpose of providing standards for ensuring that the best interests of the juvenile are foremost in consideration by the court. The statement is consistent with the Adoption and Safe Families Act of 1997 and current case law.

Section 6. The bill would add a new section to Article 4 (Venue; Petitions) to direct the clerk's office to provide a copy of the petition and any notices of hearings to the local guardian ad litem's office when a petition alleging abuse or neglect is filed. A guardian ad litem is to be appointed in either situation under G.S. 7B-601(a), but often the official appointment is during or after the non-secure custody hearing. The guardian ad litem's office could begin their work prior to this time, and attend the non-secure custody hearing, if they were notified of the existence of the case.

Section 7. The bill would clarify that guardians ad litem from the Guardian ad Litem Program are to be appointed in only those termination of parental rights cases to represent children who are or have been involved in an abuse, neglect or dependency proceeding. This amendment would resolve the conflict with G.S. 7B-1200, which creates the Guardian ad Litem program for the specific purpose of

representing children who are the subject of an abuse, neglect, or dependency judicial proceedings, and G.S.7B-601, which details the responsibilities of the Guardian ad Litem.

Section 8. The bill would delete a reference to a non-existent statute subsection.

Section 9(a)-(d). The bill would require the court, when conducting a permanency planning hearing, to verify that the person receiving custody, or being appointed guardian, of a juvenile understands the placement and has adequate resources to appropriately care for the juvenile. The requirement is added to each statute where appointment of a guardian or placement through custody can be accomplished.

Section 10. The bill would provide for an increased penalty for endangering persons involved in juvenile abuse, neglect and dependency actions, by including those persons in the definition of court personnel. (Effective December 1, 2003.)

BACKGROUND: The recommendations for the bill came from the Juvenile Code Revision Committee of the North Carolina Court Improvement Project is an inter-disciplinary committee, made up of individuals who represent the various players in the court system handling abuse, neglect, dependency, and termination of parental rights cases. On the committee are representatives of Children's Services Division of DHHS, Court Improvement Project, Guardian ad Litem Program, DSS Attorneys Association, juvenile court judges, child welfare attorneys with the Office of the Attorney General, attorneys from Indigent Defense Services, and others.

EFFECTIVE DATE: The bill would become effective when it becomes law, except as noted above for Section 10.

H1048-SMRH-002

NORTH CAROLINA GENERAL ASSEMBLY
LEGISLATIVE FISCAL NOTE
(INCARCERATION NOTE G.S. 120-36.7)

BILL NUMBER: HB 1048 2nd Edition

SHORT TITLE: Juvenile Code Revisions/Ct. Improvement

SPONSOR(S): Representative Ross

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2003-04	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08
GENERAL FUND					
Correction					
Recurring		Unable to determine exact amount.			
Judicial					
Recurring		Unable to determine exact amount.			
TOTAL EXPENDITURES:		Unable to determine exact amount.			
ADDITIONAL PRISON BEDS*		Unable to determine exact amount.			
POSITIONS: (cumulative)		Unable to determine exact amount.			

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch

EFFECTIVE DATE: Effective when it becomes law, except for Section 10, which is effective December 1, 2003.

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY:[1] HB 1048 makes various changes to Subchapter 1 of Chapter 7B (Juvenile Code – Abuse, Neglect, and Dependency). In addition, new G.S. 7B-408 requires the clerk to provide a copy of the petition and notices of hearings to the local guardian ad litem office immediately after a petition has been filed. The bill also requires the court to verify that the person being appointed as guardian of the juvenile understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile. The bill would permit the court to terminate the parental rights upon finding that the parent is incapable of providing proper care and supervision of the juvenile and the parent lacks an appropriate alternative child care arrangement.

HB 1408 also expands the definition of "court officer" under G.S. 14-16.01(1) to include: (1) an attorney or other individual employed by or acting on behalf of the department of social services in juvenile abuse, neglect, and dependency cases; and (2) an attorney or other individual appointed as a guardian ad litem or employed by the Administrative Office of the Court's guardian ad litem program. This provides for an increased penalty for endangering persons involved in juvenile abuse, neglect, and dependency actions, by including those persons in the definition of court personnel.

ASSUMPTIONS AND METHODOLOGY:

General

The Sentencing and Policy Advisory Commission prepares prison population projections for each criminal penalty bill. The Commission assumes for each bill that increasing criminal penalties does not have a deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division (FRD) does not assume savings due to deterrent effects for this bill or other criminal penalty bills.

Department of Correction

The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes and fiscal memos are based on January 2003 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory board, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five year Fiscal Note horizon and beyond.* The number of beds needed will always be equal to the projected number of inmates due to a bill.

The Sentencing and Policy Advisory Commission notes that there were no convictions in FY 2001-2002 under G.S. 14-16.6 and one conviction under G.S. 14-16.7. **However, it is not known how many additional convictions would result by broadening the scope of the existing statute to include attorneys employed by the Department of Social Services, Guardian ad Litem Services Division, or appointed by the court to represent a juvenile.**

[1] AOC Research and Planning and NC General Assembly Research Division

If, for example, there were ten additional Class I convictions under this proposed bill per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and three additional prison beds the second year. In FY 2001-2002, 55 percent of Class I felons received community sentences, 36 percent received intermediate sentences, and nine percent received active sentences. If, for example, there were two additional Class F convictions under the proposed bill per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and two additional prison beds the second year. In FY 2001-2002, 55 percent of Class F felons received intermediate sentences and 45 percent received active sentences. In 2001-2002, costs for community and intermediate sanctions ranged from $1.83 to $11.47 per offender per day, and the statewide average operating cost for one prison inmate was $62.43/day ($22,787/year).

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts (AOC) provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

AOC data for calendar year 2002 reveal that three defendants were charged under current G.S. 14-16.6(a) for assaulting an executive, legislative, or court officer and two defendants were charged under current G.S. 14-16.6(b) for assaulting an executive, legislative, or court officer with a weapon. However, the AOC does not expect a significant increase in the number of charges as a result of this bill since assault of DSS attorneys/personnel and guardians ad litem is currently proscribed under various assault statutes. For offenses of G.S. 14-16.6 that are brought to trial as Class F felonies, the estimated court cost per trial is $7,969. For Class F felony offenses not brought to trial, and where a guilty plea is entered, AOC estimates the cost per guilty plea at $387.

In addition, AOC data for calendar year 2002 reveal that seven defendants were charged with a Class I felony under current G.S. 14-16.7 for threatening an executive, legislative, or court officer. Again, the AOC does not expect a significant increase in the number of charges as a result of this bill since making threats against DSS attorneys/personnel and guardians ad litem is proscribed under current G.S. 14-277.1. However, the AOC has no data from which to estimate the number of additional charges that would arise by including DSS attorneys/personnel and guardians ad litem under G.S. 14-16.7. For offenses that are brought to trial as Class I felonies, the estimated court cost per trial is $5,687. For Class I felony offenses not brought to trial, and where a guilty plea is entered, AOC estimates the cost per guilty plea at $323.

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission.

TECHNICAL CONSIDERATIONS: None

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Nicole Kreiser and Doug Holbrook

Nicole Kreiser Douglas W. Holbrook Jr.

APPROVED BY: James D. Johnson, Director, Fiscal Research Division

James D. Johnson

DATE: May 21, 2003

HOUSE BILL 1151
Committee Substitute Favorable 4/28/03

Short Title: Improve Rule-Making Process. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE ADMINISTRATIVE PROCEDURE ACT TO REVISE THE PROCEDURE FOR ADOPTING PERMANENT AND TEMPORARY RULES, TO CREATE A PROCEDURE FOR THE ADOPTION OF EMERGENCY RULES, TO CLARIFY THE ROLE OF THE RULES REVIEW COMMISSION AND TO EXCLUDE THE STATE MEDICAL FACILITIES PLAN FROM THE DEFINITION OF A RULE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 150B-20(c) reads as rewritten:

"(c) Action. – If an agency denies a rule-making petition, it must send the person who submitted the petition a written statement of the reasons for denying the petition. If an agency grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings. When an agency grants a rule-making petition, the ~~notice of rule-making proceedings~~ notice of text it publishes in the North Carolina Register may state that the agency is initiating ~~rule-making proceedings~~ rule making as the result of a rule-making petition and state the name of the person who submitted the rule-making petition. If the rule-making petition requested the creation or amendment of a rule, the notice of text the agency publishes ~~after the notice of rule-making proceedings~~ may set out the text of the requested rule change submitted with the rule-making petition and state whether the agency endorses the proposed text."

SECTION 2. G.S. 150B-21.1 reads as rewritten:

"**§ 150B-21.1. Procedure for adopting a temporary rule.**

(a) Adoption. – An agency may adopt a temporary rule ~~without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical~~ when it finds that adherence to the notice and hearing requirements of ~~this Part~~G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

(1) A serious and unforeseen threat to the public health, safety, or welfare.

(2) The effective date of a recent act of the General Assembly or the United States Congress.
(3) A recent change in federal or State budgetary policy.
(4) A recent federal regulation.
(5) A recent court order.
(6) The need for the rule to ~~become effective the same date as~~ be made consistent with the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan.

~~An agency must prepare a written statement of its findings of need for a temporary rule. If the temporary rule establishes a new fee or increases an existing fee, the agency shall include in the written statement that it has complied with the requirements of G.S. 12-3.1. The statement must be signed by the head of the agency adopting the rule.~~

~~(a1) Notwithstanding the provisions of subsection (a) of this section, the Wildlife Resources Commission may adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical to protect the public health, safety, or welfare, conserve wildlife resources, or provide for the orderly and efficient operation of game lands by establishing any of the following:~~

(7) The need for the Wildlife Resources Commission to establish any of the following:
~~(1)~~a. No wake zones;
~~(2)~~b. Hunting or fishing seasons;
~~(3)~~c. Hunting or fishing bag limits;
~~(4)~~d. Management of public game lands as defined in G.S. 113-129(8a).

~~When the Wildlife Resources Commission adopts a temporary rule pursuant to this subsection, it must submit the reference to this subsection as its statement of need to the Codifier of Rules.~~

~~(a2) Notwithstanding the provisions of subsection (a) of this section, the Secretary of State may adopt temporary rules~~

(8) The need for the Secretary of State to implement the certification technology provisions of Article 11A of Chapter 66 of the General Statutes and to adopt uniform Statements of Policy that have been officially adopted by the North American Securities Administrators Association for the purpose of promoting uniformity of state securities regulation. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule;~~
~~(2) Accept oral and written comments on the proposed temporary rule; and~~
~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary must submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection.~~

~~(a3) Notwithstanding the provisions of subsection (a) of this section, the Commissioner of Insurance may adopt a temporary rule~~

(9) The need for the Commissioner of Insurance to implement the provisions of ~~G.S. 58-2-205~~ G.S. 58-2-205.~~after prior notice or hearing or upon any abbreviated notice or hearing. When the Commissioner adopts a temporary rule pursuant to this subsection, the Commissioner must submit the reference to this subsection as the Commissioner's statement of need to the Codifier of Rules.~~

~~(a4) Notwithstanding the provisions of subsection (a) of this section, the State Chief Information Officer may adopt temporary rules~~

(10) The need for the Chief Information Officer to implement the information technology procurement provisions of Article 3D of Chapter 147 of the General Statutes. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Officer shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule;~~

~~(2) Accept oral and written comments on the proposed temporary rule; and~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Officer adopts a temporary rule pursuant to this subsection, the Officer must submit a reference to this subsection as the Officer's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Officer in accordance with this subsection.~~

~~(a5) Notwithstanding the provisions of subsection (a) of this section,~~

(11) The need for the State Board of Elections ~~may~~ to adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical for one or more of the following:

~~(1)~~a. In accordance with the provisions of G.S. 163-22.2.

~~(2)~~b. To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules.

~~(3)~~c. The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.

~~When the State Board of Elections adopts a temporary rule pursuant to this subsection, it must submit the reference to this subsection as its statement of need to the Codifier of Rules.~~

~~(a6) Expiration by Session Laws 2001, ch. 421, s. 5.3, effective June 30, 2002.~~

~~(a7) Notwithstanding the provisions of subdivision (a)(2) of this section,~~

(12) The need for an agency ~~may~~ to adopt a temporary rule to implement the provisions of any of the following acts until all rules necessary to implement the provisions of the act have become effective as either temporary or permanent rules:

a. Repealed by Session Laws 2000, ch. 148, s. 5, effective July 1, 2002.

b. **(Repealed effective July 1, 2003)** Article 34B of Chapter 115C of the General Statutes, relating to qualified zone academy bonds.

~~(a8) (Expires on June 30, 2003) Notwithstanding the provisions of subsection (a) of this section,~~

(13) The need for the Secretary of Transportation ~~may~~ to adopt temporary rules concerning the permitted height of mobile and modular homes. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule.~~

~~(2) Accept oral and written comments on the proposed temporary rule.~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary must submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection.~~

~~(a9) (Expires June 30, 2003) Notwithstanding the provisions of subsection (a) of this section,~~

(14) The need for the Secretary of Transportation ~~may~~ to adopt temporary rules pursuant to G.S. 113A-11(b) to establish a class of minimum criteria projects.

~~After having the proposed temporary rule published in the North Carolina Register, and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall do all of the following:~~

~~(1) Notify persons on its mailing list, maintained pursuant to G.S. 150B-21.2(d), and any other interested parties, of his intent to adopt a temporary rule.~~

~~(2) Accept oral and written comments on the proposed temporary rule.~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary shall submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection.~~

~~(a10) (Expires on October 1, 2004) Notwithstanding the provisions of subsection (a) of this section,~~

(15) The need for the Department of Health and Human Services ~~may~~ to adopt temporary rules concerning the placement of individuals in facilities licensed under Article 2 of Chapter 122C of the General Statutes and the enrollment of providers of services to such individuals in the Medicaid program. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Department shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule.~~

~~(2) Accept oral and written comments on the proposed temporary rule.~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Department adopts a temporary rule pursuant to this subsection, the Department shall submit a reference to this subsection as the Department's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Department in accordance with this subsection.~~

A recent act, change, regulation, or order as used in subdivisions (2) through (5) of this subsection means an act, change, regulation, or order occurring or made effective no more than 210 days prior to the submission of a temporary rule to the Rules Review Commission. Upon written request of the agency, the Commission may waive the 210-day requirement upon consideration of the degree of public benefit, whether the agency had control over the circumstances that required the requested waiver, notice to and opposition by the public, the need for the waiver, and previous requests for waivers submitted by the agency.

(a1) Unless otherwise provided by law, at least 30 business days prior to adopting a temporary rule, the agency shall:

(1) Submit the rule to the Codifier of Rules, and the Codifier of Rules shall publish the proposed temporary rule on the Internet to be posted within five business days.

(2) Notify persons on the mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule.

(3) Accept written comments on the proposed temporary rule for at least 15 business days prior to adoption of the temporary rule.

(4) Hold at least one public hearing on the proposed temporary rule.

An agency must also prepare a written statement of its findings of need for a temporary rule stating why adherence to the notice and hearing requirements in G.S. 150B-21.2 would be contrary to the public interest and why the immediate adoption of the rule is required. The statement must be signed by the head of the agency adopting the temporary rule.

(b) Review. – When an agency adopts a temporary rule it must submit the rule and the agency's written statement of its findings of the need for the rule to the ~~Codifier of Rules.~~ Rules Review Commission. ~~Within one business day after an agency submits a temporary rule, the Codifier of Rules must review the agency's written statement of findings of need for the rule to determine whether the statement of need meets the criteria listed in subsection (a) or (a1) of this section.~~ Within 15 business days after receiving the proposed temporary rule, the Commission or its designee must review the agency's written statement of findings of need for the rule to determine whether the statement meets the criteria listed in subsection (a) of this section and the standards in G.S. 150B-21.9. The Commission's designee shall be a member of the Commission or Commission staff who is an attorney licensed to practice law in North Carolina. In reviewing the statement, the ~~Codifier of Rules~~Commission or its designee may consider any information submitted by the agency or another person. If the ~~Codifier of Rules~~ Commission or its designee finds that the statement meets the ~~criteria,~~criteria listed in subsection (a) of this section and the standards in G.S. 150B-21.9, the ~~Codifier of Rules must notify the head of the agency and enter the rule in the North Carolina Administrative Code.~~Commission or its designee must approve the temporary rule and deliver the rule to the Codifier of Rules within two business days of approval. The Codifier of Rules must enter the rule into the North Carolina Administrative Code on the sixth business day following receipt from the Commission or its designee.

If the ~~Codifier of Rules~~Commission or its designee finds that the statement does not meet either the ~~criteria,~~ criteria listed in subsection (a) of this section or the standards in G.S. 150B-21.9, the ~~Codifier of Rules~~Commission or its designee must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the ~~Codifier of Rules~~Commission or its designee must review the additional findings or new statement within ~~one business day~~five business days after the agency submits the additional findings or new statement. If the ~~Codifier of Rules~~Commission or its designee again finds that the statement does not meet the criteria listed in subsection (a) ~~or (a1)~~ of this ~~section,~~ section or the standards in G.S. 150B-21.9, the ~~Codifier of Rules~~Commission or its designee must immediately notify the head of the ~~agency.~~agency and return the rule to the agency.

If an agency decides not to provide additional findings or submit a new statement when notified by the ~~Codifier of Rules~~ Commission or its designee that the agency's findings of need for a rule do not meet either the required ~~criteria,~~ criteria or the required standards, the agency must notify the ~~Codifier of Rules~~Commission or its

designee of its decision. ~~The Codifier of Rules must then enter the rule in the North Carolina Administrative Code on the sixth business day after receiving notice of the agency's decision.~~ The Commission or its designee shall then return the rule to the agency. When the Commission returns a rule to an agency in accordance with this subsection, the agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. Notwithstanding any other provision of this subsection, if the agency has not complied with the provisions of G.S. 12-3.1, the Codifier of Rules shall not enter the rule into the Code.

(c) Standing. – A person aggrieved by a temporary rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) ~~or (a1)~~ of this section and whether the rule meets the standards in ~~G.S. 150B-21.9 that apply to review of a permanent rule.~~ G.S. 150B-21.9. The court shall not grant an ex parte temporary restraining order.

Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) Effective Date and Expiration. – A temporary rule becomes effective on the date specified in G.S. 150B-21.3. A temporary rule expires on the earliest of the following dates:

(1) The date specified in the rule.

(2) The effective date of the permanent rule adopted to replace the temporary rule, if the Commission approves the permanent rule.

(3) The date the Commission returns to an agency a permanent rule the agency adopted to replace the temporary rule.

(4) The effective date of an act of the General Assembly that specifically disapproves a permanent rule adopted to replace the temporary rule.

(5) 270 days from the date the temporary rule was published in the North Carolina Register, unless the permanent rule adopted to replace the temporary rule has been submitted to the Commission.

(e) Publication. – When the Codifier of Rules enters a temporary rule in the North Carolina Administrative Code, the Codifier must publish the rule in the North Carolina Register. ~~Publication of a temporary rule in the North Carolina Register serves as a notice of rule making proceedings for a permanent rule if the permanent rule is substantially the same as the published temporary rule, unless the agency published a notice of rule making proceedings at least 60 days before it adopted the temporary rule.~~"

SECTION 3. Part 2 of Article 2A of Chapter 150B of the General Statutes is amended by adding a new section to read:

"**§ 150B-21.1A. Adoption of an emergency rule.**

(a) Adoption. – An agency may adopt an emergency rule without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical when it finds that adherence to the notice and hearing requirements of this Part would be contrary to the public interest and that the immediate adoption of the rule is required by a serious and unforeseen threat to the public health or safety. When an agency adopts an emergency rule, it must simultaneously commence the process for adopting a temporary rule by submitting the rule to the Codifier of Rules for publication on the Internet in accordance with G.S. 150B-21.1(a1).

(b) Review. – An agency must prepare a written statement of its findings of need for an emergency rule. The statement must be signed by the head of the agency adopting the rule. When an agency adopts an emergency rule, it must submit the rule and the agency's written statement of its findings of the need for the rule to the Codifier of Rules. Within two business days after an agency submits an emergency rule, the Codifier of Rules must review the agency's written statement of findings of need for the rule to determine whether the statement of need meets the criteria in subsection (a) of this section. In reviewing the statement, the Codifier of Rules may consider any information submitted by the agency or another person. If the Codifier of Rules finds that the statement meets the criteria, the Codifier of Rules must notify the head of the agency and enter the rule in the North Carolina Administrative Code on the sixth business day following approval by the Codifier.

If the Codifier of Rules finds that the statement does not meet the criteria in subsection (a) of this section, the Codifier of Rules must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the Codifier of Rules must review the additional findings or new statement within one business day after the agency submits the additional findings or new statement. If the Codifier of Rules again finds that the statement does not meet the criteria in subsection (a) of this section, the Codifier of Rules must immediately notify the head of the agency.

If an agency decides not to provide additional findings or submit a new statement when notified by the Codifier of Rules that the agency's findings of need for a rule do not meet the required criteria, the agency must notify the Codifier of Rules of its decision. The Codifier of Rules must then enter the rule in the North Carolina Administrative Code on the sixth business day after receiving notice of the agency's decision. Notwithstanding any other provision of this subsection, if the agency has not complied with the provisions of G.S. 12-3.1, the Codifier of Rules shall not enter the rule into the Code.

(c) Standing. – A person aggrieved by an emergency rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) of this section and whether the rule meets the standards in G.S. 150B-21.9. The court shall not grant an ex parte temporary restraining order.

Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) Effective Date and Expiration. – An emergency rule becomes effective on the date specified in G.S. 150B-21.3. An emergency rule expires on the earliest of the following dates:

(1) The date specified in the rule.

(2) The effective date of the temporary rule adopted to replace the emergency rule, if the Commission approves the temporary rule.

(3) The date the Commission returns to an agency a temporary rule the agency adopted to replace the emergency rule.

(4) Sixty days from the date the emergency rule was published in the North Carolina Register, unless the temporary rule adopted to replace the emergency rule has been submitted to the Commission.

(e) Publication. – When the Codifier of Rules enters an emergency rule in the North Carolina Administrative Code, the Codifier of Rules must publish the rule in the North Carolina Register."

SECTION 4. G.S. 150B-21.2 reads as rewritten:

"**§ 150B-21.2. Procedure for adopting a permanent rule.**

(a) Steps. – Before an agency adopts a permanent rule, it must take the following actions:

(1) Publish a notice of ~~rule-making proceedings~~ text in the North Carolina ~~Register, unless the proposed rule is substantially the same as a temporary rule published in the North Carolina~~ Register.

(2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.

~~(3) Publish the text of the proposed rule in the North Carolina Register.~~

(4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.

(5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.

~~(b) Notice of Rule-Making Proceedings. – A notice of rule-making proceedings published in the North Carolina Register must include all of the following:~~

~~(1) A statement of the subject matter of the proposed rule making.~~

~~(2) A short explanation of the reason for the proposed action.~~

~~(3) A citation to the law that gives the agency the authority to adopt a rule on the subject matter of the proposed rule making.~~

~~(4) The person to whom questions or written comments may be submitted on the subject matter of the proposed rule making.~~

~~Publication in the North Carolina Register of an agency's rule-making agenda satisfies the requirements of this subsection if the agenda includes the information required by this subsection.~~

(c) ~~Text After Notice of Rule-Making Proceedings.~~ Notice of Text. – A notice of the proposed text of a rule must include all of the following:

(1) The text of the proposed rule.
(2) A short explanation of the reason for the proposed rule.
(3) A citation to the law that gives the agency the authority to adopt the rule.
(4) The proposed effective date of the rule.
(5) The date, time, and place of any public hearing scheduled on the rule.
(6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.
(7) The period of time during which and the person to whom written comments may be submitted on the proposed rule.
(8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.
(9) The procedure by which a person can object to a proposed rule and the requirements for subjecting a proposed rule to the legislative review process.

~~An agency shall not publish the proposed text of a rule until at least 60 days after the date the notice of rule-making proceedings for the proposed rule was published in the North Carolina Register.~~

(d) Mailing List. – An agency must maintain a mailing list of persons who have requested notice of rule making. When an agency publishes in the North Carolina Register a notice of ~~rule-making proceedings or the~~ text of a proposed rule, it must mail a copy of the notice or text to each person on the mailing list who has requested notice ~~of rule-making proceedings~~ on the subject matter described in the notice or the rule affected. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.

(e) Hearing. – An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and ~~all the following apply:~~

~~(1) The notice of text does not schedule a public hearing on the proposed rule.~~
~~(2)~~ ~~The~~ the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published.
~~(3) The proposed text is not a changed version of proposed text the agency previously published in the course of rule-making proceedings but did not adopt.~~

An agency may hold a public hearing on a proposed rule in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes

notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published. If notice of a public hearing has been published in the North Carolina Register and that public hearing has been cancelled, the agency shall publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.

(f) Comments. – ~~An agency must accept comments on a notice of proposed rule-making proceedings published in the North Carolina Register until the text of the proposed rule that results from the notice is published.~~ An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register ~~and that requires a fiscal note under G.S. 150B-21.4(b1)~~ for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. ~~An agency must accept comments on the text of any other proposed rule published in the North Carolina Register for at least 30 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer.~~ An agency must consider fully all written and oral comments received.

(g) Adoption. – An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

(1) Affects the interests of persons who, based on ~~either the notice of rule-making proceedings or~~ the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.

(2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.

(3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part. An agency must submit an adopted rule to the Rules Review Commission within 30 days of the agency's adoption of the rule.

(h) Explanation. – An agency must issue a concise written statement explaining why the agency adopted a rule if, within ~~30~~ 15 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule. The agency must issue the explanation within 15 days after receipt of the request for an explanation.

(i) Record. – An agency must keep a record of a rule-making proceeding. The record must include all written comments received, a transcript or recording of any

public hearing held on the rule, and any written explanation made by the agency for adopting the rule."

SECTION 5. G.S. 150B-21.3 reads as rewritten:

"**§ 150B-21.3. Effective date of rules.**

(a) Temporary and Emergency ~~Rule.~~ Rules. – A temporary rule or an emergency rule becomes effective on the date the Codifier of Rules enters the rule in the North Carolina Administrative Code.

(b) Permanent Rule. – A permanent rule approved by the Commission becomes effective on the first day of the month following the month the rule is approved by the Commission, unless the Commission received written objections to the rule in accordance with subsection (b2) of this section.

(b1) Delayed Effective Dates. – If the Commission received written objections to the rule in accordance with subsection (b2) of this section, the rule becomes effective on the earlier of the thirty-first legislative day or the day of adjournment of the next regular session of the General Assembly that begins at least 25 days after the date the Commission approved the rule, unless a different effective date applies under this section. If a bill that specifically disapproves the rule is introduced in either house of the General Assembly before the thirty-first legislative day of that session, the rule becomes effective on the earlier of either the day an unfavorable final action is taken on the bill or the day that session of the General Assembly adjourns without ratifying a bill that specifically disapproves the rule. If the agency adopting the rule specifies a later effective date than the date that would otherwise apply under this subsection, the later date applies. A permanent rule that is not approved by the Commission or that is specifically disapproved by a bill enacted into law before it becomes effective does not become effective.

A bill specifically disapproves a rule if it contains a provision that refers to the rule by appropriate North Carolina Administrative Code citation and states that the rule is disapproved. Notwithstanding any rule of either house of the General Assembly, any member of the General Assembly may introduce a bill during the first 30 legislative days of any regular session to disapprove a rule that has been approved by the Commission and that either has not become effective or has become effective by executive order under subsection (c) of this section.

(b2) Objection. – Any person who objects to the adoption of a permanent rule may submit written comments to the agency. If the objection is not resolved prior to adoption of the rule, a person may submit written objections to the Commission. If the Commission receives written objections from 10 or more persons clearly requesting review by the legislature in accordance with instructions contained in the notice pursuant to G.S. 150B-21.2(c)(9) and the Commission approves the rule, the rule will become effective as provided in subsection (b1) of this section. When the requirements of this subsection have been met and a rule is subject to legislative disapproval, the agency may adopt the rule as a temporary rule if the rule would have met the criteria listed in G.S. 150B-21.1(a) at the time the notice of text for the permanent rule was published in the North Carolina Register.

(c) Executive Order Exception. – The Governor may, by executive order, make effective a permanent rule that has been approved by the Commission ~~and has not become effective under subsection (b)~~ but the effective date of which has been delayed in accordance with subsection (b1) of this section upon finding that it is necessary that the rule become effective in order to protect public health, safety, or welfare. A rule made effective by executive order becomes effective on the date the order is issued or at a later date specified in the order. When the Codifier of Rules enters in the North Carolina Administrative Code a rule made effective by executive order, the entry must reflect this action.

A rule that is made effective by executive order remains in effect unless it is specifically disapproved by the General Assembly in a bill enacted into law on or before the day of adjournment of the regular session of the General Assembly that begins at least 25 days after the date the executive order is issued. A rule that is made effective by executive order and that is specifically disapproved by a bill enacted into law is repealed as of the date specified in the bill. If a rule that is made effective by executive order is not specifically disapproved by a bill enacted into law within the time set by this subsection, the Codifier of Rules must note this in the North Carolina Administrative Code.

(c1) Fees. – Notwithstanding any other provision of this section, a rule that establishes a new fee or increases an existing fee shall not become effective until the agency has complied with the requirements of G.S. 12-3.1.

(d) Legislative Day and Day of Adjournment. – As used in this section:

(1) A "legislative day" is a day on which either house of the General Assembly convenes in regular session.

(2) The "day of adjournment" of a regular session held in an odd-numbered year is the day the General Assembly adjourns by joint resolution for more than 10 days.

(3) The "day of adjournment" of a regular session held in an even-numbered year is the day the General Assembly adjourns sine die.

(e) OSHA Standard. – A permanent rule concerning an occupational safety and health standard that is adopted by the Occupational Safety and Health Division of the Department of Labor and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor becomes effective on the date the Division delivers the rule to the Codifier of Rules, unless the Division specifies a later effective date. If the Division specifies a later effective date, the rule becomes effective on that date.

(f) Technical Change. – A permanent rule for which no notice or hearing is required under G.S. 150B-21.5(a)(1) through (a)(5) or G.S. 150B-21.5(b) becomes effective on the first day of the month following the month the rule is approved by the Rules Review Commission."

SECTION 6. G.S. 150B-21.4(b1) reads as rewritten:

"(b1) Substantial Economic Impact. – Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would have a

substantial economic impact and that is not identical to a federal regulation that the agency is required to adopt, the agency must obtain a fiscal note for the proposed rule change from the Office of State Budget and Management or prepare a fiscal note for the proposed rule change and have the note approved by that Office. If an agency requests the Office of State Budget and Management to prepare a fiscal note for a proposed rule change, that Office must prepare the note within 90 days after receiving a written request for the note. If the Office of State Budget and Management fails to prepare a fiscal note within this time period, the agency proposing the rule change may prepare a fiscal note. A fiscal note prepared in this circumstance does not require approval of the Office of State Budget and Management.

If an agency prepares the required fiscal note, the agency must submit the note to the Office of State Budget and Management for review. The Office of State Budget and Management must review the fiscal note within 14 days after it is submitted and either approve the note or inform the agency in writing of the reasons why it does not approve the fiscal note. After addressing these reasons, the agency may submit the revised fiscal note to that Office for its review. If an agency is not sure whether a proposed rule change would have a substantial economic impact, the agency may ask the Office of State Budget and Management to determine whether the proposed rule change has a substantial economic impact.

As used in this subsection, the term "substantial economic impact" means an aggregate financial impact on all persons affected of at least ~~five million dollars ($5,000,000)~~ three million dollars ($3,000,000) in a 12-month period."

SECTION 7. G.S. 150B-21.5 reads as rewritten:

"**§ 150B-21.5. Circumstances when notice and rule-making hearing not required.**

(a) Amendment. – An agency is not required to publish a notice of ~~rule-making proceedings or a notice of~~ text in the North Carolina Register or hold a public hearing when it proposes to amend a rule to do one of the following:

(1) Reletter or renumber the rule or subparts of the rule.

(2) Substitute one name for another when an organization or position is renamed.

(3) Correct a citation in the rule to another rule or law when the citation has become inaccurate since the rule was adopted because of the repeal or renumbering of the cited rule or law.

(4) Change information that is readily available to the public, such as an address or a telephone number.

(5) Correct a typographical error in the North Carolina Administrative Code.

(6) Change a rule in response to a request or an objection by the ~~Commission.~~ Commission, unless the Commission determines that the change is substantial.

(b) Repeal. – An agency is not required to publish a notice of ~~rule-making proceedings or a notice of~~ text in the North Carolina Register or hold a public hearing when it proposes to repeal a rule as a result of any of the following:

(1) The law under which the rule was adopted is repealed.

(2) The law under which the rule was adopted or the rule itself is declared unconstitutional.

(3) The rule is declared to be in excess of the agency's statutory authority.

(c) OSHA Standard. – The Occupational Safety and Health Division of the Department of Labor is not required to publish a notice of ~~rule-making proceedings or a notice of~~ text in the North Carolina Register or hold a public hearing when it proposes to adopt a rule that concerns an occupational safety and health standard and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor. The Occupational Safety and Health Division is not required to submit to the Commission for review a rule for which notice and hearing is not required under this subsection.

(d) State Building Code. – The Building Code Council is not required to publish a notice of text in the North Carolina Register when it proposes to adopt a rule that concerns the North Carolina State Building Code. The Building Code Council is required to publish a notice ~~of rule-making proceeding~~ in the North Carolina Register when it proposes to adopt a rule that concerns the North Carolina State Building Code. The notice must include all of the following:

(1) A statement of the subject matter of the proposed rule making.

(2) A short explanation of the reason for the proposed action.

(3) A citation to the law that gives the agency the authority to adopt a rule on the subject matter of the proposed rule making.

(4) The person to whom questions or written comments may be submitted on the subject matter of the proposed rule making.

The Building Code Council is required to submit to the Commission for review a rule for which notice ~~and hearing~~ of text is not required under this subsection. In adopting a rule, the Council shall comply with the procedural requirements of G.S. 150B-21.3."

SECTION 8. G.S. 150B-21.8 reads as rewritten:

"**§ 150B-21.8. Review of rule by Commission.**

(a) ~~Temporary~~ Emergency Rule. – The Commission does not review ~~a temporary~~an emergency rule.

(b) Temporary and Permanent ~~Rule.~~ Rules. – An agency must submit ~~a~~ temporary and permanent ~~rule~~ rules adopted by it to the Commission before the rule can be included in the North Carolina Administrative Code. The Commission reviews a temporary or permanent rule in accordance with the standards in G.S. 150B-21.9 and follows the procedure in this Part in its review of a ~~permanent~~ rule.

(c) Scope. – When the Commission reviews an amendment to a rule, it may review the entire rule that is being amended. The procedure in G.S. 150B-21.12 applies when the Commission objects to a part of a rule that is within its scope of review but is not changed by a rule amendment.

(d) Judicial Review. – When the Commission returns a permanent rule to an agency in accordance with G.S. 150B-21.12(d), the agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes."

SECTION 9. G.S. 150B-21.9 reads as rewritten:

"**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. – The Commission must determine whether a rule meets all of the following criteria:

(1) It is within the authority delegated to the agency by the General Assembly.

(2) It is clear and unambiguous.

(3) It is reasonably necessary to ~~fulfill a duty delegated to the agency by~~ implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. ~~when considered in light of~~ The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is ~~proposed and the legislative intent of the General Assembly in delegating the duty.~~proposed.

(4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

~~The Commission may determine if a rule submitted to it was adopted in accordance with Part 2 of this Article.~~ The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

~~The Commission must notify the agency that adopted the rule if it determines that a rule was not adopted in accordance with Part 2 of this Article and must return the rule to the agency.~~ Entry of a rule in the North Carolina Administrative Code after review by the Commission ~~is conclusive evidence~~ creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. – The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1."

SECTION 10. G.S. 150B-21.17(a) reads as rewritten:

"(a) Content. – The Codifier of Rules must publish the North Carolina Register. The North Carolina Register must be published at least two times a month and must contain the following:

(1) Temporary rules entered in the North Carolina Administrative Code.

(1a) ~~Notices of rule making proceedings, the~~ The text of proposed ~~rules,~~ rules and the text of permanent rules approved by the Commission. ~~Except with regard to notices of rule making proceedings, this subdivision does not apply to the North Carolina State Building Code.~~

(1b) Emergency rules entered into the North Carolina Administrative Code.
(2) Notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165.
(3) Executive orders of the Governor.
(4) Final decision letters from the United States Attorney General concerning changes in laws that affect voting in a jurisdiction subject to section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H.
(5) Orders of the Tax Review Board issued under G.S. 105-241.2.
(6) Other information the Codifier determines to be helpful to the public."

SECTION 11. G.S. 150B-2(8a) reads as rewritten:

"(8a) "Rule" means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:

a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.

b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, by an occupational licensing board, as defined by G.S. 93B-1, or by the State Board of Elections.

c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

d. A form, the contents or substantive requirements of which are prescribed by rule or statute.

e. Statements of agency policy made in the context of another proceeding, including:

1. Declaratory rulings under G.S. 150B-4.
2. Orders of establishing or fixing rates or tariffs.

f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.

g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating

financial arrangements; or in the defense, prosecution, or settlement of cases.

h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Personnel Commission.

j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.1 and the variable component of the excise tax on motor fuel under G.S. 105-449.80.

k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission, and approved by the Governor."

SECTION 12. G.S. 131E-176(25) reads as rewritten:

"(25) "State Medical Facilities Plan" means the plan prepared by the Department of Health and Human Services and the North Carolina State Health Coordinating Council, and approved by the Governor. In preparing the Plan, the Department and the State Health Coordinating Council shall maintain a mailing list of persons who have requested notice of public hearings regarding the Plan. Not less than 15 days prior to a scheduled public hearing, the Department shall notify persons on its mailing list of the date, time, and location of the hearing. The Department shall hold at least one public hearing prior to the adoption of the proposed Plan and at least six public hearings after the adoption of the proposed Plan by the State Health Coordinating Council. The Council shall accept oral and written comments from the public concerning the Plan."

SECTION 13. Nothing in this act shall be construed to limit or repeal any specific grant of temporary rule-making authority to an agency enacted by the General Assembly prior to the effective date of this act.

SECTION 14. This act becomes effective July 1, 2003, and applies to temporary and emergency rules adopted on or after that date, and to permanent rules adopted on or after October 1, 2003.

Revised Notice – HB 147 removed

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	May 22, 2003	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 1151	Improve Rule-Making Process.	Representative Wilson Representative Nesbitt, Jr. Representative Culpepper, III
HB 637	Amend Powers/Settlor of Revocable Trust.	Representative Munford
HB 656	Amend Trust Administration Act.	Representative Culpepper, III

Senator Fletcher L. Hartsell, Jr., Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
May 22, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. Welcome and Opening Remarks

II. Bills to be Considered

HB 1151	Improve Rule-Making Process.	Representative Wilson Representative Nesbitt, Jr. Representative Culpepper, III
HB 637	Amend Powers/Settlor of Revocable Trust.	Representative Munford
HB 656	Amend Trust Administration Act.	Representative Culpepper, III

III. Other Business

IV. Adjournment

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — May 22, 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Marc Lodge	AG
Sharon Salzwedel	AG
V.M. McBride	NCDOT
Doug Howey	NCPMA
Andy Ellen	NCRMA
Robin Smith	DENR
Lisa Page	Conservation Council
Steve Wall	Conservation Council
Ben Anne Mumford	NC Parks Council
Bobby Bryan	RRC
Elizabeth Oates	NCPIRG

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II 5/22/03

Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Grady McClain	N.C ConNet
Jerry Rey	N.C. CONNET
Kathie Austin	FRD
CHARLOTTE MITCHELL	SELC
HALEY GILBERT	DAVID KNIGHT
Rob Lamm	DHHS
Jane Smith	DHHS
Tripvin Nopp	So. Env. Law Center
Molly Diggins	Sierra Club
John McHugh	Gov office
Kari Barsness	NCDENR

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 5-22-03

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Bill Martin	Attorney Generals Office
John Collins	Kilpatrick Stockton
Gray Styers	Kilpatrick Stockton
Amy Darden	NC Bar Assn.
Joe DeLuca	NC RRC
Julian Mann	NC OAH
Rick Zechini	NC Assoc. of REALTORS
R. Paul Wilms	NCHBA
Warren Plonk	OSBM
Bob Fitzgerald	DHHS/DFS
Tim Minton	NC Home Builders Association
Stephanie Simpson	NC Assn. of Realtors

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II 5-22-03

Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Bob Slocum	NC Forestry Assn
Lisa Martin	NC Home Builders Assoc.
Michelle Frazier	NC Bar Ass'n
Sheryl Stephens	DENR
Pricy Harrison	CRC
Nancy Thompson	NCIC
BILL HOKE	JORDAN PRICE
Lois Pleasant	WESE
Peter A. Zeeny	ACLU/LLPP
Elizabeth Dalton	Bond Assoc
Hal Miller	NCACCT

Judiciary II Committee

Minutes

May 22, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with twelve members present.

HB656 (Amend Trust Administration Act.) Representative Culpepper, bill sponsor, was introduced by Senator Hartsell to explain the bill. A Proposed Committee Substitute was presented and Senator Holloman moved to consider the PCS for purposes of discussion. All members voted and the motion carried. An amendment was presented by Senator Hartsell and explained by Kory Goldsmith, Staff Attorney. Senator Kerr moved to adopt the amendment. All members voted and the motion carried. Liz Arias, attorney representing the Bar Association, spoke on the bill. Questions by Senators Kerr and Webster were answered by Liz Arias. The bill was removed from the calendar to be heard again on Thursday, May 29th.

HB 1151 (Improve Rule-Making Process) Senator Hartsell recognized Karen Cochrane-Brown to identify the modifications in the Proposed Committee Substitute that had been adopted in the previous meeting and explain the new amendment. Senator Webster moved to adopt the amendment. All members voted and the motion carried. Representative Nesbitt, bill sponsor, was introduced to speak on the new PCS as amended. Questions by Senators Dorsett, Apodaca, and Kinnaird were answered by Representative Nesbitt and Joseph J. DeLuca, Jr., of the Rules Review Commission. Mr. Donnell (Trip) Van Noppen, of the Southern Environmental Law Center, spoke on the bill. Senators Kerr/Webster moved for a favorable report of the Proposed Committee Substitute as amended, unfavorable to the original bill, and rolled into a new Committee Substitute. All members voted and the motion carried.

There being no further business, the meeting was adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

HOUSE BILL 1151:
Improve Rule-Making Process.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Rep. Nesbitt
Date:	May 22, 2003	**Summary by:**	Karen Cochrane Brown
Version:	Proposed Committee Substitute H1151-CSRO-20[v.2]		Staff Atorney

SUMMARY: ***House Bill 1151 amends the Administrative Procedure Act (APA) to reduce the time required to make a permanent rule effective in most cases. The bill changes the procedure for adopting temporary rules and makes them subject to review by the Rules Review Commission. It also creates a procedure for adopting emergency rules and clarifies the role of the Rules Review Commission. The bill further excludes the State Medical Facilities Plan from the definition of a rule and provides notice and hearing requirements for the adoption of the Plan.***

The Proposed Committee Substitute makes clarifying changes to the provision relating to temporary rules; authorizes the Department of Health and Human Services to adopt emergency rules when necessary to increase services and benefits to children and families; and clarifies that when an agency changes a rule substantially in response to an objection by the Rules Review Commission, the agency must republish the rule using the procedure for temporary rules.

The Proposed Committee Substitute also clarifies that temporary rulemaking authority exists to implement the State Medical Facilities Plan; creates a more specific time sequence for public notice and hearing when an agency adopts temporary rules; provides that the RRC may designate a panel of at least three of its members to approve temporary rules; and clarifies that the RRC only reviews the State Medical Facilities Plan for compliance with the notice and hearings requirements.

CURRENT LAW: Article 2A of the APA establishes the procedures for an agency to adopt a rule. The APA authorizes the adoption of temporary and permanent rules. A temporary rule can be adopted very quickly if the agency has a statutory basis to adopt it. Temporary rules are not reviewed by the Rules Review Commission (RRC) and may go into effect as soon as they are entered into the Administrative Code.

Permanent rules have a more lengthy process. In order to adopt a permanent rule an agency must first publish a notice of rulemaking proceeding, which is a statement of the subject matter of the rule, in the North Carolina Register for at least 60 days. The agency must also determine whether the rule has a State or local fiscal impact, or a substantial economic impact, and if it does the agency must prepare or obtain from OSBM a fiscal note. The agency must then publish the notice of text of the rule and accept public comment for at least 30 days. In some cases the agency must also hold at least one public hearing on the rule. The agency may then adopt the rule. The rule is then reviewed by the RRC. Once the rule is approved by the RRC it may not become effective until the 31st legislative day of the next regular session of the General Assembly that occurs not less than 25 days after approval by the RRC. However, if any member of the General Assembly introduces a bill to disapprove the rule within the first 31 legislative days, it cannot go into effect until an unfavorable action is taken on the bill, or adjournment of the session without enacting the bill.

BILL ANALYSIS: House Bill 1151 revises the temporary and permanent rulemaking process and creates a new category of emergency rule.

Temporary Rules. - The bill makes the following changes regarding temporary rules:

1. Defines the term "recent" to mean 210 days prior to the submission of the temporary rule to the RRC.
2. Requires that prior to adoption the agency give notice to interested parties, accept written comments, and hold at least one public hearing. **The PCS creates a specific time sequence for publication, notice and hearing.**
3. Requires that temporary rules be reviewed by the RRC, using the same standards used for permanent rules. The Commission must conduct the review within 15 days of receipt.
4. Authorizes judicial review when a rule is rejected by the RRC.

The PCS clarifies that the Commission must review both the statement of need and the rule. It also provides that a member of the Commission's staff who is a licensed attorney shall initially review the statement and rule and make a recommendation. The Commission may then designate a panel of at least three of its members to approve the staff recommendation.

Emergency Rules. - The bill creates a new category of rule called emergency rules for cases of serious and unforeseen threat to public health or safety. These rules can be adopted using the same procedure currently in effect for temporary rules. The rules will be reviewed by the Codifier of rules and are entered into the Administrative Code by the sixth day after approval. When an agency adopts an emergency rule it must simultaneously commence the process for adopting a temporary rule. Emergency rules become effective when they are entered into the Code and expire after 60 days unless a temporary rule adopted to replace it has been submitted to the Commission.

The PCS adds a provision authorizing the Department of Health and Human Services to adopt an emergency rule when a recent act of the General Assembly or Congress or a recent federal regulation provides new or increased services or benefits to children and families and the emergency rule is necessary to implement the change in law.

Permanent Rules. - The bill makes the following changes regarding permanent rules:

1. Eliminates the requirement of publishing a notice of rulemaking proceeding to begin the process for adopting a permanent rule.
2. Provides that permanent rules go into effect on the first day of the month following the month they are approved by the RRC, unless the Commission receives written objections from ten or more people. If objections are received, the rules are delayed and become subject to legislative disapproval, as under current law. If this occurs, the agency may adopt the rule as a temporary rule if the rule would have qualified as a temporary rule when the process began.
3. The threshold to trigger the substantial economic impact fiscal note is reduced from $5,000,000 to $3,000,000.
4. Authorizes judicial review when a rule is rejected by the RRC.

The PCS clarifies that the RRC may review the entire rule when a rule is being amended only with regard to permanent rules.

Rules Review Commission. - The bill makes the following changes regarding the RRC:

1. Gives the Commission authority to review temporary rules using the same standard applied to permanent rules.
2. Adds a fourth standard requiring the Commission to determine whether the rule was adopted in accordance with Part 2 of Article 2A of the APA.
3. Clarifies the standard of reasonable necessity to provide that the rule must be necessary to interpret or implement a State or federal statute or federal regulation.
4. Provides that approval by RRC creates a rebuttable presumption that the rule was adopted properly.

The PCS adds a clarification that when an agency changes a rule in response to an objection by the RRC, the Commission must determine whether the change is substantial using the existing standard for changes made by an agency prior to adoption. If the change is substantial, the rule must be republished and reviewed in accordance with the temporary rule procedure.

The bill also excludes the State Medical Facilities Plan from the definition of a rule and sets notice and hearing requirements in the law governing the State Medical Facilities Plan. **The PCS clarifies that the RRC only reviews the Plan for compliance with the notice and hearing requirements in the law governing the Plan.**

Finally, the bill "grandfathers" any temporary rulemaking authority granted to an agency prior to the effective date of this act.

The act would become effective July 1, 2003, and apply to temporary and emergency rules adopted on or after that date, and to permanent rules adopted on or after October 1, 2003.

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. 2

H. B. No. 1151 DATE _____

S. B. No. _____ Amendment No. _____ (to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE ✓ H1151-CSRO-20 [v.2]

Rep.)
) _____
Sen.)

moves to amend the bill on page 16, line 43

( ) WHICH CHANGES THE TITLE

by rewriting the line to read:

" ~~the agency~~. (a1) Entry of a rule in the North Carolina Administrative Code after review by "

and on page 19, line 19, by adding the following at the end of the line:

" G.S. 150B-21.9(a1), as amended by Section 9 of this act, applies only to rules adopted on or after the effective date of this act.".

SIGNED _____

ADOPTED _____ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 1151

Committee Substitute Favorable 4/28/03

PROPOSED SENATE COMMITTEE SUBSTITUTE H1151-CSRO-20 [v.2]

5/21/2003 7:57:21 PM

Short Title: Improve Rule-Making Process. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE ADMINISTRATIVE PROCEDURE ACT TO REVISE THE PROCEDURE FOR ADOPTING PERMANENT AND TEMPORARY RULES, TO CREATE A PROCEDURE FOR THE ADOPTION OF EMERGENCY RULES, TO CLARIFY THE ROLE OF THE RULES REVIEW COMMISSION AND TO EXCLUDE THE STATE MEDICAL FACILITIES PLAN FROM THE DEFINITION OF A RULE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 150B-20(c) reads as rewritten:

"(c) Action. – If an agency denies a rule-making petition, it must send the person who submitted the petition a written statement of the reasons for denying the petition. If an agency grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings. When an agency grants a rule-making petition, the ~~notice of rule-making proceedings~~ notice of text it publishes in the North Carolina Register may state that the agency is initiating ~~rule-making proceedings~~ rule making as the result of a rule-making petition and state the name of the person who submitted the rule-making petition. If the rule-making petition requested the creation or amendment of a rule, the notice of text the agency publishes ~~after the notice of rule-making proceedings~~ may set out the text of the requested rule change submitted with the rule-making petition and state whether the agency endorses the proposed text."

SECTION 2. G.S. 150B-21.1 reads as rewritten:

"**§ 150B-21.1. Procedure for adopting a temporary rule.**

(a) Adoption. – An agency may adopt a temporary rule ~~without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical~~ when it finds that adherence to the notice and hearing requirements of ~~this Part~~G.S. 150B-21.2

would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

(1) A serious and unforeseen threat to the public health, safety, or welfare.
(2) The effective date of a recent act of the General Assembly or the United States Congress.
(3) A recent change in federal or State budgetary policy.
(4) A recent federal regulation.
(5) A recent court order.
(6) The need for the rule to ~~become effective the same date as~~ implement or be made consistent with the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan.

~~An agency must prepare a written statement of its findings of need for a temporary rule. If the temporary rule establishes a new fee or increases an existing fee, the agency shall include in the written statement that it has complied with the requirements of G.S. 12-3.1. The statement must be signed by the head of the agency adopting the rule.~~

~~(a1) Notwithstanding the provisions of subsection (a) of this section, the Wildlife Resources Commission may adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical to protect the public health, safety, or welfare, conserve wildlife resources, or provide for the orderly and efficient operation of game lands by establishing any of the following:~~

(7) The need for the Wildlife Resources Commission to establish any of the following:
~~(1)~~a. No wake zones;
~~(2)~~b. Hunting or fishing seasons;
~~(3)~~c. Hunting or fishing bag limits;
~~(4)~~d. Management of public game lands as defined in G.S. 113-129(8a).

~~When the Wildlife Resources Commission adopts a temporary rule pursuant to this subsection, it must submit the reference to this subsection as its statement of need to the Codifier of Rules.~~

~~(a2) Notwithstanding the provisions of subsection (a) of this section, the Secretary of State may adopt temporary rules~~

(8) The need for the Secretary of State to implement the certification technology provisions of Article 11A of Chapter 66 of the General Statutes and to adopt uniform Statements of Policy that have been officially adopted by the North American Securities Administrators Association for the purpose of promoting uniformity of state securities regulation. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule;~~

~~(2) Accept oral and written comments on the proposed temporary rule; and~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary must submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection.~~

~~(a3) Notwithstanding the provisions of subsection (a) of this section, the Commissioner of Insurance may adopt a temporary rule~~

(9) The need for the Commissioner of Insurance to implement the provisions of ~~G.S. 58-2-205~~ G.S. 58-2-205.~~after prior notice or hearing or upon any abbreviated notice or hearing. When the Commissioner adopts a temporary rule pursuant to this subsection, the Commissioner must submit the reference to this subsection as the Commissioner's statement of need to the Codifier of Rules.~~

~~(a4) Notwithstanding the provisions of subsection (a) of this section, the State Chief Information Officer may adopt temporary rules~~

(10) The need for the Chief Information Officer to implement the information technology procurement provisions of Article 3D of Chapter 147 of the General Statutes. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Officer shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule;~~

~~(2) Accept oral and written comments on the proposed temporary rule; and~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Officer adopts a temporary rule pursuant to this subsection, the Officer must submit a reference to this subsection as the Officer's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Officer in accordance with this subsection.~~

~~(a5) Notwithstanding the provisions of subsection (a) of this section,~~

(11) The need for the State Board of Elections ~~may~~ to adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical for one or more of the following:

~~(1)~~a. In accordance with the provisions of G.S. 163-22.2.

~~(2)~~b. To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules.

~~(3)~~c. The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.

~~When the State Board of Elections adopts a temporary rule pursuant to this subsection, it must submit the reference to this subsection as its statement of need to the Codifier of Rules.~~

~~(a6) Expiration by Session Laws 2001, ch. 421, s. 5.3, effective June 30, 2002.~~

~~(a7) Notwithstanding the provisions of subdivision (a)(2) of this section,~~

(12) The need for an agency ~~may~~ to adopt a temporary rule to implement the provisions of any of the following acts until all rules necessary to implement the provisions of the act have become effective as either temporary or permanent rules:

a. Repealed by Session Laws 2000, ch. 148, s. 5, effective July 1, 2002.

b. **(Repealed effective July 1, 2003)** Article 34B of Chapter 115C of the General Statutes, relating to qualified zone academy bonds.

~~(a8) (Expires on June 30, 2003) Notwithstanding the provisions of subsection (a) of this section,~~

(13) The need for the Secretary of Transportation ~~may~~ to adopt temporary rules concerning the permitted height of mobile and modular homes. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule.~~

~~(2) Accept oral and written comments on the proposed temporary rule.~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary must submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection.~~

~~(a9) (Expires June 30, 2003) Notwithstanding the provisions of subsection (a) of this section,~~

(14) The need for the Secretary of Transportation ~~may~~ to adopt temporary rules pursuant to G.S. 113A-11(b) to establish a class of minimum criteria projects.

~~After having the proposed temporary rule published in the North Carolina Register, and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall do all of the following:~~

~~(1) Notify persons on its mailing list, maintained pursuant to G.S. 150B-21.2(d), and any other interested parties, of his intent to adopt a temporary rule.~~

~~(2) Accept oral and written comments on the proposed temporary rule.~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary shall submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection.~~

~~(a10) (Expires on October 1, 2004) Notwithstanding the provisions of subsection (a) of this section,~~

(15) The need for the Department of Health and Human Services ~~may~~ to adopt temporary rules concerning the placement of individuals in facilities licensed under Article 2 of Chapter 122C of the General Statutes and the enrollment of providers of services to such individuals in the Medicaid program. ~~After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Department shall:~~

~~(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule.~~

~~(2) Accept oral and written comments on the proposed temporary rule.~~

~~(3) Hold at least one public hearing on the proposed temporary rule.~~

~~When the Department adopts a temporary rule pursuant to this subsection, the Department shall submit a reference to this subsection as the Department's statement of need to the Codifier of Rules.~~

~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Department in accordance with this subsection.~~

A recent act, change, regulation, or order as used in subdivisions (2) through (5) of this subsection means an act, change, regulation, or order occurring or made effective no more than 210 days prior to the submission of a temporary rule to the Rules Review Commission. Upon written request of the agency, the Commission may waive the 210-day requirement upon consideration of the degree of public benefit, whether the agency had control over the circumstances that required the requested waiver, notice to and opposition by the public, the need for the waiver, and previous requests for waivers submitted by the agency.

(a1) Unless otherwise provided by law, at least 30 business days prior to adopting a temporary rule, the agency shall:

(1) Submit the rule and a notice of public hearing to the Codifier of Rules, and the Codifier of Rules shall publish the proposed temporary rule

and the notice of public hearing on the Internet to be posted within five business days.

(2) Notify persons on the mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule and of the public hearing.

(3) Accept written comments on the proposed temporary rule for at least 15 business days prior to adoption of the temporary rule.

(4) Hold at least one public hearing on the proposed temporary rule no less than five days after the rule and notice have been published.

An agency must also prepare a written statement of its findings of need for a temporary rule stating why adherence to the notice and hearing requirements in G.S. 150B-21.2 would be contrary to the public interest and why the immediate adoption of the rule is required. The statement must be signed by the head of the agency adopting the temporary rule.

(b) Review. – When an agency adopts a temporary rule it must submit the rule and the agency's written statement of its findings of the need for the rule to the ~~Codifier of Rules.~~ Rules Review Commission. ~~Within one business day after an agency submits a temporary rule, the Codifier of Rules must review the agency's written statement of findings of need for the rule to determine whether the statement of need meets the criteria listed in subsection (a) or (a1) of this section.~~ Within 15 business days after receiving the proposed temporary rule, the Commission shall review the agency's written statement of findings of need for the rule and the rule to determine whether the statement meets the criteria listed in subsection (a) of this section and the rule meets the standards in G.S. 150B-21.9. The Commission shall direct a member of its staff who is an attorney licensed to practice law in North Carolina to review the statement of findings of need and the rule. The staff member shall make a recommendation to the Commission, which must be approved by the Commission or its designee. The Commission's designee shall be a panel of at least three members of the Commission. In reviewing the statement, the ~~Codifier of Rules~~Commission or its designee may consider any information submitted by the agency or another person. If the ~~Codifier of Rules~~ Commission or its designee finds that the statement meets the ~~criteria,~~criteria listed in subsection (a) of this section and the rule meets the standards in G.S. 150B-21.9, the ~~Codifier of Rules must notify the head of the agency and enter the rule in the North Carolina Administrative Code.~~Commission or its designee must approve the temporary rule and deliver the rule to the Codifier of Rules within two business days of approval. The Codifier of Rules must enter the rule into the North Carolina Administrative Code on the sixth business day following receipt from the Commission or its designee.

If the ~~Codifier of Rules~~Commission or its designee finds that the statement does not meet the ~~criteria,~~ criteria listed in subsection (a) of this section or that the rule does not meet the standards in G.S. 150B-21.9, the ~~Codifier of Rules~~Commission or its designee must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the ~~Codifier of Rules~~Commission or its designee must review the additional findings or new statement

within ~~one business day~~five business days after the agency submits the additional findings or new statement. If the ~~Codifier of Rules~~Commission or its designee again finds that the statement does not meet the criteria listed in subsection (a) ~~or (a1)~~ of this ~~section,~~ section or that the rule does not meet the standards in G.S. 150B-21.9, the ~~Codifier of Rules~~Commission or its designee must immediately notify the head of the ~~agency.~~agency and return the rule to the agency.

If an agency decides not to provide additional findings or submit a new statement when notified by the ~~Codifier of Rules~~ Commission or its designee that the agency's findings of need for a rule do not meet the required ~~criteria,~~ criteria or that the rule does not meet the required standards, the agency must notify the ~~Codifier of Rules~~Commission or its designee of its decision. ~~The Codifier of Rules must then enter the rule in the North Carolina Administrative Code on the sixth business day after receiving notice of the agency's decision.~~ The Commission or its designee shall then return the rule to the agency. When the Commission returns a rule to an agency in accordance with this subsection, the agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. Notwithstanding any other provision of this subsection, if the agency has not complied with the provisions of G.S. 12-3.1, the Codifier of Rules shall not enter the rule into the Code.

(c) Standing. – A person aggrieved by a temporary rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) ~~or (a1)~~ of this section and whether the rule meets the standards in ~~G.S. 150B-21.9 that apply to review of a permanent rule.~~ G.S. 150B-21.9. The court shall not grant an ex parte temporary restraining order.

Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) Effective Date and Expiration. – A temporary rule becomes effective on the date specified in G.S. 150B-21.3. A temporary rule expires on the earliest of the following dates:

(1) The date specified in the rule.
(2) The effective date of the permanent rule adopted to replace the temporary rule, if the Commission approves the permanent rule.
(3) The date the Commission returns to an agency a permanent rule the agency adopted to replace the temporary rule.
(4) The effective date of an act of the General Assembly that specifically disapproves a permanent rule adopted to replace the temporary rule.
(5) 270 days from the date the temporary rule was published in the North Carolina Register, unless the permanent rule adopted to replace the temporary rule has been submitted to the Commission.

(e) Publication. – When the Codifier of Rules enters a temporary rule in the North Carolina Administrative Code, the Codifier must publish the rule in the North Carolina Register. ~~Publication of a temporary rule in the North Carolina Register serves as a notice of rule-making proceedings for a permanent rule if the permanent rule is substantially the same as the published temporary rule, unless the agency published a notice of rule-making proceedings at least 60 days before it adopted the temporary rule.~~"

SECTION 3. Part 2 of Article 2A of Chapter 150B of the General Statutes is amended by adding a new section to read:

"**§ 150B-21.1A. Adoption of an emergency rule.**

(a) Adoption. – An agency may adopt an emergency rule without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical when it finds that adherence to the notice and hearing requirements of this Part would be contrary to the public interest and that the immediate adoption of the rule is required by a serious and unforeseen threat to the public health or safety. When an agency adopts an emergency rule, it must simultaneously commence the process for adopting a temporary rule by submitting the rule to the Codifier of Rules for publication on the Internet in accordance with G.S. 150B-21.1(a1). The Department of Health and Human Services or the appropriate rule-making agency within the Department may adopt emergency rules in accordance with this section when a recent act of the General Assembly or the United States Congress or a recent change in federal regulations authorizes new or increased services or benefits for children and families and the emergency rule is necessary to implement the change in State or federal law.

(b) Review. – An agency must prepare a written statement of its findings of need for an emergency rule. The statement must be signed by the head of the agency adopting the rule. When an agency adopts an emergency rule, it must submit the rule and the agency's written statement of its findings of the need for the rule to the Codifier of Rules. Within two business days after an agency submits an emergency rule, the Codifier of Rules must review the agency's written statement of findings of need for the rule to determine whether the statement of need meets the criteria in subsection (a) of this section. In reviewing the statement, the Codifier of Rules may consider any information submitted by the agency or another person. If the Codifier of Rules finds that the statement meets the criteria, the Codifier of Rules must notify the head of the agency and enter the rule in the North Carolina Administrative Code on the sixth business day following approval by the Codifier.

If the Codifier of Rules finds that the statement does not meet the criteria in subsection (a) of this section, the Codifier of Rules must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the Codifier of Rules must review the additional findings or new statement within one business day after the agency submits the additional findings or new statement. If the Codifier of Rules again finds that the statement does not meet the criteria in subsection (a) of this section, the Codifier of Rules must immediately notify the head of the agency.

If an agency decides not to provide additional findings or submit a new statement when notified by the Codifier of Rules that the agency's findings of need for a rule do not meet the required criteria, the agency must notify the Codifier of Rules of its decision. The Codifier of Rules must then enter the rule in the North Carolina Administrative Code on the sixth business day after receiving notice of the agency's decision. Notwithstanding any other provision of this subsection, if the agency has not complied with the provisions of G.S. 12-3.1, the Codifier of Rules shall not enter the rule into the Code.

(c) Standing. – A person aggrieved by an emergency rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) of this section and whether the rule meets the standards in G.S. 150B-21.9. The court shall not grant an ex parte temporary restraining order.

Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) Effective Date and Expiration. – An emergency rule becomes effective on the date specified in G.S. 150B-21.3. An emergency rule expires on the earliest of the following dates:

(1) The date specified in the rule.

(2) The effective date of the temporary rule adopted to replace the emergency rule, if the Commission approves the temporary rule.

(3) The date the Commission returns to an agency a temporary rule the agency adopted to replace the emergency rule.

(4) Sixty days from the date the emergency rule was published in the North Carolina Register, unless the temporary rule adopted to replace the emergency rule has been submitted to the Commission.

(e) Publication. – When the Codifier of Rules enters an emergency rule in the North Carolina Administrative Code, the Codifier of Rules must publish the rule in the North Carolina Register."

SECTION 4. G.S. 150B-21.2 reads as rewritten:

"**§ 150B-21.2. Procedure for adopting a permanent rule.**

(a) Steps. – Before an agency adopts a permanent rule, it must take the following actions:

(1) Publish a notice of ~~rule-making proceedings~~ text in the North Carolina ~~Register, unless the proposed rule is substantially the same as a temporary rule published in the North Carolina~~ Register.

(2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.

~~(3) Publish the text of the proposed rule in the North Carolina Register.~~

(4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.

(5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.

~~(b) Notice of Rule-Making Proceedings. – A notice of rule-making proceedings published in the North Carolina Register must include all of the following:~~

~~(1) A statement of the subject matter of the proposed rule making.~~

~~(2) A short explanation of the reason for the proposed action.~~

~~(3) A citation to the law that gives the agency the authority to adopt a rule on the subject matter of the proposed rule making.~~

~~(4) The person to whom questions or written comments may be submitted on the subject matter of the proposed rule making.~~

~~Publication in the North Carolina Register of an agency's rule-making agenda satisfies the requirements of this subsection if the agenda includes the information required by this subsection.~~

(c) ~~Text After Notice of Rule-Making Proceedings.~~ Notice of Text. – A notice of the proposed text of a rule must include all of the following:

(1) The text of the proposed rule.

(2) A short explanation of the reason for the proposed rule.

(3) A citation to the law that gives the agency the authority to adopt the rule.

(4) The proposed effective date of the rule.

(5) The date, time, and place of any public hearing scheduled on the rule.

(6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.

(7) The period of time during which and the person to whom written comments may be submitted on the proposed rule.

(8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.

(9) The procedure by which a person can object to a proposed rule and the requirements for subjecting a proposed rule to the legislative review process.

~~An agency shall not publish the proposed text of a rule until at least 60 days after the date the notice of rule-making proceedings for the proposed rule was published in the North Carolina Register.~~

(d) Mailing List. – An agency must maintain a mailing list of persons who have requested notice of rule making. When an agency publishes in the North Carolina Register a notice of ~~rule-making proceedings or the~~ text of a proposed rule, it must mail a copy of the notice or text to each person on the mailing list who has requested notice ~~of rule-making proceedings~~ on the subject matter described in the notice or the rule affected. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.

(e) Hearing. – An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and ~~all the following apply:~~

~~(1) The notice of text does not schedule a public hearing on the proposed rule.~~

~~(2)~~ ~~The~~ the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published.

~~(3) The proposed text is not a changed version of proposed text the agency previously published in the course of rule-making proceedings but did not adopt.~~

An agency may hold a public hearing on a proposed rule in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published. If notice of a public hearing has been published in the North Carolina Register and that public hearing has been cancelled, the agency shall publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.

(f) Comments. – ~~An agency must accept comments on a notice of proposed rule-making proceedings published in the North Carolina Register until the text of the proposed rule that results from the notice is published.~~ An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register ~~and that requires a fiscal note under G.S. 150B-21.4(b1)~~ for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. ~~An agency must accept comments on the text of any other proposed rule published in the North Carolina Register for at least 30 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer.~~ An agency must consider fully all written and oral comments received.

(g) Adoption. – An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

(1) Affects the interests of persons who, based on ~~either the notice of rule-making proceedings or~~ the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.

(2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.

(3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part. An agency must submit an adopted rule to the Rules Review Commission within 30 days of the agency's adoption of the rule.

(h) Explanation. – An agency must issue a concise written statement explaining why the agency adopted a rule if, within ~~30~~ 15 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule. The agency must issue the explanation within 15 days after receipt of the request for an explanation.

(i) Record. – An agency must keep a record of a rule-making proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, and any written explanation made by the agency for adopting the rule."

SECTION 5. G.S. 150B-21.3 reads as rewritten:

"**§ 150B-21.3. Effective date of rules.**

(a) Temporary and Emergency ~~Rule.~~ Rules. – A temporary rule or an emergency rule becomes effective on the date the Codifier of Rules enters the rule in the North Carolina Administrative Code.

(b) Permanent Rule. – A permanent rule approved by the Commission becomes effective on the first day of the month following the month the rule is approved by the Commission, unless the Commission received written objections to the rule in accordance with subsection (b2) of this section.

(b1) Delayed Effective Dates. – If the Commission received written objections to the rule in accordance with subsection (b2) of this section, the rule becomes effective on the earlier of the thirty-first legislative day or the day of adjournment of the next regular session of the General Assembly that begins at least 25 days after the date the Commission approved the rule, unless a different effective date applies under this section. If a bill that specifically disapproves the rule is introduced in either house of the General Assembly before the thirty-first legislative day of that session, the rule becomes effective on the earlier of either the day an unfavorable final action is taken on the bill or the day that session of the General Assembly adjourns without ratifying a bill that specifically disapproves the rule. If the agency adopting the rule specifies a later effective date than the date that would otherwise apply under this subsection, the later date applies. A permanent rule that is not approved by the Commission or that is specifically disapproved by a bill enacted into law before it becomes effective does not become effective.

A bill specifically disapproves a rule if it contains a provision that refers to the rule by appropriate North Carolina Administrative Code citation and states that the rule is disapproved. Notwithstanding any rule of either house of the General Assembly, any member of the General Assembly may introduce a bill during the first 30 legislative

days of any regular session to disapprove a rule that has been approved by the Commission and that either has not become effective or has become effective by executive order under subsection (c) of this section.

(b2) Objection. – Any person who objects to the adoption of a permanent rule may submit written comments to the agency. If the objection is not resolved prior to adoption of the rule, a person may submit written objections to the Commission. If the Commission receives written objections from 10 or more persons clearly requesting review by the legislature in accordance with instructions contained in the notice pursuant to G.S. 150B-21.2(c)(9) and the Commission approves the rule, the rule will become effective as provided in subsection (b1) of this section. When the requirements of this subsection have been met and a rule is subject to legislative disapproval, the agency may adopt the rule as a temporary rule if the rule would have met the criteria listed in G.S. 150B-21.1(a) at the time the notice of text for the permanent rule was published in the North Carolina Register.

(c) Executive Order Exception. – The Governor may, by executive order, make effective a permanent rule that has been approved by the Commission ~~and has not become effective under subsection (b)~~ but the effective date of which has been delayed in accordance with subsection (b1) of this section upon finding that it is necessary that the rule become effective in order to protect public health, safety, or welfare. A rule made effective by executive order becomes effective on the date the order is issued or at a later date specified in the order. When the Codifier of Rules enters in the North Carolina Administrative Code a rule made effective by executive order, the entry must reflect this action.

A rule that is made effective by executive order remains in effect unless it is specifically disapproved by the General Assembly in a bill enacted into law on or before the day of adjournment of the regular session of the General Assembly that begins at least 25 days after the date the executive order is issued. A rule that is made effective by executive order and that is specifically disapproved by a bill enacted into law is repealed as of the date specified in the bill. If a rule that is made effective by executive order is not specifically disapproved by a bill enacted into law within the time set by this subsection, the Codifier of Rules must note this in the North Carolina Administrative Code.

(c1) Fees. – Notwithstanding any other provision of this section, a rule that establishes a new fee or increases an existing fee shall not become effective until the agency has complied with the requirements of G.S. 12-3.1.

(d) Legislative Day and Day of Adjournment. – As used in this section:

(1) A "legislative day" is a day on which either house of the General Assembly convenes in regular session.

(2) The "day of adjournment" of a regular session held in an odd-numbered year is the day the General Assembly adjourns by joint resolution for more than 10 days.

(3) The "day of adjournment" of a regular session held in an even-numbered year is the day the General Assembly adjourns sine die.

(e) OSHA Standard. – A permanent rule concerning an occupational safety and health standard that is adopted by the Occupational Safety and Health Division of the Department of Labor and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor becomes effective on the date the Division delivers the rule to the Codifier of Rules, unless the Division specifies a later effective date. If the Division specifies a later effective date, the rule becomes effective on that date.

(f) Technical Change. – A permanent rule for which no notice or hearing is required under G.S. 150B-21.5(a)(1) through (a)(5) or G.S. 150B-21.5(b) becomes effective on the first day of the month following the month the rule is approved by the Rules Review Commission."

SECTION 6. G.S. 150B-21.4(b1) reads as rewritten:

"(b1) Substantial Economic Impact. – Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would have a substantial economic impact and that is not identical to a federal regulation that the agency is required to adopt, the agency must obtain a fiscal note for the proposed rule change from the Office of State Budget and Management or prepare a fiscal note for the proposed rule change and have the note approved by that Office. If an agency requests the Office of State Budget and Management to prepare a fiscal note for a proposed rule change, that Office must prepare the note within 90 days after receiving a written request for the note. If the Office of State Budget and Management fails to prepare a fiscal note within this time period, the agency proposing the rule change may prepare a fiscal note. A fiscal note prepared in this circumstance does not require approval of the Office of State Budget and Management.

If an agency prepares the required fiscal note, the agency must submit the note to the Office of State Budget and Management for review. The Office of State Budget and Management must review the fiscal note within 14 days after it is submitted and either approve the note or inform the agency in writing of the reasons why it does not approve the fiscal note. After addressing these reasons, the agency may submit the revised fiscal note to that Office for its review. If an agency is not sure whether a proposed rule change would have a substantial economic impact, the agency may ask the Office of State Budget and Management to determine whether the proposed rule change has a substantial economic impact.

As used in this subsection, the term "substantial economic impact" means an aggregate financial impact on all persons affected of at least ~~five million dollars ($5,000,000)~~ three million dollars ($3,000,000) in a 12-month period."

SECTION 7. G.S. 150B-21.5 reads as rewritten:

"§ 150B-21.5. Circumstances when notice and rule-making hearing not required.

(a) Amendment. – An agency is not required to publish a notice of ~~rule-making proceedings or a notice of~~ text in the North Carolina Register or hold a public hearing when it proposes to amend a rule to do one of the following:

(1) Reletter or renumber the rule or subparts of the rule.

(2) Substitute one name for another when an organization or position is renamed.

(3) Correct a citation in the rule to another rule or law when the citation has become inaccurate since the rule was adopted because of the repeal or renumbering of the cited rule or law.

(4) Change information that is readily available to the public, such as an address or a telephone number.

(5) Correct a typographical error in the North Carolina Administrative Code.

(6) Change a rule in response to a request or an objection by the ~~Commission.~~ Commission, unless the Commission determines that the change is substantial.

(b) Repeal. – An agency is not required to publish a notice of ~~rule-making proceedings or a notice of~~ text in the North Carolina Register or hold a public hearing when it proposes to repeal a rule as a result of any of the following:

(1) The law under which the rule was adopted is repealed.

(2) The law under which the rule was adopted or the rule itself is declared unconstitutional.

(3) The rule is declared to be in excess of the agency's statutory authority.

(c) OSHA Standard. – The Occupational Safety and Health Division of the Department of Labor is not required to publish a notice of ~~rule-making proceedings or a notice of~~ text in the North Carolina Register or hold a public hearing when it proposes to adopt a rule that concerns an occupational safety and health standard and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor. The Occupational Safety and Health Division is not required to submit to the Commission for review a rule for which notice and hearing is not required under this subsection.

(d) State Building Code. – The Building Code Council is not required to publish a notice of text in the North Carolina Register when it proposes to adopt a rule that concerns the North Carolina State Building Code. The Building Code Council is required to publish a notice ~~of rule-making proceeding~~ in the North Carolina Register when it proposes to adopt a rule that concerns the North Carolina State Building Code. The notice must include all of the following:

(1) A statement of the subject matter of the proposed rule making.

(2) A short explanation of the reason for the proposed action.

(3) A citation to the law that gives the agency the authority to adopt a rule on the subject matter of the proposed rule making.

(4) The person to whom questions or written comments may be submitted on the subject matter of the proposed rule making.

The Building Code Council is required to submit to the Commission for review a rule for which notice ~~and hearing~~ of text is not required under this subsection. In adopting a rule, the Council shall comply with the procedural requirements of G.S. 150B-21.3."

SECTION 8. G.S. 150B-21.8 reads as rewritten:

"**§ 150B-21.8. Review of rule by Commission.**

(a) ~~Temporary~~ Emergency Rule. – The Commission does not review ~~a temporary~~an emergency rule.

(b) Temporary and Permanent ~~Rule.~~ Rules. – An agency must submit ~~a~~ temporary and permanent ~~rule~~ rules adopted by it to the Commission before the rule can be included in the North Carolina Administrative Code. The Commission reviews a temporary or permanent rule in accordance with the standards in G.S. 150B-21.9 and follows the procedure in this Part in its review of a ~~permanent~~ rule.

(c) Scope. – When the Commission reviews an amendment to a permanent rule, it may review the entire rule that is being amended. The procedure in G.S. 150B-21.12 applies when the Commission objects to a part of a permanent rule that is within its scope of review but is not changed by a rule amendment.

(d) Judicial Review. – When the Commission returns a permanent rule to an agency in accordance with G.S. 150B-21.12(d), the agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes."

SECTION 9. G.S. 150B-21.9 reads as rewritten:

"**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. – The Commission must determine whether a rule meets all of the following criteria:

(1) It is within the authority delegated to the agency by the General Assembly.

(2) It is clear and unambiguous.

(3) It is reasonably necessary to ~~fulfill a duty delegated to the agency by~~ implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. ~~when considered in light of~~ The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is ~~proposed and the legislative intent of the General Assembly in delegating the duty.~~proposed.

(4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

~~The Commission may determine if a rule submitted to it was adopted in accordance with Part 2 of this Article.~~ The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

~~The Commission must notify the agency that adopted the rule if it determines that a rule was not adopted in accordance with Part 2 of this Article and must return the rule to the agency.~~ Entry of a rule in the North Carolina Administrative Code after review by

the Commission ~~is conclusive evidence~~ creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. – The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1."

SECTION 10. G.S. 150B-21.12(c) reads as rewritten:

"(c) Changes. – When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission shall use the standards set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.1(a1) and (b)."

SECTION 11. G.S. 150B-21.17(a) reads as rewritten:

"(a) Content. – The Codifier of Rules must publish the North Carolina Register. The North Carolina Register must be published at least two times a month and must contain the following:

(1) Temporary rules entered in the North Carolina Administrative Code.

(1a) ~~Notices of rule-making proceedings, the~~ The text of proposed ~~rules,~~ rules and the text of permanent rules approved by the Commission. ~~Except with regard to notices of rule-making proceedings, this subdivision does not apply to the North Carolina State Building Code.~~

(1b) Emergency rules entered into the North Carolina Administrative Code.

(2) Notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165.

(3) Executive orders of the Governor.

(4) Final decision letters from the United States Attorney General concerning changes in laws that affect voting in a jurisdiction subject to section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H.

(5) Orders of the Tax Review Board issued under G.S. 105-241.2.

(6) Other information the Codifier determines to be helpful to the public."

SECTION 12. G.S. 150B-2(8a) reads as rewritten:

"(8a) "Rule" means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:

a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.

b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, by an occupational licensing board, as defined by G.S. 93B-1, or by the State Board of Elections.

c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

d. A form, the contents or substantive requirements of which are prescribed by rule or statute.

e. Statements of agency policy made in the context of another proceeding, including:

1. Declaratory rulings under G.S. 150B-4.

2. Orders of establishing or fixing rates or tariffs.

f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.

g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.

h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Personnel Commission.

j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.1 and the variable component of the excise tax on motor fuel under G.S. 105-449.80.

k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor."

SECTION 13. G.S. 131E-176(25) reads as rewritten:

"(25) "State Medical Facilities Plan" means the plan prepared by the Department of Health and Human Services and the North Carolina State Health Coordinating Council, and approved by the Governor. In preparing the Plan, the Department and the State Health Coordinating Council shall maintain a mailing list of persons who have requested notice of public hearings regarding the Plan. Not less than 15 days prior to a scheduled public hearing, the Department shall notify persons on its mailing list of the date, time, and location of the hearing. The Department shall hold at least one public hearing prior to the adoption of the proposed Plan and at least six public hearings after the adoption of the proposed Plan by the State Health Coordinating Council. The Council shall accept oral and written comments from the public concerning the Plan."

SECTION 14. Nothing in this act shall be construed to limit or repeal any specific grant of temporary rule-making authority to an agency enacted by the General Assembly prior to the effective date of this act.

SECTION 15. This act becomes effective July 1, 2003, and applies to temporary and emergency rules adopted on or after that date, and to permanent rules adopted on or after October 1, 2003.

TEMPORARY RULE-MAKING PROVISIONS ENACTED FROM 1996 - 2002

AGENCY	SUBJECT
Administration: NC Council for Women	Abuser treatment programs
DENR: Coastal Resources Commission	Setbacks
DENR: Coastal Resources Commission	Buffer requirements for public trust and estuarine waters
DENR: Coastal Resources Commission	Structural modifications to piers
DENR: EMC	Leaking petroleum underground storage tanks
DENR: EMC	Neuse River Basin rules
DENR: EMC	Coastal energy facilities
DENR: EMC	Air quality and emissions
DENR: EMC	Catawba River Basin buffer rules
DENR: EMC	Leaking Underground Petroleum Storage Tanks
DENR: EMC	Ambient air quality
DENR: EMC	Maximum mass loads for nitrogen and phosphorus discharge limits
DENR: EMC[1]	Dry cleaning solvent clean-up
DENR: Marine Fisheries Commission	Compliance with the Atlantic States Marine Fisheries Commission management plan
DENR: Marine Fisheries Commission	Marine Fisheries Reform Act
DHHS	Area Mental Health Program accountability
DHHS	Medicare provider sponsored organization licensing
DHHS	Medicaid pharmacy management plan
DHHS	Placement of persons in licensed facilities for mentally ill, developmentally disabled or substance abuse services
DHHS	Medicaid estate recovery
DHHS: Commission for Health Services	Dry-cleaning solvents
DHHS: Commission for Health Services	Sanitation of hospitals, nursing homes, rest homes
DHHS: Medical Care Commission	Licensing of neonatal care beds
DHHS: Medical Care Commission	Licensing of family care homes
DHHS: Medical Care Commission	Respite care
DMV	Air quality and emissions
EMC	Cape Fear, Catawba, and Tar-Pamlico River basins
Health & Wellness Trust	Extension temporary rulemaking authority

[1] Environmental Management Commission.

Prepared by: Mary Shuping, Legislative Analyst
May 22, 2003

Fund	
Insurance	Long-term care policies conformance to federal law
Insurance	CPA audits of financial statements
Locksmith Licensing Board	Extension of temporary rule-making authority
Secretary of State	Electronic signatures
Secretary of State	Certification technology
State Board of Community Colleges	Reorganization of Human Resources Development Program
State Board of Community Colleges	Definition of generic and specific fees
State Board of Community Colleges	Training provided to law enforcement personnel
State Board of Community Colleges	Generic and specific fees
State Board of Education	Students who drop out are not eligible for drivers license
State Board of Elections	Various election law rules
State Building Commission	Open-end design agreements for design and restoration of wetland, stream, buffer creation mitigation and restoration projects
State Chief Information Officer	Information technology procurement
Tobacco Trust Fund	Extension of temporary rulemaking authority
Transportation	Air quality and emissions
Transportation	Mobile and modular home height
Transportation	Class of minimum criteria projects
Various Agencies	Hurricane Floyd Relief Act
Well Contractors Commission	Extension of time to adopt temporary rules
Wildlife Resources Comm.	Allows WRC to adopt temporary rules for taking of wild animals during rabies outbreak
Wildlife Resources Commission	No wake zones

Prepared by: Mary Shuping, Legislative Analyst
May 22, 2003

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 637

Short Title:	Amend Powers/Settlor of Revocable Trust.	(Public)
Sponsors:	Representatives Munford; Glazier, Haire, LaRoque, McMahan, Moore, Ross, Sauls, Setzer, Stam, and Stiller.	
Referred to:	Judiciary IV.	

March 25, 2003

A BILL TO BE ENTITLED

AN ACT TO PERMIT THE SETTLOR OF A REVOCABLE TRUST TO RELIEVE THE TRUSTEE OF DUTIES, RESTRICTIONS, AND LIABILITIES IMPOSED BY THE UNIFORM TRUSTS ACT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 36A-78 reads as rewritten:

"**§ 36A-78. Power of settlor.**

The settlor of any trust affected by this Article may, by provision in the instrument creating the trust if the trust was created by a writing, or by oral statement to the trustee at the time of the creation of the trust if the trust was created orally, or by an amendment of the trust if the settlor reserved the power to amend the trust, or by written instrument delivered to the trustee of a revocable trust, relieve the trustee from any or all duties, restrictions, and liabilities which would otherwise be imposed upon ~~him~~ the trustee by this Article; or alter or deny to ~~his~~ the trustee any or all of the privileges and powers conferred upon the trustee by this Article; or add duties, restrictions, liabilities, privileges, or powers, to those imposed or granted by this Article; but no act of the settlor who has not reserved the power to revoke the trust shall relieve a trustee from the duties, restrictions, and liabilities imposed upon ~~him~~ the trustee by G.S. 36A-62, 36A-63 and G.S. 36A-66."

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 3

HOUSE BILL 656

Committee Substitute Favorable 4/7/03
Committee Substitute #2 Favorable 4/29/03

Short Title: Amend Trust Administration Act. (Public)

Sponsors:

Referred to:

March 25, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE TRUST ADMINISTRATION ACT AND TO MAKE RELATED CHANGES TO THE LAW GOVERNING ACCOUNTINGS IN TESTAMENTARY TRUSTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 36A-23.1(a) reads as rewritten:

"(a) The clerks of superior court of this State have original jurisdiction over all proceedings initiated by interested persons concerning the internal affairs of trusts except proceedings ~~to modify or terminate trusts.~~ governed by Article 11A of this Chapter. Except as provided in subdivision (3) of this subsection, the clerk's jurisdiction is exclusive. Proceedings that may be maintained under this subsection are those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and trust beneficiaries, to the extent that those matters are not otherwise provided for in the governing instrument. These include proceedings:

(1) To appoint or remove a trustee;

(1a) To permit a trustee to resign or renounce; however, unless the trustee is required to account to the clerk, when the governing instrument names or provides a procedure to name a successor trustee, and the successor trustee is willing to serve, no trustee shall be required to initiate a proceeding to resign or renounce as trustee;

(2) To review trustees' fees pursuant to ~~G.S. 32-50~~ Article 5 of Chapter 32 of the General Statutes and review and settle interim or final accounts; and

(3) To ascertain beneficiaries, to determine any question arising in the administration or distribution of any trust, including questions of construction of trust instruments, and to determine the existence or nonexistence of trusts created other than by will and the existence or

nonexistence of any immunity, power, privilege, duty, or right. The clerk, on the clerk's own motion, may determine that a proceeding to determine an issue listed in this subdivision shall be originally heard by a superior court judge."

SECTION 2. G.S. 36A-24.1(b) reads as rewritten:

"(b) If the trustee is not required to account to the clerk, then unless the terms of the governing instrument provide otherwise, venue for proceedings under G.S. 36A-23.1 involving trusts ~~is in~~ is:

(1) In the case of an inter vivos trust, in any county of this State in which the trust has its principal place of administration or where any beneficiary ~~resides.~~ resides; or

(2) In the case of a testamentary trust, in any county of this State in which the trust has its principal place of administration, where any beneficiary resides, or in which the testator's estate was administered."

SECTION 3. G.S. 36A-26.1 reads as rewritten:

"**§ 36A-26.1. Trust proceedings; necessary parties.**

Proceedings under G.S. 36A-23.1 are initiated by filing a petition or complaint in the office of the clerk of superior court. Upon the filing of the petition, the clerk shall docket the cause as an estate matter. All ~~known beneficiaries, trustees, or cotrustees~~ trustees and interested persons not joined as petitioners shall be joined as respondents. The clerk shall issue the summons for the respondents. The clerk may order ~~notification of~~ that additional persons be joined as respondents and shall issue the summons for the additional persons. ~~An order is valid as to all persons who are given notice of the proceeding even if all interested persons are not notified. The beneficiaries, creditors, or any other persons interested in the trust estate have the right to~~ The summons shall notify the respondents to appear and answer the petition ~~and to offer evidence against granting the petition. The clerk shall then proceed to hear~~ within 10 days after its service upon the respondents. The summons shall comply with the requirements set forth in G.S. 1-394 for a special proceeding summons except that the clerk shall indicate on the summons by appropriate words that the summons is issued in an estate matter and not in a special proceeding or in a civil action. The clerk shall set the matter for hearing after the period for respondents to answer the petition has expired and shall direct the petitioners to provide notice of the hearing to respondents. At the hearing, petitioners and respondents may offer evidence for and against granting the petition, and the clerk shall decide and determine the matter as provided ~~for in G.S. 1-301.3.~~ in G.S. 1-301.3. An order entered by the clerk is valid as to all persons upon whom a summons is served."

SECTION 4. G.S. 36A-29 reads as rewritten:

"**§ 36A-29. ~~Final accounting before resignation.~~ Accounting to the clerk.**

(a) No trustee, including a trustee appointed by the clerk, shall be required to account to the clerk of superior court unless the governing instrument directs that the trustee shall be required to account to the clerk or unless the trustee is otherwise required by law to account to the clerk.

(b) If the trustee is required to account to the clerk of superior court, then unless the terms of the governing instrument provide otherwise, no trustee shall be permitted to resign as trustee until a final account of the trust estate is filed with the clerk, and until the court shall be satisfied that the account is true and correct."

SECTION 5. G.S. 36A-31 reads as rewritten:

"**§ 36A-31. When bond required.**

A trustee ~~need not~~ shall provide bond to secure performance of the trustee's duties ~~unless required by the~~ if:

(1) The terms of the governing ~~instrument, reasonably requested by a beneficiary, or found by the clerk to be necessary~~ instrument require the trustee to provide bond;

(2) A beneficiary requests the trustee to provide bond and the clerk finds the request to be reasonable; or

(3) The clerk finds that it is necessary for the trustee to provide bond in order to protect the interests of beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented.

However, in no event shall bond be required of a trustee, including a trustee appointed by the clerk, if the governing instrument directs otherwise. On petition of the trustee or other interested person, the clerk may excuse a requirement of bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties. ~~If the governing instrument is silent as to the requirement of a bond and the clerk finds that no bond is necessary, or if the clerk excuses or reduces the bond requirement, the clerk's decision must be approved by a superior court judge unless all beneficiaries have been notified of the decision.~~ If bond is required, it shall be in a sum double the value of the personal property to come into the trustee's hands when bond is executed by a personal surety, and in an amount not less than one and one-fourth times the value of all personal property of the trust estate when the bond is secured by a suretyship bond executed by a corporate surety company authorized by the Commissioner of Insurance to do business in this State, provided that the clerk of superior court, when the value of the personal property exceeds one hundred thousand dollars ($100,000), may accept bond in an amount equal to the value of the personal property plus ten percent (10%) thereof, conditioned upon the faithful performance of the trustee's duties and for the payment to the persons entitled to receive all moneys, assets, or other things of value which may come into the trustee's hands. All bonds executed under the provisions of this Article shall be filed with the clerk."

SECTION 6. G.S. 36A-32 reads as rewritten:

"**§ 36A-32. Rights and duties devolve on successor.**

A successor ~~trustee~~ trustee, including a successor trustee appointed by the clerk, shall succeed to all the rights, powers, and privileges, and shall be subject to all the duties, liabilities, and responsibilities that were imposed upon the original trustee unless a contrary intent appears from the governing ~~instrument.~~instrument or unless the order appointing the successor trustee provides otherwise."

SECTION 7. G.S. 36A-107 reads as rewritten:

"**§ 36A-107. Trustees in wills to qualify and file inventories and accounts.**

~~Trustees~~In any will creating a testamentary trust ~~appointed in any will~~ admitted to probate in this ~~State, into whose hands assets come under the provisions of the will,~~ State that directs that the trustee shall be required to account to the clerk, the trustee shall first qualify under the laws applicable to executors, and shall file in the office of the clerk of the county where the will is probated inventories of the assets ~~which~~ that come into ~~his~~ the trustee's hands and annual and final accounts ~~thereof,~~of the trust ~~such~~ that are the same as are required of executors and administrators. The power of the clerk to enforce the filing and ~~his~~the clerk's duties ~~in respect to auditing and approving~~ to audit and approve the trustee's inventories and accounts shall be the same as ~~in such cases.~~ the clerk's powers and duties with respect to the inventories and accounts of executors and administrators. This section shall not apply to the extent that any will makes a different provision. No trustee, including a trustee appointed by the clerk, shall be required to account to the clerk unless the subject will directs that the trustee shall be required to account to the clerk or unless otherwise required by law."

SECTION 8. Sections 4, 5, and 7 of this act apply to testamentary trusts created by decedents dying on or after January 1, 2004, and inter vivos trusts created on or after January 1, 2004. The remainder of this act becomes effective January 1, 2004, and applies to all trusts created before or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 656

Committee Substitute Favorable 4/7/03

Committee Substitute #2 Favorable 4/29/03

PROPOSED SENATE COMMITTEE SUBSTITUTE H656-CSRC-62 [v.3]

5/21/2003 6:37:11 PM

Short Title: Amend Trust Administration Act. (Public)

Sponsors:

Referred to:

March 25, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE TRUST ADMINISTRATION ACT AND TO MAKE RELATED CHANGES TO THE LAW GOVERNING ACCOUNTINGS IN TESTAMENTARY TRUSTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 36A-23.1(a) reads as rewritten:

"(a) The clerks of superior court of this State have original jurisdiction over all proceedings initiated by interested persons concerning the internal affairs of trusts except proceedings ~~to modify or terminate trusts.~~ governed by Article 11A of this Chapter. Except as provided in subdivision (3) of this subsection, the clerk's jurisdiction is exclusive. Proceedings that may be maintained under this subsection are those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and trust beneficiaries, to the extent that those matters are not otherwise provided for in the governing instrument. These include proceedings:

(1) To appoint or remove a trustee;

(1a) To permit a trustee to resign or renounce; however, unless the trustee is required to account to the clerk, when the governing instrument names or provides a procedure to name a successor trustee, and the successor trustee is willing to serve, no trustee shall be required to initiate a proceeding to resign or renounce as trustee;

(2) To review trustees' fees pursuant to ~~G.S. 32-50~~ Article 5 of Chapter 32 of the General Statutes and review and settle interim or final accounts; and

(3) To ascertain beneficiaries, to determine any question arising in the administration or distribution of any trust, including questions of

construction of trust instruments, and to determine the existence or nonexistence of trusts created other than by will and the existence or nonexistence of any immunity, power, privilege, duty, or right. The clerk, on the clerk's own motion, may determine that a proceeding to determine an issue listed in this subdivision shall be originally heard by a superior court judge."

SECTION 2. G.S. 36A-24.1(b) reads as rewritten:

"(b) If the trustee is not required to account to the clerk, then unless the terms of the governing instrument provide otherwise, venue for proceedings under G.S. 36A-23.1 involving trusts ~~is in~~ is:

(1) In the case of an inter vivos trust, in any county of this State in which the trust has its principal place of administration or where any beneficiary ~~resides.~~ resides; or

(2) In the case of a testamentary trust, in any county of this State in which the trust has its principal place of administration, where any beneficiary resides, or in which the testator's estate was administered."

SECTION 3. G.S. 36A-26.1 reads as rewritten:

"**§ 36A-26.1. Trust proceedings; necessary parties.**

Proceedings under G.S. 36A-23.1 are initiated by filing a petition ~~or complaint~~ in the office of the clerk of superior court. Upon the filing of the petition, the clerk shall docket the cause as an estate matter. All ~~known beneficiaries, trustees, or cotrustees~~ trustees and interested persons not joined as petitioners shall be joined as respondents. The clerk shall issue the summons for the respondents. The clerk may order ~~notification of~~ that additional persons be joined as respondents and shall issue the summons for the additional persons. ~~An order is valid as to all persons who are given notice of the proceeding even if all interested persons are not notified. The beneficiaries, creditors, or any other persons interested in the trust estate have the right to~~ The summons shall notify the respondents to appear and answer the petition ~~and to offer evidence against granting the petition. The clerk shall then proceed to hear~~ within 10 days after its service upon the respondents. The summons shall comply with the requirements set forth in G.S. 1-394 for a special proceeding summons except that the clerk shall indicate on the summons by appropriate words that the summons is issued in an estate matter and not in a special proceeding or in a civil action. The clerk shall set the matter for hearing after the period for respondents to answer the petition has expired and shall direct the petitioners to provide notice of the hearing to respondents. At the hearing, petitioners and respondents may offer evidence for and against granting the petition, and the clerk shall decide and determine the matter as provided ~~for in G.S. 1-301.3.~~ in G.S. 1-301.3. An order entered by the clerk is valid as to all persons upon whom a summons is served."

SECTION 4. G.S. 36A-29 reads as rewritten:

"**§ 36A-29. ~~Final accounting before resignation.~~ Accounting to the clerk.**

(a) No trustee, including a trustee appointed by the clerk, shall be required to account to the clerk of superior court unless the governing instrument directs that the

trustee shall be required to account to the clerk or unless the trustee is otherwise required by law to account to the clerk.

(b) If the trustee is required to account to the clerk of superior ~~court, then unless the terms of the governing instrument provide otherwise, no~~ court, the trustee shall not be permitted to resign as trustee until a final account of the trust estate is filed with the ~~clerk,~~ clerk and until the court shall be satisfied that the account is true and ~~correct.~~ correct, unless the terms of the governing instrument provide otherwise."

SECTION 5. G.S. 36A-31 reads as rewritten:

"**§ 36A-31. When bond required.**

(a) ~~A~~ For testamentary trusts created by decedents dying on or after January 1, 2004 and inter vivos trusts created on or after January 1, 2004, a trustee ~~need not~~ shall provide bond to secure performance of the trustee's duties ~~unless required by the~~ if the terms of the governing ~~instrument, reasonably requested by a beneficiary, or found by the clerk to be necessary~~ instrument require the trustee to provide bond. For testamentary trusts created by decedents dying before January 1, 2004 and inter vivos trusts created before January 1, 2004, a trustee shall provide bond to secure performance of the trustee's duties unless the terms of the governing instrument provides otherwise. In addition, regardless of when a trust was created a trustee shall provide bond to secure performance of the trustee's duties if:

(1) A beneficiary requests the trustee to provide bond and the clerk finds the request to be reasonable; or

(2) The clerk finds that it is necessary for the trustee to provide bond in order to protect the interests of beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented.

(b) ~~However,~~ Notwithstanding subsection (a) of this section, in no event shall bond be required of a trustee, including a trustee appointed by the clerk, if the governing instrument directs otherwise. On petition of the trustee or other interested person, the clerk may excuse a requirement of bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties. ~~If the governing instrument is silent as to the requirement of a bond and the clerk finds that no bond is necessary, or if the clerk excuses or reduces the bond requirement, the clerk's decision must be approved by a superior court judge unless all beneficiaries have been notified of the decision.~~ If bond is required, it shall be in a sum double the value of the personal property to come into the trustee's hands when bond is executed by a personal surety, and in an amount not less than one and one-fourth times the value of all personal property of the trust estate when the bond is secured by a suretyship bond executed by a corporate surety company authorized by the Commissioner of Insurance to do business in this State, provided that the clerk of superior court, when the value of the personal property exceeds one hundred thousand dollars ($100,000), may accept bond in an amount equal to the value of the personal property plus ten percent (10%) thereof, conditioned upon the faithful performance of the trustee's duties and for the payment to the persons entitled to receive all moneys, assets, or other things of value

which may come into the trustee's hands. All bonds executed under the provisions of this Article shall be filed with the clerk."

SECTION 6. G.S. 36A-32 reads as rewritten:

"**§ 36A-32. Rights and duties devolve on successor.**

A successor ~~trustee~~ trustee, including a successor trustee appointed by the clerk, shall succeed to all the rights, powers, and privileges, and shall be subject to all the duties, liabilities, and responsibilities that were imposed upon the original trustee unless a contrary intent appears from the governing ~~instrument.~~instrument or unless the order appointing the successor trustee provides otherwise."

SECTION 7. G.S. 36A-107 reads as rewritten:

"**§ 36A-107. Trustees in wills to qualify and file inventories and accounts.**

(a) Trustees appointed in any will admitted to probate in this ~~State,~~ State that creates a testamentary trust as the result of a decedent's death before January 1, 2004, and into whose hands assets come under the provisions of the will, shall first qualify under the laws applicable to executors, and shall file in the office of the clerk of the county where the will is probated inventories of the assets ~~which~~ that that come into ~~his~~ the trustee's hands and annual and final accounts ~~thereof, such~~ of the trust that are the same as required of executors and administrators. The power of the clerk to enforce the filing and ~~his~~the clerk's duties ~~in respect to auditing and approving~~ to audit and approve the trustee's inventories and accounts shall be the same as ~~in such cases.~~ the clerk's powers and duties with respect to the inventories and accounts of executors and administrators. This ~~section~~ subsection shall not apply to the extent that any will makes a different provision.

(b) For any will that creates a testamentary trust as the result of a decedent's death on or after January 1, 2004, and that directs that the trustee shall be required to account to the clerk, the trustee shall first qualify under the laws applicable to executors, and shall file in the office of the clerk of the county where the will is probated inventories of the assets that come into the trustee's hands and annual and final accounts of the trust that are the same as are required of executors and administrators. The power of the clerk to enforce the filing and the clerk's duties to audit and approve the trustee's inventories and accounts shall be the same as the clerk's powers and duties with respect to the inventories and accounts of executors and administrators. This section shall not apply to the extent that any will makes a different provision. No trustee, including a trustee appointed by the clerk, shall be required to account to the clerk unless the subject will directs that the trustee shall be required to account to the clerk or unless otherwise required by law."

SECTION 8. This act becomes effective January 1, 2004, and applies to all trusts created before or after that date.

HOUSE BILL 656:
Amend Trust Administration Act

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Representative Culpetter
Date:	May 21, 2003	**Summary by:**	Kory J. Goldsmith
Version:	Proposed Committee Substitute H656-CSRC-62[v.3]		Committee Counsel

SUMMARY: ***House Bill 656 would make various changes to Article 3 of Chapter 36A of the General Statutes, the Trust Administration Act, relating to the jurisdiction of the clerk of superior court, venue in trust proceedings, issuance and service of summons, accounting to the clerk, bond requirements, and successor trustees.***

The proposed committee substitute makes a conforming change to Section 3 of the bill. It also rewrites Sections 5 and 7 to include the effective dates in the statutes.

CURRENT LAW: Article 3 of Chapter 36A governs matters relating to the administration of trusts. This article was substantially rewritten during the 2001 Session. See the bill analysis for a more detailed explanation of current law.

BILL ANALYSIS: House Bill 656 would change current law regarding trust proceedings as follows:

Jurisdiction of the clerk: Currently, the clerk of superior court has jurisdiction to hear all proceedings concerning the internal affairs of trusts, except proceedings to modify or terminate trusts[1]. This includes proceedings concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustee and trust beneficiaries, to the extent that those matters are not otherwise provided for in the governing instrument.

Section 1 would amend the statute governing the clerk's jurisdiction in trust proceedings to specify that the only proceedings concerning the internal affairs of trusts that are not within the clerk's original jurisdiction are proceedings governed by Article 11A of Chapter 36A (concerning the modification and termination of irrevocable trusts). A trust proceeding would be outside the clerk's jurisdiction only if the proceeding expressly fell within the jurisdiction of the superior court under Article 11A. The section also specifies that the clerk has original jurisdiction over: 1) proceedings to permit a trustee to resign or renounce (however, where a successor trustee is named in the governing instrument or where the governing instrument sets forth a procedure for naming a successor trustee, and the successor is willing to serve, no proceeding is required); 2) proceedings to review trustees fees, including the fees of attorneys serving as trustees.

Venue: Currently, in the case of trusts in which an accounting is not required, venue for a trust proceeding is in any county in which the trust has its principal place of administration or where beneficiary resides.

Section 2 would amend the venue provision for trusts for which an accounting is not required to add that for a testamentary trust, venue would lie in any county in which the testator's estate was administered.

Necessary parties and issuance of summons: Trust proceedings are initiated by the filing of a petition with the clerk of court. The case is docketed as an estate matter. All known beneficiaries, trustees, or

[1] Article 11A of Chapter 36A governs the modification or termination of irrevocable trusts.

cotrustees not joined in the original petition must be joined in the proceeding, and the clerk may order that additional persons be notified. Any person interested in the trust can answer the petition and offer evidence against granting the petition.

Section 3 would broaden the category of persons who must be joined in the proceeding. Under the bill, all trustees and "interested persons" (defined in another section of the statute to include creditors, beneficiaries, and any others having a property right in or a claim against a trust estate) must be joined in the proceeding. The bill would also specify that: 1) the clerk must issue summons to any additional persons ordered by the clerk to be joined in the proceeding 2) the summons would notify the respondents to appear and answer the petition within 10 days after service 3) the clerk would set a hearing after the answer period expires and 4) an order entered by the clerk would be valid as to all persons upon whom a summons was served.

Accounting: Currently, if a trustee is required to account to the clerk, the trustee cannot resign as trustee until a final account is filed with the clerk and the court is satisfied that the account is true and correct.

Section 4 would add that no trustee would be required to account to the clerk unless the governing instrument affirmatively says so or unless the trustee is otherwise required by law to account to the clerk.

Bond requirement: A trustee is required to post a bond unless the trust instrument specifically provides otherwise. This means that if the trust is silent as the issue of the trustee posting a bond, then the trustee must post a bond. Additionally, the trustee must post a bond if a beneficiary requests it, or the clerk finds a bond to be necessary. If the governing instrument is silent as to the bond requirement and the clerk finds no bond to be necessary, or if the clerk excuses or reduces the bond, the clerk's decision must be approved by a superior court judge unless all beneficiaries have been notified of the clerk's decision. The statute prescribes the amount of the bond.

Section 5 shifts the presumption regarding whether a trustee must post a bond. If the trust was created before January 1, 2004, and is silent as to the need for a bond, the trustee would be required to post one. If the trust was created on or after January 1, 2004 and is silent as to the need for a bond, the trustee would not be required to post a bond. It would also delete the provision requiring approval of a superior court judge of a clerk's decision not to require a bond or to excuse or reduce a bond.

Successor trustees: Successor trustees by law succeed to all the powers and duties of the original trustee unless a contrary intent appears from the governing instrument.

Section 6 would specify that successor trustees appointed by the clerk succeed to all the powers and duties of the original trustee unless the order appointing the successor trustee provides otherwise.

Testamentary trusts: A testamentary trust is a trust created by operation of a will. Currently, a trustee must provide an accounting to the clerk of court unless the will specifically provides otherwise.

Section 7 shifts the presumption regarding the requirement for a trustee under a testamentary trust to provide an accounting of the trust. If the trust was created because of the decedent's death before January 1, 2004 and is silent as to the requirement for an accounting, the trustee would be provide an accounting regarding the trust to the clerk. If the trust was created because of the decedent's death on or after January 1, 2004 and is silent as to the need for an accounting, the trustee would not be required to provide an accounting to the clerk.

Effective date: *Section 7* would make the act become effective January 1, 2004 and apply to all trusts created before or after that date.

H656-SMRC-002 Dianna Jessup contributed substantially to this summary.

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. 656 DATE 5/22/03

S. B. No. _____ Amendment No. _____ (to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE H656-CSRC-62[v. 3]

Rep.) Hartsell

Sen.)

moves to amend the bill on page 4, lines 24-25

( ) WHICH CHANGES THE TITLE

by rewriting the lines to read:

"(b) For any testamentary trust created under a will of a decedent dieing on or after January 1, 2004, the provisions of which direct the trustee to:".

SIGNED _____

ADOPTED ✓ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

Judiciary II Committee

Minutes

May 27, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with twelve members present.

HB 147 (Left Turn on Red) Senator Hartsell recognized Representative Gulley, bill sponsor to explain the bill. Senator Sloan moved to adopt the Proposed Committee Substitute for purposes of discussion. All members voted and the motion carried. Representative Gulley explained the bill. Ms. Cynthia Temoshenko from the Governor's Advocacy Council for Disabilities, spoke on the bill. Questions by Senators Dorsett, Hagan, Kinnaird, Bingham, Queen, Kerr, Rucho and Shubert were answered by Representative Gulley, Senator Hartsell, Senator Thomas and Kory Goldsmith, Staff Attorney. The bill was displaced while amendments were addressed.

HB 352 (Drug Screening & Assessment.-AB) Representative Haire, bill sponsor, was introduced by Senator Thomas, Vice Chair, to explain the bill. Senator Rucho moved to adopt the bill for purposes of discussion without objection. Questions by Senators Kerr, Dorsett and Shubert were answered by Representative Haire, Tracy Little of the Department of Corrections and Robin Johnson, Staff Attorney. Mr. John Madler, of the North Carolina Sentencing and Policy Advisory Commission, spoke on the bill. Senator Sloan moved for a favorable report. All members voted and the motion carried.

HB 147 (Left Turn on Red) Staff Attorney Kory Goldsmith explained the amendment. Ms. Temoshenko spoke on the amendment. All members voted on the amendment and the amendment carried. Senator Rucho moved for a favorable report as amended and rolled into a committee substitute. All members voted and the motion carried.

There being no further business, the meeting was adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, May 27, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B. **352** Drug Screening & Assessment.-AB
Sequential Referral: None
Recommended Referral: None

H.B.(CS #1) **1048** Juvenile Code Revisions/Ct. Improvement Proj.
Sequential Referral: None
Recommended Referral: None

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **1151** Improve Rule-Making Process.
Draft Number: PCS 30346
Sequential Referral: None
Recommended Referral: None
Long Title Amended: No

TOTAL REPORTED: 3

Committee Clerk Comments:

Fiscal Note attached for HB1048

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	May 27, 2003	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 147	Left Turn on Red.	Representative Gulley
HB 304	Stalking/Supervised Probation Is Minimum.	Representative Setzer
HB 352	Drug Screening & Assessment.-AB	Representative Haire
HB 963	Hit and Run - 2 Year License Revocation.	Representative Warner
HB 965	Failure to Yield Causing Death or Injuries.	Representative Hill

Senator Fletcher L. Hartsell, Jr., Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
May 27, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. Welcome and Opening Remarks

II. Bills to be Considered

HB 147	Left Turn on Red.	Representative Gulley
HB 304	Stalking/Supervised Probation Is Minimum.	Representative Setzer
HB 352	Drug Screening & Assessment.-AB	Representative Haire
HB 963	Hit and Run - 2 Year License Revocation.	Representative Warner
HB 965	Failure to Yield Causing Death or Injuries.	Representative Hill

III. Other Business

IV. Adjournment

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — May 27, 2003
Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
PEGGY BURNS	CBA
SAM NOBLES	CBA
Debra Knox	CBA/ABATE of North Carolina
Wayne Mooney	CBA
Becky Mooney	CBA
~~Matt Osborne~~	AOC
John Madler	NC Sentencing Commission
JAMES QUERCASA	Miles + RETREAD
JIM EVERHART	MILES OF NC + RETREADS M/C
Fred Johnson	Universal Disability Advocates PO Box 12988, Ral., NC 27605
Rene Cummins	Universal Disability Advocates PO Box 12988 Ral., NC. 27605
Gregg Gelings	GACPD 2113 Capital St Suite 218; 27605
Hal Miller	NCACCT

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — May 27, 2003
Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
R. Paul Wilms	NCHBA
	NASW
	DOC
Tracy A. Little	NCDOC
Mildred Spearman	NCDOC
John O'Hale	Gov. office
John Mattox	Gov office
Amy Dobson	NC Statewatch
Joanne stevens	nursing + NCCAS/A
Mike Causey	ASA

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 2

HOUSE BILL 147
Committee Substitute Favorable 3/19/03

Short Title: Left Turn on Red. (Public)

Sponsors:

Referred to:

February 27, 2003

A BILL TO BE ENTITLED

AN ACT TO PERMIT LEFT TURNS ON RED IN CERTAIN SITUATIONS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-158(b) reads as rewritten:

"(b) Control of Vehicles at Intersections. –

(1) When a stop sign has been erected or installed at an intersection, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right-of-way to vehicles operating on the designated main-traveled or through highway. When stop signs have been erected at three or more entrances to an intersection, the driver, after stopping in obedience thereto, may proceed with caution.

(2) ~~Vehicles facing a red light controlling traffic passing straight through an intersection from a steady or strobe beam stoplight shall not enter the intersection while the steady or strobe beam stoplight is emitting a red light controlling traffic passing straight through an intersection; provided that, except where prohibited by an appropriate sign, vehicular traffic facing a red light controlling traffic passing straight through an intersection, after coming to a complete stop at the intersection, may enter the intersection to make a right turn but such vehicle shall yield the right of way to pedestrians and to other traffic using the intersection.~~ When a steady or strobe beam stoplight is emitting a red light controlling traffic passing through an intersection, an approaching vehicle facing the red light shall come to a stop and shall not enter the intersection. After coming to a complete stop and unless prohibited by an appropriate sign, that approaching vehicle may turn under one of the following conditions:

a. That vehicle may make a right turn. The turning vehicle shall yield the right-of-way to pedestrians and to other traffic using the intersection.

b. If that vehicle is in the leftmost lane of travel on a one-way street that intersects with another one-way street with traffic traveling from the turning driver's right to the turning driver's left, then that vehicle may enter the intersection and make a left turn into the extreme left-hand lane lawfully available to traffic. The turning vehicle shall yield the right-of-way to pedestrians and to other traffic using the intersection.

(2a) When ~~the~~ a stoplight is emitting a steady yellow circular light on a traffic signal controlling traffic passing straight through an intersection or a steady yellow arrow light on a traffic signal controlling traffic turning at an intersection, vehicles facing the yellow light are warned that the related green light is being terminated or a red light will be immediately forthcoming. When the stoplight is emitting a steady green light, vehicles may proceed with due care through the intersection subject to the rights of pedestrians and other vehicles as may otherwise be provided by law.

(3) When a flashing red light has been erected or installed at an intersection, approaching vehicles facing the red light shall stop and yield the right-of-way to vehicles in or approaching the intersection. The right to proceed shall be subject to the rules applicable to making a stop at a stop sign.

(4) When a flashing yellow light has been erected or installed at an intersection, approaching vehicles facing the yellow flashing light may proceed through the intersection with caution, yielding the right-of-way to vehicles in or approaching the intersection.

(5) When a stop sign, stoplight, flashing light, or other traffic-control device authorized by subsection (a) of this section requires a vehicle to stop at an intersection, the driver shall stop (i) at an appropriately marked stop line, or if none, (ii) before entering a marked crosswalk, or if none, (iii) before entering the intersection at the point nearest the intersecting street where the driver has a view of approaching traffic on the intersecting street."

SECTION 2. This act becomes effective October 1, 2003.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 147

Committee Substitute Favorable 3/19/03

PROPOSED SENATE COMMITTEE SUBSTITUTE H147-CSRC-61 [v.2]

5/22/2003 9:16:30 AM

Short Title: Left Turn on Red. (Public)

Sponsors:

Referred to:

February 27, 2003

A BILL TO BE ENTITLED

AN ACT TO PERMIT LEFT TURNS ON RED IN CERTAIN SITUATIONS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-158(b) reads as rewritten:

"(b) Control of Vehicles at Intersections. –

(1) When a stop sign has been erected or installed at an intersection, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right-of-way to vehicles operating on the designated main-traveled or through highway. When stop signs have been erected at three or more entrances to an intersection, the driver, after stopping in obedience thereto, may proceed with caution.

(2) ~~Vehicles facing a red light controlling traffic passing straight through an intersection from a steady or strobe beam stoplight shall not enter the intersection while the steady or strobe beam stoplight is emitting a red light controlling traffic passing straight through an intersection; provided that, except where prohibited by an appropriate sign, vehicular traffic facing a red light controlling traffic passing straight through an intersection, after coming to a complete stop at the intersection, may enter the intersection to make a right turn but such vehicle shall yield the right-of-way to pedestrians and to other traffic using the intersection.~~ When a steady or strobe beam stoplight is emitting a red light controlling traffic passing through an intersection, an approaching vehicle facing the red light shall come to a stop and shall not enter the intersection. After coming to a complete stop and unless prohibited by an appropriate sign, that approaching vehicle may turn under one of the following conditions:

a. That vehicle may make a right turn. The turning vehicle shall yield the right-of-way to pedestrians who are using or preparing to use the intersection and to other traffic using the intersection.

b. If that vehicle is in the leftmost lane of travel on a one-way street that intersects with another one-way street with traffic traveling from the turning driver's right to the turning driver's left, then that vehicle may enter the intersection and make a left turn into the extreme left-hand lane lawfully available to traffic. The turning vehicle shall yield the right-of-way to pedestrians who are using or preparing to use the intersection and to other traffic using the intersection.

Failure to yield to a pedestrian using or preparing to use an intersection under this subdivision shall be an infraction and the court may assess a fine of not more than one thousand dollars ($1,000) but not less than one hundred dollars ($100). Points shall be assessed against a person's driver's license as provided in G.S. 20-16(c). Municipalities shall post signs stating that vehicles must yield the right of way to pedestrians using or preparing to use an intersection at those intersections where vehicles will be allowed to turn left on a red light under this subdivision.

(2a) When ~~the~~ a stoplight is emitting a steady yellow circular light on a traffic signal controlling traffic passing straight through an intersection or a steady yellow arrow light on a traffic signal controlling traffic turning at an intersection, vehicles facing the yellow light are warned that the related green light is being terminated or a red light will be immediately forthcoming. When the stoplight is emitting a steady green light, vehicles may proceed with due care through the intersection subject to the rights of pedestrians and other vehicles as may otherwise be provided by law.

(3) When a flashing red light has been erected or installed at an intersection, approaching vehicles facing the red light shall stop and yield the right-of-way to vehicles in or approaching the intersection. The right to proceed shall be subject to the rules applicable to making a stop at a stop sign.

(4) When a flashing yellow light has been erected or installed at an intersection, approaching vehicles facing the yellow flashing light may proceed through the intersection with caution, yielding the right-of-way to vehicles in or approaching the intersection.

(5) When a stop sign, stoplight, flashing light, or other traffic-control device authorized by subsection (a) of this section requires a vehicle to stop at an intersection, the driver shall stop (i) at an appropriately marked stop line, or if none, (ii) before entering a marked crosswalk, or if none, (iii) before entering the intersection at the point nearest the

intersecting street where the driver has a view of approaching traffic on the intersecting street."

SECTION 2. G.S. 20-16(c) reads as rewritten:

"(c) The Division shall maintain a record of convictions of every person licensed or required to be licensed under the provisions of this Article as an operator and shall enter therein records of all convictions of such persons for any violation of the motor vehicle laws of this State and shall assign to the record of such person, as of the date of commission of the offense, a number of points for every such conviction in accordance with the following schedule of convictions and points, except that points shall not be assessed for convictions resulting in suspensions or revocations under other provisions of laws: Further, any points heretofore charged for violation of the motor vehicle inspection laws shall not be considered by the Division of Motor Vehicles as a basis for suspension or revocation of driver's license:

Schedule of Point Values

Passing stopped school bus	5
Failure to yield right-of-way to pedestrian pursuant to G.S. 20-158(b)(2)	5
Reckless driving	4
Hit and run, property damage only	4
Following too close	4
Driving on wrong side of road	4
Illegal passing	4
Running through stop sign	3
Speeding in excess of 55 miles per hour	3
Failing to yield right-of-way	3
Running through red light	3
No driver's license or license expired more than one year	3
Failure to stop for siren	3
Driving through safety zone	3
No liability insurance	3
Failure to report accident where such report is required	3
Speeding in a school zone in excess of the posted school zone speed limit	3
Failure to properly restrain a child in a restraint or seat belt	2
All other moving violations	2
Littering pursuant to G.S. 14-399 when the littering involves the use of a motor vehicle	1

Schedule of Point Values for Violations While Operating a Commercial Motor Vehicle

Passing stopped school bus	8
Failure to yield right-of-way to pedestrian pursuant to G.S. 20-158(b)(2)	8
Rail-highway crossing violation	6
Careless and reckless driving in violation of	

G.S. 20-140(f) 6
Speeding in violation of G.S. 20-141(j3) 6
Reckless driving 5
Hit and run, property damage only 5
Following too close 5
Driving on wrong side of road 5
Illegal passing 5
Running through stop sign 4
Speeding in excess of 55 miles per hour 4
Failing to yield right-of-way 4
Running through red light 4
No driver's license or license expired more than one year 4
Failure to stop for siren 4
Driving through safety zone 4
No liability insurance 4
Failure to report accident where such report is required 4
Speeding in a school zone in excess of the posted school zone speed limit 4
Possessing alcoholic beverages in the passenger area of a commercial motor vehicle 4
All other moving violations 3
Littering pursuant to G.S. 14-399 when the littering involves the use of a motor vehicle 1

The above provisions of this subsection shall only apply to violations and convictions which take place within the State of North Carolina. The Schedule of Point Values for Violations While Operating a Commercial Motor Vehicle shall not apply to any commercial motor vehicle known as an "aerial lift truck" having a hydraulic arm and bucket station, and to any commercial motor vehicle known as a "line truck" having a hydraulic lift for cable, if the vehicle is owned, operated by or under contract to a public utility, electric or telephone membership corporation or municipality and used in connection with installation, restoration or maintenance of utility services.

No points shall be assessed for conviction of the following offenses:

Overloads
Over length
Over width
Over height
Illegal parking
Carrying concealed weapon
Improper plates
Improper registration
Improper muffler
Improper display of license plates or dealers' tags
Unlawful display of emblems and insignia
Failure to display current inspection certificate.

In case of the conviction of a licensee of two or more traffic offenses committed on a single occasion, such licensee shall be assessed points for one offense only and if the offenses involved have a different point value, such licensee shall be assessed for the offense having the greater point value.

Upon the restoration of the license or driving privilege of such person whose license or driving privilege has been suspended or revoked because of conviction for a traffic offense, any points that might previously have been accumulated in the driver's record shall be cancelled.

Whenever any licensee accumulates as many as seven points or accumulates as many as four points during a three-year period immediately following reinstatement of his license after a period of suspension or revocation, the Division may request the licensee to attend a conference regarding such licensee's driving record. The Division may also afford any licensee who has accumulated as many as seven points or any licensee who has accumulated as many as four points within a three-year period immediately following reinstatement of his license after a period of suspension or revocation an opportunity to attend a driver improvement clinic operated by the Division and, upon the successful completion of the course taken at the clinic, three points shall be deducted from the licensee's conviction record; provided, that only one deduction of points shall be made on behalf of any licensee within any five-year period.

When a license is suspended under the point system provided for herein, the first such suspension shall be for not more than 60 days; the second such suspension shall not exceed six months and any subsequent suspension shall not exceed one year.

Whenever the driver's license of any person is subject to suspension under this subsection and at the same time also subject to suspension or revocation under other provisions of laws, such suspensions or revocations shall run concurrently.

In the discretion of the Division, a period of probation not to exceed one year may be substituted for suspension or for any unexpired period of suspension under subsections (a)(1) through (a)(10a) of this section. Any violation of probation during the probation period shall result in a suspension for the unexpired remainder of the suspension period. Any accumulation of three or more points under this subsection during a period of probation shall constitute a violation of the condition of probation.

SECTION 3. The North Carolina Rate Bureau shall review and revise the Safe Driver Incentive Plan to reflect the changes to G.S. 20-16(c) under Section 2 of this act.

SECTION 4. The Department of Transportation, as part of any regularly scheduled updates, shall revise the written portion of the driver's license examination and any publications related to obtaining a driver's license to reflect the changes in Sections 1 and 2 of this act.

SECTION 5. The Department of Transportation, counties and municipalities are encouraged to provide public service announcements on television and radio informing the public of the provisions of this act. The public service announcements should be scheduled to occur during times most likely to reach a broad audience.

SECTION 6. This act becomes effective December 1, 2003.

HOUSE BILL 147:
Left Turn on Red

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Representative Gulley
Date:	May 23, 2003	**Summary by:**	Kory J. Goldsmith
Version:	Proposed Committee Substitute 147-CSRC-61[v.2]		Committee Counsel

SUMMARY: ***The Proposed Committee Substitute to HB 147 would permit a left turn on red from the leftmost lane of travel on a one-way street to the leftmost lane of travel of an intersecting one-way street. The turning driver must first come to a complete stop and must yield the right-of-way to pedestrians and traffic using or preparing to use the intersection. The bill would take effect December 1, 2003.***

The Proposed Committee Substitute differs from the 2nd Edition of the bill as follows:

- ***Clarifies that the vehicle must yield to a pedestrian using or preparing to use the intersection;***
- ***Imposes penalties that are similar to the crime of passing a stopped school bus for vehicles that fail to yield to pedestrians while turning left or right at an intersection; and***
- ***Requiring that municipalities post signs at left turn on red intersections directing drivers to yield to pedestrians.***

CURRENT LAW: At present, a right turn on red is allowed in North Carolina, except where prohibited by a sign. Left turns on red are prohibited.

A violation of the right turn on red statute is a moving violation and therefore an infraction punishable by a maximum penalty of $100. Three driver's license points would be assigned for failure to yield right-of-way or running through a red light. Only one insurance point would be assigned.

BILL ANALYSIS: The bill would amend G.S. 20-158(b), by allowing certain drivers to make a left turn after stopping at a red light, unless prohibited by a sign at that intersection. If not so prohibited, and after coming to a complete stop and yielding the right-of-way to pedestrians who are using or preparing to use the intersection and traffic using the intersection, the driver of a vehicle in the leftmost lane of a one-way street would be allowed to turn left into the leftmost lane lawfully available to traffic. The street onto which the left turn is made must also be a one-way street with traffic traveling from the turning driver's right to the driver's left.

Violation of either the "right on red" or "left on red" provisions would be an still be an infraction. However, violations would be punishable by the imposition of a penalty of not more than $1000 and not less than $100. It would also result in 5 driver's license points being assessed against a regular driver's license, and 8 points against a commercial license. These fines and points are similar to what is imposed for conviction of passing a stopped school bus.

BACKGROUND: In the last two Sessions, the House passed similar bills, which subsequently failed to pass in the Senate. As of November 2002, 44 states and the District of Columbia allow some form of left turn on red.

H147-SMRC-03. Robin Johnson contributed substantially to this summary.

FISCAL ANALYSIS MEMORANDUM

[This confidential fiscal memorandum is a fiscal analysis of a draft bill, amendment, committee substitute, or conference committee report that has not been formally introduced or adopted on the chamber floor or in committee. This is not an official fiscal note. If upon introduction of the bill you determine that a formal fiscal note is needed, please make a fiscal note request to the Fiscal Research Division, and one will be provided under the rules of the House and the Senate.]

DATE: May 22, 2003

TO: Rep. Jim Gulley

FROM: Bob Weiss
Fiscal Research Division

RE: HB 147 PCS H147-CSRC-61 (v.2)
Left Turn on Red

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2003-04	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08
REVENUES					
EXPENDITURES					
Municipal Governments	**$238,000**				
Highway Fund-DMV	**$11,480**				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Municipal Governments; Division of Motor Vehicles – Highway Fund

EFFECTIVE DATE: December 1, 2003

BILL SUMMARY: The bill would amend G.S. 20-158(b) to permit a vehicle, unless prohibited by an appropriate sign, to make a left turn on red where the vehicle is in the leftmost lane of travel on a one-way street that intersects with another one-way street with

traffic moving from the vehicle's right to left. Municipalities would be required to post signs at all affected intersections stating that vehicles must yield the right of way to pedestrians. A person convicted of failing to yield would be fined not more than $1,000 and not less than $100 and shall have points assessed under G.S. 20-16 (c).

ASSUMPTIONS AND METHODOLOGY: The major fiscal impact would be on municipalities that would be required to erect signs at each intersection where a left turn on red could now be permitted. In most cases the sign would state that vehicles must yield the right of way to pedestrians (Section 1). In some cases the signs would prohibit left turns on red where that is the appropriate action due to restricted sightlines, heavy pedestrian traffic, etc. (The City of Raleigh Transportation Department has estimated that about 10%-20% of eligible intersections would require prohibition of left turns on red.)

Placement of signs would be the responsibility of the North Carolina Department of Transportation (DOT) on state-maintained roads and of municipal government on city streets. DOT has indicated that the number of such locations on their roads would be limited and the costs of signage minimal. For the cost to municipalities, only a very rough estimate is possible. The City of Raleigh Transportation Department has estimated that about one hundred intersections would qualify for left turn on red under the bill. According to DOT, each sign would cost approximately $150 for labor and materials. A rough estimate of the cost to Raleigh, then, would be 100 signs times $150 per sign, or $15,000. Raleigh receives about 6.3% of the State Street Aid to Municipalities (Powell Bill). If we assume that this is a reasonable proxy for Raleigh's needs for signs as a percentage of total municipality need for signs, then Raleigh's cost of $15,000 would equate to a total need throughout the state of approximately $238,000 ($15,000 divided by .063 equals $238,093). This would occur in the first year.

A second fiscal impact would result from Section 2, which rewrites G.S. 20-16(c) by requiring the Division of Motor Vehicles (DMV) to assess points against a person's driver's license for failure to yield to pedestrians when making a turn at an intersection controlled by a red light. DMV estimates that the cost to modify the State Automated Driver License System (SADLS) to reflect these changes would be $11,480 (130 programmer hours at $80 per hour equals $10,400 plus computer system overhead charges of $1,080, for a total of $11,480).

SOURCES OF DATA: North Carolina Department of Transportation; City of Raleigh Transportation Department; Division of Motor Vehicles

TECHNICAL CONSIDERATIONS: None

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. _____ DATE 5/27/03

S. B. No. 147 Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE _____

Rep.) ~~Robert~~ Kerr
Sen.)

moves to amend the bill on page 2, line 20

( ) WHICH CHANGES THE TITLE

by adding after the period the following:

"As used in this subdivision ~~a. and b. of this subsection,~~ the ~~term~~ phrase "using or preparing to use" means a pedestrian is ~~standing~~ located within two feet of the street or highway that contains the traffic facing the red light and the pedestrian is facing towards ~~the~~ or ~~has~~ the pedestrian's back is facing towards the controlling traffic.";

and by deleting Sections 2 and 3 of the bill; and by renumbering the following ~~Parts~~ Sections accordingly;

and on page 1, line 2, by inserting before the period "AND TO CLARIFY A PEDESTRIAN'S RIGHT-OF-WAY AT CERTAIN INTERSECTIONS."; and

SIGNED _____

ADOPTED _____ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. _____ DATE _____

S. B. No. _____ Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE _____

Rep.)
) _____
Sen.)

1 moves to amend the bill on page _____, line _____
2 ( ) WHICH CHANGES THE TITLE
3 by _____
4 ~~deleted~~ on page 2, lines 15-16 by
5 deleting "the sentence that begins
6 with "Points" and ends with
7 "G.S. 20-16(c)."
8
9
10
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12
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19

SIGNED J Kar

ADOPTED _____ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 2

HOUSE BILL 304

Committee Substitute Favorable 3/18/03

Short Title: Stalking/Supervised Probation Is Minimum. (Public)

Sponsors:

Referred to:

March 6, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT A DEFENDANT CONVICTED OF MISDEMEANOR STALKING WHO IS SENTENCED TO A COMMUNITY PUNISHMENT SHALL BE PLACED ON SUPERVISED PROBATION IN ADDITION TO ANY OTHER PUNISHMENT IMPOSED BY THE COURT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-277.3(b) reads as rewritten:

"(b) Classification. – A violation of this section is a Class A1 misdemeanor. A person convicted of a Class A1 misdemeanor under this section, who is sentenced to a community punishment, shall be placed on supervised probation in addition to any other punishment imposed by the court. A person who commits the offense of stalking when there is a court order in effect prohibiting similar behavior by that person is guilty of a Class H felony. A person who commits the offense of stalking after having been previously convicted of a stalking offense is guilty of a Class F felony."

SECTION 2. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 352

Short Title:	Drug Screening & Assessment.-AB	(Public)
Sponsors:	Representative Haire.	
Referred to:	Judiciary IV.	

March 6, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW REGARDING DRUG SCREENING AND ASSESSMENT OF A CRIMINAL DEFENDANT FOR CHEMICAL DEPENDENCY, AS RECOMMENDED BY THE NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-1343 is amended by adding a new subsection to read:

"(b3) Screening and assessing for chemical dependency. – A defendant ordered to submit to a period of residential treatment in the Drug Alcohol Recovery Treatment program (DART) operated by the Department of Correction must undergo a screening to determine chemical dependency. If the screening indicates the defendant is chemically dependent, the court shall order an assessment to determine the appropriate level of treatment. The assessment may be conducted either before or after the court imposes the condition, but participation in the program shall be based on the results of the assessment."

SECTION 2. G.S. 15A-1351(h) is repealed.

SECTION 3. G.S. 143B-262.1(h) reads as rewritten:

"(h) Admission priorities shall be established as follows:

~~(1) Court recommendation.~~

(2) Evaluation and referral from reception and diagnostic centers.

(3) General staff referral.

(4) Self-referral.

(i) The Program shall include extensive follow-up after the period of intensive treatment. There will be specific plans for each departing inmate for follow-up, including active involvement with Alcoholics Anonymous, community resources, and personal sponsorship."

SECTION 4. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

HOUSE BILL 352:
Drug Screening & Assessment.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Rep. Haire
Date:	May 27, 2003	**Summary by:**	Robin Johson*
Version:	First		Committee Counsel

SUMMARY: ***House Bill 352 would require a defendant who has been ordered, as a condition of probation, to submit to a period of residential treatment in the DART program to first undergo a screening to determine chemical dependency. The bill also would repeal a sentencing judge's authority to require a sentenced offender to participate in DART during a period of imprisonment.***

The NC Sentencing and Policy Advisory Commission recommends this bill. The bill would take effect December 1, 2003, and would apply to offenses committed on or after that date.

CURRENT LAW: The court may require a sentenced offender, either as a special condition of probation or as part of an active sentence, to participate in and successfully complete a drug treatment program. The Drug Alcohol Recovery Treatment (DART) program is a five-week term of intensive treatment for alcohol or drug addiction in independent residential facilities for approximately 100 offenders per facility. The program provides participants with drug or alcohol problems an initial opportunity to engage in treatment and early recovery. The program typically is provided in a medium security prison or area of the prison, so residential and program space is separate from the prison's other programs or inmate housing. Program participants are involved in extensive follow-up after the period of intensive treatment. A specific plan, including active involvement with Alcoholics Anonymous, Narcotics Anonymous, community resources, and personal sponsorship, is developed for each individual.

BILL ANALYSIS:

Section 1 deals with defendants who have been ordered to participate in DART as a special condition of probation, which may be part of an intermediate sentence. G.S. 15A-1343 sets out the permissible conditions of regular and special probation that a judge may impose on a defendant. This section would add a new subsection (b3) requiring a defendant who has been ordered to submit to a period of residential treatment in the DART program to first undergo a screening to determine chemical dependency. If the screening indicates the defendant is chemically dependent, the court would be required to order an assessment to determine the appropriate level of treatment. Program participation would be based on the results of the assessment.

Sections 2 & 3 applies to defendants ordered to participate in DART as a condition of an active sentence or while the defendant is in prison. Section 2 of the bill would repeal G.S. 15A-1351(h)[1], which authorizes the court to recommend that a sentenced offender be assigned to DART during a period of imprisonment. The practical effect of repealing this law is that, while judges would no longer have this authority, the Department of Correction, which currently screens all sentenced offenders entering the correctional system, would make the recommendation based on this screening and assessment. Section 3 would make a conforming change.

[1] G.S. 15A-1351(h) states, "Substance Abuse Recommendation. – The sentencing court may recommend that the sentenced offender be assigned to the Substance Abuse Treatment Unit for treatment of alcoholism or substance abuse during his imprisonment."

BACKGROUND: During the 2001 Session of the General Assembly, the legislature directed the NC Sentencing and Policy Advisory Commission to "study the laws regarding drug offenses and the current sentencing guidelines for those offenses." The Commission responded by forming a subcommittee to study the issue and make recommendations. The Subcommittee presented its final recommendations to the Commission, which discussed and adopted them at its January 10, 2003, meeting.

House Bill 352 represents one of seven recommendations related to this study. The subcommittee found that judges often refer defendants to DART based solely on the request of a defense attorney. The subcommittee concluded that without an assessment to determine chemical dependency, these referrals are resulting in an inefficient use of this treatment resource. The subcommittee recommended that offenders first be screened for chemical dependency and then assessed as to the level of treatment before receiving services in order to produce more efficient and effective use of limited treatment resources.

*H352-SMRH-002: *Trina Griffin, Staff Attorney, substantially contributed to this summary.*

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 2

HOUSE BILL 963
Committee Substitute Favorable 4/30/03

Short Title: Hit and Run - 2 Year License Revocation. (Public)

Sponsors:

Referred to:

April 9, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT CERTAIN PERSONS CONVICTED OF LEAVING THE SCENE OF AN ACCIDENT INVOLVING INJURY OR DEATH SHALL LOSE THEIR LICENSE FOR A PERIOD OF TWO YEARS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-166 is amended by adding a new subsection to read:

"(e) Persons convicted of violating subsection (a) of this section shall have their drivers license revoked for a period of two years. Upon a first conviction only for a violation of subsection (a) of this section, a trial judge may allow limited driving privileges in the manner set forth in G.S. 20-16.1(b)."

SECTION 2. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 3

HOUSE BILL 965

Committee Substitute Favorable 4/29/03
Third Edition Engrossed 4/30/03

Short Title: Failure to Yield Causing Death or Injuries. (Public)

Sponsors:

Referred to:

April 9, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE PENALTIES FOR PERSONS WHO CAUSE BODILY INJURY OR DEATH WHEN FAILING TO YIELD THE RIGHT-OF-WAY UNDER CERTAIN CIRCUMSTANCES.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 20 of the General Statutes is amended by adding a new section to read:

"**§ 20-160.1. Failure to yield causing injury or death; penalties.**

(a) Unless the conduct is covered under some other provision of law providing greater punishment, a person who commits the offense of failure to yield while approaching or entering an intersection, turning at a stop or yield sign, entering a roadway, upon the approach of an emergency vehicle, or at highway construction or maintenance shall be punished in the following manner:

(1) Except as provided in subdivisions (2) and (3) of this subsection, when there is bodily injury resulting from the violation, the violator shall be fined two hundred dollars ($200.00).

(2) When there is serious bodily injury but no death resulting from the violation, the violator shall be fined five hundred dollars ($500.00) and the violator's drivers license or commercial drivers license shall be suspended for 90 days.

(3) When a death results from the violation, the violator shall be fined one thousand dollars ($1,000) and the violator's drivers license or commercial drivers license shall be suspended for six months.

(b) As used in this section, 'bodily injury' means a cut, abrasion, bruise, burn, disfigurement, physical pain, illness, any impairment of the function of a bodily member, organ, or mental faculty, or any other injury to the body, no matter how temporary. 'Serious bodily injury' means bodily injury that involves a substantial risk of

death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty."

SECTION 2. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

Judiciary II Committee

Minutes

May 29, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with twelve members present.

HB 147 (Left Turn on Red) Senator Shubert moved to reconsider the bill for purposes of language clarification. All voted and the motion carried. Senator Shubert moved to accept the new Committee Substitute. Kory Goldsmith, Staff Attorney, explained the clarifying language. Senator Kinnaird introduced an amendment and moved that it be adopted. After an explanation of the amendment by Senator Kinnaird, Representative Gulley agreed to accept the amendment. Questions by Senators Allran, Shubert, Rucho and Kerr were answered by Senator Hartsell, Kory Goldsmith and Senator Kinnaird. The bill was displaced while an amendment was written.

HB 304 (Stalking/Supervised Probation Is Minimum) Representative Setzer, bill sponsor was represented by Senator Shubert who explained the bill. Senator Moore moved for a favorable report. All voted and the motion carried.

HB 963 (Hit and Run - 2 Year License Revocation) Representative Warner, bill sponsor, was recognized to explain the bill. Questions by Senators Kerr, Queen, Bingham and Allran were answered by Robin Johnson, Staff Attorney, Representative Warner and Senator Shubert. Senator Kerr introduced an amendment which was accepted by Representative Warner. Senator Hartsell explained the amendment. All voted and the motion carried. Senator Shubert moved for a favorable report as amended, unfavorable as to original bill and rolled into a new committee substitute.

HB 965 (Failure to Yield Causing Death or Injuries) Representative Hill, bill sponsor, was introduced to explain the bill. Mr. Sam Nobles, representing the Concerned Bikers Association, and Mr. Mike Causey, Lobbyist representing the Motorcycle Owners Coalition, spoke on the bill. Senator Kerr moved for a favorable report. All voted and the motion carried.

HB 637 (Amend Powers/Settlor of Revocable Trust) Representative Munford, bill sponsor, was introduced to explain the Proposed Committee Substitute. Senator Apodaca moved to accept the Committee Substitute for purposes of consideration. Questions by Senators Dalton and Kerr were answered by Representative Munford and Mr. William McPherson. Mr. William McPherson, representing the North Carolina Bar Association, spoke on the bill. Senator Kinnaird moved for a favorable report, unfavorable as to the original bill, favorable as to the Committee Substitute. All voted and the motion carried.

HB 147 (Left Turn on Red) Recalled. A modified amendment to the amendment for the bill was presented by Senator Kinnaird. Kory Goldsmith, Staff Attorney, explained the amendment as amended. Senator Kinnaird moved for the adoption of the amendment as amended. Questions by Senator Allran were answered by Kory Goldsmith. Representative Gulley accepted the amendment as amended. All voted and the motion carried. Senator Rucho and Dorsett moved to adopt the Committee Substitute as amended, unfavorable as to the original bill and rolled into a new committee substitute. Questions by Senators Dolton and Allran were answered by Senators Kinnaird and Moore. All voted and the motion failed.

HB 656 (Amend Trust Administration Act) Representative Culpepper was introduced to explain the Committee Substitute. Senator Shubert moved to adopt the Committee Substitute for purposes of consideration. Senator Holloman moved for a favorable report, unfavorable to the original bill, favorable as to the Committee Substitute. All voted and the motion carried.

There being no further business, the meeting was adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Thursday, May 29, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B.(CS #1) **304** Stalking/Supervised Probation Is Minimum.
Sequential Referral: None
Recommended Referral: None

TOTAL REPORTED: 1

Committee Clerk Comments:

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	May 29, 2003	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 147	Left Turn on Red.	Representative Gulley
HB 304	Stalking/Supervised Probation Is Minimum.	Representative Setzer
HB 963	Hit and Run - 2 Year License Revocation.	Representative Warner
HB 965	Failure to Yield Causing Death or Injuries.	Representative Hill
HB 637	Amend Powers/Settlor of Revocable Trust.	Representative Munford
HB 656	Amend Trust Administration Act.	Representative Culpepper, III

Senator Fletcher L. Hartsell, Jr., Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
May 29, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. Welcome and Opening Remarks

II. Bills to be Considered

HB 147	Left Turn on Red.	Representative Gulley
HB 304	Stalking/Supervised Probation Is Minimum.	Representative Setzer
HB 963	Hit and Run - 2 Year License Revocation.	Representative Warner
HB 965	Failure to Yield Causing Death or Injuries.	Representative Hill
HB 637	Amend Powers/Settlor of Revocable Trust.	Representative Munford
HB 656	Amend Trust Administration Act.	Representative Culpepper, III

III. Other Business

IV. Adjournment

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II 5-29-03

Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Suzanne Dulley	LA Rep. Dulley
Mary Thornsen	RESIC
John McHugh	Gov office
John O'Hale	Governor's Office
Fran Cockman	NC statewatch
Andy Romanet	NCLM
R. Paul Wilms	NCHBA
Vinny Neumann	Concerned Bikers Assn.
David Gore	" " "
William U. McPherson	NC BAR ASSN
Amy Darden	NC Bar Assn.
Camille Stell	KCLH

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 5-29-03

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Matt Osborne	AOC
Gregg Gelinas	NC GACDD
Mike Hodges	CBA/ABATE of NC
Peggy Burns	CBA/ABATE OF NC
Sam Nobles	"
Bean Mills	NCLM
Doug Lassiter	NC STA
FRED TAYLOR	WRAL
John Madler	NC Sentencing Commission
Mike Copy	NC Stop Drug Coalition
Janice Remington	NCATA

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 5-29-03

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
REGINALD JOHNSON	CRL
Yolanda McGill	CRL

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 147

Committee Substitute Favorable 3/19/03

PROPOSED SENATE COMMITTEE SUBSTITUTE H147-CSRC-61 [v.6]

5/28/2003 3:39:49 PM

Short Title: Left Turn on Red. (Public)

Sponsors:

Referred to:

February 27, 2003

A BILL TO BE ENTITLED

AN ACT TO PERMIT LEFT TURNS ON RED IN CERTAIN SITUATIONS, TO CLARIFY WHEN A PEDESTRIAN HAS THE RIGHT-OF-WAY, AND TO INCREASE THE PENALTY FOR FAILING TO YIELD THE RIGHT-OF-WAY TO A PEDESTRIAN.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-158(b) reads as rewritten:

"(b) Control of Vehicles at Intersections. –

(1) When a stop sign has been erected or installed at an intersection, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right-of-way to vehicles operating on the designated main-traveled or through highway. When stop signs have been erected at three or more entrances to an intersection, the driver, after stopping in obedience thereto, may proceed with caution.

(2) ~~Vehicles facing a red light controlling traffic passing straight through an intersection from a steady or strobe beam stoplight shall not enter the intersection while the steady or strobe beam stoplight is emitting a red light controlling traffic passing straight through an intersection; provided that, except where prohibited by an appropriate sign, vehicular traffic facing a red light controlling traffic passing straight through an intersection, after coming to a complete stop at the intersection, may enter the intersection to make a right turn but such vehicle shall yield the right-of-way to pedestrians and to other traffic using the intersection.~~

a. When a steady or strobe beam stoplight is emitting a red light controlling traffic passing through an intersection, an approaching vehicle facing the red light shall come to a stop

and shall not enter the intersection. After coming to a complete stop and unless prohibited by an appropriate sign, that approaching vehicle may turn under one of the following conditions:

1. That vehicle may make a right turn.
2. If that vehicle is in the leftmost lane of travel on a one-way street that intersects with another one-way street with traffic traveling from the turning driver's right to the turning driver's left, then that vehicle may enter the intersection and make a left turn into the extreme left-hand lane lawfully available to traffic.

b. Any vehicle that turns left or right under this subdivision shall yield the right-of-way to:

1. other traffic and pedestrians using the intersection; and
2. pedestrians who are within two feet of the intersection and who have started to move towards the intersection to cross in front of traffic that is required to stop by the controlling light.

c. Failure to yield to a pedestrian under this subdivision shall be an infraction and the court may assess a penalty of not more than one thousand dollars ($1,000) but not less than one hundred dollars ($100). Municipalities shall post signs stating that vehicles must yield the right of way to pedestrians at those intersections where vehicles will be allowed to turn left on a red light.

(2a) When ~~the~~ a stoplight is emitting a steady yellow circular light on a traffic signal controlling traffic passing straight through an intersection or a steady yellow arrow light on a traffic signal controlling traffic turning at an intersection, vehicles facing the yellow light are warned that the related green light is being terminated or a red light will be immediately forthcoming. When the stoplight is emitting a steady green light, vehicles may proceed with due care through the intersection subject to the rights of pedestrians and other vehicles as may otherwise be provided by law.

(3) When a flashing red light has been erected or installed at an intersection, approaching vehicles facing the red light shall stop and yield the right-of-way to vehicles in or approaching the intersection. The right to proceed shall be subject to the rules applicable to making a stop at a stop sign.

(4) When a flashing yellow light has been erected or installed at an intersection, approaching vehicles facing the yellow flashing light may proceed through the intersection with caution, yielding the right-of-way to vehicles in or approaching the intersection.

(5) When a stop sign, stoplight, flashing light, or other traffic-control device authorized by subsection (a) of this section requires a vehicle to stop at an intersection, the driver shall stop (i) at an appropriately marked stop line, or if none, (ii) before entering a marked crosswalk, or if none, (iii) before entering the intersection at the point nearest the intersecting street where the driver has a view of approaching traffic on the intersecting street."

SECTION 2. The Department of Transportation, as part of any regularly scheduled updates, shall revise the written portion of the driver's license examination and any publications related to obtaining a driver's license to reflect the changes in Sections 1 and 2 of this act.

SECTION 3. The Department of Transportation, counties and municipalities are encouraged to provide public service announcements on television and radio informing the public of the provisions of this act. The public service announcements should be scheduled to occur during times most likely to reach a broad audience.

SECTION 4. This act becomes effective December 1, 2003.

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
House Bill 147

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

H147-ARC-32 [v.6]

Date _____,2003

Comm. Sub. [YES]
Amends Title [NO]
H147-CSRC-61[v.6]

Senator Kinnaird

moves to amend the bill on page 1, line 4, by inserting the phrase "AND DRIVERS LICENSE POINTS ASSESSED" after the word "PENALTY";

and on page 2, line 22, by inserting the phrase "and the Department of Transportation" after the word "Municipalities";

and on page 3, by inserting between lines 15 and 16 the following:

"**SECTION 4.** G.S. 20-16(c) reads as rewritten:

'(c) The Division shall maintain a record of convictions of every person licensed or required to be licensed under the provisions of this Article as an operator and shall enter therein records of all convictions of such persons for any violation of the motor vehicle laws of this State and shall assign to the record of such person, as of the date of commission of the offense, a number of points for every such conviction in accordance with the following schedule of convictions and points, except that points shall not be assessed for convictions resulting in suspensions or revocations under other provisions of laws: Further, any points heretofore charged for violation of the motor vehicle inspection laws shall not be considered by the Division of Motor Vehicles as a basis for suspension or revocation of driver's license:

Schedule of Point Values

Passing stopped school bus	5
Reckless driving	4
Hit and run, property damage only	4
Following too close	4
Driving on wrong side of road	4
Illegal passing	4

Failure to yield right-of-way to pedestrian pursuant to G.S. 20-158(b)(2) 4
Running through stop sign 3
Speeding in excess of 55 miles per hour 3
Failing to yield right-of-way 3
Running through red light 3
No driver's license or license expired more than one year 3
Failure to stop for siren 3
Driving through safety zone 3
No liability insurance 3
Failure to report accident where such report is required 3
Speeding in a school zone in excess of the posted school zone speed limit 3
Failure to properly restrain a child in a restraint or seat belt 2
All other moving violations 2
Littering pursuant to G.S. 14-399 when the littering involves the use of a motor vehicle 1

Schedule of Point Values for Violations While Operating a Commercial Motor Vehicle

Passing stopped school bus 8
Rail-highway crossing violation 6
Careless and reckless driving in violation of G.S. 20-140(f) 6
Speeding in violation of G.S. 20-141(j3) 6
Reckless driving 5
Hit and run, property damage only 5
Following too close 5
Driving on wrong side of road 5
Illegal passing 5
Failure to yield right-of-way to pedestrian pursuant to G.S. 20-158(b)(2) 5
Running through stop sign 4
Speeding in excess of 55 miles per hour 4

Failing to yield right-of-way 4
Running through red light 4
No driver's license or license expired more than one year 4
Failure to stop for siren 4
Driving through safety zone 4
No liability insurance 4
Failure to report accident where such report is required 4
Speeding in a school zone in excess of the posted school zone speed limit 4
Possessing alcoholic beverages in the passenger area of a commercial motor vehicle 4
All other moving violations 3
Littering pursuant to G.S. 14-399 when the littering involves the use of a motor vehicle 1

The above provisions of this subsection shall only apply to violations and convictions which take place within the State of North Carolina. The Schedule of Point Values for Violations While Operating a Commercial Motor Vehicle shall not apply to any commercial motor vehicle known as an "aerial lift truck" having a hydraulic arm and bucket station, and to any commercial motor vehicle known as a "line truck" having a hydraulic lift for cable, if the vehicle is owned, operated by or under contract to a public utility, electric or telephone membership corporation or municipality and used in connection with installation, restoration or maintenance of utility services.

No points shall be assessed for conviction of the following offenses:

Overloads
Over length
Over width
Over height
Illegal parking
Carrying concealed weapon
Improper plates
Improper registration
Improper muffler
Improper display of license plates or dealers' tags

Unlawful display of emblems and insignia

Failure to display current inspection certificate.

In case of the conviction of a licensee of two or more traffic offenses committed on a single occasion, such licensee shall be assessed points for one offense only and if the offenses involved have a different point value, such licensee shall be assessed for the offense having the greater point value.

Upon the restoration of the license or driving privilege of such person whose license or driving privilege has been suspended or revoked because of conviction for a traffic offense, any points that might previously have been accumulated in the driver's record shall be cancelled.

Whenever any licensee accumulates as many as seven points or accumulates as many as four points during a three-year period immediately following reinstatement of his license after a period of suspension or revocation, the Division may request the licensee to attend a conference regarding such licensee's driving record. The Division may also afford any licensee who has accumulated as many as seven points or any licensee who has accumulated as many as four points within a three-year period immediately following reinstatement of his license after a period of suspension or revocation an opportunity to attend a driver improvement clinic operated by the Division and, upon the successful completion of the course taken at the clinic, three points shall be deducted from the licensee's conviction record; provided, that only one deduction of points shall be made on behalf of any licensee within any five-year period.

When a license is suspended under the point system provided for herein, the first such suspension shall be for not more than 60 days; the second such suspension shall not exceed six months and any subsequent suspension shall not exceed one year.

Whenever the driver's license of any person is subject to suspension under this subsection and at the same time also subject to suspension or revocation under other provisions of laws, such suspensions or revocations shall run concurrently.

In the discretion of the Division, a period of probation not to exceed one year may be substituted for suspension or for any unexpired period of suspension under subsections (a)(1) through (a)(10a) of this section. Any violation of probation during the probation period shall result in a suspension for the unexpired remainder of the suspension period. Any accumulation of three or more points under this subsection during a period of probation shall constitute a violation of the condition of probation.'

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
House Bill 147

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

H147-ARC-32 [v.6]

SECTION 5. The North Carolina Rate Bureau shall assign no more than one insurance point under the Safe Driver Incentive Plan for persons who fail to yield to a pedestrian under G.S. 20-158(b)(2).";

and by renumbering the remaining Section accordingly.

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

HOUSE BILL 147:
Left Turn on Red

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Representative Gulley
Date:	May 28, 2003	**Summary by:**	Kory J. Goldsmith
Version:	Proposed Committee Substitute 147-CSRC-61[v.6]		Committee Counsel

SUMMARY: ***The Proposed Committee Substitute to HB 147 would permit a left turn on red from the leftmost lane of travel on a one-way street to the leftmost lane of travel of an intersecting one-way street. The bill would take effect December 1, 2003.***

The Proposed Committee Substitute differs from the PCS previously adopted by the committee by clarifying that a vehicle turning right or left on red must yield to a pedestrian who is within 2 feet of the intersection and who has started to move towards the intersection to cross in front of the traffic that is required to stop by the controlling light.

CURRENT LAW: At present, a right turn on red is allowed in North Carolina, except where prohibited by a sign. Left turns on red are prohibited.

A violation of the right turn on red statute is a moving violation and therefore an infraction punishable by a maximum penalty of $100. Three driver's license points would be assigned for failure to yield right-of-way or running through a red light. Only one insurance point would be assigned.

BILL ANALYSIS: The bill would amend G.S. 20-158(b), by allowing certain drivers to make a left turn after stopping at a red light, unless prohibited by a sign at that intersection. If not so prohibited, the driver of a vehicle in the leftmost lane of a one-way street would be allowed to turn left into the leftmost lane lawfully available to traffic. The street onto which the left turn is made must also be a one-way street with traffic traveling from the turning driver's right to the driver's left.

A driver making either a right or left turn on red would be required to yield the right of way to a (1) traffic and pedestrians who are using the intersection; and (2) pedestrians who are within two feet of the intersection and who have started towards the intersection to cross in front of the traffic that is required to stop by the red light.

Failure to yield to a pedestrian while making a right or left turn on red would be still be an infraction. However, violations would be punishable by the imposition of a penalty of not more than $1000 and not less than $100. Three driver's license points would be assigned for failure to yield right-of-way or running through a red light. Only one insurance point would be assigned

BACKGROUND: In the last two Sessions, the House passed similar bills, which subsequently failed to pass in the Senate. As of November 2002, 44 states and the District of Columbia allow some form of left turn on red.

See next page for statistics provided by the UNC Center for Highway and Safety Research regarding pedestrians involved in accidents.

STATISTICS REGARDING PEDESTRIAN ACCIDENTS IN NORTH CAROLINA DURING THE YEARS OF 2001 AND 2002

	2001	2002	Total for 2001 and 2002
Total number of pedestrians involved in accidents	1960	1861	3821
Pedestrians injured at intersections	382 19.49% of reported accidents	338 18.16 of reported accidents	720
Pedestrian injured while in a marked crosswalk	125 6.38% of reported accidents	120 6.45% of reported accidents	245
Fatal Injury	19 4.97% of reported accidents	13 3.85% of reported accidents	13
Serious Injury	45 11.78% of reported accidents	29 8.58% of reported accidents	74
Moderate Injury	136 35.60 % of reported accidents	118 34.91% of reported accidents	254
Complaint of Injury, but no physical evidence	176 46.07% of reported accidents	161 47.63% of reported accidents	337
No reported injury	4 1.05% of reported accidents	9 2.66% of reported accidents	13

H147-SMRC-004

H147-SMRC-03. Robin Johnson contributed substantially to this summary.

FISCAL ANALYSIS MEMORANDUM

[This confidential fiscal memorandum is a fiscal analysis of a draft bill, amendment, committee substitute, or conference committee report that has not been formally introduced or adopted on the chamber floor or in committee. This is not an official fiscal note. If upon introduction of the bill you determine that a formal fiscal note is needed, please make a fiscal note request to the Fiscal Research Division, and one will be provided under the rules of the House and the Senate.]

DATE: May 22, 2003

TO: Rep. Jim Gulley

FROM: Bob Weiss
Fiscal Research Division

RE: HB 147 PCS H147-CSRC-61 (v.2)
Left Turn on Red

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2003-04	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08
REVENUES					
EXPENDITURES					
Municipal Governments	**$238,000**				
Highway Fund-DMV	**$11,480**				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Municipal Governments; Division of Motor Vehicles – Highway Fund

EFFECTIVE DATE: December 1, 2003

BILL SUMMARY: The bill would amend G.S. 20-158(b) to permit a vehicle, unless prohibited by an appropriate sign, to make a left turn on red where the vehicle is in the leftmost lane of travel on a one-way street that intersects with another one-way street with

traffic moving from the vehicle's right to left. Municipalities would be required to post signs at all affected intersections stating that vehicles must yield the right of way to pedestrians. A person convicted of failing to yield would be fined not more than $1,000 and not less than $100 and shall have points assessed under G.S. 20-16 (c).

ASSUMPTIONS AND METHODOLOGY: The major fiscal impact would be on municipalities that would be required to erect signs at each intersection where a left turn on red could now be permitted. In most cases the sign would state that vehicles must yield the right of way to pedestrians (Section 1). In some cases the signs would prohibit left turns on red where that is the appropriate action due to restricted sightlines, heavy pedestrian traffic, etc. (The City of Raleigh Transportation Department has estimated that about 10%-20% of eligible intersections would require prohibition of left turns on red.)

Placement of signs would be the responsibility of the North Carolina Department of Transportation (DOT) on state-maintained roads and of municipal government on city streets. DOT has indicated that the number of such locations on their roads would be limited and the costs of signage minimal. For the cost to municipalities, only a very rough estimate is possible. The City of Raleigh Transportation Department has estimated that about one hundred intersections would qualify for left turn on red under the bill. According to DOT, each sign would cost approximately $150 for labor and materials. A rough estimate of the cost to Raleigh, then, would be 100 signs times $150 per sign, or $15,000. Raleigh receives about 6.3% of the State Street Aid to Municipalities (Powell Bill). If we assume that this is a reasonable proxy for Raleigh's needs for signs as a percentage of total municipality need for signs, then Raleigh's cost of $15,000 would equate to a total need throughout the state of approximately $238,000 ($15,000 divided by .063 equals $238,093). This would occur in the first year.

A second fiscal impact would result from Section 2, which rewrites G.S. 20-16(c) by requiring the Division of Motor Vehicles (DMV) to assess points against a person's driver's license for failure to yield to pedestrians when making a turn at an intersection controlled by a red light. DMV estimates that the cost to modify the State Automated Driver License System (SADLS) to reflect these changes would be $11,480 (130 programmer hours at $80 per hour equals $10,400 plus computer system overhead charges of $1,080, for a total of $11,480).

SOURCES OF DATA: North Carolina Department of Transportation; City of Raleigh Transportation Department; Division of Motor Vehicles

TECHNICAL CONSIDERATIONS: None

PLEASE PRESS HARD - 5 COPIES

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. 147 DATE _____

S. B. No. _____ Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE _____

Rep.) Sen.) Kinnaird

moves to amend the bill on page 2, line 15

( ) WHICH CHANGES THE TITLE

by deleting the word "two" and substituting "one";

and on page 3, by inserting between lines 15 and 16:

"Section 5.1 The Department of Transportation shall collect data regarding pedestrians who are injured at intesections because a driver failed to yield the right-of-way while turning right or left on a red light.

~~The Department shall report the data to the~~

and on page 3, line 16, by adding & after the period:

"Sections 4, and 5 shall expire December 1, 2005.".

SIGNED _____

ADOPTED _____ FAILED _____ TABLED _____

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 2

HOUSE BILL 304

Committee Substitute Favorable 3/18/03

Short Title: Stalking/Supervised Probation Is Minimum. (Public)

Sponsors:

Referred to:

March 6, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT A DEFENDANT CONVICTED OF MISDEMEANOR STALKING WHO IS SENTENCED TO A COMMUNITY PUNISHMENT SHALL BE PLACED ON SUPERVISED PROBATION IN addition TO ANY OTHER PUNISHMENT IMPOSED BY THE COURT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-277.3(b) reads as rewritten:

"(b) Classification. – A violation of this section is a Class A1 misdemeanor. A person convicted of a Class A1 misdemeanor under this section, who is sentenced to a community punishment, shall be placed on supervised probation in addition to any other punishment imposed by the court. A person who commits the offense of stalking when there is a court order in effect prohibiting similar behavior by that person is guilty of a Class H felony. A person who commits the offense of stalking after having been previously convicted of a stalking offense is guilty of a Class F felony."

SECTION 2. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

HOUSE BILL 304:
Stalking/Supervised Probation Is Minimum

BILL ANALYSIS

Committee: Senate Judiciary II
Date: May 23, 2003
Version: 2nd Edition

Introduced by: Reps. Setzer and Glazier
Summary by: Kory J. Goldsmith
Committee Counsel

SUMMARY: ***House Bill 304 requires persons convicted of misdemeanor stalking and sentenced to a community punishment to also be placed on supervised probation, in addition to any other punishment imposed.***

CURRENT LAW: Under current law, a person convicted of misdemeanor stalking is subject to penalties for a Class A1 misdemeanor.

Class A1 misdemeanor penalties can include, in the discretion of the court, community, intermediate, or active punishments, (1-60 days), and may also include a fine.

BILL ANALYSIS: House Bill 304 provides that if a court convicts a person for the crime of misdemeanor stalking and sentences him or her to a community punishment, the person must also be placed on supervised probation.

House Bill 304 would become effective December 1, 2003, and applies to offenses committed on or after that date.

BACKGROUND:

Community Punishments, under current law, can include

-Supervised or unsupervised probation

-Probation conditions

-Out-patient Substance Abuse and Mental Heath Treatment

-Community service work

-Treatment Alternatives to Street Crime (TASC)

-Victim Restitution

-Fines

G.S. 14-277.3, which sets out the elements of the crime of misdemeanor stalking, is attached.

§ 14-277.3. Stalking.

(a) Offense. – A person commits the offense of stalking if the person willfully on more than one occasion follows or is in the presence of, or otherwise harasses, another person without legal purpose and with the intent to do any of the following:

(1) Place that person in reasonable fear either for the person's safety or the safety of the person's immediate family or close personal associates.

(2) Cause that person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment, and that in fact causes that person substantial emotional distress.

(b) Classification. – A violation of this section is a Class A1 misdemeanor. A person who commits the offense of stalking when there is a court order in effect prohibiting similar behavior by that person is guilty of a Class H felony. A person who commits the offense of stalking after having been previously convicted of a stalking offense is guilty of a Class F felony.

(c) Definition. – For the purposes of this section, the term "harasses" or "harassment" means knowing conduct, including written or printed communication or transmission, telephone or cellular or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions, directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose. (1991 (Reg. Sess., 1992), c. 804, s. 1; 1993, c. 539, s. 173; 1994, Ex. Sess., c. 24, s. 14(c); 1997-306, s. 1; 2001-518, s. 1.)

H304-SMRC-002

Giles Perry contributed substantially to this summary.

NORTH CAROLINA GENERAL ASSEMBLY
LEGISLATIVE FISCAL NOTE
(INCARCERATION NOTE G.S. 120-36.7)

BILL NUMBER: HB 304 1st Edition

SHORT TITLE: Stalking/Supervised Probation is Minimum

SPONSOR(S): Representatives Setzer; and Glazier

FISCAL IMPACT

	Yes (X)	No ( )	No Estimate Available ( )		
	FY 2003-04	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08
GENERAL FUND					
Correction					
Recurring	**$0**	**$26,000 or less**	**$46,300 or less each year**		
Judicial					
Recurring	Unable to determine exact amount; dependent upon whether there is an increase in revocation hearings and appeals.				
TOTAL EXPENDITURES:	Unable to determine exact amount.				
ADDITIONAL PRISON BEDS*	Unable to determine exact number of beds; no substantial impact anticipated				
POSITIONS: (cumulative)	Unable to determine exact amount.				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch

EFFECTIVE DATE: December 1, 2003

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY: HB 304 amends G.S. 14-277.3(b) to require that a person convicted of a stalking offense and who is sentenced to community punishment be placed on supervised probation in addition to any other punishment imposed by the court.

ASSUMPTIONS AND METHODOLOGY:

Current G.S. 14-277.3(b) makes stalking a Class A1 misdemeanor, unless a court order is in effect prohibiting similar behavior by that person (which in turn is a Class H felony) or the person has been previously convicted of a stalking offense (which in turn is a Class F felony).

While offenders convicted of a Class A1 misdemeanor and some offenders convicted of a Class H felony (based on prior record level) are currently eligible to receive community punishment under the sentencing grid, offenders convicted of the Class F felony are only eligible for intermediate and active punishments.

Prior to March 1, 2002, stalking was punishable as a Class 1 misdemeanor, a Class A1 misdemeanor, and a Class I felony. Effective March 1, 2002, the punishment for misdemeanor and felony stalking was reclassified. The Class 1 misdemeanor was raised to a Class A1 misdemeanor, the Class A1 misdemeanor was raised to a Class H felony, and the Class I felony was raised to a Class F felony. The reclassification of these offenses to more serious offense classes results in a change in the dispositions available, with fewer community punishments available based on the offender's offense class and prior record level. Due to this change, the historic data typically used to predict costs associated with changing a criminal penalty is not as relevant, and it is more difficult to predict the number of offenders who would be affected. ***For this fiscal analysis, we assume that the number of offenders affected will be less than or equal to the number who would have been affected in FY 2001-02.***

Department of Correction

The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes and fiscal memos are based on January 2003 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory board, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five year Fiscal Note horizon and beyond.* The number of beds needed will always be equal to the projected number of inmates due to a bill.

In FY 2001-2002[1], there were 93 convictions for misdemeanor stalking and 2 convictions for felony stalking. Of the 93 convictions for misdemeanor stalking, 78 received a community punishment and the remainder received an active sentence. Of those receiving a community punishment, 39 were placed on supervised probation and 39 were placed on unsupervised probation. Both of the convictions for felony stalking resulted in community punishments with supervised probation. It is important to note that the number of offenders placed on unsupervised community punishment may decrease significantly due to the reclassification of stalking offenses.

[1] The effective date of the reclassification of stalking offenses was over halfway into the year on which the FY 2001-2002 data are based. Due to the lag-time between arrest and conviction, the reclassification of these offenses is not evident in the FY 2001-2002 data.

Because no data is available concerning the number of stalking offenders sentenced *only* under the reclassified stalking statutes, we cannot determine the number of offenders who may be convicted of a Class A1 misdemeanor and sentenced to unsupervised community punishment. However, due to the increase in offense class in March 2002, it is likely that fewer misdemeanor stalking offenders are now sentenced to unsupervised probation. We assume, therefore, that 39 or fewer offenders would be affected by this bill each year. For those offenders who are affected, community punishment costs would increase. Costs for unsupervised probation range from $0 to $.73 per day (the higher cost is for offenders assigned to community service). HB 304 would require these offenders to be sentenced to supervised community punishment at a daily cost per offender of $1.83/day.

In addition, supervised offenders are more likely to have violations discovered, and therefore more likely to have their probation revoked. Thus, this legislation could increase the number of probation revocations. For the Class A1 misdemeanor offense, a community punishment is authorized for all three prior conviction levels. However, it is likely that the majority of stalking misdemeanants given unsupervised probation under current statute fall under Prior Record Level 1. Overall, average active time served for Class A1 misdemeanants in Prior Record Level 1 is 32 days. Active sentences of 30 to 90 days are served in county jails, but paid for by DOC at a rate of $18 per day.

Our cost estimate assumes the following:

- 39 offenders or fewer would be affected by this bill.
- Most of the affected offenders fall in Prior Record Level I.
- Increased costs per affected offender would range from $1.10 to $1.83 per day for community supervision. (Maximum increase to Community Corrections would be $1.83.)
- No more than 51 percent of the offenders currently serving unsupervised probation would be revoked; these offenders would serve active sentences at county jails, at a cost to the DOC of $18 per day.
- Offenders who are moved from unsupervised to supervised probation under this legislation will have the same success rates and average time spent on probation as the average offender with the same offense class and prior record level.

The average daily cost for a Class A1 offender who successfully completes supervised probation is $1.83, and the average daily cost for a revoked Class A1 offender in Prior Record Level I is $2.95. Approximately 50 percent of Class A1 misdemeanants on community supervision are unsuccessful, and the average active time served for Class A1 misdemeanants in Prior Record Level 1 is 32 days. Therefore, we estimate the following *maximum* cost increases:

- 20 offenders revoked to jail @ $1.83/day for 429 days (community supervision) and $18/day for 32 days (jail time once revoked) – average daily cost = $2.95/offender
- 19 offenders successfully completing community supervision @ $1.83 per day for 549 days

Total cost would be *no more than* $26,000 in the first year and $46,300 in subsequent years, due to revocations.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts (AOC) provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

AOC data indicate that during calendar year 2002, there were 833 charges of misdemeanor stalking and 16 of felony stalking. Currently, the court has the discretion to impose supervised probation, unsupervised probation, fines, as well as any regular condition of probation and other sanctions or conditions of probation that are not defined as intermediate punishment. Thus, some convicted offenders sentenced to community punishment that do not currently receive supervised probation, would be placed on supervised probation in addition to any other punishment imposed by the court. AOC does not anticipate a major impact on litigation strategies or costs. However, there could be a substantial impact on the court as a result of required supervised probation under the bill; with the larger pool of probationers, there would also be more probation violations, and more probation revocation hearings and appeals.

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission.

TECHNICAL CONSIDERATIONS: None

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Nicole Kreiser Nicole Kreiser

and Chloe Gossage Chloe Gossage

APPROVED BY: James D. Johnson, Director, Fiscal Research Division

James D. Johnson

DATE: March 11, 2003

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 2

HOUSE BILL 963
Committee Substitute Favorable 4/30/03

Short Title: Hit and Run - 2 Year License Revocation. (Public)

Sponsors:

Referred to:

April 9, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT CERTAIN PERSONS CONVICTED OF LEAVING THE SCENE OF AN ACCIDENT INVOLVING INJURY OR DEATH SHALL LOSE THEIR LICENSE FOR A PERIOD OF TWO YEARS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-166 is amended by adding a new subsection to read:

"(e) Persons convicted of violating subsection (a) of this section shall have their drivers license revoked for a period of two years. Upon a first conviction only for a violation of subsection (a) of this section, a trial judge may allow limited driving privileges in the manner set forth in G.S. 20-16.1(b)."

SECTION 2. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

HOUSE BILL 963:
Hit and Run - 2 Year License Revocation

BILL ANALYSIS

Committee:	Senate Judiciary Ii	**Introduced by:**	Rep. Warner
Date:	May 27, 2003	**Summary by:**	Robin Johnson*
Version:	2nd Edition		Committee Counsel

SUMMARY: ***House Bill 963 would require that the license of any person convicted of failing to stop in the event of an accident or collision involving death or injury be revoked for a period of two years.***

CURRENT LAW: ***G.S. 20-166(a)*** requires any driver to stop immediately at the scene of an accident or collision when the driver knows or reasonably should know that (i) the vehicle the driver is operating is involved in that accident or collision, and (ii) the accident or collision has resulted in injury or death to any person. The driver must remain at the scene until a law-enforcement officer completes investigation of the accident or collision or authorizes the driver to leave. The driver may leave to call for a law-enforcement officer or for medical assistance or medical treatment, but must return to the scene within a reasonable period of time. A willful violation of the duty to stop is a Class H felony. ***G.S. 20-166(b)*** requires the driver to give his or her name, address, driver's license number, and other information to the driver or occupants of the other vehicle involved in the collision, and the driver is required to render reasonable assistance to injured persons, including calling for medical assistance when necessary; violation is a Class 1 misdemeanor. DMV must revoke the license of any driver upon receiving a record of the driver's conviction for failure to stop and render aid in violation of either of these laws. Because the law does not specifically provide a period of revocation, under G.S. 20-19(f) the period of revocation is one year.

(When an accident or collision results only in damage to property or if the driver did not know and did not have reason to know of a death or injury resulting from that incident, G.S. 20-166(c) provides that failure to stop at the scene is a Class 1 misdemeanor. Mandatory license revocation is not required for this violation.)

BILL ANALYSIS: House Bill 963 would increase from one year to two years the period of driver's license revocation required for a conviction of G.S. 20-166(a). This two-year revocation would apply when the driver fails to stop although the driver knows or reasonably should know that the vehicle is involved in an accident or collision that has resulted in injury or death to any person.

When the offense is a first conviction of the violation, the bill would authorize the judge to allow limited driving privileges for proper purposes reasonably connected with the health, education and welfare of the offender and his or her family. For purposes of determining whether conviction is a first conviction, no prior offense occurring more than seven years before the date of the current offense will be considered. The judge is authorized to impose any restrictions the judge deems advisable including, but not limited to, conditions of days, hours, types of vehicles, routes, geographical boundaries and specific purposes for which limited driving privilege is allowed.

The bill would become effective December 1, 2003 and would apply to offenses committed on or after that date.

H963-SMRH-003: * Brenda Carter, Staff Attorney, contributed substantially to this summary.

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. 963 DATE _____

S. B. No. _____ Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE _____

Rep.) Kerr
)
Sen.)

moves to amend the bill on page 1, line 7

( ) WHICH CHANGES THE TITLE

by deleting "shall" and substitute "may".

SIGNED Ken

ADOPTED _____ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 3

HOUSE BILL 965

Committee Substitute Favorable 4/29/03
Third Edition Engrossed 4/30/03

Short Title: Failure to Yield Causing Death or Injuries. (Public)

Sponsors:

Referred to:

April 9, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE PENALTIES FOR PERSONS WHO CAUSE BODILY INJURY OR DEATH WHEN FAILING TO YIELD THE RIGHT-OF-WAY UNDER CERTAIN CIRCUMSTANCES.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 20 of the General Statutes is amended by adding a new section to read:

"**§ 20-160.1. Failure to yield causing injury or death; penalties.**

(a) Unless the conduct is covered under some other provision of law providing greater punishment, a person who commits the offense of failure to yield while approaching or entering an intersection, turning at a stop or yield sign, entering a roadway, upon the approach of an emergency vehicle, or at highway construction or maintenance shall be punished in the following manner:

(1) Except as provided in subdivisions (2) and (3) of this subsection, when there is bodily injury resulting from the violation, the violator shall be fined two hundred dollars ($200.00).

(2) When there is serious bodily injury but no death resulting from the violation, the violator shall be fined five hundred dollars ($500.00) and the violator's drivers license or commercial drivers license shall be suspended for 90 days.

(3) When a death results from the violation, the violator shall be fined one thousand dollars ($1,000) and the violator's drivers license or commercial drivers license shall be suspended for six months.

(b) As used in this section, 'bodily injury' means a cut, abrasion, bruise, burn, disfigurement, physical pain, illness, any impairment of the function of a bodily member, organ, or mental faculty, or any other injury to the body, no matter how temporary. 'Serious bodily injury' means bodily injury that involves a substantial risk of

death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty."

SECTION 2. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

HOUSE BILL 965:
Failure to Yield Causing Death or Injuries

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Rep. Hill
Date:	May 27, 2003	**Summary by:**	Robin Johnson*
Version:	3rd Edition		Committee Counsel

SUMMARY: ***House Bill 965 would provide specific penalties for persons who fail to yield the right of way as required under certain circumstances. A driver would be subject to a fine and suspension of his or her driver's license; the amount of the fine and the length of the suspension would vary depending upon whether there is bodily injury or death resulting from the violation.***

CURRENT LAW: G.S. 20-155 requires that when two vehicles approach or enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left must yield the right-of-way to the vehicle on the right. The driver of a vehicle intending to turn to the left must yield the right-of-way to any vehicle approaching from the opposite direction. The driver of any vehicle approaching but not having entered a traffic circle must yield the right-of-way to a vehicle already within the traffic circle. G.S. 20-156 requires the driver of a vehicle about to enter or cross a highway to yield the right-of-way to all vehicles approaching on the highway to be entered. A driver must also yield the right-of-way to police and fire department vehicles, ambulances, and other emergency vehicles giving a warning signal by appropriate light and siren. G.S. 20-158 provides for the control of vehicles by signs and signals, and prescribes the conditions under which a driver must stop or yield the right of way at intersections or other areas controlled by stop signs, stoplights, flashing lights or other traffic-control devices.

Under G.S. 20-176, any violation of the aforementioned statutes would be an infraction for which the person may be ordered to pay a penalty of not more than $100 (unless a specific penalty is otherwise provided by law). Under G.S. 20-141.4, if the violation results in a death, the person could be charged with misdemeanor death by vehicle. Misdemeanor death by vehicle is a Class 1 misdemeanor; a person charged with a Class 1 misdemeanor is subject to an unspecified fine in the discretion of the judge. In addition, a person found guilty of misdemeanor death by vehicle is subject to a mandatory one-year revocation is his or her driver's license.

BILL ANALYSIS: House Bill 965 would provide specific punishment for failure to yield while approaching or entering an intersection, turning at a stop sign or yield sign, entering a roadway, upon approach of an emergency vehicle, or at the site of highway construction or maintenance. ***Unless the conduct is covered under some other provision of law providing greater punishment*** the driver would be required to pay a fine, and the driver's license would be suspended for a specified period; the amount of the fine and the length of the suspension would vary depending upon whether there is serious bodily injury or death resulting from the violation as follows:

- ***When there is bodily injury*** resulting from the violation, the fine would be two hundred dollars ($200.00) 'Bodily injury' is defined to include a cut, abrasion, bruise, burn, disfigurement, physical pain, illness, any impairment of the function of a bodily member, organ, or mental faculty, or any other injury to the body, no matter how temporary.

- ***When there is serious bodily injury but no death*** resulting from the violation, the fine would be five hundred dollars ($500.00) and the violator's driver's license or commercial drivers license would be suspended for 90 days. 'Serious bodily injury' is defined as bodily injury that involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

- ***When a death results*** from the violation, the fine would be one thousand dollars ($1,000) and the violator's driver's license or commercial drivers license would be suspended for six months. *There is some question whether this provision is necessary because of existing laws that carry greater punishment.*

The bill would become effective December 1, 2003 and apply to offenses committed on or after that date.

H965-SMRH-004: * Brenda Carter, Staff Attorney, contributed substantially to this summary.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 637

Short Title:	Amend Powers/Settlor of Revocable Trust.	(Public)
Sponsors:	Representatives Munford; Glazier, Haire, LaRoque, McMahan, Moore, Ross, Sauls, Setzer, Stam, and Stiller.	
Referred to:	Judiciary IV.	

March 25, 2003

A BILL TO BE ENTITLED

AN ACT TO PERMIT THE SETTLOR OF A REVOCABLE TRUST TO RELIEVE THE TRUSTEE OF DUTIES, RESTRICTIONS, AND LIABILITIES IMPOSED BY THE UNIFORM TRUSTS ACT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 36A-78 reads as rewritten:

"**§ 36A-78. Power of settlor.**

The settlor of any trust affected by this Article may, by provision in the instrument creating the trust if the trust was created by a writing, or by oral statement to the trustee at the time of the creation of the trust if the trust was created orally, or by an amendment of the trust if the settlor reserved the power to amend the trust, or by written instrument delivered to the trustee of a revocable trust, relieve the trustee from any or all duties, restrictions, and liabilities which would otherwise be imposed upon ~~him~~ the trustee by this Article; or alter or deny to ~~his~~ the trustee any or all of the privileges and powers conferred upon the trustee by this Article; or add duties, restrictions, liabilities, privileges, or powers, to those imposed or granted by this Article; but no act of the settlor who has not reserved the power to revoke the trust shall relieve a trustee from the duties, restrictions, and liabilities imposed upon ~~him~~ the trustee by G.S. 36A-62, 36A-63 and G.S. 36A-66."

SECTION 2. This act is effective when it becomes law.

HOUSE BILL 637:
Amend Powers/Settlor of Revocable Trust

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Rep. Munford
Date:	May 29, 2003	**Summary by:**	Robin Johnson*
Version:	H637-CSRH-037[v.1]		Committee Counsel

SUMMARY: ***House Bill 637 authorizes the settlor of a revocable trust to relieve the trustee of any and all duties, restrictions, and liabilities imposed by the Uniform Trusts Act and authorizes an additional method by which the settlor may relieve the trustee of those duties and liabilities.***

The PCS rewrites the statute to make it easier to read and understand.

CURRENT LAW: The Uniform Trusts Act, originally enacted in North Carolina in 1939, provides rules about certain trustee responsibilities and obligations. These include the duty of loyalty, the registration and voting of securities, and trustee liability to persons other than beneficiaries. In addition, the Act authorizes a settlor to modify certain rules pertaining to the trustee's powers, duties, and liabilities. The statute provides three methods by which this modification may be made:

- By express statement in the original trust document;
- By an amendment to the trust, if the settlor retained the right to amend; or
- By oral statement, if the trust was created orally.

However, a settlor is prohibited from relieving a trustee from the duties, restrictions, and liabilities with regard to the following activities:

- Loaning trust funds to itself, its employees, or any affiliate. (G.S. 36A-62).
- Holding funds uninvested longer than reasonable. (G.S. 36A-63).
- If a bank, depositing funds in its own savings or commercial department unless adequate security is given. (G.S. 36A-63).
- Buying or selling any property, directly or indirectly, for the trust from or to itself or an affiliate. (G.S. 36A-66).

BILL ANALYSIS: House Bill 637 does two things:

- It authorizes an additional method by which the settlor of a revocable trust may relieve a trustee from any and all duties, restrictions, or liabilities imposed by the Uniform Trusts Act – by written instrument delivered to the trustee.
- It eliminates the prohibition against the settlor of a revocable trust from relieving a trustee from the duties, restrictions, and liabilities imposed regarding:
  - Loaning trust funds to itself, its employees, or any affiliate.
  - Holding funds uninvested longer than reasonable.
  - If a bank, depositing funds in its own savings or commercial department unless adequate security is given.
  - Buying or selling any property, directly or indirectly, for the trust from or to itself or an affiliate.

  The removal of this limitation on a settlor's powers would be consistent with the law in 46 other states and the principles embodied in the Uniform Trust Code, approved and recommended by the National Conference of Commissioners on Uniform State Laws in 2000 for adoption by the states, that while a

trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

The act would become effective when it becomes law.

BACKGROUND:

Definition of a Trust. – Generally, a trust is a right in real or personal property that is held in a fiduciary relationship by one party for the benefit of another. The *settlor* is the person who creates the trust, the *trustee* is the person who holds legal title to the trust property, and the *beneficiary* is the person who receives the benefits of the trust. In order to create a trust, the settlor must deliver the trust property to the trustee with the intent to create a trust, whereupon the trustee holds, manages, and administers the property for the benefit of the beneficiaries.

Powers of a Trustee. – Generally, a trustee can exercise those powers that are expressly conferred by the terms of the trust, that are implied as necessary or appropriate to carry out the purposes of the trust, and that are authorized by court decree or statute. By statute in North Carolina, a trustee has the general power to preserve, manage, use, and distribute the trust estate in a way that achieves the trust's purpose and is in the best interest of the trust beneficiaries. In addition, the Uniform Trusts Act specifically identifies the following powers exercisable by trustees:

- Open bank accounts and draw checks
- Enter safe-deposit boxes rented by the trust
- Employ attorneys and accountants
- List property for taxes and prepare and file State, municipal, and county tax returns
- Collect claims and debts due the trust and give receipts
- Pay or compromise claims and pay debts of the trust
- Have custody of property of the trust

Duties of a Trustee. – The primary duty of a trustee is the preservation of trust assets. Additional duties include the duty of loyalty, the duty to keep trust assets separate from personal assets, the duty to make trust property productive, the duty to protect trust assets from claims of others, and the duty to account and keep adequate records of trust activities.

Liabilities of a Trustee. – If a trustee breaches his duties, the beneficiaries may ask the court to remove him, deny him compensation, or require payment of damages suffered. The trustee is personally liable for torts committed in the course of the trust administration. A trustee may also be personally liable to third parties on contracts entered into with them in the course of the trust administration unless the contract excludes personal liability. North Carolina also permits a third party to bring a contract claim against the trustee in his representative capacity and to collect any judgment directly from the trust property.

*H637-SMRH-003: *Trina Griffin, Research Attorney, prepared this summary.*

STATUTORY REFERENCES IN HB 637

§ 36A-62. Loan of trust funds.

Except as hereinafter provided in this Article, no corporate trustee shall lend trust funds to itself or an affiliate, or other business associate, or to any director, officer, or employee of itself or of an affiliate, nor shall any noncorporate trustee lend trust funds to himself, or to his relative, employer, employee, partner, affiliate, or other business associate. (1939, c. 197, s. 3; 1977, c. 502, s. 2.)

§ 36A-63. Funds held by a corporation exercising fiduciary powers awaiting investment or distribution.

(a) Funds held in a fiduciary capacity by a bank, trust company, savings and loan association, or other corporation authorized to exercise the powers of a fiduciary, awaiting investment or distribution shall not be held uninvested or undistributed any longer than is reasonable for the proper management of the account. A corporation acting in a fiduciary capacity has complied with this requirement if such funds awaiting investment or distribution in excess of one thousand dollars ($1,000) are invested or distributed within 30 days of receipt or accumulation thereof.

(b) Funds held in a fiduciary capacity by a bank, awaiting investment or distribution may, unless prohibited by the instrument creating the fiduciary relationship, be deposited in the commercial or savings or other department of the bank, provided that it shall first set aside under control of the trust department as collateral security, such securities as may be found listed in G.S. 142-34 as being eligible for the investment of the sinking funds of the State of North Carolina equal in market value of such deposited funds, or readily marketable commercial bonds having not less than a recognized "A" rating equal to one hundred and twenty-five percent (125%) of the funds so deposited.

The securities so deposited or securities substituted therefor as collateral in the trust department by the commercial or savings or other department (as well as the deposit of cash in the commercial or savings or other department by the trust department) shall be held pursuant to the provisions of G.S. 53-43(6).

If such funds are deposited in a bank insured under the provisions of the Federal Deposit Insurance Corporation, the above collateral security will be required only for that portion of uninvested balances of each trust which are not fully insured under the provisions of that corporation.

(c) Funds held in a fiduciary capacity by a corporate fiduciary awaiting investment or distribution may, unless prohibited by the instrument creating the fiduciary relationship, be invested in short-term, trust-quality investment vehicles, through the medium of a collective investment fund or otherwise.

(d) In addition to any other compensation to which it may be entitled under G.S. 28A-23-3, 32-50, 34-12, 35A-1269, or under any other authority, a corporation acting in a fiduciary capacity shall be allowed to charge a fee for the temporary investment of funds held awaiting investment or distribution, which fee may be calculated upon the amount of such funds actually invested and upon the income produced thereby. The fee authorized by this subsection shall not exceed twelve percent (12%) of the income produced by such investment. A corporation acting in a fiduciary capacity has complied with its duty to disclose fees and practices in connection with the investment of fiduciary funds awaiting investment or distribution if the corporation's periodic statements set forth the method of computing such fees. (1939, c. 197, s. 4; 1963, c. 243, ss. 1, 2; 1977, c. 502, s. 2; 1989, c. 443.)

§ 36A-66. Trustee buying from or selling to self.

No trustee shall directly or indirectly buy or sell any property for the trust from or to itself or an affiliate; or from or to a director, officer, or employee of such trustee or of an affiliate, or from or to a relative, employer, partner, or other business associate. (1939, c. 197, s. 5; 1977, c. 502, s. 2.)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 3

HOUSE BILL 656

Committee Substitute Favorable 4/7/03
Committee Substitute #2 Favorable 4/29/03

Short Title: Amend Trust Administration Act. (Public)

Sponsors:

Referred to:

March 25, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE TRUST ADMINISTRATION ACT AND TO MAKE RELATED CHANGES TO THE LAW GOVERNING ACCOUNTINGS IN TESTAMENTARY TRUSTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 36A-23.1(a) reads as rewritten:

"(a) The clerks of superior court of this State have original jurisdiction over all proceedings initiated by interested persons concerning the internal affairs of trusts except proceedings ~~to modify or terminate trusts.~~ governed by Article 11A of this Chapter. Except as provided in subdivision (3) of this subsection, the clerk's jurisdiction is exclusive. Proceedings that may be maintained under this subsection are those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and trust beneficiaries, to the extent that those matters are not otherwise provided for in the governing instrument. These include proceedings:

(1) To appoint or remove a trustee;

(1a) To permit a trustee to resign or renounce; however, unless the trustee is required to account to the clerk, when the governing instrument names or provides a procedure to name a successor trustee, and the successor trustee is willing to serve, no trustee shall be required to initiate a proceeding to resign or renounce as trustee;

(2) To review trustees' fees pursuant to ~~G.S. 32-50~~ Article 5 of Chapter 32 of the General Statutes and review and settle interim or final accounts; and

(3) To ascertain beneficiaries, to determine any question arising in the administration or distribution of any trust, including questions of construction of trust instruments, and to determine the existence or nonexistence of trusts created other than by will and the existence or

nonexistence of any immunity, power, privilege, duty, or right. The clerk, on the clerk's own motion, may determine that a proceeding to determine an issue listed in this subdivision shall be originally heard by a superior court judge."

SECTION 2. G.S. 36A-24.1(b) reads as rewritten:

"(b) If the trustee is not required to account to the clerk, then unless the terms of the governing instrument provide otherwise, venue for proceedings under G.S. 36A-23.1 involving trusts ~~is in~~ is:

(1) In the case of an inter vivos trust, in any county of this State in which the trust has its principal place of administration or where any beneficiary ~~resides.~~ resides; or

(2) In the case of a testamentary trust, in any county of this State in which the trust has its principal place of administration, where any beneficiary resides, or in which the testator's estate was administered."

SECTION 3. G.S. 36A-26.1 reads as rewritten:

"**§ 36A-26.1. Trust proceedings; necessary parties.**

Proceedings under G.S. 36A-23.1 are initiated by filing a petition or complaint in the office of the clerk of superior court. Upon the filing of the petition, the clerk shall docket the cause as an estate matter. All ~~known beneficiaries, trustees, or cotrustees~~ trustees and interested persons not joined as petitioners shall be joined as respondents. The clerk shall issue the summons for the respondents. The clerk may order ~~notification of~~ that additional persons be joined as respondents and shall issue the summons for the additional persons. ~~An order is valid as to all persons who are given notice of the proceeding even if all interested persons are not notified. The beneficiaries, creditors, or any other persons interested in the trust estate have the right to~~ The summons shall notify the respondents to appear and answer the petition ~~and to offer evidence against granting the petition. The clerk shall then proceed to hear~~ within 10 days after its service upon the respondents. The summons shall comply with the requirements set forth in G.S. 1-394 for a special proceeding summons except that the clerk shall indicate on the summons by appropriate words that the summons is issued in an estate matter and not in a special proceeding or in a civil action. The clerk shall set the matter for hearing after the period for respondents to answer the petition has expired and shall direct the petitioners to provide notice of the hearing to respondents. At the hearing, petitioners and respondents may offer evidence for and against granting the petition, and the clerk shall decide and determine the matter as provided ~~for in G.S. 1-301.3.~~ in G.S. 1-301.3. An order entered by the clerk is valid as to all persons upon whom a summons is served."

SECTION 4. G.S. 36A-29 reads as rewritten:

"**§ 36A-29. ~~Final accounting before resignation.~~ Accounting to the clerk.**

(a) No trustee, including a trustee appointed by the clerk, shall be required to account to the clerk of superior court unless the governing instrument directs that the trustee shall be required to account to the clerk or unless the trustee is otherwise required by law to account to the clerk.

(b) If the trustee is required to account to the clerk of superior court, then unless the terms of the governing instrument provide otherwise, no trustee shall be permitted to resign as trustee until a final account of the trust estate is filed with the clerk, and until the court shall be satisfied that the account is true and correct."

SECTION 5. G.S. 36A-31 reads as rewritten:

"**§ 36A-31. When bond required.**

A trustee ~~need not~~ shall provide bond to secure performance of the trustee's duties ~~unless required by the~~ if:

(1) The terms of the governing ~~instrument, reasonably requested by a beneficiary, or found by the clerk to be necessary~~ instrument require the trustee to provide bond;

(2) A beneficiary requests the trustee to provide bond and the clerk finds the request to be reasonable; or

(3) The clerk finds that it is necessary for the trustee to provide bond in order to protect the interests of beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented.

However, in no event shall bond be required of a trustee, including a trustee appointed by the clerk, if the governing instrument directs otherwise. On petition of the trustee or other interested person, the clerk may excuse a requirement of bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties. ~~If the governing instrument is silent as to the requirement of a bond and the clerk finds that no bond is necessary, or if the clerk excuses or reduces the bond requirement, the clerk's decision must be approved by a superior court judge unless all beneficiaries have been notified of the decision.~~ If bond is required, it shall be in a sum double the value of the personal property to come into the trustee's hands when bond is executed by a personal surety, and in an amount not less than one and one-fourth times the value of all personal property of the trust estate when the bond is secured by a suretyship bond executed by a corporate surety company authorized by the Commissioner of Insurance to do business in this State, provided that the clerk of superior court, when the value of the personal property exceeds one hundred thousand dollars ($100,000), may accept bond in an amount equal to the value of the personal property plus ten percent (10%) thereof, conditioned upon the faithful performance of the trustee's duties and for the payment to the persons entitled to receive all moneys, assets, or other things of value which may come into the trustee's hands. All bonds executed under the provisions of this Article shall be filed with the clerk."

SECTION 6. G.S. 36A-32 reads as rewritten:

"**§ 36A-32. Rights and duties devolve on successor.**

A successor ~~trustee~~ trustee, including a successor trustee appointed by the clerk, shall succeed to all the rights, powers, and privileges, and shall be subject to all the duties, liabilities, and responsibilities that were imposed upon the original trustee unless a contrary intent appears from the governing ~~instrument.~~instrument or unless the order appointing the successor trustee provides otherwise."

SECTION 7. G.S. 36A-107 reads as rewritten:

"**§ 36A-107. Trustees in wills to qualify and file inventories and accounts.**

~~Trustees~~In any will creating a testamentary trust ~~appointed in any will~~ admitted to probate in this ~~State, into whose hands assets come under the provisions of the will,~~ State that directs that the trustee shall be required to account to the clerk, the trustee shall first qualify under the laws applicable to executors, and shall file in the office of the clerk of the county where the will is probated inventories of the assets ~~which~~ that come into ~~his~~ the trustee's hands and annual and final accounts ~~thereof,~~of the trust ~~such~~ that are the same as are required of executors and administrators. The power of the clerk to enforce the filing and ~~his~~the clerk's duties ~~in respect to auditing and approving~~ to audit and approve the trustee's inventories and accounts shall be the same as ~~in such cases.~~ the clerk's powers and duties with respect to the inventories and accounts of executors and administrators. This section shall not apply to the extent that any will makes a different provision. No trustee, including a trustee appointed by the clerk, shall be required to account to the clerk unless the subject will directs that the trustee shall be required to account to the clerk or unless otherwise required by law."

SECTION 8. Sections 4, 5, and 7 of this act apply to testamentary trusts created by decedents dying on or after January 1, 2004, and inter vivos trusts created on or after January 1, 2004. The remainder of this act becomes effective January 1, 2004, and applies to all trusts created before or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 656

Committee Substitute Favorable 4/7/03

Committee Substitute #2 Favorable 4/29/03

PROPOSED SENATE COMMITTEE SUBSTITUTE H656-CSRC-62 [v.5]

5/28/2003 4:04:28 PM

Short Title: Amend Trust Administration Act. (Public)

Sponsors:

Referred to:

March 25, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE TRUST ADMINISTRATION ACT AND TO MAKE RELATED CHANGES TO THE LAW GOVERNING ACCOUNTINGS IN TESTAMENTARY TRUSTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 36A-23.1(a) reads as rewritten:

"(a) The clerks of superior court of this State have original jurisdiction over all proceedings initiated by interested persons concerning the internal affairs of trusts except proceedings ~~to modify or terminate trusts.~~ governed by Article 11A of this Chapter. Except as provided in subdivision (3) of this subsection, the clerk's jurisdiction is exclusive. Proceedings that may be maintained under this subsection are those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and trust beneficiaries, to the extent that those matters are not otherwise provided for in the governing instrument. These include proceedings:

(1) To appoint or remove a trustee;

(1a) To permit a trustee to resign or renounce; however, unless the trustee is required to account to the clerk, when the governing instrument names or provides a procedure to name a successor trustee, and the successor trustee is willing to serve, no trustee shall be required to initiate a proceeding to resign or renounce as trustee;

(2) To review trustees' fees pursuant to ~~G.S. 32-50~~ Article 5 of Chapter 32 of the General Statutes and review and settle interim or final accounts; and

(3) To ascertain beneficiaries, to determine any question arising in the administration or distribution of any trust, including questions of

construction of trust instruments, and to determine the existence or nonexistence of trusts created other than by will and the existence or nonexistence of any immunity, power, privilege, duty, or right. The clerk, on the clerk's own motion, may determine that a proceeding to determine an issue listed in this subdivision shall be originally heard by a superior court judge."

SECTION 2. G.S. 36A-24.1(b) reads as rewritten:

"(b) If the trustee is not required to account to the clerk, then unless the terms of the governing instrument provide otherwise, venue for proceedings under G.S. 36A-23.1 involving trusts ~~is in~~ is:

(1) In the case of an inter vivos trust, in any county of this State in which the trust has its principal place of administration or where any beneficiary ~~resides.~~ resides; or

(2) In the case of a testamentary trust, in any county of this State in which the trust has its principal place of administration, where any beneficiary resides, or in which the testator's estate was administered."

SECTION 3. G.S. 36A-26.1 reads as rewritten:

"**§ 36A-26.1. Trust proceedings; necessary parties.**

Proceedings under G.S. 36A-23.1 are initiated by filing a petition ~~or complaint~~ in the office of the clerk of superior court. Upon the filing of the petition, the clerk shall docket the cause as an estate matter. All ~~known beneficiaries, trustees, or cotrustees~~ trustees and interested persons not joined as petitioners shall be joined as respondents. The clerk shall issue the summons for the respondents. The clerk may order ~~notification of~~ that additional persons be joined as respondents and shall issue the summons for the additional persons. ~~An order is valid as to all persons who are given notice of the proceeding even if all interested persons are not notified. The beneficiaries, creditors, or any other persons interested in the trust estate have the right to~~ The summons shall notify the respondents to appear and answer the petition ~~and to offer evidence against granting the petition. The clerk shall then proceed to hear~~ within 10 days after its service upon the respondents. The summons shall comply with the requirements set forth in G.S. 1-394 for a special proceeding summons except that the clerk shall indicate on the summons by appropriate words that the summons is issued in an estate matter and not in a special proceeding or in a civil action. The clerk shall set the matter for hearing after the period for respondents to answer the petition has expired and shall direct the petitioners to provide notice of the hearing to respondents. At the hearing, petitioners and respondents may offer evidence for and against granting the petition, and the clerk shall decide and determine the matter as provided ~~for in G.S. 1-301.3.~~ in G.S. 1-301.3. An order entered by the clerk is valid as to all persons upon whom a summons is served."

SECTION 4. G.S. 36A-29 reads as rewritten:

"**§ 36A-29. ~~Final accounting before resignation.~~ Accounting to the clerk.**

(a) No trustee, including a trustee appointed by the clerk, shall be required to account to the clerk of superior court unless the governing instrument directs that the

trustee shall be required to account to the clerk or unless the trustee is otherwise required by law to account to the clerk.

(b) If the trustee is required to account to the clerk of superior ~~court, then unless the terms of the governing instrument provide otherwise, no~~ court, the trustee shall not be permitted to resign as trustee until a final account of the trust estate is filed with the ~~clerk,~~ clerk and until the court shall be satisfied that the account is true and ~~correct.~~ correct, unless the terms of the governing instrument provide otherwise."

SECTION 5. G.S. 36A-31 reads as rewritten:

"**§ 36A-31. When bond required.**

(a) ~~A~~ For any testamentary trust created under a will of a decedent executed on or after January 1, 2004 and any inter vivos trust created on or after January 1, 2004, a trustee ~~need not~~ shall provide bond to secure performance of the trustee's duties ~~unless required by the~~ if the terms of the governing ~~instrument, reasonably requested by a beneficiary, or found by the clerk to be necessary~~ instrument require the trustee to provide bond. For any testamentary trust created under a will of a decedent executed before January 1, 2004 and for any inter vivos trust created before January 1, 2004, a trustee shall provide bond to secure performance of the trustee's duties unless the terms of the governing instrument provide otherwise. In addition, regardless of when a trust was created a trustee shall provide bond to secure performance of the trustee's duties if:

(1) A beneficiary requests the trustee to provide bond and the clerk finds the request to be reasonable; or

(2) The clerk finds that it is necessary for the trustee to provide bond in order to protect the interests of beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented.

(b) ~~However,~~ Notwithstanding subsection (a) of this section, in no event shall bond be required of a trustee, including a trustee appointed by the clerk, if the governing instrument directs otherwise. On petition of the trustee or other interested person, the clerk may excuse a requirement of bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties. ~~If the governing instrument is silent as to the requirement of a bond and the clerk finds that no bond is necessary, or if the clerk excuses or reduces the bond requirement, the clerk's decision must be approved by a superior court judge unless all beneficiaries have been notified of the decision.~~ If bond is required, it shall be in a sum double the value of the personal property to come into the trustee's hands when bond is executed by a personal surety, and in an amount not less than one and one-fourth times the value of all personal property of the trust estate when the bond is secured by a suretyship bond executed by a corporate surety company authorized by the Commissioner of Insurance to do business in this State, provided that the clerk of superior court, when the value of the personal property exceeds one hundred thousand dollars ($100,000), may accept bond in an amount equal to the value of the personal property plus ten percent (10%) thereof, conditioned upon the faithful performance of the trustee's duties and for the payment to the persons entitled to receive all moneys, assets, or other things of value

which may come into the trustee's hands. All bonds executed under the provisions of this Article shall be filed with the clerk."

SECTION 6. G.S. 36A-32 reads as rewritten:

"**§ 36A-32. Rights and duties devolve on successor.**

A successor ~~trustee~~ trustee, including a successor trustee appointed by the clerk, shall succeed to all the rights, powers, and privileges, and shall be subject to all the duties, liabilities, and responsibilities that were imposed upon the original trustee unless a contrary intent appears from the governing ~~instrument.~~instrument or unless the order appointing the successor trustee provides otherwise."

SECTION 7. G.S. 36A-107 reads as rewritten:

"**§ 36A-107. Trustees in wills to qualify and file inventories and accounts.**

(a) ~~Trustees appointed in any will admitted to probate in this State into whose hands assets come under the provisions of the will,~~ For any testamentary trust created under a will of a decedent executed before January 1, 2004, the trustee shall first qualify under the laws applicable to executors, and shall file in the office of the clerk of the county where the will is probated inventories of the assets ~~which~~ that come into ~~his~~ the trustee's hands and annual and final accounts ~~thereof, such~~ of the trust that are the same as required of executors and administrators. The power of the clerk to enforce the filing and ~~his~~the clerk's duties ~~in respect to auditing and approving~~ to audit and approve the trustee's inventories and accounts shall be the same as ~~in such cases.~~ the clerk's powers and duties with respect to the inventories and accounts of executors and administrators. This ~~section~~ subsection shall not apply to the extent that any will makes a different provision.

(b) For any testamentary trust created under a will of a decedent executed on or after January 1, 2004, the provisions of which direct the trustee to account to the clerk, the trustee shall first qualify under the laws applicable to executors, and shall file in the office of the clerk of the county where the will is probated inventories of the assets that come into the trustee's hands and annual and final accounts of the trust that are the same as are required of executors and administrators. The power of the clerk to enforce the filing and the clerk's duties to audit and approve the trustee's inventories and accounts shall be the same as the clerk's powers and duties with respect to the inventories and accounts of executors and administrators. No trustee, including a trustee appointed by the clerk, shall be required to account to the clerk unless the subject will directs that the trustee shall be required to account to the clerk or unless otherwise required by law."

SECTION 8. This act becomes effective January 1, 2004, and applies to all trusts created before or after that date.

HOUSE BILL 656:
Amend Trust Administration Act

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Representative Culpetter
Date:	May 28, 2003	**Summary by:**	Kory J. Goldsmith
Version:	Proposed Committee Substitute H656-CSRC-62[v.5]		Committee Counsel

SUMMARY: ***House Bill 656 would make various changes to Article 3 of Chapter 36A of the General Statutes, the Trust Administration Act, relating to the jurisdiction of the clerk of superior court, venue in trust proceedings, issuance and service of summons, accounting to the clerk, bond requirements, and successor trustees.***

The Proposed Committee Substitute rewrites Sections 5 and 7 to make any changes in the law prospective. The changes would apply to intervivos trusts created on or after January 1, 2004 and to testamentary trusts created by wills executed on or after January 1, 2004.

CURRENT LAW: Article 3 of Chapter 36A governs matters relating to the administration of trusts. This article was substantially rewritten during the 2001 Session. See the bill analysis for a more detailed explanation of current law.

BILL ANALYSIS: House Bill 656 would change current law regarding trust proceedings as follows:

Jurisdiction of the clerk: Currently, the clerk of superior court has jurisdiction to hear all proceedings concerning the internal affairs of trusts, except proceedings to modify or terminate trusts[1]. This includes proceedings concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustee and trust beneficiaries, to the extent that those matters are not otherwise provided for in the governing instrument.

Section 1 would amend the statute governing the clerk's jurisdiction in trust proceedings to specify that the only proceedings concerning the internal affairs of trusts that are not within the clerk's original jurisdiction are proceedings governed by Article 11A of Chapter 36A (concerning the modification and termination of irrevocable trusts). A trust proceeding would be outside the clerk's jurisdiction only if the proceeding expressly fell within the jurisdiction of the superior court under Article 11A. The section also specifies that the clerk has original jurisdiction over: 1) proceedings to permit a trustee to resign or renounce (however, where a successor trustee is named in the governing instrument or where the governing instrument sets forth a procedure for naming a successor trustee, and the successor is willing to serve, no proceeding is required); 2) proceedings to review trustees fees, including the fees of attorneys serving as trustees.

Venue: Currently, in the case of trusts in which an accounting is not required, venue for a trust proceeding is in any county in which the trust has its principal place of administration or where beneficiary resides.

Section 2 would amend the venue provision for trusts for which an accounting is not required to add that for a testamentary trust, venue would lie in any county in which the testator's estate was administered.

[1] Article 11A of Chapter 36A governs the modification or termination of irrevocable trusts.

Necessary parties and issuance of summons: Trust proceedings are initiated by the filing of a petition with the clerk of court. The case is docketed as an estate matter. All known beneficiaries, trustees, or cotrustees not joined in the original petition must be joined in the proceeding, and the clerk may order that additional persons be notified. Any person interested in the trust can answer the petition and offer evidence against granting the petition.

Section 3 would broaden the category of persons who must be joined in the proceeding. Under the bill, all trustees and "interested persons" (defined in another section of the statute to include creditors, beneficiaries, and any others having a property right in or a claim against a trust estate) must be joined in the proceeding. The bill would also specify that: 1) the clerk must issue summons to any additional persons ordered by the clerk to be joined in the proceeding 2) the summons would notify the respondents to appear and answer the petition within 10 days after service 3) the clerk would set a hearing after the answer period expires and 4) an order entered by the clerk would be valid as to all persons upon whom a summons was served.

Accounting: Currently, if a trustee is required to account to the clerk, the trustee cannot resign as trustee until a final account is filed with the clerk and the court is satisfied that the account is true and correct.

Section 4 would add that no trustee would be required to account to the clerk unless the governing instrument affirmatively says so or unless the trustee is otherwise required by law to account to the clerk.

Bond requirement: A trustee is required to post a bond unless the trust instrument specifically provides otherwise. This means that if the trust is silent as the issue of the trustee posting a bond, then the trustee must post a bond. Additionally, the trustee must post a bond if a beneficiary requests it, or the clerk finds a bond to be necessary. If the governing instrument is silent as to the bond requirement and the clerk finds no bond to be necessary, or if the clerk excuses or reduces the bond, the clerk's decision must be approved by a superior court judge unless all beneficiaries have been notified of the clerk's decision. The statute prescribes the amount of the bond.

Section 5 shifts the presumption regarding whether a trustee must post a bond. If an intervivos trust was created before January 1, 2004, or if a testamentary trust was provided for in a will executed before January 1, 2004, and the instrument is silent as to the need for a bond, the trustee would be required to post one. If the intervivos trust was created on or after January 1, 2004, or if a testamentary trust is created in a will executed on or after January 1, 2004, that the instrument is silent as to the need for a bond, the trustee would not be required to post a bond. It would also delete the provision requiring approval of a superior court judge of a clerk's decision not to require a bond or to excuse or reduce a bond.

Successor trustees: Successor trustees by law succeed to all the powers and duties of the original trustee unless a contrary intent appears from the governing instrument.

Section 6 would specify that successor trustees appointed by the clerk succeed to all the powers and duties of the original trustee unless the order appointing the successor trustee provides otherwise.

Testamentary trusts: A testamentary trust is a trust created by operation of a will. Currently, a trustee must provide an accounting to the clerk of court unless the will specifically provides otherwise.

Section 7 keeps presumption if the trust was created because of a will executed before January 1, 2004 and is silent as to the requirement for an accounting If the trust was created in a will executed on or after January 1, 2004, and is silent as to the need for an accounting, the trustee would not be required to provide an accounting to the clerk.

Effective date: *Section 7* would make the act become effective January 1, 2004 and apply to all trusts created before or after that date.

H656-SMRC-002 Dianna Jessup contributed substantially to this summary.

Judiciary II Committee

Minutes

June 3, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with twelve members present.

Senator Hartsell noted that HB 1219 which was on the agenda would not be heard at this meeting.

HB 925 (County Appeals of Certain Juvenile Orders) Senator Hartsell recognized Representative Luebke, bill sponsor, to explain the bill. Senator Shubert moved for a favorable report. All voted and the motion carried.

HB 1037 (Amend Juvenile Law) Representative Luebke, bill sponsor, explained the bill. Mr. Chuck Kitchen, Attorney for Durham County spoke on the bill. Questions by Senators Hagen, Kerr, Shubert, Dorsett and Webster were answered by Robin Johnson, Staff Attorney, Mr. Kitchen, and Donn Hargrove, from the North Carolina Department of Juvenile Justice and Delinquency Prevention. After much discussion, Senator Hartsell named Senators Dorsett, Hagan and Webster to serve on a Sub-committee. The Sub-committee will report back to the Committee on June 5 or 10, 2003.

HB 1123 (Guardianship Amendments) Senator Hartsell called for a motion to adopt the Proposed Committee Substitute for purposes of discussion. Senator Dorsett moved for adoption, all members voted and the motion carried. Senator Hartsell introduced Representative Farmer-Butterfield, bill sponsor, to explain the bill. Ms. Deborah Greenblatt, Director of Carolina Legal Assistance, spoke on the bill. Senator Webster's question was answered by Representative Farmer-Butterfield. Senator Kerr moved for a favorable report on the Committee Substitute, unfavorable as to the original bill. All members voted and the motion carried.

HB 147 (Left Turn on Red) Senator Hartsell reviewed the progress of the bill. This was the third time the bill was before the Committee. The first vote was six to four on the first committee substitute. The bill came back for modifications for a committee amendment. During that time there were a number of amendments submitted by the committee and they were ultimately rolled into another committee substitute. The motion for a favorable report on that committee substitute failed on a five to six vote. Since there was no motion for an unfavorable report as to the bill as amended at that time, the bill was still in the Committee.

A new Committee Substitute was submitted. Senator Rucho moved to adopt the new Proposed Committee Substitute for purposes of consideration. All voted and the motion

carried. Kory Goldsmith, Staff Attorney, explained the new Committee Substitute in relation to the bill that was previously considered. The questions of Senators Dorsett, Webster, Hagan and Kerr were answered by Senator Hartsell and Mrs. Goldsmith. Ms. Cynthia Temoshenko spoke on the current Committee Substitute noting that the Governor's Advocacy Council for Persons With Disabilities supports the bill and the Federation of the Blind indicate they will not oppose the bill as written. Senator Shubert moved for a favorable report as to the Proposed Committee Substitute, unfavorable as to the original bill. All members voted and the motion carried.

There being no further business, the meeting was adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, June 03, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B. **925** County Appeals of Certain Juvenile Orders.
Sequential Referral: None
Recommended Referral: None

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B. **637** Amend Powers/Settlor of Revocable Trust.
Draft Number: PCS 80322
Sequential Referral: None
Recommended Referral: None
Long Title Amended: No

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 2, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #2) **656** Amend Trust Administration Act.
Draft Number: PCS 45152
Sequential Referral: None
Recommended Referral: None
Long Title Amended: No

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **963** Hit and Run - 2 Year License Revocation.
Draft Number: PCS 30355
Sequential Referral: None
Recommended Referral: None
Long Title Amended: Yes

TOTAL REPORTED: 4

Committee Clerk Comments:

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	June 3, 2003	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 147	Left Turn on Red.	Representative Gulley
HB 925	County Appeals of Certain Juvenile Orders.	Representative Luebke
HB 1037	Amend Juvenile Law.	Representative Luebke
HB 1123	Guardianship Amendments.	Representative Farmer-Butterfield
HB 1219	Clarify Def. of Divisible Property/Equ. Dist.	Representative Hackney

Senator Fletcher L. Hartsell, Jr., Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
June 3, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. Welcome and Opening Remarks

II. Bills to be Considered

HB 147	Left Turn on Red.	Representative Gulley
HB 925	County Appeals of Certain Juvenile Orders.	Representative Luebke
HB 1037	Amend Juvenile Law.	Representative Luebke
HB 1123	Guardianship Amendments.	Representative Farmer-Butterfield
HB 1219	Clarify Def. of Divisible Property/Equ. Dist.	Representative Hackney

III. Other Business

IV. Adjournment

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 9 June 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Allison Bowen	GACDD 1314 MCS Raleigh 27699-1314
Cynthia Temoshenco	" " "
Donn Hargrove	DJJDP -
Amy Darden	NC Bar Assn.
Jim Blackburn	NC Association of County Commissioners
Lydia Burden	Political Awareness PAC of Wayne County
Dorothy Best	Political Awareness PAC of Wayne County
Helen Best	Political awareness PAC of Wayne County
Ann Sims	Political Awareness PAC of Wayne County
Isaac Bunnett, Jr.	Political Awareness PAC Wayne Co.
Johnny Lewis	Political awareness PAC

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 3 June 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Gregory Gelinas	GACPD 2113 Comeran st Suite 218 Raleigh NC 27605
Deborah Greenblatt	Carolina Legal Assistance
[illegible]	AOC
John Phelps	NCLM
John O'Hale	Governor's Office
Suzanne Gulley	Staff Rep. Gulley
Sammy Sosa	NCACC
Jim Blackburn	NCACC
Amy Robinson	NC State Watch
ELIZABETH D. WICKHAM	LIFETIME
ROSE McCREERY	LIFETIME

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 3 June 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Johnny M. Williams	Sheriff of Warren County
Sarah Lowe	Sen. Kinnaird
John McHugh	Gov office
Jack Bell	Charlotte Observer
David Crawford	AIA NC
Sarah Young	Sen Kerr
Jessica Dawson	Governor's office
Bill Martin	attorney
Dave Richard	The Ave
George Erwin, Jr.	Sheriff of Henderson Co.
Eddie Watkins	Chief Deputy Henderson County S.O.

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 3 June 2003

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Clarke Odom	DOSDOT
[illegible]	Bobbi Cullifer/Strayhorn
Barbara Hoots	NCRR, FSO
Abby Youngkin	Intern
DAVID BARNES	Poyner & Spruill

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 147

Committee Substitute Favorable 3/19/03

PROPOSED SENATE COMMITTEE SUBSTITUTE H147-CSRC-61 [v.10]

6/2/2003 5:15:57 PM

Short Title: Left Turn on Red. (Public)

Sponsors:

Referred to:

February 27, 2003

A BILL TO BE ENTITLED

AN ACT TO PERMIT LEFT TURNS ON RED IN CERTAIN SITUATIONS, TO CLARIFY WHEN A PEDESTRIAN HAS THE RIGHT-OF-WAY, AND TO INCREASE THE PENALTY AND DRIVERS LICENSE POINTS ASSESSED FOR FAILING TO YIELD THE RIGHT-OF-WAY TO A PEDESTRIAN.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-158(b) reads as rewritten:

"(b) Control of Vehicles at Intersections. –

(1) When a stop sign has been erected or installed at an intersection, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right-of-way to vehicles operating on the designated main-traveled or through highway. When stop signs have been erected at three or more entrances to an intersection, the driver, after stopping in obedience thereto, may proceed with caution.

(2) ~~Vehicles facing a red light controlling traffic passing straight through an intersection from a steady or strobe beam stoplight shall not enter the intersection while the steady or strobe beam stoplight is emitting a red light controlling traffic passing straight through an intersection; provided that, except where prohibited by an appropriate sign, vehicular traffic facing a red light controlling traffic passing straight through an intersection, after coming to a complete stop at the intersection, may enter the intersection to make a right turn but such vehicle shall yield the right-of-way to pedestrians and to other traffic using the intersection.~~

a. When a steady or strobe beam stoplight is emitting a red light controlling traffic passing through an intersection, an approaching vehicle facing the red light shall come to a stop

and shall not enter the intersection. After coming to a complete stop and unless prohibited by an appropriate sign, that approaching vehicle may turn under one of the following conditions:

1. That vehicle may make a right turn.
2. If that vehicle is in the leftmost lane of travel on a one-way street that intersects with another one-way street with traffic traveling from the turning driver's right to the turning driver's left, then that vehicle may enter the intersection and make a left turn into the extreme left-hand lane lawfully available to traffic.

b. Any vehicle that turns left or right under this subdivision shall yield the right-of-way to:

1. other traffic and pedestrians using the intersection; and
2. pedestrians who are moving towards the intersection, who are in reasonably close proximity to the intersection, and who are preparing to cross in front of the traffic that is required to stop at the red light.

c. Failure to yield to a pedestrian under this subdivision shall be an infraction and the court may assess a penalty of not more than one thousand dollars ($1,000) but not less than one hundred dollars ($100). Municipalities and the Department of Transportation shall post signs stating that vehicles must yield the right of way to pedestrians at those intersections where vehicles will be allowed to turn left on a red light.

(2a) When ~~the~~ a stoplight is emitting a steady yellow circular light on a traffic signal controlling traffic passing straight through an intersection or a steady yellow arrow light on a traffic signal controlling traffic turning at an intersection, vehicles facing the yellow light are warned that the related green light is being terminated or a red light will be immediately forthcoming. When the stoplight is emitting a steady green light, vehicles may proceed with due care through the intersection subject to the rights of pedestrians and other vehicles as may otherwise be provided by law.

(3) When a flashing red light has been erected or installed at an intersection, approaching vehicles facing the red light shall stop and yield the right-of-way to vehicles in or approaching the intersection. The right to proceed shall be subject to the rules applicable to making a stop at a stop sign.

(4) When a flashing yellow light has been erected or installed at an intersection, approaching vehicles facing the yellow flashing light may proceed through the intersection with caution, yielding the right-of-way to vehicles in or approaching the intersection.

(5) When a stop sign, stoplight, flashing light, or other traffic-control device authorized by subsection (a) of this section requires a vehicle to stop at an intersection, the driver shall stop (i) at an appropriately marked stop line, or if none, (ii) before entering a marked crosswalk, or if none, (iii) before entering the intersection at the point nearest the intersecting street where the driver has a view of approaching traffic on the intersecting street."

SECTION 2. G.S. 20-16(c) reads as rewritten:

"(c) The Division shall maintain a record of convictions of every person licensed or required to be licensed under the provisions of this Article as an operator and shall enter therein records of all convictions of such persons for any violation of the motor vehicle laws of this State and shall assign to the record of such person, as of the date of commission of the offense, a number of points for every such conviction in accordance with the following schedule of convictions and points, except that points shall not be assessed for convictions resulting in suspensions or revocations under other provisions of laws: Further, any points heretofore charged for violation of the motor vehicle inspection laws shall not be considered by the Division of Motor Vehicles as a basis for suspension or revocation of driver's license:

Schedule of Point Values

Passing stopped school bus	5
Reckless driving	4
Hit and run, property damage only	4
Following too close	4
Driving on wrong side of road	4
Illegal passing	4
Failure to yield right-of-way to pedestrian pursuant to G.S. 20-158(b)(2)	4
Running through stop sign	3
Speeding in excess of 55 miles per hour	3
Failing to yield right-of-way	3
Running through red light	3
No driver's license or license expired more than one year	3
Failure to stop for siren	3
Driving through safety zone	3
No liability insurance	3
Failure to report accident where such report is required	3
Speeding in a school zone in excess of the posted school zone speed limit	3
Failure to properly restrain a child in a restraint or seat belt	2
All other moving violations	2
Littering pursuant to G.S. 14-399 when the littering involves the use of a motor vehicle	1

Schedule of Point Values for Violations While Operating a Commercial Motor Vehicle

Passing stopped school bus 8
Rail-highway crossing violation 6
Careless and reckless driving in violation of G.S. 20-140(f) 6
Speeding in violation of G.S. 20-141(j3) 6
Reckless driving 5
Hit and run, property damage only 5
Following too close 5
Driving on wrong side of road 5
Illegal passing 5
Failure to yield right-of-way to pedestrian pursuant to G.S. 20-158(b)(2) 5
Running through stop sign 4
Speeding in excess of 55 miles per hour 4
Failing to yield right-of-way 4
Running through red light 4
No driver's license or license expired more than one year 4
Failure to stop for siren 4
Driving through safety zone 4
No liability insurance 4
Failure to report accident where such report is required 4
Speeding in a school zone in excess of the posted school zone speed limit 4
Possessing alcoholic beverages in the passenger area of a commercial motor vehicle 4
All other moving violations 3
Littering pursuant to G.S. 14-399 when the littering involves the use of a motor vehicle 1

The above provisions of this subsection shall only apply to violations and convictions which take place within the State of North Carolina. The Schedule of Point Values for Violations While Operating a Commercial Motor Vehicle shall not apply to any commercial motor vehicle known as an "aerial lift truck" having a hydraulic arm and bucket station, and to any commercial motor vehicle known as a "line truck" having a hydraulic lift for cable, if the vehicle is owned, operated by or under contract to a public utility, electric or telephone membership corporation or municipality and used in connection with installation, restoration or maintenance of utility services.

No points shall be assessed for conviction of the following offenses:

Overloads
Over length
Over width
Over height
Illegal parking
Carrying concealed weapon
Improper plates

Improper registration
Improper muffler
Improper display of license plates or dealers' tags
Unlawful display of emblems and insignia
Failure to display current inspection certificate.

In case of the conviction of a licensee of two or more traffic offenses committed on a single occasion, such licensee shall be assessed points for one offense only and if the offenses involved have a different point value, such licensee shall be assessed for the offense having the greater point value.

Upon the restoration of the license or driving privilege of such person whose license or driving privilege has been suspended or revoked because of conviction for a traffic offense, any points that might previously have been accumulated in the driver's record shall be cancelled.

Whenever any licensee accumulates as many as seven points or accumulates as many as four points during a three-year period immediately following reinstatement of his license after a period of suspension or revocation, the Division may request the licensee to attend a conference regarding such licensee's driving record. The Division may also afford any licensee who has accumulated as many as seven points or any licensee who has accumulated as many as four points within a three-year period immediately following reinstatement of his license after a period of suspension or revocation an opportunity to attend a driver improvement clinic operated by the Division and, upon the successful completion of the course taken at the clinic, three points shall be deducted from the licensee's conviction record; provided, that only one deduction of points shall be made on behalf of any licensee within any five-year period.

When a license is suspended under the point system provided for herein, the first such suspension shall be for not more than 60 days; the second such suspension shall not exceed six months and any subsequent suspension shall not exceed one year.

Whenever the driver's license of any person is subject to suspension under this subsection and at the same time also subject to suspension or revocation under other provisions of laws, such suspensions or revocations shall run concurrently.

In the discretion of the Division, a period of probation not to exceed one year may be substituted for suspension or for any unexpired period of suspension under subsections (a)(1) through (a)(10a) of this section. Any violation of probation during the probation period shall result in a suspension for the unexpired remainder of the suspension period. Any accumulation of three or more points under this subsection during a period of probation shall constitute a violation of the condition of probation."

SECTION 3. The North Carolina Rate Bureau shall assign no more than one insurance point under the Safe Driver Incentive Plan for persons who fail to yield to a pedestrian under G.S. 20-158(b)(2).

SECTION 4. The Department of Transportation shall collect data regarding pedestrians who are involved in accidents at intersections because of a driver's failure to yield the right-of-way while turning right or left at a red light. The Department shall report the data to the Joint Legislative Transportation Oversight Committee by January 1, 2006. The Transportation Oversight Committee shall make recommendations to the

2006 Regular Session of the 2005 General Assembly regarding the appropriate number of driver's license points that should be assessed against a driver who fails to yield to a pedestrian while turning right or left at a red light.

SECTION 5. The Department of Transportation, as part of any regularly scheduled updates, shall revise the written portion of the driver's license examination and any publications related to obtaining a driver's license to reflect the changes in Sections 1 and 2 of this act.

SECTION 6. The Department of Transportation, counties and municipalities are encouraged to provide public service announcements on television and radio informing the public of the provisions of this act. The public service announcements should be scheduled to occur during times most likely to reach a broad audience.

SECTION 7. This act becomes effective December 1, 2003. Sections 2 and 3 shall expire July 1, 2006.

HOUSE BILL 147:
Left Turn on Red

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Representative Gulley
Date:	May 28, 2003	**Summary by:**	Kory J. Goldsmith
Version:	Proposed Committee Substitute 147-CSRC-61[v.10]		Committee Counsel

SUMMARY: ***The HB 147 would permit a left turn on red from the leftmost lane of travel on a one-way street to the leftmost lane of travel of an intersecting one-way street. The bill would take effect December 1, 2003.***

The Proposed Committee Substitute:

- ***requires a vehicle turning right or left on red to yield to a pedestrian who is moving towards the intersection, is in reasonably close proximity to the intersection, and is preparing to cross in front of the traffic that is required to stop at the red light;***
- ***imposes four driver's license points for failing to yield to a pedestrian on EITHER a right turn or left turn on red (sunsets July 1, 2006);***
- ***allows only one insurance point be assessed for failure to yield to pedestrian when turning right or left on red (sunsets July 1, 2006);***
- ***directs the Department of Transportation to collect data on pedestrians who are involved in accidents due to a driver's failure to yield while turning left or right at a red light and report those results to the Joint Legislative Transportation Oversight Committee; and***
- ***directs the Joint Legislative Transportation Oversight Committee to make recommendations to the 2006 Session of the2005 General Assembly regarding the appropriate number of driver's license points to be assessed for failure to yield to a pedestrian when turning right or left turn on red.***

CURRENT LAW: At present, a right turn on red is allowed in North Carolina, except where prohibited by a sign. Left turns on red are prohibited. A violation of the right turn on red statute is a moving violation and therefore an infraction punishable by a maximum penalty of $100. Three driver's license points would be assigned for failure to yield right-of-way or running through a red light. Only one insurance point would be assigned.

BILL ANALYSIS:

Section 1 - The bill would amend G.S. 20-158(b), by allowing certain drivers to make a left turn after stopping at a red light, unless prohibited by a sign at that intersection. If not so prohibited, the driver of a vehicle in the leftmost lane of a one-way street would be allowed to turn left into the leftmost lane lawfully available to traffic. The street onto which the left turn is made must also be a one-way street with traffic traveling from the turning driver's right to the driver's left.

A driver making either a right or left turn on red would be required to yield the right of way to a (1) traffic and pedestrians who are using the intersection; and (2) pedestrians who are who are moving towards the intersection, who are within reasonably close proximity of an intersection, and who are preparing to cross in front of the traffic that is required to stop at the red light.

Failure to yield to a pedestrian while making a right or left turn on red would be still be an infraction. However, violations would be punishable by the imposition of a penalty of not more than $1000 and not less than $100.

Section 2 – Increases from 3 to 4 the number of driver's license points for failing to yield to a pedestrian when turning right or left on a red light. (This section sunsets July 1, 2006.)

Section 3 – Allows on one insurance point to be assessed for failure to yield while turning right or left at a red light. (This section sunsets July 1, 2006.)

Section 4 – Directs the Department of Transportation (DOT) to collect data on accidents involving pedestrians and vehicles turning right or left on a red light. DOT must report the data to the Joint Legislative Transportation Oversight Committee by January 1, 2006. The Transportation Committee must make recommendations as to the appropriate number of driver's license points to assess for failure to yield to a pedestrian while turning right or left on a red light.

Section 5 – Directs DOT, as part of its regularly scheduled updates, to revise the written driver's license examination and any publications related to obtaining a driver's license to reflect the changes in Sections 1 and 2.

Section 6 – Encourages DOT, cities and counties to provide public service announcements informing the public about this act.

The act becomes effective December 1, 2003. Sections 2 and 3 sunset July 1, 2006.

H147-SMRC-004. Robin Johnson contributed substantially to this summary.

STATISTICS REGARDING PEDESTRIAN ACCIDENTS AT INTERSECTIONS 2001 AND 2002*

	2001	2002	Total for 2001 and 2002
Total number of pedestrians involved in accidents	1960	1861	3821
Pedestrians injured at intersections	382 19.49% of reported accidents	338 18.16 of reported accidents	720
Pedestrian injured while in a marked crosswalk	125 6.38% of reported accidents	120 6.45% of reported accidents	245
Fatal Injury	19 4.97% of reported accidents	13 3.85% of reported accidents	13
Serious Injury	45 11.78% of reported accidents	29 8.58% of reported accidents	74
Moderate Injury	136 35.60 % of reported accidents	118 34.91% of reported accidents	254
Complaint of Injury, but no physical evidence	176 46.07% of reported accidents	161 47.63% of reported accidents	337
No reported injury	4 1.05% of reported accidents	9 2.66% of reported accidents	13

*Provided by the UNC Center for Highway and Safety Research.

FISCAL ANALYSIS MEMORANDUM

[This confidential fiscal memorandum is a fiscal analysis of a draft bill, amendment, committee substitute, or conference committee report that has not been formally introduced or adopted on the chamber floor or in committee. This is not an official fiscal note. If upon introduction of the bill you determine that a formal fiscal note is needed, please make a fiscal note request to the Fiscal Research Division, and one will be provided under the rules of the House and the Senate.]

DATE: May 22, 2003

TO: Rep. Jim Gulley

FROM: Bob Weiss
Fiscal Research Division

RE: HB 147 PCS H147-CSRC-61 (v.2)
Left Turn on Red

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2003-04	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08
REVENUES					
EXPENDITURES					
Municipal Governments	**$238,000**				
Highway Fund-DMV	**$11,480**				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Municipal Governments; Division of Motor Vehicles – Highway Fund

EFFECTIVE DATE: December 1, 2003

BILL SUMMARY: The bill would amend G.S. 20-158(b) to permit a vehicle, unless prohibited by an appropriate sign, to make a left turn on red where the vehicle is in the leftmost lane of travel on a one-way street that intersects with another one-way street with

traffic moving from the vehicle's right to left. Municipalities would be required to post signs at all affected intersections stating that vehicles must yield the right of way to pedestrians. A person convicted of failing to yield would be fined not more than $1,000 and not less than $100 and shall have points assessed under G.S. 20-16 (c).

ASSUMPTIONS AND METHODOLOGY: The major fiscal impact would be on municipalities that would be required to erect signs at each intersection where a left turn on red could now be permitted. In most cases the sign would state that vehicles must yield the right of way to pedestrians (Section 1). In some cases the signs would prohibit left turns on red where that is the appropriate action due to restricted sightlines, heavy pedestrian traffic, etc. (The City of Raleigh Transportation Department has estimated that about 10%-20% of eligible intersections would require prohibition of left turns on red.)

Placement of signs would be the responsibility of the North Carolina Department of Transportation (DOT) on state-maintained roads and of municipal government on city streets. DOT has indicated that the number of such locations on their roads would be limited and the costs of signage minimal. For the cost to municipalities, only a very rough estimate is possible. The City of Raleigh Transportation Department has estimated that about one hundred intersections would qualify for left turn on red under the bill. According to DOT, each sign would cost approximately $150 for labor and materials. A rough estimate of the cost to Raleigh, then, would be 100 signs times $150 per sign, or $15,000. Raleigh receives about 6.3% of the State Street Aid to Municipalities (Powell Bill). If we assume that this is a reasonable proxy for Raleigh's needs for signs as a percentage of total municipality need for signs, then Raleigh's cost of $15,000 would equate to a total need throughout the state of approximately $238,000 ($15,000 divided by .063 equals $238,093). This would occur in the first year.

A second fiscal impact would result from Section 2, which rewrites G.S. 20-16(c) by requiring the Division of Motor Vehicles (DMV) to assess points against a person's driver's license for failure to yield to pedestrians when making a turn at an intersection controlled by a red light. DMV estimates that the cost to modify the State Automated Driver License System (SADLS) to reflect these changes would be $11,480 (130 programmer hours at $80 per hour equals $10,400 plus computer system overhead charges of $1,080, for a total of $11,480).

SOURCES OF DATA: North Carolina Department of Transportation; City of Raleigh Transportation Department; Division of Motor Vehicles

TECHNICAL CONSIDERATIONS: None

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 925

Short Title: County Appeals of Certain Juvenile Orders. (Public)

Sponsors: Representative Luebke.

Referred to: Judiciary IV.

April 8, 2003

A BILL TO BE ENTITLED

AN ACT TO ALLOW COUNTY APPEAL IN JUVENILE "PAY ORDER" CASES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 7B-2604 reads as rewritten:

"**§ 7B-2604. Proper parties for appeal.**

(a) An appeal may be taken by the juvenile, the juvenile's parent, guardian, or custodian, a county, or the State.

(b) The State's appeal is limited to the following orders in delinquency or undisciplined cases:

(1) An order finding a State statute to be unconstitutional; and

(2) Any order which terminates the prosecution of a petition by upholding the defense of double jeopardy, by holding that a cause of action is not stated under a statute, or by granting a motion to suppress.

(c) A county's appeal is limited to orders in which the county has been ordered to pay for medical, surgical, psychiatric, psychological, or other evaluation or treatment of a juvenile pursuant to G.S. 7B-2502, or other medical, psychiatric, psychological, or other evaluation or treatment of a parent pursuant to G.S. 7B-2702."

SECTION 2. This act becomes effective October 1, 2003, and applies to petitions for appeal filed on or after that date.

HOUSE BILL 925:
County Appeals of Certain Juvenile Orders

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Rep. Luebke
Date:	June 2, 2003	**Summary by:**	Kory J. Goldsmith
Version:	1st Edition		Committee Counsel

SUMMARY: ***House Bill 925 authorizes counties to bring an appeal in cases in which the county has been ordered to pay for medical, surgical, psychiatric, psychological, or other evaluation or treatment of a juvenile or of a parent as part of a dispositional order entered by juvenile court.***

The bill would become effective October 1, 2003, and applies to petitions for appeal filed on or after that date.

CURRENT LAW: In any juvenile case, the court may order that the juvenile be examined by a physician, psychiatrist, psychologist, or other qualified expert as may be needed for the court to determine the needs of the juvenile. Upon completion of the examination, the court is required to conduct a hearing to determine whether the juvenile is in need of medical, surgical, psychiatric, psychological, or other evaluation or treatment and who should pay the cost of the evaluation or treatment. The county manager, or his designee, shall be notified of the hearing, and allowed to be heard. If the court finds the juvenile to be in need of treatment, the court may order the parent or legal guardian to make arrangements for treatment and pay for the cost of the care. The court may also order the parent or guardian to participate directly in the evaluation or treatment if it finds that the participation would be in the best interests of the juvenile. If the court finds the parent is unable to pay for the cost of evaluation or treatment of the juvenile or the parent, the court shall order the county to arrange and pay for the evaluation or treatment.

G.S. 7B-2604 authorizes the following parties to bring an appeal of a dispositional order entered by juvenile court:

- The juvenile
- The juvenile's parent, guardian, or custodian
- The State

However, the State may only appeal orders that find a State statute to be unconstitutional or that terminate the prosecution of a petition by upholding the defense of double jeopardy, by holding that a cause of action is not stated under a statute, or by granting a motion to suppress.

This statute does not provide counties the right to appeal dispositional orders in juvenile cases. The North Carolina Supreme Court has also held that this statute does not provide counties with the right to appeal despite the fact that counties are entitled to notice and an opportunity to be heard at certain juvenile hearings.

BILL ANALYSIS: House Bill 925 adds counties to the list of proper parties that may appeal dispositional orders entered in juvenile court. The appeal is limited to orders in which the county is ordered to pay for medical, surgical, psychiatric, psychological, or other evaluation or treatment of a juvenile or of a parent.

BACKGROUND: Prior to 1998, county *agencies* did have authority to bring an appeal under this statute. However, the North Carolina Supreme Court has held that the term "county agency" does not include the county itself for purposes of bringing an appeal. Moreover, when the Juvenile Code was rewritten and recodified in 1998, "county agency" was specifically deleted from this statute. Thus, a county has never had the statutory right to appeal in a juvenile proceeding in this state. It was not until 1996 that counties were provided with the right to be notified and an opportunity to be heard at hearings to determine whether a juvenile is in need of evaluation and treatment.

Some counties have expressed concern over instances where juvenile courts are ordering treatment for juveniles and the payment of costs by the county without notifying the county manager or providing the county with an opportunity to be heard as required by statute. While this bill would give counties the right to appeal regardless of whether a county representative was present at the hearing, the impetus for this bill is the fact that, according to some county officials, pay orders are being entered outside the presence of the county manager or his designee, as required by statute, and counties would like the opportunity to challenge these orders if necessary.

H925-SMRC-002

Trina Griffin, counsel to House Judiciary IV, contributed substantially to this bill.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 2

HOUSE BILL 1037

Committee Substitute Favorable 4/29/03

Short Title: Amend Juvenile Law. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO ESTABLISH CRIMINAL PENALTIES FOR ALLOWING JUVENILES TO ESCAPE AND TO ALLOW JUVENILE DETENTION FACILITIES TO PHOTOGRAPH JUVENILES AND TO RELEASE THE PHOTOGRAPHS WHEN THE JUVENILE ESCAPES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-239 reads as rewritten:

"**§ 14-239. Allowing prisoners to escape; punishment.**

If any sheriff, deputy sheriff, ~~or~~ jailer, or other custodial personnel shall willfully or wantonly allow the escape of any person committed to ~~his~~ that person's custody who is (i) a person charged with a crime, ~~or~~ (ii) a person sentenced by the court upon conviction of any offense, or (iii) committed to the Department of Juvenile Justice and Delinquency Prevention, ~~he~~ that person shall be guilty of a Class 1 misdemeanor. No prosecution shall be brought against any such officer pursuant to this section by reason of a prisoner being allowed to participate pursuant to court order in any work release, work study, community service, or other lawful program, or by reason of any such prisoner failing to return from participation in any such program."

SECTION 2. G.S. 7B-2102 reads as rewritten:

"**§ 7B-2102. Fingerprinting and photographing juveniles.**

(a) A law enforcement officer or agency shall fingerprint and photograph a juvenile who was 10 years of age or older at the time the juvenile allegedly committed a nondivertible offense as set forth in G.S. 7B-1701, when a complaint has been prepared for filing as a petition and the juvenile is in physical custody of law enforcement or the Department.

(a1) A youth development center or other juvenile facility may photograph a juvenile who has been committed to the facility.

(b) If a law enforcement officer or agency does not take the fingerprints or a photograph of the juvenile pursuant to subsection (a) of this section or the fingerprints or photograph have been destroyed pursuant to subsection (e) of this section, a law

enforcement officer or agency shall fingerprint and photograph a juvenile who has been adjudicated delinquent if the juvenile was 10 years of age or older at the time the juvenile committed an offense that would be a felony if committed by an adult.

(c) A law enforcement ~~officer~~ officer, facility, or agency who fingerprints or photographs a juvenile pursuant to this section shall do so in a proper format for transfer to the State Bureau of Investigation and the Federal Bureau of Investigation. After the juvenile, who was 10 years of age or older at the time of the offense, is adjudicated delinquent of an offense that would be a felony if committed by an adult, fingerprints obtained pursuant to this section shall be transferred to the State Bureau of Investigation and placed in the Automated Fingerprint Identification System (AFIS) to be used for all investigative and comparison purposes. Photographs obtained pursuant to this section shall be placed in a format approved by the State Bureau of Investigation and may be used for all investigative or comparison purposes.

(d) Fingerprints and photographs taken pursuant to this section are not public records under Chapter 132 of the General Statutes, shall not be included in the clerk's record pursuant to G.S. 7B-3000, shall be withheld from public inspection or examination, and shall not be eligible for expunction pursuant to G.S. 7B-3200. Fingerprints and photographs taken pursuant to this section shall be maintained separately from any juvenile record, other than the electronic file maintained by the State Bureau of Investigation.

(d1) Notwithstanding subsection (d) of this section, photographs of a juvenile may be released to the public if the juvenile escapes from a youth development center or other juvenile facility or a holdover facility or escapes from the custody of juvenile personnel or a local law enforcement officer.

(e) If a juvenile is fingerprinted and photographed pursuant to subsection (a) of this section, the custodian of records shall destroy all fingerprints and photographs at the earlier of the following:

(1) The juvenile court counselor or prosecutor does not file a petition against the juvenile within one year of fingerprinting and photographing the juvenile pursuant to subsection (a) of this section;
(2) The court does not find probable cause pursuant to G.S. 7B-2202; or
(3) The juvenile is not adjudicated delinquent of any offense that would be a felony or a misdemeanor if committed by an adult.

The chief court counselor shall notify the local custodian of records, and the local custodian of records shall notify any other record-holding agencies, when a decision is made not to file a petition, the court does not find probable cause, or the court does not adjudicate the juvenile delinquent."

SECTION 3. Section 1 of this act becomes effective December 1, 2003, and applies to offenses committed on or after that date. The remainder of this act becomes effective October 1, 2003.

HOUSE BILL 1037:
Amend Juvenile Law.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Rep. Luebke
Date:	June 3, 2003	**Summary by:**	Robin Johnson*
Version:	Second Edition		Committee Counsel

SUMMARY: ***House Bill 1037 would extend criminal penalties for allowing juveniles to escape, would expand the circumstances under which committed juveniles may be photographed, and would allow the public release of authorized photographs when a juvenile escapes.***

BILL ANALYSIS:

Section 1: Punishment for Allowing Prisoners to Escape

Currently, G.S. 14-239 provides that it is a Class 1 misdemeanor for any sheriff, deputy sheriff, or jailer to willfully or wantonly allow the escape of a person who is in the sheriff's, deputy sheriff's or jailer's custody. The person in custody must have been charged with a crime or sentenced by the court upon conviction of any offense.

House Bill 1037 would extend the applicability of this law in two ways. First, it would add "other custodial personnel" to the list of individuals who could be subject to the Class 1 misdemeanor. Second, the bill would add to the list of individuals in custody juveniles who have been committed to the Department of Juvenile Justice and Delinquency Prevention (DJJDP).

Punishment for a Class 1 misdemeanor, assuming no prior convictions, is 1-45 days' community punishment. Community punishments may include one of more of the following: probation, any authorized condition of probation, outpatient drug/alcohol treatment, community service, referral to Treatment Alternatives to Street Crime, restitution, or a fine in an amount in the discretion of the court.

Section 2: Photographing and Releasing Photographs of Juveniles

G.S. 7B-2101 currently requires the fingerprinting and photographing of any juvenile who allegedly has committed a nondivertible offense[1] when the juvenile was at least 10 years old at the time of the offense. Photographing, otherwise, is not permitted. The fingerprints and photographs are not public records under Chapter 132, are not included in the clerk's juvenile court records, must be withheld from public inspection, and are not eligible for expunction. They are transferred to the State and Federal Bureaus of Investigation. After that juvenile is adjudicated delinquent for an offense that would be a felony if committed by an adult, the fingerprints are placed in the Automated Fingerprint Identification System to be used for all investigative and comparison purposes and the photographs may be used for all investigative or comparison purposes.

Under current procedure, (DJJDP) is permitted to reveal to the media the circumstances surrounding a juvenile's escape from a juvenile detention facility, but it is not permitted to disclose the name or photograph of the juvenile. A judge may order the release of the photograph it serves the public interest.

[1] G.S. 7B-1701 provides that a nondivertible offense is murder, first- or second- degree rape or sexual offense, arson, first degree burglary, crime against nature, a violation of the NC Controlled Substances Act that would be a felony if committed by an adult, or any felony involving the willful infliction of serious bodily injury on another person or involving the use of a deadly weapon.

This bill would expand G.S. 7B-2102 in two ways. First, it would allow a youth development center or other confinement facility to photograph any juvenile that has been committed (i.e., by court order) to that facility. Second, the bill would allow the release of photographs of any juvenile who escapes from a youth development center, another juvenile facility, a holdover facility, or the custody of juvenile personnel or local law enforcement officer. (There would be some juveniles in these facilities or in custody for whom no photographs are authorized.) House Bill 1037 would permit the public release of an authorized photograph to aid in the apprehension of a juvenile who has escaped, but would not provide a punishment for the unlawful release of photographs under any other circumstances.

EFFECTIVE DATE: Section 1 of this act becomes effective December 1, 2003, and applies to offenses committed on or after that date. The remainder of this act becomes effective October 1, 2003.

*H1037-SMRH-002: *Nicole Kreiser and Denise Thomas, Fiscal Research, contributed to this summary.*

NORTH CAROLINA GENERAL ASSEMBLY
LEGISLATIVE FISCAL NOTE
(INCARCERATION NOTE G.S. 120-36.7)

BILL NUMBER: HB 1037 2nd Edition

SHORT TITLE: Amend Juvenile Law

SPONSOR(S): Representative Luebke

FISCAL IMPACT

Yes (X) No ( ) No Estimate Available ( )

	FY 2003-04	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08
GENERAL FUND					
Correction					
Recurring	Unable to determine exact amount; no significant impact anticipated.				
Nonrecurring					
Judicial					
Recurring	Unable to determine exact amount; no significant impact anticipated.				
Nonrecurring					
TOTAL EXPENDITURES:	Unable to determine exact amount; no significant impact anticipated.				
ADDITIONAL PRISON BEDS*	It is likely that most misdemeanants sentenced to an active sentence under this bill would be housed in local jails at a cost of $18/day. The exception is Class 1 offenders falling in Prior Record Level III who may receive active sentences that might be served in the state prison system.				
POSITIONS: (cumulative)	Unable to determine exact amount; additional positions not anticipated.				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction (DOC); Judicial Branch; Department of Juvenile Justice and Delinquency Prevention (DJJDP); Other Custodial Personnel

EFFECTIVE DATE: Section 1 is effective December 1, 2003. The remainder of the act becomes effective October 1, 2003.

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY[1]: The bill expands current G.S 14-239 pertaining to the escape of prisoners by extending the applicability of the statute to a broader group of custodial personnel as well as juveniles in the custody of the Department of Juvenile Justice and Delinquency Prevention. Current G.S. 14-239 provides that it is a Class 1 misdemeanor for any sheriff, deputy sheriff, or jailer to willfully or wantonly allow the escape of a person charged with a crime or a person sentenced by the court upon conviction of any offense. This bill expands current G.S. 14-239 in two ways. First, it broadens the pool of defendants who could be subject to charges under this statute by adding "other custodial personnel." Second, it broadens the category of prisoners by adding juveniles committed to the Department of Juvenile Justice and Delinquency Prevention. This bill does not modify the current Class 1 misdemeanor punishment for this offense.

This bill also expands current G.S. 7B-2101 governing the photographing of juveniles by providing that a juvenile detention facility can photograph a juvenile and can release the photograph to the public if the juvenile escapes. Current G.S. 7B-2102 provides, in pertinent part, that when a juvenile is in custody of law enforcement or the Department of Juvenile Justice and Delinquency Prevention, a law enforcement officer or agency must fingerprint and photograph a juvenile who was age 10 years or older at the time of the offense. These fingerprints and photographs are not public records under Chapter 132 and must be withheld from public inspection. This bill expands current G.S. 7B-2102 in two ways. First, it provides that a youth development center or other confinement facility may photograph a juvenile who has been committed to the facility. Second, it provides that photographs of a juvenile may be released to the public if the juvenile escapes from such facility or escapes from the custody of juvenile personnel or a local law enforcement officer.

ASSUMPTIONS AND METHODOLOGY:

General

The Sentencing and Policy Advisory prepares prison population projections for each criminal penalty bill. The Commission assumes for each bill that increasing criminal penalties does not have a deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division (FRD) does not assume savings due to deterrent effects for this bill or other criminal penalty bills.

Department of Correction

The Sentencing and Policy Advisory Commission prepares inmate population projections annually. The projections used for incarceration fiscal notes and fiscal memos are based on January 2003 projections. These projections are based on historical information on incarceration and release rates under Structured Sentencing, crime rate forecasts by a technical advisory board, probation and revocation rates, and the decline (parole and maxouts) of the stock prison population sentenced under previous sentencing acts. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five year Fiscal Note horizon and beyond.* The number of beds needed will always be equal to the projected number of inmates due to a bill.

The Administrative Office of the Courts (AOC) currently does not have a specific offense code for violations of G.S. 14-239. The Sentencing Commission notes that the lack of an AOC offense

[1] AOC Research and Planning

code is some indication that this offense is infrequently charged and/or infrequently results in convictions. Thus, it is not known how many additional convictions would result by expanding the current offense to include "other custodial personnel" who willfully or wantonly allow the escape of any person committed to their custody and to include persons committed to the Department of Juvenile Justice and Delinquency Prevention.

In FY 2001-2002, 15.8 percent of Class 1 misdemeanor convictions resulted in active sentences. The average estimated time served was 35.2 days. It is likely that misdemeanants sentenced under this bill would be housed in local jails but paid for by the State at a cost of $18/day. (Active sentences between 1-90 days are served in local jails; the DOC reimburses counties for active sentences between 30-90 days). Because only Class 1 offenders falling in Prior Record Level III receive active sentences that might be served in the state prison system, convictions for this proposed offense would not be expected to have a significant impact on the prison population. The impact on local jail populations is not known.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts (AOC) provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

The AOC currently does not have an offense code for G.S. 14-239. Since this bill broadens the category of prisoners and broadens the pool of defendants who could be subject to charges under G.S. 14-239, there may be an increase in the number of charges as a result of this bill. However, there is no data from which to estimate the number of additional misdemeanor charges that would occur as a result of this bill. Fiscal Research believes there will be few charges as a result of this bill and there will likely be little impact on the judicial branch.

Under current procedure, (DJJDP) is permitted to reveal to the media the circumstances surrounding a juvenile's escape from a juvenile detention facility, but it is not permitted to disclose the name or photograph of the juvenile.[2] A judge may order the release of such information if it serves the public interest. This bill permits the public release of a photograph to aid in the apprehension of a juvenile who has escaped, but does not provide a punishment for the unlawful release of photographs under any other circumstances. The AOC does not expect an increase in court workload as a result of this provision.

Department of Juvenile Justice and Delinquency Prevention

The Department of Juvenile Justice and Delinquency Prevention may incur some expense related to purchasing photography equipment and supplies for the five (5) youth development centers and 14 detention centers. These costs are expected to be minimal and can be supported within the existing continuation budget for equipment and supplies.

[2] AOC Research and Planning

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission.

TECHNICAL CONSIDERATIONS: None

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Nicole Kreiser

and

Denise Thomas

APPROVED BY: James D. Johnson, Director Fiscal Research Division

DATE: April 30, 2003

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 1123

Short Title:	Guardianship Amendments.	(Public)
Sponsors:	Representatives Farmer-Butterfield; Jones, Hackney, and Rapp.	
Referred to:	Judiciary II.	

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO EXPRESSLY PROVIDE FOR LIMITED GUARDIANSHIPS FOR INCOMPETENT PERSONS AND TO CLARIFY THE DUTY OF A GUARDIAN AD LITEM APPOINTED TO REPRESENT A PERSON IN AN INCOMPETENCY ADJUDICATION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 35A-1212(a) reads as rewritten:

"(a) The clerk shall make such inquiry and receive such evidence as the clerk deems necessary to determine:

(1) The nature and extent of the needed guardianship;

(2) The assets, liabilities, and needs of the ward; and

(3) Who, in the clerk's discretion, can most suitably serve as the guardian or guardians.

If the clerk determines that the nature and extent of the ward's capacity justifies ordering a limited guardianship, the clerk may do so."

SECTION 2. G.S. 35A-1215(b) reads as rewritten:

"(b) ~~The~~ If the clerk orders a limited guardianship as authorized by G.S. 35A-1212(a), the clerk may order that the ward retain certain legal rights and privileges to which he was entitled before he was adjudged incompetent; provided, any such order shall include findings as to the nature and extent of the ward's incompetence as it relates to the ward's need for a guardian or guardians."

SECTION 3. G.S. 35A-1107 reads as rewritten:

"**§ 35A-1107. Right to counsel or guardian ad litem.**

The respondent is entitled to be represented by counsel of his own choice or by an appointed guardian ad litem. A guardian ad litem appointed pursuant to this section shall represent the expressed interests of the respondent unless the respondent is unable to express those interests, in which case the guardian ad litem shall make inquiry into the best interests of the respondent. Upon filing of the petition, an attorney shall be appointed as guardian ad litem to represent the respondent unless the respondent retains

his own counsel, in which event the guardian ad litem may be discharged. Appointment and discharge of an appointed guardian ad litem shall be in accordance with rules adopted by the Office of Indigent Defense Services."

SECTION 4. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 1123
PROPOSED SENATE COMMITTEE SUBSTITUTE H1123-CSRC-69 [v.3]

6/2/2003 12:27:35 PM

Short Title: Guardianship Amendments. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO EXPRESSLY PROVIDE FOR LIMITED GUARDIANSHIPS FOR INCOMPETENT PERSONS AND TO CLARIFY THE DUTY OF A GUARDIAN AD LITEM APPOINTED TO REPRESENT A PERSON IN AN INCOMPETENCY ADJUDICATION AND TO CLARIFY THE APPOINTMENT OF GUARDIAN AD LITEMS UNDER RULE 17 OF THE RULES OF CIVIL PROCEDURE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 35A-1212(a) reads as rewritten:

"(a) The clerk shall make such inquiry and receive such evidence as the clerk deems necessary to determine:

(1) The nature and extent of the needed guardianship;

(2) The assets, liabilities, and needs of the ward; and

(3) Who, in the clerk's discretion, can most suitably serve as the guardian or guardians.

If the clerk determines that the nature and extent of the ward's capacity justifies ordering a limited guardianship, the clerk may do so."

SECTION 2. G.S. 35A-1215(b) reads as rewritten:

"(b) ~~The~~ If the clerk orders a limited guardianship as authorized by G.S. 35A-1212(a), the clerk may order that the ward retain certain legal rights and privileges to which ~~he~~ the ward was entitled before ~~he~~ the ward was adjudged ~~incompetent; provided, any such~~ incompetent. Any order of limited guardianship shall include findings as to the nature and extent of the ward's incompetence as it relates to the ward's need for a guardian or guardians."

SECTION 3. G.S. 35A-1107 reads as rewritten:

"**§ 35A-1107. Right to counsel or guardian ad litem.**

(a) The respondent is entitled to be represented by counsel of his own choice or by an appointed guardian ad litem. Upon filing of the petition, an attorney shall be

appointed as guardian ad litem to represent the respondent unless the respondent retains his own counsel, in which event the guardian ad litem may be discharged. Appointment and discharge of an appointed guardian ad litem shall be in accordance with rules adopted by the Office of Indigent Defense Services.

(b) An attorney appointed as a guardian ad litem under this section shall represent the respondent until the petition is dismissed or until a guardian is appointed under Subchapter II of this Chapter. After being appointed, the guardian ad litem shall personally visit the respondent as soon as possible and shall make every reasonable effort to determine the respondent's wishes regarding the incompetency proceeding and any proposed guardianship. The guardian ad litem shall present to the clerk the respondent's express wishes at all relevant stages of the proceedings. The guardian ad litem also may make recommendations to the clerk concerning the respondent's best interests if those interests differ from the respondent's express wishes. In appropriate cases, the guardian ad litem shall consider the possibility of a limited guardianship, and shall make recommendations to the clerk concerning the rights, powers and privileges that the respondent should retain under a limited guardianship."

SECTION 4. G.S. 35A-1102 reads as rewritten:

"**§ 35A-1102. Scope of law; exclusive procedure.**

This Article establishes the exclusive procedure for adjudicating a person to be an incompetent adult or an incompetent child. However, nothing in this Article shall interfere with the authority of a judge to appoint a guardian ad litem for a party to litigation under Rule 17(b) of the North Carolina Rules of Civil Procedure."

SECTION 5. This act becomes effective December 1, 2003.

HOUSE BILL 1123:
Guardianship Amendments.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Rep. Farmer-Butterfield
Date:	June 2, 2003	**Summary by:**	Kory J. Goldsmith
Version:	Proposed Committee Substitute H1123-CSRC-69[v.3]		Committee Counsel

SUMMARY: ***House Bill 1123 amends the law governing the appointment of guardians for incompetent persons to authorize the clerk to order a limited guardianship if the nature and extent of the ward's capacity justify doing so. The bill also amends the law relating to the appointment of a guardian ad litem in a proceeding to determine incompetence. The amendment provides that the guardian ad litem must represent the interests of the alleged incompetent person.***

The Proposed Committee Substitute differs from the 1st Edition as follows:

1. Clarifies the role and duties of a guardian ad litem who is appointed for a person who is the subject of an incompetency proceeding.

2. Clarifies that Rule 17(b) of the Rules of Civil Procedure may be used by a court to appoint a guardian ad litem for a party in litigation.

3. Makes the effective date to December 1, 2003.

CURRENT LAW:

Chapter 35A became effective October 1, 1987 and provides the procedure for adjudicating a person to be an incompetent adult or an incompetent child. The clerk of Superior Court has jurisdiction to hear a petition to adjudicate a person to be incompetent, and also to appoint a guardian ad litem to represent the alleged incompetent person in the proceeding. The clerk further has jurisdiction to appoint a guardian for the person once the adjudication has been made. A guardianship may be with respect to the person or the estate or may be a general guardianship.

G.S. 35A-1212(a) directs the clerk to consider the nature and extent of the needed guardianship when determining whether to appoint a guardian. However, the current statute does not specifically authorize the clerk to issue a limited guardianship. Some clerks have not been comfortable granting limited guardianships without express statutory authorization. At least 5 counties have pilot programs where limited guardianships are being used. The pilot projects utilize specially created forms and the Social Service agencies have been informed that limited guardianships are available where appropriate.

There is currently some confusion regarding whether Chapter 35A pre-empts Rule 17(b) of the Rules of Civil Procedure. When the General Assembly adopted Rule 17, it added subsection (b) that allows a court to appoint a guardian ad litem to represent a party in litigation that is not able to represent itself, such as an infant, an incompetent, an unborn person, or a trust or corporation not yet created. The use of Rule 17(b) was well established at the time Chapter 35A was adopted. In fact, "Guardian ad litem" is defined under Chapter 35A as a "guardian appointed pursuant to G.S. 1A-1, Rule 17, Rules of Civil Procedure." However, G.S. 35A-1102 does provide that "[t]his Article establishes the exclusive procedure for adjudicating a person to be an incompetent adult or an incompetent child."

In 1989, the North Carolina Court of Appeals held that Chapter 35A preempts a judge from holding a competency hearing under Rule 17(b). Culton v. Culton, 96 N.C. App. 620 (1989). However, the Culton holding was reversed on other grounds, thus calling into question whether the original holding is still good law.

BILL ANALYSIS:

Section 1. – Specifically authorizes the clerk to order a limited guardianship if the nature and extent of the ward's capacity justify doing so.

Section 2. – Amends the law relating to the issuance of the clerk's order appointing a guardian to provide that if the clerk orders a limited guardianship, the ward may retain certain legal rights and privileges. The order must include findings as to the nature and extent of the ward's incompetence as it relates to the ward's need for a guardian or guardians.

Section 3. – Amends the law relating to the appointment of a guardian ad litem (GAR) to represent the respondent in the proceeding to determine incompetency. The GAR must represent the respondent until the proceeding is dismissed or an attorney is appointed to represent the respondent. The GAR must meet personally with the respondent as soon as possible after the GAR is appointed and attempt to understand the respondent's wishes and communicate those wishes to the clerk. The GAR must also consider whether a limited guardianship is appropriate and if it is, communicate to the clerk those rights, powers and privileges the respondent should retain.

Section 4. – Amends G.S. 35A-1102 to clarify that a guardian ad litem may still be appointed under Rule 17(b) of the Rules of Civil Procedure for a party to litigation.

The act becomes effective December 1, 2003.

H1123-SMRC-002
Katen Cochrane-Brown contributed substantially to this summary.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 1219

Short Title:	Clarify Def. of Divisible Property/Equ. Dist.	(Public)
Sponsors:	Representative Hackney.	
Referred to:	Judiciary I.	

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO FURTHER CLARIFY THE DEFINITION OF DIVISIBLE PROPERTY UNDER THE LAWS RELATING TO EQUITABLE DISTRIBUTION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 50-20(b)(4) reads as rewritten:

"...

(4) "Divisible property" means all real and personal property as set forth below:

a. All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of ~~a~~ one spouse alone shall not be treated as divisible property. Increases in net value caused by postseparation payment of marital debt shall be treated as divisible property and credited to the spouse making the payment, regardless of whether the debt is paid by one spouse alone.

b. All property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights.

c. Passive income from marital property received after the date of separation, including, but not limited to, interest and dividends.

d. Increases and decreases in marital debt and financing charges and interest related to marital debt."

SECTION 2. This act becomes effective October 1, 2003.

Judiciary II Committee

Minutes

June 5, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with nine members present.

HB 785 (Rules of Civil Proc/Rewrite Rule 45) Senator Sloan moved to adopt the Proposed Committee Substitute for purposes of discussion. All members voted and the motion carried. Representative Haire, bill sponsor, was introduced to explain the Committee Substitute. Senator Apodaca moved for a favorable report to the Committee Substitute, unfavorable as to the original bill. All members voted and the motion carried.

HB 826 (Amend MH Confidentiality Statutes) Senator Hartsell recognized Representative Insko, bill sponsor, to explain the bill. Senator Allran presented a technical amendment and moved that it be adopted. All voted and the motion carried. Questions by Senators Dorsett, Bingham and Allran were answered by Representative Insko, Senator Hartsell and Mr. Don Willis of the North Carolina Division of Mental Health. Senator Apodaca moved for a favorable report to the bill as amended and rolled into a new Committee Substitute, unfavorable as to the original bill. All members voted and the motion carried.

HB 1037 (Amend Juvenile Law) The bill was heard again after review and recommendations from the sub-committee which included Senators Webster, Hagan and Dorsett. (Senator Hagan was replaced by Senator Holloman.) Senator Bingham moved to adopt the Proposed Committee Substitute. All members voted and the motion carried. Representative Luebke, bill sponsor, was recognized to present the Committee Substitute. Robin Johnson, Staff Attorney, explained the difference between the new committee substitute and the House Committee Substitute. Senator Thomas presented a perfecting amendment. All members voted and the motion carried. Senator Webster presented an amendment which was accepted by Representative Luebke. Mr. Larry Dix of the North Carolina Department of Juvenile Justice & Delinquency Prevention spoke on the bill. Questions by Senators Webster, Dorsett, Allran and Sloan were answered by Mr. Dix, Representative Luebke and Senator Hartsell. Senator Webster moved for adoption of the amendment. All members voted and the motion carried. Senator Allran moved for a favorable report as to the Committee Substitute as amended and rolled into a new Committee Substitute. All members voted and the motion carried.

HB 824 (Twin Lakes Cook Road Bridge) The bill was continued from the previous meeting. Senator Hartsell noted that there was a new Committee Substitute. Senator Sloan moved to consider the new Committee Substitute for purposes of discussion. All members voted and the motion carried. Representative Allred was recognized to explain The Committee Substitute. Questions by Senators Thomas, Dorsett and Sloan were

answered by Senator Hartsell and Representative Allred. Mr. Dan DeVane of the North Carolina Department of Transportation spoke on the bill. Senator Apodaca moved for a favorable report to the Committee Substitute, unfavorable as to the original bill. All members voted and the motion carried.

There being no further business, the meeting was adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Wednesday, June 04, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B. **1123** Guardianship Amendments.

Draft Number:	PCS 30360
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	Yes

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **147** Left Turn on Red.

Draft Number:	PCS 30359
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	Yes

TOTAL REPORTED: 2

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Thursday, June 05, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B.(CS #1) **965** Failure to Yield Causing Death or Injuries.
Sequential Referral: None
Recommended Referral: None

TOTAL REPORTED: 1

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Monday, June 09, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B. **826** Amend MH Confidentiality Statutes.

Draft Number:	PCS 60374
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **785** Rules of Civil Proc/Rewrite Rule 45.

Draft Number:	PCS 60375
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **1037** Amend Juvenile Law.

Draft Number:	PCS 60373
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 2, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #2) **824** Twin Lakes Cook Road Bridge.

Draft Number:	PCS 80327
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 4

Committee Clerk Comments:

Gerry Johnson (Sen. Hartsell)

From: Charlotte Johnston (SPC's Office)
Sent: Monday, June 09, 2003 6:00 PM
To: Harriette Smith (SPC's Office)
Cc: Gerry Johnson (Sen. Hartsell)
Subject: Judiciary II Comm. Report - Revised

HB 785 824 826 1037.doc

Short Title on HB 824 has been changed.

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

REVISED REPORT

Monday, June 09, 2003

SENATOR HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B. **826** Amend MH Confidentiality Statutes.

Draft Number:	PCS 60374
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **785** Rules of Civil Proc/Rewrite Rule 45.

Draft Number:	PCS 60375
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **1037** Amend Juvenile Law.

Draft Number:	PCS 60373
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 2, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #2) **824** DOT Bridge Encroachments

Draft Number:	PCS 80327
Sequential Referral:	None
Recommended Referral:	None

Long Title Amended: No

TOTAL REPORTED: 4

Committee Clerk Comments:

AGENDA

SENATE JUDICIARY II COMMITTEE
June 5, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. Welcome and Opening Remarks

II. Bills to be Considered

HB 785	Rules of Civil Proc/Rewrite Rule 45.	Representative Haire
HB 826	Amend MH Confidentiality Statutes.	Representative Insko
HB 1037	Amend Juvenile Law.	Representative Luebke
HB 824	Twin Lakes Cook Road Bridge	Representative Allred

III. Other Business

IV. Adjournment

Amended Notice HB 824

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **JUDICIARY II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	June 5, 2003	10:00 AM	1124

The following will be considered:

	BILL NO.	SHORT TITLE	SPONSOR
•	HB 785	Rules of Civil Proc/Rewrite Rule 45	Representative Haire
•	HB 826	Amend MH Confidentiality Statutes	Representative Insko
•	HB 1037	Amend Juvenile Law	Representative Luebke
•	HB 824	Twin Lakes Cook Road Bridge	Representative Allred

Senator HARTSELL, Chair

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — June 5, 2003
Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Michelle Frazier	NC Bar Ass'n
Steve Epstein	Hunton + Williams
Rose McCreery	LIFETREE
Elizabeth Wickham	"
John O'Hale	Gov's Office
Clark Dirk	DJJDP
Jon Rice	NASW
Jim Blackburn	NC Association of County Commissioners

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 785
Committee Substitute Favorable 4/28/03
Third Edition Engrossed 4/29/03
PROPOSED SENATE COMMITTEE SUBSTITUTE H785-CSRC-70 [v.1]

6/3/2003 9:46:22 AM

Short Title: Rules of Civil Proc/Rewrite Rule 45. (Public)

Sponsors:

Referred to:

March 27, 2003

A BILL TO BE ENTITLED

AN ACT TO REWRITE RULE 45 OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 1A-1, Rule 45, reads as rewritten:

"**Rule 45. Subpoena.**

~~(a) For attendance of witnesses; issuances; form. A subpoena for the purpose of obtaining the testimony of a witness in a pending cause shall, except as hereinafter provided, be issued at the request of any party by the clerk of superior court for the county in which the hearing or trial is to be held. A subpoena shall be directed to the witness, shall state the name of the court and the title of the action, the name of the party at whose instance the witness is summoned, and shall command the person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed but otherwise in blank, to a party requesting it, who shall fill it in before service. A subpoena for a witness or witnesses need not be signed by the clerk, and is sufficient if signed by the party or his attorney. A subpoena for the production of documentary evidence need not be signed by the clerk, and is sufficient if signed by the attorney requesting the same.~~

~~(b) Issuance by a judge. Such subpoena may also be issued by any judge of the superior court, judge of the district court, or magistrate.~~

~~(c) For production of documentary evidence. A subpoena may also command the person to whom it is directed to produce the records, books, papers, documents, or tangible things designated therein. Where the subpoena commands any custodian of public records to appear for the sole purpose of producing certain records in his custody, the custodian subpoenaed may, in lieu of a personal appearance, tender to the court by~~

~~registered mail certified copies of the records requested, together with an affidavit by the custodian as to the authentication of the record tendered or, if no such records are in his custody, an affidavit to that effect. Any original or certified copy or affidavit delivered under the provisions of this rule, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication. Where the subpoena commands any custodian of hospital medical records (as defined in G.S. 8-44.1) to appear for the sole purpose of producing certain records in his custody, the custodian subpoenaed may, in lieu of a personal appearance, tender to the presiding judge or designee by registered mail or by personal delivery at no cost certified copies of the records requested, on or before the time specified in the subpoena, together with a copy of the subpoena and an affidavit by the custodian testifying to the identity and authenticity of the records, that they are true and correct copies, and as appropriate, that the records were made and kept in the regular course of business at or near the time of the acts, conditions, or events recorded, and that they were made by persons having knowledge of the information set forth; or if no such records are in his custody, an affidavit to that effect. When the copies of medical records are personally delivered, a receipt shall be obtained from the person receiving the records. Any original or certified copy of medical records, or affidavit, delivered according to the provisions of this rule shall not be held inadmissible in any action or proceeding on the grounds that it lacks certification, identification, or authentication, and it shall be received as evidence if otherwise admissible. The copies of the medical records so tendered shall not be open to inspection or copy by any persons, except to the parties to the case or proceeding and their attorneys in depositions, until ordered published by the judge at the time of the hearing or trial. Nothing contained herein shall be construed to waive the physician-patient privilege or to require any privileged communications under law to be disclosed. The judge, upon motion to quash or modify made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may~~

~~(1) Quash or modify the subpoena if it is unreasonable and oppressive and in such case may order the party in whose behalf the subpoena is issued to pay the person to whom the subpoena is directed part or all of his reasonable expenses including attorneys' fees or~~

~~(2) Grant the motion unless the party in whose behalf the subpoena is issued advances the reasonable cost of producing the records, books, papers, documents, or tangible things.~~

~~(d) Subpoena for taking depositions.~~

~~(1) Proof of service of a notice to take a deposition as provided in Rules 30(a) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the superior court for the county in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce designated records, books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule~~

~~26(b), but in that event the subpoena will be subject to the provisions of section (c) of Rule 26 and section (c) of this rule.~~

~~The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.~~

~~(2) Repealed by Session Laws 1975, c. 762, s. 3, effective January 1, 1976.~~

~~(e) Service. All subpoenas may be served by the sheriff, by his deputy, by a coroner or by any other person not less than 18 years of age, who is not a party. Service of a subpoena for the production of documentary evidence may be made only by the delivery of a copy to the person named therein or by registered or certified mail, return receipt requested. Service of a subpoena for the attendance of a witness may be made by telephone communication with the person named therein only by an authorized server who shall be a sheriff, his designee who is not less than 18 years of age and not a party, or coroner, or by delivery of a copy to the person named therein or by registered or certified mail, return receipt requested, by any person authorized by this section to serve subpoenas. Personal service shall be proved by return of a sheriff, his deputy, or a coroner making service and by return under oath of any other person making service. Service by telephone communication shall be proved by return of the authorized process server, noting the method of service. Service by registered or certified mail shall be proved by filing the return receipt with the return.~~

~~(f) Punishment for failure to obey. Failure by any person without adequate cause to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued. Failure by a party without adequate cause to obey a subpoena served upon him shall also subject such party to the sanctions provided in Rule 37(d).~~

(a) Form; Issuance. –

(1) Every subpoena shall state all of the following:

a. The title of the action, the name of the court in which the action is pending, the number of the civil action, and the name of the party at whose instance the witness is summoned.

b. A command to each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated records, books, papers, documents, or tangible things in the possession, custody, or control of that person therein specified.

c. The protections of persons subject to subpoenas under subsection (c) of this rule.

d. The requirements for responses to subpoenas under subsection (d) of this rule.

(2) A command to produce evidence may be joined with a command to appear at trial or hearing or at a deposition, or any subpoena may be issued separately.

(3) A subpoena shall issue from the court in which the action is pending.

(4) The clerk of court in which the action is pending shall issue a subpoena, signed but otherwise blank, to a party requesting it, who shall complete it before service. Any judge of the superior court, judge of the district court, magistrate, or attorney, as officer of the court, may also issue and sign a subpoena.

(b) Service. –

(1) Manner. – Any subpoena may be served by the sheriff, by the sheriff's deputy, by a coroner, or by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to that person or by registered or certified mail, return receipt requested. Service of a subpoena for the attendance of a witness only may also be made by telephone communication with the person named therein only by a sheriff, the sheriff's designee who is not less than 18 years of age and is not a party, or a coroner.

(2) Service of copy. – A copy of the subpoena served under subdivision (1) of this subsection shall also be served upon each party in the manner prescribed by Rule 5(b). This subdivision does not apply to subpoenas issued under G.S. 15A-801 or G.S. 15A-802.

(c) Protection of Persons Subject to Subpoena. –

(1) Avoid undue burden or expense. – A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena. The court shall enforce this subdivision and impose upon the party or attorney in violation of this requirement an appropriate sanction that may include compensating the person unduly burdened for lost earnings and for reasonable attorney's fees.

(2) For production of public records or hospital medical records. – Where the subpoena commands any custodian of public records or any custodian of hospital medical records, as defined in G.S. 8-44.1, to appear for the sole purpose of producing certain records in the custodian's custody, the custodian subpoenaed may, in lieu of personal appearance, tender to the court in which the action is pending by registered or certified mail or by personal delivery, on or before the time specified in the subpoena, certified copies of the records requested together with a copy of the subpoena and an affidavit by the

custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business, or if no such records are in the custodian's custody, an affidavit to that effect. When the copies of records are personally delivered under this subdivision, a receipt shall be obtained from the person receiving the records. Any original or certified copy of records or an affidavit delivered according to the provisions of this subdivision, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication. Copies of hospital medical records tendered under this subdivision shall not be open to inspection or copied by any person, except to the parties to the case or proceedings and their attorneys in depositions, until ordered published by the judge at the time of the hearing or trial. Nothing contained herein shall be construed to waive the physician-patient privilege or to require any privileged communication under law to be disclosed.

(3) Written objection to subpoenas. – Subject to subsection (d) of this rule, a person commanded to appear at a deposition or to produce and permit the inspection and copying of records may, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, serve upon the party or the attorney designated in the subpoena written objection to the subpoena, setting forth the specific grounds for the objection. The written objection shall comply with the requirements of Rule 11. Each of the following grounds may be sufficient for objecting to a subpoena:

a. The subpoena fails to allow reasonable time for compliance.

b. The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection.

c. The subpoena subjects a person to an undue burden.

d. The subpoena is otherwise unreasonable or oppressive.

e. The subpoena is procedurally defective.

(4) Order of court required to override objection. – If objection is made under subdivision (3) of this subsection, the party serving the subpoena shall not be entitled to compel the subpoenaed person's appearance at a deposition or to inspect and copy materials to which an objection has been made except pursuant to an order of the court. If objection is made, the party serving the subpoena may, upon notice to the subpoenaed person, move at any time for an order to compel the subpoenaed person's appearance at the deposition or the production of the materials designated in the subpoena. The motion shall be filed in the court in the county in which the deposition or production of materials is to occur.

(5) Motion to quash or modify subpoena. – A person commanded to appear at a trial, hearing, deposition, or to produce and permit the inspection and copying of records, books, papers, documents, or other tangible things, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, may file a motion to quash or modify the subpoena. The court shall quash or modify the subpoena if the subpoenaed person demonstrates the existence of any of the reasons set forth in subdivision (3) of this subsection. The motion shall be filed in the court in the county in which the trial, hearing, deposition, or production of materials is to occur.

(6) Order to compel; expenses to comply with subpoena. – When a court enters an order compelling a deposition or the production of records, books, papers, documents, or other tangible things, the order shall protect any person who is not a party or an agent of a party from significant expense resulting from complying with the subpoena. The court may order that the person to whom the subpoena is addressed will be reasonably compensated for the cost of producing the records, books, papers, documents, or tangible things specified in the subpoena.

(7) Trade secrets; confidential information. – When a subpoena requires disclosure of a trade secret or other confidential research, development, or commercial information, a court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or when the party on whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship, the court may order a person to make an appearance or produce the materials only on specified conditions stated in the order.

(8) Order to quash; expenses. – When a court enters an order quashing or modifying the subpoena, the court may order the party on whose behalf the subpoena is issued to pay all or part of the subpoenaed person's reasonable expenses including attorney's fees.

(d) Duties in Responding to Subpoenas. –

(1) Form of response. – A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label the documents to correspond with the categories in the request.

(2) Specificity of objection. –When information subject to a subpoena is withheld on the objection that it is subject to protection as trial preparation materials, or that it is otherwise privileged, the objection shall be made with specificity and shall be supported by a description of the nature of the communications, records, books, papers, documents, or other tangible things not produced, sufficient for the requesting party to contest the objection.

(e) Contempt; expenses to force compliance with subpoena. –

(1) Failure by any person without adequate excuse to obey a subpoena served upon the person may be deemed a contempt of court. Failure by any party without adequate cause to obey a subpoena served upon the party shall also subject the party to the sanctions provided in Rule 37(d).

(2) The court may award costs and attorney's fees to the party who issued a subpoena if the court determines that a person objected to the subpoena or filed a motion to quash or modify the subpoena and the objection or motion was unreasonable or was made for improper purposes such as unnecessary delay."

SECTION 2. G.S.15A-801 reads as rewritten:

"**§ 15A-801. Subpoena for witness.**

The presence of a person as a witness in a criminal proceeding may be obtained by subpoena, which must be issued and served in the manner provided in Rule 45 of the Rules of Civil Procedure, ~~G.S. 1A-1.~~G.S.1A-1, except that subdivision (2) of subsection (b) of the rule does not apply to subpoenas issued under this section."

SECTION 3. G.S. 15A-802 reads as rewritten:

"**§ 15A-802. Subpoena for the production of documentary evidence.**

The production of records, books, papers, documents, or tangible things in a criminal proceeding may be obtained by subpoena which must be issued and served in the manner provided in Rule 45 of the Rules of Civil Procedure, ~~G.S. 1A-1.~~G.S. 1A-1, except that subdivision (2) of subsection (b) of the rule does not apply to subpoenas issued under this section."

SECTION 4. This act becomes effective October 1, 2003, and applies to actions pending or filed on or after that date.

HOUSE BILL 785:
Rules of Civil Proc/Rewrite Rule 45

BILL ANALYSIS

Committee:	House Judiciary IV	**Introduced by:**	Rep. Haire
Date:	June 4, 2003	**Summary by:**	Sandra Alley
Version:	H785-CSSP-70		Committee Counsel

SUMMARY: ***House Bill 785 amends Rule 45 of the North Carolina Rules of Civil Procedure by reorganizing the rule, making technical changes, and adding several new provisions. These changes are designed to adopt the format of the corresponding federal rule while retaining features of the current Rule 45 that are specific to North Carolina practice. The act would become effective October 1, 2003 and would apply to actions pending or filed on or after that date.***

CHANGES UNDER THE PCS TO HOUSE BILL 785:

- ***adds to the form provision under (a)(1)(a) the requirement that a subpoena include the name of the party at whose instance the witness is summoned;***
- ***changes the language regarding grounds for objection under (3)(6) from "Each of the following grounds*** **is** ***sufficient" to "*** **may be** ***sufficient";***
- ***changes the cost provision under (c)(6) from an allowing an advance of reasonable costs to providing compensation for the reasonable costs of answering a subpoena;***
- ***changes the title of section (e) to "Contempt; Expenses to Force Compliance with Subpoena" and adds to that section a provision that allows the court to award costs and attorney's fees to the party issuing a subpoena if it is determined that a person objected to, moved to quash, or moved to modify the subpoena upon unreasonable grounds or for improper purposes.***

CURRENT LAW: Rule 45 of the North Carolina Rules of Civil Procedure governs the form, issuance, service of, objections to, and failure to comply with subpoenas.

Types of subpoenas. – The rule identifies three different types of subpoenas: (1) subpoenas for the attendance of witnesses; (2) subpoenas for the production of documentary evidence; and (3) subpoenas for taking depositions. A subpoena for the attendance of witnesses commands each person to whom it is directed to attend and give testimony at a trial or hearing at a time and place specified therein. A subpoena for the production of documentary evidence may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein. A subpoena for taking depositions command the person to whom it is directed to attend and give testimony at a deposition and may also require the person to produce evidentiary materials at the time and place specified therein.

Form. – A subpoena for the attendance of witnesses must state the name of the court and the title of the action, the name of the party requesting the appearance of the witness, and a command directing the person to attend and give testimony at a specified time and place.

Issuance. – A clerk of superior court, a judge of the superior court, a judge of the district court, a magistrate, or an attorney may issue a subpoena.

Service. – Generally, a subpoena may be served by the sheriff, by his deputy, by a coroner, or by any other person who is not a party and is not less than 18 years of age. In addition, service may be made only by the following methods:

- Subpoena for the attendance of a witness:
  - By telephone communication with the person only by a sheriff, his designee who is not less than 18 years old and is not a party, or a coroner; or
  - By delivery of a copy to the person named therein or by registered or certified mail, return receipt requested, by any person authorized to serve subpoenas.
- Subpoenas for the production of documentary evidence:
  - By the delivery of a copy to the person; or
  - By registered or certified mail, return receipt requested.

Objections. – A person to whom a subpoena for the production of documentary evidence is directed may object in writing to the inspection or copying of any and all of the designated materials. If an objection is made, the party serving the subpoena is not entitled to inspect and copy the materials except pursuant to a court order. The rule does not identify any specific grounds upon which an objection must be made. Moreover, the rule is silent with regard to objections to subpoenas for attendance of witnesses or for taking depositions.

Punishment for Failure to Obey. – A person who fails to obey, without adequate cause, a subpoena that has been served upon him may be deemed to be in contempt of court and may be subject to sanctions, including requiring that the party pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

BILL ANALYSIS: The bill, which is a recommendation of the Litigation Section of the North Carolina Bar Association, reorganizes Rule 45 of the North Carolina Rules of Civil Procedure to correspond, as closely as practicable with the federal rule, and makes the following substantive changes:

Form. – While the bill maintains the distinction between the three types of subpoenas, the bill clarifies that a subpoena to produce evidence may be combined with a command to appear at trial or deposition, or may be issued separately. It also adds the requirement that the subpoena include the name of the court in which the action is pending, the civil action number, and notice of protections available to the recipient and the requirements for responses.

Issuance. – The bill requires that a subpoena be issued from the court in which the action is pending. Just as under current law, all of the following individuals may sign and issue a subpoena: a clerk of superior court, a judge of the superior court, a judge of the district court, a magistrate, or an attorney.

Service. – The bill does not change the substantive manner in which service of a subpoena must be made. However, the revised rule would require a copy of the subpoena to be served upon each party in a civil action. The bill exempts from this requirement subpoenas that are served in criminal proceedings.

Protection of Persons Subject to Subpoenas. – The bill adds a new subsection that provides protections to persons who are subject to a subpoena and requires every subpoena issued to set out the text of these protections. The protections available are as follows:

- *Avoiding Undue Burden or Expense.* - The issuing party must take measures to avoid imposing an undue burden or expense on the subpoena recipient. The court may impose sanctions, including reasonable attorney's fees and compensation for lost earnings, for violation of this requirement.
- *Objections.* – The bill outlines the procedure and grounds for making written objections to subpoenas commanding appearance at a deposition or commanding production of documentary evidence. Objections to subpoenas must include the nature of the objection and a general

description of the responsive materials sufficient for requesting party to contest the objection. Each of the following grounds is sufficient for objecting to a subpoena:

1) The subpoena fails to allow reasonable time for compliance.
2) The subpoena requires disclosure of privileged or other protected matter, and no exception or waiver applies to the privilege or protection.
3) The subpoena subjects a person to an undue burden.
4) The subpoena is otherwise unreasonable or oppressive.
5) The subpoena is procedurally defective.

- *Motion & Order to Compel.* – If an objection is made to a subpoena, the issuing party may, upon notice to the subpoenaed party, move for an order compelling the subpoenaed party to appear at the deposition or to produce materials. The bill clarifies that the motion to compel must be filed in the court in the county in which the deposition or production of materials is to occur. The bill further provides that if the court enters an order compelling a deposition or the production of materials, the order must protect any person who is not a party from significant expense resulting from compliance with the subpoena, including requiring the issuing party to advance the reasonable costs of production.
- *Motion to Quash or Modify Subpoena.* – The bill adds a provision outlining the procedure for filing a motion to quash or modify subpoena within 10 days after service and authorizes the court to award reasonable expenses, including attorney's fees, upon granting a motion to quash.
- *Trade Secrets; Confidential Information.* – The bill provides that a court may quash or modify issuance of a subpoena where it requests disclosure of trade secrets or other confidential information, or impose conditions on production of materials if issuing party demonstrates a substantial need for the information.

COMPARISON OF CURRENT RULE 45 AND PROPOSED RULE 45 UNDER HB 785

Substantive Changes	Current Law	HB 785
Types of subpoenas	The rule refers to three types of subpoenas: • For attendance of witnesses • For production of documents • For taking depositions	The bill combines into one subsection the provision for all three types of subpoenas. Specifically, it provides that a subpoena to produce evidence may be combined with a command to appear at trial or deposition.
Form	• Name of the court • Title of action • Name of requesting party • Command directing person to appear at specified time and place	• Title of action • Name of the court in which action is pending • Command to attend trial or hearing or produce materials • Protections for persons subject to subpoenas set out in subsection (c) of the rule • Requirements for responses set out in subsection (d) of the rule
Issuing court	• Subpoenas for attendance of witnesses - Issued by the court in which the action is pending. • Subpoenas for taking depositions - Issued by the court in the county in which	The court in which the action is pending is the court from which all subpoenas – trial and hearing subpoenas, deposition subpoenas, and document subpoenas – will be issued.

	the deposition is to occur. • Subpoenas for production of documentary evidence - The rule is silent.	
Service of subpoenas	There is no requirement that subpoenas be served on parties to the litigation.	A copy of any subpoena must be served upon each party to the action, except in criminal proceedings.
Protections Available to Subpoenaed Persons	There is no specific provision for protections. However, a person can object to a document subpoena or make a motion to quash or modify a subpoena if it is unreasonable and oppressive.	The bill provides several protections to subpoenaed persons, which must be set out in the subpoena itself. The protections include: • The requirement that the issuing party take steps to avoid undue burden or expense on subpoenaed party. • Special provisions regarding medical records. • Protection of trade secrets or other confidential information.
Objections to subpoenas	A party may object only to a document subpoena, not to a deposition subpoena. The rule does not identify grounds for objection.	A party receiving either a deposition subpoena or a document subpoena may object to the subpoena on any of the grounds listed in (c)(3). An objection must comply with Rule 11.
Proper venue for motions to compel and motions to quash or modify subpoenas	• For deposition subpoenas - motions to compel and motions to quash or modify are to be litigated in the county where the deposition is to occur. • For trial and hearing subpoenas and production of document subpoenas - The rule is silent.	All such motions are to be filed in the court that is in the county in which the trial, hearing, deposition, or production of materials is to occur.
Proper grounds for moving to quash or modify subpoenas	• For production of document subpoenas – A person may move to quash or modify on the grounds that it is unreasonable and oppressive. • For trial and hearing or deposition subpoenas – The rule is silent regarding grounds for moving to quash or modify these types of subpoenas.	Motions to quash or modify may be made with respect to all 3 types of subpoenas based on any of the reasons listed in (c)(3), which includes unreasonableness and oppressiveness as well as procedural defectiveness.

CHANGES UNDER THE PCS TO HOUSE BILL 785:

- ***adds to the form provision under (a)(1)(a) the requirement that a subpoena include the name of the party at whose instance the witness is summoned;***
- ***changes the language regarding grounds for objection under (3)(6) from "Each of the following grounds* is *sufficient" to "* may be *sufficient";***
- ***changes the cost provision under (c)(6) from an allowing an advance of reasonable costs to providing compensation for the reasonable costs of answering a subpoena;***

changes the title of section (e) to "Contempt; Expenses to Force Compliance with Subpoena" and adds to that section a provision that allows the court to award costs and attorney's fees to the party issuing a subpoena if it is determined that a person objected to, moved to quash, or moved to modify the subpoena upon unreasonable grounds or for improper purposes.

Trina Griffin, Staff Attorney, contributed significantly to this report.

H785-SMSP-002

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 3

HOUSE BILL 785

Committee Substitute Favorable 4/28/03
Third Edition Engrossed 4/29/03

Short Title: Rules of Civil Proc/Rewrite Rule 45. (Public)

Sponsors:

Referred to:

March 27, 2003

A BILL TO BE ENTITLED

AN ACT TO REWRITE RULE 45 OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 1A-1, Rule 45, reads as rewritten:

"**Rule 45. Subpoena.**

~~(a) For attendance of witnesses; issuances; form. A subpoena for the purpose of obtaining the testimony of a witness in a pending cause shall, except as hereinafter provided, be issued at the request of any party by the clerk of superior court for the county in which the hearing or trial is to be held. A subpoena shall be directed to the witness, shall state the name of the court and the title of the action, the name of the party at whose instance the witness is summoned, and shall command the person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed but otherwise in blank, to a party requesting it, who shall fill it in before service. A subpoena for a witness or witnesses need not be signed by the clerk, and is sufficient if signed by the party or his attorney. A subpoena for the production of documentary evidence need not be signed by the clerk, and is sufficient if signed by the attorney requesting the same.~~

~~(b) Issuance by a judge. Such subpoena may also be issued by any judge of the superior court, judge of the district court, or magistrate.~~

~~(c) For production of documentary evidence. A subpoena may also command the person to whom it is directed to produce the records, books, papers, documents, or tangible things designated therein. Where the subpoena commands any custodian of public records to appear for the sole purpose of producing certain records in his custody, the custodian subpoenaed may, in lieu of a personal appearance, tender to the court by registered mail certified copies of the records requested, together with an affidavit by the custodian as to the authentication of the record tendered or, if no such records are in~~

~~his custody, an affidavit to that effect. Any original or certified copy or affidavit delivered under the provisions of this rule, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication. Where the subpoena commands any custodian of hospital medical records (as defined in G.S. 8-44.1) to appear for the sole purpose of producing certain records in his custody, the custodian subpoenaed may, in lieu of a personal appearance, tender to the presiding judge or designee by registered mail or by personal delivery at no cost certified copies of the records requested, on or before the time specified in the subpoena, together with a copy of the subpoena and an affidavit by the custodian testifying to the identity and authenticity of the records, that they are true and correct copies, and as appropriate, that the records were made and kept in the regular course of business at or near the time of the acts, conditions, or events recorded, and that they were made by persons having knowledge of the information set forth; or if no such records are in his custody, an affidavit to that effect. When the copies of medical records are personally delivered, a receipt shall be obtained from the person receiving the records. Any original or certified copy of medical records, or affidavit, delivered according to the provisions of this rule shall not be held inadmissible in any action or proceeding on the grounds that it lacks certification, identification, or authentication, and it shall be received as evidence if otherwise admissible. The copies of the medical records so tendered shall not be open to inspection or copy by any persons, except to the parties to the case or proceeding and their attorneys in depositions, until ordered published by the judge at the time of the hearing or trial. Nothing contained herein shall be construed to waive the physician-patient privilege or to require any privileged communications under law to be disclosed. The judge, upon motion to quash or modify made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may~~

~~(1) Quash or modify the subpoena if it is unreasonable and oppressive and in such case may order the party in whose behalf the subpoena is issued to pay the person to whom the subpoena is directed part or all of his reasonable expenses including attorneys' fees or~~

~~(2) Grant the motion unless the party in whose behalf the subpoena is issued advances the reasonable cost of producing the records, books, papers, documents, or tangible things.~~

~~(d) Subpoena for taking depositions.~~

~~(1) Proof of service of a notice to take a deposition as provided in Rules 30(a) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the superior court for the county in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce designated records, books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of section (c) of Rule 26 and section (c) of this rule.~~

~~The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.~~

~~(2) Repealed by Session Laws 1975, c. 762, s. 3, effective January 1, 1976.~~

~~(e) Service. All subpoenas may be served by the sheriff, by his deputy, by a coroner or by any other person not less than 18 years of age, who is not a party. Service of a subpoena for the production of documentary evidence may be made only by the delivery of a copy to the person named therein or by registered or certified mail, return receipt requested. Service of a subpoena for the attendance of a witness may be made by telephone communication with the person named therein only by an authorized server who shall be a sheriff, his designee who is not less than 18 years of age and not a party, or coroner, or by delivery of a copy to the person named therein or by registered or certified mail, return receipt requested, by any person authorized by this section to serve subpoenas. Personal service shall be proved by return of a sheriff, his deputy, or a coroner making service and by return under oath of any other person making service. Service by telephone communication shall be proved by return of the authorized process server, noting the method of service. Service by registered or certified mail shall be proved by filing the return receipt with the return.~~

~~(f) Punishment for failure to obey. Failure by any person without adequate cause to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued. Failure by a party without adequate cause to obey a subpoena served upon him shall also subject such party to the sanctions provided in Rule 37(d).~~

(a) Form; Issuance. –

(1) Every subpoena shall state all of the following:

a. The title of the action, the name of the court in which the action is pending, and the number of the civil action.

b. A command to each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated records, books, papers, documents, or tangible things in the possession, custody, or control of that person therein specified.

c. The protections of persons subject to subpoenas under subsection (c) of this rule.

d. The requirements for responses to subpoenas under subsection (d) of this rule.

(2) A command to produce evidence may be joined with a command to appear at trial or hearing or at a deposition, or any subpoena may be issued separately.

(3) A subpoena shall issue from the court in which the action is pending.

(4) The clerk of court in which the action is pending shall issue a subpoena, signed but otherwise blank, to a party requesting it, who shall complete it before service. Any judge of the superior court, judge of the district court, magistrate, or attorney, as officer of the court, may also issue and sign a subpoena.

(b) Service. –

(1) Manner. – Any subpoena may be served by the sheriff, by the sheriff's deputy, by a coroner, or by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to that person or by registered or certified mail, return receipt requested. Service of a subpoena for the attendance of a witness only may also be made by telephone communication with the person named therein only by a sheriff, the sheriff's designee who is not less than 18 years of age and is not a party, or a coroner.

(2) Service of copy. – A copy of the subpoena served under subdivision (1) of this subsection shall also be served upon each party in the manner prescribed by Rule 5(b). This subdivision does not apply to subpoenas issued under G.S. 15A-801 or G.S. 15A-802.

(c) Protection of Persons Subject to Subpoena. –

(1) Avoid undue burden or expense. – A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena. The court shall enforce this subdivision and impose upon the party or attorney in violation of this requirement an appropriate sanction that may include compensating the person unduly burdened for lost earnings and for reasonable attorney's fees.

(2) For production of public records or hospital medical records. – Where the subpoena commands any custodian of public records or any custodian of hospital medical records, as defined in G.S. 8-44.1, to appear for the sole purpose of producing certain records in the custodian's custody, the custodian subpoenaed may, in lieu of personal appearance, tender to the court in which the action is pending by registered or certified mail or by personal delivery, on or before the time specified in the subpoena, certified copies of the records requested together with a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business, or if

no such records are in the custodian's custody, an affidavit to that effect. When the copies of records are personally delivered under this subdivision, a receipt shall be obtained from the person receiving the records. Any original or certified copy of records or an affidavit delivered according to the provisions of this subdivision, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication. Copies of hospital medical records tendered under this subdivision shall not be open to inspection or copied by any person, except to the parties to the case or proceedings and their attorneys in depositions, until ordered published by the judge at the time of the hearing or trial. Nothing contained herein shall be construed to waive the physician-patient privilege or to require any privileged communication under law to be disclosed.

(3) Written objection to subpoenas. – Subject to subsection (d) of this rule, a person commanded to appear at a deposition or to produce and permit the inspection and copying of records may, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, serve upon the party or the attorney designated in the subpoena written objection to the subpoena, setting forth the specific grounds for the objection. The written objection shall comply with the requirements of Rule 11. Each of the following grounds is sufficient for objecting to a subpoena:

a. The subpoena fails to allow reasonable time for compliance.

b. The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection.

c. The subpoena subjects a person to an undue burden.

d. The subpoena is otherwise unreasonable or oppressive.

e. The subpoena is procedurally defective.

(4) Order of court required to override objection. – If objection is made under subdivision (3) of this subsection, the party serving the subpoena shall not be entitled to compel the subpoenaed person's appearance at a deposition or to inspect and copy materials to which an objection has been made except pursuant to an order of the court. If objection is made, the party serving the subpoena may, upon notice to the subpoenaed person, move at any time for an order to compel the subpoenaed person's appearance at the deposition or the production of the materials designated in the subpoena. The motion shall be filed in the court in the county in which the deposition or production of materials is to occur.

(5) Motion to quash or modify subpoena. – A person commanded to appear at a trial, hearing, deposition, or to produce and permit the inspection and copying of records, books, papers, documents, or other

tangible things, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, may file a motion to quash or modify the subpoena. The court shall quash or modify the subpoena if the subpoenaed person demonstrates the existence of any of the reasons set forth in subdivision (3) of this subsection. The motion shall be filed in the court in the county in which the trial, hearing, deposition, or production of materials is to occur.

(6) Order to compel; expenses to comply with subpoena. – When a court enters an order compelling a deposition or the production of records, books, papers, documents, or other tangible things, the order shall protect any person who is not a party or an agent of a party from significant expense resulting from complying with the subpoena. The court may order the party on whose behalf the subpoena is issued to advance the reasonable cost of producing the records, books, papers, documents, or tangible things specified in the subpoena.

(7) Trade secrets; confidential information. – When a subpoena requires disclosure of a trade secret or other confidential research, development, or commercial information, a court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or when the party on whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship, the court may order a person to make an appearance or produce the materials only on specified conditions stated in the order.

(8) Order to quash; expenses. – When a court enters an order quashing or modifying the subpoena, the court may order the party on whose behalf the subpoena is issued to pay all or part of the subpoenaed person's reasonable expenses including attorney's fees.

(d) Duties in Responding to Subpoenas. –

(1) Form of response. – A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label the documents to correspond with the categories in the request.

(2) Specificity of objection. –When information subject to a subpoena is withheld on the objection that it is subject to protection as trial preparation materials, or that it is otherwise privileged, the objection shall be made with specificity and shall be supported by a description of the nature of the communications, records, books, papers, documents, or other tangible things not produced, sufficient for the requesting party to contest the objection.

(e) Contempt. – Failure by any person without adequate excuse to obey a subpoena served upon the person may be deemed a contempt of court. Failure by any

party without adequate cause to obey a subpoena served upon the party shall also subject the party to the sanctions provided in Rule 37(d)."

SECTION 2. G.S.15A-801 reads as rewritten:

"**§ 15A-801. Subpoena for witness.**

The presence of a person as a witness in a criminal proceeding may be obtained by subpoena, which must be issued and served in the manner provided in Rule 45 of the Rules of Civil Procedure, ~~G.S. 1A-1.~~G.S.1A-1, except that subdivision (2) of subsection (b) of the rule does not apply to subpoenas issued under this section."

SECTION 3. G.S. 15A-802 reads as rewritten:

"**§ 15A-802. Subpoena for the production of documentary evidence.**

The production of records, books, papers, documents, or tangible things in a criminal proceeding may be obtained by subpoena which must be issued and served in the manner provided in Rule 45 of the Rules of Civil Procedure, ~~G.S. 1A-1.~~G.S. 1A-1, except that subdivision (2) of subsection (b) of the rule does not apply to subpoenas issued under this section."

SECTION 4. This act becomes effective October 1, 2003, and applies to actions pending or filed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 826*

Short Title:	Amend MH Confidentiality Statutes.	(Public)
Sponsors:	Representative Insko.	
Referred to:	Health, if favorable, Judiciary I.	

April 1, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE CONFIDENTIALITY PROVISIONS OF CHAPTER 122C OF THE GENERAL STATUTES TO PERMIT IMPLEMENTATION OF MENTAL HEALTH SYSTEM REFORM.

The General Assembly of North Carolina enacts:

SECTION 1.(a) G.S. 122C-3 is amended by inserting the following term in alphabetical order to read:

"**§ 122C-3. Definitions.**

As used in this Chapter, unless another meaning is specified or the context clearly requires otherwise, the following terms have the meanings specified:

(1) 'Applicant' means an individual who contacts an area facility for services.

..."

SECTION 1.(b) G.S. 122C-3(14) reads as rewritten:

"**§ 122C-3. Definitions.**

As used in this Chapter, unless another meaning is specified or the context clearly requires otherwise, the following terms have the meanings specified:

...

(14) "Facility" means any person at one location whose primary purpose is to provide services for the care, treatment, habilitation, or rehabilitation of the mentally ill, the developmentally disabled, or substance abusers, and includes:

a. An "area facility", which is a facility that is operated by or under contract with the area ~~authority.~~authority or county program. For the purposes of this subparagraph, a contract is a contract, memorandum of understanding, or other written agreement whereby the facility agrees to provide services to one or more clients of the area authority or county program. ~~A facility that is providing services under contract with the area~~

~~authority is an area facility for purposes of the contracted services only.~~ Area facilities may also be licensable facilities in accordance with Article 2 of this Chapter. A State facility is not an area facility;

b. A "licensable facility", which is a facility that provides services for one or more minors or for two or more adults. When the services offered are provided to individuals who are mentally ill or developmentally disabled, these services shall be day services offered to the same individual for a period of three hours or more during a 24-hour period, or residential services provided for 24 consecutive hours or more. When the services offered are provided to individuals who are substance abusers, these services shall include all outpatient services, day services offered to the same individual for a period of three hours or more during a 24-hour period, or residential services provided for 24 consecutive hours or more. Facilities for individuals who are substance abusers include chemical dependency facilities;

c. A "private facility", which is a facility that is either a licensable facility or a special unit of a general hospital or a part of either in which the specific service provided is not covered under the terms of a contract with an area authority;

d. The psychiatric service of the University of North Carolina Hospitals at Chapel Hill;

e. A "residential facility", which is a 24-hour facility that is not a hospital, including a group home;

f. A "State facility", which is a facility that is operated by the Secretary;

g. A "24-hour facility", which is a facility that provides a structured living environment and services for a period of 24 consecutive hours or more and includes hospitals that are facilities under this Chapter; and

h. A Veterans Administration facility or part thereof that provides services for the care, treatment, habilitation, or rehabilitation of the mentally ill, the developmentally disabled, or substance abusers."

SECTION 2. G.S. 122C-54(b) reads as rewritten:

"**§ 122C-54. Exceptions; abuse reports and court proceedings.**

...

(b) If an individual is a defendant in a criminal case and a mental examination of the defendant has been ordered by the ~~court,~~ court as provided in G.S. 15A-1002, the facility ~~may~~ shall send the results or the report of the mental examination to the clerk of court, to the district attorney or prosecuting officer, and to the attorney of record for the defendant as provided in G.S. 15A-1002(d)."

SECTION 3. G.S. 122C-55 reads as rewritten:

"**§ 122C-55. Exceptions; care and treatment.**

(a) Any area or State facility or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill may share confidential information regarding any client of that facility with any other area or State facility or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill when necessary to coordinate appropriate and effective care, treatment or habilitation of ~~the client and when failure to share this information would be detrimental to the care, treatment or habilitation of the client.~~ the client. For the purposes of this subsection, coordinate means the provision, coordination, or management of mental health, developmental disabilities, and substance abuse services and related services by one or more facilities and includes the referral of a client from one facility to another. ~~Under the circumstances described in this subsection, the consent of the client or legally responsible person is not required for this information to be furnished, and the information may be furnished despite objection by the client.~~

(a1) Any State or area facility or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill may share confidential information regarding any client of that facility with the Secretary, and the Secretary may share confidential information regarding any client with an area or State facility or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill when the responsible professional or the Secretary determines that disclosure is necessary to coordinate appropriate and effective care, treatment or habilitation of ~~the client and that failure to share this information would be detrimental to the care, treatment or habilitation of the client. Under the circumstances described in this subsection, the consent of the client or legally responsible person is not required for this information to be furnished, and the information may be furnished despite objection by the client.~~client.

(a2) Any area or State facility or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill may share confidential information regarding any client of that facility with any other area facility or State facility or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill when necessary to conduct payment activities relating to an individual served by the facility. Payment activities are activities undertaken by a facility to obtain or provide reimbursement for the provision of services and may include, but are not limited to, determinations of eligibility or coverage, coordination of benefits, determinations of cost sharing amounts, claims management, claims processing, claims adjudication, claims appeals, billing and collection activities, medical necessity reviews, utilization management and review, precertification and preauthorization of services, concurrent and retrospective review of services, and appeals related to utilization management and review.

(a3) Whenever there is reason to believe that a client is eligible for benefits through a Department program, any State or area facility or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill may share confidential information regarding any client of that facility with the Secretary, and the Secretary may share confidential information regarding any client with an area facility or State facility or the psychiatric services of the University of North Carolina Hospitals at Chapel Hill. Disclosure is limited to that information necessary to establish initial

eligibility for benefits, determine continued eligibility over time, and obtain reimbursement for the costs of services provided to the client.

(a4) An area authority or county program may share confidential information regarding any client with any area facility, and any area facility may share confidential information regarding any client of that facility with the area authority or county program, when the area authority or county program determines the disclosure is necessary to develop, manage, monitor, or evaluate the area authority's or county programs network of qualified providers as provided in G.S. 122C-115.2(b)(1)b., G.S. 122C-141(a), the State Plan, and rules of the Secretary. For the purposes of this subsection, the purposes or activities for which confidential information may be disclosed include, but are not limited to, quality assessment and improvement activities, provider accreditation and staff credentialing, developing contracts and negotiating rates, investigating and responding to client grievances and complaints, evaluating practitioner and provider performance, auditing functions, on-site monitoring, conducting consumer satisfaction studies and collecting and analyzing performance data.

(a5) Any area facility may share confidential information with any other area facility regarding an applicant when necessary to determine whether the applicant is eligible for area facility services.

(b) A facility, physician, or other individual responsible for evaluation, management, supervision, or treatment of respondents examined or committed for outpatient treatment under the provisions of Article 5 of this Chapter may request, receive, and disclose confidential information to the extent necessary to enable them to fulfill their responsibilities.

(c) A facility may furnish confidential information in its possession to the Department of Correction when requested by that department regarding any client of that facility when the inmate has been determined by the Department of Correction to be in need of treatment for mental illness, developmental disabilities, or substance abuse. The Department of Correction may furnish to a facility confidential information in its possession about treatment for mental illness, developmental disabilities, or substance abuse that the Department of Correction has provided to any present or former inmate if the inmate is presently seeking treatment from the requesting facility or if the inmate has been involuntarily committed to the requesting facility for inpatient or outpatient treatment. Under the circumstances described in this subsection, the consent of the client or inmate shall not be required in order for this information to be furnished and the information shall be furnished despite objection by the client or inmate. Confidential information disclosed pursuant to this subsection is restricted from further disclosure.

(d) A responsible professional may disclose confidential information when in his opinion there is an imminent danger to the health or safety of the client or another individual or there is a likelihood of the commission of a felony or violent misdemeanor.

(e) A responsible professional may exchange confidential information with a physician or other health care provider who is providing emergency medical services to

a client. Disclosure of the information is limited to that necessary to meet the emergency as determined by the responsible professional.

(e1) A State facility may furnish client identifying information to the Department for the purpose of maintaining an index of clients served in State facilities which may be used by State facilities only if that information is necessary for the appropriate and effective evaluation, care and treatment of the client.

(e2) A responsible professional may disclose an advance instruction for mental health treatment or confidential information from an advance instruction to a physician, psychologist, or other qualified professional when the responsible professional determines that disclosure is necessary to give effect to or provide treatment in accordance with the advance instruction.

(f) A facility may disclose confidential information to a provider of support services whenever the facility has entered into a written agreement with a person to provide support services and the agreement includes a provision in which the provider of support services acknowledges that in receiving, storing, processing, or otherwise dealing with any confidential information, he will safeguard and not further disclose the information.

(g) Whenever there is reason to believe that the client is eligible for financial benefits through a governmental agency, a facility may disclose confidential information to ~~State~~ State, local, or federal government agencies. ~~Disclosure~~ Except as provided in G.S. 122C-55(a3), disclosure is limited to that confidential information necessary to establish financial benefits for a client. After establishment of these benefits, the consent of the client or his legally responsible person is required for further release of confidential information under this subsection.

(h) Within a facility, employees, students, consultants or volunteers involved in the care, treatment, or habilitation of a client may exchange confidential information as needed for the purpose of carrying out their responsibility in serving the client.

(i) Upon specific request, a responsible professional may release confidential information to a physician or psychologist who referred the client to the facility.

(j) Upon request of the next of kin or other family member who has a legitimate role in the therapeutic services offered, or other person designated by the client or his legally responsible person, the responsible professional shall provide the next of kin or other family member or the designee with notification of the client's diagnosis, the prognosis, the medications prescribed, the dosage of the medications prescribed, the side effects of the medications prescribed, if any, and the progress of the client, provided that the client or his legally responsible person has consented in writing, or the client has consented orally in the presence of a witness selected by the client, prior to the release of this information. Both the client's or the legally responsible person's consent and the release of this information shall be documented in the client's medical record. This consent shall be valid for a specified length of time only and is subject to revocation by the consenting individual.

(k) Notwithstanding the provisions of G.S. 122C-53(b) or G.S. 122C-206, upon request of the next of kin or other family member who has a legitimate role in the therapeutic services offered, or other person designated by the client or his legally

responsible person, the responsible professional shall provide the next of kin, or family member, or the designee, notification of the client's admission to the facility, transfer to another facility, decision to leave the facility against medical advice, discharge from the facility, and referrals and appointment information for treatment after discharge, after notification to the client that this information has been requested.

(l) In response to a written request of the next of kin or other family member who has a legitimate role in the therapeutic services offered, or other person designated by the client, for additional information not provided for in subsections (j) and (k) of this section, and when such written request identifies the intended use for this information, the responsible professional shall, in a timely manner:

(1) Provide the information requested based upon the responsible professional's determination that providing this information will be to the client's therapeutic benefit, and provided that the client or his legally responsible person has consented in writing to the release of the information requested; or

(2) Refuse to provide the information requested based upon the responsible professional's determination that providing this information will be detrimental to the therapeutic relationship between client and professional; or

(3) Refuse to provide the information requested based upon the responsible professional's determination that the next of kin or family member or designee does not have a legitimate need for the information requested.

(m) The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services shall adopt rules specifically to define the legitimate role referred to in subsections (j), (k), and (l) of this section."

SECTION 4. This act is effective when it becomes law.

HOUSE BILL 826:
Amend MH Confidentiality Statutes.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Rep. Insko
Date:	June 5, 2003	**Summary by:**	Robin Johnson* Robin
Version:	First Edition		Committee Counsel

SUMMARY: House Bill 826 would amend the confidentiality provisions of Chapter 122C of the General Statutes (Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985) and related definitions. The act would become effective when it becomes law.

CURRENT LAW AND BILL ANALYSIS:

Changes to Definitions.

House Bill 826 would add a new definition (applicant) and expand another definition (area facility) as applicable in Chapter 122C[1] of the General Statutes (Chapter 122C). The effect of these changes is to expand the circumstances under which confidential information may be disclosed.

Section 1.(a): Adds a definition to Chapter 122C of "applicant," defining applicant as an individual who contacts an area facility for services. A change to the mental health confidentiality provisions in Section 3 (page 4, lines 17-19) *(see below)* would permit area facilities to share confidential information with any other area facilities regarding an "applicant" when necessary to determine whether the applicant is eligible for area facility services. A "facility" is any person at one location whose primary purpose is to provide services for the care, treatment, habilitation, or rehabilitation of the mentally ill, the developmentally disabled, or substance abusers. An "area facility" is a "facility" that is operated by or under contact with an area authority or county program.

Section 1.(b): Expands the definition of "area facility" as used in Chapter 122C to specify that if a facility by written agreement agrees to provide services to one or more clients of an area authority or county program, it is an "area facility". The bill also would delete the proviso that these facilities are area facilities for purposes of the contracted services only, thereby making all facilities that contract with area authorities or county programs to provide mental health services "area facilities".

Changes to Confidentiality Provisions. Confidential information acquired in attending or treating mental health clients is not a public record, and cannot be disclosed except as specifically provided by statute.

Section 2: G.S. 122C-54 permits facilities to disclose confidential client information under certain circumstances in court proceedings. Current law permits facilities to send the results of a court-ordered mental examination to the clerk of court, to the district attorney, and to the defendant's attorney. This section would require a facility to send the results of a mental examination ordered by the court to determine whether a defendant is competent to stand trial to the clerk, district attorney, and the defendant's attorney.

Section 3: G.S. 122C-55 would make the following changes related to the disclosure of confidential client information by facilities and hospitals:

- Removes the limitation that permits disclosure of confidential information only when failure to do so would be detrimental to the client's care. Currently, area or State facilities and the psychiatric

[1] The Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985 governs the licensure of facilities, clients rights, admission and discharge, involuntary commitment, delivery of services, and other procedures related to services for individuals with mental illness, developmental disabilities, and substance abuse problems.

service of UNC Hospitals may share confidential information among themselves, and between themselves and the Secretary of DHHS, when necessary to coordinate treatment for the client and when failure to do so would be detrimental to the client's care, and the client's consent is not required. The bill also would define, for purposes of disclosure among facilities and UNC Hospitals, "coordinate" to include client referral from one facility to another. *[page 3, lines 6-25]*

- Adds a new subsection (a2) that would permit area or State facilities or the psychiatric service of UNC Hospitals to share with each other confidential information regarding a client when necessary to conduct payment activities, i.e. an extensive list of activities[2] undertaken by a facility to obtain or provide reimbursement for providing services. *[page 3, lines 26-37]*
- Adds a new subsection (a3) to permit area or State facilities or the psychiatric service of UNC Hospitals and the Secretary to share confidential information regarding a client with each other whenever there is a reason to believe that a client is eligible for benefits through a Department program. Disclosure would be limited to the information necessary to make initial and continuing eligibility determinations and to obtain reimbursement. *[page 3, line 38, through page 4, line2]*
- Adds a new subsection (a4) to permit area authorities and county programs to share confidential information[3] regarding a client when necessary to develop, manage, monitor, or evaluate the area authority's or county program's network of qualified providers. *[page 4, lines 3-16]*
- Adds a new subsection (a5) to allow area facilities to share with each other confidential information regarding an applicant (see new definition in Section 1(a)) when necessary to determine the applicant's eligibility for area facility services. *[page 4, lines 17-19]*
- Currently, a facility may disclose confidential client information to State or federal agencies whenever there is a reason to believe the client is eligible for financial benefits through a governmental agency. The bill would permit facilities to disclose information to local agencies under these circumstances. *[page 5, lines 20-21]*

EFFECTIVE DATE. The bill would be effective when it becomes law.

BACKGROUND: As enacted by the 2001 General Assembly, S.L. 2001-437 (HB 381), amended the mental health statutes to provide counties an alternative to establishing area authorities to ensure the provision of public mental health, developmentally disabled and substance abuse (MH/DD/SA) services to consumers. Counties were authorized to withdraw from existing area authorities and to ensure the delivery of public MH/DD/SA services through a single county program or jointly with one or more counties through a joint agency established pursuant to the terms of an interlocal agreement.
Other elements of the act include:

- Enhanced accountability and cooperation between boards of county commissioners, area authorities, and the Department of Health and Human Services(DHHS).
- Requirements to develop a 'business plan' to guide the management and delivery of public services at the local level and State level.

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[2] Payment activities may include determinations of eligibility or coverage, coordination of benefits, determinations of cost sharing amounts, claims management, claims processing, adjudication, or appeal, billing and collection, medical necessity reviews, utilization management and review, precertification and preauthorization of services, review of services, and appeals related to utilization management and review.

[3] The purposes or activities for which information may be disclosed includes quality assessment and improvement activities, provider accreditation, staff credentialing, developing contracts, negotiating rates, client grievances and complaints, evaluating practitioner and provider performance, auditing functions, on-site monitoring, conducting consumer satisfaction studies, collecting and analyzing performance data.

- Requirements for the universal availability of core services (including 'front-end' services such as screening, assessment, and emergency triage, and 'indirect services' such as prevention, education, and consultation at the community level) within available State and local resources.
- Enhanced powers and duties of local and State governing structures relating to quality assurance and accountability at the State and local levels.
- Establishment of a consumer advocacy program to operate at the State and local levels and to coordinate their functions with local consumer groups.
- Directives to DHHS to implement a certification process and to follow specific procedures to prepare for the reforms provided for in the legislation.
- Directives to the Secretary of DHHS to establish schedules for implementing a phased-in plan to eliminate disparities in the allocation of State funding across county programs and area authorities.
- A requirement that prior to requesting approval to close a State facility, the Secretary shall notify the Joint Legislative Commission on Governmental Operations and the Joint Legislative Committee on MH/DD/SAS and the members of the General Assembly who represent catchment areas affected by the closure and shall present a plan for the closure that addresses how patients will be cared for after the closure, how support services to community-based agencies and outreach services will be continued, and the impact on remaining facilities.
- New limitations on the authority of the Secretary to close a State facility.

*H826-SMRH-001: *Dianna Jessup, Amy Compeau, and Erika Churchill substantially contributed to this summary.*

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
House Bill 826*

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

H826-ARH-41 [v.1]

Date _____,2003

Comm. Sub. [NO]
Amends Title [NO]
First Edition

Senator _____

moves to amend the bill on page 1, lines 6-13, by deleting the lines;

and on page 1, line 14, by deleting "**(b)**";

and on page 4, line 8, by deleting the word "programs" and by substituting the word "program's";

and on page 4, line 19, by inserting at the end of the line the following new sentence: "For the purpose of this subsection, "applicant" means an individual who contacts an area facility for services.".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 2

HOUSE BILL 1037

Committee Substitute Favorable 4/29/03

Short Title: Amend Juvenile Law. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO ESTABLISH CRIMINAL PENALTIES FOR ALLOWING JUVENILES TO ESCAPE AND TO ALLOW JUVENILE DETENTION FACILITIES TO PHOTOGRAPH JUVENILES AND TO RELEASE THE PHOTOGRAPHS WHEN THE JUVENILE ESCAPES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-239 reads as rewritten:

"**§ 14-239. Allowing prisoners to escape; punishment.**

If any sheriff, deputy sheriff, ~~or~~ jailer, or other custodial personnel shall willfully or wantonly allow the escape of any person committed to ~~his~~ that person's custody who is (i) a person charged with a crime, ~~or~~ (ii) a person sentenced by the court upon conviction of any offense, or (iii) committed to the Department of Juvenile Justice and Delinquency Prevention, ~~he~~ that person shall be guilty of a Class 1 misdemeanor. No prosecution shall be brought against any such officer pursuant to this section by reason of a prisoner being allowed to participate pursuant to court order in any work release, work study, community service, or other lawful program, or by reason of any such prisoner failing to return from participation in any such program."

SECTION 2. G.S. 7B-2102 reads as rewritten:

"**§ 7B-2102. Fingerprinting and photographing juveniles.**

(a) A law enforcement officer or agency shall fingerprint and photograph a juvenile who was 10 years of age or older at the time the juvenile allegedly committed a nondivertible offense as set forth in G.S. 7B-1701, when a complaint has been prepared for filing as a petition and the juvenile is in physical custody of law enforcement or the Department.

(a1) A youth development center or other juvenile facility may photograph a juvenile who has been committed to the facility.

(b) If a law enforcement officer or agency does not take the fingerprints or a photograph of the juvenile pursuant to subsection (a) of this section or the fingerprints or photograph have been destroyed pursuant to subsection (e) of this section, a law

enforcement officer or agency shall fingerprint and photograph a juvenile who has been adjudicated delinquent if the juvenile was 10 years of age or older at the time the juvenile committed an offense that would be a felony if committed by an adult.

(c) A law enforcement ~~officer~~ officer, facility, or agency who fingerprints or photographs a juvenile pursuant to this section shall do so in a proper format for transfer to the State Bureau of Investigation and the Federal Bureau of Investigation. After the juvenile, who was 10 years of age or older at the time of the offense, is adjudicated delinquent of an offense that would be a felony if committed by an adult, fingerprints obtained pursuant to this section shall be transferred to the State Bureau of Investigation and placed in the Automated Fingerprint Identification System (AFIS) to be used for all investigative and comparison purposes. Photographs obtained pursuant to this section shall be placed in a format approved by the State Bureau of Investigation and may be used for all investigative or comparison purposes.

(d) Fingerprints and photographs taken pursuant to this section are not public records under Chapter 132 of the General Statutes, shall not be included in the clerk's record pursuant to G.S. 7B-3000, shall be withheld from public inspection or examination, and shall not be eligible for expunction pursuant to G.S. 7B-3200. Fingerprints and photographs taken pursuant to this section shall be maintained separately from any juvenile record, other than the electronic file maintained by the State Bureau of Investigation.

(d1) Notwithstanding subsection (d) of this section, photographs of a juvenile may be released to the public if the juvenile escapes from a youth development center or other juvenile facility or a holdover facility or escapes from the custody of juvenile personnel or a local law enforcement officer.

(e) If a juvenile is fingerprinted and photographed pursuant to subsection (a) of this section, the custodian of records shall destroy all fingerprints and photographs at the earlier of the following:

(1) The juvenile court counselor or prosecutor does not file a petition against the juvenile within one year of fingerprinting and photographing the juvenile pursuant to subsection (a) of this section;
(2) The court does not find probable cause pursuant to G.S. 7B-2202; or
(3) The juvenile is not adjudicated delinquent of any offense that would be a felony or a misdemeanor if committed by an adult.

The chief court counselor shall notify the local custodian of records, and the local custodian of records shall notify any other record-holding agencies, when a decision is made not to file a petition, the court does not find probable cause, or the court does not adjudicate the juvenile delinquent."

SECTION 3. Section 1 of this act becomes effective December 1, 2003, and applies to offenses committed on or after that date. The remainder of this act becomes effective October 1, 2003.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 1037

Committee Substitute Favorable 4/29/03

PROPOSED SENATE COMMITTEE SUBSTITUTE H1037-CSRH-47 [v.1]

6/4/2003 8:14:06 PM

Short Title: Amend Juvenile Law. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO ESTABLISH CRIMINAL PENALTIES FOR ALLOWING JUVENILES TO ESCAPE AND TO ALLOW JUVENILE DETENTION FACILITIES TO PHOTOGRAPH JUVENILES AND TO RELEASE THE PHOTOGRAPHS WHEN THE JUVENILE ESCAPES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-239 reads as rewritten:

"**§ 14-239. Allowing prisoners to escape; punishment.**

If any sheriff, deputy sheriff, ~~or~~ jailer, or other custodial personnel shall willfully or wantonly allow the escape of any person committed to ~~his~~ that person's custody who is (i) a person charged with a crime, ~~or~~ (ii) a person sentenced by the court upon conviction of any offense, or (iii) committed to the Department of Juvenile Justice and Delinquency Prevention, ~~he~~ that person shall be guilty of a Class 1 misdemeanor. No prosecution shall be brought against any such officer pursuant to this section by reason of a prisoner being allowed to participate pursuant to court order in any work release, work study, community service, or other lawful program, or by reason of any such prisoner failing to return from participation in any such program."

SECTION 2. G.S. 7B-2102 reads as rewritten:

"**§ 7B-2102. Fingerprinting and photographing juveniles.**

(a) A law enforcement officer or agency shall fingerprint and photograph a juvenile who was 10 years of age or older at the time the juvenile allegedly committed a nondivertible offense as set forth in G.S. 7B-1701, when a complaint has been prepared for filing as a petition and the juvenile is in physical custody of law enforcement or the Department. A county juvenile detention facility may photograph a juvenile who has been committed to that facility if the juvenile was at least 10 years old at the time that juvenile allegedly committed a nondivertible offense as set forth in G.S. 7B-1701.

(b) If a law enforcement officer or agency does not take the fingerprints or a photograph of the juvenile pursuant to subsection (a) of this section or the fingerprints or photograph have been destroyed pursuant to subsection (e) of this section, a law enforcement officer or agency shall fingerprint and photograph a juvenile who has been adjudicated delinquent if the juvenile was 10 years of age or older at the time the juvenile committed an offense that would be a felony if committed by an adult.

(c) A law enforcement ~~officer~~ officer, facility, or agency who fingerprints or photographs a juvenile pursuant to this section shall do so in a proper format for transfer to the State Bureau of Investigation and the Federal Bureau of Investigation. After the juvenile, who was 10 years of age or older at the time of the offense, is adjudicated delinquent of an offense that would be a felony if committed by an adult, fingerprints obtained pursuant to this section shall be transferred to the State Bureau of Investigation and placed in the Automated Fingerprint Identification System (AFIS) to be used for all investigative and comparison purposes. Photographs obtained pursuant to this section shall be placed in a format approved by the State Bureau of Investigation and may be used for all investigative or comparison purposes.

(d) Fingerprints and photographs taken pursuant to this section are not public records under Chapter 132 of the General Statutes, shall not be included in the clerk's record pursuant to G.S. 7B-3000, shall be withheld from public inspection or examination, and shall not be eligible for expunction pursuant to G.S. 7B-3200. Fingerprints and photographs taken pursuant to this section shall be maintained separately from any juvenile record, other than the electronic file maintained by the State Bureau of Investigation.

(d1) Notwithstanding subsection (d) of this section, the court may order the release of a juvenile's photograph the public if the juvenile escapes from a youth development center, other juvenile facility, a holdover facility, or from the custody of juvenile personnel or a local law enforcement officer.

(e) If a juvenile is fingerprinted and photographed pursuant to subsection (a) of this section, the custodian of records shall destroy all fingerprints and photographs at the earlier of the following:

(1) The juvenile court counselor or prosecutor does not file a petition against the juvenile within one year of fingerprinting and photographing the juvenile pursuant to subsection (a) of this section;
(2) The court does not find probable cause pursuant to G.S. 7B-2202; or
(3) The juvenile is not adjudicated delinquent of any offense that would be a felony or a misdemeanor if committed by an adult.

The chief court counselor shall notify the local custodian of records, and the local custodian of records shall notify any other record-holding agencies, when a decision is made not to file a petition, the court does not find probable cause, or the court does not adjudicate the juvenile delinquent."

SECTION 3. Section 1 of this act becomes effective December 1, 2003, and applies to offenses committed on or after that date. The remainder of this act becomes effective October 1, 2003.

HOUSE BILL 1037:
Amend Juvenile Law.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Rep. Luebke
Date:	June 5, 2003	**Summary by:**	Robin Johnson*
Version:	H1037-CSRH-47[v.1]		Committee Counsel

SUMMARY: ***House Bill 1037 would extend criminal penalties for allowing juveniles to escape, would expand the circumstances under which committed juveniles may be photographed, and would allow the public release of authorized photographs when a juvenile escapes.***

Changes Made by the PCS: The PCS only will authorize county juvenile detention facilities to photograph certain juveniles committed to those facilities and will allow the release of a juvenile's photograph only by court order.

BILL ANALYSIS:

Section 1: Punishment for Allowing Prisoners to Escape

Currently, G.S. 14-239 provides that it is a Class 1 misdemeanor for any sheriff, deputy sheriff, or jailer to willfully or wantonly allow the escape of a person who is in the sheriff's, deputy sheriff's or jailer's custody. The person in custody must have been charged with a crime or sentenced by the court upon conviction of any offense.

House Bill 1037 would extend the applicability of this law in two ways. First, it would add "other custodial personnel" to the list of individuals who could be subject to the Class 1 misdemeanor. Second, the bill would add to the list of individuals in custody juveniles who have been committed to the Department of Juvenile Justice and Delinquency Prevention (DJJDP).

Punishment for a Class 1 misdemeanor, assuming no prior convictions, is 1-45 days' community punishment. Community punishments may include one of more of the following: probation, any authorized condition of probation, outpatient drug/alcohol treatment, community service, referral to Treatment Alternatives to Street Crime, restitution, or a fine in an amount in the discretion of the court.

Section 2: Photographing and Releasing Photographs of Juveniles

G.S. 7B-2101 currently requires the fingerprinting and photographing of any juvenile who allegedly has committed a nondivertible offense[1] when the juvenile was at least 10 years old at the time of the offense. Photographing, otherwise, is not permitted. The fingerprints and photographs are not public records under Chapter 132, are not included in the clerk's juvenile court records, must be withheld from public inspection, and are not eligible for expunction. They are transferred to the State and Federal Bureaus of Investigation. After that juvenile is adjudicated delinquent for an offense that would be a felony if committed by an adult, the fingerprints are placed in the Automated Fingerprint Identification System to be used for all investigative and comparison purposes and the photographs may be used for all investigative or comparison purposes.

[1] G.S. 7B-1701 provides that a nondivertible offense is murder, first- or second- degree rape or sexual offense, arson, first degree burglary, crime against nature, a violation of the NC Controlled Substances Act that would be a felony if committed by an adult, or any felony involving the willful infliction of serious bodily injury on another person or involving the use of a deadly weapon.

Under current procedure, (DJJDP) is permitted to reveal to the media the circumstances surrounding a juvenile's escape from a juvenile detention facility, but it is not permitted to disclose the name or photograph of the juvenile. It is unclear whether a judge may order the release of the photograph if it serves the public interest.

This bill would expand G.S. 7B-2102 in two ways. First, it would allow each of the three county juvenile detention facilities to photograph any juvenile that is committed (i.e., by court order) to that facility. The juvenile must have been at least 10 years old at the time he or she allegedly committed a nondivertible offense.

Second, the bill would allow the court to order the release of photographs of any juvenile who escapes from a youth development center, another juvenile facility, a holdover facility, or the custody of juvenile personnel or local law enforcement officer.

EFFECTIVE DATE: Section 1 of this act becomes effective December 1, 2003, and applies to offenses committed on or after that date. The remainder of this act becomes effective October 1, 2003.

*H1037-SMRH-003: *Nicole Kreiser and Denise Thomas, Fiscal Research, contributed to this summary.*

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
House Bill 1037

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

H1037-ARH-42 [v.1]

Date _____,2003

Comm. Sub. [YES]
Amends Title [NO]
H1037-CSRH-47[v.1]

Senator Webster

moves to amend the bill on page 1, line 24, by deleting the word "may" and substituting the word "shall".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 3

HOUSE BILL 824

Committee Substitute Favorable 4/3/03
Committee Substitute #2 Favorable 4/9/03

Short Title: DOT Bridge Encroachments. (Public)

Sponsors:

Referred to:

April 1, 2003

A BILL TO BE ENTITLED

AN ACT TO AUTHORIZE THE DEPARTMENT OF TRANSPORTATION TO PERMIT ENCROACHMENT ON ITS RIGHTS-OF-WAY FOR THE CONSTRUCTION OF PRIVATE BRIDGES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 136-18 is amended by adding a new subdivision to read:

"(36) To permit private use of and encroachment upon the right-of-way of a State highway or road for the purpose of construction and maintenance of a privately owned bridge for pedestrians or motor vehicles, if the bridge shall not unreasonably interfere with or obstruct the public use of the right-of-way. Any encroachment authorized by this subdivision shall be approved by the Board of Transportation, upon a finding that the encroachment is necessary and appropriate, in the sole discretion of the Board. Locations, plans, and specifications for any pedestrian or vehicular bridge authorized by the Board for construction pursuant to this subdivision shall be approved by the Department of Transportation. For any bridge subject to this subdivision, the Department shall retain the right to reject any plans, specifications, or materials used or proposed to be used, inspect and approve all materials to be used, supervise the construction, and require the replacement, reconstruction, repair, or demolition of any partially or wholly completed bridge that, in the sole discretion of the Department, is unsafe or substandard in design or construction. The Department shall ensure that any bridge constructed pursuant to this subdivision is regularly inspected for safety. Any bridge authorized and constructed pursuant to this subdivision shall be subject to all other rules and conditions of the Department of Transportation for encroachments."

SECTION 2. This act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 824

Committee Substitute Favorable 4/3/03

Committee Substitute #2 Favorable 4/9/03

PROPOSED SENATE COMMITTEE SUBSTITUTE H824-CSRW-55 [v.1]

6/5/2003 9:43:42 AM

Short Title: DOT Bridge Encroachments. (Public)

Sponsors:

Referred to:

April 1, 2003

A BILL TO BE ENTITLED

AN ACT TO AUTHORIZE THE DEPARTMENT OF TRANSPORTATION TO PERMIT ENCROACHMENT ON ITS RIGHTS-OF-WAY FOR THE CONSTRUCTION OF PRIVATE BRIDGES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 136-18 is amended by adding a new subdivision to read:

"(36) To permit private use of and encroachment upon the right-of-way of a State highway or road for the purpose of construction and maintenance of a privately owned bridge for pedestrians or motor vehicles, if the bridge shall not unreasonably interfere with or obstruct the public use of the right-of-way. Any agreement for an encroachment authorized by this subdivision shall be approved by the Board of Transportation, upon a finding that the encroachment is necessary and appropriate, in the sole discretion of the Board. Locations, plans, and specifications for any pedestrian or vehicular bridge authorized by the Board for construction pursuant to this subdivision shall be approved by the Department of Transportation. For any bridge subject to this subdivision, the Department shall retain the right to reject any plans, specifications, or materials used or proposed to be used, inspect and approve all materials to be used, inspect the construction, maintenance, or repair, and require the replacement, reconstruction, repair, or demolition of any partially or wholly completed bridge that, in the sole discretion of the Department, is unsafe or substandard in design or construction. An encroachment agreement authorized by this section may include a requirement to purchase and maintain liability insurance in an amount determined by the Department of Transportation. The

Department shall ensure that any bridge constructed pursuant to this subdivision is regularly inspected for safety. The owner shall have the bridge inspected every two years by a qualified private engineering firm based on National Bridge Inspection Standards, and shall provide the Department copies of the Bridge Inspection Reports where they shall be kept on file. Any bridge authorized and constructed pursuant to this subdivision shall be subject to all other rules and conditions of the Department of Transportation for encroachments."

SECTION 2. This act is effective when it becomes law.

JUNE 10, 2003

DID NOT MEET

Judiciary II Committee

Minutes

June 12, 2003

The meeting of the Senate Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with nine members present.

HB 965 (Failure to Yield Causing Death or Injuries) Senator Hartsell noted that HB 965 was referred back to the Committee. Representative Hill, bill sponsor, was recognized to speak on the bill. Senators Kinnaird, Kerr and Shubert commented on the bill. Senator Hartsell requested that Senator Stan Bingham serve as acting Chairman. Mr. Sam Nobles, representing the Concerned Bikers Association spoke on the bill. Representative Hill withdrew the bill from the calendar.

There being no further business, the meeting was adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	June 12, 2003	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 965	Failure to Yield Causing Death or Injuries.	Representative Hill

Senator Fletcher L. Hartsell, Jr., Chair

AGENDA

SENATE JUDICIARY II COMMITTEE
June 12, 2003 at 10:00 a.m.
Room 1124, Legislative Building

I. Welcome and Opening Remarks

II. Bills to be Considered

HB 965	Failure to Yield Causing Death or Injuries.	Representative Hill

III. Other Business

IV. Adjournment

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 6-12-03

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Sandra Lee	NC Concerned Bikers Assn.
Peggy Burns	NC CBA/ABATE
Sam Nobles	NC CBA/ABATE
Willard Davis	NC CBA/ABATE
Nancy Holley	NC CBA/ABATE
Cindy Hodges	CBA/ABATE of NC
Mike Hodges	" "
Vinny Neumann	CBA/ABATE OF N.C.
Susan Balfour	Carolinas Ctr for Hospice "End of Life Care
Charlie Chrisawn	Poyner + Spruill
[illegible]	Poyner + Spruill

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Paul Parker	NCATL
Jim Hibbs	NC Hotel Assn

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 3

HOUSE BILL 965

Committee Substitute Favorable 4/29/03
Third Edition Engrossed 4/30/03

Short Title: Failure to Yield Causing Death or Injuries. (Public)

Sponsors:

Referred to:

April 9, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE PENALTIES FOR PERSONS WHO CAUSE BODILY INJURY OR DEATH WHEN FAILING TO YIELD THE RIGHT-OF-WAY UNDER CERTAIN CIRCUMSTANCES.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 20 of the General Statutes is amended by adding a new section to read:

"**§ 20-160.1. Failure to yield causing injury or death; penalties.**

(a) Unless the conduct is covered under some other provision of law providing greater punishment, a person who commits the offense of failure to yield while approaching or entering an intersection, turning at a stop or yield sign, entering a roadway, upon the approach of an emergency vehicle, or at highway construction or maintenance shall be punished in the following manner:

(1) Except as provided in subdivisions (2) and (3) of this subsection, when there is bodily injury resulting from the violation, the violator shall be fined two hundred dollars ($200.00).

(2) When there is serious bodily injury but no death resulting from the violation, the violator shall be fined five hundred dollars ($500.00) and the violator's drivers license or commercial drivers license shall be suspended for 90 days.

(3) When a death results from the violation, the violator shall be fined one thousand dollars ($1,000) and the violator's drivers license or commercial drivers license shall be suspended for six months.

(b) As used in this section, 'bodily injury' means a cut, abrasion, bruise, burn, disfigurement, physical pain, illness, any impairment of the function of a bodily member, organ, or mental faculty, or any other injury to the body, no matter how temporary. 'Serious bodily injury' means bodily injury that involves a substantial risk of

death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty."

SECTION 2. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

HOUSE BILL 965:
Failure to Yield Causing Death or Injuries

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Rep. Hill
Date:	June 12, 2003	**Summary by:**	Robin Johnson*
Version:	3rd Edition		Committee Counsel

SUMMARY: ***House Bill 965 would provide specific penalties for persons who fail to yield the right of way as required under certain circumstances. A driver would be subject to a fine and suspension of his or her driver's license; the amount of the fine and the length of the suspension would vary depending upon whether there is bodily injury or death resulting from the violation.***

CURRENT LAW: G.S. 20-155 requires that when two vehicles approach or enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left must yield the right-of-way to the vehicle on the right. The driver of a vehicle intending to turn to the left must yield the right-of-way to any vehicle approaching from the opposite direction. The driver of any vehicle approaching but not having entered a traffic circle must yield the right-of-way to a vehicle already within the traffic circle. G.S. 20-156 requires the driver of a vehicle about to enter or cross a highway to yield the right-of-way to all vehicles approaching on the highway to be entered. A driver must also yield the right-of-way to police and fire department vehicles, ambulances, and other emergency vehicles giving a warning signal by appropriate light and siren. G.S. 20-158 provides for the control of vehicles by signs and signals, and prescribes the conditions under which a driver must stop or yield the right of way at intersections or other areas controlled by stop signs, stoplights, flashing lights or other traffic-control devices.

Under G.S. 20-176, any violation of the aforementioned statutes would be an infraction for which the person may be ordered to pay a penalty of not more than $100 (unless a specific penalty is otherwise provided by law). Under G.S. 20-141.4, if the violation results in a death, the person could be charged with misdemeanor death by vehicle. Misdemeanor death by vehicle is a Class 1 misdemeanor; a person charged with a Class 1 misdemeanor is subject to an unspecified fine in the discretion of the judge. In addition, a person found guilty of misdemeanor death by vehicle is subject to a mandatory one-year revocation is his or her driver's license.

BILL ANALYSIS: House Bill 965 would provide specific punishment for failure to yield while approaching or entering an intersection, turning at a stop sign or yield sign, entering a roadway, upon approach of an emergency vehicle, or at the site of highway construction or maintenance. ***Unless the conduct is covered under some other provision of law providing greater punishment*** the driver would be required to pay a fine, and the driver's license would be suspended for a specified period; the amount of the fine and the length of the suspension would vary depending upon whether there is serious bodily injury or death resulting from the violation as follows:

- ***When there is bodily injury*** resulting from the violation, the fine would be two hundred dollars ($200.00) 'Bodily injury' is defined to include a cut, abrasion, bruise, burn, disfigurement, physical pain, illness, any impairment of the function of a bodily member, organ, or mental faculty, or any other injury to the body, no matter how temporary.

- ***When there is serious bodily injury but no death*** resulting from the violation, the fine would be five hundred dollars ($500.00) and the violator's driver's license or commercial drivers license would be suspended for 90 days. 'Serious bodily injury' is defined as bodily injury that involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

- ***When a death results*** from the violation, the fine would be one thousand dollars ($1,000) and the violator's driver's license or commercial drivers license would be suspended for six months. *There is some question whether this provision is necessary because of existing laws that carry greater punishment.*

The bill would become effective December 1, 2003 and apply to offenses committed on or after that date.

H965-SMRH-006: * Brenda Carter, Staff Attorney, contributed substantially to this summary.

MEMBERSHIP

Senate Judiciary II Committee
2003-2004 Biennium

Senator Fletcher Hartsell, Chairman
Room 518, LOB
733-7223

Senator Austin Allran, Vice Chair
Room 516, LOB
733-5876

Senator Scott Thomas, Vice Chair
Room 300-D, LOB
715-8363

Senator Hugh Webster, Ranking Minority
Room 1419, LB
715-0706

Senator Tom Apodaca
Room 1119, LB
733-5745

Senator Stan Bingham
Room 2117, LB
733-5665

Senator Walter Dalton
Room 523, LOB
715-3038

Senator Charlie Dannelly
Room 2010, LB
733-5955

Senator Katie Dorsett
Room 2106, LB
715-3042

Senator Kay Hagan
Room 410, LOB
733-5856

Committee Assistant:

Gerry Johnson

Senator Robert Holloman
Room 623, LOB
715-3032

Senator John Kerr
Room 526, LOB
733-5621

Senator Eleanor Kinnaird
Room 2115, LB
733-5804

Senator Tony Moore
Room 622, LOB
733-6275

Senator Joe Sam Queen
Room 2111, LB
733-3460

Senator Eric Reeves
Room 1028, LB
715-6400

Senator Robert Rucho
Room 1113, LB
733-5650

Senator Fern Shubert
Room 1414, LB
733-7659

Senator R. B. Sloan
Room 406, LOB
715-7823

Senator A. B. Swindell
Room 629 LOB
715-3030

Research Staff:

Kory Goldsmith
Robin Johnson
Sandra Alley

Bill	Introducer	Short Title		Latest Action	In Date	Out Date
		DOCKETING LAWS.		Judiciary I		
S0421	Scott Thomas	AMEND CHILD WELFARE LAWS.-AB	*SR	Ch. SL 2003-304	03-17-03	04-14-03
S0422	Scott Thomas	ADVANCE HEALTH CARE DIRECTIVE REGISTRY.	SR	Ch. SL 2003-70	03-17-03	04-09-03
S0423=	Scott Thomas	AMEND CHILD SUPPORT ENFORCEMENT LAWS.-AB	*SR	Ch. SL 2003-288	03-17-03	04-07-03
S0424	Fletcher L. Hart	TUITION WAIVER CORRECTION.	*SR	Ch. SL 2003-230	03-17-03	04-16-03
S0449	Joe Sam Queen	EVIDENCE-DWI BLOOD WITHDRAWAL VALID.	*SR	Ch. SL 2003-95	03-18-03	04-23-03
S0460	Robert Lee Hollo	EXTEND SUNSET/PRIVATE CORRECTIONAL OFFICERS.	S	Ref To Com On Judiciary III	03-19-03	04-14-03
S0468	Fletcher L. Hart	CLARIFY IRREVOCABLE TRUST LAW.	SR	Ch. SL 2003-93	03-20-03	04-22-03
S0470	Fletcher L. Hart	COMPENSATION OF TRUSTEES/OTHER FIDUCIARIES.	*S	Pres. To Gov. 7/ 14/2004	03-20-03	04-14-03
S0471	Fletcher L. Hart	AMEND SELF-INSURANCE GUARANTY ASSOC. LAWS.	*SR	Ch. SL 2003-115	03-20-03	04-24-03
S0486=	Joe Sam Queen	CUSTOMER INQUIRIES/ INSURANCE COVERAGE.	*S	Pres. To Gov. 7/8/ 2004	03-20-03	04-14-03
S0502	Scott Thomas	ACCESS TO DECEDENT'S SAFE-DEPOSIT BOX.	*SR	Ch. SL 2003-255	03-24-03	04-16-03
S0527	Fletcher L. Hart	DEATH BY VEHICLE.	S	Ref To Com On Judiciary II	03-25-03	
S0528	Fletcher L. Hart	AMEND POST-RELEASE SUPERVISION LAWS.	S	Re-ref Com On Judiciary I	03-25-03	03-25-03
S0549	Kay R. Hagan	UNIFORM PRINCIPAL AND INCOME ACT.	*SR	Ch. SL 2003-232	03-27-03	04-22-03
S0563	Kay R. Hagan	UNIFORM ATHLETE AGENTS ACT.	*SR	Ch. SL 2003-375	03-27-03	04-16-03
S0619=	Tom Apodaca	DWI BLOOD TEST RESULT-DIRECTLY TO CLERK.	*SR	Ch. SL 2003-104	03-31-03	04-16-03
S0659	Stan Bingham	CHARITABLE SOLICITATIONS/INFORM THE PUBLIC.	*SR	Ch. SL 2003-373	04-01-03	04-16-03
S0687	Scott Thomas	FELONY DEATH/SERIOUS INJURY BY VEHICLE.	S	Re-ref Com On Appropriations/ Base Budget	04-02-03	04-24-03
S0692	Scott Thomas	TERROR RESPONSE PLANS.	*SR	Ch. SL 2003-180	04-02-03	04-24-03
S0693	Scott Thomas	AMEND ENHANCED SENTENCES LAWS.	*SR	Ch. SL 2003-378	04-02-03	04-23-03
S0694=	Scott Thomas	ANALOGUES/SCHEDULE I CONTROLLED SUBSTANCE.	*SR	Ch. SL 2003-249	04-02-03	04-30-03
S0707	Fern Shubert	REPEAT MISD. LARCENY.	S	Re-ref Com On Appropriations/ Base Budget	04-02-03	04-23-03
S0708	Fern Shubert	FIRE DEPT. CRIM. BACKGROUND CHECKS.	*SR	Ch. SL 2003-182	04-02-03	04-23-03
S0716	Fletcher L. Hart	REVISED UNIFORM ARBITRATION ACT.	*SR	Ch. SL 2003-345	04-02-03	04-24-03
S0718	Kay R. Hagan	AMEND DOMESTIC VIOLENCE LAWS/TEMP. CUSTODY.	*S	Ref To Com On Judiciary I	04-03-03	04-30-03
S0721	Eleanor Kinnaird	POST-ADOPTION	*S	Ref To Com On	04-03-03	04-30-03

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2003-2004 Biennium

Bill	Introducer	Short Title		Latest Action	In Date	Out Date
		FUEL MARKETING ACT.		Finance		
H1219	Hackney	CLARIFY DEF. OF DIVISIBLE PROPERTY/ EQU. DIST.	S	Ref To Com On Judiciary II	05-05-03	
H1366	Insko	INVOLUNTARY COMMITMENT WARRANT CLARIFICATION.	SR	Ch. SL 2004-23	06-01-04	06-15-04
H1373=	Saunders	INCREASE PENALTY-TRANSIT OPERATOR ASSAULT.	*SR	Ch. SL 2004-26	06-01-04	06-15-04
H1453	Moore	DISCHARGING FIREARM ON SCHOOL PROPERTY.	*S	Concurred In S/ Com Sub	06-30-04	07-07-04
H1518	Eddins	REQUIRE PAYMENT OF RESTITUTION FOR EXPUNCTION.	*S	Pres. To Gov. 7/ 13/2004	06-14-04	06-30-04
$ H1665	**Frye**	**VENUE FOR JUVENILE HEARINGS.**	***S**	**Reptd Fav**	**07-02-04**	**07-15-04**
S0020	Stan Bingham	REGULATE PROFESSIONAL EMPLOYER ORGANIZATION.	*S	Concurred In H/ com Sub	02-10-03	06-12-03
S0033=	Scott Thomas	CONCEALED HANDGUN RECIPROCITY.	*SR	Ch. SL 2003-199	02-13-03	03-18-03
S0057	Patrick J. Balla	MUNICIPAL WHEEL LOCK AUTHORIZATION.	*SR	Ch. SL 2003-240	02-17-03	03-26-03
S0117=	Tom Apodaca	THE LARRY T. JUSTUS WESTERN JUSTICE ACADEMY.	*SR	Ch. SL 2003-289	02-20-03	03-25-03
S0135=	Eric Miller Reev	CRIMINAL UNAUTHORIZED RECORDINGS.	S	Ref To Com On Judiciary II	02-24-03	
S0145	James Forrester	PHYSICIAN-ASSISTED SUICIDE.	S	Re-ref Com On Judiciary II	02-26-03	
S0226=	William R. Purce	UNAUTHORIZED ADMIN. MEDS. BY CHILD CARE FAC.	*SR	Ch. SL 2003-406	03-05-03	04-08-03
S0230=	Fletcher L. Hart	REPEAL UCC ARTICLE ON BULK SALES.	*S	Pres. To Gov. 7/9/ 2004	02-26-03	03-25-03
S0230=	Fletcher L. Hart	REPEAL UCC ARTICLE ON BULK SALES.	*S	Pres. To Gov. 7/9/ 2004	06-24-03	06-21-04
S0251	Austin M. Allran	PROHIBIT REBIRTHING.	*SR	Ch. SL 2003-205	03-19-03	04-01-03
S0263	Andrew C. Brock	DRIVERS LICENSE EXPIRES WHEN VISA EXPIRES.	S	Ref To Com On Judiciary II	03-03-03	
S0275=	Fletcher L. Hart	SECURITIES TRANSFER ON DEATH.	S	Re-ref Com On Finance	03-04-03	03-26-03
S0293	Scott Thomas	SALES REPRESENTATIVE COMMISSIONS REVISIONS.	*SR	Ch. SL 2003-331	03-05-03	04-02-03
S0323	Fletcher L. Hart	GEN. CONTRS/PROTECT INFO/CLARIFY INJ. RELIEF.	*SR	Ch. SL 2003-97	03-06-03	04-16-03
S0331	Austin M. Allran	FAMILY PROTECTION ACT.	S	Ref To Com On Judiciary II	03-10-03	
S0353=	Stan Bingham	CHARITABLE SOLICITATIONS/REQUIRE DISCLOSURE.	*S	Ref To Com On Ways and Means	03-11-03	03-26-03
S0354=	Fletcher L. Hart	TECHNICAL CORRECTIONS ACT.	S	Ref To Com On Judiciary II	03-11-03	
S0390	Fletcher L. Hart	MODERNIZE JUDGMENT	S	Ref To Com On	03-12-03	04-09-03

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2003-2004 Biennium

Bill	Introducer	Short Title		Latest Action	In Date	Out Date
H0024	McCombs	VETERANS ADMINISTRATION POLICE OFFICERS.	SR	Ch. SL 2003-36	03-17-03	05-06-03
H0058	C. Wilson	VALIDATE CERTAIN NOTARIAL ACTS.	SR	Ch. SL 2003-38	03-10-03	05-06-03
H0147	Gulley	LEFT TURN ON RED.	*S	Conf Com Appointed	05-05-03	05-08-03
H0147	Gulley	LEFT TURN ON RED.	*S	Conf Com Appointed	05-12-03	06-04-03
$ H0281=	**Culpepper**	**TECHNICAL CORRECTIONS ACT.**	***S**	**Conf Com Appointed**	**04-28-03**	**06-02-03**
H0304	Setzer	STALKING/SUPERVISED PROBATION IS MINIMUM.	*SR	Ch. SL 2003-181	03-25-03	05-29-03
H0352	Haire	DRUG SCREENING & ASSESSMENT.-AB	SR	Ch. SL 2003-141	04-23-03	05-27-03
H0636	Munford	MODERNIZE JUDGMENT DOCKETING LAWS.	*SR	Ch. SL 2003-59	04-09-03	05-13-03
H0637	Munford	AMEND POWERS/SETTLOR OF REVOCABLE TRUST.	*SR	Ch. SL 2003-225	04-10-03	06-03-03
H0656	Culpepper	AMEND TRUST ADMINISTRATION ACT.	*SR	Ch. SL 2003-261	05-05-03	06-03-03
H0689	Glazier	CONFORM EVIDENCE RULE 103.	SR	Ch. SL 2003-101	04-24-03	05-15-03
H0785	Haire	RULES OF CIVIL PROC/ REWRITE RULE 45.	*SR	Ch. SL 2003-276	05-01-03	06-09-03
H0798=	Moore	SECURITIES TRANSFER ON DEATH.	S	Re-ref Com On Finance	04-23-03	05-06-03
H0824	Allred	DOT BRIDGE ENCROACHMENTS.	*SR	Ch. SL 2003-267	06-04-03	06-09-03
H0826=	Insko	AMEND MH CONFIDENTIALITY STATUTES.	*SR	Ch. SL 2003-313	04-29-03	06-09-03
H0925	Luebke	COUNTY APPEALS OF CERTAIN JUVENILE ORDERS.	SR	Ch. SL 2003-171	05-01-03	06-03-03
H0950	Hackney	JUVENILE COMMITMENT TO DJJDP.	*SR	Ch. SL 2003-53	05-05-03	05-13-03
H0963	Warner	HIT AND RUN - 2 YEAR LICENSE REVOCATION.	*SR	Ch. SL 2003-394	05-05-03	06-03-03
H0965	Hill	INCREASE PENALTIES FOR FAILURE TO YIELD.	*S	Ratified	05-05-03	06-05-03
H0965	Hill	INCREASE PENALTIES FOR FAILURE TO YIELD.	*S	Ratified	06-09-03	06-30-04
H1037	Luebke	AMEND JUVENILE LAW.	*SR	Ch. SL 2003-297	05-05-03	06-09-03
H1047	Hackney	ABOLISH ALIENATION OF AFFECTION/CRIM. CONV.	S	Re-ref Com On Rules and Operations of the Senate	05-05-03	05-12-03
H1048	Ross	JUVENILE CODE REVISIONS/CT. IMPROVEMENT PROJ.	*SR	Ch. SL 2003-140	05-01-03	05-27-03
H1123	Farmer-Butterfie	GUARDIANSHIP AMENDMENTS.	*SR	Ch. SL 2003-236	05-05-03	06-04-03
H1151		IMPROVE RULE-MAKING PROCESS.	*SR	Ch. SL 2003-229	05-05-03	05-27-03
H1175	Michaux	FAIR HOUSING COMPLAINTS.	*SR	Ch. SL 2003-136	04-29-03	05-21-03
H1203=	Gibson	AMEND/STUDY MOTOR	*S	Re-ref Com On	05-27-04	07-13-04

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Bill	Introducer	Short Title		Latest Action	In Date	Out Date
		PRIVILEGES.		Judiciary II		
S0722	Eleanor Kinnaird	DISPLAY OF AMERICAN FLAG.	*S	Re-ref Com On Rules, Calendar, and Operations of the House	04-03-03	04-23-03
S0748	R. B. Sloan, Jr.	ONLY EASEMENTS.	S	Ref To Com On Judiciary II	04-03-03	
S0766	Scott Thomas	PRETRIAL RELEASE PROGRAM/STATEWIDE UNIFORMITY.	S	Ref To Com On Judiciary II	04-03-03	
S0774	Walter H. Dalton	LIABILITY AT PUBLIC SKATEBOARD PARKS.	*SR	Ch. SL 2003-334	04-03-03	04-16-03
S0784	Fletcher L. Hart	JUDGMENT BONDING LEGISLATION.	*SR	Ch. SL 2003-19	04-03-03	04-08-03
S0798	Eleanor Kinnaird	CITY/COUNTY ANTIDISCRIMINATION ORDINANCES.	S	Ref To Com On Judiciary II	04-03-03	
S0867	Kay R. Hagan	ARSON-FIREFIGHTER INJURY/NEW BOMB OFFENSE.	*S	Failed Concur In Com Sub	04-03-03	04-30-03
S0868=	Kay R. Hagan	CONSUMER'S RIGHT TO KNOW AND ACT/QBI CREDIT	*S	Re-ref Com On Rules, Calendar, and Operations of the House	04-03-03	04-24-03
S0881	Fletcher L. Hart	PERMIT TOBACCO PAYMENT W/O REOPENING ESTATE.	*SR	Ch. SL 2003-295	04-03-03	04-22-03
S0882=	Fletcher L. Hart	DUE PROCESS FOR PHYSICIANS.	S	Ref To Com On Judiciary II	04-03-03	
S0901	Hugh Webster	PROTECT RIGHTS/MOTION TO STRIKE.	S	Ref To Com On Judiciary II	04-03-03	
S0925	Tony Rand	STRENGTHEN SECURITY FRAUD ENFORCEMENT LAWS.	*SR	Ch. SL 2003-413	04-03-03	04-23-03
S0956	Fletcher L. Hart	IMPROVE RULEMAKING PROCESS.	S	Ref To Com On Judiciary II	04-03-03	
S0962	A. B Swindell	REQUIRE AFFIDAVITS OF BAIL BONDSMEN.	SR	Ch. SL 2003-148	04-03-03	04-16-03
S0965	Walter H. Dalton	AMEND CONSTITUTION/ SCH. FINES & FORFEITURES.	*SR	Ch. SL 2003-423	04-03-03	04-16-03
S0969	Eleanor Kinnaird	SEXUAL PRIVACY ACT.	S	Ref To Com On Judiciary II	04-03-03	
S1054	Walter H. Dalton	INCREASE METHAMPHETAMINE PENALTIES.	*S	Concurred In H/ com Sub	05-12-04	05-27-04
S1124	Fletcher L. Hart	AMEND STRUCTURED SENTENCING/POST RELEASE SUPV.	*S	Re-ref Com On Judiciary II	05-17-04	06-08-04
S1124	Fletcher L. Hart	AMEND STRUCTURED SENTENCING/POST RELEASE SUPV.	*S	Re-ref Com On Judiciary II	06-16-04	
S1167=	Fletcher L. Hart	CONDO AND PLANNED COMM. CLARIFICATIONS.	*S	Pres. To Gov. 7/7/ 2004	05-19-04	06-08-04
S1225=	Fletcher L. Hart	2004 TECHNICAL CORRECTIONS ACT.	*S	Engrossed	05-20-04	05-27-04

'$' indicates the bill is an appropriation bill.
A bold line indicates the bill is an appropriation bill.
'*' indicates that the text of the original bill was changed by some action.
'=' indicates that the original bill is identical to another bill.

Gerry Johnson (Sen. Hartsell)

From: Gerry Johnson (Sen. Hartsell)
Sent: Wednesday, May 19, 2004 3:25 PM
To: Sen. Walter Dalton
Subject: May 25, 2004 J II Meeting Notice

Principal Clerk _____
Reading Clerk _____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	May 25, 2004	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 1054	Increase Methamphetamine Penalties.	Senator Dalton
SB 1124	Amend Structured Sentencing/Post Release Supv.	Senator Hartsell

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Tuesday, May 25, 2004, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 1054	Increase Methamphetamine Penalties.	Senator Dalton
SB 1124	Amend Structured Sentencing/Post Release Supv.	Senator Hartsell

Other Business

Adjournment

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

CORRECTED REPORT

Thursday, May 27, 2004

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **1054** Increase Methamphetamine Penalties.

Draft Number:	PCS 85342
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	Yes

TOTAL REPORTED: 1

Committee Clerk Comments:

Corrects date of report

Judiciary II Committee

Minutes

May 25, 2004

The meeting of the Senate Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with fifteen members present.

Senator Hartsell introduced and welcomed Senators Dannelly, Reeves, and Swindell as new members of the Committee.

SB 1124 (Amend Structured Sentencing/Post Release Supervision) As Senator Hartsell was the primary sponsor of the bill, he invited Senator Allran to preside. Senator Hartsell introduced the proposed committee substitute and Senator Webster moved that it be adopted. All voted and the motion carried. Senator Hartsell explained the bill and then introduced Mr. John H. Madler, of the North Carolina Sentencing and Policy Advisory Commission for further explanation and comments. Questions by Senators Kinnaird, Thomas, Kerr, Shubert, Webster Dannelly, Bingham, and Dorsett were answered by Mr. Madler, Senator Hartsell and Kory Goldsmith, Staff Attorney. Senator Thomas moved to amend the bill and explained his amendment. After discussion, Senator Shubert requested a friendly modification to the amendment. This was accepted by Senator Thomas. After additional questions and discussion by Senators Webster, Bingham, Kinnaird and Kerr, Senator Thomas moved for adoption of the amendment. All voted and the amendment passed. No vote was taken on the bill.

The Committee recessed to reconvene at 2:00 pm.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

Judiciary II Committee

Minutes

May25, 2004
(2:00 PM Meeting)

The afternoon meeting of the Judiciary II Committee was called to order by Senator Fletcher Hartsell, Chairman, with thirteen members attending.

SB 1054 (Increase Methamphetamine Penalties) Senator Hartsell welcomed Attorney General Roy Cooper who gave a Power Point presentation on the manufacture and dangers of Methamphetamine with recommendations from his office. Questions by Senator Webster were answered by Agent Jerry Ratley of the State Bureau of Investigation and Attorney General Cooper.

Senator Dalton was recognized to explain the bill. Senator Thomas presented an amendment and moved for adoption. All voted and the motion carried. Senator Thomas presented an additional amendment and moved for adoption. Senator Dalton explained the amendment. Questions by Senators Bingham, Shubert, Kerr, Webster and Thomas were answered by Mr. Gregg McCloud, of the Attorney General's Office, Senators Dalton and Hartsell and Mr. J Steven Cline, of the North Carolina Department of Health and Human Services Division of Public Health. After much discussion, Senator Hartsell called for a vote on the amendment. All voted and the motion passed.

Senator Dalton's explanation of the bill after the amendments was accepted as a motion for a favorable report of the bill as amended and placed into a new committee substitute, unfavorable as to the original bill. All voted and the motion carried.

Persons speaking on the bill were: Mr. Jeff Hunt, District Attorney of Rutherford County and President of the District Attorneys' Association, Mr. Edmond Caldwell, Sheriff's Association, Sheriff Shook of Watauga County, and Mr. Darin South, Deep Gap Fire Department, Watauga County.

There being no further business, the meeting was adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 1

SENATE BILL 1124

Short Title:	Amend Structured Sentencing/Post Release Supv.	(Public)
Sponsors:	Senators Hartsell; and Carpenter.	
Referred to:	Judiciary II.	

May 17, 2004

A BILL TO BE ENTITLED

AN ACT TO AMEND THE STRUCTURED SENTENCING LAWS WITH REGARD TO POST-RELEASE SUPERVISION AS RECOMMENDED BY THE NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-1340.11 is amended by adding a new subdivision to read:

"(6a) Post-release supervision. – The time for which a sentenced prisoner is supervised in the community following the termination of the prisoner's maximum prison term, controlled by the rules and conditions of Article 84A of this Chapter."

SECTION 2. G.S. 15A-1340.13(b) reads as rewritten:

"(b) Procedure Generally; Requirements of Judgment; Kinds of Sentences. – Before imposing a sentence, the court shall determine the prior record level for the offender pursuant to G.S. 15A-1340.14. The sentence shall contain a sentence disposition specified for the class of offense and prior record level, and its minimum term of imprisonment shall be within the range specified for the class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment. For Class B1, B2, C, D, and E felony offenses, the sentence shall include a period of post-release supervision pursuant to G.S. 15A-1340.18. The kinds of sentence dispositions are active punishment, intermediate punishment, and community punishment."

SECTION 3. G.S. 15A-1340.17 reads as rewritten:

"**§ 15A-1340.17. Punishment limits for each class of offense and prior record level.**

(a) Offense Classification; Default Classifications. – The offense classification is as specified in the offense for which the sentence is being imposed. If the offense is a felony for which there is no classification, it is a Class I felony.

(b) Fines. – Any judgment that includes a sentence of imprisonment may also include a fine. If a community punishment is authorized, the judgment may consist of a

fine only. Additionally, when the defendant is other than an individual, the judgment may consist of a fine only. Unless otherwise provided, the amount of the fine is in the discretion of the court.

(c) Punishments for Each Class of Offense and Prior Record Level; Punishment Chart Described. – The authorized punishment for each class of offense and prior record level is as specified in the chart ~~below.~~ below and under G.S. 15A-1340.18. Prior record levels are indicated by the Roman numerals placed horizontally on the top of the chart. Classes of offense are indicated by the letters placed vertically on the left side of the chart. Each cell on the chart contains the following components:

(1) A sentence disposition or dispositions: "C" indicates that a community punishment is authorized; "I" indicates that an intermediate punishment is authorized; "A" indicates that an active punishment is authorized; and "Life Imprisonment Without Parole" indicates that the defendant shall be imprisoned for the remainder of the prisoner's natural life.

(2) A presumptive range of minimum durations, if the sentence of imprisonment is neither aggravated or mitigated; any minimum term of imprisonment in that range is permitted unless the court finds pursuant to G.S. 15A-1340.16 that an aggravated or mitigated sentence is appropriate. The presumptive range is the middle of the three ranges in the cell.

(3) A mitigated range of minimum durations if the court finds pursuant to G.S. 15A-1340.16 that a mitigated sentence of imprisonment is justified; in such a case, any minimum term of imprisonment in the mitigated range is permitted. The mitigated range is the lower of the three ranges in the cell.

(4) An aggravated range of minimum durations if the court finds pursuant to G.S. 15A-1340.16 that an aggravated sentence of imprisonment is justified; in such a case, any minimum term of imprisonment in the aggravated range is permitted. The aggravated range is the higher of the three ranges in the cell.

PRIOR RECORD LEVEL

	I 0 Pts	II 1-4 Pts	III 5-8 Pts	IV 9-14 Pts	V 15-18 Pts	VI 19+ Pts	
A	Life Imprisonment Without Parole or Death as Established by Statute						
	A 240-300	A 288-360	A 336-420	A 384-480	A Life Imprisonment Without Parole	A	DISPOSITION Aggravated
B1	192-240 144-192	230-288 173-230	269-336 202-269	307-384 230-307	346-433 260-346	384-480 288-384	PRESUMPTIVE Mitigated
	A 157-196	A 189-237	A 220-276	A 251-313	A 282-353	A 313-392	DISPOSITION Aggravated

B2	125-157	151-189	176-220	201-251	225-282	251-313	PRESUMPTIVE
	94-125	114-151	132-176	151-201	169-225	188-251	Mitigated
	A	A	A	A	A	A	DISPOSITION
	73-92	100-125	116-145	133-167	151-188	168-210	Aggravated
C	58-73	80-100	93-116	107-133	121-151	135-168	PRESUMPTIVE
	44-58	60-80	70-93	80-107	90-121	101-135	Mitigated
	A	A	A	A	A	A	DISPOSITION
	64-80	77-95	103-129	117-146	133-167	146-183	Aggravated
D	51-64	61-77	82-103	94-117	107-133	117-146	PRESUMPTIVE
	38-51	46-61	61-82	71-94	80-107	88-117	Mitigated
	I/A	I/A	A	A	A	A	DISPOSITION
	25-31	29-36	34-42	46-58	53-66	59-74	Aggravated
E	20-25	23-29	27-34	37-46	42-53	47-59	PRESUMPTIVE
	15-20	17-23	20-27	28-37	32-42	35-47	Mitigated
	I/A	I/A	I/A	A	A	A	DISPOSITION
	16-20	19-24	21-26	25-31	34-42	39-49	Aggravated
F	13-16	15-19	17-21	20-25	27-34	31-39	PRESUMPTIVE
	10-13	11-15	13-17	15-20	20-27	23-31	Mitigated
	I/A	I/A	I/A	I/A	A	A	DISPOSITION
	13-16	15-19	16-20	20-25	21-26	29-36	Aggravated
G	10-13	12-15	13-16	16-20	17-21	23-29	PRESUMPTIVE
	8-10	9-12	10-13	12-16	13-17	17-23	Mitigated
	C/I/A	I/A	I/A	I/A	I/A	A	DISPOSITION
	6-8	8-10	10-12	11-14	15-19	20-25	Aggravated
H	5-6	6-8	8-10	9-11	12-15	16-20	PRESUMPTIVE
	4-5	4-6	6-8	7-9	9-12	12-16	Mitigated
	C	C/I	I	I/A	I/A	I/A	DISPOSITION
	6-8	6-8	6-8	8-10	9-11	10-12	Aggravated
I	4-6	4-6	5-6	6-8	7-9	8-10	PRESUMPTIVE
	3-4	3-4	4-5	4-6	5-7	6-8	Mitigated

(d) Maximum Sentences Specified for ~~Class F through Class I Felonies.~~ Class B1 Felonies through Class I Felonies for Minimum Terms up to 346 Month. – Unless provided otherwise in a statute establishing a punishment for a specific crime, for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table below for Class ~~F~~ B1 through Class I felonies. The first figure in each cell in the table is the minimum term and the second is the maximum term.

3-4	4-5	5-6	6-8	7-9	8-10	9-11	10-12
11-14	12-15	13-16	14-17	15-18	16-20	17-21	18-22
19-23	20-24	21-26	22-27	23-28	24-29	25-30	26-32
27-33	28-34	29-35	30-36	31-38	32-39	33-40	34-41

35-42	36-44	37-45	38-46	39-47	40-48	41-50	42-51
43-52	44-53	45-54	46-56	47-57	48-58	49-59	50-60
51-61	52-62	53-64	54-65	55-66	56-67	57-68	58-70
59-71	60-72	61-73	62-74	63-76	64-77	65-78	66-79
67-80	68-82	69-83	70-84	71-85	72-86	73-88	74-89
75-90	76-91	77-92	78-94	79-95	80-96	81-97	82-98
83-100	84-101	85-102	86-103	87-104	88-106	89-107	90-108
91-109	92-110	93-112	94-113	95-114	96-115	97-116	98-118
99-119	100-120	101-121	102-122	103-124	104-125	105-126	106-127
107-128	108-130	109-131	110-132	111-133	112-134	113-136	114-137
115-138	116-139	117-140	118-142	119-143	120-144	121-145	122-146
123-148	124-149	125-150	126-151	127-152	128-154	129-155	130-156
131-157	132-158	133-160	134-161	135-162	136-163	137-164	138-166
139-167	140-168	141-169	142-170	143-172	144-173	145-174	146-175
147-176	148-178	149-179	150-180	151-181	152-182	153-184	154-185
155-186	156-187	157-188	158-190	159-191	160-192	161-193	162-194
163-196	164-197	165-198	166-199	167-200	168-202	169-203	170-204
171-205	172-206	173-208	174-209	175-210	176-211	177-212	178-214
179-215	180-216	181-217	182-218	183-220	184-221	185-222	186-223
187-224	188-226	189-227	190-228	191-229	192-230	193-232	194-233
195-234	196-235	197-236	198-238	199-239	200-240	201-241	202-242
203-244	204-245	205-246	206-247	207-248	208-250	209-251	210-252
211-253	212-254	213-256	214-257	215-258	216-259	217-260	218-262
219-263	220-264	221-265	222-266	223-268	224-269	225-270	226-271
227-272	228-274	229-275	230-276	231-277	232-278	233-280	234-281
235-282	236-283	237-284	238-286	239-287	240-288	241-289	242-290
243-292	244-293	245-294	246-295	247-296	248-298	249-299	250-300
251-301	252-302	253-304	254-305	255-306	256-307	257-308	258-310
259-311	260-312	261-313	262-314	263-316	264-317	265-318	266-319
267-320	268-322	269-323	270-324	271-325	272-326	273-328	274-329
275-330	276-331	277-332	278-334	279-335	280-336	281-337	282-338
283-340	284-341	285-342	286-343	287-344	288-346	289-347	290-348
291-349	292-350	293-352	294-353	295-354	296-355	297-356	298-358
299-359	300-360	301-361	302-362	303-364	304-365	305-366	306-367
307-368	308-370	309-371	310-372	311-373	312-374	313-376	314-377
315-378	316-379	317-380	318-382	319-383	320-384	321-385	322-386
323-388	324-389	325-390	326-391	327-392	328-394	329-395	330-396
331-397	332-398	333-400	334-401	335-402	336-403	337-404	338-406
339-407	340-408	341-409	342-410	343-412	344-413	345-414	346-415

~~(e) Maximum Sentences Specified for Class B1 through Class E Felonies for Minimum Terms up to 339 Months. Unless provided otherwise in a statute establishing a punishment for a specific crime, for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding~~

~~maximum term of imprisonment, also expressed in months, is as specified in the table below for Class B1 through Class E felonies. The first figure in each cell of the table is the minimum term and the second is the maximum term.~~

~~15-27~~	~~16-29~~	~~17-30~~	~~18-31~~	~~19-32~~	~~20-33~~	~~21-35~~	~~22-36~~
~~23-37~~	~~24-38~~	~~25-39~~	~~26-41~~	~~27-42~~	~~28-43~~	~~29-44~~	~~30-45~~
~~31-47~~	~~32-48~~	~~33-49~~	~~34-50~~	~~35-51~~	~~36-53~~	~~37-54~~	~~38-55~~
~~39-56~~	~~40-57~~	~~41-59~~	~~42-60~~	~~43-61~~	~~44-62~~	~~45-63~~	~~46-65~~
~~47-66~~	~~48-67~~	~~49-68~~	~~50-69~~	~~51-71~~	~~52-72~~	~~53-73~~	~~54-74~~
~~55-75~~	~~56-77~~	~~57-78~~	~~58-79~~	~~59-80~~	~~60-81~~	~~61-83~~	~~62-84~~
~~63-85~~	~~64-86~~	~~65-87~~	~~66-89~~	~~67-90~~	~~68-91~~	~~69-92~~	~~70-93~~
~~71-95~~	~~72-96~~	~~73-97~~	~~74-98~~	~~75-99~~	~~76-101~~	~~77-102~~	~~78-103~~
~~79-104~~	~~80-105~~	~~81-107~~	~~82-108~~	~~83-109~~	~~84-110~~	~~85-111~~	~~86-113~~
~~87-114~~	~~88-115~~	~~89-116~~	~~90-117~~	~~91-119~~	~~92-120~~	~~93-121~~	~~94-122~~
~~95-123~~	~~96-125~~	~~97-126~~	~~98-127~~	~~99-128~~	~~100-129~~	~~101-131~~	~~102-132~~
~~103-133~~	~~104-134~~	~~105-135~~	~~106-137~~	~~107-138~~	~~108-139~~	~~109-140~~	~~110-141~~
~~111-143~~	~~112-144~~	~~113-145~~	~~114-146~~	~~115-147~~	~~116-149~~	~~117-150~~	~~118-151~~
~~119-152~~	~~120-153~~	~~121-155~~	~~122-156~~	~~123-157~~	~~124-158~~	~~125-159~~	~~126-161~~
~~127-162~~	~~128-163~~	~~129-164~~	~~130-165~~	~~131-167~~	~~132-168~~	~~133-169~~	~~134-170~~
~~135-171~~	~~136-173~~	~~137-174~~	~~138-175~~	~~139-176~~	~~140-177~~	~~141-179~~	~~142-180~~
~~143-181~~	~~144-182~~	~~145-183~~	~~146-185~~	~~147-186~~	~~148-187~~	~~149-188~~	~~150-189~~
~~151-191~~	~~152-192~~	~~153-193~~	~~154-194~~	~~155-195~~	~~156-197~~	~~157-198~~	~~158-199~~
~~159-200~~	~~160-201~~	~~161-203~~	~~162-204~~	~~163-205~~	~~164-206~~	~~165-207~~	~~166-209~~
~~167-210~~	~~168-211~~	~~169-212~~	~~170-213~~	~~171-215~~	~~172-216~~	~~173-217~~	~~174-218~~
~~175-219~~	~~176-221~~	~~177-222~~	~~178-223~~	~~179-224~~	~~180-225~~	~~181-227~~	~~182-228~~
~~183-229~~	~~184-230~~	~~185-231~~	~~186-233~~	~~187-234~~	~~188-235~~	~~189-236~~	~~190-237~~
~~191-239~~	~~192-240~~	~~193-241~~	~~194-242~~	~~195-243~~	~~196-245~~	~~197-246~~	~~198-247~~
~~199-248~~	~~200-249~~	~~201-251~~	~~202-252~~	~~203-253~~	~~204-254~~	~~205-255~~	~~206-257~~
~~207-258~~	~~208-259~~	~~209-260~~	~~210-261~~	~~211-263~~	~~212-264~~	~~213-265~~	~~214-266~~
~~215-267~~	~~216-269~~	~~217-270~~	~~218-271~~	~~219-272~~	~~220-273~~	~~221-275~~	~~222-276~~
~~223-277~~	~~224-278~~	~~225-279~~	~~226-281~~	~~227-282~~	~~228-283~~	~~229-284~~	~~230-285~~
~~231-287~~	~~232-288~~	~~233-289~~	~~234-290~~	~~235-291~~	~~236-293~~	~~237-294~~	~~238-295~~
~~239-296~~	~~240-297~~	~~241-299~~	~~242-300~~	~~243-301~~	~~244-302~~	~~245-303~~	~~246-305~~
~~247-306~~	~~248-307~~	~~249-308~~	~~250-309~~	~~251-311~~	~~252-312~~	~~253-313~~	~~254-314~~
~~255-315~~	~~256-317~~	~~257-318~~	~~258-319~~	~~259-320~~	~~260-321~~	~~261-323~~	~~262-324~~
~~263-325~~	~~264-326~~	~~265-327~~	~~266-329~~	~~267-330~~	~~268-331~~	~~269-332~~	~~270-333~~
~~271-335~~	~~272-336~~	~~273-337~~	~~274-338~~	~~275-339~~	~~276-341~~	~~277-342~~	~~278-343~~
~~279-344~~	~~280-345~~	~~281-347~~	~~282-348~~	~~283-349~~	~~284-350~~	~~285-351~~	~~286-353~~
~~287-354~~	~~288-355~~	~~289-356~~	~~290-357~~	~~291-359~~	~~292-360~~	~~293-361~~	~~294-362~~
~~295-363~~	~~296-365~~	~~297-366~~	~~298-367~~	~~299-368~~	~~300-369~~	~~301-371~~	~~302-372~~
~~303-373~~	~~304-374~~	~~305-375~~	~~306-377~~	~~307-378~~	~~308-379~~	~~309-380~~	~~310-381~~
~~311-383~~	~~312-384~~	~~313-385~~	~~314-386~~	~~315-387~~	~~316-389~~	~~317-390~~	~~318-391~~
~~319-392~~	~~320-393~~	~~321-395~~	~~322-396~~	~~323-397~~	~~324-398~~	~~325-399~~	~~326-401~~
~~327-402~~	~~328-403~~	~~329-404~~	~~330-405~~	~~331-407~~	~~332-408~~	~~333-409~~	~~334-410~~

~~335-411 336-413 337-414 338-415 339-416~~

(e1) Maximum Sentences Specified for Class B1 through Class ~~E~~ I Felonies for Minimum Terms of ~~340~~ 347 Months or More. – Unless provided otherwise in a statute establishing a punishment for a specific crime, when the minimum sentence is ~~340~~ 347 months or more, the corresponding maximum term of imprisonment shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest ~~month, plus nine additional months.~~ month."

SECTION 4. Article 81B of Chapter 15A of the General Statutes is amended by adding a new section to read:

"**§ 15A-1340.18. Post-Release supervision.**

(a) Except as provided in subsection (b) of this section, the court must also impose a period of post-release supervision to follow the term of imprisonment and an additional term of imprisonment to be served upon revocation of the period of post-release supervision on all offenders convicted of a Class B1, B2, C, D, or E felony offense, including offenders convicted of a Class B1, B2, C, D, or E felony offense under G.S. 90-95(h). The period of supervision and the term of imprisonment are as follows:

(1) Period of supervision – The period of post-release supervision shall be nine months, unless the offense is a Class B1 through E offense for which registration is required pursuant to Article 27A of Chapter 14 of the General Statutes. For offenses subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the period of post-release supervision is five years.

(2) Term of imprisonment – The term of imprisonment upon revocation of post-release supervision shall be for a minimum term of seven months and a maximum term of nine months.

(b) If an offender is convicted of a Class B1, B2, C, D, or E felony offense and receives a sentence of imprisonment, then the court may decline to impose post-release supervision if it makes a finding of facts which indicate post-release supervision would not be necessary in that case. If an offender is convicted of a Class B1 felony offense and receives a sentence of life imprisonment without parole, then post-release supervision shall not be imposed.

(c) If the court imposes an intermediate punishment on an offender who is required to receive post-release supervision under subsection (a) of this section, then the period of post-release supervision is suspended.

(d) Provisions of Article 84A of this Chapter apply to judgments entered pursuant to this section."

SECTION 5. G.S. 15A-1342(c) reads as rewritten:

"(c) Conditions; Suspended Sentence. – When the court places a convicted offender on probation, it must determine conditions of probation as provided in G.S. 15A-1343. In addition, it must impose a suspended sentence of imprisonment, determined as provided in Article 83, Imprisonment, which may be activated upon

violation of conditions of probation. Suspension of a term of imprisonment also suspends any period of post-release supervision that may be imposed for that offense."

SECTION 6. G.S. 15A-1344(d) reads as rewritten:

"(d) Extension and Modification; Response to Violations. – At any time prior to the expiration or termination of the probation period, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation. The probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation. The hearing may be held in the absence of the defendant, if he fails to appear for the hearing after a reasonable effort to notify him. If a convicted defendant violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions of G.S. 15A-1345, may continue him on probation, with or without modifying the conditions, may place the defendant on special probation as provided in subsection (e), or, if continuation, modification, or special probation is not appropriate, may revoke the probation and activate the suspended sentence and any period of post-release supervision imposed at the time of initial sentencing, if any, or may order that charges as to which prosecution has been deferred be brought to trial; provided that probation may not be revoked solely for conviction of a Class 3 misdemeanor. The court, before activating a sentence to imprisonment established when the defendant was placed on probation, may reduce the sentence, but the reduction shall be consistent with subsection (d1) of this section. A sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period unless the revoking judge specifies that it is to run consecutively with the other period."

SECTION 7. G.S. 15A-1354 reads as rewritten:

"**§ 15A-1354. Concurrent and consecutive terms of imprisonment.**

(a) Authority of Court. – When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. If not specified or not required by statute to run consecutively, sentences shall run concurrently.

(b) Effect of Consecutive Terms. – In determining the effect of consecutive sentences imposed under authority of this Article and the manner in which they will be served, the Department of Correction must treat the defendant as though he has been committed for a single term with the following incidents:

(1) The maximum prison sentence consists of the total of the maximum terms of the consecutive ~~sentences, less nine months for each of the second and subsequent sentences imposed for Class B through Class E felonies; and~~sentences; and

(2) The minimum term consists of the total of the minimum terms of the consecutive sentences.

(c) Post-Release Supervision. – When multiple periods of post-release supervision are imposed on a person, either at the same time or in addition to existing periods of supervision, the periods of post-release supervision are consolidated to run as a single period and begin at the conclusion of all terms of imprisonment."

SECTION 8. G.S. 15A-1368(a) reads as rewritten:

"(a) The following words have the listed meaning in this Article:

(1) Post-release supervision or supervision. – The time for which a sentenced prisoner is ~~released from prison before~~ supervised in the community following the termination of ~~his~~ the prisoner's maximum prison term, controlled by the rules and conditions of this Article. Purposes of post-release supervision include all or any of the following: to monitor and control the prisoner in the community, to assist the prisoner in reintegrating into society, to collect restitution and other court indebtedness from the prisoner, and to continue the prisoner's treatment or education.

(2) Supervisee. – A person released from incarceration and in the custody of the Department of Correction and Post-Release Supervision and Parole Commission on post-release supervision.

(3) Commission. – The Post-Release Supervision and Parole Commission, whose general authority is described in G.S. 143B-266.

(4) Minimum imposed term. – The minimum term of imprisonment imposed on an individual prisoner by a court judgment, as described in G.S. 15A-1340.13(c). When a prisoner is serving consecutive imprisonment terms, the minimum imposed term, for purposes of this Article, is the sum of all minimum terms imposed in the court judgment.

(5) Maximum imposed term. – The maximum term of imprisonment imposed on an individual prisoner by a court judgment, as described in G.S. 15A-1340.13(c). When a prisoner is serving consecutive prison terms, the maximum imposed term, for purposes of this Article, is the sum of all maximum terms imposed in the court judgment or ~~judgments, less nine months for each of the second and subsequent sentences imposed for Class B through Class E felonies.~~judgments."

SECTION 9. G.S. 15A-1368.1 reads as rewritten:

"§ 15A-1368.1. Applicability of Article 84A.

This Article applies to all felons in Class B1 through Class E sentenced to an active punishment under Article 81B of this ~~Chapter,~~ Chapter or G.S. 90-95(h), but does not apply to felons in Class B1 sentenced to life imprisonment without parole. Prisoners subject to Articles 85 and 85A of this Chapter are excluded from this Article's coverage."

SECTION 10. G.S. 15A-1368.2 reads as rewritten:

"§ 15A-1368.2. Post-release supervision eligibility and procedure.

(a) A prisoner to whom this Article applies shall be released from prison for post-release supervision on the date equivalent to his maximum imposed prison term ~~less nine months,~~ less any earned time awarded by the Department of Correction or the custodian of a local confinement facility under G.S. 15A-1340.13(d). If a prisoner has not been awarded any earned time, the prisoner shall be released for post-release supervision on the date equivalent to his maximum prison term less nine months.

(b) A prisoner shall not refuse post-release supervision.

(c) A supervisee's period of post-release supervision shall be for a period of nine months, unless the offense is ~~an~~ a Class B1 through E offense for which registration is required pursuant to Article 27A of Chapter 14 of the General Statutes. For offenses subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the period of post-release supervision is five years. The conditions of post-release supervision are as authorized in ~~G.S. 15A-1368.5.~~G.S. 15A-1368.4.

~~(d) A supervisee's period of post-release supervision may be reduced while the supervisee is under supervision by earned time awarded by the Department of Correction, pursuant to rules adopted in accordance with law. A supervisee is eligible to receive earned time credit toward the period of supervision for compliance with reintegrative conditions described in G.S. 15A-1368.5.~~

(e) Repealed by Session Laws 1997-237, s. 7.

(f) When a supervisee completes the period of post-release supervision, the sentence or sentences from which the supervisee was placed on post-release supervision are terminated."

SECTION 11. G.S. 15A-1368.3 reads as rewritten:

"**§ 15A-1368.3. Incidents of post-release supervision.**

(a) Conditionality. – Post-release supervision is conditional and subject to revocation.

(b) Modification. – The Commission may for good cause shown modify the conditions of post-release supervision at any time before the termination of the supervision period.

(c) Effect of Violation. – If the supervisee violates a condition, described in G.S. 15A-1368.4, at any time before the termination of the supervision period, the Commission may continue the supervisee on the existing supervision, with or without modifying the conditions, or if continuation or modification is not appropriate, may revoke post-release supervision as provided in G.S. 15A-1368.6 and reimprison the supervisee for a term consistent with the following requirements:

(1) The supervisee will be returned to prison ~~up to the time remaining on his maximum imposed term.~~for a minimum term of seven months and a maximum term of nine months.

(2) The supervisee shall not receive any credit for days on post-release supervision against the maximum term of imprisonment imposed by the court under G.S. 15A-1340.13.

(3) Pursuant to Article 19A of Chapter 15, the Department of Correction shall award a prisoner credit against any term of reimprisonment for all

time spent in custody as a result of revocation proceedings under G.S. 15A-1368.6.

(4) The prisoner is eligible to receive earned time credit against the maximum prison term as provided in G.S. 15A-1340.13(d) for time served in prison after the revocation.

(d) No Re-Release After Revocation of Post-Release Supervision. – A prisoner who has been reimprisoned prior to completing a post-release supervision period may ~~again~~ not be released again on post-release supervision by the ~~Commission subject to the provisions which govern initial release.~~Commission.

(e) Timing of Revocation. – The Commission may revoke post-release supervision for violation of a condition during the period of supervision. The Commission may also revoke post-release supervision following a period of supervision if:

(1) Before the expiration of the period of post-release supervision, the Commission has recorded its intent to conduct a revocation hearing; and

(2) The Commission finds that every reasonable effort has been made to notify the supervisee and conduct the hearing earlier. Prima facie evidence of reasonable effort to notify is the issuance of a temporary or conditional revocation order, as provided in G.S. 15A-1376, that goes unserved."

SECTION 12. G.S. 15A-1368.4 reads as rewritten:

"**§ 15A-1368.4. Conditions of post-release supervision.**

(a) In General. – Conditions of post-release supervision may be reintegrative in nature or designed to control the supervisee's behavior and to enforce compliance with law or judicial order. A supervisee may have his supervision period revoked for any violation of a controlling condition or for repeated violation of a reintegrative condition. ~~Compliance with reintegrative conditions may entitle a supervisee to earned time credits as described in G.S. 15A-1368.2(d).~~

(b) Required Condition. – The Commission shall provide as an express condition of every release that the supervisee not commit another crime during the period for which the supervisee remains subject to revocation. A supervisee's failure to comply with this controlling condition is a supervision violation for which the supervisee may face revocation as provided in G.S. 15A-1368.3.

(b1) Additional Required Conditions for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. –

In addition to the required condition set forth in subsection (b) of this section, for a supervisee who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, controlling conditions, violations of which may result in revocation of post-release supervision, are:

(1) Register as required by G.S. 14-208.7 if the offense is a reportable conviction as defined by G.S. 14-208.6(4).

(2) Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the Commission.

(3) Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.

(4) Not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor.

(5) Not reside in a household with any minor child if the offense is one in which there is evidence of physical or mental abuse of a minor, unless ~~a court of competent jurisdiction~~ the Post-Release Supervision and Parole Commission expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the child's best interest to allow the supervisee to reside in the same household with a minor child.

(c) Discretionary Conditions. – The Commission, in consultation with the Division of Community Corrections, may impose reintegrative or controlling conditions on a supervisee it believes reasonably necessary to ensure that the supervisee will lead a law-abiding life or to assist the supervisee to do so.

(d) Reintegrative Conditions. – Appropriate reintegrative conditions, for which ~~a supervisee may receive earned time credits against the leng... of the supervision period, and~~ repeated violation ~~that~~ may result in revocation of post-release supervision, are:

(1) Work faithfully at suitable employment or faithfully pursue a course of study or vocational training that will equip the supervisee for suitable employment.

(2) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(3) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on post-release supervision.

(4) Support the supervisee's dependents and meet other family responsibilities.

(5) In the case of a supervisee who attended a basic skills program during incarceration, continue attending a basic skills program in pursuit of a General Education Development Degree or adult high school diploma.

(6) Satisfy other conditions reasonably related to reintegration into society.

(e) Controlling Conditions. – Appropriate controlling conditions, violation of which may result in revocation of post-release supervision, are:

(1) Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for the supervisee by a licensed physician and is in the original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors, or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place

where such illegal drugs or controlled substances are sold, kept, or used.

(2) Comply with a court order to pay the costs of reintegrative treatment for a minor and a minor's parents or custodians where the offense involved evidence of physical, mental, or sexual abuse of a minor.

(3) Comply with a court order to pay court costs and costs for appointed counsel or public defender in the case for which the supervisee was convicted.

(4) Not possess a firearm, destructive device, or other dangerous weapon unless granted written permission by the Commission or a post-release supervision officer.

(5) Report to a post-release supervision officer at reasonable times and in a reasonable manner, as directed by the Commission or a post-release supervision officer.

(6) Permit a post-release supervision officer to visit at reasonable times at the supervisee's home or elsewhere.

(7) Remain within the geographic limits fixed by the Commission unless granted written permission to leave by the Commission or the post-release supervision officer.

(8) Answer all reasonable inquiries by the post-release supervision officer and obtain prior approval from the post-release supervision officer for any change in address or employment.

(9) Promptly notify the post-release supervision officer of any change in address or employment.

(10) Submit at reasonable times to searches of the supervisee's person by a post-release supervision officer for purposes reasonably related to the post-release supervision. The Commission shall not require as a condition of post-release supervision that the supervisee submit to any other searches that would otherwise be unlawful. Whenever the search consists of testing for the presence of illegal drugs, the supervisee may also be required to reimburse the Department of Correction for the actual cost of drug testing and drug screening, if the results are positive.

(11) Make restitution or reparation to an aggrieved party as provided in G.S. 148-57.1.

(12) Comply with an order from a court of competent jurisdiction regarding the payment of an obligation of the supervisee in connection with any judgment rendered by the court.

(13) Remain in one or more specified places for a specified period or periods each day, and wear a device that permits the defendant's compliance with the condition to be monitored electronically.

(14) Submit to supervision by officers assigned to the Intensive Post-Release Supervision Program established pursuant to G.S. 143B-262(c), and abide by the rules adopted for that Program.

(e1) Prohibited Conditions. – The Commission shall not impose community service as a condition of post-release supervision.

(e2) Additional Discretionary Controlling Conditions for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. – In addition to the discretionary conditions set forth in subsections (d) and (e) of this section, for a supervisee who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, appropriate discretionary controlling conditions, violations of which may result in revocation of post-release supervision, are that the offender:

(1) Reside at a residence to be approved by the supervising officer.

(2) Not have contact with the victim including, but not limited to: letters, phone calls, tapes, videos, computer, Internet, or visits. This includes any form of direct contact, or any form of contact through a third party.

(3) Not socialize or communicate with individuals under the age of 18 in work or social activities unless accompanied by a responsible adult who is aware of the abusive patterns and is approved in writing by the supervising officer.

(4) Submit to psychological and psychophysiological assessment at the direction of the supervising officer to assist in treatment planning and case monitoring.

(5) Participate in a sexual abuse treatment program approved by the supervising officer and complete the same to the full satisfaction of the treatment provider. Comply with all programs, including the polygraph examinations, to be used as a tool in conjunction with the treatment plan developed by the treatment provider. Program participation is defined as attendance at all meetings, prompt payment of fees, admission of responsibility for his or her offense, and progress toward reasonable treatment goals.

(6) Pay for the victim's mental health counseling expenses that are incurred as a result of the crime or offense as ordered by the court.

(7) Not possess any sexually stimulating or sexually oriented materials as deemed inappropriate by the supervising officer, nor patronize any place where such material or entertainment is the primary business.

(8) Not use, possess, control, distribute, sell, exchange, or collect pornography or child erotica, including any obtained through Internet access or telephonic communications.

(9) Submit at reasonable times to warrantless searches and seizures by the supervising officer of his person, vehicle, premises, computer equipment, and telephone records while he is present for the purposes of detecting or discovering pornography and/or erotica, which are reasonably related to his supervision.

(10) Not linger, loiter, nor spend time at locations where unsupervised persons under 18 years of age are present, including, but not limited to:

parks, playgrounds, school yards, arcades, or places frequented by children, activities, and such similar places whose purpose is the care, entertainment, or education of such persons under 18 years of age.

(11) Not work or volunteer for any business or organization(s) that provides services to or employs persons under 18 years of age. This includes, but is not limited to: arcades, babysitting, daycare agencies, schools, churches, playgrounds, and youth sporting activities or groups. The supervising officer must approve employment.

(12) Not associate with or have any contact with convicted sex offenders unless in a counseling group.

(13) When given authorization to visit another jurisdiction, present a travel letter to the local police department, have it signed, and return it to the supervising officer.

(14) Not purchase, possess, or consume alcoholic beverages or controlled substances. Submit to blood, breath, and urine testing for analysis for the presence of prohibited drugs or alcohol as requested by the supervising officer and pay any fees associated with testing.

(15) Not be alone with any minor child below the age of 18 years unless approved by his supervising officer in writing.

(16) Not engage in any sexual behavior with a minor child below the age of 18 years of age.

(17) Abide by a curfew at the discretion of the supervising officer.

(f) Required Supervision Fee. – The Commission shall require as a condition of post-release supervision that the supervisee pay a supervision fee of thirty dollars ($30.00) per month. The Commission may exempt a supervisee from this condition only if it finds that requiring payment of the fee is an undue economic burden. The fee shall be paid to the clerk of superior court of the county in which the supervisee was convicted. The clerk shall transmit any money collected pursuant to this subsection to the State to be deposited in the State's General Fund. In no event shall a supervisee be required to pay more than one supervision fee per month."

SECTION 13. G.S. 90-95(h) reads as rewritten:

"(h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article.

(1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 10 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved:

a. Is in excess of 10 pounds, but less than 50 pounds, such person shall be punished as a Class H felon and shall be sentenced to a minimum term of 25 months and a maximum term of 30 months in the State's prison and shall be fined not less than five thousand dollars ($5,000);

b. Is 50 pounds or more, but less than 2,000 pounds, such person shall be punished as a Class G felon and shall be sentenced to a

minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

c. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

d. Is 10,000 pounds or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~ 210 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined not less than two hundred thousand dollars ($200,000).

(2) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or the equivalent quantity, or more of methaqualone, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in methaqualone" and if the quantity of such substance or mixture involved:

a. Is 1,000 or more dosage units, or equivalent quantity, but less than 5,000 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 10,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~ 210 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined not less than two hundred thousand dollars ($200,000).

(3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or any coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, and any salt, isomer, salts of isomers, compound,

derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine) or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~ 210 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined at least two hundred fifty thousand dollars ($250,000).

(3a) Repealed by Session Laws 1999-370, s. 1.

(3b) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine or amphetamine shall be guilty of a felony which felony shall be known as "trafficking in methamphetamine or amphetamine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of ~~117~~ 108 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of ~~279~~ 270 months in the State's ~~prison~~ prison, a period of post-release supervision and term of

imprisonment pursuant to G.S. 15A-1340.18, and shall be fined at least two hundred fifty thousand dollars ($250,000).

(4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved:

a. Is four grams or more, but less than 14 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of ~~117~~ 108 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of ~~279~~ 270 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined not less than five hundred thousand dollars ($500,000).

(4a) Any person who sells, manufactures, delivers, transports, or possesses 100 tablets, capsules, or other dosage units, or the equivalent quantity, or more, of Lysergic Acid Diethylamide, or any mixture containing such substance, shall be guilty of a felony, which felony shall be known as "trafficking in Lysergic Acid Diethylamide". If the quantity of such substance or mixture involved:

a. Is 100 or more dosage units, or equivalent quantity, but less than 500 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 500 or more dosage units, or equivalent quantity, but less than 1,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84

months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 1,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~ 210 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined not less than two hundred thousand dollars ($200,000).

(4b) Any person who sells, manufactures, delivers, transports, or possesses 100 or more tablets, capsules, or other dosage units, or 28 grams or more of 3,4-methylenedioxyamphetamine (MDA), including its salts, isomers, and salts of isomers, or 3,4-methylenedioxymethamphetamine (MDMA), including its salts, isomers, and salts of isomers, or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in MDA/MDMA." If the quantity of the substance or mixture involved:

a. Is 100 or more tablets, capsules, or other dosage units, but less than 500 tablets, capsules, or other dosage units, or 28 grams or more, but less than 200 grams, the person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 500 or more tablets, capsules, or other dosage units, but less than 1,000 tablets, capsules, or other dosage units, or 200 grams or more, but less than 400 grams, the person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 1,000 or more tablets, capsules, or other dosage units, or 400 grams or more, the person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~ 210 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined not less than two hundred fifty thousand dollars ($250,000).

(5) Except as provided in this subdivision, a person being sentenced under this subsection may not receive a suspended sentence or be placed on probation. The sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge,

provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

(6) Sentences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder."

SECTION 13. This act becomes effective December 1, 2004, and applies to offenses committed on or after that date.

SENATE BILL 1124:
Amend Strutured Sentencing/Post-Release Supv.

BILL ANALYSIS

Committee: Senate Judiciary II
Date: May 24, 2004
Version: S1124-CSRC-87[v.1]

Introduced by: Sen. Hartsell
Summary by: Kory J. Goldsmith
Committee Counsel

SUMMARY: ***Senate Bill 1124 comes at the recommendation of the Structured Sentencing Commission and amends the laws related to Post-Release Supervision (PRS). The bill makes PRS a sanction that may be imposed at the judge's discretion and that is separate from the prison term.***

The Proposed Committee Substitute makes several technical corrections, but no substantive changes to the bill.

CURRENT LAW:

Structured Sentencing – The maximum sentences for Class B1 through Class E felonies include nine months of PRS. The purpose of PRS is to monitor and control the offender in the community, to assist the offender's reintegration into society, to collect restitution and indebtedness owed by the offender, and to continue the offender's treatment and education.

Post-Release Supervision - Individuals convicted of a Class B1 through Class E felony are released from prison nine months prior to the maximum sentence imposed, less any earned time awarded. PRS lasts for nine months, unless the individual is convicted of a sex offense that requires registration under the Sex Offender Registration Act, in which case the period of PRS is five years. The period of PRS may be reduced by earned time during the period of supervision.

PRS is conditional and subject to revocation. Violation of any condition may result is the modification or revocation of PRS. Upon a revocation of PRS, the supervisee is returned to prison to serve the remainder of the maximum sentence (nine months). This period may be reduced by earned time. Upon a second release, the prisoner is eligible for PRS under the same conditions as imposed the first time.

Certain Drug Trafficking Offenses – The maximum sentences for the following drug trafficking offenses include nine months of PRS: Marijuana (10,000 or more pounds); Methaqualone (10,000 or more dosage units); Cocaine (400 grams or more); Methamphetamine (200 grams or more and 400 grams or more); Opium or heroin (14 grams or more and 28 grams or more); LSD (1,000 or more dosage units); and MDA (1,000 or more tablets).

BILL ANALYSIS:

Section 1 amends the definitions of Article 81B of Chapter 15A (Structured Sentencing) to include "Post-release supervision". It is defined as the time a prisoner is supervised in the community following the termination of the prisoner's maximum prison term.

Section 2 amends G.S. 15A-1340.13(b) to require that when a judge is imposing a sentence under structured sentencing, the judge shall also include a period of post-release supervision if the offense is a Class B1 through Class E felony.

Section 3 amends G.S. 15A-1340.17 (the structured sentencing chart) to make PRS a separate punishment, and to create a single table for calculating the maximum sentences for Class B1 through Class I felonies where the minimum term is less than 347 months.

Section 4 creates a new section (G.S. 15A-1340.18) relating to PRS under structured sentencing. Any person convicted of a Class B1, B2, C, D, or E felony could be required to participate in PRS. The minimum period of PRS would be seven months and the maximum period would be nine months, unless the offense is subject to the registration requirements of Article 27A of Chapter 14 (Sex Offenders Registration Program). If the period of PRS is revoked, the term of re-imprisonment shall be a minimum term of seven months and a maximum of nine months. A court may decline to impose PRS if it makes a finding of facts that indicate that PRS would not be necessary in that case. PRS would not be imposed for an offender convicted of a Class B1 felony offense who receives a life sentence.

Section 5 amends G.S. 15A-1342(c) to provide that if a court places an offender on probation, the period of PRS is also suspended.

Section 6 amends G.S. 15A-1344(d) to provide that if an offender violates a condition of probation under a suspended sentence, the Post-Release Supervision and Parole Commission ("Commission") may activate the offender's prison sentence and any period of PRS.

Section 7 amends G.S. 15A-1354 to provide that where a court imposes consecutive terms, the periods of PRS are consolidated to run as a single period and run at the conclusion of the term of imprisonment.

Section 8 amends the definitions in Article 84A (Post-Release Supervision) to reflect that PRS is the time an offender is supervised in the community after the termination of the maximum prison term.

Section 9 amends G.S. 15A-1368.1 to reflect that it applies to certain drug trafficking offenses under G.S. 90-95.

Section 10 amends G.S. 15A-1368.2 to earned time inapplicable to the period of PRS.

Section 11 amends G.S. 15A-1368.3 to give PRS a maximum and a minimum term. It also prohibits the re-release of an offender into PRS once it has been revoked.

Section 12 amends G.S. 15A-1368.4 to reflect that a supervisee may not receive earned time credit during PRS. It also codifies certain discretionary controlling conditions for sex offenders that are currently being imposed under the Commission's general authority.

Section 13 amends G.S. 90-95(h) regarding the sentences for certain drug trafficking offenses to remove the period of PRS from the maximum sentence and require that it be imposed as a separate sanction.

BACKGROUND: Post-Release Supervision was not developed as part of the original structured sentencing proposals of 1993. It was added to the structured sentencing legislation during the legislative process. The Structured Sentencing Commission has repeatedly recommended changes to PRS to make it more consistent with the way structured sentencing functions and to also clarify certain details regarding how PRS functions.

This act would become effective December 1, 2004 and apply to offenses committed on or after that date.

S1124-SMRC-001

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE BILL 1124
PROPOSED COMMITTEE SUBSTITUTE S1124-CSRC-87 [v.1]

5/24/2004 3:40:38 PM

Short Title: Amend Structured Sentencing/Post Release Supv. (Public)

Sponsors:

Referred to:

May 17, 2004

A BILL TO BE ENTITLED

AN ACT TO AMEND THE STRUCTURED SENTENCING LAWS WITH REGARD TO POST-RELEASE SUPERVISION AS RECOMMENDED BY THE NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-1340.11 is amended by adding a new subdivision to read:

"(6a) Post-release supervision. – The time for which a sentenced prisoner is supervised in the community following the termination of the prisoner's maximum prison term, controlled by the rules and conditions of Article 84A of this Chapter."

SECTION 2. G.S. 15A-1340.13(b) reads as rewritten:

"(b) Procedure Generally; Requirements of Judgment; Kinds of Sentences. – Before imposing a sentence, the court shall determine the prior record level for the offender pursuant to G.S. 15A-1340.14. The sentence shall contain a sentence disposition specified for the class of offense and prior record level, and its minimum term of imprisonment shall be within the range specified for the class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment. For Class B1, B2, C, D, and E felony offenses, the sentence shall include a period of post-release supervision under to G.S. 15A-1340.18. The kinds of sentence dispositions are active punishment, intermediate punishment, and community punishment."

SECTION 3. G.S. 15A-1340.17 reads as rewritten:

"**§ 15A-1340.17. Punishment limits for each class of offense and prior record level.**

(a) Offense Classification; Default Classifications. – The offense classification is as specified in the offense for which the sentence is being imposed. If the offense is a felony for which there is no classification, it is a Class I felony.

(b) Fines. – Any judgment that includes a sentence of imprisonment may also include a fine. If a community punishment is authorized, the judgment may consist of a fine only. Additionally, when the defendant is other than an individual, the judgment may consist of a fine only. Unless otherwise provided, the amount of the fine is in the discretion of the court.

(c) Punishments for Each Class of Offense and Prior Record Level; Punishment Chart Described. – The authorized punishment for each class of offense and prior record level is as specified in the chart ~~below.~~ below and under G.S. 15A-1340.18. Prior record levels are indicated by the Roman numerals placed horizontally on the top of the chart. Classes of offense are indicated by the letters placed vertically on the left side of the chart. Each cell on the chart contains the following components:

(1) A sentence disposition or dispositions: "C" indicates that a community punishment is authorized; "I" indicates that an intermediate punishment is authorized; "A" indicates that an active punishment is authorized; and "Life Imprisonment Without Parole" indicates that the defendant shall be imprisoned for the remainder of the prisoner's natural life.

(2) A presumptive range of minimum durations, if the sentence of imprisonment is neither aggravated or mitigated; any minimum term of imprisonment in that range is permitted unless the court finds pursuant to G.S. 15A-1340.16 that an aggravated or mitigated sentence is appropriate. The presumptive range is the middle of the three ranges in the cell.

(3) A mitigated range of minimum durations if the court finds pursuant to G.S. 15A-1340.16 that a mitigated sentence of imprisonment is justified; in such a case, any minimum term of imprisonment in the mitigated range is permitted. The mitigated range is the lower of the three ranges in the cell.

(4) An aggravated range of minimum durations if the court finds pursuant to G.S. 15A-1340.16 that an aggravated sentence of imprisonment is justified; in such a case, any minimum term of imprisonment in the aggravated range is permitted. The aggravated range is the higher of the three ranges in the cell.

PRIOR RECORD LEVEL

	I 0 Pts	II 1-4 Pts	III 5-8 Pts	IV 9-14 Pts	V 15-18 Pts	VI 19+ Pts	
A	Life Imprisonment Without Parole or Death as Established by Statute						
	A 240-300	A 288-360	A 336-420	A 384-480	A Life Imprisonment Without Parole	A	DISPOSITION Aggravated
B1	192-240 144-192	230-288 173-230	269-336 202-269	307-384 230-307	346-433 260-346	384-480 288-384	PRESUMPTIVE Mitigated

	A	A	A	A	A	A	DISPOSITION
	157-196	189-237	220-276	251-313	282-353	313-392	Aggravated
B2	125-157	151-189	176-220	201-251	225-282	251-313	PRESUMPTIVE
	94-125	114-151	132-176	151-201	169-225	188-251	Mitigated
	A	A	A	A	A	A	DISPOSITION
	73-92	100-125	116-145	133-167	151-188	168-210	Aggravated
C	58-73	80-100	93-116	107-133	121-151	135-168	PRESUMPTIVE
	44-58	60-80	70-93	80-107	90-121	101-135	Mitigated
	A	A	A	A	A	A	DISPOSITION
	64-80	77-95	103-129	117-146	133-167	146-183	Aggravated
D	51-64	61-77	82-103	94-117	107-133	117-146	PRESUMPTIVE
	38-51	46-61	61-82	71-94	80-107	88-117	Mitigated
	I/A	I/A	A	A	A	A	DISPOSITION
	25-31	29-36	34-42	46-58	53-66	59-74	Aggravated
E	20-25	23-29	27-34	37-46	42-53	47-59	PRESUMPTIVE
	15-20	17-23	20-27	28-37	32-42	35-47	Mitigated
	I/A	I/A	I/A	A	A	A	DISPOSITION
	16-20	19-24	21-26	25-31	34-42	39-49	Aggravated
F	13-16	15-19	17-21	20-25	27-34	31-39	PRESUMPTIVE
	10-13	11-15	13-17	15-20	20-27	23-31	Mitigated
	I/A	I/A	I/A	I/A	A	A	DISPOSITION
	13-16	15-19	16-20	20-25	21-26	29-36	Aggravated
G	10-13	12-15	13-16	16-20	17-21	23-29	PRESUMPTIVE
	8-10	9-12	10-13	12-16	13-17	17-23	Mitigated
	C/I/A	I/A	I/A	I/A	I/A	A	DISPOSITION
	6-8	8-10	10-12	11-14	15-19	20-25	Aggravated
H	5-6	6-8	8-10	9-11	12-15	16-20	PRESUMPTIVE
	4-5	4-6	6-8	7-9	9-12	12-16	Mitigated
	C	C/I	I	I/A	I/A	I/A	DISPOSITION
	6-8	6-8	6-8	8-10	9-11	10-12	Aggravated
I	4-6	4-6	5-6	6-8	7-9	8-10	PRESUMPTIVE
	3-4	3-4	4-5	4-6	5-7	6-8	Mitigated

(d) Maximum Sentences Specified for ~~Class F through Class I Felonies.~~ Class B1 Felonies through Class I Felonies for Minimum Terms up to 346 Month. – Unless provided otherwise in a statute establishing a punishment for a specific crime, for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table below for Class ~~F~~ B1 through Class I felonies. The first figure in each cell in the table is the minimum term and the second is the maximum term.

3-4	4-5	5-6	6-8	7-9	8-10	9-11	10-12
11-14	12-15	13-16	14-17	15-18	16-20	17-21	18-22

19-23	20-24	21-26	22-27	23-28	24-29	25-30	26-32
27-33	28-34	29-35	30-36	31-38	32-39	33-40	34-41
35-42	36-44	37-45	38-46	39-47	40-48	41-50	42-51
43-52	44-53	45-54	46-56	47-57	48-58	49-59	50-60
51-61	52-62	53-64	54-65	55-66	56-67	57-68	58-70
59-71	60-72	61-73	62-74	63-76	64-77	65-78	66-79
67-80	68-82	69-83	70-84	71-85	72-86	73-88	74-89
75-90	76-91	77-92	78-94	79-95	80-96	81-97	82-98
83-100	84-101	85-102	86-103	87-104	88-106	89-107	90-108
91-109	92-110	93-112	94-113	95-114	96-115	97-116	98-118
99-119	100-120	101-121	102-122	103-124	104-125	105-126	106-127
107-128	108-130	109-131	110-132	111-133	112-134	113-136	114-137
115-138	116-139	117-140	118-142	119-143	120-144	121-145	122-146
123-148	124-149	125-150	126-151	127-152	128-154	129-155	130-156
131-157	132-158	133-160	134-161	135-162	136-163	137-164	138-166
139-167	140-168	141-169	142-170	143-172	144-173	145-174	146-175
147-176	148-178	149-179	150-180	151-181	152-182	153-184	154-185
155-186	156-187	157-188	158-190	159-191	160-192	161-193	162-194
163-196	164-197	165-198	166-199	167-200	168-202	169-203	170-204
171-205	172-206	173-208	174-209	175-210	176-211	177-212	178-214
179-215	180-216	181-217	182-218	183-220	184-221	185-222	186-223
187-224	188-226	189-227	190-228	191-229	192-230	193-232	194-233
195-234	196-235	197-236	198-238	199-239	200-240	201-241	202-242
203-244	204-245	205-246	206-247	207-248	208-250	209-251	210-252
211-253	212-254	213-256	214-257	215-258	216-259	217-260	218-262
219-263	220-264	221-265	222-266	223-268	224-269	225-270	226-271
227-272	228-274	229-275	230-276	231-277	232-278	233-280	234-281
235-282	236-283	237-284	238-286	239-287	240-288	241-289	242-290
243-292	244-293	245-294	246-295	247-296	248-298	249-299	250-300
251-301	252-302	253-304	254-305	255-306	256-307	257-308	258-310
259-311	260-312	261-313	262-314	263-316	264-317	265-318	266-319
267-320	268-322	269-323	270-324	271-325	272-326	273-328	274-329
275-330	276-331	277-332	278-334	279-335	280-336	281-337	282-338
283-340	284-341	285-342	286-343	287-344	288-346	289-347	290-348
291-349	292-350	293-352	294-353	295-354	296-355	297-356	298-358
299-359	300-360	301-361	302-362	303-364	304-365	305-366	306-367
307-368	308-370	309-371	310-372	311-373	312-374	313-376	314-377
315-378	316-379	317-380	318-382	319-383	320-384	321-385	322-386
323-388	324-389	325-390	326-391	327-392	328-394	329-395	330-396
331-397	332-398	333-400	334-401	335-402	336-403	337-404	338-406
339-407	340-408	341-409	342-410	343-412	344-413	345-414	346-415

~~(e) Maximum Sentences Specified for Class B1 through Class E Felonies for Minimum Terms up to 339 Months. Unless provided otherwise in a statute~~

~~establishing a punishment for a specific crime, for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table below for Class B1 through Class E felonies. The first figure in each cell of the table is the minimum term and the second is the maximum term.~~

~~15-27~~	~~16-29~~	~~17-30~~	~~18-31~~	~~19-32~~	~~20-33~~	~~21-35~~	~~22-36~~
~~23-37~~	~~24-38~~	~~25-39~~	~~26-41~~	~~27-42~~	~~28-43~~	~~29-44~~	~~30-45~~
~~31-47~~	~~32-48~~	~~33-49~~	~~34-50~~	~~35-51~~	~~36-53~~	~~37-54~~	~~38-55~~
~~39-56~~	~~40-57~~	~~41-59~~	~~42-60~~	~~43-61~~	~~44-62~~	~~45-63~~	~~46-65~~
~~47-66~~	~~48-67~~	~~49-68~~	~~50-69~~	~~51-71~~	~~52-72~~	~~53-73~~	~~54-74~~
~~55-75~~	~~56-77~~	~~57-78~~	~~58-79~~	~~59-80~~	~~60-81~~	~~61-83~~	~~62-84~~
~~63-85~~	~~64-86~~	~~65-87~~	~~66-89~~	~~67-90~~	~~68-91~~	~~69-92~~	~~70-93~~
~~71-95~~	~~72-96~~	~~73-97~~	~~74-98~~	~~75-99~~	~~76-101~~	~~77-102~~	~~78-103~~
~~79-104~~	~~80-105~~	~~81-107~~	~~82-108~~	~~83-109~~	~~84-110~~	~~85-111~~	~~86-113~~
~~87-114~~	~~88-115~~	~~89-116~~	~~90-117~~	~~91-119~~	~~92-120~~	~~93-121~~	~~94-122~~
~~95-123~~	~~96-125~~	~~97-126~~	~~98-127~~	~~99-128~~	~~100-129~~	~~101-131~~	~~102-132~~
~~103-133~~	~~104-134~~	~~105-135~~	~~106-137~~	~~107-138~~	~~108-139~~	~~109-140~~	~~110-141~~
~~111-143~~	~~112-144~~	~~113-145~~	~~114-146~~	~~115-147~~	~~116-149~~	~~117-150~~	~~118-151~~
~~119-152~~	~~120-153~~	~~121-155~~	~~122-156~~	~~123-157~~	~~124-158~~	~~125-159~~	~~126-161~~
~~127-162~~	~~128-163~~	~~129-164~~	~~130-165~~	~~131-167~~	~~132-168~~	~~133-169~~	~~134-170~~
~~135-171~~	~~136-173~~	~~137-174~~	~~138-175~~	~~139-176~~	~~140-177~~	~~141-179~~	~~142-180~~
~~143-181~~	~~144-182~~	~~145-183~~	~~146-185~~	~~147-186~~	~~148-187~~	~~149-188~~	~~150-189~~
~~151-191~~	~~152-192~~	~~153-193~~	~~154-194~~	~~155-195~~	~~156-197~~	~~157-198~~	~~158-199~~
~~159-200~~	~~160-201~~	~~161-203~~	~~162-204~~	~~163-205~~	~~164-206~~	~~165-207~~	~~166-209~~
~~167-210~~	~~168-211~~	~~169-212~~	~~170-213~~	~~171-215~~	~~172-216~~	~~173-217~~	~~174-218~~
~~175-219~~	~~176-221~~	~~177-222~~	~~178-223~~	~~179-224~~	~~180-225~~	~~181-227~~	~~182-228~~
~~183-229~~	~~184-230~~	~~185-231~~	~~186-233~~	~~187-234~~	~~188-235~~	~~189-236~~	~~190-237~~
~~191-239~~	~~192-240~~	~~193-241~~	~~194-242~~	~~195-243~~	~~196-245~~	~~197-246~~	~~198-247~~
~~199-248~~	~~200-249~~	~~201-251~~	~~202-252~~	~~203-253~~	~~204-254~~	~~205-255~~	~~206-257~~
~~207-258~~	~~208-259~~	~~209-260~~	~~210-261~~	~~211-263~~	~~212-264~~	~~213-265~~	~~214-266~~
~~215-267~~	~~216-269~~	~~217-270~~	~~218-271~~	~~219-272~~	~~220-273~~	~~221-275~~	~~222-276~~
~~223-277~~	~~224-278~~	~~225-279~~	~~226-281~~	~~227-282~~	~~228-283~~	~~229-284~~	~~230-285~~
~~231-287~~	~~232-288~~	~~233-289~~	~~234-290~~	~~235-291~~	~~236-293~~	~~237-294~~	~~238-295~~
~~239-296~~	~~240-297~~	~~241-299~~	~~242-300~~	~~243-301~~	~~244-302~~	~~245-303~~	~~246-305~~
~~247-306~~	~~248-307~~	~~249-308~~	~~250-309~~	~~251-311~~	~~252-312~~	~~253-313~~	~~254-314~~
~~255-315~~	~~256-317~~	~~257-318~~	~~258-319~~	~~259-320~~	~~260-321~~	~~261-323~~	~~262-324~~
~~263-325~~	~~264-326~~	~~265-327~~	~~266-329~~	~~267-330~~	~~268-331~~	~~269-332~~	~~270-333~~
~~271-335~~	~~272-336~~	~~273-337~~	~~274-338~~	~~275-339~~	~~276-341~~	~~277-342~~	~~278-343~~
~~279-344~~	~~280-345~~	~~281-347~~	~~282-348~~	~~283-349~~	~~284-350~~	~~285-351~~	~~286-353~~
~~287-354~~	~~288-355~~	~~289-356~~	~~290-357~~	~~291-359~~	~~292-360~~	~~293-361~~	~~294-362~~
~~295-363~~	~~296-365~~	~~297-366~~	~~298-367~~	~~299-368~~	~~300-369~~	~~301-371~~	~~302-372~~
~~303-373~~	~~304-374~~	~~305-375~~	~~306-377~~	~~307-378~~	~~308-379~~	~~309-380~~	~~310-381~~
~~311-383~~	~~312-384~~	~~313-385~~	~~314-386~~	~~315-387~~	~~316-389~~	~~317-390~~	~~318-391~~

~~319-392 320-393 321-395 322-396 323-397 324-398 325-399 326-401 327-402 328-403 329-404 330-405 331-407 332-408 333-409 334-410 335-411 336-413 337-414 338-415 339-416~~

(e1) Maximum Sentences Specified for Class B1 through Class ~~E~~ I Felonies for Minimum Terms of ~~340~~ 347 Months or More. – Unless provided otherwise in a statute establishing a punishment for a specific crime, when the minimum sentence is ~~340~~ 347 months or more, the corresponding maximum term of imprisonment shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest ~~month, plus nine additional months.~~ month."

SECTION 4. Article 81B of Chapter 15A of the General Statutes is amended by adding a new section to read:

"**§ 15A-1340.18. Post-Release supervision.**

(a) Except as provided in subsection (b) of this section, the court must also impose a period of post-release supervision to follow the term of imprisonment and an additional term of imprisonment to be served upon revocation of the period of post-release supervision on all offenders convicted of a Class B1, B2, C, D, or E felony offense, including offenders convicted of a Class B1, B2, C, D, or E felony offense under G.S. 90-95(h). The period of supervision and the term of imprisonment are as follows:

(1) Period of supervision – The period of post-release supervision shall be nine months, unless the offense is a Class B1 through E offense for which registration is required pursuant to Article 27A of Chapter 14 of the General Statutes. For offenses subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the period of post-release supervision is five years.

(2) Term of imprisonment – The term of imprisonment upon revocation of post-release supervision shall be for a minimum term of seven months and a maximum term of nine months.

(b) If an offender is convicted of a Class B1, B2, C, D, or E felony offense and receives a sentence of imprisonment, then the court may decline to impose post-release supervision if it makes a finding of facts which indicate post-release supervision would not be necessary in that case. If an offender is convicted of a Class B1 felony offense and receives a sentence of life imprisonment without parole, then post-release supervision shall not be imposed.

(c) If the court imposes an intermediate punishment on an offender who is eligible to receive post-release supervision under subsection (a) of this section, then the period of post-release supervision is suspended.

(d) Provisions of Article 84A of this Chapter apply to judgments entered pursuant to this section."

SECTION 5. G.S. 15A-1342(c) reads as rewritten:

"(c) Conditions; Suspended Sentence. – When the court places a convicted offender on probation, it must determine conditions of probation as provided in

G.S. 15A-1343. In addition, it must impose a suspended sentence of imprisonment, determined as provided in Article ~~83, Imprisonment,~~ 83 of this Chapter, which may be activated upon violation of conditions of probation. Suspension of a term of imprisonment also suspends any period of post-release supervision that may be imposed for that offense."

SECTION 6. G.S. 15A-1344(d) reads as rewritten:

"(d) Extension and Modification; Response to Violations. – At any time prior to the expiration or termination of the probation period, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation. The probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation. The hearing may be held in the absence of the defendant, if he fails to appear for the hearing after a reasonable effort to notify him. If a convicted defendant violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions of G.S. 15A-1345, may continue him on probation, with or without modifying the conditions, may place the defendant on special probation as provided in subsection (e), or, if continuation, modification, or special probation is not appropriate, may revoke the probation and activate the suspended sentence and any period of post-release supervision imposed at the time of initial sentencing, if any, or may order that charges as to which prosecution has been deferred be brought to trial; provided that probation may not be revoked solely for conviction of a Class 3 misdemeanor. The court, before activating a sentence to imprisonment established when the defendant was placed on probation, may reduce the sentence, but the reduction shall be consistent with subsection (d1) of this section. A sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period unless the revoking judge specifies that it is to run consecutively with the other period."

SECTION 7. G.S. 15A-1354 reads as rewritten:

"**§ 15A-1354. Concurrent and consecutive terms of imprisonment.**

(a) Authority of Court. – When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. If not specified or not required by statute to run consecutively, sentences shall run concurrently.

(b) Effect of Consecutive Terms. – In determining the effect of consecutive sentences imposed under authority of this Article and the manner in which they will be served, the Department of Correction must treat the defendant as though he has been committed for a single term with the following incidents:

(1) The maximum prison sentence consists of the total of the maximum terms of the consecutive ~~sentences, less nine months for each of the~~

~~second and subsequent sentences imposed for Class B through Class E felonies; and~~sentences; and

(2) The minimum term consists of the total of the minimum terms of the consecutive sentences.

(c) Post-Release Supervision. – When multiple periods of post-release supervision are imposed on a person, either at the same time or in addition to existing periods of supervision, the periods of post-release supervision are consolidated to run as a single period and begin at the conclusion of all terms of imprisonment."

SECTION 8. G.S. 15A-1368(a) reads as rewritten:

"(a) The following words have the listed meaning in this Article:

(1) Post-release supervision or supervision. – The time for which a sentenced prisoner is ~~released from prison before~~ supervised in the community following the termination of ~~his~~ the prisoner's maximum prison term, controlled by the rules and conditions of this Article. Purposes of post-release supervision include all or any of the following: to monitor and control the prisoner in the community, to assist the prisoner in reintegrating into society, to collect restitution and other court indebtedness from the prisoner, and to continue the prisoner's treatment or education.

(2) Supervisee. – A person released from incarceration and in the custody of the Department of Correction and Post-Release Supervision and Parole Commission on post-release supervision.

(3) Commission. – The Post-Release Supervision and Parole Commission, whose general authority is described in G.S. 143B-266.

(4) Minimum imposed term. – The minimum term of imprisonment imposed on an individual prisoner by a court judgment, as described in G.S. 15A-1340.13(c). When a prisoner is serving consecutive imprisonment terms, the minimum imposed term, for purposes of this Article, is the sum of all minimum terms imposed in the court judgment.

(5) Maximum imposed term. – The maximum term of imprisonment imposed on an individual prisoner by a court judgment, as described in G.S. 15A-1340.13(c). When a prisoner is serving consecutive prison terms, the maximum imposed term, for purposes of this Article, is the sum of all maximum terms imposed in the court judgment or ~~judgments, less nine months for each of the second and subsequent sentences imposed for Class B through Class E felonies.~~judgments."

SECTION 9. G.S. 15A-1368.1 reads as rewritten:

"**§ 15A-1368.1. Applicability of Article 84A.**

This Article applies to all felons in Class B1 through Class E sentenced to an active punishment under Article 81B of this ~~Chapter,~~ Chapter or G.S. 90-95(h), but does not apply to felons in Class B1 sentenced to life imprisonment without parole. Prisoners subject to Articles 85 and 85A of this Chapter are excluded from this Article's coverage."

SECTION 10. G.S. 15A-1368.2 reads as rewritten:

"**§ 15A-1368.2. Post-release supervision eligibility and procedure.**

(a) A prisoner to whom this Article applies shall be released from prison for post-release supervision on the date equivalent to his maximum imposed prison term ~~less nine months,~~ less any earned time awarded by the Department of Correction or the custodian of a local confinement facility under G.S. 15A-1340.13(d). If a prisoner has not been awarded any earned time, the prisoner shall be released for post-release supervision on the date equivalent to his maximum prison ~~term less nine months.~~term.

(b) A prisoner shall not refuse post-release supervision.

(c) A supervisee's period of post-release supervision shall be for a period of nine months, unless the offense is ~~an~~ a Class B1 through E offense for which registration is required pursuant to Article 27A of Chapter 14 of the General Statutes. For offenses subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the period of post-release supervision is five years. The conditions of post-release supervision are as authorized in ~~G.S. 15A-1368.5.~~G.S. 15A-1368.4.

~~(d) A supervisee's period of post-release supervision may be reduced while the supervisee is under supervision by earned time awarded by the Department of Correction, pursuant to rules adopted in accordance with law. A supervisee is eligible to receive earned time credit toward the period of supervision for compliance with reintegrative conditions described in G.S. 15A-1368.5.~~

(e) Repealed by Session Laws 1997-237, s. 7.

(f) When a supervisee completes the period of post-release supervision, the sentence or sentences from which the supervisee was placed on post-release supervision are terminated."

SECTION 11. G.S. 15A-1368.3 reads as rewritten:

"**§ 15A-1368.3. Incidents of post-release supervision.**

(a) Conditionality. – Post-release supervision is conditional and subject to revocation.

(b) Modification. – The Commission may for good cause shown modify the conditions of post-release supervision at any time before the termination of the supervision period.

(c) Effect of Violation. – If the supervisee violates a condition, described in G.S. 15A-1368.4, at any time before the termination of the supervision period, the Commission may continue the supervisee on the existing supervision, with or without modifying the conditions, or if continuation or modification is not appropriate, may revoke post-release supervision as provided in G.S. 15A-1368.6 and reimprison the supervisee for a term consistent with the following requirements:

(1) The supervisee will be returned to prison ~~up to the time remaining on his maximum imposed term.~~for a minimum term of seven months and a maximum term of nine months.

(2) The supervisee shall not receive any credit for days on post-release supervision against the maximum term of imprisonment imposed by the court under ~~G.S. 15A-1340.13.~~G.S. 15A-1340.18(a)(2).

(3) Pursuant to Article 19A of Chapter 15, the Department of Correction shall award a prisoner credit against any term of reimprisonment for all time spent in custody as a result of revocation proceedings under G.S. 15A-1368.6.

(4) The prisoner is eligible to receive earned time credit against the maximum prison term as provided in G.S. 15A-1340.13(d) for time served in prison after the revocation.

(d) No Re-Release After Revocation of Post-Release Supervision. – A prisoner who has been reimprisoned prior to completing a post-release supervision period may ~~again~~ not be released again on post-release supervision by the ~~Commission subject to the provisions which govern initial release.~~Commission.

(e) Timing of Revocation. – The Commission may revoke post-release supervision for violation of a condition during the period of supervision. The Commission may also revoke post-release supervision following a period of supervision if:

(1) Before the expiration of the period of post-release supervision, the Commission has recorded its intent to conduct a revocation hearing; and

(2) The Commission finds that every reasonable effort has been made to notify the supervisee and conduct the hearing earlier. Prima facie evidence of reasonable effort to notify is the issuance of a temporary or conditional revocation order, as provided in G.S. 15A-1376, that goes unserved."

SECTION 12. G.S. 15A-1368.4 reads as rewritten:

"**§ 15A-1368.4. Conditions of post-release supervision.**

(a) In General. – Conditions of post-release supervision may be reintegrative in nature or designed to control the supervisee's behavior and to enforce compliance with law or judicial order. A supervisee may have his supervision period revoked for any violation of a controlling condition or for repeated violation of a reintegrative condition. ~~Compliance with reintegrative conditions may entitle a supervisee to earned time credits as described in G.S. 15A-1368.2(d).~~

(b) Required Condition. – The Commission shall provide as an express condition of every release that the supervisee not commit another crime during the period for which the supervisee remains subject to revocation. A supervisee's failure to comply with this controlling condition is a supervision violation for which the supervisee may face revocation as provided in G.S. 15A-1368.3.

(b1) Additional Required Conditions for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. –

In addition to the required condition set forth in subsection (b) of this section, for a supervisee who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, controlling conditions, violations of which may result in revocation of post-release supervision, are:

(1) Register as required by G.S. 14-208.7 if the offense is a reportable conviction as defined by G.S. 14-208.6(4).

(2) Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the Commission.

(3) Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.

(4) Not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor.

(5) Not reside in a household with any minor child if the offense is one in which there is evidence of physical or mental abuse of a minor, unless ~~a court of competent jurisdiction~~ the Post-Release Supervision and Parole Commission expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the child's best interest to allow the supervisee to reside in the same household with a minor child.

(c) Discretionary Conditions. – The Commission, in consultation with the Division of Community Corrections, may impose reintegrative or controlling conditions on a supervisee it believes reasonably necessary to ensure that the supervisee will lead a law-abiding life or to assist the supervisee to do so.

(d) Reintegrative Conditions. – Appropriate reintegrative conditions, for which ~~a supervisee may receive earned time credits against the length of the supervision period, and~~ repeated violation ~~that~~ may result in revocation of post-release supervision, are:

(1) Work faithfully at suitable employment or faithfully pursue a course of study or vocational training that will equip the supervisee for suitable employment.

(2) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(3) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on post-release supervision.

(4) Support the supervisee's dependents and meet other family responsibilities.

(5) In the case of a supervisee who attended a basic skills program during incarceration, continue attending a basic skills program in pursuit of a General Education Development Degree or adult high school diploma.

(6) Satisfy other conditions reasonably related to reintegration into society.

(e) Controlling Conditions. – Appropriate controlling conditions, violation of which may result in revocation of post-release supervision, are:

(1) Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for the supervisee by a licensed physician and is in the original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors, or sellers of any such illegal drugs or controlled

substances; and not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used.

(2) Comply with a court order to pay the costs of reintegrative treatment for a minor and a minor's parents or custodians where the offense involved evidence of physical, mental, or sexual abuse of a minor.

(3) Comply with a court order to pay court costs and costs for appointed counsel or public defender in the case for which the supervisee was convicted.

(4) Not possess a firearm, destructive device, or other dangerous weapon unless granted written permission by the Commission or a post-release supervision officer.

(5) Report to a post-release supervision officer at reasonable times and in a reasonable manner, as directed by the Commission or a post-release supervision officer.

(6) Permit a post-release supervision officer to visit at reasonable times at the supervisee's home or elsewhere.

(7) Remain within the geographic limits fixed by the Commission unless granted written permission to leave by the Commission or the post-release supervision officer.

(8) Answer all reasonable inquiries by the post-release supervision officer and obtain prior approval from the post-release supervision officer for any change in address or employment.

(9) Promptly notify the post-release supervision officer of any change in address or employment.

(10) Submit at reasonable times to searches of the supervisee's person by a post-release supervision officer for purposes reasonably related to the post-release supervision. The Commission shall not require as a condition of post-release supervision that the supervisee submit to any other searches that would otherwise be unlawful. Whenever the search consists of testing for the presence of illegal drugs, the supervisee may also be required to reimburse the Department of Correction for the actual cost of drug testing and drug screening, if the results are positive.

(11) Make restitution or reparation to an aggrieved party as provided in G.S. 148-57.1.

(12) Comply with an order from a court of competent jurisdiction regarding the payment of an obligation of the supervisee in connection with any judgment rendered by the court.

(13) Remain in one or more specified places for a specified period or periods each day, and wear a device that permits the defendant's compliance with the condition to be monitored electronically.

(14) Submit to supervision by officers assigned to the Intensive Post-Release Supervision Program established pursuant to G.S. 143B-262(c), and abide by the rules adopted for that Program.

(e1) Prohibited Conditions. – The Commission shall not impose community service as a condition of post-release supervision.

(e2) Additional Discretionary Controlling Conditions for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. – In addition to the discretionary conditions set forth in subsections (d) and (e) of this section, for a supervisee who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, appropriate discretionary controlling conditions, violations of which may result in revocation of post-release supervision, are that the offender:

(1) Reside at a residence to be approved by the supervising officer.

(2) Not have contact with the victim including, but not limited to: letters, phone calls, tapes, videos, computer, Internet, or visits. This includes any form of direct contact, or any form of contact through a third party.

(3) Not socialize or communicate with individuals under the age of 18 in work or social activities unless accompanied by a responsible adult who is aware of the abusive patterns and is approved in writing by the supervising officer.

(4) Submit to psychological and psychophysiological assessment at the direction of the supervising officer to assist in treatment planning and case monitoring.

(5) Participate in a sexual abuse treatment program approved by the supervising officer and complete the same to the full satisfaction of the treatment provider. Comply with all programs, including the polygraph examinations, to be used as a tool in conjunction with the treatment plan developed by the treatment provider. Program participation is defined as attendance at all meetings, prompt payment of fees, admission of responsibility for his or her offense, and progress toward reasonable treatment goals.

(6) Pay for the victim's mental health counseling expenses that are incurred as a result of the crime or offense as ordered by the court.

(7) Not possess any sexually stimulating or sexually oriented materials as deemed inappropriate by the supervising officer, nor patronize any place where such material or entertainment is the primary business.

(8) Not use, possess, control, distribute, sell, exchange, or collect pornography or child erotica, including any obtained through Internet access or telephonic communications.

(9) Submit at reasonable times to warrantless searches and seizures by the supervising officer of his person, vehicle, premises, computer equipment, and telephone records while he is present for the purposes

of detecting or discovering pornography and/or erotica, which are reasonably related to his supervision.

(10) Not linger, loiter, nor spend time at locations where unsupervised persons under 18 years of age are present, including, but not limited to: parks, playgrounds, school yards, arcades, or places frequented by children, activities, and such similar places whose purpose is the care, entertainment, or education of such persons under 18 years of age.

(11) Not work or volunteer for any business or organization(s) that provides services to or employs persons under 18 years of age. This includes, but is not limited to: arcades, babysitting, daycare agencies, schools, churches, playgrounds, and youth sporting activities or groups. The supervising officer must approve employment.

(12) Not associate with or have any contact with convicted sex offenders unless in a counseling group.

(13) When given authorization to visit another jurisdiction, present a travel letter to the local police department, have it signed, and return it to the supervising officer.

(14) Not purchase, possess, or consume alcoholic beverages or controlled substances. Submit to blood, breath, and urine testing for analysis for the presence of prohibited drugs or alcohol as requested by the supervising officer and pay any fees associated with testing.

(15) Not be alone with any minor child below the age of 18 years unless approved by his supervising officer in writing.

(16) Not engage in any sexual behavior with any minor child below the age of 18 years of age.

(17) Abide by a curfew at the discretion of the supervising officer.

(f) Required Supervision Fee. – The Commission shall require as a condition of post-release supervision that the supervisee pay a supervision fee of thirty dollars ($30.00) per month. The Commission may exempt a supervisee from this condition only if it finds that requiring payment of the fee is an undue economic burden. The fee shall be paid to the clerk of superior court of the county in which the supervisee was convicted. The clerk shall transmit any money collected pursuant to this subsection to the State to be deposited in the State's General Fund. In no event shall a supervisee be required to pay more than one supervision fee per month."

SECTION 13. G.S. 90-95(h) reads as rewritten:

"(h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article.

(1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 10 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved:

a. Is in excess of 10 pounds, but less than 50 pounds, such person shall be punished as a Class H felon and shall be sentenced to a minimum term of 25 months and a maximum term of 30

months in the State's prison and shall be fined not less than five thousand dollars ($5,000);

b. Is 50 pounds or more, but less than 2,000 pounds, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

c. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

d. Is 10,000 pounds or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~ 210 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined not less than two hundred thousand dollars ($200,000).

(2) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or the equivalent quantity, or more of methaqualone, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in methaqualone" and if the quantity of such substance or mixture involved:

a. Is 1,000 or more dosage units, or equivalent quantity, but less than 5,000 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 10,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~ 210 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined not less than two hundred thousand dollars ($200,000).

(3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or any coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, and any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine) or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~ 210 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined at least two hundred fifty thousand dollars ($250,000).

(3a) Repealed by Session Laws 1999-370, s. 1.

(3b) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine or amphetamine shall be guilty of a felony which felony shall be known as "trafficking in methamphetamine or amphetamine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of ~~117~~ 108 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to

G.S. 15A-1340.18, and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of ~~279~~ 270 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined at least two hundred fifty thousand dollars ($250,000).

(4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved:

a. Is four grams or more, but less than 14 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of ~~117~~ 108 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of ~~279~~ 270 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined not less than five hundred thousand dollars ($500,000).

(4a) Any person who sells, manufactures, delivers, transports, or possesses 100 tablets, capsules, or other dosage units, or the equivalent quantity, or more, of Lysergic Acid Diethylamide, or any mixture containing such substance, shall be guilty of a felony, which felony shall be known as "trafficking in Lysergic Acid Diethylamide". If the quantity of such substance or mixture involved:

a. Is 100 or more dosage units, or equivalent quantity, but less than 500 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42

months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 500 or more dosage units, or equivalent quantity, but less than 1,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 1,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~ 210 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined not less than two hundred thousand dollars ($200,000).

(4b) Any person who sells, manufactures, delivers, transports, or possesses 100 or more tablets, capsules, or other dosage units, or 28 grams or more of 3,4-methylenedioxyamphetamine (MDA), including its salts, isomers, and salts of isomers, or 3,4-methylenedioxymethamphetamine (MDMA), including its salts, isomers, and salts of isomers, or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in MDA/MDMA." If the quantity of the substance or mixture involved:

a. Is 100 or more tablets, capsules, or other dosage units, but less than 500 tablets, capsules, or other dosage units, or 28 grams or more, but less than 200 grams, the person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 500 or more tablets, capsules, or other dosage units, but less than 1,000 tablets, capsules, or other dosage units, or 200 grams or more, but less than 400 grams, the person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 1,000 or more tablets, capsules, or other dosage units, or 400 grams or more, the person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~ 210 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined not less than two hundred fifty thousand dollars ($250,000).

(5) Except as provided in this subdivision, a person being sentenced under this subsection may not receive a suspended sentence or be placed on probation. The sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

(6) Sentences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder."

SECTION 13. This act becomes effective December 1, 2004, and applies to offenses committed on or after that date.

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. S1124-CSRC-87[v.1]

H. B. No. _____ DATE 5/25/04

S. B. No. _____ Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE _____

Rep.)
) _____
Sen.)

moves to amend the bill on page 6, lines 31 - 36

( ) WHICH CHANGES THE TITLE

by deleting those lines;

and on pg. 6, line 37 by deleting "(c)" and substituting "(b)";

and on pg. 6, line 40, by deleting "(d)" and substituting "(c)".

SIGNED Scott Thomas

ADOPTED _____ FAILED _____ TABLED _____

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 5/05/04

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Michelle Frazier	NC Bar Ass'n
Tamara Grisard	Senate Intern (Garrou)
John Madler	Sentencing Commission
Karen Poe	Sentencing Commission
Mildred Spearman	NCDOC
MELITA GROOMES	PAROLE COMMISSION
Pat Gallagher	Senate Intern (Hagan)
Sharf Durham	Charlotte Observer
Lu-Ann Coe	FAMM
Hal Miller	NCACDL
Brian Walker	Bill Drafting

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 5/25/04

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Arthur Yancey	Staff - Sen. Charlie Dannelly
George Reed	NC Council of Churches
George Millsaps	DOA
Cam Cree	BPMHL
Charles Williams	NCACP
Patty Dipper	River Mill Academy (CSE)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S

SENATE BILL 1054

Short Title:	Increase Methamphetamine Penalties.	(Public)
Sponsors:	Senators Dalton, Nesbitt, Queen, Thomas; Apodaca, Brock, Carpenter, Foxx, and Tillman.	
Referred to:	Judiciary II.	

May 12, 2004

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT THE UNLAWFUL DISTRIBUTION OF METHAMPHETAMINE THAT PROXIMATELY RESULTS IN THE DEATH OF A PERSON IS SECOND DEGREE MURDER, TO MAKE IT AN AGGRAVATING FACTOR TO MANUFACTURE METHAMPHETAMINE IN A LOCATION THAT ENDANGERS A CHILD, TO INCREASE THE CRIMINAL PENALTY FOR THE UNLAWFUL MANUFACTURE OF METHAMPHETAMINE, AND TO INCREASE THE CRIMINAL PENALTY FOR THE POSSESSION OF PRECURSOR SUBSTANCES FOR METHAMPHETAMINE, AS RECOMMENDED BY THE JOINT LEGISLATIVE CORRECTIONS, CRIME CONTROL, AND JUVENILE JUSTICE OVERSIGHT COMMITTEE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-17 reads as rewritten:

"**§ 14-17. Murder in the first and second degree defined; punishment.**

A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction as defined in G.S. 14-288.21, poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, a Class A felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000, except that any such person who was under 17 years of age at the time of the murder shall be punished with imprisonment in the State's prison for life without parole. Provided, however, any person under the age of 17 who commits murder in the first degree while serving a prison sentence imposed for a prior murder or while on escape from a prison sentence

imposed for a prior murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000. All other kinds of murder, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or cocaine or other substance described in G.S. 90-90(1)d., or methamphetamine, when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a Class B2 felon."

SECTION 2. G.S. 15A-1340.16(d) is amended by adding a new subdivision to read:

"(16a) The offense is the manufacture of methamphetamine and was committed where a person under the age of 18 lives, was present, or was otherwise endangered by exposure to the drug, its ingredients, its by-products, or its waste."

SECTION 3. G.S. 90-95(b) reads as rewritten:

"(b) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(1) with respect to:

(1) A controlled substance classified in Schedule I or II shall be punished as a Class H felon, except ~~that~~ as follows: (i) the sale of a controlled substance classified in Schedule I or II shall be punished as a Class G ~~felon;~~felony, and (ii) the manufacture of methamphetamine shall be punished as provided by subdivision (1a) of this subsection.

(1a) The manufacture of methamphetamine shall be punished as a Class C felony unless the offense was one of the following: packaging or repackaging methamphetamine, or labeling or relabeling the methamphetamine container. The offense of packaging or repackaging methamphetamine, or labeling or relabeling the methamphetamine container shall be punished as a Class H felony.

(2) A controlled substance classified in Schedule III, IV, V, or VI shall be punished as a Class I felon, except that the sale of a controlled substance classified in Schedule III, IV, V, or VI shall be punished as a Class H felon. The transfer of less than 5 grams of marijuana for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1)."

SECTION 4. G.S. 90-95(d1) reads as rewritten:

"(d1) Except as authorized by this Article, it is unlawful for any person to:

(1) Possess an immediate precursor chemical with intent to manufacture a controlled substance; or

(2) Possess or distribute an immediate precursor chemical knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture a controlled substance.

Any person who violates this subsection shall be punished as a Class ~~H~~ F felon."

SECTION 5. G.S. 90-95(d2) reads as rewritten:

"(d2) The immediate precursor chemicals to which subsection (d1) of this section applies are those immediate precursor chemicals designated by the Commission pursuant to its authority under G.S. 90-88, and the following (until otherwise specified by the Commission):

(1) Acetic anhydride.
(2) Acetone.
~~(1)~~(3) Anhydrous ammonia.
~~(1a)~~(4) Anthranilic acid.
(5) Benzyl chloride.
~~(2)~~(6) Benzyl cyanide.
(7) 2-Butanone (Methyl Ethyl Ketone).
~~(3)~~(8) Chloroephedrine.
~~(4)~~(9) Chloropseudoephedrine.
~~(5)~~(10) D-lysergic acid.
~~(6)~~(11) Ephedrine.
~~(7)~~(12) Ergonovine maleate.
~~(8)~~(13) Ergotamine tartrate.
(14) Ethyl ether.
~~(9)~~(15) Ethyl Malonate.
~~(10)~~(16) Ethylamine.
(17) Gamma-butyrolactone.
(18) Hydrochloric Acid.
~~(10a)~~(19) Iodine.
~~(11)~~(20) Isosafrole.
~~(11a)~~(21) Lithium.
~~(12)~~(22) Malonic acid.
~~(13)~~(23) Methylamine.
(24) Methyl Isobutyl Ketone.
~~(14)~~(25) N-acetylanthranilic acid.
~~(15)~~(26) N-ethylephedrine.
~~(16)~~(27) N-ethylepseudoephedrine.
~~(17)~~(28) N-methylephedrine.
~~(18)~~(29) N-methylpseudoephedrine.
~~(19)~~(30) Norpseudoephedrine.
~~(20)~~(31) Phenyl-2-propane.
~~(21)~~(32) Phenylacetic acid.
~~(22)~~(33) Phenylpropanolamine.
~~(23)~~(34) Piperidine.
~~(24)~~(35) Piperonal.
~~(25)~~(36) Propionic anhydride.
~~(26)~~(37) Pseudoephedrine.
~~(27)~~(38) Pyrrolidine.
~~(27a)~~(39) Red phosphorous.
~~(28)~~(40) Safrole.

~~(28a)~~(41) Sodium.
(42) Sulfuric Acid.
(43) Tetrachloroethylene.
~~(29)~~(44) Thionylchloride.
(45) Toluene.
~~(30) Gamma-butyrolactone.~~"

SECTION 6. This act becomes effective December 1, 2004, and applies to offenses committed on or after that date.

SENATE BILL 1054:
Increase Methamphetamine Penalties.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Dalton
Date:	May 25, 2004	**Summary by:**	Robin Johnson*
Version:	First		Committee Counsel

SUMMARY: ***A recommendation of the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee, Senate Bill 1054 would (i) provide that the unlawful distribution of methamphetamine that proximately results in the death of a person is second degree murder, (ii) make it an aggravating factor to manufacture methamphetamine in a location that endangers a child, (iii) increase the criminal penalty for the unlawful manufacture of methamphetamine, and (iv) increase the criminal penalty for the possession of precursor substances and add several methamphetamine precursors.***

The bill would take effect December 1, 2004, and apply to offenses committed on or after that date.

BACKGROUND: According to the Office of National Drug Control Policy (ONDCP), Methamphetamine can be easily manufactured in clandestine laboratories (meth labs) using ingredients purchased in local stores. Over-the-counter cold medicines containing ephedrine or pseudoephedrine and other materials are "cooked" in meth labs to make methamphetamine.

Meth labs can be portable and so are easily dismantled, stored, or moved. This portability helps methamphetamine manufacturers avoid law enforcement authorities. Meth labs have been found in many different types of locations, including apartments, hotel rooms, rented storage spaces, and trucks. Methamphetamine labs have been known to be boobytrapped and lab operators are often well armed.

According to DEA, in 2001 there were 12,715 methamphetamine laboratory incidents reported in 46 States. The West Coast accounted for most of the laboratory incidents. On the East Coast, the following States reported the highest incident rates: Georgia (51), North Carolina (31), and Florida (29). Nationally, the highest rate of lab activity took place in Missouri, which reported 2,207 incidents. California and Washington also had high incident rates with 1,847 and 1,477, respectively. *(Source: ONDCP Drug Policy Information Clearinghouse Fact Sheet, November 2003)*

BILL ANALYSIS

I. UNLAWFUL DISTRIBUTION/2ND DEGREE MURDER (Section 1)

CURRENT LAW: Second Degree Murder is a Class B2 Felony, which is punishable by an absolute minimum of 94 months active, and an absolute maximum of 480 months active, depending on the defendant's prior record. Opium and cocaine are already in the current law as 2nd Degree Murder when opium or cocaine is unlawfully distributed and the ingestion of the substance causes the death of the user.

BILL ANALYSIS: Senate Bill 1054 would amend G.S. 14-17 to add methamphetamine, so that, similar to opium and cocaine, the unlawful distribution of methamphetamine and the death of a person as a result of ingesting the methamphetamine will be 2nd Degree Murder.

II. AGGRAVATING FACTOR AND CHILD ENDANGERMENT (Section 2)

CURRENT LAW: G.S. 15A-1340.16 *(see attached)* requires the court to consider evidence of aggravating or mitigating factors in felony sentencing. If the court finds that aggravating or mitigating factors exist, it may depart from the presumptive ranges of sentences specified in the felony sentencing chart. The State bears the burden of proving by a preponderance of the evidence that an aggravating factor exists. The defense bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.

BILL ANALYSIS: Section 2 of Senate Bill 1054 would amend G.S. 15A-1340.16 by adding a new subsection (d) so that, in a case involving the manufacture of methamphetamine, the presence or endangerment of a child under the age of 18 would be an aggravating factor to be considered in sentencing.

If the offense is a Class C felony, the presumptive minimum sentence would be 58-73 months; if an aggravated sentence is justified, the minimum sentence would be 73-92 months.

III. INCREASE PENALTY/UNLAWFUL MANUFACTURE (Section 3)

CURRENT LAW: G.S. 90-95 *(see attached)* makes it unlawful to manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver a controlled substance. Methamphetamine, a Schedule II controlled substance that is a derivative of amphetamine, is a powerful stimulant that affects the central nervous system. Manufacture of methamphetamine is currently a Class H felony. Assuming no prior convictions, the presumptive minimum sentence for a person convicted of a Class H felony is 5-6 months community, intermediate, or active punishment.

BILL ANALYSIS: Senate Bill 1054 would amend G.S. 90-95 to increase the criminal penalty for the unlawful manufacture of methamphetamine from a Class H felony to a Class C felony. Assuming no prior convictions, the presumptive minimum sentence for a person convicted of a Class C felony is 58-73 months active punishment. As the term "manufacture" is defined in the Controlled Substances Act, it covers a number of activities that could involve persons not engaged in the actual operation of a methamphetamine lab. The bill therefore would retain the lower offense class for persons who violate the law by packaging or repackaging, or labeling and relabeling methamphetamine – those offenses would remain a Class H felony.

IV. INCREASE PENALTY/POSSESSION OF PRECURSOR SUBSTANCES (Sections 4 and 5)

CURRENT LAW: Currently, it is a Class H Felony to possess or distribute an immediate precursor chemical with the intent to manufacture a controlled substance or with the knowledge, or reasonable cause to believe, that it will be used to manufacture a controlled substance. (An immediate precursor has been designated by the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services as being the principal compound used in the manufacture of a controlled substance.) A Class H felony is punishable by an absolute minimum of 4 months community service punishment and an absolute maximum of 30 months active, dependant on the defendant's prior record.

BILL ANALYSIS: Section 4 of Senate Bill 1054 would amend G.S. 90-95(d1) by increasing the penalty for possession or distribution of all immediate precursor chemicals from a Class H Felony to a Class F Felony. A Class F Felony is punishable by an absolute minimum of 10 months intermediate punishment and an absolute maximum of 59 months active, dependant on the defendant's prior record.

Section 5 of the bill would amend G.S. 90-95(d2) by adding to the list of precursors several new chemicals used in the processing and manufacture of methamphetamine.

**S1054-SMRH-001: Brenda Carter and Susan Sitze, Attorneys, Research Division, substantially prepared this summary.*

§ 15A-1340.16. Aggravated and mitigated sentences.

(a) Generally, Burden of Proof. – The court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court. The State bears the burden of proving by a preponderance of the evidence that an aggravating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.

(b) When Aggravated or Mitigated Sentence Allowed. – If the court finds that aggravating or mitigating factors exist, it may depart from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2). If the court finds that aggravating factors are present and are sufficient to outweigh any mitigating factors that are present, it may impose a sentence that is permitted by the aggravated range described in G.S. 15A-1340.17(c)(4). If the court finds that mitigating factors are present and are sufficient to outweigh any aggravating factors that are present, it may impose a sentence that is permitted by the mitigated range described in G.S. 15A-1340.17(c)(3).

(c) Written Findings; When Required. – The court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2). Findings shall be in writing. The requirement to make findings in order to depart from the presumptive range applies regardless of whether the sentence of imprisonment is activated or suspended.

(d) Aggravating Factors. – The following are aggravating factors:

(1) The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants.

(2) The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.

(2a) The offense was committed for the benefit of, or at the direction of, any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy. A "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of felony or violent misdemeanor offenses, or delinquent acts that would be felonies or violent misdemeanors if committed by an adult, and having a common name or common identifying sign, colors, or symbols.

(3) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(4) The defendant was hired or paid to commit the offense.

(5) The offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(6) The offense was committed against or proximately caused serious injury to a present or former law enforcement officer, employee of the Department of Correction, jailer, fireman, emergency medical technician, ambulance attendant, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of that person's official duties or because of the exercise of that person's official duties.

(7) The offense was especially heinous, atrocious, or cruel.

(8) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(9) The defendant held public office at the time of the offense and the offense related to the conduct of the office.

(10) The defendant was armed with or used a deadly weapon at the time of the crime.

(11) The victim was very young, or very old, or mentally or physically infirm, or handicapped.

(12) The defendant committed the offense while on pretrial release on another charge.

(13) The defendant involved a person under the age of 16 in the commission of the crime.

(14) The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband.
(15) The defendant took advantage of a position of trust or confidence to commit the offense.
(16) The offense involved the sale or delivery of a controlled substance to a minor.
(17) The offense for which the defendant stands convicted was committed against a victim because of the victim's race, color, religion, nationality, or country of origin.
(18) The defendant does not support the defendant's family.
(18a) The defendant has previously been adjudicated delinquent for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult.
(19) The serious injury inflicted upon the victim is permanent and debilitating.
(20) Any other aggravating factor reasonably related to the purposes of sentencing.

Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation. Evidence necessary to establish that an enhanced sentence is required under G.S. 15A-1340.16A may not be used to prove any factor in aggravation.

The judge shall not consider as an aggravating factor the fact that the defendant exercised the right to a jury trial.

(e) Mitigating Factors. – The following are mitigating factors:
(1) The defendant committed the offense under duress, coercion, threat, or compulsion that was insufficient to constitute a defense but significantly reduced the defendant's culpability.
(2) The defendant was a passive participant or played a minor role in the commission of the offense.
(3) The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense.
(4) The defendant's age, immaturity, or limited mental capacity at the time of commission of the offense significantly reduced the defendant's culpability for the offense.
(5) The defendant has made substantial or full restitution to the victim.
(6) The victim was more than 16 years of age and was a voluntary participant in the defendant's conduct or consented to it.
(7) The defendant aided in the apprehension of another felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.
(8) The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating.
(9) The defendant could not reasonably foresee that the defendant's conduct would cause or threaten serious bodily harm or fear, or the defendant exercised caution to avoid such consequences.
(10) The defendant reasonably believed that the defendant's conduct was legal.
(11) Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.
(12) The defendant has been a person of good character or has had a good reputation in the community in which the defendant lives.
(13) The defendant is a minor and has reliable supervision available.
(14) The defendant has been honorably discharged from the United States armed services.
(15) The defendant has accepted responsibility for the defendant's criminal conduct.
(16) The defendant has entered and is currently involved in or has successfully completed a drug treatment program or an alcohol treatment program subsequent to arrest and prior to trial.
(17) The defendant supports the defendant's family.
(18) The defendant has a support system in the community.
(19) The defendant has a positive employment history or is gainfully employed.

(20) The defendant has a good treatment prognosis, and a workable treatment plan is available.

(21) Any other mitigating factor reasonably related to the purposes of sentences. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 7, s. 6; c. 22, s. 22; c. 24, s. 14(b); 1995, c. 509, s. 13; 1997-443, ss. 19.25(w), 19.25(ee); 2003-378, s. 6.)

§ 90-95. Violations; penalties.

(a) Except as authorized by this Article, it is unlawful for any person:

(1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;

(2) To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance;

(3) To possess a controlled substance.

(b) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(1) with respect to:

(1) A controlled substance classified in Schedule I or II shall be punished as a Class H felon, except that the sale of a controlled substance classified in Schedule I or II shall be punished as a Class G felon;

(2) A controlled substance classified in Schedule III, IV, V, or VI shall be punished as a Class I felon, except that the sale of a controlled substance classified in Schedule III, IV, V, or VI shall be punished as a Class H felon. The transfer of less than 5 grams of marijuana for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1).

(c) Any person who violates G.S. 90-95(a)(2) shall be punished as a Class I felon.

(d) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(3) with respect to:

(1) A controlled substance classified in Schedule I shall be punished as a Class I felon;

(2) A controlled substance classified in Schedule II, III, or IV shall be guilty of a Class 1 misdemeanor. If the controlled substance exceeds four tablets, capsules, or other dosage units or equivalent quantity of hydromorphone or if the quantity of the controlled substance, or combination of the controlled substances, exceeds one hundred tablets, capsules or other dosage units, or equivalent quantity, the violation shall be punishable as a Class I felony. If the controlled substance is methamphetamine, amphetamine, phencyclidine, or cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, or any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocanized coca leaves or any extraction of coca leaves which does not contain cocaine or ecgonine), the violation shall be punishable as a Class I felony.

(3) A controlled substance classified in Schedule V shall be guilty of a Class 2 misdemeanor;

(4) A controlled substance classified in Schedule VI shall be guilty of a Class 3 misdemeanor, but any sentence of imprisonment imposed must be suspended and the judge may not require at the time of sentencing that the defendant serve a period of imprisonment as a special condition of probation. If the quantity of the controlled substance exceeds one-half of an ounce (avoirdupois) of marijuana or one-twentieth of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, the violation shall be punishable as a Class 1 misdemeanor. If the quantity of the controlled substance exceeds one and one-half ounces (avoirdupois) of marijuana or three-twentieths of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, or if the controlled substance consists of any quantity of synthetic tetrahydrocannabinols or tetrahydrocannabinols isolated from the resin of marijuana, the violation shall be punishable as a Class I felony.

(d1) Except as authorized by this Article, it is unlawful for any person to:

(1) Possess an immediate precursor chemical with intent to manufacture a controlled substance; or
(2) Possess or distribute an immediate precursor chemical knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture a controlled substance.

Any person who violates this subsection shall be punished as a Class H felon.

(d2) The immediate precursor chemicals to which subsection (d1) of this section applies are those immediate precursor chemicals designated by the Commission pursuant to its authority under G.S. 90-88, and the following (until otherwise specified by the Commission):

(1) Anhydrous ammonia.
(1a) Anthranilic acid.
(2) Benzyl cyanide.
(3) Chloroephedrine.
(4) Chloropseudoephedrine.
(5) D-lysergic acid.
(6) Ephedrine.
(7) Ergonovine maleate.
(8) Ergotamine tartrate.
(9) Ethyl Malonate.
(10) Ethylamine.
(10a) Iodine.
(11) Isosafrole.
(11a) Lithium.
(12) Malonic acid.
(13) Methylamine.
(14) N-acetylanthranilic acid.
(15) N-ethylephedrine.
(16) N-ethylepseudoephedrine.
(17) N-methylephedrine.
(18) N-methylpseudoephedrine.
(19) Norpseudoephedrine.
(20) Phenyl-2-propane.
(21) Phenylacetic acid.
(22) Phenylpropanolamine.
(23) Piperidine.
(24) Piperonal.
(25) Propionic anhydride.
(26) Pseudoephedrine.
(27) Pyrrolidine.
(27a) Red phosphorous.
(28) Safrole.
(28a) Sodium.
(29) Thionylchloride.
(30) Gamma-butyrolactone.

(e) The prescribed punishment and degree of any offense under this Article shall be subject to the following conditions, but the punishment for an offense may be increased only by the maximum authorized under any one of the applicable conditions:

(1), (2) Repealed by Session Laws 1979, c. 760, s. 5.
(3) If any person commits a Class 1 misdemeanor under this Article and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he

shall be punished as a Class I felon. The prior conviction used to raise the current offense to a Class I felony shall not be used to calculate the prior record level.

(4) If any person commits a Class 2 misdemeanor, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be guilty of a Class 1 misdemeanor. The prior conviction used to raise the current offense to a Class 1 misdemeanor shall not be used to calculate the prior conviction level.

(5) Any person 18 years of age or over who violates G.S. 90-95(a)(1) by selling or delivering a controlled substance to a person under 16 years of age but more than 13 years of age or a pregnant female shall be punished as a Class D felon. Any person 18 years of age or over who violates G.S. 90-95(a)(1) by selling or delivering a controlled substance to a person who is 13 years of age or younger shall be punished as a Class C felon. Mistake of age is not a defense to a prosecution under this section. It shall not be a defense that the defendant did not know that the recipient was pregnant.

(6) For the purpose of increasing punishment under G.S. 90-95(e)(3) and (e)(4), previous convictions for offenses shall be counted by the number of separate trials at which final convictions were obtained and not by the number of charges at a single trial.

(7) If any person commits an offense under this Article for which the prescribed punishment requires that any sentence of imprisonment be suspended, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be guilty of a Class 2 misdemeanor.

(8) Any person 21 years of age or older who commits an offense under G.S. 90-95(a)(1) on property used for a child care center, or for an elementary or secondary school or within 300 feet of the boundary of real property used for a child care center, or for an elementary or secondary school shall be punished as a Class E felon. For purposes of this subdivision, the transfer of less than five grams of marijuana for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1). For purposes of this subdivision, a child care center is as defined in G.S. 110-86(3)a., and that is licensed by the Secretary of the Department of Health and Human Services.

(9) Any person who violates G.S. 90-95(a)(3) on the premises of a penal institution or local confinement facility shall be guilty of a Class H felony.

(10) Any person 21 years of age or older who commits an offense under G.S. 90-95(a)(1) on property that is a playground in a public park or within 300 feet of the boundary of real property that is a playground in a public park shall be punished as a Class E felon. For purposes of this subdivision, the transfer of less than five grams of marijuana for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1). For purposes of this subdivision the term "playground" means any outdoor facility (including any parking lot appurtenant thereto) intended for recreation open to the public, and with any portion thereof containing three or more separate apparatuses intended for the recreation of children including, but not limited to, sliding boards, swingsets, and teeterboards.

(f) Any person convicted of an offense or offenses under this Article who is sentenced to an active term of imprisonment that is less than the maximum active term that could have been imposed may, in addition, be sentenced to a term of special probation. Except as indicated in this subsection, the administration of special probation shall be the same as probation. The conditions of special probation shall be fixed in the same manner as probation, and the conditions may include requirements for rehabilitation treatment. Special probation shall follow the active sentence. No term of special probation shall exceed five years. Special probation may be revoked in the same manner as probation; upon revocation, the original term of imprisonment may be increased by no more than the difference between the active term of imprisonment actually served and the maximum active term that could

have been imposed at trial for the offense or offenses for which the person was convicted, and the resulting term of imprisonment need not be diminished by the time spent on special probation.

(g) Whenever matter is submitted to the North Carolina State Bureau of Investigation Laboratory, the Charlotte, North Carolina, Police Department Laboratory or to the Toxicology Laboratory, Reynolds Health Center, Winston-Salem for chemical analysis to determine if the matter is or contains a controlled substance, the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis shall be admissible without further authentication in all proceedings in the district court and superior court divisions of the General Court of Justice as evidence of the identity, nature, and quantity of the matter analyzed. Provided, however, that a report is admissible in a criminal proceeding in the superior court division or in an adjudicatory hearing in juvenile court in the district court division only if:

(1) The State notifies the defendant at least 15 days before trial of its intention to introduce the report into evidence under this subsection and provides a copy of the report to the defendant, and

(2) The defendant fails to notify the State at least five days before trial that the defendant objects to the introduction of the report into evidence.

Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the report.

(g1) Procedure for establishing chain of custody without calling unnecessary witnesses. –

(1) For the purpose of establishing the chain of physical custody or control of evidence consisting of or containing a substance tested or analyzed to determine whether it is a controlled substance, a statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated is prima facie evidence that the person had custody and made the delivery as stated, without the necessity of a personal appearance in court by the person signing the statement.

(2) The statement shall contain a sufficient description of the material or its container so as to distinguish it as the particular item in question and shall state that the material was delivered in essentially the same condition as received. The statement may be placed on the same document as the report provided for in subsection (g) of this section.

(3) The provisions of this subsection may be utilized by the State only if:

a. The State notifies the defendant at least 15 days before trial of its intention to introduce the statement into evidence under this subsection and provides the defendant with a copy of the statement, and

b. The defendant fails to notify the State at least five days before trial that the defendant objects to the introduction of the statement into evidence.

(4) Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the statement.

(h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article.

(1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 10 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved:

a. Is in excess of 10 pounds, but less than 50 pounds, such person shall be punished as a Class H felon and shall be sentenced to a minimum term of 25 months and a maximum term of 30 months in the State's prison and shall be fined not less than five thousand dollars ($5,000);

b. Is 50 pounds or more, but less than 2,000 pounds, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

c. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

d. Is 10,000 pounds or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(2) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or the equivalent quantity, or more of methaqualone, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in methaqualone" and if the quantity of such substance or mixture involved:

a. Is 1,000 or more dosage units, or equivalent quantity, but less than 5,000 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 10,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or any coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, and any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine) or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

(3a) Repealed by Session Laws 1999-370, s. 1.

(3b) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine or amphetamine shall be guilty of a felony which felony shall be known as "trafficking in methamphetamine or amphetamine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of 117 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of 279 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

(4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved:

a. Is four grams or more, but less than 14 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of 117 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of 279 months in the State's prison and shall be fined not less than five hundred thousand dollars ($500,000).

(4a) Any person who sells, manufactures, delivers, transports, or possesses 100 tablets, capsules, or other dosage units, or the equivalent quantity, or more, of Lysergic Acid Diethylamide, or any mixture containing such substance, shall be guilty of a felony, which felony shall be known as "trafficking in Lysergic Acid Diethylamide". If the quantity of such substance or mixture involved:

a. Is 100 or more dosage units, or equivalent quantity, but less than 500 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 500 or more dosage units, or equivalent quantity, but less than 1,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 1,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(4b) Any person who sells, manufactures, delivers, transports, or possesses 100 or more tablets, capsules, or other dosage units, or 28 grams or more of 3,4-methylenedioxyamphetamine (MDA), including its salts, isomers, and salts of isomers, or

3,4-methylenedioxymethamphetamine (MDMA), including its salts, isomers, and salts of isomers, or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in MDA/MDMA." If the quantity of the substance or mixture involved:

a. Is 100 or more tablets, capsules, or other dosage units, but less than 500 tablets, capsules, or other dosage units, or 28 grams or more, but less than 200 grams, the person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 500 or more tablets, capsules, or other dosage units, but less than 1,000 tablets, capsules, or other dosage units, or 200 grams or more, but less than 400 grams, the person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 1,000 or more tablets, capsules, or other dosage units, or 400 grams or more, the person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred fifty thousand dollars ($250,000).

(5) Except as provided in this subdivision, a person being sentenced under this subsection may not receive a suspended sentence or be placed on probation. The sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

(6) Sentences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder.

(i) The penalties provided in subsection (h) of this section shall also apply to any person who is convicted of conspiracy to commit any of the offenses described in subsection (h) of this section. (1971, c. 919, s. 1; 1973, c. 654, s. 1; c. 1078; c. 1358, s. 10; 1975, c. 360, s. 2; 1977, c. 862, ss. 1, 2; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1251, ss. 4-7; 1983, c. 18; c. 294, s. 6; c. 414; 1985, c. 569, s. 1; c. 675, ss. 1, 2; 1987, c. 90; c. 105, ss. 4, 5; c. 640, ss. 1, 2; c. 783, s. 4; 1989, c. 641; c. 672; c. 690; c. 770, s. 68; 1989 (Reg. Sess., 1990), c. 1024, s. 17; c. 1039, s. 5; c. 1081, s. 2; 1991, c. 484, s. 1; 1993, c. 538, s. 30; c. 539, s. 1358.1; 1994, Ex. Sess., c. 11, s. 1; c. 14, ss. 46, 47; c. 24, s. 14(b); 1996, 2nd Ex. Sess., c. 18, s. 20.13(c); 1997-304, ss. 1, 2; 1997-443, s. 19.25(b), (u), (ii); 1998-212, s. 17.16(e); 1999-165, s. 4; 1999-370, s. 1; 2000-140, s. 92.2(d); 2001-307, s. 1; 2001-332, s. 1.)

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 1054

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S1054-ARV-28 [v.4]

Date _____,2004

Comm. Sub. [NO]
Amends Title [YES]
First Edition

Senator _____

moves to amend the bill on page 1, line 12,
by rewriting that line to read:
"COMMITTEE; AND TO REQUIRE THE COMMISSION FOR HEALTH SERVICES TO ESTABLISH DECONTAMINATION STANDARDS FOR PROPERTY USED FOR THE MANUFACTURE OF METHAMPHETAMINE.";

and on page 4, lines 7 and 8,
by rewriting those lines to read:
"**SECTION 6.** Article 8 of Chapter 130A of the General Statutes is amended by adding a new Part to read:
'Part 12. Decontamination Standards for Methamphetamine Sites.

'**§ G.S. 130A-284. Decontamination of Property Used for the Manufacture of Methamphetamine.**

For the protection of the public health, the Commission shall adopt rules establishing decontamination standards to ensure that certain property is reasonably safe for habitation. An owner, lessee, operator or other person in control of a residence or place of business or any structure appurtenant to a residence or place of business, and who has knowledge that the property has been used for the manufacture of methamphetamine, shall comply with these rules. For purposes of this section, the terms "residence" and "place of business" shall be defined as set forth in G.S. 130A-334.'

SECTION 7. Sections 1-5 of this act become effective December 1, 2004, and apply to offenses committed on or after that date. Section 6 of this act becomes effective January 1, 2005. The remainder of this act is effective when it becomes law,

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 1054

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S1054-ARV-28 [v.4]

at which time the Commission for Health Services may adopt rules under Section 6 of this Act.".

SIGNED Scott Thomas
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

NORTH CAROLINA GENERAL ASSEMBLY
AMENDMENT
Senate Bill 1054

AMENDMENT NO. _____
(to be filled in by
Principal Clerk)

S1054-ARH-94 [v.1]

Date _____,2004

Comm. Sub. [NO]
Amends Title [NO]
First Edition

Senator _____

moves to amend the bill on page 4, line 8, by adding at the end of the line the following new sentence to read:

"Prosecutions for offenses occurring before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.".

SIGNED _____
Amendment Sponsor

SIGNED _____
Committee Chair if Senate Committee Amendment

ADOPTED _____ FAILED _____ TABLED _____

NORTH CAROLINA GENERAL ASSEMBLY
LEGISLATIVE FISCAL NOTE
(INCARCERATION NOTE G.S. 120-36.7)

BILL NUMBER: Senate Bill 1054 (First Edition)

SHORT TITLE: Increase Methamphetamine Penalties.

SPONSOR(S): Senator Dalton

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09
GENERAL FUND					
Correction					
Section 1	**$ -**	**Cannot be determined**			
Sections 2 & 3	**$ -**	**FY 05-6 range: $336,420 - $1,704,528** **FY 06-7 range: $716,131 - $3,557,554**			**(see p. 3)**
Section 4	**$ -**	**Cannot be determined**			

There are no available prison beds in this time frame. This note assumes the use of contractual prison beds ($57.92 per bed per day). In the long term, due to the limited availability of contractual beds, the State will need to construct new cells at $69,500 per bed. Construction would have to begin in FY 04-5 for beds to be available in FY 07-8.

Judicial		
Section 1	**Cannot be determined**	
Section 2	**Cannot be determined – see p. 4**	
Section 3	**FY 04-5 range (7 months): $85,134 - $464,366** **FY 05-6 range: $153,241 - $835,859**	**(see p. 3)**
Section 4	**Cannot be determined**	

ADDITIONAL PRISON BEDS*				
Section 1		**For every 1 conviction, 1 bed each year**		
Sections 2 & 3	**-**	**15 – 76 beds**	**31 – 154 beds**	**increase in later years**
Section 4	**For every 6 convictions, 1 bed in year 1 and 2 beds in year 2**			
POSITIONS: (DOC - cumulative)	**-**	**6 - 30**	**12 - 62**	**increase in later years**

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch

EFFECTIVE DATE: December 1, 2004

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.*

BILL SUMMARY:

Section 1 would add methamphetamine ("meth") to the list of controlled substances for which an overdose death can lead to a charge of second-degree murder (a B2 felony). Under current law, a person who proximately causes a death by the unlawful distribution of methamphetamine could be charged with involuntary manslaughter (a Class F felony) or perhaps some other offense.

Section 2 would create an aggravated factor for the presence, exposure, or endangerment of a child as a result of methamphetamine manufacture. In conjunction with Section 3, offenders convicted of this offense with the aggravating factor would be sentenced in the aggravated range for Class C.

Section 3 of the proposed legislation would increase the penalties for the manufacture (other than packaging/labeling) of methamphetamine from a Class H to a Class C felony.

Section 4 would increase the felony punishment level from Class H to Class F for possession of a precursor chemical with intent to manufacture a controlled substance or possession or distribution of a precursor chemical knowing or having reasonable cause to believe that it will be used to manufacture a controlled substance. This increase would apply to precursors for the manufacture of *any* controlled substance. Precursors are component substances used in drug manufacture, and are listed in G.S. 90-95.

Section 5 would add new precursor chemicals to the list in statute.

ASSUMPTIONS AND METHODOLOGY:

The Sentencing and Policy Advisory Commission prepares prison population projections for each criminal penalty bill. The Commission assumes that increasing criminal penalties does not have a deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division (FRD) does not assume savings due to deterrent effects for this bill or other criminal penalty bills.

Section 1

The Medical Examiner's Office reported three deaths due to methamphetamine overdose in 2003 and one meth-related fatal auto accident. However, many people who take methamphetamine also manufacture it for their own use, so we cannot determine whether another manufacturer or provider could have been charged in those deaths. Based on survey results from AOC, for every four second-degree murder (Class B2) charges under this bill there would be, on average, two trials and one plea to a lesser offense. If offenders are now charged under involuntary manslaughter (Class F), the AOC anticipates that the increase in penalty would increase the jury trial rate and court time for such cases. For example, the difference between the cost of a *guilty plea* for a Class F felony and a *jury trial* for a Class B2 felony is $13,000. Every Class B2 conviction would lead to one prison bed, with an average minimum sentence of 174 months.

Sections 2 and 3

When legislation proposes to increase the felony class of an existing offense, the Sentencing Commission and AOC typically project court and prison impact based on the historic number of charges and convictions for the offense and the difference in average length of sentence, active sentence rate, and trial versus plea rate for the new offense class compared to the old offense class. However, this method is not necessarily appropriate for this particular legislation. First, we cannot identify the exact historic number of charges, because methamphetamine manufacture cannot be separated out from the data on other non-cocaine Schedule II controlled substances. Second, there has been a rapid increase in the number of meth labs found each year – 98 labs in 2002, 177 labs in 2003, 350 to 375 labs projected for 2004, and 500 labs projected for 2005. Therefore, using the

number of charges and convictions in 2002 may significantly underestimate the number of charges and convictions that will occur in 2005.

Rather than rely solely on historic court data, we have identified four scenarios for the percentage of charges and convictions under Manufacture Schedule II Controlled Substance that are for manufacture – not packaging or labeling – of methamphetamine:

1. Assume 25 percent of charges and convictions are for meth.
2. Assume 50 percent of charges and convictions are for meth.
3. Assume 75 percent of charges and convictions are for meth.
4. Assume 100 percent of charges and convictions are for meth (AOC and Sentencing Commission believe that most of the charges and convictions are for meth).

For these Scenarios, we have also used the following projections and assumptions:

- SBI projected increase in labs – 2002 to 2004: 98 to 367 - increase by 3.74 times
- SBI projected increase in labs – 2003 to 2004: 177 to 367 - increase by 2.07 times
- SBI projected increase in labs – 2002 to 2005: 98 to 500 - increase by 5.10 times
- SBI projected increase in labs – 2003 to 2005: 177 to 500 - increase by 2.82 times

Note: SBI projection for 2004 is based on the number of labs found in the first four months of 2004 – 121 labs. If the same number of labs are found in 2005 as 2004, then 367 labs should be used. If, as the SBI projects, there are 500 labs found in 2005, then the 500 labs should be used. The (a) Scenarios use 367 labs, and the (b) Scenarios use 500 labs.

Assumptions:

- Meth manufacture charges and convictions will increase at same rate as meth labs.
- Conviction rate for meth is the same as average conviction rate for offense class. (The change in conviction rate from Class H to Class C: (23.8)/(29.3) = 0.81 times)
- Aggravated factor will be applied to 25 percent of charges and convictions (SBI estimate).

Scenario		Charges	Convictions	Prison Beds		FY 05-6 Costs	
				Yr 1	Yr 2	AOC	Prison
Scen. 1: 25% meth	(a) 367 labs	220	21	15	31	$153,241	$336,420
	(b) 500 labs	300	28	20	41	$208,965	$448,560
Scen. 2: 50% meth	(a) 367 labs	440	40	28	58	$306,482	$627,984
	(b) 500 labs	600	53	37	76	$417,929	$829,836
Scen. 3: 75% meth	(a) 367 labs	660	61	43	87	$459,722	$964,404
	(b) 500 labs	900	83	59	120	$626,894	$1,323,252
Scen. 4: 100% meth	(a) 367 labs	880	97	69	140	$612,963	$1,547,532
	(b) 500 labs	1,200	107	76	154	$835,859	$1,704,528

Please note:

1. An AOC survey of seven District Attorneys in counties with methamphetamine charges found an average of four manufacturing charges (excluding packaging/labelling) per meth lab. However, there may be four charges against one person, or one charge against four people.
2. The number of convictions does not take into account any convictions for a methamphetamine-related offense other than manufacturing due to plea bargains or other charges.
3. Due to the December 1 effective date, court costs will include seven months of FY 2004-5 and prison costs will begin in FY 2005-6. Court costs assume that one charge = one case.

Department of Correction
In FY 2002-3, 35 percent of the offenders convicted of the Class H offense of manufacturing a Schedule II substance received active sentences; the average sentence length was 7.6 months. Increasing these offenses to Class C would require all offenders to serve active sentences; the average sentence imposed for Class C felons in FY 2002-3 was 92 months. Under Scenario 1(a), there would be a need for 15 additional prison beds in FY 2005-6, and 31 additional prison beds in FY 2006-7 due to sentence lengths and revocations, for a cost of $336,420 in FY 2005-6 and $716,131 in FY 2006-7. Under Scenario 4(b), there would be a need for 76 additional prison beds in FY 2005-6, and 154 additional prison beds in FY 2006-7 due to sentence lengths and revocations, for a cost of $1.7 million in FY 2005-6 and $3.6 million in FY 2006-7.

Prison Costs Methodology: The average daily cost per prison bed is $57.92. Fiscal Research uses the DOC statewide average operating cost, plus 3% annually, to calculate the prison bed cost. Based on the most recent population projections and estimated available prison bed capacity, *there are no surplus prison beds available for the five year Fiscal Note horizon and beyond.* That means the number of beds needed is always equal to the projected additional inmates due to a bill.

Under Scenario 1(a), approximately 12 positions would be needed to supervise the additional inmates housed under this bill by 2006-07; under Scenario 4(b), 62 positions would be needed. These position totals include security, program, and administrative personnel at a ratio of one employee for every 2.5 inmates. This ratio is the combined average of the last three prisons opened by DOC and the three new prisons under construction.

Community Corrections Savings: Over the short term, the Division of Community Corrections (DCC) will see a caseload decrease from this bill. DCC supervises offenders given non-active (community or intermediate) sentences, at a cost of $1.75 to $10.06 per offender per day. Class H felons serve an average of two years on non-active sentences. Sixty-five percent of offenders convicted of Schedule II manufacture were given Class H non-active sentences, and 42 percent of those offenders, on average, will have their probation revoked and be sent to prison.

Under this legislation, all offenders convicted of methamphetamine manufacture (except packaging/labeling) would serve active sentences, so DCC would no longer supervise these offenders as probationers. However, unlike Class H felons, Class C felons enter Community Corrections after prison, under post-release supervision, for a term of nine months. Once the Class C felons serve their terms (average minimum sentence is 92 months), DCC will see an increase in post-release supervision caseload.

Judicial Branch
For charges increased from Class H to Class C, the AOC anticipates that cases will be more complex, require more time, and have a higher rate of trials (5% instead of 1%). Costs increases primarily reflect increases in workload for superior court judges, clerks, court reporters, jury costs, and indigent defense. The AOC estimates an increase in costs of $663 per case. The estimates on page 1 reflect seven months of costs for FY 2004-5 and annual inflation of five percent. The estimates also reflect AOC's anticipated indigency rate of 100 percent.

The AOC estimates that, at a minimum, the aggravating factor would create two hours of additional work at the guilt/innocence and sentencing phases. If, for example, the aggravated factor added two hours per case to trials, there would be an additional 165 to 225 hours of court time required. In addition, if there were two additional hours per conviction for pleas, another 11

to 54 hours of court time would be required. Six hours of court time cost $1,510, and six hours of indigent defense cost $390. Court costs would increase by 5 percent each year.

Sections 4 & 5: Precursor Chemicals

The AOC does not have an offense code for this offense, so we cannot determine the number of historical charges or convictions. However, in a search of the free text field, the Sentencing Commission discovered six convictions for this offense in FY 2002-3 (the free text field is optional, so not all convictions may have been captured). We also cannot determine the increase in offenses resulting from the addition of new precursors to the list.

Judicial Branch

The AOC notes that, for a higher felony offense, litigation would be more vigorous, time-consuming, and costly, and a greater percentage of cases would be resolved by trial rather than guilty plea. The difference in cost between a *guilty plea* for a Class H felony and a *jury trial* for a Class F felony is approximately $8,000. Without additional data, we cannot project the impact of this bill on the court system.

Department of Correction

The Sentencing Commission estimates that, for every six convictions that are increased from a Class H to a Class F, there will be the need for one additional prison bed in the first year and two additional beds in the second year due to sentence lengths and revocations. Each prison bed costs approximately $22,428 per year. There would be some savings for the Division of Community Corrections, as a greater percentage of Class F felons (50%) versus Class H felons (36%) serve active sentences. These savings would range from $1.75 to $10.06 per offender per day.

SOURCES OF DATA: State Bureau of Investigation, Department of Correction; Judicial Branch; and, North Carolina Sentencing and Policy Advisory Commission.

TECHNICAL CONSIDERATIONS: None

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Chloe Gossage

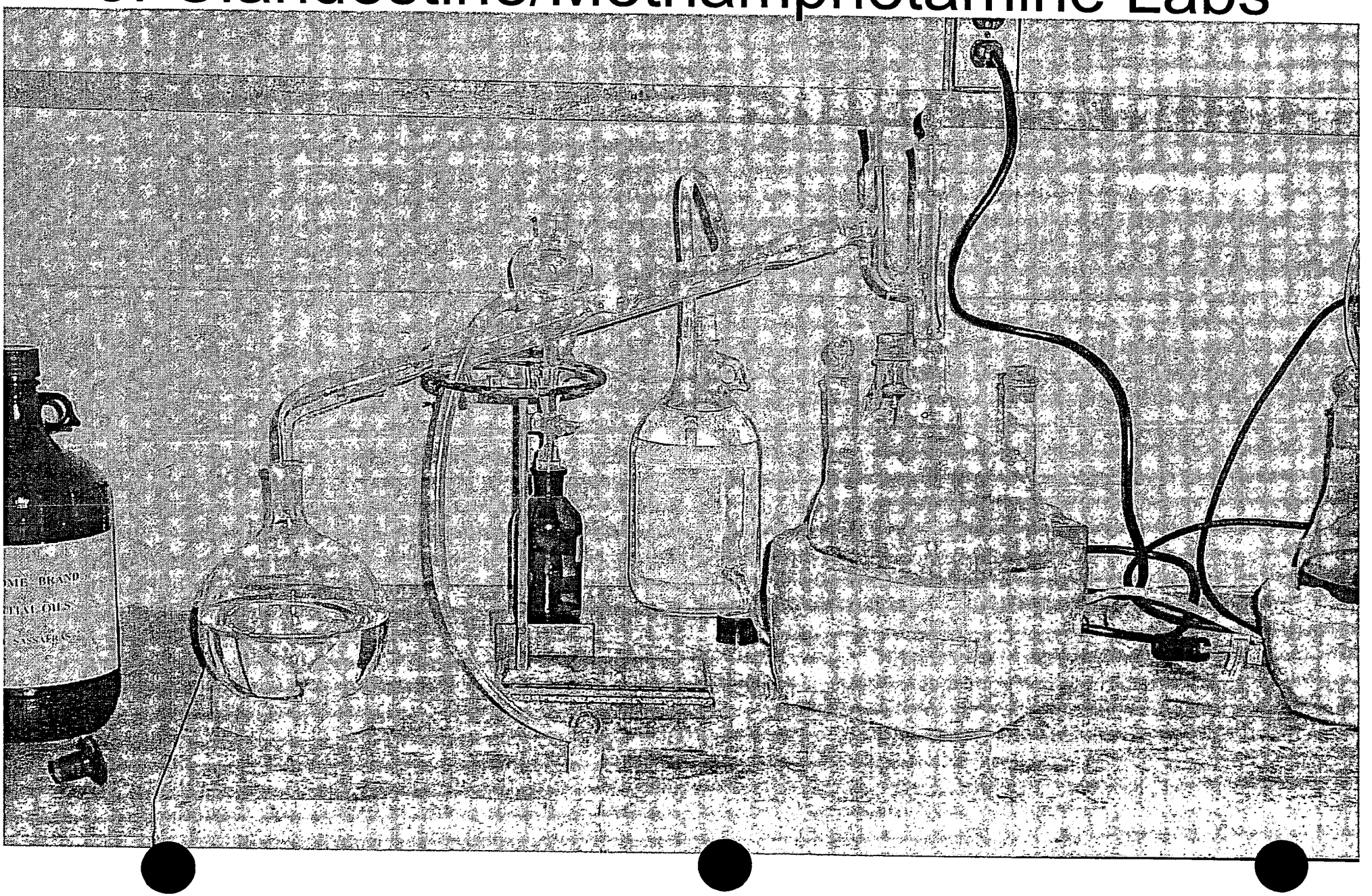
APPROVED BY: James D. Johnson Director
Fiscal Research Division

DATE: May 25, 2004

Signed Copy Located in the NCGA Principal Clerk's Offices

NORTH CAROLINA
DEPARTMENT OF JUSTICE
OFFICE
of the
ATTORNEY GENERAL

Problem: Dramatic Increase in the number of Clandestine/Methamphetamine Labs



Illegal Drug Labs

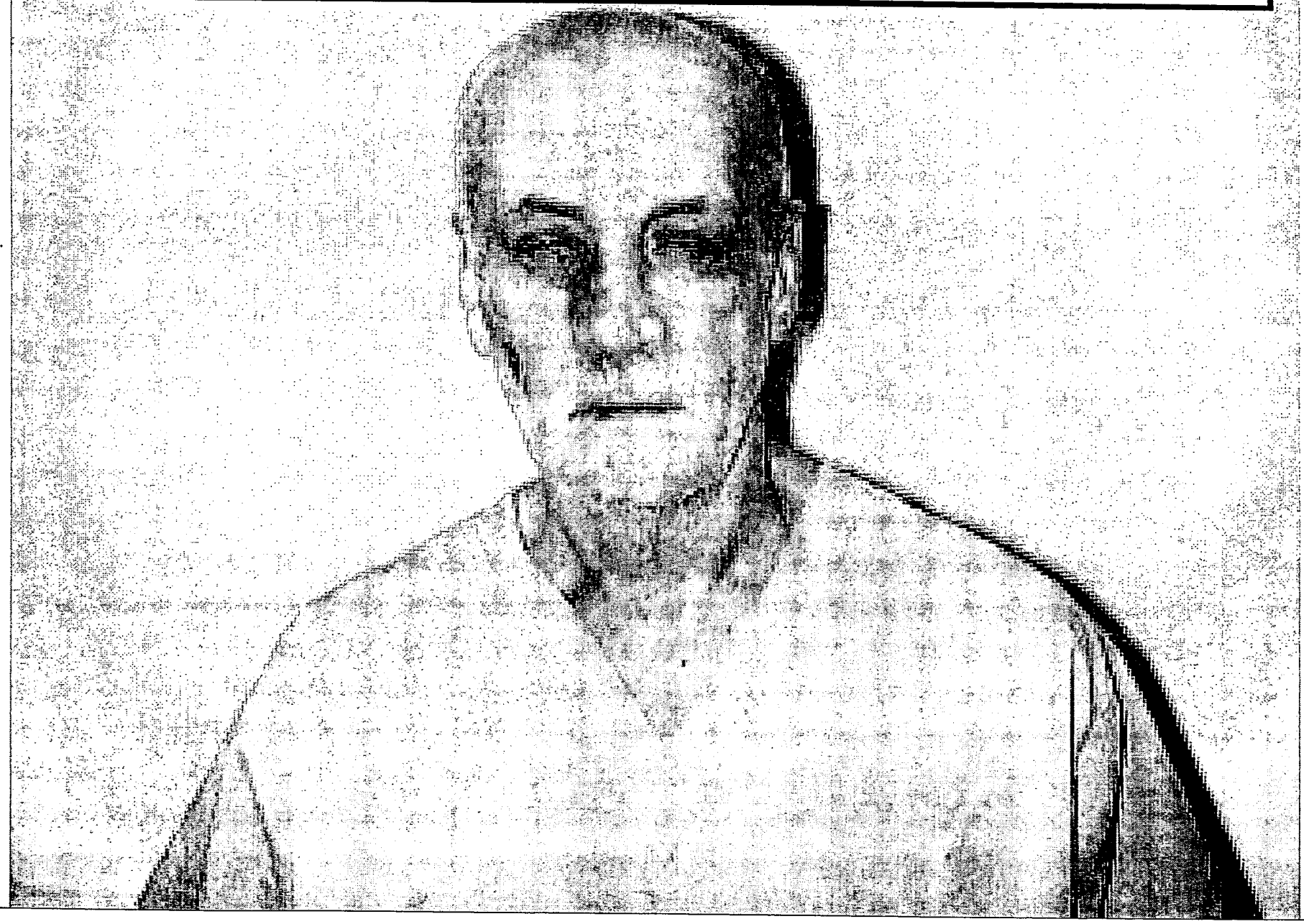
- Clandestine (or clan) labs are secret labs that produce illegal drugs.

- Nearly all of the clan labs found in North Carolina in recent years were "meth labs" producing Methamphetamine.

Methamphetamine

- Central Nervous system stimulant that can be produced in home-made labs
- Stronger and longer lasting than Cocaine
- Highly addictive

Human Lives



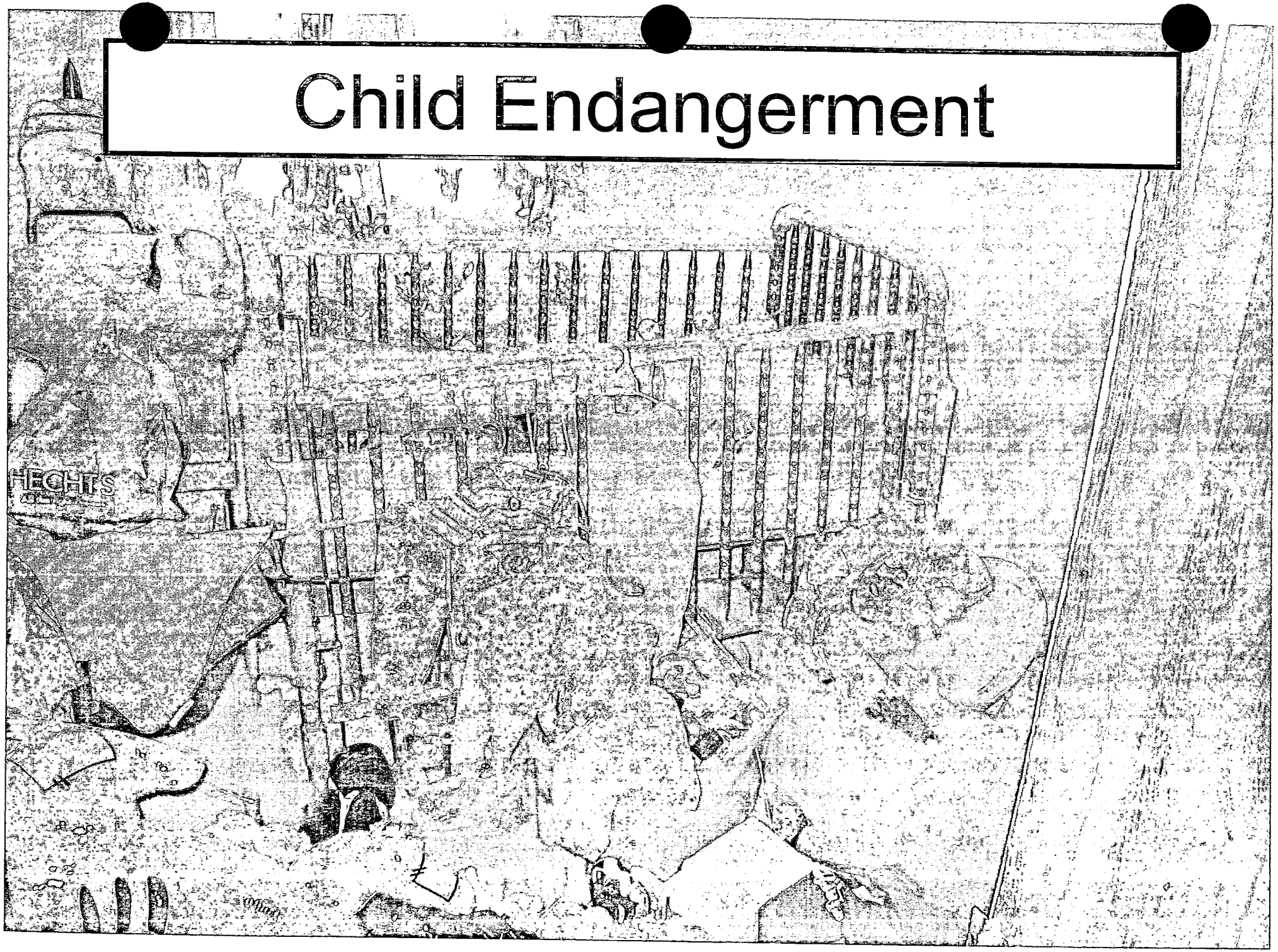
Explosions/Fires

Injuries

27 N.C. Law Enforcement Officers and First Responders were injured while working meth lab cases in 2003

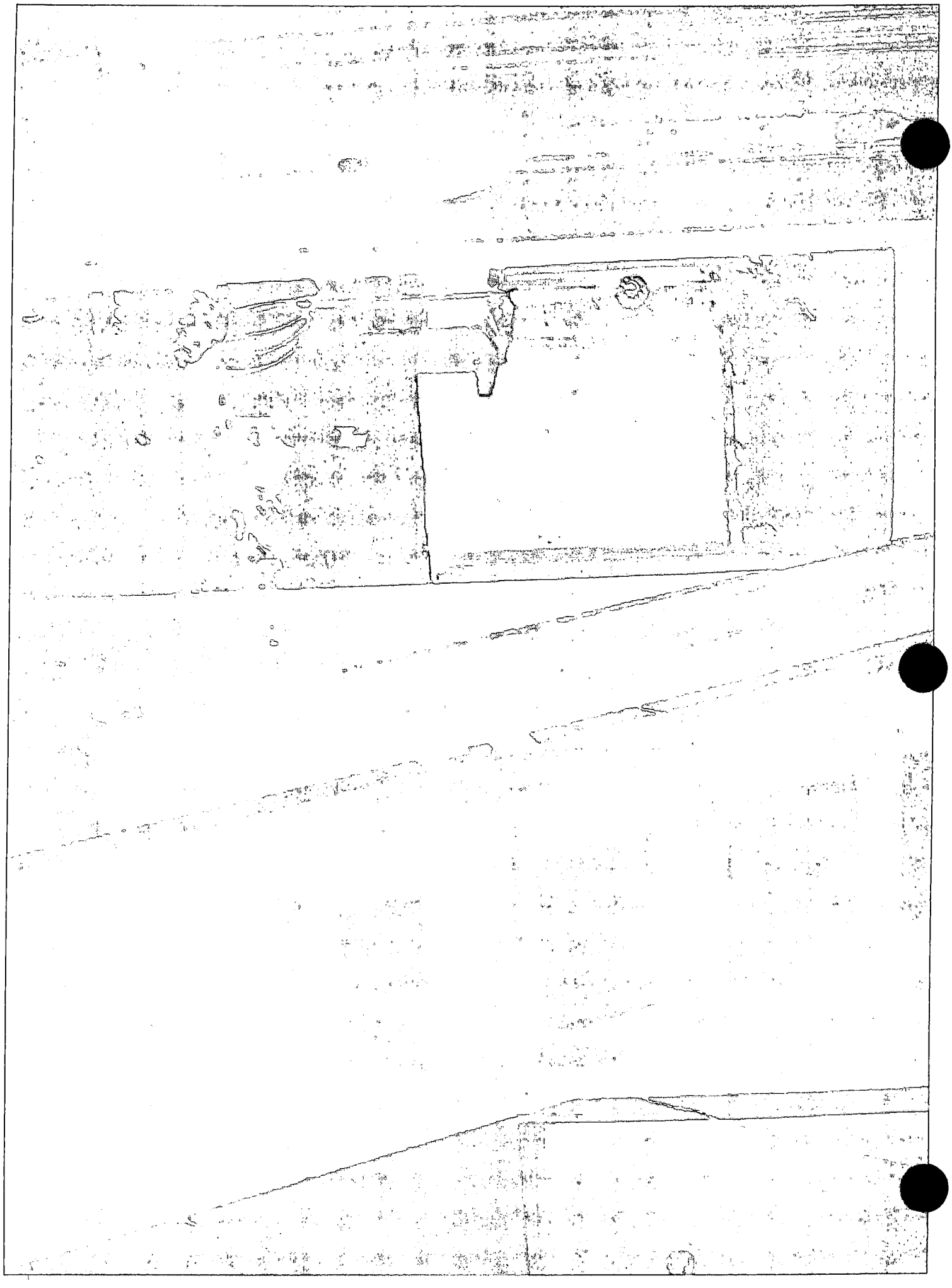
Environmental Impact

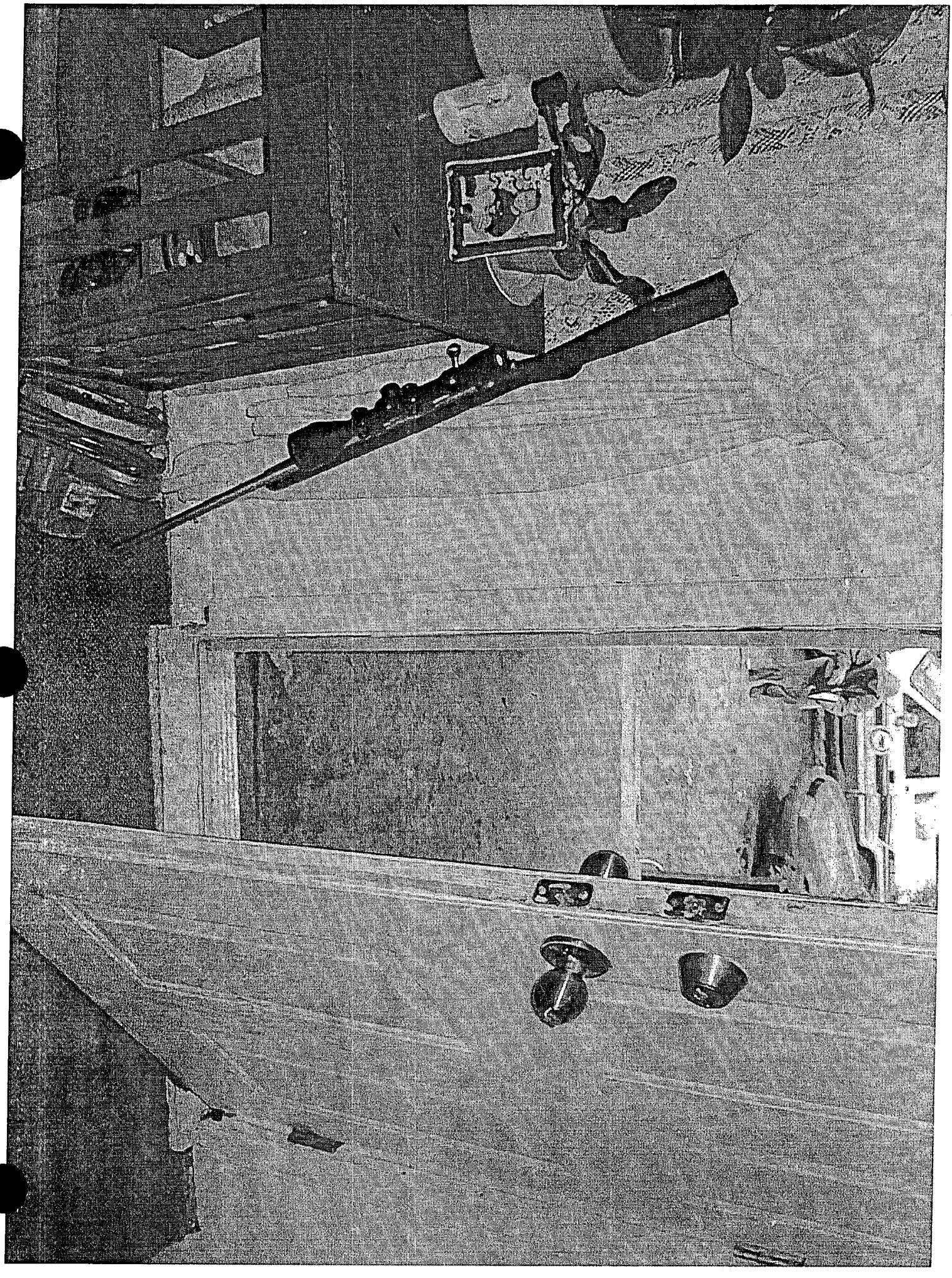
Child Endangerment

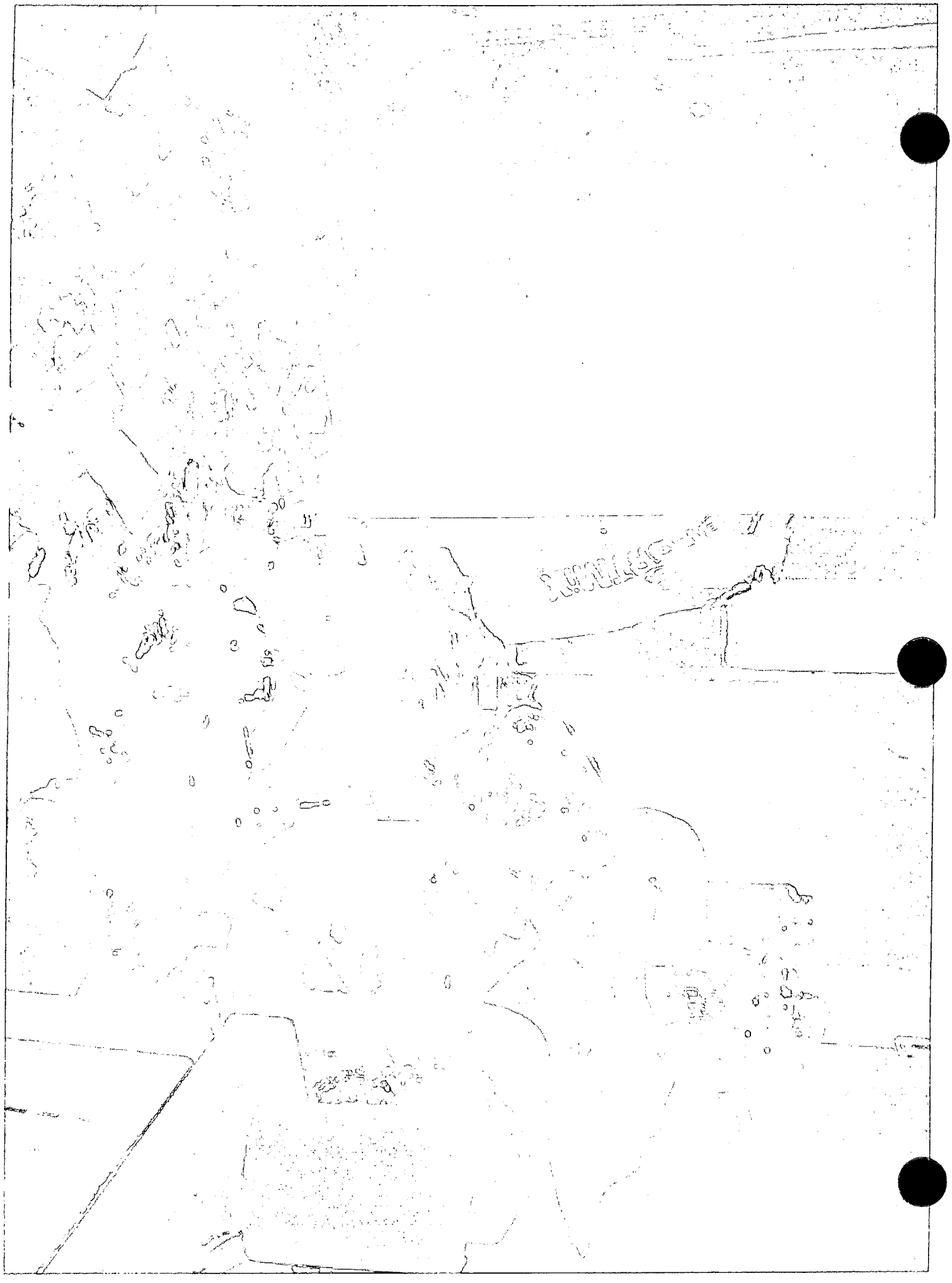


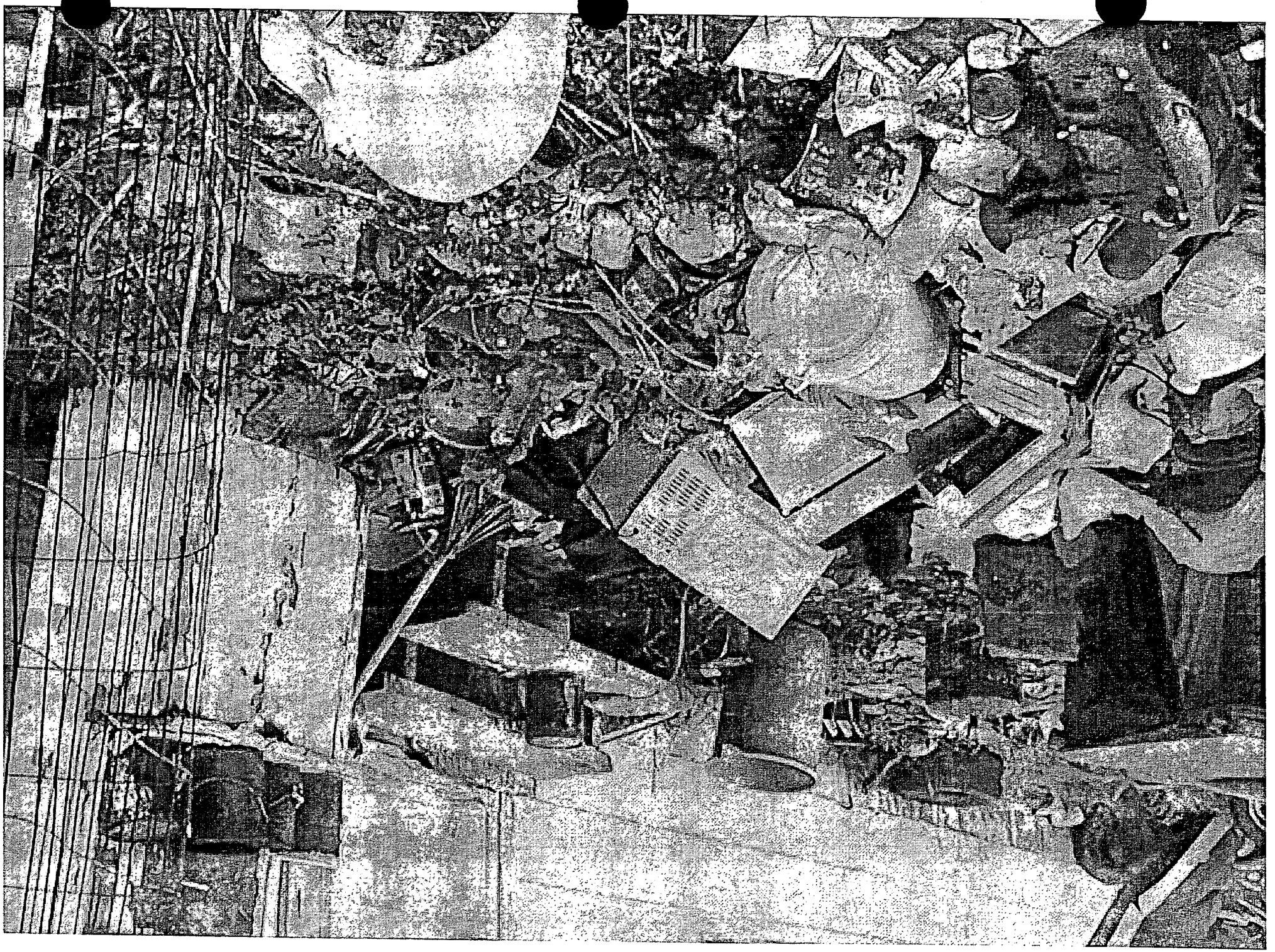
Drug Endangered Children

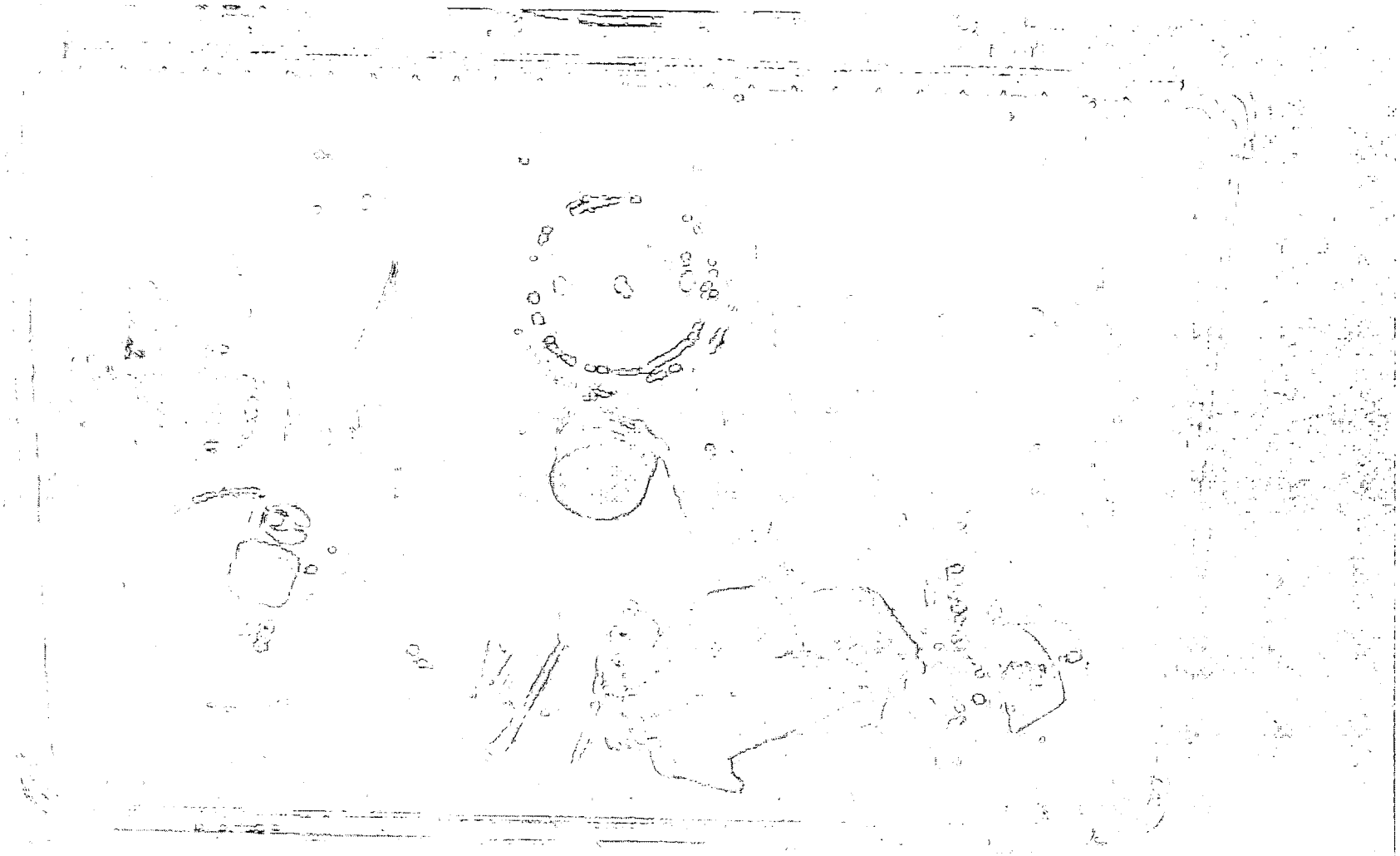
- 69 children were found residing in homes with meth labs in 2003
- 37 children were actually present when the meth lab was discovered

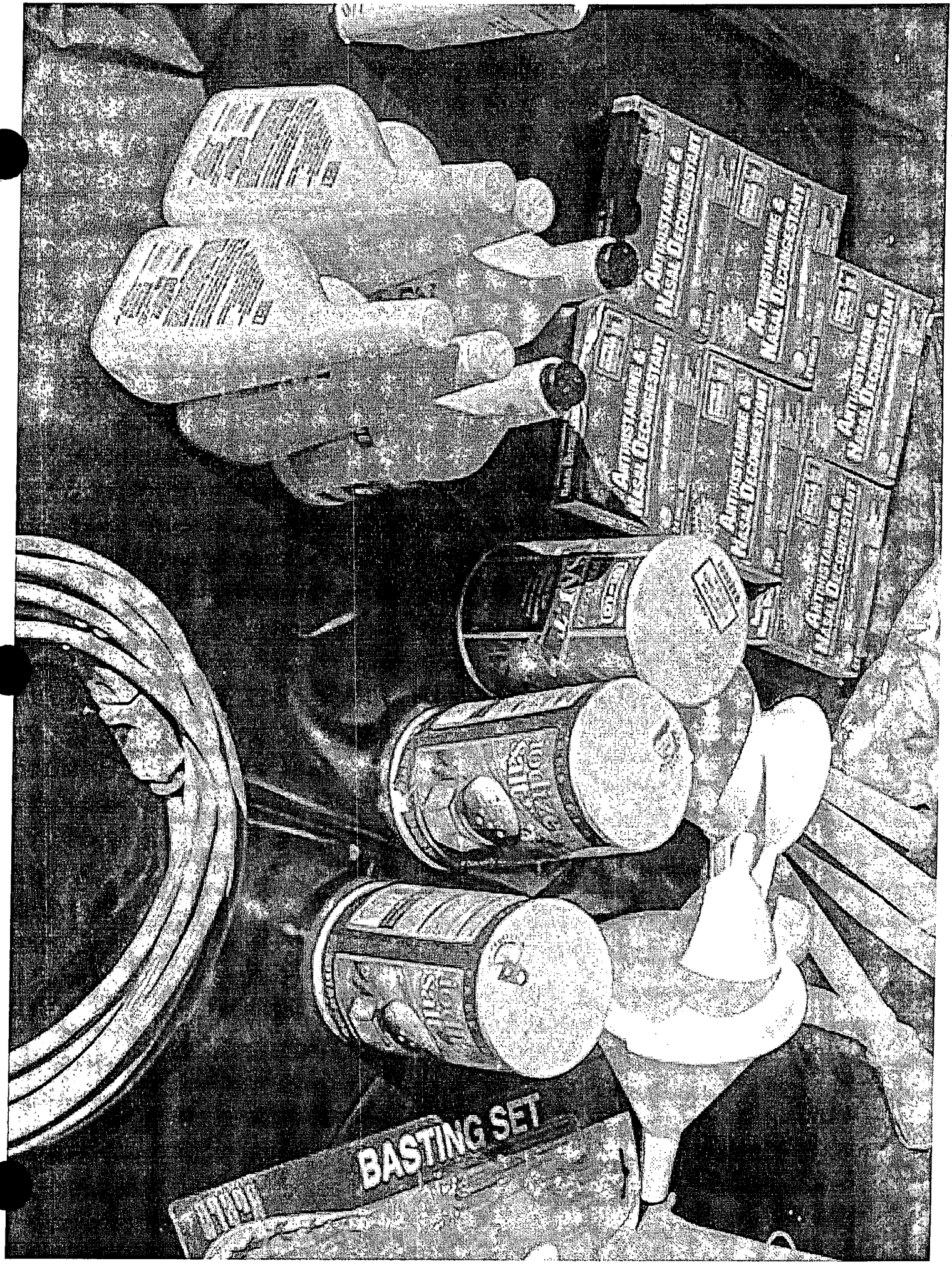




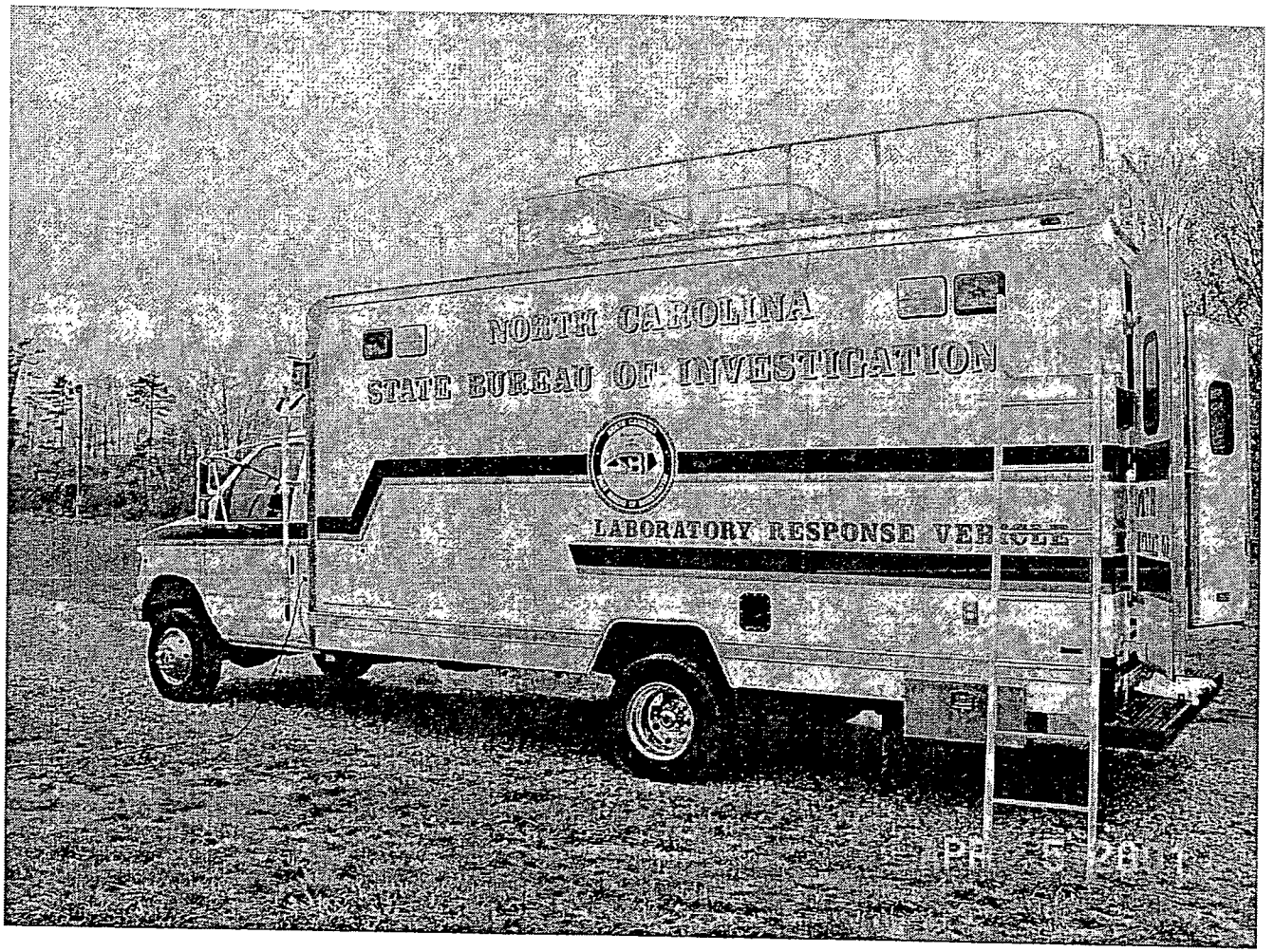


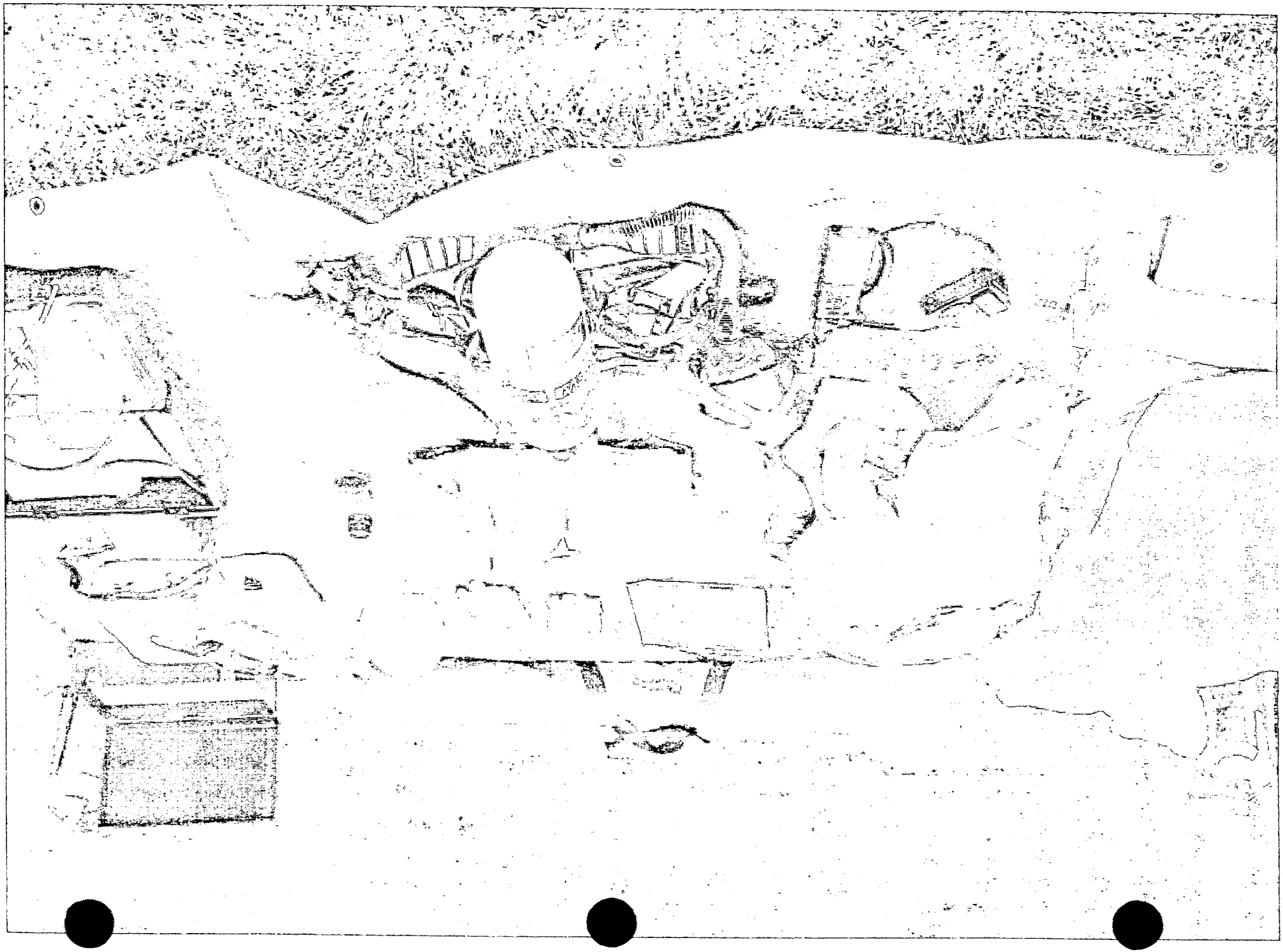


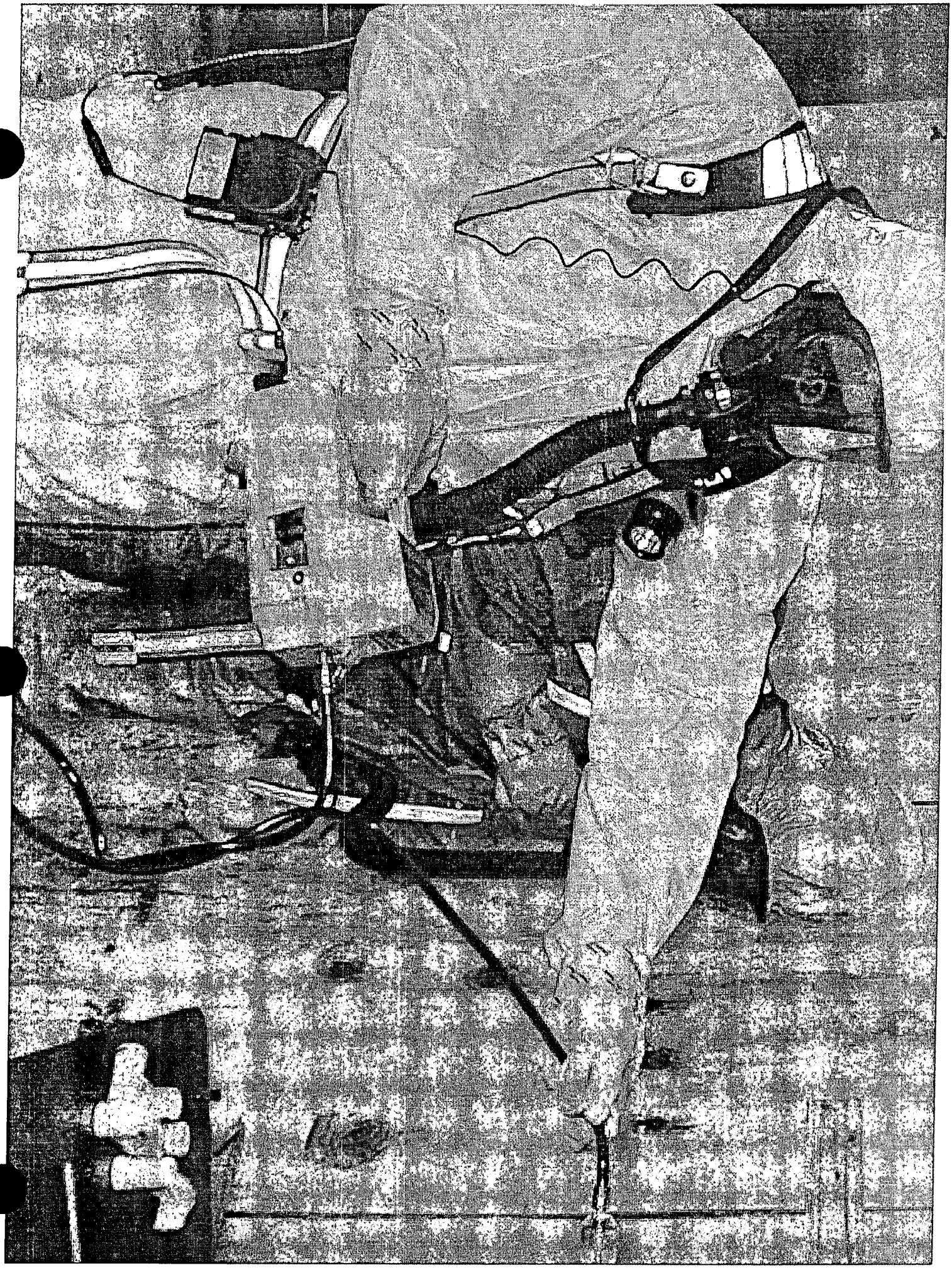



BASTING SET

Response Vehicles







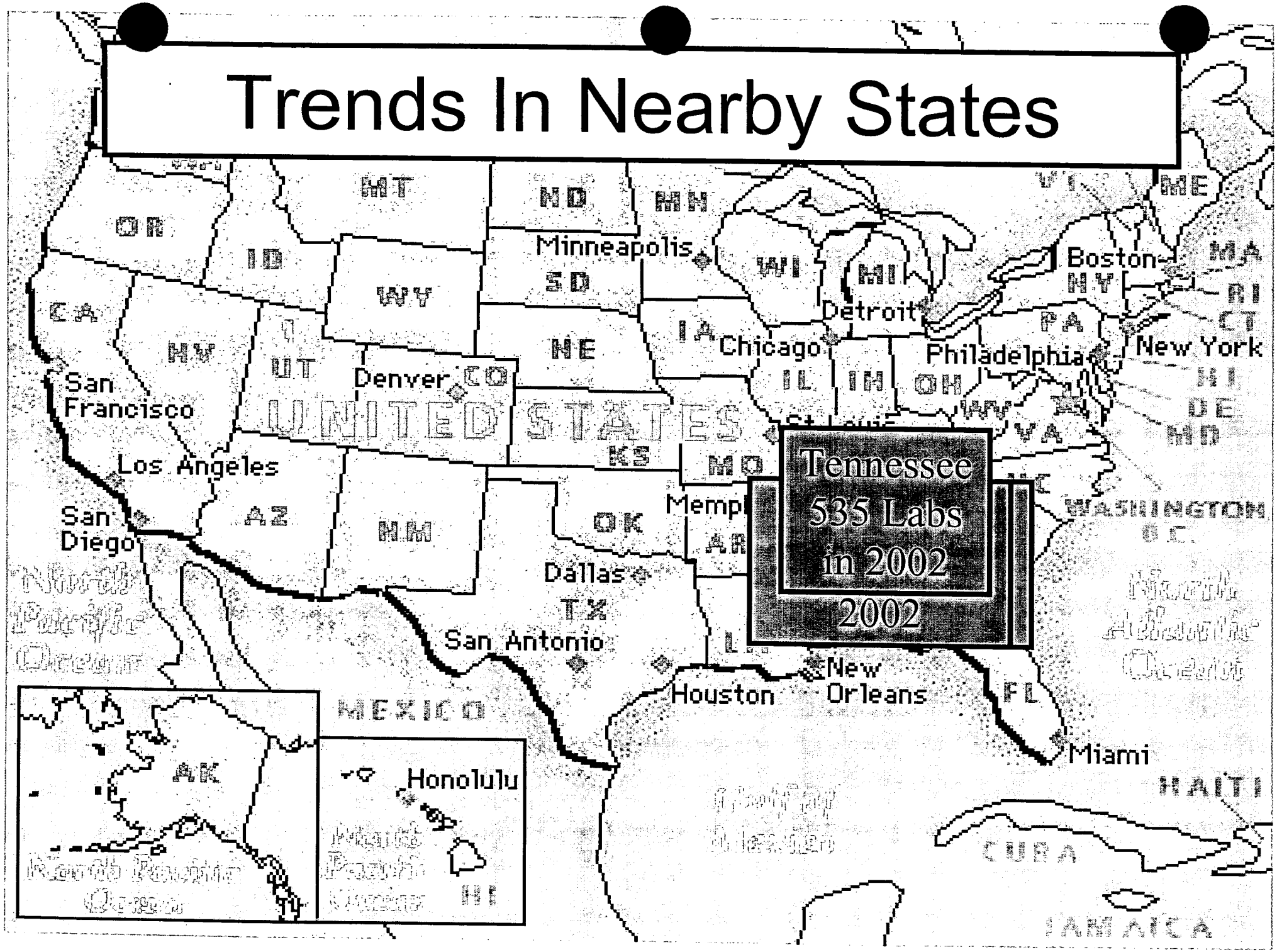
Meth Lab Response

- Single-use supplies: $400 to $600 per lab
- Minimum manpower response is 5 agents
- 2 SBI Crime Laboratory chemists, avg. 40 hours per meth lab

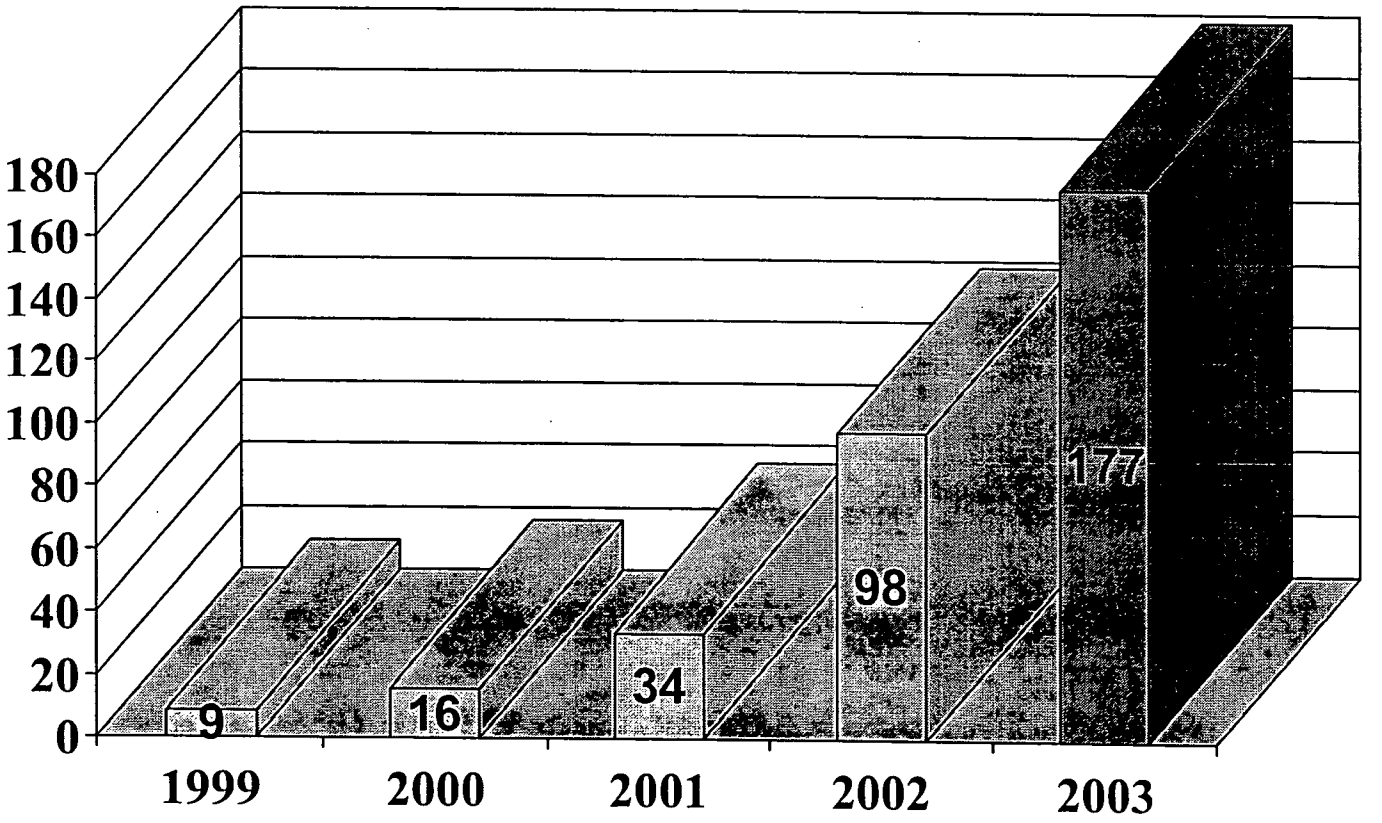
Meth Lab Response

- Medical screening for agents
- Laboratory analysis of evidence
- Equipment maintenance
- Average cost of clean-up phase: $3,000 to $10,000 per lab

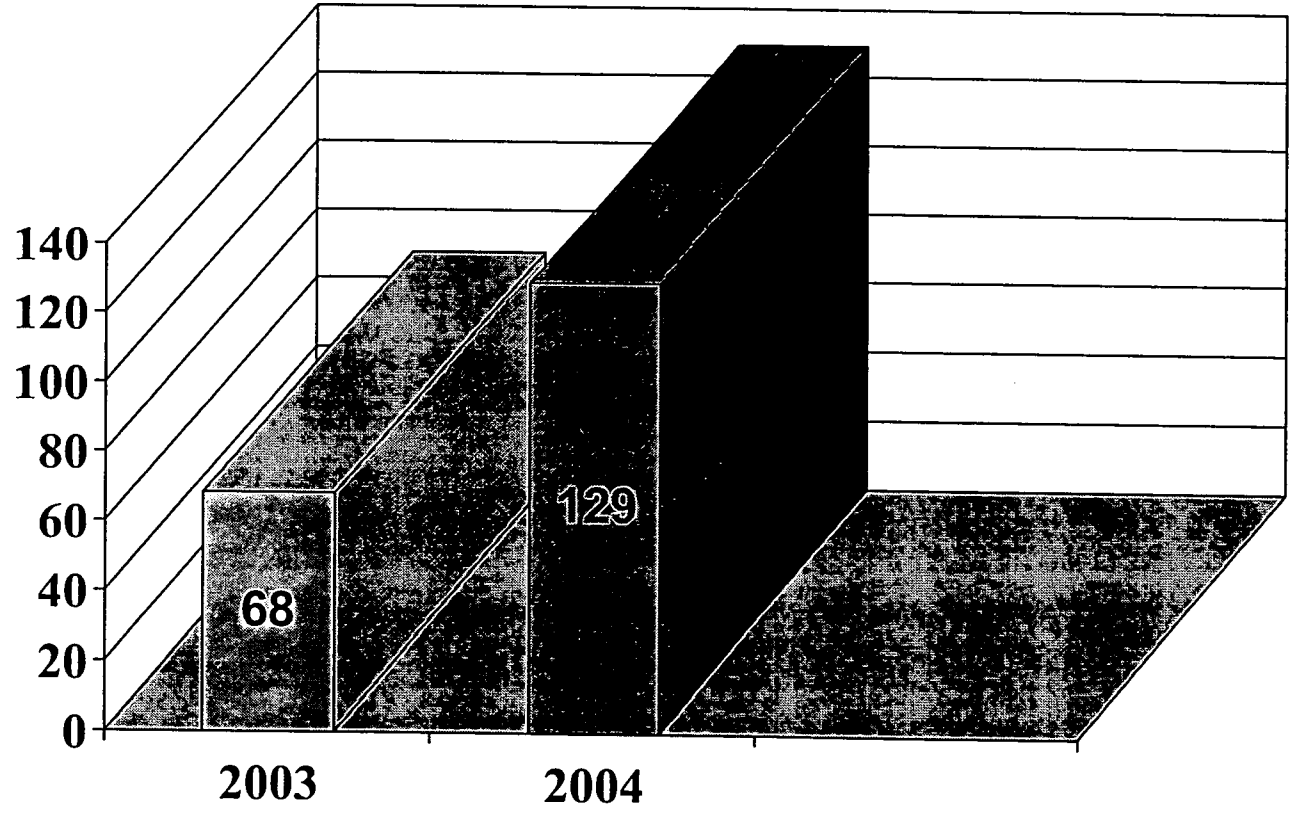
Trends In Nearby States



SBI Clandestine Laboratory Response 1999-2003

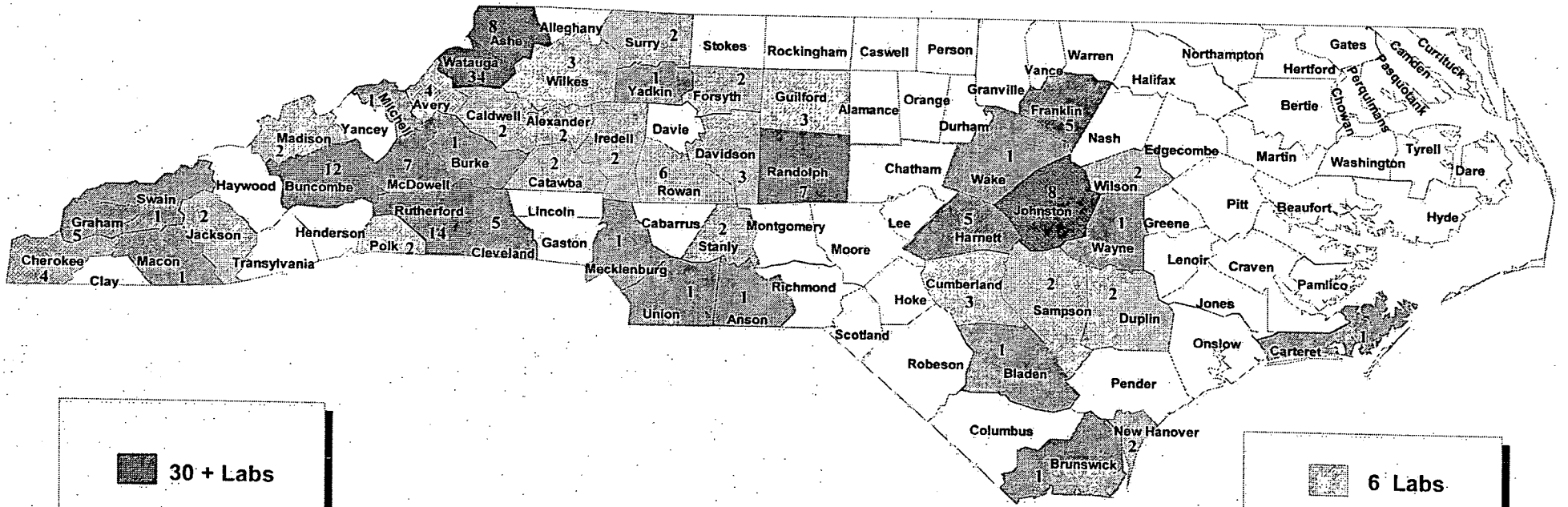


SBI Clandestine Laboratory Response As of May 24 ('03 v '04)



2003 Clandestine Lab Responses
Total: 177

(As of December 31, 2003)



30 + Labs

11- 29 Labs

10 Labs

8 Labs

7 Labs

6 Labs

5 Labs

4 Labs

3 Labs

2 Labs

1 Lab

North Carolina
State Bureau of Investigation

SBI

Work Underway

- Received DEC grant
  October 2003

- Convened Meth Summit
  October 2003

- Released Meth Summit Final Report
  May 2004

Work Underway

- Meetings with stakeholders:

  Governor's Crime Commission

  Sentencing and Policy Commission

  General Assembly

Strategies to combat Meth

- Enhance criminal penalties
- Increase awareness and detection
- Improve intervention
- Increase resources

Field and Lab Agents

Drug Agents

General Agents (Assigned to Special Response Team)

Drug Chemists

Strategies to combat Meth

- Endorsed by:

  Conference of District Attorneys

  Sheriffs Association

  The Covenant with NC's Children

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 5/25/04

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
JERRY RATLEY	SBI - Raleigh
JAY CHAUDHURI	DOT - RALEIGH
Gary McLeod	NCAOC
Ann Hamlin	SBI -
Mark Shook	Watauga Co. Sheriffs Office
Darian Dowdy	Deep Gap Fire Dept.
Mary Dowdy	Deep Gap VFC - Watauga Co.
Cindy Adelle	AG
Reyna S. Walters	AG
Eddie Caldwell	NC Sheriffs Assn / NC Law Enf. Off Assn
Clark Wilson	NC Assn. Chiefs of Police / NC Police Ex. Assoc.

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 5/25/04

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Pat Gallagher	Senate Intern (Hagan)
Deborah Rowe	NC Public Hlth Assoc NC Assoc of Local Hlth Directors
Anna Wood	NC DHHS
[signature]	NCDHHS
Tom Sri'	NCLMA
Fran Preston	NCLMA
Andy Ellen	NCLMA
Steve Cline	NC-DHHS - DPH
Peg Dorer	NC Conference of D.As
Jeff Hunt	N.C. Conf of DAs; DA-29th

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Jerry Richardson	SBI
[signature]	HHS
Lauren Yu	Staff - Sen. Daniel
Abby Youngkin	Staff - Sen. Dalton
John Madler	NC Sentencing Commission
Debbie Dawes	NC Sentencing Commission
[signature]	[illegible]
Michelle Frazier	NC Bar Ass'n
[signature]	Insider
Jess Mekeel	Appellate Section, Criminal Division, DOJ (intern)
Lee-Ann Coe	HAMM
Paul Voglerian	Infomart Inc.

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	June 8, 2004	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 1124	Amend Structured Sentencing/Post Release Supv.	Senator Hartsell
SB 1167	Condo and Planned Comm. Clarifications.	Senator Hartsell

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Tuesday, June 8, 2004, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 1124	Amend Structured Sentencing/Post Release Supv.	Senator Hartsell
SB 1167	Condo and Planned Comm. Clarifications.	Senator Hartsell

Presentations

Other Business

Adjournment

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, June 08, 2004

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

S.B. **1167** Condo and Planned Comm. Clarifications.
Sequential Referral: None
Recommended Referral: None

TOTAL REPORTED: 1

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, June 08, 2004

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO COMMITTEE SUBSTITUTE BILL

S.B. **1124** Amend Structured Sentencing/Post Release Supv.

Draft Number:	PCS 75340
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 1

Committee Clerk Comments:

SENATE JUDICIARY II COMMITTEE

MINUTES

June 8, 2004

Senator L. Hartsell, Chairman, called the Senate Judiciary II Committee to order on June 8, 2004, with ten members present. Senator Hartsell introduced the pages for today's meeting; Catherine Allran, Hickory, NC; Drew Getty, Newport, NC; Trey Creech, Newport, NC and Jennifer Pilkington, Concord, NC.

Senator Hartsell asked Senator Austin Allran, Vice Chair, to preside while he explained SB1124 and SB1167.

Senator Allran stated that SB 1124 proposed committee substitute was before the committee. Senator Apodaca moved to adopt the Committee Substitute for SB1124. Motion Carried. Senator Hartsell explained the committee substitute.

Senator Kinnaird spoke briefly in opposition of the proposed committee substitute for SB1124. Senator Hartsell moved that the Committee Substitute for SB1124 be given a favorable report. Motion carried.

Senator Hartsell was called upon to explain Senate Bill 1167, after a brief explanation of SB 1167, Bill Hale, with Jordan-Price Law Firm spoke briefly in support of SB1167.

Senator Apodaca moved that SB1167 be given a favorable report. Motion carried.

The meeting adjourned at 10:35 a.m.

Senator Fletcher L. Hartsell, Jr., Chairman

Bonnie McNeil, Acting Committee Assistant

SENATE
COMMITTEE SUBSTITUTE

GENERAL ASSEMBLY OF NORTH CAROLINA JUN 8 2004

SESSION 2003

S

ADOPTED

SENATE BILL 1124
PROPOSED COMMITTEE SUBSTITUTE S1124-PCS75340-RC-87

Short Title: Amend Structured Sentencing/Post Release Supv. (Public)

Sponsors:

Referred to:

May 17, 2004

A BILL TO BE ENTITLED

AN ACT TO AMEND THE STRUCTURED SENTENCING LAWS WITH REGARD TO POST-RELEASE SUPERVISION AS RECOMMENDED BY THE NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-1340.11 is amended by adding a new subdivision to read:

"(6a) Post-release supervision. – The time for which a sentenced prisoner is supervised in the community following the termination of the prisoner's maximum prison term, controlled by the rules and conditions of Article 84A of this Chapter."

SECTION 2. G.S. 15A-1340.13(b) reads as rewritten:

"(b) Procedure Generally; Requirements of Judgment; Kinds of Sentences. – Before imposing a sentence, the court shall determine the prior record level for the offender pursuant to G.S. 15A-1340.14. The sentence shall contain a sentence disposition specified for the class of offense and prior record level, and its minimum term of imprisonment shall be within the range specified for the class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment. For Class B1, B2, C, D, and E felony offenses, the sentence shall include a period of post-release supervision under G.S. 15A-1340.18. The kinds of sentence dispositions are active punishment, intermediate punishment, and community punishment."

SECTION 3. G.S. 15A-1340.17 reads as rewritten:

"**§ 15A-1340.17. Punishment limits for each class of offense and prior record level.**

(a) Offense Classification; Default Classifications. – The offense classification is as specified in the offense for which the sentence is being imposed. If the offense is a felony for which there is no classification, it is a Class I felony.

(b) Fines. – Any judgment that includes a sentence of imprisonment may also include a fine. If a community punishment is authorized, the judgment may consist of a fine only. Additionally, when the defendant is other than an individual, the judgment may consist of a fine only. Unless otherwise provided, the amount of the fine is in the discretion of the court.

(c) Punishments for Each Class of Offense and Prior Record Level; Punishment Chart Described. – The authorized punishment for each class of offense and prior record level is as specified in the chart ~~below.~~ below and under G.S. 15A-1340.18. Prior record levels are indicated by the Roman numerals placed horizontally on the top of the chart. Classes of offense are indicated by the letters placed vertically on the left side of the chart. Each cell on the chart contains the following components:

(1) A sentence disposition or dispositions: "C" indicates that a community punishment is authorized; "I" indicates that an intermediate punishment is authorized; "A" indicates that an active punishment is authorized; and "Life Imprisonment Without Parole" indicates that the defendant shall be imprisoned for the remainder of the prisoner's natural life.

(2) A presumptive range of minimum durations, if the sentence of imprisonment is neither aggravated or mitigated; any minimum term of imprisonment in that range is permitted unless the court finds pursuant to G.S. 15A-1340.16 that an aggravated or mitigated sentence is appropriate. The presumptive range is the middle of the three ranges in the cell.

(3) A mitigated range of minimum durations if the court finds pursuant to G.S. 15A-1340.16 that a mitigated sentence of imprisonment is justified; in such a case, any minimum term of imprisonment in the mitigated range is permitted. The mitigated range is the lower of the three ranges in the cell.

(4) An aggravated range of minimum durations if the court finds pursuant to G.S. 15A-1340.16 that an aggravated sentence of imprisonment is justified; in such a case, any minimum term of imprisonment in the aggravated range is permitted. The aggravated range is the higher of the three ranges in the cell.

PRIOR RECORD LEVEL

	I	II	III	IV	V	VI	
	0 Pts	1-4 Pts	5-8 Pts	9-14 Pts	15-18 Pts	19+ Pts	
A	Life Imprisonment Without Parole or Death as Established by Statute						
	A	A	A	A	A	A	DISPOSITION
	240-300	288-360	336-420	384-480	Life Imprisonment Without Parole		Aggravated
B1	192-240	230-288	269-336	307-384	346-433	384-480	PRESUMPTIVE
	144-192	173-230	202-269	230-307	260-346	288-384	Mitigated

	A	A	A	A	A	A	DISPOSITION
	157-196	189-237	220-276	251-313	282-353	313-392	Aggravated
B2	125-157	151-189	176-220	201-251	225-282	251-313	PRESUMPTIVE
	94-125	114-151	132-176	151-201	169-225	188-251	Mitigated
	A	A	A	A	A	A	DISPOSITION
	73-92	100-125	116-145	133-167	151-188	168-210	Aggravated
C	58-73	80-100	93-116	107-133	121-151	135-168	PRESUMPTIVE
	44-58	60-80	70-93	80-107	90-121	101-135	Mitigated
	A	A	A	A	A	A	DISPOSITION
	64-80	77-95	103-129	117-146	133-167	146-183	Aggravated
D	51-64	61-77	82-103	94-117	107-133	117-146	PRESUMPTIVE
	38-51	46-61	61-82	71-94	80-107	88-117	Mitigated
	I/A	I/A	A	A	A	A	DISPOSITION
	25-31	29-36	34-42	46-58	53-66	59-74	Aggravated
E	20-25	23-29	27-34	37-46	42-53	47-59	PRESUMPTIVE
	15-20	17-23	20-27	28-37	32-42	35-47	Mitigated
	I/A	I/A	I/A	A	A	A	DISPOSITION
	16-20	19-24	21-26	25-31	34-42	39-49	Aggravated
F	13-16	15-19	17-21	20-25	27-34	31-39	PRESUMPTIVE
	10-13	11-15	13-17	15-20	20-27	23-31	Mitigated
	I/A	I/A	I/A	I/A	A	A	DISPOSITION
	13-16	15-19	16-20	20-25	21-26	29-36	Aggravated
G	10-13	12-15	13-16	16-20	17-21	23-29	PRESUMPTIVE
	8-10	9-12	10-13	12-16	13-17	17-23	Mitigated
	C/I/A	I/A	I/A	I/A	I/A	A	DISPOSITION
	6-8	8-10	10-12	11-14	15-19	20-25	Aggravated
H	5-6	6-8	8-10	9-11	12-15	16-20	PRESUMPTIVE
	4-5	4-6	6-8	7-9	9-12	12-16	Mitigated
	C	C/I	I	I/A	I/A	I/A	DISPOSITION
	6-8	6-8	6-8	8-10	9-11	10-12	Aggravated
I	4-6	4-6	5-6	6-8	7-9	8-10	PRESUMPTIVE
	3-4	3-4	4-5	4-6	5-7	6-8	Mitigated

(d) Maximum Sentences Specified for ~~Class F through Class I Felonies.~~ Class B1 Felonies Through Class I Felonies for Minimum Terms up to 346 Months. – Unless provided otherwise in a statute establishing a punishment for a specific crime, for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table below for Class ~~F~~ B1 through Class I felonies. The first figure in each cell in the table is the minimum term and the second is the maximum term.

3-4	4-5	5-6	6-8	7-9	8-10	9-11	10-12
11-14	12-15	13-16	14-17	15-18	16-20	17-21	18-22

19-23	20-24	21-26	22-27	23-28	24-29	25-30	26-32
27-33	28-34	29-35	30-36	31-38	32-39	33-40	34-41
35-42	36-44	37-45	38-46	39-47	40-48	41-50	42-51
43-52	44-53	45-54	46-56	47-57	48-58	49-59	50-60
51-61	52-62	53-64	54-65	55-66	56-67	57-68	58-70
59-71	60-72	61-73	62-74	63-76	64-77	65-78	66-79
67-80	68-82	69-83	70-84	71-85	72-86	73-88	74-89
75-90	76-91	77-92	78-94	79-95	80-96	81-97	82-98
83-100	84-101	85-102	86-103	87-104	88-106	89-107	90-108
91-109	92-110	93-112	94-113	95-114	96-115	97-116	98-118
99-119	100-120	101-121	102-122	103-124	104-125	105-126	106-127
107-128	108-130	109-131	110-132	111-133	112-134	113-136	114-137
115-138	116-139	117-140	118-142	119-143	120-144	121-145	122-146
123-148	124-149	125-150	126-151	127-152	128-154	129-155	130-156
131-157	132-158	133-160	134-161	135-162	136-163	137-164	138-166
139-167	140-168	141-169	142-170	143-172	144-173	145-174	146-175
147-176	148-178	149-179	150-180	151-181	152-182	153-184	154-185
155-186	156-187	157-188	158-190	159-191	160-192	161-193	162-194
163-196	164-197	165-198	166-199	167-200	168-202	169-203	170-204
171-205	172-206	173-208	174-209	175-210	176-211	177-212	178-214
179-215	180-216	181-217	182-218	183-220	184-221	185-222	186-223
187-224	188-226	189-227	190-228	191-229	192-230	193-232	194-233
195-234	196-235	197-236	198-238	199-239	200-240	201-241	202-242
203-244	204-245	205-246	206-247	207-248	208-250	209-251	210-252
211-253	212-254	213-256	214-257	215-258	216-259	217-260	218-262
219-263	220-264	221-265	222-266	223-268	224-269	225-270	226-271
227-272	228-274	229-275	230-276	231-277	232-278	233-280	234-281
235-282	236-283	237-284	238-286	239-287	240-288	241-289	242-290
243-292	244-293	245-294	246-295	247-296	248-298	249-299	250-300
251-301	252-302	253-304	254-305	255-306	256-307	257-308	258-310
259-311	260-312	261-313	262-314	263-316	264-317	265-318	266-319
267-320	268-322	269-323	270-324	271-325	272-326	273-328	274-329
275-330	276-331	277-332	278-334	279-335	280-336	281-337	282-338
283-340	284-341	285-342	286-343	287-344	288-346	289-347	290-348
291-349	292-350	293-352	294-353	295-354	296-355	297-356	298-358
299-359	300-360	301-361	302-362	303-364	304-365	305-366	306-367
307-368	308-370	309-371	310-372	311-373	312-374	313-376	314-377
315-378	316-379	317-380	318-382	319-383	320-384	321-385	322-386
323-388	324-389	325-390	326-391	327-392	328-394	329-395	330-396
331-397	332-398	333-400	334-401	335-402	336-403	337-404	338-406
339-407	340-408	341-409	342-410	343-412	344-413	345-414	346-415

~~(e) Maximum Sentences Specified for Class B1 through Class E Felonies for Minimum Terms up to 339 Months. Unless provided otherwise in a statute~~

~~establishing a punishment for a specific crime, for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table below for Class B1 through Class E felonies. The first figure in each cell of the table is the minimum term and the second is the maximum term.~~

~~15-27~~	~~16-29~~	~~17-30~~	~~18-31~~	~~19-32~~	~~20-33~~	~~21-35~~	~~22-36~~
~~23-37~~	~~24-38~~	~~25-39~~	~~26-41~~	~~27-42~~	~~28-43~~	~~29-44~~	~~30-45~~
~~31-47~~	~~32-48~~	~~33-49~~	~~34-50~~	~~35-51~~	~~36-53~~	~~37-54~~	~~38-55~~
~~39-56~~	~~40-57~~	~~41-59~~	~~42-60~~	~~43-61~~	~~44-62~~	~~45-63~~	~~46-65~~
~~47-66~~	~~48-67~~	~~49-68~~	~~50-69~~	~~51-71~~	~~52-72~~	~~53-73~~	~~54-74~~
~~55-75~~	~~56-77~~	~~57-78~~	~~58-79~~	~~59-80~~	~~60-81~~	~~61-83~~	~~62-84~~
~~63-85~~	~~64-86~~	~~65-87~~	~~66-89~~	~~67-90~~	~~68-91~~	~~69-92~~	~~70-93~~
~~71-95~~	~~72-96~~	~~73-97~~	~~74-98~~	~~75-99~~	~~76-101~~	~~77-102~~	~~78-103~~
~~79-104~~	~~80-105~~	~~81-107~~	~~82-108~~	~~83-109~~	~~84-110~~	~~85-111~~	~~86-113~~
~~87-114~~	~~88-115~~	~~89-116~~	~~90-117~~	~~91-119~~	~~92-120~~	~~93-121~~	~~94-122~~
~~95-123~~	~~96-125~~	~~97-126~~	~~98-127~~	~~99-128~~	~~100-129~~	~~101-131~~	~~102-132~~
~~103-133~~	~~104-134~~	~~105-135~~	~~106-137~~	~~107-138~~	~~108-139~~	~~109-140~~	~~110-141~~
~~111-143~~	~~112-144~~	~~113-145~~	~~114-146~~	~~115-147~~	~~116-149~~	~~117-150~~	~~118-151~~
~~119-152~~	~~120-153~~	~~121-155~~	~~122-156~~	~~123-157~~	~~124-158~~	~~125-159~~	~~126-161~~
~~127-162~~	~~128-163~~	~~129-164~~	~~130-165~~	~~131-167~~	~~132-168~~	~~133-169~~	~~134-170~~
~~135-171~~	~~136-173~~	~~137-174~~	~~138-175~~	~~139-176~~	~~140-177~~	~~141-179~~	~~142-180~~
~~143-181~~	~~144-182~~	~~145-183~~	~~146-185~~	~~147-186~~	~~148-187~~	~~149-188~~	~~150-189~~
~~151-191~~	~~152-192~~	~~153-193~~	~~154-194~~	~~155-195~~	~~156-197~~	~~157-198~~	~~158-199~~
~~159-200~~	~~160-201~~	~~161-203~~	~~162-204~~	~~163-205~~	~~164-206~~	~~165-207~~	~~166-209~~
~~167-210~~	~~168-211~~	~~169-212~~	~~170-213~~	~~171-215~~	~~172-216~~	~~173-217~~	~~174-218~~
~~175-219~~	~~176-221~~	~~177-222~~	~~178-223~~	~~179-224~~	~~180-225~~	~~181-227~~	~~182-228~~
~~183-229~~	~~184-230~~	~~185-231~~	~~186-233~~	~~187-234~~	~~188-235~~	~~189-236~~	~~190-237~~
~~191-239~~	~~192-240~~	~~193-241~~	~~194-242~~	~~195-243~~	~~196-245~~	~~197-246~~	~~198-247~~
~~199-248~~	~~200-249~~	~~201-251~~	~~202-252~~	~~203-253~~	~~204-254~~	~~205-255~~	~~206-257~~
~~207-258~~	~~208-259~~	~~209-260~~	~~210-261~~	~~211-263~~	~~212-264~~	~~213-265~~	~~214-266~~
~~215-267~~	~~216-269~~	~~217-270~~	~~218-271~~	~~219-272~~	~~220-273~~	~~221-275~~	~~222-276~~
~~223-277~~	~~224-278~~	~~225-279~~	~~226-281~~	~~227-282~~	~~228-283~~	~~229-284~~	~~230-285~~
~~231-287~~	~~232-288~~	~~233-289~~	~~234-290~~	~~235-291~~	~~236-293~~	~~237-294~~	~~238-295~~
~~239-296~~	~~240-297~~	~~241-299~~	~~242-300~~	~~243-301~~	~~244-302~~	~~245-303~~	~~246-305~~
~~247-306~~	~~248-307~~	~~249-308~~	~~250-309~~	~~251-311~~	~~252-312~~	~~253-313~~	~~254-314~~
~~255-315~~	~~256-317~~	~~257-318~~	~~258-319~~	~~259-320~~	~~260-321~~	~~261-323~~	~~262-324~~
~~263-325~~	~~264-326~~	~~265-327~~	~~266-329~~	~~267-330~~	~~268-331~~	~~269-332~~	~~270-333~~
~~271-335~~	~~272-336~~	~~273-337~~	~~274-338~~	~~275-339~~	~~276-341~~	~~277-342~~	~~278-343~~
~~279-344~~	~~280-345~~	~~281-347~~	~~282-348~~	~~283-349~~	~~284-350~~	~~285-351~~	~~286-353~~
~~287-354~~	~~288-355~~	~~289-356~~	~~290-357~~	~~291-359~~	~~292-360~~	~~293-361~~	~~294-362~~
~~295-363~~	~~296-365~~	~~297-366~~	~~298-367~~	~~299-368~~	~~300-369~~	~~301-371~~	~~302-372~~
~~303-373~~	~~304-374~~	~~305-375~~	~~306-377~~	~~307-378~~	~~308-379~~	~~309-380~~	~~310-381~~
~~311-383~~	~~312-384~~	~~313-385~~	~~314-386~~	~~315-387~~	~~316-389~~	~~317-390~~	~~318-391~~

~~319-392 320-393 321-395 322-396 323-397 324-398 325-399 326-401 327-402 328-403 329-404 330-405 331-407 332-408 333-409 334-410 335-411 336-413 337-414 338-415 339-416~~

(e1) Maximum Sentences Specified for Class B1 through Class ~~E~~ I Felonies for Minimum Terms of ~~340~~ 347 Months or More. – Unless provided otherwise in a statute establishing a punishment for a specific crime, when the minimum sentence is ~~340~~ 347 months or more, the corresponding maximum term of imprisonment shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest ~~month, plus nine additional months.~~ month."

SECTION 4. Article 81B of Chapter 15A of the General Statutes is amended by adding a new section to read:

"**§ 15A-1340.18. Post-release supervision.**

(a) Except as provided in subsection (b) of this section, the court must also impose a period of post-release supervision to follow the term of imprisonment and an additional term of imprisonment to be served upon revocation of the period of post-release supervision on all offenders convicted of a Class B1, B2, C, D, or E felony offense, including offenders convicted of a Class B1, B2, C, D, or E felony offense under G.S. 90-95(h). The period of supervision and the term of imprisonment are as follows:

(1) Period of supervision. – The period of post-release supervision shall be nine months, unless the offense is a Class B1 through E offense for which registration is required pursuant to Article 27A of Chapter 14 of the General Statutes. For offenses subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the period of post-release supervision is five years.

(2) Term of imprisonment. – The term of imprisonment upon revocation of post-release supervision shall be for a minimum term of seven months and a maximum term of nine months.

(b) If an offender is convicted of a Class B1 felony offense and receives a sentence of life imprisonment without parole, then post-release supervision shall not be imposed.

(c) If the court imposes an intermediate punishment on an offender who is eligible to receive post-release supervision under subsection (a) of this section, then the period of post-release supervision is suspended.

(d) Provisions of Article 84A of this Chapter apply to judgments entered pursuant to this section."

SECTION 5. G.S. 15A-1342(c) reads as rewritten:

"(c) Conditions; Suspended Sentence. – When the court places a convicted offender on probation, it must determine conditions of probation as provided in G.S. 15A-1343. In addition, it must impose a suspended sentence of imprisonment, determined as provided in Article ~~83, Imprisonment,~~ 83 of this Chapter, which may be activated upon violation of conditions of probation. Suspension of a term of

imprisonment also suspends any period of post-release supervision that may be imposed for that offense."

SECTION 6. G.S. 15A-1344(d) reads as rewritten:

"(d) Extension and Modification; Response to Violations. – At any time prior to the expiration or termination of the probation period, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation. The probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation. The hearing may be held in the absence of the defendant, if he fails to appear for the hearing after a reasonable effort to notify him. If a convicted defendant violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions of G.S. 15A-1345, may continue him on probation, with or without modifying the conditions, may place the defendant on special probation as provided in subsection (e), or, if continuation, modification, or special probation is not appropriate, may revoke the probation and activate the suspended sentence and any period of post-release supervision imposed at the time of initial sentencing, if any, or may order that charges as to which prosecution has been deferred be brought to trial; provided that probation may not be revoked solely for conviction of a Class 3 misdemeanor. The court, before activating a sentence to imprisonment established when the defendant was placed on probation, may reduce the sentence, but the reduction shall be consistent with subsection (d1) of this section. A sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period unless the revoking judge specifies that it is to run consecutively with the other period."

SECTION 7. G.S. 15A-1354 reads as rewritten:

"**§ 15A-1354. Concurrent and consecutive terms of imprisonment.**

(a) Authority of Court. – When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. If not specified or not required by statute to run consecutively, sentences shall run concurrently.

(b) Effect of Consecutive Terms. – In determining the effect of consecutive sentences imposed under authority of this Article and the manner in which they will be served, the Department of Correction must treat the defendant as though he has been committed for a single term with the following incidents:

(1) The maximum prison sentence consists of the total of the maximum terms of the consecutive ~~sentences, less nine months for each of the second and subsequent sentences imposed for Class B through Class E felonies; and~~sentences; and

(2) The minimum term consists of the total of the minimum terms of the consecutive sentences.

(c) Post-Release Supervision. – When multiple periods of post-release supervision are imposed on a person, either at the same time or in addition to existing periods of supervision, the periods of post-release supervision are consolidated to run as a single period and begin at the conclusion of all terms of imprisonment."

SECTION 8. G.S. 15A-1368(a) reads as rewritten:

"(a) The following words have the listed meaning in this Article:

(1) Post-release supervision or supervision. – The time for which a sentenced prisoner is ~~released from prison before~~ supervised in the community following the termination of ~~his~~ the prisoner's maximum prison term, controlled by the rules and conditions of this Article. Purposes of post-release supervision include all or any of the following: to monitor and control the prisoner in the community, to assist the prisoner in reintegrating into society, to collect restitution and other court indebtedness from the prisoner, and to continue the prisoner's treatment or education.

(2) Supervisee. – A person released from incarceration and in the custody of the Department of Correction and Post-Release Supervision and Parole Commission on post-release supervision.

(3) Commission. – The Post-Release Supervision and Parole Commission, whose general authority is described in G.S. 143B-266.

(4) Minimum imposed term. – The minimum term of imprisonment imposed on an individual prisoner by a court judgment, as described in G.S. 15A-1340.13(c). When a prisoner is serving consecutive imprisonment terms, the minimum imposed term, for purposes of this Article, is the sum of all minimum terms imposed in the court judgment.

(5) Maximum imposed term. – The maximum term of imprisonment imposed on an individual prisoner by a court judgment, as described in G.S. 15A-1340.13(c). When a prisoner is serving consecutive prison terms, the maximum imposed term, for purposes of this Article, is the sum of all maximum terms imposed in the court judgment or ~~judgments, less nine months for each of the second and subsequent sentences imposed for Class B through Class E felonies.~~judgments."

SECTION 9. G.S. 15A-1368.1 reads as rewritten:

"**§ 15A-1368.1. Applicability of Article 84A.**

This Article applies to all felons in Class B1 through Class E sentenced to an active punishment under Article 81B of this ~~Chapter,~~ Chapter or G.S. 90-95(h), but does not apply to felons in Class B1 sentenced to life imprisonment without parole. Prisoners subject to Articles 85 and 85A of this Chapter are excluded from this Article's coverage."

SECTION 10. G.S. 15A-1368.2 reads as rewritten:

"**§ 15A-1368.2. Post-release supervision eligibility and procedure.**

(a) A prisoner to whom this Article applies shall be released from prison for post-release supervision on the date equivalent to his maximum imposed prison term ~~less nine months,~~ less any earned time awarded by the Department of Correction or the custodian of a local confinement facility under G.S. 15A-1340.13(d). If a prisoner has not been awarded any earned time, the prisoner shall be released for post-release supervision on the date equivalent to his maximum prison ~~term less nine months.~~term.

(b) A prisoner shall not refuse post-release supervision.

(c) A supervisee's period of post-release supervision shall be for a period of nine months, unless the offense is ~~an~~ a Class B1 through E offense for which registration is required pursuant to Article 27A of Chapter 14 of the General Statutes. For offenses subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the period of post-release supervision is five years. The conditions of post-release supervision are as authorized in ~~G.S. 15A-1368.5.~~G.S. 15A-1368.4.

~~(d) A supervisee's period of post-release supervision may be reduced while the supervisee is under supervision by earned time awarded by the Department of Correction, pursuant to rules adopted in accordance with law. A supervisee is eligible to receive earned time credit toward the period of supervision for compliance with reintegrative conditions described in G.S. 15A-1368.5.~~

(e) Repealed by Session Laws 1997-237, s. 7.

(f) When a supervisee completes the period of post-release supervision, the sentence or sentences from which the supervisee was placed on post-release supervision are terminated."

SECTION 11. G.S. 15A-1368.3 reads as rewritten:

"**§ 15A-1368.3. Incidents of post-release supervision.**

(a) Conditionality. – Post-release supervision is conditional and subject to revocation.

(b) Modification. – The Commission may for good cause shown modify the conditions of post-release supervision at any time before the termination of the supervision period.

(c) Effect of Violation. – If the supervisee violates a condition, described in G.S. 15A-1368.4, at any time before the termination of the supervision period, the Commission may continue the supervisee on the existing supervision, with or without modifying the conditions, or if continuation or modification is not appropriate, may revoke post-release supervision as provided in G.S. 15A-1368.6 and reimprison the supervisee for a term consistent with the following requirements:

(1) The supervisee will be returned to prison ~~up to the time remaining on his maximum imposed term.~~for a minimum term of seven months and a maximum term of nine months.

(2) The supervisee shall not receive any credit for days on post-release supervision against the maximum term of imprisonment imposed by the court under ~~G.S. 15A-1340.13.~~G.S. 15A-1340.18(a)(2).

(3) Pursuant to Article 19A of Chapter 15, the Department of Correction shall award a prisoner credit against any term of reimprisonment for all

time spent in custody as a result of revocation proceedings under G.S. 15A-1368.6.

(4) The prisoner is eligible to receive earned time credit against the maximum prison term as provided in G.S. 15A-1340.13(d) for time served in prison after the revocation.

(d) No Re-Release After Revocation of Post-Release Supervision. – A prisoner who has been reimprisoned prior to completing a post-release supervision period may ~~again~~ not be released again on post-release supervision by the ~~Commission subject to the provisions which govern initial release.~~Commission.

(e) Timing of Revocation. – The Commission may revoke post-release supervision for violation of a condition during the period of supervision. The Commission may also revoke post-release supervision following a period of supervision if:

(1) Before the expiration of the period of post-release supervision, the Commission has recorded its intent to conduct a revocation hearing; and

(2) The Commission finds that every reasonable effort has been made to notify the supervisee and conduct the hearing earlier. Prima facie evidence of reasonable effort to notify is the issuance of a temporary or conditional revocation order, as provided in G.S. 15A-1376, that goes unserved."

SECTION 12. G.S. 15A-1368.4 reads as rewritten:

"**§ 15A-1368.4. Conditions of post-release supervision.**

(a) In General. – Conditions of post-release supervision may be reintegrative in nature or designed to control the supervisee's behavior and to enforce compliance with law or judicial order. A supervisee may have his supervision period revoked for any violation of a controlling condition or for repeated violation of a reintegrative condition. ~~Compliance with reintegrative conditions may entitle a supervisee to earned time credits as described in G.S. 15A-1368.2(d).~~

(b) Required Condition. – The Commission shall provide as an express condition of every release that the supervisee not commit another crime during the period for which the supervisee remains subject to revocation. A supervisee's failure to comply with this controlling condition is a supervision violation for which the supervisee may face revocation as provided in G.S. 15A-1368.3.

(b1) Additional Required Conditions for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. – In addition to the required condition set forth in subsection (b) of this section, for a supervisee who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, controlling conditions, violations of which may result in revocation of post-release supervision, are:

(1) Register as required by G.S. 14-208.7 if the offense is a reportable conviction as defined by G.S. 14-208.6(4).

(2) Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the Commission.

(3) Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.

(4) Not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor.

(5) Not reside in a household with any minor child if the offense is one in which there is evidence of physical or mental abuse of a minor, unless ~~a court of competent jurisdiction~~ the Post-Release Supervision and Parole Commission expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the child's best interest to allow the supervisee to reside in the same household with a minor child.

(c) Discretionary Conditions. – The Commission, in consultation with the Division of Community Corrections, may impose reintegrative or controlling conditions on a supervisee it believes reasonably necessary to ensure that the supervisee will lead a law-abiding life or to assist the supervisee to do so.

(d) Reintegrative Conditions. – Appropriate reintegrative conditions, for which ~~a supervisee may receive earned time credits against the length of the supervision period, and~~ repeated violation ~~that~~ may result in revocation of post-release supervision, are:

(1) Work faithfully at suitable employment or faithfully pursue a course of study or vocational training that will equip the supervisee for suitable employment.

(2) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(3) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on post-release supervision.

(4) Support the supervisee's dependents and meet other family responsibilities.

(5) In the case of a supervisee who attended a basic skills program during incarceration, continue attending a basic skills program in pursuit of a General Education Development Degree or adult high school diploma.

(6) Satisfy other conditions reasonably related to reintegration into society.

(e) Controlling Conditions. – Appropriate controlling conditions, violation of which may result in revocation of post-release supervision, are:

(1) Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for the supervisee by a licensed physician and is in the original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors, or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place

where such illegal drugs or controlled substances are sold, kept, or used.

(2) Comply with a court order to pay the costs of reintegrative treatment for a minor and a minor's parents or custodians where the offense involved evidence of physical, mental, or sexual abuse of a minor.

(3) Comply with a court order to pay court costs and costs for appointed counsel or public defender in the case for which the supervisee was convicted.

(4) Not possess a firearm, destructive device, or other dangerous weapon unless granted written permission by the Commission or a post-release supervision officer.

(5) Report to a post-release supervision officer at reasonable times and in a reasonable manner, as directed by the Commission or a post-release supervision officer.

(6) Permit a post-release supervision officer to visit at reasonable times at the supervisee's home or elsewhere.

(7) Remain within the geographic limits fixed by the Commission unless granted written permission to leave by the Commission or the post-release supervision officer.

(8) Answer all reasonable inquiries by the post-release supervision officer and obtain prior approval from the post-release supervision officer for any change in address or employment.

(9) Promptly notify the post-release supervision officer of any change in address or employment.

(10) Submit at reasonable times to searches of the supervisee's person by a post-release supervision officer for purposes reasonably related to the post-release supervision. The Commission shall not require as a condition of post-release supervision that the supervisee submit to any other searches that would otherwise be unlawful. Whenever the search consists of testing for the presence of illegal drugs, the supervisee may also be required to reimburse the Department of Correction for the actual cost of drug testing and drug screening, if the results are positive.

(11) Make restitution or reparation to an aggrieved party as provided in G.S. 148-57.1.

(12) Comply with an order from a court of competent jurisdiction regarding the payment of an obligation of the supervisee in connection with any judgment rendered by the court.

(13) Remain in one or more specified places for a specified period or periods each day, and wear a device that permits the defendant's compliance with the condition to be monitored electronically.

(14) Submit to supervision by officers assigned to the Intensive Post-Release Supervision Program established pursuant to G.S. 143B-262(c), and abide by the rules adopted for that Program.

(e1) Prohibited Conditions. – The Commission shall not impose community service as a condition of post-release supervision.

(e2) Additional Discretionary Controlling Conditions for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. – In addition to the discretionary conditions set forth in subsections (d) and (e) of this section, for a supervisee who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, appropriate discretionary controlling conditions, violations of which may result in revocation of post-release supervision, are that the offender:

(1) Reside at a residence to be approved by the supervising officer.

(2) Not have contact with the victim including, but not limited to: letters, phone calls, tapes, videos, computer, Internet, or visits. This includes any form of direct contact, or any form of contact through a third party.

(3) Not socialize or communicate with individuals under the age of 18 in work or social activities unless accompanied by a responsible adult who is aware of the abusive patterns and is approved in writing by the supervising officer.

(4) Submit to psychological and psychophysiological assessment at the direction of the supervising officer to assist in treatment planning and case monitoring.

(5) Participate in a sexual abuse treatment program approved by the supervising officer and complete the same to the full satisfaction of the treatment provider. Comply with all programs, including the polygraph examinations, to be used as a tool in conjunction with the treatment plan developed by the treatment provider. Program participation is defined as attendance at all meetings, prompt payment of fees, admission of responsibility for his or her offense, and progress toward reasonable treatment goals.

(6) Pay for the victim's mental health counseling expenses that are incurred as a result of the crime or offense as ordered by the court.

(7) Not possess any sexually stimulating or sexually oriented materials as deemed inappropriate by the supervising officer, nor patronize any place where such material or entertainment is the primary business.

(8) Not use, possess, control, distribute, sell, exchange, or collect pornography or child erotica, including any obtained through Internet access or telephonic communications.

(9) Submit at reasonable times to warrantless searches and seizures by the supervising officer of his person, vehicle, premises, computer equipment, and telephone records while he is present for the purposes of detecting or discovering pornography and/or erotica, which are reasonably related to his supervision.

(10) Not linger, loiter, nor spend time at locations where unsupervised persons under 18 years of age are present, including, but not limited to:

parks, playgrounds, school yards, arcades, or places frequented by children, activities, and such similar places whose purpose is the care, entertainment, or education of such persons under 18 years of age.

(11) Not work or volunteer for any business or organization(s) that provides services to or employs persons under 18 years of age. This includes, but is not limited to: arcades, babysitting, daycare agencies, schools, churches, playgrounds, and youth sporting activities or groups. The supervising officer must approve employment.

(12) Not associate with or have any contact with convicted sex offenders unless in a counseling group.

(13) When given authorization to visit another jurisdiction, present a travel letter to the local police department, have it signed, and return it to the supervising officer.

(14) Not purchase, possess, or consume alcoholic beverages or controlled substances. Submit to blood, breath, and urine testing for analysis for the presence of prohibited drugs or alcohol as requested by the supervising officer and pay any fees associated with testing.

(15) Not be alone with any minor child below the age of 18 years unless approved by his supervising officer in writing.

(16) Not engage in any sexual behavior with any minor child below the age of 18 years of age.

(17) Abide by a curfew at the discretion of the supervising officer.

(f) Required Supervision Fee. – The Commission shall require as a condition of post-release supervision that the supervisee pay a supervision fee of thirty dollars ($30.00) per month. The Commission may exempt a supervisee from this condition only if it finds that requiring payment of the fee is an undue economic burden. The fee shall be paid to the clerk of superior court of the county in which the supervisee was convicted. The clerk shall transmit any money collected pursuant to this subsection to the State to be deposited in the State's General Fund. In no event shall a supervisee be required to pay more than one supervision fee per month."

SECTION 13. G.S. 90-95(h) reads as rewritten:

"(h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article.

(1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 10 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved:

a. Is in excess of 10 pounds, but less than 50 pounds, such person shall be punished as a Class H felon and shall be sentenced to a minimum term of 25 months and a maximum term of 30 months in the State's prison and shall be fined not less than five thousand dollars ($5,000);

b. Is 50 pounds or more, but less than 2,000 pounds, such person shall be punished as a Class G felon and shall be sentenced to a

minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

c. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

d. Is 10,000 pounds or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~ 210 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined not less than two hundred thousand dollars ($200,000).

(2) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or the equivalent quantity, or more of methaqualone, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in methaqualone" and if the quantity of such substance or mixture involved:

a. Is 1,000 or more dosage units, or equivalent quantity, but less than 5,000 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 10,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~ 210 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined not less than two hundred thousand dollars ($200,000).

(3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or any coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, and any salt, isomer, salts of isomers, compound,

derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine) or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~ 210 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined at least two hundred fifty thousand dollars ($250,000).

(3a) Repealed by Session Laws 1999-370, s. 1.

(3b) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine or amphetamine shall be guilty of a felony which felony shall be known as "trafficking in methamphetamine or amphetamine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of ~~117~~ 108 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of ~~279~~ 270 months in the State's ~~prison~~ prison, a period of post-release supervision and term of

imprisonment pursuant to G.S. 15A-1340.18, and shall be fined at least two hundred fifty thousand dollars ($250,000).

(4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved:

a. Is four grams or more, but less than 14 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of ~~117~~ 108 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of ~~279~~ 270 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined not less than five hundred thousand dollars ($500,000).

(4a) Any person who sells, manufactures, delivers, transports, or possesses 100 tablets, capsules, or other dosage units, or the equivalent quantity, or more, of Lysergic Acid Diethylamide, or any mixture containing such substance, shall be guilty of a felony, which felony shall be known as "trafficking in Lysergic Acid Diethylamide". If the quantity of such substance or mixture involved:

a. Is 100 or more dosage units, or equivalent quantity, but less than 500 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 500 or more dosage units, or equivalent quantity, but less than 1,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84

months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 1,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~ 210 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined not less than two hundred thousand dollars ($200,000).

(4b) Any person who sells, manufactures, delivers, transports, or possesses 100 or more tablets, capsules, or other dosage units, or 28 grams or more of 3,4-methylenedioxyamphetamine (MDA), including its salts, isomers, and salts of isomers, or 3,4-methylenedioxymethamphetamine (MDMA), including its salts, isomers, and salts of isomers, or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in MDA/MDMA." If the quantity of the substance or mixture involved:

a. Is 100 or more tablets, capsules, or other dosage units, but less than 500 tablets, capsules, or other dosage units, or 28 grams or more, but less than 200 grams, the person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 500 or more tablets, capsules, or other dosage units, but less than 1,000 tablets, capsules, or other dosage units, or 200 grams or more, but less than 400 grams, the person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 1,000 or more tablets, capsules, or other dosage units, or 400 grams or more, the person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of ~~219~~ 210 months in the State's ~~prison~~ prison, a period of post-release supervision and term of imprisonment pursuant to G.S. 15A-1340.18, and shall be fined not less than two hundred fifty thousand dollars ($250,000).

(5) Except as provided in this subdivision, a person being sentenced under this subsection may not receive a suspended sentence or be placed on probation. The sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge,

provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

(6) Sentences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder."

SECTION 14. This act becomes effective December 1, 2004, and applies to offenses committed on or after that date.

SENATE BILL 1124:
Amend Structured Sentencing/Post-Release Supv.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Sen. Hartsell
Date:	June 7, 2004	**Summary by:**	Kory J. Goldsmith KJG
Version:	S1124-CSRC-87[v,2]		Committee Counsel

SUMMARY: ***Senate Bill 1124 comes at the recommendation of the Structured Sentencing Commission and amends the laws related to Post-Release Supervision (PRS). The bill makes PRS a sanction that is separate from the prison term.***

The Proposed Committee Substitute incorporates the amendment adopted by the committee at the last meeting which makes PRS mandatory.

CURRENT LAW:

Structured Sentencing – The maximum sentences for Class B1 through Class E felonies include nine months of PRS. The purpose of PRS is to monitor and control the offender in the community, to assist the offender's reintegration into society, to collect restitution and indebtedness owed by the offender, and to continue the offender's treatment and education.

Post-Release Supervision - Individuals convicted of a Class B1 through Class E felony are released from prison nine months prior to the maximum sentence imposed, less any earned time awarded. PRS lasts for nine months, unless the individual is convicted of a sex offense that requires registration under the Sex Offender Registration Act, in which case the period of PRS is five years. The period of PRS may be reduced by earned time during the period of supervision.

PRS is conditional and subject to revocation. Violation of any condition may result is the modification or revocation of PRS. Upon a revocation of PRS, the supervisee is returned to prison to serve the remainder of the maximum sentence (nine months). This period may be reduced by earned time. Upon a second release, the prisoner is eligible for PRS under the same conditions as imposed the first time.

Certain Drug Trafficking Offenses – The maximum sentences for the following drug trafficking offenses include nine months of PRS: Marijuana (10,000 or more pounds); Methaqualone (10,000 or more dosage units); Cocaine (400 grams or more); Methamphetamine (200 grams or more and 400 grams or more); Opium or heroin (14 grams or more and 28 grams or more); LSD (1,000 or more dosage units); and MDA (1,000 or more tablets).

BILL ANALYSIS:

Section 1 amends the definitions of Article 81B of Chapter 15A (Structured Sentencing) to include "Post-release supervision". It is defined as the time a prisoner is supervised in the community following the termination of the prisoner's maximum prison term.

Section 2 amends G.S. 15A-1340.13(b) to require that when a judge is imposing a sentence under structured sentencing, the judge shall also include a period of post-release supervision if the offense is a Class B1 through Class E felony.

Section 3 amends G.S. 15A-1340.17 (the structured sentencing chart) to make PRS a separate punishment, and to create a single table for calculating the maximum sentences for Class B1 through Class I felonies where the minimum term is less than 347 months.

Section 4 creates a new section (G.S. 15A-1340.18) relating to PRS under structured sentencing. Any person convicted of a Class B1, B2, C, D, or E felony could be required to participate in PRS. The minimum period of PRS would be seven months and the maximum period would be nine months, unless the offense is subject to the registration requirements of Article 27A of Chapter 14 (Sex Offenders Registration Program). If the period of PRS is revoked, the term of re-imprisonment shall be a minimum term of seven months and a maximum of nine months. PRS would not be imposed for an offender convicted of a Class B1 felony offense who receives a life sentence.

Section 5 amends G.S. 15A-1342(c) to provide that if a court places an offender on probation, the period of PRS is also suspended.

Section 6 amends G.S. 15A-1344(d) to provide that if an offender violates a condition of probation under a suspended sentence, the Post-Release Supervision and Parole Commission ("Commission") may activate the offender's prison sentence and any period of PRS.

Section 7 amends G.S. 15A-1354 to provide that where a court imposes consecutive terms, the periods of PRS are consolidated to run as a single period and run at the conclusion of the term of imprisonment.

Section 8 amends the definitions in Article 84A (Post-Release Supervision) to reflect that PRS is the time an offender is supervised in the community after the termination of the maximum prison term.

Section 9 amends G.S. 15A-1368.1 to reflect that it applies to certain drug trafficking offenses under G.S. 90-95.

Section 10 amends G.S. 15A-1368.2 to earned time inapplicable to the period of PRS.

Section 11 amends G.S. 15A-1368.3 to give PRS a maximum and a minimum term. It also prohibits the re-release of an offender into PRS once it has been revoked.

Section 12 amends G.S. 15A-1368.4 to reflect that a supervisee may not receive earned time credit during PRS. It also codifies certain discretionary controlling conditions for sex offenders that are currently being imposed under the Commission's general authority.

Section 13 amends G.S. 90-95(h) regarding the sentences for certain drug trafficking offenses to remove the period of PRS from the maximum sentence and require that it be imposed as a separate sanction.

BACKGROUND: Post-Release Supervision was not developed as part of the original structured sentencing proposals of 1993. It was added to the structured sentencing legislation during the legislative process. The Structured Sentencing Commission has repeatedly recommended changes to PRS to make it more consistent with the way structured sentencing functions and to also clarify certain details regarding how PRS functions.

This act would become effective December 1, 2004 and apply to offenses committed on or after that date.

S1124-SMRC-002

NORTH CAROLINA GENERAL ASSEMBLY

LEGISLATIVE FISCAL NOTE

BILL NUMBER: Senate Bill 1124 (First Edition)

SHORT TITLE: Amend Structured Sentencing/Post Release Supervision

SPONSOR(S): Senator Hartsell

FISCAL IMPACT

Yes ( ) **No (x)** **No Estimate Available ( )**

	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09
REVENUES:					
EXPENDITURES:					
POSITIONS:					

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: NC Department of Correction.

EFFECTIVE DATE: December 1, 2004

BILL SUMMARY:

This bill rewrites the sentencing table in GS 15A-1340.17(d) for Class B1 through Class I felonies for minimum terms up to 346 months. Amends GS 15A-1340.11(b) to provide that for Class B1, B2, C, D, and E felonies, the sentence shall include a period of post-release supervision pursuant to GS 15A-1340.18. Enacts new GS 15A-1340.18 to provide that in most convictions of Class B1, B2, C, D, and E felonies, the court must impose, in addition to a term of imprisonment, a period of post-release supervision of 9 months. Upon revocation of post-release supervision, the term of imprisonment shall be for a minimum term of 7 months and a maximum term of 9 months. The court may decline to impose post-release supervision if it makes a finding of facts that indicate post-release supervision would not be necessary in that case. In addition, if an offender is convicted of a Class B1 felony and receives a life sentence, post-release supervision shall not be imposed. Deletes GS 15A-1368.2(d), concerning reduction of the period of post-release supervision by earned time. Enacts new GS 15A-1368.4(e2) to impose 17 specified conditions for post-release of persons convicted of sex offenses and of offenses involving physical, mental, or sexual abuse of a minor. These conditions include no contact with the victim, psychological assessment, participation in a sexual abuse treatment program, payment for the victim's mental health counseling expenses, submission to warrantless searches and seizures, not work or volunteer

for a business or organization that provides services to or employs person under 18 years of age, and abide by a curfew. Amends various provisions of GS 90-95(h) to provide that persons convicted of selling, possessing, etc. specified large amounts of marijuana, methaqalone, cocaine, methamphetamines, heroin or opium, LSD, or MDA/MDMA shall serve a period of post-release supervision and term of imprisonment pursuant to GS 15A-1340.18. Effective Dec. 1, 2004.

Source: Bill Digest S.B. 1124 (05/17/2004)

ASSUMPTIONS AND METHODOLOGY: As this bill makes changes to the provisions of post-release supervision, it will require no additional prison beds. Further, this bill gives judges the option of not imposing post-release supervision, thus potentially reducing the pool of offenders to be placed on supervision. There is no information available on how often judges would opt out of post-release supervision for offenders otherwise eligible.

SOURCES OF DATA: NC Sentencing and Policy Advisory Commission

TECHNICAL CONSIDERATIONS:

FISCAL RESEARCH DIVISION: (919) 733-4910
PREPARED BY: Douglas Holbrook

APPROVED BY: James D. Johnson, Director
Fiscal Research Division

DATE: May 31, 2004

Signed Copy Located in the NCGA Principal Clerk's Offices

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S D

SENATE DRS15239-LGz-213B* (05/12)

FILED - SENATE

S 1167 MAY 18 2004

PRINCIPAL CLERK

Short Title: Condo and Planned Comm. Clarifications. (Public)

Sponsors: Senator Hartsell.

Referred to:

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THE LAWS ON THE POWERS OF CONDOMINIUM UNIT OWNERS' ASSOCIATIONS AND PLANNED COMMUNITY OWNERS' ASSOCIATIONS AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 47C-1-102(a) reads as rewritten:

"(a) This Chapter applies to all condominiums created within this State after October 1, 1986. G.S. 47C-1-105 (Separate Titles and Taxation), 47C-1-106 (Applicability of Local Ordinances, Regulations, and Building Codes), 47C-1-107 (Eminent Domain), 47C-2-103 (Construction and Validity of Declaration and Bylaws), 47C-2-104 (Description of Units), 47C-2-121 (Merger or Consolidation of Condominiums), 47C-3-102(a)(1) through (6) and (11) through (16) (Powers of Unit Owners' Association), 47C-3-107.1 (Charges for Late Payment, Fines), 47C-3-111 (Tort and Contract Liability), 47C-3-112 (Conveyance or Encumbrance of Common Elements), 47C-3-116 (Lien for Assessments), 47C-3-118 (Association Records), and 47C-4-117 (Effect of Violation on Rights of Action; Attorney's Fees), and G.S. 47C-1-103 (Definitions), to the extent necessary in construing any of those sections, apply to all condominiums created in this State on or before October 1, ~~1986; but those~~ 1986, unless the declaration expressly provides to the contrary. Those sections apply only with respect to events and circumstances occurring after October 1, 1986, and do not invalidate existing provisions of the declarations, bylaws, or plats or plans of those condominiums."

SECTION 2. G.S. 47C-3-102(a) reads as rewritten:

"(a) ~~Subject to the provisions of the declaration,~~ Unless the declaration expressly provides to the contrary, the association, even if unincorporated, may:

(1) Adopt and amend bylaws and rules and regulations;

(2) Adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from unit owners;
(3) Hire and terminate managing agents and other employees, agents, and independent contractors;
(4) Institute, defend, or intervene in its own name in litigation or administrative proceedings on matters affecting the condominium;
(5) Make contracts and incur liabilities;
(6) Regulate the use, maintenance, repair, replacement, and modification of common elements;
(7) Cause additional improvements to be made as a part of the common elements;
(8) Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property, provided that common elements may be conveyed or subjected to a security interest only pursuant to G.S. 47C-3-112;
(9) Grant easements, leases, licenses, and concessions through or over the common elements;
(10) Impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements other than limited common elements described in subsections 47C-2-102(2) and (4) and for services provided to unit owners;
(11) Impose charges for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines not to exceed one hundred fifty dollars ($150.00) (G.S. 47C-3-107.1) for violations of the declaration, bylaws, and rules and regulations of the association;
(12) Impose reasonable charges for the preparation and recordation of amendments to the declaration, resale certificates required by G.S. 47C-4-109, or statements of unpaid assessments;
(13) Provide for the indemnification of and maintain liability insurance for its officers, executive board, directors, employees and agents;
(14) Assign its right to future income, including the right to receive common expense assessments, but only to the extent the declaration expressly so provides;
(15) Exercise all other powers that may be exercised in this State by legal entities of the same types as the association; and
(16) Exercise any other powers necessary and proper for the governance and operation of the association."

SECTION 3. G.S. 47F-1-102(c) reads as rewritten:

"(c) Notwithstanding the provisions of subsection (a) of this section, G.S. 47F-3-102(1) through (6) and (11) through (17) (Powers of owners' association), G.S. 47F-3-107(a), (b), and (c) (Upkeep of planned community; responsibility and assessments for damages), G.S. 47F-3-115 (Assessments for common expenses), and G.S. 47F-3-116 (Lien for assessments), apply to all planned communities created in this State before January 1, ~~1999.~~ 1999, unless the articles of incorporation or the

declaration expressly provides to the contrary. These sections apply only with respect to events and circumstances occurring on or after January 1, 1999, and do not invalidate existing provisions of the declaration, bylaws, or plats and plans of those planned communities. G.S. 47F-1-103 (Definitions) also applies to all planned communities created in this State before January 1, 1999, to the extent necessary in construing any of the preceding sections."

SECTION 4. G.S. 47F-3-102 reads as rewritten:

"**§ 47F-3-102. Powers of owners' association.**

~~Subject to the provisions of the articles of incorporation or the declaration and the declarant's rights therein,~~Unless the articles of incorporation or the declaration expressly provides to the contrary, the association may:

(1) Adopt and amend bylaws and rules and regulations;

(2) Adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from lot owners;

(3) Hire and discharge managing agents and other employees, agents, and independent contractors;

(4) Institute, defend, or intervene in litigation or administrative proceedings on matters affecting the planned community;

(5) Make contracts and incur liabilities;

(6) Regulate the use, maintenance, repair, replacement, and modification of common elements;

(7) Cause additional improvements to be made as a part of the common elements;

(8) Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property, provided that common elements may be conveyed or subjected to a security interest only pursuant to G.S. 47F-3-112;

(9) Grant easements, leases, licenses, and concessions through or over the common elements;

(10) Impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements other than the limited common elements and for services provided to lot owners;

(11) Impose reasonable charges for late payment of assessments and, after notice and an opportunity to be heard, suspend privileges or services provided by the association (except rights of access to lots) during any period that assessments or other amounts due and owing to the association remain unpaid for a period of 30 days or longer;

(12) After notice and an opportunity to be heard, impose reasonable fines or suspend privileges or services provided by the association (except rights of access to lots) for reasonable periods for violations of the declaration, bylaws, and rules and regulations of the association;

(13) Impose reasonable charges in connection with the preparation and recordation of documents, including, without limitation, amendments to the declaration or statements of unpaid assessments;

(14) Provide for the indemnification of and maintain liability insurance for its officers, executive board, directors, employees, and agents;
(15) Assign its right to future income, including the right to receive common expense assessments;
(16) Exercise all other powers that may be exercised in this State by legal entities of the same type as the association; and
(17) Exercise any other powers necessary and proper for the governance and operation of the association."

SECTION 5. This act is effective when it becomes law.

CONDO AND PLANNED COMM. CLARIFICATIONS: SB 1167

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Sen. Hartsell
Date:	June 8, 2004	**Summary by:**	Sandra Alley
Version:	First Edition		Committee Counsel

SUMMARY: SB 1167 would amend Chapter 47C, the North Carolina Condominium Act (Condominium Act), and Chapter 47F, the North Carolina Planned Community Act (Planned Community Act) of the General Statutes to make those Acts applicable to all condominium and homeowners associations regardless of when the associations were created and unless organizational documents of the associations provide otherwise.

CURRENT LAW: Under current law the Acts give condominium and homeowners associations various listed powers. Many of the listed powers apply to associations that predate the Acts.

BILL ANALYSIS: SB 1167 would amend Chapter 47C, the North Carolina Condominium Act (Condominium Act), and Chapter 47F, the North Carolina Planned Community Act (Planned Community Act) of the General Statutes.

SB 1167 would amend the Acts to specify that the listed of powers in each act:

(1) apply in the same manner to all condominiums or planned communities, regardless of the time they were created, and

(2) apply unless the organizational documents for the condominium or planned community expressly provide to the contrary.

Sections 1 and 3. These sections would amend the applicability sections of the Condominium Act and the Planned Community Act, respectively G.S. 47C-1-102 and G.S. 47F-1-102, to specify that the portions applicable to pre-existing condominiums or planned communities apply unless the organizational documents expressly provide to the contrary.

Sections 2 and 4. These sections would amend the statutes listing powers of condominium and homeowners' associations (respectively G.S. 47C-3-102 and G.S. 47F-3-102) to change the current "subject to" language to "unless [the organizational documents] expressly provide to the contrary."

Section 5. The bill would be effective when it becomes law.

BACKGROUND: See attached memorandum provided by the General Statutes Commission.

SB1167-SMSP-01

State of North Carolina
General Statutes Commission
9001 Mail Service Center
RALEIGH, NORTH CAROLINA
27699-9001

MEMORANDUM

TO: Senate Judiciary II Committee

FROM: General Statutes Commission

DATE: June 6, 2004

RE: Senate Bill 1167 (Condo and Planned Comm. Clarifications)

General Comments

This bill makes essentially the same amendments to the North Carolina Condominium Act (Condominium Act) and the North Carolina Planned Community Act (Planned Community Act) (respectively Chapter 47C and Chapter 47F of the General Statutes). Among other things, these Acts give condominium and homeowners associations various listed powers, many of which apply to condominiums and planned communities that predate the Acts. This bill amends these Acts to specify that the statute in each Act that contains the list of powers:

(1) applies in the same manner to all condominiums or planned communities, regardless of the time they were created, and

(2) applies unless the organizational documents for the condominium or planned community expressly provide to the contrary.

The General Assembly enacted the Planned Community Act in 1998 (in SL 1998-199). The enacting session law explicitly provides that portions of the Act, including G.S. 47F-3-102(12) (Powers of owners' associations to impose reasonable fines for violations of the declarations, bylaws, or rules and regulations of the association), apply to pre-existing planned communities. In 2003, the North Carolina Supreme Court considered the application of subdivision (12) to a pre-existing planned community in Wise v. Harrington Grove Homeowners Association, 357 N.C. 396, ___ S.E.2d ___ (2003). The Court construed the introductory language of G.S. 47F-3-102, that a homeowners' association has the powers listed in that statute "[s]ubject to the provisions of the articles of incorporation or the declaration . . . ", as meaning

"if the organizational documents are amended to grant the power" if the planned community was pre-existing. However, applied to homeowners' associations created after the effective date of the Planned Community Act, the Court continued, "subject to" means "unless the organizational documents prohibit or limit the power."

The Court's opinion appears to be contrary to the drafters' intent. The phrase "subject to" was intended to mean "unless the organizational documents prohibit or limit the power" when applied to both pre- and post-existing planned communities, according to the Official Comment to the equivalent section of the Uniform Planned Community Act, on which G.S. 47F-3-102 is based. The Uniform Act's Official Comment is not printed in the General Statutes and was not brought to the Court's attention before it issued its opinion in Wise and the enacting session law's applicability language was not codified with the original legislation.

The matter was brought to the General Statutes Commission's attention by the original members of the committee that drafted the Planned Community Act. They noted that Wise may also affect the Condominium Act (Chapter 47C of the General Statutes), which has similar language and was also a model for the Planned Community Act.

Specific Comments

Sections 1 and 3. These sections amend the applicability sections of the Condominium Act and the Planned Community Act, respectively G.S. 47C-1-102 and G.S. 47F-1-102, to specify that the portions applicable to pre-existing condominiums or planned communities apply unless the organizational documents expressly provide to the contrary.

Sections 2 and 4. These sections amend the statutes listing powers of condominium and homeowners' associations (respectively G.S. 47C-3-102 and G.S. 47F-3-102) to change the current "subject to" language to "unless [the organizational documents] expressly provide to the contrary."

Section 5. This section makes the bill effective when it becomes law.

State of North Carolina
General Statutes Commission
9001 Mail Service Center
RALEIGH, NORTH CAROLINA
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MEMORANDUM

TO: Senate Judiciary II Committee

FROM: General Statutes Commission

DATE: June 6, 2004

RE: Senate Bill 1167 (Condo and Planned Comm. Clarifications)

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The General Assembly enacted the Planned Community Act in 1998 (in SL 1998-199). The enacting session law explicitly provides that portions of the Act, including G.S. 47F-3-102(12) (Powers of owners' associations to impose reasonable fines for violations of the declarations, bylaws, or rules and regulations of the association), apply to pre-existing planned communities. In 2003, the North Carolina Supreme Court considered the application of subdivision (12) to a pre-existing planned community in Wise v. Harrington Grove Homeowners Association, 357 N.C. 396, ___ S.E.2d ___ (2003). The Court construed the introductory language of G.S. 47F-3-102, that a homeowners' association has the powers listed in that statute "[s]ubject to the provisions of the articles of incorporation or the declaration . . . ", as meaning

"if the organizational documents are amended to grant the power" if the planned community was pre-existing. However, applied to homeowners' associations created after the effective date of the Planned Community Act, the Court continued, "subject to" means "unless the organizational documents prohibit or limit the power."

The Court's opinion appears to be contrary to the drafters' intent. The phrase "subject to" was intended to mean "unless the organizational documents prohibit or limit the power" when applied to both pre- and post-existing planned communities, according to the Official Comment to the equivalent section of the Uniform Planned Community Act, on which G.S. 47F-3-102 is based. The Uniform Act's Official Comment is not printed in the General Statutes and was not brought to the Court's attention before it issued its opinion in Wise and the enacting session law's applicability language was not codified with the original legislation.

The matter was brought to the General Statutes Commission's attention by the original members of the committee that drafted the Planned Community Act. They noted that Wise may also affect the Condominium Act (Chapter 47C of the General Statutes), which has similar language and was also a model for the Planned Community Act.

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Sections 2 and 4. These sections amend the statutes listing powers of condominium and homeowners' associations (respectively G.S. 47C-3-102 and G.S. 47F-3-102) to change the current "subject to" language to "unless [the organizational documents] expressly provide to the contrary."

Section 5. This section makes the bill effective when it becomes law.

Senate Bill 1167 – Summary

This bill comes from the General Statutes Commission. The purpose of the bill is to correct an interpretation of a provision in the Planned Community Act that was rendered by the North Carolina Supreme Court.

The Planned Community Act, which is similar to the Condominium Act, is patterned after a model law that has been adopted by virtually all states. When the North Carolina version was enacted in 1998, the model law commentary was not published in the General Statutes because the North Carolina version deviated somewhat from the model law.

As a result, the Supreme Court did not have the benefit of the commentary when it interpreted a provision in the North Carolina law, which happened to be identical to the model law provision.

SB 1167 amends both the Planned Community Act and Condominium Act to make North Carolina consistent with the rest of the country and with the intent of the drafters of the model law (The National Conference of Commissioners on Uniform State Laws).

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 6-8-04

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Karen Gottlieb	NC Sentencing + Policy Advisory Comm.
John Madler	" " "
Jim Blackburn	NC Association of County Commissioners
Don McCorquodale	SAS
Trisha Hardin	Policy office / Intern
Gary Harris	NCPMA
Doug Hovey	NCPMA
MELITA GROOMES	PAROLE COMMISSION
Michelle Frazier	NC Bar Assn
Jo McCants	AOC
P. Bayt Hall	Sentencing Commission
Stephen Simpson	NCAR

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — Name of Committee

6/8/04 — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Mildred Spearman	NCDOC
Floyd Lewis	General Statutes Commission
Janke Gentry	Gov. office

Gerry Johnson (Sen. Hartsell)

From: Bonnie McNeil (Senate Legislative Assistant)
Sent: Friday, June 11, 2004 10:58 AM
Subject: CORRECTED NOTICE: JUDICIARY II COMMITTEE NOTICE 06-15-04

Principal Clerk _____
Reading Clerk _____

Corrected: HB 1366 ADDED TO NOTICE

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	June 15, 2004	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
SB 230	Repeal UCC Article on Bulk Sales.	Senator Hartsell
HB 1366	Involuntary Commitment Warrant Clarification.	Representative Insko
HB 1373	Increase Penalty-Transit Operator Assault.	Representative Saunders

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Tuesday, June 15, 2004, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

SB 230	Repeal UCC Article on Bulk Sales.	Senator Hartsell
HB 1366	Involuntary Commitment Warrant Clarification	Representative Insko
HB 1373	Increase Penalty-Transit Operator Assault.	Representative Saunders

Other Business

Adjournment

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Monday, June 21, 2004

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO CONCURRENCE

S.B.(HCS #1) **230** Repeal UCC Article on Bulk Sales.
Sequential Referral: None
Recommended Referral: None

TOTAL REPORTED: 1

Committee Clerk Comments:

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, June 15, 2004

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B. **1366** Involuntary Commitment Warrant Clarification.
Sequential Referral: None
Recommended Referral: None

H.B.(CS #1) **1373** Increase Penalty-Transit Operator Assault.
Sequential Referral: None
Recommended Referral: None

TOTAL REPORTED: 2

Committee Clerk Comments:

Judiciary II Committee

Minutes

June 15, 2004

The meeting of the Senate Judiciary II committee was called to order by Senator Fletcher Hartsell, Chairman, with twelve members present.

HB 1366 (Involuntary Commitment Warrant Clarification) Representative Insko was recognized to explain the bill. Senator Moore's question was answered by Representative Insko. Senator Allran moved for a favorable report. All voted and the motion carried.

HB 1373 (Increase Penalty-Transit Operator Assault) Kory Goldsmith, Staff Attorney, explained the bill which came to the Committee from Transportation Oversight. Questions by Senators Bingham, Kinnaird, Webster, Shubert, Holloman and Moore were answered by Kory Goldsmith, Senator Hartsell and Betsy Bailey, Executive Director of the North Carolina Public Transportation Association. Senator Dannelly moved for a favorable report. All voted and the motion carried.

SB 230 (Repeal UCC Article on Bulk Sales) Senator Hartsell recognized Senator Allran to chair the meeting while Senator Hartsell explained the bill. Senator Kinnaird moved not to concur. All voted and the motion carried.

There being no further business the meeting was adjourned.

Senator Fletcher Hartsell, Chairman

Gerry Johnson, Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

S 3

SENATE BILL 230*

Judiciary II Committee Substitute Adopted 3/25/03
House Committee Substitute Favorable 6/11/03

Short Title: Repeal UCC Article on Bulk Transfers. (Public)

Sponsors:

Referred to:

February 26, 2003

A BILL TO BE ENTITLED

AN ACT TO REPEAL ARTICLE 6 OF THE UNIFORM COMMERCIAL CODE RELATING TO BULK TRANSFERS AND TO ENACT CONFORMING AMENDMENTS TO THE UNIFORM COMMERCIAL CODE AND OTHER SECTIONS OF THE GENERAL STATUTES.

The General Assembly of North Carolina enacts:

SECTION 1. Article 6 of Chapter 25 of the General Statutes is repealed.

SECTION 2. G.S. 25-1-105(2), reads as rewritten:

"(2) Where one of the following provisions of this Chapter specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. (G.S. 25-2-402).

Applicability of the article on bank deposits and collections. (G.S. 25-4-102).

Governing law in the article on Funds Transfers. (G.S. 25-4A-507).

Letters of Credit. (G.S. 25-5-116).

~~Bulk transfers subject to the article on bulk transfers. (G.S. 25-6-102).~~

Applicability of the article on investment securities. (G.S. 25-8-110).

Law governing perfection, the effect of perfection or nonperfection, and the priority of security interests and agricultural liens. (G.S. 25-9-301 through G.S. 25-9-307)."

SECTION 3. G.S. 25-2-403(4) reads as rewritten:

"(4) The rights of other purchasers of goods and of lien creditors are governed by the articles on secured transactions ~~(article 9), bulk transfers (article 6)~~ (article 9) and documents of title (article 7)."

SECTION 4. G.S. 66-186 reads as rewritten:

"**§ 66-186. Uniform commercial practice.**

(a) This Article does not affect a security interest of the supplier in the inventory of the dealer.

~~(b) A repurchase of inventory under this Article shall not be subject to the bulk sales provisions of Article 6 of Chapter 25 of the General Statutes.~~"

SECTION 5. G.S. 85B-2(a)(11) reads as rewritten:

"(11) Sales of collateral, sales conducted to enforce carriers' or warehousemen's liens, ~~bulk sales,~~ sales of goods by a presenting bank following dishonor of a documentary draft, resales of rightfully rejected goods, resales of goods by an aggrieved seller, or other resales conducted pursuant to authority in Articles 2, 4, ~~6, 7~~ 7, and 9 of Chapter 25 of the General Statutes (the Uniform Commercial Code)."

SECTION 6. This act becomes effective January 1, 2004. Rights and obligations arising under Article 6 of Chapter 25 of the General Statutes and former G.S. 25-9-111 before the effective date of this act remain valid and may be enforced as though those statutes had not been repealed.

SENATE BILL 230:
Revise UCC Article on Bulk Transfers

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Senator Hartsell
Date:	June 14, 2004	**Summary by:**	Kory J. Goldsmith
Version:	3rd Edition		Committee Counsel

SUMMARY: ***The 3rd Edition of SB230 repeals Article 6 of the Uniform Commercial Code (UCC) and makes conforming changes to the other articles of the UCC and other sections of the General Statutes.***

This bill was introduced during the 2003 session as a recommendation of the General Statutes Commission. As introduced, the bill would have revised Article 6 regarding bulk transfers. The House rewrote the bill to its current form. The bill is back in this committee for a recommendation as to whether the Senate should concur with the House.

NOTE: The bill would become effective January 1, 2003, but rights and obligations arising before that date would remain valid and could be enforced as if Article 6 had not been repealed.

CURRENT LAW: Article 6 of Chapter 25 of the General Statutes regulates bulk transfers (that are not made in the ordinary course of the transferor's business) of a major part of the materials, supplies, merchandise or other inventory of the business. The purpose of the current Article 6 of the UCC is to provide protection for creditors of these businesses. Creditors of these businesses can be susceptible to a bulk transfer where the business owner may sell a large part of the inventory of the business to a any buyer for any price outside the ordinary course of business, pockets the proceeds and disappears without paying his creditors. The current Article 6 requires bulk sale buyers to provide notice to the seller's creditors of the impending bulk transfer and to maintain a list of the creditors along with a schedule of property obtained in the bulk transfer for six months after the sale takes place. This notice must be sent 10 days before paying for or taking possession of the goods, whichever comes first. If these procedures are not followed, the creditors can void the sale. Auctioneers must follow a similar procedure of notice and listing of creditors. Article 6 requires compliance even when there is no reason to believe that a fraudulent transfer is going to occur.

BILL ANALYSIS: The 3rd Edition of SB230 would repeal Article 6 in its entirety.

BACKGROUND: 42 states have repealed Article 6 of the UCC. Because the business environment has changed since Article 6 was first promulgated, in 1988 the Uniform Law Commissioners encouraged those states that enacted Article 6 to repeal it. The arguments in favor of repeal are that creditors are now able to make more informed decisions about extending credit through technology and credit reporting services. Creditors have better opportunities to collect their debts through revised jurisdiction laws that allow creditors to bring actions against debtors that flee to other states. Article 9 of the UCC, Secured Transactions, provides creditors other avenues to retain security interests in their inventory. If the bulk transfer is a fraud and the buyer is party to the fraud, then the creditor may have remedies under the Uniform Fraudulent Transfer Act, G.S. 39-23.1 et. seq. Many have also described the original Article 6 as a practice trap for the unwary because it creates an exception to normal commercial rules where good faith purchasers are protected against claims by a seller's creditors, rather than having to give the notice as they do in Article 6.

The General Statutes Commission recommended the repeal of Article 6 in the 1997, 1999, and 2001 sessions of the North Carolina General Assembly.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

HOUSE BILL 1366

Short Title:	Involuntary Commitment Warrant Clarification.	(Public)
Sponsors:	Representatives Insko; Weiss, Parmon, and Farmer-Butterfield.	
Referred to:	Rules, Calendar, and Operations of the House.	

May 11, 2004

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT AN ORDER ISSUED BY THE CLERK OF COURT, THE MAGISTRATE, OR THE COURT FOR CUSTODY RELATING TO INVOLUNTARY COMMITMENT IS VALID THROUGHOUT THE STATE.

The General Assembly of North Carolina enacts:

SECTION 1.(a) G.S. 122C-261(e) reads as rewritten:

"(e) Upon receipt of the custody order of the clerk or magistrate or a custody order issued by the court pursuant to G.S. 15A-1003, a law enforcement officer or other person designated in the order shall take the respondent into custody within 24 hours after the order is signed, and proceed according to G.S. 122C-263. The custody order is valid throughout the State."

SECTION 1.(b) G.S. 122C-281(e) reads as rewritten:

"(e) Upon receipt of the custody order of the clerk or magistrate, a law-enforcement officer or other person designated in the order shall take the respondent into custody within 24 hours after the order is signed. The custody order is valid throughout the State."

SECTION 2.(a) G.S. 122C-265(a) reads as rewritten:

"**§ 122C-265. Outpatient commitment; examination and treatment pending hearing.**

(a) If a respondent, who has been recommended for outpatient commitment by an examining physician or eligible psychologist different from the proposed outpatient treatment physician or center, fails to appear for examination by the proposed outpatient treatment physician or center at the designated time, the physician or center shall notify the clerk of superior court who shall issue an order to a law-enforcement officer or other person authorized under G.S. 122C-251 to take the respondent into custody and take him immediately to the outpatient treatment physician or center for evaluation. The custody order is valid throughout the State. The law-enforcement officer may wait during the examination and return the respondent to his home after the examination."

SECTION 2.(b) G.S. 122C-273(a)(2) reads as rewritten:

"§ 122C-273. **Duties for follow-up on commitment order.**

(a) Unless prohibited by Chapter 90 of the General Statutes, if the commitment order directs outpatient treatment, the outpatient treatment physician may prescribe or administer, or the center may administer, to the respondent reasonable and appropriate medication and treatment that are consistent with accepted medical standards.

...

(2) If the respondent fails to comply, but does not clearly refuse to comply, with all or part of the prescribed treatment after reasonable effort to solicit the respondent's compliance, the physician, the physician's designee, or the center may request the court to order the respondent taken into custody for the purpose of examination. Upon receipt of this request, the clerk shall issue an order to a law-enforcement officer to take the respondent into custody and to take him immediately to the designated outpatient treatment physician or center for examination. The custody order is valid throughout the State. The law-enforcement officer shall turn the respondent over to the custody of the physician or center who shall conduct the examination and then release the respondent. The law-enforcement officer may wait during the examination and return the respondent to his home after the examination. An examination conducted under this subsection in which a physician or eligible psychologist determines that the respondent meets the criteria for inpatient commitment may be substituted for the first examination required by G.S. 122C-263 if the clerk or magistrate issues a custody order within six hours after the examination was performed.

...."

SECTION 2.(c) G.S. 122C-290(b) reads as rewritten:

"(b) If the respondent whose treatment is provided on an outpatient basis fails to comply with all or part of the prescribed treatment after reasonable effort to solicit the respondent's compliance or whose treatment is provided on an inpatient basis is discharged in accordance with G.S. 122C-205.1(b), the area authority or physician may request the clerk or magistrate to order the respondent taken into custody for the purpose of examination. Upon receipt of this request, the clerk or magistrate shall issue an order to a law enforcement officer to take the respondent into custody and to take him immediately to the designated area authority or physician for examination. The custody order is valid throughout the State. The law enforcement officer shall turn the respondent over to the custody of the physician or area authority who shall conduct the examination and release the respondent or have the respondent taken to a 24-hour facility upon a determination that treatment in the facility will benefit the respondent. Transportation to the 24-hour facility shall be provided as specified in G.S. 122C-251, upon notice to the clerk or magistrate that transportation is necessary, or as provided in G.S. 122C-408(b). If placement in a 24-hour facility is to exceed 45 consecutive days, the area authority or physician shall notify the clerk of court by the 30th day and request a supplemental hearing as specified in G.S. 122C-291."

SECTION 3. This act is effective when it becomes law.

HOUSE BILL 1366:
Involuntary Commitment Warrant Clarification

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Rep. Verla Insko
Date:	June 15, 2004	**Summary by:**	Sandra Alley
Version:	1st Edition		Committee Counsel

SUMMARY: ***House Bill 1366 clarifies that involuntary commitment orders are valid throughout the State.***

BILL ANALYSIS: House Bill 1366 makes changes to several statutes related to involuntary commitment in Chapter 122C of the General Statutes. The bill clarifies that a custody order related to involuntary commitment that is issued by a clerk of court, magistrate, or court is valid throughout the State.

The act is effective when it becomes law.

Susan Sitze contributed to this summary.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 2

HOUSE BILL 1373*
Committee Substitute Favorable 5/25/04

Short Title: Increase Penalty-Transit Operator Assault. (Public)

Sponsors:

Referred to:

May 11, 2004

A BILL TO BE ENTITLED

AN ACT TO INCREASE THE CLASSIFICATION OF ASSAULTING A PRIVATE CONTRACTOR EMPLOYED AS A PUBLIC TRANSPORTATION OPERATOR FROM A CLASS 2 MISDEMEANOR TO A CLASS A1 MISDEMEANOR.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-33(c) is amended by adding a new subdivision to read:

"(7) Assaults a public transit operator, including a public employee or a private contractor employed as a public transit operator, when the operator is discharging or attempting to discharge his or her duties."

SECTION 2. This act becomes effective December 1, 2004, and applies to offenses committed on or after that date.

HOUSE BILL 1373:
Increase Penalty - Transit Operator Assault

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Rep. Saunders	1736
Date:	June 14, 2004	**Summary by:**	Kory J. Goldsmith	
Version:	2nd Edition		Committee Counsel	

SUMMARY: ***House Bill 1373 increases the classification for an assault of a private contractor employed as public transit system bus driver/operator from a Class 2 misdemeanor to a Class A1 misdemeanor.***

The bill comes as a recommendation of the Joint Legislative Transportation Oversight Committee.

The act becomes effective December 1, 2004, and applies to offenses committed on and after that date.

CURRENT LAW: Under current law, it is a Class A1 misdemeanor to assault an officer or employee of the State or any political subdivision of the State, such as a public transit bus driver/operator employed by a public transit system. The penalty for a first offense of a Class A1 misdemeanor is a 1-60 days, community/intermediate/active penalty.

It is a Class 2 misdemeanor to commit a simple assault (G.S. 14-33(a)), which would include an assault on a ***private contractor*** working as a public transit bus driver/operator. The penalty for a first offense a Class 2 misdemeanor is 1-30 days, community penalty.

Assault is not defined in statue and may take many different forms. The basic definition is an overt act or attempt, or the unequivocal appearance of attempt, with force and violence to immediately physically injure another person, with the show of force or menace of violence being sufficient to put a reasonable person in fear of immediate physical injury. Battery is the actual striking of another. However, the statutes use the terms 'assault' and 'battery' interchangeably.

BILL ANALYSIS: House Bill 1373 would increase the penalty for assaulting a private contractor working as a public transit system bus driver/operator from a Class 2 misdemeanor to a Class A1 misdemeanor, the same penalty applied to an assault of a public employee performing the same job.

H1373-SMRC-001

Giles Perry, Counsel to House Judiciary III Committee, contributed substantially to this summary.

§ 14-33. Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments.

(a) Any person who commits a simple assault or a simple assault and battery or participates in a simple affray is guilty of a Class 2 misdemeanor.

(b) Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class 1 misdemeanor if, in the course of the assault, assault and battery, or affray, he:

(1) through (3) Repealed by Session Laws 1995, c. 507, s. 19.5(b);

(4) through (7) Repealed by Session Laws 1991, c. 525, s. 1;

(8) Repealed by Session Laws 1995, c. 507, s. 19.5(b);

(9) Commits an assault and battery against a sports official when the sports official is discharging or attempting to discharge official duties at a sports event, or immediately after the sports event at which the sports official discharged official duties. A "sports official" is a person at a sports event who enforces the rules of the event, such as an umpire or referee, or a person who supervises the participants, such as a coach. A "sports event" includes any interscholastic or intramural athletic activity in a primary, middle, junior high, or high school, college, or university, any organized athletic activity sponsored by a community, business, or nonprofit organization, any athletic activity that is a professional or semiprofessional event, and any other organized athletic activity in the State.

(c) Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:

(1) Inflicts serious injury upon another person or uses a deadly weapon;

(2) Assaults a female, he being a male person at least 18 years of age;

(3) Assaults a child under the age of 12 years;

(4) Assaults an officer or employee of the State or any political subdivision of the State, when the officer or employee is discharging or attempting to discharge his official duties;

(5) Repealed by Session Laws 1999-105, s. 1, effective December 1, 1999; or

(6) Assaults a school employee or school volunteer when the employee or volunteer is discharging or attempting to discharge his or her duties as an employee or volunteer, or assaults a school employee or school volunteer as a result of the discharge or attempt to discharge that individual's duties as a school employee or school volunteer. For purposes of this subdivision, the following definitions shall apply:

a. "Duties" means:

1. All activities on school property;

2. All activities, wherever occurring, during a school authorized event or the accompanying of students to or from that event; and

3. All activities relating to the operation of school transportation.

b. "Employee" or "volunteer" means:

1. An employee of a local board of education; or a charter school authorized under G.S. 115C-238.29D, or a nonpublic school which has filed intent to operate under Part 1 or Part 2 of Article 39 of Chapter 115C of the General Statutes;
2. An independent contractor or an employee of an independent contractor of a local board of education, charter school authorized under G.S. 115C-238.29D, or a nonpublic school which has filed intent to operate under Part 1 or Part 2 of Article 39 of Chapter 115C of the General Statutes, if the independent contractor carries out duties customarily performed by employees of the school; and
3. An adult who volunteers his or her services or presence at any school activity and is under the supervision of an individual listed in sub-sub-subdivision 1. or 2. of this sub-subdivision.

(d) Any person who, in the course of an assault, assault and battery, or affray, inflicts serious injury upon another person, or uses a deadly weapon, in violation of subdivision (c)(1) of this section, on a person with whom the person has a personal relationship, and in the presence of a minor, shall be placed on supervised probation in addition to any other punishment imposed by the court.

A person committing a second or subsequent violation of this subsection shall be sentenced to an active punishment of no less than 30 days in addition to any other punishment imposed by the court.

The following definitions apply to this subsection:

(1) "Personal relationship" is as defined in G.S. 50B-1(b).

(2) "In the presence of a minor" means that the minor was in a position to have observed the assault.

(3) "Minor" is any person under the age of 18 years who is residing with or is under the care and supervision of, and who has a personal relationship with, the person assaulted or the person committing the assault.

NORTH CAROLINA GENERAL ASSEMBLY
LEGISLATIVE FISCAL NOTE
(INCARCERATION NOTE G.S. 120-36.7)

BILL NUMBER: House Bill 1373 (First Edition)

SHORT TITLE: Increase Penalty-Transit Operator Assault.

SPONSOR(S): Representative Saunders

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09
GENERAL FUND					
Correction	**No Fiscal Impact on Correction**				
Recurring					
Nonrecurring					
Judicial	**Fiscal Impact Cannot be Determined**				
Recurring					
Nonrecurring					
TOTAL EXPENDITURES:					
ADDITIONAL PRISON BEDS*	**Cost and Bed Impact Possible for County Jails**				
POSITIONS: (cumulative)	**Cannot be Determined**				

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch

EFFECTIVE DATE:

**This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and, thus, the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system, as well as the Judicial Department.*

BILL SUMMARY: G.S. 14-33 (c) states that anyone who commits certain assaults on public employees is guilty of Class A1 Misdemeanors. This bill amends Section (c) to make assault on on public transit operators or private contractors employed by public entities a Class A1 Misdemeanor. Under current law, assault on a private transit operator employed by a public organization is likely to be charged as a lower level misdemeanor, a Class 2.

ASSUMPTIONS AND METHODOLOGY:

Department of Correction

HB 1373 is likely to increase costs to County Jails. There will be no impact on prison beds or costs.

Class 2 misdemeanants cannot be given active time unless they have committed five or more offenses. A1 misdemeanants can receive active sentences at any prior record level. In practice, 22% of Class A1 convictions resulted in active sentences with an average sentence of 53 days. Forty per cent of Class A1 offenders that assault public employees receive active time. However, offenders serving 90 days or less are housed in county jails, not DOC prisons.

By adding private transit contractors employed by public organizations to G.S. 14-33, it increases the potential of more A1 assaults and more offenders to be sentenced to county jails. However, there is no clear source of information or count of the number of private transit operators employed by public organizations. Nor is there accurate information on number of assaults on private transit operators. Therefore, we cannot determine the cost.

Judicial Branch

For most criminal penalty bills, the Administrative Office of the Courts provides Fiscal Research with an analysis of the fiscal impact of the specific bill. For these bills, fiscal impact is typically based on the assumption that court time will increase due to an expected increase in trials and a corresponding increase in the hours of work for judges, clerks and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

The fiscal impact of HB 1373 cannot be determined but there will be increased court time and costs because of the increase in penalty.

SOURCES OF DATA: Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission; and, Office of State Construction.

TECHNICAL CONSIDERATIONS: It should be noted that this bill also adds purely public employee transit operators to G.S. 14-33. These employees may already be covered under G.S. 14-33 (c) (4), A1 assault on public employees. But, there is no additional cost to include these operators under this bill.

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Jim Mills

APPROVED BY: James D. Johnson, Director
Fiscal Research Division

DATE: May 26, 2004

Signed Copy Located in the NCGA Principal Clerk's Offices

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 6-15-04

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Michelle Hazier	NC Bar Ass'n
James Beckwith	NCCU School of Law
Richard Brown	NC Bar Assn Kennedy Covington Lobdell & Hickman
Bry Hall	General Statutes Commission
Allison Sisk	NCDOJ Intern
Richard Slipsky	NCDOJ
Lisa Corbett	NCDOJ
Lorrin Freeman	NCDOJ
Bill Carsonpheen	Charlotte Area Transit System
Colleen Kochanek	Hafer ; Caldwell
Betsy Bailey	NC Public Transportation
Kara G. Leonard	WCSR
Bill Scoggin	NCCIH

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 6-15-01

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
DAVID BARNES	Perkins Coie LLP
John Mohan	Gov office
Luke Canty	Gov. office
Beason	Capitol Gp
Camille Stell	KCLH

Gerry Johnson (Sen. Hartsell)

From: Gerry Johnson (Sen. Hartsell)
Sent: Friday, June 25, 2004 12:08 PM
To: Rep. Dewey Hill; Rep. Hugh Holliman; Rep. Rick Eddins
Subject: June 29, 2004 J II Meeting Notice

Principal Clerk _____
Reading Clerk _____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	June 29, 2004	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 965	Failure to Yield Causing Death or Injuries.	Representative Hill
HB 1518	Require Payment of Restitution for Expunction.	Representative Holliman Representative Eddins

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Tuesday, June 29, 2004, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

HB 965	Failure to Yield Causing Death or Injuries.	Representative Hill
HB 1518	Require Payment of Restitution for Expunction.	Representative Holliman Representative Eddins

Presentations

Other Business

Adjournment

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Wednesday, June 30, 2004

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B. **1518** Require Payment of Restitution for Expunction.

Draft Number:	PCS 80475
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **965** Failure to Yield Causing Death or Injuries.

Draft Number:	PCS 50437
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	Yes

TOTAL REPORTED: 2

Committee Clerk Comments:

Senate Judiciary II Committee

Minutes

June 29, 2004

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on June 29, 2004, with eleven members present.

HB 1518 (Require Payment of Restitution for Expunction) Senator Hartsell recognized Representative Holliman to explain the bill. Senator Apodaca submitted an amendment and moved for adoption. All voted and the motion carried. Senator Shubert moved for a favorable report of the bill as amended, and rolled into a committee substitute, unfavorable as to the original bill. All voted and the motion carried.

HB 965 (Failure to Yield Causing Death or Injuries) Senator Hartsell noted that a proposed committee substitute had been distributed. Senator Apodaca moved that the committee substitute be adopted for purposes of discussion. All voted and the motion carried. Representative Hill was recognized to explain the proposed committee substitute for HB 965. Representative Hill explained the first part of the bill and Kory Goldsmith, Staff Attorney, explained Section 2 through 7.

Questions and statements on the bill were made by Senators Shubert, Kinnaird, Apodaca, Swindell, Sloan, Webster and Dannelly and were answered by Representative Hill, Senator Hartsell and Kory Goldsmith. Senator Shubert offered an amendment and was recognized to explain the amendment. Robin Johnson, Staff Attorney, spoke on the amendment for clarification. Senator Shubert withdrew the amendment.

Sam Nobles and Claude Chavis of Concerned Bikers Association spoke on the bill.

Senator Shubert offered a modified amendment. Senator Hartsell and Senator Shubert explained the amendment, all voted and the motion passed. Senators Sloan, Webster and Apodaca spoke on the bill as amended. Senator Apodaca moved for a favorable report of the committee substitute as amended, rolled into a new committee substitute, unfavorable to the original bill.

Senator Webster moved for a favorable report of the original bill. Representative Hill spoke on Senator Webster's motion. All voted and the motion failed. Senator Hartsell called for a vote on Senator Apodaca's motion. All voted and the motion carried.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 3

HOUSE BILL 965

Committee Substitute Favorable 4/29/03
Third Edition Engrossed 4/30/03

Short Title: Failure to Yield Causing Death or Injuries. (Public)

Sponsors:

Referred to:

April 9, 2003

A BILL TO BE ENTITLED

AN ACT TO PROVIDE PENALTIES FOR PERSONS WHO CAUSE BODILY INJURY OR DEATH WHEN FAILING TO YIELD THE RIGHT-OF-WAY UNDER CERTAIN CIRCUMSTANCES.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 20 of the General Statutes is amended by adding a new section to read:

"**§ 20-160.1. Failure to yield causing injury or death; penalties.**

(a) Unless the conduct is covered under some other provision of law providing greater punishment, a person who commits the offense of failure to yield while approaching or entering an intersection, turning at a stop or yield sign, entering a roadway, upon the approach of an emergency vehicle, or at highway construction or maintenance shall be punished in the following manner:

(1) Except as provided in subdivisions (2) and (3) of this subsection, when there is bodily injury resulting from the violation, the violator shall be fined two hundred dollars ($200.00).

(2) When there is serious bodily injury but no death resulting from the violation, the violator shall be fined five hundred dollars ($500.00) and the violator's drivers license or commercial drivers license shall be suspended for 90 days.

(3) When a death results from the violation, the violator shall be fined one thousand dollars ($1,000) and the violator's drivers license or commercial drivers license shall be suspended for six months.

(b) As used in this section, 'bodily injury' means a cut, abrasion, bruise, burn, disfigurement, physical pain, illness, any impairment of the function of a bodily member, organ, or mental faculty, or any other injury to the body, no matter how temporary. 'Serious bodily injury' means bodily injury that involves a substantial risk of

death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty."

SECTION 2. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

HOUSE BILL 965:
Increase Penalties for Failure to Yield.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Representative Hill
Date:	June 24, 2004	**Summary by:**	Robin Johnson and Kory Goldsmith, Committee Counsel
Version:	H965-PCS70486-RC-85		

SUMMARY: The Proposed Committee Substitute for House Bill 965 would:

(1) provide for a $500 fine and a 90-day suspension of a drivers license when a driver fails to yield the right of way as required under certain circumstances and serious bodily injury, but not death, results from the violation;

(2) require a vehicle turning right at a red light to yield to a pedestrian who is moving towards the intersection, is in reasonably close proximity to the intersection, and is preparing to cross in front of the traffic that is required to stop at the red light;

(3) impose four drivers license points for failing to yield to traffic or a pedestrian when turning right on red;

(4) assess one insurance point for failure to yield to traffic or pedestrians when turning right on red;

(5) increase the monetary penalty for failure to yield to a pedestrian when turning right on red to between $100 and $500;

(6) direct the Department of Transportation to collect data on pedestrians who are involved in accidents due to a driver's failure to yield while turning right at a red light and report those results to the Joint Legislative Transportation Oversight Committee; and

(7) encourage DOT and local municipalities to run public service announcements informing the public about the new law and its penalties.

CURRENT LAW: G.S. 20-155 requires that when two vehicles approach or enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left must yield the right-of-way to the vehicle on the right. The driver of a vehicle intending to turn to the left must yield the right-of-way to any vehicle approaching from the opposite direction. The driver of any vehicle approaching but not having entered a traffic circle must yield the right-of-way to a vehicle already within the traffic circle. G.S. 20-156 requires the driver of a vehicle about to enter or cross a highway to yield the right-of-way to all vehicles approaching on the highway to be entered. A driver must also yield the right-of-way to police and fire department vehicles, ambulances, and other emergency vehicles giving a warning signal by appropriate light and siren. G.S. 20-158 provides for the control of vehicles by signs and signals, and prescribes the conditions under which a driver must stop or yield the right of way at intersections or other areas controlled by stop signs, stoplights, flashing lights or other traffic-control devices.

Under G.S. 20-176, any violation of the above statutes would be an infraction for which the person may be ordered to pay a penalty of not more than $100 (unless a specific penalty is otherwise provided by law). Under G.S. 20-141.4, if the violation results in a death, the person could be charged with misdemeanor death by vehicle. Misdemeanor death by vehicle is a Class 1 misdemeanor; a person

charged with a Class 1 misdemeanor is subject to an unspecified fine in the discretion of the judge. In addition, a person found guilty of misdemeanor death by vehicle is subject to a mandatory one-year revocation is his or her drivers license.

An automobile may turn right turn at a red light except where prohibited by a sign. A violation of the right turn on red statute is a moving violation and therefore an infraction punishable by a maximum penalty of $100. Three drivers license points would be assigned for failure to yield right-of-way or running through a red light. Only one insurance point would be assigned.

BILL ANALYSIS:

Section 1 would provide specific punishment for failure to yield while approaching or entering an intersection, turning at a stop sign or yield sign, entering a roadway, upon approach of an emergency vehicle, or at the site of highway construction or maintenance. ***Unless the conduct is covered under some other provision of law providing greater punishment,*** the driver would be required to pay a $500 fine and the driver's license would be suspended for 90 days when there is serious bodily injury, but not death, resulting from the violation. 'Serious bodily injury' is defined as bodily injury that involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

Section 2 amends G.S. 20-158(b), requiring drivers making a right turn at a red light to yield the right of way to (1) traffic and pedestrians who are using the intersection; and (2) pedestrians who are moving towards the intersection, who are within reasonably close proximity of an intersection, and who are preparing to cross in front of the traffic that is required to stop at the red light.

Failure to yield to a pedestrian while making a right or left turn on red would still be an infraction. However, violations would be punishable by the imposition of a penalty of not more than $500 and not less than $100.

Section 3 increases from 3 to 4 the number of drivers license points for failing to yield to a pedestrian when turning right on a red light.

Section 4 allows only one insurance point to be assessed for failure to yield to a pedestrian while turning right at a red light.

Section 5 directs the Department of Transportation (DOT) to collect data on accidents involving pedestrians and vehicles turning right on a red light. DOT must report the data to the Joint Legislative Transportation Oversight Committee by January 1, 2006.

Section 6 directs DOT, as part of its regularly scheduled updates, to revise the written driver's license examination and any publications related to obtaining a driver's license to reflect the changes in Sections 1, 2 and 3.

Section 7 encourages DOT, cities and counties to provide public service announcements informing the public about this act.

The bill would become effective December 1, 2004 and applies to violations committed on or after that date.

H965-SMRC-008: * Brenda Carter, Staff Attorney, contributed substantially to this summary.

NORTH CAROLINA GENERAL ASSEMBLY AMENDMENT

(Please type or use ballpoint pen)

EDITION No. _____

H. B. No. 965 DATE _____

S. B. No. _____ Amendment No. _____
(to be filled in by Principal Clerk)

COMMITTEE SUBSTITUTE ✓

Rep.)
) Shubert
Sen.)

moves to amend the bill on page 1, line 3

(✓) WHICH CHANGES THE TITLE

by inserting after "INJURY" the following "OR DEATH";

and on page 1, line 21, by adding at the end of the line the following:

"When a death results from the violation, the violator shall be ~~fined~~ fined one thousand dollars ($1,000) and the violator's driver's license or commercial license shall be suspended for six months."

SIGNED Fern H Shubert

ADOPTED _____ FAILED _____ TABLED _____

GA-33-A

PRINCIPAL CLERK'S OFFICE (FOR ENGROSSMENT)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 1

HOUSE BILL 1518

Short Title:	Require Payment of Restitution for Expunction.	(Public)
Sponsors:	Representatives Eddins, Holliman (Primary Sponsors); B. Allen, Gillespie, Harrell, Justus, Pate, A. Williams, K. Williams, Glazier, Hilton, and McLawhorn.	
Referred to:	Judiciary IV.	

May 19, 2004

A BILL TO BE ENTITLED

AN ACT REQUIRING A PERSON TO PAY ANY OUTSTANDING RESTITUTION ORDERS PRIOR TO THE EXPUNCTION OF THE PERSON'S CRIMINAL RECORD.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-145 reads as rewritten:

"**§ 15A-145. Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor; expunction of certain other misdemeanors.**

(a) Whenever any person who has (i) not yet attained the age of 18 years and has not previously been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States, the laws of this State or any other state, pleads guilty to or is guilty of a misdemeanor other than a traffic violation, or (ii) not yet attained the age of 21 years and has not previously been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States, the laws of this State or any other state, pleads guilty to or is guilty of a misdemeanor possession of alcohol pursuant to G.S. 18B-302(b)(1), he may file a petition in the court where he was convicted for expunction of the misdemeanor from his criminal record. The petition cannot be filed earlier than two years after the date of the conviction or any period of probation, whichever occurs later, and the petition shall contain, but not be limited to, the following:

(1) An affidavit by the petitioner that he has been of good behavior for the two-year period since the date of conviction of the misdemeanor in question and has not been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States or the laws of this State or any other state.

(2) Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives and that his character and reputation are good.

(3) A statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.

(4) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted and, if different, the county of which the petitioner is a resident, showing that the petitioner has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the misdemeanor in question or during the two-year period following that conviction.

(5) An affidavit by the petitioner that no restitution orders or civil judgments representing amounts ordered for restitution entered against him are outstanding.

The petition shall be served upon the district attorney of the court wherein the case was tried resulting in conviction. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the two-year period that he deems desirable.

(b) If the court, after hearing, finds that the petitioner had remained of good behavior and been free of conviction of any felony or misdemeanor, other than a traffic violation, for two years from the date of conviction of the misdemeanor in question, the petitioner has no outstanding restitution orders or civil judgments representing amounts ordered for restitution entered against him, and (i) petitioner was not 18 years old at the time of the conviction in question, or (ii) petitioner was not 21 years old at the time of the conviction of possession of alcohol pursuant to G.S. 18B-302(b)(1), it shall order that such person be restored, in the contemplation of the law, to the status he occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, or indictment, information, or trial, or response to any inquiry made of him for any purpose.

(c) The court shall also order that the said misdemeanor conviction be expunged from the records of the court, and direct all law-enforcement agencies bearing record of the same to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The sheriff, chief or head of such other arresting agency shall then transmit the copy of the order with a form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation.

(d) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts, the names of those persons granted a discharge under the provisions of this section, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in such file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted a discharge.

(e) A person who files a petition for expunction of a criminal record under this section must pay the clerk of superior court a fee of sixty-five dollars ($65.00) at the time the petition is filed. Fees collected under this subsection shall be deposited in the General Fund. This subsection does not apply to petitions filed by an indigent."

SECTION 2. This act becomes effective July 1, 2004, and applies to petitions for expunction filed on or after that date.

HOUSE BILL 1518:
Require Payment of Restitution for Expunction.

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Reps. Eddins and Holliman
Date:	June 29, 2004	**Summary by:**	Sandra Alley
Version:	1st Edition		Committee Counsel

SUMMARY: This bill would require a person to pay any outstanding restitution orders prior to the expunction of the person's criminal record. This bill is a recommendation of the House Select Committee on Preventing Unjust Profiteering from Crime.

CURRENT LAW: A person may file a petition for expunction of the person's criminal record if that person is a first offender and has been convicted of one of the following:

- A misdemeanor while under the age of 18; or
- Possession of alcohol while under the age of 21

A court, after a hearing, shall order the misdemeanor conviction expunged and the petitioner's status pre-arrest status restored if the petitioner shows the following, supported by affidavits:

(1) That he has not been convicted of any felony or misdemeanor, other than a traffic violation, prior to the conviction in question or during the two-year period following that conviction.

(2) That he is of good character and reputation in the community in which he lives.

The petition for expunction cannot be filed earlier than two years after the date of conviction or any period of probation. The petition must be accompanied by a $65 filing fee.

BILL ANALYSIS: House Bill 1518 would add the requirement that the petitioner pay any outstanding restitution orders or civil judgments representing amounts ordered for restitution before the petitioner may be granted an expunction of his record.

The bill would become effective September 1, 2004 and apply to petitions for expunction filed on or after that date.

Trina Griffin, Staff Attorney, Research Division, contributed significantly to this summary.

H1518-SMSP-001

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 6-29-2004

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Fred Johnson	Alliance of Disability Advocates PO Box 12988, Ral. 27605
Luke Conley	Gov. office 401 Oberlin Rd Suite 103
J. Michael Atkins	Alliance of Disability Advocates
Darcie Mebereau	" "
Rene Cummins	" "
Hal Miller	NCACCT
Matt Willoughby	NCAJ
Roy Rogers	Calif.

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 6-29-04

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
GARY ROY	NCABATE 2921 Roy 4
Cynthia Temoshok	2113 Cameron St. Raleigh 27612
TOM WINTON	NCDept. of Public Instruction 6356 Mail Service Center Raleigh NC 27699-6356
KEN PRESSON	CBA/ABATE
PEGGY BURNS	CBA/ABATE
SAM NOBLES	NC BIKE PAC
Claude Travis	Dixie Rider M/C News Magazine
Cindy Hodges	NC BIKE PAC, cba/abate of nc
Bruce W. HARRIS	NC ABATE/CBA NC BIKE PAC Motorcycle Riders Foundation.
Mikey Hindle	NC CBA/ABATE/Chatham Co. NC Bike PAC
Mike Hodges	NC BIKE PAC, CBA/ABATE of NC

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	July 1, 2004	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 1203	Amend Motor Fuel Marketing Act.	Representative Brubaker Representative Gibson, III

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, July 1, 2004, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

HB 1203	Amend Motor Fuel Marketing Act.	Representative Brubaker Representative Gibson, III

Presentations

Other Business

Adjournment

Senate Judiciary II Committee Meeting

Minutes

July 1, 2004

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on July 1, 2004, with fourteen members present.

HB 1203 (Amend Motor Fuel Marketing Act) Senator Hartsell noted that the meeting was for the purpose of discussion on the bill and that no vote would be taken. Representative Brubaker was recognized to introduce the bill. He invited Representative Daughtridge to explain the bill.

Speaking on the bill were: Mr. Gary Harris of the North Carolina Petroleum Marketers Association, Mr. Edward Homes and Mr. Michael Barnes, private jobbers, and Mr. Charles Ganus, President, Murphy USA Marketing Company

After much discussion the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 2

HOUSE BILL 1203*
Committee Substitute Favorable 4/29/03

Short Title: Amend Motor Fuel Marketing Act. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE MOTOR FUEL MARKETING ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 3 of Chapter 75 of the General Statutes reads as rewritten:

"Article 3.

"Motor Fuel Marketing Act.

"§ 75-80. Title.

This Article shall be known and may be cited as the "Motor Fuel Marketing Act".

"§ 75-81. Definitions.

~~The following terms shall have the meanings ascribed to them~~ As used in this ~~section unless otherwise stated and~~Article, unless the context ~~or subject matter clearly~~ indicates ~~otherwise:~~otherwise, the following definitions apply:

(1) 'Person' ~~shall mean~~means any person, firm, association, organization, partnership, business trust, joint stock company, company, corporation or legal entity.

(2) 'Sale' ~~shall mean~~means selling, offering for sale or advertising for sale.

(3) 'Motor Fuel' means motor fuel, as defined in G.S. 105-449.60, and alternative fuel, as defined in G.S. 105-449.130.

(4) 'Cost' or 'Costs' ~~shall mean as follows:~~

~~a. For a refiner or terminal supplier, costs shall be presumed to be the refiner's or terminal supplier's prevailing price to the wholesale class of trade at the terminal used by the refiner or terminal supplier to obtain the motor fuel in question or the lowest prevailing price within 10 days prior to a sale alleged to be in violation of G.S. 75-82 hereof plus all transportation expenses including freight expenses (incurred and not otherwise included in the cost of the motor fuel), and motor fuel taxes. If a refiner or terminal supplier does not regularly sell to the~~

~~wholesale class of trade at the terminal in question, then such refiner or terminal supplier shall use as the prevailing price either (i) the lowest price to the wholesale class of trade of those other refiners or terminal suppliers at the same terminal who regularly sell to the wholesaler class or (ii) a price determined by using standard functional accounting procedures.~~

~~b.~~ ~~For all other sellers, cost includes the invoice or replacement cost, whichever is less, of the grade, brand or blend, of motor fuel within 10 days prior to the date of sale, in the quantity or quantities last purchased, less all rebates and discounts received including prompt payment discounts and plus all applicable State, federal and local taxes, and transportation expenses including freight expenses, incurred and not otherwise included in the cost of the motor fuel.~~ means the total of all of the following:

a. The most recently published average reseller rack cost of motor fuel by grade and quality, as calculated by the Oil Price Information Service (OPIS) for the particular terminal from which the motor fuel was delivered to the motor fuel merchant or the low OPIS Rack Price as reported by OPIS for the particular terminal from which the motor fuel was delivered to the motor fuel merchant, whichever is less.

b. The freight charges on the motor fuel.

c. All applicable State and federal excise taxes.

~~(5) "Prompt Payment Discounts" shall mean any allowance for payment within a specified time, but shall not include discounts for cash made to the motoring public at motor fuel outlets.~~

(6) 'Affiliate' ~~shall mean~~means any person who (other than by means of a franchise) controls, is controlled by or is under common control with, any other person.

(7) 'Motor Fuel Merchant' ~~is~~ means any person selling motor fuel to the public.

(8) 'Motor Fuel Outlet' ~~is~~ means any retail facility selling motor fuel to the motoring public.

~~(9) 'New Retail Outlet' shall mean a new retail facility constructed from the ground or an existing retail facility that is offering motor fuel to the motoring public for the first time.~~

(10) 'Refiner' ~~shall mean~~means any person engaged in the production or refining of motor fuel, whether such production or refining occurs in this State or elsewhere, and includes any affiliate of such person or firm.

(11) 'Terminal Supplier' ~~shall mean~~means any person engaged in selling or brokering motor fuel to wholesalers or retailers from a storage facility

of more than 2,000,000 gallons capacity and such person has an ownership interest in or control of the storage facility.

"§ 75-82. Unlawful below-cost selling; exceptions.

(a) ~~It shall be unlawful where the intent is to injure competition for any~~ No motor fuel merchant or ~~the~~ affiliate of any motor fuel merchant ~~to~~ shall sell ~~with such frequency as to indicate a general business practice of selling at a motor fuel outlet any grade, brand or blend of~~ motor fuel for less than the cost ~~of that grade, brand or blend of motor fuel except where (i) the~~unless either of the following applies:

(1) The price is established in good faith to meet ~~or compete with~~ the lower price of a competitor ~~in the same market area on the same level of distribution~~ selling the same or comparable product of like ~~quality, (ii) the price remains in effect for no more than 10 days after the first sale of that grade, brand or blend by the merchant at a new retail outlet, (iii) the sale is made in good faith to dispose of a grade, brand or blend of motor fuel for the purpose of discontinuing sales of that product, or (iv) the~~quality.

(2) The sale is made pursuant to the order or authority of any court or governmental agency.

~~(b) For purposes of this Article, motor fuel cost shall be computed separately for each grade, brand or blend of each motor fuel at each location where said motor fuel is offered for sale; however, nothing in this subsection shall prevent a motor fuel merchant from using a weighted average motor fuel cost for comparable grade, brand or blend when such motor fuel merchant is supplied by more than one refiner or terminal supplier at one or more terminals.~~

(c) This Article ~~shall apply~~applies only to retail sales of motor fuel at motor fuel outlets.

(d) A violation of this section is an unfair method of competition under G.S. 75-1.1.

"§ 75-83. Unlawful inducement; civil penalty.

It ~~shall be~~is unlawful to knowingly induce, or to knowingly attempt to induce, a violation of this Article, whether by otherwise lawful or unlawful means. In any action initiated by the Attorney ~~General,~~ General at the request of the Commissioner of Agriculture, anyone found to have violated this provision shall be subject to the civil penalty applicable to the sales made in violation of this Article; or, if no sales were made, to a civil penalty of one thousand dollars ($1,000). The clear proceeds of any civil penalties imposed in any actions initiated by the Attorney General under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"§ 75-84. Separate offenses; injunctions.

Each act of establishing a price below cost in violation of this Article shall constitute a separate offense by the ~~seller~~ seller, and the civil penalty for each offense shall be not more than ~~one thousand dollars ($1,000).~~ten thousand dollars ($10,000). Upon a proper showing by the Attorney General or ~~his delegate,~~ the Commissioner of Agriculture, further violations may be temporarily or permanently enjoined. The clear proceeds of

civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"**§ 75-85. Investigations by ~~Attorney General.~~Commissioner of Agriculture.**

~~The Attorney General is authorized to~~Notwithstanding G.S. 75-9, the Commissioner of Agriculture may investigate any allegation of a violation of this Article made by a motor fuel merchant or ~~by an association or~~ group of motor fuel merchants. If the Commissioner of Agriculture receives a complaint in writing that a motor fuel merchant is selling motor fuel below cost, the Commissioner of Agriculture shall investigate and determine within three business days of the receipt of the written complaint whether the allegations in the complaint are true. If an investigation discloses a violation, the Commissioner of Agriculture may request the Attorney General ~~may~~ to exercise the authority under this Article to seek an injunction and ~~he may also seek~~ impose civil penalties. The Commissioner of Agriculture may, in order to prevent further sales, request the Attorney General to seize and seal any dispensing pump or dispensing devices from which motor fuel is offered or exposed for sale in violation of this Article. Motor fuel that has been seized and sealed under this section shall not be offered for sale until the Commissioner of Agriculture and the Attorney General, after consultation, are satisfied that the motor fuel merchant has satisfied the requirements of this Article. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"**§ 75-86. Private actions.**

Any person, corporation, or other business entity ~~which~~ that is engaged in the sale of motor fuel for resale or consumption and ~~which~~ that is directly or indirectly injured by a violation of this Article may bring an action in the district court ~~district as defined in G.S. 7A-133~~ or superior court ~~district or set of districts as defined in G.S. 7A-41.1, as the case may be,~~of the county where the violation is alleged to have occurred to recover ~~actual damages, exemplary damages, costs~~ treble damages under G.S. 75-16, costs, and reasonable attorneys' fees. The court shall also grant such equitable relief as is proper, including a declaratory judgment and injunctive relief. Any action under this Article must be brought within one year of the alleged violation.

"**§ 75-87. Private action presumptions.**

(a) In any private action brought under this Article, a violation shall be presumed to have occurred if: (i) the prevailing price ~~under G.S. 75-81(4)(a)~~ for any grade, brand or blend of a motor fuel sold by a refiner or terminal supplier to a wholesaler or retailer is greater than the price of the same grade, brand or blend of motor fuel sold by such refiner or terminal supplier directly through its own motor fuel outlet or through the outlet of an affiliate of said refiner or terminal supplier; or (ii) if the product price of any grade, brand or blend of a motor fuel sold by a wholesaler to a retailer is greater than the retail price of the same grade, brand or blend of motor fuel sold by such wholesaler through its own motor fuel outlet or the outlet of an affiliate of said wholesaler, provided the method of delivery and quantities of each delivery of motor fuel to the retailer and to the wholesaler's outlet or affiliate's outlet are the same or comparable.

(b) A party may rebut the presumption created by this section by presenting evidence to establish ~~his~~ that party's cost of the grade, brand or blend of motor fuel in

question, or by qualifying for an exception under subdivision (1) or subdivision (2) of subsection (a) of G.S. 75-82.

"**§ 75-88. Public ~~disclosure.~~disclosure; quantity of motor fuel available for sale.**

(a) Any refiner or terminal supplier computing prevailing price under the provisions of ~~G.S. 75-81(4)(a)(i) or (ii)~~ G.S. 75-81(4) shall be required to publicly disclose ~~said~~ this price.

(b) No entity shall limit the quantity of motor fuel sold or offered for sale from a motor fuel pump to any one customer to a quantity less than the entire supply that is owned or possessed by the seller and that the seller is authorized to sell at the place of sale or offering for sale unless preempted by a State or federal state of emergency.

(c) Motor fuel purchased under this section shall be dispensed into a container approved by the fire prevention code, the State Building Code as authorized under G.S. 143-139, or a containment vehicle approved by the Department of Transportation.

(d) Each act violating this section shall constitute a separate offense, and is subject to a civil penalty. The civil penalty for each offense shall be not more than five thousand dollars ($5,000). Upon a proper showing by the Attorney General or the Commissioner of Agriculture, further violations may be temporarily or permanently enjoined. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"**§ 75-89. Powers and remedies supplementary.**

The powers and remedies provided by this Article shall be cumulative and supplementary to all powers and remedies otherwise provided by law."

SECTION 2. This act becomes effective October 1, 2003, and applies to sales of motor fuels and offers of sale of motor fuel on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 1203*

Committee Substitute Favorable 4/29/03

PROPOSED SENATE COMMITTEE SUBSTITUTE H1203-CSRC-107 [v.1]

6/28/2004 8:55:52 PM

Short Title: Amend Motor Fuel Marketing Act. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE MOTOR FUEL MARKETING ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 3 of Chapter 75 of the General Statutes reads as rewritten:

"Article 3.

"Motor Fuel Marketing Act.

"§ 75-80. Title.

This Article shall be known and may be cited as the "Motor Fuel Marketing Act".

"§ 75-81. Definitions.

~~The following terms shall have the meanings ascribed to them~~ As used in this ~~section unless otherwise stated and~~Article, unless the context ~~or subject matter clearly~~ indicates ~~otherwise:~~otherwise, the following definitions apply:

(1) 'Person' ~~shall mean~~means any person, firm, association, organization, partnership, business trust, joint stock company, company, corporation or legal entity.

(2) 'Sale' ~~shall mean~~means selling, offering for sale or advertising for sale.

(3) 'Motor Fuel' means motor fuel, as defined in G.S. 105-449.60, and alternative fuel, as defined in G.S. 105-449.130.

(4) 'Cost' or 'Costs' ~~shall mean as follows:~~

~~a. For a refiner or terminal supplier, costs shall be presumed to be the refiner's or terminal supplier's prevailing price to the wholesale class of trade at the terminal used by the refiner or terminal supplier to obtain the motor fuel in question or the lowest prevailing price within 10 days prior to a sale alleged to be in violation of G.S. 75-82 hereof plus all transportation expenses including freight expenses (incurred and not otherwise~~

~~included in the cost of the motor fuel), and motor fuel taxes. If a refiner or terminal supplier does not regularly sell to the wholesale class of trade at the terminal in question, then such refiner or terminal supplier shall use as the prevailing price either (i) the lowest price to the wholesale class of trade of those other refiners or terminal suppliers at the same terminal who regularly sell to the wholesaler class or (ii) a price determined by using standard functional accounting procedures.~~

~~b. For all other sellers, cost includes the invoice or replacement cost, whichever is less, of the grade, brand or blend, of motor fuel within 10 days prior to the date of sale, in the quantity or quantities last purchased, less all rebates and discounts received including prompt payment discounts and plus all applicable State, federal and local taxes, and transportation expenses including freight expenses, incurred and not otherwise included in the cost of the motor fuel.~~ means the total of all of the following:

a. The most recently published average reseller rack cost of motor fuel by grade and quality, as calculated by the Oil Price Information Service (OPIS) for the particular terminal from which the motor fuel was delivered to the motor fuel merchant or the low OPIS Rack Price as reported by OPIS for the particular terminal from which the motor fuel was delivered to the motor fuel merchant, whichever is less.

b. The freight charges on the motor fuel.

c. All applicable State and federal excise taxes.

~~(5) "Prompt Payment Discounts" shall mean any allowance for payment within a specified time, but shall not include discounts for cash made to the motoring public at motor fuel outlets.~~

(6) 'Affiliate' ~~shall mean~~means any person who (other than by means of a franchise) controls, is controlled by or is under common control with, any other person.

(7) 'Motor Fuel Merchant' ~~is~~ means any person selling motor fuel to the public.

(8) 'Motor Fuel Outlet' ~~is~~ means any retail facility selling motor fuel to the motoring public.

~~(9) 'New Retail Outlet' shall mean a new retail facility constructed from the ground or an existing retail facility that is offering motor fuel to the motoring public for the first time.~~

(10) 'Refiner' ~~shall mean~~means any person engaged in the production or refining of motor fuel, whether such production or refining occurs in this State or elsewhere, and includes any affiliate of such person or firm.

(11) 'Terminal Supplier' ~~shall mean~~means any person engaged in selling or brokering motor fuel to wholesalers or retailers from a storage facility of more than 2,000,000 gallons capacity and such person has an ownership interest in or control of the storage facility.

"§ 75-82. Unlawful below-cost selling; exceptions.

(a) ~~It shall be unlawful where the intent is to injure competition for any~~ No motor fuel merchant or ~~the~~ affiliate of any motor fuel merchant ~~to~~ shall sell ~~with such frequency as to indicate a general business practice of selling at a motor fuel outlet any grade, brand or blend of~~ motor fuel for less than the cost ~~of that grade, brand or blend of motor fuel except where (i) the~~unless either of the following applies:

(1) The price is established in good faith to meet ~~or compete with~~ the lower price of a competitor ~~in the same market area on the same level of distribution~~ selling the same or comparable product of like ~~quality, (ii) the price remains in effect for no more than 10 days after the first sale of that grade, brand or blend by the merchant at a new retail outlet, (iii) the sale is made in good faith to dispose of a grade, brand or blend of motor fuel for the purpose of discontinuing sales of that product, or (iv) the~~quality.

(2) The sale is made pursuant to the order or authority of any court or governmental agency.

~~(b) For purposes of this Article, motor fuel cost shall be computed separately for each grade, brand or blend of each motor fuel at each location where said motor fuel is offered for sale; however, nothing in this subsection shall prevent a motor fuel merchant from using a weighted average motor fuel cost for comparable grade, brand or blend when such motor fuel merchant is supplied by more than one refiner or terminal supplier at one or more terminals.~~

(c) This Article ~~shall apply~~applies only to retail sales of motor fuel at motor fuel outlets.

(d) A violation of this section is an unfair method of competition under G.S. 75-1.1.

"§ 75-83. Unlawful inducement; civil penalty.

It ~~shall be~~is unlawful to knowingly induce, or to knowingly attempt to induce, a violation of this Article, whether by otherwise lawful or unlawful means. In any action initiated by the Attorney ~~General,~~ General at the request of the Commissioner of Agriculture, anyone found to have violated this provision shall be subject to the civil penalty applicable to the sales made in violation of this Article; or, if no sales were made, to a civil penalty of one thousand dollars ($1,000). The clear proceeds of any civil penalties imposed in any actions initiated by the Attorney General under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"§ 75-84. Separate offenses; injunctions.

Each act of establishing a price below cost in violation of this Article shall constitute a separate offense by the ~~seller~~ seller, and the civil penalty for each offense shall be not more than ~~one thousand dollars ($1,000).~~ten thousand dollars ($10,000). Upon a proper

showing by the Attorney General or ~~his delegate,~~ the Commissioner of Agriculture, further violations may be temporarily or permanently enjoined. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"**§ 75-85. Investigations by ~~Attorney General.~~Commissioner of Agriculture.**

~~The Attorney General is authorized to~~Notwithstanding G.S. 75-9, the Commissioner of Agriculture may investigate any allegation of a violation of this Article made by a motor fuel merchant or ~~by an association or~~ group of motor fuel merchants. If the Commissioner of Agriculture receives a complaint in writing that a motor fuel merchant is selling motor fuel below cost, the Commissioner of Agriculture shall investigate and determine within three business days of the receipt of the written complaint whether the allegations in the complaint are true. If an investigation discloses a violation, the Commissioner of Agriculture may request the Attorney General ~~may~~ to exercise the authority under this Article to seek an injunction and ~~he may also seek~~ impose civil penalties. The Commissioner of Agriculture may, in order to prevent further sales, request the Attorney General to seize and seal any dispensing pump or dispensing devices from which motor fuel is offered or exposed for sale in violation of this Article. Motor fuel that has been seized and sealed under this section shall not be offered for sale until the Commissioner of Agriculture and the Attorney General, after consultation, are satisfied that the motor fuel merchant has satisfied the requirements of this Article. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"**§ 75-86. Private actions.**

Any person, corporation, or other business entity ~~which~~ that is engaged in the sale of motor fuel for resale or consumption and ~~which~~ that is directly or indirectly injured by a violation of this Article may bring an action in the district court ~~district as defined in G.S. 7A-133~~ or superior court ~~district or set of districts as defined in G.S. 7A-41.1, as the case may be,~~of the county where the violation is alleged to have occurred to recover ~~actual damages, exemplary damages, costs~~ treble damages under G.S. 75-16, costs, and reasonable attorneys' fees. The court shall also grant such equitable relief as is proper, including a declaratory judgment and injunctive relief. Any action under this Article must be brought within one year of the alleged violation.

"**§ 75-87. Private action presumptions.**

(a) In any private action brought under this Article, a violation shall be presumed to have occurred if: (i) the prevailing price ~~under G.S. 75-81(4)(a)~~ for any grade, brand or blend of a motor fuel sold by a refiner or terminal supplier to a wholesaler or retailer is greater than the price of the same grade, brand or blend of motor fuel sold by such refiner or terminal supplier directly through its own motor fuel outlet or through the outlet of an affiliate of said refiner or terminal supplier; or (ii) if the product price of any grade, brand or blend of a motor fuel sold by a wholesaler to a retailer is greater than the retail price of the same grade, brand or blend of motor fuel sold by such wholesaler through its own motor fuel outlet or the outlet of an affiliate of said wholesaler, provided the method of delivery and quantities of each delivery of motor fuel to the retailer and to the wholesaler's outlet or affiliate's outlet are the same or comparable.

(b) A party may rebut the presumption created by this section by presenting evidence to establish ~~his~~ that party's cost of the grade, brand or blend of motor fuel in question, or by qualifying for an exception under subdivision (1) or subdivision (2) of subsection (a) of G.S. 75-82.

"§ 75-88. Public ~~disclosure.~~disclosure; quantity of motor fuel available for sale.

(a) Any refiner or terminal supplier computing prevailing price under the provisions of ~~G.S. 75-81(4)(a)(i) or (ii)~~ G.S. 75-81(4) shall be required to publicly disclose ~~said~~ this price.

(b) No entity that is selling motor fuel for less than cost shall limit the quantity of motor fuel sold or offered for sale from a motor fuel pump to any one customer to a quantity less than the entire supply that is owned or possessed by the seller and that the seller is authorized to sell at the place of sale or offering for sale unless preempted by a State or federal state of emergency.

(c) Motor fuel purchased under this section shall be dispensed into a container approved by the fire prevention code, the State Building Code as authorized under G.S. 143-139, or a containment vehicle approved by the Department of Transportation.

(d) Each act violating this section shall constitute a separate offense, and is subject to a civil penalty. The civil penalty for each offense shall be not more than five thousand dollars ($5,000). Upon a proper showing by the Attorney General or the Commissioner of Agriculture, further violations may be temporarily or permanently enjoined. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"§ 75-89. Powers and remedies supplementary.

The powers and remedies provided by this Article shall be cumulative and supplementary to all powers and remedies otherwise provided by law."

SECTION 2. This act becomes effective October 1, 2004, and applies to sales of motor fuels and offers of sale of motor fuel on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 1203*

Committee Substitute Favorable 4/29/03

PROPOSED SENATE COMMITTEE SUBSTITUTE H1203-CSRC-106 [v.1]

6/28/2004 8:53:15 PM

Short Title: Amend Motor Fuel Marketing Act. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO CREATE A PRESUMPTION THAT A VIOLATION OF THE MOTOR FUEL MARKETING ACT IS AN UNFAIR METHOD OF COMPETITION .

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 75-82 is amended by adding a new subsection to read:

"(d) A violation of this section is presumed to be an unfair method of competition under G.S. 75-1.1."

SECTION 2. This act becomes effective October 1, 2004 and applies to sales of motor fuels and offers of sale of motor fuel on or after that date.

HOUSE BILL 1203:
Amend Motor Fuel Marketing Act

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Representative Gibson
Date:	June 30, 2004	**Summary by:**	Kory J. Goldsmith KJG
Version:	2nd Edition		Committee Counsel

SUMMARY: ***The 2nd Edition of HB1203 amends the Motor Fuels Marketing Act, which generally prohibits unfair price competition between motor fuel merchants by selling below cost. The bill makes the following changes in the law:***

(1) Redefines what constitutes "cost" for persons selling motor fuel.

(2) Removes the intent to injure competition requirement from the law.

(3) Makes it an unfair and deceptive trade practice under G.S. 75-1.1 to violate the Act.

(4) Allows the recovery of treble damages.

(5) Increases the civil penalties for violations.

(6) Makes the Commissioner of Agriculture responsible for investigating complaints of violations.

(7) Authorizes the Attorney General to seize and seal the pumps of a person who is selling below cost.

(8) Prohibits a person who is selling motor fuel from limiting the amount of fuel a single customer may purchase.

The act becomes effective October 1, 2003 and applies sales of motor fuels and offers to sell motor fuel made on or after that date.

BILL ANALYSIS:

G.S. 75-81 currently defines cost to mean the refiner's or terminal supplier's prevailing cost to the wholesaler, or for other sellers, the invoice or replacement cost, plus freight and taxes. The bill redefines "cost" to mean the most recently published average reseller rack cost as calculated by the Oil Price Information Office or the actual cost paid by a motor fuel merchant for the fuel, plus freight charges and taxes.

G.S. 75-82 is amended to remove the requirement of an anticompetitive intent for a violation of the Act to occur. As amended a motor fuel merchant may not sell motor fuels below cost unless (1) the price is established in good faith to meet the lower price of a competitor or (2) the sale is made pursuant to the order of a court or government agency. The amendments also make a violation of the Act an unfair method of competition under G.S. 75-1.1.

G.S. 75-83 currently provides that the Attorney General (AG) shall initiate any action for inducing or attempting to induce a violation of the Act. As amended, the section would provide for the AG to initiate an action upon the request of the Commissioner of Agriculture.

G.S. 75-84 currently provides that each act of establishing a price in violation of the Act is a separate offense and is subject to a maximum $1,000 civil penalty. The bill would make each act of setting a price

below cost a separate offense subject to a maximum $10,000 civil penalty. The Commissioner of Agriculture, as well as the Attorney General may seek a permanent or temporary injunction prohibiting further violations.

G.S. 75-85 is amended to authorize the Commissioner of Agriculture to investigate alleged violations of the Act. (The current act provides this authority to the AG.) If the Commissioner receives a written complaint, he must determine within 3 days whether the allegations are true. If the allegations are found to be true, the Commissioner may request the AG to seize and seal the fuel pumps dispensing fuel in violation of the act. The fuel may not be offered for sale until the AG and the Commissioner are satisfied that the merchant is in compliance with the Act.

G.S. 75-86 amends the provisions of the Act providing a private right of action by any motor fuel dealer injured by a violation of the Act, to allow the recovery of treble damages. Current law allows the recovery of actual damages and exemplary (punitive) damages.

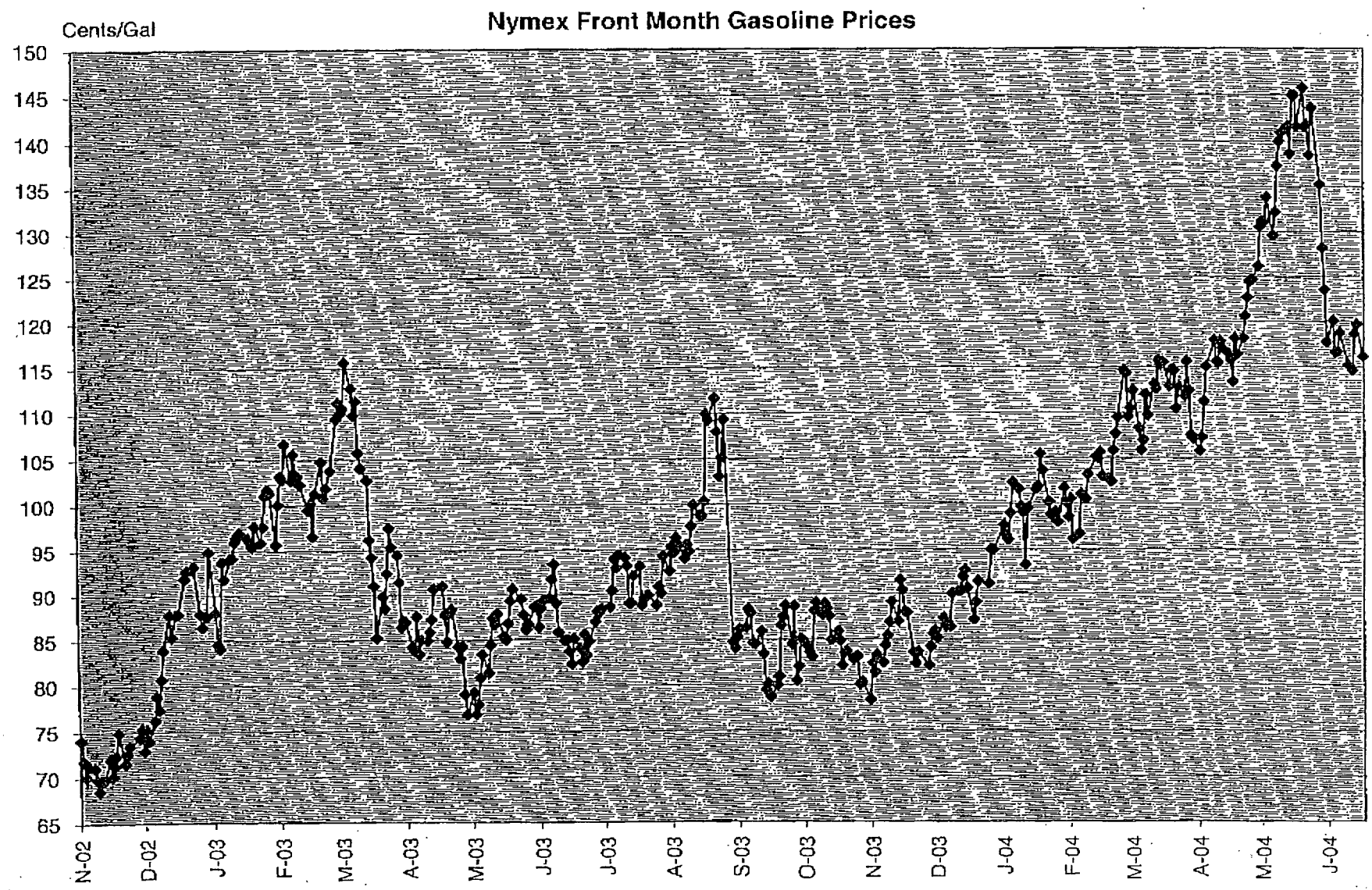
G.S. 75-87 is amended to reflect the changes in the exceptions to the prohibition against selling motor fuel below cost contained in G.S. 75-82(a).

G.S. 75-88 is amended to prohibit persons selling motor fuel from limiting the amount of fuel a single customer may purchase. Motor fuel purchased under this section must be dispensed into a container approved by the fire prevention code, the State Building Code, or a containment vehicle approved by the Department of Transportation. A violation of this section may result in a civil penalty of not more than $5,000. The Attorney General or the Commissioner of Agriculture may seek an injunction to prevent further violations.

The act becomes effective October 1, 2003, and applies to sales of motor fuels and offers of sale made on or after that date.

H1203-SMRC-004

This is a graph of daily wholesale gasoline price changed on the New York Mercantile Exchange since November 2002. Note the volatility both up and down. Minimum markup laws cause prices to rise more quickly during times of increased wholesale prices.



VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — July 1, 2004
Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Andy Ellen	NCPMA
Fran Preston	NCPMA
Mary Gurganus	NC Bar Assoc
CHARLES GANUS	MURPHY USA
Doug Hawes	NCPMA Inc
Gary Harris	NCPMA Inc.
Harold Berry	Hyatt Little & Banks LLP
Ed Turlington	BPMHA
Michael Barnes	Wilson Retro.
Ed Holmes	Holmes O.L
John Long	Martin Marietta

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — July 1, 2004

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Gary McLeod	NCDOJ
Mary Maxwell	Poyner & Spruill

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — July 1, 2004

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Josh Stern	DOJ

Gerry Johnson (Sen. Hartsell)

From: Bonnie McNeil (Senate Legislative Assistant)
Sent: Friday, July 02, 2004 12:14 PM
To: Rep. Debbie Clary; Shirley Winstead (Rep. Clary); Rep. Tim Moore; Nancy Garriss (Rep. Tim Moore)
Cc: Gerry Johnson (Sen. Hartsell)
Subject: 07-06-2004 Judiciary II Committee Notice

Principal Clerk _____
Reading Clerk _____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	July 6, 2004	1:00 P.M.	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 1453	Discharging Firearm on School Property.	Representative Clary Representative Moore

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Tuesday, July 6, 2004, 1:00 pm
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

HB 1453	Discharging Firearm on School Property.	Representative Clary Representative Moore

Presentations

Other Business

Adjournment

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Wednesday, July 07, 2004

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO BILL, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B. **1453** Discharging Firearm on School Property.

Draft Number:	PCS 50440
Sequential Referral:	None
Recommended Referral:	None
Long Title Amended:	No

TOTAL REPORTED: 1

Committee Clerk Comments:

Judiciary II Committee

Minutes

July 6, 2004

Senator Fletcher L. Hartsell, Chairman, called the Senate Judiciary II Committee to order on July 6, 2004, with eleven members present.

HB 1453 (Discharging Firearm on School Property) Senator Hartsell recognized Representative Moore to explain the bill. Questions by Senators Kinnaird, Kerr, Bingham, Webster, Swindell, Shubert and Moore were answered by Representative Moore, Robin Johnson, Staff Attorney and Senator Hartsell. Senator Shubert presented an amendment which was accepted by Representative Moore. All voted and the motion carried. Senator Bingham moved for a favorable report as amended, rolled into a committee substitute, unfavorable as original bill. All voted and the motion carried.

Senator Hartsell announced the Committee would meet Thursday July 8, 2004 and House Bill 1203 would be discussed.

There being no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — July 6, 2004
Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Tim Crowley	UNC TV
R. Paul Williams	NCHBA
Joe Delk	Gov. Office
William Lassiter	Center for the Prevention of School Violence
Michelle Frazier	NC Bar Ass'n
Jenny Schill	NC Friends ASFSC
Andy Ellen	NCRMA
Jan McKoy	Gov. Office
Audrey Galloway	NCGV
Stephanie Simpson	NCAR
Tom Sapp	SBE/DPI

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

HOUSE BILL 1453
Second Edition Engrossed 6/29/04

Short Title:	Discharging Firearm on School Property.	(Public)
Sponsors:	Representatives Moore, Clary (Primary Sponsors); Glazier, Gorman, and Pate.	
Referred to:	Judiciary III.	

May 17, 2004

A BILL TO BE ENTITLED

AN ACT TO MAKE IT A CLASS F FELONY TO DISCHARGE A FIREARM ON EDUCATIONAL PROPERTY, AS RECOMMENDED BY THE JOINT LEGISLATIVE CORRECTIONS, CRIME CONTROL, AND JUVENILE JUSTICE OVERSIGHT COMMITTEE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-269.2(b) reads as rewritten:

"(b) It shall be a Class I felony for any person to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school. Unless the conduct is covered under some other provision of law providing greater punishment, any person who willfully discharges a firearm of any kind on educational property is guilty of a Class F felony. However, this subsection does not apply to a BB gun, stun gun, air rifle, or air pistol."

SECTION 2. G.S. 14-269.2(h) reads as rewritten:

"(h) No person shall be guilty of a criminal violation of this section with regard to the possession or carrying of a firearm so long as both of the following apply:

(1) The person comes into possession of a weapon by taking or receiving the weapon from another person or by finding the weapon.

(2) The person delivers the weapon, directly or indirectly, as soon as practical to law enforcement authorities."

SECTION 3. This act becomes effective December 1, 2004, and applies to offenses committed on or after that date.

HOUSE BILL 1453:
Discharging Firearm on School Property

BILL ANALYSIS

Committee: Senate Judiciary II
Date: July 6, 2004
Version: 2nd Edition

Introduced by: Rep. Moore & Clary
Summary by: Kory J. Goldsmith CJG
Committee Counsel

SUMMARY: ***House Bill 1453 would make it a Class F felony to willfully discharge a firearm on educational property. The act becomes effective December 1, 2004, and applies to offenses committed on or after that date.***

CURRENT LAW: G.S. 14-269.2(b) makes it a Class I felony to possess or carry a firearm on educational property, or at a curricular or extracurricular activity sponsored by a school. The term "firearm" does not include a BB gun, stun gun, air rifle, or air pistol. "Educational property" includes any school building or bus, school campus, grounds, recreational area, athletic field, or other property owned, used, or operated by any board of education or school board of trustees, or directors for the administration of any school. The term "school" includes any public or private school, university, college or community college, but not a home school. The prohibition does not apply to a firearm used solely for educational or school-sanctioned ceremonial purposes or to a firearm used in a school approved program conducted under the supervision of an adult whose supervision has been approved by the school authority. A person is not in violation of the law if they come into possession of the firearm by taking or receiving it from another person or by finding the firearm and the person delivers the firearm to law enforcement officers as soon as practical.

G.S. 14-34.1 currently makes it a Class E felony for a person to willfully or wantonly discharge a firearm into occupied property. A recent North Carolina Court of Appeals decision (State v. Cockerham) found that *the offense of discharging a firearm* ***into*** *occupied property requires that the person discharging the weapon is not inside the property.* The court held that where a defendant was entirely inside his apartment unit when he fired a shot into an adjacent apartment unit, the defendant fired into occupied property within the meaning of the statute prohibiting the discharge of a firearm into occupied property. The court based its finding on a determination that each apartment within a building is an "enclosure" within the meaning of the statute – an area that is surrounded on all sides or enclosed in by a wall or fence. Under the court's reasoning, a person who fires a gun while inside a school classroom probably would not be in violation of G.S. 14-34.1.

Other offenses involving deadly weapons include:

- Assault with a deadly weapon – Class A1 misdemeanor
- Assault by pointing a gun – Class A1 misdemeanor
- Assault with a deadly weapon with intent to kill – Class E felony
- Assault with a deadly weapon inflicting serious injury – Class E felony
- Assault with a deadly weapon with intent to kill inflicting serious injury – Class C felony

BILL ANALYSIS: Unless the conduct is covered by another provision of the law providing a greater punishment, HB1453 would make it a Class F felony to willfully discharge a firearm while on educational property. The presumptive sentence for a Class F felony is 13 to 16 months of intermediate or active punishment for a person who has no prior convictions. The bill also clarifies that certain exemptions under existing law would only apply to possession of a firearm, and not to discharging a firearm on educational property.

H1453-SMRC-002

§ 14-269.2. Weapons on campus or other educational property.

(a) The following definitions apply to this section:

(1) Educational property. – Any school building or bus, school campus, grounds, recreational area, athletic field, or other property owned, used, or operated by any board of education or school board of trustees, or directors for the administration of any school.

(1a) Employee. – A person employed by a local board of education or school whether the person is an adult or a minor.

(1b) School. – A public or private school, community college, college, or university.

(2) Student. – A person enrolled in a school or a person who has been suspended or expelled within the last five years from a school, whether the person is an adult or a minor.

(3) Switchblade knife. – A knife containing a blade that opens automatically by the release of a spring or a similar contrivance.

(4) Weapon. – Any device enumerated in subsection (b), (b1), or (d) of this section.

(b) It shall be a Class I felony for any person to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school. However, this subsection does not apply to a BB gun, stun gun, air rifle, or air pistol.

(b1) It shall be a Class G felony for any person to possess or carry, whether openly or concealed, any dynamite cartridge, bomb, grenade, mine, or powerful explosive as defined in G.S. 14-284.1, on educational property or to a curricular or extracurricular activity sponsored by a school. This subsection shall not apply to fireworks.

(c) It shall be a Class I felony for any person to cause, encourage, or aid a minor who is less than 18 years old to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property. However, this subsection does not apply to a BB gun, stun gun, air rifle, or air pistol.

(c1) It shall be a Class G felony for any person to cause, encourage, or aid a minor who is less than 18 years old to possess or carry, whether openly or concealed, any dynamite cartridge, bomb, grenade, mine, or powerful explosive as defined in G.S. 14-284.1 on educational property. This subsection shall not apply to fireworks.

(d) It shall be a Class 1 misdemeanor for any person to possess or carry, whether openly or concealed, any BB gun, stun gun, air rifle, air pistol, bowie knife, dirk, dagger, slungshot, leaded cane, switchblade knife, blackjack, metallic knuckles, razors and razor blades (except solely for personal shaving), firework, or any sharp-pointed or edged instrument except instructional supplies, unaltered nail files and clips and tools used solely for preparation of food, instruction, and maintenance, on educational property.

(e) It shall be a Class 1 misdemeanor for any person to cause, encourage, or aid a minor who is less than 18 years old to possess or carry, whether openly or concealed, any BB gun, stun gun, air rifle, air pistol, bowie knife, dirk, dagger, slungshot, leaded cane, switchblade knife, blackjack, metallic knuckles, razors and razor blades (except solely for personal shaving), firework, or any sharp-pointed or edged instrument except instructional supplies, unaltered nail

files and clips and tools used solely for preparation of food, instruction, and maintenance, on educational property.

(f) Notwithstanding subsection (b) of this section it shall be a Class 1 misdemeanor rather than a Class I felony for any person to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind, on educational property or to a curricular or extracurricular activity sponsored by a school if:

(1) The person is not a student attending school on the educational property or an employee employed by the school working on the educational property; and

(1a) The person is not a student attending a curricular or extracurricular activity sponsored by the school at which the student is enrolled or an employee attending a curricular or extracurricular activity sponsored by the school at which the employee is employed; and

(2) Repealed by Session Laws 1999-211, s. 1, effective December 1, 1999, and applicable to offenses committed on or after that date.

(3) The firearm is not loaded, is in a motor vehicle, and is in a locked container or a locked firearm rack.

(4) Repealed by Session Laws 1999-211, s. 1, effective December 1, 1999, and applicable to offenses committed on or after that date.

(g) This section shall not apply to:

(1) A weapon used solely for educational or school-sanctioned ceremonial purposes, or used in a school-approved program conducted under the supervision of an adult whose supervision has been approved by the school authority;

(1a) A person exempted by the provisions of G.S. 14-269(b);

(2) Firefighters, emergency service personnel, North Carolina Forest Service personnel, and any private police employed by an educational institution, when acting in the discharge of their official duties;

(3) Home schools as defined in G.S. 115C-563(a); or

(4) Weapons used for hunting purposes on the Howell Woods Nature Center property in Johnston County owned by Johnston Community College when used with the written permission of Johnston Community College.

(h) No person shall be guilty of a criminal violation of this section so long as both of the following apply:

(1) The person comes into possession of a weapon by taking or receiving the weapon from another person or by finding the weapon.

(2) The person delivers the weapon, directly or indirectly, as soon as practical to law enforcement authorities.

Gerry Johnson (Sen. Hartsell)

From: Gerry Johnson (Sen. Hartsell)
Sent: Tuesday, July 06, 2004 3:57 PM
To: Rep. Harold "Bru" Brubaker; Rep. Pryor Gibson
Subject: July 8, 2004 Senate J II Committee Meeting

Principal Clerk _____
Reading Clerk _____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	July 8, 2004	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 1203	Amend Motor Fuel Marketing Act.	Representative Brubaker Representative Gibson, III

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, July 8, 2004, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

HB 1203	Amend Motor Fuel Marketing Act.	Representative Brubaker Representative Gibson, III

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

July 8, 2004

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on July 8, 2004, with fifteen members present.

HB 1203 (Amend Motor Fuel Marketing Act.) Senator Hartsell introduced the proposed committee substitute for discussion purposes and invited members of the audience who would like to speak on the bill to do so. Ms. Jane Pinsky, representing AAA Carolinas spoke in opposition of the bill. Also speaking on the bill were: Mr. Andy Ellen, General Counsel for North Carolina Retail Merchants Association, Michael Barnes, Edward Homes and Frank McNeal, independent marketers. Mr. William H. Weatherspoon, Executive Director of the North Carolina Petroleum Council, also spoke.

After a period of questions and answers and much discussion and no further business, the meeting was adjourned. Senator Hartsell alerted everyone to the possibility of an additional meeting after Session.

Fletcher L. Hartsell, Chairman

Gerry, Johnson, Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 2

HOUSE BILL 1203*
Committee Substitute Favorable 4/29/03

Short Title: Amend Motor Fuel Marketing Act. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE MOTOR FUEL MARKETING ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 3 of Chapter 75 of the General Statutes reads as rewritten:

"Article 3.

"Motor Fuel Marketing Act.

"§ 75-80. Title.

This Article shall be known and may be cited as the "Motor Fuel Marketing Act".

"§ 75-81. Definitions.

~~The following terms shall have the meanings ascribed to them~~ As used in this ~~section unless otherwise stated and~~ Article, unless the context ~~or subject matter clearly~~ indicates ~~otherwise:~~ otherwise, the following definitions apply:

(1) 'Person' ~~shall mean~~ means any person, firm, association, organization, partnership, business trust, joint stock company, company, corporation or legal entity.

(2) 'Sale' ~~shall mean~~ means selling, offering for sale or advertising for sale.

(3) 'Motor Fuel' means motor fuel, as defined in G.S. 105-449.60, and alternative fuel, as defined in G.S. 105-449.130.

(4) 'Cost' or 'Costs' ~~shall mean as follows:~~

~~a. For a refiner or terminal supplier, costs shall be presumed to be the refiner's or terminal supplier's prevailing price to the wholesale class of trade at the terminal used by the refiner or terminal supplier to obtain the motor fuel in question or the lowest prevailing price within 10 days prior to a sale alleged to be in violation of G.S. 75-82 hereof plus all transportation expenses including freight expenses (incurred and not otherwise included in the cost of the motor fuel), and motor fuel taxes. If a refiner or terminal supplier does not regularly sell to the~~

~~wholesale class of trade at the terminal in question, then such refiner or terminal supplier shall use as the prevailing price either (i) the lowest price to the wholesale class of trade of those other refiners or terminal suppliers at the same terminal who regularly sell to the wholesaler class or (ii) a price determined by using standard functional accounting procedures.~~

~~b.~~ ~~For all other sellers, cost includes the invoice or replacement cost, whichever is less, of the grade, brand or blend, of motor fuel within 10 days prior to the date of sale, in the quantity or quantities last purchased, less all rebates and discounts received including prompt payment discounts and plus all applicable State, federal and local taxes, and transportation expenses including freight expenses, incurred and not otherwise included in the cost of the motor fuel.~~ means the total of all of the following:

a. The most recently published average reseller rack cost of motor fuel by grade and quality, as calculated by the Oil Price Information Service (OPIS) for the particular terminal from which the motor fuel was delivered to the motor fuel merchant or the low OPIS Rack Price as reported by OPIS for the particular terminal from which the motor fuel was delivered to the motor fuel merchant, whichever is less.

b. The freight charges on the motor fuel.

c. All applicable State and federal excise taxes.

~~(5)~~ ~~"Prompt Payment Discounts" shall mean any allowance for payment within a specified time, but shall not include discounts for cash made to the motoring public at motor fuel outlets.~~

(6) 'Affiliate' ~~shall mean~~means any person who (other than by means of a franchise) controls, is controlled by or is under common control with, any other person.

(7) 'Motor Fuel Merchant' ~~is~~ means any person selling motor fuel to the public.

(8) 'Motor Fuel Outlet' ~~is~~ means any retail facility selling motor fuel to the motoring public.

~~(9)~~ ~~'New Retail Outlet' shall mean a new retail facility constructed from the ground or an existing retail facility that is offering motor fuel to the motoring public for the first time.~~

(10) 'Refiner' ~~shall mean~~means any person engaged in the production or refining of motor fuel, whether such production or refining occurs in this State or elsewhere, and includes any affiliate of such person or firm.

(11) 'Terminal Supplier' ~~shall mean~~means any person engaged in selling or brokering motor fuel to wholesalers or retailers from a storage facility

of more than 2,000,000 gallons capacity and such person has an ownership interest in or control of the storage facility.

"§ 75-82. Unlawful below-cost selling; exceptions.

(a) ~~It shall be unlawful where the intent is to injure competition for any~~ No motor fuel merchant or ~~the~~ affiliate of any motor fuel merchant ~~to~~ shall sell ~~with such frequency as to indicate a general business practice of selling at a motor fuel outlet any grade, brand or blend of~~ motor fuel for less than the cost ~~of that grade, brand or blend of motor fuel except where (i) the~~unless either of the following applies:

(1) The price is established in good faith to meet ~~or compete with~~ the lower price of a competitor ~~in the same market area on the same level of distribution~~ selling the same or comparable product of like ~~quality, (ii) the price remains in effect for no more than 10 days after the first sale of that grade, brand or blend by the merchant at a new retail outlet, (iii) the sale is made in good faith to dispose of a grade, brand or blend of motor fuel for the purpose of discontinuing sales of that product, or (iv) the~~quality.

(2) The sale is made pursuant to the order or authority of any court or governmental agency.

~~(b) For purposes of this Article, motor fuel cost shall be computed separately for each grade, brand or blend of each motor fuel at each location where said motor fuel is offered for sale; however, nothing in this subsection shall prevent a motor fuel merchant from using a weighted average motor fuel cost for comparable grade, brand or blend when such motor fuel merchant is supplied by more than one refiner or terminal supplier at one or more terminals.~~

(c) This Article ~~shall apply~~applies only to retail sales of motor fuel at motor fuel outlets.

(d) A violation of this section is an unfair method of competition under G.S. 75-1.1.

"§ 75-83. Unlawful inducement; civil penalty.

It ~~shall be~~is unlawful to knowingly induce, or to knowingly attempt to induce, a violation of this Article, whether by otherwise lawful or unlawful means. In any action initiated by the Attorney ~~General,~~General at the request of the Commissioner of Agriculture, anyone found to have violated this provision shall be subject to the civil penalty applicable to the sales made in violation of this Article; or, if no sales were made, to a civil penalty of one thousand dollars ($1,000). The clear proceeds of any civil penalties imposed in any actions initiated by the Attorney General under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"§ 75-84. Separate offenses; injunctions.

Each act of establishing a price below cost in violation of this Article shall constitute a separate offense by the ~~seller~~seller, and the civil penalty for each offense shall be not more than ~~one thousand dollars ($1,000).~~ten thousand dollars ($10,000). Upon a proper showing by the Attorney General or ~~his delegate,~~ the Commissioner of Agriculture, further violations may be temporarily or permanently enjoined. The clear proceeds of

civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"**§ 75-85. Investigations by ~~Attorney General.~~Commissioner of Agriculture.**

~~The Attorney General is authorized to~~Notwithstanding G.S. 75-9, the Commissioner of Agriculture may investigate any allegation of a violation of this Article made by a motor fuel merchant or ~~by an association or~~ group of motor fuel merchants. If the Commissioner of Agriculture receives a complaint in writing that a motor fuel merchant is selling motor fuel below cost, the Commissioner of Agriculture shall investigate and determine within three business days of the receipt of the written complaint whether the allegations in the complaint are true. If an investigation discloses a violation, the Commissioner of Agriculture may request the Attorney General ~~may~~ to exercise the authority under this Article to seek an injunction and ~~he may also seek~~ impose civil penalties. The Commissioner of Agriculture may, in order to prevent further sales, request the Attorney General to seize and seal any dispensing pump or dispensing devices from which motor fuel is offered or exposed for sale in violation of this Article. Motor fuel that has been seized and sealed under this section shall not be offered for sale until the Commissioner of Agriculture and the Attorney General, after consultation, are satisfied that the motor fuel merchant has satisfied the requirements of this Article. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"**§ 75-86. Private actions.**

Any person, corporation, or other business entity ~~which~~ that is engaged in the sale of motor fuel for resale or consumption and ~~which~~ that is directly or indirectly injured by a violation of this Article may bring an action in the district court ~~district as defined in G.S. 7A-133~~ or superior court ~~district or set of districts as defined in G.S. 7A-41.1, as the case may be,~~of the county where the violation is alleged to have occurred to recover ~~actual damages, exemplary damages, costs~~ treble damages under G.S. 75-16, costs, and reasonable attorneys' fees. The court shall also grant such equitable relief as is proper, including a declaratory judgment and injunctive relief. Any action under this Article must be brought within one year of the alleged violation.

"**§ 75-87. Private action presumptions.**

(a) In any private action brought under this Article, a violation shall be presumed to have occurred if: (i) the prevailing price ~~under G.S. 75-81(4)(a)~~ for any grade, brand or blend of a motor fuel sold by a refiner or terminal supplier to a wholesaler or retailer is greater than the price of the same grade, brand or blend of motor fuel sold by such refiner or terminal supplier directly through its own motor fuel outlet or through the outlet of an affiliate of said refiner or terminal supplier; or (ii) if the product price of any grade, brand or blend of a motor fuel sold by a wholesaler to a retailer is greater than the retail price of the same grade, brand or blend of motor fuel sold by such wholesaler through its own motor fuel outlet or the outlet of an affiliate of said wholesaler, provided the method of delivery and quantities of each delivery of motor fuel to the retailer and to the wholesaler's outlet or affiliate's outlet are the same or comparable.

(b) A party may rebut the presumption created by this section by presenting evidence to establish ~~his~~ that party's cost of the grade, brand or blend of motor fuel in

question, or by qualifying for an exception under subdivision (1) or subdivision (2) of subsection (a) of G.S. 75-82.

"**§ 75-88. Public ~~disclosure.~~disclosure; quantity of motor fuel available for sale.**

(a) Any refiner or terminal supplier computing prevailing price under the provisions of ~~G.S. 75-81(4)(a)(i) or (ii)~~ G.S. 75-81(4) shall be required to publicly disclose ~~said~~ this price.

(b) No entity shall limit the quantity of motor fuel sold or offered for sale from a motor fuel pump to any one customer to a quantity less than the entire supply that is owned or possessed by the seller and that the seller is authorized to sell at the place of sale or offering for sale unless preempted by a State or federal state of emergency.

(c) Motor fuel purchased under this section shall be dispensed into a container approved by the fire prevention code, the State Building Code as authorized under G.S. 143-139, or a containment vehicle approved by the Department of Transportation.

(d) Each act violating this section shall constitute a separate offense, and is subject to a civil penalty. The civil penalty for each offense shall be not more than five thousand dollars ($5,000). Upon a proper showing by the Attorney General or the Commissioner of Agriculture, further violations may be temporarily or permanently enjoined. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"**§ 75-89. Powers and remedies supplementary.**

The powers and remedies provided by this Article shall be cumulative and supplementary to all powers and remedies otherwise provided by law."

SECTION 2. This act becomes effective October 1, 2003, and applies to sales of motor fuels and offers of sale of motor fuel on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 1203*

Committee Substitute Favorable 4/29/03

PROPOSED SENATE COMMITTEE SUBSTITUTE H1203-CSRC-107 [v.1]

6/28/2004 8:55:52 PM

Short Title: Amend Motor Fuel Marketing Act. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE MOTOR FUEL MARKETING ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 3 of Chapter 75 of the General Statutes reads as rewritten:

"Article 3.

"Motor Fuel Marketing Act.

"§ 75-80. Title.

This Article shall be known and may be cited as the "Motor Fuel Marketing Act".

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(3) 'Motor Fuel' means motor fuel, as defined in G.S. 105-449.60, and alternative fuel, as defined in G.S. 105-449.130.

(4) 'Cost' or 'Costs' ~~shall mean as follows:~~

~~a. For a refiner or terminal supplier, costs shall be presumed to be the refiner's or terminal supplier's prevailing price to the wholesale class of trade at the terminal used by the refiner or terminal supplier to obtain the motor fuel in question or the lowest prevailing price within 10 days prior to a sale alleged to be in violation of G.S. 75-82 hereof plus all transportation expenses including freight expenses (incurred and not otherwise~~

~~included in the cost of the motor fuel), and motor fuel taxes. If a refiner or terminal supplier does not regularly sell to the wholesale class of trade at the terminal in question, then such refiner or terminal supplier shall use as the prevailing price either (i) the lowest price to the wholesale class of trade of those other refiners or terminal suppliers at the same terminal who regularly sell to the wholesaler class or (ii) a price determined by using standard functional accounting procedures.~~

~~b.~~ ~~For all other sellers, cost includes the invoice or replacement cost, whichever is less, of the grade, brand or blend, of motor fuel within 10 days prior to the date of sale, in the quantity or quantities last purchased, less all rebates and discounts received including prompt payment discounts and plus all applicable State, federal and local taxes, and transportation expenses including freight expenses, incurred and not otherwise included in the cost of the motor fuel.~~ means the total of all of the following:

a. The most recently published average reseller rack cost of motor fuel by grade and quality, as calculated by the Oil Price Information Service (OPIS) for the particular terminal from which the motor fuel was delivered to the motor fuel merchant or the low OPIS Rack Price as reported by OPIS for the particular terminal from which the motor fuel was delivered to the motor fuel merchant, whichever is less.

b. The freight charges on the motor fuel.

c. All applicable State and federal excise taxes.

~~(5) "Prompt Payment Discounts" shall mean any allowance for payment within a specified time, but shall not include discounts for cash made to the motoring public at motor fuel outlets.~~

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(8) 'Motor Fuel Outlet' ~~is~~ means any retail facility selling motor fuel to the motoring public.

~~(9) 'New Retail Outlet' shall mean a new retail facility constructed from the ground or an existing retail facility that is offering motor fuel to the motoring public for the first time.~~

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(11) 'Terminal Supplier' ~~shall mean~~means any person engaged in selling or brokering motor fuel to wholesalers or retailers from a storage facility of more than 2,000,000 gallons capacity and such person has an ownership interest in or control of the storage facility.

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(a) ~~It shall be unlawful where the intent is to injure competition for any~~ No motor fuel merchant or ~~the~~ affiliate of any motor fuel merchant ~~to~~ shall sell ~~with such frequency as to indicate a general business practice of selling at a motor fuel outlet any grade, brand or blend of~~ motor fuel for less than the cost ~~of that grade, brand or blend of motor fuel except where (i) the~~unless either of the following applies:

(1) The price is established in good faith to meet ~~or compete with~~ the lower price of a competitor ~~in the same market area on the same level of distribution~~ selling the same or comparable product of like ~~quality, (ii) the price remains in effect for no more than 10 days after the first sale of that grade, brand or blend by the merchant at a new retail outlet, (iii) the sale is made in good faith to dispose of a grade, brand or blend of motor fuel for the purpose of discontinuing sales of that product, or (iv) the~~quality.

(2) The sale is made pursuant to the order or authority of any court or governmental agency.

~~(b) For purposes of this Article, motor fuel cost shall be computed separately for each grade, brand or blend of each motor fuel at each location where said motor fuel is offered for sale; however, nothing in this subsection shall prevent a motor fuel merchant from using a weighted average motor fuel cost for comparable grade, brand or blend when such motor fuel merchant is supplied by more than one refiner or terminal supplier at one or more terminals.~~

(c) This Article ~~shall apply~~applies only to retail sales of motor fuel at motor fuel outlets.

(d) A violation of this section is an unfair method of competition under G.S. 75-1.1.

"§ 75-83. Unlawful inducement; civil penalty.

It ~~shall be~~is unlawful to knowingly induce, or to knowingly attempt to induce, a violation of this Article, whether by otherwise lawful or unlawful means. In any action initiated by the Attorney ~~General,~~ General at the request of the Commissioner of Agriculture, anyone found to have violated this provision shall be subject to the civil penalty applicable to the sales made in violation of this Article; or, if no sales were made, to a civil penalty of one thousand dollars ($1,000). The clear proceeds of any civil penalties imposed in any actions initiated by the Attorney General under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

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Each act of establishing a price below cost in violation of this Article shall constitute a separate offense by the ~~seller~~ seller, and the civil penalty for each offense shall be not more than ~~one thousand dollars ($1,000).~~ten thousand dollars ($10,000). Upon a proper

showing by the Attorney General or ~~his delegate,~~ the Commissioner of Agriculture, further violations may be temporarily or permanently enjoined. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"**§ 75-85. Investigations by ~~Attorney General.~~Commissioner of Agriculture.**

~~The Attorney General is authorized to~~Notwithstanding G.S. 75-9, the Commissioner of Agriculture may investigate any allegation of a violation of this Article made by a motor fuel merchant or ~~by an association or~~ group of motor fuel merchants. If the Commissioner of Agriculture receives a complaint in writing that a motor fuel merchant is selling motor fuel below cost, the Commissioner of Agriculture shall investigate and determine within three business days of the receipt of the written complaint whether the allegations in the complaint are true. If an investigation discloses a violation, the Commissioner of Agriculture may request the Attorney General ~~may~~ to exercise the authority under this Article to seek an injunction and ~~he may also seek~~ impose civil penalties. The Commissioner of Agriculture may, in order to prevent further sales, request the Attorney General to seize and seal any dispensing pump or dispensing devices from which motor fuel is offered or exposed for sale in violation of this Article. Motor fuel that has been seized and sealed under this section shall not be offered for sale until the Commissioner of Agriculture and the Attorney General, after consultation, are satisfied that the motor fuel merchant has satisfied the requirements of this Article. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"**§ 75-86. Private actions.**

Any person, corporation, or other business entity ~~which~~ that is engaged in the sale of motor fuel for resale or consumption and ~~which~~ that is directly or indirectly injured by a violation of this Article may bring an action in the district court ~~district as defined in G.S. 7A-133~~ or superior court ~~district or set of districts as defined in G.S. 7A-41.1, as the case may be,~~of the county where the violation is alleged to have occurred to recover ~~actual damages, exemplary damages, costs~~ treble damages under G.S. 75-16, costs, and reasonable attorneys' fees. The court shall also grant such equitable relief as is proper, including a declaratory judgment and injunctive relief. Any action under this Article must be brought within one year of the alleged violation.

"**§ 75-87. Private action presumptions.**

(a) In any private action brought under this Article, a violation shall be presumed to have occurred if: (i) the prevailing price ~~under G.S. 75-81(4)(a)~~ for any grade, brand or blend of a motor fuel sold by a refiner or terminal supplier to a wholesaler or retailer is greater than the price of the same grade, brand or blend of motor fuel sold by such refiner or terminal supplier directly through its own motor fuel outlet or through the outlet of an affiliate of said refiner or terminal supplier; or (ii) if the product price of any grade, brand or blend of a motor fuel sold by a wholesaler to a retailer is greater than the retail price of the same grade, brand or blend of motor fuel sold by such wholesaler through its own motor fuel outlet or the outlet of an affiliate of said wholesaler, provided the method of delivery and quantities of each delivery of motor fuel to the retailer and to the wholesaler's outlet or affiliate's outlet are the same or comparable.

(b) A party may rebut the presumption created by this section by presenting evidence to establish ~~his~~ that party's cost of the grade, brand or blend of motor fuel in question, or by qualifying for an exception under subdivision (1) or subdivision (2) of subsection (a) of G.S. 75-82.

"§ 75-88. Public ~~disclosure.~~disclosure; quantity of motor fuel available for sale.

(a) Any refiner or terminal supplier computing prevailing price under the provisions of ~~G.S. 75-81(4)(a)(i) or (ii)~~ G.S. 75-81(4) shall be required to publicly disclose ~~said~~ this price.

(b) No entity that is selling motor fuel for less than cost shall limit the quantity of motor fuel sold or offered for sale from a motor fuel pump to any one customer to a quantity less than the entire supply that is owned or possessed by the seller and that the seller is authorized to sell at the place of sale or offering for sale unless preempted by a State or federal state of emergency.

(c) Motor fuel purchased under this section shall be dispensed into a container approved by the fire prevention code, the State Building Code as authorized under G.S. 143-139, or a containment vehicle approved by the Department of Transportation.

(d) Each act violating this section shall constitute a separate offense, and is subject to a civil penalty. The civil penalty for each offense shall be not more than five thousand dollars ($5,000). Upon a proper showing by the Attorney General or the Commissioner of Agriculture, further violations may be temporarily or permanently enjoined. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"§ 75-89. Powers and remedies supplementary.

The powers and remedies provided by this Article shall be cumulative and supplementary to all powers and remedies otherwise provided by law."

SECTION 2. This act becomes effective October 1, 2004, and applies to sales of motor fuels and offers of sale of motor fuel on or after that date.

HOUSE BILL 1203:
Amend Motor Fuel Marketing Act

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Representative Gibson
Date:	July 7, 2004	**Summary by:**	Kory J. Goldsmith
Version:	H1203-PCS-119[v.5]		Committee Counsel

SUMMARY: ***The PCS to HB1203 amends the Motor Fuels Marketing Act (Act), which generally prohibits unfair price competition between motor fuel merchants by selling below cost. The bill makes the following changes in the law:***

(1) Re-defines what constitutes "cost" for persons selling motor fuel.

(2) Limits the defenses under the Act.

(3) Allows the recovery of treble damages in private actions.

(4) Creates a presumption in private actions that sales below cost are violations of the Act.

The PCS differs from the 2nd Edition in the following ways:

(1) Slightly alters the definition of "cost" by having it linked to the OPIS price for the day and terminal from which the motor fuel was shipped.

(2) Keeps the current requirement that a violation requires a showing of intent to injure competition UNLESS a private party brings the action.

(3) Removes provisions that would have given the Commissioner of Agriculture the authority to investigate alleged violations, removes increases in existing penalties and removes the provision that would have prohibited a merchant from limiting the amount of motor fuel any one customer could purchase at a time.

The act becomes effective October 1, 2004 and applies sales of motor fuels and offers to sell motor fuel made on or after that date.

BILL ANALYSIS:

Section 1 - Amends **G.S. 75-81** which currently defines cost to mean the refiner's or terminal supplier's prevailing cost to the wholesaler, or for other sellers, the invoice or replacement cost, plus freight and taxes. The bill redefines "cost" to mean the published average reseller rack cost as calculated by the Oil Price Information Office or the low OPIS Rack Price for the particular day and terminal from which the fuel was delivered, plus freight charges and taxes.

Note: It is not clear whether using a benchmark of this sort constitutes an unconstitutional delegation of legislative authority by the General Assembly. In Bulova Watch Company, Inc., A Corporation . Brand Distributors Of North Wilkesboro, Inc., 285 N.C. 467, 206 SE2d 141 (1974), the North Carolina Supreme Court held that a provision of the Fair Trade Act was unconstitutional because it made agreements creating price floors made between a wholesaler and a retailer applicable to third parties who obtained the same products from different sources. The Court found this to be unconstitutional because it delegated legislative power to a private corporation.

It is not clear whether this principle would apply to the benchmark proposed in HB1203. OPIS is a private service that publishes prices for most types of fuels. Those prices reflect contracts between a wide

variety parties. OPIS benchmarks reflect multiple contract prices, rather than a single contract price which was the case in Bulova. It should also be noted that, unlike the wholesaler in Bulova, OPIS itself is not involved in the making of the contracts.

Section 2 – Amends **G.S. 75-82** to remove two of the current defenses against a charge of selling below cost. The PCS keeps the requirement that a violation of the act requires evidence of the intent to injure competition. The two defenses that would still apply would be: (1) the price is established in good faith to meet the lower price of a competitor, or (2) the sale is made pursuant to the order of a court or government agency.

Section 3 – Amends **G.S. 75-86** regarding the private right of action by any motor fuel dealer injured by a violation of the Article. The PCS would allow the recovery of treble damages and costs. Current law allows the recovery of actual damages and exemplary (punitive) damages.

Section 4 – Amends **G.S. 75-87** which applies to private causes of action. The changes would create a presumption that a violation of the Act has occurred if a motor fuel merchant or an affiliate of a motor fuel merchant sells below cost. This presumption currently applies to certain situations involving refiners and terminal suppliers selling to wholesalers or retailers and to wholesalers selling to retail suppliers. A showing that the price is established in good faith to meet the lower price of a competitor, or the sale is made pursuant to the order of a court or government agency would rebut the presumption.

Section 5 - G.S. 75-88 is amended to make conforming changes.

The act becomes effective October 1, 2004 and applies to sales of motor fuels and offers of sale made on or after that date.

H1203-SMRC-008

NORTH CAROLINA GENERAL ASSEMBLY

LEGISLATIVE FISCAL NOTE

BILL NUMBER: House Bill 1203 (First Edition)

SHORT TITLE: No Motor Fuel Sales Limits.

SPONSOR(S): Representatives Brubaker and Gibson

FISCAL IMPACT

Yes (X) **No ( )** **No Estimate Available ( )**

	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09
REVENUES	No General Fund Impact - See Civil Penalties section				
EXPENDITURES					
DACS	$64,119	$87,201	$88,945	$90,724	$92,538
DOJ (R)	$166,475	$178,791	$182,367	$186,014	$189,734
(NR)	$43,200				
POSITIONS: (cumulative)	3.5	3.5	3.5	3.5	3.5

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Agriculture and Consumer Services; Department of Justice

EFFECTIVE DATE: Effective Oct. 1, 2003, and applies to sales of fuel or offers of sale on or after that date.

BILL SUMMARY:

The proposed legislation makes clarifying changes to the Motor Fuel Marketing Act. The definition of the cost of fuel is amended to be the total of the most recently published average reseller rack cost of fuel by grade and quality, the freight charges on the fuel, and all state and federal excise taxes. The bill makes clarifying changes for exceptions to the prohibition against selling fuel below cost. The maximum penalty for establishing a price below cost is increased from $1,000 to $10,000. The Commissioner of Agriculture, rather than the Attorney General, shall investigate allegations of violations of the Act. The bill also prohibits limiting the quantity of fuel sold or offered for sale from a fuel pump to any one particular customer. Fuel must be dispensed into a container approved by the fire prevention code, the state building code, or by the DOT. Violation of either provision is subject to civil penalty of not more than $5,000.

Source: Bill Digest H.B. 1203

ASSUMPTIONS AND METHODOLOGY:

Department of Agriculture and Consumer Services

The proposed legislation will impact the Department of Agriculture and Consumer Services Standards Division (Division.) Currently, the Motor Fuels Section has responsibility for testing motor fuels for compliance with guaranteed quality specifications. Upon implementation of the bill, the Division's inspectors would also be responsible for responding to allegations of motor fuel being sold below cost.

If allegations were made of motor fuel being sold below cost, the Division would be required to investigate and make a determination on a claim within three days of receipt of the written complaint. Valid complaints would then be forwarded to the Attorney General's office for further investigation and enforcement. Currently, the DOJ Consumer Services Section processes 10 to 20 unfair fuel pricing complaints a year. Because there is no way to determine how many complaints will be made under the revised Motor Fuel Marketing Act, this fiscal analysis estimates costs on the basis of one instance of a complaint.

The Division estimates it would need one additional outside auditor (Grade 75) to handle the investigative duties associated with new complaints. The legislation would also require the auditor to maintain a subscription to the Oil Price Information Service (OPIS) to research the cost of motor fuels in question. A subscription to OPIS is $5,076 annually ($47 per month for nine racks.) Total salary and benefits for this new position would be $85,491. Costs in the front-page box have been adjusted to reflect the October 1, 2004, effective date and increased by two percent each year.

The Division estimates it would be able to assume the additional field responsibilities in the proposed legislation with their existing staff, but only at the expense of other inspection services they currently provide. The Division estimates approximately $1,500 in staff time per investigation. In recent years, many inspector functions have been combined to reduce travel overlap, especially in rural areas. The Division currently employs four types of employees who visit establishments potentially impacted by this bill:

- *Gasoline and Oil Dispenser Inspectors:* test retail petroleum dispensers for accuracy, perform inspections for DENR and DOR, and respond to consumer complaints. Equipped with a truck-mounted system for testing dispensers, typically in urban areas.
- *Weights and Measures Inspectors:* test scales for accuracy, inspect price scanning systems, and respond to consumer complaints.
- *Dual Role Inspectors:* perform both the Gasoline and Oil Dispenser Inspector and Weights and Measures Inspector responsibilities. Helps to minimize travel by sending a single inspector into establishments, typically in more rural areas.
- *Field Chemists:* responsible for on-site inspection of petroleum products. Equipped with mobile laboratories to perform tests while at a station.

These inspectors routinely visit sites in their areas, thus additional investigative responsibilities would reduce available time spent on routine inspection responsibilities. Across the state, inspectors currently average one service station visitation once every 18 months, for a total of 78,000 initial inspections in 2003. The Department would prefer overall frequency of inspection be no more than 14 months statewide. Additional responsibilities may further increase this gap.

Department of Justice

The Department of Justice (DOJ) has estimated a need for two sworn Consumer Fraud Investigators and one half-time Attorney III to implement this Bill. Fiscal Research has reviewed DOJ's request, and has revised the costs of the Bill to two civilian Consumer Protection Specialists and one half-time Attorney III. Total recurring costs for positions and related expenses are estimated at $175,285 and nonrecurring costs for two vehicles and three computers are estimated at $43,200. Costs in the front-page box have been adjusted to reflect the October 1, 2004, effective date and increased by two percent each year.

Investigator Positions: Currently, a civilian attorney or consumer specialist conducts investigations of gas prices. These investigations make up less than half the workload for those positions. DOJ believes that the proposed changes in the bill would significantly change the scope and volume of incoming complaints and the resulting enforcement practices. Investigators would be required make site visits and possibly seal and close gas pumps at gas stations where unfair pricing is occurring. DOJ believes such enforcement actions would pose bodily harm safety risks to the investigators, thereby justifying the need for two armed and sworn law enforcement positions, one based in Raleigh and one based in Charlotte. However, other state agencies use civilian personnel when closing a business or aspects of a business. This fiscal note includes costs for two civilian Consumer Protection Specialists: salary and benefits total $49,968 per position. DOJ states that each position would require an annual subscription to OPIS to check gasoline prices ($4,563 each), a vehicle ($18,000), and a computer ($2,400).

Currently, DOJ receives 10 to 20 complaints per year; less than five percent are valid. DOJ estimates the proposed legislation could increase unfair motor fuel pricing complaints three to four times over their existing complaints. However, under this Bill the Department of Agriculture would handle initial investigations, and DOJ would only be responsible for pursuing complaints that the Department of Agriculture deems valid. DOJ recommends two positions due to the need to investigate complaints across the state. Depending on the number of valid complaints and the amount of travel required, the workload generated by this Bill might not fully occupy two full-time positions.

Attorney Position: DOJ reports that an Attorney III currently handles these cases. They estimate that the additional workload resulting from this bill would be the equivalent of one-half of an Attorney III position. Total salary and benefits would be $43,681.

Civil Penalty: The maximum civil penalty cap for each offense is increased from $1,000 to $10,000. The proceeds of civil penalties are to be remitted to the Civil Penalty and Forfeiture Fund. DOJ reports they have not sought civil penalties in a predatory pricing case under current law. No estimate is available on the possible number and amount of penalties associated with the new requirements.

The proposed legislation also amends G.S. 75-88 to include a new $5,000 civil penalty for violating public disclosure laws, limiting the quantity of motor fuel sold improperly, and dispensing motor fuels into unauthorized containers. The proceeds of civil penalties are to be remitted to the Civil Penalty and Forfeiture Fund. No estimate is available on the possible number and amount of penalties associated with the new requirements.

SOURCES OF DATA: Dept. of Agriculture and Consumer Services, Dept. of Justice

TECHNICAL CONSIDERATIONS:

1) The effective date in HB 1203 v.2 as passed by the House was October 1, 2003.
2) Many of the DACS Standards inspectors currently work from home and are not required to transmit information over a secure system. If the information to be transmitted were to contain sensitive information ITS may require the Division to move to a secure setup, which would require an additional $250 per person per month.
3) The implementation plans for both DACS and DOJ are tentative at this time. If the bill were to become law, the two agencies would hold a meeting to discuss the most efficient means of implementing the legislation.

FISCAL RESEARCH DIVISION: (919) 733-4910
PREPARED BY: Chloe Gossage
Stephanie Schmitt

APPROVED BY: James D. Johnson, Director
Fiscal Research Division

DATE: July 7, 2004

Signed Copy Located in the NCGA Principal Clerk's Offices

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 7-8-04

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Andy Ellen	NCRMA
Jane Pinsley	AAA Carolinas
Frank McNeill Jr	McNeill Oil Co.
Edward S. Holmes Jr.	Holmes Oil - Chapel Hill
Pat Gallagher	Sen. Hagan
Haddon Clark	United Energy
Audrey L. Shearin	Eastern Petroleum Corp.
Marvin Waters	CCRS
Kip Sturgis	AG's office
Josh Stein	AGO
Bill Wethington	NC Petroleum Council

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 7-8-04

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Lisa Piercy	Duke Energy
Gary Harris	NCPMA
C Barker	CAPA
Ed TURLINGTON	Brooks Pierce
Mike Ildeaton	Ildeaton Oil Co High Point, NC
Michael Barnes	Wilson Petroleum Co. Wilson NC
Judson Pope	EJ Pope & Son, Inc. Mt. Olive, NC
ARTHUR LANKFORD	TAR HEEL OIL, N. WILKESBORO
Tom BERRY	BERICO FUELS INC.
HAROLD KENNEDY	REX OIL CO. THOMASVILLE, NC
Harold Berry	Hatch Little & Bunn LLP

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II 7-8-04

Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Doug Hawes	NCPMHA
Sam Cooper	BPMHL
Bill Ruth	ACLU
Katie Myers	NC Bar Assoc
Mary Covington	↓
Michelle Frazier	NC Bar Ass'n

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Friday	July 9, 2004	9:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 1203	Amend Motor Fuel Marketing Act.	Representative Brubaker Representative Gibson, III

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Friday, July 9, 2004, 9:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

HB 1203	Amend Motor Fuel Marketing Act.	Representative Brubaker Representative Gibson, III

Presentations

Other Business

Adjournment

Senate Judiciary II Committee

Minutes

July 9, 2004

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on July 9, 2004, with seventeen members present.

HB 1203 (Amend Motor Fuel Marketing Act.) Senator Hartsell noted that the discussion would continue from the previous meeting. He then recognized Mr. John Stein, from the Consumer Protection Division, of the Office of the Attorney General, to speak on the bill. Also speaking on the bill was Mr. Ed Turlington, Attorney, representing the North Carolina Association of Convenience Stores. During the discussion, Mr. Michael Barnes of Wilson, and Mr. Frank McNeal of Aberdeen, independent marketers, along with Mr. Ed Turlington and Mr. Gary Harris of the Petroleum Marketers Association were helpful in answering questions of the Committee.

With no further business the Committee was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 1203*

Committee Substitute Favorable 4/29/03

PROPOSED SENATE COMMITTEE SUBSTITUTE H1203-CSRC-107 [v.1]

6/28/2004 8:55:52 PM

Short Title: Amend Motor Fuel Marketing Act. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE MOTOR FUEL MARKETING ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 3 of Chapter 75 of the General Statutes reads as rewritten:

"Article 3.

"Motor Fuel Marketing Act.

"§ 75-80. Title.

This Article shall be known and may be cited as the "Motor Fuel Marketing Act".

"§ 75-81. Definitions.

~~The following terms shall have the meanings ascribed to them~~ As used in this ~~section unless otherwise stated and~~Article, unless the context ~~or subject matter clearly~~ indicates ~~otherwise:~~otherwise, the following definitions apply:

(1) 'Person' ~~shall mean~~means any person, firm, association, organization, partnership, business trust, joint stock company, company, corporation or legal entity.

(2) 'Sale' ~~shall mean~~means selling, offering for sale or advertising for sale.

(3) 'Motor Fuel' means motor fuel, as defined in G.S. 105-449.60, and alternative fuel, as defined in G.S. 105-449.130.

(4) 'Cost' or 'Costs' ~~shall mean as follows:~~

~~a. For a refiner or terminal supplier, costs shall be presumed to be the refiner's or terminal supplier's prevailing price to the wholesale class of trade at the terminal used by the refiner or terminal supplier to obtain the motor fuel in question or the lowest prevailing price within 10 days prior to a sale alleged to be in violation of G.S. 75-82 hereof plus all transportation expenses including freight expenses (incurred and not otherwise~~

~~included in the cost of the motor fuel), and motor fuel taxes. If a refiner or terminal supplier does not regularly sell to the wholesale class of trade at the terminal in question, then such refiner or terminal supplier shall use as the prevailing price either (i) the lowest price to the wholesale class of trade of those other refiners or terminal suppliers at the same terminal who regularly sell to the wholesaler class or (ii) a price determined by using standard functional accounting procedures.~~

~~b. For all other sellers, cost includes the invoice or replacement cost, whichever is less, of the grade, brand or blend, of motor fuel within 10 days prior to the date of sale, in the quantity or quantities last purchased, less all rebates and discounts received including prompt payment discounts and plus all applicable State, federal and local taxes, and transportation expenses including freight expenses, incurred and not otherwise included in the cost of the motor fuel.~~ means the total of all of the following:

a. The most recently published average reseller rack cost of motor fuel by grade and quality, as calculated by the Oil Price Information Service (OPIS) for the particular terminal from which the motor fuel was delivered to the motor fuel merchant or the low OPIS Rack Price as reported by OPIS for the particular terminal from which the motor fuel was delivered to the motor fuel merchant, whichever is less.

b. The freight charges on the motor fuel.

c. All applicable State and federal excise taxes.

~~(5) "Prompt Payment Discounts" shall mean any allowance for payment within a specified time, but shall not include discounts for cash made to the motoring public at motor fuel outlets.~~

(6) 'Affiliate' ~~shall mean~~means any person who (other than by means of a franchise) controls, is controlled by or is under common control with, any other person.

(7) 'Motor Fuel Merchant' ~~is~~ means any person selling motor fuel to the public.

(8) 'Motor Fuel Outlet' ~~is~~ means any retail facility selling motor fuel to the motoring public.

~~(9) 'New Retail Outlet' shall mean a new retail facility constructed from the ground or an existing retail facility that is offering motor fuel to the motoring public for the first time.~~

(10) 'Refiner' ~~shall mean~~means any person engaged in the production or refining of motor fuel, whether such production or refining occurs in this State or elsewhere, and includes any affiliate of such person or firm.

(11) 'Terminal Supplier' ~~shall mean~~means any person engaged in selling or brokering motor fuel to wholesalers or retailers from a storage facility of more than 2,000,000 gallons capacity and such person has an ownership interest in or control of the storage facility.

"§ 75-82. Unlawful below-cost selling; exceptions.

(a) ~~It shall be unlawful where the intent is to injure competition for any~~ No motor fuel merchant or ~~the~~ affiliate of any motor fuel merchant ~~to~~ shall sell ~~with such frequency as to indicate a general business practice of selling at a motor fuel outlet any grade, brand or blend of~~ motor fuel for less than the cost ~~of that grade, brand or blend of motor fuel except where (i) the~~unless either of the following applies:

(1) The price is established in good faith to meet ~~or compete with~~ the lower price of a competitor ~~in the same market area on the same level of distribution~~ selling the same or comparable product of like ~~quality, (ii) the price remains in effect for no more than 10 days after the first sale of that grade, brand or blend by the merchant at a new retail outlet, (iii) the sale is made in good faith to dispose of a grade, brand or blend of motor fuel for the purpose of discontinuing sales of that product, or (iv) the~~quality.

(2) The sale is made pursuant to the order or authority of any court or governmental agency.

~~(b) For purposes of this Article, motor fuel cost shall be computed separately for each grade, brand or blend of each motor fuel at each location where said motor fuel is offered for sale; however, nothing in this subsection shall prevent a motor fuel merchant from using a weighted average motor fuel cost for comparable grade, brand or blend when such motor fuel merchant is supplied by more than one refiner or terminal supplier at one or more terminals.~~

(c) This Article ~~shall apply~~applies only to retail sales of motor fuel at motor fuel outlets.

(d) A violation of this section is an unfair method of competition under G.S. 75-1.1.

"§ 75-83. Unlawful inducement; civil penalty.

It ~~shall be~~is unlawful to knowingly induce, or to knowingly attempt to induce, a violation of this Article, whether by otherwise lawful or unlawful means. In any action initiated by the Attorney ~~General,~~ General at the request of the Commissioner of Agriculture, anyone found to have violated this provision shall be subject to the civil penalty applicable to the sales made in violation of this Article; or, if no sales were made, to a civil penalty of one thousand dollars ($1,000). The clear proceeds of any civil penalties imposed in any actions initiated by the Attorney General under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"§ 75-84. Separate offenses; injunctions.

Each act of establishing a price below cost in violation of this Article shall constitute a separate offense by the ~~seller~~ seller, and the civil penalty for each offense shall be not more than ~~one thousand dollars ($1,000).~~ten thousand dollars ($10,000). Upon a proper

showing by the Attorney General or ~~his delegate,~~ the Commissioner of Agriculture, further violations may be temporarily or permanently enjoined. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"**§ 75-85. Investigations by ~~Attorney General.~~Commissioner of Agriculture.**

~~The Attorney General is authorized to~~Notwithstanding G.S. 75-9, the Commissioner of Agriculture may investigate any allegation of a violation of this Article made by a motor fuel merchant or ~~by an association or~~ group of motor fuel merchants. If the Commissioner of Agriculture receives a complaint in writing that a motor fuel merchant is selling motor fuel below cost, the Commissioner of Agriculture shall investigate and determine within three business days of the receipt of the written complaint whether the allegations in the complaint are true. If an investigation discloses a violation, the Commissioner of Agriculture may request the Attorney General ~~may~~ to exercise the authority under this Article to seek an injunction and ~~he may also seek~~ impose civil penalties. The Commissioner of Agriculture may, in order to prevent further sales, request the Attorney General to seize and seal any dispensing pump or dispensing devices from which motor fuel is offered or exposed for sale in violation of this Article. Motor fuel that has been seized and sealed under this section shall not be offered for sale until the Commissioner of Agriculture and the Attorney General, after consultation, are satisfied that the motor fuel merchant has satisfied the requirements of this Article. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"**§ 75-86. Private actions.**

Any person, corporation, or other business entity ~~which~~ that is engaged in the sale of motor fuel for resale or consumption and ~~which~~ that is directly or indirectly injured by a violation of this Article may bring an action in the district court ~~district as defined in G.S. 7A-133~~ or superior court ~~district or set of districts as defined in G.S. 7A-41.1, as the case may be,~~of the county where the violation is alleged to have occurred to recover ~~actual damages, exemplary damages, costs~~ treble damages under G.S. 75-16, costs, and reasonable attorneys' fees. The court shall also grant such equitable relief as is proper, including a declaratory judgment and injunctive relief. Any action under this Article must be brought within one year of the alleged violation.

"**§ 75-87. Private action presumptions.**

(a) In any private action brought under this Article, a violation shall be presumed to have occurred if: (i) the prevailing price ~~under G.S. 75-81(4)(a)~~ for any grade, brand or blend of a motor fuel sold by a refiner or terminal supplier to a wholesaler or retailer is greater than the price of the same grade, brand or blend of motor fuel sold by such refiner or terminal supplier directly through its own motor fuel outlet or through the outlet of an affiliate of said refiner or terminal supplier; or (ii) if the product price of any grade, brand or blend of a motor fuel sold by a wholesaler to a retailer is greater than the retail price of the same grade, brand or blend of motor fuel sold by such wholesaler through its own motor fuel outlet or the outlet of an affiliate of said wholesaler, provided the method of delivery and quantities of each delivery of motor fuel to the retailer and to the wholesaler's outlet or affiliate's outlet are the same or comparable.

(b) A party may rebut the presumption created by this section by presenting evidence to establish ~~his~~ that party's cost of the grade, brand or blend of motor fuel in question, or by qualifying for an exception under subdivision (1) or subdivision (2) of subsection (a) of G.S. 75-82.

"§ 75-88. Public ~~disclosure.~~disclosure; quantity of motor fuel available for sale.

(a) Any refiner or terminal supplier computing prevailing price under the provisions of ~~G.S. 75-81(4)(a)(i) or (ii)~~ G.S. 75-81(4) shall be required to publicly disclose ~~said~~ this price.

(b) No entity that is selling motor fuel for less than cost shall limit the quantity of motor fuel sold or offered for sale from a motor fuel pump to any one customer to a quantity less than the entire supply that is owned or possessed by the seller and that the seller is authorized to sell at the place of sale or offering for sale unless preempted by a State or federal state of emergency.

(c) Motor fuel purchased under this section shall be dispensed into a container approved by the fire prevention code, the State Building Code as authorized under G.S. 143-139, or a containment vehicle approved by the Department of Transportation.

(d) Each act violating this section shall constitute a separate offense, and is subject to a civil penalty. The civil penalty for each offense shall be not more than five thousand dollars ($5,000). Upon a proper showing by the Attorney General or the Commissioner of Agriculture, further violations may be temporarily or permanently enjoined. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"§ 75-89. Powers and remedies supplementary.

The powers and remedies provided by this Article shall be cumulative and supplementary to all powers and remedies otherwise provided by law."

SECTION 2. This act becomes effective October 1, 2004, and applies to sales of motor fuels and offers of sale of motor fuel on or after that date.

HOUSE BILL 1203:
Amend Motor Fuel Marketing Act

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Representative Gibson
Date:	June 30, 2004	**Summary by:**	Kory J. Goldsmith
Version:	2nd Edition		Committee Counsel

SUMMARY: ***The 2nd Edition of HB1203 amends the Motor Fuels Marketing Act, which generally prohibits unfair price competition between motor fuel merchants by selling below cost. The bill makes the following changes in the law:***

(1) Redefines what constitutes "cost" for persons selling motor fuel.

(2) Removes the intent to injure competition requirement from the law.

(3) Makes it an unfair and deceptive trade practice under G.S. 75-1.1 to violate the Act.

(4) Allows the recovery of treble damages.

(5) Increases the civil penalties for violations.

(6) Makes the Commissioner of Agriculture responsible for investigating complaints of violations.

(7) Authorizes the Attorney General to seize and seal the pumps of a person who is selling below cost.

(8) Prohibits a person who is selling motor fuel from limiting the amount of fuel a single customer may purchase.

The act becomes effective October 1, 2003 and applies sales of motor fuels and offers to sell motor fuel made on or after that date.

BILL ANALYSIS:

G.S. 75-81 currently defines cost to mean the refiner's or terminal supplier's prevailing cost to the wholesaler, or for other sellers, the invoice or replacement cost, plus freight and taxes. The bill redefines "cost" to mean the most recently published average reseller rack cost as calculated by the Oil Price Information Office or the actual cost paid by a motor fuel merchant for the fuel, plus freight charges and taxes.

G.S. 75-82 is amended to remove the requirement of an anticompetitive intent for a violation of the Act to occur. As amended a motor fuel merchant may not sell motor fuels below cost unless (1) the price is established in good faith to meet the lower price of a competitor or (2) the sale is made pursuant to the order of a court or government agency. The amendments also make a violation of the Act an unfair method of competition under G.S. 75-1.1.

G.S. 75-83 currently provides that the Attorney General (AG) shall initiate any action for inducing or attempting to induce a violation of the Act. As amended, the section would provide for the AG to initiate an action upon the request of the Commissioner of Agriculture.

G.S. 75-84 currently provides that each act of establishing a price in violation of the Act is a separate offense and is subject to a maximum $1,000 civil penalty. The bill would make each act of setting a price

below cost a separate offense subject to a maximum $10,000 civil penalty. The Commissioner of Agriculture, as well as the Attorney General may seek a permanent or temporary injunction prohibiting further violations.

G.S. 75-85 is amended to authorize the Commissioner of Agriculture to investigate alleged violations of the Act. (The current act provides this authority to the AG.) If the Commissioner receives a written complaint, he must determine within 3 days whether the allegations are true. If the allegations are found to be true, the Commissioner may request the AG to seize and seal the fuel pumps dispensing fuel in violation of the act. The fuel may not be offered for sale until the AG and the Commissioner are satisfied that the merchant is in compliance with the Act.

G.S. 75-86 amends the provisions of the Act providing a private right of action by any motor fuel dealer injured by a violation of the Act, to allow the recovery of treble damages. Current law allows the recovery of actual damages and exemplary (punitive) damages.

G.S. 75-87 is amended to reflect the changes in the exceptions to the prohibition against selling motor fuel below cost contained in G.S. 75-82(a).

G.S. 75-88 is amended to prohibit persons selling motor fuel from limiting the amount of fuel a single customer may purchase. Motor fuel purchased under this section must be dispensed into a container approved by the fire prevention code, the State Building Code, or a containment vehicle approved by the Department of Transportation. A violation of this section may result in a civil penalty of not more than $5,000. The Attorney General or the Commissioner of Agriculture may seek an injunction to prevent further violations.

The act becomes effective October 1, 2003, and applies to sales of motor fuels and offers of sale made on or after that date.

H1203-SMRC-004

NCPMA Position Paper
HB 1203 - Amend Motor Fuel Marketing Act

(Passed by the House on May 1, 2003 by a vote of 84-28)

Problem: The current Motor Fuel Marketing Act of 1986 was designed to allow small business petroleum marketers to compete against major oil companies who were selling motor fuels through their branded stations at less than marketers could purchase motor fuels at the wholesale terminal rack. Today, marketers face a different challenge. Mega national retailers (Wal-Mart/Sams Club, BJ's), grocery chains (Kroger), and other large retail chains have entered the market selling motor fuels as a loss leader to boost inside sales with little or no regard for the impact on the distribution chain that is currently serving the American motoring public cost efficiently. North Carolina based petroleum marketers need the ability to compete with the incredible economic muscle of mega national retailers to survive and provide abundant, accessible, inexpensive choices for the motoring public. In addition, when the national retailers enter the petroleum business, they adversely impact small business petroleum marketers' supply contracts. Supply contracts stipulate that our companies sell certain volumes of motor fuel and the practice of selling motor fuels as a loss leader jeopardizes our ability to meet contract volumes and survive as primarily petroleum oriented businesses.

Solution: The Senate should pass HB 1203 with no amendments. The bill amends the current Motor Fuels Marketing Act as follows:

- Definition of cost is amended to be – Oil Price Information Service (OPIS) low rack price from the terminal where the product was pulled; plus all applicable state and federal excise tax and freight. This in essence establishes a wholesale floor that cannot be breached without being a violation. Sellers may sell at wholesale but not lower than OPIS low and competitors can meet them but a violation occurs if they go under wholesale cost. OPIS is a nationally recognized petroleum pricing service available via the internet by subscription. Prices at all terminal racks are posted daily. OPIS has archives of rack prices going back to 1981.
- Investigation of violations of the Act will be moved to the Department of Agriculture who upon receipt of a written request will have 3 days to investigate a violation. If a violation is detected a letter would be sent to the violator that they are being turned over to the Attorney General's office for enforcement. The Commissioner of Agriculture may request that the Attorney General lock pumps and seize product being sold if violations of the Act continue.
- There are NO exceptions such as grand openings, etc. except upon court ordered sale of a product. Again, competitors may sell at OPIS low plus freight and excise tax but no lower.
- Prohibits an entity from limiting the amount of motor fuel for sale to any one customer unless preempted by a federal or state emergency.

While this may not solve all problems currently in the market, this language is based on a Maryland law which has been effective in providing a more stable and level playing field between large and small sellers. THIS IS NOT A PROHIBITION AGAINST SELLING BELOW COST. Under the language in HB 1203 it is possible to sell below your cost if your cost is above OPIS low.

NCPMA member firms need HB 1203 for the following reasons:

- HB 1203 is a proactive measure that will allow smaller North Carolina owned companies to compete with large national retail warehouse clubs, grocers and large store chains in marketing motor fuels.
- HB 1203 levels the playing field allowing small local firms to compete at or slightly below their cost.
- NCPMA can not sit idly by and allow companies who can subsidize losses in motor fuels with other products or in other areas to wreck the distribution chain that has so ably served this State and Nation for almost 100 years over a few cents per gallon.
- The bill is pro-consumer because fair and abundant competition is good for consumers. Passage of HB 1203 will ensure continued abundant choices for the consumer which in the long run means lower motor fuel prices for all.
- The practice of subsidizing motor fuel sales will ultimately mean the consumer is paying more– whether it is on inside sales, motor fuel prices at other local stores or out of state stores in the chain -

when perpetrators move to capture market share and charge our citizens more to subsidize their expansion into new markets elsewhere.

- HB 1203 allows retailers to sell motor fuels at or below their cost; therein NO ONE is guaranteed a profit.
- Other states that have enacted similar legislation, including states where overhead percentages have been allowed in the definition of cost. States with fair marketing legislation: Alabama, Colorado, Florida, Maryland, Minnesota, Massachusetts, Missouri, New Jersey, North Carolina, South Carolina, Tennessee, Utah, Wisconsin. There is no evidence from these states that passage of these laws results in an increase in the price of motor fuels.

HB 1203 is supported by the NC Petroleum Marketers Association, the NC Association of Convenience Stores, and the NC Service Station Association.

About OPIS

The world's most comprehensive source for petroleum information, products & prices began in 1977 with the award-winning Oil Express Newsletter, quickly expanded in 1980 into the only source, and the world's most comprehensive database of U.S. wholesale petroleum prices. OPIS now distributes the most accurate, reliable and referenced petroleum prices via fax, newsletter, e-mail, Internet, 3rd party vendors, and through one of the nation's first commercial on-line services — PetroScan.

OPIS is comprised of more than 40 information specialists, including the most experienced editors and pricing experts in the business. Pricing experts track more than 70,000 rack prices for heating oil, gasoline, diesel and kerosene, and thousands of contract prices for jet fuel, LP-gas, residual fuel, and ethanol. More than 85,000 retail gasoline prices are also tracked daily.

OPIS is the most widely accepted fuel price benchmark for supply contracts and competitive positioning. It's used as the benchmark price by the world to buy and sell U.S. gasoline, diesel, LP-gas, jet fuel, crude, propane, feedstocks, residuals, kerosene, and MTBE.

OPIS is relied on as the benchmark because OPIS remains completely unbiased and independent. OPIS has no stake in fuel transactions, is not funded by oil industry initiatives, and strictly adheres to antitrust guidelines determined by independent legal counsel.

The OPIS Benchmark Is Relied On By:

Every major & independent oil company
Marketers/Jobbers, dealers, c-stores & retail service stations
Nearly every major metropolitan transit authority, school, utility, & railroad system.
Most commercial airlines, truckstops & fleets.
U.S. federal, state, municipal & county govt.
The Defense Energy Support Center (DESC) for virtually every gallon of fuel used for U.S. military operations.

CO FL MD NJ UT WI
1.88.9
AL MN NC SC TN

Daily Fuel Gauge Report

AAA's Media Site For Retail Gasoline Prices

Metro Averages:

Select A Market

Prices updated: 7/8/2004 3:01:52 AM

- National Average
- State by State Average
- What's Moving the Market
- National Media Contacts
- Local AAA Club Media Contacts
- Local AAA Clubs
- Methodology

NEW Get The Current Fuel Costs For A Trip

*Data provided in cooperation with **OPIS Energy Group** and Wright Express, LLC*

Media are encouraged to localize fuel price stories by contacting their local AAA club media representative.

Current State Averages: Click on state for detailed information

**Prices Are In US Dollars Per Gallon.*

State	Regular	Mid	Premium	Diesel
Alaska	$2.099	$2.221	$2.348	$1.919
Alabama	$1.773	$1.895	$1.952	$1.668
Arkansas	$1.786	$1.884	$2.004	$1.681
Arizona	$1.967	$2.051	$2.169	$1.999
California	$2.248	$2.393	$2.432	$2.218
Colorado	$1.895	$2.027	$2.117	$1.870
Connecticut	$2.043	$2.217	$2.275	$1.866
District of Columbia	$2.039	$2.172	$2.237	$1.884
Delaware	$1.917	$2.036	$2.126	$1.793
Florida	$1.920	$2.080	$2.118	$1.799
Georgia	$1.727	$1.857	$1.939	$1.621
Hawaii	$2.346	$2.480	$2.527	$2.358
Iowa	$1.779	$1.873	$1.963	$1.720
Idaho	$1.980	$2.090	$2.148	$1.938
Illinois	$1.896	$2.039	$2.103	$1.841
Indiana	$1.808	$1.945	$2.000	$1.720
Kansas	$1.801	$1.850	$1.922	$1.755
Kentucky	$1.794	$1.924	$2.011	$1.661
Louisiana	$1.801	$1.920	$2.010	$1.667
Massachusetts	$1.967	$2.115	$2.196	$1.831
Maryland	$1.917	$2.038	$2.090	$1.781
Maine	$1.907	$2.057	$2.115	$1.810
Michigan	$1.884	$1.995	$2.075	$1.759
Minnesota	$1.793	$1.864	$1.913	$1.730
Missouri	$1.721	$1.790	$1.895	$1.636
Mississippi	$1.790	$1.887	$1.972	$1.628
Montana	$1.974	$2.058	$2.157	$1.837
North Carolina	$1.829	$1.941	$2.027	$1.688
North Dakota	$1.861	$1.926	$1.995	$1.738

34th

Nebraska	$1.842	$1.883	$1.936	$1.741
New Hampshire	$1.930	$2.090	$2.165	$1.770
New Jersey	$1.929	$2.069	$2.147	$1.694
New Mexico	$1.861	$1.982	$2.067	$1.801
Nevada	$2.111	$2.225	$2.306	$2.029
New York	$2.111	$2.258	$2.306	$1.911
Ohio	$1.812	$1.933	$2.010	$1.765
Oklahoma	$1.717	$1.775	$1.874	$1.619
Oregon	$2.059	$2.172	$2.205	$2.079
Pennsylvania	$1.855	$1.956	$2.042	$1.820
Rhode Island	$1.998	$2.126	$2.196	$1.867
South Carolina	$1.772	$1.884	$1.975	$1.637
South Dakota	$1.848	$1.967	$2.048	$1.752
Tennessee	$1.787	$1.891	$1.982	$1.669
Texas	$1.772	$1.875	$1.942	$1.670
Utah	$1.908	$2.012	$2.100	$1.872
Virginia	$1.802	$1.890	$1.963	$1.685
Vermont	$1.951	$2.099	$2.190	$1.834
Washington	$2.065	$2.140	$2.246	$2.136
Wisconsin	$1.912	$1.985	$2.076	$1.776
West Virginia	$1.882	$1.968	$2.066	$1.789
Wyoming	$1.852	$1.931	$2.057	$1.788

AAA's Daily Fuel Gauge Report is updated each business day and is the most comprehensive retail gasoline survey available. Everyday over 60,000 self-serve stations are surveyed.

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Daily Fuel Gauge Report

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- Local AAA Clubs
- Methodology

NEW Get The Current Fuel Costs For A Trip

*Data provided in cooperation with **OPIS Energy Group** and Wright Express, LLC*

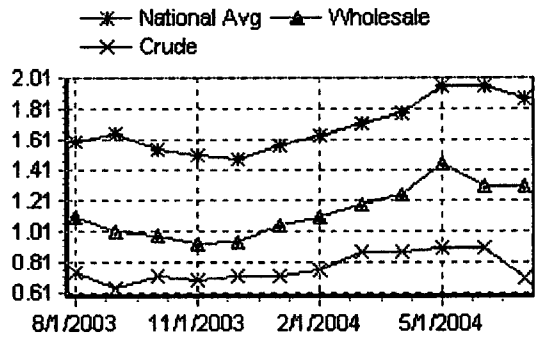
Media are encouraged to localize fuel price stories by contacting their local AAA club media representative.

National Unleaded Average

	Regular	Mid	Premium	Diesel
Current Avg.	$1.889	$2.006	$2.078	$1.780
Yesterday Avg.	$1.884	$2.000	$2.073	$1.772
Month Ago Avg.	$2.027	$2.153	$2.231	$1.815
Year Ago Avg.	$1.489	$1.581	$1.638	$1.511

**Prices are in US dollars per gallon*

12 Month Average For Regular Unleaded



Highest Recorded Price:

Regular Unl.	$2.054	5/26/2004
DSL.	$1.831	5/26/2004

AAA Fuel Gauge data may be used on a daily basis by news media Web sites, but should include attribution to AAA, the display of AAA's logo and a link to www.aaa.com. AAA's logo can be found in the "About AAA" section of the AAA NewsRoom.

AAA's Daily Fuel Gauge Report is updated each business day and is the most comprehensive retail gasoline survey available. Everyday over 60,000 self-serve stations are surveyed.

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VISITOR REGISTRATION SHEET

SENATE JUDICIARY II 7-9-04

Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Bill Weatherspoon	NC Ret. Council
Brad Berry	Duke Energy
Lee-Ann Coe	NCPA
Mary Gorgana	NC Bar Assoc.
Gene Ainsworth	RJR
George Siddath	NCSDA
Henry M Lancaster III	CCA
Angie Hart	Maupin Taylor
John Bode	Bode Law Office
[illegible]	CAPA
[illegible] Bill Rust	T [illegible] Co

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 7-9-04

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Audrey L. Shearin	Eastern Petroleum Corp.
Ed TURLINGTON	Brooks Pierce
Hadden Clark	United Energy Inc
Frank McNeill	McNeill Oil Co.
Andy Ellen	NCRMA
Kip Sturgis	AG's offic
Edward Holmes	Holmes Oil
Michael Barnes	Wilson Petroleum Co Wilson NC
Harold Barry	Hatch Little Bunn LLP
Gary Harris	NCPMA
Doug Howey	11

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Tuesday	July 13, 2004	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 1203	Amend Motor Fuel Marketing Act.	Representative Brubaker Representative Gibson, III

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Tuesday, July 13, 2004, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

HB 1203	Amend Motor Fuel Marketing Act.	Representative Brubaker Representative Gibson, III

Presentations

Other Business

Adjournment

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Tuesday, July 13, 2004

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

UNFAVORABLE AS TO COMMITTEE SUBSTITUTE BILL NO. 1, BUT FAVORABLE AS TO SENATE COMMITTEE SUBSTITUTE BILL

H.B.(CS #1) **1203** Amend Motor Fuel Marketing Act.

Draft Number:	PCS 60531
Sequential Referral:	Finance
Recommended Referral:	None
Long Title Amended:	Yes

TOTAL REPORTED: 1

Committee Clerk Comments:

Senate Judiciary II Committee

Minutes

July 13, 2004

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II Committee to order on July 13, 2004, with thirteen members present.

HB 1203 (Amend Motor Fuel Marketing Act.) Senator Hartsell noted that the Committee would continue the discussion of HB 1203. Mr. Andy Ellen of the North Carolina Retail Merchants Association and Mr. Jim Lambie, Attorney, representing the Sheets Convenience Stores spoke on the bill. Mr. Gary Harris, of the Petroleum Marketers Association presented a handout and made comments.

Senator Reeves presented a Proposed Committee Substitute which was adopted by the Committee for discussion. Senator Hartsell recognized Barbara Riley, Staff Attorney, to explain the Proposed Committee Substitute. After much discussion, Senator Apodaca moved for a favorable report as to the Committee Substitute, unfavorable as to the original bill. All voted and the motion carried.

With no further business the meeting adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

HOUSE BILL 1203*
Committee Substitute Favorable 4/29/03

Short Title: Amend Motor Fuel Marketing Act. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE MOTOR FUEL MARKETING ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 3 of Chapter 75 of the General Statutes reads as rewritten:

"Article 3.

"Motor Fuel Marketing Act.

"§ 75-80. Title.

This Article shall be known and may be cited as the "Motor Fuel Marketing Act".

"§ 75-81. Definitions.

~~The following terms shall have the meanings ascribed to them~~ As used in this ~~section unless otherwise stated and~~Article, unless the context ~~or subject matter clearly~~ indicates ~~otherwise:~~otherwise, the following definitions apply:

(1) 'Person' ~~shall mean~~means any person, firm, association, organization, partnership, business trust, joint stock company, company, corporation or legal entity.

(2) 'Sale' ~~shall mean~~means selling, offering for sale or advertising for sale.

(3) 'Motor Fuel' means motor fuel, as defined in G.S. 105-449.60, and alternative fuel, as defined in G.S. 105-449.130.

(4) 'Cost' or 'Costs' ~~shall mean as follows:~~

~~a. For a refiner or terminal supplier, costs shall be presumed to be the refiner's or terminal supplier's prevailing price to the wholesale class of trade at the terminal used by the refiner or terminal supplier to obtain the motor fuel in question or the lowest prevailing price within 10 days prior to a sale alleged to be in violation of G.S. 75-82 hereof plus all transportation expenses including freight expenses (incurred and not otherwise included in the cost of the motor fuel), and motor fuel taxes. If a refiner or terminal supplier does not regularly sell to the~~

~~wholesale class of trade at the terminal in question, then such refiner or terminal supplier shall use as the prevailing price either (i) the lowest price to the wholesale class of trade of those other refiners or terminal suppliers at the same terminal who regularly sell to the wholesaler class or (ii) a price determined by using standard functional accounting procedures.~~

~~b.~~ ~~For all other sellers, cost includes the invoice or replacement cost, whichever is less, of the grade, brand or blend, of motor fuel within 10 days prior to the date of sale, in the quantity or quantities last purchased, less all rebates and discounts received including prompt payment discounts and plus all applicable State, federal and local taxes, and transportation expenses including freight expenses, incurred and not otherwise included in the cost of the motor fuel.~~ means the total of all of the following:

a. The most recently published average reseller rack cost of motor fuel by grade and quality, as calculated by the Oil Price Information Service (OPIS) for the particular terminal from which the motor fuel was delivered to the motor fuel merchant or the low OPIS Rack Price as reported by OPIS for the particular terminal from which the motor fuel was delivered to the motor fuel merchant, whichever is less.

b. The freight charges on the motor fuel.

c. All applicable State and federal excise taxes.

~~(5)~~ ~~"Prompt Payment Discounts" shall mean any allowance for payment within a specified time, but shall not include discounts for cash made to the motoring public at motor fuel outlets.~~

(6) 'Affiliate' ~~shall mean~~means any person who (other than by means of a franchise) controls, is controlled by or is under common control with, any other person.

(7) 'Motor Fuel Merchant' ~~is~~ means any person selling motor fuel to the public.

(8) 'Motor Fuel Outlet' ~~is~~ means any retail facility selling motor fuel to the motoring public.

~~(9)~~ ~~'New Retail Outlet' shall mean a new retail facility constructed from the ground or an existing retail facility that is offering motor fuel to the motoring public for the first time.~~

(10) 'Refiner' ~~shall mean~~means any person engaged in the production or refining of motor fuel, whether such production or refining occurs in this State or elsewhere, and includes any affiliate of such person or firm.

(11) 'Terminal Supplier' ~~shall mean~~means any person engaged in selling or brokering motor fuel to wholesalers or retailers from a storage facility

of more than 2,000,000 gallons capacity and such person has an ownership interest in or control of the storage facility.

"§ 75-82. Unlawful below-cost selling; exceptions.

(a) ~~It shall be unlawful where the intent is to injure competition for any~~ No motor fuel merchant or ~~the~~ affiliate of any motor fuel merchant ~~to~~ shall sell ~~with such frequency as to indicate a general business practice of selling at a motor fuel outlet any grade, brand or blend of~~ motor fuel for less than the cost ~~of that grade, brand or blend of motor fuel except where (i) the~~unless either of the following applies:

(1) The price is established in good faith to meet ~~or compete with~~ the lower price of a competitor ~~in the same market area on the same level of distribution~~ selling the same or comparable product of like ~~quality, (ii) the price remains in effect for no more than 10 days after the first sale of that grade, brand or blend by the merchant at a new retail outlet, (iii) the sale is made in good faith to dispose of a grade, brand or blend of motor fuel for the purpose of discontinuing sales of that product, or (iv) the~~quality.

(2) The sale is made pursuant to the order or authority of any court or governmental agency.

~~(b) For purposes of this Article, motor fuel cost shall be computed separately for each grade, brand or blend of each motor fuel at each location where said motor fuel is offered for sale; however, nothing in this subsection shall prevent a motor fuel merchant from using a weighted average motor fuel cost for comparable grade, brand or blend when such motor fuel merchant is supplied by more than one refiner or terminal supplier at one or more terminals.~~

(c) This Article ~~shall apply~~applies only to retail sales of motor fuel at motor fuel outlets.

(d) A violation of this section is an unfair method of competition under G.S. 75-1.1.

"§ 75-83. Unlawful inducement; civil penalty.

It ~~shall be~~is unlawful to knowingly induce, or to knowingly attempt to induce, a violation of this Article, whether by otherwise lawful or unlawful means. In any action initiated by the Attorney ~~General,~~ General at the request of the Commissioner of Agriculture, anyone found to have violated this provision shall be subject to the civil penalty applicable to the sales made in violation of this Article; or, if no sales were made, to a civil penalty of one thousand dollars ($1,000). The clear proceeds of any civil penalties imposed in any actions initiated by the Attorney General under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"§ 75-84. Separate offenses; injunctions.

Each act of establishing a price below cost in violation of this Article shall constitute a separate offense by the ~~seller~~ seller, and the civil penalty for each offense shall be not more than ~~one thousand dollars ($1,000).~~ten thousand dollars ($10,000). Upon a proper showing by the Attorney General or ~~his delegate,~~ the Commissioner of Agriculture, further violations may be temporarily or permanently enjoined. The clear proceeds of

civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"**§ 75-85. Investigations by ~~Attorney General.~~Commissioner of Agriculture.**

~~The Attorney General is authorized to~~Notwithstanding G.S. 75-9, the Commissioner of Agriculture may investigate any allegation of a violation of this Article made by a motor fuel merchant or ~~by an association or~~ group of motor fuel merchants. If the Commissioner of Agriculture receives a complaint in writing that a motor fuel merchant is selling motor fuel below cost, the Commissioner of Agriculture shall investigate and determine within three business days of the receipt of the written complaint whether the allegations in the complaint are true. If an investigation discloses a violation, the Commissioner of Agriculture may request the Attorney General ~~may~~ to exercise the authority under this Article to seek an injunction and ~~he may also seek~~ impose civil penalties. The Commissioner of Agriculture may, in order to prevent further sales, request the Attorney General to seize and seal any dispensing pump or dispensing devices from which motor fuel is offered or exposed for sale in violation of this Article. Motor fuel that has been seized and sealed under this section shall not be offered for sale until the Commissioner of Agriculture and the Attorney General, after consultation, are satisfied that the motor fuel merchant has satisfied the requirements of this Article. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"**§ 75-86. Private actions.**

Any person, corporation, or other business entity ~~which~~ that is engaged in the sale of motor fuel for resale or consumption and ~~which~~ that is directly or indirectly injured by a violation of this Article may bring an action in the district court ~~district as defined in G.S. 7A-133~~ or superior court ~~district or set of districts as defined in G.S. 7A-41.1, as the case may be,~~of the county where the violation is alleged to have occurred to recover ~~actual damages, exemplary damages, costs~~ treble damages under G.S. 75-16, costs, and reasonable attorneys' fees. The court shall also grant such equitable relief as is proper, including a declaratory judgment and injunctive relief. Any action under this Article must be brought within one year of the alleged violation.

"**§ 75-87. Private action presumptions.**

(a) In any private action brought under this Article, a violation shall be presumed to have occurred if: (i) the prevailing price ~~under G.S. 75-81(4)(a)~~ for any grade, brand or blend of a motor fuel sold by a refiner or terminal supplier to a wholesaler or retailer is greater than the price of the same grade, brand or blend of motor fuel sold by such refiner or terminal supplier directly through its own motor fuel outlet or through the outlet of an affiliate of said refiner or terminal supplier; or (ii) if the product price of any grade, brand or blend of a motor fuel sold by a wholesaler to a retailer is greater than the retail price of the same grade, brand or blend of motor fuel sold by such wholesaler through its own motor fuel outlet or the outlet of an affiliate of said wholesaler, provided the method of delivery and quantities of each delivery of motor fuel to the retailer and to the wholesaler's outlet or affiliate's outlet are the same or comparable.

(b) A party may rebut the presumption created by this section by presenting evidence to establish ~~his~~ that party's cost of the grade, brand or blend of motor fuel in

question, or by qualifying for an exception under subdivision (1) or subdivision (2) of subsection (a) of G.S. 75-82.

"**§ 75-88. Public ~~disclosure.~~disclosure; quantity of motor fuel available for sale.**

(a) Any refiner or terminal supplier computing prevailing price under the provisions of ~~G.S. 75-81(4)(a)(i) or (ii)~~ G.S. 75-81(4) shall be required to publicly disclose ~~said~~ this price.

(b) No entity shall limit the quantity of motor fuel sold or offered for sale from a motor fuel pump to any one customer to a quantity less than the entire supply that is owned or possessed by the seller and that the seller is authorized to sell at the place of sale or offering for sale unless preempted by a State or federal state of emergency.

(c) Motor fuel purchased under this section shall be dispensed into a container approved by the fire prevention code, the State Building Code as authorized under G.S. 143-139, or a containment vehicle approved by the Department of Transportation.

(d) Each act violating this section shall constitute a separate offense, and is subject to a civil penalty. The civil penalty for each offense shall be not more than five thousand dollars ($5,000). Upon a proper showing by the Attorney General or the Commissioner of Agriculture, further violations may be temporarily or permanently enjoined. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

"**§ 75-89. Powers and remedies supplementary.**

The powers and remedies provided by this Article shall be cumulative and supplementary to all powers and remedies otherwise provided by law."

SECTION 2. This act becomes effective October 1, 2003, and applies to sales of motor fuels and offers of sale of motor fuel on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 1203*
Committee Substitute Favorable 4/29/03
PROPOSED SENATE COMMITTEE SUBSTITUTE H1203-PCS60531-RF-48

Short Title: Amend/Study Motor Fuel Marketing Act. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE MOTOR FUEL MARKETING ACT AND TO STUDY THE PREDATORY PRICING OF MOTOR FUELS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 75-88 reads as rewritten:

"**§ 75-88. Public ~~disclosure.~~disclosure; quantity of motor fuel available for sale.**

(a) Any refiner or terminal supplier computing prevailing price under the provisions of ~~G.S. 75-81(4)(a)(i) or (ii)~~ G.S. 75-81(4) shall be required to publicly disclose ~~said~~ this price.

(b) No entity that is selling motor fuel below cost shall limit the quantity of motor fuel sold or offered for sale from a motor fuel pump to any one customer to a quantity less than the entire supply that is owned or possessed by the seller and that the seller is authorized to sell at the place of sale or offering for sale unless preempted by a State or federal state of emergency.

(c) Motor fuel purchased under this section shall be dispensed into a container approved by the fire prevention code, the State Building Code as authorized under G.S. 143-139, or a containment vehicle approved by the Department of Transportation.

(d) Each act violating this section shall constitute a separate offense, and is subject to a civil penalty. The civil penalty for each offense shall be not more than five thousand dollars ($5,000). Upon a proper showing by the Attorney General or the Commissioner of Agriculture, further violations may be temporarily or permanently enjoined. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2."

SECTION 2. There is created the Legislative Study Committee on the Motor Fuels Marketing Act. The purpose of the Committee is to review Article 3 of Chapter 75 of the General Statutes regarding predatory pricing of motor fuels.

SECTION 3. The Committee shall consist of 10 members, five members appointed by the President Pro Tempore of the Senate and five members appointed by the Speaker of the House of Representatives. The President Pro Tempore shall designate one Senator as cochair, and the Speaker shall designate one Representative as cochair. Vacancies on the Committee shall be filled by the same appointing authority as made the initial appointment.

SECTION 4. In conducting the study, the Committee shall consider the following:

(1) Whether the current definition of "cost" under Article 3 does not provide an adequate standard for cases prosecuted under the Motor Fuels Marketing Act, whether the General Assembly should adopt an external benchmark for determining cost, and whether it would be constitutional for the General Assembly to adopt an external benchmark for determining cost.

(2) Whether the current statutory standard that requires a showing of intent to injure competition is consistent with other state and federal statutes and case law regarding predatory pricing, whether the current standard is so difficult to prove as to chill the effective use of the current law, and whether it would be constitutional to remove the intent to injure competition requirement from the current law.

(3) The economic effect that statutes such as the Motor Fuel Marketing Act and the changes proposed in the 2nd Edition of House Bill 1203 have, if any, on the price of motor fuel to the consumer as well as whether they provide protections against predatory pricing between competitors.

(4) The fire, public safety, and environmental issues raised by prohibiting a person who is selling motor fuel from limiting the amount of fuel that any one customer could purchase at one time.

(5) Laws and measures regarding motor fuel pricing adopted by other states to protect small businesses and consumers from predatory pricing, including, but not limited to, price gouging, zone pricing, divorcement, and marketing agreements.

SECTION 5. The Committee, while in the discharge of its official duties, may exercise all powers provided for under G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4. The Committee may meet at any time upon the joint call of the cochairs. The Committee may meet in the Legislative Building or the Legislative Office Building. The Committee may contract for professional, clerical, or consultant services as provided by G.S. 120-32.02.

The Legislative Services Commission, through the Legislative Services Officer, shall assign professional staff to assist the Committee in its work. The House of Representatives' and the Senate's Supervisors of Legislative Assistants shall assign clerical staff to the Committee, and the expenses relating to the clerical employees shall be borne by the Committee. Members of the Committee shall receive subsistence and travel expenses at the rates set forth in G.S. 120-3.1.

SECTION 6. The Committee shall report its findings and recommendations to the 2005 General Assembly upon its convening. The Committee shall terminate the earlier of the filing a report or upon the convening of the 2005 General Assembly.

SECTION 7. From funds appropriated to the General Assembly, the Legislative Services Commission shall allocate funds for the expenses of the Committee.

SECTION 8. Section 1 of this act becomes effective October 1, 2004, and applies to sales of motor fuel and offers of sale of motor fuel on or after that date. The remainder of this act is effective when it becomes law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H D

HOUSE BILL 1203*
Committee Substitute Favorable 4/29/03
PROPOSED SENATE COMMITTEE SUBSTITUTE H1203-CSRC-119 [v.5]

7/7/2004 8:34:54 PM

Short Title: Amend Motor Fuel Marketing Act. (Public)

Sponsors:

Referred to:

April 10, 2003

A BILL TO BE ENTITLED

AN ACT TO AMEND THE MOTOR FUEL MARKETING ACT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 75-81 reads as rewritten:

"**§ 75-81. Definitions.**

~~The following terms shall have the meanings ascribed to them~~ As used in this ~~section unless otherwise stated and~~Article, unless the context ~~or subject matter clearly~~ indicates ~~otherwise:~~otherwise, the following definitions apply:

(1) 'Person' ~~shall mean~~means any person, firm, association, organization, partnership, business trust, joint stock company, company, corporation or legal entity.

(2) 'Sale' ~~shall mean~~means selling, offering for sale or advertising for sale.

(3) 'Motor Fuel' means motor fuel, as defined in G.S. 105-449.60, and alternative fuel, as defined in G.S. 105-449.130.

(4) 'Cost' or 'Costs' ~~shall mean as follows:~~

~~a. For a refiner or terminal supplier, costs shall be presumed to be the refiner's or terminal supplier's prevailing price to the wholesale class of trade at the terminal used by the refiner or terminal supplier to obtain the motor fuel in question or the lowest prevailing price within 10 days prior to a sale alleged to be in violation of G.S. 75-82 hereof plus all transportation expenses including freight expenses (incurred and not otherwise included in the cost of the motor fuel), and motor fuel taxes. If a refiner or terminal supplier does not regularly sell to the wholesale class of trade at the terminal in question, then such refiner or terminal supplier shall use as the prevailing price either (i) the lowest price to the wholesale class of trade of~~

~~those other refiners or terminal suppliers at the same terminal who regularly sell to the wholesaler class or (ii) a price determined by using standard functional accounting procedures.~~

~~b.~~ ~~For all other sellers, cost includes the invoice or replacement cost, whichever is less, of the grade, brand or blend, of motor fuel within 10 days prior to the date of sale, in the quantity or quantities last purchased, less all rebates and discounts received including prompt payment discounts and plus all applicable State, federal and local taxes, and transportation expenses including freight expenses, incurred and not otherwise included in the cost of the motor fuel.~~ means the total of all of the following:

a. The published average reseller rack cost of motor fuel by grade and quality, as calculated by the Oil Price Information Service (OPIS) for the particular date and terminal from which the motor fuel was delivered to the motor fuel merchant or the low OPIS Rack Price as reported by OPIS for the particular date and terminal from which the motor fuel was delivered to the motor fuel merchant, whichever is less.

b. The freight charges on the motor fuel.

c. All applicable State and federal excise taxes.

~~(5) "Prompt Payment Discounts" shall mean any allowance for payment within a specified time, but shall not include discounts for cash made to the motoring public at motor fuel outlets.~~

(6) 'Affiliate' ~~shall mean~~means any person who (other than by means of a franchise) controls, is controlled by or is under common control with, any other person.

(7) 'Motor Fuel Merchant' ~~is~~ means any person selling motor fuel to the public.

(8) 'Motor Fuel Outlet' ~~is~~ means any retail facility selling motor fuel to the motoring public.

~~(9) 'New Retail Outlet' shall mean a new retail facility constructed from the ground or an existing retail facility that is offering motor fuel to the motoring public for the first time.~~

~~(10) 'Refiner' shall mean any person engaged in the production or refining of motor fuel, whether such production or refining occurs in this State or elsewhere, and includes any affiliate of such person or firm.~~

~~(11) 'Terminal Supplier' shall mean any person engaged in selling or brokering motor fuel to wholesalers or retailers from a storage facility of more than 2,000,000 gallons capacity and such person has an ownership interest in or control of the storage facility.~~"

SECTION 2. G.S. 75-82 reads as rewritten:

"**§ 75-82. Unlawful below-cost selling; exceptions.**

(a) It shall be unlawful where the intent is to injure competition for any motor fuel merchant or the affiliate of any motor fuel merchant to sell with such frequency as to indicate a general business practice of selling at a motor fuel outlet ~~any grade, brand or blend of~~ motor fuel for less than the cost ~~of that grade, brand or blend of motor fuel except where (i) the~~ unless either of the following applies:

(1) The price is established in good faith to meet ~~or compete with~~ the lower price of a competitor ~~in the same market area on the same level of distribution~~ selling the same or comparable product of like ~~quality, (ii) the price remains in effect for no more than 10 days after the first sale of that grade, brand or blend by the merchant at a new retail outlet, (iii) the sale is made in good faith to dispose of a grade, brand or blend of motor fuel for the purpose of discontinuing sales of that product, or (iv) the~~quality.

(2) The sale is made pursuant to the order or authority of any court or governmental agency.

~~(b) For purposes of this Article, motor fuel cost shall be computed separately for each grade, brand or blend of each motor fuel at each location where said motor fuel is offered for sale; however, nothing in this subsection shall prevent a motor fuel merchant from using a weighted average motor fuel cost for comparable grade, brand or blend when such motor fuel merchant is supplied by more than one refiner or terminal supplier at one or more terminals.~~

(c) This Article ~~shall apply~~applies only to retail sales of motor fuel at motor fuel outlets."

SECTION 3. G.S. 75-86 reads as rewritten:

"**§ 75-86. Private actions.**

Any person, corporation, or other business entity ~~which~~ that is engaged in the sale of motor fuel for resale or consumption and ~~which~~ that is directly or indirectly injured by a violation of this Article may bring an action in the district court ~~district as defined in G.S. 7A-133~~ or superior court ~~district or set of districts as defined in G.S. 7A-41.1, as the case may be,~~of the county where the violation is alleged to have occurred to recover ~~actual damages, exemplary damages, costs~~ treble damages, costs, and reasonable attorneys' fees. The court shall also grant such equitable relief as is proper, including a declaratory judgment and injunctive relief. Any action under this Article must be brought within one year of the alleged violation.

SECTION 4. G.S. 75-87 reads as rewritten:

"**§ 75-87. Private action presumptions.**

(a) In any private action brought under this Article, a violation shall be presumed to have occurred ~~if: (i)~~ if any of the following apply:

(1) ~~the~~ The prevailing price under G.S. 75 81(4)(a) for any grade, brand or blend of a motor fuel sold by a refiner or terminal supplier to a wholesaler or retailer is greater than the price of the same grade, brand or blend of motor fuel sold by such refiner or terminal supplier directly through its own motor fuel outlet or through the outlet of an affiliate of said refiner or terminal ~~supplier; or (ii) if~~ supplier.

(2) ~~the~~ The product price of any grade, brand or blend of a motor fuel sold by a wholesaler to a retailer is greater than the retail price of the same grade, brand or blend of motor fuel sold by such wholesaler through its own motor fuel outlet or the outlet of an affiliate of said wholesaler, provided the method of delivery and quantities of each delivery of motor fuel to the retailer and to the wholesaler's outlet or affiliate's outlet are the same or comparable.

(3) A motor fuel merchant or affiliate of a motor fuel merchant sells motor fuel for less than the cost.

(b) A party may rebut the presumption created by this section by presenting evidence to establish ~~his cost of the grade, brand or blend of motor fuel in question, or by~~ that the party qualifies for an exception under subdivision (1) or subdivision (2) of subsection (a) of G.S. 75-82."

SECTION 5. G.S. 75-88 reads as rewritten:

"**§ 75-88. Public disclosure.**

Any refiner or terminal supplier computing prevailing price under the provisions of ~~G.S. 75-81(4)(a)(i) or (ii)~~ G.S. 75-81(4) shall be required to publicly disclose ~~said~~ this price.

SECTION 6. This act becomes effective October 1, 2004, and applies to sales of motor fuels and offers of sale of motor fuel on or after that date.

HOUSE BILL 1203:
Amend Motor Fuel Marketing Act

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Representative Gibson
Date:	July 7, 2004	**Summary by:**	Kory J. Goldsmith
Version:	H1203-PCS-119[v.5]		Committee Counsel

SUMMARY: ***The PCS to HB1203 amends the Motor Fuels Marketing Act (Act), which generally prohibits unfair price competition between motor fuel merchants by selling below cost. The bill makes the following changes in the law:***

(1) Re-defines what constitutes "cost" for persons selling motor fuel.

(2) Limits the defenses under the Act.

(3) Allows the recovery of treble damages in private actions.

(4) Creates a presumption in private actions that sales below cost are violations of the Act.

The PCS differs from the 2nd Edition in the following ways:

(1) Slightly alters the definition of "cost" by having it linked to the OPIS price for the day and terminal from which the motor fuel was shipped.

(2) Keeps the current requirement that a violation requires a showing of intent to injure competition UNLESS a private party brings the action.

(3) Removes provisions that would have given the Commissioner of Agriculture the authority to investigate alleged violations, removes increases in existing penalties and removes the provision that would have prohibited a merchant from limiting the amount of motor fuel any one customer could purchase at a time.

The act becomes effective October 1, 2004 and applies sales of motor fuels and offers to sell motor fuel made on or after that date.

BILL ANALYSIS:

Section 1 - Amends **G.S. 75-81** which currently defines cost to mean the refiner's or terminal supplier's prevailing cost to the wholesaler, or for other sellers, the invoice or replacement cost, plus freight and taxes. The bill redefines "cost" to mean the published average reseller rack cost as calculated by the Oil Price Information Office or the low OPIS Rack Price for the particular day and terminal from which the fuel was delivered, plus freight charges and taxes.

Note: It is not clear whether using a benchmark of this sort constitutes an unconstitutional delegation of legislative authority by the General Assembly. In Bulova Watch Company, Inc., A Corporation . Brand Distributors Of North Wilkesboro, Inc., 285 N.C. 467, 206 SE2d 141 (1974), the North Carolina Supreme Court held that a provision of the Fair Trade Act was unconstitutional because it made agreements creating price floors made between a wholesaler and a retailer applicable to third parties who obtained the same products from different sources. The Court found this to be unconstitutional because it delegated legislative power to a private corporation.

It is not clear whether this principle would apply to the benchmark proposed in HB1203. OPIS is a private service that publishes prices for most types of fuels. Those prices reflect contracts between a wide

variety parties. OPIS benchmarks reflect multiple contract prices, rather than a single contract price which was the case in Bulova. It should also be noted that, unlike the wholesaler in Bulova, OPIS itself is not involved in the making of the contracts.

Section 2 – Amends **G.S. 75-82** to remove two of the current defenses against a charge of selling below cost. The PCS keeps the requirement that a violation of the act requires evidence of the intent to injure competition. The two defenses that would still apply would be: (1) the price is established in good faith to meet the lower price of a competitor, or (2) the sale is made pursuant to the order of a court or government agency.

Section 3 – Amends **G.S. 75-86** regarding the private right of action by any motor fuel dealer injured by a violation of the Article. The PCS would allow the recovery of treble damages and costs. Current law allows the recovery of actual damages and exemplary (punitive) damages.

Section 4 – Amends **G.S. 75-87** which applies to private causes of action. The changes would create a presumption that a violation of the Act has occurred if a motor fuel merchant or an affiliate of a motor fuel merchant sells below cost. This presumption currently applies to certain situations involving refiners and terminal suppliers selling to wholesalers or retailers and to wholesalers selling to retail suppliers. A showing that the price is established in good faith to meet the lower price of a competitor, or the sale is made pursuant to the order of a court or government agency would rebut the presumption.

Section 5 - G.S. 75-88 is amended to make conforming changes.

The act becomes effective October 1, 2004 and applies to sales of motor fuels and offers of sale made on or after that date.

H1203-SMRC-008

OPIS DIRECT NET CLEAR PRICES

July 12, 2004 - 9:05 a.m. EDT

Low Rack	130.98 + 43.25¢ tax = 174.23

Raleigh/Durham/Chapel Hill

Average Retail	182.53

OPIS LOW for Greensboro, NC

Date	OPIS LOW 87 Unleaded	Federal & State Taxes & Fees	Total Costs 87 Unleaded
01-Jun-04	1.27	0.4295	1.70
02-Jun-04	1.27	0.4295	1.70
03-Jun-04	1.28	0.4295	1.71
04-Jun-04	1.24	0.4295	1.67
07-Jun-04	1.18	0.4295	1.61
08-Jun-04	1.24	0.4295	1.67
09-Jun-04	1.19	0.4295	1.62
10-Jun-04	1.19	0.4295	1.62
11-Jun-04	1.20	0.4295	1.63
14-Jun-04	1.20	0.4295	1.63
15-Jun-04	1.15	0.4295	1.58
16-Jun-04	1.15	0.4295	1.58
17-Jun-04	1.13	0.4295	1.56
18-Jun-04	1.17	0.4295	1.60
21-Jun-04	1.19	0.4295	1.62
22-Jun-04	1.14	0.4295	1.57
23-Jun-04	1.17	0.4295	1.60
24-Jun-04	1.17	0.4295	1.60
25-Jun-04	1.21	0.4295	1.64
28-Jun-04	1.20	0.4295	1.63
29-Jun-04	1.14	0.4295	1.57
30-Jun-04	1.12	0.4295	1.55
01-Jul-04	1.16	0.4325	1.59
02-Jul-04	1.16	0.4325	1.59
05-Jul-04	1.24	0.4325	1.68
06-Jul-04	1.24	0.4325	1.68
07-Jul-04	1.26	0.4325	1.70
08-Jul-04	1.27	0.4325	1.70
09-Jul-04	1.31	0.4325	1.74

On Friday July 9, 2004, Cost as defined in House Bill 1203 from the Greensboro fuel terminal was $1.74 (OPIS low of $1.31 plus $0.43 federal and state taxes). If enacted, HB 1203 would result in the 13 gas stations listed on www.greensborogasprices.com (see attached) being in violation of North Carolina law by selling gasoline under cost and subjecting themselves to civil lawsuits from their competitors. Additionally, these gas stores would have no choice but to raise their prices.

Logged in: ncdol [Log Out] | [Points Standings] | [My Points Statistics] Mond

Home Page
Fuel Logbook NEW
What's New
In The News
Contact Us

GreensboroGasPrices.com

"Informed Consumers Are Wise Consumers"

Report a Gas Price

Price($/G) 9

Your Name (Optional) ncdol

Station

Other Station

Area (Suggest)

Other Area

Street Location

Add to my Favorite Stations

Submit Clear

Reported Prices Removed After 72 Hours

* All Prices Based On Regular Gasoline *
Additional 9/10ths of a Cent Assumed

Looking for prices outside of the Greensboro area? Try: NorthCarolinaGasPrices.com

6% rebate on all gas purchases with the Chase PerfectCard *

Search for Gas Prices

Area: ALL AREAS, Archdale, Forest Oaks, Gibsonville, Greensboro - Central, Greensboro - East

Station: ALL STATIONS, Amoco, BP, Citgo, Conoco, Crown Central

(Hold Ctrl to select multiple areas/stations)

Other Area (optional)

Prices in the last 72 hours

Only member entered prices

[Top Low & High] Search Now!

Search by Zip Code

Search Now!

Greensboro Gas Prices

When you report a gas price into the above form, you are assisting in the fight against high gasoline prices in North Carolina. Together we

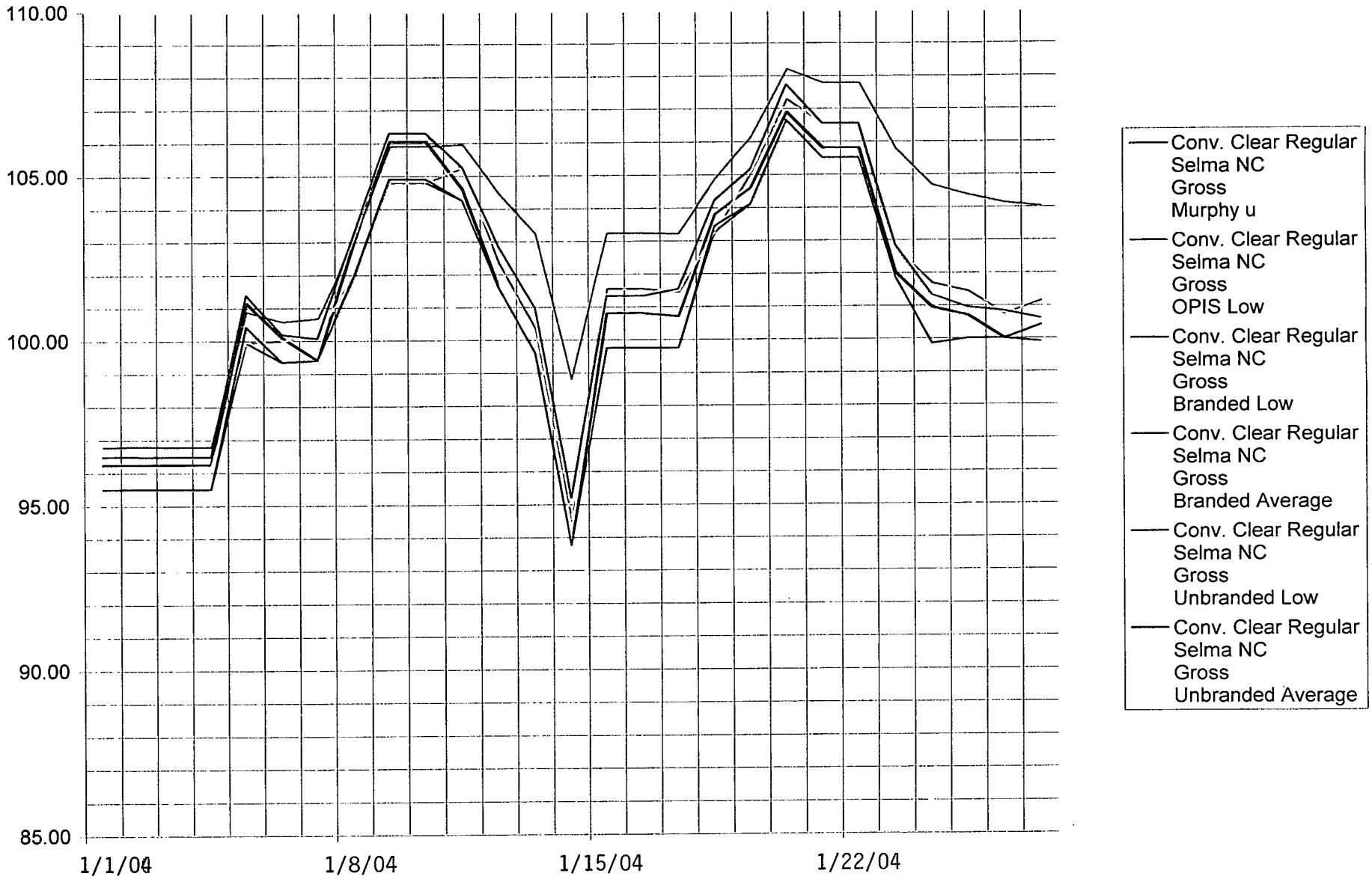
JFK High School | Ridgemont High School | Find Your High School Here

LOWEST Gas Prices in the Last 72 H

Click on a Price to Update a Station - Registered Memb

PRICE	STATION	AREA	TIME
1.70	**Spankys One Stop** Filter 3010 S Main St US 311 (No Credit Cards for Gas)	High Point	Fri 22:40
1.71	**Crown Central** Filter 1401 N. Main St. (US 311) & W. Lexington Ave.	High Point	Sun 20:17
1.71	**BP / Kangaroo** Filter E. Parris Ave. & Johnson St.	High Point	Sun 20:17
1.71	**Quality Mart No 4** Filter 2904 S. Main St. (US 311) & Archdale Rd.	High Point	Fri 22:40
1.71	**ETNA Self Svc** Filter 2608 S. Main St. (US 311) & Fraley Rd.	High Point	Fri 22:40
1.71	**ETNA Self Svc** Filter N Main St (US 311) & Trindale Rd (NC 62)	Archdale	Fri 22:40
1.71	**Exxon** Filter On the Run 820 N. Main St. & Montlieu Ave.	High Point	Fri 19:20
1.72	**Hess** Filter Friendly & Guilford College Rd	Greensboro	Sun 05:35
1.72	**Texaco** Filter 2800 S. Main St. (US 311) & W. Fairfield Rd.	High Point	Fri 22:40
1.72	**Citgo** Filter 2010 S. Main St. (U. S. Hwy 311) & Business I-85	High Point	Fri 22:40
1.72	**BP** Filter Zingo Exp. 11612 N. Main St. US 311 & Baker Rd.	Archdale	Fri 22:40
1.72	**Costco** Filter Wendover AVE. & I-40	Greensboro	Fri 19:20
1.72	**Crown Central** Filter 1619 W Lee St	Greensboro - South	Fri 18:59

JANUARY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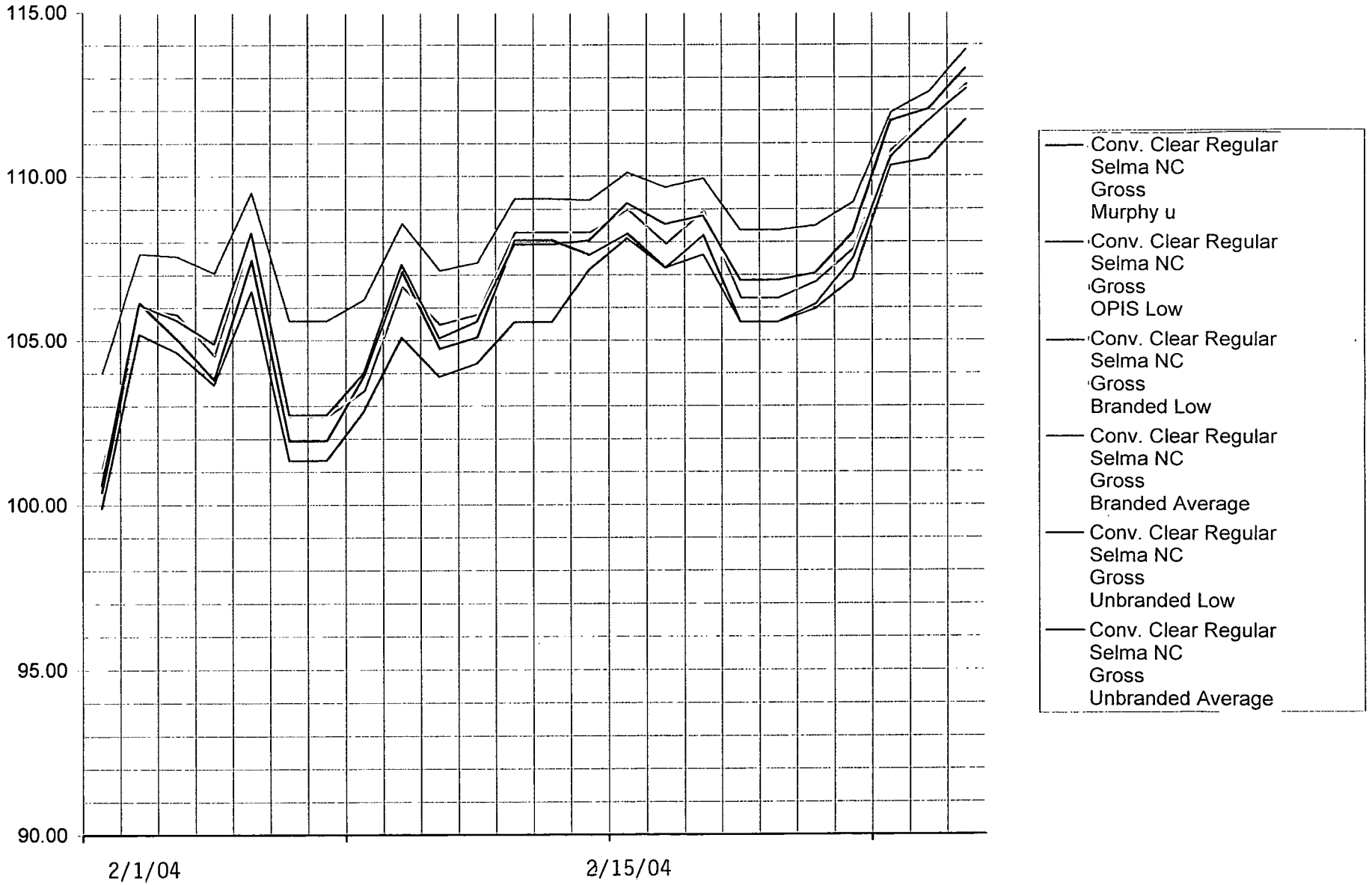
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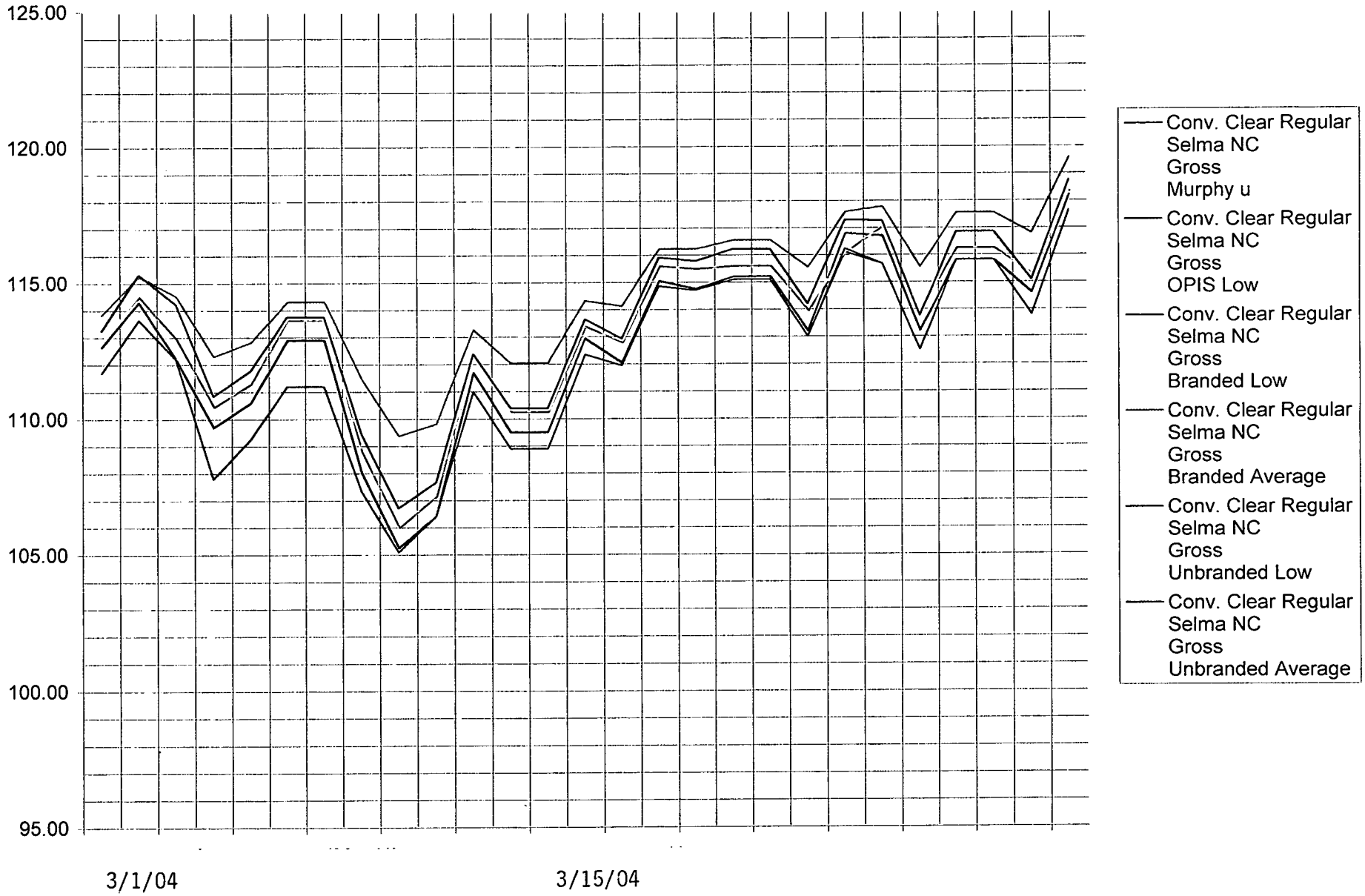
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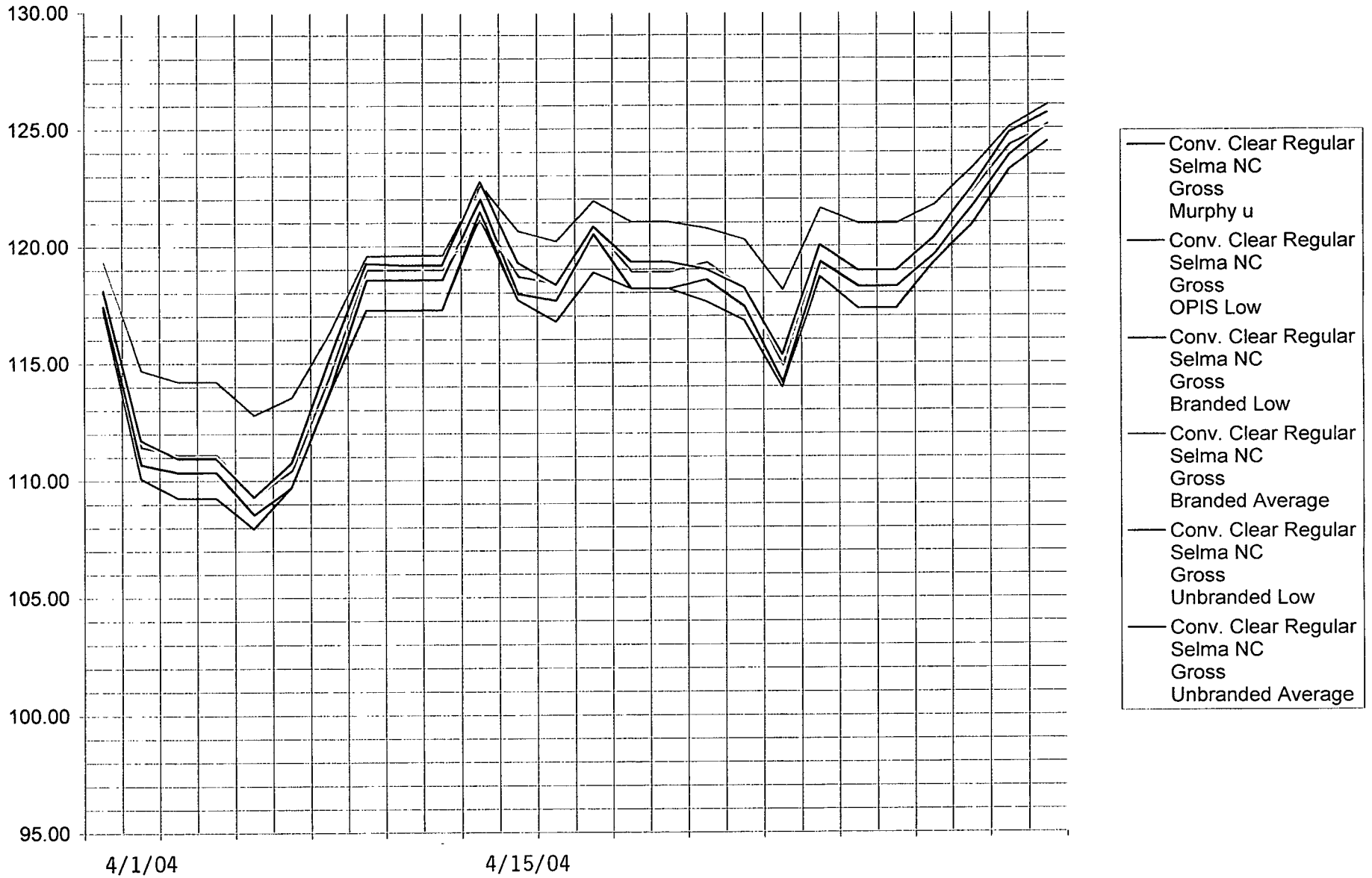
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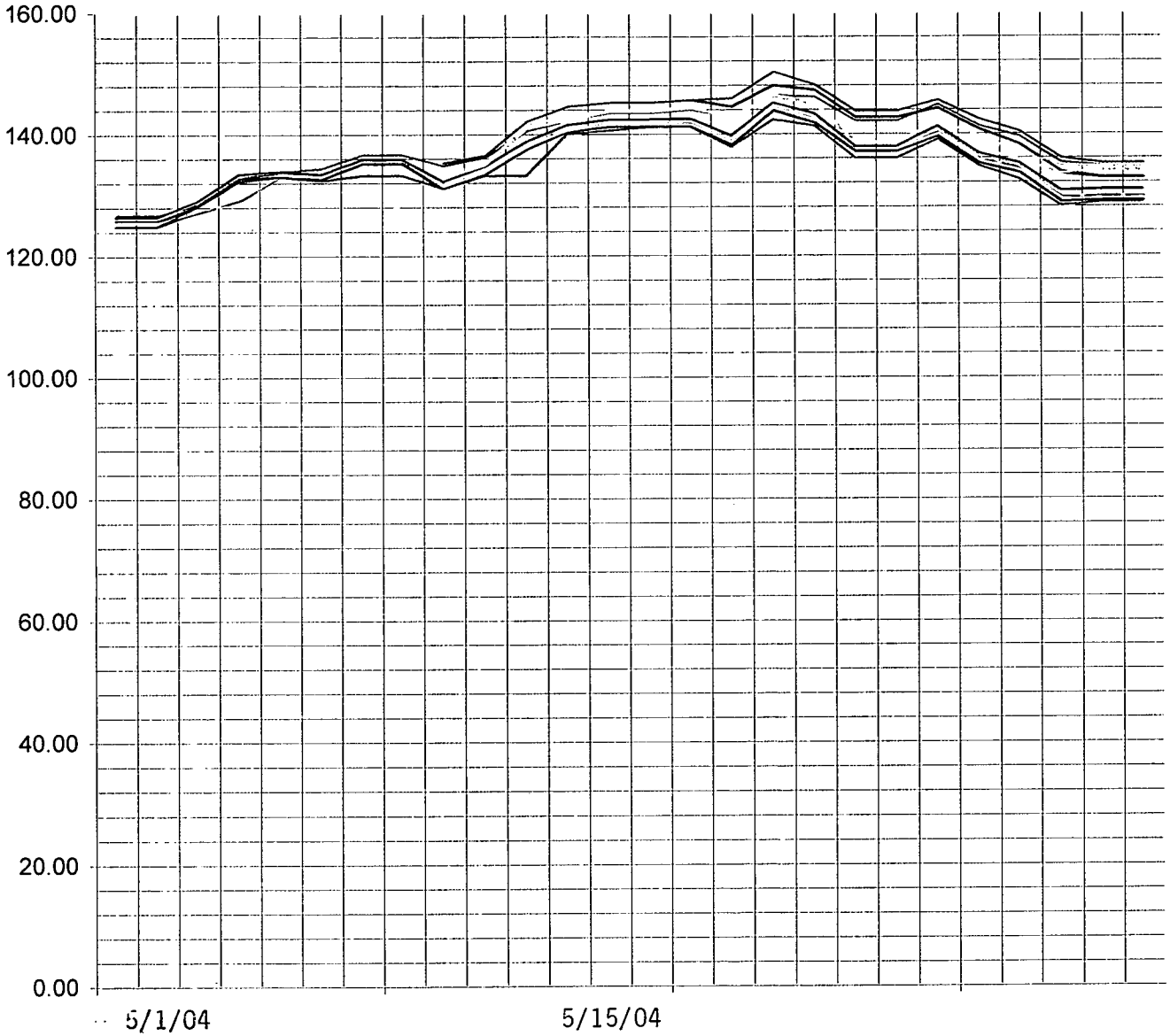

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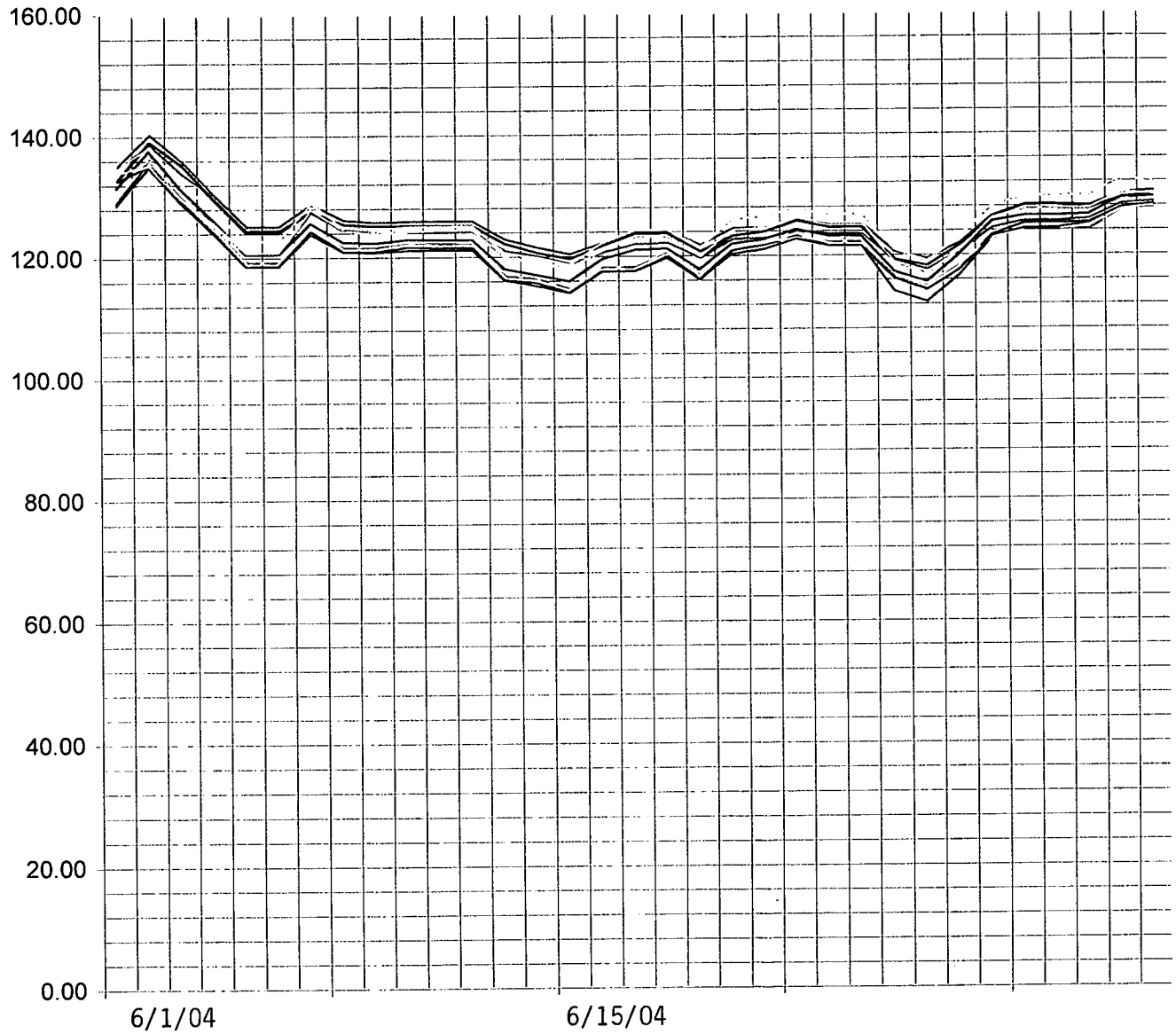

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OPIS Standard Rack Prices Daily for 01/01/2004 - 7/8/2004

Date (Daily)	DOW	Conv. Clear Regular Selma NC Gross Murphy u	Conv. Clear Regular Selma NC Gross OPIS Low	Conv. Clear Regular Selma NC Gross Branded Low	Conv. Clear Regular Selma NC Gross Branded Average	Conv. Clear Regular Selma NC Gross Unbranded Low	Conv. Clear Regular Selma NC Gross Unbranded Average
01/01/2004	Thu	96.25	95.50	96.20	96.78	95.50	96.49
01/02/2004	Fri	96.25	95.50	96.20	96.80	95.50	96.49
01/03/2004	Sat	96.25	95.50	96.20	96.78	95.50	96.48
01/05/2004	Mon	96.25	95.50	96.20	96.78	95.50	96.48
01/06/2004	Tue	101.15	99.95	99.95	100.88	100.43	101.39
[redacted]/07/2004	Wed	100.10	99.35	100.00	100.58	99.35	100.19
[redacted]/08/2004	Thu	99.40	99.40	100.15	100.68	99.40	100.07
[redacted]/09/2004	Fri	102.95	101.90	102.00	102.99	101.90	103.19
01/10/2004	Sat	106.05	104.80	104.80	105.90	104.90	106.30
01/12/2004	Mon	106.05	104.80	104.80	105.90	104.90	106.30
01/13/2004	Tue	104.60	104.25	105.25	105.95	104.25	105.27
01/14/2004	Wed	101.60	101.60	102.35	104.45	101.60	102.85
01/15/2004	Thu	99.60	99.60	100.35	103.23	99.60	100.96
01/16/2004	Fri	93.75	93.75	94.50	98.80	93.75	95.19
01/17/2004	Sat	100.80	99.75	101.55	103.23	99.75	101.33
01/19/2004	Mon	100.80	99.75	101.55	103.23	99.75	101.33
01/20/2004	Tue	100.70	99.75	101.45	103.21	99.75	101.53
01/21/2004	Wed	103.80	103.25	103.25	104.88	103.44	104.22
01/22/2004	Thu	104.60	104.10	105.05	106.14	104.10	105.16
01/23/2004	Fri	106.90	106.65	107.30	108.21	106.65	107.74
01/24/2004	Sat	105.80	105.50	106.55	107.78	105.50	106.55
01/26/2004	Mon	105.80	105.50	106.55	107.78	105.50	106.55
01/27/2004	Tue	102.00	101.85	102.75	105.77	101.85	102.83
01/28/2004	Wed	100.95	99.85	101.70	104.67	99.85	101.33
01/29/2004	Thu	100.70	100.00	101.45	104.37	100.00	100.95
01/30/2004	Fri	100.00	100.00	100.75	104.13	100.00	100.83
01/31/2004	Sat	100.40	99.90	101.15	104.02	99.90	100.61
02/02/2004	Mon	100.40	99.90	101.15	104.02	99.90	100.61
02/03/2004	Tue	106.15	105.20	106.00	107.64	105.20	106.10
02/04/2004	Wed	105.05	104.65	105.80	107.56	104.65	105.62
02/05/2004	Thu	103.80	103.65	104.55	107.05	103.65	104.90
02/06/2004	Fri	107.45	106.50	108.20	109.50	106.50	108.28
02/07/2004	Sat	101.95	101.35	102.70	105.59	101.35	102.73
02/09/2004	Mon	101.95	101.35	102.70	105.59	101.35	102.73
02/10/2004	Tue	103.95	102.85	103.50	106.25	102.85	104.01
02/11/2004	Wed	107.10	105.10	106.65	108.56	105.10	107.32
02/12/2004	Thu	104.75	103.90	105.50	107.12	103.90	105.07
02/13/2004	Fri	105.10	104.30	105.80	107.36	104.30	105.57
02/14/2004	Sat	108.05	105.55	108.30	109.30	105.55	107.91
02/16/2004	Mon	108.05	105.55	108.30	109.30	105.55	107.91
02/17/2004	Tue	107.60	107.15	108.30	109.26	107.15	108.04
02/18/2004	Wed	108.25	108.10	109.00	110.10	108.10	109.17
02/19/2004	Thu	107.20	107.20	107.95	109.65	107.20	108.53
02/20/2004	Fri	108.20	107.60	108.95	109.92	107.60	108.79
02/21/2004	Sat	105.55	105.55	106.30	108.34	105.55	106.82
02/23/2004	Mon	105.55	105.55	106.30	108.34	105.55	106.82
02/24/2004	Tue	106.10	105.95	106.80	108.48	105.95	107.04
[redacted]/25/2004	Wed	107.50	106.85	107.80	109.19	106.85	108.26
[redacted]/26/2004	Thu	110.60	110.30	110.80	111.92	110.30	111.67
[redacted]/27/2004	Fri	111.70	110.50	111.75	112.55	110.50	112.02
[redacted]/28/2004	Sat	112.65	111.70	112.80	113.84	111.70	113.26
03/01/2004	Mon	112.65	111.70	112.80	113.84	111.70	113.26
03/02/2004	Tue	114.30	113.65	114.50	115.26	113.65	115.32
03/03/2004	Wed	112.20	112.20	112.95	114.53	112.20	114.22
03/04/2004	Thu	109.70	107.80	110.45	112.31	107.80	110.85
03/05/2004	Fri	110.60	109.25	111.30	112.83	109.25	111.77
03/06/2004	Sat	112.90	111.20	113.65	114.32	111.20	113.75
03/08/2004	Mon	112.90	111.20	113.65	114.32	111.20	113.75
03/09/2004	Tue	108.05	107.35	108.80	111.48	107.35	109.47
03/10/2004	Wed	105.25	105.10	106.00	109.37	105.10	106.72
03/11/2004	Thu	106.40	106.40	107.15	109.80	106.40	107.66
03/12/2004	Fri	111.70	111.00	112.30	113.27	111.00	112.38
03/13/2004	Sat	109.50	108.90	110.25	112.04	108.90	110.39
03/15/2004	Mon	109.50	108.90	110.25	112.04	108.90	110.39
03/16/2004	Tue	112.95	112.36	113.40	114.33	112.36	113.66
03/17/2004	Wed	112.05	111.95	112.80	114.13	111.95	112.93
03/18/2004	Thu	115.05	114.85	115.60	116.23	114.85	115.91
03/19/2004	Fri	114.75	114.70	115.50	116.22	114.70	115.78
03/20/2004	Sat	115.20	115.10	115.60	116.54	115.10	116.21
03/22/2004	Mon	115.20	115.10	115.60	116.54	115.10	116.21
03/23/2004	Tue	113.20	113.00	113.95	115.54	113.00	114.20
03/24/2004	Wed	116.80	116.10	116.10	117.57	116.22	117.28
03/25/2004	Thu	116.70	115.67	117.05	117.77	115.67	117.26
03/26/2004	Fri	113.20	112.51	113.95	115.55	112.51	113.76
03/27/2004	Sat	115.80	115.80	116.25	117.54	115.80	116.84
03/29/2004	Mon	115.80	115.80	116.25	117.54	115.80	116.84
03/30/2004	Tue	114.60	113.80	115.30	116.79	113.80	115.08
03/31/2004	Wed	118.20	117.62	118.35	119.58	117.62	118.74
04/01/2004	Thu	117.45	117.30	118.20	119.33	117.30	118.10
04/02/2004	Fri	110.70	110.10	111.45	114.71	110.10	111.73
04/03/2004	Sat	110.35	109.25	111.10	114.22	109.25	110.94
04/05/2004	Mon	110.35	109.25	111.10	114.22	109.25	110.94
04/06/2004	Tue	108.55	107.95	109.30	112.80	107.95	109.29
04/07/2004	Wed	109.70	109.70	110.45	113.54	109.70	110.75
04/08/2004	Thu	113.75	113.65	114.50	116.30	113.65	115.16
04/09/2004	Fri	118.55	117.25	119.00	119.57	117.25	119.25
04/10/2004	Sat	118.55	117.25	119.00	119.60	117.25	119.17
04/12/2004	Mon	118.55	117.25	119.00	119.60	117.25	119.17
04/13/2004	Tue	122.00	121.20	121.20	122.61	121.45	122.75
04/14/2004	Wed	117.95	117.67	118.70	120.63	117.67	119.27
04/15/2004	Thu	117.65	116.75	118.40	120.19	116.75	118.33
[redacted]/16/2004	Fri	120.50	118.85	120.80	121.91	118.85	120.81
[redacted]/17/2004	Sat	118.15	118.15	118.90	121.02	118.15	119.30
04/19/2004	Mon	118.15	118.15	118.90	121.02	118.15	119.30
04/20/2004	Tue	118.55	117.60	119.30	120.74	117.60	118.98
04/21/2004	Wed	117.40	116.80	118.15	120.26	116.80	118.19
04/22/2004	Thu	114.15	113.95	114.90	118.10	113.95	115.33
04/23/2004	Fri	119.30	118.65	120.05	121.60	118.65	120.02
04/24/2004	Sat	118.25	117.30	119.00	120.93	117.30	118.92
04/26/2004	Mon	118.25	117.30	119.00	120.93	117.30	118.92
04/27/2004	Tue	119.60	119.25	120.35	121.72	119.25	120.31
04/28/2004	Wed	121.60	120.80	122.30	123.25	120.80	122.38
04/29/2004	Thu	123.85	123.21	124.30	125.05	123.21	124.78
04/30/2004	Fri	125.15	124.41	125.10	126.00	124.41	125.63

OPIS Standard Rack Prices Daily for 01/01/2004 - 7/8/2004

Date (Daily)	DOW	Conv. Clear Regular RVP 9.0 Selma NC Gross Murphy u	Conv. Clear Regular RVP 9.0 Selma NC Gross OPIS Low	Conv. Clear Regular RVP 9.0 Selma NC Gross Branded Low	Conv. Clear Regular RVP 9.0 Selma NC Gross Branded Average	Conv. Clear Regular RVP 9.0 Selma NC Gross Unbranded Low	Conv. Clear Regular RVP 9.0 Selma NC Gross Unbranded Average
05/01/2004	Sat	125.80	124.80	125.60	126.80	124.80	126.39
05/03/2004	Mon	125.80	124.80	125.60	126.80	124.80	126.39
05/04/2004	Tue	128.20	127.20	127.20	128.51	128.15	129.04
05/05/2004	Wed	132.75	129.20	129.20	132.82	132.18	133.41
05/06/2004	Thu	133.00	132.95	133.10	133.88	132.95	133.85
05/07/2004	Fri	132.60	132.30	133.35	134.42	132.30	133.38
05/08/2004	Sat	135.20	133.15	135.80	136.68	133.15	135.78
05/10/2004	Mon	135.20	133.15	135.80	136.68	133.15	135.78
05/11/2004	Tue	131.00	131.00	131.75	134.86	131.00	132.20
05/12/2004	Wed	133.40	133.10	134.15	136.27	133.10	134.66
05/13/2004	Thu	137.50	133.10	138.25	140.55	133.10	138.74
05/14/2004	Fri	140.45	140.00	140.60	142.28	140.00	141.45
05/15/2004	Sat	141.20	140.55	141.80	143.50	140.55	142.30
05/17/2004	Mon	141.20	141.05	141.80	143.50	141.05	142.36
05/18/2004	Tue	141.15	141.05	141.90	144.02	141.05	142.45
05/19/2004	Wed	138.15	137.75	138.90	142.77	137.75	139.65
05/20/2004	Thu	143.85	142.25	144.60	146.35	142.25	145.07
05/21/2004	Fri	141.80	141.24	142.55	146.08	141.24	143.27
05/22/2004	Sat	137.10	135.90	137.85	142.14	135.90	137.82
05/24/2004	Mon	137.10	135.90	137.85	142.14	135.90	137.82
05/25/2004	Tue	139.55	138.99	140.30	144.80	138.99	141.19
05/26/2004	Wed	135.15	134.60	135.90	141.27	134.60	136.70
05/27/2004	Thu	133.55	132.35	134.30	139.50	132.35	135.06
05/28/2004	Fri	128.75	128.02	129.50	135.25	128.02	130.54
05/29/2004	Sat	128.95	128.55	129.70	134.60	128.55	130.72
05/31/2004	Mon	128.95	128.55	129.70	134.60	128.55	130.72
06/01/2004	Tue	128.95	128.55	129.70	134.60	128.55	131.47
06/02/2004	Wed	136.25	134.85	136.20	138.61	134.85	137.59
06/03/2004	Thu	129.10	128.95	129.85	133.83	128.95	131.24
06/04/2004	Fri	124.10	124.00	124.85	130.13	124.00	126.17
06/05/2004	Sat	118.45	118.45	119.20	124.49	118.45	120.50
06/07/2004	Mon	118.45	118.45	119.20	124.49	118.45	120.50
06/08/2004	Tue	124.30	123.75	125.05	127.40	123.75	125.57
06/09/2004	Wed	120.85	120.85	121.60	124.48	120.85	122.48
06/10/2004	Thu	120.85	120.70	121.60	123.99	120.70	122.29
06/11/2004	Fri	121.65	121.05	122.40	124.20	121.05	122.91
06/12/2004	Sat	121.50	121.05	122.25	124.18	121.05	122.78
06/14/2004	Mon	121.50	121.05	122.25	124.18	121.05	122.78
06/15/2004	Tue	116.10	116.10	116.85	120.97	116.10	117.96
06/16/2004	Wed	115.65	115.14	116.40	120.07	115.14	116.92
06/17/2004	Thu	113.95	113.95	114.70	118.68	113.95	115.91
06/18/2004	Fri	117.45	117.45	118.20	120.60	117.45	119.51
06/19/2004	Sat	117.45	117.45	118.20	121.95	117.45	120.96
06/21/2004	Mon	119.85	119.65	120.60	122.13	119.65	121.20
06/22/2004	Tue	116.10	116.10	116.85	119.62	116.10	117.70
06/23/2004	Wed	120.85	120.20	121.50	122.68	120.20	121.87
06/24/2004	Thu	121.75	121.00	122.00	122.85	121.00	122.59
06/25/2004	Fri	123.15	122.65	123.00	124.07	122.65	124.25
06/26/2004	Sat	121.50	121.50	122.25	123.51	121.50	123.13
06/28/2004	Mon	121.50	121.50	122.25	123.51	121.50	123.13
06/29/2004	Tue	116.25	114.04	117.00	119.12	114.04	117.27
06/30/2004	Wed	114.25	112.28	115.00	117.58	112.28	115.52
07/01/2004	Thu	117.60	116.64	118.35	120.52	116.64	120.03
07/02/2004	Fri	123.20	122.70	122.70	124.40	122.98	125.45
07/03/2004	Sat	125.10	124.20	124.20	125.46	124.25	126.33
07/05/2004	Mon	125.10	124.20	124.20	125.46	124.25	126.33
07/06/2004	Tue	125.10	124.20	124.20	125.76	125.05	126.49
07/07/2004	Wed	127.60	127.45	127.45	128.24	127.60	129.29
07/08/2004	Thu	128.10	127.75	127.75	128.56	128.10	129.35

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OPIS Standard Rack Prices Daily for 01/01/2004 - 7/8/2004

Date (Daily)	DOW	Conv. Clear Regular RVP 7.8 Selma NC Gross OPIS Low	Conv. Clear Regular RVP 7.8 Selma NC Gross Branded Low	Conv. Clear Regular RVP 7.8 Selma NC Gross Branded Average	Conv. Clear Regular RVP 7.8 Selma NC Gross Unbranded Low	Conv. Clear Regular RVP 7.8 Selma NC Gross Unbranded Average
05/11/2004	Tue	132.80	135.30	135.30	132.80	132.80
05/12/2004	Wed	134.80	136.55	136.55	134.80	135.00
05/13/2004	Thu	141.00	142.10	142.10	141.00	141.60
05/14/2004	Fri	142.25	144.60	144.60	142.25	142.93
05/15/2004	Sat	143.65	145.20	145.20	143.65	143.90
05/17/2004	Mon	143.65	145.20	145.20	143.65	143.90
05/18/2004	Tue	144.25	145.60	145.60	144.25	144.45
05/19/2004	Wed	142.65	144.50	145.88	142.65	142.78
05/20/2004	Thu	146.15	148.00	150.23	146.15	146.38
05/21/2004	Fri	144.90	147.20	148.08	144.90	145.25
05/22/2004	Sat	138.50	142.70	143.75	138.50	138.58
05/24/2004	Mon	138.50	142.70	143.75	138.50	138.58
05/25/2004	Tue	141.90	144.20	145.55	141.90	142.03
05/26/2004	Wed	137.40	140.70	142.41	137.40	139.65
05/27/2004	Thu	135.75	138.20	140.36	135.75	136.83
05/28/2004	Fri	133.40	133.70	135.98	133.40	134.80
05/29/2004	Sat	132.70	132.70	135.10	133.90	134.58
05/31/2004	Mon	132.70	132.70	135.10	133.90	134.58
06/01/2004	Tue	132.70	132.70	135.10	133.90	134.58
06/02/2004	Wed	135.20	139.10	140.34	135.20	138.30
06/03/2004	Thu	129.55	135.25	135.89	129.55	132.30
06/04/2004	Fri	125.85	129.60	130.44	125.85	128.09
06/05/2004	Sat	120.75	124.10	125.11	120.75	122.69
06/07/2004	Mon	120.75	124.10	125.11	120.75	122.69
06/08/2004	Tue	127.60	127.60	128.75	127.85	128.96
06/09/2004	Wed	124.35	125.40	126.11	124.35	124.79
06/10/2004	Thu	123.95	125.10	125.73	123.95	124.56
06/11/2004	Fri	124.20	125.10	125.88	124.20	125.05
06/12/2004	Sat	124.40	125.10	125.88	124.40	125.09
06/14/2004	Mon	124.40	125.10	125.88	124.40	125.09
06/15/2004	Tue	119.95	122.15	122.89	119.95	120.58
06/16/2004	Wed	119.00	120.60	121.51	119.00	119.83
06/17/2004	Thu	118.05	119.60	120.36	118.05	118.58
06/18/2004	Fri	120.95	121.70	122.20	120.95	122.24
06/19/2004	Sat	123.15	123.70	124.04	123.15	124.23
06/21/2004	Mon	123.15	123.70	124.04	123.15	124.23
06/22/2004	Tue	119.90	120.70	121.79	119.90	121.41
06/23/2004	Wed	123.20	123.20	124.48	124.15	125.88
06/24/2004	Thu	123.90	123.90	124.53	124.50	126.51
06/25/2004	Fri	125.65	125.65	126.00	126.15	127.73
06/26/2004	Sat	124.55	124.55	125.18	125.25	126.64
06/28/2004	Mon	124.55	124.55	125.18	125.25	126.64
06/29/2004	Tue	118.75	119.20	120.50	118.75	120.80
06/30/2004	Wed	116.85	118.20	119.33	116.85	118.99
07/01/2004	Thu	120.85	121.60	121.96	120.85	122.88
07/02/2004	Fri	126.00	126.10	126.40	126.00	128.05
07/03/2004	Sat	127.50	128.10	128.19	127.50	129.66
07/05/2004	Mon	127.50	128.10	128.19	127.50	129.66
07/06/2004	Tue	127.45	127.45	127.94	127.50	129.66
07/07/2004	Wed	129.25	129.25	130.03	130.10	132.51
07/08/2004	Thu	129.75	129.75	130.39	129.75	131.84

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VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 7-13-04

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Mary Gorgaras	NC Bar Assoc
Audrey L. Shearin	Eastern Petroleum Corp.
Hadden Clark	United Energy Inc.
Michael Barnes	Wilson Petroleum Co, Inc
HAROLD KENNEDY	REX OIL COMPANY
Mike Ilderton	Ilderton Oil Co.
Andy Ellen	NCRML
Tom Sid	NCRML
Fren Preston	NCRML
Jim Lambert	Bell Davis, Pitt
Frank McNeill Jr.	McNeill Oil Co.

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Steve Ainsworth	RJR
Paul Hollowell	Infocrime Inc.
Bill Washington	NC Petroleum Council
Kip Sturgis	AGi Affairs
Edward Holmes	Holmes Oil
Bill Russell	ACP
Doug Hong	NCAMA
Harold Berry	Parker White & Brown LLP
Gary Harris	NCPMA
John McHugh	Gov Affairs
Reynolda Skinner	NCACPS

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Ed Turlington	Brooks Pierce
Paul Stock	NC Bankers Assn
	Land Citizens Bk
Betty Renner	Bank of America
	NCSSA
Glenn Lamm	VTO
Tim Minton	NC Home Builders

Principal Clerk ____
Reading Clerk ____

SENATE
NOTICE OF COMMITTEE MEETING
AND
BILL SPONSOR NOTICE

The Senate Committee on **Judiciary II** will meet at the following time:

DAY	DATE	TIME	ROOM
Thursday	July 15, 2004	10:00 AM	1124 LB

The following will be considered:

BILL NO.	SHORT TITLE	SPONSOR
HB 1665	Venue for Juvenile Hearings.	Representative Frye

Senator Fletcher L. Hartsell, Jr., Chair

Senate Judiciary II Committee
Thursday, July 15, 2004, 10:00 AM
1124 LB

AGENDA

Welcome and Opening Remarks

Introduction of Pages

Bills

HB 1665	Venue for Juvenile Hearings.	Representative Frye

Presentations

Other Business

Adjournment

NORTH CAROLINA GENERAL ASSEMBLY
SENATE

JUDICIARY II COMMITTEE REPORT
Senator Fletcher L. Hartsell, Jr., Chair

Thursday, July 15, 2004

Senator HARTSELL, JR.,
submits the following with recommendations as to passage:

FAVORABLE

H.B.(CS #1) **1665** Venue for Juvenile Hearings.
Sequential Referral: None
Recommended Referral: None

TOTAL REPORTED: 1

Committee Clerk Comments:

Senate Judiciary II Committee

Minutes

July 15, 2004

Senator Fletcher Hartsell, Chairman, called the Senate Judiciary II committee to order on July 9, 2004, with nine members present.

HB 1665 (Venue for Juvenile Hearings) Senator Hartsell recognized Representative Frye to explain the bill. Mr. Larry Dix and Ms. Kathy Dudley of the Department of Juvenile Justice and Delinquency Prevention spoke on the bill. After a brief discussion by the Committee, Senator Dannelly moved for a favorable report. All members voted and the motion passed.

With no further business, the meeting was adjourned.

Fletcher L. Hartsell, Chairman

Gerry Johnson, Committee Assistant

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

H 2

HOUSE BILL 1665

Committee Substitute Favorable 6/29/04

Short Title: Venue for Juvenile Hearings. (Public)

Sponsors:

Referred to:

May 26, 2004

A BILL TO BE ENTITLED

AN ACT TO REQUIRE THE DISPOSITIONAL HEARING OF A JUVENILE WHO IS IN RESIDENTIAL TREATMENT BE HELD IN THE COUNTY IN WHICH THE JUVENILE IS RECEIVING TREATMENT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 7B-1800 reads as rewritten:

"**§ 7B-1800. Venue.**

(a) A proceeding in which a juvenile is alleged to be delinquent or undisciplined shall be commenced and adjudicated in the district in which the offense is alleged to have occurred. When a proceeding is commenced in a district other than that of the juvenile's residence, the court shall proceed to adjudication in that ~~district.~~ district and, if the juvenile is in residential treatment or foster care in that district, the court shall conduct the dispositional hearing in that district as well, unless the judge enters an order, supported by findings of fact, that a transfer would serve the ends of justice or is in the best interests of the juvenile.

(b) ~~After~~ Except as provided in subsection (a) of this section, after adjudication, the following procedures shall be available to the court:

(1) The court may transfer the proceeding to the court in the district where the juvenile resides for disposition.

(2) Where the proceeding is not transferred under subdivision (1) of this section, the court shall immediately notify the chief district court judge in the district in which the juvenile resides. If the chief district court judge requests a transfer within five days after receipt of notification, the court shall transfer the proceeding.

(3) Where the proceeding is not transferred under subdivision (1) or (2) of this section, the court, upon motion of the juvenile, shall transfer the proceeding to the court in the district where the juvenile resides for disposition. The court shall advise the juvenile of the juvenile's right to transfer under this section."

SECTION 2. This act becomes effective October 1, 2004, and applies to hearings conducted on or after that date.

HB 1665:
Venue For Juvenile Hearings

BILL ANALYSIS

Committee:	Senate Judiciary II	**Introduced by:**	Rep. Frye
Date:	July 15, 2004	**Summary by:**	Sandra Alley
Version:	2nd Edition		Committee Counsel

SUMMARY: ***HB 1665 modifies the venue statute applicable to proceedings in District Court involving an allegation that a juvenile is delinquent or undisciplined. The bill would restrict transfer of the case to the district where the juvenile resides prior to the dispositional hearing if the juvenile is in residential treatment or foster care in the district where the proceedings are commenced.***

CURRENT LAW: G.S. 7B-1800 prescribes the venue for proceedings involving a juvenile alleged to be delinquent or undisciplined. It requires the proceeding to be commenced and adjudicated in the district where the offense took place. However, if that district is not the district of residence of the juvenile, there are transfer options to transfer the case to the district of residence available after adjudication, but before disposition. These include:

1. Transfer by the court.
2. Transfer upon the request of the chief district court judge of the district where the juvenile resides.
3. Transfer to the residence district upon motion of the juvenile.

BILL ANALYSIS: HB 1665 amends G.S. 7B-1800 by providing that if the non-resident juvenile is in a residential treatment program or foster care in the district where the proceedings are commenced, the court must conduct the dispositional hearing in that district unless the judge enters an order, supported by findings of fact, that a transfer would serve the ends of justice and or is in the best interests of the juvenile.

The act is effective October 1, 2004 and applies to hearings conducted on or after that date.

Steve Rose, Principal Attorney, contributed significantly to this summary.

H1665-SMSP-002

NORTH CAROLINA GENERAL ASSEMBLY
LEGISLATIVE FISCAL NOTE

BILL NUMBER: House Bill 1665 (Second Edition)

SHORT TITLE: Venue for Juvenile Hearings.

SPONSOR(S): Representative Frye

FISCAL IMPACT

Yes ( ) **No ( )** **No Estimate Available (X)**

	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09
REVENUES			Unable to determine		
EXPENDITURES			Unable to determine		
POSITIONS: (cumulative)					

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Juvenile Justice and Delinquency Prevention; Administrative Office of the Courts

EFFECTIVE DATE: October 1, 2004

BILL SUMMARY: Amends GS 7B-1800 for purpose indicated in title. Requires Department of Juvenile Justice and Delinquency, in consultation with Administrative Office of the Courts, to develop and implement plan for supervision, services, and treatment of juveniles in residential treatment or foster care in counties or districts other than their counties of residence, effective October 1, 2004. Appropriates $10,000 for 2004-2005 from General Fund to Department for plan. Effective July 1, 2004.

House committee substitute makes the following changes to 1st edition. Amends GS 7B-1800(a) to provide that a dispositional hearing may be held in district other than where juvenile is in residential treatment or foster care if judge finds that transfer would serve the ends of justice or would be in the best interests of the juvenile. Deletes sec. 2 (plan for juveniles in care outside counties of residence) and sec. 3 (appropriating funds for plan). Changes effective date to October 1, 2004 (was, July 1, 2004).

Source: Bill Digest H.B. 1665 (05/26/2004)

ASSUMPTIONS AND METHODOLOGY

Administrative Office of the Courts (AOC)
The bill will not affect the number of dispositional hearings required for juveniles. Therefore, there is no anticipated impact on court costs.

Department of Juvenile Justice and Delinquency Prevention (DJJDP)
For those juveniles under DJJDP supervision, there is no available data indicating the locations of juveniles' counties of residences in relation to the counties where dispositional hearings were held. However, since the proposed bill does not affect the number of hearings required, there is no anticipated impact on DJJDP's cost.

TECHNICAL CONSIDERATIONS: None

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Fiscal Research Division

DATE: July 14, 2004

Signed Copy Located in the NCGA Principal Clerk's Offices

VISITOR REGISTRATION SHEET

SENATE JUDICIARY II — 7-15-04

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Mary Gurganus	NC Bar Assoc
Michelle Frazier	NC Bar Ass'n
Judy Stephens	DJJDP
Kathy Dudley	DJJDP
[illegible] Dick	DJJDP
J McCants	AOC
[illegible]	GOG Office
Kevin G. Leonard	DCSR
Jim Blackburn	Association of County Commissioners