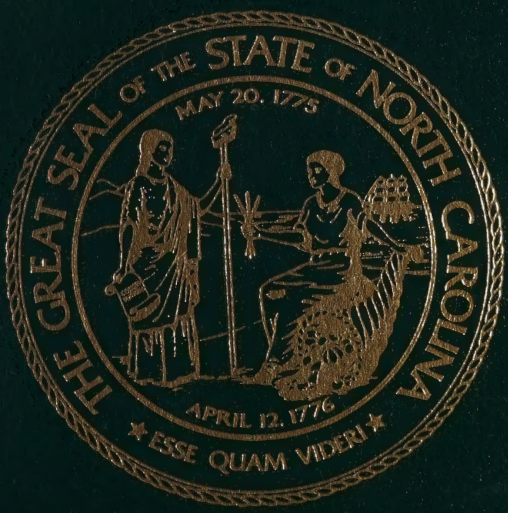
General Statutes of North Carolina

ANNOTATED



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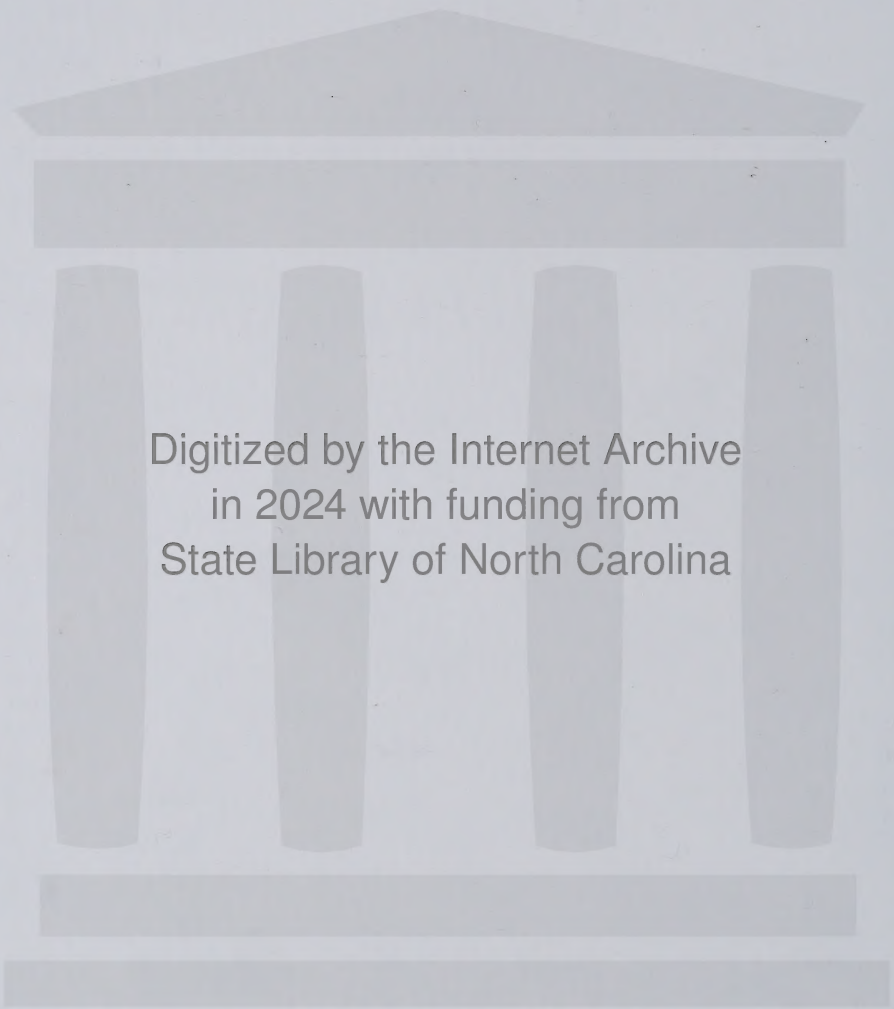

GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

2000 INTERIM SUPPLEMENT

Volume 1

Chapters 1 to 86A

CONTAINING GENERAL LAWS OF NORTH CAROLINA
ENACTED BY THE GENERAL ASSEMBLY

Prepared under the Supervision of
THE DEPARTMENT OF JUSTICE
OF THE STATE OF NORTH CAROLINA
by
The Editorial Staff of the Publishers
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K. S. MAWYER, M. R. LANGSAM, AND V. H. SPENCER

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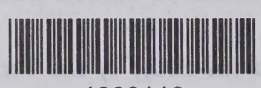

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Preface

This Volume contains the general laws of a permanent nature enacted by the General Assembly at the 2000 Extra Session and the 2000 Regular Session, which are within Chapters 2000-1 through 2000-191, and brings to date the annotations included therein. Also included are the general laws of a permanent nature enacted at the 1999 Extra Session held on December 15 and 16, 1999, which are within Chapter 1999-463, and which were first published in the 2000 Special Supplement.

A majority of the Session Laws are made effective upon becoming law, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 60 days after the adjournment of the session" in which passed.

For detailed research on any subject, both within this volume and the General Statutes as a whole, see the General Index to the General Statutes.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, selected opinions which construe a specific statute are cited in the annotations to that statute. For a copy of an opinion or of its headnotes, write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

This recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any suggestions they may have for improving the General Statutes to the Department, or to LEXIS Publishing, Charlottesville, Virginia.

MICHAEL F. EASLEY
Attorney General

Scope of Volume

Statutes:

Permanent portions of the general laws enacted by the General Assembly at the 2000 Extra Session and the 2000 Regular Session, which are within Chapters 2000-1 through 2000-191. Also included are permanent portions of the general laws enacted at the 1999 Extra Session held on December 15 and 16, 1999, which are within Chapter 1999-463, and which were first published in the 2000 Special Supplement.

Annotations:

To better serve our customers, by making our annotations more current, LEXIS Publishing has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of the more current reading of cases, as they are posted online on LEXIS, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the North Carolina Supreme Court posted on LEXIS as of July 11, 2000, decisions of the North Carolina Court of Appeals posted as of July 11, 2000, and decisions of the appropriate federal courts posted as of July 11, 2000. These cases will be printed in the following reports:

South Eastern Reporter 2nd Series
Federal Reporter 3rd Series
Federal Supplement 2nd Series
Federal Rules Decisions
Bankruptcy Reports
Supreme Court Reporter

Additionally, annotations have been taken from the following sources:

North Carolina Law Review through Volume 78, no. 5, p. 1704
Wake Forest law Review through Volume 35, no. 2, p. 508
Campbell law Review through Volume 22, no. 1, p. 251
Duke Law Review through Volume 49, no. 2, p. 599
North Carolina Central Law Journal through Volume 22, no. 1, p. 100
Opinions of the Attorney General

User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1 of the 1999 Replacement Code. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 for the complete User's Guide.

Abbreviations

(The abbreviations below are those found in the General Statutes which refer to prior codes.)

P.R. ..... Potter's Revisal (1821, 1827)
R.S. ..... Revised Statutes (1837)
R.C. ..... Revised Code (1854)
C.C.P. ..... Code of Civil Procedure (1868)
Code ..... Code (1883)
Rev. ..... Revisal of 1905
C.S. ..... Consolidated Statutes (1919, 1924)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

October, 2000

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 2000 Interim Supplement to the General Statutes of North Carolina was prepared and published by LEXIS Publishing under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY
Attorney General of North Carolina

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Applied in Little v. Hamel, 134 N.C. App. 485, 517 S.E.2d 901 (1999); Brisson v. Kathy A. Santoriello, M.D., P.A., 351 N.C. 589, 528 S.E.2d 568 (2000).

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Jury Instruction on Effect of Discovery

of Injury. — Defendant was entitled to a jury instruction on the effect of plaintiff's discovery of his injury vis-a-vis the continuous course of conduct doctrine and the running of the statute of limitations; plaintiff knew he was incontinent and impotent, but there was some question whether he knew or should have known that defendant's conduct was wrongful and whether that conduct caused his incontinence and impotence, prior to the running of the statute of limitations. Whitaker v. Akers, — N.C. App. —, 527 S.E.2d 721, 2000 N.C. App. LEXIS 315 (2000).

Prescription Medication Not Continuing Course of Treatment. — Prescription medication, absent any other contact with a doctor, did not constitute a continuing course of treatment and, therefore, did not extend the statute of limitations period. Trexler v. Pollock, 135 N.C. App. 601, 522 S.E.2d 84 (1999).

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Since plaintiff filed her medical malpractice claim more than three years from the last act giving rise to plaintiff's cause of action, the trial court did not err in granting defendants summary judgment. Jones v. Asheville Radiological Group, P.A., 134 N.C. App. 520, 518 S.E.2d 528 (1999).

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II. MINORS.

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OPINIONS OF ATTORNEY GENERAL

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CASE NOTES

II. Judgments and Decrees.

II. JUDGMENTS AND DECREES.

This section applies to foreign judgments.

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Application of Child Support Arrearages. — Trial judge properly applied father's child support payments to earlier arrearages first and then to later arrearages; therefore, the arrearages supporting mother's child support claim were within the ten year statute of limitations and were not time-barred under this section. Belcher v. Averette, — N.C. App. —, 526 S.E.2d 663, 2000 N.C. App. LEXIS 166 (2000).

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IV. Defective Condition of Improvements to Real Property.

III. INCORPOREAL HEREDITAMENTS.

Restrictive Covenant Governed by Subdivision (3). —

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IV. DEFECTIVE CONDITION OF IMPROVEMENTS TO REAL PROPERTY.

Meaning of "Last Act." — Where defendant substantially completed construction on house, the statute of repose began running, and subsequent repairs neither qualified as a "last act" under this section nor reset statute of repose. Monson v. Paramount Homes, Inc., 133 N.C.

App. 235, 515 S.E.2d 445 (1999).

"Substantial Completion" Defined. — Where house could be utilized for its intended purposes upon issuance of certificate of compliance, it was "substantially completed" for purposes of this section, even though seller/builder did not complete work designated on punch list for plaintiff/purchaser until many months later. Nolan v. Paramount Homes, Inc., 135 N.C. App. 73, 518 S.E.2d 789 (1999).

Statute Runs from Date of Construction, Not Sale. — The real property improvements statute of repose designated by this section began to run the last day that defendant performed construction relating to the harm alleged and not on the day of the sale, regardless of the later completion of items on a punch list. Nolan v. Paramount Homes, Inc., 135 N.C. App. 73, 518 S.E.2d 789 (1999).

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CASE NOTES

Cited in Staley v. Lingerfelt, 134 N.C. App. 294, 517 S.E.2d 392 (1999), cert. denied, 351 N.C. 109, — S.E.2d — (1999).

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I. IN GENERAL.

Applied in Woody v. Walters, 54 F. Supp. 2d 574 (W.D.N.C. 1999).

Stated in Webb v. Nash Hosps., 133 N.C. App. 636, 516 S.E.2d 191 (1999), cert. denied, 351 N.C. 122, — S.E.2d — (1999).

Cited in Monson v. Paramount Homes, Inc., 133 N.C. App. 235, 515 S.E.2d 445 (1999); Kirkpatrick v. Lenoir County Bd. of Educ., 216 F.3d 380 (4th Cir. 2000); White v. Crisp, — N.C. App. —, 530 S.E.2d 87, 2000 N.C. App. LEXIS 638 (2000).

II. CONTRACTS.

A. In General.

Effect of Bankruptcy Proceeding on Limitations Period. — Although bankruptcy trustee made partial payment to plaintiff, defendant did not list plaintiff as a creditor and objected to plaintiff's claim; therefore, plaintiff's action seeking payment for landscape services, filed over 5 years after the work was performed, was not stayed by the bankruptcy proceedings, and defendant's motion to dismiss should have been granted. Person Earth Movers, Inc. v. Buckland, — N.C. App. —, 525 S.E.2d 239, 2000 N.C. App. LEXIS 114 (2000).

D. Actions Held Barred.

Action to Enjoin Conveyance — Plaintiff's causes of action against a nonprofit and a for profit corporation were barred by this section. Hamlet HMA, Inc. v. Richmond County, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 636 (June 20, 2000).

IV. LIABILITY CREATED BY STATUTES.

Plaintiff's challenge to the constitutionality of Senate Bill 335 which absolved all defendants from their liability to plaintiff for participating in the conveyance process without requiring outside bids was time-barred. Hamlet HMA, Inc. v. Richmond County, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 636 (June 20, 2000).

VII. INJURY TO PERSON OR RIGHTS OF ANOTHER.

Intentional Tort Not Barred by This Section — Summary judgment was improper where the defendant's act of shooting the plaintiff, although she intended only to hit his tire, was not only an intentional tort but also gave rise to a claim of negligence, which was not barred by the one year statute of limitation but

could appropriately be brought within the three year limit of this section. Lynn v. Burnette, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 618 (2000).

Emotional Distress Claims. —

Since plaintiff failed to file her claim for emotional distress within the three-year limitations period, the trial court did not err in granting defendants summary judgment. Jones v. Asheville Radiological Group, P.A., 134 N.C. App. 520, 518 S.E.2d 528 (1999).

Medical Malpractice Suit. — Prescription medication, absent any other contact with a doctor, did not constitute a continuing course of treatment and, therefore, did not extend the statute of limitations period. Trexler v. Pollock, 135 N.C. App. 601, 522 S.E.2d 84 (1999).

Running of Statute for Minors. — Motion for dismissal of an action under 42 U.S.C § 1983 would be denied where (1) juvenile was 14 years old when the alleged incident took place, (2) juvenile was now only 17 years of age, and (3) pursuant to § 1-17 (a)(1), the statute of limitations had not begun to run against the juvenile. Simmons v. Justice, 87 F. Supp. 2d 524 (W.D.N.C. 2000).

IX. BAIL.

Action Not Barred If Extraordinary Cause. — Trial court erred in ruling that §§ 1-52 and 1-46 establish a statute of limitations of three years for an action involving bail and in failing to apply the "extraordinary cause" standard of former § 15A-544(h) (see now § 15A-544.1 et seq.) when petitioner sought remission of bonds. State v. Harkness, 133 N.C. App. 641, 516 S.E.2d 166 (1999).

§ 1-53. Two years.

CASE NOTES

II. CONTRACTUAL OBLIGATIONS OF LOCAL GOVERNMENTAL UNITS.

Plaintiff's causes of action against the county and the county commissioners to enjoin a conveyance and for a declaratory judgment upon the validity of a conveyance were barred by this section as they were filed on 21 August 1998 and the deed conveying the hospital tract was executed on 28 March 1994; this result extended also to a quitclaim deed for personal property located in the hospital, which was recorded on 20 February 1995. Hamlet HMA, Inc. v. Richmond County, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 636 (June 20, 2000).

V. DEATH BY WRONGFUL ACT.

Action Held Barred. — Although appeal at hand involved a different uninsured motorist insurer than prior appeal, plaintiff's claims were barred by the law of the instant case and doctrine of res judicata. Reese v. Barbee, 134 N.C. App. 728, 518 S.E.2d 571 (1999), cert. denied, 351 N.C. 188, — S.E.2d — (1999).

§ 1-54. One year.

CASE NOTES

I. IN GENERAL.

Cited in Staley v. Lingerfelt, 134 N.C. App. 294, 517 S.E.2d 392 (1999), cert. denied, 351 N.C. 109, — S.E.2d — (1999).

IV. DEFICIENCY JUDGMENTS.

Summary judgment was inappropriate where the evidence was sufficient to create an issue of fact with respect to the delivery date of the foreclosure deeds. The plaintiff submitted affidavits indicating that the action was timely, under this section, and the defendants submitted affidavits indicating that it was not, but neither submitted dated copies of the foreclosure deeds. Lexington State Bank v. Miller, — N.C. App. —, 529 S.E.2d 454, 2000 N.C. App. LEXIS 501 (2000).

§ 1-56. All other actions, 10 years.

CASE NOTES

III. Actions to Which Section Does Not Apply.

III. ACTIONS TO WHICH SECTION DOES NOT APPLY.

Conveyance Between a County And a Nonprofit Organization — This section did not apply to plaintiff's claim for (1) a declaratory judgment as to the constitutionality of legislation governing conveyances, (2) a declaratory judgment upon the validity of a conveyance between a county and a nonprofit organization, and (3) enjoining a conveyance between the two parties. Hamlet HMA, Inc. v. Richmond County, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 636 (June 20, 2000).

SUBCHAPTER IIIA. JURISDICTION.

ARTICLE 6A.

Jurisdiction.

§ 1-75.3. Jurisdictional requirements for judgments against persons, status and things.

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§ 1-75.4. Personal jurisdiction, grounds for generally.

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II. Due Process Considerations.
B. Determining Minimum Contacts.
III. Cases in Which Minimum Contacts Requirement Met.
VII. Local Injury; Foreign Act.
VIII. Local Services, Goods or Contracts.

II. DUE PROCESS CONSIDERATIONS.

B. Determining Minimum Contacts.

If a foreign company's activity is regular, etc.

The court properly exercised personal jurisdiction over defendant where the defendant owned real property in North Carolina, was engaged in at least one substantial and ongoing profit-making venture in the State through the leasing of that property, and had obtained authority to do business and maintained a registered agent in North Carolina. Such contacts with the state satisfied the requirements of due process, in particular the higher threshold of "general jurisdiction," by their "continuous and systematic" nature. Bruggeman v. Meditrust Acquisition Co., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 774 (July 5, 2000).

III. CASES IN WHICH MINIMUM CONTACTS REQUIREMENT MET.

Catalog Solicitation and Sales. — Where defendant mailed at least 1,937 of its sales catalogs to North Carolina residents, sold products to 239 residents, generating over $12,000 in sales, and could rely on North Carolina courts to enforce those sales contracts, minimum contact requirements were met and due process satisfied. Fran's Pecans, Inc. v. Greene, 134 N.C. App. 110, 516 S.E.2d 647 (1999).

Single Payment Held Statutorily, But Not Constitutionally, Sufficient. — Jurisdiction over defendants/veterinarians was found statutorily proper under subdivision (5)d of this section, since money payment was a "thing of value"; nevertheless, defendants' contacts with this state did not satisfy the constitutional minimum needed to justify the exercise of personal jurisdiction where there was no evidence that they purposely availed themselves of the privilege of conducting activities within this forum. Hiwassee Stables, Inc. v. Cunningham, 135 N.C. App. 24, 519 S.E.2d 317 (1999).

VII. LOCAL INJURY; FOREIGN ACT.

Subdivision (4)a of this section requires that plaintiff only claim injury, etc. —

Long-arm personal jurisdiction under subdivision (4)a was established against defendant where plaintiff alleged injuries involving misappropriated trade secrets, interfered with business relations and unfair trade practices, incident to sales and solicitation activities to North Carolina customers by defendant outside North Carolina at the proximate time of the injuries; proof of actual injury was not required. Fran's Pecans, Inc. v. Greene, 134 N.C. App. 110, 516 S.E.2d 647 (1999).

VIII. LOCAL SERVICES, GOODS OR CONTRACTS.

Unsupported Allegation of Contract for Hire — The plaintiff's allegation that the defendant "engaged" him to procure real estate in North Carolina and other states for investment purposes was insufficient to establish a prima facie showing of long-arm jurisdiction under this section where defendants denied this allegation by means of special counsel's affidavit and plaintiffs made no attempt to support the allegation with affidavits or otherwise. Bruggeman v. Meditrust Acquisition Co., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 774 (July 5, 2000).

Promise to Pay for Services to Be Performed. — Based on plaintiff's allegations that the individual defendants promised to pay for services to be performed by plaintiff in North Carolina, subsection (5)a of this section authorized the assertion of personal jurisdiction over the individual defendants. Ellison Windows & Doors, Inc. v. Vinyl Prods., — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 5000 (M.D.N.C. January 20, 2000).

Because defendant promised to pay for services to be performed by plaintiff in North Carolina, subsection (5)a of this section authorized the assertion of personal jurisdiction over the defendant. Motorsports v. Pharbco Mktg. Group, Inc., — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 5123 (M.D.N.C. January 20, 2000).

§ 1-75.10. Proof of service of summons, defendant appearing in action.

CASE NOTES

Proof of Service on Municipality by personal delivery. — Two affidavits relevant to personal delivery to acting city manager established valid service on city for purposes of a negligence action. Crabtree v. City of Durham, — N.C. App. —, 526 S.E.2d 503, 2000 N.C. App. LEXIS 151 (2000).

Service by Person in Foreign Country. — Where no affidavit was offered as required by this section, the plaintiff was allowed to prove service by mail by "a certificate of addressing and mailing by the clerk of court" to enable the German court to obtain personal jurisdiction over defendant and the North Carolina trial court was, under comity of nations, within its power to enforce the German court's order determining defendant to be the father and ordering him to pay child support. State ex rel. Desselberg v. Peele, 136 N.C. App. 206, 523 S.E.2d 125 (1999), cert. denied, 351 N.C. 479, — S.E.2d — (2000).

Cited in Motorsports v. Pharbco Mktg. Group, Inc., — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 5123 (M.D.N.C. January 20, 2000).

§ 1-75.11. Judgment against nonappearing defendant, proof of jurisdiction.

CASE NOTES

Proper Service Resulted in Enforceable Default Judgment in Foreign Country. — Where no affidavit was offered as required by § 1-75.10, the plaintiff was allowed to prove

service by mail by "a certificate of addressing and mailing by the clerk of court" to enable the German court to obtain personal jurisdiction over defendant and the North Carolina trial court was, under comity of nations, within its power to enforce the German court's order determining defendant to be the father and ordering him to pay child support. State ex rel. Desselberg v. Peele, 136 N.C. App. 206, 523 S.E.2d 125 (1999), cert. denied, 351 N.C. 479, — S.E.2d — (2000).

Cited in Coastland Corp. v. North Carolina Wildlife Resources Comm'n, 134 N.C. App. 343, 517 S.E.2d 661 (1999).

§ 1-76. Where subject of action situated.

CASE NOTES

I. In General.

I. IN GENERAL.

Actions for Monetary Damages — This section did not apply to the plaintiff's action, although his prayer for relief included a request that the defendants return "any and all" property held, because such request was ancillary to the primary purpose of the complaint, which was to recover monetary damages. Centura Bank v. Miller, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 780 (July 5, 2000).

§ 1-76.1. Where deficiency debtor resides or where loan was negotiated.

CASE NOTES

This section did not apply where the leased property had not yet been sold and there was, therefore, no deficiency owing on a debt. Centura Bank v. Miller, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 780 (July 5, 2000).

§ 1-79. Domestic corporations, limited partnerships, limited liability companies, and registered limited liability partnerships.

CASE NOTES

Applied in Centura Bank v. Miller, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 780 (July 5, 2000).

§ 1-82. Venue in all other cases.

CASE NOTES

Venue Proper in a County Other than Where the Corporation Has Its Principle Office. — The trial court did not err by refusing to grant the defendant's motion to transfer the plaintiff's case, pursuant to this section, from the county in which the plaintiff had a place of business to the county in which it had its principle office. Centura Bank v. Miller, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 780 (July 5, 2000).

§ 1-83. Change of venue.

CASE NOTES

I. In General.

I. IN GENERAL.

Construction with § 1A-1, Rule 12(b)(3). — Defendant's motion for change of venue properly was filed after the answer was filed because, although motions for change of venue based on improper venue, pursuant to section 1A-1, Rule 12(b)(3), must be filed prior to or with the answer, motions for change of venue based on the convenience of witnesses, pursuant to subsection (2) of this section, must be filed after the answer is filed, and defendant's motion was based on the convenience of the witnesses. McCullough v. Branch Banking & Trust Co., — N.C. App. —, 524 S.E.2d 569, 2000 N.C. App. LEXIS 17 (2000).

The Court Has Discretion Regarding Whether to Transfer or Not. — The trial court committed no gross improprieties by denying the plaintiff's motion to transfer venue for convenience of witnesses and to promote the ends of justice where venue was proper under § 1-82; such transfer is purely a matter of the court's discretion. Centura Bank v. Miller, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 780 (July 5, 2000).

SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

ARTICLE 8.

Summons.

§ 1-105. Service upon nonresident drivers of motor vehicles and upon the personal representatives of deceased nonresident drivers of motor vehicles.

CASE NOTES

II. Procedure for Service and Notice.

II. PROCEDURE FOR SERVICE AND NOTICE.

"Unclaimed" Requirement Not Predicated on Opportunity to Claim. — Because the plain language of subdivision (2) of this section does not expressly predicate the classification of a forwarded package as "unclaimed" on non-resident defendants' first being afforded an opportunity to claim it, constructive service on defendant was complete under this section. Coiner v. Cales, 135 N.C. App. 343, 520 S.E.2d 61 (1999).

Unlike service by publication, there appears to be no due diligence requirement under subdivision (2); all that is required is "sufficient compliance," and using the address on a three-year old accident report was deemed sufficient. Coiner v. Cales, 135 N.C. App. 343, 520 S.E.2d 61 (1999).

SUBCHAPTER VIII. JUDGMENT.

ARTICLE 26.

Declaratory Judgments.

§ 1-253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.

CASE NOTES

I. IN GENERAL.

Cited in Southern Furniture Co. of Conover, Inc. v. DOT, 133 N.C. App. 400, 516 S.E.2d 383 (1999); Town of Spencer v. Town of E. Spencer, 351 N.C. 124, 522 S.E.2d 297 (1999); Howell v. Sykes, — N.C. App. —, 526 S.E.2d 183, 2000 N.C. App. LEXIS 6 (2000).

III. ACTUAL CONTROVERSY REQUIREMENT.

Interpretation in Light of Past and Present Action. — Where parties were not asking the court to interpret a document in anticipation of future acts, but in light of past and present action, an actual controversy existed and the trial court did not err in exercising jurisdiction under the Declaratory Judgment Act. Bueltel v. Lumber Mut. Ins. Co., 134 N.C. App. 626, 518 S.E.2d 205 (1999), cert. denied, 351 N.C. 186, — S.E.2d — (1999).

IV. WHAT MAY BE DETERMINED BY DECLARATORY JUDGMENT.

B. Actions in Which Declaratory Judgment Held Available.

A conditional use rezoning ordinance may be properly challenged by an action for declaratory judgment. Village Creek Property Owners Ass'n v. Town of Edenton, 135 N.C. App. 482, 520 S.E.2d 793 (1999).

V. PROCEDURE.

Pleading Special Damages. — The plaintiffs' complaint was improperly dismissed for lack of standing due to the failure to allege special damages because the zoning statute did not require parties to be "aggrieved" in order to file a declaratory judgment action and because the Declaratory Judgment Act did not require a pleading of special damages. Village Creek Property Owners Ass'n v. Town of Edenton, 135 N.C. App. 482, 520 S.E.2d 793 (1999).

§ 1-254. Courts given power of construction of all instruments.

CASE NOTES

Covenant Not to Compete. — Trial court had the power to determine the validity and enforceability of a non-competition clause in a contract between defendant and his former employer under the Declaratory Judgment Act. Bueltel v. Lumber Mut. Ins. Co., 134 N.C. App. 626, 518 S.E.2d 205 (1999), cert. denied, 351 N.C. 186, — S.E.2d — (1999).

But Competing Resolutions of Intent to Involuntarily Annex Were Justiciable. — The validity of a resolution of intent to annex land for the purposes of determining prior jurisdiction is a justiciable controversy under the Declaratory Judgment Act. Town of Spencer v. Town of E. Spencer, 351 N.C. 124, 522 S.E.2d 297 (1999).

§ 1-256. Enumeration of declarations not exclusive.

CASE NOTES

Quoted in Town of Spencer v. Town of E. Spencer, 351 N.C. 124, 522 S.E.2d 297 (1999).

§ 1-258. Review.

CASE NOTES

Applied in First Union Nat'l Bank v. Ingold, — N.C. App. —, 523 S.E.2d 725, 1999 N.C. App. LEXIS 1375 (1999), cert. denied, 351 N.C. 354, — S.E.2d — (2000).

§ 1-260. Parties.

CASE NOTES

Stated in State v. Chisholm, 135 N.C. App. 578, 521 S.E.2d 487 (1999).

§ 1-261. Jury trial.

CASE NOTES

Applied in Village Creek Property Owners Ass'n v. Town of Edenton, 135 N.C. App. 482, 520 S.E.2d 793 (1999).

§ 1-264. Liberal construction and administration.

CASE NOTES

Stated in Town of Spencer v. Town of E. Spencer, 351 N.C. 124, 522 S.E.2d 297 (1999).

SUBCHAPTER IX. APPEAL.

ARTICLE 27.

Appeal.

§ 1-271. Who may appeal.

CASE NOTES

III. Parties Held Not Entitled to Appeal.

III. PARTIES HELD NOT ENTITLED TO APPEAL.

Third-party Defendant. — In case involving assault on retail store employee in shopping mall, court dismissed appeal by third-party defendant/retail store as improper because it was not a party aggrieved by dismissal of suit against security company. Hoisington v. ZT-Winston-Salem Assocs., 133 N.C. App. 485, 516 S.E.2d 176 (1999), cert. granted sub nom. Hoisington v. Smith, 351 N.C. 104, — S.E.2d — (1999), cert. dismissed, 351 N.C. 342, 525 S.E.2d 173 (2000).

§ 1-277. Appeal from superior or district court judge.

CASE NOTES

I. IN GENERAL.

Applied in Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999).

Cited in Lee v. Mutual Community Sav. Bank, — N.C. App. —, 525 S.E.2d 854, 2000 N.C. App. LEXIS 156 (2000); Sharpe v. Worland, — N.C. App. —, 527 S.E.2d 75, 2000 N.C. App. LEXIS 269 (2000); Bruggeman v. Meditrust Acquisition Co., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 774 (July 5, 2000).

II. FROM WHAT DECISIONS, ETC., APPEAL LIES.

B. Interlocutory Orders.

2. Substantial Right.

Qualified Immunity. — Appeal from defendants who made cross-assignments of error based on the defense of qualified immunity involved a substantial right and was properly before the court. Staley v. Lingerfelt, 134 N.C. App. 294, 517 S.E.2d 392 (1999), cert. denied, 351 N.C. 109, — S.E.2d — (1999).

Governmental Immunity. — Orders denying motions to dismiss grounded on the defense of governmental immunity through the public duty doctrine affect a substantial right and are immediately appealable. Lovelace v. City of Shelby, 133 N.C. App. 408, 515 S.E.2d 722 (1999).

Arbitration Order. —

An order compelling arbitration is interlocutory, does not affect a substantial right, and is not immediately appealable. Laws v. Horizon Hous., Inc., — N.C. App. —, 529 S.E.2d 695, 2000 N.C. App. LEXIS 534 (2000).

Where evidence showed that plaintiff knew that the terms of a Dispute Resolution Agreement (DRA) would apply to her should she continue her employment, and she did continue, sufficient consideration existed to support the agreement, plaintiff relinquished the right to pursue disputes in court, and the trial court's refusal to compel arbitration deprived defendants of a substantial right entitling them to immediate appeal. Howard v. Oakwood Homes Corp., 134 N.C. App. 116, 516 S.E.2d 879 (1999), cert. denied, 350 N.C. 832, — S.E.2d — (1999), cert. denied, — U.S. —, 120 S. Ct. 1161, 145 L. Ed. 2d 1072 (2000).

When a party asserts a statutory privilege, such as that set out by § 90-21.22(e) (right to non-disclosure of confidential information), which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion is not otherwise frivolous or insubstantial, the challenged order affects a substantial right under subsection (a) of this section and § 7A-27(d)(1) and is immediately reviewable; to the extent that cases like Kaplan v. Prolife Action League of Greensboro, 123 N.C.App. 677, 474 S.E.2d 408 (1996) differ, they are overruled. Sharpe v. Worland, 351 N.C. 159, 522 S.E.2d 577 (1999).

Deprivation of Immediate Appellate Review Not a Substantial Right. — Where the only possible "injury" defendant would suffer if not permitted immediate appellate review was the necessity of proceeding to trial before the matter was reviewed by the appellate court, defendant was not faced with the deprivation of

a substantial right under this section. Anderson v. Atlantic Cas. Ins. Co., 134 N.C. App. 724, 518 S.E.2d 786 (1999).

Denial of Appeal of Summary Judgement on Contract Claim Where Tort Claim Survived. — Plaintiff, the administrator of the estates of his wife and two children, and guardian ad litem of a surviving injured child, who sued defendants/railroad company and engineering firm, would be denied the right to an immediate interlocutory appeal of a summary judgment on his contract claim where his tort claim survived the summary judgment and the trial court reserved the right to rule on matters of evidence that judge considered competent, relevant and admissible on the remaining issues. Turner v. Norfolk S. Corp., — N.C. App. —, 526 S.E.2d 666, 2000 N.C. App. LEXIS 256 (2000).

Denial of defendant's motion to dismiss on the basis of res judicata did not affect a substantial right entitling it to immediate appeal where no possibility of inconsistent verdicts existed and no "manifest" injustice would result absent immediate appeal. Country Club of Johnston County, Inc. v. United States Fid. & Guar. Co., 135 N.C. App. 159, 519 S.E.2d 540 (1999).

V. ILLUSTRATIVE CASES.

A. Appellant Held Entitled to Appeal.

3. Summary Judgment.

Summary Judgment Held to Affect Substantial Right. — In case involving nurse who struck decedent on his way to work, summary judgment as to nursing agency/supplier affected plaintiffs' substantial right to have issues pertaining to victim's death determined in a single proceeding and entitled them to immediate appeal. Rhoney v. Fele, 134 N.C. App. 614, 518 S.E.2d 536 (1999).

Summary Judgment Dismissing Defendant. — Where the same factual issues applied to all claims against the various defendants, and many of the damages alleged were identical, and where several different proceedings could bring about inconsistent verdicts, plaintiffs had a substantial right to have the liability of all defendants determined in one proceeding; hence, grant of summary judgment to one defendant would be considered by the appellate court. Camp v. Leonard, 133 N.C. App. 554, 515 S.E.2d 909 (1999).

B. Appellant Not Entitled to Appeal.

1. In General.

The trial court's denial of defendants' constitutional challenge and its conclusion that the defendants' four tracts formed a physically unified parcel affected by the taking were interlocutory and did not affect any substantial rights, so the defendants were not required to appeal the trial court's orders immediately. DOT v. Rowe, 351 N.C. 172, 521 S.E.2d 707 (1999).

Order Increasing Attachment Bond Where No Findings Were Made. — Where the trial court was not required to make findings of fact in order to modify the plaintiffs' attachment bond on the motion of the defendant, pursuant to § 1-440.40(a), and where the plaintiffs failed to request such findings, they could not assert that the order had affected their substantial rights and they were not entitled to review. Collins v. Talley, 135 N.C. App. 758, 522 S.E.2d 794 (1999).

No Substantial Right Affected. — Where only the issue of damages remained, no final judgment had been made and no substantial right was affected, the appellate court found the trial court's certification ineffective and saw no impediment to trial court's sorting out various claims and affirmative defenses intertwined with the damages issue. CBP Resources, Inc. v. Mountaire Farms of N.C., Inc., 134 N.C. App. 169, 517 S.E.2d 151 (1999).

4. Denial of Motion to Dismiss.

Appeal by Defendants Not Party to Extension of Statute. — The right to immediate appellate review under the substantial right doctrine applied only to a substantive, rather than a merely procedural, jurisdictional challenge; thus, defendants who were neither named in motion requesting nor order granting an extension of the statute of limitations and were not served with notice of that extension could not immediately appeal, and the trial court's Rule 54(b) certification was made in error. Howze v. Hughs, 134 N.C. App. 493, 518 S.E.2d 198 (1999).

§ 1-278. Interlocutory orders reviewed on appeal from judgment.

CASE NOTES

Preservation of Issue for Review. — Plaintiffs' request for appellate review of intermediate orders dismissing plaintiffs' action for "unfair and deceptive acts or practices" for failure to state a claim and granting defendants' motions for partial summary judgment

was defeated under this section for failure to object to those orders. Gaunt v. Pittaway, 135 N.C. App. 442, 520 S.E.2d 603 (1999).

Applied in Inman v. Inman, — N.C. App. —, 525 S.E.2d 820, 2000 N.C. App. LEXIS 136 (2000).

§ 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. 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) 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. (C.C.P., ss. 304, 311; Code, s. 554; Rev., s. 598; C.S., s. 650; 2000, Ex. Sess., c. 1, s. 2.)

Editor's Note. — Session Laws 2000-1 (Extra Session), s. 3, contains a severability clause.

Session Laws 2000-1 (Extra Session), s. 4, provides: '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."

Effect of Amendments. — Session Laws 2000-1 (Extra Session), s. 2, effective April 5, 2000, added subsections (b) and (c).

§ 1-298. Procedure after determination of appeal.

CASE NOTES

Trial court judge properly assumed jurisdiction pursuant to this section because another trial court judge's order, albeit modified by higher courts, was "still in effect." Hieb v. Lowery, 134 N.C. App. 1, 516 S.E.2d 621 (1999).

ARTICLE 27A.

Appeals And Transfers From The Clerk.

§ 1-301.1. Appeal of clerk's decision in civil actions.

CASE NOTES

I. Appeal From Clerk to Judge.

I. APPEAL FROM CLERK TO JUDGE.

Applied in Wilson v. Watson, — N.C. App. —, 524 S.E.2d 812, 2000 N.C. App. LEXIS 51 (2000).

SUBCHAPTER X. EXECUTION.

ARTICLE 28.

Execution.

§ 1-311. (Effective July 1, 2001) Against the person.

If the action is one in which the defendant might have been arrested, an execution against the person of the judgment debtor may be issued to any county within the State, after the return of an execution against his property wholly or partly unsatisfied. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as provided in the Article Arrest and Bail, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by law, whether such statement of facts is necessary to the cause of action or not. Provided, that where the facts are found by a jury, the verdict shall contain a finding of facts establishing the right to execution against the person; and where jury trial is waived and the court finds the facts, the court shall find facts establishing the right to execution against the person. Such findings of fact shall include a finding that the defendant either (i) is about to flee the jurisdiction to avoid paying his creditors, (ii) has concealed or diverted assets in fraud of his creditors, or (iii) will do so unless immediately detained. If defendant appears at the hearing on the debt and the judge has reason to believe that the

§ 1-311 has a postponed effective date. See notes.

defendant is indigent, he shall inform the defendant that if he is an indigent person he is entitled to services of counsel under G.S. 7A-451, that he may petition for preliminary release on the basis of his indigency, that if he does so he will have an opportunity within 72 hours to suggest to a judge his indigency for purposes of appointment of counsel and provisional release, and that the judge will thereupon immediately appoint counsel for him if it is adjudged that he is unable to pay a lawyer. If defendant appears at the hearing on the debt and the judge provisionally concludes he is indigent, counsel should be appointed immediately pursuant to rules adopted by the Office of Indigent Defense Services. (C.C.P., s. 260; Code, s. 447; 1891, c. 541, s. 2; Rev., s. 625; C.S., s. 673; 1947, c. 781; 1977, c. 649, s. 1; 2000-144, s. 14.)

For this section as in effect until July 1, 2001, see the main volume.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Effect of Amendments. — Session Laws 2000-144, s. 14, effective July 1, 2001, added "pursuant to rules adopted by the Office of Indigent Defense Services" in the last sentence.

SUBCHAPTER XIII. PROVISIONAL REMEDIES.

ARTICLE 34.

Arrest and Bail.

§ 1-413. (Effective July 1, 2001) Issuance and form of order.

The order may be made to accompany the summons, or to issue at any time afterwards, before judgment. It shall require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a place and time therein mentioned to the clerk of the court in which the action is brought. Notice of the return must be served on the plaintiff or his attorney as prescribed by law for the service of other notices. The order shall include a statement that if the person arrested is an indigent person he is entitled to services of counsel under G.S. 7A-451, that he may petition for preliminary release on the basis of his indigency, that if he does so he will have an opportunity within 72 hours to suggest to a judge his indigency for purposes of appointment of counsel and preliminary release, and that the judge will thereupon immediately appoint counsel for him if it is adjudged that he is unable to pay a lawyer. Appointment of counsel shall be in accordance with rules adopted by the Office of Indigent Defense Services. (C.C.P., s. 153; Code, s. 295; Rev., s. 731; C.S., s. 771; 1977, c. 649, s. 3; 2000-144, s. 15.)

For this section as in effect until July 1, 2001, see the main volume.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Effect of Amendments. — Session Laws 2000-144, s. 15, effective July 1, 2001, added the last sentence.

ARTICLE 35.

Attachment.

Part 1. General Provisions.

§ 1-440.3. Grounds for attachment.

CASE NOTES

Quoted in In re Toussaint, — Bankr. —, 2000 Bankr. LEXIS 213 (E.D.N.C. February 4, 2000).

Part 5. Miscellaneous Procedure Pending Final Judgment.

§ 1-440.36. Dissolution of the order of attachment.

CASE NOTES

Cited in Collins v. Talley, 135 N.C. App. 758, 522 S.E.2d 794 (1999).

§ 1-440.37. Modification of the order of attachment.

CASE NOTES

Cited in Collins v. Talley, 135 N.C. App. 758, 522 S.E.2d 794 (1999).

§ 1-440.40. Defendant's objection to bond or surety.

CASE NOTES

Failure to Request Findings. — Where the trial court was not required to make findings of fact in order to modify the plaintiffs' attachment bond on the motion of the defendant, pursuant to subsection (a) of this section, and where the plaintiffs failed to request such findings, they could not assert that the order had affected their substantial rights and they were not entitled to review. Collins v. Talley, 135 N.C. App. 758, 522 S.E.2d 794 (1999).

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

ARTICLE 41.

Quo Warranto.

§ 1-515. Action by Attorney General.

CASE NOTES

Quo warranto was inappropriate where plaintiff/registered voter challenged the constitutionality of an election statute, not the election or its results. Comer v. Ammons, 135 N.C. App. 531, 522 S.E.2d 77 (1999).

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

ARTICLE 45A.

Arbitration and Award.

§ 1-567.2. Arbitration agreements made valid, irrevocable and enforceable; scope.

CASE NOTES

Applied in Novacare Orthotics & Prosthetics E., Inc. v. Speelman, — N.C. App. —, 528 S.E.2d 918, 2000 N.C. App. LEXIS 407 (2000).

Quoted in McCrary ex rel. McCrary v. Byrd, — N.C. App. —, 524 S.E.2d 817, 2000 N.C. App. LEXIS 57 (2000).

§ 1-567.3. Proceedings to compel or stay arbitration.

CASE NOTES

Motion to Dismiss Showing Arbitration Agreement. — Defendant's motion to dismiss pursuant to Rule 12(b)(6) based on "the terms and provisions of the parties Employment Agreement which provides for binding arbitration" would be treated as an application to stay litigation and compel arbitration pursuant to subsection (a) of this section; hence, court would vacate the order of dismissal and remand the matter to the trial court for further appropriate proceedings. Novacare Orthotics & Prosthetics E., Inc. v. Speelman, — N.C. App. —, 528 S.E.2d 918, 2000 N.C. App. LEXIS 407 (2000).

Court Can Delay Arbitration Ruling. — While the trial court should rule on the motion to compel arbitration without undue delay, where depositions had already been scheduled and noticed, it was no abuse of discretion for the trial court to enter an order requiring the completion of scheduled discovery prior to ruling on the motion to compel arbitration. McCrary ex rel. McCrary v. Byrd, — N.C. App. —, 524 S.E.2d 817, 2000 N.C. App. LEXIS 57 (2000).

Cited in Laws v. Horizon Hous., Inc., — N.C. App. —, 529 S.E.2d 695, 2000 N.C. App. LEXIS 534 (2000).

§ 1-567.10. Change of award by arbitrators.

CASE NOTES

Arbitrators Had No Authority to Modify Award. — Arbitrators had no authority under this section to modify award on the grounds that they "used the wrong formula" to calculate it. The use of an incorrect formula to determine an award is not an "evident miscalculation of figures" as defined in § 1-567.14(a)(1). North Blvd. Plaza v. North Blvd. Assocs., — N.C. App. —, 526 S.E.2d 203, 2000 N.C. App. LEXIS 144 (2000).

§ 1-567.13. Vacating an award.

CASE NOTES

Plaintiff was barred from raising the validity of an arbitration award on appeal where nothing in the record indicated that he took advantage of the procedure set out in this section or that he otherwise challenged the validity of the award at the trial level. Murakami v. Wilmington Star News, Inc., — N.C. App. —, 528 S.E.2d 68, 2000 N.C. App. LEXIS 329 (2000).

Errors of law or fact are generally insuf-

ficient to invalidate an award fairly and honestly made.

The trial court did not err in refusing to vacate the arbitration award under this section where plaintiff's only contention was that the arbitrator made mistakes of law, because an arbitrator is not bound by substantive law or rules of evidence. Sholar Bus. Assocs., Inc. v. Davis, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 607 (June 6, 2000).

Record Must Show That Arbitrators Exceeded Authority. —

Where a claim for personal injuries was properly before the arbitrator, he could dispense with it as he saw fit, and his denial of that claim, regardless of the reason, could not be considered outside his scope of authority. Howell v. Wilson, — N.C. App. —, 526 S.E.2d 194, 2000 N.C. App. LEXIS 157 (2000).

Estoppel, Election, And Parol Evidence — The trial court did not err in failing to vacate the award of arbitrator where the arbitrator failed to rule on estoppel, election, and parol evidence issues and failed to make findings of fact or conclusions of law. The parties agreed to arbitrate in accordance with the Commercial Arbitration Rules of the American Arbitration Association and the AAA rules do not require findings of fact or conclusions of law. Sholar Bus. Assocs., Inc. v. Davis, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 607 (June 6, 2000).

Cited in North Blvd. Plaza v. North Blvd. Assocs., — N.C. App. —, 526 S.E.2d 203, 2000 N.C. App. LEXIS 144 (2000).

§ 1-567.14. Modification or correction of award.

CASE NOTES

Use of Wrong Formula Is Not an "Evident Miscalculation." — Arbitrators had no authority under § 1-567.10 to modify award on the grounds that they "used the wrong formula" to calculate it. The use of an incorrect formula to determine an award is not an "evident miscalculation of figures" as defined in subsection (a)(1) of this section. North Blvd. Plaza v. North Blvd. Assocs., — N.C. App. —, 526 S.E.2d 203, 2000 N.C. App. LEXIS 144 (2000).

§ 1-567.18. Appeals.

CASE NOTES

This statute does not provide for an immediate appeal from an order compelling arbitration. Laws v. Horizon Hous., Inc., — N.C. App. —, 529 S.E.2d 695, 2000 N.C. App. LEXIS 534 (2000).

Chapter 1A.

Rules of Civil Procedure.

§ 1A-1. Rules of Civil Procedure.

The Rules of Civil Procedure are as follows:

Article 1.

Scope of Rules—One Form of Action.

Rule 1. Scope of rules.

CASE NOTES

But Federal Rules and North Carolina Rules Not Always the Same. — On dismissal of negligent employment and Civil Right Violation claims, defendants' motions for costs and fees were not time-barred. The 14-day rule in Rule 54(d)(2)(B), F.R.Civ.P., clearly does not apply to litigation pending in North Carolina state courts, and the North Carolina Rules of Civil Procedure contain neither a counterpart to federal Rule 54(d)(2)(B) nor a deadline for filing a motion for costs and fees. Okwara v. Dillard Dep't Stores, — N.C. App. —, 525 S.E.2d 481, 2000 N.C. App. LEXIS 117 (2000).

Article 2.

Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

Rule 3. Commencement of action.

CASE NOTES

II. Commencement By Issuance of Summons.

II. COMMENCEMENT BY ISSUANCE OF SUMMONS.

Summons Issued Prior to Grant of Extension. — An action is not commenced under the delayed service provision of this rule until (1) an application is made to the court for permission to file a complaint within 20 days, (2) the court enters an order granting the extension, and (3) a summons is issued pursuant to that order. Hence, a summons issued on the day that an application for extension was filed, but not issued pursuant to an order entered by the clerk granting the application for extension, did not commence plaintiff's action under § 95-243 for retaliatory employment dis-

crimination for purposes of the statute of limitations. Telesca v. SAS Inst. Inc., 133 N.C. App. 653, 516 S.E.2d 397 (1999), cert. denied, 351 N.C. 120, — S.E.2d — (1999).

Rule 4. Process.

CASE NOTES

I. IN GENERAL.

Service by Person in Foreign Country. — Where no affidavit was offered as required by § 1-75.10, the plaintiff was allowed to prove service by mail by "a certificate of addressing and mailing by the clerk of court" to enable the German court to obtain personal jurisdiction over defendant and the North Carolina trial court was, under comity of nations, within its power to enforce the German court's order determining defendant to be the father and ordering him to pay child support. State ex rel. Desselberg v. Peele, 136 N.C. App. 206, 523 S.E.2d 125 (1999), cert. denied, 351 N.C. 479, — S.E.2d — (2000).

II. PERSONAL SERVICE ON NATURAL PERSONS.

A. In General.

Evidence of Backdated Signature Voids Judgment. — Wife who agreed to husband's request that she backdate her signature on the "Acceptance of Service" submitted sufficient testimony that she did so in support of her motion to set aside a judgment of absolute divorce on the grounds that the trial court was without jurisdiction to adjudicate the absolute divorce prior to the expiration of the requisite thirty days. Latimer v. Latimer, 136 N.C. App. 227, 522 S.E.2d 801 (1999).

B. Delivery to Person Residing at Defendant's Usual Abode.

Where Plaintiff and Defendant Share Abode. — North Carolina's service of process statute does not permit a wife who sues her husband to accept service on his behalf when she lives in the same house as he does. Darby v. Darby, 135 N.C. App. 627, 521 S.E.2d 741 (1999).

III. SERVICE ON COUNTIES, MUNICIPALITIES AND OTHER LOCAL PUBLIC BODIES.

Personal Service on Acting City Manager. — Two affidavits relevant to personal delivery to acting city manager, one of those persons named in subdivision (j)(5)a of this rule, established valid service on city for purposes of a negligence action. Crabtree v. City of Durham, — N.C. App. —, 526 S.E.2d 503, 2000 N.C. App. LEXIS 151 (2000).

IV. SERVICE ON CORPORATIONS.

Service on Insurance Companies — Although the Motor Vehicle Safety and Financial Responsibility Act, § 20-279.1 et seq., does not expressly require that separate process be issued for an uninsured motorist carrier, it does specifically require that a "copy" of the summons and complaint be served on the insurer, and the appellate courts have required strict compliance with the statutes that provide for service of process on insurance companies. Thomas v. Washington, — N.C. App. —, 525 S.E.2d 839, 2000 N.C. App. LEXIS 154 (2000).

Presumption of Proper Service Rebutted. — Defendant successfully rebutted presumption that plaintiff's attempted service was proper under subdivision (j)(6)c of this rule, because defendant proved that the person who received and signed for service was not acting as an agent for defendant and was not authorized to receive and sign for certified mail. Motorsports v. Pharbco Mktg. Group, Inc., — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 5123 (M.D.N.C. January 20, 2000).

Service Held Invalid. —

Court held that plaintiff, who served process on defendant's claims examiner via regular mail and received several letters from senior corporate counsel concerning suit, had not met

the requirements of this section; she had at least four months to cure the defect in service prior to the expiration of the statute of limitations. Fulton v. Mickle, 134 N.C. App. 620, 518 S.E.2d 518 (1999).

VII. DISCONTINUANCE AND EXTENSIONS.

The provisions relating to issuance of alias or pluries summonses did not apply where both individual defendants were served personally with the original summons; the provisions under subsection (d) of this rule for an endorsement on the original summons or issuance of an alias or pluries summons apply only when the original summons was not served, and their purpose is to keep the action alive until service can be made. Thomas v. Washington, — N.C. App. —, 525 S.E.2d 839, 2000 N.C. App. LEXIS 154 (2000).

Rule 5. Service and filing of pleadings and other papers.

(a) *Service of orders, subsequent pleadings, discovery papers, written motions, written notices, and other similar papers — When required.* — Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment and similar paper shall be served upon each of the parties, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(a1) *Service of briefs or memoranda in support or opposition of certain dispositive motions.* — In actions in superior court, every brief or memorandum in support of or in opposition to a motion to dismiss, a motion for judgment on the pleadings, a motion for summary judgment, or any other motion seeking a final determination of the rights of the parties as to one or more of the claims or parties in the action shall be served upon each of the parties at least two days before the hearing on the motion. If the brief or memorandum is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served brief or memorandum, or take such other action as the ends of justice require. The parties may, by consent, alter the period of time for service. For the purpose of this two-day requirement only, service shall mean personal delivery, facsimile transmission, or other means such that the party actually receives the brief within the required time.

(b) *Service — How made.* — A pleading setting forth a counterclaim or cross claim shall be filed with the court and a copy thereof shall be served on the party against whom it is asserted or on his attorney of record. With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service with due return may be made in the manner provided for service and return of process in Rule 4 and may be made upon either the party or, unless service upon the party himself is ordered by the court, upon his attorney of record. With respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by filing it with the clerk of court. Delivery of a copy within this rule means handing it to the attorney or to the party; or leaving it at the attorney's office with a partner or employee. Service by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(c) *Service — Numerous defendants.* — In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own

initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any crossclaim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) *Filing.* — All pleadings subsequent to the complaint shall be filed with the court. All other papers required to be served upon a party, including requests for admissions, shall be filed with the court either before service or within five days thereafter, except that depositions, interrogatories, requests for documents, and answers and responses to those requests may not be filed unless ordered by the court or until used in the proceeding. The party taking a deposition or obtaining material through discovery is responsible for its preservation and delivery to the court if needed or so ordered. With respect to all pleadings and other papers as to which service and return has not been made in the manner provided in Rule 4, proof of service shall be made by filing with the court a certificate either by the attorney or the party that the paper was served in the manner prescribed by this rule, or a certificate of acceptance of service by the attorney or the party to be served. Such certificate shall show the date and method of service or the date of acceptance of service.

(e)(1) *Filing with the court defined.* — The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(2) Filing by telefacsimile transmission. — If, pursuant to G.S. 7A-34 and G.S. 7A-343, the Supreme Court and the Administrative Officer of the Courts establish uniform rules, regulations, procedures and specifications for the filing of pleadings or other court papers by telefacsimile transmission, filing may be made by the transmission when, in the manner, and to the extent provided therein. (1967, c. 954, s. 1; 1971, c. 538; c. 1156, s. 2.5; 1975, c. 762, s. 1; 1983, c. 201, s. 1; 1985, c. 546; 1991, c. 168, s. 1; 2000-127, s. 1.)

COMMENT

Comment to the 2000 Amendment. — The rule does not require any party to submit a brief or memorandum; it only applies in certain instances in which a party intends to submit a brief or memorandum to the court. The rule would not preclude a party from providing the judge with copies of cases or statutes at a hearing.

Editor's Note. —

Session Laws 2000-127, s. 3, provides that the 2000 addition to the Official Comment shall only be for annotation purposes and shall not be construed to be the law.

Effect of Amendments. — Session Laws 2000-127, s. 1, effective October 1, 2000, and applicable to motions subject to the act and to briefs, memoranda, and affidavits subject to the act filed on or after that date, inserted "of orders, subsequent pleadings, discovery papers, written motions, written notices, and other similar papers" in the heading to subsection (a); and added subsection (a1).

CASE NOTES

Last Known Address. — Where plaintiff mailed notice of hearing on her motion for default to an address other than that provided on defendant's filed response, notice was ineffective. Barnett v. King, 134 N.C. App. 348, 517 S.E.2d 397 (1999).

Applied in Webb v. Nash Hosps., 133 N.C. App. 636, 516 S.E.2d 191 (1999), cert. denied, 351 N.C. 122, — S.E.2d — (1999).

Rule 6. Time.

(a) *Computation.* — In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, including rules, orders or statutes respecting publication of notices, the day of the act, event, default or publication after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) *Enlargement.* — When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order. Upon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect. Notwithstanding any other provisions of this rule, the parties may enter into binding stipulations without approval of the court enlarging the time, not to exceed in the aggregate 30 days, within which an act is required or allowed to be done under these rules, provided, however, that neither the court nor the parties may extend the time for taking any action under Rules 50(b), 52, 59(b), (d), (e), 60(b), except to the extent and under the conditions stated in them.

(c) *Unaffected by expiration of session.* — The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a session of court. The continued existence or expiration of a session of court in no way affects the power of a court to do any act or take any proceeding, but no issue of fact shall be submitted to a jury out of session.

(d) *For motions, affidavits.* — A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and except as otherwise provided in Rule 59(c), opposing affidavits shall be served at least two days before the hearing. If the opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served affidavit, or take such other action as the ends of justice require. For the purpose of this two-day requirement only, service shall mean personal delivery, facsimile transmission, or other means such that the party actually receives the affidavit within the required time.

(e) *Additional time after service by mail.* — Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period. (1967, c. 954, s. 1; 2000-127, s. 5.)

Effect of Amendments. — Session Laws 2000-127, s. 5, effective October 1, 2000, and applicable to motions subject to the act and to briefs, memoranda, and affidavits subject to the act filed on or after that date, in subsection (d), substituted "shall be served at least two days before the hearing" for "may unless the court permits them to be served at some other time be served not later than one day before the hearing" in the third sentence and added the fourth and fifth sentences.

CASE NOTES

I. In General.

I. IN GENERAL.

This rule did not control in case where the language of a local ordinance was clear and unambiguous in its requirement that a minimum ten-day "notice of a public hearing" be given and further stated how that ten days should be calculated; furthermore, no authority exists holding that this rule applies to ordinances of local governments. Richardson v. Union County Bd. of Adjustment, 136 N.C. App. 134, 523 S.E.2d 432 (1999).

Applied in Lexington State Bank v. Miller, — N.C. App. —, 529 S.E.2d 454, 2000 N.C. App. LEXIS 501 (2000).

Article 3.

Pleadings and Motions.

Rule 7. Pleadings allowed; form of motions.

(a) *Pleadings.* — There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a crossclaim, if the answer contains a crossclaim; a third-party complaint if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. If the answer alleges contributory negligence, a party may serve a reply alleging last clear chance. No other pleading shall be allowed except that the court may order a reply to an answer or a third-party answer.

(b) *Motions and other papers.* —

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) A motion to transfer under G.S. 7A-258 shall comply with the directives therein specified but the relief thereby obtainable may also be sought in a responsive pleading pursuant to Rule 12(b).

(c) *Demurrers, pleas, etc., abolished.* — Demurrers, pleas, and exceptions for insufficiency shall not be used.

(d) *Pleadings not read to jury.* — Unless otherwise ordered by the judge, pleadings shall not be read to the jury. (1967, c. 954, s. 1; 1971, c. 1156, s. 1; 2000-127, s. 2.)

COMMENT

Comment to the 2000 Amendment. — The 2000 amendment conforms the North Carolina rule to federal Rule 7(b). The federal courts do not apply the particularity requirement as a procedural technicality to deny otherwise meritorious motions. Rather, the federal courts

apply the rule to protect parties from prejudice, to assure that opposing parties can comprehend the basis for the motion and have a fair opportunity to respond.

Editor's Note. — Session Laws 2000-127, s. 4, provides that the 2000 addition to the Official Comment shall only be for annotation purposes and shall not be construed to be the law.

Effect of Amendments. — Session Laws 2000-127, s. 2, effective October 1, 2000, and applicable to motions subject to the act and to briefs, memoranda, and affidavits subject to the act filed on or after that date, inserted "with particularity" in subdivision (b)(1).

CASE NOTES

III. Motions and Other Papers.

III. MOTIONS AND OTHER PAPERS.

Defendants' motion for a new trial did not meet the requirements of this section where the defendants merely stated that they were entitled to a new trial under §§ 1A-1, Rule 59(a)(5), (a)(7) and (a)(8), but did not state any specific basis for granting a new trial. Meehan v. Cable, 135 N.C. App. 715, 523 S.E.2d 419 (1999).

Motions for costs and fees were not time-barred. — The 14-day rule in Rule 54(d)(2)(B), F.R.Civ.P., clearly does not apply to litigation pending in North Carolina state courts, and the North Carolina Rules of Civil Procedure contain neither a counterpart to federal Rule 54(d)(2)(B) nor a deadline for filing a motion for costs and fees. Okwara v. Dillard Dep't Stores, — N.C. App. —, 525 S.E.2d 481, 2000 N.C. App. LEXIS 117 (2000).

Rule 8. General rules of pleadings.

CASE NOTES

I. In General.
II. Pleadings; Generally.

I. IN GENERAL.

Removal to Federal Court. — Because subsection (a)(2) of this rule provides that certain negligence actions claiming in excess of $10,000 may only so state and, therefore, no specific amount was alleged in the complaint, defendants were required to offer evidence such as pleadings, affidavits or other matters in the record, in support of its claim that the controversy satisfied the federal jurisdictional amount for removal to federal court. Aerial Images, Inc. v. Anderson, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 3777 (E.D.N.C. February 21, 2000).

Stated in McIver v. Smith, 134 N.C. App. 583, 518 S.E.2d 522 (1999).

II. PLEADINGS; GENERALLY.

Sufficiency of Pleading Under Notice Theory. —

Where plaintiff's complaint did not allege equitable mortgage as a possible claim against defendants, and did not allege any facts that would put defendants on notice of an equitable mortgage claim, plaintiff's pleadings did not provide defendants with the notice of such claim as required by section (a) of this rule. Parkersmith Props. v. Johnson, — N.C. App. —, 525 S.E.2d 491, 2000 N.C. App. LEXIS 115 (2000).

Rule 9. Pleading special matters.

Legal Periodicals. —

For note, "Keith v. Northern Hospital District of Surry County and Rule 9(j): Preventing Frivolous Medical Malpractice Claims at the Expense of North Carolina Courts' Equitable Powers," see 77 N.C. L. Rev. 2303 (1999).

CASE NOTES

I. IN GENERAL.

A Review of Hypothetical Medical Facts Satisfies Requirements of Section (j). — The plaintiff complied with the requirements of this rule where the plaintiff's counsel presented to the doctor/expert, during a telephone conversation, certain "facts" about the medical care provided decedent by the defendant/doctor and, based on this information, the doctor opined defendant breached the applicable standard of care for an anesthesiologist. Hylton v. Koontz, — N.C. App. —, 530 S.E.2d 108, 2000 N.C. App. LEXIS 629 (2000).

Claim For Medical Malpractice Under Subsection (j) Not Appropriate. — Because the observance and supervision of plaintiff patient when she smoked in the designated smoking area did not constitute an occupation involving specialized knowledge or skill, and because preventing the patient from dropping a match or a lighted cigarette upon herself while in a designated smoking room did not involve matters of medical science, ordinary negligence were properly applied to such behaviors, and the requirements of section (j) of this rule, concerning a complaint for medical malpractice, did not apply. Taylor v. Vencor, Inc., — N.C. App. —, 525 S.E.2d 201, 2000 N.C. App. LEXIS 62 (2000).

Effect of Tolling the Statute of Limitations in a Medical Malpractice Case. — A Rule 9(j) order extending the time to file a medical malpractice action tolls the statute of limitations as to defendants who are not named in the motion requesting the extension of time, as well as all defendants who are not served with notice of the extension. Webb v. Nash Hosps., 133 N.C. App. 636, 516 S.E.2d 191 (1999), cert. denied, 351 N.C. 122, — S.E.2d — (1999).

A Rule 9(j) extension by defendant to file her medical malpractice claim also tolls the statute of limitations as to her husband's loss of consortium. Webb v. Nash Hosps., 133 N.C. App. 636, 516 S.E.2d 191 (1999), cert. denied, 351 N.C. 122, — S.E.2d — (1999).

Stated in Howze v. Hughs, 134 N.C. App. 493, 518 S.E.2d 198 (1999); Clark v. Visiting Health Professionals, Inc., — N.C. App. —, 524 S.E.2d 605, 2000 N.C. App. LEXIS 63 (2000).

III. FRAUD, DURESS, MISTAKE, ETC.

Plaintiff's pleadings were sufficient to allege the separation and property settlement agreement was procured by fraud and the breach of fiduciary duty, in that she alleged she and the defendant were married at the time the agreement was executed and there was evidence presented, without objection, that defendant failed to disclose the existence of his State Retirement Account. The defendant's admission that he inadvertently failed to disclose the existence of his State Retirement Account, was tantamount to an amendment to the complaint that he failed to disclose a material asset. Sidden v. Mailman, — N.C. App. —, 529 S.E.2d 266, 2000 N.C. App. LEXIS 493 (2000).

VII. PLEADING AND PRACTICE.

Medical malpractice complaint

The plaintiffs' voluntary dismissal pursuant to Rule 41(a)(1) effectively extended the statute of limitations by allowing plaintiffs to refile their medical malpractice complaint against defendants within one year, even though the original complaint lacked a Rule 9(j) certification. Brisson v. Kathy A. Santoriello, M.D., P.A., 351 N.C. 589, 528 S.E.2d 568 (2000).

Rule 11. Signing and verification of pleadings.

CASE NOTES

I. IN GENERAL.

When Sanctions May Be Imposed. —

The trial court was applauded for assessing $400 in sanctions against defendants' counsel for violations of this section where he essentially attempted to refile the same counterclaims against plaintiff's counsel that had just been dismissed. Davis Lake Community Ass'n v. Feldmann, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 609 (June 6, 2000).

Motion for Sanctions Not Timely. —

Because plaintiff waited over 13 months after the North Carolina Supreme Court denied de-

fendants' petition for discretionary review to file his motion for sanctions under this rule, plaintiff failed to file within a reasonable time of detecting the alleged impropriety. Griffin v. Sweet, — N.C. App. —, 525 S.E.2d 504, 2000 N.C. App. LEXIS 145 (2000).

Sanctions Were Not Appropriate. —

Petitioner, non-party corporate officer who verified complaint on behalf of his company, but who was never a party to the litigation, was not subject to the court's jurisdiction, and had no notice or opportunity to be heard in his individual capacity, could not be sanctioned under this section. Polygenex Int'l, Inc. v. Polyzen, Inc., 133 N.C. App. 245, 515 S.E.2d 457 (1999).

Sanctions Held Appropriate. — Sufficient evidence existed to support trial court's findings that plaintiff corporation's complaint was facially implausible, not well-grounded in fact and interposed for the improper purpose of harassing defendants. Polygenex Int'l, Inc. v. Polyzen, Inc., 133 N.C. App. 245, 515 S.E.2d 457 (1999).

Sanctions were not appropriate where plaintiff/wife had grounds for seeking to register a foreign state's support order pursuant to the Uniform Interstate Family Support Act. Twaddell v. Anderson, 136 N.C. App. 56, 523 S.E.2d 710 (1999), cert. denied, 351 N.C. 480, — S.E.2d — (2000).

This section was not violated, although the court determined that the statute of limitations had run on a consent judgment barring the plaintiff's recovery, where there was a legitimate question of whether the plaintiff's consent judgment could be considered a judgment or a contract whose breach was discovered after the judgment, in which case the statute would not have run. Grover v. Norris, — N.C. App. —, 529 S.E.2d 231, 2000 N.C. App. LEXIS 429 (2000).

The trial court did not err in denying defendants' motion for sanctions although the plaintiff failed to prevail on any of its claims where the plaintiff challenged the arbitrator's award on the basis that the arbitrator failed to rule on estoppel, election, and parol evidence issues and made no findings of fact or conclusions of law; and on the basis that the defendant was awarded the right to arbitrate under a contract that the arbitrator then found not to be binding on the defendant. Sholar Bus. Assocs., Inc. v. Davis, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 607 (June 6, 2000).

Involuntary Dismissal Not Required for Failure to Prosecute — The trial court did not abuse its discretion by dismissing the plaintiff's action without prejudice, under § 1A-1-41, while imposing costs on the plaintiff where it found that the plaintiff had intentionally delayed prosecution in violation of this rule. Melton v. Stamm, — N.C. App. —, 530 S.E.2d 622, 2000 N.C. App. LEXIS 602 (2000).

Sanction Held Not Nondischargeable in Bankruptcy. — The debt owed by the defendant attorney as a result of Rule 11 sanctions imposed in a State court proceeding against him was not nondischargeable pursuant to 11 U.S.C. § 523(a)(6); although his headstrong and stubborn zealous pursuit of his client's claim may have clouded his professional judgment, his actions were neither willful nor malicious. Bryant v. Rogers, 239 Bankr. 318 (E.D.N.C. 1999).

Rule 12. Defenses and objections; when and how presented; by pleading or motion; motion for judgment on pleading.

CASE NOTES

I. IN GENERAL.

Motion to Dismiss Affected by Law Handed Down While Appeal Was Pending. — Where the court below granted the defendant's 12(b)(6) motion to dismiss based on a willful and wanton standard for licensees, and where the North Carolina Supreme Court changed the appropriate standard of duty owed to licensees to one of reasonable care while the case was pending on appeal, the decision had to be vacated. Alexander v. Quattlebaum, 135 N.C. App. 622, 522 S.E.2d 88 (1999).

Applied in Deerman v. Beverly Cal. Corp.,

135 N.C. App. 1, 518 S.E.2d 804 (1999); Frazier v. Murray, 135 N.C. App. 43, 519 S.E.2d 525 (1999); Little v. Atkinson, — N.C. App. —, 524 S.E.2d 378, 2000 N.C. App. LEXIS 9 (2000), cert. denied, 351 N.C. 474, — S.E.2d — (2000); Price v. Breedlove, — N.C. App. —, 530 S.E.2d 559, 2000 N.C. App. LEXIS 543 (2000).

Quoted in In re Estate of Montgomery, — N.C. App. —, 528 S.E.2d 618, 2000 N.C. App. LEXIS 422 (2000).

Stated in Howze v. Hughs, 134 N.C. App. 493, 518 S.E.2d 198 (1999); DOT v. Mahaffey, — N.C. App. —, 528 S.E.2d 381, 2000 N.C. App. LEXIS 426 (2000).

Cited in Buchanan v. Hight, 133 N.C. App. 299, 515 S.E.2d 225 (1999); Lovelace v. City of Shelby, 133 N.C. App. 408, 515 S.E.2d 722 (1999); Aycock v. Padgett, 134 N.C. App. 164, 516 S.E.2d 907 (1999); Shell Island Homeowners Ass'n v. Tomlinson, 134 N.C. App. 286, 517 S.E.2d 401 (1999); Little v. Atkinson, — N.C. App. —, 524 S.E.2d 378, 2000 N.C. App. LEXIS 9 (2000), cert. denied, 351 N.C. 474, — S.E.2d — (2000); Turner v. Norfolk S. Corp., — N.C. App. —, 526 S.E.2d 666, 2000 N.C. App. LEXIS 256 (2000); Energy Investors Fund, L.P. v. Metric Constructors, Inc., 351 N.C. 331, 525 S.E.2d 441 (2000); County of Johnston v. City of Wilson, — N.C. App. —, 525 S.E.2d 826, 2000 N.C. App. LEXIS 137 (2000); Inman v. Inman, — N.C. App. —, 525 S.E.2d 820, 2000 N.C. App. LEXIS 136 (2000); Walker v. Sloan, — N.C. App. —, 529 S.E.2d 236, 2000 N.C. App. LEXIS 414 (2000); Herring ex rel. Marshall v. Winston-Salem/Forsyth County Bd. of Educ., — N.C. App. —, 529 S.E.2d 458, 2000 N.C. App. LEXIS 500 (2000); Davis Lake Community Ass'n v. Feldmann, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 609 (June 6, 2000); Hamlet HMA, Inc. v. Richmond County, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 636 (June 20, 2000); Reece v. Forga, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 790 (July 5, 2000).

IV. SUBJECT MATTER JURISDICTION.

Failure to exhaust administrative remedies on non-constitutional claims rendered plaintiffs' claims subject to dismissal under this section. Shell Island Homeowners Ass'n v. Tomlinson, 134 N.C. App. 217, 517 S.E.2d 406 (1999).

V. PERSONAL JURISDICTION.

Evidence of Backdated Signature Voids Judgment Occurring Within 30 Days. — Wife who agreed to husband's request that she backdate her signature on the "Acceptance of Service" submitted sufficient testimony that she did so in support of her motion to set aside a judgment of absolute divorce on the grounds that the trial court was without jurisdiction to adjudicate the absolute divorce prior to the expiration of the requisite thirty days. Latimer v. Latimer, 136 N.C. App. 227, 522 S.E.2d 801 (1999).

Effects of Failure to Raise Issue And of Stipulating to Jurisdiction. — Where defendants raised the issues of failure to state a claim and lack of subject matter jurisdiction, but failed to raise the issue of personal jurisdiction, and stipulated in the record before the appellate court that they were properly before the trial court, the defendants could not argue that they were not subject to suit under Chapters 108A and 122C and § 153A-77. Hobbs v. North Carolina Dep't of Human Resources, 135 N.C. App. 412, 520 S.E.2d 595 (1999).

VI. IMPROPER VENUE.

Motion for Change of Venue Under Subsection (b)(3) and § 1-83(2). — Defendant's motion for change of venue properly was filed after the answer was filed because, although motions for change of venue based on improper venue, pursuant to subsection (b)(3) of this rule, must be filed prior to or with the answer, motions for change of venue based on the convenience of witnesses, pursuant to § 1-83(2), must be filed after the answer is filed, and defendant's motion was based on the convenience of the witnesses. McCullough v. Branch Banking & Trust Co., — N.C. App. —, 524 S.E.2d 569, 2000 N.C. App. LEXIS 17 (2000).

IX. FAILURE TO STATE CLAIM.

A. In General.

Constitutional Violations by a Defendant in His Individual Capacity. — Plaintiffs' alleged state constitutional claims against defendant/police officer in his individual capacity were properly dismissed pursuant to this rule. Estate of Fennell v. Stephenson, — N.C. App. —, 528 S.E.2d 911, 2000 N.C. App. LEXIS 428 (2000).

Plaintiffs' state constitutional claim against defendant/police officer in his official capacity was improperly dismissed where they alleged that he unconstitutionally "detained or seized . . . [the decedent]" for which there is an adequate remedy provided by state law but which cause of action, false imprisonment, does not survive the death of a decedent. Estate of Fennell v. Stephenson, — N.C. App. —, 528 S.E.2d 911, 2000 N.C. App. LEXIS 428 (2000).

Plaintiffs' constitutional claim against defendant/police officer in his official capacity was properly dismissed where they alleged a state constitutional claim—i.e. that he unconstitutionally "searched . . . [decedent's] vehicle"—for which there was an adequate remedy provided by state law, a common law

action for trespass to chattel. Estate of Fennell v. Stephenson, — N.C. App. —, 528 S.E.2d 911, 2000 N.C. App. LEXIS 428 (2000).

Motion to Dismiss Converted to Motion to Compel Arbitration. — Defendant's motion to dismiss pursuant to subsection (b)(6) of this rule based on "the terms and provisions of the parties' Employment Agreement which provides for binding arbitration" would be treated as an application to stay litigation and compel arbitration pursuant to § 1-567.3(a), and the order of dismissal would be vacated and the matter remanded to the trial court for further appropriate proceedings. Novacare Orthotics & Prosthetics E., Inc. v. Speelman, — N.C. App. —, 528 S.E.2d 918, 2000 N.C. App. LEXIS 407 (2000).

Complaint Sufficient to Withstand Motion to Dismiss. —

Where complaint, as reflected within the caption, body and claim for relief, indicated a suit against a crossing guard individually and in her official capacity, and alleged that crossing guard had a specific, ministerial duty to assist children, arising from fixed and designated facts, the plaintiff pled a claim against defendant in her individual capacity sufficient to overcome defendant's motion under this section to dismiss on the ground that defendant crossing guard was a public official immune to liability for ordinary negligence. Isenhour v. Hutto, 350 N.C. 601, 517 S.E.2d 121 (1999).

Where the facts alleged by the plaintiffs suggested that a special relationship existed between the plaintiffs and the defendants which would give rise to an exception to the public duty doctrine, dismissal at the pleading stage was inappropriate. Hobbs v. North Carolina Dep't of Human Resources, 135 N.C. App. 412, 520 S.E.2d 595 (1999).

Facts Alleging Unfair Claim Settlement Practices Were Insufficient — Plaintiff who sued defendant/insurance company for unfair and deceptive practices and acts, when it raised his insurance premiums after paying a claim which he repeatedly informed the insurer was fraudulent, failed to state facts sufficient to survive summary judgment under § 58-63-15(11)(b) and (c); where the defendant's advertising claimed that it did not want to pay false claims, plaintiff should have alleged that it did want to, not merely that it did, and where defendant failed to adequately investigate the claim, plaintiff should have alleged that the defendant did not act promptly in doing so. Cash v. State Farm Mut. Auto. Ins. Co., — N.C. App. —, 528 S.E.2d 372, 2000 N.C. App. LEXIS 312 (2000).

Plaintiff's claim for tortious breach of insurance contract and punitive damages, based on defendant's deciding to settle a claim which plaintiff claimed was fraudulent and subsequently raising his premiums, failed to state a claim for which relief could be granted; plaintiff failed to indicate that defendant/insurer's settlement with claimants rose to the level of aggravation defined in Taha v. Thompson, 120 N.C. App. 697, 704-05, 463 S.E.2d 553, 558 (1995), and he also failed to allege an intentional wrong by the insurer; and while he alleged that the claimants committed fraud be nowhere alleged that the insurer committed fraud by settling their claim. Cash v. State Farm Mut. Auto. Ins. Co., — N.C. App. —, 528 S.E.2d 372, 2000 N.C. App. LEXIS 312 (2000).

Or Where Plaintiffs Fail to Plead Damages — The trial court properly dismissed the plaintiffs' claim for tortious interference with prospective economic advantage, pursuant to Rule 12(b)(6) where the plaintiffs failed to sufficiently plead damages. Walker v. Sloan, — N.C. App. —, 529 S.E.2d 236, 2000 N.C. App. LEXIS 414 (2000).

Or Where Plaintiffs Fail to Demonstrate an Injury — The trial court correctly dismissed, as failing to state a claim upon which relief could be granted, the plaintiffs' claim that the defendants/minority shareholders violated the prohibition against unfair and deceptive trade practices by ratifying the adverse actions of majority shareholder/manager who had would-be-stock-buyers/employees fired. Walker v. Sloan, — N.C. App. —, 529 S.E.2d 236, 2000 N.C. App. LEXIS 414 (2000).

The public duty doctrine did not bar a claim against defendant/county for negligent inspection of plaintiffs' private residence. Thompson v. Waters, 351 N.C. 462, 526 S.E.2d 650 (2000).

The public duty doctrine did not bar a claim against the defendant/city for the alleged negligence of a 911 operator who delayed dispatching the fire department until six minutes after she received the call reporting the fire. Lovelace v. City of Shelby, 351 N.C. 458, 526 S.E.2d 652 (2000).

Public Duty Doctrine Not a Shield from Liability Resulting from Ultrahazardous Activity — The plaintiff stated a claim upon which relief could be granted when he alleged that defendant/city was strictly liable for the injuries which he sustained as a result of defendants' use of dynamite, an ultrahazardous activity. The public duty doctrine did not shield the city from liability for this claim because the protection afforded by the public duty doctrine does not extend to local governmental agencies other than law enforcement agencies engaged in their general duty to protect the public. Hargrove v. Billings & Garrett, Inc., — N.C. App. —, 529 S.E.2d 693, 2000 N.C. App. LEXIS 535 (2000).

Breach of Contract Insufficient to Support Unfair Practices Claim. — The defendants' claim was properly dismissed pursuant to this section where their contention that the

plaintiff did not follow through on an oral agreement to assist in purchasing a condominium, at most, stated a simple breach of contract, because they failed to allege any substantially aggravating circumstances which would give rise to an unfair or deceptive practices claim under § 75-1.1. Miller v. Rose, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 777 (July 5, 2000).

Governmental Official Can Be Sued in Both Official and Individual Capacity. — A government employee in his official capacity is not in privity with himself in his individual capacity for purposes of res judicata; therefore, a prior lawsuit against an individual in his official capacity does not bar later relitigation of claims against that same individual in his personal capacity. Andrews v. Daw, 201 F.3d 521 (4th Cir. 2000).

B. Conversion of Motion to Dismiss to Summary Judgment Motion.

Court Lacked Jurisdiction To Convert After Timely Voluntary Dismissal. — Where plaintiff had a motion to amend his complaint pending before the trial court and, consequent to the defendants' motion to dismiss, filed a timely voluntary dismissal under Rule 41 (a)(1)(i), and the trial court had before it matters outside the pleadings, the trial court did not have jurisdiction to dismiss plaintiff's complaint with prejudice pursuant to subdivision (b)(6) of this rule. Schnitzlein v. Hardee's Food Sys., 134 N.C. App. 153, 516 S.E.2d 891 (1999), cert. denied, 351 N.C. 109, — S.E.2d — (1999).

XI. MOTION FOR JUDGMENT ON THE PLEADINGS.

Motions Under Subsection (b)(6) and Section (c) Distinguished. —

The survival of an action after a motion under subsection (b)(6) of this rule is not the equivalent to the court determining that conflicting issues exist. No party is entitled to judgment as a matter of law under section (c). Cash v. State Farm Mut. Auto. Ins. Co., — N.C. App. —, 528 S.E.2d 372, 2000 N.C. App. LEXIS 312 (2000).

The Trial Court Cannot, on Its Own motion, Enter Judgment on the Pleadings. — The trial court was not authorized to enter judgment on the pleadings pursuant to this rule because neither party in a neglect proceeding moved for judgment on the pleadings. Thrift v. Buncombe County Dep't of Social Servs., — N.C. App. —, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000).

Grant of Motion Held Proper. —

Plaintiff's cause of action for constructive fraud against defendant/insurer, who settled a claim in spite of plaintiff's repeated protestations that claimants were acting fraudulently, failed because he did not present evidence of a fiduciary relationship between insurer/defendant and himself. Cash v. State Farm Mut. Auto. Ins. Co., — N.C. App. —, 528 S.E.2d 372, 2000 N.C. App. LEXIS 312 (2000).

A cause of action alleging breach of good faith will not lie when the insurer settles a claim within the monetary limits of the insured's policy; the insurer has the duty to consider the insured's interest, but may act in its own interest in settlement of the claim. Cash v. State Farm Mut. Auto. Ins. Co., — N.C. App. —, 528 S.E.2d 372, 2000 N.C. App. LEXIS 312 (2000).

Judgment on the Pleadings Inappropriate in an Adjudication of Neglect. — Just as a default judgment or judgment on the pleadings is inappropriate in a proceeding involving termination of parental rights, it is equally inappropriate in an adjudication of neglect. Thrift v. Buncombe County Dep't of Social Servs., — N.C. App. —, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000).

Rule 13. Counterclaim and crossclaim.

CASE NOTES

I. IN GENERAL.

Applied in Walker v. Branch Banking & Trust Co., 133 N.C. App. 580, 515 S.E.2d 727 (1999).

Cited in Davis Lake Community Ass'n v. Feldmann, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 609 (June 6, 2000).

II. COUNTERCLAIMS.

What Claims Must Be Asserted. —

Plaintiff/husband's claim to recoup money on two promissory notes executed by his wife during their marriage was a compulsory counterclaim in defendant's previously filed domestic action; and he should, therefore, have been

granted leave, upon its dismissal, to file it properly in separate case. Hudson v. Hudson, 135 N.C. App. 97, 518 S.E.2d 811 (1999).

Joinder of Other Parties. —

Joinder of plaintiff's counsel was not "required for the granting of complete relief" as to defendants' counterclaim where defendants could not have asserted a valid claim against the counsel in the first place. Davis Lake Community Ass'n v. Feldmann, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 598 (2000).

Rule 14. Third-party practice.

CASE NOTES

Refiling by Third Party Plaintiff After Voluntary Dismissal. — A third-party plaintiff who originally files a third-party complaint within the time limits set out in this rule and subsequently enters a voluntary dismissal may, within one year, refile the complaint or an amended complaint without leave of court. Clark v. Visiting Health Professionals, Inc., — N.C. App. —, 524 S.E.2d 605, 2000 N.C. App. LEXIS 63 (2000).

Rule 15. Amended and supplemental pleadings.

CASE NOTES

I. In General.
II. Amendments to Conform to Evidence.
III. Relation Back of Amendments.

I. IN GENERAL.

Undue Delay. — The trial court did not abuse its discretion in denying plaintiffs' motion to amend which was made almost three months after the defendants' answer and nearly five months after plaintiffs' original complaint. Walker v. Sloan, — N.C. App. —, 529 S.E.2d 236, 2000 N.C. App. LEXIS 414 (2000).

Amendment to Include Medical Malpractice Certification. — Where defendants had not filed any responsive pleading, only a Rule 12(b)(6) motion to dismiss, court incorrectly denied plaintiffs' motion to amend complaint to include a Rule 9(j) certification. Brisson v. Santoriello, 134 N.C. App. 65, 516 S.E.2d 911 (1999).

Summary Judgment May Precede Unverified Amended Pleadings. — While it is error for the trial court to grant a motion for summary judgment without first ruling on a party's motion to amend its pleadings, this error is harmless when the amended pleadings are unverified, because the trial court may not consider an unverified pleading when ruling on a motion for summary judgment. Allen R. Tew, P.A. v. Brown, 135 N.C. App. 763, 522 S.E.2d 127 (1999), cert. denied, — N.C. —, 531 S.E.2d 213 (2000).

Applied in Sidden v. Mailman, — N.C. App. —, 529 S.E.2d 266, 2000 N.C. App. LEXIS 493 (2000).

Cited in Estate of Fennell v. Stephenson, — N.C. App. —, 528 S.E.2d 911, 2000 N.C. App. LEXIS 428 (2000).

II. AMENDMENTS TO CONFORM TO EVIDENCE.

Amendment Where Defendants Had Notice in Pretrial Order Not Error. — The trial court did not err in allowing the plaintiff to amend his complaint to state a violation of the Act where the defendants clearly failed to pay him commissions earned as required by §§ 95-25.6 and 95-25.7; and where the plaintiff raised the violation in the pretrial order which defendants signed and, thereby, put them on notice of the claims against them. Fulk v. Piedmont Music Ctr., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 643 (June 20, 2000).

III. RELATION BACK OF AMENDMENTS.

An amended complaint, which named the defendant in his individual capacity, had the effect of adding a new party and did not relate back to the filing of the original complaint. White v. Crisp, — N.C. App. —, 530 S.E.2d 87, 2000 N.C. App. LEXIS 638 (2000).

Rule 16. Pre-trial procedure; formulating issues.

CASE NOTES

Quoted in Inman v. Inman, — N.C. App. —, 525 S.E.2d 820, 2000 N.C. App. LEXIS 136 (2000).

ARTICLE 4.

Parties.

Rule 17. Parties plaintiff and defendant; capacity.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in Energy Investors Fund, L.P. v. Metric Constructors, Inc., 351 N.C. 331, 525 S.E.2d 441 (2000).

Rule 19. Necessary joinder of parties.

CASE NOTES

I. In General.

I. IN GENERAL.

Action to Enjoin Demolition of Adjacent Structures. — Pursuant to this rule, nonparty property owners were required to be joined in an action, brought by others in their subdivision, to enjoin defendants from demolishing three residential and historic structures adjacent to plaintiffs' properties; defendants' change-of-circumstances affirmative defense had the potential to result in the invalidation of restrictive covenant requiring residential use of property in the subdivision. Karner v. Roy White Flowers, Inc., 351 N.C. 433, 527 S.E.2d 40 (2000).

Cited in Energy Investors Fund, L.P. v. Metric Constructors, Inc., 351 N.C. 331, 525 S.E.2d 441 (2000).

Rule 20. Permissive joinder of parties.

CASE NOTES

Power of Judge to Refuse to Allocate Damages. — The trial court did not abuse its discretion in refusing to allow the defendants to amend the judgment, allocating the damages among defendants, where the evidence at trial tended to show: (1) that plaintiff worked for all three defendants at some point over the course of the year in question; (2) that the sole or major owner of all three entities is the same person; and (3) that all three entities, therefore, owed the plaintiff some portion of the disputed commissions. Fulk v. Piedmont Music Ctr., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 643 (June 20, 2000).

Rule 23. Class actions.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in Karner v. Roy White Flowers, Inc., 351 N.C. 433, 527 S.E.2d 40 (2000).

Rule 24. Intervention.

CASE NOTES

I. In General.

I. IN GENERAL.

Law Firm As Interested Party. — Law firm which had no contact with defendant/phony psychiatric resident accused of sexual misconduct with client and which had not been authorized by him to undertake his representation lacked the authority under Rule 1.2(a) of the Rules of Professional Conduct to represent him on a limited basis but could intervene under Rule 24(a)(2) as an interested party to protect its interests. Dunkley v. Shoemate, 350 N.C. 573, 515 S.E.2d 442 (1999).

Newspaper/appellant had alternative means of obtaining a full and timely review of the issue it sought to raise without being allowed to intervene as a party and unduly delay the adjudication of the rights of the original parties; hence, trial court did not err in denying its motion to intervene under this section. Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 515 S.E.2d 675 (1999), cert. denied, — U.S. —, 120 S. Ct. 1452, 146 L. Ed. 2d 337 (2000).

Cited in Karner v. Roy White Flowers, Inc., 351 N.C. 433, 527 S.E.2d 40 (2000).

Article 5.

Depositions and Discovery.

Rule 26. General provisions governing discovery.

CASE NOTES

I. In General.
II. Scope of Discovery Generally.
IV. Trial Preparation.
V. Protective Orders.

I. IN GENERAL.

Applied in Jones v. Asheville Radiological Group, P.A., 134 N.C. App. 520, 518 S.E.2d 528 (1999).

II. SCOPE OF DISCOVERY GENERALLY.

Summary Judgment Motion Heard Before Motion to Compel. — Where the plaintiff's failure to seek an extension under the local rules fixed the date after which pendency of discovery "would not be allowed to delay trial or any other proceeding before the court ...," the trial court did not abuse its discretion by hearing defendants' motion for summary judgment, even though discovery was still pending. Dobson v. Harris, 134 N.C. App. 573, 521 S.E.2d 710 (1999), cert. denied, 351 N.C. 186, — S.E.2d — (1999).

IV. TRIAL PREPARATION.

Notes and witness statements taken by the State Bar's investigator were not discoverable on attorney's appeal of disbarment until there was a showing by attorney that he had a substantial need of the materials in preparation of his case and that he was unable without undue hardship to obtain the substantial equivalent. North Carolina State Bar v. Harris, — N.C. App. —, 527 S.E.2d 728, 2000 N.C. App. LEXIS 317 (2000).

V. PROTECTIVE ORDERS.

Modification to Protective Order Disallowed. — Where plaintiffs agreed to protective order and sealing provisions, arguments relating to constitutionality and presumption of access were not available to support their request for removal of protective order; wholesale declassification of the record was not, in any case, deemed appropriate. Longman v. Food Lion, Inc., 186 F.R.D. 331 (M.D.N.C. 1999).

Where plaintiffs sought to modify protective order that they had previously agreed to, on the grounds that (1) they wanted to submit the record on appeal without the administrative burden of filing it under seal, and (2) they wanted to provide material to class members and the public at large, they failed to show a change in circumstances sufficient to warrant a reconsideration of the seal. Longman v. Food Lion, Inc., 186 F.R.D. 331 (M.D.N.C. 1999).

Protective Order with Respect to MHOD Petition Affirmed. — Plaintiff seller of land whose petition for Manufactured Home Overlay District (MHOD) rezoning was denied was precluded from examining a city mayor about his actions, intentions or motives with respect to the city's denial and with respect to any other quasi-judicial or legislative matters before the council. Northfield Dev. Co. v. City of Burlington, — N.C. App. —, 523 S.E.2d 743, 2000 N.C. App. LEXIS 2 (2000).

Rule 30. Depositions upon oral examination.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in Kilgo v. Wal-Mart Stores, Inc., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 791 (July 5, 2000).

Rule 31. Depositions upon written questions.

CASE NOTES

Cited in Kilgo v. Wal-Mart Stores, Inc., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 791 (July 5, 2000).

Rule 33. Interrogatories to parties.

CASE NOTES

Proper Party to Answer Interrogatories — The State Bar's counsel, as an agent of that governmental agency, was the proper party to answer the defendant's interrogatories. North Carolina State Bar v. Harris, — N.C. App. —, 527 S.E.2d 728, 2000 N.C. App. LEXIS 317 (2000).

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in Kilgo v. Wal-Mart Stores, Inc., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 791 (July 5, 2000).

Rule 36. Requests for admission; effect of admission.

CASE NOTES

Cited in Brannock v. Brannock, 135 N.C. App. 635, 523 S.E.2d 110 (1999).

Rule 37. Failure to make discovery; sanctions.

CASE NOTES

Sanctions Upheld for Violation of Court Orders. —

When defendant, who allegedly received embezzled funds, failed to demonstrate a good faith effort at compliance with court's request, and continued to provide evasive and incomplete answers, despite orders compelling discovery and continuances granted to enable her to comply, the trial court properly struck defendant's answer and entered a default judgment against her for $250,000. Atlantic Veneer Corp. v. Robbins, 133 N.C. App. 594, 516 S.E.2d 169 (1999).

ARTICLE 6.

Trials.

Rule 38. Jury trial of right.

CASE NOTES

Cited in Fulk v. Piedmont Music Ctr., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 643 (June 20, 2000).

Rule 40. Assignment of cases for trial; continuances.

CASE NOTES

III. Continuances.

III. CONTINUANCES.

Failure of plaintiff to Demonstrate Diligence and Good Faith. — The trial court's finding that plaintiff failed to establish grounds for an additional continuance was proper where plaintiff demonstrated neither diligence nor a good faith effort to meet the schedule set by the trial court more than a month earlier. May v. City of Durham, — N.C. App. —, 525 S.E.2d 223, 2000 N.C. App. LEXIS 109 (2000).

Rule 41. Dismissal of actions.

CASE NOTES

I. In General.
II. Voluntary Dismissal.
III. Involuntary Dismissal.
  A. In General.
  B. Failure to Prosecute or to Comply with Rules or Orders.
IV. Costs.

I. IN GENERAL.

Action Not Based on Same Claim Where New Statute Eliminated Absolute Defense. — An alimony claim made pursuant to § 50-16.3A(a) and filed within one year of plaintiff's dismissal of her first claim (under repealed § 50-16.6(a)) failed to qualify as "a new action based on the same claim" under this section, because a § 50-16.3A(a) claim for alimony was distinct from that set out by the repealed section in that it deferred to the court's discretion the decision of whether to award alimony where both the supporting and dependent spouse "each participated in an act of illicit sexual behavior," whereas the old section foreclosed a dependent adulterous spouse from recovering; to allow her to maintain this new action would have deprived the defendant husband of a statutory absolute defense he had had under the old law. Brannock v. Brannock, 135 N.C. App. 635, 523 S.E.2d 110 (1999).

Stated in Cash v. State Farm Mut. Auto. Ins. Co., — N.C. App. —, 528 S.E.2d 372, 2000 N.C. App. LEXIS 312 (2000).

Cited in Hyde v. Chesney Glen Homeowners Ass'n, Inc., — N.C. App. —, 529 S.E.2d 499, 2000 N.C. App. LEXIS 504 (2000); Formyduval v. Bunn, — N.C. App. —, 530 S.E.2d 96, 2000 N.C. App. LEXIS 622 (2000); Brisson v. Kathy A. Santoriello, M.D., P.A., 351 N.C. 589, 528 S.E.2d 568 (2000).

II. VOLUNTARY DISMISSAL.

Refiling by Third-Party Plaintiff After Voluntary Dismissal. — A third-party plaintiff who originally files a third-party complaint within the time limits set out in § 1A-1, Rule 14 and subsequently enters a voluntary dismissal may, within one year, refile the complaint or an amended complaint without leave of court. Clark v. Visiting Health Professionals, Inc., — N.C. App. —, 524 S.E.2d 605, 2000 N.C. App. LEXIS 63 (2000).

Voluntarily Dismissed Suit Based on Defective Complaint Does Not Toll the Statute of Limitations. — Although a voluntary dismissal without prejudice will toll the statute of limitations if the dismissed complaint is reinstituted within one year, this rule cannot revive an action on a properly directed summons if the complaint was defective, no amendment of the complaint was ever requested, and the defect was never cured. Sweet v. Boggs, 134 N.C. App. 173, 516 S.E.2d 888 (1999).

Voluntary Dismissal with Prejudice Barred Derivative Action. — Plaintiff could not proceed against an alleged employer on the theory of respondeat superior after having voluntarily dismissed with prejudice and without payment a negligence claim against the alleged employee; even if dismissal was not with prejudice, it was the second dismissal of plaintiff's claims against the employee, an adjudication on the merits and, therefore, a bar to the action against the employer. Wrenn v. Maria Parham Hosp., 135 N.C. App. 672, 522 S.E.2d 789 (1999).

Institution of New Claim Allowed Within One Year After Voluntary Dismissal Without Prejudice. —

The plaintiffs' voluntary dismissal pursuant to this section effectively extended the statute of limitations by allowing plaintiffs to refile their good faith medical malpractice complaint against defendants within one year, even though the original complaint lacked a Rule 9(j) certification. Brisson v. Kathy A. Santoriello, M.D., P.A., 351 N.C. 589, 528 S.E.2d 568 (2000).

Court Lacked Jurisdiction After Plaintiff Files Timely Voluntary Dismissal. — Where plaintiff had a motion to amend his complaint pending before the trial court and, consequent to the defendants' motion to dismiss, filed a timely voluntary dismissal under subdivision (a)(1)(i) of this rule, and the trial court had before it matters outside the pleadings, the trial court did not have jurisdiction to dismiss plaintiff's complaint with prejudice pursuant to Rule 12(b)(6). Schnitzlein v. Hardee's Food Sys., 134 N.C. App. 153, 516 S.E.2d 891 (1999), cert. denied, 351 N.C. 109, — S.E.2d — (1999).

Savings Provision Preserves Derivative Claims. — Plaintiff's additional claim for punitive damages could be made for the first time pursuant to the savings provision of this rule more than a year after the statute of limitations expired because it was derivative of the original claims, violation of civil rights and loss of consortium. Staley v. Lingerfelt, 134 N.C. App. 294, 517 S.E.2d 392 (1999), cert. denied, 351 N.C. 109, — S.E.2d — (1999).

Savings Provision Cannot Preserve Non-Derivative Claims. — Plaintiff's additional claims of assault and battery, false arrest and imprisonment, malicious prosecution, intentional infliction of emotional distress, negligent infliction of emotional distress, trespass by a public officer and violations of the North Carolina constitution could not be made for the first time pursuant to the savings provision of this rule more than a year after the statute of limitations expired because they were not derivative of the original claims, namely, violation of civil rights and loss of consortium. Staley v. Lingerfelt, 134 N.C. App. 294, 517 S.E.2d 392 (1999), cert. denied, 351 N.C. 109, — S.E.2d — (1999).

Dismissal Allowed. — Where plaintiff/husband had filed no reply and there was no other pending matter before the court, wife/defendant was free to file her voluntary dismissal of permanent alimony counterclaim without permission of the court or notice to plaintiff.

Riviere v. Riviere, 134 N.C. App. 302, 517 S.E.2d 673 (1999).

III. INVOLUNTARY DISMISSAL.

A. In General.

Findings Required. — The appellate court would treat a motion for a directed verdict made pursuant to Rule 50(a) as a Rule 41(b) motion, because the motion was made in a bench trial, and would reverse the trial court's order dismissing the plaintiff's claim for unfair and deceptive trade practices because the court failed to make the required findings. Hill v. Lassiter, 135 N.C. App. 515, 520 S.E.2d 797 (1999).

B. Failure to Prosecute or to Comply with Rules or Orders.

Involuntary Dismissal Not Required for Failure to Prosecute — The trial court did not abuse its discretion by dismissing the plaintiff's action without prejudice, under this rule, while imposing costs on the plaintiff where it found that the plaintiff had intentionally delayed prosecution in violation of Rule 11(a). Melton v. Stamm, — N.C. App. —, 530 S.E.2d 622, 2000 N.C. App. LEXIS 602 (2000).

IV. COSTS.

Costs on Filing of "Conditional" Voluntary Dismissal. — Where despite the "conditional" label plaintiffs attempted to place upon their notice of dismissal, plaintiffs actually filed a notice of voluntary dismissal, and expressly stated in that document that the dismissal was entered pursuant to the provisions of section (a) of this rule, the voluntary dismissal entered by plaintiffs was sufficient to dismiss the case without prejudice pursuant to section (a), and the trial court did not err in taxing costs to plaintiffs, because the provisions of section (d) required the court to do so. Cullen v. Carolina Healthcare Sys., — N.C. App. —, 524 S.E.2d 596, 2000 N.C. App. LEXIS 56 (2000).

Rule 43. Evidence.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in Bruggeman v. Meditrust Acquisition Co., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 774 (July 5, 2000).

Rule 45. Subpoena.

CASE NOTES

Applied in Rush v. Living Centers-Southeast, Inc., 135 N.C. App. 509, 521 S.E.2d 145 (1999); Kilgo v. Wal-Mart Stores, Inc., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 791 (July 5, 2000).

Rule 46. Objections and exceptions.

CASE NOTES

I. In General.

I. IN GENERAL.

Filing of Rule 12 (b)(6) Motion Sufficient. — For rulings and orders of the trial court not directed to admissibility of evidence, no formal objections or exceptions are necessary; thus, when defendants filed their motion to dismiss under § 1A-1, Rule 12(b)(6), § 1A-1, no further action in the trial court was required by defendants in order to preserve their exception. Inman v. Inman, — N.C. App. —, 525 S.E.2d 820, 2000 N.C. App. LEXIS 136 (2000).

Rule 49. Verdicts.

CASE NOTES

I. In General.

I. IN GENERAL.

Award of Damages as Surplusage. — Trial court erred in failing to treat jury's award of damages to plaintiff as surplusage after jury found plaintiff contributorily negligent. Rogers v. Sportsworld of Rocky Mount, Inc., 134 N.C. App. 709, 518 S.E.2d 551 (1999).

Finding Deemed Made in Accord with Judgment Entered. —

Where defendant did not formally object to instructions or request additional instructions, and jury was not asked to determine key factual contract issues, the trial court was "deemed to have made a finding in accord with the judgment entered." Patterson v. Strickland, 139 N.C. App. 510, 515 S.E.2d 915 (1999).

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

CASE NOTES

I. In General.
II. Directed Verdict.
A. In General.
III. Judgment Notwithstanding the Verdict and New Trial.

I. IN GENERAL.

Applied in In re Will of Buck, 350 N.C. 612, 516 S.E.2d 858 (1999); Bahl v. Talford, — N.C. App. —, 530 S.E.2d 347, 2000 N.C. App. LEXIS 537 (2000).

Stated in Fulk v. Piedmont Music Ctr., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 643 (June 20, 2000).

II. DIRECTED VERDICT.

A. In General.

Directed verdicts are appropriate only in jury cases.

The appellate court would treat a motion for a directed verdict made pursuant to this section as a Rule 41(b) motion, because the motion was made in a bench trial, and would reverse the trial court's order dismissing the plaintiff's claim for unfair and deceptive trade practices because the court failed to make the required findings. Hill v. Lassiter, 135 N.C. App. 515, 520 S.E.2d 797 (1999).

The trial court properly denied the plaintiffs' directed verdict motion where the record reflected that a truck suddenly crossed in front of the defendant's automobile, causing him to brake and swerve to his right to avoid colliding with it, whereupon he struck the plaintiffs' vehicle as she was turning into the driveway of her son's residence, and although plaintiffs presented conflicting evidence as to defendant's speed and opportunity to avoid the collision, defendant's showing permitted the inference that he was not negligent. Long v. Harris, — N.C. App. —, 528 S.E.2d 633, 2000 N.C. App. LEXIS 415 (2000).

Motion for Directed Verdict Improperly Granted. —

Where driver ran into horse and rider who claimed not to have had time to get out of the way, the trial court improperly granted the defendant's motion for directed verdict as to the issues of contributory negligence and willful and wanton conduct. Wilburn v. Honeycutt, 135 N.C. App. 373, 519 S.E.2d 774 (1999).

Motion for Directed Verdict Improperly Denied. — Trial court incorrectly denied defendants' motions under subsection (a) of this rule: § 20-71.1 merely provides prima facie evidence of motor vehicle ownership but does not remove the plaintiff's burden of proof as to agency which, in this case, he failed to carry as to the first defendant and which issue the court removed in error from the jury as to the second defendant. Winston v. Brodie, 134 N.C. App. 260, 517 S.E.2d 203 (1999).

Effect of Voluntary Dismissal with Prejudice on Appeal. — In wrongful death action, plaintiffs' voluntary dismissal with prejudice of the issue of negligence, upon which all of their claims were based, rendered their appeal of directed verdict moot. Bailey v. Gitt, 135 N.C. App. 119, 518 S.E.2d 794 (1999).

III. JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL.

JNOV for the defendants's was inappropriate on a breach of contract claim where the evidence contradicted the defendant's claim that his performance under the sale of land contracts was excused, such that no breach occurred, because plaintiffs were not "ready, willing, and able to perform their part of the contract" and where the record reflected that defendant did not obtain required quitclaim deeds until seven months after the closing date, that he entered into subsequent sales contracts with third parties regarding the lots subject to the contracts with plaintiffs, and that he terminated their contracts by means of a letter. Poor v. Hill, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 540 (May 16, 2000).

Grant of Motions for Judgement N.O.V. and New Trial Inconsistent. —

Order which grants both a JNOV and a new trial is legally inconsistent and fails to conform to subsection (c)(1) of this rule, which requires that a new trial be granted if the JNOV is granted and thereafter vacated or reversed. Southern Furn. Hdwe., Inc. v. Branch Banking & Trust Co., — N.C. App. —, 526 S.E.2d 197, 2000 N.C. App. LEXIS 143 (2000).

Denial of JNOV Upheld. — Where the parties did not stipulate to the issues of proximate cause and damages, the jury was not bound by the plaintiff's proof regarding medical costs, but could accept or reject any testimony regarding plaintiff's injuries, the reasonableness of her medical expenses, and the extent of her pain and suffering; thus, the trial court did not abuse its discretion in denying her motion for judgment notwithstanding the verdict. Blackmon v. Bumgardner, 135 N.C. App. 125, 519 S.E.2d 335 (1999).

Rule 51. Instructions to jury.

CASE NOTES

II. Charge to the Jury.
A. Generally.

II. CHARGE TO THE JURY.

A. Generally.

The absence of a jury instruction on spoliation of evidence entitled the plaintiff to a new trial on the issue of employer's ratification of the conduct of employee in committing a battery upon plaintiff. McLain v. Taco Bell Corp., — N.C. App. —, 527 S.E.2d 712, 2000 N.C. App. LEXIS 330 (April 4, 2000).

Rule 52. Findings by the court.

CASE NOTES

I. In General.
II. Findings and Conclusions, Generally.

I. IN GENERAL.

Findings Held Insufficient. — Where the trial court's findings did not address the factual dispute with respect to either the necessity or the cost of "changes mandated" by the county's application of more stringent fire and building code requirements than anticipated by the contract, the findings did not support the court's conclusion that plaintiff contractor was entitled to recover damages of $36,000 from defendant owner. Mann Contractors v. Flair with Goldsmith Consultants-II, Inc., 135 N.C. App. 772, 522 S.E.2d 118 (1999).

Quoted in Collins v. Talley, 135 N.C. App. 758, 522 S.E.2d 794 (1999).

Cited in Condellone v. Condellone, — N.C. App. —, 528 S.E.2d 639, 2000 N.C. App. LEXIS 427 (2000).

II. FINDINGS AND CONCLUSIONS, GENERALLY.

Findings and Conclusions Not Required for Child Consent Judgments. — While this rule and § 50-13.2 mandate findings of fact and conclusions when a court adjudicates child custody, child consent judgments need not contain such findings of fact and conclusions of law, and consenting parties waive their right to have the court adjudicate the merits of the case. Buckingham v. Buckingham, 134 N.C. App. 82,

516 S.E.2d 869 (1999), cert. denied, 351 N.C. 100, — S.E.2d — (1999).

ARTICLE 7.

Judgment.

Rule 54. Judgments.

CASE NOTES

I. In General.
II. Judgment on Multiple Claims or Involving Multiple Parties.

I. IN GENERAL.

This Section Did Not Overrule Nuckles. — To the extent that Ingle v. Allen suggests that N.C. State Highway Comm'n v. Nuckles was overruled by the enactment of Rule 54 of the North Carolina Rules of Civil Procedure, Ingle and its progeny are hereby overruled. DOT v. Rowe, 351 N.C. 172, 521 S.E.2d 707 (1999).

Substantive Versus Procedural Challenges. — The right to immediate appellate review under the substantial right doctrine applies only to a substantive, rather than a merely procedural, jurisdictional challenge; thus, defendants who were neither named in motion requesting nor order granting an extension of the statute of limitations and were not served with notice of that extension could not immediately appeal, and the trial court's certification under subsection (b) of this rule was made in error. Howze v. Hughs, 134 N.C. App. 493, 518 S.E.2d 198 (1999).

Substantial Right. — Court addressed plaintiffs' appeal, which was not certified pursuant to subsection (b) of this rule, finding that plaintiffs had a substantial right to have the liability of all defendants determined in one proceeding. Camp v. Leonard, 133 N.C. App. 554, 515 S.E.2d 909 (1999).

Applied in Turner v. Norfolk S. Corp., — N.C. App. —, 526 S.E.2d 666, 2000 N.C. App. LEXIS 256 (2000).

Stated in Sharpe v. Worland, 351 N.C. 159, 522 S.E.2d 577 (1999).

Cited in Buckingham v. Buckingham, 134 N.C. App. 82, 516 S.E.2d 869 (1999), cert. denied, 351 N.C. 100, — S.E.2d — (1999); Rhoney v. Fele, 134 N.C. App. 614, 518 S.E.2d 536 (1999); Collins v. Talley, 135 N.C. App. 758, 522 S.E.2d 794 (1999); Lee v. Mutual Community Sav. Bank, — N.C. App. —, 525 S.E.2d 854, 2000 N.C. App. LEXIS 156 (2000); Davis v. J.M.X., Inc., — N.C. App. —, 528 S.E.2d 56, 2000 N.C. App. LEXIS 309 (2000).

II. JUDGMENT ON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES.

Burden of Proof on Appellant. — Where defendant presented neither argument nor citation to show the appeals court that it had the right to appeal trial court's interlocutory order, it was not the duty of the court to construct arguments for or find support for defendant's right to appeal; instead, the defendant had the burden of showing the appeals court that the order deprived the defendant of a substantial right. Russell v. State Farm Ins. Co., — N.C. App. —, 526 S.E.2d 494, 2000 N.C. App. LEXIS 152 (2000).

Certification Not Appropriate. — Where only the issue of damages remained, no final judgment had been made and no substantial right was affected, the appellate court found the trial court's certification ineffective and saw no impediment to the trial court's sorting out various claims and affirmative defenses intertwined with the damages issue. CBP Resources, Inc. v. Mountaire Farms of N.C., Inc., 134 N.C. App. 169, 517 S.E.2d 151 (1999).

Denial of summary judgment in case where the only appellate issues were whether plaintiff's action was barred by a general release and whether plaintiff could compel defendant to participate as a named defendant was not a final judgment and therefore was not properly certified under this rule. Anderson v. Atlantic Cas. Ins. Co., 134 N.C. App. 724, 518 S.E.2d 786 (1999).

Judgment Held Appealable. — Order of partial summary judgment on the issue of whether an insurer has a duty to defend a defendant in an underlying action, affects a substantial right that might be lost absent immediate appeal. Lambe Realty Inv., Inc. v. Allstate Ins. Co., — N.C. App. —, 527 S.E.2d 328, 2000 N.C. App. LEXIS 261 (2000).

Rule 55. Default.

CASE NOTES

IV. Setting Aside Default.

IV. SETTING ASIDE DEFAULT.

Order Refusing to Set Aside Upheld on Appeal. — The trial court's decision not to set aside the entry of default was not unsupported by reason where the defendant filed her motion to set aside the entry of default almost six months after its entry; where she claimed to be "unaware that she was required to file an answer to the plaintiff's complaint as she is not an attorney and has not been involved in civil litigation, other than the present domestic civil action;" and where she claimed to believe that she was entitled to rely on her former husband's defense of this deficiency action, since it related to property jointly owned by them. First Citizens Bank & Trust Co. v. Shaut, — N.C. App. —, 530 S.E.2d 581, 2000 N.C. App. LEXIS 549 (2000).

Entry of Default Set Aside. —

The trial court erred in denying defendant's motion to set aside entry of default where defendant did everything that could reasonably have been required to demonstrate diligent attention to the case, it did not appear as though plaintiffs suffered any harm by virtue of the delay, and there was the possibility that defendant would suffer injustice by being unable to defend the action. Brown v. Lifford, — N.C. App. —, 524 S.E.2d 587, 2000 N.C. App. LEXIS 3 (2000).

Rule 56. Summary judgment.

(a) *For claimant.* — A party seeking to recover upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party.* — A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.* — The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits at least two days before the hearing. If the opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served affidavit, or take such other action as the ends of justice require. For the purpose of this two-day requirement only, service shall mean personal delivery, facsimile transmission, or other means such that the party actually receives the affidavit within the required time.

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) *Case not fully adjudicated on motion.* — If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall

thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established.

(e) *Form of affidavits; further testimony; defense required.* — Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When affidavits are unavailable.* — Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.* — Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees. (1967, c. 954, s. 1; 2000-127, s. 6.)

Effect of Amendments. — Session Laws 2000-127, s. 6, effective October 1, 2000, and applicable to motions subject to the act and to briefs, memoranda, and affidavits subject to the act filed on or after that date, in subsection (c), deleted "prior to the day of hearing" following "The adverse party," and added the language following "may serve opposing affidavits."

CASE NOTES

I. In General.
III. Propriety of Summary Judgment.
B. Particular Types of Actions, etc.
C. Cases in Which Summary Judgment Held Proper.
D. Cases in Which Summary Judgment Held Improper.
VI. Evidence on Motion.
A. In General.

I. IN GENERAL.

Applied in South Mecklenburg Painting Contractors v. Cunnane Group, Inc., 134 N.C. App. 307, 517 S.E.2d 167 (1999); Schmidt v. Breeden, 134 N.C. App. 248, 517 S.E.2d 171 (1999); Crowder Constr. Co. v. Kiser, 134 N.C. App. 190, 517 S.E.2d 178 (1999), cert. denied, 351 N.C. 101, — S.E.2d — (1999); Barnett v. King, 134 N.C. App. 348, 517 S.E.2d 397 (1999); Market Am., Inc. v. Christman-Orth, — N.C. App. —, 517 S.E.2d 645 (1999); Fulton v. Mickle, 134 N.C. App. 620, 518 S.E.2d 518 (1999); Myers v. Town of Plymouth, 135 N.C. App. 707, 522 S.E.2d 122 (1999); Market Am., Inc. v. Christman-Orth, 134 N.C. App. 234, 520 S.E.2d 570 (1999); Barker v. Kimberly-Clark Corp., — N.C. App. —, 524 S.E.2d 821, 2000 N.C. App. LEXIS 60 (2000); Cash v. State Farm Mut. Auto. Ins. Co., — N.C. App. —, 528 S.E.2d 372, 2000 N.C. App. LEXIS 312 (2000); Associates Fin. Servs. of Am., Inc. v. North Carolina Farm Bureau Mut. Ins. Co., — N.C. App. —, 528 S.E.2d 621, 2000 N.C. App. LEXIS 421 (2000).

Quoted in Southern Furniture Co. of Conover, Inc. v. DOT, 133 N.C. App. 400, 516 S.E.2d 383 (1999).

Stated in Nolan v. Paramount Homes, Inc., 135 N.C. App. 73, 518 S.E.2d 789 (1999); Sharpe v. Worland, 351 N.C. 159, 522 S.E.2d 577 (1999).

Cited in Lilley v. Blue Ridge Elec. Membership Corp., 133 N.C. App. 256, 515 S.E.2d 483 (1999); Freeman v. Sugar Mt. Resort, Inc., 134 N.C. App. 73, 516 S.E.2d 616 (1999); Lorinovich v. K-Mart Corp., 134 N.C. App. 158, 516 S.E.2d 643 (1999), cert. denied, 351 N.C. 107, — S.E.2d — (1999); Collins v. Talley, 135 N.C. App. 758, 522 S.E.2d 794 (1999); Brannock v. Brannock, 135 N.C. App. 635, 523 S.E.2d 110 (1999); Murakami v. Wilmington Star News, Inc., — N.C. App. —, 528 S.E.2d 68, 2000 N.C. App. LEXIS 329 (2000).

III. PROPRIETY OF SUMMARY JUDGMENT.

B. Particular Types of Actions, etc.

Summary judgment based on res judicata in a negligence action was proper in favor of third-party defendants/contractors but not in favor of third-party defendant/Department of Transportation, where the court had reversed the final judgment for the latter defendant in the prior case. Green v. Dixon, — N.C. App. —, 528 S.E.2d 51, 2000 N.C. App. LEXIS 333 (2000).

Falsely Reporting Child Abuse and Neglect. — Where plaintiff alleged that the defendant store clerk made false accusations of child abuse and neglect and injury, and forecast evidence that the defendant knew the report to be false, a genuine issue of material fact existed — particularly as to whether the defendant acted with malice and therefore lost the immunity accorded by former § 7A-550 — to withstand summary judgment in a slander per se cause of action; however, summary judgment was appropriately granted in favor of defendant store where, if actual malice was proven, the defendant store clerk acted outside the scope of her employment. Dobson v. Harris, 134 N.C. App. 573, 521 S.E.2d 710 (1999), cert. denied, 351 N.C. 186, — S.E.2d — (1999).

C. Cases in Which Summary Judgment Held Proper.

Declaratory Judgment. —

Summary judgment was proper in case involving a determination of prior jurisdiction between two towns' competing resolutions of intent where one municipality had sought to involuntarily annex two acres within the boundaries of the other. Town of Spencer v. Town of E. Spencer, 351 N.C. 124, 522 S.E.2d 297 (1999).

Contributory Negligence in Use of Steps. —

Summary judgment was appropriate where defendants set forth no specific facts to support their allegation that the plaintiff represented to them that their loans would be refinanced. Lexington State Bank v. Miller, — N.C. App. —, 529 S.E.2d 454, 2000 N.C. App. LEXIS 501 (2000).

Affidavit Contained Only General Allegations — Summary judgment was appropriate where no issue of fact existed as to the outstanding balance on the respective loans because the defendant's affidavit contained only general allegations and conclusions, and no specific facts were provided in it as to the dates of any uncredited payments, their amounts, or any other relevant information. Lexington State Bank v. Miller, — N.C. App. —, 529 S.E.2d 454, 2000 N.C. App. LEXIS 501 (2000).

In an action to recover damages for alleged wrongful suspension or discharge etc.

Summary judgment for defendant was proper in an action alleging wrongful discharge due to a handicapped condition, since plaintiff's rhinitis was not a "physical impairment" under § 168A-3 because his medical records established that his condition was temporary; nor did his condition render him "handicapped" under § 168A-3. Simmons v. Chemol Corp., — N.C. App. —, 528 S.E.2d 368, 2000 N.C. App. LEXIS 311 (2000).

Where the plaintiff sought to be reinstated to the same position, pursuant to 25 N.C.A.C. 1B.0428, defendant/state agency which reinstated plaintiff/employee as an auditor, not chief auditor, but within the same pay grade, was entitled to judgment as a matter of law. Hodge v. North Carolina DOT, — N.C. App. —, 528 S.E.2d 22, 2000 N.C. App. LEXIS 334 (2000).

Duty of Insurer to Defend. — The trial court correctly entered summary judgment for real estate company on the issue of whether insurer had a duty to defend it in an underlying action, where real estate company's failure to set up a mobile home did not fit under any of the insurer's contract exclusions, because the real estate company had not completed its work and since one of the exclusions was ambiguous and a reasonable person reading the contract would have understood the contract to cover all ordinary business operations of the company. Lambe Realty Inv., Inc. v. Allstate Ins. Co., — N.C. App. —, 527 S.E.2d 328, 2000 N.C. App. LEXIS 261 (2000).

Change of Beneficiary of Insurance Policy. — Trial court properly granted summary judgment for wife of decedent/service member who made her the beneficiary of his insurance policy, although he had earlier entered into a

child support agreement promising to make the child of his first marriage the beneficiary; federal law and federal regulations bestowed upon the service member an absolute right to designate the policy beneficiary, even in conflict with state law, and the proceeds were not attachable under the federal Servicemember's Group Life Insurance Act. Lewis ex rel. Lewis v. Estate of Lewis, — N.C. App. —, 527 S.E.2d 340, 2000 N.C. App. LEXIS 250 (2000).

Summary judgment was proper under the family purpose doctrine for defendant/father whose son was killed when his automobile collided with plaintiff's, where father did little more than extend credit to his son by providing him with the purchase price of the car and the son made periodic payments and had actual, exclusive control of it after its purchase. Tart v. Martin, — N.C. App. —, 527 S.E.2d 708, 2000 N.C. App. LEXIS 326 (2000).

Summary judgment was appropriate on plaintiff's vicarious liability claim where plaintiff submitted an affidavit alleging that the person who tried to repossess her automobile, pushed her to the ground twice and injured her knee but failed to submit any affidavits or other material relating to the question of his status as an independent contractor; none of the evidence before the trial court rebutted the defendant's claim that he was an independent contractor or supported the plaintiff's claim that the company should have known of his alleged penchant for aggressive behavior and the likelihood that he would assault plaintiff. Jiggetts v. Lancaster, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 630 (2000).

Negligent Failure to Maintain Sidewalk. — Summary judgment was appropriate where the plaintiff failed to offer any evidence that the city had either actual or constructive notice of any alleged defect in its sidewalk, as required to support a negligence claim under § 160A-296(a), and so as to create a genuine issue of material fact. Willis v. City of New Bern, — N.C. App. —, 529 S.E.2d 691, 2000 N.C. App. LEXIS 499 (2000).

Slander Per Se Against Reporter of Child Abuse. — Summary judgment for the defendant on the issue of slander per se was appropriate where the plaintiff's description of retaliatory motives for defendant's report failed to rebut the statutory presumption created in favor of the defendant by the child abuse reporting provisions of §§ 7B-301 and 7B-309 which together provide immunity not merely conditional upon proof of good faith, but a "good faith" immunity which endows the reporter with the mandatory presumption that he or she acted in good faith. Dobson v. Harris, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 433 (2000).

Libel Claim. —

Where trial court determined that plaintiffs were limited-purpose public figures and the plaintiffs failed to show malice on the part of defendants vis-a-vis their statements in a newspaper story, the trial court did not err in granting summary judgment to the defendants on plaintiffs' defamation claims. Gaunt v. Pittaway, 135 N.C. App. 442, 520 S.E.2d 603 (1999).

Summary judgment on the basis of governmental immunity was appropriate where the defendants, the city and the police officer who drove the van which struck the plaintiff's vehicle, were both immune from liability because the officer's negligence took place while he was engaged in the repair and subsequent return of the van to the city's garage, a governmental function. Dobrowolska v. Wall, — N.C. App. —, 530 S.E.2d 590, 2000 N.C. App. LEXIS 539 (2000).

Failure to Assert Specific Facts in Supporting Affidavit. — Summary judgment was appropriate where defendants set forth no specific facts with respect to the various properties' fair values or other relevant information to support their allegation that the plaintiff intentionally paid less than fair market value for all the property at the foreclosure sales. Lexington State Bank v. Miller, — N.C. App. —, 529 S.E.2d 454, 2000 N.C. App. LEXIS 501 (2000).

Action Against Police Officers in High-Speed Chase. — Summary judgment was proper where plaintiff failed to demonstrate the existence of a genuine issue of material fact as to gross negligence on the part of the officers who attempted to apprehend a motorist suspected of driving while intoxicated and the actions of the officers were, otherwise, exempt under § 20-145. Norris v. Zambito, 135 N.C. App. 288, 520 S.E.2d 113 (1999).

Summary judgment was proper when only issues were legal ones, namely the effect of a note being erroneously marked "Paid and Satisfied," and the effect of plaintiff's lack of possession on its ability to enforce the note. G.E. Capital Mtg. Servs. v. Neely, 135 N.C. App. 187, 519 S.E.2d 553 (1999).

Summary judgment was appropriate where the plaintiffs failed to establish the existence of an agency relationship between defendant/franchisor and defendant/cleaning company whose driver ran over a six-year-old boy. Although the franchise agreement was extensive, prescribing standards of attire and appearance of franchisee's employees and the condition of its equipment, the franchisor's involvement functioned largely to ensure uniform service and public good will toward the corporation, and the franchisor retained no control over the hiring, firing, or supervision of the franchisee's personnel and its remedies, in the event of a breach of the Agreement, were limited. Miller ex rel. Bailey v. Piedmont Steam Co., — N.C. App. —, 528 S.E.2d 923, 2000 N.C. App. LEXIS 419 (2000).

Property Owners' Association's Assessments. — Summary judgment was proper where no genuine issue of material fact existed as to the application and enforceability of owners' association's assessment provisions against defendant property owners. McGinnis Point Owners Ass'n v. Joyner, 135 N.C. App. 752, 522 S.E.2d 317 (1999).

Subrogation. — Summary judgment was proper where the lease contained an explicit waiver by each party of its right to recover against the other for any loss covered by insurance and the defendant insurance company included a clause permitting its insured to contract to release third parties from liability, thus waiving its right to subrogation. Lexington Ins. Co. v. Tires into Recycled Energy & Supplies, Inc., — N.C. App. —, 522 S.E.2d 798, 1999 N.C. App. LEXIS 1312 (1999).

Alleged Discrimination in Violation of Constitution. — Summary judgment was proper against plaintiff who alleged that defendant/city discriminated against her in violation of the Fourteenth Amendment of the United States Constitution and Article I, Section 19 of the North Carolina Constitution by enforcing its parking requirements against her but not against other businesses in the area, because the plaintiff failed to offer evidence of an essential element of her claim, namely, that the city acted in a consciously evil manner. Brown v. City of Greensboro, — N.C. App. —, 528 S.E.2d 588, 2000 N.C. App. LEXIS 271 (2000).

Failure to Meet Severity Requirement of Negligent Infliction of Emotional Distress. — Summary judgment was appropriate where defendant/stepmother who shot her husband met her burden of demonstrating the absence of an essential element of plaintiffs stepdaughters' claim, i.e., severe emotional distress, and the alleged emotional distress of plaintiffs as described in their responses to defendant's interrogatories failed to meet the requisite level of "severe" emotional distress. Johnson v. Scott, — N.C. App. —, 528 S.E.2d 402, 2000 N.C. App. LEXIS 413 (2000).

Declaratory Judgment as to Right of Way. — Summary judgment for the defendant was proper where the plaintiff's claim was based on an original right of way which was incapable of being described and, therefore, patently ambiguous and void and where based, on their usage, the parties and their predecessors in title accepted a road, other than the original, as the right of way intended to be reserved by the recorded plat. Parrish v. Hayworth, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 784 (2000).

No Duty Owed to Plaintiff. — Summary judgment was appropriate where no genuine issue existed as to whether third-party defendants/contractors breached their duty to plaintiffs by failing to attach a 45 m.p.h. speed advisory sign to the "left lane closed ahead" sign; the third-party defendants/Department of Transportation had sole discretion in determining the signage for the construction project, and the only duty of the contractors was to exercise ordinary care in providing and maintaining reasonable warnings. Davis v. J.M.X., Inc., — N.C. App. —, 528 S.E.2d 56, 2000 N.C. App. LEXIS 309 (2000).

D. Cases in Which Summary Judgment Held Improper.

Intentional Tort — Summary judgment was inappropriate where the defendant's act of shooting the plaintiff, although she intended only to hit his tire, was not only an intentional tort but also gave rise to a claim of negligence, which was not barred by the one year statute of limitation. Lynn v. Burnette, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 618 (2000).

Insurance Claim — Summary judgment in favor of plaintiff/insurer was appropriate where the plaintiff's policy language excluded coverage for injury or damage "which may reasonably be expected to result from the intentional act ...." and the evidence showed that the defendant fired multiple shots from a rifle at night in the direction of a prowler, approximately fifty feet away. A person, under such circumstances, could reasonably expect injury or damage to result from the intentional act. North Carolina Farm Bureau Mut. Ins. Co. v. Austin, — N.C. App. —, 530 S.E.2d 93, 2000 N.C. App. LEXIS 625 (2000).

Foreclosure. —

Summary judgment was inappropriate where the evidence was sufficient to create an issue of fact with respect to the delivery date of the foreclosure deeds; the plaintiff submitted affidavits indicating that the action was timely under § 1-54(6) and the defendants submitted affidavits indicating that it was not, but neither submitted dated copies of the foreclosure deeds. Lexington State Bank v. Miller, — N.C. App. —, 529 S.E.2d 454, 2000 N.C. App. LEXIS 501 (2000).

Trespass to Chattel. — No genuine issue of material fact existed where plaintiff logger, who held an option to purchase lumber, admitted intentional interference with the defendants loggers' valid possessory interest by entering the property and removing the timber without authorization; thus, plaintiff was not entitled to summary judgment on defendants' counter-claim for trespass. Fordham v. Eason, 351 N.C. 151, 521 S.E.2d 701 (1999).

Automobile Accident. —

Plaintiff's evidence set out a prima facie case of negligence against the defendant, and summary judgment in favor of the latter was inappropriate, where a reasonable jury could find that plaintiff entered the intersection first and

obtained the right-of-way, that the defendant breached the duty to yield to plaintiff or to keep a proper lookout by proceeding through the intersection, and that such breach was a proximate cause of injury to plaintiff. Cucina v. City of Jacksonville, — N.C. App. —, 530 S.E.2d 353, 2000 N.C. App. LEXIS 547 (2000).

Although it found that the maintenance of stop signs constituted a discretionary function, thereby entitling the city to the defense of governmental immunity, the court reversed the grant of summary judgment in the city's favor where it appeared from the record the city was covered by a liability insurance policy at the time of the collision at issue, thereby waiving immunity from suit. Cucina v. City of Jacksonville, — N.C. App. —, 530 S.E.2d 353, 2000 N.C. App. LEXIS 547 (2000).

Summary judgment was inappropriate where a reasonable jury could find that plaintiff entered the intersection first and obtained the right-of-way, that defendant breached the duty to yield to plaintiff or to keep a proper lookout by proceeding through the intersection, and that such breach was a proximate cause of injury to plaintiff; similarly, question as to plaintiff's contributory negligence because she knew that the stop sign controlling defendant's direction of travel had been knocked down in an accident earlier that morning was for the jury. Cucina v. City of Jacksonville, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 310 (2000).

Summary judgment was improper under the theory of negligent entrustment where the evidence of son's moving violation and three accidents created a material issue of fact as to whether his parents/defendants knew or should have known that their son was an unsafe driver. Tart v. Martin, — N.C. App. —, 527 S.E.2d 708, 2000 N.C. App. LEXIS 326 (2000).

Failure to Erect Traffic Sign. — Summary judgment was inappropriate where genuine issues existed as to whether third-party defendants/Department of Transportation breached a duty by failing to have an advisory speed sign attached to the post of a "left lane closed ahead" sign and whether the signage was a proximate cause of the accident. Davis v. J.M.X., Inc., — N.C. App. —, 528 S.E.2d 56, 2000 N.C. App. LEXIS 309 (2000).

Resulting Trust. — The trial court erred in granting summary judgment for the plaintiff heirs of nonpaying cotenant, where a genuine issue of material fact existed as to whether plaintiffs were entitled to a beneficial interest in property held jointly by their father and paying defendant tenants. Keistler v. Keistler, 135 N.C. App. 767, 522 S.E.2d 338 (1999).

Action for Attorney's Fees. —

Summary judgment was inappropriate where there were genuine issues of material fact with respect to plaintiff's claim for attorney's fees, specifically, the forecast of evidence produced by both parties did not establish whether plaintiff complied with the statutory notice requirement in N.C. Gen. Stat. § 6-21.2(5). Davis Lake Community Ass'n v. Feldmann, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 598 (2000).

VI. EVIDENCE ON MOTION.

A. In General.

Affidavits Must Be Served Prior to Hearing. — Because affidavit was not served prior to the day of hearing, the trial court abused its discretion in failing to exclude it. Wells v. Consolidated Judicial Retirement Sys., — N.C. App. —, 526 S.E.2d 486, 2000 N.C. App. LEXIS 162 (2000).

Affidavits Must Be Based on "Personal Knowledge" — Affidavits submitted by senior vice president for medical staff affairs in support of defendant/hospital's motion for summary judgment were based on a review of facts with which he was familiar, not on the requisite "personal knowledge," and their admission was, therefore, error. Hylton v. Koontz, — N.C. App. —, 530 S.E.2d 108, 2000 N.C. App. LEXIS 787 (2000).

Rule 58. Entry of judgment.

CASE NOTES

The Court of Appeals is without authority to entertain appeal of a case which lacks entry of judgment.

Where defendants' motion for directed verdict was not reduced to writing and filed with the clerk of the court as required by this section, the court of appeals had no jurisdiction to consider the merits of the appeal. Mastin v. Griffith, 133 N.C. App. 345, 515 S.E.2d 494 (1999).

A memo of consent judgment, signed by the parties and judge and entered into the court record, was valid as a final judgment on the issue of child custody. Buckingham v. Buckingham, 134 N.C. App. 82, 516 S.E.2d 869 (1999), cert. denied, 351 N.C. 100, — S.E.2d — (1999).

Applied in State v. Smith, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 778 (July 5, 2000).

Quoted in Schnitzlein v. Hardee's Food Sys., 134 N.C. App. 153, 516 S.E.2d 891 (1999), cert. denied, 351 N.C. 109, — S.E.2d — (1999).

Rule 59. New trials; amendment of judgments.

CASE NOTES

I. IN GENERAL.

Same Scope of Review Applies to Grants and Denials of New Trial. — Under subdivision (a)(7) of this rule, appellate courts must apply the same standard, namely, whether the record affirmatively demonstrates an abuse of discretion, for reviewing a motion for a new trial for "insufficiency of the evidence to justify the jury verdict" when the trial court grants a new trial as when it denies a new trial; the higher court scrutinizes the discretionary decision of the trial court whose primary focus remains, in either case, whether the verdict represents an injustice and is against the greater weight of the evidence. In re Will of Buck, 350 N.C. 612, 516 S.E.2d 858 (1999).

Failure to State Specific Grounds as Fatal. — Defendants' motion for a new trial did not meet the requirements of § 1A-1, Rule 7(b)(1) where the defendants merely stated that they were entitled to a new trial under subdivisions (a)(5), (a)(7) and (a)(8) of this rule but did not state any specific basis for granting a new trial. Meehan v. Cable, 135 N.C. App. 715, 523 S.E.2d 419 (1999).

Trial Court's Denial of Motion for New Trial Upheld. — Where the court found no evidence of passion or prejudice in the jury's assessment of the plaintiff's injury and the amount of her damages, as evidenced by its award of medical costs of less than the amount she claimed, it upheld the trial court's denial of plaintiff's motion for a new trial. Blackmon v. Bumgardner, 135 N.C. App. 125, 519 S.E.2d 335 (1999).

Applied in Von Pettis Realty, Inc. v. McKoy, 135 N.C. App. 206, 519 S.E.2d 546 (1999); Bahl v. Talford, — N.C. App. —, 530 S.E.2d 347, 2000 N.C. App. LEXIS 537 (2000).

Quoted in Ollo v. Mills, — N.C. App. —, 525 S.E.2d 213, 2000 N.C. App. LEXIS 110 (2000).

Cited in Hyde v. Chesney Glen Homeowners Ass'n, Inc., — N.C. App. —, 529 S.E.2d 499, 2000 N.C. App. LEXIS 504 (2000).

III. ALTERING OR AMENDING JUDGMENTS.

Judge to Set Aside Verdict Not Alter It. — The trial judge erred when he attempted to change the verdict as to the defendants instead of setting aside the verdict and/or ordering a new trial on the damages issue if he deemed the verdict against the weight of the evidence or considered the damages excessive. Poor v. Hill, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 540 (May 16, 2000).

Rule 60. Relief from judgment or order.

CASE NOTES

I. IN GENERAL.

Quoted in Ollo v. Mills, — N.C. App. —, 525 S.E.2d 213, 2000 N.C. App. LEXIS 110 (2000).

Stated in Brown v. Lifford, — N.C. App. —, 524 S.E.2d 587, 2000 N.C. App. LEXIS 3 (2000).

Cited in Buckingham v. Buckingham, 134 N.C. App. 82, 516 S.E.2d 869 (1999), cert. denied, 351 N.C. 100, — S.E.2d — (1999); Hyde v. Chesney Glen Homeowners Ass'n, Inc., — N.C. App. —, 529 S.E.2d 499, 2000 N.C. App. LEXIS 504 (2000).

II. RELIEF UNDER SUBSECTION (a).

Change of Date of Accrual of Interest. — A change in the date at which interest begins to accrue is something that the trial court could effectuate through subsection (a) of this rule, because the subject of the litigation was the amount of the distributive award and interest was only incidental and tangential to this matter; therefore, changing the date at which interest accrued did not alter the underlying distributive award itself. Ice v. Ice, — N.C. App. —, 525 S.E.2d 843, 2000 N.C. App. LEXIS 155 (2000).

Appeal from Denial of Improper Motion. — Where defendant's motion under subsection (a) of this rule was improper to begin with, his appeal from a denial of that motion was necessarily dismissed. Ice v. Ice, — N.C. App. —, 525 S.E.2d 843, 2000 N.C. App. LEXIS 155 (2000).

III. RELIEF UNDER SUBSECTION (b).

A. In General.

Relief May Be Granted Absent Showing of Changed Circumstances. — The defendant's failure to present evidence of changed circumstances did not render the trial court's order, pursuant to this section, invalid. Condellone v. Condellone, — N.C. App. —, 528 S.E.2d 639, 2000 N.C. App. LEXIS 427 (2000).

B. Mistake, Inadvertence, Surprise and Excusable Neglect.

3. Relief Held Improper.

Pro Se Representation And Lack of Knowledge. — The Industrial Commission erred by concluding that excusable neglect existed where plaintiff represented himself before the deputy commissioner and was unacquainted with the complexities of the Workers' Compensation Act. Moore v. City of Raleigh, 135 N.C. App. 332, 520 S.E.2d 133 (1999).

F. Void Judgments.

Ratified Consent Order. — Where record demonstrated that both plaintiff and defendant understood and consented to oral stipulations as read into the record by plaintiff's counsel, and defendant's subsequent actions ratified and validated the trial court's order, the defendant was estopped from challenging it on the basis of withdrawal of consent; consequently, trial court did not err in denying his motion for relief from judgment. Chance v. Henderson, 134 N.C. App. 657, 518 S.E.2d 780 (1999).

Failure of Court to Follow Terms of Custody Agreement. — Although signed by both parties and the court and filed with the clerk of the court, custody and child support agreement would be vacated because the trial court did not read its terms to the parties and inquire into the parties understanding of and voluntary consent to the terms, as provided in the agreement. Tevepaugh v. Tevepaugh, 135 N.C. App. 489, 521 S.E.2d 117 (1999).

Evidence of Backdated Signature Voids Subject Matter Jurisdiction. — Wife who agreed to husband's request that she backdate her signature on the "Acceptance of Service" submitted sufficient testimony that she did so in support of her motion to set aside a judgment of absolute divorce on the grounds that the trial court was without jurisdiction to adjudicate the absolute divorce prior to the expiration of the requisite thirty days. Latimer v. Latimer, 136 N.C. App. 227, 522 S.E.2d 801 (1999).

Rule 61. Harmless error.

CASE NOTES

In the Face of Contributory Negligence. — Where plaintiffs introduced records of 911 calls from January 1988 through July 1993 concerning incidents at a restaurant where the subject murder occurred and their crime analyst testified as to the type of offenses that prompted the calls in 1992 and 1993 as well as crimes that occurred within a one-half mile radius of the restaurant in those years, the trial court did not err in excluding data pertaining to criminal activity from 1988 to 1991, some of which was probably cumulative, and if such exclusion did constitute error, such error was, in the face of the plaintiffs' contributory negligence, harmless. Benton v. Hillcrest Foods, Inc., 136 N.C. App. 42, 524S.E.2d 53 (1999).

Admission of Hearsay Testimony. — Court disagreed that the propounder's inadmissible hearsay testimony showed caveator to be a "vile" person, thereby prejudicing the jury against him, and held that the admission of this testimony was harmless error. In re Estate of Ferguson, 135 N.C. App. 102, 518 S.E.2d 796 (1999).

Introduction of Erroneous Instruction. —

Court of Appeals erred in requiring an instruction on unconsciousness as part of sudden-incapacitation defense, and plaintiff was entitled under this rule to a new trial because of the possibility of prejudice and error affecting a substantial right. Word v. Jones ex rel. Moore, 350 N.C. 557, 516 S.E.2d 144 (1999).

Applied in Wells v. Consolidated Judicial Retirement Sys., — N.C. App. —, 526 S.E.2d 486, 2000 N.C. App. LEXIS 162 (2000).

Cited in Shore v. Farmer, 133 N.C. App. 350, 515 S.E.2d 495 (1999), rev'd on other grounds, 351 N.C. 166, 522 S.E.2d 73 (1999).

ARTICLE 8.

Miscellaneous.

Rule 68. Offer of judgment and disclaimer.

CASE NOTES

I. In General.

I. IN GENERAL.

Costs Subsequent to Offer. — The trial court abused its discretion in calculating the "judgment finally obtained" under this rule by including costs incurred after the offer of judgment. Roberts v. Swain, 135 N.C. App. 613, 521 S.E.2d 493 (1999).

Where defendants made a reasonable settlement offer, four times the amount plaintiff actually recovered, the court held that plaintiff had to bear defendants' costs incurred since the making of the offer, pursuant to this rule. Blackmon v. Bumgardner, 135 N.C. App. 125, 519 S.E.2d 335 (1999).

Applied in Porterfield v. Goldkuhle, — N.C. App. —, 528 S.E.2d 71, 2000 N.C. App. LEXIS 320 (2000).

Chapter 1B.

Contribution.

Article 1.

Uniform Contribution among Tort-Feasors Act.

§ 1B-1. Right to contribution.

CASE NOTES

I. In General.

I. IN GENERAL.

Plaintiff's suit for contribution from a joint tortfeasors was not precluded by res judicata or collateral estoppel where an earlier settlement case between the defendants/tortfeasors and decedent's estate dealt only with issues of (1) good faith and (2) best interests of the estate and where the issue of the effect of the order approving the settlement on the respective rights of the joint tortfeasors to contribution was not ripe for determination until the plaintiff, as insurer for one of the joint tortfeasors, paid more than its share of the judgment. Medical Mut. Ins. Co. v. Mauldin, — N.C. App. —, 529 S.E.2d 697, 2000 N.C. App. LEXIS 532 (2000).

§ 1B-2. Pro rata shares.

CASE NOTES

Stated in Medical Mut. Ins. Co. v. Mauldin, — N.C. App. —, 529 S.E.2d 697, 2000 N.C. App. LEXIS 532 (2000).

§ 1B-3. Enforcement.

CASE NOTES

This section controls the liability of joint tortfeasors after a judgment establishing their joint and several liability has been entered; consequently, § 1B-4 does not permit one of multiple tortfeasors to avoid liability for contribution to other joint tortfeasors by a settlement, after judgment, for less than his pro rata share of the judgment. Medical Mut. Ins. Co. v. Mauldin, — N.C. App. —, 529 S.E.2d 697, 2000 N.C. App. LEXIS 532 (2000).

§ 1B-4. Release or covenant not to sue.

CASE NOTES

Construction with § 1B-3(f) — This section does not permit one of multiple tortfeasors to avoid liability for contribution to other joint tortfeasors by a settlement, after judgment, for less than his pro rata share of the judgment; § 1B-3(f) controls the liability of joint tortfeasors after a judgment establishing their joint and several liability has been entered. Medical Mut. Ins. Co. v. Mauldin, — N.C. App. —, 529 S.E.2d 697, 2000 N.C. App. LEXIS 532 (2000).

§ 1B-5. Uniformity of interpretation.

CASE NOTES

Quoted in Medical Mut. Ins. Co. v. Mauldin, — N.C. App. —, 529 S.E.2d 697, 2000 N.C. App. LEXIS 532 (2000).

Chapter 1C.

Enforcement of Judgments.

Article 17.

Uniform Enforcement of Foreign Judgments Act.

Sec.
1C-1709 through 1C-1749. [Reserved.]

Article 17A.

Enforcement of Foreign Judgments for Noncompensatory Damages.

Sec.
1C-1750. Definitions.
1C-1751 through 1C-1759. [Reserved].
1C-1760. Enforcement of foreign judgments for noncompensatory damages.
1C-1761 through 1C-1799. [Reserved].

Article 16.

Exempt Property.

§ 1C-1601. What property exempt; waiver; exceptions.

CASE NOTES

Portion of Compensation Not Exempt. — The court looked beyond the language of a Settlement Agreement and Release and determined that, in accord with the subject employment contract and complaint, while at least $11,725.56 of the bankrupt's $50,000 settlement represented income loss and was, therefore, not exempt under this section, the remainder received for mental anguish was exempt. In re LoCurto, 239 Bankr. 314 (E.D.N.C. 1999).

Article 17.

Uniform Enforcement of Foreign Judgments Act.

§ 1C-1701. Short title.

CASE NOTES

Cited in Wener v. Perrone & Cramer Realty, Inc., — N.C. App. —, 528 S.E.2d 65, 2000 N.C. App. LEXIS 331 (2000).

§ 1C-1705. Defenses; procedure.

CASE NOTES

Contractual Provisions Prevented Surety from Claiming Lack of Personal Jurisdiction. — The Virginia court had personal jurisdiction over the defendant/surety who executed a contract guaranteeing immediate payment if the corporation failed to satisfy the debt owed the plaintiff and affirming the plaintiff's forum clause. United Leasing Corp. v. Plumides, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 793 (July 5, 2000).

Cited in Wener v. Perrone & Cramer Realty, Inc., — N.C. App. —, 528 S.E.2d 65, 2000 N.C. App. LEXIS 331 (2000).

§§ 1C-1709 through 1C-1749: Reserved for future codification purposes.

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. (2000-1 (Ex. Sess.), s. 1.)

Editor's Note. — Session Laws 2000-1 (Extra Session), s. 3, contains a severability clause.

Session Laws 2000-1 (Extra Session), s. 4, makes the Article effective April 5, 2000, and applicable to judgments filed or entered in the State on or after that date, without regard to the date on which the foreign judgment was rendered in the foreign 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. (2000-1 (Ex. Sess.), s. 1.)

§§ 1C-1761 through 1C-1799: Reserved for future codification purposes.

Article 18.

North Carolina Foreign Money Judgments Recognition Act.

§ 1C-1805. Basis for personal jurisdiction.

CASE NOTES

Foreign Judgment Supported by Contractual Agreement to Submit to Jurisdiction. — The Virginia court had personal jurisdiction over the defendant/surety who executed a contract guaranteeing immediate payment if the corporation failed to satisfy the debt owed the plaintiff and affirming the plaintiff's forum clause. United Leasing Corp. v. Plumides, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 793 (July 5, 2000).

Article 19.

The North Carolina Foreign-Money Claims Act.

Editor's Note. —

Permission to include the Official Comments, as set out in the main volume, was granted by the National Conference of Commissioners on Uniform State Laws and The American Law Institute. It is believed that the Official Comments will prove of value to the practitioner in understanding and applying the text of this Chapter.

Chapter 4.

Common Law.

§ 4-1. Common law declared to be in force.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Quoted in Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 515 S.E.2d 675 (1999), cert. denied, — U.S. —, 120 S. Ct. 1452, 146 L. Ed. 2d 337 (2000).

Chapter 5A.

Contempt.

Article 2.

Civil Contempt.

Article 1.

Criminal Contempt.

§ 5A-11. Criminal contempt.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in State v. Pierce, 134 N.C. App. 148, 516 S.E.2d 916 (1999).

§ 5A-15. Plenary proceedings for contempt.

CASE NOTES

Findings Not Required. — Court need not make specific findings of improper conduct when issuing a criminal contempt citation. State v. Pierce, 134 N.C. App. 148, 516 S.E.2d 916 (1999).

Article 2.

Civil Contempt.

§ 5A-21. Civil contempt; imprisonment to compel compliance.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in Burnett v. Wheeler, 133 N.C. App. 316, 515 S.E.2d 480 (1999).

§ 5A-23. Proceedings for civil contempt.

(a) Proceedings for civil contempt are by motion pursuant to G.S. 5A-23(a1), by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt, or by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt. The order or notice must be given at least five days in advance of the hearing unless good cause is shown. The order or notice may be issued on the motion and sworn statement or affidavit of one with an interest in enforcing the order, including a judge, and a finding by the judicial official of probable cause to believe there is civil contempt.

(a1) Proceedings for civil contempt may be initiated by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt. A copy of the motion and notice must be served on the alleged contemnor at least five days in advance of the hearing unless good cause is shown. The motion must include a sworn statement or affidavit by the aggrieved party setting forth the reasons why the alleged contemnor should be held in civil contempt. The burden of proof in a hearing pursuant to this subsection shall be on the aggrieved party.

(b) Except when the General Statutes specifically provide for the exercise of contempt power by the clerk of superior court, proceedings under this section are before a district court judge, unless a court superior to the district court issued the order in which case the proceedings are before that court. When the proceedings are before a superior court, venue is in the superior court district or set of districts as defined in G.S. 7A-41.1 of the court which issued the order. Otherwise, venue is in the county where the order was issued.

(c) The person ordered to show cause may move to dismiss the order.

(d) The judicial official is the trier of facts at the show cause hearing.

(e) At the conclusion of the hearing, the judicial official must enter a finding for or against the alleged contemnor on each of the elements set out in G.S. 5A-21(a). If civil contempt is found, the judicial official must enter an order finding the facts constituting contempt and specifying the action which the contemnor must take to purge himself or herself of the contempt.

(f) A person with an interest in enforcing the order may present the case for a finding of civil contempt for failure to comply with an order.

(g) A person who is found in civil contempt under this Article shall not, for the same conduct, be found in criminal contempt under Article 1 of this Chapter. (1977, c. 711, s. 3; 1979, 2nd Sess., c. 1080, ss. 2-4; 1987 (Reg. Sess., 1988), c. 1037, s. 46; 1999-361, ss. 2, 4, 5; 2000-140, s. 35.)

Effect of Amendments. —
Session Laws 2000-140, s. 35, effective July 21, 2000, rewrote subsection (g).

CASE NOTES

Findings were insufficient to support the court's contempt holding that the defendant was in violation of the parental visitation order that provided for defendant's daily telephone contact with the minor child. Watkins v. Watkins, — N.C. App. —, 526 S.E.2d 485, 2000 N.C. App. LEXIS 163 (2000).

Opposing party must show cause why he should not be found in contempt.

The statutes governing proceedings for civil contempt in child support cases clearly assign the burden of proof to the party alleged to be delinquent, and after a civil contempt proceeding is initiated by an interested party who files

a motion in the cause, the opposing party must then show cause why he should not be found in contempt. Belcher v. Averette, — N.C. App. —, 526 S.E.2d 663, 2000 N.C. App. LEXIS 166 (2000).

Evidence sufficient to support finding of contempt. — The trial court properly found that defendant was sufficiently able to comply with the temporary alimony order but willfully, deliberately, and without justification failed to do so where the defendant failed to meet his burden of proof of establishing that he lacked the means to pay or that his failure to pay was not willful; the defendant failed to provide a financial statement or personal bank statements, failed to give his accountant accurate information, failed to explain large sums of money he received from his girlfriend, and was generally vague or indifferent as to supplemental income he did or could receive. Shumaker v. Shumaker, — N.C. App. —, 527 S.E.2d 55, 2000 N.C. App. LEXIS 268 (2000).

The trial court failed to comply with the provisions of this section in its contempt proceeding against the defendant where no notice or order to show cause was ever issued to the defendant. Watkins v. Watkins, — N.C. App. —, 526 S.E.2d 485, 2000 N.C. App. LEXIS 163 (2000).

Stated in State v. Pierce, 134 N.C. App. 148, 516 S.E.2d 916 (1999).

Cited in Ollo v. Mills, — N.C. App. —, 525 S.E.2d 213, 2000 N.C. App. LEXIS 110 (2000).

§ 5A-24. Appeals.

CASE NOTES

Cited in Watkins v. Watkins, — N.C. App. —, 526 S.E.2d 485, 2000 N.C. App. LEXIS 163 (2000).

Chapter 6.

Liability for Court Costs.

Article 3.

Civil Actions and Proceedings.

Article 3.

Civil Actions and Proceedings.

§ 6-19.1. Attorney's fees to parties appealing or defending against agency decision.

In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action pursuant to G.S. 150B-43 or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency if:

(1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and

(2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust. The party shall petition for the attorney's fees within 30 days following final disposition of the case. The petition shall be supported by an affidavit setting forth the basis for the request.

Nothing in this section shall be deemed to authorize the assessment of attorney's fees for the administrative review portion of the case in contested cases arising under Article 9 of Chapter 131E of the General Statutes.

Nothing in this section grants permission to bring an action against an agency otherwise immune from suit or gives a right to bring an action to a party who otherwise lacks standing to bring the action.

Any attorney's fees assessed against an agency under this section shall be charged against the operating expenses of the agency and shall not be reimbursed from any other source. (1983, c. 918, s. 1; 1987, c. 827, s. 1; 2000-190, s. 1.)

Effect of Amendments. — Session Laws 2000-190, s. 1, effective January 1, 2001, and applicable to contested cases commenced on or after that date, inserted "including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B" in the introductory paragraph and added the third paragraph.

CASE NOTES

Accurate Calculations Required. — The trial court erred in calculating the attorney's fee which was reasonably found to be one fourth of the present value of the future benefits

recovered by his client. Thornburg v. Consolidated Judicial Retirement Sys., — N.C. App. —, 527 S.E.2d 351, 2000 N.C. App. LEXIS 262 (2000).

Substantial Justification. —

The respondent was without "substantial justification" for denying the petitioner's retirement benefits and the trial court, therefore, reasonably awarded the petitioner attorney's fees pursuant to this section. The respondent accepted the petitioner's contributions after she began to take half year leaves of absence as part of a job sharing agreement and continued to represent to her that she was a full-fledged member of the retirement system until she prepared to collect her benefits at which time the respondent first informed petitioner that she was not a retirement system member although the North Carolina Administrative Code allowed for periods of interrupted employment. Wiebenson v. Board of Trustees, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 627 (June 20, 2000).

§ 6-20. Costs allowed or not, in discretion of court.

CASE NOTES

Cost of an Independent Appraiser's Valuation Report — The trial court acted within its discretion when it taxed the entire cost of an independent appraiser's valuation report to the defendants/majority stockholders of a closely-held corporation, as allowed under § 7A-305(d), and ignored or effectually amended the court's pre-trial case management order, in which the court stated that appraisal costs would be shared by both parties. Royals v. Piedmont Elec. Repair Co., — N.C. App. —, 529 S.E.2d 515, 2000 N.C. App. LEXIS 497 (2000).

Experts Must Be Subpoenaed. — Where one expert was not served with a subpoena and another was unsure as to what a subpoena was, the trial court did not have the authority to order defendants to pay expert witness expenses as costs. Rogers v. Sportsworld of Rocky Mount, Inc., 134 N.C. App. 709, 518 S.E.2d 551 (1999).

§ 6-21.1. Allowance of counsel fees as part of costs in certain cases.

CASE NOTES

III. Procedure.
IV. Settlement.

III. PROCEDURE.

Trial Court Failed to Appreciate the Significance of Settlement Offers. — The trial court abused its discretion in awarding attorney's fees to counsel for plaintiff without considering the guidelines established by Horton; the trial court is required to make additional findings of fact regarding the timing and amount of any settlement offers, the bargaining position of the parties, and the amount of the settlement offers as compared to the jury verdict. Culler v. Hardy, — N.C. App. —, 526 S.E.2d 698, 2000 N.C. App. LEXIS 251 (2000).

Finding Insufficient to Award Attorneys' Fees. —

The court abused its discretion in failing to make the required findings of fact to support the fee award pursuant to this section where no findings appear in the written judgment, and the hearing transcript reveals, at most, findings that a settlement offer "right prior to trial" was rejected and no meaningful negotiations were held due to the parties' intransigence. Porterfield v. Goldkuhle, — N.C. App. —, 528 S.E.2d 71, 2000 N.C. App. LEXIS 320 (2000).

IV. SETTLEMENT.

Refusal of Reasonable Settlement Offer May Affect Award of Attorney's Fees. — Where a substantial settlement offer was made well before trial, and that offer was increased through negotiations to an amount more than four times that recovered by plaintiff at trial, the trial court did not abuse its discretion in denying plaintiff's request for attorney's fees under this section. Blackmon v. Bumgardner, 135 N.C. App. 125, 519 S.E.2d 335 (1999).

§ 6-21.2. Attorneys' fees in notes, etc., in addition to interest.

Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:

(1) If such note, conditional sale contract or other evidence of indebtedness provides for attorneys' fees in some specific percentage of the "outstanding balance" as herein defined, such provision and obligation shall be valid and enforceable up to but not in excess of fifteen percent (15%) of said "outstanding balance" owing on said note, contract or other evidence of indebtedness.

(2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

(3) As to notes and other writing(s) evidencing an indebtedness arising out of a loan of money to the debtor, the "outstanding balance" shall mean the principal and interest owing at the time suit is instituted to enforce any security agreement securing payment of the debt and/or to collect said debt.

(4) As to conditional sale contracts and other such security agreements which evidence both a monetary obligation and a security interest in or a lease of specific goods, the "outstanding balance" shall mean the "time price balance" owing as of the time suit is instituted by the secured party to enforce the said security agreement and/or to collect said debt.

(5) **(Effective until July 1, 2001)** The holder of an unsecured note or other writing(s) evidencing an unsecured debt, and/or the holder of a note and chattel mortgage or other security agreement and/or the holder of a conditional sale contract or any other such security agreement which evidences both a monetary obligation and a security interest in or a lease of specific goods, or his attorney at law, shall, after maturity of the obligation by default or otherwise, notify the maker, debtor, account debtor, endorser or party sought to be held on said obligation that the provisions relative to payment of attorneys' fees in addition to the "outstanding balance" shall be enforced and that such maker, debtor, account debtor, endorser or party sought to be held on said obligation has five days from the mailing of such notice to pay the "outstanding balance" without the attorneys' fees. If such party shall pay the "outstanding balance" in full before the expiration of such time, then the obligation to pay the attorneys' fees shall be void, and no court shall enforce such provisions.

Notwithstanding the foregoing, however, if debtor has defaulted or violated the terms of the security agreement and has refused, on demand, to surrender possession of the collateral to the secured party as authorized by § 25-9-503, with the result that said secured party is required to institute an ancillary claim and delivery proceeding to secure possession of said collateral; no such written notice shall be required before enforcement of the provisions relative to payment of attorneys' fees in addition to the "outstanding balance."

§ 6-21.2(5) is set out twice. See notes.

(5) **(Effective July 1, 2001)** The holder of an unsecured note or other writing(s) evidencing an unsecured debt, and/or the holder of a note and chattel mortgage or other security agreement and/or the holder of a conditional sale contract or any other such security agreement which evidences both a monetary obligation and a security interest in or a lease of specific goods, or his attorney at law, shall, after maturity of the obligation by default or otherwise, notify the maker, debtor, account debtor, endorser or party sought to be held on said obligation that the provisions relative to payment of attorneys' fees in addition to the "outstanding balance" shall be enforced and that such maker, debtor, account debtor, endorser or party sought to be held on said obligation has five days from the mailing of such notice to pay the "outstanding balance" without the attorneys' fees. If such party shall pay the "outstanding balance" in full before the expiration of such time, then the obligation to pay the attorneys' fees shall be void, and no court shall enforce such provisions.

Notwithstanding the foregoing, however, if debtor has defaulted or violated the terms of the security agreement and has refused, on demand, to surrender possession of the collateral to the secured party as authorized by G.S. 25-9-609, with the result that said secured party is required to institute an ancillary claim and delivery proceeding to secure possession of said collateral; no such written notice shall be required before enforcement of the provisions relative to payment of attorneys' fees in addition to the outstanding balance. (1967, c. 562, s. 4; 2000-169, s. 27.)

Subdivision (5) Set Out Twice. — The first version of subdivision (5) set out above is effective until July 1, 2001. The second version of subdivision (5) set out above is effective July 1, 2001.

Effect of Amendments. — Session Laws 2000-169, s. 27, effective July 1, 2001, substituted "G.S. 25-9-609" for "§ 25-9-503" in subdivision (5).

CASE NOTES

Award of Percentage Specified in Subdivision (2). —

When reasonable attorneys' fees are authorized in property owners' association's bylaws without specifying a certain percentage, the provision shall be construed to mean 15% of the balance outstanding on the assessments. McGinnis Point Owners Ass'n v. Joyner, 135 N.C. App. 752, 522 S.E.2d 317 (1999).

Notice Prerequisite to Collection of Attorneys' Fees Under Subdivision (5). —

Summary judgment was inappropriate where there were genuine issues of material fact with respect to plaintiff's claim for attorney's fees, specifically, the forecast of evidence produced by both parties did not establish whether plaintiff complied with the statutory notice requirement in § 6-21.2(5). Davis Lake Community Ass'n v. Feldmann, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 598 (2000).

Findings on Notice Requirements. — Where nothing in the record indicated that plaintiffs/property owners' association did or did not provide defendants/property owners written notice in accord with this section, the trial court was unauthorized to award attorneys' fees and case was remanded for findings on the issue of notice. McGinnis Point Owners Ass'n v. Joyner, 135 N.C. App. 752, 522 S.E.2d 317 (1999).

The defendants/homeowners pled a valid state law counter-claim of unfair debt collector's practices, and a violation of this section, against the plaintiff/homeowners' association where the defendants were consumers who incurred a debt which the homeowners' association was trying to collect, where the defendants claimed that the amount collected included an excessive attorneys' fee, and where the plaintiffs' dues collecting activities affected commerce. Davis Lake Community Ass'n v. Feldmann, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 598 (2000).

Stated in Reid v. Ayers, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 606 (June 6, 2000).

§ 6-21.5. Attorney's fees in nonjusticiable cases.

CASE NOTES

Justiciable Issue Found. —

Where plaintiffs' complaint contained a justiciable issue, the court erred in granting defendants' motions for attorneys' fees pursuant to this section. Village Creek Property Owners Ass'n v. Town of Edenton, 135 N.C. App. 482, 520 S.E.2d 793 (1999).

Chapter 7A.

Judicial Department.

SUBCHAPTER II. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 4.

Court of Appeals.

§ 7A-16. Creation and organization.

The Court of Appeals is created effective January 1, 1967. It shall consist initially of six judges, elected by the qualified voters of the State for terms of eight years. The Chief Justice of the Supreme Court shall designate one of the judges as Chief Judge, to serve in such capacity at the pleasure of the Chief Justice. Before entering upon the duties of his office, a judge of the Court of

Appeals shall take the oath of office prescribed for a judge of the General Court of Justice.

The Governor on or after July 1, 1967, shall make temporary appointments to the six initial judgeships. The appointees shall serve until January 1, 1969. Their successors shall be elected at the general election for members of the General Assembly in November, 1968, and shall take office on January 1, 1969, to serve for the remainder of the unexpired term which began on January 1, 1967.

Upon the appointment of at least five judges, and the designation of a Chief Judge, the court is authorized to convene, organize, and promulgate, subject to the approval of the Supreme Court, such supplementary rules as it deems necessary and appropriate for the discharge of the judicial business lawfully assigned to it.

Effective January 1, 1969, the number of judges is increased to nine, and the Governor, on or after March 1, 1969, shall make temporary appointments to the additional judgeships thus created. The appointees shall serve until January 1, 1971. Their successors shall be elected at the general election for members of the General Assembly in November, 1970, and shall take office on January 1, 1971, to serve for the remainder of the unexpired term which began on January 1, 1969.

Effective January 1, 1977, the number of judges is increased to 12; and the Governor, on or after July 1, 1977, shall make temporary appointments to the additional judgeships thus created. The appointees shall serve until January 1, 1979. Their successors shall be elected at the general election for members of the General Assembly in November, 1978, and shall take office on January 1, 1979, to serve the remainder of the unexpired term which began on January 1, 1977.

On or after December 15, 2000, the Governor shall appoint three additional judges to increase the number of judges to 15. Each judgeship shall not become effective until the temporary appointment is made, and each appointee shall serve from the date of qualification until January 1, 2005. Those judges' successors shall be elected in the 2004 general election and shall take office on January 1, 2005, to serve terms expiring December 31, 2012.

The Court of Appeals shall sit in panels of three judges each. The Chief Judge insofar as practicable shall assign the members to panels in such fashion that each member sits a substantially equal number of times with each other member. He shall preside over the panel of which he is a member, and shall designate the presiding judge of the other panel or panels.

Three judges shall constitute a quorum for the transaction of the business of the court, except as may be provided in § 7A-32.

In the event the Chief Judge is unable, on account of absence or temporary incapacity, to perform the duties placed upon him as Chief Judge, the Chief Justice shall appoint an acting Chief Judge from the other judges of the Court, to temporarily discharge the duties of Chief Judge. (1967, c. 108, s. 1; 1969, c. 1190, s. 3; 1973, c. 301; 1977, c. 1047; 2000-67, s. 15.5(a).)

Editor's Note. — Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. — Session Laws 2000-67, s. 15.5.(a), effective December 15, 2000, inserted the sixth paragraph.

ARTICLE 5.

Jurisdiction.

§ 7A-27. Appeals of right from the courts of the trial divisions.

CASE NOTES

I. GENERAL CONSIDERATION.

Court would address plaintiffs' appeal, which was not certified pursuant to § 1A-1, Rule 54(b), finding that plaintiffs have a substantial right to have the liability of all defendants determined in one proceeding. Camp v. Leonard, 133 N.C. App. 554, 515 S.E.2d 909 (1999).

Applied in Little v. Hamel, 134 N.C. App. 485, 517 S.E.2d 901 (1999).

Cited in Wilson v. Watson, — N.C. App. —, 524 S.E.2d 812, 2000 N.C. App. LEXIS 51 (2000); Lee v. Mutual Community Sav. Bank, — N.C. App. —, 525 S.E.2d 854, 2000 N.C. App. LEXIS 156 (2000).

IV. INTERLOCUTORY ORDERS.

A. Generally.

Where only the issue of damages remained, no final judgment had been made and no substantial right had been affected, the appellate court found the trial court's certification ineffective and saw no impediment to the trial court's sorting out the various claims and affirmative defenses intertwined with the damages issue. CBP Resources, Inc. v. Mountaire Farms of N.C., Inc., 134 N.C. App. 169, 517 S.E.2d 151 (1999).

Avoidance of a rehearing or trial is not a "substantial right", etc.

Court found that the only possible "injury" defendant would suffer if not permitted immediate appellate review was the necessity of proceeding to trial before the matter was reviewed by the appellate court, not the deprivation of a substantial right under this section. Anderson v. Atlantic Cas. Ins. Co., 134 N.C. App. 724, 518 S.E.2d 786 (1999).

B. Particular Orders.

Denial of defendant's motion to dismiss on the basis of res judicata did not affect a substantial right entitling defendant to immediate appeal, where no possibility of inconsistent verdicts existed and no manifest injustice would result absent immediate appeal. Country Club of Johnston County, Inc. v. United States Fid. & Guar. Co., 135 N.C. App. 159, 519 S.E.2d 540 (1999).

Appeal of Order of Summary Judgment. —

The court denied the plaintiff—the administrator of the estates of his wife and two children, and guardian ad litem of a surviving injured child, who sued defendants/railroad company and engineering firm—the right to an immediate interlocutory appeal of a summary judgment on his contract claim where his tort claim survived the summary judgment and the trial court reserved the right to rule on matters of evidence which that judge considered competent, relevant and admissible on the remaining issues; the plaintiff failed to show that the court's separate treatment of the two claims would injure a substantial right where the evidence and the issues differed. Turner v. Norfolk S. Corp., — N.C. App. —, 526 S.E.2d 666, 2000 N.C. App. LEXIS 256 (2000).

Arbitration Order. —

Where evidence showed that plaintiff knew that the terms of a dispute resolution agreement would apply to her should she continue her employment, and she did continue, sufficient consideration existed to support the agreement, plaintiff relinquished the right to pursue disputes in court, and the trial court's refusal to compel arbitration deprived defendants of a substantial right entitling them to immediate appeal. Howard v. Oakwood Homes Corp., 134 N.C. App. 116, 516 S.E.2d 879 (1999), cert. denied, 350 N.C. 832, — S.E.2d — (1999), cert. denied, — U.S. —, 120 S. Ct. 1161, 145 L. Ed. 2d 1072 (2000).

Arbitration. —

An order compelling arbitration is interlocutory, does not affect a substantial right, and is not immediately appealable. Laws v. Horizon Hous., Inc., — N.C. App. —, 529 S.E.2d 695, 2000 N.C. App. LEXIS 534 (2000).

Orders Regarding Condemnation Pro-

ceedings. — The trial court's denial of defendants' constitutional challenge and its conclusion that the defendants' four tracts formed a physically unified parcel affected by condemnation proceedings were interlocutory and did not affect any substantial rights, so the defendants were not required to appeal the trial court's orders immediately. DOT v. Rowe, 351 N.C. 172, 521 S.E.2d 707 (1999).

When a party asserts a statutory privilege, such as that set out by § 90-21.22(e) (right to non-disclosure of confidential information), which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion is not otherwise frivolous or insubstantial, the challenged order affects a substantial right under § 1-277(a) and subdivision (d)(1) of this section and is immediately reviewable; to the extent that cases like Kaplan v. Prolife Action League of Greensboro, 123 N.C.App. 677, 474 S.E.2d 408 (1996) differ, they are overruled. Sharpe v. Worland, 351 N.C. 159, 522 S.E.2d 577 (1999).

Order Increasing Attachment Bond Where No Findings Were Made. — Because the trial court was not required to make findings of fact in order to modify the plaintiffs' attachment bond on the motion of the defendant pursuant to § 1-440.40(a), and where the plaintiffs failed to request such findings, they could not assert that the order had affected their substantial rights and they were not entitled to review. Collins v. Talley, 135 N.C. App. 758, 522 S.E.2d 794 (1999).

§ 7A-30. Appeals of right from certain decisions of the Court of Appeals.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in Hearne v. Sherman, 350 N.C. 612, 516 S.E.2d 864 (1999); Lovelace v. City of Shelby, 351 N.C. 458, 526 S.E.2d 652 (2000).

Cited in Beechridge Dev. Co. v. Dahners, 350 N.C. 583, 516 S.E.2d 592 (1999).

§ 7A-32. Power of Supreme Court and Court of Appeals to issue remedial writs.

CASE NOTES

Applied in Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999).

Cited in In re Voight, — N.C. App. —, 530 S.E.2d 76, 2000 N.C. App. LEXIS 624 (2000).

§ 7A-34. Rules of practice and procedure in trial courts.

CASE NOTES

Applied in Young v. Young, 133 N.C. App. 332, 515 S.E.2d 478 (1999).

§ 7A-38.4. Settlement procedures in district court actions.

(a) The purpose of this section is to authorize the design, implementation, and evaluation of a pilot program in which parties to district court actions involving equitable distribution, alimony, and support may be required to attend a pretrial mediated settlement conference or other settlement procedure.

(b) Repealed by Session Laws 1998-212, s. 16.19(a), effective October 1, 1998.

(c) The Supreme Court may adopt rules to implement this section. The definitions in G.S. 7A-38.1(b)(2) and (b)(3) apply to this section.

(d) District court judges of any participating district may order a mediated settlement conference or another settlement procedure for any action pending in the district involving issues of equitable distribution, alimony, or child or spousal support, pursuant to rules adopted by the Supreme Court. The chief district court judge may by local rule order all such cases, not otherwise exempted by Supreme Court rule, to mediated settlement conference.

(e) The parties to a district court action in which a mediated settlement conference is ordered, their attorneys, and other persons or entities with authority, by law or by contract, to settle the parties' claims shall attend the mediated settlement conference, or other settlement procedure ordered by a district court judge pursuant to rules of the Supreme Court, unless excused by those rules. Nothing in this section shall require any party or other participant in the conference to make a settlement offer or demand which it deems is contrary to its best interests.

(f) Any person required to attend a mediated settlement conference or other settlement procedure ordered by the court who, without good cause, fails to attend in compliance with this section and the rules adopted under this section, shall be subject to any appropriate monetary sanction imposed by a district court judge pursuant to rules of the Supreme Court, including the payment of attorneys' fees, mediator fees, and expenses incurred in attending the settlement procedure. If the court imposes sanctions, it shall do so, after notice and hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence.

(g) The parties to a district court action in which a mediated settlement conference is to be held pursuant to this section shall have the right to designate a mediator. Upon failure of the parties to designate within the time established by the rules of the Supreme Court, a mediator shall be appointed by a district court judge pursuant to rules of the Supreme Court.

(h) Pursuant to rules of the Supreme Court, a chief district court judge, at the request of a party and with the consent of all parties, may order the parties to attend and participate in any other settlement procedure authorized by rules adopted by the Supreme Court or adopted by local district court rules, in lieu of attending a mediated settlement conference. Neutrals acting pursuant to this section shall be selected and compensated in accordance with rules of the Supreme Court or pursuant to agreement of the parties. Nothing herein shall prohibit the parties from participating in other dispute resolution procedures, including arbitration, to the extent authorized under State or federal law.

(i) Mediators and other neutrals acting pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice, except that mediators and other neutrals may be disciplined in accordance with enforcement procedures adopted by the Supreme Court pursuant to G.S. 7A-38.2.

(j) Costs of mediated settlement conferences and other settlement procedures shall be borne by the parties. Unless otherwise ordered by the court or agreed to by the parties, the mediator's fees shall be paid in equal shares by the parties. The rules adopted by the Supreme Court implementing this section shall set out a method whereby parties found by the court to be unable to pay the costs of settlement procedures are afforded an opportunity to participate without cost to an indigent party and without expenditure of State funds.

(k) Evidence of statements made and conduct occurring in a settlement proceeding conducted pursuant to this section shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim, except in proceedings for sanctions or proceedings to enforce a

settlement of the action. No such settlement shall be enforceable unless it has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, or other neutral conducting a settlement procedure pursuant to this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a mediated settlement conference or other settlement procedure in any civil proceeding for any purpose, including proceedings to enforce a settlement of the action, except to attest to the signing of any such agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators, and proceedings to enforce laws concerning juvenile or elder abuse.

(*l*) The Supreme Court may adopt standards for the certification and conduct of mediators and other neutrals who participate in settlement procedures conducted pursuant to this section. The standards may also regulate mediator training programs. The Supreme Court may adopt procedures for the enforcement of those standards. The administration of mediator certification, regulation of mediator conduct, and decertification shall be conducted through the Dispute Resolution Commission.

(m) An administrative fee not to exceed two hundred dollars ($200.00) may be charged by the Administrative Office of the Courts to applicants for certification and annual renewal of certification for mediators and mediator training programs operation under this section. The fees collected may be used by the Director of the Administrative Office of the Courts to establish and maintain the operations of the Commission and its staff. The administrative fee shall be set by the Director of the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

(m1) The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the chief district court judge of any participating district to report statistical data about settlement procedures conducted pursuant to this section for administrative purposes.

(o) Nothing in this section or rules adopted pursuant to it shall restrict the right to jury trial. (1997-229, s. 1; 1998-212, s. 16.19(a); 1999-354, s. 6; 2000-140, s. 1.)

Effect of Amendments. — Session Laws 2000-140, s. 1, effective July 21, 2000, inserted "in" preceding "settlement procedures" in subsection (*l*).

§ 7A-39. Adverse weather cancellation of court sessions and closing court offices; extension of statutes of limitations in catastrophic conditions.

(a) *Cancellation of Court Sessions, Closing Court Offices.* — In response to adverse weather or other comparable emergency situations, any session of any court of the General Court of Justice may be cancelled, postponed, or altered by judicial officials, and court offices may be closed by judicial branch hiring authorities, pursuant to uniform statewide guidelines prescribed by the Director of the Administrative Office of the Courts.

(b) *Authority of Chief Justice to Extend Statutes of Limitations.* — When the Chief Justice of the North Carolina Supreme Court determines and declares that catastrophic conditions exist or have existed in one or more counties of the State, the Chief Justice may by order entered pursuant to this subsection extend, to a date certain no fewer than 10 days after the effective date of the order, the time within which pleadings, motions, notices, and other documents and papers may be timely filed and other acts may be timely done in civil

actions, criminal actions, estates, and special proceedings in each county named in the order.

(1) *Catastrophic conditions defined.* — As used in this subsection, "catastrophic conditions" means any set of circumstances that make it impossible or extremely hazardous for judicial officials, employees, parties, witnesses, or other persons with business before the courts to reach a courthouse, or that create a significant risk of physical harm to persons in a courthouse, or that would otherwise convince a reasonable person to avoid travelling to or being in the courthouse, including conditions that may result from hurricane, tornado, flood, snowstorm, ice storm, other severe natural disaster, fire, or riot.

(2) *Entry of order.* — The Chief Justice may enter an order under this subsection at any time after catastrophic conditions have ceased to exist. The order shall be in writing and shall become effective for each affected county upon being filed in the office of the clerk of superior court of that county.

(c) *In Chambers Jurisdiction Not Affected.* — Nothing in this section prohibits a judge or other judicial officer from exercising, during adverse weather or other emergency situations, any in chambers or ex parte jurisdiction conferred by law upon that judge or judicial officer, as provided by law. The effectiveness of any such exercise shall not be affected by a determination by the Chief Justice that catastrophic conditions existed at the time it was exercised. (2000-166, s. 1.)

Editor's Note. — Session Laws 2000-166, s. 2, made this section effective August 2, 2000, and applicable to court closings occurring on or after the date of effectiveness.

SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 7.

Organization.

§ 7A-41. Superior court divisions and districts; judges.

(a) **(Effective until January 1, 2003)** The counties of the State are organized into judicial divisions and superior court districts, and each superior court district has the counties, and the number of regular resident superior court judges set forth in the following table, and for districts of less than a whole county, as set out in subsection (b) of this section:

Judicial Division	Superior Court District	Counties	No. of Resident Judges
First	1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	2
First	2	Beaufort, Hyde, Martin, Tyrrell, Washington	1

§ 7A-41(a) is set out twice. See notes.

Judicial Division	Superior Court District	Counties	No. of Resident Judges
First	3A	Pitt	2
Second	3B	Carteret, Craven, Pamlico	2
Second	4A	Duplin, Jones, Sampson	1
Second	4B	Onslow	2
Second	5	New Hanover, Pender	3
First	6A	Halifax	1
First	6B	Bertie, Hertford, Northampton	1
First	7A	Nash	1
First	7B	(part of Wilson, part of Edgecombe, see subsection (b))	1
First	7C	(part of Wilson, part of Edgecombe, see subsection (b))	1
Second	8A	Lenoir and Greene	1
Second	8B	Wayne	1
Third	9	Franklin, Granville, Vance, Warren	2
Third	9A	Person, Caswell	1
Third	10A	(part of Wake, see subsection (b))	2
Third	10B	(part of Wake, see subsection (b))	2
Third	10C	(part of Wake, see subsection (b))	1
Third	10D	(part of Wake, see subsection (b))	1
Fourth	11A	Harnett, Lee	1
Fourth	11B	Johnston	1
Fourth	12A	(part of Cumberland, see subsection (b))	1
Fourth	12B	(part of Cumberland, see subsection (b))	1
Fourth	12C	(part of Cumberland, see subsection (b))	2
Fourth	13	Bladen, Brunswick, Columbus	2
Third	14A	(part of Durham, see subsection (b))	1

§ 7A-41(a) is set out twice. See notes.

Judicial Division	Superior Court District	Counties	No. of Resident Judges
Third	14B	(part of Durham, see subsection (b))	3
Third	15A	Alamance	2
Third	15B	Orange, Chatham	1
Fourth	16A	Scotland, Hoke	1
Fourth	16B	Robeson	2
Fifth	17A	Rockingham	2
Fifth	17B	Stokes, Surry	2
Fifth	18A	(part of Guilford, see subsection (b))	1
Fifth	18B	(part of Guilford, see subsection (b))	1
Fifth	18C	(part of Guilford, see subsection (b))	1
Fifth	18D	(part of Guilford, see subsection (b))	1
Fifth	18E	(part of Guilford, see subsection (b))	1
Sixth	19A	Cabarrus	1
Fifth	19B1	(part of Montgomery, part of Moore, part of Randolph see subsection (b))	1
	19B2	(part of Montgomery, part of Moore, part of Randolph see subsection (b))	1
Sixth	19C	Rowan	1
Sixth	20A	Anson, Richmond	1
Sixth	20B	Stanly, Union	2
Fifth	21A	(part of Forsyth, see subsection (b))	1
Fifth	21B	(part of Forsyth, see subsection (b))	1
Fifth	21C	(part of Forsyth, see subsection (b))	1
Fifth	21D	(part of Forsyth, see subsection (b))	1
Sixth	22	Alexander, Davidson, Davie, Iredell	3
Fifth	23	Alleghany, Ashe, Wilkes, Yadkin	1
Eighth	24	Avery, Madison, Mitchell, Watauga, Yancey	1

§ 7A-41(a) is set out twice. See notes.

Judicial Division	Superior Court District	Counties	No. of Resident Judges
Seventh	25A	Burke, Caldwell	2
Seventh	25B	Catawba	2
Seventh	26A	(part of Mecklenburg, see subsection (b))	2
Seventh	26B	(part of Mecklenburg, see subsection (b))	3
Seventh	26C	(part of Mecklenburg, see subsection (b))	2
Seventh	27A	Gaston	2
Seventh	27B	Cleveland, Lincoln	2
Eighth	28	Buncombe	2
Eighth	29	Henderson, McDowell, Polk, Rutherford, Transylvania	2
Eighth	30A	Cherokee, Clay, Graham, Macon, Swain	1
Eighth	30B	Haywood, Jackson	1.

(a) **(Effective January 1, 2003)** The counties of the State are organized into judicial divisions and superior court districts, and each superior court district has the counties, and the number of regular resident superior court judges set forth in the following table, and for districts of less than a whole county, as set out in subsection (b) of this section:

Judicial Division	Superior Court District	Counties	No. of Resident Judges
First	1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	2
First	2	Beaufort, Hyde, Martin, Tyrrell, Washington	1
First	3A	Pitt	2
Second	3B	Carteret, Craven, Pamlico	2
Second	4A	Duplin, Jones, Sampson	1
Second	4B	Onslow	2

§ 7A-41(a) is set out twice. See notes.

Judicial Division	Superior Court District	Counties	No. of Resident Judges
Second	5A	(part of New Hanover, part of Pender see subsection (b))	1
	5B	(part of New Hanover, part of Pender see subsection (b))	1
	5C	(part of New Hanover, see subsection (b))	1
First	6A	Halifax	1
First	6B	Bertie, Hertford, Northampton	1
First	7A	Nash	1
First	7B	(part of Wilson, part of Edgecombe, see subsection (b))	1
First	7C	(part of Wilson, part of Edgecombe, see subsection (b))	1
Second	8A	Lenoir and Greene	1
Second	8B	Wayne	1
Third	9	Franklin, Granville, Vance, Warren	2
Third	9A	Person, Caswell	1
Third	10A	(part of Wake, see subsection (b))	2
Third	10B	(part of Wake, see subsection (b))	2
Third	10C	(part of Wake, see subsection (b))	1
Third	10D	(part of Wake, see subsection (b))	1
Fourth	11A	Harnett, Lee	1
Fourth	11B	Johnston	1
Fourth	12A	(part of Cumberland, see subsection (b))	1
Fourth	12B	(part of Cumberland, see subsection (b))	1
Fourth	12C	(part of Cumberland, see subsection (b))	2
Fourth	13	Bladen, Brunswick, Columbus	2
Third	14A	(part of Durham, see subsection (b))	1
Third	14B	(part of Durham, see subsection (b))	3

§ 7A-41(a) is set out twice. See notes.

Judicial Division	Superior Court District	Counties	No. of Resident Judges
Third	15A	Alamance	2
Third	15B	Orange, Chatham	1
Fourth	16A	Scotland, Hoke	1
Fourth	16B	Robeson	2
Fifth	17A	Rockingham	2
Fifth	17B	Stokes, Surry	2
Fifth	18A	(part of Guilford, see subsection (b))	1
Fifth	18B	(part of Guilford, see subsection (b))	1
Fifth	18C	(part of Guilford, see subsection (b))	1
Fifth	18D	(part of Guilford, see subsection (b))	1
Fifth	18E	(part of Guilford, see subsection (b))	1
Sixth	19A	Cabarrus	1
Fifth	19B1	(part of Montgomery, part of Moore, part of Randolph see subsection (b))	1
	19B2	(part of Montgomery, part of Moore, part of Randolph see subsection (b))	1
Sixth	19C	Rowan	1
Sixth	20A	Anson, Richmond	1
Sixth	20B	Stanly, Union	2
Fifth	21A	(part of Forsyth, see subsection (b))	1
Fifth	21B	(part of Forsyth, see subsection (b))	1
Fifth	21C	(part of Forsyth, see subsection (b))	1
Fifth	21D	(part of Forsyth, see subsection (b))	1
Sixth	22	Alexander, Davidson, Davie, Iredell	3
Fifth	23	Alleghany, Ashe, Wilkes, Yadkin	1
Eighth	24	Avery, Madison, Mitchell, Watauga, Yancey	1

§ 7A-41(a) is set out twice. See notes.

Judicial Division	Superior Court District	Counties	No. of Resident Judges
Seventh	25A	Burke, Caldwell	2
Seventh	25B	Catawba	2
Seventh	26A	(part of Mecklenburg, see subsection (b))	2
Seventh	26B	(part of Mecklenburg, see subsection (b))	3
Seventh	26C	(part of Mecklenburg, see subsection (b))	2
Seventh	27A	Gaston	2
Seventh	27B	Cleveland, Lincoln	2
Eighth	28	Buncombe	2
Eighth	29	Henderson, McDowell, Polk, Rutherford, Transylvania	2
Eighth	30A	Cherokee, Clay, Graham, Macon, Swain	1
Eighth	30B	Haywood, Jackson	1.

(b) For superior court districts of less than a whole county, or with part of one county with part of another, the composition of the district and the number of judges is as follows:

(1) Superior Court District 7B consists of County Commissioner Districts 1, 2 and 3 of Wilson County, Blocks 127 and 128 of Census Tract 6 of Wilson County, and Townships 12 and 14 of Edgecombe County. It has one judge.

(2) Superior Court District 7C consists of the remainder of Edgecombe and Wilson Counties not in Judicial District 7B. It has one judge.

(3) Superior Court District 10A consists of Raleigh Precincts 12, 13, 14, 18, 19, 20, 22, 25, 26, 28, 34, 35, and 40, and St. Matthews #3, except that if the Wake County Board of Elections provides that the area in Raleigh Township which was incorrectly placed in a St. Mary's precinct shall be in Raleigh Precinct 40, that area shall be considered to be in Raleigh Precinct 40 for district purposes. It has one judge.

(4) Superior Court District 10B consists of Buckhorn Precinct, Cary Precincts 1, 2, 3, 4, 5, 6, and 7, Cedar Fork Precinct, Holly Springs Precinct, House Creek Precinct #1, Meredith Precinct, Middle Creek Township, Raleigh Precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 16, 21, 23, 24, 27, 29, 31, 32, 33, 36, and 41, Swift Creek Precinct #1 and #2 and White Oak Township. It has two judges.

(5) Superior Court District 10C consists of Barton's Creek Precinct, Leesville Precinct, House Creek Precinct #2, Little River Township, Marks Creek Township, New Light Township, Panther Branch Township, St. Mary's Precincts #1, #2, #3, #4, #5, and #6, and Wake Forest Township. It has one judge.

(6) Superior Court District 10D consists of the remainder of Wake County not in Superior Court Districts 10A, 10B or 10C. It has one judge.

(7) Superior Court District 12A consists of that part of Cross Creek Precinct #18 north of Raeford Road, Montclair Precinct, that part of Precinct 71-1 not in Judicial District 12B, Precinct 71-2, Morganton #2 Precinct, Cottonade Precinct, Cumberland Precincts 1 and 2, and Brentwood Precinct. It has one judge.

(8) Superior Court District 12B consists of all of State House of Representatives District 17, except for Westarea Precinct, and it also includes that part of Cross Creek Precinct #15 east of Village Drive. It has one judge.

(9) Superior Court District 12C consists of the remainder of Cumberland County not in Superior Court Districts 12A or 12B. It has two judges.

(10) Superior Court District 14A consists of Durham Precincts 9, 11, 12, 13, 14, 15, 18, 34, 40, 41, and 42, and that part of Durham Precinct 39 east of North Carolina Highway #751. It has one judge.

(11) Superior Court District 14B consists of the remainder of Durham County not in Superior Court District 14A. It has three judges.

(12) Superior Court District 18A consists of Greensboro Precincts 5, 6, 7, 8, 9, 19, 25, 29, 30, 44, and 45 and Clay and Fentress Precincts. It has one judge.

(13) Superior Court District 18B consists of High Point Precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, and 21, Deep River Precinct, and Jamestown Precincts 1 and 3. It has one judge.

(14) Superior Court District 18C consists of Greensboro Precincts 20, 27, 31, 32, 34, 37, 38, 39, and 43, High Point Precinct 19, Stokesdale, Oak Ridge, Bruce, Friendship I, Friendship II, Jamestown II, South Center Grove, North Center Grove, and North Monroe Precincts. It has one judge.

(15) Superior Court District 18D consists of Greensboro Precincts 4, 11, 13, 14, 15, 16, 17, 18, 21, 22, 23, 24, 26, 36, and 42, and North and South Sumner Precincts. It has one judge.

(16) Superior Court District 18E consists of the remainder of Guilford County not in Superior Court Districts 18A, 18B, 18C, or 18D. It has one judge.

(17) Superior Court District 21A consists of the Southwest Ward of Winston-Salem, and Precincts 80-6, 80-7, 80-8, 3-1, 9-1, 13-1, 13-2, 13-3, 7-1, 7-2, 7-3, 5-1, 5-2, 5-3, 12-2, and 12-3. It has one judge.

(18) Superior Court District 21B consists of the Northwest Ward, the South Ward, and the Southeast Ward of Winston-Salem, and Precincts 4-1 and 4-2. It has one judge.

(19) Superior Court District 21C consists of Precincts 80-1, 80-2, 80-3, 80-4, 80-5, 80-9, 10-2, 10-3, 3-2, 3-3, 11-1, 11-2, 2-1, 6-1, 6-2, 6-3, 6-4, 1-1, 1-2, and 1-3. It has one judge.

(20) Superior Court District 21D consists of the North Ward, the Northeast Ward, and the East Ward of Winston-Salem, and Precincts 8-2 and 8-3. It has one judge.

(21) Superior Court District 26A consists of Charlotte Precincts 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 27, 31, 33, 39, 41, 42, 46, 52, 54, 55, 56, 58, 60, 77, 78, and 82, and Long Creek Precinct #2 of Mecklenburg County. It has two judges.

(22) Superior Court District 26B consists of Charlotte Precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 17, 18, 20, 21, 28, 29, 30, 32, 34, 35, 36, 37, 38, 43, 44, 45, 47, 51, 61, 62, 63, 65, 66, 67, 68, 69, 71, 74, 83, 84, and 86, Crab Orchard Precincts 1 and 2, and Mallard Creek Precinct 1. It has two judges.

(23) Superior Court District 26C consists of the remainder of Mecklenburg County not in Superior Court Districts 26A or 26B. It has two judges.

(24) Superior Court District 19B1 consists of all of Montgomery County except for Star Precinct, the following precincts of Moore County: #8 West End, #9 Eastwood, #11 Vass, #12 Little River, #14 Taylortown, #17 South Southern Pines, #19 North Southern Pines; #20 West Aberdeen, #21 East Aberdeen, #22 Pinedene, #23 Pinebluff, and the remainder of Randolph County not in Superior Court District 19B2. It has one judge.

(25) Superior Court District 19B2 consists of Star Precinct in Montgomery County, the remainder of Moore County not in Superior Court District 19B1, and the following precincts of Randolph County: Archdale I, Archdale II, Archdale III, Brower, Coleridge, Franklinville, Grant, Level Cross, Liberty, New Market North, New Market South, Pleasant Grove, Prospect, Providence, Ramseur, Richland, Staley, Trinity East, and Trinity West. It has one judge.

(26) **(Effective January 1, 2003)** Superior Court District 5A consists of the New Hanover County precincts of Cape Fear #1, Cape Fear #2, Harnett #1, Harnett #4, Harnett #6, Wilmington #1, Wilmington #2, Wilmington #3, Wilmington #4, Wilmington #6, Wilmington #7, Wilmington #8, Wilmington #9, Wilmington #10, Wilmington #15, Wilmington #19, and the part of Harnett #7 that consists of the part of Block Group 6 of 1990 Census Tract 0116.02 containing Blocks 601B, 602B, 603, 611, 612, 613, 614, 615, 616, 617, 618, 619; and the Pender County precincts of Canetuck, Caswell, Columbia, Grady, Upper Holly, and Upper Union. It has one judge.

(27) **(Effective January 1, 2003)** Superior Court District 5B consists of the New Hanover County precincts of Cape Fear #3, Harnett #2, Harnett #5, the part of Harnett #7 that is not in Superior Court District 5A, Harnett #8, Wrightsville Beach, Wilmington #11, Wilmington #12, Wilmington #13, Wilmington #22, Wilmington #24, and the part of Harnett #3 that consists of the part of Block Group 1 of 1990 Census Tract 0119.01 containing Blocks 102, 105, 106A, 106B, 107A, 107B, 107C, 107D, and 108, the part of Block Group 1 of 1990 Census Tract 0119.02 containing Blocks 103, 104, and 114, and the part of Block Group 1 of 1990 Census Tract 0120.01 containing Blocks 101A, 101B, 101C, 101D, 102A, 102B, 103, 104, 105A, 105B, 115A, and 115B; and the following precincts of Pender County: North Burgaw, South Burgaw, Middle Holly, Long Creek, Penderlea, Lower Union, Rocky Point, Lower Topsail, Upper Topsail, Scotts Hill, and Surf City. It has one judge.

(28) **(Effective January 1, 2003)** Superior Court District 5C consists of the part of New Hanover County that is not in Superior Court Districts 5A or 5B. It has one judge.

(c) In subsection (b) above:

(1) the names and boundaries of townships are as they were legally defined and in effect as of January 1, 1980, and recognized in the 1980 U.S. Census;

(2) for Guilford County, precinct boundaries are as shown on maps in use by the Guilford County Board of Elections on April 15, 1987;

(3) for Mecklenburg, Wake, and Durham Counties, precinct boundaries are as shown on the current maps in use by the appropriate county board of elections as of January 31, 1984, in accordance with G.S. 163-128(b);

(4) for Wilson County, commissioner districts are those in use for election of members of the county board of commissioners as of January 1, 1987;

(5) for Cumberland County, House District 17 is in accordance with the boundaries in effect on January 1, 1987. Precincts are in accordance

with those as approved by the United States Department of Justice on February 28, 1986; and

(6) for Forsyth County, the boundaries of wards and precincts are those in effect on "WARD MAP 1985", published November 1985 by the City of Winston-Salem and Forsyth County.

(7) The names and boundaries of precincts in Montgomery, Moore, and Randolph Counties are those in existence on March 15, 1999.

(8) **(Effective January 1, 2003)** The names and boundaries of precincts in New Hanover and Pender Counties are those in existence on December 1, 1999.

If any changes in precinct boundaries, wards, commissioner districts, or House of Representative districts have been made since the dates specified, or are made, those changes shall not change the boundaries of the superior court districts; provided that if any of those boundaries have changed, a precinct is divided by a superior court judicial district boundary, and the precinct was not so divided at the time of enactment of this section in 1987, the boundaries of the superior court judicial district are changed to place the entirety of the precinct in the superior court judicial district where the majority of the residents of the precinct reside, according to the 1990 Federal Census if:

(1) Such change does not result in placing a superior court judge in another superior court district;

(2) Such change does not make a district that has an effective racial minority electorate not have an effective racial minority electorate; and

(3) The change is approved by the county board of elections where the precinct is located, State Board of Elections and by the Secretary of State upon finding that the change:

a. Will improve election administration; and

b. Complies with subdivisions (1) and (2) of this subsection.

(d) The several judges, their terms of office, and their assignments to districts are as follows:

(1) In the first superior court district, J. Herbert Small and Thomas S. Watts serve terms expiring December 31, 1994.

(2) In the second superior court district, William C. Griffin serves a term expiring December 31, 1994.

(3) In the third-A superior court district, David E. Reid serves a term expiring on December 31, 1992.

(4) In the third-B superior court district, Herbert O. Phillips, III, serves a term expiring on December 31, 1994.

(5) In the fourth-A superior court district, Henry L. Stevens, III, serves a term expiring December 31, 1994.

(6) In the fourth-B superior court district, James R. Strickland serves a term expiring December 31, 1992.

(7) In the fifth superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Bradford Tillery, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins January 1, 1995. In the fifth superior court district, Napoleon B. Barefoot serves a term expiring December 31, 1994.

(8) In the sixth-A superior court district, Richard B. Allsbrook serves a term expiring December 31, 1990.

(9) In the sixth-B superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(10) In the seventh-A superior court district, Charles B. Winberry, serves a term expiring December 31, 1994.

(11) In the seventh-B superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(12) In the seventh-C superior court district, Franklin R. Brown serves a term expiring December 31, 1990.
(13) In the eighth-A superior court district, James D. Llewellyn serves a term expiring December 31, 1994.
(14) In the eighth-B superior court district, Paul M. Wright serves a term expiring December 31, 1992.
(15) In the ninth superior court district, Robert H. Hobgood and Henry W. Hight, Jr., serve terms expiring December 31, 1994.
(16) In the tenth-A superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
(17) In the tenth-B superior court district, Robert L. Farmer serves a term expiring December 31, 1992. In the tenth-B superior court district, no election shall be held in 1990 for the full term of the seat now occupied by Henry V. Barnette, Jr., and the holder of that seat shall serve until a successor is elected in 1992 and qualifies. The succeeding term begins January 1, 1993.
(18) In the tenth-C superior court district, Edwin S. Preston, serves a term expiring December 31, 1990. In the tenth-D superior court district, Donald Stephens serves a term expiring December 31, 1988.
(19) In the eleventh superior court district, Wiley F. Bowen serves a term expiring December 31, 1990.
(20) In the twelfth-A superior court district, D.B. Herring, Jr., serves a term expiring December 31, 1990.
(21) In the twelfth-B superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
(22) In the twelfth-C superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Coy E. Brewer, Jr., and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins January 1, 1995. In the twelfth-C superior court district, E. Lynn Johnson serves a term expiring December 31, 1994.
(23) In the thirteenth superior court district, Giles R. Clark serves a term expiring December 31, 1994.
(24) In the fourteenth-A superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
(25) In the fourteenth-B superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Anthony M. Brannon, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins July 1, 1995.
(26) In the fourteenth-B superior court district, no election shall be held in 1990 for the full term of the seat now occupied by Thomas H. Lee, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins January 1, 1995. In the fourteenth-B superior court district, J. Milton Read, Jr., serves a term expiring December 31, 1994.
(27) In the fifteenth-A superior court district, J.B. Allen, Jr., serves a term expiring December 31, 1994.
(28) In the fifteenth-B superior court district, F. Gordon Battle serves a term expiring December 31, 1994.
(29) In the sixteenth-A superior court district, B. Craig Ellis serves a term expiring December 31, 1994.
(30) In the sixteenth-B superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989. In the sixteenth-B judicial [superior court] district, a judge shall be appointed by the Governor to serve until the results of the 1990 general

election are certified. A person shall be elected in the 1990 general election to serve the remainder of the term expiring December 31, 1996.

(31) In the seventeenth-A superior court district, Melzer A. Morgan, Jr., serves a term expiring December 31, 1990.

(32) In the seventeenth-B superior court district, James M. Long serves a term expiring December 31, 1994.

(33) In the eighteenth-A superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(34) In the eighteenth-B superior court district, Edward K. Washington's term expired December 31, 1986, but he is holding over because of a court order enjoining an election from being held in 1986. A successor shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(35) In the eighteenth-C superior court district, W. Douglas Albright serves a term expiring December 31, 1990.

(36) In the eighteenth-D superior court district, Thomas W. Ross's term expired December 31, 1986, but he is holding over because of a court order enjoining an election from being held in 1986. A successor shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(37) In the eighteenth-E superior court district, Joseph John's term expired December 31, 1986, but he is holding over because of a court order enjoining an election from being held in 1986. A successor shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(38) In the nineteenth-A superior court district, James C. Davis serves a term expiring December 31, 1992.

(39) In the nineteenth-B1 superior court district, Russell G. Walker, Jr., serves a term expiring December 31, 1990. No election shall be held in 1998 for the full term of the seat now occupied by Russell G. Walker, Jr., and the holder of that seat shall serve until a successor is elected in 2000 and qualifies. The succeeding term shall begin January 1, 2001. The superior court judgeship held on June 12, 1996, in Superior Court District 20A by a resident of Moore County (James M. Webb) is allocated to Superior Court District 19B2. The term of that judge expires December 31, 2000. The judge's successor shall be elected in the 2000 general election.

(40) In the nineteenth-C superior court district, Thomas W. Seay, Jr., serves a term expiring December 31, 1990.

(41) In the twentieth-A superior court district, F. Fetzer Mills serves a term expiring December 31, 1992.

(42) In the twentieth-B superior court district, William H. Helms serves a term expiring December 31, 1990.

(43) In the twenty-first-A superior court district, William Z. Wood serves a term expiring December 31, 1990.

(44) In the twenty-first-B superior court district, Judson D. DeRamus, Jr., serves a term expiring December 31, 1988.

(45) In the twenty-first-C superior court district, William H. Freeman serves a term expiring December 31, 1990.

(46) In the twenty-first-D superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(47) In the twenty-second superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Preston Cornelius, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term shall begin

January 1, 1995. In the twenty-second superior court district, Robert A. Collier serves a term expiring December 31, 1994.

(48) In the twenty-third superior court district, Julius A. Rousseau, Jr., serves a term expiring December 31, 1990.

(49) In the twenty-fourth superior court district, Charles C. Lamm, Jr., serves a term expiring December 31, 1994.

(50) In the twenty-fifth-A superior court district, Claude S. Sitton serves a term expiring December 31, 1994.

(51) In the twenty-fifth-B superior court district, Forrest A. Ferrell serves a term expiring December 31, 1990.

(52) In the twenty-sixth-A superior court district, no election shall be held in 1994 for the full term of the seat now occupied by W. Terry Sherrill, and the holder of that seat shall serve until a successor is elected in 1996 and qualifies. The succeeding term shall begin January 1, 1997. In the twenty-sixth-A superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(53) In the twenty-sixth-B superior court district, Frank W. Snepp, Jr., and Kenneth A. Griffin serve terms expiring December 31, 1990.

(54) In the twenty-sixth-C superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Chase Boone Saunders, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term shall begin January 1, 1995. In the twenty-sixth-C superior court district, Robert M. Burroughs serves a term expiring December 31, 1994.

(55) In the twenty-seventh-A superior court district, no election shall be held in 1988 for the full term of the seat now occupied by Robert E. Gaines, and the holder of that seat shall serve until a successor is elected in 1990 and qualifies. The succeeding term begins January 1, 1991. In the twenty-seventh-A superior court district, Robert W. Kirby serves a term expiring December 31, 1990.

(56) In the twenty-seventh-B superior court district, John M. Gardner serves a term expiring December 31, 1994.

(57) In the twenty-eighth superior court district, Robert D. Lewis and C. Walter Allen serve terms expiring December 31, 1990.

(58) In the twenty-ninth superior court district, Hollis M. Owens, Jr., serves a term expiring December 31, 1990.

(59) In the thirtieth-A superior court district, James U. Downs serves a term expiring December 31, 1990.

(60) In the thirtieth-B superior court district, Janet M. Hyatt serves a term expiring December 31, 1994. (1969, c. 1171, ss. 1-3; c. 1190, s. 4; 1971, c. 377, s. 5; c. 997; 1973, c. 47, s. 2; c. 646; c. 855, s. 1; 1975, c. 529; c. 956, ss. 1, 2; 1975, 2nd Sess., c. 983, s. 114; 1977, c. 1119, ss. 1, 3, 4; c. 1130, ss. 1, 2; 1977, 2nd Sess., c. 1238, s. 1; c. 1243, s. 4; 1979, c. 838, s. 119; c. 1072, s. 1; 1979, 2nd Sess., c. 1221, s. 1; 1981, c. 964, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1282, s. 71.2; 1983 (Reg. Sess., 1984), c. 1109, ss. 4, 4.1; 1985, c. 698, s. 11(a); 1987, c. 509, s. 1; c. 549, s. 6.6; c. 738, s. 124; 1987 (Reg. Sess., 1988), c. 1037, s. 1; c. 1056, ss. 14, 15; 1989, c. 795, s. 22(a); 1991, c. 746, s. 1; 1993, c. 321, ss. 200.4(a), 200.5(a), (d); 1995, c. 51, s. 1; c. 509, s. 3; 1995 (Reg. Sess., 1996), c. 589, s. 1(a), (c); 1998-212, s. 16.16A(a); 1998-217, s. 67.3(c); 1999-237, ss. 17.12(b), 17.19(a)-(d), 17.20(a)-(c); 1999-396, s. 1; 2000-67, s. 15.6(a); 2000-140, s. 36.)

Subsection (a) Set Out Twice. — The first version of subsection (a) is effective until January 1, 2003. The second version of subsection (a) is effective January 1, 2003. See the effect of amendments note regarding Session Laws 1999-237, s. 17.20.

Editor's Note. —

Session Laws 2000-67, s. 15.6(c), provides that subsection (a) of the section becomes effective December 15, 2000, as to any district in which no county is subject to section 5 of the Voting Rights Act of 1965 (Act) and, as to any district in which any county is subject to section 5 of the Act, subsection (a) becomes effective December 15, 2000, or 15 days after the date upon which that subsection is approved under section 5 of the Act, whichever is later. The preclearance request has been submitted to the Attorney General of the United States.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Session Laws 2000-67, s. 15.6(b), directs the Governor to appoint superior court judges for the additional judgeships in Superior Court Districts 4B and 26B, as authorized by subsection (a) of the section. The successor to the judge appointed for District 26B is to be elected in the 2002 general election to serve a term expiring December 31, 2010. The successor to the judge appointed for District 4B is to be elected in the 2002 general election to serve the remainder of the unexpired term expiring December 31, 2006, in order to provide for unstaggered terms for multiple judgeships in the same district.

Effect of Amendments. —

Session Laws 2000-67, s. 15.6(a), in subsection (a), under the heading "No. of Resident Judges," substituted "2" for "1" for the 4B Superior Court District and "3" for "2" for the 26B Superior Court District. See editor's note for applicability and effective date.

Session Laws 2000-140, s. 36, effective July 21, 2000, substituted "December 1, 1999" for "May 1, 1999" in subdivision (c)(8).

§ 7A-41.1. District and set of districts defined; senior resident superior court judges and their authority.

OPINIONS OF ATTORNEY GENERAL

Regarding requirements for becoming a Senior Resident Superior Court Judge, see opinion of Attorney General to Honorable Thomas Ross, Superior Court Judge, N.C. General Assembly, 1999 N.C.A.G. 14 (5/27/99).

§ 7A-44. Salary and expenses of superior court judge.

OPINIONS OF ATTORNEY GENERAL

A Resident Superior Court Judge on assignment by the Chief Justice to perform the duties of Director of the Administrative Office of the Courts would be entitled to continue to draw the salaries and expenses set out in this section. See opinion of Attorney General to Honorable Thomas Ross, Superior Court Judge, N.C. General Assembly, 1999 N.C.A.G. 14 (5/27/99).

§ 7A-44.1. Secretarial and clerical help.

(a) Each senior resident superior court judge may appoint a judicial secretary to serve at his pleasure and under his direction the secretarial and clerical needs of the superior court judges of the district or set of districts as defined by G.S. 7A-41.1(a) for which he is the senior resident superior court judge. The appointment may be full- or part-time and the compensation and allowances of such secretary shall be fixed by the senior regular resident superior court judge, within limits determined by the Administrative Office of the Courts, and paid by the State.

(b) Each senior resident superior court judge may apply to the Director of the Administrative Office of the Courts to enter into contracts with local governments for the provision by the State of services of judicial secretaries pursuant to G.S. 153A-212.1 or G.S. 160A-289.1.

(c) The Director of the Administrative Office of the Courts may provide assistance requested pursuant to subsection (b) of this section only upon a showing by the senior resident superior court judge, supported by facts, that the overwhelming public interest warrants the use of additional resources for the speedy disposition of cases involving drug offenses, domestic violence, or other offenses involving a threat to public safety.

(d) The terms of any contract entered into with local governments pursuant to subsection (b) of this section shall befixed by the Director of the Administrative Office of the Courts in each case. Nothing in this section shall be construed to obligate the General Assembly to make any appropriation to implement the provisions of this section or to obligate theAdministrative Office of the Courts to provide the administrative costs of establishing or maintaining the positions or services provided for under this section. Further, nothing in this section shall be construed to obligate the Administrative Office of the Courts to maintain positions or services initially provided for under this section. (1975, c. 956, s. 3; 1987 (Reg. Sess., 1988), c. 1037, s. 3; 2000-67, s. 15.4(a).)

Editor's Note. —

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. — Session Laws 2000-67, s. 15.4(a), effective July 1, 2000, designated the existing section as subsection (a) and added subsections (b) through (d).

§ 7A-45. (Repealed effective January 1, 1989 — See editor's note) Special judges; appointment; removal; vacancies; authority.

Editor's Note. —

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 24.7, as amended by Session Laws 1996, Second Extra Session, c. 18, s. 22.6(b), and Session Laws 2000-67, s. 15.8(b) provides: "Notwithstanding G.S. 7A-45, G.S. 7A-45.1, Section 7 of Chapter 509 of the 1987 Session Laws, or any other provision of law, if any special superior court judge who is holding office on the effective date of this act first took office as an appointed or elected regular or special superior court judge in the calendar year 1986, the term of that judge is extended through December 31, 2000."

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

§ 7A-45.1. Special judges.

(a) Effective November 1, 1993, the Governor may appoint two special superior court judges to serve terms expiring September 30, 2000. Effective October 1, 2000, one of those positions is abolished. Successors to the special superior court judge appointed pursuant to thissubsection shall be appointed to a five-year term. A special judge takes thesame oath of office and is subject to the same requirements anddisabilities as are or may be prescribed by law

for regular judges of the superior court, save the requirement of residence in a particular district.

(a1) Effective October 1, 1995, the Governor may appoint two special superior court judges to serve terms expiring September 30, 2000. Successors to the special superior court judges appointed pursuant to this subsection shall be appointed to five-year terms. A special judge takes the same oath of office and is subject to the same requirements and disabilities as are or may be prescribed by law for regular judges of the superior court, save the requirement of residence in a particular district.

(a2) Effective December 15, 1996, the Governor may appoint four special superior court judges to serve terms expiring five years from the date that each judge takes office. Successors to the special superior court judges appointed pursuant to this subsection shall be appointed to five-year terms. A special judge takes the same oath of office and is subject to the same requirements and disabilities as are or may be prescribed by law for regular judges of the superior court, save the requirement of residence in a particular district.

(a3) Effective December 15, 1998, the Governor may appoint a special superior court judge to serve a term expiring five years from the date that judge takes office. Successors to the special superior court judge appointed pursuant to this subsection shall be appointed to five-year terms. A special judge takes the same oath of office and is subject to the same requirements and disabilities as are or may be prescribed by law for regular judges of the superior court, save the requirement of residence in a particular district.

(a4) Effective October 1, 1999, the Governor may appoint four special superior court judges to serve terms expiring five years from the date that each judge takes office. Successors to the special superior court judges appointed pursuant to this subsection shall be appointed to five-year terms. A special judge takes the same oath of office and is subject to the same requirements and disabilities as are or may be prescribed by law for regular judges of the superior court, save the requirement of residence in a particular district.

(b) A special judge is subject to removal from office for the same causes and in the same manner as a regular judge of the superior court, and a vacancy occurring in the office of special judge is filled by the Governor by appointment for the unexpired term.

(c) A special judge, in any court in which he is duly appointed to hold, has the same power and authority in all matters that a regular judge holding the same court would have. A special judge, duly assigned to hold the court of a particular county, has during the session of court in that county, in open court and in chambers, the same power and authority of a regular judge in all matters arising in the district or set of districts as defined in G.S. 7A-41.1(a) in which that county is located, that could properly be heard or determined by a regular judge holding the same session of court.

(d) A special judge is authorized to settle cases on appeal and to make all proper orders in regard thereto after the time for which he was commissioned has expired. (1987, c. 738, s. 123(a); 1987 (Reg. Sess., 1988), c. 1037, s. 5; 1993, c. 321, s. 200.5(g); 1995, c. 507, s. 21.1(f); 1996, 2nd Ex. Sess., c. 18, s. 22.6(a); 1998-212, s. 16.22(a), (b); 1999-237, s. 17.12(a); 2000-67, s. 15.8(a).)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 24.7, as amended by Session Laws 1996, Second Extra Session, c. 18, s. 22.6(b), and Session Laws 2000-67, s. 15.8(b), provides: "Notwithstanding G.S. 7A-45, G.S. 7A-45.1, Section 7 of Chapter 509 of the 1987 Session Laws, or any other provision of law, if any special superior court judge who is holding office on the effective date of this act first took office as an appointed or elected regular or special superior court judge in the calendar year 1986, the term of that judge is extended through December 31, 2000."

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. —

Session Laws 2000-67, s. 15.8(a), effective July 1, 2000, in subsection (a), added the second sentence, and made stylistic changes.

Article 9.

District Attorneys and Judicial Districts.

§ 7A-60. District attorneys and prosecutorial districts.

CASE NOTES

Cited in State v. Farmer, — N.C. App. —, 530 S.E.2d 584, 2000 N.C. App. LEXIS 545 (2000).

§ 7A-61. Duties of district attorney.

CASE NOTES

Cited in State v. Summers, 351 N.C. 620, 528 S.E.2d 17 (2000).

§ 7A-64. Temporary assistance for district attorneys.

(a) A district attorney may apply to the Director of the Administrative Office of the Courts to:

(1) Temporarily assign an assistant district attorney from another district, after consultation with the district attorney thereof, to assist in the prosecution of cases in the requesting district;

(2) Authorize the temporary appointment, by the requesting district attorney, of a qualified attorney to assist the requesting district attorney; or

(3) Enter into contracts with local governments for the provision of services by the State pursuant to G.S. 153A-212.1 or G.S. 160A-289.1.

(b) The Director of the Administrative Office of the Courts may provide this assistance only upon a showing by the requesting district attorney, supported by facts, that:

(1) Criminal cases have accumulated on the dockets of the superior or district courts of the district beyond the capacity of the district attorney and the district attorney's full-time assistants to keep the dockets reasonably current; or

(2) The overwhelming public interest warrants the use of additional resources for the speedy disposition of cases involving drug offenses, domestic violence, or other offenses involving a threat to public safety.

(c) The length of service and compensation of any temporary appointee or the terms of any contract entered into with local governments shall be fixed by Director of the Administrative Office of the Courts in each case. Nothing in this section shall be construed to obligate the General Assembly to make any appropriation to implement the provisions of this section or to obligate the Administrative Office of the Courts to provide the administrative costs of establishing or maintaining the positions or services provided for under this

section. Further, nothing in this section shall be construed to obligate the Administrative Office of the Courts to maintain positions or services initially provided for under this section. (1967, c. 1049, s. 1; 1973, c. 47, s. 2; 1999-237, s. 17.17(a); 2000-67, s. 15.4(g).)

Editor's Note. —

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. —

Session Laws 2000-67, s. 15.4(g), effective July 1, 2000, in the second sentence in subsection (c), added "or to obligate the Administrative Office of the Courts to provide the administrative costs of establishing or maintaining the positions or services provided for under this section."

§ 7A-65. Compensation and allowances of district attorneys and assistant district attorneys.

(a) The annual salary of:

(1) District attorneys shall be the midpoint amount between the salary of a senior resident superior court judge and the salary of a chief district court judge, as provided by law,

(2) Full-time assistant district attorneys shall be as provided in the Current Operations Appropriations Act.

When traveling on official business, each district attorney and assistant district attorney is entitled to reimbursement for his subsistence and travel expenses to the same extent as State employees generally.

(b) Repealed by Session Laws 1985, c. 689, s. 2.

(c) In lieu of merit and other increment raises paid to regular State employees, a district attorney shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, and nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. Service shall mean service in the elective position of a district attorney and shall not include service as a deputy or acting district attorney. Service shall also mean service as a justice or judge of the General Court of Justice, as a clerk of superior court, or as an assistant district attorney.

(d) In lieu of merit and other increment raises paid to regular State employees, an assistant district attorney shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. "Service" means service as an assistant district attorney or as a district attorney. (1967, c. 1049, s. 1; 1973, c. 47, s. 2; 1983, c. 761, ss. 246, 248; 1983 (Reg. Sess., 1984), c. 1034, ss. 92, 165; c. 1109, s. 13.1; 1985, c. 689, s. 2; c. 698, s. 10(b); 1985 (Reg. Sess., 1986), c. 1014, s. 224; 1987, c. 738, s. 33(a); 1995, c. 507, s. 7.4A; 1999-237, s. 28.19(a); 2000-67, s. 26.3A(a).)

Editor's Note. —

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. —

Session Laws 2000-67, s. 26.3A(a), effective July 1, 2000, rewrote subsection (a).

Article 11.

Special Regulations.

§ 7A-97. Court's control of argument.

CASE NOTES

V. Capital Cases.

V. CAPITAL CASES.

Refusal to Allow Both Defense Counsel to Argue Was Prejudicial Error. — The failure of trial court to permit defense counsel to make three arguments during closing arguments of the guilt phase, an opening argument by one defense attorney before the State's closing arguments and two final arguments, one by each of his attorneys, after the State's closing arguments, where defendant was being tried for multiple capital felonies and did not present evidence during the guilt-innocence phase, and where counsel made a clear request, constituted prejudicial error per se and entitled the defendant to a new trial as to both capital and noncapital charges. State v. Barrow, 350 N.C. 640, 517 S.E.2d 374 (1999).

Article 12.

Clerk of Superior Court.

§ 7A-101. Compensation.

(a) The clerk of superior court is a full-time employee of the State and shall receive an annual salary, payable in equal monthly installments, based on the population of the county as determined in subsection (a1) of this section, according to the following schedule:

Population	*Annual Salary*
Less than 100,000	$69,286
100,000 to 149,999	77,827
150,000 to 249,999	86,369
250,000 and above	94,912.

The salary schedule in this subsection is intended to represent the following percentage of the salary of a chief district court judge:

Population	*Annual Salary*
Less than 100,000	73%
100,000 to 149,999	82%
150,000 to 249,999	91%
250,000 and above	100%.

When a county changes from one population group to another, the salary of the clerk shall be changed, on July 1 of the fiscal year for which the change is reported, to the salary appropriate for the new population group, except that the salary of an incumbent clerk shall not be decreased by any change in population group during his continuance in office.

(a1) For purposes of subsection (a) of this section, the population of a county for any fiscal year shall be the population for the beginning of that fiscal year as reported by the Office of State Budget, Planning, and Management to the Administrative Office of the Courts prior to the beginning of that fiscal year.

(b) The clerk shall receive no fees or commission by virtue of his office. The salary set forth in this section is the clerk's sole official compensation, but if, on June 30, 1975, the salary of a particular clerk, by reason of previous but no longer authorized merit increments, is higher than that set forth in the table, that higher salary shall not be reduced during his continuance in office.

(c) In lieu of merit and other increment raises paid to regular State employees, a clerk of superior court shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the clerk's annual salary payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. Service shall mean service in the elective position of clerk of superior court, as an assistant clerk of court and as a supervisor of clerks of superior court with the Administrative Office of the Courts and shall not include service as a deputy or acting clerk. Service shall also mean service as a justice or judge of the General Court of Justice or as a district attorney. (1965, c. 310, s. 1; 1967, c. 691, s. 5; 1969, c. 1186, s. 3; 1971, c. 877, ss. 1, 2; 1973, c. 571, ss. 1, 2; 1975, c. 956, s. 7; 1975, 2nd Sess., c. 983, s. 11; 1977, c. 802, s. 42; 1977, 2nd Sess., c. 1136, s. 13; 1979, c. 838, s. 85; 1979, 2nd Sess., c. 1137, s. 12; 1981, c. 964, s. 14; c. 1127, s. 12; 1983, c. 761, ss. 200, 247, 249; 1983 (Reg. Sess., 1984), c. 1034, ss. 86, 87; c. 1109, s. 13.1; 1985, c. 479, s. 211; c. 689, s. 3; c. 698, s. 10(c); 1985 (Reg. Sess., 1986), c. 1014, s. 34; 1987, c. 738, s. 20; 1987 (Reg. Sess., 1988), c. 1086, s. 14; c. 1100, ss. 16(a), 17; 1989, c. 752, s. 31; c. 799, s. 27(a); 1991 (Reg. Sess., 1992), c. 900, s. 40; c. 1039, s. 21; 1993, c. 321, s. 57(a); 1993 (Reg. Sess., 1994), c. 769, s. 7.10(a); 1996, 2nd Ex. Sess., c. 18, s. 28.4; 1997-443, s. 33.9; 1998-153, s. 7; 1999-237, s. 28.4; 2000-67, s. 26.4; 2000-140, s. 93.1(b).)

Editor's Note. —

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. —

Session Laws 2000-67, s. 26.4, effective July 1, 2000, in subsection (a), increased the annual salary for the clerk of superior court for each population range.

Session Laws 2000-140, s. 93.1, effective July 21, 2000, substituted "Office of State Budget, Planning, and Management" for "Office of State Planning" in (a1).

§ 7A-102. Assistant and deputy clerks; appointment; number; salaries; duties.

(a) The numbers and salaries of assistant clerks, deputy clerks, and other employees in the office of each clerk of superior court shall be determined by the Administrative Officer of the Courts after consultation with the clerk concerned. All personnel in the clerk's office are employees of the State. The clerk appoints the assistants, deputies, and other employees in his office to serve at his pleasure. Assistant and deputy clerks shall take the oath of office prescribed for clerks of superior court, conformed to the office of assistant or deputy clerk, as the case may be. The job classifications and related salaries of each employee within the office of each superior court clerk shall be subject to the approval of the Administrative Officer of the Courts after consultation with each clerk concerned and shall be subject to the availability of funds appropriated for that purpose by the General Assembly.

(b) An assistant clerk is authorized to perform all the duties and functions of the office of clerk of superior court, and any act of an assistant clerk is entitled to the same faith and credit as that of the clerk. A deputy clerk is authorized to certify the existence and correctness of any record in the clerk's office, to take the proofs and examinations of the witnesses touching the

execution of a will as required by G.S. 31-17, and to perform any other ministerial act which the clerk may be authorized and empowered to do, in his own name and without reciting the name of his principal. The clerk is responsible for the acts of his assistants and deputies. With the consent of the clerk of superior court of each county and the consent of the presiding judge in any proceeding, an assistant or deputy clerk is authorized to perform all the duties and functions of the office of the clerk of superior court in another county in any proceeding in the district or superior court that has been transferred to that county from the county in which the assistant or deputy clerk is employed.

(c) Notwithstanding the provisions of subsection (a), the Administrative Officer of the Courts shall establish an incremental salary plan for assistant clerks and for deputy clerks based on a series of salary steps corresponding to the steps contained in the Salary Plan for State Employees adopted by the Office of State Personnel, subject to a minimum and a maximum annual salary as set forth below. On and after July 1, 1985, each assistant clerk and each deputy clerk shall be eligible for an annual step increase in his salary plan based on satisfactory job performance as determined by each clerk. Notwithstanding the foregoing, if an assistant or deputy clerk's years of service in the office of superior court clerk would warrant an annual salary greater than the salary first established under this section, that assistant or deputy clerk shall be eligible on and after July 1, 1984, for an annual step increase in his salary plan. Furthermore, on and after July 1, 1985, that assistant or deputy clerk shall be eligible for an increase of two steps in his salary plan, and shall remain eligible for a two-step increase each year as recommended by each clerk until that assistant or deputy clerk's annual salary corresponds to his number of years of service. Any person covered by this subsection who would not receive a step increase in fiscal year 1995-96 because that person is at the top of the salary range as it existed for fiscal year 1994-95 shall receive a salary increase to the maximum annual salary provided by subsection (c1) of this section.

(c1) A full-time assistant clerk or a full-time deputy clerk, and up to one full-time deputy clerk serving as head bookkeeper per county, shall be paid an annual salary subject to the following minimum and maximum rates:

Assistant Clerks and Head Bookkeeper	*Annual Salary*
Minimum	$25,890
Maximum	45,839
Deputy Clerks	*Annual Salary*
Minimum	$21,940
Maximum	35,309.

(d) Full-time assistant clerks, licensed to practice law in North Carolina, who are employed in the office of superior court clerk on and after July 1, 1984, and full-time assistant clerks possessing a masters degree in business administration, public administration, accounting, or other similar discipline from an accredited college or university who are employed in the office of superior court clerk on and after July 1, 1997, are authorized an annual salary of not less than three-fourths of the maximum annual salary established for assistant clerks; the clerk of superior court, with the approval of the Administrative Office of the Courts, may establish a higher annual salary but that salary shall not be higher than the maximum annual salary established for assistant clerks. Full-time assistant clerks, holding a law degree from an accredited law school, who are employed in the office of superior court clerk on and after July 1, 1984, are authorized an annual salary of not less than two-thirds of the maximum annual salary established for assistant clerks; the clerk of superior court, with the approval of the Administrative Office of the Courts, may establish a higher annual salary, but the entry-level salary may not be more

than three-fourths of the maximum annual salary established for assistant clerks, and in no event may be higher than the maximum annual salary established for assistant clerks. The entry-level annual salary for all other assistant and deputy clerks employed on and after July 1, 1984, shall be at the minimum rates as herein established.

(e) A clerk of superior court may apply to the Director of the Administrative Office of the Courts to enter into contracts with local governments for the provision by the State of services of assistant clerks, deputy clerks, and other employees in the office of each clerk of superior court pursuant to G.S. 153A-212.1 or G.S. 160A-289.1.

(f) The Director of the Administrative Office of the Courts may provide assistance requested pursuant to subsection (e) of this section only upon a showing by the senior resident superior court judge, supported by facts, that the overwhelming public interest warrants the use of additional resources for the speedy disposition of cases involving drug offenses, domestic violence, or other offenses involving a threat to public safety.

(g) The terms of any contract entered into with local governments pursuant to subsection (e) of this section shall befixed by the Director of the Administrative Office of the Courts in each case. Nothing in this section shall be construed to obligate the General Assembly to make any appropriation to implement the provisions of this section or to obligate the Administrative Office of the Courts to provide the administrative costs of establishing or maintaining the positions or services provided for under this section. Further, nothing in this section shall be construed to obligate the Administrative Office of the Courts to maintain positions or services initially provided for under this section. (1777, c. 115, s. 86; P.R.; R.C., c. 19, s. 15; Code, s. 75; 1899, c. 235, ss. 2, 3; Rev., ss. 898-900; 1921, c. 32, ss. 1-3; C.S., ss. 934(a)-934(c), 935-937; 1951, c. 159, ss. 1, 2; 1959, c. 1297; 1963, c. 1187; 1965, c. 264; c. 310, s. 1; 1971, c. 363, s. 2; 1973, c. 678; 1983 (Reg. Sess., 1984), c. 1034, ss. 88, 89; 1985, c. 479, s. 212; c. 757, s. 190; 1985 (Reg. Sess., 1986), c. 1014, s. 35; 1987, c. 738, s. 21(a); 1987 (Reg. Sess., 1988), c. 1086, s. 15; 1989, c. 445; c. 752, s. 32; 1991 (Reg. Sess., 1992), c. 900, ss. 42, 119; 1993, c. 321, ss. 58, 59; 1993 (Reg. Sess., 1994), c. 769, ss. 7.11, 7.12; 1995, c. 507, s. 7.6(a), (b); 1996, 2nd Ex. Sess., c. 18, s. 28.5; 1997-443, ss. 33.12, 33.10(b); 1998-153, s. 8(b); 1999-237, s. 28.5; 2000-67, ss. 15.4(b), 26.5.)

Editor's Note. —

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.' "

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. —

Session Laws 2000-67, ss. 15.4(b) and 26.5, effective July 1, 2000, in subsection (c1), under the heading "Assistant Clerks and Head Bookkeeper," substituted "$25,890" for "$24,846" for the Minimum Annual Salary and substituted "45,839" for "43,991" for the Maximum Annual Salary, and under the heading "Deputy Clerks," substituted "$21,940" for "$19,865" for the Minimum Annual Salary and substituted "35,309" for "33,886" for the Maximum Annual Salary; and added subsections (e) through (g).

§ 7A-103. Authority of clerk of superior court.

CASE NOTES

Clerk Had Jurisdiction to Deny Accounting. — The clerk had jurisdiction to grant or deny plaintiffs' Motion to Compel an Accounting, because this section grants the clerk of superior court jurisdiction to audit the accounts of fiduciaries, as required by law, and by implication, to deny a request to audit such accounts as well. Wilson v. Watson, — N.C. App. —, 524 S.E.2d 812, 2000 N.C. App. LEXIS 51 (2000).

§ 7A-109. Record-keeping procedures.

CASE NOTES

Documents filed as exhibits attached to plaintiff's complaint entered the public domain for purposes of the Public Records Act, § 132-1, and public's right to inspect court records under this section, and became "public records" once the complaint was filed with the clerk of the court, although these exhibits would otherwise have been shielded by § 131E-95(b) of the Hospital Licensure Act. Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 515 S.E.2d 675 (1999), cert. denied, — U.S. —, 120 S. Ct. 1452, 146 L. Ed. 2d 337 (2000).

§ 7A-113. Bookkeeping and accounting systems equipment.

Notwithstanding the provisions of G.S. 147-64.6(10), proposed changes in the kinds of bookkeeping and accounting systems equipment employed by the clerk of superior court shall be subject to review and approval by the Office of State Budget, Planning, and Management. The Administrative Officer of the Courts shall, prior to implementing any change in the kinds of equipment, file with the Office of State Budget, Planning, and Management a request for approval of the change, along with supporting information. If within 30 days of the filing of the request the Office of State Budget, Planning, and Management has not disapproved the request, the request shall be deemed to be approved. (1983 (Reg. Sess., 1984), c. 1109, s. 9; 2000-140, s. 93.1(a).)

Effect of Amendments. — Session Laws 2000-140, s. 93.1, effective July 21, 2000, substituted "Office of State Budget, Planning, and Management" for "Office of State Budget and Management" throughout the section.

SUBCHAPTER IV. DISTRICT COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 13.

Creation and Organization of the District Court Division.

§ 7A-133. Numbers of judges by districts; numbers of magistrates and additional seats of court, by counties.

(a) **(For effective date, see note.)** Each district court district shall have the numbers of judges as set forth in the following table:

District	Judges	County
1	5	Camden
		Chowan
		Currituck
		Dare
		Gates
		Pasquotank
		Perquimans

District	Judges	County
2	4	Martin
		Beaufort
		Tyrrell
		Hyde
		Washington
3A	5	Pitt
3B	5	Craven
		Pamlico
		Carteret
4	8	Sampson
		Duplin
		Jones
		Onslow
5	7	New Hanover
		Pender
6A	2	Halifax
6B	3	Northampton
		Bertie
		Hertford
7	7	Nash
		Edgecombe
		Wilson
8	6	Wayne
		Greene
		Lenoir
9	4	Granville
		(part of Vance see subsection (b))
		Franklin
9A	2	Person
		Caswell
9B	2	Warren
		(part of Vance see subsection (b))
10	14	Wake
11	8	Harnett
		Johnston
		Lee
12	9	Cumberland
13	6	Bladen
		Brunswick
		Columbus
14	6	Durham
15A	4	Alamance
15B	4	Orange
		Chatham
16A	3	Scotland
		Hoke
16B	5	Robeson

District	Judges	County
17A	3	Rockingham
17B	3	Stokes
		Surry
18	12	Guilford
19A	4	Cabarrus
19B	6	Montgomery
		Moore
		Randolph
19C	4	Rowan
20	7	Stanly
		Union
		Anson
		Richmond
21	8	Forsyth
22	9	Alexander
		Davidson
		Davie
		Iredell
23	4	Alleghany
		Ashe
		Wilkes
		Yadkin
24	4	Avery
		Madison
		Mitchell
		Watauga
		Yancey
25	8	Burke
		Caldwell
		Catawba
26	17	Mecklenburg
27A	6	Gaston
27B	4	Cleveland
		Lincoln
28	6	Buncombe
29	6	Henderson
		McDowell
		Polk
		Rutherford
		Transylvania
30	5	Cherokee
		Clay
		Graham
		Haywood
		Jackson
		Macon
		Swain.

(b) For district court districts of less than a whole county, or with part or all of one county with part of another, the composition of the district is as follows:

(1) District Court District 9 consists of Franklin and Granville Counties and the remainder of Vance County not in District Court District 9B.

(2) District Court District 9B consists of Warren County and East Henderson I, North Henderson I, North Henderson II, Middleburg, Townsville, and Williamsboro Precincts of Vance County.

Precinct boundaries as used in this section for Vance County are those shown on maps on file with the Legislative Services Office on May 1, 1991, and for other counties are those reported by the United States Bureau of the Census under Public Law 94-171 for the 1990 Census in the IVTD Version of the TIGER files.

(c) Each county shall have the numbers of magistrates and additional seats of district court, as set forth in the following table:

County	Magistrates Min.	Max.	Additional Seats of Court
Camden	1	3	
Chowan	2	3	
Currituck	1	4	
Dare	3	8	
Gates	2	3	
Pasquotank	3	5	
Perquimans	2	4	
Martin	5	8	
Beaufort	4	8	
Tyrrell	1	3	
Hyde	2	4	
Washington	3	4	
Pitt	10	12	Farmville Ayden
Craven	7	10	Havelock
Pamlico	2	4	
Carteret	5	8	
Sampson	6	8	
Duplin	9	11	
Jones	2	3	
Onslow	8	14	
New Hanover	6	11	
Pender	4	6	
Halifax	9	14	Roanoke Rapids, Scotland Neck
Northampton	5	7	
Bertie	4	6	
Hertford	5	7	
Nash	7	10	Rocky Mount
Edgecombe	4	7	Rocky Mount
Wilson	4	7	
Wayne	5	12	Mount Olive
Greene	2	4	

County	Magistrates Min.	Max.	Additional Seats of Court
Lenoir	4	10	La Grange
Granville	3	7	
Vance	3	6	
Warren	3	5	
Franklin	3	7	
Person	3	4	
Caswell	2	5	
Wake	12	21	Apex, Wendell, Fuquay-Varina, Wake Forest
Harnett	7	11	Dunn
Johnston	10	12	Benson, Clayton, Selma
Lee	4	6	
Cumberland	10	19	
Bladen	4	6	
Brunswick	4	9	
Columbus	6	9	Tabor City
Durham	8	13	
Alamance	7	11	Burlington
Orange	4	11	Chapel Hill
Chatham	3	9	Siler City
Scotland	3	5	
Hoke	4	5	
Robeson	8	16	Fairmont, Maxton, Pembroke, Red Springs, Rowland, St. Pauls
Rockingham	4	9	Reidsville, Eden, Madison
Stokes	2	5	
Surry	5	9	Mt. Airy
Guilford	20	27	High Point
Cabarrus	5	9	Kannapolis
Montgomery	2	4	
Randolph	5	10	Liberty
Rowan	5	10	
Stanly	5	6	
Union	4	7	
Anson	4	6	
Richmond	5	6	Hamlet

County	Magistrates Min.	Max.	Additional Seats of Court
Moore	5	8	Southern Pines
Forsyth	3	15	Kernersville
Alexander	2	4	
Davidson	7	10	Thomasville
Davie	2	3	
Iredell	4	9	Mooresville
Alleghany	1	2	
Ashe	3	4	
Wilkes	4	6	
Yadkin	3	5	
Avery	3	5	
Madison	4	5	
Mitchell	3	4	
Watauga	4	6	
Yancey	2	4	
Burke	4	7	
Caldwell	4	7	
Catawba	6	10	Hickory
Mecklenburg	15	28	
Gaston	11	22	
Cleveland	5	8	
Lincoln	4	7	
Buncombe	6	15	
Henderson	4	7	
McDowell	3	6	
Polk	3	4	
Rutherford	6	8	
Transylvania	2	4	
Cherokee	3	4	
Clay	1	2	
Graham	2	3	
Haywood	5	7	Canton
Jackson	3	5	
Macon	3	4	
Swain	2	3	

(1965, c. 310, s. 1; 1967, c. 691, s. 8; 1969, c. 1190, s. 10; c. 1254; 1971, c. 377, s. 7; cc. 727, 840, 841, 842, 843, 865, 866, 898; 1973, cc. 132, 373, 483; c. 838, s. 1; c. 1376; 1975, c. 956, ss. 8, 10; 1977, cc. 121, 122; c. 678, s. 2; c. 947, s. 1; c. 1130, ss. 4, 5; 1977, 2nd Sess., c. 1238, s. 3; c. 1243, ss. 3, 6; 1979, c. 465; c. 838, ss. 117, 118; c. 1072, ss. 2, 3; 1979, 2nd Sess., c. 1221, s. 2; 1981, c. 964, s. 4; 1983, c. 881, s. 5; 1983 (Reg. Sess., 1984), c. 1109, s. 5; 1985, c. 698, ss. 7(a), 12; 1985 (Reg. Sess., 1986), c. 1014, s. 222; 1987, c. 738, ss. 126(a), 130(a); 1987 (Reg. Sess., 1988), c. 1056, s. 4; c. 1075; c. 1100, s. 17.2(a); 1989, c. 795, s. 23(a), (d), (h); 1991, c. 742, ss. 11, 12(a); 1993, c. 321, ss. 200.4(e), 200.6(a), (d); 1993 (Reg. Sess., 1994), c. 769, s. 24.9; 1995, c. 507, s. 21.1(c); 1995 (Reg. Sess., 1996), c. 589, s. 2(a); 1996, 2nd Ex. Sess., c. 18, ss. 22.4, 22.7(a); 1997-443, ss.

18.12(a), 18.13; 1998-212, ss. 16.11, 16.16(a); 1998-217, s. 67.3(a); 1999-237, ss. 17.4, 17.6(a); 2000-67, ss. 15.2, 15.3(a).)

Editor's Note. —

Session Laws 2000-67, s. 15.3(b), provides that, notwithstanding the provisions of G.S. 7A-142, the Governor shall appoint additional district court judges for District Court Districts 1, 4, 9B, 10, 11, 17A, 22, 26, and 28, as authorized by subsection (a). Those judges' successors shall be elected in the 2004 election for four-year terms commencing on the first Monday in December 2004.

Session Laws 2000-67, s. 15.3(c), makes subsection (a) of this section effective December 15, 2000, as to any district in which no county is subject to section 5 of the Voting Rights Act of 1965 (Act) and, as to any district in which any county is subject to section 5 of the Act, December 15, 2000, or 15 days after the date upon which that subsection is approved under section 5 of the Act, whichever is later. The preclearance request has been submitted to the Attorney General of the United States.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.' "

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. —

Session Laws 2000-67, s. 15.2, effective July 1, 2000, in subsection (c), under the heading "Magistrates-Maximum," substituted "4" for "3" in Perquimans, "7" for "6" in Hertford, "5" for "4" in Warren, "21" for "20" in Wake, "9" for "8" in Brunswick, "11" for "10" in Alamance, "9" for "8" in Chatham, "27" for "26" in Guilford, "6" for "5" in Anson, "4" for "3" in Alexander, "28" for "27" Mecklenburg, "6" for "5" in McDowell and "5" for "4" in Jackson.

Session Laws 2000-67, s. 15.3(a), under the heading "Judges" in subsection (a), substituted "5" for "4" in District 1, "8" for "7" in District 4, "2" for "1" in District 9B, "14" for "13" in District 10, "8" for "7" in District 11, "3" for "2" in District 17A, "9" for "8" in District 22, "17" for "16" in District 26, and "6" for "5" in District 28. For effective date, see editor's note.

Article 14.

District Judges.

§ 7A-142. Vacancies in office.

Editor's Note. —

Session Laws 2000-67, s. 15.3(b), provides that, notwithstanding the provisions of G.S. 7A-142, the Governor shall appoint additional district court judges for District Court Districts 1, 4, 9B, 10, 11, 17A, 22, 26, and 28, as authorized by subsection (a). Those judges' successors shall be elected in the 2004 election for four-year terms commencing on the first Monday in December 2004.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

§ 7A-146. Administrative authority and duties of chief district judge.

CASE NOTES

Cited in Young v. Young, 133 N.C. App. 332, 515 S.E.2d 478 (1999).

Article 16.

Magistrates.

§ 7A-170. Nature of office and oath.

OPINIONS OF ATTORNEY GENERAL

No Continued Residence Requirements. — Continued residence in the county for which a magistrate is appointed is not a prerequisite to remain in the office of magistrate for the term of the appointment. See opinion of Attorney General to Mr. David A. Phillips, Attorney at Law, 1997 N.C.A.G. 61 (10/8/97).

§ 7A-171.1. Duty hours, salary, and travel expenses within county.

(a) The Administrative Officer of the Courts, after consultation with the chief district judge and pursuant to the following provisions, shall set an annual salary for each magistrate.

(1) A full-time magistrate shall be paid the annual salary indicated in the table set out in this subdivision. A full-time magistrate is a magistrate who is assigned to work an average of not less than 40 hours a week during the term of office. The Administrative Officer of the Courts shall designate whether a magistrate is full-time. Initial appointment shall be at the entry rate. A magistrate's salary shall increase to the next step every two years on the anniversary of the date the magistrate was originally appointed for increases to Steps 1 through 3, and every four years on the anniversary of the date the magistrate was originally appointed for increases to Steps 4 through 6.

Table of Salaries of Full-Time Magistrates

Step Level	*Annual Salary*
Entry Rate	*$26,264*
Step 1	*28,900*
Step 2	*31,768*
Step 3	*34,898*
Step 4	*38,327*
Step 5	*42,096*
Step 6	*46,239.*

(2) A part-time magistrate is a magistrate who is assigned to work an average of less than 40 hours of work a week during the term, except that no magistrate shall be assigned an average of less than 10 hours of work a week during the term. A part-time magistrate is included, in accordance with G.S. 7A-170, under the provisions of G.S. 135-1(10) and G.S. 135-40.2(a). The Administrative Officer of the Courts designates whether a magistrate is a part-time magistrate. A part-time magistrate shall receive an annual salary based on the following formula: The average number of hours a week that a part-time magistrate is assigned work during the term shall be multiplied by the annual salary payable to a full-time magistrate who has the same number of years of service prior to the beginning of that term as does the part-time magistrate and the product of that multiplication shall be divided by the number 40. The quotient shall be the annual salary payable to that part-time magistrate.

(3) Notwithstanding any other provision of this subsection, an individual who, when initially appointed as a full-time magistrate, is licensed to practice law in North Carolina, shall receive the annual salary provided in the Table in subdivision (1) of this subsection for Step 4. This magistrate's salary shall increase to the next step every four years on the anniversary of the date the magistrate was originally appointed. An individual who, when initially appointed as a part-time magistrate, is licensed to practice law in North Carolina, shall be paid an annual salary based on that for Step 4 and determined according to the formula in subdivision (2) of this subsection. This magistrate's salary shall increase to the next step every four years on the anniversary of the date the magistrate was originally appointed. The salary of a full-time magistrate who acquires a license to practice law in North Carolina while holding the office of magistrate and who at the time of acquiring the license is receiving a salary at a level lower than Step 4 shall be adjusted to Step 4 and, thereafter, shall advance in accordance with the Table's schedule. The salary of a part-time magistrate who acquires a license to practice law in North Carolina while holding the office of magistrate and who at the time of acquiring the license is receiving an annual salary as determined by subdivision (2) of this subsection based on a salary level lower than Step 4 shall be adjusted to a salary based on Step 4 in the Table and, thereafter, shall advance in accordance with the provision in subdivision (2) of this subsection.

(a1) Notwithstanding subsection (a) of this section, the following salary provisions apply to individuals who were serving as magistrates on June 30, 1994:

(1) The salaries of magistrates who on June 30, 1994, were paid at a salary level of less than five years of service under the table in effect that date shall be as follows:

Less than 1 year of service	*$20,700*
1 or more but less than 3 years of service	*21,764*
3 or more but less than 5 years of service	*23,905.*

Upon completion of five years of service, those magistrates shall receive the salary set as the Entry Rate in the table in subsection (a).

(2) The salaries of magistrates who on June 30, 1994, were paid at a salary level of five or more years of service shall be based on the rates set out in subsection (a) as follows:

Salary Level on June 30, 1994	*Salary Level on July 1, 1994*
5 or more but less than 7 years of service	*Entry Rate*
7 or more but less than 9 years of service	*Step 1*
9 or more but less than 11 years of service	*Step 2*
11 or more years of service	*Step 3*

Thereafter, their salaries shall be set in accordance with the provisions in subsection (a).

(3) The salaries of magistrates who are licensed to practice law in North Carolina shall be adjusted to the annual salary provided in the table in subsection (a) as Step 4, and, thereafter, their salaries shall be set in accordance with the provisions in subsection (a).

(4) The salaries of "part-time magistrates" shall be set under the formula set out in subdivision (2) of subsection (a) but according to the rates set out in this subsection.

(a2) The Administrative Officer of the Courts shall provide magistrates with longevity pay at the same rates as are provided by the State to its employees subject to the State Personnel Act.

(b) Notwithstanding G.S. 138-6, a magistrate may not be reimbursed by the State for travel expenses incurred on official business within the county in which the magistrate resides. (1977, c. 945, s. 5; 1979, c. 838, s. 84; c. 991; 1979, 2nd Sess., c. 1137, s. 11; 1981, c. 914, s. 1; c. 1127, s. 11; 1983, c. 761, s. 199; c. 923, s. 217; 1983 (Reg. Sess., 1984), c. 1034, ss. 84, 211; 1985, c. 479, s. 210; c. 698, ss. 13(a), (b) (14); 791, s. 39.1; 1985 (Reg. Sess., 1986), c. 1014, ss. 36, 223(a); 1987, c. 564, s. 12; c. 738, ss. 22, 34; 1987 (Reg. Sess., 1988), c. 1086, s. 16; 1989, c. 752, s. 33; 1991, c. 742, s. 14(a); 1991 (Reg. Sess., 1992), c. 900, ss. 41, 43; c. 1044, s. 9.1; 1993, c. 321, s. 60; 1993 (Reg. Sess., 1994), c. 769, s. 7.13(b), (c); 1995, c. 507, s. 7.7(a), (b); 1996, 2nd Ex. Sess., c. 18, s. 28.6(a), (b); 1999-237, s. 28.6(a), (b); 2000-67, s. 26.6.)

Editor's Note. —

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.' "

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. —

Session Laws 2000-67, s. 26.6, effective July 1, 2000, in the Annual Salary column in subdivision (a)(1), substituted "$26,264" for "$25,205" for the Entry rate, "28,900" for "27,735" in Step 1, "31,768" for "30,488" in Step 2, "34,898" for "33,491" in Step 3, "38,327" for "36,782" in Step 4, "42,096" for "40,399" in Step 5, and "46,239" for "44,375" in Step 6; and in subdivision (a1)(1), substituted "$20,700" for "$19,866" for less than 1 year of service, substituted "21,764" for "20,887" for 1 to 3 years of service, and substituted "23,905" for "22,941" for 3 to 5 years of service.

§ 7A-171.2. Qualifications for nomination or renomination.

OPINIONS OF ATTORNEY GENERAL

No Continued Residence Requirements. — Continued residence in the county for which a magistrate is appointed is not a prerequisite to remain in the office of magistrate for the term of the appointment. See opinion of Attorney General to Mr. David A. Phillips, Attorney at Law, 1997 N.C.A.G. 61 (10/8/97).

Article 18.

District Court Practice and Procedure Generally.

§ 7A-191. Trials; hearings and orders in chambers.

CASE NOTES

Cited in In re a Judge, No. 238 Brown, 351 N.C. 601, 527 S.E.2d 651 (2000).

§ 7A-193. Civil procedure generally.

CASE NOTES

Applied in Thrift v. Buncombe County Dep't of Social Servs., — N.C. App. —, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000).

ARTICLE 19.

Small Claim Actions in District Court.

§ 7A-210. Small claim action defined.

CASE NOTES

Amount in Controversy. — Where the amount in controversy for plaintiff's claims was in excess of the dollar requirement for a small claim action, but less than the $ 10,000 requirement for an action in the superior court, the claim was within the jurisdiction of the district court, and the district court erred in concluding that it lacked jurisdiction to hear these claims. Wilson v. Jefferson-Green, Inc., — N.C. App. —, 526 S.E.2d 506, 2000 N.C. App. LEXIS 161 (2000).

§ 7A-211.1. Actions to enforce motor vehicle mechanic and storage liens.

Notwithstanding the provisions of G.S. 7A-210(2) and 7A-211, the chief district judge may in his discretion, by specific order or general rule, assign to any magistrate of his district actions to enforce motor vehicle mechanic and storage liens arising under G.S. 44A-2(d) or 20-77(d) when the claim arose in the county in which the magistrate resides. The defendant may be subjected to the jurisdiction of the court over his person by the methods provided in G.S. 7A-217 or 1A-1, Rules 4(j) and 4(j1), Rules of Civil Procedure. (1977, c. 86, s. 1; 1979, c. 602, s. 1; 2000-185, s. 1.)

Effect of Amendments. — Session Laws 2000-185, s. 1, effective August 2, 2000, substituted "Rules 4(j) and 4(j1)" for "Rule 4(j)."

SUBCHAPTER V. JURISDICTION AND POWERS OF THE TRIAL DIVISIONS OF THE GENERAL COURT OF JUSTICE.

ARTICLE 20.

Original Civil Jurisdiction of the Trial Divisions.

§ 7A-240. Original civil jurisdiction generally.

CASE NOTES

Applied in Hodge v. North Carolina DOT, — N.C. App. —, 528 S.E.2d 22, 2000 N.C. App. LEXIS 334 (2000).

§ 7A-243. Proper division for trial of civil actions generally determined by amount in controversy.

CASE NOTES

District Court Had Jurisdiction. — Where the amount in controversy for plaintiff's claims was in excess of the dollar requirement for a small claim action, but less than the $ 10,000 requirement for an action in the superior court, the claim was within the jurisdiction of the district court, and the district court erred in concluding that it lacked jurisdiction to hear these claims. Wilson v. Jefferson-Green, Inc., — N.C. App. —, 526 S.E.2d 506, 2000 N.C. App. LEXIS 161 (2000).

§ 7A-244. Domestic relations.

CASE NOTES

Cited in Hudson v. Hudson, 135 N.C. App. 97, 518 S.E.2d 811 (1999).

§ 7A-245. Injunctive and declaratory relief to enforce or invalidate statutes; constitutional rights.

CASE NOTES

Injunction Not Warranted. — The plaintiff, who sued when he was reinstated as Internal Auditor II, rather than Chief of the Internal Audit Section for DOT, was not entitled to an injunction where the DOT showed that it would be harmed if the position of Chief Internal Auditor could not be filled with anyone other than plaintiff because the section's operations would be disrupted, and the DOT would be unfairly restricted in management of its own operations; additionally, the plaintiff, reinstated in a similar position at same pay grade, was unable to show financial loss or irreparable injury. Hodge v. North Carolina DOT, — N.C. App. —, 528 S.E.2d 22, 2000 N.C. App. LEXIS 334 (2000).

ARTICLE 22.

Jurisdiction of the Trial Divisions in Criminal Actions.

§ 7A-271. Jurisdiction of superior court.

CASE NOTES

II. Jurisdiction over Misdemeanors.
C. Consolidation with Felony.

II. JURISDICTION OVER MISDEMEANORS.

C. Consolidation with Felony.

Consolidation Upheld. — Trial court properly consolidated charges of possession of cocaine and of possession of drug paraphernalia with murder charges. State v. Chavis, 134 N.C. App. 546, 518 S.E.2d 241 (1999).

§ 7A-272. Jurisdiction of district court; concurrent jurisdiction in guilty or no contest pleas for certain felony offenses; appellate and appropriate relief procedures applicable.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Quoted in State v. Jones, 133 N.C. App. 448, 516 S.E.2d 405 (1999).

ARTICLE 24A.

Delinquency Prevention and Youth Services.

Editor's Note. — The head above is set out to correct the erroneous head in the main volume.

ARTICLE 25.

Jurisdiction and Procedure in Criminal Appeals from District Courts.

§ 7A-290. Appeals from district court in criminal cases; notice; appeal bond.

CASE NOTES

II. Appeal to Superior Court.

II. APPEAL TO SUPERIOR COURT.

Correction of Clerical Error Is Not New Judgment. — Defendant's purported appeal was untimely because it was not made within 10 days of the original judgment in which the defendant was found guilty of attempted simple assault, simple assault and communicating threats; the district court's intervening correction of various errors on the sentencing form did not constitute a new judgment from which to start counting the ten days. State v. Linemann, 135 N.C. App. 734, 522 S.E.2d 781 (1999).

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

ARTICLE 27.

Expenses of the Judicial Department.

§ 7A-300. Expenses paid from State funds.

(a) The operating expenses of the Judicial Department shall be paid from State funds, out of appropriations for this purpose made by the General Assembly, or from funds provided by local governments pursuant to G.S. 153A-212.1 and G.S. 160A-289.1. The Administrative Office of the Courts shall prepare budget estimates to cover these expenses, including therein the following items and such other items as are deemed necessary for the proper functioning of the Judicial Department:

(1) Salaries, departmental expense, printing and other costs of the appellate division;

(2) Salaries and expenses of superior court judges, district attorneys, assistant district attorneys, public defenders, and assistant public defenders, and fees and expenses of counsel assigned to represent indigents under the provisions of Subchapter IX of this Chapter;

(3) Salaries, travel expenses, departmental expense, printing and other costs of the Administrative Office of the Courts;

(4) Salaries and travel expenses of district judges, magistrates, and family court counselors;

(5) Salaries and travel expenses of clerks of superior court, their assistants, deputies, and other employees, and the expenses of their offices, including supplies and materials, postage, telephone and telegraph, bonds and insurance, equipment, and other necessary items;

(6) Fees and travel expenses of jurors, and of witnesses required to be paid by the State;

(7) Compensation and allowances of court reporters;

(8) Briefs for counsel and transcripts and other records for adequate appellate review when an appeal is taken by an indigent person;

(9) Transcripts of preliminary hearings in indigency cases and, in cases in which the defendant pays for a transcript of the preliminary hearing, a copy for the district attorney;

(10) Transcript of the evidence and trial court charge furnished the district attorney when a criminal action is appealed to the appellate division;

(11) All other expenses arising out of the operations of the Judicial Department which by law are made the responsibility of the State; and

(12) Operating expenses of the Judicial Council and the Judicial Standards Commission.

(b) Repealed by Session Laws 1971, c. 377, s. 32. (1965, c. 310, s. 1; 1967, c. 108, s. 9; c. 1049, s. 5; 1969, c. 1013, s. 2; 1971, c. 377, ss. 18, 21; 1973, c. 47, s. 2; c. 503, ss. 10, 11; 2000-67, s. 15.4(c).)

Editor's Note. — Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. — Session Laws 2000-67, s. 15.4(c), effective July 1, 2000, in

subsection (a), added "or from funds provided by local governments pursuant to G.S. 153A-212.1 and G.S. 160A-289.1"; and in subsection (b), substituted "s. 32" for "c. 32."

§ 7A-302. Counties and municipalities responsible for physical facilities.

In each county in which a district court has been established, courtrooms, office space for juvenile court counselors and support staff as assigned by the Department of Juvenile Justice and Delinquency Prevention, and related judicial facilities (including furniture), as defined in this Subchapter, shall be provided by the county, except that courtrooms and related judicial facilities may, with the approval of the Administrative Officer of the Courts, after consultation with county and municipal authorities, be provided by a municipality in the county. To assist a county or municipality in meeting the expense of providing courtrooms and related judicial facilities, a part of the costs of court, known as the "facilities fee," collected for the State by the clerk of superior court, shall be remitted to the county or municipality providing the facilities. (1965, c. 310, s. 1; 1998-202, s. 15; 2000-137, s. 4(a).)

Effect of Amendments. — Session Laws 2000-137, s. 4(a), effective July 20, 2000, substituted "Department of Juvenile Justice and Delinquency Prevention" for "Office of Juvenile Justice."

Article 28.

Uniform Costs and Fees in the Trial Divisions.

§ 7A-304. Costs in criminal actions.

(a) In every criminal case in the superior or district court, wherein the defendant is convicted, or enters a plea of guilty or nolo contendere, or when costs are assessed against the prosecuting witness, the following costs shall be assessed and collected, except that when the judgment imposes an active prison sentence, costs shall be assessed and collected only when the judgment specifically so provides, and that no costs may be assessed when a case is dismissed.

(1) For each arrest or personal service of criminal process, including citations and subpoenas, the sum of five dollars ($5.00), to be remitted to the county wherein the arrest was made or process was served, except that in those cases in which the arrest was made or process served by a law-enforcement officer employed by a municipality, the fee shall be paid to the municipality employing the officer.

(2) **(Effective until July 1, 2001)** For the use of the courtroom and related judicial facilities, the sum of twelve dollars ($12.00) in the district court, including cases before a magistrate, and the sum of thirty dollars ($30.00) in superior court, to be remitted to the county in which the judgment is rendered. In all cases where the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used exclusively by the county or municipality for providing, maintaining, and constructing adequate courtroom and related judicial facilities, including: adequate space and furniture for judges, district attorneys, public defenders, magistrates, juries, and other court related personnel; office space, furniture and vaults for the clerk; jail and juvenile detention facilities; free parking for jurors; and a law library (including books) if one has heretofore been established

§ 7A-304(a)(2) is set out twice. See notes.

or if the governing body hereafter decides to establish one. In the event the funds derived from the facilities fees exceed what is needed for these purposes, the county or municipality may, with the approval of the Administrative Officer of the Courts as to the amount, use any or all of the excess to retire outstanding indebtedness incurred in the construction of the facilities, or to reimburse the county or municipality for funds expended in constructing or renovating the facilities (without incurring any indebtedness) within a period of two years before or after the date a district court is established in such county, or to supplement the operations of the General Court of Justice in the county.

(2) **(Effective July 1, 2001)** For the use of the courtroom and related judicial facilities, the sum of twelve dollars ($12.00) in the district court, including cases before a magistrate, and the sum of thirty dollars ($30.00) in superior court, to be remitted to the county in which the judgment is rendered. In all cases where the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used exclusively by the county or municipality for providing, maintaining, and constructing adequate courtroom and related judicial facilities, including: adequate space and furniture for judges, district attorneys, public defenders and other personnel of the Office of Indigent Defense Services, magistrates, juries, and other court related personnel; office space, furniture and vaults for the clerk; jail and juvenile detention facilities; free parking for jurors; and a law library (including books) if one has heretofore been established or if the governing body hereafter decides to establish one. In the event the funds derived from the facilities fees exceed what is needed for these purposes, the county or municipality may, with the approval of the Administrative Officer of the Courts as to the amount, use any or all of the excess to retire outstanding indebtedness incurred in the construction of the facilities, or to reimburse the county or municipality for funds expended in constructing or renovating the facilities (without incurring any indebtedness) within a period of two years before or after the date a district court is established in such county, or to supplement the operations of the General Court of Justice in the county.

(3) For the retirement and insurance benefits of both State and local government law-enforcement officers, the sum of seven dollars and twenty-five cents ($7.25), to be remitted to the State Treasurer. Fifty cents (50¢) of this sum shall be administered as is provided in Article 12C of Chapter 143 of the General Statutes. Five dollars and seventy-five cents ($5.75) of this sum shall be administered as is provided in Article 12E of Chapter 143 of the General Statutes, with one dollar and twenty-five cents ($1.25) being administered in accordance with the provisions of G.S. 143-166.50(e). One dollar ($1.00) of this sum shall be administered as is provided in Article 12F of Chapter 143 of the General Statutes.

(3a) For the supplemental pension benefits of sheriffs, the sum of seventy-five cents (75¢) to be remitted to the Department of Justice and administered under the provisions of Article 12G of Chapter 143 of the General Statutes.

(4) For support of the General Court of Justice, the sum of sixty-five dollars ($65.00) in the district court, including cases before a magis-

trate, and the sum of seventy-two dollars ($72.00) in the superior court, to be remitted to the State Treasurer.

(5) For using pretrial release services, the district or superior court judge shall, upon conviction, impose a fee of fifteen dollars ($15.00) to be remitted to the county providing the pretrial release services. This cost shall be assessed and collected only if the defendant had been accepted and released to the supervision of the agency providing the pretrial release services.

(6) For support of the General Court of Justice, for the issuance by the clerk of a report to the Division of Motor Vehicles pursuant to G.S. 20-24.2, the sum of fifty dollars ($50.00), to be remitted to the State Treasurer. Upon a showing to the court that the defendant failed to appear because of an error or omission of a judicial official, a prosecutor, or a law-enforcement officer, the court shall waive this fee.

(a1) Repealed by Session Laws 1997-475, s. 4.1.

(b) On appeal, costs are cumulative, and costs assessed before a magistrate shall be added to costs assessed in the district court, and costs assessed in the district court shall be added to costs assessed in the superior court, except that the fee for the Law-Enforcement Officers' Benefit and Retirement Fund and the Sheriffs' Supplemental Pension Fund and the fee for pretrial release services shall be assessed only once in each case. No superior court costs shall be assessed against a defendant who gives notice of appeal from the district court but withdraws it prior to the expiration of the 10-day period for entering notice of appeal. When a case is reversed on appeal, the defendant shall not be liable for costs, and the State shall be liable for the cost of printing records and briefs in the Appellate Division.

(c) Witness fees, expenses for blood tests and comparisons incurred by G.S. 8-50.1(a), jail fees and cost of necessary trial transcripts shall be assessed as provided by law in addition to other costs set out in this section. Nothing in this section shall limit the power or discretion of the judge in imposing fines or forfeitures or ordering restitution.

(d)(1) In any criminal case in which the liability for costs, fines, restitution, or any other lawful charge has been finally determined, the clerk of superior court shall, unless otherwise ordered by the presiding judge, disburse such funds when paid in accordance with the following priorities:

a. Sums in restitution to the victim entitled thereto;
b. Costs due the county;
c. Costs due the city;
d. Fines to the county school fund;
e. Sums in restitution prorated among the persons other than the victim entitled thereto;
f. Costs due the State;
g. Attorney's fees.

(2) Sums in restitution received by the clerk of superior court shall be disbursed when:

a. Complete restitution has been received; or
b. When, in the opinion of the clerk, additional payments in restriction will not be collected; or
c. Upon the request of the person or persons entitled thereto; and
d. In any event, at least once each calendar year.

(e) Unless otherwise provided by law, the costs assessed pursuant to this section for criminal actions disposed of in the district court are also applicable to infractions disposed of in the district court. The costs assessed in superior court for criminal actions appealed from district court to superior court are also applicable to infractions appealed to superior court. If an infraction is disposed

of in the superior court pursuant to G.S. 7A-271(d), costs applicable to the original charge are applicable to the infraction. (1965, c. 310, s. 1; 1967, c. 601, s. 2; c. 691, ss. 27-29; c. 1049, s. 5; 1969, c. 1013, s. 3; c. 1190, ss. 28, 29; 1971, c. 377, ss. 19-21; c. 1129; 1973, c. 47, s. 2; 1975, c. 558, ss. 1, 2; 1975, 2nd Sess., c. 980, s. 1; 1979, c. 576, s. 3; 1981, c. 369; c. 691, s. 1; c. 896, s. 2; c. 959, s. 1; 1983, c. 713, ss. 2, 3; 1983 (Reg. Sess., 1984), c. 1034, s. 249; 1985, c. 479, s. 196(a); c. 729, ss. 2-4; c. 764, s. 17; 1986, Ex. Sess., c. 5; 1985 (Reg. Sess., 1986), c. 852, s. 17; c. 1015, s. 1; 1989, c. 664, ss. 1, 2; c. 786, s. 1; 1989 (Reg. Sess., 1990), c. 1044, s. 1; 1991, c. 742, s. 15(a); 1991 (Reg. Sess., 1992), c. 811, s. 1; 1993, c. 313, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 22.13(a); 1997-475, s. 4.1; 1998-212, ss. 19.4(k), 29A.12(a); 2000-109, s. 4(a); 2000-144, s. 2.)

Subdivision (a)(2) Set Out Twice. — The first version of subdivision (a)(2) set out above is effective until July 1, 2001. The second version of subdivision (a)(2) set out above is effective July 1, 2001.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Effect of Amendments. —

Session Laws 2000-109, s. 4(a), effective July 15, 2000, and applicable to all costs assessed or collected on and after that date, in subdivision (a)(4), substituted "sixty-five dollars ($65.00)" for "sixty-one dollars ($61.00)" and substituted "seventy-two dollars ($72.00)" for "sixty-eight dollars ($68.00)."

Session Laws 2000-144, s. 2, effective July 1, 2001, inserted "and other personnel of the Office of Indigent Defense Services" in subdivision (a)(2).

§ 7A-305. Costs in civil actions.

(a) In every civil action in the superior or district court the following costs shall be assessed:

(1) For the use of the courtroom and related judicial facilities, the sum of twelve dollars ($12.00) in cases heard before a magistrate, and the sum of sixteen dollars ($16.00) in district and superior court, to be remitted to the county in which the judgment is rendered, except that in all cases in which the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(2) For support of the General Court of Justice, the sum of fifty-nine dollars ($59.00) in the superior court, and the sum of forty-four dollars ($44.00) in the district court except that if the case is assigned to a magistrate the sum shall be thirty-three dollars ($33.00). Sums collected under this subsection shall be remitted to the State Treasurer.

(a2) In every final action for absolute divorce filed in the district court, a cost of twenty dollars ($20.00) shall be assessed against the person filing the divorce action. Costs collected by the clerk pursuant to this subsection shall be remitted to the State Treasurer for deposit to the North Carolina Fund for Displaced Homemakers established under G.S. 143B-394.10. Costs assessed under this subsection shall be in addition to any other costs assessed under this section.

(b) On appeal, costs are cumulative, and when cases heard before a magistrate are appealed to the district court, the General Court of Justice fee and the facilities fee applicable in the district court shall be added to the fees assessed before the magistrate. When an order of the clerk of the superior court is appealed to either the district court or the superior court, no additional General Court of Justice fee or facilities fee shall be assessed.

(b1) When a defendant files an answer in an action filed as a small claim which requires the entire case to be withdrawn from a magistrate and

transferred to the district court, the difference between the General Court of Justice fee and facilities fee applicable to the district court and the General Court of Justice fee and facilities fee applicable to cases heard by a magistrate shall be assessed. The defendant is responsible for paying the fee.

(c) The clerk of superior court, at the time of the filing of the papers initiating the action or the appeal, shall collect as advance court costs, the facilities fee, General Court of Justice fee, and the divorce fee imposed under subsection (a2) of this section, except in suits by an indigent. The clerk shall also collect the fee for discovery procedures under Rule 27(a) and (b) at the time of the filing of the verified petition.

(d) The following expenses, when incurred, are also assessable or recoverable, as the case may be:

(1) Witness fees, as provided by law.
(2) Jail fees, as provided by law.
(3) Counsel fees, as provided by law.
(4) Expense of service of process by certified mail and by publication.
(5) Costs on appeal to the superior court, or to the appellate division, as the case may be, of the original transcript of testimony, if any, insofar as essential to the appeal.
(6) Fees for personal service and civil process and other sheriff's fees, as provided by law. Fees for personal service by a private process server may be recoverable in an amount equal to the actual cost of such service or fifty dollars ($50.00), whichever is less, unless the court finds that due to difficulty of service a greater amount is appropriate.
(7) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fee of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.
(8) Fees of interpreters, when authorized and approved by the court.
(9) Premiums for surety bonds for prosecution, as authorized by G.S. 1-109.

(e) Nothing in this section shall affect the liability of the respective parties for costs as provided by law. (1965, c. 310, s. 1; 1967, c. 108, s. 10; c. 691, s. 30; 1971, c. 377, ss. 23, 24; c. 1181, s. 1; 1973, c. 503, ss. 12-14; c. 1267, s. 3; 1975, c. 558, s. 3; 1975, 2nd Sess., c. 980, ss. 2, 3; 1979, 2nd Sess., c. 1234, s. 1; 1981, c. 555, s. 6; c. 691, s. 2; 1983, c. 713, ss. 4-6; 1989, c. 786, s. 2; 1991, c. 742, s. 15(b); 1991 (Reg. Sess., 1992), c. 811, s. 2; 1993, c. 435, s. 6; 1995, c. 275, s. 2; 1998-212, s. 29A.12(b); 1998-219, ss. 2, 3; 2000-109, s. 4(b).)

Effect of Amendments. —

Session Laws 2000-109, s. 4(b), effective July 15, 2000, and applicable to all costs assessed or collected on and after that date, in subdivision (a)(2), substituted "fifty-nine dollars ($59.00)" for "fifty-five dollars ($55.00)," substituted "forty-four dollars ($44.00)" for "forty dollars ($40.00)" and substituted "thirty-three dollars ($33.00)" for "twenty-eight dollars ($28.00)."

CASE NOTES

Cost of an Independent Appraiser's Valuation Report. — The trial court acted within its discretion when it taxed the entire cost of an independent appraiser's valuation report to the defendants/majority stockholders of a closely-held corporation and ignored or effectually amended the court's pre-trial case management order, in which the court stated that appraisal costs would be shared by both parties. Royals v. Piedmont Elec. Repair Co., — N.C. App. —, 529 S.E.2d 515, 2000 N.C. App. LEXIS 497 (2000).

§ 7A-306. Costs in special proceedings.

(a) In every special proceeding in the superior court, the following costs shall be assessed:

(1) For the use of the courtroom and related judicial facilities, the sum of ten dollars ($10.00) to be remitted to the county. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(2) For support of the General Court of Justice the sum of thirty dollars ($30.00). In addition, in proceedings involving land, except boundary disputes, if the fair market value of the land involved is over one hundred dollars ($100.00), there shall be an additional sum of thirty cents (30) per one hundred dollars ($100.00) of value, or major fraction thereof, not to exceed a maximum additional sum of two hundred dollars ($200.00). Fair market value is determined by the sale price if there is a sale, the appraiser's valuation if there is no sale, or the appraised value from the property tax records if there is neither a sale nor an appraiser's valuation. Sums collected under this subsection shall be remitted to the State Treasurer.

(b) The facilities fee and thirty dollars ($30.00) of the General Court of Justice fee are payable at the time the proceeding is initiated.

(c) The following additional expenses, when incurred, are assessable or recoverable, as the case may be:

(1) Witness fees, as provided by law.

(2) Counsel fees, as provided by law.

(3) Costs on appeal, of the original transcript of testimony, if any, insofar as essential to the appeal.

(4) Fees for personal service of civil process, and other sheriff's fees, and for service by publication, as provided by law.

(5) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fees of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.

(d) Costs assessed before the clerk shall be added to costs assessable on appeal to the judge or upon transfer to the civil issue docket.

(e) Nothing in this section shall affect the liability of the respective parties for costs, as provided by law.

(f) This section does not apply to a foreclosure under power of sale in a deed of trust or mortgage. (1965, c. 310, s. 1; 1967, c. 24, s. 2; 1971, c. 377, s. 25; c. 1181, s. 1; 1973, c. 503, s. 15; 1981, c. 691, s. 3; 1983, c. 713, ss. 7-9; c. 881, s. 4; 1985, c. 511, s. 1; 1989, c. 646, s. 1; 1991 (Reg. Sess., 1992), c. 811, s. 3; 1998-212, s. 29A.12(c); 2000-109, s. 4(c).)

Effect of Amendments. — Session Laws 2000-109, s. 4(c), effective July 15, 2000 and applicable to all costs assessed or collected on and after that date, in subdivision (a)(2) and in subsection (b), substituted "thirty dollars ($30.00)" for "twenty-six dollars ($26.00)."

§ 7A-307. Costs in administration of estates.

(a) In the administration of the estates of decedents, minors, incompetents, of missing persons, and of trusts under wills and under powers of attorney, and in collections of personal property by affidavit, the following costs shall be assessed:

(1) For the use of the courtroom and related judicial facilities, the sum of ten dollars ($10.00), to be remitted to the county. Funds derived from

the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(2) For support of the General Court of Justice, the sum of thirty dollars ($30.00), plus an additional forty cents (40) per one hundred dollars ($100.00), or major fraction thereof, of the gross estate, not to exceed three thousand dollars ($3,000). Gross estate shall include the fair market value of all personalty when received, and all proceeds from the sale of realty coming into the hands of the fiduciary, but shall not include the value of realty. In collections of personal property by affidavit, the fee based on the gross estate shall be computed from the information in the final affidavit of collection made pursuant to G.S. 28A-25-3 and shall be paid when that affidavit is filed. In all other cases, this fee shall be computed from the information reported in the inventory and shall be paid when the inventory is filed with the clerk. If additional gross estate, including income, comes into the hands of the fiduciary after the filing of the inventory, the fee for such additional value shall be assessed and paid upon the filing of any account or report disclosing such additional value. For each filing the minimum fee shall be fifteen dollars ($15.00). Sums collected under this subsection shall be remitted to the State Treasurer.

(2a) Notwithstanding subdivision (2) of this subsection, the fee of forty cents (40¢) per one hundred dollars ($100.00), or major fraction, of the gross estate, not to exceed three thousand dollars ($3,000), shall not be assessed on personalty received by a trust under a will when the estate of the decedent was administered under Chapters 28 or 28A of the General Statutes. Instead, a fee of twenty dollars ($20.00) shall be assessed on the filing of each annual and final account.

(2b) Notwithstanding subdivisions (1) and (2) of this subsection, no costs shall be assessed when the estate is administered or settled pursuant to G.S. 28A-25-6.

(3) For probate of a will without qualification of a personal representative, the clerk shall assess a facilities fee as provided in subdivision (1) of this subsection and shall assess for support of the General Court of Justice, the sum of twenty dollars ($20.00).

(b) In collections of personal property by affidavit, the facilities fee and thirty dollars ($30.00) of the General Court of Justice fee shall be paid at the time of filing the qualifying affidavit pursuant to G.S. 28A-25-1. In all other cases, these fees shall be paid at the time of filing of the first inventory. If the sole asset of the estate is a cause of action, these fees shall be paid at the time of the qualification of the fiduciary.

(b1) The clerk shall assess the following miscellaneous fees:

(1) Filing and indexing a will with no probate
— first page ..... $ 1.00
— each additional page or fraction thereof ..... .25

(2) Issuing letters to fiduciaries, per letter over five letters issued .. 1.00

(3) Inventory of safe deposits of a decedent, per box, per day 15.00

(4) Taking a deposition 5.00

(5) Docketing and indexing a will probated in another county in the State
— first page 1.00
— each additional page or fraction thereof ..... .25

(6) Hearing petition for year's allowance to surviving spouse or child, in cases not assigned to a magistrate, and allotting the same 4.00

(c) The following additional expenses, when incurred, are also assessable or recoverable, as the case may be:

(1) Witness fees, as provided by law.
(2) Counsel fees, as provided by law.
(3) Costs on appeal, of the original transcript of testimony, if any, insofar as essential to the appeal.
(4) Fees for personal service of civil process, and other sheriff's fees, as provided by law.
(5) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law.

(d) Costs assessed before the clerk shall be added to costs assessable on appeal to the judge or upon transfer to the civil issue docket.

(e) Nothing in this section shall affect the liability of the respective parties for costs, as provided by law. (1965, c. 310, s. 1; 1967, c. 691, s. 31; 1969, c. 1190, s. 30; 1971, c. 1181, s. 1; 1973, c. 1335, s. 1; 1981, c. 691, s. 4; 1983, c. 713, ss. 10-17; 1985, c. 481, ss. 1-5; 1985 (Reg. Sess., 1986), c. 855; 1987, c. 837; 1989, c. 719; 1991 (Reg. Sess., 1992), c. 811, ss. 4, 5; 1997-310, s. 4; 1998-212, s. 29A.12(d); 2000-109, s. 4(d).)

Effect of Amendments. —
Session Laws 2000-109, s. 4(d), effective July 15, 2000, and applicable to all costs assessed or collected on and after that date, in subdivision (a)(2), substituted "thirty dollars ($30.00)" for "twenty-six dollars ($26.00)" and "fifteen dollars ($15.00)" for "ten dollars ($10.00)"; substituted "twenty dollars ($20.00)" for "fifteen dollars ($15.00)" in subdivision (a)(2a); substituted "twenty dollars ($20.00)" for "seventeen dollars ($17.00)" in subdivision (a)(3); and in subsection (b), substituted "thirty dollars ($30.00)" for "twenty-six ($26.00)" and "these fees" for "the thirty dollars ($30.00)."

§ 7A-308. Miscellaneous fees and commissions.

(a) The following miscellaneous fees and commissions shall be collected by the clerk of superior court and remitted to the State for the support of the General Court of Justice:

(1) Foreclosure under power of sale in deed of trust or mortgage $40.00
If the property is sold under the power of sale, an additional amount will be charged, determined by the following formula: thirty cents (30¢) per one hundred dollars ($100.00), or major fraction thereof, of the final sale price. If the amount determined by the formula is less than ten dollars ($10.00), a minimum ten dollar ($10.00) fee will be collected. If the amount determined by the formula is more than two hundred dollars ($200.00), a maximum two hundred dollar ($200.00) fee will be collected.
(2) Proceeding supplemental to execution 20.00
(3) Confession of judgment 15.00
(4) Taking a deposition 5.00
(5) Execution 15.00
(6) Notice of resumption of former name 5.00
(7) Taking an acknowledgment or administering an oath, or both, with or without seal, each certificate (except that oaths of office shall be administered to public officials without charge) $1.00
(8) Bond, taking justification or approving 5.00
(9) Certificate, under seal 2.00
(10) Exemplification of records 5.00
(11) Recording or docketing (including indexing) any document
— first page 4.00
— each additional page or fraction thereof ..... .25

(12) Preparation of copies
— first page 1.00
— each additional page or fraction thereof ..... .25
(13) Preparation and docketing of transcript of judgment 5.00
(14) Substitution of trustee in deed of trust 5.00
(15) Execution of passport application — the amount allowed by federal law
(16) Repealed by Session Laws 1989, c. 783, s. 2.
(17) Criminal record search except if search is requested by an agency of the State or any of its political subdivisions or by an agency of the United States or by a petitioner in a proceeding under Article 2 of General Statutes Chapter 20 5.00
(18) Filing the affirmations, acknowledgments, agreements and resulting orders entered into under the provisions of G.S. 110-132 and G.S. 110-133 ..... 4.00
(19) Repealed by Session Laws 1989, c. 783, s. 3.

(b) The fees and commissions set forth in this section are not chargeable when the service is performed as a part of the regular disposition of any action or special proceeding or the administration of an estate. When a transaction involves more than one of the services set forth in this section, only the greater service fee shall be charged. The Director of the Administrative Office of the courts shall issue guidelines pursuant to G.S. 7A-343(3) to be followed in administering this subsection.

(c) A person who participates in a program for the collection of worthless checks under G.S. 14-107.2 must pay a fee of fifty dollars ($50.00). The fee collected under this subsection must be remitted to the State by the clerk of the court in the county in which the program is established and credited to the Collection of Worthless Checks Fund. The Collection of Worthless Checks Fund is created as a special revenue fund. Revenue in the Fund does not revert at the end of the fiscal year, and interest and other investment income earned by the Fund accrues to the Fund. The money in the Fund is subject to appropriation by the General Assembly and may be used solely for the expenses of the programs established under G.S. 14-107.2 for the collection of worthless checks. (1965, c. 310, s. 1; 1967, c. 691, ss. 32, 33; 1969, c. 1190, s. 31; 1971, c. 956, s. 2; 1973, c. 503, s. 16; c. 886; 1975, c. 829; 1981, c. 313, s. 1; 1983, c. 713, s. 18; 1985, c. 475, ss. 2, 3; c. 481, ss. 6-8; c. 511, s. 2; 1989, c. 783, ss. 2-4; c. 786, ss. 1, 3; 1997-114, s. 1; 1997-443, s. 18.22(a); 1998-23, s. 11; 1998-212, s. 16.3; 1999-237, s. 17.7; 2000-67, s. 15.3A(a); 2000-109, s. 4(e).)

Cross References. — As to report on implementation of the worthless checks collection program, see § 7A-376(b). As to program for the collection of worthless check cases, see § 14-107.2.

Editor's Note. —

Session Laws 1997-443, s. 18.22(a) added subsection (c). Initially, Session Laws 1997-443, s. 18.22(d) provided that s. 18.22(a) would apply to Columbus, Durham and Rockingham Counties only, and s. 18.22(e) provided that the act would become effective October 1, 1997, and would expire June 30, 1998. Session Laws 1998-23, s. 11(a) amended Session Laws 1997-443, s. 18.22(e) to provide that s. 18.22 would expire when the 1998 Appropriations Act became law; however, this provision was repealed by Session Laws 1998-212, s. 16.3(d). Section 16.3(a) of Session Laws 1998-212 provided that Session Laws 1997-443, s. 18.22 would expire June 30, 1999, and s. 16.3(d) of that act added Wake to the list of counties to which Session Laws 1997-443, s. 18.22 was applicable. Session Laws 1999-237, s. 17.7(a) deleted the sunset for Session Laws 1997-443, s. 18.22, as amended, and added Brunswick, Bladen, New Hanover, and Pender to the list of counties. Session Laws 2000-67, s. 15.3A, added Cumberland, Edgecombe, Nash, Onslow, and Wilson to the list of counties. The provisions of Session Laws 1997-443, s. 18.22(a) have been codified as subsection (c) of this section at the direction of the Revisor of Statutes.

The editor's notes and local modifications

regarding Session Laws 1997-443, s. 18.22, as amended, have been deleted from § 7A-308 in the main volume.

Effect of Amendments. — Session Laws 2000-109, s. 4(e), effective July 15, 2000, and applicable to all costs assessed or collected on and after that date, substituted "$40.00" for "$30.00" in subdivision (a)(1).

§ 7A-313. Uniform jail fees.

Persons who are lawfully confined in jail awaiting trial shall be liable to the county or municipality maintaining the jail in the sum of five dollars ($5.00) for each 24 hours" confinement, or fraction thereof, except that a person so confined shall not be liable for this fee if the case or proceeding against him is dismissed, or if acquitted, or if judgment is arrested, or if probable cause is not found, or if the grand jury fails to return a true bill.

Persons who are ordered to pay jail fees pursuant to a probationary sentence shall be liable to the county or municipality maintaining the jail at the same per diem rate paid by the Department of Correction to local jails for maintaining a prisoner, as set by the General Assembly in its appropriations acts. (1965, c. 310, s. 1; 1969, c. 1190, s. 33; 1973, c. 503, s. 20; 1975, c. 444; 1989, c. 733, s. 1; 2000-109, s. 5; 2000-140, s. 104.)

Effect of Amendments. — Session Laws 2000-109, s. 5, as amended by Session Laws 2000-140, s. 104, effective October 1, 2000, and applicable to sentences or portions of sentences being served on or after that date, substituted "Persons who are lawfully confined in jail awaiting trial" for "Only persons who are lawfully confined in jail awaiting trial, or who are ordered to pay jail fees pursuant to a probationary sentence" in the first paragraph and added the second paragraph.

§ 7A-314. Uniform fees for witnesses; experts; limit on number.

(a) A witness under subpoena, bound over, or recognized, other than a salaried State, county, or municipal law-enforcement officer, or an out-of-state witness in a criminal case, whether to testify before the court, Judicial Standards Commission, jury of view, magistrate, clerk, referee, commissioner, appraiser, or arbitrator shall be entitled to receive five dollars ($5.00) per day, or fraction thereof, during his attendance, which, except as to witnesses before the Judicial Standards Commission, must be certified to the clerk of superior court.

(b) A witness entitled to the fee set forth in subsection (a) of this section, and a law-enforcement officer who qualifies as a witness, shall be entitled to receive reimbursement for travel expenses as follows:

(1) A witness whose residence is outside the county of appearance but within 75 miles of the place of appearance shall be entitled to receive mileage reimbursement at the rate currently authorized for State employees, for each mile necessarily traveled from his place of resident to the place of appearance and return, each day.

(2) A witness whose residence is outside the county of appearance and more than 75 miles from the place of appearance shall be entitled to receive mileage reimbursement at the rate currently authorized State employees for one round-trip from his place of residence to the place of appearance. A witness required to appear more than one day shall be entitled to receive reimbursement for actual expenses incurred for lodging and meals not to exceed the maximum currently authorized for State employees, in lieu of daily mileage.

(c) A witness who resides in a state other than North Carolina and who appears for the purpose of testifying in a criminal action and proves his attendance may be compensated at the rate allowed to State officers and

employees by subdivisions (1) and (2) of G.S. 138-6(a) for one round-trip from his place of residence to the place of appearance, and five dollars ($5.00) for each day that he is required to travel and attend as a witness, upon order of the court based upon a finding that the person was a necessary witness. If such a witness is required to appear more than one day, he is also entitled to reimbursement for actual expenses incurred for lodging and meals, not to exceed the maximum currently authorized for State employees.

(d) **(Effective until July 1, 2001)** An expert witness, other than a salaried State, county, or municipal law-enforcement officer, shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion, may authorize. A law-enforcement officer who appears as an expert witness shall receive reimbursement for travel expenses only, as provided in subsection (b) of this section.

(d) **(Effective July 1, 2001)** An expert witness, other than a salaried State, county, or municipal law-enforcement officer, shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion, may authorize. A law-enforcement officer who appears as an expert witness shall receive reimbursement for travel expenses only, as provided in subsection (b) of this section. Compensation of experts provided under G.S. 7A-454 shall be in accordance with rules established by the Office of Indigent Defense Services.

(e) If more than two witnesses are subpoenaed, bound over, or recognized, to prove a single material fact, the expense of the additional witnesses shall be borne by the party issuing or requesting the subpoena.

(f) In a criminal case when a person who does not speak or understand the English language is an indigent defendant, a witness for an indigent defendant, or a witness for the State and the court appoints a language interpreter to assist that defendant or witness in the case, the reasonable fee for the interpreter's services, as set by the court, are payable from funds appropriated to the Administrative Office of the Courts. (1965, c. 310, s. 1; 1969, c. 1190, s. 34; 1971, c. 377, s. 27; 1973, c. 503, ss. 21, 22; 1983, c. 713, s. 20; 1998-212, s. 16.25(a); 2000-144, s. 3.)

Subsection (d) Set Out Twice. — The first version of subsection (d) is effective until July 1, 2001. The second version of subsection (d) is effective July 1, 2001.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Effect of Amendments. —

Session Laws 2000-144, s. 3, effective July 1, 2001, added the last sentence in subsection (d).

CASE NOTES

Experts Must Be Subpoenaed. — Where one expert was not served with a subpoena and another was unsure as to what a subpoena was, the trial court did not have the authority to order defendants to pay expert witness expenses as costs. Rogers v. Sportsworld of Rocky Mount, Inc., 134 N.C. App. 709, 518 S.E.2d 551 (1999).

Trial Court's Discretion Supersedes Even the Issuance of Subpoenas. — But trial court's denial of plaintiff's request for expert witness fees, even if subpoenas were issued, was not an abuse of its discretion. Blackmon v. Bumgardner, 135 N.C. App. 125, 519 S.E.2d 335 (1999).

Cited in Ollo v. Mills, — N.C. App. —, 525 S.E.2d 213, 2000 N.C. App. LEXIS 110 (2000).

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

ARTICLE 29.

Administrative Office of the Courts.

§ 7A-343.1. Distribution of copies of the appellate division reports.

The Administrative Officer of the Courts shall, at the State's expense distribute such number of copies of the appellate division reports to federal, State departments and agencies, and to educational institutions of instruction, as follows:

Governor, Office of the	1
Lieutenant Governor, Office of the	1
Secretary of State, Department of the	2
State Auditor, Department of the	1
Treasurer, Department of the State	1
Superintendent of Public Instruction	1
Office of the Attorney General	11
State Bureau of Investigation	1
Agriculture and Consumer Services, Department of	1
Labor, Department of	1
Insurance, Department of	1
Budget Bureau, Department of Administration	1
Property Control, Department of Administration	1
State Planning, Department of Administration	1
Environment and Natural Resources, Department of	1
Revenue, Department of	1
Health and Human Services, Department of	1
Juvenile Justice and Delinquency Prevention, Department of	1
Commission for the Blind	1
Transportation, Department of	1
Motor Vehicles, Division of	1
Utilities Commission	8
Industrial Commission	11
State Personnel Commission	1
Office of State Personnel	1
Office of Administrative Hearings	2
Community Colleges, Department of	38
Employment Security Commission	1
Commission of Correction	1
Parole Commission	1
Archives and History, Division of	1
Crime Control and Public Safety, Department of	2
Cultural Resources, Department of	3
Legislative Building Library	2
Justices of the Supreme Court	1 ea.
Judges of the Court of Appeals	1 ea.
Judges of the Superior Court	1 ea.
Clerks of the Superior Court	1 ea.
District Attorneys	1 ea.
Emergency and Special Judges of the Superior Court	1 ea.

Supreme Court Library	AS MANY AS REQUESTED
Appellate Division Reporter	1
University of North Carolina, Chapel Hill	71
University of North Carolina, Charlotte	1
University of North Carolina, Greensboro	1
University of North Carolina, Asheville	1
North Carolina State University, Raleigh	1
Appalachian State University	1
East Carolina University	1
Fayetteville State University	1
North Carolina Central University	17
Western Carolina University	1
Duke University	17
Davidson College	2
Wake Forest University	25
Lenoir Rhyne College	1
Elon College	1
Campbell University	25
Federal, Out-of-State and Foreign Secretary of State	1
Secretary of Defense	1
Secretary of Health, Education and Welfare	1
Secretary of Housing and Urban Development	1
Secretary of Transportation	1
Attorney General	1
Department of Justice	1
Internal Revenue Service	1
Veterans' Administration	1
Library of Congress	5
Federal Judges resident in North Carolina	1 ea.
Marshal of the United States Supreme Court	1
Federal District Attorneys resident in North Carolina	1 ea.
Federal Clerks of Court resident in North Carolina	1 ea.
Supreme Court Library exchange list	1

Each justice of the Supreme Court and judge of the Court of Appeals shall receive for private use, one complete and up-to-date set of the appellate division reports. The copies of reports furnished each justice or judge as set out in the table above may be retained personally to enable the justice or judge to keep up-to-date the personal set of reports. (1973, c. 476, s. 84; 1977, c. 379, s. 2; c. 771, s. 4; 1979, c. 899, s. 1; 1979, 2nd Sess., c. 1278; 1985 (Reg. Sess., 1986), c. 1022, s. 2; 1987, c. 877, s. 1; 1989, c. 727, s. 218(1); 1993, c. 257, s. 19; 1995, c. 166, s. 1; c. 509, s. 4; 1997-261, s. 109; 1997-443, s. 11A.7; 1998-202, s. 4(a); 2000-137, s. 4(b).)

Effect of Amendments. — Session Laws 2000-137, s. 4(b), effective July 20, 2000, substituted "Juvenile Justice and Delinquency Prevention, Department of" for "Juvenile Justice, Office of."

§ 7A-343.2. Court Information Technology Fund.

The Court Information Technology Fund is established within the Judicial Department as a nonreverting, interest-bearing special revenue account. Accordingly, revenue in the Fund at the end of a fiscal year does not revert and interest and other investment income earned by the Fund shall be credited to it. All moneys collected by the Director pursuant to G.S. 7A-109(d) shall be remitted to the State Treasurer and held in this Fund. Moneys in the Fund shall be used to supplement funds otherwise available to the Judicial Depart-

ment for court information technology and office automation needs. The Director shall report by August 1 and February 1 of each year to the Joint Legislative Commission on Governmental Operations, the Chairs of the Senate and House Appropriations Committees, and the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety on all moneys collected and deposited in the Fund and on the proposed expenditure of those funds collected during the preceding six months. (1999-237, s. 17.15(b); 2000-67, s. 15.1.)

Editor's Note. —

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. — Session Laws 2000-67, s. 15.1, effective July 1, 2000, inserted "and office automation" in the fourth sentence; and in the fifth sentence, substituted "August 1 and February 1" for "March 1" near the beginning and substituted "six months" for "calendar year" at the end.

§ 7A-344: Repealed by Session Laws 2000-144, s. 4, effective July 1, 2001.

For this section as in effect until July 1, 2001, see the main volume.

§ 7A-346.1: Repealed by Session Laws 2000-67, s. 15(b), effective July 1, 2000.

Editor's Note. — Session Laws 1999-237, s. 17.3, as amended by Session Laws 2000-67, s. 15(a), provides that all community mediation centers currently receiving State funds shall report annually to the Mediation Network of North Carolina on the program's funding and activities. This information shall be summarized by the Mediation Network and provided to the Chairs of the House and Senate Appropriations Committees and Subcommittees on Justice and Public Safety by February 1 of each year.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.4, contains a severability clause.

§ 7A-346.2. Various reports to General Assembly.

(a) The Administrative Office of the Courts shall report by March 1 of each year to the Chairs of the House of Representatives and Senate Appropriations Committees, to the Chairs of the House of Representatives Subcommittee on Justice and Public Safety, and to the Chairs of the Senate Appropriations Committee on Justice and Public Safety on contracts entered into with local governments for the provision of the services of assistant district attorneys, assistant public defenders, judicial secretaries, and employees in the office of the Clerk of Superior Court. The report shall include the number of applications made to the Administrative Office of the Courts for these contracts, the number of contracts entered for provision of these positions, and the dollar amounts of each contract.

(b) The Administrative Office of the Courts shall report by April 1 of each year to the Chairs of the Senate and House Appropriations Committees and the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety on the implementation of the worthless check collection programs in Columbus, Durham, Rockingham, and Wake Counties and the establishment of such programs in Bladen, Brunswick, Cumberland, Edgecombe, Nash, New Hanover, Onslow, and Pender, and Wilson Counties, including their effectiveness in assisting the recipients of worthless checks in

obtaining restitution and the amount of time saved in prosecuting worthless check cases. (1999-237, s. 17.7(c); 2000-67, ss. 15.3A(b), 15.4(h).)

Cross References. — For contracts entered into for the provision of secretarial and clerical help, see § 7A-44.1. For contracts entered into for the provision of assistant and deputy clerks, see § 7A-102. For contracts entered into for the provision of assistant public defenders, see § 7A-467. As to the program for the collection of worthless check cases, see § 14-107.2.

Editor's Note. — Session Laws 2000-67, s. 15.4(h), effective July 1, 2000, was codified as subsection (a) of this section, and Session Laws 1997-237, s. 17.7(c), effective July 1, 1999, as amended by Session Laws 2000-67, s. 15.3A(b), effective July 1, 2000, was codified as subsection (b) of this section, at the direction of the Revisor of Statutes.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Article 30.

Judicial Standards Commission.

§ 7A-376. Grounds for censure or removal.

CASE NOTES

IV. Illustrative Cases.

IV. ILLUSTRATIVE CASES.

Convicting Defendants of Traffic Violations With Which They Were Not Charged. — The actions of respondent/judge constituted willful misconduct, were prejudicial to the administration of justice such that they brought the judicial office into disrepute, violated Canons 2A, 3A(1), and 3A(4) of the North Carolina Code of Judicial Conduct, and warranted censure where the respondent knowingly convicted one defendant of careless and reckless driving when he had not been charged with that offense and where respondent took the disposition of a second case outside of the courtroom and convicted that defendant, charged with DWI, of careless and reckless driving. In re a Judge, No. 238 Brown, 351 N.C. 601, 527 S.E.2d 651 (2000).

Conduct Held Prejudicial to Administration of Justice. —

Respondent judge was censured under this section and § 7A-377 when he found defendant, who was pleading guilty, not guilty of a DWI charge, without hearing sworn testimony or according the State its full right to participate and be heard in the proceedings. In re Tucker, 350 N.C. 649, 516 S.E.2d 593 (1999).

§ 7A-377. Procedures; employment of executive secretary, special counsel or investigator.

CASE NOTES

Judge was censured for conduct prejudicial to the administration of justice, etc.

Respondent judge was censured under this section and § 7A-376 when he found defendant, who was pleading guilty, not guilty of a DWI charge, without hearing sworn testimony or according the State its full right to participate and be heard in the proceedings.

Applied in In re a Judge, No. 238 Brown, 351 N.C. 601, 527 S.E.2d 651 (2000).

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

ARTICLE 36.

Entitlement of Indigent Persons Generally.

§ 7A-450. Indigency; definition; entitlement; determination; change of status.

(a) **(Effective until July 1, 2001)** An indigent person is a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding enumerated in this Subchapter. An interpreter is a necessary expense as defined in Chapter 8A of the General Statutes for a deaf person who is entitled to counsel under this subsection.

(a) **(Effective July 1, 2001)** An indigent person is a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding enumerated in this Subchapter. An interpreter is a necessary expense as defined in Chapter 8B of the General Statutes for a deaf person who is entitled to counsel under this subsection.

(b) Whenever a person, under the standards and procedures set out in this Subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation. The professional relationship of counsel so provided to the indigent person he represents is the same as if counsel had been privately retained by the indigent person.

(b1) An indigent person indicted for murder may not be tried where the State is seeking the death penalty without an assistant counsel being appointed in a timely manner. If the indigent person is represented by the public defender's office, the requirement of an assistant counsel may be satisfied by the assignment to the case of an additional attorney from the public defender's staff.

(c) The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation.

(d) If, at any stage in the action or proceeding, a person previously determined to be indigent becomes financially able to secure legal representation and provide other necessary expenses of representation, he must inform the counsel appointed by the court to represent him of that fact. In such a case, that information is not included in the attorney client privilege, and counsel must promptly inform the court of that information. (1969, c. 1013, s. 1; 1981, c. 409, s. 2; c. 937, s. 3; 1985, c. 698, s. 22(a); 2000-144, s. 5.)

Subsection (a) Set Out Twice. — The first version of subsection (a) is effective until July 1, 2001. The second version of subsection (a) is effective July 1, 2001.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Effect of Amendments. — Session Laws 2000-144, s. 5, effective July 1, 2001, substituted "Chapter 8B" for "Chapter 8A" in subsection (a).

CASE NOTES

I. General Consideration.
II. Appointment of Counsel.
IV. Furnishing Transcripts.

I. GENERAL CONSIDERATION.

Right to Counsel May Be Forfeited. — The defendant forfeited his right to counsel and the trial court did not err by requiring him to proceed pro se, without conducting an inquiry pursuant to § 15A-1242, where he was twice appointed counsel as an indigent, each time releasing his appointed counsel and retaining private counsel; where defendant was disruptive in the courtroom on two occasions, refused to cooperate with his counsel and assaulted him, resulting in an additional month's delay in the trial. State v. Montgomery, — N.C. App. —, 530 S.E.2d 66, 2000 N.C. App. LEXIS 640 (2000).

II. APPOINTMENT OF COUNSEL.

Absences of appointed counsel during trial on account of illness did not violate defendant's rights under this section, because he had two other attorneys present; the statute does not require that both appointed attorneys be involved in every aspect of a defendant's case. State v. Parker, 350 N.C. 411, 516 S.E.2d 106 (1999), cert. denied, — U.S. —, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

IV. FURNISHING TRANSCRIPTS.

Substantially Equivalent Alternative to Transcript. —

Failure to comply with the requirement of this section to provide defendant with a complete transcript of his proceedings, as a result of a mechanical malfunction, did not entitle the defendant to any relief because the state's narrative constituted an available alternative that was "substantially equivalent" to the complete transcript, as demonstrated by the testimony of two witnesses that the narrative accurately summarized their testimony at trial. State v. Lawrence, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 441 (June 16, 2000).

§ 7A-451. (Effective July 1, 2001) Scope of entitlement.

(a) An indigent person is entitled to services of counsel in the following actions and proceedings:

(1) Any case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged;
(2) A hearing on a petition for a writ of habeas corpus under Chapter 17 of the General Statutes;
(3) A motion for appropriate relief under Chapter 15A of the General Statutes if the defendant has been convicted of a felony, has been fined five hundred dollars ($500.00) or more, or has been sentenced to a term of imprisonment;
(4) A hearing for revocation of probation;
(5) A hearing in which extradition to another state is sought;
(6) A proceeding for an inpatient involuntary commitment to a facility under Part 7 of Article 5 of Chapter 122C of the General Statutes, or a proceeding for commitment under Part 8 of Article 5 of Chapter 122C of the General Statutes.
(7) In any case of execution against the person under Chapter 1, Article 28 of the General Statutes, and in any civil arrest and bail proceeding under Chapter 1, Article 34, of the General Statutes;
(8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible;
(9) A hearing for revocation of parole at which the right to counsel is provided in accordance with the provisions of Chapter 148, Article 4, of the General Statutes;
(10) A proceeding for sterilization under Chapter 35, Article 7 (Sterilization of Persons Mentally Ill and Mentally Retarded) of the General Statutes; and

§ 7A-451 has a postponed effective date. See notes.

(11) A proceeding for the provision of protective services according to Chapter 108A, Article 6 of the General Statutes;
(12) In the case of a juvenile alleged to be neglected under Chapter 7A, Article 23 of the General Statutes;
(13) A proceeding to find a person incompetent under Subchapter I of Chapter 35A, of the General Statutes;
(14) A proceeding to terminate parental rights where a guardian ad litem is appointed pursuant to G.S. 7B-1101;
(15) An action brought pursuant to Article 24B of Chapter 7A of the General Statutes to terminate an indigent person's parental rights.
(16) A proceeding involving consent for an abortion on an unemancipated minor pursuant to Article 1A, Part 2 of Chapter 90 of the General Statutes. G.S. 7A-450.1, 7A-450.2, and 7A-450.3 shall not apply to this proceeding.

(b) In each of the actions and proceedings enumerated in subsection (a) of this section, entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process. Entitlement continues through any critical stage of the action or proceeding, including, if applicable:
(1) An in-custody interrogation;
(2) A pretrial identification procedure which occurs after formal charges have been preferred and at which the presence of the indigent is required;
(3) A hearing for the reduction of bail, or to fix bail if bail has been earlier denied;
(4) A probable cause hearing;
(5) Trial and sentencing; and
(6) Review of any judgment or decree pursuant to G.S. 7A-27, 7A-30(1), 7A-30(2), and Subchapter XIV of Chapter 15A of the General Statutes.

(c) In any capital case, an indigent defendant who is under a sentence of death may apply to the superior court of the district where the defendant was indicted for the appointment of counsel to represent the defendant in preparing, filing, and litigating a motion for appropriate relief. The application for the appointment of such postconviction counsel may be made prior to completion of review on direct appeal and shall be made no later than 10 days from the latest of the following:
(1) The mandate has been issued by the Supreme Court of North Carolina on direct appeal pursuant to N.C.R. App. P. 32(b) and the time for filing a petition for writ of certiorari to the United States Supreme Court has expired without a petition being filed;
(2) The United States Supreme Court denied a timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina; or
(3) The United States Supreme Court granted the defendant's or the State's timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina, but subsequently left the defendant's death sentence undisturbed.

If there is not a criminal or mixed session of superior court scheduled for that district, the application must be made no later than 10 days from the beginning of the next criminal or mixed session of superior court in the district. Upon application, supported by the defendant's affidavit, the superior court shall enter an order appointing the Office of Indigent Defense Services if the court finds that the defendant is indigent and desires counsel, and the Office of Defense Services shall appoint two counsel to represent the defendant. The

§ 7A-451 has a postponed effective date. See notes.

defendant does not have a right to be present at the time of appointment of counsel, and the appointment need not be made in open court. If the defendant was previously adjudicated an indigent for purposes of trial or direct appeal, the defendant shall be presumed indigent for purposes of this subsection.

(d) The appointment of counsel as provided in subsection (c) of this section and the procedure for compensation shall comply with rules adopted by the Office of Indigent Defense Services.

(e) No counsel appointed pursuant to subsection (c) of this section shall have previously represented the defendant at trial or on direct appeal in the case for which the appointment is made unless the defendant expressly requests continued representation and understandingly waives future allegations of ineffective assistance of counsel. (1969, c. 1013, s. 1; 1973, c. 151, ss. 1, 3; c. 616; c. 726, s. 4; c. 1116, s. 1; c. 1125; c. 1320; c. 1378, s. 2; 1977, c. 711, ss. 7, 8; c. 725, s. 2; 1979, 2nd Sess., c. 1206, s. 3; 1981, c. 966, s. 4; 1983, c. 638, s. 23; c. 864, s. 4; 1985, c. 509, s. 1; c. 589, s. 3; 1987, c. 550, s. 16; 1995, c. 462, s. 3; 1995 (Reg. Sess., 1996), c. 719, s. 7; 1998-202, s. 13(a); 2000-144, s. 6.)

For this section as in effect until July 1, 2001, see the main volume.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Effect of Amendments. — Session Laws 2000-144, s. 6, effective July 1, 2001, substituted "Chapter 108A, Article 6" for "Chapter 108, Article 4" in subdivision (a)(11); in the second paragraph in subsection (c), substituted "the Office of Indigent Defense Services" for "two counsel" and added "and the Office of Defense Services shall appoint two counsel to represent the defendant"; and substituted "rules adopted by the Office of Indigent Defense Services" for "the Rules and Regulations Relating to the Appointment of Counsel for Indigent Defendants pursuant to G.S. 7A-459. The court may appoint counsel recruited by the Appellate Defender pursuant to G.S. 7A-486.3(5)" in subsection (d).

§ 7A-452. (Effective July 1, 2001) Source of counsel; fees; appellate records.

(a) Upon the court's determination that a person is indigent and entitled to counsel under this Article, counsel shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services. In noncapital cases, the court shall assign counsel pursuant to rules adopted by the Office of Indigent Defense Services. In capital cases, the Office of Indigent Defense Services or designee of the Office of Indigent Defense Services shall assign counsel; at least one member of each capital defense team, where practicable, shall be a member of the bar in that division. In the courts of those counties which have a public defender, however, the public defender may tentatively assign himself or an assistant public defender to represent an indigent person, subject to subsequent determination of entitlement to counsel by the court and approval by the court in noncapital cases and by the Office of Indigent Defense Services in capital cases.

(b) Fees of assigned counsel and salaries and other operating expenses of the offices of the public defenders shall be borne by the State.

(c)(1) The clerk of superior court is authorized to make a determination of indigency and entitlement to counsel, as authorized by this Article. The word "court," as it is used in this Article and in any rules pursuant to this Article, includes the clerk of superior court.

(2) A judge of superior or district court having authority to determine entitlement to counsel in a particular case may give directions to the clerk with regard to the determination of entitlement to counsel in that case; may, if he finds it appropriate, change or modify the

§ 7A-452 has a postponed effective date. See notes.

determination made by the clerk; and may set aside a finding of waiver of counsel made by the clerk.

(d) Unless a public defender or assistant public defender is appointed to serve, standby counsel appointed under G.S. 15A-1243 shall receive reasonable compensation to be paid by the State. (1969, c. 1013, s. 1; 1971, c. 377, s. 32; 1973, c. 1286, s. 8; 1977, c. 711, s. 9; 1987 (Reg. Sess., 1988), c. 1037, s. 29; 2000-144, s. 7.)

For this section as in effect until July 1, 2001, see the main volume.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Effect of Amendments. — Session Laws 2000-144, s. 7, effective July 1, 2001, in subsection (a), substituted the present first three sentences for the former first sentence, and substituted "subsequent determination of entitlement to counsel ... in capital cases" for "approval by the court" in the last sentence; substituted "entitlement to counsel" for "to appoint counsel" in subdivision (c)(1); in subdivision (c)(2), substituted "determine entitlement to" for "appoint," substituted "determination of entitlement to" for "appointment of" and substituted "determination made" for "appointment of counsel when counsel has been appointed"; and in subsection (d), deleted "the trial judge appointing" following "appointed to serve," inserted the second instance of "appointed" and substituted "receive" for "award."

§ 7A-453. (Effective July 1, 2001) Duty of custodian of a possibly indigent person; determination of indigency.

(a) In counties designated by the Office of Indigent Defense Services, the authority having custody of a person who is without counsel for more than 48 hours after being taken into custody shall so inform the designee of the Office of Indigent Defense Services. The designee of the Office of Indigent Defense Services shall make a preliminary determination as to the person's entitlement to his services, and proceed accordingly. The court shall make the final determination.

(b) In counties that have not been designated by the Office of Indigent Defense Services, the authority having custody of a person who is without counsel for more than 48 hours after being taken into custody shall so inform the clerk of superior court.

(c) In any county, if a defendant, upon being taken into custody, states that he is indigent and desires counsel, the authority having custody shall immediately inform the designee of the Office of Indigent Defense Services or the clerk of superior court, as the case may be, who shall take action as provided in this Article.

(d) The duties imposed by this section upon authorities having custody of persons who may be indigent are in addition to the duties imposed upon arresting officers under G.S. 15-47. (1969, c. 1013, s. 1; 1973, c. 1286, s. 8; 1987 (Reg. Sess., 1988), c. 1037, s. 30; 2000-144, s. 8.)

For this section as in effect until July 1, 2001, see the main volume.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Effect of Amendments. — Session Laws 2000-144, s. 8, effective July 1, 2001, in subsection (a), substituted "designated by the Office of Indigent Defense Services" for "which have a public defender" and substituted "designee of the Office of Indigent Defense Services" for "public defender" twice; substituted "that have not been designated by the Office of Indigent Defense Services" for "which do not have a public defender" in subsection (b); and substituted "designee of the Office of Indigent Defense Services" for "defender" in subsection (c).

§ 7A-454. (Effective July 1, 2001) Supporting services.

Fees for the services of an expert witness for an indigent person and other necessary expenses of counsel shall be paid by the State in accordance with rules adopted by the Office of Indigent Defense Services. (1969, c. 1013, s. 1; 2000-144, s. 9.)

For this section as in effect until July 1, 2001, see the main volume.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Effect of Amendments. — Session Laws 2000-144, s. 9, effective July 1, 2001, rewrote the section.

§ 7A-455. (Effective July 1, 2001) Partial indigency; liens; acquittals.

(a) If, in the opinion of the court, an indigent person is financially able to pay a portion, but not all, of the value of the legal services rendered for him by assigned counsel, the public defender, or the appellate defender, and other necessary expenses of representation, he shall order the partially indigent person to pay such portion to the clerk of superior court for transmission to the State treasury.

(b) In all cases the court shall direct that a judgment be entered in the office of the clerk of superior court for the money value of services rendered by assigned counsel, the public defender, or the appellate defender, plus any sums allowed for other necessary expenses of representing the indigent person, including any fees and expenses that may have been allowed prior to final determination of the action to assigned counsel pursuant to G.S. 7A-458, which shall constitute a lien as prescribed by the general law of the State applicable to judgments. Any reimbursement to the State as provided in subsection (a) of this section or any funds collected by reason of such judgment shall be deposited in the State treasury and credited against the judgment. The value of services shall be determined in accordance with rules adopted by the Office of Indigent Defense Services. The money value of services rendered by the public defender and the appellate defender shall be based upon the factors normally involved in fixing the fees of private attorneys, such as the nature of the case, the time, effort, and responsibility involved, and the fee usually charged in similar cases. A district court judge shall direct entry of judgment for actions or proceedings finally determined in the district court and a superior court judge shall direct entry of judgment for actions or proceedings originating in, heard on appeal in, or appealed from the superior court. Even if the trial, appeal, hearing, or other proceeding is never held, preparation therefor is nevertheless compensable.

(b1) In every case in which the State is entitled to a lien pursuant to this section, the public defender shall at the time of sentencing or other conclusion of the proceedings petition the court to enter judgment for the value of the legal services rendered by the public defender, and the appellate defender shall upon completion of the appeal petition or request the trial court to enter judgment for the value of the legal services rendered by the appellate defender.

(c) No order for partial payment under subsection (a) of this section and no judgment under subsection (b) of this section shall be entered unless the indigent person is convicted. If the indigent person is convicted, the order or judgment shall become effective and the judgment shall be docketed and indexed pursuant to G.S. 1-233 et seq., in the amount then owing, upon the later of (i) the date upon which the conviction becomes final if the indigent person is not ordered, as a condition of probation, to pay the State of North

§ 7A-455 has a postponed effective date. See notes.

Carolina for the costs of his representation in the case or (ii) the date upon which the indigent person's probation is terminated or revoked if the indigent person is so ordered.

(d) In all cases in which the entry of a judgment is authorized under G.S. 7A-450.1 through G.S. 7A-450.4 or under this section, the attorney, guardian ad litem, public defender, or appellate defender who rendered the services or incurred the expenses for which the judgment is to be entered shall obtain the social security number, if any, of each person against whom judgment is to be entered. This number, or a certificate that the person has no social security number, shall be included in each fee application submitted by an assigned attorney, guardian ad litem, public defender, or appellate defender, and no order for payment entered upon an application which does not include the required social security number or certification shall be valid to authorize payment to the applicant from the Indigent Persons" Attorney Fee Fund. Each judgment docketed against any person under this section or under G.S. 7A-450.3 shall include the social security number, if any, of the judgment debtor. (1969, c. 1013, s. 1; 1983, c. 135, s. 2; 1983 (Reg. Sess., 1984), c. 1109, s. 12; 1985, c. 474, s. 9; 1989 (Reg. Sess., 1990), c. 946, ss. 5, 6; 1991, c. 761, s. 4; 1991 (Reg. Sess., 1992), c. 900, s. 116(a); 2000-144, s. 10.)

For this section as in effect until July 1, 2001, see the main volume.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Effect of Amendments. — Session Laws 2000-144, s. 10, effective July 1, 2001, rewrote subsection (b); and added subsection (b1).

§ 7A-457. Waiver of counsel; pleas of guilty.

(a) **(Effective until July 1, 2001)** An indigent person who has been informed of his right to be represented by counsel at any in-court proceeding, may, in writing, waive the right to in-court representation by counsel, if the court finds of record that at the time of waiver the indigent person acted with full awareness of his rights and of the consequences of the waiver. In making such a finding, the court shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the crime charged.

(a) **(Effective July 1, 2001)** An indigent person who has been informed of his right to be represented by counsel at any in-court proceeding, may, in writing, waive the right to in-court representation by counsel in accordance with rules adopted by the Office of Indigent Defense Services. Any waiver of counsel shall be effective only if the court finds of record that at the time of waiver the indigent person acted with full awareness of his rights and of the consequences of the waiver. In making such a finding, the court shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the crime charged.

(b) If an indigent person waives counsel as provided in subsection (a), and pleads guilty to any offense, the court shall inform him of the nature of the offense and the possible consequences of his plea, and as a condition of accepting the plea of guilty the court shall examine the person and shall ascertain that the plea was freely, understandably and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency.

(c) An indigent person who has been informed of his right to be represented by counsel at any out-of-court proceeding, may, either orally or in writing,

waive the right to out-of-court representation by counsel. (1969, c. 1013, s. 1; 1971, c. 1243; 1973, c. 151, s. 3; 2000-144, s. 11.)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective until July 1, 2001. The second version of subsection (a) is effective July 1, 2001.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Effect of Amendments. — Session Laws 2000-144, s. 11, effective July 1, 2001, inserted "in accordance with rules adopted by the Office of Indigent Defense Services. Any waiver of counsel shall be effective only" in subsection (a).

§ 7A-458. (Effective July 1, 2001) Counsel fees.

The fee to which an attorney who represents an indigent person is entitled shall be fixed in accordance with rules adopted by the Office of Indigent Defense Services. Fees shall be based on the factors normally considered in fixing attorneys" fees, such as the nature of the case, and the time, effort and responsibility involved. Even if the trial, appeal, hearing or other proceeding is never held, preparation therefor is nevertheless compensable and, in capital cases and other extraordinary cases pending in superior court, a fee for services rendered and payment for expenses incurred may be allowed pending final determination of the case. (1969, c. 1013, s. 1; 1987 (Reg. Sess., 1988), c. 1086, s. 113(b); 1991 (Reg. Sess., 1992), c. 900, s. 116(b); 2000-144, s. 12.)

For this section as in effect until July 1, 2001, see the main volume.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Effect of Amendments. — Session Laws 2000-144, s. 12, effective July 1, 2001, rewrote the section, consistent with the adoption of the Indigent Defense Services Act.

§ 7A-459: Repealed by Session Laws 2000-144, s. 13, effective July 1, 2001.

For this section as in effect until July 1, 2001, see the main volume.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Article 37.

The Public Defender.

§ 7A-465. (Repealed effective July 1, 2001) Public defender; defender districts; qualifications; compensation.

(a) The following counties of the State are organized into the defender districts listed below and in each of those defender districts an office of public defender is established:

Defender District	*Counties*
3A	Pitt
3B	Carteret
12	Cumberland
14	Durham

Defender District	*Counties*
15B	Orange, Chatham
16A	Scotland, Hoke
16B	Robeson
18	Guilford
26	Mecklenburg
27A	Gaston
28	Buncombe

Provided that the effective date of the establishment of the office of public defender in Defender District 16B shall be the date that a superior court judge for Superior Court District 16B, other than the judge holding the judgeship for that district established by Chapter 509, Session Laws of 1987, takes office.

(a1) The public defender for each of the above defender districts shall represent indigents and otherwise perform all other duties of a public defender in the district and superior courts of the counties included in his defender district.

(b) The public defender shall be an attorney licensed to practice law in North Carolina, and shall devote his full time to the duties of his the office. The annual salary of:

(1) Public defenders shall be the midpoint amount between the salary of a senior resident superior court judge and the salary of a chief district court judge, as provided by law,

(2) Full-time assistant public defenders shall be as provided in the Current Operations Appropriations Act.

In lieu of merit and other increment raises paid to regular State employees, a public defender shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. 'Service' means service as a public defender, assistant public defender, justice or judge of the General Court of Justice, or clerk of superior court. (1969, c. 1013, s. 1; 1973, c. 47, s. 2; c. 799, s. 1; 1975, c. 956, s. 14; 1977, c. 802, s. 41.2; c. 1130, s. 6; 1977, 2nd Sess., c. 1219, s. 43.3; 1979, 2nd Sess., c. 1284, s. 1; 1981 (Reg. Sess., 1982), c. 1282, s. 72; 1983 (Reg. Sess., 1984), c. 1034, s. 94; 1987, c. 738, s. 35; 1987 (Reg. Sess., 1988), c. 1056, ss. 8, 9; 1989 (Reg. Sess., 1990), c. 1066, s. 127(b); 1996, 2nd Ex. Sess., c. 18, s. 28.25; 2000-67, s. 26.3A(b).)

Section Repealed Effective July 1, 2001. This section is repealed effective July 1, 2001, by Session Laws 2000-144, s. 13.

Cross References. — For Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Editor's Note. — Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.' "

Session Laws 2000-67, s. 28.4, contains a severability clause.

Session Laws 2000-144, s. 48, provides that persons holding the position of public defender or appellate defender on the date this act becomes law are entitled to serve the remainder of their terms.

Effect of Amendments. — Session Laws 2000-67, s. 26.3A(b), effective July 1, 2000, in subsection (b), added "The annual salary of" and added subdivisions (b)(1) and (b)(2); and substituted gender-neutral terms.

§ 7A-466: Repealed by Session Laws 2000-144, s. 13, effective July 1, 2001.

For this section as in effect until July 1, 2001, see the main volume.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

§ 7A-467. (Repealed effective July 1, 2001) Assistant defenders; assigned counsel.

(a) Each public defender is entitled to such assistant public defenders and investigators, full-time or part-time, as may be authorized by the Administrative Office of the Courts. Assistants and investigators are appointed by the public defender and serve at his pleasure. Compensation of assistants shall be as provided in the biennial Current Operations Appropriations Act. The Administrative Officer of the Courts shall fix the compensation of each investigator. Assistants and investigators shall perform such duties as may be assigned by the public defender.

(b) A member of the district bar of any judicial district as defined in G.S. 84-19, all or part of which includes or is included in a defender district, who resides or regularly practices in that district and who consents to such service may be assigned by the public defender to represent an indigent person. In addition, if a conflict of interests prohibits the public defender from representing an indigent person, or in unusual circumstances when, in the opinion of the court the proper administration of justice requires it, the court may assign a member of the district bar to represent an indigent person. All assignments made under this subsection shall be governed by the rules and regulations made by the North Carolina State Bar Council pursuant to G.S. 7A-459. Any attorney assigned under this subsection is entitled to the services of the defender's office to the same extent as counsel assigned by the public defender.

(c) In assigning assistant defenders and members of the bar generally the defender shall consider the nature of the case and the skill of counsel, to the end that all indigent persons are adequately represented. Any attorney assigned shall have the minimum experience and qualifications required by the rules and regulations made by the North Carolina State Bar Council pursuant to G.S. 7A-459. Members of the bar assigned by the defender or by the court are compensated in the same manner as assigned counsel are compensated in districts which do not have a public defender.

(d) In lieu of merit and other increment raises paid to regular State employees, an assistant public defender shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. "Service" means service as an assistant public defender.

(e) A public defender may apply to the Director of the Administrative Office of the Courts to enter into contracts with local governments for the provision by the State of services of temporary assistant public defenders pursuant to G.S. 153A-212.1 or G.S. 160A-289.1.

(f) The Director of the Administrative Office of the Courtsmay provide assistance requested pursuant to subsection (e) of this section only upon a showing by the requesting public defender, supported by facts, that the overwhelming public interest warrants the use of additional resources for the speedy disposition of cases involving drug offenses, domestic violence, or other offenses involving a threat to public safety.

(g) The terms of any contract entered into with local governments pursuant to subsection (e) of this section shall be fixed by the Director of the Adminis-

trative Office of the Courts in each case. Nothing in this section shall be construed to obligate the General Assembly to make any appropriation to implement the provisions of this section or to obligate the Administrative Office of the Courts to provide the administrative costs of establishing or maintaining the positions or services provided for under this section. Further, nothing in this section shall be construed to obligate the Administrative Office of the Courts to maintain positions or services initially provided for under this section. (1969, c. 1013, s. 1; 1983 (Reg. Sess., 1984), c. 1034, ss. 93, 165; 1987, c. 738, s. 33(b); 1987 (Reg. Sess., 1988), c. 1056, s. 11; 1991, c. 304, s. 2; 1999-237, s. 28.19(b); 2000-67, s. 15.4(d).)

Section Repealed Effective July 1, 2001. — This section is repealed effective July 1, 2001, by Session Laws 2000-144, s. 13.

Cross References. — For Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Editor's Note. —

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.' "

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. —

Session Laws 2000-67, s. 15.4(d), effective July 1, 2000, added subsections (e) through (g).

§§ 7A-469 through 7A-471: Repealed by Session Laws 2000-144, s. 13, effective July 1, 2001.

For these sections as in effect until July 1, 2001, see the main volume.

Article 38A.

Appellate Defender Office.

§§ 7A-486 through 7A-486.7: Repealed by Session Laws 2000-144, s. 13, effective July 1, 2001.

For these sections as in effect until July 1, 2001, see the main volume.

Article 39.

Guardian Ad Litem Program.

Editor's Note. — The head above is set out to correct its omission in the main volume.

Article 39A.

Custody and Visitation Mediation Program.

§§ 7A-496, 7A-497: Reserved for future codification purposes.

ARTICLE 39B.

Indigent Defense Services Act.

§ 7A-498. Title.

This Article shall be known and may be cited as the "Indigent Defense Services Act of 2000". (2000-144, s. 1.)

Editor's Note. — Session Laws 2000-144, s. 46, directs the Director of the Administrative Office of the Courts to assist the chair of the Commission on Indigent Defense Services in retaining the Commission's initial Director of Indigent Defense Services. The Director of the Administrative Office of the Courts is to recruit and interview prospective candidates and submit at least three names to the full Commission for its consideration. The Commission may hire its initial Director of Indigent Defense Services from that list or may request that the chair of the Commission and Director of the Administrative Office of the Courts submit additional names.

Session Laws 2000-144, s. 47, directs the Commission on Indigent Defense Services to report on or before May 1, 2001, to the Chairs of the Senate and House Appropriations Committees and the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety regarding (i) a plan for the orderly transfer of budget and related authority from the Administrative Office of the Courts to the Commission on Indigent Defense Services, effective July 1, 2001; (ii) the rules, standards, and other regulations developed by the Commission for the delivery of indigent defense services; and (iii) other matters for implementation of the provisions of this act.

Session Laws 2000-144, s. 49, provides: "Except as otherwise provided in this Part, this act becomes effective July 1, 2001. G.S. 7A-498, 7A-498.1, 7A-498.2, 7A-498.4, 7A-498.5, and 7A-498.6, as enacted in Section 1 of this act, are effective when they become law [August 2, 2000]; however, except as otherwise provided in this Part, no rules, standards, or other regulations issued by the Commission on Indigent Defense Services, and no decisions regarding the actual delivery of services shall take effect prior to July 1, 2001, and all authority over the expenditure of funds shall remain with the Director of the Administrative Office of the Courts prior to that date. The Commission shall be responsible for the expenditure of funds for all cases pending on or after July 1, 2001."

§ 7A-498.1. Purpose.

Whenever a person is determined to be indigent and entitled to counsel, it is the responsibility of the State under the federal and state constitutions to provide that person with counsel and the other necessary expenses of representation. The purpose of this Article is to:

(1) Enhance oversight of the delivery of counsel and related services provided at State expense;
(2) Improve the quality of representation and ensure the independence of counsel;
(3) Establish uniform policies and procedures for the delivery of services;
(4) Generate reliable statistical information in order to evaluate the services provided and funds expended; and
(5) Deliver services in the most efficient and cost-effective manner without sacrificing quality representation. (2000-144, s. 1.)

Editor's Note. — For effective date and applicability, see the editor's note at § 7A-498.

§ 7A-498.2. Establishment of Office of Indigent Defense Services.

(a) The Office of Indigent Defense Services, which is administered by the Director of Indigent Defense Services and includes the Commission on Indigent Defense Services, is created within the Judicial Department. As used in this Article, "Office" means the Office of Indigent Defense Services, "Director" means the Director of Indigent Defense Services, and "Commission" means the Commission on Indigent Defense Services.

(b) The Office of Indigent Defense Services shall exercise its prescribed powers independently of the head of the Administrative Office of the Courts. The Office may enter into contracts, own property, and accept funds, grants, and gifts from any public or private source to pay expenses incident to implementing its purposes.

(c) The Director of the Administrative Office of the Courts shall provide general administrative support to the Office of Indigent Defense Services. The term "general administrative support" includes purchasing, payroll, and similar administrative services.

(d) The budget of the Office of Indigent Defense Services shall be a part of the Judicial Department's budget. The Commission on Indigent Defense Services shall consult with the Director of the Administrative Office of the Courts, who shall assist the Commission in preparing and presenting to the General Assembly the Office's budget, but the Commission shall have the final authority with respect to preparation of the Office's budget and with respect to representation of matters pertaining to the Office before the General Assembly.

(e) The Director of the Administrative Office of the Courts shall not reduce or modify the budget of the Office of Indigent Defense Services or use funds appropriated to the Office without the approval of the Commission. (2000-144, s. 1.)

Editor's Note. — For effective date and applicability, see the editor's note at § 7A-498.

§ 7A-498.3. (Effective July 1, 2001) Responsibilities of Office of Indigent Defense Services.

(a) The Office of Indigent Defense Services shall be responsible for establishing, supervising, and maintaining a system for providing legal representation and related services in the following cases:

(1) Cases in which an indigent person is subject to a deprivation of liberty or other constitutionally protected interest and is entitled by law to legal representation;

(2) Cases in which an indigent person is entitled to legal representation under G.S. 7A-451 and G.S. 7A-451.1; and

(3) Any other cases in which the Office of Indigent Defense Services is designated by statute as responsible for providing legal representation.

(b) The Office of Indigent Defense Services shall develop policies and procedures for determining indigency in cases subject to this Article, and those policies shall be applied uniformly throughout the State. The court shall determine in each case whether a person is indigent and entitled to legal representation, and counsel shall be appointed as provided in G.S. 7A-452.

(c) In all cases subject to this Article, appointment of counsel, determination of compensation, appointment of experts, and use of funds for experts and other services related to legal representation shall be in accordance with rules and procedures adopted by the Office of Indigent Defense Services.

(d) The Office of Indigent Defense Services shall allocate and disburse funds appropriated for legal representation and related services in cases subject to this Article pursuant to rules and procedures established by the Office. (2000-144, s. 1.)

Editor's Note. — For effective date and applicability, see the editor's note at § 7A-498.

§ 7A-498.4. Establishment of Commission on Indigent Defense Services.

(a) The Commission on Indigent Defense Services is created within the Office of Indigent Defense Services and shall consist of 13 members. To create an effective working group, assure continuity, and achieve staggered terms, the Commission shall be appointed as provided in this section.

(b) The members of the Commission shall be appointed as follows:

(1) The Chief Justice of the North Carolina Supreme Court shall appoint one member, who shall be an active or former member of the North Carolina judiciary.

(2) The Governor shall appoint one member, who shall be a nonattorney.

(3) The General Assembly shall appoint one member upon the recommendation of the President Pro Tempore of the Senate.

(4) The General Assembly shall appoint one member upon the recommendation of the Speaker of the House of Representatives.

(5) The North Carolina Public Defenders Association shall appoint one member.

(6) The North Carolina State Bar shall appoint one member.

(7) The North Carolina Bar Association shall appoint one member.

(8) The North Carolina Academy of Trial Lawyers shall appoint one member.

(9) The North Carolina Association of Black Lawyers shall appoint one member.

(10) The North Carolina Association of Women Lawyers shall appoint one member.

(11) The Commission shall appoint three members, who shall reside in different judicial districts from one another. One appointee shall be a nonattorney, and one appointee may be an active member of the North Carolina judiciary. One appointee shall be Native American. The initial three members satisfying this subdivision shall be appointed as provided in subsection (k) of this section.

(c) The terms of members appointed pursuant to subsection (b) of this section shall be as follows:

(1) The initial appointments by the Chief Justice, the Governor, and the General Assembly shall be for four years.

(2) The initial appointments by the Public Defenders Association and State Bar, and one appointment by the Commission, shall be for three years.

(3) The initial appointments by the Bar Association and Trial Academy, and one appointment by the Commission, shall be for two years.

(4) The initial appointments by the Black Lawyers Association and Women Lawyers Association, and one appointment by the Commission, shall be for one year.

At the expiration of these initial terms, appointments shall be for four years and shall be made by the appointing authorities designated in subsection (b) of this section. No person shall serve more than two consecutive four-year terms plus any initial term of less than four years.

(d) Persons appointed to the Commission shall have significant experience in the defense of criminal or other cases subject to this Article or shall have demonstrated a strong commitment to quality representation in indigent defense matters. No active prosecutors or law enforcement officials, or active employees of such persons, may be appointed to or serve on the Commission. No active judicial officials, or active employees of such persons, may be appointed to or serve on the Commission, except as provided in subsection (b) of this section. No active public defenders, active employees of public defenders, or other active employees of the Office of Indigent Defense Services may be appointed to or serve on the Commission, except that notwithstanding this subsection, G.S. 14-234, or any other provision of law, Commission members may include part-time public defenders employed by the Office of Indigent Defense Services and may include persons, or employees of persons or organizations, who provide legal services subject to this Article as contractors or appointed attorneys.

(e) All members of the Commission are entitled to vote on any matters coming before the Commission unless otherwise provided by rules adopted by the Commission concerning voting on matters in which a member has, or appears to have, a financial or other personal interest.

(f) Each member of the Commission shall serve until a successor in office has been appointed. Vacancies shall be filled by appointment by the appointing authority for the unexpired term. Removal of Commission members shall be in accordance with policies and procedures adopted by the Commission.

(g) A quorum for purposes of conducting Commission business shall be a majority of the members of the Commission.

(h) The Commission shall elect a Commission chair from the members of the Commission for a term of two years.

(i) The Director of Indigent Defense Services shall attend all Commission meetings except those relating to removal or reappointment of the Director or allegations of misconduct by the Director. The Director shall not vote on any matter decided by the Commission.

(j) Commission members shall not receive compensation but are entitled to be paid necessary subsistence and travel expenses in accordance with G.S. 138-5 and G.S. 138-6 as applicable.

(k) The Commission shall hold its first meeting no later than September 15, 2000. All appointments to the Commission specified in subdivisions (1) through (10) of subsection (b) of this section shall be made by the appointing authorities by September 1, 2000. The appointee of the Chief Justice shall convene the first meeting. No later than 30 days after its first meeting, the Commission shall make the appointments specified in subdivision (11) of subsection (b) of this section and shall elect its chair. (2000-144, s. 1.)

Editor's Note. — For effective date and applicability, see the editor's note at § 7A-498.

§ 7A-498.5. Responsibilities of Commission.

(a) The Commission shall have as its principal purpose the development and improvement of programs by which the Office of Indigent Defense Services provides legal representation to indigent persons.

(b) The Commission shall appoint the Director of the Office of Indigent Defense Services, who shall be chosen on the basis of training, experience, and other qualifications. The Commission shall consult with the Chief Justice and Director of the Administrative Office of the Courts in selecting a Director, but shall have final authority in making the appointment.

(c) The Commission shall develop standards governing the provision of services under this Article. The standards shall include:

(1) Standards for maintaining and operating regional and district public defender offices and appellate defender offices, including requirements regarding qualifications, training, and size of the legal and supporting staff;

(2) Standards prescribing minimum experience, training, and other qualifications for appointed counsel;

(3) Standards for public defender and appointed counsel caseloads;

(4) Standards for the performance of public defenders and appointed counsel;

(5) Standards for the independent, competent, and efficient representation of clients whose cases present conflicts of interest, in both the trial and appellate courts;

(6) Standards for providing and compensating experts and others who provide services related to legal representation;

(7) Standards for qualifications and performance in capital cases; and

(8) Standards for determining indigency and for assessing and collecting the costs of legal representation and related services.

(d) The Commission shall determine the methods for delivering legal services to indigent persons eligible for legal representation under this Article and shall establish in each district or combination of districts a system of appointed counsel, contract counsel, part-time public defenders, public defender offices, appellate defender services, and other methods for delivering counsel services, or any combination of these services.

(e) In determining the method of services to be provided in a particular district, the Director shall consult with the district bar as defined in G.S. 84-19 and the judges of the district or districts under consideration. The Commission shall adopt procedures ensuring that affected local bars have the opportunity to be significantly involved in determining the method or methods for delivering services in their districts. The Commission shall solicit written comments from the affected local district bar, senior resident superior court judge, and chief district court judge. Those comments, along with the recommendations of the Commission, shall be forwarded to the members of the General Assembly who represent the affected district and to other interested parties.

(f) The Commission shall establish policies and procedures with respect to the distribution of funds appropriated under this Article, including rates of compensation for appointed counsel, schedules of allowable expenses, appointment and compensation of expert witnesses, and procedures for applying for and receiving compensation.

(g) The Commission shall approve and recommend to the General Assembly a budget for the Office of Indigent Defense Services.

(h) The Commission shall adopt such other rules and procedures as it deems necessary for the conduct of business by the Commission and the Office of Indigent Defense Services. (2000-144, s. 1.)

Editor's Note. — For effective date and applicability, see the editor's note at § 7A-498.

§ 7A-498.6. Director of Indigent Defense Services.

(a) The Director of Indigent Defense Services shall be appointed by the Commission for a term of four years. The Director may be removed during this term in the discretion of the Commission by a vote of two-thirds of all of the Commission members. The Director shall be an attorney licensed and eligible

to practice in the courts of this State at the time of appointment and at all times during service as the Director.

(b) The Director shall:

(1) Prepare and submit to the Commission a proposed budget for the Office of Indigent Defense Services, an annual report containing pertinent data on the operations, costs, and needs of the Office, and such other information as the Commission may require;

(2) Assist the Commission in developing rules and standards for the delivery of services under this Article;

(3) Administer and coordinate the operations of the Office and supervise compliance with standards adopted by the Commission;

(4) Subject to policies and procedures established by the Commission, hire such professional, technical, and support personnel as deemed reasonably necessary for the efficient operation of the Office of Indigent Defense Services;

(5) Keep and maintain proper financial records for use in calculating the costs of the operations of the Office of Indigent Defense Services;

(6) Apply for and accept on behalf of the Office of Indigent Defense Services any funds that may become available from government grants, private gifts, donations, or bequests from any source;

(7) Coordinate the services of the Office of Indigent Defense Services with any federal, county, or private programs established to provide assistance to indigent persons in cases subject to this Article and consult with professional bodies concerning improving the administration of indigent services;

(8) Conduct training programs for attorneys and others involved in the legal representation of persons subject to this Article; and

(9) Perform other duties as the Commission may assign. (2000-144, s. 1.)

Editor's Note. — For effective date and applicability, see the editor's note at § 7A-498.

Session Laws 2000-144, s. 46, directs the Director of the Administrative Office of the Courts to assist the chair of the Commission on Indigent Defense Services in retaining the Commission's initial Director of Indigent Defense Services. The Director of the Administrative Office of the Courts is to recruit and interview prospective candidates and submit at least three names to the full Commission for its consideration. The Commission may hire its initial Director of Indigent Defense Services from that list or may request that the chair of the Commission and Director of the Administrative Office of the Courts submit additional names.

§ 7A-498.7. (Effective July 1, 2001) Public Defender Offices.

(a) The following counties of the State are organized into the defender districts listed below, and in each of those defender districts an office of public defender is established:

Defender District	Counties
3A	Pitt
3B	Carteret
12	Cumberland
14	Durham
15B	Orange, Chatham
16A	Scotland, Hoke
16B	Robeson
18	Guilford
26	Mecklenburg

27A	Gaston
28	Buncombe

After notice to, and consultation with, the affected district bar, senior resident superior court judge, and chief district court judge, the Commission on Indigent Defense Services may recommend to the General Assembly that a district or regional public defender office be established. A legislative act is required in order to establish a new office or to abolish an existing office.

(b) For each new term, and to fill any vacancy, public defenders shall be appointed from a list of not less than two and not more than three names nominated by written ballot of the attorneys resident in the defender district who are licensed to practice law in North Carolina. The balloting shall be conducted pursuant to rules adopted by the Commission on Indigent Defense Services. The appointment shall be made by the senior resident superior court judge of the superior court district or set of districts as defined in G.S. 7A-44.1 that includes the county or counties of the defender district for which the public defender is being appointed.

(c) A public defender shall be an attorney licensed to practice law in North Carolina and shall devote full time to the duties of the office. In lieu of merit and other increment raises paid to regular State employees, a public defender shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. "Service" means service as a public defender, appellate defender, assistant public or appellate defender, assistant district attorney, justice or judge of the General Court of Justice, or clerk of superior court.

(d) Subject to standards adopted by the Commission, the day-to-day operation and administration of public defender offices shall be the responsibility of the public defender in charge of the office. The public defender shall keep appropriate records and make periodic reports, as requested, to the Director of the Office of Indigent Defense Services on matters related to the operation of the office.

(e) The Office of Indigent Defense Services shall procure office equipment and supplies for the public defender, and provide secretarial and library support from State funds appropriated to the public defender's office for this purpose.

(f) Each public defender is entitled to assistant public defenders, investigators, and other staff, full-time or part-time, as may be authorized by the Commission. Assistants, investigators, and other staff are appointed by the public defender and serve at the pleasure of the public defender. Average and minimum compensation of assistants shall be as provided in the biennial Current Operations Appropriations Act. The actual salaries of assistants shall be set by the public defender in charge of the office, subject to approval by the Commission. The Commission shall fix the compensation of investigators. Assistants and investigators shall perform such duties as may be assigned by the public defender.

(g) In lieu of merit and other increment raises paid to regular State employees, an assistant public defender shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. "Service" means service as a public defender, appellate defender, assistant public or appellate defender, assistant district attorney, justice or judge of the General Court of Justice, or clerk of superior court.

(h) The term of office of public defender appointed under this section is four years. A public defender or assistant public defender may be suspended or removed from office, and reinstated, for the same causes and under the same procedures as are applicable to removal of a district attorney. (2000-144, s. 1.)

Editor's Note. — For effective date and applicability, see the editor's note at § 7A-498.

Session Laws 2000-144, s. 48, provides that persons holding the position of public or appellate defender on the date the act becomes law are entitled to serve the remainder of their terms.

§ 7A-498.8. (Effective July 1, 2001) Appellate Defender.

(a) The appellate defender shall be appointed by the Commission on Indigent Defense Services for a term of four years. A vacancy in the office of appellate defender shall be filled by appointment of the Commission on Indigent Defense Services for the unexpired term. The appellate defender may be suspended or removed from office for cause by two-thirds vote of all the members of the Commission on Indigent Defense Services. The Commission shall provide the appellate defender with timely written notice of the alleged causes and an opportunity for hearing before the Commission prior to taking any final action to remove or suspend the appellate defender, and the appellate defender shall be given written notice of the Commission's decision. The appellate defender may obtain judicial review of suspension or removal by the Commission by filing a petition within 30 days of receiving notice of the decision with the Superior Court of Wake County. Review of the Commission's decision shall be heard on the record and not as a de novo review or trial de novo. The Commission shall adopt rules implementing this section.

(b) The appellate defender shall perform such duties as may be directed by the Office of Indigent Defense Services, including:

(1) Representing indigent persons subsequent to conviction in trial courts. The Office of Indigent Defense Services may, following consultation with the appellate defender and consistent with the resources available to the appellate defender to ensure quality criminal defense services by the appellate defender's office, assign appeals, or authorize the appellate defender to assign appeals, to a local public defender's office or to private assigned counsel.

(2) Maintaining a clearinghouse of materials and a repository of briefs prepared by the appellate defender to be made available to private counsel representing indigents in criminal cases.

(3) Providing continuing legal education training to assistant appellate defenders and to private counsel representing indigents in criminal cases, including capital cases, as resources are available.

(4) Providing consulting services to attorneys representing defendants in capital cases.

(5) Recruiting qualified members of the private bar who are willing to provide representation in State and federal death penalty postconviction proceedings.

(6) In the appellate defender's discretion, serving as counsel of record for indigent defendants in capital cases in State court.

(7) Undertaking direct representation and consultation in capital cases pending in federal court only to the extent that such work is fully federally funded.

(c) The appellate defender shall appoint assistants and staff, not to exceed the number authorized by the Office of Indigent Defense Services. The assistants and staff shall serve at the pleasure of the appellate defender.

(d) Funds to operate the office of appellate defender, including office space, office equipment, supplies, postage, telephone, library, staff salaries, training,

and travel, shall be provided by the Office of Indigent Defense Services from funds authorized by law. Salaries shall be set by the Office of Indigent Defense Services. (2000-144, s. 1.)

Editor's Note. — For effective date and applicability, see the editor's note at § 7A-498.

Session Laws 2000-144, s. 48, provides that persons holding the position of public or appellate defender on the date the act becomes law are entitled to serve the remainder of their terms.

§ 7A-499: Reserved for future codification purposes.

SUBCHAPTER XII. ADMINISTRATIVE HEARINGS.

ARTICLE 60.

Office of Administrative Hearings.

§ 7A-750. Creation; status; purpose.

There is created an Office of Administrative Hearings. The Office of Administrative Hearings is an independent, quasi-judicial agency under Article III, Sec. 11 of the Constitution and, in accordance with Article IV, Sec. 3 of the Constitution, has such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which it is created. The Office of Administrative Hearings is established to ensure that administrative decisions are made in a fair and impartial manner to protect the due process rights of citizens who challenge administrative action and to provide a source of independent administrative law judges to conduct administrative hearings in contested cases in accordance with Chapter 150B of the General Statutes and thereby prevent the commingling of legislative, executive, and judicial functions in the administrative process. It shall also maintain dockets and records of contested cases and shall codify and publish all administrative rules. (1985, c. 746, s. 2; 1991, c. 103, s. 1; 2000-190, s. 2.)

Effect of Amendments. — Session Laws 2000-190, s. 2, effective January 1, 2001, and applicable to contested cases commenced on or after that date, inserted "ensure that administrative ... action and to" and substituted "administrative law judges to conduct ... General Statutes and thereby" for "hearing officers to preside in administrative cases and thereby."

§ 7A-751. Agency head; powers and duties; salaries of Chief Administrative Law Judge and other administrative law judges.

(a) The head of the Office of Administrative Hearings is the Chief Administrative Law Judge, who shall serve as Director of the Office. The Chief Administrative Law Judge has the powers and duties conferred on that position by this Chapter and the Constitution and laws of this State and may adopt rules to implement the conferred powers and duties.

The salary of the Chief Administrative Law Judge shall be the same as that fixed from time to time for district court judges. The salary of a Senior Administrative Law Judge shall be ninety-five percent (95%) of the salary of the Chief Administrative Law Judge.

In lieu of merit and other increment raises, the Chief Administrative Law Judge and any Senior Administrative Law Judge shall receive longevity pay on

the same basis as is provided to employees of the State who are subject to the State Personnel Act.

(b) The salary of other administrative law judges shall be ninety percent (90%) of the salary of the Chief Administrative Law Judge.

In lieu of merit and other increment raises, an administrative law judge shall receive longevity pay on the same basis as is provided to employees who are subject to the State Personnel Act. (1985, c. 746, s. 2; 1987, c. 774, s. 1; c. 827, s. 1; 1987 (Reg. Sess., 1988), c. 1100, s. 16(b); c. 1111, s. 14(b); 1989, c. 500, s. 45; 1991, c. 103, s. 1; 1997-34, s. 11; 1997-443, s. 33.8; 2000-140, s. 38.)

Effect of Amendments. — Session Laws 2000-140, s. 38, effective July 21, 2000, in subsection (a), added the last sentence in the second paragraph and inserted "and any Senior Administrative Law Judge" in the third paragraph.

§ 7A-754. Qualifications; standards of conduct; removal.

Only persons duly authorized to practice law in the General Court of Justice shall be eligible for appointment as the Director and chief administrative law judge or as an administrative law judge in the Office of Administrative Hearings. The Chief Administrative Law Judge and the administrative law judges shall comply with the Model Code of Judicial Conduct for State Administrative Law Judges, as adopted by the National Conference of Administrative Law Judges, Judicial Division, American Bar Association, (revised August 1998), as amended from time to time, except that the provisions of this section shall control as to the private practice of law in lieu of Canon 4G, and G.S. 126-13 shall control as to political activity in lieu of Canon 5. Failure to comply with the applicable provisions of the Model Code may constitute just cause for disciplinary action under Chapter 126 of the General Statutes and grounds for removal from office. Neither the chief administrative law judge nor any administrative law judge may engage in the private practice of law as defined in G.S. 84-2.1 while in office; violation of this provision shall constitute just cause for disciplinary action under Chapter 126 of the General Statutes and shall be grounds for removal from office. Each administrative law judge shall take the oaths required by Chapter 11 of the General Statutes. An administrative law judge may be removed from office by the Director of the Office of Administrative Hearings for just cause, as that term is used in G.S. 126-35 and this section. (1985, c. 746, s. 2; 1985 (Reg. Sess., 1986), c. 1022, s. 6(1), 6(3); 1991, c. 103, s. 1; 2000-190, s. 3.)

Effect of Amendments. — Session Laws 2000-190, s. 3, effective January 1, 2001, and applicable to contested cases commenced on or after that date, added the second and third sentences, inserted "constitute just cause for disciplinary action under Chapter 126 of the General Statutes and shall," added "from office" and added "and this section."

§ 7A-759. Role as deferral agency.

CASE NOTES

Construction with Federal Provision. — Where state law protects persons against the kind of discrimination alleged under federal law, complainants are required to resort to state and local remedies before they may proceed to the EEOC, and then to federal court. Metts v. North Carolina Dep't of Revenue, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 2567 (E.D.N.C. January 9, 2000).

SUBCHAPTER XIII. SENTENCING SERVICES PROGRAM.

Editor's Note. — Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. — Session Laws 2000-67, s. 15.9(a), effective July 1, 2000, substituted "Sentencing Services Program" for "Community Penalties Program" as the heading of subchapter XIII.

ARTICLE 61.

Sentencing Services Program.

§ 7A-771. Definitions.

As used in this Article:

(1) Recodified as subdivision (3b) by Session Laws 1999-306, s. 1, effective January 1, 2000.

(2) Recodified as subdivision (3a) by Session Laws 1999-306, s. 1, effective January 1, 2000.

(2a) "Director" means the Director of the Administrative Office of the Courts.

(3) Repealed by Session Laws 1999-306, s. 1, effective January 1, 2000.

(3a) "Sentencing plan" means a plan presented in writing to the sentencing judge which provides a detailed assessment and description of the offender's background, including available information about past criminal activity, a matching of the specific offender's needs with available resources, and, if appropriate, the program's recommendations regarding an intermediate sentence.

(3b) "Sentencing services program" means an agency or State-run office within the superior court district which shall (i) prepare sentencing plans; (ii) arrange or contract with public and private agencies for necessary services for offenders; and (iii) assist offenders in initially obtaining services ordered as part of a sentence entered pursuant to a sentencing plan, if the assistance is not available otherwise.

(4) Repealed by Session Laws 1991, c. 566, s. 4.

(4a) "Superior court district" means a superior court district established by G.S. 7A-41 for those districts consisting of one or more entire counties, and otherwise means the applicable set of districts as that term is defined in G.S. 7A-41.1.

(5) Repealed by Session Laws 1999-306, s. 1, effective January 1, 2000. (1983, c. 909, s. 1; 1989, c. 770, s. 58; 1991, c. 566, ss. 2, 4; 1993 (Reg. Sess., 1994), c. 767, s. 14; 1995, c. 324, s. 21.9(c); 1997-57, s. 5; 1999-306, s. 1.)

Editor's Note. — This section is set out above to correct a typographical error.

§ 7A-773.1. Who may request plans; disposition of plans; contents of plans.

(a) A judge presiding over a case in which the offender meets the criteria set forth in G.S. 7A-773(1) may request, at any time prior to the imposition of sentence, that the sentencing services program provide a sentencing plan. The court may also request, at any time prior to the imposition of sentence, that the program provide a sentencing plan in misdemeanor cases in which the class of

offense is Class A1 or Class 1 and the prior conviction level is Level III, if the court determines that the preparation of such a plan is in the interest of justice. In addition, in cases in which the offender meets the criteria set forth in G.S. 7A-773, the defendant or a prosecutor, at any time before the court has accepted a guilty plea or received a guilty verdict, may request that the program provide a plan. However, prior to an adjudication of guilt, a defendant may decline to participate in the preparation of a plan within a reasonable time after the request is made. In that case, no plan shall be prepared or presented to the court by the sentencing services program prior to an adjudication of guilt. A defendant's decision not to participate shall be made in writing and filed with the court. The comprehensive sentencing services program plan prepared pursuant to G.S. 7A-774 shall define what constitutes a reasonable time within the meaning of this subsection.

(b) Any sentencing plan prepared by a sentencing services program shall be presented to the court, the defendant, and the State in an appropriate manner.

(c) Sentencing plans prepared by sentencing services programs may include recommendations for use of any treatment or correctional resources available, unless the sentencing court instructs otherwise. Sentencing plans that identify an offender's needs for education, treatment, control, or other services shall, to the extent feasible, also identify resources to meet those needs. Plans may report that no intermediate punishment is appropriate under the circumstances of the case.

(d) To the extent allowed by law, the sentencing services program shall develop procedures to ensure that the program staff may work with offenders before a plea is entered. To that end, information obtained in the course of preparing a sentencing plan may not be used by the State for any purpose at trial and is subject to the provisions of G.S. 15A-1333. (1999-306, s. 1; 2000-67, s. 15.9(b).)

Editor's Note. —

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. — Session Laws 2000-67, s. 15.9(b), effective July 1, 2000, in subsection (d), substituted "at trial and is subject to the provisions of G.S. 15A-1333" for "of establishing guilt," and made minor wording changes.

Chapter 7B.

Juvenile Code.

SUBCHAPTER I. ABUSE, NEGLECT, DEPENDENCY.

Article 4.

Venue; Petitions.

Sec.
7B-406. Issuance of summons.

Article 6.

Basic Rights.

7B-600. Appointment of guardian.
7B-602. (Effective July 1, 2001) Parent's right to counsel.
7B-603. (Effective July 1, 2001) Payment of court-appointed attorney or guardian ad litem.

Article 9.

Dispositions.

7B-906. Review of custody order.

Article 10.

Modification and Enforcement of Dispositional Orders; Appeals.

7B-1000. Authority to modify or vacate.

Article 11.

Termination of Parental Rights.

7B-1101. (Effective until July 1, 2001) Jurisdiction.
7B-1101. (Effective July 1, 2001) Jurisdiction.
7B-1102. Pending child abuse, neglect, or dependency proceedings.
7B-1103. Who may file a petition or motion.
7B-1104. Petition or motion.
7B-1106. Issuance of summons.
7B-1106.1. Notice in pending child abuse, neglect, or dependency cases.
7B-1107. Failure of parent to answer or respond.
7B-1108. Answer or response of parent.
7B-1109. Adjudicatory hearing on termination.
7B-1110. Disposition.
7B-1111. Grounds for terminating parental rights.
7B-1112. Effects of termination order.

SUBCHAPTER II. UNDISCIPLINED AND DELINQUENT JUVENILES.

Article 15.

Purposes; Definitions.

7B-1501. Definitions.

Article 16.

Jurisdiction.

Sec.
7B-1601. Jurisdiction over delinquent juveniles.
7B-1602. Extended jurisdiction over a delinquent juvenile under certain circumstances.

Article 17.

Screening of Delinquency and Undisciplined Complaints.

7B-1700. Intake services.
7B-1702. Evaluation.

Article 18.

Venue; Petition; Summons.

7B-1808. First appearance for felony cases.

Article 19.

Temporary Custody; Secure and Nonsecure Custody; Custody Hearings.

7B-1900. Taking a juvenile into temporary custody.
7B-1903. Criteria for secure or nonsecure custody.
7B-1906. Secure or nonsecure custody hearings.

Article 20.

Basic Rights.

7B-2000. Juvenile's right to counsel; presumption of indigence.
7B-2002. (Effective July 1, 2001) Payment of court-appointed attorney.

Article 21.

Law Enforcement Procedures in Delinquency Proceedings.

7B-2102. Fingerprinting and photographing juveniles.

Article 24.

Hearing Procedures.

7B-2412. Legal effect of adjudication of delinquency.

Article 25.

Dispositions.

7B-2506. Dispositional alternatives for delinquent juveniles.

SUBCHAPTER I. ABUSE, NEGLECT, DEPENDENCY.

ARTICLE 1.

Purposes; Definitions.

§ 7B-100. Purpose.

Editor's Note. — Articles 1-11 of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and dependency reports received, petitions filed, and reviews commenced on or after that date.

CASE NOTES

The county was not entitled to appeal an order to pay for the mental health evaluation of a juvenile although it had to be given notice and the opportunity to be heard at the juvenile hearing. In re Voight, — N.C. App. —, 530 S.E.2d 76, 2000 N.C. App. LEXIS 624 (2000).

Cited in In re Wright, — N.C. App. —, 527 S.E.2d 70, 2000 N.C. App. LEXIS 265 (2000); Dobson v. Harris, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 433 (2000).

§ 7B-101. Definitions.

CASE NOTES

Evidence supported a finding of neglect under former § 7A-517(21) where the trial court found that the respondent parents intended to live with their new infant in the home of the maternal grandparents where their previous child died; where the child's father had been convicted of causing the infant's death; where the mother had been advised regarding the cause of this non-accidental death but continued to support the father's version of events; where the parents had neither expressed nor exhibited any concern for the future safety of their newborn in their home; and where the father "extended most of the care for the juvenile" during the visits of the parents with the child. In re McLean, 135 N.C. App. 387, 521 S.E.2d 121 (1999).

Evidence Insufficient to Show Neglect Under Former § 7A-517. — The trial court correctly held that there was insufficient evidence to support a finding that the siblings of a child who died under mysterious circumstances were abused or neglected. Norris v. Zambito, 135 N.C. App. 288, 520 S.E.2d 113 (1999).

Evidence Held Sufficient to Show Abuse. — The trial court's findings of fact regarding child's status as an abused juvenile were supported by clear and convincing evidence where the child testified that her father had shown her a picture of a woman wearing a see-through dress, the child's friend drew a picture in court of what she had seen, i.e. the father's anatomy, a social worker testified that the child had told her that her father had "asked her to touch his penis," and a doctor testified that the child had told her that her father had asked her to look at a "dirty book." In re Cogdill, — N.C. App. —, 528 S.E.2d 600, 2000 N.C. App. LEXIS 425 (2000).

Parental Rights Properly Terminated. — Even if there is no evidence of neglect at the time of the termination proceeding, parental rights may still be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to her parent or parents. In re Reyes, — N.C. App. —, 526 S.E.2d 499, 2000 N.C. App. LEXIS 160 (2000).

Absence of parent. — The respondent/mother's failure to be present at the adjudicatory hearing did not relieve the trial court of its duty to find, based on competent evidence, that the allegations of neglect contained in the petition were supported by clear and convincing evidence; nor was the father's purported consent sufficient to support a finding of neglect. Thrift v. Buncombe County Dep't of Social Servs., — N.C. App. —, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000).

Applied in In re Small, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 631 (June 20, 2000).

Cited in In re Pegram, — N.C. App. —, 527 S.E.2d 737, 2000 N.C. App. LEXIS 322 (April 4, 2000); Dobson v. Harris, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 433 (2000).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The citation to the Opinions of Attorney General annotated under this section in the main volume should be to 48 N.C.A.G. 35 (1978).*

Article 2.

Jurisdiction.

§ 7B-200. Jurisdiction.

Editor's Note. — Articles 1-11, of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and dependency reports received, petitions filed, and reviews commenced on or after that date.

Article 3.

Screening of Abuse and Neglect Complaints.

§ 7B-300. Protective services.

Editor's Note. — Articles 1-11, of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and dependency reports received, petitions filed, and reviews commenced on or after that date.

§ 7B-301. Duty to report abuse, neglect, dependency, or death due to maltreatment.

CASE NOTES

Statutory Good Faith Presumption Shields Reporter from Slander Per Se Action. — Summary judgment for the defendant on the issue of slander per se was appropriate where the plaintiff's description of retaliatory motives for defendant's report failed to rebut the statutory presumption created in favor of the defendant by the child abuse reporting provisions of this section and § 7B-309 which together provide immunity not merely conditional upon proof of good faith, but a "good faith" immunity which endows the reporter with the mandatory presumption that he or she acted in good faith. Dobson v. Harris, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 433 (2000).

§ 7B-309. Immunity of persons reporting and cooperating in an investigation.

CASE NOTES

Statutory Good Faith Presumption Shields Reporter from Slander Per Se Action. — Summary judgment for the defendant on the issue of slander per se was appropriate where the plaintiff's description of retaliatory motives for defendant's report failed to rebut the statutory presumption created in favor of the defendant by the child abuse reporting provisions of § 7B-301 and this section which together provide immunity not merely conditional upon proof of good faith, but a "good faith" immunity which endows the reporter with the mandatory presumption that he or she acted in good faith. Dobson v. Harris, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 433 (2000).

Malicious Actions. — Where plaintiff alleged that defendant made false accusations of child abuse and neglect and injury and forecast evidence that the defendant knew the report to be false, a genuine issue of material fact existed — particularly as to whether the defendant acted with malice and therefore lost the immunity accorded by former 7A-550 — to withstand summary judgment in a slander per se cause of action. Dobson v. Harris, 134 N.C. App. 573, 521 S.E.2d 710 (1999), cert. denied, 351 N.C. 186, — S.E.2d — (1999).

Article 4.

Venue; Petitions.

§ 7B-400. Venue; pleading.

Editor's Note. — Articles 1-11, of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and dependency reports received, petitions filed, and reviews commenced on or after that date.

§ 7B-402. Petition.

CASE NOTES

Proper Allegation of First Degree Murder. — Petition alleging that "juvenile was delinquent as defined by former § 7A-517(12) [see now § 7B-1501] in that in Durham County and on or about December 30, 1997, the above named juvenile unlawfully, willfully and feloniously did of malice aforethought kill and murder victim" properly alleged first degree murder under § 14-17, satisfied former § 7A-560 [see now this section] requirements, and made transfer of case to Superior Court mandatory under former § 7A-608 [see now § 7B-2200]. In re K.R.B., 134 N.C. App. 328, 517 S.E.2d 200 (1999), cert. denied, 351 N.C. 187, — S.E.2d — (1999).

§ 7B-406. Issuance of summons.

(a) Immediately after a petition has been filed alleging that a juvenile is abused, neglected, or dependent, the clerk shall issue a summons to the parent, guardian, custodian, or caretaker requiring them to appear for a hearing at the time and place stated in the summons. A copy of the petition shall be attached to each summons.

(b) A summons shall be on a printed form supplied by the Administrative Office of the Courts and shall include:

(1) Notice of the nature of the proceeding;

(2) Notice of any right to counsel and information about how to seek the appointment of counsel prior to a hearing;

(3) Notice that, if the court determines at the hearing that the allegations of the petition are true, the court will conduct a dispositional hearing to consider the needs of the juvenile and enter an order designed to meet those needs and the objectives of the State; and

(4) Notice that the dispositional order or a subsequent order:

a. May remove the juvenile from the custody of the parent, guardian, or custodian.

b. May require that the juvenile receive medical, psychiatric, psychological, or other treatment and that the parent participate in the treatment.

c. May require the parent to undergo psychiatric, psychological, or other treatment or counseling for the purpose of remedying the behaviors or conditions that are alleged in the petition or that contributed to the removal of the juvenile from the custody of that person.

d. May order the parent to pay for treatment that is ordered for the juvenile or the parent.

e. May, upon proper notice and hearing and a finding based on the criteria set out in G.S. 7B-1111, terminate the parental rights of the respondent parent.

(c) The summons shall advise the parent that upon service, jurisdiction over that person is obtained and that failure to comply with any order of the court pursuant to G.S. 7B-904 may cause the court to issue a show cause order for contempt.

(d) A summons shall be directed to the person summoned to appear and shall be delivered to any person authorized to serve process. (1979, c. 815, s. 1; 1987 (Reg. Sess., 1988), c. 1090, s. 2; 1995, c. 328, s. 1; 1998-202, s. 6; 1999-456, s. 60; 2000-183, s. 1.)

Effect of Amendments. — Session Laws 2000-183, s. 1, effective October 1, 2000, added subdivision (b)(4)e.

Article 5.

Temporary Custody; Nonsecure Custody; Custody Hearings.

§ 7B-500. Taking a juvenile into temporary custody.

Editor's Note. — Articles 1-11, of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and dependency reports received, petitions filed, and reviews commenced on or after that date.

Article 6.

Basic Rights.

§ 7B-600. Appointment of guardian.

(a) In any case when no parent appears in a hearing with the juvenile or when the court finds it would be in the best interests of the juvenile, the court may appoint a guardian of the person for the juvenile. The guardian shall operate under the supervision of the court with or without bond and shall file only such reports as the court shall require. The guardian shall have the care, custody, and control of the juvenile or may arrange a suitable placement for the juvenile and may represent the juvenile in legal actions before any court. The guardian may consent to certain actions on the part of the juvenile in place of the parent including (i) marriage, (ii) enlisting in the armed forces, and (iii) enrollment in school. The guardian may also consent to any necessary remedial, psychological, medical, or surgical treatment for the juvenile. The authority of the guardian shall continue until the guardianship is terminated by court order, until the juvenile is emancipated pursuant to Article 35 of Subchapter IV of this Chapter, or until the juvenile reaches the age of majority.

(b) In any case where the court has determined that the appointment of a relative or other suitable person as guardian of the person for a juvenile is in the best interest of the juvenile and has also made findings in accordance with G.S. 7B-907 that guardianship is the permanent plan for the juvenile, the court may not terminate the guardianship or order that the juvenile be reintegrated into a parent's home unless the court finds that the relationship between the guardian and the juvenile is no longer in the juvenile's best interest, that the guardian is unfit, that the guardian has neglected a guardian's duties, or that the guardian is unwilling or unable to continue assuming a guardian's duties. If a party files a motion or petition under G.S. 7B-906 or G.S. 7B-1000, the court may, prior to conducting a review hearing, do one or more of the following:

(1) Order the county department of social services to conduct an investigation and file a written report of the investigation regarding the performance of the guardian of the person of the juvenile and give testimony concerning its investigation.

(2) Utilize the community resources in behavioral sciences and other professions in the investigation and study of the guardian.

(3) Ensure that a guardian ad litem has been appointed for the juvenile in accordance with G.S. 7B-601 and has been notified of the pending motion or petition.

(4) Take any other action necessary in order to make a determination in a particular case. (1979, c. 815, s. 1; 1997-390, s. 7; 1998-202, s. 6; 1999-456, s. 60; 2000-124, s. 1.)

Editor's Note. — Articles 1-11, of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and dependency reports received, petitions filed, and reviews commenced on or after that date.

Effect of Amendments. — Session Laws 2000-124, s. 1, effective October 1, 2000, designated the existing paragraph as subsection (a) and added subsection (b).

§ 7B-602. (Effective July 1, 2001) Parent's right to counsel.

In cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right. (1979, c. 815, s. 1; 1981, c. 469, s. 14; 1998-202, s. 6; 1999-456, s. 60; 2000-144, s. 16.)

For this section as in effect until July 1, 2001, see the main volume.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, § 7A-498 et seq.

Effect of Amendments. — Session Laws 2000-144, s. 16, effective July 1, 2001, deleted the former last sentence, which read "In no case may the court appoint a county attorney, prosecutor, or public defender."

§ 7B-603. (Effective July 1, 2001) Payment of court-appointed attorney or guardian ad litem.

(a) An attorney or guardian ad litem appointed pursuant to G.S. 7B-601 shall be paid a reasonable fee fixed by the court or by direct engagement for specialized guardian ad litem services through the Administrative Office of the Courts.

(b) An attorney appointed pursuant to G.S. 7B-602 or pursuant to any other provision of the Juvenile Code for which the Office of Indigent Defense Services is responsible for providing counsel shall be paid a reasonable fee in accordance with rules adopted by the Office of Indigent Defense Services.

(c) The court may require payment of the attorney or guardian ad litem fee from a person other than the juvenile as provided in G.S. 7A-450.1, 7A-450.2, and 7A-450.3. In no event shall the parent or guardian be required to pay the fees for a court-appointed attorney or guardian ad litem in an abuse, neglect, or dependency proceeding unless the juvenile has been adjudicated to be abused, neglected, or dependent, or, in a proceeding to terminate parental rights, unless the parent's rights have been terminated. A person who does not comply with the court's order of payment may be punished for contempt as provided in G.S. 5A-21. (1979, c. 815, s. 1; 1983, c. 726, ss. 2, 3; 1987 (Reg. Sess., 1988), c. 1090, s. 6; 1991, c. 575, s. 1; 1998-202, s. 6; 1999-456, s. 60; 2000-144, s. 17.)

For this section as in effect until July 1, 2001, see the main volume.

Editor's Note. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, § 7A-498 et seq.

Effect of Amendments. — Session Laws 2000-144, s. 17, effective July 1, 2001, designated the existing paragraph as present subsections (a) and (c); added subsection (b); and in subsection (a), deleted "or G.S. 7B-602 pursuant to any other provision of the Juvenile Code" following "G.S. 7B-601" and deleted "in the same manner as fees for attorneys appointed in cases of indigency" following "fixed by the court."

Article 7.

Discovery.

§ 7B-700. Regulation of discovery; protective orders.

Editor's Note. — Articles 1-11, of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and dependency reports received, petitions filed, and reviews commenced on or after that date.

Article 8.

Hearing Procedures.

§ 7B-800. Amendment of petition.

Editor's Note. — Articles 1-11, of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and dependency reports received, petitions filed, and reviews commenced on or after that date.

§ 7B-802. Conduct of hearing.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Absence of parent. — The respondent/mother's failure to be present at the adjudicatory hearing did not relieve the trial court of its duty to find, based on competent evidence, that the allegations of neglect contained in the petition were supported by clear and convincing evidence; nor was the father's purported consent sufficient to support a finding of neglect. Thrift v. Buncombe County Dep't of Social Servs., — N.C. App. —, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000).

§ 7B-804. Rules of evidence.

CASE NOTES

Absence of parent. — The respondent/mother's failure to be present at the adjudicatory hearing did not relieve the trial court of its duty to find, based on competent evidence, that the allegations of neglect contained in the petition were supported by clear and convincing evidence; nor was the father's purported consent sufficient to support a finding of neglect. Thrift v. Buncombe County Dep't of Social Servs., — N.C. App. —, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000).

§ 7B-805. Quantum of proof in adjudicatory hearing.

CASE NOTES

Absence of parent. — The respondent/mother's failure to be present at the adjudicatory hearing did not relieve the trial court of its duty to find, based on competent evidence, that the allegations of neglect contained in the petition were supported by clear and convincing evidence; nor was the father's purported consent sufficient to support a find-

ing of neglect. Thrift v. Buncombe County Dep't of Social Servs., — N.C. App. —, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000).

The evidence before the trial court was sufficient to support its findings of abuse and neglect

The trial court's findings of fact regarding child's status as an abused juvenile were supported by clear and convincing evidence where the child testified that her father had shown her a picture of a woman wearing a see-through dress, the child's friend drew a picture in court of what she had seen, i.e. the father's anatomy, a social worker testified that the child had told her that her father had "asked her to touch his penis," and a doctor testified that the child had told her that her father had asked her to look at a "dirty book." In re Cogdill, — N.C. App. —, 528 S.E.2d 600, 2000 N.C. App. LEXIS 425 (2000).

Evidence supported a finding of neglect under former § 7A-635 where the trial court found that respondent parents intended to live with their new infant in the home of the maternal grandparents where their previous child died; where the child's father had been convicted of causing the infant's death; where the mother had been advised regarding the cause of this non-accidental death but continued to support the father's version of events; where the parents had neither expressed nor exhibited any concern for the future safety of their newborn in their home; and where the father "extended most of the care for the juvenile" during the visits of the parents with the child. In re McLean, 135 N.C. App. 387, 521 S.E.2d 121 (1999).

§ 7B-807. Adjudication.

CASE NOTES

Legislative Intent. — Although § 7B-1109 does not specifically require the trial court to affirmatively state in its order terminating parental rights that the allegations of the petition were proved by clear and convincing evidence, this section does require such a statement, and without such an affirmative statement the appellate court is unable to determine if the proper standard of proof was utilized for its ruling on parental termination. In re Church, — N.C. App. —, 525 S.E.2d 478, 2000 N.C. App. LEXIS 107 (2000).

When construing this section and 7B-1109(f) together to determine legislative intent, like this section, § 7B-1109(f) requires the trial court to affirmatively state in its order the standard of proof utilized in the termination proceeding. In re Church, — N.C. App. —, 525 S.E.2d 478, 2000 N.C. App. LEXIS 107 (2000).

§ 7B-808. Predisposition investigation and report.

CASE NOTES

Court's Order Upheld in Spite of Absence of Required Information. — The court rejected the defendant's contention that the juvenile court erred in making its dispositional order because it had insufficient social, medical, psychiatric, psychological, and educational information regarding the juvenile, under former 7A-639, where the juvenile and his parents refused to participate in any assessments with the court counselor either before or after the adjudicatory hearing. In re Clapp, — N.C. App. —, 526 S.E.2d 689, 2000 N.C. App. LEXIS 252 (2000).

ARTICLE 9.

Dispositions.

§ 7B-900. Purpose.

Editor's Note. — Articles 1-11, of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and dependency reports received, petitions filed, and reviews commenced on or after that date.

CASE NOTES

Restitution Not in Children's Best Interest. — Where there was insufficient evidence before the juvenile court that the juveniles had or could reasonably acquire the means to pay $539.50 each in restitution within twelve months, it was not in their best interest to require such. In re McKoy, — N.C. App. —, 530 S.E.2d 334, 2000 N.C. App. LEXIS 550 (2000).

§ 7B-902. Consent judgment in abuse, neglect, or dependency proceeding.

CASE NOTES

Default. — Just as a default judgment or judgment on the pleadings is inappropriate in a proceeding involving termination of parental rights, it is equally inappropriate in an adjudication of neglect. Thrift v. Buncombe County Dep't of Social Servs., — N.C. App. —, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000).

Absence of parents. — The respondent/mother's failure to be present at the adjudicatory hearing did not relieve the trial court of its duty to find, based on competent evidence, that the allegations of neglect contained in the petition were supported by clear and convincing evidence; nor was the father's purported consent sufficient to support a finding of neglect. Thrift v. Buncombe County Dep't of Social Servs., — N.C. App. —, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000).

§ 7B-904. Authority over parents of juvenile adjudicated as abused, neglected, or dependent.

CASE NOTES

Authority of the Court. — The trial court did not have authority, pursuant to this section, to order respondent to "secure and maintain safe, stable housing and employment" nor to contact a child support enforcement department. This section is the trial court's only source of authority over the parent of a juvenile adjudicated abused or neglected, and the trial court may not order a parent to undergo any course of conduct not provided for in the statute. In re Cogdill, — N.C. App. —, 528 S.E.2d 600, 2000 N.C. App. LEXIS 425 (2000).

The trial court properly ordered respondent to undergo a psychological evaluation and possible treatment where the evidence indicated that she knew that her daughter was being abused by her father and lied about it. In re Cogdill, — N.C. App. —, 528 S.E.2d 600, 2000 N.C. App. LEXIS 425 (2000).

§ 7B-905. Dispositional order.

CASE NOTES

Implication of Separation as Pre-Condition to Reunification Deemed Error. — Although the court was authorized under former § 7A-651(c)(2) to find that efforts to reunite a family would be futile or inconsistent with the juvenile's safety, the court's statements implying that separation of the parents was a pre-condition to the mother having a realistic chance to regain custody were prejudicial error, and the part of the court's order retaining jurisdiction was, therefore, vacated. In re McLean, 135 N.C. App. 387, 521 S.E.2d 121 (1999).

§ 7B-906. Review of custody order.

(a) In any case where custody is removed from a parent, guardian, custodian, or caretaker the court shall conduct a review hearing within 90 days from the date of the dispositional hearing and shall conduct a review hearing within six months thereafter. The director of social services shall make a timely request to the clerk to calendar each review at a session of court scheduled for

the hearing of juvenile matters. The clerk shall give 15 days' notice of the review and its purpose to the parent, the juvenile, if 12 years of age or more, the guardian, any foster parent, relative, or preadoptive parent providing care for the child, the custodian or agency with custody, the guardian ad litem, and any other person or agency the court may specify, indicating the court's impending review. Nothing in this subsection shall be construed to make any foster parent, relative, or preadoptive parent a party to the proceeding solely based on receiving notice and an opportunity to be heard.

(b) Notwithstanding other provisions of this Article, the court may waive the holding of review hearings required by subsection (a) of this section, may require written reports to the court by the agency or person holding custody in lieu of review hearings, or order that review hearings be held less often than every six months, if the court finds by clear, cogent, and convincing evidence that:

(1) The juvenile has resided with a relative or has been in the custody of another suitable person for a period of at least one year;
(2) The placement is stable and continuation of the placement is in the juvenile's best interests;
(3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months;
(4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion; and
(5) The court order has designated the relative or other suitable person as the juvenile's permanent caretaker or guardian of the person.

The court may not waive or refuse to conduct a review hearing if a party files a motion seeking the review. However, if a guardian of the person has been appointed for the juvenile and the court has also made findings in accordance with G.S. 7B-907 that guardianship is the permanent plan for the juvenile, the court shall proceed in accordance with G.S. 7B-600(b).

(c) At every review hearing, the court shall consider information from the parent, the juvenile, the guardian, any foster parent, relative, or preadoptive parent providing care for the child, the custodian or agency with custody, the guardian ad litem, and any other person or agency which will aid in its review.

In each case the court shall consider the following criteria and make written findings regarding those that are relevant:

(1) Services which have been offered to reunite the family, or whether efforts to reunite the family clearly would be futile or inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time.
(2) Where the juvenile's return home is unlikely, the efforts which have been made to evaluate or plan for other methods of care.
(3) Goals of the foster care placement and the appropriateness of the foster care plan.
(4) A new foster care plan, if continuation of care is sought, that addresses the role the current foster parent will play in the planning for the juvenile.
(5) Reports on the placements the juvenile has had and any services offered to the juvenile and the parent, guardian, custodian, or caretaker.
(6) An appropriate visitation plan.
(7) If the juvenile is 16 or 17 years of age, a report on an independent living assessment of the juvenile and, if appropriate, an independent living plan developed for the juvenile.
(8) When and if termination of parental rights should be considered.
(9) Any other criteria the court deems necessary.

(d) The court, after making findings of fact, may appoint a guardian of the person for the juvenile pursuant to G.S. 7B-600 or may make any disposition authorized by G.S. 7B-903, including the authority to place the juvenile in the custody of either parent or any relative found by the court to be suitable and found by the court to be in the best interests of the juvenile. The court may enter an order continuing the placement under review or providing for a different placement as is deemed to be in the best interests of the juvenile. If at any time custody is restored to a parent, guardian, custodian, or caretaker the court shall be relieved of the duty to conduct periodic judicial reviews of the placement.

(e) Reserved.

(f) The provisions of G.S. 7B-507 shall apply to any order entered under this section. (1979, c. 815, s. 1; 1987, c. 810; 1987 (Reg. Sess., 1988), c. 1090, s. 11; 1989, c. 152, s. 1; 1997-390, s. 9; 1998-202, s. 6; 1998-229, ss. 8, 25; 1999-456, s. 60; 2000-124, s. 2.)

Effect of Amendments. — Session Laws 2000-124, s. 2, effective October 1, 2000, added the second sentence in the second paragrah of subsection (b).

Article 10.

Modification and Enforcement of Dispositional Orders; Appeals.

§ 7B-1000. Authority to modify or vacate.

(a) Upon motion in the cause or petition, and after notice, the court may conduct a review hearing to determine whether the order of the court is in the best interests of the juvenile, and the court may modify or vacate the order in light of changes in circumstances or the needs of the juvenile. Notwithstanding the provision of this subsection, if a guardian of the person has been appointed for the juvenile and the court has also made findings in accordance with G.S. 7B-907 that guardianship is the permanent plan for the juvenile, the court shall proceed in accordance with G.S. 7B-600(b).

(b) In any case where the court finds the juvenile to be abused, neglected, or dependent, the jurisdiction of the court to modify any order or disposition made in the case shall continue during the minority of the juvenile, until terminated by order of the court, or until the juvenile is otherwise emancipated. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-456, s. 60; 2000-124, s. 3.)

Editor's Note. — Articles 1-11, of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and dependency reports received, petitions filed, and reviews commenced on or after that date.

Effect of Amendments. — Session Laws 2000-124, s. 3, effective October 1, 2000, added the last sentence in subsection (a).

Article 11.

Termination of Parental Rights.

§ 7B-1100. Legislative intent; construction of Article.

Editor's Note. — Articles 1-11, of Subchapter I of Chapter 7B, as enacted by Session Laws 1998-202, s. 6, and amended by Session Laws 1998-229, ss. 18 through 28, and Session Laws 1999-456, s. 60, are effective July 1, 1999, and applicable to abuse, neglect, and

dependency reports received, petitions filed, and reviews commenced on or after that date.

§ 7B-1101. (Effective until July 1, 2001) 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 Administrative Office of the Courts. 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

(2) Where the parent is under the age of 18 years.

The fees of the guardian ad litem shall be borne by the Administrative Office of the Courts 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. (1977, c. 879, s. 8; 1979, c. 110, s. 7; 1979, 2nd Sess., c. 1206, s. 1; 1981, c. 996, s. 1; 1983, c. 89, s. 1; 1995, c. 457, s. 3; 1998-202, s. 6; 1999-223, s. 6; 1999-456, s. 60; 2000-183, s. 2.)

Section Set Out Twice. — The section above is effective until July 1, 2001. For the section as amended July 1, 2001, see the following section, also numbered § 7B-1101.

Editor's Note. — Session Laws 2000-183, s. 14, directs the Legislative Research Commission to study issues related to expungement of information from the central registry of abuse, neglect, and dependency cases or from judicial records of juvenile cases that alleged abuse, neglect, or dependency. In particular, this study should consider whether expungement (i) from the central registry should be available when a local department of social services does not substantiate a report of abuse, neglect, or dependency or (ii) from the juvenile court record in a case where alleged abuse, neglect, or dependency is not proven by clear and convincing evidence. The Commission shall make recommendations to the 2001 Session of the General Assembly.

Effect of Amendments. —

Session Laws 2000-183, s. 2, effective October 1, 2000, inserted "or motion" twice in the first sentence of the first paragraph.

§ 7B-1101. (Effective July 1, 2001) 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

§ 7B-1101 is set out twice. See notes.

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

(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. (1977, c. 879, s. 8; 1979, c. 110, s. 7; 1979, 2nd Sess., c. 1206, s. 1; 1981, c. 996, s. 1; 1983, c. 89, s. 1; 1995, c. 457, s. 3; 1998-202, s. 6; 1999-223, s. 6; 1999-456, s. 60; 2000-183, s. 2; 2000-144, s. 18.)

Section Set Out Twice. — The section above is effective July 1, 2001. For the section as in effect until July 1, 2001, see the preceding section, also numbered § 7B-1101.

Editor's Note. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, § 7A-498 et seq.

Effect of Amendments. — Session Laws 2000-144, s. 18, effective July 1, 2001, substituted "Office of Indigent Services" for "Administrative Office of the Courts" twice.

§ 7B-1102. Pending child abuse, neglect, or dependency proceedings.

(a) When the district court is exercising jurisdiction over a juvenile and the juvenile's parent in an abuse, neglect, or dependency proceeding, a person or agency specified in G.S. 7B-1103(a) may file in that proceeding a motion for termination of the parent's rights in relation to the juvenile.

(b) A motion pursuant to subsection (a) of this section and the notice required by G.S. 7B-1106.1 shall be served in accordance with G.S. 1A-1, Rule 5(b), except:

(1) Service must be in accordance with G.S. 1A-1, Rule 4, if one of the following applies:

a. The person or agency to be served was not served originally with summons.

b. The person or agency to be served was served originally by publication that did not include notice substantially in conformity with the notice required by G.S. 7B-406(b)(4)e.

c. Two years has elapsed since the date of the original action.

(2) In any case, the court may order that service of the motion and notice be made pursuant to G.S. 1A-1, Rule 4.

For purposes of this section, the parent of the juvenile shall not be deemed to be under disability even though the parent is a minor.

(c) When a petition for termination of parental rights is filed in the same district in which there is pending an abuse, neglect, or dependency proceeding involving the same juvenile, the court on its own motion or motion of a party may consolidate the action pursuant to G.S. 1A-1, Rule 42. (1998-229, ss. 9.1, 26.1; 1999-456, s. 60; 2000-183, s. 3.)

Effect of Amendments. — Session Laws 2000-183, s. 3, effective October 1, 2000, substituted "proceedings" for "hearings" in the catchline and rewrote the section.

§ 7B-1103. Who may file a petition or motion.

(a) A petition or motion to terminate the parental rights of either or both parents to his, her, or their minor juvenile may only be filed by one or more of the following:

(1) Either parent seeking termination of the right of the other parent.

(2) Any person who has been judicially appointed as the guardian of the person of the juvenile.

(3) Any county department of social services, consolidated county human services agency, or licensed child-placing agency to whom custody of the juvenile has been given by a court of competent jurisdiction.

(4) Any county department of social services, consolidated county human services agency, or licensed child-placing agency to which the juvenile has been surrendered for adoption by one of the parents or by the guardian of the person of the juvenile, pursuant to G.S. 48-3-701.

(5) Any person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion.

(6) Any guardian ad litem appointed to represent the minor juvenile pursuant to G.S. 7B-601 who has not been relieved of this responsibility.

(7) Any person who has filed a petition for adoption pursuant to Chapter 48 of the General Statutes.

(b) Any person or agency that may file a petition under subsection (a) of this section may intervene in a pending abuse, neglect, or dependency proceeding for the purpose of filing a motion to terminate parental rights. (1977, c. 879, s. 8; 1983, c. 870, s. 1; 1985, c. 758, s. 1; 1987, c. 371, s. 2; 1995 (Reg. Sess., 1996), c. 690, s. 4; 1998-202, s. 6; 1998-229, s. 9.1; 1999-456, s. 60; 2000-183, s. 4.)

Effect of Amendments. — Session Laws 2000-183, s. 4, effective October 1, 2000, substituted "file a petition or motion" for "petition" in the catchline; designated the former first undesignated paragraph as present subsection (a) and added subsection (b); in subsection (a), inserted "or motion" and added "one or more of the following"; inserted "or motion" in subdivision (a)(5); deleted "and who has served in this capacity for at least one continuous year; or" following "responsibility" in subdivision (a)(6); and made minor stylistic changes throughout.

§ 7B-1104. Petition or motion.

The petition, or motion pursuant to G.S. 7B-1102, shall be verified by the petitioner or movant and shall be entitled "In Re (last name of juvenile), a minor juvenile"; and shall set forth such of the following facts as are known; and with respect to the facts which are unknown the petitioner or movant shall so state:

(1) The name of the juvenile as it appears on the juvenile's birth certificate, the date and place of birth, and the county where the juvenile is presently residing.

(2) The name and address of the petitioner or movant and facts sufficient to identify the petitioner or movant as one authorized by G.S. 7B-1103 to file a petition or motion.

(3) The name and address of the parents of the juvenile. If the name or address of one or both parents is unknown to the petitioner or movant, the petitioner or movant shall set forth with particularity the petitioner's or movant's efforts to ascertain the identity or whereabouts of the parent or parents. The information may be contained in an

affidavit attached to the petition or motion and incorporated therein by reference.

(4) The name and address of any person who has been judicially appointed as guardian of the person of the juvenile.

(5) The name and address of any person or agency to whom custody of the juvenile has been given by a court of this or any other state; and a copy of the custody order shall be attached to the petition or motion.

(6) Facts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist.

(7) That the petition or motion has not been filed to circumvent the provisions of Article 2 of Chapter 50A of the General Statutes, the Uniform Child-Custody Jurisdiction and Enforcement Act. (1977, c. 879, s. 8; 1979, c. 110, s. 8; 1981, c. 469, s. 23; 1987, c. 550, s. 15; 1998-202, s. 6; 1999-223, s. 7; 1999-456, s. 60; 2000-183, s. 5.)

Effect of Amendments. —

Session Laws 2000-183, s. 5, effective October 1, 2000, added "or motion" in the catchline; in the introductory paragraph, inserted "or motion pursuant to G.S. 7B-1102," twice inserted "or movant," and substituted "'In Re (last name of juvenile), a minor juvenile'" for "'In Re (last name of juvenile)', a minor juvenile"; in subdivision (2), substituted "authorized by G.S. 7B-1103 to file a petition or motion" for "entitled to petition under G.S. 7B-1103" and inserted "or movant" twice; in subdivision (3), inserted "or movant" twice, inserted "or movant's" and inserted "or motion"; in subdivision (4), inserted "who has been judicially" and deleted "pursuant to the provisions of Chapter 35A of the General Statutes, or of G.S. 7B-600" following "juvenile"; and inserted "or motion" in subdivisions (5) and (7).

§ 7B-1106. Issuance of summons.

(a) Except as provided in G.S. 7B-1105, upon the filing of the petition, the court shall cause a summons to be issued. The summons shall be directed to the following persons or agency, not otherwise a party petitioner, who shall be named as respondents:

(1) The parents of the juvenile;

(2) Any person who has been judicially appointed as guardian of the person of the juvenile;

(3) The custodian of the juvenile appointed by a court of competent jurisdiction;

(4) Any county department of social services or licensed child-placing agency to whom a juvenile has been released by one parent pursuant to Part 7 of Article 3 of Chapter 48 of the General Statutes or any county department of social services to whom placement responsibility for the child has been given by a court of competent jurisdiction; and

(5) The juvenile, if the juvenile is 12 years of age or older at the time the petition is filed.

Provided, no summons need be directed to or served upon any parent who, under Chapter 48 of the General Statutes, has irrevocably relinquished the juvenile to a county department of social services or licensed child-placing agency nor to any parent who has consented to the adoption of the juvenile by the petitioner. The summons shall notify the respondents to file a written answer within 30 days after service of the summons and petition. Service of the summons shall be completed as provided under the procedures established by G.S. 1A-1, Rule 4(j); but the parent of the juvenile shall not be deemed to be under disability even though the parent is a minor.

(b) The summons shall be issued for the purpose of terminating parental rights pursuant to the provisions of subsection (a) of this section and shall include:

(1) The name of the minor juvenile;
(2) Notice that a written answer to the petition must be filed with the clerk who signed the petition within 30 days after service of the summons and a copy of the petition, or the parent's rights may be terminated;
(3) Notice that if they are indigent, the parents are entitled to appointed counsel; the parents may contact the clerk immediately to request counsel;
(4) Notice that this is a new case. Any attorney appointed previously will not represent the parents in this proceeding unless ordered by the court;
(5) Notice that the date, time, and place of the hearing will be mailed by the clerk upon filing of the answer or 30 days from the date of service if no answer is filed; and
(6) Notice of the purpose of the hearing and notice that the parents may attend the termination hearing.

(c) If a county department of social services, not otherwise a party petitioner, is served with a petition alleging that the parental rights of the parent should be terminated pursuant to G.S. 7B-1111, the department shall file a written answer and shall be deemed a party to the proceeding. (1977, c. 879, s. 8; 1981, c. 966, s. 2; 1983, c. 581, ss. 1, 2; 1995, c. 457, s. 4; 1998-202, s. 6; 1998-229, ss. 10, 27; 1999-456, s. 60; 2000-183, s. 13.)

Effect of Amendments. — Session Laws 2000-183, s. 13, effective October 1, 2000, substituted "who, under Chapter 48 of the General Statutes, has irrevocably relinquished" for "who has previously surrendered" in the last paragraph in subsection (a).

§ 7B-1106.1. Notice in pending child abuse, neglect, or dependency cases.

(a) Upon the filing of a motion pursuant to G.S. 7B-1102, the movant shall prepare a notice directed to each of the following persons or agency, not otherwise a movant:

(1) The parents of the juvenile.
(2) Any person who has been judicially appointed as guardian of the person of the juvenile.
(3) The custodian of the juvenile appointed by a court of competent jurisdiction.
(4) Any county department of social services or licensed child-placing agency to whom a juvenile has been released by one parent pursuant to Part 7 of Article 3 of Chapter 48 of the General Statutes or any county department of social services to whom placement responsibility for the juvenile has been given by a court of competent jurisdiction.
(5) The juvenile's guardian ad litem if one has been appointed pursuant to G.S. 7B-601 and has not been relieved of responsibility.
(6) The juvenile, if the juvenile is 12 years of age or older at the time the motion is filed.

Provided, no notice need be directed to or served upon any parent who, under Chapter 48 of the General Statutes, has irrevocably relinquished the juvenile to a county department of social services or licensed child-placing agency nor to any parent who has consented to the adoption of the juvenile by the movant. The notice shall notify the person or agency to whom it is directed to file a written response within 30 days after service of the motion and notice. Service of the motion and notice shall be completed as provided under G.S. 7B-1102(b).

(b) The notice required by subsection (a) of this section shall include all of the following:

(1) The name of the minor juvenile.
(2) Notice that a written response to the motion must be filed with the clerk within 30 days after service of the motion and notice, or the parent's rights may be terminated.
(3) Notice that any attorney appointed previously to represent the parent in the abuse, neglect, or dependency proceeding will continue to represent the parents unless otherwise ordered by the court.
(4) Notice that if the parent is indigent, the parent is entitled to appointed counsel and if the parent is not already represented by appointed counsel the parent may contact the clerk immediately to request counsel.
(5) Notice that the date, time, and place of hearing will be mailed by the moving party upon filing of the response or 30 days from the date of service if no response is filed.
(6) Notice of the purpose of the hearing and notice that the parents may attend the termination hearing.

(c) If a county department of social services, not otherwise a movant, is served with a motion seeking termination of a parent's rights, the director shall file a written response and shall be deemed a party to the proceeding. (2000-183, s. 6.)

Editor's Note. — Session Laws 2000-183, s.15, made this section effective October 1, 2000.

§ 7B-1107. Failure of parent to answer or respond.

Upon the failure of a respondent parent to file written answer to the petition or written response to the motion within 30 days after service of the summons and petition or notice and motion, or within the time period established for a defendant's reply by G.S. 1A-1, Rule 4(j1) if service is by publication, the court may issue an order terminating all parental and custodial rights of that parent with respect to the juvenile; provided the court shall order a hearing on the petition or motion and may examine the petitioner or movant or others on the facts alleged in the petition or motion. (1977, c. 879, s. 8; 1979, c. 525, s. 3; 1987, c. 282, s. 2; 1998-202, s. 6; 1998-229, s. 10; 1999-456, s. 60; 2000-183, s. 7.)

Effect of Amendments. — Session Laws 2000-183, s. 7, effective October 1, 2000, substituted "parent to answer or respond" for "respondents to answer" in the catchline; substituted "a respondent parent" for "the respondents"; substituted "or written response to the motion" for "with the court"; inserted "or notice and motion"; substituted "that parent" for "the respondent or respondents"; inserted "or motion" twice; inserted "or movant"; and made a minor wording change.

§ 7B-1108. Answer or response of parent.

(a) Any respondent may file a written answer to the petition or written response to the motion. The answer or response shall admit or deny the allegations of the petition or motion and shall set forth the name and address of the answering respondent or the respondent's attorney.

(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. 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.

(c) In proceedings under this Article, the appointment of a guardian ad litem shall not be required except, as provided above, in cases in which an answer or response is filed denying material allegations, or as required under G.S. 7B-1101; but the court may, in its discretion, appoint a guardian ad litem for a juvenile, either before or after determining the existence of grounds for termination of parental rights, in order to assist the court in determining the best interests of the juvenile.

(d) If a guardian ad litem has previously been appointed for the juvenile under G.S. 7B-601, and the appointment of a guardian ad litem could also be made under this section, the guardian ad litem appointed under G.S. 7B-601, and any attorney appointed to assist that guardian, shall also represent the juvenile in all proceedings under this Article and shall have the duties and payment of a guardian ad litem appointed under this section, unless the court determines that the best interests of the juvenile require otherwise. (1977, c. 879, s. 8; 1981 (Reg. Sess., 1982), c. 1331, s. 3; 1983, c. 870, s. 2; 1989 (Reg. Sess., 1990), c. 851, s. 1; 1998-202, s. 6; 1999-456, s. 60; 2000-183, s. 8.)

Effect of Amendments. — Session Laws 2000-183, s. 8, effective October 1, 2000, substituted "Answer or response of parent" for "Answer of respondents" in the catchline; inserted "or written response to the motion" in subsection (a); in subsection (b), added "or a guardian ad litem has already been appointed pursuant to G.S. 7B-601," substituted "given by the petitioner or movant to the respondent who answered or responded" for "to the petitioner, the answering respondent," and added "or motion and response"; inserted "or response" in subsection (c); and inserted "or motion" throughout the section.

§ 7B-1109. Adjudicatory hearing on termination.

(a) The hearing on the termination of parental rights shall be conducted by the court sitting without a jury. Reporting of the hearing shall be as provided by G.S. 7A-198 for reporting civil trials.

(b) **(Effective until July 1, 2001)** The court shall inquire whether the juvenile's parents are present at the hearing and, if so, whether they are represented by counsel. If the parents are not represented by counsel, the court shall inquire whether the parents desire counsel but are indigent. In the event that the parents desire counsel but are indigent as defined in G.S. 7A-450(a) and are unable to obtain counsel to represent them, the court shall appoint counsel to represent them. The court shall grant the parents such an extension of time as is reasonable to permit their appointed counsel to prepare their defense to the termination petition or motion. In the event that the parents do not desire counsel and are present at the hearing, the court shall examine each parent and make findings of fact sufficient to show that the waivers were knowing and voluntary. This examination shall be reported as provided in G.S. 7A-198.

(b) **(Effective July 1, 2001)** The court shall inquire whether the juvenile's parents are present at the hearing and, if so, whether they are represented by counsel. If the parents are not represented by counsel, the court shall inquire whether the parents desire counsel but are indigent. In the event that the

§ 7B-1109(b) is set out twice. See notes.

parents desire counsel but are indigent as defined in G.S. 7A-450(a) and are unable to obtain counsel to represent them, counsel shall be appointed to represent them in accordance with rules adopted by the Office of Indigent Defense Services. The court shall grant the parents such an extension of time as is reasonable to permit their appointed counsel to prepare their defense to the termination petition or motion. In the event that the parents do not desire counsel and are present at the hearing, the court shall examine each parent and make findings of fact sufficient to show that the waivers were knowing and voluntary. This examination shall be reported as provided in G.S. 7A-198.

(c) The court may, upon finding that reasonable cause exists, order the juvenile to be examined by a psychiatrist, a licensed clinical psychologist, a physician, a public or private agency, or any other expert in order that the juvenile's psychological or physical condition or needs may be ascertained or, in the case of a parent whose ability to care for the juvenile is at issue, the court may order a similar examination of any parent of the juvenile.

(d) The court may for good cause shown continue the hearing for such time as is required for receiving additional evidence, any reports or assessments which the court has requested, or any other information needed in the best interests of the juvenile.

(e) The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent.

(f) The burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence. No husband-wife or physician-patient privilege shall be grounds for excluding any evidence regarding the existence or nonexistence of any circumstance authorizing the termination of parental rights. (1977, c. 879, s. 8; 1979, c. 669, s. 1; 1981, c. 966, s. 3; (Reg. Sess., 1982), c. 1331, s. 3; 1983, c. 870, s. 2; 1989 (Reg. Sess., 1990), c. 851, s. 1; 1998-202, s. 6; 1999-456, s. 60; 2000-144, s. 19; 2000-183, s. 9.)

Subsection (b) Set Out Twice — The first version of subsection (b) is effective until July 1, 2001. The second version of subsection (b) is effective July 1, 2001.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, § 7A-498 et seq.

Effect of Amendments. — Session Laws 2000-144, s. 19, effective July 1, 2001, in the third sentence of subsection (b), substituted "counsel shall be appointed to represent" for "the court shall appoint counsel to represent" and added "in accordance with rules adopted by the Office of Indigent Defense Services."

Session Laws 2000-183, s. 9, effective October 1, 2000, inserted "or motion" in subsection (b) and inserted "or movant" in subsection (f).

CASE NOTES

Standard of Proof. — Although this section does not specifically require the trial court to affirmatively state in its order terminating parental rights that the allegations of the petition were proved by clear and convincing evidence, § 7B-807 does require such a statement, and without such an affirmative statement the appellate court is unable to determine if the proper standard of proof was utilized. In re Church, — N.C. App. —, 525 S.E.2d 478, 2000 N.C. App. LEXIS 107 (2000).

Statement of Clear and Convincing Evidence Required. — When construing § 7B-807 and this section together to determine legislative intent, under subsection (f) of this section, the trial court is required to affirmatively state in its order the standard of proof utilized in the termination proceeding. In re Church, — N.C. App. —, 525 S.E.2d 478, 2000 N.C. App. LEXIS 107 (2000).

§ 7B-1110. Disposition.

(a) Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the juvenile unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated.

(b) Should the court conclude that, irrespective of the existence of one or more circumstances authorizing termination of parental rights, the best interests of the juvenile require that rights should not be terminated, the court shall dismiss the petition or deny the motion, but only after setting forth the facts and conclusions upon which the dismissal or denial is based.

(c) Should the court determine that circumstances authorizing termination of parental rights do not exist, the court shall dismiss the petition or deny the motion, making appropriate findings of fact and conclusions.

(d) Counsel for the petitioner or movant shall serve a copy of the termination of parental rights order upon the guardian ad litem for the juvenile, if any, and upon the juvenile if the juvenile is 12 years of age or older.

(e) The court may tax the cost of the proceeding to any party. (1977, c. 879, s. 8; 1981 (Reg. Sess., 1982), c. 1131, s. 1; 1983, c. 581, s. 3; c. 607, s. 3; 1998-202, s. 6; 1999-456, s. 60; 2000-183, s. 10.)

Effect of Amendments. — Session Laws 2000-183, s. 10, effective October 1, 2000, inserted "or deny the motion" in subsections (b) and (c); inserted "or denial" in subsection (b); and inserted "or movant" in subsection (d).

§ 7B-1111. Grounds for terminating parental rights.

(a) The court may terminate the parental rights upon a finding of one or more of the following:

(1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.

(2) The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made within 12 months in correcting those conditions which led to the removal of the juvenile. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

(3) The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

(4) One parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by said decree or custody agreement.

(5) The father of a juvenile born out of wedlock has not, prior to the filing of a petition or motion to terminate parental rights:
   a. Established paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Health and Human Services; provided, the court shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and shall incorporate into the case record the Department's certified reply; or
   b. Legitimated the juvenile pursuant to provisions of G.S. 49-10 or filed a petition for this specific purpose; or
   c. Legitimated the juvenile by marriage to the mother of the juvenile; or
   d. Provided substantial financial support or consistent care with respect to the juvenile and mother.

(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.

(7) The parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion.

(8) The parent has committed murder or voluntary manslaughter of another child of the parent or other child residing in the home; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child, another child of the parent, or other child residing in the home; or has committed a felony assault that results in serious bodily injury to the child, another child of the parent, or other child residing in the home.

(9) The parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home.

(b) The burden in such proceedings shall be upon the petitioner or movant to prove the facts justifying such termination by clear and convincing evidence. (1977, c. 879, s. 8; 1979, c. 669, s. 2; 1979, 2nd Sess., c. 1088, s. 2; c. 1206, s. 2; 1983, c. 89, s. 2; c. 512; 1985, c. 758, ss. 2, 3; c. 784; 1991 (Reg. Sess., 1992), c. 941, s. 1; 1997-390, ss. 1, 2; 1997-443, s. 11A.118(a); 1998-202, s. 6; 1998-229, ss. 11, 28; 1999-456, s. 60; 2000-183, s. 11.)

Effect of Amendments. — Session Laws 2000-183, s. 11, effective October 1, 2000, inserted "or motion" in subdivisions (a)(3), (a)(4), (a)(5) and (a)(7), and inserted "or movant" in subsection (b).

CASE NOTES

I. General Consideration.
II. Neglect.

I. GENERAL CONSIDERATION.

A severance proceeding is not essentially the same as a criminal proceeding, nor does a parent whose rights are sought to be terminated enjoy the same rights as a person accused of committing a crime, including the right to file an "Anders" brief. In re Harrison, — N.C. App. —, 526 S.E.2d 502, 2000 N.C. App. LEXIS 159 (2000).

No right to file "Anders" brief. — Counsel for a parent appealing from a juvenile court's

severance order has no right to file an "Anders" brief. In re Harrison, — N.C. App. —, 526 S.E.2d 502, 2000 N.C. App. LEXIS 159 (2000).

Applied in In re Reyes, — N.C. App. —, 526 S.E.2d 499, 2000 N.C. App. LEXIS 160 (2000).

Stated in Thrift v. Buncombe County Dep't of Social Servs., — N.C. App. —, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000).

II. NEGLECT.

Neglect Shown — Evidence, including mother's refusal to enroll in a residential drug treatment facility and her failure to make improvements in her lifestyle which might help her care for and supervise her children in view of her alcohol dependence, supported a finding of neglect or the probability of its repetition at the time of termination hearing. In re Leftwich, 135 N.C. App. 67, 518 S.E.2d 799 (1999).

Termination Not Upheld. —

Termination of respondent's parental rights was not supported by the evidence where none of the witnesses—the respondent's guardian ad litem, her counselor, and a court appointed clinical psychologist— expressed certainty that her mental illness would prevent her from adequately parenting her children and where the father of one of the children, whom the trial court seemed to have viewed as a threat, had since died. In re Small, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 631 (June 20, 2000).

§ 7B-1112. Effects of termination order.

An order terminating the parental rights completely and permanently terminates all rights and obligations of the parent to the juvenile and of the juvenile to the parent arising from the parental relationship, except that the juvenile's right of inheritance from the juvenile's parent shall not terminate until a final order of adoption is issued. The parent is not thereafter entitled to notice of proceedings to adopt the juvenile and may not object thereto or otherwise participate therein:

(1) If the juvenile had been placed in the custody of or released for adoption by one parent to a county department of social services or licensed child-placing agency and is in the custody of the agency at the time of the filing of the petition or motion, including a petition or motion filed pursuant to G.S. 7B-1103(6), that agency shall, upon entry of the order terminating parental rights, acquire all of the rights for placement of the juvenile as the agency would have acquired had the parent whose rights are terminated released the juvenile to that agency pursuant to the provisions of Part 7 of Article 3 of Chapter 48 of the General Statutes, including the right to consent to the adoption of the juvenile.

(2) Except as provided in subdivision (1) above, upon entering an order terminating the parental rights of one or both parents, the court may place the juvenile in the custody of the petitioner or movant, or some other suitable person, or in the custody of the department of social services or licensed child-placing agency, as may appear to be in the best interests of the juvenile. (1977, c. 879, s. 8; 1983, c. 870, s. 3; 1995, c. 457, s. 5; 1998-202, s. 6; 1998-229, s. 11; 1999-456, s. 60; 2000-183, s. 12.)

Effect of Amendments. — Session Laws 2000-183, s. 12, effective October 1, 2000, inserted "or motion" twice in subdivision (1); and inserted "or movant" in subdivision (2).

SUBCHAPTER II. UNDISCIPLINED AND DELINQUENT JUVENILES.

ARTICLE 15.

Purposes; Definitions.

§ 7B-1501. Definitions.

In this Subchapter, unless the context clearly requires otherwise, the following words have the listed meanings:

(1) Chief court counselor. — The person responsible for administration and supervision of juvenile intake, probation, and post-release supervision in each judicial district, operating under the supervision of the Department of Juvenile Justice and Delinquency Prevention.

(2) Clerk. — Any clerk of superior court, acting clerk, or assistant or deputy clerk.

(3) Community-based program. — A program providing nonresidential or residential treatment to a juvenile under the jurisdiction of the juvenile court in the community where the juvenile's family lives. A community-based program may include specialized foster care, family counseling, shelter care, and other appropriate treatment.

(4) Court. — The district court division of the General Court of Justice.

(5) Court counselor. — A person responsible for probation and post-release supervision to juveniles under the supervision of the chief court counselor.

(6) Custodian. — The person or agency that has been awarded legal custody of a juvenile by a court.

(7) Delinquent juvenile. — Any juvenile who, while less than 16 years of age but at least 6 years of age, commits a crime or infraction under State law or under an ordinance of local government, including violation of the motor vehicle laws.

(7a) Department. — The Department of Juvenile Justice and Delinquency Prevention created under Article 12 of Chapter 143B of the General Statutes.

(8) Detention. — The secure confinement of a juvenile under a court order.

(9) Detention facility. — A facility approved to provide secure confinement and care for juveniles. Detention facilities include both State and locally administered detention homes, centers, and facilities.

(10) District. — Any district court district as established by G.S. 7A-133.

(11) Holdover facility. — A place in a jail which has been approved by the Department of Health and Human Services as meeting the State standards for detention as required in G.S. 153A-221 providing close supervision where the juvenile cannot converse with, see, or be seen by the adult population.

(12) House arrest. — A requirement that the juvenile remain at the juvenile's residence unless the court or the juvenile court counselor authorizes the juvenile to leave for specific purposes.

(13) Intake counselor. — A person who screens and evaluates a complaint alleging that a juvenile is delinquent or undisciplined to determine whether the complaint should be filed as a petition.

(14) Interstate Compact on Juveniles. — An agreement ratified by 50 states and the District of Columbia providing a formal means of returning a juvenile, who is an absconder, escapee, or runaway, to the juvenile's home state, and codified in Article 28 of this Chapter.

(15) Judge. — Any district court judge.

(16) Judicial district. — Any district court district as established by G.S. 7A-133.

(17) Juvenile. — Except as provided in subdivisions (7) and (27) of this section, any person who has not reached the person's eighteenth birthday and is not married, emancipated, or a member of the armed forces of the United States. Wherever the term "juvenile" is used with reference to rights and privileges, that term encompasses the attorney for the juvenile as well.

(18) Juvenile court. — Any district court exercising jurisdiction under this Chapter.

(19) Repealed by Session Laws 2000, c. 137, s. 2, effective July 20, 2000.

(20) Petitioner. — The individual who initiates court action by the filing of a petition or a motion for review alleging the matter for adjudication.

(21) Post-release supervision. — The supervision of a juvenile who has been returned to the community after having been committed to the Department for placement in a training school.

(22) Probation. — The status of a juvenile who has been adjudicated delinquent, is subject to specified conditions under the supervision of a court counselor, and may be returned to the court for violation of those conditions during the period of probation.

(23) Prosecutor. — The district attorney or assistant district attorney assigned by the district attorney to juvenile proceedings.

(24) Protective supervision. — The status of a juvenile who has been adjudicated undisciplined and is under the supervision of a court counselor.

(25) Teen court program. — A community resource for the diversion of cases in which a juvenile has allegedly committed certain offenses for hearing by a jury of the juvenile's peers, which may assign the juvenile to counseling, restitution, curfews, community service, or other rehabilitative measures.

(26) Training school. — A secure residential facility authorized to provide long-term treatment, education, and rehabilitative services for delinquent juveniles committed by the court to the Department.

(27) Undisciplined juvenile. —

a. A juvenile who, while less than 16 years of age but at least 6 years of age, is unlawfully absent from school; or is regularly disobedient to and beyond the disciplinary control of the juvenile's parent, guardian, or custodian; or is regularly found in places where it is unlawful for a juvenile to be; or has run away from home for a period of more than 24 hours; or

b. A juvenile who is 16 or 17 years of age and who is regularly disobedient to and beyond the disciplinary control of the juvenile's parent, guardian, or custodian; or is regularly found in places where it is unlawful for a juvenile to be; or has run away from home for a period of more than 24 hours.

(28) Wilderness program. — A rehabilitative residential treatment program in a rural or outdoor setting.

The singular includes the plural, unless otherwise specified. (1979, c. 815, s. 1; 1981, c. 336; c. 359, s. 2; c. 469, ss. 1-3; c. 716, s. 1; 1985, c. 648; c. 757, s. 156(q); 1985 (Reg. Sess., 1986), c. 852, s. 16; 1987, c. 162; c. 695; 1987 (Reg. Sess., 1988), c. 1037, ss. 36, 37; 1989 (Reg. Sess., 1990), c. 815, s. 1; 1991, c. 258, s. 3; c. 273, s. 11; 1991 (Reg. Sess., 1992), c. 1030, s. 3; 1993, c. 324, s. 1; c. 516, ss. 1-3; 1997-113, s. 1; 1997-390, ss. 3, 3.2; 1997-443, s. 11A.118(a); 1997-506, s. 30; 1998-202, s. 6; 1998-229, s. 1; 2000-137, s. 2.)

Effect of Amendments. — Session Laws 2000-137, s.2, effective July 20, 2000, substituted "Department of Juvenile Justice and Delinquency Prevention" for "Office of Juvenile Justice" in subdivision (1); added subdivision (7a); deleted subdivision 19, defining "Office" to mean the Office of Juvenile Justice; substituted "Department" for "Office" in subdivision (21); and substituted "Department" for "Office of Juvenile Justice" in subdivision (26).

CASE NOTES

Proper Allegation of First Degree Murder. — Petition alleging that "juvenile was delinquent as defined by former § 7A-517(12) [see now this section] in that in Durham County and on or about December 30, 1997, the above named juvenile unlawfully, willfully and feloniously did of malice aforethought kill and murder victim" properly alleged first degree murder under § 14-17, satisfied former § 7A-560 [see now § 7B-402] requirements, and made transfer of case to Superior Court mandatory under former § 7A-608 [see now § 7B-2200]. In re K.R.B., 134 N.C. App. 328, 517 S.E.2d 200 (1999), cert. denied, 351 N.C. 187, — S.E.2d — (1999).

Article 16.

Jurisdiction.

§ 7B-1601. Jurisdiction over delinquent juveniles.

(a) The court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent. For purposes of determining jurisdiction, the age of the juvenile at the time of the alleged offense governs.

(b) When the court obtains jurisdiction over a juvenile alleged to be delinquent, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years, except as provided otherwise in this Article.

(c) When delinquency proceedings cannot be concluded before the juvenile reaches the age of 18 years, the court retains jurisdiction for the sole purpose of conducting proceedings pursuant to Article 22 of this Chapter and either transferring the case to superior court for trial as an adult or dismissing the petition.

(d) When the court has not obtained jurisdiction over a juvenile before the juvenile reaches the age of 18, for a felony and any related misdemeanors the juvenile allegedly committed on or after the juvenile's thirteenth birthday and prior to the juvenile's sixteenth birthday, the court has jurisdiction for the sole purpose of conducting proceedings pursuant to Article 22 of this Chapter and either transferring the case to superior court for trial as an adult or dismissing the petition.

(e) The court has jurisdiction over delinquent juveniles in the custody of the Department and over proceedings to determine whether a juvenile who is under the post-release supervision of the court counselor has violated the terms of the juvenile's post-release supervision.

(f) The court has jurisdiction over persons 18 years of age or older who are under the extended jurisdiction of the juvenile court.

(g) The court has jurisdiction over the parent, guardian, or custodian of a juvenile who is under the jurisdiction of the court pursuant to this section if the parent, guardian, or custodian has been served with a summons pursuant to G.S. 7B-1805. (1979, c. 815, s. 1; 1983, c. 837, s. 1; 1985, c. 459, s. 2; 1987, c. 409, s. 2; 1995, c. 328, s. 3; c. 462, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 23.2(c); 1998-202, s. 6; 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department" for "Office" in subsection (e).

§ 7B-1602. Extended jurisdiction over a delinquent juvenile under certain circumstances.

(a) When a juvenile is committed to the Department for placement in a training school for an offense that would be first degree murder pursuant to G.S. 14-17, first-degree rape pursuant to G.S. 14-27.2, or first-degree sexual offense pursuant to G.S. 14-27.4 if committed by an adult, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 21 years, whichever occurs first.

(b) When a juvenile is committed to the Department for placement in a training school for an offense that would be a Class B1, B2, C, D, or E felony if committed by an adult, other than an offense set forth in subsection (a) of this section, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 19 years, whichever occurs first. (1979, c. 815, s. 1; 1981, c. 469, s. 4; 1996, 2nd Ex. Sess., c. 18, s. 23.2(d); 1998-202, s. 6; 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, twice substituted "Department" for "Office."

Article 17.

Screening of Delinquency and Undisciplined Complaints.

§ 7B-1700. Intake services.

The chief court counselor, under the direction of the Department, shall establish intake services in each judicial district of the State for all delinquency and undisciplined cases.

The purpose of intake services shall be to determine from available evidence whether there are reasonable grounds to believe the facts alleged are true, to determine whether the facts alleged constitute a delinquent or undisciplined offense within the jurisdiction of the court, to determine whether the facts alleged are sufficiently serious to warrant court action, and to obtain assistance from community resources when court referral is not necessary. The intake counselor shall not engage in field investigations to substantiate complaints or to produce supplementary evidence but may refer complainants to law enforcement agencies for those purposes. (1979, c. 815, s. 1; 1998-202, s. 6; 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department" for "Office" in the first paragraph.

OPINIONS OF ATTORNEY GENERAL

Authority of Chief Court Counselor. — A local administrative order issued by the Chief District Court Judge prohibiting the diversion of juveniles from the juvenile justice system in cases arising from the public school system would not be consistent with the law, in that it would usurp the statutory authority provided to the chief court counselor by the General Assembly. See opinion of Attorney General to Joel H. Brewer, District Attorney, N.C. General Assembly, 1999 N.C.A.G. 15 (6/9/99).

§ 7B-1702. Evaluation.

Upon a finding of legal sufficiency, except in cases involving nondivertible offenses set out in G.S. 7B-1701, the intake counselor shall determine whether a complaint should be filed as a petition, the juvenile diverted pursuant to G.S. 7B-1706, or the case resolved without further action. In making the decision, the counselor shall consider criteria provided by the Department. The intake process shall include the following steps if practicable:

(1) Interviews with the complainant and the victim if someone other than the complainant;

(2) Interviews with the juvenile and the juvenile's parent, guardian, or custodian;

(3) Interviews with persons known to have relevant information about the juvenile or the juvenile's family.

Interviews required by this section shall be conducted in person unless it is necessary to conduct them by telephone. (1979, c. 815, s. 1; 1981, c. 469, s. 5; 1998-202, s. 6; 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department" for "Office" in the first paragraph.

Article 18.

Venue; Petition; Summons.

§ 7B-1808. First appearance for felony cases.

(a) A juvenile who is alleged in the petition to have committed an offense that would be a felony if committed by an adult shall be summoned to appear before the court for a first appearance within 10 days of the filing of the petition. If the juvenile is in secure or nonsecure custody, the first appearance shall take place at the initial hearing required by G.S. 7B-1906. Unless the juvenile is in secure or nonsecure custody, the court may continue the first appearance to a time certain for good cause.

(b) **(Effective until July 1, 2001)** At the first appearance, the court shall:

(1) Inform the juvenile of the allegations set forth in the petition;

(2) Determine whether the juvenile has retained counsel or has been assigned counsel and, if the juvenile is not represented by counsel, appoint counsel for the juvenile;

(3) If applicable, inform the juvenile of the date of the probable cause hearing, which shall be within 15 days of the first appearance; and

(4) Inform the parent, guardian, or custodian that the parent, guardian, or custodian is required to attend all hearings scheduled in the matter and may be held in contempt of court for failure to attend any scheduled hearing.

(b) **(Effective July 1, 2001)** At the first appearance, the court shall:

(1) Inform the juvenile of the allegations set forth in the petition;

(2) Determine whether the juvenile has retained counsel or has been assigned counsel counsel;

(3) If applicable, inform the juvenile of the date of the probable cause hearing, which shall be within 15 days of the first appearance; and

(4) Inform the parent, guardian, or custodian that the parent, guardian, or custodian is required to attend all hearings scheduled in the matter and may be held in contempt of court for failure to attend any scheduled hearing.

If the juvenile is not represented by counsel, counsel for the juvenile shall be appointed in accordance with rules adopted by the Office of Indigent Services. (1998-202, s. 6; 2000-144, s. 20.)

Subsection (b) Set Out Twice. — The first version of subsection (b) is effective until July 1, 2001. The second version of subsection (b) is effective July 1, 2001.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, § 7A-498 et seq.

Editor's Note. — Session Laws 2000, c. 144, s. 20, amended this section in the coded bill drafting format prescribed by § 120-20.1. The word "counsel" was apparently inadvertently included twice at the end of subdivision (b)(2). Subdivision (b)(2) has been set out in the form above as directed by the Revisor of Statutes.

Effect of Amendments. — Session Laws 2000-144, s. 20, effective July 1, 2001, deleted "and, if the juvenile is not represented by counsel, appoint counsel for the juvenile" following "assigned counsel" in subdivision (b)(2) and added the second paragraph in subsection (b).

Article 19.

Temporary Custody; Secure and Nonsecure Custody; Custody Hearings.

§ 7B-1900. Taking a juvenile into temporary custody.

Temporary custody means the taking of physical custody and providing personal care and supervision until a court order for secure or nonsecure custody can be obtained. A juvenile may be taken into temporary custody without a court order under the following circumstances:

(1) By a law enforcement officer if grounds exist for the arrest of an adult in identical circumstances under G.S. 15A-401(b).

(2) By a law enforcement officer or a court counselor if there are reasonable grounds to believe that the juvenile is an undisciplined juvenile.

(3) By a law enforcement officer, by a court counselor, by a member of the Black Mountain Center, Alcohol Rehabilitation Center, and Juvenile Evaluation Center Joint Security Force established pursuant to G.S. 122C-421, or by personnel of the Department if there are reasonable grounds to believe the juvenile is an absconder from any residential facility operated by the Department or from an approved detention facility. (1979, c. 815, s. 1; 1985, c. 408, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 1; 1994, Ex. Sess., c. 27, s. 2; 1995, c. 391, s. 1; 1997-443, s. 11A.118(a); 1998-202, s. 6; 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department" for "Office" in two places in subdivision (3).

§ 7B-1903. Criteria for secure or nonsecure custody.

(a) When a request is made for nonsecure custody, the court shall first consider release of the juvenile to the juvenile's parent, guardian, custodian, or other responsible adult. An order for nonsecure custody shall be made only when there is a reasonable factual basis to believe the matters alleged in the petition are true, and that:

(1) The juvenile is a runaway and consents to nonsecure custody; or

(2) The juvenile meets one or more of the criteria for secure custody, but the court finds it in the best interests of the juvenile that the juvenile be placed in a nonsecure placement.

(b) When a request is made for secure custody, the court may order secure custody only where the court finds there is a reasonable factual basis to believe that the juvenile committed the offense as alleged in the petition, and that one of the following circumstances exists:

(1) The juvenile is charged with a felony and has demonstrated that the juvenile is a danger to property or persons.

(2) The juvenile is charged with a misdemeanor at least one element of which is assault on a person and has demonstrated that the juvenile is a danger to persons.

(3) The juvenile has willfully failed to appear on a pending delinquency charge or on charges of violation of probation or post-release supervision, providing the juvenile was properly notified.

(4) A delinquency charge is pending against the juvenile, and there is reasonable cause to believe the juvenile will not appear in court.

(5) The juvenile is an absconder from (i) any residential facility operated by the Department or any detention facility in this State or (ii) any comparable facility in another state.

(6) There is reasonable cause to believe the juvenile should be detained for the juvenile's own protection because the juvenile has recently suffered or attempted self-inflicted physical injury. In such case, the juvenile must have been refused admission by one appropriate hospital, and the period of secure custody is limited to 24 hours to determine the need for inpatient hospitalization. If the juvenile is placed in secure custody, the juvenile shall receive continuous supervision and a physician shall be notified immediately.

(7) The juvenile is alleged to be undisciplined by virtue of the juvenile's being a runaway and is inappropriate for nonsecure custody placement or refuses nonsecure custody, and the court finds that the juvenile needs secure custody for up to 24 hours, excluding Saturdays, Sundays, and State holidays, or where circumstances require, for a period not to exceed 72 hours to evaluate the juvenile's need for medical or psychiatric treatment or to facilitate reunion with the juvenile's parents, guardian, or custodian.

(8) The juvenile is alleged to be undisciplined and has willfully failed to appear in court after proper notice; the juvenile shall be brought to court as soon as possible and in no event should be held more than 24 hours, excluding Saturdays, Sundays, and State holidays or where circumstances require for a period not to exceed 72 hours.

(c) When a juvenile has been adjudicated delinquent, the court may order secure custody pending the dispositional hearing or pending placement of the juvenile pursuant to G.S. 7B-2506.

(d) The court may order secure custody for a juvenile who is alleged to have violated the conditions of the juvenile's probation or post-release supervision, but only if the juvenile is alleged to have committed acts that damage property or injure persons.

(e) If the criteria for secure custody as set out in subsection (b), (c), or (d) of this section are met, the court may enter an order directing an officer or other authorized person to assume custody of the juvenile and to take the juvenile to the place designated in the order. (1979, c. 815, s. 1; 1981, c. 426, ss. 1-4; c. 526; 1983, c. 590, ss. 2-6; 1987, c. 101; 1987 (Reg. Sess., 1988), c. 1090, s. 3; 1989, c. 550; 1998-202, s. 6; 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department" for "Office" in subdivision (b)(5).

§ 7B-1906. Secure or nonsecure custody hearings.

(a) No juvenile shall be held under a secure custody order for more than five calendar days or under a nonsecure custody order for more than seven calendar days without a hearing on the merits or an initial hearing to determine the need for continued custody. A hearing conducted under this subsection may not be continued or waived. In every case in which an order has been entered by an official exercising authority delegated pursuant to G.S. 7B-1902, a hearing to determine the need for continued custody shall be conducted on the day of the next regularly scheduled session of district court in the city or county where the order was entered if the session precedes the expiration of the applicable time period set forth in this subsection. If the session does not precede the expiration of the time period, the hearing may be conducted at another regularly scheduled session of district court in the district where the order was entered.

(b) As long as the juvenile remains in secure or nonsecure custody, further hearings to determine the need for continued secure custody shall be held at intervals of no more than 10 calendar days. A subsequent hearing on continued nonsecure custody shall be held within seven business days, excluding Saturdays, Sundays, and legal holidays, of the initial hearing required in subsection (a) of this section and hearings thereafter shall be held at intervals of no more than 30 calendar days. In the case of a juvenile alleged to be delinquent, further hearings may be waived only with the consent of the juvenile, through counsel for the juvenile.

(c) **(Effective until July 1, 2001)** The court shall determine whether a juvenile who is alleged to be delinquent has retained counsel or has been assigned counsel; and, if the juvenile is not represented by counsel, appoint counsel for the juvenile.

(c) **(Effective July 1, 2001)** The court shall determine whether a juvenile who is alleged to be delinquent has retained counsel or has been assigned counsel; if the juvenile is not represented by counsel, counsel for the juvenile shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services.

(d) At a hearing to determine the need for continued custody, the court shall receive testimony and shall allow the juvenile and the juvenile's parent, guardian, or custodian an opportunity to introduce evidence, to be heard in their own behalf, and to examine witnesses. The State shall bear the burden at every stage of the proceedings to provide clear and convincing evidence that restraints on the juvenile's liberty are necessary and that no less intrusive alternative will suffice. The court shall not be bound by the usual rules of evidence at the hearings.

(e) The court shall be bound by criteria set forth in G.S. 7B-1903 in determining whether continued custody is warranted.

(f) The court may impose appropriate restrictions on the liberty of a juvenile who is released from secure custody, including:

(1) Release on the written promise of the juvenile's parent, guardian, or custodian to produce the juvenile in court for subsequent proceedings;
(2) Release into the care of a responsible person or organization;
(3) Release conditioned on restrictions on activities, associations, residence, or travel if reasonably related to securing the juvenile's presence in court; or
(4) Any other conditions reasonably related to securing the juvenile's presence in court.

(g) If the court determines that the juvenile meets the criteria in G.S. 7B-1903 and should continue in custody, the court shall issue an order to that effect. The order shall be in writing with appropriate findings of fact. The findings of fact shall include the evidence relied upon in reaching the decision and the purposes which continued custody is to achieve.

(h) The hearing to determine the need to continue custody may be conducted by audio and video transmission which allows the court and the juvenile to see and hear each other. If the juvenile has counsel, the juvenile may communicate fully and confidentially with the juvenile's attorney during the proceeding. Prior to the use of audio and video transmission, the procedures and type of equipment for audio and video transmission shall be submitted to the Administrative Office of the Courts by the chief district court judge and approved by the Administrative Office of the Courts. (1979, c. 815, s. 1; 1981, c. 469, s. 13; 1987 (Reg. Sess., 1988), c. 1090, s. 4; 1994, Ex. Sess., c. 27, s. 1; 1997-390, ss. 5, 6; 1998-202, s. 6; 1998-229, s. 4; 2000-144, s. 21.)

Subsection (c) Set Out Twice. — The first version of subsection (c) is effective until July 1, 2001. The second version of subsection (c) is effective July 1, 2001.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, § 7A-498 et seq.

Effect of Amendments. — Session Laws 2000-144, s. 21, effective July 1, 2001, in subsection (c), substituted "counsel for the juvenile shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services" for "appoint counsel for the juvenile" and made a minor wording change.

Article 20.

Basic Rights.

§ 7B-2000. Juvenile's right to counsel; presumption of indigence.

(a) **(Effective until July 1, 2001)** A juvenile alleged to be within the jurisdiction of the court has the right to be represented by counsel in all proceedings. The court shall appoint counsel for the juvenile, unless counsel is retained for the juvenile, in any proceeding in which the juvenile is alleged to be (i) delinquent or (ii) in contempt of court when alleged or adjudicated to be undisciplined.

(a) **(Effective July 1, 2001)** A juvenile alleged to be within the jurisdiction of the court has the right to be represented by counsel in all proceedings. Counsel for the juvenile shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services, unless counsel is retained for the juvenile, in any proceeding in which the juvenile is alleged to be (i) delinquent or (ii) in contempt of court when alleged or adjudicated to be undisciplined.

(b) All juveniles shall be conclusively presumed to be indigent, and it shall not be necessary for the court to receive from any juvenile an affidavit of indigency. (1979, c. 815, s. 1; 1998-202, s. 6; 2000-144, s. 22.)

Subsection (a) Set Out Twice. — The first version of subsection (a) is effective until July 1, 2001. The second version of subsection (a) is effective July 1, 2001.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, § 7A-498 et seq.

Effect of Amendments. — Session Laws 2000-144, s. 22, effective July 1, 2001, substituted "Counsel for the juvenile shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services" for "The court shall appoint counsel for the juvenile" in subsection (a).

§ 7B-2002. (Effective July 1, 2001) Payment of court-appointed attorney.

An attorney appointed pursuant to G.S. 7B-2000 or pursuant to any other provision of this Subchapter shall be paid a reasonable fee in accordance with rules adopted by the Office of Indigent Defense Services. The court may require payment of the attorneys" fees from a person other than the juvenile as provided in G.S. 7A-450.1, 7A-450.2, and 7A-450.3. A person who does not comply with the court's order of payment may be found in civil contempt as provided in G.S. 5A-21. (1979, c. 815, s. 1; 1983, c. 726, ss. 2, 3; 1987 (Reg. Sess., 1988), c. 1090, s. 6; 1991, c. 575, s. 1; 1998-202, s. 6; 2000-144, s. 23.)

For this section as in effect until July 1, 2001, see the main volume.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, § 7A-498 et seq.

Effect of Amendments. — Session Laws 2000-144, s. 23, effective July 1, 2001, substituted "in accordance with rules adopted by the Office of Indigent Defense Services" for "fixed by the court in the same manner as fees for attorneys appointed in cases of indigency through the Administrative Office of the Courts."

Article 21.

Law Enforcement Procedures in Delinquency Proceedings.

§ 7B-2101. Interrogation procedures.

CASE NOTES

Subsequent Statement Admissible Where Defendant Initiated Communication. — Defendant's subsequent statement was admissible where defendant stated that he did not wish to answer any questions, but then, upon considering his mother's statement, he turned to the police officer and nodded his head affirmatively, after which the detective asked defendant if he then wished to answer questions without a lawyer present and the defendant answered "yes." State v. Johnson, — N.C. App. —, 525 S.E.2d 830, 2000 N.C. App. LEXIS 164 (2000).

§ 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.

(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 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.

(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 intake 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. (1996, 2nd Ex. Sess., c. 18, s. 23.2(a); 1998-202, s. 6; 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department" for "Office" in subsection (a).

§ 7B-2200. Transfer of jurisdiction of juvenile to superior court.

CASE NOTES

Age Requirement Strictly Construed. — The court rejected the defendant's contention that the transfer statutes should be construed to prohibit transfer to superior court of a juvenile who is developmentally, socially, psychologically, and emotionally younger than 13. In re Wright, — N.C. App. —, 527 S.E.2d 70, 2000 N.C. App. LEXIS 265 (2000).

Transfer Proper. — Petition alleging that "juvenile was delinquent as defined by former § 7A-517(12) [see now § 7B-1501] in that in Durham County and on or about December 30, 1997, the above named juvenile unlawfully, willfully and feloniously did of malice aforethought kill and murder victim" properly alleged first degree murder under § 14-17, satisfied former § 7A-560 [see now § 7B-402] requirements, and made transfer of case to Superior Court mandatory under former § 7A-608 [see now this section]. In re K.R.B., 134 N.C. App. 328, 517 S.E.2d 200 (1999), cert. denied, 351 N.C. 187, — S.E.2d — (1999).

§ 7B-2203. Transfer hearing.

CASE NOTES

Evidence Supported Transfer. — The trial court's order transferring first degree sex offense charges against 13-year-old to the Superior Court was supported by sufficient evidence and findings; and due consideration of juvenile's age, maturity, condition or needs for treatment was given although not required. In re Wright, — N.C. App. —, 527 S.E.2d 70, 2000 N.C. App. LEXIS 265 (2000).

The juvenile court abused its discretion

in transferring felony charges to superior court under former § 7A-610 where the transfer order was deficient because it failed to adequately state reasons for the transfer, as required by the section and State v. Green, 348 N.C. 588, 502 S.E. 2d 819 (1998); nor did it reflect that consideration was given to the needs of the juvenile, to his rehabilitative potential, and to the family support he received. In re J.L.W., — N.C. App. —, 525 S.E.2d 500, 2000 N.C. App. LEXIS 118 (2000).

Article 24.

Hearing Procedures.

§ 7B-2407. When admissions by juvenile may be accepted.

CASE NOTES

Stated in Thrift v. Buncombe County Dep't of Social Servs., — N.C. App. —, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000).

§ 7B-2412. Legal effect of adjudication of delinquency.

An adjudication that a juvenile is delinquent or commitment of a juvenile to the Department for placement in a training school shall neither be considered conviction of any criminal offense nor cause the juvenile to forfeit any citizenship rights. (1979, c. 815, s. 1; 1998-202, s. 6; 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department" for "Office."

Article 25.

Dispositions.

§ 7B-2506. Dispositional alternatives for delinquent juveniles.

The court exercising jurisdiction over a juvenile who has been adjudicated delinquent may use the following alternatives in accordance with the dispositional structure set forth in G.S. 7B-2508:

(1) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the judge may:
   a. Require that a juvenile be supervised in the juvenile's own home by the department of social services in the juvenile's county, a court counselor, or other personnel as may be available to the court, subject to conditions applicable to the parent, guardian, or custodian or the juvenile as the judge may specify; or
   b. Place the juvenile in the custody of a parent, guardian, custodian, relative, private agency offering placement services, or some other suitable person; or
   c. Place the juvenile in the custody of the department of social services in the county of his residence, or in the case of a juvenile who has legal residence outside the State, in the physical custody of a department of social services in the county where the juvenile is found so that agency may return the juvenile to the responsible

authorities in the juvenile's home state. The director may, unless otherwise ordered by the judge, arrange for, provide, or consent to, needed routine or emergency medical or surgical care or treatment. In the case where the parent is unknown, unavailable, or unable to act on behalf of the juvenile or juveniles, the director may, unless otherwise ordered by the judge, arrange for, provide, or consent to any psychiatric, psychological, educational, or other remedial evaluations or treatment for the juvenile placed by a judge or his designee in the custody or physical custody of a county department of social services under the authority of this or any other Chapter of the General Statutes. Prior to exercising this authority, the director shall make reasonable efforts to obtain consent from a parent, guardian, or custodian of the affected juvenile. If the director cannot obtain consent, the director shall promptly notify the parent, guardian, or custodian that care or treatment has been provided and shall give the parent, guardian, or custodian frequent status reports on the circumstances of the juvenile. Upon request of a parent, guardian, or custodian of the affected juvenile, the results or records of the aforementioned evaluations, findings, or treatment shall be made available to the parent, guardian, or custodian by the director unless prohibited by G.S. 122C-53(d).

(2) Excuse the juvenile from compliance with the compulsory school attendance law when the court finds that suitable alternative plans can be arranged by the family through other community resources for one of the following:
   a. An education related to the needs or abilities of the juvenile including vocational education or special education;
   b. A suitable plan of supervision or placement; or
   c. Some other plan that the court finds to be in the best interests of the juvenile.

(3) Order the juvenile to cooperate with a community-based program, an intensive substance abuse treatment program, or a residential or nonresidential treatment program. Participation in the programs shall not exceed 12 months.

(4) Require restitution, full or partial, up to five hundred dollars ($500.00), payable within a 12-month period to any person who has suffered loss or damage as a result of the offense committed by the juvenile. The court may determine the amount, terms, and conditions of the restitution. If the juvenile participated with another person or persons, all participants should be jointly and severally responsible for the payment of restitution; however, the court shall not require the juvenile to make restitution if the juvenile satisfies the court that the juvenile does not have, and could not reasonably acquire, the means to make restitution.

(5) Impose a fine related to the seriousness of the juvenile's offense. If the juvenile has the ability to pay the fine, it shall not exceed the maximum fine for the offense if committed by an adult.

(6) Order the juvenile to perform up to 100 hours supervised community service consistent with the juvenile's age, skill, and ability, specifying the nature of the work and the number of hours required. The work shall be related to the seriousness of the juvenile's offense and in no event may the obligation to work exceed 12 months.

(7) Order the juvenile to participate in the victim-offender reconciliation program.

(8) Place the juvenile on probation under the supervision of a court counselor, as specified in G.S. 7B-2510.

(9) Order that the juvenile shall not be licensed to operate a motor vehicle in the State of North Carolina for as long as the court retains jurisdiction over the juvenile or for any shorter period of time. The clerk of court shall notify the Division of Motor Vehicles of that order.
(10) Impose a curfew upon the juvenile.
(11) Order that the juvenile not associate with specified persons or be in specified places.
(12) Impose confinement on an intermittent basis in an approved detention facility. Confinement shall be limited to not more than five 24-hour periods, the timing of which is determined by the court in its discretion.
(13) Order the juvenile to cooperate with placement in a wilderness program.
(14) Order the juvenile to cooperate with placement in a residential treatment facility, an intensive nonresidential treatment program, an intensive substance abuse program, or in a group home other than a multipurpose group home operated by a State agency.
(15) Place the juvenile on intensive probation under the supervision of a court counselor.
(16) Order the juvenile to cooperate with a supervised day program requiring the juvenile to be present at a specified place for all or part of every day or of certain days. The court also may require the juvenile to comply with any other reasonable conditions specified in the dispositional order that are designed to facilitate supervision.
(17) Order the juvenile to participate in a regimented training program.
(18) Order the juvenile to submit to house arrest.
(19) Suspend imposition of a more severe, statutorily permissible disposition with the provision that the juvenile meet certain conditions agreed to by the juvenile and specified in the dispositional order. The conditions shall not exceed the allowable dispositions for the level under which disposition is being imposed.
(20) Order that the juvenile be confined in an approved juvenile detention facility for a term of up to 14 24-hour periods, which confinement shall not be imposed consecutively with intermittent confinement pursuant to subdivision (12) of this section at the same dispositional hearing. The timing of this confinement shall be determined by the court in its discretion.
(21) Order the residential placement of a juvenile in a multipurpose group home operated by a State agency.
(22) Require restitution of more than five hundred dollars ($500.00), full or partial, payable within a 12-month period to any person who has suffered loss or damage as a result of an offense committed by the juvenile. The court may determine the amount, terms, and conditions of restitution. If the juvenile participated with another person or persons, all participants should be jointly and severally responsible for the payment of the restitution; however, the court shall not require the juvenile to make restitution if the juvenile satisfies the court that the juvenile does not have, and could not reasonably acquire, the means to make restitution.
(23) Order the juvenile to perform up to 200 hours supervised community service consistent with the juvenile's age, skill, and ability, specifying the nature of work and the number of hours required. The work shall be related to the seriousness of the juvenile's offense.
(24) Commit the juvenile to the Department for placement in a training school in accordance with G.S. 7B-2513 for a period of not less than six months. (1979, c. 815, s. 1; 1981, c. 469, ss. 19, 20; 1985, c. 589, s. 5;

c. 777, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 2; 1991, c. 353, s. 1; 636, s. 19(a); 1991 (Reg. Sess., 1992), c. 1030, s. 4; 1993, c. 369, s. 1; c. 462, s. 1; 1995 (Reg. Sess., 1996), c. 609, s. 3; 1997-516, s. 1A; 1998-202, s. 6; 1998-229, s. 6; 1999-444, s. 1; 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department" for "Office" in subdivision (24).

§ 7B-2507. Delinquency history levels.

(a) Generally. — The delinquency history level for a delinquent juvenile is determined by calculating the sum of the points assigned to each of the juvenile's prior adjudications and to the juvenile's probation status, if any, that the court finds to have been proved in accordance with this section.

(b) Points. — Points are assigned as follows:

(1) For each prior adjudication of a Class A through E felony offense, 4 points.

(2) For each prior adjudication of a Class F through I felony offense or Class A1 misdemeanor offense, 2 points.

(3) For each prior adjudication of a Class 1, 2, or 3 misdemeanor offense, 1 point.

(4) If the juvenile was on probation at the time of offense, 2 points.

(c) Delinquency History Levels. — The delinquency history levels are:

(1) Low — No more than 1 point.

(2) Medium — At least 2, but not more than 3 points.

(3) High — At least 4 points.

In determining the delinquency history level, the classification of a prior offense is the classification assigned to that offense at the time the juvenile committed the offense for which disposition is being ordered.

(d) Multiple Prior Adjudications Obtained in One Court Session. — For purposes of determining the delinquency history level, if a juvenile is adjudicated delinquent for more than one offense in a single session of district court, only the adjudication for the offense with the highest point total is used.

(e) Classification of Prior Adjudications From Other Jurisdictions. — Except as otherwise provided in this subsection, an adjudication occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. If the juvenile proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning delinquency history level points. If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning delinquency history level points. If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 misdemeanor in North Carolina, the adjudication is treated as a Class A1 misdemeanor for assigning delinquency history level points.

(f) Proof of Prior Adjudications. — A prior adjudication shall be proved by any of the following methods:

(1) Stipulation of the parties.

(2) An original or copy of the court record of the prior adjudication.

(3) A copy of records maintained by the Division of Criminal Information or by the Department.

(4) Any other method found by the court to be reliable.

The State bears the burden of proving, by a preponderance of the evidence, that a prior adjudication exists and that the juvenile before the court is the same person as the juvenile named in the prior adjudication. The original or a copy of the court records or a copy of the records maintained by the Division of Criminal Information or of the Department, bearing the same name as that by which the juvenile is charged, is prima facie evidence that the juvenile named is the same person as the juvenile before the court, and that the facts set out in the record are true. For purposes of this subsection, "a copy" includes a paper writing containing a reproduction of a record maintained electronically on a computer or other data processing equipment, and a document produced by a facsimile machine. The prosecutor shall make all feasible efforts to obtain and present to the court the juvenile's full record. Evidence presented by either party at trial may be utilized to prove prior adjudications. If asked by the juvenile, the prosecutor shall furnish the juvenile's prior adjudications to the juvenile within a reasonable time sufficient to allow the juvenile to determine if the record available to the prosecutor is accurate. (1998-202, s. 6; 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department" for "Office" in subdivision (f)(3) and in the last paragraph of (f).

§ 7B-2508. Dispositional limits for each class of offense and delinquency history level.

(a) Offense Classification. — The offense classifications are as follows:

(1) Violent — Adjudication of a Class A through E felony offense;

(2) Serious — Adjudication of a Class F through I felony offense or a Class A1 misdemeanor;

(3) Minor — Adjudication of a Class 1, 2, or 3 misdemeanor.

(b) Delinquency History Levels. — A delinquency history level shall be determined for each delinquent juvenile as provided in G.S. 7B-2507.

(c) Level 1 — Community Disposition. — A court exercising jurisdiction over a juvenile who has been adjudicated delinquent and for whom the dispositional chart in subsection (f) of this section prescribes a Level 1 disposition may provide for evaluation and treatment under G.S. 7B-2502 and for any of the dispositional alternatives contained in subdivisions (1) through (13) of G.S. 7B-2506. In determining which dispositional alternative is appropriate, the court shall consider the needs of the juvenile as indicated by the risk and needs assessment contained in the predisposition report, the appropriate community resources available to meet those needs, and the protection of the public.

(d) Level 2 — Intermediate Disposition. — A court exercising jurisdiction over a juvenile who has been adjudicated delinquent and for whom the dispositional chart in subsection (f) of this section prescribes a Level 2 disposition may provide for evaluation and treatment under G.S. 7B-2502 and for any of the dispositional alternatives contained in subdivisions (1) through (23) of G.S. 7B-2506, but shall provide for at least one of the intermediate dispositions authorized in subdivisions (13) through (23) of G.S. 7B-2506. However, notwithstanding any other provision of this section, a court may impose a Level 3 disposition if the juvenile has previously received a Level 3 disposition in a prior juvenile action. In determining which dispositional alternative is appropriate, the court shall consider the needs of the juvenile as indicated by the risk and needs assessment contained in the predisposition report, the appropriate community resources available to meet those needs, and the protection of the public.

(e) Level 3 — Commitment. — A court exercising jurisdiction over a juvenile who has been adjudicated delinquent and for whom the dispositional chart in subsection (f) of this section prescribes a Level 3 disposition shall commit the juvenile to the Department for placement in a training school in accordance with G.S. 7B-2506(24). However, a court may impose a Level 2 disposition rather than a Level 3 disposition if the court submits written findings on the record that substantiate extraordinary needs on the part of the offending juvenile.

(f) Dispositions for Each Class of Offense and Delinquency History Level; Disposition Chart Described. — The authorized disposition for each class of offense and delinquency history level is as specified in the chart below. Delinquency history levels are indicated horizontally on the top of the chart. Classes of offense are indicated vertically on the left side of the chart. Each cell on the chart indicates which of the dispositional levels described in subsections (c) through (e) of this section are prescribed for that combination of offense classification and delinquency history level:

	DELINQUENCY HISTORY		
OFFENSE	LOW	MEDIUM	HIGH
VIOLENT	Level 2 or 3	Level 3	Level 3
SERIOUS	Level 1 or 2	Level 2	Level 2 or 3
MINOR	Level 1	Level 1 or 2	Level 2.

(g) Notwithstanding subsection (f) of this section, a juvenile who has been adjudicated for a minor offense may be committed to a Level 3 disposition if the juvenile has been adjudicated of four or more prior offenses. For purposes of determining the number of prior offenses under this subsection, each successive offense is one that was committed after adjudication of the preceding offense.

(h) If a juvenile is adjudicated of more than one offense during a session of juvenile court, the court shall consolidate the offenses for disposition and impose a single disposition for the consolidated offenses. The disposition shall be specified for the class of offense and delinquency history level of the most serious offense. (1998-202, s. 6; 2000-137, s. 3.)

Editor's Note. —

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.' "

Session Laws 2000-67, s. 19.7, transfers the Guard Response Alternative Sentencing Program and all its functions, powers, duties, and obligations from the Department of Crime Control and Public Safety for the Guard Response Alternative Sentencing Program to the Office of Juvenile Justice (now the Department of Juvenile Justice and Delinquency Prevention.) The Program is to continue to function as an additional probation option for certain first-time juveniles who have been adjudicated delinquent and who are subject to Level 2 disposition.

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department" for "Office" in subsection (e).

§ 7B-2510. Conditions of probation; violation of probation.

(a) In any case where a juvenile is placed on probation pursuant to G.S. 7B-2506(8), the court counselor shall have the authority to visit the juvenile where the juvenile resides. The court may impose conditions of probation that are related to the needs of the juvenile and that are reasonably necessary to ensure that the juvenile will lead a law-abiding life, including:

(1) That the juvenile shall remain on good behavior.
(2) That the juvenile shall not violate any laws.
(3) That the juvenile shall not violate any reasonable and lawful rules of a parent, guardian, or custodian.
(4) That the juvenile attend school regularly.
(5) That the juvenile maintain passing grades in up to four courses during each grading period and meet with the court counselor and a representative of the school to make a plan for how to maintain those passing grades.
(6) That the juvenile not associate with specified persons or be in specified places.
(7) That the juvenile:
  a. Refrain from use or possession of any controlled substance included in any schedule of Article 5 of Chapter 90 of the General Statutes, the Controlled Substances Act;
  b. Refrain from use or possession of any alcoholic beverage regulated under Chapter 18B of the General Statutes; and
  c. Submit to random drug testing.
(8) That the juvenile abide by a prescribed curfew.
(9) That the juvenile submit to a warrantless search at reasonable times.
(10) That the juvenile possess no firearm, explosive device, or other deadly weapon.
(11) That the juvenile report to a court counselor as often as required by the court counselor.
(12) That the juvenile make specified financial restitution or pay a fine in accordance with G.S. 7B-2506(4), (5), and (22).
(13) That the juvenile be employed regularly if not attending school.
(14) That the juvenile satisfy any other conditions determined appropriate by the court.

(b) In addition to the regular conditions of probation specified in subsection (a) of this section, the court may, at a dispositional hearing or any subsequent hearing, order the juvenile to comply, if directed to comply by the chief court counselor, with one or more of the following conditions:

(1) Perform up to 20 hours of community service;
(2) Submit to substance abuse monitoring and treatment;
(3) Participate in a life skills or an educational skills program administered by the Department;
(4) Cooperate with electronic monitoring; and
(5) Cooperate with intensive supervision.

However, the court shall not give the chief court counselor discretion to impose the conditions of either subsection (4) or (5) of this section unless the juvenile is subject to Level 2 dispositions pursuant to G.S. 7B-2508 or subsection (d) of this section.

(c) An order of probation shall remain in force for a period not to exceed one year from the date entered. Prior to expiration of an order of probation, the court may extend it for an additional period of one year after a hearing, if the court finds that the extension is necessary to protect the community or to safeguard the welfare of the juvenile.

(d) On motion of the court counselor or the juvenile, or on the court's own motion, the court may review the progress of any juvenile on probation at any time during the period of probation or at the end of probation. The conditions or duration of probation may be modified only as provided in this Subchapter and only after notice and a hearing.

(e) If the court, after notice and a hearing, finds by the greater weight of the evidence that the juvenile has violated the conditions of probation set by the court, the court may continue the original conditions of probation, modify the conditions of probation, or, except as provided in subsection (f) of this section, order a new disposition at the next higher level on the disposition chart in G.S. 7B-2508. In the court's discretion, part of the new disposition may include an order of confinement in a secure juvenile detention facility for up to twice the term authorized by G.S. 7B-2508.

(f) A court shall not order a Level 3 disposition for violation of the conditions of probation by a juvenile adjudicated delinquent for an offense classified as minor under G.S. 7B-2508. (1979, c. 815, s. 1; 1981, c. 469, s. 20; 1991, c. 353, s. 1; 1991 (Reg. Sess., 1992), c. 1030, s. 4; 1993, c. 369, s. 1; c. 462, s. 1; 1998-202, s. 6; 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department" for "Office" in subdivision (b)(3).

§ 7B-2512. Dispositional order.

CASE NOTES

Implication of Separation as Pre-Condition to Reunification Deemed Prejudicial. — Although the court was authorized under former § 7A-651(c)(2) to find that efforts to reunite a family would be futile or inconsistent with the juvenile's safety, the court's statements implying that separation of the parents was a pre-condition to the mother having a realistic chance to regain custody were prejudicial error, and the part of the court's order retaining jurisdiction was, therefore, vacated. In re McLean, 135 N.C. App. 387, 521 S.E.2d 121 (1999).

§ 7B-2513. Commitment of delinquent juvenile to Department.

(a) Pursuant to G.S. 7B-2506 and G.S. 7B-2508, the court may commit a delinquent juvenile who is at least 10 years of age to the Department for placement in a training school. Commitment shall be for an indefinite term of at least six months. In no event shall the term exceed:

(1) The twenty-first birthday of the juvenile if the juvenile has been committed to the Department for an offense that would be first-degree murder pursuant to G.S. 14-17, first-degree rape pursuant to G.S. 14-27.2, or first-degree sexual offense pursuant to G.S. 14-27.4 if committed by an adult;

(2) The nineteenth birthday of the juvenile if the juvenile has been committed to the Department for an offense that would be a Class B1, B2, C, D, or E felony if committed by an adult, other than an offense set forth in subdivision (1) of this subsection; or

(3) The eighteenth birthday of the juvenile if the juvenile has been committed to the Department for an offense other than an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult.

No juvenile shall be committed to a training school beyond the minimum six-month commitment for a period of time in excess of the maximum term of imprisonment for which an adult in prior record level VI for felonies or in prior

conviction level III for misdemeanors could be sentenced for the same offense, except when the Department pursuant to G.S. 7B-2515 determines that the juvenile's commitment needs to be continued for an additional period of time to continue care or treatment under the plan of care or treatment developed under subsection (f) of this section. At the time of commitment to a training school, the court shall determine the maximum period of time the juvenile may remain committed before a determination must be made by the Department pursuant to G.S. 7B-2515 and shall notify the juvenile of that determination.

(b) The court may commit a juvenile to a definite term of not less than six months and not more than two years if the court finds that the juvenile is 14 years of age or older, has been previously adjudicated delinquent for two or more felony offenses, and has been previously committed to a training school.

(c) The chief court counselor shall have the responsibility for transporting the juvenile to the training school designated by the Department. The juvenile shall be accompanied to the training school by a person of the same sex.

(d) The chief court counselor shall ensure that the records requested by the Department accompany the juvenile upon transportation for admittance to a training school or, if not obtainable at the time of admission, are sent to the training school within 15 days of the admission. If records requested by the Department for admission do not exist, to the best knowledge of the chief court counselor, the chief court counselor shall so stipulate in writing to the training school. If such records do exist, but the chief court counselor is unable to obtain copies of them, a district court may order that the records from public agencies be made available to the training school. Records that are confidential by law shall remain confidential and the Department shall be bound by the specific laws governing the confidentiality of these records. All records shall be used in a manner consistent with the best interests of the juvenile.

(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 training school 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.

(f) When the court commits a juvenile to the Department for placement in a training school, the Department shall prepare a plan for care or treatment within 30 days after assuming custody of the juvenile.

(g) Commitment of a juvenile to the Department for placement in a training school does not terminate the court's continuing jurisdiction over the juvenile and the juvenile's parent, guardian, or custodian. Commitment of a juvenile to the Department for placement in a training school transfers only physical custody of the juvenile. Legal custody remains with the parent, guardian, custodian, agency, or institution in whom it was vested.

(h) Pending placement of a juvenile with the Department, the court may house a juvenile who has been adjudicated delinquent for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult in a holdover facility up to 72 hours if the court, based on the information provided by the court counselor, determines that no acceptable alternative placement is available and the protection of the public requires that the juvenile be housed in a holdover facility.

(i) A juvenile who is committed to the Department for placement in a training school shall be tested for the use of controlled substances or alcohol. The results of this initial test shall be incorporated into the plan of care as provided in subsection (f) of this section and used for evaluation and treatment purposes only.

(j) When a juvenile is committed to the Department for placement in a training school for an offense that would have been a Class A or B1 felony if

committed by an adult, the chief court counselor shall notify the victim and members of the victim's immediate family that the victim, or the victim's immediate family members may request in writing to be notified in advance of the juvenile's scheduled release date in accordance with G.S. 7B-2514(d). (1979, c. 815, s. 1; 1983, c. 133, s. 2; 1987, c. 100; c. 372; 1991, c. 434, ss. 2, 3; 1995 (Reg. Sess., 1996), c. 609, s. 2; 1997-443, s. 11A.118(a); 1998-202, s. 6; 1999-423, s. 1; 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department" for "Office" throughout.

§ 7B-2514. Post-release supervision planning; release.

(a) The Department shall be responsible for evaluation of the progress of each juvenile at least once every six months as long as the juvenile remains in the care of the Department. Any determination that the juvenile should remain in the care of the Department for an additional period of time shall be based on the Department's determination that the juvenile requires additional treatment or rehabilitation pursuant to G.S. 7B-2515. If the Department determines that a juvenile is ready for release, the Department shall initiate a post-release supervision planning process. The post-release supervision planning process shall be defined by rules and regulations of the Department, but shall include the following:

(1) Written notification shall be given to the court that ordered commitment.

(2) A post-release supervision planning conference shall be held involving as many as possible of the following: the juvenile, the juvenile's parent, guardian, or custodian, court counselors who have supervised the juvenile on probation or will supervise the juvenile on post-release supervision, and staff of the facility that found the juvenile ready for release. The planning conference shall include personal contact and evaluation rather than telephonic notification.

(3) The planning conference participants shall consider, based on the individual needs of the juvenile and pursuant to rules adopted by the Department, placement of the juvenile in any program under the auspices of the Department, including the juvenile court services programs that, in the judgment of the Department, would be appropriate transitional placement, pending release under G.S. 7B-2513.

(b) The Department shall develop the plan in writing and base the terms on the needs of the juvenile and the protection of the public. Every plan shall require the juvenile to complete at least 90 days, but not more than one year, of post-release supervision.

(c) The Department shall release a juvenile under a plan of post-release supervision at least 90 days prior to:

(1) Completion of the juvenile's definite term of commitment; or

(2) The juvenile's twenty-first birthday if the juvenile has been committed to the Department for an offense that would be first-degree murder pursuant to G.S. 14-17, first-degree rape pursuant to G.S. 14-27.2, or first-degree sexual offense pursuant to G.S. 14-27.4 if committed by an adult.

(3) The juvenile's nineteenth birthday if the juvenile has been committed to the Department for an offense that would be a Class B1, B2, C, D, or E felony if committed by an adult, other than an offense set forth in G.S. 7B-1602(a).

(4) The juvenile's eighteenth birthday if the juvenile has been committed to the Department for an offense other than an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult.

(d) Notwithstanding Articles 30 and 31 of Subchapter III of this Chapter, at least 45 days before releasing to post-release supervision a juvenile who was committed for a Class A or B1 felony, the Department shall notify, by first-class mail at the last known address:

(1) The juvenile;
(2) The juvenile's parent, guardian, or custodian;
(3) The district attorney of the district where the juvenile was adjudicated;
(4) The head of the enforcement agency that took the juvenile into custody; and
(5) The victim and any of the victim's immediate family members who have requested in writing to be notified.

The notification shall include only the juvenile's name, offense, date of commitment, and date proposed for release. A copy of the notice shall be sent to the appropriate clerk of superior court for placement in the juvenile's court file.

(e) The Department may release a juvenile under an indefinite commitment to post-release supervision only after the juvenile has been committed to the Department for placement in a training school for a period of at least six months.

(f) A juvenile committed to the Department for placement in a training school for a definite term shall receive credit toward that term for the time the juvenile spends on post-release supervision.

(g) A juvenile on post-release supervision shall be supervised by a court counselor. Post-release supervision shall be terminated by order of the court. (1979, c. 815, s. 1; 1983, c. 133, s. 1; c. 276, s. 1; 1989, c. 235; 1996, 2nd Ex. Sess., c. 18, s. 23.2(e); 1998-202, s. 6; 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department" for "Office" throughout.

§ 7B-2515. Notification of extended commitment; plan of treatment.

(a) In determining whether a juvenile should be released before the juvenile's 18th birthday, the Department shall consider the protection of the public and the likelihood that continued placement will lead to further rehabilitation. If the Department does not intend to release the juvenile prior to the juvenile's eighteenth birthday, or if the Department determines that the juvenile's commitment should be continued beyond the maximum commitment period as set forth in G.S. 7B-2513(a), the Department shall notify the juvenile and the juvenile's parent, guardian, or custodian in writing at least 30 days in advance of the juvenile's eighteenth birthday or the end of the maximum commitment period, of the additional specific commitment period proposed by the Department, the basis for extending the commitment period, and the plan for future care or treatment.

(b) The Department shall modify the plan of care or treatment developed pursuant to G.S. 7B-2513(f) to specify (i) the specific goals and outcomes that require additional time for care or treatment of the juvenile; (ii) the specific course of treatment or care that will be implemented to achieve the established goals and outcomes; and (iii) the efforts that will be taken to assist the juvenile's family in creating an environment that will increase the likelihood that the efforts to treat and rehabilitate the juvenile will be successful upon release. If appropriate, the Department may place the juvenile in a setting other than a training school.

(c) The juvenile and the juvenile's parent, guardian, or custodian may request a review by the court of the Department's decision to extend the juvenile's commitment beyond the juvenile's eighteenth birthday or maximum commitment period, in which case the court shall conduct a review hearing. The court may modify the Department's decision and the juvenile's maximum commitment period. If the juvenile or the juvenile's parent, guardian, or custodian does not request a review of the Department's decision, the Department's decision shall become the juvenile's new maximum commitment period. (1998-202, s. 6; 1998-217, s. 57(1); 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department" for "Office" throughout.

§ 7B-2516. Revocation of post-release supervision.

(a) On motion of the court counselor providing post-release supervision or motion of the juvenile, or on the court's own motion, and after notice, the court may hold a hearing to review the progress of any juvenile on post-release supervision at any time during the period of post-release supervision. With respect to any hearing involving allegations that the juvenile has violated the terms of post-release supervision, the juvenile:

(1) Shall have reasonable notice in writing of the nature and content of the allegations in the motion, including notice that the purpose of the hearing is to determine whether the juvenile has violated the terms of post-release supervision to the extent that post-release supervision should be revoked;

(2) Shall be represented by an attorney at the hearing;

(3) Shall have the right to confront and cross-examine witnesses; and

(4) May admit, deny, or explain the violation alleged and may present proof, including affidavits or other evidence, in support of the juvenile's contentions. A record of the proceeding shall be made and preserved in the juvenile's record.

(b) If the court determines by the greater weight of the evidence that the juvenile has violated the terms of post-release supervision, the court may revoke the post-release supervision or make any other disposition authorized by this Subchapter.

(c) If the court revokes post-release supervision, the juvenile shall be returned to the Department for placement in a training school for an indefinite term of at least 90 days, provided, however, that no juvenile shall remain committed to the Department for placement in a training school past:

(1) The juvenile's twenty-first birthday if the juvenile has been committed to the Department for an offense that would be first-degree murder pursuant to G.S. 14-17, first-degree rape pursuant to G.S. 14-27.2, or first-degree sexual offense pursuant to G.S. 14-27.4 if committed by an adult.

(2) The juvenile's nineteenth birthday if the juvenile has been committed to the Department for an offense that would be a Class B1, B2, C, D, or E felony if committed by an adult, other than an offense set forth in G.S. 7B-1602(a).

(3) The juvenile's eighteenth birthday if the juvenile has been committed to the Department for an offense other than an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult. (1979, c. 815, s. 1; 1998-202, s. 6; 2000-137, s.3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department" for "Office" throughout.

§ 7B-2517. Transfer authority of Governor.

The Governor may order transfer of any person less than 18 years of age from any jail or penal facility of the State to one of the residential facilities operated by the Department in appropriate circumstances, provided the Governor shall consult with the Department concerning the feasibility of the transfer in terms of available space, staff, and suitability of program.

When an inmate, committed to the Department of Correction, is transferred by the Governor to a residential program operated by the Department, the Department may release the juvenile based on the needs of the juvenile and the best interests of the State. Transfer shall not divest the probation or parole officer of the officer's responsibility to supervise the inmate on release. (1979, c. 815, s. 1; 1997-443, s. 11A.118(a); 1998-202, s. 6; 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department" for "Office" throughout.

Article 26.

Modification and Enforcement of Dispositional Orders; Appeals.

§ 7B-2600. Authority to modify or vacate.

(a) Upon motion in the cause or petition, and after notice, the court may conduct a review hearing to determine whether the order of the court is in the best interests of the juvenile, and the court may modify or vacate the order in light of changes in circumstances or the needs of the juvenile.

(b) In a case of delinquency, the court may reduce the nature or the duration of the disposition on the basis that it was imposed in an illegal manner or is unduly severe with reference to the seriousness of the offense, the culpability of the juvenile, or the dispositions given to juveniles convicted of similar offenses.

(c) In any case where the court finds the juvenile to be delinquent or undisciplined, the jurisdiction of the court to modify any order or disposition made in the case shall continue (i) during the minority of the juvenile, (ii) until the juvenile reaches the age of 19 years if the juvenile has been adjudicated delinquent and committed to the Department for an offense that would be a Class B1, B2, C, D, or E felony if committed by an adult, other than an offense set forth in G.S. 7B-1602(a), (iii) until the juvenile reaches the age of 21 years if the juvenile has been adjudicated delinquent and committed for an offense that would be first-degree murder pursuant to G.S. 14-17, first-degree rape pursuant to G.S. 14-27.2, or first-degree sexual offense pursuant to G.S. 14-27.4 if committed by an adult, or (iv) until terminated by order of the court. (1979, c. 815, s. 1; 1998-202, s. 6; 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department" for "Office" in subsection (c).

§ 7B-2601. Request for modification for lack of suitable services.

If the Department finds that any juvenile committed to the Department's care is not suitable for its program, the Department may make a motion in the cause so that the court may make an alternative disposition that is consistent with G.S. 7B-2508. (1979, c. 815, s. 1; 1998-202, s. 6; 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department" for "Office" throughout.

§ 7B-2602. Right to appeal.

CASE NOTES

This statute does not authorize an appeal following the adjudicatory portion of a juvenile case, only a final order. In re Pegram, — N.C. App. —, 527 S.E.2d 737, 2000 N.C. App. LEXIS 322 (April 4, 2000).

Finding of Probable Cause Not Final Order. —

A finding of probable cause in a juvenile proceeding did not fall within any of the four categories of final orders specified in former § 7A-666 [see now this section] and, therefore, was not immediately appealable. In re K.R.B., 134 N.C. App. 328, 517 S.E.2d 200 (1999), cert. denied, 351 N.C. 187, — S.E.2d — (1999).

§ 7B-2604. Proper parties for appeal.

CASE NOTES

County May Not Appeal. —

The county was not entitled to appeal an order to pay for the mental health evaluation of a juvenile although it had to be given notice and the opportunity to be heard at the juvenile hearing. In re Voight, — N.C. App. —, 530 S.E.2d 76, 2000 N.C. App. LEXIS 624 (2000).

Article 27.

Authority over Parents of Juveniles Adjudicated Delinquent or Undisciplined.

§ 7B-2704. (Effective July 1, 2001) Payment of support or other expenses; assignment of insurance coverage.

At the dispositional hearing or a subsequent hearing, if the court finds that the parent is able to do so, the court may order the parent to:

(1) Pay a reasonable sum that will cover in whole or in part the support of the juvenile. If the court requires the payment of child support, the amount of the payments shall be determined as provided in G.S. 50-13.4;

(2) Pay a fee for probation supervision or residential facility costs;

(3) Assign private insurance coverage to cover medical costs while the juvenile is in secure detention, training school, or other out-of-home placement; and

(4) Pay appointed attorneys' fees.

All money paid by a parent pursuant to this section shall be paid into the office of the clerk of superior court.

§ 7B-2704 has a postponed effective date. See notes.

If the court places a juvenile in the custody of a county department of social services and if the court finds that the parent is unable to pay the cost of the support required by the juvenile, the cost shall be paid by the county department of social services in whose custody the juvenile is placed, provided the juvenile is not receiving care in an institution owned or operated by the State or federal government or any subdivision thereof. (1979, c. 815, s. 1; 1981, c. 469, s. 19; 1983, c. 837, ss. 2, 3; 1985, c. 589, s. 5; c. 777, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 2; 1987, c. 598, s. 2; 1989, c. 218; c. 529, s. 7; 1991, c. 636, s. 19(a); 1995, c. 328, s. 2; 1995 (Reg. Sess., 1996), c. 609, ss. 3, 4; 1997-456, s. 1; 1997-516, s. 1A; 1998-202, s. 6; 1998-229, s. 6; 2000-144, s. 24.)

For this section as in effect until July 1, 2001, see the main volume.

Editor's Note. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, § 7A-498 et seq.

Effect of Amendments. — Session Laws 2000-144, s. 24, effective July 1, 2001, substituted "appointed" for "court-appointed" in subdivision (4).

Article 28.

Interstate Compact on Juveniles.

§ 7B-2804. Return of runaways.

(a) **(Effective until July 1, 2001)** The parent, guardian, person, or agency entitled to legal custody of a juvenile who has not been adjudged delinquent but who has run away without the consent of the parent, guardian, person, or agency may petition the appropriate court in the demanding state for the issuance of a requisition for the juvenile's return. The petition shall state the name and age of the juvenile, the name of the petitioner, and the basis of entitlement to the juvenile's custody, the circumstances of the running away, the juvenile's location if known at the time application is made, and any other facts that may tend to show that the juvenile who has run away is endangering the juvenile's own welfare or the welfare of others and is not an emancipated minor. The petition shall be verified by affidavit, shall be executed in duplicate, and shall be accompanied by two certified copies of the document or documents on which the petitioner's entitlement to the juvenile's custody is based, such as birth certificates, letters of guardianship, or custody decrees. Any further affidavits and other documents as may be deemed proper may be submitted with the petition. The judge of the court to which this application is made may hold a hearing thereon to determine whether for the purposes of this Compact the petitioner is entitled to the legal custody of the juvenile, whether or not it appears that the juvenile has in fact run away without consent, whether or not the juvenile is an emancipated minor, and whether or not it is in the best interests of the juvenile to compel the juvenile's return to the state. If the judge determines, either with or without a hearing, that the juvenile should be returned, the judge shall present to the appropriate court or to the executive authority of the state where the juvenile is alleged to be located a written requisition for the return of the juvenile. The requisition shall set forth the name and age of the juvenile, the determination of the court that the juvenile has run away without the consent of a parent, guardian, person, or agency entitled to legal custody, and that it is in the best interests and for the protection of the juvenile that the juvenile be returned. In the event that a proceeding for the adjudication of the juvenile as a delinquent, neglected, or dependent juvenile is pending in the court at the time when the juvenile runs

§ 7B-2804(a) is set out twice. See notes.

away, the court may issue a requisition for the return of the juvenile upon its own motion, regardless of the consent of the parent, guardian, person, or agency entitled to legal custody, reciting therein the nature and circumstances of the pending proceeding. The requisition shall in every case be executed in duplicate and shall be signed by the judge. One copy of the requisition shall be filed with the Compact Administrator of the demanding state, there to remain on file subject to the provisions of law governing records of the court. Upon the receipt of a requisition demanding the return of a juvenile who has run away, the court or the executive authority to whom the requisition is addressed shall issue an order to any peace officer or other appropriate person directing that person to take into custody and detain the juvenile. The detention order must substantially recite the facts necessary to the validity of its issuance hereunder. No juvenile detained upon the order shall be delivered over to the officer whom the court has appointed to receive the juvenile unless the juvenile first is taken before a judge of a court in the state, who shall inform the juvenile of the demand made for the juvenile's return, and who may appoint counsel or guardian ad litem for the juvenile. If the court finds that the requisition is in order, the court shall deliver the juvenile over to the officer appointed to receive the juvenile by the court demanding the juvenile. The court, however, may fix a reasonable time to be allowed for the purpose of testing the legality of the proceeding.

Upon reasonable information that a person is a juvenile who has run away from another state party to this Compact without the consent of a parent, guardian, person, or agency entitled to legal custody, the juvenile may be taken into custody without a requisition and brought before a judge of the appropriate court who may appoint counsel or guardian ad litem for the juvenile and who shall determine after a hearing whether sufficient cause exists to hold the person, subject to the order of the court, for the juvenile's own protection and welfare, for such a time not exceeding 90 days as will enable the return of the juvenile to another state party to this Compact pursuant to a requisition for return from a court of that state. If, at the time when a state seeks the return of a juvenile who has run away, there is pending in the state wherein the juvenile is found, any criminal charge, or any proceeding to have the juvenile adjudicated a delinquent juvenile for an act committed in the state, or if the juvenile is suspected of having committed within the state a criminal offense or an act of juvenile delinquency, the juvenile shall not be returned without the consent of the state until discharged from prosecution or other form of proceeding, imprisonment, detention, or supervision for the offense or juvenile delinquency. The duly accredited officers of any state party to this Compact, upon the establishment of their authority and the identity of the juvenile being returned, shall be permitted to transport the juvenile through any and all states party to this Compact, without interference. Upon return of the juvenile to the state from which the juvenile ran away, the juvenile shall be subject to such further proceedings as may be appropriate under the laws of that state.

(a) **(Effective July 1, 2001)** The parent, guardian, person, or agency entitled to legal custody of a juvenile who has not been adjudged delinquent but who has run away without the consent of the parent, guardian, person, or agency may petition the appropriate court in the demanding state for the issuance of a requisition for the juvenile's return. The petition shall state the name and age of the juvenile, the name of the petitioner, and the basis of entitlement to the juvenile's custody, the circumstances of the running away, the juvenile's location if known at the time application is made, and any other facts that may tend to show that the juvenile who has run away is endangering the juvenile's own welfare or the welfare of others and is not an emancipated

§ 7B-2804(a) is set out twice. See notes.

minor. The petition shall be verified by affidavit, shall be executed in duplicate, and shall be accompanied by two certified copies of the document or documents on which the petitioner's entitlement to the juvenile's custody is based, such as birth certificates, letters of guardianship, or custody decrees. Any further affidavits and other documents as may be deemed proper may be submitted with the petition. The judge of the court to which this application is made may hold a hearing thereon to determine whether for the purposes of this Compact the petitioner is entitled to the legal custody of the juvenile, whether or not it appears that the juvenile has in fact run away without consent, whether or not the juvenile is an emancipated minor, and whether or not it is in the best interests of the juvenile to compel the juvenile's return to the state. If the judge determines, either with or without a hearing, that the juvenile should be returned, the judge shall present to the appropriate court or to the executive authority of the state where the juvenile is alleged to be located a written requisition for the return of the juvenile. The requisition shall set forth the name and age of the juvenile, the determination of the court that the juvenile has run away without the consent of a parent, guardian, person, or agency entitled to legal custody, and that it is in the best interests and for the protection of the juvenile that the juvenile be returned. In the event that a proceeding for the adjudication of the juvenile as a delinquent, neglected, or dependent juvenile is pending in the court at the time when the juvenile runs away, the court may issue a requisition for the return of the juvenile upon its own motion, regardless of the consent of the parent, guardian, person, or agency entitled to legal custody, reciting therein the nature and circumstances of the pending proceeding. The requisition shall in every case be executed in duplicate and shall be signed by the judge. One copy of the requisition shall be filed with the Compact Administrator of the demanding state, there to remain on file subject to the provisions of law governing records of the court. Upon the receipt of a requisition demanding the return of a juvenile who has run away, the court or the executive authority to whom the requisition is addressed shall issue an order to any peace officer or other appropriate person directing that person to take into custody and detain the juvenile. The detention order must substantially recite the facts necessary to the validity of its issuance hereunder. No juvenile detained upon the order shall be delivered over to the officer whom the court has appointed to receive the juvenile unless the juvenile first is taken before a judge of a court in the state, who shall inform the juvenile of the demand made for the juvenile's return, and who may determine that counsel or guardian ad litem for the juvenile should be appointed. If the court finds that the requisition is in order, the court shall deliver the juvenile over to the officer appointed to receive the juvenile by the court demanding the juvenile. The court, however, may fix a reasonable time to be allowed for the purpose of testing the legality of the proceeding.

Upon reasonable information that a person is a juvenile who has run away from another state party to this Compact without the consent of a parent, guardian, person, or agency entitled to legal custody, the juvenile may be taken into custody without a requisition and brought before a judge of the appropriate court who may determine that counsel or guardian ad litem for the juvenile should be appointed and who shall determine after a hearing whether sufficient cause exists to hold the person, subject to the order of the court, for the juvenile's own protection and welfare, for such a time not exceeding 90 days as will enable the return of the juvenile to another state party to this Compact pursuant to a requisition for return from a court of that state. In cases in which the court determines that counsel or guardian ad litem should be provided for the juvenile, appointment shall be in accordance with rules adopted by the

§ 7B-2804(a) is set out twice. See notes.

Office of Indigent Defense Services. If, at the time when a state seeks the return of a juvenile who has run away, there is pending in the state wherein the juvenile is found, any criminal charge, or any proceeding to have the juvenile adjudicated a delinquent juvenile for an act committed in the state, or if the juvenile is suspected of having committed within the state a criminal offense or an act of juvenile delinquency, the juvenile shall not be returned without the consent of the state until discharged from prosecution or other form of proceeding, imprisonment, detention, or supervision for the offense or juvenile delinquency. The duly accredited officers of any state party to this Compact, upon the establishment of their authority and the identity of the juvenile being returned, shall be permitted to transport the juvenile through any and all states party to this Compact, without interference. Upon return of the juvenile to the state from which the juvenile ran away, the juvenile shall be subject to such further proceedings as may be appropriate under the laws of that state.

(b) The state to which the juvenile is returned under this Article shall be responsible for payment of the transportation costs of return.

(c) The term "juvenile" as used in this Article means any person who is a minor under the law of the state of residence of the parent, guardian, person, or agency entitled to the legal custody of the minor. (1963, c. 910, s. 1; c. 1965, c. 925, s. 1; 1979, c. 815, s. 1; 1998-202, s. 6; 2000-144, s. 25.)

Subsection (a) Set Out Twice. — The first version of subsection (a) is effective until July 1, 2001. The second version of subsection (a) is effective July 1, 2001.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, § 7A-498 et seq.

Effect of Amendments. — Session Laws 2000-144, s. 25, effective July 1, 2001, in subsection (a), substituted "determine that counsel or guardian ad litem for the juvenile should be appointed" for "appoint counsel or guardian ad litem for the juvenile" near the end of the first paragraph and near the beginning of the second paragraph, and added the second sentence in the second paragraph.

§ 7B-2805. (Effective July 1, 2001) Return of escapees and absconders.

(a) The appropriate person or authority from whose probation or parole supervision a delinquent juvenile has absconded or from whose institutional custody a delinquent juvenile has escaped shall present to the appropriate court or to the executive authority of the state where the delinquent juvenile is alleged to be located a written requisition for the return of the delinquent juvenile. The requisition shall state the name and age of the delinquent juvenile, the particulars of the juvenile's adjudication as a delinquent juvenile, the circumstances of the breach of the terms of probation or parole or of the juvenile's escape from an institution or agency vested with legal custody or supervision, and the location of the delinquent juvenile, if known, at the time the requisition is made. The requisition shall be verified by affidavit, shall be executed in duplicate, and shall be accompanied by two certified copies of the judgment, formal adjudication, or order of commitment which subjects the delinquent juvenile to probation or parole or to the legal custody of the institution or agency concerned. Any further affidavits and documents as may be deemed proper may be submitted with the requisition. One copy of the requisition shall be filed with the Compact Administrator of the demanding state, there to remain on file subject to the provisions of the law governing records of the appropriate court. Upon the receipt of a requisition demanding the return of a delinquent juvenile who has absconded or escaped, the court or the executive authority to whom the requisition is addressed shall issue an

§ 7B-2805 has a postponed effective date. See notes.

order to any peace officer or other appropriate person directing the person to take into custody and detain such delinquent juvenile. The detention order must substantially recite the facts necessary to the validity of its issuance hereunder. No delinquent juvenile detained upon the order shall be delivered over to the officer whom the appropriate person or authority demanding the juvenile has appointed to receive the juvenile, unless the juvenile is first taken forthwith before a judge of an appropriate court in the state, who shall inform the juvenile of the demand made for the return, and who may determine that counsel or guardian ad litem for the juvenile should be appointed. If the judge of the court finds that the requisition is in order, the judge shall deliver the delinquent juvenile over to the officer whom the appropriate person or authority demanding the juvenile appointed to receive the juvenile. The judge, however, may fix a reasonable time to be allowed for the purpose of testing the legality of the proceeding.

Upon reasonable information that a person is a delinquent juvenile who has absconded while on probation or parole, or escaped from an institution or agency vested with legal custody or supervision in any state party to this Compact, the person may be taken into custody in any other state party to this Compact without a requisition. But in that event, the juvenile shall be taken forthwith before a judge of the appropriate court, who may determine that counsel or guardian ad litem for the person should be appointed and who shall determine after a hearing, whether sufficient cause exists to hold the person subject to the order of the court for a length of time, not exceeding 90 days, as will enable detention of the juvenile under a detention order issued on a requisition pursuant to this Article. If, at the time when a state seeks the return of a delinquent who has either absconded while on probation or parole or escaped from an institution or agency vested with legal custody or supervision, there is pending in the state wherein the juvenile is detained any criminal charge or any proceeding to have the juvenile adjudicated a delinquent juvenile for an act committed in the state, or if the juvenile is suspected of having committed a criminal offense or an act of juvenile delinquency within the state, the juvenile shall not be returned without the consent of the state until discharged from prosecution or other form of proceeding, imprisonment, detention, or supervision for the offense or juvenile delinquency. The duly accredited officers of any state party to this Compact, upon the establishment of their authority and the identity of the delinquent juvenile being returned, shall be permitted to transport the delinquent juvenile through any and all states party to this Compact, without interference. Upon return to the state from which the juvenile escaped or absconded, the delinquent juvenile shall be subject to any further proceedings appropriate under the laws of that state.

(b) The state to which a delinquent juvenile is returned under this Article shall be responsible for the payment of transportation costs of the return.

(c) If the court determines that counsel or guardian ad litem should be provided under this section, appointment shall be in accordance with rules adopted by the Office of Indigent Defense Services. (2000-144, s. 26.)

For this section as in effect until July 1, 2001, see the main volume.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, 7A-498 et seq.

Effect of Amendments. — Session Laws 2000-144, s. 26, effective July 1, 2001, in subsection (a), substituted "determine that counsel or guardian ad litem for the juvenile should be appointed" for "appoint counsel or guardian ad litem for the juvenile" near the end of the first paragraph and substituted "determine that counsel or guardian ad litem for the person should be appointed" for "appoint counsel or guardian ad litem for the person" near the end of the second paragraph; and added subsection (c).

SUBCHAPTER III. JUVENILE RECORDS.

ARTICLE 30.

Juvenile Records and Social Reports of Delinquency and Undisciplined Cases.

§ 7B-3000. Juvenile court records.

(a) The clerk shall maintain a complete record of all juvenile cases filed in the clerk's office to be known as the juvenile record. The record shall include the summons and petition, any secure or nonsecure custody order, any electronic or mechanical recording of hearings, and any written motions, orders, or papers filed in the proceeding.

(b) All juvenile records shall be withheld from public inspection and, except as provided in this subsection, may be examined only by order of the court. Except as provided in subsection (c) of this section, the following persons may examine the juvenile's record and obtain copies of written parts of the record without an order of the court:

(1) The juvenile;

(2) The juvenile's parent, guardian, or custodian, or the authorized representative of the juvenile's parent, guardian, or custodian;

(3) The prosecutor; and

(4) Court counselors.

Except as provided in subsection (c) of this section, the prosecutor may, in the prosecutor's discretion, share information obtained from a juvenile's record with law enforcement officers sworn in this State, but may not allow a law enforcement officer to photocopy any part of the record.

(c) The court may direct the clerk to "seal" any portion of a juvenile's record. The clerk shall secure any sealed portion of a juvenile's record in an envelope clearly marked "SEALED: MAY BE EXAMINED ONLY BY ORDER OF THE COURT", or with similar notice, and shall permit examination or copying of sealed portions of a juvenile's record only pursuant to a court order specifically authorizing inspection or copying.

(d) Any portion of a juvenile's record consisting of an electronic or mechanical recording of a hearing shall be transcribed only when notice of appeal has been timely given and shall be copied electronically or mechanically, only by order of the court. After the time for appeal has expired with no appeal having been filed, the court may enter a written order directing the clerk to destroy the recording of the hearing.

(e) The juvenile's record of an adjudication of delinquency for an offense that would be a felony if committed by an adult may be used by law enforcement, the magistrate, and the prosecutor for pretrial release and plea negotiating decisions.

(f) The juvenile's record of an adjudication of delinquency for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult may be used in a subsequent criminal proceeding against the juvenile either under G.S. 8C-1, Rule 404(b), or to prove an aggravating factor at sentencing under G.S. 15A-1340.4(a), 15A-1340.16(d), or 15A-2000(e). The record may be so used only by order of the court in the subsequent criminal proceeding, upon motion of the prosecutor, after an in camera hearing to determine whether the record in question is admissible.

(g) Except as provided in subsection (d) of this section, a juvenile's record

shall be destroyed only as authorized by G.S. 7B-3200 or by rules adopted by the Department of Juvenile Justice and Delinquency Prevention. (1979, c. 815, s. 1; 1987, c. 297; 1994, Ex. Sess., c. 7, s. 1; 1995, c. 462, s. 4; c. 509, s. 5; 1997-459, s. 2; 1998-202, s. 6; 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department of Juvenile Justice and Delinquency Prevention" for "Office of Juvenile Justice" in subsection (g).

§ 7B-3001. Other records relating to juveniles.

(a) The chief court counselor shall maintain a record of all cases of juveniles under supervision of court counselors, to be known as the court counselor's record. The court counselor's record shall include family background information; reports of social, medical, psychiatric, or psychological information concerning a juvenile or the juvenile's family; probation reports; interviews with the juvenile's family; or other information the court finds should be protected from public inspection in the best interests of the juvenile.

(b) Unless jurisdiction of the juvenile has been transferred to superior court, all law enforcement records and files concerning a juvenile shall be kept separate from the records and files of adults and shall be withheld from public inspection. The following persons may examine and obtain copies of law enforcement records and files concerning a juvenile without an order of the court:

(1) The juvenile;
(2) The juvenile's parent, guardian, custodian, or the authorized representative of the juvenile's parent, guardian, or custodian;
(3) The district attorney or prosecutor;
(4) Court counselors; and
(5) Law enforcement officers sworn in this State.

Otherwise, the records and files may be examined or copied only by order of the court.

(c) All records and files maintained by the Department pursuant to this Chapter shall be withheld from public inspection. The following persons may examine and obtain copies of the Department records and files concerning a juvenile without an order of the court:

(1) The juvenile and the juvenile's attorney;
(2) The juvenile's parent, guardian, custodian, or the authorized representative of the juvenile's parent, guardian, or custodian;
(3) Professionals in the agency who are directly involved in the juvenile's case; and
(4) Court counselors.

Otherwise, the records and files may be examined or copied only by order of the court. The court may inspect and order the release of records maintained by the Department. (1979, c. 815, s. 1; 1987, c. 297; 1994, Ex. Sess., c. 7, s. 1; 1995, c. 462, s. 4; c. 509, s. 5; 1997-459, s. 2; 1998-202, s. 6; 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department" for "Office" three times in subsection (c).

Article 31.

Disclosure of Juvenile Information.

§ 7B-3100. Disclosure of information about juveniles.

(a) The Department, after consultation with the Conference of Chief District Court Judges, shall adopt rules designating certain local agencies that are authorized to share information concerning juveniles in accordance with the provisions of this section. Agencies so designated shall share with one another, upon request, information that is in their possession that is relevant to any case in which a petition is filed alleging that a juvenile is abused, neglected, dependent, undisciplined, or delinquent and shall continue to do so until the juvenile is no longer subject to the jurisdiction of juvenile court. Agencies that may be designated as "agencies authorized to share information" include local mental health facilities, local health departments, local departments of social services, local law enforcement agencies, local school administrative units, the district's district attorney's office, the Department of Juvenile Justice and Delinquency Prevention, and the Office of Guardian ad Litem Services of the Administrative Office of the Courts. Any information shared among agencies pursuant to this section shall remain confidential, shall be withheld from public inspection, and shall be used only for the protection of the juvenile and others or to improve the educational opportunities of the juvenile, and shall be released in accordance with the provisions of the Family Educational and Privacy Rights Act as set forth in 20 U.S.C. § 1232g. Nothing in this section or any other provision of law shall preclude any other necessary sharing of information among agencies. Nothing herein shall be deemed to require the disclosure or release of any information in the possession of a district attorney.

(b) Disclosure of information concerning any juvenile under investigation or alleged to be within the jurisdiction of the court that would reveal the identity of that juvenile is prohibited except that publication of pictures of runaways is permitted with the permission of the parents. (1979, c. 815, s. 1; 1987, c. 297; 1994, Ex. Sess., c. 7, s. 1; 1995, c. 462, s. 4; c. 509, s. 5; 1997-459, s. 2; 1998-202, s. 6; 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department" for "Office" and "Department of Juvenile Justice and Delinquency Prevention" for "Office of Juvenile Justice" in subsection (a).

Article 32.

Expunction of Juvenile Records.

§ 7B-3200. Expunction of records of juveniles alleged or adjudicated delinquent and undisciplined.

(a) Any person who has attained the age of 18 years may file a petition in the court where the person was adjudicated undisciplined for expunction of all records of that adjudication.

(b) Any person who has attained the age of 18 years may file a petition in the court where the person was adjudicated delinquent for expunction of all records of that adjudication provided:

(1) The offense for which the person was adjudicated would have been a crime other than a Class A, B1, B2, C, D, or E felony if committed by an adult.

(2) At least 18 months have elapsed since the person was released from juvenile court jurisdiction, and the person has not subsequently been adjudicated delinquent or convicted as an adult 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.

Records relating to an adjudication for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult shall not be expunged.

(c) The petition shall contain, but not be limited to, the following:

(1) An affidavit by the petitioner that the petitioner has been of good behavior since the adjudication and, in the case of a petition based on a delinquency adjudication, that the petitioner has not subsequently been adjudicated delinquent or convicted as an adult 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 the petitioner lives and that the petitioner's character and reputation are good; and

(3) A statement that the petition is a motion in the cause in the case wherein the petitioner was adjudicated delinquent or undisciplined.

The petition shall be served upon the district attorney in the district wherein adjudication occurred. 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 on the petition.

(d) If the court, after hearing, finds that the petitioner satisfies the conditions set out in subsections (a) or (b) of this section, the court shall order and direct the clerk and all law enforcement agencies to expunge their records of the adjudication including all references to arrests, complaints, referrals, petitions, and orders.

(e) The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other law enforcement agency.

(f) Records of a juvenile adjudicated delinquent or undisciplined being maintained by the chief court counselor, an intake counselor, or a court counselor shall be retained or disposed of as provided by the Department, except that no records shall be destroyed before the juvenile reaches the age of 18 or 18 months have elapsed since the person was released from juvenile court jurisdiction, whichever occurs last.

(g) Records of a juvenile adjudicated delinquent or undisciplined being maintained by personnel at a residential facility operated by the Department, shall be retained or disposed of as provided by the Department, except that no records shall be destroyed before the juvenile reaches the age of 18 or 18 months have elapsed since the person was released from juvenile court jurisdiction, whichever occurs last.

(h) Any person who was alleged to be delinquent as a juvenile and has attained the age of 16 years, or was alleged to be undisciplined as a juvenile and has attained the age of 18 years, may file a petition in the court in which the person was alleged to be delinquent or undisciplined, for expunction of all juvenile records of the juvenile having been alleged to be delinquent or undisciplined if the court dismissed the juvenile petition without an adjudication that the juvenile was delinquent or undisciplined. The petition shall be served on the chief court counselor in the district where the juvenile petition was filed. The chief court counselor shall have 10 days thereafter in which to file a written objection in the court. If no objection is filed, the court may grant

the petition without a hearing. If an objection is filed or the court so directs, a hearing shall be scheduled and the chief court counselor shall be notified as to the date of the hearing. If the court finds at the hearing that the petitioner satisfies the conditions specified herein, the court shall order the clerk and the appropriate law enforcement agencies to expunge their records of the allegations of delinquent or undisciplined acts including all references to arrests, complaints, referrals, juvenile petitions, and orders. The clerk shall forward a certified copy of the order of expunction to the sheriff, chief of police, or other appropriate law enforcement agency, and to the chief court counselor, and these specified officials shall immediately destroy all records relating to the allegations that the juvenile was delinquent or undisciplined.

(i) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in the clerk's county, file with the Administrative Office of the Courts, the names of those persons granted an expunction under the provisions of this section, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted an expunction. 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 an expunction. (1979, c. 815, s. 1; 1989, c. 186; 1994, Ex. Sess., c. 7, s. 2; 1995, c. 509, s. 6; 1997-443, s. 11A.118(a); 1998-202, s. 6; 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department" for "Office" in subsections (f) and (g).

Article 33.

Computation of Recidivism Rates.

§ 7B-3300. Juvenile recidivism rates.

(a) On an annual basis, the Department of Juvenile Justice and Delinquency Prevention shall compute the recidivism rate of juveniles who are adjudicated delinquent for offenses that would be Class A, B1, B2, C, D, or E felonies if committed by adults and who subsequently are adjudicated delinquent or convicted and shall report the statistics to the Joint Legislative Commission on Governmental Operations by February 15 each year.

(b) The chief court counselor of each judicial district shall forward to the Department relevant information, as determined by the Department, regarding every juvenile who is adjudicated delinquent for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult for the purpose of computing the statistics required by this section. (1997-443, s. 18.15(a); 1998-212, s. 16.2; 1998-202, s. 6; 2000-137, s. 3.)

Effect of Amendments. — Session Laws 2000-137, s. 3, effective July 20, 2000, substituted "Department of Juvenile Justice and Delinquency Prevention" for "Office of Juvenile Justice" in subsection (a), and "Department" for "Office" in subsection (b).

Chapter 8.

Evidence.

Article 5.

Life Tables.

§ 8-46. Mortality tables as evidence.

CASE NOTES

Where testimony tended to show that plaintiff's injuries were permanent, etc.

Where sufficient evidence existed to establish that slip and fall plaintiff suffered permanent injuries, the introduction of a mortuary table was not error. Matthews v. Food Lion, Inc., 135 N.C. App. 784, 522 S.E.2d 587 (1999).

Article 7.

Competency of Witnesses.

§ 8-50.1. Competency of blood tests; jury charge; taxing of expenses as costs.

CASE NOTES

The trial court properly admitted the presumption of paternity relevant to genetic marker testing set forth in this section although the record contained no ruling as to defendant's written objection to the admission nor any stipulation to admit the evidence, contrary to the court's assertion that the parties did so stipulate; where expert testimony indicated that paternity by defendant was a factual possibility, it would have been error to assign 0 as the prior probability of paternity. Brown v. Smith, — N.C. App. —, 526 S.E.2d 686, 2000 N.C. App. LEXIS 253 (2000).

§ 8-53. Communications between physician and patient.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Discretion of Trial Judge. —

The court examined sealed medical records of the victim which the victim's hospital asserted as privileged under § 8-53 and concluded that they contained no information exculpatory of defendant's guilt or material to her defense or punishment. State v. Jarrett, — N.C. App. —, 527 S.E.2d 693, 2000 N.C. App. LEXIS 318 (2000).

§ 8-58.1. Injured party as witness when medical charges at issue.

CASE NOTES

Applied in Bueltel v. Lumber Mut. Ins. Co., 134 N.C. App. 626, 518 S.E.2d 205 (1999), cert. denied, 351 N.C. 186, — S.E.2d — (1999).

Chapter 8C.

Evidence Code.

Article 1.

General Provisions.

Rule 103. Rulings on evidence.

CASE NOTES

Applied in State v. Lawrence, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 441 (June 16, 2000).

Rule 104. Preliminary questions.

CASE NOTES

Applied in In re Faircloth, — N.C. App. —, 527 S.E.2d 679, 2000 N.C. App. LEXIS 327 (2000); State v. Noffsinger, — N.C. App. —, 528 S.E.2d 605, 2000 N.C. App. LEXIS 420 (2000).

Rule 106. Remainder of or related writings or recorded statements.

CASE NOTES

Prior Inconsistent Statements. — Co-conspirator was allowed to use her attorney-client privilege with regard to a prior inconsistent statement made in conference with her attorney; that privilege was not waived when the information was published and defendant had the opportunity to cross-examine and discredit the witness as to that portion of her statement and never asserted, and was never denied, the right to pursue any other aspect of the statement. State v. Gell, 351 N.C. 192, 524 S.E.2d 332 (2000).

Rule 301. Presumptions in general in civil actions and proceedings.

CASE NOTES

Failure to Rebut Statutory Presumption Resulted in Summary Judgment. — Summary judgment for the defendant on the issue of slander per se was appropriate where the plaintiff's description of retaliatory motives for defendant's report failed to rebut the statutory presumption created in favor of the defendant by the child abuse reporting provisions of this section and § 7B-309 which together provide immunity not merely conditional upon proof of good faith, but a "good faith" immunity which endows the reporter with the mandatory presumption that he or she acted in good faith. Dobson v. Harris, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 433 (2000).

ARTICLE 4.

Relevancy and Its Limits.

Rule 401. Definition of "relevant evidence."

CASE NOTES

I. General Consideration.
II. Relevant Evidence.
III. Irrelevant Evidence.

I. GENERAL CONSIDERATION.

Applied in State v. Underwood, 134 N.C. App. 533, 518 S.E.2d 231 (1999).

Quoted in State v. Teague, 134 N.C. App. 702, 518 S.E.2d 573 (1999); State v. Leggett, 135 N.C. App. 168, 519 S.E.2d 328 (1999).

Stated in State v. Shuler, 135 N.C. App. 449, 520 S.E.2d 585 (1999).

Cited in State v. Lawrence, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 441 (June 16, 2000).

II. RELEVANT EVIDENCE.

Witness' testimony in which he stated he was "pretty sure" that defendant had admitted to killing victim was relevant to the issue of the identification of defendant and not unfairly prejudicial. State v. Moses, 350 N.C. 741, 517 S.E.2d 853 (1999), cert. denied, — U.S. —, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Videotaped interview, initiated by defendant herself and containing the story as told to her family, police, doctors and the news reporter, was relevant to show how she lied consistently concerning the cause of the injuries leading to her child's death and, even if wrongly admitted into evidence, was not prejudicial. State v. Burgess, 134 N.C. App. 632, 518 S.E.2d 209 (1999).

Evidence from a Void Statutory Rape Charge. — The court rejected the defendant's claim that the admission of evidence on a void statutory rape charge was irrelevant and unfairly prejudicial and found that the evidence of defendant's sexual activity with the fourteen-year-old was relevant to establish intent, motive, knowledge, as well as defendant's scheme of involving himself with vulnerable, disturbed teenage girls at the home. State v. Crockett, — N.C. App. —, 530 S.E.2d 359, 2000 N.C. App. LEXIS 548 (2000).

Medical Records Relevant. — The court properly allowed evidence of the plaintiff's medical records indicating the possibility of a history of alcohol abuse to explain the reason defendants considered the possibility that alcohol withdrawal was a potential cause of the plaintiff's post-operative confusion or hallucinations. Marley v. Graper, 135 N.C. App. 423, 521 S.E.2d 129 (1999).

Evidence of the Method Used by the Defendant in Loading Merchandise After the Accident. — Since plaintiff allegedly had been injured by merchandise falling from the defendant's trailer, defendant's employee was properly permitted to testify that he had observed the method by which defendant loaded and packed its trailers and that he had observed merchandise fall out of the trailers when the rear doors were opened. The observations were not too remote in time (within 18 months) and allowed a reasonable inference that the same methods had been used to load the trailer involved in plaintiff's injury. Kilgo v. Wal-Mart Stores, Inc., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 791 (July 5, 2000).

Evidence Held Relevant. —

Where witness remembered that defendant had a gun similar to the one used in the two murders at issue because defendant had playfully held it to his head, the trial court properly allowed the prosecution to present evidence of the defendant's prior misconduct with a handgun. State v. Moses, 350 N.C. 741, 517 S.E.2d 853 (1999), cert. denied, — U.S. —, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Officer's testimony that he had training in the investigation of drug offenses, had dealt with occupants of the subject house when investigating drug offenses, and had arrested "folks" that resided in the house for drug offenses was relevant to show motive, i.e., that defendant committed robbery with a dangerous weapon in order to get money to buy drugs. State v. Stevenson, — N.C. App. —, 523 S.E.2d 734, 1999 N.C. App. LEXIS 1378 (1999), cert. denied, 351 N.C. 368, — S.E.2d — (2000).

III. IRRELEVANT EVIDENCE.

Evidence Properly Excluded. —

Trial court properly precluded defendant from cross-examining victim concerning an alleged sexual offense on grounds of lack of relevance. State v. Chavis, 134 N.C. App. 546, 518 S.E.2d 241 (1999).

The trial court properly excluded the defendant's proffered expert testimony that the defendant was reacting to a potential fear that he was about to be harmed when defendant killed the victim since such testimony would not aid but rather tend to confuse the jury in understanding the evidence and determining the facts in issue. State v. Lawrence, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 441 (June 16, 2000).

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

CASE NOTES

Evidence Held Relevant. — Where persuasive evidence existed to show that a death caused by unprotected floor openings placed the defendant on notice of the danger, evidence of OSHA citations against the defendant/general contractor showing continuing violations several days later was properly admitted as relevant to the questions of negligence and gross negligence. Lane v. R.N. Rouse & Co., 135 N.C. App. 494, 521 S.E.2d 137 (1999).

Admission of Evidence Held Harmless. — Trial court's error in admitting irrelevant evidence of co-attacker's robbery and attack of another person following victims' deaths constituted harmless error. State v. Teague, 134 N.C. App. 702, 518 S.E.2d 573 (1999).

Cited in State v. Jones, — N.C. App. —, 527 S.E.2d 700, 2000 N.C. App. LEXIS 313 (2000).

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

CASE NOTES

I. General Consideration.
II. Photographs and Videotapes.
III. Prejudicial Evidence, Evidence Excluded Based on Confusion, Etc.
IV. Admission or Exclusion of Evidence Not Prejudicial.

I. GENERAL CONSIDERATION.

The appellate court will not intervene where the trial court has properly weighed both the probative and prejudicial value of evidence and made its ruling accordingly. Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, — N.C. App. —, 524 S.E.2d 591, 2000 N.C. App. LEXIS 52 (2000).

Factors Entering into Expert's Opinion. — Although court was not required to conduct a balancing test under this section in the sentencing proceeding, it correctly allowed admission of evidence of list of serial killers defendant possessed near the time of two murders as relevant for cross-examination of mental health expert, because jury was entitled to know to what extent, if any, these materials entered into the expert's opinion regarding defendant's state of mind. State v. Moses, 350 N.C. 741, 517 S.E.2d 853 (1999), cert. denied, — U.S. —, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Applied in State v. Underwood, 134 N.C. App. 533, 518 S.E.2d 231 (1999); State v. Chavis, 134 N.C. App. 546, 518 S.E.2d 241 (1999); State v. Lathan, — N.C. App. —, 530 S.E.2d 615, 2000 N.C. App. LEXIS 603 (2000); State v. Brooks, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 601 (June 6, 2000).

Stated in State v. Riley, — N.C. App. —, 528 S.E.2d 590, 2000 N.C. App. LEXIS 411 (2000).

Cited in State v. Burgess, 134 N.C. App. 632, 518 S.E.2d 209 (1999); State v. Locklear, — N.C. App. —, 525 S.E.2d 813, 2000 N.C. App. LEXIS 138 (2000); State v. Merrill, — N.C. App. —, 530 S.E.2d 608, 2000 N.C. App. LEXIS 597 (2000); State v. Lawrence, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 441 (June 16, 2000); State v. Doisey, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 779 (July 5, 2000).

II. PHOTOGRAPHS AND VIDEOTAPES.

Photographs Held Relevant. — The relevance of fifty-one photographs was upheld where these photographs, albeit numerous, were unique in subject matter and in detail in that they (1) depicted the exceedingly large number of wounds inflicted upon different parts of the victim's body by various weapons, including a knife, a drill bit, a pipe, an ax head, and a limb or pruning saw, (2) depicted the condition of the body, its location, and the crime

scene, (3) corroborated defendant's confession by demonstrating that the victim was attacked in his bedroom, that he fell to the floor with his head toward the closet, that he was stabbed while on the floor, and that his neck was cut with a saw while on the floor. State v. Hyde, — N.C. —, 530 S.E.2d 281, 2000 N.C. LEXIS 443 (2000).

Where a party introduces photographs for illustrative purposes, etc.

The admission of two photographs depicting the victim's damaged car did not result in unfair prejudice to defendant where the court instructed the jury that the photographs were being admitted only for the purpose of illustrating the investigating trooper's testimony; although blood was visible in both photographs, and prominent in one, the photographs were not gruesome, horrifying, or revolting. State v. Gray, — N.C. App. —, 528 S.E.2d 46, 2000 N.C. App. LEXIS 324 (2000).

Photographs Held Properly Admitted. — Court properly allowed photographs of victims before and after their deaths where it gave due consideration to counsel's objection and arguments and found the photos relevant, not repetitive, and no more gruesome than photos from other murders of the same nature, and where the probative value of the photos outweighed the danger of any prejudice to the defendant. State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622 (1999), cert. denied, — U.S. —, 120 S. Ct. 1432, 146 L. Ed. 2d 322 (2000).

III. PREJUDICIAL EVIDENCE, EVIDENCE EXCLUDED BASED ON CONFUSION, ETC.

Evidence of One Murder in Support of Another. — The defendant failed to show that the trial court abused its discretion in permitting evidence of one murder to show opportunity and identity in support of another murder. State v. Moses, 350 N.C. 741, 517 S.E.2d 853 (1999), cert. denied, — U.S. —, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Evidence Improperly Admitted. — The appellate court agreed with 14-year-old defendant that allegations of a subsequent sexual assault on a four-year-old were not admissible since the incident was not sufficiently similar to the one at issue involving a nine-year-old; the admission of such evidence tended only to show the propensity of the defendant to commit sexual acts against young female children, an improper purpose, and therefore entitled defendant to a new trial. State v. White, 135 N.C. App. 349, 520 S.E.2d 70 (1999).

Evidence Properly Excluded. —

Trial court acted within its sound discretion as required by this rule and properly excluded testimony of three defense witnesses regarding defendant/wife's claims of domestic violence and mysogynistic behavior of husband. State v. Owen, 133 N.C. App. 543, 516 S.E.2d 159 (1999), cert. denied, 351 N.C. 117, — S.E.2d — (1999).

Medical Record Properly Excluded. — In a case arising from an automobile accident which plaintiff testified resulted in injury to her neck, shoulder and thoracic spine, the court properly excluded evidence from her 10-year-old medical record indicating "longstanding mid-thoracic pain" and "paraspinal muscle pain" along with the testimony of defense witness/doctor regarding disputed medical record. Sitton v. Cole, 135 N.C. App. 625, 521 S.E.2d 739 (1999).

Evidence of subsequent remedial measures in the form of written instructions to security guards was properly excluded since it could not be used to impeach testimony and since its probative value tended to be outweighed by the danger of unfair prejudice. Benton v. Hillcrest Foods, Inc., 136 N.C. App. 42, 524S.E.2d 53 (1999).

Exclusion of Evidence Held Harmless — Trial court's decision to prevent defendant's expert from relating statements made by defendant to him and used by him to form the basis of his expert opinion of defendant's mental state at the time of the homicide, if an abuse of discretion, was harmless error since the same information was related in answers given by the expert to other questions. State v. Holston, 134 N.C. App. 599, 518 S.E.2d 216 (1999).

Admission of Prejudicial Evidence within the Discretion of the Court. — The court determined within its discretion that the probative value of the admission of the unredacted version of the incident report, obtained through a subpoena duces tecum, when the redacted version had previously been introduced into evidence, outweighed its tendency to prejudice the defendant. Kilgo v. Wal-Mart Stores, Inc., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 791 (July 5, 2000).

IV. ADMISSION OR EXCLUSION OF EVIDENCE NOT PREJUDICIAL.

Cross-Examination Upheld. — The defendant on trial for nine murders was not prejudiced by the cross-examination of expert witnesses concerning two additional murders he had committed. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (2000).

Evidence Properly Admitted. —

The decedent/wife's statements that her husband was jealous and had repeatedly threatened to kill her were admissible, although arguably no more than recitations of fact, where the facts that she recited tended to show her state of mind as to her marriage, indicated her relationship with the defendant and, therefore,

were relevant under this rule, and rebutted testimony by the defendant that they had a good marriage. State v. Jones, — N.C. App. —, 527 S.E.2d 700, 2000 N.C. App. LEXIS 313 (2000).

Court properly allowed testimony about a letter written by defendant to rape victim's mother who later destroyed it, because any prejudicial effect the letter may have had was outweighed by its probative value. State v. Jarrell, 133 N.C. App. 264, 515 S.E.2d 247 (1999).

Where State introduced evidence of defendant's assaultive behavior prior to a brain injury which he claimed partially caused his violence, the court correctly determined that the probative value of the evidence of defendant's prior violent acts was not substantially outweighed by the danger of unfair prejudice under this rule. State v. Hedgepeth, 350 N.C. 776, 517 S.E.2d 605 (1999), cert. denied, — U.S. —, 120 S. Ct. 1274, 146 L. Ed. 2d 223 (2000).

Evidence of defendant's participation in several robberies was properly admitted in murder trial under § 8C-1, Rule 404 to corroborate the accounts of other witnesses or for the purpose of showing defendant's motive, intent or plan to commit the instant crime and presented with limiting jury instructions could not fairly be characterized as arbitrary and unreasonable under this rule. State v. Hall, 134 N.C. App. 417, 517 S.E.2d 907 (1999).

Evidence of a prior robbery and a prior attempted robbery was correctly admitted after court determined that the evidence was relevant for some purpose other than to show defendant's propensity to commit this type of crime, as required by § 8C-1, Rule 404, and that it was more probative than prejudicial, as required by this rule. State v. Leggett, 135 N.C. App. 168, 519 S.E.2d 328 (1999).

Evidence of defendant's molestation of a fourth sister had probative value to show the existence of intent, plan or design which, in light of the direct evidence presented by the other three sisters/victims and the investigator, was not outweighed by any unfair prejudice. State v. Owens, 135 N.C. App. 456, 520 S.E.2d 590 (1999).

Testimony Based on Blood-Alcohol Analyzer. — Court did not abuse its discretion in admitting Blood-Alcohol Analyzer as a reliable scientific method of proof under § 8C-1, Rule 702(a), nor should it have been excluded under this rule, since the probative value of its results were not substantially outweighed by the danger of unfair prejudice or jury confusion and since both parties had opportunity to either attack or support its reliability. State v. Cardwell, 133 N.C. App. 496, 516 S.E.2d 388 (1999).

Admission of a tape recording of a 911 call, etc. —

Defendant failed to show that the decision of the trial court to admit 911 tape recording of his daughter telling dispatchers that he was "trying to kill" her mother was not the result of a reasoned choice in conformity with the requirements of this rule. State v. Wilds, 130 N.C. App. 195, 515 S.E.2d 466 (1999).

Evidence Properly Excluded. —

Where plaintiffs introduced records of 911 calls from January 1988 through July 1993 concerning incidents at a restaurant where the subject murder occurred, and where their crime analyst testified as to the type of offenses that prompted the calls in 1992 and 1993 as well as crimes that occurred within a one-half mile radius of the restaurant in those years, the trial court did not err in excluding data pertaining to criminal activity from 1988 to 1991, some of which was probably cumulative; if such exclusion did constitute error, such error was, in the face of the plaintiffs' contributory negligence, harmless. Benton v. Hillcrest Foods, Inc., 136 N.C. App. 42, 524S.E.2d 53 (1999).

Statements Regarding Prior Similar Actions. — Trial court did not abuse its discretion in admitting certain statements by a town mayor regarding previous actions of a chief building official where the statements were relevant to the claim for negligent supervision and the trial court thrice gave a limiting instruction as to their applicability. Leftwich v. Gaines, 134 N.C. App. 502, 521 S.E.2d 717 (1999).

Photographs of Other Houses' Cracks in Structural Defect Case — Photographs of cracks in the foundations and floors of other houses constructed by the defendant/construction company were properly admitted into evidence because the probative value of the photographs was not outweighed by unfair prejudice. Allen v. Roberts Constr. Co., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 783 (July 5, 2000).

Admission of Prior Misconduct with Gun. — Defendant was not prejudiced by admission of testimony that witness remembered a gun, similar to that used in two murders, because defendant had playfully held it to his head. State v. Moses, 350 N.C. 741, 517 S.E.2d 853 (1999), cert. denied, — U.S. —, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Witness testimony in which he stated he was "pretty sure" that defendant had admitted to killing victim was relevant to the issue of the identification of defendant and not unfairly prejudicial. State v. Moses, 350 N.C. 741, 517 S.E.2d 853 (1999), cert. denied, — U.S. —, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

CASE NOTES

I. GENERAL CONSIDERATION.

Single Scheme or Plan. — Where there existed an extended interval of as much as several years between sex offenses and where there was a lack of a consistent pattern in defendant's molesting behavior, all of the charged acts perpetrated against three sisters did not constitute part of a single scheme or plan, as a matter of law, and the trial court erred in joining the cases under § 15A-926; however, since evidence of other molestations would have been admissible pursuant to this rule to show "intent, plan or design," at the trial of any one offense, the error was harmless. State v. Owens, 135 N.C. App. 456, 520 S.E.2d 590 (1999).

Evidence of Motive. — The evidence of defendant's drug dealing activities, the victim's desire for a greater cut of the profits and his failure to turn in all the money, was relevant to show defendant's motive for murdering the victim. State v. Lundy, 135 N.C. App. 13, 519 S.E.2d 73 (1999).

Applied in State v. Cardwell, 133 N.C. App. 496, 516 S.E.2d 388 (1999); State v. Jones, 133 N.C. App. 448, 516 S.E.2d 405 (1999); State v. Krider, — N.C. App. —, 530 S.E.2d 569, 2000 N.C. App. LEXIS 541 (2000); Allen v. Roberts Constr. Co., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 783 (July 5, 2000).

Quoted in State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1 (2000).

Cited in State v. Merrill, — N.C. App. —, 530 S.E.2d 608, 2000 N.C. App. LEXIS 597 (2000).

II. CHARACTER EVIDENCE GENERALLY.

When Evidence of Character Traits Is Admissible. —

Where defendant proffered evidence of his good character, trial court did not abuse its discretion in allowing the State to rebut by introducing evidence of his assaultive behavior prior to his 1976 brain injury. State v. Hedgepeth, 350 N.C. 776, 517 S.E.2d 605 (1999), cert. denied, — U.S. —, 120 S. Ct. 1274, 146 L. Ed. 2d 223 (2000).

Admission of Victim's Character Evidence Not Plain Error — The admission of the evidence concerning decedent/wife's good character before the defendant offered any evidence of her character was error but not plain error. State v. Jones, — N.C. App. —, 527 S.E.2d 700, 2000 N.C. App. LEXIS 313 (2000).

III. OTHER CRIMES AND WRONGS.

A prior act or crime is "similar" if, etc.

Evidence of defendant's attempt to burn a second victim's body was admissible where the unusual, unique and bizarre circumstances of the two deaths — the dismemberment of the bodies, the severing of the ears, the saving of those ears, and the building of two bonfires — revealed a contrived, common plan showing the same person committed both crimes. State v. Sokolowski, 351 N.C. 137, 522 S.E.2d 65 (1999).

Prior Violent Acts of Defendant. — Court did not err in allowing the State to put defendant's character into evidence by presenting specific instances of violent conduct by defendant, where defendant opened the door to the State's subsequent questions by portraying herself as a good mother. State v. Burgess, 134 N.C. App. 632, 518 S.E.2d 209 (1999).

Prior Act of Witness. — The trial court did not err by excluding evidence of witness's prior knife threat on a police officer where the record revealed no unusual facts surrounding the knife threat that were also present in the circumstances surrounding the victim's death. State v. Hamilton, 351 N.C. 14, 519 S.E.2d 514 (1999), cert. denied, — U.S. —, 120 S. Ct. 1841, 146 L. Ed. 2d 783 (2000).

When Evidence of Other Crimes May Be Admitted. —

Evidence of defendant's prior traffic violations—driving 75 mph in a 45 mph zone, 76 mph in a 45 mph zone, 70 mph in a 35 mph zone, and 70 mph in a 55 mph zone—was relevant to establish defendant's "depraved heart" on the night he struck the victims' vehicle while rounding a sharp curve at a speed at least 40 mph over the posted limit. State v. Rich, — N.C. —, 527 S.E.2d 299, 2000 N.C. LEXIS 239 (2000).

Evidence of Husband's Prior Misconduct Toward His Wife. —

Trial court properly allowed evidence of defendant's prior conviction for assault and injury to personal property pursuant to this section to show intent, ill will and malice; ten-year time

span affected weight of evidence, not admissibility. State v. Wilds, 130 N.C. App. 195, 515 S.E.2d 466 (1999).

Insufficiently Similar Crimes. — The admission of defendant's prior conviction was in error because any similarity between the prior robbery for which defendant was convicted and the subsequent robbery was so slight as to be virtually non-existent. State v. Willis, — N.C. App. —, 526 S.E.2d 191, 2000 N.C. App. LEXIS 148 (2000).

Probative Value Must Be Weighed Against Potential Prejudice. —

The admission into evidence of a crack pipe was proper to show motive in a robbery, especially since the defendant failed to argue that its probative value outweighed its prejudice to the defendant. State v. Stevenson, — N.C. App. —, 523 S.E.2d 734, 1999 N.C. App. LEXIS 1378 (1999), cert. denied, 351 N.C. 368, — S.E.2d — (2000).

Prior Conviction And Prior Pending Impaired Driving Charge. — The trial court did not err in admitting evidence of the two prior incidents of impaired driving where the 1991 conviction was identical with the one at bar and the 1997 incident was indicative of the defendant's state of mind although the defendant was appealing that decision and awaited a trial de novo, especially where the court's instruction clearly communicated that the defendant had not been convicted and that the evidence was admitted for the limited purpose of showing state of mind or intent. State v. McAllister, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 600 (June 6, 2000).

Seventeen Year Prior Assault on First Wife, Not Too Remote. — The time between defendant's assault of his first wife and of his second wife was not so remote as to make his first wife's testimony inadmissible where the defendant spent at least half of the seventeen years in prison serving time for the assault; where the defendant attacked both women during a period of marital discord; and where the defendant never denied stabbing his first wife or shooting his second wife to prevent either from leaving him. State v. Brooks, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 601 (June 6, 2000).

Prior Bad Acts Showing Intent, Plan or Design. —

Past incidents of defendant's failure to provide proper care for the victim, her daughter who had cerebral palsy and died from malnutrition, were relevant and admissible to show intent because the trial court properly balanced its probative value against any unduly prejudicial effect by giving a limiting instruction and granted defendant's other motions in limine to suppress evidence of the pathologist's conclusion that the victim died from the withholding of food, of defendant's lifestyle, of the injury to the victim's brother's eye, and of two investigations by the DSS into unsubstantiated allegations of neglect of other children. State v. Fritsch, 351 N.C. 373, 526 S.E.2d 451 (2000).

Prior Bad Act Showing Intent, Malice, Premeditation, and Deliberation. —

The defendant's prior alcohol-related conviction pursuant to N.C. Gen. Stat. § 20-138.3 was relevant, where the impaired defendant caused a death and was charged with second-degree murder, and admissible for the purpose of establishing malice even though the prior offense imposed strict liability based upon defendant's age without regard to the quantity consumed. State v. Gray, — N.C. App. —, 528 S.E.2d 46, 2000 N.C. App. LEXIS 324 (2000).

Evidence of Other Murder — Showing Opportunity and Identity. — Trial court correctly allowed evidence of one murder to show opportunity and identity in support of another murder. State v. Moses, 350 N.C. 741, 517 S.E.2d 853 (1999), cert. denied, — U.S. —, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Same-Showing Common Scheme. — Where State used evidence of another victim's death to show that defendant had a common scheme to hurt his former girlfriend for refusing to continue their relationship, and the two killings shared significant similarities, and the court conducted a lengthy pretrial hearing which supported its decision to admit the evidence, appellate court found no abuse of discretion under this rule. State v. Underwood, 134 N.C. App. 533, 518 S.E.2d 231 (1999).

Testimony concerning the defendant's discipline of the victim, the manner in which she spoke to him, along with testimony describing her as a "pushy person," was properly admitted where the defendant was charged with felony child abuse and her treatment of the victim was at issue and, thus, relevant. State v. Clark, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 635 (June 20, 2000).

Evidence of prior sex acts, etc. —

While testimony regarding previous rape may have been irrelevant, its admission was not prejudicial where defendant's admission of intercourse on the grounds of consent was effectively a confession. State v. Anthony, 133 N.C. App. 573, 516 S.E.2d 195 (1999), appeal dismissed, cert. granted, 351 N.C. 109, 516 S.E.2d 195 (1999), aff'd, 528 S.E.2d 321 (2000).

Evidence of a party's prior driving record

The court did not commit plain error in admitting defendant's driving offenses where defendant's driving offenses from eight to two years past were sufficiently proximate in time to the offenses charged, including murder in the second degree for causing a fatal automobile accident as a result of fleeing a police officer. State v. Fuller, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 632 (June 20, 2000).

The trial court's instructions properly limited the use of evidence of defendant's prior traffic violations under this rule. State v. Fuller, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 632 (June 20, 2000).

Evidence of Prior Robberies. — Admission of evidence of defendant's participation in several robberies, to corroborate the accounts of other witnesses or for the purpose of showing defendant's motive, intent or plan to commit the instant crime, presented with limiting jury instructions, could not fairly be characterized as arbitrary and unreasonable and in violation of the principles of § 8C-1, Rule 403. State v. Hall, 134 N.C. App. 417, 517 S.E.2d 907 (1999).

Evidence of a prior robbery and a prior attempted robbery was correctly admitted after the court determined that the evidence was relevant for some purpose other than to show defendant's propensity to commit this type of crime, as required by this rule, and that it was more probative than prejudicial, as required by § 8C-1, Rule 403. State v. Leggett, 135 N.C. App. 168, 519 S.E.2d 328 (1999).

Evidence Inadmissible If Its Only Value Is to Show Defendant's Propensity to Commit an Offense. —

The trial court's error in allowing evidence of a prior assault by defendant on the victim entitled him to a new trial; evidence of the 1994 assault did not tend to prove a material fact in issue in the crimes charged and demonstrated no connection between the 1994 assault and the 1997 assaults, other than the defendant's propensity for violence, making it inadmissible under this section. State v. Elliott, — N.C. App. —, 528 S.E.2d 32, 2000 N.C. App. LEXIS 325 (2000).

Videotaping of Family Bathroom Not Relevant to Sex Offense Charge. — The admission of evidence indicating that the defendant, who was charged with two counts of first degree statutory sex offense against the twelve-year-old daughter of his girlfriend, installed a camcorder in his girlfriend's bathroom was error, pursuant to this section, since it did not tend to demonstrate a plan or scheme to sexually assault the child; however, its admission was not reversible error since the defendant failed to show it had "a probable impact on the jury's finding of guilt." State v. Doisey, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 779 (July 5, 2000).

IV. ILLUSTRATIVE CASES.

Evidence Held Admissible. —

The defendant's comment to witness about having gotten in trouble was admissible where it was not presented in a vacuum, but was part of a narrative that justified a police officer's initial contact with defendant, clarified the witness' identification of defendant after the shooting, and explained why an incorrect name was placed on certain documentation in the case. State v. Riley, — N.C. App. —, 528 S.E.2d 590, 2000 N.C. App. LEXIS 411 (2000).

Exception under subsection (b) of this rule applied to witnesses' repetition of defendant's statements relating to recent burglaries at home in question, showing proof of opportunity, preparation, knowledge, identity, and absence of mistake, entrapment, or accident, proximate time, as well as statements regarding victim's demeanor after rape. State v. Campbell, 133 N.C. App. 531, 515 S.E.2d 732 (1999), cert. denied, 351 N.C. 111, — S.E.2d — (1999).

Where evidence surrounding two robberies, as well as the circumstances immediately preceding and following those robberies, was relevant to facts other than the defendant's propensity to commit the robbery and murder at issue, the trial court correctly allowed its inclusion. State v. Cheek, 351 N.C. 48, 520 S.E.2d 545 (1999), cert. denied, — U.S. —, 120 S. Ct. 2694, — L. Ed. — (2000).

Testimony of fourth sister regarding sexual molestation by defendant was admissible in case involving sexual molestation of three other sisters to show a common plan or scheme. State v. Owens, 135 N.C. App. 456, 520 S.E.2d 590 (1999).

The admission of statements in a letter in which defendant urged his girlfriend to divorce her estranged husband and made threatening statements towards him were clearly relevant as an admission with respect to victim's death and also to show defendant's deliberate intent to kill. State v. Perez, 135 N.C. App. 543, 522 S.E.2d 102 (1999).

Evidence that defendant lied in order to have child support for his three children terminated and that the Department of Social Services planned to have said support reinstated was not admitted to show bad character but was relevant to show motive for murder and attempted murders, and to show the particular circumstances leading up to them. State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000).

Evidence that defendant complained to a co-worker about having the Department of Social Services take over half his paycheck for child support was admissible to show motive and plan for first-degree murder of defendant's daughter and attempted murder of defendant's two children and their mother. State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000).

Admission of testimony revealing that police informant became informant as a result of being arrested for buying cocaine from defendant and promising to help catch the seller, i.e. the defendant, was proper to prove intent, a common plan or scheme, and to identify defendant. State v. Montford, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 431 (2000).

Evidence Held Inadmissible. —
Evidence of witness's juvenile adjudication of guilt of involuntary manslaughter was not relevant; admission of the evidence was not necessary to a fair determination of defendant's guilt or innocence. State v. Deese, — N.C. App. —, 524 S.E.2d 381, 2000 N.C. App. LEXIS 8 (2000), cert. denied, 351 N.C. 476, — S.E.2d — (2000).

Evidence Held Prejudicial. —
The appellate court agreed with 14-year-old defendant that allegations of a subsequent sexual assault on a four-year-old were not admissible since the incident was not sufficiently similar to the one at issue involving a nine-year-old; the admission of such evidence tended only to show the propensity of the defendant to commit sexual acts against young female children, an improper purpose, and therefore entitled defendant to a new trial. State v. White, 135 N.C. App. 349, 520 S.E.2d 70 (1999).

Rule 405. Methods of proving character.

CASE NOTES

It was not error for witnesses to be cross-examined about whether they knew that defendant had hit or been violent toward his wife where defendant placed his character at issue by having members of his family testify about his reputation for nonviolence or peacefulness. State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1 (2000).

Expert Opinion on Credibility. —
Although Rules 405 and 608, when read together, prohibit an expert witness from commenting on the credibility of another witness, Rule 702 allows expert testimony where the expert's testimony goes to the reliability of a diagnosis and not to the credibility of a victim. State v. Marine, 135 N.C. App. 279, 520 S.E.2d 65 (1999).

Failure to Object to Expert Opinion on Credibility. — Defense counsel's failure to object to a social worker's testimony that child/victim's statements were believable did not constitute ineffective assistance of counsel, where testimony was elicited by defense counsel in an effort to show that child's sexual knowledge resulted from a prior incident of sexual abuse. State v. Pretty, 134 N.C. App. 379, 517 S.E.2d 677 (1999), cert. denied, appeal dismissed, 351 N.C. 117, — S.E.2d — (1999).

Rule 406. Habit; routine practice.

CASE NOTES

Admission of Testimony Properly Denied. — The trial court did not abuse its discretion in refusing to admit habit evidence under this section given the vague and imprecise nature of the witness's testimony regarding defendant's speed (defendant was driving "'wide open as usual") and the witness's potential, albeit understandable, interest in the outcome of the case as the son of plaintiffs. Long v. Harris, — N.C. App. —, 528 S.E.2d 633, 2000 N.C. App. LEXIS 415 (2000).

Stated in State v. Griffin, — N.C. App. —, 525 S.E.2d 793, 2000 N.C. App. LEXIS 108 (2000).

Cited in Kilgo v. Wal-Mart Stores, Inc., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 791 (July 5, 2000).

Rule 407. Subsequent remedial measures.

CASE NOTES

Evidence of subsequent remedial measures in the form of written instructions to security guards was properly excluded since it could not be used to impeach testimony that there was no reason to lock the front door of the restaurant and since its probative value tended to be outweighed by the danger of unfair prejudice. Benton v. Hillcrest Foods, Inc., 136 N.C. App. 42, 524S.E.2d 53 (1999).

Evidence of Control and Feasibility of Precautionary Measures. — Where general contractor repeatedly argued that it had no control of a construction site on the day of the subject accident, the measures taken by it, immediately following decedent's death, to cover floor openings, were admissible to rebut this contention and to demonstrate the feasibility of taking precautionary measures. Lane v. R.N. Rouse & Co., 135 N.C. App. 494, 521 S.E.2d 137 (1999).

Applied in Monson v. Paramount Homes, Inc., 133 N.C. App. 235, 515 S.E.2d 445 (1999).

Rule 408. Compromise and offers to compromise.

CASE NOTES

Harmless Error. — The admission of offers of compromise to boost defendant's argument that decedent intended for home listed in her daughter's name to belong to her constituted harmless error where an abundance of evidence otherwise supported the decedent's intent to treat the property as a gift. Tucker v. Westlake, 136 N.C. App. 162, 523 S.E.2d 139 (1999).

Use of Statements Made During Compromise Negotiations to Support Separate Claim. — While affidavit of plaintiff's attorney containing statements made during negotiations between a member and the board of a voluntary association could not be offered up to prove plaintiff's innocence of the charges against her, they could support a distinct and separate claim for damages on the ground that she was denied a fair hearing by an impartial board. Wilson Realty & Constr., Inc. v. Asheboro-Randolph Bd. of Realtors, Inc., 134 N.C. App. 468, 518 S.E.2d 28 (1999).

Rule 412. Rape or sex offense cases; relevance of victim's past behavior.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Exclusion of Evidence Upheld. — Evidence of victim's alleged past sexual behavior was not the type of relevant evidence which could be offered, under this rule, for the purpose of showing that the acts charged were not committed by defendant. State v. Trogden, 135 N.C. App. 85, 519 S.E.2d 64 (1999), cert. denied, 351 N.C. 190, — S.E.2d — (1999).

Error in the Face of Overwhelming Evidence to Convict. — Even if evidence of victim's alleged past sexual behavior was improperly excluded, the defendant failed to show, in view of the testimony of seven other juvenile sexual abuse victims, that a different result would have resulted from its inclusion. State v. Trogden, 135 N.C. App. 85, 519 S.E.2d 64 (1999), cert. denied, 351 N.C. 190, — S.E.2d — (1999).

ARTICLE 6.

Witnesses.

Rule 601. General rule of competency; disqualification of witness.

CASE NOTES

I. General Consideration.
III. Testimony Not Disqualified.

I. GENERAL CONSIDERATION.

The test of competency, etc.

The trial court applied an erroneous legal standard in denying respondent father's request to call the children as witnesses because the focus of the voir dire was incorrectly directed to the effect the children's testifying would have on their mental health, rather than upon the ability of the children to understand their obligation to tell the truth and to relate events which they may have seen, heard or

experienced; rather than determining whether all or any of them were competent to testify under this section, the trial court disqualified them as being "unavailable," apparently relying upon the definition of "unavailability" contained in § 8C-1, Rule 804(a)(4), but the question of a potential witness' unavailability becomes relevant only with respect to the admissibility of his hearsay declarations. In re Faircloth, — N.C. App. —, 527 S.E.2d 679, 2000 N.C. App. LEXIS 327 (2000).

Further findings were required because the juvenile court disqualified the four-year-old victim without making an appropriate inquiry into her competency to testify. A short voir dire based on five questions, only one of which she did not answer, was insufficient to allow the juvenile court to determine whether she was incapable of expressing herself concerning the matter or incapable of understanding the duty to tell the truth. State v. Pugh, — N.C. App. —, 530 S.E.2d 328, 2000 N.C. App. LEXIS 551 (2000).

Cited in State v. Waddell, 351 N.C. 413, 527 S.E.2d 644 (2000).

III. TESTIMONY NOT DISQUALIFIED.

Child Held Competent. —
The child victim-witness was competent to testify where it was demonstrated that she knew the difference between the truth and a lie; she indicated a capacity to understand and relate facts to the jury concerning defendant's assaults upon her; she displayed a comprehension of the difference between truth and untruth; and she affirmed her intention to tell the truth. State v. Ford, — N.C. App. —, 525 S.E.2d 218, 2000 N.C. App. LEXIS 111 (2000).

Four-Year-Old Child Competent to Testify. — Juvenile court did not commit plain error in admitting the testimony of a four-year-old victim, despite defendant's argument that the victim was incompetent to testify in that she did not clearly communicate her understanding of the obligation to tell the truth or illustrate that she had the capacity to understand and relate facts since she provided inaudible responses to questions; the victim's story was consistent and corroborated by the testimony of her mother, her brother, her doctor, and the investigating officer and the evidence sufficiently demonstrated the use of force. In re Clapp, — N.C. App. —, 526 S.E.2d 689, 2000 N.C. App. LEXIS 252 (2000).

Rule 602. Lack of personal knowledge.

CASE NOTES

Testimony Establishing Personal Knowledge. —
Officer's testimony as to what occurred after his conversation with informant consisted of details of the drug transaction derived from his subsequent participation in the deal and not from any prior conversation with the informant and was, therefore, admissible under this rule. State v. Broome, 136 N.C. App. 82, 523 S.E.2d 448 (1999), cert. denied, 351 N.C. 362, — S.E.2d — (2000).

Testimony Held Improper But Not Prejudicial. — Witness testimony that the defendant intended to purchase a gun for the purpose of threatening the victim was admitted without a foundation in violation of this rule but did not prejudice the defendant where other evidence at trial pointed to premeditation and deliberation. State v. Harshaw, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 776 (July 5, 2000).

State of Mind Testimony Was Not Plain Error. — The testimony of a police officer as to defendant's state of mind neither constituted "a miscarriage of justice" nor did it probably cause the jury to reach a different verdict than it otherwise would have in light of defendant's confession, as well as his trial testimony concerning his involvement in these crimes. State v. Holder, — N.C. App. —, 530 S.E.2d 562, 2000 N.C. App. LEXIS 552 (2000).

Testimony Held Proper. — Where all of the evidence challenged by the defendant, accused of murdering her grandmother in a nursing home, was either within the personal knowledge of the witness or was permitted due to the defendant's having opened the door to the subject on cross-examination, the court rejected the contention that the trial court erred by permitting various witnesses to offer a variety of speculative testimony. State v. Smith, 135 N.C. App. 649, 522 S.E.2d 321 (1999).

Rule 603. Oath or affirmation.

CASE NOTES

Rule Not Applicable at Sentencing Hearing. — The trial court committed no error by allowing an unsworn victim impact statement at the sentencing hearing where the rules of evidence do not apply. State v. Hendricks, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 794 (July 5, 2000).

Rule 606. Competency of juror as witness.

CASE NOTES

Testimony in Criminal Contempt Hearing. — Jurors' testimony regarding the alleged misconduct of a fellow juror was admissible in a criminal contempt hearing, fell within exception to subsection (b) of this rule, and did not frustrate public policy considerations underlying this rule. State v. Pierce, 134 N.C. App. 148, 516 S.E.2d 916 (1999).

Cited in State v. Smith, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 778 (July 5, 2000).

Rule 607. Who may impeach.

CASE NOTES

Witness Summary Improperly and Prejudicially Admitted. — Defendant was entitled to yet another new trial where a witness' purported summary, allegedly written by an investigating officer who was not called as a witness by the State, was improperly and prejudicially admitted into evidence although it was not admissible as a recorded recollection under Rule 803(5), did not refresh the witness' recollection, was not properly used to impeach her under this rule and the witness, in fact, objected to parts of the statement. State v. Spinks, 136 N.C. App. 153, 523 S.E.2d 129 (1999).

Quoted in State v. Miller, — N.C. App. —, 528 S.E.2d 626, 2000 N.C. App. LEXIS 418 (2000).

Rule 608. Evidence of character and conduct of witness.

CASE NOTES

I. General Consideration.
II. Opinion and Reputation Evidence of Character.
III. Specific Instances of Conduct.

I. GENERAL CONSIDERATION.

Stated in State v. Cardwell, 133 N.C. App. 496, 516 S.E.2d 388 (1999).

II. OPINION AND REPUTATION EVIDENCE OF CHARACTER.

Expert Opinion on Credibility. — Although Rules 405 and 608, when read together, prohibit an expert witness from commenting on the credibility of another witness, Rule 702 allows expert testimony where the expert's testimony goes to the reliability of a diagnosis and not to the credibility of a rape victim. State v. Marine, 135 N.C. App. 279, 520 S.E.2d 65 (1999).

Failure to Object to Expert Opinion on Credibility. — Defense counsel's failure to object to a social worker's testimony that child/victim's statements were believable did not constitute ineffective assistance of counsel, where testimony was elicited by defense counsel in an effort to show that child's sexual knowledge resulted from a prior incident of sexual abuse. State v. Pretty, 134 N.C. App. 379, 517 S.E.2d 677 (1999), cert. denied, appeal dismissed, 351 N.C. 117, — S.E.2d — (1999).

III. SPECIFIC INSTANCES OF CONDUCT.

Cross-Examination on Witness' Prior Violent Conduct. — Trial court properly denied

defendant the right to cross-examine a State's witness regarding his prior violent conduct. State v. Holston, 134 N.C. App. 599, 518 S.E.2d 216 (1999).

Limiting Cross-Examination Held Proper. — Trial court did not abuse its discretion in preventing defendant's cross-examination of witness about theft of restaurant ribs, when defendant had already impeached witness with evidence that he waited four months before admitting that he knew about the robbery, had experienced a messy break-up with defendant's sister, and had "bad blood" with defendant. State v. Grigsby, 134 N.C. App. 315, 517 S.E.2d 195 (1999), rev'd on other grounds, 351 N.C. 454, 526 S.E.2d 460 (2000).

Rule 609. Impeachment by evidence of conviction of crime.

CASE NOTES

Evidence of Prior Convictions Held Admissible on Issue of Credibility. — Where trial court conducted an extensive hearing and entered findings of fact revealing that the credibility of defendant's testimony, in which he claimed he acted in self-defense, was central to the resolution of the case and that evidence of a 1981 conviction was therefore more probative than prejudicial, evidence of the old attempted robbery was properly presented to the jury for its consideration. State v. Holston, 134 N.C. App. 599, 518 S.E.2d 216 (1999).

Juvenile Convictions Properly Excluded. —

The trial court did not abuse its discretion when it allowed the State's pre-trial motion in limine to prohibit defendant from cross-examining a witness concerning her juvenile adjudication of guilt of involuntary manslaughter in South Carolina. State v. Deese, — N.C. App. —, 524 S.E.2d 381, 2000 N.C. App. LEXIS 8 (2000), cert. denied, 351 N.C. 476, — S.E.2d — (2000).

The trial court properly used this section as guide in limiting the defendant's cross-examination of State's witness as to her criminal record where the defendant did not give notice of his intent to impeach her, nor make an offer of proof as to: (1) whether she was actually convicted of the offenses, (2) what the convictions were, (3) the exact nature of the offenses involved, or (4) how long ago the convictions were obtained. State v. Greene, 351 N.C. 562, 528 S.E.2d 575 (2000).

Cited in State v. Stanfield, 134 N.C. App. 685, 518 S.E.2d 541 (1999).

Rule 611. Mode and order of interrogation and presentation.

CASE NOTES

Plaintiffs' attempt to generate an exhibit during trial while a witness was undergoing cross-examination, by extracting and charting portions of the testimony, was governed by subsection (a) of this rule, not by Rule 1006, and the trial court acted within its discretion in disallowing it as a kind of premature final argument. Marley v. Graper, 135 N.C. App. 423, 521 S.E.2d 129 (1999).

Cross-Examination of Expert Upheld. — State's questions regarding an expert's familiarity with relevant diagnostic treatises, reliability or truth of defendant's statements, and the degree of reliance placed upon them by the expert witness in forming his opinion, and its effort to impeach defendant's stated memory loss, were all well within the bounds of a proper cross-examination. State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622 (1999), cert. denied, — U.S. —, 120 S. Ct. 1432, 146 L. Ed. 2d 322 (2000).

Leading Question Permitted. —

Where the record showed that the questions that the defendant objected to during trial were not so much "leading" as they were "bridges" or summaries of testimony, and where the case was long and complicated, the court did not err in allowing the district attorney to direct witness's attention to a certain topic by asking leading questions. State v. Smith, 135 N.C. App. 649, 522 S.E.2d 321 (1999).

Leading Question to Refresh Memory Upheld. — The prosecutor's leading question eliciting the fact that the defendant spat on the decedent after shooting him was permissible where he used it in an attempt to refresh the witness' memory. State v. Lesane, — N.C. App. —, 528 S.E.2d 37, 2000 N.C. App. LEXIS 323 (2000).

Prohibition of Leading Questions Upheld. —

Although the witness was called to contradict the testimony of a prior witness, defendant

failed to argue the exception at trial and failed to cite any case law in support of its application in his brief on appeal; therefore, there was no abuse of discretion where the trial court sustained the timely objection of the State to what was a leading question posed by counsel on direct examination of a non-hostile witness. State v. Wiggins, — N.C. App. —, 526 S.E.2d 207, 2000 N.C. App. LEXIS 149 (2000).

Compensation of Expert Witness. — The State may cross-examine a court-appointed and state-funded expert witness about any potential bias resulting from compensation as a defense witness. State v. Lawrence, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 441 (June 16, 2000).

Quoted in State v. Shuler, 135 N.C. App. 449, 520 S.E.2d 585 (1999).

Rule 613. Prior statements of witnesses.

CASE NOTES

Cited in State v. Frogge, 351 N.C. 576, 528 S.E.2d 893 (2000).

Article 7.

Opinions and Expert Testimony.

Rule 701. Opinion testimony by lay witness.

CASE NOTES

Shorthand Statements of Fact. — The witness' statement that it looked to him like the defendant was trying to shoot the decedent in the head was a permissible opinion in the form of a "shorthand statement of fact;" asking the witness to recite the precise position of the decedent, the stance of the defendant, and the angle of the gun would have been impractical. State v. Lesane, — N.C. App. —, 528 S.E.2d 37, 2000 N.C. App. LEXIS 323 (2000).

Lay Opinion on Ownership of Church Property. — Although trial court may have erred in admitting, over objection, certain lay opinion testimony regarding the ownership of church property, this did not constitute reversible error. Fire Baptized Holiness Church of God of Ams., Inc. v. McSwain, 134 N.C. App. 676, 518 S.E.2d 558 (1999).

Lay Opinion on Psychiatric Diagnosis. — The admission of testimony by a lay witness that defendant suffered from multiple personality disorder, in violation of this section, was not prejudicial in light of the other evidence properly admitted at trial. State v. Merrill, — N.C. App. —, 530 S.E.2d 608, 2000 N.C. App. LEXIS 597 (2000).

Lay Opinion on Victim's Viability. — Court properly allowed lay opinion that the victim remained alive for a period of time following shooting. State v. Hedgepeth, 350 N.C. 776, 517 S.E.2d 605 (1999), cert. denied, — U.S. —, 120 S. Ct. 1274, 146 L. Ed. 2d 223 (2000).

Police Officer's Testimony Regarding Intoxication. — The opinion testimony of a police officer, who posited that the defendant was impaired at the time of the accident, was admissible for purposes of showing malice; notwithstanding his cross-examination testimony which tended to show that he relied on the moderate to strong odor of alcohol coming from the defendant almost two hours after the accident in forming his opinion, the Supreme Court believed him to have based his opinion not only on the odor of alcohol, but also on his investigation of the accident and upon his experience enforcing traffic laws and dealing with intoxicated drivers. State v. Rich, — N.C. —, 527 S.E.2d 299, 2000 N.C. LEXIS 239 (2000).

Testimony of Detectives At Time of Confession. — The detectives' testimony was properly admitted where their opinions were based upon their personal perception of defendant at the time of the confession and helped the trial court determine the ultimate issue of the voluntariness of the defendant's statement. State v. Johnson, — N.C. App. —, 525 S.E.2d 830, 2000 N.C. App. LEXIS 164 (2000).

Testimony by Police Officer Which Required No Expertise Upheld. — The police officer's opinion that the defendant appeared intoxicated was rationally based on her perception, and the trial court did not err in allowing the police officer to answer the question of whether defendant appeared intoxicated. State v. Locklear, — N.C. App. —, 525 S.E.2d 813, 2000 N.C. App. LEXIS 138 (2000).

Rule 702. Testimony by experts.

CASE NOTES

I. GENERAL CONSIDERATION.

General Construction. — The statute was interpreted to apply as follows: Health care providers other than physicians were governed exclusively by subsection (b). Subsection (c) applied only to physicians who were "general practitioners," while subsection (b) applied only to physicians who were "specialists." Formyduval v. Bunn, — N.C. App. —, 530 S.E.2d 96, 2000 N.C. App. LEXIS 622 (2000).

Who May Be a Specialist. — A doctor who is either board certified in a specialty or who holds himself out to be a specialist or limits his practice to a specific field of medicine is properly deemed a "specialist" for purposes of this rule. Formyduval v. Bunn, — N.C. App. —, 530 S.E.2d 96, 2000 N.C. App. LEXIS 622 (2000).

Applied in State v. Jones, 133 N.C. App. 448, 516 S.E.2d 405 (1999); Brisson v. Kathy A. Santoriello, M.D., P.A., 351 N.C. 589, 528 S.E.2d 568 (2000).

Cited in State v. Lawrence, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 441 (June 16, 2000); Hylton v. Koontz, — N.C. App. —, 530 S.E.2d 108, 2000 N.C. App. LEXIS 629 (2000).

III. EXPERT OPINION NOT ADMISSIBLE.

Specialists Disqualified from Testifying against General Practitioner. — All three of the plaintiff's witnesses were disqualified from testifying against the defendant, a general practitioner, pursuant to this rule, because they were specialists as that term is used in the statute. One was board certified in oncology; another, in emergency medicine and family practice; and the third held himself out as a specialist in emergency medicine. Consequently, the defendant's motion for a directed verdict was properly granted. Formyduval v. Bunn, — N.C. App. —, 530 S.E.2d 96, 2000 N.C. App. LEXIS 622 (2000).

The failure to admit testimony challenging the undercover procedures used by an undercover agent in obtaining drugs from the defendant did not constitute an abuse of discretion, under this section, where the evidence was already sufficient to prove the drug charges under § 90-95(a) and where the record already contained evidence that the agent used the drugs from the buys and the jury, therefore, had the ability, on its own, to assess the agent's credibility. State v. Mackey, — N.C. App. —, 530 S.E.2d 306, 2000 N.C. App. LEXIS 533 (2000).

Prejudicial, Unhelpful Testimony Excluded. — In case involving wife who helped her husband rape juvenile, trial court properly excluded testimony of both director of a nonprofit domestic violence corporation and defense psychologist because it was prejudicial and did little to appreciably help the jury. State v. Owen, 133 N.C. App. 543, 516 S.E.2d 159 (1999), cert. denied, 351 N.C. 117, — S.E.2d — (1999).

IV. EXPERT OPINION ADMISSIBLE.

Serologist. —

Foundations for the testimony of expert witnesses who testified regarding spermatozoa, hair and DNA found on female minor's bed, clothes and body were sufficient. State v. Bowers, 135 N.C. App. 682, 522 S.E.2d 332 (1999).

Expert So Qualified May Testify Regarding Causation. — In medical malpractice case resulting from bilateral hernia operation in which the doctor mistakenly cut plaintiff's penis, the trial court did not violate this section when it allowed plaintiff's expert witness to testify regarding causation. Andrews v. Carr, 135 N.C. App. 463, 521 S.E.2d 269 (1999).

Testimony Regarding the Compentency of Witnesses to Testify. — The testimony of a clinical social worker and licensed psychological associate/counselor was properly admitted as relevant to the issue of the competency of three children to testify. In re Faircloth, — N.C. App. —, 527 S.E.2d 679, 2000 N.C. App. LEXIS 327 (2000).

Expert Opinion on Credibility. — Although Rules 405 and 608, when read together, prohibit an expert witness from commenting on the credibility of another witness, this rule allows expert testimony where the expert's testimony goes to the reliability of a diagnosis and not to the credibility of a rape victim. State v. Marine, 135 N.C. App. 279, 520 S.E.2d 65 (1999).

Expert in Child Sexual Abuse Case. — Court properly allowed the opinion testimony of expert/doctor where the record indicated that the doctor based her opinions on her own exam of the victim, extensive personal experience examining child sexual abuse victims, knowledge of child sexual abuse studies, and a colleague's notes from an interview with the victim. State v. Crumbley, 135 N.C. App. 59, 519 S.E.2d 94 (1999).

Testimony Based on Blood-Alcohol Analyzer. — Court did not abuse its discretion in admitting Blood-Alcohol Analyzer as a reliable scientific method of proof under subsection (a) of this rule, nor should it have been excluded under § 8C-1, Rule 403, since the probative value of its results were not substantially outweighed by the danger of unfair prejudice or jury confusion, and since both parties had opportunity to either attack or support its reliability. State v. Cardwell, 133 N.C. App. 496, 516 S.E.2d 388 (1999).

Expert on Mitochondrial DNA Analysis. — Trial court properly admitted expert testimony concerning mitochondrial DNA analysis (mtDNA) evidence, despite defendant's assertion that mtDNA testing was not scientifically reliable and that its reasoning and methodology were not properly applied to the facts of the case. State v. Underwood, 134 N.C. App. 533, 518 S.E.2d 231 (1999).

Rule 703. Bases of opinion testimony by experts.

CASE NOTES

Deposition summaries used by plaintiff's expert witness, although not admissible as substantive evidence, were admissible under this rule for the limited purpose of demonstrating to the jury facts the expert relied upon when forming his opinion. Wolfe v. Wilmington Shipyard, Inc., 135 N.C. App. 661, 522 S.E.2d 306 (1999).

Rule 704. Opinion on ultimate issue.

CASE NOTES

Legal Conclusions. —

The trial court correctly excluded portions of an expert witness's affidavit in which he opined that police officers in pursuit of a driver whom they suspected of being intoxicated and who, while fleeing, collided with and killed plaintiff's decedent acted "in a grossly negligent manner and showed a reckless disregard for the safety of others" in "violation of the City of Durham's pursuit policy." Norris v. Zambito, 135 N.C. App. 288, 520 S.E.2d 113 (1999).

Wound Consistent with Intent to Cause Death. — Forensic expert's testimony that one of victim's "gunshot wounds to the head was consistent with an intent to cause death" was admissible. State v. Teague, 134 N.C. App. 702, 518 S.E.2d 573 (1999).

Rule 705. Disclosure of facts or data underlying expert opinion.

CASE NOTES

Cross-Examination Upheld — The defendant on trial for nine murders was not prejudiced by the cross-examination of expert witnesses concerning two additional murders he had committed. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (2000).

Denial of defendant's motion for pretrial voir dire of State's expert witnesses was not prejudicial, where defendant had opportunity to obtain evidence on direct and cross-examination. State v. Pretty, 134 N.C. App. 379, 517 S.E.2d 677 (1999), cert. denied, appeal dismissed, 351 N.C. 117, — S.E.2d — (1999).

Quoted in McCarver v. Lee, — F.3d —, 2000 U.S. App. LEXIS 12222 (4th Cir. May 23, 2000).

Stated in State v. Holston, 134 N.C. App. 599, 518 S.E.2d 216 (1999).

Rule 706. Court appointed experts.

CASE NOTES

Stated in Offerman v. Offerman, — N.C. App. —, 527 S.E.2d 684, 2000 N.C. App. LEXIS 328 (2000).

ARTICLE 8.

Hearsay.

Rule 801. Definitions and exception for admissions of a party-opponent.

CASE NOTES

Evidence Not Hearsay. —

Testimony regarding whether the defendant had told her brother that the victim/her ex-husband actually forced her to have sex in order to visit her children was not offered to prove the truth of the matter asserted but was instead, introduced in an attempt to illustrate his state of mind regarding the victim and tended to show motive, and was, therefore, admissible under this section. State v. Merrill, — N.C. App. —, 530 S.E.2d 608, 2000 N.C. App. LEXIS 597 (2000).

Statement by co-conspirator to SBI agent indicating that defendant had told someone "all about it" was offered to support the witness's testimony at trial, not to prove the truth of the matter asserted and, therefore, not inadmissible hearsay. State v. Gell, 351 N.C. 192, 524 S.E.2d 332 (2000).

The jailer's and deputy sheriff's testimony that inmate said "hurry" or "leave" to defendant as she was departing did not constitute inadmissible hearsay because it was offered to prove that the directive was made, not to prove the truth of any matters asserted. State v. Mitchell, 135 N.C. App. 617, 522 S.E.2d 94 (1999).

Remarks made by defendant, accused of murdering her grandmother in a nursing home, to the police were admissible under this section as an admission of a party opponent. State v. Smith, 135 N.C. App. 649, 522 S.E.2d 321 (1999).

Agency. — The admission of an un-redacted report, after a redacted report had already been offered in court, and comments made thereon by defendant's manager was proper and not violative of the rules prohibiting hearsay or opinion testimony where the manager of the defendant store was defendant's agent at the time he entered his comments on the incident report and the entry concerned a matter within the scope of his agency. Kilgo v. Wal-Mart Stores, Inc., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 791 (July 5, 2000).

Statements Admissible to Explain Subsequent Conduct. —

The statements by witness outlining her daughter's problems with defendant and her request that someone meet her at the bus stop were introduced to explain why the mother asked the victim to meet her at the bus stop that afternoon and not for the truth of the matter asserted; their admission was, therefore, not in violation of this section. State v. Lesane, — N.C. App. —, 528 S.E.2d 37, 2000 N.C. App. LEXIS 323 (2000).

Admissions of Party's Attorney. —

Statements by defendant's attorney contained in an affidavit of the plaintiff's attorney were admissible against defendant under subsection (d) of this rule, since they concerned a matter within the scope of the context and scope of the attorney-client representation. Wilson Realty & Constr., Inc. v. Asheboro-Randolph Bd. of Realtors, Inc., 134 N.C. App. 468, 518 S.E.2d 28 (1999).

Applied in State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (2000).

Quoted in State v. Locklear, — N.C. App. —, 525 S.E.2d 813, 2000 N.C. App. LEXIS 138 (2000); State v. Jones, — N.C. App. —, 527 S.E.2d 700, 2000 N.C. App. LEXIS 313 (2000).

Cited in State v. Earhart, 134 N.C. App. 130, 516 S.E.2d 883 (1999), appeal dismissed, 351 N.C. 112, — S.E.2d — (1999); State v. Harris, — N.C. App. —, 525 S.E.2d 208, 2000 N.C. App. LEXIS 106 (2000).

Rule 802. Hearsay rule.

CASE NOTES

Evidence Held Admissible. —

The substance of witness's conversation with another detective was not inadmissible hearsay, because it was admitted for the purpose of explaining witness's subsequent conduct and not for the truth of the matter asserted. State v. Earhart, 134 N.C. App. 130, 516 S.E.2d 883 (1999), appeal dismissed, 351 N.C. 112, — S.E.2d — (1999).

Stated in State v. Jones, — N.C. App. —, 527 S.E.2d 700, 2000 N.C. App. LEXIS 313 (2000).

Cited in State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (2000).

Rule 803. Hearsay exceptions; availability of declarant immaterial.

CASE NOTES

I. GENERAL CONSIDERATION.

Corroborating Testimony. —

Although the State did not specify the purpose for which it offered the testimony of the victim's mother about the victim's out-of-court statement, and defendant did not request a limiting instruction, the trial court, in its final instructions to the jury, informed the jury that evidence of any out-of-court statement was to be received for corroborative purposes only. State v. Ford, — N.C. App. —, 525 S.E.2d 218, 2000 N.C. App. LEXIS 111 (2000).

Applied in Sitton v. Cole, 135 N.C. App. 625, 521 S.E.2d 739 (1999); In re Clapp, — N.C. App. —, 526 S.E.2d 689, 2000 N.C. App. LEXIS 252 (2000).

Stated in State v. Mitchell, 135 N.C. App. 617, 522 S.E.2d 94 (1999); Hylton v. Koontz, — N.C. App. —, 530 S.E.2d 108, 2000 N.C. App. LEXIS 787 (2000); State v. Pugh, — N.C. App. —, 530 S.E.2d 328, 2000 N.C. App. LEXIS 551 (2000).

IV. MENTAL, EMOTIONAL OR PHYSICAL CONDITION.

Statements That Merely Recite Facts. — Testimony that victim said he knew the defendant had stabbed someone seventeen times was inadmissible under this section, because the witness did not testify as to an actual statement of emotion by the victim but rather as to her opinion that he acted frightened. State v. Lesane, — N.C. App. —, 528 S.E.2d 37, 2000 N.C. App. LEXIS 323 (2000).

Testimony As To Victim's Fear of the Defendant. — The admission of hearsay statements did not violate the defendant's Confrontation Clause rights as set forth in the Sixth and Fourteenth Amendments to the United States Constitution where the testimony was accompanied by descriptions of the victim's emotions or mental state. Statements unaccompanied by such description, such as statements regarding past factual events, were wrongly admitted but no prejudice resulted to the defendant. State v. Lathan, — N.C. App. —, 530 S.E.2d 615, 2000 N.C. App. LEXIS 603 (2000).

Testimony Held Admissible. —

Witnesses' testimony regarding victim's/wife's prior statements was admissible to show her state of mind, despite the fact that the statements also contained descriptions of factual events. State v. Wilds, 130 N.C. App. 195, 515 S.E.2d 466 (1999).

Hearsay objections in capital murder case were properly overruled since statements reflected victim's state of mind and were therefore admissible under this rule. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

V. STATEMENTS FOR DIAGNOSIS OR TREATMENT.

Testimony is only admissible under the medical diagnosis or treatment exception when two inquiries are satisfied: first, the declarant intended to make the statements in order to obtain medical diagnosis or treatment; second, the declarant's statements were reasonably pertinent to medical diagnosis or treatment. Because the record indicated that no one explained to an alleged child sexual abuse victim the importance of truthful answers or the medical purpose for the interview, and because the interview took place in a non-medical environment, and the record did not demonstrate that the victim possessed the requisite intent, the testimony was not admissible. State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (2000).

Statements Inadmissible under This Exception May Be Admissible for Some Other Reason. — While the testimony of the victim's mother—that the victim had explained that defendant touched her in her "private part," was "rubbing her hard," and that it hurt—was improperly admitted under this rule because the record revealed no evidence that the victim made these statements to her mother with the understanding that they would lead to medical treatment, such testimony was admissible to corroborate the victim's trial testimony or as an excited utterance. State v. McGraw, — N.C. App. —, 529 S.E.2d 493, 2000 N.C. App. LEXIS 503 (2000).

Statements Held Admissible. — Hearsay statements made to social workers and resulting in medical treatment and diagnosis were properly allowed by trial court. State v.

Crumbley, 135 N.C. App. 59, 519 S.E.2d 94 (1999).

Exclusion Held Harmless. — Trial court's decision to prevent defendant's expert from relating statements made by defendant to him and used by him to form the basis of his expert opinion of defendant's mental state at the time of the homicide, if an abuse of discretion, was harmless error, since the same information was related in answers given by the expert to other questions. State v. Holston, 134 N.C. App. 599, 518 S.E.2d 216 (1999).

VI. RECORDED RECOLLECTION.

Improperly Admitted Statement Resulted in New Trial. — Defendant was entitled to yet another new trial where a witness' purported summary, allegedly written by an investigating officer who was not called as a witness by the State, was improperly and prejudicially admitted into evidence although it was not admissible as a recorded recollection under subdivision (5) of this rule, did not refresh the witness' recollection, was not properly used to impeach her under Rule 607, and the witness, in fact, objected to parts of the statement. State v. Spinks, 136 N.C. App. 153, 523 S.E.2d 129 (1999).

Cellmate's Statements. — Trial judge properly allowed written statements by cellmate to be read to jurors, where witness gave the statements within a reasonable time of having heard them and testified that they were accurate when given, even though he was unable at trial to recall what he knew and said. State v. Leggett, 135 N.C. App. 168, 519 S.E.2d 328 (1999).

VII. RECORDS OF REGULARLY CONDUCTED ACTIVITY.

Constitutionality. — The recorded recollection exception codified under this rule is firmly rooted and not a violation of defendant's constitutional right of confrontation. State v. Leggett, 135 N.C. App. 168, 519 S.E.2d 328 (1999).

Highway Accident Reports. —

The trial court properly admitted sections of an authenticated police report, prepared in the regular course of business, containing accident information about a hit-and-run vehicle because the record indicated that the information about that car's positioning, etc. was obtained from witnesses with "first-hand knowledge" and because the defendant did not initially object to the report's contents. Nunnery v. Baucom, 135 N.C. App. 556, 521 S.E.2d 479 (1999).

XIII. OTHER EXCEPTIONS.

Trustworthiness of Child Victim's Out-of-Court Statements in Sexual Abuse Case. —

Expert's testimony regarding defendant's sexual abuse of son was precluded from admission under the residual exception to hearsay where the State declared that "The testimony of [the expert] comes in under the medical diagnosis" and the trial court failed to make any findings of fact and conclusions of law supporting admissibility as residual hearsay; however, its admission was not reversible error because defendant not only did not object to the admission of the testimony at trial, but also stated he thought the testimony as to the examination of the child was admissible, and he failed to show that a different result would have been reached by the jury without the testimony. State v. Waddell, 351 N.C. 413, 527 S.E.2d 644 (2000).

Evidence Admissible to Rebut Testimony And Indicate State of Mind. — The decedent/wife's statements that her husband was jealous and had repeatedly threatened to kill her were admissible although arguably no more than recitations of fact where the facts that she recited tended to show her state of mind as to her marriage, indicated her relationship with the defendant and, therefore, were relevant under Rule 403, and rebutted testimony by the defendant that they had a good marriage. State v. Jones, — N.C. App. —, 527 S.E.2d 700, 2000 N.C. App. LEXIS 313 (2000).

Rule 804. Hearsay exceptions; declarant unavailable.

CASE NOTES

I. GENERAL CONSIDERATION.

This Section Contains Requirements for Unavailability, Not Competency. — The trial court applied an erroneous legal standard in denying respondent father's request to call the children as witnesses because the focus of the voir dire was incorrectly directed to the

effect the children's testifying would have on their mental health, rather than upon the ability of the children to understand their obligation to tell the truth and to relate events which they may have seen, heard or experienced; rather than determining whether all or any of them were competent to testify under § 8C-1, Rule 601, the trial court disqualified them as being "unavailable," apparently relying upon the definition of "unavailability" contained in this section, but the question of a potential witness' unavailability becomes relevant only with respect to the admissibility of his hearsay declarations. In re Faircloth, — N.C. App. —, 527 S.E.2d 679, 2000 N.C. App. LEXIS 327 (2000).

Error Was Harmless Beyond a Reasonable Doubt. — Defendant was not entitled to a new trial because the State demonstrated that the error of admitting prejudicial testimony of a co-conspirator was harmless beyond a reasonable doubt since the evidence of defendant's participation in the crimes was overwhelming. State v. Harris, — N.C. App. —, 525 S.E.2d 208, 2000 N.C. App. LEXIS 106 (2000).

Cited in State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (2000).

V. STATEMENT AGAINST INTEREST.

Co-conspirator's statements against interest must contain "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability; the indicia of reliability must be present in the statement itself and not by reference to other evidence presented at trial. State v. Harris, — N.C. App. —, 525 S.E.2d 208, 2000 N.C. App. LEXIS 106 (2000).

VI. OTHER EXCEPTIONS.

Admission of Evidence Upheld. —

Where victim was unavailable to testify against defendant/father, evidence and findings supported the trial court's admission of hearsay statements under this rule. State v. Pretty, 134 N.C. App. 379, 517 S.E.2d 677 (1999), cert. denied, appeal dismissed, 351 N.C. 117, — S.E.2d — (1999).

Rule 806. Attacking and supporting credibility of declarant.

CASE NOTES

Cited in State v. Lemons, — N.C. —, 530 S.E.2d 542, 2000 N.C. LEXIS 431 (2000).

Article 9.

Authentication and Identification.

Rule 901. Requirement of authentication or identification.

CASE NOTES

However, the State's failure to properly authenticate telephone calls was not reversible error; the witnesses who testified about these phone calls did not recognize the defendant's voice but simply accepted the caller's self-identification. State v. Jones, — N.C. App. —, 527 S.E.2d 700, 2000 N.C. App. LEXIS 313 (2000).

Failure to Object at Trial. —

Because the State laid a sufficient foundation to establish the trustworthiness of the Mutual Aid Agreement between Robeson County and all police departments in the county, and because defendant neither moved to pass the agreement among the jurors nor cross-examine the police captain on its contents, defendant could not subsequently complain that the jurors never saw the detailed provisions of the agreement. State v. Locklear, — N.C. App. —, 525 S.E.2d 813, 2000 N.C. App. LEXIS 138 (2000).

Cited in State v. Spinks, 136 N.C. App. 153, 523 S.E.2d 129 (1999).

ARTICLE 10.

Contents of Writings, Recordings and Photographs.

Rule 1004. Admissibility of other evidence of contents.

CASE NOTES

Applied in State v. Jarrell, 133 N.C. App. 264, 515 S.E.2d 247 (1999).

Rule 1006. Summaries.

CASE NOTES

Plaintiffs' attempt to generate an exhibit during trial while a witness was undergoing cross-examination, by extracting and charting portions of the testimony, was governed by § 8C-1-611(a), not by this rule, and the trial court acted within its discretion in disallowing it as a kind of premature final argument. Marley v. Graper, 135 N.C. App. 423, 521 S.E.2d 129 (1999).

ARTICLE 11.

Miscellaneous Rules.

Rule 1101. Applicability of rules.

CASE NOTES

Applied in State v. Moses, 350 N.C. 741, 517 S.E.2d 853 (1999), cert. denied, — U.S. —, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Chapter 9.

Jurors.

Article 1.

Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

§ 9-6. Jury service a public duty; excuses to be allowed in exceptional cases; procedure.

CASE NOTES

The Dismissal of Jurors Outside of Defendant's Presence Before Trial Upheld. — The trial court did not commit error in excusing prospective jurors prior to the calling of defendant's case as the defendant had no right to be present at that time because his trial had not yet begun. Furthermore, the defendant failed to demonstrate corrupt intent or that he was prejudiced by the jury that was impaneled. State v. Hyde, — N.C. —, 530 S.E.2d 281, 2000 N.C. LEXIS 443 (2000).

Juror Properly Excused. — Trial judge's failure to record his ex parte communication with one prospective juror as required by § 15A-1241 was harmless error, where the record adequately revealed the substance of the unrecorded conversation, and the juror was properly excused under subsection (a) of this section and § 9-6.1 because "he was over sixty-five." State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

§ 9-6.1. Excuses on account of age.

CASE NOTES

Juror Properly Excused. — Trial judge's failure to record his ex parte communication with one prospective juror as required by § 15A-1241 was harmless error, where the record adequately revealed the substance of the unrecorded conversation, and the juror was properly excused under this section and § 9-6(a) and 9-6.1 because "he was over sixty-five." State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

§ 9-14. Jury sworn; judge decides competency.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

The trial court was not required to ask prospective jurors to swear to tell the truth during jury voir dire State v. Hyde, — N.C. —, 530 S.E.2d 281, 2000 N.C. LEXIS 443 (2000).

Chapter 12.

Statutory Construction.

§ 12-3. Rules for construction of statutes.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Applied in Sharpe v. Worland, — N.C. App. —, 527 S.E.2d 75, 2000 N.C. App. LEXIS 269 (2000).

Chapter 13.
Citizenship Restored.

§ 13-1. Restoration of citizenship.

OPINIONS OF ATTORNEY GENERAL

An ex-felon found in possession of a firearm could be prosecuted under the Felony Firearms Act, even though he may have lawfully possessed it prior to the December 1, 1995, amendment since his restoration of rights under this chapter, when read in conjunction with § 14-415.1, expressly prohibits the possession of firearms regardless of the date of felony conviction; the General Assembly clearly intended § 14-415.1's application to be retroactive. See opinion of Attorney General to Michael P. Martin, Assistant Chief Counsel, Department of the Treasury Bureau of Alcohol, Tobacco, and Firearms, 1997 N.C.A.G. 52 (8/21/97).

Chapter 14.

Criminal Law.

SUBCHAPTER I. GENERAL PROVISIONS.

Article 2B.

Violent Habitual Felons.

Sec.
14-7.7. Persons defined as violent habitual felons.

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

Article 19.

False Pretenses and Cheats.

14-107.2. Program for the collection of worthless check cases.
14-111.2. Obtaining ambulance services without intending to pay therefor — certain named counties.
14-111.3. Making unneeded ambulance request in certain counties.

Article 19C.

Financial Identity Fraud.

14-113.20. Financial identity fraud.

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

Article 26.

Offenses against Public Morality and Decency.

14-196. Using profane, indecent or threatening language to any person over telephone; annoying or harassing by repeated telephoning or making false statements over telephone.
14-196.3. Cyberstalking.

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

Article 31.

Misconduct in Public Office.

14-234. Director of public trust contracting for his own benefit; participation in business transaction involving public funds; exemptions.

SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

Article 36.

Offenses Against the Public Safety.

14-280.1. Trespassing on railroad right-of-way.

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

Article 37.

Lotteries, Gaming, Bingo and Raffles.

Part 1. Lotteries and Gaming.

Sec.
14-298. Gaming tables, illegal punchboards, slot machines, and prohibited video game machines to be destroyed by police officers.
14-306. Slot machine or device defined.
14-306.1. Types of machines and devices prohibited by law; penalties.
14-306.2. Violation of G.S. 14-306.1 a violation of the ABC laws.
14-309. Violation made criminal.

Article 39.

Protection of Minors.

14-316.1. Contributing to delinquency and neglect by parents and others.

Article 52.

Miscellaneous Police Regulations.

14-401.17. Unlawful removal or destruction of electronic dog collars.

Article 54B.

Concealed Handgun Permit.

14-415.11. Permit to carry concealed handgun; scope of permit.
14-415.14. Application form to be provided by sheriff; information to be included in application form.
14-415.16. Renewal of permit.
14-415.19. Fees.

Article 60.

Computer-Related Crime.

14-453. Definitions.
14-454. Accessing computers.
14-455. Damaging computers, computer programs, computer systems, computer networks, and resources.
14-456. Denial of computer services to an authorized user.
14-458. Computer trespass; penalty.

SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1.

Felonies and Misdemeanors.

§ 14-2.4. Punishment for conspiracy to commit a felony.

CASE NOTES

Proof of conspiracy held insufficient where the State's evidence indicated that the defendant wished her ex-husband dead, that they disagreed about custody, that she was present when her brother and husband discussed a plan for "taking care" of the victim, that someone made a long-distance phone call to the victim the night before his murder, that defendant borrowed ten dollars to take the kids camping on the day of the murder, that defendant participated in efforts to hide the victim's body and personal belongings, and initially attempted to deceive law enforcement officers regarding his disappearance. State v. Merrill, — N.C. App. —, 530 S.E.2d 608, 2000 N.C. App. LEXIS 597 (2000).

§ 14-2.5. Punishment for attempt to commit a felony or misdemeanor.

CASE NOTES

Stated in State v. Clark, — N.C. App. —, 527 S.E.2d 319, 2000 N.C. App. LEXIS 267 (2000).

§ 14-4. Violation of local ordinances misdemeanor.

Local Modification. — By virtue of Session Laws 2000-26, s. 4, city of Charlotte: 1983, c. 71, should be stricken from the main volume.

ARTICLE 2A.

Habitual Felons.

§ 14-7.1. Persons defined as habitual felons.

CASE NOTES

Applied in State v. Gentry, 135 N.C. App. 107, 519 S.E.2d 68 (1999).

Quoted in State v. Briggs, — N.C. App. —, 526 S.E.2d 678, 2000 N.C. App. LEXIS 255 (2000).

Cited in State v. Hairston, — N.C. App. —, 528 S.E.2d 29, 2000 N.C. App. LEXIS 308 (2000).

§ 14-7.3. Charge of habitual felon.

CASE NOTES

Trivial Amendment to Sufficient Indictment Irrelevant. — The amending of three indictments to include the words "in North Carolina" was irrelevant where the original

indictment itself was not flawed and thus any attempt to correct a perceived flaw was harmless for the amendment could not have in any way prejudiced defendant. State v. Montford, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 431 (2000).

Indictment Held Sufficient. —

A habitual felon indictment citing the defendant's conviction for "the felony of breaking and entering buildings in violation of N.C.G.S. [§] 14-54" was sufficient because the indictment clearly stated defendant had been convicted of felony breaking and entering, contained the date the felony was committed, the court in which he was convicted, the number assigned to the case, and the date of the conviction and, therefore, provided him with adequate notice of the underlying felony. State v. Briggs, — N.C. App. —, 526 S.E.2d 678, 2000 N.C. App. LEXIS 255 (2000).

§ 14-7.4. Evidence of prior convictions of felony offenses.

CASE NOTES

The "prima facie evidence" provisions of this section do not unconstitutionally shift the burden of proof to the defendant on the essential element of identity but merely create a presumption that allows the jury to decide whether the elements of the crime have been proven beyond a reasonable doubt. State v. Hairston, — N.C. App. —, 528 S.E.2d 29, 2000 N.C. App. LEXIS 308 (2000).

§ 14-7.6. Sentencing of habitual felons.

Legal Periodicals. —

For note, "Ramifications of the 1997 DWI/Felony Prior Record Level Amendment to the Structured Sentencing Act: State of North Carolina v. Tanya Watts Gentry," see 22 Campbell L. Rev. 211 (1999).

CASE NOTES

Cited in Hawkins v. Freeman, 195 F.3d 732 (4th Cir. 1999).

Article 2B.

Violent Habitual Felons.

§ 14-7.7. Persons defined as violent habitual felons.

(a) Any person who has been convicted of two violent felonies in any federal court, in a court of this or any other state of the United States, or in a combination of these courts is declared to be a violent habitual felon. For purposes of this Article, "convicted" means the person has been adjudged guilty of or has entered a plea of guilty or no contest to the violent felony charge, and judgment has been entered thereon when such action occurred on or after July 6, 1967. This Article does not apply to a second violent felony unless it is committed after the conviction or plea of guilty or no contest to the first violent felony. Any felony to which a pardon has been extended shall not, for the purposes of this Article, constitute a felony. The burden of proving a pardon shall rest with the defendant, and this State shall not be required to disprove a pardon. Conviction as an habitual felon shall not, for purposes of this Article, constitute a violent felony.

(b) For purposes of this Article, "violent felony" includes the following offenses:

(1) All Class A through E felonies.

(2) Any repealed or superseded offense substantially equivalent to the offenses listed in subdivision (1).

(3) Any offense committed in another jurisdiction substantially similar to the offenses set forth in subdivision (1) or (2). (1994, Ex. Sess., c. 22, ss. 31, 32; 2000-155, s. 14.)

Effect of Amendments. — Session Laws 2000-155, s. 14, effective September 1, 2000, and applicable to offenses committed on or after that date, substituted "similar to the offenses" for "equivalent to the offenses" in subdivision (b)(3).

CASE NOTES

Constitutionality. —

Punishment as a violent habitual felon does not constitute double jeopardy. State v. Stevenson, — N.C. App. —, 523 S.E.2d 734, 1999 N.C. App. LEXIS 1378 (1999), cert. denied, 351 N.C. 368, — S.E.2d — (2000).

Evidence of Prior Violent Felonies. —

Defendant's 1992 conviction in California of the North Carolina equivalent of an "attempt" to commit a second degree sexual offense, although classified as a Class H felony at the time, was classified as a Class D felony and could be used for the purposes of a conviction under this section. State v. Stevenson, — N.C. App. —, 523 S.E.2d 734, 1999 N.C. App. LEXIS 1378 (1999), cert. denied, 351 N.C. 368, — S.E.2d — (2000).

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

ARTICLE 6.

Homicide.

§ 14-17. Murder in the first and second degree defined; punishment.

Legal Periodicals. —

For comment, "North Carolina's Unconstitutional Expansion of an Ancient Maxim: Using DWI Fatalitites to Satisfy First Degree Felony Murder," see 22 Campbell L. Rev. 169 (1999).

CASE NOTES

I. GENERAL CONSIDERATION.

Section Not Unconstitutionally Vague. —

Failure of this section to define the term "deadly weapon" does not result in the statute being unconstitutionally vague. Furthermore, because North Carolina cases provide adequate notice of what constitutes a deadly weapon, a defendant is not deprived of due process. State v. Jones, 133 N.C. App. 448, 516 S.E.2d 405 (1999).

Applied in State v. Lesane, — N.C. App. —, 528 S.E.2d 37, 2000 N.C. App. LEXIS 323 (2000).

Quoted in Frye v. Lee, 89 F. Supp. 2d 693 (W.D.N.C. 2000).

Cited in State v. Harris, — N.C. App. —, 525 S.E.2d 208, 2000 N.C. App. LEXIS 106 (2000).

II. MURDER IN THE FIRST DEGREE GENERALLY.

The jury's finding of malice required for a second-degree murder conviction was supported by the State's evidence that defendant's blood alcohol level was 0.113 three hours after the accident, that the collision occurred in the victim's lane of travel, and that, at the time of the accident, charges of driving while impaired and driving while license revoked were pending against defendant. State v. Gray, — N.C. App. —, 528 S.E.2d 46, 2000 N.C. App. LEXIS 324 (2000).

Evidence Held Sufficient. — Substantial evidence, including the contents of victim's stomach, the motive, the weapon, the fact that defendant looked into who owned victim's car, which had been parked outside his former girl friend's house, the fact that he had his car painted and cleaned after victim disappeared, mtDNA sequencing, and other circumstances, supported the conviction of defendant under this section. State v. Underwood, 134 N.C. App. 533, 518 S.E.2d 231 (1999).

Finding of Malice, Premeditation And Deliberation Precludes Voluntary Manslaughter — The jury's finding that defendant was guilty of first degree murder on the basis of malice, premeditation and deliberation rendered harmless the trial court's failure to submit the lesser included offense of voluntary manslaughter. State v. Jarrett, — N.C. App. —, 527 S.E.2d 693, 2000 N.C. App. LEXIS 318 (2000).

III. MURDER BY MEANS STATED IN SECTION.

A separate showing of malice is not necessary for the charges of first-degree murder by means of poison and attempted first-degree murder by poison. State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000).

IV. MURDER IN PERPETRATION OF A FELONY.

Felony murder rule may be used in automobile cases where an underlying felony is committed, even though the General Assembly has enacted the more specific statutes of felony death by vehicle and misdemeanor death by vehicle, § 20-141.4. State v. Jones, 133 N.C. App. 448, 516 S.E.2d 405 (1999).

And prohibition against ex post facto laws was not violated by the felony murder rule's application in automobile accident. State v. Jones, 133 N.C. App. 448, 516 S.E.2d 405 (1999).

Felonious Child Abuse And Use of Hands as Deadly Weapons. — The court rejected the defendant's ex post facto objections and upheld the defendant's conviction, under this section, of murder while committing felonious child abuse in violation of § 14-318.4 with the use of a deadly weapon, her hands, although this theory had not, at the time of the victim's death, been used to support a first degree murder conviction resulting from the use of the hands as deadly weapons. State v. Krider, — N.C. App. —, 530 S.E.2d 569, 2000 N.C. App. LEXIS 541 (2000).

V. MURDER IN THE SECOND DEGREE.

The Importance of Malice in Attempted Second-Degree Murder. — Although defendant contended that attempted second-degree murder was a legal impossibility because "one cannot specifically intend a crime of general, or non-specific, intent," the court held that there are forms of second-degree murder in which the malice element contains the intent to kill, and that attempted second-degree murder, therefore, does properly exist in North Carolina. State v. Coble, 134 N.C. App. 607, 518 S.E.2d 251 (1999), appeal dismissed, cert. granted, 351 N.C. 111, — S.E.2d — (1999).

But Some Intentional Act Must Be in Chain of Causation. —

A conviction under this section was supported by evidence that defendant and the victim were embroiled in a tempestuous relationship; that the defendant and the victim had words the night of the shooting, and she tried to leave him; that he followed her with a high-powered rifle and fired a shot at her legs to frighten her; that they returned to the house and continued arguing; that defendant then pointed the rifle at the victim or in her direction and fired; and that he realized she was hit but had not intended to kill her. State v. Lathan, — N.C. App. —, 530 S.E.2d 615, 2000 N.C. App. LEXIS 603 (2000).

Substantial evidence existed to demonstrate the type of malice manifesting a mind utterly without regard for human life and social duty which would support a second degree murder conviction where the defendant operated his automobile with a high degree of alcohol in his blood and where, during the 16.7-mile chase, defendant ran both a stop sign and a red stop light, passing stopped traffic at speeds of 90-95 m.p.h. State v. Fuller, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 632 (June 20, 2000).

Instruction Warranted. — Where defendant had been drinking heavily and smoking crack cocaine for several hours, it was possible for a trier of fact to find that he lacked the requisite state of mind — that is, the necessary specific intent of premeditation and deliberation — for first degree murder, and the trial court's instruction of second degree murder

was, therefore, proper. State v. Brooks, 136 N.C. App. 124, 523 S.E.2d 704 (1999), cert. denied, 351 N.C. 475, — S.E.2d — (2000).

The evidence was insufficient to support the defendant's conviction of second degree murder for shaking his girlfriend's baby where the doctor testified that the victim died from shaken baby syndrome, which he said was caused by more than a light shaking; the defendant did not mention shaking the child at the first interview with police, but only after the results of the autopsy were made known to him, at which time he said he "became frustrated and started shaking [the baby]" but did not "realize that he was shaking her that hard" and that he did not mean to hurt her. Many small blood vessels on the surface of the victim's brain were torn and bleeding, but larger vessels were not torn and there were no other internal or external injuries to the victim's body, her ribs were not bruised or fractured, and there were no external head injuries and the skull was not fractured. State v. Blue, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 633 (June 20, 2000).

Evidence Held Sufficient. —

The evidence supported a conviction under this section and the defendant's acts manifested recklessness of consequences and a total disregard for human life where the evidence showed that the he drove while impaired by alcohol, at a time when his license was in a state of permanent revocation; that he drove his pickup truck erratically, swerved off the road, and struck the victim's bicycle killing him instantly; and that he was previously convicted of driving while impaired in 1991 and a 1997 conviction for driving while impaired was on appeal. State v. McAllister, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 600 (June 6, 2000).

There is no "attempted second-degree murder" under North Carolina law; instead of seeking such a conviction, the prosecutor could have charged the defendant in a separate indictment with assault with a deadly weapon with intent to kill which requires proof of an element not required for attempted murder—use of a deadly weapon—and is not a lesser-included offense of attempted murder. State v. Coble, 351 N.C. 448, 527 S.E.2d 45 (2000).

The trial court did not err or violate double jeopardy principles in sentencing the defendant for both impaired driving and second degree murder. Driving while impaired is not a lesser included offense of second degree murder. State v. McAllister, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 600 (June 6, 2000).

VII. EVIDENCE.

A. In General.

Sufficient Circumstantial Evidence. — The State presented sufficient evidence to the jury that the defendant committed the subject crime where the evidence showed that the victim knew his assailant; that the defendant had borrowed money from the victim before; that the defendant's behavior was suspicious to several witnesses, including his mother; that the defendant spent all his paycheck on beer and crack cocaine on the night of the murder; that, after the time of the murder, defendant returned to his friend's house with more cocaine than he possessed before leaving and also with his shirt covered with blood; that defendant related three different stories as to how his shirt got bloody; and that a shoeprint found on the scene could be a match to the defendant's shoe. State v. Brooks, 136 N.C. App. 124, 523 S.E.2d 704 (1999), cert. denied, 351 N.C. 475, — S.E.2d — (2000).

B. Physical Evidence.

Victim's Medical Records — The court examined sealed medical records of the victim, which the victim's hospital asserted as privileged under § 8-53, and concluded that they contained no information exculpatory of defendant's guilt or material to her defense or punishment. State v. Jarrett, — N.C. App. —, 527 S.E.2d 693, 2000 N.C. App. LEXIS 318 (2000).

VIII. INSTRUCTIONS.

A. In General.

Robbery Occurring after Murder. — Where a jury could reasonably infer that murder and subsequent robbery were all part of one continuous transaction, the trial court's instructions on this issue were properly supported by the evidence. State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622 (1999), cert. denied, — U.S. —, 120 S. Ct. 1432, 146 L. Ed. 2d 322 (2000).

B. Degree of Offense.

Instruction on Second Degree Murder Properly Denied. — No rational juror could have convicted defendant of second degree murder, and the trial court did not err in denying defendant's request for such an instruction, because the evidence did not support an alcohol impairment defense, and because any conduct by defendant indicating remorse in the hours after the offense was more than outweighed by his words and actions during and immediately after the killings. Skipper v. Lee, 1999 U.S. Dist. LEXIS 21347, — F. Supp. 2d — (E.D.N.C. November 30, 1999).

IX. CHARGE AND INDICTMENT.

Juvenile Delinquency Petition Properly Alleged Murder. — Petition alleging that "juvenile was delinquent as defined by former § 7A-517(12) [see now § 7B-101] in that in Durham County and on or about December 30, 1997, the above named juvenile unlawfully, willfully and feloniously did of malice aforethought kill and murder victim" properly alleged first degree murder under § 14-17, satisfied the requirements of former § 7A-560 [see now § 7B-402], and made transfer of case to Superior Court mandatory under former § 7A-608 [see now § 7B-2200]. In re K.R.B., 134 N.C. App. 328, 517 S.E.2d 200 (1999), cert. denied, 351 N.C. 187, — S.E.2d — (1999).

§ 14-18. Punishment for manslaughter.

CASE NOTES

II. Manslaughter.
C. Involuntary.

II. MANSLAUGHTER.

C. Involuntary.

Evidence Held Not to Support Involuntary Manslaughter Instruction. —

Defendant was not entitled to a jury instruction on involuntary manslaughter where the State's evidence showed that the defendant had knowledge of and experience with farm pesticides; that he went to a farm to obtain the deadly pesticide used in the murder; that he concocted a story as to why he needed the poison; that he showed the poison to two people; that he put it in his children's Kool-Aid; that he failed to say anything at the hospital as to the real reason his children were sick; and where no evidence except the defendant's denial negated the State's evidence. State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000).

ARTICLE 7A.

Rape and Other Sex Offenses.

§ 14-27.1. Definitions.

CASE NOTES

Cited in State v. Anthony, 351 N.C. 611, 528 S.E.2d 321 (2000).

§ 14-27.2. First-degree rape.

CASE NOTES

I. General Consideration.
V. Consent.
IX. Parties to Crime.
XIII. Evidence.

I. GENERAL CONSIDERATION.

Separate Acts of Intercourse as Separate Offenses. —

Although defendant's husband did not fully penetrate the 11-year-old victim until his third attempt, each separate act of intercourse was complete and sufficient to sustain an indictment for first degree rape, and no double jeopardy occurred when the defendant/wife was convicted as an aider and abettor for two counts of attempted rape and one count of rape. State v. Owen, 133 N.C. App. 543, 516 S.E.2d 159 (1999), cert. denied, 351 N.C. 117, — S.E.2d — (1999).

Stated in State v. Anthony, 133 N.C. App. 573, 516 S.E.2d 195 (1999), appeal dismissed, cert. granted, 351 N.C. 109, 516 S.E.2d 195

(1999), aff'd, 528 S.E.2d 321 (2000).

Cited in State v. Crockett, — N.C. App. —, 530 S.E.2d 359, 2000 N.C. App. LEXIS 548 (2000).

V. CONSENT.

Consent is also not a defense to § 14-27.7A although the legislature created it as a separate statute, rather than amending this section. State v. Anthony, 351 N.C. 611, 528 S.E.2d 321 (2000).

IX. PARTIES TO CRIME.

Aiders and Abettors Are Guilty of Rape. —

Defendant/female, as an aider and abettor, was equally as guilty of rape against 11-year old victim as the actual male perpetrator. State v. Owen, 133 N.C. App. 543, 516 S.E.2d 159 (1999), cert. denied, 351 N.C. 117, — S.E.2d — (1999).

XIII. EVIDENCE.

Failure to Submit Proof of Age. — Noting the difficulty of determining the age of a juvenile by mere observation, particularly when the age of the juvenile at the time of the alleged offense, not at the time of trial, is the crucial determination, the court held that the charge of first-degree rape should have been dismissed at the close of the evidence because the State failed to offer any direct evidence of respondent's age. In re Jones, 135 N.C. App. 400, 520 S.E.2d 787 (1999).

Letter Written by Defendant to Victim's Mother. —

In prosecution for first-degree rape under this section, court properly permitted testimony regarding a letter from defendant to victim's mother, and the State did not violate § 15A-903(a)(1) when it failed to produce this letter, since it was never in the State's possession and defendant failed to show that the original was destroyed in bad faith, as required by § 8C-1, Rule 1004. State v. Jarrell, 133 N.C. App. 264, 515 S.E.2d 247 (1999).

Evidence Held Sufficient. —

Evidence which included the testimony of victim, victim's mother, a police detective, a social worker and a counselor, was sufficient to support the charges of first-degree rape under this section. State v. Jarrell, 133 N.C. App. 264, 515 S.E.2d 247 (1999).

§ 14-27.3. Second-degree rape.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Stated in State v. Anthony, 133 N.C. App. 573, 516 S.E.2d 195 (1999), appeal dismissed, cert. granted, 351 N.C. 109, 516 S.E.2d 195 (1999), aff'd, 528 S.E.2d 321 (2000).

§ 14-27.4. First-degree sexual offense.

CASE NOTES

I. General Consideration.
II. Elements of Offense.
III. Practice and Procedure.

I. GENERAL CONSIDERATION.

Stated in State v. Anthony, 133 N.C. App. 573, 516 S.E.2d 195 (1999), appeal dismissed, cert. granted, 351 N.C. 109, 516 S.E.2d 195 (1999), aff'd, 528 S.E.2d 321 (2000).

Cited in In re Wright, — N.C. App. —, 527 S.E.2d 70, 2000 N.C. App. LEXIS 265 (2000); State v. Anthony, 351 N.C. 611, 528 S.E.2d 321 (2000).

II. ELEMENTS OF OFFENSE.

Failure to Allege Age Deemed Fatal. — Four petitions, brought pursuant to this section, failed to state the respondent's alleged misconduct with particularity, as they did not contain the crucial allegations of the age of the victim and the respondent and, therefore, were dismissed as fatally defective. In re Jones, 135 N.C. App. 400, 520 S.E.2d 787 (1999).

III. PRACTICE AND PROCEDURE.

Confession was voluntary because defendant was not under arrest during the questioning; he was advised of and knowingly waived his constitutional rights; the officer's statements regarding defendant's employment, the possession of his car, and his rights to visit his son came in response to specific questions asked by defendant; and any promises that may have been made by the officer concerned collateral matters, not involving the crime charged. State v. Cabe, — N.C. App. —, 524 S.E.2d 828, 2000 N.C. App. LEXIS 53 (2000), cert. denied, 351 N.C. 475, — S.E.2d — (2000).

Jury Instruction on Crime Not Set Out in Indictment. — The court erred in entering judgment upon the defendant's conviction of a statutory sexual offense, a violation of § 14-27.7A, following instructions under § 14-27.7A where the indictment alleged a forcible sexual offense, a violation of this section. State v. Miller, — N.C. App. —, 528 S.E.2d 626, 2000 N.C. App. LEXIS 418 (2000).

§ 14-27.5. Second-degree sexual offense.

CASE NOTES

Young Victim's Testimony Held Sufficient. —

The court rejected the defendant's contention that the juvenile court committed plain error in admitting the victim's testimony since she was only four-years-old and was incompetent to testify, specifically, his argument that she did not clearly communicate her understanding of the obligation to tell the truth or illustrate that she had the capacity to understand and relate facts since she provided inaudible responses to questions. The victim's story was consistent and corroborated by the testimony of her mother, her brother, her doctor, and the investigating officer and the evidence sufficiently demonstrated the use of force. In re Clapp, — N.C. App. —, 526 S.E.2d 689, 2000 N.C. App. LEXIS 252 (2000).

Ineffectiveness of Counsel Argument Rejected Where Evidence Sufficient. — The evidence was sufficient under this section—even if the victim and her brother had been found incompetent to testify and thus, unavailable, because the victim's mother testified that the three-year-old victim came out of the bedroom and told her that the twelve-year-old defendant made her take off her clothes and licked her private parts—and allegations as to ineffective assistance of counsel due to failure to object to the minors' testimony were rejected where the result would not have been different had the attorney objected to its admission. In re Clapp, — N.C. App. —, 526 S.E.2d 689, 2000 N.C. App. LEXIS 252 (2000).

Stated in State v. Anthony, 133 N.C. App. 573, 516 S.E.2d 195 (1999), appeal dismissed, cert. granted, 351 N.C. 109, 516 S.E.2d 195 (1999), aff'd, 528 S.E.2d 321 (2000).

§ 14-27.7. Intercourse and sexual offenses with certain victims; consent no defense.

CASE NOTES

Applied in State v. Campbell, 133 N.C. App. 531, 515 S.E.2d 732 (1999), cert. denied, 351 N.C. 111, — S.E.2d — (1999).

§ 14-27.7A. Statutory rape or sexual offense of person who is 13, 14, or 15 years old.

CASE NOTES

Constitutionality. — Even though consent is not a defense to "statutory" rape under this section, the sentencing scheme does not violate the North Carolina Constitution. State v. Anthony, 133 N.C. App. 573, 516 S.E.2d 195 (1999), appeal dismissed, cert. granted, 351 N.C. 109, 516 S.E.2d 195 (1999), aff'd, 528 S.E.2d 321 (2000).

Consent is not a defense to a crime codified under this section. State v. Anthony, 133 N.C. App. 573, 516 S.E.2d 195 (1999), appeal dismissed, cert. granted, 351 N.C. 109, 516 S.E.2d

195 (1999), aff'd, 528 S.E.2d 321 (2000).

Mistake of age is not a defense to the crime codified under this section. State v. Anthony, 133 N.C. App. 573, 516 S.E.2d 195 (1999), appeal dismissed, cert. granted, 351 N.C. 109, 516 S.E.2d 195 (1999), aff'd, 528 S.E.2d 321 (2000).

Consent is not a defense to this statute although the legislature created it as a separate statute, rather than amending § 14-27.2(a)(1). State v. Anthony, 351 N.C. 611, 528 S.E.2d 321 (2000).

Conviction Overturned. — The defendant's pre-December 1995 conviction for statutory rape with a fourteen-year-old could not stand where § 14-27.7A which made rape statutory if the victim is under fifteen years of age did not become effective until 1 December 1995, five days after defendant had sex with the fourteen-year-old. State v. Crockett, — N.C. App. —, 530 S.E.2d 359, 2000 N.C. App. LEXIS 548 (2000).

Date of Offense Not Necessary for Statutory Rape Indictment. — The fact that an indictment charging the defendant with statutory rape did not specify the exact date the offense was committed was immaterial because the evidence at trial showed that this offense occurred in January 1996 when the victim was fourteen which age satisfied the requirements of this section. State v. Crockett, — N.C. App. —, 530 S.E.2d 359, 2000 N.C. App. LEXIS 548 (2000).

Jury Instruction on Crime Not Set Out in Indictment. — The court erred in entering judgment upon the defendant's conviction of a statutory sexual offense, a violation of this section, following instructions under this section where the indictment alleged a forcible sexual offense, a violation of § 14-27.4. State v. Miller, — N.C. App. —, 528 S.E.2d 626, 2000 N.C. App. LEXIS 418 (2000).

The defendant was entitled to the Miranda warnings prior to the date of birth question elicited during booking, and the failure to give those warnings rendered his response inadmissible as evidence where defendant's age was an essential element of the crime charged, and the investigating officer, knew or should have known her question regarding his date of birth would elicit an incriminating response. State v. Locklear, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 626 (June 20, 2000).

Article 8.

Assaults.

§ 14-32. Felonious assault with deadly weapon with intent to kill or inflicting serious injury; punishments.

CASE NOTES

I. GENERAL CONSIDERATION.

Facts Not Showing Two Offenses. —

The defendant's second assault charge should have been dismissed where the defendant testified that the gun went off while he struggled with the victim/his former wife after having already once shot her and the prosecution asserted that the defendant shot her later after he had abducted her but had no evidence to establish this assertion because the victim fainted shortly after the struggle. State v. Brooks, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 601 (June 6, 2000).

Cited in State v. Blackwell, 135 N.C. App. 729, 522 S.E.2d 313 (1999); State v. Coble, 351 N.C. 448, 527 S.E.2d 45 (2000).

VI. INTENT TO KILL.

Whether defendant was so intoxicated as to prevent his forming the specific intent, required by this section, to rob and assault the victim, was a question of fact to be determined by the jury. State v. Robertson, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 642 (June 20, 2000).

XI. SUFFICIENCY OF EVIDENCE.

Intent to Kill. — Defendant's intent to not only rob or to injure, but to kill was supported by evidence that defendant leapt onto the victim's back once he seized defendant's knife; that he struggled with him, causing him serious injury; that defendant threatened the vic-

tim before and after the scuffle without appearing to hear his acquiescence in his demands; that defendant had attempted to obtain and had subsequently regretted not being equipped with a gun at the assault; and that defendant had instead obtained and chosen to use an assault-type knife with finger-holes, designed to enable an assailant to repeatedly stab a victim without losing his grip. State v. Grigsby, 351 N.C. 454, 526 S.E.2d 460 (2000).

Use of Deadly Weapon. —

The State's evidence that the defendant hit the victim with a log and that the victim suffered two hematomas near his brain and received 15 stitches sufficiently supported its theory that the defendant used a deadly weapon during the assault. State v. Cody, 135 N.C. App. 722, 522 S.E.2d 777 (1999).

Assault. — The State's evidence that the defendant participated in a fight and that one witness saw him hit the victim with a "branch or a log" sufficiently supported its theory that he assaulted the victim. State v. Cody, 135 N.C. App. 722, 522 S.E.2d 777 (1999).

§ 14-33. Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments.

CASE NOTES

I. General Consideration.
V. Assaults on Females.

I. GENERAL CONSIDERATION.

Stated in State v. Elliott, — N.C. App. —, 528 S.E.2d 32, 2000 N.C. App. LEXIS 325 (2000).

V. ASSAULTS ON FEMALES.

Prior Contempt Adjudication Resulted in Double Jeopardy. — Defendant's prosecution on the change of assault on a female under subdivision (b)(2) of this section, subsequent to his being held in contempt for violating a violence protective order, was barred by the Double Jeopardy Clause, and his conviction for assault on a female was accordingly vacated. State v. Gilley, 135 N.C. App. 519, 522 S.E.2d 111 (1999).

§ 14-33.2. Habitual misdemeanor assault.

CASE NOTES

Cited in State v. Jenkins, — N.C. App. —, 527 S.E.2d 672, 2000 N.C. App. LEXIS 316 (2000).

§ 14-34.1. Discharging certain barreled weapons or a firearm into occupied property.

CASE NOTES

Multiple Shots as Multiple Violations. — Substantial evidence existed that defendant who killed his wife discharged his firearm into the victim's truck seven times, therefore validating seven distinct violations of this section. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

§ 14-34.2. Assault with a firearm or other deadly weapon upon governmental officers or employees, company police officers, or campus police officers.

CASE NOTES

The trial court erred by amending the jury verdict after deliberation to enhance the defendant's conviction to the felony of assault with a deadly weapon upon a government official, pursuant to this section, where the trial court only instructed the jury on the charge of assault on a government official and the State's motion to amend the verdict did not comport with any of the challenges allowable under § 15A-1240. State v. Brogden, — N.C. App. —, 528 S.E.2d 391, 2000 N.C. App. LEXIS 423 (2000).

Cited in State v. Locklear, — N.C. App. —, 525 S.E.2d 813, 2000 N.C. App. LEXIS 138 (2000).

Article 10.

Kidnapping and Abduction.

§ 14-39. Kidnapping.

CASE NOTES

I. GENERAL CONSIDERATION.

Quoted in State v. Griffin, — N.C. App. —, 525 S.E.2d 793, 2000 N.C. App. LEXIS 108 (2000).

II. KIDNAPPING, GENERALLY.

Prior Contempt Adjudication And Double Jeopardy. — Defendant's convictions for kidnapping, non-felonious breaking or entering, and domestic criminal trespass did not violate the Double Jeopardy Clause where several elements contained within the applicable statutory language were not set out in the protective order that the defendant had previously been held in contempt for violating. State v. Gilley, 135 N.C. App. 519, 522 S.E.2d 111 (1999).

200 Feet Not Minor. — Distance of removal need not be substantial, but where defendant forced victim 200 feet in the course of a robbery, asportation was not "minor" or "merely technical in nature." In fact, it was unnecessary to extract more money from victim, and trial court did not err in denying motion to dismiss charge of kidnapping. State v. Little, 133 N.C. App. 601, 515 S.E.2d 752 (1999), cert. denied, appeal dismissed, 351 N.C. 115, — S.E.2d — (1999).

Evidence held sufficient, etc.

Substantial evidence, including the contents of victim's stomach, the motive, the weapon, the fact that defendant looked into who owned defendant's car, parked outside his former girl friend's house, the fact that he had his car painted and cleaned after victim disappeared, Mitochondrial DNA sequencing, and other circumstances, supported the conviction of defendant under § 14-17 and this section. State v. Underwood, 134 N.C. App. 533, 518 S.E.2d 231 (1999).

IV. FACILITATING COMMISSION OF FELONY OR FLIGHT.

No Conviction for Kidnapping to Facilitate an Assault Where the Assault Charge was Unsupported by Evidence. — The defendant's kidnapping conviction based on an indictment charging that the defendant kidnapped the victim "to facilitate the commission of a [] felony" was overturned where; based on

the court's earlier finding that the state's assertion that the defendant committed two assaults was unsupported by evidence, it held the kidnapping conviction based on the alleged second assault plain error. State v. Brooks, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 601 (June 6, 2000).

VI. FIRST-DEGREE KIDNAPPING.

Sentence Violated Double Jeopardy. — Defendant was improperly convicted of first degree kidnapping and first degree rape where the first degree kidnapping conviction arose from the same sexual assault which was the basis of the first degree rape conviction. State v. Wiggins, — N.C. App. —, 526 S.E.2d 207, 2000 N.C. App. LEXIS 149 (2000).

VII. SECOND-DEGREE KIDNAPPING.

A. In General.

Evidence Insufficient to Sustain Removal Requirement. — Conviction for second-degree kidnapping was vacated in case where removal to victim's bedroom was an inherent part of armed robbery. State v. Ross, 133 N.C. App. 310, 515 S.E.2d 252 (1999).

VIII. CHARGE AND INDICTMENT, GENERALLY.

Confining, Restraining And/Or Removing. — The trial court's use of the disjunctive "or" in the jury instruction on kidnapping was not error although the indictment used the conjunctive "and" to describe the State's allegations because substantial evidence supported any of the three methods set out in the indictment: confining, restraining and/or removing where the evidence showed that the defendant bound the victim's hands behind her back with wire ties, dragged her approximately 15 feet and forced her into a storage closet where he left her while he returned to the front office to empty the cash register, then returned and bound the her ankles with wire ties before raping her twice. State v. Lancaster, — N.C. App. —, 527 S.E.2d 61, 2000 N.C. App. LEXIS 266 (2000).

Instructing Jury on a Theory Unsupported by the Indictment. —

Where the indictment charged the defendant with kidnapping for "removing" the victims, but the trial court informed the jury that the defendant committed kidnapping if he "confined, restrained or removed" the victims, the appellate court would vacate defendant's first degree kidnapping convictions and remand for a new trial. State v. Dominie, 134 N.C. App. 445, 518 S.E.2d 32 (1999).

IX. INSTRUCTIONS.

Instructions as to Lesser Included Offenses. —

The trial court did not err in failing to instruct on the lesser-included offense of false imprisonment, where the evidence shows that defendant, who was charged with kidnapping the victim for the purpose of facilitating the commission of a felony, confined, restrained, or removed the victim in order to commit a robbery and there was no evidence indicating that defendant acted for any other purpose. State v. Lancaster, — N.C. App. —, 527 S.E.2d 61, 2000 N.C. App. LEXIS 266 (2000).

Failure to Instruct on Specific Intent Held Error. — The trial court's aiding and abetting instructions were erroneous in failing to require that the jury find the defendant possessed the specific criminal intent for commission of first degree burglary and second degree kidnapping. The trial court's use of the phrases "knowingly encouraged and[/or] aided" did not "adequately convey" the requisite specific intent concept as expressly requested by defendant in writing. State v. Lucas, — N.C. App. —, 530 S.E.2d 602, 2000 N.C. App. LEXIS 596 (2000).

Article 11.

Abortion and Kindred Offenses.

§ 14-45.1. When abortion not unlawful.

Legal Periodicals. —

For a note on minors' rights vis-a-vis abortion, see 1999 Duke L.J. 297.

For article discussing the rise and decline of North Carolina Abortion Fund, see 22 Campbell L. Rev. 119 (1999).

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

ARTICLE 14.

Burglary and Other Housebreakings.

§ 14-51. First and second degree burglary.

CASE NOTES

I. GENERAL CONSIDERATION.

Stated in State v. Lawrence, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 441 (June 16, 2000).

II. ELEMENTS OF OFFENSE.

B. First Degree.

Property "of Another" Requirement Met. — The defendant committed burglary by breaking into his grandmother's house to murder her although defendant had a key, paid rent, kept personal belongings in the house, and had recently lived there. The victim/grandmother had exclusive possession of her residence at the time the defendant broke and entered into it, she had expressly refused to allow him entry into her house, and locked the screen door to keep others, including defendant and his girlfriend, from entering. State v. Blyther, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 619 (June 20, 2000).

XI. INSTRUCTIONS.

Failure to Instruct on Specific Intent Held Error. — The trial court's aiding and abetting instructions were erroneous in failing to require that the jury find the defendant possessed the specific criminal intent for commission of first degree burglary and second degree kidnapping. The trial court's use of the phrases "knowingly encouraged and[/or] aided" did not "adequately convey" the requisite specific intent concept as expressly requested by defendant in writing. State v. Lucas, — N.C. App. —, 530 S.E.2d 602, 2000 N.C. App. LEXIS 596 (2000).

Charge of Misdemeanor Breaking and Entering Not Required. —

Where State's evidence clearly satisfied the elements of first-degree burglary and first-degree statutory rape, and there was no substantial evidence of misdemeanor breaking or entering, it was not error for judge to refuse to instruct on the lesser offense. State v. Campbell, 133 N.C. App. 531, 515 S.E.2d 732 (1999), cert. denied, 351 N.C. 111, — S.E.2d — (1999).

Sufficient Evidence to Submit Question of First-Degree Burglary to Jury. —

Where evidence supported an inference that second victim had been forced, through violence and the threat of violence, back into his upstairs apartment before being killed, trial court did not err in submitting the charge of first-degree burglary to the jury. State v. Parker, 350 N.C. 411, 516 S.E.2d 106 (1999), cert. denied, — U.S. —, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

XII. VERDICT.

Double Jeopardy. —

Defendant's burglary conviction did not violate double jeopardy principles where he was also convicted for first degree felony-murder; there was no inconsistency in the jury finding a lack of premeditation and deliberation required for first degree murder but finding the requisite intent to satisfy a felony-murder conviction. State v. Blyther, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 619 (June 20, 2000).

§ 14-53. Breaking out of dwelling house burglary.

CASE NOTES

Editor's Note. *— The case annotation under this section from the case of State v. Vester, 22 N.C. App 16, 205 S.E.2d 556, should have been placed under § 14-54.*

§ 14-54. Breaking or entering buildings generally.

CASE NOTES

I. General Consideration.
III. Breaking or Entering.
V. Intent.
VIII. Lesser Offenses.

I. GENERAL CONSIDERATION.

Double Jeopardy. —
Defendant's convictions for kidnapping, nonfelonious breaking or entering, and domestic criminal trespass did not violate the Double Jeopardy Clause where several elements contained within the applicable statutory language were not set out in the protective order that defendant had previously been held in contempt for violating. State v. Gilley, 135 N.C. App. 519, 522 S.E.2d 111 (1999).

Applied in State v. Briggs, — N.C. App. —, 526 S.E.2d 678, 2000 N.C. App. LEXIS 255 (2000).

III. BREAKING OR ENTERING.

The absence of evidence of breaking does not constitute a fatal defect of proof. State v. Vester, 22 N.C. App. 16, 205 S.E.2d 556, cert. denied, 285 N.C. 668, 207 S.E.2d 760 (1974), 419 U.S. 1116, 95 S. Ct. 795, 42 L. Ed. 2d 814 (1975).

V. INTENT.

Intent May Be Inferred from Circumstances. —
Where defendant offered no exculpatory evidence as to his intent when he entered a young girl's room through her bedroom window, that intent could properly be inferred from the circumstances and the court properly denied his motion to dismiss the charge of felony breaking and entering for insufficient evidence. State v. Roberts, 135 N.C. App. 690, 522 S.E.2d 130 (1999).

Misdemeanor Instruction Not Warranted Where Intent to Murder Proven. — The submission of misdemeanor breaking or entering as a lesser-included offense of first-degree burglary was not warranted where the evidence was clear and positive that defendant entered the mobile home with the intent to commit murder. State v. Lawrence, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 441 (June 16, 2000).

VIII. LESSER OFFENSES.

Breaking and Entering Is Lesser Offense of Burglary. —
The defendant's burglary conviction was vacated because the evidence failed to support the state's theory that he entered with the intent to commit a sex offense; and the case was remanded for an appropriate entry of judgment where the jury found facts that would support defendant's conviction for non-felonious breaking and entering, pursuant to this section. State v. Cooper, — N.C. App. —, 530 S.E.2d 73, 2000 N.C. App. LEXIS 637 (2000).

Article 15.

Arson and Other Burnings.

§ 14-58. Punishment for arson.

CASE NOTES

No evidence was needed to prove that dwelling was "occupied" for purposes of this section, where the burning of a downstairs apartment, after the murder of that apart-

ment's tenant, and the murder of an upstairs victim were parts of a continuous transaction. State v. Parker, 350 N.C. 411, 516 S.E.2d 106 (1999), cert. denied, — U.S. —, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Second-Degree Arson - Not Submitted — Defendant was not entitled to submit second degree arson as a possible verdict where, during the time which elapsed between the murder and the arson, the defendant took additional actions designed to further his "criminal scheme," i.e, defendant and co-defendant disposed of the murder weapon, burned their blood-soiled clothes, purchased gasoline to ignite the fire at the victim's house, and set the house on fire. State v. Holder, — N.C. App. —, 530 S.E.2d 562, 2000 N.C. App. LEXIS 552 (2000).

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

ARTICLE 16.

Larceny.

§ 14-70. Distinctions between grand and petit larceny abolished; punishment; accessories to larceny.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Indictment Must State Ownership — The defendant's conviction for larceny of a blue suitcase was vacated where the indictment should have named either the child as general owner, or his mother, as special owner but, instead, named his grandmother who was not standing in loco parentis and thus, had no special interest in the child's belongings. State v. Salters, — N.C. App. —, 528 S.E.2d 386, 2000 N.C. App. LEXIS 410 (2000).

ARTICLE 17.

Robbery.

§ 14-87. Robbery with firearms or other dangerous weapons.

CASE NOTES

III. Armed Robbery.
V. Use or Threatened Use of Dangerous Weapon.
B. Dangerous Weapon.
IX. Evidence.
X. Instructions.

III. ARMED ROBBERY.

Illustrative Cases. —

The evidence was sufficient for a conviction on armed robbery under this section, where an inference existed that defendant took money from the victim's person after having shot him with a firearm even though other evidence supported a contrary conclusion that the shooting and the taking of the money were two separate transactions. State v. Jarrett, — N.C. App. —, 527 S.E.2d 693, 2000 N.C. App. LEXIS 318 (2000).

V. USE OR THREATENED USE OF DANGEROUS WEAPON.

B. Dangerous Weapon.

Defendant Failed to Prove Weapon Was Not Dangerous. — There was no error in the

finding that defendant used a dangerous weapon in the commission of the robbery where defendant failed to show conclusively that the weapon was not operational and did not eliminate the permissive inference of danger to the victim. State v. Duncan, — N.C. App. —, 524 S.E.2d 808, 2000 N.C. App. 59 (2000).

IX. EVIDENCE.

The evidence of robbery with a dangerous weapon was sufficient for the trial court to submit it as an aggravating circumstance where the wallet—containing a driver's license and other papers, but no money—was found lying open in front of the victim's body; inside the wallet were a drop and a smear of blood which the defendant admitted could have come from his hand but which he could not explain given the fact that he claimed not to have taken the money until after cleaning up and disposing of the murder weapon and bloody clothes, supporting a reasonable inference that defendant removed the money immediately after the murder. State v. Frogge, 351 N.C. 576, 528 S.E.2d 893 (2000).

Evidence held sufficient to sustain conviction, etc.

The victim's testimony that defendant "held a metal object towards her" and demanded all the money in the store's cash register, coupled with her testimony that she was afraid for her life, was sufficient to satisfy the requirements of this section. State v. Stevenson, — N.C. App. —, 523 S.E.2d 734, 1999 N.C. App. LEXIS 1378 (1999), cert. denied, 351 N.C. 368, — S.E.2d — (2000).

X. INSTRUCTIONS.

Error in the instructions with respect to actual or constructive possession did not entitle defendant to a new trial where the central issue was whether the defendant's use of the pistol to threaten and endanger the victim was close enough in time to the taking of the property as to constitute one continuous transaction and the trial court's instructions upon this point were clear and correct. State v. Jarrett, — N.C. App. —, 527 S.E.2d 693, 2000 N.C. App. LEXIS 318 (2000).

Instruction Proper Where Substantially the Same. — There was no error where the instruction given by the court was substantially the same as the one requested by the defendant. State v. Duncan, — N.C. App. —, 524 S.E.2d 808, 2000 N.C. App. 59 (2000).

Article 19.

False Pretenses and Cheats.

§ 14-107. Worthless checks.

Editor's Note. — Session Laws 2000-67, s. 15.3A, added Cumberland, Edgecombe, Nash, Onslow, and Wilson to the list of affected localities for Session Laws 1997-443, s. 18.22, as amended by Session Laws 1998-212, s. 16.3, Session Laws 1998-23, s. 11, and Session Laws 1999-237, s. 17.7, noted under this section in the main volume under the head "Local Modification." The provisions of Session Laws 1997-443, s. 18.22, as amended, have now been codified at §§ 7A-308, 7A-346.2, and 14-107.2 at the direction of the Revisor of Statutes.

§ 14-107.2. Program for the collection of worthless check cases.

A district attorney may establish a program for the collection of worthless check cases that would, if prosecuted under G.S. 14-107, be punishable as a Class 2 misdemeanor. The purpose of the program is to collect worthless checks in a more timely manner, to alleviate the need to prosecute each worthless check case, and to provide an opportunity for the check passer to avoid criminal prosecution. In creating the program, the district attorney must establish criteria for the types of worthless check cases that will be eligible for collection under the program. If the check passer participates in the program by paying the fee under G.S. 7A-308(c) and providing restitution to the check taker for (i) the amount of the check or draft, (ii) any service charges imposed on the check taker by a bank or depository for processing the dishonored check, and (iii) any processing fees imposed by the check taker pursuant to G.S. 25-3-512, then the district attorney will not prosecute the worthless check case under G.S. 14-107. The Administrative Office of the Courts must establish procedures for remit-

ting the fee and providing restitution to the check taker. For the purposes of this section, the terms "check passer" and "check taker" have the same meanings as defined in G.S. 14-107.1.

This act applies only to Brunswick, Bladen, Columbus, Cumberland, Durham, Edgecombe, Nash, New Hanover, Onslow, Pender, Rockingham, Wake, and Wilson Counties. (1997-443, s. 18.22(b); 1998-23, s. 11(a); 1998-212, s. 16.3(a); 1999-237, s. 17.7; 2000-67, s. 15.3A(a).)

Cross References. — As to the Collection of Worthless Checks Fund, see § 7A-308(c). As to report on implementation of the worthless check collection program, see § 7A-376(b).

Editor's Note. — Session Laws 1997-443, s. 18.22(b) has been codified as this section at the direction of the Revisor of Statutes. Initially, Session Laws 1997-443, s. 18.22(d) provided that s. 18.22(b) would apply to Columbus, Durham and Rockingham Counties only, and s. 18.22(e) provided that the act would become effective October 1, 1997, and would expire June 30, 1998. Session Laws 1998-23, s. 11(a) amended Session Laws 1997-443, s. 18.22(e) to provide that s. 18.22 would expire when the 1998 Appropriations Act became law; however, this provision was repealed by Session Laws 1998-212, s. 16.3(d). Section 16.3(a) of Session Laws 1998-212 provided that Session Laws 1997-443, s. 18.22 would expire June 30, 1999, and s. 16.3(d) of that act added Wake to the list of counties to which Session Laws 1997-443, s. 18.22 was applicable. Session Laws 1999-237, s. 17.7(a) deleted the sunset for Session Laws 1997-443, s. 18.22, as amended, and added Brunswick, Bladen, New Hanover, and Pender to the list of counties. Session Laws 2000-67, s. 15.3A, added Cumberland, Edgecombe, Nash, Onslow, and Wilson to the list of counties. The provisions of Session Laws 1997-443, s. 18.22(b) have been codified as this section at the direction of the Revisor of Statutes.

The editor's notes and local modifications regarding Session Laws 1997-443, s. 18.22, as amended, have been deleted from this section in the main volume.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Session Laws 2000-67, s. 28.5, makes the section effective July 1, 2000.

§ 14-111.2. Obtaining ambulance services without intending to pay therefor — certain named counties.

Any person who with intent to defraud shall obtain ambulance services without intending at the time of obtaining such services to pay, if financially able, any reasonable charges therefor shall be guilty of a Class 2 misdemeanor. A determination by the court that the recipient of such services has willfully failed to pay for the services rendered for a period of 90 days after request for payment, and that the recipient is financially able to do so, shall raise a presumption that the recipient at the time of obtaining the services intended to defraud the provider of the services and did not intend to pay for the services.

The section shall apply to Anson, Ashe, Beaufort, Caldwell, Camden, Caswell, Catawba, Chatham, Cherokee, Clay, Cleveland, Cumberland, Davie, Duplin, Durham, Forsyth, Gaston, Graham, Guilford, Haywood, Henderson, Hoke, Hyde, Iredell, Macon, Mecklenburg, Montgomery, Orange, Pasquotank, Person, Polk, Randolph, Robeson, Rockingham, Scotland, Stanly, Surry, Transylvania, Union, Vance, Washington, Wilkes and Yadkin Counties only. (1967, c. 964; 1969, cc. 292, 753; c. 1224, s. 4; 1971, cc. 125, 203, 300, 496; 1973, c. 880, s. 2; 1977, cc. 63, 144; 1983, c. 42, s. 1; 1985, c. 335, s. 1; 1987 (Reg. Sess., 1988), c. 910, s. 1; 1993, c. 539, s. 50; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 9, s. 2; 1999-64, s. 1; 2000-15, s. 1.)

Effect of Amendments. — Session Laws 2000-15, s. 1, effective December 1, 2000, and applicable only to offenses committed on or after that date, inserted "Camden" in the second paragraph.

§ 14-111.3. Making unneeded ambulance request in certain counties.

It shall be unlawful for any person or persons to willfully obtain or attempt to obtain ambulance service that is not needed, or to make a false request or report that an ambulance is needed. Every person convicted of violating this section shall be guilty of a Class 3 misdemeanor.

This section shall apply only to the Counties of Ashe, Buncombe, Camden, Cherokee, Clay, Cleveland, Davie, Duplin, Durham, Graham, Greene, Haywood, Hoke, Macon, Madison, Polk, Robeson, Washington, Wilkes and Yadkin. (1965, c. 976, s. 2; 1971, c. 496; 1977, c. 96; 1983, c. 42, s. 2; 1985, c. 335, s. 2; 1987 (Reg. Sess., 1988), c. 910, s. 2; 1989, c. 514; 1989 (Reg. Sess., 1990), c. 834; 1993, c. 539, s. 51; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 9, s. 3; 1999-64, s. 2; 2000-15, s. 2.)

Effect of Amendments. — Session Laws 2000-15, s. 2, effective December 1, 2000, and applicable only to offenses committed on or after that date, inserted "Camden" in the second paragraph.

Article 19C.

Financial Identity Fraud.

§ 14-113.20. Financial identity fraud.

(a) A person who knowingly obtains, possesses, or uses personal identifying information of another person without the consent of that other person, with the intent to fraudulently represent that the person is the other person for the purposes of making financial or credit transactions in the other person's name or for the purpose of avoiding legal consequences is guilty of a felony punishable as provided in G.S. 14-113.22(a).

(b) The term "identifying information" as used in this section includes the following:

(1) Social security numbers.
(2) Drivers license numbers.
(3) Checking account numbers.
(4) Savings account numbers.
(5) Credit card numbers.
(6) Debit card numbers.
(7) Personal Identification (PIN) Code as defined in G.S. 14-113.8(6).
(8) Electronic identification numbers.
(9) Digital signatures.
(10) Any other numbers or information that can be used to access a person's financial resources.

(c) It shall not be a violation under this section for a person to do any of the following:

(1) Lawfully obtain credit information in the course of a bona fide consumer or commercial transaction.
(2) Lawfully exercise, in good faith, a security interest or a right of offset by a creditor or financial institution.
(3) Lawfully comply, in good faith, with any warrant, court order, levy, garnishment, attachment, or other judicial or administrative order,

decree, or directive, when any party is required to do so. (1999-449, s. 1; 2000-140, s. 37.)

Effect of Amendments. — Session Laws 2000-140, s. 37, effective July 21, 2000, substituted "G.S. 14-113.8(6)" for "G.S. 14-113.8(8)" in subdivision (b)(7).

SUBCHAPTER VI. CRIMINAL TRESPASS.

ARTICLE 22.

Damages and Other Offenses to Land and Fixtures.

§ 14-134.3. Domestic criminal trespass.

CASE NOTES

Prior Contempt Adjudication And Double Jeopardy. — Defendant's convictions for kidnapping, non-felonious breaking or entering, and domestic criminal trespass did not violate the Double Jeopardy Clause where several elements contained within the applicable statutory language were not set out in the protective order that defendant had previously been held in contempt for violating. State v. Gilley, 135 N.C. App. 519, 522 S.E.2d 111 (1999).

§ 14-147. Removing, altering or defacing landmarks.

CASE NOTES

Applied in Suhre v. Haywood County, 55 F. Supp. 2d 384 (W.D.N.C. 1999).

§ 14-159.3. Trespass to land on motorized all terrain vehicle.

CASE NOTES

Definition of "Recreational Vehicle". — North Carolina statutes do not preclude the definition of a "recreational vehicle" including an ATV. Halter v. J.C. Penney Life Ins. Co., 1999 U.S. Dist. LEXIS 21386, — F. Supp. 2d — (M.D.N.C. November 30, 1999).

§ 14-160. Willful and wanton injury to personal property; punishments.

CASE NOTES

Children Throwing Rocks at a Car — Sufficient evidence existed to support the juvenile court's findings that the juveniles acted "wantonly and willfully" in damaging a vehicle, when they threw rocks at it denting it and cracking the windshield, and thus support the findings of delinquency. In re McKoy, — N.C. App. —, 530 S.E.2d 334, 2000 N.C. App. LEXIS 550 (2000).

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

ARTICLE 26.

Offenses against Public Morality and Decency.

§ 14-190.9. Indecent exposure.

CASE NOTES

Creek embankment was a "public place"; although located adjacent to the victims' back yard, it was a place where children played, where anyone could go by walking through the back yard, and where no signs of a "No Trespassing" nature were posted. State v. Fusco, — N.C. App. —, 523 S.E.2d 741, 1999 N.C. App. LEXIS 1377 (1999).

Victim testimony is not necessary to substantiate the charge of indecent exposure where other testimony established that defendant was exposing himself and that a female was present and could have seen had she looked. State v. Fusco, — N.C. App. —, 523 S.E.2d 741, 1999 N.C. App. LEXIS 1377 (1999).

Inclusion of a sentence focusing on viewability as part of the court's overall instruction on the meaning of "public place" was not error. State v. Fusco, — N.C. App. —, 523 S.E.2d 741, 1999 N.C. App. LEXIS 1377 (1999).

§ 14-196. Using profane, indecent or threatening language to any person over telephone; annoying or harassing by repeated telephoning or making false statements over telephone.

(a) It shall be unlawful for any person:

(1) To use in telephonic communications any words or language of a profane, vulgar, lewd, lascivious or indecent character, nature or connotation;

(2) To use in telephonic communications any words or language threatening to inflict bodily harm to any person or to that person's child, sibling, spouse, or dependent or physical injury to the property of any person, or for the purpose of extorting money or other things of value from any person;

(3) To telephone another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number;

(4) To make a telephone call and fail to hang up or disengage the connection with the intent to disrupt the service of another;

(5) To telephone another and to knowingly make any false statement concerning death, injury, illness, disfigurement, indecent conduct or criminal conduct of the person telephoned or of any member of his family or household with the intent to abuse, annoy, threaten, terrify, harass, or embarrass;

(6) To knowingly permit any telephone under his control to be used for any purpose prohibited by this section.

(b) Any of the above offenses may be deemed to have been committed at either the place at which the telephone call or calls were made or at the place where the telephone call or calls were received. For purposes of this section, the term "telephonic communications" shall include communications made or received by way of a telephone answering machine or recorder, telefacsimile machine, or computer modem.

(c) Anyone violating the provisions of this section shall be guilty of a Class 2 misdemeanor. (1913, c. 35; 1915, c. 41; C.S., s. 4351; 1967, c. 833, s. 1; 1989, c. 305; 1993, c. 539, s. 128; 1994, Ex. Sess., c. 24, s. 14(c); 1999-262, s. 1; 2000-125, s. 2.)

Effect of Amendments. — Session Laws 2000-125, s. 2, effective December 1, 2000, and applicable to offenses committed on or after that date, deleted "or electronic mail" following "To use in telephonic" in subdivision (a)(2).

§ 14-196.3. Cyberstalking.

(a) The following definitions apply in this section:

(1) Electronic communication. — Any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature, transmitted in whole or in part by a wire, radio, computer, electromagnetic, photoelectric, or photo-optical system.

(2) Electronic mail. — The transmission of information or communication by the use of the Internet, a computer, a facsimile machine, a pager, a cellular telephone, a video recorder, or other electronic means sent to a person identified by a unique address or address number and received by that person.

(b) It is unlawful for a person to:

(1) Use in electronic mail or electronic communication any words or language threatening to inflict bodily harm to any person or to that person's child, sibling, spouse, or dependent, or physical injury to the property of any person, or for the purpose of extorting money or other things of value from any person.

(2) Electronically mail or electronically communicate to another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing, or embarrassing any person.

(3) Electronically mail or electronically communicate to another and to knowingly make any false statement concerning death, injury, illness, disfigurement, indecent conduct, or criminal conduct of the person electronically mailed or of any member of the person's family or household with the intent to abuse, annoy, threaten, terrify, harass, or embarrass.

(4) Knowingly permit an electronic communication device under the person's control to be used for any purpose prohibited by this section.

(c) Any offense under this section committed by the use of electronic mail or electronic communication may be deemed to have been committed where the electronic mail or electronic communication was originally sent, originally received in this State, or first viewed by any person in this State.

(d) Any person violating the provisions of this section shall be guilty of a Class 2 misdemeanor.

(e) This section does not apply to any peaceable, nonviolent, or nonthreatening activity intended to express political views or to provide lawful information to others. This section shall not be construed to impair any constitutionally protected activity, including speech, protest, or assembly. (2000-125, s. 1; 2000-140, s. 91.)

Editor's Note. — Session Laws 2000-125, s. 10, as amended by Session Laws 2000-140, s. 91, makes the section effective December 1, 2000, and applicable to offenses committed on or after that date. As enacted by Session Laws 2000-125, the section was assigned to Article 35 of Chapter 14; Session Laws 2000-140 assigned the section to Article 26.

§ 14-202.1. Taking indecent liberties with children.

CASE NOTES

I. General Consideration.
III. Evidence.

I. GENERAL CONSIDERATION.

Constitutionality. —

The term "with" contained in this section was not unconstitutionally vague as applied to defendant who exposed himself from behind a sliding glass door to children some 35 feet away. State v. Nesbitt, 133 N.C. App. 420, 515 S.E.2d 503 (1999).

Neither the indictments nor the jury verdicts returned thereon were required to specify the acts which constituted the indecent liberties for which the defendant was convicted. State v. Miller, — N.C. App. —, 528 S.E.2d 626, 2000 N.C. App. LEXIS 418 (2000).

Youth of Victim as Aggravating Factor. —

The trial court improperly used the victim's age as an aggravating factor because the State did not present evidence that "the victim was more vulnerable than other victims because of his age"; merely checking the AOC form is not sufficient to establish this aggravating factor except in cases where the child is of such tender age that the vulnerability is established by consideration of the nature of the crime. State v. Rudisill, — N.C. App. —, 527 S.E.2d 727, 2000 N.C. App. LEXIS 321 (2000).

III. EVIDENCE.

Record contained sufficient evidence that defendant was "with" children, within the meaning of this section, when he used his dogs to encourage children to come to his yard and then exposed himself from within a nearby glass door. State v. Nesbitt, 133 N.C. App. 420, 515 S.E.2d 503 (1999).

Evidence Supported Finding of Abuse. — The trial court's findings of fact regarding child's status as an abused juvenile were supported by clear and convincing evidence where the child testified that her father had shown her a picture of a woman wearing a see-through dress, the child's friend drew a picture in court of what she had seen, i.e. the father's anatomy, a social worker testified that the child had told her that her father had "asked her to touch his penis," and a doctor testified that the child had told her that her father had asked her to look at a "dirty book." In re Cogdill, — N.C. App. —, 528 S.E.2d 600, 2000 N.C. App. LEXIS 425 (2000).

§ 14-202.2. Indecent liberties between children.

CASE NOTES

The element "for the purpose of arousing or gratifying sexual desire" may not be inferred solely from the act itself under this section. Without some evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting, sexual ambitions must not be assigned to a child's actions. In re T.S., 133 N.C. App. 272, 515 S.E.2d 230 (1999).

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

ARTICLE 31.

Misconduct in Public Office.

§ 14-234. Director of public trust contracting for his own benefit; participation in business transaction involving public funds; exemptions.

(a) If any person appointed or elected a commissioner or director to discharge any trust wherein the State or any county, city or town may be in any

manner interested shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another, he shall be guilty of a misdemeanor. Provided, that this section shall not apply to public officials transacting business with banks or banking institutions or savings and loan associations or public utilities regulated under the provisions of Chapter 62 of the General Statutes in regular course of business: Provided further, that such undertaking or contracting shall be authorized by said governing board by specific resolution on which such public official shall not vote.

(b) Nothing in this section nor in any general principle of common law shall render unlawful the acceptance of remuneration from a governmental board, agency or commission for services, facilities, or supplies furnished directly to needy individuals by a member of said board, agency or commission under any program of direct public assistance being rendered under the laws of this State or the United States to needy persons administered in whole or in part by such board, agency or commission; provided, however, that such programs of public assistance to needy persons are open to general participation on a nondiscriminatory basis to the practitioners of any given profession, professions or occupation; and provided further that the board, agency or commission, nor any of its employees or agents, shall have no control over who, among licensed or qualified providers, shall be selected by the beneficiaries of the assistance, and that the remuneration for such services, facilities or supplies shall be in the same amount as would be paid to any other provider; and provided further that, although the board, agency or commission member may participate in making determinations of eligibility of needy persons to receive the assistance, he shall take no part in approving his own bill or claim for remuneration.

(c) No director, board member, commissioner, or employee of any State department, agency, or institution shall directly or indirectly enter into or otherwise participate in any business transaction involving public funds with any firm, corporation, partnership, person or association which at any time during the preceding two-year period had a financial association with such director, board member, commissioner or employee.

(c1) The fact that a person owns ten percent (10%) or less of the stock of a corporation or has a ten percent (10%) or less ownership in any other business entity or is an employee of said corporation or other business entity does not make the person "in any manner interested" or "concerned or interested in making such contract, or in the profits thereof," as such phrase is used in subsection (a) of this section, and does not make the person one who "had a financial association," as defined in subsection (c) of this section; provided that in order for the exception provided by this subsection to apply, such undertaking or contracting must be authorized by the governing board by specific resolution on which such public official shall not vote.

(d) The provisions of subsection (c) shall not apply to any transactions meeting the requirements of Article 3, Chapter 143 of the General Statutes or any other transaction specifically authorized by the Advisory Budget Commission.

(d1) The first sentence of subsection (a) shall not apply to (i) any elected official or person appointed to fill an elective office of a village, town, or city having a population of no more than 7,500 according to the most recent official federal census, (ii) any elected official or person appointed to fill an elective office of a county within which there is located no village, town, or city with a population of more than 7,500 according to the most recent official federal census, (iii) any elected official or person appointed to fill an elective office on a city board of education in a city having a population of no more than 7,500 according to the most recent official federal census, (iv) any elected official or

person appointed to fill an elective office as a member of a county board of education in a county within which there is located no village, town or city with a population of more than 7,500 according to the most recent official federal census, (v) any physician, pharmacist, dentist, optometrist, veterinarian, or nurse appointed to a county social services board, local health board, or area mental health, developmental disabilities, and substance abuse board serving one or more counties within which there is located no village, town, or city with a population of more than 7,500 according to the most recent official federal census, and (vi) any member of the board of directors of a public hospital if:

(1) The undertaking or contract or series of undertakings or contracts between the village, town, city, county, county social services board, county or city board of education, local health board or area mental health, developmental disabilities, and substance abuse board, or public hospital and one of its officials is approved by specific resolution of the governing body adopted in an open and public meeting, and recorded in its minutes and the amount does not exceed ten thousand dollars ($10,000) for medically related services and fifteen thousand dollars ($15,000) for other goods or services within a 12-month period; and

(2) The official entering into the contract or undertaking with the unit or agency does not in his official capacity participate in any way or vote; and

(3) The total annual amount of undertakings or contracts with each official, shall be specifically noted in the audited annual financial statement of the village, town, city, or county; and

(4) The governing board of any village, town, city, county, county social services board, county or city board of education, local health board, area mental health, developmental disabilities, and substance abuse board, or public hospital which undertakes or contracts with any of the officials of their governmental unit shall post in a conspicuous place in its village, town, or city hall, or courthouse, as the case may be, a list of all such officials with whom such undertakings or contracts have been made, briefly describing the subject matter of the undertakings or contracts and showing their total amounts; this list shall cover the preceding 12 months and shall be brought up-to-date at least quarterly.

(d2) The provision of subsection (d1) shall not apply to contracts required by Article 8 of Chapter 143 of the General Statutes, Public Building Contracts.

(d3) Subsection (a) of this section does not apply to an application for or the receipt of a grant under the Agriculture Cost Share Program for Nonpoint Source Pollution Control created pursuant to G.S. 143-215.74 by a member of the Soil and Water Conservation Commission if the requirements of G.S. 139-4(e) are met, and does not apply to a district supervisor of a soil and water conservation district if the requirements of G.S. 139-8(b) are met.

(d4) Subsection (a) of this section does not apply to an application for, or the receipt of a grant or other financial assistance from, the Tobacco Trust Fund created under Article 75 of Chapter 143 of the General Statutes by a member of the Tobacco Trust Fund Commission or an entity in which a member of the Commission has an interest provided that the requirements of G.S. 143-717(g) are met.

(e) Anyone violating this section shall be guilty of a Class 1 misdemeanor. (1825, c. 1269, P.R.; 1826, c. 29; R.C., c. 34, s. 38; Code, s. 1011; Rev., s. 3572; C.S., s. 4388; 1929, c. 19, s. 1; 1969, c. 1027; 1975, c. 409; 1977, cc. 240, 761; 1979, c. 720; 1981, c. 103, ss. 1, 2, 5; 1983, c. 544, ss. 1, 2; 1985, c. 190; 1987, c. 570; 1989, c. 231; 1991 (Reg. Sess., 1992), c. 1030, s. 5; 1993, c. 539, s. 145; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 519, s. 4; 2000-147, s. 6.)

Editor's Note. — Session Laws 2000-147, s. 8(a)-(c), provides:

"(a) Interpretation of Act. — The foregoing sections of this act provide an additional and alternative method for the doing of the things authorized by the act, are supplemental and additional to powers conferred by other laws, and do not derogate any powers now existing.

"(b) References in this act to specific sections or Chapters of the General Statutes are intended to be references to those sections or Chapters as amended and as they may be amended from time to time by the General Assembly.

"(c) This act, being necessary for the health and welfare of the people of the State, shall be liberally construed to effect its purposes."

Session Laws 2000-147, s. 8(d), contains a severability clause.

Effect of Amendments. — Session Laws 2000-147, s. 6, effective August 2, 2000, added subsection (d4).

OPINIONS OF ATTORNEY GENERAL

Regarding a possible conflict of interest which could arise between an airport authority and two members of its board of directors if the authority decides to refund some of its outstanding bonds, which would likely involve entering into a contract with a financial institution to underwrite the issuance of such bonds, see opinion of Attorney General to William Owen Cooke, Cooke & Cooke, Attorneys At Law, 1999 N.C.A.G. 20 (6/24/99).

§ 14-234.1. Misuse of confidential information.

CASE NOTES

Section Relevant in Constructive Fraud Claim. — Where plaintiff had to establish that the defendant had a fiduciary relationship with her and that he breached that duty, in order to sustain her burden as to a claim of constructive fraud, this section was relevant as evidence of the corrupt and possible criminal nature of the acts allegedly perpetrated. Leftwich v. Gaines, 134 N.C. App. 502, 521 S.E.2d 717 (1999).

Article 33.

Prison Breach and Prisoners.

§ 14-258.1. Furnishing poison, controlled substances, deadly weapons, cartridges, ammunition or alcoholic beverages to inmates of charitable, mental or penal institutions or local confinement facilities.

CASE NOTES

Evidence Held Sufficient in Controlled Substance Case. — The State's evidence showing that the defendant's boyfriend was an inmate at a local confinement facility, that defendant gave him a controlled substance while he was an inmate, and that defendant acted knowingly and intentionally was sufficient to sustain a conviction under this section. State v. Mitchell, 135 N.C. App. 617, 522 S.E.2d 94 (1999).

SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

ARTICLE 35.

Offenses Against the Public Peace.

§ 14-269.2. Weapons on campus or other educational property.

CASE NOTES

Evidence Was Sufficient. — The State presented sufficient evidence for a reasonable mind to conclude that the juvenile knowingly possessed a pellet gun on educational property. In re Murray, — N.C. App. —, 525 S.E.2d 496, 2000 N.C. App. LEXIS 113 (2000).

The juvenile's motion to suppress the search was properly denied where the school principal had reasonable grounds for suspicion about the contents of the book bag, and the search was conducted in a reasonable manner under the circumstances. In re Murray, — N.C. App. —, 525 S.E.2d 496, 2000 N.C. App. LEXIS 113 (2000).

§ 14-277.3. Stalking.

CASE NOTES

The trial courts should instruct the jury as to the definition of "reasonable fear" when handling violations under this section to ensure that an objective standard, based on what frightens an ordinary, prudent person under the same or similar circumstances, is applied rather than a subjective standard which focuses on the individual victim's fears and apprehensions. State v. Ferebee, — N.C. App. —, 529 S.E.2d 686, 2000 N.C. App. LEXIS 498 (2000).

Acts Prior to Warning Relevant to Show Context But Not to Convict. — The trial court's charge, given in accordance with the pattern jury instructions, "incorrectly allowed the jury to consider acts prior to the alleged warning as constituting part of the basis of a stalking conviction." A conviction for the offense of stalking may not be based upon acts which occurred prior to the time a defendant was warned to desist, but rather upon acts committed after the warning. State v. Ferebee, — N.C. App. —, 529 S.E.2d 686, 2000 N.C. App. LEXIS 498 (2000).

SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

ARTICLE 36.

Offenses Against the Public Safety.

§ 14-280. Shooting or throwing at trains or passengers.

CASE NOTES

Cited in Aycock v. Padgett, 134 N.C. App. 164, 516 S.E.2d 907 (1999).

§ 14-280.1. Trespassing on railroad right-of-way.

(a) Offense. — A person commits the offense of trespassing on railroad right-of-way if the person enters and remains on the railroad right-of-way without the consent of the railroad company or the person operating the railroad or without authority granted pursuant to State or federal law.

(b) Crossings. — Nothing in this section shall apply to a person crossing the railroad right-of-way at a public or private crossing.

(c) Legally Abandoned Rights-of-Way. — This section shall not apply to any right-of-way that has been legally abandoned pursuant to an order of a federal or State agency having jurisdiction over the right-of-way and is not being used for railroad services.

(d) Classification. — Trespassing on railroad right-of-way is a Class 3 misdemeanor. (2000-146, s. 10.)

Editor's Note. — Session Laws 2000-146, s. 14, made Session Laws 2000-146, s. 10, which added this section, effective December 1, 2000, and applicable to offenses occurring on or after that date.

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

ARTICLE 37.

Lotteries, Gaming, Bingo and Raffles.

Part 1. Lotteries and Gaming.

§ 14-298. Gaming tables, illegal punchboards, slot machines, and prohibited video game machines to be destroyed by police officers.

All sheriffs and officers of police are hereby authorized and directed, on information made to them on oath that any gaming table prohibited to be used by G.S. 14-289 through G.S. 14-300, any illegal punchboard or illegal slot machine, or any video game machine prohibited to be used by G.S. 14-306 or G.S. 14-306.1, is in the possession or use of any person within the limits of their jurisdiction, to destroy the same by every means in their power; and they shall call to their aid all the good citizens of the county, if necessary, to effect its destruction. (1791, c. 336, P.R.; 1798, c. 502, s. 2, P.R.; R.C., c. 34, s. 74; Code, s. 1049; Rev., s. 3720; C.S., s. 4435; 1931, c. 14, s. 4; 1973, c. 108, s. 11; 2000-151, s. 5.)

Editor's Note. —

Session Laws 2000-151, s. 6, directs the Legislative Research Commission to study the implementation of the act and recommend any changes it deems necessary in order to strengthen the act. Notwithstanding G.S. 120-30.11, the Commission may make its report under this section to the 2001 General Assembly no later than April 1, 2001.

Session Laws 2000-151, s. 6.1 authorizes the Department of Revenue to draw from collections under Article 4 of Chapter 105 of the General Statutes for the 2000-2001 fiscal year its actual costs of implementing G.S. 14-306.1(e1) (now G.S. 14-306.1(j)) as enacted by the act.

Session Laws 2000-151, s. 7, contains a severability clause.

Effect of Amendments. — Session Laws 2000-151, s. 5, effective August 2, 2000, substituted "through G.S. 14-300, any illegal" for "through 14-300, or any illegal" and inserted "or any video game machine prohibited to be used by G.S. 14-306 or G.S. 14-306.1."

§ 14-306. Slot machine or device defined.

(a) Any machine, apparatus or device is a slot machine or device within the provisions of G.S. 14-296 through 14-309, if it is one that is adapted, or may be readily converted into one that is adapted, for use in such a way that, as a result of the insertion of any piece of money or coin or other object, such machine or device is caused to operate or may be operated in such manner that the user may receive or become entitled to receive any piece of money, credit, allowance or thing of value, or any check, slug, token or memorandum, whether of value or otherwise,or which may be exchanged for any money, credit, allowance or any thing of value, or which may be given in trade, or the user may secure additional chances or rights to use such machine, apparatus or device; or any other machine or device designed and manufactured primarily for use in connection with gambling and which machine or device is classified by the United States as requiring a federal gaming device tax stamp under applicable provisions of the Internal Revenue Code. This definition is intended to embrace all slot machines and similar devices except slot machines in which is kept any article to be purchased by depositing any coin or thing of value, and for which may be had any article of merchandise which makes the same return or returns of equal value each and every time it is operated, or any machine wherein may be seen any pictures or heard any music by depositing therein any coin or thing of value, or any slot weighing machine or any machine for making stencils by the use of contrivances operated by depositing in the machine any coin or thing of value, or any lock operated by slot wherein money or thing of value is to be deposited, where such slot machines make the same return or returns of equal value each and every time the same is operated and does not at any time it is operated offer the user or operator any additional money, credit, allowance, or thing of value, or check, slug, token or memorandum, whether of value or otherwise, which may be exchanged for money, credit, allowance or thing of value or which may be given in trade or by which the user may secure additional chances or rights to use such machine, apparatus, or device, or in the playing of which the operator does not have a chance to make varying scores or tallies.

(b) The definition contained in subsection (a) of this section and G.S. 14-296, 14-301, 14-302, and 14-305 does not include coin-operated machines, video games, pinball machines, and other computer, electronic or mechanical devices that are operated and played for amusement, that involve the use of skill or dexterity to solve problems or tasks or to make varying scores or tallies and that:

(1) Do not emit, issue, display, print out, or otherwise record any receipt, paper, coupon, token, or other form of record which is capable of being redeemed, exchanged, or repurchased for cash, cash equivalent, or prizes, or award free replays; or

(2) In actual operation, limit to eight the number of accumulated credits or replays that may be played at one time and which may award free replays or paper coupons that may be exchanged for prizes or merchandise with a value not exceeding ten dollars ($10.00), but may not be exchanged or converted to money.

(c) Any video machine, the operation of which is made lawful by subsection (b)(2) of this section, shall have affixed to it in view of the player a sticker informing that person that it is a criminal offense with the potential of imprisonment to pay more than that which is allowed by law. In addition, if the machine has an attract chip which allows programming, the static display shall contain the same message.

(d) The exception in subsection (b)(2) of this section does not apply to any machine that pays off in cash. The exemption in subsection (b)(2) of this section

does not apply where the prizes, merchandise, credits, or replays are (i) repurchased for cash or rewarded by cash, (ii) exchanged for merchandise of a value of more than ten dollars ($10.00), or (iii) where there is a cash payout of any kind, by the person operating or managing the machine or the premises, or any agent or employee of that person. It is also a criminal offense, punishable under G.S. 14-309, for the person making the unlawful payout to the player of the machine to violate this section, in addition to any other person whose conduct may be unlawful. (1937, c. 196, s. 3; 1967, c. 1219; 1977, c. 837; 1985, c. 644; 1989, c. 406, s. 1; 1993, c. 366, s. 1; 2000-151, s. 4.)

Editor's Note. — Session Laws 2000-151, s. 6, directs the Legislative Research Commission to study the implementation of the act and recommend any changes it deems necessary in order to strengthen the act. Notwithstanding G.S. 120-30.11, the Commission may make its report under this section to the 2001 General Assembly no later than April 1, 2001.

Session Laws 2000-151, s. 6.1 authorizes the Department of Revenue to draw from collections under Article 4 of Chapter 105 of the General Statutes for the 2000-2001 fiscal year its actual costs of implementing G.S. 14-306.1(e1) (now (j)) as enacted by the act.

Session Laws 2000-151, s. 7, contains a severability clause.

Session Laws 2000-151, s. 8(1) provides: "G.S. 14-306.1(a), (c), (e) (now (i)), (i) (now (n)), (j) (now (o)), and (*l*) (now (q)) are effective when this act becomes law [August 2, 2000]. Section 4 of this act, other than subsections (c) and (d), are effective when this act becomes law [August 2, 2000]. G.S. 14-306.1(h) (now(m) becomes effective 30 days after this bill becomes law."

Session Laws 2000-151, s. 8(2) provides: "Section 3 of this act and G.S. 14-306(c) and (d) as added by Section 4 of this act become effective with respect to offenses committed on or after October 1, 2000, except as to a violation of G.S. 14-306.1(a), they are effective when they become law [August 2, 2000]." See the editor's note at § 14-306.1 regarding the recodification of subsections in that section.

Effect of Amendments. — Session Laws 2000-151, s. 4, designated the existing first paragraph as present subsection (a); designated the existing second paragraph as subsection (b) and subdivision (b)(2) and added subdivision (b)(1); added subsections (c) and (d); in subsection (b), substituted "subsection (a)" for "the first paragraph," substituted "pinball machines, and other computer, electronic or mechanical devices that are operated and played for amusement" for "and devices used for amusement. Included within this exception are pinball machines, video games, and other mechanical devices," inserted "solve problems or tasks or to" and substituted "that:" for "which, in"; and made a minor wording change in subdivision (b)(2). See editor's note for applicability and effective date.

OPINIONS OF ATTORNEY GENERAL

Legal Video Poker Machines. — Collins Coin Music Co. v. N.C. Alcoholic Beverage Control Comm., 117 N.C. App. 405, cert. denied, 340 N.C. 110 (1995), is no longer controlling when determining whether a video poker machine is a legal machine as defined in this section. In order to be exempt under present law from the definition of an illegal slot machine, the video poker machine must satisfy each of the following statutory criteria: 1. the machine must be "used for amusement;" 2. the players ability to make varying scores and receive coupons must "involve the use of skill or dexterity;" 3. in actual operation, the number of accumulated credits or replays that may be played at one time and which may award free replays or paper coupons that may be exchanged for prizes or merchandise is limited to eight; and 4. the coupons or credits that a player can accumulate in a single hand may not be exchanged for cash and may not be exchanged for merchandise having a value greater than $10.00. See opinion of Attorney General to The Honorable Billy J. Creech N.C. House of Representatives, 1997 N.C.A.G. 66 (11/5/97).

§ 14-306.1. Types of machines and devices prohibited by law; penalties.

(a) Ban on New Machines. — It shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person's possession

for the purpose of operation any video gaming machine as defined in subsection (c) of this section unless either:

(1) Such machine was:

a. Lawfully in operation, and available for play, within this State on or before June 30, 2000; and

b. Listed in this State by January 31, 2000 for ad valorem taxation for the 2000-2001 tax year; or

(2) Such machine is within the scope of the exclusion provided in G.S. 14-306(b)(1).

(b) Prohibition of More Than Three Existing Video Gaming Machines at One Location. — It shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person's possession for the purpose of operation at one location more than three video gaming machines as defined in subsection (c).

(c) Definitions. — As used in this section, a video gaming machine means a slot machine as defined in G.S. 14-306(a) and other forms of electrical, mechanical, or computer games such as by way of illustration:

(1) A video poker game or any other kind of video playing card game.

(2) A video bingo game.

(3) A video craps game.

(4) A video keno game.

(5) A video lotto game.

(6) Eight liner.

(7) Pot-of-gold.

(8) A video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player.

For the purpose of this section, a video gaming machine is a video machine which requires deposit of any coin, token, or use of any credit card, debit card, or any other method that requires payment to activate play of any of the games listed in this subsection. The enumeration of games in the list in this subsection does not authorize the possession or operation of such game if it is otherwise prohibited by law.

For the purpose of this section, a video gaming machine includes those that are within the scope of the exclusion provided in G.S. 14-306(b)(2), but does not include those that are within the scope of the exclusion provided in G.S. 14-306(b)(1).

(d) Age Requirement. — It shall be an infraction for any person under the age of 18 years to play any video gaming machine defined in subsection (c) of this section. It shall be unlawful for the operator of the video gaming machine to knowingly allow a person under the age of 18 years to play any video gaming machine as proscribed by this subsection.

(e) Hours of Operation. — It shall be unlawful to operate or allow the operation of any video gaming machine during the hours of 2:00 A.M. Sunday through 7:00 A.M. Monday.

(f) Plain View. — Any video gaming machine available for operation shall be in plain view of persons visiting the premises.

(g) Advertising Prohibited. — It is unlawful to advertise the operation of video gaming machines by use of on-premise or off-premise signs.

(h) Proximity to Other Locations Regulated; Permanent Building Required. — Each location where it is lawful to operate any video gaming machines as defined in G.S. 14-306.1(c) shall be at least 300 feet in any plane from any other location where such machines are operated. For the purpose of this section, a location is a permanent building having, or being within, a single exterior structure. Notwithstanding this subsection, two or more places where video gaming machines were lawfully operated under separate ownership on June

30, 2000, shall be considered to be separate locations more than 300 feet from each other, regardless of the distance from each other or whether they are located in the same building or edifice. Video gaming machines as defined in G.S. 14-306.1(c) may be operated only within permanent buildings.

(i) Registration With Sheriff. — No later than October 1, 2000, the owner of any video game which is regulated by this section shall register the machine with the Sheriff of the county in which the machine is located using a standardized registration form supplied by the Sheriff. The registration form shall be signed under oath by the owner of the machine. A material false statement in the registration form shall subject the owner to seizure of the machine under G.S. 14-298 in addition to any other punishment imposed by law. At any time that the video gaming machine is moved to a different location, the owner shall reregister the machine with the Sheriff prior to its being placed in operation. At a minimum, the registration form shall require that the registrant provide evidence of the date on which the machine was placed in operation, the serial number of the machine, the location of the facility at which the machine is operated, and the name of the owner of the facility at which the machine is operated. Each Sheriff shall report to the Joint Legislative Commission on Governmental Operations no later than November 1, 2000, on the total number of machines registered in that county, itemizing how many locations have one, two, or three machines.

(j) Report on Receipts and Prizes and Merchandise Awarded. — The owner of each machine or the agent of that owner shall report each calendar quarter to the Department of Revenue, under oath on a form provided by that Department, the total amount of gross receipts itemized by each machine, the number of machines at that location, and the total value of prizes and merchandise awarded to players of each machine at that location. The report shall be filed by the fifteenth day of the month after the quarter ends. Failure of the owner or agent to timely file the required report, or filing a report containing a material false statement shall subject the owner of the machine to seizure of the machine under G.S. 14-298 in addition to any other punishment imposed by law. Upon request of the Sheriff of the county, the Department of Revenue shall forward a copy of the report to the Sheriff of the county where the machines are located. The Department of Revenue shall compile the reports and make a summary report each quarter to the Joint Legislative Commission on Governmental Operations.

(k) Report to 2001 Session. — The North Carolina Sheriffs' Association, Inc., after consultation with the Division of Alcohol Law Enforcement, and the Conference of District Attorneys of North Carolina, shall report to the Joint Legislative Commission on Governmental Operations no later than January 1, 2001, its estimates of the costs of the registration process and the cost of enforcement of this section, along with suggested fees to make the registration and enforcement self-supporting, and recommendations as to a system with registration at the State level and primary enforcement at the local level. Such fee schedule is not effective until approved by the General Assembly.

(*l*) Exemption for Certain Machines. — This section shall not apply to assemblers, manufacturers, and transporters of video gaming machines who assemble, manufacture, and transport them for sale in another state as long as the machines, while located in this State, cannot be used to play the prohibited games, and does not apply to those who assemble, manufacture, and sell such machines for the use only by a federally recognized Indian Tribe if such machines may be lawfully used on Indian Land under the Indian Gaming Regulatory Act.

(m) Ban on Warehousing. — It is unlawful to warehouse any video gaming machine except in conjunction with the permitted assembly, manufacture, and transportation of such machines under subsection (*l*) of this section.

(n) Exemption for Activities Under IGRA. — This section does not make any activities of a federally recognized Indian Tribe unlawful or against public policy, which are lawful for any federally recognized Indian Tribe under the Indian Gaming Regulatory Act, Public Law 100-497.

(o) No Local Preemption. — This section does not preempt any more restrictive ordinance lawfully adopted under Article 18 of Chapter 153A of the General Statutes or under Article 19 of Chapter 160A of the General Statutes.

(p) No person who has been convicted:

(1) Once under G.S. 14-309(a) may possess any video gaming machine as defined in G.S. 14-306.1 for a period of one year.

(2) Twice under G.S. 14-309(a) may possess any video gaming machine as defined in G.S. 14-306.1 for a period of two years.

(3) Three or more times under G.S. 14-309(a) may possess any video gaming machine.

(q) Not Legalizing Unlawful Activity. — This section does not make lawful any activity which is currently unlawful. (2000-151, s. 1.)

Editor's Note. — Session Laws 2000-151, s. 6, directs the Legislative Research Commission to study the implementation of the act and recommend any changes it deems necessary in order to strengthen the act. Notwithstanding G.S. 120-30.11, the Commission may make its report under this section to the 2001 General Assembly no later than April 1, 2001.

Session Laws 2000-151, s. 6.1 authorizes the Department of Revenue to draw from collections under Article 4 of Chapter 105 of the General Statutes for the 2000-2001 fiscal year its actual costs of implementing G.S. 14-306.1(e1) (now G.S. 14-306.1(j)) as enacted by the act.

Session Laws 2000-151, s. 7, contains a severability clause.

Session Laws 2000-151, s. 8, generally makes the act effective October 1, 2000, with specified exceptions.

Session Laws 2000-151, s. 8(1) provides: "G.S. 14-306.1(a), (c), (e) (now (i)), (i) (now (n)), (j) (now (o)), and (*l*) (now (q)) are effective when this act becomes law [August 2, 2000]. Section 4 of this act, other than subsections (c) and (d), are effective when this act becomes law [August 2, 2000]. G.S. 14-306.1(h) (now (m)) becomes effective 30 days after this bill becomes law."

Session Laws 2000-151, s. 8(4) provides: "The first report under G.S. 14-306.1(e1) (now (j)) is for the first quarter of calendar year 2001, due April 15, 2001."

Subsections (a) to (q) of this section were originally enacted by Session Laws 2000-151, s. 1, as subsections (a), (b), (c), (c1), (c2), (c3), (c4), (d), (e), (e1), (f), (g), (h), (i), (j), (k), and (*l*), and were recodified at the direction of the Revisor of Statutes, and an internal reference was changed accordingly.

§ 14-306.2. Violation of G.S. 14-306.1 a violation of the ABC laws.

A violation of G.S. 14-306.1 is a violation of the gambling statutes for the purposes of G.S. 18B-1005(a)(3). (2000-151, s. 2.)

Editor's Note. — Session Laws 2000-151, s. 6, directs the Legislative Research Commission to study the implementation of the act and recommend any changes it deems necessary in order to strengthen the act. Notwithstanding G.S. 120-30.11, the Commission may make its report under this section to the 2001 General Assembly no later than April 1, 2001.

Session Laws 2000-151, s. 6.1 authorizes the Department of Revenue to draw from collections under Article 4 of Chapter 105 of the General Statutes for the 2000-2001 fiscal year its actual costs of implementing G.S. 14-306.1(e1) (now G.S. 14-306.1(j)) as enacted by the act. See the editor's note at § 14-306.1 regarding the recodification of subsections in that section.

Session Laws 2000-151, s. 7, contains a severability clause.

Session Laws 2000-151, s. 8, made this section effective October 1, 2000.

§ 14-309. Violation made criminal.

(a) Any person who violates any provision of G.S. 14-304 through 14-309 is guilty of a Class 1 misdemeanor for the first offense, and is guilty of a Class I felony for a second offense and a Class H felony for a third or subsequent offense.

(b) Notwithstanding the provisions of subsection (a) of this section, any person violating the provisions of G.S. 14-306.1 involving the operation of five or more machines prohibited by that section is guilty of a Class G felony. (1937, c. 196, s. 6; 1993, c. 366, s. 3, c. 539, s. 211; 1994, Ex. Sess., c. 14, s. 9(a), (b); 2000-151, s. 3.)

Editor's Note. — Session Laws 2000-151, s. 6, directs the Legislative Research Commission to study the implementation of the act and recommend any changes it deems necessary in order to strengthen the act. Notwithstanding G.S. 120-30.11, the Commission may make its report under this section to the 2001 General Assembly no later than April 1, 2001.

Session Laws 2000-151, s. 6.1 authorizes the Department of Revenue to draw from collections under Article 4 of Chapter 105 of the General Statutes for the 2000-2001 fiscal year its actual costs of implementing G.S. 14-306.1(e1) (now G.S. 14-306(j)) as enacted by the act. See the editor's note at § 14-306.1 regarding the recodification of subsections in that section.

Session Laws 2000-151, s. 7, contains a severability clause.

Session Laws 2000-151, s. 8(2) provides: "Section 3 of this act [which amended G.S. 14-309] and G.S. 14-306(c) and (d) as added by Section 4 of this act become effective with respect to offenses committed on or after October 1, 2000, except as to a violation of G.S. 14-306.1(a), they are effective when they become law [August 2, 2000]."

Effect of Amendments. — Session Laws 2000-151, s. 3, substituted "criminal" for "misdemeanor" in the catchline; designated the existing paragraph as present subsection (a) and added subsection (b); and substituted "Class 1 misdemeanor for the first offense, and is guilty of a Class I felony for a second offense and a Class H felony for a third or subsequent offense" for "Class 2 misdemeanor" in subsection (a). See editor's note for applicability and effective date.

Part 2. Bingo and Raffles.

§ 14-309.14. Beach bingo.

CASE NOTES

Cited in Aycock v. Padgett, 134 N.C. App. 164, 516 S.E.2d 907 (1999).

Article 39.

Protection of Minors.

§ 14-316.1. Contributing to delinquency and neglect by parents and others.

Any person who is at least 16 years old who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected as defined by G.S. 7B-101 and G.S. 7B-1501 shall be guilty of a Class 1 misdemeanor.

It is not necessary for the district court exercising juvenile jurisdiction to make an adjudication that any juvenile is delinquent, undisciplined, abused, or neglected in order to prosecute a parent or any person, including an employee of the Department of Juvenile Justice and Delinquency Prevention under this

section. An adjudication that a juvenile is delinquent, undisciplined, abused, or neglected shall not preclude a subsequent prosecution of a parent or any other person including an employee of the Department of Juvenile Justice and Delinquency Prevention, who contributes to the delinquent, undisciplined, abused, or neglected condition of any juvenile. (1919, c. 97, s. 19; C.S., s. 5057; 1959, c. 1284; 1969, c. 911, s. 4; 1971, c. 1180, s. 5; 1979, c. 692; 1983, c. 175, ss. 8, 10; c. 720, s. 4; 1993, c. 539, s. 219; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 11A.118(a); 1998-202, s. 4(b); 2000-137, s. 4.(c).)

Effect of Amendments. —
Session Laws 2000-137, s. 4.(c), effective July 20, 2000, substituted "Department of Juvenile Justice and Delinquency Prevention" for "Office of Juvenile Justice" twice in the second paragraph.

§ 14-318.2. Child abuse a Class 1 misdemeanor.

CASE NOTES

I. In General.

I. IN GENERAL.

Court's Duty on Review of Denial of Motion to Dismiss. — The Court of Appeals improperly considered exculpatory evidence presented by the defendant in reversing the trial court's denial of defendant's motions to dismiss where the State presented substantial evidence of involuntary manslaughter and felonious or misdemeanor child abuse sufficient to survive defendant's motions to dismiss. State v. Fritsch, 351 N.C. 373, 526 S.E.2d 451 (2000).

Cited in Dobson v. Harris, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 433 (2000).

§ 14-318.4. Child abuse a felony.

CASE NOTES

A violation of this section is a crime of moral turpitude, and where the complaint indicated that defendant had accused the plaintiff of violating this section, the plaintiff alleged slander per se and presented evidence sufficient to withstand defendant's motion for summary judgment. Dobson v. Harris, 134 N.C. App. 573, 521 S.E.2d 710 (1999), cert. denied, 351 N.C. 186, — S.E.2d — (1999).

Age as Aggravating Factor in Crime Where Age Is Already an Element. — Where mother/defendant was accused of shaking her three-week old infant to death, the trial court did not err in finding as an aggravating factor, under § 15A-1340.16(d)(11), that the victim was of a very young age, even though the victim's age had already been used as an element of the crime under subsection (a) of this section. State v. Burgess, 134 N.C. App. 632, 518 S.E.2d 209 (1999).

Evidence held sufficient

The evidence was sufficient for a conviction under this section where the child suffered numerous, severe injuries which were inflicted on various occasions, including burns, head trauma, fractures to the leg, arm and ribs, facial bruising, and puncture marks, where the defendant was laughing and talking with co-defendant outside of the emergency room and even appeared to doze when the doctor informed her of the child's condition, and where the defendant's statements exonerated every other member of the household. The jury could also have found defendant guilty under a theory of aiding and abetting because the evidence indicated that she was present when the child was injured by the co-defendant who plead guilty. State v. Noffsinger, — N.C. App. —, 528 S.E.2d 605, 2000 N.C. App. LEXIS 420 (2000).

Substantial evidence supported the conclusion that the defendant committed assault, in violation of this section, where defendant was the parent of the victim, was providing care to him, and he was under sixteen years of age at the time of his death. Defendant admitted that she shook him and threw him down, and as a result, seriously injured him; and had assaulted the victim on occasions prior to the assault which led to his death. State v. Krider, — N.C. App. —, 530 S.E.2d 569, 2000 N.C. App. LEXIS 541 (2000).

Felony Murder Conviction Upheld. — The court rejected the defendant's ex post facto objections and upheld the defendant's convic-

tion, under § 14-17, of murder while committing felonious child abuse, in violation of this section, with the use of her hands as a deadly weapon although this theory had not, at the time of the victim's death, been used to support such a first degree felony murder conviction. State v. Krider, — N.C. App. —, 530 S.E.2d 569, 2000 N.C. App. LEXIS 541 (2000).

Cited in State v. Fritsch, 351 N.C. 373, 526 S.E.2d 451 (2000).

Article 52.

Miscellaneous Police Regulations.

§ 14-401.11. Distribution of certain food at Halloween and all other times prohibited.

CASE NOTES

Cited in Aycock v. Padgett, 134 N.C. App. 164, 516 S.E.2d 907 (1999).

§ 14-401.17. Unlawful removal or destruction of electronic dog collars.

(a) It is unlawful to intentionally remove or destroy an electronic collar or other electronic device placed on a dog by its owner to maintain control of the dog.

(b) A first conviction for a violation of this section is a Class 3 misdemeanor. A second or subsequent conviction for a violation of this section is a Class 2 misdemeanor.

(c) This act is enforceable by officers of the Wildlife Resources Commission, by sheriffs and deputy sheriffs, and peace officers with general subject matter jurisdiction.

(d) This act applies only to Alamance, Avery, Beaufort, Brunswick, Buncombe, Burke, Caldwell, Camden, Caswell, Cherokee, Clay, Columbus, Craven, Cumberland, Davidson, Graham, Haywood, Henderson, Hyde, Jackson, Macon, Madison, McDowell, Mecklenburg, Mitchell, New Hanover, Orange, Pasquotank, Pitt, Robeson, Rockingham, Swain, Transylvania, Union, Wilkes, and Yancey Counties. (1993 (Reg. Sess., 1994), c. 699, s. 1-4; 1995 (Reg. Sess., 1996) c. 682; 1997-150; 1998-6, s. 1; 1999-51, s. 1; 2000-12, s. 1.)

Effect of Amendments. — Session Laws 2000-12, s. 1, effective December 1, 2000, and applicable to offenses committed on or after that date, inserted "Camden" in subsection (d).

Article 52A.

Sale of Weapons in Certain Counties.

§ 14-404. Issuance or refusal of permit; appeal from refusal; grounds for refusal; sheriff's fee.

Local Modification. — By virtue of Session Laws 2000-64, s. 1, as amended by Session Laws 2000-140, s. 89, Martin: 1993, c. 205, should be stricken from the main volume.

Article 54A.

The Felony Firearms Act.

§ 14-415.1. Possession of firearms, etc., by felon prohibited.

CASE NOTES

Construction with Federal Law. — When North Carolina discharged defendant's 1975 and 1977 convictions, the Felony Firearms Act in effect in 1983 barred his possession of firearms for five years; consequently, the occurrence of his 1988 conviction before the expiration of the five-year period precluded a restoration of his civil rights after the other two convictions, and these were, therefore, properly considered along with the 1988 conviction for purposes of the Federal Armed Career Criminal Act, 18 U.S.C. § 924(e). United States v. O'Neal, 180 F.3d 115 (4th Cir. 1999), cert. denied, — U.S. —, 120 S. Ct. 433, 145 L. Ed. 2d 339 (1999).

Cited in United States v. Jones, 195 F.3d 205 (4th Cir. 1999), cert. denied, — U.S. —, 120 S. Ct. 1443, 146 L. Ed. 2d 330 (2000).

OPINIONS OF ATTORNEY GENERAL

An ex-felon found in possession of a firearm could be prosecuted under the Felony Firearms Act, even though he may have lawfully possessed it prior to the December 1, 1995, amendment since his restoration of rights under Chapter 13, when read in conjunction with this section, expressly prohibits the possession of firearms regardless of the date of felony conviction; the General Assembly clearly intended this section's application to be retroactive. See opinion of Attorney General to Michael P. Martin, Assistant Chief Counsel, Department of the Treasury Bureau of Alcohol, Tobacco, and Firearms, 1997 N.C.A.G. 52 (8/21/97).

Article 54B.

Concealed Handgun Permit.

§ 14-415.11. Permit to carry concealed handgun; scope of permit.

(a) Any person who has a concealed handgun permit may carry a concealed handgun unless otherwise specifically prohibited by law. The person shall carry the permit together with valid identification whenever the person is carrying a concealed handgun, shall disclose to any law enforcement officer that the person holds a valid permit and is carrying a concealed handgun when approached or addressed by the officer, and shall display both the permit and the proper identification upon the request of a law enforcement officer.

(b) The sheriff shall issue a permit to carry a concealed handgun to a person who qualifies for a permit under G.S. 14-415.12. The permit shall be valid throughout the State for a period of five years from the date of issuance.

(c) A permit does not authorize a person to carry a concealed handgun in the areas prohibited by G.S. 14-269.2, 14-269.3, 14-269.4, and 14-277.2, in an area prohibited by rule adopted under G.S. 120-32.1, in any area prohibited by 18 U.S.C. § 922 or any other federal law, in a law enforcement or correctional facility, in a building housing only State or federal offices, in an office of the State or federal government that is not located in a building exclusively occupied by the State or federal government, a financial institution, or on any other premises, except state-owned rest areas or state-owned rest stops along the highways, where notice that carrying a concealed handgun is prohibited by

the posting of a conspicuous notice or statement by the person in legal possession or control of the premises. It shall be unlawful for a person, with or without a permit, to carry a concealed handgun while consuming alcohol or at any time while the person has remaining in his body any alcohol or in his blood a controlled substance previously consumed, but a person does not violate this condition if a controlled substance in his blood was lawfully obtained and taken in therapeutically appropriate amounts.

(d) A person who is issued a permit shall notify the sheriff who issued the permit of any change in the person's permanent address within 30 days after the change of address. If a permit is lost or destroyed, the person to whom the permit was issued shall notify the sheriff who issued the permit of the loss or destruction of the permit. A person may obtain a duplicate permit by submitting to the sheriff a notarized statement that the permit was lost or destroyed and paying the required duplicate permit fee. (1995, c. 398, s. 1; c. 507, s. 22.1(c); c. 509, s. 135.3(e); 1997, c. 238, s. 6; 2000-140, s. 103; 2000-191, s. 5.)

Effect of Amendments. — Session Laws 2000-191, s. 5, as amended by Session Laws 2000-140, s. 103, applicable to permits issued or renewed on or after August 1, 2000, substituted "five years" for "four years" in subsection (b).

§ 14-415.12. Criteria to qualify for the issuance of a permit.

CASE NOTES

Quoted in Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999).

§ 14-415.14. Application form to be provided by sheriff; information to be included in application form.

(a) The sheriff shall make permit applications readily available at the office of the sheriff or at other public offices in the sheriff's jurisdiction. The permit application shall be in triplicate, in a form to be prescribed by the Administrative Office of the Courts, and shall include the following information with regard to the applicant: name, address, physical description, signature, date of birth, social security number, military status, law enforcement status, and the drivers license number or State identification card number of the applicant if used for identification in applying for the permit.

(b) The permit application shall also contain a warning substantially as follows:

"CAUTION: Federal law and State law on the possession of handguns and firearms differ. If you are prohibited by federal law from possessing a handgun or a firearm, you may be prosecuted in federal court. A State permit is not a defense to a federal prosecution."

(c) Any person or entity who is presented by the applicant or by the sheriff with an original or photocopied release form as described in G.S. 14-415.13(a)(5) shall promptly disclose to the sheriff any records concerning the mental health or capacity of the applicant who signed the form and authorized the release of the records. (1995, c. 398, s. 1; 1997-274, s. 3; 2000-140, s. 103; 2000-191, s. 3.)

Editor's Note. — Session Laws 2000-191, s. 4, as amended by Session Laws 2000-140, s. 103, directs the Division of Mental Health, Developmental Disabilities, and Substance

Abuse Services of the Department of Health and Human Services to notify by United States mail, telefacsimile, or electronic mail all mental health clinics, hospitals, and licensed mental health professionals in North Carolina about the requirement in section 3 of the act within 30 days after August 1, 2000.

Effect of Amendments. — Session Laws 2000-191, s. 3, as amended by Session Laws 2000-140, s. 103, effective August 1, 2000, added subsection (c).

§ 14-415.16. Renewal of permit.

The holder of a permit shall apply to renew the permit at least 30 days prior to its expiration date by filing with the sheriff of the county in which the person resides a renewal form provided by the sheriff's office, a notarized affidavit stating that the permittee remains qualified under the criteria provided in this Article, a newly administered full set of the permittee's fingerprints, and a renewal fee. Upon receipt of the completed renewal application, including the permittee's fingerprints, and the appropriate payment of fees, the sheriff shall determine if the permittee remains qualified to hold a permit in accordance with the provisions of G.S. 14-415.12. The permittee's criminal history shall be updated, and the sheriff may waive the requirement of taking another firearms safety and training course. If the permittee applies for a renewal of the permit within 30 days of its expiration date and if the permittee remains qualified to have a permit under G.S. 14-415.12, the sheriff shall renew the permit. No fingerprints shall be required for a renewal permit if the applicant's fingerprints were submitted to the State Bureau of Investigation after June 30, 2001, on the Automated Fingerprint Information System (AFIS) as prescribed by the State Bureau of Investigation. (1995, c. 398, s. 1; c. 507, s. 22.2(b); 2000-140, s. 103; 2000-191, s. 1.)

Effect of Amendments. — Session Laws 2000-191, s. 1, as amended by Session Laws 2000-140, s. 103, effective August 1, 2000, added the last sentence.

§ 14-415.19. Fees.

(a) The permit fees assessed under this Article are payable to the sheriff. The sheriff shall transmit the proceeds of these fees to the county finance officer to be remitted or credited by the county finance officer in accordance with the provisions of this subsection. The permit fees are as follows:

Application fee	$80.00
Renewal fee	$75.00
Duplicate permit fee	$15.00

The county finance officer shall remit forty-five dollars ($45.00) of each new application fee and forty dollars ($40.00) of each renewal fee to the North Carolina Department of Justice for the costs of State and federal criminal record checks performed in connection with processing applications and for the implementation of the provisions of this Article. The remaining thirty-five dollars ($35.00) of each application or renewal 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.

(b) An additional fee, not to exceed ten dollars ($10.00), shall be collected by the sheriff from an applicant for a permit to pay for the costs of processing the applicant's fingerprints, if fingerprints were required to be taken. This fee shall be retained by the sheriff. (1995, c. 398, s. 1; c. 507, s. 22.1(a); 1997-470, s. 1; 2000-140, s. 103; 2000-191, s. 2.)

Effect of Amendments. — Session Laws 2000-191, s. 2, as amended by Session Laws 2000-140, s. 103, effective August 1, 2000, in subsection (a), substituted "$75.00" for "$80.00" as the designated Renewal fee, substituted "new application fee and forty dollars ($40.00)

of each renewal fee" for "application or renewal fee"; and added "if fingerprints were required to be taken" in subsection (b).

ARTICLE 60.

Computer-Related Crime.

§ 14-453. Definitions.

As used in this Article, unless the context clearly requires otherwise, the following terms have the meanings specified:

(1) "Access" means to instruct, communicate with, cause input, cause output, cause data processing, or otherwise make use of any resources of a computer, computer system, or computer network.

(1a) "Authorization" means having the consent or permission of the owner, or of the person licensed or authorized by the owner to grant consent or permission to access a computer, computer system, or computer network in a manner not exceeding the consent or permission.

(1b) "Commercial electronic mail" means messages sent and received electronically consisting of commercial advertising material, the principal purpose of which is to promote the for-profit sale or lease of goods or services to the recipient.

(2) "Computer" means an internally programmed, automatic device that performs data processing or telephone switching.

(3) "Computer network" means the interconnection of communication systems with a computer through remote terminals, or a complex consisting of two or more interconnected computers or telephone switching equipment.

(4) "Computer program" means an ordered set of data that are coded instructions or statements that when executed by a computer cause the computer to process data.

(4a) "Computer services" means computer time or services, including data processing services, Internet services, electronic mail services, electronic message services, or information or data stored in connection with any of these services.

(5) "Computer software" means a set of computer programs, procedures and associated documentation concerned with the operation of a computer, computer system, or computer network.

(6) "Computer system" means at least one computer together with a set of related, connected, or unconnected peripheral devices.

(6a) "Data" means a representation of information, facts, knowledge, concepts, or instructions prepared in a formalized or other manner and intended for use in a computer, computer system, or computer network. Data may be embodied in any form including computer printouts, magnetic storage media, optical storage media, and punch cards, or may be stored internally in the memory of a computer.

(6b) "Electronic mail" means the same as the term is defined in G.S. 14-196.3(a)(2).

(6c) "Electronic mail service provider" means any person who (i) is an intermediary in sending or receiving electronic mail and (ii) provides to end users of electronic mail services the ability to send or receive electronic mail.

(7) "Financial instrument" includes any check, draft, money order, certificate of deposit, letter of credit, bill of exchange, credit card or

marketable security, or any electronic data processing representation thereof.

(8) "Property" includes financial instruments, information, including electronically processed or produced data, and computer software and computer programs in either machine or human readable form, and any other tangible or intangible item of value.

(8a) "Resource" includes peripheral devices, computer software, computer programs, and data, and means to be a part of a computer, computer system, or computer network.

(9) "Services" includes computer time, data processing and storage functions.

(10) "Unsolicited" means not addressed to a recipient with whom the initiator has an existing business or personal relationship and not sent at the request of, or with the express consent of, the recipient. (1979, c. 831, s. 1; 1993 (Reg. Sess., 1994), c. 764, s. 1; 1999-212, s. 2; 2000-125, s. 3.)

Effect of Amendments. — Session Laws 2000-125, s. 3, effective December 1, 2000, and applicable to offenses committed on or after that date, in subdivision (6a), deleted "but not limited to" following "including" and inserted "optical storage media"; added present subdivision (6b) and redesignated former subdivision (6b) as present subdivision (6c).

§ 14-454. Accessing computers.

(a) It is unlawful to willfully, directly or indirectly, access or cause to be accessed any computer, computer program, computer system, computer network, or any part thereof, for the purpose of:

(1) Devising or executing any scheme or artifice to defraud, unless the object of the scheme or artifice is to obtain educational testing material, a false educational testing score, or a false academic or vocational grade, or

(2) Obtaining property or services other than educational testing material, a false educational testing score, or a false academic or vocational grade for a person, by means of false or fraudulent pretenses, representations or promises.

A violation of this subsection is a Class G felony if the fraudulent scheme or artifice results in damage of more than one thousand dollars ($1,000), or if the property or services obtained are worth more than one thousand dollars ($1,000). Any other violation of this subsection is a Class 1 misdemeanor.

(b) Any person who willfully and without authorization, directly or indirectly, accesses or causes to be accessed any computer, computer program, computer system, or computer network for any purpose other than those set forth in subsection (a) above, is guilty of a Class 1 misdemeanor.

(c) For the purpose of this section, the phrase "access or cause to be accessed" includes introducing, directly or indirectly, a computer program (including a self-replicating or a self-propagating computer program) into a computer, computer program, computer system, or computer network. (1979, c. 831, s. 1; 1979, 2nd Sess., c. 1316, s. 19; 1981, cc. 63, 179; 1993, c. 539, s. 293; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 764, s. 1; 2000-125, s. 4.)

Effect of Amendments. — Session Laws 2000-125, s. 4, effective December 1, 2000, and applicable to offenses committed on or after that date, inserted "computer program" in subsections (a), (b) and (c); and substituted "phrase 'access or cause to be accessed'" for "term 'accessing or causing to be accessed'" in subsection (c).

CASE NOTES

The trial court did not err in finding the aggravating factor of damage causing great monetary loss where the crime involved the use of computers to divert millions of dollars and where the amount of money involved in the offense was not an element but came into play only at the time of sentencing. State v. Hughes, 136 N.C. App. 92, 524 S.E.2d 63 (1999).

§ 14-455. Damaging computers, computer programs, computer systems, computer networks, and resources.

(a) It is unlawful to willfully and without authorization alter, damage, or destroy a computer, computer program, computer system, computer network, or any part thereof. A violation of this subsection is a Class G felony if the damage caused by the alteration, damage, or destruction is more than one thousand dollars ($1,000). Any other violation of this subsection is a Class 1 misdemeanor.

(b) This section applies to alteration, damage, or destruction effectuated by introducing, directly or indirectly, a computer program (including a self-replicating or a self-propagating computer program) into a computer, computer program, computer system, or computer network. (1979, c. 831, s. 1; 1979, 2nd Sess., c. 1316, s. 20; 1981, cc. 63, 179; 1993, c. 539, s. 294; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 764, s. 1; 1995, c. 509, s. 12; 2000-125, s. 5.)

Effect of Amendments. — Session Laws 2000-125, s. 5, effective December 1, 2000, and applicable to offenses committed on or after that date, inserted "computer program" or its plural variant in the section heading and in subsections (a) and (b).

§ 14-456. Denial of computer services to an authorized user.

(a) Any person who willfully and without authorization denies or causes the denial of computer, computer program, computer system, or computer network services to an authorized user of the computer, computer program, computer system, or computer network services is guilty of a Class 1 misdemeanor.

(b) This section also applies to denial of services effectuated by introducing, directly or indirectly, a computer program (including a self-replicating or a self-propagating computer program) into a computer, computer program, computer system, or computer network. (1979, c. 831, s. 1; 1993, c. 539, s. 295; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 764, s. 1; 2000-125, s. 6.)

Effect of Amendments. — Session Laws 2000-125, s. 6, effective December 1, 2000, and applicable to offenses committed on or after that date, inserted "computer program" twice in subsection (a) and once in subsection (b).

§ 14-458. Computer trespass; penalty.

(a) Except as otherwise made unlawful by this Article, it shall be unlawful for any person to use a computer or computer network without authority and with the intent to do any of the following:

(1) Temporarily or permanently remove, halt, or otherwise disable any computer data, computer programs, or computer software from a computer or computer network.

(2) Cause a computer to malfunction, regardless of how long the malfunction persists.
(3) Alter or erase any computer data, computer programs, or computer software.
(4) Cause physical injury to the property of another.
(5) Make or cause to be made an unauthorized copy, in any form, including, but not limited to, any printed or electronic form of computer data, computer programs, or computer software residing in, communicated by, or produced by a computer or computer network.
(6) Falsely identify with the intent to deceive or defraud the recipient or forge commercial electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk commercial electronic mail through or into the computer network of an electronic mail service provider or its subscribers.

For purposes of this subsection, a person is "without authority" when (i) the person has no right or permission of the owner to use a computer, or the person uses a computer in a manner exceeding the right or permission, or (ii) the person uses a computer or computer network, or the computer services of an electronic mail service provider to transmit unsolicited bulk commercial electronic mail in contravention of the authority granted by or in violation of the policies set by the electronic mail service provider.

(b) Any person who violates this section shall be guilty of computer trespass, which offense shall be punishable as a Class 3 misdemeanor. If there is damage to the property of another and the damage is valued at less than two thousand five hundred dollars ($2,500) caused by the person's act in violation of this section, the offense shall be punished as a Class 1 misdemeanor. If there is damage to the property of another valued at two thousand five hundred dollars ($2,500) or more caused by the person's act in violation of this section, the offense shall be punished as a Class I felony.

(c) Any person whose property or person is injured by reason of a violation of this section may sue for and recover any damages sustained and the costs of the suit pursuant to G.S. 1-539.2A. (1999-212, s. 3; 2000-125, s. 7.)

Effect of Amendments. — Session Laws 2000-125, s. 7, effective December 1, 2000, and applicable to offenses committed on or after that date, substituted "Except as otherwise made unlawful by this Article, it shall be unlawful" for "It shall be unlawful" in subsection (a).

Chapter 15.

Criminal Procedure.

Article 2.

Record and Disposition of Seized, etc., Articles.

Sec.
15-11.1. Seizure, custody and disposition of articles; exceptions.

Article 2.

Record and Disposition of Seized, etc., Articles.

§ 15-11.1. Seizure, custody and disposition of articles; exceptions.

(a) If a law-enforcement officer seizes property pursuant to lawful authority, he shall safely keep the property under the direction of the court or magistrate as long as necessary to assure that the property will be produced at and may be used as evidence in any trial. Upon application by the lawful owner or a person, firm or corporation entitled to possession or upon his own determination, the district attorney may release any property seized pursuant to his lawful authority if he determines that such property is no longer useful or necessary as evidence in a criminal trial and he is presented with satisfactory evidence of ownership. If the district attorney refuses to release such property, the lawful owner or a person, firm or corporation entitled to possession may make application to the court for return of the property. The court, after notice to all parties, including the defendant, and after hearing, may in its discretion order any or all of the property returned to the lawful owner or a person, firm or corporation entitled to possession. The court may enter such order as may be necessary to assure that the evidence will be available for use as evidence at the time of trial, and will otherwise protect the rights of all parties. Notwithstanding any other provision of law, photographs or other identification or analyses made of the property may be introduced at the time of the trial provided that the court determines that the introduction of such substitute evidence is not likely to substantially prejudice the rights of the defendant in the criminal trial.

(b) **(Effective until July 1, 2001)** In the case of unknown or unapprehended defendants or of defendants willfully absent from the jurisdiction, the court shall have discretion to appoint a guardian ad litem, who shall be a licensed attorney, to represent and protect the interest of such unknown or absent defendants. The judicial findings concerning identification or value that are made at such hearing whereby property is returned to the lawful owner or a person, firm, or corporation entitled to possession, may be admissible into evidence at the trial. After final judgment all property lawfully seized by or otherwise coming into the possession of law-enforcement authorities shall be disposed of as the court or magistrate in its discretion orders, and may be forfeited and either sold or destroyed in accordance with due process of law.

(b) **(Effective July 1, 2001)** In the case of unknown or unapprehended defendants or of defendants willfully absent from the jurisdiction, the court shall determine whether an attorney should be appointed as guardian ad litem

§ 15-11.1(b) is set out twice. See Notes.

to represent and protect the interest of such unknown or absent defendants. Appointment shall be in accordance with rules adopted by the Office of Indigent Defense Services. The judicial findings concerning identification or value that are made at such hearing whereby property is returned to the lawful owner or a person, firm, or corporation entitled to possession, may be admissible into evidence at the trial. After final judgment all property lawfully seized by or otherwise coming into the possession of law-enforcement authorities shall be disposed of as the court or magistrate in its discretion orders, and may be forfeited and either sold or destroyed in accordance with due process of law.

(b1) Notwithstanding subsections (a) and (b) of this section or any other provision of law, if the property seized is a firearm and the district attorney determines the firearm is no longer necessary or useful as evidence in a criminal trial, the district attorney, after notice to all parties known or believed by the district attorney to have an ownership or a possessory interest in the firearm, including the defendant, shall apply to the court for an order of disposition of the firearm. The judge, after hearing, may order the disposition of the firearm in one of the following ways:

(1) By ordering the firearm returned to its rightful owner, when the rightful owner is someone other than the defendant and upon findings by the court (i) that the person, firm, or corporation determined by the court to be the rightful owner is entitled to possession of the firearm and (ii) that the person, firm, or corporation determined by the court to be the rightful owner of the firearm was unlawfully deprived of the same or had no knowledge or reasonable belief of the defendant's intention to use the firearm unlawfully.

(2) By ordering the firearm returned to the defendant, but only if the defendant is not convicted of any criminal offense in connection with the possession or use of the firearm, the defendant is the rightful owner of the firearm, and the defendant is not otherwise ineligible to possess such firearm.

(3) By ordering the firearm turned over to be destroyed by the sheriff of the county in which the firearm was seized or by his duly authorized agent. The sheriff shall maintain a record of the destruction of the firearm.

This subsection (b1) is not applicable to seizures pursuant to G.S. 113-137 of firearms used only in connection with a violation of Article 22 of Chapter 113 of the General Statutes or any local wildlife hunting ordinance.

(c) Any property, the forfeiture and disposition of which is specified in any general or special law, shall be disposed of in accordance therewith. (1977, c. 613; 1979, c. 593; 1994, Ex. Sess., c. 16, s. 1; 2000-144, s. 27.)

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective until July 1, 2001. The second version of subsection (b) set out above is effective July 1, 2001.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, § 7A-498 et seq.

Effect of Amendments. — Session Laws 2000-144, s. 27, effective July 1, 2001, in subsection (b), substituted "determine whether an attorney should be appointed as guardian ad litem" for "have discretion to appoint a guardian ad litem, who shall be a licensed attorney" in the first sentence and inserted the second sentence.

Article 15.

Indictment.

§ 15-144. Essentials of bill for homicide.

CASE NOTES

Indictment for Murder Need Not Allege All Elements of Crimes Charged. — Short-form indictments which complied with this section were constitutional although they failed to allege all of the elements of the crimes charged, specifically, those elements which differentiate first-degree murder, rape, and sexual offense from second-degree murder, rape, and sexual offense. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (2000).

Failure to Allege Premeditation and Deliberation Not a Constitutional Violation. — The court rejected the defendant's argument that because the indictment failed to allege two essential elements of first degree murder, i.e., premeditation and deliberation, his conviction of first degree murder based thereon violated Article I, §§ 19, 22 and 23 of the North Carolina Constitution. The court found that the defendant had adequate notice of the charge against him, as North Carolina has for nearly 100 years authorized the use of the short form murder indictment as sufficient to allege the elements of premeditation and deliberation, and the jury was properly required to find those elements beyond a reasonable doubt. State v. Holder, — N.C. App. —, 530 S.E.2d 562, 2000 N.C. App. LEXIS 552 (2000).

Indictment need not include aggravating circumstances or differentiate first-degree murder from second-degree murder. State v. Lawrence, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 441 (June 16, 2000).

Stated in State v. Riley, — N.C. App. —, 528 S.E.2d 590, 2000 N.C. App. LEXIS 411 (2000).

§ 15-144.1. Essentials of bill for rape.

CASE NOTES

But Is Constitutional. —

Eight indictments against defendant for first-degree rape comported with federal and state constitutional requirements although they did not contain each element and fact which might increase the maximum punishment for the crime charged. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (2000).

Stated in State v. Doisey, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 779 (July 5, 2000).

Article 17.

Trial in Superior Court.

§ 15-166. Exclusion of bystanders in trial for rape and sex offenses.

CASE NOTES

Alleged rapist was entitled to habeas corpus where appellate counsel provided ineffective assistance resulting in prejudice by failing to appeal the trial court's decision to close the court. Bell v. Jarvis, 198 F.3d 432 (4th Cir. 1999).

§ 15-167. Extension of session of court by trial judge.

CASE NOTES

Quoted in State v. Smith, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 778 (July 5, 2000).

§ 15-170. Conviction for a less degree or an attempt.

CASE NOTES

I. General Consideration.
II. Jury Instructions.

I. GENERAL CONSIDERATION.

Applied in State v. Clark, — N.C. App. —, 527 S.E.2d 319, 2000 N.C. App. LEXIS 267 (2000).

II. JURY INSTRUCTIONS.

Defendant Not Entitled to Instruction. — In a trafficking by possession case, the trial judge properly refused to instruct on attempt where the State's uncontroverted evidence showed that defendant gave officer a tube sock full of cash and discussed the exchange before the officer placed cocaine in the back seat of his vehicle and left the car. State v. Broome, 136 N.C. App. 82, 523 S.E.2d 448 (1999), cert. denied, 351 N.C. 362, — S.E.2d — (2000).

Chapter 15A.

Criminal Procedure Act.

SUBCHAPTER I. GENERAL.

ARTICLE 1.

Definitions and General Provisions.

§ 15A-101. Definitions.

CASE NOTES

Cited in State v. Smith, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 778 (July 5, 2000).

SUBCHAPTER II. LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES.

ARTICLE 11.

Search Warrants.

§ 15A-244. Contents of the application for a search warrant.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in State v. Washington, 134 N.C. App. 479, 518 S.E.2d 14 (1999).

§ 15A-245. Basis for issuance of a search warrant; duty of the issuing official.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in State v. Washington, 134 N.C. App. 479, 518 S.E.2d 14 (1999).

§ 15A-256. Detention and search of persons present in private premises or vehicle to be searched.

CASE NOTES

All Buildings Within Curtilage Included in "Premises." — So long as probable cause exists to search buildings within curtilage, then those buildings must be included within the

term "premises" under this section, especially where the warrant explicitly authorizes the search of the outbuildings. State v. Cutshall, — N.C. App. —, 526 S.E.2d 187, 2000 N.C. App. LEXIS 141 (2000).

Seizure Illegal. — In the absence of probable cause or other warrant exception, the trial court should have suppressed evidence officers seized during search of defendant's person, because the officers' search yielded crack cocaine, the exact object of the investigation, and after the officers discovered cocaine in the outbuilding, their statutory authority to search the non-resident defendant ceased to exist. State v. Cutshall, — N.C. App. —, 526 S.E.2d 187, 2000 N.C. App. LEXIS 141 (2000).

Article 13.

DNA Database and Databank.

§ 15A-266. Short title.

Legal Periodicals. —

For article, "DNA Databanks: Law Enforcement's Greatest Surveillance Tools?," see 34 Wake Forest L. Rev. 767 (1999).

For article, "Genetic Testing, Genetic Medicine, And Managed Care," see 34 Wake Forest L. Rev. 849 (1999).

For article, "The Use of Genetic Testing in the Courtroom," see 34 Wake Forest L. Rev. 889 (1999).

§ 15A-266.3. Procedural compatibility with the FBI.

Legal Periodicals. — For article, "DNA Databanks: Law Enforcement's Greatest Surveillance Tools?," see 34 Wake Forest L. Rev. 767 (1999).

Article 14.

Nontestimonial Identification.

§ 15A-271. Authority to issue order.

CASE NOTES

While gunshot residue evidence is nontestimonial identification, the evidence was still admissible where probable cause—based on the behavior and comments of the defendant coupled with the officer's knowledge of her stormy marriage—and exigent circumstances—the need for testing within four hours of the homicide—existed at the time of the gunshot residue test, and the warrantless search was, therefore, valid. State v. Coplen, — N.C. App. —, 530 S.E.2d 313, 2000 N.C. App. LEXIS 544 (2000).

§ 15A-272. Time of application; additional investigative procedures not precluded.

CASE NOTES

While gunshot residue evidence is nontestimonial identification, the evidence was still admissible where probable cause—based on the behavior and comments of the defendant coupled with the officer's knowledge of her stormy marriage—and exigent circumstances—the need for testing within four hours of the homicide—existed at the time of the gunshot residue test, and the warrantless search was, therefore, valid. State v. Coplen, — N.C. App. —, 530 S.E.2d 313, 2000 N.C. App. LEXIS 544 (2000).

§ 15A-279. Implementation of order.

(a) Nontestimonial identification procedures may be conducted by any law-enforcement officer or other person designated by the judge issuing the order. The extraction of any bodily fluid must be conducted by a qualified member of the health professions and the judge may require medical supervision for any other test ordered pursuant to this Article when he considers such supervision necessary.

(b) In conducting authorized identification procedures, no unreasonable or unnecessary force may be used.

(c) No person who appears under an order of appearance issued under this Article may be detained longer than is reasonably necessary to conduct the specified nontestimonial identification procedures, and in no event for longer than six hours, unless he is arrested for an offense.

(d) **(Effective until July 1, 2001)** Any such person is entitled to have counsel present and must be advised prior to being subjected to any nontestimonial identification procedures of his right to have counsel present during any nontestimonial identification procedure and to the appointment of counsel if he cannot afford to retain counsel. No statement made during nontestimonial identification procedures by the subject of the procedures shall be admissible in any criminal proceeding against him, unless his counsel was present at the time the statement was made.

(d) **(Effective July 1, 2001)** Any such person is entitled to have counsel present and must be advised prior to being subjected to any nontestimonial identification procedures of his right to have counsel present during any nontestimonial identification procedure and to the appointment of counsel if he cannot afford to retain counsel. Appointment of counsel shall be in accordance with rules adopted by the Office of Indigent Defense Services. No statement made during nontestimonial identification procedures by the subject of the procedures shall be admissible in any criminal proceeding against him, unless his counsel was present at the time the statement was made.

(e) Any person who resists compliance with the authorized nontestimonial identification procedures may be held in contempt of the court which issued the order pursuant to the provisions of G.S. 5A-12(a) and G.S. 5A-21(b).

(f) A nontestimonial identification order may not be issued against a person previously subject to a nontestimonial identification order unless it is based on different evidence which was not reasonably available when the previous order was issued.

(g) Resisting compliance with a nontestimonial identification order is not itself grounds for finding probable cause to arrest the suspect, but it may be considered with other evidence in making the determination whether probable cause exists. (1973, c. 1286, s. 1; 1977, c. 711, s. 20; 2000-144, s. 28.)

Subsection (d) Set Out Twice. — The first version of subsection (d) set out above is effective until July 1, 2001. The second version of subsection (d) set out above is effective July 1, 2001.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, § 7A-498 et seq.

Effect of Amendments. — Session Laws 2000-144, s. 28, effective July 1, 2001, added the second sentence in subsection (d).

CASE NOTES

The defendant's right to counsel under this section was not violated by the administering of the gunshot residue kit. No order was required in that probable cause and exigent circumstances existed which justified the search and the defendant sought to suppress the results of the test, not statements made during the procedure. State v. Coplen, — N.C. App. —, 530 S.E.2d 313, 2000 N.C. App. LEXIS 544 (2000).

SUBCHAPTER III. CRIMINAL PROCESS.

ARTICLE 17.

Criminal Process.

§ 15A-302. Citation.

CASE NOTES

Cited in State v. McClendon, 350 N.C. 630, 517 S.E.2d 128 (1999).

SUBCHAPTER IV. ARREST.

ARTICLE 20.

Arrest.

§ 15A-401. Arrest by law-enforcement officer.

CASE NOTES

IV. Use of Force in Arrest.

IV. USE OF FORCE IN ARREST.

Defendant Not Justified in Resisting. — The court did not err by refusing to give defendant's requested special jury instruction that if the officer was beyond his jurisdiction, the defendant had a right to resist; even if the entry was illegal or the arrest unauthorized, defendant was not justified in using a deadly weapon against a law enforcement officer attempting to effect an arrest. State v. Locklear, — N.C. App. —, 525 S.E.2d 813, 2000 N.C. App. LEXIS 138 (2000).

§ 15A-402. Territorial jurisdiction of officers to make arrests.

CASE NOTES

State Has Burden to Show Officer Was a Government Officer. — The State did not meet its burden of showing that officer was a government officer at the time of the incident because the officer was outside the jurisdiction of his city police department pursuant to this section, and the State failed to show that the requirements of § 160A-288 and the emergency assistance provisions of the Mutual Aid Agreement were followed. State v. Locklear, — N.C. App. —, 525 S.E.2d 813, 2000 N.C. App. LEXIS 138 (2000).

SUBCHAPTER V. CUSTODY.

ARTICLE 23.

Police Processing and Duties upon Arrest.

§ 15A-501. Police processing and duties upon arrest generally.

CASE NOTES

I. General Consideration.
II. Taking Person Before Judiciary Official.

I. GENERAL CONSIDERATION.

Transfer After High-Speed Chase Upheld. — Where defendant was arrested in Chatham County solely because he was trying to evade police in a chase that began in Randolph County and, consequently, was brought before a Randolph County magistrate without "unnecessary delay," the "seizure and transfer" of defendant and his car did not violate his statutory and constitutional rights. State v. Chavis, 134 N.C. App. 546, 518 S.E.2d 241 (1999).

II. TAKING PERSON BEFORE JUDICIARY OFFICIAL.

Delay Held Necessary and Reasonable. —

Defendant failed to show that police investigators violated this section by waiting nineteen hours to take defendant before a magistrate after his arrest, taking him to the Law Enforcement Center (LEC) for questioning prior to his appearance before a magistrate, and waiting three and a half hours after questioning began before advising him of his Miranda rights where his confession was not a result of the delay; his confession necessarily took a lot of time because it involved nine murders; the police accommodated his request to sleep, and he was advised of his rights at the outset. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (2000).

ARTICLE 26.

Bail.

Part 1. General Provisions.

§ 15A-531. Definitions.

As used in this Article the following definitions apply unless the context clearly requires otherwise:

(1) "Accommodation bondsman" means a natural person who has reached the age of 18 years and is a bona fide resident of this State and who, aside from love and affection and release of the person concerned, receives no consideration for action as surety and who endorses the bail bond after providing satisfactory evidences of ownership, value, and marketability of real or personal property to the extent necessary to reasonably satisfy the official taking bond that such real or personal property will in all respects be sufficient to assure that the full principal sum of the bond will be realized in the event of breach of the conditions thereof. "Consideration" as used in this subdivision does not include the legal rights of a surety against a defendant by reason of breach of the conditions of a bail bond nor does it include collateral

furnished to and securing the surety so long as the value of the surety's rights in the collateral do not exceed the defendant's liability to the surety by reason of a breach in the conditions of said bail bond.

(2) "Address of record" means:
   a. For a defendant or an accommodation bondsman, the address entered on the bail bond under G.S. 15A-544.2, or any later address filed by that person with the clerk of superior court.
   b. For an insurance company, the address of the insurance company as it appears on the power of appointment of the company's bail agent registered with the clerk of superior court under G.S. 58-71-140.
   c. For a bail agent, the address shown on the bail agent's license from the Department of Insurance registered with the clerk of superior court under G.S. 58-71-140.
   d. For a professional bondsman, the address shown on that bondsman's license from the Department of Insurance, as registered with the clerk of superior court under G.S. 58-71-140.

(3) "Bail agent" means any person who is licensed by the Commissioner as a surety bondsman under Article 71 of Chapter 58 of the General Statutes, is appointed by an insurance company by power of attorney to execute or countersign bail bonds for the insurance company in connection with judicial proceedings, and receives or is promised consideration for doing so.

(4) "Bail bond" means an undertaking by the defendant to appear in court as required upon penalty of forfeiting bail to the State in a stated amount. Bail bonds include an unsecured appearance bond, an appearance bond secured by a cash deposit of the full amount of the bond, an appearance bond secured by a mortgage under G.S. 58-74-5, and an appearance bond secured by at least one solvent surety. A bail bond for which the surety is a bail agent acting on behalf of an insurance company is considered the same as a cash deposit for all purposes in this Article. A bail bond signed by a professional bondsman who is not a bail agent is not considered the same as a cash deposit under this Article. Cash bonds set in child support contempt proceedings shall not be satisfied in any manner other than the deposit of cash.

(5) "Defendant" means a person obligated to appear in court as required upon penalty of forfeiting bail under a bail bond.

(6) "Insurance company" means any domestic, foreign, or alien surety company which has qualified under Chapter 58 of the General Statutes generally to transact surety business and specifically to transact bail bond business in this State.

(7) "Professional bondsman" means any person who is approved and licensed by the Commissioner of Insurance under Article 71 of Chapter 58 of the General Statutes and who pledges cash or approved securities with the Commissioner as security for bail bonds written in connection with a judicial proceeding and receives or is promised money or other things of value therefor.

(8) "Surety" means:
   a. The insurance company, when a bail bond is executed by a bail agent on behalf of an insurance company.
   b. The professional bondsman, when a bail bond is executed by a professional bondsman or by a runner on behalf of a professional bondsman.
   c. The accommodation bondsman, when a bail bond is executed by an accommodation bondsman. (1973, c. 1286, s. 1; 1975, c. 166, s. 12; 1995, c. 290, s. 1; c. 503, s. 1; 2000-133, s. 1.)

Editor's Note. — Subdivisions (1) to (8) had been designated as subdivisions (1), (1a) to (1f) and (4) by Session Laws 2000-133, s. 1, and were renumbered at the direction of the Revisor of Statutes.

Session Laws 2000-133, s. 5, effective January 1, 2001, and applicable to all bail bonds executed and all forfeiture proceedings initiated on and after that date, added the Part 1 heading.

Effect of Amendments. — Session Laws 2000-133, s. 1, effective January 1, 2001, and applicable to all bail bonds executed and all forfeiture proceedings initiated on and after that date, rewrote the section.

§ 15A-534.1. Crimes of domestic violence; bail and pretrial release.

CASE NOTES

The defendant's procedural due process rights were not violated under this section where there was a session of district court at approximately 9:30 a.m., but his bond hearing was delayed until 1:30 p.m. that afternoon, resulting in his being detained for approximately seven hours; his bond hearing occurred in a reasonably feasible time and promoted the efficient administration of the court system. State v. Jenkins, — N.C. App. —, 527 S.E.2d 672, 2000 N.C. App. LEXIS 316 (2000).

§ 15A-540. Surrender of a defendant by a surety; setting new conditions of release.

(a) Going Off the Bond Before Breach. — Before there has been a breach of the conditions of a bail bond, the surety may surrender the defendant as provided in G.S. 58-71-20. Upon application by the surety after such surrender, the clerk must exonerate the surety from the bond.

(b) Surrender After Breach of Condition. — After there has been a breach of the conditions of a bail bond, a surety may surrender the defendant as provided in this subsection. A surety may arrest the defendant for the purpose of returning the defendant to the sheriff. After arresting a defendant, the surety may surrender the defendant to the sheriff of the county in which the defendant is bonded to appear or to the sheriff where the defendant was bonded. Alternatively, a surety may surrender a defendant who is already in the custody of any sheriff by appearing in person and informing the sheriff that the surety wishes to surrender the defendant. Before surrendering a defendant to a sheriff, the surety must provide the sheriff with a certified copy of the bail bond. Upon surrender of the defendant, the sheriff shall provide a receipt to the surety.

(c) New Conditions of Pretrial Release. — When a defendant is surrendered by a surety under subsection (b) of this section, the sheriff shall without unnecessary delay take the defendant before a judicial official, along with a copy of the undertaking received from the surety and a copy of the receipt provided to the surety. The judicial official shall then determine whether the defendant is again entitled to release and, if so, upon what conditions. The judicial official determining conditions of pretrial release under this subsection shall impose any conditions set by the court in any order for arrest issued for the defendant's failure to appear. If no conditions have been set, the judicial official shall require the execution of a secured appearance bond in an amount at least double the amount of the previous bond, and shall impose such restrictions on the travel, associations, conduct, or place of abode of the defendant as will assure that the defendant will not again fail to appear. The magistrate shall also indicate on the release order that the defendant was surrendered after failing to appear as required under a prior release order. (1973, c. 1286, s. 1; 1995, c. 290, s. 2; 2000-133, s. 2.)

Effect of Amendments. — Session Laws 2000-133, s. 2, effective January 1, 2001, and applicable to all bail bonds executed and all forfeiture proceedings initiated on and after that date, rewrote the section.

§ 15A-543. Penalties for failure to appear.

(a) In addition to forfeiture imposed under Part 2 of this Article, any person released pursuant to this Article who willfully fails to appear before any court or judicial official as required is subject to the criminal penalties set out in this section.

(b) A violation of this section is a Class I felony if:

(1) The violator was released in connection with a felony charge against him; or

(2) The violator was released under the provisions of G.S. 15A-536.

(c) If, except as provided in subsection (b) above, a violator was released in connection with a misdemeanor charge against him, a violation of this section is a Class 2 misdemeanor. (1973, c. 1286, s. 1; 1983, c. 294, s. 4; 1993, c. 539, s. 301; 1994, Ex. Sess., c. 14, s. 16; c. 24, s. 14(c); 2000-133, s. 3.)

Effect of Amendments. — Session Laws 2000-133, s. 3, effective January 1, 2001, and applicable to all bail bonds executed and all forfeiture proceedings initiated on and after that date, substituted "Part 2 of this Article" for "G.S. 15A-544" in subsection (a).

§ 15A-544: Repealed by Session Laws 2000-133, s. 4, effective January 1, 2001.

Cross References. — For present provisions as to bail bond forfeiture, see § 15A-544.1 et seq.

Editor's Note. — Session Laws 2000-133, s. 9, made the repeal of this section effective January 1, 2001, and applicable to to all bail bonds executed and all forfeiture proceedings initiated on and after that date.

Part 2. Bail Bond Forfeiture.

§ 15A-544.1. Forfeiture jurisdiction.

By executing a bail bond the defendant and each surety submit to the jurisdiction of the court and irrevocably consent to be bound by any notice given in compliance with this Part. The liability of the defendant and each surety may be enforced as provided in this Part, without the necessity of an independent action. (2000-133, s. 6.)

Editor's Note. — Session Laws 2000-133, s. 9, made this Part effective January 1, 2001, and applicable to to all bail bonds executed and all forfeiture proceedings initiated on and after that date.

CASE NOTES

Editor's Note. — *The cases cited below were decided under prior law.*

Purpose. — The purpose of former § 15A-544, regulating the forfeiture of bonds in criminal proceedings, is to establish an orderly procedure for forfeiture. State v. Moore, 57 N.C. App. 676, 292 S.E.2d 153 (1982).

Extraordinary Cause—Interaction with Other Statutes. — Trial court erred in ruling that §§ 1-52 and 1-46 established a statute of limitations of three years for an action involving bail and in failing to apply the "extraordinary cause" standard when petitioner sought remission of bonds. State v. Harkness, 133 N.C. App. 641, 516 S.E.2d 166 (1999).

§ 15A-544.2. Identifying information on bond.

(a) The following information shall be entered on each bail bond executed under Part 1 of this Article:

(1) The name and mailing address of the defendant.

(2) The name and mailing address of any accommodation bondsman executing the bond as surety.

(3) The name and license number of any professional bondsman executing the bond as surety and the name and license number of the runner executing the bail bond on behalf of the professional bondsman.

(4) The name of any insurance company executing the bond as surety, and the name, license number, and power of appointment number of the bail agent executing the bail bond on behalf of the insurance company.

(b) If a defendant is released upon execution of a bail bond that does not contain all the information required by subsection (a) of this section, the defendant's order of pretrial release may be revoked as provided in G.S. 15A-534(f). (2000-133, s. 6.)

§ 15A-544.3. Entry of forfeiture.

(a) If a defendant who was released under Part 1 of this Article upon execution of a bail bond fails on any occasion to appear before the court as required, the court shall enter a forfeiture for the amount of that bail bond in favor of the State against the defendant and against each surety on the bail bond.

(b) The forfeiture shall contain the following information:

(1) The name and address of record of the defendant.

(2) The file number of each case in which the defendant's appearance is secured by the bail bond.

(3) The amount of the bail bond.

(4) The date on which the bail bond was executed.

(5) The name and address of record of each surety on the bail bond.

(6) The name, address of record, license number, and power of appointment number of any bail agent who executed the bail bond on behalf of an insurance company.

(7) The date on which the forfeiture is entered.

(8) The date on which the forfeiture will become a final judgment under G.S. 15A-544.6 if not set aside before that date.

(9) The following notice: "TO THE DEFENDANT AND EACH SURETY NAMED ABOVE: The defendant named above has failed to appear as required before the court in the case identified above. A forfeiture for the amount of the bail bond shown above was entered in favor of the State against the defendant and each surety named above on the date of forfeiture shown above. This forfeiture will be set aside if, on or before the final judgment date shown above, satisfactory evidence is presented to the court that one of the following events has occurred: (i) the defendant's failure to appear has been stricken by the court in which the defendant was required to appear and any order for arrest that was issued for that failure to appear is recalled, (ii) all charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State's taking a voluntary dismissal with leave, (iii) the defendant has been surrendered by a surety or bail agent to a sheriff of this State as provided by law, the defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question, (v) the defendant died before or within the period between the forfeiture and the final judgment as

demonstrated by the presentation of a death certificate, or the defendant was incarcerated in a unit of the Department of Correction and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the State at the time of the failure to appear. The forfeiture will not be set aside for any other reason. If this forfeiture is not set aside on or before the final judgment date shown above, and if no motion to set it aside is pending on that date, the forfeiture will become a final judgment on that date. The final judgment will be enforceable by execution against the defendant and any accommodation bondsman and professional bondsman on the bond. The final judgment will also be reported to the Department of Insurance. Further, no surety will be allowed to execute any bail bond in the above county until the final judgment is satisfied in full.' (2000-133, s. 6.)

CASE NOTES

Editor's Note. — *The cases cited below were decided under prior law.*

Purpose — The purpose of former § 15A-544(b) relating to entry of an order of forfeiture was to regulate the forfeiture of bonds in criminal proceedings and to establish an orderly procedure for forfeiture. State v. Cox, 90 N.C. App. 742, 370 S.E.2d 260 (1988).

Mandatory Requirements. — Requirements of former § 15A-544(b), relating to entry of an order of forfeiture, were not discretionary but mandatory. State v. Cox, 90 N.C. App. 742, 370 S.E.2d 260 (1988).

Independent Proceeding Unneces- sary. — The judgment that the recognizance has been forfeited must be entered in the court, and in the cause, in which said recognizance was filed and it is not required that the prosecution for the forfeiture of such recognizance shall be taken by an independent proceeding. State v. Sanders, 153 N.C. 624, 69 S.E. 272 (1910).

Discretion of Court. — The power given by former § 15A-544 and predecessor statutes, relating to forfeiture, was a matter of judicial discretion in the judges below, which could not be reviewed except for some error in a matter of law or legal inference. State v. Moody, 74 N.C. 73 (1876); State v. Morgan, 136 N.C. 593, 48 S.E. 604 (1904); State v. Hawkins, 14 N.C. App. 129, 187 S.E.2d 417 (1972).

Discretion of Court. — Whether a judgment will be made absolute, or whether it will be stricken out, either upon condition or otherwise, rests in the discretion of the judge of the superior court. State v. Clarke, 222 N.C. 744, 24 S.E.2d 619 (1943); State v. Wiggins, 228 N.C. 76, 44 S.E.2d 471 (1947).

Forfeiture for Failure to Report to Probation Office. — The trial court had authority under § 15A-536(d) to require defendant to post a secured appearance bond for his post-conviction release while his appeal was pending and to consign defendant to the custody of the county probation office, and to order that defendant report to the probation office by noon each Monday, and the trial court was authorized by former § 15A-544(c) to enter a judgment of forfeiture of the bond upon determining that defendant failed to comply with the condition requiring him to report to the probation office and that defendant had failed to satisfy the court that his appearance in compliance with the condition was impossible or that his failure to appear was without his fault. State v. Cooley, 50 N.C. App. 544, 274 S.E.2d 274, cert. denied, 302 N.C. 631, 280 S.E.2d 442 (1981).

Judgment Against Bond on Same Day Defendant Failed to Appear Held Error. — The trial court erred in entering judgment absolute against defendant's cash bond on the same day that defendant was called and failed to appear. State v. Hawkins, 14 N.C. App. 127, 187 S.E.2d 418 (1972).

§ 15A-544.4. Notice of forfeiture.

(a) The court shall give notice of the entry of forfeiture by mailing a copy of the forfeiture to the defendant and to each surety whose name appears on the bail bond.

(b) The notice shall be sent by first-class mail to the defendant and to each surety named on the bond at the surety's address of record.

(c) If a bail agent on behalf of an insurance company executed the bond, the court shall also provide a copy of the forfeiture to the bail agent, but failure to

provide notice to the bail agent shall not affect the validity of any notice given to the insurance company.

(d) Notice given under this section is effective when the notice is mailed.

(e) Notice under this section shall be mailed not later than the thirtieth day after the date on which the forfeiture is entered. If notice under this section is not given within the prescribed time, the forfeiture shall not become a final judgment and shall not be enforced or reported to the Department of Insurance. (2000-133, s. 6.)

CASE NOTES

Editor's Note. *— The cases cited below were decided under prior law.*

Surety Entitled to Notice. — Surety on an appearance bond was an obligor and therefore was entitled to notice as required under former § 15A-544(b). State v. Cox, 90 N.C. App. 742, 370 S.E.2d 260 (1988).

Forfeiture Vacated. — Where surety on appearance bond was not personally served, nor was he mailed a copy of the order of forfeiture or notice, although the sheriff had a record of the surety's address throughout the proceedings, and he had no knowledge of the order of forfeiture and notice, that the judgment was made absolute, or that the matter was transferred to the sheriff's department for execution, the sheriff's department did not comply with the statutory requirements of former § 15A-544(b), and the judgment of forfeiture was null and void and would be vacated. State v. Cox, 90 N.C. App. 742, 370 S.E.2d 260 (1988).

§ 15A-544.5. Setting aside forfeiture.

(a) Relief Exclusive. — There shall be no relief from a forfeiture except as provided in this section. The reasons for relief are those specified in subsection (b) of this section. The procedures for obtaining relief are those specified in subsections (c) and (d) of this section. Subsections (f), (g), (h), and (i) of this section apply regardless of the reason for relief given or the procedure followed.

(b) Reasons for Set Aside. — A forfeiture shall be set aside for any one of the following reasons, and none other:

(1) The defendant's failure to appear has been set aside by the court and any order for arrest issued for that failure to appear has been recalled, as evidenced by a copy of an official court record, including an electronic record.

(2) All charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State's taking dismissal with leave, as evidenced by a copy of an official court record, including an electronic record.

(3) The defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the sheriff's receipt provided for in that section.

(4) The defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question.

(5) The defendant died before or within the period between the forfeiture and the final judgment as demonstrated by the presentation of a death certificate.

(6) The defendant was incarcerated in a unit of the Department of Correction and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the State at the time of the failure to appear.

(c) Procedure When Failure to Appear Is Stricken. — If the court before which a defendant's appearance was secured by a bail bond enters an order striking the defendant's failure to appear and recalling any order for arrest issued for that failure to appear, that court may simultaneously enter an order setting aside any forfeiture of that bail bond. When an order setting aside a

forfeiture is entered, the defendant's further appearances shall continue to be secured by that bail bond unless the court orders otherwise.

(d) Motion Procedure. — If a forfeiture is not set aside under subsection (c) of this section, the only procedure for setting it aside is as follows:

(1) At any time before the expiration of 150 days after the date on which notice was given under G.S. 15A-544.4, the defendant or any surety on a bail bond may make a written motion that the forfeiture be set aside, stating the reason and attaching the evidence specified in subsection (a) of this section.

(2) The motion is filed in the office of the clerk of superior court of the county in which the forfeiture was entered, and a copy is served, under G.S. 1A-1, Rule 5, on the district attorney for that county and the county board of education.

(3) Either the district attorney or the county board of education may object to the motion by filing a written objection in the office of the clerk and serving a copy on the moving party.

(4) If neither the district attorney nor the board of education has filed a written objection to the motion by the tenth day after the motion is served, the clerk shall enter an order setting aside the forfeiture.

(5) If either the district attorney or the county board of education files a written objection to the motion, then not more than 30 days after the objection is filed a hearing on the motion and objection shall be held in the county, in the trial division in which the defendant was bonded to appear.

(6) If at the hearing the court allows the motion, the court shall enter an order setting aside the forfeiture.

(7) If at the hearing the court does not enter an order setting aside the forfeiture, the forfeiture shall become a final judgment of forfeiture on the later of:

a. The date of the hearing.

b. The date of final judgment specified in G.S. 15A-544.6.

(e) Only One Motion Per Forfeiture. — No more than one motion to set aside a specific forfeiture may be considered by the court.

(f) No More Than Two Forfeitures May Be Set Aside Per Case. — In any case in which the State proves that the surety or the bail agent had notice or actual knowledge, before executing a bail bond, that the defendant had already failed to appear on two or more prior occasions, no forfeiture of that bond may be set aside for any reason.

(g) No Final Judgment After Forfeiture Is Set Aside. — If a forfeiture is set aside under this section, the forfeiture shall not thereafter ever become a final judgment of forfeiture or be enforced or reported to the Department of Insurance.

(h) Appeal. — An order on a motion to set aside a forfeiture is a final order or judgment of the trial court for purposes of appeal. Appeal is the same as provided for appeals in civil actions. When notice of appeal is properly filed, the court may stay the effectiveness of the order on any conditions the court considers appropriate. (2000-133, s. 6.)

CASE NOTES

Editor's Note. — *The cases cited below were decided under prior law.*

Authority to Review Another Judge's Forfeiture Order. — A superior court judge had authority to review an order of bond forfeiture entered by another superior court judge. State v. Hawkins, 14 N.C. App. 129, 187 S.E.2d 417 (1972).

Injunction to Restrain Enforcement of Execution. — A motion by the surety asking that the forfeiture theretofore entered upon the appearance bond be stricken out, due to the fact

that defendant had been subsequently arrested, is addressed to the sound discretion of the court in the exercise of its power to remit the forfeiture, and does not serve to stay execution on the judgment entered against the surety; therefore, the court, while the motion is pending, may hear and determine the surety's application for injunction to restrain enforcement of the execution issued on the judgment. The remedy for a reduction or remission of the forfeiture was by application under former statute. Tar Heel Bond Co. v. Krider, 218 N.C. 361, 11 S.E.2d 291 (1940), followed in State v. Brown, 218 N.C. 368, 11 S.E.2d 294 (1940).

Apprehension and Delivery of Defendant after Judgment. — Where judgment absolute has been entered against the surety on an appearance bond, the surety is entitled, upon the later apprehension and delivery of the defendant to the authorities of that county for trial, to be heard upon its motion to modify or vacate the judgment absolute. State v. Dew, 240 N.C. 595, 83 S.E.2d 482 (1954).

Subsequent Arrest Does Not Automatically Discharge Forfeiture. — The arrest of defendant in a criminal proceeding and his trial and conviction does not discharge the original forfeiture of his appearance bond, and judgment absolute against the surety may be entered after defendant has been arrested. In such case the defendant is not arrested and surrendered by the surety. Surrender by the bail after recognizance is forfeited does not discharge the bail, but is merely addressed to the discretionary power of the court to reduce or remit the forfeiture. Tar Heel Bond Co. v. Krider, 218 N.C. 361, 11 S.E.2d 291 (1940), followed in State v. Brown, 218 N.C. 368, 11 S.E.2d 294 (1940).

Where surety's answer amounts to nothing more than a plea for additional time, without allegation of facts disclosing excusable neglect or constituting a legal defense or appealing to the conscience and sense of fair play, the surety is not entitled to a hearing as a matter of right, and judgment absolute against the surety is proper. State v. Dew, 240 N.C. 595, 83 S.E.2d 482 (1954).

Authority of Court. — Superior courts have authority to lessen or remit forfeited recognizances upon the petition of the party aggrieved, either before or after final judgment. State v. Moody, 74 N.C. 73 (1876); State v. Hawkins, 14 N.C. App. 129, 187 S.E.2d 417 (1972).

Court May Remit Penalty Without Setting Aside Forfeiture. — Where a motion is made to set aside the entry of forfeiture of a recognizance, its refusal does not prevent the court from reducing or remitting the penalty. State v. Morgan, 136 N.C. 593, 48 S.E. 604 (1904).

Imprisonment in Mexico No Excuse. — Fact that principal was prevented from appearing in superior court by reason of his own criminal acts, committed after his pretrial release, rendering him subject to imprisonment pursuant to the criminal laws of Mexico, did not excuse him from appearing, and the liability of the sureties being correspondent with that of their principal, would afford no excuse to sureties for his failure to appear. State v. Vikre, 86 N.C. App. 196, 356 S.E.2d 802 (1987).

Court's Discretion Not Abused. — Where the facts conclusively showed that defendant was not incarcerated, and there was no evidence of personal sickness or death, the trial court did not abuse its discretion in refusing to recognize the sureties' defense of excusable absence because of defendant's inability to attend court. State v. Horne, 68 N.C. App. 480, 315 S.E.2d 321 (1984).

§ 15A-544.6. Final judgment of forfeiture.

A forfeiture entered under G.S. 15A-544.3 becomes a final judgment of forfeiture without further action by the court and may be enforced under G.S. 15A-544.7, on the one hundred fiftieth day after notice is given under G.S. 15A-544.4, if:

(1) No order setting aside the forfeiture under G.S. 15A-544.5 is entered on or before that date; and

(2) No motion to set aside the forfeiture is pending on that date. (2000-133, s. 6.)

§ 15A-544.7. Docketing and enforcement of final judgment of forfeiture.

(a) Final Judgment Docketed As Civil Judgment. — When a forfeiture has become a final judgment under this Part, the clerk of superior court, under G.S. 1-234, shall docket the judgment as a civil judgment against the defendant and against each surety named in the judgment.

(b) Judgment Lien. — When a final judgment of forfeiture is docketed, the judgment shall become a lien on the real property of the defendant and of each surety named in the judgment, as provided in G.S. 1-234.

(c) Execution; Copy to Commissioner of Insurance. — After docketing a final judgment under this section, the clerk shall:

(1) Issue execution on the judgment against the defendant and against each accommodation bondsman and professional bondsman named in the judgment and shall remit the clear proceeds to the county finance officer as provided in G.S. 115C-452.

(2) If an insurance company or professional bondsman is named in the judgment, send the Commissioner of Insurance a copy of the judgment, showing the date on which the judgment was docketed.

(d) Sureties May Not Execute Bonds in County. — After a final judgment is docketed as provided in this section, no surety named in the judgment shall become a surety on any bail bond in the county in which the judgment is docketed until the judgment is satisfied in full. (2000-133, s. 6.)

CASE NOTES

When Execution Mandatory. — Execution was mandatory under former § 15A-544(f) if a judgment was not remitted within the period provided in former § 15A-544 (e). State v. Moore, 57 N.C. App. 676, 292 S.E.2d 153 (1982).

§ 15A-544.8. Relief from final judgment of forfeiture.

(a) Relief Exclusive. — There is no relief from a final judgment of forfeiture except as provided in this section.

(b) Reasons. — The court may grant the defendant or any surety named in the judgment relief from the judgment, for the following reasons, and none other:

(1) The person seeking relief was not given notice as provided in G.S. 15A-544.4.

(2) Other extraordinary circumstances exist that the court, in its discretion, determines should entitle that person to relief.

(c) Procedure. — The procedure for obtaining relief from a final judgment under this section is as follows:

(1) At any time before the expiration of three years after the date on which a judgment of forfeiture became final, the defendant or any surety named in the judgment may make a written motion for relief under this section, stating the reasons and setting forth the evidence in support of each reason.

(2) The motion is filed in the office of the clerk of superior court of the county in which the final judgment was entered, and a copy shall be served, under G.S. 1A-1, Rule 5, on the district attorney for that county and the county board of education.

(3) A hearing on the motion shall be scheduled within a reasonable time in the trial division in which the defendant was bonded to appear.

(4) At the hearing the court may grant the party any relief from the judgment that the court considers appropriate, including the refund of all or a part of any money paid to satisfy the judgment.

(d) Only One Motion. — No more than one motion by any party for relief under this section may be considered by the court.

(e) Finality of Judgment as to Other Parties Not Affected. — The finality of a final judgment of forfeiture shall not be affected, as to any party to the judgment, by the filing of a motion by, or the granting of relief to, any other party.

(f) Appeal. — An order on a motion for relief from a final judgment of forfeiture is a final order or judgment of the trial court for purposes of appeal. Appeal is the same as provided for appeals in civil actions. When notice of appeal is properly filed, the court may stay the effectiveness of the order on any conditions it considers appropriate. (2000-133, s. 6.)

CASE NOTES

Editor's Note. *— The cases cited below were decided under prior law.*

Constitutionality of Former Remission Provision. — Former § 15A-544(h) did not violate the constitutional provision that the proceeds of forfeitures are to remain in the several counties and be used in the public schools. State v. Locklear, 42 N.C. App. 486, 256 S.E.2d 830, appeal dismissed, 298 N.C. 302, 259 S.E.2d 303 (1979).

Extraordinary Cause Standard. — Trial court erred in ruling that §§ 1-52 and 1-46 established a statute of limitations of three years for an action involving bail, and in failing to apply the "extraordinary cause" standard of former § 15A-544(h) when petitioner sought remission of bonds. State v. Harkness, 133 N.C. App. 641, 516 S.E.2d 166 (1999).

Petition for Relief After Final Judgment. — A surety on a bail bond may present a petition for relief to the judge of the superior court, notwithstanding that a final judgment has been rendered. State v. Bradsher, 189 N.C. 401, 127 S.E. 349 (1925); State v. Dew, 240 N.C. 595, 83 S.E.2d 482 (1954).

Error of Court in Failing to Make Findings. — Trial court erred in failing to make any findings of fact and conclusions of law in its order denying the petition for remission of a judgment of forfeiture where petitioner-surety submitted affidavits and some 20 pages of exhibits detailing the time, effort and expense its agents incurred in finding, arresting and returning the defendant to the proper authorities; judge's observation that the school board needed the funds more than the surety did not fulfill the required test as to whether "extraordinary cause" was shown. State v. Lanier, 93 N.C. App. 779, 379 S.E.2d 109 (1989).

Authority of Court. — Superior courts have authority to lessen or remit forfeited recognizances upon the petition of the party aggrieved, either before or after final judgment. State v. Moody, 74 N.C. 73 (1876); State v. Hawkins, 14 N.C. App. 129, 187 S.E.2d 417 (1972).

Court May Remit Penalty Without Setting Aside Forfeiture. — Where a motion is made to set aside the entry of forfeiture of a recognizance, its refusal does not prevent the court from reducing or remitting the penalty. State v. Morgan, 136 N.C. 593, 48 S.E. 604 (1904).

When Remission Authorized. — After entry of judgment of forfeiture, former § 15A-544 (e) and (h) provided two situations in which the court was authorized to order remission. State v. Moore, 57 N.C. App. 676, 292 S.E.2d 153 (1982).

Discretion of Court to Order Remission. — Since former § 15A-544 (e) said "may" remit, the decision to do so or not was a discretionary one. In order to exercise judicial discretion in a manner favorable to a surety, the judge had to determine in his discretion that justice required remission. State v. Horne, 68 N.C. App. 480, 315 S.E.2d 321 (1984).

Justice Guides Judge's Discretion. — Under former § 15A-544 (e), the court is guided in its discretion as "justice requires." State v. Moore, 57 N.C. App. 676, 292 S.E.2d 153 (1982).

Findings and Conclusions as to "Extraordinary Cause" Required. — Even if the record contains ample evidence to support a conclusion that "extraordinary cause" has been shown, the trial court should make brief, definite, pertinent findings and conclusions to that effect. State v. Moore, 57 N.C. App. 676, 292 S.E.2d 153 (1982).

"Extraordinary Cause" Shown. — The trial court did not err in finding that the surety on a forfeited criminal appearance bond had shown "extraordinary cause" for remission to the surety of a portion of the amount forfeited where, after defendant was arrested for driving under the influence, the surety's personal efforts led to denial of any further bond for the defendant and resulted in defendant's detention on the assault charge for which the bondsman had secured defendant's appearance. State v. Locklear, 42 N.C. App. 486, 256 S.E.2d 830, appeal dismissed, 298 N.C. 302, 259 S.E.2d 303 (1979).

Expenses Incurred May Not Constitute Extraordinary Cause — The fact that sureties incurred expenses in connection with a forfeiture does not necessarily constitute extraordinary cause. State v. Vikre, 86 N.C. App. 196, 356 S.E.2d 802 (1987).

§ 15A-545: Reserved for future codification purposes.

Part 3. Other Provisions.

Editor's Note. — Sections 15A-546 to 15A-547.6 have been designated as Part 3 of Article 26 in Chapter 15A at the direction of the Revisor of Statutes.

SUBCHAPTER VI. PRELIMINARY PROCEEDINGS.

ARTICLE 31.

The Grand Jury and Its Proceedings.

§ 15A-622. Formation and organization of grand juries; other preliminary matters.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Applied in State v. Rankins, 133 N.C. App. 607, 515 S.E.2d 748 (1999).

§ 15A-628. Functions of grand jury; record to be kept by clerk.

CASE NOTES

Applied in State v. Chavis, 134 N.C. App. 546, 518 S.E.2d 241 (1999).

Cited in State v. Griffin, — N.C. App. —, 525 S.E.2d 793, 2000 N.C. App. LEXIS 108 (2000).

§ 15A-631. Grand jury venue.

CASE NOTES

Applied in State v. Chavis, 134 N.C. App. 546, 518 S.E.2d 241 (1999).

SUBCHAPTER VIII. ATTENDANCE OF WITNESSES; DEPOSITIONS.

ARTICLE 42.

Attendance of Witnesses Generally.

§ 15A-803. Attendance of witnesses.

(a) Material Witness Order Authorized. — A judge may issue an order assuring the attendance of a material witness at a criminal proceeding. This material witness order may be issued when there are reasonable grounds to believe that the person whom the State or a defendant desires to call as a witness in a pending criminal proceeding possesses information material to the determination of the proceeding and may not be amenable or responsive to a subpoena at a time when his attendance will be sought.

(b) When Order Issued. — A material witness order may be issued by a judge of superior court at any time after the initiation of criminal proceedings. A judge of district court may issue a material witness order only at the time that a defendant is bound over to superior court at a probable-cause hearing.

(c) How Long Effective. — A material witness order remains in effect during the period indicated in the order by the issuing judge unless it is sooner modified or vacated by a judge of superior court. In no event may a material witness order which provides for incarceration of the material witness be issued for a period longer than 20 days, but upon review a superior court judge in his discretion may renew an order one or more times for periods not to exceed five days each.

(d) **(Effective until July 1, 2001)** Procedure. — A material witness order may be obtained upon motion supported by affidavit showing cause for its issuance. The witness must be given reasonable notice, opportunity to be heard and present evidence, and the right of representation by counsel at a hearing on the motion. Counsel for a material witness may be appointed and compensated in the same manner as counsel for an indigent defendant. The order must be based on findings of fact supporting its issuance.

(d) **(Effective July 1, 2001)** Procedure. — A material witness order may be obtained upon motion supported by affidavit showing cause for its issuance. The witness must be given reasonable notice, opportunity to be heard and present evidence, and the right of representation by counsel at a hearing on the motion. Counsel for a material witness may be appointed and compensated in the same manner as counsel for an indigent defendant. Appointment of counsel shall be in accordance with rules adopted by the Office of Indigent Defense Services. The order must be based on findings of fact supporting its issuance.

(e) Order. — If the court makes a material witness order:

(1) It may direct release of the witness in the same manner that a defendant may be released under G.S. 15A-534.

(2) It may direct the detention of the witness.

(f) Modification or Vacation. — A material witness order may be modified or vacated by a judge of superior court upon a showing of new or changed facts or circumstances by the witness, the State, or any defendant.

(g) Securing Attendance or Custody of Material Witness. — The witness may be required to attend the hearing by subpoena, or if the court considers it necessary, by order for arrest. An order for arrest also may be issued if it becomes necessary to take the witness into custody after issuance of a material witness order. (1973, c. 1286, s. 1; 2000-144, s. 29.)

Subsection (d) Set Out Twice. — The first version of subsection (d) set out above is effective until July 1, 2001. The second version of subsection (d) set out above is effective July 1, 2001.

Editor's Note. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, § 7A-498 et seq.

Effect of Amendments. — Session Laws 2000-144, s. 29, effective July 1, 2001, added the next-to-last sentence in subsection (d), relating to the Office of Indigent Defense Services.

§ 15A-825. Treatment due victims and witnesses.

CASE NOTES

Sympathy for Victims, Not Bias. — The trial judge's comment that "the court system needs to become [victims'] friends, not their enemy" did not manifests a bias against defendant but rather illustrated an affinity for the use of victim impact statements, a procedure specifically endorsed by North Carolina's statutes. State v. Hendricks, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 794 (July 5, 2000).

SUBCHAPTER IX. PRETRIAL PROCEDURE.

ARTICLE 48.

Discovery in the Superior Court.

§ 15A-903. Disclosure of evidence by the State — Information subject to disclosure.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Griffin, — N.C. App. —, 525 S.E.2d 793, 2000 N.C. App. LEXIS 108 (2000).

Cited in State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622 (1999), cert. denied, — U.S. —, 120 S. Ct. 1432, 146 L. Ed. 2d 322 (2000).

II. STATEMENT OF DEFENDANT.

"Substance" Requirement of Subdivision (a)(2) Met. — Delivery of a synopsis of a defendant's oral statements in response to discovery requests complies with the "substance" requirement of subdivision (a)(2); because detective did not testify that defendant made a statement in response to the reading of his rights at the top of the juvenile rights and waiver of rights form, the State could not have provided a recorded statement by the defendant in response to the reading of these rights. State v. Johnson, — N.C. App. —, 525 S.E.2d 830, 2000 N.C. App. LEXIS 164 (2000).

Duty of State to Disclose. — Where the trial court allowed the defendant, accused of murdering her grandmother in a nursing home, to recall witnesses after the prosecutor used her undisclosed statement, the trial court did not abuse its discretion in not declaring a mistrial. State v. Smith, 135 N.C. App. 649, 522 S.E.2d 321 (1999).

VI. DOCUMENTS, TANGIBLE OBJECTS, AND REPORTS.

Letter Written by Defendant to Victim's Mother — In prosecution for first degree rape, court properly permitted testimony regarding a letter from defendant to victim's mother, and the State did not violate subdivision (a)(1) of this section when it failed to produce this letter, since it was never in the State's possession and defendant failed to show that the original was destroyed in bad faith, as required by § 8C-1, Rule 1004. State v. Jarrell, 133 N.C. App. 264, 515 S.E.2d 247 (1999).

Trial court did not err in admitting slides depicting the medical examination of victim, since State was unaware of existence of slides and defendant viewed them prior to conclusion of evidence. State v. Jarrell, 133 N.C. App. 264, 515 S.E.2d 247 (1999).

§ 15A-905. Disclosure of evidence by the defendant — Information subject to disclosure.

CASE NOTES

Voir Dire in Lieu of Report. — Where defendant failed to comply with the court's order to produce a written mental health report, court properly allowed the State to conduct voir dire in lieu of the report, as it had forewarned that it would. State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622 (1999), cert. denied, — U.S. —, 120 S. Ct. 1432, 146 L. Ed. 2d 322 (2000).

§ 15A-907. Continuing duty to disclose.

CASE NOTES

Belated Disclosure of Hypnosis. — The State's failure to disclose that a witness was hypnotized was improper but was mitigated by the fact that disclosure came prior to identification testimony and comprehensive voir dire, and that the identification was not improperly tainted by the hypnosis. State v. Hall, 134 N.C. App. 417, 517 S.E.2d 907 (1999).

§ 15A-910. Regulation of discovery — Failure to comply.

CASE NOTES

Failure to Impose Sanctions Not Improper. —

Where defendant could not use duress as a defense to the charge of first-degree murder and where he failed to produce sufficient evidence that he was coerced into participating in the kidnapping and robbery of the victim, the trial court correctly concluded that a diary which indicated that the accomplice was a violent person did not contain any exculpatory evidence which could aid defendant and, therefore, denied his motions to compel production and to sanction the State for failure to preserve and disclose exculpatory evidence pursuant to this section. State v. Cheek, 351 N.C. 48, 520 S.E.2d 545 (1999), cert. denied, — U.S. —, 120 S. Ct. 2694, — L. Ed. — (2000).

Applied in State v. Smith, 135 N.C. App. 649, 522 S.E.2d 321 (1999).

ARTICLE 49.

Pleadings and Joinder.

§ 15A-923. Use of pleadings in felony cases and misdemeanor cases initiated in the superior court division.

CASE NOTES

Change of Address on Indictment. — The trial court did not violate this section when it allowed the State's amendment to an indictment for keeping and maintaining a dwelling for the use of a controlled substance to correct the address from "919 Dollard Town Road" to "929 Dollard Town Road." State v. Grady, — N.C. App. —, 524 S.E.2d 75, 2000 N.C. App. LEXIS 12 (2000).

Correction of Victim's Name. —

A change in defendant's name, adding one letter, was not a substantial alteration and did not impermissibly alter the charge in the original indictment. State v. Grigsby, 134 N.C. App. 315, 517 S.E.2d 195 (1999), rev'd on other grounds, 351 N.C. 454, 526 S.E.2d 460 (2000).

Change of Date on Indictment. —

Change of date in indictment was not an amendment proscribed by this section. State v. Campbell, 133 N.C. App. 531, 515 S.E.2d 732 (1999), cert. denied, 351 N.C. 111, — S.E.2d — (1999).

§ 15A-924. Contents of pleadings; duplicity; alleging and proving previous convictions; failure to charge crime; surplusage.

CASE NOTES

I. General Consideration.
IV. Allegation of Prior Convictions.

I. GENERAL CONSIDERATION.

Specifying Felony in Indictment. — Indictments which did not allege specific felonies nonetheless satisfied the requirements of this section. State v. Parker, 350 N.C. 411, 516 S.E.2d 106 (1999), cert. denied, — U.S. —, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Indictments listing the month and year of each alleged offense sufficiently comply with this section in a case involving sexual abuse of a child. State v. Jarrell, 133 N.C. App. 264, 515 S.E.2d 247 (1999).

Cited in State v. Parker, 350 N.C. 411, 516 S.E.2d 106 (1999), cert. denied, — U.S. —, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

IV. ALLEGATION OF PRIOR CONVICTIONS.

Habitual Felons. — Because being a habitual felon is not a substantive criminal offense, but rather a status, each element of the offense need not be pleaded; all that is needed is that the defendant be given notice "that he is being prosecuted for some substantive felony as a recidivist." State v. Roberts, 135 N.C. App. 690, 522 S.E.2d 130 (1999).

§ 15A-925. Bill of particulars.

CASE NOTES

Stated in State v. Parker, 350 N.C. 411, 516 S.E.2d 106 (1999), cert. denied, — U.S. —, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000); In re K.R.B., 134 N.C. App. 328, 517 S.E.2d 200 (1999), cert. denied, 351 N.C. 187, — S.E.2d — (1999).

§ 15A-926. Joinder of offenses and defendants.

CASE NOTES

I. General Consideration.
II. Joinder of Offenses.
B. Illustrative Cases.
III. Joinder of Defendants.
B. Illustrative Cases.

I. GENERAL CONSIDERATION.

Applied in State v. Merrill, — N.C. App. —, 530 S.E.2d 608, 2000 N.C. App. LEXIS 597 (2000).

II. JOINDER OF OFFENSES.

B. Illustrative Cases.

Evidence Was Sufficient for Transactional Connection. — The defendant's two drug offenses were properly consolidated where they shared a transactional connection. The offenses for which defendant was being tried were identical, sale and delivery of cocaine, the facts involved in each offense were nearly identical, and finally, only three weeks elapsed between the commission of each offense. Joinder of the offenses did not impede defendant's ability to receive a fair trial and put on his defense. State v. Montford, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 431 (2000).

The following substantial similarities justified joinder of murder cases for trial: both were murders of young men whom defendant knew and with whom he was associated in the drug trade, both murders occurred after the victims had paged him, both victims were shot in the head with the same gun at a range of approximately two feet or less, both murders occurred in Winston-Salem, both murders occurred on the premises of the victims, and both

murders occurred after defendant argued with the victims. State v. Moses, 350 N.C. 741, 517 S.E.2d 853 (1999), cert. denied, — U.S. —, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Embezzlement And Perjury. — The trial court did not err in allowing the state to join 3 counts of embezzling, and 3 counts of perjury against the defendant/attorney based on their being "part of a common scheme or plan." The defendant did not show that the offenses were so separate in time and place, or so distinct in circumstances as to render a consolidation unjust nor how the consolidation prejudiced his ability to present a defense and receive a fair trial. State v. Linney, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 538 (May 16, 2000).

Offenses Committed on Separate Dates. —

Where there existed an extended interval of as much as several years between sex offenses and the lack of a consistent pattern in defendant's molesting behavior, all of the charged acts perpetrated against three sisters did not constitute part of a single scheme or plan, as a matter of law, and the trial court erred in joining the cases under this section; however, since evidence of other molestations would have been admissible pursuant to § 8C-1, Rule 404(b) to show "intent, plan or design," at the trial of any one offense, the error was harmless. State v. Owens, 135 N.C. App. 456, 520 S.E.2d 590 (1999).

III. JOINDER OF DEFENDANTS.

B. Illustrative Cases.

Murder Charges. —

The consolidation of defendants' charges for trial did not result in any unfair prejudice to defendant, where neither defendant put on a defense, and where there was nothing in the record to suggest that this course of action was forced on either defendant as a result of the other defendant's position or strategy. State v. Lundy, 135 N.C. App. 13, 519 S.E.2d 73 (1999).

§ 15A-927. Severance of offenses; objection to joinder of defendants for trial.

CASE NOTES

Severance Properly Denied. —

Where the state presented plenary evidence of defendant's guilt on the crime of accessory after the fact and any reference to defendant by expert/clinical psychologist, who stated that her brother was concerned for her mental health, only marginally affected defendant's own case, there was no error in the trial court's denial of defendant's motion to sever. State v. Merrill, — N.C. App. —, 530 S.E.2d 608, 2000 N.C. App. LEXIS 597 (2000).

Joinder Held Error. —

The consolidation of defendants' charges for trial did not result in any unfair prejudice to defendant, where neither defendant put on a defense, and where there was nothing in the record to suggest that this course of action was forced on either defendant as a result of the other defendant's position or strategy. State v. Lundy, 135 N.C. App. 13, 519 S.E.2d 73 (1999).

Cited in State v. Lemons, — N.C. —, 530 S.E.2d 542, 2000 N.C. LEXIS 431 (2000).

Article 51.

Arraignment.

§ 15A-943. Arraignment in superior court — Required calendaring.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Failure to Conduct Formal Arraignment Proceeding Not Error. — Where there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of a formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding. State v. Griffin, — N.C. App. —, 525 S.E.2d 793, 2000 N.C. App. LEXIS 108 (2000).

ARTICLE 52.

Motions Practice.

§ 15A-951. Motions in general; definition, service, and filing.

CASE NOTES

Cited in State v. Branch, 134 N.C. App. 637, 518 S.E.2d 213 (1999).

§ 15A-952. Pretrial motions; time for filing; sanction for failure to file; motion hearing date.

CASE NOTES

I. General Consideration.
II. Motions to Continue.

I. GENERAL CONSIDERATION.

Failure to Object to Impropriety in the Indictment. — The defendant waived his right to object to any impropriety in the indictment, such as a contention of vindictive prosecution, where the defendant failed to make a motion to the trial court to dismiss the indictment for robbery with a dangerous weapon. State v. Frogge, 351 N.C. 576, 528 S.E.2d 893 (2000).

II. MOTIONS TO CONTINUE.

Denial of Motion Held Improper. — The defendant was entitled to a new trial because the court's denials of his repeated motions for a continuance resulted in a violation of his constitutional rights to effective assistance of counsel, to confront his accusers, and to due process of law. Defendant's counsels had only thirty-four days to prepare for a complex, bifurcated capital case, involving multiple incidents in multiple locations over a two-day period, which they took over from another attorney who had done little other than filing pretrial motions and trying to persuade the defendant to accept a plea bargain. No evidence existed that any witness interviews had been performed; the orders based on the trial court's rulings on pretrial motions had not been prepared; and a jury questionnaire was not submitted for distribution to prospective jurors. State v. Rogers, — N.C. —, 529 S.E.2d 671, 2000 N.C. LEXIS 430 (2000).

§ 15A-954. Motion to dismiss — Grounds applicable to all criminal pleadings; dismissal of proceedings upon death of defendant.

CASE NOTES

III. Flagrant Violation of Constitutional Rights.

III. FLAGRANT VIOLATION OF CONSTITUTIONAL RIGHTS.

No Grounds Warranting Dismissal. — Defendant's allegation that the prosecution delayed trying his case after it had been calendared in order to locate missing witnesses and, thereby, gain a tactical advantage, did not warrant dismissal of the case nor did the behavior complained of rise to a sufficiently egregious level. State v. Roberts, 135 N.C. App. 690, 522 S.E.2d 130 (1999).

§ 15A-957. Motion for change of venue.

CASE NOTES

Discretion of Trial Judge. —

Although the evidence of pretrial publicity, most of which was favorable to defendant or factually neutral, was substantial at the time of defendant's motion for a change of venue, the trial court did not abuse its discretion in recognizing facts in support of its refusal which, ultimately, may have impacted whether the environment for defendant's trial was prejudicial; or in stating its belief that the best evidence of whether pretrial publicity was prejudicial or inflammatory was jurors' responses to voir dire questioning. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (2000).

Defendant's Surveys Must Take Into Account Potential Jurors' Attitudes. — The evidence presented was insufficient to show infection of the jury pool so as to deprive defendant of a fair trial and require a change of venue. Defendant presented two telephone surveys which indicated that media coverage of the crimes was widespread and that a large number of persons was aware of the crimes and defendant's identity but failed to measure the prejudicial effect of the media coverage on potential jurors' attitudes toward the presumption of innocence or their ability to confine their determinations as jurors to the evidence presented in court. Although the surveys asked questions relating to the death penalty and defendant's guilt, answers to these questions were outside the context of the presumption of innocence and the juror's duty to consider only the evidence presented at trial and were not reliable evidence of bias or prejudice. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (2000).

The defendant failed to meet his burden of showing that prospective jurors were tainted by pretrial information where he merely provided a broad statement from his investigator that certain unnamed witnesses were afraid to testify for the defense because they feared reprisal from other unnamed parties and where he failed to exercise all his preemptory challenges. State v. Farmer, — N.C. App. —, 530 S.E.2d 584, 2000 N.C. App. LEXIS 545 (2000).

Specific Findings of Fact. — Although the trial court did not make findings of fact in support of its order for change of venue, it is not required to do so, and in light of the detailed statements by the trial court in the record about the factors it was considering in determining the State's request for change of venue, the court did not abuse its discretion in ordering the change of venue State v. Griffin, — N.C. App. —, 525 S.E.2d 793, 2000 N.C. App. LEXIS 108 (2000).

§ 15A-958. Motion for a special venire from another county.

CASE NOTES

Cited in State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (2000); State v. Farmer, — N.C. App. —, 530 S.E.2d 584, 2000 N.C. App. LEXIS 545 (2000).

§ 15A-959. Notice of defense of insanity; pretrial determination of insanity.

CASE NOTES

Stated in State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622 (1999), cert. denied, — U.S. —, 120 S. Ct. 1432, 146 L. Ed. 2d 322 (2000).

Article 53.

Motion to Suppress Evidence.

§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.

CASE NOTES

III. Substantial Violation of Chapter.

III. SUBSTANTIAL VIOLATION OF CHAPTER.

Defendant failed to show that his confession had to be suppressed pursuant to this section because police investigators waited nineteen hours to take defendant before a magistrate after his arrest, took him to the Law Enforcement Center (LEC) for questioning prior to his appearance before a magistrate, and waited three and a half hours after questioning began before advising him of his Miranda rights where his confession was not a result of the delay; his confession necessarily took a lot of time because it involved nine murders; the police accommodated his request to sleep, and he was advised of his rights at the outset. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (2000).

§ 15A-975. Motion to suppress evidence in superior court prior to trial and during trial.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Failure of Trial Judge to Allow Motion to Suppress. — Where the trial court barely allowed defendant to state his motion to suppress and denied defendant any opportunity to state his grounds or present evidence in support of his motion, defendant was not only denied his constitutional rights, but also his statutory right to make a motion to suppress under this section. State v. Battle, — N.C. App. —, 525 S.E.2d 850, 2000 N.C. App. LEXIS 142 (2000).

§ 15A-977. Motion to suppress evidence in superior court; procedure.

CASE NOTES

II. Findings of Fact.

II. FINDINGS OF FACT.

When Findings of Fact Not Required. — Since probable cause existed to search defendant's vehicle for narcotics, evidence as to his consent was not relevant, and the trial court's failure to make findings and conclusion on defendant's motion to suppress was not prejudicial error. State v. Earhart, 134 N.C. App. 130, 516 S.E.2d 883 (1999), appeal dismissed, 351 N.C. 112, — S.E.2d — (1999).

§ 15A-978. Motion to suppress evidence in superior court or district court; challenge of probable cause supporting search on grounds of truthfulness; when identity of informant must be disclosed.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Quoted in State v. Miller, — N.C. App. —, 528 S.E.2d 626, 2000 N.C. App. LEXIS 418 (2000).

SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

§ 15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

This section is not an absolute confidentiality rule, so trial counsel was not ineffective by failing to use it to exclude competency examination reports from the record on the grounds that the reports had been sent to the district attorney unlawfully or that they remained confidential where the prosecution lawfully possessed the reports. McCarver v. Lee, — F.3d —, 2000 U.S. App. LEXIS 12222 (4th Cir. May 23, 2000).

ARTICLE 58.

Procedures Relating to Guilty Pleas in Superior Court.

§ 15A-1021. Plea conference; improper pressure prohibited; submission of arrangement to judge; restitution and reparation as part of plea arrangement agreement, etc.

CASE NOTES

Cited in In re a Judge, No. 238 Brown, 351 N.C. 601, 527 S.E.2d 651 (2000).

§ 15A-1022. Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required.

CASE NOTES

Failure of the trial judge to comply with this section did not require reversal where the defendant failed to demonstrate prejudice by the court's lapse. The transcript of plea entered into between defendant and the prosecutor covered all the areas omitted by the trial judge. State v. Hendricks, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 794 (July 5, 2000).

Concession of Guilt Upheld. — An acceptable consent as to a concession of guilt does not require the same formalities as mandated by the provisions concerning guilty pleas, and the evidence supported a proper consent where the defendant testified under oath that he understood the consequences of the concession, had discussed it with his attorney, and believed that the strategy was in his best interest. State v. Perez, 135 N.C. App. 543, 522 S.E.2d 102 (1999).

ARTICLE 59.

Maintenance of Order in the Courtroom.

§ 15A-1031. Custody and restraint of defendant and witnesses.

CASE NOTES

Defendant waived error as to having his legs shackled when, instead of objecting to being shackled, he objected to a conference regarding the shackles being held in his absence. State v. Thomas, 134 N.C. App. 560, 518 S.E.2d 222 (1999), appeal dismissed, cert. denied, 351 N.C. 119, — S.E.2d — (1999).

Quoted in State v. Elliott, — N.C. App. —, 528 S.E.2d 32, 2000 N.C. App. LEXIS 325 (2000).

§ 15A-1032. Removal of disruptive defendant.

CASE NOTES

Disruptive Pro Se Defendant's Removal Upheld. — Where record indicated that defendant continued disruptive behavior while court attempted to enter findings into the record, in spite of the trial court's warnings that persistence would warrant his removal, and defendant was present when the proceedings resumed and was given opportunity to make his objections, the court's decision to remove defendant was without error. State v. Thomas, 134 N.C. App. 560, 518 S.E.2d 222 (1999), appeal dismissed, cert. denied, 351 N.C. 119, — S.E.2d — (1999).

ARTICLE 62.

Mistrial.

§ 15A-1061. Mistrial for prejudice to defendant.

CASE NOTES

Failure to Rule Promptly. — The trial court abused its discretion in denying defendant's motion to set aside the jury verdict after waiting a year to rule on the motion. State v.

Smith, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 778 (July 5, 2000).

Remedy Less Drastic Than Mistrial Held Sufficient. —

Any prejudice to defendant caused by the prosecutor's closing remark that "in [the] sympathy game, ladies and gentlemen of the jury, it's a hands-down victory [for the prosecution]" was remedied by the actions of the trial court in sustaining defendant's objection to the statement and instructing the jury not to consider it. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (2000).

Mistrial Required After Race-Based Remark. — The trial court abused its discretion in denying defendant's motion for a mistrial after the prosecutor gratuitously referred to the jury as "twelve people good and true, twelve white jurors" although the judge, prosecutor and defendant were all white; furthermore, the comment by the trial court that "We're not going to have that thing going on" failed to cure the prosecutor's opprobrious appeal for a "race-based decision." State v. Diehl, — N.C. App. —, 528 S.E.2d 613, 2000 N.C. App. LEXIS 412 (2000).

Comment of victim's father during trial in response to defendant's contention that he was being railroaded did not result in such prejudice to defendant, who failed to request curative instructions, as to render the denial of his motion for mistrial a manifest abuse of discretion reversible on appeal. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

SUBCHAPTER XII. TRIAL PROCEDURE IN SUPERIOR COURT.

ARTICLE 72.

Selecting and Impaneling the Jury.

§ 15A-1211. Selection procedure generally; role of judge; challenge to the panel; authority of judge to excuse jurors.

CASE NOTES

Cited in State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (2000).

§ 15A-1212. Grounds for challenge for cause.

CASE NOTES

I. General Consideration.
II. Mental or Physical Infirmity.
III. Opinion as to Guilt or Innocence.
IV. Inability to Render Verdict in Accordance with Law.

I. GENERAL CONSIDERATION.

When Juror's Answers Conflict. — The trial court did not abuse its discretion in violation of Article I, Sections 19, 23, and 27 of the North Carolina Constitution and this section by excusing for cause a juror who told the prosecutor that he had reasonably strong religious beliefs about the death penalty which he had held for a long period of time; that, because of those beliefs, it would be hard for him to find the death penalty warranted under any circumstances; that his religious beliefs would substantially impair his duty as a juror to recommend to the trial court a punishment of death if the evidence warranted it; even though he also claimed he could follow the law and "go by which one I thought was right, whoever proved the most." State v. Greene, 351 N.C. 562, 528 S.E.2d 575 (2000).

II. MENTAL OR PHYSICAL INFIRMITY.

Brain Tumor and Loss of Memory. — Denial of defendant's challenge for cause to juror whose brain tumor and consequent loss of memory had not interfered with his full-time job as a loan officer and office supervisor and

who stated that note-taking would likely compensate for any memory impairment did not constitute an abuse of discretion. State v. Hedgepeth, 350 N.C. 776, 517 S.E.2d 605 (1999), cert. denied, — U.S. —, 120 S. Ct. 1274, 146 L. Ed. 2d 223 (2000).

III. OPINION AS TO GUILT OR INNOCENCE.

Ability to Set Aside Opinion. —
The trial court properly denied the defendant's challenge for cause of a prospective juror where the juror indicated his ability to set aside his opinion and render a verdict based on the law and evidence as presented in court. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (2000).

Jurors' Prior Knowledge of Related Conviction. — Where five jurors challenged for cause said they could set aside their knowledge, based on news media accounts, of defendant's prior first-degree murder conviction and could decide guilt or innocence based solely on evidence presented at trial, the trial court did not err in refusing to excuse them even though the State offered evidence during the trial that the two murders were connected. State v. Sokolowski, 351 N.C. 137, 522 S.E.2d 65 (1999).

IV. INABILITY TO RENDER VERDICT IN ACCORDANCE WITH LAW.

Inability to Impose Death Penalty. — Where four prospective jurors clearly demonstrated their inability to render a verdict in accordance with the laws of the State because of their feelings or opinions about capital punishment, the trial court did not abuse its discretion by granting the State's for-cause challenges. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

The trial court did not abuse its discretion in excusing juror because of his perceived inability to follow the law with regard to the possible imposition of capital punishment. State v. Moses, 350 N.C. 741, 517 S.E.2d 853 (1999), cert. denied, — U.S. —, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Juror with Preference for Death Penalty. — The trial court did not err by denying defendant's challenge for cause of juror who according to the defendant had an admitted tendency to "lean more strongly towards the death penalty." State v. Moses, 350 N.C. 741, 517 S.E.2d 853 (1999), cert. denied, — U.S. —, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

§ 15A-1213. Informing prospective jurors of case.

CASE NOTES

Failure to Instruct on Affirmative Defense. — Trial court committed error in declining, in violation of this section, to inform prospective jurors of the presumption of spousal coercion as an affirmative defense, but its many curative steps ameliorated any prejudice the defendant may have suffered. State v. Owen, 133 N.C. App. 543, 516 S.E.2d 159 (1999), cert. denied, 351 N.C. 117, — S.E.2d — (1999).

§ 15A-1214. Selection of jurors; procedure.

CASE NOTES

I. General Consideration.
II. Authority of Trial Judge.

I. GENERAL CONSIDERATION.

Right to Challenge. —
Defendant cannot demonstrate prejudice in the jury selection process if he does not exhaust his peremptory challenges. State v. Hyde, — N.C. —, 530 S.E.2d 281, 2000 N.C. LEXIS 443 (2000).

Preserving Exception to Acceptance of Juror Challenged for Cause. —
Defendant did not preserve his exception to the ruling on his challenge for cause for appellate review where he—after using a peremptory challenge to remove a juror whom he believed the court should have excused for cause, being denied his request for additional peremptory challenges, and announcing that he was satisfied with the last seated juror—failed to renew his earlier challenge for cause to said juror. State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1 (2000).

Where defendant did not exhaust his peremptory challenges In accord with the main volume. See State v. Billings, 348 N.C. 169, 500 S.E.2d 423 (1998).

Failure to Pass Full Panel Not Prejudicial. — Although the jury selection procedure violated the express requirement of this section that the state pass a full panel of twelve jurors, the defendant failed to show prejudice where he

was not forced to accept an undesirable juror—he did not exhaust his peremptory challenges nor request removal of the juror for cause—and, thus, could not establish any prejudice as a result of the jury selection procedure under § 15A-1443(c). State v. Lawrence, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 441 (June 16, 2000).

Cited in Frye v. Lee, 89 F. Supp. 2d 693 (W.D.N.C. 2000).

II. AUTHORITY OF TRIAL JUDGE.

Deviations Not a Violation of This Section — No violation of this section occurred where the record disclosed that no confusion or error resulted from any deviation from the prescribed statutory procedure, the defendant specifically requested or consented to such deviation, and the trial court's jury selection method did not disadvantage or prejudice him. State v. Hyde, — N.C. —, 530 S.E.2d 281, 2000 N.C. LEXIS 443 (2000).

§ 15A-1215. Alternate jurors.

CASE NOTES

Replacing Juror for Medical Reasons. — Trial judge exercised his discretion when he excused pregnant juror for medical reasons, in spite of his noting, "Well, I don't see that I have much choice." State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

Premature Selection of Foreperson. — Court found no violation of subsection (a) of this section or of the defendant's constitutional rights under N.C. Const., Article I, Section 24, when twelve jurors prematurely selected a foreperson while alternates were still present in the jury room, because they made no deliberations nor had any other conversation regarding the facts of the case. State v. Parker, 350 N.C. 411, 516 S.E.2d 106 (1999), cert. denied, — U.S. —, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Article 73.

Criminal Jury Trial in Superior Court.

§ 15A-1222. Expression of opinion prohibited.

CASE NOTES

II. Questions by Trial Judge.

II. QUESTIONS BY TRIAL JUDGE.

Trial judge's exchanges with defendant and defendant's witnesses did not constitute improperly expressed opinion; judge acted similarly with plaintiff's witnesses. Shore v. Farmer, 133 N.C. App. 350, 515 S.E.2d 495 (1999), rev'd on other grounds, 351 N.C. 166, 522 S.E.2d 73 (1999).

Prejudicial Actions by Judge. — Defendant's 16 assignments of error regarding alleged denigration of defense counsel, improper expressions of opinion and improper comments by the trial judge were without merit; the judge merely made appropriate inquiries, supervised and controlled the course of the trial and the scope and manner of witness examination with care and prudence. State v. Gell, 351 N.C. 192, 524 S.E.2d 332 (2000).

§ 15A-1223. Disqualification of judge.

CASE NOTES

When County Wherein Judge Sits Has an Interest in the Proceedings. — Motion for the presiding judge's recusal was properly denied where city presented no affidavits sup-

porting its motion, the record revealed no evidence of personal bias, prejudice or interest on the part of the judge, and the court refused to set a standard that resident superior court judges could not participate in proceedings in which the county where the judge resides, and not the judge himself, has a potential interest in the proceedings. County of Johnston v. City of Wilson, — N.C. App. —, 525 S.E.2d 826, 2000 N.C. App. LEXIS 137 (2000).

§ 15A-1227. Motion for dismissal.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Applied in State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622 (1999), cert. denied, — U.S. —, 120 S. Ct. 1432, 146 L. Ed. 2d 322 (2000).

§ 15A-1232. Jury instructions; explanation of law; opinion prohibited.

CASE NOTES

II. Expression of Opinion.
D. Remarks Concerning Counsel.

II. EXPRESSION OF OPINION.

D. Remarks Concerning Counsel.

Remarks Belittling Counsel. —
Defendant's 16 assignments of error regarding alleged denigration of defense counsel, improper expressions of opinion and improper comments by the trial judge were without merit; the judge merely made appropriate inquiries, supervised and controlled the course of the trial and the scope and manner of witness examination with care and prudence. State v. Gell, 351 N.C. 192, 524 S.E.2d 332 (2000).

§ 15A-1233. Review of testimony; use of evidence by the jury.

CASE NOTES

Failure to Conduct Jurors to Courtroom. — Defendant in capital murder case failed to meet his burden of showing prejudice as a result of the trial court's failure to conduct jurors to the courtroom as required by this section. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

Exercise of Discretion in Denying Jury's Request. —
The trial judge did not impermissibly deny the jury's request based solely on the unavailability of the transcript but plainly exercised his discretion. Moreover, the defendant acquiesced in the instruction and, therefore, could not complain that he was prejudiced by the court's action. State v. Lawrence, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 441 (June 16, 2000).

No Abuse of Discretion Found. — Where the trial court explained that to allow the jurors' request to review certain evidence might give undue importance to the portions of the evidence reviewed without giving equal importance to the other evidence in the case and cautioned the jurors that it was their duty to recall and consider all of the evidence, the trial court did not abuse its discretion in allowing the jurors' request in part; the transcript made it apparent that the trial court considered the court reporter's absence a factor in its decision. State v. Perez, 135 N.C. App. 543, 522 S.E.2d 102 (1999).

Failure to Exercise Discretion Held Prejudicial Error. — The trial court's statement that it did not have the ability to present the transcript to the jury indicated a failure to exercise discretion and resulted in prejudicial error. State v. Barrow, 350 N.C. 640, 517 S.E.2d 374 (1999).

§ 15A-1235. Length of deliberations; deadlocked jury.

CASE NOTES

I. General Consideration.
II. Instructing Jurors Not to Surrender Convictions.

I. GENERAL CONSIDERATION.

Discretion of Trial Judge. — Trial court did not abuse its discretion when it encouraged the jury to overcome its difficulty in reaching a verdict, properly reinstructed the jury as to its duty under this section, and denied defendant's motion for a mistrial due to deadlock. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

Cited in State v. Miller, — N.C. App. —, 528 S.E.2d 626, 2000 N.C. App. LEXIS 418 (2000).

II. INSTRUCTING JURORS NOT TO SURRENDER CONVICTIONS.

Instruction Held Sufficient. —
Given the length of deliberations, the substantial quantity of conflicting evidence, the failure of the defendant to request the court to instruct the jury on its failure to reach a verdict pursuant to this section, and the fact that the record was devoid of any evidence suggesting that the jury indicated it was deadlocked, the trial court did not err in failing to declare a hung jury or in failing to instruct ex mero motu as to each juror's individual responsibility under this section. State v. Cheek, 351 N.C. 48, 520 S.E.2d 545 (1999), cert. denied, — U.S. —, 120 S. Ct. 2694, — L. Ed. — (2000).

§ 15A-1236. Admonitions to jurors; regulation and separation of jurors.

CASE NOTES

Failure to Question Jurors Held Not Prejudicial. — The trial court did not err in denying defendant's motion to have jurors questioned concerning whether they had read about a statement she made in the local newspaper because the court repeatedly warned the jurors to avoid reading, watching, or listening to accounts of the trial and because the statement was eventually admitted into evidence. State v. Smith, 135 N.C. App. 649, 522 S.E.2d 321 (1999).

Stated in State v. Brogden, — N.C. App. —, 528 S.E.2d 391, 2000 N.C. App. LEXIS 423 (2000).

§ 15A-1238. Polling the jury.

CASE NOTES

The defendant was not entitled to poll the jury the morning after it returned its verdict. State v. Clark, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 635 (June 20, 2000).

Untimely Motion to Poll. — Where court allowed defendant until Monday morning to present authority for his request to individually repoll a juror, and he failed to present any arguments on this subject when the court reconvened, instead making a motion to repoll the entire jury, defendant's motion was untimely. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

§ 15A-1240. Impeachment of the verdict.

CASE NOTES

Applicability. —
The trial court erred by amending the jury verdict after deliberation to enhance the defendant's conviction to the felony of assault with a deadly weapon upon a government official, pursuant to section 14-34.2, where the trial court

instructed the jury on the charge of assault on a government official and the State's motion to amend the verdict did not comport with any of the challenges allowable under this section. State v. Brogden, — N.C. App. —, 528 S.E.2d 391, 2000 N.C. App. LEXIS 423 (2000).

§ 15A-1241. Record of proceedings.

CASE NOTES

Lack of Complete Record Harmless. — Trial judge's failure to record his ex parte communication with one prospective juror, as required by this section, was harmless error, because the record adequately revealed the substance of the unrecorded conversation and the juror was properly excused under §§ 9-6(a) and 9-6.1 "[b]ecause he was over sixty-five." State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

Applied in State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

§ 15A-1242. Defendant's election to represent himself at trial.

CASE NOTES

Strict Compliance Required — The trial court's failure to comply with this section was plain error entitling the defendant to a new trial where the record indicated that the trial court discussed with him the consequences of his decision to represent himself and advised him of his right to assigned counsel but did not make any inquiry to satisfy itself that he comprehended "the nature of the charges and proceedings and the range of permissible punishments." State v. Stanback, 529 S.E.2d 229 (N.C. Ct. App. 2000).

Inquiry Not Required Where Defendant Forfeits Right to Counsel — The defendant forfeited his right to counsel and the trial court did not err by requiring him to proceed pro se, without conducting an inquiry pursuant to this section, where: he was twice appointed counsel as an indigent, each time releasing his appointed counsel and retaining private counsel, was disruptive in the courtroom, and assaulted his attorney, resulting in an additional month's delay in the trial. State v. Montgomery, — N.C. App. —, 530 S.E.2d 66, 2000 N.C. App. LEXIS 640 (2000).

The defendant's waiver of counsel was knowing, intelligent and voluntary where the trial court apprised the defendant, who, on the day of the trial, rid himself of his attorney of more than a year in the name of strategy, not only of his right to counsel—though not necessarily his right to "fire" counsel and have more appointed—but also of the possible consequences of his "less-than-prudent" decision. Additionally, the trial court asked the counsel to remain for the duration of the trial and the defendant continued to confer with him, thus availing himself of his expertise and experience. State v. Brooks, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 601 (June 6, 2000).

§ 15A-1243. (Effective until July 1, 2001) Standby counsel for defendant representing himself.

CASE NOTES

Participation of Standby Counsel Upheld. — Where standby counsel participated only "when called upon" by defendant and in a manner that was not at odds with defendant's right to conduct his own defense, trial court did not err in permitting such participation. State v. Thomas, 134 N.C. App. 560, 518 S.E.2d 222 (1999), appeal dismissed, cert. denied, 351 N.C. 119, — S.E.2d — (1999).

§ 15A-1243. (Effective July 1, 2001) Standby counsel for defendant representing himself.

When a defendant has elected to proceed without the assistance of counsel, the trial judge in his discretion may determine that standby counsel should be appointed to assist the defendant when called upon and to bring to the judge's attention matters favorable to the defendant upon which the judge should rule upon his own motion. Appointment and compensation of standby counsel shall be in accordance with rules adopted by the Office of Indigent Defense Services. (2000-144, s. 30.)

For this section as in effect until July 1, 2001, see the main volume.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, § 7A-498 et seq.

Effect of Amendments. — Session Laws 2000-144, s. 30, effective July 1, 2001, substituted "determine that standby counsel should be appointed" for "appoint standby counsel" in the first sentence, and added the last sentence.

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.

ARTICLE 81.

General Sentencing Provisions.

§ 15A-1331. Authorized sentences; conviction.

CASE NOTES

Plea of No Contest Considered Conviction. — Defendant was convicted of the prior offense for purposes of assessing prior record level points when he entered plea of no contest, even though no final judgment had been entered. State v. Hatcher, — N.C. App. —, 524 S.E.2d 815, 2000 N.C. App. LEXIS 55 (2000).

Improper Correction of Sentence. — After granting defendant's motion for appropriate relief which correctly alleged that a prior trial judge had improperly corrected his sentence outside of defendant's presence when he discovered that the original sentence violated the Structured Sentencing Act, the trial judge properly resentenced defendant to the same amount of time. State v. Roberts, 351 N.C. 325, 523 S.E.2d 417 (2000).

Applied in State v. Hasty, 133 N.C. App. 563, 516 S.E.2d 428 (1999).

§ 15A-1333. Availability of presentence report.

(a) Presentence Reports and Sentencing Services Information Not Public Records. — A written presentence report, the record of an oral presentence report, and information obtained in the preparation of a sentencing plan by a sentencing services program under Article 61 of Chapter 7A are not public records and may not be made available to any person except as provided in this section.

(b) Access to Reports. — The defendant, his counsel, the prosecutor, or the court may have access at any reasonable time to a written presentence report or to any record of an oral presentence report. Access to a sentencing plan and information obtained in the preparation of a sentencing plan shall be in accordance with the comprehensive sentencing services program plan developed pursuant to G.S. 7A-774.

(c) Expunging Reports. — On motion of the defendant, the court in its discretion may order a written presentence report, the record of an oral presentence report, or a sentencing plan expunged from the court record. (1977, c. 711, s. 1; 2000-67, s. 15.9(c).)

Editor's Note. — Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. — Session Laws 2000-67, s. 15.9(c), effective July 1, 2000, in subsection (a), inserted "and Sentencing Services Information" and inserted the language beginning "and information obtained and ending "Article 61 of Chapter 7A"; added the last sentence in subsection (b); and in subsection (c), inserted "or a sentencing plan"; and made stylistic changes.

§ 15A-1334. The sentencing hearing.

CASE NOTES

I. General Consideration.
II. Evidence.

I. GENERAL CONSIDERATION.

After sentence had been entered, it was too late in the proceedings for defendant to inform the court of mitigating factors relevant to sentencing or to plead for leniency. State v. Rankins, 133 N.C. App. 607, 515 S.E.2d 748 (1999).

Opportunity to Prepare for Hearing. — The defendant's rights to a fair trial and to equal protection of the law under the State and Federal Constitutions, and his rights pursuant to this section, were violated by the trial court's refusal to permit him to address the court prior to sentencing. State v. Miller, — N.C. App. —, 528 S.E.2d 626, 2000 N.C. App. LEXIS 418 (2000).

II. EVIDENCE.

The trial court committed no error by allowing an unsworn victim impact statement at the sentencing hearing where the rules of evidence do not apply. State v. Hendricks, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 794 (July 5, 2000).

Article 81B.

Structured Sentencing of Persons Convicted of Crimes.

Part 1. General Provisions.

§ 15A-1340.10. Applicability of structured sentencing.

CASE NOTES

Construction with Fair Sentencing Act. — Court disagreed with defendant who asserted that there was no outright ban against consolidating offenses committed before the implementation of the Structured Sentencing Act with offenses committed after the act was implemented; crimes committed earlier were controlled by the Fair Sentencing Act. State v. Branch, 134 N.C. App. 637, 518 S.E.2d 213 (1999).

Stated in State v. Bright, 135 N.C. App. 381, 520 S.E.2d 138 (1999).

Court's Exercise of Discretion Resulted in Gender Discrimination. — Writ of habeas corpus was issued because the petitioner's prima facie claim of gender discrimination was unrebutted by the respondent where the 19 year-old petitioner was sentenced to between 23 and 36 years whereas a similarly situated 16 year-old female co-defendant received probation and eight months of time already served. The court found no mitigating or aggravating circumstances but, rather, the totality of the evidence, including arguments of the prosecutor and statements of the court, indicated that the two were equally culpable; and where both were due to be sentenced as adults. Williams v. Currie, 103 F. Supp. 2d 858 (M.D.N.C. 2000).

§ 15A-1340.11. Definitions.

CASE NOTES

Plea of No Contest Considered Conviction. — Defendant was convicted of the prior offense for purposes of assessing prior record level points when he entered the plea of no contest even though no final judgment had been entered. State v. Hatcher, — N.C. App. —, 524 S.E.2d 815, 2000 N.C. App. LEXIS 55 (2000).

Defendant's guilty plea followed by probation under § 90-96 was a "conviction" for the purposes of the Structured Sentencing Act and thus furnished a legitimate basis for the trial court's determination of defendant's sentence. State v. Hasty, 133 N.C. App. 563, 516 S.E.2d 428 (1999).

Part 2. Felony Sentencing.

§ 15A-1340.13. Procedure and incidents of sentence of imprisonment for felonies.

CASE NOTES

Stated in State v. Bright, 135 N.C. App. 381, 520 S.E.2d 138 (1999).

§ 15A-1340.14. Prior record level for felony sentencing.

CASE NOTES

Determination of Prior Record Level. — Trial court impermissibly assigned points to defendant's three prior DWI convictions where those same three DWI convictions were the basis for her habitual DWI charge. State v. Gentry, 135 N.C. App. 107, 519 S.E.2d 68 (1999).

§ 15A-1340.16. Aggravated and mitigated sentences.

CASE NOTES

Findings. — As the Structured Sentencing Act provides specifically and without exception that a trial court must make written findings when deviating from the presumptive sentence and, unlike the Fair Sentencing Act, contains no exception for a sentence imposed pursuant to a plea arrangement, the trial court erred in imposing an aggravated sentence upon defendant without making written findings. State v. Bright, 135 N.C. App. 381, 520 S.E.2d 138 (1999).

No findings of mitigating or aggravating factors were required where the trial court sentenced defendant within the presumptive guidelines for his offense. State v. Brooks, 136 N.C. App. 124, 523 S.E.2d 704 (1999), cert. denied, 351 N.C. 475, — S.E.2d — (2000).

Restitution as Mitigating Factor. — Defendant did not make substantial restitution to the victim so as to merit a mitigating instruction where the evidence indicated that defendant did not return property or money to victim until a civil lawsuit was filed and an investigator was employed. State v. Hughes, 136 N.C. App. 92, 524 S.E.2d 63 (1999).

Mitigating Factors Not Found. — Where the presentence investigative report showed that defendant had held various jobs, mostly part-time, some for undisclosed amounts of time, and only one full-time for six months, the trial court in its discretion could have found that this employment history did not amount to substantial or manifest credible evidence in support of mitigating factors. State v. Hughes, 136 N.C. App. 92, 524 S.E.2d 63 (1999).

Trial court was not required to justify a decision to sentence a defendant within the presumptive range by making findings of aggravation and mitigation under this section. State v. Campbell, 133 N.C. App. 531, 515 S.E.2d 732 (1999), cert. denied, 351 N.C. 111, — S.E.2d — (1999).

Hispanic Victims. This section was correctly applied where co-defendant testified that he and defendant selected two Hispanic men as their victims because they thought Hispanics carry large sums of cash and are less likely to report crimes committed against them. State v. Hatcher, — N.C. App. —, 524 S.E.2d 815, 2000 N.C. App. LEXIS 55 (2000).

The trial court erred in finding as an aggravating factor that defendant joined with more than one other person in committing the offense—felony child abuse—since defendant was not charged with committing a conspiracy because the state failed to meet its burden of proof. State v. Noffsinger, — N.C. App. —, 528 S.E.2d 605, 2000 N.C. App. LEXIS 420 (2000).

Age as Aggravating Factor in Crime Where Age Is Already an Element. — Where mother/defendant was accused of shaking her three-week old infant to death, the trial court did not err in finding as an aggravating factor, under subdivision (d)(11) of this section, that the victim was of a very young age, even though the victim's age had already been used as an element of the crime under § 14-318.4(a). State v. Burgess, 134 N.C. App. 632, 518 S.E.2d 209 (1999).

Great Monetary Loss as Aggravating Factor. — The trial court did not err in finding the aggravating factor of damage causing great monetary loss where the crime involved the use of computers to divert millions of dollars and where the amount of money involved in the offense was not an element but came into play only at the time of sentencing. State v. Hughes, 136 N.C. App. 92, 524 S.E.2d 63 (1999).

Evidence Sufficient to Support "Great Monetary Value" Factor — A sufficient evidentiary basis existed to support the aggravating factor that the defendant's larceny involved the "taking of property of great monetary value" where the defendant pled guilty to all the facts listed in the indictment which listed the value of the property taken as $ 17,000 and where the prosecutor summarized the facts to the judge by saying that "the house had been ransacked." State v. Hendricks, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 794 (July 5, 2000).

The trial court properly found as an aggravating sentencing factor that 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 where the defendant engaged a trooper in a high speed chase which resulted in the death of two passengers of a truck which the defendant struck. State v. Fuller, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 632 (June 20, 2000).

Clerical Error Did Not Entitle Defendant to New Trial. — Contrary to the defendant's assertion, the record reflected that the trial court did not — and recognized that it could not — find the aggravating factor that defendant was armed with a deadly weapon in sentencing defendant for an armed robbery conviction, notwithstanding a clerical error on the sentencing form. State v. Gell, 351 N.C. 192, 524 S.E.2d 332 (2000).

Capital Sentence Upheld — Equal protection clause was not violated when court applied felony murder rule and punished defendant more severely by sentencing him to death because more victims were harmed as authorized subdivision (d)(8) of this section and § 15A-2000(e)(11). State v. Jones, 133 N.C. App. 448, 516 S.E.2d 405 (1999).

Stated in Williams v. Currie, 103 F. Supp. 2d 858 (M.D.N.C. 2000).

§ 15A-1340.17. Punishment limits for each class of offense and prior record level.

CASE NOTES

Construction with Federal Law. — Defendant was properly indicted for violating 18 U.S.C. § 922(g)(1) where his prior State felon-in-possession conviction resulted in an 8 to 10 month sentence after the application of this section, because he could potentially have been sentenced to 30 months in prison. United States v. Jones, 195 F.3d 205 (4th Cir. 1999), cert. denied, — U.S. —, 120 S. Ct. 1443, 146 L. Ed. 2d 330 (2000).

Because the focus in sentencing under federal law is on the potential punishment for the crime, not the individual, the district court properly considered the North Carolina statutory sentence maximums, not defendant's individual maximum, and used defendant's June 1998, conviction as a prior felony for purposes of United States Sentencing Guidelines (USSG) § 4B1.1. United States v. Chavez-Lopez, — F.3d —, 2000 U.S. App. LEXIS 3820 (4th Cir. March 14, 2000).

Court's Exercise of Discretion Resulted in Gender Discrimination. — Writ of habeas corpus was issued because the petitioner's prima facie claim of gender discrimination was unrebutted by the respondent where the 19 year-old petitioner was sentenced to between 23 and 36 years whereas a similarly situated 16

year-old female co-defendant received probation and eight months of time already served; where the court found no mitigating or aggravating circumstances but, rather, the totality of the evidence, including arguments of the prosecutor and statements of the court, indicated that the two were equally culpable; and where both were due to be sentenced as adults. Williams v. Currie, 103 F. Supp. 2d 858 (M.D.N.C. 2000).

Cited in State v. Roberts, 351 N.C. 325, 523 S.E.2d 417 (2000); In re Wright, — N.C. App. —, 527 S.E.2d 70, 2000 N.C. App. LEXIS 265 (2000).

Article 82.

Probation.

§ 15A-1342. Incidents of probation.

CASE NOTES

Quoted in In re McLean, 135 N.C. App. 387, 521 S.E.2d 121 (1999).

§ 15A-1343. Conditions of probation.

(a) In General. — The court may impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so.

(b) Regular Conditions. — As regular conditions of probation, a defendant must:

(1) Commit no criminal offense in any jurisdiction.

(2) Remain within the jurisdiction of the court unless granted written permission to leave by the court or his probation officer.

(3) Report as directed by the court or his probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit him at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment.

(4) Satisfy child support and other family obligations as required by the court. If the court requires the payment of child support, the amount of the payments shall be determined as provided in G.S. 50-13.4(c).

(5) Possess no firearm, explosive device or other deadly weapon listed in G.S. 14-269 without the written permission of the court.

(6) Pay a supervision fee as specified in subsection (c1).

(7) Remain gainfully and suitably employed or faithfully pursue a course of study or of vocational training that will equip him for suitable employment. A defendant pursuing a course of study or of vocational training shall abide by all of the rules of the institution providing the education or training, and the probation officer shall forward a copy of the probation judgment to that institution and request to be notified of any violations of institutional rules by the defendant.

(8) Notify the probation officer if he fails to obtain or retain satisfactory employment.

(9) Pay the costs of court, any fine ordered by the court, and make restitution or reparation as provided in subsection (d).

(10) Pay the State of North Carolina for the costs of appointed counsel, public defender, or appellate defender to represent him in the case(s) for which he was placed on probation.

(11) At a time to be designated by his probation officer, visit with his probation officer a facility maintained by the Division of Prisons.

In addition to these regular conditions of probation, a defendant required to serve an active term of imprisonment as a condition of special probation pursuant to G.S. 15A-1344(e) or G.S. 15A-1351(a) shall, as additional regular conditions of probation, obey the rules and regulations of the Department of Correction governing the conduct of inmates while imprisoned and report to a probation officer in the State of North Carolina within 72 hours of his discharge from the active term of imprisonment.

Regular conditions of probation apply to each defendant placed on supervised probation unless the presiding judge specifically exempts the defendant from one or more of the conditions in open court and in the judgment of the court. It is not necessary for the presiding judge to state each regular condition of probation in open court, but the conditions must be set forth in the judgment of the court.

Defendants placed on unsupervised probation are subject to the provisions of this subsection, except that defendants placed on unsupervised probation are not subject to the regular conditions contained in subdivisions (2), (3), (6), (8), and (11).

(b1) Special Conditions. — In addition to the regular conditions of probation specified in subsection (b), the court may, as a condition of probation, require that during the probation the defendant comply with one or more of the following special conditions:

(1) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(2) Attend or reside in a facility providing rehabilitation, counseling, treatment, social skills, or employment training, instruction, recreation, or residence for persons on probation.

(2a) Submit to a period of residential treatment in the Intensive Motivational Program of Alternative Correctional Treatment (IMPACT), pursuant to G.S. 15A-1343.1, for a minimum of 90 days or a maximum of 120 days and abide by all rules and regulations of that program. This condition may also include a period of supervision through the Post-Boot Camp Probation Program.

(2b) Participate in and successfully complete a Drug Treatment Court Program pursuant to Article 62 of Chapter 7A of the General Statutes.

(3) Submit to imprisonment required for special probation under G.S. 15A-1351(a) or G.S. 15A-1344(e).

(3a) Repealed by Session Laws 1997-57, s. 3.

(3b) Submit to supervision by officers assigned to the Intensive Supervision Program established pursuant to G.S. 143B-262(c), and abide by the rules adopted for that Program. Unless otherwise ordered by the court, intensive supervision also requires multiple contacts by a probation officer per week, a specific period each day during which the offender must be at his or her residence, and that the offender remain gainfully and suitably employed or faithfully pursue a course of study or of vocational training that will equip the offender for suitable employment.

(3c) Remain at his or her residence unless the court or the probation officer authorizes the offender to leave for the purpose of employment, counseling, a course of study, or vocational training. The offender shall be required to wear a device which permits the supervising agency to monitor the offender's compliance with the condition electronically.

(4) Surrender his or her driver's license to the clerk of superior court, and not operate a motor vehicle for a period specified by the court.

(5) Compensate the Department of Environment and Natural Resources or the North Carolina Wildlife Resources Commission, as the case

may be, for the replacement costs of any marine and estuarine resources or any wildlife resources which were taken, injured, removed, harmfully altered, damaged or destroyed as a result of a criminal offense of which the defendant was convicted. If any investigation is required by officers or agents of the Department of Environment and Natural Resources or the Wildlife Resources Commission in determining the extent of the destruction of resources involved, the court may include compensation of the agency for investigative costs as a condition of probation. This subdivision does not apply in any case governed by G.S. 143-215.3(a)(7).

(6) Perform community or reparation service and pay any fee required by law or ordered by the court for participation in the community or reparation service program.

(7) Submit at reasonable times to warrantless searches by a probation officer of his or her person and of his or her vehicle and premises while the probationer is present, for purposes specified by the court and reasonably related to his or her probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful. Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse the Department of Correction for the actual cost of drug screening and drug testing, if the results are positive.

(8) Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for him or her 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.

(8a) Purchase the least expensive annual statewide license or combination of licenses to hunt, trap, or fish listed in G.S. 113-270.2, 113-270.3, 113-270.5, 113-271, 113-272, and 113-272.2 that would be required to engage lawfully in the specific activity or activities in which the defendant was engaged and which constitute the basis of the offense or offenses of which he was convicted.

(9) If the offense is one in which there is evidence of physical, mental or sexual abuse of a minor, the court should encourage the minor and the minor's parents or custodians to participate in rehabilitative treatment and may order the defendant to pay the cost of such treatment.

(9a) Attend and complete an abuser treatment program if (i) the court finds the defendant is responsible for acts of domestic violence and (ii) the program is approved by the Department of Administration.

(10) Satisfy any other conditions determined by the court to be reasonably related to his rehabilitation.

(b2) Special Conditions of Probation for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. — As special conditions of probation, a defendant 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, must:

(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 court.

(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 the court expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the minor child's best interest to allow the probationer to reside in the same household with a minor child.
(6) Satisfy any other conditions determined by the court to be reasonably related to his rehabilitation.

Defendants subject to the provisions of this subsection shall not be placed on unsupervised probation.

(c) Statement of Conditions. — A defendant released on supervised probation must be given a written statement explicitly setting forth the conditions on which he is being released. If any modification of the terms of that probation is subsequently made, he must be given a written statement setting forth the modifications.

(c1) Supervision Fee. — Any person placed on supervised probation pursuant to subsection (a) shall pay a supervision fee of twenty dollars ($20.00) per month, unless exempted by the court. The court may exempt a person from paying the fee only for good cause and upon written motion of the person placed on supervised probation. No person shall be required to pay more than one supervision fee per month. The court may require that the fee be paid in advance or in a lump sum or sums, and a probation officer may require payment by such methods if he is authorized by subsection (g) to determine the payment schedule. Supervision fees must be paid to the clerk of court for the county in which the judgment was entered or the deferred prosecution agreement was filed. Fees collected under this subsection shall be transmitted to the State for deposit into the State's General Fund.

(d) Restitution as a Condition of Probation. — As a condition of probation, a defendant may be required to make restitution or reparation to an aggrieved party or parties who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant. When restitution or reparation is a condition imposed, the court shall take into consideration the factors set out in G.S. 15A-1340.35 and G.S. 15A-1340.36. As used herein, "reparation" shall include but not be limited to the performing of community services, volunteer work, or doing such other acts or things as shall aid the defendant in his rehabilitation. As used herein "aggrieved party" includes individuals, firms, corporations, associations, other organizations, and government agencies, whether federal, State or local, including the Crime Victims Compensation Fund established by G.S. 15B-23. A government agency may benefit by way of reparation even though the agency was not a party to the crime provided that when reparation is ordered, community service work shall be rendered only after approval has been granted by the owner or person in charge of the property or premises where the work will be done.

(e) **(Effective until July 1, 2001)** Costs of Court and Appointed Counsel. — Unless the court finds there are extenuating circumstances, any person placed upon supervised or unsupervised probation under the terms set forth by the court shall, as a condition of probation, be required to pay all court costs and costs for appointed counsel or public defender in the case in which he was convicted. The court shall determine the amount due and the method of payment.

(e) **(Effective July 1, 2001)** Costs of Court and Appointed Counsel. — Unless the court finds there are extenuating circumstances, any person placed

§ 15A-1343(e) is set out twice. See Notes.

upon supervised or unsupervised probation under the terms set forth by the court shall, as a condition of probation, be required to pay all court costs and costs for appointed counsel or public defender in the case in which he was convicted. The cost of appointed counsel or public defender services shall be determined in accordance with rules adopted by the Office of Indigent Defense Services. The court shall determine the amount of those costs to be repaid and the method of payment.

(f) Repealed by Session Laws 1983, c. 561, s. 5.

(g) Probation Officer May Determine Payment Schedules. — If a person placed on supervised probation is required as a condition of that probation to pay any moneys to the clerk of superior court, the court may delegate to a probation officer the responsibility to determine the payment schedule. The court may also authorize the probation officer to transfer the person to unsupervised probation after all the moneys are paid to the clerk. If the probation officer transfers a person to unsupervised probation, he must notify the clerk of that action. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 8-10; 1979, c. 662, s. 1; c. 801, s. 3; c. 830, s. 12; 1981, c. 530, ss. 1, 2; 1983, c. 135, s. 1; c. 561, ss. 1-6; c. 567, s. 2; c. 712, s. 1; 1983 (Reg. Sess., 1984), c. 972, ss. 1, 2; 1985, c. 474, ss. 1, 7, 8; 1985 (Reg. Sess., 1986), c. 859, ss. 1, 2; 1987, c. 282, s. 33; c. 397, s. 1; c. 579, ss. 1, 2; c. 598, s. 1; c. 819, s. 32; c. 830, s. 17; 1989, c. 529, s. 5; c. 727, s. 218(4); 1989 (Reg. Sess., 1990), c. 1010, s. 1; c. 1034, s. 1; 1991 (Reg. Sess., 1992), c. 1000, s. 1; 1993, c. 538, s. 16; 1994, Ex. Sess., c. 9, s. 1; c. 24, s. 14(b); 1996, 2nd Ex. Sess., c. 18, s. 20.14(c); 1997-57, s. 3; 1997-443, ss. 11A.119(a), 19.11(a); 1998-212, ss. 17.21(a), 19.4(f); 1999-298, s. 2; 2000-125, s. 8; 2000-144, s. 31.)

Subsection (e) Set Out Twice. — The first version of subsection (e) set out above is effective until July 1, 2001. The second version of subsection (e) set out above is effective July 1, 2001.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, § 7A-498 st seq.

Effect of Amendments. —

Session Laws 2000-125, s. 8, effective December 1, 2000, and applicable to offenses committed on or after that date, substituted the first instance of "the probationer" for "he" in subdivision (b1)(7); added subdivision (b1)(9a); and inserted "or her" in subdivisions (b1)(4), (b1)(7), and (b1)(8).

Session Laws 2000-144, s. 31, effective July 1, 2001, in subsection (e), inserted the next-to-last sentence, relating to the Office of Indigent Defense Services, and substituted "of those costs to be repaid" for "due" in the last sentence.

CASE NOTES

IV. Restitution.

IV. RESTITUTION.

Restitution Cannot Be Imposed with Active Prison Sentence. — When the court imposes an active sentence, it may recommend restitution as a condition of work-release or as a condition of post-release supervision and parole or as a condition of probation, but it may not require the defendant to make restitution while serving an active sentence. State v. Hughes, 136 N.C. App. 92, 524 S.E.2d 63 (1999).

§ 15A-1343.2. Special probation rules for persons sentenced under Article 81B.

CASE NOTES

Resentencing was required for defendant's reckless driving conviction when trial court sentenced defendant to a longer period than that provided in this section without making the required finding. State v. Cardwell, 133 N.C. App. 496, 516 S.E.2d 388 (1999).

Findings Required for Exceptional Probation Terms. — Trial court erred in placing defendant on supervised probation for a period of 60 months without making findings that a period longer than 36 months was necessary. State v. Hughes, 136 N.C. App. 92, 524 S.E.2d 63 (1999).

§ 15A-1344. Response to violations; alteration and revocation.

CASE NOTES

Stated in In re McLean, 135 N.C. App. 387, 521 S.E.2d 121 (1999).

ARTICLE 83.

Imprisonment.

§ 15A-1354. Concurrent and consecutive terms of imprisonment.

CASE NOTES

Trial judge was not required to inform jurors whether he intended to impose concurrent or consecutive sentences before they deliberated concerning whether or not to recommend the death sentence. State v. Parker, 350 N.C. 411, 516 S.E.2d 106 (1999), cert. denied, — U.S. —, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Imposition of Consecutive Sentences Outside Defendant's Presence. — Where the written judgment entered by the trial court provided that defendant's sentences would run consecutively, not concurrently, and thereby substantively changed the sentence outside the presence of the defendant, the sentence would be vacated and the case remanded for the entry of a new sentencing judgment. State v. Crumbley, 135 N.C. App. 59, 519 S.E.2d 94 (1999).

ARTICLE 84A.

Post-Release Supervision.

§ 15A-1368.6. Arrest and hearing on post-release supervision violation.

(a) Arrest for Violation of Post-Release Supervision. — A supervisee is subject to arrest by a law enforcement officer or a post-release supervision officer for violation of conditions of post-release supervision only upon issuance of an order of temporary or conditional revocation of post-release supervision by the Commission. However, a post-release supervision revocation hearing under subsection (e) of this section may be held without first arresting the supervisee.

(b) When and Where Preliminary Hearing on Post-Release Supervision Violation Required. — Unless the hearing required by subsection (e) of this section is first held or a continuance is requested by the supervisee, a preliminary hearing on supervision violation shall be held reasonably near the place of the alleged violation or arrest and within seven working days of the arrest of a supervisee to determine whether there is probable cause to believe that the supervisee violated a condition of post-release supervision. Otherwise, the supervisee shall be released seven working days after arrest to continue on supervision pending a hearing. If the supervisee is not within the State, the preliminary hearing is as prescribed by G.S. 148-65.1A.

(c) Officers to Conduct Preliminary Hearing. — The preliminary hearing on post-release supervision violation shall be conducted by a judicial official, or by a hearing officer designated by the Commission. A person employed by the Department of Correction shall not serve as a hearing officer at a hearing provided by this section unless that person is a member of the Commission, or is employed solely as a hearing officer.

(d) Procedure for Preliminary Hearing. — The Department of Correction shall give the supervisee notice of the preliminary hearing and its purpose, including a statement of the violations alleged. At the hearing, the supervisee may appear and speak in the supervisee's own behalf, may present relevant information, and may, on request, personally question witnesses and adverse informants, unless the hearing officer finds good cause for not allowing confrontation. If the person holding the hearing determines there is probable cause to believe the supervisee violated conditions of supervision, the hearing officer shall summarize the reasons for the determination and the evidence relied on. Formal rules of evidence do not apply at the hearing. If probable cause is found, the supervisee may be held in the custody of the Department of Correction to serve the appropriate term of imprisonment, subject to the outcome of a revocation hearing under subsection (e) of this section.

(e) Revocation Hearing. — Before finally revoking post-release supervision, the Commission shall, unless the supervisee waived the hearing or the time limit, provide a hearing within 45 days of the supervisee's reconfinement to determine whether to revoke supervision finally. For purposes of this subsection, the 45-day period begins when the preliminary hearing required by subsection (b) of this section is held or waived, or upon the passage of seven working days after arrest, whichever is sooner. The Commission shall adopt rules governing the hearing. (1993, c. 538, s. 20.1; 1994, Ex. Sess., c. 24, s. 14(b); 1996, 2nd Ex. Sess., c. 18, s. 20.15(b); 1997-237, s. 1; 2000-189, s. 1.)

Effect of Amendments. — Session Laws 2000-189, s. 1, effective August 2, 2000, deleted "and shall file and publish them as provided in Article 5 of Chapter 150B of the General Statutes" at the end of subsection (e).

Article 85.

Parole.

§ 15A-1371. Parole eligibility, consideration, and refusal.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in Hawkins v. Freeman, 195 F.3d 732 (4th Cir. 1999); Frye v. Lee, 89 F. Supp. 2d 693 (W.D.N.C. 2000).

§ 15A-1373. Incidents of parole.

CASE NOTES

Stated in Hawkins v. Freeman, 195 F.3d 732 (4th Cir. 1999).

§ 15A-1374. Conditions of parole.

CASE NOTES

Cited in Hawkins v. Freeman, 195 F.3d 732 (4th Cir. 1999).

§ 15A-1376. Arrest and hearing on parole violation.

(a) Arrest for Violation of Parole. — A parolee is subject to arrest by a law-enforcement officer or a parole officer for violation of conditions of parole only upon the issuance of an order of temporary or conditional revocation of parole by the Post-Release Supervision and Parole Commission. However, a parole revocation hearing under subsection (e) may be held without first arresting the parolee.

(b) When and Where Preliminary Hearing on Parole Violation Required. — Unless the hearing required by subsection (e) is first held or a continuance is requested by the parolee, a preliminary hearing on parole violation must be held reasonably near the place of the alleged violation or arrest and within seven working days of the arrest of a parolee to determine whether there is probable cause to believe that he violated a condition of parole. Otherwise, the parolee must be released seven working days after his arrest to continue on parole pending a hearing. If the parolee is not within the State, his preliminary hearing is as prescribed by G.S. 148-65.1A.

(c) Officers to Conduct Hearing. — The preliminary hearing on parole violation must be conducted by a judicial official, or by a hearing officer designated by the Post-Release Supervision and Parole Commission. No person employed by the Department of Correction may serve as a hearing officer at a hearing provided in this section unless he is a member of the Post-Release Supervision and Parole Commission or is employed solely as a hearing officer.

(d) Procedure for Preliminary Hearing on Parole Violation. — The Department of Correction must give the parolee notice of the preliminary hearing and its purpose, including a statement of the violations alleged. At the hearing, the parolee may appear and speak in his own behalf, may present relevant information, and may, on request, personally question witnesses and adverse informants, unless the hearing officer finds good cause for not allowing confrontation. If the person holding the hearing determines there is probable cause to believe the parolee violated his parole, he must summarize the reasons for his determination and the evidence he relied on. Formal rules of evidence do not apply at the hearing. If probable cause is found, the parolee may be held in the custody of the Department of Correction to serve the appropriate term of imprisonment, subject to the outcome of a revocation hearing under subsection (e).

(e) Revocation Hearing. — Before finally revoking parole, the Post-Release Supervision and Parole Commission must, unless the parolee waived the hearing or the time limit, provide a hearing within 45 days of the parolee's reconfinement to determine whether to revoke parole finally. The Post-Release

Supervision and Parole Commission must adopt rules governing the hearing. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 23-26; 1987, c. 827, s. 1; 1993, c. 538, s. 40; 1994, Ex. Sess., c. 24, s. 14(b); 1996, 2nd Ex. Sess., c. 18, s. 20.15(a); 2000-189, s. 2.)

Effect of Amendments. — Session Laws 2000-189, s. 2, effective August 2, 2000, substituted "adopt rules governing the hearing" for "adopt regulations governing the hearing and must file and publish them as provided in Article 5 of the Chapter 150B of the General Statutes" at the end of subsection (e).

CASE NOTES

Cited in Hawkins v. Freeman, 195 F.3d 732 (4th Cir. 1999).

SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.

ARTICLE 89.

Motion for Appropriate Relief and Other Post-Trial Relief.

§ 15A-1415. Grounds for appropriate relief which may be asserted by defendant after verdict; limitation as to time.

CASE NOTES

Newly Discovered Evidence Not Credible. — Trial court properly denied defendant's motion for appropriate relief where newly discovered evidence was a confession, was found inconsistent with the facts, and was by an individual who later stated that he only made the statement as a result of threats by police officers to have his girlfriend evicted and have social services take away her child. State v. Garner, 136 N.C. App. 1, 523 S.E.2d 689 (1999), cert. denied, 351 N.C. 477, — S.E.2d — (2000).

Trial court properly denied defendant's motion for appropriate relief where newly discovered evidence was a witness's recantation of his trial testimony and was probably false. State v. Garner, 136 N.C. App. 1, 523 S.E.2d 689 (1999), cert. denied, 351 N.C. 477, — S.E.2d — (2000).

Newly Discovered Evidence Did Not Warrant New Trial. — While affidavit of witness changed her account of defendant's involvement in a finance office robbery, it merely served to impeach and contradict earlier testimony by two other victims and was not of "such a nature that a different result will probably be reached at a new trial," given the strength of the two eyewitness identifications. State v. Garner, 136 N.C. App. 1, 523 S.E.2d 689 (1999), cert. denied, 351 N.C. 477, — S.E.2d — (2000).

Defendant failed to show that newly discovered evidence warranted a new trial where the evidence consisted of cellmate's testimony regarding an accomplice's plan to commit perjury, offered to contradict prior testimony; a detective's affidavit relating to the post-conviction investigation, found immaterial or irrelevant; and the affidavits of experts in eyewitness identification and forensic psychiatry, offered to discredit a former witness. State v. Garner, 136 N.C. App. 1, 523 S.E.2d 689 (1999), cert. denied, 351 N.C. 477, — S.E.2d — (2000).

Defendant Entitled to Discovery. — Defendant whose motion for appropriate relief was denied on May 21, 1996, was nevertheless entitled to discovery under this section, since trial court resurrected the defendant's motion by allowing him until June 30, 1996, to respond to the State's motion for summary denial of defendant's motion to vacate. State v. Basden, 350 N.C. 579, 515 S.E.2d 220 (1999).

Applicability of Subsection (e). — This section did not supersede and effectively overrule State v. Taylor, 327 N.C. 147, 393 S.E.2d 801, and thereby set out a specific, concrete set of discovery rules applicable to materials privileged between defendant and his trial counsel. Discovery under this subsection is not per se limited to merely "oral and written communi-

cations," and determining the extent of discovery—the inclusion of work product, for example—under this subsection is the job of the court, not the privilege of the trial counsel who is accused of ineffective assistance of counsel. State v. Buckner, — N.C. —, 527 S.E.2d 307, 2000 N.C. LEXIS 234 (2000).

Applicability of Subsection (f). — Subsection (f) of this section, which became effective on June 21, 1996, and provides broader post-conviction discovery in capital cases, did not apply to defendant's case, which was filed before the effective date of the act, because the North Carolina Supreme Court held in State v. Green, 350 N.C. 400, 514 S.E.2d 724 (1999), that subsection (f) did not apply retroactively. Self v. Johnson, 1999 U.S. Dist. LEXIS 21346, — F. Supp. 2d — (E.D.N.C. December 10, 1999).

Time Requirements of Subsection (f). — To be entitled to postconviction discovery under subsection (f) of this section, a capital defendant, not otherwise eligible under State v. Green, 350 N.C. 400, 514 S.E.2d 724 (1999), must file a written motion for discovery within 120 days of the triggering occurrence under § 15A-1415(a); because the purpose of the statute is to assist capital defendants in investigating, preparing, or presenting all potential claims in a single motion for appropriate relief (MAR), it logically follows that any requests for postconviction discovery must necessarily be made within the same time period statutorily prescribed for filing the underlying MAR. State v. Williams, 351 N.C. 465, 526 S.E.2d 655 (2000).

Quoted in State v. Branch, 134 N.C. App. 637, 518 S.E.2d 213 (1999).

Cited in State v. Linemann, 135 N.C. App. 734, 522 S.E.2d 781 (1999); Fisher v. Lee, 215 F.3d 438 (4th Cir. 2000).

§ 15A-1416. Motion by the State for appropriate relief.

CASE NOTES

Letter from the Department of Correction, alerting the trial court of its erroneously consolidated sentence and resulting in a less-favorable resentencing, was not a motion for appropriate relief and, therefore, did not need to be filed within the statutory period of 10 days. State v. Branch, 134 N.C. App. 637, 518 S.E.2d 213 (1999).

Applied in State v. Linemann, 135 N.C. App. 734, 522 S.E.2d 781 (1999).

§ 15A-1417. Relief available.

CASE NOTES

Resentencing Inappropriate Outside Presence of Defendant. — After granting defendant's motion for appropriate relief, which correctly alleged that a prior trial judge had improperly corrected his sentence outside of defendant's presence when it was discovered that the original sentence violated the Structured Sentencing Act, the trial judge properly resentenced defendant to the same amount of time. State v. Roberts, 351 N.C. 325, 523 S.E.2d 417 (2000).

Where defendant was resentenced after trial court discovered that its prior consolidated sentence was illegal, the court retained jurisdiction, even though the term of court had expired, and the judgment was valid under this section. State v. Branch, 134 N.C. App. 637, 518 S.E.2d 213 (1999).

§ 15A-1418. Motion for appropriate relief in the appellate division.

CASE NOTES

Applied in State v. Garner, 136 N.C. App. 1, 523 S.E.2d 689 (1999), cert. denied, 351 N.C. 477, — S.E.2d — (2000).

Cited in State v. Riley, — N.C. App. —, 528 S.E.2d 590, 2000 N.C. App. LEXIS 411 (2000).

§ 15A-1419. When motion for appropriate relief denied.

CASE NOTES

Construction with Other Law. — The court properly rejected the defendant's challenge to the jury instruction on the basis of the adequate and independent state procedural rule set forth in this section and not because it was statutorily obliged to do so by § 15A-2000(d)(2). Fisher v. Lee, 215 F.3d 438 (4th Cir. 2000).

Denial of Relief Where Claim Not Raised on Previous Appeal. —

The defendant's motion for appropriate relief (MAR) challenging the State's use of the short form indictment on constitutional grounds was denied because the defendant was in a position on a previous appeal to raise the issues in the MAR but failed to do so. State v. Riley, — N.C. App. —, 528 S.E.2d 590, 2000 N.C. App. LEXIS 411 (2000).

Ineffective assistance claims are not categorically different from other kinds of claims that can be barred under this section; the North Carolina courts are required to examine each claim to determine whether the particular claim at issue could have been brought on direct review. McCarver v. Lee, — F.3d —, 2000 U.S. App. LEXIS 12222 (4th Cir. May 23, 2000).

Applied in State v. Garner, 136 N.C. App. 1, 523 S.E.2d 689 (1999), cert. denied, 351 N.C. 477, — S.E.2d — (2000).

Quoted in Self v. Johnson, 1999 U.S. Dist. LEXIS 21346, — F. Supp. 2d — (E.D.N.C. December 10, 1999).

Cited in State v. Linemann, 135 N.C. App. 734, 522 S.E.2d 781 (1999); State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (2000).

§ 15A-1420. Motion for appropriate relief; procedure.

CASE NOTES

The defendant's motion under this section was properly denied where the evidence showed that the twelve-year-old daughter of his girlfriend had recanted after being repeatedly questioned by family and friends because she was embarrassed and did not want to have to testify on the sexual matters again. State v. Doisey, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 779 (July 5, 2000).

Cited in State v. Branch, 134 N.C. App. 637, 518 S.E.2d 213 (1999).

§ 15A-1422. Review upon appeal.

CASE NOTES

Defendant's motion for appropriate relief was reviewable where the appellate court's order simply reversed the lower court's judgment, and did not review the decision by the lower court to grant the defendant's motion, and therefore did not constitute a final decision. State v. Roberts, 351 N.C. 325, 523 S.E.2d 417 (2000).

Applied in State v. Linemann, 135 N.C. App. 734, 522 S.E.2d 781 (1999).

Cited in State v. Doisey, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 779 (July 5, 2000).

ARTICLE 90.

Appeals from Magistrates and District Court Judges.

§ 15A-1431. Appeals by defendants from magistrate and district court judge; trial de novo.

CASE NOTES

Entry of Judgment. — Defendant's purported appeal was untimely where it was not made within 10 days of the original judgment in which the defendant was found guilty of attempted simple assault, simple assault and communicating threats; the district court's intervening correction of various errors on the sentencing form did not constitute a new judgment from which to start counting the ten days. State v. Linemann, 135 N.C. App. 734, 522 S.E.2d 781 (1999).

ARTICLE 91.

Appeal to Appellate Division.

§ 15A-1443. Existence and showing of prejudice.

CASE NOTES

I. General Consideration.
II. Prejudicial Error.
III. Harmless Error.
IV. Rights under Federal Constitution.

I. GENERAL CONSIDERATION.

Applied in State v. Moses, 350 N.C. 741, 517 S.E.2d 853 (1999), cert. denied, — U.S. —, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000); State v. Holston, 134 N.C. App. 599, 518 S.E.2d 216 (1999); State v. Cody, 135 N.C. App. 722, 522 S.E.2d 777 (1999); State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000); State v. Elliott, — N.C. App. —, 528 S.E.2d 32, 2000 N.C. App. LEXIS 325 (2000); State v. Diehl, — N.C. App. —, 528 S.E.2d 613, 2000 N.C. App. LEXIS 412 (2000); State v. Merrill, — N.C. App. —, 530 S.E.2d 608, 2000 N.C. App. LEXIS 597 (2000); State v. Harshaw, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 776 (July 5, 2000); State v. Hendricks, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 794 (July 5, 2000).

Quoted in State v. Cardwell, 133 N.C. App. 496, 516 S.E.2d 388 (1999).

II. PREJUDICIAL ERROR.

Error Must Affect Probable Result of Trial. —

Defendant was granted a new trial where the trial court failed to give a limiting instruction concerning statements from a co-defendant describing defendant's involvement in the robbery, and there was a reasonable possibility the outcome of the trial would have been different for defendant with the instruction. State v. Robinson, — N.C. App. —, 524 S.E.2d 805, 2000 N.C. App. LEXIS 58 (2000).

Failure to Give Limiting Instruction. — When, at a joint trial, evidence is admitted against one defendant that is not admissible against a co-defendant, it is the duty of the trial court to give a specific limiting instruction due to the inherent danger of confusing the jury with the admission of evidence applicable only to one of multiple defendants. State v. Robinson, — N.C. App. —, 524 S.E.2d 805, 2000 N.C. App. LEXIS 58 (2000).

Prejudice from Excluded Evidence Held Cured. — Even if evidence that defendant requested a polygraph exam was erroneously excluded on cross-examination of the detective, any prejudice was cured by defendant's subsequent testimony that such a request was made. State v. Cabe, — N.C. App. —, 524 S.E.2d 828, 2000 N.C. App. LEXIS 53 (2000), cert. denied, 351 N.C. 475, — S.E.2d — (2000).

Error Held Prejudicial. —

Defendant was granted a new trial because there was a reasonable possibility that, had the improperly admitted evidence of defendant's prior conviction of common law robbery been

excluded, a different result might have been reached in defendant's trial. State v. Willis, — N.C. App. —, 526 S.E.2d 191, 2000 N.C. App. LEXIS 148 (2000).

III. HARMLESS ERROR.

Erroneous admission of hearsay,

The trial court's admission of a police officer's statement recounting that the defendant's wife had told him that the defendant had pulled out a patch of her hair did not constitute prejudicial error, in light of the overwhelming evidence of defendant's guilt, although the hearsay statement was collateral to the main issues in the prosecution, and should not have been admitted. State v. Crockett, — N.C. App. —, 530 S.E.2d 359, 2000 N.C. App. LEXIS 548 (2000).

Failure to Pass Full Panel Not Prejudicial. — Although the jury selection procedure violated the express requirement of § 15A-1214(d) that the state pass a full panel of twelve jurors, the defendant failed to show prejudice where he was not forced to accept an undesirable juror—he did not exhaust his peremptory challenges nor request removal of the juror for cause—and, thus, could not establish any prejudice as a result of the jury selection procedure under this section. State v. Lawrence, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 441 (June 16, 2000).

No Error Where Defendant Failed to Show Prejudice — Where defendant was incorrectly sentenced to life imprisonment, and, within a few hours, re-sentenced to life without parole based on the court's corrected interpretation of § 14-17, his claim that his being misinformed of his ineligibility for parole prejudiced him by causing him to forgo presenting evidence of imperfect self-defense was without merit. State v. Lesane, — N.C. App. —, 528 S.E.2d 37, 2000 N.C. App. LEXIS 323 (2000).

Error in instructions with respect to actual or constructive possession did not entitle defendant to a new trial, because the central issue was whether defendant's use of pistol to threaten and endanger victim was close enough in time to the taking of property as to constitute one continuous transaction, and the trial court's instructions upon this point were clear and correct. State v. Jarrett, — N.C. App. —, 527 S.E.2d 693, 2000 N.C. App. LEXIS 318 (2000).

Admission of Identification with Hypnotically Refreshed Details. — Trial court's determination that witness' identification was based upon her observations the night of the murder and was related immediately to police well before hypnosis, and that it was "not tainted" by her subsequent hypnotic sessions, was uncontradicted by any evidence in the record. State v. Hall, 134 N.C. App. 417, 517 S.E.2d 907 (1999).

Trial court's exclusion of defendant's proposed cross-examination regarding co-defendant's outstanding warrants was reasonable in view of its repetitive and cumulative effect, was harmless error beyond a reasonable doubt, and was not a violation of the North Carolina Constitution. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486 (1999), cert. denied, — U.S. —, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

Prosecutor's Question as to Whether Defendant Prepared His Testimony. — The trial court committed no prejudicial error in allowing prosecutor to cross-examine defendant regarding whether defendant and his family discussed and planned their testimony with attorneys prior to trial. State v. Trogden, 135 N.C. App. 85, 519 S.E.2d 64 (1999), cert. denied, 351 N.C. 190, — S.E.2d — (1999).

Where Defense Broached Topic. — Where the jury heard testimony from a defense witness regarding defendant's suspected distribution of drugs, the State's offer of testimony regarding the sheriff's department's investigation of defendant "for the use or distribution of controlled substances," followed by a curative instruction by the trial judge, did not constitute reversible error. State v. Marine, 135 N.C. App. 279, 520 S.E.2d 65 (1999).

Failure to Include Defendant in Discussion Regarding Removal of Leg Shackles. — Even if trial judge's conversation with defendant's standby counsel, held outside defendant's presence, concerning whether or not to remove his leg shackles constituted a "stage" in the proceeding, the error in excluding the defendant was harmless beyond a reasonable doubt. State v. Thomas, 134 N.C. App. 560, 518 S.E.2d 222 (1999), appeal dismissed, cert. denied, 351 N.C. 119, — S.E.2d — (1999).

Failure to Remove Leg Shackles. — Where State offered overwhelming evidence of malice, premeditation, and deliberation to support a first-degree murder conviction, jury would not likely have reached a different verdict if defendant had not been made to appear in shackles, and any error in allowing such appearance was harmless beyond a reasonable doubt. State v. Thomas, 134 N.C. App. 560, 518 S.E.2d 222 (1999), appeal dismissed, cert. denied, 351 N.C. 119, — S.E.2d — (1999).

IV. RIGHTS UNDER FEDERAL CONSTITUTION.

Defendant Precluded from Challenging Benefit Received. — Where defendant opposed joinder of third murder, and State, consequently, had no evidence available to support a statutory aggravating circumstance related to the severed case and was thereby precluded from submitting it to the jury, defendant obtained a benefit which he could not claim, on

appellate review, was illegal. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486 (1999), cert. denied, — U.S. —, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

§ 15A-1444. When defendant may appeal; certiorari.

CASE NOTES

Applied in State v. Linemann, 135 N.C. App. 734, 522 S.E.2d 781 (1999).

Cited in State v. Rudisill, — N.C. App. —, 527 S.E.2d 727, 2000 N.C. App. LEXIS 321 (2000).

§ 15A-1445. Appeal by the State.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Applied in State v. Roberts, 351 N.C. 325, 523 S.E.2d 417 (2000).

Quoted in State v. Rankins, 133 N.C. App. 607, 515 S.E.2d 748 (1999).

SUBCHAPTER XV. CAPITAL PUNISHMENT.

ARTICLE 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

CASE NOTES

I. General Consideration.
II. Review of Judgment and Sentence.
III. Aggravating Circumstances.
  A. In General.
  B. Prior Convictions.
  C. Avoiding Arrest or Escaping Custody.
  D. Felony Murder.
  E. Especially Heinous, Atrocious, or Cruel Act.
  F. Risk of Death to More Than One Person.
  G. Course of Conduct.
IV. Mitigating Circumstances.
  A. In General.
  B. No Significant Prior Criminal Activity.
  C. Mental or Emotional Disturbance.
  E. Impaired Capacity.
  F. Age of Defendant.

I. GENERAL CONSIDERATION.

Construction with Other Law — The court properly rejected the defendant's challenge to the jury instruction on the basis of the adequate and independent state procedural rule set forth in § 15A-1419(a)(3) and not because it was statutorily obliged to do so by this

section. Fisher v. Lee, 215 F.3d 438 (4th Cir. 2000).

Jurors Properly Excused for Cause. — Court's excusal of juror whose physician had determined that jury duty could cause complications with her pregnancy prior to the sentencing proceeding was not an abuse of discretion. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

Prosecutor's Statements. — The defendant's constitutional rights under Article I, Sections 19, 23, and 27 of the North Carolina Constitution were not violated by the prosecution's argument in opposition to the "catchall" mitigating circumstance of this section that the jury should not give any mitigating value to the fact that his accomplice was not sentenced to death where the prosecution did not imply that the accomplice's sentence could be treated as a nonstatutory aggravating circumstance. State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1 (2000).

Competence of Counsel. — The court rejected the defendant's claim that his trial counsel was ineffective in his presentation of expert testimony to support the voluntary intoxication defense, as well as the (f)(2) and (f)(6) mitigating circumstances. Fisher v. Lee, 215 F.3d 438 (4th Cir. 2000).

Defendant Not Entitled to Testify Without Being Subjected to Cross-Examination or to Make Unsworn Statements. — The trial court's denial of the defendant's motion for allocution did not violate his rights under this section. State v. Ray, — N.C. App. —, 527 S.E.2d 675, 2000 N.C. App. LEXIS 314 (2000).

Applied in State v. McNeil, 350 N.C. 657, 518 S.E.2d 486 (1999), cert. denied, — U.S. —, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000); Frye v. Lee, 89 F. Supp. 2d 693 (W.D.N.C. 2000).

Stated in State v. Peterson, 350 N.C. 518, 516 S.E.2d 131 (1999), cert. denied, — U.S. —, 120 S. Ct. 1181, 145 L. Ed. 2d 1087 (2000).

Cited in State v. Holder, — N.C. App. —, 530 S.E.2d 562, 2000 N.C. App. LEXIS 552 (2000).

II. REVIEW OF JUDGMENT AND SENTENCE.

No Prejudice Suffered from Improperly Admitted Testimony. — Because defendant received the minimum allowable sentence for conviction of first-degree murder, he necessarily suffered no prejudice in sentencing from the improperly admitted testimony of his co-conspirator. State v. Harris, — N.C. App. —, 525 S.E.2d 208, 2000 N.C. App. LEXIS 106 (2000).

Facts held to support the jury's decision to recommend a sentence of death. — The defendant received a fair trial and capital sentencing proceeding, free of prejudicial error, and the judgment of death recommended by the jury was not disturbed where defendant cold-heartedly and calmly planned to obtain the pesticide which he eventually put in his children's Kool-Aid, passed the blame on to his ex-girlfriend, and remained silent as they lay dying or deathly ill in the hospital. State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000).

Death Penalty Was Appropriate. — The defendant who was convicted of both felony murder and premeditated and deliberate murder received a fair trial and capital sentencing proceeding, free from prejudicial error, and defendant's death sentence was not excessive or disproportionate. State v. Hyde, — N.C. —, 530 S.E.2d 281, 2000 N.C. LEXIS 443 (2000).

Death Penalty Held Appropriate. — Defendant convicted of two counts of first degree murder received a fair trial and capital sentencing proceeding; the evidence supported the aggravating circumstances found by the jury; and the sentences of death were neither disproportionate nor imposed under the influence of passion, prejudice or any other arbitrary factor. State v. Moses, 350 N.C. 741, 517 S.E.2d 853 (1999), cert. denied, — U.S. —, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Where defendant was convicted of first-degree murder on the basis of premeditation and deliberation, the imposition of death was not imposed under the influence of any arbitrary considerations, the evidence fully supported the aggravating circumstance of prior felony convictions, and the sentence of death was not disproportionate. State v. Hamilton, 351 N.C. 14, 519 S.E.2d 514 (1999), cert. denied, — U.S. —, 120 S. Ct. 1841, 146 L. Ed. 2d 783 (2000).

Death Penalty Warranted. — The death penalty was not disproprotionate and the trial free of passion, prejudice, or any other arbitrary factor where defendant was convicted of first-degree murder based upon premeditation and deliberation, and under the felony murder rule as well as conspiracy to commit murder, conspiracy to commit kidnapping, first-degree burglary and first-degree kidnapping. State v. Lawrence, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 441 (June 16, 2000).

Sentence Held Not Excessive or Disproportionate. —

Where (1) defendant was convicted of first-degree murder of one victim under the theory of premeditation and deliberation; (2) defendant shot second victim directly in the face at close range; (3) defendant showed no remorse for brutal murder and castration of first victim; and (4) defendant murdered both victims in their homes, sentences of death were neither excessive nor disproportionate. State v. Parker, 350 N.C. 411, 516 S.E.2d 106 (1999), cert. denied, — U.S. —, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Where defendant shot former wife and her date in a restaurant after months of premeditation, and expressed regret about running "out of bullets," the record supported the aggravat-

ing circumstances found by the jury and the death sentence was not arbitrary, disproportionate, or excessive. State v. Hedgepeth, 350 N.C. 776, 517 S.E.2d 605 (1999), cert. denied, — U.S. —, 120 S. Ct. 1274, 146 L. Ed. 2d 223 (2000).

Where evidence showed that defendant murdered first victim in her home before robbing her, then lured second victim to that location and interrupted his strangling of her to make her perform oral sex on him before finally killing her, the court concluded that the record supported the aggravating circumstances found by the jury and the imposition of capital punishment was not arbitrary, disproportionate or excessive. State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622 (1999), cert. denied, — U.S. —, 120 S. Ct. 1432, 146 L. Ed. 2d 322 (2000).

The defendant's trial was free of prejudicial error where the death penalty was neither disproportionate nor arbitrarily imposed, was not unconstitutional as applied, and where the aggravating circumstance was supported by evidence. State v. Gell, 351 N.C. 192, 524 S.E.2d 332 (2000).

The death penalty was not disproportionate where defendant was convicted of nine counts of first-degree murder. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (2000).

The death penalty was not excessive or disproportionate in case involving the premeditated murder of an elderly woman in her home. The fact that defendant raped the victim in her own bed while she was dead or in her "last breath of life" elevated the brutality. State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1 (2000).

The defendant convicted for murdering his invalid bedridden stepmother by stabbing her numerous times while robbing and killing his father received a fair trial and capital sentencing proceeding, free from prejudicial error, and the sentence of death recommended by the jury and entered by the trial court was not disproportionate. State v. Frogge, 351 N.C. 576, 528 S.E.2d 893 (2000).

Sentence Not Imposed Under Influence of Passion, Prejudice or Other Arbitrary Consideration. —

Where facts reveal that defendant, using an assault rifle, gunned down a totally defenseless elderly woman after she had already given him all the money from cash register in family run grocery store, and the jury found the existence of various aggravating circumstances, including the fact that defendant had previously been convicted of a felony involving the use or threat of violence to the person, the death sentence was not imposed under the influence of passion, prejudice or other arbitrary considerations in violation of this section. State v. Peterson, 350 N.C. 518, 516 S.E.2d 131 (1999), cert. denied, — U.S. —, 120 S. Ct. 1181, 145 L. Ed. 2d 1087 (2000).

The evidence supported the aggravating circumstances found by the jury; the sentence was entered absent passion, prejudice or any arbitrary factor, and the sentence of death was not excessive or disproportionate as a matter of law. State v. Cheek, 351 N.C. 48, 520 S.E.2d 545 (1999), cert. denied, — U.S. —, 120 S. Ct. 2694, — L. Ed. — (2000).

Illustrative Cases — The record, transcript, and briefs in this case fully support the aggravating circumstances found by the jury and the defendant's sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor nor was it disproportional. State v. Greene, 351 N.C. 562, 528 S.E.2d 575 (2000).

III. AGGRAVATING CIRCUMSTANCES.

A. In General.

Constitutionality of Considering Pecuniary Gain. —

Jury instruction regarding capital felony committed for pecuniary gain to support submission of aggravating circumstance under subdivision (e)(6) of this section did not violate defendant's due process and fair trial rights under N.C. Const., Art. I, §§ 19 and 23; although gun may have been intended for his personal use, it had pecuniary value. State v. Parker, 350 N.C. 411, 516 S.E.2d 106 (1999), cert. denied, — U.S. —, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

When Multiple Aggravating Circumstances May Be Submitted. —

The trial court properly submitted to the jury as aggravating circumstances both that the murder was committed during the course of a felony (burglary), and that the murder was part of a course of conduct which involved commission of other crimes of violence against other persons. The trial court properly instructed the jury not to consider the same evidence as the basis of more than one aggravating circumstance, that different evidence supported each aggravating circumstance, and that the two circumstances were not inherently duplicative. State v. Lawrence, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 441 (June 16, 2000).

Substantial separate evidence supported the submission of jury instructions regarding aggravating circumstances under both subdivision (e)(5) of this section (defendant murdered one victim while engaged in the murder of another) and subdivision (e)(11) of this section (defendant murdered one victim while engaged in the commission of malicious castration on another). State v. Parker, 350 N.C. 411, 516 S.E.2d 106 (1999), cert. denied, — U.S. —, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Submission of Multiple Factors Upheld. —

Where the State presented distinct evidence that defendant committed both robbery and kidnapping against the victim during the course of a murder, the trial court properly submitted the subdivision (e)(5) circumstance twice. State v. Cheek, 351 N.C. 48, 520 S.E.2d 545 (1999), cert. denied, — U.S. —, 120 S. Ct. 2694, — L. Ed. — (2000).

Trial court's instruction to jury relieved the State of its burden to prove each element of this section's aggravating circumstances and constituted plain error, entitling defendant to a new capital sentencing proceeding. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

Malicious Castration. — Substantial evidence showing that defendant engaged in a violent felony, malicious castration, while committing murder, supported an aggravating circumstances jury instruction under this section. State v. Parker, 350 N.C. 411, 516 S.E.2d 106 (1999), cert. denied, — U.S. —, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Arson. — Substantial evidence showing that victim was murdered while defendant was engaged in the commission of arson, supported an aggravating circumstances jury instruction under this section. State v. Parker, 350 N.C. 411, 516 S.E.2d 106 (1999), cert. denied, — U.S. —, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

No evidence was needed to prove that dwelling was "occupied" for purposes of the arson statute, § 14-58, where the burning of a downstairs apartment, after the murder of that apartment's tenant, and the murder of an upstairs victim were parts of a continuous transaction. State v. Parker, 350 N.C. 411, 516 S.E.2d 106 (1999), cert. denied, — U.S. —, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

B. Prior Convictions.

Evidence Offered in Support of (e)(3) Instruction. — Expert's testimony regarding defendant's wife's death offered to rebut the defendant's line of questioning and to establish the existence of (e)(3) aggravating circumstances was harmless beyond a reasonable doubt. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486 (1999), cert. denied, — U.S. —, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

Offense of voluntary manslaughter fell within this section and that evidence supported trial court's instruction that the death of defendant's wife, who was thrown from a bridge while under the influence of narcotics, involved an inherently violent act. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486 (1999), cert. denied, — U.S. —, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

C. Avoiding Arrest or Escaping Custody.

Evidence was sufficient to support a rational jury's finding that one of defendant's purposes for killing the victim was to eliminate a witness whom he thought would report him to the authorities where the defendant had made a statement to the police investigators to that effect and his girlfriend testified that he said that "he wasn't for sure about [whether the victim would say anything] . . ." State v. Hyde, — N.C. —, 530 S.E.2d 281, 2000 N.C. LEXIS 443 (2000).

D. Felony Murder.

Murder for Pecuniary Gain. —

The evidence sufficiently supported the submission of the pecuniary gain aggravating circumstance in the murder of a restaurant employee where the State presented evidence that the victim had obtained a roll of quarters from her employer as she left work the night of her murder, the investigator testified that he was unable to find them when he searched her home, and defendant admitted taking the quarters from the victim's apartment in his statement to police which was given in redacted form to the jury. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (2000).

The court upheld the following instruction: "A murder is committed for pecuniary gain if the defendant, when he commits it, has obtained, or intends or expects to obtain, money or some other thing which can be valued in money, either as compensation for committing it, or as a result of the death of the victim," in spite of defendant's claim that the instruction allowed the jury to find the existence of the aggravating circumstance in a situation where the defendant obtained money or something of value as a result of the murder rather than where the defendant committed the murder for the purpose of obtaining the money or valuable thing. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (2000).

Murder While Committing Burglary and Rape. — The trial court did not err when it instructed the jury that it could consider as separate aggravating circumstances whether the murder was committed in the course of a burglary and whether the murder was committed in the course of a rape where the evidence showed that defendant broke into the victim's home at night with the intent to steal her television and that he returned later, entered the victim's bedroom and raped her. State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1 (2000).

The evidence of robbery with a dangerous weapon was sufficient for the trial court to submit it as an aggravating circumstance where the wallet—containing a driver's license and other papers, but no money—was found lying open in front of the victim's body. Inside

the wallet were a drop and a smear of blood which the defendant admitted could have come from his hand but which he could not explain given the fact that he claimed not to have taken the money until after cleaning up and disposing of the murder weapon and bloody clothes, supporting a reasonable inference that defendant removed the money immediately after the murder. State v. Frogge, 351 N.C. 576, 528 S.E.2d 893 (2000).

Murder As Evidence of Burglary. — The evidence supported the submission of burglary as an aggravating circumstance where the state's evidence that defendant killed the victim after he entered the mobile home was substantial evidence that he had the intent to commit murder when he entered the mobile home. State v. Lawrence, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 441 (June 16, 2000).

Closing Argument Appropriate. — The prosecutor's statements about the victim being killed in his home served to inform the jury about the aggravating circumstance that "the capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of . . . burglary," and not some other circumstance not listed in this section. State v. Hyde, — N.C. —, 530 S.E.2d 281, 2000 N.C. LEXIS 443 (2000).

E. Especially Heinous, Atrocious, or Cruel Act.

Death by Poison. — Where the State's testimony showed that defendant coldly and designedly planned and carried out the murder of his child, and attempted to murder his other two children, their mother, and his ex-girlfriend, using pesticide to poison them, the record fully supported the aggravating circumstances found by the jury: the crime was especially heinous, atrocious, or cruel, pursuant to subdivision (e)(9) of this section, part of a course of conduct in which defendant engaged, and which included the commission by defendant of other crimes of violence against another person or persons, pursuant to subdivision (e)(11) of this section. State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000).

Evidence Held Sufficient. —

Where the evidence, although not conclusive, was sufficient for a jury to find that not only was the victim alive when her taxicab was set on fire, but that she was aware of her impending death, the trial court did not err in submitting this aggravating circumstance to the jury. State v. Cheek, 351 N.C. 48, 520 S.E.2d 545 (1999), cert. denied, — U.S. —, 120 S. Ct. 2694, — L. Ed. — (2000).

The Performance of Court and of Defense Counsel Held Adequate. — The court's instruction regarding the aggravating circumstance that "the capital felony was especially heinous, atrocious, or cruel" was adequately limited to guide the jury, and the defendant's counsel was not constitutionally deficient for failing to challenge the instruction on direct appeal since, given the gruesome facts underlying the murder, the result would not have been different if the counsel had challenged it. Fisher v. Lee, 215 F.3d 438 (4th Cir. 2000).

Instruction Not Based on Combined Actions of Two Defendants. — Evidence did not support defendant's assertion that trial court's instructions impermissibly allowed the jury to find the existence of the statutory aggravating circumstance for victim's murder based upon the combined actions of defendant and co-defendant. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486 (1999), cert. denied, — U.S. —, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

Instruction Under Subdivision (e)(9) Held Proper. — Trial court's submission of instructions regarding aggravating circumstance, pursuant to this section, that murder was especially heinous, atrocious, or cruel did not violate the defendant's rights to due process nor result in cruel and unusual punishment, nor was the language unconstitutionally vague. State v. Parker, 350 N.C. 411, 516 S.E.2d 106 (1999), cert. denied, — U.S. —, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

F. Risk of Death to More Than One Person.

Equal Protection Clause was not violated when court applied felony murder rule and punished defendant more severely by sentencing him to death because more victims were harmed as authorized by § 15A-1340.16(d)(8) and subdivision (e)(11) of this section. State v. Jones, 133 N.C. App. 448, 516 S.E.2d 405 (1999).

G. Course of Conduct.

Common Modus Operandi and Motivation. — Defendant's challenge to evidence of a course of conduct which was the sole aggravating circumstance in one murder and one of only two aggravating circumstances admitted in a second murder was denied where the similarities in the two murders demonstrated that there did exist in the defendant's mind a common plan, scheme or design. State v. Moses, 350 N.C. 741, 517 S.E.2d 853 (1999), cert. denied, — U.S. —, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Failure to Submit (e)(11) Evidence Upheld. — Where defendant opposed joinder of third murder, and State, consequently, had no evidence available to support a statutory aggravating circumstance related to the severed case and was thereby precluded from submitting it to the jury, defendant obtained a benefit which he could not claim, on appellate review, was

illegal. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486 (1999), cert. denied, — U.S. —, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

IV. MITIGATING CIRCUMSTANCES.

A. In General.

The trial judge's jury instructions were proper where they mirrored the requirements of a constitutional instruction by instructing the jury that only one juror needed to deem a factor mitigating for it to receive consideration. Skipper v. Lee, 1999 U.S. Dist. LEXIS 21347, — F. Supp. 2d — (E.D.N.C. November 30, 1999).

Substantial Evidence of Mitigating Factors. —

Where evidence as to subdivision (f)(2) and (f)(6) mitigating circumstances conflicted (defendant's experts testified that he had borderline mental intelligence and a reading disorder while his psychologist conceded that he worked, earned his living, had a driver's license and functioned within the limits of his intelligence; the State's testimony showed defendant coldheartedly and calmly planning to obtain the pesticide which he eventually put in his children's Kool-Aid, cunningly passing the blame on to his ex-girlfriend and remaining silent as they lay dying or deathly ill in the hospital; and no one testified that defendant was in any way enraged or intoxicated at the time of the crimes), the trial court did not err in denying the defendant's request for instructions regarding mitigating circumstances. State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000).

Instructions on Defendant's Relatively Minor Role in Murder Inappropriate. — The jury's factual findings underlying the determination that defendant was guilty of first-degree murder at the guilt-phase precluded the resentencing jury from considering the statutory mitigating circumstance that "defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor." State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1 (2000).

The trial court did not err in refusing to peremptorily instruct the jury, etc. —

Where there was contradictory evidence supporting the subdivision (f)(2) and (f)(6) mitigators, the defendant's evidence was not "uncontroverted and manifestly credible" so as to warrant preemptory instructions. State v. Cheek, 351 N.C. 48, 520 S.E.2d 545 (1999), cert. denied, — U.S. —, 120 S. Ct. 2694, — L. Ed. — (2000).

The court's denial of the nonstatutory mitigating circumstance of "[t]he defendant having found a closer path to the Lord" was not improper where the evidence was controverted. State v. Gell, 351 N.C. 192, 524 S.E.2d 332 (2000).

The trial court's properly denied defendant's motion for a peremptory instruction regarding two statutory mitigating circumstances where the evidence conflicted concerning his mental state and ability to conform his conduct to the law. The girlfriend of the defendant, who carried out nine premeditated, calculated, and vicious murders while carefully avoiding detection for two years, testified that she had not observed anything unusual about him and had not known him to experience hallucinations. Defendant held numerous jobs involving management responsibilities and maintained nonabusive relationships with his girlfriend and other women during the time these crimes were committed. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (2000).

Testimony Offered Solely to Refute Possible Mitigating Circumstances. —

The court's admission of state-proffered hearsay testimony during the sentencing proceeding as rebuttal to the hearsay evidence offered by defendant in support of the (f)(4) mitigating circumstance and a nonstatutory mitigating circumstance that defendant requested, i.e. based on his contentions that someone else pulled the trigger and that his role in the murders was relatively small, did not result in plain error where other evidence existed from which the jury could infer that he shot and killed the victims. State v. Lemons, — N.C. —, 530 S.E.2d 542, 2000 N.C. LEXIS 431 (2000).

Court's Refusal to Submit Mitigating Factors Independently Was Not Error. —

The trial court correctly refused to submit the defendant's nonstatutory mitigating circumstance which was subsumed in other mitigating circumstances submitted to the jury. State v. Cheek, 351 N.C. 48, 520 S.E.2d 545 (1999), cert. denied, — U.S. —, 120 S. Ct. 2694, — L. Ed. — (2000).

Evidence as to the different levels of security in the prison was properly excluded. as irrelevant to show defendant's character, prior record, or circumstances of the offense although its exclusion prevented him from showing that he was not considered by the prison staff to be dangerous or to require special supervision. State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1 (2000).

B. No Significant Prior Criminal Activity.

Where the defendant's conduct in the robbery-murder of his father was strikingly similar to his lengthy history of prior criminal activity and convictions, the trial court properly refused to submit the mitigating circumstance of no significant history of prior criminal activity to the jury. The focus for determining submission of instructions under this section should be on whether the criminal activity is such as to influence the

jury's sentencing recommendation. State v. Greene, 351 N.C. 562, 528 S.E.2d 575 (2000).

Significant Criminal Activity Shown. — The trial court properly refrained from submitting the statutory mitigating circumstance that defendant had no significant history of prior criminal activity where the evidence included a conviction for indecent liberties with a minor, previous recent assaults on his ex-girlfriend, recent communicated death threats against her and her new boyfriend, a history of drowning young puppies and kittens, and where the defendant did not request such an instruction. State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000).

Submission of Mitigating Factor over Defendant's Objection. —

Trial court had to submit evidence of the defendant's history of prior criminal activity — his drug use, juvenile delinquency and violence — as a mitigating circumstance under this section if a rational jury could conclude that such history was insignificant, and failure to inform jury that submission was required as a matter of law, in spite of defendant's objections, was harmless error. State v. Parker, 350 N.C. 411, 516 S.E.2d 106 (1999), cert. denied, — U.S. —, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

The submission of the (f)(1) mitigating factor, showing that defendant's prior criminal history including robbery and armed robbery occurred six years earlier, and that evidence indicated that defendant had put his past behind him, as required by law, did not prejudice defendant nor did it injure the defense team's credibility before the jury. State v. Peterson, 350 N.C. 518, 516 S.E.2d 131 (1999), cert. denied, — U.S. —, 120 S. Ct. 1181, 145 L. Ed. 2d 1087 (2000).

Failure to Submit Upheld. — Trial court properly found that no reasonable juror could have concluded that defendant's criminal history was insignificant and therefore properly precluded instructions on the statutory mitigating circumstance under this section. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486 (1999), cert. denied, — U.S. —, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

Where defendant stipulated to the State's evidence that his prior record included convictions for second-degree rape and second-degree murder and he objected to the State's request for the (f)(1) mitigating circumstance, the trial court did not err by failing to submit it to the jury. State v. Hamilton, 351 N.C. 14, 519 S.E.2d 514 (1999), cert. denied, — U.S. —, 120 S. Ct. 1841, 146 L. Ed. 2d 783 (2000).

New Sentencing Proceeding Not Warranted. — The trial court's admission of a felony larceny conviction occurring after the murder for the jury's consideration vis-a-vis the subdivision (f)(1) mitigating circumstance, where the truck theft was the subject of collateral attack by a pending motion for appropriate relief at the time of defendant's murder trial, was not reversible error; the pending motion was irrelevant and the submission of this later occurring felony, although in error, was not highly prejudicial given the prosecutor's emphasis on the defendant's drug activity. State v. Gell, 351 N.C. 192, 524 S.E.2d 332 (2000).

C. Mental or Emotional Disturbance.

Controverted and conflicting evidence proffered by defendant in support of mitigating circumstances to show that murder was committed while defendant was under the influence of a mental or emotional disturbance did not entitle him to a jury instruction under this section. State v. Hedgepeth, 350 N.C. 776, 517 S.E.2d 605 (1999), cert. denied, — U.S. —, 120 S. Ct. 1274, 146 L. Ed. 2d 223 (2000).

E. Impaired Capacity.

Refusal to Instruct Where Not All Evidence Supports Existence of Factor. —

Where the record disclosed conflicting evidence concerning whether defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, the trial court did not err by denying his motion for a peremptory instruction on this mitigating circumstance. State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1 (2000).

Controverted and conflicting evidence proffered by defendant in support of mitigating circumstances to show that murder was committed while defendant was under the influence of a mental or emotional disturbance did not entitle him to a jury instruction under this section. State v. Hedgepeth, 350 N.C. 776, 517 S.E.2d 605 (1999), cert. denied, — U.S. —, 120 S. Ct. 1274, 146 L. Ed. 2d 223 (2000).

Separate Instructions Not Required. — The trial court did not err by denying defendant's request for separate instructions on each of his three alleged mental impairments under this section or by giving a single instruction combining all of the mental impairments into a single mitigating circumstance. The trial court's instruction specifically referred to each of the alleged mental disorders—his "personality disorder," "borderline range of intelligence," and "long-term, chronic and severe abuse of crack-cocaine at and around the time of the offenses"—and instructed the jury to consider whether one or all of them impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the law. State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1 (2000).

F. Age of Defendant.

Link Between Condition and Culpability Required. — Evidence that a physical condition exists is not enough to establish a mitigating factor, and although petitioner es-

tablished the existence of his age, the jury did not believe, as evidenced by the verdict, that defendant had established a link between his age and his culpability by a preponderance of the evidence. Skipper v. Lee, 1999 U.S. Dist. LEXIS 21347, — F. Supp. 2d — (E.D.N.C. November 30, 1999).

Age Properly Not Considered. —

Where defendant presented evidence of a restricted childhood and a lack of friends to support a showing of immaturity relative to his age, but evidence existed that he had completed his GED, had a normal level of reading skills, had a stable marital relationship, handled his own finances, and had held various jobs including aiding his ill father-in-law in running his business, the trial court did not err in failing to submit the age statutory mitigating circumstance. State v. Peterson, 350 N.C. 518, 516 S.E.2d 131 (1999), cert. denied, — U.S. —, 120 S. Ct. 1181, 145 L. Ed. 2d 1087 (2000).

§ 15A-2002. Capital offenses; jury verdict and sentence.

CASE NOTES

1994 Amendment. — In accord with the main volume. See State v. Warren, 348 N.C. 80, 499 S.E.2d 431 (1998).

Instructions Regarding Parole Upheld. — The trial court's instruction to "determine the question as though life imprisonment without parole means exactly what the statute says 'imprisonment for life without parole in the state's prison'" did not violate this section. State v. Lawrence, — N.C. —, — S.E.2d —, 2000 N.C. LEXIS 441 (June 16, 2000).

Substantial Compliance. — While the better practice would be to charge precisely as this section states: "a sentence of life imprisonment means a sentence of life without parole," the trial court did not err in instructing the jurors that "[i]f you unanimously recommend a sentence of life imprisonment without parole, the Court will impose a sentence of life imprisonment without parole." State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000).

Where offense predated new law providing that jury must be informed that a sentence of life imprisonment means a sentence of life without parole, trial court correctly denied defendant's pretrial motion to question the jurors about their understanding of life imprisonment. State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622 (1999), cert. denied, — U.S. —, 120 S. Ct. 1432, 146 L. Ed. 2d 322 (2000).

Instructions Not Required to Be Repeated. — Trial judge who, on one occasion, correctly instructed jury, pursuant to this section, "that a sentence of life imprisonment means a sentence of life without parole" was not required to give the same instructions again during voir dire, as well as on each and every other occasion where the issue arose. State v. Peterson, 350 N.C. 518, 516 S.E.2d 131 (1999), cert. denied, — U.S. —, 120 S. Ct. 1181, 145 L. Ed. 2d 1087 (2000).

Instructions Upheld. — Where trial court instructed jury, pursuant to this section, that "life" meant life imprisonment "without parole," fact that court would not tell the jury what he would do if they returned two life sentences did not constitute reversible error. State v. Parker, 350 N.C. 411, 516 S.E.2d 106 (1999), cert. denied, — U.S. —, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Chapter 15B.

Victims Compensation.

§ 15B-6. Powers of the Commission and Director.

(a) In addition to powers authorized by this Chapter and Chapter 150B, the Commission may:

(1) Adopt rules in accordance with Part 3, Article 1 of Chapter 143B and Article 2A of Chapter 150B of the General Statutes necessary to carry out the purposes of this Chapter;

(2) Establish general policies and guidelines for awarding compensation and provide guidance to the staff assigned by the Secretary of the Department of Crime Control and Public Safety to administer the program;

(3) Accept for any lawful purpose and functions under this Chapter any and all donations, both real and personal, and grants of money from any governmental unit or public agency, or from any institution, person, firm, or corporation, and may deposit the same to the Crime Victims Compensation Fund.

(b) The Director shall have the following authority:

(1) With the consent of the district attorney, to request that law enforcement officers employed by the State or any political subdivision provide copies of any information or data gathered in the investigation of criminally injurious conduct that is the basis of any claim to enable the Director or Commission to determine whether, and the extent to which, a claimant qualifies for an award of compensation;

(2) With the consent of the district attorney, to request that prosecuting attorneys, law enforcement officers, and State agencies conduct investigations and provide information necessary to enable the Director or Commission to determine whether, and the extent to which, a claimant qualifies for an award of compensation; and

(3) To require the claimant to supplement the application for an award of compensation with any reasonably available medical or psychological reports pertaining to the injury for which the award of compensation is claimed.

Information obtained pursuant to this subsection is subject to the same privilege against public disclosure that may be asserted by the providing source. (1983, c. 832, s. 1; 1987, c. 819, s. 12; 1989, c. 679, s. 2; 1991, c. 301, s. 1; 2000-189, s. 3.)

Effect of Amendments. — Session Laws 2000-189, s. 3, effective August 2, 2000, substituted "Article 2A" for "Article 2" in subdivision (a)(1).

§ 15B-23. Crime Victims Compensation Fund.

Editor's Note. — Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 18.1, effective July 1, 2000, provides that, notwithstanding the provisions of G.S. 15B-23, the sum of $1,025,000 from the cash balance of the Crime

Victims Compensation Fund is to revert to the General Fund on July 1, 2000, to be used for domestic violence programs, the rape victim assistance program, and other victims' assistance programs.

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Chapter 17C.

North Carolina Criminal Justice Education and Training Standards Commission.

§ 17C-2. (Effective June 30, 2001. See notes) Definitions.

Unless the context clearly otherwise requires, the following definitions apply in this Chapter:

(1) Commission. — The North Carolina Criminal Justice Education and Training Standards Commission.

(2) Criminal justice agencies. — The State and local law-enforcement agencies, other correctional agencies maintained by local governments, and the juvenile justice agencies, but shall not include deputy sheriffs, special deputy sheriffs, sheriffs "jailers, or other sheriffs" department personnel governed by the provisions of Chapter 17E of these General Statutes.

(3) Criminal justice officers. — The administrative and subordinate personnel of all the departments, agencies, units or entities comprising the criminal justice agencies who are sworn law-enforcement officers, both State and local, with the power of arrest; revenue law enforcement officers; officers, supervisory and administrative personnel of local confinement facilities; and State youth services officers.

(4) Entry level. — The initial appointment or employment of any person by a criminal justice agency, or any appointment or employment of a person previously employed by a criminal justice agency who has not been employed by a criminal justice agency for the 12-month period preceding this appointment or employment, or any appointment or employment of a previously certified criminal justice officer to a position which requires a different type of certification. (2000-67, s. 17.3(a).)

For this section as in effect until June 30, 2001, unless a new certification system, as contemplated by Session Laws 2000-67, s. 17.3 (c), has been established, see the main volume.

Editor's Note. — Session Laws 2000-67, s. 17.3(c), provides that this section becomes effective June 30, 2001, unless the Criminal Justice Education and Training Standards Commission has established and implemented by the convening of the 2001 General Assembly a new certification system for employees in the Department of Correction, as originally requested of the Commission in Session Laws 1999-237, s. 18.14, for implementation no later than July 1, 2000. The Commission is to report on the new system to the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety by the convening of the 2001 General Assembly. If the system has not been established and implemented by the convening of the 2001 General Assembly, it is the intent of the General Assembly to develop a new system for the certification of Department employees and enact that system to coincide with the repeal of the Commission's authority over certification of correctional employees effective June 30, 2001.

Session Laws 2000-67, s. 1.1, provides: "This

act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. — Session Laws 2000-67, s. 17.3(a), deleted "the State correctional agencies" following "The State and local law-enforcement agencies" in subdivision (2); and in subdivision (3), deleted "State correctional officers; State probation/parole officers" following "revenue law enforcement officers," and deletes "State probation/parole intake officers; State probation/parole officers surveillance; State probation/parole intensive officers; and State parole case analysts" at the end of that subdivision. See editor's note for effective date and contingency.

§ 17C-3. (Effective until June 30, 2001. See notes) North Carolina Criminal Justice Education and Training Standards Commission established; members; terms; vacancies.

(a) There is established the North Carolina Criminal Justice Education and Training Standards Commission, hereinafter called "the Commission." The Commission shall be composed of 26 members as follows:

(1) Police Chiefs. — Three police chiefs selected by the North Carolina Association of Chiefs of Police and one police chief appointed by the Governor.

(2) Police Officers. — Three police officials appointed by the North Carolina Police Executives Association and two criminal justice officers certified by the Commission as selected by the North Carolina Law-Enforcement Officers' Association.

(3) Departments. — The Attorney General of the State of North Carolina; the Secretary of the Department of Crime Control and Public Safety; the Secretary of the Department of Correction; the President of the North Carolina System of Community Colleges.

(3a) A representative of the Department of Juvenile Justice and Delinquency Prevention.

(4) At-large Groups. — One individual representing and appointed by each of the following organizations: one mayor selected by the League of Municipalities; one law-enforcement training officer selected by the North Carolina Law-Enforcement Training Officers' Association; one criminal justice professional selected by the North Carolina Criminal Justice Association; one sworn law-enforcement officer selected by the North State Law-Enforcement Officers' Association; one member selected by the North Carolina Law-Enforcement Women's Association; and one District Attorney selected by the North Carolina Association of District Attorneys.

(5) Citizens and Others. — The President of The University of North Carolina; the Director of the Institute of Government; and two citizens, one of whom shall be selected by the Governor and one of whom shall be selected by the Attorney General. The General Assembly shall appoint two persons, one upon the recommendation of the Speaker of the House of Representatives and one upon the recommendation of the President Pro Tempore of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-122. Appointments by the General Assembly shall serve two-year terms to conclude on June 30th in odd-numbered years.

(b) The members shall be appointed for staggered terms. The initial appointments shall be made prior to September 1, 1983, and the appointees shall hold office until July 1 of the year in which their respective terms expire and until their successors are appointed and qualified as provided hereafter:

For the terms of one year: one member from subdivision (1) of subsection (a), serving as a police chief; three members from subdivision (2) of subsection (a),

§ 17C-3 is set out twice. See notes.

one serving as a police official, and two criminal justice officers; one member from subdivision (4) of subsection (a), appointed by the North Carolina Law-Enforcement Training Officers' Association; and two members from subdivision (5) of subsection (a), one appointed by the Governor and one appointed by the Attorney General.

For the terms of two years: one member from subdivision (1) of subsection (a), serving as a police chief; one member from subdivision (2) of subsection (a), serving as a police official; and two members from subdivision (4) of subsection (a), one appointed by the League of Municipalities and one appointed by the North Carolina Association of District Attorneys.

For the terms of three years: two members from subdivision (1) of subsection (a), one police chief appointed by the North Carolina Association of Chiefs of Police and one police chief appointed by the Governor; one member from subdivision (2) of subsection (a), serving as a police official; and three members from subdivision (4) of subsection (a), one appointed by the North Carolina Law-Enforcement Women's Association, one appointed by the North Carolina Criminal Justice Association, and one appointed by the North State Law-Enforcement Officers' Association.

Thereafter, as the term of each member expires, his successor shall be appointed for a term of three years. Notwithstanding the appointments for a term of years, each member shall serve at the will of the appointing authority.

The Attorney General, the Secretary of the Department of Crime Control and Public Safety, the Secretary of the Department of Correction, the President of The University of North Carolina, the Director of the Institute of Government, and the President of the Department of Community Colleges shall be continuing members of the Commission during their tenure. These members of the Commission shall serve ex officio and shall perform their duties on the Commission in addition to the other duties of their offices. The ex officio members may elect to serve personally at any or all meetings of the Commission or may designate, in writing, one member of their respective office, department, university or agency to represent and vote for them on the Commission at all meetings the ex officio members are unable to attend.

Vacancies in the Commission occurring for any reason shall be filled, for the unexpired term, by the authority making the original appointment of the person causing the vacancy. A vacancy may be created by removal of a Commission member by majority vote of the Commission for misconduct, incompetence, or neglect of duty. A Commission member may be removed only pursuant to a hearing, after notice, at which the member subject to removal has an opportunity to be heard. (1971, c. 963, s. 3; 1977, c. 70, ss. 29, 30; 1979, c. 763, s. 1; 1981 (Reg. Sess., 1982), c. 1191, s. 31; 1983, c. 558, s. 3; c. 618, ss. 1, 2; c. 807, ss. 1, 2; 1987, c. 282, s. 4; 1989, c. 757, s. 2; 1995, c. 490, s. 15; 1997-443, s. 11A.118(a); 1998-202, s. 4(c); 2000-137, s. 4(d); 2000-140, s. 38.1(a).)

Section Set Out Twice. — The section above is effective until June 30, 2001, unless a new certification system, as contemplated by Session Laws 2000-67, s. 17.3 (c), has been established. For the section as amended June 30, 2001, depending upon that contingency, see the following section, also numbered § 17C-3. And see the editor's note under that section.

Effect of Amendments. —

Session Laws 2000-137, s. 4.(d), effective July 20, 2000, substituted "Department of Juvenile Justice and Delinquency Prevention" for "Office of Juvenile Justice" in subdivision (a)(3a).

Session Laws 2000-140, s. 38.1(a), effective July 21, 2000, deleted "in the Department of Justice" following "the Commission" in the introductory language of subsection (a), and substituted "North Carolina System" for "Department" in subdivision (a)(3).

§ 17C-3. (Effective June 30, 2001. See notes) North Carolina Criminal Justice Education and Training Standards Commission established; members; terms; vacancies.

(a) There is established the North Carolina Criminal Justice Education and Training Standards Commission, hereinafter called "the Commission." The Commission shall be composed of 25 members as follows:

(1) Police Chiefs. — Three police chiefs selected by the North Carolina Association of Chiefs of Police and one police chief appointed by the Governor.

(2) Police Officers. — Three police officials appointed by the North Carolina Police Executives Association and two criminal justice officers certified by the Commission as selected by the North Carolina Law-Enforcement Officers' Association.

(3) Departments. — The Attorney General of the State of North Carolina; the Secretary of the Department of Crime Control and Public Safety; the President of the North Carolina System of Community Colleges.

(3a) A representative of the Department of Juvenile Justice and Delinquency Prevention.

(4) At-large Groups. — One individual representing and appointed by each of the following organizations: one mayor selected by the League of Municipalities; one law-enforcement training officer selected by the North Carolina Law-Enforcement Training Officers" Association; one criminal justice professional selected by the North Carolina Criminal Justice Association; one sworn law-enforcement officer selected by the North State Law-Enforcement Officers" Association; one member selected by the North Carolina Law-Enforcement Women's Association; and one District Attorney selected by the North Carolina Association of District Attorneys.

(5) Citizens and Others. — The President of The University of North Carolina; the Director of the Institute of Government; and two citizens, one of whom shall be selected by the Governor and one of whom shall be selected by the Attorney General. The General Assembly shall appoint two persons, one upon the recommendation of the Speaker of the House of Representatives and one upon the recommendation of the President Pro Tempore of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-122. Appointments by the General Assembly shall serve two-year terms to conclude on June 30th in odd-numbered years.

(b) The members shall be appointed for staggered terms. The initial appointments shall be made prior to September 1, 1983, and the appointees shall hold office until July 1 of the year in which their respective terms expire and until their successors are appointed and qualified as provided hereafter:

For the terms of one year: one member from subdivision (1) of subsection (a), serving as a police chief; three members from subdivision (2) of subsection (a), one serving as a police official, and two criminal justice officers; one member from subdivision (4) of subsection (a), appointed by the North Carolina Law-Enforcement Training Officers' Association; and two members from subdivision (5) of subsection (a), one appointed by the Governor and one appointed by the Attorney General.

For the terms of two years: one member from subdivision (1) of subsection (a), serving as a police chief; one member from subdivision (2) of subsection (a), serving as a police official; and two members from subdivision (4) of subsection (a), one appointed by the League of Municipalities and one appointed by the North Carolina Association of District Attorneys.

§ 17C-3 is set out twice. See notes.

For the terms of three years: two members from subdivision (1) of subsection (a), one police chief appointed by the North Carolina Association of Chiefs of Police and one police chief appointed by the Governor; one member from subdivision (2) of subsection (a), serving as a police official; and three members from subdivision (4) of subsection (a), one appointed by the North Carolina Law-Enforcement Women's Association, one appointed by the North Carolina Criminal Justice Association, and one appointed by the North State Law-Enforcement Officers' Association.

Thereafter, as the term of each member expires, his successor shall be appointed for a term of three years. Notwithstanding the appointments for a term of years, each member shall serve at the will of the appointing authority.

The Attorney General, the Secretary of the Department of Crime Control and Public Safety, the President of The University of North Carolina, the Director of the Institute of Government, and the President of the Department of Community Colleges shall be continuing members of the Commission during their tenure. These members of the Commission shall serve ex officio and shall perform their duties on the Commission in addition to the other duties of their offices. The ex officio members may elect to serve personally at any or all meetings of the Commission or may designate, in writing, one member of their respective office, department, university or agency to represent and vote for them on the Commission at all meetings the ex officio members are unable to attend.

Vacancies in the Commission occurring for any reason shall be filled, for the unexpired term, by the authority making the original appointment of the person causing the vacancy. A vacancy may be created by removal of a Commission member by majority vote of the Commission for misconduct, incompetence, or neglect of duty. A Commission member may be removed only pursuant to a hearing, after notice, at which the member subject to removal has an opportunity to be heard. (1971, c. 963, s. 3; 1977, c. 70, ss. 29, 30; 1979, c. 763, s. 1; 1981 (Reg. Sess., 1982), c. 1191, s. 31; 1983, c. 558, s. 3; c. 618, ss. 1, 2; c. 807, ss. 1, 2; 1987, c. 282, s. 4; 1989, c. 757, s. 2; 1995, c. 490, s. 15; 1997-443, s. 11A.118(a); 1998-202, s. 4(c); 2000-67, s. 17.3(b); 2000-137, s. 4(d); 2000-140, s. 38.1(a).)

Section Set Out Twice. — The section above is effective June 30, 2001, unless a new certification system, as contemplated by Session Laws 2000-67, s. 17.3 (c), has been established. For the section as effective until June 30, 2001, depending upon that contingency, see the preceding section, also numbered § 17C-3.

Editor's Note. — Session Laws 2000-67, s. 17.3(c), provides that this section becomes effective June 30, 2001, unless the Criminal Justice Education and Training Standards Commission has established and implemented by the convening of the 2001 General Assembly a new certification system for employees in the Department of Correction, as originally requested of the Commission in Session Laws 1999-237, s. 18.14, for implementation no later than July 1, 2000. The Commission is to report on the new system to the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety by the convening of the 2001 General Assembly. If the system has not been established and implemented by the convening of the 2001 General Assembly, it is the intent of the General Assembly to develop a new system for the certification of Department employees and enact that system to coincide with the repeal of the Commission's authority over certification of correctional employees effective June 30, 2001.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. — Session Laws 2000-67, s. 17.3(b), substituted "25 members" for "26 members" in the introductory language of subsection (a); and deleted "the Secretary of the Department of Correction" following "the Department of Crime Control and Public Safety" in subdivision (a)(3) and in the sixth paragraph in subsection (b). See editor's note for effective date and contingency.

Session Laws 2000-137, s. 4(d), effective July 20, 2000, substituted "Department of Juvenile Justice and Delinquency Prevention" for "Office of Juvenile Justice" in subdivision (a)(3a).

Session Laws 2000-140, s. 38.1(a), effective July 21, 2000, deleted "in the Department of Justice" following "the Commission" in the introductory language of subsection (a), and substituted "North Carolina System" for "Department" in subdivision (a)(3).

§ 17C-5. Chairman; vice-chairman; other officers; meetings; reports.

Editor's Note. — Session Laws 1999-237, s. 18.14 provides in part that the Criminal Justice Education and Training Standards Commission shall appoint a special committee to study and rewrite the necessary standards, administrative code provisions, and policies and procedures relating to the employment of certified positions in the Department of Correction and develop a new certification system for those officers that reflects the impact and statutory requirements of Chapters 126 and 17C of the General Statutes. The new certification system is to be implemented no later than July 1, 2000.

Session Laws 2000-67, s. 17.3(c), provides that the amendments by Session Laws 2000-67, ss. 17.3(a) and 17.3(b), to §§ 17C-2 and 17C-3, deleting State correctional agencies and certain State correctional officers from the definitions in § 17C-2, and deleting the Secretary of the Department of Correction as a member of the Commission in § 17C-3, become effective June 30, 2001, unless the Criminal Justice Education and Training Standards Commission has established and implemented by the convening of the 2001 General Assembly a new certification system for employees in the Department of Correction, as originally requested of the Commission in Session Laws 1999-237, s. 18.14, for implementation no later than July 1, 2000. The Commission shall report on the new system to the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety by the convening of the 2001 General Assembly. If the system has not been established and implemented by the convening of the 2001 General Assembly, it is the intent of the General Assembly to develop a new system for the certification of Department employees and enact that system to coincide with the repeal of the Commission's authority over certification of correctional employees effective June 30, 2001.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

§ 17C-6. Powers of Commission.

(a) In addition to powers conferred upon the Commission elsewhere in this Chapter, the Commission shall have the following powers, which shall be enforceable through its rules and regulations, certification procedures, or the provisions of G.S. 17C-10:

(1) Promulgate rules and regulations for the administration of this Chapter, which rules may require (i) the submission by any criminal justice agency of information with respect to the employment, education, retention, and training of its criminal justice officers, and (ii) the submission by any criminal justice training school of information with respect to its criminal justice training programs that are required by this Chapter;

(2) Establish minimum educational and training standards that must be met in order to qualify for entry level employment and retention as a criminal justice officer in temporary or probationary status or in a permanent position;

(3) Certify and recertify, pursuant to the standards that it has established for the purpose, persons as qualified under the provisions of this Chapter to be employed at entry level and retained as criminal justice officers;

(4) Establish minimum standards for the certification of criminal justice training schools and programs or courses of instruction that are required by this Chapter;
(5) Certify and recertify, pursuant to the standards that it has established for the purpose, criminal justice training schools and programs or courses of instruction that are required by this Chapter;
(6) Establish minimum standards and levels of education and experience for all criminal justice instructors who participate in programs or courses of instruction that are required by this Chapter;
(7) Certify and recertify, pursuant to the standards that it has established for the purpose, criminal justice instructors who participate in programs or courses of instruction that are required by this Chapter;
(8) Investigate and make such evaluations as may be necessary to determine if criminal justice agencies, schools, and individuals are complying with the provisions of this Chapter;
(9) Adopt and amend bylaws, consistent with law, for its internal management and control;
(10) Enter into contracts incident to the administration of its authority pursuant to this Chapter;
(11) Establish minimum standards and levels of training for certification and periodic recertification of operators of and instructors for training programs in radio microwave, laser, and other electronic speed-measuring instruments;
(12) Certify and recertify, pursuant to the standards that it has established, operators and instructors for training programs for each approved type of radio microwave, laser, and other electronic speed-measuring instruments;
(13) In conjunction with the Secretary of Crime Control and Public Safety, approve use of specific models and types of radio microwave, laser, and other speed-measuring instruments and establish the procedures for operation of each approved instrument and standards for calibration and testing for accuracy of each approved instrument.
(14) Establish minimum standards for in-service training for criminal justice officers.

(b) The Commission shall have the following powers, which shall be advisory in nature and for which the Commission is not authorized to undertake any enforcement actions:

(1) Identify types of criminal justice positions, other than entry level positions, for which advanced or specialized training and education are appropriate, and establish minimum standards for the certification of persons as being qualified for those positions on the basis of specified education, training, and experience; provided, that compliance with these minimum standards shall be discretionary on the part of criminal justice agencies with respect to their criminal justice officers;
(2) Certify, pursuant to the standards that it has established for the purpose, criminal justice officers for those criminal justice agencies that elect to comply with the minimum education, training, and experience standards established by the Commission for positions for which advanced or specialized training, education, and experience are appropriate;
(3) Consult and cooperate with counties, municipalities, agencies of this State, other governmental agencies, and with universities, colleges, junior colleges, and other institutions concerning the development of criminal justice training schools and programs or courses of instruction;

(4) Study and make reports and recommendations concerning criminal justice education and training in North Carolina;
(5) Conduct and stimulate research by public and private agencies which shall be designed to improve education and training in the administration of criminal justice;
(6) Study, obtain data, statistics, and information and make reports concerning the recruitment, selection, education, retention, and training of persons serving criminal justice agencies in this State; to make recommendations for improvement in methods of recruitment, selection, education, retention, and training of persons serving criminal justice agencies;
(7) Make recommendations concerning any matters within its purview pursuant to this Chapter;
(8) Appoint such advisory committees as it may deem necessary;
(9) Do such things as may be necessary and incidental to the administration of its authority pursuant to this Chapter;
(10) Formulate basic plans for and promote the development and improvement of a comprehensive system of education and training for the officers and employees of criminal justice agencies consistent with its rules and regulations;
(11) Maintain liaison among local, State and federal agencies with respect to criminal justice education and training;
(12) Promote the planning and development of a systematic career development program for criminal justice professionals.

(c) All decisions and rules and regulations heretofore made by the North Carolina Criminal Justice Training and Standards Council and the North Carolina Criminal Justice Education and Training System Council shall remain in full force and effect unless and until repealed or suspended by action of the North Carolina Criminal Justice Education and Training Standards Commission established herein. The present Councils are terminated on December 31, 1979, and their power, duties and responsibilities vest in the North Carolina Criminal Justice Education and Training Standards Commission effective January 1, 1980.

(d) The standards established by the Commission pursuant to G.S. 17C-6(a)(11) and 17C-6(a)(12) and by the Commission and the Secretary of Crime Control and Public Safety pursuant to G.S. 17C-6(a)(13) shall not be less stringent than standards established by the U.S. Department of Transportation, National Highway Traffic Safety Administration, National Bureau of Standards, or the Federal Communications Commission. (1971, c. 963, s. 6; 1975, c. 372, s. 2; 1979, c. 763, s. 1; 1979, 2nd Sess., c. 1184, ss. 1, 2; 1989, c. 757, s. 4; 1994, Ex. Sess., c. 18, s. 2; 1995, c. 509, s. 14.1; 2000-140, s. 38.1(b).)

Effect of Amendments. — Session Laws 2000-140, s.38.1(b), effective July 21, 2000, inserted "and recertify" in subdivisions (a)(3), (a)(5) and (a)(7).

Chapter 17E.

North Carolina Sheriffs' Education and Training Standards Commission.

§ 17E-1. Findings and policy.

CASE NOTES

Quoted in Knight v. Vernon, 214 F.3d 544 (4th Cir. 2000).

§ 17E-2. Definitions.

CASE NOTES

Applied in Knight v. Vernon, 214 F.3d 544 (4th Cir. 2000).

Chapter 18B.

Regulation of Alcoholic Beverages.

Article 1.

General Provisions.

§ 18B-108. Sales on trains.

Alcoholic beverages may be sold on railroad trains in this State upon compliance with Article 2C of Chapter 105 of the General Statutes. (1981, c. 412, s. 2; c. 747, s. 37; 1985, c. 114, s. 5; 2000-140, s. 39.)

Effect of Amendments. — Session Laws 2000-140, s. 39, effective July 21, 2000, substituted "compliance with Article 2C of Chapter 105 of the General Statutes" for "receipt of the required revenue license under G.S. 105-113.76."

Article 6.

Elections.

§ 18B-603. Effect of alcoholic beverage elections on issuance of permits.

(a) Malt Beverage Elections. — If a malt beverage election is held under G.S. 18B-602(a) and the sale of malt beverages is approved, the Commission may issue permits to qualified persons and establishments in the jurisdiction that held the election as follows:

(1) If on-premises sales are approved, the Commission may issue on-premises malt beverage permits.

(2) If off-premises sales are approved, the Commission may issue off-premises malt beverage permits.

(3) If both on-premises and off-premises sales are approved, the Commission may issue both on-premises and off-premises malt beverage permits.

(4) If the kinds of sales described in G.S. 18B-602(a)(4) are approved, the Commission may issue on-premises malt beverage permits to restaurants and hotels only and off-premises malt beverage permits to other permittees.

(b) Unfortified Wine Elections. — If an unfortified wine election is held under G.S. 18B-602(d) and the sale of unfortified wine is approved, the Commission may issue permits to qualified persons and establishments in the jurisdiction that held the election as follows:

(1) If on-premises sales are approved, the Commission may issue on-premises unfortified wine permits.
(2) If off-premises sales are approved, the Commission may issue off-premises unfortified wine permits.
(3) If both on-premises and off-premises sales are approved, the Commission may issue both on-premises and off-premises unfortified wine permits.

(c) ABC Store Elections. — If an ABC store election is held under G.S. 18B-602(g) and the establishment of ABC stores is approved, each of the following shall be authorized in the jurisdiction that held the election:

(1) The jurisdiction that held the election may establish and operate ABC stores in the manner described in Articles 7 and 8.
(2) The Commission may issue on-premises and off-premises fortified wine and unfortified wine permits to qualified persons and establishments in that jurisdiction, regardless of any unfortified wine election or any local act, except that neither on-premises nor off-premises unfortified wine permits may be issued in a jurisdiction if:
   a. The jurisdiction approved ABC stores before January 1, 1982;
   b. The jurisdiction held an unfortified wine election before January 1, 1982; and
   c. In that unfortified wine election, the jurisdiction did not approve either on-premises or off-premises sales of unfortified wine.
(3) The Commission may issue brown-bagging permits to restaurants, hotels, and community theatres in the county in which the election was held, whether the election was held by the county or by a city or other jurisdiction within the county. Brown-bagging permits may not be issued, however, for restaurants, hotels, or community theatres in any jurisdiction in which the sale of mixed beverages has been approved.

(d) Mixed Beverage Elections. — If a mixed beverage election is held under G.S. 18B-602(h) and the sale of mixed beverages is approved, the Commission may issue permits to qualified persons and establishments in the jurisdiction that held the election as follows:

(1) The Commission may issue mixed beverage permits.
(2) The Commission may issue on-premises malt beverage, unfortified wine, and fortified wine permits for establishments with mixed beverage permits, regardless of any other election or any local act concerning sales of those kinds of alcoholic beverages.
(3) The Commission may issue off-premises malt beverage permits to any establishment that meets the requirements under G.S. 18B-1001(2) in any township which has voted to permit the sale of mixed beverages, regardless of any other local act concerning sales of those kinds of alcoholic beverages. The Commission may also issue off-premises unfortified wine permits to any establishment that meets the requirements under G.S. 18B-1001(4) in any township which has voted to permit the sale of mixed beverages, regardless of any other local act concerning sales of those kinds of alcoholic beverages.
(4) The Commission may issue brown-bagging permits for private clubs and congressionally chartered veterans organizations but may no longer issue and may not renew brown-bagging permits for restaurants, hotels, and community theatres. A restaurant, hotel, or community theatre may not be issued a mixed beverage permit under subdivision (1) until it surrenders its brown-bagging permit.
(5) The Commission may continue to issue culinary permits for establishments that do not have mixed beverage permits. An establishment may not be issued a mixed beverage permit under subdivision (1) until it surrenders its culinary permit.

(d1) In any county in which the sale of mixed beverages has been approved in elections in at least three cities that, combined, contain more than two-thirds the total county population as of the most recent federal census, the county board of commissioners may by resolution approve the sale of mixed beverages throughout the county, and the Commission may issue permits as if mixed beverages had been approved in a county election.

(d2) If a county or city holds a mixed beverage election and an ABC store election at the same time and the voters do not approve the establishment of an ABC store, the Commission may issue mixed beverages permits in that county or city. The mixed beverages purchase-transportation permit authorized by G.S. 18B-404(b) shall be issued by a local board operating a store located in the county.

(e) Mixed Beverages at Airports. — When the sale of mixed beverages has been approved in a city election, the Commission may also issue permits under subsection (d) for qualified establishments outside the city but within the same county, if:

(1) The establishment is on the property of an airport;

(2) The airport is operated by the city or by an airport authority in which the city participates; and

(3) The airport services planes which board at least 150,000 passengers annually.

(f) Permits Not Dependent on Elections. — The Commission may issue the following kinds of permits without approval at an election:

(1) Special occasion permits;

(2) Limited special occasion permits;

(3) Brown-bagging permits for private clubs and congressionally chartered veterans organizations;

(4) Culinary permits, except as restricted by subdivision (d)(5);

(5) Special one-time permits issued under G.S. 18B-1002;

(6) All permits listed in G.S. 18B-1100;

(7) On-premises malt beverage permits and on-premises unfortified wine permits for a tourism ABC establishment;

(8) The permits authorized by G.S. 18B-1001(1), (3), (5), and (10) for tourism resorts;

(9) The permits authorized by G.S. 18B-1001(1), (3), (5), and (10) for historic ABC establishments.

(f1) Reserved for future codification purposes.

(f2) Permits for Special ABC Areas. — The Commission may issue the permits provided for in G.S. 18B-1001(1), G.S. 18B-1001(2), G.S. 18B-1001(3), G.S. 18B-1001(4), G.S. 18B-1001(5), G.S. 18B-1001(6), and G.S. 18B-1001(10) to qualified persons and establishments located within a Special ABC area as defined in G.S. 18B-101, provided that: (i) if such area is a municipal corporation, the area shall conduct an election authorized by subdivision (a)(4) of G.S. 18B-600, which election may be held regardless of the number of registered voters located within the municipal corporation; or (ii) if such area is unincorporated but has within such area a private association or club, the board of such private association or club shall call and conduct a special meeting at which meeting a majority of private association members, club members, lot and home owners, votes and approves the sale of mixed beverages, and the board certifies the results of such meeting to the Alcoholic Beverage Control Commission. The mixed beverages purchase-transportation permit authorized by G.S. 18B-404(b) shall be issued by a local board operating a store located in the same county as the Special ABC area.

(g) Miscellaneous. — The definitions in G.S. 18B-1000 shall apply to this section.

(h) Permits Based on Existing Permits. — In any county which borders on the Atlantic Ocean and where (i) the sale of malt beverage on and off premises,

the sale of unfortified wine on and off premises, the sale of mixed beverages, and the operation of an ABC system has been allowed in at least six cities in the county, or in any county adjacent to that county in which an ABC system has been allowed, or (ii) the sale of malt beverage on and off premises, the sale of unfortified wine on and off premises, the sale of mixed beverages, and the operation of an ABC system has been allowed in at least eight cities in the county, the Commission may issue permits to sports clubs as defined in G.S. 18B-1000(8) throughout the county.

The Commission may issue the following permits:

(1) On and Off Premises Malt Beverage;
(2) On and Off Premises Unfortified Wine;
(3) On and Off Premises Fortified Wine; or
(4) Mixed Beverages.

The Commission may also issue on-premises malt beverage, unfortified wine, fortified wine and mixed beverages permits to a sports club located in a county adjacent to any county that has approved the sale of mixed beverages pursuant to G.S. 18B-603(d1), if the county in which the sports club is located borders another state and has at least one city that has approved the sale of mixed beverages. Sports clubs holding mixed beverages permits shall purchase their spirituous liquor at the nearest ABC system store that is located in the county.

The Commission may further issue on-premises malt beverage and on-premises unfortified wine permits to a sports club located in a county bordering on another state that is adjacent to any county in which permits were issued pursuant to this subsection prior to August 1, 1993. The sports clubs must be located in the unincorporated areas of a county, in which the sale of malt beverages and unfortified wine is not permitted, and where there are six or more municipalities in that county where the sale of malt beverages and unfortified wine is permitted. (1947, c. 1084, s. 3; 1969, c. 647, s. 2; 1971, c. 872, s. 1; 1981, c. 412, s. 2; c. 589; 1981 (Reg. Sess., 1982), c. 1240; 1983, c. 113, s. 2; 1985, c. 689, s. 7; 1987, c. 136, ss. 5, 6; c. 307, s. 2; c. 443, s. 2; 1989, c. 629, s. 2; 1991 (Reg. Sess., 1992), c. 920, ss. 11, 13; 1993, c. 415, ss. 7-9; 1995, c. 466, s. 5; 1999-456, s. 10; 1999-461, s. 2; 1999-462, ss. 3, 6, 7, 9; 2000-140, s. 2.)

Effect of Amendments. — Session Laws 2000-140, s. 2, effective July 21, 2000, substituted "G.S. 18B-1001(1)" for "G.S. 18B-100(1)" in subdivision (f)(8).

Article 10.

Retail Activity.

§ 18B-1009. In-stand sales.

Nothing in this Chapter shall be construed to prohibit a retail permittee from selling for consumption, malt beverages in the seating areas of stadiums, ballparks, and other similar public places with a seating capacity of 60,000 or more during professional sporting events, in municipalities with a population greater than 450,000, according to the most recent estimate of population made by the Office of State Budget, Planning, and Management, provided that:

(1) The seating areas are designated as part of the retail permittee's licensed premises;
(2) The retail permittee has notified the Commission, in writing, of its intent to sell malt beverages in the seating areas at sporting events;
(3) Service of food and nonalcoholic beverages is available in the seating areas;

(4) The retail permittee has certified to the Commission that it has trained its employees:
   a. To identify underage persons and intoxicated persons; and
   b. To refuse to sell malt beverages to those persons as required by G.S. 18B-305; and
(5) The employees do not verbally shout or hawk the sale of malt beverages. (1997-167, s. 1; 2000-140, s. 93.1(a).)

Effect of Amendments. — Session Laws 2000-140, s. 93.1(a), effective July 1, 2000, substituted "Office of State Budget, Planning, and Management" for "Office of State Budget and Management" in the introductory paragraph.

Chapter 19A.

Protection of Animals.

Article 4.

Animal Cruelty Investigators.

§§ 19A-50 through 19A-59: Reserved for future codification purposes.

Article 5.

Spay/Neuter Program.

§ 19A-60. Legislative findings.

The General Assembly finds that the uncontrolled breeding of cats and dogs in the State has led to unacceptable numbers of unwanted dogs, puppies and cats and kittens. These unwanted animals become strays and constitute a public nuisance and a public health hazard. The animals themselves suffer privation and death, are impounded, and most are destroyed at great expense to local governments. It is the intention of the General Assembly to provide a voluntary means of funding a spay/neuter program to provide financial assistance to local governments offering low-income persons reduced-cost spay/neuter services for their dogs and cats and to provide a statewide education program on the benefits of spaying and neutering pets. (2000-163, s. 1.)

Editor's Note. — The numbers of §§ 19A-60 to 19A-64 were assigned by the Revisor of Statutes, the numbers in Session Laws 2000-63, s.1 having been §§ 19A-50 to 19A-54.

Session Laws 2000-163, s. 7, made this Article effective January 1, 2001.

§ 19A-61. Spay/Neuter Program established.

There is established in the Department of Health and Human Services a statewide program to foster the spaying and neutering of dogs and cats for the purpose of reducing the population of unwanted animals in the State. The program shall consist of the following components:

(1) Education Program. — The Department shall establish a statewide program to educate the public about the benefits of having cats and dogs spayed and neutered. The Department may work cooperatively on the program with the North Carolina School of Veterinary Medicine, other State agencies and departments, county and city health

departments and animal control agencies, and statewide and local humane organizations. The Department may employ outside consultants to assist with the education program.

(2) Local Spay/Neuter Assistance Program. — The Department shall administer the Spay/Neuter Account established in G.S. 19A-62. Monies deposited in the account shall be available to reimburse eligible counties and cities for the direct costs of spay/neuter surgeries for cats and dogs made available to low-income persons. (2000-163, s. 1.)

§ 19A-62. Spay/Neuter Account established.

(a) Creation. — The Spay/Neuter Account is established as a nonreverting special revenue account in the Department of Health and Human Services. The Account consists of the following:

(1) Fifty cents (50¢) of the fee imposed by G.S. 130A-190(c) on the costs of obtaining rabies vaccination tags from the Department of Health and Human Services.

(2) Ten dollars ($10.00) of the additional fee imposed by G.S. 20-79.7 for an Animal Lovers special license plate.

(3) Any other funds available from appropriations by the General Assembly or from contributions and grants from public or private sources.

(b) Use. — The revenue in the Account shall be used by the Department of Health and Human Services as follows:

(1) Twenty percent (20%) shall be used to develop and implement the statewide education program component of the Spay/Neuter Program established in G.S. 19A-61(a).

(2) Up to twenty percent (20%) of the money in the Account may be used to defray the costs of administering the Spay/Neuter Program established in this Article.

(3) Funds remaining after deductions for the education program and administrative expenses shall be distributed quarterly to eligible counties and cities seeking reimbursement for reduced-cost spay/neuter surgeries performed during the previous year. (2000-163, s. 1.)

Editor's Note. — Session Laws 2000-163, s. 6, directs the Department of Health and Human Services to establish a pilot program for animal control in one of the counties within the enterprise tier one area, as defined in G.S. 105-29.3, that does not have an existing animal control program and that meets qualifications established in the section. The Department shall select a county to participate from among those counties applying for consideration for the pilot program, and shall make its selection based on its determination of where the pilot program would most effectively reduce the population of unwanted cats and dogs and enhance public health and safety. To qualify to participate in the program, in a county where a tax exists, the county shall establish a differentiated tax on dogs and cats and offer a reduced cost spay/neuter program to low-income persons as provided in G.S. 19A-63(a). The county selected shall be required to provide a 50% match to any State funds that are allocated for the local animal control program. The county shall keep records of the number of cats and dogs spayed and neutered under the reduced cost spay/neuter program and shall report the results of the pilot program on animal control problems in the county to the Department on a semiannual basis. Funding for the program shall be from the Spay/Neuter Account established pursuant to G.S. 19A-62 from funds received from the sale of Animal Lovers special license plates pursuant to G.S. 20-79.7 and shall not exceed 50% of the funds available from the sale of the special license plate or $50,000, whichever is less.

§ 19A-63. Eligibility for distributions from Spay/Neuter Account.

(a) A county or city is eligible for reimbursement from the Spay/Neuter Account if it meets the following condition:

(1) The county or city offers one or more of the following programs to low-income persons on a year-round basis for the purpose of reducing the cost of spaying and neutering procedures for dogs and cats:

a. A spay/neuter clinic operated by the county or city.

b. A spay/neuter clinic operated by a private organization under contract or other arrangement with the county or city.

c. A contract or contracts with one or more veterinarians, whether or not located within the county, to provide reduced-cost spaying and neutering procedures.

d. Subvention of the spaying and neutering costs incurred by low-income pet owners through the use of vouchers or other procedure that provides a discount of the cost of the spaying or neutering procedure fixed by a participating veterinarian or other provider.

e. Subvention of the spaying and neutering costs incurred by persons who adopt a pet from an animal shelter operated by or under contract with the county or city.

(2) Reserved for future codification purposes.

(b) For purposes of this Article, the term "low-income person" shall mean an individual who qualifies for one or more of the programs of public assistance administered by the Department pursuant to Chapter 108A of the General Statutes. (2000-163, s. 1.)

Editor's Note. — See note at § 19A-62 relating to Session Laws 2000-163, s. 6, and the establishment of a pilot program for animal control.

§ 19A-64. Distributions to counties and cities from Spay/Neuter Account.

(a) Reimbursable Costs. — Counties and cities eligible for distributions from the Spay/Neuter Account may receive reimbursement for the direct costs of a spay/neuter surgical procedure for a dog or cat owned by a low-income person meeting the Department's eligibility requirements for spay/neuter services. Reimbursable costs shall include anesthesia, medication, and veterinary services. Counties and cities shall not be reimbursed for the administrative costs of providing reduced-cost spay/neuter services or capital expenditures for facilities and equipment associated with the provision of such services.

(b) Application. — A county or city eligible for reimbursement of spaying and neutering costs from the Spay/Neuter Account shall apply to the Department of Health and Human Services by the last day of January, April, July, and October of each year to receive a distribution from the Account for that quarter. The application shall be submitted in the form required by the Department and shall include an itemized listing of the costs for which reimbursement is sought.

(c) Distribution. — The Department shall make payments from the Spay/Neuter Account to eligible counties and cities who have made timely application for reimbursement within 30 days of the closing date for receipt of applications for that quarter. In the event that total requests for reimbursement exceed the amounts available in the Spay/Neuter Account for distribution, the monies available will be distributed as follows:

(1) Fifty percent (50%) of the monies available in the Spay/Neuter Account shall be reserved for reimbursement for eligible applicants

within enterprise tier one, two, and three areas as defined in G.S. 105-129.3. The remaining fifty percent (50%) of the funds shall be used to fund reimbursement requests from eligible applicants in enterprise tier four and five areas as defined in G.S. 105-129.3.

(2) Among the eligible counties and cities in enterprise tier one, two, and three areas, reimbursement shall be made to each eligible county or city in proportion to the number of dogs and cats that have received rabies vaccinations during the preceding fiscal year in that county or city as compared to the number of dogs and cats that have received rabies vaccinations during the preceding fiscal year by all of the eligible applicants in enterprise tier one, two, or three areas.

(3) Among the eligible counties and cities in enterprise tier four and five areas, reimbursement shall be made to each eligible county or city in proportion to the number of dogs and cats that have received rabies vaccinations during the preceding fiscal year in that county or city as compared to the number of dogs and cats that have received rabies vaccinations during the preceding fiscal year by all of the eligible applicants in enterprise tier four and five areas.

(4) Should funds remain available from the fifty percent (50%) of the Spay/Neuter Account designated for enterprise tier one, two, or three areas after reimbursement of all claims by eligible applicants in those areas, the remaining funds shall be made available to reimburse eligible applicants in enterprise tier four and five areas. (2000-163, s. 1.)

§ 19A-65. Annual Report Required From Every Animal Shelter in Receipt of State or Local Funding.

Every county or city animal shelter, or animal shelter operated under contract with a county or city or otherwise in receipt of State or local funding to prepare an annual report setting forth the numbers, by species, of animals received into the shelter, the number adopted out, the number returned to owner, and the number destroyed. The report shall also contain the total operating expenses of the shelter and the cost per animal handled. The report shall be filed with the Department of Health and Human Services by August 1 of each year. (2000-163, s. 5.)

Editor's Note. — Session Laws 2000-163, s. 5 was codified as this section at the direction of the Revisor of Statutes.

Chapter 20.
Motor Vehicles.

Article 1.

Division of Motor Vehicles.

Sec.

Article 2.

Uniform Driver's License Act.

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Part 3. Registration and Certificates of Titles of Motor Vehicles.

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Part 5. Issuance of Special Plates.

Part 6. Vehicles of Nonresidents of State; Permanent Plates; Highway Patrol.

Part 7. Title and Registration Fees.

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

Part 10. Operation of Vehicles and Rules of the Road.

Article 1.

Division of Motor Vehicles.

§ 20-1. Division of Motor Vehicles established.

Local Modification. — (As to Chapter 20) City of Charlotte: 2000-26, s. 1. For additional local modifications to this section, see the bound volume.

§ 20-4.01. Definitions.

Unless the context requires otherwise, the following definitions apply throughout this Chapter to the defined words and phrases and their cognates:

(1a) Alcohol. — Any substance containing any form of alcohol, including ethanol, methanol, propanol, and isopropanol.

(1b) Alcohol Concentration. — The concentration of alcohol in a person, expressed either as:

a. Grams of alcohol per 100 milliliters of blood; or

b. Grams of alcohol per 210 liters of breath.

The results of a defendant's alcohol concentration determined by a chemical analysis of the defendant's breath or blood shall be reported to the hundredths. Any result between hundredths shall be reported to the next lower hundredth.

(1c) Business District. — The territory prescribed as such by ordinance of the Board of Transportation.

(2) Canceled. — As applied to drivers' licenses and permits, a declaration that a license or permit which was issued through error or fraud is void and terminated.

(2a) Class A Motor Vehicle. — A combination of motor vehicles that meets either of the following descriptions:
a. Has a combined GVWR of at least 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.
b. Has a combined GVWR of less than 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.

(2b) Class B Motor Vehicle. — Any of the following:
a. A single motor vehicle that has a GVWR of at least 26,001 pounds.
b. A combination of motor vehicles that includes as part of the combination a towing unit that has a GVWR of at least 26,001 pounds and a towed unit that has a GVWR of less than 10,001 pounds.

(2c) Class C Motor Vehicle. — Any of the following:
a. A single motor vehicle not included in Class B.
b. A combination of motor vehicles not included in Class A or Class B.

(3) Repealed by Session Laws 1979, c. 667, s. 1.

(3a) Chemical Analysis. — A test or tests of the breath, blood, or other bodily fluid or substance of a person to determine the person's alcohol concentration or presence of an impairing substance, performed in accordance with G.S. 20-139.1, including duplicate or sequential analyses.

(3b) Chemical Analyst. — A person granted a permit by the Department of Health and Human Services under G.S. 20-139.1 to perform chemical analyses.

(3c) Commercial Drivers License (CDL). — A license issued by a state to an individual who resides in the state that authorizes the individual to drive a class of commercial motor vehicle. A "nonresident commercial drivers license (NRCDL)" is issued by a state to an individual who resides in a foreign jurisdiction.

(3d) Commercial Motor Vehicle. — Any of the following motor vehicles that are designed or used to transport passengers or property:
a. A Class A motor vehicle that has a combined GVWR of at least 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.
b. A Class B motor vehicle.
c. A Class C motor vehicle that meets either of the following descriptions:
1. Is designed to transport 16 or more passengers, including the driver.
2. Is transporting hazardous materials and is required to be placarded in accordance with 49 C.F.R. Part 172, Subpart F.
d. Repealed by Session Laws 1999, c. 330, s. 9, effective December 1, 1999.

(4) Commissioner. — The Commissioner of Motor Vehicles.

(4a) Conviction. — A conviction for an offense committed in North Carolina or another state:
a. In-State. When referring to an offense committed in North Carolina, the term means any of the following:
1. A final conviction of a criminal offense, including a no contest plea.
2. A determination that a person is responsible for an infraction, including a no contest plea.
3. An unvacated forfeiture of cash in the full amount of a bond required by Article 26 of Chapter 15A of the General Statutes.

4. A third or subsequent prayer for judgment continued within any five-year period.

b. Out-of-State. When referring to an offense committed outside North Carolina, the term means any of the following:

1. An unvacated adjudication of guilt.
2. A determination that a person has violated or failed to comply with the law in a court of original jurisdiction or an authorized administrative tribunal.
3. An unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court.
4. A violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated.

(4b) Crash. — Any event that results in injury or property damage attributable directly to the motion of a motor vehicle or its load. The terms collision, accident, and crash and their cognates are synonymous.

(5) Dealer. — Every person engaged in the business of buying, selling, distributing, or exchanging motor vehicles, trailers, or semitrailers in this State, and having an established place of business in this State.

The terms "motor vehicle dealer," "new motor vehicle dealer," and "used motor vehicle dealer" as used in Article 12 of this Chapter have the meaning set forth in G.S. 20-286.

(5a) Disqualification. — A withdrawal of the privilege to drive a commercial motor vehicle.

(6) Division. — The Division of Motor Vehicles acting directly or through its duly authorized officers and agents.

(7) Driver. — The operator of a vehicle, as defined in subdivision (25). The terms "driver" and "operator" and their cognates are synonymous.

(7a) Employer. — Any person who owns or leases a commercial motor vehicle or assigns a person to drive a commercial motor vehicle.

(8) Essential Parts. — All integral and body parts of a vehicle of any type required to be registered hereunder, the removal, alteration, or substitution of which would tend to conceal the identity of the vehicle or substantially alter its appearance, model, type, or mode of operation.

(9) Established Place of Business. — Except as provided in G.S. 20-286, the place actually occupied by a dealer or manufacturer at which a permanent business of bargaining, trading, and selling motor vehicles is or will be carried on and at which the books, records, and files necessary and incident to the conduct of the business of automobile dealers or manufacturers shall be kept and maintained.

(10) Explosives. — Any chemical compound or mechanical mixture that is commonly used or intended for the purpose of producing an explosion and which contains any oxidizing and combustive units or other ingredients in such proportions, quantities, or packing that an ignition by fire, by friction, by concussion, by percussion, or by detonator of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructible effects on contiguous objects or of destroying life or limb.

(11) Farm Tractor. — Every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry.

(11a) For-Hire Motor Carrier. — A person who transports passengers or property by motor vehicle for compensation.

(12) Foreign Vehicle. — Every vehicle of a type required to be registered hereunder brought into this State from another state, territory, or country, other than in the ordinary course of business, by or through a manufacturer or dealer and not registered in this State.

(12a) Gross Vehicle Weight Rating (GVWR). — The value specified by the manufacturer as the maximum loaded weight of a vehicle. The GVWR of a combination vehicle is the GVWR of the power unit plus the GVWR of the towed unit or units. When a vehicle is determined by an enforcement officer to be structurally altered from the manufacturer's original design, the license weight or the total weight of the vehicle or combination of vehicles may be deemed as the GVWR for the purpose of enforcing this Chapter.

(12b) Hazardous Materials. — Materials designated as hazardous by the United States Secretary of Transportation under 49 U.S.C. § 1803.

(13) Highway. — The entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic. The terms "highway" and "street" and their cognates are synonymous.

(14) House Trailer. — Any trailer or semitrailer designed and equipped to provide living or sleeping facilities and drawn by a motor vehicle.

(14a) Impairing Substance. — Alcohol, controlled substance under Chapter 90 of the General Statutes, any other drug or psychoactive substance capable of impairing a person's physical or mental faculties, or any combination of these substances.

(15) Implement of Husbandry. — Every vehicle which is designed for agricultural purposes and used exclusively in the conduct of agricultural operations.

(16) Intersection. — The area embraced within the prolongation of the lateral curblines or, if none, then the lateral edge of roadway lines of two or more highways which join one another at any angle whether or not one such highway crosses the other.

Where a highway includes two roadways 30 feet or more apart, then every crossing of each roadway of such divided highway by an intersecting highway shall be regarded as a separate intersection. In the event that such intersecting highway also includes two roadways 30 feet or more apart, then every crossing of two roadways of such highways shall be regarded as a separate intersection.

(17) License. — Any driver's license or any other license or permit to operate a motor vehicle issued under or granted by the laws of this State including:

a. Any temporary license or learner's permit;

b. The privilege of any person to drive a motor vehicle whether or not such person holds a valid license; and

c. Any nonresident's operating privilege.

(18) Local Authorities. — Every county, municipality, or other territorial district with a local board or body having authority to adopt local police regulations under the Constitution and laws of this State.

(19) Manufacturer. — Every person, resident, or nonresident of this State, who manufactures or assembles motor vehicles.

(20) Manufacturer's Certificate. — A certification on a form approved by the Division, signed by the manufacturer, indicating the name of the person or dealer to whom the therein-described vehicle is transferred, the date of transfer and that such vehicle is the first transfer of such vehicle in ordinary trade and commerce. The description of the vehicle shall include the make, model, year, type of body, identification

number or numbers, and such other information as the Division may require.

(21) Metal Tire. — Every tire the surface of which in contact with the highway is wholly or partly of metal or other hard, nonresilient material.

(21a) Moped. — A type of passenger vehicle as defined in G.S. 105-164.3.

(21b) Motor Carrier. — A for-hire motor carrier or a private motor carrier.

(22) Motorcycle. — A type of passenger vehicle as defined in G.S. 20-4.01(27).

(23) Motor Vehicle. — Every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. This shall not include mopeds as defined in G.S. 20-4.01(27)d1.

(24) Nonresident. — Any person whose legal residence is in some state, territory, or jurisdiction other than North Carolina or in a foreign country.

(24a) Offense Involving Impaired Driving. — Any of the following offenses:

a. Impaired driving under G.S. 20-138.1.

b. Death by vehicle under G.S. 20-141.4 when conviction is based upon impaired driving or a substantially similar offense under previous law.

c. First or second degree murder under G.S. 14-17 or involuntary manslaughter under G.S. 14-18 when conviction is based upon impaired driving or a substantially similar offense under previous law.

d. An offense committed in another jurisdiction which prohibits substantially similar conduct prohibited by the offenses in this subsection.

e. A repealed or superseded offense substantially similar to impaired driving, including offenses under former G.S. 20-138 or G.S. 20-139.

f. Impaired driving in a commercial motor vehicle under G.S. 20-138.2, except that convictions of impaired driving under G.S. 20-138.1 and G.S. 20-138.2 arising out of the same transaction shall be considered a single conviction of an offense involving impaired driving for any purpose under this Chapter.

g. Habitual impaired driving under G.S. 20-138.5.

A conviction under former G.S. 20-140(c) is not an offense involving impaired driving.

(25) Operator. — A person in actual physical control of a vehicle which is in motion or which has the engine running. The terms "operator" and "driver" and their cognates are synonymous.

(25a) Out of Service Order. — A declaration that a driver, a commercial motor vehicle, or a motor carrier operation is out-of-service.

(26) Owner. — A person holding the legal title to a vehicle, or in the event a vehicle is the subject of a chattel mortgage or an agreement for the conditional sale or lease thereof or other like agreement, with the right of purchase upon performance of the conditions stated in the agreement, and with the immediate right of possession vested in the mortgagor, conditional vendee or lessee, said mortgagor, conditional vendee or lessee shall be deemed the owner for the purpose of this Chapter. For the purposes of this Chapter, the lessee of a vehicle owned by the government of the United States shall be considered the owner of said vehicle.

(27) Passenger Vehicles. —

a. Excursion passenger vehicles. — Vehicles transporting persons on sight-seeing or travel tours.

b. For hire passenger vehicles. — Vehicles transporting persons for compensation. This classification shall not include vehicles operated as ambulances; vehicles operated by the owner where the costs of operation are shared by the passengers; vehicles operated pursuant to a ridesharing arrangement as defined in G.S. 136-44.21; vehicles transporting students for the public school system under contract with the State Board of Education or vehicles leased to the United States of America or any of its agencies on a nonprofit basis; or vehicles used for human service or volunteer transportation.

c. Common carriers of passengers. — Vehicles operated under a certificate of authority issued by the Utilities Commission for operation on the highways of this State between fixed termini or over a regular route for the transportation of persons for compensation.

c1. Child care vehicles. — Vehicles under the direction and control of a child care facility, as defined in G.S. 110-86(3), and driven by an owner, employee, or agent of the child care facility for the primary purpose of transporting children to and from the child care facility, or to and from a place for participation in an event or activity in connection with the child care facility.

d. Motorcycles. — Vehicles having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, including motor scooters and motor-driven bicycles, but excluding tractors and utility vehicles equipped with an additional form of device designed to transport property, three-wheeled vehicles while being used by law-enforcement agencies and mopeds as defined in subdivision d1 of this subsection.

d1. Moped. — Defined in G.S. 105-164.3.

d2. Motor home or house car. — A vehicular unit, designed to provide temporary living quarters, built into as an integral part, or permanently attached to, a self-propelled motor vehicle chassis or van. The vehicle must provide at least four of the following facilities: cooking, refrigeration or icebox, self-contained toilet, heating or air conditioning, a portable water supply system including a faucet and sink, separate 110-125 volt electrical power supply, or an LP gas supply.

d3. School activity bus. — A vehicle, generally painted a different color from a school bus, whose primary purpose is to transport school students and others to or from a place for participation in an event other than regular classroom work. The term includes a public, private, or parochial vehicle that meets this description.

d4. School bus. — A vehicle whose primary purpose is to transport school students over an established route to and from school for the regularly scheduled school day, that is equipped with alternately flashing red lights on the front and rear and a mechanical stop signal, and that bears the words "School Bus" on the front and rear in letters at least 8 inches in height. The term includes a public, private, or parochial vehicle that meets this description.

e. U-drive-it passenger vehicles. — Passenger vehicles included in the definition of U-drive-it vehicles set forth in this section.

f. Ambulances. — Vehicles equipped for transporting wounded, injured, or sick persons.

g. Private passenger vehicles. — All other passenger vehicles not included in the above definitions.

(28) Person. — Every individual, firm, partnership, association, corporation, governmental agency, or combination thereof of whatsoever form or character.

(29) Pneumatic Tire. — Every tire in which compressed air is designed to support the load.

(29a) Private Motor Carrier. — A person who transports passengers or property by motor vehicle in interstate commerce and is not a for-hire motor carrier.

(30) Private Road or Driveway. — Every road or driveway not open to the use of the public as a matter of right for the purpose of vehicular traffic.

(31) Property-Hauling Vehicles. —

a. Vehicles used for the transportation of property.

b., c. Repealed by Session Laws 1995 (Regular Session, 1996), c. 756, s. 4.

d. Semitrailers. — Vehicles without motive power designed for carrying property or persons and for being drawn by a motor vehicle, and so constructed that part of their weight or their load rests upon or is carried by the pulling vehicle.

e. Trailers. — Vehicles without motive power designed for carrying property or persons wholly on their own structure and to be drawn by a motor vehicle, including "pole trailers" or a pair of wheels used primarily to balance a load rather than for purposes of transportation.

f. Repealed by Session Laws 1995 (Regular Session, 1996), c. 756, s. 4.

(31a) Provisional Licensee. — A person under the age of 18 years.

(32) Public Vehicular Area. — Any area within the State of North Carolina that is generally open to and used by the public for vehicular traffic, including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley, or parking lot upon the grounds and premises of:

a. Any public or private hospital, college, university, school, orphanage, church, or any of the institutions, parks or other facilities maintained and supported by the State of North Carolina or any of its subdivisions; or

b. Any service station, drive-in theater, supermarket, store, restaurant, or office building, or any other business, residential, or municipal establishment providing parking space for customers, patrons, or the public; or

c. Any property owned by the United States and subject to the jurisdiction of the State of North Carolina. (The inclusion of property owned by the United States in this definition shall not limit assimilation of North Carolina law when applicable under the provisions of Title 18, United States Code, section 13.)

The term "public vehicular area" shall also include any beach area used by the public for vehicular traffic as well as any road opened to vehicular traffic within or leading to a subdivision for use by subdivision residents, their guests, and members of the public, whether or not the subdivision roads have been offered for dedication to the public. The term "public vehicular area" shall not be construed to mean any private property not generally open to and used by the public.

(32a) Regular Drivers License. — A license to drive a commercial motor vehicle that is exempt from the commercial drivers license requirements or a noncommercial motor vehicle.

(33)a. Flood Vehicle. — A motor vehicle that has been submerged or partially submerged in water to the extent that damage to the body, engine, transmission, or differential has occurred.

b. Non-U.S.A. Vehicle. — A motor vehicle manufactured outside of the United States and not intended by the manufacturer for sale in the United States.

c. Reconstructed Vehicle. — A motor vehicle of a type required to be registered hereunder that has been materially altered from original construction due to removal, addition or substitution of new or used essential parts; and includes glider kits and custom assembled vehicles.

d. Salvage Motor Vehicle. — Any motor vehicle damaged by collision or other occurrence to the extent that the cost of repairs to the vehicle and rendering the vehicle safe for use on the public streets and highways would exceed seventy-five percent (75%) of its fair retail market value, whether or not the motor vehicle has been declared a total loss by an insurer. Repairs shall include the cost of parts and labor. Fair market retail values shall be as found in the NADA Pricing Guide Book or other publications approved by the Commissioner.

e. Salvage Rebuilt Vehicle. — A salvage vehicle that has been rebuilt for title and registration.

f. Junk Vehicle. — A motor vehicle which is incapable of operation or use upon the highways and has no resale value except as a source of parts or scrap, and shall not be titled or registered.

(33a) Relevant Time after the Driving. — Any time after the driving in which the driver still has in his body alcohol consumed before or during the driving.

(33b) Reportable Crash. — A crash involving a motor vehicle that results in one or more of the following:

a. Death or injury of a human being.

b. Total property damage of one thousand dollars ($1,000) or more, or property damage of any amount to a vehicle seized pursuant to G. S. 20-28.3.

(34) Resident. — Any person who resides within this State for other than a temporary or transitory purpose for more than six months shall be presumed to be a resident of this State; but absence from the State for more than six months shall raise no presumption that the person is not a resident of this State.

(35) Residential District. — The territory prescribed as such by ordinance of the Department of Transportation.

(36) Revocation or Suspension. — Termination of a licensee's or permittee's privilege to drive or termination of the registration of a vehicle for a period of time stated in an order of revocation or suspension. The terms "revocation" or "suspension" or a combination of both terms shall be used synonymously.

(37) Road Tractors. — Vehicles designed and used for drawing other vehicles upon the highway and not so constructed as to carry any part of the load, either independently or as a part of the weight of the vehicle so drawn.

(38) Roadway. — That portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the shoulder. In the event a highway includes two or more separate roadways the term "roadway" as used herein shall refer to any such roadway separately but not to all such roadways collectively.

(39) Safety Zone. — Traffic island or other space officially set aside within a highway for the exclusive use of pedestrians and which is so plainly

marked or indicated by proper signs as to be plainly visible at all times while set apart as a safety zone.

(40) Security Agreement. — Written agreement which reserves or creates a security interest.

(41) Security Interest. — An interest in a vehicle reserved or created by agreement and which secures payments or performance of an obligation. The term includes but is not limited to the interest of a chattel mortgagee, the interest of a vendor under a conditional sales contract, the interest of a trustee under a chattel deed of trust, and the interest of a lessor under a lease intended as security. A security interest is "perfected" when it is valid against third parties generally.

(41a) Serious Traffic Violation. — A conviction of one of the following offenses when operating a commercial motor vehicle:

a. Excessive speeding, involving a single charge of any speed 15 miles per hour or more above the posted speed limit.
b. Careless and reckless driving.
c. A violation of any State or local law relating to motor vehicle traffic control, other than a parking violation, arising in connection with a fatal accident.
d. Improper or erratic lane changes.
e. Following the vehicle ahead too closely.

(42) Solid Tire. — Every tire of rubber or other resilient material which does not depend upon compressed air for the support of the load.

(43) Specially Constructed Vehicles. — Vehicles of a type required to be registered hereunder not originally constructed under a distinctive name, make, model, or type by a generally recognized manufacturer of vehicles and not materially altered from their original construction.

(44) Special Mobile Equipment. — Defined in G.S. 105-164.3.

(45) State. — A state, territory, or possession of the United States, District of Columbia, Commonwealth of Puerto Rico, or a province of Canada.

(46) Street. — A highway, as defined in subdivision (13). The terms "highway" and "street" and their cognates are synonymous.

(47) Suspension. — Termination of a licensee's or permittee's privilege to drive or termination of the registration of a vehicle for a period of time stated in an order of revocation or suspension. The terms "revocation" or "suspension" or a combination of both terms shall be used synonymously.

(48) Truck Tractors. — Vehicles designed and used primarily for drawing other vehicles and not so constructed as to carry any load independent of the vehicle so drawn.

(48a) U-drive-it vehicles. — The following vehicles that are rented to a person, to be operated by that person:

a. A private passenger vehicle other than the following:
    1. A private passenger vehicle of nine-passenger capacity or less that is rented for a term of one year or more.
    2. A private passenger vehicle that is rented to public school authorities for driver-training instruction.
b. A property-hauling vehicle under 7,000 pounds that does not haul products for hire and that is rented for a term of less than one year.
c. Motorcycles.

(48b) Under the Influence of an Impairing Substance. — The state of a person having his physical or mental faculties, or both, appreciably impaired by an impairing substance.

(49) Vehicle. — Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices

moved by human power or used exclusively upon fixed rails or tracks; provided, that for the purposes of this Chapter bicycles shall be deemed vehicles and every rider of a bicycle upon a highway shall be subject to the provisions of this Chapter applicable to the driver of a vehicle except those which by their nature can have no application. This term shall not include a device which is designed for and intended to be used as a means of transportation for a person with a mobility impairment, is suitable for use both inside and outside a building, and whose maximum speed does not exceed 12 miles per hour when the device is being operated by a person with a mobility impairment.

(50) Wreckers. — Vehicles with permanently attached cranes used to move other vehicles; provided, that said wreckers shall be equipped with adequate brakes for units being towed. (1973, c. 1330, s. 1; 1975, cc. 94, 208; c. 716, s. 5; c. 743; c. 859, s. 1; 1977, c. 313; c. 464, s. 34; 1979, c. 39; c. 423, s. 1; c. 574, ss. 1-4; c. 667, s. 1; c. 680; 1981, c. 606, s. 3; c. 792, s. 2; 1983, c. 435, s. 8; 1983 (Reg. Sess., 1984), c. 1101, ss. 1-3; 1985, c. 509, s. 6; 1987, c. 607, s. 2; c. 658, s. 1; 1987 (Reg. Sess., 1988), c. 1069; c. 1105, s. 1; c. 1112, ss. 1-3; 1989, c. 455, ss. 1, 2; c. 727, s. 219(1); c. 771, ss. 1, 18; 1991, c. 449, s. 2; c. 726, ss. 1-4; 1991 (Reg. Sess., 1992), c. 1015, s. 1; 1993 (Reg. Sess., 1994), c. 761, s. 22; 1995, c. 191, s. 1; 1995 (Reg. Sess., 1996), c. 756, ss. 2-4; 1997-379, s. 5.1; 1997-443, s. 11A.8; 1997-456, s. 27; 1998-149, s. 1; 1998-182, ss. 1, 1.1, 26; 1998-217, s. 62(e); 1999-330, s. 9; 1999-337, s. 28(c)-(e); 1999-406, s. 14; 1999-452, ss. 1-5; 2000-155, s. 9; 2000-173, s. 10(c).)

Effect of Amendments. —

Session Laws 2000-155, s. 9, effective September 1, 2000, and applicable to offenses committed on or after that date, substituted "similar offense" for "equivalent offense" in subdivisions (24a)b., c. and e.

Session Laws 2000-173, s. 10(c), effective August 2, 2000, in subdivision (5), inserted "and" preceding "having an established place," deleted "and being subject to the tax levied by G.S. 105-89" following "place of business in this State," substituted "as used in Article 12 of this Chapter have" for "shall have" and made a minor punctuation.

CASE NOTES

Offense Involving Impaired Driving — Similar Offense in Another Jurisdiction. — Although the definitions of "impairment" under North Carolina and New York laws are not identical and the statutes do not "mirror" one another, they are "substantially equivalent"; consequently, the trial court did not err in determining that defendant's prior conviction under New York law was a grossly aggravating factor in sentencing him under North Carolina law. State v. Parisi, 135 N.C. App. 222, 519 S.E.2d 531 (1999).

Quoted in State v. Clapp, 135 N.C. App. 52, 519 S.E.2d 90 (1999).

Cited in Halter v. J.C. Penney Life Ins. Co., 1999 U.S. Dist. LEXIS 21386, — F. Supp. 2d — (M.D.N.C. November 30, 1999); Cooke v. Faulkner, — N.C. App. —, 529 S.E.2d 512, 2000 N.C. App. LEXIS 496 (2000).

Article 1B.

Reciprocal Provisions as to Arrest of Nonresidents.

§ 20-4.20. Division to transmit report to reciprocating state; suspension of license for noncompliance with citation issued by reciprocating state.

CASE NOTES

Cited in Cooke v. Faulkner, — N.C. App. —, 529 S.E.2d 512, 2000 N.C. App. LEXIS 496 (2000).

Article 2.

Uniform Driver's License Act.

§ 20-7. Issuance and renewal of drivers licenses.

(a) License Required. — To drive a motor vehicle on a highway, a person must be licensed by the Division under this Article or Article 2C of this Chapter to drive the vehicle and must carry the license while driving the vehicle. The Division issues regular drivers licenses under this Article and issues commercial drivers licenses under Article 2C.

A license authorizes the holder of the license to drive any vehicle included in the class of the license and any vehicle included in a lesser class of license, except a vehicle for which an endorsement is required. To drive a vehicle for which an endorsement is required, a person must obtain both a license and an endorsement for the vehicle. A regular drivers license is considered a lesser class of license than its commercial counterpart.

The classes of regular drivers licenses and the motor vehicles that can be driven with each class of license are:

(1) Class A. — A Class A license authorizes the holder to drive any of the following:
   a. A Class A motor vehicle that is exempt under G.S. 20-37.16 from the commercial drivers license requirements.
   b. A Class A motor vehicle that has a combined GVWR of less than 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.

(2) Class B. — A Class B license authorizes the holder to drive any Class B motor vehicle that is exempt under G.S. 20-37.16 from the commercial drivers license requirements.

(3) Class C. — A Class C license authorizes the holder to drive any of the following:
   a. A Class C motor vehicle that is not a commercial motor vehicle.
   b. When operated by a volunteer member of a fire department, a rescue squad, or an emergency medical service (EMS) in the performance of duty, a Class A or Class B fire-fighting, rescue, or EMS motor vehicle or a combination of these vehicles.

The Commissioner may assign a unique motor vehicle to a class that is different from the class in which it would otherwise belong.

A new resident of North Carolina who has a drivers license issued by another jurisdiction must obtain a license from the Division within 60 days after becoming a resident.

(a1) Motorcycles and Mopeds. — To drive a motorcycle, a person shall have:
(1) A full provisional license with a motorcycle learner's permit;
(2) A regular drivers license with a motorcycle learner's permit; or
(3) Either:
a. A full provisional license; or
b. A regular drivers license, with a motorcycle endorsement.
Subsection (a2) of this section sets forth the requirements for a motorcycle learner's permit.

To obtain a motorcycle endorsement, a person shall demonstrate competence to drive a motorcycle by:
(1) Passing a road test;
(2) Passing a written or oral test concerning motorcycles; and
(3) Paying the fee for a motorcycle endorsement.
Neither a drivers license nor a motorcycle endorsement is required to drive a moped.

(a2) Motorcycle Learner's Permit. — The following persons are eligible for a motorcycle learner's permit:
(1) A person who is at least 16 years old but less than 18 years old and has a full provisional license issued by the Division.
(2) A person who is at least 18 years old and has a license issued by the Division.

To obtain a motorcycle learner's permit, an applicant shall pass a vision test, a road sign test, and a written test specified by the Division. A motorcycle learner's permit expires 18 months after it is issued. The holder of a motorcycle learner's permit may not drive a motorcycle with a passenger. The fee for a motorcycle learner's permit is the amount set in G.S. 20-7(l) for a learner's permit.

(b) Repealed by Session Laws 1993, c. 368, s. 1, c. 533, s. 12.

(b1) Application. — To obtain a drivers license from the Division, a person must complete an application form provided by the Division, present at least two forms of identification approved by the Commissioner, be a resident of this State, and demonstrate his or her physical and mental ability to drive safely a motor vehicle included in the class of license for which the person has applied. The Division may copy the identification presented or hold it for a brief period of time to verify its authenticity. To obtain an endorsement, a person must demonstrate his or her physical and mental ability to drive safely the type of motor vehicle for which the endorsement is required.

The application form must request all of the following information, and it must contain the disclosures concerning the request for an applicant's social security number required by section 7 of the federal Privacy Act of 1974, Pub. L. No. 93-579:
(1) The applicant's full name.
(2) The applicant's mailing address and residence address.
(3) A physical description of the applicant, including the applicant's sex, height, eye color, and hair color.
(4) The applicant's date of birth.
(5) The applicant's social security number. The Division shall not issue a license to an applicant who fails to provide the applicant's social security number.
(6) The applicant's signature.

(b2) Disclosure of Social Security Number. — The social security number of an applicant is not a public record. The Division may not disclose an applicant's social security number except as allowed under federal law. A violation of the disclosure restrictions is punishable as provided in 42 U.S.C. § 408, and amendments to that law.

In accordance with 42 U.S.C. 405 and 42 U.S.C. 666, and amendments thereto, the Division may disclose a social security number obtained under subsection (b1) of this section only as follows:

(1) For the purpose of administering the drivers license laws.
(2) To the Department of Health and Human Services, Child Support Enforcement Program for the purpose of establishing paternity or child support or enforcing a child support order.
(3) To the Department of Revenue for the purpose of verifying taxpayer identity.

(c) Tests. — To demonstrate physical and mental ability, a person must pass an examination. The examination may include road tests, vision tests, oral tests, and, in the case of literate applicants, written tests, as the Division may require. The tests must ensure that an applicant recognizes the handicapped international symbol of access, as defined in G.S. 20-37.5. The Division may not require a person who applies to renew a license that has not expired to take a written test or a road test unless one or more of the following applies:

(1) The person has been convicted of a traffic violation since the person's license was last issued.
(2) The applicant suffers from a mental or physical condition that impairs the person's ability to drive a motor vehicle.

The Division may not require a person who is at least 60 years old to parallel park a motor vehicle as part of a road test.

(c1) Insurance. — The Division may not issue a drivers license to a person until the person has furnished proof of financial responsibility. Proof of financial responsibility shall be in one of the following forms:

(1) A written certificate or electronically-transmitted facsimile thereof from any insurance carrier duly authorized to do business in this State certifying that there is in effect a nonfleet private passenger motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. The certificate or facsimile shall state the effective date and expiration date of the nonfleet private passenger motor vehicle liability policy and shall state the date that the certificate or facsimile is issued. The certificate or facsimile shall remain effective proof of financial responsibility for a period of 30 consecutive days following the date the certificate or facsimile is issued but shall not in and of itself constitute a binder or policy of insurance.
(2) A binder for or policy of nonfleet private passenger motor vehicle liability insurance under which the applicant is insured, provided that the binder or policy states the effective date and expiration date of the nonfleet private passenger motor vehicle liability policy.

The preceding provisions of this subsection do not apply to applicants who do not own currently registered motor vehicles and who do not operate nonfleet private passenger motor vehicles that are owned by other persons and that are not insured under commercial motor vehicle liability insurance policies. In such cases, the applicant shall sign a written certificate to that effect. Such certificate shall be furnished by the Division and may be incorporated into the license application form. Any material misrepresentation made by such person on such certificate shall be grounds for suspension of that person's license for a period of 90 days.

For the purpose of this subsection, the term "nonfleet private passenger motor vehicle" has the definition ascribed to it in Article 40 of General Statute Chapter 58.

The Commissioner may require that certificates required by this subsection be on a form approved by the Commissioner.

The requirement of furnishing proof of financial responsibility does not apply to a person who applies for a renewal of his or her drivers license.

Nothing in this subsection precludes any person from showing proof of financial responsibility in any other manner authorized by Articles 9A and 13 of this Chapter.

(d) Repealed by Session Laws 1993, c. 368, s. 1.

(e) Restrictions. — The Division may impose any restriction it finds advisable on a drivers license. It is unlawful for the holder of a restricted license to operate a motor vehicle without complying with the restriction and is the equivalent of operating a motor vehicle without a license. If any applicant shall suffer from any physical defect or disease which affects his or her operation of a motor vehicle, the Division may require to be filed with it a certificate of such applicant's condition signed by some medical authority of the applicant's community designated by the Division. This certificate shall in all cases be treated as confidential. Nothing in this subsection shall be construed to prevent the Division from refusing to issue a license, either restricted or unrestricted, to any person deemed to be incapable of safely operating a motor vehicle. This subsection does not prohibit deaf persons from operating motor vehicles who in every other way meet the requirements of this section.

(f) Expiration and Temporary License. — The first drivers license the Division issues to a person expires on the person's fourth or subsequent birthday that occurs after the license is issued and on which the individual's age is evenly divisible by five, unless this subsection sets a different expiration date. The first drivers license the Division issues to a person who is at least 17 years old but is less than 18 years old expires on the person's twentieth birthday. The first drivers license the Division issues to a person who is at least 62 years old expires on the person's birthday in the fifth year after the license is issued, whether or not the person's age on that birthday is evenly divisible by five.

A drivers license that was issued by the Division and is renewed by the Division expires five years after the expiration date of the license that is renewed. A person may apply to the Division to renew a license during the 180-day period before the license expires. The Division may not accept an application for renewal made before the 180-day period begins.

The Division may renew by mail a drivers license issued by the Division to a person who meets any of the following descriptions:

(1) Is serving on active duty in the armed forces of the United States and is stationed outside this State.

(2) Is a resident of this State and has been residing outside the State for at least 30 continuous days.

When renewing a license by mail, the Division may waive the examination that would otherwise be required for the renewal and may impose any conditions it finds advisable. A license renewed by mail is a temporary license that expires 60 days after the person to whom it is issued returns to this State.

(g) Repealed by Session Laws 1979, c. 667, s. 6.

(h) Repealed by Session Laws 1979, c. 113, s. 1.

(i) Fees. — The fee for a regular drivers license is the amount set in the following table multiplied by the number of years in the period for which the license is issued:

Class of Regular License	Fee for Each Year
Class A	$3.75
Class B	3.75
Class C	2.50

The fee for a motorcycle endorsement is one dollar and twenty-five cents ($1.25) for each year of the period for which the endorsement is issued. The appropriate fee must be paid before a person receives a regular drivers license or an endorsement.

(i1) Restoration Fee. — Any person whose drivers license has been revoked pursuant to the provisions of this Chapter, other than G.S. 20-17(2), shall pay a restoration fee of twenty-five dollars ($25.00). A person whose drivers license has been revoked under G.S. 20-17(2) shall pay a restoration fee of fifty dollars

($50.00) until the end of the fiscal year in which the cumulative total amount of fees deposited under this subsection in the General Fund exceeds ten million dollars ($10,000,000), and shall pay a restoration fee of twenty-five dollars ($25.00) thereafter. The fee shall be paid to the Division prior to the issuance to such person of a new drivers license or the restoration of the drivers license. The restoration fee shall be paid to the Division in addition to any and all fees which may be provided by law. This restoration fee shall not be required from any licensee whose license was revoked or voluntarily surrendered for medical or health reasons whether or not a medical evaluation was conducted pursuant to this Chapter. The twenty-five dollar ($25.00) fee, and the first twenty-five dollars ($25.00) of the fifty-dollar ($50.00) fee, shall be deposited in the Highway Fund. The remaining twenty-five dollars ($25.00) of the fifty-dollar ($50.00) fee shall be deposited in the General Fund of the State. The Office of State Budget, Planning, and Management shall certify to the Department of Transportation and the General Assembly when the cumulative total amount of fees deposited in the General Fund under this subsection exceeds ten million dollars ($10,000,000), and shall annually report to the General Assembly the amount of fees deposited in the General Fund under this subsection.

It is the intent of the General Assembly to annually appropriate the funds deposited in the General Fund under this subsection to the Board of Governors of The University of North Carolina to be used for the Center for Alcohol Studies Endowment at The University of North Carolina at Chapel Hill, but not to exceed this cumulative total of ten million dollars ($10,000,000).

(j) Highway Fund. — The fees collected under this section and G.S. 20-14 shall be placed in the Highway Fund.

(k) Repealed by Session Laws 1991, c. 726, s. 5.

(*l*) Learner's Permit. — A person who is at least 18 years old may obtain a learner's permit. A learner's permit authorizes the permit holder to drive a specified type or class of motor vehicle while in possession of the permit. A learner's permit is valid for a period of 18 months after it is issued. The fee for a learner's permit is ten dollars ($10.00). A learner's permit may be renewed, or a second learner's permit may be issued, for an additional period of 18 months. The permit holder must, while operating a motor vehicle over the highways, be accompanied by a person who is licensed to operate the motor vehicle being driven and is seated beside the permit holder.

(*l*-1) Repealed by Session Laws 1991, c. 726, s. 5.

(m) Instruction Permit. — The Division upon receiving proper application may in its discretion issue a restricted instruction permit effective for a school year or a lesser period to any of the following applicants:

(1) An applicant who is less than 18 years old and is enrolled in a drivers education program that is approved by the State Superintendent of Public Instruction and is offered at a public high school, a nonpublic secondary school, or a licensed drivers training school.

(2) An applicant for certification under G.S. 20-218 as a school bus driver.

A restricted instruction permit authorizes the holder of the permit to drive a specified type or class of motor vehicle when in possession of the permit, subject to any restrictions imposed by the Division. The restrictions the Division may impose on a permit include restrictions to designated areas and highways and restrictions prohibiting operation except when an approved instructor is occupying a seat beside the permittee. A restricted instruction permit is not required to have a distinguishing number or a picture of the person to whom the permit is issued.

(n) Format. — A drivers license issued by the Division must be tamperproof and must contain all of the following information:

(1) An identification of this State as the issuer of the license.

(2) The license holder's full name.

(3) The license holder's residence address.
(4) A color photograph of the license holder, taken by the Division.
(5) A physical description of the license holder, including sex, height, eye color, and hair color.
(6) The license holder's date of birth.
(7) An identifying number for the license holder assigned by the Division. The identifying number may not be the license holder's social security number.
(8) Each class of motor vehicle the license holder is authorized to drive and any endorsements or restrictions that apply.
(9) The license holder's signature.
(10) The date the license was issued and the date the license expires.

The Commissioner may waive the requirement of a color photograph on a license if the license holder proves to the satisfaction of the Commissioner that taking the photograph would violate the license holder's religious convictions. In taking photographs of license holders, the Division must distinguish between license holders who are less than 21 years old and license holders who are at least 21 years old by using different color backgrounds or borders for each group. The Division shall determine the different colors to be used.

At the request of an applicant for a drivers license, a license issued to the applicant must contain the applicant's race.

(o) Repealed by Session Laws 1991, c. 726, s. 5.

(p) The Division must give the clerk of superior court in each county at least 50 copies of the driver license handbook free of charge. The clerk must give a copy to a person who requests it. (1935, c. 52, s. 2; 1943, c. 649, s. 1; c. 787, s. 1; 1947, c. 1067, s. 10; 1949, c. 583, ss. 9, 10; c. 826, ss. 1, 2; 1951, c. 542, ss. 1, 2; c. 1196, ss. 1-3; 1953, cc. 839, 1284, 1311; 1955, c. 1187, ss. 2-6; 1957, c. 1225; 1963, cc. 754, 1007, 1022; 1965, c. 410, s. 5; 1967, c. 509; 1969, c. 183; c. 783, s. 1; c. 865; 1971, c. 158; 1973, cc. 73, 705; c. 1057, ss. 1, 3; 1975, c. 162, s. 1; c. 295; c. 296, ss. 1, 2; c. 684; c. 716, s. 5; c. 841; c. 875, s. 4; c. 879, s. 46; 1977, c. 6; c. 340, s. 3; c. 865, ss. 1, 3; 1979, c. 37, s. 1; c. 113; c. 178, s. 2; c. 667, ss. 3-11, 41; c. 678, ss. 1-3; c. 801, ss. 5, 6; 1981, c. 42; c. 690, ss. 8-10; c. 792, s. 3; 1981 (Reg. Sess., 1982), c. 1257, s. 1; 1983, c. 443, s. 1; 1985, c. 141, s. 4; c. 682, ss. 1, 2; 1987, c. 869, ss. 10, 11; 1989, c. 436, ss. 1, 2; c. 771, s. 5; c. 786, s. 4; 1991, c. 478, s. 1; c. 689, s. 325; c. 726, s. 5; 1991 (Reg. Sess., 1992), c. 1007, s. 27; c. 1030, s. 10; 1993, c. 368, s. 1; c. 533, ss. 2, 3, 12; 1993 (Reg. Sess., 1994), c. 595, ss. 1, 2; c. 750, s. 1; c. 761, s. 1.1; 1995 (Reg. Sess., 1996), c. 675, s. 1; 1997-16, ss. 5, 8, 9; 1997-122, ss. 2, 3; 1997-377, s. 1; 1997-433, s. 4; 1997-443, ss. 11A.122, 32.20; 1997-456, s. 32, 33; 1998-17, s. 1; 1998-149, s. 2; 2000-120, ss. 14, 15; 2000-140, s. 93.1(a).)

Effect of Amendments. —

Session Laws 2000-120, ss. 14 and 15, effective July 14, 2000, rewrote existing subsection (b1) as subsections (b1) and (b2), in subsection (b1) transferring the provision that the application must contain disclosures required by section 7 of Public L. No. 93-579 to precede the list of information required rather than to follow the list, deleting the last sentence in subdivision (b1)(5) regarding the release of an applicant's social security number, adding the subsection heading and the first two sentences in subsection (b2), and rewriting the remainder of subsection (b2); and in subdivision (n)(7), substituted "An identifying number for the license holder" for "The license holder's social security number or another identifying number" in the first sentence and added the second sentence.

Session Laws 2000-140, s. 93.1.(a), effective July 1, 2000, substituted "Office of State Budget, Planning, and Management" for "Office of State Budget and Management" in subsection (i1).

§ 20-13.2. Grounds for revoking provisional license.

OPINIONS OF ATTORNEY GENERAL

Regarding the application of this section to three separate groups of drivers based upon when driving privileges were received, see opinion of Attorney General to Michael E. Ward, State Superintendent of Public Instruction, N.C. General Assembly, 1999 N.C.A.G. 11 (10/14/99).

§ 20-16. Authority of Division to suspend license.

(a) The Division shall have authority to suspend the license of any operator with or without a preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee:

(1) through (4) Repealed by Session Laws 1979, c. 36;

(5) Has, under the provisions of subsection (c) of this section, within a three-year period, accumulated 12 or more points, or eight or more points in the three-year period immediately following the reinstatement of a license which has been suspended or revoked because of a conviction for one or more traffic offenses;

(6) Has made or permitted an unlawful or fraudulent use of such license or a learner's permit, or has displayed or represented as his own, a license or learner's permit not issued to him;

(7) Has committed an offense in another state, which if committed in this State would be grounds for suspension or revocation;

(8) Has been convicted of illegal transportation of alcoholic beverages;

(8a) Has been convicted of impaired instruction under G.S. 20-12.1;

(8b) Has violated on a military installation a regulation of that installation prohibiting conduct substantially similar to conduct that constitutes impaired driving under G.S. 20-138.1 and, as a result of that violation, has had his privilege to drive on that installation revoked or suspended after an administrative hearing authorized by the commanding officer of the installation and that commanding officer has general court martial jurisdiction;

(9) Has, within a period of 12 months, been convicted of two or more charges of speeding in excess of 55 and not more than 80 miles per hour, or of one or more charges of reckless driving and one or more charges of speeding in excess of 55 and not more than 80 miles per hour;

(10) Has been convicted of operating a motor vehicle at a speed in excess of 75 miles per hour on a public road or highway where the maximum speed is less than 70 miles per hour;

(10a) Has been convicted of operating a motor vehicle at a speed in excess of 80 miles per hour on a public highway where the maximum speed is 70 miles per hour; or

(11) Has been sentenced by a court of record and all or a part of the sentence has been suspended and a condition of suspension of the sentence is that the operator not operate a motor vehicle for a period of time.

However, if the Division revokes without a preliminary hearing and the person whose license is being revoked requests a hearing before the effective date of the revocation, the licensee retains his license unless it is revoked under some other provision of the law, until the hearing is held, the person withdraws his request, or he fails to appear at a scheduled hearing.

(b) Pending an appeal from a conviction of any violation of the motor vehicle laws of this State, no driver's license shall be suspended by the Division of

Motor Vehicles because of such conviction or because of evidence of the commission of the offense for which the conviction has been had.

(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
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
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.

(d) Upon suspending the license of any person as authorized in this section, the Division shall immediately notify the licensee in writing and upon his request shall afford him an opportunity for a hearing, not to exceed 60 days after receipt of the request, unless a preliminary hearing was held before his license was suspended. Upon such hearing the duly authorized agents of the Division may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require a reexamination of the licensee. Upon such hearing the Division shall either rescind its order of suspension, or good cause appearing therefor, may extend the suspension of such license. Provided further upon such hearing, preliminary or otherwise, involving subsections (a)(1) through (a)(10a) of this section, the Division may for good cause appearing in its discretion substitute a period of probation not to exceed one year for the suspension or for any unexpired period of suspension. Probation shall mean any written agreement between the suspended driver and a duly authorized representative of the Division and such period of probation shall not exceed one year, and any violation of the probation agreement during the probation period shall result in a suspension for the unexpired remainder of the suspension period. The authorized agents of the Division shall have the same powers in connection with a preliminary hearing prior to suspension as this subsection provided in connection with hearings held after suspension. These agents shall also have the authority to take possession of a surrendered license on behalf of the Division if the suspension is upheld and the licensee requests that the suspension begin immediately.

(e) The Division may conduct driver improvement clinics for the benefit of those who have been convicted of one or more violations of this Chapter. Each driver attending a driver improvement clinic shall pay a fee of twenty-five dollars ($25.00).

(e1) Notwithstanding any other provision of this Chapter, if the Division suspends the license of an operator pursuant to subdivisions (a)(9), (a)(10), or (a)(10a) of this section, upon the first suspension only, a district court judge may allow the licensee a limited driving privilege or license for a period not to exceed 12 months, provided he has not been convicted of any other motor vehicle moving violation within the previous 12 months. The limited driving privilege shall be issued in the same manner and under the terms and conditions prescribed in G.S. 20-16.1(b)(1), (2), (3), (4), and (5). (1935, c. 52, s. 11; 1947, c. 893, ss. 1, 2; c. 1067, s. 13; 1949, c. 373, ss. 1, 2; c. 1032, s. 2; 1953, c. 450; 1955, c. 1152, s. 15; c. 1187, ss. 9-12; 1957, c. 499, s. 1; 1959, c. 1242, ss. 1-2; 1961, c. 460, ss. 1, 2(a); 1963, c. 1115; 1965, c. 130; 1967, c. 16; 1971, c. 234, ss. 1, 2; c. 793, ss. 1, 2; c. 1198, ss. 1, 2; 1973, c. 17, ss. 1, 2; 1975, c. 716, s. 5; 1977, c. 902, s. 1; 1979, c. 36; c. 667, ss. 18, 41; 1981, c. 412, s. 4; c. 747, ss. 33, 66; 1981 (Reg. Sess., 1982), c. 1256; 1983, c. 435, s. 10; c. 538, ss. 3-5; c. 798; 1983 (Reg. Sess., 1984), c. 1101, s. 4; 1987, c. 744, ss. 1, 2; 1987 (Reg. Sess.,

1988), c. 1037, s. 75; 1989, c. 784, s. 9; 1991, c. 682, s. 3; 1999-330, s. 7; 1999-452, s. 10; 2000-109, s. 7(d); 2000-117, s. 2; 2000-155, s. 10.)

Effect of Amendments. —

Session Laws 2000-109, s. 7(d), effective July 13, 2000, inserted entries for "Careless and reckless driving in violation of G.S. 20-140(f)" and "Speeding in violation of G.S. 20-141(j3)" in the Schedule of Point Values for Violations While Operating a Commercial Motor Vehicle table.

Session Laws 2000-117, s. 2, effective December 1, 2000, inserted the entry for "Failure to properly restrain a child in a restraint or seat belt" in the Schedule of Point Values table.

Session Laws 2000-155, s. 10, effective September 1, 2000, and applicable to offenses committed on or after that date, substituted "similar to conduct" for "equivalent to conduct" in subdivision (a)(8b).

§ 20-16.2. Implied consent to chemical analysis; mandatory revocation of license in event of refusal; right of driver to request analysis.

(a) Basis for Charging Officer to Require Chemical Analysis; Notification of Rights. — Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense. The charging officer shall designate the type of chemical analysis to be administered, and it may be administered when the officer has reasonable grounds to believe that the person charged has committed the implied-consent offense.

Except as provided in this subsection or subsection (b), before any type of chemical analysis is administered the person charged shall be taken before a chemical analyst authorized to administer a test of a person's breath, who shall inform the person orally and also give the person a notice in writing that:

(1) The person has a right to refuse to be tested.

(2) Refusal to take any required test or tests will result in an immediate revocation of the person's driving privilege for at least 30 days and an additional 12-month revocation by the Division of Motor Vehicles.

(3) The test results, or the fact of the person's refusal, will be admissible in evidence at trial on the offense charged.

(4) The person's driving privilege will be revoked immediately for at least 30 days if:

a. The test reveals an alcohol concentration of 0.08 or more;

b. The person was driving a commercial motor vehicle and the test reveals an alcohol concentration of 0.04 or more; or

c. The person is under 21 years of age and the test reveals any alcohol concentration.

(5) The person may choose a qualified person to administer a chemical test or tests in addition to any test administered at the direction of the charging officer.

(6) The person has the right to call an attorney and select a witness to view for him or her the testing procedures, but the testing may not be delayed for these purposes longer than 30 minutes from the time when the person is notified of his or her rights.

If the charging officer or an arresting officer is authorized to administer a chemical analysis of a person's breath, the charging officer or the arresting officer may give the person charged the oral and written notice of rights required by this subsection. This authority applies regardless of the type of chemical analysis designated.

(a1) Meaning of Terms. — Under this section, an "implied-consent offense" is an offense involving impaired driving or an alcohol-related offense made subject to the procedures of this section. A person is "charged" with an offense

if the person is arrested for it or if criminal process for the offense has been issued. A "charging officer" is a law-enforcement officer who arrests the person charged, lodges the charge, or assists the officer who arrested the person or lodged the charge by assuming custody of the person to make the request required by subsection (c) and, if necessary, to present the person to a judicial official for an initial appearance.

(b) Unconscious Person May Be Tested. — If a charging officer has reasonable grounds to believe that a person has committed an implied-consent offense, and the person is unconscious or otherwise in a condition that makes the person incapable of refusal, the charging officer may direct the taking of a blood sample by a person qualified under G.S. 20-139.1 or may direct the administration of any other chemical analysis that may be effectively performed. In this instance the notification of rights set out in subsection (a) and the request required by subsection (c) are not necessary.

(c) Request to Submit to Chemical Analysis. — The charging officer, in the presence of the chemical analyst who has notified the person of his or her rights under subsection (a), must request the person charged to submit to the type of chemical analysis designated. If the person charged willfully refuses to submit to that chemical analysis, none may be given under the provisions of this section, but the refusal does not preclude testing under other applicable procedures of law.

(c1) Procedure for Reporting Results and Refusal to Division. — Whenever a person refuses to submit to a chemical analysis or a person's drivers license has an alcohol concentration restriction and the results of the chemical analysis establish a violation of the restriction, the charging officer and the chemical analyst must without unnecessary delay go before an official authorized to administer oaths and execute an affidavit(s) stating that:

(1) The person was charged with an implied-consent offense or had an alcohol concentration restriction on the drivers license;
(2) The charging officer had reasonable grounds to believe that the person had committed an implied-consent offense or violated the alcohol concentration restriction on the drivers license;
(3) Whether the implied-consent offense charged involved death or critical injury to another person, if the person willfully refused to submit to chemical analysis;
(4) The person was notified of the rights in subsection (a); and
(5) The results of any tests given or that the person willfully refused to submit to a chemical analysis upon the request of the charging officer.

If the person's drivers license has an alcohol concentration restriction, pursuant to G.S. 20-19(c3), and an officer has reasonable grounds to believe the person has violated a provision of that restriction other than violation of the alcohol concentration level, the charging officer and chemical analyst shall complete the applicable sections of the affidavit and indicate the restriction which was violated. The charging officer must immediately mail the affidavit(s) to the Division. If the charging officer is also the chemical analyst who has notified the person of the rights under subsection (a), the charging officer may perform alone the duties of this subsection.

(d) Consequences of Refusal; Right to Hearing before Division; Issues. — Upon receipt of a properly executed affidavit required by subsection (c1), the Division must expeditiously notify the person charged that the person's license to drive is revoked for 12 months, effective on the tenth calendar day after the mailing of the revocation order unless, before the effective date of the order, the person requests in writing a hearing before the Division. Except for the time referred to in G.S. 20-16.5, if the person shows to the satisfaction of the Division that his or her license was surrendered to the court, and remained in the court's possession, then the Division shall credit the amount of time for

which the license was in the possession of the court against the 12-month revocation period required by this subsection. If the person properly requests a hearing, the person retains his or her license, unless it is revoked under some other provision of law, until the hearing is held, the person withdraws the request, or the person fails to appear at a scheduled hearing. The hearing officer may subpoena any witnesses or documents that the hearing officer deems necessary. The person may request the hearing officer to subpoena the charging officer, the chemical analyst, or both to appear at the hearing if the person makes the request in writing at least three days before the hearing. The person may subpoena any other witness whom the person deems necessary, and the provisions of G.S. 1A-1, Rule 45, apply to the issuance and service of all subpoenas issued under the authority of this section. The hearing officer is authorized to administer oaths to witnesses appearing at the hearing. The hearing must be conducted in the county where the charge was brought, and must be limited to consideration of whether:

(1) The person was charged with an implied-consent offense or the driver had an alcohol concentration restriction on the drivers license pursuant to G.S. 20-19;

(2) The charging officer had reasonable grounds to believe that the person had committed an implied-consent offense or violated the alcohol concentration restriction on the drivers license;

(3) The implied-consent offense charged involved death or critical injury to another person, if this allegation is in the affidavit;

(4) The person was notified of the person's rights as required by subsection (a); and

(5) The person willfully refused to submit to a chemical analysis upon the request of the charging officer.

If the Division finds that the conditions specified in this subsection are met, it must order the revocation sustained. If the Division finds that any of the conditions (1), (2), (4), or (5) is not met, it must rescind the revocation. If it finds that condition (3) is alleged in the affidavit but is not met, it must order the revocation sustained if that is the only condition that is not met; in this instance subsection (d1) does not apply to that revocation. If the revocation is sustained, the person must surrender his or her license immediately upon notification by the Division.

(d1) Consequences of Refusal in Case Involving Death or Critical Injury. — If the refusal occurred in a case involving death or critical injury to another person, no limited driving privilege may be issued. The 12-month revocation begins only after all other periods of revocation have terminated unless the person's license is revoked under G.S. 20-28, 20-28.1, 20-19(d), or 20-19(e). If the revocation is based on those sections, the revocation under this subsection begins at the time and in the manner specified in subsection (d) for revocations under this section. However, the person's eligibility for a hearing to determine if the revocation under those sections should be rescinded is postponed for one year from the date on which the person would otherwise have been eligible for such a hearing. If the person's driver's license is again revoked while the 12-month revocation under this subsection is in effect, that revocation, whether imposed by a court or by the Division, may only take effect after the period of revocation under this subsection has terminated.

(e) Right to Hearing in Superior Court. — If the revocation for a willful refusal is sustained after the hearing, the person whose license has been revoked has the right to file a petition in the superior court for a hearing de novo upon the issues listed in subsection (d), in the same manner and under the same conditions as provided in G.S. 20-25 except that the de novo hearing is conducted in the superior court district or set of districts as defined in G.S. 7A-41.1 where the charge was made.

(e1) Limited Driving Privilege after Six Months in Certain Instances. — A person whose driver's license has been revoked under this section may apply for and a judge authorized to do so by this subsection may issue a limited driving privilege if:

(1) At the time of the refusal the person held either a valid drivers license or a license that had been expired for less than one year;
(2) At the time of the refusal, the person had not within the preceding seven years been convicted of an offense involving impaired driving;
(3) At the time of the refusal, the person had not in the preceding seven years willfully refused to submit to a chemical analysis under this section;
(4) The implied-consent offense charged did not involve death or critical injury to another person;
(5) The underlying charge for which the defendant was requested to submit to a chemical analysis has been finally disposed of:
    a. Other than by conviction; or
    b. By a conviction of impaired driving under G.S. 20-138.1, at a punishment level authorizing issuance of a limited driving privilege under G.S. 20-179.3(b), and the defendant has complied with at least one of the mandatory conditions of probation listed for the punishment level under which the defendant was sentenced;
(6) Subsequent to the refusal the person has had no unresolved pending charges for or additional convictions of an offense involving impaired driving;
(7) The person's license has been revoked for at least six months for the refusal; and
(8) The person has obtained a substance abuse assessment from a mental health facility and successfully completed any recommended training or treatment program.

Except as modified in this subsection, the provisions of G.S. 20-179.3 relating to the procedure for application and conduct of the hearing and the restrictions required or authorized to be included in the limited driving privilege apply to applications under this subsection. If the case was finally disposed of in the district court, the hearing shall be conducted in the district court district as defined in G.S. 7A-133 in which the refusal occurred by a district court judge. If the case was finally disposed of in the superior court, the hearing shall be conducted in the superior court district or set of districts as defined in G.S. 7A-41.1 in which the refusal occurred by a superior court judge. A limited driving privilege issued under this section authorizes a person to drive if the person's license is revoked solely under this section or solely under this section and G.S. 20-17(2). If the person's license is revoked for any other reason, the limited driving privilege is invalid.

(f) Notice to Other States as to Nonresidents. — When it has been finally determined under the procedures of this section that a nonresident's privilege to drive a motor vehicle in this State has been revoked, the Division must give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which the person has a license.

(g) Repealed by Session Laws 1973, c. 914.

(h) Repealed by Session Laws 1979, c. 423, s. 2.

(i) Right to Chemical Analysis before Arrest or Charge. — A person stopped or questioned by a law-enforcement officer who is investigating whether the person may have committed an implied-consent offense may request the administration of a chemical analysis before any arrest or other charge is made for the offense. Upon this request, the officer shall afford the person the

opportunity to have a chemical analysis of his or her breath, if available, in accordance with the procedures required by G.S. 20-139.1(b). The request constitutes the person's consent to be transported by the law-enforcement officer to the place where the chemical analysis is to be administered. Before the chemical analysis is made, the person shall confirm the request in writing and shall be notified:

(1) That the test results will be admissible in evidence and may be used against the person in any implied-consent offense that may arise;

(2) That the person's license will be revoked for at least 30 days if:
   a. The test reveals an alcohol concentration of 0.08 or more; or
   b. The person was driving a commercial motor vehicle and the test results reveal an alcohol concentration of 0.04 or more; or
   c. The person is under 21 years of age and the test reveals any alcohol concentration.

(3) That if the person fails to comply fully with the test procedures, the officer may charge the person with any offense for which the officer has probable cause, and if the person is charged with an implied-consent offense, the person's refusal to submit to the testing required as a result of that charge would result in revocation of the person's driver's license. The results of the chemical analysis are admissible in evidence in any proceeding in which they are relevant. (1963, c. 966, s. 1; 1965, c. 1165; 1969, c. 1074, s. 1; 1971, c. 619, ss. 3-6; 1973, c. 206, ss. 1, 2; cc. 824, 914; 1975, c. 716, s. 5; 1977, c. 812; 1979, c. 423, s. 2; 1979, 2nd Sess., c. 1160; 1981, c. 412, s. 4; c. 747, s. 66; 1983, c. 87; c. 435, s. 11; 1983 (Reg. Sess., 1984), c. 1101, ss. 5-8; 1987, c. 797, s. 3; 1987 (Reg. Sess., 1988), c. 1037, ss. 76, 77; c. 1112; 1989, c. 771, ss. 13, 14, 18; 1991, c. 689, s. 233.1(c); 1993, c. 285, ss. 3, 4; 1995, c. 163, s. 1; 1997-379, ss. 3.1-3.3; 1998-182, s. 28; 1999-406, ss. 1, 10; 2000-155, s. 5.)

Effect of Amendments. — Session Laws 2000-155, s. 5, effective September 1, 2000, and applicable to offenses committed on or after that date, in subsection (c1) added the first sentence following subdivision (c1)(5).

CASE NOTES

I. In General.
IV. Evidence in Prosecution for Drunken Driving.

I. IN GENERAL.

Construction with § 20-138.1 — A civil superior court determination, on appeal from an administrative hearing, pursuant to this section, regarding an allegation of willful refusal, estops the relitigation of that same issue in a defendant's criminal prosecution for DWI. The district attorney and the Attorney General both represent the interests of the people of North Carolina, regardless of whether it be the district attorney in a criminal trial court or the Attorney General in a civil or criminal appeal. State v. Summers, 351 N.C. 620, 528 S.E.2d 17 (2000).

Applied in Gibson v. Faulkner, 132 N.C. App. 728, 515 S.E.2d 452 (1999), decided prior to the 2000 amendment.

Cited in State v. Summers, 351 N.C. 620, 528 S.E.2d 17 (2000).

IV. EVIDENCE IN PROSECUTION FOR DRUNKEN DRIVING.

Adequate Advice Given. — Evidence, including state trooper's testimony and defendant's telephone call subsequent to refusal to sign written form, supported trial court's finding that defendant had been adequately advised of his chemical test rights as required by this section. Gibson v. Faulkner, 132 N.C. App. 728, 515 S.E.2d 452 (1999), decided prior to the 2000 amendment.

§ 20-16.3A. Impaired driving checks.

CASE NOTES

Permissibility of Monitoring Checkpoint Avoidance — It is reasonable and permissible for an officer to monitor a checkpoint's entrance for vehicles whose drivers may be attempting to avoid the checkpoint. An officer, in conjunction with the totality of the circumstances or the checkpoint plan, may, also, pursue and stop a vehicle which has turned away from a checkpoint within its perimeters for reasonable inquiry to determine why the vehicle turned away. North Carolina's interest in combating intoxicated drivers outweighs the minimal intrusion that an investigatory stop may impose upon a motorist under these circumstances. State v. Foreman, 351 N.C. 627, 527 S.E.2d 921 (2000).

Police officers were not required to follow the requirements of this section where the stop which resulted in defendant/drunk driver's arrest did not arise pursuant to an impaired driving check but arose as the result of a false report of breaking and entering. State v. Covington, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 775 (July 5, 2000).

§ 20-16.5. Immediate civil license revocation for certain persons charged with implied-consent offenses.

(a) Definitions. — As used in this section the following words and phrases have the following meanings:

(1) Charging Officer. — As described in G.S. 20-16.2(a1).

(2) Clerk. — As defined in G.S. 15A-101(2).

(3) Judicial Official. — As defined in G.S. 15A-101(5).

(4) Revocation Report. — A sworn statement by a charging officer and a chemical analyst containing facts indicating that the conditions of subsection (b) have been met, and whether the person has a pending offense for which their license had been or is revoked under this section. When one chemical analyst analyzes a person's blood and another chemical analyst informs a person of his rights and responsibilities under G.S. 20-16.2, the report must include the statements of both analysts.

(5) Surrender of a Driver's License. — The act of turning over to a court or a law-enforcement officer the person's most recent, valid driver's license or learner's permit issued by the Division or by a similar agency in another jurisdiction, or a limited driving privilege issued by a North Carolina court. A person who is validly licensed but who is unable to locate his license card may file an affidavit with the clerk setting out facts that indicate that he is unable to locate his license card and that he is validly licensed; the filing of the affidavit constitutes a surrender of the person's license.

(b) Revocations for Persons Who Refuse Chemical Analyses or Who Are Charged With Certain Implied-Consent Offenses. — A person's driver's license is subject to revocation under this section if:

(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.

(b1) Precharge Test Results as Basis for Revocation. — Notwithstanding the provisions of subsection (b), a person's driver's license is subject to revocation under this section if:

(1) The person requests a precharge chemical analysis pursuant to G.S. 20-16.2(i); and

(2) The person has:

a. An alcohol concentration of 0.08 or more at any relevant time after driving;

b. An alcohol concentration of 0.04 or more at any relevant time after driving a commercial motor vehicle; or

c. Any alcohol concentration at any relevant time after driving and the person is under 21 years of age; and

(3) The person is charged with an implied-consent offense.

(c) Duty of Charging Officers and Chemical Analysts to Report to Judicial Officials. — If a person's driver's license is subject to revocation under this section, the charging officer and the chemical analyst must execute a revocation report. If the person has refused to submit to a chemical analysis, a copy of the affidavit to be submitted to the Division under G.S. 20-16.2(c) may be substituted for the revocation report if it contains the information required by this section. It is the specific duty of the charging officer to make sure that the report is expeditiously filed with a judicial official as required by this section.

(d) Which Judicial Official Must Receive Report. — The judicial official with whom the revocation report must be filed is:

(1) The judicial official conducting the initial appearance on the underlying criminal charge if:

a. No revocation report has previously been filed; and

b. At the time of the initial appearance the results of the chemical analysis, if administered, or the reports indicating a refusal, are available.

(2) A judicial official conducting any other proceeding relating to the underlying criminal charge at which the person is present, if no report has previously been filed.

(3) The clerk of superior court in the county in which the underlying criminal charge has been brought if subdivisions (1) and (2) are not applicable at the time the charging officer must file the report.

(e) Procedure if Report Filed with Judicial Official When Person Is Present. — If a properly executed revocation report concerning a person is filed with a judicial official when the person is present before that official, the judicial official shall, after completing any other proceedings involving the person, determine whether there is probable cause to believe that each of the conditions of subsection (b) has been met. If he determines that there is such probable cause, he shall enter an order revoking the person's driver's license for the period required in this subsection. The judicial official shall order the person to surrender his license and if necessary may order a law-enforcement officer to seize the license. The judicial official shall give the person a copy of the revocation order. In addition to setting it out in the order the judicial official shall personally inform the person of his right to a hearing as specified in subsection (g), and that his license remains revoked pending the hearing. The revocation under this subsection begins at the time the revocation order is issued and continues until the person's license has been surrendered for the period specified in this subsection, and the person has paid the applicable costs. The period of revocation is 30 days, if there are no pending offenses for

which the person's license had been or is revoked under this section. 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 under this subsection be less than 30 days. If within five working days of the effective date of the order, the person does not surrender his license or demonstrate that he is not currently licensed, the clerk shall immediately issue a pick-up order. The pick-up order shall be issued to a member of a local law-enforcement agency if the charging officer was employed by the agency at the time of the charge and the person resides in or is present in the agency's territorial jurisdiction. In all other cases, the pick-up order shall be issued to an officer or inspector of the Division. A pick-up order issued pursuant to this section is to be served in accordance with G.S. 20-29 as if the order had been issued by the Division.

(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. 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.

(g) Hearing before Magistrate or Judge if Person Contests Validity of Revocation. — A person whose license is revoked under this section may request in writing a hearing to contest the validity of the revocation. The request may be made at the time of the person's initial appearance, or within 10 days of the effective date of the revocation to the clerk or a magistrate designated by the clerk, and may specifically request that the hearing be conducted by a district court judge. The Administrative Office of the Courts must develop a hearing request form for any person requesting a hearing. Unless a district court judge is requested, the hearing must be conducted within the county by a magistrate assigned by the chief district judge to conduct such hearings. If the person requests that a district court judge hold the hearing, the hearing must be conducted within the district court district as defined in G.S. 7A-133 by a district court judge assigned to conduct such hearings. The revocation remains in effect pending the hearing, but the hearing must be held within three working days following the request if the hearing is before a magistrate or within five working days if the hearing is before a district court judge. The request for the hearing 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 his evidence by affidavit unless he 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 he is not satisfied with the accuracy or completeness of evidence. The person contesting the validity of the revocation may, but is not required to, testify in his own behalf. Unless contested by the person requesting the hearing, the judicial official may accept as true any matter stated in the revocation report. If any relevant condition under subsection (b) is contested, the judicial official must find by the greater weight of the evidence that the condition was met in order to sustain the revocation. At the conclusion of the hearing the judicial official must enter an order sustaining or rescinding the revocation. The judicial official's findings are without prejudice to the person contesting the revocation and to any other potential party as to any other proceedings, civil or criminal, that may involve facts bearing upon the conditions in subsection (b) considered by the judicial official. The decision of the judicial official is final and may not be appealed in the General Court of Justice. If the hearing is not held and completed within three working days of the written request for a hearing before a magistrate or within five working days of the written request for a hearing before a district court judge, the judicial official must enter an order rescinding the revocation, unless the person contesting the revocation contributed to the delay in completing the hearing. If the person requesting the hearing fails to appear at the hearing or any rescheduling thereof after having been properly notified, he forfeits his right to a hearing.

(h) Return of License. — After the applicable period of revocation under this section, or if the magistrate or judge orders the revocation rescinded, the person whose license was revoked may apply to the clerk for return of his surrendered license. Unless the clerk finds that the person is not eligible to use the surrendered license, he must return it if:

(1) The applicable period of revocation has passed and the person has tendered payment for the costs under subsection (j); or

(2) The magistrate or judge has ordered the revocation rescinded.

If the license has expired, he may return it to the person with a caution that it is no longer valid. Otherwise, if the person is not eligible to use the license and the license was issued by the Division or in another state, the clerk must mail it to the Division. If the person has surrendered his copy of a limited driving privilege and he is no longer eligible to use it, the clerk must make a record that he has withheld the limited driving privilege and forward that record to the clerk in the county in which the limited driving privilege was issued for filing in the case file. If the person's license is revoked under this section and under another section of this Chapter, the clerk must surrender the license to the Division if the revocation under this section can terminate before the other revocation; in such cases, the costs required by subsection (j) must still be paid before the revocation under this section is terminated.

(i) Effect of Revocations. — A revocation under this section revokes a person's privilege to drive in North Carolina whatever the source of his authorization to drive. Revocations under this section are independent of and run concurrently with any other revocations. No court imposing a period of revocation following conviction of an offense involving impaired driving may give credit for any period of revocation imposed under this section. A person whose license is revoked pursuant to this section is not eligible to receive a limited driving privilege except as specifically authorized by G.S. 20-16.5(p).

(j) Costs. — Unless the magistrate or judge orders the revocation rescinded, a person whose license is revoked under this section must pay a fee of fifty dollars ($50.00) as costs for the action before the person's license may be returned under subsection (h). The costs collected under this section shall be credited to the General Fund. Fifty percent (50%) of the costs collected shall be used to fund a statewide chemical alcohol testing program administered by the Injury Control Section of the Department of Health and Human Services.

(k) Report to Division. — Except as provided below, the clerk shall mail a report to the Division:

(1) If the license is revoked indefinitely, within 10 working days of the revocation of the license; and

(2) In all cases, within 10 working days of the return of a license under this section or of the termination of a revocation of the driving privilege of a person not currently licensed.

The report shall identify the person whose license has been revoked, specify the date on which his license was revoked, and indicate whether the license has been returned. The report must also provide, if applicable, whether the license is revoked indefinitely. No report need be made to the Division, however, if there was a surrender of the driver's license issued by the Division, a 30-day minimum revocation was imposed, and the license was properly returned to the person under subsection (h) within five working days after the 30-day period had elapsed.

(*l*) Restoration Fee for Unlicensed Persons. — If a person whose license is revoked under this section has no valid license, he must pay the restoration fee required by G.S. 20-7 before he may apply for a license from the Division.

(m) Modification of Revocation Order. — Any judicial official presiding over a proceeding under this section may issue a modified order if he determines that an inappropriate order has been issued.

(n) Exception for Revoked Licenses. — Notwithstanding any other provision of this section, if the judicial official required to issue a revocation order under this section determines that the person whose license is subject to revocation under subsection (b):

(1) Has a currently revoked driver's license;

(2) Has no limited driving privilege; and

(3) Will not become eligible for restoration of his license or for a limited driving privilege during the period of revocation required by this section,

the judicial official need not issue a revocation order under this section. In this event the judicial official must file in the records of the civil proceeding a copy of any documentary evidence and set out in writing all other evidence on which he relies in making his determination.

(o) Designation of Proceedings. — Proceedings under this section are civil actions, and must be identified by the caption "In the Matter of _____" and filed as directed by the Administrative Office of the Courts.

(p) Limited Driving Privilege. — A person whose drivers license has been revoked for a specified period of 30 or 45 days under this section may apply for a limited driving privilege if:

(1) At the time of the alleged offense the person held either a valid drivers license or a license that had been expired for less than one year;

(2) Does not have an unresolved pending charge involving impaired driving except the charge for which the license is currently revoked under this section or additional convictions of an offense involving impaired driving since being charged for the violation for which the license is currently revoked under this section;

(3) The person's license has been revoked for at least 10 days if the revocation is for 30 days or 30 days if the revocation is for 45 days; and

(4) The person has obtained a substance abuse assessment from a mental health facility and registers for and agrees to participate in any recommended training or treatment program.

A person whose license has been indefinitely revoked under this section may, after completion of 30 days under subsection (e) or the applicable period of time under subdivision (1), (2), or (3) of subsection (f), apply for a limited driving privilege. In the case of an indefinite revocation, a judge of the division in which the current offense is pending may issue the limited driving privilege only if the privilege is necessary to overcome undue hardship and the person meets the eligibility requirements of G.S. 20-179.3, except that the requirements in G.S. 20-179.3(b)(1)c. and G.S. 20-179.3(e) shall not apply. Except as modified in this subsection, the provisions of G.S. 20-179.3 relating to the procedure for application and conduct of the hearing and the restrictions required or authorized to be included in the limited driving privilege apply to applications under this subsection. Any district court judge authorized to hold court in the judicial district is authorized to issue such a limited driving privilege. A limited driving privilege issued under this section authorizes a person to drive if the person's license is revoked solely under this section. If the person's license is revoked for any other reason, the limited driving privilege is invalid. (1983, c. 435, s. 14; 1983 (Reg. Sess., 1984), c. 1101, ss. 11-17; 1985, c. 690, ss. 1, 2; 1987 (Reg. Sess., 1988), c. 1037, s. 80, c. 1112; 1989, c. 771, ss. 15, 16, 18; 1991, c. 689, s. 233.1(a); 1993, c. 285, ss. 5, 6; 1997-379, ss. 3.4-3.8; 1997-443, s. 11A.9; 1997-486, ss. 2-6; 1998-182, ss. 29, 30; 1999-406, s. 13; 2000-140, s. 103A; 2000-155, s. 15.)

Effect of Amendments. —

Session Laws 2000-155, s. 15, as amended by Session Laws 2000-140, s. 103A, effective September 1, 2000, and applicable to offenses committed on or after that date, inserted "motor" in subdivision (b)(4)c.

§ 20-17.4. Disqualification to drive a commercial motor vehicle.

(a) One Year. — Any of the following disqualifies a person from driving a commercial motor vehicle for one year:

(1) A first conviction of G.S. 20-138.1, driving while impaired, that occurred while the person was driving a motor vehicle not a commercial motor vehicle.

(2) A first conviction of G.S. 20-138.2, driving a commercial motor vehicle while impaired.

(3) A first conviction of G.S. 20-166, hit and run, involving a commercial motor vehicle driven by the person.

(4) A first conviction of a felony in the commission of which a commercial motor vehicle was used.

(5) Refusal to submit to a chemical test when charged with an implied-consent offense, as defined in G.S. 20-16.2, that occurred while the person was driving a commercial motor vehicle.

(6) A second or subsequent conviction, as defined in G.S. 20-138.2A(d), of driving a commercial motor vehicle after consuming alcohol under G.S. 20-138.2A.

(a1) Ten-Day Disqualification. — A person who is convicted for a first offense of driving a commercial motor vehicle after consuming alcohol under G.S. 20-138.2A is disqualified from driving a commercial motor vehicle for 10 days.

(b) Modified Life. — A person who has been disqualified from driving a commercial motor vehicle for a conviction or refusal described in subsection (a) who, as the result of a separate incident, is subsequently convicted of an offense or commits an act requiring disqualification under subsection (a) is disqualified for life. The Division may adopt guidelines, including conditions, under which a disqualification for life under this subsection may be reduced to 10 years.

(b1) Life Without Reduction. — A person is disqualified from driving a commercial motor vehicle for life, without the possibility of reinstatement after 10 years, if that person is convicted of a third or subsequent violation of G.S. 20-138.2, a fourth or subsequent violation of G.S. 20-138.2A, or if the person refuses to submit to a chemical test a third time when charged with an implied-consent offense, as defined in G.S. 20-16.2, that occurred while the person was driving a commercial motor vehicle.

(c) Life. — A person is disqualified from driving a commercial motor vehicle for life if that person uses a commercial motor vehicle in the commission of any felony involving the manufacture, distribution, or dispensing of a controlled substance, or possession with intent to manufacture, distribute, or dispense a controlled substance.

(d) Less Than a Year. — A person is disqualified from driving a commercial motor vehicle for 60 days if that person is convicted of two serious traffic violations, or 120 days if convicted of three or more serious traffic violations, committed in a commercial motor vehicle arising from separate incidents occurring within a three-year period. For purposes of this subsection, a "serious violation" includes violations of G.S. 20-140(f) and G.S. 20-141(j3).

(e) Three Years. — A person is disqualified from driving a commercial motor vehicle for three years if that person is convicted of an offense or commits an act requiring disqualification under subsection (a) and the offense or act occurred while the person was transporting a hazardous material that required the motor vehicle driven to be placarded.

(f) Revocation Period. — A person is disqualified from driving a commercial motor vehicle for the period during which the person's regular or commercial drivers license is revoked.

(g) Violation of Out-of-Service Order. — Any person convicted for violating an out-of-service order, except as described in subsection (h) of this section, shall be disqualified as follows:

(1) A person is disqualified from driving a commercial vehicle for a period of 90 days if convicted of a first violation of an out-of-service order.

(2) A person is disqualified for a period of one year if convicted of a second violation of an out-of-service order during any 10-year period, arising from separate incidents.

(3) A person is disqualified for a period of three years if convicted of a third or subsequent violation of an out-of-service order during any 10-year period, arising from separate incidents.

(h) Violation of Out-of-Service Order; Special Rule for Hazardous Materials and Passenger Offenses. — Any person convicted for violating an out-of-service order while transporting hazardous materials or while operating a commercial vehicle designed or used to transport more than 15 passengers, including the driver, shall be disqualified as follows:

(1) A person is disqualified for a period of 180 days if convicted of a first violation of an out-of-service order.

(2) A person is disqualified for a period of three years if convicted of a second or subsequent violation of an out-of-service order during any 10-year period, arising from separate incidents.

(i) Disqualification for Out-of-State Violations. — The Division shall withdraw the privilege to operate a commercial vehicle of any resident of this State upon receiving notice of the person's conviction in another state for an offense that, if committed in this State, would be grounds for disqualification. The period of disqualification shall be the same as if the offense occurred in this State.

(j) Disqualification of Persons Without Commercial Drivers Licenses. — Any person convicted of an offense that requires disqualification under this section, but who does not hold a commercial drivers license, shall be disqualified from operating a commercial vehicle in the same manner as if the person held a valid commercial drivers license. (1989, c. 771, s. 3; 1991, c. 726, s. 8; 1993, c. 533, s. 5; 1998-149, s. 3; 1998-182, s. 19; 2000-109, s. 7(e).)

Effect of Amendments. — Session Laws 2000-109, s. 7(e), effective July 13, 2000, added the last sentence in subsection (d).

§ 20-17.8. Restoration of a license after certain driving while impaired convictions; ignition interlock.

(a) Scope. — This section applies to a person whose license was revoked as a result of a conviction of driving while impaired, G.S. 20-138.1, and:

(1) The person had an alcohol concentration of 0.16 or more; or

(2) The person has been convicted of another offense involving impaired driving, which offense occurred within seven years immediately preceding the date of the offense for which the person's license has been revoked.

(b) Ignition Interlock Required. — When the Division restores the license of a person who is subject to this section, in addition to any other restriction or condition, it shall require the person to agree to and shall indicate on the person's drivers license the following restrictions for the period designated in subsection (c):

(1) A restriction that the person may operate only a vehicle that is equipped with a functioning ignition interlock system of a type approved by the Commissioner. The Commissioner shall not unreasonably withhold approval of an ignition interlock system and shall

consult with the Division of Purchase and Contract in the Department of Administration to ensure that potential vendors are not discriminated against.

(2) A requirement that the person personally activate the ignition interlock system before driving the motor vehicle.

(3) An alcohol concentration restriction as follows:

a. If the ignition interlock system is required pursuant only to subdivision (a)(1) of this section, a requirement that the person not drive with an alcohol concentration of 0.04 or greater;

b. If the ignition interlock system is required pursuant to subdivision (a)(2) of this section, a requirement that the person not drive with an alcohol concentration of greater than 0.00; or

c. If the ignition interlock system is required pursuant to subdivision (a)(1) of this section, and the person has also been convicted, based on the same set of circumstances, of: (i) driving while impaired in a commercial vehicle, G.S. 20-138.2, (ii) driving while less than 21 years old after consuming alcohol or drugs, G.S. 20-138.3, (iii) felony death by vehicle, G.S. 20-141.4(a1), or (iv) manslaughter or negligent homicide resulting from the operation of a motor vehicle when the offense involved impaired driving, a requirement that the person not drive with an alcohol concentration of greater than 0.00.

(c) Length of Requirement. — The requirements of subsection (b) shall remain in effect for:

(1) One year from the date of restoration if the original revocation period was one year;

(2) Three years from the date of restoration if the original revocation period was four years; or

(3) Seven years from the date of restoration if the original revocation was a permanent revocation.

(c1) Vehicles Subject to Requirement. — A person subject to this section shall have all registered vehicles owned by that person equipped with a functioning ignition interlock system of a type approved by the Commissioner, unless the Division determines that one or more specific registered vehicles owned by that person are relied upon by another member of that person's family for transportation and that the vehicle is not in the possession of the person subject to this section.

(d) Effect of Limited Driving Privileges. — If the person was eligible for and received a limited driving privilege under G.S. 20-179.3, with the ignition interlock requirement contained in G.S. 20-179.3(g5), the period of time for which that limited driving privilege was held shall be applied towards the requirements of subsection (c).

(e) Notice of Requirement. — When a court reports to the Division a conviction of a person who is subject to this section, the Division must send the person written notice of the requirements of this section and of the consequences of failing to comply with these requirements. The notification must include a statement that the person may contact the Division for information on obtaining and having installed an ignition interlock system of a type approved by the Commissioner.

(f) Effect of Violation of Restriction. — A person subject to this section who violates any of the restrictions of this section commits the offense of driving while license revoked under G.S. 20-28(a) and is subject to punishment and license revocation as provided in that section. If a law enforcement officer has reasonable grounds to believe that a person subject to this section has consumed alcohol while driving or has driven while he has remaining in his body any alcohol previously consumed, the suspected offense of driving while

license is revoked is an alcohol-related offense subject to the implied-consent provisions of G.S. 20-16.2. If a person subject to this section is charged with driving while license revoked by violating a condition of subsection (b) of this section, and a judicial official determines that there is probable cause for the charge, the person's license is suspended pending the resolution of the case, and the judicial official must require the person to surrender the license. The judicial official must also notify the person that he is not entitled to drive until his case is resolved. An alcohol concentration report from the ignition interlock system shall not be admissible as evidence of driving while license revoked, nor shall it be admissible in an administrative revocation proceeding as provided in subsection (g) of this section, unless the person operated a vehicle when the ignition interlock system indicated an alcohol concentration in violation of the restriction placed upon the person by subdivision (b)(3) of this section. If a person subject to this section is charged with driving while license revoked by violating the requirements of subsection (c1) of this section, and no other violation of this section is alleged, the court may make a determination at the hearing of the case that the vehicle, on which the ignition interlock system was not installed, was relied upon by another member of that person's family for transportation and that the vehicle was not in the possession of the person subject to this section, and therefore the vehicle was not required to be equipped with a functioning ignition interlock system. If the court determines that the vehicle was not required to be equipped with a functioning ignition interlock system and the person subject to this section has committed no other violation of this section, the court shall find the person not guilty of driving while license revoked.

(g) Effect of Violation of Restriction When Driving While License Revoked Not Charged. — A person subject to this section who violates any of the restrictions of this section, but is not charged or convicted of driving while license revoked pursuant to G.S. 20-28(a), shall have the person's license revoked by the Division for a period of one year.

(h) Beginning of Revocation Period. — If the original period of revocation was imposed pursuant to G.S. 20-19(d) or (e), any remaining period of the original revocation, prior to its reduction, shall be reinstated and the revocation required by subsection (f) or (g) of this section begins after all other periods of revocation have terminated.

(i) Notification of Revocation. — If the person's license has not already been surrendered to the court, the Division must expeditiously notify the person that the person's license to drive is revoked pursuant to subsection (f) or (g) of this section effective on the tenth calendar day after the mailing of the revocation order.

(j) Right to Hearing Before Division; Issues. — If the person's license is revoked pursuant to subsection (g) of this section, before the effective date of the order issued under subsection (i) of this section, the person may request in writing a hearing before the Division. Except for the time referred to in G.S. 20-16.5, if the person shows to the satisfaction of the Division that the person's license was surrendered to the court and remained in the court's possession, then the Division shall credit the amount of time for which the license was in the possession of the court against the revocation period required by subsection (g) of this section. If the person properly requests a hearing, the person retains the person's license, unless it is revoked under some other provision of law, until the hearing is held, the person withdraws the request, or the person fails to appear at a scheduled hearing. The hearing officer may subpoena any witnesses or documents that the hearing officer deems necessary. The person may request the hearing officer to subpoena the charging officer, the chemical analyst, or both to appear at the hearing if the person makes the request in writing at least three days before the hearing. The person may subpoena any

other witness whom the person deems necessary, and the provisions of G.S. 1A-1, Rule 45, apply to the issuance and service of all subpoenas issued under the authority of this section. The hearing officer is authorized to administer oaths to witnesses appearing at the hearing. The hearing must be conducted in the county where the charge was brought, and must be limited to consideration of whether:

(1) The drivers license of the person had an ignition interlock requirement; and

(2) The person:

a. Was driving a vehicle that was not equipped with a functioning ignition interlock system; or

b. Did not personally activate the ignition interlock system before driving the vehicle; or

c. Drove the vehicle with an alcohol concentration of 0.04 or greater.

If the Division finds that the conditions specified in this subsection are met, it must order the revocation sustained. If the Division finds that the condition of subdivision (1) is not met, or that none of the conditions of subdivision (2) are met, it must rescind the revocation. If the revocation is sustained, the person must surrender the person's license immediately upon notification by the Division. If the revocation is sustained, the person may appeal the decision of the Division pursuant to G.S. 20-25.

(k) Restoration After Violation. — When the Division restores the license of a person whose license was revoked pursuant to subsection (f) or (g) of this section and the revocation occurred prior to completion of time period required by subsection (c) of this section, in addition to any other restriction or condition, it shall require the person to comply with the conditions of subsection (b) of this section until the person has complied with those conditions for the cumulative period of time as set forth in subsection (c) of this section. The period of time for which the person successfully complied with subsection (b) of this section prior to revocation pursuant to subsection (f) or (g) of this section shall be applied towards the requirements of subsection (c) of this section. (1999-406, s. 3; 2000-155, ss. 1-3.)

Effect of Amendments. — Session Laws 2000-155, ss. 1-3, effective September 1, 2000, and applicable to offenses committed on or after that date, rewrote subdivision (b)(3); added subsection (c1); and in subsection (f), substituted the language following "subsection (g) of this section" for "provided that the person did not operate a vehicle until the ignition interlock system indicated an alcohol concentration of less than 0.04" at the end of the fifth sentence, and added the last two sentences.

§ 20-19. Period of suspension or revocation; conditions of restoration.

(a) When a license is suspended under subdivision (8) or (9) of G.S. 20-16(a), the period of suspension shall be in the discretion of the Division and for such time as it deems best for public safety but shall not exceed six months.

(b) When a license is suspended under subdivision (10) of G.S. 20-16(a), the period of suspension shall be in the discretion of the Division and for such time as it deems best for public safety but shall not exceed a period of 12 months.

(c) When a license is suspended under any other provision of this Article which does not specifically provide a period of suspension, the period of suspension shall be not more than one year.

(c1) When a license is revoked under subdivision (2) of G.S. 20-17, and the period of revocation is not determined by subsection (d) or (e) of this section, the period of revocation is one year.

(c2) When a license is suspended under G.S. 20-17(a)(14), the period of revocation for a first conviction shall be for 10 days. For a second or subsequent

conviction as defined in G.S. 20-138.2B(d), the period of revocation shall be one year.

(c3) Restriction; Revocations. — When the Division restores a person's drivers license which was revoked pursuant to G.S. 20-13.2 (a), G.S. 20-23 when the offense involved impaired driving, G.S. 20-23.2, subdivision (2) of G.S. 20-17(a), subdivision (1) or (9) of G.S. 20-17(a) when the offense involved impaired driving, or this subsection, in addition to any other restriction or condition, it shall place the applicable restriction on the person's drivers license as follows:

(1) For the first restoration of a drivers license for a person convicted of driving while impaired, G.S. 20-138.1, or a drivers license revoked pursuant to G.S. 20-23 or G.S. 20-23.2 when the offense for which the person's license was revoked prohibits substantially similar conduct which if committed in this State would result in a conviction of driving while impaired under G.S. 20-138.1, that the person not operate a vehicle with an alcohol concentration of 0.04 or more at any relevant time after the driving;

(2) For the second or subsequent restoration of a drivers license for a person convicted of driving while impaired, G.S. 20-138.1, or a drivers license revoked pursuant to G.S. 20-23 or G.S. 20-23.2 when the offense for which the person's license was revoked prohibits substantially similar conduct which if committed in this State would result in a conviction of driving while impaired under G.S. 20-138.1, that the person not operate a vehicle with an alcohol concentration greater than 0.00 at any relevant time after the driving;

(3) For any restoration of a drivers license for a person convicted of driving while impaired in a commercial motor vehicle, G.S. 20-138.2, driving while less than 21 years old after consuming alcohol or drugs, G.S. 20-138.3, felony death by vehicle, G.S. 20-141.4(a1), manslaughter or negligent homicide resulting from the operation of a motor vehicle when the offense involved impaired driving, or a revocation under this subsection, that the person not operate a vehicle with an alcohol concentration of greater than 0.00 at any relevant time after the driving;

(4) For any restoration of a drivers license revoked pursuant to G.S. 20-23 or G.S. 20-23.2 when the offense for which the person's license was revoked prohibits substantially similar conduct which if committed in this State would result in a conviction of driving while impaired in a commercial motor vehicle, G.S. 20-138.2, driving while less than 21 years old after consuming alcohol or drugs, G.S. 20-138.3, felony death by vehicle, G.S. 20-141.4(a1), or manslaughter or negligent homicide resulting from the operation of a motor vehicle when the offense involved impaired driving, that the person not operate a vehicle with an alcohol concentration of greater than 0.00 at any relevant time after the driving.

In addition, the person seeking restoration of a license must agree to submit to a chemical analysis in accordance with G.S. 20-16.2 at the request of a law enforcement officer who has reasonable grounds to believe the person is operating a motor vehicle on a highway or public vehicular area in violation of the restriction specified in this subsection. The person must also agree that, when requested by a law enforcement officer, the person will agree to be transported by the law enforcement officer to the place where chemical analysis is to be administered.

The restrictions placed on a license under this subsection shall be in effect (i) seven years from the date of restoration if the person's license was permanently revoked, (ii) until the person's twenty-first birthday if the revocation was for a conviction under G.S. 20-138.3, and (iii) three years in all other cases.

A law enforcement officer who has reasonable grounds to believe that a person has violated a restriction placed on the person's drivers license shall complete an affidavit pursuant to G.S. 20-16.2(c1). On the basis of information reported pursuant to G.S. 20-16.2, the Division shall revoke the drivers license of any person who violates a condition of reinstatement imposed under this subsection. An alcohol concentration report from an ignition interlock system shall not be used as the basis for revocation under this subsection. A violation of a restriction imposed under this subsection or the willful refusal to submit to a chemical analysis shall result in a one-year revocation. If the period of revocation was imposed pursuant to subsection (d) or (e), any remaining period of the original revocation, prior to its reduction, shall be reinstated and the one-year revocation begins after all other periods of revocation have terminated.

(c4) Applicable Procedures. — When a person has violated a condition of restoration by refusing a chemical analysis, the notice and hearing procedures of G.S. 20-16.2 apply. When a person has submitted to a chemical analysis and the results show a violation of the alcohol concentration restriction, the notification and hearing procedures of this section apply.

(c5) Right to Hearing Before Division; Issues. — Upon receipt of a properly executed affidavit required by G.S. 20-16.2(c1), the Division must expeditiously notify the person charged that the person's license to drive is revoked for the period of time specified in this section, effective on the tenth calendar day after the mailing of the revocation order unless, before the effective date of the order, the person requests in writing a hearing before the Division. Except for the time referred to in G.S. 20-16.5, if the person shows to the satisfaction of the Division that the person's license was surrendered to the court and remained in the court's possession, then the Division shall credit the amount of time for which the license was in the possession of the court against the revocation period required by this section. If the person properly requests a hearing, the person retains the person's license, unless it is revoked under some other provision of law, until the hearing is held, the person withdraws the request, or the person fails to appear at a scheduled hearing. The hearing officer may subpoena any witnesses or documents that the hearing officer deems necessary. The person may request the hearing officer to subpoena the charging officer, the chemical analyst, or both to appear at the hearing if the person makes the request in writing at least three days before the hearing. The person may subpoena any other witness whom the person deems necessary, and the provisions of G.S. 1A-1, Rule 45, apply to the issuance and service of all subpoenas issued under the authority of this section. The hearing officer is authorized to administer oaths to witnesses appearing at the hearing. The hearing must be conducted in the county where the charge was brought, and must be limited to consideration of whether:

(1) The charging officer had reasonable grounds to believe that the person had violated the alcohol concentration restriction;
(2) The person was notified of the person's rights as required by G.S. 20-16.2(a);
(3) The drivers license of the person had an alcohol concentration restriction; and
(4) The person submitted to a chemical analysis upon the request of the charging officer, and the analysis revealed an alcohol concentration in excess of the restriction on the person's drivers license.

If the Division finds that the conditions specified in this subsection are met, it must order the revocation sustained. If the Division finds that any of the conditions (1), (2), (3), or (4) is not met, it must rescind the revocation. If the revocation is sustained, the person must surrender the person's license immediately upon notification by the Division.

(c6) Appeal to Court. — There is no right to appeal the decision of the Division. However, if the person properly requested a hearing before the Division under subsection (c5) and the Division held such a hearing, the person may within 30 days of the date the Division's decision is mailed to the person, petition the superior court of the county in which the hearing took place for discretionary review on the record of the revocation. The superior court may stay the imposition of the revocation only if the court finds that the person is likely to succeed on the merits of the case and will suffer irreparable harm if such a stay is not granted. The stay shall not exceed 30 days. The reviewing court shall review the record only and shall be limited to determining if the Division hearing officer followed proper procedures and if the hearing officer made sufficient findings of fact to support the revocation. There shall be no further appeal.

(d) When a person's license is revoked under G.S. 20-17(a)(2) and the person has another offense involving impaired driving for which he has been convicted, which offense occurred within three years immediately preceding the date of the offense for which his license is being revoked, the period of revocation is four years, and this period may be reduced only as provided in this section. The Division may conditionally restore the person's license after it has been revoked for at least two years under this subsection if he provides the Division with satisfactory proof that:

(1) He has not in the period of revocation been convicted in North Carolina or any other state or federal jurisdiction of a motor vehicle offense, an alcoholic beverage control law offense, a drug law offense, or any other criminal offense involving the possession or consumption of alcohol or drugs; and

(2) He is not currently an excessive user of alcohol or drugs.

If the Division restores the person's license, it may place reasonable conditions or restrictions on the person for the duration of the original revocation period.

(e) When a person's license is revoked under G.S. 20-17(a)(2) and the person has two or more previous offenses involving impaired driving for which he has been convicted, and the most recent offense occurred within the five years immediately preceding the date of the offense for which his license is being revoked, the revocation is permanent. The Division may, however, conditionally restore the person's license after it has been revoked for at least three years under this subsection if he provides the Division with satisfactory proof that:

(1) In the three years immediately preceding the person's application for a restored license, he has not been convicted in North Carolina or in any other state or federal court of a motor vehicle offense, an alcohol beverage control law offense, a drug law offense, or any criminal offense involving the consumption of alcohol or drugs; and

(2) He is not currently an excessive user of alcohol or drugs.

If the Division restores the person's license, it may place reasonable conditions or restrictions on the person for any period up to three years from the date of restoration.

(f) When a license is revoked under any other provision of this Article which does not specifically provide a period of revocation, the period of revocation shall be one year.

(g) When a license is suspended under subdivision (11) of G.S. 20-16(a), the period of suspension shall be for a period of time not in excess of the period of nonoperation imposed by the court as a condition of the suspended sentence; further, in such case, it shall not be necessary to comply with the Motor Vehicle Safety and Financial Responsibility Act in order to have such license returned at the expiration of the suspension period.

(g1) When a license is revoked under subdivision (12) of G.S. 20-17, the period of revocation is six months for conviction of a second offense and one year for conviction of a third or subsequent offense.

(h) Repealed by Session Laws 1983, c. 435, s. 17.

(i) When a person's license is revoked under subdivision (1) or (9) of G.S. 20-17 and the offense is one involving impaired driving, the revocation is permanent. The Division may, however, conditionally restore the person's license after it has been revoked for at least three years in accordance with the procedure in subsection (e) of this section.

(j) The Division is authorized to issue amended revocation orders issued under subsections (d) and (e), if necessary because convictions do not respectively occur in the same order as offenses for which the license may be revoked under those subsections.

(k) Before the Division restores a driver's license that has been suspended or revoked under any provision of this Article, other than G.S. 20-24.1, the person seeking to have his driver's license restored shall submit to the Division proof that he has notified his insurance agent or company of his seeking the restoration and that he is financially responsible. Proof of financial responsibility shall be in one of the following forms:

(1) A written certificate or electronically-transmitted facsimile thereof from any insurance carrier duly authorized to do business in this State certifying that there is in effect a nonfleet private passenger motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. The certificate or facsimile shall state the effective date and expiration date of the nonfleet private passenger motor vehicle liability policy and shall state the date that the certificate or facsimile is issued. The certificate or facsimile shall remain effective proof of financial responsibility for a period of 30 consecutive days following the date the certificate or facsimile is issued but shall not in and of itself constitute a binder or policy of insurance or

(2) A binder for or policy of nonfleet private passenger motor vehicle liability insurance under which the applicant is insured, provided that the binder or policy states the effective date and expiration date of the nonfleet private passenger motor vehicle liability policy.

The preceding provisions of this subsection do not apply to applicants who do not own currently registered motor vehicles and who do not operate nonfleet private passenger motor vehicles that are owned by other persons and that are not insured under commercial motor vehicle liability insurance policies. In such cases, the applicant shall sign a written certificate to that effect. Such certificate shall be furnished by the Division and may be incorporated into the restoration application form. Any material misrepresentation made by such person on such certificate shall be grounds for suspension of that person's license for a period of 90 days.

For the purposes of this subsection, the term "nonfleet private passenger motor vehicle" has the definition ascribed to it in Article 40 of General Statute Chapter 58.

The Commissioner may require that certificates required by this subsection be on a form approved by the Commissioner. The financial responsibility required by this subsection shall be kept in effect for not less than three years after the date that the license is restored. Failure to maintain financial responsibility as required by this subsection shall be grounds for suspending the restored driver's license for a period of thirty (30) days. Nothing in this subsection precludes any person from showing proof of financial responsibility in any other manner authorized by Articles 9A and 13 of this Chapter. (1935, c. 52, s. 13; 1947, c. 1067, s. 15; 1951, c. 1202, ss. 2-4; 1953, c. 1138; 1955, c. 1187, ss. 13, 17, 18; 1957, c. 499, s. 2; c. 515, s. 1; 1959, c. 1264, s. 11A; 1969, c. 242; 1971, c. 619, ss. 8-10; 1973, c. 1445, ss. 1-4; 1975, c. 716, s. 5; 1979, c. 903, ss. 4-6; 1981, c. 412, s. 4; c. 747, ss. 34, 66; 1983, c. 435, s. 17; 1983 (Reg.

Sess., 1984), c. 1101, s. 18; 1987, c. 869, s. 12; 1987 (Reg. Sess., 1988), c. 1112; 1989, c. 436, s. 5; c. 771, s. 18; 1995, c. 506, s. 8; 1998-182, s. 21; 1999-406, s. 2; 1999-452, ss. 11, 12; 2000-140, ss. 3, 4; 2000-155, s. 6.)

Effect of Amendments. —

Session Laws 2000-140, ss. 3, 4, effective July 21, 2000, substituted "greater than 0.00" for "0.00 or more" in subdivisions (c3)(3) and (c3)(4).

Session Laws 2000-155, s. 6, effective September 1, 2000, and applicable to offenses committed on or after that date, in subsection (c3), inserted "or public vehicular area" in the first sentence of the second paragraph and added the first sentence in the third paragraph.

CASE NOTES

Cited in Cooke v. Faulkner, — N.C. App. —, 529 S.E.2d 512, 2000 N.C. App. LEXIS 496 (2000).

§ 20-25. Right of appeal to court.

CASE NOTES

Section 20-25 creates no right to appeal a revocation under § 20-138.5, since § 20-138.5 appears in Article 3 rather than Article 2. Following a conviction for habitual impaired driving, under that section, permanent revocation is mandatory and the trial court lacks the authority to provide relief. Cooke v. Faulkner, — N.C. App. —, 529 S.E.2d 512, 2000 N.C. App. LEXIS 496 (2000).

§ 20-28. Unlawful to drive while license revoked or while disqualified.

CASE NOTES

I. In General.

I. IN GENERAL.

Exclusion of Evidence of Operability Upheld. — Where defendant admitted that he was sitting behind the wheel of an automobile while the motor was running, that he put the car into drive three times and that the car moved forward on each occasion, failure to allow defendant to introduce evidence that the vehicle he was alleged to have been operating was not operable was not prejudicial and did not entitle him to a new trial for the offenses of habitual impaired driving and driving during revocation, as defendant demonstrated in the presence of a police officer that the car in which he was seated was a device in which a person might be transported for purposes of § 20-4.01(49). State v. Clapp, 135 N.C. App. 52, 519 S.E.2d 90 (1999).

Cited in Cooke v. Faulkner, — N.C. App. —, 529 S.E.2d 512, 2000 N.C. App. LEXIS 496 (2000).

§ 20-28.2. Forfeiture of motor vehicle for impaired driving after impaired driving license revocation.

(a) Meaning of "Impaired Driving License Revocation". — The revocation of a person's drivers license is an impaired driving license revocation if the revocation is pursuant to:

(1) G.S. 20-13.2, 20-16(a)(8b), 20-16.2, 20-16.5, 20-17(a)(2), 20-17(a)(12), 20-17.2, or 20-138.5; or

(2) G.S. 20-16(a)(7), 20-17(a)(1), 20-17(a)(3), 20-17(a)(9), or 20-17(a)(11), if the offense involves impaired driving; or

(3) The laws of another state and the offense for which the person's license is revoked prohibits substantially similar conduct which if committed in this State would result in a revocation listed in subdivisions (1) or (2).

(a1) Definitions. — As used in this section and in G.S. 20-28.3, 20-28.4, 20-28.5, 20-28.7, 20-28.8, and 20-28.9, the following terms mean:

(1) Acknowledgment. — A written document acknowledging that:

a. The motor vehicle was operated by a person charged with an offense involving impaired driving while that person's drivers license was revoked as a result of a prior impaired drivers license revocation;

b. If the motor vehicle is again operated by this particular person, at any time while that person's drivers license is revoked, and the person is charged with an offense involving impaired driving, the motor vehicle is subject to impoundment and forfeiture; and

c. A lack of knowledge or consent to the operation will not be a defense in the future, unless the motor vehicle owner has taken all reasonable precautions to prevent the use of the motor vehicle by this particular person and immediately reports, upon discovery, any unauthorized use to the appropriate law enforcement agency.

(1a) Fair Market Value. — The value of the seized motor vehicle, as determined in accordance with the schedule of values adopted by the Commissioner pursuant to G.S. 105-187.3.

(2) Innocent Owner. — A motor vehicle owner:

a. Who did not know and had no reason to know that the defendant's drivers license was revoked; or

b. Who knew that the defendant's drivers license was revoked, but the defendant drove the vehicle without the person's expressed or implied permission, and the owner files a police report for unauthorized use of the motor vehicle and agrees to prosecute the unauthorized operator of the motor vehicle;

c. Whose vehicle was reported stolen;

d. Repealed by Session Laws 1999-406, s. 17, effective December 1, 1999.

e. Who is in the business of renting vehicles, and the vehicle was driven by a person who is not listed as an authorized driver on the rental contract; or

f. Who is in the business of leasing motor vehicles, who holds legal title to the motor vehicle as a lessor at the time of seizure and who has no actual knowledge of the revocation of the lessee's drivers license at the time the lease is entered.

(2a) Insurance Company. — Any insurance company that has coverage on or is otherwise liable for repairs or damages to the motor vehicle at the time of the seizure.

(2b) Insurance Proceeds. — Proceeds paid under an insurance policy for damage to a seized motor vehicle less any payments actually paid to valid lienholders and for towing and storage costs incurred for the motor vehicle after the time the motor vehicle became subject to seizure.

(3) Lienholder. — A person who holds a perfected security interest in a motor vehicle at the time of seizure.

(3a) Motor Vehicle Owner. — A person in whose name a registration card or certificate of title for a motor vehicle is issued at the time of seizure.

(4) Order of Forfeiture. — An order by the court which terminates the rights and ownership interest of a motor vehicle owner in a motor

vehicle and any insurance proceeds or proceeds of sale in accordance with G.S. 20-28.2.

(5) Repealed by Session Laws 1998-182, s. 2, effective December 1, 1998.

(6) Registered Owner. — A person in whose name a registration card for a motor vehicle is issued at the time of seizure.

(7) Repealed by Session Laws 1998-182, s. 2, effective December 1, 1998.

(b) When Motor Vehicle Becomes Property Subject to Order of Forfeiture. — If at a sentencing hearing for the underlying offense involving impaired driving, at a separate hearing after conviction of the defendant, or at a forfeiture hearing held at least 60 days after the defendant failed to appear at the scheduled trial for the underlying offense and the defendant's order of arrest for failing to appear has not been set aside, the judge determines by the greater weight of the evidence that the defendant is guilty of an offense involving impaired driving and that the defendant's license was revoked pursuant to an impaired driving license revocation as defined in subsection (a) of this section, the motor vehicle that was driven by the defendant at the time the defendant committed the offense becomes property subject to an order of forfeiture.

(c) Duty of Prosecutor to Notify Possible Innocent Parties. — In any case in which a prosecutor determines that a motor vehicle driven by a defendant may be subject to forfeiture under this section and the motor vehicle has not been permanently released to a nondefendant vehicle owner pursuant to G.S. 20-28.3(e1), a defendant owner pursuant to G.S. 20-28.3(e2), or a lienholder, pursuant to G.S. 20-28.3(e3), the prosecutor shall notify the defendant, each motor vehicle owner, and each lienholder that the motor vehicle may be subject to forfeiture and that the defendant, motor vehicle owner, or the lienholder may intervene to protect that person's interest. The notice may be served by any means reasonably likely to provide actual notice, and shall be served at least 10 days before the hearing at which an order of forfeiture may be entered.

(c1) Motor Vehicles Involved in Accidents. — If a motor vehicle subject to forfeiture was damaged while the defendant operator was committing the underlying offense involving impaired driving, or was damaged incident to the seizure of the motor vehicle, the Division shall determine the name of any insurance companies that are the insurers of record with the Division for the motor vehicle at the time of the seizure or that may otherwise be liable for repair to the motor vehicle. In any case where a seized motor vehicle was involved in an accident, the Division shall notify the insurance companies that the claim for insurance proceeds for damage to the seized motor vehicle shall be paid to the clerk of superior court of the county where the motor vehicle driver was charged to be held and disbursed pursuant to further orders of the court. Any insurance company that receives written or other actual notice of seizure pursuant to this section shall not be relieved of any legal obligation under any contract of insurance unless the claim for property damage to the seized motor vehicle minus the policy owner's deductible is paid directly to the clerk of court. The insurance company paying insurance proceeds to the clerk of court pursuant to this section shall be immune from suit by the motor vehicle owner for any damages alleged to have occurred as a result of the motor vehicle seizure. The proceeds shall be held by the clerk. The clerk shall disburse the insurance proceeds pursuant to further orders of the court.

(d) Forfeiture Hearing. — Unless a motor vehicle that has been seized pursuant to G.S. 20-28.3 has been permanently released to an innocent owner pursuant to G.S. 20-28.3(e1), a defendant owner pursuant to G.S. 20-28.3(e2), or to a lienholder pursuant to G.S. 20-28.3(e3), the court shall conduct a hearing on the forfeiture of the motor vehicle. The hearing may be held at the sentencing hearing on the underlying offense involving impaired driving, at a separate hearing after conviction of the defendant, or at a separate forfeiture

hearing held not less than 60 days after the defendant failed to appear at the scheduled trial for the underlying offense and the defendant's order of arrest for failing to appear has not been set aside. If at the forfeiture hearing, the judge determines that the motor vehicle is subject to forfeiture pursuant to this section and proper notice of the hearing has been given, the judge shall order the motor vehicle forfeited. If at the sentencing hearing or at a forfeiture hearing, the judge determines that the motor vehicle is subject to forfeiture pursuant to this section and proper notice of the hearing has been given, the judge shall order the motor vehicle forfeited unless another motor vehicle owner establishes, by the greater weight of the evidence, that such motor vehicle owner is an innocent owner as defined in this section, in which case the trial judge shall order the motor vehicle released to the innocent owner pursuant to the provisions of subsection (e) of this section. In any case where the motor vehicle is ordered forfeited, the judge shall:

(1)a. Authorize the sale of the motor vehicle at public sale or allow the county board of education to retain the motor vehicle for its own use pursuant to G.S. 20-28.5; or

b. Order the motor vehicle released to a lienholder pursuant to the provisions of subsection (f) of this section; and

(2)a. Order any proceeds of sale or insurance proceeds held by the clerk of court to be disbursed to the county board of education; and

b. Order any outstanding insurance claims be assigned to the county board of education in the event the motor vehicle has been damaged in an accident incident to the seizure of the motor vehicle.

If the judge determines that the motor vehicle is subject to forfeiture pursuant to this section, but that notice as required by subsection (c) has not been given, the judge shall continue the forfeiture proceeding until adequate notice has been given. In no circumstance shall the sentencing of the defendant be delayed as a result of the failure of the prosecutor to give adequate notice.

(e) Release of Vehicle to Innocent Motor Vehicle Owner. — At a forfeiture hearing, if a nondefendant motor vehicle owner establishes by the greater weight of the evidence that: (i) the motor vehicle was being driven by a person who was not the only motor vehicle owner or had no ownership interest in the motor vehicle at the time of the underlying offense and (ii) the petitioner is an "innocent owner", as defined by this section, a judge shall order the motor vehicle released to that owner, conditioned upon payment of all towing and storage charges incurred as a result of the seizure and impoundment of the motor vehicle.

Release to an innocent owner shall only be ordered upon satisfactory proof of:

(1) The identity of the person as a motor vehicle owner;

(2) The existence of financial responsibility to the extent required by Article 13 of this Chapter or by the laws of the state in which the vehicle is registered; and

(3) Repealed by Session Laws 1998-182, s. 2, effective December 1, 1998.

(4) The execution of an acknowledgment as defined in subdivision (a1)(1) of this section.

If the nondefendant owner is a lessor, the release shall also be conditioned upon the lessor agreeing not to sell, give, or otherwise transfer possession of the forfeited motor vehicle to the defendant or any person acting on the defendant's behalf. A lessor who refuses to sell, give, or transfer possession of a seized motor vehicle to the defendant or any person acting on the behalf of the defendant shall not be liable for damages arising out of the refusal.

No motor vehicle subject to forfeiture under this section shall be released to a nondefendant motor vehicle owner if the records of the Division indicate the

motor vehicle owner had previously signed an acknowledgment, as required by this section, and the same person was operating the motor vehicle while that person's license was revoked unless the innocent owner shows by the greater weight of the evidence that the motor vehicle owner has taken all reasonable precautions to prevent the use of the motor vehicle by this particular person and immediately reports, upon discovery, any unauthorized use to the appropriate law enforcement agency. A determination by the court at the forfeiture hearing held pursuant to subsection (d) of this section that the petitioner is not an innocent owner is a final judgment and is immediately appealable to the Court of Appeals.

(f) Release to Lienholder. — At a forfeiture hearing, the trial judge shall order a forfeited motor vehicle released to the lienholder upon payment of all towing and storage charges incurred as a result of the seizure of the motor vehicle if the judge determines, by the greater weight of the evidence, that:

(1) The lienholder's interest has been perfected and appears on the title to the forfeited vehicle;

(2) The lienholder agrees not to sell, give, or otherwise transfer possession of the forfeited motor vehicle to the defendant or to the motor vehicle owner who owned the motor vehicle immediately prior to forfeiture, or any person acting on the defendant's or motor vehicle owner's behalf;

(3) The forfeited motor vehicle had not previously been released to the lienholder;

(4) The owner is in default under the terms of the security instrument evidencing the interest of the lienholder and as a consequence of the default the lienholder is entitled to possession of the motor vehicle; and

(5) **(Effective until July 1, 2001)** The lienholder agrees to sell the motor vehicle in accordance with the terms of its agreement and pursuant to the provisions of Part 5 of Article 9 of Chapter 25 of the General Statutes. Upon the sale of the motor vehicle, the lienholder will pay to the clerk of court of the county in which the vehicle was forfeited all proceeds from the sale, less the amount of the lien in favor of the lienholder, and any towing and storage costs paid by the lienholder.

(5) **(Effective July 1, 2001)** The lienholder agrees to sell the motor vehicle in accordance with the terms of its agreement and pursuant to the provisions of Part 6 of Article 9 of Chapter 25 of the General Statutes. Upon the sale of the motor vehicle, the lienholder will pay to the clerk of court of the county in which the vehicle was forfeited all proceeds from the sale, less the amount of the lien in favor of the lienholder, and any towing and storage costs paid by the lienholder.

A lienholder who refuses to sell, give, or transfer possession of a forfeited motor vehicle to the defendant, the vehicle owner who owned the motor vehicle immediately prior to forfeiture, or any person acting on the behalf of the defendant or motor vehicle owner shall not be liable for damages arising out of such refusal. The defendant, the motor vehicle owner who owned the motor vehicle immediately prior to forfeiture, and any person acting on the defendant's or motor vehicle owner's behalf are prohibited from purchasing the motor vehicle at any sale conducted by the lienholder.

(g) Repealed by Session Laws 1998-182, s. 2, effective December 1, 1998. (1983, c. 435, s. 21; 1983 (Reg. Sess., 1984), c. 1101, s. 19; 1989 (Reg. Sess., 1990), c. 1024, s. 6; 1997-379, s. 1.1; 1997-456, s. 30; 1998-182, s. 2; 1999-406, ss. 11, 12, 17; 2000-169, s. 28.)

Subsection (f)(5) Set Out Twice. — The first version of subsection (f)(5) set out above is effective until July 1, 2001. The second version of subsection (f)(5) set out above is effective July 1, 2001.

Effect of Amendments. —

Session Laws 2000-169, s. 28, effective July 1, 2001, substituted "Part 6" for "Part 5" in subdivision (f)(5).

§ 20-28.3. Seizure, impoundment, forfeiture of motor vehicles for offenses involving impaired driving while license revoked.

(a) Motor Vehicles Subject to Seizure. — A motor vehicle that is driven by a person who is charged with an offense involving impaired driving is subject to seizure if at the time of the violation the drivers license of the person driving the motor vehicle was revoked as a result of a prior impaired driving license revocation as defined in G.S. 20-28.2(a).

(b) Duty of Officer. — If the charging officer has probable cause to believe that a motor vehicle driven by the defendant may be subject to forfeiture under this section, the officer shall seize the motor vehicle and have it impounded. If the officer determines prior to seizure that the motor vehicle had been reported stolen, the officer shall not seize the motor vehicle pursuant to this section. If the officer determines prior to seizure that the motor vehicle was a rental vehicle driven by a person not listed as an authorized driver on the rental contract, the officer shall not seize the motor vehicle pursuant to this section, but shall make a reasonable effort to notify the owner of the rental vehicle that the vehicle was stopped and that the driver of the vehicle was not listed as an authorized driver on the rental contract. Probable cause may be based on the officer's personal knowledge, reliable information conveyed by another officer, records of the Division, or other reliable source. The seizing officer shall notify the executive agency designated under subsection (b1) of this section as soon as practical but no later than 72 hours after seizure of the motor vehicle of the seizure in accordance with procedures established by the executive agency designated under subsection (b1) of this section.

(b1) Notification of Impoundment. — Within 48 hours of receipt of the notice of seizure, an executive agency designated by the Governor shall issue written notification of impoundment to the Division, to any lienholder of record and to any motor vehicle owner who was not operating the motor vehicle at the time of the offense. This notice shall be sent by first-class mail to the most recent address contained in the Division's records. If the motor vehicle is registered in another state, notice shall be sent to the address shown on the records of the state where the motor vehicle is registered. This written notification shall provide notice that the motor vehicle has been seized, state the reason for the seizure and the procedure for requesting release of the motor vehicle. Additionally, if the motor vehicle was damaged while the defendant operator was committing an offense involving impaired driving or incident to the seizure, the agency shall issue written notification of the seizure to the owner's insurance company of record and to any other insurance companies that may be insuring other motor vehicles involved in the accident. The Division shall prohibit title to a seized motor vehicle from being transferred by a motor vehicle owner unless authorized by court order.

(c) Review by Magistrate. — Upon determining that there is probable cause for seizing a motor vehicle, the seizing officer shall present to a magistrate within the county where the driver was charged an affidavit of impoundment setting forth the basis upon which the motor vehicle has been or will be seized for forfeiture. The magistrate shall review the affidavit of impoundment and if the magistrate determines the requirements of this section have been met, shall order the motor vehicle held. The magistrate may request additional

information and may hear from the defendant if the defendant is present. If the magistrate determines the requirements of this section have not been met, the magistrate shall order the motor vehicle released to a motor vehicle owner upon payment of towing and storage fees. If the motor vehicle has not yet been seized, and the magistrate determines that seizure is appropriate, the magistrate shall issue an order of seizure of the motor vehicle. The magistrate shall provide a copy of the order of seizure to the clerk of court. The clerk shall provide copies of the order of seizure to the district attorney and the attorney for the county board of education.

(c1) Effecting an Order of Seizure. — An order of seizure shall be valid anywhere in the State. Any officer with territorial jurisdiction and who has subject matter jurisdiction for violations of this Chapter may use such force as may be reasonable to seize the motor vehicle and to enter upon the property of the defendant to accomplish the seizure. An officer who has probable cause to believe the motor vehicle is concealed or stored on private property of a person other than the defendant may obtain a search warrant to enter upon that property for the purpose of seizing the motor vehicle.

(d) Custody of Motor Vehicle. — Unless the motor vehicle is towed pursuant to a statewide or regional contract, or a contract with the county board of education, the seized motor vehicle shall be towed by a commercial towing company designated by the law enforcement agency that seized the motor vehicle. Seized motor vehicles not towed pursuant to a statewide or regional contract or a contract with a county board of education shall be retrieved from the commercial towing company within a reasonable time, not to exceed 10 days, by the county board of education or their agent who must pay towing and storage fees to the commercial towing company when the motor vehicle is retrieved. If either a statewide or regional contractor, or the county board of education, chooses to contract for local towing services, all towing companies on the towing list for each law enforcement agency with jurisdiction within the county shall be given written notice and an opportunity to submit proposals prior to a contract for local towing services being awarded. The seized motor vehicle is under the constructive possession of the county board of education for the county in which the operator of the vehicle is charged at the time the vehicle is delivered to a location designated by the county board of education or delivered to its agent pending release or sale, or in the event a statewide or regional contract is in place, under the constructive possession of the Department of Public Instruction, on behalf of the State at the time the vehicle is delivered to a location designated by the Department of Public Instruction or delivered to its agent pending release or sale. Absent a statewide or regional contract that provides otherwise, each county board of education may elect to have seized motor vehicles stored on property owned or leased by the county board of education and charge a reasonable fee for storage, not to exceed ten dollars ($10.00) per day. In the alternative, the county board of education may contract with a commercial towing and storage facility or other private entity for the towing, storage, and disposal of seized motor vehicles, and a storage fee of not more than ten dollars ($10.00) per day may be charged. Except for gross negligence or intentional misconduct, the county board of education, or any of its employees, shall not be liable to the owner or lienholder for damage to or loss of the motor vehicle or its contents, or to the owner of personal property in a seized vehicle, during the time the motor vehicle is being towed or stored pursuant to this subsection.

(e) Release of Motor Vehicle Pending Trial. — A motor vehicle owner, other than the driver at the time of the underlying offense resulting in the seizure, may apply to the clerk of superior court in the county where the charges are pending for pretrial release of the motor vehicle.

The clerk shall release the motor vehicle to a nondefendant motor vehicle owner conditioned upon payment of all towing and storage charges incurred as

a result of seizure and impoundment of the motor vehicle under the following conditions:

(1) The motor vehicle has been seized for not less than 24 hours;

(2) Repealed by Session Laws 1998-182, s. 3, effective December 1, 1998.

(3) A bond in an amount equal to the fair market value of the motor vehicle as defined by G.S. 20-28.2 has been executed and is secured by a cash deposit in the full amount of the bond, by a recordable deed of trust to real property in the full amount of the bond, by a bail bond under G.S. 58-71-1(2), or by at least one solvent surety, payable to the county school fund and conditioned on return of the motor vehicle, in substantially the same condition as it was at the time of seizure and without any new or additional liens or encumbrances, on the day of any hearing scheduled and noticed by the district attorney under G.S. 20-28.2(c), unless the motor vehicle has been permanently released;

(4) Execution of an acknowledgment as described in G.S. 20-28.2(a1);

(5) A check of the records of the Division indicates that the requesting motor vehicle owner has not previously executed an acknowledgment naming the operator of the seized motor vehicle; and

(6) A bond posted to secure the release of this motor vehicle under this subsection has not been previously ordered forfeited under G.S. 20-28.5.

In the event a nondefendant motor vehicle owner who obtains temporary possession of a seized motor vehicle pursuant to this subsection does not return the motor vehicle on the day of the forfeiture hearing as noticed by the district attorney under G.S. 20-28.3(c) or otherwise violates a condition of pretrial release of the seized motor vehicle as set forth in this subsection, the bond posted shall be ordered forfeited and an order of seizure shall be issued by the court. Additionally, a nondefendant motor vehicle owner or lienholder who willfully violates any condition of pretrial release may be held in civil or criminal contempt.

(e1) Pretrial Release of Motor Vehicle to Innocent Owner. — A nondefendant motor vehicle owner may file a petition with the clerk of court seeking a pretrial determination that the petitioner is an innocent owner. The clerk shall schedule a hearing before a judge to be held within 10 business days or as soon as thereafter may be feasible. Notice of the hearing shall be given to the petitioner, the district attorney, and the attorney for the county board of education. The clerk shall forward a copy of the petition to the district attorney for the district attorney's review. If, based on available information, the district attorney determines that the petitioner is an innocent owner and that the motor vehicle is not subject to forfeiture, the district attorney may note the State's consent to the release of the motor vehicle on the petition and return the petition to the clerk of court who shall enter an order releasing the motor vehicle to the petitioner subject to the conditions of release as set forth in G.S. 20-28.2(e) and no hearing shall be held. The clerk shall send a copy of the order of release to the county board of education attorney. At any pretrial hearing conducted pursuant to this subsection, the court is not required to determine the issue of forfeiture, only the issue of whether the petitioner is an innocent owner. Accordingly, the State shall not be required to prove the underlying offense of impaired driving or the existence of a prior drivers license revocation. If the court determines that the petitioner is an innocent owner, the court shall release the motor vehicle to the petitioner subject to the same conditions as if the petitioner were an innocent owner under G.S. 20-28.2(e). An order issued under this subsection finding that the petitioner failed to establish that the petitioner is an innocent owner may be reconsidered by the court as part of the forfeiture hearing conducted pursuant to G.S. 20-28.2(d).

(e2) Pretrial Release of Motor Vehicle to Defendant Owner. — A defendant motor vehicle owner may file a petition with the clerk of court seeking a

pretrial determination that the defendant's license was not revoked pursuant to an impaired driving license revocation as defined in G.S. 20-28.2(a). The clerk shall schedule a hearing before a judge of the division in which the underlying criminal charge is pending for a hearing to be held within 10 business days or as soon thereafter as may be feasible. Notice of the hearing shall be given to the defendant, the district attorney, and the attorney for the county board of education. The clerk shall forward a copy of the petition to the district attorney for the district attorney's review. If, based on available information, the district attorney determines that the defendant's motor vehicle is not subject to forfeiture, the district attorney may note the State's consent to the release of the motor vehicle on the petition and return the petition to the clerk of court who shall enter an order releasing the motor vehicle to the defendant upon payment of all towing and storage charges incurred as a result of the seizure and impoundment of the motor vehicle, subject to the satisfactory proof of the identity of the defendant as a motor vehicle owner and the existence of financial responsibility to the extent required by Article 13 of this Chapter, and no hearing shall be held. The clerk shall send a copy of the order of release to the attorney for the county board of education. At any pretrial hearing conducted pursuant to this subsection, the court is not required to determine the issue of the underlying offense of impaired driving only the existence of a prior drivers license revocation as an impaired driving license revocation. Accordingly, the State shall not be required to prove the underlying offense of impaired driving. An order issued under this subsection finding that the defendant failed to establish that the defendant's license was not revoked pursuant to an impaired driving license revocation as defined in G.S. 20-28.2(a) may be reconsidered by the court as part of the forfeiture hearing conducted pursuant to G.S. 20-28.2(d).

(e3) Pretrial Release of Motor Vehicle to Lienholder. —

(1) A lienholder may file a petition with the clerk of court requesting the court to order pretrial release of a seized motor vehicle. The lienholder shall serve a copy of the petition on all interested parties which shall include the registered owner, the titled owner, the district attorney, and the county board of education attorney. Upon 10 days' prior notice of the date, time, and location of the hearing sent by the lienholder to all interested parties, a judge, after a hearing, shall order a seized motor vehicle released to the lienholder conditioned upon payment of all towing and storage costs incurred as a result of the seizure and impoundment of the motor vehicle if the judge determines, by the greater weight of the evidence, that:

a. Default on the obligation secured by the motor vehicle has occurred;

b. As a consequence of default, the lienholder is entitled to possession of the motor vehicle;

c. **(Effective until July 1, 2001)** The lienholder agrees to sell the motor vehicle in accordance with the terms of its agreement and pursuant to the provisions of Part 5 of Article 9 of Chapter 25 of the General Statutes. Upon sale of the motor vehicle, the lienholder will pay to the clerk of court of the county in which the driver was charged all proceeds from the sale, less the amount of the lien in favor of the lienholder, and any towing and storage costs paid by the lienholder;

c. **(Effective July 1, 2001)** The lienholder agrees to sell the motor vehicle in accordance with the terms of its agreement and pursuant to the provisions of Part 6 of Article 9 of Chapter 25 of the General Statutes. Upon sale of the motor vehicle, the lienholder will pay to the clerk of court of the county in which the

§ 20-28.3(e3)(1)c. is set out twice. See notes.

driver was charged all proceeds from the sale, less the amount of the lien in favor of the lienholder, and any towing and storage costs paid by the lienholder;

d. The lienholder agrees not to sell, give, or otherwise transfer possession of the seized motor vehicle while the motor vehicle is subject to forfeiture, or the forfeited motor vehicle after the forfeiture hearing, to the defendant or the motor vehicle owner; and

e. The seized motor vehicle while the motor vehicle is subject to forfeiture, or the forfeited motor vehicle after the forfeiture hearing, had not previously been released to the lienholder as a result of a prior seizure involving the same defendant or motor vehicle owner.

(2) The clerk of superior court may order a seized vehicle released to the lienholder conditioned upon payment of all towing and storage costs incurred as a result of the seizure and impoundment of the motor vehicle at any time when all interested parties have, in writing, waived any rights that they may have to notice and a hearing, and the lienholder has agreed to the provision of subdivision (4) above. A lienholder who refuses to sell, give, or transfer possession of a seized motor vehicle while the motor vehicle is subject to forfeiture, or a forfeited motor vehicle after the forfeiture hearing, to:

a. The defendant;

b. The motor vehicle owner who owned the motor vehicle immediately prior to seizure pending the forfeiture hearing, or to forfeiture after the forfeiture hearing; or

c. Any person acting on the behalf of the defendant or the motor vehicle owner,

shall not be liable for damages arising out of such refusal. However, any subsequent violation of the conditions of release by the lienholder shall be punishable by civil or criminal contempt.

(f), (g) Repealed by Session Laws 1998-182, s. 3, effective December 1, 1998.

(h) Insurance Proceeds. — In the event a motor vehicle is damaged incident to the conduct of the defendant which gave rise to the defendant's arrest and seizure of the motor vehicle pursuant to this section, the county board of education, or its authorized designee, is authorized to negotiate the county board of education's interest with the insurance company and to compromise and accept settlement of any claim for damages. Property insurance proceeds accruing to the defendant, or other owner of the seized motor vehicle, shall be paid by the responsible insurance company directly to the clerk of superior court in the county where the motor vehicle driver was charged. If the motor vehicle is declared a total loss by the insurance company liable for the damages to the motor vehicle, the clerk of superior court, upon application of the county board of education, shall enter an order that the motor vehicle be released to the insurance company upon payment into the court of all insurance proceeds for damage to the motor vehicle after payment of towing and storage costs and all valid liens. The clerk of superior court shall provide the Division with a certified copy of the order entered pursuant to this subsection, and the Division shall transfer title to the insurance company or to such other person or entity as may be designated by the insurance company. Insurance proceeds paid to the clerk of court pursuant to this subsection shall be subject to forfeiture pursuant to G.S. 20-28.5 and shall be disbursed pursuant to further orders of

the court. An affected motor vehicle owner or lienholder who objects to any agreed upon settlement under this subsection may file an independent claim with the insurance company for any additional monies believed owed. Notwithstanding any other provisions in this Chapter, nothing in this section or G.S. 20-28.2 shall require an insurance company to make payments in excess of those required pursuant to its policy of insurance on the seized motor vehicle.

(i) Expedited Sale of Seized Motor Vehicles in Certain Cases. — In order to avoid additional liability for towing and storage costs pending resolution of the criminal proceedings of the defendant, the county board of education may, after expiration of 90 days from the date of seizure, sell any motor vehicle having a fair market value of one thousand five hundred dollars ($1,500) or less. The county board of education may also sell a motor vehicle, regardless of the fair market value, any time the outstanding towing and storage costs exceed eighty-five percent (85%) of the fair market value of the vehicle, or with the consent of all the motor vehicle owners. Any sale conducted pursuant to this subsection shall be conducted in accordance with the provisions of G.S. 20-28.5(a), and the proceeds of the sale, after the payment of outstanding towing and storage costs or reimbursement of towing and storage costs paid by a person other than the defendant, shall be deposited with the clerk of superior court. If an order of forfeiture is entered by the court, the court shall order the proceeds held by the clerk to be disbursed as provided in G.S. 20-28.5(b). If the court determines that the motor vehicle is not subject to forfeiture, the court shall order the proceeds held by the clerk to be disbursed first to pay the sale, towing, and storage costs, second to pay outstanding liens on the motor vehicle, and the balance to be paid to the motor vehicle owners.

(j) Retrieval of Certain Personal Property. — At reasonable times, the entity charged with storing the motor vehicle may permit owners of personal property not affixed to the motor vehicle to retrieve those items from the motor vehicle, provided satisfactory proof of ownership of the motor vehicle or the items of personal property is presented to the storing entity.

(k) County Board of Education Right to Appear and Participate in Proceedings. — The attorney for the county board of education shall be given notice of all proceedings regarding offenses involving impaired driving related to a motor vehicle subject to forfeiture. The attorney for the county board of education shall also have the right to appear and to be heard on all issues relating to the seizure, possession, release, forfeiture, sale, and other matters related to the seized vehicle under this section. With the prior consent of the county board of education, the district attorney may delegate to the attorney for the county board of education any or all of the duties of the district attorney under this section. Clerks of superior court, law enforcement agencies, and all other agencies with information relevant to the seizure, impoundment, release, or forfeiture of motor vehicles are authorized and directed to provide county boards of education with access to that information and to do so by electronic means when existing technology makes this type of transmission possible.

(*l*) Payment of Fees Upon Conviction. — If the driver of a motor vehicle seized pursuant to this section is convicted of an offense involving impaired driving, the defendant shall be ordered to pay as restitution to the county board of education, the motor vehicle owner, or the lienholder the cost paid or owing for the towing, storage, and sale of the motor vehicle to the extent the costs were not covered by the proceeds from the forfeiture and sale of the motor vehicle. In addition, a civil judgment for the costs under this section in favor of the party to whom the restitution is owed shall be docketed by the clerk of superior court. If the defendant is sentenced to an active term of imprisonment, the civil judgment shall become effective and be docketed when the

defendant's conviction becomes final. If the defendant is placed on probation, the civil judgment in the amount found by a judge during the probation revocation or termination hearing to be due shall become effective and be docketed by the clerk when the defendant's probation is revoked or terminated.

(m) Trial Priority. — District court trials of impaired driving offenses involving forfeitures of motor vehicles pursuant to G.S. 20-28.2 shall be scheduled on the arresting officer's next court date or within 30 days of the offense, whichever comes first.

Once scheduled, the case shall not be continued unless all of the following conditions are met:

(1) A written motion for continuance is filed with notice given to the opposing party prior to the motion being heard.

(2) The judge makes a finding of a "compelling reason" for the continuance.

(3) The motion and finding are attached to the court case record.

Upon a determination of guilt, the issue of vehicle forfeiture shall be heard by the judge immediately, or as soon thereafter as feasible, and the judge shall issue the appropriate orders pursuant to G.S. 20-28.2(d).

Should a defendant appeal the conviction to superior court, any party who has not previously been heard on a petition for pretrial release under subsections (e1) or (e3) of this section or any party whose motor vehicle has not been the subject of a forfeiture hearing held pursuant to G.S. 20-28.2(d) may be heard on a petition for pretrial release pursuant to subsections (e1) or (e3) of this section. The provisions of subsection (e) of this section shall also apply to seized motor vehicles pending trial in superior court. Where a motor vehicle was released pursuant to subsection (e) of this section pending trial in district court, the release of the motor vehicle continues, and the terms and conditions of the original bond remain the same as those required for the initial release of the motor vehicle under subsection (e) of this section, pending the resolution of the underlying offense involving impaired driving in superior court. (1997-379, s. 1.2; 1997-456, s. 31; 1998-182, s. 3; 1998-217, s. 62(a)-(c); 2000-169, s. 29.)

Subsection (e3)(1)c Set Out Twice. — The first version of subsection (e3)(1)c set out above is effective until July 1, 2001. The second version of subsection (e3)(1)c set out above is effective July 1, 2001.

Effect of Amendments. —

Session Laws 2000-169, s. 29, effective July 1, 2001, substituted "Part 6" for "Part 5" in subdivision (e3)(1)c.

CASE NOTES

DWI seizure statutes were deemed constitutional in spite of a "law of the land" challenge, indicating that these statutes have a legitimate objective — keeping impaired drivers and their cars off of the roads — and that the means chosen to further the goals — seizing the cars, even when they belong to people other than the drivers — is directly related to said objective. State v. Chisholm, 135 N.C. App. 578, 521 S.E.2d 487 (1999).

ARTICLE 3.

Motor Vehicle Act of 1937.

Part 3. Registration and Certificates of Titles of Motor Vehicles.

§ 20-52.1. (Effective May 1, 2001) Manufacturer's certificate of transfer of new motor vehicle.

(a) Any manufacturer transferring a new motor vehicle to another shall, at the time of the transfer, supply the transferee with a manufacturer's certificate of origin assigned to the transferee.

(b) Any dealer transferring a new vehicle to another dealer shall, at the time of transfer, give such transferee the proper manufacturer's certificate assigned to the transferee.

(c) Upon sale of a new vehicle by a dealer to a consumer-purchaser, the dealer shall execute in the presence of a person authorized to administer oaths an assignment of the manufacturer's certificate of origin for the vehicle, including in such assignment the name and address of the transferee and no title to a new motor vehicle acquired by a dealer under the provisions of subsections (a) and (b) of this section shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee.

Any dealer transferring title to, or an interest in, a new vehicle shall deliver the manufacturer's certificate of origin duly assigned in accordance with the foregoing provision to the transferee at the time of delivering the vehicle, except that where a security interest is obtained in the motor vehicle from the transferee in payment of the purchase price or otherwise, the transferor shall deliver the manufacturer's certificate of origin to the lienholder and the lienholder shall forthwith forward the manufacturer's certificate of origin together with the transferee's application for certificate of title and necessary fees to the Division. Any person who delivers or accepts a manufacturer's certificate of origin assigned in blank shall be guilty of a Class 2 misdemeanor, unless done in accordance with subsection (d) of this section.

(d) When a manufacturer's statement of origin or an existing certificate of title on a motor vehicle is unavailable, a motor vehicle dealer licensed under Article 12 of this Chapter may also transfer title to another by certifying in writing in a sworn statement to the Division that all prior perfected liens on the vehicle have been paid and that the motor vehicle dealer, despite having used reasonable diligence, is unable to obtain the vehicle's statement of origin or certificate of title. The Division is authorized to develop a form for this purpose. The filing of a false sworn certification with the Division pursuant to this subsection shall constitute a Class H felony. The dealer shall hold harmless the consumer-purchaser from any damages arising from the use of the procedure authorized by this subsection. (1961, c. 835, s. 4; 1967, c. 863; 1975, c. 716, s. 5; 1993, c. 539, s. 331; 1994, Ex. Sess., c. 24, s. 14(c); 2000-182, s. 1.)

For this section as in effect until May 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-182, s. 1, effective May 1, 2001, and applicable to offenses occurring on or after that date, added "unless done in accordance with subsection (d) of this section" in the second paragraph in subsection (c); and added subsection (d).

§ 20-58. (Effective May 1, 2001) Perfection by indication of security interest on certificate of title.

(a) Except as provided in G.S. 20-58.8, a security interest in a vehicle of a type for which a certificate of title is required shall be perfected only as hereinafter provided.

(1) If the vehicle is not registered in this State, the application for notation of a security interest shall be the application for certificate of title provided for in G.S. 20-52.

(2) If the vehicle is registered in this State, the application for notation of a security interest shall be in the form prescribed by the Division, signed by the debtor, and contain the date of application of each security interest, and name and address of the secured party from whom information concerning the security interest may be obtained. The application must be accompanied by the existing certificate of title unless in the possession of a prior secured party. If there is an existing certificate of title issued by this or any other jurisdiction in the possession of a prior secured party, the application for notation of the security interest shall in addition contain the name and address of such prior secured party. An application for notation of a security interest may be signed by the secured party instead of the debtor when the application is accompanied by documentary evidence of the applicant's security interest in that motor vehicle signed by the debtor and by affidavit of the applicant stating the reason the debtor did not sign the application. In the event the certificate cannot be obtained for recordation of the security interest, when title remains in the name of the debtor, the Division shall cancel the certificate and issue a new certificate of title listing all the respective security interests.

(3) If the application for notation of security interest is made in order to continue the perfection of a security interest perfected in another jurisdiction, it may be signed by the secured party instead of the debtor. Such application shall be accompanied by documentary evidence of a perfected security interest. No such application shall be valid unless an application for a certificate of title has been made in North Carolina. The security interest perfected herein shall be subject to the provisions set forth in G.S. 20-58.5.

(b) When a manufacturer's statement of origin or an existing certificate of title on a motor vehicle is unavailable, a first lienholder who holds a valid license as a motor vehicle dealer issued by the Commissioner under Article 12 of this Chapter or his designee may file a notarized copy of an instrument creating and evidencing a security interest in the motor vehicle with the Division of Motor Vehicles. A filing pursuant to this subsection shall constitute constructive notice to all persons of the security interest in the motor vehicle described in the filing. The constructive notice shall be effective from the date of the filing if the filing is made within 20 days after the date of the security agreement. The constructive notice shall date from the date of the filing with the Division if it is made more than 20 days after the date of the security agreement. The notation of a security interest created under this subsection shall automatically expire 60 days after the date of the creation of the security interest, or upon perfection of the security interest as provided in subsection (a) of this section, whichever occurs first. A security interest notation made under this subsection and then later perfected under subsection (a) of this section shall be presumed to have been perfected on the date of the earlier filing. The Division may charge a fee not to exceed ten dollars ($10.00) for each notation of security interest filed pursuant to this subsection. The fee shall be credited to the Highway Fund. A false filing with the Division pursuant to this

§ 20-58 has a postponed effective date. See notes.

subsection shall constitute a Class H felony. (1937, c. 407, s. 22; 1955, c. 554, s. 2; 1961, c. 835, s. 6; 1969, c. 838, s. 1; 1975, c. 716, s. 5; 1979, c. 145, ss. 1, 2; c. 199; 2000-182, s. 2.)

For this section as in effect until May 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-182, s. 2, effective May 1, 2001, and applicable to offenses occurring on or after that date, designated the first paragraph as subsection (a) and added subsection (b).

§ 20-58.8. (Effective July 1, 2001) Applicability of §§ 20-58 to 20-58.8; use of term "lien".

(a) Repealed by Session Laws 2000, c. 169, s. 30, effective July 1, 2001.

(b) The provisions of G.S. 20-58 through 20-58.8 inclusive shall not apply to or affect:

(1) A lien given by statute or rule of law for storage of a motor vehicle or to a supplier of services or materials for a vehicle;

(2) A lien arising by virtue of a statute in favor of the United States, this State or any political subdivision of this State; or

(3) A security interest in a vehicle created by a manufacturer or by a dealer in new or used vehicles who holds the vehicle in his inventory.

(c) When the term "lien" is used in other sections of this Chapter, or has been used prior to October 1, 1969, with reference to transactions governed by G.S. 20-58 through 20-58.8, to describe contractual agreements creating security interests in personal property, the term "lien" shall be construed to refer to a "security interest" as the term is used in G.S. 20-58 through 20-58.8 and the Uniform Commercial Code. (1961, c. 835, s. 6; 1969, c. 838, s. 1; 2000-169, s. 30.)

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 30, effective July 1, 2001, repealed subsection (a), pertaining to the applicability of §§ 20-58 to 20-58.8 to perfection of security interests; and deleted the last sentence in subdivision (b)(3), which read "Such security interests shall be performed by filing a financing statement under Article 9 of the Uniform Commercial Code."

§ 20-63. Registration plates furnished by Division; requirements; replacement of regular plates with First in Flight plates; surrender and reissuance; displaying; preservation and cleaning; alteration or concealment of numbers; commission contracts for issuance.

(a) The Division upon registering a vehicle shall issue to the owner one registration plate for a motorcycle, trailer or semitrailer and for every other motor vehicle. Registration plates issued by the Division under this Article shall be and remain the property of the State, and it shall be lawful for the Commissioner or his duly authorized agents to summarily take possession of any plate or plates which he has reason to believe is being illegally used, and to keep in his possession such plate or plates pending investigation and legal disposition of the same. Whenever the Commissioner finds that any registration plate issued for any vehicle pursuant to the provisions of this Article has become illegible or is in such a condition that the numbers thereon may not be readily distinguished, he may require that such registration plate, and its

companion when there are two registration plates, be surrendered to the Division. When said registration plate or plates are so surrendered to the Division, a new registration plate or plates shall be issued in lieu thereof without charge. The owner of any vehicle who receives notice to surrender illegible plate or plates on which the numbers are not readily distinguishable and who willfully refuses to surrender said plates to the Division shall be guilty of a Class 2 misdemeanor.

(b) Every license plate shall have displayed upon it the registration number assigned to the vehicle for which it is issued, the name of the State of North Carolina, which may be abbreviated, and the year number for which it is issued or the date of expiration. A plate issued for a commercial vehicle, as defined in G.S. 20-4.2(1), must bear the word "commercial," unless the plate is a special registration plate authorized in G.S. 20-79.4 or the commercial vehicle is a trailer or is licensed for 6,000 pounds or less.

A registration plate issued by the Division for a private passenger vehicle or for a private hauler vehicle licensed for 6,000 pounds or less, other than a Friends of the Great Smoky Mountains National Park special registration plate, shall be a "First in Flight" plate. A "First in Flight" plate shall have the words "First in Flight" printed at the top of the plate above all other letters and numerals. The background of the plate shall depict the Wright Brothers biplane flying over Kitty Hawk Beach, with the plane flying slightly upward and to the right.

(c) Such registration plate and the required numerals thereon, except the year number for which issued, shall be of sufficient size to be plainly readable from a distance of 100 feet during daylight.

(d) Registration plates issued for a motor vehicle other than a motorcycle, trailer, or semitrailer shall be attached thereto, one in the front and the other in the rear: Provided, that when only one registration plate is issued for a motor vehicle other than a truck-tractor, said registration plate shall be attached to the rear of the motor vehicle. The registration plate issued for a truck-tractor shall be attached to the front thereof. Provided further, that when only one registration plate is issued for a motor vehicle and this motor vehicle is transporting a substance that may adhere to the plate so as to cover or discolor the plate or if the motor vehicle has a mechanical loading device that may damage the plate, the registration plate may be attached to the front of the motor vehicle.

Any motor vehicle of the age of 35 years or more from the date of manufacture may bear the license plates of the year of manufacture instead of the current registration plates, if the current registration plates are maintained within the vehicle and produced upon the request of any person.

The Division shall provide registered owners of motorcycles and motorcycle trailers with suitably reduced size registration plates.

(e) Preservation and Cleaning of Registration Plates. — It shall be the duty of each and every registered owner of a motor vehicle to keep the registration plates assigned to such motor vehicle reasonably clean and free from dust and dirt, and such registered owner, or any person in his employ, or who operates such motor vehicle by his authority, shall, upon the request of any proper officer, immediately clean such registration plates so that the numbers thereon may be readily distinguished, and any person who shall neglect or refuse to so clean a registration plate, after having been requested to do so, shall be guilty of a Class 3 misdemeanor.

(f) Operating with False Numbers. — Any person who shall willfully operate a motor vehicle with a registration plate which has been repainted or altered or forged shall be guilty of a Class 2 misdemeanor.

(g) Alteration, Disguise, or Concealment of Numbers. — Any operator of a motor vehicle who shall willfully mutilate, bend, twist, cover or cause to be

covered or partially covered by any bumper, light, spare tire, tire rack, strap, or other device, or who shall paint, enamel, emboss, stamp, print, perforate, or alter or add to or cut off any part or portion of a registration plate or the figures or letters thereon, or who shall place or deposit or cause to be placed or deposited any oil, grease, or other substance upon such registration plates for the purpose of making dust adhere thereto, or who shall deface, disfigure, change, or attempt to change any letter or figure thereon, or who shall display a number plate in other than a horizontal upright position, shall be guilty of a Class 2 misdemeanor. Any operator of a motor vehicle who shall otherwise intentionally cover any number or registration renewal sticker on a registration plate with any material that makes the number or registration renewal sticker illegible commits an infraction and shall be fined under G.S. 14-3.1.

(h) Commission Contracts for Issuance of Plates and Certificates. — All registration plates, registration certificates and certificates of title issued by the Division, outside of those issued from the Raleigh offices of the said Division and those issued and handled through the United States mail, shall be issued insofar as practicable and possible through commission contracts entered into by the Division for the issuance of such plates and certificates in localities throughout North Carolina with persons, firms, corporations or governmental subdivisions of the State of North Carolina and the Division shall make a reasonable effort in every locality, except as hereinbefore noted, to enter into a commission contract for the issuance of such plates and certificates and a record of these efforts shall be maintained in the Division. In the event the Division is unsuccessful in making commission contracts as hereinbefore set out it shall then issue said plates and certificates through the regular employees of the Division. Whenever registration plates, registration certificates and certificates of title are issued by the Division through commission contract arrangements, the Division shall provide proper supervision of such distribution. Commission contracts entered under this subsection shall provide for the payment of compensation for all transactions as set forth below. Nothing contained in this subsection will allow or permit the operation of fewer outlets in any county in this State than are now being operated.

A transaction is any of the following activities:

(1) Issuance of a registration plate, a registration card, a registration renewal sticker, or a certificate of title.
(2) Issuance of a handicapped placard or handicapped identification card.
(3) Acceptance of an application for a personalized registration plate.
(4) Acceptance of a surrendered registration plate, registration card, or registration renewal sticker, or acceptance of an affidavit stating why a person cannot surrender a registration plate, registration card, or registration renewal sticker.
(5) Cancellation of a title because the vehicle has been junked.
(6) Acceptance of an application for, or issuance of, a refund for a fee or a tax, other than the highway use tax.
(7) Receipt of the civil penalty imposed by G.S. 20-309 for a lapse in financial responsibility or receipt of the restoration fee imposed by that statute.
(8) Acceptance of a notice of failure to maintain financial responsibility for a motor vehicle.
(8a) Collection of civil penalties imposed for violations of G.S. 20-183.8A.
(8b) Sale of one or more inspection stickers in a single transaction to a licensed inspection station.
(9) Collection of the highway use tax.
(10) **(Effective May 1, 2001)** Acceptance of a temporary lien filing.

Performance at the same time of any combination of the items that are listed within each subdivision or are listed within subdivisions (1) through (8b) of

this section is a single transaction for which a dollar and thirty-five cent ($1.35) compensation shall be paid. Performance of the item listed in subdivision (9) of this subsection in combination with any other items listed in this subsection is a separate transaction for which a one dollar and twenty cent ($1.20) compensation shall be paid.

(i) Electronic Applications and Collections. — The Division is authorized to accept electronic applications for the issuance of registration plates, registration certificates, and certificates of title, and to electronically collect fees and penalties. (1937, c. 407, s. 27; 1943, c. 726; 1951, c. 102, ss. 1-3; 1955, c. 119, s. 1; 1961, c. 360, s. 4; c. 861, s. 2; 1963, c. 552, s. 6; c. 1071; 1965, c. 1088; 1969, c. 1140; 1971, c. 945; 1973, c. 629; 1975, c. 716, s. 5; 1979, c. 470, s. 1; c. 604, s. 1; c. 917, s. 4; 1981, c. 750; c. 859, s. 76; 1983, c. 253, ss. 1-3; 1985, c. 257; 1991 (Reg. Sess., 1992), c. 1007, s. 32; 1993, c. 539, ss. 333-336; 1994, Ex. Sess., c. 24, s. 14(c); 1997-36, s. 1; 1997-443, s. 32.7(a); 1997-461, s. 1; 1998-160, s. 3; 1998-212, ss. 15.4(a), 27.6(a); 1999-452, ss. 13, 14; 2000-182, s. 3.)

Editor's Note. —

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 25.5, effective July 1, 2000, creates the Commission to Study Commission Contracts for the Issuance of Motor Vehicle Registration Plates and Certificates and appropriates $25,000 from the Highway Fund to the General Assembly for the 2000-2001 fiscal year for Commission expenses. The Commission is to (1) review the history and policies leading to the enactiment of G.S. 20-63(h), (2) study the current implementation and consequences of that provision, (3) study how registration plates and certificates are issued in other states, (4) study the implications and potential effects on the contract agents of the authority of the Division of Motor Vehicles to use electronic applications and collections authorized in G.S. 20-63(i), (5) study other factors related to the use of contract agents for the issuance of plates and certificates, and (6) make findings and recommendations on improving services related to issuance of registration plates and certificates to the citizens while reducing costs to the State. The Commission is to submit a final report of findings and recommendations to the General Assembly on or before the first day of the 2001 General Assembly, at which time the Commission shall terminate.

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. —

Session Laws 2000-182, s. 3, effective May 1, 2001, and applicable to offenses occurring on or after that date, added subdivision (h)(10), reading "Acceptance of a temporary lien filing."

§ 20-71.1. Registration evidence of ownership; ownership evidence of defendant's responsibility for conduct of operation.

CASE NOTES

As Plaintiff Has Burden of Proving Agency. —

Trial court incorrectly denied defendants' motions under § 1A-1, Rule 50(a); this section merely provides prima facie evidence of motor vehicle ownership, but does not remove plaintiff's burden of proof as to agency which, in this case, he failed to carry as to the first defendant and which issue the court removed in error from the jury as to the second defendant. Winston v. Brodie, 134 N.C. App. 260, 517 S.E.2d 203 (1999).

Part 4. Transfer of Title or Interest.

§ 20-72. Transfer by owner.

(a) Whenever the owner of a registered vehicle transfers or assigns his title or interests thereto, he shall remove the license plates. The registration card and plates shall be forwarded to the Division unless the plates are to be transferred to another vehicle as provided in G.S. 20-64. If they are to be transferred to and used with another vehicle, then the endorsed registration card and the plates shall be retained and preserved by the owner. If such registration plates are to be transferred to and used with another vehicle, then the owner shall make application to the Division for assignment of the registration plates to such other vehicle under the provisions of G.S. 20-64. Such application shall be made within 20 days after the date on which such plates are last used on the vehicle to which theretofore assigned.

(b) **(Effective until May 1, 2001)** In order to assign or transfer title or interest in any motor vehicle registered under the provisions of this Article, the owner shall execute in the presence of a person authorized to administer oaths an assignment and warranty of title on the reverse of the certificate of title in form approved by the Division, including in such assignment the name and address of the transferee; and no title to any motor vehicle shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee. The provisions of this section shall not apply to any foreclosure or repossession under a chattel mortgage or conditional sales contract or any judicial sale.

Any person transferring title or interest in a motor vehicle shall deliver the certificate of title duly assigned in accordance with the foregoing provision to the transferee at the time of delivering the vehicle, except that where a security interest is obtained in the motor vehicle from the transferee in payment of the purchase price or otherwise, the transferor shall deliver the certificate of title to the lienholder and the lienholder shall forward the certificate of title together with the transferee's application for new title and necessary fees to the Division within 20 days. Any person who delivers or accepts a certificate of title assigned in blank shall be guilty of a Class 2 misdemeanor.

The title to a salvage vehicle shall be forwarded to the Division as provided in G.S. 20-109.1.

(b) **(Effective May 1, 2001)** In order to assign or transfer title or interest in any motor vehicle registered under the provisions of this Article, the owner shall execute in the presence of a person authorized to administer oaths an assignment and warranty of title on the reverse of the certificate of title in form approved by the Division, including in such assignment the name and address of the transferee; and no title to any motor vehicle shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee. The provisions of this section shall not apply to any foreclosure or repossession under a chattel mortgage or conditional sales contract or any judicial sale.

When a manufacturer's statement of origin or an existing certificate of title on a motor vehicle is unavailable, a motor vehicle dealer licensed under Article 12 of this Chapter may also transfer title to another by certifying in writing in a sworn statement to the Division that all prior perfected liens on the vehicle have been paid and that the motor vehicle dealer, despite having used reasonable diligence, is unable to obtain the vehicle's statement of origin or certificate of title. The Division is authorized to develop a form for this purpose. The filing of a false sworn certification with the Division pursuant to this paragraph shall constitute a Class H felony.

§ 20-72(b) is set out twice. See notes.

Any person transferring title or interest in a motor vehicle shall deliver the certificate of title duly assigned in accordance with the foregoing provision to the transferee at the time of delivering the vehicle, except that where a security interest is obtained in the motor vehicle from the transferee in payment of the purchase price or otherwise, the transferor shall deliver the certificate of title to the lienholder and the lienholder shall forward the certificate of title together with the transferee's application for new title and necessary fees to the Division within 20 days. Any person who delivers or accepts a certificate of title assigned in blank shall be guilty of a Class 2 misdemeanor.

The title to a salvage vehicle shall be forwarded to the Division as provided in G.S. 20-109.1.

(c) When the Division finds that any person other than the registered owner of a vehicle has in his possession a certificate of title to the vehicle on which there appears an endorsement of an assignment of title but there does not appear in the assignment any designation to show the name and address of the assignee or transferee, the Division shall be authorized and empowered to seize and hold said certificate of title until the assignor whose name appears in the assignment appears before the Division to complete the execution of the assignment or until evidence satisfactory to the Division is presented to the Division to show the name and address of the transferee. (1937, c. 407, s. 36; 1947, c. 219, ss. 4, 5; 1955, c. 554, ss. 5, 6; 1961, c. 360, s. 8; c. 835, s. 8; 1963, c. 552, ss. 3, 4; 1971, c. 678; 1973, c. 1095, s. 2; 1975, c. 716, s. 5; 1993, c. 539, s. 338; 1994, Ex. Sess., c. 24, s. 14(c); 2000-182, s. 4.)

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective until May 1, 2001. The second version of subsection (b) set out above is effective May 1, 2001.

Effect of Amendments. — Session Laws 2000-182, s. 4, effective May 1, 2001, and applicable to offenses occurring on or after that date, added the second paragraph in subsection (b), relating to unavailability of a manufacturer's statement of origin or certificate of title.

Part 5. Issuance of Special Plates.

§ 20-79.1. Use of temporary registration plates or markers by purchasers of motor vehicles in lieu of dealers' plates.

(a) The Division may, subject to the limitations and conditions hereinafter set forth, deliver temporary registration plates or markers designed by said Division to a dealer duly registered under the provisions of this Article who applies for at least 25 such plates or markers and who encloses with such application a fee of one dollar ($1.00) for each plate or marker for which application is made. Such application shall be made upon a form prescribed and furnished by the Division. Dealers, subject to the limitations and conditions hereinafter set forth, may issue such temporary registration plates or markers to owners of vehicles, provided that such owners shall comply with the pertinent provisions of this section.

(b) Every dealer who has made application for temporary registration plates or markers shall maintain in permanent form a record of all temporary registration plates or markers delivered to him, and shall also maintain in permanent form a record of all temporary registration plates or markers issued by him, and in addition thereto, shall maintain in permanent form a record of any other information pertaining to the receipt or the issuance of temporary

registration plates or markers that the Division may require. Each record shall be kept for a period of at least one year from the date of entry of such record. Every dealer shall allow full and free access to such records during regular business hours, to duly authorized representatives of the Division and to peace officers.

(c) Every dealer who issues temporary registration plates or markers shall also issue a temporary registration certificate upon a form furnished by the Division and deliver it with the registration plate or marker to the owner.

(d) A dealer shall:

(1) Not issue, assign, transfer, or deliver temporary registration plates or markers to anyone other than a bona fide purchaser or owner of a vehicle which he has sold.

(2) Not issue a temporary registration plate or marker without first obtaining from the purchaser or owner a written application for titling and registration of the vehicle and the applicable fees.

(3) Within 10 working days, mail or deliver the application and fees to the Division or deliver the application and fees to a local license agency for processing. Delivery need not be made if the contract for sale has been rescinded in writing by all parties to the contract.

(4) Not deliver a temporary registration plate to anyone purchasing a vehicle that has an unexpired registration plate that is to be transferred to the purchaser.

(5) Not lend to anyone, or use on any vehicle that he may own, any temporary registration plates or markers.

A dealer may issue temporary markers, without obtaining the written application for titling and registration or collecting the applicable fees, to nonresidents for the purpose of removing the vehicle from the State.

(e) Every dealer who issues temporary plates or markers shall write clearly and indelibly on the face of the temporary registration plate or marker:

(1) The dates of issuance and expiration;

(2) The make, motor number, and serial numbers of the vehicle; and

(3) Any other information that the Division may require.

It shall be unlawful for any person to issue a temporary registration plate or marker containing any misstatement of fact or to knowingly write any false information on the face of the plate or marker.

(f) If the Division finds that the provisions of this section or the directions of the Division are not being complied with by the dealer, he may suspend, after a hearing, the right of a dealer to issue temporary registration plates or markers.

(g) Every person to whom temporary registration plates or markers have been issued shall permanently destroy such temporary registration plates or markers immediately upon receiving the annual registration plates from the Division: Provided, that if the annual registration plates are not received within 30 days of the issuance of the temporary registration plates or markers, the owner shall, notwithstanding, immediately upon the expiration of such 30-day period, permanently destroy the temporary registration plates or markers.

(h) **(Effective until May 1, 2001)** Temporary registration plates or markers shall expire and become void upon the receipt of the annual registration plates from the Division, or upon the rescission of a contract to purchase a motor vehicle, or upon the expiration of 30 days from the date of issuance, depending upon whichever event shall first occur. No refund or credit or fees paid by dealers to the Division for temporary registration plates or markers shall be allowed, except in the event that the Division discontinues the

§ 20-79.1(h) is set out twice. See notes.

issuance of temporary registration plates or markers or unless the dealer discontinues business. In this event the unissued registration plates or markers with the unissued registration certificates shall be returned to the Division and the dealer may petition for a refund.

(h) **(Effective May 1, 2001)** Temporary registration plates or markers shall expire and become void upon the receipt of the annual registration plates from the Division, or upon the rescission of a contract to purchase a motor vehicle, or upon the expiration of 30 days from the date of issuance, depending upon whichever event shall first occur. No refund or credit or fees paid by dealers to the Division for temporary registration plates or markers shall be allowed, except in the event that the Division discontinues the issuance of temporary registration plates or markers or unless the dealer discontinues business. In this event the unissued registration plates or markers with the unissued registration certificates shall be returned to the Division and the dealer may petition for a refund. Upon the expiration of the 30 days from the date of issuance, a second 30-day temporary registration plate or marker may be issued by the dealer upon showing the vehicle has been sold, a temporary lien has been filed as provided in G.S. 20-58, and that the dealer, having used reasonable diligence, is unable to obtain the vehicle's statement of origin or certificate of title so that the lien may be perfected.

(i) A temporary registration plate or marker may be used on the vehicle for which issued only and may not be transferred, loaned, or assigned to another. In the event a temporary registration plate or marker or temporary registration certificate is lost or stolen, the owner shall permanently destroy the remaining plate or marker or certificate and no operation of the vehicle for which the lost or stolen registration certificate, registration plate or marker has been issued shall be made on the highways until the regular license plate is received and attached thereto.

(j) The Commissioner of Motor Vehicles shall have the power to make such rules and regulations, not inconsistent herewith, as he shall deem necessary for the purpose of carrying out the provisions of this section.

(k) The provisions of G.S. 20-63, 20-71, 20-110 and 20-111 shall apply in like manner to temporary registration plates or markers as is applicable to nontemporary plates. (1957, c. 246, s. 1; 1963, c. 552, s. 8; 1975, c. 716, s. 5; 1985, c. 95; c. 263; 1997-327, ss. 1, 2; 2000-182, s. 5.)

Subsection (h) Set Out Twice. — The first version of subsection (h) set out above is effective until May 1, 2001. The second version of subsection (h) set out above is effective May 1, 2001.

Effect of Amendments. — Session Laws 2000-182, s. 5, effective May 1, 2001, and applicable to offenses occurring on or after that date, added the last sentence in subsection (h), beginning "Upon the expiration of the 30 days."

§ 20-79.4. Special registration plates.

(a) General. — Upon application and payment of the required registration fees, a person may obtain from the Division a special registration plate for a motor vehicle registered in that person's name if the person qualifies for the registration plate. A special registration plate may not be issued for a vehicle registered under the International Registration Plan. A special registration plate may be issued for a commercial vehicle that is not registered under the International Registration Plan. A holder of a special registration plate who becomes ineligible for the plate, for whatever reason, must return the special plate within 30 days.

(b) Types. — The Division shall issue the following types of special registration plates:

(1) Administrative Officer of the Courts. — Issuable to the Director of the Administrative Office of the Courts. The plate shall bear the phrase "J-20".

(2) Amateur Radio Operator. — Issuable to an amateur radio operator who holds an unexpired and unrevoked amateur radio license issued by the Federal Communications Commission and who asserts to the Division that a portable transceiver is carried in the vehicle. The plate shall bear the phrase "Amateur Radio". The plate shall bear the operator's official amateur radio call letters, or call letters with numerical or letter suffixes so that an owner of more than one vehicle may have the call letters on each.

(3) American Legion. — Issuable to a member of the American Legion. The plate shall bear the words "American Legion" and the emblem of the American Legion. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(3a) Animal Lovers. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a picture of a dog and cat and the phrase "I Care."

(3b) Bronze Star Recipient. — Issuable to a recipient of the Bronze Star. The plate shall bear the emblem of the Bronze Star and the words "Bronze Star".

(4) Civil Air Patrol Member. — Issuable to an active member of the North Carolina Wing of the Civil Air Patrol. The plate shall bear the phrase "Civil Air Patrol". A plate issued to an officer member shall begin with the number "201" and the number shall reflect the seniority of the member; a plate issued to an enlisted member, a senior member, or a cadet member shall begin with the number "501".

(5) Civic Club. — Issuable to a member of a nationally recognized civic organization whose member clubs in the State are exempt from State corporate income tax under G.S. 105-130.11(a)(5). Examples of these clubs include Jaycees, Kiwanis, Optimist, Rotary, Ruritan, and Shrine. The plate shall bear a word or phrase identifying the civic club and the emblem of the civic club. The Division may not issue a civic club plate authorized by this subdivision unless it receives at least 300 applications for that civic club plate.

(6) Class D Citizen's Radio Station Operator. — Issuable to a Class D citizen's radio station operator. For an operator who has been issued Class D citizen's radio station call letters by the Federal Communications Commission, the plate shall bear the operator's official Class D citizen's radio station call letters. For an operator who has not been issued Class D citizen's radio station call letters by the Federal Communications Commission, the plate shall bear the phrase "Citizen's Band Radio".

(7) Clerk of Superior Court. — Issuable to a current or retired clerk of superior court. A plate issued to a current clerk shall bear the phrase "Clerk Superior Court" and the letter "C" followed by a number that indicates the county the clerk serves. A plate issued to a retired clerk shall bear the phrase "Clerk Superior Court, Retired", the letter "C" followed by a number that indicates the county the clerk served, and the letter "X" indicating the clerk's retired status.

(8) Coast Guard Auxiliary Member. — Issuable to an active member of the United States Coast Guard Auxiliary. The plate shall bear the phrase "Coast Guard Auxiliary".

(9) Collegiate Insignia Plate. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a

phrase or an insignia representing a public or private college or university.

(10) Combat Veteran. — Issuable to a veteran of the armed forces who served in a combat zone, or in waters adjacent to a combat zone, during a period of war and who was separated from the armed forces under honorable conditions. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate. A "period of war" is any of the following:

a. World War I, which began April 16, 1917, and ended November 11, 1918.
b. World War II, which began December 7, 1941, and ended December 31, 1946.
c. The Korean Conflict, which began June 27, 1950, and ended January 31, 1955.
d. The Vietnam Era, which began August 5, 1964, and ended May 7, 1975.
e. The Persian Gulf War.
f. Any other campaign, expedition, or engagement for which the United States Department of Defense authorizes a campaign badge or medal.

(11) County Commissioner. — Issuable to a county commissioner of a county in this State. The plate shall bear the words "County Commissioner" followed first by a number representing the commissioner's county and then by a letter or number that distinguishes plates issued to county commissioners of the same county. The number of a county shall be the order of the county in an alphabetical list of counties that assigns number one to the first county in the list and a letter or number to distinguish different cars owned by the county commissioners in that county. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(12) Disabled Veteran. — Issuable to a veteran of the armed forces of the United States who suffered a 100% service-connected disability.

(12a) Distinguished Flying Cross. — Issuable to a recipient of the Distinguished Flying Cross. The plate shall bear the emblem of the Distinguished Flying Cross and the words "Distinguished Flying Cross".

(13) District Attorney. — Issuable to a North Carolina or United States District Attorney. The plate issuable to a North Carolina district attorney shall bear the letters "DA" followed by a number that represents the prosecutorial district the district attorney serves. The plate for a United States attorney shall bear the phrase "U.S. Attorney" followed by a number that represents the district the attorney serves, with 1 being the Eastern District, 2 being the Middle District, and 3 being the Western District.

(13a) Ducks Unlimited. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the logo of Ducks Unlimited, Inc., and shall bear the words: "Ducks Unlimited".

(13b) Eagle Scout. — Issuable to a young man who has been certified as an Eagle Scout by the Boy Scouts of America, or to his parents or guardians. The plate shall bear the insignia of the Boy Scouts of America and shall bear the words "Eagle Scout". The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(14) 82nd Airborne Division Association Member. — Issuable to a member of the 82nd Airborne Division Association, Inc. The plate shall bear

the insignia of the 82nd Airborne Division Association, Inc. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(15) Fire Department or Rescue Squad Member. — Issuable to an active regular member or volunteer member of a fire department, rescue squad, or both a fire department and rescue squad. The plate shall bear the words "Firefighter", "Rescue Squad", or "Firefighter-Rescue Squad".

(16) Future Farmers of America. — Issuable to a member or a supporter of the National Future Farmers of America Organization. The plate shall bear the emblem of the organization and the letters "FFA". The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(16a) Girl Scout Gold Award recipient. — Issuable to a young woman who has been certified as a Girl Scout Gold Award recipient by the Girl Scouts of the U.S.A., or to her parents or guardians. The plate shall bear the insignia of the Girl Scouts of the U.S.A. and shall bear the words "Girl Scout Gold Award". The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(16b) Goodness Grows. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the "Goodness Grows in North Carolina" logo and the phrase "Agriculture: NC's #1 Industry".

(17) Historic Vehicle Owner. — Issuable for a motor vehicle that is at least 35 years old measured from the date of manufacture. The plate for an historic vehicle shall bear the word "Antique" unless the vehicle is a model year 1943 or older. The plate for a vehicle that is a model year 1943 or older shall bear the word "Antique" or the words "Horseless Carriage", at the option of the vehicle owner.

(18) Historical Attraction Plate. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or an insignia representing a publicly owned or nonprofit historical attraction located in North Carolina.

(19) Honorary Plate. — Issuable to a member of the Honorary Consular Corps, who has been certified by the U. S. State Department, the plate shall bear the words "Honorary Consular Corps" and a distinguishing number based on the order of issuance.

(19a) International Association of Fire Fighters. — Issuable to a member of the International Association of Fire Fighters. The plate shall bear the logo of the International Association of Fire Fighters. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(20) Judge or Justice. — Issuable to a sitting or retired judge or justice in accordance with G.S. 20-79.6.

(20a) Kids First. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear the phrase "Kids First" and a logo of children's hands.

(21) Legion of Valor. — Issuable to a recipient of one of the following military decorations: the Congressional Medal of Honor, the Distinguished Service Cross, the Navy Cross, or the Air Force Cross. The plate shall bear the emblem and name of the recipient's decoration.

(22) Legislator. — Issuable to a member of the North Carolina General Assembly. The plate shall bear "The Great Seal of the State of North Carolina" and, as appropriate, the word "Senate" or "House" followed by the Senator's or Representative's assigned seat number.

(22a) Litter Prevention. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase and picture appropriate to the subject of litter prevention in North Carolina.

(23) Magistrate. — Issuable to a North Carolina magistrate. The plate shall bear the letters "MJ" followed by a number indicating the district court district the magistrate serves, then by a hyphen, and then by a number indicating the seniority of the magistrate. The Division shall use the number "9" to designate District Court Districts 9 and 9B.

(24) March of Dimes. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or an insignia representing the March of Dimes Foundation.

(25) Marshal. — Issuable to a United States Marshal. The plate shall bear the phrase "U.S. Marshal" followed by a number that represents the district the Marshal serves, with 1 being the Eastern District, 2 being the Middle District, and 3 being the Western District.

(26) Military Reservist. — Issuable to a member of a reserve component of the armed forces of the United States. The plate shall bear the name and insignia of the appropriate reserve component. Plates shall be numbered sequentially for members of a component with the numbers 1 through 5000 reserved for officers, without regard to rank.

(27) Military Retiree. — Issuable to an individual who has retired from the armed forces of the United States. The plate shall bear the word "Retired" and the name and insignia of the branch of service from which the individual retired.

(28) National Guard Member. — Issuable to an active or a retired member of the North Carolina National Guard. The plate shall bear the phrase "National Guard". A plate issued to an active member shall bear a number that reflects the seniority of the member; a plate issued to a commissioned officer shall begin with the number "1"; a plate issued to a noncommissioned officer with a rank of E7, E8, or E9 shall begin with the number "1601"; a plate issued to an enlisted member with a rank of E6 or below shall begin with the number "3001". The plate issued to a retired or separated member shall indicate the member's retired status.

(28a) Native American. — Issuable to the registered owner of a motor vehicle. The plate may bear a phrase or an insignia representing Native Americans. The Division must receive 300 or more applications for the plate before it may be developed.

(29) Olympic Games. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or insignia representing the Olympic Games.

(29a) Omega Psi Phi Fraternity. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the fraternity's symbol and name.

(30) Partially Disabled Veteran. — Issuable to a veteran of the armed forces of the United States who suffered a service connected disability of less than 100%.

(31) Pearl Harbor Survivor. — Issuable to a veteran of the armed forces of the United States who was present at and survived the attack on Pearl Harbor on December 7, 1941. The plate will bear the phrase "Pearl Harbor Survivor" and the insignia of the Pearl Harbor Survivors' Association.

(32) Personalized. — Issuable to the registered owner of a motor vehicle. The plate will bear the letters or letters and numbers requested by the

owner. The Division may refuse to issue a plate with a letter combination that is offensive to good taste and decency. The Division may not issue a plate that duplicates another plate.

(33) Prisoner of War. — Issuable to the following:

a. A member or veteran member of the armed forces of the United States who has been captured and held prisoner by forces hostile to the United States while serving in the armed forces.

b. The surviving spouse of a person who had a prisoner of war plate at the time of death so long as the surviving spouse continues to renew the plate and does not remarry.

(34) Professional Sports Fan. — Issuable to the registered owner of a motor vehicle. The plate shall bear the logo of a professional sports team located in North Carolina. The Division shall receive 300 or more applications for a professional sports fan plate before a plate may be issued. The Division shall not develop a professional sports fan plate unless the professional sports team licenses, without charge, the State to use the official team logo on the plate.

(35) Purple Heart Recipient. — Issuable to a recipient of the Purple Heart award. The plate shall bear the phrase "Purple Heart Veteran, Combat Wounded" and the letters "PH".

(36) Register of Deeds. — Issuable to a register of deeds. The plate shall bear the words "Register of Deeds" and the letter "R" followed by a number representing the county of the register of deeds. The number of a county shall be the order of the county in an alphabetical list of counties that assigns number one to the first county in the list.

(36a) Retired Highway Patrol. — Issuable to an individual who has retired from the North Carolina Highway Patrol. The plate shall bear the phrase "SHP, Retired." The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(37) Scenic Rivers. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the words "Scenic Rivers" and a picture representing the unique beauty of the scenic rivers of North Carolina.

(38) School Technology. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or an insignia representing the public school system in North Carolina.

(39) Sheriff. — Issuable to a current sheriff or to a retired sheriff who served as sheriff for at least 10 years before retiring. A plate issued to a current sheriff shall bear the word "Sheriff" and the letter "S" followed by a number that indicates the county the sheriff serves. A plate issued to a retired sheriff shall bear the phrase "Sheriff, Retired", the letter "S" followed by a number that indicates the county the sheriff served, and the letter "X" indicating the sheriff's retired status.

(39a) Silver Star Recipient. — Issuable to a recipient of the Silver Star. The plate shall bear the emblem of the Silver Star and the words "Silver Star".

(40) Soil and Water Conservation. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase and picture appropriate to the subject of water quality and environmental protection in North Carolina.

(41) Special Olympics. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or an insignia representing the North Carolina Special Olympics.

(42) Square Dance Clubs. — Issuable to a member of a recognized square dance organization exempt from corporate income tax under G.S. 105-130.11(a)(5). The plate shall bear a word or phrase identifying the club and the emblem of the club. The Division shall not issue a dance club plate authorized by this subdivision unless it receives at least 300 applications for that dance club plate.

(43) State Government Official. — Issuable to elected and appointed members of State government in accordance with G.S. 20-79.5.

(44) State Attraction. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or an insignia representing a publicly owned or nonprofit State or federal attraction located in North Carolina.

(45) Street Rod Owner. — Issuable to the registered owner of a modernized private passenger motor vehicle manufactured prior to the year 1949 or designed to resemble a vehicle manufactured prior to the year 1949. The plate shall bear the phrase "Street Rod". The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(45a) Support Public Schools. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear a picture representing an old-time one-room schoolhouse and shall bear the words: "Support Our Public Schools".

(45b) Tobacco Heritage. — Issuable to the registered owner of a motor vehicle. The plate shall bear a picture of a tobacco leaf and plow. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(46) Transportation Personnel. — Issuable to various members of the Divisions of the Department of Transportation. The plate shall bear the letters "DOT" followed by a number from 1 to 85, as designated by the Governor.

(47) U.S. Representative. — Issuable to a United States Representative for North Carolina. The plate shall bear the phrase "U.S. House" and shall be issued on the basis of Congressional district numbers.

(48) U.S. Senator. — Issuable to a United States Senator for North Carolina. The plates shall bear the phrase "U.S. Senate" and shall be issued on the basis of seniority represented by the numbers 1 and 2.

(48a) University Health Systems of Eastern Carolina. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or insignia representing the University Health Systems of Eastern Carolina.

(49) Veterans of Foreign Wars. — Issuable to a member or a supporter of the Veterans of Foreign Wars. The plate shall bear the words "Veterans of Foreign Wars" or "VFW" and the emblem of the VFW. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(50) Vietnam Veteran. — Issuable to a veteran of the armed forces of the United States who served in Vietnam. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(51) Wildlife Resources. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear a picture representing a native wildlife species occurring in North Carolina.

(c) Repealed by Session Laws 1991 (Regular Session, 1992), c. 1042, s. 1.

(1991, c. 672, s. 2; c. 726, s. 23; 1991 (Reg. Sess., 1992), c. 1042, s. 1; 1993, c. 543, s. 2; 1995, c. 326, ss. 1-3; c. 433, ss. 1, 4.1; 1997-156, s. 1; 1997-158, s. 1;

1997-339, s. 1; 1997-427, s. 1; 1997-461, ss. 2-4; 1997-477, s. 1; 1997-484, ss. 1-3; 1998-155, s. 1; 1998-160, ss. 1, 2; 1998-163, ss. 3-5; 1999-220, s. 3.1; 1999-277, s. 1; 1999-314, s. 1; 1999-403, s. 1; 1999-450, s. 1; 1999-452, s. 16; 2000-159, ss. 1, 2.)

Editor's Note. —

Session Laws 2000-159 s. 9(c), directs the Department of Transportation, the Department of Environment and Natural Resources, and the Department of Public Instruction to cooperatively develop the phrase and picture to be used on the litter prevention registration plate authorized under § 20-79.4(b)(22a).

Effect of Amendments. —

Session Laws 2000-159, ss. 1 and 2, effective August 2, 2000, recodified former subdivision (b)(13a), relating to Eagle Scouts, as subdivision (b)(13b); and added subdivisions (b)(13a), (16b), (22a), (29a), (45a) and (45b).

§ 20-79.5. Special registration plates for elected and appointed State government officials.

(a) Plates. — The State government officials listed in this section are eligible for a special registration plate under G.S. 20-79.4. The plate shall bear the number designated in the following table for the position held by the official.

Position	Number on Plate
Governor	1
Lieutenant Governor	2
Speaker of the House of Representatives	3
President Pro Tempore of the Senate	4
Secretary of State	5
State Auditor	6
State Treasurer	7
Superintendent of Public Instruction	8
Attorney General	9
Commissioner of Agriculture	10
Commissioner of Labor	11
Commissioner of Insurance	12
Speaker Pro Tempore of the House	13
Legislative Services Officer	14
Secretary of Administration	15
Secretary of Environment and Natural Resources	16
Secretary of Revenue	17
Secretary of Health and Human Services	18
Secretary of Commerce	19
Secretary of Correction	20
Secretary of Cultural Resources	21
Secretary of Crime Control and Public Safety	22
Secretary of Juvenile Justice and Delinquency Prevention	23
Governor's Staff	24-29
State Budget Officer	30
State Personnel Director	31
Advisory Budget Commission Nonlegislative Member	32-41
Chair of the State Board of Education	42

Position	Number on Plate
President of the U.N.C. System	43
Alcoholic Beverage Control Commission	44-46
Assistant Commissioners of Agriculture	47-48
Deputy Secretary of State	49
Deputy State Treasurer	50
Assistant State Treasurer	51
Deputy Commissioner for the Department of Labor	52
Chief Deputy for the Department of Insurance	53
Assistant Commissioner of Insurance	54
Deputies and Assistant to the Attorney General	55-65
Board of Economic Development Nonlegislative Member	66-88
State Ports Authority Nonlegislative Member	89-96
Utilities Commission Member	97-104
Post-Release Supervision and Parole Commission Member	105-109
State Board Member, Commission Member, or State Employee Not Named in List	110-200

(b) Designation. — When the table in subsection (a) designates a range of numbers for certain officials, the number given an official in that group shall be assigned. The Governor shall assign a number for members of the Governor's staff, nonlegislative members of the Advisory Budget Commission, nonlegislative members of the Board of Economic Development, nonlegislative members of the State Ports Authority, members of State boards and commissions, and for State employees. The Attorney General shall assign a number for the Attorney General's deputies and assistants.

The first number assigned to the Alcoholic Beverage Control Commission is reserved for the Chair of that Commission. The remaining numbers shall be assigned to the Alcoholic Beverage Control Commission members on the basis of seniority. The first number assigned to the Utilities Commission is reserved for the Chair of that Commission. The remaining numbers shall be assigned to the Utilities Commission members on the basis of seniority. The first number assigned to the Parole Commission is reserved for the Chair of that Commission. The remaining numbers shall be assigned to the Parole Commission members on the basis of seniority. (1991, c. 672, s. 2; c. 726, s. 23; 1991 (Reg. Sess., 1992), c. 959, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 8(a); 1997-443, ss. 11A.118(a), 11A.119(a); 2000-137, s. 4.(e).)

Effect of Amendments. — Session Laws 2000-137, s. 4(e), effective January 1, 2001, in the table in subsection (a) inserted the entry for the Secretary of Juvenile Justice and Delinquency Prevention, and substituted "24-29" for "23-29" in the entry for the Governor's Staff.

§ 20-79.7. Fees for special registration plates and distribution of the fees.

(a) Fees. — Upon request, the Division shall provide and issue free of charge one registration plate to a recipient of the Congressional Medal of Honor, a 100% disabled veteran, and an ex-prisoner of war. All other special registration plates, including additional Congressional Medal of Honor, 100% Disabled

Veteran, and Ex-Prisoner of War plates, are subject to the regular motor vehicle registration fee in G.S. 20-87 or G.S. 20-88 plus an additional fee in the following amount:

Special Plate	Additional Fee Amount
Historical Attraction	$30.00
State Attraction	$30.00
Collegiate Insignia	$25.00
Goodness Grows	$25.00
Kids First	$25.00
Olympic Games	$25.00
Special Olympics	$25.00
University Health Systems of Eastern Carolina	$25.00
Animal Lovers	$20.00
Ducks Unlimited	$20.00
Litter Prevention	$20.00
March of Dimes	$20.00
Omega Psi Phi Fraternity	$20.00
Scenic Rivers	$20.00
School Technology	$20.00
Soil and Water Conservation	$20.00
Support Public Schools	$20.00
Wildlife Resources	$20.00
Personalized	$20.00
Active Member of the National Guard	None
100% Disabled Veteran	None
Ex-Prisoner of War	None
Legion of Valor	None
Purple Heart Recipient	None
Silver Star Recipient	None
All Other Special Plates	$10.00.

(b) Distribution of Fees. — The Special Registration Plate Account and the Collegiate and Cultural Attraction Plate Account are established within the Highway Fund. The Division must credit the additional fee imposed for the special registration plates listed in subsection (a) among the Special Registration Plate Account (SRPA), the Collegiate and Cultural Attraction Plate Account (CCAPA), and the Natural Heritage Trust Fund (NHTF), which is established under G.S. 113-77.7, as follows:

Special Plate	SRPA	CCAPA	NHTF
Animal Lovers	$10	$10	0
Ducks Unlimited	$10	$10	0
Goodness Grows	$10	$10	0
Historical Attraction	$10	$20	0
In-State Collegiate Insignia	$10	$15	0
Kids First	$10	$15	0
Litter Prevention	$10	$10	0
March of Dimes	$10	$10	0
Olympic Games	$10	$15	0
Omega Psi Phi Fraternity	$10	$10	0
Out-of-state Collegiate Insignia	$10	0	$15
Personalized	$10	0	$10
Scenic Rivers	$10	$10	0

Special Plate	SRPA	CCAPA	NHTF
School Technology	$10	$10	0
Soil and Water Conservation	$10	$10	0
Special Olympics	$10	$10	0
State Attraction	$10	$20	0
Support Public Schools	$10	$10	0
University Health Systems of Eastern Carolina	$10	$15	0
Wildlife Resources	$10	$10	0
All other Special Plates	$10	0	0

(c) Use of Funds in Special Registration Plate Account. —

(1) The Division shall deduct the costs of special registration plates, including the costs of issuing, handling, and advertising the availability of the special plates, from the Special Registration Plate Account.

(2) From the funds remaining in the Special Registration Plate Account after the deductions in accordance with subdivision (1) of this subsection, there is annually appropriated from the Special Registration Plate Account the sum of five hundred twenty-five thousand dollars ($525,000) to provide operating assistance for the Visitor Centers:

a. on U.S. Highway 17 in Camden County, ($75,000);
b. on U.S. Highway 17 in Brunswick County, ($75,000);
c. on U.S. Highway 441 in Macon County, ($75,000);
d. in the Town of Boone, Watauga County, ($75,000);
e. on U.S. Highway 29 in Caswell County, ($75,000);
f. on U.S. Highway 70 in Carteret County, ($75,000); and
g. on U.S. Highway 64 in Tyrrell County, ($75,000).

(3) The Division shall transfer the remaining revenue in the Account quarterly as follows:

a. Thirty-three percent (33%) to the account of the Department of Commerce to aid in financing out-of-state print and other media advertising under the program for the promotion of travel and industrial development in this State.

b. Fifty percent (50%) to the Department of Transportation to be used solely for the purpose of beautification of highways other than those designated as interstate. These funds shall be administered by the Department of Transportation for beautification purposes not inconsistent with good landscaping and engineering principles.

c. Seventeen percent (17%) to the account of the Department of Health and Human Services to promote travel accessibility for disabled persons in this State. These funds shall be used to collect and update site information on travel attractions designated by the Department of Commerce in its publications, to provide technical assistance to travel attractions concerning accommodation of disabled tourists, and to develop, print, and promote the publication ACCESS NORTH CAROLINA as provided in G.S. 168-2. Any funds allocated for these purposes that are neither spent nor obligated at the end of the fiscal year shall be transferred to the Department of Administration for removal of man-made barriers to disabled travelers at State-funded travel attractions. Guidelines for the removal of man-made barriers shall be developed in consultation with the Department of Health and Human Services. (1967, c. 413; 1971, c. 42; 1973, c. 507, s. 5; c. 1262, s. 86; 1975, c. 716, s. 5; 1977, c. 464, s. 3; c. 771, s. 4; 1979, c. 126, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1258, s. 6; 1983, c. 848;

1985, c. 766; 1987, c. 252; c. 738, s. 140; c. 830, ss. 113(a), 116(a)-(c); 1989, c. 751, s. 7(1); c. 774, s. 1; 1989 (Reg. Sess., 1990), c. 814, s. 31; 1991, c. 672, s. 3; c. 726, s. 23; 1991 (Reg. Sess., 1992), c. 959, s. 2; c. 1042, s. 2; c. 1044, ss. 33, 34; 1993, c. 321, s. 169.3(a); c. 543, s. 3; 1995, c. 163, s. 2; c. 324, s. 18.7(a); c. 433, ss. 2, 3; c. 507, s. 18.17(a); 1996, 2nd Ex. Sess., c. 18, s. 19.11(e); 1997-443, s. 11A.118(a); 1997-477, ss. 2, 3; 1997-484, ss. 4, 5; 1998-163, s. 1; 1999-277, ss. 2, 3; 1999-403, ss. 2, 3; 1999-450, ss. 2, 3; 2000-159, ss. 3, 4.)

Effect of Amendments. —

Session Laws 2000-159, ss. 3 and 4, effective August 2, 2000, inserted "including additional Congressional Medal of Honor, 100% Disabled Veteran, and Ex-Prisoner of War plates" in the first paragraph in subsection (a) and inserted the following entries and corresponding Additional Fee Amounts in the table in subsection (a): Goodness Grows, Ducks Unlimited, Litter Prevention, Omega Psi Phi Fraternity, Support Public Schools, 100% Disabled Veteran, Ex-Prisoner of War, Legion of Valor, and Silver Star Recipient; and in the table in subsection (b), inserted the following entries and corresponding distribution of fee amounts: Ducks Unlimited, Goodness Grows, Litter Prevention, Omega Psi Phi Fraternity, and Support Public Schools, alphabetized the location of the following entries: Special Olympics, Olympic Games, State Attraction, and March of Dimes, and reduced the CCAPA entry for the Special Olympics from $15 to $10.

§ 20-81.12. Collegiate insignia plates and certain other special plates.

(a) Collegiate Insignia Plates. — The Division must receive 300 or more applications for a collegiate insignia license plate for a college or university before a collegiate license plate may be developed. The color, design, and material for the plate must be approved by both the Division and the alumni or alumnae association of the appropriate college or university. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of in-State collegiate insignia plates to the Board of Governors of The University of North Carolina for in-State, public colleges and universities and to the respective board of trustees for in-State, private colleges and universities in proportion to the number of collegiate plates sold representing that institution for use for academic enhancement.

(b) Historical Attraction Plates. — The Division must receive 300 or more applications for an historical attraction plate representing a publicly owned or nonprofit historical attraction located in North Carolina and listed below before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of historical attraction plates to the organizations named below in proportion to the number of historical attraction plates sold representing that organization:

(1) Historical Attraction Within Historic District. — The revenue derived from the special plate shall be transferred quarterly to the appropriate Historic Preservation Commission, or entity designated as the Historic Preservation Commission, and used to maintain property in the historic district in which the attraction is located. As used in this subdivision, the term "historic district" means a district created under G.S. 160A-400.4.

(2) Nonprofit Historical Attraction. — The revenue derived from the special plate shall be transferred quarterly to the nonprofit corporation that is responsible for maintaining the attraction for which the plate is issued and used to develop and operate the attraction.

(3) State Historic Site. — The revenue derived from the special plate shall be transferred quarterly to the Department of Cultural Resources and

used to develop and operate the site for which the plate is issued. As used in this subdivision, the term "State historic site" has the same meaning as in G.S. 121-2(11).

(b1) Special Olympics Plates. — The Division must receive 300 or more applications for a special olympics plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of special olympics plates to the North Carolina Special Olympics, Inc., to be used to train volunteers to assist in the statewide games and to help pay the costs of the statewide games.

(b2) State Attraction Plates. — The Division must receive 300 or more applications for a State attraction plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of State attraction plates to the organizations named below in proportion to the number of State attraction plates sold representing that organization:

(1) Friends of the Great Smoky Mountains National Park. — The revenue derived from the special plate shall be transferred quarterly to the Friends of the Great Smoky Mountains National Park, Inc., to be used for educational materials, preservation programs, capital improvements for the portion of the Great Smoky Mountains National Park that is located in North Carolina, and operating expenses of the Great Smoky Mountains National Park.

(1a) The North Carolina Arboretum. — The revenue derived from the special plate shall be transferred quarterly to The North Carolina Arboretum Society and used to help the Society obtain grants for the North Carolina Arboretum and for capital improvements to the North Carolina Arboretum.

(1b) The North Carolina Maritime Museum. — The revenue derived from the special plate shall be transferred quarterly to Friends of the Museum, North Carolina Maritime Museum, Inc., to be used for educational programs and conservation programs and for operating expenses of the North Carolina Maritime Museum.

(2) The North Carolina Zoological Society. — The revenue derived from the special plate shall be transferred quarterly to The North Carolina Zoological Society, Incorporated, to be used for educational programs and conservation programs at the North Carolina Zoo at Asheboro and for operating expenses of the North Carolina Zoo at Asheboro.

(b3) Wildlife Resources Plates. — The Division must receive 300 or more applications for a wildlife resources plate with a picture representing a particular native wildlife species occurring in North Carolina before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of wildlife resources plates to the Wildlife Conservation Account established by G.S. 143-247.2.

(b4) Olympic Games. — The Division may not issue an Olympic Games special plate unless it receives 300 or more applications for the plate and the U.S. Olympic Committee licenses, without charge, the State to develop a plate bearing the Olympic Games symbol and name. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Olympic Games plates to the N.C. Health and Fitness Foundation, Inc., which will allocate the funds as follows:

(1) Fifty percent (50%) to the U.S. Olympic Committee to assist in training olympic athletes.

(2) Twenty-five percent (25%) to North Carolina Amateur Sports to assist with administration of the State Games of North Carolina.

(3) Twenty-five percent (25%) to the Governor's Council on Physical Fitness and Health to support local fitness council development throughout North Carolina.

(b5) March of Dimes Plates. — The Division must receive 300 or more applications for a March of Dimes plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of March of Dimes plates to the Eastern Carolina Chapter of the March of Dimes Birth Defects Foundation. The Eastern Carolina Chapter shall disperse the revenue proportionately among the Eastern Carolina Chapter, the Western Carolina Chapter, the Greater Triad Chapter, and the Greater Piedmont Chapter of the March of Dimes Birth Defects Foundation based upon the population of the area each Chapter represents. The money must be used for the prevention of birth defects through local community services and educational programs and through research and development.

(b6) School Technology Plates. — The Division must receive 300 or more applications for a School Technology plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of School Technology plates to the State School Technology Fund, which is established under G.S. 115C-102.6D.

(b7) Scenic Rivers Plates. — The Division must receive 300 or more applications for a Scenic Rivers plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Scenic Rivers plates to the Clean Water Management Trust Fund established in G.S. 113-45.3.

(b8) Soil and Water Conservation Plates. — The Division must receive 300 or more applications for a soil and water conservation plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the soil and water conservation plates to the Soil and Water Conservation Account established in G.S. 143B-297.1.

(b9) Kids First Plates. — The Division must receive 300 or more applications for a Kids First plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Kids First plates to the North Carolina Children's Trust Fund established in G.S. 7B-1302.

(b10) University Health Systems of Eastern Carolina. — The Division must receive 300 or more applications for a University Health Systems of Eastern Carolina plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of University Health Systems of Eastern Carolina plates to the Pitt Memorial Hospital Foundation, Inc., for use in the Children's Hospital of Eastern North Carolina.

(b11) Animal Lovers Plates. — The Division must receive 300 or more applications before an animal lovers plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the animal lovers plate to the Spay/Neuter Account established in G.S. 19A-60.

(b12) Support Public Schools Plates. — The Division must receive 300 or more applications for a Support Public Schools plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Support Public Schools plates to the Fund for the Reduction of Class Size in Public Schools created pursuant to G.S. 115C-472.10.

(b13) Ducks Unlimited Plates. — The Division must receive 300 or more applications for a Ducks Unlimited plate and receive any necessary licenses from Ducks Unlimited, Inc., for use of their logo before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate

and Cultural Attraction Plate Account derived from the sale of Ducks Unlimited plates to the Wildlife Resources Commission to be used to support the conservation programs of Ducks Unlimited, Inc., in this State.

(b14) Omega Psi Phi Fraternity Plates. — The Division must receive 300 or more applications for an Omega Psi Phi Fraternity plate and receive any necessary licenses, without charge, from Omega Psi Phi Fraternity, Incorporated, before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Omega Psi Phi Fraternity plates to the United Negro College Fund, Inc., through the Winston-Salem Area Office for the benefit of UNCF colleges in this State.

(b15) Litter Prevention Plates. — The Division must receive 300 or more applications for a Litter Prevention plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the litter prevention plates to the Litter Prevention Account created pursuant to G.S. 136-125.1.

(b16) Goodness Grows Plates. — The Division must receive 300 or more applications for a Goodness Grows plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Goodness Grows plates to the North Carolina Agricultural Promotions, Inc., to be used to promote the sale of North Carolina agricultural products.

(c) General. — An application for a special license plate named in this section may be made at any time during the year. If the application is made to replace an existing current valid plate, the special plate must be issued with the appropriate decals attached. No refund shall be made to the applicant for any unused portion remaining on the original plate. The request for a special license plate named in this section may be combined with a request that the plate be a personalized license plate.

(d) through (g) Repealed by Session Laws 1991 (Regular Session, 1992), c. 1042, s. 3. (1991, c. 758, s. 1; 1991 (Reg. Sess., 1992), c. 1007, s. 33; c. 1042, s. 3; 1993, c. 543, s. 5; 1995, c. 433, s. 4; 1997-427, s. 2; 1997-477, s. 4; 1997-484, s. 6; 1999-277, s. 4; 1999-403, s. 4; 1999-450, s. 4; 2000-159, ss. 5, 6; 2000-163, s. 3.)

Editor's Note. —

This section was amended by Session Laws 2000-163, s. 3 in the coded bill drafting format. It failed to incorporate the addition of subsection (b10) by Session Laws 1999-403, s. 4, and the subsequent renumbering of subsection (b10) as added by Session Laws 1999-450, s. 4, as subsection (b11). The section has been set out in the form above at the direction of the Revisor of Statutes.

Effect of Amendments. —

Session Laws 2000-159, ss. 5 and 6, effective August 2, 2000, added subsections (b12), (b13), (b14), (b15), (b16), and added subdivision (b2)(1b).

Session Laws 2000-163, s. 3, effective January 1, 2001, substituted "Spay/Neuter Account established in G.S. 19A-60" for "Department of Health and Human Services to create a statewide program to promote spaying and neutering of dogs and cats" in subsection (b11).

Part 6. Vehicles of Nonresidents of State; Permanent Plates; Highway Patrol.

§ 20-84. Permanent registration plates; State Highway Patrol.

(a) General. — The Division may issue a permanent registration plate for a motor vehicle owned by one of the persons authorized to have a permanent

registration plate in this section. To obtain a permanent registration plate, a person must provide proof of ownership, provide proof of financial responsibility as required by G.S. 20-309, and pay a fee of six dollars ($6.00). A permanent plate issued under this section may be transferred as provided in G.S. 20-78 to a replacement vehicle of the same classification. A permanent registration plate issued under this section must be a distinctive color and bear the word "permanent". In addition, a permanent registration plate issued under subdivision (b)(1) of this section must have distinctive color and design that is readily distinguishable from all other permanent registration plates issued under this section.

(b) Permanent Registration Plates. — The Division may issue permanent plates for the following motor vehicles:

(1) A motor vehicle owned by the State or one of its agencies.
(2) A motor vehicle owned by a county, city or town.
(3) A motor vehicle owned by a board of education.
(4) A motor vehicle owned by an orphanage.
(5) A motor vehicle owned by the civil air patrol.
(6) A motor vehicle owned by an incorporated emergency rescue squad.
(7) A motor vehicle owned by an incorporated REACT ("Radio Emergency Association of Citizen Teams") Team.
(8) A motor vehicle owned by a person and used exclusively in the support of a disaster relief effort.
(9) A bus owned by a church and used exclusively for transporting individuals to Sunday school, to church services, and to other church related activities.
(10) A motor vehicle owned by a rural fire department, agency, or association.
(11) A motor vehicle in the form of a mobile X-ray unit operated exclusively in this State for the purpose of diagnosis, treatment, and discovery of tuberculosis, and owned by the North Carolina Tuberculosis Association, Incorporated, or by a local chapter or association of the North Carolina Tuberculosis Association, Incorporated.
(12) A motor vehicle owned by a local chapter of the American National Red Cross and used for emergency or disaster work.
(13) A motor vehicle owned by a sheltered workshop recognized or approved by the Division of Vocational Rehabilitation Services.
(14) A motor vehicle owned by a nonprofit agency or organization that provides transportation for or operates programs subject to and approved in accordance with standards adopted by the Commission for Mental Health and Human Services.
(15) A bus or trackless trolley owned by a city and operated under a franchise authorizing the use of city streets. This subdivision does not apply to a bus or trackless trolley operated under a franchise authorizing an intercity operation.
(16) A trailer owned by a nationally chartered charitable organization and used exclusively for parade floats and for transporting vehicles and structures used only in parades.

(c) State Highway Patrol. — In lieu of all other registration requirements, the Commissioner shall each year assign to the State Highway Patrol, upon payment of six dollars ($6.00) per registration plate, a sufficient number of regular registration plates of the same letter prefix and in numerical sequence beginning with number 100 to meet the requirements of the State Highway Patrol for use on Division vehicles assigned to the State Highway Patrol. The commander of the Patrol shall, when such plates are assigned, issue to each member of the State Highway Patrol a registration plate for use upon the Division vehicle assigned to the member pursuant to G.S. 20-190 and assign a

registration plate to each Division service vehicle operated by the Patrol. An index of such assignments of registration plates shall be kept at each State Highway Patrol radio station and a copy of it shall be furnished to the registration division of the Division. Information as to the individual assignments of the registration plates shall be made available to the public upon request to the same extent and in the same manner as regular registration information. The commander, when necessary, may reassign registration plates provided that the reassignment shall appear upon the index required under this subsection within 20 days after the reassignment. (1937, c. 407, s. 48; 1939, c. 275; 1949, c. 583, s. 1; 1951, c. 388; 1953, c. 1264; 1955, cc. 368, 382; 1967, c. 284; 1969, c. 800; 1971, c. 460, s. 1; 1975, c. 548; c. 716, s. 5; 1977, c. 370, s. 1; 1979, c. 801, s. 9; 1981 (Reg. Sess., 1982), c. 1159; 1983, c. 593, ss. 1, 2; 1987 (Reg. Sess., 1988), c. 885; 1991 (Reg. Sess., 1992), c. 1030, s. 11; 1997-443, s. 11A.118(a); 1999-220, s. 3; 2000-159, s. 7.)

Effect of Amendments. — Session Laws 2000-159, s. 7, effective August 2, 2000, substituted "Sunday school, to church services, and to other church related activities" for "Sunday school and church services" in subdivision (b)(9).

Part 7. Title and Registration Fees.

§ 20-96. Detaining property-hauling vehicles or vehicles regulated by the Motor Carrier Safety Regulation Unit until fines or penalties and taxes are collected.

(a) Authority to Detain Vehicles. — A law enforcement officer may seize and detain the following property-hauling vehicles operating on the highways of the State:

(1) A property-hauling vehicle with an overload in violation of G.S. 20-88(k) and G.S. 20-118.

(2) A property-hauling vehicle that does not have a proper registration plate as required under G.S. 20-118.3.

(3) A property-hauling vehicle that is owned by a person liable for any overload penalties or assessments due and unpaid for more than 30 days.

(4) A property-hauling vehicle that is owned by a person liable for any taxes or penalties under Article 36B of Chapter 105 of the General Statutes.

(5) Any commercial vehicle operating under the authority of a motor carrier when the motor carrier has been assessed a fine pursuant to G.S. 20-17.7 and that fine has not been paid.

The officer may detain the vehicle until the delinquent fines or penalties and taxes are paid and, in the case of a vehicle that does not have the proper registration plate, until the proper registration plate is secured.

(b) Storage; Liability. -- When necessary, an officer who detains a vehicle under this section may have the vehicle stored. The motor carrier under whose authority the vehicle is being operated or the owner of a vehicle that is detained or stored under this section is responsible for the care of any property being hauled by the vehicle and for any storage charges. The State shall not be liable for damage to the vehicle or loss of the property being hauled. (1937, c. 407, s. 60; 1943, c. 726; 1949, c. 583, s. 8; c. 1207, s. 4½; c. 1253; 1951, c. 1013, ss. 1-3; 1953, c. 694, ss. 2, 3; 1955, c. 554, s. 9; 1957, c. 65, s. 11; 1959, c. 1264, s. 5; 1973, c. 507, s. 5; 1985, c. 116, ss. 1-3; 1993, c. 539, s. 345; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 109, s. 2; 1999-452, s. 18; 2000-67, s. 25.11.)

Editor's Note. — Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. —

Session Laws 2000-67, s. 25.11, effective July 1, 2000, rewrote the section heading; added subdivision (a)(5); inserted "fines or" in the last paragraph in subsection (a); and inserted "motor carrier under whose authority the vehicle is being operated" in subsection (b).

§ 20-101. Certain business vehicles to be marked.

A motor vehicle that is subject to 49 C.F.R. Part 390, the federal motor carrier safety regulations, shall be marked as required by that Part.

A motor vehicle that is not subject to those regulations, has a gross vehicle weight rating of more than 10,000 pounds, is used in intrastate commerce, and is not a farm vehicle, as further described in G.S. 20-118 (c)(4), (c)(5), or (c)(12), shall have the name of the owner printed on the side of the vehicle in letters not less than three inches in height.

A motor vehicle that is subject to regulation by the North Carolina Utilities Commission shall be marked as required by that Commission and as otherwise required by this section. (1937, c. 407, s. 65; 1951, c. 819, s. 1; 1967, c. 1132; 1985, c. 132; 1995 (Reg. Sess., 1996), c. 756, s. 12; 2000-67, s. 25.8.)

Editor's Note. — Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. — Session Laws 2000-67, s. 25.8, effective July 1, 2000, divided the section into three paragraphs, substituted "C.F.R." for "U.S.C." in the first paragraph, substituted "commerce, and is not a farm vehicle, as further described in G.S. 20-118(c)(4), (c)(5), or (c)(12), shall" for "commerce must" in the second paragraph, and substituted "shall" for "must" in the first and third paragraphs.

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

§ 20-116. Size of vehicles and loads.

(a) The total outside width of any vehicle or the load thereon shall not exceed 102 inches, except as otherwise provided in this section. When hogsheads of tobacco are being transported, a tolerance of six inches is allowed. When sheet or bale tobacco is being transported the load must not exceed a width of 114 inches at the top of the load and the bottom of the load at the truck bed must not exceed the width of 102 inches inclusive of allowance for load shifting or settling. Vehicles (other than passenger buses) that do not exceed the overall width of 102 inches and otherwise provided in this section may be operated in accordance with G.S. 20-115.1(c), (f), and (g).

(b) No passenger-type vehicle shall be operated on any highway with any load carried thereon extending beyond the line of the fenders on the left side of such vehicle nor extending more than six inches beyond the line of the fenders on the right side thereof.

(c) No vehicle, unladen or with load, shall exceed a height of 13 feet, six inches. Provided, however, that neither the State of North Carolina nor any agency or subdivision thereof, nor any person, firm or corporation, shall be required to raise, alter, construct or reconstruct any underpass, wire, pole, trestle, or other structure to permit the passage of any vehicle having a height, unladen or with load, in excess of 12 feet, six inches. Provided further, that the operator or owner of any vehicle having an overall height, whether unladen or

with load, in excess of 12 feet, six inches, shall be liable for damage to any structure caused by such vehicle having a height in excess of 12 feet, six inches. The term "automobile transport" as used in this subsection shall mean only vehicles engaged exclusively in transporting automobiles, trucks and other commercial vehicles.

(d) A single vehicle having two axles shall not exceed 40 feet in length of extreme overall dimensions inclusive of front and rear bumpers. A single vehicle having three axles shall not exceed 40 feet in length overall of dimensions inclusive of front and rear bumpers. Provided, however, trucks transporting unprocessed cotton from farm to gin shall not exceed 48 feet in length overall of dimensions inclusive of front and rear bumpers. A truck-tractor and semitrailer shall be regarded as two vehicles for the purpose of determining lawful length and license taxes.

(e) Except as provided by G.S. 20-115.1, no combination of vehicles coupled together shall consist of more than two units and no such combination of vehicles shall exceed a total length of 60 feet inclusive of front and rear bumpers, subject to the following exceptions: Said length limitation shall not apply to vehicles operated in the daytime when transporting poles, pipe, machinery or other objects of a structural nature which cannot readily be dismembered, nor to such vehicles transporting such objects operated at nighttime by a public utility when required for emergency repair of public service facilities or properties, but in respect to such night transportation every such vehicle and the load thereon shall be equipped with a sufficient number of clearance lamps on both sides and marker lamps upon the extreme ends of said projecting load to clearly mark the dimensions of such load: Provided that vehicles designed and used exclusively for the transportation of motor vehicles shall be permitted an overhang tolerance front or rear not to exceed five feet. Provided, that wreckers in an emergency may tow a combination tractor and trailer to the nearest feasible point for repair and/or storage: Provided, however, that a combination of a house trailer used as a mobile home, together with its towing vehicle, shall not exceed a total length of 55 feet exclusive of front and rear bumpers. Provided further, that the said limitation that no combination of vehicles coupled together shall consist of more than two units shall not apply to trailers not exceeding three in number drawn by a motor vehicle used by municipalities for the removal of domestic and commercial refuse and street rubbish, but such combination of vehicles shall not exceed a total length of 50 feet inclusive of front and rear bumpers. Provided further, that the said limitation that no combination of vehicles coupled together shall consist of more than two units shall not apply to a combination of vehicles coupled together by a saddle mount device used to transport motor vehicles in a driveway service when no more than three saddle mounts are used and provided further, that equipment used in said combination is approved by the safety regulations of the Federal Highway Administration and the safety rules of the Division.

(f) The load upon any vehicle operated alone, or the load upon the front vehicle of a combination of vehicles, shall not extend more than three feet beyond the foremost part of the vehicle. Under this subsection "load" shall include the boom on a self-propelled vehicle.

A utility pole carried by a self-propelled pole carrier may extend beyond the front overhang limit set in this subsection if the pole cannot be dismembered, the pole is less than 80 feet in length and does not extend more than 10 feet beyond the front bumper of the vehicle, and either of the following circumstances apply:

(1) It is daytime and the front of the extending load of poles is marked by a flag of the type required by G.S. 20-117 for certain rear overhangs.
(2) It is nighttime, operation of the vehicle is required to make emergency repairs to utility service, and the front of the extending load of poles

is marked by a light of the type required by G.S. 20-117 for certain rear overhangs.

As used in this subsection, a "self-propelled pole carrier" is a vehicle designed to carry a pole on the side of the vehicle at a height of at least five feet when measured from the bottom of the brace used to carry the pole. A self-propelled pole carrier may not tow another vehicle when carrying a pole that extends beyond the front overhang limit set in this subsection.

(g) No vehicle shall be driven or moved on any highway unless such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping therefrom, except that sand may be dropped for the purpose of securing traction, or water or other substance may be sprinkled on a roadway in cleaning or maintaining such roadway.

Trucks, trailers or other vehicles when loaded with rock, gravel, stone or other similar substances which could blow, leak, sift or drop shall not be driven or moved on any highway unless the height of the load against all four walls does not extend above a horizontal line six inches below their tops when loaded at the loading point, or if not so loaded, unless the load shall be securely covered by tarpaulin or some other suitable covering, or unless it is otherwise constructed so as to prevent any of its load from dropping, sifting, leaking, blowing, or otherwise escaping therefrom.

Provided this section shall not be applicable to or in any manner restrict the transportation of seed cotton, of poultry or livestock or silage or other feed grain used in the feeding of poultry or livestock.

(h) Whenever there exist two highways of the State highway system of approximately the same distance between two or more points, the Department of Transportation may, when in the opinion of the Department of Transportation, based upon engineering and traffic investigation, safety will be promoted or the public interest will be served, designate one of the highways the "truck route" between those points, and to prohibit the use of the other highway by heavy trucks or other vehicles of a gross vehicle weight or axle load limit in excess of a designated maximum. In such instances the highways selected for heavy vehicle traffic shall be designated as "truck routes" by signs conspicuously posted, and the highways upon which heavy vehicle traffic is prohibited shall likewise be designated by signs conspicuously posted showing the maximum gross vehicle weight or axle load limits authorized for those highways. The operation of any vehicle whose gross vehicle weight or axle load exceeds the maximum limits shown on signs over the posted highway shall constitute a Class 2 misdemeanor: Provided, that nothing in this subsection shall prohibit a truck or other motor vehicle whose gross vehicle weight or axle load exceeds that prescribed for those highways from using them when its destination is located solely upon that highway, road or street: Provided, further, that nothing in this subsection shall prohibit passenger vehicles or other light vehicles from using any highways designated for heavy truck traffic.

(i) Repealed by Session Laws 1973, c. 1330, s. 39.

(j) Self-propelled grain combines of other farm equipment self-propelled, pulled or otherwise, not exceeding 18 feet in width may be operated on any highway, except a highway or section of highway that is a part of the National System of Interstate and Defense Highways: Provided that all such combines or equipment which exceed 10 feet in width may be so operated only under the following conditions:

(1) Said equipment may only be so operated during daylight hours; and

(2) Said equipment must display a red flag on front and rear, said flags shall not be smaller than three feet wide and four feet long and be attached to a stick, pole, staff, etc., not less than four feet long and shall be so attached to said equipment as to be visible from both

directions at all times while being operated on the public highway for not less than 300 feet; and

(3) Equipment [covered] by this section, which by necessity must travel more than 10 miles or where by nature of the terrain or obstacles the flags referred to in subdivision (2) are not visible from both directions for 300 feet at any point along the proposed route, must be preceded at a distance of 300 feet and followed at a distance of 300 feet by a flagman in a vehicle having mounted thereon an appropriate warning light or flag.

(4) Every such piece of equipment so operated shall operate to the right of the center line when meeting traffic coming from the opposite direction and at all other times when possible and practical.

(5) Violation of this section shall not constitute negligence per se.

(6) When said equipment is causing a delay in traffic, the operator of said equipment shall move the equipment off the paved portion of the highway at the nearest practical location until the vehicles following said equipment have passed.

(k) Nothing in this section shall be construed to prevent the operation of passenger buses having an overall width of 102 inches, exclusive of safety equipment, upon the highways of this State which are 20 feet or wider and that are designated as the State primary system, or as municipal streets, when, and not until, the federal law and regulations thereunder permit the operation of passenger buses having a width of 102 inches or wider on the National System of Interstate and Defense Highways. (1937, c. 246; c. 407, s. 80; 1943, c. 213, s. 1; 1945, c. 242, s. 1; 1947, c. 844; 1951, c. 495, s. 1; c. 733; 1953, cc. 682, 1107; 1955, c. 296, s. 2; c. 729; 1957, c. 65, s. 11; cc. 493, 1183, 1190; 1959, c. 559; 1963, c. 356, s. 1; c. 610, ss. 1, 2; c. 702, s. 4; c. 1027, s. 1; 1965, c. 471; 1967, c. 24, s. 4; c. 710; 1969, cc. 128, 880; 1971, cc. 128, 680, 688, 1079; 1973, c. 507, s. 5; c. 546; c. 1330, s. 39; 1975, c. 148, ss. 1-5; c. 716, s. 5; 1977, c. 464, s. 34; 1979, cc. 21, 218; 1981, c. 169, s. 1; 1983, c. 724, s. 2; 1985, c. 587; 1987, c. 272; 1989, c. 277, s. 1; c. 790, s. 2; 1991, c. 112, s. 1; c. 449, ss. 1, 2.1; 1993, c. 539, s. 355; 1994, Ex. Sess., c. 24, s. 14(c); 1995 (Reg. Sess., 1996), c. 573, s. 1; c. 756, s. 14; 1998-149, s. 7; 1999-438, s. 28; 2000-185, s. 2.)

Editor's Note. —

Session Laws 2000-185, s. 3, directs the Joint Legislative Transportation Oversight Committee, with the assistance of the Department of Transportation, to study the issue of motor vehicle lengths. The Committee is to examine both the issue of trailers of 53 feet in length and vehicles with a total overall length of 70 feet as a part of its study. The Department is to assist the Committee by developing data on the types and lengths of truck equipment sold and operated in the State. The Department is to report to the Committee by October 1, 2000, and the Committee is to submit its final report on this issue, along with any recommended legislation, to the 2001 Regular Session of the General Assembly on or before January 15, 2001.

Effect of Amendments. —

Session Laws 2000-185, s. 2, effective August 2, 2000, in subsection (a), substituted "102 inches" for "96 inches" in the first sentence, and deleted the former fourth sentence, which read "Special mobile equipment is allowed a total outside width not to exceed 102 inches."

§ 20-118. Weight of vehicles and load.

(a) For the purposes of this section, the following definitions shall apply:

(1) Single-axle weight. — The gross weight transmitted by all wheels whose centers may be included between two parallel transverse vertical planes 40 inches apart, extending across the full width of the vehicle.

(2) Tandem-axle weight. — The gross weight transmitted to the road by two or more consecutive axles whose centers may be included between

parallel vertical planes spaced more than 40 inches and not more than 96 inches apart, extending across the full width of the vehicle.

(3) Axle group. — Any two or more consecutive axles on a vehicle or combination of vehicles.

(4) Gross weight. — The weight of any single axle, tandem axle, or axle group of a vehicle or combination of vehicles plus the weight of any load thereon.

(5) Light-traffic roads. — Any highway on the State Highway System, excepting routes designated I, U.S. or N.C., posted by the Department of Transportation to limit the axle weight below the statutory limits.

(b) The following weight limitations shall apply to vehicles operating on the highways of the State:

(1) The single-axle weight of a vehicle or combination of vehicles shall not exceed 20,000 pounds.

(2) The tandem-axle weight of a vehicle or combination of vehicles shall not exceed 38,000 pounds.

(3) The gross weight imposed upon the highway by any axle group of a vehicle or combination of vehicles shall not exceed the maximum weight given for the respective distance between the first and last axle of the group of axles measured longitudinally to the nearest foot as set forth in the following table:

*Distance Between Axles**	*Maximum Weight in Pounds for any Group of Two or More Consecutive Axles*					
	2 Axles	*3 Axles*	*4 Axles*	*5 Axles*	*6 Axles*	*7 Axles*
4	38000					
5	38000					
6	38000					
7	38000					
8 or less	38000	38000				
more than 8	38000	42000				
9	39000	42500				
10	40000	43500				
11		44000				
12		45000	50000			
13		45500	50500			
14		46500	51500			
15		47000	52000			
16		48000	52500	58000		
17		48500	53500	58500		
18		49500	54000	59000		
19		50000	54500	60000		
20		51000	55500	60500	66000	
21		51500	56000	61000	66500	
22		52500	56500	61500	67000	
23		53000	57500	62500	68000	
24		54000	58000	63000	68500	74000
25		54500	58500	63500	69000	74500
26		55500	59500	64000	69500	75000
27		56000	60000	65000	70000	75500
28		57000	60500	65500	71000	76500

*Distance Between Axles**	*Maximum Weight in Pounds for any Group of Two or More Consecutive Axles*					
	2 Axles	*3 Axles*	*4 Axles*	*5 Axles*	*6 Axles*	*7 Axles*
29		57500	61500	66000	71500	77000
30		58500	62000	66500	72000	77500
31		59000	62500	67500	72500	78000
32		60000	63500	68000	73000	78500
33			64000	68500	74000	79000
34			64500	69000	74500	80000
35			65500	70000	75000	
36			66000**	70500	75500	
37			66500**	71000	76000	
38			67500**	72000	77000	
39			68000	72500	77500	
40			68500	73000	78000	
41			69500	73500	78500	
42			70000	74000	79000	
43			70500	75000	80000	
44			71500	75500		
45			72000	76000		
46			72500	76500		
47			73500	77500		
48			74000	78000		
49			74500	78500		
50			75500	79000		
51			76000	80000		
52			76500			
53			77500			
54			78000			
55			78500			
56			79500			
57			80000			

*Distance in Feet Between the Extremes of any Group of Two or More Consecutive Axles.

**See exception in G.S. 20-118(c)(1).

(4) The Department of Transportation may establish light-traffic roads and further restrict the axle weight limit on such light-traffic roads lower than the statutory limits. The Department of Transportation shall have authority to designate any highway on the State Highway System, excluding routes designated by I, U.S. and N.C., as a light-traffic road when in the opinion of the Department of Transportation, such road is inadequate to carry and will be injuriously affected by vehicles using the said road carrying the maximum axle weight. All such roads so designated shall be conspicuously posted as light-traffic roads and the maximum axle weight authorized shall be displayed on proper signs erected thereon.

(c) Exceptions. — The following exceptions apply to G.S. 20-118(b) and 20-118(e).

(1) Two consecutive sets of tandem axles may carry a gross weight of 34,000 pounds each without penalty provided the overall distance between the first and last axles of the consecutive sets of tandem axles is 36 feet or more.

(2) When a vehicle is operated in violation of G.S. 20-118(b)(1), 20-118(b)(2), or 20-118(b)(3), but the gross weight of the vehicle or

combination of vehicles does not exceed that permitted by G.S. 20-118(b)(3), the owner of the vehicle shall be permitted to shift the load within the vehicle, without penalty, from one axle to another to comply with the weight limits in the following cases:

a. Where the single-axle load exceeds the statutory limits, but does not exceed 21,000 pounds.

b. Where the vehicle or combination of vehicles has tandem axles, but the tandem-axle weight does not exceed 40,000 pounds.

(3) When a vehicle is operated in violation of G.S. 20-118(b)(4) the owner of the vehicle shall be permitted, without penalty, to shift the load within the vehicle from one axle to another to comply with the weight limits where the single-axle weight does not exceed the posted limit by 2,500 pounds.

(4) A truck or other motor vehicle shall be exempt from such light-traffic road limitations provided for pursuant to G.S. 20-118(b)(4), when transporting supplies, material or equipment necessary to carry out a farming operation engaged in the production of meats and agricultural crops and livestock or poultry by-products or a business engaged in the harvest or processing of seafood when the destination of such vehicle and load is located solely upon said light-traffic road.

(5) The light-traffic road limitations provided for pursuant to subdivision (b)(4) of this section do not apply to a vehicle while that vehicle is transporting only the following from its point of origin on a light-traffic road to the nearest highway that is not a light-traffic road:

a. Processed or unprocessed seafood transported from boats or any other point of origin to a processing plant or a point of further distribution.

b. Meats or agricultural crop products transported from a farm to first market.

c. Forest products originating and transported from a farm or from woodlands to first market without interruption or delay for further packaging or processing after initiating transport.

d. Livestock or poultry transported from their point of origin to first market.

e. Livestock by-products or poultry by-products transported from their point of origin to a rendering plant.

f. Recyclable material transported from its point of origin to a scrap-processing facility for processing. As used in this subpart, the terms "recyclable material" and "processing" have the same meaning as in G.S. 130A-290(a).

g. Garbage collected by the vehicle from residences or garbage dumpsters if the vehicle is fully enclosed and is designed specifically for collecting, compacting, and hauling garbage from residences or from garbage dumpsters. As used in this subpart, the term "garbage" does not include hazardous waste as defined in G.S. 130A-290(a), spent nuclear fuel regulated under G.S. 20-167.1, low-level radioactive waste as defined in G.S. 104E-5, or radioactive material as defined in G.S. 104E-5.

h. Treated sludge collected from a wastewater treatment facility.

i. Apples when transported from the orchard to the first processing or packing point.

j. Trees grown as Christmas trees from the field, farm, stand, or grove to first processing point.

(6) A truck or other motor vehicle shall be exempt from such light-traffic road limitations provided by G.S. 20-118(b)(4) when such motor vehicles are owned, operated by or under contract to a public utility,

electric or telephone membership corporation or municipality and such motor vehicles are used in connection with installation, restoration or emergency maintenance of utility services.

(7) A wrecker may tow a disabled vehicle or combination of vehicles in an emergency to the nearest feasible point for parking or storage without being in violation of G.S. 20-118 provided that the wrecker and towed vehicle or combination of vehicles otherwise meet all requirements of this section.

(8) A firefighting vehicle operated by any member of a municipal or rural fire department in the performance of his duties, regardless of whether members of that fire department are paid or voluntary and any vehicle of a voluntary lifesaving organization, when operated by a member of that organization while answering an official call shall be exempt from such light-traffic road limitations provided by G.S. 20-118(b)(4).

(9) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 761, s. 12.

(10) Fully enclosed motor vehicles designed specifically for collecting, compacting and hauling garbage from residences, or from garbage dumpsters shall, when operating for those purposes, be allowed a single axle weight not to exceed 23,500 pounds on the steering axle on vehicles equipped with a boom, or on the rear axle on vehicles loaded from the rear. This exemption shall not apply to vehicles operating on interstate highways, vehicles transporting hazardous waste as defined in G.S. 130A-290(a)(8), spent nuclear fuel regulated under G.S. 20-167.1, low-level radioactive waste as defined in G.S. 104E-5(9a), or radioactive material as defined in G.S. 104E-5(14).

(11) A truck or other motor vehicle shall be exempt for light-traffic road limitations issued under subdivision (b)(4) of this section when transporting heating fuel for on-premises use at a destination located on the light-traffic road.

(12) Subsections (b) and (e) of this section do not apply to a vehicle that (i) is hauling agricultural crops from the farm where they were grown to first market, (ii) is within 35 miles of that farm, (iii) does not operate on an interstate highway or posted bridge while hauling the crops, and meets one of the following descriptions:

a. Is a five-axle combination with a gross weight of no more than 90,000 pounds, a single-axle weight of no more than 22,000 pounds, a tandem-axle weight of no more than 42,000 pounds, and a length of at least 51 feet between the first and last axles of the combination.

b. Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 761, s. 13.

c. Is a four-axle combination with a gross weight that does not exceed the limit set in subdivision (b)(3) of this section, a single-axle weight of no more than 22,000 pounds, and a tandem-axle weight of no more than 42,000 pounds.

(13) Vehicles specifically designed for fire fighting that are owned by a municipal or rural fire department. This exception does not apply to vehicles operating on interstate highways.

(14) Subsections (b) and (e) of this section do not apply to a vehicle that meets all of the following conditions:

a. Is hauling aggregates from a distribution yard or a State-permitted production site within a North Carolina county contiguous to the North Carolina State border to a destination in an adjacent state as verified by a weight ticket in the driver's possession and available for inspection by enforcement personnel.

b. Does not operate on an interstate highway or posted bridge.

c. Does not exceed 69,850 pounds gross vehicle weight and 53,850 pounds per axle grouping for tri-axle vehicles. For purposes of this subsection, a tri-axle vehicle is a single unit vehicle with a three consecutive axle group on which the respective distance between any two consecutive axles of the group, measured longitudinally center to center to the nearest foot, does not exceed eight feet. For purposes of this subsection, the tolerance provisions of subsection (h) of this section do not apply.

d. All other enforcement provisions of this Article remain applicable.

(d) The Department of Transportation is authorized to abrogate certain exceptions. The exceptions provided for in G.S. 20-118(c)(4) and 20-118(c)(5) as applied to any light-traffic road may be abrogated by the Department of Transportation upon a determination of the Department of Transportation that undue damage to such light-traffic road is resulting from such vehicles exempted by G.S. 20-118(c)(4) and 20-118(c)(5). In those cases where the exemption to the light-traffic roads are abrogated by the Department of Transportation, the Department shall post the road to indicate no exemptions.

(e) Penalties. —

(1) Except as provided in subdivision (2) of this subsection, for each violation of the single-axle or tandem-axle weight limits set in subdivision (b)(1), (b)(2), or (b)(4) of this section, the Department of Transportation shall assess a civil penalty against the owner or registrant of the vehicle in accordance with the following schedule: for the first 1,000 pounds or any part thereof, four cents (4¢) per pound; for the next 1,000 pounds or any part thereof, six cents (6¢) per pound; and for each additional pound, ten cents (10¢) per pound. These penalties apply separately to each weight limit violated. In all cases of violation of the weight limitation, the penalty shall be computed and assessed on each pound of weight in excess of the maximum permitted.

(2) The penalty for a violation of the single-axle or tandem-axle weight limits by a vehicle that is transporting an item listed in subdivision (c)(5) of this section is one-half of the amount it would otherwise be under subdivision (1) of this subsection.

(3) If an axle-group weight of a vehicle exceeds the weight limit set in subdivision (b)(3) of this section plus any tolerance allowed in subsection (h) of this section, the Department of Transportation shall assess a civil penalty against the owner or registrant of the motor vehicle. The penalty shall be assessed on the number of pounds by which the axle-group weight exceeds the limit set in subdivision (b)(3), as follows: for the first 2,000 pounds or any part thereof, two cents (2¢) per pound; for the next 3,000 pounds or any part thereof, four cents (4¢) per pound; for each pound in excess of 5,000 pounds, ten cents (10¢) per pound. Tolerance pounds in excess of the limit set in subdivision (b)(3) are subject to the penalty if the vehicle exceeds the tolerance allowed in subsection (h) of this section. These penalties apply separately to each axle-group weight limit violated.

(4) The penalty for a violation of an axle-group weight limit by a vehicle that is transporting an item listed in subdivision (c)(5) of this section is one-half of the amount it would otherwise be under subdivision (3) of this subsection.

(5) A violation of a weight limit in this section is not punishable under G.S. 20-176.

(f) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 761, s. 15.

(g) General Statutes 20-118 shall not be construed to permit the gross weight of any vehicle or combination in excess of the safe load carrying

capacity established by the Department of Transportation on any bridge pursuant to G.S. 136-72.

(h) Tolerance. — A vehicle may exceed maximum and the inner axle-group weight limitations set forth in subdivision (b)(3) of this section by a tolerance of ten percent (10%). This exception does not authorize a vehicle to exceed either the single-axle or tandem-axle weight limitations set forth in subdivisions (b)(1) and (b)(2) of this section, or the maximum gross weight limit of 80,000 pounds. This exception does not apply to bridges posted under G.S. 136-72 or to vehicles operating on interstate highways. The tolerance allowed under this subsection does not authorize the weight of a vehicle to exceed the weight for which that vehicle is licensed under G.S. 20-88. No tolerance on the single-axle weight or the tandem-axle weight provided for in subdivisions (b)(1) and (b)(2) of this section shall be granted administratively or otherwise. The Department of Transportation shall report back to the Transportation Oversight Committee and to the General Assembly on the effects of the tolerance granted under this section, any abuses of this tolerance, and any suggested revisions to this section by that Department on or before May 1, 1998.

(i) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 761, s. 16.

(j) Repealed by Session Laws 1987, c. 392.

(k) From September 1 through March 1 of each year, a vehicle which is equipped with a self-loading bed and which is designed and used exclusively to transport compressed seed cotton from the farm to a cotton gin may operate on the highways of the State, except interstate highways, with a tandem-axle weight not exceeding 44,000 pounds. Such vehicles shall be exempt from light-traffic road limitations only from point of origin on the light-traffic road to the nearest State-maintained road which is not posted to prohibit the transportation of statutory load limits. This exemption does not apply to restricted, posted bridge structures. (1937, c. 407, s. 82; 1943, c. 213, s. 2; cc. 726, 784; 1945, c. 242, s. 2; c. 569, s. 2; c. 576, s. 7; 1947, c. 1079; 1949, c. 1207, s. 2; 1951, c. 495, s. 2; c. 942, s. 1; c. 1013, ss. 5, 6, 8; 1953, cc. 214, 1092; 1959, c. 872; c. 1264, s. 6; 1963, c. 159; c. 610, ss. 3-5; c. 702, s. 5; 1965, cc. 483, 1044; 1969, c. 537; 1973, c. 507, s. 5; c. 1449, ss. 1, 2; 1975, c. 325; c. 373, s. 2; c. 716, s. 5; c. 735; c. 736, ss. 1-3; 1977, c. 461; c. 464, s. 34; 1977, 2nd Sess., c. 1178; 1981, c. 690, ss. 27, 28; c. 726; c. 1127, s. 53.1; 1983, c. 407; c. 724, s. 1; 1983 (Reg. Sess., 1984), c. 1116, ss. 105-109; 1985, c. 54; c. 274; 1987, c. 392; c. 707, ss. 1-4; 1991, c. 202, s. 1; 1991 (Reg. Sess., 1992), c. 905, s. 1; 1993, c. 426, ss. 1, 2; c. 470, s. 1; c. 533, s. 11; 1993 (Reg. Sess., 1994), c. 761, ss. 10-16; 1995, c. 109, s. 3; c. 163, s. 4; c. 332, ss. 1-3 ; c. 509, s. 135.1(b); 1995 (Reg. Sess., 1996), c. 756, s. 29; 1997-354, s. 1; 1997-373, s. 1; 1997-466, s. 2; 1998-149, ss. 8, 9, 9.1; 1998-177, s. 1; 1999-452, s. 23; 2000-57, s. 1.)

§ 20-119. Weight of vehicles and load.

(a) The Department of Transportation may, in their discretion, upon application, for good cause being shown therefor, issue a special permit in writing authorizing the applicant to operate or move a vehicle of a size or weight or number of units exceeding a maximum specified in this Article upon any highway under the jurisdiction and for the maintenance of which the body granting the permit is responsible. However, the Department is not authorized to issue any permit to operate or move over the State highways twin trailers, commonly referred to as double bottom trailers. Every such permit shall be carried in the vehicle to which it refers and shall be open to inspection by any peace officer. The authorities in any incorporated city or town may grant permits in writing and for good cause shown, authorizing the applicant to move a vehicle over the streets of such city or town, the size or weight exceeding the maximum expressed in this Article. The Department of Transportation shall issue rules to implement this section, but no rule shall provide that the permits issued pursuant to this section may be invalidated by law enforcement personnel.

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(b) Upon the issuance of a special permit for an oversize or overweight vehicle by the Department of Transportation in accordance with this section, the applicant shall pay to the Department for a single trip permit a fee of twelve dollars ($12.00) for each imension over lawful dimensions, including height, length, width, and weight up to 132,000 pounds. For overweight vehicles, the applicant shall pay to the Department for a single trip permit in addition to the fee imposed by the previous sentence a fee of three dollars ($3.00) per 1,000 pounds over 132,000 pounds.

Upon the issuance of an annual permit for a single vehicle, the applicant shall pay a fee in accordance with the following schedule:

Commodity:	Annual Fee:
Annual Permit to Move House Trailers	$200.00
Annual Permit to Move Other Commodities	$100.00

In addition to the fees set out in this subsection, applications for permits that require an engineering study for pavement or structures or other special conditions or considerations shall be accompanied by a nonrefundable application fee of one hundred dollars ($100.00).

This subsection does not apply to farm equipment or machinery being used at the time for agricultural purposes, nor to the moving of a house as provided for by the license and permit requirements of Article 16 of this Chapter. Fees will not be assessed for permits for oversize and overweight vehicles issued to any agency of the United States Government or the State of North Carolina, its agencies, institutions, subdivisions, or municipalities if the vehicle is registered in the name of the agency.

(b1) Neither the Department nor the Board may require review or renewal of annual permits, with or without fee, more than once per calendar year.

(c) Nothing in this section shall require the Department of Transportation to issue any permit for any load.

(d) For each violation of any of the terms or conditions of a special permit issued under this section the Department of Transportation may assess a separate civil penalty against the registered owner of the vehicle as follows:

(1) A fine of five hundred dollars ($500.00) for any of the following: operating without a permit, moving a load off the route specified in the permit, falsifying information to obtain a permit, failing to comply with dimension restrictions of a permit, or failing to comply with escort vehicle requirements.

(2) A fine of two hundred fifty dollars ($250.00) for moving loads beyond the distance allowances of an annual permit covering the movement of house trailers from the retailer's premises or for operating in violation of time of travel restrictions.

(3) A fine of one hundred dollars ($100.00) for any other violation of the permit conditions or requirements imposed by applicable regulations.

The Department of Transportation may refuse to issue additional permits or suspend existing permits if there are repeated violations of subdivision (1) or (2) of this subsection.

(e) It is the intent of the General Assembly that the permit fees provided in G.S. 20-119 shall be adjusted periodically to assure that the revenue generated by the fees is equal to the cost to the Department of administering the Oversize/verweight Permit Unit Program within the Division of Highways. At least every two years, the Department shall review and compare the revenue generated by the permit fees and the cost of administering the program, and shall report to the Joint Legislative Transportation Oversight Committee created in G.S.120-70.50 its recommendations for adjustments to the permit fees to bring the revenues and the costs into alignment. (1937, c. 407, s. 83; 1957, c. 65, s. 11; 1959, c. 1129; 1973, c. 507, s. 5; 1977, c. 464, s. 34; 1981, c. 690, ss. 31, 32; c. 736, ss. 1, 2; 1989, c. 54; 1991, c. 604, ss. 1, 2; c. 689, s. 334; 1993, c. 539, s. 357; 1994, Ex. Sess., c. 24, s. 14(c); 2000-109, ss. 7(a), 7(f), 7(g).)

Editor's Note. —

Session Laws 2000-109, s. 7(g), was codified as subsection (e) of this section at the direction of the Revisor of Statutes, effective July 13, 2000. Pursuant to Session Laws 2000-109, s. 10(g), the first report required by s. 7(g) is due December 1, 2002.

Effect of Amendments. — Session Laws 2000-109, s. 7(a), effective July 13, 2000, rewrote subsection (d).

Session Laws 2000-109, s. 7(f), effective October 1, 2000, rewrote subsection (b).

Session Laws 2000-109, s. 7(g), effective July 13, 2000, added subsection (e). See editor's note.

§ 20-127. (Effective July 1, 2001) Windows and windshield wipers.

(a) Windshield Wipers. — A vehicle that is operated on a highway and has a windshield shall have a windshield wiper to clear rain or other substances from the windshield in front of the driver of the vehicle and the windshield wiper shall be in good working order. If a vehicle has more than one windshield wiper to clear substances from the windshield, all the windshield wipers shall be in good working order.

(b) Window Tinting Restrictions. — A window of a vehicle that is operated on a highway or a public vehicular area shall comply with this subsection. The windshield of the vehicle may be tinted only along the top of the windshield and the tinting may not extend more than five inches below the top of the windshield or below the AS1 line of the windshield, whichever measurement is longer. Provided, however, an untinted clear film which does not obstruct vision but which reduces or eliminates ultraviolet radiation from entering a vehicle may be applied to the windshield. Any other window of the vehicle may be tinted in accordance with the following restrictions:

(1) The total light transmission of the tinted window shall be at least thirty-five percent (35%). A vehicle window that, by use of a light meter approved by the Commissioner, measures a total light transmission of more than thirty-two percent (32%) is conclusively presumed to meet this restriction.

(2) The light reflectance of the tinted window shall be twenty percent (20%) or less.

(3) Tinted film or another material used to tint the window shall be nonreflective and shall not be red, yellow, or amber.

(c) Tinting Exceptions. — The window tinting restrictions in subsection (b) of this section apply without exception to the windshield of a vehicle. The window tinting restrictions in subdivisions (b)(1) and (b)(2) of this section do not apply to any of the following vehicle windows:

(1) A window of an excursion passenger vehicle, as defined in G.S. 20-4.01(27)a.

(2) A window of a for-hire passenger vehicle, as defined in G.S. 20-4.01(27)b.

(3) A window of a common carrier of passengers, as defined in G.S. 20-4.01(27)c.

(4) A window of a motor home, as defined in G.S. 20-4.01(27)d2.

(5) A window of an ambulance, as defined in G.S. 20-4.01(27)f.

(6) The rear window of a property-hauling vehicle, as defined in G.S. 20-4.01(31).

(7) A window of a limousine.

(8) A window of a law enforcement vehicle.

(9) A window of a multipurpose vehicle that is behind the driver of the vehicle. A multipurpose vehicle is a passenger vehicle that is designed to carry 10 or fewer passengers and either is constructed on a truck chassis or has special features designed for occasional off-road operation. A minivan and a pickup truck are multipurpose vehicles.

(10) A window of a vehicle that is registered in another state and meets the requirements of the state in which it is registered.

(11) A window of a vehicle for which the Division has issued a medical exception permit under subsection (f) of this section.

§ 20-127 has a postponed effective date. See notes.

(d) Violations. — A person who does any of the following commits a misdemeanor of the class set in G.S. 20-176:

(1) Applies tinting to the window of a vehicle that is subject to a safety inspection in this State and the resulting tinted window does not meet the window tinting restrictions set in this section.

(2) Drives on a highway or a public vehicular area a vehicle that has a window that does not meet the window tinting restrictions set in this section.

(e) Defense. — It is a defense to a charge of driving a vehicle with an unlawfully tinted window that the tinting was removed within 15 days after the charge and the window now meets the window tinting restrictions. To assert this defense, the person charged shall produce in court, or submit to the prosecuting attorney before trial, a certificate from the Division of Motor Vehicles or the Highway Patrol showing that the window complies with the restrictions.

(f) Medical Exception. — A person who suffers from a medical condition that causes the person to be photosensitive to visible light may obtain a medical exception permit. To obtain a permit, an applicant shall apply in writing to the Drivers Medical Evaluation Program and have his or her doctor complete the required medical evaluation form provided by the Division. The permit shall be valid for five years from the date of issue, unless a shorter time is directed by the Drivers Medical Evaluation Program. The renewal shall require a medical recertification that the person continues to suffer from a medical condition requiring tinting.

A person may receive no more than two medical exception permits that are valid at any one time. A permit issued under this subsection shall specify the vehicle to which it applies, the windows that may be tinted, and the permitted levels of tinting. The permit shall be carried in the vehicle to which it applies when the vehicle is driven on a highway.

The Division shall give a person who receives a medical exception permit a sticker to place on the lower left-hand corner of the rear window of the vehicle to which it applies. The sticker shall be designed to give prospective purchasers of the vehicle notice that the windows of the vehicle do not meet the requirements of G.S. 20-127(b), and shall be placed between the window and the tinting when the tinting is installed. The Division shall adopt rules regarding the specifications of the medical exception sticker. Failure to display the sticker is an infraction punishable by a two hundred dollar ($200.00) fine. (1937, c. 407, s. 90; 1953, c. 1254; 1955, c. 1157, s. 2; 1959, c. 1264, s. 7; 1967, c. 1077; 1985, c. 789; 1985 (Reg. Sess., 1986), c. 997; 1987, c. 567; 1987 (Reg. Sess., 1988), c. 1082, ss. 7-8.1; 1989, c. 770, s. 66; 1991 (Reg. Sess., 1992), c. 1007, s. 34; 1993, c. 539, s. 360; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 683, s. 1; c. 754, s. 4; 1995, c. 14, s. 1; c. 473, s. 1; 2000-75, s. 1.)

For this section as in effect until July 1, 2001, see the main volume.

Editor's Note. — Session Laws 2000-75, s. 2, provides:

"The Medical Review Branch of the Division of Motor Vehicles shall issue rules and create forms and permits necessary for this program. Until funds for this program are appropriated by the General Assembly, the Medical Review Branch shall manually issue all medical exception permits and shall manually maintain the records related specifically to these permits.

"The Division of Motor Vehicles shall add the medical exception described in Section 1 of this act [which amended § 20-127] to the STARS program, to allow the computerized issuance of medical exception permits and to allow computerized maintenance of the records related specifically to these permits when it is modifying that computer program for some other purpose.

"The Division of Motor Vehicles shall report to the Joint Legislative Transportation Oversight Committee six months after the first medical exception permit is issued on the number of permits issued and the projected additional costs, if any, of operating the program."

Effect of Amendments. — Session Laws 2000-75, s. 1, effective July 1, 2001, added the next to last sentence in subsection (b); substituted "shall be nonreflective and shall not be red" for "must be nonreflective and must be a color other than red" in subdivision (b)(3); added subdivision (c)(11); added subsection (f); and substituted "shall" for "must" throughout the section.

§ 20-128. Exhaust system and emissions control devices.

(a) No person shall drive a motor vehicle on a highway unless such motor vehicle is equipped with a muffler, or other exhaust system of the type installed at the time of manufacture, in good working order and in constant operation to prevent excessive or unusual noise, annoying smoke and smoke screens.

(b) It shall be unlawful to use a "muffler cut-out" on any motor vehicle upon a highway.

(c) No motor vehicle registered in this State that was manufactured after model year 1967 shall be operated in this State unless it is equipped with emissions control devices that were installed on the vehicle at the time the vehicle was manufactured and these devices are properly connected.

(d) The requirements of subsection (c) of this section shall not apply if the emissions control devices have been removed for the purpose of converting the motor vehicle to operate on natural or liquefied petroleum gas or other modifications have been made in order to reduce air pollution and these modifications are approved by the Department of Environment and Natural Resources. (1937, c. 407, s. 91; 1971, c. 455, s. 1; 1983, c. 132; 1989, c. 727, s. 9; 1997-443, s. 11A.119(a); 2000-134, s. 6.)

Editor's Note. — Session Laws 2000-134, s. 20, provides that during the period July 1, 2002, through December 31, 2005, in the counties of Cabarrus, Durham, Forsyth, Gaston, Guilford, Mecklenburg, Orange, Union, and Wake, an emissions inspection station, an emissions inspection mechanic, and an emissions self-inspector, as those terms are used in G.S. 20-183.4A, may elect to perform emissions inspections: (i) only on 1975 through 1995 model vehicles using an emissions analyzer; (ii) only on 1996 or later model vehicles using equipment to analyze data provided by the on-board diagnostic (OBD) equipment, or (iii) both on 1975 through 1995 model vehicles using an emissions analyzer and on 1996 or later model vehicles using equipment to analyze data provided by the on-board diagnostic (OBD) equipment. Section 20 does not authorize an emissions inspection station or an emissions self-inspector to perform an emissions inspection on a vehicle of a model year for which the emissions inspection station or emissions self-inspector does not have the equipment necessary to perform an emissions inspection of vehicles of that model year, nor does section 20 authorize an emissions inspection mechanic to perform an emissions inspection on a vehicle unless the emissions inspection mechanic has successfully completed a course, as required by G.S. 20-183.4A(2) or G.S. 20-183.4A(2a)[G.S. 20-183.4A(c)(2) or (c)(2a)], that includes training on the use of the equipment necessary to perform an emissions inspection on vehicles of that model year.

Session Laws 2000-134, s. 21, provides that the act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1, and that, notwithstanding G.S. 150B-21.1(a)(2) and 26 NCAC 2C.0102(11), the Environmental Management Commission and the Division of Motor Vehicles of the Department of Transportation may adopt temporary rules to implement the provisions of this act. Section 21 is to continue in effect until all rules necessary to implement the provisions of the act have become effective as either temporary rules or permanent rules.

Session Laws 2000-134, s. 23, directs the Environmental Review Commission, with the assistance of the Department of Environment and Natural Resources, the Division of Motor Vehicles of the Department of Transportation, the affected parties, and the Fiscal Research Division of the Legislative Services Office to study issues related to the costs associated with the motor vehicle safety and emissions inspection and maintenance program, specifically to determine what constitutes a reasonable fee for motor vehicle inspections under the current program and under the enhanced inspection and maintenance program to be implemented pursuant to G.S. 20-183.3, as amended by the act, taking into consideration the cost of emissions inspection equipment, the useful life of the equipment, the average period of time during which a purchaser of this equipment is able to amortize this cost, telephone charges incurred in connection with the registration de-

nial program, whether a fee should be charged to reinspect a vehicle that fails an emissions inspection after repairs to the vehicle have been made, the cost of the safety inspection program in relation to the emissions inspection program, and any other factors that the Commission determines to be relevant. The Commission may also evaluate strategies to ensure an efficient and orderly implementation of the enhanced inspection and maintenance program required by Part III of S.L. 1999-328 and by S.L. 2000-134. The Environmental Review Commission is to recommend legislation to amend G.S. 20-183.7 to increase the fee for motor vehicle emissions inspections to the 2001 General Assembly.

Effect of Amendments. — Session Laws 2000-134, s. 6, effective July 1, 2000, substituted "Exhaust system and emissions control devices" for "Prevention of noise, smoke, etc; muffler cut-outs regulated" as the section heading; added subsection designation (d); in subsection (c), substituted "emissions control devices that were installed on the vehicle" for "such emission control devices to reduce air pollution as were installed," substituted "the vehicle was manufactured and these devices are properly connected" for "of manufacture, provided the foregoing requirement" and made a minor wording change; and in subsection (d), inserted "The requirements of subsection (c) of this section," substituted "if the emissions control" for "where such" and substituted "pollution and these modifications are" for "pollution, further provided that such modifications shall have first been."

§ 20-129.1. Additional lighting equipment required on certain vehicles.

In addition to other equipment required by this Chapter, the following vehicles shall be equipped as follows:

(1) On every bus or truck, whatever its size, there shall be the following:
On the rear, two reflectors, one at each side, and one stoplight.

(2) On every bus or truck 80 inches or more in overall width, in addition to the requirements in subdivision (1):
On the front, two clearance lamps, one at each side.
On the rear, two clearance lamps, one at each side.
On each side, two side marker lamps, one at or near the front and one at or near the rear.
On each side, two reflectors, one at or near the front and one at or near the rear.

(3) On every truck tractor:
On the front, two clearance lamps, one at each side.
On the rear, one stoplight.

(4) On every trailer or semitrailer having a gross weight of 4,000 pounds or more:
On the front, two clearance lamps, one at each side.
On each side, two side marker lamps, one at or near the front and one at or near the rear.
On each side, two reflectors, one at or near the front and one at or near the rear.
On the rear, two clearance lamps, one at each side, also two reflectors, one at each side, and one stoplight.

(5) On every pole trailer having a gross weight of 4,000 pounds or more:
On each side, one side marker lamp and one clearance lamp which may be in combination, to show to the front, side and rear.
On the rear of the pole trailer or load, two reflectors, one at each side.

(6) On every trailer, semitrailer or pole trailer having a gross weight of less than 4,000 pounds:
On the rear, two reflectors, one on each side. If any trailer or semitrailer is so loaded or is of such dimensions as to obscure the stoplight on the towing vehicle, then such vehicle shall also be equipped with one stoplight.

(7) Front clearance lamps and those marker lamps and reflectors mounted on the front or on the side near the front of a vehicle shall display or reflect an amber color.

(8) Rear clearance lamps and those marker lamps and reflectors mounted on the rear or on the sides near the rear of a vehicle shall display or reflect a red color.

(9) **(Effective until May 1, 2001)** Brake lights (and/or brake reflectors) on the rear of a motor vehicle shall be red. The light illuminating the license plate shall be white. All other lights shall be white, amber, yellow, clear or red.

(9) **(Effective May 1, 2001)** Brake lights (and/or brake reflectors) on the rear of a motor vehicle shall have red lenses so that the light displayed is red. The light illuminating the license plate shall be white. All other lights shall be white, amber, yellow, clear or red.

(10) On every trailer and semitrailer which is 30 feet or more in length and has a gross weight of 4,000 pounds or more, one combination marker lamp showing amber and mounted on the bottom side rail at or near the center of each side of the trailer. (1955, c. 1157, s. 4; 1969, c. 387; 1983, c. 245; 1987, c. 363, s. 1; 2000-159, s. 10.)

Subsection (9) Set Out Twice. — The first version of subsection (9) set out above is effective until May 1, 2001. The second version of subsection (9) set out above is effective May 1, 2001.

Effect of Amendments. — Session Laws 2000-159, s. 10, effective May 1, 2001, substituted "shall have red lenses so that the light displayed is red" for "shall be red" in subdivision (9).

§ 20-137.1. Child restraint systems required.

(a) Every driver who is transporting one or more passengers of less than 16 years of age shall have all such passengers properly secured in a child passenger restraint system or seat belt which meets federal standards applicable at the time of its manufacture.

(a1) **(See editor's note for applicability)** A child less than five years of age and less than 40 pounds in weight shall be properly secured in a weight-appropriate child passenger restraint system. In vehicles equipped with an active passenger-side front air bag, if the vehicle has a rear seat, a child less than five years of age and less than 40 pounds in weight shall be properly secured in a rear seat, unless the child restraint system is designed for use with air bags.

(b) The provisions of this section shall not apply: (i) to ambulances or other emergency vehicles; (ii) when the child's personal needs are being attended to; (iii) if all seating positions equipped with child passenger restraint systems or seat belts are occupied; or (iv) to vehicles which are not required by federal law or regulation to be equipped with seat belts.

(c) Any driver found responsible for a violation of this section may be punished by a penalty not to exceed twenty-five dollars ($25.00), even when more than one child less than 16 years of age was not properly secured in a restraint system. No driver charged under this section for failure to have a child under five years of age properly secured in a restraint system shall be convicted if he produces at the time of his trial proof satisfactory to the court that he has subsequently acquired an approved child passenger restraint system.

(d) A violation of this section shall have all of the following consequences:

(1) Two drivers license points shall be assessed pursuant to G.S. 20-16.

(2) No insurance points shall be assessed.

(3) The violation shall not constitute negligence per se or contributory negligence per se.

(4) The violation shall not be evidence of negligence or contributory negligence. (1981, c. 804, ss. 1, 4, 5; 1985, c. 218; 1993 (Reg. Sess., 1994), c. 748, s. 1; 1999-183, ss. 6, 7; 2000-117, s. 1.)

Editor's Note. — Session Laws 1981, c. 804, s. 6, provided: "This act shall become effective on July 1, 1982, and shall expire on June 30, 1985." The section was subsequently rewritten by Session Laws 1985, c. 218, effective July 1, 1985, and hence did not expire.

Session Laws 1999-183, s. 8, provides that G.S. 20-137.1(a1), as enacted in s. 6, does not apply to persons who reach the age of four years old before October 1, 1999.

Effect of Amendments. —

Session Laws 2000-117, s. 1, effective December 1, 2000, deleted the former second sentence in subsection (c), which read "Conviction of an infraction under this section has no consequence other than payment of a penalty"; and rewrote subsection (d).

Part 10. Operation of Vehicles and Rules of the Road.

§ 20-138.1. Impaired driving.

Legal Periodicals. —

For comment, "North Carolina's Unconstitutional Expansion of an Ancient Maxim: Using DWI Fatalitites to Satisfy First Degree Felony Murder," see 22 Campbell L. Rev. 169 (1999).

For note, "Ramifications of the 1997 DWI/Felony Prior Record Level Amendment to the Structured Sentencing Act: State of North Carolina v. Tanya Watts Gentry," see 22 Campbell L. Rev. 211 (1999).

CASE NOTES

I. In General.
V. Instructions.

I. IN GENERAL.

Construction with § 20-16.2 — A civil superior court determination, on appeal from an administrative hearing, pursuant to § 20-16.2(e), regarding an allegation of willful refusal, estops the relitigation of that same issue in a defendant's criminal prosecution for DWI. The district attorney and the Attorney General both represent the interests of the people of North Carolina, regardless of whether it be the district attorney in a criminal trial court or the Attorney General in a civil or criminal appeal. State v. Summers, 351 N.C. 620, 528 S.E.2d 17 (2000).

Exclusion of Evidence of Operability Upheld. — Where defendant admitted that he was sitting behind the wheel of an automobile while the motor was running, that he put the car into drive three times and that the car moved forward on each occasion, failure to allow defendant to introduce evidence that the vehicle he was alleged to have been operating was not operable was not prejudicial and did not entitle him to a new trial for the offenses of habitual impaired driving and driving during revocation, as defendant demonstrated in the presence of a police officer that the car in which he was seated was a device in which a person might be transported for purposes of § 20-4.01(49). State v. Clapp, 135 N.C. App. 52, 519 S.E.2d 90 (1999).

Applied in State v. Parisi, 135 N.C. App. 222, 519 S.E.2d 531 (1999).

Stated in State v. Covington, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 775 (July 5, 2000).

Cited in McCrary ex rel. McCrary v. Byrd, — N.C. App. —, 524 S.E.2d 817, 2000 N.C. App. LEXIS 57 (2000); In re a Judge, No. 238 Brown, 351 N.C. 601, 527 S.E.2d 651 (2000); Cooke v. Faulkner, — N.C. App. —, 529 S.E.2d 512, 2000 N.C. App. LEXIS 496 (2000).

V. INSTRUCTIONS.

The trial court did not err or violate double jeopardy principles in sentencing the defendant for both impaired driving and second degree murder. Driving while impaired is not a lesser included offense of second degree murder. State v. McAllister, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 600 (June 6, 2000).

§ 20-138.2A. Operating a commercial vehicle after consuming alcohol.

(a) Offense. — A person commits the offense of operating a commercial motor vehicle after consuming alcohol if the person drives a commercial motor vehicle, as defined in G.S. 20-4.01(3d)a. and b., upon any highway, any street, or any public vehicular area within the State while consuming alcohol or while alcohol remains in the person's body.

(b) Implied-Consent Offense. — An offense under this section is an implied-consent offense subject to the provisions of G.S. 20-16.2. The provisions of G.S. 20-139.1 shall apply to an offense committed under this section.

(b1) Odor Insufficient. — The odor of an alcoholic beverage on the breath of the driver is insufficient evidence by itself to prove beyond a reasonable doubt that alcohol was remaining in the driver's body in violation of this section unless the driver was offered an alcohol screening test or chemical analysis and refused to provide all required samples of breath or blood for analysis.

(b2) Alcohol Screening Test. — Notwithstanding any other provision of law, an alcohol screening test may be administered to a driver suspected of violation of subsection (a) of this section, and the results of an alcohol screening test or the driver's refusal to submit may be used by a law enforcement officer, a court, or an administrative agency in determining if alcohol was present in the driver's body. No alcohol screening tests are valid under this section unless the device used is one approved by the Commission for Health Services, and the screening test is conducted in accordance with the applicable regulations of the Commission as to its manner and use.

(c) Punishment. — Except as otherwise provided in this subsection, a violation of the offense described in subsection (a) of this section is a Class 3 misdemeanor and, notwithstanding G.S. 15A-1340.23, is punishable by a penalty of one hundred dollars ($100.00). A second or subsequent violation of this section is a misdemeanor punishable under G.S. 20-179. This offense is a lesser included offense of impaired driving of a commercial vehicle under G.S. 20-138.2.

(d) Second or Subsequent Conviction Defined. — A conviction for violating this offense is a second or subsequent conviction if at the time of the current offense the person has a previous conviction under this section, and the previous conviction occurred in the seven years immediately preceding the date of the current offense. This definition of second or subsequent conviction also applies to G.S. 20-17(a)(13) and G.S. 20-17.4(a)(6). (1998-182, s. 23; 1999-406, s. 15; 2000-140, s. 5; 2000-155, s. 16.)

Effect of Amendments. — Session Laws 2000-140, s. 5, effective July 21, 2000, and Session Laws 2000-155, s. 16, effective September 1, 2000, both substituted "Commission for Health Services" for "Commission on Health Services" in subsection (b2).

§ 20-138.2B. Operating a school bus, school activity bus, or child care vehicle after consuming alcohol.

(a) Offense. — A person commits the offense of operating a school bus, school activity bus, or child care vehicle after consuming alcohol if the person drives a school bus, school activity bus, or child care vehicle upon any highway, any street, or any public vehicular area within the State while consuming alcohol or while alcohol remains in the person's body.

(b) Implied-Consent Offense. — An offense under this section is an implied-consent offense subject to the provisions of G.S. 20-16.2. The provisions of G.S. 20-139.1 shall apply to an offense committed under this section.

(b1) Odor Insufficient. — The odor of an alcoholic beverage on the breath of the driver is insufficient evidence by itself to prove beyond a reasonable doubt that alcohol was remaining in the driver's body in violation of this section unless the driver was offered an alcohol screening test or chemical analysis and refused to provide all required samples of breath or blood for analysis.

(b2) Alcohol Screening Test. — Notwithstanding any other provision of law, an alcohol screening test may be administered to a driver suspected of violation of subsection (a) of this section, and the results of an alcohol screening test or the driver's refusal to submit may be used by a law enforcement officer, a court, or an administrative agency in determining if alcohol was present in the driver's body. No alcohol screening tests are valid under this section unless the device used is one approved by the Commission for Health Services, and the screening test is conducted in accordance with the applicable regulations of the Commission as to its manner and use.

(c) Punishment. — Except as otherwise provided in this subsection, a violation of the offense described in subsection (a) of this section is a Class 3 misdemeanor and, notwithstanding G.S. 15A-1340.23, is punishable by a penalty of one hundred dollars ($100.00). A second or subsequent violation of this section is a misdemeanor punishable under G.S. 20-179. This offense is a lesser included offense of impaired driving of a commercial vehicle under G.S. 20-138.1.

(d) Second or Subsequent Conviction Defined. — A conviction for violating this offense is a second or subsequent conviction if at the time of the current offense the person has a previous conviction under this section, and the previous conviction occurred in the seven years immediately preceding the date of the current offense. This definition of second or subsequent conviction also applies to G.S. 20-19(c2). (1998-182, s. 27; 1999-406, s. 16; 2000-140, s. 6; 2000-155, s. 17.)

Effect of Amendments. — Session Laws 2000-140, s. 6, effective July 21, 2000, and Session Laws 2000-155, s. 17, effective September 1, 2000, both substituted "Commission for Health Services" for "Commission on Health Services" in subsection (b2).

§ 20-138.3. Driving by person less than 21 years old after consuming alcohol or drugs.

(a) Offense. — It is unlawful for a person less than 21 years old to drive a motor vehicle on a highway or public vehicular area while consuming alcohol or at any time while he has remaining in his body any alcohol or controlled substance previously consumed, but a person less than 21 years old does not violate this section if he drives with a controlled substance in his body which was lawfully obtained and taken in therapeutically appropriate amounts.

(b) Subject to Implied-Consent Law. — An offense under this section is an alcohol-related offense subject to the implied-consent provisions of G.S. 20-16.2.

(b1) Odor Insufficient. — The odor of an alcoholic beverage on the breath of the driver is insufficient evidence by itself to prove beyond a reasonable doubt that alcohol was remaining in the driver's body in violation of this section unless the driver was offered an alcohol screening test or chemical analysis and refused to provide all required samples of breath or blood for analysis.

(b2) Alcohol Screening Test. — Notwithstanding any other provision of law, an alcohol screening test may be administered to a driver suspected of violation of subsection (a) of this section, and the results of an alcohol screening test or the driver's refusal to submit may be used by a law enforcement officer, a court, or an administrative agency in determining if alcohol was present in the driver's body. No alcohol screening tests are valid under this section unless

the device used is one approved by the Commission for Health Services, and the screening test is conducted in accordance with the applicable regulations of the Commission as to its manner and use.

(c) Punishment; Effect When Impaired Driving Offense Also Charged. — The offense in this section is a Class 2 misdemeanor. It is not, in any circumstances, a lesser included offense of impaired driving under G.S. 20-138.1, but if a person is convicted under this section and of an offense involving impaired driving arising out of the same transaction, the aggregate punishment imposed by the court may not exceed the maximum applicable to the offense involving impaired driving, and any minimum punishment applicable shall be imposed.

(d) Limited Driving Privilege. — A person who is convicted of violating subsection (a) of this section and whose drivers license is revoked solely based on that conviction may apply for a limited driving privilege as provided in G.S. 20-179.3. This subsection shall apply only if the person meets both of the following requirements:

(1) Is 18, 19, or 20 years old on the date of the offense.

(2) Has not previously been convicted of a violation of this section.

The judge may issue the limited driving privilege only if the person meets the eligibility requirements of G.S. 20-179.3, other than the requirement in G.S. 20-179.3(b) (1)c. G.S. 20-179.3(e) shall not apply. All other terms, conditions, and restrictions provided for in G.S. 20-179.3 shall apply. G.S. 20-179.3, rather than this subsection, governs the issuance of a limited driving privilege to a person who is convicted of violating subsection (a) of this section and of driving while impaired as a result of the same transaction. (1983, c. 435, s. 34; 1985 (Reg. Sess., 1986), c. 852, s. 11; 1993, c. 539, s. 364; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 506, s. 6; 1997-379, ss. 4, 5.2; 2000-140, s. 7; 2000-155, s. 18.)

Effect of Amendments. — Session Laws 2000-140, s. 7, effective July 21, 2000, and Session Laws 2000-155, s. 18, effective September 1, 2000, both substituted "Commission for Health Services" for "Commission on Health Services" in subsection (b2).

CASE NOTES

Construction with Other Law. — The defendant's prior alcohol-related conviction pursuant to this section was relevant, because the impaired defendant caused a death and was charged with second-degree murder, and was admissible for the purpose of establishing malice, even though the prior offense imposed strict liability based upon defendant's age without regard to the quantity consumed. State v. Gray, — N.C. App. —, 528 S.E.2d 46, 2000 N.C. App. LEXIS 324 (2000).

§ 20-138.5. Habitual impaired driving.

Legal Periodicals. —

For comment, "North Carolina's Unconstitutional Expansion of an Ancient Maxim: Using DWI Fatalitites to Satisfy First Degree Felony Murder," see 22 Campbell L. Rev. 169 (1999).

For note, "Ramifications of the 1997 DWI/Felony Prior Record Level Amendment to the Structured Sentencing Act: State of North Carolina v. Tanya Watts Gentry," see 22 Campbell L. Rev. 211 (1999).

CASE NOTES

Section 20-25 creates no right to appeal a revocation under this section since this section appears in Article 3 rather than Article 2. Following a conviction for habitual impaired driving, under this section, permanent revocation is mandatory and the trial court lacks the authority to provide relief. Cooke v. Faulkner, — N.C. App. —, 529 S.E.2d 512, 2000 N.C. App. LEXIS 496 (2000).

Determination of Prior Record Level. — Trial court impermissibly assigned points to defendant's three prior DWI convictions where

those same three DWI convictions were the basis for her habitual DWI charge. State v. Gentry, 135 N.C. App. 107, 519 S.E.2d 68 (1999).

§ 20-138.7. (Effective until September 30, 2002) Transporting an open container of alcoholic beverage.

(a) Offense. — No person shall drive a motor vehicle on a highway or the right-of-way of a highway:

(1) While there is an alcoholic beverage in the passenger area in other than the unopened manufacturer's original container; and

(2) While the driver is consuming alcohol or while alcohol remains in the driver's body.

(a1) Offense. — No person shall possess an alcoholic beverage other than in the unopened manufacturer's original container, or consume an alcoholic beverage, in the passenger area of a motor vehicle while the motor vehicle is on a highway or the right-of-way of a highway. For purposes of this subsection, only the person who possesses or consumes an alcoholic beverage in violation of this subsection shall be charged with this offense.

(a2) Exception. — It shall not be a violation of subsection (a1) of this section for a passenger to possess an alcoholic beverage other than in the unopened manufacturer's original container, or for a passenger to consume an alcoholic beverage, if the container is:

(1) In the passenger area of a motor vehicle that is designed, maintained, or used primarily for the transportation of persons for compensation;

(2) In the living quarters of a motor home or house car as defined in G.S. 20-4.01(27)d2.; or

(3) In a house trailer as defined in G.S. 20-4.01(14).

(a3) Meaning of Terms. — Under this section, the term "motor vehicle" means only those types of motor vehicles which North Carolina law requires to be registered, whether the motor vehicle is registered in North Carolina or another jurisdiction.

(b) Subject to Implied-Consent Law. — An offense under this section is an alcohol-related offense subject to the implied-consent provisions of G.S. 20-16.2.

(c) Odor Insufficient. — The odor of an alcoholic beverage on the breath of the driver is insufficient evidence to prove beyond a reasonable doubt that alcohol was remaining in the driver's body in violation of this section, unless the driver was offered an alcohol screening test or chemical analysis and refused to provide all required samples of breath or blood for analysis.

(d) Alcohol Screening Test. — Notwithstanding any other provision of law, an alcohol screening test may be administered to a driver suspected of violating subsection (a) of this section, and the results of an alcohol screening test or the driver's refusal to submit may be used by a law enforcement officer, a court, or an administrative agency in determining if alcohol was present in the driver's body. No alcohol screening tests are valid under this section unless the device used is one approved by the Commission for Health Services, and the screening test is conducted in accordance with the applicable regulations of the Commission as to the manner of its use.

(e) Punishment; Effect When Impaired Driving Offense Also Charged. — Violation of subsection (a) of this section shall be a Class 3 misdemeanor for the first offense and shall be a Class 2 misdemeanor for a second or subsequent offense. Violation of subsection (a) of this section is not a lesser included offense of impaired driving under G.S. 20-138.1, but if a person is convicted under subsection (a) of this section and of an offense involving impaired driving arising out of the same transaction, the punishment imposed by the court shall not exceed the maximum applicable to the offense involving impaired driving,

§ 20-138.7 has a postponed date. See notes.

and any minimum applicable punishment shall be imposed. Violation of subsection (a1) of this section by the driver of the motor vehicle is a lesser-included offense of subsection (a) of this section. A violation of subsection (a) shall be considered a moving violation for purposes of G.S. 20-16(c).

Violation of subsection (a1) of this section shall be an infraction and shall not be considered a moving violation for purposes of G.S. 20-16(c).

(f) Definitions. — If the seal on a container of alcoholic beverages has been broken, it is opened within the meaning of this section. For purposes of this section, "passenger area of a motor vehicle" means the area designed to seat the driver and passengers and any area within the reach of a seated driver or passenger, including the glove compartment. The area of the trunk or the area behind the last upright back seat of a station wagon, hatchback, or similar vehicle shall not be considered part of the passenger area. The term "alcoholic beverage" is as defined in G.S. 18B-101(4).

(g) Pleading. — In any prosecution for a violation of subsection (a) of this section, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant drove a motor vehicle on a highway or the right-of-way of a highway with an open container of alcoholic beverage after drinking.

In any prosecution for a violation of subsection (a1) of this section, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that (i) the defendant possessed an open container of alcoholic beverage in the passenger area of a motor vehicle while the motor vehicle was on a highway or the right-of-way of a highway, or (ii) the defendant consumed an alcoholic beverage in the passenger area of a motor vehicle while the motor vehicle was on a highway or the right-of-way of a highway.

(h) Limited Driving Privilege. — A person who is convicted of violating subsection (a) of this section and whose drivers license is revoked solely based on that conviction may apply for a limited driving privilege as provided for in G.S. 20-179.3. The judge may issue the limited driving privilege only if the driver meets the eligibility requirements of G.S. 20-179.3, other than the requirement in G.S. 20-179.3(b)(1)c. G.S. 20-179.3(e) shall not apply. All other terms, conditions, and restrictions provided for in G.S. 20-179.3 shall apply. G.S. 20-179.3, rather than this subsection, governs the issuance of a limited driving privilege to a person who is convicted of violating subsection (a) of this section and of driving while impaired as a result of the same transaction. (2000-155, s. 4.)

For this section as in effect September 30, 2002, see the main volume.

Editor's Note. — Session Laws 2000-155, s. 21 provides that the amendment to this section by s. 4 of the act is effective September 1, 2000, and expires September 30, 2002.

Effect of Amendments. — Session Laws 2000-155, s. 4, effective September 1, 2000 and expiring September 30, 2002, deleted "after consuming alcohol" following "beverage" in the catchline; substituted "the right-of-way of a highway" for "public vehicular area" in subsection (a); in subdivision (a)(1), inserted "in the passenger area," and deleted "in passenger area" following "container"; added subsections (a1) through (a3); in subsection (e), deleted "punished as" preceding "Class 3" and "Class 2," deleted the former second sentence stating, "A fine imposed for a second or subsequent offense may not exceed one thousand dollars ($1,000)," substituted "subsection (a) of this section" for "this section" three times, added the next- to-last sentence, substituted "subsection (a)" for "this section," and added the last paragraph; and in subsection (g), substituted "subsection (a) of this section" for "this section," substituted "the right-of-way of a highway" for "public vehicular area" and added the last paragraph.

§ 20-139.1. Procedures governing chemical analyses; admissibility; evidentiary provisions; controlled-drinking programs.

(a) Chemical Analysis Admissible. — In any implied-consent offense under G.S. 20-16.2, a person's alcohol concentration or the presence of any other impairing substance in the person's body as shown by a chemical analysis is admissible in evidence. This section does not limit the introduction of other competent evidence as to a person's alcohol concentration or results of other tests showing the presence of an impairing substance, including other chemical tests.

(b) Approval of Valid Test Methods; Licensing Chemical Analysts. — A chemical analysis, to be valid, shall be performed in accordance with the provisions of this section. The chemical analysis shall be performed according to methods approved by the Commission for Health Services by an individual possessing a current permit issued by the Department of Health and Human Services for that type of chemical analysis. The Commission for Health Services may adopt rules approving satisfactory methods or techniques for performing chemical analyses, and the Department of Health and Human Services may ascertain the qualifications and competence of individuals to conduct particular chemical analyses. The Department may issue permits to conduct chemical analyses to individuals it finds qualified subject to periodic renewal, termination, and revocation of the permit in the Department's discretion.

(b1) When Officer May Perform Chemical Analysis. — Except as provided in this subsection, a chemical analysis is not valid in any case in which it is performed by an arresting officer or by a charging officer under the terms of G.S. 20-16.2. A chemical analysis of the breath may be performed by an arresting officer or by a charging officer when both of the following apply:

(1) The officer possesses a current permit issued by the Department of Health and Human Services for the type of chemical analysis.

(2) The officer performs the chemical analysis by using an automated instrument that prints the results of the analysis.

(b2) Breath Analysis Results Inadmissible if Preventive Maintenance Not Performed. — Notwithstanding the provisions of subsection (b), the results of a chemical analysis of a person's breath performed in accordance with this section are not admissible in evidence if:

(1) The defendant objects to the introduction into evidence of the results of the chemical analysis of the defendant's breath; and

(2) The defendant demonstrates that, with respect to the instrument used to analyze the defendant's breath, preventive maintenance procedures required by the regulations of the Commission for Health Services had not been performed within the time limits prescribed by those regulations.

(b3) Sequential Breath Tests Required. — By January 1, 1985, the regulations of the Commission for Health Services governing the administration of chemical analyses of the breath shall require the testing of at least duplicate sequential breath samples. Those regulations must provide:

(1) A specification as to the minimum observation period before collection of the first breath sample and the time requirements as to collection of second and subsequent samples.

(2) That the test results may only be used to prove a person's particular alcohol concentration if:

a. The pair of readings employed are from consecutively administered tests; and

b. The readings do not differ from each other by an alcohol concentration greater than 0.02.

(3) That when a pair of analyses meets the requirements of subdivision (2), only the lower of the two readings may be used by the State as proof of a person's alcohol concentration in any court or administrative proceeding.

A person's refusal to give the sequential breath samples necessary to constitute a valid chemical analysis is a refusal under G.S. 20-16.2(c).

A person's refusal to give the second or subsequent breath sample shall make the result of the first breath sample, or the result of the sample providing the lowest alcohol concentration if more than one breath sample is provided, admissible in any judicial or administrative hearing for any relevant purpose, including the establishment that a person had a particular alcohol concentration for conviction of an offense involving impaired driving.

(b4) Introducing Routine Records Kept as Part of Breath-Testing Program. — In civil and criminal proceedings, any party may introduce, without further authentication, simulator logs and logs for other devices used to verify a breath-testing instrument, certificates and other records concerning the check of ampoules and of simulator stock solution and the stock solution used in any other equilibration device, preventive maintenance records, and other records that are routinely kept concerning the maintenance and operation of breath-testing instruments. In a criminal case, however, this subsection does not authorize the State to introduce records to prove the results of a chemical analysis of the defendant or of any validation test of the instrument that is conducted during that chemical analysis.

(b5) Subsequent Tests Allowed. — A person may be requested, pursuant to G.S. 20-16.2, to submit to a chemical analysis of the person's blood or other bodily fluid or substance in addition to or in lieu of a chemical analysis of the breath, in the discretion of the charging officer. If a subsequent chemical analysis is requested pursuant to this subsection, the person shall again be advised of the implied consent rights in accordance with G.S. 20-16.2(a). A person's willful refusal to submit to a chemical analysis of the blood or other bodily fluid or substance is a willful refusal under G.S. 20-16.2.

(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.

(d) Right to Additional Test. — A person who submits to a chemical analysis may have a qualified person of his own choosing administer an additional chemical test or tests, or have a qualified person withdraw a blood sample for later chemical testing by a qualified person of his own choosing. Any law-enforcement officer having in his charge any person who has submitted to a chemical analysis shall assist the person in contacting someone to administer the additional testing or to withdraw blood, and shall allow access to the person for that purpose. The failure or inability of the person who submitted to a chemical analysis to obtain any additional test or to withdraw blood does not preclude the admission of evidence relating to the chemical analysis.

(e) Recording Results of Chemical Analysis of Breath. — The chemical analyst who administers a test of a person's breath shall record the following information after making any chemical analysis:

(1) The alcohol concentration or concentrations revealed by the chemical analysis.

(2) The time of the collection of the breath sample or samples used in the chemical analysis.

A copy of the record of this information shall be furnished to the person submitting to the chemical analysis, or to his attorney, before any trial or proceeding in which the results of the chemical analysis may be used.

(e1) Use of Chemical Analyst's Affidavit in District Court. — An affidavit by a chemical analyst sworn to and properly executed before an official authorized to administer oaths is admissible in evidence without further authentication in any hearing or trial in the District Court Division of the General Court of Justice with respect to the following matters:

(1) The alcohol concentration or concentrations or the presence or absence of an impairing substance of a person given a chemical analysis and who is involved in the hearing or trial.

(2) The time of the collection of the blood, breath, or other bodily fluid or substance sample or samples for the chemical analysis.

(3) The type of chemical analysis administered and the procedures followed.

(4) The type and status of any permit issued by the Department of Health and Human Services that the analyst held on the date the analyst performed the chemical analysis in question.

(5) If the chemical analysis is performed on a breath-testing instrument for which regulations adopted pursuant to subsection (b) require preventive maintenance, the date the most recent preventive maintenance procedures were performed on the breath-testing instrument used, as shown on the maintenance records for that instrument.

The Department of Health and Human Services shall develop a form for use by chemical analysts in making this affidavit. If any person who submitted to a chemical analysis desires that a chemical analyst personally testify in the hearing or trial in the District Court Division, the person may subpoena the chemical analyst and examine him as if he were an adverse witness.

(f) Evidence of Refusal Admissible. — If any person charged with an implied-consent offense refuses to submit to a chemical analysis, evidence of that refusal is admissible in any criminal action against him for an implied-consent offense under G.S. 20-16.2.

(g) Controlled-Drinking Programs. — The Department of Health and Human Services may adopt rules concerning the ingestion of controlled amounts of alcohol by individuals submitting to chemical testing as a part of scientific, experimental, educational, or demonstration programs. These regulations shall prescribe procedures consistent with controlling federal law governing the acquisition, transportation, possession, storage, administration, and disposition of alcohol intended for use in the programs. Any person in charge of a controlled-drinking program who acquires alcohol under these regulations must keep records accounting for the disposition of all alcohol acquired, and the records must at all reasonable times be available for inspection upon the request of any federal, State, or local law-enforcement officer with jurisdiction over the laws relating to control of alcohol. A controlled-drinking program exclusively using lawfully purchased alcoholic beverages in places in which they may be lawfully possessed, however, need not comply with the record-keeping requirements of the regulations authorized by this subsection. All acts pursuant to the regulations reasonably done in furtherance of bona fide objectives of a controlled-drinking program authorized by the regulations are lawful notwithstanding the provisions of any other general or local statute, regulation, or ordinance controlling alcohol. (1963, c. 966, s. 2; 1967, c. 123; 1969, c. 1074, s. 2; 1971, c. 619, ss. 12, 13; 1973, c. 476, s. 128; c. 1081, s. 2; c. 1331, s. 3; 1975, c. 405; 1979, 2nd Sess., c. 1089; 1981, c. 412, s. 4; c. 747, s. 66; 1983, c. 435, s. 26; 1983 (Reg. Sess., 1984), c. 1101, s. 20; 1989, c. 727, s. 219(2); 1991, c. 689, s. 233.1(b); 1993, c. 285, s. 7; 1997-379, ss. 5.3-5.5; 1997-443, s. 11A.10; 1997-443, s. 11A.123; 1997-456, s. 34(b); 2000-155, s. 8.)

Effect of Amendments. — Session Laws 2000-155, s. 8, effective September 1, 2000, and applicable to offenses committed on or after that date, deleted "willful" preceding "refusal" three times in subsection (b3).

CASE NOTES

I. In General.

I. IN GENERAL.

Sufficient evidence existed to conclude that petitioner refused to give sequential breath samples and that petitioner's conduct constituted a willful refusal under this section, and defendant's contention that the test was not performed according to applicable rules and regulations was irrelevant to the revocation proceedings. Gibson v. Faulkner, 132 N.C. App. 728, 515 S.E.2d 452 (1999), decided prior to the 2000 amendment.

Applied in State v. Summers, 351 N.C. 620, 528 S.E.2d 17 (2000).

§ 20-140. Reckless driving.

(a) Any person who drives any vehicle upon a highway or any public vehicular area carelessly and heedlessly in willful or wanton disregard of the rights or safety of others shall be guilty of reckless driving.

(b) Any person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving.

(c) Repealed by Session Laws 1983, c. 435, s. 23.

(d) Reckless driving as defined in subsections (a) and (b) is a Class 2 misdemeanor.

(e) Repealed by Session Laws 1983, c. 435, s. 23.

(f) A person is guilty of the Class 2 misdemeanor of reckless driving if the person drives a commercial motor vehicle carrying a load that is subject to the permit requirements of G.S. 20-119 upon a highway or any public vehicular area either:

(1) Carelessly and heedlessly in willful or wanton disregard of the rights or safety of others; or

(2) Without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property. (1937, c. 407, s. 102; 1957, c. 1368, s. 1; 1959, c. 1264, s. 8; 1973, c. 1330, s. 3; 1979, c. 903, ss. 7, 8; 1981, c. 412, s. 4; c. 466, s. 7; c. 747, s. 66; 1983, c. 435, s. 23; 1985, c. 764, s. 28; 1985 (Reg. Sess., 1986), c. 852, s. 17; 1993, c. 539, s. 365; 1994, Ex. Sess., c. 24, s. 14(c); 2000-109, s. 7(b).)

Effect of Amendments. — Session Laws 2000-109, s. 7(b), effective July 13, 2000, added subsection (f).

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in In re a Judge, No. 238 Brown, 351 N.C. 601, 527 S.E.2d 651 (2000).

§ 20-140.4. Special provisions for motorcycles and mopeds.

CASE NOTES

Standing to Challenge This Statute. — Respondents, who were not wearing safety helmets of any kind when they were cited, did not fall in the class of persons who might be adversely affected by this statute's alleged vagueness as to the type of helmet motorcyclists ought to wear and, therefore, lacked standing to challenge the statute on constitutional grounds. State v. Barker, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 604 (June 6, 2000).

§ 20-141. Speed restrictions.

(a) No person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing.

(b) Except as otherwise provided in this Chapter, it shall be unlawful to operate a vehicle in excess of the following speeds:

(1) Thirty-five miles per hour inside municipal corporate limits for all vehicles.

(2) Fifty-five miles per hour outside municipal corporate limits for all vehicles except for school buses and school activity buses.

(c) Except while towing another vehicle, or when an advisory safe-speed sign indicates a slower speed, or as otherwise provided by law, it shall be unlawful to operate a passenger vehicle upon the interstate and primary highway system at less than the following speeds:

(1) Forty miles per hour in a speed zone of 55 miles per hour.

(2) Forty-five miles per hour in a speed zone of 60 miles per hour or greater.

These minimum speeds shall be effective only when appropriate signs are posted indicating the minimum speed.

(d)(1) Whenever the Department of Transportation determines on the basis of an engineering and traffic investigation that any speed allowed by subsection (b) is greater than is reasonable and safe under the conditions found to exist upon any part of a highway outside the corporate limits of a municipality or upon any part of a highway designated as part of the Interstate Highway System or any part of a controlled-access highway (either inside or outside the corporate limits of a municipality), the Department of Transportation shall determine and declare a reasonable and safe speed limit.

(2) Whenever the Department of Transportation determines on the basis of an engineering and traffic investigation that a higher maximum speed than those set forth in subsection (b) is reasonable and safe under the conditions found to exist upon any part of a highway designated as part of the Interstate Highway System or any part of a controlled-access highway (either inside or outside the corporate limits of a municipality) the Department of Transportation shall determine and declare a reasonable and safe speed limit. A speed limit set pursuant to this subsection may not exceed 70 miles per hour.

Speed limits set pursuant to this subsection are not effective until appropriate signs giving notice thereof are erected upon the parts of the highway affected.

(e) Local authorities, in their respective jurisdictions, may authorize by ordinance higher speeds or lower speeds than those set out in subsection (b) upon all streets which are not part of the State highway system; but no speed

so fixed shall authorize a speed in excess of 55 miles per hour. Speed limits set pursuant to this subsection shall be effective when appropriate signs giving notice thereof are erected upon the part of the streets affected.

(e1) Local authorities within their respective jurisdictions may authorize, by ordinance, lower speed limits than those set in subsection (b) of this section on school property. If the lower speed limit is being set on the grounds of a public school, the local school administrative unit must request or consent to the lower speed limit. If the lower speed limit is being set on the grounds of a private school, the governing body of the school must request or consent to the lower speed limit. Speed limits established pursuant to this subsection shall become effective when appropriate signs giving notice of the speed limit are erected upon affected property. A person who drives a motor vehicle on school property at a speed greater than the speed limit set and posted under this subsection is responsible for an infraction and is required to pay a penalty of not less than twenty-five dollars ($25.00).

(f) Whenever local authorities within their respective jurisdictions determine upon the basis of an engineering and traffic investigation that a higher maximum speed than those set forth in subsection (b) is reasonable and safe, or that any speed hereinbefore set forth is greater than is reasonable and safe, under the conditions found to exist upon any part of a street within the corporate limits of a municipality and which street is a part of the State highway system (except those highways designated as part of the interstate highway system or other controlled-access highway) said local authorities shall determine and declare a safe and reasonable speed limit. A speed limit set pursuant to this subsection may not exceed 55 miles per hour. Limits set pursuant to this subsection shall become effective when the Department of Transportation has passed a concurring ordinance and signs are erected giving notice of the authorized speed limit.

The Department of Transportation is authorized to raise or lower the statutory speed limit on all highways on the State highway system within municipalities which do not have a governing body to enact municipal ordinances as provided by law. The Department of Transportation shall determine a reasonable and safe speed limit in the same manner as is provided in G.S. 20-141(d)(1) and G.S. 20-141(d)(2) for changing the speed limits outside of municipalities, without action of the municipality.

(g) Whenever the Department of Transportation or local authorities within their respective jurisdictions determine on the basis of an engineering and traffic investigation that slow speeds on any part of a highway considerably impede the normal and reasonable movement of traffic, the Department of Transportation or such local authority may determine and declare a minimum speed below which no person shall operate a motor vehicle except when necessary for safe operation in compliance with law. Such minimum speed limit shall be effective when appropriate signs giving notice thereof are erected on said part of the highway. Provided, such minimum speed limit shall be effective as to those highways and streets within the corporate limits of a municipality which are on the State highway system only when ordinances adopting the minimum speed limit are passed and concurred in by both the Department of Transportation and the local authorities. The provisions of this subsection shall not apply to farm tractors and other motor vehicles operating at reasonable speeds for the type and nature of such vehicles.

(h) No person shall operate a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law; provided, this provision shall not apply to farm tractors and other motor vehicles operating at reasonable speeds for the type and nature of such vehicles.

(i) The Department of Transportation shall have authority to designate and appropriately mark certain highways of the State as truck routes.

(j) Repealed by Session Laws 1997, c. 443, s. 19.26(b).

(j1) A person who drives a vehicle on a highway at a speed that is either more than 15 miles per hour more than the speed limit established by law for the highway where the offense occurred or over 80 miles per hour is guilty of a Class 2 misdemeanor.

(j2) A person who drives a motor vehicle in a highway work zone at a speed greater than the speed limit set and posted under this section shall be required to pay a penalty of two hundred fifty dollars ($250.00). This penalty shall be imposed in addition to those penalties established in this Chapter. A "highway work zone" is the area between the first sign that informs motorists of the existence of a work zone on a highway and the last sign that informs motorists of the end of the work zone. This subsection applies only if a sign posted at the beginning of the highway work zone states the penalty for speeding in the work zone. The Secretary shall ensure that work zones shall only be posted with penalty signs if the Secretary determines, after engineering review, that the posting is necessary to ensure the safety of the traveling public due to a hazardous condition.

A law enforcement officer issuing a citation for a violation of this section while in a highway work zone shall indicate the vehicle speed and speed limit posted in the work zone. Upon an individual's conviction of a violation of this section while in a highway work zone, the clerk of court shall report that the vehicle was in a work zone at the time of the violation, the vehicle speed, and the speed limit of the work zone to the Division of Motor Vehicles.

(j3) A person is guilty of a Class 2 misdemeanor if the person drives a commercial motor vehicle carrying a load that is subject to the permit requirements of G.S. 20-119 upon a highway or any public vehicular area at a speed in excess of 15 miles per hour above either:

(1) The posted speed; or

(2) The restricted speed, if any, of the permit, or if no permit was obtained, the speed that would be applicable to the load if a permit had been obtained.

(k) Repealed by Session Laws 1995 (Regular Session, 1996), c. 652, s. 1.

(*l*) Notwithstanding any other provision contained in G.S. 20-141 or any other statute or law of this State, including municipal charters, any speed limit on any portion of the public highways within the jurisdiction of this State shall be uniformly applicable to all types of motor vehicles using such portion of the highway, if on November 1, 1973, such portion of the highway had a speed limit which was uniformly applicable to all types of motor vehicles using it. Provided, however, that a lower speed limit may be established for any vehicle operating under a special permit because of any weight or dimension of such vehicle, including any load thereon. The requirement for a uniform speed limit hereunder shall not apply to any portion of the highway during such time as the condition of the highway, weather, an accident, or other condition creates a temporary hazard to the safety of traffic on such portion of the highway.

(m) The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the operator of a vehicle from the duty to decrease speed as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway, and to avoid injury to any person or property.

(n) Notwithstanding any other provision contained in G.S. 20-141 or any other statute or law of this State, the failure of a motorist to stop his vehicle within the radius of its headlights or the range of his vision shall not be held negligence per se or contributory negligence per se. (1937, c. 297, s. 2; c. 407, s. 103; 1939, c. 275; 1941, c. 347; 1947, c. 1067, s. 17; 1949, c. 947, s. 1; 1953, c. 1145; 1955, c. 398; c. 555, ss. 1, 2; c. 1042; 1957, c. 65, s. 11; c. 214; 1959, c.

640; c. 1264, s. 10; 1961, cc. 99, 1147; 1963, cc. 134, 456, 949; 1967, c. 106; 1971, c. 79, ss. 1-3; 1973, c. 507, s. 5; c. 1330, s. 7; 1975, c. 225; 1977, c. 367; c. 464, s. 34; c. 470; 1983, c. 131; 1985, c. 764, ss. 29, 30; 1985 (Reg. Sess., 1986), c. 852, s. 17; 1987, c. 164; 1991 (Reg. Sess., 1992), c. 818, s. 1; c. 1034, s. 1; 1993, c. 539, ss. 366, 367; 1994, Ex. Sess., c. 24, s. 14(c); 1995 (Reg. Sess., 1996), c. 652, s. 1; 1997-341, s. 1; 1997-443, s. 19.26(b); 1997-488, s. 1; 1999-330, s. 3; 2000-109, s. 7(c).)

Effect of Amendments. —
Session Laws 2000-109, s. 7(c), effective July 13, 2000, added subsection (j3).

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in State v. McClendon, 350 N.C. 630, 517 S.E.2d 128 (1999).

OPINIONS OF ATTORNEY GENERAL

Operating military tactical vehicles at slow speeds does not violate the North Carolina Motor Vehicle Code. See opinion of Attorney General to Colonel Kenneth C. Sallenger, Command Logistics Officer, North Carolina National Guard, 1999 N.C.A.G. 4 (1/21/99).

§ 20-141.4. Felony and misdemeanor death by vehicle.

CASE NOTES

Felony murder rule may be used in automobile cases where an underlying felony is committed, even though the General Assembly has enacted the more specific statutes of felony death by vehicle and misdemeanor death by vehicle. State v. Jones, 133 N.C. App. 448, 516 S.E.2d 405 (1999).

§ 20-142.1. Obedience to railroad signal.

CASE NOTES

Contributory Negligence. — Decedent's own negligence contributed to his injuries and barred recovery on plaintiff's negligence claim where the evidence showed that engineer signaled train's approach, that plaintiff failed to explain what prevented decedent from hearing warning bell and horn, and that decedent also failed to stop within 50 feet of the crossing to determine whether it was safe to proceed. Parchment v. Garner, 135 N.C. App. 312, 520 S.E.2d 100 (1999).

§ 20-145. When speed limit not applicable.

CASE NOTES

Gross or Wanton Negligence. —
Summary judgment was proper where plaintiff failed to demonstrate the existence of a genuine issue of material fact as to gross negligence on the part of the officers who attempted to apprehend a motorist suspected of driving while intoxicated and where the actions of the officers were otherwise exempt under this section. Norris v. Zambito, 135 N.C. App. 288, 520 S.E.2d 113 (1999).

§ 20-152. Following too closely.

CASE NOTES

Cited in State v. McClendon, 350 N.C. 630, 517 S.E.2d 128 (1999).

§ 20-155. Right-of-way.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in Cucina v. City of Jacksonville, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 310 (2000); Cucina v. City of Jacksonville, — N.C. App. —, 530 S.E.2d 353, 2000 N.C. App. LEXIS 547 (2000).

Part 12. Sentencing; Penalties.

§ 20-179. Sentencing hearing after conviction for impaired driving; determination of grossly aggravating and aggravating and mitigating factors; punishments.

CASE NOTES

Conviction of a Similar Offense in Another Jurisdiction. — Although the definitions of "impairment" under North Carolina and New York laws are not identical and the statutes do not "mirror" one another, they are "substantially equivalent"; consequently, the trial court did not err in determining that defendant's prior conviction under New York law was a grossly aggravating factor in sentencing him under North Carolina law. State v. Parisi, 135 N.C. App. 222, 519 S.E.2d 531 (1999).

§ 20-179.3. Limited driving privilege.

(a) Definition of Limited Driving Privilege. — A limited driving privilege is a judgment issued in the discretion of a court for good cause shown authorizing a person with a revoked driver's license to drive for essential purposes related to any of the following:

(1) His employment.
(2) The maintenance of his household.
(3) His education.
(4) His court-ordered treatment or assessment.
(5) Community service ordered as a condition of the person's probation.
(6) Emergency medical care.

(b) Eligibility. —

(1) A person convicted of the offense of impaired driving under G.S. 20-138.1 is eligible for a limited driving privilege if:
   a. At the time of the offense he held either a valid driver's license or a license that had been expired for less than one year;
   b. At the time of the offense he had not within the preceding seven years been convicted of an offense involving impaired driving;
   c. Punishment Level Three, Four, or Five was imposed for the offense of impaired driving;

d. Subsequent to the offense he has not been convicted of, or had an unresolved charge lodged against him for, an offense involving impaired driving; and

e. The person has obtained and filed with the court a substance abuse assessment of the type required by G.S. 20-17.6 for the restoration of a drivers license.

A person whose North Carolina driver's license is revoked because of a conviction in another jurisdiction substantially similar to impaired driving under G.S. 20-138.1 is eligible for a limited driving privilege if he would be eligible for it had the conviction occurred in North Carolina. Eligibility for a limited driving privilege following a revocation under G.S. 20-16.2(d) is governed by G.S. 20-16.2(e1).

(2) Any person whose licensing privileges are forfeited pursuant to G.S. 15A-1331A is eligible for a limited driving privilege if the court finds that at the time of the forfeiture, the person held either a valid drivers license or a drivers license that had been expired for less than one year and

a. The person is supporting existing dependents or must have a drivers license to be gainfully employed; or

b. The person has an existing dependent who requires serious medical treatment and the defendant is the only person able to provide transportation to the dependent to the health care facility where the dependent can receive the needed medical treatment.

The limited driving privilege granted under this subdivision must restrict the person to essential driving related to the purposes listed above, and any driving that is not related to those purposes is unlawful even though done at times and upon routes that may be authorized by the privilege.

(c) Privilege Not Effective until after Compliance with Court-Ordered Revocation. — A person convicted of an impaired driving offense may apply for a limited driving privilege at the time the judgment is entered. If the judgment does not require the person to complete a period of nonoperation pursuant to G.S. 20-179, the privilege may be issued at the time the judgment is issued. If the judgment requires the person to complete a period of nonoperation pursuant to G.S. 20-179, the limited driving privilege may not be effective until the person successfully completes that period of nonoperation. A person whose license is revoked because of a conviction in another jurisdiction substantially similar to impaired driving under G.S. 20-138.1 may apply for a limited driving privilege only after having completed at least 60 days of a court-imposed term of nonoperation of a motor vehicle, if the court in the other jurisdiction imposed such a term of nonoperation.

(d) Application for and Scheduling of Subsequent Hearing. — The application for a limited driving privilege made at any time after the day of sentencing must be filed with the clerk in duplicate, and no hearing scheduled may be held until a reasonable time after the clerk files a copy of the application with the district attorney's office. The hearing must be scheduled before:

(1) The presiding judge at the applicant's trial if that judge is assigned to a court 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, in which the conviction for impaired driving was imposed.

(2) The senior regular resident superior court judge of the superior court district or set of districts as defined in G.S. 7A-41.1 in which the conviction for impaired driving was imposed, if the presiding judge is not available within the district and the conviction was imposed in superior court.

(3) The chief district court judge of the district court district as defined in G.S. 7A-133 in which the conviction for impaired driving was imposed, if the presiding judge is not available within the district and the conviction was imposed in district court.

If the applicant was convicted of an offense in another jurisdiction, the hearing must be scheduled before the chief district court judge of the district court district as defined in G.S. 7A-133 in which he resides. G.S. 20-16.2(e1) governs the judge before whom a hearing is scheduled if the revocation was under G.S. 20-16.2(d). The hearing may be scheduled in any county within 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.

(e) Limited Basis for and Effect of Privilege. — A limited driving privilege issued under this section authorizes a person to drive if his license is revoked solely under G.S. 20-17(2) or as a result of a conviction in another jurisdiction substantially similar to impaired driving under G.S. 20-138.1; if the person's license is revoked under any other statute, the limited driving privilege is invalid.

(f) Overall Provisions on Use of Privilege. — Every limited driving privilege must restrict the applicant to essential driving related to the purposes listed in subsection (a), and any driving that is not related to those purposes is unlawful even though done at times and upon routes that may be authorized by the privilege. If the privilege is granted, driving related to emergency medical care is authorized at any time and without restriction as to routes, but all other driving must be for a purpose and done within the restrictions specified in the privilege.

(f1) Definition of "Standard Working Hours". — Under this section, "standard working hours" are 6:00 A.M. to 8:00 P.M. on Monday through Friday.

(g) Driving for Work-Related Purposes in Standard Working Hours. — In a limited driving privilege, the court may authorize driving for work-related purposes during standard working hours without specifying the times and routes in which the driving must occur. If the applicant is not required to drive for essential work-related purposes except during standard working hours, the limited driving privilege must prohibit driving during nonstandard working hours unless the driving is for emergency medical care or is authorized by subsection (g2). The limited driving privilege must state the name and address of the applicant's place of work or employer, and may include other information and restrictions applicable to work-related driving in the discretion of the court.

(g1) Driving for Work-Related Purposes in Nonstandard Hours. — If the applicant is required to drive during nonstandard working hours for an essential work-related purpose, he must present documentation of that fact before the judge may authorize him to drive for this purpose during those hours. If the applicant is self-employed, the documentation must be attached to or made a part of the limited driving privilege. If the judge determines that it is necessary for the applicant to drive during nonstandard hours for a work-related purpose, he may authorize the applicant to drive subject to these limitations:

(1) If the applicant is required to drive to and from a specific place of work at regular times, the limited driving privilege must specify the general times and routes in which the applicant will be driving to and from work, and restrict driving to those times and routes.

(2) If the applicant is required to drive to and from work at a specific place, but is unable to specify the times at which that driving will occur, the limited driving privilege must specify the general routes in which the applicant will be driving to and from work, and restrict the driving to those general routes.

(3) If the applicant is required to drive to and from work at regular times but is unable to specify the places at which work is to be performed, the limited driving privilege must specify the general times and geographic boundaries in which the applicant will be driving, and restrict driving to those times and within those boundaries.

(4) If the applicant can specify neither the times nor places in which he will be driving to and from work, or if he is required to drive during these nonstandard working hours as a condition of employment, the limited driving privilege must specify the geographic boundaries in which he will drive and restrict driving to that within those boundaries.

The limited driving privilege must state the name and address of the applicant's place of work or employer, and may include other information and restrictions applicable to work-related driving, in the discretion of the court.

(g2) Driving for Other than Work-Related Purposes. — A limited driving privilege may not allow driving for maintenance of the household except during standard working hours, and the limited driving privilege may contain any additional restrictions on that driving, in the discretion of the court. The limited driving privilege must authorize driving essential to the completion of any community work assignments, course of instruction at an Alcohol and Drug Education Traffic School, or substance abuse assessment or treatment, to which the applicant is ordered by the court as a condition of probation for the impaired driving conviction. If this driving will occur during nonstandard working hours, the limited driving privilege must specify the same limitations required by subsection (g1) for work-related driving during those hours, and it must include or have attached to it the name and address of the Alcohol and Drug Education Traffic School, the community service coordinator, or mental health treatment facility to which the applicant is assigned. Driving for educational purposes other than the course of instruction at an Alcohol and Drug Education Traffic School is subject to the same limitations applicable to work related driving under subsections (g) and (g1).

(g3) Ignition Interlock Allowed. — A judge may include all of the following in a limited driving privilege order:

(1) A restriction that the applicant may operate only a designated motor vehicle.

(2) A requirement that the designated motor vehicle be equipped with a functioning ignition interlock system of a type approved by the Commissioner. The Commissioner shall not unreasonably withhold approval of an ignition interlock system and shall consult with the Division of Purchase and Contract in the Department of Administration to ensure that potential vendors are not discriminated against.

(3) A requirement that the applicant personally activate the ignition interlock system before driving the motor vehicle.

(g4) The restrictions set forth in subsection (g3) and (g5) of this section do not apply to a motor vehicle that meets all of the following requirements:

(1) Is owned by the applicant's employer.

(2) Is operated by the applicant solely for work-related purposes.

(3) Its owner has filed with the court a written document authorizing the applicant to drive the vehicle, for work-related purposes, under the authority of a limited driving privilege.

(g5) Ignition Interlock Required. — If a person's drivers license is revoked for a conviction of G.S. 20-138.1, and the person had an alcohol concentration of 0.16 or more, a judge shall include all of the following in a limited driving privilege order:

(1) A restriction that the applicant may operate only a designated motor vehicle.

(2) A requirement that the designated motor vehicle be equipped with a functioning ignition interlock system of a type approved by the Commissioner, which is set to prohibit driving with an alcohol concentration of greater than 0.00. The Commissioner shall not unreasonably withhold approval of an ignition interlock system and shall consult with the Division of Purchase and Contract in the Department of Administration to ensure that potential vendors are not discriminated against.

(3) A requirement that the applicant personally activate the ignition interlock system before driving the motor vehicle.

(h) Other Mandatory and Permissive Conditions or Restrictions. — In all limited driving privileges the judge shall also include a restriction that the applicant not consume alcohol while driving or drive at any time while he has remaining in his body any alcohol or controlled substance previously consumed, unless the controlled substance was lawfully obtained and taken in therapeutically appropriate amounts. The judge may impose any other reasonable restrictions or conditions necessary to achieve the purposes of this section.

(i) Modification or Revocation of Privilege. — A judge who issues a limited driving privilege is authorized to modify or revoke the limited driving privilege upon a showing that the circumstances have changed sufficiently to justify modification or revocation. If the judge who issued the privilege is not presiding in the court in which the privilege was issued, a presiding judge in that court may modify or revoke a privilege in accordance with this subsection. The judge must indicate in the order of modification or revocation the reasons for the order, or he must make specific findings indicating the reason for the order and those findings must be entered in the record of the case.

(j) Effect of Violation of Restriction. — A holder of a limited driving privilege who violates any of its restrictions commits the offense of driving while his license is revoked under G.S. 20-28(a) and is subject to punishment and license revocation as provided in that section. If a law-enforcement officer has reasonable grounds to believe that the holder of a limited driving privilege has consumed alcohol while driving or has driven while he has remaining in his body any alcohol previously consumed, the suspected offense of driving while license is revoked is an alcohol-related offense subject to the implied-consent provisions of G.S. 20-16.2. If a holder of a limited driving privilege is charged with driving while license revoked by violating a restriction contained in his limited driving privilege, and a judicial official determines that there is probable cause for the charge, the limited driving privilege is suspended pending the resolution of the case, and the judicial official must require the holder to surrender the limited driving privilege. The judicial official must also notify the holder that he is not entitled to drive until his case is resolved.

Notwithstanding any other provision of law, an alcohol screening test may be administered to a driver suspected of violating this section, and the results of an alcohol screening test or the driver's refusal to submit may be used by a law enforcement officer, a court, or an administrative agency in determining if alcohol was present in the driver's body. No alcohol screening tests are valid under this section unless the device used is one approved by the Commission for Health Services, and the screening test is conducted in accordance with the applicable regulations of the Commission as to the manner of its use.

(k) Copy of Limited Driving Privilege to Division; Action Taken if Privilege Invalid. — The clerk of court or the child support enforcement agency must send a copy of any limited driving privilege issued in the county to the Division. A limited driving privilege that is not authorized by this section, G.S. 20-16.2(e1), 20-16.1, 50-13.12, or 110-142.2, or that does not contain the limitations required by law, is invalid. If the limited driving privilege is invalid

on its face, the Division must immediately notify the court and the holder of the privilege that it considers the privilege void and that the Division records will not indicate that the holder has a limited driving privilege.

(*l*) Any judge granting limited driving privileges under this section shall, prior to granting such privileges, be furnished proof and be satisfied that the person being granted such privileges is financially responsible. Proof of financial responsibility shall be in one of the following forms:

(1) A written certificate or electronically-transmitted facsimile thereof from any insurance carrier duly authorized to do business in this State certifying that there is in effect a nonfleet private passenger motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. The certificate or facsimile shall state the effective date and expiration date of the nonfleet private passenger motor vehicle liability policy and shall state the date that the certificate or facsimile is issued. The certificate or facsimile shall remain effective proof of financial responsibility for a period of 30 consecutive days following the date the certificate or facsimile is issued but shall not in and of itself constitute a binder or policy of insurance or

(2) A binder for or policy of nonfleet private passenger motor vehicle liability insurance under which the applicant is insured, provided that the binder or policy states the effective date and expiration date of the nonfleet private passenger motor vehicle liability policy.

The preceding provisions of this subsection do not apply to applicants who do not own currently registered motor vehicles and who do not operate nonfleet private passenger motor vehicles that are owned by other persons and that are not insured under commercial motor vehicle liability insurance policies. In such cases, the applicant shall sign a written certificate to that effect. Such certificate shall be furnished by the Division. Any material misrepresentation made by such person on such certificate shall be grounds for suspension of that person's license for a period of 90 days.

For the purpose of this subsection "nonfleet private passenger motor vehicle" has the definition ascribed to it in Article 40 of General Statute Chapter 58.

The Commissioner may require that certificates required by this subsection be on a form approved by the Commissioner. Such granting of limited driving privileges shall be conditioned upon the maintenance of such financial responsibility during the period of the limited driving privilege. Nothing in this subsection precludes any person from showing proof of financial responsibility in any other manner authorized by Articles 9A and 13 of this Chapter. (1983, c. 435, s. 31; 1983 (Reg. Sess., 1984), c. 1101, ss. 30-33; 1985, c. 706, s. 2; 1987, c. 869, s. 13; 1987 (Reg. Sess., 1988), c. 1037, s. 78; 1989, c. 436, s. 6; 1994, Ex. Sess., c. 20, s. 3; 1995, c. 506, ss. 1, 2; c. 538, s. 2(h); 1995 (Reg. Sess., 1996), c. 756, s. 31; 1997-379, s. 5.6; 1999-406, ss. 4-6; 2000-155, ss. 7, 11-13.)

Effect of Amendments. —

Session Laws 2000-155, ss. 7, and 11-13, effective September 1, 2000, and applicable to offenses committed on or after that date, substituted "similar to impaired driving" for "equivalent to impaired driving" in subdivision (b)(1), and in subsections (c) and (e); and inserted "which is set to prohibit driving with an alcohol concentration of greater than 0.00" in subdivision (g5)(2).

§ 20-183. Duties and powers of law-enforcement officers; warning by local officers before stopping another vehicle on highway; warning tickets.

CASE NOTES

Cited in State v. McClendon, 350 N.C. 630, 517 S.E.2d 128 (1999).

Article 3A.

Safety and Emissions Inspection Program.

Part 2. Safety and Emissions Inspections of Certain Vehicles.

§ 20-183.2. Description of vehicles subject to safety or emissions inspection; definitions.

(a) Safety. — A motor vehicle is subject to a safety inspection in accordance with this Part if it meets all of the following requirements:

(1) It is subject to registration with the Division under Article 3 of this Chapter.

(2) It is not subject to inspection under 49 C.F.R. Part 396, the federal Motor Carrier Safety Regulations.

(3) It is not a trailer whose gross weight is less than 4,000 pounds or a house trailer.

(b) **(Effective until July 1, 2002)** Emissions. — A motor vehicle is subject to an emissions inspection in accordance with this Part if it meets all of the following requirements:

(1) It is subject to registration with the Division under Article 3 of this Chapter.

(2) It is not a trailer whose gross weight is less than 4,000 pounds, a house trailer, or a motorcycle.

(3) It is a 1975 or later model.

(4) Repealed by Session Laws 1999-328, s. 3.11, effective July 21, 1999.

(5) It meets any of the following descriptions:

a. It is required to be registered in an emissions county.

b. It is part of a fleet that is operated primarily in an emissions county.

c. It is offered for rent in an emissions county.

d. It is a used vehicle offered for sale by a dealer in an emissions county.

e. It is operated on a federal installation located in an emissions county and it is not a tactical military vehicle. Vehicles operated on a federal installation include those that are owned or leased by employees of the installation and are used to commute to the installation and those owned or operated by the federal agency that conducts business at the installation.

f. It is otherwise required by 40 C.F.R. Part 51 to be subject to an emissions inspection.

(6) It is not licensed at the farmer rate under G.S. 20-88(b).

(b) **(Effective July 1, 2002 until July 1, 2003)** Emissions. — A motor vehicle is subject to an emissions inspection in accordance with this Part if it meets all of the following requirements:

§ 20-183.2(b) is set out three times. See notes.

(1) It is subject to registration with the Division under Article 3 of this Chapter.
(2) It is not a trailer whose gross weight is less than 4,000 pounds, a house trailer, or a motorcycle.
(3) It is a 1975 or later model.
(4) Repealed by Session Laws 1999-328, s. 3.11, effective July 21, 1999.
(5) It meets any of the following descriptions:
a. It is required to be registered in an emissions county.
b. It is part of a fleet that is operated primarily in an emissions county.
c. It is offered for rent in an emissions county.
d. It is a used vehicle offered for sale by a dealer in an emissions county.
e. It is operated on a federal installation located in an emissions county and it is not a tactical military vehicle. Vehicles operated on a federal installation include those that are owned or leased by employees of the installation and are used to commute to the installation and those owned or operated by the federal agency that conducts business at the installation.
f. It is otherwise required by 40 C.F.R. Part 51 to be subject to an emissions inspection.
(6) It is not licensed at the farmer rate under G.S. 20-88(b).
(7) It is not a new motor vehicle, as defined in G.S. 20-286(10)a. and has been a used motor vehicle, as defined in G.S. 20-286(10)b., for 12 months or more. However, a motor vehicle that has been leased or rented, or offered for lease or rent, is subject to an emissions inspection when it either:
a. Has been leased or rented, or offered for lease or rent, for 12 months or more.
b. Is sold to a consumer-purchaser.

(b) **(Effective July 1, 2003. See notes.)** Emissions. — A motor vehicle is subject to an emissions inspection in accordance with this Part if it meets all of the following requirements:
(1) It is subject to registration with the Division under Article 3 of this Chapter.
(2) It is not a trailer whose gross weight is less than 4,000 pounds, a house trailer, or a motorcycle.
(3) Except as provided in G.S. 20-183.3(b), it is a 1996 or later model.
(4) Repealed by Session Laws 1999-328, s. 3.11, effective July 21, 1999.
(5) It meets any of the following descriptions:
a. It is required to be registered in an emissions county.
b. It is part of a fleet that is operated primarily in an emissions county.
c. It is offered for rent in an emissions county.
d. It is a used vehicle offered for sale by a dealer in an emissions county.
e. It is operated on a federal installation located in an emissions county and it is not a tactical military vehicle. Vehicles operated on a federal installation include those that are owned or leased by employees of the installation and are used to commute to the installation and those owned or operated by the federal agency that conducts business at the installation.
f. It is otherwise required by 40 C.F.R. Part 51 to be subject to an emissions inspection.

§ 20-183.2(b) is set out three times. See notes.

(6) It is not licensed at the farmer rate under G.S. 20-88(b).

(7) It is not a new motor vehicle, as defined in G.S. 20-286(10)a. and has been a used motor vehicle, as defined in G.S. 20-286(10)b., for 12 months or more. However, a motor vehicle that has been leased or rented, or offered for lease or rent, is subject to an emissions inspection when it either:

a. Has been leased or rented, or offered for lease or rent, for 12 months or more.

b. Is sold to a consumer-purchaser.

(c) Definitions. — The following definitions apply in this Part:

(1) Emissions county. — A county listed in G.S. 143-215.107A(c) or designated by the Environmental Management Commission pursuant to G.S. 143-215.107A(d) and certified to the Commissioner of Motor Vehicles as a county in which the implementation of a motor vehicle emissions inspection program will improve ambient air quality.

(2) Federal installation. — An installation that is owned by, leased to, or otherwise regularly used as the place of business of a federal agency. (1965, c. 734, s. 1; 1967, c. 692, s. 1; 1969, c. 179, s. 2; cc. 219, 386; 1973, c. 679, s. 2; 1975, c. 683; c. 716, s. 5; 1979, c. 77; 1989, c. 467; 1991, c. 394, s. 1; c. 761, s. 7; 1993 (Reg. Sess., 1994), c. 754, s. 1; 1995, c. 163, s. 10; 1997-29, s. 12; 1999-328, s. 3.11; 2000-134, ss. 7, 7.1, 9.)

Subsection (b) Set Out Three Times. — The first version of subsection (b) set out above is effective until July 1, 2002. The second version of subsection (b) set out above is effective July 1, 2002 until July 1, 2003. The third version of subsection (b) set out above is effective July 1, 2003. For later amendment to subdivision (b)(3) effective January 1, 2006, see the editor's note.

Editor's Note. —

Session Laws 2000-134, s. 11, amends subdivision (b)(3) effective January 1, 2006, by substituting "It is a 1996 or later model" for "Except as provided in G.S. 20-183.3(b), it is a 1996 or later model." In view of the remoteness of the effective date of this amendment, at the direction of the Revisor of Statutes it has not been set out in the text of the section.

For provisions of Session Laws 2000-134, ss. 20, 21 and 23, relating to emissions inspections in the counties of Cabarrus, Durham, Forsyth, Gaston, Guilford, Mecklenburg, Orange, Union and Wake during the period July 1, 2002 through December 31, 2005, and directing a study of issues related to the costs and fees associated with the motor vehicle safety and emissions inspection and maintenance program, which may also evaluate strategies to ensure an efficient and orderly implementation of the enhanced inspection and maintenance program required by Part III of S.L. 1999-328 and S.L. 2000-134, see the editor's note at § 20-128.

Effect of Amendments. —

Session Laws 2000-134, s. 7, effective July 1, 2000, added subdivision (b)(6).

Session Laws 2000-134, s. 7.1, effective July 1, 2002, added subdivision (b)(7).

Session Laws 2000-134, s. 9, effective July 1, 2003, substituted "Except as provided in G.S. 20-183.3(b), it is a 1996 or later model" for "It is a 1975 or later model" in subdivision (b)(3).

§ 20-183.3. (Effective July 1, 2002 until July 1, 2003) Scope of safety inspection and emissions inspection.

(a) Safety. — A safety inspection of a motor vehicle consists of an inspection of the following equipment to determine if the vehicle has the equipment required by Part 9 of Article 3 of this Chapter and if the equipment is in a safe operating condition:

(1) Brakes, as required by G.S. 20-124.

(2) Lights, as required by G.S. 20-129 or G.S. 20-129.1.

(3) Horn, as required by G.S. 20-125(a).

(4) Steering mechanism, as required by G.S. 20-123.1.

§ 20-183.3 is set out twice. See notes.

(5) Windows and windshield wipers, as required by G.S. 20-127. To determine if a vehicle window meets the window tinting restrictions, a safety inspection mechanic must first determine, based on use of an automotive film check card or knowledge of window tinting techniques, if after-factory tint has been applied to the window. If after-factory tint has been applied, the mechanic must use a light meter approved by the Commissioner to determine if the window meets the window tinting restrictions.
(6) Directional signals, as required by G.S. 20-125.1.
(7) Tires, as required by G.S. 20-122.1.
(8) Mirrors, as required by G.S. 20-126.
(9) Exhaust system and emissions control devices, as required by G.S. 20-128. For a vehicle that is subject to an emissions inspection in addition to a safety inspection, a visual inspection of the vehicle's emissions control devices is included in the emissions inspection rather than the safety inspection.

(b) Emissions. — An emissions inspection of a motor vehicle consists of a visual inspection of the vehicle's emissions control devices to determine if the devices are present, are properly connected, and are the correct type for the vehicle and, if the vehicle is a 1975 through 1995 model, an analysis of the exhaust emissions of the vehicle to determine if the exhaust emissions meet the standards for the model year of the vehicle set by the Environmental Management Commission or, if the vehicle is a 1996 or later model, an analysis of data provided by the on-board diagnostic (OBD) equipment installed by the vehicle manufacturer to identify any deterioration or malfunction in the operation of the vehicle that violates standards for the model year of the vehicle set by the Environmental Management Commission. To pass an emissions inspection a vehicle must pass both the visual inspection and, if the vehicle is a 1975 through 1995 model, the exhaust emissions analysis or, if the vehicle is a 1996 or later model, the OBD analysis. When an emissions inspection is performed on a vehicle, a safety inspection must be performed on the vehicle as well.

(c) Reinspection After Failure. — The scope of a reinspection of a vehicle that has been repaired after failing an inspection is the same as the original inspection unless the vehicle is presented for reinspection within 30 days of failing the original inspection. If the vehicle is presented for reinspection within this time limit and the inspection the vehicle failed was a safety inspection, the reinspection is limited to an inspection of the equipment that failed the original inspection. If the vehicle is presented for reinspection within this time limit and the inspection the vehicle failed was an emissions inspection, the reinspection is limited to the portion of the inspection the vehicle failed and any other portion of the inspection that would be affected by repairs made to correct the failure. (1965, c. 734, s. 1; 1969, c. 378, s. 2; 1971, c. 455, s. 2; c. 478, ss. 1, 2; 1979, 2nd Sess., c. 1180, s. 3; 1981 (Reg. Sess., 1982), c. 1261, s. 1; 1989, c. 391, s. 2; 1991, c. 654, s. 2; 1993 (Reg. Sess., 1994), c. 754, s. 1; 1995, c. 473, s. 2; 2000-134, s. 8.)

Section Set Out Twice. — The section above is effective July 1, 2002 until July 1, 2003. For the section as in effect until July 1, 2002, see the main volume. For the section as amended effective July 1, 2003, see the following section, also numbered § 20-183.3.

Editor's Note. — For provisions of Session Laws 2000-134, ss. 20, 21 and 23, relating to emissions inspections in the counties of Cabarrus, Durham, Forsyth, Gaston, Guilford, Mecklenburg, Orange, Union and Wake during the period July 1, 2002 through December 31, 2005, and directing a study of issues related to the costs and fees associated with the motor vehicle safety and emissions inspection and maintenance program, which may also evalu-

ate strategies to ensure an efficient and orderly implementation of the enhanced inspection and maintenance program required by Part III of S.L. 1999-328 and S.L. 2000-134, see the editor's note at § 20-128.

Effect of Amendments. — Session Laws 2000-134, s. 8, effective July 1, 2002, in subdivision (a)(9), inserted "and emissions control devices" and substituted "emissions control" for "emission control"; and in the first sentence in subsection (b), substituted the second instance of "emissions" for "emission," twice inserted "if the vehicle is a 1975 through 1995 model," added the language following "Environmental Management Commission" at the end of the first sentence, and added "or, if the vehicle is a 1996 or later model, the OBD analysis" at the end of the second sentence.

§ 20-183.3. (Effective July 1, 2003. See notes.) Scope of safety inspection and emissions inspection.

(a) Safety. — A safety inspection of a motor vehicle consists of an inspection of the following equipment to determine if the vehicle has the equipment required by Part 9 of Article 3 of this Chapter and if the equipment is in a safe operating condition:

(1) Brakes, as required by G.S. 20-124.
(2) Lights, as required by G.S. 20-129 or G.S. 20-129.1.
(3) Horn, as required by G.S. 20-125(a).
(4) Steering mechanism, as required by G.S. 20-123.1.
(5) Windows and windshield wipers, as required by G.S. 20-127. To determine if a vehicle window meets the window tinting restrictions, a safety inspection mechanic must first determine, based on use of an automotive film check card or knowledge of window tinting techniques, if after-factory tint has been applied to the window. If after-factory tint has been applied, the mechanic must use a light meter approved by the Commissioner to determine if the window meets the window tinting restrictions.
(6) Directional signals, as required by G.S. 20-125.1.
(7) Tires, as required by G.S. 20-122.1.
(8) Mirrors, as required by G.S. 20-126.
(9) Exhaust system and emissions control devices, as required by G.S. 20-128. For a vehicle that is subject to an emissions inspection in addition to a safety inspection, a visual inspection of the vehicle's emissions control devices is included in the emissions inspection rather than the safety inspection.

(b) Emissions Inspection Requirements in Certain Counties. — An emissions inspection of a motor vehicle in the Counties of Cabarrus, Durham, Forsyth, Gaston, Guilford, Mecklenburg, Orange, Union, and Wake consists of a visual inspection of the vehicle's emissions control devices to determine if the devices are present, are properly connected, and are the correct type for the vehicle and, if the vehicle is a 1975 through 1995 model, an analysis of the exhaust emissions of the vehicle to determine if the exhaust emissions meet the standards for the model year of the vehicle set by the Environmental Management Commission or, if the vehicle is a 1996 or later model, an analysis of data provided by the on-board diagnostic (OBD) equipment installed by the vehicle manufacturer to identify any deterioration or malfunction in the operation of the vehicle that would cause an increase in the emission of pollutants by the vehicle that violates standards for the model year of the vehicle set by the Environmental Management Commission. To pass an emissions inspection a vehicle must pass both the visual inspection and, if the vehicle is a 1975 through 1995 model, the exhaust emissions analysis or, if the vehicle is a 1996 or later model, the OBD analysis. When an emissions inspection is performed on a vehicle, a safety inspection must be performed on the vehicle as well.

(b1) Emissions. — An emissions inspection of a motor vehicle consists of a visual inspection of the vehicle's emission control devices to determine if the

§ 20-183.3 is set out twice. See notes.

devices are present, are properly connected, and are the correct type for the vehicle and an analysis of data provided by the on-board diagnostic (OBD) equipment installed by the vehicle manufacturer to identify any deterioration or malfunction in the operation of the vehicle that violates standards for the model year of the vehicle set by the Environmental Management Commission. To pass an emissions inspection a vehicle must pass both the visual inspection and the OBD analysis. When an emissions inspection is performed on a vehicle, a safety inspection must be performed on the vehicle as well.

(c) Reinspection After Failure. — The scope of a reinspection of a vehicle that has been repaired after failing an inspection is the same as the original inspection unless the vehicle is presented for reinspection within 30 days of failing the original inspection. If the vehicle is presented for reinspection within this time limit and the inspection the vehicle failed was a safety inspection, the reinspection is limited to an inspection of the equipment that failed the original inspection. If the vehicle is presented for reinspection within this time limit and the inspection the vehicle failed was an emissions inspection, the reinspection is limited to the portion of the inspection the vehicle failed and any other portion of the inspection that would be affected by repairs made to correct the failure. (1965, c. 734, s. 1; 1969, c. 378, s. 2; 1971, c. 455, s. 2; c. 478, ss. 1, 2; 1979, 2nd Sess., c. 1180, s. 3; 1981 (Reg. Sess., 1982), c. 1261, s. 1; 1989, c. 391, s. 2; 1991, c. 654, s. 2; 1993 (Reg. Sess., 1994), c. 754, s. 1; 1995, c. 473, s. 2; 2000-134, ss. 8, 10.)

Section Set Out Twice. — The section above is effective July 1, 2003. For the section as in effect July 1, 2002 until July 1, 2003, see the preceding section, also numbered § 20-183.3. For the section effective until July 1, 2002, see the main volume. For later amendment to this section, effective July 1, 2006, see the editor's note.

Editor's Note. — Session Laws 2000-134, s. 12, amends this section effective January 1, 2006, by repealing subsection (b), pertaining to emissions inspections. In view of the remoteness of the effective date of this amendment, at the direction of the Revisor of Statutes it has not been set out in the text of the section.

For provisions of Session Laws 2000-134, ss. 20, 21 and 23, relating to emissions inspections in the counties of Cabarrus, Durham, Forsyth, Gaston, Guilford, Mecklenburg, Orange, Union and Wake during the period July 1, 2002 through December 31, 2005, and directing a study of issues related to the costs and fees associated with the motor vehicle safety and emissions inspection and maintenance program, which may also evaluate strategies to ensure an efficient and orderly implementation of the enhanced inspection and maintenance program required by Part III of S.L. 1999-328 and S.L. 2000-134, see the editor's note at § 20-128.

§ 20-183.4A. (Effective July 1, 2002 until July 1, 2003) License required to perform emissions inspection; qualifications for license.

(a) License Required. — An emissions inspection must be performed by one of the following methods:

(1) At a station that has an emissions inspection station license issued by the Division and by a mechanic who is employed by the station and has an emissions inspection mechanic license issued by the Division.

(2) At a place of business of a person who has an emissions self-inspector license issued by the Division and by an individual who has an emissions inspection mechanic license.

(b) Station Qualifications. — An applicant for a license as an emissions inspection station must meet all of the following requirements:

(1) Have a license as a safety inspection station.

§ 20-183.4A is set out twice. See notes.

(2) Have an emissions analyzer approved by the Environmental Management Commission, equipment to analyze data provided by the on-board diagnostic (OBD) equipment approved by the Environmental Management Commission, or both.

(3) Have equipment to transfer information on emissions inspections to the Division by electronic means.

(4) Regularly employ at least one mechanic who has an emissions inspection mechanic license.

(c) Mechanic Qualifications. — An applicant for a license as an emissions inspection mechanic must meet all of the following requirements:

(1) Have a license as a safety inspection mechanic.

(2) Have successfully completed an eight-hour course approved by the Division that teaches students about the causes and effects of the air pollution problem; the purpose of the emissions inspection program; the vehicle emission standards established by the United States Environmental Protection Agency; the emission control devices on vehicles; how to conduct an emissions inspection using an emissions analyzer approved by the Environmental Management Commission, equipment to analyze data provided by the on-board diagnostic (OBD) equipment approved by the Environmental Management Commission, or both; and any other topic required by 40 C.F.R. § 51.367 to be included in the course. Successful completion requires a passing score on a written test and on a hands-on test in which the student is required to conduct an emissions inspection of a motor vehicle.

(d) Self-Inspector Qualifications. — An applicant for a license as an emissions self-inspector must meet all of the following requirements:

(1) Have a license as a safety self-inspector.

(2) Operate a fleet of at least 10 vehicles that are subject to an emissions inspection.

(3) Have, or have a contract with a person who has, an emissions analyzer approved by the Environmental Management Commission, equipment to analyze data provided by the on-board diagnostic (OBD) equipment approved by the Environmental Management Commission, or both.

(4) Regularly employ or contract with an individual who has an emissions inspection mechanic license and who will perform an emissions inspection on the vehicles that are part of the self-inspector's fleet. (1993 (Reg. Sess., 1994), c. 754, s. 1; 2000-134, s. 13.)

Section Set Out Twice. — The section above is effective July 1, 2002 until July 1, 2003. For the section as in effect until July 1, 2002, see the preceding section, also numbered § 20-183.4A. For the section as amended effective July 1, 2003, see the following section, also numbered § 20-183.4A.

Editor's Note. — For provisions of Session Laws 2000-134, ss. 20, 21 and 23, relating to emissions inspections in the counties of Cabarrus, Durham, Forsyth, Gaston, Guilford, Mecklenburg, Orange, Union and Wake during the period July 1, 2002 through December 31, 2005, and directing a study of issues related to the costs and fees associated with the motor vehicle safety and emissions inspection and maintenance program, which may also evaluate strategies to ensure an efficient and orderly implementation of the enhanced inspection and maintenance program required by Part III of S.L. 1999-328 and S.L. 2000-134, see the editor's note at § 20-128.

Effect of Amendments. — Session Laws 2000-134, s. 13, effective July 1, 2002, inserted the language following "Environmental Management Commission" in subdivision (b)(2); in subdivision (c)(2), substituted "United States Environmental Protection Agency" for "federal Environmental Protection Agency," inserted "equipment to analyze data provided by the on-board diagnostic (OBD) equipment approved by the Environmental Management Commission, or both" and made four minor punctuation changes; and added the language

following "Environmental Management Commission" in subdivision (d)(3).

§ 20-183.4A. (Effective July 1, 2003. See notes.) License required to perform emissions inspection; qualifications for license.

(a) License Required. — An emissions inspection must be performed by one of the following methods:

(1) At a station that has an emissions inspection station license issued by the Division and by a mechanic who is employed by the station and has an emissions inspection mechanic license issued by the Division.

(2) At a place of business of a person who has an emissions self-inspector license issued by the Division and by an individual who has an emissions inspection mechanic license.

(b) Station Qualifications. — An applicant for a license as an emissions inspection station must meet all of the following requirements:

(1) Have a license as a safety inspection station.

(2) In the Counties of Cabarrus, Durham, Forsyth, Gaston, Guilford, Mecklenburg, Orange, Union, and Wake, have an emissions analyzer approved by the Environmental Management Commission, equipment to analyze data provided by the on-board diagnostic (OBD) equipment approved by the Environmental Management Commission, or both.

(2a) Have equipment to analyze data provided by the on-board diagnostic (OBD) equipment approved by the Environmental Management Commission.

(3) Have equipment to transfer information on emissions inspections to the Division by electronic means.

(4) Regularly employ at least one mechanic who has an emissions inspection mechanic license.

(c) Mechanic Qualifications. — An applicant for a license as an emissions inspection mechanic must meet all of the following requirements:

(1) Have a license as a safety inspection mechanic.

(2) In the Counties of Cabarrus, Durham, Forsyth, Gaston, Guilford, Mecklenburg, Orange, Union, and Wake, have successfully completed an eight-hour course approved by the Division that teaches students about the causes and effects of the air pollution problem; the purpose of the emissions inspection program; the vehicle emission standards established by the United States Environmental Protection Agency; the emission control devices on vehicles; how to conduct an emissions inspection using an emissions analyzer approved by the Environmental Management Commission, equipment to analyze data provided by the on-board diagnostic (OBD) equipment approved by the Environmental Management Commission, or both; and any other topic required by 40 C.F.R. § 51.367 to be included in the course. Successful completion requires a passing score on a written test and on a hands-on test in which the student is required to conduct an emissions inspection of a motor vehicle.

(2a) Have successfully completed an eight-hour course approved by the Division that teaches students about the causes and effects of the air pollution problem, the purpose of the emissions inspection program, the vehicle emission standards established by the United States Environmental Protection Agency, the emission control devices on vehicles, how to conduct an emissions inspection using equipment to analyze data provided by the on-board diagnostic (OBD) equipment

§ 20-183.4A is set out twice. See notes.

approved by the Environmental Management Commission, and any other topic required by 40 C.F.R. § 51.367 to be included in the course. Successful completion requires a passing score on a written test and on a hands-on test in which the student is required to conduct an emissions inspection of a motor vehicle.

(d) Self-Inspector Qualifications. — An applicant for a license as an emissions self-inspector must meet all of the following requirements:

(1) Have a license as a safety self-inspector.

(2) Operate a fleet of at least 10 vehicles that are subject to an emissions inspection.

(3) In the Counties of Cabarrus, Durham, Forsyth, Gaston, Guilford, Mecklenburg, Orange, Union, and Wake, have, or have a contract with a person who has, an emissions analyzer approved by the Environmental Management Commission, equipment to analyze data provided by the on-board diagnostic (OBD) equipment approved by the Environmental Management Commission, or both.

(3a) Have, or have a contract with a person who has, equipment to analyze data provided by the on-board diagnostic (OBD) equipment approved by the Environmental Management Commission.

(4) Regularly employ or contract with an individual who has an emissions inspection mechanic license and who will perform an emissions inspection on the vehicles that are part of the self-inspector's fleet. (1993 (Reg. Sess., 1994), c. 754, s. 1; 2000-134, ss. 13, 14.)

Section Set Out Twice. — The section above is effective July 1, 2003. For the section as in effect July 1, 2002 until July 1, 2003, see the preceding section, also numbered § 20-183.4A. For the section as in effect until July 1, 2002, see the section preceding that section, also numbered § 20-183.4A. For later amendment to this section, effective July 1, 2006, see the editor's note.

Editor's Note. — Session Laws 2000-134, s. 15, amends this section effective January 1, 2006, by repealing subdivision (b)(2), requiring each station to have an emissions analyzer; repealing subdivision (c)(2), requiring a mechanic to have successfully completed an approved course in air pollution and emissions control; and repealing subdivision (d)(3), requiring self-inspectors to have an emissions analyzer. In view of the remoteness of the effective date of this amendment, at the direction of the Revisor of Statutes it has not been set out in the text of the section.

For provisions of Session Laws 2000-134, ss. 20, 21 and 23, relating to emissions inspections in the counties of Cabarrus, Durham, Forsyth, Gaston, Guilford, Mecklenburg, Orange, Union and Wake during the period July 1, 2002 through December 31, 2005, and directing a study of issues related to the costs and fees associated with the motor vehicle safety and emissions inspection and maintenance program, which may also evaluate strategies to ensure an efficient and orderly implementation of the enhanced inspection and maintenance program required by Part III of S.L. 1999-328 and S.L. 2000-134, see the editor's note at § 20-128.

Effect of Amendments. — Session Laws 2000-134, s. 14, effective July 1, 2003, inserted "In the Counties of Cabarrus, Durham, Forsyth, Gaston, Guilford, Mecklenburg, Orange, Union, and Wake" in subdivisions (b)(2), (c)(2) and (d)(3); and added subdivisions (b)(2a), (c)(2a) and (d)(3a).

§ 20-183.5. When a vehicle that fails an emissions inspection may obtain a waiver from the inspection requirement.

(a) **(Effective until July 1, 2002)** Requirements. — The Division may issue a waiver for a vehicle that meets all of the following requirements:

(1) Fails an emissions inspection because it passes the visual inspection part of the inspection but fails the exhaust emissions analysis part of the inspection.

§ 20-183.5(a) is set out twice. See notes.

(2) Has documented repairs costing at least the waiver amount made to the vehicle to correct the cause of the failure. The waiver amount is seventy-five dollars ($75.00) if the vehicle is a pre-1981 model and is two hundred dollars ($200.00) if the vehicle is a 1981 or newer model.

(3) Is reinspected and again fails the inspection because it passes the visual inspection part of the inspection but fails the exhaust emissions analysis part of the inspection.

(4) Meets any other waiver criteria required by 40 C.F.R. § 51.360.

(a) **(Effective July 1, 2002. See notes.)** Requirements. — The Division may issue a waiver for a vehicle that meets all of the following requirements:

(1) Fails an emissions inspection because it passes the visual inspection but fails the analysis of exhaust emissions or the analysis of data provided by the on-board diagnostic (OBD) equipment.

(2) Has documented repairs costing at least the waiver amount made to the vehicle to correct the cause of the failure. The waiver amount is seventy-five dollars ($75.00) if the vehicle is a pre-1981 model and is two hundred dollars ($200.00) if the vehicle is a 1981 or newer model.

(3) Is reinspected and again fails the inspection because it passes the visual inspection but fails the analysis of exhaust emissions or the analysis of data provided by the on-board diagnostic (OBD) equipment.

(4) Meets any other waiver criteria required by 40 C.F.R. § 51.360.

(b) Procedure. — To obtain a waiver, a person must contact a local enforcement office of the Division. Before issuing a waiver, an employee of the Division must review the inspection receipts issued for the inspections of the vehicle, review the documents establishing what repairs were made to the vehicle and at what cost, review any statement denying warranty coverage of the repairs made, and do a visual inspection of the vehicle, if appropriate, to determine if the documented repairs were made. The Division must issue a waiver if it determines that the vehicle qualifies for a waiver. A person to whom a waiver is issued must present the waiver to the self-inspector or inspection station performing the inspection to obtain an inspection sticker.

(c) Repairs. — The following repairs and their costs cannot be considered in determining whether the cost of repairs made to a vehicle equals or exceeds the waiver amount:

(1) Repairs covered by a warranty that applies to the vehicle.

(2) Repairs needed as a result of tampering with an emission control device of the vehicle.

(3) If the vehicle is a 1981 or newer model, repairs made by an individual who is not engaged in the business of repairing vehicles.

(d) Sticker Expiration. — An inspection sticker put on a vehicle after the vehicle receives a waiver from the requirement of passing the emissions inspection expires at the same time it would if the vehicle had passed the emissions inspection. (1965, c. 734, s. 1; 1993 (Reg. Sess., 1994), c. 754, s. 1; 2000-134, s. 16.)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective until July 1, 2002. The second version of subsection (a) set out above is effective July 1, 2002. See editor's note for later amendment to subsection (a), effective July 1, 2006.

Editor's Note. — Session Laws 2000-134, s. 17, amends this section effective January 1, 2006, by deleting "the analysis of exhaust emissions or" following "visual inspection but fails" in subdivisions (a)(1) and (a)(3). In view of the remoteness of the effective date of this amendment, at the direction of the Revisor of Statutes it has not been set out in the text of the section.

For provisions of Session Laws 2000-134, ss. 20, 21 and 23, relating to emissions inspections in the counties of Cabarrus, Durham, Forsyth, Gaston, Guilford, Mecklenburg, Orange, Union

and Wake during the period July 1, 2002 through December 31, 2005, and directing a study of issues related to the costs and fees associated with the motor vehicle safety and emissions inspection and maintenance program, which may also evaluate strategies to ensure an efficient and orderly implementation of the enhanced inspection and maintenance program required by Part III of S.L. 1999-328 and S.L. 2000-134, see the editor's note at § 20-128.

Effect of Amendments. — Session Laws 2000-134, s. 16, effective July 1, 2002, rewrote subdivisions (a)(1) and (a)(4).

§ 20-183.7. Fees for performing an inspection and putting an inspection sticker on a vehicle; use of civil penalties.

(a) **(Effective until July 1, 2001)** Fee Amount. — When a fee applies to an inspection of a vehicle or the issuance of an inspection sticker, the fee must be collected. The following fees apply to an inspection of a vehicle and the issuance of an inspection sticker:

Type	Inspection	Sticker
Safety Only, Without After-Factory Tinted Window	$ 8.25	$ 1.00
Safety Only, With After-Factory Tinted Window	18.25	1.00
Emissions and Safety Without After-Factory Tinted Window	17.00	2.40
Emissions and Safety With After-Factory Tinted Window	27.00	2.40.

The fee for performing an inspection of a vehicle applies when an inspection is performed, regardless of whether the vehicle passes the inspection. The fee for an inspection sticker applies when an inspection sticker is put on a vehicle. The fee for performing an inspection of a vehicle with a tinted window applies only to an inspection performed with a light meter after a safety inspection mechanic determined that the window had after-factory tint.

A vehicle that is inspected at an inspection station and fails the inspection is entitled to be reinspected at the same station at any time within 30 days of the failed inspection without paying another inspection fee.

(a) **(Effective July 1, 2001)** Fee Amount. — When a fee applies to an inspection of a vehicle or the issuance of an inspection sticker, the fee must be collected. The following fees apply to an inspection of a vehicle and the issuance of an inspection sticker:

Type	Inspection	Sticker
Safety Only	$ 8.25	$ 1.00
Emissions and Safety	17.00	2.40

The fee for performing an inspection of a vehicle applies when an inspection is performed, regardless of whether the vehicle passes the inspection. The fee for an inspection sticker applies when an inspection sticker is put on a vehicle. The fee for inspecting after-factory tinted windows shall be ten dollars ($10.00), and the fee applies only to an inspection performed with a light meter after a safety inspection mechanic determined that the window had after-factory tint. A safety inspection mechanic shall not inspect an after-factory tinted window of a vehicle for which the Division has issued a medical exception permit pursuant to G.S. 20-127(f).

A vehicle that is inspected at an inspection station and fails the inspection is entitled to be reinspected at the same station at any time within 30 days of the failed inspection without paying another inspection fee.

(b) Self-Inspector. — The fee for an inspection does not apply to an inspection performed by a self-inspector. The fee for putting an inspection sticker on a vehicle applies to an inspection performed by a self-inspector.

(c) Fee Distribution. — Fees collected for inspection stickers are payable to the Division of Motor Vehicles. The amount of each fee listed in the table below shall be credited to the Highway Fund, the Emissions Program Account established in subsection (d) of this section, the Volunteer Rescue/EMS Fund established in G.S. 58-87-5, the Rescue Squad Workers' Relief Fund established in G.S. 58-88-5, and the Division of Air Quality of the Department of Environment and Natural Resources:

Recipient	Safety Only Sticker	Emissions and Safety Sticker
Highway Fund	.75	.00
Emissions Program Account	.00	1.80
Volunteer Rescue/EMS Fund	.15	.15
Rescue Squad Workers' Relief Fund	.10	.10
Division of Air Quality	.00	.35.

(d) Account. — The Emissions Program Account is created as a nonreverting account within the Highway Fund. The Division shall administer the Account. Revenue in the Account may be used only to fund the vehicle emissions inspection and maintenance program.

(e) Civil Penalties. — Civil penalties collected under this Part shall be credited to the Highway Fund as nontax revenue. (1965, c. 734, s. 1; 1969, c. 1242; 1973, c. 1480; 1975, c. 547; c. 716, s. 5; c. 875, s. 4; 1979, c. 688; 1979, 2nd Sess., c. 1180, ss. 5, 6; 1981, c. 690, s. 17; 1981 (Reg. Sess., 1982), c. 1261, s. 2; 1985, c. 415, ss. 1-6; 1985 (Reg. Sess., 1986), c. 1018, s. 8; 1987, c. 584, ss. 1-3; 1987 (Reg. Sess., 1988), c. 1062, ss. 3-5; 1989, c. 391, s. 3; c. 534, s. 3; 1989 (Reg. Sess., 1990), c. 1066, s. 33(b); 1991 (Reg. Sess., 1992), c. 943, s. 1; 1993, c. 385, s. 1; 1993 (Reg. Sess., 1994), c. 754, s. 1; 1995, c. 473, s. 3; 1995 (Reg. Sess., 1996), c. 743, s. 1; 1997-29, s. 4; 1997-443, s. 11A.119(a); 2000-75, s. 3.)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective until July 1, 2001. The second version of subsection (a) set out above is effective July 1, 2001.

Editor's Note. — Session Laws 2000-134, s. 23, directs the Environmental Review Commission, with the assistance of the Department of Environment and Natural Resources, the Division of Motor Vehicles of the Department of Transportation, the affected parties, and the Fiscal Research Division of the Legislative Services Office to study issues related to the costs associated with the motor vehicle safety and emissions inspection and maintenance program, specifically to determine what constitutes a reasonable fee for motor vehicle inspections under the current program and under the enhanced inspection and maintenance program to be implemented pursuant to G.S. 20-183.3, as amended by S.L. 2000-134, taking into consideration the cost of emissions inspection equipment, the useful life of the equipment, the average period of time during which a purchaser of this equipment is able to amortize this cost, telephone charges incurred in connection with the registration denial program, whether a fee should be charged to reinspect a vehicle that fails an emissions inspection after repairs to the vehicle have been made, the cost of the safety inspection program in relation to the emissions inspection program, and any other factors that the Commission determines to be relevant. The Commission may also evaluate strategies to ensure an efficient and orderly implementation of the enhanced inspection and maintenance program required by Part III of S.L. 1999-328 and S.L. 2000-134. The Environmental Review Commission is to recommend legislation to amend G.S. 20-183.7 to increase the fee for motor vehicle emissions inspections to the 2001 General Assembly.

Effect of Amendments. — Session Laws 2000-75, s. 3, effective July 1, 2001, in subsection (a), rewrote the table, deleting delineations between inspections for vehicles with factory-tinted windows and those without factory-tinted windows, and in the second paragraph, substituted "inspecting after-factory tinted windows shall be ten dollars ($10.00), and the fee" for "performing an inspection of a vehicle

with a tinted window" and added the last sentence.

§ 20-183.8C. (Effective July 1, 2002) Acts that are Type I, II, or III emissions violations.

(a) Type I. — It is a Type I violation for an emissions self-inspector, an emissions inspection station, or an emissions inspection mechanic to do any of the following:

(1) Put an emissions inspection sticker on a vehicle without performing an emissions inspection of the vehicle.

(1a) Put an emissions inspection sticker on a vehicle after performing an emissions inspection of the vehicle and determining that the vehicle did not pass the inspection.

(2) Use a test-defeating strategy when conducting an emissions inspection, such as holding the accelerator pedal down slightly during an idle test, disconnecting or crimping a vacuum hose to effect a passing result, or changing the emission standards for a vehicle by incorrectly entering the vehicle type or model year to achieve a passing result.

(3) Allow a person who is not licensed as an emissions inspection mechanic to perform an emissions inspection for a self-inspector or at an emissions station.

(4) Sell or otherwise give an inspection sticker to another other than as the result of a vehicle inspection in which the vehicle passed the inspection or for which the vehicle received a waiver.

(5) Be unable to account for five or more inspection stickers at any one time upon the request of an auditor of the Division.

(6) Perform a safety-only inspection on a vehicle that is subject to both a safety and an emissions inspection.

(7) Transfer an inspection sticker from one vehicle to another.

(b) Type II. — It is a Type II violation for an emissions self-inspector, an emissions inspection station, or an emissions inspection mechanic to do any of the following:

(1) Use the identification code of another to gain access to an emissions analyzer or to equipment to analyze data provided by on-board diagnostic (OBD) equipment.

(2) Keep inspection stickers and other compliance documents in a manner that makes them easily accessible to individuals who are not inspection mechanics.

(3) Put an emissions inspection sticker on a vehicle that is required to have one of the following emissions control devices but does not have it:

a. Catalytic converter.
b. PCV valve.
c. Thermostatic air control.
d. Oxygen sensor.
e. Unleaded gas restrictor.
f. Gasoline tank cap.
g. Air injection system.
h. Evaporative emissions system.
i. Exhaust gas recirculation (EGR) valve.

(4) Put an emissions inspection sticker on a vehicle without performing a visual inspection of the vehicle's exhaust system and checking the exhaust system for leaks.

(5) Impose no fee for an emissions inspection of a vehicle or the issuance of an emissions inspection sticker or impose a fee for one of these

§ 20-183.8C has a postponed effective date. See notes.

actions in an amount that differs from the amount set in G.S. 20-183.7.

(c) Type III. — It is a Type III violation for an emissions self-inspector, an emissions inspection station, or an emissions inspection mechanic to do any of the following:

(1) Fail to post an emissions license issued by the Division.
(2) Fail to send information on emissions inspections to the Division at the time or in the form required by the Division.
(3) Fail to post emissions information required by federal law to be posted.
(4) Fail to put the required information on an inspection sticker in a legible manner using ink.
(5) Fail to put the required information on an inspection receipt in a legible manner.
(6) Fail to maintain a maintenance log for an emissions analyzer or for equipment to analyze data provided by on-board diagnostic (OBD) equipment.

(d) Other Acts. — The lists in this section of the acts that are Type I, Type II, or Type III violations are not the only acts that are one of these types of violations. The Division may designate other acts that are a Type I, Type II, or Type III violation. (1993 (Reg. Sess., 1994), c. 754, s. 1; 1995, c. 163, s. 11; 1997-29, s. 7; 1997-456, s. 35; 2000-134, ss. 18, 19.)

For this section as in effect until July 1, 2002, see the main volume. For amendment to this section effective July 1, 2006, see the editor's note.

Editor's Note. — Session Laws 2000-134, s. 19, amends this section effective January 1, 2006, by deleting "to an emissions analyzer or" following "to gain access" in subdivision (b)(1); and deleting "for an emissions analyzer or" following "a maintenance log" in subdivision (c)(6). In view of the remoteness of the effective date of this amendment, at the direction of the Revisor of Statutes it has not been set out in the text of this section.

For provisions of Session Laws 2000-134, ss. 20, 21 and 23, relating to emissions inspections in the counties of Cabarrus, Durham, Forsyth, Gaston, Guilford, Mecklenburg, Orange, Union and Wake during the period July 1, 2002 through December 31, 2005, and directing a study of issues related to the costs and fees associated with the motor vehicle safety and emissions inspection and maintenance program, which may also evaluate strategies to ensure an efficient and orderly implementation of the enhanced inspection and maintenance program required by Part III of S.L. 1999-328 and S.L. 2000-134, see the editor's note at § 20-128.

Effect of Amendments. — Session Laws 2000-134, s. 18, effective July 1, 2002, added the language following "emissions analyzer" in subdivision (b)(1); and substituted "a maintenance log for ... diagnostic (OBD) equipment" for "an emissions analyzer maintenance log" in subdivision (c)(6).

Article 9A.

Motor Vehicle Safety and Financial Responsibility Act of 1953.

§ 20-279.1. Definitions.

CASE NOTES

Cited in Tart v. Martin, — N.C. App. —, 527 S.E.2d 708, 2000 N.C. App. LEXIS 326 (2000).

§ 20-279.2. Commissioner to administer Article; appeal to court.

CASE NOTES

A cause of action alleging breach of good faith will not lie when the insurer settles a claim within the monetary limits of the insured's policy; the insurer has the duty to consider the insured's interest but may act in its own interest in settlement of the claim. Cash v. State Farm Mut. Auto. Ins. Co., — N.C. App. —, 528 S.E.2d 372, 2000 N.C. App. LEXIS 312 (2000).

§ 20-279.5. Security required unless evidence of insurance; when security determined; suspension; exceptions.

CASE NOTES

There is no requirement that all those covered under a policy be insured at identical levels of coverage; thus, as long as the minimum coverage requirements are met, no reason exists to prevent an insured from obtaining multi-tiered coverage for its employees. Hlasnick v. Federated Mut. Ins. Co., — N.C. App. —, 524 S.E.2d 386, 2000 N.C. App. LEXIS 18 (2000).

§ 20-279.20. Certificate furnished by nonresident as proof.

CASE NOTES

Cited in Fortune Ins. Co. v. Owens, 351 N.C. 424, 526 S.E.2d 463 (2000).

§ 20-279.21. "Motor vehicle liability policy" defined.

CASE NOTES

I. General Consideration.
III. Uninsured Motorist Coverage.
IV. Underinsured Motorist Coverage.

I. GENERAL CONSIDERATION.

Rate Bureau Form Not Required. — This section did not require the defendant's fleet policy to use a form promulgated by the Rate Bureau. Hlasnick v. Federated Mut. Ins. Co., — N.C. App. —, 524 S.E.2d 386, 2000 N.C. App. LEXIS 18 (2000).

Action by Insured Against Insurer. — A cause of action alleging breach of good faith will not lie when the insurer settles a claim, in spite of insured's protestations that the claimants acted fraudulently, within the monetary limits of the insured's policy; the insurer has the duty to consider the insured's interest but may act in its own interest in settlement of the claim. Cash v. State Farm Mut. Auto. Ins. Co., — N.C. App. —, 528 S.E.2d 372, 2000 N.C. App. LEXIS 312 (2000).

Minimum Coverage Requirements Not Violated by "Other Insurance" Clause. — The court rejected the contention that the plaintiff/insurance company's "other insurance" clause violated North Carolina law and public policy by allowing the defendant/insurer to defeat the statutory requirement of providing minimum limits of coverage under this section and paying only a pro rata share of an insurance claim. USAA Cas. Ins. Co. v. Universal Underwriters Ins. Co., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 789 (July 5, 2000).

Applicability of Act Where Foreign Insurer Is Involved. — The Act was not triggered by a contract's conformity clause which stated that "if any provision of this policy is contrary to any law to which it is subject, such provision is hereby amended to conform there-

to" where the defendant/insurance company was never authorized to transact business and issue insurance policies in North Carolina. The mere fact that the accident happened in North Carolina did not make the Florida policy subject to North Carolina law. Fortune Ins. Co. v. Owens, 351 N.C. 424, 526 S.E.2d 463 (2000).

Applied in Cash v. State Farm Mut. Auto. Ins. Co., — N.C. App. —, 528 S.E.2d 372, 2000 N.C. App. LEXIS 312 (2000).

Cited in Reese v. Barbee, 134 N.C. App. 728, 518 S.E.2d 571 (1999), cert. denied, 351 N.C. 188, — S.E.2d — (1999); Anderson v. Atlantic Cas. Ins. Co., 134 N.C. App. 724, 518 S.E.2d 786 (1999).

III. UNINSURED MOTORIST COVERAGE.

Action under Uninsured Motorist Policy Is One for Tort. —

The three-year tort statute of limitations, which begins running on the date of an accident, also applies to the uninsured motorist carrier. Thomas v. Washington, — N.C. App. —, 525 S.E.2d 839, 2000 N.C. App. LEXIS 154 (2000).

Service of Process on Uninsured Motorist Carrier. — Although this section does not expressly require that separate process be issued for an uninsured motorist carrier, it does specifically require that a "copy" of the summons and complaint be served on the insurer, and the appellate courts have required strict compliance with the statutes which provide for service of process on insurance companies. Thomas v. Washington, — N.C. App. —, 525 S.E.2d 839, 2000 N.C. App. LEXIS 154 (2000).

IV. UNDERINSURED MOTORIST COVERAGE.

Legislative Intent. —

There is no requirement that all those covered under a policy be insured at identical levels of coverage; thus, as long as the minimum coverage requirements are met, no reason exists to prevent an insured from obtaining multi-tiered coverage for its employees. Hlasnick v. Federated Mut. Ins. Co., — N.C. App. —, 524 S.E.2d 386, 2000 N.C. App. LEXIS 18 (2000).

Strict Compliance Needed for UIM Rejection to Be Effective. — An automobile insurance policy issued by defendant provided underinsured motorist (UIM) coverage to plaintiff for injuries sustained as a passenger where insured had rejected UIM coverage on company's own form rather than on one promulgated by the Rate Bureau; "substantial compliance" was irrelevant. Sanders v. American Spirit Ins. Co., 135 N.C. App. 178, 519 S.E.2d 323 (1999).

Where terms of policy expressly excluded underinsured motorist (UIM) coverage, this section did not require an excess personal liability policy to provide UIM coverage. Piazza v. Little, 350 N.C. 585, 515 S.E.2d 219 (1999).

Determination as to Primary and Excess Coverage. — Trial court erred in finding that insurance company which insured plaintiffs' two vehicles, neither of which was involved in the subject accident, was primary and that the underinsured motorist coverage for the vehicle involved in the accident was excess; the plaintiffs were second-class insureds on the defendant's UIM policy and first-class on their own policy, but there was no need to pro-rate or consider classes where the "other insurance" clauses were not mutually repugnant, but could be read together harmoniously. Hlasnick v. Federated Mut. Ins. Co., — N.C. App. —, 524 S.E.2d 386, 2000 N.C. App. LEXIS 18 (2000).

Insured was held to have received two separate policies of underinsured coverage, although the insurance company contended that only one policy was issued and that it included the later-added fourth vehicle, where the insured was told she could not add her fourth vehicle to the existing policy, was billed separately, and where the billings showed different renewal dates for the two policies. Iodice v. Jones, 135 N.C. App. 740, 522 S.E.2d 593 (1999).

ARTICLE 12.

Motor Vehicle Dealers and Manufacturers Licensing Law.

§ 20-288. Application for license; license requirements; expiration of license; bond.

CASE NOTES

Seller as Purchaser. — Although plaintiff had already contracted to resell vehicle that turned out to be stolen prior to its purchase, he qualified as an aggrieved purchaser and was

entitled to recover under surety bond. Perkins v. Helms, 133 N.C. App. 620, 515 S.E.2d 906 (1999).

Total Amount of Bond Recovery. — Bond purchased in the middle of the first year entitled recovery of $25,000 for each of the three license years during which it was effective, not an aggregate total of $25,000 for the three years. Perkins v. Helms, 133 N.C. App. 620, 515 S.E.2d 906 (1999).

Article 13.

The Vehicle Financial Responsibility Act of 1957.

§ 20-309. Financial responsibility prerequisite to registration; must be maintained throughout registration period.

(a) No motor vehicle shall be registered in this State unless the owner at the time of registration has financial responsibility for the operation of such motor vehicle, as provided in this Article. The owner of each motor vehicle registered in this State shall maintain financial responsibility continuously throughout the period of registration.

(a1) An owner of a commercial motor vehicle, as defined in G.S. 20-4.01(3d), shall have financial responsibility for the operation of the motor vehicle in an amount equal to that required for for-hire carriers transporting nonhazardous property in interstate or foreign commerce in 49 C.F.R. § 387.9.

(b) Financial responsibility shall be a liability insurance policy or a financial security bond or a financial security deposit or by qualification as a self-insurer, as these terms are defined and described in Article 9A, Chapter 20 of the General Statutes of North Carolina, as amended.

(c) When it is certified that financial responsibility is a liability insurance policy, the Commissioner of Motor Vehicles may require that the owner produce records to prove the fact of such insurance, and failure to produce such records shall be prima facie evidence that no financial responsibility exists with regard to the vehicle concerned. It shall be the duty of insurance companies, upon request of the Division, to verify the accuracy of any owner's certification.

(d) When liability insurance with regard to any motor vehicle is terminated by cancellation or failure to renew, or the owner's financial responsibility for the operation of any motor vehicle is otherwise terminated, the owner shall forthwith surrender the registration certificate and plates of the vehicle to the Division of Motor Vehicles unless financial responsibility is maintained in some other manner in compliance with this Article.

(e) Upon termination by cancellation or otherwise of an insurance policy provided in subsection (b) of this section, the insurer shall notify the Division of the termination within 20 business days; provided, no cancellation notice is required if the same insurer issues a replacement insurance policy complying with this Article at the same time the insurer cancels or otherwise terminates the old policy, no lapse in coverage results, and the insurer sends the certificate of insurance form for the new policy to the Division. The insurer shall notify the Division of any new policy for insurance within 20 working days of its issuance unless the new coverage is a replacement insurance policy for a policy terminated by the same insurer. Any insurance company with twenty-five million dollars ($25,000,000) or more in annual vehicle insurance premium volume must submit the notices required under this section by electronic means. All other insurance companies may submit the notices required under this section by either paper or electronic means. The names of insureds and the beginning date and termination date of insurance coverage provided to the

Division by the insurer pursuant to this paragraph shall constitute a designated trade secret under G.S. 132-1.2.

The Division, upon receiving notice of a lapse in insurance coverage, shall notify the owner of the lapse in coverage, and the owner shall, to retain the registration plate for the vehicle registered or required to be registered, within 10 days from date of notice given by the Division either:

(1) Certify to the Division that he had financial responsibility effective on or prior to the date of such termination; or

(2) In the case of a lapse in financial responsibility, pay a fifty dollar ($50.00) civil penalty; and certify to the Division that he now has financial responsibility effective on the date of certification, that he did not operate the vehicle in question during the period of no financial responsibility with the knowledge that there was no financial responsibility, and that the vehicle in question was not involved in a motor vehicle crash during the period of no financial responsibility.

Failure of the owner to certify that he has financial responsibility as herein required shall be prima facie evidence that no financial responsibility exists with regard to the vehicle concerned and unless the owner's registration plate has on or prior to the date of termination of insurance been surrendered to the Division by surrender to an agent or representative of the Division designated by the Commissioner, or depositing the same in the United States mail, addressed to the Division of Motor Vehicles, Raleigh, North Carolina, the Division shall revoke the vehicle's registration for 30 days.

In no case shall any vehicle, the registration of which has been revoked for failure to have financial responsibility, be reregistered in the name of the registered owner, spouse, or any child of the spouse, or any child of such owner within less than 30 days after the date of receipt of the registration plate by the Division of Motor Vehicles, except that a spouse living separate and apart from the registered owner may register such vehicle immediately in such spouse's name. Additionally, as a condition precedent to the reregistration of the vehicle by the registered owner, spouse, or any child of the spouse, or any child of such owner, except a spouse living separate and apart from the registered owner, the payment of a restoration fee of fifty dollars ($50.00) and the appropriate fee for a new registration plate is required. Any person, firm or corporation failing to give notice of termination shall be subject to a civil penalty of two hundred dollars ($200.00) to be assessed by the Commissioner of Insurance upon a finding by the Commissioner of Insurance that good cause is not shown for such failure to give notice of termination to the Division.

(f) The Commissioner shall administer and enforce the provisions of this Article and may make rules and regulations necessary for its administration and shall provide for hearings upon request of persons aggrieved by orders or acts of the Commissioner under the provisions of this Article. (1957, c. 1393, s. 1; 1959, c. 1277, s. 1; 1963, c. 964, s. 1; 1965, c. 272; c. 1136, ss. 1, 2; 1967, c. 822, ss. 1, 2; c. 857, ss. 1, 2; 1971, c. 477, ss. 1, 2; c. 924; 1975, c. 302; c. 348, ss. 1-3; c. 716, s. 5; 1979, 2nd Sess., c. 1279, s. 1; 1981, c. 690, s. 25; 1983, c. 761, s. 146; 1983 (Reg. Sess., 1984), c. 1069, ss. 1, 2; 1985, c. 666, s. 84; 1991, c. 402, s. 1; 1999-330, s. 4; 1999-452, s. 20; 2000-140, s. 100(a); 2000-155, s. 20.)

Editor's Note. — Session Laws 2000-155, s. 20, effective August 2, 2000, rewrote s. 10 of Session Laws 1999-330 to provide that the amendment to G.S. 20-309 by s. 4 of Session Laws 1999-330 would be effective September 1, 2000, and applies to new or renewal policies written to become effective on or after that date.

Effect of Amendments. — Session Laws 1999-330, s. 4, in subsection (a), deleted "self-propelled" preceding "motor vehicle" near the beginning of the first paragraph and added the second paragraph. For effective date and applicability of this amendment, see the editor's note.

Session Laws 2000-140, s. 100(a), effective September 1, 2000, and applicable to new or renewal policies written to become effective on

or after that date, designated the former second paragraph in subsection (a) as present subsection (a1); substituted "vehicle in an amount" for "vehicle as required by this section. The financial responsibility for a commercial motor vehicle shall be" and substituted "required for for-hire carriers ... in 49 C.F.R. § 387.9" for "required in 49 C.F.R. §§ 387.3, 387.5, 387.7, and 387.11 for for-hire or private motor vehicles transporting property in interstate or intrastate commerce" in subsection (a1).

Chapter 22.

Contracts Requiring Writing.

§ 22-2. Contract for sale of land; leases.

CASE NOTES

I. In General.

I. IN GENERAL.

Illustrative Cases. — Defendant, claiming that he and his "roommate" of more than 20 years did not have a common law marriage and did not enter into a contract for the purchase of the property where they lived, correctly pled the statute of frauds and was improperly denied his motion for directed verdict. Patterson v. Strickland, 139 N.C. App. 510, 515 S.E.2d 915 (1999).

Plaintiff, alleging that she and her "roommate" of over 20 years had an agreement to jointly purchase the property where they lived was not barred by statute of frauds from recovering under a purchase-money resulting trust claim. Patterson v. Strickland, 139 N.C. App. 510, 515 S.E.2d 915 (1999).

Applied in Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999).

Chapter 22B.

Contracts Against Public Policy.

Article 1.

Invalid Agreements.

§ 22B-1. Construction indemnity agreements invalid.

CASE NOTES

Stated in St. Paul Fire & Marine Ins. Co. v. Hanover Ins. Co., — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 2783 (E.D.N.C. February 18, 2000).

Chapter 23.

Debtor and Creditor.

Article 4.

Discharge of Insolvent Debtors.

Article 4.

Discharge of Insolvent Debtors.

§ 23-30.1. (Effective July 1, 2001) Provisional release.

Every person who has filed a petition under the provisions of G.S. 23-30 shall be brought before a judge within 72 hours after filing the petition and shall be provisionally released from imprisonment unless a hearing shall be held and the creditor shall establish that the prisoner has fraudulently concealed assets. If, at the time he is brought before a judge, the prisoner makes a showing of indigency, counsel shall be appointed for [the] prisoner in accordance with rules adopted by the Office of Indigent Defense Services. A provisional release under this section shall not constitute a discharge of the debtor, and the creditor may oppose the discharge by suggesting fraud even if he has unsuccessfully attempted to oppose the provisional release on the basis of fraudulent concealment. The debtor may be provisionally released even though actual service upon the creditor has not been accomplished if 72 hours has passed since the debtor delivered the notice to the sheriff for service upon the creditor. (1977, c. 649, s. 5; 2000-144, s. 32.)

For this section as in effect until July 1, 2001, see the main volume.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, § 7A-498 et seq.

Effect of Amendments. — Session Laws 2000-144, s. 32, effective July 1, 2001, substituted "counsel shall be appointed for [the] prisoner in accordance with rules adopted by the Office of Indigent Defense Services" for "the judge shall appoint counsel for him."

Chapter 24.

Interest.

Article 1.

General Provisions.

Article 1.

General Provisions.

§ 24-1.1A. Contract rates on home loans secured by first mortgages or first deeds of trust.

(a) Notwithstanding any other provision of this Chapter, but subject to the provisions of G.S. 24-1.1E, parties to a home loan may contract in writing as follows:

(1) Where the principal amount is ten thousand dollars ($10,000) or more the parties may contract for the payment of interest as agreed upon by the parties;

(2) Where the principal amount is less than ten thousand dollars ($10,000) the parties may contract for the payment of interest as agreed upon by the parties, if the lender is either (i) approved as a mortgagee by the Secretary of Housing and Urban Development, the Federal Housing Administration, the Department of Veterans Affairs, a national mortgage association or any federal agency; or (ii) a local or foreign bank, savings and loan association or service corporation wholly owned by one or more savings and loan associations and permitted by law to make home loans, credit union or insurance company; or (iii) a State or federal agency;

(3) Where the principal amount is less than ten thousand dollars ($10,000) and the lender is not a lender described in the preceding subdivision (2) the parties may contract for the payment of interest not in excess of sixteen percent (16%) per annum.

(4) Notwithstanding any other provision of law, where the lender is an affiliate operating in the same office or subsidiary operating in the same office of a licensee under the North Carolina Consumer Finance Act, the lender may charge interest to be computed only on the following basis: monthly on the outstanding principal balance at a rate not to exceed the rate provided in this subdivision.

On the fifteenth day of each month, the Commissioner of Banks shall announce and publish the maximum rate of interest permitted by this subdivision. Such rate shall be the latest published noncompetitive rate for U.S. Treasury bills with a six-month maturity as of the fifteenth day of the month plus six percent (6%), rounded upward or downward, as the case may be, to the nearest one-half of one percent (1/2 of 1%) or fifteen percent (15%), whichever is greater. If there is no nearest one-half of one percent (1/2 of 1%), the Commissioner shall round downward to the lower one-half of one percent (1/2 of 1%). The rate so announced shall be the maximum rate permitted

for the term of loans made under this section during the following calendar month when the parties to such loans have agreed that the rate of interest to be charged by the lender and paid by the borrower shall not vary or be adjusted during the term of the loan. The parties to a loan made under this section may agree to a rate of interest which shall vary or be adjusted during the term of the loan in which case the maximum rate of interest permitted on such loans during a month during the term of the loan shall be the rate announced by the Commissioner in the preceding calendar month.

An affiliate operating in the same office or subsidiary operating in the same office of a licensee under the North Carolina Consumer Finance Act may not make a home loan for a term in excess of six (6) months which provides for a balloon payment. For purposes of this subdivision, a balloon payment means any scheduled payment that is more than twice as large as the average of earlier scheduled payments. This subsection does not apply to equity lines of credit as defined in G.S. 45-81.

(b) Except as provided in subdivision (1) of this subsection, a lender and a borrower may agree on any terms as to the prepayment of a home loan.

(1) No prepayment fees or penalties shall be contracted by the borrower and lender with respect to any home loan in which: (i) the principal amount borrowed is one hundred fifty thousand dollars ($150,000) or less, (ii) the borrower is a natural person, (iii) the debt is incurred by the borrower primarily for personal, family, or household purposes, and (iv) the loan is secured by a first mortgage or first deed of trust on real estate upon which there is located or there is to be located a structure or structures designed principally for occupancy of from one to four families which is or will be occupied by the borrower as the borrower's principal dwelling.

(2) The limitations on prepayment fees and penalties contained in subdivision (b)(1) of this section shall not apply to the extent state law limitations on prepayment fees and penalties are preempted by federal law or regulation.

(c) If the home loan is one described in subdivision (a)(1) or subdivision (a)(2) of this section, the lender may charge the borrower the following fees and charges in addition to interest and other fees and charges as permitted in this section and late payment charges as permitted in G.S. 24-10.1:

(1) At or before loan closing, the lender may charge such of the following fees and charges as may be agreed upon by the parties notwithstanding the provisions of any State law, other than G.S. 24-1.1E, limiting the amount of such fees or charges:

a. Loan application, origination, commitment, and interest rate lock fees;

a1. Fees to administer a construction loan or a construction/permanent loan, including inspection fees and loan conversion fees;

b. Discount points, but only to the extent the discount points are paid for the purpose of reducing, and in fact result in a bona fide reduction of the interest rate or time-price differential;

c. Assumption fees to the extent permitted by G.S. 24-10(d);

d. Appraisal fees to the extent permitted by G.S. 24-10(h);

e. Fees and charges to the extent permitted by G.S. 24-8(d); and

f. Additional fees and charges, however individually or collectively denominated, payable to the lender which, in the aggregate, do not exceed the greater of (i) one quarter of one percent (1/4 of 1%) of the principal amount of the loan, or (ii) one hundred fifty dollars ($150.00).

(2) Except as provided in subsection (g) of this section with respect to the deferral of loan payments, upon modification, renewal, extension, or amendment of any of the terms of a home loan, the lender may charge such of the following fees and charges as may be agreed upon by the parties notwithstanding the provisions of any State law, other than G.S. 24-1.1E, limiting the amount of such fees or charges:

a. Discount points, but only to the extent the discount points are paid for the purpose of reducing, and in fact result in a bona fide reduction of, the interest rate or time-price differential;

a1. Fees which do not exceed one quarter of one percent (1/4 of 1%) of the principal amount of the loan if the principal amount of the loan is less than one hundred fifty thousand dollars ($150,000), or one percent of the principal amount of the loan if the principal amount of the loan is one hundred fifty thousand dollars ($150,000) or more, for the conversion of a variable interest rate loan to a fixed interest rate loan, of a fixed interest rate loan to a variable interest rate loan, of a closed-end loan to an open-end loan, or of an open-ended loan to a closed-end loan;

b. Assumption fees to the extent permitted by G.S. 24-10(d);

c. Appraisal fees to the extent permitted by G.S. 24-10(h);

d. Fees and charges to the extent permitted by G.S. 24-8(d); and

e. If no fees are charged under subdivision (c)(2)b. of this section, additional fees and charges, however individually or collectively denominated, payable to the lender which, in the aggregate, do not exceed the greater of (i) one quarter of one percent (1/4 of 1%) of the balance outstanding at the time of the modification, renewal, extension, or amendment of terms, or (ii) one hundred fifty dollars ($150.00). The fees and charges permitted by this sub-subdivision may be charged only pursuant to a written agreement which states the amount of the fee or charge and is made at the time of the specific modification, renewal, extension, or amendment, or at the time the specific modification, renewal, extension, or amendment is requested.

(c1) No lender on home loans under subdivision (a)(3) of this section may charge or receive any interest, fees, charges, or discount points other than: (i) to the extent permitted by G.S. 24-8(d), sums for the payment of bona fide loan-related goods, products, and services provided or to be provided by third parties and sums for the payment of taxes, filing fees, recording fees, and other charges and fees, paid or to be paid to public officials; (ii) interest as permitted in subdivision (a)(3) of this section; and (iii) late payment charges to the extent permitted by G.S. 24-10.1.

(c2) No lender on home loans under subdivision (a)(4) of this section may charge or receive any interest, fees, charges, or discount points other than: (i) the fees described in G.S. 24-10; (ii) to the extent permitted by G.S. 24-8(d), sums for the payment of bona fide loan-related goods, products, and services provided or to be provided by third parties and sums for the payment of taxes, filing fees, recording fees, and other charges and fees, paid or to be paid to public officials; (iii) interest as permitted in subdivision (a)(4) of this section; and (iv) late payment charges to the extent permitted by G.S. 24-10.1.

(d) The loans or investments regulated by G.S. 53-45 shall not be subject to the provisions of this section.

(e) The term "home loan" shall mean a loan, other than an open-end credit plan, where the principal amount is less than three hundred thousand dollars ($300,000) secured by a first mortgage or first deed of trust on real estate upon which there is located or there is to be located one or more single-family dwellings or dwelling units.

(f) Any home loan obligation existing before June 13, 1977, shall be construed with regard to the law existing at the time the home loan or commitment to lend was made and this act shall only apply to home loans or loan commitments made from and after June 13, 1977; provided, however, that variable rate home loan obligations executed prior to April 3, 1974, which by their terms provide that the interest rate shall be decreased and may be increased in accordance with a stated cost of money formula or other index shall be enforceable according to the terms and tenor of said written obligations.

(g) The parties to a home loan governed by subdivision (a)(1) or (2) of this section may contract to defer the payment of all or part of one or more unpaid installments and for payment of interest on deferred interest as agreed upon by the parties. The parties may agree that deferred interest may be added to the principal balance of the loan. This subsection shall not be construed to limit payment of interest upon interest in connection with other types of loans. Except as restricted by G.S. 24-1.1E, the lender may charge deferral fees as may be agreed upon by the parties to defer the payment of one or more unpaid installments. If the home loan is of a type described in subdivision (1) of this subsection, the deferral fees shall be subject to the limitations set forth in subdivision (2) of this subsection:

(1) A home loan will be subject to the deferral fee limitations set forth in subdivision (2) of this subsection if:
   a. The borrower is a natural person;
   b. The debt is incurred by the borrower primarily for personal, family, or household purposes; and
   c. The loan is secured by a first mortgage or first deed of trust on real estate upon which there is located or there is to be located a structure or structures designed principally for occupancy of from one to four families which is or will be occupied by the borrower as the borrower's principal dwelling.

(2) Deferral fees for home loans identified in subdivision (1) of this subsection shall be subject to the following limitations:
   a. Deferral fees may be charged only pursuant to an agreement which states the amount of the fee and is made at the time of the specific deferral or at the time the specific deferral is requested; provided, that if the agreement relates to an installment which is then past due for 15 days or more, the agreement must be in writing and signed by at least one of the borrowers. For purposes of this subdivision an agreement will be considered a signed writing if the lender receives from at least one of the borrowers a facsimile or computer-generated message confirming or otherwise accepting the agreement.
   b. Deferral fees may not exceed the greater of five percent (5%) of each installment deferred or fifty dollars ($50.00), multiplied by the number of complete months in the deferral period. A month shall be measured from the date an installment is due. The deferral period is that period during which no payment is required or made as measured from the date on which the deferred installment would otherwise have been due to the date the next installment is due under the terms of the note or the deferral agreement.
   c. If a deferral fee has once been imposed with respect to a particular installment, no deferral fee may be imposed with respect to any future payment which would have been timely and sufficient but for the previous deferral.
   d. If a deferral fee is charged pursuant to a deferral agreement, a late charge may be imposed with respect to the deferred payment only

if the amount deferred is not paid when due under the terms of the deferral agreement and no new deferral agreement is entered into with respect to that installment.

e. A lender may charge a deferral fee under this subsection for deferring the payment of all or part of one or more regularly scheduled payments, regardless of whether the deferral results in an extension of the loan maturity date or the date a balloon payment is due. A modification or extension of the loan maturity date or the date a balloon payment is due which is not incident to the deferral of a regularly scheduled payment shall be considered a modification or extension subject to the provisions of subdivision (c)(2) of this section.

(h) The parties to a home loan governed by subdivision (a)(1) or (2) of this section may agree in writing to a mortgage or deed of trust which provides that periodic payments may be graduated during parts of or over the entire term of the loan. The parties to such a loan may also agree in writing to a mortgage or deed of trust which provides that periodic disbursements of part of the loan proceeds may be made by the lender over a period of time agreed upon by the parties, or over a period of time agreed upon by the parties ending with the death of the borrower(s). Such mortgages or deeds of trust may include provisions for adding deferred interest to principal or otherwise providing for charging of interest on deferred interest as agreed upon by the parties. This subsection shall not be construed to limit other types of mortgages or deeds of trust or methods or plans of disbursement or repayment of loans that may be agreed upon by the parties.

(i) Nothing in this section shall be construed to authorize or prohibit a lender, a borrower, or any other party to pay compensation to a mortgage broker or a mortgage banker for services provided by the mortgage broker or the mortgage banker in connection with a home loan. (1973, c. 1119, ss. 1, 2; 1975, c. 260, s. 1; 1977, c. 542, ss. 1, 2; 1979, c. 362; 1983, c. 126, s. 4; 1985, c. 154, s. 1; c. 381, ss. 1, 2; 1987, c. 444, ss. 1, 3, 4; c. 853, s. 4; 1989, c. 17, ss. 13, 14; 1999-332, s. 1; 2000-140, ss. 40(a), 40(b).)

Effect of Amendments. —

Session Laws 2000-140, ss. 40(a) and 40(b), effective July 21, 2000, substituted "commitment, and interest rate lock fees" for "and commitment fees" in subdivision (c)(1)a; added subdivision (c)(1)a1; rewrote subdivision (c)(1)e; inserted "individually or collectively" in subdivision (c)(1)f; added subdivision (c)(2)a1; rewrote subdivision (c)(2)d; in subdivision (c)(2)e, inserted "If no fees are charged under subdivision (c)(2)b. of this section" and inserted "individually or collectively"; and rewrote subdivision (g)(2)e.

§ 24-1.1E. Restrictions and limitations on high-cost home loans.

(a) Definitions. — The following definitions apply for the purposes of this section:

(1) "Affiliate" means any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act of 1956 (12 U.S.C. § 1841 et seq.), as amended from time to time.

(2) "Annual percentage rate" means the annual percentage rate for the loan calculated according to the provisions of the federal Truth-in-Lending Act (15 U.S.C. § 1601, et seq.), and the regulations promulgated thereunder by the Federal Reserve Board (as said Act and regulations are amended from time to time).

(3) "Bona fide loan discount points" means loan discount points knowingly paid by the borrower for the purpose of reducing, and which in fact

result in a bona fide reduction of, the interest rate or time-price differential applicable to the loan, provided the amount of the interest rate reduction purchased by the discount points is reasonably consistent with established industry norms and practices for secondary mortgage market transactions.

(4) A "high-cost home loan" means a loan other than an open-end credit plan or a reverse mortgage transaction in which:
   a. The principal amount of the loan does not exceed the lesser of (i) the conforming loan size limit for a single-family dwelling as established from time to time by the Federal National Mortgage Association, or (ii) three hundred thousand dollars ($300,000);
   b. The borrower is a natural person;
   c. The debt is incurred by the borrower primarily for personal, family, or household purposes;
   d. The loan is secured by either (i) a security interest in a manufactured home (as defined in G.S. 143-147(7)) which is or will be occupied by the borrower as the borrower's principal dwelling, or (ii) a mortgage or deed of trust on real estate upon which there is located or there is to be located a structure or structures designed principally for occupancy of from one to four families which is or will be occupied by the borrower as the borrower's principal dwelling; and
   e. The terms of the loan exceed one or more of the thresholds as defined in subdivision (6) of this section.

(5) "Points and fees" means:
   a. All items required to be disclosed under sections 226.4(a) and 226.4(b) of Title 12 of the Code of Federal Regulations, as amended from time to time, except interest or the time-price differential;
   b. All charges for items listed under section 226.4(c)(7) of Title 12 of the Code of Federal Regulations, as amended from time to time, but only if the lender receives direct or indirect compensation in connection with the charge or the charge is paid to an affiliate of the lender; otherwise, the charges are not included within the meaning of the phrase "points and fees";
   c. All compensation paid directly by the borrower to a mortgage broker not otherwise included in sub-subdivision a. or b. of this subdivision;
   d. The maximum prepayment fees and penalties which may be charged or collected under the terms of the loan documents; and
   e. "Points and fees" shall not include (i) taxes, filing fees, recording and other charges and fees paid or to be paid to public officials for determining the existence of or for perfecting, releasing, or satisfying a security interest; and (ii) fees paid to a person other than a lender or an affiliate of the lender or to the mortgage broker or an affiliate of the mortgage broker for the following: fees for tax payment services; fees for flood certification; fees for pest infestation and flood determinations; appraisal fees; fees for inspections performed prior to closing; credit reports; surveys; attorneys" fees (if the borrower has the right to select the attorney from an approved list or otherwise); notary fees; escrow charges, so long as not otherwise included under sub-subdivision a. of this subdivision; title insurance premiums; and fire insurance and flood insurance premiums, provided that the conditions in section 226.4(d)(2) of Title 12 of the Code of Federal Regulations are met.

(6) "Thresholds" means:

a. Without regard to whether the loan transaction is or may be a "residential mortgage transaction" (as the term "residential mortgage transaction" is defined in section 226.2(a)(24) of Title 12 of the Code of Federal Regulations, as amended from time to time), the annual percentage rate of the loan at the time the loan is consummated is such that the loan is considered a "mortgage" under section 152 of the Home Ownership and Equity Protection Act of 1994 (Pub. Law 103-25, [15 U.S.C. § 1602(aa)]), as the same may be amended from time to time, and regulations adopted pursuant thereto by the Federal Reserve Board, including section 226.32 of Title 12 of the Code of Federal Regulations, as the same may be amended from time to time;

b. The total points and fees payable by the borrower at or before the loan closing exceed five percent (5%) of the total loan amount if the total loan amount is twenty thousand dollars ($20,000) or more, or (ii) the lesser of eight percent (8%) of the total loan amount or one thousand dollars ($1,000), if the total loan amount is less than twenty thousand dollars ($20,000); provided, the following discount points and prepayment fees and penalties shall be excluded from the calculation of the total points and fees payable by the borrower:

1. Up to and including two bona fide loan discount points payable by the borrower in connection with the loan transaction, but only if the interest rate from which the loan's interest rate will be discounted does not exceed by more than one percentage point (1%) the required net yield for a 90-day standard mandatory delivery commitment for a reasonably comparable loan from either the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, whichever is greater;

2. Up to and including one bona fide loan discount point payable by the borrower in connection with the loan transaction, but only if the interest rate from which the loan's interest rate will be discounted does not exceed by more than two percentage points (2%) the required net yield for a 90-day standard mandatory delivery commitment for a reasonably comparable loan from either the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, whichever is greater;

3. Prepayment fees and penalties which may be charged or collected under the terms of the loan documents which do not exceed one percent (1%) of the amount prepaid, provided the loan documents do not permit the lender to charge or collect any prepayment fees or penalties more than 30 months after the loan closing; or

c. The loan documents permit the lender to charge or collect prepayment fees or penalties more than 30 months after the loan closing or which exceed, in the aggregate, more than two percent (2%) of the amount prepaid.

(7) "Total loan amount" means the same as the term "total loan amount" as used in section 226.32 of Title 12 of the Code of Federal Regulations, and the same shall be calculated in accordance with the Federal Reserve Board's Official Staff Commentary thereto.

(b) Limitations. — A high-cost home loan shall be subject to the following limitations:

(1) No call provision. — No high-cost home loan may contain a provision which permits the lender, in its sole discretion, to accelerate the

indebtedness. This provision does not apply when repayment of the loan has been accelerated by default, pursuant to a due-on-sale provision, or pursuant to some other provision of the loan documents unrelated to the payment schedule.

(2) No balloon payment. — No high-cost home loan may contain a scheduled payment that is more than twice as large as the average of earlier scheduled payments. This provision does not apply when the payment schedule is adjusted to the seasonal or irregular income of the borrower.

(3) No negative amortization. — No high-cost home loan may contain a payment schedule with regular periodic payments that cause the principal balance to increase.

(4) No increased interest rate. — No high-cost home loan may contain a provision which increases the interest rate after default. This provision does not apply to interest rate changes in a variable rate loan otherwise consistent with the provisions of the loan documents, provided the change in the interest rate is not triggered by the event of default or the acceleration of the indebtedness.

(5) No advance payments. — No high-cost home loan may include terms under which more than two periodic payments required under the loan are consolidated and paid in advance from the loan proceeds provided to the borrower.

(6) No modification or deferral fees. — A lender may not charge a borrower any fees to modify, renew, extend, or amend a high-cost home loan or to defer any payment due under the terms of a high-cost home loan.

(c) Prohibited Acts and Practices. — The following acts and practices are prohibited in the making of a high-cost home loan:

(1) No lending without home-ownership counseling. — A lender may not make a high-cost home loan without first receiving certification from a counselor approved by the North Carolina Housing Finance Agency that the borrower has received counseling on the advisability of the loan transaction and the appropriate loan for the borrower.

(2) No lending without due regard to repayment ability. — As used in this subsection, the term "obligor" refers to each borrower, co-borrower, cosigner, or guarantor obligated to repay a loan. A lender may not make a high-cost home loan unless the lender reasonably believes at the time the loan is consummated that one or more of the obligors, when considered individually or collectively, will be able to make the scheduled payments to repay the obligation based upon a consideration of their current and expected income, current obligations, employment status, and other financial resources (other than the borrower's equity in the dwelling which secures repayment of the loan). An obligor shall be presumed to be able to make the scheduled payments to repay the obligation if, at the time the loan is consummated, the obligor's total monthly debts, including amounts owed under the loan, do not exceed fifty percent (50%) of the obligor's monthly gross income as verified by the credit application, the obligor's financial statement, a credit report, financial information provided to the lender by or on behalf of the obligor, or any other reasonable means; provided, no presumption of inability to make the scheduled payments to repay the obligation shall arise solely from the fact that, at the time the loan is consummated, the obligor's total monthly debts (including amounts owed under the loan) exceed fifty percent (50%) of the obligor's monthly gross income.

(3) No financing of fees or charges. — In making a high-cost home loan, a lender may not directly or indirectly finance:

a. Any prepayment fees or penalties payable by the borrower in a refinancing transaction if the lender or an affiliate of the lender is the noteholder of the note being refinanced;
b. Any points and fees; or
c. Any other charges payable to third parties.

(4) No benefit from refinancing existing high-cost home loan with new high-cost home loan. — A lender may not charge a borrower points and fees in connection with a high-cost home loan if the proceeds of the high-cost home loan are used to refinance an existing high-cost home loan held by the same lender as noteholder.

(5) Restrictions on home-improvement contracts. — A lender may not pay a contractor under a home-improvement contract from the proceeds of a high-cost home loan other than (i) by an instrument payable to the borrower or jointly to the borrower and the contractor, or (ii) at the election of the borrower, through a third-party escrow agent in accordance with terms established in a written agreement signed by the borrower, the lender, and the contractor prior to the disbursement.

(6) No shifting of liability. — A lender is prohibited from shifting any loss, liability, or claim of any kind to the closing agent or closing attorney for any violation of this section.

(d) Unfair and Deceptive Acts or Practices. — Except as provided in subsection (e) of this section, the making of a high-cost home loan which violates any provisions of subsection (b) or (c) of this section is hereby declared usurious in violation of the provisions of this Chapter and unlawful as an unfair or deceptive act or practice in or affecting commerce in violation of the provisions of G.S. 75-1.1. The provisions of this section shall apply to any person who in bad faith attempts to avoid the application of this section by (i) the structuring of a loan transaction as an open-end credit plan for the purpose and with the intent of evading the provisions of this section when the loan would have been a high-cost home loan if the loan had been structured as a closed-end loan, or (ii) dividing any loan transaction into separate parts for the purpose and with the intent of evading the provisions of this section, or (iii) any other such subterfuge. The Attorney General, the Commissioner of Banks, or any party to a high-cost home loan may enforce the provisions of this section. Any person seeking damages or penalties under the provisions of this section may recover damages under either this Chapter or Chapter 75, but not both.

(e) Corrections and Unintentional Violations. — A lender in a high-cost home loan who, when acting in good faith, fails to comply with subsections (b) or (c) of this section, will not be deemed to have violated this section if the lender establishes that either:

(1) Within 30 days of the loan closing and prior to the institution of any action under this section, the borrower is notified of the compliance failure, appropriate restitution is made, and whatever adjustments are necessary are made to the loan to either, at the choice of the borrower, (i) make the high-cost home loan satisfy the requirements of subsections (b) and (c) of this section, or (ii) change the terms of the loan in a manner beneficial to the borrower so that the loan will no longer be considered a high-cost home loan subject to the provisions of this section; or

(2) The compliance failure was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such errors, and within 60 days after the discovery of the compliance failure and prior to the institution of any action under this section or the receipt of written notice of the compliance failure, the borrower is notified of the compliance failure, appropriate restitution is made, and whatever adjustments are necessary are made to

the loan to either, at the choice of the borrower, (i) make the high-cost home loan satisfy the requirements of subsections (b) and (c) of this section, or (ii) change the terms of the loan in a manner beneficial to the borrower so that the loan will no longer be considered a high-cost home loan subject to the provisions of this section. Examples of a bona fide error include clerical, calculation, computer malfunction and programming, and printing errors. An error of legal judgment with respect to a person's obligations under this section is not a bona fide error.

(f) Severability. — The provisions of this section shall be severable, and if any phrase, clause, sentence, or provision is declared to be invalid or is preempted by federal law or regulation, the validity of the remainder of this section shall not be affected thereby. If any provision of this section is declared to be inapplicable to any specific category, type, or kind of points and fees, the provisions of this section shall nonetheless continue to apply with respect to all other points and fees. (1999-332, s. 2; 2000-140, s. 40.1.)

Effect of Amendments. — Session Laws 2000-140, s. 40.1, effective July 21, 2000, added subdivision (c)(6).

§ 24-5. (See editor's note) 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.

(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 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 until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate. (1786, c. 253, P.R.; 1789, c. 314, s. 4, P.R.; 1807, c. 721, P.R.; R.C., c. 31, s. 90; Code, s. 530; Rev., s. 1954; C.S., s. 2309; 1981, c. 327, s. 1; 1985, c. 214, s. 1; 1987, c. 758; 1999-384, s. 1; 2000-133, s. 8.)

Editor's Note. —
For explanatory notes, see the main volume.

Effect of Amendments. —
Session Laws 2000-133, s. 8, effective January 1, 2001, and applicable to all bail bonds executed and all forfeiture proceedings initiated on and after that date, substituted "docketing of judgment" for "entry of judgment" in subsection (a1).

CASE NOTES

III. Other Actions.

III. OTHER ACTIONS.

No Interest on Awards Under State Tort Claims Act Absent Express Statutory Authority. —

Plaintiff was not entitled to pre- or post-judgment interest under this section for his claim against the State under the Tort Claims Act. McGee v. North Carolina Dep't of Revenue, 135 N.C. App. 319, 520 S.E.2d 84 (1999).

Interest on Eminent Domain Actions. — Trial court erred in awarding 14% interest from the time of entry of judgment until its satisfaction, even though subsection (b) of this section might be construed as allowing interest at the legal rate until judgment is satisfied, because § 40A-53 specifically provides for interest in eminent domain actions during this period at the rate of 6% per annum. Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999).

Interest on Judgment Proceeds Applied to Workers' Compensation Lien. — Workers' compensation lien on judgment proceeds under the specific facts of case were neither derived from an action in contract nor from an amount "designated by the fact-finder as compensatory damages," and the trial court's award of interest would therefore be vacated. Hieb v. Lowery, 134 N.C. App. 1, 516 S.E.2d 621 (1999).

§ 24-8. Loans not in excess of $300,000; what interest, fees and charges permitted.

(a) If the principal amount of a loan is less than three hundred thousand dollars ($300,000), no lender shall charge or receive from any borrower or require in connection with any loan any borrower, directly or indirectly, to pay, deliver, transfer, or convey or otherwise confer upon or for the benefit of the lender or any other person, firm, or corporation any sum of money, thing of value, or other consideration other than that which is pledged as security or collateral to secure the repayment of the full principal of the loan, together with fees and interest provided for in this Chapter or Chapter 53 of the General Statutes.

(b) Notwithstanding any contrary provision of State law, if the principal amount of a loan is three hundred thousand dollars ($300,000) or more, any borrower may agree to pay, and any lender or other person may charge and collect from the borrower, interest, fees, and other charges as may be agreed upon between the parties, and the borrower and anyone claiming by or through the borrower is prohibited from asserting usury as a claim or defense.

(c) The provisions of this section shall not prevent a borrower from selling, transferring, or conveying property other than security or collateral to any person, firm, or corporation for a fair consideration so long as such transaction is not made a condition or requirement for any loan.

(d) Notwithstanding any contrary provision of State law, any lender may collect money from the borrower for the payment of (i) bona fide loan-related goods, products, and services provided or to be provided by third parties, (ii) taxes, filing fees, recording fees, and other charges and fees paid or to be paid to public officials, and (iii) fees payable to the federal government, any state or local government or any federal, state, or local governmental agency in connection with a loan made pursuant to a loan program sponsored by or offered through the federal government, any state or local government or any federal, state or local government agency, including loan guarantee and tax credit programs. No third party shall charge or receive (i) any unreasonable compensation for loan-related goods, products, and services, or (ii) any compensation for which no loan-related goods and products are provided or for which no or only nominal loan-related services are performed. Loan-related goods, products, and services include fees for tax payment services, fees for flood certification, fees for pest-infestation determinations, mortgage brokers'

fees, appraisal fees, inspection fees, environmental assessment fees, fees for credit report services, assessments, costs of upkeep, surveys, attorneys' fees, notary fees, escrow charges, and insurance premiums (including, for example, fire, title, life, accident and health, disability, unemployment, flood, and mortgage insurance).

(e) Notwithstanding any contrary provision of State law, any lender may receive the proceeds from any insurance policies where loss occurs under the terms of such policies.

(f) This section shall not be applicable to any corporation licensed as a "Small Business Investment Company" under the provisions of the United States Code Annotated, Title 15, section 66, et seq., nor shall it be applicable to the sale or purchase of convertible debentures, nor to the sale or purchase of any debt security with accompanying warrants, nor to the sale or purchase of other securities through an organized securities exchange. (1961, c. 1142; 1969, c. 127; c. 1303, s. 5; 1993, c. 226, s. 12; 1999-332, s. 4; 2000-140, s. 40(c).)

Effect of Amendments. —

Session Laws 2000-140, s. 40(c), effective July 21, 2000, deleted "and" at the end of clause (i) in the first sentence of subsection (d) and added the language beginning "and (iii)" at the end of that sentence.

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Article 1.

General Provisions.

PART 1.

Short Title, Construction, Application and Subject Matter of the Act.

§ 25-1-103. Supplementary general principles of law applicable.

CASE NOTES

Applied in Fordham v. Eason, 351 N.C. 151, 521 S.E.2d 701 (1999).

§ 25-1-105. (Effective July 1, 2001) Territorial application of the act; parties' power to choose applicable law.

(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this State and also to another state or nation the parties may agree that the law either of this State or of such other state or nation shall govern their rights and duties. Failing such agreement this chapter applies to transactions bearing an appropriate relation to this State.

(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). (1965, c. 700, s. 1; 1975, c. 862, s. 1; 1993, c. 157, s. 2; 1997-181, s. 17; 1999-73, s. 2; 2000-169, s. 3.)

AMENDED OFFICIAL COMMENT (1999 ED.)

Prior Uniform Statutory Provision:
None.

Purposes:
1. Subsection (1) states affirmatively the

right of the parties to a multi-state transaction or a transaction involving foreign trade to choose their own law. That right is subject to the firm rules stated in the five sections listed in subsection (2), and is limited to jurisdictions to which the transaction bears a "reasonable relation." In general, the test of "reasonable relation" is similar to that laid down by the Supreme Court in Seeman v. Philadelphia Warehouse Co., 274 U.S. 403, 47 S.Ct. 626, 71 L.Ed. 1123 (1927). Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs. But an agreement as to choice of law may sometimes take effect as a shorthand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen.

2. Where there is no agreement as to the governing law, the Act is applicable to any transaction having an "appropriate" relation to any state which enacts it. Of course, the Act applies to any transaction which takes place in its entirety in a state which has enacted the Act. But the mere fact that suit is brought in a state does not make it appropriate to apply the substantive law of that state. Cases where a relation to the enacting state is not "appropriate" include, for example, those where the parties have clearly contracted on the basis of some other law, as where the law of the place of contracting and the law of the place of contemplated performance are the same and are contrary to the law under the Code.

3. Where a transaction has significant contacts with a state which has enacted the Act and also with other jurisdictions, the question what relation is "appropriate" is left to judicial decision. In deciding that question, the court is not strictly bound by precedents established in other contexts. Thus a conflict-of-laws decision refusing to apply a purely local statute or rule of law to a particular multi-state transaction may not be valid precedent for refusal to apply the Code in an analogous situation. Application of the Code in such circumstances may be justified by its comprehensiveness, by the policy of uniformity, and by the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries. Compare Global Commerce Corp. v. Clark-Babbitt Industries, Inc., 239 F.2d 716, 719 (2d Cir. 1956). In particular, where a transaction is governed in large part by the Code, application of another law to some detail of performance because of an accident or geography may violate the commercial understanding of the parties.

4. The Act does not attempt to prescribe choice-of-law rules for states which do not enact it, but this section does not prevent application of the Act in a court of such a state. Common-law choice of law often rests on policies of giving effect to agreements and of uniformity of result regardless of where suit is brought. To the extent that such policies prevail, the relevant considerations are similar in such a court to those outlined above.

5. Subsection (2) spells out essential limitations on the parties' right to choose the applicable law. Especially in Article 9 parties taking a security interest or asked to extend credit which may be subject to a security interest must have sure ways to find out whether and where to file and where to look for possible existing filings.

6. Sections 9-301 through 9-307 should be consulted as to the rules for perfection of security interests and agricultural liens, the effect of perfection and non-perfection, and priority.

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. —

Session Laws 2000-169, s. 3, effective July 1, 2001, in subdivision (2), moved the entries relating to §§ 25-4A-507 and 25-5-116 to fall in numerical order, inserted "Law governing perfection ... (G.S. 25-9-307)," and deleted "Perfection provisions of the article on secured transactions. (G.S. 25-9-103)."

§ 25-1-109. (Effective July 1, 2001) Section captions.

Section captions are parts of this chapter. The subsection headings in Article 9 of this Chapter are not parts of this Chapter. (1965, c. 700, s. 1; 2000-169, s. 4.)

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 4, effective July 1, 2001, added the second sentence.

PART 2.

General Definitions and Principles of Interpretation.

§ 25-1-201. (Effective until July 1, 2001) General definitions.

CASE NOTES

"Holder". —

Bank which had cancelled and released a promissory note because of a clerical error, and therefore was not a "holder" in the traditional sense, could still meet the burden required by this section by showing that debtor never satisfied the underlying obligation. G.E. Capital Mtg. Servs. v. Neely, 135 N.C. App. 187, 519 S.E.2d 553 (1999).

Quoted in In re Environmental Aspecs, Inc., 235 Bankr. 378 (E.D.N.C. 1999).

§ 25-1-201. (Effective July 1, 2001) General definitions.

Subject to additional definitions contained in the subsequent articles of this chapter which are applicable to specific articles or parts thereof, and unless the context otherwise requires, in this chapter:

(1) "Action" in the sense of a judicial proceeding includes recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined.

(2) "Aggrieved party" means a party entitled to resort to a remedy.

(3) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this chapter (G.S. 25-1-205, 25-2-208, and 25-2A-207). Whether an agreement has legal consequences is determined by the provisions of this chapter, if applicable; otherwise by the law of contracts (G.S. 25-1-103). (Compare "Contract.")

(4) "Bank" means any person engaged in the business of banking.

(5) "Bearer" means the person in possession of an instrument, document of title, or certificated security payable to bearer or indorsed in blank.

(6) "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.

(7) "Branch" includes a separately incorporated foreign branch of a bank.

(8) "Burden of establishing a fact" means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.

(9) "Buyer in ordinary course of business" means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the 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. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for

cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Article 2 of this Chapter may be a buyer in ordinary course of business. A person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt is not a buyer in ordinary course of business.

(10) "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.

(11) "Contract" means the total legal obligation which results from the parties' agreement as affected by this chapter and any other applicable rules of law. (Compare "Agreement.")

(12) "Creditor" includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate.

(13) "Defendant" includes a person in the position of defendant in a cross action or counterclaim.

(14) "Delivery" with respect to instruments, documents of title, chattel paper, or certificated securities means voluntary transfer of possession.

(15) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

(16) "Fault" means wrongful act, omission or breach.

(17) "Fungible" with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this chapter to the extent that under a particular agreement or document unlike units are treated as equivalents.

(18) "Genuine" means free of forgery or counterfeiting.

(19) "Good faith" means honesty in fact in the conduct or transaction concerned.

(20) "Holder" with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. "Holder" with respect to a document of title means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.

(21) To "honor" is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.

(22) "Insolvency proceedings" includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.

(23) A person is "insolvent" who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the Federal Bankruptcy Law.

(24) "Money" means a medium of exchange authorized or adopted by a domestic or foreign government and includes a monetary unit of account established by an intergovernmental organization or by an agreement between two or more nations.

(25) A person has "notice" of a fact when:

(a) The person has actual knowledge of it; or

(b) The person has received a notice or notification of it; or

(c) From all the facts and circumstances known to the person at the time in question he has reason to know that it exists.

A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this chapter.

(26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when:

(a) It comes to the person's attention; or

(b) It is duly delivered at the place of business through which the contract was made or at any other place held out by the person as the place for receipt of the communications.

(27) Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to the individual's attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of the individual's regular duties or unless the individual has reason to know of the transaction and that the transaction would be materially affected by the information.

(28) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(29) "Party," as distinct from "third party," means a person who has engaged in a transaction or made an agreement within this chapter.

(30) "Person" includes an individual or an organization (See G.S. 25-1-102).

(31) "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.

(32) "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, security interest, issue or re-issue, gift or any other voluntary transaction creating an interest in property.

(33) "Purchaser" means a person who takes by purchase.

(34) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(35) "Representative" includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.

(36) "Rights" includes remedies.

(37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The term also includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9 of this Chapter. The special property interest of a buyer of goods on identification of those goods to a contract for sale under G.S. 25-2-401 is not a "security interest," but a buyer may also acquire a "security interest" by complying with Article 9 of this Chapter. Except as otherwise provided in G.S. 25-2-505, the right of a seller or lessor of goods under Article 2 or 2A of this Chapter to retain or acquire possession of the goods is not a "security interest', but a seller or lessor may also acquire a "security interest" by complying with Article 9 of this Chapter. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (G.S. 25-2-401) is limited in effect to a reservation of a "security interest".

(a) Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and:

(i) The original term of the lease is equal to or greater than the remaining economic life of the goods, or

(ii) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods, or

(iii) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement, or

(iv) The lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

(b) A transaction does not create a security interest merely because it provides that:

(i) The present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into,

(ii) The lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods,

(iii) The lessee has an option to renew the lease or to become the owner of the goods,

(iv) The lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed, or

(v) The lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably

predictable fair market value of the goods at the time the option is to be performed.

(c) For purposes of this subsection (37):

(i) Additional consideration is not nominal if (i) when the option to renew the lease is granted to the lessee the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed, or (ii) when the option to become the owner of the goods is granted to the lessee the price is stated to be the fair market value of the goods determined at the time the option is to be performed. Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised;

(ii) "Reasonably predictable" and "remaining economic life of the goods" are to be determined with reference to the facts and circumstances at the time the transaction is entered into; and

(iii) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

(38) "Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.

(39) "Signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing.

(40) "Surety" includes guarantor.

(41) "Telegram" includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.

(42) "Term" means that portion of an agreement which relates to a particular matter.

(43) "Unauthorized" signature means one made without actual, implied, or apparent authority and includes a forgery.

(44) "Value." Except as otherwise provided with respect to negotiable instruments and bank collections (G.S. 25-3-303, 25-4-210 [25-4-208], and 25-4-211 [25-4-209] a person gives "value" for rights if the person acquires them:

(a) In return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; or

(b) As security for or in total or partial satisfaction of a pre-existing claim; or

(c) By accepting delivery pursuant to a pre-existing contract for purchase; or

(d) Generally, in return for any consideration sufficient to support a simple contract.

(45) "Warehouse receipt" means a receipt issued by a person engaged in the business of storing goods for hire.

(46) "Written" or "writing" includes printing, typewriting or any other intentional reduction to tangible form. (1899, c. 733, ss. 25, 56, 191; Rev., ss. 2173, 2205, 2340, 3032; 1917, c. 37, ss. 4, 5, 58; 1919, c. 65, ss. 1, 10, 32, 42; c. 290; C.S., ss. 280, 283, 292, 314, 2976, 3005, 3037, 4037, 4044, 4046; 1941, c. 353, s. 22; G.S., s. 55-102; 1955, c. 1371, s. 2; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, ss. 2, 3; 1989 (Reg. Sess., 1990), c. 1024, s. 8(a)-(c); 1993, c. 463, s. 2; 1995, c. 232, s. 3; 2000-169, ss. 5-7.)

AMENDED OFFICIAL COMMENT (1999 ED.)

Prior Uniform Statutory Provision, Changes and New Matter:

1. "Action". See similar definitions in Section 191, Uniform Negotiable Instruments Law; Section 76, Uniform Sales Act; Section 58, Uniform Warehouse Receipts Act; Section 53, Uniform Bills of Lading Act. The definition has been rephrased and enlarged.

2. "Aggrieved party". New.

3. "Agreement". New. As used in this Act the word is intended to include full recognition of usage of trade, course of dealing, course of performance and the surrounding circumstances as effective parts thereof, and of any agreement permitted under the provisions of this Act to displace a stated rule of law.

4. "Bank". See Section 191, Uniform Negotiable Instruments Law.

5. "Bearer". From Section 191, Uniform Negotiable Instruments Law. The prior definition has been broadened.

6. "Bill of Lading". See similar definitions in Section 1, Uniform Bills of Lading Act. The definition has been enlarged to include freight forwarders' bills and bills issued by contract carriers as well as those issued by common carriers. The definition of airbill is new.

7. "Branch". New.

8. "Burden of establishing a fact". New.

9. "Buyer in ordinary course of business". From Section 1, Uniform Trust Receipts Act. The definition has been expanded to make clear the type of person protected. Its major significance lies in Section 2-403 and in the Article on Secured Transactions (Article 9).

The first sentence of paragraph (9) makes clear that a buyer from a pawnbroker cannot be a buyer in ordinary course of business. The second sentence tracks Section 6-102(1)(m). It explains what it means to buy "in the ordinary course." The penultimate sentence prevents a buyer that does not have the right to possession as against the seller from being a buyer in ordinary course of business. Concerning when a buyer obtains possessory rights, see Sections 2-502 and 2-716. However, the penultimate sentence is not intended to affect a buyer's status as a buyer in ordinary course of business in cases (such as a "drop shipment") involving delivery by the seller to a person buying from the buyer or a donee from the buyer. The requirement relates to whether *as against the seller* the buyer or one taking through the buyer has possessory rights.

10. Conspicuous". New. This is intended to indicate some of the methods of making a term attention-calling. But the test is whether attention can reasonably be expected to be called to it.

11. "Contract". New. But see Sections 3 and 71, Uniform Sales Act.

12. "Creditor". New.

13. "Defendant". From Section 76. Uniform Sales Act. Rephrased.

14. "Delivery". Section 76, Uniform Sales Act, Section 191, Uniform Negotiable Instruments Law, Section 58, Uniform Warehouse Receipts Act and Section 53, Uniform Bills of Lading Act.

15. "Document of title". From Section 76, Uniform Sales Act, but rephrased to eliminate certain ambiguities. Thus, by making it explicit that the obligation or designation of a third party as "bailee" is essential to a document of title, this definition clearly rejects any such result as obtained in Hixson v. Ward, 254 Ill. App. 505 (1929), which treated a conditional sales contract as a document of title. Also the definition is left open so that new types of documents may be included. It is unforeseeable what documents may one day serve the essential purpose now filled by warehouse receipts and bills of lading. Truck transport has already opened up problems which do not fit the patterns of practice resting upon the assumption that a draft can move through banking channels faster than the goods themselves can reach their destination. There lie ahead air transport and such probabilities as teletype transmission of what may some day be regarded commercially as "Documents of Title". The definition is stated in terms of the function of the documents with the intention that any document which gains commercial recognition as accomplishing the desired result shall be included within its scope. Fungible goods are adequately identified within the language of the definition by identification of the mass of which they are a part.

Dock warrants were within the Sales Act definition of document of title apparently for the purpose of recognizing a valid tender by means of such paper. In current commercial

practice a dock warrant or receipt is a kind of interim certificate issued by steamship companies upon delivery of the goods at the dock, entitling a designated person to have issued to him at the company's office a bill of lading. The receipt itself is invariably nonnegotiable in form although it may indicate that a negotiable bill is to be forthcoming. Such a document is not within the general compass of the definition, although trade usage may in some cases entitle such paper to be treated as a document of title. If the dock receipt actually represents a storage obligation undertaken by the shipping company, then it is a warehouse receipt within this section regardless of the name given to the instrument.

The goods must be "described", but the description may be by marks or labels and may be qualified in such a way as to disclaim personal knowledge of the issuer regarding contents or condition. However, baggage and parcel checks and similar "tokens" of storage which identify stored goods only as those received in exchange for the token are not covered by this Article.

The definition is broad enough to include an airway bill.

16. "Fault". From Section 76, Uniform Sales Act.

17. "Fungible". See Sections 5, 6 and 76, Uniform Sales Act; Section 58, Uniform Warehouse Receipts Act. Fungibility of goods "by agreement" has been added for clarity and accuracy. As to securities, see Section 8-107 and Comment.

18. "Genuine". New.

19. "Good faith". See Section 76(2), Uniform Sales Act; Section 58(2), Uniform Warehouse Receipts Act; Section 53(2), Uniform Bills of Lading Act; Section 22(2), Uniform Stock Transfer Act. "Good faith", whenever it is used in the Code, means at least what is here stated. In certain Articles, by specific provision, additional requirements are made applicable. See, e.g., Secs. 2-103(1) (b), 7-404. To illustrate, in the Article on Sales, Section 2-103, good faith is expressly defined as including in the case of a merchant observance of reasonable commercial standards of fair dealing in the trade, so that throughout that Article wherever a merchant appears in the case an inquiry into his observance of such standards is necessary to determine his good faith.

20. "Holder". See similar definitions in Section 191, Uniform Negotiable Instruments Law; Section 58, Uniform Warehouse Receipts Act; Section 53, Uniform Bills of Lading Act.

21. "Honor". New.

22. "Insolvency proceedings". New.

23. "Insolvent". Section 76(3), Uniform Sales Act. The three tests of insolvency—"ceased to pay his debts in the ordinary course of business," "cannot pay his debts as they become due," and "insolvent within the meaning of the federal bankruptcy law"—are expressly set up as alternative tests and must be approached from a commercial standpoint.

24. "Money". Section 6(5), Uniform Negotiable Instruments Law. The test adopted is that of sanction of government, whether by authorization before issue or adoption afterward, which recognizes the circulating medium as a part of the official currency of that government. The narrow view that money is limited to legal tender is rejected.

25. "Notice". New. Compare N.I.L. Sec. 56. Under the definition a person has notice when he has received a notification of the fact in question. But by the last sentence the act leaves open the time and circumstances under which notice or notification may cease to be effective. Therefore such cases as Graham v. White-Phillips Co., 296 U. S. 27, 56 S. Ct. 21, 80 L. Ed. 20 (1935), are not overruled.

26. "Notifies". New. This is the word used when the essential fact is the proper dispatch of the notice, not its receipt. Compare "Send". When the essential fact is the other party's receipt of the notice, that is stated. The second sentence states when a notification is received.

27. New. This makes clear that reason to know, knowledge, or a notification, although "received" for instance by a clerk in Department A of an organization, is effective for a transaction conducted in Department B only from the time when it was or should have been communicated to the individual conducting that transaction.

28. "Organization". This is the definition of every type of entity or association, excluding an individual, acting as such. Definitions of "person" were included in Section 191, Uniform Negotiable Instruments Law; Section 76, Uniform Sales Act; Section 58, Uniform Warehouse Receipts Act; Section 53, Uniform Bills of Lading Act; Section 22, Uniform Stock Transfer Act; Section 1, Uniform Trust Receipts Act. The definition of "organization" given here includes a number of entities or associations not specifically mentioned in prior definition of "person", namely, government, governmental subdivision or agency, business trust, trust and estate.

29. "Party". New. Mention of a party includes, of course, a person acting through an agent. However, where an agent comes into opposition or contrast to his principal, particular account is taken of that situation.

30. "Person". See Comment to definition of "Organization". The reference to Section 1-102 is to subsection (5) of that section.

31. "Presumption". New.

32. "Purchase". Section 58, Uniform Warehouse Receipts Act; Section 76, Uniform Sales Act; Section 53, Uniform Bills of Lading Act; Section 22, Uniform Stock Transfer Act; Section 1, Uniform Trust Receipts Act. Rephrased. With the addition of taking "by ... security interest,"

the revised definition makes explicit what formerly was implicit.

33. "Purchaser". Section 58, Uniform Warehouse Receipts Act; Section 76, Uniform Sales Act; Section 53, Uniform Bills of Lading Act; Section 22, Uniform Stock Transfer Act; Section 1, Uniform Trust Receipts Act. Rephrased.

34. "Remedy" New. The purpose is to make it clear that both remedy and rights (as defined) include those remedial rights of "self help" which are among the most important bodies of rights under this Act, remedial rights being those to which an aggrieved party can resort on his own motion.

35. "Representative". New.

36. "Rights". New. See Comment to "Remedy".

37. "Security Interest". See Section 1, Uniform Trust Receipts Act. The definition of "security interest" was revised in connection with the promulgation of Article 2A and also to take account of the expanded scope of Article 9 as revised in the 1998 Official Text. It includes the interest of a consignor and the interest of a buyer of accounts, chattel paper, payment intangibles, or promissory notes. See Section 9-109. It also makes clear that, with certain exceptions, *in rem* rights of sellers and lessors under Articles 2 and 2A are not "security interests." Among the rights that are not security interests are the right to withhold delivery under Section 2-702(1), 2-703(a), or 2A-525, the right to stop delivery under Section 2-705 or 2A-526, and the right to reclaim under Section 2-507(2) or 2-702(2).

38. "Send". New. Compare "notifies".

39. "Signed". New. The inclusion of authentication in the definition of "signed" is to make clear that as the term is used in this Act a complete signature is not necessary. Authentication may be printed, stamped or written; it may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. No catalog of possible authentications can be complete and the court must use common sense and commercial experience in passing upon these matters. The question always is whether the symbol was executed or adopted by the party with present intention to authenticate the writing.

40. "Surety". New.

41. "Telegram". New.

42. "Term". New.

43. Under the former version of § 1-201(43), it was not clear whether a reference to an "unauthorized signature" in Articles 3 and 4 applied to indorsements. The words "or indorsement" are deleted so that references to "unauthorized signature" in § 3-406 and elsewhere will unambiguously refer to any signature.

44. "Value". See Sections 25, 26, 27, 191, Uniform Negotiable Instruments Law; Section 76, Uniform Sales Act; Section 53, Uniform Bills of Lading Act; Section 58, Uniform Warehouse Receipts Act; Section 22(1), Uniform Stock Transfer Act; Section 1, Uniform Trust Receipts Act. All the Uniform Acts in the commercial law field (except the Uniform Conditional Sales Act) have carried definitions of "value". All those definitions provided that value was any consideration sufficient to support a simple contract, including the taking of property in satisfaction of or as security for a pre-existing claim. Subsections (a), (b) and (d) in substance continue the definitions of "value" in the earlier acts. Subsection (c) makes explicit that "value" is also given in a third situation: where a buyer by taking delivery under a pre-existing contract converts a contingent into a fixed obligation.

This definition is not applicable to Articles 3 and 4, but the express inclusion of immediately available credit as value follows the separate definitions in those Articles. See Sections 4-208, 4-209, 3-303. A bank or other financing agency which in good faith makes advances against property held as collateral becomes a bona fide purchaser of that property even though provision may be made for charge-back in case of trouble. Checking credit is "immediately available" within the meaning of this section if the bank would be subject to an action for slander of credit in case checks drawn against the credit were dishonored, and when a charge-back is not discretionary with the bank, but may only be made when difficulties in collection arise in connection with the specific transaction involved.

45. "Warehouse receipt". See Section 76(1), Uniform Sales Act; Section 1, Uniform Warehouse Receipts Act. Receipts issued by a field warehouse are included, provided the warehouseman and the depositor of the goods are different persons.

46. "Written" or "writing". This is a broadening of the definition contained in Section 191 of the Uniform Negotiable Instruments Law.

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, ss. 5-7, effective July 1, 2001, rewrote subdivision (9); inserted "security interest" in subdivision (32); rewrote the first paragraph in subdivision (37); and inserted "if the consideration ... and" in subdivision (37)(a).

ARTICLE 2.

Sales.

PART 1.

SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER.

§ 25-2-103. (Effective July 1, 2001) Definitions and index of definitions.

(1) In this article unless the context otherwise requires
(a) "Buyer" means a person who buys or contracts to buy goods.
(b) "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.
(c) "Receipt" of goods means taking physical possession of them.
(d) "Seller" means a person who sells or contracts to sell goods. Any manufacturer of self-propelled motor vehicles, as defined in G.S. 20-4.01, is also a "seller" with respect to buyers of its product to whom it makes an express warranty, notwithstanding any lack of privity between them, for purposes of all rights and remedies available to buyers under this Article.

(2) Other definitions applying to this article or to specified parts thereof, and the sections in which they appear are:
"Acceptance." G.S. 25-2-606.
"Banker's credit." G.S. 25-2-325.
"Between merchants." G.S. 25-2-104.
"Cancellation." G.S. 25-2-106 (4).
"Commercial unit." G.S. 25-2-105.
"Confirmed credit." G.S. 25-2-325.
"Conforming to contract." G.S. 25-2-106.
"Contract for sale." G.S. 25-2-106.
"Cover." G.S. 25-2-712.
"Entrusting." G.S. 25-2-403.
"Financing agency." G.S. 25-2-104.
"Future goods." G.S. 25-2-105.
"Goods." G.S. 25-2-105.
"Identification." G.S. 25-2-501.
"Installment contract." G.S. 25-2-612.
"Letter of credit." G.S. 25-2-325.
"Lot." G.S. 25-2-105.
"Merchant." G.S. 25-2-104.
"Overseas." G.S. 25-2-323.
"Person in position of seller." G.S. 25-2-707.
"Present sale." G.S. 25-2-106.
"Sale." G.S. 25-2-106.
"Sale on approval." G.S. 25-2-326.
"Sale or return." G.S. 25-2-326.
"Termination." G.S. 25-2-106.

(3) The following definitions in other articles apply to this article:
"Check." G.S. 25-3-104.
"Consignee." G.S. 25-7-102.
"Consignor." G.S. 25-7-102.

"Consumer goods." G.S. 25-9-102.
"Dishonor." G.S. 25-3-502.
"Draft." G.S. 25-3-104.
(4) In addition article 1 contains general definitions and principles of construction and interpretation applicable throughout this article. (1965, c. 700, s. 1; 1983, c. 598; 2000-169, s. 8.)

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 8, effective July 1, 2001, in subdivision (3), substituted "G.S. 25-9-102" for "G.S. 25-9-109" and "G.S. 25-3-502" for "G.S. 25-3-507."

§ 25-2-107. Goods to be severed from realty; recording.

CASE NOTES

Trespass to Chattel. — A dispute over a trespass to timber where the claim of a possessory interest arises under a contract for sale of timber should be settled using a trespass to chattel analysis because such timber is classified as goods under North Carolina law. Fordham v. Eason, 351 N.C. 151, 521 S.E.2d 701 (1999).

Where, under the Uniform Commercial Code, defendants/loggers had a valid contract for the sale of timber when plaintiff/logger, who held only an option to purchase and had given no consideration to finalize the contract, entered and removed the timber from defendant/owners' land, said removal was unauthorized and resulted in a trespass to chattel. Fordham v. Eason, 351 N.C. 151, 521 S.E.2d 701 (1999).

PART 2.

Form, Formation and Readjustment of Contract.

§ 25-2-201. Formal requirements; statute of frauds.

CASE NOTES

Stated in Fordham v. Eason, 351 N.C. 151, 521 S.E.2d 701 (1999).

§ 25-2-204. Formation in general.

CASE NOTES

Quoted in Fordham v. Eason, 351 N.C. 151, 521 S.E.2d 701 (1999).

§ 25-2-205. Firm offers.

CASE NOTES

Applied in Fordham v. Eason, 351 N.C. 151, 521 S.E.2d 701 (1999).

§ 25-2-210. (Effective July 1, 2001) Delegation of performance; assignment of rights.

(1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.

(2) Except as otherwise provided in G.S. 25-9-406, unless otherwise agreed, all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

(3) The creation, attachment, perfection, or enforcement of a security interest in the seller's interest under a contract is not a transfer that materially changes the duty of or increases materially the burden or risk imposed on the buyer or impairs materially the buyer's chance of obtaining return performance within the purview of subsection (2) of this section unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the seller. Even in that event, the creation, attachment, perfection, and enforcement of the security interest remain effective, but (i) the seller is liable to the buyer for damages caused by the delegation to the extent that the damages could not reasonably be prevented by the buyer, and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the contract for sale or an injunction against enforcement of the security interest or consummation of the enforcement.

(4) Unless the circumstances indicate the contrary, a prohibition of assignment of "the contract" is to be construed as barring only the delegation to the assignee of the assignor's performance.

(5) An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

(6) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee. (1965, c. 700, s. 1; 2000-169, s. 9.)

AMENDED OFFICIAL COMMENT (1999 ED.)

Prior Uniform Statutory Provision:
None.

Purposes:

1. Generally, this section recognizes both delegation of performance and assignability as normal and permissible incidents of a contract for the sale of goods.

2. Delegation of performance, either in conjunction with an assignment or otherwise, is provided for by subsection (1) where no substantial reason can be shown as to why the delegated performance will not be as satisfactory as personal performance.

3. Under subsection (2) rights which are no longer executory such as a right to damages for breach may be assigned although the agreement prohibits assignment. In such cases no question of delegation of any performance is involved. Subsection (2) is subject to Section 9-406, which makes rights to payment for goods sold ("accounts"), whether or not earned, freely alienable notwithstanding a contrary agreement or rule of law.

4. The nature of the contract or the circumstances of the case, however, may bar assignment of the contract even where delegation of

performance is not involved. This Article and this section are intended to clarify this problem, particularly in cases dealing with output requirement and exclusive dealing contracts. In the first place the section on requirements and exclusive dealing removes from the construction of the original contract most of the "personal discretion" element by substituting the reasonably objective standard of good faith operation of the plant or business to be supplied. Secondly, the section on insecurity and assurances, which is specifically referred to in subsection (5) of this section, frees the other party from the doubts and uncertainty which may afflict him under an assignment of the character in question by permitting him to demand adequate assurance of due performance without which he may suspend his own performance. Subsection (5) is not in any way intended to limit the effect of the section on insecurity and assurances and the word "performance" includes the giving of orders under a requirements contract. Of course, in any case where a material personal discretion is sought to be transferred, effective assignment is barred by subsection (2).

5. Subsection (4) lays down a general rule of construction distinguishing between a normal commercial assignment, which substitutes the assignee for the assignor both as to rights and duties, and a financing assignment in which only the assignor's rights are transferred.

This Article takes no position on the possibility of extending some recognition or power to the original parties to work out normal commercial readjustments of the contract in the case of financing assignments even after the original obligor has been notified of the assignment. This question is dealt with in the Article on Secured Transactions (Article 9).

6. Subsection (5) recognizes that the nonassigning original party has a stake in the reliability of the person with whom he has closed the original contract, and is, therefore, entitled to due assurance that any delegated performance will be properly forthcoming.

7. This section is not intended as a complete statement of the law of delegation and assignment but is limited to clarifying a few points doubtful under the case law. Particularly, neither this section nor this Article touches directly on such questions as the need or effect of notice of the assignment, the rights of successive assignees, or any question of the form of an assignment, either as between the parties or as against any third parties. Some of these questions are dealt with in Article 9.

Cross References:
Point 3: Articles 5 and 9.
Point 4: Sections 2-306 and 2-609.
Point 5: Article 9, Sections 9-317 and 9-318.
Point 7: Article 9.

Definitional Cross References:
"Agreement". Section 1-201.
"Buyer". Section 2-103.
"Contract". Section 1-201.
"Party". Section 1-201.
"Rights". Section 1-201.
"Seller". Section 2-103.
"Term". Section 1-201.

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 9, effective July 1, 2001, rewrote the section.

PART 3.

General Obligation and Construction of Contract.

§ 25-2-312. Warranty of title and against infringement; buyer's obligation against infringement.

AMENDED OFFICIAL COMMENT (1999 ED.)

Editor's Note. — *This Amended Official Comment accompanies the revision to Article 9, effective July 1, 2001.*

Prior Uniform Statutory Provision:
Section 13, Uniform Sales Act.

Changes: Completely rewritten, the provisions concerning infringement being new.

Purposes of Changes:

1. Subsection (1) makes provision for a buyer's basic needs in respect to a title which he in good faith expects to acquire by his purchase, namely, that he receive a good, clean title transferred to him also in a rightful manner so that he will not be exposed to a lawsuit in order to protect it.

The warranty extends to a buyer whether or not the seller was in possession of the goods at the time the sale or contract to sell was made.

The warranty of quiet possession is abolished. Disturbance of quiet possession, although not mentioned specifically, is one way, among many, in which the breach of the warranty of title may be established.

The "knowledge" referred to in subsection 1(b) is actual knowledge as distinct from notice.

2. The provisions of this Article requiring notification to the seller within a reasonable time after the buyer's discovery of a breach apply to notice of a breach of the warranty of title, where the seller's breach was innocent. However, if the seller's breach was in bad faith he cannot be permitted to claim that he has been misled or prejudiced by the delay in giving notice. In such case the "reasonable" time for notice should receive a very liberal interpretation. Whether the breach by the seller is in good or bad faith Section 2-725 provides that the cause of action accrues when the breach occurs. Under the provisions of that section the breach of the warranty of good title occurs when tender of delivery is made since the warranty is not one which extends to "future performance of the goods."

3. When the goods are part of the seller's normal stock and are sold in his normal course of business, it is his duty to see that no claim of infringement of a patent or trademark by a third party will mar the buyer's title. A sale by a person other than a dealer, however, raises no implication in its circumstances of such a warranty. Nor is there such an implication when the buyer orders goods to be assembled, prepared or manufactured on his own specifications. If, in such a case, the resulting product infringes a patent or trademark, the liability will run from buyer to seller. There is, under such circumstances, a tacit representation on the part of the buyer that the seller will be safe in manufacturing according to the specifications, and the buyer is under an obligation in good faith to indemnify him for any loss suffered.

4. This section rejects the cases which recognize the principle that infringements violate the warranty of title but deny the buyer a remedy unless he has been expressly prevented from using the goods. Under this Article "eviction" is not a necessary condition to the buyer's remedy since the buyer's remedy arises immediately upon receipt of notice of infringement; it is merely one way of establishing the fact of breach.

5. Subsection (2) recognizes that sales by sheriffs, executors, certain foreclosing lienors and persons similarly situated may be so out of the ordinary commercial course that their peculiar character is immediately apparent to the buyer and therefore no personal obligation is imposed upon the seller who is purporting to sell only an unknown or limited right. This subsection does not touch upon and leaves open all questions of restitution arising in such cases, when a unique article so sold is reclaimed by a third party as the rightful owner.

Foreclosure sales under Article 9 are another matter. Section 9-610 provides that a disposition of collateral under that section includes warranties such as those imposed by this section on a voluntary disposition of property of the kind involved. Consequently, unless properly excluded under subsection (2) or under the special provisions for exclusion in Section 9-610, a disposition under Section 9-610 of collateral consisting of goods includes the warranties imposed by subsection (1) and, if applicable, subsection (3).

6. The warranty of subsection (1) is not designated as an "implied" warranty, and hence is not subject to Section 2-316 (3). Disclaimer of the warranty of title is governed instead by subsection (2), which requires either specific language or the described circumstances.

Cross References:

Point 1: Section 2-403.
Point 2: Sections 2-607 and 2-725.
Point 3: Section 1-203.
Point 4: Sections 2-609 and 2-725.
Point 6: Section 2-316.

Definitional Cross References:

"Buyer". Section 2-103.
"Contract for sale". Section 2-106.
"Goods". Section 2-105.
"Person". Section 1-201.
"Right". Section 1-201.
"Seller". Section 2-103.

§ 25-2-314. Implied warranty: Merchantability; usage of trade.

CASE NOTES

Summary Judgment Inappropriate in Light Fixture Case. — Genuine issues of material fact regarding whether a flourescent light fixture and ballast were fit for the ordinary purpose for which such goods are used supported a claim of products liability based on breach of implied warranty of merchantability. There was evidence from plaintiff's expert and

investigators that the fire that destroyed the mill originated at the suspect fluorescent light fixture and was caused by the ballast, even though they could not point to a specific defect within the ballast. Red Hill Hosiery Mill v. Magnetek, Inc., — N.C. App. —, 530 S.E.2d 321, 2000 N.C. App. LEXIS 542 (2000).

§ 25-2-326. (Effective July 1, 2001) Sale on approval and sale or return; rights of creditors.

(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is:

(a) a "sale on approval" if the goods are delivered primarily for use, and

(b) a "sale or return" if the goods are delivered primarily for resale.

(2) Goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

(3) Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this article (G.S. 25-2-201) and as contradicting the sale aspect of the contract within the provisions of this article on parol or extrinsic evidence (G.S. 25-2-202). (1965, c. 700, s. 1; 2000-169, s. 10.)

AMENDED OFFICIAL COMMENT (1999 ED.)

Prior Uniform Statutory Provision:
Section 19(3), Uniform Sales Act.

Changes: Completely rewritten in this and the succeeding section.

Purposes of Changes: To make it clear that:

1. Both a "sale on approval" and a "sale or return" should be distinguished from other types of transactions with which they frequently have been confused. A "sale on approval," sometimes also called a sale "on trial" or "on satisfaction," deals with a contract under which the seller undertakes a risk in order to satisfy its prospective buyer with the appearance or performance of the goods that are sold. The goods are delivered to the proposed purchaser but they remain the property of the seller until the buyer accepts them. The price has already been agreed. The buyer's willingness to receive and test the goods is the consideration for the seller's engagement to deliver and sell. A "sale or return," on the other hand, typically is a sale to a merchant whose unwillingness to buy is overcome only by the seller's engagement to take back the goods (or any commercial unit of goods) in lieu of payment if they fail to be resold. A sale or return is a present sale of goods which may be undone at the buyer's option. Accordingly, subsection (2) provides that goods delivered on approval are not subject to the prospective buyer's creditors until acceptance, and goods delivered in a sale or return are subject to the buyer's creditors while in the buyer's possession.

These two transactions are so strongly delineated in practice and in general understanding that every presumption runs against a delivery to a consumer being a "sale or return" and against a delivery to a merchant for resale being a "sale on approval."

2. The right to return goods for failure to conform to the contract does not make the transaction a "sale on approval" or "sale or return" and has nothing to do with this section or Section 2-327. This section is not concerned with remedies for breach of contract. It deals instead with a power given by the contract to turn back the goods even though they are wholly as warranted. This section nevertheless pre-supposes that a contract for sale is contemplated by the parties although that contract may be of the particular character that this section addresses (i.e., a sale on approval or a sale or return).

If a buyer's obligation as a buyer is conditioned not on his personal approval but on the article's passing a described objective test, the risk of loss by casualty pending the test is properly the seller's and proper return is at his expense. On the point of "satisfaction" as meaning "reasonable satisfaction" when an industrial machine is involved, this Article takes no position.

3. Subsection (3) resolves a conflict in the pre-UCC case law by recognizing that an "or return" provision is so definitely at odds with any ordinary contract for sale of goods that if a written agreement is involved the "or return" term must be contained in a written memorandum. The "or return" aspect of a sales contract must be treated as a separate contract under the Statute of Frauds section and as contradicting the sale insofar as questions of parole or extrinsic evidence are concerned.

4. Certain true consignment transactions

were dealt with in former Sections 2-326(3) and 9-114. These provisions have been deleted and have been replaced by new provisions in Article 9. See, e.g., Sections 9-109(a)(4); 9-103(d); 9-319.

Cross References:
Point 2: Article 9.
Point 3: Sections 2-201 and 2-202.

Definitional Cross References:
"Between merchants". Section 2-104.
"Buyer". Section 2-103.
"Conform". Section 2-106.
"Contract for sale". Section 2-106.
"Creditor". Section 1-201.
"Goods". Section 2-105.
"Sale". Section 2-106.
"Seller". Section 2-103.

For this section as in effect until July 1, 2001, see the main volume.

Editor's Note. — The comments to this section contain technical amendments approved through July, 2000.

Effect of Amendments. — Session Laws 2000-169, s. 10, effective July 1, 2001, rewrote the section and its catchline.

PART 5.

PERFORMANCE.

§ 25-2-502. (Effective July 1, 2001) Buyer's right to goods on seller's repudiation, failure to deliver, or insolvency.

(1) Subject to subsections (2) and (3) of this section and even though the goods have not been shipped, a buyer who has paid a part or all of the price of goods in which he has a special property under G.S. 25-2-501 may, on making and keeping good a tender of any unpaid portion of their price, recover them from the seller if:

a. in the case of goods bought for personal, family, or household purposes, the seller repudiates or fails to deliver as required by the contract; or
b. in all cases, the seller becomes insolvent within 10 days after receipt of the first installment on their price.

(2) The buyer's right to recover the goods under subdivision (1)a. of this section vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

(3) If the identification creating his special property has been made by the buyer, he acquires the right to recover the goods only if they conform to the contract for sale. (1965, c. 700, s. 1; 2000-169, s. 11.)

AMENDED OFFICIAL COMMENT (1999 ED.)

Prior Uniform Statutory Provision:
Compare Sections 17, 18 and 19, Uniform Sales Act.

Purposes:

1. This section gives an additional right to the buyer as a result of identification of the goods to the contract in the manner provided in Section 2-501. The buyer is given a right to recover the goods, conditioned upon making and keeping good a tender of any unpaid portion of the price, in two limited circumstances. First, the buyer may recover goods bought for personal, family, or household purposes if the seller repudiates the contract or fails to deliver the goods. Second, in any case, the buyer may recover the goods if the seller becomes insolvent within 10 days after the seller receives the first installment on their price. The buyer's right to recover the goods under this section is an exception to the usual rule, under which the disappointed buyer must resort to an action to recover damages.

2. The question of whether the buyer also acquires a security interest in identified goods and has rights to the goods when insolvency

takes place after the ten-day period provided in this section depends upon compliance with the provisions of the Article on Secured Transactions (Article 9).

3. Under subsection (2), the buyer's right to recover consumer goods under subsection (1)(a) vests upon acquisition of a special property, which occurs upon identification of the goods to the contract. See Section 2-501. Inasmuch as a secured party normally acquires no greater rights in its collateral that its debtor had or had power to convey, see Section 2-403(1) (first sentence), a buyer who acquires a right to recover under this section will take free of a security interest created by the seller if it attaches to the goods after the goods have been identified to the contract. The buyer will take free, even if the buyer does not buy in ordinary course and even if the security interest is perfected. Of course, to the extent that the buyer pays the price after the security interest attaches, the payments will constitute proceeds of the security interest.

4. Subsection (3) is included to preclude the possibility of unjust enrichment, which would exist if the buyer were permitted to recover goods even though they were greatly superior in quality or quantity to that called for by the contract for sale.

Cross References:
Point 1: Sections 1-201 and 2-702.
Point 2: Article 9.

Definitional Cross References:
"Buyer". Section 2-103.
"Conform". Section 2-106.
"Contract for sale". Section 2-106.
"Goods". Section 2-105.
"Insolvent". Section 1-201.
"Right". Section 1-201.
"Seller". Section 2-103.

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 11, effective July 1, 2001, rewrote the section and its catchline.

PART 7.

REMEDIES.

§ 25-2-716. (Effective July 1, 2001) Buyer's right to specific performance or replevin.

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered. In the case of goods bought for personal, family, or household purposes, the buyer's right of replevin vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver. (1965, c. 700, s. 1; 1967, c. 562, s. 1; 2000-169, s. 12.)

AMENDED OFFICIAL COMMENT (1999 ED.)

Prior Uniform Statutory Provision:
Section 68, Uniform Sales Act.

Changes: Rephrased.

Purposes of Changes: To make it clear that:

1. The present section continues in general prior policy as to specific performance and injunction against breach. However, without intending to impair in any way the exercise of the court's sound discretion in the matter, this Article seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale.

2. In view of this Article's emphasis on the commercial feasibility of replacement, a new concept of what are "unique" goods is introduced under this section. Specific performance is no longer limited to goods which are already specific or ascertained at the time of contracting. The test of uniqueness under this section must be made in terms of the total situation which characterizes the contract. Output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation, as contrasted with contracts for the sale of heirlooms or priceless works of art which were usually involved in the older cases. However, uniqueness is not the sole basis of the remedy under this section for the relief may also be granted "in other proper circumstances" and inability to cover is strong evidence of "other proper circumstances".

3. The legal remedy of replevin is given to the buyer in cases in which cover is reasonably unavailable and goods have been identified to the contract. This is in addition to the buyer's right to recover identified goods under Section 2-502. For consumer goods, the buyer's right to replevin vests upon the buyer's acquisition of a special property, which occurs upon identification of the goods to the contract. See Section 2-501. Inasmuch as a secured party normally acquires no greater rights in its collateral that its debtor had or had power to convey, see Section 2-403(1) (first sentence), a buyer who acquires a right of replevin under subsection (3) will take free of a security interest created by the seller if it attaches to the goods after the goods have been identified to the contract. The buyer will take free, even if the buyer does not buy in ordinary course and even if the security interest is perfected. Of course, to the extent that the buyer pays the price after the security interest attaches, the payments will constitute proceeds of the security interest.

4. This section is intended to give the buyer rights to the goods comparable to the seller's rights to the price.

5. If a negotiable document of title is outstanding, the buyer's right of replevin relates of course to the document not directly to the goods. See Article 7, especially Section 7-602.

Cross References:
Point 3: Section 2-502.
Point 4: Section 2-709.
Point 5: Article 7.

Definitional Cross References:
"Buyer". Section 2-103.
"Goods". Section 1-201.
"Rights". Section 1-201.

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 12, effective July 1, 2001, added the last sentence in subdivision (3).

ARTICLE 2A.

Leases.

PART 1.

GENERAL PROVISIONS.

§ 25-2A-103. (Effective July 1, 2001) Definitions and index of definitions.

(1) In this Article unless the context otherwise requires:

(a) "Buyer in ordinary course of business", means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a preexisting contract for sale but does not

include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(b) "Cancellation" occurs when either party puts an end to the lease contract for default by the other party.

(c) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of lease and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article, as a machine, or a set of articles, as a suite of furniture or a line of machinery, or a quantity, as a gross or carload, or any other unit treated in use or in the relevant market as a single whole.

(d) "Conforming" goods or performance under a lease contract means goods or performance that are in accordance with the obligations under the lease contract.

(e) "Consumer lease" means a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease primarily for a personal, family, or household purpose, if the total payments to be made under the lease contract, excluding payments for options to renew or buy, do not exceed twenty-five thousand dollars ($25,000).

(f) "Fault" means wrongful act, omission, breach, or default.

(g) "Finance lease" means a lease with respect to which: (i) the lessor does not select, manufacture, or supply the goods; (ii) the lessor acquires the goods or the right to possession and use of the goods in connection with the lease; and (iii) one of the following occurs:

(A) the lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract;

(B) the lessee's approval of the contract by which the lessor acquired the goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract;

(C) the lessee, before signing the lease contract, receives an accurate and complete statement designating the promises and warranties, and any disclaimers of warranties, limitations or modifications of remedies, or liquidated damages, including those of a third party, such as the manufacturer of the goods, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; or

(D) if the lease is not a consumer lease, the lessor, before the lessee signs the lease contract, informs the lessee in writing (a) of the identity of the person supplying the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods from that person, (b) that the lessee is entitled under this Article to the promises and warranties, including those of any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods, and (c) that the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.

(h) "Goods" means all things that are movable at the time of identification to the lease contract, or are fixtures (G.S. 25- 2A-309), but the term does not include money, documents, instruments, accounts, chattel

paper, general intangibles, or minerals or the like, including oil and gas, before extraction. The term also includes the unborn young of animals.

(i) "Installment lease contract" means a lease contract that authorizes or requires the delivery of goods in separate lots to be separately accepted, even though the lease contract contains a clause "each delivery is a separate lease" or its equivalent.

(j) "Lease" means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease. The term includes a motor vehicle operating agreement that is considered a lease under § 7701(h) of the Internal Revenue Code.

(k) "Lease agreement" means the bargain, with respect to the lease, of the lessor and the lessee in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Article. Unless the context clearly indicates otherwise, the term includes a sublease agreement.

(*l*) "Lease contract" means the total legal obligation that results from the lease agreement as affected by this Article and any other applicable rules of law. Unless the context clearly indicates otherwise, the term includes a sublease contract.

(m) "Leasehold interest" means the interest of the lessor or the lessee under a lease contract.

(n) "Lessee" means a person who acquires the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessee.

(o) "Lessee in ordinary course of business" means a person who in good faith and without knowledge that the lease to him is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods leases in ordinary course from a person in the business of selling or leasing goods of that kind but does not include a pawnbroker. "Leasing" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a preexisting lease contract but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(p) "Lessor" means a person who transfers the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessor.

(q) "Lessor's residual interest" means the lessor's interest in the goods after expiration, termination, or cancellation of the lease contract.

(r) "Lien" means a charge against or interest in goods to secure payment of a debt or performance of an obligation, but the term does not include a security interest.

(s) "Lot" means a parcel or a single article that is the subject matter of a separate lease or delivery, whether or not it is sufficient to perform the lease contract.

(t) "Merchant lessee" means a lessee that is a merchant with respect to goods of the kind subject to the lease.

(u) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate was not manifestly unreasonable at the time the transaction

was entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

(v) "Purchase" includes taking by sale, lease, mortgage, security interest, pledge, gift, or any other voluntary transaction creating an interest in goods.

(w) "Sublease" means a lease of goods the right to possession and use of which was acquired by the lessor as a lessee under an existing lease.

(x) "Supplier" means a person from whom a lessor buys or leases goods to be leased under a finance lease.

(y) "Supply contract" means a contract under which a lessor buys or leases goods to be leased.

(z) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the lease contract otherwise than for default.

(2) Other definitions applying to this Article and the sections in which they appear are:

"Accessions". G.S. 25-2A-310(1).
"Construction mortgage". G.S. 25-2A-309(1)(d).
"Encumbrance". G.S. 25-2A-309(1)(e).
"Fixtures". G.S. 25-2A-309(1)(a).
"Fixture filing". G.S. 25-2A-309(1)(b).
"Purchase money lease". G.S. 25-2A-309(1)(c).

(3) The following definitions in other Articles apply to this Article:

"Account". G.S. 25-9-102(a)(2).
"Between merchants". G.S. 25-2-104(3).
"Buyer". G.S. 25-2-103(1)(a).
"Chattel paper". G.S. 25-9-102(a)(11).
"Consumer goods". G.S. 25-9-102(a)(23).
"Document". G.S. 25-9-102(a)(30).
"Entrusting". G.S. 25-2-403(3).
"General intangible". G.S. 25-9-102(a)(42).
"Good faith". G.S. 25-2-103(1)(b).
"Instrument". G.S. 25-9-102(a)(47).
"Merchant". G.S. 25-2-104(1).
"Mortgage". G.S. 25-9-102(a)(55).
"Pursuant to commitment". G.S. 25-9-102(a)(68).
"Receipt". G.S. 25-2-103(1)(c).
"Sale". G.S. 25-2-106(1).
"Sale on approval". G.S. 25-2-326.
"Sale or return". G.S. 25-2-326.
"Seller". G.S. 25-2-103(1)(d).

(4) In addition, Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article. (1993, c. 463, s. 1; 1993 (Reg. Sess., 1994), c. 756, s. 1; 1995, c. 509, s. 21; 2000-169, s. 13.)

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 13, effective July 1, 2001, in subdivision (3), substituted "General intangible" for "General intangibles" and updated the section references in the entries for "Account," "Chattel paper," "Consumer goods," "Documents," "General intangible," "Instrument," "Mortgage," and "Pursuant to commitment."

PART 3.

Effect of Lease Contract.

§ 25-2A-303. (Effective July 1, 2001) Alienability of party's interest under lease contract or of lessor's residual interest in goods; delegation of performance; transfer of rights.

(1) As used in this section, "creation of a security interest" includes the sale of a lease contract that is subject to Article 9 of this Chapter, Secured Transactions, by reason of G.S. 25-9-109(a)(3).

(2) Except as provided in subsection (3) of this section and G.S. 25-9-407, a provision in a lease agreement which (i) prohibits the voluntary or involuntary transfer, including a transfer by sale, sublease, creation, or enforcement of a security interest, or attachment, levy, or other judicial process, of an interest of a party under the lease contract or of the lessor's residual interest in the goods; or (ii) makes such a transfer an event of default, gives rise to the rights and remedies provided in subsection (4) of this section, but a transfer that is prohibited or is an event of default under the lease agreement is otherwise effective.

(3) A provision in a lease agreement which (i) prohibits a transfer of a right to damages for default with respect to the whole lease contract or of a right to payment arising out of the transferor's due performance of the transferor's entire obligation, or (ii) makes such a transfer an event of default, is not enforceable, and such a transfer is not a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract within the purview of subsection (4) of this section.

(4) Subject to subsection (3) of this section and G.S. 25-9-407:

(a) if a transfer is made which is made an event of default under a lease agreement, the party to the lease contract not making the transfer, unless that party waives the default or otherwise agrees, has the rights and remedies described in G.S. 25-2A-501(2);

(b) if paragraph (a) is not applicable and if a transfer is made that (i) is prohibited under a lease agreement or (ii) materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract, unless the party not making the transfer agrees at any time to the transfer in the lease contract or otherwise, then, except as limited by contract, (i) the transferor is liable to the party not making the transfer for damages caused by the transfer to the extent that the damages could not reasonably be prevented by the party not making the transfer and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the lease contract or an injunction against the transfer.

(5) A transfer of "the lease" or of "all my rights under the lease', or a transfer in similar general terms, is a transfer of rights and, unless the language or the circumstances, as in a transfer for security, indicate the contrary, the transfer is a delegation of duties by the transferor to the transferee. Acceptance by the transferee constitutes a promise by the transferee to perform those duties. The promise is enforceable by either the transferor or the other party to the lease contract.

(6) Unless otherwise agreed by the lessor and the lessee, a delegation of performance does not relieve the transferor as against the other party of any duty to perform or of any liability for default.

(7) In a consumer lease, to prohibit the transfer of an interest of a party under the lease contract or to make a transfer an event of default, the language must be specific, by a writing, and conspicuous. (1993, c. 463, s. 1; 2000-169, s. 14.)

AMENDED OFFICIAL COMMENT (1999 ED.)

Uniform Statutory Source: Sections 2-210 and 9-311.

Changes: The provisions of Sections 2-210 and 9-311 were incorporated in this section, with substantial modifications to reflect leasing terminology and practice and to harmonize the principles of the respective provisions, i.e., limitations on delegation of performance on the one hand and alienability of rights on the other. In addition, unlike Section 2-210 which deals only with voluntary transfers, this section deals with involuntary as well as voluntary transfers. Moreover, the principle of Section 9-318(4) denying effectiveness to contractual terms prohibiting assignments of receivables due and to become due also is implemented.

Purposes:

1. Subsection (2) states a rule, consistent with Section 9-401(b), that voluntary and involuntary transfers of an interest of a party under the lease contract or of the lessor's residual interest, including by way of the creation or enforcement of a security interest, are effective, notwithstanding a provision in the lease agreement prohibiting the transfer or making the transfer an event of default. Although the transfers are effective, the provision in the lease agreement is nevertheless enforceable, but only as provided in subsection (4). Under subsection (4) the prejudiced party is limited to the remedies on "default under the lease contract" in this Article and, except as limited by this Article, as provided in the lease agreement, if the transfer has been made an event of default. Section 2A-501(2). Usually, there will be a specific provision to this effect or a general provision making a breach of a covenant an event of default. In those cases where the transfer is prohibited, but not made an event of default, the prejudiced party may recover damages; or, if the damage remedy would be ineffective adequately to protect that party, the court can order cancellation of the lease contract or enjoin the transfer. This rule that such provisions generally are enforceable is subject to subsection (3) and Section 9-407, which make such provisions unenforceable in certain instances.

2. Under Section 9-407, a provision in a lease agreement which prohibits the creation or enforcement of a security interest, including sales of lease contracts subject to Article 9 (Section 9-109(a)(3)), or makes it an event of default is generally not enforceable, reflecting the policy of Section 9-406 and former Section 9-318(4).

3. Subsection (3) is based upon Section 2-210(2) and Section 9-406. It makes unenforceable a prohibition against transfers of certain rights to payment or a provision making the transfer an event of default. It also provides that such transfers do not materially impair the prospect of obtaining return performance by, materially change the duty of, or materially increase the burden or risk imposed on, the other party to the lease contract so as to give rise to the rights and remedies stated in subsection (4). Accordingly, a transfer of a right to payment cannot be prohibited or made an event of default, or be one that materially impairs performance, changes duties or increases risk, if the right is already due or will become due without further performance being required by the party to receive payment. Thus, a lessor can transfer the right to future payments under the lease contract, including by way of a grant of a security interest, and the transfer will not give rise to the rights and remedies stated in subsection (4) if the lessor has no remaining performance under the lease contract. The mere fact that the lessor is obligated to allow the lessee to remain in possession and to use the goods as long as the lessee is not in default does not mean that there is remaining performance on the part of the lessor. Likewise, the fact that the lessor has potential liability under a "non-operating" lease contract for breaches of warranty does not mean that there is remaining performance. In contrast, the lessor would have remaining performance under a lease contract requiring the lessor to regularly maintain and service the goods or to provide "upgrades" of the equipment on a periodic basis in order to avoid obsolescence. The basic distinction is between a mere potential duty to respond which is not remaining performance, and an affirmative duty to render stipulated performance. Although the distinction may be difficult to draw in some cases, it is instructive to focus on the difference between "operating" and "non-operating" leases as generally understood in the marketplace. Even if there is remaining performance under a lease contract, a transfer for security of a right to payment that is made an event of default or that is in violation of a prohibition against transfer does not give rise to the rights and remedies under subsection (4) if it does not constitute an actual delegation of a material performance under Section 9-407.

4. The application of either the rule of Section 9-407 or the rule of subsection (3) to the grant by the lessor of a security interest in the lessor's right to future payment under the lease contract may produce the same result. Both provisions generally protect security transfers by the lessor in particular because the creation by the lessor of a security interest or the enforcement of that interest generally will not prejudice the lessee's rights if it does not result in a delegation of the lessor's duties. To the contrary, the receipt of loan proceeds or relief from the enforcement of an antecedent debt normally should enhance the lessor's ability to perform its duties under the lease contract. Nevertheless, there are circumstances where relief might be justified. For example, if ownership of the goods is transferred pursuant to enforcement of a security interest to a party whose ownership would prevent the lessee from continuing to possess the goods, relief might be warranted. See 49 U.S.C. § 1401(a) and (b) which places limitations on the operation of aircraft in the United States based on the citizenship or corporate qualification of the registrant.

5. Relief on the ground of material prejudice when the lease agreement does not prohibit the transfer or make it an event of default should be afforded only in extreme circumstances, considering the fact that the party asserting material prejudice did not insist upon a provision in the lease agreement that would protect against such a transfer.

6. Subsection (4) implements the rule of subsection (2). Subsection (2) provides that, even though a transfer is effective, a provision in the lease agreement prohibiting it or making it an event of default may be enforceable as provided in subsection (4). See Brummond v. First National Bank of Clovis, 656 P.2d 884, 35 U.C.C. Rep. Serv. (Callaghan) 1311 (N. Mex. 1983), stating the analogous rule for Section 9-311. If the transfer prohibited by the lease agreement is made an event of default, then, under subsection (4)(a), unless the default is waived or there is an agreement otherwise, the aggrieved party has the rights and remedies referred to in Section 2A-501(2), viz. those in this Article and, except as limited in the Article, those provided in the lease agreement. In the unlikely circumstance that the lease agreement prohibits the transfer without making a violation of the prohibition an event of default or, even if there is no prohibition against the transfer, and the transfer is one that materially impairs performance, changes duties, or increases risk (for example, a sublease or assignment to a party using the goods improperly or for an illegal purpose), then subsection (4)(b) is applicable. In that circumstance, unless the party aggrieved by the transfer has otherwise agreed in the lease contract, such as by assenting to a particular transfer or to transfers in general, or agrees in some other manner, the aggrieved party has the right to recover damages from the transferor and a court may, in appropriate circumstances, grant other relief, such as cancellation of the lease contract or an injunction against the transfer.

7. If a transfer gives rise to the rights and remedies provided in subsection (4), the transferee as an alternative may propose, and the other party may accept, adequate cure or compensation for past defaults and adequate assurance of future due performance under the lease contract. Subsection (4) does not preclude any other relief that may be available to a party to the lease contract aggrieved by a transfer subject to an enforceable prohibition, such as an action for interference with contractual relations.

8. Subsection (7) requires that a provision in a consumer lease prohibiting a transfer, or making it an event of default, must be specific, written and conspicuous. See Section 1-201(10). This assists in protecting a consumer lessee against surprise assertions of default.

9. Subsection (5) is taken almost verbatim from the provisions of Section 2-210(5). The subsection states a rule of construction that distinguishes a commercial assignment, which substitutes the assignee for the assignor as to rights and duties, and an assignment for security or financing assignment, which substitutes the assignee for the assignor only as to rights. Note that the assignment for security or financing assignment is a subset of all security interests. Security interest is defined to include "any interest of a buyer of . . . chattel paper". Section 1-201(37). Chattel paper is defined to include a lease. Section 9-102. Thus, a buyer of leases is the holder of a security interest in the leases. That conclusion should not influence this issue, as the policy is quite different. Whether a buyer of leases is the holder of a commercial assignment, or an assignment for security or financing assignment should be determined by the language of the assignment or the circumstances of the assignment.

Cross References:

Sections 1-201(11), 1-201(37), 2-210, 2A-401, 9-102(1)(b), 9-104(f), 9-105(1)(a), 9-206, and 9-318.

Definitional Cross References:

"Agreed" and "Agreement". Section 1-201(3).
"Conspicuous". Section 1-201(10).
"Goods". Section 2A-103(1)(h).
"Lease". Section 2A-103(1)(j).
"Lease contract". Section 2A-103(1)(*l*).
"Lessee". Section 2A-103(1)(n).
"Lessor". Section 2A-103(1)(p).
"Lessor's residual interest". Section 2A-103(1)(q).

"Notice". Section 1-201(25).
"Party". Section 1-201(29).
"Person". Section 1-201(30).
"Reasonable time". Section 1-204(1) and (2).
"Rights". Section 1-201(36).
"Term". Section 1-201(42).
"Writing". Section 1-201(46).

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 14, effective July 1, 2001, rewrote the section.

§ 25-2A-307. (Effective July 1, 2001) Priority of liens arising by attachment or levy on, security interests in, and other claims to goods.

(1) Except as otherwise provided in G.S. 25-2A-306, a creditor of a lessee takes subject to the lease contract.

(2) Except as otherwise provided in subsection (3) of this section and in G.S. 25-2A-306 and G.S. 25-2A-308, a creditor of a lessor takes subject to the lease contract unless the creditor holds a lien that attached to the goods before the lease contract became enforceable.

(3) Except as otherwise provided in G.S. 25-9-317, 25-9-321, and 25-9-323, a lessee takes a leasehold interest subject to a security interest held by a creditor of the lessor. (1993, c. 463, s. 1; 2000-169, s. 15.)

AMENDED OFFICIAL COMMENT (1999 ED.)

Uniform Statutory Source: None for subsection (1). Subsection (2) is derived from Section 9-301, and subsections (3) and (4) are derived from Section 9-307(1) and (3), respectively.

Changes: The provisions of Sections 9-301 and 9-307(1) and (3) were incorporated, and modified to reflect leasing terminology and the basic concepts reflected in this Article.

Purposes:

1. Subsection (1) states a general rule of priority that a creditor of the lessee takes subject to the lease contract. The term lessee (Section 2A-103(1)(n)) includes sublessee. Therefore, this subsection not only covers disputes between the prime lessor and a creditor of the prime lessee but also disputes between the prime lessor, or the sublessor, and a creditor of the sublessee. Section 2A-301 official comment 3(g). Further, by using the term creditor (Section 1-201(12)), this subsection will cover disputes with a general creditor, a secured creditor, a lien creditor and any representative of creditors. Section 2A-103(4).

2. Subsection (2) states a general rule of priority that a creditor of a lessor takes subject to the lease contract. Note the discussion above with regard to the scope of these rules. Section 2A-301 official comment 3(g). Thus, the section will not only cover disputes between the prime lessee and a creditor of the prime lessor but also disputes between the prime lessee, or the sublessee, and a creditor of the sublessor.

3. To take priority over the lease contract, and the interests derived therefrom, the creditor must come within the exception stated in subsection (2) or within one of the provisions of Article 9 mentioned in subsection (3). Subsection (2) provides that where the creditor holds a lien (Section 2A-103(1)(r)) that attached before the lease contract became enforceable (Section 2A-301), the creditor does not take subject to the lease. Subsection (3) provides that a lessee takes its leasehold interest subject to a security interest except as otherwise provided in Sections 9-317, 9-321, or 9-323.

4. The rules of this section operate in favor of whichever party to the lease contract may enforce it, even if one party perhaps may not, e.g., under Section 2A-201(1)(b).

Cross References:

Sections 1-201(12), 1-201(25), 1-201(37), 1-201(44), 2A-103(1)(n), 2A-103(1)(o), 2A-103(1)(r), 2A-103(4), 2A-201(1)(b), 2A-301 official comment 3(g), Article 9, especially Sections 9-301, 9-307(1) and 9-307(3).

Definitional Cross References:

"Creditor". Section 1-201(12).
"Goods". Section 2A-103(1)(h).
"Knowledge" and "Knows". Section 1-201(25).
"Lease". Section 2A-103(1)(j).
"Lease contract". Section 2A-103(1)(*l*).
"Leasehold interest". Section 2A103(1)(m).
"Lessee". Section 2A-103(1)(n).
"Lessee in the ordinary course of business". Section 2A-103(1)(o).

"Lessor". Section 2A-103(1)(p).
"Lien". Section 2A-103(1)(r).
"Party". Section 1-201(29).
"Pursuant to commitment". Section 2A-103(3).
"Security interest". Section 1-201(37).

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 15, effective July 1, 2001, rewrote the section.

§ 25-2A-309. (Effective July 1, 2001) Lessor's and lessee's rights when goods become fixtures.

(1) In this section:
- (a) goods are "fixtures" when they become so related to particular real estate that an interest in them arises under real estate law;
- (b) a "fixture filing" is the filing, in the office where a record of a mortgage on the real estate would be filed or recorded, of a financing statement covering goods that are or are to become fixtures and conforming to the requirements of G.S. 25-9-502(a) and (b);
- (c) a lease is a "purchase money lease" unless the lessee has possession or use of the goods or the right to possession or use of the goods before the lease agreement is enforceable;
- (d) a mortgage is a "construction mortgage" to the extent it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates; and
- (e) "encumbrance" includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests.

(2) Under this Article a lease may be of goods that are fixtures or may continue in goods that become fixtures, but no lease exists under this Article of ordinary building materials incorporated into an improvement on land.

(3) This Article does not prevent creation of a lease of fixtures pursuant to real estate law.

(4) The perfected interest of a lessor of fixtures has priority over a conflicting interest of an encumbrancer or owner of the real estate if:
- (a) the lease is a purchase money lease, the conflicting interest of the encumbrancer or owner arises before the goods become fixtures, the interest of the lessor is perfected by a fixture filing before the goods become fixtures or within 10 days thereafter, and the lessee has an interest of record in the real estate or is in possession of the real estate; or
- (b) the interest of the lessor is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the lessor's interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the lessee has an interest of record in the real estate or is in possession of real estate.

(5) The interest of a lessor of fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate if:
- (a) the fixtures are readily removable factory or office machines, readily removable equipment that is not primarily used or leased for use in the operation of the real estate, or readily removable replacements of domestic appliances that are goods subject to a consumer lease, and before the goods become fixtures, the lease contract is enforceable; or
- (b) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the lease contract is enforceable; or

(c) the encumbrancer or owner has consented in writing to the lease or has disclaimed an interest in the goods as fixtures; or

(d) the lessee has a right to remove the goods as against the encumbrancer or owner. If the lessee's right to remove terminates, the priority of the interest of the lessor continues for a reasonable time.

(6) Notwithstanding subsection (4)(a) of this section but otherwise subject to subsections (4) and (5) of this section, the interest of a lessor of fixtures, including the lessor's residual interest, is subordinate to the conflicting interest of an encumbrancer of the real estate under a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent given to refinance a construction mortgage, the conflicting interest of an encumbrancer of the real estate under a mortgage has this priority to the same extent as the encumbrancer of the real estate under the construction mortgage.

(7) In cases not within the preceding subsections, priority between the interest of a lessor of fixtures, including the lessor's residual interest, and the conflicting interest of an encumbrancer or owner of the real estate who is not the lessee is determined by the priority rules governing conflicting interests in real estate.

(8) If the interest of a lessor of fixtures, including the lessor's residual interest, has priority over all conflicting interests of all owners and encumbrancers of the real estate, the lessor or the lessee may (i) on default, expiration, termination, or cancellation of the lease agreement but subject to the lease agreement and this Article, or (ii) if necessary to enforce other rights and remedies of the lessor or lessee under this Article, remove the goods from the real estate, free and clear of all conflicting interests of all owners and encumbrancers of the real estate, but the lessor or lessee must reimburse any encumbrancer or owner of the real estate who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation.

(9) Even though the lease agreement does not create a security interest, the interest of a lessor of fixtures, including the lessor's residual interest, is perfected by filing a financing statement as a fixture filing for leased goods that are or are to become fixtures in accordance with the relevant provisions of the Article on Secured Transactions (Article 9). (1993, c. 463, s. 1; 2000-169, s. 16.)

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 16, effective July 1, 2001, in subdivision (1)(b), inserted "record of a" and substituted "G.S. 25-9-502(a) and (b)" for "G.S. 25-9-402(5)."

ARTICLE 3.

Negotiable Instruments.

(Revised)

PART 3.

ENFORCEMENT OF INSTRUMENTS.

§ 25-3-301. Person entitled to enforce instrument.

CASE NOTES

Bank which had cancelled and released a promissory note because of a clerical error, and therefore was not a "holder" in the traditional sense, could still meet burden required by § 25-1-201 by showing that debtor never satisfied the underlying obligation. G.E. Capital Mtg. Servs. v. Neely, 135 N.C. App. 187, 519 S.E.2d 553 (1999).

Other Avenues of Recovery. — Plaintiff bank did not need to rely solely on the law of negotiable instruments to recover debt underlying promissory note which was cancelled because of clerical error; it could also recover under general contract law. G.E. Capital Mtg. Servs. v. Neely, 135 N.C. App. 187, 519 S.E.2d 553 (1999).

PART 5.

DISHONOR.

§ 25-3-506. Collection of processing fee for returned checks.

A person who accepts a check in payment for goods or services or his assignee may charge and collect a processing fee, not to exceed twenty-five dollars ($25.00), for a check on which payment has been refused by the payor bank because of insufficient funds or because the drawer did not have an account at that bank.

If a collection agency collects or seeks to collect on behalf of its principal a processing fee as specified in this section in addition to the sum payable of a check, the amount of such processing fee must be separately stated on the collection notice. The collection agency shall not collect or seek to collect from the drawer any sum other than the actual amount of the returned check and the specified processing fee. (1981, c. 781, s. 1; 1983, c. 529; 1987, c. 147; 1991, c. 455, s. 1; 1995, c. 232, s. 1; 1997-334, s. 1; 2000-118, s. 1.)

Effect of Amendments. — Session Laws 2000-118, s. 1, effective October 1, 2000, and applicable to checks presented by the consumer on or after that date, rewrote the section.

PART 6.

Discharge and Payment.

§ 25-3-604. Discharge by cancellation or renunciation.

CASE NOTES

Cancellation and surrender of a promissory note due to clerical error or mistake alone does not provide the requisite intent to effectively discharge the debt represented by that note. G.E. Capital Mtg. Servs. v. Neely, 135 N.C. App. 187, 519 S.E.2d 553 (1999).

Article 4.

Bank Deposits and Collections.

PART 2.

Collection of Items: Depositary and Collecting Banks.

§ 25-4-208. (Effective July 1, 2001) Security interest of collecting bank in items, accompanying documents and proceeds.

(a) A collecting bank has a security interest in an item and any accompanying documents or the proceeds of either:

(1) In case of an item deposited in an account, to the extent to which credit given for the item has been withdrawn or applied;

(2) In case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given, whether or not the credit is drawn upon or there is a right of charge-back; or

(3) If it makes an advance on or against the item.

(b) If credit given for several items received at one time or pursuant to a single agreement is withdrawn or applied in part, the security interest remains upon all the items, any accompanying documents or the proceeds of either. For the purpose of this section, credits first given are first withdrawn.

(c) Receipt by a collecting bank of a final settlement for an item is a realization on its security interest in the item, accompanying documents, and proceeds. So long as the bank does not receive final settlement for the item or give up possession of the item or accompanying documents for purposes other than collection, the security interest continues to that extent and is subject to Article 9, but:

(1) No security agreement is necessary to make the security interest enforceable (G.S. 25-9-203(b)(3)a.);

(2) No filing is required to perfect the security interest; and

(3) The security interest has priority over conflicting perfected security interests in the item, accompanying documents or proceeds. (1965, c. 700, s. 1; 1995, c. 232, s. 2; 2000-169, s. 17.)

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 17, effective July 1, 2001, substituted "G.S. 25-9-203(b)(3)a." for "G.S. 25-9-203(1)(a)" in subdivision (c)(1).

Article 5.

Letters Of Credit.

§ 25-5-118. (Effective July 1, 2001) Security interest of issuer or nominated person.

(a) An issuer or nominated person has a security interest in a document presented under a letter of credit to the extent that the issuer or nominated person honors or gives value for the presentation.

(b) So long as and to the extent that an issuer or nominated person has not been reimbursed or has not otherwise recovered the value given with respect to a security interest in a document under subsection (a) of this section, the security interest continues and is subject to Article 9 of this Chapter, but:

(1) A security agreement is not necessary to make the security interest enforceable under G.S. 25-9-203(b)(3);

(2) If the document is presented in a medium other than a written or other tangible medium, the security interest is perfected; and

(3) If the document is presented in a written or other tangible medium and is not a certificated security, chattel paper, a document of title, an instrument, or a letter of credit, the security interest is perfected and has priority over a conflicting security interest in the document so long as the debtor does not have possession of the document. (2000-169, s. 18.)

OFFICIAL COMMENT (1999 ED.)

1. This section gives the issuer of a letter of credit or a nominated person thereunder an automatic perfected security interest in a "document" (as that term is defined in Section 5-102(a)(6)). The security interest arises only if the document is presented to the issuer or nominated person under the letter of credit and only to the extent of the value that is given. This security interest is analogous to that awarded to a collecting bank under Section 4-210. Subsection (b) contains special rules governing the security interest arising under this section. In all other respects, a security interest arising under this section is subject to Article 9. See Section 9-109. Thus, for example, a security interest arising under this section may give rise to a security interest in proceeds under Section 9-315.

2. Subsection (b)(1) makes a security agreement unnecessary to the creation of a security interest under this section. Under subsection (b)(2), a security interest arising under this section is perfected if the document is presented in a medium other than a written or tangible medium. Documents that are written and that are not an otherwise-defined type of collateral under Article 9 (e.g., an invoice or inspection certificate) may be goods, in which an issuer or nominated person could perfect its security interest by possession. Because the definition of document in Section 5-102(a)(6) includes records (e.g., electronic records) that may not be goods, subsection (b)(2) provides for automatic perfection (i.e., without filing or possession).

Under subsection (b)(3), if the document (i) is in a written or tangible medium, (ii) is not a certified security, chattel paper, a document of title, an instrument, or a letter of credit, and (iii) is not in the debtor's possession, the security interest is perfected and has priority over a conflicting security interest. If the document is a type of tangible collateral that subsection (b)(3) excludes from its perfection and priority rules, the issuer or nominated person must comply with the normal method of perfection (e.g., possession of an instrument) and is subject to the applicable Article 9 priority rules. Documents to which subsection (b)(3) applies may be important to an issuer or nominated person. For example, a confirmer who pays the beneficiary must be assured that its rights to all documents are not impaired. It will find it necessary to present all of the required documents to the issuer in order to be reimbursed. Moreover, when a nominated person sends documents to an issuer in connection with the nominated person's reimbursement, that activity is not a collection, enforcement, or disposition of collateral under Article 9.

One purpose of this section is to protect an issuer or nominated person from claims of a beneficiary's creditors. It is a fallback provision inasmuch as issuers and nominated persons

frequently may obtain and perfect security interests under the usual Article 9 rules, and, in many cases, the documents will be owned by the issuer, nominated person, or applicant.

Editor's Note. — Session Laws 2000-169, s. 51, made this section effective July 1, 2001.

Article 6.

Bulk Transfers.

§ 25-6-102. (Effective July 1, 2001) "Bulk transfers"; transfers of equipment; enterprises subject to this article; bulk transfers subject to this article.

(1) A "bulk transfer" is 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 (G.S. 25-9-102) of an enterprise subject to this article.

(2) A transfer of a substantial part of the equipment (G.S. 25-9-102) of such an enterprise is a bulk transfer if it is made in connection with a bulk transfer of inventory, but not otherwise.

(3) The enterprises subject to this article are all those whose principal business is the sale of merchandise from stock, including those who manufacture what they sell.

(4) Except as limited by G.S. 25-6-103 all bulk transfers of goods located within this State are subject to this article. (1907, c. 623; 1913, ch. 30, s. 1; Ex. Sess. 1913, c. 66, s. 1; C.S., s. 1013; 1933, c. 190; 1945, c. 635; 1963, c. 1179; 1965, c. 700, s. 1; 2000-169, s. 19.)

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 19, effective July 1, 2001, substituted "(G.S. 25-9-102)" for "(G.S. 25-9-109)" in subsections (1) and (2); and substituted "G.S. 25-6-103" for "the following section [G.S. 25-6-103]" in subsection (4).

Article 7.

Warehouse Receipts, Bills of Lading and Other Documents of Title.

PART 5.

Warehouse Receipts and Bills of Lading: Negotiation and Transfer.

§ 25-7-503. (Effective July 1, 2001) Document of title to goods defeated in certain cases.

(1) A document of title confers no right in goods against a person who before issuance of the document had a legal interest or a perfected security interest in them and who neither

(a) delivered or entrusted them or any document of title covering them to the bailor or his nominee with actual or apparent authority to ship,

store or sell or with power to obtain delivery under this article (G.S. 25-7-403) or with power of disposition under this chapter (G.S. 25-2-403 and G.S. 25-9-320) or other statute or rule of law; nor

(b) acquiesced in the procurement by the bailor or his nominee of any document of title.

(2) Title to goods based upon an unaccepted delivery order is subject to the rights of anyone to whom a negotiable warehouse receipt or bill of lading covering the goods has been duly negotiated. Such a title may be defeated under the next section [G.S. 25-7-504] to the same extent as the rights of the issuer or a transferee from the issuer.

(3) Title to goods based upon a bill of lading issued to a freight forwarder is subject to the rights of anyone to whom a bill issued by the freight forwarder is duly negotiated; but delivery by the carrier in accordance with part 4 of this article pursuant to its own bill of lading discharges the carrier's obligation to deliver. (1917, c. 37, s. 41; 1919, c. 65, s. 31; C.S., ss. 313, 4081; 1965, c. 700, s. 1; 2000-169, s. 20.)

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 20, effective July 1, 2001, substituted "G.S. 25-9-320" for "25-9-307" in subdivision (1)(a).

Article 8.

Investment Securities.

(Revised)

PART 1.

Short Title and General Matters.

§ 25-8-102. Definitions.

AMENDED OFFICIAL COMMENT (1999 ED.)

Editor's Note. — *This Amended Official Comment accompanies the revision to Article 9, effective July 1, 2001.*

1. "Adverse Claim." The definition of the term "adverse claim" has two components. First, the term refers only to property interests. Second, the term means not merely that a person has a property interest in a financial asset but that it is a violation of the claimant's property interest for the other person to hold or transfer the security or other financial asset.

The term adverse claim is not, of course, limited to ownership rights, but extends to other property interests established by other law. A security interest, for example, would be an adverse claim with respect to a transferee from the debtor since any effort by the second party to enforce the security interest against the property would be an interference with the transferee's interest.

The definition of adverse claim in the prior version of Article 8 might have been read to suggest that any wrongful action concerning a security, even a simple breach of contract, gave rise to an adverse claim. Insofar as such cases as *Fallon v. Wall Street Clearing Corp.,* 586 N.Y.S.2d 953, 182 A.D.2d 245, (1992) and *Pentech Intl. v. Wall St. Clearing Co.,* 983 F.2d 441 (2d Cir. 1993), were based on that view, they are rejected by the new definition which explicitly limits the term adverse claim to property interests. Suppose, for example, that A contract to sell or deliver securities to B, but fails to do so and instead sells or pledges the securities to C. B, the promisee, has an action against A for breach of contract, but absent unusual circumstances the action for breach would not give rise to a property interest in the securities. Accordingly, B does not have an adverse claim. An adverse claim might, however, be based upon principles of equitable remedies that give rise to property claims. It would, for example, cover a right established by other law to rescind a transaction in which

securities were transferred. Suppose, for example, that A holds securities and is induced by B's fraud to transfer them to B. Under the law of contract of restitution, A may, have a right to rescind the transfer, which gives A a property claim to the securities. If so, A has an adverse claim to the securities in B's hands. By contrast, if B had committed no fraud, but had merely committed a breach of contract in connection with the transfer from A to B, A may have only a right to damages for breach, not a right to rescind. In that case, A would not have an adverse claim to the securities in B's hands.

2. "Bearer form." The definition of "bearer form" has remained substantially unchanged since the early drafts of the original version of Article 8. The requirement that the certificate be payable to bearer by its terms rather than by an indorsement has the effect of preventing instruments governed by other law, such as chattel paper or Article 3 negotiable instruments, from being inadvertently swept into the Article 8 definition of security merely by virtue of blank indorsements. Although the other elements of the definition of security in Section 8-102(a)(14) probably suffice for that purpose in any event, the language used in the prior version of Article 8 has been retained.

3. "Broker." Broker is defined by reference to the definitions of broker and dealer in the federal securities laws. The only difference is that banks, which are excluded from the federal securities law definition, are included in the Article 8 definition when they perform functions that would bring them within the federal securities law definition if it did not have the cause excluding banks. The definition covers both those who act as agents ("brokers" in securities parlance) and those who act as principals ("dealers" in securities parlance). Since the definition refers to persons "defined" as brokers or dealers under the federal securities law, rather than to persons required to "register" as brokers or dealers under the federal securities law, it covers not only registered brokers and dealers but also those exempt from the registration requirement, such as purely intrastate brokers. The only substantive rules that turn on the defined term broker are one provision of the section on warranties, Section 8-108(i), and the special perfection rule in Article 9 for security interests granted by brokers, Section 9-115(4)(c).

4. "Certificated security." The term "certificated security" means a security that is represented by a security certificate.

5. "Clearing corporation." The definition of clearing corporation limits its application to entities that are subject to a rigorous regulatory framework. Accordingly, the definition includes only federal reserve banks, persons who are registered as "clearing agencies" under the federal securities laws (which impose a comprehensive system of regulation of the activities and rules of clearing agencies), and other entities subject to a comparable system of regulatory oversight.

6. "Communicate." The term "communicate" assures that the Article 8 rules will be sufficiently flexible adapt to changes in information technology. Sending a signed writing always suffices as a communication, but the parties can agree that a different means of transmitting information is to be used. Agreement is defined in Section 1-201(3) as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade of course of performance." Thus, use of an information transmission method might be found to be authorized by agreement, even though the parties have not explicitly so specified in formal agreement. The term communicate is used in Sections 8-102(a)(8) (definition of entitlement order), 8-102(a)(12) (definition of instruction), and 8-403 (demand that issuer not register transfer).

7. "Entitlement holder." This term designates those who hold financial assets through intermediaries in the indirect holding system. Because many of the rules of Part 5 impose duties on securities intermediaries in favor of entitlement holders, the definition of entitlement holder is, in most cases, limited to the person specifically designated as such on the records of the intermediary. The last sentence of the definition covers the relatively unusual cases where a person may acquire a security entitlement under Section 8-501 even though the person may not be specifically designated as an entitlement holder on the records of the securities intermediary.

A person may have an interest in a security entitlement, and may even have the right to give entitlement orders to the securities intermediary with respect to it, even though the person is not the entitlement holder. For example, a person who holds securities through a securities account in its own name may have given discretionary trading authority to another person, such as an investment adviser. Similarly, the control provisions in Section 8-106 and the related provisions in Article 9 are designed to facilitate transactions in which a person who holds securities through a securities account uses them as collateral in an arrangement where the securities intermediary has agreed that if the secured party so directs the intermediary will dispose of the position. In such arrangements, the debtor remains the entitlement holder but has agreed that the secured party can initiate entitlement orders. Moreover, an entitlement holder may be acting for another person as a nominee, agent, trustee, or in another capacity. Unless the entitlement holder is itself acting as a securities intermedi-

ary for the other person, in which case the other person would be an entitlement holder with respect to the securities entitlement, the relationship between an entitlement holder and another person for whose benefit the entitlement holder holds a securities entitlement is governed by other law.

8. "Entitlement orders." The term is defined as a notification communicated to a securities intermediary directing transfer or redemption of the financial asset to which an entitlement holder has a security entitlement. The term is used in the rules for the indirect holding system in a fashion analogous to the use of the terms "indorsement" and "instruction" in the rules for the direct holding. If a person directly holds a certificated security in registered form and wishes to transfer it, the means of transfer is an indorsement. If a person directly holds an uncertificated security and wishes to transfer it, the means of transfer is an instruction. If a person holds a security entitlement, the means of disposition is an entitlement order. An entitlement order includes a direction under Section 8-508 to the securities intermediary to transfer a financial asset to the account of the entitlement holder at another financial intermediary or to cause the financial asset to be transferred to the entitlement holder in the direct holding system (e.g., the delivery of a securities certificate registered in the name of the former entitlement holder). As noted in Comment 7, an entitlement order need not be initiated by the entitlement holder in order to be effective, so long as the entitlement holder has authorized the other party to initiate entitlement orders. See Section 8-107(b).

9. "Financial asset." The definition of "financial asset," in conjunction with the definition of "security account" in Section 8-501, sets the scope of the indirect holding system rules of Part 5 of Revised Article 8. The Part 5 rules apply not only to securities held through intermediaries, but also to other financial assets held through intermediaries. The term financial asset is defined to include not only securities but also a broader category of obligations, shares, participations, and interests.

Having separate definitions of security and financial asset makes it possible to separate the question of the proper scope of the traditional Article 8 rules from the question of the proper scope of the new indirect holding system rules. Some forms of financial assets should be covered by the indirect holding system rules of Part 5, but not by the rules of Parts 2, 3, and 4. The term financial asset is used to cover such property. Because the term security entitlement is defined in terms of financial assets rather than securities, the rules concerning security entitlements set out in Part 5 of Article 8 in Revised Article 9 apply to the broader class of financial assets.

The fact that something does or could fall within the definition of financial assets does not, without more, trigger Article 8 coverage. The indirect holding system rules of Revised Article 8 apply only if the financial asset is in fact held in a securities account, so that the interest of the person who holds the financial asset through the securities account is a security entitlement. Thus, question of the scope of the indirect holding system rules cannot be framed as "Is such-and-such a 'financial asset' under Article 8?" Rather, one must analyze whether relationship between an institution and a person on whose behalf the institution holds an asset falls within the scope of the term securities account as defined in Section 8-501. That question turns in large measure on whether it makes sense to apply the Part 5 rules to the relationship.

The term financial asset is used to refer both to the underlying asset and the particular means by which ownership is evidenced. Thus, with respect to a certificated security, the term financial asset may, as context requires, refer either to the interest or obligation of the issuer or to the security certificate representing that interest or obligation. Similarly, if a person holds a security or other financial asset through a securities account, the term financial asset may, as context requires, refer either to the underlying asset or to the person's security entitlement.

10. "Good faith." Good faith is defined in Article 8 for purposes of the application Article 8 of Section 10-203, which provides that "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." The sole function of the good faith definition in Revised Article 8 is to give content to the Section 1-203 obligation as it applies to contract and duties that are governed by Article 8. The standard is one of "reasonable commercial standards of fair dealing." The reference to commercial standards makes clear that assessments of conduct are to be made in light of the commercial setting. The substantive rules of Article 8 have been drafted to take account of the commercial circumstances of the securities holding and processing system. For example, Section 8-115 provides that a securities intermediary acting on an effective entitlement order, or a broker or other agent acting as a conduit in a securities transaction, is not liable to an adverse claimant, unless the claimant obtained legal process or the intermediary acted in collusion with the wrongdoer. This, and other similar provisions, see Sections 8-404 and 8-503(e), do not depend on notice of adverse claims, because it would impair rather than advance the interest of investors in having a sound and efficient securities clearance and settlement system to require intermediaries to investigate the propriety of the transactions

they are processing. The good faith obligation does not supplant the standards of conduct established in provisions of this kind.

In Revised Article 8, the definition of good faith is not germane to the question whether a purchaser takes free from adverse claims. The rules on such questions as whether a purchaser who takes in suspicious circumstances is disqualified from protected purchaser status are treated not as an aspect of good faith but directly in the rules of Section 8-105 on notice of adverse claims.

11. "Indorsement" is defined as a signature made on a security certificate or separate document for purposes of transferring or redeeming the security. The definition is adapted from the language of Section 8-308(1) of the prior version and from the definition of indorsement in the Negotiable Instruments Article, see Section 3-204(a). The definition of indorsement does not include the requirement that the signature be made by an appropriate person or be authorized. Those questions are treated in the separate substantive provision on whether the indorsement is effective, rather than in the definition of indorsement. See Section 8-107.

12. "Instruction" is defined as a notification communicated to the issuer of an uncertificated security directing that transfer be registered or that the security be redeemed. Instructions are the analog for uncertificated securities of indorsements of certificated securities.

13. "Registered form." The definition of "registered form" is substantially the same as in the prior version of Article 8. Like the definition of bearer form, it serves primarily to distinguish Article 8 securities from instruments governed by other law, such as Article 3.

14. "Securities intermediary." A "securities intermediary" is a person that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity. The most common examples of securities intermediaries would be clearing corporations holding securities for their participants, banks acting as securities custodians, and brokers holding securities on behalf of their customers. Clearing corporations are listed separately as a category of securities intermediary in subparagraph (i) even though in most circumstances they would fall within the general definition in subparagraph (ii). The reason is to simplify the analysis of arrangements such as the NSCC-DTC system in which NSCC performs the comparison, clearance, and netting functions while DTC acts as the depository. Because NSCC is a registered clearing agency under the federal securities laws, it is a clearing corporation and hence a securities intermediary under Article 8, regardless of whether it is at any particular time or in any particular aspect of its operations holding securities on behalf of its participants.

The terms securities intermediary and broker have different meanings. Broker means a person engaged in the business of buying and selling securities, as agent for others or as principal. Securities intermediary means a person maintaining securities accounts for others. A stockbroker, in the colloquial sense, may or may not be acting as a securities intermediary.

The definition of securities intermediary includes the requirement that the person in question is "acting to the capacity" of maintaining securities accounts for others. This is to take account of the fact that a particular entity, such as a bank, may act in many different capacities in securities transactions. A bank may act as a transfer agent for issuers, as a securities custodian for institutional investors and private investors, as a dealer in government securities, as a lender taking securities as collateral, and as a provider of general payment and collection services that might be used in connection with securities transactions. A bank that maintains securities accounts for its customers would be a securities intermediary with respect to those accounts; but if it takes a pledge of securities from a borrower to secure a loan, it is not thereby acting as a securities intermediary with respect to the pledge securities, since it holds them for its own account rather than for a customer. In other circumstances, those two functions might be combined. For example, if the bank is a government securities dealer it may maintain securities accounts for customers and also provide the customers with margin credit to purchase or carry the securities, in much the same way that broker provide margin loans to their customer.

15. "Security." The definition of "security" has three components. First, there is the subparagraph (i) test that the interest or obligation be fully transferable, in the sense that the issuer either maintains transfer books or the obligation or interest is represented by a certificate in bearer or registered form. Second, there is the subparagraph (ii) test that the interest or obligation be divisible, that is, one of a class or series, as distinguished from individual obligations of the sort governed by the ordinary contract law or by Article 3. Third, there is the subparagraph (iii) functional test, which generally turns on whether the interest or obligation is, or is of a type, dealt in or traded on securities markets or securities exchanges. There is, however, an "opt-in" provision in subparagraph (iii) which permits the issuer of any interest or obligation that is "a medium of investment" to specify that it is a security governed by Article 8.

The divisibility test of subparagraph (ii) applies to the security — that is, the underlying intangible interest not the means by which that interest is evidenced. Thus, securities issued in book-entry only form meet the divisibility test

because the underlying intangible interest in divisible via the mechanism of the indirect holding system. This is so even though the clearing corporation is the only eligible direct holder of the security.

The third component, the functional test in subparagraph (iii), provides flexibility while ensuring that the Article 8 rules do not apply to interests or obligations in circumstances so unconnected with the securities markets that parties are unlikely to have thought of the possible that Article 8 might apply. Subparagraph (iii)(A) covers interests or obligations that either are dealt in or traded on securities exchanges or securities markets, or are of a type dealt in or traded on securities exchanges or securities markets. The "is dealt in or traded on" phrase eliminates problems in the characterization of new forms of securities which are to be traded in the markets, even though no similar type has previously been dealt in or traded in the markets. Subparagraph (iii)(B) covers the broader category of media for investment, but it applies only if the terms of the interest or obligation specify that it is an Article 8 security. This opt-in provision allows for deliberate expansion of the scope of Article 8.

Section 8-103 contains additional rules on the treatment of particular interests as securities or financial assets.

16. "Security certificate." The term "security" refers to the underlying asset, e.g., 1000 shares of common stock of Acme, Inc. The term "security certificate" refers to the paper certificates that have traditionally been used to embody the underlying intangible interest.

17. "Security entitlement" means the rights and property interest of a person who holds securities or other financial assets through a securities intermediary. A security entitlement is both a package of personal rights against the securities intermediary and an interest in the property held by the securities intermediary. A security entitlement is not, however, a specific property interest in any financial asset held by the securities intermediary or by the clearing corporation through which the securities intermediary holds the financial asset. See Section 8-104(c) and 8-503. The formal definition of security entitlement set out in subsection (a)(17) of this section is a cross-reference to the rules of Part 5. In a sense, then, the entirety of Part 5 is the definition of security entitlement. The Part 5 rules specify the rights and property interest that comprise a security entitlement.

18. "Uncertificated security." The term "uncertificated security" means a security that is not represented by a security certificate. For uncertificated securities, there is no need to draw any distinction between the underlying asset and the means by which a direct holder's interest in that asset is evidenced. Compare "certificated security" and "security certificate."

Definitional Cross References:

"Agreement"	Section 1-201(3).
"Bank"	Section 1-201(4).
"Person"	Section 8-201(30).
"Send"	Section 1-201(38).
"Signed"	Section 1-201(39).
"Writing"	Section 1-201(46).

§ 25-8-103. (Effective July 1, 2001) Rules for determining whether certain obligations and interests are securities or financial assets.

(a) A share or similar equity interest issued by a corporation, business trust, joint stock company, or similar entity is a security.

(b) An "investment company security" is a security. "Investment company security" means a share or similar equity interest issued by an entity that is registered as an investment company under the federal investment company laws, an interest in a unit investment trust that is so registered, or a face-amount certificate issued by a face-amount certificate company that is so registered. Investment company security does not include an insurance policy or endowment policy or annuity contract issued by an insurance company.

(c) An interest in a partnership or limited liability company is not a security unless it is dealt in or traded on securities exchanges or in securities markets, its terms expressly provide that it is a security governed by this Article, or it is an investment company security. However, an interest in a partnership or limited liability company is a financial asset if it is held in a securities account.

(d) A writing that is a security certificate is governed by this Article and not by Article 3 of this Chapter, even though it also meets the requirements of that Article. However, a negotiable instrument governed by Article 3 is a financial asset if it is held in a securities account.

(e) An option or similar obligation issued by a clearing corporation to its participants is not a security, but is a financial asset.

(f) A commodity contract, as defined in G.S. 25-9-102(a)(15), is not a security or financial asset. (1941, c. 353, s. 15; G.S., s. 55-95; 1955, c. 1371, s. 2; 1965, c. 700, s. 1; 1989, c. 588, s. 1; 1997-181, s. 1; 1998-217, s. 5; 2000-169, s. 21.)

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 21, effective July 1, 2001, substituted "G.S. 25-9-102(a)(15)" for "G.S. 25-9-115" in subsection (f).

§ 25-8-106. (Effective July 1, 2001) Control.

(a) A purchaser has "control" of a certificated security in bearer form if the certificated security is delivered to the purchaser.

(b) A purchaser has "control" of a certificated security in registered form if the certificated security is delivered to the purchaser, and:

(1) The certificate is endorsed to the purchaser or in blank by an effective endorsement; or

(2) The certificate is registered in the name of the purchaser, upon original issue or registration of transfer by the issuer.

(c) A purchaser has "control" of an uncertificated security if:

(1) The uncertificated security is delivered to the purchaser; or

(2) The issuer has agreed that it will comply with instructions originated by the purchaser without further consent by the registered owner.

(d) A purchaser has "control" of a security entitlement if:

(1) The purchaser becomes the entitlement holder;

(2) The securities intermediary has agreed that it will comply with entitlement orders originated by the purchaser without further consent by the entitlement holder; or

(3) Another person has control of the security entitlement on behalf of the purchaser or, having previously acquired control of the security entitlement, acknowledges that it has control on behalf of the purchaser.

(e) If an interest in a security entitlement is granted by the entitlement holder to the entitlement holder's own securities intermediary, the securities intermediary has control.

(f) A purchaser who has satisfied the requirements of subsection (c) or (d) of this section has control, even if the registered owner in the case of subsection (c) of this section or the entitlement holder in the case of subsection (d) of this section retains the right to make substitutions for the uncertificated security or security entitlement, to originate instructions or entitlement orders to the issuer or securities intermediary, or otherwise to deal with the uncertificated security or security entitlement.

(g) An issuer or a securities intermediary may not enter into an agreement of the kind described in subdivision (c) (2) or (d) (2) of this section without the consent of the registered owner or entitlement holder, but an issuer or a securities intermediary is not required to enter into such an agreement even though the registered owner or entitlement holder so directs. An issuer or securities intermediary that has entered into such an agreement is not required to confirm the existence of the agreement to another party unless requested to do so by the registered owner or entitlement holder. (1965, c. 700, s. 1; 1989, c. 588, s. 1; 1997-181, s. 1; 2000-169, s. 22.)

AMENDED OFFICIAL COMMENT (1999 ED.)

1. The concept of "control" plays a key role in various provisions dealing with the rights of purchasers, including secured parties. See Sections 8-303 (protected purchasers); 8-503(e) (purchasers from securities intermediaries); 8-510 (purchasers of security entitlements from entitlement holders); 9-314 (perfection of security interests); 9-328 (priorities among conflicting security interests).

Obtaining "control" means that the purchaser has taken whatever steps are necessary, given the manner in which the securities are held, to place itself in a position where it can have the securities sold, without further action by the owner.

2. Subsection (a) provides that a purchaser obtains "control" with respect to a certificated security in bearer form by taking "delivery," as defined in Section 8-301. Subsection (b) provides that a purchaser obtains "control" with respect to a certificated security in registered form by taking "delivery," as defined in Section 8-301, provided that the security certificate has been indorsed to the purchaser or in blank. Section 8-301 provides that delivery of a certificated security occurs when the purchaser obtains possession of the security certificate, or when an agent for the purchaser (other than a securities intermediary) either acquires possession or acknowledges that the agent holds for the purchaser.

3. Subsection (c) specifies the means by which a purchaser can obtain control over uncertificated securities which the transferor holds directly. Two mechanisms are possible.

Under subsection (c)(1), securities can be "delivered" to a purchaser. Section 8-301(b) provides that "delivery" of an uncertificated security occurs when the purchaser becomes the registered holder. So far as the issuer is concerned, the purchaser would then be entitled to exercise all rights of ownership. See Section 8-207. As between the parties to a purchase transaction, however, the rights of the purchaser are determined by their contract. Cf. Section 9-202. Arrangements covered by this paragraph are analogous to arrangements in which bearer certificates are delivered to a secured party — so far as the issuer or any other parties are concerned, the secured party appears to be the outright owner, although it is in fact holding as collateral property that belongs to the debtor.

Under subsection (c)(2), a purchaser has control if the issuer has agreed to act on the instructions of the purchaser, even though the owner remains listed as the registered owner. The issuer, of course, would be acting wrongfully against the registered owner if it entered into such an agreement without the consent of the registered owner. Subsection (g) makes this point explicit. The subsection (c)(2) provision makes it possible for issuers to offer a service akin to the registered pledge device of the 1978 version of Article 8, without mandating that all issuers offer that service.

4. Subsection (d) specifies the means by which a purchaser can obtain control of a security entitlement. Three mechanisms are possible, analogous to those provided in subsection (c) for uncertificated securities. Under subsection (d)(1), a purchaser has control if it is the entitlement holder. This subsection would apply whether the purchaser holds through the same intermediary that the debtor used, or has the securities position transferred to its own intermediary. Subsection (d)(2) provides that a purchaser has control if the securities intermediary has agreed to act on entitlement orders originated by the purchaser if no further consent by the entitlement holder is required. Under subsection (d)(2), control may be achieved even though the original entitlement holder remains as the entitlement holder. Finally, a purchaser may obtain control under subsection (d)(3) if another person has control and the person acknowledges that it has control on the purchaser's behalf. Control under subsection (d)(3) parallels the delivery of certificated securities and uncertificated securities under Section 8-301. Of course, the acknowledging person cannot be the debtor.

This section specifies only the minimum requirements that such an arrangement must meet to confer "control"; the details of the arrangement can be specified by agreement. The arrangement might cover all of the positions in a particular account or subaccount, or only specified positions. There is no requirement that the control party's right to give entitlement orders be exclusive. The arrangement might provide that only the control party can give entitlement orders, or that either the entitlement holder or the control party can give entitlement orders. See subsection (f).

The following examples illustrate the application of subsection (d):

Example 1. Debtor grants Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds through an account with Able & Co. Alpha also has an account with Able. Debtor instructs Able to transfer the shares to Alpha, and Able does so by crediting the shares to Alpha's account. Alpha has control of the 1000 shares under subsection (d)(1). Although Debtor may have become the beneficial owner of the new securities entitlement, as between Debtor and Alpha, Able has agreed to act on Alpha's entitlement orders

because, as between Able and Alpha, Alpha has become the entitlement holder. See Section 8-506.

Example 2. Debtor grants Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds through an account with Able & Co. Alpha does not have an account with Able. Alpha uses Beta as its securities custodian. Debtor instructs Able to transfer the shares to Beta, for the account of Alpha, and Able does so. Alpha has control of the 1000 shares under subsection (d)(1). As in Example 1, although Debtor may have become the beneficial owner of the new securities entitlement, as between Debtor and Alpha, Beta has agreed to act on Alpha's entitlement orders because, as between Beta and Alpha, Alpha has become the entitlement holder.

Example 3. Debtor grants Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds through an account with Able & Co. Debtor, Able, and Alpha enter into an agreement under which Debtor will continue to receive dividends and distributions, and will continue to have the right to direct dispositions, but Alpha also has the right to direct dispositions. Alpha has control of the 1000 shares under subsection (d)(2).

Example 4. Able & Co., a securities dealer, grants Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Able holds through an account with Clearing Corporation. Able causes Clearing Corporation to transfer the shares into Alpha's account at Clearing Corporation. As in Example 1, Alpha has control of the 1000 shares under subsection (d)(1).

Example 5. Able & Co., a securities dealer, grants Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Able holds through an account with Clearing Corporation. Alpha does not have an account with Clearing Corporation. It holds its securities through Beta Bank, which does have an account with Clearing Corporation. Able causes Clearing Corporation to transfer the shares into Beta's account at Clearing Corporation. Beta credits the position to Alpha's account with Beta. As in Example 2, Alpha has control of the 1000 shares under subsection (d)(1).

Example 6. Able & Co., a securities dealer, grants Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Able holds through an account with Clearing Corporation. Able causes Clearing Corporation to transfer the shares into a pledge account, pursuant to an agreement under which Able will continue to receive dividends, distributions, and the like, but Alpha has the right to direct dispositions. As in Example 3, Alpha has control of the 1000 shares under subsection (d)(2).

Example 7. Able & Co., a securities dealer, grants Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Able holds through an account with Clearing Corporation. Able, Alpha, and Clearing Corporation enter into an agreement under which Clearing Corporation will act on instructions from Alpha with respect to the XYZ Co. stock carried in Able's account, but Able will continue to receive dividends, distributions, and the like, and will also have the right to direct dispositions. As in Example 3, Alpha has control of the 1000 shares under subsection (d)(2).

Example 8. Able & Co., a securities dealer, holds a wide range of securities through its account at Clearing Corporation. Able enters into an arrangement with Alpha Bank pursuant to which Alpha provides financing to Able secured by securities identified as the collateral on lists provided by Able to Alpha on a daily or other periodic basis. Able, Alpha, and Clearing Corporation enter into an agreement under which Clearing Corporation agrees that if at any time Alpha directs Clearing Corporation to do so, Clearing Corporation will transfer any securities from Able's account at Alpha's instructions. Because Clearing Corporation has agreed to act on Alpha's instructions with respect to any securities carried in Able's account, at the moment that Alpha's security interest attaches to securities listed by Able, Alpha obtains control of those securities under subsection (d)(2). There is no requirement that Clearing Corporation be informed of which securities Able has pledged to Alpha.

Example 9. Debtor grants Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds through an account with Able & Co. Beta Bank agrees with Alpha to act as Alpha's collateral agent with respect to the security entitlement. Debtor, Able, and Beta enter into an agreement under which Debtor will continue to receive dividends and distributions, and will continue to have the right to direct dispositions, but Beta also has the right to direct dispositions. Because Able has agreed that it will comply with entitlement orders originated by Beta without further consent by Debtor, Beta has control of the security entitlement (see Example 3). Because Beta has control on behalf of Alpha, Alpha also has control under subsection (d)(3). It is not necessary for Able to enter

into an agreement directly with Alpha or for Able to be aware of Beta's agency relationship with Alpha.

5. For a purchaser to have "control" under subsection (c)(2) or (d)(2), it is essential that the issuer or securities intermediary, as the case may be, actually be a party to the agreement. If a debtor gives a secured party a power of attorney authorizing the secured party to act in the name of the debtor, but the issuer or securities intermediary does not specifically agree to this arrangement, the secured party does not have "control" within the meaning of subsection (c)(2) or (d)(2) because the issuer or securities intermediary is not a party to the agreement. The secured party does not have control under subsection (c)(1) or (d)(1) because, although the power of attorney might give the secured party authority to act on the debtor's behalf as an agent, the secured party has not actually become the registered owner or entitlement holder.

6. Subsection (e) provides that if an interest in a security entitlement is granted by an entitlement holder to the securities intermediary through which the security entitlement is maintained, the securities intermediary has control. A common transaction covered by this provision is a margin loan from a broker to its customer.

7. The term "control" is used in a particular defined sense. The requirements for obtaining control are set out in this section. The concept is not to be interpreted by reference to similar concepts in other bodies of law. In particular, the requirements for "possession" derived from the common law of pledge are not to be used as a basis for interpreting subsection (c)(2) or (d)(2). Those provisions are designed to supplant the concepts of "constructive possession" and the like. A principal purpose of the "control" concept is to eliminate the uncertainty and confusion that results from attempting to apply common law possession concepts to modern securities holding practices.

The key to the control concept is that the purchaser has the ability to have the securities sold or transferred without further action by the transferor. There is no requirement that the powers held by the purchaser be exclusive. For example, in a secured lending arrangement, if the secured party wishes, it can allow the debtor to retain the right to make substitutions, to direct the disposition of the uncertificated security or security entitlement, or otherwise to give instructions or entitlement orders. (As explained in Section 8-102, Comment 8, an entitlement order includes a direction under Section 8-508 to the securities intermediary to transfer a financial asset to the account of the entitlement holder at another financial intermediary or to cause the financial asset to be transferred to the entitlement holder in the direct holding system (e.g., by delivery of a securities certificate registered in the name of the former entitlement holder).) Subsection (f) is included to make clear the general point stated in subsections (c) and (d) that the test of control is whether the purchaser has obtained the requisite power, not whether the debtor has retained other powers. There is no implication that retention by the debtor of powers other than those mentioned in subsection (f) is inconsistent with the purchaser having control. Nor is there a requirement that the purchaser's powers be unconditional, provided that further consent of the entitlement holder is not a condition.

Example 10. Debtor grants to Alpha Bank and to Beta Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds through an account with Able & Co. By agreement among the parties, Alpha's security interest is senior and Beta's is junior. Able agrees to act on the entitlement orders of either Alpha or Beta. Alpha and Beta each has control under subsection (d)(2). Moreover, Beta has control notwithstanding a term of Able's agreement to the effect that Able's obligation to act on Beta's entitlement orders is conditioned on Alpha's consent. The crucial distinction is that Able's agreement to act on Beta's entitlement orders is not conditioned on Debtor's further consent.

Example 11. Debtor grants to Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds through an account with Able & Co. Able agrees to act on the entitlement orders of Alpha, but Alpha's right to give entitlement orders to the securities intermediary is conditioned on the Debtor's default. Alternatively, Alpha's right to give entitlement orders is conditioned upon Alpha's statement to Able that Debtor is in default. Because Able's agreement to act on Alpha's entitlement orders is not conditioned on Debtor's further consent, Alpha has control of the securities entitlement under either alternative.

In many situations, it will be better practice for both the securities intermediary and the purchaser to insist that any conditions relating in any way to the entitlement holder be effective only as between the purchaser and the entitlement holder. That practice would avoid the risk that the securities intermediary could be caught between conflicting assertions of the entitlement holder and the purchaser as to whether the conditions in fact have been met. Nonetheless, the existence of unfulfilled conditions effective against the intermediary would not preclude the purchaser from having control.

Definitional Cross References:

"Bearer form"	Section 8-102(a)(2).
"Certificated security"	Section 8-102(a)(4).
"Delivery"	Section 8-301.
"Effective"	Section 8-107.
"Entitlement holder"	Section 8-102(a)(7).
"Entitlement order"	Section 8-102(a)(8).
"Indorsement"	Section 8-102(a)(11).
"Instruction"	Section 8-102(a)(12).
"Purchaser"	Section 1-201(33) & 8-116.
"Registered form"	Section 8-102(a)(13).
"Securities intermediary"	Section 8-102(a)(14).
"Security entitlement"	Section 8-102(a)(17).
"Uncertificated security"	Section 8-102(a)(18).

For this section as in effect until July 1, 2001, see the main volume.

Editor's Note. — The comments to this section contain technical amendments approved through July, 2000.

Effect of Amendments. — Session Laws 2000-169, s. 22, effective July 1, 2001, deleted "or" at the end of subdivision (d)(1); added "or" at the end of subdivision (d)(2); added subdivision (d)(3); and in subsection (f), substituted "subsection (c) or (d)" for "subdivision (c)(2) or (d)(2)," substituted "subsection (c)" for "subdivision (c)(2)" and substituted "subsection (d)" for "subdivision (d)(2)."

§ 25-8-110. (Effective July 1, 2001) Applicability; choice of law.

(a) The local law of the issuer's jurisdiction, as specified in subsection (d) of this section, governs:

(1) The validity of a security;

(2) The rights and duties of the issuer with respect to registration of transfer;

(3) The effectiveness of registration of transfer by the issuer;

(4) Whether the issuer owes any duties to an adverse claimant to a security; and

(5) Whether an adverse claim can be asserted against a person to whom transfer of a certificated or uncertificated security is registered or a person who obtains control of an uncertificated security.

(b) The local law of the securities intermediary's jurisdiction, as specified in subsection (e) of this section, governs:

(1) Acquisition of a security entitlement from the securities intermediary;

(2) The rights and duties of the securities intermediary and entitlement holder arising out of a security entitlement;

(3) Whether the securities intermediary owes any duties to an adverse claimant to a security entitlement; and

(4) Whether an adverse claim can be asserted against a person who acquires a security entitlement from the securities intermediary or a person who purchases a security entitlement or interest therein from an entitlement holder.

(c) The local law of the jurisdiction in which a security certificate is located at the time of delivery governs whether an adverse claim can be asserted against a person to whom the security certificate is delivered.

(d) "Issuer's jurisdiction" means the jurisdiction under which the issuer of the security is organized or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer. An issuer organized under the law of this State may specify the law of another jurisdiction as the law governing the matters specified in subdivisions (a)(2) through (5) of this section.

(e) The following rules determine a "securities intermediary's jurisdiction" for purposes of this section:

(1) If an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that a particular jurisdiction is the securities intermediary's jurisdiction

for purposes of this Part, this Article, or this Chapter, that jurisdiction is the securities intermediary's jurisdiction.

(2) If subdivision (1) of this subsection does not apply and an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.

(3) If neither subdivision (1) nor subdivision (2) of this section applies and an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that the securities account is maintained at an office in a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.

(4) If none of the preceding subdivisions applies, the securities intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the entitlement holder's account is located.

(5) If none of the preceding subdivisions applies, the securities intermediary's jurisdiction is the jurisdiction in which the chief executive office of the securities intermediary is located.

(f) A securities intermediary's jurisdiction is not determined by the physical location of certificates representing financial assets, or by the jurisdiction in which is organized the issuer of the financial asset with respect to which an entitlement holder has a security entitlement, or by the location of facilities for data processing or other record keeping concerning the account. (1997-181, s. 1; 2000-169, s. 23.)

AMENDED OFFICIAL COMMENT (1999 ED.)

1. This section deals with applicability and choice of law issues concerning Article 8. The distinction between the direct and indirect holding systems plays a significant role in determining the governing law. An investor in the direct holding system is registered on the books of the issuer and/or has possession of a security certificate. Accordingly, the jurisdiction of incorporation of the issuer or location of the certificate determine the applicable law. By contrast, an investor in the indirect holding system has a security entitlement, which is a bundle of rights against the securities intermediary with respect to a security, rather than a direct interest in the underlying security. Accordingly, in the rules for the indirect holding system, the jurisdiction of incorporation of the issuer of the underlying security or the location of any certificates that might be held by the intermediary or a higher tier intermediary, do not determine the applicable law.

The phrase "local law" refers to the law of a jurisdiction other than its conflict of laws rules. See Restatement (Second) of Conflict of Laws Section 4.

2. Subsection (a) provides that the law of an issuer's jurisdiction governs certain issues where the substantive rules of Article 8 determine the issuer's rights and duties. Paragraph (1) of subsection (a) provides that the law of the issuer's jurisdiction governs the validity of the security. This ensures that a single body of law will govern the questions addressed in Part 2 of Article 8, concerning the circumstances in which an issuer can and cannot assert invalidity as a defense against purchasers. Similarly, paragraphs (2), (3), and (4) of subsection (a) ensure that the issuer will be able to look to a single body of law on the questions addressed in Part 4 of Article 8, concerning the issuer's duties and liabilities with respect to registration of transfer.

Paragraph (5) of subsection (a) applies the law of an issuer's jurisdiction to the question whether an adverse claim can be asserted against a purchaser to whom transfer has been registered, or who has obtained control over an uncertificated security. Although this issue deals with the rights of persons other than the issuer, the law of the issuer's jurisdiction applies because the purchasers to whom the provision applies are those whose protection against adverse claims depends on the fact that their interests have been recorded on the books of the issuer.

The principal policy reflected in the choice of law rules in subsection (a) is that an issuer and others should be able to look to a single body of law on the matters specified in subsection (a), rather than having to look to the law of all of the different jurisdictions in which security holders may reside. The choice of law policies

reflected in this subsection do not require that the body of law governing all of the matters specified in subsection (a) be that of the jurisdiction in which the issuer is incorporated. Thus, subsection (d) provides that the term "issuer's jurisdiction" means the jurisdiction in which the issuer is organized, or, if permitted by that law, the law of another jurisdiction selected by the issuer. Subsection (d) also provides that issuers organized under the law of a State which adopts this Article may make such a selection, except as to the validity issue specified in paragraph (1). The question whether an issuer can assert the defense of invalidity may implicate significant policies of the issuer's jurisdiction of incorporation. See, e.g., Section 8-202 and Comments thereto.

Although subsection (a) provides that the issuer's rights and duties concerning registration of transfer are governed by the law of the issuer's jurisdiction, other matters related to registration of transfer, such as appointment of a guardian for a registered owner or the existence of agency relationships, might be governed by another jurisdiction's law. Neither this section nor Section 1-105 deals with what law governs the appointment of the administrator or executor; that question is determined under generally applicable choice of law rules.

3. Subsection (b) provides that the law of the securities intermediary's jurisdiction governs the issues concerning the indirect holding system that are dealt with in Article 8. Paragraphs (1) and (2) cover the matters dealt with in the Article 8 rules defining the concept of security entitlement and specifying the duties of securities intermediaries. Paragraph (3) provides that the law of the security intermediary's jurisdiction determines whether the intermediary owes any duties to an adverse claimant. Paragraph (4) provides that the law of the security intermediary's jurisdiction determines whether adverse claims can be asserted against entitlement holders and others.

Subsection (e) determines what is a "securities intermediary's jurisdiction." The policy of subsection (b) is to ensure that a securities intermediary and all of its entitlement holders can look to a single, readily-identifiable body of law to determine their rights and duties. Accordingly, subsection (e) sets out a sequential series of tests to facilitate identification of that body of law. Paragraph (1) of subsection (e) permits specification of the securities intermediary's jurisdiction by agreement. In the absence of such a specification, the law chosen by the parties to govern the securities account determines the securities intermediary's jurisdiction. See paragraph (2). Because the policy of this section is to enable parties to determine, in advance and with certainty, what law will apply to transactions governed by this Article, the validation of the parties' selection of governing law by agreement is not conditioned upon a determination that the jurisdiction whose law is chosen bear a "reasonable relation" to the transaction. See Section 4A-507; compare Section 1-105(1). That is also true with respect to the similar provisions in subsection (d) of this section and in Section 9-305. The remaining paragraphs in subsection (e) contain additional default rules for determining the securities intermediary's jurisdiction.

Subsection (f) makes explicit a point that is implicit in the Article 8 description of a security entitlement as a bundle of rights against the intermediary with respect to a security or other financial asset, rather than as a direct interest in the underlying security or other financial asset. The governing law for relationships in the indirect holding system is not determined by such matters as the jurisdiction of incorporation of the issuer of the securities held through the intermediary, or the location of any physical certificates held by the intermediary or a higher tier intermediary.

4. Subsection (c) provides a choice of law rule for adverse claim issues that may arise in connection with delivery of security certificates in the direct holding system. It applies the law of the place of delivery. If a certificated security issued by an Idaho corporation is sold, and the sale is settled by physical delivery of the certificate from Seller to Buyer in New York, under subsection (c), New York law determines whether Buyer takes free from adverse claims. The domicile of Seller, Buyer, and any adverse claimant is irrelevant.

5. The following examples illustrate how a court in a jurisdiction which has enacted this section would determine the governing law:

Example 1. John Doe, a resident of Kansas, maintains a securities account with Able & Co. Able is incorporated in Delaware. Its chief executive offices are located in Illinois. The office where Doe transacts business with Able is located in Missouri. The agreement between Doe and Able specifies that Illinois is the securities intermediary's (Able's) jurisdiction. Through the account, Doe holds securities of a Colorado corporation, which Able holds through Clearing Corporation. The rules of Clearing Corporation provide that the rights and duties of Clearing Corporation and its participants are governed by New York law. Subsection (a) specifies that a controversy concerning the rights and duties as between the issuer and Clearing Corporation is governed by Colorado law. Subsections (b) and (e) specify that a controversy concerning the rights and duties as between the Clearing Corporation and Able is governed by New York law, and that a controversy concerning the rights and duties as between Able and Doe is governed by Illinois law.

Example 2. Same facts as to Doe and Able as in example 1. Through the account, Doe holds securities of a Senegalese corporation, which Able holds through Clearing Corporation. Clearing Corporation's operations are located in Belgium, and its rules and agreements with its participants provide that they are governed by Belgian law. Clearing Corporation holds the securities through a custodial account at the Paris branch office of Global Bank, which is organized under English law. The agreement between Clearing Corporation and Global Bank provides that it is governed by French law. Subsection (a) specifies that a controversy concerning the rights and duties as between the issuer and Global Bank is governed by Senegalese law. Subsections (b) and (e) specify that a controversy concerning the rights and duties as between Global Bank and Clearing Corporation is governed by French law, that a controversy concerning the rights and duties as between Clearing Corporation and Able is governed by Belgian law, and that a controversy concerning the rights and duties as between Able and Doe is governed by Illinois law.

6. To the extent that this section does not specify the governing law, general choice of law rules apply. For example, suppose that in either of the examples in the preceding Comment, Doe enters into an agreement with Roe, also a resident of Kansas, in which Doe agrees to transfer all of his interests in the securities held through Able to Roe. Article 8 does not deal with whether such an agreement is enforceable or whether it gives Roe some interest in Doe's security entitlement. This section specifies what jurisdiction's law governs the issues that are dealt with in Article 8. Article 8, however, does specify that securities intermediaries have only limited duties with respect to adverse claims. See Section 8-115. Subsection (b)(3) of this section provides that Illinois law governs whether Able owes any duties to an adverse claimant. Thus, if Illinois has adopted Revised Article 8, Section 8-115 as enacted in Illinois determines whether Roe has any rights against Able.

7. The choice of law provisions concerning security interests in securities and security entitlements are set out in Section 9-305.

Definitional Cross References:

"Adverse claim"	Section 8-102(a)(1).
"Agreement"	Section 1-201(3).
"Certificated security"	Section 8-102(a)(4).
"Entitlement holder"	Section 8-102(a)(7).
"Financial asset"	Section 8-102(a)(9).
"Issuer"	Section 8-201.
"Person"	Section 1-201(30).
"Purchase"	Section 1-201(32).
"Securities intermediary"	Section 8-102(a)(14).
"Security"	Section 8-102(a)(15).
"Security certificate"	Section 8-102(a)(16).
"Security entitlement"	Section 8-102(a)(17).
"Uncertificated security"	Section 8-102(a)(18).

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 23, effective July 1, 2001, rewrote subsection (e).

PART 3.

Transfer of Certificated and Uncertificated Securities.

§ 25-8-301. (Effective July 1, 2001) Delivery.

(a) Delivery of a certificated security to a purchaser occurs when:

(1) The purchaser acquires possession of the security certificate;

(2) Another person, other than a securities intermediary, either acquires possession of the security certificate on behalf of the purchaser or, having previously acquired possession of the certificate, acknowledges that it holds for the purchaser; or

(3) A securities intermediary acting on behalf of the purchaser acquires possession of the security certificate, only if the certificate is in registered form and is (i) registered in the name of the purchaser, (ii) payable to the order of the purchaser, or (iii) specially indorsed to the purchaser by an effective indorsement and has not been indorsed to the securities intermediary or in blank.

(b) Delivery of an uncertificated security to a purchaser occurs when:

(1) The issuer registers the purchaser as the registered owner, upon original issue or registration of transfer; or

(2) Another person, other than a securities intermediary, either becomes the registered owner of the uncertificated security on behalf of the purchaser or, having previously become the registered owner, acknowledges that it holds for the purchaser. (1899, c. 733, ss. 52, 57 to 59; Rev., ss. 2201, 2206 to 2208; C.S., ss. 3033, 3038 to 3040; 1941, c. 353, ss. 6, 7; G.S., ss. 55-86, 55-87; 1955, c. 1371, s. 2; 1965, c. 700, s. 1; 1989, c. 588, s. 1; 1997-181, s. 1; 2000-169, s. 24.)

AMENDED OFFICIAL COMMENT (1999 ED.)

1. This section specifies the requirements for "delivery" of securities. Delivery is used in Article 8 to describe the formal steps necessary for a purchaser to acquire a direct interest in a security under this Article. The concept of delivery refers to the implementation of a transaction, not the legal categorization of the transaction which is consummated by delivery. Issuance and transfer are different kinds of transactions, though both may be implemented by delivery. Sale and pledge are different kinds of transfers, but both may be implemented by delivery.

2. Subsection (a) defines delivery with respect to certificated securities. Paragraph (1) deals with simple cases where purchasers themselves acquire physical possession of certificates. Paragraphs (2) and (3) of subsection (a) specify the circumstances in which delivery to a purchaser can occur although the certificate is in the possession of a person other than the purchaser. Paragraph (2) contains the general rule that a purchaser can take delivery through another person, so long as the other person is actually acting on behalf of the purchaser or acknowledges that it is holding on behalf of the purchaser. Paragraph (2) does not apply to acquisition of possession by a securities intermediary, because a person who holds securities through a securities account acquires a security entitlement, rather than having a direct interest. See Section 8-501. Subsection (a)(3) specifies the limited circumstances in which delivery of security certificates to a securities intermediary is treated as a delivery to the customer. Note that delivery is a method of perfecting a security interest in a certified security. See Section 9-313(a), (e).

3. Subsection (b) defines delivery with respect to uncertificated securities. Use of the term "delivery" with respect to uncertificated securities, does, at least on first hearing, seem a bit solecistic. The word "delivery" is, however, routinely used in the securities business in a broader sense than manual tradition. For example, settlement by entries on the books of a clearing corporation is commonly called "delivery," as in the expression "delivery versus payment." The diction of this section has the advantage of using the same term for uncertificated securities as for certificated securities, for which delivery is conventional usage. Paragraph (1) of subsection (b) provides that delivery occurs when the purchaser becomes the registered owner of an uncertificated security, either upon original issue or registration of transfer. Paragraph (2) provides for delivery of an uncertificated security through a third person, in a fashion analogous to subsection (a)(2).

Definitional Cross References:

"Certificated security"	Section 8-102(a)(4).
"Effective"	Section 8-107.
"Issuer"	Section 8-201.
"Purchaser"	Sections 1-201(33) & 8-116.
"Registered form"	Section 8-102(a)(13).
"Securities intermediary"	Section 8-102(a)(14).
"Security certificate"	Section 8-102(a)(16).
"Special indorsement"	Section 8-304(a).
"Uncertificated security"	Section 8-102(a)(18).

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 24, effective July 1, 2001, in subdivision (a)(3), substituted "is (i) registered in the name of the purchaser, (ii) payable to the order of the purchaser, or (iii)" for "has been" and inserted "and has not been indorsed to the securities intermediary or in blank."

§ 25-8-302. (Effective July 1, 2001) Rights of purchaser.

(a) Except as otherwise provided in subsections (b) and (c) of this section, a purchaser of a certificated or uncertificated security acquires all rights in the security that the transferor had or had power to transfer.

(b) A purchaser of a limited interest acquires rights only to the extent of the interest purchased.

(c) A purchaser of a certificated security who as a previous holder had notice of an adverse claim does not improve its position by taking from a protected purchaser. (1899, c. 733, s. 52; Rev., s. 2201; C.S., s. 3033; 1965, c. 700, s. 1; 1989, c. 588, s. 1; 1997-181, s. 1; 2000-169, s. 25.)

AMENDED OFFICIAL COMMENT (1999 ED.)

1. Subsection (a) provides that a purchaser of a certificated or uncertificated security acquires all rights that the transferor had or had power to transfer. This statement of the familiar "shelter" principle is qualified by the exceptions that a purchaser of a limited interest acquires only that interest, subsection (b), and that a person who does not qualify as a protected purchaser cannot improve its position by taking from a subsequent protected purchaser, subsection (c).

2. Although this section provides that a purchaser acquires a property interest in a certificated or uncertificated security, it does not state that a person can acquire an interest in a security only by purchase. Article 8 also is not a comprehensive codification of all of the law governing the creation or transfer of interests in securities. For example, the grant of a security interest is a transfer of a property interest, but the formal steps necessary to effectuate such a transfer are governed by Article 9 not by Article 8. Under the Article 9 rules, a security interest in a certificated or uncertificated security can be created by execution of a security agreement under Section 9-203 and can be perfected by filing. A transfer of an Article 9 security interest can be implemented by an Article 8 delivery, but need not be.

Similarly, Article 8 does not determine whether a property interest in certificated or uncertificated security is acquired under other law, such as the law of gifts, trusts, or equitable remedies. Nor does Article 8 deal with transfers by operation of law. For example, transfers from decedent to administrator, from ward to guardian, and from bankrupt to trustee in bankruptcy are governed by other law as to both the time they occur and the substance of the transfer. The Article 8 rules do, however, determine whether the issuer is obligated to recognize the rights that a third party, such as a transferee, may acquire under other law. See Sections 8-207, 8-401, and 8-404.

Definitional Cross References:

"Certificated security"	Section 8-102(a)(4).
"Delivery"	Section 8-301.
"Notice of adverse claim"	Section 8-105.
"Protected purchaser"	Section 8-303.
"Purchaser"	Sections 1-201(33) & 8-116.
"Uncertificated security"	Section 8-102(a)(18).

For this section as in effect until July 1, 2001, see the main volume.

Editor's Note. — The comments in this section contain technical amendments approved through July, 2000.

Effect of Amendments. — Session Laws 2000-169, s. 25, effective July 1, 2001, in subsection (a), substituted "a purchaser" for "upon delivery" and deleted "to a purchaser, the purchaser" following "uncertificated security."

PART 5

SECURITY ENTITLEMENTS.

§ 25-8-502. Assertion of adverse claim against entitlement holder.

AMENDED OFFICIAL COMMENT (1999 ED.)

Editor's Note. *— This Amended Official Comment accompanies the revison to Article 9, effective July 1, 2001.*

1. This section provides investors in the indirect holding system with protection against adverse claims by specifying that no adverse claim can be asserted against a person who acquires a security entitlement under Section 8-501 for value and without notice of the adverse claim. It plays a role in the indirect holding system analogous to the rule of the direct holding system that protected purchasers take free from adverse claims (Section 8-303).

This section does not use the locution "takes free from adverse claims" because that could be confusing as applied to the indirect holding system. The nature of the indirect holding system is that an entitlement holder has an interest in common with others who hold positions in the same financial asset through the same intermediary. Thus, a particular entitlement holder's interest in the financial assets held by its intermediary is necessarily "subject to" the interests of others. See Section 8-503. The rule stated in this section might have been expressed by saying that a person who acquires a security entitlement under Section 8-501 for value and without notice of adverse claims takes "that security entitlement" free from adverse claims. That formulation has not been used, however, for fear that it would be misinterpreted as suggesting that the person acquires a right to the underlying financial assets that could not be affected by the competing rights of others claiming through common or higher tier intermediaries. A security entitlement is a complex bundle of rights. This section does not deal with the question of what rights are in the bundle. Rather, this section provides that once a person has acquired the bundle, someone else cannot take it away on the basis of assertion that the transaction in which the security entitlement was created involved a violation of the claimant's rights.

2. Because securities trades are typically settled on a net basis by book-entry movements, it would ordinarily be impossible for anyone to trace the path of any particular security, no matter how the interest of parties who hold through intermediaries is described. Suppose, for example, that S has a 1000 share position in XYZ common stock through an account with a broker, Able & Co. S's identical twin impersonates S and directs Able to sell the securities. That same day, B places an order with Baker & Co., to buy 1000 shares of XYZ common stock. Later, S discovers the wrongful act and seeks to recover "her shares." Even if S can show that, at the stage of the trade, her sell order was matched with B's buy order, that would not suffice to show that "her shares" went to B. Settlement between Able and Baker occurs on a net basis for all trades in XYZ that day; indeed Able's net position may have been such that it received rather than delivered shares in XYZ through the settlement system.

In the unlikely event that this was the only trade in XYZ common stock executed in the market that day, one could follow the shares from S's account to B's account. The plaintiff in an action in conversion or similar legal action to enforce a property interest must show that the defendant has an item of property that belongs to the plaintiff. In this example, B's security entitlement is not the same item of property that formerly was held by S, it is a new package of rights that B acquired against Baker under Section 8-501. Principles of equitable remedies might, however, provide S with a basis for contending that if the position B received was the traceable product of the wrongful taking of S's property by S's twin, a constructive trust should be imposed on B's property in favor of S. See G. Palmer, The Law of Restitution § 2.14. Section 8-502 ensures that no such claims can be asserted against a person, such as B in this example, who acquires a security entitlement under Section 8-501 for value and without notice, regardless of what theory of law or equity is used to describe the basis of the assertion of the adverse claim.

In the above example, S would ordinarily have no reason to pursue B unless Able is insolvent and S's claim will not be satisfied in the insolvency proceedings. Because S did not give an entitlement order for the disposition of her security entitlement, Able must recredit her account for the 1000 shares of XYZ common stock. See section 8-507(b).

3. The following examples illustrate the operation of Section 8-502.

Example 1. Thief steals bearer bonds from Owner. Thief delivers the bonds to Broker for credit to Thief's securities account, thereby acquiring a security entitlement under Section 8-501(b). Under other law, Owner may have a claim to have a constructive trust imposed on the security entitlement as the traceable product of the bonds that Thief misappropriated. Because Thief was the wrongdoer, Thief obviously had notice of Owner's adverse claim. Accordingly, Section 8-502 does not preclude Owner from asserting an adverse claim against Thief.

Example 2. Thief steals bearer bonds from Owner. Thief owes a personal debt to Creditor. Creditor has a securities account with Broker. Thief agrees to transfer the bonds to Creditor as security for or in satisfaction of his debt to Creditor. Thief does so by sending the bonds to Broker for credit to Creditor's securities account. Creditor thereby acquires a security entitlement under Section 8-501(b). Under other law, Owner may have a claim to have a constructive trust imposed on the security entitlement as the traceable product of the bonds that Thief misappropriated. Creditor acquired the security entitlement for value, since Creditor acquired it as security for or in satisfaction of Thief's debt to Creditor. See Section 1-201(44). If Creditor did not have notice of Owner's claim, Section 8-502 precludes any action by Owner against Creditor, whether framed in constructive trust or other theory. Section 8-105 specifies what counts as notice of an adverse claim.

Example 3. Father, as trustee for Son, holds XYZ Co. shares in a securities account with Able & Co. In violation of his fiduciary duties, Father sells the XYZ Co. shares and uses the proceeds for personal purposes. Father dies, and his estate is insolvent. Assume — implausibly — that Son is able to trace the XYZ Co. shares and show that the "same shares" ended up in Buyer's securities account with Baker & Co. Section 8-502 precludes any action by Son against Buyer, whether framed in constructive trust or other theory, provided that Buyer acquired the security entitlement for value and without notice of adverse claims.

Example 4. Debtor holds XYZ Co. shares in a securities account with Able & Co. As collateral for a loan from Bank, Debtor grants Bank a security interest in the security entitlement to the XYZ Co. shares. Bank perfects by a method which leaves Debtor with the ability to dispose of the shares. See Section 9-312. In violation of the security agreement, Debtor sells the XYZ Co. shares and absconds with the proceeds. Assume — implausibly — that Bank is able to trace the XYZ Co. shares and show that the "same shares" ended up in Buyer's securities account with Baker & Co. Section 8-502 precludes any action by Bank against Buyer, whether framed in constructive trust or other theory, provided that Buyer acquired the security entitlement for value and without notice of adverse claims.

Example 5. Debtor owns controlling interests in various public companies, including Acme and Ajax. Acme owns 60% of the stock of another public company, Beta. Debtor causes the Beta stock to be pledged to Lending Bank as collateral for Ajax's debt. Acme holds the Beta stock through an account with a securities custodian, C Bank, which in turn holds through Clearing Corporation. Lending Bank is also a Clearing Corporation participant. The pledge of the Beta stock is implemented by Acme instructing C Bank to instruct Clearing Corporation to debit C Bank's account and credit Lending Bank's account. Acme and Ajax both become insolvent. The Beta stock is still valuable. Acme's liquidator asserts that the pledge of the Beta stock for Ajax's debt was wrongful as against Acme and seeks to recover the Beta stock from Lending Bank. Because the pledge was implemented by an outright transfer into Lending Bank's account at Clearing Corporation, Lending Bank acquired a security entitlement to the Beta stock under Section 8-501. Lending Bank acquired the security entitlement for value, since it acquired it as security for a debt. See Section 1-201(44). If Lending Bank did not have notice of Acme's claim, Section 8-502 will preclude any action by Acme against Lending Bank, whether framed in constructive trust or other theory.

Example 6. Debtor grants Alpha Co. a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds through an account with Able & Co. Alpha also has an account with Able. Debtor instructs Able to transfer the shares to Alpha, and Able does so by crediting the shares to Alpha's account. Alpha has control of the 1000 shares under Section 8-106(d). (The facts to this point are identical to those in Section 8-106, Comment 4, Example 1, except that Alpha Co. was Alpha Bank.) Alpha next grants Beta Co. a security interest in the 1000 shares included in Alpha's security entitlement. See Section 9-207(c)(3). Alpha instructs Able to transfer the shares to Gamma Co., Beta's custodian. Able does so, and Gamma credits the 1000 shares to Beta's account. Beta now has control under section 8-106(d). By virtue of Debtor's explicit permission or by virtue of the permission inherent in Debtor's creation of a security interest in favor of Alpha and Alpha's resulting power to grant a security interest under Section 9-207, Debtor has no adverse claim to assert against Beta, assuming implausibly that

Debtor could "trace" an interest to the Gamma account. Moreover, even if Debtor did hold an adverse claim, if Beta did not have notice of Debtor's claim, Section 8-502 will preclude any action by Debtor against Beta, whether framed in constructive trust or other theory.

4. Although this section protects entitlement holders against adverse claims, it does not protect them against the risk that their securities intermediary will not itself have sufficient financial assets to satisfy the claims of all of its entitlement holders. Suppose that Customer A holds 1000 shares of XYZ Co. stock in an account with her broker, Able & Co. Able in turn holds 1000 shares of XYZ Co. through its account with Clearing Corporation, but has no other positions in XYZ Co. shares, either for other customers or for its own proprietary account. Customer B places an order with Able for the purchase of 1000 shares of XYZ Co. stock, and pays the purchase price. Able credits B's account with a 1000 share position in XYZ Co. stock, but Able does not itself buy any additional XYZ Co. shares. Able fails, having only 1000 shares to satisfy the claims of A and B. Unless other insolvency law establishes a different distributional rule, A and B would share the 1000 shares held by Able pro rata, without regard to the time that their respective entitlements were established. See Section 8-503(b). Section 8-502 protects entitlement holders, such as A and B, against adverse claimants. In this case, however, the problem that A and B face is not that someone is trying to take away their entitlements, but that the entitlements are not worth what they thought. The only role that Section 8-502 plays in this case is to preclude any assertion that A has some form of claim against B by virtue of the fact that Able's establishment of an entitlement in favor of B diluted A's rights to the limited assets held by Able.

Definitional Cross References:

"Adverse claim"	Section 8-102(a)(1).
"Financial asset"	Section 8-102(a)(9).
"Notice of adverse claim"	Section 8-105.
"Security entitlement"	Section 8-102(a)(17).
"Value"	Sections 1-201(44) & 8-116.

§ 25-8-510. (Effective July 1, 2001) Rights of purchaser of security entitlement from entitlement holder.

(a) In a case not covered by the priority rules in Article 9 of this Chapter or the rules stated in subsection (c) of this section, an action based on an adverse claim to a financial asset or security entitlement, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against a person who purchases a security entitlement, or an interest therein, from an entitlement holder if the purchaser gives value, does not have notice of the adverse claim, and obtains control.

(b) If an adverse claim could not have been asserted against an entitlement holder under G.S. 25-8-502, the adverse claim cannot be asserted against a person who purchases a security entitlement, or an interest therein, from the entitlement holder.

(c) In a case not covered by the priority rules in Article 9 of this Chapter, a purchaser for value of a security entitlement, or an interest therein, who obtains control has priority over a purchaser of a security entitlement, or an interest therein, who does not obtain control. Except as otherwise provided in subsection (d) of this section, purchasers who have control rank according to priority in time of:

(1) The purchaser's becoming the person for whom the securities account, in which the security entitlement is carried, is maintained, if the purchaser obtained control under G.S. 25-8-106(d)(1);

(2) The securities intermediary's agreement to comply with the purchaser's entitlement orders with respect to security entitlements carried or to be carried in the securities account in which the security entitlement is carried, if the purchaser obtained control under G.S. 25-8-106(d)(2); or

(3) If the purchaser obtained control through another person under G.S. 25-8-106(d)(3), the time on which priority would be based under this subsection if the other person were the secured party.

(d) A securities intermediary as purchaser has priority over a conflicting purchaser who has control unless otherwise agreed by the securities intermediary. (1997-181, s. 1; 2000-169, s. 26.)

AMENDED OFFICIAL COMMENT (1999 ED.)

1. This section specifies certain rules concerning the rights of persons who purchase interests in security entitlements from entitlement holders. The rules of this section are provided to take account of cases where the purchaser's rights are derivative from the rights of another person who is and continues to be the entitlement holder.

2. Subsection (a) provides that no adverse claim can be asserted against a purchaser of an interest in a security entitlement if the purchaser gives value, obtains control, and does not have notice of the adverse claim. The primary purpose of this rule is to give adverse claim protection to persons who take security interests in security entitlements and obtain control, but do not themselves become entitlement holders.

The following examples illustrate subsection (a):

Example 1. X steals a certificated bearer bond from Owner. X delivers the certificate to Able & Co. for credit to X's securities account. Later, X borrows from Bank and grants Bank a security interest in the security entitlement. Bank obtains control under Section 8-106(d)(2) by virtue of an agreement in which Able agrees to comply with entitlement orders originated by Bank. X absconds.

Example 2. Same facts as in Example 1, except that Bank does not obtain a control agreement. Instead, Bank perfects by filing a financing statement.

In both of these examples, when X deposited the bonds X acquired a security entitlement under Section 8-501. Under other law, Owner may be able have a constructive trust imposed on the security entitlement as the traceable product of the bonds that X misappropriated. X granted a security interest in that entitlement to Bank. Bank was a purchaser of an interest in the security entitlement from X. In Example 1, although Bank was not a person who acquired a security entitlement from the intermediary, Bank did obtain control. If Bank did not have notice of Owner's claim, Section 8-510(a) precludes Owner from asserting an adverse claim against Bank. In Example 2, Bank had a perfected security interest, but did not obtain control. Accordingly, Section 8-510(a) does not preclude Owner from asserting its adverse claim against Bank.

3. Subsection (b) applies to the indirect holding system a limited version of the "shelter principle." The following example illustrates the relatively limited class of cases for which it may be needed:

Example 3. Thief steals a certificated bearer bond from Owner. Thief delivers the certificate to Able & Co. for credit to Thief's securities account. Able forwards the certificate to a clearing corporation for credit to Able's account. Later Thief instructs Able to sell the positions in the bonds. Able sells to Baker & Co., acting as broker for Buyer. The trade is settled by book-entries in the accounts of Able and Baker at the clearing corporation, and in the accounts of Thief and Buyer at Able and Baker respectively. Owner may be able to reconstruct the trade records to show that settlement occurred in such fashion that the "same bonds" that were carried in Thief's account at Able are traceable into Buyer's account at Baker. Buyer later decides to donate the bonds to Alma Mater University and executes an assignment of its rights as entitlement holder to Alma Mater.

Buyer had a position in the bonds, which Buyer held in the form of a security entitlement against Baker. Buyer then made a gift of the position to Alma Mater. Although Alma Mater is a purchaser, Section 1-201(33), it did not give value. Thus, Alma Mater is a person who purchased a security entitlement, or an interest therein, from an entitlement holder (Buyer). Buyer was protected against Owner's adverse claim by the Section 8-502 rule. Thus, by virtue of the Section 8-510(b), Owner is also precluded from asserting an adverse claim against Alma Mater.

4. Subsection (c) specifies a priority rule for cases where an entitlement holder transfers conflicting interests in the same security entitlement to different purchasers. It follows the same principle as the Article 9 priority rule for investment property, that is, control trumps non-control. Indeed, the most significant category of conflicting "purchasers" may be secured parties. Priority questions for security interests, however, are governed by the rules in Article 9. Subsection (c) applies only to cases not covered by the Article 9 rules. It is intended primarily for disputes over conflicting claims arising out of repurchase agreement transactions that are not covered by the other rules set out in Articles 8 and 9.

The following example illustrates subsection (c):

Example 4. Dealer holds securities through an account at Alpha Bank. Alpha Bank in turn holds through a clearing corporation account. Dealer transfers securities to RP1 in

a "hold in custody" repo transaction. Dealer then transfers the same securities to RP2 in another repo transaction. The repo to RP2 is implemented by transferring the securities from Dealer's regular account at Alpha Bank to a special account maintained by Alpha Bank for Dealer and RP2. The agreement among Dealer, RP2, and Alpha Bank provides that Dealer can make substitutions for the securities but RP2 can direct Alpha Bank to sell any securities held in the special account. Dealer becomes insolvent. RP1 claims a prior interest in the securities transferred to RP2.

In this example Dealer remained the entitlement holder but agreed that RP2 could initiate entitlement orders to Dealer's security intermediary, Alpha Bank. If RP2 had become the entitlement holder, the adverse claim rule of Section 8-502 would apply. Even if RP2 does not become the entitlement holder, the arrangement among Dealer, Alpha Bank, and RP2 does suffice to give RP2 control. Thus, under Section 8-510(c), RP2 has priority over RP1, because RP2 is a purchaser who obtained control, and RP1 is a purchaser who did not obtain control. The same result could be reached under Section 8-510(a) which provides that RP1's earlier in time interest cannot be asserted as an adverse claim against RP2. The same result would follow under the Article 9 priority rules if the interests of RP1 and RP2 are characterized as "security interests," see Section 9-328(1). The main point of the rules of Section 8-510(c) is to ensure that there will be clear rules to cover the conflicting claims of RP1 and RP2 without characterizing their interests as Article 9 security interests.

The priority rules in Article 9 for conflicting security interests also include a default temporal priority rule for cases where multiple secured parties have obtained control but omitted to specify their respective rights by agreement. See Section 9-328(2) and Comment 5 to Section 9-328. Because the purchaser priority rule in Section 8-510(c) is intended to track the Article 9 priority rules, it too has a temporal priority rule for cases where multiple nonsecured party purchasers have obtained control but omitted to specify their respective rights by agreement. The rule is patterned on Section 9-328(2).

5. If a securities intermediary itself is a purchaser, subsection (d) provides that it has priority over the interest of another purchaser who has control. Article 9 contains a similar rule. See Section 9-328(3).

Definitional Cross References:

"Adverse claim"	Section 8-102(a)(1).
"Control"	Section 8-106.
"Entitlement holder"	Section 8-102(a)(7).
"Notice of adverse claim"	Section 8-105.
"Purchase"	Section 1-201(32).
"Purchaser"	Sections 1-201(33) & 8-116.
"Securities intermediary"	Section 8-102(a)(14).
"Security entitlement"	Section 8-102(a)(17).
"Value"	Sections 1-201(44) & 8-116.

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 26, effective July 1, 2001, inserted "In a case not covered by the priority rules in Article 9 of this Chapter or the rules stated in subsection (c) of this section" in subsection (a); in subsection (c), substituted "Article 9 of this Chapter" for "Article 9," inserted "Except as otherwise provided in subsection (d) of this section," and substituted "according to priority in time of" for "equally, except that a"; added subdivisions (a)(1), (2) and (3); and added the designation (d).

ARTICLE 9.

Secured Transactions; Sales of Accounts and Chattel Paper.

(Effective until July 1, 2001)

Editor's Note. —

Session Laws 2000-169, s. 1, rewrites Article 9 of Chapter 25, effective July 1, 2001.

Article 9 of Chapter 25, as rewritten effective July 1, 2001, and tables showing comparable sections and their disposition in revised Article 9, may be found in the 2000 Interim Supplement.

§ 25-9-105. (Effective until July 1, 2001) Definitions and index of definitions.

CASE NOTES

Quoted in In re Environmental Aspecs, Inc., 235 Bankr. 378 (E.D.N.C. 1999).

§ 25-9-203. (Effective until July 1, 2001) Attachment and enforceability of security interest; proceeds; formal requisites.

CASE NOTES

Stated in In re Environmental Aspecs, Inc., 235 Bankr. 378 (E.D.N.C. 1999).

§ 25-9-302. (Effective until July 1, 2001) When filing is required to perfect security interests; security interests to which filing provisions of this article do not apply.

CASE NOTES

Stated in In re Environmental Aspecs, Inc., 235 Bankr. 378 (E.D.N.C. 1999).

§ 25-9-303. (Effective until July 1, 2001) When security interest is perfected; continuity of perfection.

CASE NOTES

Quoted in In re Environmental Aspecs, Inc., 235 Bankr. 378 (E.D.N.C. 1999).

§ 25-9-312. (Effective until July 1, 2001) Priorities among conflicting security interests in the same collateral.

CASE NOTES

Quoted in In re Environmental Aspecs, Inc., 235 Bankr. 378 (E.D.N.C. 1999).

PART 4.

FILING.

(Effective until July 1, 2001)

§ 25-9-401. (Effective until July 1, 2001) Place of filing; erroneous filing; removal of collateral.

CASE NOTES

Cited in In re Environmental Aspecs, Inc., 235 Bankr. 378 (E.D.N.C. 1999); Chrysler Fin. Co. v. Offerman, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 605 (June 6, 2000).

§ 25-9-402. (Effective until July 1, 2001) Formal requisites of financing statement; amendments; mortgage as financing statement.

CASE NOTES

A financing statement substantially complying with the requirements of this section is effective, etc.

Omission of the words "of North Carolina" in two spaces on otherwise informative and adequate financing statement, which was attached to a valid security agreement, did not render the statement "seriously misleading." In re Environmental Aspecs, Inc., 235 Bankr. 378 (E.D.N.C. 1999).

Effect of Absence of Debtor's Signature. — Creditor's financing statement was inadequate to establish a lien where the debtor did not sign the financing statement and the description of the collateral in that statement did not identify the assets; the "notice filing" theory would be construed as subordinate to the mandatory requirement that the debtor must sign the financing statement. In re Environmental Aspecs, Inc., 235 Bankr. 378 (E.D.N.C. 1999).

§ 25-9-403. (Effective until July 1, 2001) What constitutes filing; duration of filing; effect of lapsed filing; duties of filing officer.

(1) Presentation for filing of a financing statement and tender of the filing fee or acceptance of the statement by the filing officer constitutes filing under this article.

(2) Except as provided in subsection (6), or in Article 12 of Chapter 44, a filed financing statement is effective for a period of five years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of the five-year period unless a continuation statement is filed prior to the lapse. If a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the security interest remains perfected until termination of the insolvency proceedings and thereafter for a period of 60 days or until expiration of the five-year period, whichever occurs later. Upon lapse the security interest becomes unperfected, unless it is perfected without filing. If the security interest becomes unperfected upon lapse, it is deemed to have been unperfected as against a person who became a purchaser or lien creditor before lapse.

(3) A continuation statement may be filed by the secured party within six months prior to the expiration of the five-year period specified in subsection (2). Any such continuation statement must be signed by the secured party, identify the original statement by file number and also by the most current file

number if any continuation was filed and state that the original statement is still effective. A continuation statement signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with subsection (2) of G.S. 25-9-405, including payment of the required fee. Upon timely filing of the continuation statement, the effectiveness of the original statement is continued for five years after the last date to which the filing was effective whereupon it lapses in the same manner as provided in subsection (2) unless another continuation statement is filed prior to such lapse. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the original statement. Unless a statute on disposition of public records provides otherwise, the filing officer may remove a lapsed statement from the files and destroy it immediately if he has retained a microfilm or other photographic record, or in other cases after one year after the lapse. The filing officer shall so arrange matters by physical annexation of financing statements to continuation statements or other related filings, or by other means, that if he physically destroys the financing statements of a period more than five years past, those which have been continued by a continuation statement or which are still effective under subsection (6) shall be retained. Any continuation statement which is not filed in accordance with the requirements set forth herein and during the stated time periods set forth above shall be invalid.

(4) A filing officer shall mark each statement with a file number and with the date and hour of filing and shall hold the statement or a microfilm or other photographic copy thereof for public inspection. In addition the filing officer shall index the statement according to the name of the debtor and shall note in the index the file number given in the statement.

(5) The uniform fee for filing and indexing and for stamping a copy furnished by the secured party to show the date and place of filing for an original financing statement or for a continuation statement is thirty dollars ($30.00).

(6) A real estate mortgage which is effective as a fixture filing under subsection (6) of G.S. 25-9-402 remains effective as a fixture filing until the mortgage is redeemed or satisfied of record or its effectiveness otherwise terminates as to the real estate.

(7) When a financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to subsection (5) of G.S. 25-9-103, or is filed as a fixture filing, the filing officer, in addition to complying with subsection (4) of this section, shall:

(a) index the statements in the Uniform Commercial Code index to financing statements so as to reflect the name of any record owner given in the statement. When the debtor is not the record owner, the filing officer shall enter the name of the record owner in the place designated for entry of the name of the debtor and shall stamp or print conspicuously beneath the surname of the record owner the legend "RECORD OWNER" and shall note therein the file number of the financing statement. When the debtor is also the record owner, the filing officer shall make one index entry in the name of the debtor and shall stamp or print conspicuously beneath his surname the legend, "RECORD OWNER." The filing officer shall also:

(b) index the statements in the real estate indexes under the names of the debtor and any owner of record shown on the financing statement in the same fashion as if they were the mortgagors in a mortgage of the real estate described, and, to the extent that the law of this State provides for indexing of mortgages under the name of the mortgagee, under the name of the secured party as if he were the mortgagee thereunder, or where indexing is by description in the same fashion as

if the financing statement were a mortgage of the real estate described. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C.S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, ss. 2, 4; c. 196, s. 2; 1955, c. 386, ss. 1, 2; c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1969, c. 1115, s. 1; 1971, c. 1170; 1973, c. 1316, s. 1; 1975, c. 862, s. 7; 1977, cc. 156, 295; 1983, c. 713, s. 23; 1987, c. 792, s. 6; 1989, c. 523, s. 4; 1991, c. 164, s. 1; 1997-456, s. 55.3; 1997-475, s. 5.4; 2000-169, s. 45.)

Editor's Note. —

Session Laws 2000-67, s. 24B.1, effective July 1, 2000, provides: "Of the funds appropriated in this act to the Department of the Secretary of State for the 2000-2001 fiscal year, the Department may use up to the sum of eight hundred sixty-eight thousand six hundred sixty-four dollars ($868,664) in recurring funds and one million eight hundred ninty-one thousand four dollars ($1,891,004) in nonrecurring funds for personnel, start-up expenses, and operating costs necessary for the implementation of Senate Bill 1305, 1999 General Assembly, if it becomes law. Prior to using any of these funds or establishing any of the 41 positons authorized by the General Assembly, the Department shall present its plan for implementing Senate Bill 1305, 1999 General Assembly, to the Joint Legislative Commission on Governmental Operations, the Chairs of the Senate and House Appropriations Subcommittees on General Government, and the Joint Select Committee on Information Technology. The Department shall maintain monthly reports on UCC filings and, on a quarterly basis, submit the reports to the House and Senate Appropriations Subcommittees on General Government and the Fiscal Research Division. The reports shall include: the number of filings, the time required to process the filings, the filings per employee ratio, and the actual and projected revenue from filing fees." Senate Bill 1305, 1999 General Assembly, was enacted into law as Session Laws 2000-169.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. — Session Laws 2000-169, s. 45, effective September 1, 2000, and applicable to fees paid on or after that date, substituted "thirty dollars ($30.00)" for "fifteen dollars ($15.00)" in subdivision (5).

CASE NOTES

Quoted in In re Environmental Aspecs, Inc., 235 Bankr. 378 (E.D.N.C. 1999).

§ 25-9-405. (Effective until July 1, 2001) Assignment of security interest; duties of filing officer; fees.

(1) A financing statement may disclose an assignment of a security interest in the collateral described in the financing statement by indication in the financing statement of the name and address of the assignee or by an assignment itself or a copy thereof on the face or back of the statement. On presentation to the filing officer of such a financing statement the filing officer shall mark the same as provided in G.S. 25-9-403(4). The uniform fee for filing, indexing, and furnishing filing data for a financing statement so indicating an assignment is thirty dollars ($30.00).

(2) A secured party may assign of record all or part of his rights under a financing statement by the filing in the place where the original financing statement was filed of a separate written statement of assignment signed by the secured party of record and setting forth the name of the secured party of record and the debtor, the file number and also the most current file number if it has been continued and the date of filing of the financing statement and the name and address of the assignee and containing a description of the collateral

assigned. A copy of the assignment is sufficient as a separate statement if it complies with the preceding sentence. On presentation to the filing officer of such a separate statement, the filing officer shall mark such separate statement with the date and hour of the filing. He shall note the assignment on the Uniform Commercial Code index of the financing statement, and in the case of a fixture filing, or a filing covering timber to be cut, or covering minerals or the like (including oil and gas) or accounts subject to subsection (5) of G.S. 25-9-103, he shall index in the real estate index the assignment under the name of the assignor as grantor and, to the extent that the law of this State provides for indexing the assignment of a mortgage under the name of the assignee, he shall index the assignment of the financing statement under the name of the assignee. The uniform fee for filing, indexing, and furnishing filing data about such a separate statement of assignment is thirty dollars ($30.00). Notwithstanding the provisions of this subsection, an assignment of record of a security interest in a fixture contained in a mortgage effective as a fixture filing (subsection (6) of G.S. 25-9-402) may be made only by an assignment of the mortgage in the manner provided by the law of the State other than this Chapter.

(3) After the disclosure or filing of an assignment under this section, the assignee is the secured party of record. (1965, c. 700, s. 1; 1967, c. 24, s. 23; 1969, c. 1115, s. 1; 1973, c. 1316, ss. 4, 5; 1975, c. 862, s. 7; 1983, c. 713, ss. 24, 25; 1987, c. 792, ss. 7, 8; 1989, c. 523, s. 6; 1997-456, s. 55.3; 1997-475, s. 5.5; 2000-169, s. 46.)

Editor's Note. —

Session Laws 2000-67, s. 24B.1, effective July 1, 2000, provides: "Of the funds appropriated in this act to the Department of the Secretary of State for the 2000-2001 fiscal year, the Department may use up to the sum of eight hundred sixty-eight thousand six hundred sixty-four dollars ($868,664) in recurring funds and one million eight hundred ninty-one thousand four dollars ($1,891,004) in nonrecurring funds for personnel, start-up expenses, and operating costs necessary for the implementation of Senate Bill 1305, 1999 General Assembly, if it becomes law. Prior to using any of these funds or establishing any of the 41 positons authorized by the General Assembly, the Department shall present its plan for implementing Senate Bill 1305, 1999 General Assembly, to the Joint Legislative Commission on Governmental Operations, the Chairs of the Senate and House Appropriations Subcommittees on General Government, and the Joint Select Committee on Information Technology. The Department shall maintain monthly reports on UCC filings and, on a quarterly basis, submit the reports to the House and Senate Appropriations Subcommittees on General Government and the Fiscal Research Division. The reports shall include: the number of filings, the time required to process the filings, the filings per employee ratio, and the actual and projected revenue from filing fees." Senate Bill 1305, 1999 General Assembly, was enacted into law as Session Laws 2000-169.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. — Session Laws 2000-169, s. 46, effective September 1, 2000, and applicable to fees paid on or after that date, substituted "thirty dollars ($30.00)" for "fifteen dollars ($15.00)" in subsections (1) and (2).

§ 25-9-406. (Effective until July 1, 2001) Release of collateral; duties of filing officer; fees.

A secured party of record may, by his signed statement, release all or a part of any collateral described in a filed financing statement. The statement of release is sufficient if it contains a description of the collateral being released, the name and address of the debtor, the name and address of the secured party,

and the file number of the financing statement. A statement of release signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with subsection (2) of G.S. 25-9-405, including payment of the required fee. Upon presentation of such a statement of release to the filing officer he shall mark the statement with the hour and date of filing and shall note the same upon the margin of the index of the filing of the financing statement. The uniform fee for filing and noting such a statement of release is thirty dollars ($30.00). (1965, c. 700, s. 1; 1967, c. 24, s. 25; 1969, c. 1115, s. 1; 1973, c. 1316, s. 6; 1975, c. 862, s. 7; 1983, c. 713, s. 26; 1987, c. 792, s. 9; 1997-456, s. 55.3; 1997-475, s. 5.6; 2000-169, s. 46.)

Editor's Note. —

Session Laws 2000-67, s. 24B.1, effective July 1, 2000, provides: "Of the funds appropriated in this act to the Department of the Secretary of State for the 2000-2001 fiscal year, the Department may use up to the sum of eight hundred sixty-eight thousand six hundred sixty-four dollars ($868,664) in recurring funds and one million eight hundred ninty-one thousand four dollars ($1,891,004) in nonrecurring funds for personnel, start-up expenses, and operating costs necessary for the implementation of Senate Bill 1305, 1999 General Assembly, if it becomes law. Prior to using any of these funds or establishing any of the 41 positons authorized by the General Assembly, the Department shall present its plan for implementing Senate Bill 1305, 1999 General Assembly, to the Joint Legislative Commission on Governmental Operations, the Chairs of the Senate and House Appropriations Subcommittees on General Government, and the Joint Select Committee on Information Technology. The Department shall maintain monthly reports on UCC filings and, on a quarterly basis, submit the reports to the House and Senate Appropriations Subcommittees on General Government and the Fiscal Research Division. The reports shall include: the number of filings, the time required to process the filings, the filings per employee ratio, and the actual and projected revenue from filing fees." Senate Bill 1305, 1999 General Assembly, was enacted into law as Session Laws 2000-169.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. — Session Laws 2000-169, s. 47, effective September 1, 2000, and applicable to fees paid on or after that date, substituted "thirty dollars ($30.00)" for "fifteen dollars ($15.00)" at the end of the section.

§ 25-9-407. (Effective until July 1, 2001) Information from filing officer.

(1) If the person filing any financing statement, termination statement, statement of assignment or statement of release furnishes the filing officer a copy thereof, the filing officer shall upon request note upon the copy the file number and date and hour of the filing of the original and deliver or send the copy to such person.

(2) Upon request of any person, the filing officer shall issue his certificate for which he shall not be liable showing whether there is on file, on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any statement of assignment thereof and if there is, giving the date and hour of filing of each such statement and the names and addresses of each secured party therein. The uniform fee for such a certificate shall be thirty dollars ($30.00). Where the Uniform Commercial Code index has been automated, the filing officer shall issue a computer printout of the index entries for a particular debtor for a fee of thirty dollars ($30.00). Upon request the filing officer shall furnish a copy of any filed financing statement or statement of assignment for a uniform fee of one dollar ($1.00) per page. (1965, c. 700, s. 1; 1967, c. 562, s. 1; 1973, c. 1316, s. 7; 1975, c. 862, s. 7; 1983, c. 713,

ss. 27, 28; 1987, c. 792, s. 10; 1997-456, s. 55.3; 1997-475, s. 5.7; 2000-169, s. 48.)

Editor's Note. —

Session Laws 2000-67, s. 24B.1, effective July 1, 2000, provides: "Of the funds appropriated in this act to the Department of the Secretary of State for the 2000-2001 fiscal year, the Department may use up to the sum of eight hundred sixty-eight thousand six hundred sixty-four dollars ($868,664) in recurring funds and one million eight hundred ninty-one thousand four dollars ($1,891,004) in nonrecurring funds for personnel, start-up expenses, and operating costs necessary for the implementation of Senate Bill 1305, 1999 General Assembly, if it becomes law. Prior to using any of these funds or establishing any of the 41 positons authorized by the General Assembly, the Department shall present its plan for implementing Senate Bill 1305, 1999 General Assembly, to the Joint Legislative Commission on Governmental Operations, the Chairs of the Senate and House Appropriations Subcommittees on General Government, and the Joint Select Committee on Information Technology. The Department shall maintain monthly reports on UCC filings and, on a quarterly basis, submit the reports to the House and Senate Appropriations Subcommittees on General Government and the Fiscal Research Division. The reports shall include: the number of filings, the time required to process the filings, the filings per employee ratio, and the actual and projected revenue from filing fees." Senate Bill 1305, 1999 General Assembly, was enacted into law as Session Laws 2000-169.

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Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. — Session Laws 2000-169, s. 48, effective September 1, 2000, and applicable to fees paid on or after that date, substituted "thirty dollars ($30.00)" for "fifteen dollars ($15.00)" twice in subsection (2).

§ 25-9-504. (Effective until July 1, 2001) Secured party's right to dispose of collateral after default; effect of disposition.

CASE NOTES

Cited in Ingram v. Cuomo, 51 F. Supp. 2d 667 (M.D.N.C. 1999).

Article 9.

Secured Transactions.

(Effective July 1, 2001)

Editor's Note. —

Session Laws 2000-169, s. 1, effective July 1, 2001, rewrote Article 9 of Chapter 25 of the Uniform Commercial Code. At the end of Article 9 are tables showing comparable sections and their disposition in new Article 9. This revised Article 9 supersedes the revision of Article 9 by Session Laws 1975, c. 862, s. 1. Where appropriate, historical citations to section of former Article 9 have been placed under corresponding sections of revised Article 9.

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PART 1.

General Provisions.

(Effective July 1, 2001)

SUBPART 1. Short Title, Definitions, and General Concepts.

§ 25-9-101. (Effective July 1, 2001) Short title.

This Article may be cited as Uniform Commercial Code-Secured Transactions. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** This article supersedes former Uniform Commercial Code (UCC) article 9. As did its predecessor, it provides a comprehensive scheme for the regulation of security interests in personal property and fixtures. For the most part this article follows the general approach and retains much of the terminology of former article 9. In addition to describing many aspects of the operation and interpretation of this article, these comments explain the material changes that this article makes to former article 9. Former article 9 superseded the wide variety of pre-UCC security devices. Unlike the comments to former article 9, however, these comments dwell very little on the pre-UCC state of the law. For that reason, the comments to former article 9 will remain of substantial historical value and interest. They also will remain useful in understanding the background and general conceptual approach of this article.

Citations to "Bankruptcy Code section _____" in these comments are to Title 11 of the United States Code as in effect on December 31, 1998.

2. **Background and History.** In 1990, the Permanent Editorial Board for the UCC with the support of its sponsors, The American Law Institute and the National Conference of Commissioners on Uniform State Laws, established a committee to study article 9 of the UCC. The study committee issued its report as of December 1, 1992, recommending the creation of a drafting committee for the revision of article 9 and also recommending numerous specific changes to article 9. Organized in 1993, a drafting committee met fifteen times from 1993 to 1998. This article was approved by its sponsors in 1998.

3. **Reorganization and Renumbering; Captions; Style.** This article reflects a substantial reorganization of former article 9 and renumbering of most sections. New part 4 deals with several aspects of third-party rights and duties that are unrelated to perfection and priority. Some of these were covered by part 3 of former article 9. Part 5 deals with filing (covered by former part 4) and part 6 deals with default and enforcement (covered by former part 5). Appendix I contains conforming revisions to other articles of the UCC, and Appendix II contains model provisions for production-money priority.

This article also includes headings for the subsections as an aid to readers. Unlike section captions, which are part of the UCC, see section 1-109, subsection headings are not a part of the official text itself and have not been approved by the sponsors. Each jurisdiction in which this article is introduced may consider whether to adopt the headings as a part of the statute and whether to adopt a provision clarifying the effect, if any, to be given to the headings. This article also has been conformed to current style conventions.

4. **Summary of Revisions.** Following is a brief summary of some of the more significant revisions of article 9 that are included in this article.

a. **Scope of Article 9.** This article expands the scope of article 9 in several respects.

Deposit accounts. Section 9-109 includes within this article's scope deposit accounts as original collateral, except in consumer transactions. Former article 9 dealt with deposit accounts only as proceeds of other collateral.

Sales of payment intangibles and promissory notes. Section 9-109 also includes within the scope of this article most sales of "payment intangibles" (defined in section 9-102 as general intangibles under which an account debtor's principal obligation is monetary) and "promissory notes" (also defined in section 9-102). Former article 9 included sales of accounts and chattel paper, but not sales of payment intangibles or promissory notes. In its inclusion of sales of payment intangibles and promissory notes, this article continues the drafting con-

vention found in former article 9; it provides that the sale of accounts, chattel paper, payment intangibles, or promissory notes creates a "security interest." The definition of "account" in section 9-102 also has been expanded to include various rights to payment that were general intangibles under former article 9.

Health-care-insurance receivables. Section 9-109 narrows article 9's exclusion of transfers of interests in insurance policies by carving out of the exclusion "health-care-insurance receivables" (defined in section 9-102). A health-care-insurance receivable is included within the definition of "account" in section 9-102.

Nonpossessory statutory agricultural liens. Section 9-109 also brings nonpossessory statutory agricultural liens within the scope of article 9.

Consignments. Section 9-109 provides that "true" consignments—bailments for the purpose of sale by the bailee—are security interests covered by article 9, with certain exceptions. See section 9-102 (defining "consignment"). Currently, many consignments are subject to article 9's filing requirements by operation of former section 2-326.

Supporting obligations and property securing rights to payment. This article also addresses explicitly (i) obligations, such as guaranties and letters of credit, that support payment or performance of collateral such as accounts, chattel paper, and payment intangibles, and (ii) any property (including real property) that secures a right to payment or performance that is subject to an article 9 security interest. See sections 9-203, 9-308.

Commercial tort claims. Section 9-109 expands the scope of article 9 to include the assignment of commercial tort claims by narrowing the exclusion of tort claims generally. However, this article continues to exclude tort claims for bodily injury and other nonbusiness tort claims of a natural person. See section 9-102 (defining "commercial tort claim").

Transfers by states and governmental units of states. Section 9-109 narrows the exclusion of transfers by states and their governmental units. It excludes only transfers covered by another statute (other than a statute generally applicable to security interests) to the extent the statute governs the creation, perfection, priority, or enforcement of security interests.

Nonassignable general intangibles, promissory notes, health-care-insurance receivables, and letter-of-credit rights. This article enables a security interest to attach to letter-of-credit rights, health-care-insurance receivables, promissory notes, and general intangibles, including contracts, permits, licenses, and franchises, notwithstanding a contractual or statutory prohibition against or limitation on assignment. This article explicitly protects third parties against any adverse effect of the creation or attempted enforcement of the security interest. See sections 9-408 and 9-409.

Subject to sections 9-408 and 9-409 and two other exceptions (sections 9-406, concerning accounts, chattel paper, and payment intangibles, and 9-407, concerning interests in leased goods), section 9-401 establishes a baseline rule that the inclusion of transactions and collateral within the scope of article 9 has no effect on nonarticle 9 law dealing with the alienability or inalienability of property. For example, if a commercial tort claim is nonassignable under other applicable law, the fact that a security interest in the claim is within the scope of article 9 does not override the other applicable law's effective prohibition of assignment.

b. **Duties of Secured Party.** This article provides for expanded duties of secured parties.

Release of control. Section 9-208 imposes upon a secured party having control of a deposit account, investment property, or a letter-of-credit right the duty to release control when there is no secured obligation and no commitment to give value. Section 9-209 contains analogous provisions when an account debtor has been notified to pay a secured party.

Information. Section 9-210 expands a secured party's duties to provide the debtor with information concerning collateral and the obligations that it secures.

Default and enforcement. Part 6 also includes some additional duties of secured parties in connection with default and enforcement. See, e.g., section 9-616 (duty to explain calculation of deficiency or surplus in a consumer-goods transaction).

c. **Choice of Law.** The choice of law rules for the law governing perfection, the effect of perfection or nonperfection, and priority are found in part 3, subpart 1 (sections 9-301 through 9-307). See also section 9-316.

Where to file: Location of debtor. This article changes the choice of law rule governing perfection (i.e., where to file) for most collateral to the law of the jurisdiction where the debtor is located. See section 9-301. Under former article 9, the jurisdiction of the debtor's location governed only perfection and priority of a security interest in accounts, general intangibles, mobile goods, and, for purposes of perfection by filing, chattel paper and investment property.

Determining debtor's location. As a baseline rule, section 9-307 follows former section 9-103, under which the location of the debtor is the debtor's place of business (or chief executive office, if the debtor has more than one place of business). Section 9-307 contains three major exceptions. First, a "registered organization," such as a corporation or limited liability company, is located in the state under whose law the debtor is organized, e.g., a corporate debtor's state of incorporation. Second, an individual debtor is located at his or her principal

residence. Third, there are special rules for determining the location of the United States and registered organizations organized under the law of the United States.

Location of non-U.S. debtors. If, applying the foregoing rules, a debtor is located in a jurisdiction whose law does not require public notice as a condition of perfection of a nonpossessory security interest, the entity is deemed located in the District of Columbia. See section 9-307. Thus, to the extent that this article applies to non-U.S. debtors, perfection could be accomplished in many cases by a domestic filing.

Priority. For tangible collateral such as goods and instruments, section 9-301 provides that the law applicable to priority and the effect of perfection or nonperfection will remain the law of the jurisdiction where the collateral is located, as under former section 9-103 (but without the confusing "last event" test). For intangible collateral, such as accounts, the applicable law for priority will be that of the jurisdiction in which the debtor is located.

Possessory security interests; agricultural liens. Perfection, the effect of perfection or nonperfection, and priority of a possessory security interest or an agricultural lien are governed by the law of the jurisdiction where the collateral subject to the security interest or lien is located. See sections 9-301 and 9-302.

Goods covered by certificates of title; deposit accounts; letter-of-credit rights; investment property. This article includes several refinements to the treatment of choice of law matters for goods covered by certificates of title. See section 9-303. It also provides special choice of law rules, similar to those for investment property under current articles 8 and 9, for deposit accounts (section 9-304), investment property (section 9-305), and letter-of-credit rights (section 9-306).

Change in applicable law. Section 9-316 addresses perfection following a change in applicable law.

d. **Perfection.** The rules governing perfection of security interests and agricultural liens are found in part 3, subpart 2 (sections 9-308 through 9-316).

Deposit accounts; letter-of-credit rights. With certain exceptions, this article provides that a security interest in a deposit account or a letter-of-credit right may be perfected only by the secured party's acquiring "control" of the deposit account or letter-of-credit right. See sections 9-312 and 9-314. Under section 9-104, a secured party has "control" of a deposit account when, with the consent of the debtor, the secured party obtains the depositary bank's agreement to act on the secured party's instructions (including when the secured party becomes the account holder) or when the secured party is itself the depositary bank. The control requirements are patterned on section 8-106, which specifies the requirements for control of investment property. Under section 9-107, "control" of a letter-of-credit right occurs when the issuer or nominated person consents to an assignment of proceeds under section 5-114.

Electronic chattel paper. Section 9-102 includes a new defined term: "Electronic chattel paper." Electronic chattel paper is a record or records consisting of information stored in an electronic medium (i.e., it is not written). Perfection of a security interest in electronic chattel paper may be by control or filing. See sections 9-105 (sui generis definition of control of electronic chattel paper), 9-312 (perfection by filing), and 9-314 (perfection by control).

Investment property. The perfection requirements for "investment property" (defined in section 9-102), including perfection by control under section 9-106, remain substantially unchanged. However, a new provision in section 9-314 is designed to ensure that a secured party retains control in "repledge" transactions that are typical in the securities markets.

Instruments, agricultural liens, and commercial tort claims. This article expands the types of collateral in which a security interest may be perfected by filing to include instruments. See section 9-312. Agricultural liens and security interests in commercial tort claims also are perfected by filing, under this article. See sections 9-308 and 9-310.

Sales of payment intangibles and promissory notes. Although former article 9 covered the outright sale of accounts and chattel paper, sales of most other types of receivables also are financing transactions to which article 9 should apply. Accordingly, section 9-102 expands the definition of "account" to include many types of receivables (including "health-care-insurance receivables," defined in section 9-102) that former article 9 classified as "general intangibles." It thereby subjects to article 9's filing system sales of more types of receivables than did former article 9. Certain sales of payment intangibles—primarily bank loan participation transactions—should not be subject to the article 9 filing rules. These transactions fall in a residual category of collateral, "payment intangibles" (general intangibles under which the account debtor's principal obligation is monetary), the sale of which is exempt from the filing requirements of article 9. See sections 9-102, 9-109, and 9-309 (perfection upon attachment). The perfection rules for sales of promissory notes are the same as those for sales of payment intangibles.

Possessory security interests. Several provisions of this article address aspects of security interests involving a secured party or a third party who is in possession of the collateral. In particular, section 9-313 resolves a number of uncertainties under former section 9-305. It provides that a security interest in collateral in

the possession of a third party is perfected when the third party acknowledges in an authenticated record that it holds for the secured party's benefit. Section 9-313 also provides that a third party need not so acknowledge and that its acknowledgment does not impose any duties on it, unless it otherwise agrees. A special rule in section 9-313 provides that if a secured party already is in possession of collateral, its security interest remains perfected by possession if it delivers the collateral to a third party and the collateral is accompanied by instructions to hold it for the secured party or to redeliver it to the secured party. Section 9-313 also clarifies the limited circumstances under which a security interest in goods covered by a certificate of title may be perfected by the secured party's taking possession.

Automatic perfection. Section 9-309 lists various types of security interests as to which no public-notice step is required for perfection (e.g., purchase-money security interests in consumer goods other than automobiles). This automatic perfection also extends to a transfer of a health-care-insurance receivable TO a health-care provider. Those transfers normally will be made by natural persons who receive health-care services; there is little value in requiring filing for perfection in that context. Automatic perfection also applies to security interests created by sales of payment intangibles and promissory notes. Section 9-308 provides that a perfected security interest in collateral supported by a "supporting obligation" (such as an account supported by a guaranty) also is a perfected security interest in the supporting obligation, and that a perfected security interest in an obligation secured by a security interest or lien on property (e.g., a real property mortgage) also is a perfected security interest in the security interest or lien.

e. **Priority; Special Rules for Banks and Deposit Accounts.** The rules governing priority of security interests and agricultural liens are found in part 3, subpart 3 (sections 9-317 through 9-339). This article includes several new priority rules and some special rules relating to banks and deposit accounts found in part 3, subpart 4 (sections 9-340 through 9-342).

Purchase-money security interests: General; consumer-goods transactions; inventory. Section 9-103 substantially rewrites the definition of purchase-money security interest (PMSI) (although the term is not formally "defined"). The substantive changes, however, apply only to nonconsumer goods transactions. (Consumer transactions and consumer goods transactions are discussed below in comment 4(j)). For nonconsumer goods transactions, section 9-103 makes clear that a security interest in collateral may be (to some extent) both a PMSI as well as a non-PMSI, in accord with the "dual status" rule applied by some courts under former article 9 (thereby rejecting the "transformation" rule). The definition provides an even broader conception of a PMSI in inventory, yielding a result that accords with private agreements entered into in response to the uncertainty under former article 9. It also treats consignments as purchase-money security interests in inventory. Section 9-324 revises the PMSI priority rules, but for the most part without material change in substance. Section 9-324 also clarifies the priority rules for competing PMSIs in the same collateral.

Purchase-money security interests in livestock; agricultural liens. Section 9-324 provides a special PMSI priority, similar to the inventory PMSI priority rule, for livestock. Section 9-322 (which contains the baseline first-to-file-or-perfect priority rule) also recognizes special nonarticle 9 priority rules for agricultural liens, which can override the baseline first-in-time rule.

Purchase-money security interests in software. Section 9-324 contains a new priority rule for a software purchase-money security interest. (Section 9-102 includes a definition of "software.") Under section 9-103, a software PMSI includes a PMSI in software that is used in goods that are also subject to a PMSI. (Note also that the definition of "chattel paper" has been expanded to include records that evidence a monetary obligation and a security interest in specific goods and software used in the goods.)

Investment property. The priority rules for investment property are substantially similar to the priority rules found in former section 9-115, which was added in conjunction with the 1994 revisions to UCC article 8. Under section 9-328, if a secured party has control of investment property (sections 8-106 and 9-106), its security interest is senior to a security interest perfected in another manner (e.g., by filing). Also under section 9-328, security interests perfected by control generally rank according to the time that control is obtained or, in the case of a security entitlement or a commodity contract carried in a commodity account, the time when the control arrangement is entered into. This is a change from former section 9-115, under which the security interests ranked equally. However, as between a securities intermediary's security interest in a security entitlement that it maintains for the debtor and a security interest held by another secured party, the securities intermediary's security interest is senior.

Deposit accounts. This article's priority rules applicable to deposit accounts are found in section 9-327. They are patterned on and are similar to those for investment property in former section 9-115 and section 9-328 of this article. Under section 9-327, if a secured party has control of a deposit account, its security interest is senior to a security interest per-

fected in another manner (i.e., as cash proceeds). Also under section 9-327, security interests perfected by control rank according to the time that control is obtained, but as between a depositary bank's security interest and one held by another secured party, the depositary bank's security interest is senior. A corresponding rule in section 9-340 makes a depositary bank's right of set-off generally senior to a security interest held by another secured party. However, if the other secured party becomes the depositary bank's customer with respect to the deposit account, then its security interest is senior to the depositary bank's security interest and right of set-off. Sections 9-327 and 9-340.

Letter-of-credit rights. The priority rules for security interests in letter-of-credit rights are found in section 9-329. They are somewhat analogous to those for deposit accounts. A security interest perfected by control has priority over one perfected in another manner (i.e., as a supporting obligation for the collateral in which a security interest is perfected). Security interests in a letter-of-credit right perfected by control rank according to the time that control is obtained. However, the rights of a transferee beneficiary or a nominated person are independent and superior to the extent provided in section 5-114. See section 9-109(c)(4).

Chattel paper and instruments. Section 9-330 is the successor to former section 9-308. As under former section 9-308, differing priority rules apply to purchasers of chattel paper who give new value and take possession (or, in the case of electronic chattel paper, obtain control) of the collateral depending on whether a conflicting security interest in the collateral is claimed merely as proceeds. The principal change relates to the role of knowledge and the effect of an indication of a previous assignment of the collateral. Section 9-330 also affords priority to purchasers of instruments who take possession in good faith and without knowledge that the purchase violates the rights of the competing secured party. In addition, to qualify for priority, purchasers of chattel paper, but not of instruments, must purchase in the ordinary course of business.

Proceeds. Section 9-322 contains new priority rules that clarify when a special priority of a security interest in collateral continues or does not continue with respect to proceeds of the collateral. Other refinements to the priority rules for proceeds are included in sections 9-324 (purchase-money security interest priority) and 9-330 (priority of certain purchasers of chattel paper and instruments).

Miscellaneous priority provisions. This article also includes: (i) Clarifications of selected good-faith-purchase and similar issues (sections 9-317 and 9-331); (ii) new priority rules to deal with the "double debtor" problem arising when a debtor creates a security interest in collateral acquired by the debtor subject to a security interest created by another person (section 9-325); (iii) new priority rules to deal with the problems created when a change in corporate structure or the like results in a new entity that has become bound by the original debtor's after-acquired property agreement (section 9-326); (iv) a provision enabling most transferees of funds from a deposit account or money to take free of a security interest (section 9-332); (v) substantially rewritten and refined priority rules dealing with accessions and commingled goods (sections 9-335 and 9-336); (vi) revised priority rules for security interests in goods covered by a certificate of title (section 9-337); and (vii) provisions designed to ensure that security interests in deposit accounts will not extend to most transferees of funds on deposit or payees from deposit accounts and will not otherwise "clog" the payments system (sections 9-341 and 9-342).

Model provisions relating to production-money security interests. Appendix II to this Article contains model definitions and priority rules relating to "production-money security interests" held by secured parties who give new value used in the production of crops. Because no consensus emerged on the wisdom of these provisions during the drafting process, the sponsors make no recommendation on whether these model provisions should be enacted.

f. **Proceeds.** Section 9-102 contains an expanded definition of "proceeds" of collateral which includes additional rights and property that arise out of collateral, such as distributions on account of collateral and claims arising out of the loss or nonconformity of, defects in, or damage to collateral. The term also includes collections on account of "supporting obligations," such as guarantees.

g. **Part 4: Additional Provisions Relating to Third-Party Rights.** New part 4 contains several provisions relating to the relationships between certain third parties and the parties to secured transactions. It contains new sections 9-401 (replacing former section 9-311) (alienability of debtor's rights), 9-402 (replacing former section 9-317) (secured party not obligated on debtor's contracts), 9-403 (replacing former section 9-206) (agreement not to assert defenses against assignee), 9-404, 9-405, and 9-406 (replacing former section 9-318) (rights acquired by assignee, modification of assigned contract, discharge of account debtor, restrictions on assignment of account, chattel paper, promissory note, or payment intangible ineffective), and 9-407 (replacing some provisions of former section 2A-303) (restrictions on creation or enforcement of security interest in leasehold interest or lessor's residual interest ineffective). It also contains new sections 9-408 (restrictions on assignment of promissory notes, health-care-insurance receivables ineffective,

and certain general intangibles ineffective) and 9-409 (restrictions on assignment of letter-of-credit rights ineffective), which are discussed above.

h. **Filing.** Part 5 (formerly part 4) of article 9 has been substantially rewritten to simplify the statutory text and to deal with numerous problems of interpretation and implementation that have arisen over the years.

Medium-neutrality. This article is "medium-neutral"; that is, it makes clear that parties may file and otherwise communicate with a filing office by means of records communicated and stored in media other than on paper.

Identity of person who files a record; authorization. Part 5 is largely indifferent as to the person who effects a filing. Instead, it addresses whose authorization is necessary for a person to file a record with a filing office. The filing scheme does not contemplate that the identity of a "filer" will be a part of the searchable records. This approach is consistent with, and a necessary aspect of, eliminating signatures or other evidence of authorization from the system (except to the extent that filing offices may choose to employ authentication procedures in connection with electronic communications). As long as the appropriate person authorizes the filing, or, in the case of a termination statement, the debtor is entitled to the termination, it is largely insignificant whether the secured party or another person files any given record.

Section 9-509 collects in one place most of the rules that determine when a record may be filed. In general, the debtor's authorization is required for the filing of an initial financing statement or an amendment that adds collateral. With one further exception, a secured party of record's authorization is required for the filing of other amendments. The exception arises if a secured party has failed to provide a termination statement that is required because there is no outstanding secured obligation or commitment to give value. In that situation, a debtor is authorized to file a termination statement indicating that it has been filed by the debtor.

Financing statement formal requisites. The formal requisites for a financing statement are set out in section 9-502. A financing statement must provide the name of the debtor and the secured party and an indication of the collateral that it covers. Sections 9-503 and 9-506 address the sufficiency of a name provided on a financing statement and clarify when a debtor's name is correct and when an incorrect name is insufficient. Section 9-504 addresses the indication of collateral covered. Under section 9-504, a super-generic description (e.g., "all assets" or "all personal property") in a financing statement is a sufficient indication of the collateral. (Note, however, that a super-generic description is inadequate for purposes of a security agreement. See sections 9-108 and 9-203.) To facilitate electronic filing, this article does not require that the debtor's signature or other authorization appear on a financing statement. Instead, it prohibits the filing of unauthorized financing statements and imposes liability upon those who violate the prohibition. See sections 9-509 and 9-626.

Filing-office operations. Part 5 contains several provisions governing filing operations. First, it prohibits the filing office from rejecting an initial financing statement or other record for a reason other than one of the few that are specified. See sections 9-516 and 9-520. Second, the filing office is obliged to link all subsequent records (e.g., assignments, continuation statements, etc.) to the initial financing statement to which they relate. See section 9-519. Third, the filing office may delete a financing statement and related records from the files no earlier than one year after lapse (lapse normally is five years after the filing date), and then only if a continuation statement has not been filed. See sections 9-515, 9-519, and 9-522. Thus, a financing statement and related records would be discovered by a search of the files even after the filing of a termination statement. This approach helps eliminate filing-office discretion and also eases problems associated with multiple secured parties and multiple partial assignments. Fourth, part 5 mandates performance standards for filing offices. See sections 9-519, 9-520, and 9-523. Fifth, it provides for the promulgation of filing-office rules to deal with details best left out of the statute and requires the filing office to submit periodic reports. See sections 9-526 and 9-527.

Correction of records: Defaulting or missing secured parties and fraudulent filings. In some areas of the country, serious problems have arisen from fraudulent financing statements that are filed against public officials and other persons. This article addresses the fraud problem by providing the opportunity for a debtor to file a termination statement when a secured party wrongfully refuses or fails to provide a termination statement. See section 9-509. This opportunity also addresses the problem of secured parties that simply disappear through mergers or liquidations. In addition, section 9-518 affords a statutory method by which a debtor who believes that a filed record is inaccurate or was wrongfully filed may indicate that fact in the files by filing a correction statement, albeit without affecting the efficacy, if any, of the challenged record.

Extended period of effectiveness for certain financing statements. Section 9-515 contains an exception to the usual rule that financing statements are effective for five years unless a continuation statement is filed to continue the effectiveness for another five years. Under that section, an initial financing statement filed in

connection with a "public-finance transaction" or a "manufactured-home transaction" (terms defined in section 9-102) is effective for 30 years.

National form of financing statement and related forms. Section 9-521 provides for uniform, national written forms of financing statements and related written records that must be accepted by a filing office that accepts written records.

i. **Default and Enforcement.** Part 6 of article 9 extensively revises former part 5. Provisions relating to enforcement of consumer-goods transactions and consumer transactions are discussed in comment 4(j).

Debtor, secondary obligor; waiver. Section 9-602 clarifies the identity of persons who have rights and persons to whom a secured party owes specified duties under part 6. Under that section, the rights and duties are enjoyed by and run to the "debtor," defined in section 9-102 to mean any person with a nonlien property interest in collateral, and to any "obligor." However, with one exception (section 9-616, as it relates to a consumer obligor), the rights and duties concerned affect nondebtor obligors only if they are "secondary obligors." "Secondary obligor" is defined in section 9-102 to include one who is secondarily obligated on the secured obligation, e.g., a guarantor, or one who has a right of recourse against the debtor or another obligor with respect to an obligation secured by collateral. However, under section 9-628, the secured party is relieved from any duty or liability to any person unless the secured party knows that the person is a debtor or obligor. Resolving an issue on which courts disagreed under former article 9, this article generally prohibits waiver by a secondary obligor of its rights and a secured party's duties under part 6. See section 9-602. However, section 9-624 permits a secondary obligor or debtor to waive the right to notification of disposition of collateral and, in a nonconsumer transaction, the right to redeem collateral, if the secondary obligor or debtor agrees to do so after default.

Rights of collection and enforcement of collateral. Section 9-607 explains in greater detail than former 9-502 the rights of a secured party who seeks to collect or enforce collateral, including accounts, chattel paper, and payment intangibles. It also sets forth the enforcement rights of a depositary bank holding a security interest in a deposit account maintained with the depositary bank. Section 9-607 relates solely to the rights of a secured party vis-a-vis a debtor with respect to collections and enforcement. It does not affect the rights or duties of third parties, such as account debtors on collateral, which are addressed elsewhere (e.g., section 9-406). Section 9-608 clarifies the manner in which proceeds of collection or enforcement are to be applied.

Disposition of collateral: Warranties of title. Section 9-610 imposes on a secured party who disposes of collateral the warranties of title, quiet possession, and the like that are otherwise applicable under other law. It also provides rules for the exclusion or modification of those warranties.

Disposition of collateral: Notification, application of proceeds, surplus and deficiency, other effects. Section 9-611 requires a secured party to give notification of a disposition of collateral to other secured parties and lienholders who have filed financing statements against the debtor covering the collateral. (That duty was eliminated by the 1972 revisions to article 9.) However, that section relieves the secured party from that duty when the secured party undertakes a search of the records and a report of the results is unreasonably delayed. Section 9-613, which applies only to nonconsumer transactions, specifies the contents of a sufficient notification of disposition and provides that a notification sent 10 days or more before the earliest time for disposition is sent within a reasonable time. Section 9-615 addresses the application of proceeds of disposition, the entitlement of a debtor to any surplus, and the liability of an obligor for any deficiency. Section 9-619 clarifies the effects of a disposition by a secured party, including the rights of transferees of the collateral.

Rights and duties of secondary obligor. Section 9-618 provides that a secondary obligor obtains the rights and assumes the duties of a secured party if the secondary obligor receives an assignment of a secured obligation, agrees to assume the secured party's rights and duties upon a transfer to it of collateral, or becomes subrogated to the rights of the secured party with respect to the collateral. The assumption, transfer, or subrogation is not a disposition of collateral under section 9-610, but it does relieve the former secured party of further duties. Former section 9-504(5) did not address whether a secured party was relieved of its duties in this situation.

Transfer of record or legal title. Section 9-619 contains a new provision making clear that a transfer of record or legal title to a secured party is not of itself a disposition under part 6. This rule applies regardless of the circumstances under which the transfer of title occurs.

Strict foreclosure. Section 9-620, unlike former section 9-505, permits a secured party to accept collateral in partial satisfaction, as well as full satisfaction, of the obligations secured. This right of strict foreclosure extends to intangible as well as tangible property. Section 9-622 clarifies the effects of an acceptance of collateral on the rights of junior claimants. It rejects the approach taken by some courts—deeming a secured party to have constructively retained collateral in satisfaction of

the secured obligations—in the case of a secured party's unreasonable delay in the disposition of collateral. Instead, unreasonable delay is relevant when determining whether a disposition under section 9-610 is commercially reasonable.

Effect of noncompliance: "Rebuttable presumption" test. Section 9-626 adopts the "rebuttable presumption" test for the failure of a secured party to proceed in accordance with certain provisions of part 6. Under this approach, the deficiency claim of a noncomplying secured party is calculated by crediting the obligor with the greater of the actual net proceeds of a disposition and the amount of net proceeds that would have been realized if the disposition had been conducted in accordance with part 6 (e.g., in a commercially reasonable manner). Section 9-626 rejects the "absolute bar" test that some courts have imposed; that approach bars a noncomplying secured party from recovering any deficiency, regardless of the loss (if any) the debtor suffered as a consequence of the noncompliance.

"Low-price" dispositions: Calculation of deficiency and surplus. Section 9-615(f) addresses the problem of procedurally regular dispositions that fetch a low price. Subsection (f) provides a special method for calculating a deficiency if the proceeds of a disposition of collateral to a secured party, a person related to the secured party, or a secondary obligor are "significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought." ("Person related to" is defined in section 9-102.) In these situations there is reason to suspect that there may be inadequate incentives to obtain a better price. Consequently, instead of calculating a deficiency (or surplus) based on the actual net proceeds, the deficiency (or surplus) would be calculated based on the proceeds that would have been received in a disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor.

j. **Consumer Goods, Consumer-Goods Transactions, and Consumer Transactions.** This article (including the accompanying conforming revisions) includes several special rules for "consumer goods," "consumer transactions," and "consumer-goods transactions." Each term is defined in section 9-102.

(i) Revised sections 2-502 and 2-716 provide a buyer of consumer goods with enhanced rights to possession of the goods, thereby accelerating the opportunity to achieve "buyer in ordinary course of business" status under section 1-201.

(ii) Section 9-103(e) (allocation of payments for determining extent of purchase-money status), (f) (purchase-money status not affected by cross-collateralization, refinancing, restructuring, or the like), and (g) (secured party has burden of establishing extent of purchase-money status) do not apply to consumer-goods transactions. Section 9-103 also provides that the limitation of those provisions to transactions other than consumer-goods transactions leaves to the courts the proper rules for consumer-goods transactions and prohibits the courts from drawing inferences from that limitation.

(iii) Section 9-108 provides that in a consumer transaction a description of consumer goods, a security entitlement, securities account, or commodity account "only by (UCC-defined) type of collateral" is not a sufficient collateral description in a security agreement.

(iv) Sections 9-403 and 9-404 make effective the Federal Trade Commission's antiholder-in-due-course rule (when applicable), 16 C.F.R. part 433, even in the absence of the required legend.

(v) The 10-day safe-harbor for notification of a disposition provided by section 9-612 does not apply in a consumer transaction.

(vi) Section 9-613 (contents and form of notice of disposition) does not apply to a consumer-goods transaction.

(vii) Section 9-614 contains special requirements for the contents of a notification of disposition and a safe-harbor, "plain English" form of notification, for consumer-goods transactions.

(viii) Section 9-616 requires a secured party in a consumer-goods transaction to provide a debtor with a notification of how it calculated a deficiency at the time it first undertakes to collect a deficiency.

(ix) Section 9-620 prohibits partial strict foreclosure with respect to consumer goods collateral and, unless the debtor agrees to waive the requirement in an authenticated record after default, in certain cases requires the secured party to dispose of consumer goods collateral which has been repossessed.

(x) Section 9-626 ("rebuttable presumption" rule) does not apply to a consumer transaction. Section 9-626 also provides that its limitation to transactions other than consumer transactions leaves to the courts the proper rules for consumer transactions and prohibits the courts from drawing inferences from that limitation.

k. **Good Faith.** Section 9-102 contains a new definition of "good faith" that includes not only "honesty in fact" but also "the observance of reasonable commercial standards of fair dealing." The definition is similar to the ones adopted in connection with other, recently completed revisions of the UCC.

l. **Transition Provisions.** Part 7 (sections 9-701 through 9-707) contains transition provisions. Transition from former article 9 to this article will be particularly challenging in view of its expanded scope, its modification of choice

of law rules for perfection and priority, and its expansion of the methods of perfection.

m. **Conforming and Related Amendments to Other UCC Articles.** Appendix I contains several proposed revisions to the provisions and Comments of other UCC articles. For the most part the revisions are explained in the Comments to the proposed revisions. Cross-references in other UCC articles to sections of Article 9 also have been revised.

Article 1. Revised section 1-201 contains revisions to the definitions of "buyer in ordinary course of business," "purchaser," and "security interest."

Articles 2 and 2A. Sections 2-210, 2-326, 2-502, 2-716, 2A-303, and 2A-307 have been revised to address the intersection between articles 2 and 2A and article 9.

Article 5. New section 5-118 is patterned on section 4-210. It provides for a security interest in documents presented under a letter of credit in favor of the issuer and a nominated person on the letter of credit.

Article 8. Revisions to section 8-106, which deals with "control" of securities and security entitlements, conform it to section 8-302, which deals with "delivery." Revisions to section 8-110, which deals with a "securities intermediary's jurisdiction," conform it to the revised treatment of a "commodity intermediary's jurisdiction" in section 9-305. Sections 8-301 and 8-302 have been revised for clarification. Section 8-510 has been revised to conform it to the revised priority rules of section 9-328. Several comments in article 8 also have been revised.

Editor's Note. — Session Laws 2000-169, s. 1, effective July 1, 2001, rewrote Article 9 of Chapter 25 of the Uniform Commercial Code. At the end of Article 9 are tables showing comparable sections and their disposition in new Article 9. This revised Article 9 supersedes the revision of Article 9 by Session Laws 1975, c. 862, s. 1. Where appropriate, historical citations to section of former Article 9 have been placed under corresponding sections of revised Article 9.

Session Laws 2000-67, s. 24B.1, effective July 1, 2000, provides: "Of the funds appropriated in this act to the Department of the Secretary of State for the 2000-2001 fiscal year, the Department may use up to the sum of eight hundred sixty-eight thousand six hundred sixty-four dollars ($868,664) in recurring funds and one million eight hundred ninty-one thousand four dollars ($1,891,004) in nonrecurring funds for personnel, start-up expenses, and operating costs necessary for the implementation of Senate Bill 1305, 1999 General Assembly, if it becomes law. Prior to using any of these funds or establishing any of the 41 positons authorized by the General Assembly, the Department shall present its plan for implementing Senate Bill 1305, 1999 General Assembly, to the Joint Legislative Commission on Governmental Operations, the Chairs of the Senate and House Appropriations Subcommittees on General Government, and the Joint Select Committee on Information Technology. The Department shall maintain monthly reports on UCC filings and, on a quarterly basis, submit the reports to the House and Senate Appropriations Subcommittees on General Government and the Fiscal Research Division. The reports shall include: the number of filings, the time required to process the filings, the filings per employee ratio, and the actual and projected revenue from filing fees." Senate Bill 1305, 1999 General Assembly, was enacted into law as Session Laws 2000-169.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Session Laws 2000-169, s. 49, directs the Revisor of Statutes to cause to be printed along with the act all relevant portions of the official comments to the Uniform Commercial Code, Revised Article 9 and conforming amendments to Articles 1, 2, 2A, 4, 5, 6, 7, and 8 and all explanatory comments of the drafters of this act as the Revisor deems appropriate.

Session Laws 2000-169, s. 50, effective August 2, 2000, directs the Department of the Secretary of State to study the issue of fraudulent filings under Article 9 that are intended to hinder, harass, delay, or otherwise interfere with public employees in the performance of their lawful duties and to issue a report to the General Assembly by January 1, 2001, with any recommendations which may include the creation of civil or criminal sanctions or remedies related to these filings.

§ 25-9-102. (Effective July 1, 2001) Definitions and index of definitions.

(a) Article 9 definitions. — In this Article:

(1) "Accession" means goods that are physically united with other goods in such a manner that the identity of the original goods is not lost.

(2) "Account", except as used in "account for", means a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a vessel under a charter or other contract, (vii) arising out of the use of a credit or charge card or information contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance operated or sponsored by a state, governmental unit of a state, or person licensed or authorized to operate the game by a state or governmental unit of a state. The term includes health-care-insurance receivables. The term does not include (i) rights to payment evidenced by chattel paper or an instrument, (ii) commercial tort claims, (iii) deposit accounts, (iv) investment property, (v) letter-of-credit rights or letters of credit, or (vi) rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card.

(3) "Account debtor" means a person obligated on an account, chattel paper, or general intangible. The term does not include persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper.

(4) "Accounting", except as used in "accounting for", means a record:

a. Authenticated by a secured party;

b. Indicating the aggregate unpaid secured obligations as of a date not more than 35 days earlier or 35 days later than the date of the record; and

c. Identifying the components of the obligations in reasonable detail.

(5) "Agricultural lien" means an interest, other than a security interest, in farm products:

a. Which secures payment or performance of an obligation for:

1. Goods or services furnished in connection with a debtor's farming operation; or

2. Rent on real property leased by a debtor in connection with its farming operation;

b. Which is created by statute in favor of a person that:

1. In the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation; or

2. Leased real property to a debtor in connection with the debtor's farming operation; and

c. Whose effectiveness does not depend on the person's possession of the personal property.

(6) "As-extracted collateral" means:

a. Oil, gas, or other minerals that are subject to a security interest that:

1. Is created by a debtor having an interest in the minerals before extraction; and

2. Attaches to the minerals as extracted; or

b. Accounts arising out of the sale at the wellhead or minehead of oil, gas, or other minerals in which the debtor had an interest before extraction.

(7) "Authenticate" means:
a. To sign; or
b. To execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record.

(8) "Bank" means an organization that is engaged in the business of banking. The term includes savings banks, savings and loan associations, credit unions, and trust companies.

(9) "Cash proceeds" means proceeds that are money, checks, deposit accounts, or the like.

(10) "Certificate of title" means a certificate of title with respect to which a statute provides for the security interest in question to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral.

(11) "Chattel paper" means a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods. In this subdivision, "monetary obligation" means a monetary obligation secured by the goods or owed under a lease of the goods and includes a monetary obligation with respect to software used in the goods. The term does not include (i) charters or other contracts involving the use or hire of a vessel or (ii) records that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card. If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper.

(12) "Collateral" means the property subject to a security interest or agricultural lien. The term includes:
a. Proceeds to which a security interest attaches;
b. Accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and
c. Goods that are the subject of a consignment.

(13) "Commercial tort claim" means a claim arising in tort with respect to which:
a. The claimant is an organization; or
b. The claimant is an individual and the claim:
1. Arose in the course of the claimant's business or profession; and
2. Does not include damages arising out of personal injury to or the death of an individual.

(14) "Commodity account" means an account maintained by a commodity intermediary in which a commodity contract is carried for a commodity customer.

(15) "Commodity contract" means a commodity futures contract, an option on a commodity futures contract, a commodity option, or another contract if the contract or option is:
a. Traded on or subject to the rules of a board of trade that has been designated as a contract market for such a contract pursuant to federal commodities laws; or

b. Traded on a foreign commodity board of trade, exchange, or market, and is carried on the books of a commodity intermediary for a commodity customer.

(16) "Commodity customer" means a person for which a commodity intermediary carries a commodity contract on its books.

(17) "Commodity intermediary" means a person that:

a. Is registered as a futures commission merchant under federal commodities law; or

b. In the ordinary course of its business provides clearance or settlement services for a board of trade that has been designated as a contract market pursuant to federal commodities law.

(18) "Communicate" means:

a. To send a written or other tangible record;

b. To transmit a record by any means agreed upon by the persons sending and receiving the record; or

c. In the case of transmission of a record to or by a filing office, to transmit a record by any means prescribed by filing-office rule.

(19) "Consignee" means a merchant to which goods are delivered in a consignment.

(20) "Consignment" means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and:

a. The merchant:

1. Deals in goods of that kind under a name other than the name of the person making delivery;

2. Is not an auctioneer; and

3. Is not generally known by its creditors to be substantially engaged in selling the goods of others;

b. With respect to each delivery, the aggregate value of the goods is one thousand dollars ($1,000) or more at the time of delivery;

c. The goods are not consumer goods immediately before delivery; and

d. The transaction does not create a security interest that secures an obligation.

(21) "Consignor" means a person that delivers goods to a consignee in a consignment.

(22) "Consumer debtor" means a debtor in a consumer transaction.

(23) "Consumer goods" means goods that are used or bought for use primarily for personal, family, or household purposes.

(24) "Consumer-goods transaction" means a consumer transaction in which:

a. An individual incurs an obligation primarily for personal, family, or household purposes; and

b. A security interest in consumer goods secures the obligation.

(25) "Consumer obligor" means an obligor who is an individual and who incurred the obligation as part of a transaction entered into primarily for personal, family, or household purposes.

(26) "Consumer transaction" means a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes, (ii) a security interest secures the obligation, and (iii) the collateral is held or acquired primarily for personal, family, or household purposes. The term includes consumer-goods transactions.

(27) "Continuation statement" means an amendment of a financing statement which:

a. Identifies, by its file number, the initial financing statement to which it relates; and

b. Indicates that it is a continuation statement for, or that it is filed to continue the effectiveness of, the identified financing statement.

(28) "Debtor" means:
a. A person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor;
b. A seller of accounts, chattel paper, payment intangibles, or promissory notes; or
c. A consignee.
(29) "Deposit account" means a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument.
(30) "Document" means a document of title or a receipt of the type described in G.S. 25-7-201(2).
(31) "Electronic chattel paper" means chattel paper evidenced by a record or records consisting of information stored in an electronic medium.
(32) "Encumbrance" means a right, other than an ownership interest, in real property. The term includes mortgages and other liens on real property.
(33) "Equipment" means goods other than inventory, farm products, or consumer goods.
(34) "Farm products" means goods, other than standing timber, with respect to which the debtor is engaged in a farming operation and which are:
a. Crops grown, growing, or to be grown, including:
1. Crops produced on trees, vines, and bushes; and
2. Aquatic goods produced in aquacultural operations;
b. Livestock, born or unborn, including aquatic goods produced in aquacultural operations;
c. Supplies used or produced in a farming operation; or
d. Products of crops or livestock in their unmanufactured states.
(35) "Farming operation" means raising, cultivating, propagating, fattening, grazing, or any other farming, livestock, or aquacultural operation.
(36) "File number" means the number assigned to an initial financing statement pursuant to G.S. 25-9-519(a).
(37) "Filing office" means an office designated in G.S. 25-9-501 as the place to file a financing statement.
(38) "Filing-office rule" means a rule adopted pursuant to G.S. 25-9-526.
(39) "Financing statement" means a record or records composed of an initial financing statement and any filed record relating to the initial financing statement.
(40) "Fixture filing" means the filing of a financing statement covering goods that are or are to become fixtures and satisfying G.S. 25-9-502(a) and (b). The term includes the filing of a financing statement covering goods of a transmitting utility which are or are to become fixtures.
(41) "Fixtures" means goods that have become so related to particular real property that an interest in them arises under real property law.
(42) "General intangible" means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.
(43) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.
(44) "Goods" means all things that are movable when a security interest attaches. The term includes (i) fixtures, (ii) standing timber that is to

be cut and removed under a conveyance or contract for sale, (iii) the unborn young of animals, (iv) crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes, and (v) manufactured homes. The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (i) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded. The term also does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction.

(45) "Governmental unit" means a subdivision, agency, department, county, parish, municipality, or other unit of the government of the United States, a state, or a foreign country. The term includes an organization having a separate corporate existence if the organization is eligible to issue debt on which interest is exempt from income taxation under the laws of the United States.

(46) "Health-care-insurance receivable" means an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health-care goods or services provided.

(47) "Instrument" means a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment. The term does not include (i) investment property, (ii) letters of credit, or (iii) writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card.

(48) "Inventory" means goods, other than farm products, which:
   a. Are leased by a person as lessor;
   b. Are held by a person for sale or lease or to be furnished under a contract of service;
   c. Are furnished by a person under a contract of service; or
   d. Consist of raw materials, work in process, or materials used or consumed in a business.

(49) "Investment property" means a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account.

(50) "Jurisdiction of organization", with respect to a registered organization, means the jurisdiction under whose law the organization is organized.

(51) "Letter-of-credit right" means a right to payment or performance under a letter of credit, whether or not the beneficiary has demanded or is at the time entitled to demand payment or performance. The term does not include the right of a beneficiary to demand payment or performance under a letter of credit.

(52) "Lien creditor" means:
   a. A creditor that has acquired a lien on the property involved by attachment, levy, or the like;
   b. An assignee for benefit of creditors from the time of assignment;
   c. A trustee in bankruptcy from the date of the filing of the petition; or

d. A receiver in equity from the time of appointment.

(53) "Manufactured home" means a structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or 40 body feet or more in length, or, when erected on site, is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems contained therein. The term includes any structure that meets all of the requirements of this subdivision except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the United States Secretary of Housing and Urban Development and complies with the standards established under Title 42 of the United States Code.

(54) "Manufactured-home transaction" means a secured transaction:

a. That creates a purchase-money security interest in a manufactured home, other than a manufactured home held as inventory; or

b. In which a manufactured home, other than a manufactured home held as inventory, is the primary collateral.

(55) "Mortgage" means a consensual interest in real property, including fixtures, which secures payment or performance of an obligation.

(56) "New debtor" means a person that becomes bound as debtor under G.S. 25-9-203(d) by a security agreement previously entered into by another person.

(57) "New value" means (i) money, (ii) money's worth in property, services, or new credit, or (iii) release by a transferee of an interest in property previously transferred to the transferee. The term does not include an obligation substituted for another obligation.

(58) "Noncash proceeds" means proceeds other than cash proceeds.

(59) "Obligor" means a person that, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral, (i) owes payment or other performance of the obligation, (ii) has provided property other than the collateral to secure payment or other performance of the obligation, or (iii) is otherwise accountable in whole or in part for payment or other performance of the obligation. The term does not include issuers or nominated persons under a letter of credit.

(60) "Original debtor", except as used in G.S. 25-9-310(c), means a person that, as debtor, entered into a security agreement to which a new debtor has become bound under G.S. 25-9-203(d).

(61) "Payment intangible" means a general intangible under which the account debtor's principal obligation is a monetary obligation.

(62) "Person related to", with respect to an individual, means:

a. The spouse of the individual;

b. A brother, brother-in-law, sister, or sister-in-law of the individual;

c. An ancestor or lineal descendant of the individual or the individual's spouse; or

d. Any other relative, by blood or marriage, of the individual or the individual's spouse who shares the same home with the individual.

(63) "Person related to", with respect to an organization, means:

a. A person directly or indirectly controlling, controlled by, or under common control with the organization;

b. An officer or director of, or a person performing similar functions with respect to, the organization;

c. An officer or director of, or a person performing similar functions with respect to, a person described in sub-subdivision a. of this subdivision;

d. The spouse of an individual described in sub-subdivision a., b., or c. of this subdivision; or
e. An individual who is related by blood or marriage to an individual described in sub-subdivision a., b., c., or d. of this subdivision and shares the same home with the individual.

(64) "Proceeds", except as used in G.S. 25-9-609(b), means the following property:
a. Whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral;
b. Whatever is collected on, or distributed on account of, collateral;
c. Rights arising out of collateral;
d. To the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, the collateral; or
e. To the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, the collateral.

(65) "Production-money crops" means crops that secure a production-money obligation incurred with respect to the production of those crops.

(66) "Production-money obligation" means an obligation of an obligor incurred for new value given to enable the debtor to produce crops if the value is in fact used for the production of the crops.

(67) "Production of crops" includes tilling and otherwise preparing land for growing, planting, cultivating, fertilizing, irrigating, harvesting, gathering, and curing crops, and protecting them from damage or disease.

(68) "Promissory note" means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.

(69) "Proposal" means a record authenticated by a secured party which includes the terms on which the secured party is willing to accept collateral in full or partial satisfaction of the obligation it secures pursuant to G.S. 25-9-620, 25-9-621, and 25-9-622.

(70) "Public-finance transaction" means a secured transaction in connection with which:
a. Debt securities are issued;
b. All or a portion of the securities issued have an initial stated maturity of at least 20 years; and
c. The debtor, obligor, secured party, account debtor or other person obligated on collateral, assignor or assignee of a secured obligation, or assignor or assignee of a security interest is a state or a governmental unit of a state.

(71) "Pursuant to commitment", with respect to an advance made or other value given by a secured party, means pursuant to the secured party's obligation, whether or not a subsequent event of default or other event not within the secured party's control has relieved or may relieve the secured party from its obligation.

(72) "Record", except as used in "for record", "of record", "record or legal title", and "record owner", 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.

(73) "Registered organization" means an organization organized solely under the law of a single state or the United States and as to which

the state or the United States must maintain a public record showing the organization to have been organized.

(74) "Secondary obligor" means an obligor to the extent that:
   a. The obligor's obligation is secondary; or
   b. The obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either.

(75) "Secured party" means:
   a. A person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding;
   b. A person that holds an agricultural lien;
   c. A consignor;
   d. A person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold;
   e. A trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for; or
   f. A person that holds a security interest arising under G.S. 25-2-401, 25-2-505, 25-2-711(3), 25-2A-508(5), 25-4-208, or 25-5-118.

(76) "Security agreement" means an agreement that creates or provides for a security interest.

(77) "Send", in connection with a record or notification, means:
   a. To deposit in the mail, deliver for transmission, or transmit by any other usual means of communication, with postage or cost of transmission provided for, addressed to any address reasonable under the circumstances; or
   b. To cause the record or notification to be received within the time that it would have been received if properly sent under sub-subdivision a. of this subdivision.

(78) "Software" means a computer program and any supporting information provided in connection with a transaction relating to the program. The term does not include a computer program that is included in the definition of goods.

(79) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(80) "Supporting obligation" means a letter-of-credit right or secondary obligation that supports the payment or performance of an account, chattel paper, a document, a general intangible, an instrument, or investment property.

(81) "Tangible chattel paper" means chattel paper evidenced by a record or records consisting of information that is inscribed on a tangible medium.

(82) "Termination statement" means an amendment of a financing statement which:
   a. Identifies, by its file number, the initial financing statement to which it relates; and
   b. Indicates either that it is a termination statement or that the identified financing statement is no longer effective.

(83) "Transmitting utility" means a person primarily engaged in the business of:
   a. Operating a railroad, subway, street railway, or trolley bus;
   b. Transmitting communications electrically, electromagnetically, or by light;
   c. Transmitting goods by pipeline or sewer; or

d. Transmitting or producing and transmitting electricity, steam, gas, or water.

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

"Applicant"	G.S. 25-5-102.
"Beneficiary"	G.S. 25-5-102.
"Broker"	G.S. 25-8-102.
"Certificated security"	G.S. 25-8-102.
"Check"	G.S. 25-3-104.
"Clearing corporation"	G.S. 25-8-102.
"Contract for sale"	G.S. 25-2-106.
"Customer"	G.S. 25-4-104.
"Entitlement holder"	G.S. 25-8-102.
"Financial asset"	G.S. 25-8-102.
"Holder in due course"	G.S. 25-3-302.
"Issuer" (with respect to a letter of credit or letter-of-credit right)	G.S. 25-5-102.
"Issuer" (with respect to a security)	G.S. 25-8-201.
"Lease"	G.S. 25-2A-103.
"Lease agreement"	G.S. 25-2A-103.
"Lease contract"	G.S. 25-2A-103.
"Leasehold interest"	G.S. 25-2A-103.
"Lessee"	G.S. 25-2A-103.
"Lessee in ordinary course of business"	G.S. 25-2A-103.
"Lessor"	G.S. 25-2A-103.
"Lessor's residual interest"	G.S. 25-2A-103.
"Letter of credit"	G.S. 25-5-102.
"Merchant"	G.S. 25-2-104.
"Negotiable instrument"	G.S. 25-3-104.
"Nominated person"	G.S. 25-5-102.
"Note"	G.S. 25-3-104.
"Proceeds of a letter of credit"	G.S. 25-5-114.
"Prove"	G.S. 25-3-103.
"Sale"	G.S. 25-2-106.
"Securities account"	G.S. 25-8-501.
"Securities intermediary"	G.S. 25-8-102.
"Security"	G.S. 25-8-102.
"Security certificate"	G.S. 25-8-102.
"Security entitlement"	G.S. 25-8-102.
"Uncertificated security"	G.S. 25-8-102.

(c) Article 1 definitions and principles. — Article 1 of this Chapter contains general definitions and principles of construction and interpretation applicable throughout this Article. (1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7; 1989 (Reg. Sess., 1990), c. 1024, s. 8(g); 1997-181, s. 3; 1997-456, s. 4; 1999-73, s. 6; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** All terms that are defined in article 9 and used in more than one section are consolidated in this section. Note that the definition of "security interest" is found in section 1-201, not in this article, and has been revised. Many of the definitions in this section are new; many others derive from those in former section 9-105. The following comments also indicate other sections of former article 9 that defined (or explained) terms.

2. **Parties to Secured Transactions.**

a. **"Debtor"; "Obligor"; "Secondary Obligor."** Determining whether a person was a "debtor" under former section 9-105(1)(d) required a close examination of the context in which the term was used. To reduce the need for this examination, this article redefines "debtor" and adds new defined terms, "second-

ary obligor" and "obligor." In the context of part 6 (default and enforcement), these definitions distinguish among three classes of persons: (i) Those persons who may have a stake in the proper enforcement of a security interest by virtue of their nonlien property interest (typically, an ownership interest) in the collateral; (ii) those persons who may have a stake in the proper enforcement of the security interest because of their obligation to pay the secured debt; and (iii) those persons who have an obligation to pay the secured debt but have no stake in the proper enforcement of the security interest. Persons in the first class are debtors. Persons in the second class are secondary obligors if any portion of the obligation is secondary or if the obligor has a right of recourse against the debtor or another obligor with respect to an obligation secured by collateral. One must consult the law of suretyship to determine whether an obligation is secondary. The Restatement (3d), Suretyship and Guaranty section 1 (1996), contains a useful explanation of the concept. Obligors in the third class are neither debtors nor secondary obligors. With one exception (section 9-616, as it relates to a consumer obligor), the rights and duties provided by Part 6 affect nondebtor obligors only if they are "secondary obligors."

By including in the definition of "debtor" all persons with a property interest (other than a security interest in or other lien on collateral), the definition includes transferees of collateral, whether or not the secured party knows of the transfer or the transferee's identity. Exculpatory provisions in part 6 protect the secured party in that circumstance. See sections 9-605 and 9-628. The definition renders unnecessary former section 9-112, which governed situations in which collateral was not owned by the debtor. The definition also includes a "consignee," as defined in this section, as well as a seller of accounts, chattel paper, payment intangibles, or promissory notes.

Secured parties and other lienholders are excluded from the definition of "debtor" because the interests of those parties normally derive from and encumber a debtor's interest. However, if in a *separate* secured transaction a secured party grants, as *debtor*, a security interest in its own interest (i.e., its security interest and any obligation that it secures), the secured party is a debtor *in that transaction*. This typically occurs when a secured party with a security interest in specific goods assigns chattel paper.

Consider the following examples:

Example 1: Behnfeldt borrows money and grants a security interest in her Miata to secure the debt. Behnfeldt is a debtor and an obligor.

Example 2: Behnfeldt borrows money and grants a security interest in her Miata to secure the debt. Bruno cosigns a negotiable note as maker. As before, Behnfeldt is the debtor and an obligor. As an accommodation party (see section 3-419), Bruno is a secondary obligor. Bruno has this status even if the note states that her obligation is a primary obligation and that she waives all suretyship defenses.

Example 3: Behnfeldt borrows money on an unsecured basis. Bruno cosigns the note and grants a security interest in her Honda to secure her obligation. Inasmuch as Behnfeldt does not have a property interest in the Honda, Behnfeldt is not a debtor. Having granted the security interest, Bruno is the debtor. Because Behnfeldt is a principal obligor, she is not a secondary obligor. Whatever the outcome of enforcement of the security interest against the Honda or Bruno's secondary obligation, Bruno will look to Behnfeldt for her losses. The enforcement will not affect Behnfeldt's aggregate obligations.

When the principal obligor (borrower) and the secondary obligor (surety) each has granted a security interest in different collateral, the status of each is determined by the collateral involved.

Example 4: Behnfeldt borrows money and grants a security interest in her Miata to secure the debt. Bruno cosigns the note and grants a security interest in her Honda to secure her obligation. When the secured party enforces the security interest in Behnfeldt's Miata, Behnfeldt is the debtor, and Bruno is a secondary obligor. When the secured party enforces the security interest in the Honda, Bruno is the "debtor." As in Example 3, Behnfeldt is an obligor, but not a secondary obligor.

b. **"Secured Party."** The secured party is the person in whose favor the security interest has been created, as determined by reference to the security agreement. This definition controls, among other things, which person has the duties and potential liability that part 6 imposes upon a secured party. The definition of "secured party" also includes a "consignee," a person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold, and the holder of an agricultural lien.

The definition of "secured party" clarifies the status of various types of representatives. Consider, for example, a multi-bank facility under which Bank A, Bank B, and Bank C are lenders and Bank A serves as the collateral agent. If the security interest is granted to the banks, then they are the secured parties. If the security interest is granted to Bank A as collateral agent, then Bank A is the secured party.

c. **Other Parties.** A "consumer obligor" is defined as the obligor in a consumer transaction. Definitions of "new debtor" and "original debtor" are used in the special rules found in sections 9-326 and 9-508.

3. **Definitions Relating to Creation of a Security Interest.**

a. **"Collateral."** As under former section 9-105, "collateral" is the property subject to a security interest and includes accounts and chattel paper that have been sold. It has been expanded in this article. The term now explicitly includes proceeds subject to a security interest. It also reflects the broadened scope of the article. It includes property subject to an agricultural lien as well as payment intangibles and promissory notes that have been sold.

b. **"Security Agreement."** The definition of "security agreement" is substantially the same as under former section 9-105—an agreement that creates or provides for a security interest. However, the term frequently was used colloquially in former article 9 to refer to the document or writing that contained a debtor's security agreement. This article eliminates that usage, reserving the term for the more precise meaning specified in the definition.

Whether an agreement creates a security interest depends not on whether the parties intend that the law *characterize* the transaction as a security interest but rather on whether the transaction falls within the definition of "security interest" in section 1-201. Thus, an agreement that the parties characterize as a "lease" of goods may be a "security agreement," notwithstanding the parties' stated intention that the law treat the transaction as a lease and not as a secured transaction.

4. **Goods-Related Definitions.**

a. **"Goods"; "Consumer Goods"; "Equipment"; "Farm Products"; "Farming Operation"; "Inventory."** The definition of "goods" is substantially the same as the definition in former section 9-105. This article also retains the four mutually-exclusive "types" of collateral that consist of goods: "Consumer goods;" "equipment;" "farm products;" and "inventory." The revisions are primarily for clarification.

The classes of goods are mutually exclusive. For example, the same property cannot simultaneously be both equipment and inventory. In borderline cases—a physician's car or a farmer's truck that might be either consumer goods or equipment—the principal use to which the property is put is determinative. Goods can fall into different classes at different times. For example, a radio may be inventory in the hands of a dealer and consumer goods in the hands of a consumer. As under former article 9, goods are "equipment" if they do not fall into another category.

The definition of "consumer goods" follows former section 9-109. The classification turns on whether the debtor uses or bought the goods for use "primarily for personal, family, or household purposes."

Goods are inventory if they are leased by a lessor or held by a person for sale or lease. The revised definition of "inventory" makes clear that the term includes goods leased by the debtor to others as well as goods held for lease. (The same result should have been obtained under the former definition.) Goods to be furnished or furnished under a service contract, raw materials, and work in process also are inventory. Implicit in the definition is the criterion that the sales or leases are or will be in the ordinary course of business. For example, machinery used in manufacturing is equipment, not inventory, even though it is the policy of the debtor to sell machinery when it becomes obsolete or worn. Inventory also includes goods that are consumed in a business (e.g., fuel used in operations). In general, goods used in a business are equipment if they are fixed assets or have, as identifiable units, a relatively long period of use, but are inventory, even though not held for sale or lease, if they are used up or consumed in a short period of time in producing a product or providing a service.

Goods are "farm products" if the debtor is engaged in farming operations with respect to the goods. Animals in a herd of livestock are covered whether the debtor acquires them by purchase or as a result of natural increase. Products of crops or livestock remain farm products as long as they have not been subjected to a manufacturing process. The terms "crops" and "livestock" are not defined. The new definition of "farming operations" is for clarification only.

Crops, livestock, and their products cease to be "farm products" when the debtor ceases to be engaged in farming operations with respect to them. If, for example, they come into the possession of a marketing agency for sale or distribution or of a manufacturer or processor as raw materials, they become inventory. Products of crops or livestock, even though they remain in the possession of a person engaged in farming operations, lose their status as farm products if they are subjected to a manufacturing process. What is and what is not a manufacturing operation is not specified in this article. At one end of the spectrum, some processes are so closely connected with farming—such as pasteurizing milk or boiling sap to produce maple syrup or sugar—that they would not constitute manufacturing. On the other hand an extensive canning operation would be manufacturing. Once farm products have been subjected to a manufacturing operation, they normally become inventory.

The revised definition of "farm products" clarifies the distinction between crops and standing timber and makes clear that aquatic goods produced in aquacultural operations may be either crops or livestock. Although aquatic goods that are vegetable in nature often would be crops and those that are animal would be livestock, this article leaves the courts free to classify the goods on a case-by-case basis. See section 9-324, comment 11.

The definitions of "goods" and "software" are also mutually exclusive. Computer programs usually constitute "software," and, as such, are not "goods" as this Article uses the terms. However, under the circumstances specified in the definition of "goods," computer programs embedded in goods are part of the "goods" and are not "software."

b. **"Accession"; "Manufactured Home"; "Manufactured-Home Transaction."** Other specialized definitions of goods include "accession" (see the special priority and enforcement rules in section 9-335) and "manufactured home" (see section 9-515, permitting a financing statement in a "manufactured-home transaction" to be effective for 30 years). The definition of "manufactured home" borrows from the federal Manufactured Housing Act, 42 U.S.C. section 5401 et seq., and is intended to have the same meaning.

c. **"As-Extracted Collateral."** Under this article, oil, gas, and other minerals that have not been extracted from the ground are treated as real property, to which this article does not apply. Upon extraction, minerals become personal property (goods) and eligible to be collateral under this article. See the definition of "goods," which excludes "oil, gas, and other minerals before extraction." To take account of financing practices reflecting the shift from real to personal property, this article contains special rules for perfecting security interests in minerals which attach upon extraction and in accounts resulting from the sale of minerals at the wellhead or minehead. See, e.g., sections 9-301(4) (law governing perfection and priority), 9-501 (place of filing), 9-502 (contents of financing statement), and 9-519 (indexing of records). The new term, "as-extracted collateral," refers to the minerals and related accounts to which the special rules apply. The term "at the wellhead" encompasses arrangements based on a sale of the produce at the moment that it issues from the ground and is measured, without technical distinctions as to whether title passes at the "Christmas tree" of a well, the far side of a gathering tank, or at some other point. The term "at ... the minehead" is comparable.

The following examples explain the operation of these provisions.

Example 5: Debtor owns an interest in oil that is to be extracted. To secure Debtor's obligations to Lender, Debtor enters into an authenticated agreement granting Lender an interest in the oil. Although Lender may acquire an interest in the oil under real property law, Lender does not acquire a security interest under this article until the oil becomes personal property, i.e., until it is extracted and becomes "goods" to which this article applies. Because Debtor had an interest in the oil before extraction and Lender's security interest attached to the oil as extracted, the oil is "as-extracted collateral."

Example 6: Debtor owns an interest in oil that is to be extracted and contracts to sell the oil to Buyer at the wellhead. In an authenticated agreement, Debtor agrees to sell to Lender the right to payment from Buyer. This right to payment is an account that constitutes "as-extracted collateral." If Lender then resells the account to Financer, Financer acquires a security interest. However, inasmuch as the debtor-seller in that transaction, Lender, had no interest in the oil before extraction, Financer's collateral (the account it owns) is not "as-extracted collateral."

Example 7: Under the facts of example 6, before extraction, Buyer grants a security interest in the oil to Bank. Although Bank's security interest attaches when the oil is extracted, Bank's security interest is not in "as-extracted collateral," inasmuch as its debtor, Buyer, did not have an interest in the oil before extraction.

5. **Receivables-Related Definitions.**

a. **"Account"; "Health-Care-Insurance Receivable"; "As-Extracted Collateral."** The definition of "account" has been expanded and reformulated. It is no longer limited to rights to payment relating to goods or services. Many categories of rights to payment that were classified as general intangibles under former article 9 are accounts under this article. Thus, if they are sold, a financing statement must be filed to perfect the buyer's interest in them. Among the types of property that are expressly excluded from the definition is "a right to payment for money or funds advanced or sold." As defined in section 1-201, "money" is limited essentially to currency. As used in the exclusion from the definition of "account," however, "funds" is a broader concept (although the term is not defined). For example, when a bank-lender credits a borrower's deposit account for the amount of a loan, the bank's advance of funds is not a transaction giving rise to an account.

The definition of "health-care-insurance receivable" is new. It is a subset of the definition of "account." However, the rules generally applicable to account debtors on accounts do not apply to insurers obligated on health-care-insurance receivables. See sections 9-404(e), 9-405(d), and 9-406(i).

Note that certain accounts also are "as-extracted collateral." See comment 4(c), examples 6 and 7.

b. **"Chattel Paper"; "Electronic Chattel Paper"; "Tangible Chattel Paper."** "Chattel paper" consists of a monetary obligation together with a security interest in or a lease of specific goods if the obligation and security interest or lease are evidenced by "a record or records." The definition has been expanded

from that found in former article 9 to include records that evidence a monetary obligation and a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, or a lease of specific goods and license of software used in the goods. The expanded definition covers transactions in which the debtor's or lessee's monetary obligation includes amounts owed with respect to software used in the goods. The monetary obligation with respect to the software need not be owed under a license from the secured party or lessor, and the secured party or lessor need not be a party to the license transaction itself. Among the types of monetary obligations that are included in "chattel paper" are amounts that have been advanced by the secured party or lessor to enable the debtor or lessee to acquire or obtain financing for a license of the software used in the goods. The definition also makes clear that rights to payment arising out of credit-card transactions are not chattel paper.

Charters of vessels are expressly excluded from the definition of chattel paper; they are accounts. The term "charter" as used in this section includes bareboat charters, time charters, successive voyage charters, contracts of affreightment, contracts of carriage, and all other arrangements for the use of vessels.

Under former section 9-105, only if the evidence of an obligation consisted of "a writing or writings" could an obligation qualify as chattel paper. In this article, traditional, written chattel paper is included in the definition of "tangible chattel paper." "Electronic chattel paper" is chattel paper that is stored in an electronic medium instead of in tangible form. The concept of an electronic medium should be construed liberally to include electrical, digital, magnetic, optical, electromagnetic, or any other current or similar emerging technologies.

The definition of electronic chattel paper does not dictate that it be created in any particular fashion. For example, a record consisting of a tangible writing may be converted to electronic form (e.g., by creating electronic images of a signed writing). Or, records may be initially created and executed in electronic form (e.g., a lessee might authenticate an electronic record of a lease that is then stored in electronic form). In either case the resulting records are electronic chattel paper.

c. **"Instrument"; "Promissory Note."** The definition of "instrument" includes a negotiable instrument. As under former section 9-105, it also includes any other right to payment of a monetary obligation that is evidenced by a writing of a type that in ordinary course of business is transferred by delivery (and, if necessary, an indorsement or assignment). Except in the case of chattel paper, the fact that an instrument is secured by a security interest or encumbrance on property does not change the character of the instrument as such or convert the combination of the instrument and collateral into a separate classification of personal property. The definition makes clear that rights to payment arising out of credit-card transactions are not instruments. The definition of "promissory note" is new, necessitated by the inclusion of sales of promissory notes within the scope of article 9. It explicitly excludes obligations arising out of "orders" to pay (e.g., checks) as opposed to "promises" to pay. See section 3-104.

d. **"General Intangible"; "Payment Intangible."** "General intangible" is the residual category of personal property, including things in action, that is not included in the other defined types of collateral. Examples are various categories of intellectual property and the right to payment of a loan of funds that is not evidenced by chattel paper or an instrument. As used in the definition of "general intangible," "things in action" includes rights that arise under a license of intellectual property, including the right to exploit the intellectual property without liability for infringement. The definition has been revised to exclude commercial tort claims, deposit accounts, and letter-of-credit rights. Each of the three is a separate type of collateral. One important consequence of this exclusion is that tortfeasors (commercial tort claims), banks (deposit accounts), and persons obligated on letters of credit (letter-of-credit rights) are not "account debtors" having the rights and obligations set forth in sections 9-404, 9-405, and 9-406. In particular, tortfeasors, banks, and persons obligated on letters of credit are not obligated to pay an assignee (secured party) upon receipt of the notification described in section 9-404(a). See comment 5(h). Another important consequence relates to the adequacy of the description in the security agreement. See section 9-108.

"Payment intangible" is a subset of the definition of "general intangible." The sale of a payment intangible is subject to this article. See section 9-109(a)(3). Virtually any intangible right could give rise to a right to payment of money once one hypothesizes, for example, that the account debtor is in breach of its obligation. The term "payment intangible," however, embraces only those general intangibles "under which the account debtor's *principal* obligation is a monetary obligation." (Emphasis added.)

In classifying intangible collateral, a court should begin by identifying the particular rights that have been assigned. The account debtor (promisor) under a particular contract may owe several types of monetary obligations as well as other, nonmonetary obligations. If the promisee's right to payment of money is assigned separately, the right is an account or

payment intangible, depending on how the account debtor's obligation arose. When all the promisee's rights are assigned together, an account, a payment intangible, and a general intangible all may be involved, depending on the nature of the rights.

A right to the payment of money is frequently buttressed by ancillary covenants, such as covenants in a purchase agreement, note, or mortgage requiring insurance on the collateral or forbidding removal of the collateral, or covenants to preserve the creditworthiness of the promisor, such as covenants restricting dividends and the like. This article does not treat these ancillary rights separately from the rights to payment to which they relate. For example, attachment and perfection of an assignment of a right to payment of a monetary obligation, whether it be an account or payment intangible, also carries these ancillary rights.

Every "payment intangible" is also a "general intangible." Likewise, "software" is a "general intangible" for purposes of this article. See comment 25. Accordingly, except as otherwise provided, statutory provisions applicable to general intangibles apply to payment intangibles and software.

e. **"Letter-of-Credit Right."** The term "letter-of-credit right" embraces the rights to payment and performance under a letter of credit (defined in section 5-102). However, it does not include a beneficiary's right to demand payment or performance. Transfer of those rights to a transferee beneficiary is governed by article 5. See sections 9-107, comment 4, and 9-329, comments 3 and 4.

f. **"Supporting Obligation."** This new term covers the most common types of credit enhancements—suretyship obligations (including guarantees) and letter-of-credit rights that support one of the types of collateral specified in the definition. As explained in comment 2(a), suretyship law determines whether an obligation is "secondary" for purposes of this definition. Section 9-109 generally excludes from this article transfers of interests in insurance policies. However, the regulation of a secondary obligation as an insurance product does not necessarily mean that it is a "policy of insurance" for purposes of the exclusion in section 9-109. Thus, this article may cover a secondary obligation (as a supporting obligation), even if the obligation is issued by a regulated insurance company and the obligation is subject to regulation as an "insurance" product.

This article contains rules explicitly governing attachment, perfection, and priority of security interests in supporting obligations. See sections 9-203, 9-308, 9-310, and 9-322. These provisions reflect the principle that a supporting obligation is an incident of the collateral it supports.

Collections of or other distributions under a supporting obligation are "proceeds" of the supported collateral as well as "proceeds" of the supporting obligation itself. See section 9-102 (defining "proceeds") and comment 13(b). As such, the collections and distributions are subject to the priority rules applicable to proceeds generally. See section 9-322. However, under the special rule governing security interests in a letter-of-credit right, a secured party's failure to obtain control (section 9-107) of a letter-of-credit right supporting collateral may leave its security interest exposed to a priming interest of a party who does take control. See section 9-329 (security interest in a letter-of-credit right perfected by control has priority over a conflicting security interest).

g. **"Commercial Tort Claim."** This term is new. A tort claim may serve as original collateral under this article only if it is a "commercial tort claim." See section 9-109(d). Although security interests in commercial tort claims are within its scope, this article does not override other applicable law restricting the assignability of a tort claim. See section 9-401. A security interest in a tort claim also may exist under this article if the claim is proceeds of other collateral.

h. **"Account Debtor."** An "account debtor" is a person obligated on an account, chattel paper, or general intangible. The account debtor's obligation often is a monetary obligation; however, this is not always the case. For example, if a franchisee uses its rights under a franchise agreement (a general intangible) as collateral, then the franchisor is an "account debtor." As a general matter, article 3, and not article 9, governs obligations on negotiable instruments. Accordingly, the definition of "account debtor" excludes obligors on negotiable instruments constituting part of chattel paper. The principal effect of this change from the definition in former article 9 is that the rules in sections 9-403, 9-404, 9-405, and 9-406, dealing with the rights of an assignee and duties of an account debtor, do not apply to an assignment of chattel paper in which the obligation to pay is evidenced by a negotiable instrument. (Section 9-406(d), however, does apply to promissory notes, including negotiable promissory notes.) Rather, the assignee's rights are governed by article 3. Similarly, the duties of an obligor on a nonnegotiable instrument are governed by nonarticle 9 law unless the nonnegotiable instrument is a part of chattel paper, in which case the obligor is an account debtor.

i. **Receivables Under Government Entitlement Programs.** This article does not contain a defined term that encompasses specifically rights to payment or performance under the many and varied government entitlement programs. Depending on the nature of a right under a program, it could be an account, a

payment intangible, a general intangible other than a payment intangible, or another type of collateral. The right also might be proceeds of collateral (e.g., crops).

6. **Investment-Property-Related Definitions: "Commodity Account"; "Commodity Contract"; "Commodity Customer"; "Commodity Intermediary"; "Investment Property."** These definitions are substantially the same as the corresponding definitions in former section 9-115. "Investment property" includes securities, both certificated and uncertificated, securities accounts, security entitlements, commodity accounts, and commodity contracts. The term investment property includes a "securities account" in order to facilitate transactions in which a debtor wishes to create a security interest in all of the investment positions held through a particular account rather than in particular positions carried in the account. Former section 9-115 was added in conjunction with revised article 8 and contained a variety of rules applicable to security interests in investment property. These rules have been relocated to the appropriate sections of article 9. See, e.g., sections 9-203 (attachment), 9-314 (perfection by control), and 9-328 (priority).

The terms "security," "security entitlement," and related terms are defined in section 8-102, and the term "securities account" is defined in section 8-501. The terms "commodity account," "commodity contract," "commodity customer," and "commodity intermediary" are defined in this section. Commodity contracts are not "securities" or "financial assets" under article 8. See section 8-103(f). Thus, the relationship between commodity intermediaries and commodity customers is not governed by the indirect-holding-system rules of part 5 of article 8. For securities, article 9 contains rules on security interests, and article 8 contains rules on the rights of transferees, including secured parties, on such matters as the rights of a transferee if the transfer was itself wrongful and gives rise to an adverse claim. For commodity contracts, article 9 establishes rules on security interests, but questions of the sort dealt with in article 8 for securities are left to other law.

The indirect-holding-system rules of article 8 are sufficiently flexible to be applied to new developments in the securities and financial markets, where that is appropriate. Accordingly, the definition of "commodity contract" is narrowly drafted to ensure that it does not operate as an obstacle to the application of the article 8 indirect holding system rules to new products. The term "commodity contract" covers those contracts that are traded on or subject to the rules of a designated contract market and foreign commodity contracts that are carried on the books of American commodity intermediaries. The effect of this definition is that the category of commodity contracts that is excluded from article 8 but governed by article 9 is essentially the same as the category of contracts that fall within the exclusive regulatory jurisdiction of the federal Commodity Futures Trading Commission.

Commodity contracts are different from securities or other financial assets. A person who enters into a commodity futures contract is not buying an asset having a certain value and holding it in anticipation of increase in value. Rather the person is entering into a contract to buy or sell a commodity at set price for delivery at a future time. That contract may become advantageous or disadvantageous as the price of the commodity fluctuates during the term of the contract. The rules of the commodity exchanges require that the contracts be marked to market on a daily basis; that is, the customer pays or receives any increment attributable to that day's price change. Because commodity customers may incur obligations on their contracts, they are required to provide collateral at the outset, known as "original margin," and may be required to provide additional amounts, known as "variation margin," during the term of the contract.

The most likely setting in which a person would want to take a security interest in a commodity contract is where a lender who is advancing funds to finance an inventory of a physical commodity requires the borrower to enter into a commodity contract as a hedge against the risk of decline in the value of the commodity. The lender will want to take a security interest in both the commodity itself and the hedging commodity contract. Typically, such arrangements are structured as security interests in the entire commodity account in which the borrower carries the hedging contracts, rather than in individual contracts.

One important effect of including commodity contracts and commodity accounts in article 9 is to provide a clearer legal structure for the analysis of the rights of commodity clearing organizations against their participants and futures commission merchants against their customers. The rules and agreements of commodity clearing organizations generally provide that the clearing organization has the right to liquidate any participant's positions in order to satisfy obligations of the participant to the clearing corporation. Similarly, agreements between futures commission merchants and their customers generally provide that the futures commission merchant has the right to liquidate a customer's positions in order to satisfy obligations of the customer to the futures commission merchant.

The main property that a commodity intermediary holds as collateral for the obligations that the commodity customer may incur under its commodity contracts is not other commodity contracts carried by the customer but the other

property that the customer has posted as margin. Typically, this property will be securities. The commodity intermediary's security interest in such securities is governed by the rules of this article on security interests in securities, not the rules on security interests in commodity contracts or commodity accounts.

Although there are significant analytic and regulatory differences between commodities and securities, the development of commodity contracts on financial products in the past few decades has resulted in a system in which the commodity markets and securities markets are closely linked. The rules on security interests in commodity contracts and commodity accounts provide a structure that may be essential in times of stress in the financial markets. Suppose, for example that a firm has a position in a securities market that is hedged by a position in a commodity market, so that payments that the firm is obligated to make with respect to the securities position will be covered by the receipt of funds from the commodity position. Depending upon the settlement cycles of the different markets, it is possible that the firm could find itself in a position where it is obligated to make the payment with respect to the securities position before it receives the matching funds from the commodity position. If cross-margining arrangements have not been developed between the two markets, the firm may need to borrow funds temporarily to make the earlier payment. The rules on security interests in investment property would facilitate the use of positions in one market as collateral for loans needed to cover obligations in the other market.

7. **Consumer-Related Definitions: "Consumer Debtor"; "Consumer Goods"; "Consumer-goods transaction"; "Consumer Obligor"; "Consumer Transaction."** The definition of "consumer goods" (discussed above) is substantially the same as the definition in former section 9-109. The definitions of "consumer debtor," "consumer obligor," "consumer-goods transaction," and "consumer transaction" have been added in connection with various new (and old) consumer-related provisions and to designate certain provisions that are inapplicable in consumer transactions.

"Consumer-goods transaction" is a subset of "consumer transaction." Under each definition, both the obligation secured and the collateral must have a personal, family, or household purpose. However, "mixed" business and personal transactions also may be characterized as a consumer-goods transaction or consumer transaction. Subparagraph (A) of the definition of consumer-goods transactions and clause (i) of the definition of consumer transaction are primary purposes tests. Under these tests, it is necessary to determine the primary purpose of the obligation or obligations secured. Subparagraph (B) and clause (iii) of these definitions are satisfied if any of the collateral is consumer goods, in the case of a consumer-goods transaction, or "is held or acquired primarily for personal, family, or household purposes," in the case of a consumer transaction. The fact that some of the obligations secured or some of the collateral for the obligation does not satisfy the tests (e.g., some of the collateral is acquired for a business purpose) does not prevent a transaction from being a "consumer transaction" or "consumer-goods transaction."

8. **Filing-Related Definitions: "Continuation Statement"; "File Number"; "Filing Office"; "Filing-Office Rule"; "Financing Statement"; "Fixture Filing"; "Manufactured-Home Transaction"; "New Debtor"; "Original Debtor"; "Public-Finance Transaction"; "Termination Statement"; "Transmitting Utility."** These definitions are used exclusively or primarily in the filing-related provisions in Part 5. Most are self-explanatory and are discussed in the comments to Part 5. A financing statement filed in a manufactured-home transaction or a public-finance transaction may remain effective for 30 years instead of the 5 years applicable to other financing statements. See section 9-515(b). The definitions relating to medium neutrality also are significant for the filing provisions. See comment 9.

The definition of "transmitting utility" has been revised to embrace the business of transmitting communications generally to take account of new and future types of communications technology. The term designates a special class of debtors for whom separate filing rules are provided in Part 5, thereby obviating the many local fixture filings that would be necessary under the rules of section 9-501 for a far-flung public-utility debtor. A transmitting utility will not necessarily be regulated by or operating as such in a jurisdiction where fixtures are located. For example, a utility might own transmission lines in a jurisdiction, although the utility generates no power and has no customers in the jurisdiction.

9. **Definitions Relating to Medium Neutrality.**

a. **"Record."** In many, but not all, instances, the term "record" replaces the term "writing" and "written." A "record" includes information that is in intangible form (e.g., electronically stored) as well as tangible form (e.g., written on paper). Given the rapid development and commercial adoption of modern communication and storage technologies, requirements that documents or communications be "written," "in writing," or otherwise in tangible form do not necessarily reflect or aid commercial practices.

A "record" need not be permanent or indestructible, but the term does not include any oral or other communication that is not stored or preserved by any means. The information

must be stored on paper or in some other medium. Information that has not been retained other than through human memory does not qualify as a record. Examples of current technologies commercially used to communicate or store information include, but are not limited to, magnetic media, optical discs, digital voice messaging systems, electronic mail, audio tapes, and photographic media, as well as paper. "Record" is an inclusive term that includes all of these methods of storing or communicating information. Any "writing" is a record. A record may be authenticated. See comment 9(b). A record may be created without the knowledge or intent of a particular person.

Like the terms "written" or "in writing," the term "record" does not establish the purposes, permitted uses, or legal effect that a record may have under any particular provision of law. Whatever is filed in the article 9 filing system, including financing statements, continuation statements, and termination statements, whether transmitted in tangible or intangible form, would fall within the definition. However, in some instances, statutes or filing-office rules may require that a paper record be filed. In such cases, even if this article permits the filing of an electronic record, compliance with those statutes or rules is necessary. Similarly, a filer must comply with a statute or rule that requires a particular type of encoding or formatting for an electronic record.

This article sometimes uses the terms "for record," "of record," "record or legal title," and "record owner." Some of these are terms traditionally used in real property law. The definition of "record" in this article now explicitly excepts these usages from the defined term. Also, this article refers to a record that is filed or recorded in real property recording systems to record a mortgage as a "record of a mortgage." This usage recognizes that the defined term "mortgage" means an interest in real property; it does not mean the record that evidences, or is filed or recorded with respect to, the mortgage.

b. **"Authenticate"; "Communicate"; "Send."** The terms "authenticate" and "authenticated" generally replace "sign" and "signed." "Authenticated" replaces and broadens the definition of "signed," in section 1-201, to encompass authentication of all records, not just writings. (References to authentication of, e.g., an agreement, demand, or notification mean, of course, authentication of a record containing an agreement, demand, or notification.) The terms "communicate" and "send" also contemplate the possibility of communication by nonwritten media. These definitions include the act of transmitting both tangible and intangible records. The definition of "send" replaces, for purposes of this article, the corresponding term in section 1-201. The reference to "usual means of communication" in that definition contemplates an inquiry into the appropriateness of the method of transmission used in the particular circumstances involved.

10. **Scope-Related Definitions.**

a. **Expanded Scope of Article: "Agricultural Lien"; "Consignment"; "Payment Intangible"; "Promissory Note."** These new definitions reflect the expanded scope of Article 9, as provided in section 9-109(a).

b. **Reduced Scope of Exclusions: "Governmental Unit"; "Health-Care-Insurance Receivable"; "Commercial Tort Claims."** These new definitions reflect the reduced scope of the exclusions, provided in section 9-109(c) and (d), of transfers by governmental debtors and assignments of interests in insurance policies and commercial tort claims.

11. **Choice-of-Law-Related Definitions: "Certificate of Title"; "Governmental Unit"; "Jurisdiction of Organization"; "Registered Organization"; "State."** These new definitions reflect the changes in the law governing perfection and priority of security interests and agricultural liens provided in Part 3, Subpart 1.

Not every organization that may provide information about itself in the public records is a "registered organization." For example, a general partnership is not a "registered organization," even if it files a statement of partnership authority under section 303 of the Uniform Partnership Act (1994) or an assumed name ("dba") certificate. This is because the state under whose law the partnership is organized is not required to maintain a public record showing that the partnership has been organized. In contrast, corporations, limited liability companies, and limited partnerships are "registered organizations."

12. **Deposit-Account-Related Definitions: "Deposit Account"; "Bank."** The revised definition of "deposit account" incorporates the definition of "bank," which is new. The definition derives from the definitions of "bank" in sections 4-105(1) and 4A-105(a)(2), which focus on whether the organization is "engaged in the business of banking."

Deposit accounts evidenced by article 9 "instruments" are excluded from the term "deposit account." In contrast, former section 9-105 excluded from the former definition "an account evidenced by a certificate of deposit." The revised definition clarifies the proper treatment of nonnegotiable or uncertificated certificates of deposit. Under the definition, an uncertificated certificate of deposit would be a deposit account (assuming there is no writing evidencing the bank's obligation to pay) whereas a nonnegotiable certificate of deposit would be a deposit account only if it is not an "instrument" as defined in this section (a question that turns on whether the nonnegotiable certificate of deposit

is "of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment.")

A deposit account evidenced by an instrument is subject to the rules applicable to instruments generally. As a consequence, a security interest in such an instrument cannot be perfected by "control" (see section 9-104), and the special priority rules applicable to deposit accounts (see sections 9-327 and 9-340) do not apply.

The term "deposit account" does not include "investment property," such as securities and security entitlements. Thus, the term also does not include shares in a money-market mutual fund, even if the shares are redeemable by check.

13. **Proceeds-Related Definitions: "Cash Proceeds"; "Noncash Proceeds"; "Proceeds."** The revised definition of "proceeds" expands the definition beyond that contained in former section 9-306 and resolves ambiguities in the former section.

a. **Distributions on Account of Collateral.** The phrase "whatever is collected on, or distributed on account of, collateral," in subparagraph (B), is broad enough to cover cash or stock dividends distributed on account of securities or other investment property that is original collateral. Compare former section 9-306 ("Any payments or distributions made with respect to investment property collateral are proceeds."). This section rejects the holding of Hastie v. FDIC, 2 F.3d 1042 (10th Cir. 1993) (postpetition cash dividends on stock subject to a prepetition pledge are not "proceeds" under Bankruptcy Code section 552(b)), to the extent the holding relies on the article 9 definition of "proceeds."

b. **Distributions on Account of Supporting Obligations.** Under subparagraph (B), collections on and distributions on account of collateral consisting of various credit-support arrangements ("supporting obligations," as defined in section 9-102) also are proceeds. Consequently, they are afforded treatment identical to proceeds collected from or distributed by the obligor on the underlying (supported) right to payment or other collateral. Proceeds of supporting obligations also are proceeds of the underlying rights to payment or other collateral.

c. **Proceeds of Proceeds.** The definition of "proceeds" no longer provides that proceeds of proceeds are themselves proceeds. That idea is expressed in the revised definition of "collateral" in section 9-102. No change in meaning is intended.

d. **Proceeds Received by Person Who Did Not Create Security Interest.** When collateral is sold subject to a security interest and the buyer then resells the collateral, a question arose under former article 9 concerning whether the "debtor" had "received" what the buyer received on resale and, therefore, whether those receipts were "proceeds" under former section 9-306(2). This article contains no requirement that property be "received" by the debtor for the property to qualify as proceeds. It is necessary only that the property be traceable, directly or indirectly, to the original collateral.

e. **Cash Proceeds and Noncash Proceeds.** The definition of "cash proceeds" is substantially the same as the corresponding definition in former section 9-306. The phrase "and the like" covers property that is functionally equivalent to "money, checks, or deposit accounts," such as some money market accounts that are securities or part of securities entitlements. Proceeds other than cash proceeds are noncash proceeds.

14. **Consignment-Related Definitions: "Consignee"; "Consignment"; "Consignor."** The definition of "consignment" excludes, in subparagraphs (B) and (C), transactions for which filing would be inappropriate or of insufficient benefit to justify the costs. A consignment excluded from the application of this article by one of those subparagraphs may still be a true consignment; however, it is governed by nonarticle 9 law. The definition also excludes, in subparagraph (D), what have been called "consignments intended for security." These "consignments" are not bailments but secured transactions. Accordingly, all of article 9 applies to them. See sections 1-201(37) and 9-109(a)(1). The "consignor" is the person who delivers goods to the "consignee" in a consignment.

The definition of "consignment" requires that the goods be delivered "to a merchant for the purpose of sale." If the goods are delivered for another purpose as well, such as milling or processing, the transaction is a consignment nonetheless because a purpose of the delivery is "sale." On the other hand, if a merchant-processor-bailee will not be selling the goods itself but will be delivering to buyers to which the owner-bailor agreed to sell the goods, the transaction would not be a consignment.

15. **"Accounting."** This definition describes the record and information that a debtor is entitled to request under section 9-210.

16. **"Document."** The definition of "document" is unchanged in substance from the corresponding definitions in former section 9-105. See section 1-201(15) and comment 15.

17. **"Encumbrance"; "Mortgage."** The definitions of "encumbrance" and "mortgage" are unchanged in substance from the corresponding definitions in former section 9-105. They are used primarily in the special real-property-related priority and other provisions relating to crops, fixtures, and accessions.

18. **"Fixtures."** This definition is unchanged in substance from the corresponding definition in former section 9-313. See section 9-334 (priority of security interests in fixtures and crops).

19. **"Good Faith."** This article expands the definition of "good faith" to include "the observance of reasonable commercial standards of fair dealing." The definition in this section applies when the term is used in this article, and the same concept applies in the context of this article for purposes of the obligation of good faith imposed by section 1-203. See subsection (c).

20. **"Lien Creditor."** This definition is unchanged in substance from the corresponding definition in former section 9-301.

21. **"New Value."** This article deletes former section 9-108. Its broad formulation of new value, which embraced the taking of after-acquired collateral for a pre-existing claim, was unnecessary, counterintuitive, and ineffective for its original purpose of sheltering after-acquired collateral from attack as a voidable preference in bankruptcy. The new definition derives from Bankruptcy Code section 547(a). The term is used with respect to temporary perfection of security interests in instruments, certificated securities, or negotiable documents under section 9-312(e) and with respect to chattel paper priority in section 9-330.

22. **"Person Related To."** Section 9-615 provides a special method for calculating a deficiency or surplus when "the secured party, a person related to the secured party, or a secondary obligor" acquires the collateral at a foreclosure disposition. Separate definitions of the term are provided with respect to an individual secured party and with respect to a secured party that is an organization. The definitions are patterned on the corresponding definition in section 1.301(32) of the Uniform Consumer Credit Code (1974).

23. **"Proposal."** This definition describes a record that is sufficient to propose to retain collateral in full or partial satisfaction of a secured obligation. See sections 9-620, 9-621, and 9-622.

24. **"Pursuant to Commitment."** This definition is unchanged in substance from the corresponding definition in former section 9-105. It is used in connection with special priority rules applicable to future advances. See section 9-323.

25. **"Software."** The definition of "software" is used in connection with the priority rules applicable to purchase-money security interests. See sections 9-103 and 9-324. Software, like a payment intangible, is a type of general intangible for purposes of this article. See Comment 4.a., above, regarding the distinction between "goods" and "software."

26. **Terminology: "Assignment" and "Transfer."** In numerous provisions, this article refers to the "assignment" or the "transfer" of property interests. These terms and their derivatives are not defined. This article generally follows common usage by using the terms "assignment" and "assign" to refer to transfers of rights to payment, claims, and liens and other security interests. It generally uses the term "transfer" to refer to other transfers of interests in property. Except when used in connection with a letter-of-credit transaction (see section 9-107, comment 4), no significance should be placed on the use of one term or the other. Depending on the context, each term may refer to the assignment or transfer of an outright ownership interest or to the assignment or transfer of a limited interest, such as a security interest.

§ 25-9-103. (Effective July 1, 2001) Purchase-money security interest; application of payments; burden of establishing.

(a) Definitions. — In this section:

(1) "Purchase-money collateral" means goods or software that secures a purchase-money obligation incurred with respect to that collateral; and

(2) "Purchase-money obligation" means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used.

(b) Purchase-money security interest in goods. — A security interest in goods is a purchase-money security interest:

(1) To the extent that the goods are purchase-money collateral with respect to that security interest;

(2) If the security interest is in inventory that is or was purchase-money collateral, also to the extent that the security interest secures a purchase-money obligation incurred with respect to other inventory in

which the secured party holds or held a purchase-money security interest; and

(3) Also to the extent that the security interest secures a purchase-money obligation incurred with respect to software in which the secured party holds or held a purchase-money security interest.

(c) Purchase-money security interest in software. — A security interest in software is a purchase-money security interest to the extent that the security interest also secures a purchase-money obligation incurred with respect to goods in which the secured party holds or held a purchase-money security interest if:

(1) The debtor acquired its interest in the software in an integrated transaction in which it acquired an interest in the goods; and

(2) The debtor acquired its interest in the software for the principal purpose of using the software in the goods.

(d) Consignor's inventory purchase-money security interest. — The security interest of a consignor in goods that are the subject of a consignment is a purchase-money security interest in inventory.

(e) Application of payment in non-consumer-goods transaction. — In a transaction other than a consumer-goods transaction, if the extent to which a security interest is a purchase-money security interest depends on the application of a payment to a particular obligation, the payment must be applied:

(1) In accordance with any reasonable method of application to which the parties agree;

(2) In the absence of the parties" agreement to a reasonable method, in accordance with any intention of the obligor manifested at or before the time of payment; or

(3) In the absence of an agreement to a reasonable method and a timely manifestation of the obligor's intention, in the following order:

a. To obligations that are not secured; and

b. If more than one obligation is secured, to obligations secured by purchase-money security interests in the order in which those obligations were incurred.

(f) No loss of status of purchase-money security interest in non-consumer-goods transaction. — In a transaction other than a consumer-goods transaction, a purchase-money security interest does not lose its status as such, even if:

(1) The purchase-money collateral also secures an obligation that is not a purchase-money obligation;

(2) Collateral that is not purchase-money collateral also secures the purchase-money obligation; or

(3) The purchase-money obligation has been renewed, refinanced, consolidated, or restructured.

(g) Burden of proof in non-consumer-goods transaction. — In a transaction other than a consumer-goods transaction, a secured party claiming a purchase-money security interest has the burden of establishing the extent to which the security interest is a purchase-money security interest.

(h) Non-consumer-goods transactions; no inference. — The limitation of the rules in subsections (e), (f), and (g) of this section to transactions other than consumer-goods transactions is intended to leave to the court the determination of the proper rules in consumer-goods transactions. The court may not infer from that limitation the nature of the proper rule in consumer-goods transactions and may continue to apply established approaches. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 1993, c. 370, s. 1; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-107.

2. **Scope of This Section.** Under section 9-309(1), a purchase-money security interest in consumer goods is perfected when it attaches. Sections 9-317 and 9-324 provide special priority rules for purchase-money security interests in a variety of contexts. This section explains when a security interest enjoys purchase-money status.

3. **"Purchase-Money Collateral"; "Purchase-Money Obligation"; "Purchase-Money Security Interest."** Subsection (a) defines "purchase-money collateral" and "purchase-money obligation." These terms are essential to the description of what constitutes a purchase-money security interest under subsection (b). As used in subsection (a)(2), the definition of "purchase-money obligation," the "price" of collateral or the "value given to enable" includes obligations for expenses incurred in connection with acquiring rights in the collateral, sales taxes, duties, finance charges, interest, freight charges, costs of storage in transit, demurrage, administrative charges, expenses of collection and enforcement, attorney's fees, and other similar obligations.

The concept of "purchase-money security interest" requires a close nexus between the acquisition of collateral and the secured obligation. Thus, a security interest does not qualify as a purchase-money security interest if a debtor acquires property on unsecured credit and subsequently creates the security interest to secure the purchase price.

4. **Cross-Collateralization of Purchase-Money Security Interests in Inventory.** Subsection (b)(2) deals with the problem of cross-collateralized purchase-money security interests in inventory. Consider a simple example:

Example: Seller (S) sells an item of inventory (Item-1) to Debtor (D), retaining a security interest in Item-1 to secure Item-1's price and all other obligations, existing and future, of D to S. S then sells another item of inventory to D (Item-2), again retaining a security interest in Item-2 to secure Item-2's price as well as all other obligations of D to S. D then pays to S Item-1's price. D then sells Item-2 to a buyer in ordinary course of business, who takes Item-2 free of S's security interest.

Under subsection (b)(2), S's security interest in *Item-1* securing *Item-2's unpaid price* would be a purchase-money security interest. This is so because S has a purchase-money security interest in Item-1, Item-1 secures the price of (a "purchase-money obligation incurred with respect to") Item-2 ("other inventory"), and Item-2 itself was subject to a purchase-money security interest. Note that, to the extent Item-1 secures the price of Item-2, S's security interest in Item-1 would not be a purchase-money security interest under subsection (b)(1). The security interest in Item-1 is a purchase-money security interest under subsection (b)(1) only to the extent that Item-1 is "purchase-money collateral," i.e., only to the extent that Item-1 "secures a purchase-money obligation incurred with respect to that collateral" (i.e., Item-1). See subsection (a)(1).

5. **Purchase-Money Security Interests in Goods and Software.** Subsections (b) and (c) limit purchase-money security interests to security interests in goods, including fixtures, and software. Otherwise, no change in meaning from former section 9-107 is intended. The second sentence of former section 9-115(5)(f) made the purchase-money priority rule (former section 9-312(4)) inapplicable to investment property. This section's limitation makes that provision unnecessary.

Subsection (c) describes the limited circumstances under which a security interest in goods may be accompanied by a purchase-money security interest in software. The software must be acquired by the debtor in a transaction integrated with the transaction in which the debtor acquired the goods, and the debtor must acquire the software for the principal purpose of using the software in the goods. "Software" is defined in section 9-102.

6. **Consignments.** Under former section 9-114, the priority of the consignor's interest is similar to that of a purchase-money security interest. Subsection (d) achieves this result more directly, by defining the interest of a "consignor," defined in section 9-102, to be a purchase-money security interest in inventory for purposes of this article. This drafting convention obviates any need to set forth special priority rules applicable to the interest of a consignor. Rather, the priority of the consignor's interest as against the rights of lien creditors of the consignee, competing secured parties, and purchasers of the goods from the consignee can be determined by reference to the priority rules generally applicable to inventory, such as sections 9-317, 9-320, 9-322, and 9-324. For other purposes, including the rights and duties of the consignor and consignee as between themselves, the consignor would remain the owner of goods under a bailment arrangement with the consignee. See Section 9-319.

7. **Provisions Applicable Only to Non-Consumer-Goods Transactions.**

a. **"Dual-Status" Rule.** For transactions other than consumer-goods transactions, this article approves what some cases have called the "dual-status" rule, under which a security interest may be a purchase-money security

interest to some extent and a nonpurchase-money security interest to some extent. (Concerning consumer-goods transactions, see subsection (h) and comment 8.) Some courts have found this rule to be explicit or implicit in the words "to the extent," found in former section 9-107 and continued in subsections (b)(1) and (b)(2). The rule is made explicit in subsection (e). For nonconsumer-goods transactions, this article rejects the "transformation" rule adopted by some cases, under which any cross-collateralization, refinancing, or the like destroys the purchase-money status entirely.

Consider, for example, what happens when a $10,000 loan secured by a purchase-money security interest is refinanced by the original lender, and, as part of the transaction, the debtor borrows an additional $2,000 secured by the collateral. Subsection (f) resolves any doubt that the security interest remains a purchase-money security interest. Under subsection (b), however, it enjoys purchase-money status only to the extent of $10,000.

b. **Allocation of Payments.** Continuing with the example, if the debtor makes a $1,000 payment on the $12,000 obligation, then one must determine the extent to which the security interest remains a purchase-money security interest $9,000 or $10,000. Subsection (e)(1) expresses the overriding principle, applicable in cases other than consumer-goods transactions, for determining the extent to which a security interest is a purchase-money security interest under these circumstances: Freedom of contract, as limited by principle of reasonableness. An unconscionable method of application, for example, is not a reasonable one and so would not be given effect under subsection (e)(1). In the absence of agreement, subsection (e)(2) permits the obligor to determine how payments should be allocated. If the obligor fails to manifest its intention, obligations that are not secured will be paid first. (As used in this article, the concept of "obligations that are not secured" means obligations for which the debtor has not created a security interest. This concept is different from and should not be confused with the concept of an "unsecured claim" as it appears in Bankruptcy Code section 506(a).) The obligor may prefer this approach, because unsecured debt is likely to carry a higher interest rate than secured debt. A creditor who would prefer to be secured rather than unsecured also would prefer this approach.

After the unsecured debt is paid, payments are to be applied first toward the obligations secured by purchase-money security interests. In the event that there is more than one such obligation, payments first received are to be applied to obligations first incurred. See subsection (e)(3). Once these obligations are paid, there are no purchase-money security interests and no additional allocation rules are needed.

Subsection (f) buttresses the dual-status rule by making it clear that (in a transaction other than a consumer-goods transaction) cross-collateralization and renewals, refinancings, and restructurings do not cause a purchase-money security interest to lose its status as such. The statutory terms "renewed," "refinanced," and "restructured" are not defined. Whether the terms encompass a particular transaction depends upon whether, under the particular facts, the purchase-money character of the security interest fairly can be said to survive. Each term contemplates that an identifiable portion of the purchase-money obligation could be traced to the new obligation resulting from a renewal, refinancing, or restructuring.

c. **Burden of Proof.** As is the case when the extent of a security interest is in issue, under subsection (g) the secured party claiming a purchase-money security interest in a transaction other than a consumer-goods transaction has the burden of establishing whether the security interest retains its purchase-money status. This is so whether the determination is to be made following a renewal, refinancing, or restructuring or otherwise.

8. **Consumer-Goods Transactions; Characterization Under Other Law.** Under subsection (h), the limitation of subsections (e), (f), and (g) to transactions other than consumer-goods transactions leaves to the court the determination of the proper rules in consumer-goods transactions. Subsection (h) also instructs the court not to draw any inference from this limitation as to the proper rules for consumer-goods transactions and leaves the court free to continue to apply established approaches to those transactions.

This section addresses only whether a security interest is a "purchase-money security interest" under this article, primarily for purposes of perfection and priority. See, e.g., sections 9-317 and 9-324. In particular, its adoption of the dual-status rule, allocation of payments rules, and burden of proof standards for non-consumer-goods transactions is not intended to affect or influence characterizations under other statutes. Whether a security interest is a "purchase-money security interest" under other law is determined by that law. For example, decisions under Bankruptcy Code section 522(f) have applied both the dual-status and the transformation rules. The Bankruptcy Code does not expressly adopt the state law definition of "purchase-money security interest." Where federal law does not defer to this article, this article does not, and could not, determine a question of federal law.

§ 25-9-103.1. (Effective July 1, 2001) Production-money crops; production-money obligation; production-money security interest; burden of establishing.

(a) Production-money crops. — A security interest in crops is a production-money security interest to the extent that the crops are production-money crops.

(b) Production-money obligation. — If the extent to which a security interest is a production-money security interest depends on the application of a payment to a particular obligation, the payment must be applied:

(1) In accordance with any reasonable method of application to which the parties agree;

(2) In the absence of the parties" agreement to a reasonable method, in accordance with any intention of the obligor manifested at or before the time of payment; or

(3) In the absence of an agreement to a reasonable method and a timely manifestation of the obligor's intention, in the following order:

a. To obligations that are not secured; and

b. If more than one obligation is secured, to obligations secured by production-money security interests in the order in which those obligations were incurred.

(c) Production-money security interest. — A production-money security interest does not lose its status as such, even if:

(1) The production-money crops also secure an obligation that is not a production-money obligation;

(2) Collateral that is not production-money crops also secures the production-money obligation; or

(3) The production-money obligation has been renewed, refinanced, or restructured.

(d) Burden of proof. — A secured party claiming a production-money security interest has the burden of establishing the extent to which the security interest is a production-money security interest. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C.S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 196, s. 4; 1955, c. 816; 1957, c. 999; 1965, c. 700, s. 1; 1967, c. 24, s. 13; 1975, c. 862, s. 7; 1979, c. 404, s. 2; 1989 (Reg. Sess., 1990), c. 1024, s. 8(o); 1997-181, ss. 15, 16; 1997-336, s. 1; 1997-456, s. 5; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Production-Money Priority; "Production-Money Security Interest."** This section is patterned closely on Section 9-103, which defines "purchase-money security interest." Subsection (b) makes clear that a security interest can obtain production-money status only to the extent that it secures value that actually can be traced to the direct production of crops. To the extent that a security interest secures indirect costs of production, such as general living expenses, the security interest is not entitled to production-money treatment.

§ 25-9-104. (Effective July 1, 2001) Control of deposit account.

(a) Requirements for control. — A secured party has control of a deposit account if:

(1) The secured party is the bank with which the deposit account is maintained;

(2) The debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; or

(3) The secured party becomes the bank's customer with respect to the deposit account.

(b) Debtor's right to direct disposition. — A secured party that has satisfied subsection (a) of this section has control, even if the debtor retains the right to direct the disposition of funds from the deposit account. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 1999-73, s. 5(a), (b); 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New; derived from section 8-106.

2. **Why "Control" Matters.** This section explains the concept of "control" of a deposit account. "Control" under this section may serve two functions. First, "control . . . pursuant to the debtor's agreement" may substitute for an authenticated security agreement as an element of attachment. See section 9-203(b)(3)(D). Second, when a deposit account is taken as original collateral, the only method of perfection is obtaining control under this section. See section 9-312(b)(1).

3. **Requirements for "Control."** This section derives from section 8-106 of revised article 8, which defines "control" of securities and certain other investment property. Under subsection (a)(1), the bank with which the deposit account is maintained has control. The effect of this provision is to afford the bank automatic perfection. No other form of public notice is necessary; all actual and potential creditors of the debtor are always on notice that the bank with which the debtor's deposit account is maintained may assert a claim against the deposit account.

Under subsection (a)(2), a secured party may obtain control by obtaining the bank's authenticated agreement that it will comply with the secured party's instructions without further consent by the debtor. The analogous provision in section 8-106 does not require that the agreement be authenticated. An agreement to comply with the secured party's instructions suffices for "control" of a deposit account under this section even if the bank's agreement is subject to specified conditions, e.g., that the secured party's instructions are accompanied by a certification that the debtor is in default. (Of course, if the condition is the *debtor's* further consent, the statute explicitly provides that the agreement would *not* confer control.) See revised section 8-106, comment 7.

Under subsection (a)(3), a secured party may obtain control by becoming the bank's "customer," as defined in section 4-104. As the customer, the secured party would enjoy the right (but not necessarily the exclusive right) to withdraw funds from, or close, the deposit account. See sections 4-401(a) and 4-403(a).

Although the arrangements giving rise to control may themselves prevent, or may enable the secured party at its discretion to prevent, the debtor from reaching the funds on deposit, subsection (b) makes clear that the debtor's ability to reach the funds is not inconsistent with "control."

Perfection by control is not available for bank accounts evidenced by an instrument (e.g., certain certificates of deposit), which by definition are "instruments" and not "deposit accounts." See section 9-102 (defining "deposit account" and "instrument").

§ 25-9-105. (Effective July 1, 2001) Control of electronic chattel paper.

A secured party has control of electronic chattel paper if the record or records comprising the chattel paper are created, stored, and assigned in such a manner that:

(1) A single authoritative copy of the record or records exists which is unique, identifiable and, except as otherwise provided in subdivisions (4), (5), and (6) of this section, unalterable;

(2) The authoritative copy identifies the secured party as the assignee of the record or records;

(3) The authoritative copy is communicated to and maintained by the secured party or its designated custodian;

(4) Copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the participation of the secured party;
(5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and
(6) Any revision of the authoritative copy is readily identifiable as an authorized or unauthorized revision. (1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7; 1989 (Reg. Sess., 1990), c. 1024, s. 8(g); 1997-181, s. 3; 1997-456, s. 4; 1999-73, s. 6; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **"Control" of Electronic Chattel Paper.** This article covers security interests in "electronic chattel paper," a new term defined in section 9-102. This section governs how "control" of electronic chattel paper may be obtained. A secured party's control of electronic chattel paper (i) may substitute for an authenticated security agreement for purposes of attachment under section 9-203, (ii) is a method of perfection under section 9-314, and (iii) is a condition for obtaining special, nontemporal priority under section 9-330. Because electronic chattel paper cannot be transferred, assigned, or possessed in the same manner as tangible chattel paper, a special definition of control is necessary. In descriptive terms, this section provides that control of electronic chattel paper is the functional equivalent of possession of "tangible chattel paper" (a term also defined in section 9-102).

3. **"Authoritative Copy" of Electronic Chattel Paper.** One requirement for establishing control is that a particular copy be an "authoritative copy." Although other copies may exist, they must be distinguished from the authoritative copy. This may be achieved, for example, through the methods of authentication that are used or by business practices involving the marking of any additional copies. When tangible chattel paper is converted to electronic chattel paper, in order to establish that a copy of the electronic chattel paper is the authoritative copy it may be necessary to show that the tangible chattel paper no longer exists or has been permanently marked to indicate that it is not the authoritative copy.

4. **Development of Control Systems.** This article leaves to the marketplace the development of systems and procedures, through a combination of suitable technologies and business practices, for dealing with control of electronic chattel paper in a commercial context. However, achieving control under this section requires more than the agreement of interested persons that the elements of control are satisfied. For example, paragraph (4) contemplates that control requires that it be a physical impossibility (or sufficiently unlikely or implausible so as to approach practical impossibility) to add or change an identified assignee without the participation of the secured party (or its authorized representative). It would not be enough for the assignor merely to agree that it will not change the identified assignee without the assignee-secured party's consent. However, the standards applied to determine whether a party is in control of electronic chattel paper should not be more stringent than the standards now applied to determine whether a party is in possession of tangible chattel paper. Control of electronic chattel paper contemplates systems or procedures such that the secured party must take some action (either directly or through its designated custodian) to effect a change or addition to the authoritative copy. But just as a secured party does not lose possession of tangible chattel paper merely by virtue of the possibility that a person acting on its behalf *could* wrongfully redeliver the chattel paper to the debtor, so control of electronic chattel paper would not be defeated by the possibility that the secured party's interest *could* be subverted by the wrongful conduct of a person (such as a custodian) acting on its behalf.

Systems that evolve for control of electronic chattel paper may or may not involve a third party custodian of the relevant records. However, this section and the concept of control of electronic chattel paper are not based on the same concepts as are control of deposit accounts (section 9-104), security entitlements, a type of investment property (section 9-106), and letter-of-credit rights (section 9-107). The rules for control of that collateral are based on existing market practices and legal and regulatory regimes for institutions such as banks and securities intermediaries. Analogous practices for electronic chattel paper are developing nonetheless. The flexible approach adopted by this section, moreover, should not impede the development of these practices and, eventually, legal and regulatory regimes, which may become analogous to those for, e.g., investment property.

§ 25-9-106. (Effective July 1, 2001) Control of investment property.

(a) Control under G.S. 25-8-106. — A person has control of a certificated security, uncertificated security, or security entitlement as provided in G.S. 25-8-106.

(b) Control of commodity contract. — A secured party has control of a commodity contract if:

(1) The secured party is the commodity intermediary with which the commodity contract is carried; or

(2) The commodity customer, secured party, and commodity intermediary have agreed that the commodity intermediary will apply any value distributed on account of the commodity contract as directed by the secured party without further consent by the commodity customer.

(c) Effect of control of securities account or commodity account. — A secured party having control of all security entitlements or commodity contracts carried in a securities account or commodity account has control over the securities account or commodity account. (1945, c. 196, s. 1; 1957, c. 504; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7; 1997-181, s. 4; 1999-73, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-115(e).

2. **"Control" Under Article 8.** For an explanation of "control" of securities and certain other investment property, see section 8-106, comments 4 and 7.

3. **"Control" of Commodity Contracts.** This section, as did former section 9-115(1)(e), contains provisions relating to control of commodity contracts which are analogous to those in section 8-106 for other types of investment property.

4. **Securities Accounts and Commodity Accounts.** For drafting convenience, control with respect to a securities account or commodity account is defined in terms of obtaining control over the security entitlements or commodity contracts. Of course, an agreement that provides that (without further consent of the debtor) the securities intermediary or commodity intermediary will honor instructions from the secured party concerning a securities account or commodity account described as such is sufficient. Such an agreement necessarily implies that the intermediary will honor instructions concerning all security entitlements or commodity contracts carried in the account and thus affords the secured party control of all the security entitlements or commodity contracts.

§ 25-9-107. (Effective July 1, 2001) Control of letter-of-credit right.

A secured party has control of a letter-of-credit right to the extent of any right to payment or performance by the issuer or any nominated person if the issuer or nominated person has consented to an assignment of proceeds of the letter of credit under G.S. 25-5-114(c) or otherwise applicable law or practice. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 1993, c. 370, s. 1; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **"Control" of Letter-of-Credit Right.** Whether a secured party has control of a letter-of-credit right may determine the secured party's priority as against competing secured parties. See section 9-329. This section provides that a secured party acquires control of a letter-of-credit right by receiving an assignment if the secured party obtains the consent of the issuer or any nominated person, such as a confirmer or negotiating bank, under section 5-114 or other applicable law or practice. Because both issuers and nominated persons may give or be obligated to give value under a letter of credit, this section contemplates that a secured party obtains control of a letter-of-credit right with respect to the issuer or a particular nominated person only to the extent that the issuer or that

nominated person consents to the assignment. For example, if a secured party obtains control to the extent of an issuer's obligation but fails to obtain the consent of a nominated person, the secured party does not have control to the extent that the nominated person gives value. In many cases the person or persons who will give value under a letter of credit will be clear from its terms. In other cases, prudence may suggest obtaining consent from more than one person. The details of the consenting issuer's or nominated person's duties to pay or otherwise render performance to the secured party are left to the agreement of the parties.

3. **"Proceeds of a Letter of Credit."** Section 5-114 follows traditional banking terminology by referring to a letter of credit beneficiary's assignment of its right to receive payment thereunder as an assignment of the "proceeds of a letter of credit." However, as the seller of goods can assign its right to receive payment (an "account") before it has been earned by delivering the goods to the buyer, so the beneficiary of a letter of credit can assign its contingent right to payment before the letter of credit has been honored. See section 5-114(b). If the assignment creates a security interest, the security interest can be perfected at the time it is created. An assignment of, including the creation of a security interest in, a letter-of-credit right is an assignment of a present interest.

4. **"Transfer" vs. "Assignment."** Letter-of-credit law and practice distinguish the "transfer" of a letter of credit from an "assignment." Under a transfer, the transferee itself becomes the beneficiary and acquires the right to draw. Whether a new, substitute credit is issued or the issuer advises the transferee of its status as such, the transfer constitutes a novation under which the transferee is the new, substituted beneficiary (but only to the extent of the transfer, in the case of a partial transfer).

Section 5-114(e) provides that the rights of a transferee beneficiary or nominated person are independent of the beneficiary's assignment of the proceeds of a letter of credit and are superior to the assignee's right to the proceeds. For this reason, transfer does not appear in this article as a means of control or perfection. Section 9-109(c)(4) recognizes the independent and superior rights of a transferee beneficiary under section 5-114(e); this article does not apply to the rights of a transferee beneficiary or nominated person to the extent that those rights are independent and superior under section 5-114.

5. **Supporting Obligation: Automatic Attachment and Perfection.** A letter-of-credit right is a type of "supporting obligation," as defined in section 9-102. Under sections 9-203 and 9-308, a security interest in a letter-of-credit right automatically attaches and is automatically perfected if the security interest in the supported obligation is a perfected security interest. However, unless the secured party has control of the letter-of-credit right or itself becomes a transferee beneficiary, it cannot obtain any rights against the issuer or a nominated person under article 5. Consequently, as a practical matter, the secured party's rights would be limited to its ability to locate and identify proceeds distributed by the issuer or nominated person under the letter of credit.

§ 25-9-108. (Effective July 1, 2001) Sufficiency of description.

(a) Sufficiency of description. — Except as otherwise provided in subsections (c), (d), and (e) of this section, a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.

(b) Examples of reasonable identification. — Except as otherwise provided in subsection (d) of this section, a description of collateral reasonably identifies the collateral if it identifies the collateral by:

(1) Specific listing;

(2) Category;

(3) Except as otherwise provided in subsection (e) of this section, a type of collateral defined in this Chapter;

(4) Quantity;

(5) Computational or allocational formula or procedure; or

(6) Except as otherwise provided in subsection (c) of this section, any other method, if the identity of the collateral is objectively determinable.

(c) Supergeneric description not sufficient. — A description of collateral as "all the debtor's assets" or "all the debtor's personal property" or using words of similar import does not reasonably identify the collateral.

(d) Investment property. — Except as otherwise provided in subsection (e) of this section, a description of a security entitlement, securities account, or commodity account is sufficient if it describes:

(1) The collateral by those terms or as investment property; or

(2) The underlying financial asset or commodity contract.

(e) When description by type insufficient. — A description only by type of collateral defined in this Chapter is an insufficient description of:

(1) A commercial tort claim; or

(2) In a consumer transaction, consumer goods, a security entitlement, a securities account, or a commodity account. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former sections 9-110 and 9-115(3).

2. **General Rules.** Subsection (a) retains substantially the same formulation as former section 9-110. Subsection (b) expands upon subsection (a) by indicating a variety of ways in which a description might reasonably identify collateral. Whereas a provision similar to subsection (b) was applicable only to investment property under former section 9-115(3), subsection (b) applies to all types of collateral, subject to the limitation in subsection (d). Subsection (b) is subject to subsection (c), which follows prevailing case law and adopts the view that an "all assets" or "all personal property" description for purposes of a *security agreement* is *not* sufficient. Note, however, that under section 9-504, a *financing statement* sufficiently indicates the collateral if it "covers all assets or all personal property."

The purpose of requiring a description of collateral in a security agreement under section 9-203 is evidentiary. The test of sufficiency of a description under this section, as under former section 9-110, is that the description do the job assigned to it: Make possible the identification of the collateral described. This section rejects any requirement that a description is insufficient unless it is exact and detailed (the so-called "serial number" test).

3. **After-Acquired Collateral.** Much litigation has arisen over whether a description in a security agreement is sufficient to include after-acquired collateral if the agreement does not explicitly so provide. This question is one of contract interpretation and is not susceptible to a statutory rule (other than a rule to the effect that it is a question of contract interpretation). Accordingly, this section contains no reference to descriptions of after-acquired collateral.

4. **Investment Property.** Under subsection (d), the use of the wrong article 8 terminology does not render a description invalid (e.g., a security agreement intended to cover a debtor's "security entitlements" is sufficient if it refers to the debtor's "securities"). Note also that given the broad definition of "securities account" in section 8-501, a security interest in a securities account also includes all other rights of the debtor against the securities intermediary arising out of the securities account. For example, a security interest in a securities account would include credit balances due to the debtor from the securities intermediary, whether or not they are proceeds of a security entitlement. Moreover, describing collateral as a securities account is a simple way of describing all of the security entitlements carried in the account.

5. **Consumer Investment Property; Commercial Tort Claims.** Subsection (e) requires greater specificity of description in order to prevent debtors from inadvertently encumbering certain property. Subsection (e) requires that a description by defined "type" of collateral alone of a commercial tort claim or, in a consumer transaction, of a security entitlement, securities account, or commodity account, is not sufficient. For example, "all existing and after-acquired investment property" or "all existing and after-acquired security entitlements," without more, would be insufficient in a consumer transaction to describe a security entitlement, securities account, or commodity account. The reference to "*only* by type" in subsection (e) means that a description is sufficient if it satisfies subsection (a) and contains a descriptive component beyond the "type" alone. Moreover, if the collateral consists of a securities account or commodity account, a description of the account is sufficient to cover all existing and future security entitlements or commodity contracts carried in the account. See section 9-203(h) and (i).

Under section 9-204, an after-acquired collateral clause in a security agreement will not reach future commercial tort claims. It follows that when an effective security agreement covering a commercial tort claim is entered into the claim already will exist. Subsection (e) does not require a description to be specific. For example, a description such as "all tort claims arising out of the explosion of debtor's factory" would suffice, even if the exact amount of the

claim, the theory on which it may be based, and the identity of the tortfeasor(s) are not described. (Indeed, those facts may not be known at the time.)

SUBPART 2. Applicability of Article.

§ 25-9-109. (Effective July 1, 2001) Scope.

(a) General scope of Article. — Except as otherwise provided in subsections (c) and (d) of this section, this Article applies to:

(1) A transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;

(2) An agricultural lien;

(3) A sale of accounts, chattel paper, payment intangibles, or promissory notes;

(4) A consignment;

(5) A security interest arising under G.S. 25-2-401, 25-2-505, 25-2-711(3), or 25-2A-508(5), as provided in G.S. 25-9-110; and

(6) A security interest arising under G.S. 25-4-208 or G.S. 25-5-118.

(b) Security interest in secured obligation. — The application of this Article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this Article does not apply.

(c) Extent to which Article does not apply. — This Article does not apply to the extent that:

(1) A statute, regulation, or treaty of the United States preempts this Article;

(2) Another statute of this State expressly governs the creation, perfection, priority, or enforcement of a security interest created by this State or a governmental unit of this State;

(3) A statute of another state, a foreign country, or a governmental unit of another state or a foreign country, other than a statute generally applicable to security interests, expressly governs creation, perfection, priority, or enforcement of a security interest created by the state, country, or governmental unit; or

(4) The rights of a transferee beneficiary or nominated person under a letter of credit are independent and superior under G.S. 25-5-114.

(d) Inapplicability of Article. — This Article does not apply to:

(1) A landlord's lien, other than an agricultural lien;

(2) A lien, other than an agricultural lien, given by statute or other rule of law for services or materials, but G.S. 25-9-333 applies with respect to priority of the lien;

(3) An assignment of a claim for wages, salary, or other compensation of an employee;

(4) A sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose;

(5) An assignment of accounts, chattel paper, payment intangibles, or promissory notes which is for the purpose of collection only;

(6) An assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract;

(7) An assignment of a single account, payment intangible, or promissory note to an assignee in full or partial satisfaction of a preexisting indebtedness;

(8) A transfer of an interest in or an assignment of a claim under a policy of insurance, other than an assignment by or to a health-care provider of a health-care-insurance receivable and any subsequent assignment

of the right to payment, but G.S. 25-9-315 and G.S. 25-9-322 apply with respect to proceeds and priorities in proceeds;

(9) An assignment of a right represented by a judgment, other than a judgment taken on a right to payment that was collateral;

(10) A right of recoupment or setoff, but:

a. G.S. 25-9-340 applies with respect to the effectiveness of rights of recoupment or setoff against deposit accounts; and

b. G.S. 25-9-404 applies with respect to defenses or claims of an account debtor;

(11) The creation or transfer of an interest in or lien on real property, including a lease or rents thereunder, except to the extent that provision is made for:

a. Liens on real property in G.S. 25-9-203 and G.S. 25-9-308;

b. Fixtures in G.S. 25-9-334;

c. Fixture filings in G.S. 25-9-501, 25-9-502, 25-9-512, 25-9-516, and 25-9-519; and

d. Security agreements covering personal and real property in G.S. 25-9-604;

(12) An assignment of a claim arising in tort, other than a commercial tort claim, but G.S. 25-9-315 and G.S. 25-9-322 apply with respect to proceeds and priorities in proceeds; or

(13) An assignment of a deposit account in a consumer transaction, but G.S. 25-9-315 and G.S. 25-9-322 apply with respect to proceeds and priorities in proceeds. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former sections 9-102 and 9-104.

2. **Basic Scope Provision.** Subsection (a)(1) derives from former section 9-102(1) and (2). These subsections have been combined and shortened. No change in meaning is intended. Under subsection (a)(1), all consensual security interests in personal property and fixtures are covered by this article, except for transactions excluded by subsections (c) and (d). As to which transactions give rise to a "security interest," the definition of that term in section 1-201 must be consulted. When a security interest is created, this article applies regardless of the form of the transaction or the name that parties have given to it.

3. **Agricultural Liens.** Subsection (a)(2) is new. It expands the scope of this article to cover agricultural liens, as defined in section 9-102.

4. **Sales of Accounts, Chattel Paper, Payment Intangibles, Promissory Notes, and Other Receivables.** Under subsection (a)(3), as under former section 9-102, this article applies to sales of accounts and chattel paper. This approach generally has been successful in avoiding difficult problems of distinguishing between transactions in which a receivable secures an obligation and those in which the receivable has been sold outright. In many commercial financing transactions the distinction is blurred.

Subsection (a)(3) expands the scope of this article by including the sale of a "payment intangible" (defined in section 9-102 as "a general intangible under which the account debtor's principal obligation is a monetary obligation") and a "promissory note" (also defined in section 9-102). To a considerable extent, this article affords these transactions treatment identical to that given sales of accounts and chattel paper. In some respects, however, sales of payment intangibles and promissory notes are treated differently from sales of other receivables. See, e.g., sections 9-309 (automatic perfection upon attachment) and 9-408 (effect of restrictions on assignment). By virtue of the expanded definition of "account" (defined in section 9-102), this article now covers sales of (and other security interests in) "health-care-insurance receivables" (also defined in section 9-102). Although this article occasionally distinguishes between outright sales of receivables and sales that secure an obligation, neither this article nor the definition of "security interest" (section 1-201(37)) delineates how a particular transaction is to be classified. That issue is left to the courts.

5. **Transfer of Ownership in Sales of Receivables.** A "sale" of an account, chattel paper, a promissory note, or a payment intangible includes a sale of a right in the receivable, such as a sale of a participation interest. The term also includes the sale of an enforcement right. For example, a "(p)erson entitled to enforce" a negotiable promissory note (section

3-301) may sell its ownership rights in the instrument. See section 3-203, comment 1 ("Ownership rights in instruments may be determined by principles of the law of property, independent of article 3, which do not depend upon whether the instrument was transferred under section 3-203."). Also, the right under section 3-309 to enforce a lost, destroyed, or stolen negotiable promissory note may be sold to a purchaser who could enforce that right by causing the seller to provide the proof required under that section. This article rejects decisions reaching a contrary result, e.g., *Dennis Joslin Co. v. Robinson Broadcasting*, 977 F.Supp. 491 (D.D.C. 1997).

Nothing in this section or any other provision of article 9 prevents the transfer of full and complete ownership of an account, chattel paper, an instrument, or a payment intangible in a transaction of sale. However, as mentioned in comment 4, neither this article nor the definition of "security interest" in section 1-201 provides rules for distinguishing sales transactions from those that create a security interest securing an obligation. This article applies to both types of transactions. The principal effect of this coverage is to apply this article's perfection and priority rules to these sales transactions. Use of terminology such as "security interest," "debtor," and "collateral" is merely a drafting convention adopted to reach this end, and its use has no relevance to distinguishing sales from other transactions. See PEB Commentary No. 14.

Following a debtor's outright sale and transfer of ownership of a receivable, the debtor-seller retains no legal or equitable rights in the receivable that has been sold. See section 9-318(a). This is so whether or not the buyer's security interest is perfected. (A security interest arising from the sale of a promissory note or payment intangible is perfected upon attachment without further action. See section 9-309.) However, if the buyer's interest in accounts or chattel paper is unperfected, a subsequent lien creditor, perfected secured party, or qualified buyer can reach the sold receivable and achieve priority over (or take free of) the buyer's unperfected security interest under section 9-317. This is so not because the seller of a receivable retains rights in the property sold; it does not. Nor is this so because the seller of a receivable is a "debtor" and the buyer of a receivable is a "secured party" under this article (they are). It is so for the simple reason that sections 9-317, 9-318(b), and 9-322 make it so, as did former sections 9-301 and 9-312. Because the buyer's security interest is unperfected, for purposes of determining the rights of creditors of and purchasers for value from the debtor-seller, under section 9-318(b) the debtor-seller is deemed to have the rights and title it sold. Section 9-317 subjects the buyer's unperfected interest in accounts and chattel paper to that of the debtor-seller's lien creditor and other persons who qualify under that section.

6. **Consignments.** Subsection (a)(4) is new. This article applies to every "consignment." The term, defined in section 9-102, includes many but not all "true" consignments (i.e., bailments for the purpose of sale). If a transaction is a "sale or return," as defined in revised section 2-326, it is not a "consignment." In a "sale or return" transaction, the buyer becomes the owner of the goods, and the seller may obtain an enforceable security interest in the goods only by satisfying the requirements of section 9-203.

Under common law, creditors of a bailee were unable to reach the interest of the bailor (in the case of a consignment, the consignor-owner). Like former section 2-326 and former article 9, this article changes the common law result; however, it does so in a different manner. For purposes of determining the rights and interests of third-party creditors of, and purchasers of the goods from, the consignee, but not for other purposes, such as remedies of the consignor, the consignee is deemed to acquire under this article whatever rights and title the consignor had or had power to transfer. See section 9-319. The interest of a consignor is defined to be a security interest under revised section 1-201(37), more specifically, a purchase-money security interest in the consignee's inventory. See section 9-103(d). Thus, the rules pertaining to lien creditors, buyers, and attachment, perfection, and priority of competing security interests apply to consigned goods. The relationship between the consignor and consignee is left to other law. Consignors also have no duties under part 6. See section 9-601(g).

Sometimes parties characterize transactions that secure an obligation (other than the bailee's obligation to returned bailed goods) as "consignments." These transactions are not "consignments" as contemplated by section 9-109(a)(4). See section 9-102. This article applies also to these transactions, by virtue of section 9-109(a)(1). They create a security interest within the meaning of the first sentence of section 1-201(37).

This article does not apply to bailments for sale that fall outside the definition of "consignment" in section 9-102 and that do not create a security interest that secures an obligation.

7. **Security Interest in Obligation Secured by Nonarticle 9 Transaction.** Subsection (b) is unchanged in substance from former section 9-102(3). The following example provides an illustration.

Example 1: O borrows $10,000 from M and secures its repayment obligation, evidenced by a promissory note, by granting to M a mortgage on O's land. This article does not apply to the creation of the real property mortgage. How-

ever, if M sells the promissory note to X or gives a security interest in the note to secure M's own obligation to X, this article applies to the security interest thereby created in favor of X. The security interest in the promissory note is covered by this article even though the note is secured by a real property mortgage. Also, X's security interest in the note gives X an attached security interest in the mortgage lien that secures the note and, if the security interest in the note is perfected, the security interest in the mortgage lien likewise is perfected. See sections 9-203 and 9-308.

It also follows from subsection (b) that an attempt to obtain or perfect a security interest in a secured obligation by complying with nonarticle 9 law, as by an assignment of record of a real property mortgage, would be ineffective. Finally, it is implicit from subsection (b) that one cannot obtain a security interest in a lien, such as a mortgage on real property, that is not also coupled with an equally effective security interest in the secured obligation. This article rejects cases such as In re *Maryville Savings & Loan Corp.*, 743 F.2d 413 (6th Cir. 1984), clarified on reconsideration, 760 F.2d 119 (1985).

8. **Federal Preemption.** Former section 9-104(a) excluded from article 9 "a security interest subject to any statute of the United States, to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property." Some (erroneously) read the former section to suggest that article 9 sometimes deferred to federal law even when federal law did not preempt article 9. Subsection (c)(1) recognizes explicitly that this article defers to federal law only when and to the extent that it must—i.e., when federal law preempts it.

9. **Governmental Debtors.** Former section 9-104(e) excluded transfers by governmental debtors. It has been revised and replaced by the exclusions in new paragraphs (2) and (3) of subsection (c). These paragraphs reflect the view that article 9 should apply to security interests created by a state, foreign country, or a "governmental unit" (defined in section 9-102) of either except to the extent that another statute governs the issue in question. Under paragraph (2), this article defers to all statutes of the forum state. (A forum cannot determine whether it should consult the choice of law rules in the forum's UCC unless it first determines that its UCC applies to the transaction before it.) Paragraph (3) defers to statutes of another state or a foreign country only to the extent that those statutes contain rules applicable specifically to security interests created by the governmental unit in question.

Example 2: A New Jersey state commission creates a security interest in favor of a New York bank. The validity of the security interest is litigated in New York. The relevant security agreement provides that it is governed by New York law. To the extent that a New Jersey statute contains rules peculiar to creation of security interests by governmental units generally, to creation of security interests by state commissions, or to creation of security interests by this particular state commission, then that law will govern. On the other hand, to the extent that New Jersey law provides that security interests created by governmental units, state commissions, or this state commission are governed by the law generally applicable to secured transactions (i.e., New Jersey's article 9), then New York's article 9 will govern.

Example 3: An airline that is an instrumentality of a foreign country creates a security interest in favor of a New York bank. The analysis used in the previous example would apply here. That is, if the matter is litigated in New York, New York law would govern except to the extent that the foreign country enacted a statute applicable to security interests created by governmental units generally or by the airline specifically.

The fact that New York law applies does not necessarily mean that perfection is accomplished by filing in New York. Rather, it means that the court should apply New York's article 9, including its choice of law provisions. Under New York's section 9-301, perfection is governed by the law of the jurisdiction in which the debtor is located. Section 9-307 determines the debtor's location for choice of law purposes.

If a transaction does not bear an appropriate relation to the forum state, then that state's article 9 will not apply, regardless of whether the transaction would be excluded by paragraph (3).

Example 4: A Belgian governmental unit grants a security interest in its equipment to a Swiss secured party. The equipment is located in Belgium. A dispute arises and, for some reason, an action is brought in a New Mexico state court. Inasmuch as the transaction bears no "appropriate relation" to New Mexico, New Mexico's UCC, including its article 9, is inapplicable. See section 1-105(1). New Mexico's section 9-109(c) on excluded transactions should not come into play. Even if the parties agreed that New Mexico law would govern, the parties' agreement would not be effective because the transaction does not bear a "reasonable relation" to New Mexico. See section 1-105(1).

Conversely, article 9 will come into play only if the litigation arises in a UCC jurisdiction or if a foreign choice of law rule leads a foreign court to apply the law of a UCC jurisdiction. For example, if issues concerning a security interest granted by a foreign airline to a New York bank are litigated overseas, the court may be bound to apply the law of the debtor's jurisdic-

tion and not New York's article 9.

10. **Certain Statutory and Common-Law Liens; Interests in Real Property.** With few exceptions (nonconsensual agricultural liens being one), this article applies only to consensual security interests in personal property. Following former section 9-104(b) and (j), paragraphs (1) and (11) of subsection (d) exclude landlord's liens and leases and most other interests in or liens on real property. These exclusions generally reiterate the limitations on coverage (i.e., "by contract," "in personal property and fixtures") made explicit in subsection (a)(1). Similarly, most jurisdictions provide special liens to suppliers of many types of services and materials, either by statute or by common law. With the exception of agricultural liens, it is not necessary for this article to provide general codification of this lien structure, which is determined in large part by local conditions and which is far removed from ordinary commercial financing. As under former section 9-104(c), subsection (d)(2) excludes these suppliers' liens (other than agricultural liens) from this article. However, section 9-333 provides a rule for determining priorities between certain possessory suppliers' liens and security interests covered by this article.

11. **Wage and Similar Claims.** As under former section 9-104(d), subsection (d)(3) excludes assignments of claims for wages and the like from this article. These assignments present important social issues that other law addresses. The Federal Trade Commission has ruled that, with some exceptions, the taking of an assignment of wages or other earnings is an unfair act or practice under the Federal Trade Commission Act. See 16 C.F.R. part 444. State statutes also may regulate such assignments.

12. **Certain Sales and Assignments of Receivables; Judgments.** In general this article covers security interests in (including sales of) accounts, chattel paper, payment intangibles, and promissory notes. Paragraphs (4), (5), (6), and (7) of subsection (d) exclude from the article certain sales and assignments of receivables that, by their nature, do not concern commercial financing transactions. These paragraphs add to the exclusions in former section 9-104(f) analogous sales and assignments of payment intangibles and promissory notes. For similar reasons, subsection (d)(9) retains the exclusion of assignments of judgments under former section 9-104(h) (other than judgments taken on a right to payment that itself was collateral under this article).

13. **Insurance.** Subsection (d)(8) narrows somewhat the broad exclusion of interests in insurance policies under former section 9-104(g). This article now covers assignments by or to a health-care provider of "health-care-insurance receivables" (defined in section 9-102).

14. **Set-Off.** Subsection (d)(10) adds two exceptions to the general exclusion of set-off rights from article 9 under former section 9-104(i). The first takes account of new section 9-340, which regulates the effectiveness of a set-off against a deposit account that stands as collateral. The second recognizes section 9-404, which affords the obligor on an account, chattel paper, or general intangible the right to raise claims and defenses against an assignee (secured party).

15. **Tort Claims.** Subsection (d)(12) narrows somewhat the broad exclusion of transfers of tort claims under former section 9-104(k). This article now applies to assignments of "commercial tort claims" (defined in section 9-102) as well as to security interests in tort claims that constitute proceeds of other collateral (e.g., a right to payment for negligent destruction of the debtor's inventory). Note that once a claim arising in tort has been settled and reduced to a contractual obligation to pay, the right to payment becomes a payment intangible and ceases to be a claim arising in tort.

This article contains two special rules governing creation of a security interest in tort claims. First, a description of collateral in a security agreement as "all tort claims" is insufficient to meet the requirement for attachment. See section 9-108(e). Second, no security interest attaches under an after-acquired property clause to a tort claim. See section 9-204(b). In addition, this article does not determine whom the tortfeasor must pay to discharge its obligation. Inasmuch as a tortfeasor is not an "account debtor," the rules governing waiver of defenses and discharge of an obligation by an obligor (sections 9-403, 9-404, 9-405, and 9-406) are inapplicable to tort claim collateral.

16. **Deposit Accounts.** Except in consumer transactions, deposit accounts may be taken as original collateral under this article. Under former section 9-104(l), deposit accounts were excluded as original collateral, leaving security interests in deposit accounts to be governed by the common law. The common law is nonuniform, often difficult to discover and comprehend, and frequently costly to implement. As a consequence, debtors who wished to use deposit accounts as collateral sometimes were precluded from doing so as a practical matter. By excluding deposit accounts from the article's scope as original collateral in consumer transactions, subsection (d)(13) leaves those transactions to law other than this article. However, in both consumer and nonconsumer transactions, sections 9-315 and 9-322 apply to deposit accounts as proceeds and with respect to priorities in proceeds.

This article contains several safeguards to protect debtors against inadvertently encumbering deposit accounts and to reduce the likelihood that a secured party will realize a wind-

fall from a debtor's deposit accounts. For example, because "deposit account" is a separate type of collateral, a security agreement covering general intangibles will not adequately describe deposit accounts. Rather, a security agreement must reasonably identify the deposit accounts that are the subject of a security interest, e.g., by using the term "deposit accounts." See section 9-108. To perfect a security interest in a deposit account as original collateral, a secured party (other than the bank with which the deposit account is maintained) must obtain "control" of the account either by obtaining the bank's authenticated agreement or by becoming the bank's customer with respect to the deposit account. See sections 9-104 and 9-312(b)(1). Either of these steps requires the debtor's consent.

This article also contains new rules that determine which state's law governs perfection and priority of a security interest in a deposit account (section 9-304), priority of conflicting security interests in and set-off rights against a deposit account (sections 9-327 and 9-340), the rights of transferees of funds from an encumbered deposit account (section 9-332), the obligations of the bank (section 9-341), enforcement of security interests in a deposit account (section 9-607(c)), and the duty of a secured party to terminate control of a deposit account (section 9-208(b)).

§ 25-9-110. (Effective July 1, 2001) Security interests arising under Article 2 or 2A of this Chapter.

A security interest arising under G.S. 25-2-401, 25-2-505, 25-2-711(3), or 25-2A-508(5) is subject to this Article. However, until the debtor obtains possession of the goods:

(1) The security interest is enforceable, even if G.S. 25-9-203(b)(3) has not been satisfied;

(2) Filing is not required to perfect the security interest;

(3) The rights of the secured party after default by the debtor are governed by Article 2 or 2A of this Chapter; and

(4) The security interest has priority over a conflicting security interest created by the debtor. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 1993, c. 463, s. 3; 2000-169, § 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-113.

2. **Background.** Former section 9-113, from which this section derives, referred generally to security interests "arising solely under the Article on Sales (Article 2) or the Article on Leases (Article 2A)." Views differed as to the precise scope of that section. In contrast, section 9-110 specifies the security interests to which it applies.

3. **Security Interests Under Articles 2 and 2A.** Section 2-505 explains how a seller of goods may reserve a security interest in them. Section 2-401 indicates that a reservation of title by the seller of goods, despite delivery to the buyer, is limited to reservation of a security interest. As did former article 9, this article governs a security interest arising solely under one of those sections; however, until the buyer obtains possession of the goods, the security interest is enforceable even in the absence of a security agreement, filing is not necessary to perfect the security interest, and the seller-secured party's rights on the buyer's default are governed by article 2.

Sections 2-711(3) and 2A-508(5) create a security interest in favor of a buyer or lessee in possession of goods that were rightfully rejected or as to which acceptance was justifiably revoked. As did former article 9, this article governs a security interest arising solely under one of those sections; however, until the seller or lessor obtains possession of the goods, the security interest is enforceable even in the absence of a security agreement, filing is not necessary to perfect the security interest, and the secured party's (buyer's or lessee's) rights on the debtor's (seller's or lessor's) default are governed by article 2 or 2A, as the case may be.

4. **Priority.** This section adds to former section 9-113 a priority rule. Until the debtor obtains possession of the goods, a security interest arising under one of the specified sections of article 2 or 2A has priority over conflicting security interests created by the debtor. Thus, a security interest arising under section 2-401 or 2-505 has priority over a conflicting security interest in the buyer's after-acquired goods, even if the goods in question are inventory. Arguably, the same result would obtain under section 9-322, but even if it would not, a purchase-money-like priority is appropriate. Similarly, a security interest under section 2-711(3) or 2A-508(5) has priority over security interests claimed by the seller's or lessor's

secured lender. This result is appropriate, inasmuch as the payments giving rise to the debt secured by the article 2 or 2A security interest are likely to be included among the lender's proceeds.

Example: Seller owns equipment subject to a security interest created by Seller in favor of Lender. Buyer pays for the equipment, accepts the goods, and then justifiably revokes acceptance. As long as Seller does not recover possession of the equipment, Buyer's security interest under section 2-711(3) is senior to that of Lender.

In the event that a security interest referred to in this section conflicts with a security interest that is created by a person other than the debtor, section 9-325 applies. Thus, if Lender's security interest in the example was created not by Seller but by the person from whom Seller acquired the goods, section 9-325 would govern.

5. **Relationship to Other Rights and Remedies Under Articles 2 and 2A.** This article does not specifically address the conflict between (i) a security interest created by a buyer or lessee and (ii) the seller's or lessor's right to withhold delivery under section 2-702(1), 2-703(a), or 2A-525, the seller's or lessor's right to stop delivery under section 2-705 or 2A-526, or the seller's right to reclaim under section 2-507(2) or 2-702(2). These conflicts are governed by the first sentence of section 2-403(1), under which the buyer's secured party obtains no greater rights in the goods than the buyer had or had power to convey, or section 2A-307(1), under which creditors of the lessee take subject to the lease contract.

PART 2.

Effectiveness of Security Agreement; Attachment of Security Interest; Rights of Parties to Security Agreement.

SUBPART 1. Effectiveness and Attachment.

§ 25-9-201. (Effective July 1, 2001) General effectiveness of security agreement.

(a) General effectiveness. — Except as otherwise provided in this Chapter, a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors.

(b) Applicable consumer laws and other law. — A transaction subject to this Article is subject to any applicable rule of law which establishes a different rule for consumers, to any other statute, rule, or regulation of this State that regulates the rates, charges, agreements, and practices for loans, credit sales, or other extensions of credit, and to any consumer-protection statute, rule, or regulation of this State, including Chapter 24 of the General Statutes, the Retail Installment Sales Act (Chapter 25A of the General Statutes), the North Carolina Consumer Finance Act (Article 15 of Chapter 53 of the General Statutes), and the Pawnbrokers Modernization Act of 1989 (Chapter 91A of the General Statutes).

(c) Other applicable law controls. — In case of conflict between this Article and a rule of law, statute, or regulation described in subsection (b) of this section, the rule of law, statute, or regulation controls. Failure to comply with a statute or regulation described in subsection (b) of this section has only the effect the statute or regulation specifies.

(d) Further deference to other applicable law. — This Article does not:

(1) Validate any rate, charge, agreement, or practice that violates a rule of law, statute, or regulation described in subsection (b) of this section; or

(2) Extend the application of the rule of law, statute, or regulation to a transaction not otherwise subject to it. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former sections 9-201 and 9-203(4).

2. **Effectiveness of Security Agreement.** Subsection (a) provides that a security agreement is generally effective. With certain exceptions, a security agreement is effective between the debtor and secured party and is likewise effective against third parties. Note that "security agreement" is used here (and elsewhere in this article) as it is defined in section 9-102: "(A)n agreement that creates or provides for a security interest." It follows that subsection (a) does not provide that every term or provision contained in a record that contains a security agreement or that is so labeled is effective. Properly read, former section 9-201 was to the same effect. Exceptions to the general rule of subsection (a) arise where there is an overriding provision in this article or any other article of the UCC. For example, section 9-317 subordinates unperfected security interests to lien creditors and certain buyers, and several provisions in part 3 subordinate some security interests to other security interests and interests of purchasers.

3. **Law, Statutes, and Regulations Applicable to Certain Transactions.** Subsection (b) makes clear that certain transactions, although subject to this article, also are subject to other applicable laws relating to consumers or specified in that subsection. Subsection (c) provides that the other law is controlling in the event of a conflict, and that a violation of other law does not *ipso facto* constitute a violation of this article. Subsection (d) provides that this article does not validate violations under or extend the application of the other applicable laws.

§ 25-9-202. (Effective July 1, 2001) Title to collateral immaterial.

Except as otherwise provided with respect to consignments or sales of accounts, chattel paper, payment intangibles, or promissory notes, the provisions of this Article with regard to rights and obligations apply whether title to collateral is in the secured party or the debtor. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-202.

2. **Title Immaterial.** The rights and duties of parties to a secured transaction and affected third parties are provided in this article without reference to the location of "title" to the collateral. For example, the characteristics of a security interest that secures the purchase price of goods are the same whether the secured party appears to have retained title or the debtor appears to have obtained title and then conveyed title or a lien to the secured party.

3. **When Title Matters.**

a. **Under This Article.** This section explicitly acknowledges two circumstances in which the effect of certain article 9 provisions turns on ownership (title). First, in some respects sales of accounts, chattel paper, payment intangibles, and promissory notes receive special treatment. See, e.g., sections 9-207(a), 9-210(b), and 9-615(e). Buyers of receivables under former article 9 were treated specially, as well. See, e.g., former section 9-502(2). Second, the remedies of a consignor under a true consignment and, for the most part, the remedies of a buyer of accounts, chattel paper, payment intangibles, or promissory notes are determined by other law and not by part 6. See section 9-601(g).

b. **Under Other Law.** This article does not determine which line of interpretation (e.g., title theory or lien theory, retained title or conveyed title) should be followed in cases in which the applicability of another rule of law depends upon who has title. If, for example, a revenue law imposes a tax on the "legal" owner of goods or if a corporation law makes a vote of the stockholders prerequisite to a corporation "giving" a security interest but not if it acquires property "subject" to a security interest, this article does not attempt to define whether the secured party is a "legal" owner or whether the transaction "gives" a security interest for the purpose of such laws. Other rules of law or the agreement of the parties determines the location and source of title for those purposes.

§ 25-9-203. (Effective July 1, 2001) Attachment and enforceability of security interest; proceeds; supporting obligations; formal requisites.

(a) Attachment. — A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(b) Enforceability. — Except as otherwise provided in subsections (c) through (i) of this section, a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

(1) Value has been given;

(2) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and

(3) One of the following conditions is met:

a. The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;

b. The collateral is not a certificated security and is in the possession of the secured party under G.S. 25-9-313 pursuant to the debtor's security agreement;

c. The collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under G.S. 25-8-301 pursuant to the debtor's security agreement; or

d. The collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and the secured party has control under G.S. 25-9-104, 25-9-105, 25-9-106, or 25-9-107 pursuant to the debtor's security agreement.

(c) Other UCC provisions. — Subsection (b) of this section is subject to G.S. 25-4-208 on the security interest of a collecting bank, G.S. 25-5-118 on the security interest of a letter-of-credit issuer or nominated person, G.S. 25-9-110 on a security interest arising under Article 2 or 2A of this Chapter, and G.S. 25-9-206 on security interests in investment property.

(d) When person becomes bound by another person's security agreement. — A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than this Article or by contract:

(1) The security agreement becomes effective to create a security interest in the person's property; or

(2) The person becomes generally obligated for the obligations of the other person, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

(e) Effect of new debtor becoming bound. — If a new debtor becomes bound as debtor by a security agreement entered into by another person:

(1) The agreement satisfies subdivision (b)(3) of this section with respect to existing or after-acquired property of the new debtor to the extent the property is described in the agreement; and

(2) Another agreement is not necessary to make a security interest in the property enforceable.

(f) Proceeds and supporting obligations. — The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by G.S. 25-9-315 and is also attachment of a security interest in a supporting obligation for the collateral.

(g) Lien securing right to payment. — The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.

(h) Security entitlement carried in securities account. — The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(i) Commodity contracts carried in commodity account. — The attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contracts carried in the commodity account. (1997-181, s. 5; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former sections 9-115(2), (6) and 9-203.

2. **Creation, Attachment, and Enforceability.** Subsection (a) states the general rule that a security interest attaches to collateral only when it becomes enforceable against the debtor. Subsection (b) specifies the circumstances under which a security interest becomes enforceable. Subsection (b) states three basic prerequisites to the existence of a security interest: Value (paragraph (1)), rights or power to transfer rights in collateral (paragraph (2)), and agreement plus satisfaction of an evidentiary requirement (paragraph (3)). When all of these elements exist, a security interest becomes enforceable between the parties and attaches under subsection (a). Subsection (c) identifies certain exceptions to the general rule of subsection (b).

3. **Security Agreement; Authentication.** Under subsection (b)(3), enforceability requires the debtor's security agreement and compliance with an evidentiary requirement in the nature of a statute of frauds. Paragraph (3)(A) represents the most basic of the evidentiary alternatives, under which the debtor must authenticate a security agreement that provides a description of the collateral. Under section 9-102, a "security agreement" is "an agreement that creates or provides for a security interest." Neither that definition nor the requirement of paragraph (3)(A) rejects the deeply rooted doctrine that a bill of sale, although absolute in form, may be shown in fact to have been given as security. Under this article, as under prior law, a debtor may show by parol evidence that a transfer purporting to be absolute was in fact for security. Similarly, a self-styled "lease" may serve as a security agreement if the agreement creates a security interest. See section 1-201(37) (distinguishing security interest from lease).

4. **Possession, Delivery, or Control Pursuant to Security Agreement.** The other alternatives in subsection (b)(3) dispense with the requirement of an authenticated security agreement and provide alternative evidentiary tests. Under paragraph (3)(B), the secured party's possession substitutes for the debtor's authentication under paragraph (3)(A) if the secured party's possession is "pursuant to the debtor's security agreement." That phrase refers to the debtor's agreement to the secured party's possession for the purpose of creating a security interest. The phrase should not be confused with the phrase "debtor has authenticated a security agreement," used in paragraph (3)(A), which contemplates the debtor's authentication of a record. In the unlikely event that possession is obtained without the debtor's agreement, possession would not suffice as a substitute for an authenticated security agreement. However, once the security interest has become enforceable and has attached, it is not impaired by the fact that the secured party's possession is maintained without the agreement of a subsequent debtor (e.g., a transferee). Possession as contemplated by section 9-313 is possession for purposes of subsection (b)(3)(B), even though it may not constitute possession "pursuant to the debtor's agreement" and consequently might not serve as a substitute for an authenticated security agreement under subsection (b)(3)(A). Subsection (b)(3)(C) provides that delivery of a certificated security to the secured party under section 8-301 pursuant to the debtor's security agreement is sufficient as a substitute for an authenticated security agreement. Similarly, under subsection (b)(3)(D), control of investment property, a deposit account, electronic chattel paper, or a letter-of-credit right satisfies the evidentiary test if control is pursuant to the debtor's security agreement.

5. **Collateral Covered by Other Statute or Treaty.** One evidentiary purpose of the formal requisites stated in subsection (b) is to minimize the possibility of future disputes as to the terms of a security agreement (e.g., as to the property that stands as collateral for the obligation secured). One should distinguish the evidentiary functions of the formal requisites of attachment and enforceability (such as the requirement that a security agreement contain a description of the collateral) from the more limited goals of "notice filing" for financing statements under part 5, explained in section 9-502, comment 2. When perfection is achieved by compliance with the requirements of a statute or treaty described in section 9-311(a), such as a federal recording act or a certificate-of-title statute, the manner of describing the collateral in a registry imposed by the statute or treaty may or may not be adequate for purposes of this

section and section 9-108. However, the description contained in the security agreement, not the description in a public registry or on a certificate of title, controls for purposes of this section.

6. **Debtor's Rights; Debtor's Power to Transfer Rights.** Subsection (b)(2) conditions attachment on the debtor's having "rights in the collateral or the power to transfer rights in the collateral to a secured party." A debtor's limited rights in collateral, short of full ownership, are sufficient for a security interest to attach. However, in accordance with basic personal property conveyancing principles, the baseline rule is that a security interest attaches only to whatever rights a debtor may have, broad or limited as those rights may be.

Certain exceptions to the baseline rule enable a debtor to transfer, and a security interest to attach to, greater rights than the debtor has. See part 3, subpart 3 (priority rules). The phrase, "or the power to transfer rights in the collateral to a secured party," accommodates those exceptions. In some cases, a debtor may have power to transfer another person's rights only to a class of transferees that excludes secured parties. See, e.g., section 2-403(2) (giving certain merchants power to transfer an entruster's rights to a buyer in ordinary course of business). Under those circumstances, the debtor would not have the power to create a security interest in the other person's rights, and the condition in subsection (b)(2) would not be satisfied.

7. **New Debtors.** Subsection (e) makes clear that the enforceability requirements of subsection (b)(3) are met when a new debtor becomes bound under an original debtor's security agreement. If a new debtor becomes bound as debtor by a security agreement entered into by another person, the security agreement satisfies the requirement of subsection (b)(3) as to the existing and after-acquired property of the new debtor to the extent the property is described in the agreement.

Subsection (d) explains when a new debtor becomes bound. Persons who become bound under paragraph (2) are limited to those who both become primarily liable for the original debtor's obligations and succeed to (or acquire) its assets. Thus, the paragraph excludes sureties and other secondary obligors as well as persons who become obligated through veil piercing and other nonsuccessorship doctrines. In many cases, paragraph (2) will exclude successors to the assets and liabilities of a division of a debtor. See also section 9-508, comment 3.

8. **Supporting Obligations.** Under subsection (f), a security interest in a "supporting obligation" (defined in section 9-102) automatically follows from a security interest in the underlying, supported collateral. This result was implicit under former article 9. Implicit in subsection (f) is the principle that the secured party's interest in a supporting obligation extends to the supporting obligation only to the extent that it supports the collateral in which the secured party has a security interest. Complex issues may arise, however, if a supporting obligation supports many separate obligations of a particular account debtor and if the supported obligations are separately assigned as security to several secured parties. The problems may be exacerbated if a supporting obligation is limited to an aggregate amount that is less than the aggregate amount of the obligations it supports. This article does not contain provisions dealing with competing claims to a limited supporting obligation. As under former article 9, the law of suretyship and the agreements of the parties will control.

9. **Collateral Follows Right to Payment or Performance.** Subsection (g) codifies the common law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien. See Restatement (3d), Property (Mortgages) section 5.4(a) (1997). See also section 9-308(e) (analogous rule for perfection).

10. **Investment Property.** Subsections (h) and (i) make clear that attachment of a security interest in a securities account or commodity account is also attachment in security entitlements or commodity contracts carried in the accounts.

§ 25-9-204. (Effective July 1, 2001) After-acquired property; future advances.

(a) After-acquired collateral. — Except as otherwise provided in subsection (b) of this section, a security agreement may create or provide for a security interest in after-acquired collateral.

(b) When after-acquired property clause not effective. — A security interest does not attach under a term constituting an after-acquired property clause to:

(1) Consumer goods, other than an accession when given as additional security, unless the debtor acquires rights in them within 10 days after the secured party gives value; or

(2) A commercial tort claim.

(c) Future advances and other value. — A security agreement may provide that collateral secures, or that accounts, chattel paper, payment intangibles, or promissory notes are sold in connection with future advances or other value, whether or not the advances or value are given pursuant to commitment. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C.S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, s. 2; c. 196, s. 1; 1955, c. 386, s. 1; c. 816; 1957, cc. 504, 999; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-204.

2. **After-Acquired Property; Continuing General Lien.** Subsection (a) makes clear that a security interest arising by virtue of an after-acquired property clause is no less valid than a security interest in collateral in which the debtor has rights at the time value is given. A security interest in after-acquired property is not merely an "equitable" interest; no further action by the secured party—such as a supplemental agreement covering the new collateral—is required. This section adopts the principle of a "continuing general lien" or "floating lien." It validates a security interest in the debtor's existing and (upon acquisition) future assets, even though the debtor has liberty to use or dispose of collateral without being required to account for proceeds or substitute new collateral. See section 9-205. Subsection (a), together with subsection (c), also validates "cross-collateral" clauses under which collateral acquired at any time secures advances whenever made.

3. **After-Acquired Consumer Goods.** Subsection (b)(1) makes ineffective an after-acquired property clause covering consumer goods (defined in section 9-109), except as accessions (see section 9-335), acquired more than 10 days after the secured party gives value. Subsection (b)(1) is unchanged in substance from the corresponding provision in former section 9-204(2).

4. **Commercial Tort Claims.** Subsection (b)(2) provides that an after-acquired property clause in a security agreement does not reach future commercial tort claims. In order for a security interest in a tort claim to attach, the claim must be in existence when the security agreement is authenticated. In addition, the security agreement must describe the tort claim with greater specificity than simply "all tort claims." See section 9-108(e).

5. **Future Advances; Obligations Secured.** Under subsection (c) collateral may secure future as well as past or present advances if the security agreement so provides. This is in line with the policy of this article toward security interests in after-acquired property under subsection (a). Indeed, the parties are free to agree that a security interest secures any obligation whatsoever. Determining the obligations secured by collateral is solely a matter of construing the parties' agreement under applicable law. This article rejects the holdings of cases decided under former article 9 that applied other tests, such as whether a future advance or other subsequently incurred obligation was of the same or a similar type or class as earlier advances and obligations secured by the collateral.

6. **Sales of Receivables.** Subsections (a) and (c) expressly validate after-acquired property and future advance clauses not only when the transaction is for security purposes but also when the transaction is the sale of accounts, chattel paper, payment intangibles, or promissory notes. This result was implicit under former article 9.

7. **Financing Statements.** The effect of after-acquired property and future advance clauses as components of a security agreement should not be confused with the requirements applicable to financing statements under this article's system of perfection by notice filing. The references to after-acquired property clauses and future advance clauses in this section are limited to security agreements. There is no need to refer to after-acquired property or future advances or other obligations secured in a financing statement. See section 9-502, comment 2.

§ 25-9-205. (Effective July 1, 2001) Use or disposition of collateral permissible.

(a) When security interest not invalid or fraudulent. — A security interest is not invalid or fraudulent against creditors solely because:

(1) The debtor has the right or ability to:

a. Use, commingle, or dispose of all or part of the collateral, including returned or repossessed goods;

b. Collect, compromise, enforce, or otherwise deal with collateral;
c. Accept the return of collateral or make repossessions; or
d. Use, commingle, or dispose of proceeds; or

(2) The secured party fails to require the debtor to account for proceeds or replace collateral.

(b) Requirements of possession not relaxed. — This section does not relax the requirements of possession if attachment, perfection, or enforcement of a security interest depends upon possession of the collateral by the secured party. (1945, c. 196, s. 7; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-205.

2. **Validity of Unrestricted "Floating Lien."** This article expressly validates the "floating lien" on shifting collateral. See sections 9-201, 9-204, and comment 2. This section provides that a security interest is not invalid or fraudulent by reason of the debtor's liberty to dispose of the collateral without being required to account to the secured party for proceeds or substitute new collateral. As did former section 9-205, this section repeals the rule of Benedict v. Ratner, 268 U.S. 353 (1925), and other cases which held such arrangements void as a matter of law because the debtor was given unfettered dominion or control over collateral. The Benedict rule did not effectively discourage or eliminate security transactions in inventory and receivables. Instead, it forced financing arrangements to be self-liquidating. Although this section repeals Benedict, the filing and other perfection requirements (see part 3, subpart 2, and part 5) provide for public notice that overcomes any potential misleading effects of a debtor's use and control of collateral. Moreover, nothing in this section prevents the debtor and secured party from agreeing to procedures by which the secured party polices or monitors collateral or to restrictions on the debtor's dominion. However, this article leaves these matters to agreement based on business considerations, not on legal requirements.

3. **Possessory Security Interests.** Subsection (b) makes clear that this section does not relax the requirements for perfection by possession under section 9-315. If a secured party allows the debtor access to and control over collateral its security interest may be or become unperfected.

4. **Permissible Freedom for Debtor to Enforce Collateral.** Former section 9-205 referred to a debtor's "liberty ...to collect or compromise accounts or chattel paper." This section recognizes the broader rights of a debtor to "enforce," as well as to "collect" and "compromise" collateral. This section's reference to collecting, compromising, and enforcing "collateral" instead of "accounts or chattel paper" contemplates the many other types of collateral that a debtor may wish to "collect, compromise, or enforce": E.g., deposit accounts, documents, general intangibles, instruments, investment property, and letter-of-credit rights.

§ 25-9-206. (Effective July 1, 2001) Security interest arising in purchase or delivery of financial asset.

(a) Security interest when person buys through securities intermediary. — A security interest in favor of a securities intermediary attaches to a person's security entitlement if:

(1) The person buys a financial asset through the securities intermediary in a transaction in which the person is obligated to pay the purchase price to the securities intermediary at the time of the purchase; and

(2) The securities intermediary credits the financial asset to the buyer's securities account before the buyer pays the securities intermediary.

(b) Security interest secures obligation to pay for financial asset. — The security interest described in subsection (a) of this section secures the person's obligation to pay for the financial asset.

(c) Security interest in payment against delivery transaction. — A security interest in favor of a person that delivers a certificated security or other financial asset represented by a writing attaches to the security or other financial asset if:

(1) The security or other financial asset:

a. In the ordinary course of business is transferred by delivery with any necessary indorsement or assignment; and

b. Is delivered under an agreement between persons in the business of dealing with such securities or financial assets; and

(2) The agreement calls for delivery against payment.

(d) Security interest secures obligation to pay for delivery. — The security interest described in subsection (c) of this section secures the obligation to make payment for the delivery. (1997-181, s. 6; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-116.

2. **Codification of "Broker's Lien."** Depending upon a securities intermediary's arrangements with its entitlement holders, the securities intermediary may treat the entitlement holder as entitled to financial assets before the entitlement holder has actually made payment for them. For example, many brokers permit retail customers to pay for financial assets by check. The broker may not receive final payment of the check until several days after the broker has credited the customer's securities account for the financial assets. Thus, the customer will have acquired a security entitlement prior to payment. Subsection (a) provides that, in such circumstances, the securities intermediary has a security interest in the entitlement holder's security entitlement. Under subsection (b) the security interest secures the customer's obligation to pay for the financial asset in question. Subsections (a) and (b) codify and adapt to the indirect holding system the so-called "broker's lien," which has long been recognized. See Restatement, Security section 12.

3. **Financial Assets Delivered Against Payment.** Subsection (c) creates a security interest in favor of persons who deliver certificated securities or other financial assets in physical form, such as money market instruments, if the agreed payment is not received. In some arrangements for settlement of transactions in physical financial assets, the seller's securities custodian will deliver physical certificates to the buyer's securities custodian and receive a time-stamped delivery receipt. The buyer's securities custodian will examine the certificate to ensure that it is in good order, and that the delivery matches a trade in which the buyer has instructed the seller to deliver to that custodian. If all is in order, the receiving custodian will settle with the delivering custodian through whatever funds settlement system has been agreed upon or is used by custom and usage in that market. The understanding of the trade, however, is that the delivery is conditioned upon payment, so that if payment is not made for any reason, the security will be returned to the deliverer. Subsection (c) clarifies the rights of persons making deliveries in such circumstances. It provides the person making delivery with a security interest in the securities or other financial assets; under subsection (d), the security interest secures the seller's right to receive payment for the delivery. Section 8-301 specifies when delivery of a certificated security occurs; that section should be applied as well to other financial assets as well for purposes of this section.

4. **Automatic Attachment and Perfection.** Subsections (a) and (c) refer to attachment of a security interest. Attachment under this section has the same incidents (enforceability, right to proceeds, etc.) as attachment under section 9-203. This section overrides the general attachment rules in section 9-203. See section 9-203(c). A securities intermediary's security interest under subsection (a) is perfected by control without further action. See sections 8-106 (control) and 9-314 (perfection). Security interests arising under subsection (c) are automatically perfected. See section 9-309(9).

SUBPART 2. Rights and Duties.

§ 25-9-207. (Effective July 1, 2001) Rights and duties of secured party having possession or control of collateral.

(a) Duty of care when secured party in possession. — Except as otherwise provided in subsection (d) of this section, a secured party shall use reasonable care in the custody and preservation of collateral in the secured party's possession. In the case of chattel paper or an instrument, reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.

(b) Expenses, risks, duties, and rights when secured party in possession. — Except as otherwise provided in subsection (d) of this section, if a secured party has possession of collateral:

(1) Reasonable expenses, including the cost of insurance and payment of taxes or other charges, incurred in the custody, preservation, use, or operation of the collateral are chargeable to the debtor and are secured by the collateral;

(2) The risk of accidental loss or damage is on the debtor to the extent of a deficiency in any effective insurance coverage;

(3) The secured party shall keep the collateral identifiable, but fungible collateral may be commingled; and

(4) The secured party may use or operate the collateral:

a. For the purpose of preserving the collateral or its value;

b. As permitted by an order of a court having competent jurisdiction; or

c. Except in the case of consumer goods, in the manner and to the extent agreed by the debtor.

(c) Rights and duties when secured party in possession or control. — Except as otherwise provided in subsection (d) of this section, a secured party having possession of collateral or control of collateral under G.S. 25-9-104, 25-9-105, 25-9-106, or 25-9-107:

(1) May hold as additional security any proceeds, except money or funds, received from the collateral;

(2) Shall apply money or funds received from the collateral to reduce the secured obligation, unless remitted to the debtor; and

(3) May create a security interest in the collateral.

(d) Buyer of certain rights to payment. — If the secured party is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor:

(1) Subsection (a) of this section does not apply unless the secured party is entitled under an agreement:

a. To charge back uncollected collateral; or

b. Otherwise to full or limited recourse against the debtor or a secondary obligor based on the nonpayment or other default of an account debtor or other obligor on the collateral; and

(2) Subsections (b) and (c) of this section do not apply. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-207.

2. **Duty of Care for Collateral in Secured Party's Possession.** Like former section 9-207, subsection (a) imposes a duty of care, similar to that imposed on a pledgee at common law, on a secured party in possession of collateral. See Restatement, Security sections 17 and 18. In many cases a secured party in possession of collateral may satisfy this duty by notifying the debtor of action that should be taken and allowing the debtor to take the action itself. If the secured party itself takes action, its reasonable expenses may be added to the secured obligation. The revised definitions of "collateral," "debtor," and "secured party" in section 9-102 make this section applicable to collateral subject to an agricultural lien if the collateral is in the lienholder's possession. Under section 1-102 the duty to exercise reasonable care may not be disclaimed by agreement, although under that section the parties remain free to determine by agreement standards that are not manifestly unreasonable as to what constitutes reasonable care. Unless otherwise agreed, for a secured party in possession of chattel paper or an instrument, reasonable care includes the preservation of rights against prior parties. The secured party's right to have instruments or documents indorsed or transferred to it or its order is dealt with in the relevant sections of articles 3, 7, and 8. See sections 3-201, 7-506, and 8-304(d).

3. **Specific Rules When Secured Party in Possession or Control of Collateral.** Subsections (b) and (c) provide rules following common law precedents which apply unless the parties otherwise agree. The rules in subsection (b) apply to typical issues that may arise

while a secured party is in possession of collateral, including expenses, insurance, and taxes, risk of loss or damage, identifiable and fungible collateral, and use or operation of collateral. Subsection (c) contains rules that apply in certain circumstances that may arise when a secured party is in either possession or control of collateral. These circumstances include the secured party's receiving proceeds from the collateral and the secured party's creation of a security interest in the collateral.

4. **Applicability Following Default.** This section applies when the secured party has possession of collateral either before or after default. See sections 9-601(b) and 9-609. Subsection (b)(4)(C) limits agreements concerning the use or operation of collateral to collateral other than consumer goods. Under section 9-602(1), a debtor cannot waive or vary that limitation.

5. **"Repledges" and Right of Redemption.** Subsection (c)(3) eliminates the qualification in former section 9-207 to the effect that the terms of a "repledge" may not "impair" a debtor's "right to redeem" collateral. The change is primarily for clarification. There is no basis on which to draw from subsection (c)(3) any inference concerning the debtor's right to redeem the collateral. The debtor enjoys that right under section 9-623; this section need not address it. For example, if the collateral is a negotiable note that the secured party (SP-1) repledges to SP-2, nothing in this section suggests that the debtor (D) does not retain the right to redeem the note upon payment to SP-1 of all obligations secured by the note. But, as explained below, the debtor's unimpaired right to redeem as against the debtor's original secured party nevertheless may not be enforceable as against the new secured party.

In resolving questions that arise from the creation of a security interest by SP-1, one must take care to distinguish D's rights against SP-1 from D's rights against SP-2. Once D discharges the secured obligation, D becomes entitled to the note; SP-1 has no legal basis upon which to withhold it. If, as a practical matter, SP-1 is unable to return the note because SP-2 holds it as collateral for SP-1's unpaid debt, then SP-1 is liable to D under the law of conversion.

Whether SP-2 would be liable to D depends on the relative priority of SP-2's security interest and D's interest. By permitting SP-1 to create a security interest in the collateral (repledge), subsection (c)(3) provides a statutory power for SP-1 to give SP-2 a security interest (subject, of course, to any agreement by SP-1 not to give a security interest). In the vast majority of cases where repledge rights are significant, the security interest of the second secured party, SP-2 in the example, will be senior to the debtor's interest. By virtue of the debtor's consent or applicable legal rules, SP-2 typically would cut off D's rights in investment property or be immune from D's claims. See sections 3-306 and 9-331 (holder in due course), 8-303 (protected purchaser), 8-502 (acquisition of a security entitlement), and 8-503(e) (action by entitlement holder). Moreover, the expectations and business practices in some markets, such as the securities markets, are such that D's consent to SP-2's taking free of D's rights inheres in D's creation of SP-1's security interest which gives rise to SP-1's power under this section. In these situations, D would have no right to recover the collateral or recover damages from SP-2. Nevertheless, D would have a damage claim against SP-1 if SP-1 had given a security interest to SP-2 in breach of its agreement with D. Moreover, if SP-2's security interest secures an amount that is less than the amount secured by SP-1's security interest (granted by D), then D's exercise of its right to redeem would provide value sufficient to discharge SP-1's obligations to SP-2.

For the most part this section does not change the law under former section 9-207, although eliminating the reference to the debtor's right of redemption may alter the secured party's right to repledge in one respect. Former section 9-207 could have been read to limit the secured party's statutory right to repledge collateral to repledge transactions in which the collateral did not secure a greater obligation than that of the original debtor. Inasmuch as this is a matter normally dealt with by agreement between the debtor and secured party, any change would appear to have little practical effect.

6. **"Repledges" of Investment Property.** The following example will aid the discussion of "repledges" of investment property.

Example. Debtor grants Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds through an account with Able & Co. Alpha does not have an account with Able. Alpha uses Beta Bank as its securities custodian. Debtor instructs Able to transfer the shares to Beta, for the account of Alpha, and Able does so. Beta then credits Alpha's account. Alpha has control of the security entitlement for the 1000 shares under section 8-106(d). (These are the facts of Example 2, section 8-106, comment 4.) Although, as between Debtor and Alpha, Debtor may have become the beneficial owner of the new securities entitlement with Beta, Beta has agreed to act on Alpha's entitlement orders because, as between Beta and Alpha, Alpha has become the entitlement holder.

Next, Alpha grants Gamma Bank a security interest in the security entitlement with Beta that includes the 1000 shares of XYZ Co. stock. In order to afford Gamma control of the entitle-

ment, Alpha instructs Beta to transfer the stock to Gamma's custodian, Delta Bank, which credits Gamma's account for 1000 shares. At this point Gamma holds its securities entitlement for its benefit as well as that of its debtor, Alpha. Alpha's derivative rights also are for the benefit of Debtor.

In many, probably most, situations and at any particular point in time, it will be impossible for Debtor or Alpha to "trace" Alpha's "repledge" to any particular securities entitlement or financial asset of Gamma or anyone else. Debtor would retain, of course, a right to redeem the collateral from Alpha upon satisfaction of the secured obligation. However, in the absence of a traceable interest, Debtor would retain only a personal claim against Alpha in the event Alpha failed to restore the security entitlement to Debtor. Moreover, even in the unlikely event that Debtor could trace a property interest, in the context of the financial markets, normally the operation of this section, Debtor's explicit agreement to permit Alpha to create a senior security interest, or legal rules permitting Gamma to cut off Debtor's rights or become immune from Debtor's claims would effectively subordinate Debtor's interest to the holder of a security interest created by Alpha. And, under the shelter principle, all subsequent transferees would obtain interests to which Debtor's interest also would be subordinate.

7. **Buyers of Chattel Paper and Other Receivables; Consignors.** This section has been revised to reflect the fact that a seller of accounts, chattel paper, payment intangibles, or promissory notes retains no interest in the collateral and so is not disadvantaged by the secured party's noncompliance with the requirements of this section. Accordingly, subsection (d) provides that subsection (a) applies only to security interests that secure an obligation and to sales of receivables in which the buyer has recourse against the debtor. (Of course, a buyer of accounts or payment intangibles could not have "possession" of original collateral, but might have possession of proceeds, such as promissory notes or checks.) The meaning of "recourse" in this respect is limited to recourse arising out of the account debtor's failure to pay or other default.

Subsection (d) makes subsections (b) and (c) inapplicable to buyers of accounts, chattel paper, payment intangibles, or promissory notes and consignors. Of course, there is no reason to believe that a buyer of receivables or a consignor could not, for example, create a security interest or otherwise transfer an interest in the collateral, regardless of who has possession of the collateral. However, this section leaves the rights of those owners to law other than article 9.

§ 25-9-208. (Effective July 1, 2001) Additional duties of secured party having control of collateral.

(a) Applicability of section. — This section applies to cases in which there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations, or otherwise give value.

(b) Duties of secured party after receiving demand from debtor. — Within 10 days after receiving an authenticated demand by the debtor:

(1) A secured party having control of a deposit account under G.S. 25-9-104(a)(2) shall send to the bank with which the deposit account is maintained an authenticated statement that releases the bank from any further obligation to comply with instructions originated by the secured party;

(2) A secured party having control of a deposit account under G.S. 25-9-104(a)(3) shall:

a. Pay the debtor the balance on deposit in the deposit account; or

b. Transfer the balance on deposit into a deposit account in the debtor's name;

(3) A secured party, other than a buyer, having control of electronic chattel paper under G.S. 25-9-105 shall:

a. Communicate the authoritative copy of the electronic chattel paper to the debtor or its designated custodian;

b. If the debtor designates a custodian that is the designated custodian with which the authoritative copy of the electronic chattel paper is maintained for the secured party, communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions

originated by the secured party and instructing the custodian to comply with instructions originated by the debtor; and

c. Take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authoritative copy which add or change an identified assignee of the authoritative copy without the consent of the secured party;

(4) A secured party having control of investment property under G.S. 25-8-106(d)(2) or G.S. 25-9-106(b) shall send to the securities intermediary or commodity intermediary with which the security entitlement or commodity contract is maintained an authenticated record that releases the securities intermediary or commodity intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party; and

(5) A secured party having control of a letter-of-credit right under G.S. 25-9-107 shall send to each person having an unfulfilled obligation to pay or deliver proceeds of the letter of credit to the secured party an authenticated release from any further obligation to pay or deliver proceeds of the letter of credit to the secured party. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Scope and Purpose.** This section imposes duties on a secured party who has control of a deposit account, electronic chattel paper, investment property, or a letter-of-credit right. The duty to terminate the secured party's control is analogous to the duty to file a termination statement, imposed by section 9-513. Under subsection (a), it applies only when there is no outstanding secured obligation and the secured party is not committed to give value. The requirements of this section can be varied by agreement under section 1-102(3). For example, a debtor could by contract agree that the secured party may comply with subsection (b) by releasing control more than 10 days after demand. Also, duties under this section should not be read to conflict with the terms of the collateral itself. For example, if the collateral is a time deposit account, subsection (b)(2) should not require a secured party with control to make an early withdrawal of the funds (assuming that were possible) in order to pay them over to the debtor or put them in an account in the debtor's name.

3. **Remedy for Failure to Relinquish Control.** If a secured party fails to comply with the requirements of subsection (b), the debtor has the remedy set forth in section 9-625(e). This remedy is identical to that applicable to failure to provide or file a termination statement under section 9-513.

4. **Duty to Relinquish Possession.** Although section 9-207 addresses directly the duties of a secured party in possession of collateral, that section does not require the secured party to relinquish possession when the secured party ceases to hold a security interest. Under common law, absent agreement to the contrary, the failure to relinquish possession of collateral upon satisfaction of the secured obligation would constitute a conversion. Inasmuch as problems apparently have not surfaced in the absence of statutory duties under former article 9 and the common law duty appears to have been sufficient, this article does not impose a statutory duty to relinquish possession.

§ 25-9-209. (Effective July 1, 2001) Duties of secured party if account debtor has been notified of assignment.

(a) Applicability of section. — Except as otherwise provided in subsection (c) of this section, this section applies if:

(1) There is no outstanding secured obligation; and

(2) The secured party is not committed to make advances, incur obligations, or otherwise give value.

(b) Duties of secured party after receiving demand from debtor. — Within 10 days after receiving an authenticated demand by the debtor, a secured party shall send to an account debtor that has received notification of an assignment

to the secured party as assignee under G.S. 25-9-406(a) an authenticated record that releases the account debtor from any further obligation to the secured party.

(c) Inapplicability to sales. — This section does not apply to an assignment constituting the sale of an account, chattel paper, or payment intangible. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Scope and Purpose.** Like sections 9-208 and 9-513, which require a secured party to relinquish control of collateral and to file or provide a termination statement for a financing statement, this section requires a secured party to free up collateral when there no longer is any outstanding secured obligation or any commitment to give value in the future. This section addresses the case in which account debtors have been notified to pay a secured party to whom the receivables have been assigned. It requires the secured party (assignee) to inform the account debtors that they no longer are obligated to make payment to the secured party. See subsection (b). It does not apply to account debtors whose obligations on an account, chattel paper, or payment intangible have been sold. See subsection (c).

§ 25-9-210. (Effective July 1, 2001) Request for accounting; request regarding list of collateral or statement of account.

(a) Definitions. — In this section:

(1) "Request" means a record of a type described in subdivision (2), (3), or (4) of this subsection.

(2) "Request for an accounting" means a record authenticated by a debtor requesting that the recipient provide an accounting of the unpaid obligations secured by collateral and reasonably identifying the transaction or relationship that is the subject of the request.

(3) "Request regarding a list of collateral" means a record authenticated by a debtor requesting that the recipient approve or correct a list of what the debtor believes to be the collateral securing an obligation and reasonably identifying the transaction or relationship that is the subject of the request.

(4) "Request regarding a statement of account" means a record authenticated by a debtor requesting that the recipient approve or correct a statement indicating what the debtor believes to be the aggregate amount of unpaid obligations secured by collateral as of a specified date and reasonably identifying the transaction or relationship that is the subject of the request.

(b) Duty to respond to requests. — Subject to subsections (c), (d), (e), and (f) of this section, a secured party, other than a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor, shall comply with a request within 14 days after receipt:

(1) In the case of a request for an accounting, by authenticating and sending to the debtor an accounting; and

(2) In the case of a request regarding a list of collateral or a request regarding a statement of account, by authenticating and sending to the debtor an approval or correction.

(c) Request regarding list of collateral; statement concerning type of collateral. — A secured party that claims a security interest in all of a particular type of collateral owned by the debtor may comply with a request regarding a list of collateral by sending to the debtor an authenticated record including a statement to that effect within 14 days after receipt.

(d) Request regarding list of collateral; no interest claimed. — A person that receives a request regarding a list of collateral, claims no interest in the

collateral when it receives the request, and claimed an interest in the collateral at an earlier time shall comply with the request within 14 days after receipt by sending to the debtor an authenticated record:

(1) Disclaiming any interest in the collateral; and

(2) If known to the recipient, providing the name and mailing address of any assignee of or successor to the recipient's interest in the collateral.

(e) Request for accounting or regarding statement of account; no interest in obligation claimed. — A person that receives a request for an accounting or a request regarding a statement of account, claims no interest in the obligations when it receives the request, and claimed an interest in the obligations at an earlier time shall comply with the request within 14 days after receipt by sending to the debtor an authenticated record:

(1) Disclaiming any interest in the obligations; and

(2) If known to the recipient, providing the name and mailing address of any assignee of or successor to the recipient's interest in the obligations.

(f) Charges for responses. — A debtor is entitled without charge to one response to a request under this section during any six-month period. The secured party may require payment of a charge not exceeding twenty-five dollars ($25.00) for each additional response. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-208.

2. **Scope and Purpose.** This section provides a procedure whereby a debtor may obtain from a secured party information about the secured obligation and the collateral in which the secured party may claim a security interest. It clarifies and resolves some of the issues that arose under former section 9-208 and makes information concerning the secured indebtedness readily available to debtors, both before and after default. It applies to agricultural lien transactions (see the definitions of "debtor," "secured party," and "collateral" in section 9-102), but generally not to sales of receivables. See subsection (b).

3. **Requests by Debtors Only.** A financing statement filed under part 5 may disclose only that a secured party may have a security interest in specified types of collateral. In most cases the financing statement will contain no indication of the obligation (if any) secured, whether any security interest actually exists, or the particular property subject to a security interest. Because creditors of and prospective purchasers from a debtor may have legitimate needs for more detailed information, it is necessary to provide a procedure under which the secured party will be required to provide information. On the other hand, the secured party should not be under a duty to disclose any details of the debtor's financial affairs to any casual inquirer or competitor who may inquire. For this reason, this section gives the right to request information to the debtor only. The debtor may submit a request in connection with negotiations with subsequent creditors and purchasers, as well as for the purpose of determining the status of its credit relationship or demonstrating which of its assets are free of a security interest.

4. **Permitted Types of Requests for Information.** Subsection (a) contemplates that a debtor may request three types of information by submitting three types of "requests" to the secured party. First, the debtor may request the secured party to prepare and send an "accounting" (defined in section 9-102). Second, the debtor may submit to the secured party a list of collateral for the secured party's approval or correction. Third, the debtor may submit to the secured party for its approval or correction a statement of the aggregate amount of unpaid secured obligations. Inasmuch as a secured party may have numerous transactions and relationships with a debtor, each request must identify the relevant transactions or relationships. Subsections (b) and (c) require the secured party to respond to a request within 14 days following receipt of the request.

5. **Recipients Claiming No Interest in the Transaction.** A debtor may be unaware that a creditor with whom it has dealt has assigned its security interest or the secured obligation. Subsections (d) and (e) impose upon recipients of requests under this section the duty to inform the debtor that they claim no interest in the collateral or secured obligation, respectively, and to inform the debtor of the name and mailing address of any known assignee or successor. As under subsections (b) and (c), a response to a request under subsection (d) or (e) is due 14 days following receipt.

6. **Waiver; Remedy for Failure to Comply.** The debtor's rights under this section may

not be waived or varied. See section 9-602(2). Section 9-625 sets forth the remedies for noncompliance with the requirements of this section.

7. **Limitation on Free Responses to Requests.** Under subsection (f), during a six-month period a debtor is entitled to receive from the secured party one free response to a request. The debtor is not entitled to a free response to each type of request (i.e., three free responses) during a six-month period.

PART 3.

Perfection and Priority.

SUBPART 1. Law Governing Perfection and Priority.

§ 25-9-301. (Effective July 1, 2001) Law governing perfection and priority of security interests.

Except as otherwise provided in G.S. 25-9-303 through G.S. 25-9-306, the following rules determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral:

(1) Except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral.

(2) While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral.

(3) Except as otherwise provided in subdivision (4) of this section, while negotiable documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs:

a. Perfection of a security interest in the goods by filing a fixture filing;

b. Perfection of a security interest in timber to be cut; and

c. The effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral.

(4) The local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in as-extracted collateral. (1945, c. 196, s. 2; 1957, c. 564; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7; 1989 (Reg. Sess., 1990), c. 1024, s. 8(e), (f); 1997-181, s. 2; 1999-73, s. 4(a), (b); 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former sections 9-103(1)(a) and (b), 9-103(3)(a) and (b), and 9-103(5), substantially modified.

2. **Scope of this Subpart.** Part 3, subpart 1 (sections 9-301 through 9-307) contains choice of law rules similar to those of former section 9-103. Former section 9-103 generally addresses which state's law governs "perfection and the effect of perfection or nonperfection of" security interests. See, e.g., former section 9-103(1)(b). This article follows the broader and more precise formulation in former section 9-103(6)(b), which was revised in connection with the promulgation of revised article 8 in 1994: "Perfection, the effect of perfection or nonperfection, and the priority of" security interests. Priority, in this context, subsumes all of the rules in part 3, including "cut off" or "take free" rules such as sections 9-317(b), (c), and (d), 9-320(a), (b), and (d), and 9-332. This subpart does not address choice of law for other purposes. For example, the law applicable to issues such as attachment, validity, characterization (e.g., true lease or security interest), and en-

forcement is governed by the rules in section 1-105; that governing law typically is specified in the same agreement that contains the security agreement. And, another jurisdiction's law may govern other third-party matters addressed in this article. See section 9-401, comment 3.

3. **Scope of Referral.** In designating the jurisdiction whose law governs, this article directs the court to apply only the substantive ("local") law of a particular jurisdiction and not its choice of law rules.

Example 1: Litigation over the priority of a security interest in accounts arises in State X. State X has adopted the official text of this article, which provides that priority is determined by the local law of the jurisdiction in which the debtor is located. See section 9-301(1). The debtor is located in State Y. Even if State Y has retained former article 9 or enacted a nonuniform choice of law rule (e.g., one that provides that perfection is governed by the law of State Z), a State X court should look only to the substantive law of State Y and disregard State Y's choice of law rule. State Y's substantive law (e.g., its section 9-501) provides that financing statements should be filed in a filing office in State Y. Note, however, that if the identical perfection issue were to be litigated in State Y, the court would look to State Y's former section 9-103 or nonuniform section 9-301 and conclude that a filing in State Y is ineffective.

Example 2: In the preceding example, assume that State X has adopted the official text of this article, and State Y has adopted a nonuniform section 9-301(1) under which perfection is governed by the whole law of State X, including its choice of law rules. If litigation occurs in State X, the court should look to the substantive law of State Y, which provides that financing statements are to be filed in a filing office in State Y. If litigation occurs in State Y, the court should look to the law of State X, whose choice of law rule requires that the court apply the substantive law of State Y. Thus, regardless of the jurisdiction in which the litigation arises, the financing statement should be filed in State Y.

4. **Law Governing Perfection: General Rule.** Paragraph (1) contains the general rule: The law governing perfection of security interests in both tangible and intangible collateral, whether perfected by filing or automatically, is the law of the jurisdiction of the debtor's location, as determined under section 9-307.

Paragraph (1) substantially simplifies the choice of law rules. Former section 9-103 contained different choice of law rules for different types of collateral. Under section 9-301(1), the law of a single jurisdiction governs perfection with respect to most types of collateral, both tangible and intangible. Paragraph (1) eliminates the need for former section 9-103(1)(c), which concerned purchase-money security interests in tangible collateral that is intended to move from one jurisdiction to the other. It is likely to reduce the frequency of cases in which the governing law changes after a financing statement is properly filed. (Presumably, debtors change their own location less frequently than they change the location of their collateral.) The approach taken in paragraph (1) also eliminates some difficult priority issues and the need to distinguish between "mobile" and "ordinary" goods, and it reduces the number of filing offices in which secured parties must file or search when collateral is located in several jurisdictions.

5. **Law Governing Perfection: Exceptions.** The general rule is subject to several exceptions. It does not apply to goods covered by a certificate of title (see section 9-303), deposit accounts (see section 9-304), investment property (see section 9-305), or letter-of-credit rights (see section 9-306). Nor does it apply to possessory security interests, i.e., security interests that the secured party has perfected by taking possession of the collateral (see paragraph (2)), security interests perfected by filing a fixture filing (see subparagraph (3)(A)), security interests in timber to be cut (subparagraph (3)(B)), or security interests in as-extracted collateral (see paragraph (4)).

a. **Possessory Security Interests.** Paragraph (2) applies to possessory security interests and provides that perfection is governed by the local law of the jurisdiction in which the collateral is located. This is the rule of former section 9-103(1)(b), except paragraph (2) eliminates the troublesome "last event" test of former law.

The distinction between nonpossessory and possessory security interests creates the potential for the same jurisdiction to apply two different choice of law rules to determine perfection in the same collateral. For example, were a secured party in possession of an instrument or document to relinquish possession in reliance on temporary perfection, the applicable law immediately would change from that of the location of the collateral to that of the location of the debtor. The applicability of two different choice of law rules for perfection is unlikely to lead to any material practical problems. The perfection rules of one article 9 jurisdiction are likely to be identical to those of another. Moreover, under paragraph (3), the relative priority of competing security interests in tangible collateral is resolved by reference to the law of the jurisdiction in which the collateral is located, regardless of how the security interests are perfected.

b. **Fixtures.** Application of the general rule in paragraph (1) to perfection of a security interest in fixtures would yield strange results. For example, perfection of a security interest in

fixtures located in Arizona and owned by a Delaware corporation would be governed by the law of Delaware. Although Delaware law would send one to a filing office in Arizona for the place to file a financing statement as a fixture filing, see section 9-501, Delaware law would not take account of local, nonuniform, real property filing and recording requirements that Arizona law might impose. For this reason, paragraph (3)(A) contains a special rule for security interests perfected by a fixture filing; the law of the jurisdiction in which the fixtures are located governs perfection, including the formal requisites of a fixture filing. Under paragraph (3)(C), the same law governs priority. Fixtures are "goods" as defined in section 9-102.

c. **Timber to Be Cut.** Application of the general rule in paragraph (1) to perfection of a security interest in timber to be cut would yield undesirable results analogous to those described with respect to fixtures. Paragraph (3)(B) adopts a similar solution: Perfection is governed by the law of the jurisdiction in which the timber is located. As with fixtures, under paragraph (3)(C), the same law governs priority. Timber to be cut also is "goods" as defined in section 9-102.

Paragraph (3)(B) applies only to "timber to be cut," not to timber that has been cut. Consequently, once the timber is cut, the general choice of law rule in paragraph (1) becomes applicable. To ensure continued perfection, a secured party should file in both the jurisdiction in which the timber to be cut is located and in the state where the debtor is located. The former filing would be with the office in which a real property mortgage would be filed, and the latter would be a central filing. See section 9-501.

d. **As-Extracted Collateral.** Paragraph (4) adopts the rule of former section 9-103(5) with respect to certain security interests in minerals and related accounts. Like security interests in fixtures perfected by filing a fixture filing, security interests in minerals that are as-extracted collateral are perfected by filing in the office designated for the filing or recording of a mortgage on the real property. For the same reasons, the law governing perfection and priority is the law of the jurisdiction in which the wellhead or minehead is located.

6. **Change in Law Governing Perfection.** When the debtor changes its location to another jurisdiction, the jurisdiction whose law governs perfection under paragraph (1) changes, as well. Similarly, the law governing perfection of a possessory security interest in collateral under paragraph (2) changes when the collateral is removed to another jurisdiction. Nevertheless, these changes will not result in an immediate loss of perfection. See section 9-316(a) and (b).

7. **Law Governing Effect of Perfection and Priority: Goods, Documents, Instruments, Money, Negotiable Documents, and Tangible Chattel Paper.** Under former section 9-103, the law of a single jurisdiction governed both questions of perfection and those of priority. This article generally adopts that approach. See paragraph (1). But the approach may create problems if the debtor and collateral are located in different jurisdictions. For example, assume a security interest in equipment located in Pennsylvania is perfected by filing in Illinois, where the debtor is located. If the law of the jurisdiction in which the debtor is located were to govern priority, then the priority of an execution lien on goods located in Pennsylvania would be governed by rules enacted by the Illinois legislature.

To address this problem, paragraph (3)(C) divorces questions of perfection from questions of "the effect of perfection or nonperfection and the priority of a security interest." Under paragraph (3)(C), the rights of competing claimants to tangible collateral are resolved by reference to the law of the jurisdiction in which the collateral is located. A similar bifurcation applied to security interests in investment property under former section 9-103(6). See section 9-305.

Paragraph (3)(C) applies the law of the situs to determine priority only with respect to goods (including fixtures), instruments, money, negotiable documents, and tangible chattel paper. Compare former section 9-103(1), which applied the law of the location of the collateral to documents, instruments, and "ordinary" (as opposed to "mobile") goods. This article does not distinguish among types of goods. The ordinary obile goods distinction appears to address concerns about where to file and search, rather than concerns about priority. There is no reason to preserve this distinction under the bifurcated approach.

Particularly serious confusion may arise when the choice of law rules of a given jurisdiction result in each of two competing security interests in the same collateral being governed by a different priority rule. The potential for this confusion existed under former section 9-103(4) with respect to chattel paper: Perfection by possession was governed by the law of the location of the paper, whereas perfection by filing was governed by the law of the location of the debtor. Consider the mess that would have been created if the language or interpretation of former section 9-308 were to differ in the two relevant states, or if one of the relevant jurisdictions (e.g., a foreign country) had not adopted article 9. The potential for confusion could have been exacerbated when a secured party perfected both by taking possession in the state where the collateral is located (State A) and by filing in the state where the debtor is located (State B)—a common practice for some

chattel paper financers. By providing that the law of the jurisdiction in which the collateral is located governs priority, paragraph (3) substantially diminishes this problem.

8. **Non-U.S. Debtors.** This article applies the same choice of law rules to all debtors, foreign and domestic. For example, it adopts the bifurcated approach for determining the law applicable to security interests in goods and other tangible collateral. See comment 5(a), above. The article contains a new rule specifying the location of non-U.S. debtors for purposes of this part. The rule appears in section 9-307 and is explained in the Reporters' Comments following that section. Former section 9-103(3)(c), which contained a special choice of law rule governing security interests created by debtors located in a non-U.S. jurisdiction, proved unsatisfactory and was deleted.

§ 25-9-302. (Effective July 1, 2001) Law governing perfection and priority of agricultural liens.

While farm products are located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of an agricultural lien on the farm products. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Agricultural Liens.** This section provides choice of law rules for agricultural liens on farm products. Perfection, the effect of perfection or nonperfection, and priority all are governed by the law of the jurisdiction in which the farm products are located. Other choice of law rules, including section 1-105, determine which jurisdiction's law governs other matters, such as the secured party's rights on default. See section 9-301, comment 2. Inasmuch as no agricultural lien on proceeds arises under this article, this section does not expressly apply to proceeds of agricultural liens. However, if another statute creates an agricultural lien on proceeds, it may be appropriate for courts to apply the choice of law rule in this section to determine priority in the proceeds.

§ 25-9-303. (Effective July 1, 2001) Law governing perfection and priority of security interests in goods covered by a certificate of title.

(a) Applicability of section. — This section applies to goods covered by a certificate of title, even if there is no other relationship between the jurisdiction under whose certificate of title the goods are covered and the goods or the debtor.

(b) When goods covered by certificate of title. — Goods become covered by a certificate of title when a valid application for the certificate of title and the applicable fee are delivered to the appropriate authority. Goods cease to be covered by a certificate of title at the earlier of the time the certificate of title ceases to be effective under the law of the issuing jurisdiction or the time the goods become covered subsequently by a certificate of title issued by another jurisdiction.

(c) Applicable law. — The local law of the jurisdiction under whose certificate of title the goods are covered governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in goods covered by a certificate of title from the time the goods become covered by the certificate of title until the goods cease to be covered by the certificate of title. (1945, c. 196, s. 2; 1957, c. 564; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7; 1989 (Reg. Sess., 1990), c. 1024, s. 8(e), (f); 1997-181, s. 2; 1999-73, s. 4(a), (b); 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-103(2)(a) and (b), substantially revised.

2. **Scope of This Section.** This section applies to "goods covered by a certificate of title."

The new definition of "certificate of title" in section 9-102 makes clear that this section applies not only to certificate-of-title statutes under which perfection occurs upon notation of the security interest on the certificate but also to those that contemplate notation but provide that perfection is achieved by another method, e.g., delivery of designated documents to an official. Subsection (a), which is new, makes clear that this section applies to certificates of a jurisdiction having no other contacts with the goods or the debtor. This result comports with most of the reported cases on the subject and with contemporary business practices in the trucking industry.

3. **Law Governing Perfection and Priority.** Subsection (c) is the basic choice of law rule for goods covered by a certificate of title. Perfection and priority of a security interest are governed by the law of the jurisdiction under whose certificate of title the goods are covered from the time the goods become covered by the certificate of title until the goods cease to be covered by the certificate of title.

Normally, under the law of the relevant jurisdiction, the perfection step would consist of compliance with that jurisdiction's certificate-of-title statute and a resulting notation of the security interest on the certificate of title. See section 9-311(b). In the typical case of an automobile or over-the-road truck, a person who wishes to take a security interest in the vehicle can ascertain whether it is subject to any security interests by looking at the certificate of title. But certificates of title cover certain types of goods in some states but not in others. A secured party who does not realize this may extend credit and attempt to perfect by filing in the jurisdiction in which the debtor is located. If the goods had been titled in another jurisdiction, the lender would be unperfected.

Subsection (b) explains when goods become covered by a certificate of title and when they cease to be covered. Goods may become covered by a certificate of title, even though no certificate of title has issued. Former section 9-103(2)(b) provided that the law of the jurisdiction issuing the certificate ceases to apply upon "surrender" of the certificate. This article eliminates the concept of "surrender." However, if the certificate is surrendered in conjunction with an appropriate application for a certificate to be issued by another jurisdiction, the law of the original jurisdiction ceases to apply because the goods became covered subsequently by a certificate of title from another jurisdiction. Alternatively, the law of the original jurisdiction ceases to apply when the certificate "ceases to be effective" under the law of that jurisdiction. Given the diversity in certificate-of-title statutes, the term "effective" is not defined.

4. **Continued Perfection.** The fact that the law of one state ceases to apply under subsection (b) does not mean that a security interest perfected under that law becomes unperfected automatically. In most cases, the security interest will remain perfected. See section 9-316(d) and (e). Moreover, a perfected security interest may be subject to defeat by certain buyers and secured parties. See section 9-337.

5. **Inventory.** Compliance with a certificate-of-title statute generally is *not* the method of perfecting security interests in inventory. Section 9-311(d) provides that a security interest created in inventory held by a person in the business of selling goods of that kind is subject to the normal filing rules; compliance with a certificate-of-title statute is not necessary or effective to perfect the security interest. Most certificate-of-title statutes are in accord.

The following example explains the subtle relationship between this rule and the choice of law rules in section 9-303 and former section 9-103(2):

Example: Goods are located in State A and covered by a certificate of title issued under the law of State A. The State A certificate of title is "clean"; it does not reflect a security interest. Owner takes the goods to State B and sells (trades in) the goods to Dealer, who is in the business of selling goods of that kind and is located (within the meaning of section 9-307) in State B. As is customary, Dealer retains the duly assigned State A certificate of title pending resale of the goods. Dealer's inventory financer, SP, obtains a security interest in the goods under its after-acquired property clause.

Under section 9-311(d) of both State A and State B, Dealer's inventory financer, SP, must perfect by filing instead of complying with a certificate-of-title statute. If section 9-303 were read to provide that the law applicable to perfection of SP's security interest is that of State A, because the goods are covered by a State A certificate, then SP would be required to file in State A under State A's section 9-501. That result would be anomalous, to say the least, since the principle underlying section 9-311(d) is that the inventory should be treated as ordinary goods.

Section 9-303 (and former section 9-103(2)) should be read as providing that the law of State B, not State A, applies. A court looking to the forum's section 9-303(a) would find that section 9-303 applies only if two conditions are met: (i) The goods are covered by the certificate as explained in section 9-303(b), i.e., application had been made for a State (here, State A) to issue a certificate of title covering the goods and (ii) the certificate is a "certificate of title" as defined in section 9-102, i.e., "a statute provides for the security interest in question to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor." Stated otherwise, section 9-303 applies only when compliance

with a certificate-of-title statute, and not filing, is the appropriate method of perfection. Under the law of State A, *for purposes of perfecting SP's security interest in the dealer's inventory*, the proper method of perfection is filing—not compliance with State A's certificate-of-title statute. For that reason, the goods are not covered by a "certificate of title," and the second condition is not met. Thus, section 9-303 does not apply to the goods. Instead, section 9-301 applies, and the applicable law is that of State B, where the debtor (dealer) is located.

6. **External Constraints on This Section.** The need to coordinate article 9 with a variety of nonuniform certificate-of-title statutes, the need to provide rules to take account of situations in which multiple certificates of title are outstanding with respect to particular goods, and the need to govern the transition from perfection by filing in one jurisdiction to perfection by notation in another all create pressure for a detailed and complex set of rules. In an effort to minimize complexity, this article does not attempt to coordinate article 9 with the entire array of certificate-of-title statutes. In particular, sections 9-303, 9-311, and 9-316(d) and (e) assume that the certificate-of-title statutes to which they apply do not have relation-back provisions (i.e., provisions under which perfection is deemed to occur at a time earlier than when the perfection steps actually are taken). A legislative note to section 9-311 recommends the elimination of relation-back provisions in certificate-of-title statutes affecting perfection of security interests.

Ideally, at any given time, only one certificate of title is outstanding with respect to particular goods. In fact, however, sometimes more than one jurisdiction issues more than one certificate of title with respect to the same goods. This situation results from defects in certificate-of-title laws and the interstate coordination of those laws, not from deficiencies in this article. As long as the possibility of multiple certificates of title remains, the potential for innocent parties to suffer losses will continue. At best, this article can identify clearly which innocent parties will bear the losses in familiar fact patterns.

§ 25-9-304. (Effective July 1, 2001) Law governing perfection and priority of security interests in deposit accounts.

(a) Law of bank's jurisdiction governs. — The local law of a bank's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a deposit account maintained with that bank.

(b) Bank's jurisdiction. — The following rules determine a bank's jurisdiction for purposes of this Part:

(1) If an agreement between the bank and the debtor governing the deposit account expressly provides that a particular jurisdiction is the bank's jurisdiction for purposes of this Part, this Article, or this Chapter, that jurisdiction is the bank's jurisdiction.

(2) If subdivision (1) of this subsection does not apply and an agreement between the bank and its customer governing the deposit account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the bank's jurisdiction.

(3) If neither subdivision (1) nor subdivision (2) of this subsection applies and an agreement between the bank and its customer governing the deposit account expressly provides that the deposit account is maintained at an office in a particular jurisdiction, that jurisdiction is the bank's jurisdiction.

(4) If none of subdivisions (1), (2), and (3) of this subsection applies, the bank's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the customer's account is located.

(5) If none of subdivisions (1), (2), (3), and (4) of this subsection applies, the bank's jurisdiction is the jurisdiction in which the chief executive office of the bank is located. (1945, c. 196, s. 2; 1957, c. 564; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7; 1989 (Reg. Sess., 1990), c. 1024, s. 8(e), (f); 1997-181, s. 2; 1999-73, s. 4(a), (b); 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New; derived from section 8-110(e) and former section 9-103(6).

2. **Deposit Accounts.** Under this section, the law of the "bank's jurisdiction" governs perfection and priority of a security interest in deposit accounts. Subsection (b) contains rules for determining the "bank's jurisdiction." The substance of these rules is substantially similar to that of the rules determining the "security intermediary's jurisdiction" under former section 8-110(e), except that subsection (b)(1) provides more flexibility than the analogous provision in former section 8-110(e)(1). Subsection (b)(1) permits the parties to choose the law of one jurisdiction to govern perfection and priority of security interests and a different governing law for other purposes. The parties' choice is effective, even if the jurisdiction whose law is chosen bears no relationship to the parties or the transaction. Section 8-110(e)(1) has been conformed to subsection (b)(1) of this section, and section 9-305(b)(1), concerning a commodity intermediary's jurisdiction, makes a similar departure from former section 9-103(6)(e)(i).

3. **Change in Law Governing Perfection.** When the bank's jurisdiction changes, the jurisdiction whose law governs perfection under subsection (a) changes, as well. Nevertheless, the change will not result in an immediate loss of perfection. See section 9-316(f) and (g).

§ 25-9-305. (Effective July 1, 2001) Law governing perfection and priority of security interests in investment property.

(a) Governing law: general rules. — Except as otherwise provided in subsection (c) of this section, the following rules apply:

(1) While a security certificate is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the certificated security represented thereby.

(2) The local law of the issuer's jurisdiction as specified in G.S. 25-8-110(d) governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in an uncertificated security.

(3) The local law of the securities intermediary's jurisdiction as specified in G.S. 25-8-110(e) governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a security entitlement or securities account.

(4) The local law of the commodity intermediary's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a commodity contract or commodity account.

(b) Commodity intermediary's jurisdiction. — The following rules determine a commodity intermediary's jurisdiction for purposes of this Part:

(1) If an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that a particular jurisdiction is the commodity intermediary's jurisdiction for purposes of this Part, this Article, or this Chapter, that jurisdiction is the commodity intermediary's jurisdiction.

(2) If subdivision (1) of this subsection does not apply and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

(3) If neither subdivision (1) nor subdivision (2) of this subsection applies and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the commodity account is maintained at an office in a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

(4) If none of subdivisions (1), (2), and (3) of this subsection applies, the commodity intermediary's jurisdiction is the jurisdiction in which the

office identified in an account statement as the office serving the commodity customer's account is located.

(5) If none of subdivisions (1), (2), (3), and (4) of this subsection applies, the commodity intermediary's jurisdiction is the jurisdiction in which the chief executive office of the commodity intermediary is located.

(c) When perfection governed by law of jurisdiction where debtor located. — The local law of the jurisdiction in which the debtor is located governs:

(1) Perfection of a security interest in investment property by filing;

(2) Automatic perfection of a security interest in investment property created by a broker or securities intermediary; and

(3) Automatic perfection of a security interest in a commodity contract or commodity account created by a commodity intermediary. (1945, c. 196, s. 2; 1957, c. 564; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7; 1989 (Reg. Sess., 1990), c. 1024, s. 8(e), (f); 1997-181, s. 2; 1999-73, s. 4(a), (b); 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-103(6).

2. **Investment Property: General Rules.** This section specifies choice of law rules for perfection and priority of security interests in investment property. Subsection (a)(1) covers security interests in certificated securities. Subsection (a)(2) covers security interests in uncertificated securities. Subsection (a)(3) covers security interests in security entitlements and securities accounts. Subsection (a)(4) covers security interests in commodity contracts and commodity accounts. The approach of each of these paragraphs is essentially the same. They identify the jurisdiction's law that governs questions of perfection and priority by using the same principles that article 8 uses to determine other questions concerning that form of investment property. Thus, for certificated securities, the law of the jurisdiction in which the certificate is located governs. Cf. section 8-110(c). For uncertificated securities, the law of the issuer's jurisdiction governs. Cf. section 8-110(a). For security entitlements and securities accounts, the law of the securities intermediary's jurisdiction governs. Cf. section 8-110(b). For commodity contracts and commodity accounts, the law of the commodity intermediary's jurisdiction governs. Because commodity contracts and commodity accounts are not governed by article 8, subsection (b) contains rules that specify the commodity intermediary's jurisdiction. These are analogous to the rules in section 8-110(e) specifying a securities intermediary's jurisdiction. Subsection (b)(1) affords the parties greater flexibility than did former section 9-103(6)(3). See also section 9-304(b) (bank's jurisdiction) and revised section 8-110(e)(1) (securities intermediary's jurisdiction).

3. **Investment Property: Exceptions.** Subsection (c) establishes an exception to the general rules set out in subsection (a). It provides that perfection of a security interest by filing, automatic perfection of a security interest in investment property created by a debtor who is a broker or securities intermediary (see section 9-309(10)), and automatic perfection of a security interest in a commodity contract or commodity account of a debtor who is a commodity intermediary (see section 9-309(11)) are governed by the law of the jurisdiction in which the debtor is located, as determined under section 9-307.

4. **Examples:** The following examples illustrate the rules in this section:

Example 1: A customer residing in New Jersey maintains a securities account with Able & Co. The agreement between the customer and Able specifies that it is governed by Pennsylvania law but expressly provides that the law of California is Able's jurisdiction for purposes of the Uniform Commercial Code. Through the account the customer holds securities of a Massachusetts corporation, which Able holds through a clearing corporation located in New York. The customer obtains a margin loan from Able. Subsection (a)(3) provides that California law—the law of the securities intermediary's jurisdiction—governs perfection and priority of the security interest, even if California has no other relationship to the parties or the transaction.

Example 2: A customer residing in New Jersey maintains a securities account with Able & Co. The agreement between the customer and Able specifies that it is governed by Pennsylvania law. Through the account the customer holds securities of a Massachusetts corporation, which Able holds through a clearing corporation located in New York. The customer obtains a loan from a lender located in Illinois. The lender takes a security interest and perfects by obtaining an agreement among the debtor, itself, and Able, which satisfies the requirement of section 8-106(d)(2) to give the lender control. Subsection (a)(3) provides that

Pennsylvania law-the law of the securities intermediary's jurisdiction-governs perfection and priority of the security interest, even if Pennsylvania has no other relationship to the parties or the transaction.

Example 3: A customer residing in New Jersey maintains a securities account with Able & Co. The agreement between the customer and Able specifies that it is governed by Pennsylvania law. Through the account, the customer holds securities of a Massachusetts corporation, which Able holds through a clearing corporation located in New York. The customer borrows from SP-1, and SP-1 files a financing statement in New Jersey. Later, the customer obtains a loan from SP-2. SP-2 takes a security interest and perfects by obtaining an agreement among the debtor, itself, and Able, which satisfies the requirement of section 8-106(d)(2) to give the SP-2 control. Subsection (c) provides that perfection of SP-1's security interest by filing is governed by the location of the debtor, so the filing in New Jersey was appropriate. Subsection (a)(3), however, provides that Pennsylvania law-the law of the securities intermediary's jurisdiction-governs all other questions of perfection and priority. Thus, Pennsylvania law governs perfection of SP-2's security interest, and Pennsylvania law also governs the priority of the security interests of SP-1 and SP-2.

5. **Change in Law Governing Perfection.** When the issuer's jurisdiction, the securities intermediary's jurisdiction, or commodity intermediary's jurisdiction changes, the jurisdiction whose law governs perfection under subsection (a) changes, as well. Similarly, the law governing perfection of a possessory security interest in a certificated security changes when the collateral is removed to another jurisdiction, see subsection (a)(1), and the law governing perfection by filing changes when the debtor changes its location. See subsection (c). Nevertheless, these changes will not result in an immediate loss of perfection. See section 9-316.

§ 25-9-306. (Effective July 1, 2001) Law governing perfection and priority of security interests in letter-of-credit rights.

(a) Governing law: issuer's or nominated person's jurisdiction. — Subject to subsection (c) of this section, the local law of the issuer's jurisdiction or a nominated person's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a letter-of-credit right if the issuer's jurisdiction or nominated person's jurisdiction is a state.

(b) Issuer's or nominated person's jurisdiction. — For purposes of this Part, an issuer's jurisdiction or nominated person's jurisdiction is the jurisdiction whose law governs the liability of the issuer or nominated person with respect to the letter-of-credit right as provided in G.S. 25-5-116.

(c) When section not applicable. — This section does not apply to a security interest that is perfected only under G.S. 25-9-308(d). (1945, c. 196, s. 2; 1957, c. 564; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7; 1989 (Reg. Sess., 1990), c. 1024, s. 8(e), (f); 1997-181, s. 2; 1999-73, s. 4(a), (b); 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New; derived in part from section 8-110(e) and former section 9-103(6).

2. ***Sui Generis* Treatment.** This section governs the applicable law for perfection and priority of security interests in letter-of-credit rights, other than a security interest perfected only under section 9-308(d) (i.e., as a supporting obligation). The treatment differs substantially from that provided in section 9-304 for deposit accounts. The basic rule is that the law of the issuer's or nominated person's (e.g., confirmer's) jurisdiction, derived from the terms of the letter of credit itself, controls perfection and priority, but only if the issuer's or nominated person's jurisdiction is a state, as defined in section 9-102. If the issuer's or nominated person's jurisdiction is not a state, the baseline rule of section 9-301 applies—perfection and priority are governed by the law of the debtor's location, determined under section 9-307. Export transactions typically involve a foreign issuer and a domestic nominated person, such as a confirmer, located in a state. The principal goal of this section is to reduce the likelihood that perfection and priority would be governed by the law of a foreign jurisdiction in a transaction that is essentially domestic from the standpoint of the debtor-beneficiary, its creditors, and a domestic nominated person.

3. **Issuer's or Nominated Person's Jurisdiction.** Subsection (b) defers to the rules established under section 5-116 for determination of an issuer's or nominated person's jurisdiction.

Example: An Italian bank issues a letter of credit that is confirmed by a New York bank. The beneficiary is a Connecticut corporation. The letter of credit provides that the issuer's liability is governed by Italian law, and the confirmation provides that the confirmer's liability is governed by the law of New York. Under sections 5-116(a) and 9-306(b), Italy is the issuer's jurisdiction and New York is the confirmer's (nominated person's) jurisdiction. Because the confirmer's jurisdiction is a state, the law of New York governs perfection and priority of a security interest in the beneficiary's letter-of-credit right against the confirmer. See section 9-306(a). However, because the issuer's jurisdiction is not a state, the law of that jurisdiction does not govern. See section 9-306(a). Rather, the choice-of-law rule in section 9-301(1) applies to perfection and priority of a security interest in the beneficiary's letter-of-credit right against the issuer. Under that section, perfection and priority are governed by the law of the jurisdiction in which the debtor (beneficiary) is located. That jurisdiction is Connecticut. See section 9-307.

4. **Scope of this section.** This section specifies only the law governing perfection, the effect of perfection or nonperfection, and priority of security interests. Section 5-116 specifies the law governing the liability of, and article 5 (or other applicable law) deals with the rights and duties of, an issuer or nominated person. Perfection, nonperfection, and priority have no effect on those rights and duties.

5. **Change in Law Governing Perfection.** When the issuer's jurisdiction, or nominated person's jurisdiction changes, the jurisdiction whose law governs perfection under subsection (a) changes, as well. Nevertheless, this change will not result in an immediate loss of perfection. See section 9-316(f) and (g).

§ 25-9-307. (Effective July 1, 2001) Location of debtor.

(a) "Place of business." — In this section, "place of business" means a place where a debtor conducts its affairs.

(b) Debtor's location: general rules. — Except as otherwise provided in this section, the following rules determine a debtor's location:

(1) A debtor who is an individual is located at the individual's principal residence.

(2) A debtor that is an organization and has only one place of business is located at its place of business.

(3) A debtor that is an organization and has more than one place of business is located at its chief executive office.

(c) Limitation of applicability of subsection (b). — Subsection (b) of this section applies only if a debtor's residence, place of business, or chief executive office, as applicable, is located in a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral. If subsection (b) of this section does not apply, the debtor is located in the District of Columbia.

(d) Continuation of location: cessation of existence, etc. — A person that ceases to exist, have a residence, or have a place of business continues to be located in the jurisdiction specified by subsections (b) and (c) of this section.

(e) Location of registered organization organized under state law. — A registered organization that is organized under the law of a state is located in that state.

(f) Location of registered organization organized under federal law; bank branches and agencies. — Except as otherwise provided in subsection (i) of this section, a registered organization that is organized under the law of the United States and a branch or agency of a bank that is not organized under the law of the United States or a state are located:

(1) In the state that the law of the United States designates, if the law designates a state of location;

(2) In the state that the registered organization, branch, or agency designates, if the law of the United States authorizes the registered organization, branch, or agency to designate its state of location; or

(3) In the District of Columbia, if neither subdivision (1) nor subdivision (2) of this subsection applies.

(g) Continuation of location: change in status of registered organization. — A registered organization continues to be located in the jurisdiction specified by subsection (e) or (f) of this section notwithstanding:

(1) The suspension, revocation, forfeiture, or lapse of the registered organization's status as such in its jurisdiction of organization; or

(2) The dissolution, winding up, or cancellation of the existence of the registered organization.

(h) Location of United States. — The United States is located in the District of Columbia.

(i) Location of foreign bank branch or agency if licensed in only one state. — A branch or agency of a bank that is not organized under the law of the United States or a state is located in the state in which the branch or agency is licensed, if all branches and agencies of the bank are licensed in only one state.

(j) Location of foreign air carrier. — A foreign air carrier under the Federal Aviation Act of 1958, as amended, is located at the designated office of the agent upon which service of process may be made on behalf of the carrier.

(k) Section applies only to this Part. — This section applies only for purposes of this Part. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-103(3)(d), substantially revised.

2. **General Rules.** As a general matter, the location of the debtor determines the jurisdiction whose law governs perfection of a security interest. See sections 9-301(1) and 9-305(c). It also governs priority of a security interest in certain types of intangible collateral, such as accounts, electronic chattel paper, and general intangibles. This section determines the location of the debtor for choice of law purposes, but not for other purposes. See subsection (k).

Subsection (b) states the general rules: An individual debtor is deemed to be located at the individual's principal residence with respect to both personal and business assets. Any other debtor is deemed to be located at its place of business if it has only one, or at its chief executive office if it has more than one place of business.

As used in this section, a "place of business" means a place where the debtor conducts its affairs. See subsection (a). Thus, every organization, even eleemosynary institutions and other organizations that do not conduct "for profit" business activities, has a "place of business." Under subsection (d), a person who ceases to exist, have a residence, or have a place of business continues to be located in the jurisdiction determined by subsection (b).

The term "chief executive office" is not defined in this section or elsewhere in the Uniform Commercial Code. "Chief executive office" means the place from which the debtor manages the main part of its business operations or other affairs. This is the place where persons dealing with the debtor would normally look for credit information, and is the appropriate place for filing. With respect to most multistate debtors, it will be simple to determine which of the debtor's offices is the "chief executive office." Even when a doubt arises, it would be rare that there could be more than two possibilities. A secured party in such a case may protect itself by perfecting under the law of each possible jurisdiction.

Similarly, the term "principal residence" is not defined. If the security interest in question is a purchase-money security interest in consumer goods which is perfected upon attachment, see section 9-309(1), the choice of law may make no difference. In other cases, when a doubt arises, prudence may dictate perfecting under the law of each jurisdiction that might be the debtor's "principal residence."

The general rule is subject to several exceptions, each of which is discussed below.

3. **Non-U.S. Debtors.** Under the general rules of this section, a non-U.S. debtor normally would be located in a foreign jurisdiction and, as a consequence, foreign law would govern perfection. When foreign law affords no public notice of security interests, the general rule yields unacceptable results.

Accordingly, subsection (c) provides that the normal rules for determining the location of a debtor (i.e., the rules in subsection (b)) apply only if they yield a location that is "a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien

creditor with respect to the collateral." The phrase "generally requires" is meant to include legal regimes that generally require notice in a filing or recording system as a condition of perfecting nonpossessory security interests, but which permit perfection by another method (e.g., control, automatic perfection, temporary perfection) in limited circumstances. A jurisdiction that has adopted this article or an earlier version of this article is such a jurisdiction. If the rules in subsection (b) yield a jurisdiction whose law does not generally require notice in a filing or registration system, the debtor is located in the District of Columbia.

Example 1: Debtor is an English corporation with 7 offices in the United States and its chief executive office in London, England. Debtor creates a security interest in its accounts. Under subsection (b)(3), Debtor would be located in England. However, subsection (c) provides that subsection (b) applies only if English law generally conditions perfection on giving public notice in a filing, recording, or registration system. Otherwise, Debtor is located in the District of Columbia. Under section 9-301(1), perfection, the effect of perfection, and priority are governed by the law of the jurisdiction of the debtor's location—here, England or the District of Columbia (depending on the content of English law).

Example 2: Debtor is an English corporation with 7 offices in the United States and its chief executive office in London, England. Debtor creates a security interest in equipment located in London. Under subsection (b)(3) Debtor would be located in England. However, subsection (c) provides that subsection (b) applies only if English law generally conditions perfection on giving public notice in a filing, recording, or registration system. Otherwise, Debtor is located in the District of Columbia. Under section 9-301(1), perfection is governed by the law of the jurisdiction of the debtor's location, whereas, under section 9-301(3), the law of the jurisdiction in which the collateral is located—here, England—governs priority.

The foregoing discussion assumes that each transaction bears an appropriate relation to the forum state. In the absence of an appropriate relation, the forum state's entire UCC, including the choice of law provisions in article 9 (sections 9-301 through 9-307), will not apply. See section 9-109, comment 9.

4. **Registered Organizations Organized Under Law of a State.** Under subsection (e), a registered organization (e.g., a corporation or limited partnership) organized under the law of a "state" (defined in section 9-102) is located in its state of organization. Subsection (g) makes clear that events affecting the status of a registered organization, such as the dissolution of a corporation or revocation of its charter, do not affect its location for purposes of subsection (e). However, certain of these events may result in, or be accompanied by, a transfer of collateral from the registered organization to another debtor. This section does not determine whether a transfer occurs, nor does it determine the legal consequences of any transfer.

Determining the registered organization-debtor's location by reference to the jurisdiction of organization could provide some important side benefits for the filing systems. A jurisdiction could structure its filing system so that it would be impossible to make a mistake in a registered organization-debtor's name on a financing statement. For example, a filer would be informed if a filed record designated an incorrect corporate name for the debtor. Linking filing to the jurisdiction of organization also could reduce pressure on the system imposed by transactions in which registered organizations cease to exist—as a consequence of merger or consolidation, for example. The jurisdiction of organization might prohibit such transactions unless steps were taken to ensure that existing filings were refiled against a successor or terminated by the secured party.

5. **Registered Organizations Organized Under Law of United States;** Branches and Agencies of Banks Not Organized Under Law of United States. Subsection (f) specifies the location of a debtor that is a registered organization organized under the law of the United States. It defers to law of the United States, to the extent that that law determines, or authorizes the debtor to determine, the debtor's location. Thus, if the law of the United States designates a particular state as the debtor's location, that state is the debtor's location for purposes of this article's choice of law rules. Similarly, if the law of the United States authorizes the registered organization to designate its state of location, the state that the registered organization designates is the state in which it is located for purposes of this article's choice of law rules. In other cases, the debtor is located in the District of Columbia.

Subsection (f) also determines the location of branches and agencies of banks that are not organized under the law of the United States or a state. However, if all the branches and agencies of the bank are licensed only in one state, then they are located in that state. See subsection (i).

6. **United States.** To the extent that article 9 governs (see sections 1-105 and 9-109(c)), the United States is located in the District of Columbia for purposes of this article's choice of law rules. See subsection (h).

7. **Foreign Air Carriers.** Subsection (j) follows former section 9-103(3)(d). To the extent that it is applicable, the Convention on the International Recognition of Rights in Aircraft (Geneva Convention) supersedes state legislation on this subject, as set forth in section

9-311(b), but some nations are not parties to that convention.

SUBPART 2. Perfection.

§ 25-9-308. (Effective July 1, 2001) When security interest or agricultural lien is perfected; continuity of perfection.

(a) Perfection of security interest. — Except as otherwise provided in this section and G.S. 25-9-309, a security interest is perfected if it has attached and all of the applicable requirements for perfection in G.S. 25-9-310 through G.S. 25-9-316 have been satisfied. A security interest is perfected when it attaches if the applicable requirements are satisfied before the security interest attaches.

(b) Perfection of agricultural lien. — An agricultural lien is perfected if it has become effective and all of the applicable requirements for perfection in G.S. 25-9-310 have been satisfied. An agricultural lien is perfected when it becomes effective if the applicable requirements are satisfied before the agricultural lien becomes effective.

(c) Continuous perfection; perfection by different methods. — A security interest or agricultural lien is perfected continuously if it is originally perfected by one method under this Article and is later perfected by another method under this Article, without an intermediate period when it was unperfected.

(d) Supporting obligation. — Perfection of a security interest in collateral also perfects a security interest in a supporting obligation for the collateral.

(e) Lien securing right to payment. — Perfection of a security interest in a right to payment or performance also perfects a security interest in a security interest, mortgage, or other lien on personal or real property securing the right.

(f) Security entitlement carried in securities account. — Perfection of a security interest in a securities account also perfects a security interest in the security entitlements carried in the securities account.

(g) Commodity contract carried in commodity account. — Perfection of a security interest in a commodity account also perfects a security interest in the commodity contracts carried in the commodity account. (1997-181, s. 5; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former sections 9-115(2) and 9-303.

2. **General Rule.** This article uses the term "attach" to describe the point at which property becomes subject to a security interest. The requisites for attachment are stated in section 9-203. When it attaches, a security interest may be either perfected or unperfected. "Perfected" means that the security interest has attached and the secured party has taken all the steps required by this article as specified in sections 9-310 through 9-316. A perfected security interest may still be or become subordinate to other interests. See, e.g., sections 9-320 and 9-322. However, in general, after perfection the secured party is protected against creditors and transferees of the debtor and, in particular, against any representative of creditors in insolvency proceedings instituted by or against the debtor. See, e.g., section 9-317.

Subsection (a) explains that the time of perfection is when the security interest has attached and any necessary steps for perfection, such as taking possession or filing, have been taken. The "except" clause refers to the perfection-upon-attachment rules appearing in section 9-309. It also reflects that other subsections of this section, e.g., subsection (d), contain automatic perfection rules. If the steps for perfection have been taken in advance, as when the secured party files a financing statement before giving value or before the debtor acquires rights in the collateral, then the security interest is perfected when it attaches.

3. **Agricultural Liens.** Subsection (b) is new. It describes the elements of perfection of an agricultural lien.

4. **Continuous Perfection.** The following example illustrates the operation of subsection (c):

Example 1: Debtor, an importer, creates a security interest in goods that it imports and the documents of title that cover the goods. The secured party, Bank, takes possession of a negotiable bill of lading covering certain imported goods and thereby perfects its security interest in the bill of lading and the goods. See sections 9-312(c)(1) and 9-313(a). Bank releases the bill of lading to the debtor for the purpose of procuring the goods from the carrier and selling them. Under section 9-312(f), Bank continues to have a perfected security interest in the document and goods for 20 days. Bank files a financing statement covering the collateral before the expiration of the 20-day period. Its security interest now continues perfected for as long as the filing is good.

If the successive stages of Bank's security interest succeed each other without an intervening gap, the security interest is "perfected continuously," and the date of perfection is when the security interest first became perfected (i.e., when Bank received possession of the bill of lading). If, however, there is a gap between stages—for example, if Bank does not file until after the expiration of the 20-day period specified in section 9-312(f) and leaves the collateral in the debtor's possession—then, the chain being broken, the perfection is no longer continuous. The date of perfection would now be the date of filing (after expiration of the 20-day period). Bank's security interest would be vulnerable to any interests arising during the gap period which under section 9-317 take priority over an unperfected security interest.

5. **Supporting Obligations.** Subsection (d) is new. It provides for automatic perfection of a security interest in a supporting obligation for collateral if the security interest in the collateral is perfected. This is unlikely to effect any change in the law prior to adoption of this article.

Example 2: Buyer is obligated to pay Debtor for goods sold. Buyer's president guarantees the obligation. Debtor creates a security interest in the right to payment (account) in favor of Lender. Under section 9-203(f), the security interest attaches to Debtor's rights under the guarantee (supporting obligation). Under subsection (d), perfection of the security interest in the account constitutes perfection of the security interest in Debtor's rights under the guarantee.

6. **Rights to Payment Secured by Lien.** Subsection (e) is new. It deals with the situation in which a security interest is created in a right to payment that is secured by a security interest, mortgage, or other lien.

Example 3: Owner gives to Mortgagee a mortgage on Blackacre to secure a loan. Owner's obligation to pay is evidenced by a promissory note. In need of working capital, Mortgagee borrows from Financer and creates a security interest in the note in favor of Financer. Section 9-203(g) adopts the traditional view that the mortgage follows the note; i.e., the transferee of the note acquires the mortgage, as well. This subsection adopts a similar principle: Perfection of a security interest in the right to payment constitutes perfection of a security interest in the mortgage securing it.

An important consequence of the rules in section 9-203(g) and subsection (e) is that, by acquiring a perfected security interest in a mortgage (or other secured) note, the secured party acquires a security interest in the mortgage (or other lien) that is senior to the rights of a person who becomes a lien creditor of the mortgagee (article 9 debtor). See section 9-317(a)(2). This result helps prevent the separation of the mortgage (or other lien) from the note.

Under this article, attachment and perfection of a security interest in a secured right to payment do not of themselves affect the obligation to pay. For example, if the obligation is evidenced by a negotiable note, then article 3 dictates the person whom the maker must pay to discharge the note and any lien securing it. See section 3-602. If the right to payment is a payment intangible, then section 9-406 determines whom the account debtor must pay.

Similarly, this article does not determine who has the power to release a mortgage of record. That issue is determined by real property law.

7. **Investment Property.** Subsections (f) and (g) follow former section 9-115(2).

§ 25-9-309. (Effective July 1, 2001) Security interest perfected upon attachment.

The following security interests are perfected when they attach:

(1) A purchase-money security interest in consumer goods, except as otherwise provided in G.S. 25-9-311(b) with respect to consumer goods that are subject to a statute or treaty described in G.S. 25-9-311(a);

(2) An assignment of accounts or payment intangibles which does not by itself or in conjunction with other assignments to the same assignee transfer a significant part of the assignor's outstanding accounts or payment intangibles;
(3) A sale of a payment intangible;
(4) A sale of a promissory note;
(5) A security interest created by the assignment of a health-care-insurance receivable to the provider of the health-care goods or services;
(6) A security interest arising under G.S. 25-2-401, 25-2-505, 25-2-711(3), or 25-2A-508(5), until the debtor obtains possession of the collateral;
(7) A security interest of a collecting bank arising under G.S. 25-4-208;
(8) A security interest of an issuer or nominated person arising under G.S. 25-5-118;
(9) A security interest arising in the delivery of a financial asset under G.S. 25-9-206(c);
(10) A security interest in investment property created by a broker or securities intermediary;
(11) A security interest in a commodity contract or a commodity account created by a commodity intermediary;
(12) An assignment for the benefit of all creditors of the transferor and subsequent transfers by the assignee thereunder; and
(13) A security interest created by an assignment of a beneficial interest in a decedent's estate. (1997-181, s. 5; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Derived from former sections 9-115(4)(c) and (d), 9-116, and 9-302(1).

2. **Automatic Perfection.** This section contains the perfection-upon-attachment rules previously located in former sections 9-115(4)(c) and (d), 9-116, and 9-302(1). Rather than continue to state the rule by indirection, this section explicitly provides for perfection upon attachment.

3. **Purchase-Money Security Interest in Consumer Goods.** Former section 9-302(1)(d) has been revised and appears here as paragraph (1). No filing or other step is required to perfect a purchase-money security interest in consumer goods, other than goods, such as automobiles, that are subject to a statute or treaty described in section 9-311(a). However, filing is required to perfect a non-purchase-money security interest in consumer goods and is necessary to prevent a buyer of consumer goods from taking free of a security interest under section 9-320(b). A fixture filing is required for priority over conflicting interests in fixtures to the extent provided in section 9-334.

4. **Rights to Payment.** Paragraph (2) expands upon former section 9-302(1)(e) by affording automatic perfection to certain assignments of payment intangibles as well as accounts. The purpose of paragraph (2) is to save from ex post facto invalidation casual or isolated assignments—assignments which no one would think of filing. Any person who regularly takes assignments of any debtor's accounts or payment intangibles should file. In this connection section 9-109(d)(4) through (7), which excludes certain transfers of accounts, chattel paper, payment intangibles, and promissory notes from this article, should be consulted.

Paragraphs (3) and (4), which are new, afford automatic perfection to sales of payment intangibles and promissory notes, respectively. They reflect the practice under former article 9. Under that article, filing a financing statement did not affect the rights of a buyer of payment intangibles or promissory notes, inasmuch as the former article did not cover those sales. To the extent that the exception in paragraph (2) covers outright sales of payment intangibles, which automatically are perfected under paragraph (3), the exception is redundant.

5. **Health-Care-Insurance Receivables.** Paragraph (5) extends automatic perfection to assignments of health-care-insurance receivables if the assignment is made to the health-care provider that provided the health-care goods or services. The primary effect is that, when an individual assigns a right to payment under an insurance policy to the person who provided health-care goods or services, the provider has no need to file a financing statement against the individual. The normal filing requirements apply to other assignments of health-care-insurance receivables covered by this article, e.g., assignments from the health-care provider to a financer.

6. **Investment Property.** Paragraph (9) replaces the last clause of former section 9-116(2), concerning security interests that arise in the delivery of a financial asset.

Paragraphs (10) and (11) replace former section 9-115(4)(c) and (d), concerning secured financing of securities and commodity firms and clearing corporations. The former sections indicated that, with respect to certain security interests created by a securities intermediary or commodity intermediary, "(t)he filing of a financing statement . . . has no effect for purposes of perfection or priority with respect to that security interest." No change in meaning is intended by the deletion of the quoted phrase.

Secured financing arrangements for securities firms are currently implemented in various ways. In some circumstances, lenders may require that the transactions be structured as "hard pledges," where the securities are transferred on the books of a clearing corporation from the debtor's account to the lender's account or to a special pledge account for the lender where they cannot be disposed of without the specific consent of the lender. In other circumstances, lenders are content with so-called "agreement to pledge" or "agreement to deliver" arrangements, where the debtor retains the positions in its own account, but reflects on its books that the positions have been hypothecated and promises that the securities will be transferred to the secured party's account on demand.

The perfection and priority rules of this article are designed to facilitate current secured financing arrangements for securities firms as well as to provide sufficient flexibility to accommodate new arrangements that develop in the future. Hard pledge arrangements are covered by the concept of control. See sections 8-106, 9-106, and 9-314. Noncontrol secured financing arrangements for securities firms are covered by the automatic perfection rule of paragraph (10). Before the 1994 revision of articles 8 and 9, agreement to pledge arrangements could be implemented under a provision that a security interest in securities given for new value under a written security agreement was perfected without filing or possession for a period of 21 days. Although the security interests were temporary in legal theory, the financing arrangements could, in practice, be continued indefinitely by rolling over the loans at least every 21 days. Accordingly, a knowledgeable creditor of a securities firm realizes that the firm's securities may be subject to security interests that are not discoverable from any public records. The automatic-perfection rule of paragraph (10) makes it unnecessary to engage in the purely formal practice of rolling over these arrangements every 21 days.

In some circumstances, a clearing corporation may be the debtor in a secured financing arrangement. For example, a clearing corporation that settles delivery-versus-payment transactions among its participants on a net, same-day basis relies on timely payments from all participants with net obligations due to the system. If a participant that is a net debtor were to default on its payment obligation, the clearing corporation would not receive some of the funds needed to settle with participants that are net creditors to the system. To complete end-of-day settlement after a payment default by a participant, a clearing corporation that settles on a net, same-day basis may need to draw on credit lines and pledge securities of the defaulting participant or other securities pledged by participants in the clearing corporation to secure such drawings. The clearing corporation may be the top-tier securities intermediary for the securities pledged, so that it would not be practical for the lender to obtain control. Even where the clearing corporation holds some types of securities through other intermediaries, however, the clearing corporation is unlikely to be able to complete the arrangements necessary to convey "control" over the securities to be pledged in time to complete settlement in a timely manner. However, the term "securities intermediary" is defined in section 8-102(a)(14) to include clearing corporations. Thus, the perfection rule of paragraph (10) applies to security interests in investment property granted by clearing corporations.

7. **Beneficial Interests in Trusts.** Under former section 9-302(1)(c), filing was not required to perfect a security interest created by an assignment of a beneficial interest in a trust. Because beneficial interests in trusts are now used as collateral with greater frequency in commercial transactions, under this article filing is required to perfect a security interest in a beneficial interest.

8. **Assignments for Benefit of Creditors.** No filing or other action is required to perfect an assignment for the benefit of creditors. These assignments are not financing transactions, and the debtor ordinarily will not be engaging in further credit transactions.

§ 25-9-310. (Effective July 1, 2001) When filing required to perfect security interest or agricultural lien; security interests and agricultural liens to which filing provisions do not apply.

(a) General rule: perfection by filing. — Except as otherwise provided in subsection (b) of this section and G.S. 25-9-312(b), a financing statement must be filed to perfect all security interests and agricultural liens.

(b) Exceptions: filing not necessary. — The filing of a financing statement is not necessary to perfect a security interest:

(1) That is perfected under G.S. 25-9-308(d), (e), (f), or (g);
(2) That is perfected under G.S. 25-9-309 when it attaches;
(3) In property subject to a statute, regulation, or treaty described in G.S. 25-9-311(a);
(4) In goods in possession of a bailee which is perfected under G.S. 25-9-312(d)(1) or (2);
(5) In certificated securities, documents, goods, or instruments which is perfected without filing or possession under G.S. 25-9-312(e), (f), or (g);
(6) In collateral in the secured party's possession under G.S. 25-9-313;
(7) In a certificated security which is perfected by delivery of the security certificate to the secured party under G.S. 25-9-313;
(8) In deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights which is perfected by control under G.S. 25-9-314;
(9) In proceeds which is perfected under G.S. 25-9-315;
(10) That is perfected under G.S. 25-9-316; or
(11) Created in connection with the issuance of any bond, note, or other evidence of indebtedness for borrowed money by this State or any political subdivision or agency thereof, except as provided in G.S. 63A-11(e), 143B-456.1(f), 159C-28, and 159D-23.

(c) Assignment of perfected security interest. — If a secured party assigns a perfected security interest or agricultural lien, a filing under this Article is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor. (1866-7, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C.S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, s. 3; c. 196, s. 2; 1955, c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7; 1977, c. 103; 1989 (Reg. Sess., 1990), c. 1024, s. 8(i); 1997-181, s. 92000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-302(1), (2).

2. **General Rule.** Subsection (a) establishes a central article 9 principle: Filing a financing statement is necessary for perfection of security interests and agricultural liens. However, filing is not necessary to perfect a security interest that is perfected by another permissible method, see subsection (b), nor does filing ordinarily perfect a security interest in a deposit account, letter-of-credit right, or money. See section 9-312(b). Part 5 of the article deals with the office in which to file, mechanics of filing, and operations of the filing office.

3. **Exemptions from Filing.** Subsection (b) lists the security interests for which filing is not required as a condition of perfection, because they are perfected automatically upon attachment (subsections (b)(2) and (b)(9)) or upon the occurrence of another event (subsections (b)(1), (b)(5), and (b)(9)), because they are perfected under the law of another jurisdiction (subsection (b)(10)), or because they are perfected by another method, such as by the secured party's taking possession or control (subsections (b)(3), (b)(4), (b)(5), (b)(6), (b)(7), and (b)(8)).

4. **Assignments of Perfected Security Interests.** Subsection (c) concerns assignment of a perfected security interest or agricultural lien. It provides that no filing is necessary in connection with an assignment by a secured

party to an assignee in order to maintain perfection as against creditors of and transferees from the original debtor.

Example 1: Buyer buys goods from Seller, who retains a security interest in them. After Seller perfects the security interest by filing, Seller assigns the perfected security interest to X. The security interest, in X's hands and without further steps on X's part, continues perfected against Buyer's transferees and creditors.

Example 2: Dealer creates a security interest in specific equipment in favor of Lender. After Lender perfects the security interest in the equipment by filing, Lender assigns the chattel paper (which includes the perfected security interest in Dealer's equipment) to X. The security interest in the equipment, in X's hands and without further steps on X's part, continues perfected against Dealer's transferees and creditors. However, regardless of whether Lender made the assignment to secure Lender's obligation to X or whether the assignment was an outright sale of the chattel paper, the assignment creates a security interest in the chattel paper in favor of X. Accordingly, X must take whatever steps may be required for perfection in order to be protected against Lender's transferees and creditors with respect to the chattel paper.

Subsection (c) applies not only to an assignment of a security interest perfected by filing but also to an assignment of a security interest perfected by a method other than by filing, such as by control or by possession. Although subsection (c) addresses explicitly only the absence of an additional filing requirement, the same result normally will follow in the case of an assignment of a security interest perfected by a method other than by filing. For example, as long as possession of collateral is maintained by an assignee or by the assignor or another person on behalf of the assignee, no further perfection steps need be taken on account of the assignment to continue perfection as against creditors and transferees of the original debtor. Of course, additional action may be required for perfection of the assignee's interest as against creditors and transferees of the assignor.

Similarly, subsection (c) applies to the assignment of a security interest perfected by compliance with a statute, regulation, or treaty under section 9-311(b), such as a certificate-of-title statute. Unless the statute expressly provides to the contrary, the security interest will remain perfected against creditors of and transferees from the original debtor, even if the assignee takes no action to cause the certificate of title to reflect the assignment or to cause its name to appear on the certificate of title. See PEB Commentary No. 12, which discusses this issue under former section 9-302(3). Compliance with the statute is "equivalent to filing" under section 9-311(b).

§ 25-9-311. (Effective July 1, 2001) Perfection of security interests in property subject to certain statutes, regulations, and treaties.

(a) Security interest subject to other law. — Except as otherwise provided in subsection (d) of this section, the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to:

(1) A statute, regulation, or treaty of the United States whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt G.S. 25-9-310(a);

(2) A certificate-of-title statute of this State covering automobiles or other goods that provides for a security interest to be indicated on the certificate as a condition to or result of perfection of the security interest, including G.S. 20-58 and G.S. 75A-41; or

(3) A certificate-of-title statute of another jurisdiction which provides for a security interest to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the property.

(b) Compliance with other law. — Compliance with the requirements of a statute, regulation, or treaty described in subsection (a) of this section for obtaining priority over the rights of a lien creditor is equivalent to the filing of a financing statement under this Article. Except as otherwise provided in subsection (d) of this section and G.S. 25-9-313 and G.S. 25-9-316(d) and (e) for goods covered by a certificate of title, a security interest in property subject to a statute, regulation, or treaty described in subsection (a) of this section may be perfected only by compliance with those requirements, and a security

interest so perfected remains perfected notwithstanding a change in the use or transfer of possession of the collateral.

(c) Duration and renewal of perfection. — Except as otherwise provided in subsection (d) of this section and G.S. 25-9-316(d) and (e), duration and renewal of perfection of a security interest perfected by compliance with the requirements prescribed by a statute, regulation, or treaty described in subsection (a) of this section are governed by the statute, regulation, or treaty. In other respects, the security interest is subject to this Article.

(d) Inapplicability to certain inventory. — During any period in which collateral subject to a statute specified in subdivision (a)(2) of this section is inventory held for sale or lease by a person or leased by that person as lessor and that person is in the business of selling goods of that kind, this section does not apply to a security interest in that collateral created by that person. (1866-7, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C.S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, s. 3; c. 196, s. 2; 1955, c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7; 1977, c. 103; 1989 (Reg. Sess., 1990), c. 1024, s. 8(i); 1997-181, s. 9; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-302(3), (4).

2. **Federal Statutes, Regulations, and Treaties.** Subsection (a)(1) exempts from the filing provisions of this article transactions as to which a system of filing—state or federal—has been established under federal law. Subsection (b) makes clear that when such a system exists, perfection of a relevant security interest can be achieved only through compliance with that system (i.e., filing under this article is not a permissible alternative).

An example of the type of federal statute referred to in subsection (a)(1) is 49 U.S.C. sections 44107-11, for civil aircraft of the United States. The Assignment of Claims Act of 1940, as amended, provides for notice to contracting and disbursing officers and to sureties on bonds but does not establish a national filing system and therefore is not within the scope of subsection (a)(1). An assignee of a claim against the United States may benefit from compliance with the Assignment of Claims Act. But regardless of whether the assignee complies with that act, the assignee must file under this article in order to perfect its security interest against creditors and transferees of its assignor.

Subsection (a)(1) provides explicitly that the filing requirement of this article defers only to federal statutes, regulations, or treaties whose requirements for a security interest's obtaining priority over the rights of a lien creditor preempt section 9-310(a). The provision eschews reference to the term "perfection," inasmuch as section 9-308 specifies the meaning of that term and a preemptive rule may use other terminology.

3. **State Statutes.** Subsections (a)(2) and (3) exempt from the filing requirements of this article transactions covered by state certificate-of-title statutes covering motor vehicles and the like. The description of certificate-of-title statutes in subsections (a)(2) and (a)(3) tracks the language of the definition of "certificate of title" in section 9-102. For a discussion of the operation of state certificate-of-title statutes in interstate contexts, see the comments to section 9-303.

Some states have enacted central filing statutes with respect to secured transactions in kinds of property that are of special importance in the local economy. Subsection (a)(2) defers to these statutes with respect to filing for that property.

4. **Inventory Covered by Certificate of Title.** Under subsection (d), perfection of a security interest in the inventory of a person in the business of selling goods of that kind is governed by the normal perfection rules, even if the inventory is subject to a certificate-of-title statute. Compliance with a certificate-of-title statute is both unnecessary and ineffective to perfect a security interest in inventory to which this subsection applies. Thus, a secured party who finances an automobile dealer that is in the business of selling and leasing its inventory of automobiles can perfect a security interest in all the automobiles by filing a financing statement but not by compliance with a certificate-of-title statute.

Subsection (d), and thus the filing and other perfection provisions of this Article, does not apply to inventory that is subject to a certificate-of-title statute and is of a kind that the debtor is not in the business of selling. For example, if goods are subject to a certificate-of-title statute and the debtor is in the business of leasing but not of selling, goods of that kind, the other subsections of this section govern perfection of a security interest in the goods. The fact that the debtor eventually sells the goods does

not, of itself, mean that the debtor "is in the business of selling goods of that kind."

The filing and other perfection provisions of this Article apply to goods subject to a certificate-of-title statute only "during any period in which collateral is inventory held for sale or lease or leased." If the debtor takes goods of this kind out of inventory and uses them, say, as equipment, a filed financing statement would not remain effective to perfect a security interest.

5. **Compliance with Perfection Requirements of Other Statute.** Subsection (b) makes clear that compliance with the perfection requirements (i.e., the requirements for obtaining priority over a lien creditor), but not other requirements, of a statute, regulation, or treaty described in subsection (a), is sufficient for perfection under this article. Perfection of a security interest under such a statute, regulation, or treaty has all the consequences of perfection under this article.

The interplay of this section with certain certificate-of-title statutes may create confusion and uncertainty. For example, statutes under which perfection does not occur until a certificate of title is issued will create a gap between the time that the goods are covered by the certificate under section 9-303 and the time of perfection. If the gap is long enough, it may result in turning some unobjectionable transactions into avoidable preferences under Bankruptcy Code section 547. (The preference risk arises if more than 10 days (or 20 days, in the case of a purchase-money security interest) passes between the time a security interest attaches (or the debtor receives possession of the collateral, in the case of a purchase-money security interest) and the time it is perfected.) Accordingly, the legislative note to this section instructs the legislature to amend the applicable certificate-of-title statute to provide that perfection occurs upon receipt by the appropriate state official of a properly tendered application for a certificate of title on which the security interest is to be indicated.

Under some certificate-of-title statutes, including the Uniform Motor Vehicle Certificate of Title and Anti-Theft Act, perfection generally occurs upon delivery of specified documents to a state official but may, under certain circumstances, relate back to the time of attachment. This relation-back feature can create great difficulties for the application of the rules in sections 9-303 and 9-311(b). Accordingly, the legislative note also recommends to legislatures that they remove any relation-back provisions from certificate-of-title statutes affecting security interests.

6. **Compliance with Perfection Requirements of Other Statute as Equivalent to Filing.** Under subsection (b), compliance with the perfection requirements (i.e., the requirements for obtaining priority over a lien creditor) of a statute, regulation, or treaty described in subsection (a) "is equivalent to the filing of a financing statement."

The quoted phrase appeared in former section 9-302(3). Its meaning was unclear, and many questions arose concerning the extent to which and manner in which article 9 rules referring to "filing" were applicable to perfection by compliance with a certificate-of-title statute. This article takes a variety of approaches for applying article 9's filing rules to compliance with other statutes and treaties. First, as discussed above in comment 5, it leaves the determination of some rules, such as the rule establishing time of perfection (section 9-516(a)), to the other statutes themselves. Second, this article explicitly applies some article 9 filing rules to perfection under other statutes or treaties. See, e.g., section 9-505. Third, this article makes other article 9 rules applicable to security interests perfected by compliance with another statute through the "equivalent to . . . filing" provision in the first sentence of section 9-311(b). The third approach is reflected for the most part in occasional comments explaining how particular rules apply when perfection is accomplished under section 9-311(b). See, e.g., section 9-310, comment 4; section 9-315, comment 6; and section 9-317, comment 8. The absence of a comment indicating that a particular filing provision applies to perfection pursuant to section 9-311(b) does not mean the provision is inapplicable.

7. **Perfection by Possession of Goods Covered by Certificate-of-Title Statute.** A secured party who holds a security interest perfected under the law of State A in goods that subsequently are covered by a State B certificate of title may face a predicament. Ordinarily, the secured party will have four months under State B's section 9-316(c) and (d) in which to (re)perfect as against a purchaser of the goods by having its security interest noted on a State B certificate. This procedure is likely to require the cooperation of the debtor and any competing secured party whose security interest has been noted on the certificate. Comment 4(e) to former section 9-103 observed that "that cooperation is not likely to be forthcoming from an owner who wrongfully procured the issuance of a new certificate not showing the out-of-state security interest, or from a local secured party finding himself in a priority contest with the out-of-state secured party." According to that comment, "(t)he only solution for the out-of-state secured party under present certificate of title statutes seems to be to reperfect by possession, i.e., by repossessing the goods." But the "solution" may not have worked: Former section 9-302(4) provided that a security interest in property subject to a certificate-of-title stat-

ute "can be perfected only by compliance therewith."

Sections 9-311(c), 9-313(b), and 9-316(d) and (e) of this article resolve the conflict by providing that a security interest that remains perfected solely by virtue of section 9-316(e) can be (re)perfected by the secured party's taking possession of the collateral. These sections contemplate only that taking possession of goods covered by a certificate of title will work as a method of perfection. None of these sections creates a right to take possession. Section 9-609 and the agreement of the parties define the secured party's right to take possession.

§ 25-9-312. (Effective July 1, 2001) Perfection of security interests in chattel paper, deposit accounts, documents, goods covered by documents, instruments, investment property, letter-of-credit rights, and money; perfection by permissive filing; temporary perfection without filing or transfer of possession.

(a) Perfection by filing permitted. — A security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing.

(b) Control or possession of certain collateral. — Except as otherwise provided in G.S. 25-9-315(c) and (d) for proceeds:

(1) A security interest in a deposit account may be perfected only by control under G.S. 25-9-314;

(2) And except as otherwise provided in G.S. 25-9-308(d), a security interest in a letter-of-credit right may be perfected only by control under G.S. 25-9-314; and

(3) A security interest in money may be perfected only by the secured party's taking possession under G.S. 25-9-313.

(c) Goods covered by negotiable document. — While goods are in the possession of a bailee that has issued a negotiable document covering the goods:

(1) A security interest in the goods may be perfected by perfecting a security interest in the document; and

(2) A security interest perfected in the document has priority over any security interest that becomes perfected in the goods by another method during that time.

(d) Goods covered by nonnegotiable document. — While goods are in the possession of a bailee that has issued a nonnegotiable document covering the goods, a security interest in the goods may be perfected by:

(1) Issuance of a document in the name of the secured party;

(2) The bailee's receipt of notification of the secured party's interest; or

(3) Filing as to the goods.

(e) Temporary perfection: new value. — A security interest in certificated securities, negotiable documents, or instruments is perfected without filing or the taking of possession for a period of 20 days from the time it attaches to the extent that it arises for new value given under an authenticated security agreement.

(f) Temporary perfection: goods or documents made available to debtor. — A perfected security interest in a negotiable document or goods in possession of a bailee, other than one that has issued a negotiable document for the goods, remains perfected for 20 days without filing if the secured party makes available to the debtor the goods or documents representing the goods for the purpose of:

(1) Ultimate sale or exchange; or

(2) Loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise dealing with them in a manner preliminary to their sale or exchange.

(g) Temporary perfection: delivery of security certificate or instrument to debtor. — A perfected security interest in a certificated security or instrument remains perfected for 20 days without filing if the secured party delivers the security certificate or instrument to the debtor for the purpose of:

(1) Ultimate sale or exchange; or

(2) Presentation, collection, enforcement, renewal, or registration of transfer.

(h) Expiration of temporary perfection. — After the 20-day period specified in subsection (e), (f), or (g) of this section expires, perfection depends upon compliance with this Article. (1997-181, s. 5; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-304, with additions and some changes.

2. **Instruments.** Under subsection (a), a security interest in instruments may be perfected by filing. This rule represents an important change from former article 9, under which the secured party's taking possession of an instrument was the only method of achieving long-term perfection. The rule is likely to be particularly useful in transactions involving a large number of notes that a debtor uses as collateral but continues to collect from the makers. A security interest perfected by filing is subject to defeat by certain subsequent purchasers (including secured parties). Under section 9-330(d), purchasers for value who take possession of an instrument without knowledge that the purchase violates the rights of the secured party generally would achieve priority over a security interest in the instrument perfected by filing. In addition, section 9-331 provides that filing a financing statement does not constitute notice that would preclude a subsequent purchaser from becoming a holder in due course and taking free of all claims under section 3-306.

3. **Chattel Paper; Negotiable Documents.** Subsection (a) further provides that filing is available as a method of perfection for security interests in chattel paper and negotiable documents. Tangible chattel paper is sometimes delivered to the assignee, and sometimes left in the hands of the assignor for collection. Subsection (a) allows the assignee to perfect its security interest by filing in the latter case. Alternatively, the assignee may perfect by taking possession. See section 9-313(a). An assignee of electronic chattel paper may perfect by taking control. See sections 9-105 and 9-314(a). The security interest of an assignee who takes possession or control may qualify for priority over a competing security interest perfected by filing. See section 9-330.

Negotiable documents may be, and usually are, delivered to the secured party. The secured party's taking possession will suffice as a perfection step. See section 9-313(a). However, as is the case with chattel paper, a security interest in a negotiable document may be perfected by filing.

4. **Investment Property.** A security interest in investment property, including certificated securities, uncertificated securities, security entitlements, and securities accounts, may be perfected by filing. However, security interests created by brokers, securities intermediaries, or commodity intermediaries are automatically perfected; filing is of no effect. See section 9-309(10) and (11). A security interest in all kinds of investment property also may be perfected by control, see sections 9-105 and 9-314, and a security interest in a certificated security also may be perfected by the secured party's taking delivery under section 8-301. See section 9-313(a). A security interest perfected only by filing is subordinate to a conflicting security interest perfected by control or delivery. See section 9-328(1) and (5). Thus, although filing is a permissible method of perfection, a secured party who perfects by filing takes the risk that the debtor has granted or will grant a security interest in the same collateral to another party who obtains control. Also, perfection by filing would not give the secured party protection against other types of adverse claims, since the article 8 adverse claim cut-off rules require control. See section 8-510.

5. **Deposit Accounts.** Under new subsection (b)(1), the only method of perfecting a security interest in a deposit account as original collateral is by control. Filing is ineffective, except as provided in section 9-315 with respect to proceeds. As explained in section 9-104, "control" can arise as a result of an agreement among the secured party, debtor, and bank, whereby the bank agrees to comply with instructions of the secured party with respect to disposition of the funds on deposit, even though the debtor retains the right to direct disposition of the funds. Thus, subsection (b)(1) takes an intermediate position between certain non-UCC law, which conditions the effectiveness of a security interest on the secured party's enjoyment of such dominion and control over the deposit account that the debtor is unable to dispose of the funds, and the approach this article takes to

securities accounts, under which a secured party who is unable to reach the collateral without resort to judicial process may perfect by filing. By conditioning perfection on "control," rather than requiring the secured party to enjoy absolute dominion to the exclusion of the debtor, subsection (b)(1) permits perfection in a wide variety of transactions, including those in which the secured party actually relies on the deposit account in extending credit and maintains some meaningful dominion over it, but does not wish to deprive the debtor of access to the funds altogether.

6. **Letter-of-Credit Rights.** Letter-of-credit rights commonly are "supporting obligations," as defined in section 9-102. Perfection as to the related account, chattel paper, document, general intangible, instrument, or investment property will perfect as to the letter-of-credit rights. See section 9-308(d). Subsection (b)(2) provides that, in other cases, a security interest in a letter-of-credit right may be perfected only by control. "Control," for these purposes, is explained in section 9-107.

7. **Goods Covered by Document of Title.** Subsection (c) applies to goods in the possession of a bailee who has issued a negotiable document covering the goods. Subsection (d) applies to goods in the possession of a bailee who has issued a nonnegotiable document of title, including a document of title that is "non-negotiable" under section 7-104. Section 9-313 governs perfection of a security interest in goods in the possession of a bailee who has not issued a document of title.

Subsection (c) clarifies the perfection and priority rules in former section 9-304(2). Consistently with the provisions of article 7, subsection (c) takes the position that, as long as a negotiable document covering goods is outstanding, title to the goods is, so to say, locked up in the document. Accordingly, a security interest in goods covered by a negotiable document may be perfected by perfecting a security interest in the document. The security interest also may be perfected by another method, e.g., by filing. The priority rule in subsection (c) governs only priority between (i) a security interest in goods which is perfected by perfecting in the document and (ii) a security interest in the goods which becomes perfected by another method while the goods are covered by the document.

Example 1: While wheat is in a grain elevator and covered by a negotiable warehouse receipt, Debtor creates a security interest in the wheat in favor of SP-1 and SP-2. SP-1 perfects by filing a financing statement covering "wheat." Thereafter, SP-2 perfects by filing a financing statement describing the warehouse receipt. Subsection (c)(1) provides that SP-2's security interest is perfected. Subsection (c)(2) provides that SP-2's security interest is senior to SP-1's.

Example 2: The facts are as in Example 1, but SP-1's security interest attached and was perfected before the goods were delivered to the grain elevator. Subsection (c)(2) does not apply, because SP-1's security interest did not become perfected during the time that the wheat was in the possession of a bailee. Rather, the first-to-file-or-perfect priority rule applies. See section 9-322.

A secured party may become "a holder to whom a negotiable document of title has been duly negotiated" under section 7-501. If so, the secured party acquires the rights specified by article 7. Article 9 does not limit those rights, which may include the right to priority over an earlier-perfected security interest. See section 9-331(a).

Subsection (d) takes a different approach to the problem of goods covered by a nonnegotiable document. Here, title to the goods is not looked on as being locked up in the document, and the secured party may perfect its security interest directly in the goods by filing as to them. The subsection provides two other methods of perfection: Issuance of the document in the secured party's name (as consignee of a straight bill of lading or the person to whom delivery would be made under a nonnegotiable warehouse receipt) and receipt of notification of the secured party's interest by the bailee. Perfection under subsection (d) occurs when the bailee receives notification of the secured party's interest in the goods, regardless of who sends the notification. Receipt of notification is effective to perfect, regardless of whether the bailee responds. Unlike former section 9-304(3), from which it derives, subsection (d) does not apply to goods in the possession of a bailee who has not issued a document of title. Section 9-313(c) covers that case and provides that perfection by possession as to goods not covered by a document requires the bailee's acknowledgment.

8. **Temporary Perfection Without Having First Otherwise Perfected.** Subsection (e) follows former section 9-304(4) in giving perfected status to security interests in certificated securities, instruments, and negotiable documents for a short period (reduced from 21 to 20 days, which is the time period generally applicable in this article), although there has been no filing and the collateral is in the debtor's possession. The 20-day temporary perfection runs from the date of attachment. There is no limitation on the purpose for which the debtor is in possession, but the secured party must have given "new value" (defined in section 9-102) under an authenticated security agreement.

9. **Maintaining Perfection After Surrendering Possession.** There are a variety of

legitimate reasons—many of them are described in subsections (f) and (g)—why certain types of collateral must be released temporarily to a debtor. No useful purpose would be served by cluttering the files with records of such exceedingly short term transactions.

Subsection (f) affords the possibility of 20-day perfection in negotiable documents and goods in the possession of a bailee but not covered by a negotiable document. Subsection (g) provides for 20-day perfection in certificated securities and instruments. These subsections derive from former section 9-305(5). However, the period of temporary perfection has been reduced from 21 to 20 days, which is the time period generally applicable in this article, and "enforcement" has been added in subsection (g) as one of the special and limited purposes for which a secured party can release an instrument or certificated security to the debtor and still remain perfected. The period of temporary perfection runs from the date a secured party who already has a perfected security interest turns over the collateral to the debtor. There is no new value requirement, but the turnover must be for one or more of the purposes stated in subsection (f) or (g). The 20-day period may be extended by perfecting as to the collateral by another method before the period expires. However, if the security interest is not perfected by another method until after the 20-day period expires, there will be a gap during which the security interest is unperfected.

Temporary perfection extends only to the negotiable document or goods under subsection (f) and only to the certificated security or instrument under subsection (g). It does not extend to proceeds. If the collateral is sold, the security interest will continue in the proceeds for the period specified in section 9-315.

Subsections (f) and (g) deal only with perfection. Other sections of this article govern the priority of a security interest in goods after surrender of the document covering them. In the case of a purchase-money security interest in inventory, priority may be conditioned upon giving notification to a prior inventory financer. See section 9-324.

§ 25-9-313. (Effective July 1, 2001) When possession by or delivery to secured party perfects security interest without filing.

(a) Perfection by possession or delivery. — Except as otherwise provided in subsection (b) of this section, a secured party may perfect a security interest in negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under G.S. 25-8-301.

(b) Goods covered by certificate of title. — With respect to goods covered by a certificate of title issued by this State, a secured party may perfect a security interest in the goods by taking possession of the goods only in the circumstances described in G.S. 25-9-316(d).

(c) Collateral in possession of person other than debtor. — With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor's business, when:

(1) The person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party's benefit; or

(2) The person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party's benefit.

(d) Time of perfection by possession; continuation of perfection. — If perfection of a security interest depends upon possession of the collateral by a secured party, perfection occurs no earlier than the time the secured party takes possession and continues only while the secured party retains possession.

(e) Time of perfection by delivery; continuation of perfection. — A security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under G.S. 25-8-301 and remains perfected by delivery until the debtor obtains possession of the security certificate.

(f) Acknowledgment not required. — A person in possession of collateral is not required to acknowledge that it holds possession for a secured party's benefit.

(g) Effectiveness of acknowledgment; no duties or confirmation. — If a person acknowledges that it holds possession for the secured party's benefit:

(1) The acknowledgment is effective under subsection (c) of this section or G.S. 25-8-301(a), even if the acknowledgment violates the rights of a debtor; and

(2) Unless the person otherwise agrees or law other than this Article otherwise provides, the person does not owe any duty to the secured party and is not required to confirm the acknowledgment to another person.

(h) Secured party's delivery to person other than debtor. — A secured party having possession of collateral does not relinquish possession by delivering the collateral to a person other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's business if the person was instructed before the delivery or is instructed contemporaneously with the delivery:

(1) To hold possession of the collateral for the secured party's benefit; or

(2) To redeliver the collateral to the secured party.

(i) Effect of delivery under subsection (h); no duties or confirmation. — A secured party does not relinquish possession, even if a delivery under subsection (h) of this section violates the rights of a debtor. A person to which collateral is delivered under subsection (h) of this section does not owe any duty to the secured party and is not required to confirm the delivery to another person unless the person otherwise agrees or law other than this Article otherwise provides. (1997-181, s. 5; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former sections 9-115(6) and 9-305.

2. **Perfection by Possession.** As under the common law of pledge, no filing is required by this article to perfect a security interest if the secured party takes possession of the collateral. See section 9-310(b)(6).

This section permits a security interest to be perfected by the taking of possession only when the collateral is goods, instruments, negotiable documents, money, or tangible chattel paper. Accounts, commercial tort claims, deposit accounts, investment property, letter-of-credit rights, letters of credit, and oil, gas, or other minerals before extraction are excluded. (But see comment 6, below, regarding certificated securities.) A security interest in accounts and payment intangibles—property not ordinarily represented by any writing whose delivery operates to transfer the right to payment—may under this article be perfected only by filing. This rule would not be affected by the fact that a security agreement or other record described the assignment of such collateral as a "pledge." Section 9-309(2) exempts from filing certain assignments of accounts or payment intangibles which are out of the ordinary course of financing. These exempted assignments are perfected when they attach. Similarly, under section 9-309(3), sales of payment intangibles are automatically perfected.

3. **"Possession."** This section does not define "possession." It adopts the general concept as it developed under former Article 9. As under former Article 9, in determining whether a particular person has possession, the principles of agency apply. For example, if the collateral is in possession of an agent of the secured party for the purposes of possessing on behalf of the secured party, and if the agent is not also an agent of the debtor, the secured party has taken actual possession, and subsection (c) does not apply. Sometimes a person holds collateral both as an agent of the secured party and as an agent of the debtor. The fact of dual agency is not of itself inconsistent with the secured party's having taken possession (and thereby having rendered subsection (c) inapplicable). The debtor cannot qualify as an agent for the secured party for purposes of the secured party's taking possession. And, under appropriate circumstances, a court may determine that a person in possession is so closely connected to or controlled by the debtor that the debtor has retained effective possession, even though the person may have agreed to take possession on behalf of the secured party. If so, the person's taking possession would not constitute the secured party's taking possession and would not be sufficient for perfection. See also Section

9-205(b). In a typical escrow arrangement, where the escrowee has possession of collateral as agent for both the secured party and the debtor, the debtor's relationship to the escrowee is not such as to constitute retention of possession by the debtor.

4. **Goods in Possession of Third Party: Perfection.** Former section 9-305 permitted perfection of a security interest by notification to a bailee in possession of collateral. This article distinguishes between goods in the possession of a bailee who has issued a document of title covering the goods and goods in the possession of a third party who has not issued a document. Section 9-312(c) or (d) applies to the former, depending on whether the document is negotiable. Section 9-313(c) applies to the latter. It provides a method of perfection by possession when the collateral is possessed by a third person who is not the secured party's agent.

Notification of a third person does not suffice to perfect under section 9-313(c). Rather, perfection does not occur unless the third person authenticates an acknowledgment that it holds possession of the collateral for the secured party's benefit. Compare section 9-312(d), under which receipt of notification of the security party's interest by a bailee holding goods covered by a nonnegotiable document is sufficient to perfect, even if the bailee does not acknowledge receipt of the notification. A third person may acknowledge that it will hold for the secured party's benefit goods to be received in the future. Under these circumstances, perfection by possession occurs when the third person obtains possession of the goods.

Under subsection (c), acknowledgment of notification by a "lessee ... in ... ordinary course of ... business" (defined in section 2A-103) does not suffice for possession. The section thus rejects the reasoning of In re Atlantic Systems, Inc., 135 B.R. 463 (Bankr. S.D.N.Y. 1992) (holding that notification to debtor-lessor's lessee sufficed to perfect security interest in leased goods). See Steven O. Weise, Perfection by Possession: The Need for an Objective Test, 29 Idaho Law Rev. 705 (1992-93) (arguing that lessee's possession in ordinary course of debtor-lessor's business does not provide adequate public notice of possible security interest in leased goods). Inclusion of a per se rule concerning lessees is not meant to preclude a court, under appropriate circumstances, from determining that a third person is so closely connected to or controlled by the debtor that the debtor has retained effective possession. If so, the third person's acknowledgment would not be sufficient for perfection.

In some cases, it may be uncertain whether a person who has possession of collateral is an agent of the secured party or a non-agent bailee. Under those circumstances, prudence might suggest that the secured party obtain the person's acknowledgment to avoid litigation and ensure perfection by possession regardless of how the relationship between the secured part and the person is characterized.

5. **No Relation Back.** Former section 9-305 provided that a security interest is perfected by possession from the time possession is taken "without a relation back." As the comment to former section 9-305 observed, the relation-back theory, under which the taking of possession was deemed to relate back to the date of the original security agreement, has had little vitality since the 1938 revision of the Federal Bankruptcy Act. The theory is inconsistent with former article 9 and with this article. See section 9-313(d). Accordingly, this article deletes the quoted phrase as unnecessary. Where a pledge transaction is contemplated, perfection dates only from the time possession is taken, although a security interest may attach, unperfected. The only exceptions to this rule are the short, 20-day periods of perfection provided in section 9-312(e), (f), and (g), during which a debtor may have possession of specified collateral in which there is a perfected security interest.

6. **Certificated Securities.** The second sentence of subsection (a) reflects the traditional rule for perfection of a security interest in certificated securities. Compare sections 8-313(1)(a) and 8-321 (1978 Official Text); section 9-115(6) (1994 Official Text); and section 9-305 (1972 Official Text). It has been modified to refer to "delivery" under section 8-301. Corresponding changes appear in section 9-203(b).

Subsections (e), (f), and (g), which are new, apply to a person in possession of security certificates or holding security certificates for the secured party's benefit under section 8-301. For delivery to occur when a person other than a secured party holds possession for the secured party, the person may not be a securities intermediary.

Under subsection (e), a possessory security interest in a certificated security remains perfected until the debtor obtains possession of the security certificate. This rule is analogous to that of section 9-314(c), which deals with perfection of security interests in investment property by control. See section 9-314, comment 3.

7. **Goods Covered by Certificate of Title.** Subsection (b) is necessary to effect changes to the choice-of-law rules governing goods covered by a certificate of title. These changes are described in the comments to section 9-311. Subsection (b), like subsection (a), does not create a right to take possession. Rather, it indicates the circumstances under which the secured party's taking possession of goods covered by a certificate of title is effective to perfect a security interest in the goods: The goods become covered by a certificate of title issued by

this state at a time when the security interest is perfected by any method under the law of another jurisdiction.

8. **Goods in Possession of Third Party: No Duty to Acknowledge; Consequences of Acknowledgment.** Subsections (f) and (g) are new and address matters as to which former article 9 was silent. They derive in part from section 8-106(g). Subsection (f) provides that a person in possession of collateral is not required to acknowledge that it holds for a secured party. Subsection (g)(1) provides that an acknowledgment is effective even if wrongful as to the debtor. Subsection (g)(2) makes clear that an acknowledgment does not give rise to any duties or responsibilities under this article. Arrangements involving the possession of goods are hardly standardized. They include bailments for services to be performed on the goods (such as repair or processing), for use (leases), as security (pledges), for carriage, and for storage. This article leaves to the agreement of the parties and to any other applicable law the imposition of duties and responsibilities upon a person who acknowledges under subsection (c). For example, by acknowledging, a third party does not become obliged to act on the secured party's direction or to remain in possession of the collateral unless it agrees to do so or other law so provides.

9. **Delivery to Third Party by Secured Party.** New subsections (h) and (i) address the practice of mortgage warehouse lenders. These lenders typically send mortgage notes to prospective purchasers under cover of letters advising the prospective purchasers that the lenders hold security interests in the notes. These lenders relied on notification to maintain perfection under former section 9-305. Requiring them to obtain authenticated acknowledgments from each prospective purchaser under subsection (c) could be unduly burdensome and disruptive of established practices. Under subsection (h), when a secured party in possession itself delivers the collateral to a third party, instructions to the third party would be sufficient to maintain perfection by possession; an acknowledgment would not be necessary. Under subsection (i), the secured party does not relinquish possession by making a delivery under subsection (h), even if the delivery violates the rights of the debtor. That subsection also makes clear that a person to whom collateral is delivered under subsection (h) does not owe any duty to the secured party and is not required to confirm the delivery to another person unless the person otherwise agrees or law other than this article provides otherwise.

§ 25-9-314. (Effective July 1, 2001) Perfection by control.

(a) Perfection by control. — A security interest in investment property, deposit accounts, letter-of-credit rights, or electronic chattel paper may be perfected by control of the collateral under G.S. 25-9-104, 25-9-105, 25-9-106, or 25-9-107.

(b) Specified collateral: time of perfection by control; continuation of perfection. — A security interest in deposit accounts, electronic chattel paper, or letter-of-credit rights is perfected by control under G.S. 25-9-104, 25-9-105, or 25-9-107 when the secured party obtains control and remains perfected by control only while the secured party retains control.

(c) Investment property: time of perfection by control; continuation of perfection. — A security interest in investment property is perfected by control under G.S. 25-9-106 from the time the secured party obtains control and remains perfected by control until:

(1) The secured party does not have control; and

(2) One of the following occurs:

a. If the collateral is a certificated security, the debtor has or acquires possession of the security certificate;

b. If the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner; or

c. If the collateral is a security entitlement, the debtor is or becomes the entitlement holder. (1997-181, s. 5; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Substantially new; derived in part from former section 9-115(4).

2. **Control.** This section provides for perfection by control with respect to investment property, deposit accounts, letter-of-credit rights, and electronic chattel paper. For explanations

of how a secured party takes control of these types of collateral, see sections 9-104 through 9-107. Subsection (b) explains when a security interest is perfected by control and how long a security interest remains perfected by control. Like section 9-313(d) and for the same reasons, subsection (b) makes no reference to the doctrine of "relation back." See section 9-313, comment 5.

3. **Investment Property.** Subsection (c) provides a special rule for investment property. Once a secured party has control, its security interest remains perfected by control until the secured party ceases to have control and the debtor receives possession of collateral that is a certificated security, becomes the registered owner of collateral that is an uncertificated security, or becomes the entitlement holder of collateral that is a security entitlement. The result is particularly important in the "repledge" context. See section 9-207, comment 5.

In a transaction in which a secured party who has control grants a security interest in investment property or sells outright the investment property, by virtue of the debtor's consent or applicable legal rules, a purchaser from the secured party typically will cut off the debtor's rights in the investment property or be immune from the debtor's claims. See section 9-207, comments 5 and 6. If the investment property is a security, the debtor normally would retain no interest in the security following the purchase from the secured party, and a claim of the debtor against the secured party for redemption (section 9-623) or otherwise with respect to the security would be a purely personal claim. If the investment property transferred by the secured party is a financial asset in which the debtor had a security entitlement credited to a securities account maintained with the secured party as a securities intermediary, the debtor's claim against the secured party could arise as a part of its securities account notwithstanding its personal nature. (This claim would be analogous to a "credit balance" in the securities account, which is a component of the securities account even though it is a personal claim against the intermediary.) In the case in which the debtor may retain an interest in investment property notwithstanding a repledge or sale by the secured party, subsection (c) makes clear that the security interest will remain perfected by control.

§ 25-9-315. (Effective July 1, 2001) Secured party's rights on disposition of collateral and in proceeds.

(a) Disposition of collateral: continuation of security interest or agricultural lien; proceeds. — Except as otherwise provided in this Article and in G.S. 25-2-403(2):

(1) A security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien; and

(2) A security interest attaches to any identifiable proceeds of collateral.

(b) When commingled proceeds identifiable. — Proceeds that are commingled with other property are identifiable proceeds:

(1) If the proceeds are goods, to the extent provided by G.S. 25-9-336; and

(2) If the proceeds are not goods, to the extent that the secured party identifies the proceeds by a method of tracing, including application of equitable principles, that is permitted under law other than this Article with respect to commingled property of the type involved.

(c) Perfection of security interest in proceeds. — A security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected.

(d) Continuation of perfection. — A perfected security interest in proceeds becomes unperfected on the twenty-first day after the security interest attaches to the proceeds unless:

(1) The following conditions are satisfied:

a. A filed financing statement covers the original collateral;

b. The proceeds are collateral in which a security interest may be perfected by filing in the office in which the financing statement has been filed; and

c. The proceeds are not acquired with cash proceeds;

(2) The proceeds are identifiable cash proceeds; or

(3) The security interest in the proceeds is perfected other than under subsection (c) of this section when the security interest attaches to the proceeds or within 20 days thereafter.

(e) When perfected security interest in proceeds becomes unperfected. — If a filed financing statement covers the original collateral, a security interest in proceeds which remains perfected under subdivision (d)(1) of this section becomes unperfected at the later of:

(1) When the effectiveness of the filed financing statement lapses under G.S. 25-9-515 or is terminated under G.S. 25-9-513; or

(2) The twenty-first day after the security interest attaches to the proceeds. (1945, c. 196, s. 8; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7; 1997-181, ss. 12, 13; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-306.

2. **Continuation of Security Interest or Agricultural Lien Following Disposition of Collateral.** Subsection (a)(1)(A), which derives from former section 9-306(2), contains the general rule that a security interest survives disposition of the collateral. In these cases, the secured party may repossess the collateral from the transferee or, in an appropriate case, maintain an action for conversion. The secured party may claim both any proceeds and the original collateral but, of course, may have only one satisfaction.

In many cases, a purchaser or other transferee of collateral will take free of a security interest, and the secured party's only right will be to proceeds. For example, the general rule does not apply, and a security interest does not continue in collateral, if the secured party authorized the disposition, in the agreement that contains the security agreement or otherwise. Subsection (a)(1)(A) adopts the view of PEB Commentary No. 3 and makes explicit that the authorized disposition to which it refers is an authorized disposition "free of" the security interest or agricultural lien. The secured party's right to proceeds under this section or under the express terms of an agreement does not in itself constitute an authorization of disposition. The change in language from former section 9-306(2) is not intended to address the frequently litigated situation in which the effectiveness of the secured party's consent to a disposition is conditioned upon the secured party's receipt of the proceeds. In that situation, subsection (a) leaves the determination of authorization to the courts, as under former article 9.

This article contains several provisions under which a transferee takes free of a security interest or agricultural lien. For example, section 9-317 states when transferees take free of unperfected security interests; sections 9-320 and 9-321 on goods, 9-321 on general intangibles, 9-330 on chattel paper and instruments, and 9-331 on negotiable instruments, negotiable documents, and securities state when purchasers of such collateral take free of a security interest, even though perfected and even though the disposition was not authorized. Section 9-332 enables most transferees (including nonpurchasers) of funds from a deposit account and most transferees of money to take free of a perfected security interest in the deposit account or money.

Likewise, the general rule that a security interest survives disposition does not apply if the secured party entrusts goods collateral to a merchant who deals in goods of that kind and the merchant sells the collateral to a buyer in ordinary course of business. Section 2-403(2) gives the merchant the power to transfer all the secured party's rights to the buyer, even if the sale is wrongful as against the secured party. Thus, under subsection (a)(1)(A), an entrusting secured party runs the same risk as any other entruster.

3. **Secured Party's Right to Identifiable Proceeds.** Under subsection (a)(1)(B), which derives from former section 9-306(2), a security interest attaches to any identifiable "proceeds," as defined in section 9-102. See also section 9-203(f). Subsection (b) is new. It indicates when proceeds commingled with other property are identifiable proceeds and permits the use of whatever methods of tracing other law permits with respect to the type of property involved. Among the "equitable principles" whose use other law may permit is the "lowest intermediate balance rule." See Restatement (2d), Trusts section 202.

4. **Automatic Perfection in Proceeds: General Rule.** Under subsection (c), a security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected. This article extends the period of automatic perfection in proceeds from 10 days to 20 days. Generally, a security interest in proceeds becomes unperfected on the 21st day after the security interest attaches to the proceeds. See subsection (d). The loss of perfected status under subsection (d) is pro-

spective only. Compare, e.g., section 9-515(c) (deeming security interest unperfected retroactively).

5. **Automatic Perfection in Proceeds: Proceeds Acquired with Cash Proceeds.** Subsection (d)(1) derives from former section 9-306(3)(a). It carries forward the basic rule that a security interest in proceeds remains perfected beyond the period of automatic perfection if a filed financing statement covers the original collateral (e.g., inventory) and the proceeds are collateral in which a security interest may be perfected by filing in the office where the financing statement has been filed (e.g., equipment). A different rule applies if the proceeds are acquired with cash proceeds, as is the case if the original collateral (inventory) is sold for cash (cash proceeds) that is used to purchase equipment (proceeds). Under these circumstances, the security interest in the equipment proceeds remains perfected only if the description in the filed financing indicates the type of property constituting the proceeds (e.g., "equipment").

This section reaches the same result but takes a different approach. It recognizes that the treatment of proceeds acquired with cash proceeds under former section 9-306(3)(a) essentially was superfluous. In the example, had the filing covered "equipment" as well as "inventory," the security interest in the proceeds would have been perfected under the usual rules governing after-acquired equipment (see former sections 9-302 and 9-303); paragraph (3)(a) added only an exception to the general rule. Subsection (d)(1)(C) of this section takes a more direct approach. It makes the general rule of continued perfection inapplicable to proceeds acquired with cash proceeds, leaving perfection of a security interest in those proceeds to the generally applicable perfection rules under subsection (d)(3).

Example 1: Lender perfects a security interest in Debtor's inventory by filing a financing statement covering "inventory." Debtor sells the inventory and deposits the buyer's check into a deposit account. Debtor draws a check on the deposit account and uses it to pay for equipment. Under the "lowest intermediate balance rule," which is a permitted method of tracing in the relevant jurisdiction, see comment 3, the funds used to pay for the equipment were identifiable proceeds of the inventory. Because the proceeds (equipment) were acquired with cash proceeds (deposit account), subsection (d)(1) does not extend perfection beyond the 20-day automatic period.

Example 2: Lender perfects a security interest in Debtor's inventory by filing a financing statement covering "all debtor's property." As in Example 1, Debtor sells the inventory, deposits the buyer's check into a deposit account, draws a check on the deposit account, and uses the check to pay for equipment. Under the "lowest intermediate balance rule," which is a permitted method of tracing in the relevant jurisdiction, see comment 3, the funds used to pay for the equipment were identifiable proceeds of the inventory. Because the proceeds (equipment) were acquired with cash proceeds (deposit account), subsection (d)(1) does not extend perfection beyond the 20-day automatic period. However, because the financing statement is sufficient to perfect a security interest in debtor's equipment, under subsection (d)(3) the security interest in the equipment proceeds remains perfected beyond the 20-day period.

6. **Automatic Perfection in Proceeds: Lapse or Termination of Financing Statement During 20-Day Period; Perfection Under Other Statute or Treaty.** Subsection (e) provides that a security interest in proceeds perfected under subsection (d)(1) ceases to be perfected when the financing statement covering the original collateral lapses or is terminated. If the lapse or termination occurs before the 21st day after the security interest attaches, however, the security interest in the proceeds remains perfected until the 21st day. Section 9-311(b) provides that compliance with the perfection requirements of a statute or treaty described in section 9-311(a) "is equivalent to the filing of a financing statement." It follows that collateral subject to a security interest perfected by such compliance under section 9-311(b) is covered by a "filed financing statement" within the meaning of section 9-315(d) and (e).

7. **Automatic Perfection in Proceeds: Continuation of Perfection in Cash Proceeds.** Former section 9-306(3)(b) provided that if a filed financing statement covered original collateral, a security interest in identifiable cash proceeds of the collateral remained perfected beyond the ten-day period of automatic perfection. Former section 9-306(3)(c) contained a similar rule with respect to identifiable cash proceeds of investment property. Subsection (d)(2) extends the benefits of former sections 9-306(3)(b) and (3)(c) to identifiable cash proceeds of all types of original collateral in which a security interest is perfected by any method. Under subsection (d)(2), if the security interest in the original collateral was perfected, a security interest in identifiable cash proceeds will remain perfected indefinitely, regardless of whether the security interest in the original collateral remains perfected. In many cases, however, a purchaser or other transferee of the cash proceeds will take free of the perfected security interest. See, e.g., sections 9-330(d) (purchaser of check), 9-331 (holder in due course of check), and 9-332 (transferee of money or funds from a deposit account).

8. **Insolvency Proceedings; Returned and Repossessed Goods.** This article deletes

former section 9-306(4), which dealt with proceeds in insolvency proceedings. Except as otherwise provided by the Bankruptcy Code, the debtor's entering into bankruptcy does not affect a secured party's right to proceeds.

This article also deletes former section 9-306(5), which dealt with returned and repossessed goods. Section 9-330, comments 9 to 11, explain and clarify the application of priority rules to returned and repossessed goods as proceeds of chattel paper.

9. **Proceeds of Collateral Subject to Agricultural Lien.** This article does not determine whether a lien extends to proceeds of farm products encumbered by an agricultural lien. If, however, the proceeds are themselves farm products on which an "agricultural lien" (defined in section 9-102) arises under other law, then the agricultural-lien provisions of this article apply to the agricultural lien on the proceeds in the same way in which they would apply had the farm products not been proceeds.

§ 25-9-316. (Effective July 1, 2001) Continued perfection of security interest following change in governing law.

(a) General rule: effect on perfection of change in governing law. — A security interest perfected pursuant to the law of the jurisdiction designated in G.S. 25-9-301(1) or G.S. 25-9-305(c) remains perfected until the earliest of:

(1) The time perfection would have ceased under the law of that jurisdiction;

(2) The expiration of four months after a change of the debtor's location to another jurisdiction; or

(3) The expiration of one year after a transfer of collateral to a person that thereby becomes a debtor and is located in another jurisdiction.

(b) Security interest perfected or unperfected under law of new jurisdiction. — If a security interest described in subsection (a) of this section becomes perfected under the law of the other jurisdiction before the earliest time or event described in that subsection, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earliest time or event, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

(c) Possessory security interest in collateral moved to new jurisdiction. — A possessory security interest in collateral, other than goods covered by a certificate of title and as-extracted collateral consisting of goods, remains continuously perfected if:

(1) The collateral is located in one jurisdiction and subject to a security interest perfected under the law of that jurisdiction;

(2) Thereafter the collateral is brought into another jurisdiction; and

(3) Upon entry into the other jurisdiction, the security interest is perfected under the law of the other jurisdiction.

(d) Goods covered by certificate of title from this State. — Except as otherwise provided in subsection (e) of this section, a security interest in goods covered by a certificate of title which is perfected by any method under the law of another jurisdiction when the goods become covered by a certificate of title from this State remains perfected until the security interest would have become unperfected under the law of the other jurisdiction had the goods not become so covered.

(e) When subsection (d) security interest becomes unperfected against purchasers. — A security interest described in subsection (d) of this section becomes unperfected as against a purchaser of the goods for value and is deemed never to have been perfected as against a purchaser of the goods for value if the applicable requirements for perfection under G.S. 25-9-311(b) or G.S. 25-9-313 are not satisfied before the earlier of:

(1) The time the security interest would have become unperfected under the law of the other jurisdiction had the goods not become covered by a certificate of title from this State; or

(2) The expiration of four months after the goods had become so covered.

(f) Change in jurisdiction of bank, issuer, nominated person, securities intermediary, or commodity intermediary. — A security interest in deposit accounts, letter-of-credit rights, or investment property which is perfected under the law of the bank's jurisdiction, the issuer's jurisdiction, a nominated person's jurisdiction, the securities intermediary's jurisdiction, or the commodity intermediary's jurisdiction, as applicable, remains perfected until the earlier of:

(1) The time the security interest would have become unperfected under the law of that jurisdiction; or

(2) The expiration of four months after a change of the applicable jurisdiction to another jurisdiction.

(g) Subsection (f) security interest perfected or unperfected under law of new jurisdiction. — If a security interest described in subsection (f) of this section becomes perfected under the law of the other jurisdiction before the earlier of the time or the end of the period described in that subsection, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earlier of that time or the end of that period, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value. (1945, c. 196, s. 2; 1957, c. 564; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7; 1989 (Reg. Sess., 1990), c. 1024, s. 8(e), (f); 1997-181, s. 2; 1999-73, s. 4(a), (b); 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-103(1)(d), (2)(b), (3)(e), as modified.

2. **Continued Perfection.** This section deals with continued perfection of security interests that have been perfected under the law of another jurisdiction. The fact that the law of a particular jurisdiction ceases to govern perfection under sections 9-301 through 9-307 does not necessarily mean that a security interest perfected under that law automatically becomes unperfected. To the contrary: This section generally provides that a security interest perfected under the law of one jurisdiction remains perfected for a fixed period of time (four months or one year, depending on the circumstances), even though the jurisdiction whose law governs perfection changes. However, cessation of perfection under the law of the original jurisdiction cuts short the fixed period. The four-month and one-year periods are long enough for a secured party to discover in most cases that the law of a different jurisdiction governs perfection and to reperfect (typically by filing) under the law of that jurisdiction. If a secured party properly reperfects a security interest before it becomes unperfected under subsection (a), then the security interest remains perfected continuously thereafter. See subsection (b).

Example 1: Debtor is a general partnership whose chief executive office is in Pennsylvania. Lender perfects a security interest in Debtor's equipment by filing in Pennsylvania on May 15, 2002. On April 1, 2005, without Lender's knowledge, Debtor moves its chief executive office to New Jersey. Lender's security interest remains perfected for four months after the move. See subsection (a)(2).

Example 2: Debtor is a general partnership whose chief executive office is in Pennsylvania. Lender perfects a security interest in Debtor's equipment by filing in Pennsylvania on May 15, 2002. On April 1, 2007, without Lender's knowledge, Debtor moves its chief executive office to New Jersey. Lender's security interest remains perfected only through May 14, 2007, when the effectiveness of the filed financing statement lapses. See subsection (a)(1). Although, under these facts, Lender would have only a short period of time to discover that Debtor had relocated and to reperfect under New Jersey law, Lender could have protected itself by filing a continuation statement in Pennsylvania before Debtor relocated. By doing so, Lender would have prevented lapse and allowed itself the full four months to discover Debtor's new location and refile there or, if Debtor is in default, to perfect by taking possession of the equipment.

Example 3: Under the facts of Example 2, Lender files a financing statement in New Jersey before the effectiveness of the Pennsylvania financing statement lapses. Under subsection (b), Lender's security interest is continuously perfected beyond May 14, 2007, for a period determined by New Jersey's article 9.

Subsection (a)(3) allows a one-year period in which to reperfect. The longer period is neces-

sary, because, even with the exercise of due diligence, the secured party may be unable to discover that the collateral has been transferred to a person located in another jurisdiction.

Example 4: Debtor is a Pennsylvania corporation. Lender perfects a security interest in Debtor's equipment by filing in Pennsylvania. Debtor's shareholders decide to "reincorporate" in Delaware. They form a Delaware corporation (Newcorp) into which they merge Debtor. The merger effectuates a transfer of the collateral from Debtor to Newcorp, which thereby becomes a debtor and is located in another jurisdiction. Under subsection (a)(3), the security interest remains perfected for one year after the merger. If a financing statement is filed in Delaware against Newcorp within the year following the merger, then the security interest remains perfected thereafter for a period determined by Delaware's article 9.

Note that although Newcorp is a "new debtor" as defined in section 9-102, the application of subsection (a)(3) is not limited to transferees who are new debtors. Note also that, under section 9-507, the financing statement naming Debtor remains effective even though Newcorp has become the debtor.

This section addresses security interests that are perfected (i.e., that have attached and as to which any required perfection step has been taken) before the debtor changes its location. As the following example explains, this section does not apply to security interests that have not attached before the location changes.

Example 5: Debtor is a Pennsylvania corporation. Debtor grants to Lender a security interest in Debtor's existing and after-acquired inventory. Lender perfects by filing in Pennsylvania. Debtor's shareholders decide to "reincorporate" in Delaware. They form a Delaware corporation (Newcorp) into which they merge Debtor. By virtue of the merger, Newcorp becomes bound by Debtor's security agreement. See section 9-203. After the merger, Newcorp acquires inventory to which Lender's security interest attaches. Because Newcorp is located in Delaware, Delaware law governs perfection of a security interest in Newcorp's inventory. See sections 9-301 and 9-307. Having failed to perfect under Delaware law, Lender holds an unperfected security interest in the inventory acquired by Newcorp after the merger. The same result follows regardless of the name of the Delaware corporation (i.e., even if the Delaware corporation and Debtor have the same name). A different result would occur if Debtor and Newcorp were incorporated in the same state. See Section 9-508. Comment 4.

3. **Retroactive Unperfection.** Subsection (b) sets forth the consequences of the failure to reperfect before perfection ceases under subsection (a): The security interest becomes unperfected prospectively and, as against purchasers for value, including buyers and secured parties, but not as against donees or lien creditors, retroactively. The rule applies to agricultural liens, as well. See also section 9-515 (taking the same approach with respect to lapse). Although this approach creates the potential for circular priorities, the alternative—retroactive unperfection against lien creditors—would create substantial and unjustifiable preference risks.

Example 6: Under the facts of Example 4, six months after the merger, Buyer bought from Newcorp some equipment formerly owned by Debtor. At the time of the purchase, Buyer took subject to Lender's perfected security interest, of which Buyer was unaware. See section 9-315(a)(1)(A). However, subsection (b) provides that if Lender fails to reperfect in Delaware within a year after the merger, its security interest becomes unperfected and is deemed never to have been perfected against Buyer. Having given value and received delivery of the equipment without knowledge of the security interest and before it was perfected, Buyer would take free of the security interest. See section 9-317(b).

Example 7: Under the facts of Example 4, one month before the merger, Debtor created a security interest in certain equipment in favor of Financer, who perfected by filing in Pennsylvania. At that time, Financer's security interest is subordinate to Lender's. See section 9-322(a)(1). Financer reperfects by filing in Delaware within a year after the merger, but Lender fails to do so. Under subsection (b), Lender's security interest is deemed never to have been perfected against Financer, a purchaser for value. Consequently, under section 9-322(a)(2), Financer's security interest is now senior.

Of course, the expiration of the time period specified in subsection (a) does not of itself prevent the secured party from later reperfecting under the law of the new jurisdiction. If the secured party does so, however, there will be a gap in perfection, and the secured party may lose priority as a result. Thus, in Example 7, if Lender perfects by filing in Delaware more than one year under the merger, it will have a new date of filing and perfection for purposes of section 9-322(a)(1). Financer's security interest, whose perfection dates back to the filing in Pennsylvania under subsection (b), will remain senior.

4. **Possessory Security Interests.** Subsection (c) deals with continued perfection of possessory security interests. It applies not only to security interests perfected solely by the secured party's having taken possession of the collateral. It also applies to security interests perfected by a method that includes as an element of perfection the secured party's hav-

ing taken possession, such as perfection by taking delivery of a certificated security in registered form, see section 9-313(a), and perfection by obtaining control over a certificated security. See section 9-314(a).

5. **Goods Covered by Certificate of Title.** Subsections (d) and (e) address continued perfection of a security interest in goods covered by a certificate of title. The following examples explain the operation of those subsections.

Example 8: Debtor's automobile is covered by a certificate of title issued by Illinois. Lender perfects a security interest in the automobile by complying with Illinois' certificate-of-title statute. Thereafter, Debtor applies for a certificate of title in Indiana. Six months thereafter, Creditor acquires a judicial lien on the automobile. Under section 9-303(b), Illinois law ceases to govern perfection; rather, once Debtor delivers the application and applicable fee to the appropriate Indiana authority, Indiana law governs. Nevertheless, under Indiana's section 9-316(d), Lender's security interest remains perfected until it would become unperfected under Illinois law had no certificate of title been issued by Indiana. (For example, Illinois' certificate-of-title statute may provide that the surrender of an Illinois certificate of title in connection with the issuance of a certificate of title by another jurisdiction causes a security interest noted thereon to become unperfected.) If Lender's security interest remains perfected, it is senior to Creditor's judicial lien.

Example 9: Under the facts in Example 8, five months after Debtor applies for an Indiana certificate of title, Debtor sells the automobile to Buyer. Under subsection (e)(2), because Lender did not reperfect within the four months after the goods became covered by the Indiana certificate of title, Lender's security interest is deemed never to have been perfected against Buyer. Under section 9-317(b), Buyer is likely to take free of the security interest. Lender could have protected itself by perfecting its security interest either under Indiana's certificate-of-title statute, see section 9-311, or, if it had a right to do so under an agreement or section 9-609, by taking possession of the automobile. See section 9-313(b).

The results in examples 8 and 9 do not depend on the fact that the original perfection was achieved by notation on a certificate of title. Subsection (d) applies regardless of the method by which a security interest is perfected under the law of another jurisdiction when the goods became covered by a certificate of title from this state.

Section 9-337 affords protection to a limited class of persons buying or acquiring a security interest in the goods while a security interest is perfected under the law of another jurisdiction but after this state has issued a clean certificate of title.

6. **Deposit Accounts, Letter-of-Credit Rights, and Investment Property.** Subsections (f) and (g) address changes in the jurisdiction of a bank, issuer of an uncertificated security, issuer of or nominated person under a letter of credit, securities intermediary, and commodity intermediary. The provisions are analogous to those of subsections (a) and (b).

7. **Agricultural Liens.** This section does not apply to agricultural liens.

Example 10: Supplier holds an agricultural lien on corn. The lien arises under an Iowa statute. Supplier perfects by filing a financing statement in Iowa, where the corn is located. See section 9-302. Debtor stores the corn in Missouri. Assume the Iowa agricultural lien survives or an agricultural lien arises under Missouri law (matters that this article does not govern). Once the corn is located in Missouri, Missouri becomes the jurisdiction whose law governs perfection. See section 9-302. Thus, the agricultural lien will not be perfected unless Supplier files a financing statement in Missouri.

SUBPART 3. Priority.

§ 25-9-317. (Effective July 1, 2001) Interests that take priority over or take free of security interest or agricultural lien.

(a) Conflicting security interests and rights of lien creditors. — A security interest or agricultural lien is subordinate to the rights of:

(1) A person entitled to priority under G.S. 25-9-322; and

(2) Except as otherwise provided in subsection (e) of this section, a person that becomes a lien creditor before the earlier of the time:

a. The security interest or agricultural lien is perfected; or

b. One of the conditions specified in G.S. 25-9-203(b)(3) is met and a financing statement covering the collateral is filed.

(b) Buyers that receive delivery. — Except as otherwise provided in subsection (e) of this section, a buyer, other than a secured party, of tangible chattel paper, documents, goods, instruments, or a security certificate takes free of a security interest or agricultural lien if the buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(c) Lessees that receive delivery. — Except as otherwise provided in subsection (e) of this section, a lessee of goods takes free of a security interest or agricultural lien if the lessee gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(d) Licensees and buyers of certain collateral. — A licensee of a general intangible or a buyer, other than a secured party, of accounts, electronic chattel paper, general intangibles, or investment property other than a certificated security takes free of a security interest if the licensee or buyer gives value without knowledge of the security interest and before it is perfected.

(e) Purchase-money security interest. — Except as otherwise provided in G.S. 25-9-320 and G.S. 25-9-321, if a person files a financing statement with respect to a purchase-money security interest before or within 20 days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of a buyer, lessee, or lien creditor which arise between the time the security interest attaches and the time of filing. (1945, c. 182, s. 4; c. 196, s. 4; 1955, c. 386, s. 2; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 1979, c. 404, s. 1; 1997-181, s. 8; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former sections 2A-307(2) and 9-301.

2. **Scope of This Section.** As did former section 9-301, this section lists the classes of persons who take priority over, or take free of, an unperfected security interest. Section 9-308 explains when a security interest or agricultural lien is "perfected." A security interest that has attached (see section 9-203) but as to which a required perfection step has not been taken is "unperfected." Certain provisions have been moved from former section 9-301. The definition of "lien creditor" now appears in section 9-102, and the rules governing priority in future advances are found in section 9-323.

3. **Competing Security Interests.** Section 9-322 states general rules for determining priority among conflicting security interests and refers to other sections that state special rules of priority in a variety of situations. The security interests given priority under section 9-322 and the other sections to which it refers take priority in general even over a perfected security interest. *A fortiori* they take priority over an unperfected security interest.

4. **Filed but Unattached Security Interest vs. Lien Creditor.** Under former section 9-301(1)(b), a lien creditor's rights had priority over an unperfected security interest. Perfection required attachment (former section 9-303), and attachment required the giving of value (former section 9-203). It followed that, if a secured party had filed a financing statement but the debtor had not entered into a security agreement and value had not yet been given, an intervening lien creditor whose lien arose after filing but before attachment of the security interest acquired rights that are senior to those of the secured party who later gives value. This result comported with the *nemo dat* concept: When the security interest attached, the collateral was already subject to the judicial lien.

On the other hand, this approach treated the first secured advance differently from all other advances, even in circumstances in which a security agreement covering the collateral had been entered into before the judicial lien attached. The special rule for future advances in former section 9-301(4) (substantially reproduced in section 9-323(b)) afforded priority to a discretionary advance made by a secured party within 45 days after the lien creditor's rights arose as long as the secured party was "perfected" when the lien creditor's lien arose—i.e., as long as the advance was not the first one and an earlier advance had been made.

Subsection (a)(2) revises former section 9-301(1)(b) and, in appropriate cases, treats the first advance the same as subsequent advances. More specifically, a judicial lien that arises after the security-agreement condition of section 9-203(b)(3) is satisfied and a financing statement is filed, but before the security interest attaches and becomes perfected, is subordinate to all advances secured by the security interest, even the first advance, except as oth-

erwise provided in section 9-323(b). However, if the security interest becomes unperfected (e.g., because the effectiveness of the filed financing statement lapses) before the judicial lien arises, the security interest is subordinate. If a financing statement is filed but a security interest does not attach, then no priority contest arises. The lien creditor has the only enforceable claim to the property.

5. **Security Interest of Consignor or Receivables Buyer vs. Lien Creditor.** Section 1-201(37) defines "security interest" to include the interest of most true consignors of goods and the interest of most buyers of certain receivables (accounts, chattel paper, payment intangibles, and promissory notes). A consignee of goods or a seller of accounts or chattel paper each is deemed to have rights in the collateral which a lien creditor may reach, as long as the competing security interest of the consignor or buyer is unperfected. This is so even though, as between the consignor and the debtor-consignee, the latter has only limited rights, and, as between the buyer and debtor-seller, the latter does not have any rights in the collateral. See sections 9-318 (seller) and 9-319 (consignee). Security interests arising from sales of payment intangibles and promissory notes are automatically perfected. See section 9-309. Accordingly, a subsequent judicial lien always would be subordinate to the rights of a buyer of those types of receivables.

6. **Purchasers Other Than Secured Parties.** Subsections (b), (c), and (d) afford priority over an unperfected security interest to certain purchasers (other than secured parties) of collateral. They derive from former sections 9-301(1)(c), 9-301(1)(d), and 9-307(2). Former section 9-301(1)(c) and (1)(d) provided that unperfected security interests are "subordinate" to the rights of certain purchasers. But, as former comment 9 suggested, the practical effect of subordination in this context is that the purchaser takes free of the security interest. To avoid any possible misinterpretation, subsections (b) and (d) of this section use the phrase "takes free."

Subsection (b) governs goods, as well as intangibles of the type whose transfer is effected by physical delivery of the representative piece of paper (tangible chattel paper, documents, instruments, and security certificates). To obtain priority, a buyer must both give value and receive delivery of the collateral without knowledge of the existing security interest and before perfection. Even if the buyer gave value without knowledge and before perfection, the buyer would take subject to the security interest if perfection occurred before physical delivery of the collateral to the buyer. Subsection (c) contains a similar rule with respect to lessees of goods. Note that a lessee of goods in ordinary course of business takes free of all security interests created by the lessor, even if perfected. See section 9-321.

Normally, there will be no question when a buyer of chattel paper, documents, instruments, or security certificates "receives delivery" of the property. See section 1-201 (defining "delivery"). However, sometimes a buyer or lessee of goods, such as complex machinery, takes delivery of the goods in stages and completes assembly at its own location. Under those circumstances, the buyer or lessee "receives delivery" within the meaning of subsections (b) and (c) when, after an inspection of the portion of the goods remaining with the seller or lessor, it would be apparent to a potential lender to the seller or lessor that another person might have an interest in the goods.

The rule of subsection (b) obviously is not appropriate where the collateral consists of intangibles and there is no representative piece of paper whose physical delivery is the only or the customary method of transfer. Therefore, with respect to such intangibles (accounts, electronic chattel paper, general intangibles, and investment property other than certificated securities), subsection (d) gives priority to any buyer who gives value without knowledge, and before perfection, of the security interest. A licensee of a general intangible takes free of an unperfected security interest in the general intangible under the same circumstances. Note that a licensee of a general intangible in ordinary course of business takes rights under a nonexclusive license free of security interests created by the licensor, even if perfected. See section 9-321.

Unless section 9-109 excludes the transaction from this article, a buyer of accounts, chattel paper, payment intangibles, or promissory notes is a "secured party" (defined in section 9-102), and subsections (b) and (d) do not determine priority of the security interest created by the sale. Rather, the priority rules generally applicable to competing security interests apply. See section 9-322.

7. **Agricultural Liens.** Subsections (a), (b), and (c) subordinate unperfected agricultural liens in the same manner in which they subordinate unperfected security interests.

8. **Purchase-Money Security Interests.** Subsection (e) derives from former section 9-301(2). It provides that, if a purchase-money security interest is perfected by filing no later than 20 days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of buyers, lessees, or lien creditors which arise between the time the security interest attaches and the time of filing. Subsection (e) differs from former section 9-301(2) in two significant respects. First, subsection (e) protects a purchase-money security interest against all buyers and lessees, not just against transferees in bulk. Second, subsection

(e) conditions this protection on filing within 20, as opposed to ten, days after delivery.

Section 9-311(b) provides that compliance with the perfection requirements of a statute or treaty described in section 9-311(a) "is equivalent to the filing of a financing statement." It follows that a person who perfects a security interest in goods covered by a certificate of title by complying with the perfection requirements of an applicable certificate-of-title statute "files a financing statement" within the meaning of subsection (e).

§ 25-9-318. (Effective July 1, 2001) No interest retained in right to payment that is sold; rights and title of seller of account or chattel paper with respect to creditors and purchasers.

(a) Seller retains no interest. — A debtor that has sold an account, chattel paper, payment intangible, or promissory note does not retain a legal or equitable interest in the collateral sold.

(b) Deemed rights of debtor if buyer's security interest unperfected. — For purposes of determining the rights of creditors of, and purchasers for value of an account or chattel paper from, a debtor that has sold an account or chattel paper, while the buyer's security interest is unperfected, the debtor is deemed to have rights and title to the account or chattel paper identical to those the debtor sold. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Sellers of Accounts, Chattel Paper, Payment Intangibles, and Promissory Notes.** Section 1-201(37) defines "security interest" to include the interest of a buyer of accounts, chattel paper, payment intangibles, or promissory notes. See also section 9-109(a) and comment 5. Subsection (a) makes explicit what was implicit, but perfectly obvious, under former article 9: The fact that a sale of an account or chattel paper gives rise to a "security interest" does not imply that the seller retains an interest in the property that has been sold. To the contrary, a seller of an account or chattel paper retains no interest whatsoever in the property to the extent that it has been sold. Subsection (a) also applies to sales of payment intangibles and promissory notes, transactions that were not covered by former article 9. Neither this article nor the definition of "security interest" in section 1-201 provides rules for distinguishing sales transactions from those that create a security interest securing an obligation.

3. **Buyers of Accounts and Chattel Paper.** Another aspect of sales of accounts and chattel paper also was implicit, and equally obvious, under former article 9: If the buyer's security interest is unperfected, then for purposes of determining the rights of certain third parties, the seller (debtor) is deemed to have all rights and title that the seller sold. The seller is deemed to have these rights even though, as between the parties, it has sold all its rights to the buyer. Subsection (b) makes this explicit. As a consequence of subsection (b), if the buyer's security interest is unperfected, the seller can transfer, and the creditors of the seller can reach, the account or chattel paper as if it had not been sold.

Example: Debtor sells accounts or chattel paper to Buyer-1 and retains no interest in them. Buyer-1 does not file a financing statement. Debtor then sells the same receivables to Buyer-2. Buyer-2 files a proper financing statement. Having sold the receivables to Buyer-1, Debtor would not have any rights in the collateral so as to permit Buyer-2's security (ownership) interest to attach. Nevertheless, under this section, for purposes of determining the rights of purchasers for value from Debtor, Debtor is deemed to have the rights that Debtor sold. Accordingly, Buyer-2's security interest attaches, is perfected by the filing, and, under section 9-322, is senior to Buyer-1's interest.

4. **Effect of Perfection.** If the security interest of a buyer of accounts or chattel paper is perfected the usual result would take effect: Transferees from and creditors of the seller could not acquire an interest in the sold accounts or chattel paper. The same result would occur if payment intangibles or promissory notes were sold, inasmuch as the buyer's security interest is automatically perfected under section 9-309.

§ 25-9-319. (Effective July 1, 2001) Rights and title of consignee with respect to creditors and purchasers.

(a) Consignee has consignor's rights. — Except as otherwise provided in subsection (b) of this section, for purposes of determining the rights of creditors of, and purchasers for value of goods from, a consignee, while the goods are in the possession of the consignee, the consignee is deemed to have rights and title to the goods identical to those the consignor had or had power to transfer.

(b) Applicability of other law. — For purposes of determining the rights of a creditor of a consignee, law other than this Article determines the rights and title of a consignee while goods are in the consignee's possession if, under this Part, a perfected security interest held by the consignor would have priority over the rights of the creditor. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Consignments.** This section takes an approach to consignments similar to that taken by section 9-318 with respect to buyers of accounts and chattel paper. Revised section 1-201(37) defines "security interest" to include the interest of a consignor of goods under many true consignments. Section 9-319(a) provides that, for purposes of determining the rights of certain third parties, the consignee is deemed to acquire all rights and title that the consignor had, if the consignor's security interest is unperfected. The consignee acquires these rights even though, as between the parties, it purchases a limited interest in the goods (as would be the case in a true consignment, under which the consignee acquires only the interest of a bailee). As a consequence of this section, creditors of the consignee can acquire judicial liens and security interests in the goods.

Insofar as creditors of the consignee are concerned, this article to a considerable extent reformulates the former law, which appeared in former sections 2-326 and 9-114, without changing the results. However, neither article 2 nor former article 9 specifically addresses the rights of nonordinary course buyers from the consignee. Former section 9-114 contained priority rules applicable to security interests in consigned goods. Under this article, the priority rules for purchase-money security interests in inventory apply to consignments. See section 9-103(d). Accordingly, a special section containing priority rules for consignments no longer is needed. Section 9-317 determines whether the rights of a judicial lien creditor are senior to the interest of the consignor, sections 9-322 and 9-324 govern competing security interests in consigned goods, and sections 9-315, 9-317, and 9-320 determine whether a buyer takes free of the consignor's interest.

The following example explains the operation of this section:

Example 1: SP-1 delivers goods to Debtor in a transaction constituting a "consignment" as defined in section 9-102. SP-1 does not file a financing statement. Debtor then grants a security interest in the goods to SP-2. SP-2 files a proper financing statement. Assuming Debtor is a mere bailee, as in a "true" consignment, Debtor would not have any rights in the collateral (beyond those of a bailee) so as to permit SP-2's security interest to attach to any greater rights. Nevertheless, under this section, for purposes of determining the rights of Debtor's creditors, Debtor is deemed to acquire SP-1's rights. Accordingly, SP-2's security interest attaches, is perfected by the filing, and, under section 9-322, is senior to SP-1's interest.

3. **Effect of Perfection.** Subsection (b) contains a special rule with respect to consignments that are perfected. If application of this article would result in the consignor having priority over a competing creditor, then other law determines the rights and title of the consignee.

Example 2: SP-1 delivers goods to Debtor in a transaction constituting a "consignment" as defined in section 9-102. SP-1 files a proper financing statement. Debtor then grants a security interest in the goods to SP-2. Under section 9-322, SP-1's security interest is senior to SP-2's. Subsection (b) indicates that, for purposes of determining SP-2's rights, other law determines the rights and title of the consignee. If, for example, a consignee obtains only the special property of a bailee, then SP-2's security interest would attach only to that special property.

Example 3: SP-1 obtains a security interest in all Debtor's existing and after-acquired inventory. SP-1 perfects its security interest with a proper filing. Then SP-2 delivers goods to Debtor in a transaction constituting a "consignment" as defined in section 9-102. SP-2 files a proper financing statement but does not send notification to SP-1 under section 9-324(b). Accordingly, SP-2's security interest is junior to SP-1's under section 9-322(a). Under section

9-319(a), Debtor is deemed to have the consignor's rights and title, so that SP-1's security interest attaches to SP-2's ownership interest in the goods. Thereafter, Debtor grants a security interest in the goods to SP-3, and SP-3 perfects by filing. Because SP-2's perfected security interest is senior to SP-3's under section 9-322(a), section 9-319(b) applies: Other law determines Debtor's rights and title to the goods insofar as SP-3 is concerned, and SP-3's security interest attaches to those rights.

§ 25-9-320. (Effective July 1, 2001) Buyer of goods.

(a) Buyer in ordinary course of business. — Except as otherwise provided in subsection (e) of this section, a buyer in ordinary course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence.

(b) Buyer of consumer goods. — Except as otherwise provided in subsection (e) of this section, a buyer of goods from a person who used or bought the goods for use primarily for personal, family, or household purposes takes free of a security interest, even if perfected, if the buyer buys:

(1) Without knowledge of the security interest;

(2) For value;

(3) Primarily for the buyer's personal, family, or household purposes; and

(4) Before the filing of a financing statement covering the goods.

(c) Effectiveness of filing for subsection (b). — To the extent that it affects the priority of a security interest over a buyer of goods under subsection (b) of this section, the period of effectiveness of a filing made in the jurisdiction in which the seller is located is governed by G.S. 25-9-316(a) and (b).

(d) Buyer in ordinary course of business at wellhead or minehead. — A buyer in ordinary course of business buying oil, gas, or other minerals at the wellhead or minehead or after extraction takes free of an interest arising out of an encumbrance.

(e) Possessory security interest not affected. — Subsections (a) and (b) of this section do not affect a security interest in goods in the possession of the secured party under G.S. 25-9-313. (1945, c. 182, s. 4; 1955, c. 386, s. 2; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7.; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-307.

2. **Scope of This Section.** This section states when buyers of goods take free of a security interest even though perfected. Of course, a buyer who takes free of a perfected security interest takes free of an unperfected one. Section 9-317 should be consulted to determine what purchasers, in addition to the buyers covered in this section, take free of an unperfected security interest. Article 2 states general rules on purchase of goods from a seller with defective or voidable title (section 2-403).

3. **Buyers in Ordinary Course.** Subsection (a) derives from former section 9-307(1). The definition of "buyer in ordinary course of business" in section 1-201 restricts its application to buyers "from a person, other than a pawnbroker, in the business of selling goods of that kind." Thus subsection (a) applies primarily to inventory collateral. The subsection further excludes from its operation buyers of "farm products" (defined in section 9-102) from a person engaged in farming operations. The buyer in ordinary course of business is defined as one who buys goods "in good faith, without knowledge that the sale violates the rights of another person and in the ordinary course." Subsection (a) provides that such a buyer takes free of a security interest, even though perfected, and even though the buyer knows the security interest exists. Reading the definition together with the rule of law results in the buyer's taking free if the buyer merely knows that a security interest covers the goods but taking subject if the buyer knows, in addition, that the sale violates a term in an agreement with the secured party.

As did former section 9-307(1), subsection (a) applies only to security interests created by the seller of the goods to the buyer in ordinary course. However, under certain circumstances a buyer in ordinary course who buys goods that were encumbered with a security interest created by a person other than the seller may take free of the security interest, as Example 2 explains. See also comment 6, below.

Example 1: Manufacturer, who is in the business of manufacturing appliances, owns manufacturing equipment subject to a perfected security interest in favor of Lender. Manufacturer sells the equipment to Dealer, who is in the business of buying and selling used equipment. Buyer buys the equipment from Dealer. Even if Buyer qualifies as a buyer in the ordinary course of business, Buyer does not take free of Lender's security interest under subsection (a), because Dealer did not create the security interest; Manufacturer did.

Example 2: Manufacturer, who is in the business of manufacturing appliances, owns manufacturing equipment subject to a perfected security interest in favor of Lender. Manufacturer sells the equipment to Dealer, who is in the business of buying and selling used equipment. Lender learns of the sale but does nothing to assert its security interest. Buyer buys the equipment from Dealer. Inasmuch as Lender's acquiescence constitutes an "entrusting" of the goods to Dealer within the meaning of section 2-403(3) Buyer takes free of Lender's security interest under section 2-403(2) if Buyer qualifies as a buyer in ordinary course of business.

4. **Buyers of Farm Products.** This section does not enable a buyer of farm products to take free of a security interest created by the seller, even if the buyer is a buyer in ordinary course of business. However, a buyer of farm products may take free of a security interest under section 1324 of the Food Security Act of 1985, 7 U.S.C. section 1631.

5. **Buyers of Consumer Goods.** Subsection (b), which derives from former section 9-307(2), deals with buyers of collateral that the debtor-seller holds as "consumer goods" (defined in section 9-102). Under section 9-309(1), a purchase-money interest in consumer goods, except goods that are subject to a statute or treaty described in section 9-311(a) (such as automobiles that are subject to a certificate-of-title statute), is perfected automatically upon attachment. There is no need to file to perfect. Under subsection (b) a buyer of consumer goods takes free of a security interest, even though perfected, if the buyer buys (1) without knowledge of the security interest, (2) for value, (3) primarily for the buyer's own personal, family, or household purposes, and (4) before a financing statement is filed.

As to purchase-money security interests which are perfected without filing under section 9-309(1): A secured party may file a financing statement, although filing is not required for perfection. If the secured party does file, all buyers take subject to the security interest. If the secured party does not file, a buyer who meets the qualifications stated in the preceding paragraph takes free of the security interest.

As to security interests for which a perfection step is required: This category includes all non-purchase-money security interests, and all security interests, whether or not purchase-money, in goods subject to a statute or treaty described in section 9-311(a), such as automobiles covered by a certificate-of-title statute. As long as the required perfection step has not been taken and the security interest remains unperfected, not only the buyers described in subsection (b) but also the purchasers described in section 9-317 will take free of the security interest. After a financing statement has been filed or the perfection requirements of the applicable certificate-of-title statute have been complied with (compliance is the equivalent of filing a financing statement; see section 9-311(b)), all subsequent buyers, under the rule of subsection (b), are subject to the security interest.

The rights of a buyer under subsection (b) turn on whether a financing statement has been filed against consumer goods. Occasionally, a debtor changes his or her location after a filing is made. Subsection (c), which derives from former section 9-103(1)(d)(iii), deals with the continued effectiveness of the filing under those circumstances. It adopts the rules of section 9-316(a) and (b). These rules are explained in the comments to that section.

6. **Authorized Dispositions.** The limitations that subsections (a) and (b) impose on the persons who may take free of a security interest apply of course only to unauthorized sales by the debtor. If the secured party authorized the sale in an express agreement or otherwise, the buyer takes free under section 9-315(a)(1) without regard to the limitations of this section. (That section also states the right of a secured party to the proceeds of a sale, authorized or unauthorized.) Moreover, the buyer also takes free if the secured party waived or otherwise is precluded from asserting its security interest against the buyer. See section 1-103.

7. **Oil, Gas, and Other Minerals.** Under subsection (d), a buyer in ordinary course of business of minerals at the wellhead or minehead or after extraction takes free of a security interest created by the seller. Specifically, it provides that qualified buyers take free not only of article 9 security interests but also of interests "arising out of an encumbrance." As defined in section 9-102, the term "encumbrance" means "a right, other than an ownership interest, in real property." Thus, to the extent that a mortgage encumbers minerals not only before but also after extraction, subsection (d) enables a buyer in ordinary course of the minerals to take free of the mortgage. This subsection does not, however, enable these buyers to take free of interests arising out of ownership interests in the real property. This issue is significant only in a minority of states. Several of them have adopted special statutes

and nonuniform amendments to article 9 to provide special protections to mineral owners, whose interests often are highly fractionalized in the case of oil and gas. See Terry I. Cross, Oil and Gas Product Liens—Statutory Security Interests for Producers and Royalty Owners Under the Statutes of Kansas, New Mexico, Oklahoma, Texas and Wyoming, 50 Consumer Fin. L. Q. Rep. 418 (1996). Inasmuch as a complete resolution of the issue would require the addition of complex provisions to this article, and there are good reasons to believe that a uniform solution would not be feasible, this article leaves its resolution to other legislation.

8. **Possessory Security Interests.** Subsection (e) is new. It rejects the holding of Tanbro Fabrics Corp. v. Deering Milliken, Inc., 350 N.E.2d 590 (N.Y. 1976) and, together with section 9-317(b), prevents a buyer of goods collateral from taking free of a security interest if the collateral is in the possession of the secured party. "The secured party" referred in subsection (e) is the holder of the security interest referred to in subsection (a) or (b). Section 9-313 determines whether a secured party is in possession for purposes of this section. Under some circumstances, section 9-313 provides that a secured party is in possession of collateral even if the collateral is in the physical possession of a third party.

§ 25-9-321. (Effective July 1, 2001) Licensee of general intangible and lessee of goods in ordinary course of business.

(a) "Licensee in ordinary course of business". — In this section, "licensee in ordinary course of business" means a person that becomes a licensee of a general intangible in good faith, without knowledge that the license violates the rights of another person in the general intangible, and in the ordinary course from a person in the business of licensing general intangibles of that kind. A person becomes a licensee in the ordinary course if the license to the person comports with the usual or customary practices in the kind of business in which the licensor is engaged or with the licensor's own usual or customary practices.

(b) Rights of licensee in ordinary course of business. — A licensee in ordinary course of business takes its rights under a nonexclusive license free of a security interest in the general intangible created by the licensor, even if the security interest is perfected and the licensee knows of its existence.

(c) Rights of lessee in ordinary course of business. — A lessee in ordinary course of business takes its leasehold interest free of a security interest in the goods created by the lessor, even if the security interest is perfected and the lessee knows of its existence. (1993, c. 463, s. 1; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Derived from sections 2A-103(1)(o) and 2A-307(3).

2. **Licensee in Ordinary Course.** Like the analogous rules in section 9-320(a) with respect to buyers in ordinary course and subsection (c) with respect to lessees in ordinary course, the new rule in subsection (b) reflects the expectations of the parties and the marketplace: A licensee under a nonexclusive license takes subject to a security interest unless the secured party authorizes the license free of the security interest or other, controlling law such as that of this section (protecting ordinary-course licensees) dictates a contrary result. See sections 9-201 and 9-315. The definition of "licensee in ordinary course of business" in subsection (a) is modeled upon that of "buyer in ordinary course of business."

3. **Lessee in Ordinary Course.** Subsection (c) contains the rule formerly found in section 2A-307(3). The rule works in the same way as that of section 9-320(a).

§ 25-9-322. (Effective July 1, 2001) Priorities among conflicting security interests in and agricultural liens on same collateral.

(a) General priority rules. — Except as otherwise provided in this section, priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules:

(1) Conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection.

(2) A perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien.

(3) The first security interest or agricultural lien to attach or become effective has priority if conflicting security interests and agricultural liens are unperfected.

(b) Time of perfection: proceeds and supporting obligations. — For the purposes of subdivision (a)(1) of this section:

(1) The time of filing or perfection as to a security interest in collateral is also the time of filing or perfection as to a security interest in proceeds; and

(2) The time of filing or perfection as to a security interest in collateral supported by a supporting obligation is also the time of filing or perfection as to a security interest in the supporting obligation.

(c) Special priority rules: proceeds and supporting obligations. — Except as otherwise provided in subsection (f) of this section, a security interest in collateral which qualifies for priority over a conflicting security interest under G.S. 25-9-327, 25-9-328, 25-9-329, 25-9-330, or 25-9-331 also has priority over a conflicting security interest in:

(1) Any supporting obligation for the collateral; and

(2) Proceeds of the collateral if:

a. The security interest in proceeds is perfected;

b. The proceeds are cash proceeds or of the same type as the collateral; and

c. In the case of proceeds that are proceeds of proceeds, all intervening proceeds are cash proceeds, proceeds of the same type as the collateral, or an account relating to the collateral.

(d) First-to-file priority rule for certain collateral. — Subject to subsection (e) of this section and except as otherwise provided in subsection (f) of this section, if a security interest in chattel paper, deposit accounts, negotiable documents, instruments, investment property, or letter-of-credit rights is perfected by a method other than filing, conflicting perfected security interests in proceeds of the collateral rank according to priority in time of filing.

(e) Applicability of subsection (d). — Subsection (d) of this section applies only if the proceeds of the collateral are not cash proceeds, chattel paper, negotiable documents, instruments, investment property, or letter-of-credit rights.

(f) Limitations on subsections (a) through (e). — Subsections (a) through (e) of this section are subject to:

(1) Subsection (g) of this section and the other provisions of this Part;

(2) G.S. 25-4-208 with respect to a security interest of a collecting bank;

(3) G.S. 25-5-118 with respect to a security interest of an issuer or nominated person; and

(4) G.S. 25-9-110 with respect to a security interest arising under Article 2 or 2A of this Chapter.

(g) Priority under agricultural lien statute. — A perfected agricultural lien on collateral has priority over a conflicting security interest in or agricultural lien on the same collateral if the statute creating the agricultural lien so provides. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C.S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 196, s. 4; 1955, c. 816; 1957, c. 999; 1965, c. 700, s. 1; 1967, c. 24, s. 13; 1975, c. 862, s. 7; 1979, c. 404, s. 2; 1989 (Reg. Sess., 1990), c. 1024, s. 8(o); 1997-181, ss. 15, 16; 1997-336, s. 1; 1997-456, s. 5; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-312(5), (6).

2. **Scope of This Section.** In a variety of situations, two or more people may claim a security interest in the same collateral. This section states general rules of priority among conflicting security interests. As subsection (f) provides, the general rules in subsections (a) through (e) are subject to the rule in subsection (g) governing perfected agricultural liens and to the other rules in this part of this article. Rules that override this section include those applicable to purchase-money security interests (section 9-324) and those qualifying for special priority in particular types of collateral. See, e.g., section 9-327 (deposit accounts); section 9-328 (investment property); section 9-329 (letter-of-credit rights); section 9-330 (chattel paper and instruments); and section 9-334 (fixtures). In addition, the general rules of sections (a) through (e) are subject to priority rules governing security interests arising under articles 2, 2A, 4, and 5.

3. **General Rules.** Subsection (a) contains three general rules. Subsection (a)(1) governs the priority of competing perfected security interests. Subsection (a)(2) governs the priority of competing security interests if one is perfected and the other is not. Subsection (a)(3) governs the priority of competing unperfected security interests. The rules may be regarded as adaptations of the idea, deeply rooted at common law, of a race of diligence among creditors. The first two rules are based on precedence in the time as of which the competing secured parties either filed their financing statements or obtained perfected security interests. Under subsection (a)(1), the first secured party who files or perfects has priority. Under subsection (a)(2), which is new, a perfected security interest has priority over an unperfected one. Under subsection (a)(3), if both security interests are unperfected, the first to attach has priority. Note that section 9-709(b) may affect the application of subsection (a) to a filing that occurred before the effective date of this article (July 1, 2001) and which would be ineffective to perfect a security interest under former article 9 but effective under this article.

4. **Competing Perfected Security Interests.** When there is more than one perfected security interest, the security interests rank according to priority in time of filing or perfection. "Filing," of course, refers to the filing of an effective financing statement. "Perfection" refers to the acquisition of a perfected security interest, i.e., one that has attached and as to which any required perfection step has been taken. See sections 9-308 and 9-309.

Example 1: On February 1, A files a financing statement covering a certain item of Debtor's equipment. On March 1, B files a financing statement covering the same equipment. On April 1, B makes a loan to Debtor and obtains a security interest in the equipment. On May 1, A makes a loan to Debtor and obtains a security interest in the same collateral. A has priority even though B's loan was made earlier and was perfected when made. It makes no difference whether A knew of B's security interest when A made its advance.

The problem stated in Example 1 is peculiar to a notice-filing system under which filing may occur before the security interest attaches (see section 9-502). The justification for determining priority by order of filing lies in the necessity of protecting the filing system—that is, of allowing the first secured party who has filed to make subsequent advances without each time having to check for subsequent filings as a condition of protection. Note, however, that this first-to-file protection is not absolute. For example, section 9-324 affords priority to certain purchase-money security interests, even if a competing secured party was the first to file or perfect.

Example 2: A and B make non-purchase-money advances secured by the same collateral. The collateral is in Debtor's possession, and neither security interest is perfected when the second advance is made. Whichever secured party first perfects its security interest (by taking possession of the collateral or by filing) takes priority. It makes no difference whether that secured party knows of the other security interest at the time it perfects its own.

The rule of subsection (a)(1), affording priority to the first to file or perfect, applies to security interests that are perfected by any method, including temporarily (section 9-312) or upon attachment (section 9-309), even though there may be no notice to creditors or

subsequent purchasers and notwithstanding any common-law rule to the contrary. The form of the claim to priority, i.e., filing or perfection, may shift from time to time, and the rank will be based on the first filing or perfection as long as there is no intervening period without filing or perfection. See section 9-308(c).

Example 3: On October 1, A acquires a temporarily perfected (20-day) security interest, unfiled, in a negotiable document in the debtor's possession under section 9-312(e). On October 5, B files and thereby perfects a security interest that previously had attached to the same document. On October 10, A files. A has priority, even after the 20-day period expires, regardless of whether A knows of B's security interest when A files. A was the first to perfect and maintained continuous perfection or filing since the start of the 20-day period. However, the perfection of A's security interest extends only "to the extent it arises for new value given." To the extent A's security interest secures advances made by A beyond the 20-day period, its security interest would be subordinate to B's, inasmuch as B was the first to file.

In general, the rule in subsection (a)(1) does not distinguish among various advances made by a secured party. The priority of every advance dates from the earlier of filing or perfection. However, in rare instances, the priority of an advance dates from the time the advance is made. See example 3 and section 9-323.

5. **Priority in After-Acquired Property.** The application of the priority rules to after-acquired property must be considered separately for each item of collateral. Priority does not depend only on time of perfection but may also be based on priority in filing before perfection.

Example 4: On February 1, A makes advances to Debtor under a security agreement covering "all Debtor's machinery, both existing and after-acquired." A promptly files a financing statement. On April 1, B takes a security interest in all Debtor's machinery, existing and after-acquired, to secure an outstanding loan. The following day, B files a financing statement. On May 1, Debtor acquires a new machine. When Debtor acquires rights in the new machine, both A and B acquire security interests in the machine simultaneously. Both security interests are perfected simultaneously. However, A has priority because A filed before B.

When after-acquired collateral is encumbered by more than one security interest, one of the security interests often is a purchase-money security interest that is entitled to special priority under section 9-324.

6. **Priority in Proceeds: General Rule.** Subsection (b)(1) follows former section 9-312(6). It provides that the baseline rules of subsection (a) apply generally to priority conflicts in proceeds except where otherwise provided (e.g., as in subsections (c) through (e)). Under section 9-203, attachment cannot occur (and therefore, under section 9-308, perfection cannot occur) as to particular collateral until the collateral itself comes into existence and the debtor has rights in it. Thus, a security interest in proceeds of original collateral does not attach and is not perfected until the proceeds come into existence and the debtor acquires rights in them.

Example 5: On April 1, Debtor authenticates a security agreement granting to A a security interest in all Debtor's existing and after-acquired inventory. The same day, A files a financing statement covering inventory. On May 1, Debtor authenticates a security agreement granting B a security interest in all Debtor's existing and future accounts. On June 1, Debtor sells inventory to a customer on 30-day unsecured credit. When Debtor acquires the account, B's security interest attaches to it and is perfected by B's financing statement. At the very same time, A's security interest attaches to the account as proceeds of the inventory and is automatically perfected. See section 9-315. Under subsection (b) of this section, for purposes of determining A's priority in the account, the time of filing as to the original collateral (April 1, as to inventory) is also the time of filing as to proceeds (account). Accordingly, A's security interest in the account has priority over B's. Of course, had B filed its financing statement before A filed (e.g., on March 1), then B would have priority in the accounts.

Section 9-324 governs the extent to which a special purchase-money priority in goods or software carries over into the proceeds of the original collateral.

7. **Priority in Proceeds: Special Rules.** Subsections (c), (d), and (e), which are new, provide additional priority rules for proceeds of collateral in situations where the temporal (first-in-time) rules of subsection (a)(1) are not appropriate. These new provisions distinguish what these comments refer to as "non-filing collateral" from what they call "filing collateral." As used in these comments, non-filing collateral is collateral of a type for which perfection may be achieved by a method other than filing (possession or control, mainly) and for which secured parties who so perfect generally do not expect or need to conduct a filing search. More specifically, non-filing collateral is chattel paper, deposit accounts, negotiable documents, instruments, investment property, and letter-of-credit rights. Other collateral—accounts, commercial tort claims, general intangibles, goods, nonnegotiable documents, and payment intangibles—is filing collateral.

8. **Proceeds of Non-Filing Collateral: Non-Temporal Priority.** Subsection (c)(2) provides a baseline priority rule for proceeds of

non-filing collateral which applies if the secured party has taken the steps required for non-temporal priority over a conflicting security interest in non-filing collateral (e.g., control, in the case of deposit accounts, letter-of-credit rights, and investment property). This rule determines priority in proceeds of non-filing collateral whether or not there exists an actual conflicting security interest in the original non-filing collateral. Under subsection (c)(2), the priority in the original collateral continues in proceeds if the security interest in proceeds is perfected and the proceeds are cash proceeds or non-filing proceeds "of the same type" as the original collateral. As used in subsection (c)(2), "type" means a type of collateral defined in the Uniform Commercial Code and should be read broadly. For example, a security is "of the same type" as a security entitlement (i.e., investment property), and a promissory note is "of the same type" as a draft (i.e., an instrument).

Example 6: SP-1 perfects its security interest in investment property by filing. SP-2 perfects subsequently by taking control of a certificated security. Debtor receives cash proceeds of the security (e.g., dividends deposited into Debtor's deposit account). If the first-to-file-or-perfect rule of subsection (a)(1) were applied, SP-1's security interest in the cash proceeds would be senior, although SP-2's security interest continues perfected under section 9-315 beyond the 20-day period of automatic perfection. This was the result under former article 9. Under subsection (c), however, SP-2's security interest is senior.

Note that a different result would obtain in Example 6 (i.e., SP-1's security interest would be senior) if SP-1 were to obtain control of the deposit-account proceeds. This is so because subsection (c) is subject to subsection (f), which in turn provides that the priority rules under subsections (a) through (e) are subject to "the other provisions of this part." One of those "other provisions" is section 9-327, which affords priority to a security interest perfected by control. See section 9-327(1).

Example 7: SP-1 perfects its security interest in investment property by filing. SP-2 perfects subsequently by taking control of a certificated security. Debtor receives proceeds of the security consisting of a new certificated security issued as a stock dividend on the original collateral. Although the new security is of the same type as the original collateral (i.e., investment property), once the 20-day period of automatic perfection expires (see section 9-315(d)), SP-2's security interest is unperfected. (SP-2 has not filed or taken delivery or control, and no temporary-perfection rule applies.) Consequently, once the 20-day period expires, subsection (c) does not confer priority, and, under subsection (a)(2), SP-1's security interest in the security is senior. This was the result under former article 9.

Example 8: SP-1 perfects its security interest in investment property by filing. SP-2 perfects subsequently by taking control of a certificated security and also by filing against investment property. Debtor receives proceeds of the security consisting of a new certificated security issued as a stock dividend of the collateral. Because the new security is of the same type as the original collateral (i.e., investment property) and (unlike example 7) SP-2's security interest is perfected by filing, SP-2's security interest is senior under subsection (c). If the new security were redeemed by the issuer upon surrender and yet another security were received by Debtor, SP-2's security interest would continue to enjoy priority under subsection (c). The new security would be proceeds of proceeds.

Example 9: SP-1 perfects its security interest in invesment property by filing. SP-2 subsequently perfects its security interest in investment property by taking control of a certificated security and also by filing against investment property. Debtor receives proceeds of the security consisting of a dividend check that it deposits to a deposit account. Because the check and the deposit account are cash proceeds, SP-1's and SP-2's security interests in the cash proceeds are perfected under section 9-315 beyond the 20-day period of automatic perfection. However, SP-2's security interest is senior under subsection (c).

Example 10: SP-1 perfects its security interest in investment property by filing. SP-2 perfects subsequently by taking control of a certificated security and also by filing against investment property. Debtor receives an instrument as proceeds of the security. (Assume that the instrument is not cash proceeds.) Because the instrument is not of the same type as the original collateral (i.e., investment property), SP-2's security interest, although perfected by filing, does not achieve priority under subsection (c). Under the first-to-file-or-perfect rule of subsection (a)(1), SP-1's security interest in the proceeds is senior.

The proceeds of proceeds are themselves proceeds. See section 9-102 (defining "proceeds" and "collateral"). Sometimes competing security interests arise in proceeds that are several generations removed from the original collateral. As the following example explains, the applicability of subsection (c) may turn on the nature of the intervening proceeds.

Example 11: SP-1 perfects its security interest in Debtor's deposit account by obtaining control. Thereafter, SP-2 files against inventory, (presumably) searches, finds no indication of a conflicting security interest, and advances against Debtor's existing and after-acquired inventory. Debtor uses funds from the deposit

account to purchase inventory, which SP-1 can trace as identifiable proceeds of its security interest in Debtor's deposit account, and which SP-2 claims as original collateral. The inventory is sold and the proceeds deposited into another deposit account, as to which SP-1 has not obtained control. Subsection (c) does not govern priority in this other deposit account. This deposit account is cash proceeds and is also the same type of collateral as SP-1's original collateral, as required by subsections (c)(2)(A) and (B). However, SP-1's security interest does not satisfy subsection (c)(2)(C) because the inventory proceeds, which intervened between the original deposit account and the deposit account constituting the proceeds at issue, are not cash proceeds, proceeds of the same type as the collateral (original deposit account), or an account relating to the collateral. Stated otherwise, once proceeds other than cash proceeds, proceeds of the same type as the original collateral, or an account relating to the original collateral intervene in the chain of proceeds, priority under subsection (c) is thereafter unavailable. The special priority rule in subsection (d) also is inapplicable to this case. See comment 9, example 13, below. Instead, the general first-to-file-or-perfect rule of subsections (a) and (b) apply. Under that rule, SP-1 has priority unless its security interest in the inventory proceeds became unperfected under section 9-315(d). Had SP-2 filed against inventory before SP-1 obtained control of the original deposit account, the SP-2 would have had priority even if SP-1's security interest in the inventory proceeds remained perfected.

9. **Proceeds of Nonfiling Collateral: Special Temporal Priority.** Under subsections (d) and (e), if a security interest in nonfiling collateral is perfected by a method other than filing (e.g., control or possession), it does not retain its priority over a conflicting security interest in proceeds that are filing collateral. Moreover, it is not entitled to priority in proceeds under the first-to-file-or-perfect rule of subsections (a)(1) and (b). Instead, under subsection (d), priority is determined by a new first-to-file rule.

Example 12: SP-1 perfects its security interest in Debtor's deposit account by obtaining control. Thereafter, SP-2 files against equipment, (presumably) searches, finds no indication of a conflicting security interest, and advances against Debtor's equipment. SP-1 then files against Debtor's equipment. Debtor uses funds from the deposit account to purchase equipment, which SP-1 can trace as proceeds of its security interest in Debtor's deposit account. If the first-to-file-or-perfect rule were applied, SP-1's security interest would be senior under subsections (a)(1) and (b), because it was the first to perfect in the original collateral and there was no period during which its security interest was unperfected. Under subsection (d), however, SP-2's security interest would be senior because it filed first. This corresponds with the likely expectations of the parties.

Note that under subsection (e), the first-to-file rule of subsection (d) applies only if the proceeds in question are other than nonfiling collateral (i.e., if the proceeds are filing collateral). If the proceeds are nonfiling collateral, either the first-to-file-or-perfect rule under subsections (a) and (b) or the nontemporal priority rule in subsection (c) would apply, depending on the facts.

Example 13: SP-1 perfects its security interest in Debtor's deposit account by obtaining control. Thereafter, SP-2 files against inventory, (presumably) searches, finds no indication of a conflicting security interest, and advances against Debtor's existing and after-acquired inventory. Debtor uses funds from the deposit account to purchase inventory, which SP-1 can trace as identifiable proceeds of its security interest in Debtor's deposit account, and which SP-2 claims as original collateral. The inventory is sold and the proceeds deposited into another deposit account, as to which SP-1 has not obtained control. As discussed above in comment 8, example 11, subsection (c) does not govern priority in this deposit account. Subsection (d) also does not govern, because the proceeds at issue (the deposit account) are cash proceeds. See subsection (e). Rather, the general rules of subsections (a) and (b) govern.

10. **Priority in Supporting Obligations.** Under subsections (b)(2) and (c)(1), a security interest having priority in collateral also has priority in a supporting obligation for that collateral. However, the rules in these subsections are subject to the special rule in section 9-329 governing the priority of security interests in a letter-of-credit right. See subsection (f). Under section 9-329, a secured party's failure to obtain control (section 9-107) of a letter-of-credit right that serves as supporting collateral leaves its security interest exposed to a priming interest of a party who does take control.

11. **Unperfected Security Interests.** Under subsection (a)(3), if conflicting security interests are unperfected, the first to attach has priority. This rule may be of merely theoretical interest, inasmuch as it is hard to imagine a situation where the case would come into litigation without either secured party's having perfected its security interest. If neither security interest had been perfected at the time of the filing of a petition in bankruptcy, ordinarily neither would be good against the trustee in bankruptcy under the Bankruptcy Code.

12. **Agricultural Liens.** Statutes other than this article may purport to grant priority to an agricultural lien as against a conflicting security interest or agricultural lien. Under subsec-

tion (g), if another statute grants priority to an agricultural lien, the agricultural lien has priority only if the same statute creates the agricultural lien and the agricultural lien is perfected. Otherwise, subsection (a) applies the same priority rules to an agricultural lien as to a security interest, regardless of whether the agricultural lien conflicts with another agricultural lien or with a security interest.

Inasmuch as no agricultural lien on proceeds arises under this article, subsections (b) through (e) do not apply to proceeds of agricultural liens. However, if an agricultural lien has priority under subsection (g) and the statute creating the agricultural lien gives the secured party a lien on proceeds of the collateral subject to the lien, a court should apply the principle of subsection (g) and award priority in the proceeds to the holder of the perfected agricultural lien.

§ 25-9-323. (Effective July 1, 2001) Future advances.

(a) When priority based on time of advance. — Except as otherwise provided in subsection (c) of this section, for purposes of determining the priority of a perfected security interest under G.S. 25-9-322(a)(1), perfection of the security interest dates from the time an advance is made to the extent that the security interest secures an advance that:

(1) Is made while the security interest is perfected only:
   a. Under G.S. 25-9-309 when it attaches; or
   b. Temporarily under G.S. 25-9-312(e), (f), or (g); and
(2) Is not made pursuant to a commitment entered into before or while the security interest is perfected by a method other than under G.S. 25-9-309 or G.S. 25-9-312(e), (f), or (g).

(b) Lien creditor. — Except as otherwise provided in subsection (c) of this section, a security interest is subordinate to the rights of a person that becomes a lien creditor to the extent that the security interest secures an advance made more than 45 days after the person becomes a lien creditor unless the advance is made:

(1) Without knowledge of the lien; or
(2) Pursuant to a commitment entered into without knowledge of the lien.

(c) Buyer of receivables. — Subsections (a) and (b) of this section do not apply to a security interest held by a secured party that is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor.

(d) Buyer of goods. — Except as otherwise provided in subsection (e) of this section, a buyer of goods other than a buyer in ordinary course of business takes free of a security interest to the extent that it secures advances made after the earlier of:

(1) The time the secured party acquires knowledge of the buyer's purchase; or
(2) 45 days after the purchase.

(e) Advances made pursuant to commitment: priority of buyer of goods. — Subsection (d) of this section does not apply if the advance is made pursuant to a commitment entered into without knowledge of the buyer's purchase and before the expiration of the 45-day period.

(f) Lessee of goods. — Except as otherwise provided in subsection (g) of this section, a lessee of goods, other than a lessee in ordinary course of business, takes the leasehold interest free of a security interest to the extent that it secures advances made after the earlier of:

(1) The time the secured party acquires knowledge of the lease; or
(2) 45 days after the lease contract becomes enforceable.

(g) Advances made pursuant to commitment: priority of lessee of goods. — Subsection (f) of this section does not apply if the advance is made pursuant to a commitment entered into without knowledge of the lease and before the expiration of the 45-day period. (1945, c. 182, s. 4; c. 196, s. 4; 1955, c. 386, s. 2; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 1979, c. 404, s. 1; 1997-181, s. 8; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former sections 2A-307(4), 9-301(4), 9-307(3), and 9-312(7).

2. **Scope of This Section.** A security agreement may provide that collateral secures future advances. See section 9-204(c). This section collects all of the special rules dealing with the priority of advances made by a secured party after a third party acquires an interest in the collateral. Subsection (a) applies when the third party is a competing secured party. It replaces and clarifies former section 9-312(7). Subsection (b) deals with lien creditors and replaces former section 9-301(4). Subsections (d) and (e) deal with buyers and replace former section 9-307(3). Subsections (f) and (g) deal with lessees and replace former section 2A-307(4).

3. **Competing Security Interests.** Under a proper reading of the first-to-file-or-perfect rule of section 9-322(a)(1) (and former section 9-312(5)), it is abundantly clear that the time when an advance is made plays no role in determining priorities among conflicting security interests except when a financing statement was not filed and the advance is the giving of value as the last step for attachment and perfection. Thus, a secured party takes subject to all advances secured by a competing security interest having priority under section 9-322(a)(1). This result generally obtains regardless of how the competing security interest is perfected and regardless of whether the advances are made "pursuant to commitment" (section 9-102). Subsection (a) of this section states the only other instance when the time of an advance figures in the priority scheme in section 9-322: When the security interest is perfected only automatically under section 9-309 or temporarily under section 9-312(e), (f), or (g), and the advance is not made pursuant to a commitment entered into while the security interest was perfected by another method. Thus, an advance has priority from the date it is made only in the rare case in which it is made without commitment and while the security interest is perfected only temporarily under section 9-312.

The new formulation in subsection (a) clarifies the result when the initial advance is paid and a new ("future") advance is made subsequently. Under former section 9-312(7), the priority of the new advance turned on whether it was "made while a security interest is perfected." This section resolves any ambiguity by omitting the quoted phrase.

Example 1: On February 1, A makes an advance secured by machinery in the debtor's possession and files a financing statement. On March 1, B makes an advance secured by the same machinery and files a financing statement. On April 1, A makes a further advance, under the original security agreement, against the same machinery. A was the first to file and so, under the first-to-file-or-perfect rule of section 9-322(a)(1), A's security interest has priority over B's, both as to the February 1 and as to the April 1 advance. It makes no difference whether A knows of B's intervening advance when A makes the second advance. Note that, as long as A was the first to file or perfect, A would have priority with respect to both advances if either A or B had perfected by taking possession of the collateral. Likewise, A would have priority if A's April 1 advance was not made under the original agreement with the debtor, but was under a new agreement.

Example 2: On October 1, A acquires a temporarily perfected (20-day) security interest, unfiled, in a negotiable document in the debtor's possession under section 9-312(e) or (f). The security interest secures an advance made on that day as well as future advances. On October 5, B files and thereby perfects a security interest that previously had attached to the same document. On October 8, A makes an additional advance. On October 10, A files. Under section 9-322(a)(1), because A was the first to perfect and maintained continuous perfection or filing since the start of the 20-day period, A has priority, even after the 20-day period expires. See section 9-322, comment 4, example 3. However, under this section, for purposes of section 9-322(a)(1), to the extent A's security interest secures the October 8 advance, the security interest was perfected on October 8. Inasmuch as B perfected on October 5, B has priority over the October 8 advance.

The rule in subsection (a) is more liberal toward the priority of future advances than the corresponding rules applicable to intervening lien creditors (subsection (b)), buyers (subsections (d) and (e)), and lessees (subsections (f) and (g)).

4. **Competing Lien Creditors.** Subsection (b) replaces former section 9-301(4) and addresses the rights of a "lien creditor," as defined in Section 9-102. Under Section 9-317(a)(2), a security interest is senior to the rights of a person who becomes a lien creditor, unless the person becomes a lien creditor before the security interest is perfected and before a financing statement covering the collateral is filed and Sections 9-203(b)(3) is satisfied. Subsection (b) of this section provides that a security interest is subordinate to those rights to the extent the the specified circumstances occur. Subsection (b) does not elevate the priority of a security interest that is subordinate to the rights of a lien creditor under Section 9-317(a)(2); it only subordinates.

As under former section 9-301(4), a secured party's knowledge does not cut short the 45-day period during which future advances can achieve priority over an intervening lien creditor's interest. Rather, because of the impact of the rule in subsection (b) on the question whether the security interest for future advances is "protected" under section 6323(c)(2) and (d) of the Internal Revenue Code as amended by the Federal Tax Lien Act of 1966, the priority of the security interest for future advances over a lien creditor is made absolute for 45 days regardless of knowledge of the secured party concerning the lien. If, however, the advance is made after the 45 days, the advance will not have priority unless it was made or committed without knowledge of the lien.

5. **Sales of Receivables; Consignments.** Subsections (a) and (b) do not apply to outright sales of accounts, chattel paper, payment intangibles, or promissory notes, nor do they apply to consignments.

6. **Competing Buyers and Lessees.** Under subsections (d) and (e), a buyer will not take subject to a security interest to the extent it secures advances made after the secured party has knowledge that the buyer has purchased the collateral or more than 45 days after the purchase unless the advances were made pursuant to a commitment entered into before the expiration of the 45-day period and without knowledge of the purchase. Subsections (f) and (g) provide an analogous rule for lessees. Of course, a buyer in ordinary course who takes free of the security interest under section 9-320 and a lessee in ordinary course who takes free under section 9-321 are not subject to any future advances. Subsections (d) and (e) replace former section 9-307(3), and subsections (f) and (g) replace former section 2A-307(4). No change in meaning is intended.

§ 25-9-324. (Effective July 1, 2001) Priority of purchase-money security interests.

(a) General rule: purchase-money priority. — Except as otherwise provided in subsection (g) of this section, a perfected purchase-money security interest in goods other than inventory or livestock has priority over a conflicting security interest in the same goods, and, except as otherwise provided in G.S. 25-9-327, a perfected security interest in its identifiable proceeds also has priority, if the purchase-money security interest is perfected when the debtor receives possession of the collateral or within 20 days thereafter.

(b) Inventory purchase-money priority. — Subject to subsection (c) of this section and except as otherwise provided in subsection (g) of this section, a perfected purchase-money security interest in inventory has priority over a conflicting security interest in the same inventory, has priority over a conflicting security interest in chattel paper or an instrument constituting proceeds of the inventory and in proceeds of the chattel paper, if so provided in G.S. 25-9-330, and, except as otherwise provided in G.S. 25-9-327, also has priority in identifiable cash proceeds of the inventory to the extent the identifiable cash proceeds are received on or before the delivery of the inventory to a buyer, if:

(1) The purchase-money security interest is perfected when the debtor receives possession of the inventory;

(2) The purchase-money secured party sends an authenticated notification to the holder of the conflicting security interest;

(3) The holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory; and

(4) The notification states that the person sending the notification has or expects to acquire a purchase-money security interest in inventory of the debtor and describes the inventory.

(c) Holders of conflicting inventory security interests to be notified. — Subdivisions (b)(2) through (b)(4) of this section apply only if the holder of the conflicting security interest had filed a financing statement covering the same types of inventory:

(1) If the purchase-money security interest is perfected by filing, before the date of the filing; or

(2) If the purchase-money security interest is temporarily perfected without filing or possession under G.S. 25-9-312(f), before the beginning of the 20-day period thereunder.

(d) Livestock purchase-money priority. — Subject to subsection (e) of this section and except as otherwise provided in subsection (g) of this section, a perfected purchase-money security interest in livestock that are farm products has priority over a conflicting security interest in the same livestock, and, except as otherwise provided in G.S. 25-9-327, a perfected security interest in their identifiable proceeds and identifiable products in their unmanufactured states also has priority, if:

(1) The purchase-money security interest is perfected when the debtor receives possession of the livestock;

(2) The purchase-money secured party sends an authenticated notification to the holder of the conflicting security interest;

(3) The holder of the conflicting security interest receives the notification within six months before the debtor receives possession of the livestock; and

(4) The notification states that the person sending the notification has or expects to acquire a purchase-money security interest in livestock of the debtor and describes the livestock.

(e) Holders of conflicting livestock security interests to be notified. — Subdivisions (d)(2) through (d)(4) of this section apply only if the holder of the conflicting security interest had filed a financing statement covering the same types of livestock:

(1) If the purchase-money security interest is perfected by filing, before the date of the filing; or

(2) If the purchase-money security interest is temporarily perfected without filing or possession under G.S. 25-9-312(f), before the beginning of the 20-day period thereunder.

(f) Software purchase-money priority. — Except as otherwise provided in subsection (g) of this section, a perfected purchase-money security interest in software has priority over a conflicting security interest in the same collateral, and, except as otherwise provided in G.S. 25-9-327, a perfected security interest in its identifiable proceeds also has priority, to the extent that the purchase-money security interest in the goods in which the software was acquired for use has priority in the goods and proceeds of the goods under this section.

(g) Conflicting purchase-money security interests. — If more than one security interest qualifies for priority in the same collateral under subsection (a), (b), (d), or (f) of this section:

(1) A security interest securing an obligation incurred as all or part of the price of the collateral has priority over a security interest securing an obligation incurred for value given to enable the debtor to acquire rights in or the use of collateral; and

(2) In all other cases, G.S. 25-9-322(a) applies to the qualifying security interests. (1945, c. 182, s. 4; c. 196, s. 4; 1955, c. 386, s. 2; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 1979, c. 404, s. 1; 1997-181, s. 8; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-312(3) and (4).

2. **Priority of Purchase-Money Security Interests.** This section contains the priority rules applicable to purchase-money security interests, as defined in section 9-103. It affords a special, nontemporal priority to those purchase-money security interests that satisfy the statutory conditions. In most cases, priority will be over a security interest asserted under an after-acquired property clause. See section 9-204 on the extent to which security interests in after-acquired property are validated.

A purchase-money security interest can be created only in goods and software. See section 9-103. Section 9-324(a), which follows former section 9-312(4), contains the general rule for purchase-money security interests in goods. It is subject to subsections (b) and (c), which derive from former section 9-312(3) and apply to purchase-money security interests in inventory, and subsections (d) and (e), which apply to purchase-money security interests in livestock that are farm products. Subsection (f) applies to purchase-money security interests in software. Subsection (g) deals with the relatively unusual case in which a debtor creates two purchase-money security interests in the same collateral and both security interests qualify for special priority under one of the other subsections.

Former section 9-312(2) contained a rule affording special priority to those who provided secured credit that enabled a debtor to produce crops. This rule proved unworkable and has been eliminated from this article. Instead, model section 9-324A contains a revised production-money priority rule. That section is a model, not uniform, provision. The sponsors of the UCC have taken no position as to whether it should be enacted, instead leaving the matter for state legislatures to consider if they are so inclined.

3. **Purchase-Money Priority in Goods Other Than Inventory and Livestock.** Subsection (a) states a general rule applicable to all types of goods except inventory and farm-products livestock: The purchase-money interest takes priority if it is perfected when the debtor receives possession of the collateral or within 20 days thereafter. (As to the 20-day "grace period," compare section 9-317(e). Former sections 9-301(2) and 9-312(4) contained a 10-day grace period.) The perfection requirement means that the purchase-money secured party either has filed a financing statement before that time or has a temporarily perfected security interest in goods covered by documents under section 9-312(e) and (f) which is continued in a perfected status by filing before the expiration of the 20-day period specified in that section. A purchase-money security interest qualifies for priority under subsection (a), even if the purchase-money secured party knows that a conflicting security interest has been created and/or that the holder of the conflicting interest has filed a financing statement covering the collateral.

Normally, there will be no question when "the debtor receives possession of the collateral" for purposes of subsection (a). However, sometimes a debtor buys goods and takes possession of them in stages, and then assembly and testing are completed (by the seller or debtor-buyer) at the debtor's location. Under those circumstances, the buyer "takes possession" within the meaning of subsection (a) when, after an inspection of the portion of the goods in the debtor's possession, it would be apparent to a potential lender to the debtor that the debtor has acquired an interest in the goods taken as a whole.

A similar issue concerning the time when "the debtor receives possession" arises when a person acquires possession of goods under a transaction that is not governed by this article and then later agrees to buy the goods on secured credit. For example, a person may take possession of goods as lessee under a lease contract and then exercise an option to purchase the goods from the lessor on secured credit. Under section 2A-307(1), creditors of the lessee generally take subject to the lease contract; filing a financing statement against the lessee is unnecessary to protect the lessor's leasehold or residual interest. Once the lease is converted to a security interest, filing a financing statement is necessary to protect the seller's (former lessor's) security interest. Accordingly, the 20-day period in subsection (a) does not commence until the goods become "collateral" (defined in section 9-102), i.e., until they are subject to a security interest.

4. **Purchase-Money Security Interests in Inventory.** Subsections (b) and (c) afford a means by which a purchase-money security interest in inventory can achieve priority over an earlier-filed security interest in the same collateral. To achieve priority, the purchase-money security interest must be perfected when the debtor receives possession of the inventory. For a discussion of when "the debtor receives possession," see comment 3, above. The 20-day grace period of subsection (a) does not apply.

The arrangement between an inventory secured party and its debtor typically requires the secured party to make periodic advances against incoming inventory or periodic releases of old inventory as new inventory is received. A fraudulent debtor may apply to the secured party for advances even though it has already given a purchase-money security interest in the inventory to another secured party. For this reason, subsections (b)(2) through (4) and (c) impose a second condition for the purchase-money security interest's achieving priority: The purchase-money secured party must give notification to the holder of a conflicting security interest who filed against the same item or type of inventory before the purchase-money secured party filed or its security interest became perfected temporarily under section 9-312(e) or (f). The notification requirement protects the non-purchase-money inventory secured party in such a situation: If the inventory secured party has received notification, it presumably will not make an advance; if it has not received notification (or if the other security interest does not qualify as purchase-money),

any advance the inventory secured party may make ordinarily will have priority under section 9-322. Inasmuch as an arrangement for periodic advances against incoming goods is unusual outside the inventory field, subsection (a) does not contain a notification requirement.

5. **Notification to Conflicting Inventory Secured Party: Timing.** Under subsection (b)(3), the perfected purchase-money security interest achieves priority over a conflicting security interest only if the holder of the conflicting security interest receives a notification within five years before the debtor receives possession of the purchase-money collateral. If the debtor never receives possession, the five-year period never begins, and the purchase-money security interest has priority, even if notification is not given. However, where the purchase-money inventory financing began by the purchase-money secured party's possession of a negotiable document of title, to retain priority the secured party must give the notification required by subsection (b) at or before the usual time, i.e., when the debtor gets possession of the inventory, even though the security interest remains perfected for 20 days under section 9-312(e) or (f).

Some people have mistakenly read former section 9-312(3)(b) to require, as a condition of purchase-money priority in inventory, that the purchase-money secured party give the notification before it files a financing statement. Read correctly, the "before" clauses compare (i) the time when the holder of the conflicting security interest filed a financing statement with (ii) the time when the purchase-money security interest becomes perfected by filing or automatically perfected temporarily. Only if (i) occurs before (ii) must notification be given to the holder of the conflicting security interest. Subsection (c) has been rewritten to clarify this point.

6. **Notification to Conflicting Inventory Secured Party: Address.** Inasmuch as the address provided as that of the secured party on a filed financing statement is an "address that is reasonable under the circumstances," the holder of a purchase-money security interest may satisfy the requirement to "send" notification to the holder of a conflicting security interest in inventory by sending a notification to that address, even if the address is or becomes incorrect. See section 9-102 (definition of "send"). Similarly, because the address is "held out by (the holder of the conflicting security interest) as the place for receipt of such communications (i.e., communications relating to security interests)," the holder is deemed to have "received" a notification delivered to that address. See section 1-201(26).

7. **Consignments.** Subsections (b) and (c) also determine the priority of a consignor's interest in consigned goods as against a security interest in the goods created by the consignee. Inasmuch as a consignment subject to this article is defined to be a purchase-money security interest, see section 9-103(d), no inference concerning the nature of the transaction should be drawn from the fact that a consignor uses the term "security interest" in its notice under subsection (b)(4). Similarly, a notice stating that the consignor has delivered or expects to deliver goods, properly described, "on consignment" meets the requirements of subsection (b)(4), even if it does not contain the term "security interest," and even if the transaction subsequently is determined to be a security interest. Cf. section 9-505 (use of "consignor" and "consignee" in financing statement).

8. **Priority in Proceeds: General.** When the purchase-money secured party has priority over another secured party, the question arises whether this priority extends to the proceeds of the original collateral. Subsections (a), (d), and (f) give an affirmative answer, but only as to proceeds in which the security interest is perfected (see section 9-315). Although this qualification did not appear in former section 9-312(4), it was implicit in that provision.

In the case of inventory collateral under subsection (b), where financing frequently is based on the resulting accounts, chattel paper, or other proceeds, the special priority of the purchase-money secured interest carries over into only certain types of proceeds. As under former section 9-312(3), the purchase-money priority in inventory under subsection (b) carries over into identifiable cash proceeds (defined in section 9-102) received on or before the delivery of the inventory to a buyer.

As a general matter, also like former section 9-312(3), the purchase-money priority in inventory does not carry over into proceeds consisting of accounts or chattel paper. Many parties financing inventory are quite content to protect their first-priority security interest in the inventory itself. They realize that when the inventory is sold, someone else will be financing the resulting receivables (accounts or chattel paper), and the priority for inventory will not run forward to the receivables constituting the proceeds. Indeed, the cash supplied by the receivables financer often will be used to pay the inventory financing. In some situations, the party financing the inventory on a purchase-money basis makes contractual arrangements that the proceeds of receivables financing by another be devoted to paying off the inventory security interest.

However, the purchase-money priority in inventory does carry over to proceeds consisting of chattel paper and its proceeds (and also to instruments) to the extent provided in section 9-330. Under section 9-330(e), the holder of a purchase-money security interest in inventory is deemed to give new value for proceeds con-

sisting of chattel paper. Taken together, sections 9-324(b) and 9-330(e) enable a purchase-money inventory secured party to obtain priority in chattel paper constituting proceeds of the inventory, even if the secured party does not actually give new value for the chattel paper, provided the purchase-money secured party satisfies the other conditions for achieving priority.

When the proceeds of original collateral (goods or software) consist of a deposit account, section 9-327 governs priority to the extent it conflicts with the priority rules of this section.

9. **Priority in Accounts Constituting Proceeds of Inventory.** The application of the priority rules in subsection (b) is shown by the following examples:

Example 1: Debtor creates a security interest in its existing and after-acquired inventory in favor of SP-1, who files a financing statement covering inventory. SP-2 subsequently takes a purchase-money security interest in certain inventory and, under subsection (b), achieves priority in this inventory over SP-1. This inventory is then sold, producing accounts. Accounts are not cash proceeds, and so the special purchase-money priority in the inventory does not control the priority in the accounts. Rather, the first-to-file-or-perfect rule of section 9-322(a)(1) applies. The time of SP-1's filing as to the inventory is also the time of filing as to the accounts under section 9-322(b). Assuming that each security interest in the accounts proceeds remains perfected under section 9-315, SP-1 has priority as to the accounts.

Example 2: In Example 1, if SP-2 had filed directly against accounts, the date of that filing as to accounts would be compared with the date of SP-1's filing as to the inventory. The first filed would prevail under section 9-322(a)(1).

Example 3: If SP-3 had filed against accounts in Example 1 before either SP-1 or SP-2 filed against inventory, SP-3's filing against accounts would have priority over the filings of SP-1 and SP-2. This result obtains even though the filings against inventory are effective to continue the perfected status of SP-1's and SP-2's security interest in the accounts beyond the 20-day period of automatic perfection. See section 9-315. SP-1's and SP-2's position as to the inventory does not give them a claim to accounts (as proceeds of the inventory) which is senior to someone who has filed earlier against accounts. If, on the other hand, either SP-1's or SP-2's filing against the inventory preceded SP-3's filing against accounts, SP-1 or SP-2 would outrank SP-3 as to the accounts.

10. **Purchase-Money Security Interests in Livestock.** New subsections (d) and (e) provide a purchase-money priority rule for farm-products livestock. They are patterned on the purchase-money priority rule for inventory found in subsections (b) and (c) and include a requirement that the purchase-money secured party notify earlier-filed parties. Two differences between subsections (b) and (d) are noteworthy. First, unlike the purchase-money inventory lender, the purchase-money livestock lender enjoys priority in all proceeds of the collateral. Thus, under subsection (d), the purchase-money secured party takes priority in accounts over an earlier-filed accounts financer. Second, subsection (d) affords priority in certain products of the collateral as well as proceeds.

11. **Purchase-Money Security Interests in Aquatic Farm Products.** Aquatic goods produced in aquacultural operations (e.g., catfish raised on a catfish farm) are farm products. See section 9-102 (definition of "farm products"). The definition does not indicate whether aquatic goods are "crops," as to which the model production money security interest priority in section 9-324A applies, or "livestock," as to which the purchase-money priority in subsection (d) of this section applies. This article leaves courts free to determine the classification of particular aquatic goods on a case-by-case basis, applying whichever priority rule makes more sense in the overall context of the debtor's business.

12. **Purchase-Money Security Interests in Software.** Subsection (f) governs the priority of purchase-money security interests in software. Under section 9-103(c), a purchase-money security interest arises in software only if the debtor acquires its interest in the software for the principal purpose of using the software in goods subject to a purchase-money security interest. Under subsection (f), a purchase-money security interest in software has the same priority as the purchase-money security interest in the goods in which the software was acquired for use. This priority is determined under subsections (b) and (c) (for inventory) or (a) (for other goods).

13. **Multiple Purchase-Money Security Interests.** New subsection (g) governs priority among multiple purchase-money security interests in the same collateral. It grants priority to purchase-money security interests securing the price of collateral (i.e., created in favor of the seller) over purchase-money security interests that secure enabling loans. Section 7.2(c) of the Restatement (3d) of the Law of Property (Mortgages) (1997) adopts this rule with respect to real property mortgages. As comment d to that section explains:

> the equities favor the vendor. Not only does the vendor part with specific real estate rather than money, but the vendor would never relinquish it at all except on the understanding that the vendor will be able to use it to satisfy the obligation to pay the price. This is the case even though the vendor may know that the mortgagor is going to finance the

transaction in part by borrowing from a third party and giving a mortgage to secure that obligation. In the final analysis, the law is more sympathetic to the vendor's hazard of losing real estate previously owned than to the third party lender's risk of being unable to collect from an interest in real estate that never previously belonged to it.

The first-to-file-or-perfect rule of section 9-322 applies to multiple purchase-money security interests securing enabling loans.

§ 25-9-324.1. (Effective July 1, 2001) Priority of production-money security interests and agricultural liens.

(a) Priority over conflicting security interests. — Except as otherwise provided in subsections (c), (d), and (e) of this section, if the requirements of subsection (b) of this section are satisfied, a perfected production-money security interest in production-money crops has priority over a conflicting security interest in the same crops and, except as otherwise provided in G.S. 25-9-327, also has priority in their identifiable proceeds.

(b) Requirements for priority. — A production-money security interest has priority under subsection (a) of this section if:

(1) The production-money security interest is perfected by filing when the production-money secured party first gives new value to enable the debtor to produce the crops;

(2) The production-money secured party sends an authenticated notification to the holder of the conflicting security interest not less than 10 or more than 30 days before the production-money secured party first gives new value to enable the debtor to produce the crops if the holder had filed a financing statement covering the crops before the date of the filing made by the production-money secured party; and

(3) The notification states that the production-money secured party has or expects to acquire a production-money security interest in the debtor's crops and provides a description of the crops.

(c) Multiple production-money security interests. — Except as otherwise provided in subsection (d) or (e) of this section, if more than one security interest qualifies for priority in the same collateral under subsection (a) of this section, the security interests rank according to priority in time of filing under G.S. 25-9-322(a).

(d) New value to produce production-money crops. — To the extent that a person holding a perfected security interest in production-money crops that are the subject of a production-money security interest gives new value to enable the debtor to produce the production-money crops and the value is in fact used for the production of the production-money crops, the security interests rank according to priority in time of filing under G.S. 25-9-322(a).

(e) Holder of agricultural lien and production-money security interest. — To the extent that a person holds both an agricultural lien and a production-money security interest in the same collateral securing the same obligations, the rules of priority applicable to agricultural liens govern priority.

(f) Creating or perfecting production-money security interest not to operate as default or accelerating event. — Creating or perfecting a production-money security interest shall not operate under any circumstances as a default on, an accelerating event under, or otherwise as a breach of any note or other instrument or agreement of any kind or nature to pay debt, any loan or credit agreement, or any security agreement or arrangement of any kind or nature where the collateral is real or personal property. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C.S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 196, s. 4; 1955, c. 816; 1957, c. 999; 1965, c. 700, s. 1; 1967, c. 24, s. 13; 1975, c. 862, s. 7; 1979, c. 404, s. 2; 1989 (Reg.

Sess., 1990), c. 1024, s. 8(o); 1997-181, ss. 15, 16; 1997-336, s. 1; 1997-456, s. 5; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New; replaces former Section 9-312(2).

2. **Priority of Production-Money Security Interests and Conflicting Security Interests.** This section replaces the limited priority in crops afforded by former Section 9-312(2). That priority generally has been thought to be of little value for its intended beneficiaries. This section attempts to balance the interests of the production-money secured party with those of a secured party who has previously filed a financing statement covering the crops that are to be produced. For example, to qualify for priority under this section, the production-money secured party must notify the earlier-filed secured party prior to extending the production-money credit. The notification affords the earlier secured party the opportunity to prevent subordination by extending the credit itself. Subsection (d) makes this explicit. If the holder of a security interest in production-money crops which conflicts with a production-money security interest gives new value for the production of the crops, the security interests rank according to priority in time of filing under Section 9-322(a).

3. **Multiple Production-Money Security Interest.** In the case of multiple production-money security interests that qualify for priority under subsection (a), the first to file has priority. See subsection (c). Note that only a security interest perfected by filing is entitled to production-money priority. See subsection (b)(1). Consequently, subsection (c) does not adopt the first-to-file-or-perfect formulation.

4. **Holder of Agricultural Lien and Production-Money Security Interest.** Subsection (e) deals with a creditor who holds both an agricultural lien and an Article 9 production-money security interest in the same collateral. In these cases, the priority rules applicable to agricultural liens govern. The creditor can avoid this result by waiving its agricultural lien.

§ 25-9-325. (Effective July 1, 2001) Priority of security interests in transferred collateral.

(a) Subordination of security interest in transferred collateral. — Except as otherwise provided in subsection (b) of this section, a security interest created by a debtor is subordinate to a security interest in the same collateral created by another person if:

(1) The debtor acquired the collateral subject to the security interest created by the other person;

(2) The security interest created by the other person was perfected when the debtor acquired the collateral; and

(3) There is no period thereafter when the security interest is unperfected.

(b) Limitation of subsection (a) subordination. — Subsection (a) of this section subordinates a security interest only if the security interest:

(1) Otherwise would have priority solely under G.S. 25-9-322(a) or G.S. 25-9-324; or

(2) Arose solely under G.S. 25-2-711(3) or G.S. 25-2A-508(5). (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **"Double Debtor" Problem.** This section addresses the "double debtor" problem, which arises when a debtor acquires property that is subject to a security interest created by another debtor.

3. **Taking Subject to Perfected Security Interest.** Consider the following scenario:

Example 1: A owns an item of equipment subject to a perfected security interest in favor of SP-A. A sells the equipment to B, not in the ordinary course of business. B acquires its interest subject to SP-A's security interest. See sections 9-201 and 9-315(a)(1)(A). Under this section, if B creates a security interest in the equipment in favor of SP-B, SP-B's security interest is subordinate to SP-A's security interest, even if SP-B filed against B before SP-A filed against A, and even if SP-B took a purchase-money security interest. Normally, SP-B

could have investigated the source of the equipment and discovered SP-A's filing before making an advance against the equipment, whereas SP-A had no reason to search the filings against someone other than its debtor, A.

4. **Taking Subject to Unperfected Security Interest.** This section applies only if the security interest in the transferred collateral was perfected when the transferee acquired the collateral. See subsection (a)(2). If this condition is not met, then the normal priority rules apply.

Example 2: A owns an item of equipment subject to an unperfected security interest in favor of SP-A. A sells the equipment to B, who gives value and takes delivery of the equipment without knowledge of the security interest. B takes free of the security interest. See section 9-317(b). If B then creates a security interest in favor of SP-B, no priority issue arises; SP-B has the only security interest in the equipment.

Example 3: The facts are as in Example 2, except that B knows of SP-A's security interest and therefore takes the equipment subject to it. If B creates a security interest in the equipment in favor of SP-B, this section does not determine the relative priority of the security interests. Rather, the normal priority rules govern. If SP-B perfects its security interest, then, under section 9-322(a)(2), SP-A's unperfected security interest will be junior to SP-B's perfected security interest. The award of priority to SP-B is premised on the belief that SP-A's failure to file could have misled SP-B.

5. **Taking Subject to Perfected Security Interest that Becomes Unperfected.** This section applies only if the security interest in the transferred collateral did not become unperfected at any time after the transferee acquired the collateral. See subsection (a)(3). If this condition is not met, then the normal priority rules apply.

Example 4: As in Example 1, A owns an item of equipment subject to a perfected security interest in favor of SP-A. A sells the equipment to B, not in the ordinary course of business. B acquires its interest subject to SP-A's security interest. See sections 9-201 and 9-315(a)(1)(A). B creates a security interest in favor of SP-B, and SP-B perfects its security interest. This section provides that SP-A's security interest is senior to SP-B's. However, if SP-A's financing statement lapses while SP-B's security interest is perfected, then the normal priority rules would apply, and SP-B's security interest would become senior to SP-A's security interest. See sections 9-322(a)(2) and 9-515(c).

6. **Unusual Situations.** The appropriateness of the rule of subsection (a) is most apparent when it works to subordinate security interests having priority under the basic priority rules of section 9-322(a) or the purchase-money priority rules of section 9-324. The rule also works properly when applied to the security interest of a buyer under section 2-711(3) or a lessee under section 2A-508(5). However, subsection (a) may provide an inappropriate resolution of the "double debtor" problem in some of the wide variety of other contexts in which the problem may arise. Although subsection (b) limits the application of subsection (a) to those cases in which subordination is known to be appropriate, courts should apply the rule in other settings, if necessary to promote the underlying purposes and policies of the Uniform Commercial Code. See section 1-102(1).

§ 25-9-326. (Effective July 1, 2001) Priority of security interests created by new debtor.

(a) Subordination of security interest created by new debtor. — Subject to subsection (b) of this section, a security interest created by a new debtor which is perfected by a filed financing statement that is effective solely under G.S. 25-9-508 in collateral in which a new debtor has or acquires rights is subordinate to a security interest in the same collateral which is perfected other than by a filed financing statement that is effective solely under G.S. 25-9-508.

(b) Priority under other provisions; multiple original debtors. — The other provisions of this Part determine the priority among conflicting security interests in the same collateral perfected by filed financing statements that are effective solely under G.S. 25-9-508. However, if the security agreements to which a new debtor became bound as debtor were not entered into by the same original debtor, the conflicting security interests rank according to priority in time of the new debtor's having become bound. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Subordination of Security Interests Created by New Debtor.** This section addresses the priority contests that may arise when a new debtor becomes bound by the security agreement of an original debtor and each debtor has a secured creditor.

Subsection (a) subordinates the original debtor's secured party's security interest perfected against the new debtor solely under section 9-508. The security interest is subordinated to security interests in the same collateral perfected by another method, e.g., by filing against the new debtor. As used in this section, "a filed financing statement that is effective solely under section 9-508" refers to a financing statement filed against the original debtor that continues to be effective under section 9-508. It does not encompass a new initial financing statement providing the name of the new debtor, even if the initial financing statement is filed to maintain the effectiveness of a financing statement under the circumstances described in section 9-508(b). Nor does it encompass a financing statement filed against the original debtor which remains effective against collateral transferred by the original debtor to the new debtor. See section 9-508(c). Concerning priority contests involving transferred collateral, see sections 9-325 and 9-507.

Example 1: SP-X holds a perfected-by-filing security interest in X Corp's existing and after-acquired inventory, and SP-Z holds a perfected-by-possession security interest in an item of Z Corp's inventory. Z Corp becomes bound as debtor by X Corp's security agreement (e.g., Z Corp buys X Corp's assets and assumes its security agreement). See section 9-203(d). Under section 9-508, SP-X's financing statement is effective to perfect a security interest in the item of inventory in which Z Corp has rights. However, subsection (a) provides that SP-X's security interest is subordinate to SP-Z's, regardless of whether SP-X's financing statement was filed before SP-Z perfected its security interest.

Example 2: SP-X holds a perfected-by-filing security interest in X Corp's existing and after-acquired inventory, and SP-Z holds a perfected-by-filing security interest in Z Corp's existing and after-acquired inventory. Z Corp becomes bound as debtor by X Corp's security agreement. Subsequently, Z Corp acquires a new item of inventory. Under section 9-508, SP-X's financing statement is effective to perfect a security interest in the new item of inventory in which Z Corp has rights. However, because SP-Z's security interest was perfected by another method, subsection (a) provides that SP-X's security interest is subordinate to SP-Z's, regardless of which financing statement was filed first. This would be the case even if SP-Z filed after Z Corp became bound by X Corp's security agreement.

3. **Other Priority Rules.** Subsection (b) addresses the priority among security interests created by the original debtor (X Corp). By invoking the other priority rules of this subpart, as applicable, subsection (b) preserves the relative priority of security interests created by the original debtor.

Example 3: Under the facts of Example 2, SP-Y also holds a perfected-by-filing security interest in X Corp's existing and after-acquired inventory. SP-Y filed after SP-X. Inasmuch as both SP-X's and SP-Y's security interests in inventory acquired by Z Corp after it became bound are perfected solely under section 9-508, the normal priority rules determine their relative priorities. Under the "first-to-file-or-perfect" rule of section 9-322(a)(1), SP-X has priority over SP-Y.

Example 4: Under the facts of Example 3, after Z Corp became bound by X Corp's security agreement, SP-Y promptly filed a new initial financing statement against Z Corp. At that time, SP-X's security interest was perfected only by virtue of its original filing against X Corp which was "effective solely under section 9-508." Because SP-Y's security interest no longer is perfected by a financing statement that is "effective solely under section 9-508," this section does not apply to the priority contest. Rather, the normal priority rules apply. Under section 9-322, because SP-Y's financing statement was filed against Z Corp, the new debtor, before SP-X's, SP-Y's security interest is senior to that of SP-X. Similarly, the normal priority rules would govern priority between SP-Y and SP-Z.

The second sentence of subsection (b) effectively limits the applicability of the first sentence to situations in which a new debtor has become bound by more than one security agreement entered into by the same original debtor. When the new debtor has become bound by security agreements entered into by different original debtors, the second sentence provides that priority is based on priority in time of the new debtor's becoming bound.

Example 5: Under the facts of Example 2, SP-W holds a perfected-by-filing security interest in W Corp's existing and after-acquired inventory. After Z Corp became bound by X Corp's security agreement in favor of SP-X, Z Corp became bound by W Corp's security agreement. Under subsection (b), SP-W's security interest in inventory acquired by Z Corp is subordinate to that of SP-X, because Z Corp became bound under SP-X's security agreement

before it became bound under SP-W's security agreement. This is the result regardless of which financing statement (SP-X's or SP-W's) was filed first.

The second sentence of subsection (b) reflects the generally accepted view that priority based on the first-to-file rule is inappropriate for resolving priority disputes when the filings were made against different debtors. Like subsection (a) and the first sentence of subsection (b), however, the second sentence of subsection (b) relates only to priority conflicts among security interests perfected by filed financing statements that are "effective solely under section 9-508."

Example 6: Under the facts of Example 5, after Z Corp became bound by W Corp's security agreement, SP-W promptly filed a new initial financing statement against Z Corp. At that time, SP-X's security interest was perfected only pursuant to its original filing against X Corp which was "effective solely under section 9-508." Because SP-W's security interest is not perfected by a financing statement that is "effective solely under section 9-508," this section does not apply to the priority contest. Rather, the normal priority rules apply. Under section 9-322, because SP-W's financing statement was the first to be filed against Z Corp, the new debtor, SP-W's security interest is senior to that of SP-X. Similarly, the normal priority rules would govern priority between SP-W and SP-Z.

§ 25-9-327. (Effective July 1, 2001) Priority of security interests in deposit account.

The following rules govern priority among conflicting security interests in the same deposit account:

(1) A security interest held by a secured party having control of the deposit account under G.S. 25-9-104 has priority over a conflicting security interest held by a secured party that does not have control.

(2) Except as otherwise provided in subdivisions (3) and (4) of this section, security interests perfected by control under G.S. 25-9-314 rank according to priority in time of obtaining control.

(3) Except as otherwise provided in subdivision (4) of this section, a security interest held by the bank with which the deposit account is maintained has priority over a conflicting security interest held by another secured party.

(4) A security interest perfected by control under G.S. 25-9-104(a)(3) has priority over a security interest held by the bank with which the deposit account is maintained. (1997-181, s. 5; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New; derived from former section 9-115(5).

2. **Scope of This Section.** This section contains the rules governing the priority of conflicting security interests in deposit accounts. It overrides conflicting priority rules. See sections 9-322(f)(1) and 9-324(a), (b), (d), and (f). This section does not apply to accounts evidenced by an instrument (e.g., certain certificates of deposit), which by definition are not "deposit accounts."

3. **Control.** Under paragraph (1), security interests perfected by control (sections 9-104 and 9-314) take priority over those perfected otherwise, e.g., as identifiable cash proceeds under section 9-315. Secured parties for whom the deposit account is an integral part of the credit decision will, at a minimum, insist upon the right to immediate access to the deposit account upon the debtor's default (i.e., control). Those secured parties for whom the deposit account is less essential will not take control, thereby running the risk that the debtor will dispose of funds on deposit (either outright or for collateral purposes) after default but before the account can be frozen by court order or the secured party can obtain control.

Paragraph (2) governs the case (expected to be very rare) in which a bank enters into a section 9-104(a)(2) control agreement with more than one secured party. It provides that the security interests rank according to time of obtaining control. If the bank is solvent and the control agreements are well drafted, the bank will be liable to each secured party, and the priority rule will have no practical effect.

4. **Priority of Bank.** Under paragraph (3), the security interest of the bank with which the deposit account is maintained normally takes priority over all other conflicting security interests in the deposit account, regardless of whether the deposit account constitutes the competing secured party's original collateral or its proceeds. A rule of this kind enables banks

to extend credit to their depositors without the need to examine either the public record or their own records to determine whether another party might have a security interest in the deposit account.

A secured party who takes a security interest in the deposit account as original collateral can protect itself against the results of this rule in one of two ways. It can take control of the deposit account by becoming the bank's customer. Under paragraph (4), this arrangement operates to subordinate the bank's security interest. Alternatively, the secured party can obtain a subordination agreement from the bank. See section 9-339.

A secured party who claims the deposit account as proceeds of other collateral can reduce the risk of becoming junior by obtaining the debtor's agreement to deposit proceeds into a specific cash-collateral account and obtaining the agreement of that bank to subordinate all its claims to those of the secured party. But if the debtor violates its agreement and deposits funds into a deposit account other than the cash-collateral account, the secured party risks being subordinated.

5. **Priority in Proceeds of, and Funds Transferred from, Deposit Account.** The priority afforded by this section does not extend to proceeds of a deposit account. Rather, section 9-322(c) through (e) and the provisions referred to in section 9-322(f) govern priorities in proceeds of a deposit account. Section 9-315(d) addresses continuation of perfection in proceeds of deposit accounts. As to funds transferred from a deposit account that serves as collateral, see section 9-332.

§ 25-9-328. (Effective July 1, 2001) Priority of security interests in investment property.

The following rules govern priority among conflicting security interests in the same investment property:

(1) A security interest held by a secured party having control of investment property under G.S. 25-9-106 has priority over a security interest held by a secured party that does not have control of the investment property.

(2) Except as otherwise provided in subdivisions (3) and (4) of this section, conflicting security interests held by secured parties each of which has control under G.S. 25-9-106 rank according to priority in time of:

a. If the collateral is a security, obtaining control;

b. If the collateral is a security entitlement carried in a securities account and:

1. If the secured party obtained control under G.S. 25-8-106(d)(1), the secured party's becoming the person for which the securities account is maintained;

2. If the secured party obtained control under G.S. 25-8-106(d)(2), the securities intermediary's agreement to comply with the secured party's entitlement orders with respect to security entitlements carried or to be carried in the securities account; or

3. If the secured party obtained control through another person under G.S. 25-8-106(d)(3), the time on which priority would be based under this subdivision if the other person were the secured party; or

c. If the collateral is a commodity contract carried with a commodity intermediary, the satisfaction of the requirement for control specified in G.S. 25-9-106(b)(2) with respect to commodity contracts carried or to be carried with the commodity intermediary.

(3) A security interest held by a securities intermediary in a security entitlement or a securities account maintained with the securities intermediary has priority over a conflicting security interest held by another secured party.

(4) A security interest held by a commodity intermediary in a commodity contract or a commodity account maintained with the commodity intermediary has priority over a conflicting security interest held by another secured party.

(5) A security interest in a certificated security in registered form which is perfected by taking delivery under G.S. 25-9-313(a) and not by control under G.S. 25-9-314 has priority over a conflicting security interest perfected by a method other than control.

(6) Conflicting security interests created by a broker, securities intermediary, or commodity intermediary which are perfected without control under G.S. 25-9-106 rank equally.

(7) In all other cases, priority among conflicting security interests in investment property is governed by G.S. 25-9-322 and G.S. 25-9-323. (1997-181, s. 5; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-115(5).

2. **Scope of This Section.** This section contains the rules governing the priority of conflicting security interests in investment property. Paragraph (1) states the most important general rule—that a secured party who obtains control has priority over a secured party who does not obtain control. Paragraphs (2) through (4) deal with conflicting security interests each of which is perfected by control. Paragraph (5) addresses the priority of a security interest in a certificated security which is perfected by delivery but not control. Paragraph (6) deals with the relatively unusual circumstance in which a broker, securities intermediary, or commodity intermediary has created conflicting security interests none of which is perfected by control. Paragraph (7) provides that the general priority rules of sections 9-322 and 9-323 apply to cases not covered by the specific rules in this section. The principal application of this residual rule is that the usual first in time of filing rule applies to conflicting security interests that are perfected only by filing. Because the control priority rule of paragraph (1) provides for the ordinary cases in which persons purchase securities on margin credit from their brokers, there is no need for special rules for purchase-money security interests. See also section 9-103 (limiting purchase-money collateral to goods and software).

3. **General Rule: Priority of Security Interest Perfected by Control.** Under paragraph (1), a secured party who obtains control has priority over a secured party who does not obtain control. The control priority rule does not turn on either temporal sequence or awareness of conflicting security interests. Rather, it is a structural rule, based on the principle that a lender should be able to rely on the collateral without question if the lender has taken the necessary steps to assure itself that it is in a position where it can foreclose on the collateral without further action by the debtor. The control priority rule is necessary because the perfection rules provide considerable flexibility in structuring secured financing arrangements. For example, at the "retail" level, a secured lender to an investor who wants the full measure of protection can obtain control, but the creditor may be willing to accept the greater measure of risk that follows from perfection by filing. Similarly, at the "wholesale" level, a lender to securities firms can leave the collateral with the debtor and obtain a perfected security interest under the automatic perfection rule of section 9-309(10), but a lender who wants to be entirely sure of its position will want to obtain control. The control priority rule of paragraph (1) is an essential part of this system of flexibility. It is feasible to provide more than one method of perfecting security interests only if the rules ensure that those who take the necessary steps to obtain the full measure of protection do not run the risk of subordination to those who have not taken such steps. A secured party who is unwilling to run the risk that the debtor has granted or will grant a conflicting control security interest should not make a loan without obtaining control of the collateral.

As applied to the retail level, the control priority rule means that a secured party who obtains control has priority over a conflicting security interest perfected by filing without regard to inquiry into whether the control secured party was aware of the filed security interest. Prior to the 1994 revisions to articles 8 and 9, article 9 did not permit perfection of security interests in securities by filing. Accordingly, parties who deal in securities never developed a practice of searching the UCC files before conducting securities transactions. Although filing is now a permissible method of perfection, in order to avoid disruption of existing practices in this business it is necessary to give perfection by filing a different and more limited effect for securities than for some other forms of collateral. The priority rules are not based on the assumption that parties who perfect by the usual method of obtaining control will search the files. Quite the contrary, the control priority rule is intended to ensure that, with respect to investment property, secured parties who do obtain control are entirely unaffected by filings. To state the point another

way, perfection by filing is intended to affect only general creditors or other secured creditors who rely on filing. The rule that a security interest perfected by filing can be primed by a control security interest, without regard to awareness, is a consequence of the system of perfection and priority rules for investment property. These rules are designed to take account of the circumstances of the securities markets, where filing is not given the same effect as for some other forms of property. No implication is made about the effect of filing with respect to security interests in other forms of property, nor about other article 9 rules, e.g., section 9-330, which govern the circumstances in which security interests in other forms of property perfected by filing can be primed by subsequent perfected security interests.

The following examples illustrate the application of the priority rule in paragraph (1):

Example 1: Debtor borrows from Alpha and grants Alpha a security interest in a variety of collateral, including all of Debtor's investment property. At that time Debtor owns 1000 shares of XYZ Co. stock for which Debtor has a certificate. Alpha perfects by filing. Later, Debtor borrows from Beta and grants Beta a security interest in the 1000 shares of XYZ Co. stock. Debtor delivers the certificate, properly indorsed, to Beta. Alpha and Beta both have perfected security interests in the XYZ Co. stock. Beta has control, see section 8-106(b)(1), and hence has priority over Alpha.

Example 2: Debtor borrows from Alpha and grants Alpha a security interest in a variety of collateral, including all of Debtor's investment property. At that time Debtor owns 1000 shares of XYZ Co. stock, held through a securities account with Able & Co. Alpha perfects by filing. Later, Debtor borrows from Beta and grants Beta a security interest in the 1000 shares of XYZ Co. stock. Debtor instructs Able to have the 1000 shares transferred through the clearing corporation to Custodian Bank, to be credited to Beta's account with Custodian Bank. Alpha and Beta both have perfected security interests in the XYZ Co. stock. Beta has control, see section 8-106(d)(1), and hence has priority over Alpha.

Example 3: Debtor borrows from Alpha and grants Alpha a security interest in a variety of collateral, including all of Debtor's investment property. At that time Debtor owns 1000 shares of XYZ Co. stock, which is held through a securities account with Able & Co. Alpha perfects by filing. Later, Debtor borrows from Beta and grants Beta a security interest in the 1000 shares of XYZ Co. stock. Debtor, Able, and Beta enter into an agreement under which Debtor will continue to receive dividends and distributions, and will continue to have the right to direct dispositions, but Beta will also have the right to direct dispositions and receive the proceeds. Alpha and Beta both have perfected security interests in the XYZ Co. stock (more precisely, in the Debtor's security entitlement to the financial asset consisting of the XYZ Co. stock). Beta has control, see section 8-106(d)(2), and hence has priority over Alpha.

Example 4: Debtor borrows from Alpha and grants Alpha a security interest in a variety of collateral, including all of Debtor's investment property. At that time Debtor owns 1000 shares of XYZ Co. stock, held through a securities account with Able & Co. Alpha perfects by filing. Debtor's agreement with Able & Co. provides that Able has a security interest in all securities carried in the account as security for any obligations of Debtor to Able. Debtor incurs obligations to Able and later defaults on the obligations to Alpha and Able. Able has control by virtue of the rule of section 8-106(e) that if a customer grants a security interest to its own intermediary, the intermediary has control. Since Alpha does not have control, Able has priority over Alpha under the general control priority rule of paragraph (1).

4. **Conflicting Security Interests Perfected by Control: Priority of Securities Intermediary or Commodity Intermediary.** Paragraphs (2) through (4) govern the priority of conflicting security interests each of which is perfected by control. The following example explains the application of the rules in paragraphs (3) and (4):

Example 5: Debtor holds securities through a securities account with Able & Co. Debtor's agreement with Able & Co. provides that Able has a security interest in all securities carried in the account as security for any obligations of Debtor to Able. Debtor borrows from Beta and grants Beta a security interest in 1000 shares of XYZ Co. stock carried in the account. Debtor, Able, and Beta enter into an agreement under which Debtor will continue to receive dividends and distributions and will continue to have the right to direct dispositions, but Beta will also have the right to direct dispositions and receive the proceeds. Debtor incurs obligations to Able and later defaults on the obligations to Beta and Able. Both Beta and Able have control, so the general control priority rule of paragraph (1) does not apply. Compare Example 4. Paragraph (3) provides that a security interest held by a securities intermediary in positions of its own customer has priority over a conflicting security interest of an external lender, so Able has priority over Beta. (Paragraph (4) contains a parallel rule for commodity intermediaries.) The agreement among Able, Beta, and Debtor could, of course, determine the relative priority of the security interests of Able and Beta, see section 9-339, but the fact that the intermediary has agreed to act on the instructions of a secured party such as Beta does not itself imply

any agreement by the intermediary to subordinate.

5. **Conflicting Security Interests Perfected by Control: Temporal Priority.** Former section 9-115 introduced into article 9 the concept of conflicting security interests that rank equally. Paragraph (2) of this section governs priority in those circumstances in which more than one secured party (other than a broker, securities intermediary, or commodity intermediary) has control. It replaces the equal-priority rule for conflicting security interests in investment property with a temporal rule. For securities, both certificated and uncertificated, under paragraph (2)(A) priority is based on the time that control is obtained. For security entitlements carried in securities accounts, the treatment is more complex. Paragraph (2)(B) bases priority on the timing of the steps taken to achieve control. The following example illustrates the application of paragraph (2).

Example 6: Debtor borrows from Alpha and grants Alpha a security interest in a variety of collateral, including all of Debtor's investment property. At that time Debtor owns a security entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds through a securities account with Able & Co. Debtor, Able, and Alpha enter into an agreement under which Debtor will continue to receive dividends and distributions, and will continue to have the right to direct dispositions, but Alpha will also have the right to direct dispositions and receive the proceeds. Later, Debtor borrows from Beta and grants Beta a security interest in all its investment property, existing and after-acquired. Debtor, Able, and Beta enter into an agreement under which Debtor will continue to receive dividends and distributions, and will continue to have the right to direct dispositions, but Beta will also have the right to direct dispositions and receive the proceeds. Alpha and Beta both have perfected-by-control security interests in the security entitlement to the XYZ Co. stock by virtue of their agreements with Able. See sections 8-106(d)(2), 9-106(a), and 9-314(a). Under paragraph (2)(B)(ii), the priority of each security interest dates from the time of the secured party's agreement with Able. Because Alpha's agreement was first in time, Alpha has priority. This priority applies equally to security entitlements to financial assets credited to the account after the agreement was entered into.

The priority rule is analogous to "first-to-file" priority under section 9-322 with respect to after-acquired collateral. Paragraphs (2)(B)(i) and (2)(B)(iii) provide similar rules for security entitlements as to which control is obtained by other methods, and paragraph (2)(C) provides a similar rule for commodity contracts carried in a commodity account. Section 8-510 also has been revised to provide a temporal priority conforming to paragraph (2)(B).

6. **Certificated Securities.** A long-standing practice has developed whereby secured parties whose collateral consists of a security evidenced by a security certificate take possession of the security certificate. If the security certificate is in bearer form, the secured party's acquisition of possession constitutes "delivery" under section 8-301(a)(1), and the delivery constitutes "control" under section 8-106(a). Comment 5 discusses the priority of security interests perfected by control of investment property.

If the security certificate is in registered form, the secured party will not achieve control over the security unless the security certificate contains an appropriate indorsement or is (re)-registered in the secured party's name. See section 8-106(b). However, the secured party's acquisition of possession constitutes "delivery" of the security certificate under section 8-301 and serves to perfect the security interest under section 9-313(a), even if the security certificate has not been appropriately indorsed and has not been (re)registered in the secured party's name. A security interest perfected by this method has priority over a security interest perfected other than by control (e.g., by filing). See paragraph (5).

The priority rule stated in paragraph (5) may seem anomalous, in that it can afford less favorable treatment to purchasers who buy collateral outright than to those who take a security interest in it. For example, a buyer of a security certificate would cut off a security interest perfected by filing only if the buyer achieves the status of a protected purchaser under section 8-303. The buyer would not be a protected purchaser, for example, if it does not obtain "control" under section 8-106 (e.g., if it fails to obtain a proper indorsement of the certificate) or if it had notice of an adverse claim under section 8-105. The apparent anomaly disappears, however, when one understands the priority rule not as one intended to protect careless or guilty parties, but as one that eliminates the need to conduct a search of the public records only insofar as necessary to serve the needs of the securities markets.

7. **Secured Financing of Securities Firms.** Priority questions concerning security interests granted by brokers and securities intermediaries are governed by the general control-beats-non-control priority rule of paragraph (1), as supplemented by the special rules set out in paragraphs (2) (temporal priority—first to control), (3) (special priority for securities intermediary), and (6) (equal priority for noncontrol). The following examples illustrate the priority rules as applied to this setting. (In all cases it is assumed that the debtor retains sufficient other securities to satisfy all

customers' claims. This section deals with the relative rights of secured lenders to a securities firm. Disputes between a secured lender and the firm's own customers are governed by section 8-511.)

Example 7: Able & Co., a securities dealer, enters into financing arrangements with two lenders, Alpha Bank and Beta Bank. In each case the agreements provide that the lender will have a security interest in the securities identified on lists provided to the lender on a daily basis, that the debtor will deliver the securities to the lender on demand, and that the debtor will not list as collateral any securities which the debtor has pledged to any other lender. Upon Able's insolvency it is discovered that Able has listed the same securities on the collateral lists provided to both Alpha and Beta. Alpha and Beta both have perfected security interests under the automatic-perfection rule of section 9-309(10). Neither Alpha nor Beta has control. Paragraph (6) provides that the security interests of Alpha and Beta rank equally, because each of them has a noncontrol security interest granted by a securities firm. They share pro-rata.

Example 8: Able enters into financing arrangements, with Alpha Bank and Beta Bank as in Example 7. At some point, however, Beta decides that it is unwilling to continue to provide financing on a noncontrol basis. Able directs the clearing corporation where it holds its principal inventory of securities to move specified securities into Beta's account. Upon Able's insolvency it is discovered that a list of collateral provided to Alpha includes securities that had been moved to Beta's account. Both Alpha and Beta have perfected security interests; Alpha under the automatic-perfection rule of section 9-309(10), and Beta under that rule and also the perfection-by-control rule in section 9-314(a). Beta has control but Alpha does not. Beta has priority over Alpha under paragraph (1).

Example 9: Able & Co. carries its principal inventory of securities through Clearing Corporation, which offers a "shared control" facility whereby a participant securities firm can enter into an arrangement with a lender under which the securities firm will retain the power to trade and otherwise direct dispositions of securities carried in its account, but Clearing Corporation agrees that, at any time the lender so directs, Clearing Corporation will transfer any securities from the firm's account to the lender's account or otherwise dispose of them as directed by the lender. Able enters into financing arrangements with two lenders, Alpha and Beta, each of which obtains such a control agreement from Clearing Corporation. The agreement with each lender provides that Able will designate specific securities as collateral on lists provided to the lender on a daily or other periodic basis, and that it will not pledge the same securities to different lenders. Upon Able's insolvency, it is discovered that Able has listed the same securities on the collateral lists provided to both Alpha and Beta. Both Alpha and Beta have control over the disputed securities. Paragraph (2) awards priority to whichever secured party first entered into the agreement with Clearing Corporation.

8. **Relation to Other Law.** Section 1-103 provides that "unless displaced by particular provisions of the Uniform Commercial Code, the principles of law and equity . . . shall supplement its provisions." There may be circumstances in which a secured party's action in acquiring a security interest that has priority under this section constitutes conduct that is wrongful under other law. Though the possibility of such resort to other law may provide an appropriate "escape valve" for cases of egregious conduct, care must be taken to ensure that this does not impair the certainty and predictability of the priority rules. Whether a court may appropriately look to other law to impose liability upon or estop a secured party from asserting its article 9 priority depends on an assessment of the secured party's conduct under the standards established by such other law as well as a determination of whether the particular application of such other law is displaced by the UCC.

Some circumstances in which other law is clearly displaced by the UCC rules are readily identifiable. Common law "first in time, first in right" principles, or correlative tort liability rules such as common law conversion principles under which a purchaser may incur liability to a person with a prior property interest without regard to awareness of that claim, are necessarily displaced by the priority rules set out in this section since these rules determine the relative ranking of security interests in investment property. So too, article 8 provides protections against adverse claims to certain purchasers of interests in investment property. In circumstances where a secured party not only has priority under section 9-328, but also qualifies for protection against adverse claims under section 8-303, 8-502, or 8-510, resort to other law would be precluded.

In determining whether it is appropriate in a particular case to look to other law, account must also be taken of the policies that underlie the commercial law rules on securities markets and security interests in securities. A principal objective of the 1994 revision of article 8 and the provisions of article 9 governing investment property was to ensure that secured financing transactions can be implemented on a simple, timely, and certain basis. One of the circumstances that led to the revision was the concern that uncertainty in the application of the rules on secured transactions involving securities

and other financial assets could contribute to systemic risk by impairing the ability of financial institutions to provide liquidity to the markets in times of stress. The control priority rule is designed to provide a clear and certain rule to ensure that lenders who have taken the necessary steps to establish control do not face a risk of subordination to other lenders who have not done so.

The control priority rule does not turn on an inquiry into the state of a secured party's awareness of potential conflicting claims because a rule under which a person's rights depended on that sort of after-the-fact inquiry could introduce an unacceptable measure of uncertainty. If an inquiry into awareness could provide a complete and satisfactory resolution of the problem in all cases, the priority rules of this section would have incorporated that test. The fact that they do not necessarily means that resort to other law based solely on that factor is precluded, though the question whether a control secured party induced or encouraged its financing arrangement with actual knowledge that the debtor would be violating the rights of another secured party may, in some circumstances, appropriately be treated as a factor in determining whether the control party's action is the kind of egregious conduct for which resort to other law is appropriate.

§ 25-9-329. (Effective July 1, 2001) Priority of security interests in letter-of-credit right.

The following rules govern priority among conflicting security interests in the same letter-of-credit right:

(1) A security interest held by a secured party having control of the letter-of-credit right under G.S. 25-9-107 has priority to the extent of its control over a conflicting security interest held by a secured party that does not have control.

(2) Security interests perfected by control under G.S. 25-9-314 rank according to priority in time of obtaining control. (1997-181, s. 5; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New; loosely modeled after former section 9-115(5).

2. **General Rule.** Paragraph (1) awards priority to a secured party who perfects a security interest directly in letter-of-credit rights (i.e., one that takes an assignment of proceeds and obtains consent of the issuer or any nominated person under section 5-114(c)) over another conflicting security interest (i.e., one that is perfected automatically in the letter-of-credit rights as supporting obligations under section 9-308(d)). This is consistent with international letter-of-credit practice and provides finality to payments made to recognized assignees of letter-of-credit proceeds. If an issuer or nominated person recognizes multiple security interests in a letter-of-credit right, resulting in multiple parties having control (section 9-107), under paragraph (2) the security interests rank according to the time of obtaining control.

3. **Drawing Rights; Transferee Beneficiaries.** Drawing under a letter of credit is personal to the beneficiary and requires the beneficiary to perform the conditions for drawing under the letter of credit. Accordingly, a beneficiary's grant of a security interest in a letter of credit includes the beneficiary's "letter-of-credit right" as defined in section 9-102 and the right to "proceeds of (the) letter of credit" as defined in section 5-114(a), but does not include the right to demand payment under the letter of credit.

Section 5-114(e) provides that the "(r)ights of a transferee beneficiary or nominated person are independent of the beneficiary's assignment of the proceeds of a letter of credit and are superior to the assignee's right to the proceeds." To the extent the rights of a transferee beneficiary or nominated person are independent and superior, this article does not apply. See section 9-109(c).

Under article 5, there is in effect a novation upon the transfer with the issuer becoming bound on a new, independent obligation to the transferee. The rights of nominated persons and transferee beneficiaries under a letter of credit include the right to demand payment from the issuer. Under section 5-114(e), their rights to payment are independent of their obligations to the beneficiary (or original beneficiary) and superior to the rights of assignees of letter-of-credit proceeds (section 5-114(c)) and others claiming a security interest in the beneficiary's (or original beneficiary's) letter-of-credit rights.

A transfer of drawing rights under a transferable letter of credit establishes independent article 5 rights in the transferee and does not create or perfect an article 9 security interest in the transferred drawing rights. The definition

of "letter-of-credit right" in section 9-102 excludes a beneficiary's drawing rights. The exercise of drawing rights by a transferee beneficiary may breach a contractual obligation of the transferee to the original beneficiary concerning when and how much the transferee may draw or how it may use the funds received under the letter of credit. If, for example, drawing rights are transferred to support a sale or loan from the transferee to the original beneficiary, then the transferee would be obligated to the original beneficiary under the sale or loan agreement to account for any drawing and for the use of any funds received. The transferee's obligation would be governed by the applicable law of contracts or restitution.

4. **Secured Party-Transferee Beneficiaries.** As described in comment 3, drawing rights under letters of credit are transferred in many commercial contexts in which the transferee is not a secured party claiming a security interest in an underlying receivable supported by the letter of credit. Consequently, a transfer of a letter of credit is not a method of "perfection" of a security interest. The transferee's independent right to draw under the letter of credit and to receive and retain the value thereunder (in effect, priority) is not based on article 9 but on letter-of-credit law and the terms of the letter of credit. Assume, however, that a secured party does hold a security interest in a receivable that is owned by a beneficiary-debtor and supported by a transferable letter of credit. Assume further that the beneficiary-debtor causes the letter of credit to be transferred to the secured party, the secured party draws under the letter of credit, and, upon the issuer's payment to the secured party-transferee, the underlying account debtor's obligation to the original beneficiary-debtor is satisfied. In this situation, the payment to the secured party-transferee is proceeds of the receivable collected by the secured party-transferee. Consequently, the secured party-transferee would have certain duties to the debtor and third parties under article 9. For example, it would be obliged to collect under the letter of credit in a commercially reasonable manner and to remit any surplus pursuant to sections 9-607 and 9-608.

This scenario is problematic under letter-of-credit law and practice, inasmuch as a transferee beneficiary collects in its own right arising from its own performance. Accordingly, under section 5-114, the independent and superior rights of a transferee control over any inconsistent duties under article 9. A transferee beneficiary may take a transfer of drawing rights to avoid reliance on the original beneficiary's credit and collateral, and it may consider any article 9 rights superseded by its article 5 rights. Moreover, it will not always be clear (i) whether a transferee beneficiary has a security interest in the underlying collateral, (ii) whether any security interest is senior to the rights of others, or (iii) whether the transferee beneficiary is aware that it holds a security interest. There will be clear cases in which the role of a transferee beneficiary as such is merely incidental to a conventional secured financing. There also will be cases in which the existence of a security interest may have little to do with the position of a transferee beneficiary as such. In dealing with these cases and less clear cases involving the possible application of article 9 to a nominated person or a transferee beneficiary, the right to demand payment under a letter of credit should be distinguished from letter-of-credit rights. The courts also should give appropriate consideration to the policies and provisions of article 5 and letter-of-credit practice as well as article 9.

§ 25-9-330. (Effective July 1, 2001) Priority of purchaser of chattel paper or instrument.

(a) Purchaser's priority: security interest claimed merely as proceeds. — A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed merely as proceeds of inventory subject to a security interest if:

(1) In good faith and in the ordinary course of the purchaser's business, the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under G.S. 25-9-105; and

(2) The chattel paper does not indicate that it has been assigned to an identified assignee other than the purchaser.

(b) Purchaser's priority: other security interests. — A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed other than merely as proceeds of inventory subject to a security interest if the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under G.S. 25-9-105 in good faith, in the ordinary course of the purchaser's business, and without knowledge that the purchase violates the rights of the secured party.

(c) Chattel paper purchaser's priority in proceeds. — Except as otherwise provided in G.S. 25-9-327, a purchaser having priority in chattel paper under subsection (a) or (b) of this section also has priority in proceeds of the chattel paper to the extent that:

(1) G.S. 25-9-322 provides for priority in the proceeds; or

(2) The proceeds consist of the specific goods covered by the chattel paper or cash proceeds of the specific goods, even if the purchaser's security interest in the proceeds is unperfected.

(d) Instrument purchaser's priority. — Except as otherwise provided in G.S. 25-9-331(a), a purchaser of an instrument has priority over a security interest in the instrument perfected by a method other than possession if the purchaser gives value and takes possession of the instrument in good faith and without knowledge that the purchase violates the rights of the secured party.

(e) Holder of purchase-money security interest gives new value. — For purposes of subsections (a) and (b) of this section, the holder of a purchase-money security interest in inventory gives new value for chattel paper constituting proceeds of the inventory.

(f) Indication of assignment gives knowledge. — For purposes of subsections (b) and (d) of this section, if chattel paper or an instrument indicates that it has been assigned to an identified secured party other than the purchaser, a purchaser of the chattel paper or instrument has knowledge that the purchase violates the rights of the secured party. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-308.

2. **Nontemporal Priority.** This article permits a security interest in chattel paper or instruments to be perfected either by filing or by the secured party's taking possession. This section enables secured parties and other purchasers of chattel paper (both electronic and tangible) and instruments to obtain priority over earlier-perfected security interests.

3. **Chattel Paper.** Subsections (a) and (b) follow former section 9-308 in distinguishing between earlier-perfected security interests in chattel paper that is claimed merely as proceeds of inventory subject to a security interest and chattel paper that is claimed other than merely as proceeds. Like former section 9-308, this section does not elaborate upon the phrase "merely as proceeds." For an elaboration, see PEB Commentary No. 8.

This section makes explicit the "good faith" requirement and retains the requirements of "the ordinary course of the purchaser's business" and the giving of "new value" as conditions for priority. Concerning the last, this article deletes former section 9-108 and adds to section 9-102 a completely different definition of the term "new value." Under subsection (e), the holder of a purchase-money security interest in inventory is deemed to give "new value" for chattel paper constituting the proceeds of the inventory. Accordingly, the purchase-money secured party may qualify for priority in the chattel paper under subsection (a) or (b), whichever is applicable, even if it does not make an additional advance against the chattel paper.

If a possessory security interest in tangible chattel paper or a perfected-by-control security interest in electronic chattel paper does not qualify for priority under this section, it may be subordinate to a perfected-by-filing security interest under section 9-322(a)(1).

4. **Possession.** The priority afforded by this section turns in part on whether a purchaser "takes possession" of tangible chattel paper. Similarly, the governing law provisions in section 9-301 address both "possessory" and "nonpossessory" security interests. Two common practices have raised particular concerns. First, in some cases the parties create more than one copy or counterpart of chattel paper evidencing a single secured obligation or lease. This practice raises questions as to which counterpart is the "original" and whether it is necessary for a purchaser to take possession of all counterparts in order to "take possession" of the chattel paper. Second, parties sometimes enter into a single "master" agreement. The master agreement contemplates that the parties will enter into separate "schedules" from time to time, each evidencing chattel paper. Must a purchaser of an obligation or lease evidenced by a single schedule also take possession of the master agreement as well as the schedule in order to "take possession" of the chattel paper?

The problem raised by the first practice is easily solved. The parties may in the terms of their agreement and by designation on the chattel paper identify only one counterpart as the original chattel paper for purposes of taking

possession of the chattel paper. Concerns about the second practice also are easily solved by careful drafting. Each schedule should provide that it incorporates the terms of the master agreement, not the other way around. This will make it clear that each schedule is a "stand alone" document.

5. **Chattel Paper Claimed Merely as Proceeds.** Subsection (a) revises the rule in former section 9-308(b) to eliminate reference to what the purchaser knows. Instead, a purchaser who meets the possession or control, ordinary course, and new value requirements takes priority over a competing security interest unless the chattel paper itself indicates that it has been assigned to an identified assignee other than the purchaser. Thus subsection (a) recognizes the common practice of placing a "legend" on chattel paper to indicate that it has been assigned. This approach, under which the chattel paper purchaser who gives new value in ordinary course can rely on possession of unlegended, tangible chattel paper without any concern for other facts that it may know, comports with the expectations of both inventory and chattel paper financers.

6. **Chattel Paper Claimed Other Than Merely as Proceeds.** Subsection (b) eliminates the requirement that the purchaser take without knowledge that the "specific paper" is subject to the security interest and substitutes for it the requirement that the purchaser take "without knowledge that the purchase violates the rights of the secured party." This standard derives from the definition of "buyer in ordinary course of business" in section 1-201(9). The source of the purchaser's knowledge is irrelevant. Note, however, that "knowledge" means "actual knowledge." Section 1-201(25).

In contrast to a junior secured party in accounts, who may be required in some special circumstances to undertake a search under the "good faith" requirement, see comment 5 to section 9-331, a purchaser of chattel paper under this section is not required as a matter of good faith to make a search in order to determine the existence of prior security interests. There may be circumstances where the purchaser undertakes a search nevertheless, either on its own volition or because other considerations make it advisable to do so, e.g., where the purchaser also is purchasing accounts. Without more, a purchaser of chattel paper who has seen a financing statement covering the chattel paper or who knows that the chattel paper is encumbered with a security interest, does not have knowledge that its purchase violates the secured party's rights. However, if a purchaser sees a statement in a financing statement to the effect that a purchase of chattel paper from the debtor would violate the rights of the filed secured party, the purchaser would have such knowledge. Likewise, under new subsection (f), if the chattel paper itself indicates that it had been assigned to an identified secured party other than the purchaser, the purchaser would have wrongful knowledge for purposes of subsection (b), thereby preventing the purchaser from qualifying for priority under that subsection, even if the purchaser did not have actual knowledge. In the case of tangible chattel paper, the indication normally would consist of a written legend on the chattel paper. In the case of electronic chattel paper, this article leaves to developing market and technological practices the manner in which the chattel paper would indicate an assignment.

7. **Instruments.** Subsection (d) contains a special priority rule for instruments. Under this subsection, a purchaser of an instrument has priority over a security interest perfected by a method other than possession (e.g., by filing, temporarily under section 9-312(e) or (g), as proceeds under section 9-315(d), or automatically upon attachment under section 9-309(4) if the security interest arises out of a sale of the instrument) if the purchaser gives value and takes possession of the instrument in good faith and without knowledge that the purchase violates the rights of the secured party. Generally, to the extent subsection (d) conflicts with section 3-306, subsection (d) governs. See section 3-102(b). For example, notice of a conflicting security interest precludes a purchaser from becoming a holder in due course under section 3-302 and thereby taking free of all claims to the instrument under section 3-306. However, a purchaser who takes even with knowledge of the security interest qualifies for priority under subsection (d) if it takes without knowledge that the purchase violates the rights of the holder of the security interest. Likewise, a purchaser qualifies for priority under subsection (d) if it takes for "value" as defined in section 1-201, even if it does not take for "value" as defined in section 3-303.

Subsection (d) is subject to section 9-331(a), which provides that article 9 does not limit the rights of a holder in due course under article 3. Thus, in the rare case in which the purchaser of an instrument qualifies for priority under subsection (d), but another person has the rights of a holder in due course of the instrument, the other person takes free of the purchaser's claim. See section 3-306.

The rule in subsection (d) is similar to the rules in subsections (a) and (b), which govern priority in chattel paper. The observations in comment 6 concerning the requirement of good faith and the phrase "without knowledge that the purchase violates the rights of the secured party" apply equally to purchasers of instruments. However, unlike a purchaser of chattel paper, to qualify for priority under this section a purchaser of an instrument need only give

"value" as defined in section 1-201; it need not give "new value." Also, the purchaser need not purchase the instrument in the ordinary course of its business.

Subsection (d) applies to checks as well as notes. For example, to collect and retain checks that are proceeds (collections) of accounts free of a senior secured party's claim to the same checks, a junior secured party must satisfy the good-faith requirement (honesty in fact and the observance of reasonable commercial standards of fair dealing) of this subsection. This is the same good-faith requirement applicable to holders in due course. See section 9-331, comment 5.

8. **Priority in Proceeds of Chattel Paper.** Subsection (c) sets forth the two circumstances under which the priority afforded to a purchaser of chattel paper under subsection (a) or (b) extends also to proceeds of the chattel paper. The first is if the purchaser would have priority under the normal priority rules applicable to proceeds. The second, which the following comments discuss in greater detail, is if the proceeds consist of the specific goods covered by the chattel paper. Former article 9 generally was silent as to the priority of a security interest in proceeds when a purchaser qualifies for priority under section 9-308 (but see former section 9-306(5)(b), concerning returned and repossessed goods).

9. **Priority in Returned and Repossessed Goods.** Returned and repossessed goods may constitute proceeds of chattel paper. The following comments explain the treatment of returned and repossessed goods as proceeds of chattel paper. The analysis is consistent with that of PEB Commentary No. 5, which these comments replace, and is based upon the following example:

Example: SP-1 has a security interest in all the inventory of a dealer in goods (Dealer); SP-1's security interest is perfected by filing. Dealer sells some of its inventory to a buyer in the ordinary course of business (BIOCOB) pursuant to a conditional sales contract (chattel paper) that does not indicate that it has been assigned to SP-1. SP-2 purchases the chattel paper from Dealer and takes possession of the paper in good faith, in the ordinary course of business, and without knowledge that the purchase violates the rights of SP-1. Subsequently, BIOCOB returns the goods to Dealer because they are defective. Alternatively, Dealer acquires possession of the goods following BIOCOB's default.

10. **Assignment of Nonlease Chattel Paper.**

a. **Loan by SP-2 to Dealer Secured by Chattel Paper (or Functional Equivalent Pursuant to Recourse Arrangement).**

(1) **Returned Goods.** If BIOCOB returns the goods to Dealer for repairs, Dealer is merely a bailee and acquires thereby no meaningful rights in the goods to which SP-1's security interest could attach. (Although SP-1's security interest could attach to Dealer's interest as a bailee, that interest is not likely to be of any particular value to SP-1.) Dealer is the owner of the chattel paper (i.e., the owner of a right to payment secured by a security interest in the goods); SP-2 has a security interest in the chattel paper, as does SP-1 (as proceeds of the goods under section 9-315). Under section 9-330, SP-2's security interest in the chattel paper is senior to that of SP-1. SP-2 enjoys this priority regardless of whether, or when, SP-2 filed a financing statement covering the chattel paper. Because chattel paper and goods represent different types of collateral, Dealer does not have any meaningful interest in goods to which either SP-1's or SP-2's security interest could attach in order to secure Dealer's obligations to either creditor. See section 9-102 (defining "chattel paper" and "goods").

Now assume that BIOCOB returns the goods to Dealer under circumstances whereby Dealer once again becomes the owner of the goods. This would be the case, for example, if the goods were defective and BIOCOB was entitled to reject or revoke acceptance of the goods. See sections 2-602 (rejection), and 2-608 (revocation of acceptance). Unless BIOCOB has waived its defenses as against assignees of the chattel paper, SP-1's and SP-2's rights against BIOCOB would be subject to BIOCOB's claims and defenses. See sections 9-403 and 9-404. SP-1's security interest would attach again because the returned goods would be proceeds of the chattel paper. Dealer's acquisition of the goods easily can be characterized as "proceeds" consisting of an "in kind" collection on or distribution on account of the chattel paper. See section 9-102 (definition of "proceeds"). Assuming that SP-1's security interest is perfected by filing against the goods and that the filing is made in the same office where a filing would be made against the chattel paper, SP-1's security interest in the goods would remain perfected beyond the 20-day period of automatic perfection. See section 9-315(d).

Because Dealer's newly reacquired interest in the goods is proceeds of the chattel paper, SP-2's security interest also would attach in the goods as proceeds. If SP-2 had perfected its security interest in the chattel paper by filing (again, assuming that filing against the chattel paper was made in the same office where a filing would be made against the goods), SP-2's security interest in the reacquired goods would be perfected beyond 20 days. See section 9-315(d). However, if SP-2 had relied only on its possession of the chattel paper for perfection and had not filed against the chattel paper or the goods, SP-2's security interest would be unperfected after the 20-day period. See section

9-315(d). Nevertheless, SP-2's unperfected security interest in the goods would be senior to SP-1's security interest under section 9-330(c). The result in this priority contest is not affected by SP-2's acquiescence or non-acquiescence in the return of the goods to Dealer.

(2) **Repossessed Goods.** As explained above, Dealer owns the chattel paper covering the goods, subject to security interests in favor of SP-1 and SP-2. In article 9 parlance, Dealer has an interest in chattel paper, not goods. If Dealer, SP-1, or SP-2 repossesses the goods upon BIOCOB's default, whether the repossession is rightful or wrongful as among Dealer, SP-1, or SP-2, Dealer's interest will not change. The location of goods and the party who possesses them does not affect the fact that Dealer's interest is in chattel paper, not goods. The goods continue to be owned by BIOCOB. SP-1's security interest in the goods does not attach until such time as Dealer reacquires an interest (other than a bare possessory interest) in the goods. For example, Dealer might buy the goods at a foreclosure sale from SP-2 (whose security interest in the chattel paper is senior to that of SP-1); that disposition would cut off BIOCOB's rights in the goods. Section 9-617.

In many cases the matter would end upon sale of the goods to Dealer at a foreclosure sale and there would be no priority contest between SP-1 and SP-2; Dealer would be unlikely to buy the goods under circumstances whereby SP-2 would retain its security interest. There can be exceptions, however. For example, Dealer may be obliged to purchase the goods from SP-2 and SP-2 may be obliged to convey the goods to Dealer, but Dealer may fail to pay SP-2. Or, one could imagine that SP-2, like SP-1, has a general security interest in the inventory of Dealer. In the latter case, SP-2 should not receive the benefit of any special priority rule, since its interest in no way derives from priority under section 9-330. In the former case, SP-2's security interest in the goods reacquired by Dealer is senior to SP-1's security interest under section 9-330.

b. **Dealer's Outright Sale of Chattel Paper to SP-2.** Article 9 also applies to a transaction whereby SP-2 buys the chattel paper in an outright sale transaction without recourse against Dealer. Sections 1-201(37) and 9-109(a). Although Dealer does not, in such a transaction, retain any residual ownership interest in the chattel paper, the chattel paper constitutes proceeds of the goods to which SP-1's security interest will attach and continue following the sale of the goods. Section 9-315(a)(1). Even though Dealer has not retained any interest in the chattel paper, as discussed above BIOCOB subsequently may return the goods to Dealer under circumstances whereby Dealer reacquires an interest in the goods. The priority contest between SP-1 and SP-2 will be resolved as discussed above; section 9-330 makes no distinction among purchasers of chattel paper on the basis of whether the purchaser is an outright buyer of chattel paper or one whose security interest secures an obligation of Dealer.

11. **Assignment of Lease Chattel Paper.** As defined in section 9-102, "chattel paper" includes not only writings that evidence security interests in specific goods but also those that evidence true leases of goods.

The analysis with respect to lease chattel paper is similar to that set forth above with respect to nonlease chattel paper. It is complicated, however, by the fact that, unlike the case of chattel paper arising out of a sale, Dealer retains a residual interest in the goods. See section 2A-103(1)(q) (defining "lessor's residual interest"); In re Leasing Consultants, Inc., 486 F.2d 367 (2d Cir. 1973) (lessor's residual interest under true lease is an interest in goods and is a separate type of collateral from lessor's interest in the lease). If Dealer leases goods to a "lessee in ordinary course of business" (LIOCOB), then LIOCOB takes its interest under the lease (i.e., its "leasehold interest") free of the security interest of SP-1. See section 2A-103(1)(m) (defining "leasehold interest") and (1)(o) (defining "lessee in ordinary course of business") and section 2A-307(3). SP-1 would, however, retain its security interest in the residual interest. In addition, SP-1 would acquire an interest in the lease chattel paper as proceeds. If Dealer then assigns the lease chattel paper to SP-2, section 9-330 gives SP-2 priority over SP-1 with respect to the chattel paper, but not with respect to the residual interest in the goods. Consequently, assignees of lease chattel paper typically take a security interest in and file against the lessor's residual interest in goods, expecting their priority in the goods to be governed by the first-to-file-or-perfect rule of section 9-322.

If the goods are returned to Dealer, other than upon expiration of the lease term, then the security interests of both SP-1 and SP-2 normally would attach to the goods as proceeds of the chattel paper. (If the goods are returned to Dealer at the expiration of the lease term and the lessee has made all payments due under the lease, however, then Dealer no longer has any rights under the chattel paper. Dealer's interest in the goods consists solely of its residual interest, as to which SP-2 has no claim.) This would be the case, for example, when the lessee rescinds the lease or when the lessor recovers possession in the exercise of its remedies under article 2A. See, e.g., section 2A-525. If SP-2 enjoyed priority in the chattel paper under section 9-330, then SP-2 likewise would enjoy priority in the returned goods as proceeds. This does not mean that SP-2 necessarily is entitled to the entire value of the returned

goods. The value of the goods represents the sum of the present value of (i) the value of their use for the term of the lease and (ii) the value of the residual interest. SP-2 has priority in the former, but SP-1 ordinarily would have priority in the latter. Thus, an allocation of a portion of the value of the goods to each component may be necessary. Where, as here, one secured party has a security interest in the lessor's residual interest and another has a priority security interest in the chattel paper, it may be advisable for the conflicting secured parties to establish a method for making such an allocation and otherwise to determine their relative rights in returned goods by agreement.

§ 25-9-331. (Effective July 1, 2001) Priority of rights of purchasers of instruments, documents, and securities under other Articles; priority of interests in financial assets and security entitlements under Article 8.

(a) Rights under Articles 3, 7, and 8 not limited. — This Article does not limit the rights of a holder in due course of a negotiable instrument, a holder to which a negotiable document of title has been duly negotiated, or a protected purchaser of a security. These holders or purchasers take priority over an earlier security interest, even if perfected, to the extent provided in Articles 3, 7, and 8 of this Chapter.

(b) Protection under Article 8. — This Article does not limit the rights of or impose liability on a person to the extent that the person is protected against the assertion of a claim under Article 8 of this Chapter.

(c) Filing not notice. — Filing under this Article does not constitute notice of a claim or defense to the holders, or purchasers, or persons described in subsections (a) and (b) of this section. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 1989 (Reg. Sess., 1990), c. 1024, s. 8(m), (n); 1997-181, s. 14; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-309.

2. **"Priority."** In some provisions, this article distinguishes between claimants that take collateral free of a security interest (in the sense that the security interest no longer encumbers the collateral) and those that take an interest in the collateral that is senior to a surviving security interest. See, e.g., section 9-317. Whether a holder or purchaser referred to in this section takes free or is senior to a security interest depends on whether the purchaser is a buyer of the collateral or takes a security interest in it. The term "priority" is meant to encompass both scenarios, as it does in section 9-330.

3. **Rights Acquired by Purchasers.** The rights to which this section refers are set forth in sections 3-305 and 3-306 (holder in due course), 7-502 (holder to whom a negotiable document of title has been duly negotiated), and 8-303 (protected purchaser). The holders and purchasers referred to in this section do not always take priority over a security interest. See, e.g., section 7-503 (affording paramount rights to certain owners and secured parties as against holder to whom a negotiable document of title has been duly negotiated). Accordingly, this section adds the clause, "to the extent provided in articles 3, 7, and 8" to former section 9-309.

4. **Financial Assets and Security Entitlements.** New subsection (b) provides explicit protection for those who deal with financial assets and security entitlements and who are immunized from liability under article 8. See, e.g., sections 8-502, 8-503(e), 8-510, and 8-511. The new subsection makes explicit in article 9 what is implicit in former article 9 and explicit in several provisions of article 8. It does not change the law.

5. **Collections by Junior Secured Party.** Under this section, a secured party with a junior security interest in receivables (accounts, chattel paper, promissory notes, or payment intangibles) may collect and retain the proceeds of those receivables free of the claim of a senior secured party to the same receivables, if the junior secured party is a holder in due course of the proceeds. In order to qualify as a holder in due course, the junior must satisfy the requirements of section 3-302, which include taking in "good faith." This means that the junior not only must act "honestly" but also must observe "reasonable commercial standards of fair dealing" under the particular circumstances. See section 9-102(a). Although

"good faith" does not impose a general duty of inquiry, e.g., a search of the records in filing offices, there may be circumstances in which "reasonable commercial standards of fair dealing" would require such a search.

Consider, for example, a junior secured party in the business of financing or buying accounts who fails to undertake a search to determine the existence of prior security interests. Because a search, under the usages of trade of that business, would enable it to know or learn upon reasonable inquiry that collecting the accounts violated the rights of a senior secured party, the junior may fail to meet the good-faith standard. See Utility Contractors Financial Services, Inc. v. Amsouth Bank, NA, 985 F.2d 1554 (11th Cir. 1993). Likewise, a junior secured party who collects accounts when it knows or should know under the particular circumstances that doing so would violate the rights of a senior secured party, because the debtor had agreed not to grant a junior security interest in, or sell, the accounts, may not meet the good-faith test. Thus, if a junior secured party conducted or should have conducted a search and a financing statement filed on behalf of the senior secured party states such a restriction, the junior's collection would not meet the good-faith standard. On the other hand, if there was a course of performance between the senior secured party and the debtor which placed no such restrictions on the debtor and allowed the debtor to collect and use the proceeds without any restrictions, the junior secured party may then satisfy the requirements for being a holder in due course. This would be more likely in those circumstances where the junior secured party was providing additional financing to the debtor on an ongoing basis by lending against or buying the accounts and had no notice of any restrictions against doing so. Generally, the senior secured party would not be prejudiced because the practical effect of such payment to the junior secured party is little different than if the debtor itself had made the collections and subsequently paid the secured party from the debtor's general funds. Absent collusion, the junior secured party would take the funds free of the senior security interests. See section 9-332. In contrast, the senior secured party is likely to be prejudiced if the debtor is going out of business and the junior secured party collects the accounts by notifying the account debtors to make payments directly to the junior. Those collections may not be consistent with "reasonable commercial standards of fair dealing."

Whether the junior secured party qualifies as a holder in due course is fact-sensitive and should be decided on a case-by-case basis in the light of those circumstances. Decisions such as Financial Management Services Inc. v. Familian, 905 P.2d 506 (Ariz. App. Div. 1995) (finding holder in due course status) could be determined differently under this application of the good-faith requirement.

The concepts addressed in this comment are also applicable to junior secured parties as purchasers of instruments under section 9-330(d). See section 9-330, comment 7.

§ 25-9-332. (Effective July 1, 2001) Transfer of money; transfer of funds from deposit account.

(a) Transferee of money. — A transferee of money takes the money free of a security interest unless the transferee acts in collusion with the debtor in violating the rights of the secured party.

(b) Transferee of funds from deposit account. — A transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Scope of This Section.** This section affords broad protection to transferees who take funds from a deposit account and to those who take money. The term "transferee" is not defined; however, the debtor itself is not a transferee. Thus this section does not cover the case in which a debtor withdraws money (currency) from its deposit account or the case in which a bank debits an encumbered account and credits another account it maintains for the debtor.

A transfer of funds from a deposit account, to which subsection (b) applies, normally will be made by check, by funds transfer, or by debiting the debtor's deposit account and crediting another depositor's account.

Example 1: Debtor maintains a deposit account with Bank A. The deposit account is subject to a perfected security interest in favor of Lender. Debtor draws a check on the account, payable to Payee. Inasmuch as the check is not the proceeds of the deposit account (it is an

order to pay funds from the deposit account), Lender's security interest in the deposit account does not give rise to a security interest in the check. Payee deposits the check into its own deposit account, and Bank A pays it. Unless Payee acted in collusion with Debtor in violating Lender's rights, Payee takes the funds (the credits running in favor of Payee) free of Lender's security interest. This is true regardless of whether Payee is a holder in due course of the check and even if Payee gave no value for the check.

Example 2: Debtor maintains a deposit account with Bank A. The deposit account is subject to a perfected security interest in favor of Lender. At Bank B's suggestion, Debtor moves the funds from the account at Bank A to Debtor's deposit account with Bank B. Unless Bank B acted in collusion with Debtor in violating Lender's rights, Bank B takes the funds (the credits running in favor of Bank B) free from Lender's security interest. See subsection (b). However, inasmuch as the deposit account maintained with Bank B constitutes the proceeds of the deposit account at Bank A, Lender's security interest would attach to that account as proceeds. See section 9-315.

Subsection (b) also would apply if, in the example, Bank A debited Debtor's deposit account in exchange for the issuance of Bank A's cashier's check. Lender's security interest would attach to the cashier's check as proceeds of the deposit account, and the rules applicable to instruments would govern any competing claims to the cashier's check. See, e.g., sections 3-306, 9-322, 9-330, and 9-331.

If Debtor withdraws money (currency) from an encumbered deposit account and transfers the money to a third party, then subsection (a), to the extent not displaced by federal law relating to money, applies. It contains the same rule as subsection (b).

Subsection (b) applies to transfers of funds from a deposit account; it does not apply to transfers of the deposit account itself or of an interest therein. For example, this section does not apply to the creation of a security interest in a deposit account. Competing claims to the deposit account itself are dealt with by other article 9 priority rules. See sections 9-317(a), 9-327, 9-340, and 9-341. Similarly, a corporate merger normally would not result in a transfer of funds from a deposit account. Rather, it might result in a transfer of the deposit account itself. If so, the normal rules applicable to transferred collateral would apply; this section would not.

3. **Policy.** Broad protection for transferees helps to ensure that security interests in deposit accounts do not impair the free flow of funds. It also minimizes the likelihood that a secured party will enjoy a claim to whatever the transferee purchases with the funds. Rules concerning recovery of payments traditionally have placed a high value on finality. The opportunity to upset a completed transaction, or even to place a completed transaction in jeopardy by bringing suit against the transferee of funds, should be severely limited. Although the giving of value usually is a prerequisite for receiving the ability to take free from third-party claims, where payments are concerned the law is even more protective. Thus, section 3-418(c) provides that, even where the law of restitution otherwise would permit recovery of funds paid by mistake, no recovery may be had from a person "who in good faith changed position in reliance on the payment." Rather than adopt this standard, this section eliminates all reliance requirements whatsoever. Payments made by mistake are relatively rare, but payments of funds from encumbered deposit accounts (e.g., deposit accounts containing collections from accounts receivable) occur with great regularity. In most cases, unlike payment by mistake, no one would object to these payments. In the vast proportion of cases, the transferee probably would be able to show a change of position in reliance on the payment. This section does not put the transferee to the burden of having to make this proof.

4. **"Bad Actors."** To deal with the question of the "bad actor," this section borrows "collusion" language from article 8. See, e.g., sections 8-115 and 8-503(e). This is the most protective (i.e., least stringent) of the various standards now found in the UCC. Compare, e.g., section 1-201(9) ("without knowledge that the sale . . . is in violation of the . . . security interest"); section 1-201(19) ("honesty in fact in the conduct or transaction concerned"); and section 3-302(a)(2)(v) ("without notice of any claim").

5. **Transferee Who Does Not Take Free.** This section sets forth the circumstances under which certain transferees of money or funds take free of security interests. It does not determine the rights of a transferee who does not take free of a security interest.

Example 3: The facts are as in example 2, but, in wrongfully moving the funds from the deposit account at Bank A to Debtor's deposit account with Bank B, Debtor acts in collusion with Bank B. Bank B does not take the funds free of Lender's security interest under this section. If Debtor grants a security interest to Bank B, section 9-327 governs the relative priorities of Lender and Bank B. Under section 9-327(3), Bank B's security interest in the Bank B deposit account is senior to Lender's security interest in the deposit account as proceeds. However, Bank B's senior security interest does not protect Bank B against any liability to Lender that might arise from Bank B's wrongful conduct.

§ 25-9-333. (Effective July 1, 2001) Priority of certain liens arising by operation of law.

(a) "Possessory lien." — In this section, "possessory lien" means an interest, other than a security interest or an agricultural lien:

(1) Which secures payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person's business;

(2) Which is created by statute or rule of law in favor of the person; and

(3) Whose effectiveness depends on the person's possession of the goods.

(b) Priority of possessory lien. — A possessory lien on goods has priority over a security interest in the goods unless the lien is created by a statute that expressly provides otherwise. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-310.

2. **"Possessory Liens."** This section governs the relative priority of security interests arising under this article and "possessory liens," i.e., common-law and statutory liens whose effectiveness depends on the lienor's possession of goods with respect to which the lienor provided services or furnished materials in the ordinary course of its business. As under former section 9-310, the possessory lien has priority over a security interest unless the possessory lien is created by a statute that expressly provides otherwise. If the statute creating the possessory lien is silent as to its priority relative to a security interest, this section provides a rule of interpretation that the possessory lien takes priority, even if the statute has been construed judicially to make the possessory lien subordinate.

§ 25-9-334. (Effective July 1, 2001) Priority of security interests in fixtures and crops.

(a) Security interest in fixtures under this Article. — A security interest under this Article may be created in goods that are fixtures or may continue in goods that become fixtures. A security interest does not exist under this Article in ordinary building materials incorporated into an improvement on land.

(b) Security interest in fixtures under real-property law. — This Article does not prevent creation of an encumbrance upon fixtures under real property law.

(c) General rule: subordination of security interest in fixtures. — In cases not governed by subsections (d) through (h) of this section, a security interest in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of the related real property other than the debtor.

(d) Fixtures purchase-money priority. — Except as otherwise provided in subsection (h) of this section, a perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property and:

(1) The security interest is a purchase-money security interest;

(2) The interest of the encumbrancer or owner arises before the goods become fixtures; and

(3) The security interest is perfected by a fixture filing before the goods become fixtures or within 20 days thereafter.

(e) Priority of security interest in fixtures over interests in real property. — A perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if:

(1) The debtor has an interest of record in the real property or is in possession of the real property and the security interest:

a. Is perfected by a fixture filing before the interest of the encumbrancer or owner is of record; and

b. Has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner;

(2) Before the goods become fixtures, the security interest is perfected by any method permitted by this Article and the fixtures are readily removable:

a. Factory or office machines;

b. Equipment that is not primarily used or leased for use in the operation of the real property; or

c. Replacements of domestic appliances that are consumer goods;

(3) The conflicting interest is a lien on the real property obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this Article; or

(4) The security interest is:

a. Created in a manufactured home in a manufactured-home transaction; and

b. Perfected pursuant to a statute described in G.S. 25-9-311(a)(2).

(f) Priority based on consent, disclaimer, or right to remove. — A security interest in fixtures, whether or not perfected, has priority over a conflicting interest of an encumbrancer or owner of the real property if:

(1) The encumbrancer or owner has, in an authenticated record, consented to the security interest or disclaimed an interest in the goods as fixtures; or

(2) The debtor has a right to remove the goods as against the encumbrancer or owner.

(g) Continuation of subdivision (f)(2) priority. — The priority of the security interest under subdivision (f)(2) of this section continues for a reasonable time if the debtor's right to remove the goods as against the encumbrancer or owner terminates.

(h) Priority of construction mortgage. — A mortgage is a construction mortgage to the extent that it secures an obligation incurred for the construction of an improvement on land, including the acquisition cost of the land, if a recorded record of the mortgage so indicates. Except as otherwise provided in subsections (e) and (f) of this section, a security interest in fixtures is subordinate to a construction mortgage if a record of the mortgage is recorded before the goods become fixtures and the goods become fixtures before the completion of the construction. A mortgage has this priority to the same extent as a construction mortgage to the extent that it is given to refinance a construction mortgage.

(i) Priority of security interest in crops. — Except as provided in G.S. 42-15, a perfected security interest in crops growing on real property has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property. (1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-313.

2. **Scope of This Section.** This section contains rules governing the priority of security interests in fixtures and crops as against persons who claim an interest in real property. Priority contests with other article 9 security interests are governed by the other priority rules of this article. The provisions with respect to fixtures follow those of former section 9-313. However, they have been rewritten to conform to section 2A-309 and to prevailing style conventions. Subsections (i) and (j), which apply to crops, are new.

3. **Security Interests in Fixtures.** Certain goods that are the subject of personal-property (chattel) financing become so affixed or otherwise so related to real property that they become part of the real property. These goods are called "fixtures." See section 9-102 (definition of "fixtures"). Some fixtures retain their personal property nature: A security interest under this article may be created in fixtures and may

continue in goods that become fixtures. See subsection (a). However, if the goods are ordinary building materials incorporated into an improvement on land, no security interest in them exists. Rather, the priority of claims to the building materials are determined by the law governing claims to real property. (Of course, the fact that no security interest exists in ordinary building materials incorporated into an improvement on land does not prejudice any rights the secured party may have against the debtor or any other person who violated the secured party's rights by wrongfully incorporating the goods into real property.)

Thus, this section recognizes three categories of goods: (1) Those that retain their chattel character entirely and are not part of the real property; (2) ordinary building materials that have become an integral part of the real property and cannot retain their chattel character for purposes of finance; and (3) an intermediate class that has become real property for certain purposes, but as to which chattel financing may be preserved.

To achieve priority under certain provisions of this section, a security interest must be perfected by making a "fixture filing" (defined in section 9-102) in the real property records. Because the question whether goods have become fixtures often is a difficult one under applicable real property law, a secured party may make a fixture filing as a precaution. Courts should not infer from a fixture filing that the secured party concedes that the goods are or will become fixtures.

4. **Priority in Fixtures: General.** In considering priority problems under this section, one must first determine whether real property claimants per se have an interest in the crops or fixtures as part of real property. If not, it is immaterial, so far as concerns real property parties as such, whether a security interest arising under this article is perfected or unperfected. In no event does a real property claimant (e.g., owner or mortgagee) acquire an interest in a "pure" chattel just because a security interest therein is unperfected. If on the other hand real property law gives real property parties an interest in the goods, a conflict arises and this section states the priorities.

5. **Priority in Fixtures: Residual Rule.** Subsection (c) states the residual priority rule, which applies only if one of the other rules does not: A security interest in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of the related real property other than the debtor.

6. **Priority in Fixtures: First to File or Record.** Subsection (e)(1), which follows former section 9-313(4)(b), contains the usual priority rule of conveyancing, that is, the first to file or record prevails. In order to achieve priority under this rule, however, the security interest must be perfected by a "fixture filing" (defined in section 9-102), i.e., a filing for record in the real property records and indexed therein, so that it will be found in a real property search. The condition in subsection (e)(1)(B), that the security interest must have had priority over any conflicting interest of a predecessor in title of the conflicting encumbrancer or owner, appears to limit to the first-in-time principle. However, this apparent limitation is nothing other than an expression of the usual rule that a person must be entitled to transfer what he or she has. Thus, if the fixture security interest is subordinate to a mortgage, it is subordinate to an interest of an assignee of the mortgage, even though the assignment is a later recorded instrument. Similarly if the fixture security interest is subordinate to the rights of an owner, it is subordinate to a subsequent grantee of the owner and likewise subordinate to a subsequent mortgagee of the owner.

7. **Priority in Fixtures: Purchase-Money Security Interests.** Subsection (d), which follows former section 9-313(4)(a), contains the principal exception to the first-to-file-or-record rule of subsection (e)(1). It affords priority to purchase-money security interests in fixtures as against prior recorded real property interests, provided that the purchase-money security interest is filed as a fixture filing in the real property records before the goods become fixtures or within 20 days thereafter. This priority corresponds to the purchase-money priority under section 9-324(a). (Like other 10-day periods in former article 9, the 10-day period in this section has been changed to 20 days.)

It should be emphasized that this purchase-money priority with the 20-day grace period for filing is limited to rights against real property interests that arise before the goods become fixtures. There is no such priority with the 20-day grace period as against real property interests that arise subsequently. The fixture security interest can defeat subsequent real property interests only if it is filed first and prevails under the usual conveyancing rule in subsection (e)(1) or one of the other rules in this section.

8. **Priority in Fixtures: Readily Removable Goods.** Subsection (e)(2), which derives from section 2A-309 and former section 9-313(4)(d), contains another exception to the usual first-to-file-or-perfect rule. It affords priority to the holders of security interests in certain types of readily removable goods—factory and office machines, equipment that is not primarily used or leased for use in the operation of the real property, and (as discussed below) certain replacements of domestic appliances. This rule is made necessary by the confusion in the law as to whether certain machinery, equipment, and appliances become fixtures. It protects a secured party who, per-

haps in the mistaken belief that the readily removable goods will not become fixtures, makes a UCC filing (or otherwise perfects under this article) rather than making a fixture filing.

Frequently, under applicable law, goods of the type described in subsection (e)(2) will not be considered to have become part of the real property. In those cases, the fixture security interest does not conflict with a real property interest, and resort to this section is unnecessary. However, if the goods have become part of the real property, subsection (e)(2) enables a fixture secured party to take priority over a conflicting real-property interest if the fixture security interest is perfected by a fixture filing or by any other method permitted by this article. If perfection is by fixture filing, the fixture security interest would have priority over subsequently recorded real property interests under subsection (e)(1) and, if the fixture security interest is a purchase-money security interest (a likely scenario), it would also have priority over most real property interests under the purchase-money priority of subsection (d). Note, however, that unlike the purchase-money priority rule in subsection (d), the priority rules in subsection (e) override the priority given to a construction mortgage under subsection (h).

The rule in subsection (e)(2) is limited to readily removable replacements of domestic appliances. It does not apply to original installations. Moreover, it is limited to appliances that are "consumer goods" (defined in section 9-102) in the hands of the debtor. The principal effect of the rule is to make clear that a secured party financing occasional replacements of domestic appliances in noncommercial, owner-occupied contexts need not concern itself with real-property descriptions or records; indeed, for a purchase-money replacement of consumer goods, perfection without any filing will be possible. See section 9-309(1).

9. **Priority in Fixtures: Judicial Liens.** Subsection (e)(3), which follows former section 9-313(4)(d), adopts a first-in-time rule applicable to conflicts between a fixture security interest and a lien on the real property obtained by legal or equitable proceedings. Such a lien is subordinate to an earlier-perfected security interest, regardless of the method by which the security interest was perfected. Judgment creditors generally are not reliance creditors who search real property records. Accordingly, a perfected fixture security interest takes priority over a subsequent judgment lien or other lien obtained by legal or equitable proceedings, even if no evidence of the security interest appears in the relevant real property records. Subsection (e)(3) thus protects a perfected fixture security interest from avoidance by a trustee in bankruptcy under Bankruptcy Code section 544(a), regardless of the method of perfection.

10. **Priority in Fixtures: Manufactured Homes.** A manufactured home may become a fixture. New subsection (e)(4) contains a special rule granting priority to certain security interests created in a "manufactured home" as part of a "manufactured-home transaction" (both defined in section 9-102). Under this rule, a security interest in a manufactured home that becomes a fixture has priority over a conflicting interest of an encumbrancer or owner of the real property if the security interest is perfected under a certificate of title statute (see section 9-311). Subsection (e)(4) is only one of the priority rules applicable to security interests in a manufactured home that becomes a fixture. Thus, a security interest in a manufactured home which does not qualify for priority under this subsection may qualify under another.

11. **Priority in Fixtures: Construction Mortgages.** The purchase-money priority presents a difficult problem in relation to construction mortgages. The latter ordinarily will have been recorded even before the commencement of delivery of materials to the job, and therefore would take priority over fixture security interests were it not for the purchase-money priority. However, having recorded first, the holder of a construction mortgage reasonably expects to have first priority in the improvement built using the mortgagee's advances. Subsection (g) expressly gives priority to the construction mortgage recorded before the filing of the purchase-money security interest in fixtures. A refinancing of a construction mortgage has the same priority as the construction mortgage itself. The phrase "an obligation incurred for the construction of an improvement" covers both optional advances and advances pursuant to commitment. Both types of advances have the same priority under subsection (g).

The priority under this subsection applies only to goods that become fixtures during the construction period leading to the completion of the improvement. The construction priority will not apply to additions to the building made long after completion of the improvement, even if the additions are financed by the real property mortgagee under an open-end clause of the construction mortgage. In such case, subsections (d), (e), and (f) govern.

Although this subsection affords a construction mortgage priority over a purchase-money security interest that otherwise would have priority under subsection (d), the subsection is subject to the priority rules in subsections (e) and (f). Thus, a construction mortgage may be junior to a fixture security interest perfected by a fixture filing before the construction mortgage was recorded. See subsection (e)(1).

12. **Crops.** Growing crops are "goods" in which a security interest may be created and perfected under this article. In some jurisdictions, a mortgage of real property may cover crops, as well. In the event that crops are encumbered by both a mortgage and an article 9 security interest, subsection (i) provides that the security interest has priority. States whose real property law provides otherwise should either amend that law directly or override it by enacting subsection (j).

§ 25-9-335. (Effective July 1, 2001) Accessions.

(a) Creation of security interest in accession. — A security interest may be created in an accession and continues in collateral that becomes an accession.

(b) Perfection of security interest. — If a security interest is perfected when the collateral becomes an accession, the security interest remains perfected in the collateral.

(c) Priority of security interest. — Except as otherwise provided in subsection (d) of this section, the other provisions of this Part determine the priority of a security interest in an accession.

(d) Compliance with certificate-of-title statute. — A security interest in an accession is subordinate to a security interest in the whole which is perfected by compliance with the requirements of a certificate-of-title statute under G.S. 25-9-311(b).

(e) Removal of accession after default. — After default, subject to Part 6 of this Article, a secured party may remove an accession from other goods if the security interest in the accession has priority over the claims of every person having an interest in the whole.

(f) Reimbursement following removal. — A secured party that removes an accession from other goods under subsection (e) of this section shall promptly reimburse any holder of a security interest or other lien on, or owner of, the whole or of the other goods, other than the debtor, for the cost of repair of any physical injury to the whole or the other goods. The secured party need not reimburse the holder or owner for any diminution in value of the whole or the other goods caused by the absence of the accession removed or by any necessity for replacing it. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate assurance for the performance of the obligation to reimburse. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-314.

2. **"Accession."** This section applies to an "accession," as defined in section 9-102, regardless of the cost or difficulty of removing the accession from the other goods, and regardless of whether the original goods have come to form an integral part of the other goods. This section does not apply to goods whose identity has been lost. Goods of that kind are "commingled goods" governed by section 9-336. Neither this section nor the following one addresses the case of collateral that changes form without the addition of other goods.

3. **"Accession" vs. "Other Goods."** This section distinguishes among the "accession," the "other goods," and the "whole." The last term refers to the combination of the "accession" and the "other goods." If one person's collateral becomes physically united with another person's collateral, each is an "accession."

Example 1: SP-1 holds a security interest in the debtor's tractors (which are not subject to a certificate of title statute), and SP-2 holds a security interest in a particular tractor engine. The engine is installed in a tractor. From the perspective of SP-1, the tractor becomes an "accession" and the engine is the "other goods." From the perspective of SP-2, the engine is the "accession" and the tractor is the "other goods." The completed tractor—tractor cum engine—constitutes the "whole."

4. **Scope.** This section governs only a few issues concerning accessions. Subsection (a) contains rules governing continuation of a security interest in an accession. Subsection (b) contains a rule governing continued perfection of a security interest in goods that become an accession. Subsection (d) contains a special priority rule governing accessions that become part of a whole covered by a certificate of title. Subsections (e) and (f) govern enforcement of a security interest in an accession.

5. **Matters Left to Other Provisions of This Article: Attachment and Perfection.** Other provisions of this article often govern accession-related issues. For example, this section does not address whether a secured party acquires a security interest in the whole if its collateral becomes an accession. Normally this will turn on the description of the collateral in the security agreement.

Example 2: Debtor owns a computer subject to a perfected security interest in favor of SP-1. Debtor acquires memory and installs it in the computer. Whether SP-1's security interest attaches to the memory depends on whether the security agreement covers it.

Similarly, this section does not determine whether perfection against collateral that becomes an accession is effective to perfect a security interest in the whole. Other provisions of this article, including the requirements for indicating the collateral covered by a financing statement, resolve that question.

6. **Matters Left to Other Provisions of This Article: Priority.** With one exception, concerning goods covered by a certificate of title (see subsection (d)), the other provisions of this part, including the rules governing purchase-money security interests, determine the priority of most security interests in an accession, including the relative priority of a security interest in an accession and a security interest in the whole. See subsection (c).

Example 3: Debtor owns an office computer subject to a security interest in favor of SP-1. Debtor acquires memory and grants a perfected security interest in the memory to SP-2. Debtor installs the memory in the computer, at which time (one assumes) SP-1's security interest attaches to the memory. The first-to-file-or-perfect rule of section 9-322 governs priority in the memory. If, however, SP-2's security interest is a purchase-money security interest, section 9-324(a) would afford priority in the memory to SP-2, regardless of which security interest was perfected first.

7. **Goods Covered by Certificate of Title.** This section does govern the priority of a security interest in an accession that is or becomes part of a whole that is subject to a security interest perfected by compliance with a certificate of title statute. Subsection (d) provides that a security interest in the whole, perfected by compliance with a certificate of title statute, takes priority over a security interest in the accession. It enables a secured party to rely upon a certificate of title without having to check the UCC files to determine whether any components of the collateral may be encumbered. The subsection imposes a corresponding risk upon those who finance goods that may become part of goods covered by a certificate of title. In doing so, it reverses the priority that appeared reasonable to most pre-UCC courts.

Example 4: Debtor owns an automobile subject to a security interest in favor of SP-1. The security interest is perfected by notation on the certificate of title. Debtor buys tires subject to a perfected-by-filing purchase-money security interest in favor of SP-2 and mounts the tires on the automobile's wheels. If the security interest in the automobile attaches to the tires, then SP-1 acquires priority over SP-2. The same result would obtain if SP-1's security interest attached to the automobile and was perfected after the tires had been mounted on the wheels.

§ 25-9-336. (Effective July 1, 2001) Commingled goods.

(a) "Commingled goods." — In this section, "commingled goods" means goods that are physically united with other goods in such a manner that their identity is lost in a product or mass.

(b) No security interest in commingled goods as such. — A security interest does not exist in commingled goods as such. However, a security interest may attach to a product or mass that results when goods become commingled goods.

(c) Attachment of security interest to product or mass. — If collateral becomes commingled goods, a security interest attaches to the product or mass.

(d) Perfection of security interest. — If a security interest in collateral is perfected before the collateral becomes commingled goods, the security interest that attaches to the product or mass under subsection (c) of this section is perfected.

(e) Priority of security interest. — Except as otherwise provided in subsection (f) of this section, the other provisions of this Part determine the priority of a security interest that attaches to the product or mass under subsection (c) of this section.

(f) Conflicting security interests in product or mass. — If more than one security interest attaches to the product or mass under subsection (c) of this section, the following rules determine priority:

(1) A security interest that is perfected under subsection (d) of this section has priority over a security interest that is unperfected at the time the collateral becomes commingled goods.

(2) If more than one security interest is perfected under subsection (d) of this section, the security interests rank equally in proportion to the value of the collateral at the time it became commingled goods. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-315.

2. **"Commingled Goods."** Subsection (a) defines "commingled goods." It is meant to include not only goods whose identity is lost through manufacturing or production (e.g., flour that has become part of baked goods) but also goods whose identity is lost by commingling with other goods from which they cannot be distinguished (e.g., ball bearings).

3. **Consequences of Becoming "Commingled Goods."** By definition, the identity of the original collateral cannot be determined once the original collateral becomes commingled goods. Consequently, the security interest in the specific original collateral alone is lost once the collateral becomes commingled goods, and no security interest in the original collateral can be created thereafter except as a part of the resulting product or mass. See subsection (b).

Once collateral becomes commingled goods, the secured party's security interest is transferred from the original collateral to the product or mass. See subsection (c). If the security interest in the original collateral was perfected, the security interest in the product or mass is a perfected security interest. See subsection (d). This perfection continues until lapse.

4. **Priority of Perfected Security Interests That Attach Under This Section.** This section governs the priority of competing security interests in a product or mass only when both security interests arise under this section. In that case, if both security interests are perfected by operation of this section (see subsections (c) and (d)), then the security interests rank equally, in proportion to the value of the collateral at the time it became commingled goods. See subsection (f)(2).

Example 1: SP-1 has a perfected security interest in Debtor's eggs, which have a value of $300 and secure a debt of $400, and SP-2 has a perfected security interest in Debtor's flour, which has a value of $500 and secures a debt of $600. Debtor uses the flour and eggs to make cakes, which have a value of $1000. The two security interests rank equally and share in the ratio of 3:5. Applying this ratio to the entire value of the product, SP-1 would be entitled to $375 (i.e., 3/8 x $1000), and SP-2 would be entitled to $625 (i.e., 5/8 x $1000).

Example 2: Assume the facts of Example 1, except that SP-1's collateral, worth $300, secures a debt of $200. Recall that, if the cake is worth $1000, then applying the ratio of 3:5 would entitle SP-1 to $375 and SP-2 to $625. However, SP-1 is not entitled to collect from the product more than it is owed. Accordingly, SP-1's share would be only $200, SP-2 would receive the remaining value, up to the amount it is owed ($600).

Example 3: Assume that the cakes in the previous examples have a value of only $600. Again, the parties share in the ratio of 3:5. If, as in Example 1, SP-1 is owed $400, then SP-1 is entitled to $225 (i.e., 3/8 x $600), and SP-2 is entitled to $375 (i.e., 5/8 x $600). Debtor receives nothing. If, however, as in Example 2, SP-1 is owed only $200, then SP-2 receives $400.

The results in the foregoing examples remain the same, regardless of whether SP-1 or SP-2 (or each) has a purchase-money security interest.

5. **Perfection: Unperfected Security Interests.** The rule explained in the preceding comment applies only when both security interests in original collateral are perfected when the goods become commingled goods. If a security interest in original collateral is unperfected at the time the collateral becomes commingled goods, subsection (f)(1) applies.

Example 4: SP-1 has a perfected security interest in the debtor's eggs, and SP-2 has an unperfected security interest in the debtor's flour. Debtor uses the flour and eggs to make cakes. Under subsection (c), both security interests attach to the cakes. But since SP-1's security interest was perfected at the time of commingling and SP-2's was not, only SP-1's security interest in the cakes is perfected. See subsection (d). Under subsection (f)(1) and section 9-322(a)(2), SP-1's perfected security interest has priority over SP-2's unperfected security interest.

If both security interests are unperfected, the rule of section 9-322(a)(3) would apply.

6. **Multiple Security Interests.** On occasion, a single input may be encumbered by more than one security interest. In those cases, the multiple secured parties should be treated like a single secured party for purposes of determining their collective share under subsection (f)(2). The normal priority rules would determine how that share would be allocated

between them. Consider the following example, which is a variation on Example 1 above:

Example 5: SP-1A has a perfected, first-priority security interest in Debtor's eggs. SP-1B has a perfected, second-priority security interest in the same collateral. The eggs have a value of $300. Debtor owes $200 to SP-1A and $200 to SP-1B. SP-2 has a perfected security interest in Debtor's flour, which has a value of $500 and secures a debt of $600. Debtor uses the flour and eggs to make cakes, which have a value of $1000.

For purposes of subsection (f)(2), SP-1A and SP-1B should be treated like a single secured party. The collective security interest would rank equally with that of SP-2. Thus, the secured parties would share in the ratio of 3 (for SP-1A and SP-1B combined) to 5 (for SP-2). Applying this ratio to the entire value of the product, SP-1A and SP-1B in the aggregate would be entitled to $375 (i.e., 3/8 x $1000), and SP-2 would be entitled to $625 (i.e., 5/8 x $1000).

SP-1A and SP-1B would share the $375 in accordance with their priority, as established under other rules. Inasmuch as SP-1A has first priority, it would receive $200, and SP-1B would receive $175.

7. **Priority of Security Interests That Attach Other Than by Operation of This Section.** Under subsection (e), the normal priority rules determine the priority of a security interest that attaches to the product or mass other than by operation of this section. For example, assume that SP-1 has a perfected security interest in Debtor's existing and after-acquired baked goods, and SP-2 has a perfected security interest in Debtor's flour. When the flour is processed into cakes, subsections (c) and (d) provide that SP-2 acquires a perfected security interest in the cakes. If SP-1 filed against the baked goods before SP-2 filed against the flour, then SP-1 will enjoy priority in the cakes. See section 9-322 (first-to-file-or-perfect). But if SP-2 filed against the flour before SP-1 filed against the baked goods, then SP-2 will enjoy priority in the cakes to the extent of its security interest.

§ 25-9-337. (Effective July 1, 2001) Priority of security interests in goods covered by certificate of title.

If, while a security interest in goods is perfected by any method under the law of another jurisdiction, this State issues a certificate of title that does not show that the goods are subject to the security interest or contain a statement that they may be subject to security interests not shown on the certificate:

(1) A buyer of the goods, other than a person in the business of selling goods of that kind, takes free of the security interest if the buyer gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest; and

(2) The security interest is subordinate to a conflicting security interest in the goods that attaches, and is perfected under G.S. 25-9-311(b), after issuance of the certificate and without the conflicting secured party's knowledge of the security interest. (1945, c. 196, s. 2; 1957, c. 564; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7; 1989 (Reg. Sess., 1990), c. 1024, s. 8(e), (f); 1997-181, s. 2; 1999-73, s. 4(a), (b); 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Derived from former section 9-103(2)(d).

2. **Protection for Buyers and Secured Parties.** This section affords protection to certain good-faith purchasers for value who are likely to have relied on a "clean" certificate of title, i.e., one that neither shows that the goods are subject to a particular security interest nor contains a statement that they may be subject to security interests not shown on the certificate. Under this section, a buyer can take free of, and the holder of a conflicting security interest can acquire priority over, a security interest that is perfected by any method under the law of another jurisdiction. The fact that the security interest has been reperfected by possession under section 9-313 does not of itself disqualify the holder of a conflicting security interest from protection under paragraph (2).

§ 25-9-338. (Effective July 1, 2001) Priority of security interest or agricultural lien perfected by filed financing statement providing certain incorrect information.

If a security interest or agricultural lien is perfected by a filed financing statement providing information described in G.S. 25-9-516(b)(5) which is incorrect at the time the financing statement is filed:

(1) The security interest or agricultural lien is subordinate to a conflicting perfected security interest in the collateral to the extent that the holder of the conflicting security interest gives value in reasonable reliance upon the incorrect information; and

(2) A purchaser, other than a secured party, of the collateral takes free of the security interest or agricultural lien to the extent that, in reasonable reliance upon the incorrect information, the purchaser gives value and, in the case of chattel paper, documents, goods, instruments, or a security certificate, receives delivery of the collateral. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Effect of Incorrect Information in Financing Statement.** Section 9-520(a) requires the filing office to reject financing statements that do not contain information concerning the debtor as specified in section 9-516(b)(5). An error in this information does not render the financing statement ineffective. On rare occasions, a subsequent purchaser of the collateral (i.e., a buyer or secured party) may rely on the misinformation to its detriment. This section subordinates a security interest or agricultural lien perfected by an effective, but flawed, financing statement to the rights of a buyer or holder of a perfected security interest to the extent that, in reasonable reliance on the incorrect information, the purchaser gives value and, in the case of tangible collateral, receives delivery of the collateral. A purchaser who has not made itself aware of the information in the filing office with respect to the debtor cannot act in "reasonable reliance" upon incorrect information.

3. **Relationship to Section 9-507.** This section applies to financing statements that contain information that is incorrect at the time of filing and imposes a small risk of subordination on the filer. In contrast, section 9-507 deals with financing statements containing information that is correct at the time of filing but which becomes incorrect later. Except as provided in section 9-507 with respect to changes in the debtor's name, an otherwise effective financing statement does not become ineffective if the information contained in it becomes inaccurate.

§ 25-9-339. (Effective July 1, 2001) Priority subject to subordination.

This Article does not preclude subordination by agreement by a person entitled to priority. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-316.

2. **Subordination by Agreement.** The preceding sections deal elaborately with questions of priority. This section makes it entirely clear that a person entitled to priority may effectively agree to subordinate its claim. Only the person entitled to priority may make such an agreement: A person's rights cannot be adversely affected by an agreement to which the person is not a party.

SUBPART 4. Rights of Banks.

§ 25-9-340. (Effective July 1, 2001) Effectiveness of right of recoupment or setoff against deposit account.

(a) Exercise of recoupment or setoff. — Except as otherwise provided in subsection (c) of this section, a bank with which a deposit account is maintained may exercise any right of recoupment or setoff against a secured party that holds a security interest in the deposit account.

(b) Recoupment or setoff not affected by security interest. — Except as otherwise provided in subsection (c) of this section, the application of this Article to a security interest in a deposit account does not affect a right of recoupment or setoff of the secured party as to a deposit account maintained with the secured party.

(c) When setoff ineffective. — The exercise by a bank of a setoff against a deposit account is ineffective against a secured party that holds a security interest in the deposit account which is perfected by control under G.S. 25-9-104(a)(3), if the setoff is based on a claim against the debtor. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New; subsection (b) is based on a nonuniform Illinois amendment.

2. **Set-off vs. Security Interest.** This section resolves the conflict between a security interest in a deposit account and the bank's rights of recoupment and set-off.

Subsection (a) states the general rule and provides that the bank may effectively exercise rights of recoupment and set-off against the secured party. Subsection (c) contains an exception: If the secured party has control under section 9-104(a)(3) (i.e., if it has become the bank's customer), then any set-off exercised by the bank against a debt owed by the debtor (as opposed to a debt owed to the bank by the secured party) is ineffective. The bank may, however, exercise its recoupment rights effectively. This result is consistent with the priority rule in section 9-327(4), under which the security interest of a bank in a deposit account is subordinate to that of a secured party who has control under section 9-104(a)(3).

This section deals with rights of set-off and recoupment that a bank may have under other law. It does not create a right of set-off or recoupment, nor is it intended to override any limitations or restrictions that other law imposes on the exercise of those rights.

3. **Preservation of Set-Off Right.** Subsection (b) makes clear that a bank may hold both a right of set-off against, and an article 9 security interest in, the same deposit account. By holding a security interest in a deposit account, a bank does not impair any right of set-off it would otherwise enjoy. This subsection does not pertain to accounts evidenced by an instrument (e.g., certain certificates of deposit), which are excluded from the definition of "deposit accounts."

§ 25-9-341. (Effective July 1, 2001) Bank's rights and duties with respect to deposit account.

Except as otherwise provided in G.S. 25-9-340(c), and unless the bank otherwise agrees in an authenticated record, a bank's rights and duties with respect to a deposit account maintained with the bank are not terminated, suspended, or modified by:

(1) The creation, attachment, or perfection of a security interest in the deposit account;

(2) The bank's knowledge of the security interest; or

(3) The bank's receipt of instructions from the secured party. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Free Flow of Funds.** This section is designed to prevent security interests in deposit accounts from impeding the free flow of funds through the payment system. Subject to two exceptions, it leaves the bank's rights and duties with respect to the deposit account and the funds on deposit unaffected by the creation or perfection of a security interest or by the bank's knowledge of the security interest. In addition, the section permits the bank to ignore the instructions of the secured party unless it had agreed to honor them or unless other law provides to the contrary. A secured party who wishes to deprive the debtor of access to funds on deposit or to appropriate those funds for itself needs to obtain the agreement of the bank, utilize the judicial process, or comply with procedures set forth in other law. Section 4-303(a), concerning the effect of notice on a bank's right and duty to pay items, is not to the contrary. That section addresses only whether an otherwise effective notice comes too late; it does not determine whether a timely notice is otherwise effective.

3. **Operation of Rule.** The general rule of this section is subject to section 9-340(c), under which a bank's right of set-off may not be exercised against a deposit account in the secured party's name if the right is based on a claim against the debtor. This result reflects current law in many jurisdictions and does not appear to have unduly disrupted banking practices or the payments system. The more important function of this section, which is not impaired by section 9-340, is the bank's right to follow the debtor's (customer's) instructions (e.g., by honoring checks, permitting withdrawals, etc.) until such time as the depository institution is served with judicial process or receives instructions with respect to the funds on deposit from a secured party who has control over the deposit account.

4. **Liability of Bank.** This article does not determine whether a bank that pays out funds from an encumbered deposit is liable to the holder of a security interest. Although the fact that a secured party has control over the deposit account and the manner by which control was achieved may be relevant to the imposition of liability, whatever rule applies generally when a bank pays out funds in which a third party has an interest would determine liability to a secured party. Often, this rule is found in a non-UCC adverse claim statute.

5. **Certificates of Deposit.** This section does not address the obligations of banks that issue instruments evidencing deposits (e.g., certain certificates of deposit).

§ 25-9-342. (Effective July 1, 2001) Bank's right to refuse to enter into or disclose existence of control agreement.

This Article does not require a bank to enter into an agreement of the kind described in G.S. 25-9-104(a)(2), even if its customer so requests or directs. A bank that has entered into such an agreement is not required to confirm the existence of the agreement to another person unless requested to do so by its customer. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New; derived from section 8-106(g).

2. **Protection for Bank.** This section protects banks from the need to enter into agreements against their will and from the need to respond to inquiries from persons other than their customers.

PART 4.

Rights of Third Parties.

§ 25-9-401. (Effective July 1, 2001) Alienability of debtor's rights.

(a) Other law governs alienability; exceptions. — Except as otherwise provided in subsection (b) of this section and G.S. 25-9-406, 25-9-407, 25-9-408, and 25-9-409, whether a debtor's rights in collateral may be voluntarily or involuntarily transferred is governed by law other than this Article.

(b) Agreement does not prevent transfer. — An agreement between the debtor and secured party which prohibits a transfer of the debtor's rights in collateral or makes the transfer a default does not prevent the transfer from taking effect. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-311.

2. **Scope of This Part.** This part deals with several issues affecting third parties (i.e., parties other than the debtor and the secured party). These issues are not addressed in part 3, subpart 3, which deals with priorities. This part primarily addresses the rights and duties of account debtors and other persons obligated on collateral who are not, themselves, parties to a secured transaction.

3. **Governing Law.** There was some uncertainty under former article 9 as to which jurisdiction's law (usually, which jurisdiction's version of article 9) applied to the matters that this part addresses. Part 3, subpart 1, does not determine the law governing these matters because they do not relate to perfection, the effect of perfection or nonperfection, or priority. However, it might be inappropriate for a designation of applicable law by a debtor and secured party under section 1-105 to control the law applicable to an independent transaction or relationship between the debtor and an account debtor.

Consider an example under section 9-408:

Example 1: State X has adopted this article; former article 9 is the law of State Y. A general intangible (e.g., a franchise agreement) between a debtor-franchisee, D, and an account debtor-franchisor, AD, is governed by the law of State Y. D grants to SP a security interest in its rights under the franchise agreement. The franchise agreement contains a term prohibiting D's assignment of its rights under the agreement. D and SP agree that their secured transaction is governed by the law of State X. Under State X's section 9-408, the restriction on D's assignment is ineffective to prevent the creation, attachment, or perfection of SP's security interest. State Y's former section 9-318(4), however, does not address restrictions on the creation of security interests in general intangibles other than general intangibles for money due or to become due. Accordingly, it does not address restrictions on the assignment to SP of D's rights under the franchise agreement. The non-article-9 law of State Y, which does address restrictions, provides that the prohibition on assignment is effective.

This article does not provide a specific answer to the question of which State's law applies to the restriction on assignment in the example. However, assuming that under non-UCC choice-of-law principles the effectiveness of the restriction would be governed by the law of State Y, which governs the franchise agreement, the fact that State X's article 9 governs the secured transaction between SP and D would not override the otherwise applicable law governing the agreement. Of course, to the extent that jurisdictions eventually adopt identical versions of this article and courts interpret it consistently, the inability to identify the applicable law in circumstances such as those in the example may be inconsequential.

4. **Inalienability Under Other Law.** Subsection (a) addresses the question whether property necessarily is transferable by virtue of its inclusion (i.e., its eligibility as collateral) within the scope of article 9. It gives a negative answer, subject to the identified exceptions. The substance of subsection (a) was implicit under former article 9.

5. **Negative Pledge Covenant.** Subsection (b) is an exception to the general rule in subsection (a). It makes clear that in secured transactions under this article the debtor has rights in collateral (whether legal title or equitable) which it can transfer and which its creditors can reach. It is best explained with an example:

Example 2: A debtor, D, grants to SP a security interest to secure a debt in excess of the value of the collateral. D agrees with SP

that it will not create a subsequent security interest in the collateral and that any security interest purportedly granted in violation of the agreement will be void. Subsequently, in violation of its agreement with SP, D purports to grant a security interest in the same collateral to another secured party.

Subsection (b) validates D's creation of the subsequent (prohibited) security interest, which might even achieve priority over the earlier security interest. See comment 7. However, unlike some other provisions of this part, such as section 9-406, subsection (b) does not provide that the agreement restricting assignment itself is "ineffective." Consequently, the debtor's breach may create a default.

6. **Rights of Lien Creditors.** Difficult problems may arise with respect to attachment, levy, and other judicial procedures under which a debtor's creditors may reach collateral subject to a security interest. For example, an obligation may be secured by collateral worth many times the amount of the obligation. If a lien creditor has caused all or a portion of the collateral to be seized under judicial process, it may be difficult to determine the amount of the debtor's "equity" in the collateral that has been seized. The section leaves resolution of this problem to the courts. The doctrine of marshaling may be appropriate.

7. **Sale of Receivables.** If a debtor sells an account, chattel paper, payment intangible, or promissory note outright, as against the buyer the debtor has no remaining rights to transfer. If, however, the buyer fails to perfect its interest, then solely insofar as the rights of certain third parties are concerned, the debtor is deemed to retain its rights and title. See section 9-318. The debtor has the power to convey these rights to a subsequent purchaser. If the subsequent purchaser (buyer or secured lender) perfects its interest, it will achieve priority over the earlier, unperfected purchaser. See section 9-322(a)(1).

§ 25-9-402. (Effective July 1, 2001) Secured party not obligated on contract of debtor or in tort.

The existence of a security interest, agricultural lien, or authority given to a debtor to dispose of or use collateral, without more, does not subject a secured party to liability in contract or tort for the debtor's acts or omissions. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-317.

2. **Nonliability of Secured Party.** This section, like former section 9-317, rejects theories on which a secured party might be held liable on a debtor's contracts or in tort merely because a security interest exists or because the debtor is entitled to dispose of or use collateral. This section expands former section 9-317 to cover agricultural liens.

§ 25-9-403. (Effective July 1, 2001) Agreement not to assert defenses against assignee.

(a) "Value." — In this section, "value" has the meaning provided in G.S. 25-3-303(a).

(b) Agreement not to assert claim or defense. — Except as otherwise provided in this section, an agreement between an account debtor and an assignor not to assert against an assignee any claim or defense that the account debtor may have against the assignor is enforceable by an assignee that takes an assignment:

(1) For value;
(2) In good faith;
(3) Without notice of a claim of a property or possessory right to the property assigned; and
(4) Without notice of a defense or claim in recoupment of the type that may be asserted against a person entitled to enforce a negotiable instrument under G.S. 25-3-305(a).

(c) When subsection (b) not applicable. — Subsection (b) of this section does not apply to defenses of a type that may be asserted against a holder in due course of a negotiable instrument under G.S. 25-3-305(b).

(d) Omission of required statement in consumer transaction. — In a consumer transaction, if a record evidences the account debtor's obligation, law other than this Article requires that the record include a statement to the effect that the rights of an assignee are subject to claims or defenses that the account debtor could assert against the original obligee, and the record does not include such a statement:

(1) The record has the same effect as if the record included such a statement; and

(2) The account debtor may assert against an assignee those claims and defenses that would have been available if the record included such a statement.

(e) Rule for individual under other law. — This section is subject to law other than this Article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(f) Other law not displaced. — Except as otherwise provided in subsection (d) of this section, this section does not displace law other than this Article which gives effect to an agreement by an account debtor not to assert a claim or defense against an assignee. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-206.

2. **Scope and Purpose.** Subsection (b), like former section 9-206, generally validates an agreement between an account debtor and an assignor that the account debtor will not assert against an assignee claims and defenses that it may have against the assignor. These agreements are typical in installment sale agreements and leases. However, this section expands former section 9-206 to apply to all account debtors; it is not limited to account debtors that have bought or leased goods. This section applies only to the obligations of an "account debtor," as defined in section 9-102. Thus, it does not determine the circumstances under which and the extent to which a person who is obligated on a negotiable instrument is disabled from asserting claims and defenses. Rather, article 3 must be consulted. See, e.g., sections 3-305 and 3-306. Article 3 governs even when the negotiable instrument constitutes part of chattel paper. See section 9-102 (an obligor on a negotiable instrument constituting part of chattel paper is not an "account debtor").

3. **Conditions of Validation; Relationship to Article 3.** Subsection (b) validates an account debtor's agreement only if the assignee takes an assignment for value, in good faith, and without notice of conflicting claims to the property assigned or of certain claims or defenses of the account debtor. Like former section 9-206, this section is designed to put the assignee in a position that is no better and no worse than that of a holder in due course of a negotiable instrument under article 3. However, former section 9-206 left open certain issues, e.g., whether the section incorporated the special article 3 definition of "value" in section 3-303 or the generally applicable definition in section 1-201(44). Subsection (a) addresses this question; it provides that "value" has the meaning specified in section 3-303(a). Similarly, subsection (c) provides that subsection (b) does not validate an agreement with respect to defenses that could be asserted against a holder in due course under section 3-305(b) (the so-called "real" defenses). In 1990, the definition of "holder in due course" (section 3-302) and the articulation of the rights of a holder in due course (sections 3-305 and 3-306) were revised substantially. This section tracks more closely the rules of sections 3-302, 3-305, and 3-306.

4. **Relationship to Terms of Assigned Property.** Former section 9-206(2), concerning warranties accompanying the sale of goods, has been deleted as unnecessary. This article does not regulate the terms of the account, chattel paper, or general intangible that is assigned, except insofar as the account, chattel paper, or general intangible itself creates a security interest (as often is the case with chattel paper). Thus, article 2, and not this article, determines whether a seller of goods makes or effectively disclaims warranties, even if the sale is secured. Similarly, other law, and not this article, determines the effectiveness of an account debtor's undertaking to pay notwithstanding, and not to assert, any defenses or claims against an assign*or*—e.g., a "hell-or-high-water" provision in the underlying agreement that is assigned. If other law gives effect to this undertaking, then, under principles of *nemo*

dat, the undertaking would be enforceable by the assignee (secured party). If other law prevents the assignor from enforcing the undertaking, this section nevertheless might permit the assignee to do so. The right of the assignee to enforce would depend upon whether, under the particular facts, the account debtor's undertaking fairly could be construed as an agreement that falls within the scope of this section and whether the assignee meets the requirements of this section.

5. **Relationship to Federal Trade Commission Rule.** Subsection (d) is new. It applies to rights evidenced by a record that is required to contain, but does not contain, the notice set forth in Federal Trade Commission Rule 433, 16 C.F.R. part 433 (the "Holder-in-Due-Course Regulations"). Under this subsection, an assignee of such a record takes subject to the consumer account debtor's claims and defenses to the same extent as it would have if the writing had contained the required notice. Thus, subsection (d) effectively renders waiver-of-defense clauses ineffective in the transactions with consumers to which it applies.

6. **Relationship to Other Law.** Like former section 9-206(1), this section takes no position on the enforceability of waivers of claims and defenses by consumer account debtors, leaving that question to other law. However, the reference to "law other than this article" in subsection (e) encompasses administrative rules and regulations; the reference in former section 9-206(1) that it replaces ("statute or decision") arguably did not.

This section does not displace other law that gives effect to a nonconsumer account debtor's agreement not to assert defenses against an assignee, even if the agreement would not qualify under subsection (b). See subsection (f). It validates, but does not invalidate, agreements made by a nonconsumer account debtor. This section also does not displace other law to the extent that the other law permits an assignee, who takes an assignment with notice of a claim of a property or possessory right, a defense, or a claim in recoupment, to enforce an account debtor's agreement not to assert claims and defenses against the assignor (e.g., a "hell-or-high-water" agreement). See comment 4. It also does not displace an assignee's right to assert that an account debtor is estopped from asserting a claim or defense. Nor does this section displace other law with respect to waivers of potential future claims and defenses that are the subject of an agreement between the account debtor and the assignee. Finally, it does not displace section 1-107, concerning waiver of a breach that allegedly already has occurred.

Editor's Note. — Session Laws 2000-67, s. 28.4, contains a severability clause.

§ 25-9-404. (Effective July 1, 2001) Rights acquired by assignee; claims and defenses against assignee.

(a) Assignee's rights subject to terms, claims, and defenses; exceptions. — Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsections (b) through (e) of this section, the rights of an assignee are subject to:

(1) All terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and

(2) Any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee.

(b) Account debtor's claim reduces amount owed to assignee. — Subject to subsection (c) of this section and except as otherwise provided in subsection (d) of this section, the claim of an account debtor against an assignor may be asserted against an assignee under subsection (a) of this section only to reduce the amount the account debtor owes.

(c) Rule for individual under other law. — This section is subject to law other than this Article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(d) Omission of required statement in consumer transaction. — In a consumer transaction, if a record evidences the account debtor's obligation, law other than this Article requires that the record include a statement to the effect that the account debtor's recovery against an assignee with respect to claims and defenses against the assignor may not exceed amounts paid by the account debtor under the record, and the record does not include such a statement, the extent to which a claim of an account debtor against the assignor may be asserted against an assignee is determined as if the record included such a statement.

(e) Inapplicability to health-care-insurance receivable. — This section does not apply to an assignment of a health-care-insurance receivable. (1945, c. 196, s. 6; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-318(1).

2. **Purpose; Rights of Assignee in General.** Subsection (a), like former section 9-318(1), provides that an assignee generally takes an assignment subject to defenses and claims of an account debtor. Under subsection (a)(1), if the account debtor's defenses on an assigned claim arise from the transaction that gave rise to the contract with the assignor, it makes no difference whether the defense or claim accrues before or after the account debtor is notified of the assignment. Under subsection (a)(2), the assignee takes subject to other defenses or claims only if they accrue before the account debtor has been notified of the assignment. Of course, an account debtor may waive its right to assert defenses or claims against an assignee under section 9-403 or other applicable law. Subsection (a) tracks section 3-305(a)(3) more closely than its predecessor.

3. **Limitation on Affirmative Claims.** Subsection (b) is new. It limits the claim that the account debtor may assert against an assignee. Borrowing from section 3-305(a)(3) and cases construing former section 9-318, subsection (b) generally does not afford the account debtor the right to an affirmative recovery from an assignee.

4. **Consumer Account Debtors; Relationship to Federal Trade Commission Rule.** Subsections (c) and (d) also are new. Subsection (c) makes clear that the rules of this section are subject to other law establishing special rules for consumer account debtors. An "account debtor who is an individual" as used in subsection (c) includes individuals who are jointly or jointly and severally obligated. Subsection (d) applies to rights evidenced by a record that is required to contain, but does not contain, the notice set forth in Federal Trade Commission Rule 433, 16 C.F.R. part 433 (the "Holder-in-Due-Course Regulations"). Under subsection (d), a consumer account debtor has the same right to an affirmative recovery from an assignee of such a record as the consumer would have had against the assignee had the record contained the required notice.

5. **Scope; Application to "Account Debtor."** This section deals only with the rights and duties of "account debtors"—and for the most part only with account debtors on accounts, chattel paper, and payment intangibles. Subsection (e) provides that the obligation of an insurer with respect to a health care insurance receivable is governed by other law. References in this section to an "account debtor" include account debtors on collateral that is proceeds. Neither this section nor any other provision of this article, including sections 9-408 and 9-409, provides analogous regulation of the rights and duties of other obligors on collateral, such as the maker of a negotiable instrument (governed by article 3), the issuer of or nominated person under a letter of credit (governed by article 5), or the issuer of a security (governed by article 8). Article 9 leaves those rights and duties untouched; however, section 9-409 deals with the special case of letters of credit. When chattel paper is composed in part of a negotiable instrument, the obligor on the instrument is not an "account debtor," and article 3 governs the rights of the assignee of the chattel paper with respect to the issues that this section addresses. See, e.g., section 3-601 (dealing with discharge of an obligation to pay a negotiable instrument).

§ 25-9-405. (Effective July 1, 2001) Modification of assigned contract.

(a) Effect of modification on assignee. — A modification of or substitution for an assigned contract is effective against an assignee if made in good faith. The assignee acquires corresponding rights under the modified or substituted

contract. The assignment may provide that the modification or substitution is a breach of contract by the assignor. This subsection is subject to subsections (b) through (d) of this section.

(b) Applicability of subsection (a). — Subsection (a) of this section applies to the extent that:

(1) The right to payment or a part thereof under an assigned contract has not been fully earned by performance; or

(2) The right to payment or a part thereof has been fully earned by performance and the account debtor has not received notification of the assignment under G.S. 25-9-406(a).

(c) Rule for individual under other law. — This section is subject to law other than this Article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(d) Inapplicability to health-care-insurance receivable. — This section does not apply to an assignment of a health-care-insurance receivable. (1945, c. 196, s. 6; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-318(2).

2. **Modification of Assigned Contract.** The ability of account debtors and assignors to modify assigned contracts can be important, especially in the case of government contracts and complex contractual arrangements (e.g., construction contracts) with respect to which modifications are customary. Subsections (a) and (b) provide that good-faith modifications of assigned contracts are binding against an assignee to the extent that (i) the right to payment has not been fully earned or (ii) the right to payment has been earned and notification of the assignment has not been given to the account debtor. Former section 9-318(2) did not validate modifications of fully-performed contracts under any circumstances, whether or not notification of the assignment had been given to the account debtor. Subsection (a) protects the interests of assignees by (i) limiting the effectiveness of modifications to those made in good faith, (ii) affording the assignee with corresponding rights under the contract as modified, and (iii) recognizing that the modification may be a breach of the assignor's agreement with the assignee.

3. **Consumer Account Debtors.** Subsection (c) is new. It makes clear that the rules of this section are subject to other law establishing special rules for consumer account debtors.

4. **Account Debtors on Health-Care-Insurance Receivables.** Subsection (d) also is new. It provides that this section does not apply to an assignment of a health-care-insurance receivable. The obligation of an insurer with respect to a health-care-insurance receivable is governed by other law.

§ 25-9-406. (Effective July 1, 2001) Discharge of account debtor; notification of assignment; identification and proof of assignment; restrictions on assignment of accounts, chattel paper, payment intangibles, and promissory notes ineffective.

(a) Discharge of account debtor; effect of notification. — Subject to subsections (b) through (i) of this section, an account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.

(b) When notification ineffective. — Subject to subsection (h) of this section, notification is ineffective under subsection (a) of this section:

(1) If it does not reasonably identify the rights assigned;
(2) To the extent that an agreement between an account debtor and a seller of a payment intangible limits the account debtor's duty to pay a person other than the seller and the limitation is effective under law other than this Article; or
(3) At the option of an account debtor, if the notification notifies the account debtor to make less than the full amount of any installment or other periodic payment to the assignee, even if:
a. Only a portion of the account, chattel paper, or payment intangible has been assigned to that assignee;
b. A portion has been assigned to another assignee; or
c. The account debtor knows that the assignment to that assignee is limited.

(c) Proof of assignment. — Subject to subsection (h) of this section, if requested by the account debtor, an assignee shall seasonably furnish reasonable proof that the assignment has been made. Unless the assignee complies, the account debtor may discharge its obligation by paying the assignor, even if the account debtor has received a notification under subsection (a) of this section.

(d) Term restricting assignment generally ineffective. — Except as otherwise provided in subsection (e) of this section and G.S. 25-2A-303 and G.S. 25-9-407 and subject to subsection (h) of this section, a term in an agreement between an account debtor and an assignor or in a promissory note is ineffective to the extent that it:
(1) Prohibits, restricts, or requires the consent of the account debtor or person obligated on the promissory note to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account, chattel paper, payment intangible, or promissory note; or
(2) Provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account, chattel paper, payment intangible, or promissory note.

(e) Inapplicability of subsection (d) to certain sales. — Subsection (d) of this section does not apply to the sale of a payment intangible or promissory note.

(f) Legal restrictions on assignment generally ineffective. — Except as otherwise provided in G.S. 25-2A-303 and G.S. 25-9-407 and subject to subsections (h) and (i) of this section, a rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, or account debtor to the assignment or transfer of, or creation of a security interest in, an account or chattel paper is ineffective to the extent that the rule of law, statute, or regulation:
(1) Prohibits, restricts, or requires the consent of the government, governmental body or official, or account debtor to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in the account or chattel paper; or
(2) Provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account or chattel paper.

(g) Subdivision (b)(3) not waivable. — Subject to subsection (h) of this section, an account debtor may not waive or vary its option under subdivision (b)(3) of this section.

(h) Rule for individual under other law. — This section is subject to law other than this Article which establishes a different rule for an account debtor

who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(i) Inapplicability. — This section does not apply to an assignment of a health-care-insurance receivable. Subsection (f) of this section does not apply to an assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, a right the transfer of which is prohibited or restricted by any of the following statutes to the extent that the statute is inconsistent with subsection (f) of this section: North Carolina Structured Settlement Act (Article 44B of Chapter 1 of the General Statutes); North Carolina Crime Victims Compensation Act (Chapter 15B of the General Statutes); North Carolina Consumer Finance Act (Article 15 of Chapter 53 of the General Statutes); North Carolina Firemen's and Rescue Squad Workers" Pension Fund (Article 86 of Chapter 58 of the General Statutes); Employment Security Law (Chapter 96 of the General Statutes); North Carolina Workers" Compensation Act (Article 1 of Chapter 97 of the General Statutes); and Programs of Public Assistance (Article 2 of Chapter 108A of the General Statutes).

(j) Section prevails over inconsistent law. — Except to the extent otherwise provided in subsection (i) of this section, this section prevails over any inconsistent provision of an existing or future statute, rule, or regulation of this State unless the provision is contained in a statute of this State, refers expressly to this section, and states that the provision prevails over this section. (1945, c. 196, s. 6; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-318(3), (4).

2. **Account Debtor's Right to Pay Assignor Until Notification.** Subsection (a) provides the general rule concerning an account debtor's right to pay the assignor until the account debtor receives appropriate notification. The revision makes clear that once the account debtor receives the notification, the account debtor cannot discharge its obligation by paying the assignor. It also makes explicit that payment to the assignor before notification, or payment to the assignee after notification, discharges the obligation. No change in meaning from former section 9-318 is intended. Nothing in this section conditions the effectiveness of a notification on the identity of the person who gives it. An account debtor that doubts whether the right to payment has been assigned may avail itself of the procedures in subsection (c). See comment 4.

An effective notification under subsection (a) must be authenticated. This requirement normally could be satisfied by sending notification on the notifying person's letterhead or on a form on which the notifying person's name appears. In each case the printed name would be a symbol adopted by the notifying person for the purpose of identifying the person and adopting the notification. See section 9-102 (defining "authenticate").

Subsection (a) applies only to account debtors on accounts, chattel paper, and payment intangibles. (Section 9-102 defines the term "account debtor" more broadly, to include those obligated on all general intangibles.) Although subsection (a) is more precise than its predecessor, it probably does not change the rule that applied under former article 9. Former section 9-318(3) referred to the account debtor's obligation to "pay," indicating that the subsection was limited to account debtors on accounts, chattel paper, and other payment obligations.

3. **Limitations on Effectiveness of Notification.** Subsection (b) contains some special rules concerning the effectiveness of a notification under subsection (a).

Subsection (b)(1) tracks former section 9-318(3) by making ineffective a notification that does not reasonably identify the rights assigned. A reasonable identification need not identify the right to payment with specificity, but what is reasonable also is not left to the arbitrary decision of the account debtor. If an account debtor has doubt as to the adequacy of a notification, it may not be safe in disregarding the notification unless it notifies the assignee with reasonable promptness as to the respects in which the account debtor considers the notification defective.

Subsection (b)(2), which is new, applies only to sales of payment intangibles. It makes a notification ineffective to the extent that other law gives effect to an agreement between an account debtor and a seller of a payment intangible that limits the account debtor's duty to pay a person other than the seller. Payment

intangibles are substantially less fungible than accounts and chattel paper. In some (e.g., commercial bank loans), account debtors customarily and legitimately expect that they will not be required to pay any person other than the financial institution that has advanced funds.

It has become common in financing transactions to assign interests in a single obligation to more than one assignee. Requiring an account debtor that owes a single obligation to make multiple payments to multiple assignees would be unnecessarily burdensome. Thus, under subsection (b)(3), an account debtor that is notified to pay an assignee less than the full amount of any installment or other periodic payment has the option to treat the notification as ineffective, ignore the notice, and discharge the assigned obligation by paying the assignor. Some account debtors may not realize that the law affords them the right to ignore certain notices of assignment with impunity. By making the notification ineffective at the account debtor's option, subsection (b)(3) permits an account debtor to pay the assignee in accordance with the notice and thereby to satisfy its obligation pro tanto. Under subsection (g), the rights and duties created by subsection (b)(3) cannot be waived or varied.

4. **Proof of Assignment.** Subsection (c) links payment with discharge, as in subsection (a). It follows former section 9-318(3) in referring to the right of the account debtor to pay the assignor if the requested proof of assignment is not seasonably forthcoming. Even if the proof is not forthcoming, the notification of assignment would remain effective, so that, in the absence of reasonable proof of the assignment, the account debtor could discharge the obligation by paying either the assignee or the assignor. Of course, if the assignee did not in fact receive an assignment, the account debtor cannot discharge its obligation by paying a putative assignee who is a stranger. The observations in comment 3 concerning the reasonableness of an identification of a right to payment also apply here. An account debtor that questions the adequacy of proof submitted by an assignor would be well advised to promptly inform the assignor of the defects.

An account debtor may face another problem if its obligation becomes due while the account debtor is awaiting reasonable proof of the assignment that it has requested from the assignee. This section does not excuse the account debtor from timely compliance with its obligations. Consequently, an account debtor that has received a notification of assignment and who has requested reasonable proof of the assignment may discharge its obligation by paying the assignor at the time (or even earlier if reasonably necessary to avoid risk of default) when a payment is due, even if the account debtor has not yet received a response to its request for proof. On the other hand, after requesting reasonable proof of the assignment, an account debtor may not discharge its obligation by paying the assignor substantially in advance of the time that the payment is due unless the assignee has failed to provide the proof seasonably.

5. **Contractual Restrictions on Assignment.** Former section 9-318(4) rendered ineffective an agreement between an account debtor and an assignor which prohibited assignment of an account (whether outright or to secure an obligation) or prohibited a security assignment of a general intangible for the payment of money due or to become due. Subsection (d) essentially follows former section 9-318(4), but expands the rule of free assignability to chattel paper (subject to sections 2A-303 and 9-407) and promissory notes and explicitly overrides both restrictions and prohibitions of assignment. The policies underlying the ineffectiveness of contractual restrictions under this section build on common-law developments that essentially have eliminated legal restrictions on assignments of rights to payment as security and other assignments of rights to payment such as accounts and chattel paper. Any that might linger for accounts and chattel paper are addressed by new subsection (f). See comment 6.

Former section 9-318(4) did not apply to a sale of a payment intangible (as described in the former provision, "a general intangible for money due or to become due") but did apply to an assignment of a payment intangible for security. Subsection (e) continues this approach and also makes subsection (d) inapplicable to sales of promissory notes. Section 9-408 addresses anti-assignment clauses with respect to sales of payment intangibles and promissory notes.

Like former section 9-318(4), subsection (d) provides that anti-assignment clauses are "ineffective." The quoted term means that the clause is of no effect whatsoever; the clause does not prevent the assignment from taking effect between the parties and the prohibited assignment does not constitute a default under the agreement between the account debtor and assignor. However, subsection (d) does not override terms that do not directly prohibit, restrict, or require consent to an assignment but which might, nonetheless, present a practical impairment of the assignment. Properly read, however, subsection (d) reaches only covenants that prohibit, restrict, or require consents to assignments; it does not override all terms that might "impair" an assignment in fact.

Example: Buyer enters into an agreement with Seller to buy equipment that Seller is to manufacture according to Buyer's specifications. Buyer agrees to make a series of prepayments during the construction process. In re-

turn, Seller agrees to set aside the prepaid funds in a special account and to use the funds solely for the manufacture of the designated equipment. Seller also agrees that it will not assign any of its rights under the sale agreement with Buyer. Nevertheless, Seller grants to Secured Party a security interest in its accounts. Seller's anti-assignment agreement is ineffective under subsection (d); its agreement concerning the use of prepaid funds, which is not a restriction or prohibition on assignment, is not. However, if Secured Party notifies Buyer to make all future payments directly to Secured Party, Buyer will be obliged to do so under subsection (a) if it wishes the payments to discharge its obligation. Unless Secured Party releases the funds to Seller so that Seller can comply with its use-of-funds covenant, Seller will be in breach of that covenant.

In the example, there appears to be a plausible business purpose for the use-of-funds covenant. However, a court may conclude that a covenant with no business purpose other than imposing an impediment to an assignment actually is a direct restriction that is rendered ineffective by subsection (d).

6. **Legal Restrictions on Assignment.** Former section 9-318(4), like subsection (d) of this section, addressed only contractual restrictions on assignment. The former section was grounded on the reality that legal, as opposed to contractual, restrictions on assignments of rights to payment had largely disappeared. New subsection (f) codifies this principle of free assignability for accounts and chattel paper. For the most part the discussion of contractual restrictions in comment 5 applies as well to legal restrictions rendered ineffective under subsection (f).

7. **Multiple Assignments.** This section, like former section 9-318, is not a complete codification of the law of assignments of rights to payment. In particular, it is silent concerning many of the ramifications for an account debtor in cases of multiple assignments of the same right. For example, an assignor might assign the same receivable to multiple assignees (which assignments could be either inadvertent or wrongful). Or, the assignor could assign the receivable to assignee-1, which then might reassign it to assignee-2, and so forth. The rights and duties of an account debtor in the face of multiple assignments and in other circumstances not resolved in the statutory text are left to the common-law rules. See, e.g., Restatement (2d), Contracts sections 338(3) and 339. The failure of former article 9 to codify these rules does not appear to have caused problems.

8. **Consumer Account Debtors.** Subsection (h) is new. It makes clear that the rules of this section are subject to other law establishing special rules for consumer account debtors.

9. **Account Debtors on Health-Care-Insurance Receivables.** Subsection (i) also is new. The obligation of an insurer with respect to a health-care-insurance receivable is governed by other law. Section 9-408 addresses contractual and legal restrictions on the assignment of a health-care-insurance receivable.

§ 25-9-407. (Effective July 1, 2001) Restrictions on creation or enforcement of security interest in leasehold interest or in lessor's residual interest.

(a) Term restricting assignment generally ineffective. — Except as otherwise provided in subsection (b) of this section, a term in a lease agreement is ineffective to the extent that it:

(1) Prohibits, restricts, or requires the consent of a party to the lease to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, an interest of a party under the lease contract or in the lessor's residual interest in the goods; or

(2) Provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the lease.

(b) Effectiveness of certain terms. — Except as otherwise provided in G.S. 25-2A-303(7), a term described in subdivision (a)(2) of this section is effective to the extent that there is:

(1) A transfer by the lessee of the lessee's right of possession or use of the goods in violation of the term; or

(2) A delegation of a material performance of either party to the lease contract in violation of the term.

(c) Security interest not material impairment. — The creation, attachment, perfection, or enforcement of a security interest in the lessor's interest under the lease contract or the lessor's residual interest in the goods is not a transfer that materially impairs the lessee's prospect of obtaining return performance or materially changes the duty of or materially increases the burden or risk imposed on the lessee within the purview of G.S. 25-2A-303(4) unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the lessor. (1993, c. 463, s. 1; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Section 2A-303.

2. **Restrictions on Assignment Generally Ineffective.** Under subsection (a), as under former section 2A-303(3), a term in a lease agreement which prohibits or restricts the creation of a security interest generally is ineffective. This reflects the general policy of section 9-406(d) and former section 9-318(4). This section has been conformed in several respects to analogous provisions in sections 9-406, 9-408, and 9-409, including the substitution of "ineffective" for "not enforceable" and the substitution of "assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest" for "creation or enforcement of a security interest."

3. **Exceptions for Certain Transfers and Delegations.** Subsection (b) provides exceptions to the general ineffectiveness of restrictions under subsection (a). A term that otherwise is ineffective under subsection (a)(2) is effective to the extent that a lessee transfers its right to possession and use of goods or if either party delegates material performance of the lease contract in violation of the term. However, under subsection (c), as under former section 2A-303(3), a lessor's creation of a security interest in its interest in a lease contract or its residual interest in the leased goods is not a material impairment under section 2A-303(4) (former section 2A-303(5)), absent an actual delegation of the lessor's material performance. The terms of the lease contract determine whether the lessor, in fact, has any remaining obligations to perform. If it does, it is then necessary to determine whether there has been an actual delegation of "material performance." See section 2A-303, comments 3 and 4.

§ 25-9-408. (Effective July 1, 2001) Restrictions on assignment of promissory notes, health-care-insurance receivables, and certain general intangibles ineffective.

(a) Term restricting assignment generally ineffective. — Except as otherwise provided in subsection (b) of this section, a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health-care-insurance receivable or a general intangible, including a contract, permit, license, or franchise, and which term prohibits, restricts, or requires the consent of the person obligated on the promissory note or the account debtor to, the assignment or transfer of, or creation, attachment, or perfection of a security interest in, the promissory note, health-care-insurance receivable, or general intangible, is ineffective to the extent that the term:

(1) Would impair the creation, attachment, or perfection of a security interest; or

(2) Provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health-care-insurance receivable, or general intangible.

(b) Applicability of subsection (a) to sales of certain rights to payment. — Subsection (a) of this section applies to a security interest in a payment intangible or promissory note only if the security interest arises out of a sale of the payment intangible or promissory note.

(c) Legal restrictions on assignment generally ineffective. — A rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a

government, governmental body or official, person obligated on a promissory note, or account debtor to the assignment or transfer of, or creation of a security interest in, a promissory note, health-care-insurance receivable, or general intangible, including a contract, permit, license, or franchise between an account debtor and a debtor, is ineffective to the extent that the rule of law, statute, or regulation:

(1) Would impair the creation, attachment, or perfection of a security interest; or

(2) Provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health-care-insurance receivable, or general intangible.

(d) Limitation on ineffectiveness under subsections (a) and (c). — To the extent that a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health-care-insurance receivable or general intangible or a rule of law, statute, or regulation described in subsection (c) of this section would be effective under law other than this Article but is ineffective under subsection (a) or (c) of this section, the creation, attachment, or perfection of a security interest in the promissory note, health-care-insurance receivable, or general intangible:

(1) Is not enforceable against the person obligated on the promissory note or the account debtor;

(2) Does not impose a duty or obligation on the person obligated on the promissory note or the account debtor;

(3) Does not require the person obligated on the promissory note or the account debtor to recognize the security interest, pay or render performance to the secured party, or accept payment or performance from the secured party;

(4) Does not entitle the secured party to use or assign the debtor's rights under the promissory note, health-care-insurance receivable, or general intangible, including any related information or materials furnished to the debtor in the transaction giving rise to the promissory note, health-care-insurance receivable, or general intangible;

(5) Does not entitle the secured party to use, assign, possess, or have access to any trade secrets or confidential information of the person obligated on the promissory note or the account debtor; and

(6) Does not entitle the secured party to enforce the security interest in the promissory note, health-care-insurance receivable, or general intangible.

(e) Section prevails over inconsistent law. — Except to the extent otherwise provided in subsection (f) of this section, this section prevails over any inconsistent provision of an existing or future statute, rule, or regulation of this State unless the provision is contained in a statute of this State, refers expressly to this section, and states that the provision prevails over this section.

(f) Inapplicability. — Subsection (c) of this section does not apply to an assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, a right the transfer of which is prohibited or restricted by any of the following statutes to the extent that the statute is inconsistent with subsection (c) of this section: North Carolina Structured Settlement Act (Article 44B of Chapter 1 of the General Statutes); North Carolina Crime Victims Compensation Act (Chapter 15B of the General Statutes); North Carolina Consumer Finance Act (Article 15 of Chapter 53 of the General Statutes); North Carolina Firemen's and Rescue Squad Workers" Pension Fund (Article 86 of Chapter 58 of the General Statutes); Employment

Security Law (Chapter 96 of the General Statutes); North Carolina Workers' Compensation Act (Article 1 of Chapter 97 of the General Statutes); and Programs of Public Assistance (Article 2 of Chapter 108A of the General Statutes). (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Free Assignability.** This section makes ineffective any attempt to restrict the assignment of a general intangible, health-care-insurance receivable, or promissory note, whether the restriction appears in the terms of a promissory note or the agreement between an account debtor and a debtor (subsection (a)) or in a rule of law, including a statute or governmental rule or regulation (subsection (c)). This result allows the creation, attachment, and perfection of a security interest in a general intangible, such as an agreement for the nonexclusive license of software, as well as sales of certain receivables, such as a health-care-insurance receivable (which is an "account"), payment intangible, or promissory note, without giving rise to a default or breach by the assignor or from triggering a remedy of the account debtor or person obligated on a promissory note. This enhances the ability of certain debtors to obtain credit. On the other hand, subsection (d) protects the other party—the "account debtor" on a general intangible or the person obligated on a promissory note—from adverse effects arising from the security interest. It leaves the account debtor's or obligated person's rights and obligations unaffected in all material respects if a restriction rendered ineffective by subsection (a) or (c) would be effective under law other than article 9.

Example 1: A term of an agreement for the nonexclusive license of computer software prohibits the licensee from assigning any of its rights as licensee with respect to the software. The agreement also provides that an attempt to assign rights in violation of the restriction is a default entitling the licensor to terminate the license agreement. The licensee, as debtor, grants to a secured party a security interest in its rights under the license and in the computers in which it is installed. Under this section, the term prohibiting assignment and providing for a default upon an attempted assignment is ineffective to prevent the creation, attachment, or perfection of the security interest or entitle the licensor to terminate the license agreement. However, under subsection (d), the secured party (absent the licensor's agreement) is not entitled to enforce the license or to use, assign, or otherwise enjoy the benefits of the licensed software, and the licensor need not recognize (or pay any attention to) the secured party. Even if the secured party takes possession of the computers on the debtor's default, the debtor would remain free to remove the software from the computer, load it on another computer, and continue to use it, if the license so permits. If the debtor does not remove the software, other law may require the secured party to remove it before disposing of the computer. Disposition of the software with the computer could violate an effective prohibition on enforcement of the security interest. See subsection (d).

3. **Nature of Debtor's Interest.** Neither this section nor any other provision of this article determines whether a debtor has a property interest. The definition of the term "security interest" provides that it is an "interest in personal property." See section 1-201(37). Ordinarily, a debtor can create a security interest in collateral only if it has "rights in the collateral." See section 9-203(b). Other law determines whether a debtor has a property interest ("rights in the collateral") and the nature of that interest. For example, the nonexclusive license addressed in Example 1 may not create any property interest whatsoever in the intellectual property (e.g., copyright) that underlies the license and that effectively enables the licensor to grant the license. The debtor's property interest may be confined solely to its interest in the promises made by the licensor in the license agreement (e.g., a promise not to sue the debtor for its use of the software).

4. **Scope: Sales of Payment Intangibles and Other General Intangibles; Assignments Unaffected by this Section.** Subsections (a) and (c) render ineffective restrictions on assignments only "to the extent" that the assignments restrict the "creation, attachment, or perfection of a security interest," including sales of payment intangibles and promissory notes. This section does not render ineffective a restriction on an assignment that does not create a security interest. For example, if the debtor in comment 2, Example 1, purported to assign the license to another entity that would use the computer software itself, other law would govern the effectiveness of the anti-assignment provisions.

Subsection (a) applies to a security interest in payment intangibles only if the security interest arises out of sale of the payment intangibles. Contractual restrictions directed to security interests in payment intangibles which secure an obligation are subject to section 9-406(d). Subsection (a) also deals with sales of

promissory notes which also create security interests. See section 9-109(a). Subsection (c) deals with all security interests in payment intangibles or promissory notes, whether or not arising out of a sale.

Subsection (a) does not render ineffective any term, and subsection (c) does not render ineffective any law, statute, or regulation, that restricts outright sales of general intangibles other than payment intangibles. They deal only with restrictions on security interests. The only sales of general intangibles that create security interests are sales of payment intangibles.

5. **Terminology: "Account Debtor"; "Person Obligated on a Promissory Note."** This section uses the term "account debtor" as it is defined in section 9-102. The term refers to the party, other than the debtor, to a general intangible, including a permit, license, franchise, or the like, and the person obligated on a health-care-insurance receivable, which is a type of account. The definition of "account debtor" does not limit the term to persons who are obligated to pay under a general intangible. Rather, the term includes all persons who are obligated on a general intangible, including those who are obligated to render performance in exchange for payment. In some cases, e.g., the creation of a security interest in a franchisee's rights under a franchise agreement, the principal payment obligation may be owed by the debtor (franchisee) to the account debtor (franchisor). This section also refers to a "person obligated on a promissory note," inasmuch as those persons do not fall within the definition of "account debtor."

Example 2: A licensor and licensee enter into an agreement for the nonexclusive license of computer software. The licensee's interest in the license agreement is a general intangible. If the licensee grants to a secured party a security interest in its rights under the license agreement, the licensee is the debtor and the licensor is the account debtor. On the other hand, if the licensor grants to a secured party a security interest in its right to payment (an account) under the license agreement, the licensor is the debtor and the licensee is the account debtor. (This section applies to the security interest in the general intangible but not to the security interest in the account, which is not a health-care-insurance receivable.)

6. **Effects on Account Debtors and Persons Obligated on Promissory Notes.** Subsections (a) and (c) affect two classes of persons. These subsections affect account debtors on general intangibles and health-care-insurance receivables and persons obligated on promissory notes. Subsection (c) also affects governmental entities that enact or determine rules of law. However, subsection (d) ensures that these affected persons are not affected adversely. That provision removes any burdens or adverse effects on these persons for which any rational basis could exist to restrict the effectiveness of an assignment or to exercise any remedies. For this reason, the effects of subsections (a) and (c) are immaterial insofar as those persons are concerned.

Subsection (a) does not override terms that do not directly prohibit, restrict, or require consent to an assignment but which might, nonetheless, present a practical impairment of the assignment. Properly read, however, this section, like section 9-406(d), reaches only covenants that prohibit, restrict, or require consents to assignments; it does not override all terms that might "impair" an assignment in fact.

Example 3: A licensor and licensee enter into an agreement for the nonexclusive license of valuable business software. The license agreement includes terms (i) prohibiting the licensee from assigning its rights under the license, (ii) prohibiting the licensee from disclosing to anyone certain information relating to the software and the licensor, and (iii) deeming prohibited assignments and prohibited disclosures to be defaults. The licensee wishes to obtain financing and, in exchange, is willing to grant a security interest in its rights under the license agreement. The secured party, reasonably, refuses to extend credit unless the licensee discloses the information that it is prohibited from disclosing under the license agreement. The secured party cannot determine the value of the proposed collateral in the absence of this information. Under this section, the terms of the license prohibiting the assignment (grant of the security interest) and making the assignment a default are ineffective. However, the nondisclosure covenant is not a term that prohibits the assignment or creation of a security interest in the license. Consequently, the nondisclosure term is enforceable even though the practical effect is to restrict the licensee's ability to use its rights under the license agreement as collateral.

The nondisclosure term also would be effective in the factual setting of comment 2, Example 1. If the secured party's possession of the computers loaded with software would put it in a position to discover confidential information that the debtor was prohibited from disclosing, the licensor should be entitled to enforce its rights against the secured party. Moreover, the licensor could have required the debtor to obtain the secured party's agreement that (i) it would immediately return all copies of software loaded on the computers and that (ii) it would not examine or otherwise acquire any information contained in the software. This section does not prevent an account debtor from protecting by agreement its independent interests that are unrelated to the "creation, attachment, or perfection" of a security interest. In Example

1, moreover, the secured party is not in possession of copies of software by virtue of its security interest or in connection with enforcing its security interest in the debtor's license of the software. Its possession is incidental to its possession of the computers, in which it has a security interest. Enforcing against the secured party a restriction relating to the software in no way interferes with its security interest in the computers.

7. **Effect in Assignor's Bankruptcy.** This section could have a substantial effect if the assignor enters bankruptcy. Roughly speaking, Bankruptcy Code section 552 invalidates security interests in property acquired after a bankruptcy petition is filed, except to the extent that the postpetition property constitutes proceeds of prepetition collateral.

Example 4: A debtor is the owner of a cable television franchise that, under applicable law, cannot be assigned without the consent of the municipal franchisor. A lender wishes to extend credit to the debtor, provided that the credit is secured by the debtor's "going business" value. To secure the loan, the debtor grants a security interest in all its existing and after-acquired property. The franchise represents the principal value of the business. The municipality refuses to consent to any assignment for collateral purposes. If other law were given effect, the security interest in the franchise would not attach; and if the debtor were to enter bankruptcy and sell the business, the secured party would receive but a fraction of the business's value. Under this section, however, the security interest would attach to the franchise. As a result, the security interest would attach to the proceeds of any sale of the franchise while a bankruptcy is pending. However, this section would protect the interests of the municipality by preventing the secured party from enforcing its security interest to the detriment of the municipality.

8. **Effect Outside of Bankruptcy.** The principal effects of this section will take place outside of bankruptcy. Compared to the relatively few debtors that enter bankruptcy, there are many more that do not. By making available previously unavailable property as collateral, this section should enable debtors to obtain additional credit. For purposes of determining whether to extend credit, under some circumstances a secured party may ascribe value to the collateral to which its security interest has attached, even if this section precludes the secured party from enforcing the security interest without the agreement of the account debtor or person obligated on the promissory note. This may be the case where the secured party sees a likelihood of obtaining that agreement in the future. This may also be the case where the secured party anticipates that the collateral will give rise to a type of proceeds as to which this section would not apply.

Example 5: Under the facts of Example 4, the debtor does not enter bankruptcy. Perhaps in exchange for a fee, the municipality agrees that the debtor may transfer the franchise to a buyer. As consideration for the transfer, the debtor receives from the buyer its check for part of the purchase price and its promissory note for the balance. The security interest attaches to the check and promissory note as proceeds. See section 9-315(a)(1)(B). This section does not apply to the security interest in the check, which is not a promissory note, health-care-insurance receivable, or general intangible. Nor does it apply to the security interest in the promissory note, inasmuch as it was not sold to the secured party.

9. **Contrary Federal Law.** This section does not override federal law to the contrary. However, it does reflect an important policy judgment that should provide a template for future federal law reforms.

§ 25-9-409. (Effective July 1, 2001) Restrictions on assignment of letter-of-credit rights ineffective.

(a) Term or law restricting assignment generally ineffective. — A term in a letter of credit or a rule of law, statute, regulation, custom, or practice applicable to the letter of credit which prohibits, restricts, or requires the consent of an applicant, issuer, or nominated person to a beneficiary's assignment of or creation of a security interest in a letter-of-credit right is ineffective to the extent that the term or rule of law, statute, regulation, custom, or practice:

(1) Would impair the creation, attachment, or perfection of a security interest in the letter-of-credit right; or

(2) Provides that the assignment or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the letter-of-credit right.

(b) Limitation on ineffectiveness under subsection (a). — To the extent that a term in a letter of credit is ineffective under subsection (a) of this section but would be effective under law other than this Article or a custom or practice applicable to the letter of credit, to the transfer of a right to draw or otherwise demand performance under the letter of credit, or to the assignment of a right to proceeds of the letter of credit, the creation, attachment, or perfection of a security interest in the letter-of-credit right:

(1) Is not enforceable against the applicant, issuer, nominated person, or transferee beneficiary;

(2) Imposes no duties or obligations on the applicant, issuer, nominated person, or transferee beneficiary; and

(3) Does not require the applicant, issuer, nominated person, or transferee beneficiary to recognize the security interest, pay or render performance to the secured party, or accept payment or other performance from the secured party. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Purpose and Relevance.** This section, patterned on section 9-408, limits the effectiveness of attempts to restrict the creation, attachment, or perfection of a security interest in letter-of-credit rights, whether the restriction appears in the letter of credit or a rule of law, custom, or practice applicable to the letter of credit. It protects the creation, attachment, and perfection of a security interest while preventing these events from giving rise to a default or breach by the assignor or from triggering a remedy or defense of the issuer or other person obligated on a letter of credit. Letter-of-credit rights are a type of supporting obligation. See section 9-102. Under sections 9-203 and 9-308, a security interest in a supporting obligation attaches and is perfected automatically if the security interest in the supported obligation attaches and is perfected. See section 9-107, comment 5. The automatic attachment and perfection under article 9 would be anomalous or misleading if, under other law (e.g., article 5), a restriction on transfer or assignment were effective to block attachment and perfection.

3. **Relationship to Letter-of-Credit Law.** Although restrictions on an assignment of a letter of credit are ineffective to prevent creation, attachment, and perfection of a security interest, subsection (b) protects the issuer and other parties from any adverse effects of the security interest by preserving letter-of-credit law and practice that limits the right of a beneficiary to transfer its right to draw or otherwise demand performance (section 5-112) and limits the obligation of an issuer or nominated person to recognize a beneficiary's assignment of letter-of-credit proceeds (section 5-114). Thus, this section's treatment of letter-of-credit rights differs from this article's treatment of instruments and investment property. Moreover, under section 9-109(c)(4), this article does not apply to the extent that the rights of a transferee beneficiary or nominated person are independent and superior under section 5-114, thereby preserving the "independence principle" of letter-of-credit law.

PART 5

FILING.

SUBPART 1. Filing Office; Contents and Effectiveness of Financing Statement.

§ 25-9-501. (Effective July 1, 2001) Filing offices.

(a) Filing offices. — Except as otherwise provided in subsection (b) of this section, if the local law of this State governs perfection of a security interest or agricultural lien, the office in which to file a financing statement to perfect the security interest or agricultural lien is:

(1) The office designated for the filing or recording of a record of a mortgage on the related real property, if:
a. The collateral is as-extracted collateral or timber to be cut; or
b. The financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures; or
(2) The office of the Secretary of State, in all other cases, including a case in which the collateral is goods that are or are to become fixtures and the financing statement is not filed as a fixture filing.

(b) Filing office for transmitting utilities. — The office in which to file a financing statement to perfect a security interest in collateral, including fixtures, of a transmitting utility is the office of the Secretary of State. The financing statement also constitutes a fixture filing as to the collateral indicated in the financing statement which is or is to become fixtures. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C.S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, s. 3; c. 196, s. 2; 1955, c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 1983 (Reg. Sess., 1984), c. 1116, ss. 41, 42; 1989, c. 523, s. 3; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Derived from former section 9-401.

2. **Where to File.** Subsection (a) indicates where in a given state a financing statement is to be filed. Former article 9 afforded each state three alternative approaches, depending on the extent to which the state desires central filing (usually with the Secretary of State), local filing (usually with a county office), or both. As comment 1 to former section 9-401 observed, "The principal advantage of state-wide filing is ease of access to the credit information which the files exist to provide. Consider for example the national distributor who wishes to have current information about the credit standing of the thousands of persons he sells to on credit. The more completely the files are centralized on a state-wide basis, the easier and cheaper it becomes to procure credit information; the more the files are scattered in local filing units, the more burdensome and costly." Local filing increases the net costs of secured transactions also by increasing uncertainty and the number of required filings. Any benefit that local filing may have had in the 1950's is now insubstantial. Accordingly, this article dictates central filing for most situations, while retaining local filing for real-estate-related collateral and special filing provisions for transmitting utilities.

3. **Minerals and Timber.** Under subsection (a)(1), a filing in the office where a record of a mortgage on the related real property would be filed will perfect a security interest in as-extracted collateral. Inasmuch as the security interest does not attach until extraction, the filing continues to be effective after extraction. A different result occurs with respect to timber to be cut, however. Unlike as-extracted collateral, standing timber may be goods before it is cut. See section 9-102 (defining "goods"). Once cut, however, it is no longer timber to be cut, and the filing in the real-property-mortgage office ceases to be effective. The timber then becomes ordinary goods, and filing in the office specified in subsection (a)(2) is necessary for perfection. Note also that after the timber is cut the law of the debtor's location, not the location of the timber, governs perfection under section 9-301.

4. **Fixtures.** There are two ways in which a secured party may file a financing statement to perfect a security interest in goods that are or are to become fixtures. It may file in the article 9 records, as with most other goods. See subsection (a)(2). Or it may file the financing statement as a "fixture filing," defined in section 9-102, in the office in which a record of a mortgage on the related real property would be filed. See subsection(a)(1)(B).

5. **Transmitting Utilities.** The usual filing rules do not apply well for a transmitting utility (defined in section 9-102). Many pre-UCC statutes provided special filing rules for railroads and in some cases for other public utilities, to avoid the requirements for filing with legal descriptions in every county in which such debtors had property. Former section 9-401(5) recreated and broadened these provisions, and subsection (b) follows this approach. The nature of the debtor will inform persons searching the record as to where to make a search.

§ 25-9-502. (Effective July 1, 2001) Contents of financing statement; record of mortgage as financing statement; time of filing financing statement.

(a) Sufficiency of financing statement. — Subject to subsection (b) of this section, a financing statement is sufficient only if it:

(1) Provides the name of the debtor;

(2) Provides the name of the secured party or a representative of the secured party; and

(3) Indicates the collateral covered by the financing statement.

(b) Real-property-related financing statements. — Except as otherwise provided in G.S. 25-9-501(b), to be sufficient, a financing statement that covers as-extracted collateral or timber to be cut, or which is filed as a fixture filing and covers goods that are or are to become fixtures, must satisfy subsection (a) of this section and also:

(1) Indicate that it covers this type of collateral;

(2) Indicate that it is to be filed in the real property records;

(3) Provide a description of the real property to which the collateral is related; and

(4) If the debtor does not have an interest of record in the real property, provide the name of a record owner.

(c) Record of mortgage as financing statement. — A record of a mortgage is effective, from the date of recording, as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut only if:

(1) The record indicates the goods or accounts that it covers;

(2) The goods are or are to become fixtures related to the real property described in the record or the collateral is related to the real property described in the record and is as-extracted collateral or timber to be cut;

(3) The record satisfies the requirements for a financing statement in this section other than an indication that it is to be filed in the real property records; and

(4) The record is duly recorded.

(d) Filing before security agreement or attachment. — A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. (1899, cc. 17, 247; 1901, cc. 329, 704; 1903, c. 489; 1905, cc. 226, 319; Rev., s. 2055; 1907, c. 843; 1909, c. 532; P.L. 1913, c. 49; C.S., s. 2490; 1925, c. 285, s. 1; 1931, c. 196; 1933, c. 101, s. 6; 1945, c. 182, s. 2; c. 196, s. 2; 1951, c. 926, s. 1; 1955, c. 386, s. 1; 1957, c. 564; 1961, c. 574; 1965, c. 700, s. 1; 1969, c. 1115, s. 1; 1975, c. 862, s. 7; 1983 (Reg. Sess., 1984), c. 1116, s. 43; 1989, c. 523, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-402(1), (5), (6).

2. **"Notice Filing."** This section adopts the system of "notice filing." What is required to be filed is not, as under pre-UCC chattel mortgage and conditional sales acts, the security agreement itself, but only a simple record providing a limited amount of information (financing statement). The financing statement may be filed before the security interest attaches or thereafter. See subsection (d). See also section 9-308(a) (contemplating situations in which a financing statement is filed before a security interest attaches).

The notice itself indicates merely that a person may have a security interest in the collateral indicated. Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs. Section 9-210 provides a statutory procedure under which the secured party, at the debtor's request, may be required to make disclosure. However, in many cases, information may be forthcoming without the need to resort to the formalities of that section.

Notice filing has proved to be of great use in financing transactions involving inventory, accounts, and chattel paper, because it obviates

the necessity of refiling on each of a series of transactions in a continuing arrangement under which the collateral changes from day to day. However, even in the case of filings that do not necessarily involve a series of transactions (e.g., a loan secured by a single item of equipment), a financing statement is effective to encompass transactions under a security agreement not in existence and not contemplated at the time the notice was filed, if the indication of collateral in the financing statement is sufficient to cover the collateral concerned. Similarly, a financing statement is effective to cover after-acquired property of the type indicated and to perfect with respect to future advances under security agreements, regardless of whether after-acquired property or future advances are mentioned in the financing statement and even if not in the contemplation of the parties at the time the financing statement was authorized to be filed.

3. **Debtor's Signature; Required Authorization.** Subsection (a) sets forth the simple formal requirements for an effective financing statement. These requirements are: (1) The debtor's name; (2) the name of a secured party or representative of the secured party; and (3) an indication of the collateral.

Whereas former section 9-402(1) required the debtor's signature to appear on a financing statement, this article contains no signature requirement. The elimination of the signature requirement facilitates paperless filing. (However, as PEB Commentary No. 15 indicates, a paperless financing statement was sufficient under former article 9.) Elimination of the signature requirement also makes the exceptions provided by former section 9-402(2) unnecessary.

The fact that this article does not require that an authenticating symbol be contained in the public record does not mean that all filings are authorized. Rather, section 9-509(a) entitles a person to file an initial financing statement, an amendment that adds collateral, or an amendment that adds a debtor only if the debtor authorizes the filing, and section 9-509(d) entitles a person other than the debtor to file a termination statement only if the secured party of record authorizes the filing. Of course, a filing has legal effect only to the extent it is authorized. See section 9-510.

Law other than this article, including the law with respect to ratification of past acts, generally determines whether a person has the requisite authority to file a record under this article. See section 1-103. However, under section 9-509(b), the debtor's authentication of (or becoming bound by) a security agreement ipso facto constitutes the debtor's authorization of the filing of a financing statement covering the collateral described in the security agreement. The secured party need not obtain a separate authorization.

Section 9-625 provides a remedy for unauthorized filings. Making an unauthorized filing also may give rise to civil or criminal liability under other law. In addition, this article contains provisions that assist in the discovery of unauthorized filings and the amelioration of their practical effect. For example, section 9-518 provides a procedure whereby a person may add to the public record a statement to the effect that a financing statement indexed under the person's name was wrongfully filed, and section 9-509(d) entitles any person to file a termination statement if the secured party of record fails to comply with its obligation to file or send one to the debtor, the debtor authorizes the filing, and the termination statement so indicates. However, the filing office is neither obligated nor permitted to inquire into issues of authorization. See section 9-520(a).

4. **Certain Other Requirements.** Subsection (a) deletes other provisions of former section 9-402(1) because they seem unwise (real-property description for financing statements covering crops), unnecessary (adequacy of copies of financing statements), or both (copy of security agreement as financing statement). In addition, the filing office must reject a financing statement lacking certain other information formerly required as a condition of perfection (e.g., an address for the debtor or secured party). See sections 9-516(b) and 9-520(a). However, if the filing office accepts the record, it is effective nevertheless. See section 9-520(c).

5. **Real-Property-Related Filings.** Subsection (b) contains the requirements for financing statements filed as fixture filings and financing statements covering timber to be cut or minerals and minerals-related accounts constituting as-extracted collateral. A description of the related real property must be sufficient to reasonably identify it. See section 9-108. This formulation rejects the view that the real property description must be by metes and bounds, or otherwise conforming to traditional real-property practice in conveyancing, but, of course, the incorporation of such a description by reference to the recording data of a deed, mortgage, or other instrument containing the description should suffice under the most stringent standards. The proper test is that a description of real property must be sufficient so that the financing statement will fit into the real property search system and be found by a real property searcher. Under the optional language in subsection (b)(3), the test of adequacy of the description is whether it would be adequate in a record of a mortgage of the real property. As suggested in the legislative note, more detail may be required if there is a tract indexing system or a land registration system.

If the debtor does not have an interest of

record in the real property, a real-property-related financing statement must show the name of a record owner, and section 9-519(d) requires the financing statement to be indexed in the name of that owner. This requirement also enables financing statements covering as-extracted collateral or timber to be cut and financing statements filed as fixture filings to fit into the real property search system.

6. **Record of Mortgage Effective as Financing Statement.** Subsection (c) explains when a record of a mortgage is effective as a financing statement filed as a fixture filing or to cover timber to be cut or as-extracted collateral. Use of the term "record of a mortgage" recognizes that in some systems the record actually filed is not the record pursuant to which a mortgage is created. Moreover, "mortgage" is defined in section 9-102 as an "interest in real property," not as the record that creates or evidences the mortgage or the record that is filed in the public recording systems. A record creating a mortgage may also create a security interest with respect to fixtures (or other goods) in conformity with this article. A single agreement creating a mortgage on real property and a security interest in chattels is common and useful for certain purposes. Under subsection (c), the recording of the record evidencing a mortgage (if it satisfies the requirements for a financing statement) constitutes the filing of a financing statement as to the fixtures (but not, of course, as to other goods). Section 9-515(g) makes the usual five-year maximum life for financing statements inapplicable to mortgages that operate as fixture filings under section 9-502(c). Such mortgages are effective for the duration of the real property recording.

Of course, if a combined mortgage covers chattels that are not fixtures, a regular financing statement filing is necessary with respect to the chattels, and subsection (c) is inapplicable. Likewise, a financing statement filed as a "fixture filing" is not effective to perfect a security interest in personal property other than fixtures.

In some cases it may be difficult to determine whether goods are or will become fixtures. Nothing in this part prohibits the filing of a "precautionary" fixture filing, which would provide protection in the event goods are determined to be fixtures. The fact of filing should not be a factor in the determining whether goods are fixtures. Cf. section 9-505(b).

§ 25-9-503. (Effective July 1, 2001) Name of debtor and secured party.

(a) Sufficiency of debtor's name. — A financing statement sufficiently provides the name of the debtor:

(1) If the debtor is a registered organization, only if the financing statement provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized;

(2) If the debtor is a decedent's estate, only if the financing statement provides the name of the decedent and indicates that the debtor is an estate;

(3) If the debtor is a trust or a trustee acting with respect to property held in trust, only if the financing statement:

a. Provides the name specified for the trust in its organic documents or, if no name is specified, provides the name of the settlor and additional information sufficient to distinguish the debtor from other trusts having one or more of the same settlors; and

b. Indicates, in the debtor's name or otherwise, that the debtor is a trust or is a trustee acting with respect to property held in trust; and

(4) In other cases:

a. If the debtor has a name, only if it provides the individual or organizational name of the debtor; and

b. If the debtor does not have a name, only if it provides the names of the partners, members, associates, or other persons comprising the debtor.

(b) Additional debtor-related information. — A financing statement that provides the name of the debtor in accordance with subsection (a) of this section is not rendered ineffective by the absence of:

(1) A trade name or other name of the debtor; or

(2) Unless required under sub-subdivision (a)(4)b. of this section, names of partners, members, associates, or other persons comprising the debtor.

(c) Debtor's trade name insufficient. — A financing statement that provides only the debtor's trade name does not sufficiently provide the name of the debtor.

(d) Representative capacity. — Failure to indicate the representative capacity of a secured party or representative of a secured party does not affect the sufficiency of a financing statement.

(e) Multiple debtors and secured parties. — A financing statement may provide the name of more than one debtor and the name of more than one secured party. (1899, cc. 17, 247; 1901, cc. 329, 704; 1903, c. 489; 1905, cc. 226, 319; Rev., s. 2055; 1907, c. 843; 1909, c. 532; P.L. 1913, c. 49; C.S., s. 2490; 1925, c. 285, s. 1; 1931, c. 196; 1933, c. 101, s. 6; 1945, c. 182, s. 2; c. 196, s. 2; 1951, c. 926, s. 1; 1955, c. 386, s. 1; 1957, c. 564; 1961, c. 574; 1965, c. 700, s. 1; 1969, c. 1115, s. 1; 1975, c. 862, s. 7; 1983 (Reg. Sess., 1984), c. 1116, s. 43; 1989, c. 523, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Subsections (a)(4)(A), (b), and (c) derive from former section 9-402(7); otherwise, new.

2. **Debtor's Name.** The requirement that a financing statement provide the debtor's name is particularly important. Financing statements are indexed under the name of the debtor, and those who wish to find financing statements search for them under the debtor's name. Subsection (a) explains what the debtor's name is for purposes of a financing statement. If the debtor is a "registered organization" (defined in section 9-102 so as to ordinarily include corporations, limited partnerships, and limited liability companies), then the debtor's name is the name shown on the public records of the debtor's "jurisdiction of organization" (also defined in section 9-102). Subsections (a)(2) and (a)(3) contain special rules for decedent's estates and common-law trusts. (Subsection (a)(1) applies to business trusts that are registered organizations.)

Subsection (a)(4)(A) essentially follows the first sentence of former section 9-402(7). Section 1-201(28) defines the term "organization," which appears in subsection (a)(4), very broadly, to include all legal and commercial entities as well as associations that lack the status of a legal entity. Thus, the term includes corporations, partnerships of all kinds, business trusts, limited liability companies, unincorporated associations, personal trusts, governments, and estates. If the organization has a name, that name is the correct name to put on a financing statement. If the organization does not have a name, then the financing statement should name the individuals or other entities who comprise the organization.

Together with subsections (b) and (c), subsection (a) reflects the view prevailing under former article 9 that the actual individual or organizational name of the debtor on a financing statement is both necessary and sufficient, whether or not the financing statement provides trade or other names of the debtor and, if the debtor has a name, whether or not the financing statement provides the names of the partners, members, or associates who comprise the debtor.

Note that, even if the name provided in an initial financing statement is correct, the filing office nevertheless must reject the financing statement if it does not identify an individual debtor's last name (e.g., if it is not clear whether the debtor's name is Perry Mason or Mason Perry). See section 9-516(b)(3)(C).

3. **Secured Party's Name.** New subsection (d) makes clear that when the secured party is a representative, a financing statement is sufficient if it names the secured party, whether or not it indicates any representative capacity. Similarly, a financing statement that names a representative of the secured party is sufficient, even if it does not indicate the representative capacity.

Example: Debtor creates a security interest in favor of Bank X, Bank Y, and Bank Z, but not to their representative, the collateral agent (Bank A). The collateral agent is not itself a secured party. See section 9-102. Under sections 9-502(a) and 9-503(d), however, a financing statement is effective if it names as secured party Bank A and not the actual secured parties, even if it omits Bank A's representative capacity.

Each person whose name is provided in an initial financing statement as the name of the secured party or representative of the secured party is a secured party of record. See section 9-511.

4. **Multiple Names.** Subsection (e) makes explicit what is implicit under former article 9:

A financing statement may provide the name of more than one debtor and secured party. See section 1-102(5)(a) (words in the singular include the plural). With respect to records relating to more than one debtor, see section 9-520(d). With respect to financing statements providing the name of more than one secured party, see sections 9-509(e) and 9-510(b).

§ 25-9-504. (Effective July 1, 2001) Indication of collateral.

A financing statement sufficiently indicates the collateral that it covers if the financing statement provides:

(1) A description of the collateral pursuant to G.S. 25-9-108; or

(2) An indication that the financing statement covers all assets or all personal property. (1899, cc. 17, 247; 1901, cc. 329, 704; 1903, c. 489; 1905, cc. 226, 319; Rev., s. 2055; 1907, c. 843; 1909, c. 532; P.L. 1913, c. 49; C.S., s. 2490; 1925, c. 285, s. 1; 1931, c. 196; 1933, c. 101, s. 6; 1945, c. 182, s. 2; c. 196, s. 2; 1951, c. 926, s. 1; 1955, c. 386, s. 1; 1957, c. 564; 1961, c. 574; 1965, c. 700, s. 1; 1969, c. 1115, s. 1; 1975, c. 862, s. 7; 1983 (Reg. Sess., 1984), c. 1116, s. 43; 1989, c. 523, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-402(1).

2. **Indication of Collateral.** To comply with section 9-502(a), a financing statement must "indicate" the collateral it covers. A financing statement sufficiently indicates collateral claimed to be covered by the financing statement if it satisfies the purpose of conditioning perfection on the filing of a financing statement, i.e., if it provides notice that a person may have a security interest in the collateral claimed. See Section 9-502, Comment 2. In particular, an indication of collateral that would have satisfied the requirements of former Section 9-402(1) (i.e., "a statement indicating the types, or describing the items, of collateral") suffices under Section 9-502(a). An indication may satisfy the requirements of Section 9-502(a), even if it would not have satisfied the requirements of former Section 9-402(1).

This section provides two safe harbors. Under paragraph (1), a "description" of the collateral (as the term is explained in Section 9-108) suffices as an indication for purposes of the sufficiency of a financing statement.

Debtors sometimes create a security interest in all, or substantially all, of their assets. To accommodate this practice, paragraph (2) expands the class of sufficient collateral references to embrace "an indication that the financing statement covers all assets or all personal property." If the property in question belongs to the debtor and is personal property, any searcher will know that the property is covered by the financing statement. Of course, regardless of its breadth, a financing statement has no effect with respect to property indicated but to which a security interest has not attached. Note that a broad statement of this kind (e.g., "all debtor's personal property") would not be a sufficient "description" for purposes of a security agreement. See sections 9-108 and 9-203(b)(3)(A). It follows that a somewhat narrower description than "all assets," e.g., "all assets other than automobiles," is sufficient for purposes of this section, even if it does not suffice for purposes of a security agreement.

§ 25-9-505. (Effective July 1, 2001) Filing and compliance with other statutes and treaties for consignments, leases, other bailments, and other transactions.

(a) Use of terms other than "debtor" and "secured party." — A consignor, lessor, or other bailor of goods, a licensor, or a buyer of a payment intangible or promissory note may file a financing statement, or may comply with a statute or treaty described in G.S. 25-9-311(a), using the terms "consignor", "consignee", "lessor", "lessee", "bailor", "bailee", "licensor", "licensee", "owner, "registered owner", "buyer", "seller", or words of similar import, instead of the terms "secured party" and "debtor".

(b) Effect of financing statement under subsection (a). — This Part applies to the filing of a financing statement under subsection (a) of this section and,

as appropriate, to compliance that is equivalent to filing a financing statement under G.S. 25-9-311(b), but the filing or compliance is not of itself a factor in determining whether the collateral secures an obligation. If it is determined for another reason that the collateral secures an obligation, a security interest held by the consignor, lessor, bailor, licensor, owner, or buyer which attaches to the collateral is perfected by the filing or compliance. (1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-408.

2. **Precautionary Filing.** Occasionally, doubts arise concerning whether a transaction creates a relationship to which this article or its filing provisions apply. For example, questions may arise over whether a "lease" of equipment in fact creates a security interest or whether the "sale" of payment intangibles in fact secures an obligation, thereby requiring action to perfect the security interest. This section, which derives from former section 9-408, affords the option of filing of a financing statement with appropriate changes of terminology but without affecting the substantive question of classification of the transaction.

3. **Changes from Former Section 9-408.** This section expands the rule of section 9-408 to embrace more generally other bailments and transactions, as well as sales transactions, primarily sales of payment intangibles and promissory notes. It provides the same benefits for compliance with a statute or treaty described in section 9-311(a) that former section 9-408 provided for filing, in connection with the use of terms such as "lessor," "consignor," etc. The references to "owner" and "registered owner" are intended to address, for example, the situation where a putative lessor is the registered owner of an automobile covered by a certificate of title and the transaction is determined to create a security interest. Although this section provides that the security interest is perfected, the relevant certificate of title statute may expressly provide to the contrary or may be ambiguous. If so, it may be necessary or advisable to amend the certificate of title statute to ensure that perfection of the security interest will be achieved.

As does section 1-201, former article 9 referred to transactions, including leases and consignments, "intended as security." This misleading phrase created the erroneous impression that the parties to a transaction can dictate how the law will classify it (e.g., as a bailment or as a security interest) and thus affect the rights of third parties. This article deletes the phrase wherever it appears. Subsection (b) expresses the principle more precisely by referring to a security interest that "secures an obligation."

4. **Consignments.** Although a "true" consignment is a bailment, the filing and priority provisions of former article 9 applied to "true" consignments. See former sections 2-326(3) and 9-114. A consignment "intended as security" created a security interest that was in all respects subject to former article 9. This article subsumes most true consignments under the rubric of "security interest." See sections 1-201(37) (definition of "security interest"), 9-102 (definition of "consignment"), and 9-109(a)(4). Nevertheless, it maintains the distinction between a (true) "consignment," as to which only certain aspects of article 9 apply, and a so-called consignment that actually "secures an obligation," to which article 9 applies in full. The revisions to this section reflect the change in terminology.

§ 25-9-506. (Effective July 1, 2001) Effect of errors or omissions.

(a) Minor errors and omissions. — A financing statement substantially satisfying the requirements of this Part is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading.

(b) Financing statement seriously misleading. — Except as otherwise provided in subsection (c) of this section, a financing statement that fails sufficiently to provide the name of the debtor in accordance with G.S. 25-9-503(a) is seriously misleading.

(c) Financing statement not seriously misleading. — If a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with G.S.

25-9-503(a), the name provided does not make the financing statement seriously misleading.

(d) "Debtor's correct name." — For purposes of G.S. 25-9-508(b), the "debtor's correct name" in subsection (c) of this section means the correct name of the new debtor. (1899, cc. 17, 247; 1901, cc. 329, 704; 1903, c. 489; 1905, cc. 226, 319; Rev., s. 2055; 1907, c. 843; 1909, c. 532; P.L. 1913, c. 49; C.S., s. 2490; 1925, c. 285, s. 1; 1931, c. 196; 1933, c. 101, s. 6; 1945, c. 182, s. 2; c. 196, s. 2; 1951, c. 926, s. 1; 1955, c. 386, s. 1; 1957, c. 564; 1961, c. 574; 1965, c. 700, s. 1; 1969, c. 1115, s. 1; 1975, c. 862, s. 7; 1983 (Reg. Sess., 1984), c. 1116, s. 43; 1989, c. 523, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-402(8).

2. **Errors.** Like former section 9-402(8), subsection (a) is in line with the policy of this article to simplify formal requisites and filing requirements. It is designed to discourage the fanatical and impossibly refined reading of statutory requirements in which courts occasionally have indulged themselves. Subsection (a) provides the standard applicable to indications of collateral. Subsections (b) and (c), which are new, concern the effectiveness of financing statements in which the debtor's name is incorrect. Subsection (b) contains the general rule: A financing statement that fails sufficiently to provide the debtor's name in accordance with section 9-503(a) is seriously misleading as a matter of law. Subsection (c) provides an exception: If the financing statement nevertheless would be discovered in a search under the debtor's correct name, using the filing office's standard search logic, if any, then as a matter of law the incorrect name does not make the financing statement seriously misleading. A financing statement that is seriously misleading under this section is ineffective even if it is disclosed by (i) using a search logic other than that of the filing office to search the official records, or (ii) using the filing office's standard search logic to search a data base other than that of the filing office.

In addition to requiring the debtor's name and an indication of the collateral, section 9-502(a) requires a financing statement to provide the name of the secured party or a representative of the secured party. Inasmuch as searches are not conducted under the secured party's name, and no filing is needed to continue the perfected status of security interest after it is assigned, an error in the name of the secured party or its representative will not be seriously misleading. However, in an appropriate case, an error of this kind may give rise to an estoppel in favor of a particular holder of a conflicting claim to the collateral. See section 1-103.

3. **New Debtors.** Subsection (d) provides that, in determining the extent to which a financing statement naming an original debtor is effective against a new debtor, the sufficiency of the financing statement should be tested against the name of the new debtor.

§ 25-9-507. (Effective July 1, 2001) Effect of certain events on effectiveness of financing statement.

(a) Disposition. — A filed financing statement remains effective with respect to collateral that is sold, exchanged, leased, licensed, or otherwise disposed of and in which a security interest or agricultural lien continues, even if the secured party knows of or consents to the disposition.

(b) Information becoming seriously misleading. — Except as otherwise provided in subsection (c) of this section and G.S. 25-9-508, a financing statement is not rendered ineffective if, after the financing statement is filed, the information provided in the financing statement becomes seriously misleading under G.S. 25-9-506.

(c) Change in debtor's name. — If a debtor so changes its name that a filed financing statement becomes seriously misleading under G.S. 25-9-506:

(1) The financing statement is effective to perfect a security interest in collateral acquired by the debtor before, or within four months after, the change; and

(2) The financing statement is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the

change, unless an amendment to the financing statement which renders the financing statement not seriously misleading is filed within four months after the change. (1899, cc. 17, 247; 1901, cc. 329, 704; 1903, c. 489; 1905, cc. 226, 319; Rev., s. 2055; 1907, c. 843; 1909, c. 532; P.L. 1913, c. 49; C.S., s. 2490; 1925, c. 285, s. 1; 1931, c. 196; 1933, c. 101, s. 6; 1945, c. 182, s. 2; c. 196, s. 2; 1951, c. 926, s. 1; 1955, c. 386, s. 1; 1957, c. 564; 1961, c. 574; 1965, c. 700, s. 1; 1969, c. 1115, s. 1; 1975, c. 862, s. 7; 1983 (Reg. Sess., 1984), c. 1116, s. 43; 1989, c. 523, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-402(7).

2. **Scope of Section.** This section deals with situations in which the information in a proper financing statement becomes inaccurate after the financing statement is filed. Compare section 9-338, which deals with situations in which a financing statement contains a particular kind of information concerning the debtor (i.e., the information described in section 9-516(b)(5)) that is incorrect at the time it is filed.

3. **Post-Filing Disposition of Collateral.** Under subsection (a), a financing statement remains effective even if the collateral is sold or otherwise disposed of. This subsection clarifies the third sentence of former section 9-402(7) by providing that a financing statement remains effective following the disposition of collateral only when the security interest or agricultural lien continues in that collateral. This result is consistent with the conclusion of PEB Commentary No. 3. Normally, a security interest does continue after disposition of the collateral. See section 9-315(a)(1). Law other than this article determines whether an agricultural lien survives disposition of the collateral.

As a consequence of the disposition, the collateral may be owned by a person other than the debtor against whom the financing statement was filed. Under subsection (a), the secured party remains perfected even if it does not correct the public record. For this reason, any person seeking to determine whether a debtor owns collateral free of security interests must inquire as to the debtor's source of title and, if circumstances seem to require it, search in the name of a former owner. Subsection (a) addresses only the sufficiency of the information contained in the financing statement. A disposition of collateral may result in loss of perfection for other reasons. See section 9-316.

Example: Dee Corp. is an Illinois corporation. It creates a security interest in its equipment in favor of Secured Party. Secured Party files a proper financing statement in Illinois. Dee Corp. sells an item of equipment to Bee Corp., a Pennsylvania corporation, subject to the security interest. The security interest continues, see section 9-315(a)(1), and remains perfected, see section 9-507(a), notwithstanding that the financing statement is filed under "D" (for Dee Corp.) and not under "B." However, because Bee Corp. is located in Pennsylvania and not Illinois, see section 9-307, unless Secured Party perfects under Pennsylvania law within one year after the transfer, its security interest will become unperfected and will be deemed to have been unperfected against purchasers of the collateral. See section 9-316.

4. **Other Post-Filing Changes.** Subsection (b) provides that, as a general matter, post-filing changes that render a financing statement inaccurate and seriously misleading have no effect on a financing statement. The financing statement remains effective. It is subject to two exceptions: Sections 9-507(c) and 9-508. Section 9-508 addresses the effectiveness of a financing statement filed against an original debtor when a new debtor becomes bound by the original debtor's security agreement. It is discussed in the comments to that section. Section 9-507(c) addresses a "pure" change of the debtor's name, i.e., a change that does not implicate a new debtor. It clarifies former section 9-402(7). If a name change renders a filed financing statement seriously misleading, the financing statement is not effective as to collateral acquired more than four months after the change, unless before the expiration of the four months an amendment is filed that specifies the debtor's new correct name (or provides an incorrect name that renders the financing statement not seriously misleading under section 9-506). As under former section 9-402(7), the original financing statement would continue to be effective with respect to collateral acquired before the name change as well as collateral acquired within the four-month period.

§ 25-9-508. (Effective July 1, 2001) Effectiveness of financing statement if new debtor becomes bound by security agreement.

(a) Financing statement naming original debtor. — Except as otherwise provided in this section, a filed financing statement naming an original debtor is effective to perfect a security interest in collateral in which a new debtor has or acquires rights to the extent that the financing statement would have been effective had the original debtor acquired rights in the collateral.

(b) Financing statement becoming seriously misleading. — If the difference between the name of the original debtor and that of the new debtor causes a filed financing statement that is effective under subsection (a) of this section to be seriously misleading under G.S. 25-9-506:

(1) The financing statement is effective to perfect a security interest in collateral acquired by the new debtor before, and within four months after, the new debtor becomes bound under G.S. 25-9-203(d); and

(2) The financing statement is not effective to perfect a security interest in collateral acquired by the new debtor more than four months after the new debtor becomes bound under G.S. 25-9-203(d) unless an initial financing statement providing the name of the new debtor is filed before the expiration of that time.

(c) When section not applicable. — This section does not apply to collateral as to which a filed financing statement remains effective against the new debtor under G.S. 25-9-507(a). (1967, c. 562, s. 3; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **The Problem.** Section 9-203(d) and (e) and this section deal with situations where one party (the "new debtor") becomes bound as debtor by a security agreement entered into by another person (the "original debtor"). These situations often arise as a consequence of changes in business structure. For example, the original debtor may be an individual debtor who operates a business as a sole proprietorship and then incorporates it. Or, the original debtor may be a corporation that is merged into another corporation. Under both former article 9 and this article, collateral that is transferred in the course of the incorporation or merger normally would remain subject to a perfected security interest. See sections 9-315(a)(1) and 9-507(a). Former article 9 was less clear with respect to whether an after-acquired property clause in a security agreement signed by the original debtor would be effective to create a security interest in property acquired by the new corporation or the merger survivor and, if so, whether a financing statement filed against the original debtor would be effective to perfect the security interest. This section and sections 9-203(d) and (e) are a clarification.

3. **How New Debtor Becomes Bound.** Normally, a security interest is unenforceable unless the debtor has authenticated a security agreement describing the collateral. See section 9-203(b). New section 9-203(e) creates an exception, under which a security agreement entered into by one person is effective with respect to the property of another. This exception comes into play if a "new debtor" becomes bound as debtor by a security agreement entered into by another person (the "original debtor"). (The quoted terms are defined in section 9-102.) If a new debtor does become bound, then the security agreement entered into by the original debtor satisfies the security-agreement requirement of section 9-203(b)(3) as to existing or after-acquired property of the new debtor to the extent the property is described in the security agreement. In that case, no other agreement is necessary to make a security interest enforceable in that property. See section 9-203(e).

Section 9-203(d) explains when a new debtor becomes bound by an original debtor's security agreement. Under section 9-203(d)(1), a new debtor becomes bound as debtor if, by contract or operation of other law, the security agreement becomes effective to create a security interest in the new debtor's property. For example, if the applicable corporate law of mergers provides that when A Corp merges into B Corp, B Corp becomes a debtor under A Corp's security agreement, then B Corp would become bound as debtor following such a merger. Similarly, B Corp would become bound as debtor if B Corp contractually assumes A's obligations under the security agreement.

Under certain circumstances, a new debtor becomes bound for purposes of this article even though it would not be bound under other law. Under section 9-203(d)(2), a new debtor becomes bound when, by contract or operation of other law, it (i) becomes obligated not only for the secured obligation but also generally for the obligations of the original debtor and (ii) acquires or succeeds to substantially all the assets of the original debtor. For example, some corporate laws provide that, when two corporations merge, the surviving corporation succeeds to the assets of its merger partner and "has all liabilities" of both corporations. In the case where, for example, A Corp merges into B Corp (and A Corp ceases to exist), some people have questioned whether A Corp's grant of a security interest in its existing and after-acquired property becomes a "liability" of B Corp, such that B Corp's existing and after-acquired property becomes subject to a security interest in favor of A Corp's lender. Even if corporate law were to give a negative answer, under section 9-203(d)(2), B Corp would become bound for purposes of section 9-203(e) and this section. The "substantially all of the assets" requirement of section 9-203(d)(2) excludes sureties and other secondary obligors as well as persons who become obligated through veil piercing and other nonsuccessorship doctrines. In most cases, it will exclude successors to the assets and liabilities of a division of a debtor.

4. **When Financing Statement Effective Against New Debtor.** Subsection (a) provides that a filing against the original debtor generally is effective to perfect a security interest in collateral that a new debtor has at the time it becomes bound by the original debtor's security agreement and collateral that it acquires after the new debtor becomes bound. Under subsection (b), however, if the filing against the original debtor is seriously misleading as to the new debtor's name, the filing is effective as to collateral acquired by the new debtor more than four months after the new debtor becomes bound only if a person files during the four-month period an initial financing statement providing the name of the new debtor. Compare section 9-507(c) (four-month period of effectiveness with respect to collateral acquired by a debtor after the debtor changes its name). Moreover, if the original debtor and the new debtor are located in different jurisdictions, a filing against the original debtor would not be effective to perfect a security interest in collateral that the new debtor acquires or has acquired from a person other than the original debtor. See Example 5, Section 9-316, Comment 2.

5. **Transferred Collateral.** This section does not apply to collateral transferred by the original debtor to a new debtor. See subsection (c). Under those circumstances, the filing against the original debtor continues to be effective until it lapses or perfection is lost for another reason. See sections 9-316, 9-507(a).

6. **Priority.** Section 9-326 governs the priority contest between a secured creditor of the original debtor and a secured creditor of the new debtor.

§ 25-9-509. (Effective July 1, 2001) Persons entitled to file a record.

(a) Person entitled to file record. — A person may file an initial financing statement, amendment that adds collateral covered by a financing statement, or amendment that adds a debtor to a financing statement only if:

(1) The debtor authorizes the filing in an authenticated record or pursuant to subsection (b) or (c) of this section; or

(2) The person holds an agricultural lien that has become effective at the time of filing and the financing statement covers only collateral in which the person holds an agricultural lien.

(b) Security agreement as authorization. — By authenticating or becoming bound as debtor by a security agreement, a debtor or new debtor authorizes the filing of an initial financing statement, and an amendment, covering:

(1) The collateral described in the security agreement; and

(2) Property that becomes collateral under G.S. 25-9-315(a)(2), whether or not the security agreement expressly covers proceeds.

(c) Acquisition of collateral as authorization. — By acquiring collateral in which a security interest or agricultural lien continues under G.S. 25-9-315(a)(1), a debtor authorizes the filing of an initial financing statement, and an amendment, covering the collateral and property that becomes collateral under G.S. 25-9-315(a)(2).

(d) Person entitled to file certain amendments. — A person may file an amendment other than an amendment that adds collateral covered by a

financing statement or an amendment that adds a debtor to a financing statement only if:

(1) The secured party of record authorizes the filing; or

(2) The amendment is a termination statement for a financing statement as to which the secured party of record has failed to file or send a termination statement as required by G.S. 25-9-513(a) or (c), the debtor authorizes the filing, and the termination statement indicates that the debtor authorized it to be filed.

(e) Multiple secured parties of record. — If there is more than one secured party of record for a financing statement, each secured party of record may authorize the filing of an amendment under subsection (d) of this section. (1967, c. 562, s. 3; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Scope and Approach of This Section.** This section collects in one place most of the rules determining whether a record may be filed. Section 9-510 explains the extent to which a filed record is effective. Under these sections, the identity of the person who effects a filing is immaterial. The filing scheme contemplated by this part does not contemplate that the identity of a "filer" will be a part of the searchable records. This is consistent with, and a necessary aspect of, eliminating signatures or other evidence of authorization from the system. (Note that the 1972 amendments to this article eliminated the requirement that a financing statement contain the signature of the secured party.) As long as the appropriate person authorizes the filing, or, in the case of a termination statement, the debtor is entitled to the termination, it is insignificant whether the secured party or another person files any given record. The question of authorization is one for the court, not the filing office. However, a filing office may choose to employ authentication procedures in connection with electronic communications, e.g., to verify the identity of a filer who seeks to charge the filing fee.

3. **Unauthorized Filings.** Records filed in the filing office do not require signatures for their effectiveness. Subsection (a)(1) substitutes for the debtor's signature on a financing statement the requirement that the debtor authorize in an authenticated record the filing of an initial financing statement or an amendment that adds collateral. Also, under subsection (a)(1), if an amendment adds a debtor, the debtor who is added must authorize the amendment. A person who files an unauthorized record in violation of subsection (a)(1) is liable under section 9-625 for actual and statutory damages. Of course, a filed financing statement is ineffective to perfect a security interest if the filing is not authorized. See section 9-510(a). Law other than this article, including the law with respect to ratification of past acts, generally determines whether a person has the requisite authority to file a record under this section. See sections 1-103 and 9-502 comment 3.

4. ***Ipso Facto* Authorization.** Under subsection (b), the authentication of a security agreement ipso facto constitutes the debtor's authorization of the filing of a financing statement covering the collateral described in the security agreement. The secured party need not obtain a separate authorization. Similarly, a new debtor's becoming bound by a security agreement ipso facto constitutes the new debtor's authorization of the filing of a financing statement covering the collateral described in the security agreement by which the new debtor has become bound. And, under subsection (c), the acquisition of collateral in which a security interest continues after disposition under section 9-315(a)(1)(A) ipso facto constitutes an authorization to file an initial financing statement against the person who acquired the collateral. The authorization to file an initial financing statement also constitutes an authorization to file a record covering actual proceeds of the original collateral, even if the security agreement is silent as to proceeds.

Example 1: Debtor authenticates a security agreement creating a security interest in Debtor's inventory in favor of Secured Party. Secured Party files a financing statement covering inventory and accounts. The financing statement is authorized insofar as it covers inventory and unauthorized insofar as it covers accounts. (Note, however, that the financing statement will be effective to perfect a security interest in accounts constituting proceeds of the inventory to the same extent as a financing statement covering only inventory.)

Example 2: Debtor authenticates a security agreement creating a security interest in Debtor's inventory in favor of Secured Party. Secured Party files a financing statement covering inventory. Debtor sells some inventory, deposits the buyer's payment into a deposit account, and withdraws the funds to purchase equipment. As long as the equipment can be

traced to the inventory, the security interest continues in the equipment. See section 9-315(a)(1)(B). However, because the equipment was acquired with cash proceeds, the financing statement becomes ineffective to perfect the security interest in the equipment on the 21st day after the security interest attaches to the equipment unless Secured Party continues perfection beyond the 20-day period by filing a financing statement against the equipment or amending the filed financing statement to cover equipment. See section 9-315(d). Debtor's authentication of the security agreement authorizes the filing of an initial financing statement or amendment covering the equipment, which is "property that becomes collateral under section 9-315(a)(1)(B)." See section 9-509(b)(2).

5. **Agricultural Liens.** Under subsection (a)(2), the holder of an agricultural lien may file a financing statement covering collateral subject to the lien without obtaining the debtor's authorization. Because the lien arises as matter of law, the debtor's consent is not required. A person who files an unauthorized record in violation of this subsection is liable under section 9-625(e) for a statutory penalty and damages.

6. **Amendments; Termination Statements Authorized by Debtor.** Most amendments may not be filed unless the secured party of record, as determined under section 9-511, authorizes the filing. See subsection (d)(1). However, under subsection (d)(2), the authorization of the secured party of record is not required for the filing of a termination statement if the secured party of record failed to send or file a termination statement as required by section 9-513, the debtor authorizes it to be filed, and the termination statement so indicates.

7. **Multiple Secured Parties of Record.** Subsection (e) deals with multiple secured parties of record. It permits each secured party of record to authorize the filing of amendments. However, section 9-510(b) protects the rights and powers of one secured party of record from the effects of filings made by another secured party of record. See section 9-510, comment 3.

8. **Successor to Secured Party of Record.** A person may succeed to the powers of the secured party of record by operation of other law, e.g., the law of corporate mergers. In that case, the successor has the power to authorize filings within the meaning of this section.

§ 25-9-510. (Effective July 1, 2001) Effectiveness of filed record.

(a) Filed record effective if authorized. — A filed record is effective only to the extent that it was filed by a person that may file it under G.S. 25-9-509.

(b) Authorization by one secured party of record. — A record authorized by one secured party of record does not affect the financing statement with respect to another secured party of record.

(c) Continuation statement not timely filed. — A continuation statement that is not filed within the six-month period prescribed by G.S. 25-9-515(d) is ineffective. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Ineffectiveness of Unauthorized or Overbroad Filings.** Subsection (a) provides that a filed financing statement is effective only to the extent it was filed by a person entitled to file it.

Example 1: Debtor authorizes the filing of a financing statement covering inventory. Under section 9-509, the secured party may file a financing statement covering only inventory; it may not file a financing statement covering other collateral. The secured party files a financing statement covering inventory and equipment. This section provides that the financing statement is effective only to the extent the secured party may file it. Thus, the financing statement is effective to perfect a security interest in inventory but ineffective to perfect a security interest in equipment.

3. **Multiple Secured Parties of Record.** Section 9-509(e) permits any secured party of record to authorize the filing of most amendments. Subsection (b) of this section prevents a filing authorized by one secured party of record from affecting the rights and powers of another secured party of record without the latter's consent.

Example 2: Debtor creates a security interest in favor of A and B. The filed financing statement names A and B as the secured parties. An amendment deleting some collateral covered by the financing statement is filed pursuant to B's authorization. Although B's security interest in the deleted collateral becomes unperfected, A's security interest remains perfected in all the collateral.

Example 3: Debtor creates a security interest in favor of A and B. The financing statement names A and B as the secured parties. A termination statement is filed pursuant to B's authorization. Although the effectiveness of the financing statement terminates with respect to B's security interest, A's rights are unaffected. That is, the financing statement continues to be effective to perfect A's security interest.

4. **Continuation Statements.** A continuation statement may be filed only within the six months immediately before lapse. See section 9-515(d). The filing office is obligated to reject a continuation statement that is filed outside the six-month period. See sections 9-516(b)(7) and 9-520(a). Subsection (c) provides that if the filing office fails to reject a continuation statement that is not filed in a timely manner, the continuation statement is ineffective nevertheless.

§ 25-9-511. (Effective July 1, 2001) Secured party of record.

(a) Secured party of record. — A secured party of record with respect to a financing statement is a person whose name is provided as the name of the secured party or a representative of the secured party in an initial financing statement that has been filed. If an initial financing statement is filed under G.S. 25-9-514(a), the assignee named in the initial financing statement is the secured party of record with respect to the financing statement.

(b) Amendment naming secured party of record. — If an amendment of a financing statement which provides the name of a person as a secured party or a representative of a secured party is filed, the person named in the amendment is a secured party of record. If an amendment is filed under G.S. 25-9-514(b), the assignee named in the amendment is a secured party of record.

(c) Amendment deleting secured party of record. — A person remains a secured party of record until the filing of an amendment of the financing statement which deletes the person. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Secured Party of Record.** This new section explains how the secured party of record is to be determined. If SP-1 is named as the secured party in an initial financing statement, it is the secured party of record. Similarly, if an initial financing statement reflects a total assignment from SP-0 to SP-1, then SP-1 is the secured party of record. See subsection (a). If, subsequently, an amendment is filed assigning SP-1's status to SP-2, then SP-2 becomes the secured party of record in place of SP-1. The same result obtains if a subsequent amendment deletes the reference to SP-1 and substitutes therefor a reference to SP-2. If, however, a subsequent amendment adds SP-2 as a secured party but does not purport to remove SP-1 as a secured party, then SP-2 and SP-1 each is a secured party of record. See subsection (b). An amendment purporting to remove the only secured party of record without providing a successor is ineffective. See section 9-512(e). At any point in time, all effective records that comprise a financing statement must be examined to determine the person or persons that have the status of secured party of record.

3. **Successor to Secured Party of Record.** Application of other law may result in a person succeeding to the powers of a secured party of record. For example, if the secured party of record (A) merges into another corporation (B) and the other corporation (B) survives, other law may provide that B has all of A's powers. In that case, B is authorized to take all actions under this part that A would have been authorized to take. Similarly, acts taken by a person who is authorized under generally applicable principles of agency to act on behalf of the secured party of record are effective under this part.

§ 25-9-512. (Effective July 1, 2001) Amendment of financing statement.

(a) Amendment of information in financing statement. — Subject to G.S. 25-9-509, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or, subject to subsection (e) of this section, otherwise amend the information provided in, a financing statement by filing an amendment that:

(1) Identifies, by its file number, the initial financing statement to which the amendment relates; and

(2) If the amendment relates to an initial financing statement filed in a filing office described in G.S. 25-9-501(a)(1), provides the name of the debtor and the information specified in G.S. 25-9-502(b).

(b) Period of effectiveness not affected. — Except as otherwise provided in G.S. 25-9-515, the filing of an amendment does not extend the period of effectiveness of the financing statement.

(c) Effectiveness of amendment adding collateral. — A financing statement that is amended by an amendment that adds collateral is effective as to the added collateral only from the date of the filing of the amendment.

(d) Effectiveness of amendment adding debtor. — A financing statement that is amended by an amendment that adds a debtor is effective as to the added debtor only from the date of the filing of the amendment.

(e) Certain amendments ineffective. — An amendment is ineffective to the extent it:

(1) Purports to delete all debtors and fails to provide the name of a debtor to be covered by the financing statement; or

(2) Purports to delete all secured parties of record and fails to provide the name of a new secured party of record. (1899, cc. 17, 247; 1901, cc. 329, 704; 1903, c. 489; 1905, cc. 226, 319; Rev., s. 2055; 1907, c. 843; 1909, c. 532; P.L. 1913, c. 49; C.S., s. 2490; 1925, c. 285, s. 1; 1931, c. 196; 1933, c. 101, s. 6; 1945, c. 182, s. 2; c. 196, s. 2; 1951, c. 926, s. 1; 1955, c. 386, s. 1; 1957, c. 564; 1961, c. 574; 1965, c. 700, s. 1; 1969, c. 1115, s. 1; 1975, c. 862, s. 7; 1983 (Reg. Sess., 1984), c. 1116, s. 43; 1989, c. 523, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-402(4).

2. **Changes to Financing Statements.** This section addresses changes to financing statements, including addition and deletion of collateral. Although termination statements, assignments, and continuation statements are types of amendments, this article follows former article 9 and contains separate sections containing additional provisions applicable to particular types of amendments. See section 9-513 (termination statements); 9-514 (assignments); and 9-515 (continuation statements). One should not infer from this separate treatment that this article requires a separate amendment to accomplish each change. Rather, a single amendment would be legally sufficient to, e.g., add collateral and continue the effectiveness of the financing statement.

3. **Amendments.** An amendment under this article may identify only the information contained in a financing statement that is to be changed; alternatively, it may take the form of an amended and restated financing statement. The latter would state, for example, that the financing statement "is amended and restated to read as follows: . . ." References in this part to an "amended financing statement" are to a financing statement as amended by an amendment using either technique.

This section revises former section 9-402(4) to permit secured parties of record to make changes in the public record without the need to obtain the debtor's signature. However, the filing of an amendment that adds collateral or adds a debtor must be authorized by the debtor or it will not be effective. See sections 9-509(a) and 9-510(a).

4. **Amendment Adding Debtor.** An amendment that adds a debtor is effective, provided that the added debtor authorizes the filing. See section 9-509(a). However, filing an amendment adding a debtor to a previously filed financing statement affords no advantage over filing an initial financing statement against that debtor

and may be disadvantageous. With respect to the added debtor, for purposes of determining the priority of the security interest, the time of filing is the time of the filing of the amendment, not the time of the filing of the initial financing statement. See subsection (d). However, the effectiveness of the financing statement lapses with respect to added debtor at the time it lapses with respect to the original debtor. See subsection (b).

5. **Deletion of All Debtors or Secured Parties of Record.** Subsection (e) assures that there will be a debtor and secured party of record for every financing statement.

Example: A filed financing statement names A and B as secured parties of record and covers inventory and equipment. An amendment deletes equipment and purports to delete A and B as secured parties of record without adding a substitute secured party. The amendment is ineffective to the extent it purports to delete the secured parties of record but effective with respect to the deletion of collateral. As a consequence, the financing statement, as amended, covers only inventory, but A and B remain as secured parties of record.

§ 25-9-513. (Effective July 1, 2001) Termination statement.

(a) Consumer goods. — A secured party shall cause the secured party of record for a financing statement to file a termination statement for the financing statement if the financing statement covers consumer goods and:

(1) There is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value; or

(2) The debtor did not authorize the filing of the initial financing statement.

(b) Time for compliance with subsection (a). — To comply with subsection (a) of this section, a secured party shall cause the secured party of record to file the termination statement:

(1) Within one month after there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value; or

(2) If earlier, within 20 days after the secured party receives an authenticated demand from a debtor.

(c) Other collateral. — In cases not governed by subsection (a) of this section, within 20 days after a secured party receives an authenticated demand from a debtor, the secured party shall cause the secured party of record for a financing statement to send to the debtor a termination statement for the financing statement or file the termination statement in the filing office if:

(1) Except in the case of a financing statement covering accounts or chattel paper that has been sold or goods that are the subject of a consignment, there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value;

(2) The financing statement covers accounts or chattel paper that has been sold but as to which the account debtor or other person obligated has discharged its obligation;

(3) The financing statement covers goods that were the subject of a consignment to the debtor but are not in the debtor's possession; or

(4) The debtor did not authorize the filing of the initial financing statement.

(d) Effect of filing termination statement. — Except as otherwise provided in G.S. 25-9-510, upon the filing of a termination statement with the filing office, the financing statement to which the termination statement relates ceases to be effective. Except as otherwise provided in G.S. 25-9-510, for purposes of G.S. 25-9-519(g), 25-9-522(a), and 25-9-523(c), the filing with the filing office of a termination statement relating to a financing statement that indicates that the debtor is a transmitting utility also causes the effectiveness

of the financing statement to lapse. (1945, c. 182, s. 5; c. 196, s. 3; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1969, c. 1115, s. 1; 1973, c. 1316, ss. 2, 3; 1975, c. 862, s. 7; 1985, c. 221; 1989, c. 523, s. 5; 1991, c. 164, s. 2; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-404.

2. **Duty to File or Send.** This section specifies when a secured party must cause the secured party of record to file or send to the debtor a termination statement for a financing statement. Because most financing statements expire in five years unless a continuation statement is filed (section 9-515), no compulsion is placed on the secured party to file a termination statement unless demanded by the debtor, except in the case of consumer goods. Because many consumers will not realize the importance to them of clearing the public record, an affirmative duty is put on the secured party in that case. But many purchase-money security interests in consumer goods will not be filed, except for motor vehicles. See section 9-309(1). Under section 9-311(b), compliance with a certificate of title statute is "equivalent to the filing of a financing statement under this article." Thus, this section applies to a certificate of title unless the section is superseded by a certificate of title statute that contains a specific rule addressing a secured party's duty to cause a notation of a security interest to be removed from a certificate of title. In the context of a certificate of title, however, the secured party could comply with this section by causing the removal itself or providing the debtor with documentation sufficient to enable the debtor to effect the removal.

Subsections (a) and (b) apply to a financing statement covering consumer goods. Subsection (c) applies to other financing statements. Subsections (a) and (c) each makes explicit what was implicit under former article 9: If the debtor did not authorize the filing of a financing statement in the first place, the secured party of record should file or send a termination statement. The liability imposed upon a secured party that fails to comply with subsection (a) or (c) is identical to that imposed for the filing of an unauthorized financing statement or amendment. See section 9-625(e).

3. **"Bogus" Filings.** A secured party's duty to send a termination statement arises when the secured party "receives" an authenticated demand from the debtor. In the case of an unauthorized financing statement, the person named as debtor in the financing statement may have no relationship with the named secured party and no reason to know the secured party's address. Inasmuch as the address in the financing statement is "held out by (the person named as secured party in the financing statement) as the place for receipt of such communications (i.e., communications relating to security interests)," the putative secured party is deemed to have "received" a notification delivered to that address. See section 1-201(26). If a termination statement is not forthcoming, the person named as debtor itself may authorize the filing of a termination statement, which will be effective if it indicates that the person authorized it to be filed. See sections 9-509(d)(2) and 9-510(c).

4. **Buyers of Receivables.** Applied literally, former section 9-404(1) would have required many buyers of receivables to file a termination statement immediately upon filing a financing statement because "there is no outstanding secured obligation and no commitment to make advances, incur obligations, or otherwise give value." Subsections (a)(1) and (2) remedy this problem. While the security interest of a buyer of accounts or chattel paper (B-1) is perfected, the debtor is not deemed to retain an interest in the sold receivables and thus could transfer no interest in them to another buyer (B-2) or to a lien creditor (LC). However, for purposes of determining the rights of the debtor's creditors and certain purchasers of accounts or chattel paper from the debtor, while B-1's security interest is unperfected, the debtor-seller is deemed to have rights in the sold receivables, and a competing security interest or judicial lien may attach to those rights. See sections 9-109 and 9-318 and comment 5. Suppose that B-1's security interest in certain accounts and chattel paper is perfected by filing, but the effectiveness of the financing statement lapses. Both before and after lapse, B-1 collects some of the receivables. After lapse, LC acquires a lien on the accounts and chattel paper. B-1's unperfected security interest in the accounts and chattel paper is subordinate to LC's rights. See section 9-317(a)(2). But collections on accounts and chattel paper are not "accounts" or "chattel paper." Even if B-1's security interest in the accounts and chattel paper is or becomes unperfected, neither the debtor nor LC acquires rights to the collections that B-1 collects (and owns) before LC acquires a lien.

5. **Effect of Filing.** Subsection (b) states the effect of filing a termination statement: The related financing statement ceases to be effective. If one of several secured parties of record files a termination statement, subsection (b) applies only with respect to the rights of the person who authorized the filing of the termi-

nation statement. See section 9-510(b). The financing statement remains effective with respect to the rights of the others. However, even if a financing statement is terminated (and thus no longer is effective) with respect to all secured parties of record, the financing statement, including the termination statement, will remain of record until at least one year after it lapses with respect to all secured parties of record. See section 9-519(g).

§ 25-9-514. (Effective July 1, 2001) Assignment of powers of secured party of record.

(a) Assignment reflected on initial financing statement. — Except as otherwise provided in subsection (c) of this section, an initial financing statement may reflect an assignment of all of the secured party's power to authorize an amendment to the financing statement by providing the name and mailing address of the assignee as the name and address of the secured party.

(b) Assignment of filed financing statement. — Except as otherwise provided in subsection (c) of this section, a secured party of record may assign of record all or part of its power to authorize an amendment to a financing statement by filing in the filing office an amendment of the financing statement which:

(1) Identifies, by its file number, the initial financing statement to which it relates;

(2) Provides the name of the assignor; and

(3) Provides the name and mailing address of the assignee.

(c) Assignment of record of mortgage. — An assignment of record of a security interest in a fixture covered by a record of a mortgage which is effective as a financing statement filed as a fixture filing under G.S. 25-9-502(c) may be made only by an assignment of record of the mortgage in the manner provided by law of this State other than this Chapter. (1965, c. 700, s. 1; 1967, c. 24, s. 23; 1969, c. 1115, s. 1; 1973, c. 1316, ss. 4, 5; 1975, c. 862, s. 7; 1983, c. 713, ss. 24, 25; 1987, c. 792, ss. 7, 8; 1989, c. 523, s. 6; 1997-456, s. 55.3; 1997-475, s. 5.5; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-405.

2. **Assignments.** This section provides a permissive device whereby a secured party of record may effectuate an assignment of its power to affect a financing statement. It may also be useful for a secured party who has assigned all or part of its security interest or agricultural lien and wishes to have the fact noted of record, so that inquiries concerning the transaction would be addressed to the assignee. See section 9-502, comment 2. Upon the filing of an assignment, the assignee becomes the "secured party of record" and may authorize the filing of a continuation statement, termination statement, or other amendment. Note that under section 9-310(c) no filing of an assignment is required as a condition of continuing the perfected status of the security interest against creditors and transferees of the original debtor. However, if an assignment is not filed, the assignor remains the secured party of record, with the power (even if not the right) to authorize the filing of effective amendments. See sections 9-509(d) and 9-511(c).

Where a record of a mortgage is effective as a financing statement filed as a fixture filing (section 9-502(c)), then an assignment of record of the security interest may be made only in the manner in which an assignment of record of the mortgage may be made under local real property law.

3. **Comparison to Prior Law.** Most of the changes reflected in this section are for clarification or to embrace medium-neutral drafting. As a general matter, this section preserves the opportunity given by former section 9-405 to assign a security interest of record in one of two different ways. Under subsection (a), a secured party may assign all of its power to affect a financing statement by naming an assignee in the initial financing statement. The secured party of record may accomplish the same result under subsection (b) by making a subsequent filing. Subsection (b) also may be used for an assignment of only some of the secured party of record's power to affect a financing statement, e.g., the power to affect the financing statement as it relates to particular items of collateral or as it relates to an undivided interest in a security interest in all the collateral. An initial financing statement may not be used to change the secured party of record under these circum-

stances. However, an amendment adding the assignee as a secured party of record may be used.

§ 25-9-515. (Effective July 1, 2001) Duration and effectiveness of financing statement; effect of lapsed financing statement.

(a) Five-year effectiveness. — Except as otherwise provided in subsections (b), (e), (f), and (g) of this section, a filed financing statement is effective for a period of five years after the date of filing.

(b) Public-finance or manufactured-home transaction. — Except as otherwise provided in subsections (e), (f), and (g) of this section, an initial financing statement filed in connection with a public-finance transaction or manufactured-home transaction is effective for a period of 30 years after the date of filing if it indicates that it is filed in connection with a public-finance transaction or manufactured-home transaction.

(c) Lapse and continuation of financing statement. — The effectiveness of a filed financing statement lapses on the expiration of the period of its effectiveness unless before the lapse a continuation statement is filed pursuant to subsection (d) of this section. Upon lapse, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected, unless the security interest is perfected otherwise. If the security interest or agricultural lien becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value.

(d) When continuation statement may be filed. — A continuation statement may be filed only within six months before the expiration of the five-year period specified in subsection (a) of this section or the 30-year period specified in subsection (b) of this section, whichever is applicable.

(e) Effect of filing continuation statement. — Except as otherwise provided in G.S. 25-9-510, upon timely filing of a continuation statement, the effectiveness of the initial financing statement continues for a period of five years commencing on the day on which the financing statement would have become ineffective in the absence of the filing. Upon the expiration of the five-year period, the financing statement lapses in the same manner as provided in subsection (c) of this section, unless, before the lapse, another continuation statement is filed pursuant to subsection (d) of this section. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the initial financing statement.

(f) Transmitting utility financing statement. — If a debtor is a transmitting utility and a filed financing statement so indicates, the financing statement is effective until a termination statement is filed.

(g) Record of mortgage as financing statement. — A record of a mortgage that is effective as a financing statement filed as a fixture filing under G.S. 25-9-502(c) remains effective as a financing statement filed as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real property. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C.S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, ss. 2, 4; c. 196, s. 2; 1955, c. 386, ss. 1, 2; c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1969, c. 1115, s. 1; 1971, c. 1170; 1973, c. 1316, s. 1; 1975, c. 862, s. 7; 1977, cc. 156, 295; 1983, c. 713, s. 23; 1987, c. 792, s. 6; 1989, c. 523, s. 4; 1991, c. 164, s. 1; 1997-456, s. 55.3; 1997-475, s. 5.4; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-403(2), (3), and (6).

2. **Period of Financing Statement's Effectiveness.** Subsection (a) states the general rule: A financing statement is effective for a five-year period unless its effectiveness is continued under this section or terminated under section 9-513. Subsection (b) provides that if the financing statement relates to a public-finance transaction or a manufactured-home transaction and so indicates, the financing statement is effective for 30 years. These financings typically extend well beyond the standard, five-year period. Under subsection (f), a financing statement filed against a transmitting utility remains effective indefinitely, until a termination statement is filed. Likewise, under subsection (g), a mortgage effective as a fixture filing remains effective until its effectiveness terminates under real property law.

3. **Lapse.** When the period of effectiveness under subsection (a) or (b) expires, the effectiveness of the financing statement lapses. The last sentence of subsection (c) addresses the effect of lapse. The deemed retroactive unperfection applies only with respect to purchasers for value; unlike former section 9-403(2), it does not apply with respect to lien creditors.

Example 1: SP-1 and SP-2 both hold security interests in the same collateral. Both security interests are perfected by filing. SP-1 filed first and has priority under section 9-322(a)(1). The effectiveness of SP-1's filing lapses. As long as SP-2's security interest remains perfected thereafter, SP-2 is entitled to priority over SP-1's security interest, which is deemed never to have been perfected as against a purchaser for value (SP-2). See section 9-322(a)(2).

Example 2: SP holds a security interest perfected by filing. On July 1, LC acquires a judicial lien on the collateral. Two weeks later, the effectiveness of the financing statement lapses. Although the security interest becomes unperfected upon lapse, it was perfected when LC acquired its lien. Accordingly, notwithstanding the lapse, the perfected security interest has priority over the rights of LC, who is not a purchaser. See section 9-317(a)(2).

4. **Effect of Debtor's Bankruptcy.** Under former section 9-403(2), lapse was tolled if the debtor entered bankruptcy or another insolvency proceeding. Nevertheless, being unaware that insolvency proceedings had been commenced, filing offices routinely removed records from the files as if lapse had not been tolled. Subsection (c) deletes the former tolling provision and thereby imposes a new burden on the secured party: To be sure that a financing statement does not lapse during the debtor's bankruptcy. The secured party can prevent lapse by filing a continuation statement, even without first obtaining relief from the automatic stay. See Bankruptcy Code section 362(b)(3). Of course, if the debtor enters bankruptcy before lapse, the provisions of this article with respect to lapse would be of no effect to the extent that federal bankruptcy law dictates a contrary result (e.g., to the extent that the Bankruptcy Code determines rights as of the date of the filing of the bankruptcy petition).

5. **Continuation Statements.** Subsection (d) explains when a continuation statement may be filed. A continuation statement filed at a time other than that prescribed by subsection (d) is ineffective, see section 9-510(c), and the filing office may not accept it. See sections 9-516(b) and 9-520(a). Subsection (e) specifies the effect of a continuation statement and provides for successive continuation statements.

§ 25-9-516. (Effective July 1, 2001) What constitutes filing; effectiveness of filing.

(a) What constitutes filing. — Except as otherwise provided in subsection (b) of this section, communication of a record to a filing office and tender of the filing fee or acceptance of the record by the filing office constitutes filing.

(b) Refusal to accept record; filing does not occur. — Filing does not occur with respect to a record that a filing office refuses to accept because:

(1) The record is not communicated by a method or medium of communication authorized by the filing office;

(2) An amount equal to or greater than the applicable filing fee is not tendered;

(3) The filing office is unable to index the record because:

a. In the case of an initial financing statement, the record does not provide a name for the debtor;

b. In the case of an amendment or correction statement, the record:
1. Does not identify the initial financing statement as required by G.S. 25-9-512 or G.S. 25-9-518, as applicable; or
2. Identifies an initial financing statement whose effectiveness has lapsed under G.S. 25-9-515;
c. In the case of an initial financing statement that provides the name of a debtor identified as an individual or an amendment that provides a name of a debtor identified as an individual which was not previously provided in the financing statement to which the record relates, the record does not identify the debtor's last name; or
d. In the case of a record filed in the filing office described in G.S. 25-9-501(a)(1), the record does not provide a sufficient description of the real property to which it relates;

(4) In the case of an initial financing statement or an amendment that adds a secured party of record, the record does not provide a name and mailing address for the secured party of record;

(5) In the case of an initial financing statement or an amendment that provides a name of a debtor which was not previously provided in the financing statement to which the amendment relates, the record does not:
a. Provide a mailing address for the debtor;
b. Indicate whether the debtor is an individual or an organization; or
c. If the financing statement indicates that the debtor is an organization, provide:
1. A type of organization for the debtor;
2. A jurisdiction of organization for the debtor; or
3. An organizational identification number for the debtor or indicate that the debtor has none;

(6) In the case of an assignment reflected in an initial financing statement under G.S. 25-9-514(a) or an amendment filed under G.S. 25-9-514(b), the record does not provide a name and mailing address for the assignee; or

(7) In the case of a continuation statement, the record is not filed within the six-month period prescribed by G.S. 25-9-515(d).

(c) Rules applicable to subsection (b). — For purposes of subsection (b) of this section:

(1) A record does not provide information if the filing office is unable to read or decipher the information; and

(2) A record that does not indicate that it is an amendment or identify an initial financing statement to which it relates, as required by G.S. 25-9-512, 25-9-514, or 25-9-518, is an initial financing statement.

(d) Refusal to accept record; record effective as filed record. — A record that is communicated to the filing office with tender of the filing fee, but which the filing office refuses to accept for a reason other than one set forth in subsection (b) of this section, is effective as a filed record except as against a purchaser of the collateral which gives value in reasonable reliance upon the absence of the record from the files. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C.S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, ss. 2, 4; c. 196, s. 2; 1955, c. 386, ss. 1, 2; c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1969, c. 1115, s. 1; 1971, c. 1170; 1973, c. 1316, s. 1; 1975, c. 862, s. 7; 1977, cc. 156, 295; 1983, c. 713, s. 23; 1987, c. 792, s. 6; 1989, c. 523, s. 4; 1991, c. 164, s. 1; 1997-456, s. 55.3; 1997-475, s. 5.4; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Subsection (a): Former section 9-403(1); the remainder is new.

2. **What Constitutes Filing.** Subsection (a) deals generically with what constitutes filing of a record, including an initial financing statement and amendments of all kinds (e.g., assignments, termination statements, and continuation statements). It follows former section 9-403(1), under which either acceptance of a record by the filing office or presentation of the record and tender of the filing fee constitutes filing.

3. **Effectiveness of Rejected Record.** Subsection (b) provides an exclusive list of grounds upon which the filing office may reject a record. See section 9-520(a). Although some of these grounds would also be grounds for rendering a filed record ineffective (e.g., an initial financing statement does not provide a name for the debtor), many others would not be (e.g., an initial financing statement does not provide a mailing address for the debtor or secured party of record). Neither this section nor section 9-520 requires or authorizes the filing office to determine, or even consider, the accuracy of information provided in a record. For example, the State A filing office may not reject under subsection (b)(5)(C) an initial financing statement indicating that the debtor is a State A corporation and providing a three-digit organizational identification number, even if all State A organizational identification numbers contain at least five digits and two letters.

A financing statement or other record that is communicated to the filing office but which the filing office refuses to accept provides no public notice, regardless of the reason for the rejection. However, this section distinguishes between records that the filing office rightfully rejects and those that it wrongfully rejects. A filer is able to prevent a rightful rejection by complying with the requirements of subsection (b). No purpose is served by giving effect to records that justifiably never find their way into the system, and subsection (b) so provides.

Subsection (d) deals with the filing office's unjustified refusal to accept a record. Here, the filer is in no position to prevent the rejection and as a general matter should not be prejudiced by it. Although wrongfully rejected records generally are effective, subsection (d) contains a special rule to protect a third-party purchaser of the collateral (e.g., a buyer or competing secured party) who gives value in reliance upon the apparent absence of the record from the files. As against a person who searches the public record and reasonably relies on what the public record shows, subsection (d) imposes upon the filer the risk that a record failed to make its way into the filing system because of the filing office's wrongful rejection of it. (Compare section 9-517, under which a mis-indexed financing statement is fully effective.) This risk is likely to be small, particularly when a record is presented electronically, and the filer can guard against this risk by conducting a post-filing search of the records. Moreover, section 9-520(b) requires the filing office to give prompt notice of its refusal to accept a record for filing.

4. **Method or Medium of Communication.** Rejection pursuant to subsection (b)(1) for failure to communicate a record properly should be understood to mean noncompliance with procedures relating to security, authentication, or other communication-related requirements that the filing office may impose. Subsection (b)(1) does not authorize a filing office to impose additional substantive requirements. See section 9-520, comment 2.

5. **Address for Secured Party of Record.** Under subsection (b)(4) and section 9-520(a), the lack of a mailing address for the secured party of record requires the filing office to reject an initial financing statement. The failure to include an address for the secured party of record no longer renders a financing statement ineffective. See section 9-502(a). The function of the address is not to identify the secured party of record but rather to provide an address to which others can send required notifications, e.g., of a purchase-money security interest in inventory or of the disposition of collateral. Inasmuch as the address shown on a filed financing statement is an "address that is reasonable under the circumstances," a person required to send a notification to the secured party may satisfy the requirement by sending a notification to that address, even if the address is or becomes incorrect. See section 9-102 (definition of "send"). Similarly, because the address is "held out by (the secured party) as the place for receipt of such communications (i.e., communications relating to security interests)," the secured party is deemed to have received a notification delivered to that address. See section 1-201(26).

6. **Uncertainty Concerning Individual Debtor's Last Name.** Subsection (b)(3)(C) requires the filing office to reject an initial financing statement or amendment adding an individual debtor if the office cannot index the record because it does not identify the debtor's last name (e.g., it is unclear whether the debtor's name is Elton John or John Elton).

7. **Inability of Filing Office to Read or Decipher Information.** Under subsection (c)(1), if the filing office cannot read or decipher information, the information is not provided by a record for purposes of subsection (b).

8. **Classification of Records.** For purposes of subsection (b), a record that does not indicate it is an amendment or identify an initial financing statement to which it relates is deemed to be an initial financing statement. See subsection (c)(2).

9. **Effectiveness of Rejectable But Unrejected Record.** Section 9-520(a) requires the filing office to refuse to accept an initial financing statement for a reason set forth in subsection (b). However, if the filing office accepts such a financing statement nevertheless, the financing statement generally is effective if it complies with the requirements of section 9-502(a) and (b). See section 9-520(c). Similarly, an otherwise effective financing statement generally remains so even though the information in the financing statement becomes incorrect. See section 9-507(b). (Note that if the information required by subsection (b)(5) is incorrect when the financing statement is filed, section 9-338 applies.)

§ 25-9-517. (Effective July 1, 2001) Effect of indexing errors.

The failure of the filing office to index a record correctly does not affect the effectiveness of the filed record. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Effectiveness of Mis-Indexed Records.** This section provides that the filing office's error in mis-indexing a record does not render ineffective an otherwise effective record. As did former section 9-401, this section imposes the risk of filing-office error on those who search the files rather than on those who file.

§ 25-9-518. (Effective July 1, 2001) Claim concerning inaccurate or wrongfully filed record.

(a) Correction statement. — A person may file in the filing office a correction statement with respect to a record indexed there under the person's name if the person believes that the record is inaccurate or was wrongfully filed.

(b) Sufficiency of correction statement. — A correction statement must:

(1) Identify the record to which it relates by the file number assigned to the initial financing statement to which the record relates;

(2) Indicate that it is a correction statement; and

(3) Provide the basis for the person's belief that the record is inaccurate and indicate the manner in which the person believes the record should be amended to cure any inaccuracy or provide the basis for the person's belief that the record was wrongfully filed.

(c) Record not affected by correction statement. — The filing of a correction statement does not affect the effectiveness of an initial financing statement or other filed record. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Correction Statements.** Former article 9 did not afford a nonjudicial means for a debtor to correct a financing statement or other record that was inaccurate or wrongfully filed. Subsection (a) affords the debtor the right to file a correction statement. Among other requirements, the correction statement must provide the basis for the debtor's belief that the public record should be corrected. See subsection (b). These provisions, which resemble the analogous remedy in the Fair Credit Reporting Act, 15 U.S.C. section 1681i, afford an aggrieved person the opportunity to state its position on the public record. They do not permit an aggrieved person to change the legal effect of the public record. Thus, although a filed correction statement becomes part of the "financing statement," as defined in section 9-102, the filing does not affect the effectiveness of the initial financing statement or any other filed record. See subsection (c).

This section does not displace other provisions of this article that impose liability for making unauthorized filings or failing to file or send a termination statement (see section 9-625(e)), nor does it displace any available judicial remedies.

3. **Resort to Other Law.** This article cannot provide a satisfactory or complete solution to

problems caused by misuse of the public records. The problem of "bogus" filings is not limited to the UCC filing system but extends to the real property records, as well. A summary judicial procedure for correcting the public record and criminal penalties for those who misuse the filing and recording systems are likely to be more effective and put less strain on the filing system than provisions authorizing or requiring action by filing and recording offices.

SUBPART 2. Duties and Operation of Filing Office.

§ 25-9-519. (Effective July 1, 2001) Numbering, maintaining, and indexing records; communicating information provided in records.

(a) Filing office duties. — For each record filed in a filing office, the filing office shall:

(1) Assign a unique number to the filed record;

(2) Create a record that bears the number assigned to the filed record and the date and time of filing;

(3) Maintain the filed record for public inspection; and

(4) Index the filed record in accordance with subsections (c), (d), and (e) of this section.

(b) File number. — Except as otherwise provided in subsection (i) of this section, a file number assigned after January 1, 2003, must include a digit that:

(1) Is mathematically derived from or related to the other digits of the file number; and

(2) Aids the filing office in determining whether a number communicated as the file number includes a single-digit or transpositional error.

(c) Indexing: general. — Except as otherwise provided in subsections (d) and (e) of this section, the filing office shall:

(1) Index an initial financing statement according to the name of the debtor and index all filed records relating to the initial financing statement in a manner that associates with one another an initial financing statement and all filed records relating to the initial financing statement; and

(2) Index a record that provides a name of a debtor which was not previously provided in the financing statement to which the record relates also according to the name that was not previously provided.

(d) Indexing: real-property-related financing statement. — If a financing statement is filed as a fixture filing or covers as-extracted collateral or timber to be cut, the filing office shall index it:

(1) Under the names of the debtor and of each owner of record shown on the financing statement as if they were the mortgagors under a mortgage of the real property described; and

(2) To the extent that the law of this State provides for indexing of records of mortgages under the name of the mortgagee, under the name of the secured party as if the secured party were the mortgagee thereunder, or, if indexing is by description, as if the financing statement were a record of a mortgage of the real property described.

(e) Indexing: real-property-related assignment. — If a financing statement is filed as a fixture filing or covers as-extracted collateral or timber to be cut, the filing office shall index an assignment filed under G.S. 25-9-514(a) or an amendment filed under G.S. 25-9-514(b):

(1) Under the name of the assignor as grantor; and

(2) To the extent that the law of this State provides for indexing a record of the assignment of a mortgage under the name of the assignee, under the name of the assignee.

(f) Retrieval and association capability. — The filing office shall maintain a capability:

(1) To retrieve a record by the name of the debtor and by the file number assigned to the initial financing statement to which the record relates; and

(2) To associate and retrieve with one another an initial financing statement and each filed record relating to the initial financing statement.

(g) Removal of debtor's name. — The filing office may not remove a debtor's name from the index until one year after the effectiveness of a financing statement naming the debtor lapses under G.S. 25-9-515 with respect to all secured parties of record.

(h) Timeliness of filing office performance. — The filing office shall perform the acts required by subsections (a) through (e) of this section at the time and in the manner prescribed by filing-office rule, but after January 1, 2003, not later than three business days after the filing office receives the record in question.

(i) Inapplicability to real-property-related filing office. — Subsection (b) of this section does not apply to a filing office described in G.S. 25-9-501(a)(1). (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C.S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, ss. 2, 4; c. 196, s. 2; 1955, c. 386, ss. 1, 2; c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1969, c. 1115, s. 1; 1971, c. 1170; 1973, c. 1316, s. 1; 1975, c. 862, s. 7; 1977, cc. 156, 295; 1983, c. 713, s. 23; 1987, c. 792, s. 6; 1989, c. 523, s. 4; 1991, c. 164, s. 1; 1997-456, s. 55.3; 1997-475, s. 5.4; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former sections 9-403(4) and (7), and section 9-405(2).

2. **Filing Office's Duties.** Subsections (a) through (e) set forth the duties of the filing office with respect to filed records. Subsection (h), which is new, imposes a minimum standard of performance for those duties. Prompt indexing is crucial to the effectiveness of any filing system. An accepted but unindexed record affords no public notice. Subsection (f) requires the filing office to maintain appropriate storage and retrieval facilities, and subsection (g) contains minimum requirements for the retention of records.

3. **File Number.** Subsection (a)(1) requires the filing office to assign a unique number to each filed record. That number is the "file number" only if the record is an initial financing statement. See section 9-102.

4. **Time of Filing.** Subsection (a)(2) and section 9-523 refer to the "date and time" of filing. The statutory text does not contain any instructions to a filing office as to how the time of filing is to be determined. The method of determining or assigning a time of filing is an appropriate matter for filing-office rules to address.

5. **Related Records.** Subsections (c) and (f) are designed to ensure that an initial financing statement and all filed records relating to it are associated with one another, indexed under the name of the debtor, and retrieved together. To comply with subsection (f), a filing office (other than a real property recording office in a state that enacts subsection (f), Alternative B) must be capable of retrieving records in each of two ways: By the name of the debtor and by the file number of the initial financing statement to which the record relates.

6. **Prohibition on Deleting Names from Index.** This article contemplates that the filing office will not delete the name of a debtor from the index until at least one year passes after the effectiveness of the financing statement lapses as to all secured parties of record. See subsection (g). This rule applies even if the filing office accepts an amendment purporting to delete or modify the name of a debtor or terminate the effectiveness of the financing statement. If an amendment provides a modified name for a debtor, the amended name should be added to the index, see subsection (c)(2), but the preamendment name should remain in the index.

Compared to former article 9, the rule in subsection (g) increases the amount of information available to those who search the public records. The rule also contemplates that searchers—not the filing office—will determine the significance and effectiveness of filed records.

§ 25-9-520. (Effective July 1, 2001) Acceptance and refusal to accept record.

(a) Mandatory refusal to accept record. — A filing office shall refuse to accept a record for filing for a reason set forth in G.S. 25-9-516(b) and may refuse to accept a record for filing only for a reason set forth in G.S. 25-9-516(b).

(b) Communication concerning refusal. — If a filing office refuses to accept a record for filing, it shall communicate to the person that presented the record the fact of and reason for the refusal and the date and time the record would have been filed had the filing office accepted it. The communication must be made at the time and in the manner prescribed by filing-office rule but in no event more than three business days after the filing office receives the record.

(c) When filed financing statement effective. — A filed financing statement satisfying G.S. 25-9-502(a) and (b) is effective, even if the filing office is required to refuse to accept it for filing under subsection (a) of this section. However, G.S. 25-9-338 applies to a filed financing statement providing information described in G.S. 25-9-516(b)(5) which is incorrect at the time the financing statement is filed.

(d) Separate application to multiple debtors. — If a record communicated to a filing office provides information that relates to more than one debtor, this Part applies as to each debtor separately. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Refusal to Accept Record for Filing.** In some states, filing offices considered themselves obligated by former article 9 to review the form and content of a financing statement and to refuse to accept those that they determine are legally insufficient. Some filing offices imposed requirements for or conditions to filing that do not appear in the statute. Under this section, the filing office is not expected to make legal judgments and is not permitted to impose additional conditions or requirements.

Subsection (a) both prescribes and limits the bases upon which the filing office must and may reject records by reference to the reasons set forth in section 9-516(b). For the most part, the bases for rejection are limited to those that prevent the filing office from dealing with a record that it receives—because some of the requisite information (e.g., the debtor's name) is missing or cannot be deciphered, because the record is not communicated by a method (e.g., it is MIME-rather than UU-encoded) or medium (e.g., it is written rather than electronic) that the filing office accepts, or because the filer fails to tender an amount equal to or greater than the filing fee.

3. **Consequences of Accepting Rejectable Record.** Section 9-516(b) includes among the reasons for rejecting an initial financing statement the failure to give certain information that is not required as a condition of effectiveness. In conjunction with section 9-516(b)(5), this section requires the filing office to refuse to accept a financing statement that is legally sufficient to perfect a security interest under section 9-502 but does not contain a mailing address for the debtor, does not disclose whether the debtor is an individual or an organization (e.g., a partnership or corporation) or, if the debtor is an organization, does not give certain specified information concerning the organization. The information required by section 9-516(b)(5) assists searchers in weeding out "false positives," i.e., records that a search reveals but which do not pertain to the debtor in question. It assists filers by helping to ensure that the debtor's name is correct and that the financing statement is filed in the proper jurisdiction.

If the filing office accepts a financing statement that does not give this information at all, the filing is fully effective. Section 9-520(c). The financing statement also generally is effective if the information is given but is incorrect; however, section 9-338 affords protection to buyers and holders of perfected security interests who give value in reasonable reliance upon the incorrect information.

4. **Filing Office's Duties with Respect to Rejected Record.** Subsection (b) requires the filing office to communicate the fact of rejection and the reason therefor within a fixed period of time. Inasmuch as a rightfully rejected record is ineffective and a wrongfully rejected record is not fully effective, prompt communication concerning any rejection is important.

5. **Partial Effectiveness of Record.** Under subsection (d), the provisions of this part apply to each debtor separately. Thus, a filing office may reject an initial financing statement or other record as to one named debtor but accept it as to the other.

Example: An initial financing statement is communicated to the filing office. The financing statement names two debtors, John Smith and Jane Smith. It contains all of the information described in section 9-516(b)(5) with respect to John but lacks some of the information with respect to Jane. The filing office must accept the financing statement with respect to John, reject it with respect to Jane, and notify the filer of the rejection.

§ 25-9-521. (Effective July 1, 2001) Uniform form of written financing statement and amendment.

(a) Initial financing statement form. — A filing office that accepts written records may not refuse to accept a written initial financing statement in the following form and format except for a reason set forth in G.S. 25-9-516(b):

[redacted]

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER [optional]

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME - Insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME

OR

1b. INDIVIDUAL'S LAST NAME | FIRST NAME | MIDDLE NAME | SUFFIX

1c. MAILING ADDRESS | CITY | STATE | POSTAL CODE | COUNTRY

1d. TAX ID #: SSN OR EIN | ADD'L INFO RE ORGANIZATION DEBTOR | 1e. TYPE OF ORGANIZATION | 1f. JURISDICTION OF ORGANIZATION | 1g. ORGANIZATIONAL ID #, if any ☐ NONE

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - Insert only one debtor name (2a or 2b) - do not abbreviate or combine names

2a. ORGANIZATION'S NAME

OR

2b. INDIVIDUAL'S LAST NAME | FIRST NAME | MIDDLE NAME | SUFFIX

2c. MAILING ADDRESS | CITY | STATE | POSTAL CODE | COUNTRY

2d. TAX ID #: SSN OR EIN | ADD'L INFO RE ORGANIZATION DEBTOR | 2e. TYPE OF ORGANIZATION | 2f. JURISDICTION OF ORGANIZATION | 2g. ORGANIZATIONAL ID #, if any ☐ NONE

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE of ASSIGNOR S/P) - Insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME

OR

3b. INDIVIDUAL'S LAST NAME | FIRST NAME | MIDDLE NAME | SUFFIX

3c. MAILING ADDRESS | CITY | STATE | POSTAL CODE | COUNTRY

4. This FINANCING STATEMENT covers the following collateral:

5. ALTERNATIVE DESIGNATION (if applicable): ☐ LESSEE/LESSOR ☐ CONSIGNEE/CONSIGNOR ☐ BAILEE/BAILOR ☐ SELLER/BUYER ☐ AG. LIEN ☐ NON-UCC FILING

6. ☐ This FINANCING STATEMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS. Attach Addendum (if applicable)

7. Check to REQUEST SEARCH REPORT(S) on Debtor(s) (ADDITIONAL FEE) (optional) ☐ All Debtors ☐ Debtor 1 ☐ Debtor 2

8. OPTIONAL FILER REFERENCE DATA

NATIONAL UCC FINANCING STATEMENT (FORM UCC1) (REV. 07/29/98)

UCC FINANCING STATEMENT ADDENDUM

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

9. NAME OF FIRST DEBTOR (1a or 1b) ON RELATED FINANCING STATEMENT

9a. ORGANIZATION'S NAME

OR

9b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME,SUFFIX

10. MISCELLANEOUS:

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

11. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - Insert only one name (11a or 11b) - do not abbreviate or combine names

11a. ORGANIZATION'S NAME

OR

11b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

11c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

11d. TAX ID #: SSN OR EIN	ADD'L INFO RE ORGANIZATION DEBTOR	11e. TYPE OF ORGANIZATION	11f. JURISDICTION OF ORGANIZATION	11g. ORGANIZATIONAL ID #, if any
				☐ NONE

12. ☐ ADDITIONAL SECURED PARTY'S or ☐ ASSIGNOR S/P'S NAME - Insert only one name (12a or 12b)

12a. ORGANIZATION'S NAME

OR

12b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

12c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

13. This FINANCING STATEMENT covers ☐ timber to be cut or ☐ as-extracted collateral, or is filed as a ☐ fixture filing.

14. Description of real estate:

15. Name and address of a RECORD OWNER of above-described real estate (if Debtor does not have a record interest):

16. Additional collateral description:

17. Check only if applicable and check only one box.

Debtor is a ☐ Trust or ☐ Trustee acting with respect to property held in trust or ☐ Decedent's Estate

18. Check only if applicable and check only one box.

☐ Debtor is a TRANSMITTING UTILITY

☐ Filed in connection with a Manufactured-Home Transaction — effective 30 years

☐ Filed in connection with a Public-Finance Transaction — effective 30 years

NATIONAL UCC FINANCING STATEMENT ADDENDUM (FORM UCC1Ad) (REV. 07/29/98)

(b) Amendment form. — A filing office that accepts written records may not refuse to accept a written record in the following form and format except for a reason set forth in G.S. 25-9-516(b):

[redacted]

UCC FINANCING STATEMENT AMENDMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER [optional]

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1a. INITIAL FINANCING STATEMENT FILE #

1b. This FINANCING STATEMENT AMENDMENT is ☐ to be filed [for record] (or recorded) in the REAL ESTATE RECORDS.

2. ☐ TERMINATION: Effectiveness of the Financing Statement identified above is terminated with respect to security interest(s) of the Secured Party authorizing this Termination Statement.

3. ☐ CONTINUATION: Effectiveness of the Financing Statement identified above with respect to security interest(s) of the Secured Party authorizing this Continuation Statement is continued for the additional period provided by applicable law.

4. ☐ ASSIGNMENT (full or partial): Give name of assignee in item 7a or 7b and address of assignee in item 7c; and also give name of assignor in item 9.

5. AMENDMENT (PARTY INFORMATION): This Amendment affects ☐ Debtor or ☐ Secured Party of record. Check only one of these two boxes.

Also check one of the following three boxes and provide appropriate information in items 6 and/or 7.

☐ CHANGE name and/or address: Give current record name in item 6a or 6b; also give new name (if name change) in item 7a or 7b and/or new address (if address change) in item 7c. ☐ DELETE name: Give record name to be deleted in item 6a or 6b. ☐ ADD name: Complete item 7a or 7b, and also item 7c; also complete items 7d-7g (if applicable).

6. CURRENT RECORD INFORMATION:

6a. ORGANIZATION'S NAME

OR

6b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

7. CHANGED (NEW) OR ADDED INFORMATION:

7a. ORGANIZATION'S NAME

OR

7b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

7c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

7d. TAX ID #: SSN OR EIN	ADDL INFO RE ORGANIZATION DEBTOR	7e. TYPE OF ORGANIZATION	7f. JURISDICTION OF ORGANIZATION	7g. ORGANIZATIONAL ID #, if any
				☐ NONE

8. AMENDMENT (COLLATERAL CHANGE): check only one box.

Describe collateral ☐ deleted or ☐ added, or give entire ☐ restated collateral description, or describe collateral ☐ assigned.

9. NAME OF SECURED PARTY OF RECORD AUTHORIZING THIS AMENDMENT (name of assignor, if this is an Assignment). If this is an Amendment authorized by a Debtor which adds collateral or adds the authorizing Debtor, or if this is a Termination authorized by a Debtor, check here ☐ and enter name of DEBTOR authorizing this Amendment.

9a. ORGANIZATION'S NAME

OR

9b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

10. OPTIONAL FILER REFERENCE DATA

NATIONAL UCC FINANCING STATEMENT AMENDMENT (FORM UCC3) (REV. 07/29/98)

UCC FINANCING STATEMENT AMENDMENT ADDENDUM

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

11. INITIAL FINANCING STATEMENT FILE # (same as item 1a on Amendment form)

12. NAME OF PARTY AUTHORIZING THIS AMENDMENT (same as item 9 on Amendment form)

12a. ORGANIZATION'S NAME

OR

12b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME,SUFFIX

13. Use this space for additional information

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

NATIONAL UCC FINANCING STATEMENT AMENDMENT ADDENDUM (FORM UCC3Ad) (REV. 07/29/98)

(1899, cc. 17, 247; 1901, cc. 329, 704; 1903, c. 489; 1905, cc. 226, 319; Rev., s. 2055; 1907, c. 843; 1909, c. 532; P.L. 1913, c. 49; C.S., s. 2490; 1925, c. 285, s. 1; 1931, c. 196; 1933, c. 101, s. 6; 1945, c. 182, s. 2; c. 196, s. 2; 1951, c. 926, s. 1; 1955, c. 386, s. 1; 1957, c. 564; 1961, c. 574; 1965, c. 700, s. 1; 1969, c. 1115, s. 1; 1975, c. 862, s. 7; 1983 (Reg. Sess., 1984), c. 1116, s. 43; 1989, c. 523, s. 7; 2000-169, ss. 1, 2(a)-(c).)

Editor's Note. — Session Laws 2000-169, s. 51, makes this section effective July 1, 2001.

Session Laws 2000-169, ss. 2(b) and (2)(c), direct the Revisor of Statutes to cause to be printed in G.S. 25-9-521(a), the National UCC Financing Statement (Form UCC1) (Rev. 07/29/98) and the National UCC Financing Statement Addendum (Form UCC1 Ad) (Rev. 07/29/98), and to cause to be printed in G.S. 25-9-521(b), the National UCC Financing Statement Amendment (Form UCC3) (Rev. 07/29/98) and the National UCC Financing Statement Amendment Addendum (Form UCC3 Ad) (Rev. 07/29/98), both as reproduced in the official text of U.C.C. Article 9 (1999), and incorporates these forms by reference into G.S. 25-9-521(a) and (b), respectively.

OFFICIAL COMMENT

1. **Source.** New.

2. **"Safe Harbor" Written Forms.** Although Section 9-520 limits the bases upon which the filing office can refuse to accept records, this section provides sample written forms that must be accepted in every filing office in the country, as long as the filing office's rules permit it to accept written communications. By completing one of the forms in this section, a secured party can be certain that the filing office is obligated to accept it.

The forms in this section are based upon national financing statement forms that were in use under former Article 9. Those forms were developed over an extended period and reflect the comments and suggestions of filing officers, secured parties and their counsel, and service companies. The formatting of those forms and of the ones in this section has been designed to reduce error by both filers and filing offices.

A filing office that accepts written communications may not reject, on grounds of form or format, a filing using these forms. Although filers are not required to use the forms, they are encouraged and can be expected to do so, inasmuch as the forms are well designed and avoid the risk of rejection on the basis of form or format. As their use expands, the forms will rapidly become familiar to both filers and filing-office personnel. Filing offices may and should encourage the use of these forms by declaring them to be the "standard" (but not exclusive) forms for each jurisdiction, albeit without in any way suggesting that alternative forms are unacceptable.

The multi-purpose form in subsection (b) covers changes with respect to the debtor, the secured party, the collateral, and the status of the financing statement (termination and continuation). A single form may be used for several different types of amendments at once (e.g., both to change a debtor's name and continue the effectiveness of the financing statement.)

§ 25-9-522. (Effective July 1, 2001) Maintenance and destruction of records.

(a) Post-lapse maintenance and retrieval of information. — The filing office shall maintain a record of the information provided in a filed financing statement for at least one year after the effectiveness of the financing statement has lapsed under G.S. 25-9-515 with respect to all secured parties of record. The record must be retrievable by using the name of the debtor and by using the file number assigned to the initial financing statement to which the record relates.

(b) Destruction of written records. — Except to the extent that a statute governing disposition of public records provides otherwise, the filing office immediately may destroy any written record evidencing a financing statement. However, if the filing office destroys a written record, it shall maintain another record of the financing statement which complies with subsection (a) of this section. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C.S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, ss.

2, 4; c. 196, s. 2; 1955, c. 386, ss. 1, 2; c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1969, c. 1115, s. 1; 1971, c. 1170; 1973, c. 1316, s. 1; 1975, c. 862, s. 7; 1977, cc. 156, 295; 1983, c. 713, s. 23; 1987, c. 792, s. 6; 1989, c. 523, s. 4; 1991, c. 164, s. 1; 1997-456, s. 55.3; 1997-475, s. 5.4; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-403(3), revised substantially.

2. **Maintenance of Records.** Section 9-523 requires the filing office to provide information concerning certain lapsed financing statements. Accordingly, subsection (a) requires the filing office to maintain a record of the information in a financing statement for at least one year after lapse. During that time, the filing office may not delete any information with respect to a filed financing statement; it may only add information. This approach relieves the filing office from any duty to determine whether to substitute or delete information upon receipt of an amendment. It also assures searchers that they will receive all information with respect to financing statements filed against a debtor and thereby be able themselves to determine the state of the public record.

The filing office may maintain this information in any medium. Subsection (b) permits the filing office immediately to destroy written records evidencing a financing statement, provided that the filing office maintains another record of the information contained in the financing statement as required by subsection (a).

§ 25-9-523. (Effective July 1, 2001) Information from filing office.

(a) Acknowledgment of filing written record. — If a person that files a written record requests an acknowledgment of the filing, the filing office shall send to the person an image of the record showing the number assigned to the record pursuant to G.S. 25-9-519(a)(1) and the date and time of the filing of the record. However, if the person furnishes a copy of the record to the filing office, the filing office may instead:

(1) Note upon the copy the number assigned to the record pursuant to G.S. 25-9-519(a)(1) and the date and time of the filing of the record; and

(2) Send the copy to the person.

(b) Acknowledgment of filing other record. — If a person files a record other than a written record, the filing office shall communicate to the person an acknowledgment that provides:

(1) The information in the record;

(2) The number assigned to the record pursuant to G.S. 25-9-519(a)(1); and

(3) The date and time of the filing of the record.

(c) Communication of requested information. — Except as otherwise provided in subsection (g) of this section, the filing office shall communicate or otherwise make available in a record, for which it shall not be liable, the following information to any person that requests it:

(1) Whether there is on file on a date and time specified by the filing office, but not a date earlier than three business days before the filing office receives the request, any financing statement that:

a. Designates a particular debtor;

b. Has not lapsed under G.S. 25-9-515 with respect to all secured parties of record; and

c. If the request so states, has lapsed under G.S. 25-9-515 and a record of which is maintained by the filing office under G.S. 25-9-522(a);

(2) The date and time of filing of each financing statement; and

(3) The information provided in each financing statement.

(d) Medium for communicating information. — In complying with its duty under subsection (c) of this section, the filing office may communicate infor-

mation in any medium. However, if requested, the filing office shall communicate information by issuing a record that can be admitted into evidence in the courts of this State without extrinsic evidence of its authenticity.

(e) Timeliness of filing office performance. — The filing office shall perform the acts required by subsections (a) through (d) of this section at the time and in the manner prescribed by filing-office rule, but after January 1, 2003, for a filing office described in G.S. 25-9-501(a)(2), not later than three business days after the filing office receives the request.

(f) Reserved.

(g) Inapplicability to real-property-related filing office. — Subsection (c) of this section does not apply to a filing office described in G.S. 25-9-501(a)(1) with respect to financing statements filed on or after the effective date of this act. (1965, c. 700, s. 1; 1967, c. 562, s. 1; 1973, c. 1316, s. 7; 1975, c. 862, s. 7; 1983, c. 713, ss. 27, 28; 1987, c. 792, s. 10; 1997-456, s. 55.3; 1997-475, s. 5.7; 2000-169, s. 1(d).)

OFFICIAL COMMENT

1. **Source.** Former section 9-407; subsections (d) and (e) are new.

2. **Filing Office's Duty to Provide Information.** Former section 9-407, dealing with obtaining information from the filing office, was bracketed to suggest to legislatures that its enactment was optional. Experience has shown that the method by which interested persons can obtain information concerning the public records should be uniform. Accordingly, the analogous provisions of this article are not in brackets.

Most of the other changes from former section 9-407 are for clarification, to embrace medium-neutral drafting, or to impose standards of performance on the filing office.

3. **Acknowledgments of Filing.** Subsections (a) and (b) require the filing office to acknowledge the filing of a record. Under subsection (a), the filing office is required to acknowledge the filing of a written record only upon request of the filer. Subsection (b) requires the filing office to acknowledge the filing of a non-written record even in the absence of a request from the filer.

4. **Response to Search Request.** Subsection (c)(3) requires the filing office to provide "the information contained in each financing statement" to a person who requests it. This requirement can be satisfied by providing copies, images, or reports. The requirement does not in any manner inhibit the filing office from also offering to provide less than all of the information (presumably for a lower fee) to a person who asks for less. Thus, subsection (c) accommodates the practice of providing only the type of record (e.g., initial financing statement, continuation statement), number assigned to the record, date and time of filing, and names and addresses of the debtor and secured party when a requesting person asks for no more (i.e., when the person does not ask for copies of financing statements). In contrast, the filing office's obligation under subsection (b) to provide an acknowledgment containing "the information contained in the record" is not defined by a customer's request. Thus unless the filer stipulates otherwise, to comply with subsection (b) the filing office's acknowledgment must contain all of the information in a record.

Subsection (c) assures that a minimum amount of information about filed records will be available to the public. It does not preclude a filing office from offering additional services.

5. **Lapsed and Terminated Financing Statements.** This section reflects the policy that terminated financing statements will remain part of the filing office's data base. The filing office may remove from the data base only lapsed financing statements, and then only when at least a year has passed after lapse. See section 9-519(g). Subsection (c)(1)(C) requires a filing office to conduct a search and report as to lapsed financing statements that have not been removed from the data base, when requested.

6. **Search by Debtor's Address.** Subsection (c)(1)(A) contemplates that, by making a single request, a searcher will receive the results of a search of the entire public record maintained by any given filing office. Addition of the bracketed language in subsection (c)(1)(A) would permit a search report limited to financing statements showing a particular address for the debtor, but only if the search request is so limited. With or without the bracketed language, this subsection does not permit the filing office to compel a searcher to limit a request by address.

7. **Medium of Communication; Certificates.** Former article 9 provided that the filing office respond to a request for information by providing a certificate. The principle of medium-neutrality would suggest that the statute not require a written certificate. Subsection (d) follows this principle by permitting the filing

office to respond by communicating "in any medium." By permitting communication "in any medium," subsection (d) is not inconsistent with a system in which persons other than filing office staff conduct searches of the filing office's (computer) records.

Some searchers find it necessary to introduce the results of their search into evidence. Because official written certificates might be introduced into evidence more easily than official communications in another medium, subsection (d) affords states the option of requiring the filing office to issue written certificates upon request. The alternative bracketed language in subsection (d) recognizes that some states may prefer to permit the filing office to respond in another medium, as long as the response can be admitted into evidence in the courts of that state without extrinsic evidence of its authenticity.

8. **Performance Standard.** The utility of the filing system depends on the ability of searchers to get current information quickly. Accordingly, subsection (e) requires that the filing office respond to a request for information no later than two business days after it receives the request. The information contained in the response must be current as of a date no earlier than three business days before the filing office receives the request. See subsection (c)(1). The failure of the filing office to comply with performance standards, such as subsection (e), has no effect on the private rights of persons affected by the filing of records.

9. **Sales of Records in Bulk.** Subsection (f), which is new, mandates that the appropriate official or the filing office sell or license the filing records to the public in bulk, on a nonexclusive basis, in every medium available to the filing office. The details of implementation are left to filing-office rules.

§ 25-9-524. (Effective July 1, 2001) Delay by filing office.

Delay by the filing office beyond a time limit prescribed by this Part is excused if:

(1) The delay is caused by interruption of communication or computer facilities, war, emergency conditions, failure of equipment, or other circumstances beyond control of the filing office; and

(2) The filing office exercises reasonable diligence under the circumstances. (2000-169, s. 1.)

OFFICIAL COMMENT

Source. New; derived from section 4-109.

§ 25-9-525. (Effective July 1, 2001) Fees.

(a) Initial financing statement or other record: general rule. — Except as otherwise provided in subsection (e) of this section, the fee for filing and indexing a record under this Part is:

(1) Thirty dollars ($30.00) if the record is communicated in writing and consists of one or two pages;

(2) Forty-five dollars ($45.00) if the record is communicated in writing and consists of more than two pages, plus two dollars ($2.00) for each page over 10 pages; and

(3) Thirty dollars ($30.00) if the record is communicated by another medium authorized by filing-office rule.

(b) Reserved.

(c) Number of names. — The number of names required to be indexed does not affect the amount of the fee in subsection (a) of this section.

(d) Response to information request. — The fee for responding to a request for information from the filing office, including for communicating whether there is on file any financing statement naming a particular debtor, is:

(1) Thirty dollars ($30.00) if the request is communicated in writing; and

(2) Thirty dollars ($30.00) if the request is communicated by another medium authorized by filing-office rule.

Upon request the filing office shall furnish a copy of any filed financing statement or statement of assignment for a uniform fee of two dollars ($2.00) per page. This subsection does not require that a fee be charged for remote access searching of the filing office database.

(e) Record of mortgage. — This section does not require a fee with respect to a record of a mortgage which is effective as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut under G.S. 25-9-502(c). However, the recording and satisfaction fees that otherwise would be applicable to the record of the mortgage apply. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C.S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, ss. 2, 4; c. 196, s. 2; 1955, c. 386, ss. 1, 2; c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1969, c. 1115, s. 1; 1971, c. 1170; 1973, c. 1316, s. 1; 1975, c. 862, s. 7; 1977, cc. 156, 295; 1983, c. 713, s. 23; 1987, c. 792, s. 6; 1989, c. 523, s. 4; 1991, c. 164, s. 1; 1997-456, s. 55.3; 1997-475, s. 5.4; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Various sections of former part 4.

2. **Fees.** This section contains all fee requirements for filing, indexing, and responding to requests for information. Uniformity in the fee structure (but not necessarily in the amount of fees) makes this article easier for secured parties to use and reduces the likelihood that a filed record will be rejected for failure to pay at least the correct amount of the fee. See section 9-516(b)(2).

The costs of processing electronic records are less than those with respect to written records. Accordingly, this section mandates a lower fee as an incentive to file electronically and imposes the additional charge (if any) for multiple debtors only with respect to written records. When written records are used, this article encourages the use of the uniform forms in section 9-521. The fee for filing these forms should be no greater than the fee for other written records.

To make the relevant information included in a filed record more accessible once the record is found, this section mandates a higher fee for longer written records than for shorter ones. Finally, recognizing that financing statements naming more than one debtor are most often filed against a husband and wife, any additional charge for multiple debtors applies to records filed with respect to more than two debtors, rather than with respect to more than one.

Editor's Note. — Session Laws 2000-67, s. 24B.1, effective July 1, 2000, provides: "Of the funds appropriated in this act to the Department of the Secretary of State for the 2000-2001 fiscal year, the Department may use up to the sum of eight hundred sixty-eight thousand six hundred sixty-four dollars ($868,664) in recurring funds and one million eight hundred ninty-one thousand four dollars ($1,891,004) in nonrecurring funds for personnel, start-up expenses, and operating costs necessary for the implementation of Senate Bill 1305, 1999 General Assembly, if it becomes law. Prior to using any of these funds or establishing any of the 41 positons authorized by the General Assembly, the Department shall present its plan for implementing Senate Bill 1305, 1999 General Assembly, to the Joint Legislative Commission on Governmental Operations, the Chairs of the Senate and House Appropriations Subcommittees on General Government, and the Joint Select Committee on Information Technology. The Department shall maintain monthly reports on UCC filings and, on a quarterly basis, submit the reports to the House and Senate Appropriations Subcommittees on General Government and the Fiscal Research Division. The reports shall include: the number of filings, the time required to process the filings, the filings per employee ratio, and the actual and projected revenue from filing fees." Senate Bill 1305, 1999 General Assembly, was enacted into law as Session Laws 2000-169.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

§ 25-9-526. (Effective July 1, 2001) Filing-office rules.

(a) Adoption of filing-office rules. — The Secretary of State shall adopt and publish rules to implement the Secretary of State's responsibilities under this Part. The filing-office rules must be consistent with this Article.

(b) Harmonization of rules. — To keep the filing-office rules and practices of the filing office in harmony with the rules and practices of filing offices in other jurisdictions that enact substantially this Part, and to keep the technology used by the filing office compatible with the technology used by filing offices in other jurisdictions that enact substantially this Part, the Secretary of State, so far as is consistent with the purposes, policies, and provisions of this Article, in adopting, amending, and repealing filing-office rules, may:

(1) Consult with filing offices in other jurisdictions that enact substantially this Part;

(2) Consult the most recent version of the Model Rules promulgated by the International Association of Corporate Administrators or any successor organization; and

(3) Take into consideration the rules and practices of, and the technology used by, filing offices in other jurisdictions that enact substantially this Part. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New; subsection (b) derives in part from the Uniform Consumer Credit Code (1974).

2. **Rules Required.** Operating a filing office is a complicated business, requiring many more rules and procedures than this article can usefully provide. Subsection (a) requires the adoption of rules to carry out the provisions of article 9. The filing office rules must be consistent with the provisions of the statute and adopted in accordance with local procedures. The publication requirement informs secured parties about filing office practices, aids secured parties in evaluating filing-related risks and costs, and promotes regularity of application within the filing office.

3. **Importance of Uniformity.** In today's national economy, uniformity of the policies and practices of the filing offices will reduce the costs of secured transactions substantially. The International Association of Corporate Administrators (IACA), referred to in subsection (b), is an organization whose membership includes filing officers from every state. These individuals are responsible for the proper functioning of the article 9 filing system and have worked diligently to develop model filing office rules, with a view toward efficiency and uniformity.

Although uniformity is an important desideratum, subsection (a) affords considerable flexibility in the adoption of filing office rules. Each state may adopt a version of subsection (a) that reflects the desired relationship between the statewide filing office described in section 9-501(a)(2) and the local filing offices described in section 9-501(a)(1) and that takes into account the practices of its filing offices. Subsection (a) need not designate a single official or agency to adopt rules applicable to all filing offices, and the rules applicable to the statewide filing office need not be identical to those applicable to the local filing office. For example, subsection (a) might provide for the statewide filing office to adopt filing office rules, and, if not prohibited by other law, the filing office might adopt one set of rules for itself and another for local offices. Or, subsection (a) might designate one official or agency to adopt rules for the statewide filing office and another to adopt rules for local filing offices.

PART 6.

DEFAULT.

SUBPART 1. Default and Enforcement of Security Interest.

§ 25-9-601. (Effective July 1, 2001) Rights after default; judicial enforcement; consignor or buyer of accounts, chattel paper, payment intangibles, or promissory notes.

(a) Rights of secured party after default. — After default, a secured party has the rights provided in this Part and, except as otherwise provided in G.S. 25-9-602, those provided by agreement of the parties. A secured party:

(1) May reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure; and

(2) If the collateral is documents, may proceed either as to the documents or as to the goods they cover.

(b) Rights and duties of secured party in possession or control. — A secured party in possession of collateral or control of collateral under G.S. 25-9-104, 25-9-105, 25-9-106, or 25-9-107 has the rights and duties provided in G.S. 25-9-207.

(c) Rights cumulative; simultaneous exercise. — The rights under subsections (a) and (b) of this section are cumulative and may be exercised simultaneously.

(d) Rights of debtor and obligor. — Except as otherwise provided in subsection (g) of this section and G.S. 25-9-605, after default, a debtor and an obligor have the rights provided in this Part and by agreement of the parties.

(e) Lien of levy after judgment. — If a secured party has reduced its claim to judgment, the lien of any levy that may be made upon the collateral by virtue of an execution based upon the judgment relates back to the earliest of:

(1) The date of perfection of the security interest or agricultural lien in the collateral;

(2) The date of filing a financing statement covering the collateral; or

(3) Any date specified in a statute under which the agricultural lien was created.

(f) Execution sale. — A sale pursuant to an execution is a foreclosure of the security interest or agricultural lien by judicial procedure within the meaning of this section. A secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this Article.

(g) Consignor or buyer of certain rights to payment. — Except as otherwise provided in G.S. 25-9-607(c), this Part imposes no duties upon a secured party that is a consignor or is a buyer of accounts, chattel paper, payment intangibles, or promissory notes. (1866-7, c. 1, s. 2; 1872-3, c. 133, s. 2; 1883, c. 88; Code, s. 1800; 1893, c. 9; Rev., s. 2054; C.S., s. 2488; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-501(1), (2), (5).

2. **Enforcement: In General.** The rights of a secured party to enforce its security interest in collateral after the debtor's default are an important feature of a secured transaction. (Note that the term "rights," as defined in section 1-201, includes "remedies.") This part provides those rights as well as certain limitations on their exercise for the protection of the defaulting debtor, other creditors, and other

affected persons. However, subsections (a) and (d) make clear that the rights provided in this part do not exclude other rights provided by agreement.

3. **When Remedies Arise.** Under subsection (a) the secured party's rights arise "(a)fter default." As did former section 9-501, this article leaves to the agreement of the parties the circumstances giving rise to a default. This article does not determine whether a secured party's post-default conduct can constitute a waiver of default in the face of an agreement stating that such conduct shall not constitute a waiver. Rather, it continues to leave to the parties' agreement, as supplemented by law other than this article, the determination whether a default has occurred or has been waived. See section 1-103.

4. **Possession of Collateral; Section 9-207.** After a secured party takes possession of collateral following a default, there is no longer any distinction between a security interest that before default was nonpossessory and a security interest that was possessory before default, as under a common-law pledge. This part generally does not distinguish between the rights of a secured party with a nonpossessory security interest and those of a secured party with a possessory security interest. However, section 9-207 addresses rights and duties with respect to collateral in a secured party's possession. Under subsection (b) of this section, section 9-207 applies not only to possession before default but also to possession after default. Subsection (b) also has been conformed to section 9-207, which, unlike former section 9-207, applies to secured parties having control of collateral.

5. **Cumulative Remedies.** Former section 9-501(1) provided that the secured party's remedies were cumulative, but it did not explicitly provide whether the remedies could be exercised simultaneously. Subsection (c) permits the simultaneous exercise of remedies if the secured party acts in good faith. The liability scheme of subpart 2 affords redress to an aggrieved debtor or obligor. Moreover, permitting the simultaneous exercise of remedies under subsection (c) does not override any non-UCC law, including the law of tort and statutes regulating collection of debts, under which the simultaneous exercise of remedies in a particular case constitutes abusive behavior or harassment giving rise to liability.

6. **Judicial Enforcement.** Under subsection (a) a secured party may reduce its claim to judgment or foreclose its interest by any available procedure outside this article under applicable law. Subsection (e) generally follows former section 9-501(5). It makes clear that any judicial lien that the secured party may acquire against the collateral effectively is a continuation of the original security interest (if perfected) and not the acquisition of a new interest or a transfer of property on account of a preexisting obligation. Under former section 9-501(5), the judicial lien was stated to relate back to the date of perfection of the security interest. Subsection (e), however, provides that the lien relates back to the earlier of the date of filing or the date of perfection. This provides a secured party who enforces a security interest by judicial process with the benefit of the "first-to-file-or-perfect" priority rule of section 9-322(a)(1).

7. **Agricultural Liens.** Part 6 provides parallel treatment for the enforcement of agricultural liens and security interests. Because agricultural liens are statutory rather than consensual, this article does draw a few distinctions between these liens and security interests. Under subsection (e), the statute creating an agricultural lien would govern whether and the date to which an execution lien relates back. Section 9-606 explains when a "default" occurs in the agricultural lien context.

8. **Execution Sales.** Subsection (f) also follows former section 9-501(5). It makes clear that an execution sale is an appropriate method of foreclosure contemplated by this part. However, the sale is governed by other law and not by this article, and the limitations under section 9-610 on the right of a secured party to purchase collateral do not apply.

9. **Sales of Receivables; Consignments.** Subsection (g) provides that, except as provided in section 9-607(c), the duties imposed on secured parties do not apply to buyers of accounts, chattel paper, payment intangibles, or promissory notes. Although denominated "secured parties," these buyers own the entire interest in the property sold and so may enforce their rights without regard to the seller ("debtor") or the seller's creditors. Likewise, a true consignor may enforce its ownership interest under other law without regard to the duties that this part imposes on secured parties. Note, however, that section 9-615 governs cases in which a consignee's secured party (other than a consignor) is enforcing a security interest that is senior to the security interest (i.e., ownership interest) of a true consignor.

§ 25-9-602. (Effective July 1, 2001) Waiver and variance of rights and duties.

Except as otherwise provided in G.S. 25-9-624, to the extent that they give rights to a debtor or obligor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in the following listed sections:

(1) G.S. 25-9-207(b)(4)c., which deals with use and operation of the collateral by the secured party;
(2) G.S. 25-9-210, which deals with requests for an accounting and requests concerning a list of collateral and statement of account;
(3) G.S. 25-9-607(c), which deals with collection and enforcement of collateral;
(4) G.S. 25-9-608(a) and G.S. 25-9-615(c) to the extent that they deal with application or payment of noncash proceeds of collection, enforcement, or disposition;
(5) G.S. 25-9-608(a) and G.S. 25-9-615(d) to the extent that they require accounting for or payment of surplus proceeds of collateral;
(6) G.S. 25-9-609 to the extent that it imposes upon a secured party that takes possession of collateral without judicial process the duty to do so without breach of the peace;
(7) G.S. 25-9-610(b), 25-9-611, 25-9-613, and 25-9-614, which deal with disposition of collateral;
(8) G.S. 25-9-615(f), which deals with calculation of a deficiency or surplus when a disposition is made to the secured party, a person related to the secured party, or a secondary obligor;
(9) G.S. 25-9-616, which deals with explanation of the calculation of a surplus or deficiency;
(10) G.S. 25-9-620, 25-9-621, and 25-9-622, which deal with acceptance of collateral in satisfaction of obligation;
(11) G.S. 25-9-623, which deals with redemption of collateral;
(12) G.S. 25-9-624, which deals with permissible waivers; and
(13) G.S. 25-9-625 and G.S. 25-9-626, which deal with the secured party's liability for failure to comply with this Article. (1866-7, c. 1, s. 2; 1872-3, c. 133, s. 2; 1883, c. 88; Code, s. 1800; 1893, c. 9; Rev., s. 2054; C.S., s. 2488; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-501(3).

2. **Waiver: In General.** Section 1-102(3) addresses which provisions of the UCC are mandatory and which may be varied by agreement. With exceptions relating to good faith, diligence, reasonableness, and care, immediate parties, as between themselves, may vary its provisions by agreement. However, in the context of rights and duties after default, our legal system traditionally has looked with suspicion on agreements that limit the debtor's rights and free the secured party of its duties. As stated in former section 9-501, comment 4, "no mortgage clause has ever been allowed to clog the equity of redemption." The context of default offers great opportunity for overreaching. The suspicious attitudes of the courts have been grounded in common sense. This section, like former section 9-501(3), codifies this long-standing and deeply rooted attitude. The specified rights of the debtor and duties of the secured party may not be waived or varied except as stated. Provisions that are not specified in this section are subject to the general rules in section 1-102(3).

3. **Nonwaivable Rights and Duties.** This section revises former section 9-501(3) by restricting the ability to waive or modify additional specified rights and duties: (i) Duties under section 9-207(b)(4)(C), which deals with the use and operation of consumer goods; (ii) the right to a response to a request for an accounting, concerning a list of collateral, or concerning a statement of account (section 9-210); (iii) the duty to collect collateral in a commercially reasonable manner (section 9-607); (iv) the implicit duty to refrain from a breach of the peace in taking possession of

collateral under section 9-609; (v) the duty to apply noncash proceeds of collection or disposition in a commercially reasonable manner (sections 9-608 and 9-615); (vi) the right to a special method of calculating a surplus or deficiency in certain dispositions to a secured party, a person related to secured party, or a secondary obligor (section 9-615); (vii) the duty to give an explanation of the calculation of a surplus or deficiency (section 9-616); (viii) the right to limitations on the effectiveness of certain waivers (section 9-624); and (ix) the right to hold a secured party liable for failure to comply with this article (sections 9-625 and 9-626). For clarity and consistency, this article uses the term "waive or vary" instead of "renounc[e] or modify[ ]," which appeared in former section 9-504(3).

This section provides generally that the specified rights and duties "may not be waived or varied." However, it does not restrict the ability of parties to agree to settle, compromise, or renounce claims for past conduct that may have constituted a violation or breach of those rights and duties, even if the settlement involves an express "waiver."

4. **Waiver by Debtors and Obligors.** The restrictions on waiver contained in this section apply to obligors as well as debtors. This resolves a question under former article 9 as to whether secondary obligors, assuming that they were "debtors" for purposes of former part 5, were permitted to waive, under the law of suretyship, rights and duties under that part.

5. **Certain Post-Default Waivers.** Section 9-624 permits post-default waivers in limited circumstances. These waivers must be made in agreements that are authenticated. Under section 1-201, an "'agreement' means the bargain of the parties in fact." In considering waivers under section 9-624 and analogous agreements in other contexts, courts should carefully scrutinize putative agreements that appear in records that also address many additional or unrelated matters.

§ 25-9-603. (Effective July 1, 2001) Agreement on standards concerning rights and duties.

(a) Agreed standards. — The parties may determine by agreement the standards measuring the fulfillment of the rights of a debtor or obligor and the duties of a secured party under a rule stated in G.S. 25-9-602 if the standards are not manifestly unreasonable.

(b) Agreed standards inapplicable to breach of peace. — Subsection (a) of this section does not apply to the duty under G.S. 25-9-609 to refrain from breaching the peace. (1866-7, c. 1, s. 2; 1872-3, c. 133, s. 2; 1883, c. 88; Code, s. 1800; 1893, c. 9; Rev., s. 2054; C.S., s. 2488; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-501(3).

2. **Limitation on Ability to Set Standards.** Subsection (a), like former section 9-501(3), permits the parties to set standards for compliance with the rights and duties under this part if the standards are not "manifestly unreasonable." Under subsection (b), the parties are not permitted to set standards measuring fulfillment of the secured party's duty to take collateral without breaching the peace.

§ 25-9-604. (Effective July 1, 2001) Procedure if security agreement covers real property or fixtures.

(a) Enforcement: personal and real property. — If a security agreement covers both personal and real property, a secured party may proceed:

(1) Under this Part as to the personal property without prejudicing any rights with respect to the real property; or

(2) As to both the personal property and the real property in accordance with the rights with respect to the real property, in which case the other provisions of this Part do not apply.

(b) Enforcement: fixtures. — Subject to subsection (c) of this section, if a security agreement covers goods that are or become fixtures, a secured party may proceed:

(1) Under this Part; or

(2) In accordance with the rights with respect to real property, in which case the other provisions of this Part do not apply.

(c) Removal of fixtures. — Subject to the other provisions of this Part, if a secured party holding a security interest in fixtures has priority over all owners and encumbrancers of the real property, the secured party, after default, may remove the collateral from the real property.

(d) Injury caused by removal. — A secured party that removes collateral shall promptly reimburse any encumbrancer or owner of the real property, other than the debtor, for the cost of repair of any physical injury caused by the removal. The secured party need not reimburse the encumbrancer or owner for any diminution in value of the real property caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate assurance for the performance of the obligation to reimburse. (1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former sections 9-313(8) and 9-501(4).

2. **Real-Property-Related Collateral.** The collateral in many transactions consists of both real and personal property. In the interest of simplicity, speed, and economy, subsection (a), like former section 9-501(4), permits (but does not require) the secured party to proceed as to both real and personal property in accordance with its rights and remedies with respect to the real property. Subsection (a) also makes clear that a secured party who exercises rights under part 6 with respect to personal property does not prejudice any rights under real-property law.

This article does not address certain other real-property-related problems. In a number of states, the exercise of remedies by a creditor who is secured by both real property and nonreal property collateral is governed by special legal rules. For example, under some antideficiency laws, creditors risk loss of rights against personal property collateral if they err in enforcing their rights against the real property. Under a "one-form-of-action" rule (or rule against splitting a cause of action), a creditor who judicially enforces a real property mortgage and does not proceed in the same action to enforce a security interest in personalty may (among other consequences) lose the right to proceed against the personalty. Although statutes of this kind create impediments to enforcement of security interests, this article does not override these limitations under other law.

3. **Fixtures.** Subsection (b) is new. It makes clear that a security interest in fixtures may be enforced either under real property law or under any of the applicable provisions of part 6, including sale or other disposition either before or after removal of the fixtures (see subsection (c)). Subsection (b) also serves to overrule cases holding that a secured party's only remedy after default is the removal of the fixtures from the real property. See, e.g., Maplewood Bank & Trust v. Sears, Roebuck & Co., 625 A.2d 537 (N.J. Super. Ct. App. Div. 1993).

Subsection (c) generally follows former section 9-313(8). It gives the secured party the right to remove fixtures under certain circumstances. A secured party whose security interest in fixtures has priority over owners and encumbrancers of the real property may remove the collateral from the real property. However, subsection (d) requires the secured party to reimburse any owner (other than the debtor) or encumbrancer for the cost of repairing any physical injury caused by the removal. This right to reimbursement is implemented by the last sentence of subsection (d), which gives the owner or encumbrancer a right to security or indemnity as a condition for giving permission to remove.

§ 25-9-605. (Effective July 1, 2001) Unknown debtor or secondary obligor.

A secured party does not owe a duty based on its status as secured party:

(1) To a person that is a debtor or obligor, unless the secured party knows:
   a. That the person is a debtor or obligor;
   b. The identity of the person; and
   c. How to communicate with the person; or

(2) To a secured party or lienholder that has filed a financing statement against a person, unless the secured party knows:
   a. That the person is a debtor; and
   b. The identity of the person. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Duties to Unknown Persons.** This section relieves a secured party from duties owed to a debtor or obligor, if the secured party does not know about the debtor or obligor. Similarly, it relieves a secured party from duties owed to a secured party or lienholder who has filed a financing statement against the debtor, if the secured party does not know about the debtor. For example, a secured party may be unaware that the original debtor has sold the collateral subject to the security interest and that the new owner has become the debtor. If so, the secured party owes no duty to the new owner (debtor) or to a secured party who has filed a financing statement against the new owner. This section should be read in conjunction with the exculpatory provisions in section 9-628. Note that it relieves a secured party not only from duties arising under this article but also from duties arising under other law by virtue of the secured party's status as such under this article, unless the other law otherwise provides.

§ 25-9-606. (Effective July 1, 2001) Time of default for agricultural lien.

For purposes of this Part, a default occurs in connection with an agricultural lien at the time the secured party becomes entitled to enforce the lien in accordance with the statute under which it was created. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Time of Default.** Remedies under this part become available upon the debtor's "default." See section 9-601. This section explains when "default" occurs in the agricultural-lien context. It requires one to consult the enabling statute to determine when the lienholder is entitled to enforce the lien.

§ 25-9-607. (Effective July 1, 2001) Collection and enforcement by secured party.

(a) Collection and enforcement generally. — If so agreed, and in any event after default, a secured party:

(1) May notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party;

(2) May take any proceeds to which the secured party is entitled under G.S. 25-9-315;

(3) May enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral;

(4) If it holds a security interest in a deposit account perfected by control under G.S. 25-9-104(a)(1), may apply the balance of the deposit account to the obligation secured by the deposit account; and

(5) If it holds a security interest in a deposit account perfected by control under G.S. 25-9-104(a)(2) or (a)(3), may instruct the bank to pay the balance of the deposit account to or for the benefit of the secured party.

(b) Nonjudicial enforcement of mortgage. — If necessary to enable a secured party to exercise under subdivision (a)(3) of this section the right of a debtor to enforce a mortgage nonjudicially, the secured party may record in the office in which a record of the mortgage is recorded:

(1) A copy of the security agreement that creates or provides for a security interest in the obligation secured by the mortgage; and

(2) The secured party's sworn affidavit in recordable form stating that:

a. A default has occurred; and

b. The secured party is entitled to enforce the mortgage nonjudicially.

(c) Commercially reasonable collection and enforcement. — A secured party shall proceed in a commercially reasonable manner if the secured party:

(1) Undertakes to collect from or enforce an obligation of an account debtor or other person obligated on collateral; and

(2) Is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or a secondary obligor.

(d) Expenses of collection and enforcement. — A secured party may deduct from the collections made pursuant to subsection (c) of this section reasonable expenses of collection and enforcement, including reasonable attorney's fees and legal expenses incurred by the secured party.

(e) Duties to secured party not affected. — This section does not determine whether an account debtor, bank, or other person obligated on collateral owes a duty to a secured party. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-502; subsections (b), (d), and (e) are new.

2. **Collections:** In General. Collateral consisting of rights to payment is not only the most liquid asset of a typical debtor's business but also is property that may be collected without any interruption of the debtor's business. This situation is far different from that in which collateral is inventory or equipment, whose removal may bring the business to a halt. Furthermore, problems of valuation and identification, present with collateral that is tangible personal property, frequently are not as serious in the case of rights to payment and other intangible collateral. Consequently, this section, like former section 9-502, recognizes that financing through assignments of intangibles lacks many of the complexities that arise after default in other types of financing. This section allows the assignee to liquidate collateral by collecting whatever may become due on the collateral, whether or not the method of collection contemplated by the security arrangement before default was direct (i.e., payment by the account debtor to the assignee, "notification" financing) or indirect (i.e., payment by the account debtor to the assignor, "nonnotification" financing).

3. **Scope.** The scope of this section is broader than that of former section 9-502. It applies not only to collections from account debtors and obligors on instruments but also to enforcement more generally against all persons obligated on collateral. It explicitly provides for the secured party's enforcement of the debtor's rights in respect of the account debtor's (and other third parties') obligations and for the secured party's enforcement of supporting obligations with respect to those obligations. (Supporting obligations are components of the collateral under section 9-203(f).) The rights of a secured party under subsection (a) include the right to enforce claims that the debtor may enjoy against others. For example, the claims might include a breach-of-warranty claim arising out of a defect in equipment that is collateral or a secured party's action for an injunction against infringement of a patent that is collateral. Those claims typically would be proceeds of original collateral under section 9-315.

4. **Collection and Enforcement Before Default.** Like part 6 generally, this section deals with the rights and duties of secured parties following default. However, as did former section 9-502 with respect to collection rights, this section also applies to the collection and enforcement rights of secured parties even if a default has not occurred, as long as the debtor has so agreed. It is not unusual for debtors to agree that secured parties are entitled to collect and enforce rights against account debtors prior to default.

5. **Collections by Junior Secured Party.** A secured party who holds a security interest in a right to payment may exercise the right to collect and enforce under this section, even if the security interest is subordinate to a conflicting security interest in the same right to payment. Whether the junior secured party has priority in the collected proceeds depends on whether the junior secured party qualifies for priority as a purchaser of an instrument (e.g., the account debtor's check) under section 9-330(d), as a holder in due course of an instrument under sections 3-305 and 9-331(a), or as a transferee of money under section 9-332(a). See

sections 9-330, comment 7; 9-331, comment 5; and 9-332.

6. **Relationship to Rights and Duties of Persons Obligated on Collateral.** This section permits a secured party to collect and enforce obligations included in collateral in its capacity as a secured party. It is not necessary for a secured party first to become the owner of the collateral pursuant to a disposition or acceptance. However, the secured party's rights, as between it and the debtor, to collect from and enforce collateral against account debtors and others obligated on collateral under subsection (a) are subject to section 9-341, part 4, and other applicable law. *Neither this section nor former section 9-502 should be understood to regulate the duties of an account debtor or other person obligated on collateral.* Subsection (e) makes this explicit. For example, the secured party may be unable to exercise the debtor's rights under an instrument if the debtor is in possession of the instrument, or under a nontransferable letter of credit if the debtor is the beneficiary. Unless a secured party has control over a letter-of-credit right and is entitled to receive payment or performance from the issuer or a nominated person under article 5, its remedies with respect to the letter-of-credit right may be limited to the recovery of any identifiable proceeds from the debtor. This section establishes only the baseline rights of the secured party vis-a-vis the debtor—the secured party is entitled to enforce and collect after default or earlier if so agreed.

7. **Deposit Account Collateral.** Subsections (a)(4) and (5) set forth the self-help remedy for a secured party whose collateral is a deposit account. Subsection (a)(4) addresses the rights of a secured party that is the bank with which the deposit account is maintained. That secured party automatically has control of the deposit account under section 9-104(a)(1). After default, and otherwise if so agreed, the bank/secured party may apply the funds on deposit to the secured obligation.

If a security interest of a third party is perfected by control (section 9-104(a)(2) or (a)(3)), then after default, and otherwise if so agreed, the secured party may instruct the bank to pay out the funds in the account. If the third party has control under section 9-104(a)(3), the depositary institution is obliged to obey the instruction because the secured party is its customer. See section 4-401. If the third party has control under section 9-104(a)(2), the control agreement determines the depositary institution's obligation to obey.

If a security interest in a deposit account is unperfected, or is perfected by filing by virtue of the proceeds rules of section 9-315, the depositary institution ordinarily owes no obligation to obey the secured party's instructions. See section 9-341. To reach the funds without the debtor's cooperation, the secured party must use an available judicial procedure.

8. **Rights Against Mortgagor of Real Property.** Subsection (b) addresses the situation in which the collateral consists of a mortgage note (or other obligation secured by a mortgage on real property). After the debtor's (mortgagee's) default, the secured party (assignee) may wish to proceed with a nonjudicial foreclosure of the mortgage securing the note but may be unable to do so because it has not become the assignee of record. The assignee/secured party may not have taken a recordable assignment at the commencement of the transaction (perhaps the mortgage note in question was one of hundreds assigned to the secured party as collateral). Having defaulted, the mortgagee may be unwilling to sign a recordable assignment. This section enables the secured party (assignee) to become the assignee of record by recording in the applicable real property records the security agreement and an affidavit certifying default. Of course, the secured party's rights derive from those of its debtor. Subsection (b) would not entitle the secured party to proceed with a foreclosure unless the mortgagor also were in default or the debtor (mortgagee) otherwise enjoyed the right to foreclose.

9. **Commercial Reasonableness.** Subsection (c) provides that the secured party's collection and enforcement rights under subsection (a) must be exercised in a commercially reasonable manner. These rights include the right to settle and compromise claims against the account debtor. The secured party's failure to observe the standard of commercial reasonableness could render it liable to an aggrieved person under section 9-625, and the secured party's recovery of a deficiency would be subject to section 9-626. Subsection (c) does not apply if, as is characteristic of most sales of accounts, chattel paper, payment intangibles, and promissory notes, the secured party (buyer) has no right of recourse against the debtor (seller) or a secondary obligor. However, if the secured party does have a right of recourse, the commercial reasonableness standard applies to collection and enforcement even though the assignment to the secured party was a "true" sale. The obligation to proceed in a commercially reasonable manner arises because the collection process affects the extent of the seller's recourse liability, not because the seller retains an interest in the sold collateral (the seller does not). Concerning classification of a transaction, see Section 9-109, Comment 4.

10. **Attorney's Fees and Legal Expenses.** The phrase "reasonable attorney's fees and legal expenses," which appears in subsection (d), includes only those fees and expenses incurred in proceeding against account debtors or other third parties. The secured party's right to re-

cover these expenses from the collections arises automatically under this section. The secured party also may incur other attorney's fees and legal expenses in proceeding against the debtor or obligor. Whether the secured party has a right to recover those fees and expenses depends on whether the debtor or obligor has agreed to pay them, as is the case with respect to attorney's fees and legal expenses under sections 9-608(a)(1)(A) and 9-615(a)(1). The parties also may agree to allocate a portion of the secured party's overhead to collection and enforcement under subsection (d) or section 9-608(a).

§ 25-9-608. (Effective July 1, 2001) Application of proceeds of collection or enforcement; liability for deficiency and right to surplus.

(a) Application of proceeds, surplus, and deficiency if obligation secured. — If a security interest or agricultural lien secures payment or performance of an obligation, the following rules apply:

(1) A secured party shall apply or pay over for application the cash proceeds of collection or enforcement under G.S. 25-9-607 in the following order to:

a. The reasonable expenses of collection and enforcement and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party;

b. The satisfaction of obligations secured by the security interest or agricultural lien under which the collection or enforcement is made; and

c. The satisfaction of obligations secured by any subordinate security interest in or other lien on the collateral subject to the security interest or agricultural lien under which the collection or enforcement is made if the secured party receives an authenticated demand for proceeds before distribution of the proceeds is completed.

(2) If requested by a secured party, a holder of a subordinate security interest or other lien shall furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder complies, the secured party need not comply with the holder's demand under sub-subdivision (a)(1)c. of this section.

(3) A secured party need not apply or pay over for application noncash proceeds of collection and enforcement under G.S. 25-9-607 unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds shall do so in a commercially reasonable manner.

(4) A secured party shall account to and pay a debtor for any surplus, and the obligor is liable for any deficiency.

(b) No surplus or deficiency in sales of certain rights to payment. — If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, the debtor is not entitled to any surplus, and the obligor is not liable for any deficiency. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Subsection (a) is new; subsection (b) derives from former section 9-502(2).

2. **Modifications of Prior Law.** Subsections (a) and (b) modify former section 9-502(2) by explicitly providing for the application of proceeds recovered by the secured party in substantially the same manner as provided in section 9-615(a) and (e) for dispositions of collateral.

3. **Surplus and Deficiency.** Subsections (a)(4) and (b) omit, as unnecessary, the references contained in former section 9-502(2) to agreements varying the baseline rules on surplus and deficiency. The parties are always free

to agree that an obligor will not be liable for a deficiency, even if the collateral secures an obligation, and that an obligor is liable for a deficiency, even if the transaction is a sale of receivables. For parallel provisions, see section 9-615(d) and (e).

4. **Noncash Proceeds.** Subsection (a)(3) addresses the situation in which an enforcing secured party receives noncash proceeds.

Example: An enforcing secured party receives a promissory note from an account debtor who is unable to pay an account when it is due. The secured party accepts the note in exchange for extending the date on which the account debtor's obligation is due. The secured party may wish to credit its debtor (the assignor) with the principal amount of the note upon receipt of the note, but probably will prefer to credit the debtor only as and when the note is paid.

Under subsection (a)(3), the secured party is under no duty to apply the note or its value to the outstanding obligation unless its failure to do so would be commercially unreasonable. If the secured party does apply the note to the outstanding obligation, however, it must do so in a commercially reasonable manner. The parties may provide for the method of application of noncash proceeds by agreement, if the method is not manifestly unreasonable. See section 9-603. This section does not explain when the failure to apply noncash proceeds would be commercially unreasonable; it leaves that determination to case-by-case adjudication. In the example, the secured party appears to have accepted the account debtor's note in order to increase the likelihood of payment and decrease the likelihood that the account debtor would dispute its obligation. Under these circumstances, it may well be commercially reasonable for the secured party to credit its debtor's obligations only as and when cash proceeds are collected from the account debtor, especially given the uncertainty that attends the account debtor's eventual payment. For an example of a secured party's receipt of noncash proceeds in which it may well be commercially unreasonable for the secured party to delay crediting its debtor's obligations with the value of noncash proceeds, see section 9-615, comment 3.

When the secured party is not required to "apply or pay over for application noncash proceeds," the proceeds nonetheless remain collateral subject to this article. If the secured party were to dispose of them, for example, appropriate notification would be required (see section 9-611), and the disposition would be subject to the standards provided in this part (see section 9-610). Moreover, a secured party in possession of the noncash proceeds would have the duties specified in section 9-207.

5. **No Effect on Priority of Senior Security Interest.** The application of proceeds required by subsection (a) does not affect the priority of a security interest in collateral which is senior to the interest of the secured party who is collecting or enforcing collateral under section 9-607. Although subsection (a) imposes a duty to apply proceeds to the enforcing secured party's expenses and to the satisfaction of the secured obligations owed to it and to subordinate secured parties, that duty applies only among the enforcing secured party and those persons. Concerning the priority of a junior secured party who collects and enforces collateral, see section 9-607, comment 5.

§ 25-9-609. (Effective July 1, 2001) Secured party's right to take possession after default.

(a) Possession; rendering equipment unusable; disposition on debtor's premises. — After default, a secured party:

(1) May take possession of the collateral; and

(2) Without removal, may render equipment unusable and dispose of collateral on a debtor's premises under G.S. 25-9-610.

(b) Judicial and nonjudicial process. — A secured party may proceed under subsection (a) of this section:

(1) Pursuant to judicial process; or

(2) Without judicial process, if it proceeds without breach of the peace.

(c) Assembly of collateral. — If so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. (1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-503.

2. **Secured Party's Right to Possession.** This section follows former section 9-503 and earlier uniform legislation. It provides that the secured party is entitled to take possession of collateral after default.

3. **Judicial Process; Breach of Peace.** Subsection (b) permits a secured party to proceed under this section without judicial process if it does so "without breach of the peace." Although former section 9-503 placed the same condition on a secured party's right to take possession of collateral, subsection (b) extends the condition to the right provided in subsection (a)(2) as well. Like former section 9-503, this section does not define or explain the conduct that will constitute a breach of the peace, leaving that matter for continuing development by the courts. In considering whether a secured party has engaged in a breach of the peace, however, courts should hold the secured party responsible for the actions of others taken on the secured party's behalf, including independent contractors engaged by the secured party to take possession of collateral.

This section does not authorize a secured party who repossesses without judicial process to utilize the assistance of a law enforcement officer. A number of cases have held that a repossessing secured party's use of a law enforcement officer without benefit of judicial process constituted a failure to comply with former section 9-503.

4. **Damages for Breach of Peace.** Concerning damages that may be recovered based on a secured party's breach of the peace in connection with taking possession of collateral, see section 9-625, comment 3.

5. **Multiple Secured Parties.** More than one secured party may be entitled to take possession of collateral under this section. Conflicting rights to possession among secured parties are resolved by the priority rules of this article. Thus, a senior secured party is entitled to possession as against a junior claimant. Non-UCC law governs whether a junior secured party in possession of collateral is liable to the senior in conversion. Normally, a junior who refuses to relinquish possession of collateral upon the demand of a secured party having a superior possessory right to the collateral would be liable in conversion.

6. **Secured Party's Right to Disable and Dispose of Equipment on Debtor's Premises.** In the case of some collateral, such as heavy equipment, the physical removal from the debtor's plant and the storage of the collateral pending disposition may be impractical or unduly expensive. This section follows former section 9-503 by providing that, in lieu of removal, the secured party may render equipment unusable or may dispose of collateral on the debtor's premises. Unlike former section 9-503, however, this section explicitly conditions these rights on the debtor's default. Of course, this section does not validate unreasonable action by a secured party. Under section 9-610, all aspects of a disposition must be commercially reasonable.

7. **Debtor's Agreement to Assemble Collateral.** This section follows former section 9-503 also by validating a debtor's agreement to assemble collateral and make it available to a secured party at a place that the secured party designates. Similar to the treatment of agreements to permit collection prior to default under section 9-607 and former section 9-502, however, this section validates these agreements whether or not they are conditioned on the debtor's default. For example, a debtor might agree to make available to a secured party, from time to time, any instruments or negotiable documents that the debtor receives on account of collateral. A court should not infer from this section's validation that a debtor's agreement to assemble and make available collateral would not be enforceable under other applicable law.

8. **Agreed Standards.** Subject to the limitation imposed by section 9-603(b), this section's provisions concerning agreements to assemble and make available collateral and a secured party's right to disable equipment and dispose of collateral on a debtor's premises are likely topics for agreement on standards as contemplated by section 9-603.

§ 25-9-610. (Effective July 1, 2001) Disposition of collateral after default.

(a) Disposition after default. — After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.

(b) Commercially reasonable disposition. — Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may

dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.

(c) Purchase by secured party. — A secured party may purchase collateral:

(1) At a public disposition; or

(2) At a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.

(d) Warranties on disposition. — A contract for sale, lease, license, or other disposition includes the warranties relating to title, possession, quiet enjoyment, and the like which by operation of law accompany a voluntary disposition of property of the kind subject to the contract.

(e) Disclaimer of warranties. — A secured party may disclaim or modify warranties under subsection (d) of this section:

(1) In a manner that would be effective to disclaim or modify the warranties in a voluntary disposition of property of the kind subject to the contract of disposition; or

(2) By communicating to the purchaser a record evidencing the contract for disposition and including an express disclaimer or modification of the warranties.

(f) Record sufficient to disclaim warranties. — A record is sufficient to disclaim warranties under subsection (e) of this section if it indicates "There is no warranty relating to title, possession, quiet enjoyment, or the like in this disposition" or uses words of similar import. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-504(1), (3).

2. **Commercially Reasonable Dispositions.** Subsection (a) follows former section 9-504 by permitting a secured party to dispose of collateral in a commercially reasonable manner following a default. Although subsection (b) permits both public and private dispositions, "every aspect of a disposition . . . must be commercially reasonable." This section encourages private dispositions on the assumption that they frequently will result in higher realization on collateral for the benefit of all concerned. Subsection (a) does not restrict dispositions to sales; collateral may be sold, leased, licensed, or otherwise disposed. Section 9-627 provides guidance for determining the circumstances under which a disposition is "commercially reasonable."

3. **Time of Disposition.** This article does not specify a period within which a secured party must dispose of collateral. This is consistent with this article's policy to encourage private dispositions through regular commercial channels. It may, for example, be prudent not to dispose of goods when the market has collapsed. Or, it might be more appropriate to sell a large inventory in parcels over a period of time instead of in bulk. Of course, under subsection (b) every aspect of a disposition of collateral must be commercially reasonable. This requirement explicitly includes the "method, manner, time, place, and other terms." For example, if a secured party does not proceed under section 9-620 and holds collateral for a long period of time without disposing of it, and if there is no good reason for not making a prompt disposition, the secured party may be determined not to have acted in a "commercially reasonable" manner. See also section 1-203 (general obligation of good faith).

4. **Pre-Disposition Preparation and Processing.** Former section 9-504(1) appeared to give the secured party the choice of disposing of collateral either "in its then condition or following any commercially reasonable preparation or processing." Some courts held that the "commercially reasonable" standard of former section 9-504(3) nevertheless could impose an affirmative duty on the secured party to process or prepare the collateral prior to disposition. Subsection (a) retains the substance of the quoted language. Although courts should not be quick to impose a duty of preparation or processing on the secured party, subsection (a) does not grant the secured party the right to dispose of the collateral "in its then condition" under all circumstances. A secured party may not dispose of collateral "in its then condition" when, taking into account the costs and probable benefits of preparation or processing and the fact that the secured party would be advancing the costs at its risk, it would be commercially unreasonable to dispose of the collateral in that condition.

5. **Disposition by Junior Secured Party.** Disposition rights under subsection (a) are not

limited to first-priority security interests. Rather, any secured party as to whom there has been a default enjoys the right to dispose of collateral under this subsection. The exercise of this right by a secured party whose security interest is subordinate to that of another secured party does not of itself constitute a conversion or otherwise give rise to liability in favor of the holder of the senior security interest. Section 9-615 addresses application of the proceeds of a disposition by a junior secured party. Under section 9-615(a), a junior secured party owes no obligation to apply the proceeds of disposition to the satisfaction of obligations secured by a senior security interest. Section 9-615(g) builds on this general rule by protecting certain juniors from claims of a senior concerning cash proceeds of the disposition. Even if a senior were to have a nonarticle 9 claim to proceeds of a junior's disposition, section 9-615(g) would protect a junior that acts in good faith and without knowledge that its actions violate the rights of a senior party. Because the disposition by a junior would not cut off a senior's security interest or other lien (see section 9-617), in many (probably most) cases the junior's receipt of the cash proceeds would not violate the rights of the senior.

The holder of a senior security interest is entitled, by virtue of its priority, to take possession of collateral from the junior secured party and conduct its own disposition, provided that the senior enjoys the right to take possession of the collateral from the debtor. See section 9-609. The holder of a junior security interest normally must notify the senior secured party of an impending disposition. See section 9-611. Regardless of whether the senior receives a notification from the junior, the junior's disposition does not of itself discharge the senior's security interest. See section 9-617. Unless the senior secured party has authorized the disposition free and clear of its security interest, the senior's security interest ordinarily will survive the disposition by the junior and continue under section 9-315(a)(1). If the senior enjoys the right to repossess the collateral from the debtor, the senior likewise may recover the collateral from the transferee.

When a secured party's collateral is encumbered by another security interest or other lien, one of the claimants may seek to invoke the equitable doctrine of marshaling. As explained by the Supreme Court, that doctrine "rests upon the principle that a creditor having two funds to satisfy his debt, may not by his application of them to his demand, defeat another creditor, who may resort to only one of the funds." Meyer v. United States, 375 U.S. 233, 236 (1963), quoting Sowell v. Federal Reserve Bank, 268 U.S. 449, 456-57 (1925). The purpose of the doctrine is "to prevent the arbitrary action of a senior lienor from destroying the rights of a junior lienor or a creditor having less security." Id. at 237. Because it is an equitable doctrine, marshaling "is applied only when it can be equitably fashioned as to all of the parties" having an interest in the property. Id. This article leaves courts free to determine whether marshaling is appropriate in any given case. See section 1-103.

6. **Security Interests of Equal Rank.** Sometimes two security interests enjoy the same priority. This situation may arise by contract, e.g., pursuant to "equal and ratable" provisions in indentures, or by operation of law. See section 9-328(6). This article treats a security interest having equal priority like a senior security interest in many respects. Assume, for example, that SP-X and SP-Y enjoy equal priority, SP-W is senior to them, and SP-Z is junior. If SP-X disposes of the collateral under this section, then (i) SP-W's and SP-Y's security interests survive the disposition but SP-Z's does not, see section 9-617, and (ii) neither SP-W nor SP-Y is entitled to receive a distribution of proceeds, but SP-Z is. See section 9-615(a)(3).

When one considers the ability to obtain possession of the collateral, a secured party with equal priority is unlike a senior secured party. As the senior secured party, SP-W should enjoy the right to possession as against SP-X. See section 9-609, comment 5. If SP-W takes possession and disposes of the collateral under this section, it is entitled to apply the proceeds to satisfy its secured claim. SP-Y, however, should not have such a right to take possession from SP-X; otherwise, once SP-Y took possession from SP-X, SP-X would have the right to get possession from SP-Y, which would be obligated to redeliver possession to SP-X, and so on. Resolution of this problem is left to the parties and, if necessary, the courts.

7. **Public vs. Private Dispositions.** This part maintains two distinctions between "public" and other dispositions: (i) The secured party may buy at the former, but normally not at the latter (section 9-610(c)), and (ii) the debtor is entitled to notification of "the time and place of a public disposition" and notification of "the time after which" a private disposition or other intended disposition is to be made (section 9-613(1)(E)). It does not retain the distinction under former section 9-504(4), under which transferees in a noncomplying public disposition could lose protection more easily than transferees in other noncomplying dispositions. Instead, section 9-617(b) adopts a unitary standard. Although the term is not defined, as used in this article, a "public disposition" is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding. "Meaningful opportunity" is meant to imply that some form of advertisement or public notice must precede the sale (or

other disposition) and that the public must have access to the sale (disposition).

8. **Investment Property.** Dispositions of investment property may be regulated by the federal securities laws. Although a "public" disposition of securities under this article may implicate the registration requirements of the Securities Act of 1933, it need not do so. A disposition that qualifies for a "private placement" exemption under the Securities Act of 1933 nevertheless may constitute a "public" disposition within the meaning of this section. Moreover, the "commercially reasonable" requirements of subsection (b) need not prevent a secured party from conducting a foreclosure sale without the issuer's compliance with federal registration requirements.

9. **"Recognized Market."** A "recognized market," as used in subsection (c) and section 9-611(d), is one in which the items sold are fungible and prices are not subject to individual negotiation. For example, the New York Stock Exchange is a recognized market. A market in which prices are individually negotiated or the items are not fungible is not a recognized market, even if the items are the subject of widely disseminated price guides or are disposed of through dealer auctions.

10. **Relevance of Price.** While not itself sufficient to establish a violation of this part, a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable. Note also that even if the disposition is commercially reasonable, section 9-615(f) provides a special method for calculating a deficiency or surplus if (i) the transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor, and (ii) the amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

11. **Warranties.** Subsection (d) affords the transferee in a disposition under this section the benefit of any title, possession, quiet enjoyment, and similar warranties that would have accompanied the disposition by operation of nonarticle 9 law had the disposition been conducted under other circumstances. For example, the article 2 warranty of title would apply to a sale of goods, the analogous warranties of article 2A would apply to a lease of goods, and any common law warranties of title would apply to dispositions of other types of collateral. See, e.g., Restatement (2d), Contracts section 333 (warranties of assignor).

Subsection (e) explicitly provides that these warranties can be disclaimed either under other applicable law or by communicating a record containing an express disclaimer. The record need not be written, but an oral communication would not be sufficient. See section 9-102 (definition of "record"). Subsection (f) provides a sample of wording that will effectively exclude the warranties in a disposition under this section, whether or not the exclusion would be effective under nonarticle 9 law.

The warranties incorporated by subsection (d) are those relating to "title, possession, quiet enjoyment, and the like." Depending on the circumstances, a disposition under this section also may give rise to other statutory or implied warranties, e.g., warranties of quality or fitness for purpose. Law other than this article determines whether such other warranties apply to a disposition under this section. Other law also determines issues relating to disclaimer of such warranties. For example, a foreclosure sale of a car by a car dealer could give rise to an implied warranty of merchantability (section 2-314) unless effectively disclaimed or modified (section 2-316).

This section's approach to these warranties conflicts with the former comment to section 2-312. This article rejects the baseline assumption that commercially reasonable dispositions under this section are out of the ordinary commercial course or peculiar. The comment to section 2-312 has been revised accordingly.

§ 25-9-611. (Effective July 1, 2001) Notification before disposition of collateral.

(a) "Notification date." — In this section, "notification date" means the earlier of the date on which:

(1) A secured party sends to the debtor and any secondary obligor an authenticated notification of disposition; or

(2) The debtor and any secondary obligor waive the right to notification.

(b) Notification of disposition required. — Except as otherwise provided in subsection (d) of this section, a secured party that disposes of collateral under G.S. 25-9-610 shall send to the persons specified in subsection (c) of this section a reasonable authenticated notification of disposition.

(c) Persons to be notified. — To comply with subsection (b) of this section, the secured party shall send an authenticated notification of disposition to:

(1) The debtor;
(2) Any secondary obligor; and
(3) If the collateral is other than consumer goods:
a. Any other person from which the secured party has received, before the notification date, an authenticated notification of a claim of an interest in the collateral;
b. Any other secured party or lienholder that, 10 days before the notification date, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that:
1. Identified the collateral;
2. Was indexed under the debtor's name as of that date; and
3. Was filed in the office in which to file a financing statement against the debtor covering the collateral as of that date; and
c. Any other secured party that, 10 days before the notification date, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in G.S. 25-9-311(a).

(d) Subsection (b) inapplicable: perishable collateral; recognized market. — Subsection (b) of this section does not apply if the collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market.

(e) Compliance with sub-subdivision (c)(3)b. — A secured party complies with the requirement for notification prescribed by sub-subdivision (c)(3)b. of this section if:
(1) Not later than 20 days or earlier than 30 days before the notification date, the secured party requests, in a commercially reasonable manner, information concerning financing statements indexed under the debtor's name in the office indicated in sub-subdivision (c)(3)b. of this section; and
(2) Before the notification date, the secured party:
a. Did not receive a response to the request for information; or
b. Received a response to the request for information and sent an authenticated notification of disposition to each secured party or other lienholder named in that response whose financing statement covered the collateral. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-504(3).

2. **Reasonable Notification.** This section requires a secured party who wishes to dispose of collateral under section 9-610 to send "a reasonable authenticated notification of disposition" to specified interested persons, subject to certain exceptions. The notification must be reasonable as to the manner in which it is sent, its timeliness (i.e., a reasonable time before the disposition is to take place), and its content. See sections 9-612 (timeliness of notification), 9-613 (contents of notification generally), 9-614 (contents of notification in consumer-goods transactions).

3. **Notification to Debtors and Secondary Obligors.** This section imposes a duty to send notification of a disposition not only to the debtor but also to any secondary obligor. Subsections (b) and (c) resolve an uncertainty under former article 9 by providing that secondary obligors (sureties) are entitled to receive notification of an intended disposition of collateral, regardless of who created the security interest in the collateral. If the surety created the security interest, it would be the debtor. If it did not, it would be a secondary obligor. (This article also resolves the question of the secondary obligor's ability to waive, pre-default, the right to notification—waiver generally is not permitted. See section 9-602.) Section 9-605 relieves a secured party from any duty to send notification to a debtor or secondary obligor unknown to the secured party.

Under subsection (b), the principal obligor (borrower) is not always entitled to notification of disposition.

Example: Behnfeldt borrows on an unsecured basis, and Bruno grants a security interest in her car to secure the debt. Behnfeldt is a primary obligor, not a secondary obligor. As such, she is not entitled to notification of disposition under this section.

4. **Notification to Other Secured Parties.** Prior to the 1972 amendments to article 9, former section 9-504(3) required the enforcing secured party to send reasonable notification of the disposition:

> except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this State or who is known by the secured party to have a security interest in the collateral.

The 1972 amendments eliminated the duty to give notice to secured parties other than those from whom the foreclosing secured party had received written notice of a claim of an interest in the collateral.

Many of the problems arising from dispositions of collateral encumbered by multiple security interests can be ameliorated or solved by informing all secured parties of an intended disposition and affording them the opportunity to work with one another. To this end, subsection (c)(3)(B) expands the duties of the foreclosing secured party to include the duty to notify (and the corresponding burden of searching the files to discover) certain competing secured parties. The subsection imposes a search burden that in some cases may be greater than the pre-1972 burden on foreclosing secured parties but certainly is more modest than that faced by a new secured lender.

To determine who is entitled to notification, the foreclosing secured party must determine the proper office for filing a financing statement as of a particular date, measured by reference to the "notification date," as defined in subsection (a). This determination requires reference to the choice of law provisions of part 3. The secured party must ascertain whether any financing statements covering the collateral and indexed under the debtor's name, as the name existed as of that date, in fact were filed in that office. The foreclosing secured party generally need not notify secured parties whose effective financing statements have become more difficult to locate because of changes in the location of the debtor, proceeds rules, or changes in the debtor's name.

Under subsection (c)(3)(C), the secured party also must notify a secured party who has perfected a security interest by complying with a statute or treaty described in section 9-311(a), such as a certificate of title statute.

Subsection (e) provides a "safe harbor" that takes into account the delays that may be attendant to receiving information from the public filing offices. It provides, generally, that the secured party will be deemed to have satisfied its notification duty under subsection (c)(3)(B) if it requests a search from the proper office at least 20 but not more than 30 days before sending notification to the debtor and if it also sends a notification to all secured parties (and other lienholders) reflected on the search report. The secured party's duty under subsection (c)(3)(B) also will be satisfied if the secured party requests but does not receive a search report before the notification is sent to the debtor. Thus, if subsection (e) applies, a secured party who is entitled to notification under subsection (c)(3)(B) has no remedy against a foreclosing secured party who does not send the notification. The foreclosing secured party has complied with the notification requirement. Subsection (e) has no effect on the requirements of the other paragraphs of subsection (c). For example, if the foreclosing secured party received a notification from the holder of a conflicting security interest in accordance with subsection (c)(3)(A) but failed to send to the holder a notification of the disposition, the holder of the conflicting security interest would have the right to recover any loss under section 9-625(b).

5. **Authentication Requirement.** Subsections (b) and (c) explicitly provide that a notification of disposition must be "authenticated." Some cases read former section 9-504(3) as validating oral notification.

6. **Second Try.** This article leaves to judicial resolution, based upon the facts of each case, the question whether the requirement of "reasonable notification" requires a "second try," i.e., whether a secured party who sends notification and learns that the debtor did not receive it must attempt to locate the debtor and send another notification.

7. **Recognized Market; Perishable Collateral.** New subsection (d) makes it clear that there is no obligation to give notification of a disposition in the case of perishable collateral or collateral customarily sold on a recognized market (e.g., marketable securities). Former section 9-504(3) might be read (incorrectly) to relieve the secured party from its duty to notify a debtor but not from its duty to notify other secured parties in connection with dispositions of such collateral.

8. **Failure to Conduct Notified Disposition.** Nothing in this article prevents a secured party from electing not to conduct a disposition after sending a notification. Nor does this article prevent a secured party from electing to send a revised notification if its plans for disposition change. This assumes, however, that the secured party acts in good faith, the revised notification is reasonable, and the revised plan for disposition and any attendant delay are commercially reasonable.

9. **Waiver.** A debtor or secondary obligor may waive the right to notification under this section only by a post-default authenticated agreement. See section 9-624(a).

§ 25-9-612. (Effective July 1, 2001) Timeliness of notification before disposition of collateral.

(a) Reasonable time is question of fact. — Except as otherwise provided in subsection (b) of this section, whether a notification is sent within a reasonable time is a question of fact.

(b) Ten-day period sufficient in nonconsumer transaction. — In a transaction other than a consumer transaction, a notification of disposition sent after default and 10 days or more before the earliest time of disposition set forth in the notification is sent within a reasonable time before the disposition. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Reasonable Notification.** Section 9-611(b) requires the secured party to send a "reasonable authenticated notification." Under that section, as under former section 9-504(3), one aspect of a reasonable notification is its timeliness. This generally means that the notification must be sent at a reasonable time in advance of the date of a public disposition or the date after which a private disposition is to be made. A notification that is sent so near to the disposition date that a notified person could not be expected to act on or take account of the notification would be unreasonable.

3. **Timeliness of Notification: Safe Harbor.** The 10-day notice period in subsection (b) is intended to be a "safe harbor" and not a minimum requirement. To qualify for the "safe harbor" the notification must be sent after default. A notification also must be sent in a commercially reasonable manner. See section 9-611(b) ("reasonable authenticated notification"). These requirements prevent a secured party from taking advantage of the "safe harbor" by, for example, giving the debtor a notification at the time of the original extension of credit or sending the notice by surface mail to a debtor overseas.

§ 25-9-613. (Effective July 1, 2001) Contents and form of notification before disposition of collateral: general.

Except in a consumer-goods transaction, the following rules apply:

(1) The contents of a notification of disposition are sufficient if the notification:
   a. Describes the debtor and the secured party;
   b. Describes the collateral that is the subject of the intended disposition;
   c. States the method of intended disposition;
   d. States that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and
   e. States the time and place of a public disposition or the time after which any other disposition is to be made.

(2) Whether the contents of a notification that lacks any of the information specified in subdivision (1) of this section are nevertheless sufficient is a question of fact.

(3) The contents of a notification providing substantially the information specified in subdivision (1) of this section are sufficient, even if the notification includes:
   a. Information not specified by that subdivision; or
   b. Minor errors that are not seriously misleading.

(4) A particular phrasing of the notification is not required.

(5) The following form of notification and the form appearing in G.S. 25-9-614(3), when completed, each provides sufficient information:

NOTIFICATION OF DISPOSITION OF COLLATERAL

To: [Name of debtor, obligor, or other person to which the notification is sent]
From: [Name, address, and telephone number of secured party]
Name of Debtor(s): [Include only if debtor(s) is/are not an addressee]
[For a public disposition:]
We will sell [or lease or license, as applicable] the [describe collateral] [to the highest qualified bidder] in public as follows:
Day and Date: _____
Time: _____
Place: _____
[For a private disposition:]
We will sell [or lease or license, as applicable] the [describe collateral] privately sometime after [day and date] .
You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell [or lease or license, as applicable] [for a charge of $ _____].
You may request an accounting by calling us at [telephone number]
(2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Contents of Notification.** To comply with the "reasonable authenticated notification" requirement of section 9-611(b), the contents of a notification must be reasonable. Except in a consumer-goods transaction, the contents of a notification that includes the information set forth in paragraph (1) are sufficient as a matter of law, unless the parties agree otherwise. (The reference to "time" of disposition means here, as it did in former section 9-504(3), not only the hour of the day but also the date.) Although a secured party may choose to include additional information concerning the transaction or the debtor's rights and obligations, no additional information is required unless the parties agree otherwise. A notification that lacks some of the information set forth in paragraph (1) nevertheless may be sufficient if found to be reasonable by the trier of fact, under paragraph (2). A properly completed sample form of notification in paragraph (5) or in section 9-614(3) is an example of a notification that would contain the information set forth in paragraph (1). Under paragraph (4), however, no particular phrasing of the notification is required.

§ 25-9-614. (Effective July 1, 2001) Contents and form of notification before disposition of collateral: consumer-goods transaction.

In a consumer-goods transaction, the following rules apply:

(1) A notification of disposition must provide the following information:
   a. The information specified in G.S. 25-9-613(1);
   b. A description of any liability for a deficiency of the person to which the notification is sent;
   c. A telephone number from which the amount that must be paid to the secured party to redeem the collateral under G.S. 25-9-623 is available; and
   d. A telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.

(2) A particular phrasing of the notification is not required.

(3) The following form of notification, when completed, provides sufficient information:

[Name and address of secured party]
[Date]

NOTICE OF OUR PLAN TO SELL PROPERTY

[Name and address of any obligor who is also a debtor]

Subject: [Identification of Transaction]

We have your [describe collateral] , because you broke promises in our agreement.

[For a public disposition:]
We will sell [describe collateral] at public sale. A sale could include a lease or license. The sale will be held as follows:

Date: _____
Time: _____
Place: _____
You may attend the sale and bring bidders if you want.

[For a private disposition:]
We will sell [describe collateral] at private sale sometime after [date] . A sale could include a lease or license.

The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you [will or will not, as applicable] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due payments), including our expenses. To learn the exact amount you must pay, call us at [telephone number] .

If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at [telephone number] or write us at [secured party's address]] and request a written explanation. [We will charge you $ _____ for the explanation if we sent you another written explanation of the amount you owe us within the last six months.]

If you need more information about the sale call us at [telephone number] [or write us at [secured party's address]].

We are sending this notice to the following other people who have an interest in [describe collateral] or who owe money under your agreement:
[Names of all other debtors and obligors, if any]

We are sending this notice to the following other people who have an interest in
[describe collateral] or who owe money under your agreement:
[Names of all other debtors and obligors, if any]

(4) A notification in the form of subdivision (3) of this section is sufficient, even if additional information appears at the end of the form.
(5) A notification in the form of subdivision (3) of this section is sufficient, even if it includes errors in information not required by subdivision (1) of this section, unless the error is misleading with respect to rights arising under this Article.
(6) If a notification under this section is not in the form of subdivision (3) of this section, law other than this Article determines the effect of including information not required by subdivision (1) of this section. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Notification in Consumer-Goods Transactions.** Paragraph (1) sets forth the information required for a reasonable notification in a consumer-goods transaction. A notification that lacks any of the information set forth in paragraph (1) is insufficient as a matter of law. Compare section 9-613(2), under which the trier of fact may find a notification to be sufficient even if it lacks some information listed in paragraph (1) of that section.

3. **Safe-Harbor Form of Notification; Errors in Information.** Although paragraph (2) provides that a particular phrasing of a notification is not required, paragraph (3) specifies a safe-harbor form that, when properly completed, satisfies paragraph (1). Paragraphs (4), (5), and (6) contain special rules applicable to erroneous and additional information. Under paragraph (4), a notification in the safe-harbor form specified in paragraph (3) is not rendered insufficient if it contains additional information at the end of the form. Paragraph (5) provides that nonmisleading errors in information contained in a notification are permitted if the safe-harbor form is used and if the errors are in information not required by paragraph (1). Finally, if a notification is in a form other than the paragraph (3) safe-harbor form, other law determines the effect of including in the notification information other than that required by paragraph (1).

§ 25-9-615. (Effective July 1, 2001) Application of proceeds of disposition; liability for deficiency and right to surplus.

(a) Application of proceeds. — A secured party shall apply or pay over for application the cash proceeds of disposition under G.S. 25-9-610 in the following order to:

(1) The reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party;

(2) The satisfaction of obligations secured by the security interest or agricultural lien under which the disposition is made;

(3) The satisfaction of obligations secured by any subordinate security interest in or other subordinate lien on the collateral if:

a. The secured party receives from the holder of the subordinate security interest or other lien an authenticated demand for proceeds before distribution of the proceeds is completed; and

b. In a case in which a consignor has an interest in the collateral, the subordinate security interest or other lien is senior to the interest of the consignor; and

(4) A secured party that is a consignor of the collateral if the secured party receives from the consignor an authenticated demand for proceeds before distribution of the proceeds is completed.

(b) Proof of subordinate interest. — If requested by a secured party, a holder of a subordinate security interest or other lien shall furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder does so, the secured party need not comply with the holder's demand under subdivision (a)(3) of this section.

(c) Application of noncash proceeds. — A secured party need not apply or pay over for application noncash proceeds of disposition under G.S. 25-9-610 unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds shall do so in a commercially reasonable manner.

(d) Surplus or deficiency if obligation secured. — If the security interest under which a disposition is made secures payment or performance of an obligation, after making the payments and applications required by subsection (a) of this section and permitted by subsection (c) of this section:

(1) Unless subdivision (a)(4) of this section requires the secured party to apply or pay over cash proceeds to a consignor, the secured party shall account to and pay a debtor for any surplus; and

(2) The obligor is liable for any deficiency.

(e) No surplus or deficiency in sales of certain rights to payment. — If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes:

(1) The debtor is not entitled to any surplus; and

(2) The obligor is not liable for any deficiency.

(f) Calculation of surplus or deficiency in disposition to person related to secured party. — The surplus or deficiency following a disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with this Part to a transferee other than the secured party, a person related to the secured party, or a secondary obligor if:

(1) The transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor; and

(2) The amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

(g) Cash proceeds received by junior secured party. — A secured party that receives cash proceeds of a disposition in good faith and without knowledge that the receipt violates the rights of the holder of a security interest or other lien that is not subordinate to the security interest or agricultural lien under which the disposition is made:

(1) Takes the cash proceeds free of the security interest or other lien;

(2) Is not obligated to apply the proceeds of the disposition to the satisfaction of obligations secured by the security interest or other lien; and

(3) Is not obligated to account to or pay the holder of the security interest or other lien for any surplus. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-504(1) and (2).

2. **Application of Proceeds.** This section contains the rules governing application of proceeds and the debtor's liability for a deficiency following a disposition of collateral. Subsection (a) sets forth the basic order of application. The proceeds are applied first to the expenses of disposition, second to the obligation secured by the security interest that is being enforced, and third, in the specified circumstances, to interests that are subordinate to that security interest.

Subsections (a) and (d) also address the right of a consignor to receive proceeds of a disposition by a secured party whose interest is senior to that of the consignor. Subsection (a) requires the enforcing secured party to pay excess proceeds first to subordinate secured parties or lienholders whose interests are senior to that of a consignor and, finally, to a consignor. Inasmuch as a consignor is the owner of the collateral, secured parties and lienholders whose interests are junior to the consignor's interest will not be entitled to any proceeds. In like fashion, under subsection (d)(1) the debtor is not entitled to a surplus when the enforcing secured party is required to pay over proceeds to a consignor.

3. **Noncash Proceeds.** Subsection (c) addresses the application of noncash proceeds of a disposition, such as a note or lease. The explanation in section 9-608, comment 4, generally applies to this subsection.

Example: A secured party in the business of selling or financing automobiles takes possession of collateral (an automobile) following its debtor's default. The secured party decides to sell the automobile in a private disposition under section 9-610 and sends appropriate notification under section 9-611. After undertaking its normal credit investigation and in accordance with its normal credit policies, the secured party sells the automobile on credit, on terms typical of the credit terms normally extended by the secured party in the ordinary course of its business. The automobile stands as collateral for the remaining balance of the price. The noncash proceeds received by the

secured party are chattel paper. The secured party may wish to credit its debtor (the assignor) with the principal amount of the chattel paper or may wish to credit the debtor only as and when the payments are made on the chattel paper by the buyer.

Under subsection (c), the secured party is under no duty to apply the noncash proceeds (here, the chattel paper) or their value to the secured obligation unless its failure to do so would be commercially unreasonable. If a secured party elects to apply the chattel paper to the outstanding obligation, however, it must do so in a commercially reasonable manner. The facts in the example indicate that it would be commercially unreasonable for the secured party to fail to apply the value of the chattel paper to the original debtor's secured obligation. Unlike the example in comment 4 to section 9-608, the noncash proceeds received in this example are of the type that the secured party regularly generates in the ordinary course of its financing business in nonforeclosure transactions. The original debtor should not be exposed to delay or uncertainty in this situation. Of course, there will be many situations that fall between the examples presented in the comment to section 9-608 and in this comment. This article leaves their resolution to the court based on the facts of each case.

One would expect that where noncash proceeds are or may be material, the secured party and debtor would agree to more specific standards in an agreement entered into before or after default. The parties may agree to the method of application of noncash proceeds if the method is not manifestly unreasonable. See section 9-603.

When the secured party is not required to "apply or pay over for application noncash proceeds," the proceeds nonetheless remain collateral subject to this article. See section 9-608, comment 4.

4. **Surplus and Deficiency.** Subsection (d) deals with surplus and deficiency. It revises former section 9-504(2) by imposing an explicit requirement that the secured party "pay" the debtor for any surplus, while retaining the secured party's duty to "account." Inasmuch as the debtor may not be an obligor, subsection (d) provides that the obligor (not the debtor) is liable for the deficiency. The special rule governing surplus and deficiency when receivables have been sold likewise takes into account the distinction between a debtor and an obligor. Subsection (d) also addresses the situation in which a consignor has an interest that is subordinate to the security interest being enforced.

5. **Collateral Under New Ownership.** When the debtor sells collateral subject to a security interest, the original debtor (creator of the security interest) is no longer a debtor inasmuch as it no longer has a property interest in the collateral; the buyer is the debtor. See section 9-102. As between the debtor (buyer of the collateral) and the original debtor (seller of the collateral), the debtor (buyer) normally would be entitled to the surplus following a disposition. Subsection (d) therefore requires the secured party to pay the surplus to the debtor (buyer), not to the original debtor (seller) with which it has dealt. But, because this situation typically arises as a result of the debtor's wrongful act, this article does not expose the secured party to the risk of determining ownership of the collateral. If the secured party does not know about the buyer and accordingly pays the surplus to the original debtor, the exculpatory provisions of this article exonerate the secured party from liability to the buyer. See sections 9-605 and 9-628(a) and (b). If a debtor sells collateral free of a security interest, as in a sale to a buyer in ordinary course of business (see section 9-320(a)), the property is no longer collateral and the buyer is not a debtor.

6. **Certain "Low-Price" Dispositions.** Subsection (f) provides a special method for calculating a deficiency or surplus when the secured party, a person related to the secured party (defined in section 9-102), or a secondary obligor acquires the collateral at a foreclosure disposition. It recognizes that when the foreclosing secured party or a related party is the transferee of the collateral, the secured party sometimes lacks the incentive to maximize the proceeds of disposition. As a consequence, the disposition may comply with the procedural requirements of this article (e.g., it is conducted in a commercially reasonable manner following reasonable notice) but nevertheless fetch a low price.

Subsection (f) adjusts for this lack of incentive. If the proceeds of a disposition of collateral to a secured party, a person related to the secured party, or a secondary obligor are "significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought," then instead of calculating a deficiency (or surplus) based on the actual net proceeds, the calculation is based upon the amount that would have been received in a commercially reasonable disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor. Subsection (f) thus rejects the view that the secured party's receipt of such a price necessarily constitutes noncompliance with part 6. However, such a price may suggest the need for greater judicial scrutiny. See section 9-610, comment 10.

7. **"Person Related To."** Section 9-102 defines "person related to." That term is a key

element of the system provided in subsection (f) for low-price dispositions. One part of the definition applies when the secured party is an individual, and the other applies when the secured party is an organization. The definition is patterned closely on the corresponding definition in section 1.301(32) of the Uniform Consumer Credit Code.

§ 25-9-616. (Effective July 1, 2001) Explanation of calculation of surplus or deficiency.

(a) Definitions. — In this section:

(1) "Explanation" means a writing that:

a. States the amount of the surplus or deficiency;

b. Provides an explanation in accordance with subsection (c) of this section of how the secured party calculated the surplus or deficiency;

c. States, if applicable, that future debits, credits, charges, including additional credit service charges or interest, rebates, and expenses may affect the amount of the surplus or deficiency; and

d. Provides a telephone number or mailing address from which additional information concerning the transaction is available.

(2) "Request" means a record:

a. Authenticated by a debtor or consumer obligor;

b. Requesting that the recipient provide an explanation; and

c. Sent after disposition of the collateral under G.S. 25-9-610.

(b) Explanation of calculation. — In a consumer-goods transaction in which the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency under G.S. 25-9-615, the secured party shall:

(1) Send an explanation to the debtor or consumer obligor, as applicable, after the disposition and:

a. Before or when the secured party accounts to the debtor and pays any surplus or first makes written demand on the consumer obligor after the disposition for payment of the deficiency; and

b. Within 14 days after receipt of a request; or

(2) In the case of a consumer obligor who is liable for a deficiency, within 14 days after receipt of a request, send to the consumer obligor a record waiving the secured party's right to a deficiency.

(c) Required information. — To comply with sub-subdivision (a)(1)b. of this section, a writing must provide the following information in the following order:

(1) The aggregate amount of obligations secured by the security interest under which the disposition was made, and, if the amount reflects a rebate of unearned interest or credit service charge, an indication of that fact, calculated as of a specified date:

a. If the secured party takes or receives possession of the collateral after default, not more than 35 days before the secured party takes or receives possession; or

b. If the secured party takes or receives possession of the collateral before default or does not take possession of the collateral, not more than 35 days before the disposition;

(2) The amount of proceeds of the disposition;

(3) The aggregate amount of the obligations after deducting the amount of proceeds;

(4) The amount, in the aggregate or by type, and types of expenses, including expenses of retaking, holding, preparing for disposition, processing, and disposing of the collateral, and attorney's fees secured by the collateral which are known to the secured party and relate to the current disposition;

(5) The amount, in the aggregate or by type, and types of credits, including rebates of interest or credit service charges, to which the obligor is known to be entitled and which are not reflected in the amount in subdivision (1) of this subsection; and

(6) The amount of the surplus or deficiency.

(d) Substantial compliance. — A particular phrasing of the explanation is not required. An explanation complying substantially with the requirements of subsection (a) of this section is sufficient, even if it includes minor errors that are not seriously misleading.

(e) Charges for responses. — A debtor or consumer obligor is entitled without charge to one response to a request under this section during any six-month period in which the secured party did not send to the debtor or consumer obligor an explanation pursuant to subdivision (b)(1) of this section. The secured party may require payment of a charge not exceeding twenty-five dollars ($25.00) for each additional response. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Duty to Send Information Concerning Surplus or Deficiency.** This section reflects the view that, in every consumer-goods transaction, the debtor or obligor is entitled to know the amount of a surplus or deficiency and the basis upon which the surplus or deficiency was calculated. Under subsection (b)(1), a secured party is obligated to provide this information (an "explanation," defined in subsection (a)(1)) no later than the time that it accounts for and pays a surplus or the time of its first written attempt to collect the deficiency. The obligor need not make a request for an accounting in order to receive an explanation. A secured party who does not attempt to collect a deficiency in writing or account for and pay a surplus has no obligation to send an explanation under subsection (b)(1) and, consequently, cannot be liable for noncompliance.

A debtor or secondary obligor need not wait until the secured party commences written collection efforts in order to receive an explanation of how a deficiency or surplus was calculated. Subsection (b)(2) obliges the secured party to send an explanation within 14 days after it receives a "request" (defined in subsection (a)(2)).

3. **Explanation of Calculation of Surplus or Deficiency.** Subsection (c) contains the requirements for how a calculation of a surplus or deficiency must be explained in order to satisfy subsection (a)(1)(B). It gives a secured party some discretion concerning rebates of interest or credit service charges. The secured party may include these rebates in the aggregate amount of obligations secured, under subsection (c)(1), or may include them with other types of rebates and credits under subsection (c)(5). Rebates of interest or credit service charges are the only types of rebates for which this discretion is provided. If the secured party provides an explanation that includes rebates of precomputed interest, its explanation must so indicate. The expenses and attorney's fees to be described pursuant to subsection (c)(4) are those relating to the most recent disposition, not those that may have been incurred in connection with earlier enforcement efforts and which have been resolved by the parties.

4. **Liability for Noncompliance.** A secured party who fails to comply with subsection (b)(2) is liable for any loss caused plus $500. See section 9-625(b), (c), and (e)(6). A secured party who fails to send an explanation under subsection (b)(1) is liable for any loss caused plus, if the noncompliance was "part of a pattern, or consistent with a practice of noncompliance," $500. See section 9-625(b), (c), and (e)(5). However, a secured party who fails to comply with this section is not liable for statutory minimum damages under section 9-625(c)(2). See section 9-628(d).

§ 25-9-617. (Effective July 1, 2001) Rights of transferee of collateral.

(a) Effects of disposition. — A secured party's disposition of collateral after default:

(1) Transfers to a transferee for value all of the debtor's rights in the collateral;

(2) Discharges the security interest under which the disposition is made; and

(3) Discharges any subordinate security interest or other subordinate lien.

(b) Rights of good-faith transferee. — A transferee that acts in good faith takes free of the rights and interests described in subsection (a) of this section, even if the secured party fails to comply with this Article or the requirements of any judicial proceeding.

(c) Rights of other transferee. — If a transferee does not take free of the rights and interests described in subsection (a) of this section, the transferee takes the collateral subject to:

(1) The debtor's rights in the collateral;

(2) The security interest or agricultural lien under which the disposition is made; and

(3) Any other security interest or other lien. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-504(4).

2. **Title Taken by Good Faith Transferee.** Subsection (a) sets forth the rights acquired by persons who qualify under subsection (b)—transferees who act in good faith. Such a person is a "transferee," inasmuch as a buyer at a foreclosure sale does not meet the definition of "purchaser" in section 1-201 (the transfer is not, vis-a-vis the debtor, "voluntary"). By virtue of the expanded definition of the term "debtor" in section 9-102, subsection (a) makes clear that the ownership interest of a person who bought the collateral subject to the security interest is terminated by a subsequent disposition under this part. Such a person is a debtor under this article. Under former article 9, the result arguably was the same, but the statute was less clear. Under subsection (a), a disposition normally discharges the security interest being foreclosed and any subordinate security interests and other liens.

A disposition has the effect specified in subsection (a), even if the secured party fails to comply with this article. An aggrieved person (e.g., the holder of a subordinate security interest to whom a notification required by section 9-611 was not sent) has a right to recover any loss under section 9-625(b).

3. **Unitary Standard in Public and Private Dispositions.** Subsection (b) now contains a unitary standard that applies to transferees in both private and public dispositions—acting in good faith. However, this change from former section 9-504(4) should not be interpreted to mean that a transferee acts in good faith even though it has knowledge of defects or buys in collusion, standards applicable to public dispositions under the former section. Properly understood, those standards were specific examples of the absence of good faith.

4. **Title Taken by Nonqualifying Transferee.** Subsection (c) specifies the consequences for a transferee who does not qualify for protection under subsections (a) and (b) (i.e., a transferee who does not act in good faith). The transferee takes subject to the rights of the debtor, the enforcing secured party, and other security interests or other liens.

§ 25-9-618. (Effective July 1, 2001) Rights and duties of certain secondary obligors.

(a) Rights and duties of secondary obligor. — A secondary obligor acquires the rights and becomes obligated to perform the duties of the secured party after the secondary obligor:

(1) Receives an assignment of a secured obligation from the secured party;

(2) Receives a transfer of collateral from the secured party and agrees to accept the rights and assume the duties of the secured party; or

(3) Is subrogated to the rights of a secured party with respect to collateral.

(b) Effect of assignment, transfer, or subrogation. — An assignment, transfer, or subrogation described in subsection (a) of this section:

(1) Is not a disposition of collateral under G.S. 25-9-610; and

(2) Relieves the secured party of further duties under this Article. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-504(5).

2. **Scope of This Section.** Under this section, assignments of secured obligations and other transactions (regardless of form) that function like assignments of secured obligations are not dispositions to which part 6 applies. Rather, they constitute assignments of rights and (occasionally) delegations of duties. Application of this section may require an investigation into the agreement of the parties, which may not be reflected in the words of the repurchase agreement (e.g., when the agreement requires a recourse party to "purchase the collateral" but contemplates that the purchaser will then conduct an article 9 foreclosure disposition).

This section, like former section 9-504(5), does not constitute a general and comprehensive rule for allocating rights and duties upon assignment of a secured obligation. Rather, it applies only in situations involving a secondary obligor described in subsection (a). In other contexts, the agreement of the parties and applicable law other than article 9 determine whether the assignment imposes upon the assignee any duty to the debtor and whether the assignor retains its duties to the debtor after the assignment.

Subsection (a)(1) applies when there has been an assignment of an obligation that is secured at the time it is assigned. Thus, if a secondary obligor acquires the collateral at a disposition under section 9-610 and simultaneously or subsequently discharges the unsecured deficiency claim, subsection (a)(1) is not implicated. Similarly, subsection (a)(3) applies only when the secondary obligor is subrogated to the secured party's rights with respect to collateral. Thus, this subsection will not be implicated if a secondary obligor discharges the debtor's unsecured obligation for a post-disposition deficiency. Similarly, if the secured party disposes of some of the collateral and the secondary obligor thereafter discharges the remaining obligation, subsection (a) applies only with respect to rights and duties concerning the remaining collateral, and, under subsection (b), the subrogation is not a disposition of the remaining collateral.

As discussed more fully in comment 3, a secondary obligor may receive a transfer of collateral in a disposition under section 9-610 in exchange for a payment that is applied against the secured obligation. However, a secondary obligor who pays and receives a transfer of collateral does not necessarily become subrogated to the rights of the secured party as contemplated by subsection (a)(3). Only to the extent the secondary obligor makes a payment in satisfaction of its secondary obligation would it become subrogated. To the extent its payment constitutes the price of the collateral in a section 9-610 disposition by the secured party, the secondary obligor would not be subrogated. Thus, if the amount paid by the secondary obligor for the collateral in a section 9-610 disposition is itself insufficient to discharge the secured obligation, but the secondary obligor makes an additional payment that satisfies the remaining balance, the secondary obligor would be subrogated to the secured party's deficiency claim. However, the duties of the secured party as such would have come to an end with respect to that collateral. In some situations the capacity in which the payment is made may be unclear. Accordingly, the parties should in their relationship provide clear evidence of the nature and circumstances of the payment by the secondary obligor.

3. **Transfer of Collateral to Secondary Obligor.** It is possible for a secured party to transfer collateral to a secondary obligor in a transaction that is a disposition under section 9-610 and that establishes a surplus or deficiency under section 9-615. Indeed, this article includes a special rule, in section 9-615(f), for establishing a deficiency in the case of some dispositions to, inter alia, secondary obligors. This article rejects the view, which some may have ascribed to former section 9-504(5), that a transfer of collateral to a recourse party can never constitute a disposition of collateral which discharges a security interest. Inasmuch as a secured party could itself buy collateral at its own public sale, it makes no sense to prohibit a recourse party ever from buying at the sale.

4. **Timing and Scope of Obligations.** Under subsection (a), a recourse party acquires rights and incurs obligations only "after" one of the specified circumstances occurs. This makes clear that when a successor assignee, transferee, or subrogee becomes obligated it does not assume any liability for earlier actions or inactions of the secured party whom it has succeeded unless it agrees to do so. Once the successor becomes obligated, however, it is responsible for complying with the secured party's duties thereafter. For example, if the successor is in possession of collateral, then it has the duties specified in section 9-207.

Under subsection (b), the same event (assignment, transfer, or subrogation) that gives rise to rights to, and imposes obligations on, a successor relieves its predecessor of any further duties under this article. For example, if the security interest is enforced after the secured obligation is assigned, the assignee—but not the assignor—has the duty to comply with this part. Similarly, the assignment does not excuse

the assignor from liability for failure to comply with duties that arose before the event or impose liability on the assignee for the assignor's failure to comply.

§ 25-9-619. (Effective July 1, 2001) Transfer of record or legal title.

(a) "Transfer statement." — In this section, "transfer statement" means a record authenticated by a secured party stating:

(1) That the debtor has defaulted in connection with an obligation secured by specified collateral;

(2) That the secured party has exercised its postdefault remedies with respect to the collateral;

(3) That, by reason of the exercise, a transferee has acquired the rights of the debtor in the collateral; and

(4) The name and mailing address of the secured party, debtor, and transferee.

(b) Effect of transfer statement. — A transfer statement entitles the transferee to the transfer of record of all rights of the debtor in the collateral specified in the statement in any official filing, recording, registration, or certificate-of-title system covering the collateral. If a transfer statement is presented with the applicable fee and request form to the official or office responsible for maintaining the system, the official or office shall:

(1) Accept the transfer statement;

(2) Promptly amend its records to reflect the transfer; and

(3) If applicable, issue a new appropriate certificate of title in the name of the transferee.

(c) Transfer not a disposition; no relief of secured party's duties. — A transfer of the record or legal title to collateral to a secured party under subsection (b) of this section or otherwise is not of itself a disposition of collateral under this Article and does not of itself relieve the secured party of its duties under this Article. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Transfer of Record or Legal Title.** Potential buyers of collateral that is covered by a certificate of title (e.g., an automobile) or is subject to a registration system (e.g., a copyright) typically require as a condition of their purchase that the certificate or registry reflect their ownership. In many cases, this condition can be met only with the consent of the record owner. If the record owner is the debtor and, as may be the case after the default, the debtor refuses to cooperate, the secured party may have great difficulty disposing of the collateral.

Subsection (b) provides a simple mechanism for obtaining record or legal title, for use primarily when other law does not provide one. Of course, use of this mechanism will not be effective to clear title to the extent that subsection (b) is preempted by federal law. Subsection (b) contemplates a transfer of record or legal title to a third party, following a secured party's exercise of its disposition or acceptance remedies under this part, as well as a transfer by a debtor to a secured party prior to the secured party's exercise of those remedies. Under subsection (c), a transfer of record or legal title (under subsection (b) or under other law) to a secured party prior to the exercise of those remedies merely puts the secured party in a position to pass legal or record title to a transferee at foreclosure. A secured party who has obtained record or legal title retains its duties with respect to enforcement of its security interest, and the debtor retains its rights as well.

3. **Title-Clearing Systems Under Other Law.** Applicable non-UCC law (e.g., a certificate of title statute, federal registry rules, or the like) may provide a means by which the secured party may obtain or transfer record or legal title for the purpose of a disposition of the property under this article. The mechanism provided by this section is in addition to any title clearing provision under law other than this article.

§ 25-9-620. (Effective July 1, 2001) Acceptance of collateral in full or partial satisfaction of obligation; compulsory disposition of collateral.

(a) Conditions to acceptance in satisfaction. — Except as otherwise provided in subsection (g) of this section, a secured party may accept collateral in full or partial satisfaction of the obligation it secures only if:

(1) The debtor consents to the acceptance under subsection (c) of this section;

(2) The secured party does not receive, within the time set forth in subsection (d) of this section, a notification of objection to the proposal authenticated by:

a. A person to which the secured party was required to send a proposal under G.S. 25-9-621; or

b. Any other person, other than the debtor, holding an interest in the collateral subordinate to the security interest that is the subject of the proposal;

(3) If the collateral is consumer goods, the collateral is not in the possession of the debtor when the debtor consents to the acceptance; and

(4) Subsection (e) of this section does not require the secured party to dispose of the collateral or the debtor waives the requirement pursuant to G.S. 25-9-624.

(b) Purported acceptance ineffective. — A purported or apparent acceptance of collateral under this section is ineffective unless:

(1) The secured party consents to the acceptance in an authenticated record or sends a proposal to the debtor; and

(2) The conditions of subsection (a) of this section are met.

(c) Debtor's consent. — For purposes of this section:

(1) A debtor consents to an acceptance of collateral in partial satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record authenticated after default; and

(2) A debtor consents to an acceptance of collateral in full satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record authenticated after default or the secured party:

a. Sends to the debtor after default a proposal that is unconditional or subject only to a condition that collateral not in the possession of the secured party be preserved or maintained;

b. In the proposal, proposes to accept collateral in full satisfaction of the obligation it secures; and

c. Does not receive a notification of objection authenticated by the debtor within 20 days after the proposal is sent.

(d) Effectiveness of notification. — To be effective under subdivision (a)(2) of this section, a notification of objection must be received by the secured party:

(1) In the case of a person to which the proposal was sent pursuant to G.S. 25-9-621, within 20 days after notification was sent to that person; and

(2) In other cases:

a. Within 20 days after the last notification was sent pursuant to G.S. 25-9-621; or

b. If a notification was not sent, before the debtor consents to the acceptance under subsection (c) of this section.

(e) Mandatory disposition of consumer goods. — A secured party that has taken possession of collateral shall dispose of the collateral pursuant to G.S. 25-9-610 within the time specified in subsection (f) of this section if:

(1) Sixty percent (60%) of the cash price has been paid in the case of a purchase-money security interest in consumer goods; or
(2) Sixty percent (60%) of the principal amount of the obligation secured has been paid in the case of a non-purchase-money security interest in consumer goods.

(f) Compliance with mandatory disposition requirement. — To comply with subsection (e) of this section, the secured party shall dispose of the collateral:
(1) Within 90 days after taking possession; or
(2) Within any longer period to which the debtor and all secondary obligors have agreed in an agreement to that effect entered into and authenticated after default.

(g) No partial satisfaction in consumer transaction. — In a consumer transaction, a secured party may not accept collateral in partial satisfaction of the obligation it secures. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-505.

2. **Overview.** This section and the two sections following deal with strict foreclosure, a procedure by which the secured party acquires the debtor's interest in the collateral without the need for a sale or other disposition under section 9-610. Although these provisions derive from former section 9-505, they have been entirely reorganized and substantially rewritten. The more straightforward approach taken in this article eliminates the fiction that the secured party always will present a "proposal" for the retention of collateral and the debtor will have a fixed period to respond. By eliminating the need (but preserving the possibility) for proceeding in that fashion, this section eliminates much of the awkwardness of former section 9-505. It reflects the belief that strict foreclosures should be encouraged and often will produce better results than a disposition for all concerned.

Subsection (a) sets forth the conditions necessary to an effective acceptance (formerly, retention) of collateral in full or partial satisfaction of the secured obligation. Section 9-621 requires in addition that a secured party who wishes to proceed under this section notify certain other persons who have or claim to have an interest in the collateral. Unlike the failure to meet the conditions in subsection (a), under section 9-622(b) the failure to comply with the notification requirement of section 9-621 does not render the acceptance of collateral ineffective. Rather, the acceptance can take effect notwithstanding the secured party's noncompliance. A person to whom the required notice was not sent has the right to recover damages under section 9-625(b). Section 9-622(a) sets forth the effect of an acceptance of collateral.

3. **Conditions to Effective Acceptance.** Subsection (a) contains the conditions necessary to the effectiveness of an acceptance of collateral. Subsection (a)(1) requires the debtor's consent. Under subsections (c)(1) and (c)(2), the debtor may consent by agreeing to the acceptance in writing after default. Subsection (c)(2) contains an alternative method by which to satisfy the debtor's-consent condition in subsection (a)(1). It follows the proposal-and-objection model found in former section 9-505: The debtor consents if the secured party sends a proposal to the debtor and does not receive an objection within 20 days. Under subsection (c)(1), however, that silence is not deemed to be consent with respect to acceptances in partial satisfaction. Thus, a secured party who wishes to conduct a "partial strict foreclosure" must obtain the debtor's agreement in a record authenticated after default. In all other respects, the conditions necessary to an effective partial strict foreclosure are the same as those governing acceptance of collateral in full satisfaction. (But see subsection (g), prohibiting partial strict foreclosure of a security interest in consumer transactions.)

The time when a debtor consents to a strict foreclosure is significant in several circumstances under this section and the following one. See sections 9-620(a)(1), (d)(2), 9-621(a)(1), (a)(2), and (a)(3). For purposes of determining the time of consent, a debtor's conditional consent constitutes consent.

Subsection (a)(2) contains the second condition to the effectiveness of an acceptance under this section—the absence of a timely objection from a person holding a junior interest in the collateral or from a secondary obligor. Any junior party—secured party or lienholder—is entitled to lodge an objection to a proposal, even if that person was not entitled to notification under section 9-621. Subsection (d), discussed below, indicates when an objection is timely.

Subsections (a)(3) and (a)(4) contain special rules for transactions in which consumers are involved. See comment 12.

4. **Proposals.** Section 9-102 defines the term "proposal." It is necessary to send a "proposal" to the debtor only if the debtor does not agree to

an acceptance in an authenticated record as described in subsection (c)(1) or (c)(2). Section 9-621(a) determines whether it is necessary to send a proposal to third parties. A proposal need not take any particular form as long as it sets forth the terms under which the secured party is willing to accept collateral in satisfaction. A proposal to accept collateral should specify the amount (or a means of calculating the amount, such as by including a per diem accrual figure) of the secured obligations to be satisfied, state the conditions (if any) under which the proposal may be revoked, and describe any other applicable conditions. Note, however, that a conditional proposal generally requires the debtor's agreement in order to take effect. See subsection (c).

5. **Secured Party's Agreement; No "Constructive" Strict Foreclosure.** The conditions of subsection (a) relate to actual or implied consent by the debtor and any secondary obligor or holder of a junior security interest or lien. To ensure that the debtor cannot unilaterally cause an acceptance of collateral, subsection (b) provides that compliance with these conditions is necessary but not sufficient to cause an acceptance of collateral. Rather, under subsection (b), acceptance does not occur unless, in addition, the secured party consents to the acceptance in an authenticated record or sends to the debtor a proposal. For this reason, a mere delay in collection or disposition of collateral does not constitute a "constructive" strict foreclosure. Instead, delay is a factor relating to whether the secured party acted in a commercially reasonable manner for purposes of section 9-607 or 9-610. A debtor's voluntary surrender of collateral to a secured party and the secured party's acceptance of possession of the collateral does not, of itself, necessarily raise an implication that the secured party intends or is proposing to accept the collateral in satisfaction of the secured obligation under this section.

6. **When Acceptance Occurs.** This section does not impose any formalities or identify any steps that a secured party must take in order to accept collateral once the conditions of subsections (a) and (b) have been met. Absent facts or circumstances indicating a contrary intention, the fact that the conditions have been met provides a sufficient indication that the secured party has accepted the collateral on the terms to which the secured party has consented or proposed and the debtor has consented or failed to object. Following a proposal, acceptance of the collateral normally is automatic upon the secured party's becoming bound and the time for objection passing. As a matter of good business practice, an enforcing secured party may wish to memorialize its acceptance following a proposal, such as by notifying the debtor that the strict foreclosure is effective or by placing a written record to that effect in its files. The secured party's agreement to accept collateral is self-executing and cannot be breached. The secured party is bound by its agreement to accept collateral and by any proposal to which the debtor consents.

7. **No Possession Requirement.** This section eliminates the requirement in former section 9-505 that the secured party be "in possession" of collateral. It clarifies that intangible collateral, which cannot be possessed, may be subject to a strict foreclosure under this section. However, under subsection (a)(3), if the collateral is consumer goods, acceptance does not occur unless the debtor is not in possession.

8. **When Objection Timely.** Subsection (d) explains when an objection is timely and thus prevents an acceptance of collateral from taking effect. An objection by a person to which notification was sent under section 9-621 is effective if it is received by the secured party within 20 days from the date the notification was sent to that person. Other objecting parties (i.e., third parties who are not entitled to notification) may object at any time within 20 days after the last notification is sent under section 9-621. If no such notification is sent, third parties must object before the debtor agrees to the acceptance in writing or is deemed to have consented by silence. The former may occur any time after default, and the latter requires a 20-day waiting period. See subsection (c).

9. **Applicability of Other Law.** This section does not purport to regulate all aspects of the transaction by which a secured party may become the owner of collateral previously owned by the debtor. For example, a secured party's acceptance of a motor vehicle in satisfaction of secured obligations may require compliance with the applicable motor vehicle certificate of title law. State legislatures should conform those laws so that they mesh well with this section and section 9-610, and courts should construe those laws and this section harmoniously. A secured party's acceptance of collateral in the possession of the debtor also may implicate statutes dealing with a seller's retention of possession of goods sold.

10. **Accounts, Chattel Paper, Payment Intangibles, and Promissory Notes.** If the collateral is accounts, chattel paper, payment intangibles, or promissory notes, then a secured party's acceptance of the collateral in satisfaction of secured obligations would constitute a sale to the secured party. That sale normally would give rise to a new security interest (the ownership interest) under sections 1-201(37) and 9-109. In the case of accounts and chattel paper, the new security interest would remain perfected by a filing that was effective to perfect the secured party's original security interest. In the case of payment intangibles or promissory notes, the security interest would

be perfected when it attaches. See section 9-309. However, the procedures for acceptance of collateral under this section satisfy all necessary formalities and a new security agreement authenticated by the debtor would not be necessary.

11. **Role of Good Faith.** Section 1-203 imposes an obligation of good faith on a secured party's enforcement under this article. This obligation may not be disclaimed by agreement. See section 1-102. Thus, a proposal and acceptance made under this section in bad faith would not be effective. For example, a secured party's proposal to accept marketable securities worth $1,000 in full satisfaction of indebtedness in the amount of $100, made in the hopes that the debtor might inadvertently fail to object, would be made in bad faith. On the other hand, in the normal case proposals and acceptances should be not second guessed on the basis of the "value" of the collateral involved. Disputes about valuation or even a clear excess of collateral value over the amount of obligations satisfied do not necessarily demonstrate the absence of good faith.

12. **Special Rules in Consumer Cases.** Subsection (e) imposes an obligation on the secured party to dispose of consumer goods under certain circumstances. Subsection (f) explains when a disposition that is required under subsection (e) is timely. An effective acceptance of collateral cannot occur if subsection (e) requires a disposition unless the debtor waives this requirement pursuant to section 9-624(b). Moreover, a secured party who takes possession of collateral and unreasonably delays disposition violates subsection (e), if applicable, and may also violate section 9-610 or other provisions of this part. Subsection (e) eliminates as superfluous the express statutory reference to "conversion" found in former section 9-505. Remedies available under other law, including conversion, remain available under this article in appropriate cases. See sections 1-103 and 1-106.

Subsection (g) prohibits the secured party in consumer transactions from accepting collateral in partial satisfaction of the obligation it secures. If a secured party attempts an acceptance in partial satisfaction in a consumer transaction, the attempted acceptance is void.

§ 25-9-621. (Effective July 1, 2001) Notification of proposal to accept collateral.

(a) Persons to which proposal to be sent. — A secured party that desires to accept collateral in full or partial satisfaction of the obligation it secures shall send its proposal to:

(1) Any person from which the secured party has received, before the debtor consented to the acceptance, an authenticated notification of a claim of an interest in the collateral;

(2) Any other secured party or lienholder that, 10 days before the debtor consented to the acceptance, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that:

a. Identified the collateral;

b. Was indexed under the debtor's name as of that date; and

c. Was filed in the office or offices in which to file a financing statement against the debtor covering the collateral as of that date; and

(3) Any other secured party that, 10 days before the debtor consented to the acceptance, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in G.S. 25-9-311(a).

(b) Proposal to be sent to secondary obligor in partial satisfaction. — A secured party that desires to accept collateral in partial satisfaction of the obligation it secures shall send its proposal to any secondary obligor in addition to the persons described in subsection (a) of this section. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-505.

2. **Notification Requirement.** Subsection (a) specifies three classes of competing claimants to whom the secured party must send

notification of its proposal: (i) Those who notify the secured party that they claim an interest in the collateral; (ii) holders of certain security interests and liens who have filed against the debtor; and (iii) holders of certain security interests who have perfected by compliance with a statute (including a certificate of title statute), regulation, or treaty described in section 9-311(a). With regard to (ii), see section 9-611, comment 4. Subsection (b) also requires notification to any secondary obligor if the proposal is for acceptance in partial satisfaction.

Unlike section 9-611, this section contains no "safe harbor," which excuses an enforcing secured party from notifying certain secured parties and other lienholders. This is because, unlike section 9-610, which requires that a disposition of collateral be commercially reasonable, section 9-620 permits the debtor and secured party to set the amount of credit the debtor will receive for the collateral subject only to the requirement of good faith. An effective acceptance discharges subordinate security interests and other subordinate liens. See section 9-622. If collateral is subject to several liens securing debts much larger than the value of the collateral, the debtor may be disinclined to refrain from consenting to an acceptance by the holder of the senior security interest, even though, had the debtor objected and the senior disposed of the collateral under section 9-610, the collateral may have yielded more than enough to satisfy the senior security interest (but not enough to satisfy all the liens). Accordingly, this section imposes upon the enforcing secured party the risk of the filing office's errors and delay. The holder of a security interest who is entitled to notification under this section but does not receive it has the right to recover under section 9-625(b) any loss resulting from the enforcing secured party's noncompliance with this section.

§ 25-9-622. (Effective July 1, 2001) Effect of acceptance of collateral.

(a) Effect of acceptance. — A secured party's acceptance of collateral in full or partial satisfaction of the obligation it secures:

(1) Discharges the obligation to the extent consented to by the debtor;

(2) Transfers to the secured party all of a debtor's rights in the collateral;

(3) Discharges the security interest or agricultural lien that is the subject of the debtor's consent and any subordinate security interest or other subordinate lien; and

(4) Terminates any other subordinate interest.

(b) Discharge of subordinate interest notwithstanding noncompliance. — A subordinate interest is discharged or terminated under subsection (a) of this section, even if the secured party fails to comply with this Article. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Effect of Acceptance.** Subsection (a) specifies the effect of an acceptance of collateral in full or partial satisfaction of the secured obligation. The acceptance to which it refers is an effective acceptance. If a purported acceptance is ineffective under section 9-620, e.g., because the secured party receives a timely objection from a person entitled to notification, then neither this subsection nor subsection (b) applies. Paragraph (1) expresses the fundamental consequence of accepting collateral in full or partial satisfaction of the secured obligation—the obligation is discharged to the extent consented to by the debtor. Unless otherwise agreed, the obligor remains liable for any deficiency. Paragraphs (2) through (4) indicate the effects of an acceptance on various property rights and interests. Paragraph (2) follows section 9-617(a) in providing that the secured party acquires "all of a debtor's rights in the collateral." Under paragraph (3), the effect of strict foreclosure on holders of junior security interests and other liens is the same regardless of whether the collateral is accepted in full or partial satisfaction of the secured obligation: All junior encumbrances are discharged. Paragraph (4) provides for the termination of other subordinate interests.

Subsection (b) makes clear that subordinate interests are discharged under subsection (a) regardless of whether the secured party complies with this article. Thus, subordinate interests are discharged regardless of whether a proposal was required to be sent or, if required, was sent. However, a secured party's failure to send a proposal or otherwise to comply with this article may subject the secured party to liability under section 9-625.

§ 25-9-623. (Effective July 1, 2001) Right to redeem collateral.

(a) Persons that may redeem. — A debtor, any secondary obligor, or any other secured party or lienholder may redeem collateral.

(b) Requirements for redemption. — To redeem collateral, a person shall tender:

(1) Fulfillment of all obligations secured by the collateral; and

(2) The reasonable expenses and attorney's fees described in G.S. 25-9-615(a)(1).

(c) When redemption may occur. — A redemption may occur at any time before a secured party:

(1) Has collected collateral under G.S. 25-9-607;

(2) Has disposed of collateral or entered into a contract for its disposition under G.S. 25-9-610; or

(3) Has accepted collateral in full or partial satisfaction of the obligation it secures under G.S. 25-9-622. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-506.

2. **Redemption Right.** Under this section, as under former section 9-506, the debtor or another secured party may redeem collateral as long as the secured party has not collected (section 9-607), disposed of or contracted for the disposition of (section 9-610), or accepted (section 9-620) the collateral. Although this section generally follows former section 9-506, it extends the right of redemption to holders of nonconsensual liens. To redeem the collateral a person must tender fulfillment of all obligations secured, plus certain expenses. If the entire balance of a secured obligation has been accelerated, it would be necessary to tender the entire balance. A tender of fulfillment obviously means more than a new promise to perform an existing promise. It requires payment in full of all monetary obligations then due and performance in full of all other obligations then matured. If unmatured secured obligations remain, the security interest continues to secure them (i.e., as if there had been no default).

3. **Redemption of Remaining Collateral Following Partial Enforcement.** Under section 9-610 a secured party may make successive dispositions of portions of its collateral. These dispositions would not affect the debtor's, another secured party's, or a lienholder's right to redeem the remaining collateral.

4. **Effect of "Repledging."** Section 9-207 generally permits a secured party having possession or control of collateral to create a security interest in the collateral. As explained in the comments to that section, the debtor's right (as opposed to its practical ability) to redeem collateral is not affected by, and does not affect, the priority of a security interest created by the debtor's secured party.

§ 25-9-624. (Effective July 1, 2001) Waiver.

(a) Waiver of disposition notification. — A debtor or secondary obligor may waive the right to notification of disposition of collateral under G.S. 25-9-611 only by an agreement to that effect entered into and authenticated after default.

(b) Waiver of mandatory disposition. — A debtor may waive the right to require disposition of collateral under G.S. 25-9-620(e) only by an agreement to that effect entered into and authenticated after default.

(c) Waiver of redemption right. — Except in a consumer-goods transaction, a debtor or secondary obligor may waive the right to redeem collateral under G.S. 25-9-623 only by an agreement to that effect entered into and authenticated after default. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former sections 9-504(3), 9-505, and 9-506.

2. **Waiver.** This section is a limited exception to section 9-602, which generally prohibits waiver by debtors and obligors. It makes no provision for waiver of the rule prohibiting a secured party from buying at its own private disposition. Transactions of this kind are equivalent to "strict foreclosures" and are governed by sections 9-620, 9-621, and 9-622.

SUBPART 2. Noncompliance with Article.

§ 25-9-625. (Effective July 1, 2001) Remedies for secured party's failure to comply with Article.

(a) Judicial orders concerning noncompliance. — If it is established that a secured party is not proceeding in accordance with this article, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions.

(b) Damages for noncompliance. — Subject to subsections (c), (d), and (f) of this section, a person is liable for damages in the amount of any loss caused by a failure to comply with this Article. Loss caused by a failure to comply may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing.

(c) Persons entitled to recover damages; statutory damages in consumer-goods transaction. — Except as otherwise provided in G.S. 25-9-628:

(1) A person that, at the time of the failure, was a debtor, was an obligor, or held a security interest in or other lien on the collateral may recover damages under subsection (b) of this section for its loss; and

(2) If the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this Part may recover for that failure in any event an amount not less than the credit service charge plus ten percent (10%) of the principal amount of the obligation or the time-price differential plus ten percent (10%) of the cash price.

(d) Recovery when deficiency eliminated or reduced. — A debtor whose deficiency is eliminated under G.S. 25-9-626 may recover damages for the loss of any surplus. However, a debtor or secondary obligor whose deficiency is eliminated or reduced under G.S. 25-9-626 may not otherwise recover under subsection (b) of this section for noncompliance with the provisions of this Part relating to collection, enforcement, disposition, or acceptance.

(e) Statutory damages: noncompliance with specified provisions. — In addition to any damages recoverable under subsection (b) of this section, the debtor, consumer obligor, or person named as a debtor in a filed record, as applicable, may recover five hundred dollars ($500.00) in each case from a person that:

(1) Fails to comply with G.S. 25-9-208;

(2) Fails to comply with G.S. 25-9-209;

(3) Files a record that the person is not entitled to file under G.S. 25-9-509(a);

(4) Fails to cause the secured party of record to file or send a termination statement as required by G.S. 25-9-513(a) or (c);

(5) Fails to comply with G.S. 25-9-616(b)(1) and whose failure is part of a pattern, or consistent with a practice, of noncompliance; or

(6) Fails to comply with G.S. 25-9-616(b)(2).

(f) Statutory damages: noncompliance with G.S. 25-9-210. — A debtor or consumer obligor may recover damages under subsection (b) of this section and, in addition, five hundred dollars ($500.00) in each case from a person that,

without reasonable cause, fails to comply with a request under G.S. 25-9-210. A recipient of a request under G.S. 25-9-210 which never claimed an interest in the collateral or obligations that are the subject of a request under that section has a reasonable excuse for failure to comply with the request within the meaning of this subsection.

(g) Limitation of security interest: noncompliance with G.S. 25-9-210. — If a secured party fails to comply with a request regarding a list of collateral or a statement of account under G.S. 25-9-210, the secured party may claim a security interest only as shown in the list or statement included in the request as against a person that is reasonably misled by the failure. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-507.

2. **Remedies for Noncompliance; Scope.** Subsections (a) and (b) provide the basic remedies afforded to those aggrieved by a secured party's failure to comply with this article. Like all provisions that create liability, they are subject to section 9-628, which should be read in conjunction with section 9-605. The principal limitations under this part on a secured party's right to enforce its security interest against collateral are the requirements that it proceed in good faith (section 1-203), in a commercially reasonable manner (sections 9-607 and 9-610), and, in most cases, with reasonable notification (sections 9-611 through 9-614). Following former section 9-507, under subsection (a) an aggrieved person may seek injunctive relief, and under subsection (b) the person may recover damages for losses caused by noncompliance. Unlike former section 9-507, however, subsections (a) and (b) are not limited to noncompliance with provisions of this part of article 9. Rather, they apply to noncompliance with any provision of this article. The change makes this section applicable to noncompliance with sections 9-207 (duties of secured party in possession of collateral), 9-208 (duties of secured party having control over deposit account), 9-209 (duties of secured party if account debtor has been notified of an assignment), 9-210 (duty to comply with request for accounting, etc.), 9-509(a) (duty to refrain from filing unauthorized financing statement), and 9-513(a) (duty to provide termination statement). Subsection (a) also modifies the first sentence of former section 9-507(1) by adding the references to "collection" and "enforcement." Subsection (c)(2), which gives a minimum damage recovery in consumer goods transactions, applies only to noncompliance with the provisions of this part.

3. **Damages for Noncompliance with This Article.** Subsection (b) sets forth the basic remedy for failure to comply with the requirements of this article: A damage recovery in the amount of loss caused by the noncompliance. Subsection (c) identifies who may recover under subsection (b). It affords a remedy to any aggrieved person who is a debtor or obligor. However, a principal obligor who is not a debtor may recover damages only for noncompliance with section 9-616, inasmuch as none of the other rights and duties in this article run in favor of such a principal obligor. Such a principal obligor could not suffer any loss or damage on account of noncompliance with rights or duties of which it is not a beneficiary. Subsection (c) also affords a remedy to an aggrieved person who holds a competing security interest or other lien, regardless of whether the aggrieved person is entitled to notification under part 6. The remedy is available even to holders of senior security interests and other liens. The exercise of this remedy is subject to the normal rules of pleading and proof. A person who has delegated the duties of a secured party but who remains obligated to perform them is liable under this subsection. The last sentence of subsection (d) eliminates the possibility of double recovery or other over-compensation arising out of a reduction or elimination of a deficiency under section 9-626, based on noncompliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance. Assuming no double recovery, a debtor whose deficiency is eliminated under section 9-626 may pursue a claim for a surplus. Because section 9-626 does not apply to consumer transactions, the statute is silent as to whether a double recovery or other over-compensation is possible in a consumer transaction.

Damages for violation of the requirements of this article, including section 9-609, are those reasonably calculated to put an eligible claimant in the position that it would have occupied had no violation occurred. See section 1-106. Subsection (b) supports the recovery of actual damages for committing a breach of the peace in violation of section 9-609, and principles of tort law supplement this subsection. See section 1-103. However, to the extent that damages in tort compensate the debtor for the same loss dealt with by this article, the debtor should be entitled to only one recovery.

4. **Minimum Damages in Consumer-Goods Transactions.** Subsection (c)(2) provides a minimum, statutory, damage recovery for a debtor and secondary obligor in a consumer-goods transaction. It is patterned on former section 9-507(1) and is designed to ensure that every noncompliance with the requirements of part 6 in a consumer goods transaction results in liability, regardless of any injury that may have resulted. Subsection (c)(2) leaves the treatment of statutory damages as it was under former article 9. A secured party is not liable for statutory damages under this subsection more than once with respect to any one secured obligation (see section 9-628(e)), nor is a secured party liable under this subsection for failure to comply with section 9-616 (see section 9-628(d)).

Following former section 9-507(1), this article does not include a definition or explanation of the terms "credit service charge," "principal amount," "time-price differential," or "cash price," as used in subsection (c)(2). It leaves their construction and application to the court, taking into account the subsection's purpose of providing a minimum recovery in consumer-goods transactions.

5. **Supplemental Damages.** Subsections (e) and (f) provide damages that supplement the recovery, if any, under subsection (b). Subsection (e) imposes an additional $500 liability upon a person who fails to comply with the provisions specified in that subsection, and subsection (f) imposes like damages on a person who, without reasonable excuse, fails to comply with a request for an accounting or a request regarding a list of collateral or statement of account under section 9-210. However, under subsection (f), a person has a reasonable excuse for the failure if the person never claimed an interest in the collateral or obligations that were the subject of the request.

6. **Estoppel.** Subsection (g) limits the extent to which a secured party who fails to comply with a request regarding a list of collateral or statement of account may claim a security interest.

§ 25-9-626. (Effective July 1, 2001) Action in which deficiency or surplus is in issue.

(a) Applicable rules if amount of deficiency or surplus in issue. — In an action arising from a transaction, other than a consumer transaction, in which the amount of a deficiency or surplus is in issue, the following rules apply:

(1) A secured party need not prove compliance with the provisions of this Part relating to collection, enforcement, disposition, or acceptance unless the debtor or a secondary obligor places the secured party's compliance in issue.

(2) If the secured party's compliance is placed in issue, the secured party has the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with this Part.

(3) Except as otherwise provided in G.S. 25-9-628, if a secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this Part relating to collection, enforcement, disposition, or acceptance, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of:

a. The proceeds of the collection, enforcement, disposition, or acceptance; or

b. The amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with the provisions of this Part relating to collection, enforcement, disposition, or acceptance.

(4) For purposes of sub-subdivision (a)(3)b. of this section, the amount of proceeds that would have been realized is equal to the sum of the secured obligation, expenses, and attorney's fees unless the secured party proves that the amount is less than that sum.

(5) If a deficiency or surplus is calculated under G.S. 25-9-615(f), the debtor or obligor has the burden of establishing that the amount of proceeds of the disposition is significantly below the range of prices that a complying disposition to a person other than the secured party,

a person related to the secured party, or a secondary obligor would have brought.

(b) Nonconsumer transactions; no inference. — The limitation of the rules in subsection (a) of this section to transactions other than consumer transactions is intended to leave to the court the determination of the proper rules in consumer transactions. The court may not infer from that limitation the nature of the proper rule in consumer transactions and may continue to apply established approaches. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Scope.** The basic damage remedy under section 9-625(b) is subject to the special rules in this section for transactions other than consumer transactions. This section addresses situations in which the amount of a deficiency or surplus is in issue, i.e., situations in which the secured party has collected, enforced, disposed of, or accepted the collateral. It contains special rules applicable to a determination of the amount of a deficiency or surplus. Because this section affects a person's liability for a deficiency, it is subject to section 9-628, which should be read in conjunction with section 9-605. The rules in this section apply only to noncompliance in connection with the "collection, enforcement, disposition, or acceptance" under part 6. For other types of noncompliance with part 6, the general liability rule of section 9-625(b)—recovery of actual damages—applies. Consider, for example, a repossession that does not comply with section 9-609 for want of a default. The debtor's remedy is under section 9-625(b). In a proper case, the secured party also may be liable for conversion under non-UCC law. If the secured party thereafter disposed of the collateral, however, it would violate section 9-610 at that time, and this section would apply.

3. **Rebuttable Presumption Rule.** Section 9-626 establishes the rebuttable presumption rule for transactions other than consumer transactions. Under paragraph (1), the secured party need not prove compliance with the relevant provisions of this part as part of its prima facie case. If, however, the debtor or a secondary obligor raises the issue (in accordance with the forum's rules of pleading and practice), then the secured party bears the burden of proving that the collection, enforcement, disposition, or acceptance complied. In the event the secured party is unable to meet this burden, then paragraph (3) explains how to calculate the deficiency. Under this rebuttable presumption rule, the debtor or obligor is to be credited with the greater of the actual proceeds of the disposition or the proceeds that would have been realized had the secured party complied with the relevant provisions. If a deficiency remains, then the secured party is entitled to recover it. The references to "the secured obligation, expenses, and attorney's fees" in paragraphs (3) and (4) embrace the application rules in sections 9-608(a) and 9-615(a).

Unless the secured party proves that compliance with the relevant provisions would have yielded a smaller amount, under paragraph (4) the amount that a complying collection, enforcement, or disposition would have yielded is deemed to be equal to the amount of the secured obligation, together with expenses and attorney's fees. Thus, the secured party may not recover any deficiency unless it meets this burden.

4. **Consumer Transactions.** Although section 9-626 adopts a version of the rebuttable presumption rule for transactions other than consumer transactions, with certain exceptions part 6 does not specify the effect of a secured party's noncompliance in consumer transactions. (The exceptions are the provisions for the recovery of damages in section 9-625.) Subsection (b) provides that the limitation of subsection (a) (section 9-626) to transactions other than consumer transactions is intended to leave to the court the determination of the proper rules in consumer transactions. It also instructs the court not to draw any inference from the limitation as to the proper rules for consumer transactions and leaves the court free to continue to apply established approaches to those transactions.

Courts construing former section 9-507 disagreed about the consequences of a secured party's failure to comply with the requirements of former part 5. Three general approaches emerged. Some courts have held that a noncomplying secured party may not recover a deficiency (the "absolute bar" rule). A few courts held that the debtor can offset against a claim to a deficiency all damages recoverable under former section 9-507 resulting from the secured party's noncompliance (the "offset" rule). A plurality of courts considering the issue held that the noncomplying secured party is barred from recovering a deficiency unless it overcomes a rebuttable presumption that compliance with former part 5 would have yielded an amount sufficient to satisfy the secured debt. In addition to the nonuniformity resulting from court decisions, some states enacted special rules governing the availability of deficiencies.

5. **Burden of Proof When Section 9-615(f) Applies.** In a non-consumer transaction, paragraph (5) imposes upon a debtor or obligor the burden of proving that the proceeds of a disposition are so low that, under section 9-615(f), the actual proceeds should not serve as the basis upon which a deficiency or surplus is calculated. Were the burden placed on the secured party, then debtors might be encouraged to challenge the price received in every disposition to the secured party, a person related to the secured party, or a secondary obligor.

6. **Delay in Applying This Section.** There is an inevitable delay between the time a secured party engages in a noncomplying collection, enforcement, disposition, or acceptance and the time of a subsequent judicial determination that the secured party did not comply with part 6. During the interim, the secured party, believing that the secured obligation is larger than it ultimately is determined to be, may continue to enforce its security interest in collateral. If some or all of the secured indebtedness ultimately is discharged under this section, a reasonable application of this section would impose liability on the secured party for the amount of any excess, unwarranted recoveries but would not make the enforcement efforts wrongful.

§ 25-9-627. (Effective July 1, 2001) Determination of whether conduct was commercially reasonable.

(a) Greater amount obtainable under other circumstances; no preclusion of commercial reasonableness. — The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.

(b) Dispositions that are commercially reasonable. — A disposition of collateral is made in a commercially reasonable manner if the disposition is made:

(1) In the usual manner on any recognized market;

(2) At the price current in any recognized market at the time of the disposition; or

(3) Otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

(c) Approval by court or on behalf of creditors. — A collection, enforcement, disposition, or acceptance is commercially reasonable if it has been approved:

(1) In a judicial proceeding;

(2) By a bona fide creditors' committee;

(3) By a representative of creditors; or

(4) By an assignee for the benefit of creditors.

(d) Approval under subsection (c) of this section not necessary; absence of approval has no effect. — Approval under subsection (c) of this section need not be obtained, and lack of approval does not mean that the collection, enforcement, disposition, or acceptance is not commercially reasonable. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** Former section 9-507(2).

2. **Relationship of Price to Commercial Reasonableness.** Some observers have found the notion contained in subsection (a) (derived from former section 9-507(2)) (the fact that a better price could have been obtained does not establish lack of commercial reasonableness) to be inconsistent with that found in section 9-610(b) (derived from former section 9-504(3)) (every aspect of the disposition, including its terms, must be commercially reasonable). There is no such inconsistency. While not itself sufficient to establish a violation of this part, a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable.

The law long has grappled with the problem of dispositions of personal and real property which comply with applicable procedural re-

quirements (e.g., advertising, notification to interested persons, etc.) but which yield a price that seems low. This article addresses that issue in section 9-615(f). That section applies only when the transferee is the secured party, a person related to the secured party, or a secondary obligor. It contains a special rule for calculating a deficiency or surplus in a complying disposition that yields a price that is "significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought."

3. **Determination of Commercial Reasonableness; Advance Approval.** It is important to make clear the conduct and procedures that are commercially reasonable and to provide a secured party with the means of obtaining, by court order or negotiation with a creditors' committee or a representative of creditors, advance approval of a proposed method of enforcement as commercially reasonable. This section contains rules that assist in that determination and provides for advance approval in appropriate situations. However, none of the specific methods of disposition specified in subsection (b) is required or exclusive.

4. **"Recognized Market."** As in sections 9-610(c) and 9-611(d), the concept of a "recognized market" in subsections (b)(1) and (2) is quite limited; it applies only to markets in which there are standardized price quotations for property that is essentially fungible, such as stock exchanges.

§ 25-9-628. (Effective July 1, 2001) Nonliability and limitation on liability of secured party; liability of secondary obligor.

(a) Limitation of liability of secured party for noncompliance with Article. — Unless a secured party knows that a person is a debtor or obligor, knows the identity of the person, and knows how to communicate with the person:

(1) The secured party is not liable to the person, or to a secured party or lienholder that has filed a financing statement against the person, for failure to comply with this Article; and

(2) The secured party's failure to comply with this Article does not affect the liability of the person for a deficiency.

(b) Limitation of liability based on status as secured party. — A secured party is not liable because of its status as secured party:

(1) To a person that is a debtor or obligor, unless the secured party knows:

a. That the person is a debtor or obligor;

b. The identity of the person; and

c. How to communicate with the person; or

(2) To a secured party or lienholder that has filed a financing statement against a person, unless the secured party knows:

a. That the person is a debtor; and

b. The identity of the person.

(c) Limitation of liability if reasonable belief that transaction not a consumer-goods transaction or consumer transaction. — A secured party is not liable to any person, and a person's liability for a deficiency is not affected, because of any act or omission arising out of the secured party's reasonable belief that a transaction is not a consumer-goods transaction or a consumer transaction or that goods are not consumer goods, if the secured party's belief is based on its reasonable reliance on:

(1) A debtor's representation concerning the purpose for which collateral was to be used, acquired, or held; or

(2) An obligor's representation concerning the purpose for which a secured obligation was incurred.

(d) Limitation of liability for statutory damages. — A secured party is not liable to any person under G.S. 25-9-625(c)(2) for its failure to comply with G.S. 25-9-616.

(e) Limitation of multiple liability for statutory damages. — A secured party is not liable under G.S. 25-9-625(c)(2) more than once with respect to any one secured obligation. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Source.** New.

2. **Exculpatory Provisions.** Subsections (a), (b), and (c) contain exculpatory provisions that should be read in conjunction with section 9-605. Without this group of provisions, a secured party could incur liability to unknown persons and under circumstances that would not allow the secured party to protect itself. The broadened definition of the term "debtor" underscores the need for these provisions.

If a secured party reasonably, but mistakenly, believes that a consumer transaction or consumer-goods transaction is a non-consumer transaction or non-consumer-goods transaction, and if the secured party's belief is based on its reasonable reliance on a representation of the type specified in subsection (c)(1) or (c)(2), then this article should be applied as if the facts reasonably believed and the representation reasonably relied upon were true. For example, if a secured party reasonably believed that a transaction was a non-consumer transaction and its belief was based on reasonable reliance on the debtor's representation that the collateral secured an obligation incurred for business purposes, the secured party is not liable to any person, and the debtor's liability for a deficiency is not affected, because of any act or omission of the secured party which arises out of the reasonable belief. Of course, if the secured party's belief is not reasonable or, even if reasonable, is not based on reasonable reliance on the debtor's representation, this limitation on liability is inapplicable.

3. **Inapplicability of Statutory Damages to Section 9-616.** Subsection (d) excludes noncompliance with section 9-616 entirely from the scope of statutory damage liability under section 9-625(c)(2).

4. **Single Liability for Statutory Minimum Damages.** Subsection (e) ensures that a secured party will incur statutory damages only once in connection with any one secured obligation.

PART 7

TRANSITION.

§ 25-9-701. (Effective July 1, 2001) Effective date.

This act takes effect on July 1, 2001. References in this Part to "this act" refer to PARTS I, II, and III of the session law by which this Part is added to Article 9 of Chapter 25 of the General Statutes. References in this Part to "former Article 9" are to Article 9 of Chapter 25 of the General Statutes as in effect immediately before July 1, 2001. (2000-169, s. 1.)

OFFICIAL COMMENT

A uniform law as complex as article 9 necessarily gives rise to difficult problems and uncertainties during the transition to the new law. As is customary for uniform laws, this article is based on the general assumption that all states will have enacted substantially identical versions. While always important, uniformity is essential to the success of this article. If former article 9 is in effect in some jurisdictions, and this article is in effect in others, horrendous complications may arise. For example, the proper place in which to file to perfect a security interest (and thus the status of a particular security interest as perfected or unperfected) would depend on whether the matter was litigated in a state in which former article 9 was in effect or a state in which this article was in effect. Accordingly, this section contemplates that states will adopt a uniform effective date for this article. Any one state's failure to adopt the uniform effective date will greatly increase the cost and uncertainty surrounding the transition.

Other problems arise from transactions and relationships that were entered into under former article 9 or under non-UCC law and which remain outstanding on the effective date of this article. The difficulties arise primarily because this article expands the scope of former article 9 to cover additional types of collateral and transactions and because it provides new methods of perfection for some types of collateral, different priority rules, and different choice of law rules governing perfection and priority. This section and the other sections in this part address primarily this second set of problems.

§ 25-9-702. (Effective July 1, 2001) Savings clause.

(a) Pre-effective-date transactions or liens. — Except as otherwise provided in this Part, this act applies to a transaction or lien within its scope, even if the transaction or lien was entered into or created before July 1, 2001.

(b) Continuing validity. — Except as otherwise provided in subsection (c) of this section and G.S. 25-9-703 through G.S. 25-9-709:

(1) Transactions and liens that were not governed by former Article 9, were validly entered into or created before July 1, 2001, and would be subject to this act if they had been entered into or created after July 1, 2001, and the rights, duties, and interests flowing from those transactions and liens remain valid after July 1, 2001; and

(2) The transactions and liens described in subdivision (1) of this subsection may be terminated, completed, consummated, and enforced as required or permitted by this act or by the law that otherwise would apply if this act had not taken effect.

(c) Pre-effective-date proceedings. — This act does not affect an action, case, or proceeding commenced before July 1, 2001. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Pre-Effective-Date Transactions.** Subsection (a) contains the general rule that this article applies to transactions, security interests, and other liens within its scope (see section 9-109), even if the transaction or lien was entered into or created before the effective date. Thus, secured transactions entered into under former article 9 must be terminated, completed, consummated, and enforced under this article. Subsection (b) is an exception to the general rule. It applies to valid, pre-effective-date transactions and liens that were not governed by former article 9 but would be governed by this article if they had been entered into or created after this Article takes effect. Under subsection (b), these valid transactions, such as the creation of agricultural liens and security interests in commercial tort claims, retain their validity under this article and may be terminated, completed, consummated, and enforced under this article. However, these transactions also may be terminated, completed, consummated, and enforced by the law that otherwise would apply had this article not taken effect.

2. **Judicial Proceedings Commenced Before Effective Date.** As is usual in transition provisions, subsection (c) provides that this article does not affect litigation pending on the effective date.

§ 25-9-703. (Effective July 1, 2001) Security interest perfected before effective date.

(a) Continuing priority over lien creditor: perfection requirements satisfied. — A security interest that is enforceable immediately before July 1, 2001 and would have priority over the rights of a person that becomes a lien creditor at that time is a perfected security interest under this act if, on July 1, 2001, the applicable requirements for enforceability and perfection under this act are satisfied without further action.

(b) Continuing priority over lien creditor: perfection requirements not satisfied. — Except as otherwise provided in G.S. 25-9-705, if, immediately before July 1, 2001, a security interest is enforceable and would have priority over the rights of a person that becomes a lien creditor at that time, but the applicable requirements for enforceability or perfection under this act are not satisfied on July 1, 2001, the security interest:

(1) Is a perfected security interest for one year after July 1, 2001;

(2) Remains enforceable thereafter only if the security interest becomes enforceable under G.S. 25-9-203 before the year expires; and

(3) Remains perfected thereafter only if the applicable requirements for perfection under this act are satisfied before the year expires. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Perfected Security Interests Under Former Article 9 and This Article.** This section deals with security interests that are perfected (i.e., that are enforceable and have priority over the rights of a lien creditor) under former article 9 or other applicable law immediately before this article takes effect. Subsection (a) provides, not surprisingly, that if the security interest would be a perfected security interest under this article (i.e., if the transaction satisfies this article's requirements for enforceability (attachment) and perfection), no further action need be taken for the security interest to be a perfected security interest.

2. **Security Interests Enforceable and Perfected Under Former Article 9 but Unenforceable or Unperfected Under This Article.** Subsection (b) deals with security interests that are enforceable and perfected under former article 9 or other applicable law immediately before this Article takes effect but do not satisfy the requirements for enforceability (attachment) or perfection under this article. Except as otherwise provided in section 9-705, these security interests are perfected security interests for one year after the effective date. If the security interest satisfies the requirements for attachment and perfection within that period, the security interest remains perfected thereafter. If the security interest satisfies only the requirements for attachment within that period, the security interest becomes unperfected at the end of the one-year period.

Example 1: A pre-effective-date security agreement in a consumer transaction covers "all securities accounts." The security interest is properly perfected. The collateral description was adequate under former article 9 (see former section 9-115(3)) but is insufficient under this article (see section 9-108(e)(2)). Unless the debtor authenticates a new security agreement describing the collateral other than by "type" (or section 9-203(b)(3) otherwise is satisfied) within the one-year period following the effective date, the security interest becomes unenforceable at the end of that period.

Other examples under former article 9 or other applicable law that may be effective as attachment or enforceability steps but may be ineffective under this article include an oral agreement to sell a payment intangible or possession by virtue of a notification to a bailee under former section 9-305. Neither the oral agreement nor the notification would satisfy the revised section 9-203 requirements for attachment.

Example 2: A pre-effective-date possessory security interest in instruments is perfected by a bailee's receipt of notification under former section 9-305. The bailee has not, however, acknowledged that it holds for the secured party's benefit under revised section 9-313. Unless the bailee authenticates a record acknowledging that it holds for the secured party (or another appropriate perfection step is taken) within the one-year period following the effective date, the security interest becomes unperfected at the end of that period.

3. **Interpretation of Pre-Effective-Date Security Agreements.** Section 9-102 defines "security agreement" as "an agreement that creates or provides for a security interest." Under section 1-201(3), an "agreement" is a "bargain of the parties in fact." If parties to a pre-effective-date security agreement describe the collateral by using a term defined in former article 9 in one way and defined in this article in another way, in most cases it should be presumed that the bargain of the parties contemplated the meaning of the term under former article 9.

Example 3: A pre-effective-date security agreement covers "all accounts" of a debtor. As defined under former article 9, an "account" did not include a right to payment for lottery winnings. These rights to payment are "accounts" under this article, however. The agreement of the parties presumptively created a security interest in "accounts" as defined in former article 9. A different result might be appropriate, for example, if the security agreement explicitly contemplated future changes in the article 9 definitions of types of collateral—e.g., "'Accounts' means 'accounts' as defined in the UCC article 9 of (State X), as that definition may be amended from time to time." Whether a different approach is appropriate in any given case depends on the bargain of the parties, as determined by applying ordinary principles of contract construction.

§ 25-9-704. (Effective July 1, 2001) Security interest unperfected before effective date.

A security interest that is enforceable immediately before July 1, 2001 but which would be subordinate to the rights of a person that becomes a lien creditor at that time:

(1) Remains an enforceable security interest for one year after July 1, 2001;
(2) Remains enforceable thereafter if the security interest becomes enforceable under G.S. 25-9-203 on July 1, 2001 or within one year thereafter; and
(3) Becomes perfected:
a. Without further action, on July 1, 2001 if the applicable requirements for perfection under this act are satisfied before or at that time; or
b. When the applicable requirements for perfection are satisfied if the requirements are satisfied after that time. (2000-169, s. 1.)

OFFICIAL COMMENT

This section deals with security interests that are enforceable but unperfected (i.e., subordinate to the rights of a person who becomes a lien creditor) under former article 9 or other applicable law immediately before this Article takes effect. These security interests remain enforceable for one year after the effective date, and thereafter if the appropriate steps for attachment under this article are taken before the one-year period expires. (This section's treatment of enforceability is the same as that of section 9-703.) The security interest becomes a perfected security interest on the effective date if, at that time, the security interest satisfies the requirements for perfection under this article. If the security interest does not satisfy the requirements for perfection until sometime thereafter, it becomes a perfected security interest at that later time.

Example: A security interest has attached under former article 9 but is unperfected because the filed financing statement covers "all of debtor's personal property" and controlling case law in the applicable jurisdiction has determined that this identification of collateral in a financing statement is insufficient. Upon the effective date of this Article, the financing statement becomes sufficient under section 9-504(2). On that date the security interest becomes perfected. (This assumes, of course, that the financing statement is filed in the proper filing office under this article.)

§ 25-9-705. (Effective July 1, 2001) Effectiveness of action taken before effective date.

(a) Pre-effective-date action; one-year perfection period unless reperfected. — If action, other than the filing of a financing statement, is taken before July 1, 2001 and the action would have resulted in priority of a security interest over the rights of a person that becomes a lien creditor had the security interest become enforceable before July 1, 2001, the action is effective to perfect a security interest that attaches under this act within one year after July 1, 2001. An attached security interest becomes unperfected one year after July 1, 2001 unless the security interest becomes a perfected security interest under this act before the expiration of that period.

(b) Pre-effective-date filing. — The filing of a financing statement before July 1, 2001 is effective to perfect a security interest to the extent the filing would satisfy the applicable requirements for perfection under this act.

(c) Pre-effective-date filing in jurisdiction formerly governing perfection. — This act does not render ineffective an effective financing statement that, before July 1, 2001, is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in G.S. 25-9-103 of former Article 9. However, except as otherwise provided in subsections (d) and (e) of this section and G.S. 25-9-706, the financing statement ceases to be effective at the earlier of:

(1) The time the financing statement would have ceased to be effective under the law of the jurisdiction in which it is filed; and [or]
(2) June 30, 2006.

(d) Continuation statement. — The filing of a continuation statement after July 1, 2001 does not continue the effectiveness of the financing statement filed

before July 1, 2001. However, upon the timely filing of a continuation statement after July 1, 2001 and in accordance with the law of the jurisdiction governing perfection as provided in Part 3 of this Article, the effectiveness of a financing statement filed in the same office in that jurisdiction before July 1, 2001 continues for the period provided by the law of that jurisdiction.

(e) Application of subdivision (c)(2) to transmitting utility financing statement. — Subdivision (c)(2) of this section applies to a financing statement that, before July 1, 2001, is filed against a transmitting utility and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in G.S. 25-9-103 of former Article 9 only to the extent that Part 3 of this Article provides that the law of a jurisdiction other than the jurisdiction in which the financing statement is filed governs perfection of a security interest in collateral covered by the financing statement.

(f) Application of Part 5. — A financing statement that includes a financing statement filed before July 1, 2001 and a continuation statement filed after July 1, 2001 is effective only to the extent that it satisfies the requirements of Part 5 of this Article for an initial financing statement. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **General.** This section addresses primarily the situation in which the perfection step is taken under former article 9 or other applicable law before the effective date of this Article, but the security interest does not attach until after that date.

2. **Perfection Other Than by Filing.** Subsection (a) applies when the perfection step is a step other than the filing of a financing statement. If the step that would be a valid perfection step under former article 9 or other law is taken before this Article takes effect, and if a security interest attaches within one year after this Article takes effect, then the security interest becomes a perfected security interest upon attachment. However, the security interest becomes unperfected one year after the effective date unless the requirements for attachment and perfection under this article are satisfied within that period.

3. **Perfection by Filing: Ineffective Filings Made Effective.** Subsection (b) deals with financing statements that were filed under former article 9 and which would not have perfected a security interest under the former article (because, e.g., they did not accurately describe the collateral or were filed in the wrong place), but which would perfect a security interest under this article. Under subsection (b), such a financing statement is effective to perfect a security interest to the extent it complies with this article. Subsection (b) applies regardless of the reason for the filing. For example, a secured party need not wait until the effective date to respond to the change this article makes with respect to the jurisdiction whose law governs perfection of certain security interests. Rather, a secured party may wish to prepare for this change by filing a financing statement before the effective date in the jurisdiction whose law governs perfection under this article. When this Article takes effect, the filing becomes effective to perfect a security interest (assuming the filing satisfies the perfection requirements of this article). Note, however, that section 9-706 determines whether a financing statement filed before the effective date operates to continue the effectiveness of a financing statement filed in another office before the effective date.

4. **Perfection by Filing: Change in Applicable Law or Filing Office.** Subsection (c) provides that a financing statement filed in the proper jurisdiction under former section 9-103 remains effective for all purposes, despite the fact that this article would require filing of a financing statement in a different jurisdiction or in a different office in the same jurisdiction. This means that, during the early years of this article's effectiveness, it may be necessary to search not only in the filing office of the jurisdiction whose law governs perfection under this article but also (if different) in the jurisdiction(s) and filing office(s) designated by former article 9. To limit this burden, subsection (c) provides that a financing statement filed in the jurisdiction determined by former section 9-103 becomes ineffective at the earlier of the time it would become ineffective under the law of that jurisdiction or June 30, 2006. The June 30, 2006, limitation addresses some nonuniform versions of former article 9 that extended the effectiveness of a financing statement beyond five years. Note that a financing statement filed before the effective date may remain effective beyond June 30, 2006, if subsection (d) (concerning continuation statements) or (e) (concerning transmitting utilities) or section 9-706 (concerning initial financing statements that

operate to continue pre-effective-date financing statements) so provides.

Subsection (c) is an exception to section 9-703(b). Under the general rule in section 9-703(b), a security interest that is enforceable and perfected on the effective date of this Article is a perfected security interest for one year after this article takes effect, even if the security interest is not enforceable under this article and the applicable requirements for perfection under this article have not been met. However, in some cases subsection (c) may shorten the one-year period of perfection; in others, if the security interest is enforceable under section 9-203, it may extend the period of perfection.

Example 1: On July 3, 1996, D, a State X corporation, creates a security interest in certain manufacturing equipment located in State Y. On July 6, 1996, SP perfects a security interest in the equipment under former article 9 by filing in the office of the State Y Secretary of State. See former section 9-103(1)(b). This article takes effect in States X and Y on July 1, 2001. Under section 9-705(c), the financing statement remains effective until it lapses in July 2001. See former section 9-403. Had SP continued the effectiveness of the financing statement by filing a continuation statement in State Y under former article 9 before July 1, 2001, the financing statement would have remained effective to perfect the security interest through June 30, 2006. See subsection (c)(2). Alternatively, SP could have filed an initial financing statement in State X under subsection (b) or section 9-706 before the State Y financing statement lapsed. Had SP done so, the security interest would have remained perfected without interruption until the State X financing statement lapsed.

5. **Continuing Effectiveness of Filed Financing Statement.** A financing statement filed before the effective date of this Article may be continued only by filing in the state and office designated by this article. This result is accomplished in the following manner: Subsection (d) indicates that, as a general matter, a continuation statement filed after the effective date of this Article does not continue the effectiveness of a financing statement filed under the law designated by former section 9-103. Instead, an initial financing statement must be filed under section 9-706. The second sentence of subsection (d) contains an exception to the general rule. It provides that a continuation statement is effective to continue the effectiveness of a financing statement filed before this Article takes effect if this article prescribes not only the same jurisdiction but also the same filing office.

Example 2: On November 8, 2000, D, a State X corporation, creates a security interest in certain manufacturing equipment located in State Y. On November 15, 2000, SP perfects a security interest in the equipment under former article 9 by filing in the office of the State Y Secretary of State. See former section 9-103(1)(b). This article takes effect in States X and Y on July 1, 2001. Under section 9-705(c), the financing statement ceases to be effective in November, 2005, when it lapses. See section 9-515. Under this article, the law of D's location (State X, see section 9-307) governs perfection. See section 9-301. Thus, the filing of a continuation statement in State Y on or after July 1, 2001, would not continue the effectiveness of the financing statement. See subsection (d). However, the effectiveness of the financing statement could be continued under section 9-706.

Example 3: The facts are as in Example 2, except that D is a State Y corporation. Assume State Y adopted former section 9-401(1) (second alternative). State Y law governs perfection under part 3 of this article. (See sections 9-301 and 9-307.) Under the second sentence of subsection (d), the timely filing of a continuation statement in accordance with the law of State Y continues the effectiveness of the financing statement.

Example 4: The facts are as in Example 3, except that the collateral is equipment used in farming operations and, in accordance with former section 9-401(1) (second alternative) as enacted in State Y, the financing statement was filed in State Y, in the office of the Shelby County Recorder of Deeds. Under this article, a continuation statement must be filed in the office of the State Y Secretary of State. See section 9-501(a)(2). Under the second sentence of subsection (d), the timely filing of a continuation statement in accordance with the law of State Y operates to continue a pre-effective-date financing statement only if the continuation statement is filed in the same office as the financing statement. Accordingly, the continuation statement is not effective in this case, but the financing statement may be continued under section 9-706.

Example 5: The facts are as in Example 3, except that State Y enacted former section 9-401(1) (third alternative). As required by former section 9-401(1), SP filed financing statements in both the office of the State Y Secretary of State and the office of the Shelby County Recorder of Deeds. Under this article, a continuation statement must be filed in the office of the State Y Secretary of State. See section 9-501(a)(2). The timely filing of a continuation statement in that office after this Article takes effect would be effective to continue the effectiveness of the financing statement (and thus continue the perfection of the security interest), even if the financing statement filed with the county recorder lapses.

6. **Continuation Statements.** In some

cases, this article reclassifies collateral covered by a financing statement filed under former article 9. For example, collateral consisting of the right to payment for real property sold would be a "general intangible" under the former article but an "account" under this article. To continue perfection under those circumstances, a continuation statement must comply with the normal requirements for a continuation statement. See section 9-515. In addition, the pre-effective-date financing statement and continuation statement, taken together, must satisfy the requirements of this article concerning the sufficiency of the debtor's name, secured party's name, and indication of collateral. See subsection (f).

Example 6: A pre-effective-date financing statement covers "all general intangibles" of a debtor. As defined under former article 9, a "general intangible," would include rights to payment for lottery winnings. These rights to payment are "accounts" under this article, however. A post-effective-date continuation statement will not continue the effectiveness of the pre-effective-date financing statement with respect to lottery winnings unless it amends the indication of collateral covered to include lottery winnings (e.g., by adding "accounts," "rights to payment for lottery winnings," or the like). If the continuation statement does not amend the indication of collateral, the continuation statement will be effective to continue the effectiveness of the financing statement only with respect to "general intangibles" as defined in this article.

Example 7: The facts are as in Example 6, except that the pre-effective-date financing statement covers "all accounts and general intangibles." Even though rights to payment for lottery winnings are "general intangibles" under former Article 9 and "accounts" under this Article, a post-effective-date continuation statement would continue the effectiveness of the pre-effective-date financing statement with respect to lottery winnings. There would be no need to amend the indication of collateral covered, inasmuch as the indication ("accounts") satisfies the requirements of this article.

§ 25-9-706. (Effective July 1, 2001) When initial financing statement suffices to continue effectiveness of financing statement.

(a) Initial financing statement in lieu of continuation statement. — The filing of an initial financing statement in the office specified in G.S. 25-9-501 continues the effectiveness of a financing statement filed before July 1, 2001 if:

(1) The filing of an initial financing statement in that office would be effective to perfect a security interest under this act;

(2) The pre-effective-date financing statement was filed in an office in another state or another office in this State; and

(3) The initial financing statement satisfies subsection (c) of this section.

(b) Period of continued effectiveness. — The filing of an initial financing statement under subsection (a) of this section continues the effectiveness of the pre-effective-date financing statement:

(1) If the initial financing statement is filed before July 1, 2001, for the period provided in G.S. 25-9-403 of former Article 9 with respect to a financing statement; and

(2) If the initial financing statement is filed after July 1, 2001, for the period provided in G.S. 25-9-515 with respect to an initial financing statement.

(c) Requirement for initial financing statement under subsection (a). — To be effective for purposes of subsection (a) of this section, an initial financing statement must:

(1) Satisfy the requirements of Part 5 of this Article for an initial financing statement;

(2) Identify the pre-effective-date financing statement by indicating the office in which the financing statement was filed and providing the dates of filing and file numbers, if any, of the financing statement and of the most recent continuation statement filed with respect to the financing statement; and

(3) Indicate that the pre-effective-date financing statement remains effective. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Continuation of Financing Statements Not Filed in Proper Filing Office Under This Article.** This section deals with continuing the effectiveness of financing statements that are filed in the proper state and office under former article 9, but which would be filed in the wrong state or in the wrong office of the proper state under this article. Section 9-705(d) provides that, under these circumstances, filing a continuation statement after the effective date of this article in the office designated by former article 9 would not be effective. This section provides the means by which the effectiveness of such a financing statement can be continued if this article governs perfection under the applicable choice of law rule: Filing an initial financing statement in the office specified by section 9-501.

Although it has the effect of continuing the effectiveness of a pre-effective-date financing statement, an initial financing statement described in this section is not a continuation statement. Rather, it is governed by the rules applicable to initial financing statements. (However, the debtor need not authorize the filing. See section 9-707.) Unlike a continuation statement, the initial financing statement described in this section may be filed any time during the effectiveness of the pre-effective-date financing statement—even before this article is enacted—and not only within the six months immediately prior to lapse. In contrast to a continuation statement, which extends the lapse date of a filed financing statement for five years, the initial financing statement has its own lapse date, which bears no relation to the lapse date of the pre-effective-date financing statement whose effectiveness the initial financing statement continues. See subsection (b).

As subsection (a) makes clear, the filing of an initial financing statement under this section continues the effectiveness of a pre-effective-date financing statement. If the effectiveness of a pre-effective-date financing statement lapses before the initial financing statement is filed, the effectiveness of the pre-effective-date financing statement cannot be continued. Rather, unless the security interest is perfected otherwise, there will be a period during which the security interest is unperfected before becoming perfected again by the filing of the initial financing statement under this section.

If an initial financing statement is filed under this section before the effective date of this Article, it takes effect when this Article takes effect (assuming that it is ineffective under former article 9). Note, however, that former article 9 determines whether the filing office is obligated to accept such an initial financing statement. For the reason given in the preceding paragraph, an initial financing statement filed before the effective date of this Article does not continue the effectiveness of a pre-effective-date financing statement unless the latter remains effective on the effective date of this Article. Thus, for example, if the effectiveness of the pre-effective-date financing statement lapses before this Article takes effect, the initial financing statement would not continue its effectiveness.

2. **Requirements of Initial Financing Statement Filed in Lieu of Continuation Statement.** Subsection (c) sets forth the requirements for the initial financing statement under subsection (a). These requirements are needed to inform searchers that the initial financing statement operates to continue a financing statement filed elsewhere and to enable searchers to locate and discover the attributes of the other financing statement. A single initial financing statement may continue the effectiveness of more than one financing statement filed before this Article's effective date. See section 1-102(5)(a) (words in the singular include the plural). If a financing statement has been filed in more than one office in a given jurisdiction, as may be the case if the jurisdiction had adopted former Section 9-401(1), third alternative, then an identification of the filing in the central filing office suffices for purposes of subsection (c)(2). If under this article the collateral is of a type different from its type under former article 9—as would be the case, e.g., with a right to payment of lottery winnings (a "general intangible" under former article 9 and an "account" under this article), then subsection (c) requires that the initial financing statement indicate the type under this article.

§ 25-9-707. (Effective July 1, 2001) Amendment of pre-effective-date financing statement.

(a) "Pre-effective-date financing statement". — In this section, "pre-effective-date financing statement" means a financing statement filed before July 1, 2001.

(b) Applicable law. — After July 1, 2001, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or otherwise

amend the information provided in, a pre-effective-date financing statement only in accordance with the law of the jurisdiction governing perfection as provided in Part 3 of this Article. However, the effectiveness of a pre-effective-date financing statement also may be terminated in accordance with the law of the jurisdiction in which the financing statement is filed.

(c) Method of amending: general rule. — Except as otherwise provided in subsection (d) of this section, if the law of this State governs perfection of a security interest, the information in a pre-effective-date financing statement may be amended after July 1, 2001 only if:

(1) The pre-effective-date financing statement and an amendment are filed in the office specified in G.S. 25-9-501;

(2) An amendment is filed in the office specified in G.S. 25-9-501 concurrently with, or after the filing in that office of, an initial financing statement that satisfies G.S. 25-9-706(c); or

(3) An initial financing statement that provides the information as amended and satisfies G.S. 25-9-706(c) is filed in the office specified in G.S. 25-9-501.

(d) Method of amending: continuation. — If the law of this State governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement may be continued only under G.S. 25-9-705(d) and (f) or G.S. 25-9-706.

(e) Reserved.

(f) Method of amending: termination. — If the law of this State governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement may be terminated after July 1, 2001 only if:

(1) The pre-effective-date financing statement and a termination statement are filed in the office specified in G.S. 25-9-501; or

(2) A termination statement is filed in the office specified in G.S. 25-9-501 concurrently with the filing in that office of an initial financing statement that satisfies G.S. 25-9-706(c). Under this subsection, no separate fee shall be charged for the filing or indexing of the termination statement. (2000-169, s. 1.)

OFFICIAL COMMENT

1. Scope of This Section. This section addresses post-effective-date amendments to pre-effective-date financing statements.

2. Applicable Law. Determining how to amend a pre-effective-date financing statement requires one first to determine the jurisdiction whose law applies. Subsection (b) provides that, as a general matter, post-effective-date amendments to pre-effective-date financing statements are effective only if they are accomplished in accordance with the substantive (or local) law of the jurisdiction governing perfection under Part 3 of this Article. However, under certain circumstances, the effectiveness of a financing statement may be terminated in accordance with the substantive law of the jurisdiction in which the financing statement is filed. See Comment 5, below.

Example 1: D is a corporation organized under the law of State Y. It owns equipment located in State X. Under former Article 9, SP properly perfected a security interest in the equipment by filing a financing statement in State X. Under this Article, the law of State Y governs perfection of the security interest. See Sections 9-301, 9-307. After this Article takes effect, SP wishes to amend the financing statement to reflect a change in D's name. Under subsection (b), the financing statement may be amended in accordance with the law of State Y, i.e., in accordance with subsection (c) as enacted in State Y.

Example 2: The facts are as in Example 1, except that SP wishes to terminate the effectiveness of the State X filing. The first sentence of subsection (b) provides that the financing statement may be terminated after the effective date of this Article in accordance with the law of State Y, i.e., in accordance with subsection (c) as enacted in State Y. However, the second sentence provides that the financing statement also may be terminated in accordance with the law of the jurisdiction in which it is filed, i.e., in accordance with subsection (e) as enacted in State X. If the pre-effective-date financing statement is filed in the jurisdiction whose law governs perfection (here, State Y),

then both sentences would designate the law of State Y as applicable to the termination of the financing statement. That is, the financing statement could be terminated in accordance with subsection (c) or (e) as enacted in State Y.

3. Method of Amending. Subsection (c) provides three methods of effectuating a post-effective-date amendment to a pre-effective-date financing statement. Under subsection (c)(1), if the financing statement is filed in the jurisdiction and office determined by this Article, then an effective amendment may be filed in the same office.

Example 3: D is a corporation organized under the law of State Z. It owns equipment located in State Z. Before the effective date of this Article, SP perfected a security interest in the equipment by filing in two offices in State Z, a local filing office and the office of the Secretary of State. See former Section 9-401(1) (third alternative). State Z enacts this Article and specifies in Section 9-501 that a financing statement covering equipment is to be filed in the office of the Secretary of State. SP wishes to assign its power as secured party of record. Under subsection (b), the substantive law of State Z applies. Because the pre-effective-date financing statement is filed in the office specified in subsection (c)(1) as enacted by State Z, SP may effectuate the assignment by filing an amendment under Section 9-514 with the office of the Secretary of State. SP need not amend the local filing, and the priority of the security interest perfected by the filing of the financing statement would not be affected by the failure to amend the local filing.

If a pre-effective-date financing statement is filed in an office other than the one specified by Section 9-501 of the relevant jurisdiction, then ordinarily an amendment filed in that office is ineffective. (Subsection (e) provides an exception for termination statements.) Rather, the amendment must be effectuated by a filing in the jurisdiction and office determined by this Article. That filing may consist of an initial financing statement followed by an amendment, an initial financing statement together with an amendment, or an initial financing statement that indicates the information provided in the financing statement, as amended. Subsection (c)(2) encompasses the first two options; subsection (c)(3) contemplates the last. In each instance, the initial financing statement must satisfy Section 9-706(c).

4. Continuation. Subsection (d) refers to the two methods by which a secured party may continue the effectiveness of a pre-effective-date financing statement under this Part. The Comments to Section 9-705 and 9-706 explain these methods.

5. Termination. The effectiveness of a pre-effective-date financing statement may be terminated pursuant to subsection (c). This section also provides an alternative method for accomplishing this result: filing a termination statement in the office in which the financing statement is filed. The alternative method becomes unavailable once an initial financing statement that relates to the pre-effective-date financing statement and satisfies Section 9-706(c) is filed in the jurisdiction and office determined by this Article.

Example 4. The facts are as in Example 1, except that SP wishes to terminate a financing statement filed in State X. As explained in Example 1, the financing statement may be amended in accordance with the law of the jurisdiction governing perfection under this Article, i.e., in accordance with the substantive law of State Y. As enacted in State Y, subsection (c)(1) is inapplicable because the financing statement was not filed in the State Y filing office specified in Section 9-501. Under subsection (c)(2), the financing statement may be amended by filing in the State Y filing office an initial financing statement followed by a termination statement. The filing of an initial financing statement together with a termination statement also would be legally sufficient under subsection (c)(2), but Section 9-512(a)(1) may render this method impractical. The financing statement also may be amended under subsection (c)(3), but the resulting initial financing statement is likely to be very confusing. In each instance, the initial financing statement must satisfy Section 9-706(c). Applying the law of State Y, subsection (e) is inapplicable, because the financing statement was not filed in "this State," i.e., State Y.

This section affords another option to SP. Subsection (b) provides that the effectiveness of a financing statement may be terminated either in accordance with the law of the jurisdiction governing perfection (here, State Y) or in accordance with the substantive law of the jurisdiction in which the financing statement is filed (here, State X). Applying the law of State X, the financing statement is filed in "this State," i.e., State X, and subsection (e) applies. Accordingly, the effectiveness of the financing statement can be terminated by filing a termination statement in the State X office in which the financing statement is filed, unless an initial financing statement that relates to the financing statement and satisfies Section 9-706(c) as enacted in State X has been filed in the jurisdiction and office determined by this Article (here, the State Y filing office).

§ 25-9-708. (Effective July 1, 2001) Persons entitled to file initial financing statement or continuation statement.

A person may file an initial financing statement or a continuation statement under this Part if:

(1) The secured party of record authorizes the filing; and

(2) The filing is necessary under this Part:

a. To continue the effectiveness of a financing statement filed before July 1, 2001; or

b. To perform or continue the perfection of a security interest. (2000-169, s. 1.)

OFFICIAL COMMENT

This section permits a secured party to file an initial financing statement or continuation statement necessary under this part to continue the effectiveness of a financing statement filed before this Article takes effect or to perfect or otherwise continue the perfection of a security interest. Because a filing described in this section typically operates to continue the effectiveness of a financing statement whose filing the debtor already has authorized, this section does not require authorization from the debtor.

§ 25-9-709. (Effective July 1, 2001) Priority.

(a) Law governing priority. — This act determines the priority of conflicting claims to collateral. However, if the relative priorities of the claims were established before July 1, 2001, former Article 9 determines priority.

(b) Priority if security interest becomes enforceable under G.S. 25-9-203. — For purposes of G.S. 25-9-322(a), the priority of a security interest that becomes enforceable under G.S. 25-9-203 dates from July 1, 2001 if the security interest is perfected under this act by the filing of a financing statement before July 1, 2001 which would not have been effective to perfect the security interest under former Article 9. This subsection does not apply to conflicting security interests each of which is perfected by the filing of such a financing statement. (2000-169, s. 1.)

OFFICIAL COMMENT

1. **Law Governing Priority.** Ordinarily, this article determines the priority of conflicting claims to collateral. However, when the relative priorities of the claims were established before July 1, 2001, former article 9 governs.

Example 1: In 1999, SP-1 obtains a security interest in a right to payment for goods sold ("account"). SP-1 fails to file a financing statement. This Article takes effect on July 1, 2001. Thereafter, on August 1, 2001, D creates a security interest in the same account in favor of SP-2, who files a financing statement. This Article determines the relative priorities of the claims. SP-2's security interest has priority under section 9-322(a)(1).

Example 2: In 1999, SP-1 obtains a security interest in a right to payment for goods sold ("account"). SP-1 fails to file a financing statement. In 2000, D creates a security interest in the same account in favor of SP-2, who likewise fails to file a financing statement. This Article takes effect on July 1, 2001. Because the relative priorities of the security interests were established before the effective date of this Article, former Article 9 governs priority, and SP-1's security interest has priority under former section 9-312(5)(b).

Example 3: The facts are as in Example 2, except that, on August 1, 2001, SP-2 files a proper financing statement under this article. Until August 1, 2001, the relative priorities of the security interests were established before the effective date of this Article, as in Example 2. However, by taking the affirmative step of filing a financing statement, SP-2 established anew the relative priority of the conflicting claims after the effective date. Thus, this article determines priority. SP-2's security interest has priority under section 9-322(a)(1).

As Example 3 illustrates, relative priorities that are "established" before the effective date do not necessarily remain unchanged following the effective date. Of course, unlike priority

contests among unperfected security interests, some priorities are established permanently, e.g., the rights of a buyer of property who took free of a security interest under former article 9.

One consequence of the rule in subsection (a) is that the mere taking effect of this article does not of itself adversely affect the priority of conflicting claims to collateral.

Example 4: In 1999, SP-1 obtains a security interest in a right to payment for lottery winnings (a "general intangible" as defined in former Article 9 but an "account" as defined in this Article). SP-1's security interest is unperfected because its filed financing statement covers only "accounts." In 2000, D creates a security interest in the same right to payment in favor of SP-2, who files a financing statement covering "accounts and general intangibles." Before this Article takes effect on July 1, 2001, SP-2's perfected security interest has priority over SP-1's unperfected security interest under former section 9-312(5). Because the relative priorities of the security interests were established before the effective date of this Article, former Article 9 continues to govern priority after this Article takes effect. Thus, SP-2's priority is not adversely affected by this Article's having taken effect.

Note that were this article to govern priority, SP-2 would become subordinated to SP-1 under section 9-322(a)(1), even though nothing changes other than this article's having taken effect. Under section 9-704, SP-1's security interest would become perfected; the financing statement covering "accounts" adequately covers the lottery winnings and complies with the other perfection requirements of this article, e.g., it is filed in the proper office.

Example 5: In 1999, SP-1 obtains a security interest in a right to payment for lottery winnings—a "general intangible" (as defined under former article 9). SP-1's security interest is unperfected because its filed financing statement covers only "accounts." In 2000, D creates a security interest in the same right to payment in favor of SP-2, who makes the same mistake and also files a financing statement covering only "accounts." Before this article takes effect on July 1, 2001, SP-1's unperfected security interest has priority over SP-2's unperfected security interest, because SP-1's security interest was the first to attach. See former section 9-312(5)(b). Because the relative priorities of the security interests were established before the effective date of this Article, former Article 9 continues to govern priority after this Article takes effect. Although section 9-704 makes both security interests perfected for purposes of this article, both are unperfected under former article 9, which determines their relative priorities.

2. **Financing Statements Ineffective Under Former Article 9 but Effective Under This Article.** If this article determines priority, subsection (b) may apply. It deals with the case in which a filing that occurs before the effective date of this Article would be ineffective to perfect a security interest under former article 9 but effective under this article. For purposes of section 9-322(a), the priority of a security interest that attaches on or after July 1, 2001, and is perfected in this manner dates from the time this Article takes effect.

Example 6: In 1999, SP-1 obtains a security interest in D's existing and after-acquired instruments and files a financing statement covering "instruments." In 2000, D grants a security interest in its existing and after-acquired accounts in favor of SP-2, who files a financing statement covering "accounts." After this Article takes effect on July 1, 2001, one of D's account debtors gives D a negotiable note to evidence its obligation to pay an overdue account. Under the first-to-file-or-perfect rule in section 9-322(a), SP-1 would have priority in the instrument, which constitutes SP-2's proceeds. SP-1's filing in 1999 was earlier than SP-2's in 2000. However, subsection (b) provides that, for purposes of section 9-322(a), SP-1's priority dates from the time this article takes effect (July 1, 2001). Under section 9-322(b), SP-2's priority with respect to the proceeds (instrument) dates from its filing as to the original collateral (accounts). Accordingly, SP-2's security interest would be senior.

Subsection (b) does not apply to conflicting security interests each of which is perfected by a pre-effective-date filing that was not effective under former article 9 but is effective under this article.

Example 7: In 1999, SP-1 obtains a security interest in D's existing and after-acquired instruments and files a financing statement covering "instruments." In 2000, D grants a security interest in its existing and after-acquired instruments in favor of SP-2, who files a financing statement covering "instruments." After this article takes effect on July 1, 2001, one of D's account debtors gives D a negotiable note to evidence its obligation to pay an overdue account. Under the first-to-file-or-perfect rule in section 9-322(a), SP-1 would have priority in the instrument. Both filings are effective under this article, see section 9-705(b), and SP-1's filing in 1999 was earlier than SP-2's in 2000. Subsection (b) does not change this result.

§ 25-9-710. (Effective July 1, 2001) Special transitional provision for maintaining and searching local-filing office records.

(a) In this section:

(1) "Former-Article-9 records" means:

a. Financing statements and other records that have been filed in the local-filing office before July 1, 2001, and that are, or upon processing and indexing will be, reflected in the index maintained, as of June 30, 2001, by the local-filing office for financing statements and other records filed in the local-filing office before July 1, 2001; and

b. The index as of June 30, 2001.

The term does not include records presented to a local-filing office for filing after June 30, 2001, whether or not the records relate to financing statements filed in the local-filing office before July 1, 2001.

(2) "Local-filing office" means a filing office, other than the office of the Secretary of State, that is designated as the proper place to file a financing statement under G.S. 25-9-401(1) of former Article 9. The term applies only with respect to a record that covers a type of collateral as to which the filing office is designated in that section as the proper place to file.

(b) A local-filing office must not accept for filing a record presented after June 30, 2001, whether or not the record relates to a financing statement filed in the local-filing office before July 1, 2001.

(c) Until July 1, 2008, each local-filing office must maintain all former Article 9 records in accordance with former Article 9. A former Article 9 record that is not reflected on the index maintained at June 30, 2001, by the local-filing office must be processed and indexed, and reflected on the index as of June 30, 2001, as soon as practicable but in any event no later than July 30, 2001.

(d) Until at least June 30, 2008, each local-filing office must respond to requests for information with respect to former Article 9 records relating to a debtor and issue certificates, in accordance with former Article 9. The fees charged for responding to requests for information relating to a debtor and issuing certificates with respect to former-Article-9 records must be the fees in effect under former Article 9 on June 30, 2001.

(e) After June 30, 2008, each local-filing office may remove and destroy, in accordance with any then applicable record retention law of this State, all former-Article-9 records, including the related index.

(f) This section does not apply, with respect to financing statements and other records, to a filing office in which mortgages or records of mortgages on real property are required to be filed or recorded, if:

(1) The collateral is timber to be cut or as-extracted collateral, or

(2) The record is or relates to a financing statement filed as a fixture and the collateral is goods that are or are to become fixtures. (2000-169, s. 1.)

TABLES OF COMPARABLE SECTIONS FOR ARTICLE 9

Former to Present

Editor's Note. — The following table shows G.S. sections from former Article 9, as well as several sections from Articles 2 and 2A, and their comparable, new Article 9 numbers. Where there is no comparable, new number, the term "None" has been inserted.

Former Section	Present Section
25-2-326(3)	25-9-102
25-2A-303(3)	25-9-407
25-2A-307(2)(b),(c)	25-9-317
25-2A-307(3)	25-9-321
25-2A-307(4)	25-9-323
25-9-101	25-9-101
25-9-102	25-9-109
25-9-103(1)(a),(b)	25-9-301
25-9-103(1)(c)	None
25-9-103(1)(d)	25-9-316
25-9-103(2)(a),(b)	25-9-303, 25-9-316
25-9-103(2)(c)	None
25-9-103(2)(d)	25-9-337
25-9-103(3)(a),(b)	25-9-301
25-9-103(3)(c)	None
25-9-103(3)(d)	25-9-307
25-9-103(3)(e)	25-9-316
25-9-103(4)	25-9-301
25-9-103(5)	25-9-301
25-9-103(6)	25-9-304, 25-9-305, 25-9-306
25-9-104	25-9-109
25-9-105	25-9-102
25-9-106	25-9-102
25-9-107	25-9-103
25-9-108	None
25-9-109	25-9-102
25-9-110	25-9-108
25-9-111	None
25-9-112	None, see 25-9-102(a)(28)
25-9-113	25-9-110
25-9-114	None, see 325-9-103 and 25-9-324
25-9-115(1)	25-9-102, 25-9-106
25-9-115(2)	25-9-203, 25-9-308
25-9-115(3)	25-9-108
25-9-115(4)	25-9-309, 25-9-312, 25-9-314
25-9-115(5)	25-9-327, 25-9-328, 25-9-329
25-9-115(6)	25-9-203, 25-9-313
25-9-116	25-9-206, 25-9-309
25-9-201	25-9-201
25-9-202	25-9-202
25-203(1) - (3)-	25-9-203
25-9-203(4)	25-9-201
25-9-204	25-9-204
25-9-205	25-9-205
25-9-206	25-9-403
25-9-207	25-9-207
25-9-208	25-9-210
25-9-301(1),(2)	25-9-317
25-9-301(3)	25-9-102
25-9-301(4)	25-9-323
25-9-302(1)	25-9-309, 25-9-310
25-9-302(2)	25-9-310
25-9-302(3),(4)	25-9-311
25-9-302(5)	None, see 25-9-102(a)(40) and (83), 25-9-501, 25-9-502, 25-9-515, 25-7-705
25-9-302(6)	25-9-310
25-9-303	25-9-308
25-9-304	25-9-312
25-9-305	25-9-306, 25-9-313
25-9-306	25-9-315
25-9-307(1),(2)	25-9-320
25-9-307(3)	25-9-323
25-9-308	25-9-330
25-9-309	25-9-331
25-9-310	25-9-333
25-9-311	25-9-401
25-9-312(1)	25-9-322
25-9-312(2)	25-9-102(a)(65),(66), and (67), 25-9-103.1, 25-9-324.1
25-9-312(3),(4)	25-9-324
25-9-312(5),(6)	25-9-322
25-9-312(7)	25-9-323
25-9-313(1) - (7)	25-9-334
25-9-313(8)	25-9-604
25-9-314	25-9-335
25-9-315	25-9-336
25-9-316	25-9-339
25-9-317	25-9-402
25-9-318(1)	25-9-404
25-9-318(2)	25-9-405
25-9-318(3),(4)	25-9-406
25-9-401	25-9-501
25-9-402(1)	25-9-502, 25-9-504
25-9-402(2)	None
25-9-402(3)	25-9-521
25-9-402(4)	25-9-512
25-9-402(5),(6)	25-9-502
25-9-402(7)	25-9-503(a)(4), 25-9-507
25-9-402(8)	25-9-506

Former Section	Present Section
25-9-402(9)	None
25-9-403(1)	25-9-516(a)
25-9-403(2)	25-9-515
25-9-403(3)	25-9-515, 25-9-522
25-9-403(4)	25-9-519
25-9-403(5)	25-9-525
25-9-403(6)	25-9-515
25-9-403(7)	25-9-519
25-9-404	25-9-513
25-9-405	25-9-514, 25-9-519
25-9-406	25-9-512
25-9-407	25-9-523
25-9-408	25-9-505
25-9-501(1),(2)	25-9-601
25-9-501(3)	25-9-602, 25-9-603
25-9-501(4)	25-9-604
25-9-501(5)	25-9-601
25-9-502	25-9-607, 25-9-608
25-9-503	25-9-609
25-9-504(1)	25-9-610, 25-9-615
25-9-504(2)	25-9-615
25-9-504(3)	25-9-610, 25-9-611, 25-9-624
25-9-504(4)	25-9-617
25-9-504(5)	25-9-618
25-9-504.1	None
25-9-504.2	None
25-9-505	25-9-620, 25-9-621, 25-9-624
25-9-506	25-9-623, 25-9-624
25-9-507	25-9-625, 25-9-627
25-9-508	None
25-9-509	None
25-9-601	None
25-9-602	None
25-9-603	None
25-9-604	None
25-9-605	None
25-9-606	None
25-9-607	None

Present to Former

Editor's Note. — The following table shows G.S. sections from new Article 9, and their comparable, former Article 9 numbers, as well as several sections from Articles 2 and 2A. Where there is no comparable, former section number, the term "None" has been inserted.

Present Section	Former Section
25-9-101	25-9-101
25-9-102	25-2-326(3)
25-9-317	25-2A-307(2)(b), (c)
25-9-321	25-2A-307(3)
25-9-102	25-9-105
25-9-102	25-9-106
25-9-102, 25-9-106	25-9-115(1)
25-9-102	25-9-301(3)
25-9-102	25-9-109
25-9-102(a)(65),(66), and (67), 25-9-103.1, 25-9-324.1	25-9-312(2)
25-9-103	25-9-107
25-9-108	25-9-110
25-9-108	25-9-115(3)
25-9-109	25-9-102
25-9-109	25-9-104
25-9-110	25-9-113
25-9-201	25-9-201
25-9-201	25-9-203(4)
25-9-202	25-9-202
25-9-203	25-203(1) - (3)
25-9-203, 25-9-308	25-9-115(2)
25-9-203, 25-9-313	25-9-115(6)
25-9-204	25-9-204
25-9-205	25-9-205
25-9-206, 25-9-309	25-9-116
25-9-207	25-9-207
25-9-210	25-9-208
25-9-301	25-9-103(3)(a),(b)
25-9-301	25-9-103(4)
25-9-301	25-9-103(5)
25-9-301	25-9-103(1)(a),(b)
25-9-303, 25-9-316	25-9-103(2)(a),(b)
25-9-304, 25-9-305, 25-9-306	25-9-103(6)
25-9-306, 25-9-313	25-9-305
25-9-307	25-9-103(3)(d)
25-9-308	25-9-303
25-9-309, 25-9-312, 25-9-314	25-9-115(4)
25-9-309, 25-9-310	25-9-302(1)
25-9-310	25-9-302(2)
25-9-310	25-9-302(6)
25-9-311	25-9-302(3),(4)
25-9-312	25-9-304
25-9-315	25-9-306
25-9-316	25-9-103(3)(e)
25-9-316	25-9-103(1)(d)
25-9-317	25-9-301(1),(2)
25-9-320	25-9-307(1),(2)
25-9-321	25-2A-307(3)
25-9-322	25-9-312(1)
25-9-322	25-9-312(5),(6)
25-9-323	25-9-301(4)
25-9-323	25-9-307(3)
25-9-323	25-9-307(4)
25-9-323	25-9-312(7)
25-9-324	25-9-312(3),(4)
25-9-327, 25-9-328, 25-9-329	25-9-115(5)
25-9-330	25-9-308
25-9-331	25-9-309
25-9-333	25-9-310
25-9-334	25-9-313(1) - (7)
25-9-335	25-9-314
25-9-336	25-9-315
25-9-337	25-9-103(2)(d)
25-9-339	25-9-316
25-9-401	25-9-311
25-9-402	25-9-317
25-9-403	25-9-206
25-9-404	25-9-318(1)
25-9-405	25-9-318(2)
25-9-406	25-9-318(3),(4)
25-9-407	25-2A-303(3)
25-9-501	25-9-401
25-9-502, 25-9-504	25-9-402(1)
25-9-502	25-9-402(5),(6)
25-9-503(a)(4), 25-9-507	25-9-402(7)
25-9-505	25-9-408
25-9-506	25-9-402(8)
25-9-512	25-9-402(4)
25-9-512	25-9-406
25-9-513	25-9-404
25-9-514, 25-9-519	25-9-405
25-9-515	25-9-403(6)
25-9-515	25-9-403(2)
25-9-515, 25-9-522	25-9-403(3)
25-9-516(a)	25-9-403(1)
25-9-519	25-9-403(7)
25-9-519	25-9-403(4)
25-9-521	25-9-402(3)
25-9-523	25-9-407
25-9-525	25-9-403(5)
25-9-601	25-9-501(1),(2)
25-9-601	25-9-501(5)
25-9-602, 25-9-603	25-9-501(3)
25-9-604	25-9-501(4)
25-9-604	25-9-313(8)
25-9-607, 25-9-608	25-9-502
25-9-609	25-9-503
25-9-610, 25-9-615	25-9-504(1)
25-9-610, 25-9-611, 25-9-624	25-9-504(3)
25-9-615	25-9-504(2)
25-9-617	25-9-504(4)

Present Section	Former Section
25-9-618	25-9-504(5)
25-9-620, 25-9-621, 25-9-624	25-9-505
25-9-623, 25-9-624	25-9-506
25-9-625, 25-9-627	25-9-507e

Chapter 25A.

Retail Installment Sales Act.

§ 25A-1. Scope of act.

CASE NOTES

Lender Not Engaged in Sale of Goods And Services. — Plaintiff borrowers' contention that bank was "indirectly" engaged in the furnishing of goods and services when it provided loan for a mobile home was supported by neither logic nor the plain language of this section. Collins v. Horizon Hous., Inc., 135 N.C. App. 227, 519 S.E.2d 534 (1999).

§ 25A-16. (Effective July 1, 2001) Transfer of equity.

If a buyer voluntarily transfers his rights in collateral pursuant to applicable law and the seller agrees, the seller may impose a transfer fee not to exceed ten percent (10%) of the unpaid balance of the debt or thirty-five dollars ($35.00), whichever is less. (1971, c. 796, s. 1; 2000-169, s. 31.)

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 31, effective July 1, 2001, substituted "applicable law" for "G.S. 25-9-311."

§ 25A-22. (Effective July 1, 2001) Receipts for payments; return of title documents upon full payment.

(a) When any payment is made under any consumer credit sale transaction, the person receiving such payment shall, if the payment is made in cash, give the buyer a written receipt therefor. If the buyer specifies that the payment is made on one of several obligations, the receipt shall so state.

(b) Upon the payment of all sums for which the buyer is obligated under a consumer credit sale, the seller shall promptly release any security interest in accordance with the terms of G.S. 25-9-513 or G.S. 20-58.4, whichever is applicable. In the event a security interest in real property is involved, the seller shall take such action as is necessary to enable the lien to be discharged of record under the provisions of G.S. 45-37. (1971, c. 796, s. 1; 2000-169, s. 32.)

For this section as is in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 32, effective July 1, 2001, substituted "G.S. 25-9-513" for "G.S. 25-9-404" in subsection (b).

Chapter 28A.

Administration of Decedents' Estates.

Article 2.

Jurisdiction for Probate of Wills and Administration of Estates of Decedents.

§ 28A-2-1. Clerk of superior court.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Applied in In re Estate of Hodgin, 133 N.C. App. 650, 516 S.E.2d 174 (1999).

Article 3.

Venue for Probate of Wills and Administration of Estates of Decedents.

§ 28A-3-5. Waiver of venue.

CASE NOTES

Venue Challenge Precluded. — Caveators who failed to raise objections until over four months after the issuance of testamentary letters were precluded from challenging venue under this section. In re Estate of Hodgin, 133 N.C. App. 650, 516 S.E.2d 174 (1999).

Article 4.

Qualification and Disqualification for Letters Testamentary and Letters of Administration.

§ 28A-4-2. Persons disqualified to serve as personal representative.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Applied in In re Estate of Montgomery, — N.C. App. —, 528 S.E.2d 618, 2000 N.C. App. LEXIS 422 (2000).

Article 6.

Appointment of Personal Representative.

§ 28A-6-1. Application for letters; grant of letters.

CASE NOTES

Disqualification. — Considering the legislative history and the purpose of § 31A-1(a), "living in adultery" means a spouse engages in repeated acts of adultery within a reasonable period of time preceding the death of her spouse; therefore, "living in adultery" requires a showing of something more than "committing adultery," or a single act of adultery, and something less than "residing" in adultery, because the latter construction would permit spouses to engage in habitual adultery with those with whom they do not reside and nevertheless be qualified to administer their decedent spouse's estate under this section. In re Estate of Montgomery, — N.C. App. —, 528 S.E.2d 618, 2000 N.C. App. LEXIS 422 (2000).

Article 9.

Revocation of Letters.

§ 28A-9-1. Revocation after hearing.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Applied in In re Estate of Montgomery, — N.C. App. —, 528 S.E.2d 618, 2000 N.C. App. LEXIS 422 (2000).

Article 12.

Public Administrator.

§ 28A-12-5. Powers and duties.

CASE NOTES

Applied in City of Durham v. Hicks, 135 N.C. App. 699, 522 S.E.2d 583 (1999).

Article 13.

Representative's Powers, Duties and Liabilities.

§ 28A-13-3. Powers of a personal representative or fiduciary.

CASE NOTES

Applied in State v. Linney, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 614 (June 6, 2000).

Cited in State v. Linney, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 538 (May 16, 2000).

Article 15.

Assets; Discovery of Assets.

§ 28A-15-2. Title and possession of property.

CASE NOTES

Cited in State v. Linney, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 538 (May 16, 2000); State v. Linney, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 614 (June 6, 2000).

Article 17.

Sales, Leases or Mortgages of Real Property.

§ 28A-17-1. Sales of real property.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in State v. Linney, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 538 (May 16, 2000).

§ 28A-17-11. Personal representative may lease or mortgage.

CASE NOTES

Cited in State v. Linney, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 538 (May 16, 2000).

ARTICLE 18.

Actions and Proceedings.

§ 28A-18-1. Survival of actions to and against personal representative.

CASE NOTES

I. General Consideration.
II. Revival and Survival of Actions.

I. GENERAL CONSIDERATION.

Applied in Sweet v. Boggs, 134 N.C. App. 173, 516 S.E.2d 888 (1999); Estate of Fennell v. Stephenson, — N.C. App. —, 528 S.E.2d 911, 2000 N.C. App. LEXIS 428 (2000).

II. REVIVAL AND SURVIVAL OF ACTIONS.

Decedent's rights in an action for equitable distribution were vested, and said action would not abate if decedent and her husband were separated as required by § 50-21(a) at the time of her death. Brown v. Brown, — N.C. App. —, 524 S.E.2d 89, 2000 N.C. App. LEXIS 15 (2000).

§ 28A-18-2. Death by wrongful act of another; recovery not assets.

CASE NOTES

I. General Consideration.
II. Limitation of the Action.
V. Damages Recoverable.
D. Loss of Decedent's Income, Services, Society, etc.
E. Punitive Damages.

I. GENERAL CONSIDERATION.

No Simultaneous Constitutional Recovery. — The trial court properly dismissed the plaintiffs' constitutional claim against defendant/police officer pursuant to § 1A-1-12(b)(6) where the plaintiffs had an adequate remedy at law, a wrongful death claim under this section which would compensate plaintiffs for the same alleged injuries. Estate of Fennell v. Stephenson, — N.C. App. —, 528 S.E.2d 911, 2000 N.C. App. LEXIS 428 (2000).

Applied in Bailey v. Gitt, 135 N.C. App. 119, 518 S.E.2d 794 (1999).

II. LIMITATION OF THE ACTION.

Collateral estoppel precluded plaintiffs from bringing a wrongful death action against police officer, where an earlier federal district court decision found that the defendant was entitled to qualified immunity regarding plaintiffs' federal constitutional claims because "a reasonable officer in the same situation as [defendant] could have found probable cause to believe that [the decedent] posed a deadly threat, and, therefore, that [defendant] would have been authorized to use deadly force to protect himself," thereby raising an issue identical to the issue raised in plaintiffs' wrongful death action, the standard of defendant's conduct under the circumstances. Estate of Fennell v. Stephenson, — N.C. App. —, 528 S.E.2d 911, 2000 N.C. App. LEXIS 428 (2000).

V. DAMAGES RECOVERABLE.

D. Loss of Decedent's Income, Services, Society, etc.

But Direct Evidence of Intent to Give Is Essential. — The trial judge erred in submitting to the jury as an element of damages the amount of income plaintiffs could reasonably have expected from the deceased where the plaintiffs presented no direct evidence that their deceased daughters "had ever expressed an intent to provide any of [their] income to

[their] parents"; although the evidence indicated that deceased daughters were brought up in a family and culture within which intrafamily financial assistance was favored, absolutely no evidence tended to show that the two teenage girls, specifically, would grow up to follow this example. Bahl v. Talford, — N.C. App. —, 530 S.E.2d 347, 2000 N.C. App. LEXIS 537 (2000).

E. Punitive Damages.

"Gross negligence" does not constitute a lower standard of negligence than "willful or wanton conduct" in the context of a wrongful death suit. Benton v. Hillcrest Foods, Inc., 136 N.C. App. 42, 524S.E.2d 53 (1999).

Article 19.

Claims against the Estate.

§ 28A-19-6. Order of payment of claims.

CASE NOTES

II. Specific Liens on Property.

II. SPECIFIC LIENS ON PROPERTY.

Tax Liens Take Priority Over Estate Administration Costs. — The conflict between this section and § 105-356 was resolved in favor of city and county/appellants who sought to recover back taxes and interest through a foreclosure proceeding on property, although the guardian ad litem and public administrator asserted that such foreclosure would cause the tax lien to take precedence over the costs of estate administration in violation of this section and would result in inequity should the sale fail to render sufficient funds to cover both taxes and costs. City of Durham v. Hicks, 135 N.C. App. 699, 522 S.E.2d 583 (1999).

Article 20.

Inventory.

§ 28A-20-1. Inventory within three months.

CASE NOTES

Failure to Accurately State Value of Account May Constitute Perjury. — The trial court did not err in denying defendant's motion to dismiss charge of perjury concerning 90-day inventory of estate, signed pursuant to this section, where defendant intentionally reported under oath that the "value" of checking account was $27,885, when in reality, the checking account contained only$17,885 and the defendant had misappropriated $10,000 by depositing it into his law firm operating account. State v. Linney, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 538 (May 16, 2000).

Chapter 29.

Intestate Succession.

Article 8.

Election to Take Life Interest in Lieu of Intestate Share.

Article 1.

General Provisions.

§ 29-4. Curtesy and dower abolished.

CASE NOTES

Stated in Watson v. Smoker, — N.C. App. —, 530 S.E.2d 344, 2000 N.C. App. LEXIS 554 (2000).

Article 2.

Shares of Persons Who Take upon Intestacy.

§ 29-15. Shares of others than surviving spouse.

CASE NOTES

Quoted in Hixson v. Krebs, 136 N.C. App. 183, 523 S.E.2d 684 (1999).

Article 8.

Election to Take Life Interest in Lieu of Intestate Share.

§ 29-30. Election of surviving spouse to take life interest in lieu of intestate share provided.

(a) In lieu of the intestate share provided in G.S. 29-14 or G.S. 29-21, or of the elective share provided in G.S. 30-3.1, the surviving spouse of an intestate or the surviving spouse who has petitioned for an elective share shall be entitled to take as his or her intestate share or elective share a life estate in one third in value of all the real estate of which the deceased spouse was seised and possessed of an estate of inheritance at any time during coverture, except that real estate as to which the surviving spouse:

(1) Has waived his or her rights by joining with the other spouse in a conveyance thereof, or

(2) Has release or quitclaimed his or her interest therein in accordance with G.S. 52-10, or

(3) Was not required by law to join in conveyance thereof in order to bar the elective life estate, or

(4) Is otherwise not legally entitled to the election provided in this section.

(b) Regardless of the value thereof and despite the fact that a life estate therein might exceed the fractional limitation provided for in subsection (a), the life estate provided for in subsection (a) shall at the election of the surviving spouse include a life estate in the usual dwelling house occupied by the surviving spouse at the time of the death of the deceased spouse if such dwelling house were owned by the deceased spouse at the time of his or her death, together with the outbuildings, improvements and easements thereunto belonging or appertaining, and lands upon which situated and reasonably necessary to the use and enjoyment thereof, as well as a fee simple ownership in the household furnishings therein.

(c) The election provided for in subsection (a) shall be made by the filing of a notice thereof with the clerk of the superior court of the county in which the administration of the estate is pending, or, if no administration is pending, then with the clerk of the superior court of any county in which the administration of the estate could be commenced. Such election shall be made:

(1) At any time within one month after the expiration of the time fixed for the filing of the petition for elective share under Article 1A of Chapter 30, or

(2) In case of intestacy, then within 12 months after the death of the deceased spouse if letters of administration are not issued within that period, or

(3) If letters of administration are issued within 12 months after the date of the death of the deceased spouse, then within one month after the expiration of the time limited for filing claims against the estate, or

(4) If litigation that affects the share of the surviving spouse in the estate is pending, then within such reasonable time as may be allowed by written order of the clerk of the superior court.

(c1) The notice of election shall:

(1) Be directed to the clerk with whom filed;

(2) State that the surviving spouse making the same elects to take under this section rather than under the provisions of G.S. 29-14, 29-21, or 30-3.1, as applicable;

(3) Set forth the names of all heirs, devisees, legatees, personal representatives and all other persons in possession of or claiming an estate or an interest in the property described in subsection (a); and

(4) Request the allotment of the life estate provided for in subsection (a).

(c2) The notice of election may be in person, or by attorney authorized in a writing executed and duly acknowledged by the surviving spouse and attested by at least one witness. If the surviving spouse is a minor or an incompetent, the notice of election may be executed and filed by a general guardian or by the guardian of the person or estate of the minor or incompetent spouse. If the minor or incompetent spouse has no guardian, the notice of election may be executed and filed by a next friend appointed by the clerk. The notice of election, whether in person or by attorney, shall be filed as a record of the court, and a summons together with a copy of the notice shall be served upon each of the interested persons named in the notice of election.

(d) In case of election to take a life estate in lieu of an intestate share or elective share, as provided in either G.S. 29-14, 29-21, or 30-3.3(a), the clerk of superior court, with whom the notice of election has been filed, shall summon and appoint a jury of three disinterested persons who being first duly sworn shall promptly allot and set apart to the surviving spouse the life estate provided for in subsection (a) and make a final report of such action to the clerk.

(e) The final report shall be filed by the jury not more than 60 days after the summoning and appointment thereof, shall be signed by all jurors, and shall describe by metes and bounds the real estate in which the surviving spouse shall have been allotted and set aside a life estate. It shall be filed as a record of court and a certified copy thereof shall be filed and recorded in the office of the register of deeds of each county in which any part of the real property of the deceased spouse, affected by the allotment, is located.

(f) In the election and procedure to have the life estate allotted and set apart provided for in this section, the rules of procedure relating to partition proceedings shall apply except insofar as the same would be inconsistent with the provisions of this section.

(g) Neither the household furnishings in the dwelling house nor the life estates taken by election under this section shall be subject to the payment of debts due from the estate of the deceased spouse, except those debts secured by such property as follows:

(1) By a mortgage or deed of trust in which the surviving spouse has waived his or her rights by joining with the other spouse in the making thereof; or

(2) By a purchase money mortgage or deed of trust, or by a conditional sales contract of personal property in which title is retained by the vendor, made prior to or during the marriage; or

(3) By a mortgage or deed of trust made prior to the marriage; or

(4) By a mortgage or deed of trust constituting a lien on the property at the time of its acquisition by the deceased spouse either before or during the marriage.

(h) If no election is made in the manner and within the time provided for in subsection (c) the surviving spouse shall be conclusively deemed to have waived his or her right to elect to take under the provisions of this section, and any interest which the surviving spouse may have had in the real estate of the deceased spouse by virtue of this section shall terminate. (1959, c. 879, s. 1; 1961, c. 958, ss. 4-8; 1965, c. 848; 1997-456, s. 27; 2000-178, s. 3.)

Cross References. — As to right of elective share, see § 30-3.1 et seq.

Effect of Amendments. — Session Laws 2000-178, s. 3, effective January 1, 2001, and applicable to estates of decedents dying on or after that date, in subsection (a), inserted "intestate," substituted "G.S. 29-21, or of the elective share provided in G.S. 30-3.1" for "29-21," substituted "has petitioned for an elective share" for "dissents from the will of a testator" and inserted "or elective share"; in subdivision (c)(1), substituted "the petition for elective share under Article 1A of Chapter 30" for "a dissent"; in subdivision (c1)(2), substituted "G.S. 29-14, 29-21, or 30-3.1" for "G.S. 29-14 or 29-21"; and in subsection (d), inserted "or elective share" and substituted "30-3.3(a)" for "30-3(a)."

Chapter 30.

Surviving Spouses.

Article 1.

Dissent from Will.

§§ 30-1 through 30-3: Repealed by Session Laws 2000-178, s. 1, effective January 1, 2001, and applicable to estates of decedents dying on or after that date.

Cross References. — As to right of elective share, see § 30-3.1 et seq.

Article 1A.

Elective Share.

§ 30-3.1. Right of elective share.

(a) Elective Share. — The surviving spouse of a decedent who dies domiciled in this State has a right to claim an "elective share", which means an amount equal to (i) the applicable share of the Total Net Assets, as defined in G.S. 30-3.2(c), less (ii) the value of Property Passing to Surviving Spouse, as defined in G.S. 30-3.3(a). The applicable share of the Total Net Assets is as follows:

(1) If the decedent is not survived by any lineal descendants, one-half of the Total Net Assets.

(2) If the decedent is survived by one child, or lineal descendants of one deceased child, one-half of the Total Net Assets.

(3) If the decedent is survived by two or more children, or by one or more children and the lineal descendants of one or more deceased children, or by the lineal descendants of two or more deceased children, one-third of the Total Net Assets.

(b) Reduction of Applicable Share. — In those cases in which the surviving spouse is a second or successive spouse, and the decedent has one or more lineal descendants surviving by a prior marriage but there are no lineal descendants surviving by the surviving spouse, the applicable share as determined in subsection (a) of this section shall be reduced by one-half.

(c) Death Taxes. — Death taxes shall be taken into account as a claim against the estate in determining Total Net Assets only to the extent that such taxes are increased because the assets received by the surviving spouse do not

qualify for the federal estate tax marital deduction pursuant to section 2056 of the Code or similar provisions under the laws of any other applicable taxing jurisdiction. (2000-178, s. 2.)

Cross References. — As to intestate succession, see § 29-1 et seq. As to abolition of dower and curtesy, see § 29-4. For provision that a decedent's half of community property is not subject to the surviving spouse's right to petition for an elective share, see § 31C-3.

Editor's Note. — Session Laws 2000-178, ss. 1 and 2, effective January 1, 2001, and applicable to estates of decedents dying on or after that date, repeal §§ 30-1 to 30-3, relating to the surviving spouse's right to dissent from his or her deceased spouse's will, and enact this article, relating to the right to claim an elective share. Case notes from repealed §§ 30-1 to 30-3 have been placed under §§ 30-3.1 to 30-3.6, as appropriate.

Legal Periodicals. — For discussion of prior law, see 11 N.C.L. Rev. 274 (1933); 23 N.C.L. Rev. 380 (1945).

For note on dissent by incompetent widow through her guardian, see 35 N.C.L. Rev. 520 (1957).

For note on constitutionality of husband's right to dissent from wife's will, under former law, see 41 N.C.L. Rev. 311 (1963).

For case law survey on devolution of property, see 41 N.C.L. Rev. 432 (1963).

For note, "Contracts to Devise — Effect of Excluded Forced Heirs," see 47 N.C.L. Rev. 905 (1969).

For note, "Does North Carolina Law Adequately Protect Surviving Spouses?" see 48 N.C.L. Rev. 361 (1970).

For article, "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

For note on a surviving spouse's right to dissent, under prior law, see 16 Wake Forest L. Rev. 251 (1980).

For note on the right of surviving spouse to dissent, under prior law, from deceased spouse's will when survivor receives less than an intestate share of deceased's net estate, see 12 N.C. Cent. L.J. 511 (1981).

For comment, "The North Carolina Dissent Statutes: The Seeds of Inequities Germinate ...," see 8 Campbell L. Rev. 449 (1986).

For comment, "The Uniform Probate Code's 'Augmented Estate' Concept: A Remedy for the North Carolina Dissent Statute," see 12 Campbell L. Rev. 425 (1990).

For article, "A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?", see 18 Campbell L. Rev. 203 (1996).

CASE NOTES

I. DECISIONS UNDER PRIOR LAW.

A. In General.

Editor's Note. *— The cases below were decided under former §§ 30-1 to 30-3 and corresponding prior provisions, relating to right to dissent.*

Constitutionality of Former Provisions. — The provisions of, former §§ 30-1, 30-2, and 30-3, insofar as they gave a husband a right in certain cases to dissent from his deceased wife's will, and to take a specified share of his deceased wife's real and personal property, violated the former provisions of N.C. Const., Art. X, § 6 (see now N.C. Const., Art. X, § 4), since they diminished a married woman's estate disposed of by her will, and restricted and abridged her constitutional power to dispose of her property by will as if she were unmarried. Dudley v. Staton, 257 N.C. 572, 126 S.E.2d 590 (1962), commented on in 41 N.C.L. Rev. 311 (1963).

Former §§ 30-1, 30-2, and 30-3, insofar as they gave a husband the right in certain instances to dissent from his deceased wife's will and take a specified share of her estate, were unconstitutional under former N.C. Const., Art. X, § 6 (see now N.C. Const., Art. X, § 4), to the extent that they diminished pro tanto a devise of her separate estate in accordance with a will executed by her. But the adoption by the voters of the amendment to former N.C. Const., Art. X, § 6 (see now N.C. Const., Art. X, § 4), restored, subject to the qualifications set forth in Session Laws 1963, c. 1209, the right of the husband to dissent from the will of his wife. Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967); Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967).

Former § 30-3(b), which provided that a sec-

ond or successive spouse who dissented from the will of his deceased spouse should take only one half the amount provided by the Intestate Succession Act, § 29-1 et seq., for the surviving spouse if the testator had surviving him lineal descendants by a former marriage but there were no surviving lineal descendants by the second or successive marriage, was not arbitrarily discriminatory and capricious so as to be violative of the due process provisions of the federal and State Constitutions. Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 686 (1969).

Former statute had no application in cases of intestacy. Vinson v. Chappell, 3 N.C. App. 348, 164 S.E.2d 631 (1968), aff'd, 275 N.C. 234, 166 S.E.2d 686 (1969).

It was only when a spouse died testate that former § 30-1 et seq. became applicable. Vinson v. Chappell, 3 N.C. App. 348, 164 S.E.2d 631 (1968), aff'd, 275 N.C. 234, 166 S.E.2d 686 (1969).

Purpose of Statute. — The apparent purpose of fromer § 30-1 to deny a surviving spouse a share of the testator's "net estate" when he or she had been adequately provided for by property passing outside the probate estate. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Right Conferred by Statute. — The right of a husband or wife to dissent from the will of his spouse was conferred by statute and could be under former § 30-1 exercised at the time and in the manner fixed by statute. Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 686 (1969).

Husband and Wife Have Same Rights. — Session Laws 1963, c. 1209 was enacted to abrogate the effect of the decision in Dudley v. Staton, 257 N.C. 572, 126 S.E.2d 590 (1962), and to make the rights of husbands and wives the same in each other's separate property. Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967).

Assignment of Reason Not Required. — The surving spouse in the exercise of the right to dissent under former § 30-1 was not required to assign any reason therefor. In re Estate of Cox, 32 N.C. App. 765, 233 S.E.2d 926, cert. denied, 292 N.C. 729, 235 S.E.2d 783 (1977).

The right of a widow to dissent from the will pursuant to former § 30-1 was given by law, and she could exercise such right within the time fixed by statute without assigning any reason therefor. Union Nat'l Bank v. Easterby, 236 N.C. 599, 73 S.E.2d 541 (1952); In re Estate of Kirkman, 38 N.C. App. 515, 248 S.E.2d 438 (1978), cert. denied, 296 N.C. 584, 254 S.E.2d 31 (1979).

Former § 30-1 conferred no right of dower or year's support; these rights existed independently. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

Rights Analogous to Former Right of Dower. — The rights devolving after the allocation by the commissioners of the spouse's share after a dissent (claim of elective share) is analogous to the rights which devolved upon a widow in the allocation of her dower before its abolishment. Etheridge v. Etheridge, 41 N.C. App. 44, 255 S.E.2d 729 (1979), cert. denied, 299 N.C. 735, 267 S.E.2d 660 (1980).

Limitation on Right. — Right to dissert under former provisions was limited to those cases in which provisions under the will, when added to the value of property passing outside the will as a result of the testator's death, (1) were less than the intestate share, or (2) were less than one half of the net estate if neither lineal descendant nor parent survived. North Carolina Nat'l Bank v. Stone, 263 N.C. 384, 139 S.E.2d 573 (1965).

Right Not an Obligation. The right to dissent was not an obligation to dissent. Moveover, it was a common principle of law that a surviving spouse had to elect between taking under a will and dissenting from the will, and the election of one precluded the other. Tarlton v. Stidham, 122 N.C. App. 77, 469 S.E.2d 38 (1996).

Right Not Contingent. — Although under prior law the right to take property after dissenting from a will must be established, it was not a contingent right. Tighe v. Michal, 41 N.C. App. 15, 254 S.E.2d 538 (1979).

Testator Presumed to Have Known of Surviving Spouse's Right. — In making a will a husband is presumed to have knowledge of and to have taken into consideration the statutory right of his widow under former § 30-1 to dissent from the will. Keesler v. North Carolina Nat'l Bank, 256 N.C. 12, 122 S.E.2d 807 (1961); Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 686 (1969).

And a testator can prevent his will from being upset by giving his surviving spouse the minimum provision required by statute, which may be satisfied in whole or in part by a life estate or life income interest. In re Estate of Finch, 97 N.C. App. 489, 389 S.E.2d 126 (1990).

Election Required under Prior Statutes. — Under prior statutes, surviving spouse had to elect between taking under a will and dissenting from the will. The spouse could not do both; the election of one precludes the other. Hill v. Smith, 51 N.C. App. 670, 277 S.E.2d 542, cert. denied, 303 N.C. 543, 281 S.E.2d 392 (1981).

Dissenting Widow Could Not Assert Any Benefits under Will. — Widow's dissent from her husband's will under former § 30-1 et seq. was a rejection of it as far as her rights were concerned, and having elected to treat it as a nullity, she could not assert any benefits thereunder, even in regard to direction in the will for the payment of estate taxes. Wachovia Bank & Trust Co. v. Green, 236 N.C. 654, 73 S.E.2d 879

(1953), commented on in 31 N.C.L. Rev. 491 (1953).

The act of qualifying as administratrix c.t.a. did not constitute an election to take under the will so as to bar the statutory right of dissent under prior statutes, when at the time of qualification as administratrix c.t.a., the widow was 69 years old, had not communicated with her deceased husband for 18 years, was not accomplished in business affairs on the administration of estates and did not have the assistance of legal counsel. Hurdle v. Sawyer, 46 N.C. App. 814, 266 S.E.2d 404 (1980).

Effect of Dissent on Provisions of Will. — A widow having dissented from her husband's will under former § 30-1 et seq. was entitled to exactly the same share in his estate she would have received if he had died intestate. So far as her property rights in her husband's estate were concerned there was no will. In all other respects the will remained and the executors were controlled by its terms. Wachovia Bank & Trust Co. v. Green, 236 N.C. 654, 73 S.E.2d 879 (1953), commented on in 31 N.C.L. Rev. 491 (1953).

Dissent Held to Bar Other Actions. — Plaintiff's dissent to her husband's will, under former § 30-1, which was subject only to an essentially ministerial act by the clerk of court in approving a valuation agreement, precluded her from maintaining an action for construction of the will or claiming property passing under the residuary clause of the will. Taylor v. Taylor, 301 N.C. 357, 271 S.E.2d 506 (1980).

Effect on Remainder. — Widow's dissent from will under former § 30-1 et seq. was held to terminate her life estate thereunder and accelerate the vesting of remainder. Union Nat'l Bank v. Easterby, 236 N.C. 599, 73 S.E.2d 541 (1952).

Dissent of surviving spouse, so far as remaindermen are concerned, is equivalent to her death. Keesler v. North Carolina Nat'l Bank, 256 N.C. 12, 122 S.E.2d 807 (1961).

Separate Agreement with Remaindermen. — The fact that widow's unconditional dissent from will under former § 30-3.1 and election to take her statutory rights was based upon separate agreement with the vested remaindermen that they pay her a specified sum, did not affect the validity of the dissent, the dissent being valid unless she was induced to dissent in ignorance of her rights to her prejudice. Union Nat'l Bank v. Easterby, 236 N.C. 599, 73 S.E.2d 541 (1952).

Personal Representative Who Was Surviving Spouse Need Not Resign While Right Is Determined. — The personal representative need not resign from that position during the time the right to dissent under former § 30-1 was being determined. North Carolina Nat'l Bank v. Stone, 263 N.C. 384, 139 S.E.2d 573 (1965).

And Failure to Resign Is Not Waiver of Right. — The failure of the surviving spouse to resign as personal representative during the time the right to dissent under former § 30-1 was determined could not constitute a waiver of the right. North Carolina Nat'l Bank v. Stone, 263 N.C. 384, 139 S.E.2d 573 (1965).

Right of Widow Who Offered Will and Was Appointed Executrix. — Under prior statutes, widow who offered a will for probate and qualified as executrix thereunder, and entered upon the duties of her office, or knowingly took property thereunder, could not afterwards be allowed to resign and dissent from said will, unless it appeared that such widow was at the time mentally and physically disqualified from attending to the business in hand or having any intelligent concept of what she was about. Joyce v. Joyce, 260 N.C. 757, 133 S.E.2d 675 (1963).

As to decisions under former law, see also Cheshire v. McCoy, 52 N.C. 376 (1860); Jones v. Gerock, 59 N.C. 190 (1861); Hinton v. Hinton, 61 N.C. 410 (1868); Ramsour v. Ramsour, 63 N.C. 231 (1869); Hinton v. Hinton, 68 N.C. 100 (1873); Arrington v. Dorten, 77 N.C. 367 (1877); Yorkly v. Stinson, 97 N.C. 236, 1 S.E. 452 (1887); Horton v. Lee, 99 N.C. 227, 5 S.E. 404 (1888); Hollomon v. Hollomon, 125 N.C. 29, 34 S.E. 99 (1899); Richardson v. Justice, 125 N.C. 409, 34 S.E. 441 (1899); Trustees of Baptist Female Univ. v. Borden, 132 N.C. 476, 44 S.E. 47 (1903); Perkins v. Brinkley, 133 N.C. 86, 45 S.E. 465 (1903); Lee v. Giles, 161 N.C. 541, 77 S.E. 852 (1913); Atlantic Trust & Banking Co. v. Stone, 176 N.C. 270, 97 S.E. 8 (1918); In re Smith's Estate, 226 N.C. 169, 37 S.E.2d 127 (1946).

B. Lineal Descendants.

The term "lineal descendants" is defined at § 29-2(4) as "all children of such person"; this would include even illegitimate children of a deceased female, under § 29-19(a), and clearly includes adopted children, pursuant to § 29-17. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

The phrase "lineal descendants" is generally applied not to distinguish between children of various marriages or out of wedlock, but to distinguish children from other collateral descendants, e.g., nieces and nephews. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

Adopted Children as Lineal Descendants. — Natural children of one spouse born during a previous marriage, if adopted by second spouse with the consent of their surviving natural parent, would be considered lineal descendants by the second marriage for the pur-

poses of former § 30-3(b), which determined a dissenting spouse's share. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

Applying § 48-23(1), children adopted must be treated legally as having been born at the time of the order of adoption; accordingly, children in question were as a matter of law born of decedent's second marriage, and were "lineal descendants by the second marriage" within the intended meaning of former § 30-3(b). In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

The natural children of a testatrix, born of a previous marriage and duly adopted by her second husband, would be considered to be her lineal descendants by the second marriage for purposes of determining the second spouse's distributive share upon his dissent from the testatrix's will pursuant to former § 30-3(b). In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

More Testamentary Freedom Allowed to Spouse with Lineal Descendants by First Marriage Only. — The real effect of former § 30-3 was to allow a spouse who left a child or other lineal descendant by a previous marriage but none by the spouse who survived him more testamentary freedom than he would have had otherwise. It was not for the Court of Appeals to "second guess" the General Assembly on the wisdom of this distinction. The court believed the statute was enacted in good faith and it created a classification based upon real distinctions which were not unreasonable. Vinson v. Chappell, 3 N.C. App. 348, 164 S.E.2d 631 (1968), aff'd, 275 N.C. 234, 166 S.E.2d 686 (1969).

Establishment of Right When Spouse and Lineal Descendant Survive. — Under prior statutes where the testator was survived by his spouse and a lineal descendant, the right of the surviving spouse to dissent was established by the determination and comparison of two figures: (1) the aggregate value of property passing under the will and outside the will to the surviving spouse: and (2) the intestate share of the surviving spouse. Phillips v. Phillips, 34 N.C. App. 428, 238 S.E.2d 790 (1977), 296 N.C. 590, 252 S.E.2d 761 (1979).

C. Second or Successive Spouse.

Intent of the legislature in enacting former § 30-3(b) was to enable a person who had a child or lineal descendant by a former marriage to make greater provision for such child or lineal descendant. Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 686 (1969).

While the legislative purpose of former § 30-3(b) was not entirely clear, it was apparently passed to protect a testator's children by a former marriage against a "fortune-hunting" second or successive spouse. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

Former § 30-3(b) was enacted for the protection of a testator's children by a former spouse, on the assumption that a second or successive spouse would not feel as compelled to provide for the stepchildren upon testator's death as would the testator in his will. In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

When Former § 30-3(b) was Applicable. — Former § 30-3(b) was applicable when the decedent was survived by a child or lineal descendant of a former marriage, even if the decedent's will left nothing to such child or lineal descendant. Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 686 (1969).

Former § 30-3(b) applied to limit the share of a surviving spouse to one half the intestate share only when (1) a married person died testate survived by his spouse, (2) the surviving spouse, being entitled under former § 30-1 to do so, dissented, (3) the surviving spouse was a "second or successive spouse," (4) no lineal descendants by the second or successive marriage survived the testator, and (5) the testator was survived by lineal descendants by his former marriage. Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 686 (1969).

Facts Not Considered as to Applicability of Former § 30-3(b). — Whether former § 30-3(b) applied did not depend at all upon such considerations as: (1) the comparative durations of the first and second marriage; (2) whether the former marriage was terminated by death or by divorce; (3) the age(s) of the child or children of the former marriage at the time of the second or successive marriage; and (4) the age(s) of the child or children of the former marriage and their financial status at the time of the death of the decedent. Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 686 (1969).

Wife's failure to "join" in her husband's petition for adoption of her two minor children by a previous marriage in no way affected her relationship with the children and was immaterial to a determination of her husband's distributive share under former § 30-3(b). In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

The right of a "second or successive spouse" to dissent under former § 30-1 was determined by former § 30-1(a)(1) without reference to former § 30-3(b). Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

D. Federal Estate Tax.

Estimate of federal estate tax required by former § 30-1(a) was not an estimate of the actual tax which would be paid on the estate, but rather, an estimate of the tax which would be paid if plaintiff received the share of the "net estate" specified by former § 30-1(a)(1), including any marital deduction the estate would receive as a result of her taking that share. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

For purposes of determining whether a surviving spouse could dissent under former § 30-1, it was an estimation of the federal estate tax which had to be deducted in approximating the "net estate." Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Interest and penalties on federal estate tax were not to be considered when computing the "net estate" for the purpose of determining whether a surviving spouse could dissent under former § 30-1. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

When Dissenting Widow Takes Share Free of Federal Estate Tax. — Under former § 30-1, et seq., the only instance where a surviving wife was allowed to take her distributive share free and clear of the federal estate tax would occur when her husband died testate, leaving no lineal descendants or parents surviving him, and she dissented from his will. Tolson v. Young, 260 N.C. 506, 133 S.E.2d 135 (1963); Adams v. Adams, 261 N.C. 342, 134 S.E.2d 633 (1964).

When Share Taken after Federal Estate Taxes. — Under former § 30-1 et seq., childless widow who dissented from the will of her husband who was survived also by one or more lineal descendants by a former marriage would take her statutory share of the estate computed after the deduction of the federal estate taxes. Tolson v. Young, 260 N.C. 506, 133 S.E.2d 135 (1963).

§ 30-3.2. Definitions.

(a) "Code" means the Internal Revenue Code in effect at the time of the decedent's death.

(b) "Death taxes" means any estate, inheritance, succession, and similar taxes imposed by any taxing authority, reduced by any applicable credits against those taxes.

(c) "Nonadverse trustee" means a trustee who would be deemed nonadverse under section 672 of the Code.

(d) "Total Net Assets" means, after the payment or provision for payment of the decedent's funeral expenses, year's allowances to persons other than to the surviving spouse, debts, claims, and administration expenses, the sum of the following:

(1) All property to which the decedent had legal and equitable title immediately prior to death;

(2) All property received by the decedent's personal representative by reason of the decedent's death, other than wrongful death proceeds;

(3) One-half of the value of any property held by the decedent and the surviving spouse as tenants by the entirety, or as joint tenants with rights of survivorship;

(4) The entire value of any interest in property held by the decedent and another person, other than the surviving spouse, as joint tenants with right of survivorship, except to the extent that contribution can be proven by clear and convincing evidence;

(5) The value of any property which would be included in the taxable estate of the decedent pursuant to sections 2033, 2035, 2036, 2037, 2038, 2039, or 2040 of the Code.

(6) Any donative transfers of property made by the decedent to donees other than the surviving spouse within six months of the decedent's death, excluding:

a. Any gifts within the annual exclusion provisions of section 2503 of the Code;

b. Any gifts to which the surviving spouse consented. A signing of a deed, or income or gift tax return reporting such gift shall be considered consent; and

c. Any gifts made prior to marriage;

(7) Any proceeds of any individual retirement account, pension or profit-sharing plan, or any private or governmental retirement plan or annuity of which the decedent controlled the designation of beneficiary, excluding any benefits under the federal social security system;
(8) Any other Property Passing to Surviving Spouse under G.S. 30-3.3; and
(9) In case of overlapping application of the same property under more than one provision, the property shall be included only once under the provision yielding the greatest value. (2000-140, s. 92; 2000-178, s. 2.)

Effect of Amendments. — Session Laws 2000-140, s. 92, effective July 21, 2000, substituted "2040" for "2040, or 2042" in subdivision (d)(5).

§ 30-3.3. Property Passing to Surviving Spouse.

(a) Property Passing to Surviving Spouse. — For purposes of this Article, "Property Passing to Surviving Spouse" means the sum of the following:
(1) One-half of the value of any interest in property held by the decedent and the surviving spouse as tenants by the entirety or as joint tenants with rights of survivorship;
(2) The value of any interest in property (outright or in trust, including any interest subject to a general power of appointment held by the surviving spouse, as defined in section 2041 of the Code) devised by the decedent to the surviving spouse, or which passes to the surviving spouse by intestacy, or by beneficiary designation, or by exercise of or in default of the exercise of the decedent's testamentary general or limited power of appointment, or by operation of law or otherwise by reason of the decedent's death, excluding any benefits under the federal social security system;
(3) Any year's allowance awarded to the surviving spouse;
(4) The value of any property renounced by the surviving spouse;
(5) The value of the surviving spouse's interest, outright or in trust, in any life insurance proceeds on the life of the decedent;
(6) The value of any interest in property, outright or in trust, transferred from the decedent to the surviving spouse during the lifetime of decedent for which (i) a gift tax return is timely filed reporting such gift, or (ii) the surviving spouse signs a statement acknowledging such a gift. For purposes of this subdivision, any gift to the surviving spouse by the decedent of the decedent's interest in any property held by the decedent and the surviving spouse as tenants by the entirety or as joint tenants with right of survivorship shall be valued at one-half of the entire value of that interest in property at the time the gift is made; and
(7) The entire value of any property held in trust for the exclusive benefit of the surviving spouse during the surviving spouse's lifetime, where the trust requires a Nonadverse Trustee to utilize the principal and income of the trust for the support and maintenance of the surviving spouse.

(b) Death Taxes. — The value of Property Passing to Surviving Spouse shall be reduced by any death taxes that are a charge against or apportioned against the surviving spouse on property interests included in Property Passing to Surviving Spouse.

(c) No Duplication. — In case of overlapping application of the same property under more than one provision, the property shall be included only once, under the provision yielding the greatest value. (2000-178, s. 2.)

CASE NOTES

I. Decisions under Prior Law.

I. DECISIONS UNDER PRIOR LAW.

Editor's Note. *— The cases below were decided under former §§ 30-1 to 30-3 and corresponding prior provisions, relating to the right to dissent.*

Chapter 29 Governs Intestate Share. — The determination of a surviving spouse's intestate share is governed in the first instance by the "Intestate Succession Act," Chapter 29, § 29-1 et seq. Phillips v. Phillips, 34 N.C. App. 428, 238 S.E.2d 790 (1977), rev'd on other grounds, 296 N.C. 590, 252 S.E.2d 761 (1979).

"Intestate share," as used in former § 30-1, means the amount of real and personal property that the surviving spouse would receive under the provisions of Chapter 29, § 29-1 et seq., known as the Intestate Succession Act, if her husband had died intestate. In re Estate of Connor, 5 N.C. App. 228, 168 S.E.2d 245 (1969); Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

The term "intestate share," as used in former § 30-1(a)(1), was clear and unambiguous. The fact that the legislature provided one criterion for determining whether the right to dissent existed and another for determining the consequences of the dissent created no ambiguity. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

And Would Not Be Defined with References to Consequences of Dissent. — The 1975 amendment which added subdivision (a)(3) of former § 30-1, cases where the surviving spouse is a second or successive spouse and the testator has surviving him lineal descendants by a former marriage and there are no lineal descendants surviving him by the second or successive marriage, did not manifest that the General Assembly's intent that the term "intestate share" in subdivision (a)(1) of the section be defined with reference to the consequences of the dissent. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Year's Allowance Not Part of Intestate Share. — The year's allowance for the surviving spouse under the provisions of § 30-15 is not a part of the "intestate share" passing to a surviving spouse under the provisions of Chapter 29, § 29-1 et seq., known as the Intestate Succession Act. In re Estate of Connor, 5 N.C. App. 228, 168 S.E.2d 245 (1969).

Nor Is Entirety Property, Insurance, or Joint Accounts with Survivorship. — "Intestate share" does not include any property received by the surviving spouse as a tenant by entirety, or from insurance contracts, or from joint accounts with right of survivorship. In re Estate of Connor, 5 N.C. App. 228, 168 S.E.2d 245 (1969).

§ 30-3.4. Procedure for determining the elective share.

(a) Exercisable Only During Lifetime. — The right of the surviving spouse to file a claim for an elective share must be exercised during the lifetime of the surviving spouse, by the surviving spouse, the surviving spouse's agent under a power of attorney, or the guardian of the surviving spouse's estate. If a surviving spouse dies before the claim for an elective share has been settled, the surviving spouse's personal representative shall succeed to the surviving spouse's rights to an elective share.

(b) Time Limitations. — A claim for an elective share must be made within six months after the issuance of letters testamentary or letters of administration by (i) filing a petition with the clerk of superior court of the county in which the primary administration of the decedent's estate lies, and (ii) mailing or delivering a copy of that petition to the personal representative of the decedent's estate. A surviving spouse's incapacity shall not toll the six-month period of limitations.

(c) Time for Hearing. — Unless waived by the personal representative and the surviving spouse, the clerk shall set the matter for hearing no earlier than two months and no later than six months after the filing of the petition. However, the clerk may extend the time of hearing as the clerk sees fit. The surviving spouse shall give notice of the hearing to the personal representative, and to any person described in G.S. 30-3.5 who may be required to contribute toward the satisfaction of the elective share.

(d) Preparation of Tax Form. — In every case in which a petition to determine an elective share has been filed, and within two months of the filing

of the petition, the personal representative shall prepare and submit to the clerk a proposed Form 706, federal estate tax return, for the estate, regardless of whether that form is required to be filed with the Internal Revenue Service. The clerk may extend the time for submission of the proposed Form 706 as the clerk sees fit.

(e) Valuation. — The valuation of interests in property for purposes of G.S. 30-3.2 and G.S. 30-3.3 shall be determined as follows:

(1) Basic principles. — Each interest shall be valued at its fair market value, reduced by all liens, claims, or encumbrances against the interest. For interests passing at the decedent's death, valuation shall be as of the date of death, and for interests transferred during the decedent's lifetime, valuation shall be as of the date of transfer.

(2) Valuation of partial and contingent interests in property. — The valuation of interests in property, outright or in trust, which are limited to commence or terminate upon the death of one or more persons, upon the expiration of a period of time, or upon the occurrence of one or more contingencies, shall be determined by computations based upon the mortuary and annuity tables set forth in G.S. 8-46 and G.S. 8-47, and upon the basis of six percent (6%) of the gross value of the underlying property in which those interests are limited. However, in valuing interests passing to the surviving spouse, the following special rules apply:

a. To the extent that the interest is dependent upon the exercise of discretion by a fiduciary, the interest shall have no value unless the spouse is serving as that fiduciary and the power to distribute the trust property constitutes a general power of appointment held by the spouse, as defined in section 2041 of the Code or the fiduciary is a Nonadverse Trustee required to utilize the income and principal for the exclusive benefit of the surviving spouse during the surviving spouse's lifetime;

b. To the extent that the interest is dependent upon the occurrence of any contingency that is not subject to the control of the surviving spouse and that is not subject to valuation by reference to the mortuary and annuity tables set forth in G.S. 8-46 and G.S. 8-47, the contingency will be conclusively presumed to result in the lowest possible value passing to the surviving spouse. However, a life estate or income interest that will terminate only upon the earlier of the surviving spouse's death or remarriage will be valued without regard to the possibility of termination upon remarriage; and

c. To the extent that the valuation of an interest is dependent upon the life expectancy of the surviving spouse, that life expectancy shall be conclusively presumed to be no less than 10 years, regardless of the actual attained age of the surviving spouse at the decedent's death.

(3) Determination of fair market value. — The fair market value of each asset comprising Total Net Assets shall be determined as follows:

a. Probate assets and assets passing to spouse. — The value of each probate asset and Property Passing to Surviving Spouse, other than assets held in trust, shall be established by the good faith agreement of the surviving spouse and the personal representative, unless either (i) the surviving spouse is the personal representative, or (ii) the clerk determines that the personal representative may not be able to represent the estate adversely to the surviving spouse.

b. Trust assets. — The value of each trust asset shall be established by good faith agreement of the surviving spouse and the trustee,

unless either (i) the surviving spouse is the trustee, or (ii) the clerk determines that the trustee may not be able to represent the trust adversely to the surviving spouse.

c. Other assets. — The value of any other asset shall be established by the good faith agreement of the surviving spouse and each person described in G.S. 30-3.5 who may be required to contribute toward the satisfaction of the elective share because of that person's interest in the asset, unless the clerk determines that valuation under sub-subdivision d. of this subdivision is more appropriate.

d. Use of disinterested persons. — If the value of any asset is not established by agreement, the clerk shall appoint one or more qualified and disinterested persons to determine a value of each asset. That determination of the value of an asset shall be final for the exclusive purposes of this Article.

(f) Findings and Conclusions. — After notice and hearing, the clerk shall determine whether or not the surviving spouse is entitled to an elective share, and if so, the clerk shall then determine the elective share and shall order the personal representative to transfer that amount to the surviving spouse. The clerk's order shall recite specific findings of fact and conclusions of law in arriving at the decedent's Total Net Assets, Property Passing to Surviving Spouse, and the elective share.

(g) Appeals. — Any party in interest may appeal from the decision of the clerk to the superior court. If an appeal is taken from the decision of the clerk, that appeal shall have the effect of staying the judgment and order of the clerk until the cause is heard and determined by the superior court upon the appeal taken. Upon an appeal taken from the clerk to the superior court, the judge may review the findings of fact by the clerk and may find the facts or take other evidence, but the facts found by the judge shall be final and conclusive upon any appeal to the Appellate Division. (2000-178, s. 2.)

CASE NOTES

I. DECISIONS UNDER PRIOR LAW.

A. In General.

Editor's Note. *— The cases below were decided under former §§ 30-1 to 30-3 and corresponding prior provisions, relating to the right to dissent.*

Legislative Policy. — Former § 30-2(b), relating to how and by whom dissent could be given, was an expression of legislative policy which the Court of Appeals would not vitiate. In re Estate of Burleson, 24 N.C. App. 136, 210 S.E.2d 114 (1974).

The legislature has created a two-step process to be used when a surviving spouse attempts to dissent from a deceased spouse's will (claim an elective share): the first step is to determine if the surviving spouse has the right to dissent (to claim an elective share), and the second step is to determine the consequences. In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990); Funk v. Masten, 121 N.C. App. 364, 465 S.E.2d 322 (1996).

Widow Required to Comply with Statute. — Although a will gave a widow nothing, she was nevertheless required to comply with former section. First-Citizens Bank & Trust Co. v. Willis, 257 N.C. 59, 125 S.E.2d 359 (1962).

Dissent signed by a subscribing witness did not comply with former § 30-2(b). In re Estate of Burleson, 24 N.C. App. 136, 210 S.E.2d 114 (1974).

To hold that the signature by a subscribing witness satisfied the acknowledgment required by former § 30-2(b) would constitute judicial repeal of the 1959 amendment of that section, which provided for acknowledgment of dissents. In re Estate of Burleson, 24 N.C. App. 136, 210 S.E.2d 114 (1974).

The guardian of an incompetent widower was authorized to file a dissent by him

from his wife's will under former § 30-2. Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967).

Filing Creates Vested Right. — The timely and correct filing of a proper dissent under former § 30-1 et seq. constituted an exercise of the right to dissent and created a vested property right in the dissenting spouse. Tighe v. Michal, 41 N.C. App. 15, 254 S.E.2d 538 (1979).

The dissenting spouse, upon filing dissent to the will under former § 30-1 et seq., became vested, eo instanti, as of the date of the testator's death, with title to the intestate share of the testator's realty which was allowed by the statutes providing therefor. Etheridge v. Etheridge, 41 N.C. App. 44, 255 S.E.2d 729 (1979), cert. denied, 299 N.C. 735, 267 S.E.2d 660 (1980).

Prompt Determination of Right. — The legislature intended for the right to dissent under former § 30-1 et seq. to be determined as quickly as possible after the dissent was filed. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Sufficiency of Marital Trust. — Where under the terms of a trust established for his wife by the testator, the trustee was required to fund the trust with assets which would give wife a life income the value of which (when added to the value of other assets passing to wife under and outside the will) would be equal to her intestate share, and there were no allegations or evidence that the assets of the estate were insufficient to meet this requirement, the marital trust established for wife was not insufficient, as a matter of law, to defeat her right of dissent under former law. In re Estate of Finch, 97 N.C. App. 489, 389 S.E.2d 126 (1990).

Surviving Spouse Held to Have No Right to Dissent. — Under prior statutes, where surviving spouse under will received all of his deceased wife's personal property and, outside the will, received real property owned by the entireties, which was all the real property, he had no right to dissent, because he received everything that he would have received had his wife died without a will. In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990).

Notice to Executor of Intentions of Dissenting Spouse. — The giving of notice of dissent to the clerk of superior court under former § 30-2(a) was sufficient to alert the executor with respect to the intentions of the dissenting spouse and afford him ample opportunity to prepare for a hearing on the question of the spouse's statutory right to dissent under former § 30-1. In re Estate of Kirkman, 38 N.C. App. 515, 248 S.E.2d 438 (1978), cert. denied, 296 N.C. 584, 254 S.E.2d 31 (1979).

Duty of Clerk to Record Filing. — While former § 30-2 merely required filing of dissent, it was the duty of the clerk to record the dissent when filed. Philbrick v. Young, 255 N.C. 737, 122 S.E.2d 725 (1961).

Effect of Recording. — Recording creates the presumption that the instrument was the act of the widow done in the time and manner required by law. Philbrick v. Young, 255 N.C. 737, 122 S.E.2d 725 (1961).

B. Time Limitations.

Former § 30-2 was a statute of limitation, not an enabling statute. The period provided a widow to dissent from her husband's will was not a condition precedent to that right, but merely limited the time in which she could resort to the courts to enforce it. Whitted v. Wade, 247 N.C. 81, 100 S.E.2d 263 (1957); Taylor v. Taylor, 301 N.C. 357, 271 S.E.2d 506 (1980).

Former § 30-2 was a statute of limitations. It extinguished no right, but limited the time in which a widow could enforce the right the law gave her to participate in her husband's estate. First-Citizens Bank & Trust Co. v. Willis, 257 N.C. 59, 125 S.E.2d 359 (1962).

Filing Procedure Not Determinative of Right. — The filing procedure prescribed by former § 30-3.4(a) was merely a limitation on the time within which a surviving spouse had to note her dissent of record. It was not conditioned upon or determinative of the right to dissent, which might not be established until some later date. 292 N.C. 729, 235 S.E.2d 783 (1977); Phillips v. Phillips, 34 N.C. App. 428, 238 S.E.2d 790 (1977), rev'd on other grounds, 296 N.C. 590, 252 S.E.2d 761 (1979).

Effect of Failure to File Within Time Specified. — Failure to dissent under former § 30-2 within the time specified did not extinguish the right, it simply barred the action therefor. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

Time as to When Right Would Arise. — Although a surviving spouse's right to dissent under prior statutes could not be established until a mathematical computation of the value of the deceased spouse's estate was made, the right to dissent generally arose as of the date of the death of the deceased spouse or it never arose. Tighe v. Michal, 41 N.C. App. 15, 254 S.E.2d 538 (1979).

The right time, manner and effect of filing and recording a dissent to a will under former § 30-1 were all matters within the probate jurisdiction of the clerk of superior court. In re Estate of Outen, 77 N.C. App. 818, 336 S.E.2d 436 (1985), cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

To establish the right to dissent, under former § 30-1, a spouse had to make a timely filing, and to show an entitlement to that right. In re Estate of Outen, 77 N.C. App. 818, 336

S.E.2d 436 (1985), cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

Time Limitations of Six Months. — Former § 30-1 allowed a surviving spouse six months from the probate of the will within which to dissent. Joyce v. Joyce, 260 N.C. 757, 133 S.E.2d 675 (1963).

Time Is to Enable Surviving Spouse to Reach Intelligent Conclusion. — Time is allowed by statute to enable the surviving spouse to make an examination into the value of the estate, the debts and liabilities, and for her to come to an intelligent conclusion as to the course she should pursue under all the circumstances that surround her. Joyce v. Joyce, 260 N.C. 757, 133 S.E.2d 675 (1963).

Statute Tolled by Disability. — The six-month period of limitation in former § 30-2 for dissenting from a will in probate was a statute of limitations which could be tolled by § 1-17 for a disability. In re Estate of Owens, 117 N.C. App. 118, 450 S.E.2d 2 (1994).

Appointment of Guardian after Six Months. — Where no guardian for an insane widow was appointed within six months after her husband's will was proved, but one was subsequently appointed and he filed a dissent on her behalf on the day he was appointed, the widow was not barred by the statute of limitations in former § 30-2, but could bring the action through a guardian as within three years after the disability was removed pursuant to § 1-17. Whitted v. Wade, 247 N.C. 81, 100 S.E.2d 263 (1957).

Statute Ran Against Insane Widow from Appointment of Guardian. — The statute of limitation provided in former § 30-2 began to run against an insane widow's right to dissent from the date a guardian was appointed. First-Citizens Bank & Trust Co. v. Willis, 257 N.C. 59, 125 S.E.2d 359 (1962).

Although an insane widow received nothing in the will of her husband, the failure of her guardian to dissent for her within six months of his qualification barred her right of dissent under former § 30-2 at the end of that period. First-Citizens Bank & Trust Co. v. Willis, 257 N.C. 59, 125 S.E.2d 359 (1962).

When Dissent Timely. — Under former § 30-2, so long as the dissent was filed within six months after the issuance of letters testamentary, or extended pursuant to former § 30-2(a), it was timely, regardless of whether the appraisal had been conducted. In re Estate of Cox, 32 N.C. App. 765, 233 S.E.2d 926, cert. denied, 292 N.C. 729, 235 S.E.2d 783 (1977).

Spouse Must File Within Time Limit Although Right Not Finally Established. — A surviving spouse could and, in fact, had to file her dissent under former § 30-1 within the statutory time period even though her right to dissent was not finally established until after the statutory time period had expired due to the necessity of ascertaining "net estate." Phillips v. Phillips, 34 N.C. App. 428, 238 S.E.2d 790 (1977), rev'd on other grounds, 296 N.C. 590, 252 S.E.2d 761 (1979).

C. Valuation.

Constitutionality of Methods of Determining Values. — The values which must be determined under the statutory procedure can be reasonably ascertained by the use of aids such as tax tables and expert witnesses, and the procedure is not constitutionally invalid. The procedure set forth in former statute did not approach that level of arbitrary governmental action necessary to support a claim of denial of due process. In re Estate of Kirkman, 38 N.C. App. 515, 248 S.E.2d 438 (1978), cert. denied, 296 N.C. 584, 254 S.E.2d 31 (1979).

Contributions by Surviving Spouse Excluded. — The plain meaning of former § 30-1 completely excluded any property or interest in property to the extent that the surviving spouse gave, donated, contributed, or paid for it. Funk v. Masten, 126 N.C. App. 529, 485 S.E.2d 890 (1997).

Purposes for Which Established Value Binding under Former Statute. — Any determination and establishment of value made as provided in former § 30-1 was binding only for the purposes of determining whether there was a right of dissent. In re Kirkman, 302 N.C. 164, 273 S.E.2d 712 (1981).

Method for Determining Different Benefits. — Former § 30-1(c) provided a method by which to determine the value of benefits under the will and the benefits in case of intestacy. North Carolina Nat'l Bank v. Stone, 263 N.C. 384, 139 S.E.2d 573 (1965).

Right Mathematically Determined by Value of Property. — Former § 30-1 provided that when values were determined as set out therein, they would be final for determining the right of dissent and should be used exclusively for this purpose. No doubt when this legislation was enacted it was contemplated that the right to dissent would be thus mathematically established. In re Estate of Connor, 5 N.C. App. 228, 168 S.E.2d 245 (1969).

Under former § 30-1, if A equalled the aggregate value of provisions under the will for the benefit of the surviving spouse and B equalled the value of property or interests in property passing in any manner outside the will to the surviving spouse as a result of the death of the testator, and C equalled the net estate of the decedent, then the surviving spouse was entitled to dissent from his wife's will if A plus B was less than one-half of C; that is, if $A + B < 1/2(C)$. In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990).

Under former § 30-1, statutory scheme contemplated that the surviving spouse's right of dissent would be established by a mathemati-

cal computation. Taylor v. Taylor, 301 N.C. 357, 271 S.E.2d 506 (1980).

And Right Could Not Be Established Until Property Is Determined and Valued. — In the absence of a determination and valuation of the property passing to the surviving spouse under the will and outside the will as of the date of the death of the deceased spouse as provided by former § 30-1, there could be no proper determination of whether the right to dissent had been established. When the property involved is determined and valued as provided by statute, then the right of dissent can be determined mathematically. In re Estate of Connor, 5 N.C. App. 228, 168 S.E.2d 245 (1969).

Where the record was bare of any recitation of values necessary to determine if plaintiff could indeed dissent from decedent's will under former § 30-1, and contained no findings or conclusions as to plaintiff's right to dissent, the issue was not ripe for resolution and was nonjusticiable. Funk v. Masten, 121 N.C. App. 364, 465 S.E.2d 322 (1996).

Property Determined and Valued as of Date of Testator's Death. — Former statute, which permitted dissent in certain instances, also required that the property involved be determined and valued as of the date of death of the testator. The procedure was mandatory. In re Estate of Connor, 5 N.C. App. 228, 168 S.E.2d 245 (1969).

Determination Made from Net, Not Gross, Estate. — Former § 30-1(c) did not require the intestate share to be determined, for purposes of establishing the right to dissent, from decedent's gross estate valued as of the date of his death rather than from net estate. Phillips v. Phillips, 34 N.C. App. 428, 238 S.E.2d 790 (1977), rev'd on other grounds, 296 N.C. 590, 252 S.E.2d 761 (1979).

In establishing the right of a surviving spouse to dissent pursuant to former § 30-1(a)(1), the determination of intestate share would be based on the value of the decedent's net estate, as provided in Chapter 29, § 29-1 et seq. Phillips v. Phillips, 34 N.C. App. 428, 238 S.E.2d 790 (1977), rev'd on other grounds, 296 N.C. 590, 252 S.E.2d 761 (1979).

Computation of Net Estate. — To ascertain "net estate" under § 29-2(5), it is necessary to subtract from the value of the gross estate, "family allowances, costs of administration, and all lawful claims against the estate." Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Since the intestate share of any surviving spouse, or other heir, is ordinarily a percentage of the decedent's net estate, for purposes of former § 30-1, the amount of the net estate had to be determined within limits which would permit the court to ascertain with substantial accuracy whether the value of the intestate share of the surviving spouse was less or greater than the value of the property passing to her in and outside the will. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Value Seldom Determined with Complete Accuracy Prior to Final Account. — Prior to the time the personal representative files his final account, it will seldom, if ever, be possible to determine with complete accuracy the value of the testator's net estate and the intestate share of the surviving spouse. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Estimating Value of Net Estate. — Under former § 30-1, the right to dissent was to be determined by the clerk whenever, in his judgment, the value of the "net estate" could be estimated with reasonable accuracy, rather than such time as the actual value of the net estate could be ascertained, i.e., at the time of distribution. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Property Owned as Tenants by Entirety. — Under former § 30-1, the value of real property owned by couple as tenants by the entirety was not to be included in testatrix's net estate. In re Estate of Francis, 94 N.C. App. 744, 381 S.E.2d 484, rev'd on other grounds, 327 N.C. 101, 394 S.E.2d 150 (1990).

Real property held as tenants by the entirety could not be included in net estate for purposes of determining right to dissent under former § 30-1. In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990).

For purposes of former § 30-1, real property owned by the entireties was included in the value of property passing to surviving spouse outside the will as a result of the death of the testator. In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990).

Funds held by testator-spouse in joint tenancy with right of survivorship with third party established pursuant to § 41-2.1(a) did not become part of testator-spouse's net estate for purposes of former § 30-1. In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990).

Listing Survivorship Accounts on 90-Day Inventory Did Not Make Those Accounts Part of Net Estate. — Fact that executrix listed one-half of funds in survivorship accounts on 90-day inventory to comply with § 41-2.1(b)(3) and (b)(4) did not make the funds part of the net estate for purposes of determining her right to dissent under former § 30-1. In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990).

Bank Account Held as Joint Tenants. — Where testatrix retained complete control over the assets of the bank account held by herself and her husband as joint tenants with right of survivorship until the moment of her death, public policy expressed in the former dissent statutes would be served by including in the net estate for purposes of the dissent statute the

value of the bank accounts. In re Estate of Francis, 94 N.C. App. 744, 381 S.E.2d 484, rev'd on other grounds, 327 N.C. 101, 394 S.E.2d 150 (1990).

Property Given or Paid for by Surviving Spouse. — The plain meaning of former § 30-1 completely excluded any property or interest in property to the extent that the surviving spouse gave, donated, contributed, or paid for it. Once the property was excluded, no other valuation as to that specific property could be made. Funk v. Masten, 126 N.C. App. 529, 485 S.E.2d 890 (1997).

Property Held as Tenants by Entirety and Paid for by Surviving Spouse. — For purposes of calculating the surviving spouse's right to dissent (right to claim an elective share), none of the value of the property owned as tenants by the entirety could be included in the value of property passing outside the will to the surviving spouse when the surviving spouse contributed the total purchase price of the property. Funk v. Masten, 126 N.C. App. 529, 485 S.E.2d 890 (1997).

Federal estate tax was a "lawful claim" against testator's estate, for purposes of former § 30-1 and the widow's intestate share of the estate was to be computed after its deduction. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Variance between Valuations and Ultimate Distributive Share. — The language of former § 30-1(c), which established a valuation procedure for the purpose of establishing the right of dissent and mandated that the value so determined be used exclusively for that purpose, indicated that the General Assembly anticipated a variance between this valuation and the ultimate distributive share. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Clerk's Approval of Valuation Required. — To establish her entitlement to the right of dissent under former § 30-1, surviving spouse was required to obtain the clerk's approval of the value of the property passing to her under and outside her husband's will as of the date of his death. Greene v. Lynch, 51 N.C. App. 665, 277 S.E.2d 454 (1981).

Agreement as to Valuation. — Under former § 30-1, absent a showing that the parties failed to act in an arm's length manner, or that the rights of creditors of the estate would be adversely affected thereby, it was proper for the clerk ought to abide by an agreement as to the valuation of the estate and the testate and intestate shares thereof. Taylor v. Taylor, 301 N.C. 357, 271 S.E.2d 506 (1980).

Agreement Between Personal Representative and Dissenting Spouse as to Net Estate. — Where the testator's personal representative and the dissenting spouse, dealing at arm's length, were able to agree upon the value of the "net estate," the clerk or the court would ordinarily abide by this agreement in determining the right to dissent under former § 30-1. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Compliance with Statute. — Where plaintiff filed a dissent to her late husband's will, pursuant to former § 30-1, and the administrator with the will annexed and the other devisees under the will implicitly assented to the wife's valuation of the estate and her testate and intestate shares thereof by conceding her right to dissent from the will, the parties complied with the provisions of former § 30-1(c) with respect to an agreement as to valuation except for procuring the approval of the clerk of their valuation. Taylor v. Taylor, 301 N.C. 357, 271 S.E.2d 506 (1980).

§ 30-3.5. Recovery of assets by personal representative.

(a) Recovery of Assets. — The personal representative is entitled to recover proportionately from all persons, other than the surviving spouse, receiving or in possession of any of the decedent's Total Net Assets a sufficient amount to enable the personal representative to pay the elective share. The apportionment shall be made in the proportion that the value of the interest of each person receiving or in possession of any of Total Net Assets bears to Total Net Assets, excluding any Property Passing to Surviving Spouse. The only persons subject to contribution to make up the elective share are (i) original recipients of property comprising the decedent's Total Net Assets, and subsequent gratuitous inter vivos donees or persons claiming by testate or intestate succession to the extent those persons have the property or its proceeds on or after the date of decedent's death, and (ii) a fiduciary, as to the property under the fiduciary's control at or after the time a fiduciary receives notice that a surviving spouse has claimed an elective share. A fiduciary shall not be considered to have notice until it receives notice at its address as shown in the decedent's estate papers in the clerk's office or, if there are no such papers or no such address is shown in those papers, at the fiduciary's residence or the office of its registered agent.

The personal representative may withhold from any property of the decedent in his possession, distributable to any person subject to apportionment, the amount of the elective share apportioned to such person. If the property in possession of the personal representative and distributable to any person subject to apportionment is insufficient to satisfy the proportionate amount of the elective share determined to be due from that person, the personal representative may recover the deficiency from that person. If the property is not in possession of the personal representative, the personal representative may recover from the person the amount of the elective share apportioned to that person in accordance with this Article. If the personal representative cannot reasonably collect from any person subject to apportionment the amount of the elective share apportioned to that person, the amount not reasonably recoverable shall, with the approval of the clerk, be apportioned among the other persons who are subject to apportionment. The apportionment shall be made in the proportion that the value of the interest of each remaining person bears to the total value of the interests of all remaining persons.

(b) Standstill Order. — After the filing of the petition demanding an elective share, either the personal representative or surviving spouse may request the clerk to issue an order that any recipients not dispose of any of the decedent's Total Net Assets pending the hearing. The decision to issue such an order shall be in the discretion of the clerk.

(c) Satisfaction of Liability. — A person receiving or in possession of any of the decedent's Total Net Assets may pay his proportionate elective share liability with respect to that property by any of the following methods:

(1) Conveyance of the property included in the decedent's Total Net Assets;

(2) Payment of the value of his liability in cash or, upon agreement of the surviving spouse, other property; or

(3) Partial conveyance and partial payment under subdivisions (1) and (2) of this subsection, provided the value conveyed and paid is equal to his liability.

(d) Expenses. — The expenses reasonably incurred by the personal representative in connection with the appraisal or recovery of assets shall be apportioned as provided for the elective share under this Article. If the personal representative finds that it is inequitable to apportion the expenses because those expenses were incurred because of the fault of one or more persons subject to apportionment, the personal representative may direct other more equitable apportionment, with the approval of the clerk.

(e) Bond. — If property held by the personal representative is distributed prior to final apportionment of the elective share, the personal representative may require the distributee to provide a bond or other security for the apportionment liability in the form and amount prescribed by the personal representative, with the approval of the clerk. (2000-178, s. 2.)

CASE NOTES

I. Decisions under Prior Law.

I. DECISIONS UNDER PRIOR LAW.

Editor's Note. *— The cases below were decided under former §§ 30-1 to 30-3 and corresponding prior provisions, relating to the right to dissent.*

Allocation so as to Cause Least Disruption of Decedent's Plan. — When a surviving spouse dissented from a will under former § 30-1 et seq., the intestate share was to be allocated so as to cause the least possible disruption of the decedent's plan for the distribution of his estate. Insofar as possible the beneficiaries of the will were to receive the property testatrix intended for them to receive. In re Estate of Etheridge, 33 N.C. App. 585, 235

S.E.2d 924, cert. denied, 293 N.C. 253, 237 S.E.2d 535 (1977).

Property from Which General Legacies Come as Asset. — When the property from which general legacies must come provides income, it is a general asset of the estate subject to the payment of debts and disposition under the terms of the will; hence, under former § 30-1 et seq., where a widow dissented, it would be proportionately distributed to her under the applicable statute. First Union Nat'l Bank v. Melvin, 259 N.C. 255, 130 S.E.2d 387 (1963).

§ 30-3.6. Waiver of rights.

(a) The right of a surviving spouse to claim an elective share may be waived, wholly or partially, before or after marriage, with or without consideration, by a written waiver signed by the surviving spouse.

(b) A waiver is not enforceable if the surviving spouse proves that:

(1) The waiver was not executed voluntarily; or

(2) The surviving spouse was not provided a fair and reasonable disclosure of the property and financial obligations of the decedent, unless the surviving spouse waived, in writing, the right to that disclosure. (2000-178, s. 2.)

CASE NOTES

I. Decisions under Prior Law.

I. DECISIONS UNDER PRIOR LAW.

Editor's Note. *— The cases below were decided under former §§ 30-1 to 30-3 and corresponding prior provisions, relating to the right to dissent.*

Family settlement agreements are favored by the law; however, such an agreement is invalid unless all who receive under the will join in the agreement. In re Estate of Outen, 77 N.C. App. 818, 336 S.E.2d 436 (1985), cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

Alleged agreement between widow and estate was not a "family settlement agreement," where it was never executed by all of the beneficiaries under the will. In re Estate of Outen, 77 N.C. App. 818, 336 S.E.2d 436 (1985), cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

Release of Right Held Effective. — Although husband's release did not enumerate the statutory right to dissent under former § 30-1, where it did release "all rights or claims of curtesy, inheritance, descent, and distribution and all other rights or claims growing out of the marital relationship between the parties ... [and] all rights in the estate of the said wife, real, personal and mixed, now owned or hereafter acquired by her," this full and final settlement of such rights encompassed the unenumerated statutory right of dissent under former statute. In re Estate of Tucci, 94 N.C. App. 428, 380 S.E.2d 782, cert. denied as to additional issues, 325 N.C. 271, 384 S.E.2d 514 (1989), aff'd, 326 N.C. 359, 388 S.E.2d 768 (1990).

Release Held Not Rescinded by Resumption of Cohabitation. — Where husband and wife's combined separation agreement and property settlement expressly provided that in the event of resumption of cohabitation by the parties the separation agreement and property settlement would remain in full force and effect, and there was no other evidence of rescission, the couple's reconciliation prior to the wife's death did not imply a rescission of husband's release of his right to dissent under former section. In re Estate of Tucci, 94 N.C. App. 428, 380 S.E.2d 782, cert. denied as to additional issues, 325 N.C. 271, 384 S.E.2d 514 (1989), aff'd, 326 N.C. 359, 388 S.E.2d 768 (1990).

ARTICLE 4.

Year's Allowance.

Part 1. Nature of Allowance.

§ 30-15. When spouse entitled to allowance.

Every surviving spouse of an intestate or of a testator, whether or not he has petitioned for an elective share, shall, unless he has forfeited his right thereto, as provided by law, be entitled, out of the personal property of the deceased spouse, to an allowance of the value of ten thousand dollars ($10,000) for his support for one year after the death of the deceased spouse. Such allowance shall be exempt from any lien, by judgment or execution, acquired against the property of the deceased spouse, and shall, in cases of testacy, be charged against the share of the surviving spouse. (1868-9, c. 93, s. 81; 1871-2, c. 193, s. 44; 1880, c. 42; Code, s. 2116; 1889, c. 499, s. 2; Rev., s. 3091; C.S., s. 4108; 1953, c. 913, s. 1; 1961, c. 316, s. 1; c. 749, s. 1; 1969, c. 14; 1981, c. 413, s. 1; 1995, c. 262, s. 4; 2000-178, s. 4.)

Cross References. — As to right of elective share, see § 30-3.1 et seq.

Effect of Amendments. — Session Laws 2000-177, s. 4, effective January 1, 2001, and applicable to estates of decedents dying on or after that date, substituted "petitioned for an elective share" for "dissented from the will."

Chapter 31.

Wills.

Article 2.

Revocation of Will.

Article 1.

Execution of Will.

§ 31-3.5. Nuncupative will.

CASE NOTES

"Last Sickness." — Where genuine issues of fact existed as to whether decedent reasonably believed he was in the last stage of a chronic disease and whether he was actually in his "last sickness," summary judgment was inappropriate. In re Will of Krantz, 135 N.C. App. 354, 520 S.E.2d 96 (1999).

Article 2.

Revocation of Will.

§ 31-5.3. Will not revoked by marriage; dissent from will made prior to marriage.

A will is not revoked by a subsequent marriage of the maker; and the surviving spouse may petition for an elective share when there is a will made prior to the marriage in the same manner, upon the same conditions, and to the same extent, as a surviving spouse may petition for an elective share when there is a will made subsequent to marriage. (1844, c. 88, s. 10; R.C., c. 119, s. 23; Code, s. 2177; Rev., s. 3116; C.S., s. 4134; 1947, c. 110; 1953, c. 1098, s. 5; 1967, c. 128; 2000-178, s. 5.)

Cross References. — As to right of elective share, see § 30-3.1 et seq.

Effect of Amendments. — Session Laws 2000-178, s. 5, effective January 1, 2001, and applicable to estates of decedents dying on or after that date, substituted petition for an elective share when there is a" for "dissent from such" and substituted "petition for an elective share when there is" for "dissent from."

Article 5.

Probate of Will.

§ 31-12. Executor may apply for probate.

CASE NOTES

Cited in Bueltel v. Lumber Mut. Ins. Co., 134 N.C. App. 626, 518 S.E.2d 205 (1999), cert. denied, 351 N.C. 186, — S.E.2d — (1999).

§ 31-19. Probate conclusive until vacated; substitution of consolidated bank as executor or trustee under will.

CASE NOTES

Quoted in Bueltel v. Lumber Mut. Ins. Co., 134 N.C. App. 626, 518 S.E.2d 205 (1999), cert. denied, 351 N.C. 186, — S.E.2d — (1999).

Chapter 31A.

Acts Barring Property Rights.

Article 1.

Rights of Spouse.

Article 1.

Rights of Spouse.

§ 31A-1. Acts barring rights of spouse.

(a) The following persons shall lose the rights specified in subsection (b) of this section:

(1) A spouse from whom or by whom an absolute divorce or marriage annulment has been obtained or from whom a divorce from bed and board has been obtained; or

(2) A spouse who voluntarily separates from the other spouse and lives in adultery and such has not been condoned; or

(3) A spouse who wilfully and without just cause abandons and refuses to live with the other spouse and is not living with the other spouse at the time of such spouse's death; or

(4) A spouse who obtains a divorce the validity of which is not recognized under the laws of this State; or

(5) A spouse who knowingly contracts a bigamous marriage.

(b) The rights lost as specified in subsection (a) of this section shall be as follows:

(1) All rights of intestate succession in the estate of the other spouse;

(2) All right to claim or succeed to a homestead in the real property of the other spouse;

(3) All right to petition for an elective share of the estate of the other spouse and take either the elective intestate share provided or the life interest in lieu thereof;

(4) All right to any year's allowance in the personal property of the other spouse;

(5) All right to administer the estate of the other spouse; and

(6) Any rights or interests in the property of the other spouse which by a settlement before or after marriage were settled upon the offending spouse solely in consideration of the marriage.

(c) Any act specified in subsection (a) of this section may be pleaded in bar of any action or proceeding for the recovery of such rights, interests or estate as set forth in subsection (b) of this section.

(d) The spouse not at fault may sell and convey his or her real and personal property without the joinder of the other spouse, and thereby bar the other spouse of all right, title and interest therein in the following instances:

(1) During the continuance of a separation arising from a divorce from bed and board as specified in subsection (a)(1) of this section, or

(2) During the continuance of a separation arising from adultery as specified in subsection (a)(2) of this section, or during the continuance of a separation arising from an abandonment as specified in subsection (a)(3) of this section, or

(3) When a divorce is granted as specified in subsection (a)(4) of this section, or a bigamous marriage contracted as specified in subsection (a)(5) of this section. (1961, c. 210, s. 1; 1965, c. 850; 2000-178, s. 6.)

Cross References. — As to right of elective share, see § 30-3.1 et seq.

Effect of Amendments. — Session Laws 2000-178, s. 6, effective January 1, 2001, and applicable to estates of decedents dying on or after that date, in subdivision (b)(3), substituted "petition for an elective share of the estate" for "dissent from the will" and inserted "elective."

CASE NOTES

"Living in Adultery" — Considering the legislative history and the purpose of this section, "living in adultery" means a spouse engages in repeated acts of adultery within a reasonable period of time preceding the death of her spouse; therefore, "living in adultery" requires a showing of something more than "committing adultery," or a single act of adultery, and something less than "residing" in adultery because the latter construction would permit spouses to engage in habitual adultery with those with whom they do not reside and nevertheless be qualified to administer their decedent spouse's estate under section 28A-6-1. In re Estate of Montgomery, — N.C. App. —, 528 S.E.2d 618, 2000 N.C. App. LEXIS 422 (2000).

Summary judgment was appropriate for the defendant under this section where the evidence failed to support a finding of willful abandonment of the deceased, and that any failure to care for, or cohabit with, her was due to the advanced age and deteriorating health of both spouses. Meares v. Jernigan, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 612 (June 6, 2000).

Article 2.

Parents.

§ 31A-2. Acts barring rights of parents.

CASE NOTES

Abandonment Found. — Where respondent/mother never provided child support for her daughters, rarely visited them, and voluntarily relinquished custody a year before a divorce judgment, a jury could conclude that she had abandoned her daughters. Hixson v. Krebs, 136 N.C. App. 183, 523 S.E.2d 684 (1999).

Article 4.

General Provisions.

§ 31A-15. Chapter to be broadly construed.

CASE NOTES

Applied in In re Estate of Montgomery, — N.C. App. —, 528 S.E.2d 618, 2000 N.C. App. LEXIS 422 (2000).

Stated in Meares v. Jernigan, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 612 (June 6, 2000).

Chapter 31B.

Renunciation of Property and Renunciation of Fiduciary Powers Act.

Sec.
31B-4. Waiver and bar.

§ 31B-4. Waiver and bar.

(a) The right to renounce property or an interest therein is barred by:
(1) An assignment, conveyance, encumbrance, pledge, or transfer of the property or interest, or a contract therefor by the person authorized to renounce,
(2) A written waiver of the right to renounce, or
(3) Repealed by Session Laws 1998-148, s. 4.
(4) A sale of the property or interest under judicial sale made before the renunciation is effected.

(b) The renunciation or the written waiver of the right to renounce is binding upon the renouncer or person waiving and all persons claiming through or under him.

(c) A fiduciary's application for appointment or assumption of duties as fiduciary does not waive or bar the fiduciary's right to renounce a right, power, privilege, or immunity.

(d) No person shall be liable for distributing or disposing of property in reliance upon the terms of a renunciation that is invalid for the reason that the right of renunciation has been waived or barred, if the distribution or disposition is otherwise proper, and the person has no actual knowledge of the facts that constitute a waiver or bar to the right of renunciation.

(e) The right to renounce property or an interest in property pursuant to this Chapter is not barred by an acceptance of the property, interest, or benefit thereunder; provided, however, an acceptance of the property, interest, or benefit thereunder may preclude such renunciation from being a qualified renunciation for federal and State inheritance, estate, and gift tax purposes. (1975, c. 371, s. 1; 1989, c. 684, s. 6; 1998-148, ss. 4, 5; 2000-140, s. 8.)

Effect of Amendments. — Session Laws 2000-140, s. 8, effective July 21, 2000, added "or" at the end of subdivision (a)(2).

Chapter 31C.

Uniform Disposition of Community Property Rights at Death Act.

Sec.
31C-3. Disposition of community property upon death.

§ 31C-3. Disposition of community property upon death.

Upon death of a married person, one half of the property to which this Chapter applies is the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the laws of succession of this State. One half of that property is the property of the decedent and is subject to testamentary disposition or distribution under the laws of succession of this State. With respect to property to which this Chapter applies, the one half of the property of the decedent is not subject to the surviving spouse's right to petition for an elective share under the provisions of Article 1A of Chapter 30, and is not subject to the right to elect a life estate under the provisions of Article 8 of Chapter 29. (1981, c. 882, s. 1; 2000-178, s. 7.)

Cross References. — As to right of elective share, see § 30-3.1 et seq.

Effect of Amendments. — Session Laws 2000-178, s. 7, effective January 1, 2001, and applicable to estates of decedents dying on or after that date, substituted "petition for an elective share" for "dissent from the will" and substituted "Article 1A of Chapter 30" for "Article 1 of Chapter 30."

Chapter 32A.

Powers of Attorney.

Article 2.

Durable Power of Attorney.

§ 32A-11. File with clerk, records, inventories, accounts, fees, and commissions.

CASE NOTES

Quoted in Wilson v. Watson, — N.C. App. —, 524 S.E.2d 812, 2000 N.C. App. LEXIS 51 (2000).

Article 2A.

Authority of Attorney-In-Fact to Make Gifts.

§ 32A-14.1. Gifts under power of attorney.

CASE NOTES

Illustrative Cases. — Plaintiff/niece was entitled to summary judgment as a matter of law where the defendant/step-daughter, purporting to act under the power of attorney, deeded the decedent's real property to herself and acted beyond the scope of her authority as his attorney in fact. Hutchins v. Dowell, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 781 (July 5, 2000).

Chapter 35A.

Incompetency and Guardianship.

SUBCHAPTER I. PROCEEDINGS TO DETERMINE INCOMPETENCE.

ARTICLE 1.

Determination of Incompetence.

§ 35A-1107. (Effective July 1, 2001) 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. 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. (1987, c. 550, s. 1; 2000-144, s. 33.)

For this section as in effect until July 1, 2001, see the main volume.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Effect of Amendments. — Session Laws 2000-144, s. 33, effective July 1, 2001, substituted "an appointed" for "court-appointed" in the first sentence, in the second sentence substituted "petition, an attorney shall be appointed as guardian ad litem to" for "petition, the clerk shall appoint as guardian ad litem an attorney who shall" and added "may be discharged" and added the last sentence.

ARTICLE 3.

Restoration to Competency.

§ 35A-1130. Proceedings before clerk.

(a) The guardian, ward, or any other interested person may petition for restoration of the ward to competency by filing a motion in the cause of the incompetency proceeding with the clerk who is exercising jurisdiction therein. The motion shall be verified and shall set forth facts tending to show that the ward is competent.

(b) Upon receipt of the motion, the clerk shall set a date, time, and place for a hearing, which shall be not less than 10 days or more than 30 days from service of the motion and notice of hearing on the ward and the guardian, or on the one of them who is not the petitioner, unless the clerk for good cause directs

otherwise. The petitioner shall cause notice and a copy of the motion to be served on the guardian and ward (but not on one who is the petitioner) and any other parties to the incompetency proceeding. Service shall be in accordance with provisions of G.S. 1A-1, Rule 4, Rules of Civil Procedure.

(c) **(Effective until July 1, 2001)** At the hearing on the motion, the ward shall be entitled to be represented by counsel or guardian ad litem, and the clerk shall appoint a guardian ad litem if the ward is indigent and not represented by counsel. Upon motion of any party or the clerk's own motion, the clerk may order a multidisciplinary evaluation. The ward has a right, upon request by him, his counsel, or his guardian ad litem to trial by jury. Failure to request a trial by jury shall constitute a waiver of the right. The clerk may nevertheless require trial by jury in accordance with G.S. 1A-1, Rule 39(b), Rules of Civil Procedure, by entering an order for trial by jury on his own motion. Provided, if there is a jury in a proceeding for restoration to competency, it shall be a jury of six persons selected in accordance with the provisions of Chapter 9 of the General Statutes.

(c) **(Effective July 1, 2001)** At the hearing on the motion, the ward shall be entitled to be represented by counsel or guardian ad litem, and a guardian ad litem shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services if the ward is indigent and not represented by counsel. Upon motion of any party or the clerk's own motion, the clerk may order a multidisciplinary evaluation. The ward has a right, upon request by him, his counsel, or his guardian ad litem to trial by jury. Failure to request a trial by jury shall constitute a waiver of the right. The clerk may nevertheless require trial by jury in accordance with G.S. 1A-1, Rule 39(b), Rules of Civil Procedure, by entering an order for trial by jury on his own motion. Provided, if there is a jury in a proceeding for restoration to competency, it shall be a jury of six persons selected in accordance with the provisions of Chapter 9 of the General Statutes.

(d) If the clerk or jury finds by a preponderance of the evidence that the ward is competent, the clerk shall enter an order adjudicating that the ward is restored to competency. Upon such adjudication, the ward is authorized to manage his affairs, make contracts, control and sell his property, both real and personal, and exercise all rights as if he had never been adjudicated incompetent.

(e) The filing and approval of final accounts from the guardian and the discharge of the guardian shall be as provided in Subchapter II of this Chapter.

(f) If the clerk or jury fails to find that the ward should be restored to competency, the clerk shall enter an order denying the petition. The ward may appeal from the clerk's order to the superior court for trial de novo. (1987, c. 550, s. 1; 2000-144, s. 34.)

Subsection (c) Set Out Twice. — The first version of subsection (c) set out above is effective until July 1, 2001. The second version of subsection (c) set out above is effective July 1, 2001.

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Effect of Amendments. — Session Laws 2000-144, s. 34, effective July 1, 2001, substituted "a guardian ad litem shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services" for "the clerk shall appoint a guardian ad litem" in subsection (c).

SUBCHAPTER II. GUARDIAN AND WARD.

ARTICLE 4.

Purpose and Scope; Jurisdiction; Venue.

§ 35A-1201. Purpose.

CASE NOTES

Cited in Simmons v. Justice, 87 F. Supp. 2d 524 (W.D.N.C. 2000).

§ 35A-1202. Definitions.

CASE NOTES

Stated in Valles de Portillo v. D.H. Griffin Wrecking Co., 134 N.C. App. 714, 518 S.E.2d 555 (1999), cert. denied, 351 N.C. 188, — S.E.2d — (1999).

ARTICLE 5.

Appointment of Guardian for Incompetent Person.

§ 35A-1213. Qualifications of guardians.

CASE NOTES

The court correctly dismissed the plaintiff's challenge to this section due to a lack of standing where he failed to allege that the court would have named him his grandmother's guardian in the absence of the residency requirements of this section. Jones v. Jones, — F.3d —, 2000 U.S. App. LEXIS 12271 (4th Cir. June 5, 2000).

ARTICLE 6.

Appointment of Guardian for a Minor.

§ 35A-1224. Criteria for appointment of guardians.

CASE NOTES

Appointment of Person to Receive Minor's Death Benefits. — Clerk of Superior Court may not appoint a "general guardian" for a minor if a natural guardian, such as a biological mother, exists; however, clerk of Superior Court may appoint "some other person" to receive death benefits on behalf of minor. Valles de Portillo v. D.H. Griffin Wrecking Co., 134 N.C. App. 714, 518 S.E.2d 555 (1999), cert. denied, 351 N.C. 188, — S.E.2d — (1999).

Article 9.

Powers and Duties of Guardian of the Estate.

§ 35A-1251. Guardian's powers in administering incompetent ward's estate.

CASE NOTES

Conclusion of Law. — The court committed reversible error in allowing a county clerk to testify in the embezzlement and perjury case against an attorney regarding whether he had failed to meet the standards required by this section since that was/is a conclusion of law. State v. Linney, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 538 (May 16, 2000).

Chapter 36A.

Trusts and Trustees.

Article 9.

Alienability of Beneficial Interest; Spendthrift Trust.

Article 9.

Alienability of Beneficial Interest; Spendthrift Trust.

§ 36A-115. Alienability of beneficiary's interest; spendthrift trusts.

(a) Except as provided in subsection (b) hereof, all estates or interests of trust beneficiaries are alienable either voluntarily or involuntarily to the same extent as are legal estates or interests of a similar nature.

(b) Subsection (a) hereof shall not apply to a beneficiary's estate or interest in any one or any combination of one or more of the trusts described below, in which the beneficiary's estate or interest shall not be alienable either voluntarily or involuntarily.

(1) Discretionary Trust. — A trust wherein the amount to be received by the beneficiary, including whether or not the beneficiary is to receive anything at all, is within the discretion of the trustee. A discretionary trust within the meaning of this subsection shall also include a trust for the benefit of one or more classes of beneficiaries as defined in the trust, wherein the amount to be received by any beneficiary or class of beneficiaries, including whether or not that beneficiary or class of beneficiaries is to receive anything at all, is determined by the board of directors of a certification entity. A certification entity is one that delivers on a yearly basis to the trustee a plan describing the categories of persons or entities to whom trust distributions will be made and explaining how each category falls within the definition of class or classes of beneficiaries defined in the trust.

(2) Support Trust. — A trust wherein the trustee has no duty to pay or distribute any particular amount to the beneficiary, but has only a duty to pay or distribute to the beneficiary, or to apply on behalf of the beneficiary such sums as the trustee shall, in his discretion, determine are appropriate for the support, education or maintenance of the beneficiary.

(3) Protective Trust. — A trust wherein the creating instrument provides that the interest of the beneficiary shall cease if

a. The beneficiary alienates or attempts to alienate that interest; or

b. Any creditor attempts to reach the beneficiary's interest by attachment, levy, or otherwise; or

c. The beneficiary becomes insolvent or bankrupt. (1979, c. 180, s. 1; 2000-147, s. 7.)

Editor's Note. — Session Laws 2000-147, s. 8(a)-(c), provides: "(a) Interpretation of Act.--The foregoing sections of this act provide an additional and

alternative method for the doing of the things authorized by the act, are supplemental and additional to powers conferred by other laws, and do not derogate any powers now existing.

"(b) References in this act to specific sections or Chapters of the General Statutes are intended to be references to those sections or Chapters as amended and as they may be amended from time to time by the General Assembly.

"(c) This act, being necessary for the health and welfare of the people of the State, shall be liberally construed to effect its purposes."

Session Laws 2000-147, s. 8(d), contains a severability clause.

Effect of Amendments. — Session Laws 2000-147, s. 7, effective August 2, 2000, added the second and third sentences in subdivision (b)(1).

Chapter 40A.

Eminent Domain.

Article 1.

General.

§ 40A-1. Exclusive provisions.

Local Modification. — City of Charlotte: 2000-26, s. 1, as amended by 2000-89, s. 1. By virtue of Session Laws 2000-26, s. 4, city of Charlotte: 1983, c. 437, should be stricken from the main volume. For additional local modifications to this section, see the main volume.

CASE NOTES

Stated in Piedmont Triad Regional Water Auth. v. Sumner Hills, Inc., — N.C. App. —, 524 S.E.2d 375, 2000 N.C. App. LEXIS 7 (2000).

§ 40A-3. By whom right may be exercised.

(a) Private Condemnors. — For the public use or benefit, the persons or organizations listed below shall have the power of eminent domain and may acquire by purchase or condemnation property for the stated purposes and other works which are authorized by law.

(1) Corporations, bodies politic or persons have the power of eminent domain for the construction of railroads, power generating facilities, substations, switching stations, microwave towers, roads, alleys, access railroads, turnpikes, street railroads, plank roads, tramroads, canals, telegraphs, telephones, electric power lines, electric lights, public water supplies, public sewerage systems, flumes, bridges, and pipelines or mains originating in North Carolina for the transportation of petroleum products, coal, gas, limestone or minerals. Land condemned for any liquid pipelines shall:
a. Not be less than 50 feet nor more than 100 feet in width; and
b. Comply with the provisions of G.S. 62-190(b).
The width of land condemned for any natural gas pipelines shall not be more than 100 feet.

(2) School committees or boards of trustees or of directors of any corporation holding title to real estate upon which any private educational institution is situated, have the power of eminent domain in order to obtain a pure and adequate water supply for such institution.

(3) Franchised motor vehicle carriers or union bus station companies organized by authority of the Utilities Commission, have the power of eminent domain for the purpose of constructing and operating union bus stations: Provided, that this subdivision shall not apply to any city or town having a population of less than 60,000.

(4) Any railroad company has the power of eminent domain for the purposes of: constructing union depots; maintaining, operating, improving or straightening lines or of altering its location; constructing double tracks; constructing and maintaining new yards and terminal facilities or enlarging its yard or terminal facilities; connecting two of its lines already in operation not more than six miles apart; or constructing an industrial siding ordered by the Utilities Commission as provided in G.S. 62-232.

(5) A condemnation in fee simple by a State-owned railroad company for the purposes specified in subdivision (4) of this subsection and as provided under G.S. 124-12(2).

The width of land condemned for any single or double track railroad purpose shall be not less than 80 feet nor more than 100 feet, except where the road may run through a town, where it may be of less width, or where there may be deep cuts or high embankments, where it may be of greater width.

No rights granted or acquired under this subsection shall in any way destroy or abridge the rights of the State to regulate or control any railroad company or to regulate foreign corporations doing business in this State. Whenever it is necessary for any railroad company doing business in this State to cross the street or streets in a town or city in order to carry out the orders of the Utilities Commission, to construct an industrial siding, the power is hereby conferred upon such railroad company to occupy such street or streets of any such town or city within the State. Provided, license so to do be first obtained from the board of aldermen, board of commissioners, or other governing authorities of such town or city.

No such condemnor shall be allowed to have condemned to its use, without the consent of the owner, his burial ground, usual dwelling house and yard, kitchen and garden, unless condemnation of such property is expressly authorized by statute.

The power of eminent domain shall be exercised by private condemnors under the procedures of Article 2 of this Chapter.

(b) Local Public Condemnors. — For the public use or benefit, the governing body of each municipality or county shall possess the power of eminent domain and may acquire by purchase, gift or condemnation any property, either inside or outside its boundaries, for the following purposes.

(1) Opening, widening, extending, or improving roads, streets, alleys, and sidewalks. The authority contained in this subsection is in addition to the authority to acquire rights-of-way for streets, sidewalks and highways under Article 9 of Chapter 136. The provisions of this subdivision (1) shall not apply to counties.

(2) Establishing, extending, enlarging, or improving any of the public enterprises listed in G.S. 160A-311 for cities, or G.S. 153A-274 for counties.

(3) Establishing, enlarging, or improving parks, playgrounds, and other recreational facilities.

(4) Establishing, extending, enlarging, or improving storm sewer and drainage systems and works, or sewer and septic tank lines and systems.

(5) Establishing, enlarging, or improving hospital facilities, cemeteries, or library facilities.

(6) Constructing, enlarging, or improving city halls, fire stations, office buildings, courthouse jails and other buildings for use by any department, board, commission or agency.

(7) Establishing drainage programs and programs to prevent obstructions to the natural flow of streams, creeks and natural water channels or improving drainage facilities. The authority contained in this subdivision is in addition to any authority contained in Chapter 156.

(8) Acquiring designated historic properties, designated as such before October 1, 1989, or acquiring a designated landmark designated as such on or after October 1, 1989, for which an application has been made for a certificate of appropriateness for demolition, in pursuance of the purposes of G.S. 160A-399.3, Chapter 160A, Article 19, Part 3B, effective until October 1, 1989, or G.S. 160A-400.14, whichever is appropriate.

(9) Opening, widening, extending, or improving public wharves.

The board of education of any municipality or county or a combined board may exercise the power of eminent domain under this Chapter for purposes authorized by other statutes.

The power of eminent domain shall be exercised by local public condemnors under the procedures of Article 3 of this Chapter.

(c) Other Public Condemnors. — For the public use or benefit, the following political entities shall possess the power of eminent domain and may acquire property by purchase, gift, or condemnation for the stated purposes.

(1) A sanitary district board established under the provisions of Part 2 of Article 2 of Chapter 130A for the purposes stated in that Part.

(2) The board of commissioners of a mosquito control district established under the provisions of Part 2 of Article 12 of Chapter 130A for the purposes stated in that Part.

(3) A hospital authority established under the provisions of Part B of Article 2 of Chapter 131E for the purposes stated in that Part, provided, however, that the provisions of G.S. 131E-24(c) shall continue to apply.

(4) A watershed improvement district established under the provisions of Article 2 of Chapter 139 for the purposes stated in that Article, provided, however, that the provisions of G.S. 139-38 shall continue to apply.

(5) A housing authority established under the provisions of Article 1 of Chapter 157 for the purposes of that Article, provided, however, that the provisions of G.S. 157-11 shall continue to apply.

(6) A corporation as defined in G.S. 157-50 for the purposes of Article 3 of Chapter 157, provided, however, the provisions of G.S. 157-50 shall continue to apply.

(7) A commission established under the provisions of Article 22 of Chapter 160A for the purposes of that Article.

(8) An authority created under the provisions of Article 1 of Chapter 162A for the purposes of that Article, provided, however, the provisions of G.S. 162A-7 shall continue to apply.

(9) A district established under the provisions of Article 4 of Chapter 162A for the purposes of that Article.

(10) A district established under the provisions of Article 5 of Chapter 162A for purposes of that Article.

(11) The board of trustees of a community college established under the provisions of Article 2 of Chapter 115D for the purposes of that Article.

(12) A district established under the provisions of Article 6 of Chapter 162A for the purposes of that Article.

(13) A regional transportation authority established under Article 26 of Chapter 160A of the General Statutes for the purposes of that Article.

The power of eminent domain shall be exercised by a public condemnor listed in this subsection under the procedures of Article 3 of this Chapter. (1852, c. 92, s. 1; R.C., c. 61, s. 9; 1874-5, c. 83; Code, s. 1698; Rev., s. 2575; 1907, cc. 39, 458, 783; 1911, c. 62, ss. 25, 26, 27; 1917, cc. 51, 132; C.S., s. 1706; 1923, c. 205; Ex. Sess. 1924, c. 118; 1937, c. 108, s. 1; 1939, c. 228, s. 4; 1941, c. 254; 1947, c. 806; 1951, c. 1002, ss. 1, 2; 1953, c. 1211; 1957, c. 65, s. 11; c. 1045, s. 1; 1961, c. 247;

1973, c. 507, s. 5; c. 1262, s. 86; 1977, c. 771, s. 4; 1981, c. 919, s. 1; 1983, c. 378, s. 2; 1983 (Reg. Sess., 1984), c. 1084; 1985, c. 689, s. 10; c. 696, s. 2; 1987, c. 2, s. 1; c. 564, s. 13; c. 783, s. 6; 1989, c. 706, s. 3; c. 740, s. 1.1; 2000-146, s. 8.)

Local Modification. — City of Monroe: 2000-35, s. 1. For additional local modifications to this section, see the main volume.

Effect of Amendments. — Session Laws 2000-146, s. 8, effective December 1, 2000, added subdivision (a)(5).

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Stated in Piedmont Triad Regional Water Auth. v. Sumner Hills, Inc., — N.C. App. —, 524 S.E.2d 375, 2000 N.C. App. LEXIS 7 (2000).

§ 40A-5. Condemnation of property owned by other condemnors.

(a) A condemnor listed in G.S. 40A-3(a), (b) or (c) shall not possess the power of eminent domain with respect to property owned by the State of North Carolina or a State-owned railroad as defined in G.S. 124-11 unless the State consents to the taking. The State's consent shall be given by the Council of State, or by the Secretary of Administration if the Council of State delegates this authority to the Secretary. In a condemnation proceeding against State property consented to by the State, the only issue shall be the compensation to be paid for the property.

(b) Unless otherwise provided by statute a condemnor listed in G.S. 40A-3(a), (b) or (c) may condemn the property of a private condemnor if such property is not in actual public use or not necessary to the operation of the business of the owner. Unless otherwise provided by statute a condemnor listed in G.S. 40A-3(b) or (c) may condemn the property of a condemnor listed in G.S. 40A-3(b) or (c) if the property proposed to be taken is not being used or held for future use for any governmental or proprietary purpose. (1981, c. 919, s. 1; 2000-146, s. 9.)

Effect of Amendments. — Session Laws 2000-146, s. 9, effective December 1, 2000, in subsection (a), inserted "or a State-owned railroad as defined in G.S. 124-11" and substituted "authority to the Secretary" for "authority to him."

§ 40A-7. Acquisition of whole parcel or building.

CASE NOTES

The "of little value" determination in subsection (a) of this section does not establish a threshold determination to be met before the subsequent subdivisions are considered; it is a mere introduction. Piedmont Triad Regional Water Auth. v. Sumner Hills, Inc., — N.C. App. —, 524 S.E.2d 375, 2000 N.C. App. LEXIS 7 (2000).

Where the record revealed only conclusory assertions as to whether all three requirements of subsection (a) were met, the case had to be remanded. Piedmont Triad Regional Water Auth. v. Sumner Hills, Inc., — N.C. App. —, 524 S.E.2d 375, 2000 N.C. App. LEXIS 7 (2000).

§ 40A-8. Costs.

CASE NOTES

Failure to Make Findings of Fact. — Case remanded for failure of trial court to make findings of fact as required by this section in support of an award of attorney's fees. Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999).

ARTICLE 3.

Condemnation by Public Condemnors.

§ 40A-41. Institution of action and deposit.

CASE NOTES

Stated in State v. Coastland Corp., 134 N.C. App. 269, 517 S.E.2d 655 (1999), cert. denied, 351 N.C. 111, — S.E.2d — (1999).

Cited in Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999); Piedmont Triad Regional Water Auth. v. Sumner Hills, Inc., — N.C. App. —, 524 S.E.2d 375, 2000 N.C. App. LEXIS 7 (2000).

§ 40A-43. Memorandum of action.

CASE NOTES

Cited in Piedmont Triad Regional Water Auth. v. Sumner Hills, Inc., — N.C. App. —, 524 S.E.2d 375, 2000 N.C. App. LEXIS 7 (2000).

§ 40A-47. Determination of issues other than damages.

CASE NOTES

Applied in Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999).

Cited in Piedmont Triad Regional Water Auth. v. Sumner Hills, Inc., — N.C. App. —, 524 S.E.2d 375, 2000 N.C. App. LEXIS 7 (2000).

§ 40A-53. Interest as a part of just compensation.

CASE NOTES

Trial court erred in awarding 14% interest from the time of entry of judgment until its satisfaction, even though § 24-5(b) might be construed as allowing interest at the legal rate until judgment is satisfied, because this section specifically provides for interest in eminent domain actions during this period at the rate of 6% per annum. Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999).

§ 40A-54. Final judgments.

CASE NOTES

Recording the Judgment. — In case involving the public taking of land outside easement for sewer lines, court ordered compliance with recordation requirements of this section. Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999).

Article 4.

Just Compensation.

§ 40A-64. Compensation for taking.

CASE NOTES

This Section Compared with § 136-112(1). — Section 136-112(1) violates the equal protection rights of the property owners who have part of a tract of land condemned for highway purposes because they are denied the just compensation received by other property owners also subjected to condemnation proceedings. A property owner will receive just compensation if the taking is imposed under this section, even though the same property owner is not entitled to compensation which is just if the imposed taking is under § 136-112(1). A property owner receiving compensation under § 136-112(2) is not subjected to an offset for general benefits while a property owner under § 136-112(1) is. DOT v. Rowe, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 615 (June 20, 2000).

§ 40A-67. Entire tract.

CASE NOTES

No Unity of Use Found. — The trial court erred in finding that commercially-dedicated tracts C and D were part of the area affected by the taking where the four tracts (A, B, C, D) were separated by strips of land deeded to a city for streets and where the defendants' use and enjoyment of tracts C and D were not related to their use of tracts A and B, nor related to or affected by the area taken. Normally, lands will not be considered to constitute a single tract for the purpose of determining severance damages and benefits unless there is unity of use. DOT v. Rowe, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 615 (June 20, 2000).

Chapter 41.

Estates.

Article 1.

Survivorship Rights and Future Interests.

§ 41-2.1. Right of survivorship in bank deposits created by written agreement.

CASE NOTES

Liability for Wrongful Conversion. — Co-defendants of step-daughter who transferred funds that were located in her joint bank accounts which she shared with her step-father, the decedent, were not entitled to summary judgment pursuant to this section on the plaintiff's conversion claims where the defendant/step-daughter knew that the money was not hers and that "[s]aid transfers were made without [his]knowledge or consent." Hutchins v. Dowell, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 781 (July 5, 2000).

§ 41-2.2. Joint ownership of corporate stock and investment securities.

CASE NOTES

Applied in Johnston Health Care Ctr., L.L.C. v. North Carolina Dep't of Human Resources, — N.C. App. —, 524 S.E.2d 352, 2000 N.C. App. LEXIS 20 (2000).

§ 41-10. Titles quieted.

CASE NOTES

I. General Consideration.
III. Pleading and Practice.
A. In General.

I. GENERAL CONSIDERATION.

Cited in Parrish v. Hayworth, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 784 (2000).

III. PLEADING AND PRACTICE.

A. In General.

Default Judgment against Non-Responding Defendants Cannot Automatically Extend to Answering Defendants. — A default final judgment against the non-responding defendants/property buyers did not adjudicate any rights, i.e. quiet title under this provision, between plaintiffs/conveyors of property and answering defendants/alleged innocent bona fide purchasers for value nor did it result in any admissions on behalf of defendant-appellants, bar any of their defenses or claims, or prejudice their rights. Little v. Barson Fin. Servs. Corp., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 792 (July 5, 2000).

Chapter 42.
Landlord and Tenant.

Article 5.
Residential Rental Agreements.

§ 42-38. Application.

Legal Periodicals. — For essay, "Confusion Worse Confounded: The North Carolina Residential Rental Agreements Act," see 78 N.C.L. Rev. 539 (2000).

CASE NOTES

Implied Warranty of Habitability and Commercial Tenancy. — Doctrine of implied warranty of habitability did not apply to case involving commercial tenancy. K & S Enters. v. Kennedy Office Supply Co., 135 N.C. App. 260, 520 S.E.2d 122 (1999), aff'd, 351 N.C. 470, 527 S.E.2d 644 (2000).

§ 42-40. Definitions.

Legal Periodicals. — For essay, "Confusion Worse Confounded: The North Carolina Residential Rental Agreements Act," see 78 N.C.L. Rev. 539 (2000).

§ 42-42. Landlord to provide fit premises.

Legal Periodicals. — For essay, "Confusion Worse Confounded: The North Carolina Residential Rental Agreements Act," see 78 N.C.L. Rev. 539 (2000).

CASE NOTES

The proper measure of damages in a rent abatement action based on a breach of the implied warranty of habitability is the difference between the fair rental value of the property in a warranted condition and the fair rental value of the property in its unwarranted condition, provided, however, the damages do not exceed the total amount of rent paid by the tenant; and the tenant is entitled to any special and consequential damages alleged and proved. Von Pettis Realty, Inc. v. McKoy, 135 N.C. App. 206, 519 S.E.2d 546 (1999).

Implied Warranty of Habitability and Commercial Tenancy. — Doctrine of implied warranty of habitability did not apply to case involving commercial tenancy. K & S Enters. v. Kennedy Office Supply Co., 135 N.C. App. 260, 520 S.E.2d 122 (1999), aff'd, 351 N.C. 470, 527 S.E.2d 644 (2000).

Damages for Rent Abatement. —

Jury's award of $6,400.00 fell within the permissible range of damages in a rent abatement case, and the trial court therefore correctly denied plaintiff's motion for a new trial on the issue of damages. Von Pettis Realty, Inc. v. McKoy, 135 N.C. App. 206, 519 S.E.2d 546 (1999).

Cited in Wilson v. Jefferson-Green, Inc., — N.C. App. —, 526 S.E.2d 506, 2000 N.C. App. LEXIS 161 (2000).

Chapter 42A.

Vacation Rental Act.

Article 3.

Handling and Accounting of Funds.

Article 1.

Vacation Rentals.

§ 42A-1. Title.

Legal Periodicals. — For essay, "Confusion Worse Confounded: The North Carolina Residential Rental Agreements Act," see 78 N.C.L. Rev. 539 (2000).

Article 2.

Vacation Rental Agreements.

§ 42A-10. Written agreement required.

Legal Periodicals. — For essay, "Confusion Worse Confounded: The North Carolina Residential Rental Agreements Act," see 78 N.C.L. Rev. 539 (2000).

Article 3.

Handling and Accounting of Funds.

§ 42A-19. Transfer of property subject to a vacation rental agreement.

(a) The grantee of residential property voluntarily transferred by a landlord who has entered into a vacation rental agreement for the use of the property shall take his or her title subject to the vacation rental agreement if the vacation rental is to end not later than 180 days after the grantee's interest in the property is recorded in the office of the register of deeds. If the vacation rental is to end more than 180 days after the recording of the grantee's interest, the tenant shall have no right to enforce the terms of the agreement unless the grantee has agreed in writing to honor such terms, but the tenant shall be entitled to a refund of payments made by him or her, as provided in subsection (b) of this section. Prior to entering into any contract of sale, the landlord shall disclose to the grantee the time periods that the property is subject to a vacation rental agreement. Not later than 10 days after entering into the contract of sale the landlord shall disclose to the grantee each tenant's name and address and shall provide the grantee with a copy of each vacation rental agreement. Not later than 10 days after transfer of the property, the grantee or the grantee's agent shall:

(1) Notify each tenant in writing of the property transfer, the grantee's name and address, and the date the grantee's interest was recorded.

(2) Advise each tenant whether he or she has the right to occupy the property subject to the terms of the vacation rental agreement and the provisions of this section.

(3) Advise each tenant of whether he or she has the right to receive a refund of any payments made by him or her.

(b) Except as otherwise provided in this subsection, upon termination of the landlord's interest in the residential property subject to a vacation rental agreement, whether by sale, assignment, death, appointment of receiver or otherwise, the landlord or the landlord's agent, or the real estate broker, shall, within 30 days, transfer all advance rent paid by the tenant, and the portion of any fees remaining after any lawful deductions made under G.S. 42A-16, to the landlord's successor in interest and thereafter notify the tenant by mail of such transfer and of the transferee's name and address. For vacation rentals that end more than 180 days after the recording of the interest of the landlord's successor in interest, unless the landlord's successor in interest has agreed in writing to honor the vacation rental agreement, the landlord or the landlord's agent, or the real estate broker, shall, within 30 days, transfer all advance rent paid by the tenant, and the portion of any fees remaining after any lawful deductions made under G.S. 42A-16, to the tenant. Compliance with this subsection shall relieve the landlord or real estate broker of further liability with respect to any payment of rent or fees. Funds held as a security deposit shall be disbursed in accordance with G.S. 42A-18.

(c) Repealed by Session Laws 2000-140, s. 41, effective July 21, 2000.

(d) The failure of a landlord to comply with the provisions of this section shall constitute an unfair trade practice in violation of G.S. 75-1.1. A landlord who complies with the requirements of this section shall have no further obligations to the tenant. (1999-420, s. 1; 2000-140, s. 41.)

Effect of Amendments. — Session Laws 2000-140, s. 41, effective July 21, 2000, substituted "refund of payments made by him or her, as provided in subsection (b) of this section" for "refund of any payments made by him or her" at the end of the second sentence of subsection (a); and repealed subsection (c), regarding a refund to the tenant, if the landlord's interest in the property is involuntarily transferred to another.

Article 5.

Landlord and Tenant Duties.

§ 42A-31. Landlord to provide fit premises.

Legal Periodicals. — For essay, "Confusion Worse Confounded: The North Carolina Residential Rental Agreements Act," see 78 N.C.L. Rev. 539 (2000).

Chapter 43.

Land Registration.

Article 4.

Registration and Effect.

§ 43-22. Jurisdiction of courts; registered land affected only by registration.

Except as otherwise specially provided by this Chapter, registered land and ownership therein shall be subject to the jurisdiction of the courts in the same manner as if it had not been registered; but the registration shall be the only operative act to transfer or affect the title to registered land, and shall date from the time the writing, instrument or record to be registered is duly filed in the office of the register of deeds, subject to the provisions of this Chapter; no voluntary or involuntary transaction shall affect the title to registered lands until registered in accordance with the provisions of this Chapter: Provided, that all mortgages, deeds, surrendered and canceled certificates, when new certificates are issued for the land so deeded, the other paper-writings, if any, pertaining to and affecting the registered estate or estates herein referred to, shall be filed by the register of deeds for reference and information, but the consolidated real property records shall be and constitute sole and conclusive legal evidence of title, except in cases of mistake and fraud, which shall be corrected in the methods now provided for the correction of papers authorized to be registered. (1913, c. 90, s. 28; C.S., s. 2397; 2000-140, s. 42(a).)

Effect of Amendments. — Session Laws 2000-140, s. 42(a), effective retroactive to January 1, 2000, substituted "consolidated real property records" for "registration of titles book."

§ 43-25. Release from registration.

Whenever the record owner of any estate in lands, the title to which has been registered or attempted to be registered in accordance with the provisions of this Chapter, desires to have such estate released from the provisions of said Chapter insofar as said Chapter relates to the form of conveyance, so that such estate may ever thereafter be conveyed, either absolutely or upon condition or trust, by the use of any desired form of conveyance other than the certificate of title prescribed by said Chapter, such owner may present his owner's certifi-

cate of title to such registered estate to the register of deeds of the county wherein such land lies, with a memorandum or statement written by him on the margin thereof in the words following, or words of similar import, to wit: "I (or we),....., being the owner (or owners) of the registered estate evidenced by this certificate of title, do hereby release said estate from the provisions of Chapter 43 of the General Statutes of North Carolina insofar as said Chapter relates to the form of conveyance, so that hereafter the said estate may, and shall be forever until again hereafter registered in accordance with the provisions of said Chapter and acts amendatory thereof, conveyed, either absolutely or upon condition or trust, by any form of conveyance other than the certificate of title prescribed by said Chapter, and in the same manner as if said estate had never been registered." Which said memorandum or statement shall further state that it is made pursuant to the provisions of this section, and shall be signed by such record owner and attested by the register of deeds under his hand and official seal, and a like memorandum or statement so entered, signed and attested upon the margin of the record of the said owner's certificate of title in the consolidated real property records in said register's office, with the further notation made and signed by the register of deeds on the margin of the certificate of title in the consolidated real property records showing that such entry has been made upon the owner's certificate of title; and thereafter any conveyance of such registered estate, or any part thereof, by such owner, his heirs or assigns, by means of any desired form of conveyance other than such certificate of title shall be as valid and effectual to pass such estate of the owner according to the tenor and purport of such conveyance in the same manner and to the same extent as if such estate had never been so registered. (Ex. Sess. 1924, c. 40; 2000-140, s. 42(b).)

Effect of Amendments. — Session Laws 2000-140, s. 42(b), effective retroactive to January 1, 2000, substituted "consolidated real property records" for "registration of titles book" twice near the end of the section.

Article 6.

Method of Transfer.

§ 43-31. When whole of land conveyed.

Whenever the whole of any registered estate is transferred or conveyed the same shall be done by a transfer or conveyance attached to the certificate substantially as follows:

The owners (giving the names of the parties owning land described in the certificate) hereby, in consideration of _____ dollars, sell and convey to the purchaser (giving name of purchaser) the lot or tract of land, as the case may be, described in the certificate of title hereto attached. The transfer shall be indexed on the grantor and grantee indexes in the same manner as deeds are indexed.

The same shall be signed and properly acknowledged by the parties and shall have the full force and effect of a deed in fee simple: Provided, that if the sale shall be in trust, upon condition, with power to sell or other unusual form of conveyance, the same shall be set out in the transfer, and shall be entered upon the consolidated real property records as hereinafter provided; that upon presentation of the transfer, together with the certificate of title, to the register of deeds, the transaction shall be duly noted and registered in accordance with the provisions of this Chapter, and certificate of title so presented shall be canceled and a new certificate with the same number issued to the purchaser thereof, which new certificate shall fully refer by number and also by name of

holder to former certificate just canceled. (1913, c. 90, s. 12; C.S., s. 2405; 1999-59, s. 3; 2000-140, s. 42(c).)

Effect of Amendments. — Session Laws 2000-140, s. 42(c), effective retroactive to January 1, 2000, substituted "consolidated real property records" for "registration of titles book" in the last paragraph.

§ 43-35. References and cross references entered on register.

In all cases the register of deeds shall place upon the consolidated real property records and upon the certificate of title of such registered estate therein, references and cross references to the new certificates issued as above provided, in accordance with the provisions of this Article, and the new certificates issued shall fully refer by number and by name of the holder to the canceled certificate in place of which they are issued. (1919, c. 82, s. 4; C.S., s. 2409; 2000-140, s. 42(d).)

Effect of Amendments. — Session Laws 2000-140, s. 42(d), effective retroactive to January 1, 2000, substituted "consolidated real property records" for "registry of title books."

§ 43-36. When land conveyed as security.

(a) Whole Land Conveyed. — Whenever the owner of any registered estate shall desire to convey same as security for debt, it may be done in the following manner, by a short form of transfer, substantially as follows, to wit:

A.B. and wife (giving names of all owners or holders of certificates and their wives) hereby transfer to C.D. the tract or lot of land described as No. _____ in registration of titles book for _____ County, a certificate for the title for same being hereto attached, to secure a debt of _____ dollars, due to _____, of _____ County and State, on the _____ day of _____, _____, evidenced by bond (or otherwise as the case may be) dated the _____ day of _____, _____. In case of default in payment of said debt with accrued interest, _____ days notice of sale required.

The same shall be signed and properly acknowledged by the parties making same, and shall be presented, together with the owner's certificate, to the register of deeds, whose duty it shall be to note upon the owner's certificate and upon the certificate of title in the consolidated real property records the name of the trustee, the amount of debt, and the date of maturity of same.

(b) Part of Land Conveyed. — When a part of the registered estate shall be so conveyed, the register of deeds shall note upon the consolidated real property records and owner's certificate the part so conveyed, and if the same be required and the proper fee paid by the trustee, shall issue what shall be known as a partial certificate, over his hand and seal, setting out the portion so conveyed.

(c) Effect of Transfer. — All transfers by such short form shall convey the power of sale upon due advertisement at the county courthouse and in some newspaper published in the county, or adjoining county, in the same manner and as fully as is now provided by law in the case of mortgages and deeds of trust and default therein.

(d) Other Encumbrances Noted. — All registered encumbrances, rights or adverse claims affecting the estate represented thereby shall continue to be noted, not only upon the certificate of title in the consolidated real property records, but also upon the owner's certificate, until same shall have been released or discharged. And in the event of second or other subsequent voluntary encumbrances the holder of the certificate may be required to

produce such certificate for the entry thereon or attachment thereto of the note of such subsequent charge or encumbrance as provided in this Article.

(e) Other Forms of Conveyance May Be Used. — Nothing in this section nor this Chapter shall be construed to prevent the owner from conveying such land, or any part of the same, as security for a debt by deed of trust or mortgage in any form which may be agreed upon between the parties thereto, and having such deed of trust or mortgage recorded in the office of the register of deeds as other deeds of trust and mortgages are recorded: Provided, that the book and page of the record at which such deed of trust or mortgage is recorded shall be entered by the register of deeds upon the owner's certificate and also on the consolidated real property records.

(f) Sale under Lien; New Certification. — Upon foreclosure of such deed of trust or mortgage, or sale under execution for taxes or other lien on the land, the fact of such foreclosure or sale shall be reported by the trustee, mortgagee or other person authorized to make the same, to the register of deeds of the county in which the land lies, and, upon satisfactory evidence thereof, it shall be his duty to call in and cancel the outstanding certificate of title for the land, so sold, and to issue a new certificate in its place to the purchaser or other person entitled thereto; and the production of such outstanding certificate and its surrender by the holder thereof may be compelled, upon notice to him, by motion before and order of the clerk of the superior court in the original proceeding or the clerk of the superior court of the county in which the land lies; but the right of appeal from such order may be exercised and shall be allowed as in other special proceedings, and pending any such appeal the rights of all parties shall be preserved. (1913, c. 90, s. 14; 1915, c. 245; 1919, c. 82, s. 5; C.S., s. 2410; 1999-456, s. 59; 2000-140, s. 42(e).)

Effect of Amendments. — Session Laws 2000-140, s. 42(e), effective retroactive to January 1, 2000, substituted "consolidated real property records" for "registration of titles book" in the third paragraph of subsection (a) and in subsection (e); substituted "consolidated real property records" for "book" in subsection (b); and substituted "consolidated real property records" for "registration book" in subsection (d).

§ 43-38. Transfers probated; partitions; contracts.

All transfers of registered land shall be duly executed and probated as required by law upon like conveyances of other lands, and in all cases of change in boundary by partition, subtraction or addition of land there shall be an accurate survey and permanent marking of boundaries and accurate plots, showing the courses, distances and markings of every portion thereof, which shall be duly proved and registered as upon the initial registration. Such transfers shall be presented to the register of deeds for entry upon the consolidated real property records and upon the owner's certificate within 30 days from the date thereof, or become subject to any rights which may accrue to any other person by a prior registration. All leases or contracts affecting land for a period exceeding three years shall be in writing, duly proved before the clerk of the superior court, recorded in the register's office, and noted upon the registry and upon the owner's certificate. (1913, c. 90, ss. 15, 32; C.S., s. 2412; 2000-140, s. 42(f).)

Effect of Amendments. — Session Laws 2000-140, s. 42(f), effective retroactive to January 1, 2000, substituted "consolidated real property records" for "registration of titles book."

§ 43-39. Certified copy of order of court noted.

In voluntary transactions a certificate from the proper State, county or court officer, or certified copy of the order, decree or judgment of any court of competent jurisdiction shall be authority for him to order a proper notation thereof upon the consolidated real property records, and for the register of deeds to note the transaction under the direction of the court. (1913, c. 90, s. 16; C.S., s. 2413; 2000-140, s. 42(g).)

Effect of Amendments. — Session Laws 2000-140, s. 42(g), effective retroactive to January 1, 2000, substituted "consolidated real property records" for "registration of titles book."

§ 43-42. Conveyance of registered land in trust.

Whenever a writing, instrument or record is filed for the purpose of transferring registered land in trust, or upon any equitable condition or limitation expressed therein, or for the purpose of creating or declaring a trust or other equitable interest in such land, the particulars of the trust, condition, limitation or other equitable interest shall not be entered on the certificate, but it shall be sufficient to enter in the consolidated real property records and upon the certificates a memorial thereof by the terms "in trust" or "upon condition" or in other apt words, and to refer by number to the writing, instrument or record authorizing or creating the same. And if express power is given to sell, encumber or deal with the land in any manner, such power shall be noted upon the certificates by the term "with power to sell" or "with power to encumber," or by other apt words. (1913, c. 90, s. 19; C.S., s. 2416; 2000-140, s. 42(h).)

Effect of Amendments. — Session Laws 2000-140, s. 42(h), effective retroactive to January 1, 2000, substituted "consolidated real property records" for "book."

§ 43-44. Validating conveyance by entry on margin of certificate.

In all cases where the owner of any estate in lands, the title to which has been registered or attempted to be registered in accordance with the provisions of this Chapter, has before August 21, 1924, and subsequent to such registration made any conveyance of such estate, or any portion thereof, by any form of conveyance sufficient in law to pass the title thereto if the title to said lands had not been so registered, the record owner and holder of the certificate of title covering such registered estate may enter upon the margin of his certificate of title in the consolidated real property records a memorandum showing that such registered estate, or a portion thereof, has been so conveyed, and further showing the name of the grantee or grantees and the number of the book and the page thereof where such conveyance is recorded in the office of the register of deeds, and make a like entry upon the owner's certificate of title held by him, both of such entries to be signed by him and witnessed by the register of deeds, and attested by the seal of office of the register of deeds upon said owner's certificate, with the further notation made and signed by the register of deeds on the margin of the certificate of title in the consolidated real property records showing that such entry has been made upon the owner's certificate of title, and thereupon such conveyance shall become and be as valid and effectual to pass such estate of the owner according to the tenor and purport of such conveyance as if the title to said lands had never been so registered, whether such conveyance be in form absolute or upon condition of trust; and in all cases where such conveyance has been made before August 21, 1924, upon the making of the entries herein authorized by the record owner and holder of such

owner's certificate of title, the grantee and his heirs and assigns shall thereafter have the same right to convey the said estate or any part of the same in all respects as if the title to said lands had never been so registered. (Ex. Sess. 1924, c. 41; 2000-140, s. 42(i).)

Effect of Amendments. — Session Laws 2000-140, s. 42(i), effective retroactive to January 1, 2000, substituted "consolidated real property records" for "registration of titles book" twice.

Article 7.

Liens upon Registered Lands.

§ 43-46. Notice of delinquent taxes filed.

It shall be the duty of the tax collector of each taxing unit, not later than June 30 following the date the taxes became delinquent, to file an exact memorandum of the delinquency, if any, of any registered land for the nonpayment of the taxes or assessments thereon, including interest, in the office of the register of deeds for registration; and if such officer fails to perform such duty, and there shall be subsequent to such day a transfer of the land as hereinbefore provided, the grantee shall acquire a good title free from any lien for such taxes and assessments, and the collector and his sureties shall be liable for the payment of the taxes and assessments with the interest thereon. The register of deeds shall enter the notice of delinquency on the record copy of the certificate of title, and the tax lien shall be valid against the registered estate from the time it is noted on the record copy. The register of deeds shall enter the notice of cancellation of the tax lien on the record copy of the certificate of title upon presentation of satisfactory evidence of payment. (1913, c. 90, s. 21; C.S., s. 2419; 1999-59, s. 7; 2000-140, s. 9.)

Effect of Amendments. — Session Laws 2000-140, s. 9, effective July 21, 2000, substituted "including interest" for "including the interest" near the end of the first clause of the first sentence.

Chapter 44.

Liens.

Article 9B.

Attachment or Garnishment and Lien for Ambulance Service in Certain Counties.

§ 44-51.8. Counties to which Article applies.

The provisions of this Article shall apply only to Alamance, Alexander, Alleghany, Anson, Ashe, Beaufort, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Caldwell, Camden, Carteret, Caswell, Catawba, Chatham, Cherokee, Chowan, Cleveland, Columbus, Craven, Cumberland, Dare, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Franklin, Gaston, Graham, Granville, Greene, Guilford, Halifax, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Iredell, Johnston, Jones, Lee, Lenoir, Lincoln, McDowell, Macon, Madison, Mecklenburg, Mitchell, Montgomery, Moore, Nash, New Hanover, Onslow, Orange, Pasquotank, Pender, Person, Pitt, Polk, Randolph, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Swain, Transylvania, Tyrrell, Union, Vance, Wake, Warren, Washington, Watauga, Wilkes, Wilson, Yadkin and Yancey Counties. (1969, c. 708, s. 5; c. 1197; 1971, c. 132; 1973, c. 880, s. 1; cc. 887, 894, 907, 1182; 1975, c. 595, s. 1; 1977, cc. 64, 138, 357; 1977, 2nd Sess., cc. 1144, 1157; 1979, c. 452; 1983, cc. 186, 424; 1983 (Reg. Sess., 1984), c. 933; 1985, c. 9; 1985 (Reg. Sess., 1986), c. 936, s. 6; 1987, c. 466; 1995, c. 9, s. 1; 1995 (Reg. Sess., 1996), c. 676, s. 1; 2000-15, s. 3; 2000-107, s. 1.)

Effect of Amendments. — Session Laws 2000-15, s. 3, effective December 1, 2000, inserted "Camden."

Session Laws 2000-107, s. 1, effective July 12, 2000, added Carteret, Orange, and Pender counties to the list of localities to which the Article applies.

Article 11A.

Uniform Federal Lien Registration Act.

§ 44-68.14. Duties of filing officer.

(a) If a notice of federal lien, a refiling of a notice of federal lien, or a notice of revocation of any certificate described in subsection (b) is presented to a filing officer who is:

(1) **(Effective until July 1, 2001)** The Secretary of State, he shall cause the notice to be marked, held, and indexed in accordance with the provisions of G.S. 25-9-403(4), as if the notice were a financing statement within the meaning of the Uniform Commercial Code, Chapter 25 of the General Statutes; or

§ 44-68.14(a)(1) is set out twice. See notes.

(1) **(Effective July 1, 2001)** The Secretary of State, he shall cause the notice to be numbered, maintained, and indexed in accordance with G.S. 25-9-519, as if the notice were a financing statement within the meaning of the Uniform Commercial Code, Chapter 25 of the General Statutes; or

(2) Any other officer described in G.S. 44-68.12, he shall endorse thereon his identification and the date and time of receipt and forthwith file it alphabetically or enter it in an alphabetical index showing the name and address of the person named in the notice, the date and time of receipt, the title and address of the official or entity certifying the lien, and the total amount appearing on the notice of lien.

(b) **(Effective until July 1, 2001)** If a certificate of release, nonattachment, discharge, or subordination of any lien is presented to the Secretary of State for filing he shall cause:

(1) A certificate of release or nonattachment to be marked, held, and indexed as if the certificate were a termination statement within the meaning of the Uniform Commercial Code, Chapter 25 of the General Statutes, but the notice of lien to which the certificate relates may not be removed from the files; and

(2) A certificate of discharge or subordination to be marked, held, and indexed as if the certificate were a release of collateral within the meaning of the Uniform Commercial Code, Chapter 25 of the General Statutes.

(b) **(Effective July 1, 2001)** If a certificate of release, nonattachment, discharge, or subordination of any lien is presented to the Secretary of State for filing he shall cause:

(1) A record of a certificate of release or nonattachment to be numbered, maintained, and indexed as if a record of the certificate were a termination statement within the meaning of the Uniform Commercial Code, Chapter 25 of the General Statutes, but the record of the notice of lien to which the certificate relates may not be removed from the files; and

(2) A record of a certificate of discharge or subordination to be numbered, maintained, and indexed as if the record of the certificate were a release of collateral within the meaning of the Uniform Commercial Code, Chapter 25 of the General Statutes.

(c) If a refiled notice of federal lien referred to in subsection (a) or any of the certificates or notices referred to in subsection (b) is presented for filing to any other filing officer specified in G.S. 44-68.12, he shall permanently attach the refiled notice or the certificate to the original notice of lien and enter the refiled notice or the certificate with the date of filing in any alphabetical lien index on the line where the original notice of lien is entered.

(d) Upon request of any person, the filing officer shall issue his certificate showing whether there is on file, on the date and hour stated therein, any notice of lien or certificate or notice affecting any lien filed under this Article or (reference previous federal tax lien registration act), naming a particular person, and if a notice or certificate is on file, giving the date and hour of filing of each notice or certificate. The fee for a certificate is five dollars ($5.00). Upon request, the filing officer shall furnish a copy of any notice of federal lien, or notice or certificate affecting a federal lien, for a fee of one dollar ($1.00) per page. (Ex. Sess. 1924, c. 44, ss. 2, 3; 1953, c. 1106, ss. 1, 2; 1963, c. 544; 1969, c. 216; 1989 (Reg. Sess., 1990), c. 1047, s. 1; 2000-169, ss. 33, 34.)

Subdivision (a)(1) and Subsection (b) Set Out Twice. — The first version of subdivision (a)(1) and subsection (b) set out above is effective until July 1, 2001. The second version of subdivision (a)(1) and subsection (b) set out above is effective July 1, 2001.

Effect of Amendments. — Session Laws 2000-169, ss. 33 and 34, effective July 1, 2001, substituted "G.S. 25-9-519" for "the provisions of G.S. 25-9-403(4)" in subdivision (a)(1); inserted "record of a" or a variant throughout subsection (b); and substituted "numbered, maintained, and indexed" for "marked, held, and indexed" in subdivisions (a)(1), (b)(1), and (b)(2).

Chapter 44A.

Statutory Liens and Charges.

Article 1.

Possessory Liens on Personal Property.

§ 44A-2. Persons entitled to lien on personal property.

CASE NOTES

Owner of storage or towing company was entitled to recovery under this section because the company had an implied contract with the sheriff. Green Tree Fin. Servicing v. Young, 133 N.C. App. 339, 515 S.E.2d 223 (1999).

Stated in North Carolina Farm Bureau Mut. Ins. Co. v. Weaver, 134 N.C. App. 359, 517 S.E.2d 381 (1999).

§ 44A-3. When lien arises and terminates.

CASE NOTES

Stated in North Carolina Farm Bureau Mut. Ins. Co. v. Weaver, 134 N.C. App. 359, 517 S.E.2d 381 (1999).

§ 44A-6.1. Action to regain possession of a motor vehicle or vessel.

CASE NOTES

Failure to Use Legal Remedies May Preclude Insurance Coverage. — The actions of defendant, who had available legal remedies under subsection (a) of this section but attempted to repossess car by means not authorized by law, were not "necessary or incidental" to "garage operations" and insurance contract did not provide coverage for conduct complained of in wrongful death action. North Carolina Farm Bureau Mut. Ins. Co. v. Weaver, 134 N.C. App. 359, 517 S.E.2d 381 (1999).

Article 3.

Model Payment and Performance Bond.

§ 44A-25. Definitions.

CASE NOTES

Applied in McClure Estimating Co. v. H.G. Reynolds Co., 136 N.C. App. 176, 523 S.E.2d 144 (1999).

§ 44A-28. Actions on payment bonds; venue and limitations.

CASE NOTES

Construction Contract is Prime Contract. — A complaint which was filed in the county where some portion of a subcontract was performed should have been removed for improper venue to the county where the prime contract was performed because the statutory definitions, the plain language, context and federal case law support an interpretation that "the construction contract" addressed in this section is the prime contract and only the prime contract. McClure Estimating Co. v. H.G. Reynolds Co., 136 N.C. App. 176, 523 S.E.2d 144 (1999).

Chapter 45.

Mortgages and Deeds of Trust.

Article 2A.

Sales under Power of Sale.

Part 2. Procedure for Sale.

§ 45-21.16. Notice and hearing.

CASE NOTES

Valid Debt Not Shown. —
Where all parties to an appeal agreed that the defendants' signatures on a loan application were forged and the president of the bank, a long-time friend of one defendant's father, accepted his representation of the signatures as authentic, the superior court correctly found that there was no "valid debt" for plaintiff/bank to enforce, that the loans were not ratified because the loan maker did not act as defendants' agent, and defendants did not receive, directly or indirectly, any of the loan proceeds; foreclosure under power of sale was properly denied. Espinosa v. Martin, 135 N.C. App. 305, 520 S.E.2d 108 (1999).

Request for Equitable Relief Denied. —
Superior court correctly declined to address the plaintiff/bank's argument for equitable relief, as such an action would have exceeded its permissible scope of review in a foreclosure action. Espinosa v. Martin, 135 N.C. App. 305, 520 S.E.2d 108 (1999).

Article 2B.

Injunctions; Deficiency Judgments.

§ 45-21.36. Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense.

CASE NOTES

Sufficient evidence supported the trial court's finding, under this section, that the foreclosed property was worth far more than the plaintiff bid for it and that the defendant was, therefore, not indebted to plaintiff in any amount. First Citizens Bank & Trust Co. v. Shaut, — N.C. App. —, 530 S.E.2d 581, 2000 N.C. App. LEXIS 549 (2000).

§ 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price.

CASE NOTES

IV. Application.

IV. APPLICATION.

Section Held Inapplicable. —
Where the underlying obligation represented by note was still valid, and the anti-deficiency judgment statute did not apply because the bank was not a seller/purchase-money mortgagee, the trial court was correct in awarding

plaintiff a monetary judgment in the amount of the outstanding debt balance, plus interest and late fees. G.E. Capital Mtg. Servs. v. Neely, 135 N.C. App. 187, 519 S.E.2d 553 (1999).

Chapter 46.

Partition.

Article 1.

Partition of Real Property.

§ 46-1. Partition is a special proceeding.

CASE NOTES

Taking Rendered Partition Suit Moot. — Taking which was proper under this section rendered earlier suit for partition of property moot; State did not have to wait until partition proceedings had been completed to condemn petitioner's interest. Coastland Corp. v. North Carolina Wildlife Resources Comm'n, 134 N.C. App. 343, 517 S.E.2d 661 (1999).

Sovereign immunity does not bar a suit for partition against the State, in its initial stage where petitioner merely seeks, through a "special proceeding," to have what already belongs to him and makes no demands on the State's property or ownership. Coastland Corp. v. North Carolina Wildlife Resources Comm'n, 134 N.C. App. 343, 517 S.E.2d 661 (1999).

Chapter 47.

Probate and Registration.

Article 2.

Registration.

Article 2.

Registration.

§ 47-20. Deeds of trust, mortgages, conditional sales contracts, assignments of leases and rents; effect of registration.

(a) No deed of trust or mortgage of real or personal property, or of a leasehold interest or other chattel real, or conditional sales contract of personal property in which the title is retained by the vendor, shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the grantor, mortgagor or conditional sales vendee, but from the time of registration thereof as provided in this Article; provided however that any transaction subject to the provisions of the Uniform Commercial Code (Chapter 25 of the General Statutes) is controlled by the provisions of that act and not by this section.

(b) For purposes of this section and G.S. 47-20.1, the following definitions apply:

(1) **(Effective until July 1, 2001)** "Rents, issues, or profits" means all amounts payable by or on behalf of any lessee, tenant, or other person having a possessory interest in real estate on account of or pursuant to any written or oral lease or other instrument evidencing a possessory interest in real property or pursuant to any form of tenancy implied by law, and all amounts payable by or on behalf of any licensee or permittee or other person occupying or using real property under license or permission from the owner or person entitled to possession. The term shall not include farm products as defined in G.S. 25-9-109(3), timber, the proceeds from the sale of farm products or timber, or the proceeds from the recovery or severance of any mineral deposits located on or under real property.

(1) **(Effective July 1, 2001)** "Rents, issues, or profits" means all amounts payable by or on behalf of any lessee, tenant, or other person having a possessory interest in real estate on account of or pursuant to any written or oral lease or other instrument evidencing a possessory interest in real property or pursuant to any form of tenancy implied by law, and all amounts payable by or on behalf of any licensee or permittee or other person occupying or using real property under license or permission from the owner or person entitled to possession. The term shall not include farm products as defined in G.S. 25-9-102(34), timber, the proceeds from the sale of farm products or timber, or the proceeds from the recovery or severance of any mineral deposits located on or under real property.

(2) "Assignment of leases, rents, issues, or profits" means every document assigning, transferring, pledging, mortgaging, or conveying an interest in leases, licenses to real property, and rents, issues, or profits arising from real property, whether set forth in a separate instrument or contained in a mortgage, deed of trust, conditional sales contract, or other deed or instrument of conveyance.

(3) "Collateral assignment" means any assignment of leases, rents, issues, or profits made and delivered in connection with the grant of any mortgage, or the execution of any conditional sales contract or deed of trust or in connection with any extension of credit made against the security of any interest in real property, where the assignor retains the right to collect or to apply such lease revenues, rents, issues, or profits after assignment and prior to default.

(c) The recording of a written document in accordance with G.S. 47-20.1 containing an assignment of leases, rents, issues, or profits arising from real property shall be valid and enforceable from the time of recording to pass the interest granted, pledged, assigned, or transferred as against the assignor, and shall be perfected from the time of recording against subsequent assignees, lien creditors, and purchasers for a valuable consideration from the assignor.

(d) Where an assignment of leases, rents, issues, or profits is a collateral assignment, after a default under the mortgage, deed of trust, conditional sales contract, or evidence of indebtedness which such assignment secures, the assignee shall thereafter be entitled, but not required, to collect and receive any accrued and unpaid or subsequently accruing lease revenues, rents, issues, or profits subject to the assignment, without need for the appointment of a receiver, any act to take possession of the property, or any further demand on the assignor. Unless otherwise agreed, after default the assignee shall be entitled to notify the tenant or other obligor to make payment to him and shall also be entitled to take control of any proceeds to which he may be entitled. The assignee must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections.

(e) This section shall not exclude other methods of creating, perfecting, collecting, sequestering, or enforcing a security interest in rents, issues, or profits provided by the law of this State. (1829, c. 20; R.C., c. 37, s. 22; Code, s. 1254; Rev., s. 982; 1909, c. 874, s. 1; C.S., s. 3311; 1953, c. 1190, s. 1; 1959, c. 1026, s. 2; 1965, c. 700, s. 8; 1967, c. 562, s. 5; 1991, c. 234, s. 1; 2000-169, s. 35.)

Subdivision (b)(1) Set Out Twice. — The first version of subdivision (b)(1) set out above is effective until July 1, 2001. The second version of subdivision (b)(1) set out above is effective July 1, 2001.

Effect of Amendments. — Session Laws 2000-169, s. 35, effective July 1, 2001, substituted "G.S. 25-9-102(34)" for "G.S. 25-9-109(3)" in subdivision (b)(1).

CASE NOTES

III. Persons Protected.

III. PERSONS PROTECTED.

Trustee in Bankruptcy. —

Bankruptcy trustee properly and rightfully asserted his claim for equitable subrogation such that he obtained a first priority deed of trust on debtors' real property where creditor was not a bona fide purchaser when it made its loan to the debtors in exchange for a second mortgage and did not change its position in reliance on the fact that another creditor, successor to a priority deed, filed its deed of trust in the wrong county; if the debtors had not filed bankruptcy, as between the two creditors, the latter still could have filed its deed of trust in the proper county and sought equitable subrogation to the first priority deed of trust. In re Kline, 242 Bankr. 306 (W.D.N.C. 1999).

§ 47-20.1. Place of registration; real property.

CASE NOTES

Applied in In re Kline, 242 Bankr. 306 (W.D.N.C. 1999).

§ 47-30. Plats and subdivisions; mapping requirements.

(a) Size Requirements. — All land plats presented to the register of deeds for recording in the registry of a county in North Carolina after September 30, 1991, having an outside marginal size of either 18 inches by 24 inches, 21 inches by 30 inches, or 24 inches by 36 inches, and having a minimum one and one-half inch border on the left side and a minimum one-half inch border on the other sides shall be deemed to meet the size requirements for recording under this section. Where size of land areas, or suitable scale to assure legibility require, plats may be placed on two or more sheets with appropriate match lines. Counties may specify either:

(1) Only 18 inches by 24 inches;
(2) A combination of 18 inches by 24 inches and 21 inches by 30 inches;
(3) A combination of 18 inches by 24 inches and 24 inches by 36 inches; or
(4) A combination of all three sizes.

Provided, that all registers of deeds where specific sizes other than the combination of all three sizes have been specified, shall be required to submit said size specifications to the North Carolina Association of Registers of Deeds for inclusion on a master list of all such counties. The list shall be available in each register of deeds office by October 1, 1991. For purposes of this section, the terms "plat" and "map" are synonymous.

(b) Plats to Be Reproducible. — Each plat presented for recording shall be a reproducible plat, either original ink on polyester film (mylar), or a reproduced drawing, transparent and archival (as defined by the American National Standards Institute), and submitted in this form. The recorded plat must be such that the public may obtain legible copies. A direct or photographic copy of each recorded plat shall be placed in the plat book or plat file maintained for that purpose and properly indexed for use. In those counties in which the register has made a security copy of the plat from which legible copies can be made, the original may be returned to the person indicated on the plat.

(c) Information Contained in Title of Plat. — The title of each plat shall contain the following information: property designation, name of owner (the name of owner shall be shown for indexing purposes only and is not to be construed as title certification), location to include township, county and state, the date or dates the survey was made; scale or scale ratio in words or figures and bar graph; name and address of surveyor or firm preparing the plat.

(d) Certificate; Form. — There shall appear on each plat a certificate by the person under whose supervision the survey or plat was made, stating the origin of the information shown on the plat, including recorded deed and plat references shown thereon. The ratio of precision before any adjustments must be shown. Any lines on the plat that were not actually surveyed must be clearly indicated and a statement included revealing the source of information. Where a plat consists of more than one sheet, only one sheet must contain the certification and all other sheets must be signed and sealed.

The certificate required above shall include the source of information for the survey and data indicating the ratio of precision of the survey before adjustments and shall be in substantially the following form:

"I, _____, certify that this plat was drawn under my supervision from an actual survey made under my supervision (deed description recorded in

Book _____, page _____, etc.) (other); that the boundaries not surveyed are clearly indicated as drawn from information found in Book _____, page _____; that the ratio of precision as calculated is 1: _____; that this plat was prepared in accordance with G.S. 47-30 as amended. Witness my original signature, registration number and seal this _____ day of _____, A.D., _____.

Seal or Stamp

_____
Surveyor
Registration Number"

Nothing in this requirement shall prevent the recording of a map that was prepared in accordance with a previous version of G.S. 47-30 as amended, properly signed, and notarized under the statutes applicable at the time of the signing of the map. However, it shall be the responsibility of the person presenting the map to prove that the map was so prepared.

(e) Method of Computation. — An accurate method of computation shall be used to determine the acreage and ratio of precision shown on the plat. Area by estimation is not acceptable nor is area by planimeter, area by scale, or area copied from another source, except in the case of tracts containing inaccessible sections or areas. In such case the surveyor may make use of aerial photographs or other appropriate aids to determine the acreage of any inaccessible areas when the areas are bounded by natural and visible monuments. In such case the methods used must be stated on the plat and all accessible areas of the tract shall remain subject to all applicable standards of this section.

(f) Plat to Contain Specific Information. — Every plat shall contain the following specific information:

(1) An accurately positioned north arrow coordinated with any bearings shown on the plat. Indication shall be made as to whether the north index is true, magnetic, North Carolina grid ("NAD 83" or "NAD 27"), or is referenced to old deed or plat bearings. If the north index is magnetic or referenced to old deed or plat bearings, the date and the source (if known) the index was originally determined shall be clearly indicated.

(2) The azimuth or course and distance of every property line surveyed shall be shown. Distances shall be in feet or meters and decimals thereof. The number of decimal places shall be appropriate to the class of survey required.

(3) All plat distances shall be by horizontal or grid measurements. All lines shown on the plat shall be correctly plotted to the scale shown. Enlargement of portions of a plat are acceptable in the interest of clarity, where shown as inserts. Where the North Carolina grid system is used the grid factor shall be shown on the face of the plat. If grid distances are used, it must be shown on the plat.

(4) Where a boundary is formed by a curved line, the following data must be given: actual survey data from the point of curvature to the point of tangency shall be shown as standard curve data, or as a traverse of bearings and distances around the curve. If standard curve data is used the bearing and distance of the long chord (from point of curvature to point of tangency) must be shown on the plat.

(5) Where a subdivision of land is set out on the plat, all streets and lots shall be accurately plotted with dimension lines indicating widths and all other information pertinent to reestablishing all lines in the field. This shall include bearings and distances sufficient to form a continuous closure of the entire perimeter.

(6) Where control corners have been established in compliance with G.S. 39-32.1, 39-32.2, 39-32.3, and 39-32.4, as amended, the location and

pertinent information as required in the reference statute shall be plotted on the plat. All other corners which are marked by monument or natural object shall be so identified on all plats, and where practical all corners of adjacent owners along the boundary lines of the subject tract which are marked by monument or natural object shall be shown.

(7) The names of adjacent landowners, or lot, block, parcel, subdivision designations or other legal reference where applicable, shall be shown where they could be determined by the surveyor.

(8) All visible and apparent rights-of-way, watercourses, utilities, roadways, and other such improvements shall be accurately located where crossing or forming any boundary line of the property shown.

(9) Where the plat is the result of a survey, one or more corners shall, by a system of azimuths or courses and distances, be accurately tied to and coordinated with a horizontal control monument of some United States or State Agency survey system, such as the North Carolina Geodetic Survey where the monument is within 2,000 feet of the subject property. Where the North Carolina Grid System coordinates of the monument are on file in the North Carolina Office of State Budget, Planning, and Management, the coordinates of both the referenced corner and the monuments used shall be shown in X (easting) and Y (northing) coordinates on the plat. The coordinates shall be identified as based on "NAD 83," indicating North American Datum of 1983, or as "NAD 27," indicating North American Datum of 1927. The tie lines to the monuments shall also be sufficient to establish true north or grid north bearings for the plat if the monuments exist in pairs. Within a previously recorded subdivision that has been tied to grid control, control monuments within the subdivision may be used in lieu of additional ties to grid control. Within a previously recorded subdivision that has not been tied to grid control, if horizontal control monuments are available within 2,000 feet, the above requirements shall be met; but in the interest of bearing consistency with previously recorded plats, existing bearing control should be used where practical. In the absence of Grid Control, other appropriate natural monuments or landmarks shall be used. In all cases, the tie lines shall be sufficient to accurately reproduce the subject lands from the control or reference points used.

(10) A vicinity map (location map) shall appear on the plat.

(11) Notwithstanding any other provision contained in this section, it is the duty of the surveyor, by a certificate on the face of the plat, to certify to one of the following:

a. That the survey creates a subdivision of land within the area of a county or municipality that has an ordinance that regulates parcels of land;

b. That the survey is located in a portion of a county or municipality that is unregulated as to an ordinance that regulates parcels of land;

c. Any one of the following:

1. That the survey is of an existing parcel or parcels of land and does not create a new street or change an existing street;

2. That the survey is of an existing building or other structure, or natural feature, such as a watercourse; or

3. That the survey is a control survey.

d. That the survey is of another category, such as the recombination of existing parcels, a court-ordered survey, or other exception to the definition of subdivision;

e. That the information available to the surveyor is such that the surveyor is unable to make a determination to the best of the surveyor's professional ability as to provisions contained in (a) through (d) above.

However, if the plat contains the certificate of a surveyor as stated in a., d., or e. above, then the plat shall have, in addition to said surveyor's certificate, a certification of approval, or no approval required, as may be required by local ordinance from the appropriate government authority before the plat is presented for recordation. If the plat contains the certificate of a surveyor as stated in b. or c. above, nothing shall prevent the recordation of the plat if all other provisions have been met.

(g) Recording of Plat. — In certifying a plat for recording pursuant to G.S. 47-30.2, the Review Officer shall not be responsible for reviewing or certifying as to any of the following requirements of this section:

(1) Subsection (b) of this section as to archival.
(2) Repealed by Session Laws 1997-309, s. 2.
(3) Subsection (e) of this section.
(4) Subdivisions (1) through (10) of subsection (f) of this section.

A plat, when certified pursuant to G.S. 47-30.2 and presented for recording, shall be recorded in the plat book or plat file and when so recorded shall be duly indexed. Reference in any instrument hereafter executed to the record of any plat herein authorized shall have the same effect as if the description of the lands as indicated on the record of the plat were set out in the instrument.

(h) Nothing in this section shall be deemed to prevent the filing of any plat prepared by a registered land surveyor but not recorded prior to the death of the registered land surveyor. However, it is the responsibility of the person presenting the map to the Review Officer pursuant to G.S. 47-30.2 to prove that the plat was so prepared. For preservation these plats may be filed without signature, notary acknowledgement or probate, in a special plat file.

(i) Nothing in this section shall be deemed to invalidate any instrument or the title thereby conveyed making reference to any recorded plat.

(j) The provisions of this section shall not apply to boundary plats of areas annexed by municipalities nor to plats of municipal boundaries, whether or not required by law to be recorded.

(k) The provisions of this section shall apply to all counties in North Carolina.

(*l*) The provisions of this section shall not apply to the registration of highway right-of-way plans provided for in G.S. 136-19.4 nor to registration of roadway corridor official maps provided in Article 2E of Chapter 136.

(m) Maps attached to deeds or other instruments and submitted for recording in that form must be no larger than 81/2 inches by 14 inches and comply with either this subsection or subsection (n) of this section. Such a map shall either (i) have the original signature of a registered land surveyor and the surveyor's seal as approved by the State Board of Registration for Professional Engineers and Land Surveyors, or (ii) be a copy of a map, already on file in the public records, that is certified by the custodian of the public record to be a true and accurate copy of a map bearing an original personal signature and original seal. The presence of the original personal signature and seal shall constitute a certification that the map conforms to the standards of practice for land surveying in North Carolina, as defined in the rules of the North Carolina State Board of Registration for Professional Engineers and Land Surveyors.

(n) A map that does not meet the requirements of subsection (m) of this section may be attached to a deed or other instrument submitted for recording in that form for illustrative purposes only if it meets both of the following requirements:

(1) It is no larger than 81/2 inches by 14 inches.
(2) It is conspicuously labelled, "THIS MAP IS NOT A CERTIFIED SURVEY AND HAS NOT BEEN REVIEWED BY A LOCAL GOVERNMENT AGENCY FOR COMPLIANCE WITH ANY APPLICABLE LAND DEVELOPMENT REGULATIONS." (1911, c. 55, s. 2; C.S., s. 3318; 1923, c. 105; 1935, c. 219; 1941, c. 249; 1953, c. 47, s. 1; 1959, c. 1235, ss. 1, 3A, 3.1; 1961, cc. 7, 111, 164, 199, 252, 660, 687, 932, 1122; 1963, c. 71, ss. 1, 2; cc. 180, 236; c. 361, s. 1; c. 403; 1965, c. 139, s. 1; 1967, c. 228, s. 2; c. 394; 1971, c. 658; 1973, cc. 76, 848, 1171; c. 1262, s. 86; 1975, c. 192; c. 200, s. 1; 1977, c. 50, s. 1; c. 221, s. 1; c. 305, s. 2; c. 771, s. 4; 1979, c. 330, s. 1; 1981, c. 138, s. 1; c. 140, s. 1; c. 479; 1983, c. 473; 1987, c. 747, s. 20; 1989, c. 727, s. 218(6); 1991, c. 268, s. 3; 1993, c. 119, ss. 1, 2; 1997-309, s. 2; 1997-443, s. 11A.119(a); 1998-228, ss. 11, 12; 1999-456, s. 59; 2000-140, s. 93.1(b).)

Effect of Amendments. —
Session Laws 2000-140, s. 93.1(b), effective July 1, 2000, substituted the phrase "Office of State Budget, Planning, and Management" for "Office of State Planning" in subdivision (f)(9).

Chapter 47F.

North Carolina Planned Community Act.

Article 1.

General Provisions.

§ 47F-1-101. Short title.

Legal Periodicals. — For article discussing the changes and effects of North Carolina Planned Community Act, see 22 Campbell L. Rev. 1 (1999).

CASE NOTES

Cited in Reid v. Ayers, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 606 (June 6, 2000).

Chapter 48.

Adoptions.

Article 1.

General Provisions.

§ 48-1-100. Legislative findings and intent; construction of Chapter.

Editor's Note. —

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.' "

Session Laws 2000-67, s. 11.16, effective July 1, 2000, creates a Special Needs Adoptions Incentive Fund to provide financial assistance to facilitate the adoption of special needs children residing in licensed foster care homes, effective January 1, 2001. These funds are to be matched by county funds. This program does not constitute an entitlement and is subject of availability of funds. The Social Services Commission is to adopt rules to implement the provisions of this section.

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Article 3.

Adoption of Minors.

Part 6. Consent to Adoption.

§ 48-3-601. Persons whose consent to adoption is required.

CASE NOTES

The court insisted that the respondent had failed to provide the requisite support, pursuant to this section, for the biological mother and for his child although he asserted that he was prevented from complying by the mother's refusing his offer to stay with his mother during her pregnancy, the filing of the adoption petition just one day after the birth of the child, and the uncertainty as to whether he was, in fact, the father. Byrd ex rel. Byrd, — N.C. App. —, 529 S.E.2d 465, 2000 N.C. App. LEXIS 502 (2000).

Acknowledgment May Not Be Conditioned on Establishing Biological Link. — This section does not allow a potential father's acknowledgment of his paternity to be conditioned on establishing a biological link with the child. Consequently, the respondent who conditioned his acknowledgment of his paternity of the child failed to preserve his consent rights for adoption although he offered to provide the biological mother a place to live during her pregnancy and attempted a variety of jobs to provide for the child. Byrd ex rel. Byrd, — N.C. App. —, 529 S.E.2d 465, 2000 N.C. App. LEXIS 502 (2000).

Cited in Byrd ex rel. Byrd, — N.C. App. —, 529 S.E.2d 465, 2000 N.C. App. LEXIS 502 (2000).

Chapter 49.

Bastardy.

Article 3.

Civil Actions Regarding Illegitimate Children.

§ 49-14. Civil action to establish paternity.

CASE NOTES

Clear, Cogent & Convincing Standard. — The plaintiff's testimony at trial that she had sexual contact with no man other than defendant either in 1990 or 1991, expert testimony regarding the likelihood of conception given the number of sexual encounters between the two, and exhibits indicating that the child bears a strong resemblance to the defendant were sufficient to support the trial court's conclusion that defendant was the child's biological parent. Brown v. Smith, — N.C. App. —, 526 S.E.2d 686, 2000 N.C. App. LEXIS 253 (2000).

Chapter 50.

Divorce and Alimony.

Article 1.

Divorce, Alimony, and Child Support, Generally.

§ 50-6. Divorce after separation of one year on application of either party.

CASE NOTES

II. Separation.

II. SEPARATION.

An interlocutory appeal to determine the date of separation for the purposes of equitable distribution was rightfully dismissed, as the parties had been separated for a period far in excess of one year and as the date of separation was irrelevant to the validity of the divorce. Stafford v. Stafford, 351 N.C. 94, 520 S.E.2d 785 (1999).

§ 50-10. Material facts found by judge or jury in divorce or annulment proceedings; when notice of trial not required; procedure same as ordinary civil actions.

CASE NOTES

Stated in McCall v. McCall, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 795 (July 5, 2000).

§ 50-11. (For applicability see note) Effects of absolute divorce.

Editor's Note. —
As to the applicability of the 1995 amendment, see the editor's note to this section in the main volume.

CASE NOTES

Absolute Defense Under Prior Law. — An alimony claim made pursuant to § 50-16.3A(a) and filed within one year of plaintiff's dismissal of her first claim (under repealed § 50-16.6(a)) failed to qualify as "a new action based on the same claim" under Rule 41(a)(1) because the § 50-16.3A(a) claim for alimony was distinct from that set out by the repealed section in that it deferred to the court's discretion on the decision of whether to award alimony where both the supporting and dependent spouse "each participated in an act of illicit sexual behavior," whereas the old section foreclosed a dependent spouse from recovering; to allow her to maintain this new action would have deprived the defendant/husband of a statutory absolute defense he had had under the old law. Brannock v. Brannock, 135 N.C. App. 635, 523 S.E.2d 110 (1999).

§ 50-13.1. Action or proceeding for custody of minor child.

CASE NOTES

Grandparent Had No Rights to Proceed. — There are four statutes in North Carolina which permit a grandparent to maintain an action for custody or visitation of a minor child, and although plaintiff, mother of the deceased father of the two minor children, did not specify under which statute she filed, it was clear that she had no right to proceed under this section, or 50-13.2(b1), 50-13.2A, or 50-13.5(j). Shaut v. Cannon, — N.C. App. —, 526 S.E.2d 214, 2000 N.C. App. LEXIS 158 (2000).

Grandparents' Rights When Family Intact. — Disatisfaction with defendant mother's husband, their standard of living, and the couple's residence did not provide plaintiff grandmother and her husband with an adequate claim upon which court could justify removal of grandchild from mother's custody; plaintiff must allege facts which would support a finding that the defendant engaged in conduct inconsistent with her parental responsibility and/or constitutionally protected status. Penland v. Harris, 135 N.C. App. 359, 520 S.E.2d 105 (1999).

Grandparents, whose son was living separate and apart from his wife and children when he died in a highway accident, could not seek visitation with their grandchildren under this section because the children and their widowed mother constituted an "intact family." Montgomery v. Montgomery, — N.C. App. —, 524 S.E.2d 360, 2000 N.C. App. LEXIS 19 (2000).

The plaintiff/grandmother had no standing to seek visitation with her grandchildren under this section where the grandchildren, whose mother died in an automobile accident, and their father were an "intact family." Price v. Breedlove, — N.C. App. —, 530 S.E.2d 559, 2000 N.C. App. LEXIS 543 (2000).

§ 50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State.

CASE NOTES

I. IN GENERAL.

Quoted in Montgomery v. Montgomery, — N.C. App. —, 524 S.E.2d 360, 2000 N.C. App. LEXIS 19 (2000).

Stated in Penland v. Harris, 135 N.C. App. 359, 520 S.E.2d 105 (1999).

IV. VISITATION RIGHTS.

Grandparent Had No Rights to Proceed. — There are four statutes in North Carolina which permit a grandparent to maintain an action for custody or visitation of a minor child, and although plaintiff, mother of the deceased father of the two minor children, did not specify under which statute she filed, it was clear that she had no right to proceed under § § 50-13.1(a), this section, 50-13.2A, or 50-13.5(j). Shaut v. Cannon, — N.C. App. —, 526 S.E.2d 214, 2000 N.C. App. LEXIS 158 (2000).

VII. FINDINGS OF FACT.

Findings of Fact Insufficient. — The trial court erred in amending the custody decree based on a finding of substantial change in circumstances where it found only that the proposed relocation of the mother after her remarriage would adversely affect the relationship between the father and his child but made no other findings about the effect of the proposed relocation on the child and on the child's best interests. Evans v. Evans, — N.C. App. —, 530 S.E.2d 576, 2000 N.C. App. LEXIS 536 (2000).

VIII. EFFECT OF VERDICTS, SEPARATION AGREEMENTS AND CONSENT JUDGMENTS.

Findings and Conclusions Not Required for Child Consent Judgments. — While

§ 1A-1, Rule 52 and this section mandate findings of fact and conclusions when a court adjudicates child custody, child consent judgments need not contain such findings of fact and conclusions of law, and consenting parties waive their right to have the court adjudicate the merits of the case. Buckingham v. Buckingham, 134 N.C. App. 82, 516 S.E.2d 869 (1999), cert. denied, 351 N.C. 100, — S.E.2d — (1999).

§ 50-13.2A. Action for visitation of an adopted grandchild.

CASE NOTES

Grandparent Had No Right to Proceed. — There are four statutes in North Carolina which permit a grandparent to maintain an action for custody or visitation of a minor child, and although plaintiff, mother of the deceased father of the two minor children, did not specify under which statute she filed, it was clear that she had no right to proceed under § § 50-13.1(a), 50-13.2(b1), this section, or 50-13.5(j). Shaut v. Cannon, — N.C. App. —, 526 S.E.2d 214, 2000 N.C. App. LEXIS 158 (2000).

§ 50-13.4. (For applicability see note) Action for support of minor child.

Editor's Note. —
The catchline for this section is set out to include the parenthetical inadvertently omitted from the main volume.

CASE NOTES

I. IN GENERAL.

Applied in Thomas v. Thomas, 134 N.C. App. 591, 518 S.E.2d 513 (1999).

IV. AMOUNT OF SUPPORT.

A. In General.

Disability Checks Received on Behalf of Child. — Trial court properly refused to consider a disability check received by disabled defendant on child's behalf as defendant's income in figuring his obligation, but erred in allowing defendant to receive the money for his own use. Sain v. Sain, 134 N.C. App. 460, 517 S.E.2d 921 (1999).

Income of Business in which Defendant Held Controlling Interest. — Court neither abused its discretion nor imputed income to defendant when it allocated to him the amount of income earned by the business in which he held 51% and controlled disbursement of corporate funds. Cauble v. Cauble, 133 N.C. App. 390, 515 S.E.2d 708 (1999).

Use of Accrual Figures. — Use of accrual figures in the trial court's calculations was reflective of an appropriate level of gross income available to the defendant and not manifestly unsupported by reason. Cauble v. Cauble, 133 N.C. App. 390, 515 S.E.2d 708 (1999).

Remand to Allow Court to Make Findings. — Appellate court remanded case to allow trial court to make findings concerning the reasonable needs of child, the relative ability of the parents to support the child, and a determination of whether a variation from the Guidelines was appropriate on these grounds. Brooker v. Brooker, 133 N.C. App. 285, 515 S.E.2d 234 (1999).

VII. FINDINGS AND CONCLUSIONS.

Remand for Further Findings. —
Case was remanded for additional fact-find-

ing where the district court failed to identify the presumptive amount of support due under the Guidelines and where there was no analysis of the reasonable needs of the two minor children, other than a finding that plaintiff's child care costs for one of the children was reasonable. Rowan County DSS v. Brooks, 135 N.C. App. 776, 522 S.E.2d 590 (1999).

Findings Must Be Specific. —

Case would be remanded for additional findings regarding the income or loss, if any, of one of defendant's businesses where the trial court's order failed to reflect its treatment of these figures. Cauble v. Cauble, 133 N.C. App. 390, 515 S.E.2d 708 (1999).

Where child support for defendant's five children by three different mothers, set pursuant to the guidelines, amounted to 66% of his gross income, the trial court's duty was to determine whether this support exceeded the reasonable needs of each child, whether it was unjust or inappropriate, and whether defendant had "sufficient income to maintain a minimum standard of living based on the 1997 federal poverty level for one person." Buncombe County v. Jackson, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 608 (June 6, 2000).

Findings Held Insufficient. —

Appellate court would remand case where the trial court failed to make findings as to what the child support amount would be under the applicable Guidelines, as to the child's reasonable needs, and as to whether the greater weight of the evidence established that application of the presumptive Guidelines amount would be "unjust or inappropriate." Sain v. Sain, 134 N.C. App. 460, 517 S.E.2d 921 (1999).

IX. REMEDIES.

A. In General.

Child Support May Not Be Offset by Equitable Distribution Judgment or Other Obligations. — Defendant was not entitled to a "credit" against his future child support payments for the $12,435.50 he paid over and above his court-ordered obligation or for the $500.00 plaintiff owed him as a result of an equitable distribution judgment; child support obligations may not be offset by other obligations. Brinkley v. Brinkley, 135 N.C. App. 608, 522 S.E.2d 90 (1999).

F. Retroactive Support and Reimbursement.

Retroactive Distinguished from Prospective. —

Although prospective child support based upon the presumptive guidelines requires no factual findings regarding the child's reasonable needs or the supporting parent's ability to pay, the trial court must set out specific findings of fact in a reimbursement award for retroactive support. Biggs v. Greer, — N.C. App. —, 524 S.E.2d 577, 2000 N.C. App. LEXIS 13 (2000).

"Emergency Situation" Must Be Shown. — Child support reimbursement, or child support governing a period prior to a motion to increase an existing child support order, would constitute retroactive child support and would not be based on the presumptive guidelines. Therefore, a child support payment order may not be retroactively increased without evidence of some emergency situation that required the expenditure of sums in excess of the amount of child support paid. Biggs v. Greer, — N.C. App. —, 524 S.E.2d 577, 2000 N.C. App. LEXIS 13 (2000).

Retroactive Support for Private Schooling Denied. — Award of additional retroactive child support for private schooling was denied where the trial court's limited findings failed to set forth the existence of a "sudden emergency" so unusual or extraordinary as to require plaintiff to expend sums in excess of defendant's existing support obligation, and the court's order contained no findings reflective of defendant's ability to pay during the period the emergency expenses were allegedly incurred. Biggs v. Greer, — N.C. App. —, 524 S.E.2d 577, 2000 N.C. App. LEXIS 13 (2000).

The trial court was under no obligation to render findings of fact where it did not deviate from the presumptive guidelines, but rather adjusted the guideline amounts to account, prospectively, for the extraordinary expense of private schooling. Biggs v. Greer, — N.C. App. —, 524 S.E.2d 577, 2000 N.C. App. LEXIS 13 (2000).

G. Contempt.

Contempt for Violation Based on Willfulness Upheld. — Trial court acted correctly when it exercised jurisdiction under this section and found defendant/husband in civil contempt, where he made a calculated and deliberate decision to pay a lower amount of child support than it had previously ordered. Burnett v. Wheeler, 133 N.C. App. 316, 515 S.E.2d 480 (1999).

§ 50-13.5. Procedure in actions for custody or support of minor children.

CASE NOTES

I. IN GENERAL.

Quoted in Montgomery v. Montgomery, — N.C. App. —, 524 S.E.2d 360, 2000 N.C. App. LEXIS 19 (2000).

Stated in Penland v. Harris, 135 N.C. App. 359, 520 S.E.2d 105 (1999).

VII. VISITATION RIGHTS.

C. Grandparents' Rights.

Grandparents' Right to Seek Visitation Terminated Upon Death of Daughter/Non-Custodial Parent. — The trial court's jurisdiction over the issues of visitation and custody regarding plaintiff's grandchildren terminated upon the death of plaintiff's daughter, where the son-in-law had exclusive custody. Price v. Breedlove, — N.C. App. —, 530 S.E.2d 559, 2000 N.C. App. LEXIS 543 (2000).

Right to File Suit. — There are four statutes in North Carolina which permit a grandparent to maintain an action for custody or visitation of a minor child, and although plaintiff, mother of the deceased father of the two minor children, did not specify under which statute she filed, it was clear that she had no right to proceed under § § 50-13.1(a), 50-13.2(b1), 50-13.2A, or under this section. Shaut v. Cannon, — N.C. App. —, 526 S.E.2d 214, 2000 N.C. App. LEXIS 158 (2000).

§ 50-13.6. Counsel fees in actions for custody and support of minor children.

CASE NOTES

I. IN GENERAL.

Order Must Contain Factual Findings. —

The trial court made insufficient findings relative to its award of attorneys' fees where it failed to take into account the plaintiff's liquid estate of $88,000 and focused instead on her negative disposable income and where it failed to determine whether she was an interested party acting in good faith, required for actions involving child support. Bookholt v. Bookholt, — N.C. App. —, 523 S.E.2d 729, 1999 N.C. App. LEXIS 1376 (1999).

Award of Fees Appropriate. —

Trial court did not err in awarding attorney's fees to plaintiff's counsel where defendant had substantial assets, retirement and investment accounts, a home, an aircraft, a boat and a business, and plaintiff had a $41,000 income plus $2,000 in modest bank accounts. Burnett v. Wheeler, 133 N.C. App. 316, 515 S.E.2d 480 (1999).

II. ACTIONS FOR SUPPORT ONLY.

Findings Required in Action for Support. —

Case would be remanded where trial court failed to make specific findings that: (1) the mother was acting in good faith; (2) the mother's means were insufficient to defray the expenses of the suit; and (3) the father refused to provide the child support which was adequate under the circumstances existing at the time of the action. Thomas v. Thomas, 134 N.C. App. 591, 518 S.E.2d 513 (1999).

§ 50-13.7. Modification of order for child support or custody.

CASE NOTES

I. IN GENERAL.

Cited in Price v. Breedlove, — N.C. App. —, 530 S.E.2d 559, 2000 N.C. App. LEXIS 543 (2000).

II. MODIFICATION, GENERALLY.

A court is without authority to sua sponte modify an existing support order. Trial court's order allowing partial payment of support obligation at contempt proceeding did not constitute a modification, such modification of child support being only allowed "upon motion in the cause and a showing of changed circumstances by either party." Bogan v. Bogan, 134 N.C. App. 176, 516 S.E.2d 641 (1999).

Retroactive Increase Requires "Emergency Situation". — Child support reimbursement or child support governing a period prior to a motion to increase an existing child support order would constitute retroactive child support and would not be based on the presumptive guidelines. Therefore, a child support payment order may not be retroactively increased without evidence of some emergency situation that required the expenditure of sums in excess of the amount of child support paid. Biggs v. Greer, — N.C. App. —, 524 S.E.2d 577, 2000 N.C. App. LEXIS 13 (2000).

Modification of Custody Order Erroneous. — Where the trial court correctly found that no change in circumstances affecting minor's welfare had been shown, its order requiring plaintiff/mother to give defendant/father final decision-making authority as to child's schooling, extracurricular activities, and travel constituted a wrongful modification of prior custody order. Sain v. Sain, 134 N.C. App. 460, 517 S.E.2d 921 (1999).

III. CHANGE IN CIRCUMSTANCES.

The trial court was not required to find adverse changes in circumstances, but properly modified custody based on special needs child's best interests, where (1) reformed father's lifestyle would be better suited to providing the boy with the proper structure and educational opportunities he needed; (2) defendant/mother's job would require her to be away from the child in the evenings, leaving him in the care of others; (3) mother's home schooling of him would not meet his social and educational needs; (4) since father enrolled the child in the local public schools during the trial custody period, the boy had exhibited "phenomenal" improvement with respect to his stuttering and motor tics due to the specialized speech therapy he received; (5) father lived in a spacious new home where the boy had his own bedroom and bathroom; and (6) mother lived in an overcrowded rental home in which the boy shared a bathroom with four other people. Metz v. Metz, — N.C. App. —, 530 S.E.2d 79, 2000 N.C. App. LEXIS 621 (2000).

Relocation After Remarriage. — The trial court erred in amending the custody decree based on a finding of substantial change in circumstances where it found only that the proposed relocation of mother after her remarriage would adversely affect the relationship between father and his child, but made no other findings about the effect of the proposed relocation on the child and on the child's best interests. Evans v. Evans, — N.C. App. —, 530 S.E.2d 576, 2000 N.C. App. LEXIS 536 (2000).

Adverse Effect on Child as Factor to Support Modification. —

Where parties crossed out a cohabitation provision on the face of their separation memorandum, the trial court only partially discharged its duty in finding that a change of circumstances occurred when husband began cohabiting with his girlfriend because it failed to determine whether plaintiff's wife had met her burden of showing the effect, if any, such change had upon the welfare of the children. Browning v. Helff, — N.C. App. —, 524 S.E.2d 95, 2000 N.C. App. LEXIS 14 (2000).

Decrease in Father's Income. —

Trial court erred in modifying original child-support order, where most of its findings of fact were insufficient to support the modification, and the sole valid finding was an increase infather's annual income. Thomas v. Thomas, 134 N.C. App. 591, 518 S.E.2d 513 (1999).

Change in Circumstances Shown. —

Court properly modified support order to reflect changed circumstances where child's needs and related expenses had greatly in-

creased. Brooker v. Brooker, 133 N.C. App. 285, 515 S.E.2d 234 (1999).

V. FINDINGS AND DISCRETION OF TRIAL COURT.

Findings Held Insufficient. —
Award of additional retroactive child support for private schooling was denied where the trial court's limited findings failed to set forth the existence of a "sudden emergency" so unusual or extraordinary as to require plaintiff to expend sums in excess of defendant's existing support obligation, and the court's order contained no findings reflective of defendant's ability to pay during the period the emergency expenses were allegedly incurred. Biggs v. Greer, — N.C. App. —, 524 S.E.2d 577, 2000 N.C. App. LEXIS 13 (2000).

VII. PROCEDURE.

Procedure and Contents of Order for Retrospective Increase. — An order for retrospective increase of an existing child support order must set out a conclusion of law that there was a substantial and material change in circumstances affecting the welfare of the child occasioned by a sudden emergency so as to warrant such an increase. The court's conclusion of law must be sustained by specific factual findings based upon competent evidence, reflecting the actual amount disbursed by a party within three years or less of the date of filing of the current motion, towards reasonably necessary expenditures made on behalf of the child. The findings also must reflect the ability to pay of the parent subject to the motion during the period for which increased support is sought. Biggs v. Greer, — N.C. App. —, 524 S.E.2d 577, 2000 N.C. App. LEXIS 13 (2000).

§ 50-13.10. Past due child support vested; not subject to retroactive modification; entitled to full faith and credit.

CASE NOTES

Stated in Biggs v. Greer, — N.C. App. —, 524 S.E.2d 577, 2000 N.C. App. LEXIS 13 (2000).

§ 50-13.11. (See editor's note) Orders and agreements regarding medical support and health insurance coverage for minor children.

Editor's Note. —
As to the applicability of the 1989 amendment, see the editor's not to this section in the main volume.

CASE NOTES

The trial court committed reversible error in ordering the defendant to carry health insurance for his five minor children by three different mothers without first determining its availability at a reasonable cost. The trial court has no discretion outside this section to order a parent to provide health insurance, not even under § 50-13.11(a) in the guise of "medical support." Buncombe County v. Jackson, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 608 (June 6, 2000).

§ 50-16.1A. (For applicability see editor's note) Definitions.

Editor's Note. —
As to the applicability of the 1995 amendment, see the editor's note to this section in the main volume.

CASE NOTES

Termination of Postseparation Support. — Although the General Assembly may have intended postseparation support to be a temporary measure, the statutory definition of postseparation support provides for only three possible termination dates, the death of either spouse or the remarriage of the receiving spouse. Marsh v. Marsh, — N.C. App. —, 525 S.E.2d 476, 2000 N.C. App. LEXIS 103 (2000).

Postseparation Support After Divorce. — Postseparation support may continue despite a judgment of divorce if the postseparation support order does not specify a termination date and there is no court order awarding or denying alimony. Marsh v. Marsh, — N.C. App. —, 525 S.E.2d 476, 2000 N.C. App. LEXIS 103 (2000).

Cited in Rhew v. Rhew, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 634 (June 20, 2000).

§ 50-16.2. (For continued applicability see editor's note).

Editor's Note. —
As to continuing applicability of this section, see the editor's note to this section in the main volume.

CASE NOTES

I. In General.

I. IN GENERAL.

Effect of Voluntary Dismissal with Prejudice. — Defendant/wife's voluntary dismissal with prejudice of her suit for permanent alimony based on adultery and abandonment amounted to a concession that none of the grounds entitling her to permanent alimony existed and resulted in a final judgment on the merits with res judicata implications; the case would therefor be remanded for a hearing to consider whether husband should recoup the alimony pendente lite paid. Riviere v. Riviere, 134 N.C. App. 302, 517 S.E.2d 673 (1999).

§ 50-16.3A. (For applicability see editor's note) Alimony.

Editor's Note. —
As to the applicablity of the 1995 amendment, see the editor's note to this section in the main volume.

CASE NOTES

"New Action" Under Rule 41(a)(1). — An alimony claim made pursuant to subsection (a) of this section and filed within one year of plaintiff's dismissal of her first claim (under repealed § 50-16.6(a)) failed to qualify as "a new action based on the same claim" under § 1A-1, Rule 41(a)(1), because the claim for alimony under this section was distinct from that set out by the repealed section in that it deferred to the court's discretion the decision of whether to award alimony where both the supporting and dependent spouse "each participated in an act of illicit sexual behavior," whereas the old section foreclosed a dependent spouse from recovering. Brannock v. Brannock, 135 N.C. App. 635, 523 S.E.2d 110 (1999).

Actual findings by the trial court were insufficiently detailed or specific where, other than the parties' contributions to retirement and stock, the trial court made no findings regarding the parties' standard of living during the marriage and the parties' respective living expenses since the separation. Rhew v. Rhew, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 634 (June 20, 2000).

The amount of alimony pendente lite does not bind the trial court as to the amount of permanent alimony it must eventually award. Bookholt v. Bookholt, — N.C. App. —, 523 S.E.2d 729, 1999 N.C. App. LEXIS 1376 (1999).

Findings as to Duration of Alimony Award. — Where an action was filed on 16 July 1993, pre-dating this section, and where the prior applicable version of the alimony provisions contained no requirement that there be findings relative to the duration of any alimony award, the trial court did not err in mandating a lifetime award and making no other findings relative to the duration of the award. Bookholt v. Bookholt, — N.C. App. —, 523 S.E.2d 729, 1999 N.C. App. LEXIS 1376 (1999).

Remand Where Court Made Unsupported Findings. — Trial court correctly considered relevant factors, including wife's constructive abandonment of husband, in denying her claim for permanent alimony; nevertheless, case would be remanded because the record revealed that the trial court made at least three findings of fact which were not supported by the evidence. Alvarez v. Alvarez, 134 N.C. App. 321, 517 S.E.2d 420 (1999).

Trial court erred by speculating about the results of the pending equitable distribution between the parties where no evidence was presented as to the likely outcome of the equitable distribution. Rhew v. Rhew, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 634 (June 20, 2000).

§ 50-16.6. (For applicability see note) When alimony, postseparation support, counsel fees not payable.

Editor's Note. —
As to the applicablity of the 1995 amendment, see the editor's note to this section in the main volume.

CASE NOTES

III. Separation Agreements.

III. SEPARATION AGREEMENTS.

Agreement Did Not Waive Alimony Rights. — Defendant's execution of a separation agreement which stated that it was executed with "the express understanding" and "in full satisfaction of all obligations" did not constitute an express waiver of her alimony rights within the meaning of § 52-10.1 or this section where the preamble to the agreement referred to § 50-20, an equitable distribution statute, thus excluding issues of spousal support. Napier v. Napier, 135 N.C. App. 364, 520 S.E.2d 312 (1999).

§ 50-16.9. (For applicability see note) Modification of order.

Editor's Note. —
As to the applicablity of the 1995 amendment, see the editor's note to this section in the main volume.

CASE NOTES

I. In General.
II. Change of Circumstances.

I. IN GENERAL.

Cited in Rhew v. Rhew, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 634 (June 20, 2000).

II. CHANGE OF CIRCUMSTANCES.

Trial court could not automatically terminate alimony upon cohabitation where action was filed before the provisions of this section were applicable. Bookholt v. Bookholt, — N.C. App. —, 523 S.E.2d 729, 1999 N.C. App. LEXIS 1376 (1999).

§ 50-20. Distribution by court of marital and divisible property upon divorce.

Legal Periodicals. —
For note, "O'Brien v. O'Brien: The Changing Nature of Property Under the Equitable Distribution Laws in North Carolina," see 77 N.C. L. Rev. 2280 (1999).

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in Inman v. Inman, 134 N.C. App. 719, 518 S.E.2d 777 (1999).

II. MARITAL AND SEPARATE PROPERTY.

E. Pension and Retirement Benefits.

Section 135-9 and this section do not mandate entry of a Qualified Domestic Relations Order to assign a retirement plan; therefore, the plain language of a property settlement agreement incorporated into a consent order served to secure ex-wife's 20% interest in her ex-husband's state university retirement plan. Patterson ex rel. Jordan v. Patterson, — N.C. App. —, 529 S.E.2d 484, 2000 N.C. App. LEXIS 505 (2000).

IV. VALUATION OF PROPERTY.

The trial court erred in considering post-separation events in determining the value of the marital corporation where the case arose prior to the 1997 amendments to the Equitable Distribution Act; events which occurred following the date of separation were to be considered only as distributional factors under this section while events which occurred prior to the separation—for example, the wife's freezing the equity line which, for all practical purposes, destroyed the relationship between the marital corporation and its major client—could be considered in valuation of the property. Offerman v. Offerman, — N.C. App. —, 527 S.E.2d 684, 2000 N.C. App. LEXIS 328 (2000).

VI. ALIMONY AND CHILD SUPPORT.

Agreement Speaking to Equitable Distribution Did Not Waive Alimony Rights. — Defendant's execution of a separation agreement which stated that it was executed with "the express understanding" and "in full satisfaction of all obligations" did not constitute an express waiver of her alimony rights within the meaning of §§ 52-10.1 or 50-16.6 where the preamble to the agreement referred to this section on equitable distribution, thus excluding issues of spousal support. Napier v. Napier, 135 N.C. App. 364, 520 S.E.2d 312 (1999).

Equitable Distribution Judgment May Not Offset Child Support. — Defendant was not entitled to a "credit" against his future child support payments for the $12,435.50 he paid over and above his court-ordered obligation or for the $500.00 plaintiff owed him as a result of an equitable distribution judgment; child support obligations may not be offset by other obligations. Brinkley v. Brinkley, 135 N.C. App. 608, 522 S.E.2d 90 (1999).

§ 50-20.1. Pension and retirement benefits.

CASE NOTES

Quoted in Patterson ex rel. Jordan v. Patterson, — N.C. App. —, 529 S.E.2d 484, 2000 N.C. App. LEXIS 505 (2000).

§ 50-21. Procedures in actions for equitable distribution of property; sanctions for purposeful and prejudicial delay.

CASE NOTES

Equitable Distribution Action Vests at Time of Separation. — An equitable distribution action vested at the time of separation and thereafter did not abate upon plaintiff's death. Brown v. Brown, — N.C. App. —, 524 S.E.2d 89, 2000 N.C. App. LEXIS 15 (2000).

Chapter 50A.

Uniform Child-Custody Jurisdiction and Enforcement Act.

Article 2.

Uniform Child-Custody Jurisdiction and Enforcement Act.

Part 1. General Provisions.

§ 50A-102. Definitions.

CASE NOTES

Changed Circumstances. — Where the parties crossed out a cohabitation provision on the face of their separation memorandum, the trial court only partially discharged its duty when it found that a change of circumstances occurred when husband began cohabiting with his girlfriend but failed to determine whether plaintiff had met her burden of showing the effect, if any, such change had upon the welfare of the children. Browning v. Helff, — N.C. App. —, 524 S.E.2d 95, 2000 N.C. App. LEXIS 14 (2000).

Chapter 50B.

Domestic Violence.

§ 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 costs and 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 Department of Administration; and
(13) Include any additional prohibitions or requirements the court deems necessary to protect any party or any minor child.

(b) Protective orders entered or consent orders approved pursuant to this Chapter shall be for a fixed period of time not to exceed one year. Upon application of the aggrieved party, a judge may renew the original or any succeeding order for up to one additional year. Protective orders entered or consent orders approved shall not be mutual in nature except where both parties file a claim and the court makes detailed findings of fact indicating that both parties acted as aggressors, that neither party acted primarily in self-defense, and that the right of each party to due process is preserved.

(c) A copy of any order entered and filed under this Article shall be issued to each party. In addition, a copy of the order shall be issued promptly to and retained by the police department of the city of the victim's residence. If the victim does not reside in a city or resides in a city with no police department, copies shall be issued promptly to and retained by the sheriff, and the county police department, if any, of the county in which the victim resides.

(d) The sheriff of the county where a domestic violence order is entered shall provide for prompt entry of the order into the National Crime Information Center registry and shall provide for access of such orders to magistrates on a

24-hour-a-day basis. Modifications, terminations, and dismissals of the order shall also be promptly entered. (1979, c. 561, s. 1; 1985, c. 463; 1994, Ex. Sess., c. 4, s. 2; 1995, c. 527, s. 1; 1995 (Reg. Sess., 1996), c. 591, s. 2; c. 742, s. 42.1.; 1999-23, s. 1; 2000-125, s. 9.)

Effect of Amendments. —

Session Laws 2000-125, s. 9, effective December 1, 2000, and applicable to offenses committed on or after that date, deleted "available within a reasonable distance of that party's residence and is" following "the program is" in subdivision (a)(12).

Chapter 51.

Marriage.

Article 1.

General Provisions.

Article 1.

General Provisions.

§ 51-1. Requisites of marriage; solemnization.

The consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, and in the presence of an ordained minister of any religious denomination, minister authorized by his church, or of a magistrate, and the consequent declaration by such minister or officer that such persons are husband and wife, shall be a valid and sufficient marriage: Provided, that the rite of marriage among the Society of Friends, according to a form and custom peculiar to themselves, shall not be interfered with by the provisions of this Chapter: Provided further, that marriages solemnized and witnessed by a local spiritual assembly of the Baha'is, according to the usage of their religious community, shall be valid; provided further, marriages solemnized before March 9, 1909, by ministers of the gospel licensed, but not ordained, are validated from their consummation. (1871-2, c. 193, s. 3; Code, s. 1812; Rev., s. 2081; 1908, c. 47; 1909, c. 704, s. 2; c. 897; C.S., s. 2493; 1945, c. 839; 1965, c. 152; 1971, c. 1185, s. 26; 1977, c. 592, s. 1; 2000-58, ss. 1, 2.)

Editor's Note. —

Session Laws 2000-58, s. 1, effective June 30, 2000, inserted "superior court judge of this State or of another state" following "authorized by his church" and inserted "judge" following "declaration by such minister." Section 2 of the act provided for the amendment to expire September 15, 2000. The section is set out above as it reads following the expiration of the 2000 amendment.

Article 2.

Marriage Licenses.

§ 51-8. License issued by register of deeds.

OPINIONS OF ATTORNEY GENERAL

Aliens. — Where the register of deeds is satisfied that an applicant is an alien who has not come to the United States for the purpose of establishing a permanent residence or for the purpose of engaging in employment, and who otherwise meets the lawful requirements for a marriage license, the register of deeds should issue the license even though the alien is ineligible for a social security number. See opinion of Attorney General to The Honorable Katherine Lee Payne, Guilford County Register of Deeds, Guilford County Courthouse, 1998 N.C.A.G. 36 (8/14/98).

Chapter 52.

Powers and Liabilities of Married Persons.

§ 52-10. Contracts between husband and wife generally; releases.

CASE NOTES

Construction With Other Provisions. — The validity of a separation agreement as it related to a waiver of alimony was not to be judged in the context of this section, but executed pursuant to § 52-10.1. Napier v. Napier, 135 N.C. App. 364, 520 S.E.2d 312 (1999).

§ 52-10.1. Separation agreements.

CASE NOTES

Construction With Other Sections. — The validity of a separation agreement as it related to a waiver of alimony was not to be judged in the context of § 52-10, but executed pursuant to this section. Napier v. Napier, 135 N.C. App. 364, 520 S.E.2d 312 (1999).

Agreement Did Not Waive Alimony Rights. — Defendant's execution of a separation agreement which stated that it was executed with "the express understanding" and "in full satisfaction of all obligations" did not constitute an express waiver of her alimony rights within the meaning of this section or § 50-16.6 where the preamble to the agreement referred to § 50-20, an equitable distribution statute, thus excluding issues of spousal support. Napier v. Napier, 135 N.C. App. 364, 520 S.E.2d 312 (1999).

Failure of Court to Follow Dictates of Agreement. — Although signed by the parties and the court and filed with the clerk of the court, a custody and child support agreement was vacated because the trial court did not read its terms to the parties and inquire into the parties' understanding of and voluntary consent to the terms, as provided in the agreement. Tevepaugh v. Tevepaugh, 135 N.C. App. 489, 521 S.E.2d 117 (1999).

Chapter 52C.

Uniform Interstate Family Support Act.

Article 1.

General Provisions.

§ 52C-1-100. Short title.

CASE NOTES

Foreign Order. — The effect of a 1986 North Carolina URESA order on a 1981 California child support order was determined in accordance with URESA, not UIFSA; and where no North Carolina order made findings pertaining to the nullification of the California order or to exclusive jurisdiction, the trial court erred in finding that the California order was superseded and effectively voided. Twaddell v. Anderson, 136 N.C. App. 56, 523 S.E.2d 710 (1999), cert. denied, 351 N.C. 480, — S.E.2d — (2000).

Nonparentage Not a Defense. — Pursuant to § 52C-3-314, a party whose parentage of a child has been previously determined by or pursuant to law may not plead nonparentage as a defense to a proceeding under this chapter. Reid v. Dixon, — N.C. App. —, 524 S.E.2d 576, 2000 N.C. App. LEXIS 21 (2000).

Article 3.

Civil Provisions of General Application.

§ 52C-3-301. Proceedings under this Chapter.

CASE NOTES

Nonparentage Not a Defense to Support Enforcement. — Where an Alaskan decree had adjudged the defendant to be the father of the subject child, under North Carolina's enactment of the Uniform Interstate Family Support Act (UIFSA), § 52C-1 et seq., he may not plead nonparentage as a defense in a proceeding to enforce the payment of child support. See § 52C-3-314. Reid v. Dixon, — N.C. App. —, 524 S.E.2d 576, 2000 N.C. App. LEXIS 21 (2000).

§ 52C-3-308. Representation of obligee.

CASE NOTES

The Attorney General of North Carolina had standing to file a brief on behalf of a New York resident in a case involving the enforcement of orders rendered in an action to register a foreign child support order. New York v. Paugh, 135 N.C. App. 434, 521 S.E.2d 475 (1999).

§ 52C-3-314. Nonparentage as defense.

CASE NOTES

Applied in Reid v. Dixon, — N.C. App. —, 524 S.E.2d 576, 2000 N.C. App. LEXIS 21 (2000).

Article 6.

Enforcement and Modification of Support Order After Registration.

Part 1. Registration and Enforcement of Support Order.

§ 52C-6-602. Procedure to register order for enforcement.

CASE NOTES

Substantial Compliance. — The plaintiff substantially complied with this section where the record indicated that her "Registration Statement" was signed and notarized, and contained the case number, date and county of the foreign state's order, the parties to the action and their respective addresses and employers, and the support amount, date of last payment, and total amount of arrears, along with the name and address of the State agency to which support payments were to be remitted. Twaddell v. Anderson, 136 N.C. App. 56, 523 S.E.2d 710 (1999), cert. denied, 351 N.C. 480, — S.E.2d — (2000).

Part 2. Contest of Validity of Enforcement.

§ 52C-6-607. Contest of registration or enforcement.

CASE NOTES

Nonparentage Not a Defense. — Pursuant to § 52C-3-314, a party whose parentage of a child has been previously determined by or pursuant to law may not plead nonparentage as a defense to a proceeding under this chapter. Reid v. Dixon, — N.C. App. —, 524 S.E.2d 576, 2000 N.C. App. LEXIS 21 (2000).

Chapter 53.

Banks.

Article 15.

North Carolina Consumer Finance Act.

Article 15.

North Carolina Consumer Finance Act.

§ 53-177. (Effective July 1, 2001) Recording fees.

The licensee may collect from the borrower the amount of any fees necessary to file or record its security interest with any public official or agency of a county or the State as may be required pursuant to Article 9 of Chapter 25 of the General Statutes or G.S. 20-58 et seq. Upon full disclosure to the borrower on how the fees will be applied, such fees may either (i) be paid by the licensee to such public official or agency of the county or State, or (ii) in lieu of recording or filing, applied by the licensee to purchase nonfiling or nonrecording insurance on the instrument securing the loan, or (iii) be retained by a licensee that elects to self insure against the loss of a security interest by reason of not filing or recording its security instrument: Provided, however, the amount collected by the licensee from the borrower for the purchase of a nonfiling or nonrecording insurance policy, or for self insurance, shall be the premium amount for such insurance as fixed by the Commissioner of Insurance. Such premium shall be at least one dollar ($1.00) less than the cost of recording or filing a security interest. Provided further, a licensee shall not collect or permit to be collected any notary fee in connection with any loan made under this Article, nor may a licensee collect any fee from the borrower for the cost of releasing a security interest except such fee as actually paid to any public official or agency of the county or State for such purpose. (1961, c. 1053, s. 1; 1989, c. 17, s. 7; 2000-169, s. 36.)

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 36, effective July 1, 2001, substituted "Article 9 of Chapter 25 of the General Statutes" for "G.S. 25-9-302 et seq."

Chapter 54.

Cooperative Organizations.

SUBCHAPTER III. CREDIT UNIONS.

ARTICLE 14D.

Membership.

§ 54-109.26. "Membership" defined.

OPINIONS OF ATTORNEY GENERAL

Credit unions, organized under the laws of North Carolina, may not be composed of separate employer groups with different common bonds. See opinion of Attorney General to The Honorable Walter G. Church, Sr., Member of the North Carolina House of Representatives, 1998 N.C.A.G. 19 (4/9/98).

Chapter 55.

North Carolina Business Corporation Act.

Article 5.

Office and Agent.

§ 55-5-01. Registered office and registered agent.

(a) Each corporation must continuously maintain in this State:

(1) A registered office that may be the same as any of its places of business; and

(2) A registered agent, who shall be (i) an individual who resides in this State and whose business office is identical with the registered office; (ii) a domestic corporation, nonprofit corporation, or limited liability company whose business office is identical with the registered office; or (iii) a foreign corporation, nonprofit corporation, or limited liability company authorized to transact business or conduct affairs in this State whose business office is identical with the registered office.

(b) The sole duty of the registered agent to the corporation is to forward to the corporation at its last known address any notice, process, or demand that is served on the registered agent. (1901, c. 5; Rev., s. 1243; C.S., s. 1137; 1937, c. 133, ss. 1-3; G.S., ss. 55-38, 55-39; 1955, c. 1371, s. 1; 1957, c. 979, s. 17; 1989, c. 265, s. 1; 2000-140, s. 101(a).)

Effect of Amendments. — Session Laws 2000-140, s. 101(a), effective July 21, 2000, in subdivision (a)(2), substituted "corporation, nonprofit corporation, or limited liability company" for "corporation or nonprofit domestic corporation" in (ii) and substituted "corporation, nonprofit corporation, or limited liability company authorized to transact business or conduct affairs" for "corporation or nonprofit foreign corporation authorized to transact business" in (iii).

§ 55-5-04. Service on corporation.

(a) A corporation's registered agent is an agent of the corporation for service of process, notice or demand required or permitted by law to be served on the corporation.

(b) Whenever a corporation shall fail to appoint or maintain a registered agent in this State, or whenever its registered agent cannot with due diligence be found at the registered office, then the Secretary of State shall be an agent of such corporation upon whom any such process, notice or demand may be served. Service on the Secretary of State of any such process, notice or demand shall be made by delivering to and leaving with the Secretary of State or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of such process, notice or demand and the fee required by G.S. 55-1-22(b). In the event any such process, notice or demand is served on the Secretary of State in the manner provided by this subsection, the Secretary of State shall immediately mail one of the copies thereof, by registered or certified mail, return receipt requested, to the corporation at its principal office or, if there is no mailing address for the principal office on file, to the corporation at its registered office. Service on a corporation under this subsection shall be effective for all purposes from and after the date of the service on the Secretary of State.

(c) The Secretary of State shall keep a record of all processes, notices and demands served upon him under this section and shall record therein the time of such service and his action with reference thereto.

(d) Nothing herein contained shall limit or affect the right to serve any process, notice or demand required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law. (1937, c. 133, ss. 1-3; G.S., s. 55-39; 1955, c. 1371, s. 1; 1977, 2nd Sess., c. 1219, s. 33; 1989, c. 265, s. 1; 2000-140, s. 43.)

Effect of Amendments. — Session Laws 2000-140, s. 43, effective July 21, 2000, in subsection (b), substituted "the Secretary of State or with any clerk authorized by the Secretary of State to accept service of process" for "him or with any clerk having charge of the corporation department of his office," added "and the fee required by G.S. 55-1-22(b)," substituted "State in the manner provided by this subsection, the Secretary of State" for "State, he," deleted "shown in its most recent annual report or in any subsequent communication received from the corporation stating the current mailing address of its principal office" following "to the corporation at its principal office," and substituted "the service" for "such service" near the end of the section.

Article 6.

Shares and Distribution.

Part 2. Issuance of Shares.

§ 55-6-27. Restriction on transfer of shares and other securities.

CASE NOTES

Stock Restriction Upheld. — When considering the enforcement of a stock restriction agreement pursuant to this section, a trial court may decline to specifically enforce the agreement if there has been a change of circumstances since its execution, such that its enforcement would be unconscionable; and found that where defendant, an employee at will, was terminated prior to the full vesting of his stock but for a justifiable business purpose, where

the parties had discussed but rejected a "buy-out" formula based on fair market value, and where defendant entered freely into an agreement based on adjusted book value, no change of circumstances existed rendering the arm's length agreement unconscionable and unenforceable. Crowder Constr. Co. v. Kiser, 134 N.C. App. 190, 517 S.E.2d 178 (1999), cert. denied, 351 N.C. 101, — S.E.2d — (1999).

Article 8.

Directors and Officers.

Part 3. Standards of Conduct.

§ 55-8-30. General standards for directors.

CASE NOTES

Cited in Howell v. Sykes, — N.C. App. —, 526 S.E.2d 183, 2000 N.C. App. LEXIS 6 (2000).

Article 9.

Shareholder Protection Act.

§ 55-9-05. Exemptions.

The provisions of G.S. 55-9-02 shall not be applicable to any corporation that shall be made the subject of a business combination by an other entity if: (i) the corporation was not a public corporation (as defined in G.S. 55-1-40 (18a)) at the time such other entity acquired in excess of ten percent (10%) of the voting shares; (ii) on or before September 30, 1990 (or such earlier date as may be irrevocably established by resolution of the board of directors), the board of directors of a corporation to which G.S. 55-9-02 was not applicable on July 1, 1990, (other than a corporation described in G.S. 55-9-05 (iii)) adopted a bylaw stating that the provisions of this Article shall not be applicable to the corporation; (iii) in the case of a corporation to which G.S. 55-9-02 was not applicable on July 1, 1990, as the result of adoption by its board of directors under G.S. 55-9-05(ii) of a bylaw providing that G.S. 55-9-02 not apply to such corporation, the board of directors of such corporation shall not have rescinded such bylaw on or before September 30, 1990 (or such earlier date as may be irrevocably established by resolution of the board of directors); (iv) in the case of a corporation (including its predecessors) which becomes a public corporation for the first time after July 1, 1990, such corporation adopts a bylaw within 90 days of becoming a public corporation stating that the provisions of this Article shall not be applicable to it; (v) in the case of a newly formed corporation after April 23, 1987, the initial articles of incorporation of the corporation shall provide that the provisions of this Article shall not be applicable; (vi) such business combination was the subject of an existing agreement of the corporation on April 23, 1987; or (vii) on or after September 1, 2000, and on or before December 31, 2000, the board of directors of a corporation to which G.S. 55-9-02 was applicable on September 1, 2000, adopts a bylaw stating that the provisions of this Article shall not be applicable to the corporation. Neither the adoption or failure to adopt a bylaw of the type set forth in G.S. 55-9-05(ii), (iv), or (vii) of this section nor the rescission or failure to rescind a bylaw of the type referred to in G.S. 55-9-05(iii) shall constitute

grounds for any cause of action, at law or in equity, against the corporation or any of its directors. (1987, c. 88, s. 1; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.15; 2000-140, s. 44.)

Effect of Amendments. — Session Laws 2000-140, s. 44, effective July 21, 2000, in the first sentence, deleted "or" at the end of clause (v) and added the language beginning "or (vii)" at the end of that sentence, and in the second sentence substituted "G.S. 55-9-05(ii), (iv), or (vii) of this section" for "G.S. 55-9-05(ii) or (iv)."

Article 9A.

Control Share Acquisitions.

§ 55-9A-09. Exemptions.

The provisions of this Article shall not be applicable to any corporation if, on or before September 30, 1990, or such earlier date as may be irrevocably established by resolution of the board of directors, or at any time before the corporation becomes, or after it ceases to be, a covered corporation, the board of directors adopts a bylaw stating that the provisions of this Article shall not be applicable to the corporation; or, in the case of a corporation formed after August 12, 1987, its initial articles of incorporation provide that this Article shall not be applicable to the corporation; or on or after September 1, 2000, and on or before December 31, 2000, the board of directors of a corporation to which the provisions of this Article were applicable on September 1, 2000, adopts a bylaw stating that the provisions of this Article shall not be applicable to the corporation. Neither adoption nor failure to adopt such a bylaw or provision shall constitute grounds for any cause of action against the corporation, or any officer or director of the corporation. (1987, c. 773, s. 12; 1989, c. 200, s. 1; c. 265, s. 1; 2000-140, s. 47.)

Effect of Amendments. — Session Laws 2000-140, s. 47, effective July 21, 2000, inserted the language beginning "or on or after September 1, 2000" at the end of the first sentence.

Article 10.

Amendment of Articles of Incorporation and Bylaws.

Part 1. Amendment of Articles of Incorporation.

§ 55-10-03. Amendment by board of directors and shareholders.

(a) A corporation's board of directors may propose one or more amendments to the articles of incorporation for submission to the shareholders.

(b) For the amendment to be adopted:

(1) The board of directors must recommend the amendment to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation, in which event the board of directors must communicate the basis for its lack of a recommendation to the shareholders with the amendment; and

(2) The shareholders entitled to vote on the amendment must approve the amendment as provided in subsection (e).

(c) The board of directors may condition its submission of the proposed amendment on any basis.

(d) The corporation shall notify each shareholder, whether or not the shareholder is entitled to vote, of the proposed shareholders' meeting in accordance with G.S. 55-7-05. The notice of meeting must state that the purpose, or one of the purposes, of the meeting is to consider the proposed amendment and the notice must contain or be accompanied by a copy or summary of the amendment.

(e) Unless this Chapter, the articles of incorporation, a bylaw adopted by the shareholders, or the board of directors (acting pursuant to subsection (c)) require a greater vote or a vote by voting groups, the amendment to be adopted must be approved by:

(1) A majority of the votes entitled to be cast on the amendment by any voting group with respect to which the amendment would create dissenters' rights; and

(2) The votes required by G.S. 55-7-25 and G.S. 55-7-26 by every other voting group entitled to vote on the amendment. (1893, c. 380; 1899, c. 618; 1901, c. 2, ss. 28, 29, 30, 37; 1903, c. 510; Rev., ss. 1174, 1175, 1178; C.S., ss. 1130, 1131; 1925, c. 118, ss. 1, 2a; 1927, c. 142; 1931, c. 243, ss. 4, 5; 1933, c. 100, ss. 7, 8; 1941, c. 97, s. 5; G.S., ss. 55-30, 55-31; 1953, c. 54; c. 119, ss. 1, 2; 1955, c. 1371, s. 1; 1959, c. 1316, s. 25; 1973, c. 469, s. 30; 1989, c. 265, s. 1; 1991, c. 645, s. 8; 2000-140, s. 101(b).)

Effect of Amendments. — Session Laws 2000-140, s. 101(b), effective July 21, 2000, in subsection (d), inserted "whether or not the shareholder is," inserted "the notice must" and made a minor punctuation change.

Article 11.

Merger and Share Exchange.

§ 55-11-10. Merger with unincorporated entity.

(a) As used in this section, "business entity" means a domestic corporation as defined in G.S. 55-1-40 (including a professional corporation as defined in G.S. 55B-2), a foreign corporation as defined in G.S. 55-1-40 (including a foreign professional corporation as defined in G.S. 55B-16), a domestic or foreign nonprofit corporation as defined in G.S. 55A-1-40, a domestic or foreign limited liability company as defined in G.S. 57C-1-03, a domestic or foreign limited partnership as defined in G.S. 59-102, and any other partnership as defined in G.S. 59-36 whether or not formed under the laws of this State (including a registered limited liability partnership as defined in G.S. 59-32 and any limited liability partnership formed under a law other than the laws of this State).

(b) One or more domestic corporations may merge with one or more unincorporated entities and, if desired, one or more foreign corporations, domestic nonprofit corporations, or foreign nonprofit corporations if:

(1) The merger is permitted by the laws of the state or country governing the organization and internal affairs of each other merging business entity; and

(2) Each merging domestic corporation and each other merging business entity comply with the requirements of this section and, to the extent applicable, the laws referred to in subdivision (1) of this subsection.

(c) Each merging domestic corporation and each other merging business entity shall approve a written plan of merger containing:

(1) For each merging business entity, its name, type of business entity, and the state or country whose laws govern its organization and internal affairs;
(2) The name of the merging business entity that shall survive the merger;
(3) The terms and conditions of the merger;
(4) The manner and basis for converting the interests in each merging business entity into interests, obligations, or securities of the surviving business entity or into cash or other property in whole or in part; and
(5) If the surviving business entity is a domestic corporation, any amendments to its articles of incorporation that are to be made in connection with the merger.

The plan of merger may contain other provisions relating to the merger.

In the case of a domestic corporation, approval of the plan of merger requires that the plan of merger be adopted by its board of directors as provided in G.S. 55-11-03 and, unless shareholder approval is not required under subsection (g) of G.S. 55-11-03, be approved by its shareholders as provided in G.S. 55-11-03. In the case of each other merging business entity, the plan of merger must be approved in accordance with the laws of the state or country governing the organization and internal affairs of that merging business entity.

After a plan of merger has been approved by a domestic corporation but before the articles of merger become effective, the plan of merger (i) may be amended as provided in the plan of merger, or (ii) may be abandoned (subject to any contractual rights) as provided in the plan of merger or, if there is no such provision, as determined by the board of directors without further shareholder action.

(d) After a plan of merger has been approved by each merging domestic corporation and each other merging business entity as provided in subsection (c) of this section, the surviving business entity shall deliver articles of merger to the Secretary of State for filing. The articles of merger shall set forth:

(1) The plan of merger;
(2) For each merging business entity, its name, type of business entity, and the state or country whose laws govern its organization and internal affairs;
(3) The name and address of the surviving business entity;
(4) A statement that the plan of merger has been approved by each merging business entity in the manner required by law; and
(5) The effective date and time of merger if it is not to be effective at the time of filing of the articles of merger.

If the plan of merger is amended or abandoned before the articles of merger become effective, the surviving business entity promptly shall deliver to the Secretary of State for filing an amendment to the articles of merger reflecting the amendment or abandonment of the plan of merger.

Certificates of merger shall also be registered as provided in G.S. 47-18.1.

(e) A merger takes effect when the articles of merger become effective. When a merger takes effect:

(1) Each other merging business entity merges into the surviving business entity and the separate existence of each merging business entity except the surviving business entity ceases;
(2) The title to all real estate and other property owned by each merging business entity is vested in the surviving business entity without reversion or impairment;
(3) The surviving business entity has all liabilities of each merging business entity;
(4) A proceeding pending by or against any merging business entity may be continued as if the merger did not occur, or the surviving business

entity may be substituted in the proceeding for a merging business entity whose separate existence ceases in the merger;

(5) If a domestic corporation is the surviving business entity, its articles of incorporation shall be amended to the extent provided in the plan of merger;

(6) The interests in each merging business entity that are to be converted into interests, obligations, or securities of the surviving business entity or into the right to receive cash or other property are thereupon so converted, and the former holders of the interests are entitled only to the rights provided to them in the articles of merger or, in the case of former holders of shares in a domestic corporation, any rights they may have under Article 13 of this Chapter; and

(7) If the surviving business entity is not a domestic corporation, the surviving business entity is deemed to agree that it will promptly pay to the dissenting shareholders of any merging domestic corporation the amount, if any, to which they are entitled under Article 13 of this Chapter and otherwise to comply with the requirements of Article 13 as if it were a surviving domestic corporation in the merger.

The merger shall not affect the liability or absence of liability of any holder of an interest in a merging business entity for any acts, omissions, or obligations of any merging business entity made or incurred prior to the effectiveness of the merger. The cessation of separate existence of a merging business entity in the merger shall not constitute a dissolution or termination of the merging business entity.

(e1) If the surviving business entity is not a domestic limited liability company, a domestic corporation, a domestic nonprofit corporation, or a domestic limited partnership, when the merger takes effect the surviving business entity is deemed:

(1) To agree that it may be served with process in this State in any proceeding for enforcement (i) of any obligation of any merging domestic limited liability company, domestic corporation, domestic nonprofit corporation, domestic limited partnership, or other partnership as defined in G.S. 59-36 that is formed under the laws of this State, (ii) the rights of dissenting shareholders of any merging domestic corporation under Article 13 of this Chapter, and (iii) any obligation of the surviving business entity arising from the merger; and

(2) To have appointed the Secretary of State as its agent for service of process in any such proceeding. Service on the Secretary of State of any such process shall be made by delivering to and leaving with the Secretary of State or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of such process and the fee required by G.S. 55-1-22(b). Upon receipt of service of process on behalf of a surviving business entity in the manner provided for in this section, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the surviving business entity. If the surviving business entity is authorized to transact business or conduct affairs in this State, the address for mailing shall be its principal office designated in the latest document filed with the Secretary of State that is authorized by law to designate the principal office or, if there is no principal office on file, its registered office. If the surviving business is not authorized to transact business or conduct affairs in this State, the address for mailing shall be the mailing address designated pursuant to subdivision (3) of subsection (d) of this section.

(f) This section does not apply to a merger that does not include a merging unincorporated entity. (1999-369, s. 1.8; 2000-140, s. 45.)

Effect of Amendments. — Session Laws 2000-140, s. 45, effective July 21, 2000, in subdivision (e1)(2), deleted "If the surviving business entity does not have a registered agent in this State" preceding "To have appointed," deleted "until such time as the surviving business entity appoints a registered agent in this State" following "in any such proceeding," inserted "and the fee required by G.S. 55-1-22(b)," inserted "in the manner provided for in this section," deleted "at its address shown in the articles of merger or, if an application for certificate of withdrawal by reason of merger has been filed, at the address for service of process contained in that application" following "surviving business entity" and added the last two sentences.

Article 14.

Dissolution.

Part 1. Voluntary Dissolution.

§ 55-14-05. Effect of dissolution.

CASE NOTES

Effect of Temporary Suspension of Charter Under § 105-230. —

A corporation could not bring suit to enforce a contract entered into during a period of revenue suspension. South Mecklenburg Painting Contractors v. Cunnane Group, Inc., 134 N.C. App. 307, 517 S.E.2d 167 (1999).

Part 3. Judicial Dissolution.

§ 55-14-30. Grounds for judicial dissolution.

CASE NOTES

Order of Dissolution Upheld. — The trial court did not abuse its discretion in ordering dissolution of a closely-held corporation where the reasonable expectations of a minority shareholder and former vice-president with 38% of the shares, that he would receive fair market value for his shares after his company compensation was cut off, and of his grandson, that he would have a share in the management of the company after he was elected director, were frustrated by the majority shareholders, did not result from any fault of their own, and only judicial dissolution could safeguard those expectations. Royals v. Piedmont Elec. Repair Co., — N.C. App. —, 529 S.E.2d 515, 2000 N.C. App. LEXIS 497 (2000).

§ 55-14-31. Procedure for judicial dissolution.

CASE NOTES

Applied in Royals v. Piedmont Elec. Repair Co., — N.C. App. —, 529 S.E.2d 515, 2000 N.C. App. LEXIS 497 (2000).

ARTICLE 15.

Foreign Corporations.

Part 1. Certificate of Authority.

§ 55-15-07. Registered office and registered agent of foreign corporation.

(a) Each foreign corporation authorized to transact business in this State must continuously maintain in this State:

(1) A registered office that may be the same as any of its places of business; and

(2) A registered agent, who shall be (i) an individual who resides in this State and whose business office is identical with the registered office; (ii) a domestic corporation, nonprofit corporation, or limited liability company whose business office is identical with the registered office; or (iii) a foreign corporation, nonprofit corporation, or limited liability company authorized to transact business or conduct affairs in this State whose business office is identical with the registered office.

(b) The sole duty of the registered agent to the foreign corporation is to forward to the corporation at its last known address any notice, process, or demand that is served on the registered agent. (1901, c. 5; Rev., s. 1243; C.S., s. 1137; G.S., s. 55-38; 1955, c. 1371, s. 1; 1989, c. 265, s. 1; 2000-140, s. 101(c).)

Effect of Amendments. — Session Laws 2000-140, s. 101(c), effective July 21, 2000, in subdivision (a)(2), substituted "corporation, nonprofit corporation, or limited liability company" for "corporation or nonprofit domestic corporation" in (ii) and substituted "corporation, nonprofit corporation, or limited liability company authorized to transact business or conduct affairs" for "corporation or nonprofit foreign corporation authorized to transact business" in (iii).

Chapter 55A.

North Carolina Nonprofit Corporation Act.

Article 1.

General Provisions.

Part 1. Short Title and Reservation of Power.

§ 55A-1-01. Short title.

OPINIONS OF ATTORNEY GENERAL

Grants And Gifts. — The Secretary of State has the power, without further legislative authorization, to accept federal grants and private gifts to assist her in implementing her duties under the Nonprofit Corporation Act so long as those grants or gifts are not contrary to State law and so long as she complies with the applicable provisions of the Executive Budget Act. See opinion of Attorney General to Sheila Stafford Pope, General Counsel, Secretary of State, N.C. General Assembly, 1999 N.C.A.G. 17 (6/21/99).

Article 5.

Office and Agent.

§ 55A-5-01. Registered office and registered agent.

(a) Each corporation shall continuously maintain in this State:
(1) A registered office that may be the same as any place where it conducts affairs; and
(2) A registered agent, who shall be:
a. An individual who resides in this State and whose office is identical with the registered office;
b. A domestic business corporation, nonprofit corporation, or limited liability company whose office is identical with the registered office; or
c. A foreign business corporation, nonprofit corporation, or limited liability company authorized to transact business or conduct affairs in this State whose office is identical with the registered office.

(b) The sole duty of the registered agent to the corporation is to forward to the corporation at its last known address any notice, process, or demand that

is served on the registered agent. (1955, c. 1230; 1957, c. 979, s. 20; 1993, c. 398, s. 1; 1995, c. 400, s. 1; 2000-140, s. 101(d).)

Effect of Amendments. — Session Laws 2000-140, s. 101(d), effective July 21, 2000, substituted "corporation, nonprofit corporation, or limited liability liability company" for "or nonprofit corporation" in subdivision (a)(2)b. and c.

§ 55A-5-04. Service on corporation.

(a) A corporation's registered agent is an agent of the corporation for service of process, notice, or demand required or permitted by law to be served on the corporation.

(b) When a corporation fails to appoint or maintain a registered agent in this State, or when its registered agent cannot with due diligence be found at the registered office, the Secretary of State shall be an agent of the corporation upon whom any process, notice, or demand may be served. Service on the Secretary of State of any process, notice, or demand shall be made by delivering to and leaving with the Secretary of State or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of such process, notice, or demand and the fee required by G.S. 55A-1-22(b). In the event any process, notice, or demand is served on the Secretary of State in the manner provided for in this section, the Secretary of State shall immediately mail one of the copies thereof, by registered or certified mail, return receipt requested, to the corporation at its principal office or, if there is no mailing address for the principal office on file, to the corporation at its registered office. Service on a corporation under this subsection shall be effective for all purposes from and after the date of such service on the Secretary of State.

(c) The Secretary of State shall keep a record of all processes, notices, and demands served upon the Secretary of State under this section and shall record therein the date of service and his action with reference thereto.

(d) Nothing in this section shall limit or affect the right to serve any process, notice, or demand required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law. (1955, c. 1230; 1977, 2nd Sess., c. 1219, s. 35; 1993, c. 398, s. 1; 1995, c. 539, s. 23; 2000-140, s. 46.)

Effect of Amendments. — Session Laws 2000-140, s. 46, effective July 21, 2000, in subsection (b), substituted "authorized by the Secretary of State to accept service of process" for "having charge of the corporation department of his office," and inserted "and the fee required by G.S. 55A-1-22(b)" in the second sentence, and in the third sentence substituted "in the manner provided for in this section, the Secretary of State shall" for "he shall," and deleted "shown in its most recent annual report, if applicable, the articles of incorporation, the Designation of Principal Office Address form, or in any subsequent Corporation's Statement of Change of Principal Office Address form, or in any subsequent communication received from the corporation stating the current mailing address of its principal office" following "to the corporation at its principal office."

Article 11.

Merger.

§ 55A-11-09. Merger with unincorporated entity.

(a) As used in this section, "business entity" means a domestic corporation as defined in G.S. 55-1-40 (including a professional corporation as defined in G.S. 55B-2), a foreign corporation as defined in G.S. 55-1-40 (including a foreign professional corporation as defined in G.S. 55B-16), a domestic or

foreign nonprofit corporation as defined in G.S. 55A-1-40, a domestic or foreign limited liability company as defined in G.S. 57C-1-03, a domestic or foreign limited partnership as defined in G.S. 59-102, a registered limited liability partnership or foreign limited liability partnership as defined in G.S. 59-32, or any other partnership as defined in G.S. 59-36 whether or not formed under the laws of this State.

(b) One or more domestic nonprofit corporations may merge with one or more unincorporated entities and, if desired, one or more foreign nonprofit corporations, domestic business corporations, or foreign business corporations if:

(1) The merger is permitted by the laws of the state or country governing the organization and internal affairs of each of the other merging business entities;

(2) Each merging domestic nonprofit corporation and each other merging business entity comply with the requirements of this section and, to the extent applicable, the laws referred to in subdivision (1) of this subsection; and

(3) The merger complies with G.S. 55A-11-02, if applicable.

(c) Each merging domestic nonprofit corporation and each other merging business entity shall approve a written plan of merger containing:

(1) For each merging business entity, its name, type of business entity, and the state or country whose laws govern its organization and internal affairs;

(2) The name of the merging business entity that shall survive the merger;

(3) The terms and conditions of the merger;

(4) The manner and basis for converting the interests in each merging business entity into interests, obligations, or securities of the surviving business entity or into cash or other property in whole or in part; and

(5) If the surviving business entity is a domestic nonprofit corporation, any amendments to its articles of incorporation that are to be made in connection with the merger.

The plan of merger may contain other provisions relating to the merger.

In the case of a domestic nonprofit corporation, approval of the plan of merger requires that the plan of merger be adopted as provided in G.S. 55A-11-03. In the case of each other merging business entity, the plan of merger must be approved in accordance with the laws of the state or country governing the organization and internal affairs of such merging business entity.

After a plan of merger has been approved by a domestic nonprofit corporation but before the articles of merger become effective, the plan of merger (i) may be amended as provided in the plan of merger, or (ii) may be abandoned (subject to any contractual rights) as provided in the plan of merger or, if there is no such provision, as determined by the board of directors.

(d) After a plan of merger has been approved by each merging domestic nonprofit corporation and each other merging business entity as provided in subsection (c) of this section, the surviving business entity shall deliver articles of merger to the Secretary of State for filing. The articles of merger shall set forth:

(1) The plan of merger;

(2) For each merging business entity, its name, type of business entity, and the state or country whose laws govern its organization and internal affairs;

(3) The name of the surviving business entity and, if the surviving business entity is not authorized to transact business or conduct

affairs in this State, a designation of its mailing address and a commitment to file with the Secretary of State a statement of any subsequent change in its mailing address;

(4) A statement that the plan of merger has been approved by each merging business entity in the manner required by law; and

(5) The effective date and time of merger if it is not to be effective at the time of filing of the articles of merger.

If the plan of merger is amended or abandoned after the articles of merger have been filed but before the articles of merger become effective, the surviving business entity promptly shall deliver to the Secretary of State for filing an amendment to the articles of merger reflecting the amendment or abandonment of the plan of merger.

Certificates of merger shall also be registered as provided in G.S. 47-18.1.

(e) A merger takes effect when the articles of merger become effective. When a merger takes effect:

(1) Each other merging business entity merges into the surviving business entity and the separate existence of each merging business entity except the surviving business entity ceases;

(2) The title to all real estate and other property owned by each merging business entity is vested in the surviving business entity without reversion or impairment;

(3) The surviving business entity has all liabilities of each merging business entity;

(4) A proceeding pending by or against any merging business entity may be continued as if the merger did not occur, or the surviving business entity may be substituted in the proceeding for a merging business entity whose separate existence ceases in the merger;

(5) If a domestic nonprofit corporation is the surviving business entity, its articles of incorporation shall be amended to the extent provided in the plan of merger;

(6) The interests in each merging business entity that are to be converted into interests, obligations, or securities of the surviving business entity or into the right to receive cash or other property are thereupon so converted, and the former holders of the interests are entitled only to the rights provided to them in the articles of merger or, in the case of former holders of shares in a domestic business corporation, any rights they may have under Article 13 of Chapter 55 of the General Statutes; and

(7) If the surviving business entity is not a domestic business corporation, the surviving business entity is deemed to agree that it will promptly pay to the dissenting shareholders of any merging domestic business corporation the amount, if any, to which they are entitled under Article 13 of Chapter 55 of the General Statutes and otherwise to comply with the requirements of Article 13 as if it were a surviving domestic business corporation in the merger.

The merger shall not affect the liability or absence of liability of any holder of an interest in a merging business entity for any acts, omissions, or obligations of any merging business entity made or incurred prior to the effectiveness of the merger. The cessation of separate existence of a merging business entity in the merger shall not constitute a dissolution or termination of the merging business entity.

(e1) If the surviving business entity is not a domestic limited liability company, a domestic business corporation, a domestic nonprofit corporation, or a domestic limited partnership, when the merger takes effect the surviving business entity is deemed:

(1) To agree that it may be served with process in this State in any proceeding for enforcement of (i) any obligation of any merging

domestic limited liability company, domestic business corporation, domestic nonprofit corporation, domestic limited partnership, or other partnership as defined in G.S. 59-36 that is formed under the laws of this State, (ii) the rights of dissenting shareholders of any merging domestic business corporation under Article 13 of Chapter 55 of the General Statutes, and (iii) any obligation of the surviving business entity arising from the merger; and

(2) To have appointed the Secretary of State as its agent for service of process in any such proceeding. Service on the Secretary of State of any such process shall be made by delivering to and leaving with the Secretary of State or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of such process and the fee required by G.S. 55A-1-22(b). Upon receipt of service of process on behalf of a surviving business entity in the manner provided by this section, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the surviving business entity. If the surviving business entity is authorized to transact business or conduct affairs in this State, the address for mailing shall be its principal office designated in the latest document filed with the Secretary of State that is authorized by law to designate the principal office or, if there is no principal office on file, its registered office. If the surviving business is not authorized to transact business or conduct affairs in this State, the address for mailing shall be the mailing address designated pursuant to subdivision (3) of subsection (d) of this section.

(f) This section does not apply to a merger that does not include a merging unincorporated entity. (1999-369, s. 2.7; 2000-140, s. 48.)

Effect of Amendments. — Session Laws 2000-140, s. 48, effective July 21, 2000, at the end of subsection (a), substituted the language beginning "a registered limited partnership" for "and any other partnership as defined in G.S. 59-36 whether or not formed under the laws of this State (including a registered limited liability partnership as defined in G.S. 59-32 and any limited liability partnership formed under a law other than the laws of this State)"; in subdivision (d)(3), deleted "and address" following "The name" and added the language following "business entity"; in the second paragraph of subsection (d), inserted "after the articles of merger have been filed but"; and rewrote subdivision (e1)(2).

Article 15.

Foreign Corporations.

Part 1. Certificate of Authority.

§ 55A-15-07. Registered office and registered agent of foreign corporation.

(a) Each foreign corporation authorized to conduct affairs in this State shall continuously maintain in this State:

(1) A registered office that may be the same as any place where it conducts affairs; and

(2) A registered agent, who shall be: (i) an individual who resides in this State and whose office is identical with the registered office; (ii) a domestic business corporation, nonprofit corporation, or limited liability company whose office is identical with the registered office; or (iii) a foreign business corporation, nonprofit corporation, or limited

liability company authorized to transact business or conduct affairs in this State whose office is identical with the registered office.

(b) The sole duty of the registered agent to the foreign corporation is to forward to the corporation at its last known address any notice, process, or demand that is served on the registered agent. (1955, c. 1230; 1993, c. 398, s. 1; 2000-140, s. 101(e).)

Effect of Amendments. — Session Laws 2000-140, s. 101(e), effective July 21, 2000, in subdivision (a)(2), substituted "business corporation, nonprofit corporation, or limited liability company" for "business or nonprofit corporation" twice and made a minor punctuation change.

TABLES OF COMPARABLE SECTIONS FOR CHAPTER 55A

Former to Present

Editor's Note. — The following table shows G.S. sections from former Chapter 55A and their comparable, new Chapter 55A numbers. Where there is no comparable, new number, the term "None" has been inserted.

Former Section	Present Section
55A-1	55A-1-01
55A-2	55A-1-40
55A-3	55A-17-01
55A-4(a)	55A-1-20, 55A-1-25
55A-4(b)	55A-1-23
55A-5	55A-3-01
55A-6	55A-2-01
55A-7	55A-2-02
55A-8	55A-2-03
55A-8.1	55A-3-05
55A-9	55A-2-05
55A-10	55A-4-01, 55A-4-02, 55A-4-03, 55A-4-04
55A-11	55A-5-01
55A-12	55A-5-02, 55A-5-03
55A-13	55A-5-04
55A-14	55A-2-06, 55A-6-20, 55A-6-31, 55A-10-20, 55A-10-21
55A-15	55A-1-50, 55A-3-02
55A-16	55A-3-06
55A-17	55A-3-04
55A-17.1	55A-8-51 55A-8-53, 55A-8-57
55A-17.2	55A-8-51, 55A-8-52, 55A-8-54, 55A-8-55, 55A-8-56
55A-17.3	55A-8-52, 55A-8-54
55A-18	55A-8-32
55A-19	55A-8-01, 55A-8-02
55A-20	55A-7-26, 55A-8-03, 55A-8-04, 55A-8-05, 55A-8-06, 55A-8-08, 55A-8-09,
55A-21	55A-8-11
55A-22	55A-8-24
55A-23	55A-8-25
55A-24	55A-8-20, 55A-8-22, 55A-8-23
55A-24.1	55A-8-20, 55A-8-21
55A-24.2	55A-8-12, 55A-8-31
55A-24.3	None
55A-25	55A-8-40, 55A-8-41
55A-26	55A-8-43, 55A-8-44
55A-26.1	55A-8-30, 55A-8-42
55A-26.2	None
55A-27	55A-16-01, 55A-16-02, 55A-16-03
55A-27.1	55A-16-01
55A-28	55A-6-21, 55A-13-01, 55A-13-02
55A-28.1	55A-8-24, 55A-8-33, 55A-14-09
55A-28.1A	55A-8-60
55A-28.2	55A-7-40
55A-29	55A-6-01, 55A-6-20, 55A-6-31
55A-30	55A-7-01, 55A-7-02
55A-31	55A-7-05
55A-32	55A-6-20, 55A-7-08, 55A-7-21, 55A-7-24, 55A-7-25
55A-33	55A-7-22, 55A-7-23

Former Section	Present Section
55A-33.1	55A-7-04
55A-34	55A-10-01
55A-35	55A-10-02, 55A-10-03
55A-36	55A-10-05
55A-37	55A-10-07
55A-37.1	55A-10-06
55A-38	55A-11-01
55A-39	None
55A-40	55A-11-03
55A-41	55A-11-04
55A-42	55A-11-05
55A-42.1	55A-11-06
55A-43	55A-12-01, 55A-12-02
55A-44	55A-14-01, 55A-14-02, 55A-14-07, 55A-14-08
55A-44.1	None
55A-45	55A-14-03
55A-46	55A-14-02
55A-47	55A-14-05
55A-48	55A-14-04
55A-49	55A-14-06
55A-50	55A-14-30
55A-51	None
55A-52	55A-14-31
55A-53	55A-14-30, 55A-14-31, 55A-14-33
55A-54	55A-14-32
55A-55	None
55A-56	55A-14-33
55A-57	55A-14-40
55A-57.1	55A-14-01
55A-58	55A-15-01
55A-59	55A-15-05
55A-60	55A-15-06
55A-61	55A-15-03
55A-62	55A-15-03
55A-63	55A-15-05
55A-64	55A-15-07
55A-65	55A-15-08
55A-66	55A-15-10
55A-67	55A-15-10
55A-68	55A-15-10
55A-68.1	55A-15-10
55A-69	None
55A-70	None
55A-71	55A-15-04
55A-72	55A-15-20
55A-73	55A-15-30, 55A-15-31
55A-74	55A-15-31
55A-75	55A-17-01
55A-76	55A-15-02
55A-77	55A-1-22
55A-78	55A-1-22
55A-79	55A-1-31
55A-80	55A-1-29, 55A-1-32
55A-81	55A-1-30
55A-82	55A-1-25, 55A-1-27, 55A-1-28
55A-83	55A-1-21
55A-84	None
55A-85	55A-7-06, 55A-8-23
55A-86	None
55A-87	55A-1-02
55A-88	55A-17-02
55A-89	None
55A-89.1	55A-17-05

Present to Former

Editor's Note. — The following table shows G.S. sections of current Chapter 55A and their comparable, former Chapter 55A sections numbers. Where there is no comparable, former Chapter 55A number, the term "None" has been inserted.

Present Section	Former Section
55A-1-01	55A-1
55A-1-02	55A-87
55A-1-20	55A-4(a)
55A-1-21	55A-83
55A-1-22	55A-77, 55A-78
55A-1-23	55A-4(b)
55A-1-24	None
55A-1-25	55A-4(a)(5), 55A-82
55A-1-26	None
55A-1-27	55A-82
55A-1-28(a), (b)	None
55A-1-28(c)	55A-82
55A-1-29	55A-80(b)
55A-1-30	55A-81
55A-1-31	55A-79
55A-1-32	55A-80
55A-1-33	None
55A-1-40	55A-2
55A-1-41	None
55A-1-50	55A-15(c)
55A-1-60	None
55A-2-01	55A-6
55A-2-02	55A-7
55A-2-03	55A-8
55A-2-04	None
55A-2-05	55A-9
55A-2-06	55A-14
55A-2-07	None
55A-3-01	55A-5
55A-3-02	55A-15
55A-3-03	None
55A-3-04	55A-17
55A-3-05	55A-8.1
55A-3-06	55A-16
55A-4-01	55A-10
55A-4-02	55A-10
55A-4-03	55A-10
55A-4-04	55A-10
55A-4-05	None
55A-5-01	55A-11
55A-5-02	55A-12
55A-5-03	55A-12
55A-5-04	55A-13
55A-6-01	55A-29(a)
55A-6-20	55A-14, 55A-29(a), 55A-32
55A-6-21	55A-28(a)
55A-6-22	None
55A-6-23	None
55A-6-24	None
55A-6-30	None
55A-6-31	55A-14, 55A-29(b)
55A-6-40	None
55A-7-01	55A-30(a), (b)
55A-7-02	55A-30(c)
55A-7-03	None
55A-7-04	55A-33.1
55A-7-05	55A-31
55A-7-06	55A-85
55A-7-07	None
55A-7-08	55A-32(b)
55A-7-20	None
55A-7-21	55A-32
55A-7-22	55A-33
55A-7-23	55A-33
55A-7-24	55A-32(b)
55A-7-25	55A-32(c)
55A-7-26	55A-20(c)
55A-7-27	None
55A-7-30	None
55A-7-40	55A-28.2
55A-8-01	55A-19
55A-8-02	55A-19(c)
55A-8-03	55A-20(a), (b)
55A-8-04	55A-20(c), (e)
55A-8-05	55A-20(c)
55A-8-06	55A-20(d)
55A-8-07	None
55A-8-08	55A-20(f)
55A-8-09	55A-20(f)
55A-8-10	None
55A-8-11	55A-21
55A-8-12	55A-24.2(a)
55A-8-20	55A-24(a), 55A-24.1(c)
55A-8-21	55A-24.1(a)
55A-8-22	55A-24(a), (c)
55A-8-23	55A-24(c), 55A-85
55A-8-24	55A-22, 55A-28.1(f)
55A-8-25	55A-23
55A-8-30	55A-26.1
55A-8-31	55A-24.2(b)
55A-8-32	55A-18
55A-8-33	55A-28.1
55A-8-40	55A-25
55A-8-41	55A-25(b)
55A-8-42	55A-26.1
55A-8-43(b)	55A-26

Present Section	Former Section
55A-8-44	55A-26
55A-8-50	None
55A-8-51	55A-17.1, 55A-17.2
55A-8-52	55A-17.2, 55A-17.3
55A-8-53	55A-17.1
55A-8-54	55A-17.2, 55A-17.3
55A-8-55	55A-17.2
55A-8-56	55A-17.2
55A-8-57	55A-17.1
55A-8-58	None
55A-8-60	55A-28.1A
55A-10-01	55A-34
55A-10-02	55A-35
55A-10-03	55A-35
55A-10-04	None
55A-10-05	55A-36
55A-10-06	55A-37.1
55A-10-07	55A-37
55A-10-20	55A-14
55A-10-21	55A-14
55A-10-22	None
55A-10-30	None
55A-11-01	55A-38
55A-11-02	None
55A-11-03	55A-40
55A-11-04	55A-41
55A-11-05	55A-42
55A-11-06	55A-42.1
55A-11-07	None
55A-12-01	55A-43
55A-12-02	55A-43
55A-13-01	55A-28(b)
55A-13-02	55A-28(c), (d), (e)
55A-14-01	55A-44, 55A-57.1
55A-14-02	55A-44, 55A-46
55A-14-03	55A-45
55A-14-04	55A-48
55A-14-05	55A-47
55A-14-06	55A-49
55A-14-07	55A-44(b)
55A-14-08	55A-44(b)
55A-14-09	55A-28.1(h)
55A-14-20	None
55A-14-21	None
55A-14-22	None
55A-14-23	None
55A-14-24	None
55A-14-30	55A-50, 55A-53
55A-14-31	55A-52, 55A-53
55A-14-32	55A-54
55A-14-33	55A-53, 55A-56
55A-14-40	55A-57
55A-14A-01	None
55A-15-01	55A-58
55A-15-02	55A-76
55A-15-03	55A-61, 55A-62
55A-15-04	55A-71
55A-15-05	55A-59, 55A-63
55A-15-06	55A-60
55A-15-07	55A-64
55A-15-08	55A-65
55A-15-09	None
55A-15-10	55A-66, 55A-67, 55A-68, 55A-68.1
55A-15-20	55A-72
55A-15-21	None
55A-15-30	55A-73
55A-15-31	55A-73, 55A-74
55A-15-32	None
55A-16-01	55A-27, 55A-27.1
55A-16-02	55A-27
55A-16-03	55A-27
55A-16-04	None
55A-16-05	None
55A-16-20	None
55A-16-21	None
55A-16-22	None
55A-17-01	55A-3
55A-17-02	55A-88
55A-17-03	None
55A-17-04	None
55A-17-05	55A-89.1

Chapter 55B.

Professional Corporation Act.

§ 55B-2. Definitions.

As used in this Chapter, the following words shall, unless the context requires otherwise, have the following meanings:

(1) "Disqualified person" means a licensed person who for any reason becomes legally disqualified to render the same professional services which are or were being rendered by the professional corporation of which such person is an officer, director, shareholder or employee.

(2) "Licensee" means any natural person who is duly licensed by the appropriate licensing board to render the same professional services which will be rendered by the professional corporation of which he is, or intends to become, an officer, director, shareholder or employee.

(3) "Licensing board" means a board which is charged with the licensing and regulating of the profession or practice in this State in which the professional corporation is organized to engage.

(4) The term "licensing board," as the same applies to attorneys at law, shall mean the Council of the North Carolina State Bar, and it shall include the North Carolina State Board of Law Examiners only to the extent that the North Carolina Board of Law Examiners is authorized to issue licenses for the practice of law under the supervision of the Council of the North Carolina State Bar.

(5) "Professional corporation" means a corporation which is engaged in rendering the professional services as herein specified and defined, pursuant to a certificate of registration issued by the Licensing Board regulating the profession or practice, and which has as its shareholders only those individuals permitted by G.S. 55B-6 of this Chapter to be shareholders and which designates itself as may be required by this statute, and which is organized under the provisions of this Chapter and of Chapter 55, the North Carolina Business Corporation Act.

(6) The term "professional service" means any type of personal or professional service of the public which requires as a condition precedent to the rendering of such service the obtaining of a license from a licensing board as herein defined, and pursuant to the following provisions of the General Statutes: Chapter 83A, "Architects"; Chapter 84, "Attorneys-at-Law"; Chapter 93, "Public Accountants"; and Article 1, "Practice of Medicine," Article 2, "Dentistry," Article 6, "Optometry," Article 7, "Osteopathy," Article 8, "Chiropractic," Article 9A, "Nursing Practice Act," with regard to registered nurses, Article 11, "Veterinarians," Article 12A, "Podiatrists," Article 18A, "Practicing Psychologists," Article 18D, "Occupational Therapy," and Article 24, "Licensed Professional Counselors," of Chapter 90; Chapter 89C, "Engineering and Land Surveying"; Chapter 89A, "Landscape Architects"; Chapter 90B, "Social Worker Certification Act" with regard to Certified Clinical Social Workers as defined by G.S. 90B-3; Chapter 89E, "Geologists"; Chapter 89B, "Foresters"; and Chapter 89F, "North Carolina Soil Scientist Licensing Act". (1969, c. 718, s. 2; 1971, c. 196,

s. 1; 1977, c. 53; c. 855, s. 1; 1979, c. 460; 1989 (Reg. Sess., 1990), c. 1024, s. 3; 1991, c. 205, s. 1; 1995, c. 382, s. 2; 1997-421, s. 2; 2000-115, s. 4.)

Effect of Amendments. — Session Laws 2000-115, s. 4, effective July 14, 2000, substituted "Chapter 89B, 'Foresters'; and Chapter 89F, 'North Carolina Soil Scientist Licensing Act'." for "and Chapter 89B, 'Foresters'." in subdivision (6).

§ 55B-6. Capital stock.

(a) Except as provided in subsection (b), a professional corporation may issue shares of its capital stock only to a licensee as defined in G.S. 55B-2, and a shareholder may voluntarily transfer such shares of stock issued to him only to another such licensee. No share or shares of any stock of such corporation shall be transferred upon the books of the corporation unless the corporation has received a certification of the appropriate licensing board that the transferee of such shares is a licensee. Provided, it shall be lawful in the case of professional corporations rendering services as defined in Chapters 83A, 89A, 89C, 89E, and 89F, for non-licensed employees of such corporation to own not more than one-third of the total issued and outstanding shares of such corporation. Provided further, subject to any additional conditions that the appropriate licensing board may by rule or order impose in the public interest, it shall be lawful for individuals who are not licensees but who perform professional services on behalf of a professional corporation in another jurisdiction in which the corporation maintains an office, and who are duly licensed to perform professional services under the laws of the other jurisdiction, to be shareholders of the corporation so long as there is at least one shareholder who is a licensee as defined in G.S. 55B-2, and the corporation renders its professional services in the State only through those shareholders that are licensed in North Carolina. Upon the transfer of any shares of such corporation to a non-licensed employee of such corporation, the corporation shall inform the appropriate licensing board of the name and address of the transferee and the number of shares issued to such nonprofessional transferee. Any share of stock of such corporation issued or transferred in violation of this section shall be null and void. No shareholder of a professional corporation shall enter into a voting trust agreement or any other type of agreement vesting in another person the authority to exercise the voting power of any or all of his stock.

(a1) Any person may own up to forty-nine percent of the stock of a professional corporation rendering services under Chapter 93 of the General Statutes as long as:

(1) Licensees continue to own and control voting stock that represents at least fifty-one percent (51%) the votes entitled to be cast in the election of directors of the professional corporation; and

(2) All licensees who perform professional services on behalf of the corporation comply with Chapter 93 of the General Statutes and the rules adopted thereunder.

(b) A professional corporation formed pursuant to this Chapter may issue one hundred percent (100%) of its capital stock to another professional corporation in order for that corporation (the distributing corporation) to distribute in accordance with section 355 of the Internal Revenue Code of 1986, as amended (or any succeeding section), the stock of the controlled corporation to one or more shareholders of the distributing corporation authorized under this section to hold the shares. The distributing corporation shall distribute the stock of the controlled corporation within 30 days after the stock is issued to the distributing corporation. A share of stock of the controlled corporation that is not transferred in accordance with this subsection within 30 days after

the share was issued to the distributing corporation is void. (1969, c. 718, s. 6; 1977, c. 855, s. 1; 1989, c. 258; 1991, c. 179, s. 1; c. 205, s. 3; 1995, c. 351, s. 16; 1999-440, s. 1; 2000-115, s. 5.)

Effect of Amendments. — Session Laws 2000-115, s. 5, effective July 14, 2000, substituted "89E, and 89F" for "and 89E" in subsection (a).

§ 55B-9. Professional relationship and liability.

(a) Relationship. — Nothing in this Chapter shall be interpreted to abolish, modify, restrict, limit or alter the law in this State applicable to the professional relationship and liabilities between the licensee furnishing the professional services and the person receiving such professional service, or the standards of professional conduct applicable to the rendering therein of such services.

(b) Liability. — A shareholder, a director, or an officer of a professional corporation is not individually liable, directly or indirectly, including by indemnification, contribution, assessment, or otherwise, for the debts, obligations, and liabilities of, or chargeable to, the professional corporation that arise from errors, omissions, negligence, malpractice, incompetence, or malfeasance committed by another shareholder, director, or officer or by a representative of the professional corporation; provided, however, nothing in this Chapter shall affect the liability of a shareholder, director, or officer of a professional corporation for his or her own errors, omissions, negligence, malpractice, incompetence, or malfeasance committed in the rendering of professional services. (1969, c. 718, s. 9; 1993, c. 354, s. 2; 1999-362, s. 2; 2000-140, s. 101(f).)

Effect of Amendments. — Session Laws 2000-140, s. 101(f), effective July 21, 2000, deleted the former last sentence in subsection (b) regarding the joint and several liability of a shareholder, a director, or an officer of a professional corporation.

§ 55B-14. Types of professional services.

(a) A professional corporation shall render only one specific type professional service, and such services as may be ancillary thereto, and shall not engage in any other business or profession; provided, however, such corporation may own real and personal property necessary or appropriate for rendering the type of professional services it was organized to render and it may invest in real estate, mortgages, stocks, bonds, and any other type of investments.

(b) Notwithstanding subsection (a) of this section, in the case of architectural, landscape architectural, engineering or land surveying, geological, and soil science services, as defined in Chapters 83A, 89A, 89C, 89E, and 89F respectively, one corporation may be authorized to provide such of these services where such corporation, and at least one corporate officer who is a stockholder thereof, is duly licensed by the licensing board of each such profession.

(c) A professional corporation may also be formed by and between or among:

(1) A licensed psychologist and a physician practicing psychiatry to render psychotherapeutic and related services.

(2) Any combination of a registered nurse, nurse practitioner, certified clinical specialist in psychiatric and mental health nursing, certified nurse midwife, and certified nurse anesthetist, to render nursing and related services that the respective stockholders are licensed, certified, or otherwise approved to provide.

(3) A physician and a physician assistant who is licensed, registered, or otherwise certified under Chapter 90 of the General Statutes to render medical and related services.

(4) A physician, or a licensed psychologist, or both, and a certified clinical specialist in psychiatric and mental health nursing, a certified clinical social worker, a licensed professional counselor, or each of them, to render psychotherapeutic and related services that the respective stockholders are licensed, certified, or otherwise approved to provide.

(5) A physician and any combination of a nurse practitioner, certified clinical specialist in psychiatric and mental health nursing, or certified nurse midwife, registered or otherwise certified under Chapter 90 of the General Statutes, to render medical and related services that the respective stockholders are licensed, certified, or otherwise approved to provide.

(6) A physician practicing anesthesiology and a certified nurse anesthetist to render anesthesia and related medical services that the respective stockholders are licensed, certified, or otherwise approved to provide.

(7) A physician and an audiologist who is licensed under Article 22 of Chapter 90 of the General Statutes to render audiological and related medical services that the respective stockholders are licensed, certified, or otherwise approved to provide.

(8) A physician practicing ophthalmology and an optometrist who is licensed under Article 6 of Chapter 90 of the General Statutes to render either or both of ophthalmic services and optometric and related services that the respective stockholders are licensed, certified, or otherwise approved to provide. (1969, c. 718, s. 14; 1971, c. 196, s. 2; 1973, c. 1446, s. 9; 1985, c. 251; 1991, c. 205, s. 4; 1995, c. 382, s. 1; 1997-421, s. 1; 1997-500, s. 1; 1999-136, s. 1; 2000-115, s. 6.)

Effect of Amendments. —

Session Laws 2000-115, s. 6, effective July 14, 2000, in subsection (b), substituted "surveying, geological, and soil science services" for "surveying and geological services" and substituted "89E, and 89F" for "and 89E."

Chapter 57C.

North Carolina Limited Liability Company Act.

Article 1.

General Provisions.

Part 1. Short Title; Reservation of Power; Definitions.

§ 57C-1-03. Definitions.

Editor's Note. — Session Laws 1999-189, s. 7, which amended this section as amended by Session Laws 2000-140, s. 101(t), effective July 21, 2000, provides: "This act is effective when it becomes law [June 18, 1999], applies to limited liability companies in existence or formed on or after the date the act becomes law, and applies to actions commenced on or after October 1, 1999."

Part 2. Filing Documents.

§ 57C-1-20. Filing requirements.

Editor's Note. — Session Laws 1999-189, s. 7, which amended this section as amended by Session Laws 2000-140, s. 101(t), effective July 21, 2000, provides: "This act is effective when it becomes law [June 18, 1999], applies to limited liability companies in existence or formed on or after the date the act becomes law, and applies to actions commenced on or after October 1, 1999."

ARTICLE 2.

Purposes, Powers, Formation, Annual Report, Name, Registered Office, and Agent.

Part 2. Formation; Articles of Organization; Amendment of Articles; Annual Report.

§ 57C-2-20. Formation.

(a) One or more persons may form a limited liability company by delivering executed articles of organization to the Secretary of State for filing. A limited liability company may also be formed through the conversion of another business entity pursuant to Part 1 of Article 9A of this Chapter.

(b)(1) When the filing by the Secretary of State of the articles of organization becomes effective, the proposed organization becomes a limited liability company subject to this Chapter and to the purposes, conditions, and provisions stated in the articles of organization.

(2) Filing of the articles of organization by the Secretary of State is conclusive evidence of the formation of the limited liability company, except in a proceeding by the State to cancel or revoke the articles of organization or involuntarily dissolve the limited liability company.

(c) If initial members are not identified in the articles of organization of a limited liability company in the manner provided in G.S. 57C-3-01(a), the organizers shall hold one or more meetings at the call of a majority of the organizers to identify the initial members of the limited liability company. Unless otherwise provided in this Chapter or in the articles of organization of the limited liability company, all decisions to be made by the organizers at such meetings shall require the approval, consent, agreement, or ratification of a majority of the organizers. Unless otherwise provided in the articles of organization, the organizers may, in lieu of a meeting, take action as described in this subsection by written consent signed by all of the organizers. The written consent may be incorporated in, or otherwise made part of, the initial written operating agreement of the limited liability company. (1993, c. 354, s. 1; 1997-485, s. 28; 1999-189, s. 2.2; 1999-369, s. 3.4; 1999-456, s. 50; 2000-140, ss. 10(a), 10(b).)

Editor's Note. — The section above was amended by Session Laws 1999-189, s. 2.2, and Session Laws 1999-456, s. 50, in the coded bill drafting format provided by § 120-20.1. The amendment by 1999-456 rewrote the section, as amended by Session Laws 1999-189, s. 2, and failed to incorporate changes made by Session Laws 1999-189, including the addition of subsection (d), regarding formation of a limited liability company through the conversion of another business entity. As added by Session Laws 1999-189, s. 2, subsection (d) read as follows: "(d) A limited liability company may also be formed through the conversion of another business entity in accordance with Part 1 of Article 9 of this Chapter." Subsequently, Session Laws 2000-140, s. 10(a), repealed s. 2.2 of Session Laws 1999-189 and s. 50 of Session Laws 1999-456, effective July 21, 2000.

Effect of Amendments. —

Session Laws 2000-140, s. 10(b), effective July 21, 2000, substituted "form" for "organize" in the first sentence of subsection (a); in subdivision (b)(1), substituted "filing by the Secretary of State of the articles of organization becomes effective" for "Secretary of State files the articles of organization" and substituted "stated in the articles of organization" for "stated in the articles, and the person executing the articles of organization become members of the limited liability company" at the end of the subdivision; in subdivision (b)(2), inserted "of organization" and substituted "formation" for "organization"; and added subsection (c).

§ 57C-2-21. Articles of organization.

Editor's Note. — Session Laws 1999-189, s. 7, which amended this section as amended by Session Laws 2000-140, s. 101(t), effective July 21, 2000, provides: "This act is effective when it becomes law [June 18, 1999], applies to limited liability companies in existence or formed on or after the date the act becomes law, and applies to actions commenced on or after October 1, 1999."

§ 57C-2-22. Amendment of articles of organization.

Editor's Note. — Session Laws 1999-189, s. 7, which amended this section as amended by Session Laws 2000-140, s. 101(t), effective July 21, 2000, provides: "This act is effective when it becomes law [June 18, 1999], applies to limited liability companies in existence or formed on or after the date the act becomes law, and applies to actions commenced on or after October 1, 1999."

§ 57C-2-22.1. Restated articles of organization.

Editor's Note. — Session Laws 1999-189, s. 7, which amended this section as amended by Session Laws 2000-140, s. 101(t), effective July 21, 2000, provides: "This act is effective when it becomes law [June 18, 1999], applies to limited liability companies in existence or formed on or after the date the act becomes law, and applies to actions commenced on or after October 1, 1999."

Part 3. Name.

§ 57C-2-34. Real property records.

Editor's Note. — Session Laws 1999-189, s. 7, which amended this section as amended by Session Laws 2000-140, s. 101(t), effective July 21, 2000, provides: "This act is effective when it becomes law [June 18, 1999], applies to limited liability companies in existence or formed on or after the date the act becomes law, and applies to actions commenced on or after October 1, 1999."

Part 4. Registered Office and Registered Agent.

§ 57C-2-40. Registered office and registered agent.

(a) Each limited liability company must continuously maintain in this State:

(1) A registered office that may be the same as any of its places of business; and

(2) A registered agent, who shall be (i) an individual who resides in this State and whose business office is identical with the registered office; (ii) a domestic corporation, nonprofit corporation, or limited liability company whose business office is identical with the registered office; or (iii) a foreign corporation, nonprofit corporation, or limited liability company authorized to transact business or conduct affairs in this State whose business office is identical with the registered office.

(b) The sole duty of the registered agent to the limited liability company is to forward to the limited liability company at its last known address any notice, process, or demand that is served on the registered agent. (1993, c. 354, s. 1; 2000-140, s. 101(g).)

Effect of Amendments. — Session Laws 2000-140, s. 101(g), effective July 21, 2000, inserted "or conduct affairs" in subdivision (a)(2).

§ 57C-2-43. Service on limited liability company.

(a) A limited liability company's registered agent is an agent of the limited liability company for service of process, notice, or demand required or permitted by law to be served on the limited liability company.

(b) Whenever a limited liability company shall fail to appoint or maintain a registered agent in this State, or whenever its registered agent cannot with due diligence be found at the registered office, then the Secretary of State shall be an agent of the limited liability company upon whom any process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with the Secretary of State or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of the process, notice, or demand and the fee required by G.S. 57C-1-22(b). In the event any such process, notice, or demand is served on the Secretary of State in the manner provided for in this section, the Secretary of State shall immediately mail one of the copies thereof, by registered or certified mail, return receipt requested, to the limited liability company at its principal office or, if there is no mailing address for the principal office on file, to the limited liability company at its registered office. Service on a limited liability company under this subsection shall be effective for all purposes from and after the date of the service on the Secretary of State.

(c) The Secretary of State shall keep a record of all processes, notices, and demands served upon the Secretary of State under this section and shall record therein the time of the service and his action with reference thereto.

(d) Nothing herein contained shall limit or affect the right to serve any process, notice, or demand required or permitted by law to be served upon a limited liability company in any other manner now or hereafter permitted by law. (1993, c. 354, s. 1; 2000-140, s. 49.)

Effect of Amendments. — Session Laws 2000-140, s. 49, effective July 21, 2000, in subsection (b), substituted "authorized by the Secretary of State to accept service of process" for "having charge of the limited liability company department of the Secretary of State's office" and inserted "and the fee required by G.S. 57C-1-22(b)" in the second sentence, and inserted "in the manner provided for in this section," and deleted "the address indicated in the latest communication received by the secretary of State from the limited liability company stating the current mailing address of" following "limited liability company at" in the third sentence.

Article 3.

Membership and Management.

Part 1. Membership.

§ 57C-3-01. Admission of members.

Editor's Note. — Session Laws 1999-189, s. 7, which amended this section as amended by Session Laws 2000-140, s. 101(t), effective July 21, 2000, provides: "This act is effective when it becomes law [June 18, 1999], applies to limited liability companies in existence or formed on or after the date the act becomes law, and applies to actions commenced on or after October 1, 1999."

§ 57C-3-05. Members bound by operating agreements.

Editor's Note. — Session Laws 1999-189, s. 7, which amended this section as amended by Session Laws 2000-140, s. 101(t), effective July 21, 2000, provides: "This act is effective when it becomes law [June 18, 1999], applies to limited liability companies in existence or formed on or after the date the act becomes law, and applies to actions commenced on or after October 1, 1999."

Part 2. Managers.

§ 57C-3-20. Determination of managers; management.

Editor's Note. — Session Laws 1999-189, s. 7, which amended this section as amended by Session Laws 2000-140, s. 101(t), effective July 21, 2000, provides: "This act is effective when it becomes law [June 18, 1999], applies to limited liability companies in existence or formed on or after the date the act becomes law, and applies to actions commenced on or after October 1, 1999."

Part 3. Liability.

§ 57C-3-32. Limitation of liability of managers and members and permissive indemnification of managers and members; insurance.

Editor's Note. — Session Laws 1999-189, s. 7, which amended this section as amended by Session Laws 2000-140, s. 101(t), effective July 21, 2000, provides: "This act is effective when it becomes law [June 18, 1999], applies to limited liability companies in existence or formed on or after the date the act becomes law, and applies to actions commenced on or after October 1, 1999."

Article 5.

Assignment of Membership Interests; Withdrawal.

§ 57C-5-06. Voluntary withdrawal of member.

Editor's Note. — Session Laws 1999-189, s. 7, which amended this section as amended by Session Laws 2000-140, s. 101(t), effective July 21, 2000, provides: "This act is effective when it becomes law [June 18, 1999], applies to limited liability companies in existence or formed on or after the date the act becomes law, and applies to actions commenced on or after October 1, 1999."

§ 57C-5-07. Distribution upon withdrawal.

Editor's Note. — Session Laws 1999-189, s. 7, which amended this section as amended by Session Laws 2000-140, s. 101(t), effective July 21, 2000, provides: "This act is effective when it becomes law [June 18, 1999], applies to limited liability companies in existence or formed on or after the date the act becomes law, and applies to actions commenced on or after October 1, 1999."

Article 6.

Dissolution.

§ 57C-6-01. Dissolution.

Editor's Note. — Session Laws 1999-189, s. 7, which amended this section as amended by Session Laws 2000-140, s. 101(t), effective July 21, 2000, provides: "This act is effective when it becomes law [June 18, 1999], applies to limited liability companies in existence or formed on or after the date the act becomes law, and applies to actions commenced on or after October 1, 1999."

§ 57C-6-02. Grounds for judicial dissolution.

Editor's Note. — Session Laws 1999-189, s. 7, which amended this section as amended by Session Laws 2000-140, s. 101(t), effective July 21, 2000, provides: "This act is effective when it becomes law [June 18, 1999], applies to limited liability companies in existence or formed on or after the date the act becomes law, and applies to actions commenced on or after October 1, 1999."

§ 57C-6-02.1. Procedure for judicial dissolution.

Editor's Note. —
Session Laws 1999-189, s. 7, which amended this section as amended by Session Laws 2000-140, s. 101(t), effective July 21, 2000, provides: "This act is effective when it becomes law [June 18, 1999], applies to limited liability companies in existence or formed on or after the date the act becomes law, and applies to actions commenced on or after October 1, 1999."

§ 57C-6-02.2. Receivership.

Editor's Note. —
Session Laws 1999-189, s. 7, which amended this section as amended by Session Laws 2000-140, s. 101(t), effective July 21, 2000, provides: "This act is effective when it becomes law [June 18, 1999], applies to limited liability companies in existence or formed on or after the date the act becomes law, and applies to actions commenced on or after October 1, 1999."

§ 57C-6-02.3. Decree of dissolution.

Editor's Note. —
Session Laws 1999-189, s. 7, which amended this section as amended by Session Laws 2000-140, s. 101(t), effective July 21, 2000, provides: "This act is effective when it becomes law [June 18, 1999], applies to limited liability companies in existence or formed on or after the date the act becomes law, and applies to actions commenced on or after October 1, 1999."

Article 7.

Foreign Limited Liability Companies.

§ 57C-7-04. Application for certificate of authority.

(a) A foreign limited liability company may apply for a certificate of authority to transact business in this State by delivering an application to the Secretary of State for filing. The application must set forth:

(1) The name of the foreign limited liability company or, if its name is unavailable for use in this State, a name that satisfies the requirements of G.S. 57C-7-06;
(2) The name of the state or country under whose law it is organized;
(3) Its date of organization and period of duration;
(4) The street address, and the mailing address if different from the street address, of its principal office;
(5) The street address, and the mailing address if different from the street address, of its registered office in this State and the name of its registered agent at that office; and
(6) The names and usual business addresses of its current managers.

(b) The foreign limited liability company shall deliver with the completed application a certificate of existence (or a document of similar import) duly authenticated by the Secretary of State or other official having custody of limited liability company records in the state or country under whose law it is organized.

(c) If the Secretary of State finds that the application conforms to law, the Secretary of State shall, when all taxes and fees have been tendered as prescribed in this Chapter:
(1) Endorse on the application and an exact or conformed copy thereof the word "filed" and the hour, day, month, and year of the filing thereof;
(2) File in his office the application and the certificate of existence (or document of similar import as described in subsection (b) of this section);
(3) Issue a certificate of authority to transact business in this State to which the Secretary of State shall affix the exact or conformed copy of the application; and
(4) Send to the foreign limited liability company or its representative the certificate of authority, together with the exact or conformed copy of the application affixed thereto. (1993, c. 354, s. 1; 2000-140, s. 50.)

Effect of Amendments. — Session Laws 2000-140, s. 50, effective July 21, 2000, deleted "in the state or country under whose law it is organized" following "principal office" in subdivision (a)(4).

§ 57C-7-07. Registered office and registered agent of foreign limited liability company.

(a) Each foreign limited liability company authorized to transact business in this State must continuously maintain in this State:
(1) A registered office that may be the same as any of its places of business; and
(2) A registered agent, who shall be (i) an individual who resides in this State and whose business office is identical with the registered office; (ii) a domestic corporation, nonprofit corporation, or limited liability company whose business office is identical with the registered office; or (iii) a foreign corporation, nonprofit corporation, or limited liability company authorized to transact business or conduct affairs in this State whose business office is identical with the registered office.

(b) The sole duty of the registered agent to the foreign limited liability company is to forward to the limited liability company at its last known address any notice, process, or demand that is served on the registered agent. (1993, c. 354, s. 1; 2000-140, s. 101(h).)

Effect of Amendments. — Session Laws 2000-140, s. 101(h), effective July 21, 2000, inserted "or conduct affairs" in subdivision (a)(2).

CASE NOTES

Cited in Bruggeman v. Meditrust Acquisition Co., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 774 (July 5, 2000).

§ 57C-7-12. Withdrawal of limited liability company by reason of a merger, consolidation, or conversion.

(a) Whenever a foreign limited liability company authorized to transact business in this State ceases its separate existence as a result of a statutory merger or consolidation permitted by the laws of the state or country under which it was organized, or converts into another type of entity as permitted by those laws, the surviving or resulting entity shall apply for a certificate of withdrawal for the foreign limited liability company by delivering to the Secretary of State for filing a copy of the articles of merger, consolidation, or conversion or a certificate reciting the facts of the merger, consolidation, or conversion, duly authenticated by the Secretary of State or other official having custody of limited liability company records in the state or country under the laws of which the foreign limited liability company was organized. If the surviving or resulting entity is not authorized to transact business in this State, the articles or certificate must be accompanied by an application which must set forth:

(1) The name of the foreign limited liability company authorized to transact business in this State, the type of entity and name of the surviving or resulting entity, and a statement that the surviving or resulting entity is not authorized to transact business in this State;

(2) A statement that the surviving or resulting entity consents that service of process based upon any cause of action arising in this State, or arising out of business transacted in this State, during the time the foreign limited liability company was authorized to transact business in this State, may thereafter be made by service thereof on the Secretary of State;

(3) A mailing address to which the Secretary of State may mail a copy of any process served on him under subdivision (a)(2) of this section; and

(4) A commitment to file with the Secretary of State a statement of any change in its subsequent mailing address.

(b) If the Secretary of State finds that the articles or certificate and the application for withdrawal, if required, conform to law, the Secretary of State shall:

(1) Endorse on the articles or certificate and the application for withdrawal, if required, the word "filed" and the hour, day, month, and year of filing thereof;

(2) File the articles or certificate and the application, if required;

(3) Issue a certificate of withdrawal; and

(4) Send to the surviving or resulting entity or its representative the certificate of withdrawal, together with the exact or conformed copy of the application, if required, affixed thereto. (1993, c. 354, s. 1; 1999-369, s. 3.6; 2000-140, s. 101(i).)

Effect of Amendments. —

Session Laws 2000-140, s. 101(i), effective July 21, 2000, substituted "merger or consolidation" for "merger, consolidation, or conversion" in subsection (a) and substituted "file with the Secretary of State a statement of any change in its subsequent mailing" for "notify the Secretary of State in the future of any change in its mailing" in subdivision (a)(4).

ARTICLE 9A.

Conversion and Merger.

Part 2. Merger.

§ 57C-9A-23. Effects of merger.

(a) When the merger takes effect:

(1) Each other merging business entity merges into the surviving business entity, and the separate existence of each merging business entity except the surviving business entity ceases;

(2) The title to all real estate and other property owned by each merging business entity is vested in the surviving business entity without reversion or impairment;

(3) The surviving business entity has all liabilities of each merging business entity;

(4) A proceeding pending by or against any merging business entity may be continued as if the merger did not occur, or the surviving business entity may be substituted in the proceeding for a merging business entity whose separate existence ceases in the merger;

(5) If a domestic limited liability company is the surviving business entity, its articles of organization shall be amended to the extent provided in the plan of merger;

(6) The interests in each merging business entity that are to be converted into interests, obligations, or securities of the surviving business entity or into the right to receive cash or other property are thereupon so converted, and the former holders of the interests are entitled only to the rights provided to them in the articles of merger or, in the case of former holders of shares in a domestic corporation, any rights they may have under Article 13 of Chapter 55 of the General Statutes; and

(7) If the surviving business entity is not a domestic corporation, the surviving business entity is deemed to agree that it will promptly pay to the dissenting shareholders of any merging domestic corporation the amount, if any, to which they are entitled under Article 13 of Chapter 55 of the General Statutes and otherwise to comply with the requirements of Article 13 as if it were a surviving domestic corporation in the merger.

The merger shall not affect the liability or absence of liability of any holder of an interest in a merging business entity for any acts, omissions, or obligations of any merging business entity made or incurred prior to the effectiveness of the merger. The cessation of separate existence of a merging business entity in the merger shall not constitute a dissolution or termination of that merging business entity.

(b) If the surviving business entity is not a domestic limited liability company, a domestic corporation, a domestic nonprofit corporation, or a domestic limited partnership when the merger takes effect, the surviving business entity is deemed:

(1) To agree that it may be served with process in this State in any proceeding for enforcement of (i) any obligation of any merging domestic limited liability company, domestic corporation, domestic nonprofit corporation, domestic limited partnership, or other partnership as defined in G.S. 59-36 that is formed under the laws of this State, (ii) the rights of dissenting shareholders of any merging domestic corporation under Article 13 of Chapter 55 of the General

Statutes, and (iii) any obligation of the surviving business entity arising from the merger; and

(2) To have appointed the Secretary of State as its registered agent for service of process in any such proceeding. Service on the Secretary of State of any such process shall be made by delivering to and leaving with the Secretary of State or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of such process and the fee required by G.S. 57C-1-22(b). Upon receipt of service of process on behalf of a surviving business entity in the manner provided for in this section, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the surviving business entity. If the surviving business entity is authorized to transact business or conduct affairs in this State, the address for mailing shall be its principal office designated in the latest document filed with the Secretary of State that is authorized by law to designate the principal office or, if there is no principal office on file, its registered office. If the surviving business is not authorized to transact business or conduct affairs in this State, the address for mailing shall be the mailing address designated pursuant to subdivision (3) of subsection (d) of this section. (1999-369, s. 3.7; 1999-456, s. 52(b); 2000-140, s. 51.)

Effect of Amendments. — Session Laws 2000-140, s. 51, effective July 21, 2000, rewrote subdivision (b)(2).

Chapter 58.

Insurance.

Article 2.

Commissioner of Insurance.

§ 58-2-1. Department established.

CASE NOTES

Stated in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 350 N.C. 539, 516 S.E.2d 150 (1999).

§ 58-2-25. Other deputies, actuaries, examiners and employees.

(a) The Commissioner shall appoint or employ such other deputies, actuaries, economists, financial analysts, financial examiners, licensed attorneys, rate and policy analysts, accountants, fire and rescue training instructors, market conduct analysts, insurance complaint analysts, investigators, engineers, building inspectors, risk managers, clerks and other employees that the Commissioner considers to be necessary for the proper execution of the work of the Department, at the compensation that is fixed and provided by the Department of Administration. If the Commissioner considers it to be necessary for the proper execution of the work of the Department to contract with persons, except to fill authorized employee positions, all of those contracts, except those provided for in Articles 36 and 37 of this Chapter, shall be made pursuant to the provisions of Article 3C of Chapter 143 of the General Statutes.

Whenever the Commissioner or any deputy or employee of the Department is requested or subpoenaed to testify as an expert witness in any civil or administrative action, the party making the request or filing the subpoena and on whose behalf the testimony is given shall, upon receiving a statement of the cost from the Commissioner, reimburse the Department for the actual time and expenses incurred by the Department in connection with the testimony.

(b) The minimum education requirements for financial analysts and examiners referred to in subsection (a) of this section are a bachelors degree, with the appropriate courses in accounting as defined in 21 NCAC 8A.0309, and

other courses that are required to qualify the applicant as a candidate for the uniform certified public accountant examination, based on the examination requirements in effect at the time of graduation by the analyst or examiner from an accredited college or university. (1945, c. 383; 1981, c. 859, s. 94; 1987, c. 864, s. 20; 1989 (Reg. Sess., 1990), c. 1069, s. 20; 1991, c. 681, s. 1; 2000-122, s. 4.)

Effect of Amendments. — Session Laws 2000-122, s. 4, effective July 14, 2000, in subsection (b), substituted "graduation by the analyst or examiner from an accredited college or university" for "employment by the Department of the analyst or examiner."

§ 58-2-40. Powers and duties of Commissioner.

The Commissioner shall:

(1) See that all laws of this State that the Commissioner is responsible for administering and the provisions of this Chapter are faithfully executed; and to that end the Commissioner is authorized to adopt rules in accordance with Chapter 150B of the General Statutes, in order to enforce, carry out and make effective the provisions of those laws. The Commissioner is also authorized to adopt such further rules not contrary to those laws that will prevent persons subject to the Commissioner's regulatory authority from engaging in practices injurious to the public.

(2) Have the power and authority to adopt rules pertaining to and governing the solicitation of proxies, including financial reporting in connection therewith, with respect to the capital stock or other equity securities of any domestic stock insurance company.

(3) Prescribe to the companies, associations, orders, or bureaus required by Articles 1 through 64 of this Chapter to report to the Commissioner, the necessary forms for the statements required. The Commissioner may change those forms from time to time when necessary to secure full information as to the standing, condition, and such other information desired of companies, associations, orders, or bureaus under the jurisdiction of the Department.

(4) Receive and thoroughly examine each financial statement required by Articles 1 through 64 of this Chapter.

(5) Report in detail to the Attorney General any violations of the laws relative to insurance companies, associations, orders and bureaus or the business of insurance; and the Commissioner may institute civil actions or criminal prosecutions either by the Attorney General or another attorney whom the Attorney General may select, for any violation of the provisions of Articles 1 through 64 of this Chapter.

(6) Upon a proper application by any citizen of this State, give a statement or synopsis of the provisions of any insurance contract offered or issued to the citizen.

(7) Administer, or the Commissioner's deputy may administer, all oaths required in the discharge of the Commissioner's official duty.

(8) Compile and make available to the public such lists of rates charged, including deviations, and such explanations of coverages that are provided by insurers for and in connection with contracts or policies of (i) insurance against loss to residential real property with not more than four housing units located in this State and any contents thereof or valuable interest therein and other insurance coverages written in connection with the sale of such property insurance and (ii) private passenger (nonfleet) motor vehicle liability, physical damage, theft, medical payments, uninsured motorists, and other insurance cover-

ages written in connection with the sale of such insurance, as may be advisable to inform the public of insurance premium differentials and of the nature and types of coverages provided. The explanations of coverages provided for in this section must comply with the provisions of Article 38 of this Chapter.

(9) Repealed by Session Laws 2000, ch. 19, s. 3, effective on or after April 1, 1998. (1899, c. 54, s. 8; 1905, c. 430, s. 3; Rev., s. 4689; C.S., s. 6269; 1945, c. 383; 1947, c. 721; 1965, c. 127, s. 1; 1971, c. 757, s. 1; 1977, c. 376, s. 1; 1979, c. 755, s. 19; c. 881, s. 1; 1981, c. 846, s. 2; 1989, c. 485, s. 29; 1991, c. 644, s. 26; 1997-392, s. 3; 2000-19, s. 3.)

Editor's Note. — Session Laws 2000-19, s. 20, contains a severability clause.

Effect of Amendments. — Session Laws 2000-19, s. 3, effective on and after April 1, 1998, repealed subdivision (9), pertaining to the Commission's duty to adopt rules governing what constitutes an uninsurable facility.

CASE NOTES

Anti-subrogation Rule. — Commissioner's promulgation of 11 N.C.A.C. 12.0319, prohibiting subrogation provisions in life or accident and health insurance contracts, supported by this section (right to limit practices injurious to the public) and § 58-50-15(a) (prohibiting provisions less favorable to the insured), did not exceed his statutory authority, even though it may have changed state substantive law, and did not amount to an unconstitutional delegation of legislative powers because statutory provisions (this section and §§ 58-51-15 and 58-50-15) and judicial review (available under Chapter 150B) offer adequate procedural safeguards and support the delegation of power to the Commissioner. In re 11 N.C.A.C 12.0319, 134 N.C. App. 22, 517 S.E.2d 134 (1999), cert. denied, appeal dismissed, 351 N.C. 105, — S.E.2d — (1999).

Article 3.

General Regulations for Insurance.

§ 58-3-1. State law governs insurance contracts.

CASE NOTES

An automobile accident did not, in and of itself, constitute a sufficient interest or connection between the insurer and North Carolina under this section to warrant application of North Carolina law where the policy was issued in Florida, the insured vehicle had a Florida identification number and a Florida license plate, and the insured had a Florida driver's license. Fortune Ins. Co. v. Owens, 351 N.C. 424, 526 S.E.2d 463 (2000).

Applied in St. Paul Fire & Marine Ins. Co. v. Hanover Ins. Co., — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 2783 (E.D.N.C. February 18, 2000).

§ 58-3-10. Statements in application not warranties.

CASE NOTES

I. In General.

I. IN GENERAL.

Even if Misrepresentations were Unintentional. —

A material false representation in an application for insurance renders a policy voidable by the insurance company, and a policy may be declared voidable even in the absence of any intentional or fraudulent misrepresentation. Galindo v. John Hancock Variable Life Ins. Co.,

— F. Supp. 2d —, 2000 U.S. Dist. LEXIS 5108 (E.D.N.C. March 13, 2000).

§ 58-3-100. Revocation, suspension and refusal to renew license.

(a) The Commissioner may revoke, suspend, or refuse to renew the license of any insurer if:

(1) The insurer fails or refuses to comply with any law, order or rule applicable to the insurer.

(2) The insurer's financial condition is unsound, or its assets above its liabilities, exclusive of capital, are less than the amount of its capital or required minimum surplus.

(3) The insurer has published or made to the Department or to the public any false statement or report.

(4) The insurer refuses to submit to any examination authorized by law.

(5) The insurer is found to make a practice of unduly engaging in litigation or of delaying the investigation of claims or the adjustment or payment of valid claims.

(b) Any suspension, revocation or refusal to renew an insurer's license under this section may also be made applicable to the license or registration of any natural person regulated under this Chapter who is a party to any of the causes for licensing sanctions listed in subsection (a) of this section.

(c) **(Effective until July 1, 2001)** The Commissioner may impose a civil penalty under G.S. 58-2-70 if an HMO, service corporation, MEWA, or insurer fails to acknowledge a claim within 30 days after receiving written notice of the claim, but only if the notice contains sufficient information for the insurer to identify the specific coverage involved. Acknowledgement of the claim shall be made to the claimant or his legal representative advising that the claim is being investigated; or shall be a payment of the claim; or shall be a bona fide written offer of settlement; or shall be a written denial of the claim. A claimant includes an insured, a health care provider, or a health care facility that is responsible for directly making the claim with an insurer.

(c) **(Effective July 1, 2001)** The Commissioner may impose a civil penalty under G.S. 58-2-70 if an HMO, service corporation, MEWA, or insurer fails to acknowledge a claim within 30 days after receiving written or electronic notice of the claim, but only if the notice contains sufficient information for the insurer to identify the specific coverage involved. Acknowledgement of the claim shall be made to the claimant or his legal representative advising that the claim is being investigated; or shall be a payment of the claim; or shall be a bona fide written offer of settlement; or shall be a written denial of the claim. A claimant includes an insured, a health care provider, or a health care facility that is responsible for directly making the claim with an insurer. This subsection does not apply to insurers subject to G.S. 58-3-225. (1899, c. 54, ss. 66, 75, 112; 1901, c. 391, s. 5; Rev., ss. 4703, 4705; C.S., s. 6297; 1947, c. 721; 1963, c. 1234; 1993, c. 409, s. 1; 1995, c. 193, s. 10; 1999-294, s. 9; 2000-162, s. 4(b).)

Subsection (c) Set Out Twice — The first version of subsection (c) set out above is effective until July 1, 2001. The second version of subsection (c) set out above is effective July 1, 2001.

Effect of Amendments. — Session Laws 2000-162, s. 4(b), effective July 1, 2001, and applicable to claims received on or after that date, in subsection (c), inserted "or electronic" in the first sentence and added the last sentence.

§ 58-3-169. Required coverage for minimum hospital stay following birth.

Legal Periodicals. — For article, "Drive-Through Deliveries: Is 'Consumer Protection' Just What the Doctor Ordered?" see 78 N.C.L. Rev. 5 (1999).

§ 58-3-172. Notice of claim denied.

(a) **(Effective until July 1, 2001)** For all claims denied for health care provider services under health benefit plans, written notification of the denied claim shall be given to the insured and to the health care provider submitting the claim if the health care provider would otherwise be eligible for payment.

(a) **(Effective July 1, 2001)** For all claims denied for health care provider services under health benefit plans, written notification of the denied claim shall be given to the insured and to the health care provider submitting the claim if the health care provider would otherwise be eligible for payment. This subsection does not apply to insurers subject to G.S. 58-3-225.

(b) For purposes of this section, "health benefit plans" means accident and health insurance policies or certificates; nonprofit hospital or medical service corporation contracts; health, hospital, or medical service corporation plan contracts; health maintenance organization (HMO) subscriber contracts and other plans provided by managed-care organizations; plans provided by a MEWA or plans provided by other benefit arrangements, to the extent permitted by ERISA; and the Teachers' and State Employees' Comprehensive Major Medical Plan. (1993, c. 529, s. 4.2; 1993 (Reg. Sess., 1994), c. 678, s. 6; 2000-162, s. 4(c).)

Subsection (a) Set Out Twice — The first version of subsection (a) set out above is effective until July 1, 2001. The second version of subsection (a) set out above is effective July 1, 2001.

Effect of Amendments. — Session Laws 2000-162, s. 4(c), effective July 1, 2001, and applicable to claims received on or after that date, added the last sentence in subsection (a).

§ 58-3-225. (Effective July 1, 2001) Prompt claim payments under health benefit plans.

(a) As used in this section:

(1) "Claimant" includes a health care provider or facility that is responsible or permitted under contract with the insurer or by valid assignment of benefits for directly making the claim with an insurer.

(2) "Health benefit plan" means an accident and health insurance policy or certificate; a nonprofit hospital or medical service corporation contract; a health maintenance organization subscriber contract; a plan provided by a multiple employer welfare arrangement; or a plan provided by another benefit arrangement, to the extent permitted by the Employee Retirement Income Security Act of 1974, as amended, or by any waiver of or other exception to that act provided under federal law or regulation. "Health benefit plan" does not mean any plan implemented or administered by the North Carolina or United States Department of Health and Human Services, or any successor agency, or its representatives. "Health benefit plan" also does not mean any of the following kinds of insurance:

a. Credit.

b. Disability income.

c. Coverage issued as a supplement to liability insurance.

d. Hospital income or indemnity.

§ 58-3-225 has a postponed date. See notes.

e. Insurance under which benefits are payable with or without regard to fault and that is statutorily required to be contained in any liability policy or equivalent self-insurance.
f. Long-term or nursing home care.
g. Medical payments under motor vehicle or homeowners" insurance policies.
h. Medicare supplement.
i. Short-term limited duration health insurance policies as defined in Part 144 of Title 45 of the Code of Federal Regulations.
j. Workers" compensation.

(3) "Health care facility" means a facility that is licensed under Chapter 131E or Chapter 122C of the General Statutes or is owned or operated by the State of North Carolina in which health care services are provided to patients.
(4) "Health care provider" means an individual who is licensed, certified, or otherwise authorized under Chapter 90 or 90B of the General Statutes to provide health care services in the ordinary course of business or practice of a profession or in an approved education or training program.
(5) "Insurer" includes an insurance company subject to this Chapter, a service corporation organized under Article 65 of this Chapter, a health maintenance organization organized under Article 67 of this Chapter, or a multiple employer welfare arrangement subject to Article 49 of this Chapter, that writes a health benefit plan.

(b) An insurer shall, within 30 calendar days after receipt of a claim, send by electronic or paper mail to the claimant:

(1) Payment of the claim.
(2) Notice of denial of the claim.
(3) Notice that the proof of loss is inadequate or incomplete.
(4) Notice that the claim is not submitted on the form required by the health benefit plan, by the contract between the insurer and health care provider or health care facility, or by applicable law.
(5) Notice that coordination of benefits information is needed in order to pay the claim.
(6) Notice that the claim is pending based on nonpayment of fees or premiums.

For purposes of this section, an insurer is presumed to have received a written claim five business days after the claim has been placed first-class postage prepaid in the United States mail addressed to the insurer or an electronic claim transmitted to the insurer or a designated clearinghouse on the day the claim is electronically transmitted. The presumption may be rebutted by sufficient evidence that the claim was received on another day or not received at all.

(c) If the claim is denied, the notice shall include all of the specific good faith reason or reasons for the denial, including, without limitation, coordination of benefits, lack of eligibility, or lack of coverage for the services provided. If the claim is contested or cannot be paid because the proof of loss is inadequate or incomplete, or not paid pending receipt of requested coordination of benefits information, the notice shall contain the specific good faith reason or reasons why the claim has not been paid and an itemization or description of all of the information needed by the insurer to complete the processing of the claim. If all or part of the claim is contested or cannot be paid because of the application of a specific utilization management or medical necessity standard is not satis-

§ 58-3-225 has a postponed date. See notes.

fied, the notice shall contain the specific clinical rationale for that decision or shall refer to specific provisions in documents that are made readily available through the insurer which provide the specific clinical rationale for that decision; however, if a notice of noncertification has already been provided under G.S. 58-50-61(h), then the specific clinical rationale for the decision is not required under this subsection. If the claim is contested or cannot be paid because of nonpayment of premiums, the notice shall contain a statement advising the claimant of the nonpayment of premiums. If a claim is not paid pending receipt of requested coordination of benefits information, the notice shall so specify. If a claim is denied or contested in part, the insurer shall pay the undisputed portion of the claim within 30 calendar days after receipt of the claim and send the notice of the denial or contested status within 30 days after receipt of the claim. If a claim is contested or cannot be paid because the claim was not submitted on the required form, the notice shall contain the required form, if the form is other than a UB or HCFA form, and instructions to complete that form. Upon receipt of additional information requested in its notice to the claimant, the insurer shall continue processing the claim and pay or deny the claim within 30 days after receiving the additional information.

(d) If an insurer requests additional information under subsection (c) of this section and the insurer does not receive the additional information within 90 days after the request was made, the insurer shall deny the claim and send the notice of denial to the claimant in accordance with subsection (c) of this section. The insurer shall include the specific reason or reasons for denial in the notice, including the fact that information that was requested was not provided. The insurer shall inform the claimant in the notice that the claim will be reopened if the information previously requested is submitted to the insurer within one year after the date of the denial notice closing the claim.

(e) Health benefit plan claim payments that are not made in accordance with this section shall bear interest at the annual percentage rate of eighteen percent (18%) beginning on the date following the day on which the claim should have been paid. If additional information was requested by the insurer under subsection (b) of this section, interest on health benefit claim payments shall begin to accrue on the 31st day after the insurer received the additional information. A payment is considered made on the date upon which a check, draft, or other valid negotiable instrument is placed in the United States Postal Service in a properly addressed, postpaid envelope, or, if not mailed, on the date of the electronic transfer or other delivery of the payment to the claimant. This subsection does not apply to claims for benefits that are not covered by the health benefit plan; nor does this subsection apply to deductibles, co-payments, or other amounts for which the insurer is not liable.

(f) Insurers may require that claims be submitted within 180 days after the date of the provision of care to the patient by the health care provider and, in the case of health care provider facility claims, within 180 days after the date of the patient's discharge from the facility. However, an insurer may not limit the time in which claims may be submitted to fewer than 180 days. Unless otherwise agreed to by the insurer and the claimant, failure to submit a claim within the time required does not invalidate or reduce any claim if it was not reasonably possible for the claimant to file the claim within that time, provided that the claim is submitted as soon as reasonably possible and in no event, except in the absence of legal capacity of the insured, later than one year from the time submittal of the claim is otherwise required.

(g) If a claim for which the claimant is a health care provider or health care facility has not been paid or denied within 60 days after receipt of the initial

§ 58-3-225 has a postponed date. See notes.

claim, the insurer shall send a claim status report to the insured. Provided, however, that the claims status report is not required during the time an insurer is awaiting information requested under subsection (c) of this section. The report shall indicate that the claim is under review and the insurer is communicating with the health care provider or health care facility to resolve the matter. While a claim remains unresolved, the insurer shall send a claim status report to the insured with a copy to the provider 30 days after the previous report was sent.

(h) To the extent permitted by the contract between the insurer and the health care provider or health care facility, the insurer may recover overpayments made to the health care provider or health care facility by making demands for refunds and by offsetting future payments. Any such recoveries may also include related interest payments that were made under the requirements of this section. Recoveries by the insurer must be accompanied by the specific reason and adequate information to identify the specific claim. To the extent permitted by the contract between the insurer and the health care provider or health care facility, the health care provider or health care facility may recover underpayments or nonpayments by the insurer by making demands for refunds. Any such recoveries by the health care provider or health care facility of underpayments or nonpayment by the insurer may include applicable interest under this section. The period for which such recoveries may be made may be specified in the contract between the insurer and health care provider or health care facility.

(i) Every insurer shall maintain written or electronic records of its activities under this section, including records of when each claim was received, paid, denied, or pended, and the insurer's review and handling of each claim under this section, sufficient to demonstrate compliance with this section.

(j) A violation of this section by an insurer subjects the insurer to the sanctions in G.S. 58-2-70. The authority of the Commissioner under this subsection does not impair the right of a claimant to pursue any other action or remedy available under law. With respect to a specific claim, an insurer paying statutory interest in good faith under this section is not subject to sanctions for that claim under this subsection.

(k) An insurer is not in violation of this section nor subject to interest payments under this section if its failure to comply with this section is caused in material part by (i) the person submitting the claim, or (ii) by matters beyond the insurer's reasonable control, including an act of God, insurrection, strike, fire, or power outages. In addition, an insurer is not in violation of this section or subject to interest payments to the claimant under this section if the insurer has a reasonable basis to believe that the claim was submitted fraudulently and notifies the claimant of the alleged fraud.

(*l*) **(Expires January 1, 2003)** This section does not apply to claims processed by an insurer on a claims adjudication system that was implemented prior to January 1, 1982, provided that the insurer:

(1) Verifies with the Commissioner that its claims adjudication system qualifies under this subsection; and

(2) Is implementing a new claims adjudication software system and is proceeding in good faith to move all claims to the new system as soon as possible and in any event no later than December 31, 2002.

This subsection expires January 1, 2003.

(m) Nothing in this section limits or impairs the patient's liability under existing law for payment of medical expenses. (2000-162, s. 4(a).)

Editor's Note. — The definitions in subdivisions (a)(1) and (a)(2) were enacted by Session Laws 2000-162, s. 4(a) in reverse order, and were redesignated at the direction of the Revisor of Statutes to preserve alphabetical order. Session Laws 2000-162, s. 5, made this section effective July 1, 2001 and applicable to claims received on or after that date.

Article 6.

License Fees and Taxes.

§ 58-6-25. Insurance regulatory charge.

(a) Charge Levied. — There is levied on each insurance company an annual charge for the purposes stated in subsection (d) of this section. The charge levied in this section is in addition to all other fees and taxes. The percentage rate of the charge is established pursuant to subsection (b) of this section. For each insurance company that is not an Article 65 corporation nor a health maintenance organization, the rate is applied to the company's premium tax liability for the taxable year. For Article 65 corporations and health maintenance organizations, the rate is applied to a presumed premium tax liability for the taxable year calculated as if the corporation or organization were an insurer providing health insurance. In determining an insurance company's premium tax liability for a taxable year, the following shall be disregarded:

(1) Additional taxes imposed by G.S. 105-228.8.

(2) The additional local fire and lightning tax imposed by G.S. 105-228.5(d)(4).

(3) Any tax credits for guaranty or solvency fund assessments under G.S. 105-228.5A or G.S. 97-133(a).

(4) Any tax credits allowed under Chapter 105 of the General Statutes other than tax payments made by or on behalf of the taxpayer.

(b) Rates. — The rate of the charge for each taxable year shall be the percentage rate established by the General Assembly. When the Department prepares its budget request for each upcoming fiscal year, the Department shall propose a percentage rate of the charge levied in this section. The Governor shall submit that proposed rate to the General Assembly each fiscal year. The General Assembly shall set by law the percentage rate of the charge levied in this section. The percentage rate may not exceed the rate necessary to generate funds sufficient to defray the estimated cost of the operations of the Department for each upcoming fiscal year, including a reasonable margin for a reserve fund. The amount of the reserve may not exceed one-third of the estimated cost of operating the Department for each upcoming fiscal year. In calculating the amount of the reserve, the General Assembly shall consider all relevant factors that may affect the cost of operating the Department or a possible unanticipated increase or decrease in North Carolina premiums or other charge revenue.

(c) Returns; When Payable. — The charge levied on each health maintenance organization is payable March 15 following the end of each calendar year. The charge levied on each insurance company other than a health maintenance organization is payable at the time the insurance company remits its premium tax. If the insurance company is required to remit installment payments of premiums tax under G.S. 105-228.5 for a taxable year, it shall also remit installment payments of the charge levied in this section for that taxable year at the same time and on the same basis as the premium tax installment payments. Each installment payment shall be equal to at least thirty-three and one-third percent (33.3%) of the insurance company's regulatory charge liability incurred in the immediately preceding taxable year.

Every insurance company shall, on or before the date the charge levied in this section is due, file a return on a form prescribed by the Secretary of

Revenue. The return shall state the company's total North Carolina premiums or presumed premiums for the taxable year and shall be accompanied by any supporting documentation that the Secretary of Revenue may by rule require.

(d) Use of Proceeds. — The Insurance Regulatory Fund is created in the State treasury, under the control of the Office of State Budget, Planning, and Management. The proceeds of the charge levied in this section and all fees collected under Articles 69 through 71 of this Chapter and under Articles 9 and 9C of Chapter 143 of the General Statutes shall be credited to the Fund. The Fund shall be placed in an interest-bearing account and any interest or other income derived from the Fund shall be credited to the Fund. Moneys in the Fund may be spent only pursuant to appropriation by the General Assembly and in accordance with the line item budget enacted by the General Assembly. The Fund is subject to the provisions of the Executive Budget Act, except that no unexpended surplus of the Fund shall revert to the General Fund. All money credited to the Fund shall be used to reimburse the General Fund for the following:

(1) Money appropriated to the Department of Insurance to pay its expenses incurred in regulating the insurance industry and other industries in this State.

(2) Money appropriated to State agencies to pay the expenses incurred in regulating the insurance industry, in certifying statewide data processors under Article 11A of Chapter 131E of the General Statutes, and in purchasing reports of patient data from statewide data processors certified under that Article.

(3) Money appropriated to the Department of Revenue to pay the expenses incurred in collecting and administering the taxes on insurance companies levied in Article 8B of Chapter 105 of the General Statutes.

(e) Definitions. — The following definitions apply in this section:

(1) Article 65 corporation. — Defined in G.S. 105-228.3.

(2) Insurance company. — A company that pays the gross premiums tax levied in G.S. 105-228.5 and G.S. 105-228.8 or a health maintenance organization.

(3) Insurer. — Defined in G.S. 105-228.3. (1991, c. 689, s. 289; 1991 (Reg. Sess., 1992), c. 812, s. 6(e); 1995, c. 360, ss. 1(i), 3(a); c. 517, s. 39(f), (g); 1995 (Reg. Sess., 1996), c. 646, s. 19; c. 747, s. 3; 1997-443, s. 26.1; 1997-475, s. 2.2; 1998-212, s. 29A.7(b); 1999-413, s. 4; 2000-140, s. 93.1(a).)

Editor's Note. —

Session Laws 2000-109, s. 3, effective July 13, 2000, directs that the percentage rate to be used in calculating the insurance regulatory charge under this section is seven percent (7%) for the 2000 calendar year.

Effect of Amendments. —

Session Laws 2000-140, s. 93.1, effective July 1, 2000, in subsection (d), substituted "Office of State Budget, Planning and Management" for "Office of State Budget and Management."

Article 7.

General Domestic Companies.

§ 58-7-70. Effects of redomestication.

The agent appointments and licenses, rates, and other items that the Commissioner authorizes or grants, in his discretion, that are in existence at the time any insurer licensed to transact the business of insurance in this State transfers its corporate domicile to this or any other state by merger,

consolidation, or any other lawful method, shall continue in full force and effect upon such transfer if such insurer remains duly licensed to transact the business of insurance in this State. All outstanding policies of any transferring insurer shall remain in full force and effect and need not be endorsed as to any new name of the insurer or its new location unless so ordered by the Commissioner. Every transferring insurer shall file new policy forms with the Commissioner on or before the effective date of the transfer, but may use existing policy forms with appropriate endorsements if allowed by, and under such conditions as approved by, the Commissioner: Provided, however, every such transferring insurer shall (i) notify the Commissioner of the details of the proposed transfer and (ii) promptly file any resulting amendments to corporate documents filed or required to be filed with the Commissioner. (1987, c. 752, s. 10; 1999-132, s. 9.1; 2000-140, s. 11.)

Effect of Amendments. — Session Laws 2000-140, s. 11, effective July 21, 2000, deleted "license" preceding "agent appointments and licenses" in the first sentence.

Article 16.

Foreign or Alien Insurance Companies.

§ 58-16-30. Service of legal process upon Commissioner.

CASE NOTES

Applied in Fulton v. Mickle, 134 N.C. App. 620, 518 S.E.2d 518 (1999).

Article 23.

Local Government Risk Pools.

§ 58-23-5. Local government pooling of property, liability and workers' compensation coverages.

CASE NOTES

The city did not waive governmental immunity by participating in a local government excess liability fund; the fund was not a local government risk pool under this Article because two members of the fund were not "local governments," no notice was given to the commissioner of insurance that the participating entities intended to organize and operate a risk pool pursuant to statute, and the fund did not contain a provision for a system or program of loss control as required by this section. Dobrowolska v. Wall, — N.C. App. —, 530 S.E.2d 590, 2000 N.C. App. LEXIS 539 (2000).

§ 58-23-15. Contract.

CASE NOTES

Applied in Dobrowolska v. Wall, — N.C. App. —, 530 S.E.2d 590, 2000 N.C. App. LEXIS 539 (2000).

Article 24.

Fraternal Benefit Societies.

§ 58-24-85. Benefits not attachable.

CASE NOTES

Quoted in Sara Lee Corp. v. Carter, 351 N.C. 27, 519 S.E.2d 308 (1999).

Article 26.

Real Estate Title Insurance Companies.

§ 58-26-1. Purpose of organization; formation; insuring closing services; premium rates; combined premiums for lenders' coverages.

CASE NOTES

Ethical Obligation of Attorney. — Where attorney knew that a particular lot was mistakenly included in the deed, he was under an ethical obligation to disclose this information to the title insurance company in order to prevent the possible perpetuation of a fraud. Lawyers Title Ins. Co. v. Golf Links Dev. Corp., 87 F. Supp. 2d 505 (W.D.N.C. 1999).

Article 28.

Unauthorized Insurers.

§ 58-28-15. Validity of acts or contracts of unauthorized company shall not impair obligation of contract as to the company; maintenance of suits; right to defend.

The failure of a company to obtain a license shall not impair the validity of any acts or contracts of the company. Any person or insured holding contracts of insurance of an unauthorized insurer may bring an action in the courts of this State under the provisions of G.S. 58-16-35 for the enforcement of any rights pursuant to the contract of insurance. The failure of the insurance company to obtain a license shall not prevent such company from defending any action at law or suit in equity in any court of this State so long as the said company fully complies with the provisions of G.S. 58-16-35(c), but no company transacting insurance business in this State without a license shall be permitted to maintain an action at law or in equity in any court of this State to enforce any right, claim or demand arising out of the transaction of such business until such company shall have obtained a license. Nor shall an action at law or in equity be maintained in any court of this State by any successor or assignee of such company on any such right, claim or demand originally held by such company until a license shall have been obtained by the company or by a company which has acquired all or substantially all of its assets. Nothing in this section shall be construed to abrogate the conditions of admission into this State nor to impair the authority of the Commissioner with respect to the

issuance of licenses. The Commissioner in considering the issuance of a license shall take into consideration the acts or transactions which an unauthorized company has engaged in in this State prior to its application for a license. (1967, c. 909, s. 1; 1991, c. 720, ss. 4, 56; 1999-132, s. 9.1; 2000-140, s. 12.)

Effect of Amendments. — Session Laws 2000-140, s. 12, effective July 21, 2000, substituted "licenses" for "certificates of authority" at the end of the next to last sentence.

Article 30.

Insurers Supervision, Rehabilitation, and Liquidation.

§ 58-30-10. Definitions.

As used in this Article, unless the context clearly indicates otherwise:

(1) "Alien country" means any other jurisdiction not in any state.

(2) "Ancillary state" means any state other than a domiciliary state.

(3) "Court" means the Superior Court of Wake County.

(4) "Creditor" means a person having any claim, whether matured or unmatured, liquidated or unliquidated, secured or unsecured, absolute, fixed, or contingent.

(5) "Delinquency proceeding" means any proceeding instituted against an insurer for the purpose of supervising, rehabilitating, conserving, or liquidating such insurer.

(6) "Doing business" includes any of the following acts by insurers, whether effected by mail or otherwise:

a. The issuance or delivery of contracts of insurance to persons resident in this State;

b. The solicitation of applications for such contracts, or other negotiations preliminary to the execution of such contracts;

c. The collection of premiums, membership fees, assessments, or other consideration for such contracts;

d. The transaction of matters subsequent to execution of such contracts and arising out of them;

e. Operating as an insurer under a license issued by the Department; or

f. The purchase of contracts of insurance issued to persons in this State by an assumption agreement.

(7) "Domestic guaranty association" means the Postassessment Insurance Guaranty Association in Article 48 of this Chapter, as amended; the North Carolina Self-Insurance Guaranty Association in Article 4 of Chapter 97 of the General Statutes; the Life and Accident and Health Insurance Guaranty Association in Article 62 of this Chapter, as amended; or any other similar entity hereafter created by the General Assembly for the payment of claims of insolvent insurers.

(8) "Domiciliary state" means the state in which an insurer is incorporated or organized; or, in the case of an alien insurer, its state of entry.

(9) "Fair consideration" is given for property or obligation when:

a. In exchange for such property or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or services are rendered or an obligation is incurred or an antecedent debt is satisfied; or

b. Such property or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportion-

ately small as compared to the value of the property or obligation obtained.

(10) "Foreign guaranty association" means a guaranty association now in existence in or hereafter created by the legislature of any other state.

(11) "Formal delinquency proceeding" means any liquidation or rehabilitation proceeding.

(12) "General assets" means all real, personal, or other property that is not specifically mortgaged, pledged, hypothecated, deposited, or otherwise encumbered for the security or benefit of specified persons or classes of persons. As to specifically encumbered property, "general assets" includes all such property or its proceeds in excess of the amount necessary to discharge the sum or sums secured thereby. Assets that are held in trust and on deposit for the security or benefit of all policyholders in more than one state or all policyholders and creditors in more than one state shall be treated as "general assets".

(13) "Insolvency" or "insolvent" means that an insurer is unable to pay its obligations when they are due, or that its admitted assets do not exceed its liabilities plus the greater of (i) any capital and surplus required by law for its organization; or (ii) the total par or stated value of its authorized and issued capital stock. For the purposes of this subdivision, "liabilities" includes reserves required by statute, by Department rules, or by specific requirements imposed by the Commissioner upon a subject company at the time of admission or subsequent thereto, except those reserves that are an allocation of surplus as specified in G.S. 58-65-95.

(14) "Insurer" means any entity that is or should be licensed under Articles 7, 16, 26, 47, 49, 65, or 67 of this Chapter or under Article 5 of Chapter 97 of the General Statutes. For the purposes of this Article, "insurer" also includes continuing care retirement communities that are or should be licensed under Article 64 of this Chapter.

(15) "Preferred claim" means any claim with respect to which the provisions of this Article accord priority of payment from the general assets of the insurer.

(16) "Receiver" includes a liquidator, rehabilitator, or conservator, as the context requires.

(17) "Reciprocal state" means any state other than this State in which in substance and effect the provisions of G.S. 58-30-105(a), 58-30-270, 58-30-275, and 58-30-285 through 58-30-295 are in force, and in which provisions are in force requiring that the insurance regulator of that state be the receiver of a delinquent insurer; and in which provisions exist for the avoidance of fraudulent conveyances and preferential transfers.

(18) "Secured claim" means any claim secured by mortgage, trust deed, pledge, deposit as security, escrow, or otherwise; and includes any claim that has become a lien upon specific assets by reason of judicial process. "Secured claim" does not include a special deposit claim or a claim against general assets.

(19) "Special deposit claim" means any claim secured by a deposit made pursuant to statute for the security or benefit of a limited class or classes of persons, but does not include any claim secured by general assets.

(20) "Transfer" includes the sale and every other and different mode, whether direct or indirect, of disposing of or of parting with property, an interest therein, or the possession thereof; or of voluntarily fixing a lien upon property or an interest therein, whether absolutely or conditionally, by or without judicial proceedings. The retention of a

security title to property delivered to a debtor is a transfer suffered by the debtor. (1989, c. 452, s. 1; 1995, c. 471, ss. 4, 5; 1995 (Reg. Sess., 1996), c. 582, s. 2; c. 742, s. 24; 1999-132, ss. 2.1, 7.3, 9.1; 1999-294, s. 11(a), (b); 2000-140, s. 13.)

Effect of Amendments. — Session Laws 2000-140, s. 13, effective July 21, 2000, deleted "or license" following "a license" in subdivision (6)e.

§ 58-30-55. Condition on release from delinquency proceedings.

No insurer that is subject to any delinquency proceedings, whether formal or informal, administrative or judicial, shall:

(1) Be released from such proceeding, unless such proceeding is converted into a judicial rehabilitation or liquidation proceeding;

(2) Be permitted to solicit or accept new business or request or accept the restoration of any suspended or revoked license;

(3) Be returned to the control of its shareholders or private management; or

(4) Have any of its assets returned to the control of its shareholders or private management;

until all payments of or on account of the insurer's contractual obligations by all guaranty associations, along with all expenses thereof and interest on all such payments and expenses, have been repaid to the guaranty associations or a plan of repayment by the insurer shall have been approved by the guaranty associations. (1989, c. 452, s. 1; 1999-132, s. 9.1; 2000-140, s. 14.)

Effect of Amendments. — Session Laws 2000-140, s. 14, effective July 21, 2000, deleted "license or" preceding "license" at the end of subdivision (2).

Article 31.

Insuring State Property, Officials and Employees.

§ 58-31-40. Commissioner to inspect State property; plans submitted.

(a) The Commissioner shall, at least once every year or more often if the Commissioner considers it necessary, visit, inspect, and thoroughly examine every State property to analyze and determine its protection from fire, including the property's occupants or contents. The Commissioner shall notify the agency or official in charge of the property of any defect noted by the Commissioner or any improvement considered by the Commissioner to be necessary.

(b) No agency or other person authorized or directed by law to select a plan and erect a building for the use of the State or any State institution shall receive and approve of the plan until it is submitted to and approved by the Commissioner as to the safety of the proposed building from fire, including the property's occupants or contents. No agency or person authorized or directed by law to select a plan or erect a building comprising 10,000 square feet or or more for the use of any county, city, or school district shall receive and approve of the plan until it is submitted to and approved by the Commissioner as to the safety of the proposed building from fire, including the property's occupants or contents. (1901, c. 710, ss. 1, 2; 1903, c. 771, s. 3; Rev., s. 4829; 1909, c. 880; 1919, c. 186, s. 3; C.S., s. 6453; 2000-122, s. 10.)

Editor's Note. — This section was amended by Session Laws 2000-122, s. 10 in the coded bill drafting format. The act inadvertently failed to strike through an extra "or". Subsection (b) has been set out in the form above at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2000-122, s. 10, effective July 14, 2000, rewrote the section.

Article 33.

Licensing of Agents, Brokers, Limited Representatives, and Adjusters.

§ 58-33-30. License requirements.

The Commissioner shall not issue or continue any license of an agent, broker, limited representative, adjuster, or motor vehicle damage appraiser except as follows:

(a) Application. — Application shall be made to the Commissioner by the applicant on a form prescribed by the Commissioner.

(b) Age. — Every individual applicant for license under this Article must be 18 years or more of age.

(c) Character. — An applicant for any license under this Article must be deemed by the Commissioner to be competent, trustworthy and financially responsible, and must have not willfully violated the insurance laws of this or any other state.

(d) Education and Training. —

(1) Each applicant must have had special education, training, or experience of sufficient duration and extent reasonably to satisfy the Commissioner that the applicant possesses the competence necessary to fulfill the responsibilities of an agent, broker, limited representative, adjuster, or motor vehicle damage appraiser.

(2) All individual applicants for licensing as life and health agents or as property and liability agents shall furnish evidence satisfactory to the Commissioner of successful completion of at least 40 hours of instruction, which shall in all cases include the general principles of insurance and any other topics that the Commissioner establishes by regulation; and which shall, in the case of life and health insurance applicants, include the principles of life, accident, and health insurance and, in the case of property and liability insurance applicants, shall include instruction in property and liability insurance. Any applicant who submits satisfactory evidence of having successfully completed an agent training course that has been approved by the Commissioner and that is offered by or under the auspices of a property or liability or life or health insurance company admitted to do business in this State or a professional insurance association shall be deemed to have satisfied the educational requirements of this subdivision. The requirement in this subdivision for completion of 40 hours of instruction applies only to applicants for life and health or property and liability insurance licenses.

(3) Each applicant for a Medicare supplement and long- term care insurance license shall furnish evidence satisfactory to the Commissioner of successful completion of 10 hours of instruction, which shall in all cases include the principles of Medicare supplement and long-term care insurance and federal and North Carolina law relating to such insurance. An applicant who submits satisfactory evidence of having successfully completed an

agent training course that has been approved by the Commissioner and that is offered by or under the auspices of an admitted life or health insurer or a professional insurance association satisfies the educational requirements of this subdivision.

(e) Examination.

(1) After completion and filing of the application with the Commissioner, except as provided in G.S. 58-33-35, the Commissioner shall require each applicant for license as an agent or an adjuster to take a written examination as to his competence to be licensed. The applicant must take and pass the examination according to requirements prescribed by the Commissioner.

(2) The Commissioner may require any licensed agent, adjuster, or motor vehicle damage appraiser to take and successfully pass an examination in writing, testing his competence and qualifications as a condition to the continuance or renewal of his license, if the licensee has been found guilty of any violation of any provision of Articles 1 through 67 of this Chapter. If an individual fails to pass such an examination, the Commissioner shall revoke all licenses issued in his name and no license shall be issued until such individual has passed an examination as provided in this Article.

(3) Each examination shall be as the Commissioner prescribes and shall be of sufficient scope to test the applicant's knowledge of:

a. The terms and provisions of the policies or contracts of insurance he proposes to effect; or

b. The types of claims or losses he proposes to adjust; and

c. The duties and responsibilities of such a license; and

d. The current laws of this State applicable to such a license.

(4) The answers of the applicant to any such examination shall be written by the applicant under the Commissioner's supervision. The Commissioner shall give examinations at such times and places within this State as he deems necessary reasonably to serve the convenience of both the Commissioner and applicants: Provided that the Commissioner is authorized to contract directly with persons for the processing of examination application forms and for the administration and grading of the examinations required by this section; the Commissioner is authorized to charge a reasonable fee in addition to the registration fee charged under G.S. 58-33-125, to offset the cost of the examination contract authorized by this subsection; and such contracts shall not be subject to Article 3 of Chapter 143 of the General Statutes.

(5) The Commissioner shall collect in advance the examination and registration fees provided in G.S. 58-33-125 and in subsection (4) of this section. The Commissioner shall make or cause to be made available to all applicants, for a reasonable fee to offset the costs of production, materials that he deems necessary for the applicants' proper preparation for such exams. The Commissioner is empowered to contract directly with publishers and other suppliers for the production of such preparatory materials, and contracts so let by the Commissioner shall not be subject to Article 3 of Chapter 143 of the General Statutes.

In addition to the examinations for the kinds of insurance specified in G.S. 58-33-25(c)(1) and (2), before any person may sell Medicare supplement or long-term care insurance policies defined respectively in Articles 54 and 55 of this Chapter, he must take and pass a supplemental written examination according to requirements prescribed by the Commissioner.

(f) Brokers.

(1) Bond. — Prior to issuance of a license as a broker, the applicant shall file with the Commissioner and thereafter, for as long as the license remains in effect, shall keep in force a bond in favor of the State of North Carolina for the use of aggrieved parties in the sum of not less than fifteen thousand dollars ($15,000), executed by an authorized corporate surety approved by the Commissioner. The aggregate liability of the surety for any and all claims on any such bond shall in no event exceed the sum thereof. The bond shall be conditioned on the accounting by the broker (i) to any person requesting the broker to obtain insurance for moneys or premiums collected in connection therewith, (ii) to any licensed insurer or agent who provides coverage for such person with respect to any such moneys or premiums, and (iii) to any premium finance company or to any association of insurers under any plan or plans for the placement of insurance under the laws of North Carolina which afforded coverage for such person with respect to any such moneys or premiums. No such bond shall be terminated unless at least 30 days' prior written notice thereof is given by the surety to the licensee and the Commissioner. Upon termination of the license for which the bond was in effect, the Commissioner shall notify the surety within 10 business days. A person required by this subdivision to maintain a bond may, in lieu of that bond, deposit with the Commissioner the equivalent amount in cash, in certificates of deposit issued by banks organized under the laws of the State of North Carolina, or any national bank having its principal office in North Carolina, or securities, which shall be held in accordance with Article 5 of this Chapter. Securities may only be obligations of the United States or of federal agencies listed in G.S. 147-69.1(c)(2) guaranteed by the United States, obligations of the State of North Carolina, or obligations of a city or county of this State. Any proposed deposit of an obligation of a city or county of this State is subject to the prior approval of the Commissioner.

(2) Other Requirements. — An applicant must hold a valid agent's license at the time of application for the broker's license and throughout the duration of the broker's license. A broker's license shall be issued to cover only those kinds of insurance authorized by his agent's license. Suspension or revocation of the agent's license shall cause immediate revocation of the broker's license.

(g) Denial of License. — If the Commissioner finds that the applicant has not fully met the requirements for licensing, he shall refuse to issue the license and shall notify in writing the applicant and the appointing insurer, if any, of such denial, stating the grounds therefor. The application may also be denied for any reason for which a license may be suspended or revoked or not renewed under G.S. 58-33-45(a). Within 30 days after service of the notification, the applicant may make a written demand upon the Commissioner for a review to determine the reasonableness of the Commissioner's action. The review shall be completed without undue delay, and the applicant shall be notified promptly in writing as to the outcome of the review. Within 30 days after service of the notification as to the outcome, the applicant may make a written demand upon the Commissioner for a hearing under Article 3A of Chapter 150B of the General Statutes if the applicant disagrees with the outcome.

(h) Resident-Nonresident Licenses. — The Commissioner shall issue a resident or nonresident license to an agent, broker, limited representative, adjuster, or motor vehicle damage appraiser as follows:

(1) Resident.

An individual may qualify for a license as a resident if he resides in this State. Any license issued pursuant to an application claiming residency in this State shall be void if the licensee, while holding a resident license in this State, also holds or makes application for a resident license in, or thereafter claims to be a resident of, any other state, or ceases to be a resident of this State; provided, however, if the applicant is a resident of a county in another state, the border of which county is contiguous with the state line of this State, the applicant may qualify as a resident for licensing purposes in this State.

(2) Nonresident.

a. An individual may qualify for a license under this Article as a nonresident if he holds a like license in another state or territory of the United States. An individual may qualify for a license as a nonresident motor vehicle damage appraiser or a nonresident adjuster if the applicant's state of residency does not offer such licenses and such applicant meets all other requirements for licensure of a resident. A license issued to a nonresident of this State shall grant the same rights and privileges afforded a resident licensee, except as provided in subsection (i) of this section.

b. Except as provided in G.S. 58-33-32, a nonresident of this State may be licensed without taking an otherwise required written examination if the insurance regulator of the state of the applicant's residence certifies that the applicant has passed a similar written examination or has been a continuous holder, prior to the time such written examination was required, of a license like the license being applied for in this State. nonresident of this State may be licensed without taking an otherwise required written examination if the Commissioner of the state of the applicant's residence certifies that the applicant has passed a similar written examination or has been a continuous holder, prior to the time such written examination was required, of a license like the license being applied for in this State.

c. Notwithstanding other provisions of this Article, no new bond shall be required for a nonresident broker if the Commissioner is satisfied that an existing bond covers his insurance business in this State.

d. Process Against Nonresident Licensees.

1. Each licensed nonresident agent, broker, adjuster, limited representative, or motor vehicle damage appraiser shall by the act of acquiring such license be deemed to appoint the Commissioner as his attorney to receive service of legal process issued against the agent, broker, adjuster, limited representative, or motor vehicle damage appraiser in this State upon causes of action arising within this State.

2. The appointment shall be irrevocable for as long as there could be any cause of action against the nonresident arising out of his insurance transactions in this State.

3. Duplicate copies of such legal process against such nonresident licensee shall be served upon the Commissioner either by a person competent to serve a summons, or through certified or registered mail. At the time of such

service the plaintiff shall pay to the Commissioner a fee in the amount set in G.S. 58-16-30, taxable as costs in the action to defray the expense of such service.

4. Upon receiving such service, the Commissioner or his duly appointed deputy shall within three business days send one of the copies of the process, by registered or certified mail, to the defendant nonresident licensee at his last address of record as filed with the Commissioner.
5. The Commissioner shall keep a record of the day and hour of service upon him of all such legal process. No proceedings shall be had against the defendant nonresident licensee, and such defendant shall not be required to appear, plead or answer until the expiration of 40 days after the date of service upon the Commissioner.

e. If the Commissioner revokes or suspends any nonresident's license through a formal proceeding under this Article, he shall promptly notify the appropriate Commissioner of the licensee's residence of such action and of the particulars thereof.

(i) Retaliatory Provision. — Whenever, by the laws or regulations of any other state or jurisdiction, any limitation of rights and privileges, conditions precedent, or any other requirements are imposed upon residents of this State who are nonresident applicants or licensees of such other state or jurisdiction in addition to, or in excess of, those imposed on nonresidents under this Article, the same such requirements shall be imposed upon such residents of such other state or jurisdiction.

(j) Reciprocity Provision. — To the extent that other states that provide for the licensing and regulation of and payment of commissions to agents, limited representatives, or brokers, waive restrictions on the basis of reciprocity with respect to North Carolina licensees applying for or holding nonresident licenses in those states, the same restrictions on licensees from those states applying for or holding North Carolina nonresident licenses shall be waived. (1987, c. 629, s. 1; c. 864, ss. 80, 86; 1987 (Reg. Sess., 1988), c. 975, s. 30; 1989, c. 485, s. 21; c. 645, s. 5; c. 657, s. 1.1; 1989 (Reg. Sess., 1990), c. 941, ss. 3, 7; 1991, c. 212, s. 2; c. 476, s. 3; 1993, c. 409, s. 2; c. 504, ss. 26, 37; 1998-211, s. 18; 2000-122, s. 3.)

Effect of Amendments. — Session Laws 2000-122, s. 3, effective July 14, 2000, in subdivision (h)(2)b., substituted "Except as provided in G.S. 58-33-32, a nonresident" for "A nonresident" and substituted "insurance regulator" for "Commissioner."

§ 58-33-32. Interstate reciprocity in producer licensing.

(a) The purpose of this section is to make North Carolina insurance producer licensing comply with the reciprocity requirements in the federal Gramm-Leach-Bliley Act, Public Law 106-102. This section does not apply to surplus lines licensees in Article 21 of this Chapter, except as provided in subsections (c) and (d) of this section.

(b) As used in this section:

(1) "Home state" means the District of Columbia and any state or territory of the United States in which an insurance producer maintains a principal place of residence or principal place of business and is licensed to act as an insurance producer.
(2) "Insurance producer" or "producer" means a person required to be licensed under this Article to sell, solicit, or negotiate insurance.

(3) "License" means a document issued by the Commissioner authorizing a person to act as an insurance producer for the kinds of insurance specified in the document. The license itself does not create any authority, actual, apparent, or inherent, in the holder to represent or commit to an insurance carrier.

(4) "Limited line credit insurance" includes any type of credit insurance written under Article 57 of this Chapter, mortgage life, mortgage guaranty, mortgage disability, automobile dealer gap insurance, and any other form of insurance offered in connection with an extension of credit that is limited to partially or wholly extinguishing that credit obligation and that the Commissioner determines should be designated a form of limited line credit insurance.

(5) "Limited line credit insurance producer" means a person who sells, solicits, or negotiates one or more forms of limited line credit insurance coverage to individuals through a master, corporate, group, or individual policy.

(6) "Negotiate" means the act of conferring directly with or offering advice directly to a purchaser or prospective purchaser of a particular contract of insurance concerning any of the substantive benefits, terms, or conditions of the contract, provided that the person engaged in that act either sells insurance or obtains insurance from insurers for purchasers.

(7) "Sell" means to exchange a contract of insurance by any means, for money or its equivalent, on behalf of an insurance company.

(8) "Solicit" means attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance from a particular company.

(9) "Uniform Application" means the most recent version of the NAIC Uniform Application for resident and nonresident producer licensing.

(10) "Uniform Business Entity Application" means the most recent version of the NAIC Uniform Business Entity Application for a resident and a nonresident corporation, association, partnership, limited liability company, limited liability partnership, or other legal entity.

(c) Unless denied licensure under G.S. 58-33-30 or G.S. 58-33-50, a nonresident person shall receive a nonresident producer license if:

(1) The person is currently licensed as a resident and in good standing in that person's home state;

(2) The person has submitted the proper request for licensure and has paid the fees required by G.S. 58-33-125;

(3) The person has submitted or transmitted to the Commissioner the application for licensure that the person submitted to that person's home state, or in lieu of the same, a completed Uniform Application or Uniform Business Entity Application; and

(4) The person's home state awards nonresident producer licenses to residents of this State on the same basis.

The Commissioner may verify the producer's licensing status through the producer database maintained by the NAIC or affiliates or subsidiaries of the NAIC.

(d) Notwithstanding any other provision of this section, a person licensed as a surplus lines producer in that person's home state shall receive a nonresident surplus lines license pursuant to the provisions of this section. Except for the licensure provisions of this section, nothing in this section otherwise amends or supersedes any provision of Article 21 of this Chapter.

(e) Notwithstanding any other provision of this section, a person licensed or registered as a viatical settlement broker, viatical settlement provider, or viatical settlement representative, as defined in G.S. 58-58-42(a), in that

person's home state shall receive a nonresident viatical settlement broker, viatical settlement provider, or viatical settlement representative license pursuant to this section. Except for the licensure provisions of this section, nothing in this section otherwise amends or supersedes any provision of G.S. 58-58-42.

(f) Notwithstanding any other provision of this section, a person licensed as a limited line credit insurance producer or other type of insurance producer in that person's home state shall receive a nonresident limited lines producer license pursuant to the provisions of this section, granting the same scope of authority as granted under the license issued by the producer's home state.

(g) An individual who applies for an insurance producer license in this State who was previously licensed for the same kinds of insurance in that individual's home state shall not be required to complete any prelicensing education or examination. This exemption is available only if:

(1) The applicant is currently licensed in the applicant's home state; or

(2) The application is received within 90 days after the cancellation of the applicant's previous license and the applicant's home state issues a certification that, at the time of cancellation, the applicant was in good standing in that state; or

(3) The home state's producer database records, maintained by the NAIC or affiliates or subsidiaries of the NAIC, indicate that the producer is or was licensed in good standing for the kind of insurance requested.

(h) The Commissioner shall not assess a greater fee for an insurance license or related service to a nonresident producer based solely on the fact that the producer does not reside in this State.

(i) The Commissioner shall waive any license application requirements for a nonresident license applicant with a valid license from the applicant's home state, except the requirements imposed by subsection (c) of this section, if the applicant's home state awards nonresident licenses to residents of this State on the same basis.

(j) A nonresident producer's satisfaction of the nonresident producer's home state's continuing education requirements for licensed insurance producers shall constitute satisfaction of this State's continuing education requirements if the nonresident producer's home state recognizes the satisfaction of its continuing education requirements imposed upon producers from this State on the same basis.

(k) A producer shall report to the Commissioner any administrative action taken against the producer in another state or by another governmental agency in this State within 30 days after the final disposition of the matter. This report shall include a copy of the order or consent order and other relevant legal documents.

(*l*) Within 30 days after the initial pretrial hearing date, a producer shall report to the Commissioner any criminal prosecution of the producer taken in any state. The report shall include a copy of the initial complaint filed, the order resulting from the hearing, and any other relevant legal documents. (2000-122, s. 2.)

Editor's Note. — Session Laws 2000-122, s. 11, made this section effective July 14, 2000.

§ 58-33-125. Fees.

(a) The following table indicates the annual fees that are required for the respective licenses issued, renewed, or cancelled under this Article and Article 21 of this Chapter:

Adjuster $75.00

Adjuster, crop hail only	20.00
Agent appointment cancellation (paid by insurer)	10.00
Agent appointment, individual	20.00
Agent appointment, nonindividual	50.00
Agent appointment, Medicare supplement and long-term care, individual	10.00
Agent appointment, Medicare supplement and long-term care, nonindividual	20.00
Agent, overseas military	20.00
Broker, nonresident	50.00
Broker, resident	50.00
Limited representative	20.00
Limited representative cancellation (paid by insurer)	10.00
Motor vehicle damage appraiser	75.00
Recertification, continuing education	5.00
Surplus lines licensee, corporate	50.00
Surplus lines licensee, individual	50.00

These fees are in lieu of any other license fees. Fees paid by an insurer on behalf of a person who is licensed or appointed to represent the insurer shall be paid to the Commissioner on a quarterly or monthly basis, in the discretion of the Commissioner. The recertification fee in this subsection shall be paid by persons subject to G.S. 58-33-130 at the time they renew their licenses or appointments under G.S. 58-33-130(c).

(b) Whenever a temporary license may be issued pursuant to this Article, the fee shall be at the same rate as provided in subsection (a) of this section; and any amounts so paid for a temporary license may be credited against the fee required for an appointment by the sponsoring company.

(c) Any person not registered who is required by law or administrative rule to secure a license shall, upon application for registration, pay to the Commissioner a fee of thirty dollars ($30.00). In the event additional licensing for other kinds of insurance is requested, a fee of thirty dollars ($30.00) shall be paid to the Commissioner upon application for registration for each additional kind of insurance.

In addition to the fees prescribed by this subsection, any person applying for a supplemental license to sell Medicare supplement and long-term care insurance policies shall pay an additional fee of thirty dollars ($30.00) upon application for registration for those kinds of insurance.

(d) The requirement for an examination, prelicensing education, continuing education, or a registration fee does not apply to agents for domestic farmers' mutual assessment fire insurance companies or associations who solicit and sell only those kinds of insurance specified in G.S. 58-7-75(5)d for such companies or associations.

(e) In the event a license issued under this Article is lost, stolen, or destroyed, the Commissioner may issue a duplicate license upon a written request from the licensee and payment of a fee of five dollars ($5.00).

(f) Whenever a printed record of an agent's file is requested, the fee shall be ten dollars ($10.00) for each copy whether or not the agent is currently licensed, previously licensed, or no record of that agent exists.

(g) All fees prescribed by this section are nonrefundable. (1987, c. 629, s. 1; c. 864, ss. 84, 85; 1989 (Reg. Sess., 1990), c. 941, ss. 4-5; c. 1021, s. 9; c. 1069, s. 14; 1991, c. 476, s. 3; c. 721, s. 7; 1991 (Reg. Sess., 1992), c. 837, s. 3; 2000-122, s. 1.)

Effect of Amendments. — Session Laws 2000-122, s. 1, effective July 14, 2000, decreased the fee for "Broker, nonresident" from "100.00" to "50.00."

Article 36.

North Carolina Rate Bureau.

§ 58-36-1. North Carolina Rate Bureau created.

CASE NOTES

Cited in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 350 N.C. 539, 516 S.E.2d 150 (1999).

§ 58-36-5. Membership as a prerequisite for writing insurance; governing committee; rules and regulations; expenses.

CASE NOTES

Cited in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 350 N.C. 539, 516 S.E.2d 150 (1999); Prentiss v. Allstate Ins. Co., 87 F. Supp. 2d 514 (W.D.N.C. 1999).

§ 58-36-10. Method of rate making; factors considered.

The following standards shall apply to the making and use of rates:

(1) Rates or loss costs shall not be excessive, inadequate or unfairly discriminatory.

(2) Due consideration shall be given to actual loss and expense experience within this State for the most recent three-year period for which that information is available; to prospective loss and expense experience within this State; to the hazards of conflagration and catastrophe; to a reasonable margin for underwriting profit and to contingencies; to dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers; to investment income earned or realized by insurers from their unearned premium, loss, and loss expense reserve funds generated from business within this State; to past and prospective expenses specially applicable to this State; and to all other relevant factors within this State: Provided, however, that countrywide expense and loss experience and other countrywide data may be considered only where credible North Carolina experience or data is not available.

(3) In the case of property insurance rates under this Article, consideration may be given to the experience of property insurance business during the most recent five-year period for which that experience is available. In the case of property insurance rates under this Article, consideration shall be given to the insurance public protection classifications of fire districts established by the Commissioner. The Commissioner shall establish and modify from time to time insurance public protection districts for all rural areas of the State and for cities with populations of 100,000 or fewer, according to the most recent annual population estimates certified by the State Planning Officer. In establishing and modifying these districts, the Commissioner shall use standards at least equivalent to those used by the Insurance Services Office, Inc., or any successor organization. The standards developed by the Commissioner are subject to Article 2A of Chapter 150B of the General Statutes. The insurance public protection classi-

fications established by the Commissioner issued pursuant to the provisions of this Article shall be subject to appeal as provided in G.S. 58-2-75, et seq. The exceptions stated in G.S. 58-2-75(a) do not apply.

(4) Risks may be grouped by classifications and lines of insurance for establishment of rates, loss costs, and base premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans that establish standards for measuring variations in hazards or expense provisions or both. Those standards may measure any differences among risks that can be demonstrated to have a probable effect upon losses or expenses. The Bureau shall establish and implement a comprehensive classification rating plan for motor vehicle insurance under its jurisdiction. No such classification plans shall base any standard or rating plan for private passenger (nonfleet) motor vehicles, in whole or in part, directly or indirectly, upon the age or gender of the persons insured. The Bureau shall at least once every three years make a complete review of the filed classification rates to determine whether they are proper and supported by statistical evidence, and shall at least once every 10 years make a complete review of the territories for nonfleet private passenger motor vehicle insurance to determine whether they are proper and reasonable.

(5) In the case of workers' compensation insurance and employers' liability insurance written in connection therewith, due consideration shall be given to the past and prospective effects of changes in compensation benefits and in legal and medical fees that are provided for in General Statutes Chapter 97. (1977, c. 828, s. 6; 1979, c. 824, s. 1; 1981, c. 521, s. 5; c. 790; 1987, c. 632, s. 1; 1991, c. 644, s. 39; 1999-132, s. 3.3; 2000-176, s. 1.)

Editor's Note. — Session Laws 2000-176, s. 3, makes the act is effective August 2, 2000, and provides that any changes to classifications of insurance public protection districts issued by the Commissioner pursuant to the act shall become effective no sooner than 90 days after the standards for public protection district classifications are adopted by the Department and shall apply to insurance policies issued or renewed on or after that date.

Effect of Amendments. —

Session Laws 2000-176, s. 1, in subdivision (3), substituted "property insurance" for "fire insurance" twice, substituted "rates under this Article" for "rates, as are subject to the ratemaking authority of the Bureau," substituted "under this Article" for "that are subject to the ratemaking authority of the Bureau," substituted "fire districts" for "rural fire districts based upon standards," and substituted the present third through seventh sentences for the former third sentence. See editor's note for applicability and effective date.

CASE NOTES

Calculation of Rate Level. —

Where the established rate level was not inadequate, excessive, or unfairly discriminatory, the Commissioner of Insurance, in the exercise of his sound discretion and expertise, gave "due consideration" to dividends and deviations as required under this section. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 350 N.C. 539, 516 S.E.2d 150 (1999).

Factors for Consideration When Figuring Underwriting Profit. —

This section lists the factors considered in ratemaking, and makes no provision for consideration of investment income from capital and surplus; the Court of Appeals therefore correctly concluded that the Commissioner of Insurance cannot order rates based on underwriting profit provisions that require the consideration of such income. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 350 N.C. 539, 516 S.E.2d 150 (1999).

§ 58-36-65. Classifications and Safe Driver Incentive Plan for nonfleet private passenger motor vehicle insurance.

Editor's Note. — This section heading corrects an error appearing in the section heading in the main volume.

CASE NOTES

Challenge to Regulatory Scheme to be Decided in State Court. — The court declined to make a declaratory judgment where plaintiffs sought a declaration in state court that the delegation of adjudicative power to an automobile insurer is unconstitutional under the North Carolina constitution, because the State of North Carolina's interest in having this challenge to its regulatory scheme decided in state court was compelling. Prentiss v. Allstate Ins. Co., 87 F. Supp. 2d 514 (W.D.N.C. 1999).

Cited in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 350 N.C. 539, 516 S.E.2d 150 (1999).

Article 40.

Regulation of Insurance Rates.

§ 58-40-25. Rating methods.

In determining whether rates comply with the standards under G.S. 58-40-20, the following criteria shall be applied:

(1) Due consideration shall be given to past and prospective loss and expense experience within this State, to catastrophe hazards, to a reasonable margin for underwriting profit and contingencies, to trends within this State, to dividends or savings to be allowed or returned by insurers to their policyholders, members, or subscribers, and to all other relevant factors, including judgment factors; however, regional or countrywide expense or loss experience and other regional or countrywide data may be considered only when credible North Carolina expense or loss experience or other data is not available.

(2) Risks may be grouped by classifications for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which establish standards for measuring variations in hazards or expense provisions, or both. Those standards may measure any differences among risks that have probable effect upon losses or expenses. Classifications or modifications of classifications of risks may be established based upon size, expense, management, individual experience, location or dispersion of hazard, or any other reasonable considerations. Those classifications and modifications shall apply to all risks under the same or substantially the same circumstances or conditions.

(3) The expense provisions included in the rates to be used by an insurer may reflect the operating methods of the insurer and, as far as it is credible, its own expense experience.

(4) In the case of property insurance rates under this Article, consideration shall be given to the insurance public protection classifications of fire districts established by the Commissioner. The Commissioner shall establish and modify from time to time insurance public protection districts for all rural areas of the State and for cities with

populations of 100,000 or fewer, according to the most recent annual population estimates certified by the State Planning Officer. In establishing and modifying these districts, the Commissioner shall use standards at least equivalent to those used by the Insurance Services Office, Inc., or any successor organization. The standards developed by the Commissioner are subject to Article 2A of Chapter 150B of the General Statutes. The insurance public protection classifications established by the Commissioner issued pursuant to the provisions of this Article shall be subject to appeal as provided in G.S. 58-2-75, et seq. The exceptions stated in G.S. 58-2-75(a) do not apply. (1977, c. 828, s. 2; 1985 (Reg. Sess., 1986), c. 1027, s. 16; 1991, c. 644, s. 40; 2000-176, s. 2.)

Editor's Note. — Session Laws 2000-176, s. 3, makes the act is effective August 2, 2000, and provides that any changes to classifications of insurance public protection districts issued by the Commissioner pursuant to this act shall become effective no sooner than 90 days after the standards for public protection district classifications are adopted by the Department and shall apply to insurance policies issued or renewed on or after that date.

Effect of Amendments. — Session Laws 2000-176, s. 2, rewrote subdivision (4). See editor's note for applicability and effective date.

Article 41.

Insurance Regulatory Reform Act.

§ 58-41-15. Certain policy cancellations prohibited.

CASE NOTES

The plaintiff/lender was not entitled to notice pursuant to this section because the defendant/insurer did not cancel the policy within the meaning of this section where the policy expired at the end of its term as a result of the insured's failure to pay the premium. Associates Fin. Servs. of Am., Inc. v. North Carolina Farm Bureau Mut. Ins. Co., — N.C. App. —, 528 S.E.2d 621, 2000 N.C. App. LEXIS 421 (2000).

§ 58-41-20. Notice of nonrenewal, premium rate increase, or change in coverage required.

CASE NOTES

The notice requirements of this section did not apply, and defendant was not required to provide plaintiff with notification of the policy's expiration where the undisputed facts showed that defendant mailed two renewal declarations to the insureds, that these renewal declarations demonstrated defendant's willingness to renew the policy, and that the failure of the policy holders to pay the premium was a rejection of defendant's offer to renew the policy. Associates Fin. Servs. of Am., Inc. v. North Carolina Farm Bureau Mut. Ins. Co., — N.C. App. —, 528 S.E.2d 621, 2000 N.C. App. LEXIS 421 (2000).

Article 42.

Mandatory or Voluntary Risk Sharing Plans.

(Expires July 1, 2001)

§ 58-42-45. (Expires July 1, 2001) Article subject to Administrative Procedure Act; legislative oversight of plans.

(a) The provisions of Chapter 150B of the General Statutes shall apply to this Article.

(b) At the same time the Commissioner issues a notice of hearing under G.S. 150B-38, the Commissioner shall provide copies of the notice to the Joint Legislative Administrative Procedure Oversight Committee and to the Joint Legislative Commission on Governmental Operations. The Commissioner shall provide the Committee and Commission with copies of any plan promulgated by or approved by the Commissioner under G.S. 58-42-1(1) or (2). (1986, Ex. Sess., c. 7, s. 1; 1999-114, s. 1; 2000-140, s. 15.)

Effect of Amendments. — Session Laws 2000-140, s. 15, effective July 21, 2000, deleted "shall pursuant to" following subsection (a). This language had been inadvertently retained when the section was amended by Session Laws 1999-114, s. 3.

Article 44.

Fire Insurance Policies.

§ 58-44-15. Fire insurance contract; standard policy provisions.

Editor's Note. — In the sample fire insurance policy form reproduced at the end of subsection (c) of this section, the time for commencement of suit reflected in the next to last paragraph, headed "Suit," should be three years, not twelve months. See § 1-52 (12).

CASE NOTES

I. In General.

I. IN GENERAL.

Defendants did not make material misrepresentations where they "inflated" the estimated losses by submitting their bids for repairs based on the assumption of a "worst case" scenario and were forthright in revealing what they sought recovery for. Westchester Fire Ins. Co. v. Johnson, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 5001 (M.D.N.C. January 6, 2000).

Article 45.

Essential Property Insurance for Beach Area Property.

§ 58-45-1. Declarations and purpose of Article.

CASE NOTES

Cited in Gray v. North Carolina Ins. Underwriting Ass'n, — N.C. —, 529 S.E.2d 676, 2000 N.C. LEXIS 437 (2000).

§ 58-45-6. Persons who can be insured by the Association.

As used in this Article, "person" includes any county, city, or other political subdivision of the State of North Carolina. (2000-122, s. 5.)

Effect of Amendments. — Session Laws 2000-122, s. 11, made this section effective July 14, 2000.

§ 58-45-10. North Carolina Insurance Underwriting Association created.

CASE NOTES

Cited in Gray v. North Carolina Ins. Underwriting Ass'n, — N.C. —, 529 S.E.2d 676, 2000 N.C. LEXIS 437 (2000).

Article 46.

Fair Access to Insurance Requirements.

§ 58-46-2. Persons who can be insured by the Association.

As used in this Article, "person" includes any county, city, or other political subdivision of the State of North Carolina. (2000-122, s. 6.)

Editor's Note. — Session Laws 2000-122, s. 11, made this section effective July 14, 2000.

Article 48.

Postassessment Insurance Guaranty Association.

§ 58-48-55. Nonduplication of recovery.

CASE NOTES

Cited in Patel v. Stone, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 788 (July 5, 2000).

Article 50.

General Regulations.

§ 58-50-1. Waiver by insurer.

The acknowledgment by any insurer of the receipt of notice given under any policy covered by Articles 49, 50 through 55, 65, or 67 of this Chapter, or the furnishing of forms for filing proofs of loss, or the acceptance of such proofs, or the investigation of any claim under the policy, shall not operate as a waiver of any of the rights of the insurer in defense of any claim arising under the policy. (1913, c. 91, s. 7; C.S., s. 6484; 1991, c. 720, s. 28; 1999-244, s. 10; 2000-140, s. 16.)

Effect of Amendments. — Session Laws 2000-140, s. 16, effective July 21, 2000, inserted "under" preceding "the policy, shall not operate."

§ 58-50-15. Conforming to statute.

CASE NOTES

Anti-subrogation Rule. — Commissioner's promulgation of 11 N.C.A.C. 12.0319, prohibiting subrogation provisions in life or accident and health insurance contracts, supported by § 58-2-40 (right to limit practices injurious to the public) and subsection (a) of this section (prohibiting provisions less favorable to the insured), did not exceed his statutory authority, even though it may have changed state substantive law, and did not amount to an unconstitutional delegation of legislative powers because statutory provisions (§§ 58-2-40 and 58-51-15, and this section) and judicial review (available under Chapter 150B) offer adequate procedural safeguards and support the delegation of power to the Commissioner. In re 11 N.C.A.C 12.0319, 134 N.C. App. 22, 517 S.E.2d 134 (1999), cert. denied, appeal dismissed, 351 N.C. 105, — S.E.2d — (1999).

Article 51.

Nature of Policies.

§ 58-51-15. Accident and health policy provisions.

(a) Required Provisions. — Except as provided in subsection (c) of this section each such policy delivered or issued for delivery to any person in this State shall contain the provisions specified in this subsection in the substance of the words that appear in this section. Such provisions shall be preceded individually by the caption appearing in this subsection or, at the option of the insurer, by such appropriate individual or group captions or subcaptions as the Commissioner may approve.

(1) A provision in the substance of the following language:

ENTIRE CONTRACT; CHANGES: This policy, including the endorsements and the attached papers, if any, constitutes the entire contract of insurance. No change in this policy shall be valid until approved by an executive officer of the insurer and unless such approval be endorsed hereon or attached hereto. No agent has authority to change this policy or waive any of its provisions.

(2) A provision in the substance of the following language:

TIME LIMIT ON CERTAIN DEFENSES:

a. After two years from the date of issue or reinstatement of this policy no misstatements except fraudulent misstatements made

by the applicant in the application for such policy shall be used to void the policy or deny a claim for loss incurred or disability (as defined in the policy) commencing after the expiration of such two-year period.

The foregoing policy provision may be used in its entirety only in major or catastrophe hospitalization policies and major medical policies each affording benefits of five thousand dollars ($5,000) or more for any one sickness or injury; disability income policies affording benefits of one hundred dollars ($100.00) or more per month for not less than 12 months; and franchise policies. Other policies to which this section applies must delete the words "except fraudulent misstatements."

(The foregoing policy provision shall not be so construed as to affect any legal requirement for avoidance of a policy or denial of a claim during such initial two-year period, nor to limit the application of G.S. 58-51-15(b), (1), (2), (3), (4) and (5) in the event of misstatement with respect to age or occupation or other insurance.)

(A policy which the insured has the right to continue in force subject to its terms by the timely payment of premium:

1. Until at least age 50 or,
2. In the case of a policy issued after age 44, for at least five years from its date of issue, may contain in lieu of the foregoing the following provisions (from which the clause in parentheses may be omitted at the insurer's option) under the caption "INCONTESTABLE."

After this policy has been in force for a period of two years during the lifetime of the insured (excluding any period during which the insured is disabled), it shall become incontestable as to the statements contained in the application.)

b. This policy contains a provision limiting coverage for preexisting conditions. Preexisting conditions are covered under this policy _____ (insert number of months or days, not to exceed one year) after the effective date of coverage. Preexisting conditions mean "those conditions for which medical advice, diagnosis, care, or treatment was received or recommended within the one-year period immediately preceding the effective date of the person's coverage." Credit for having satisfied some or all of the preexisting condition waiting periods under previous health benefits coverage shall be given in accordance with G.S. 58-68-30.

(3) A provision in the substance of the following language:

GRACE PERIOD: A grace period of _____ (insert a number not less than "7" for weekly premium policies, "10" for monthly premium policies and "31" for all other policies) days will be granted for the payment of each premium falling due after the first premium, during which grace period the policy shall continue in force.

(A policy which contains a cancellation provision may add, at the end of the above provision, subject to the right of the insurer to cancel in accordance with the cancellation provision hereof.

A policy in which the insurer reserves the right to refuse any renewal shall have, at the beginning of the above provision,

Unless not less than five days prior to the premium due date the insurer has delivered to the insured or has mailed to his last address as shown by the record of the insurer written notice of its intention not to renew this policy beyond the period for which the premium has been accepted.)

(4) A provision in the substance of the following language:

REINSTATEMENT: If any renewal premium be not paid within the time granted the insured for payment, a subsequent acceptance of premium by the insurer or by any agent duly authorized by the insurer to accept such premium, without requiring in connection therewith an application for reinstatement, shall reinstate the policy; provided, however, that if the insurer or such agent requires an application for reinstatement and issues a conditional receipt for the premium tendered, the policy will be reinstated upon approval of such application by the insurer, or, lacking such approval, upon the forty-fifth day following the date of such conditional receipt unless the insurer has previously notified the insured in writing of its disapproval of such application. The reinstated policy shall cover only loss resulting from such accidental injury as may be sustained after the date of reinstatement and loss due to such sickness as may begin more than 10 days after such date. In all other respects the insured and insurer shall have the same rights thereunder as they had under the policy immediately before the due date of the defaulted premium, subject to any provisions endorsed hereon or attached hereto in connection with the reinstatement. Any premium accepted in connection with a reinstatement shall be applied to a period for which premium has not been previously paid, but not to any period more than 60 days prior to the date of reinstatement.

(The last sentence of the above provision may be omitted from any policy which the insured has the right to continue in force subject to its terms by the timely payment of premiums:

a. Until at least age 50 or,

b. In the case of a policy issued after age 44, for at least five years from its date of issue.)

(5) A provision in the substance of the following language:

NOTICE OF CLAIM: Written notice of claim must be given to the insurer within 20 days after the occurrence or commencement of any loss covered by the policy, or as soon thereafter as is reasonably possible. Notice given by or on behalf of the insured or the beneficiary to the insurer at _____ (insert the location of such office as the insurer may designate for the purpose), or to any authorized agent of the insurer, with information sufficient to identify the insured, shall be deemed notice to the insurer.

(In a policy providing a loss-of-time benefit which may be payable for at least two years, an insurer may at its option insert the following between the first and second sentences of the above provision:

Subject to the qualifications set forth below, if the insured suffers loss of time on account of disability for which indemnity may be payable for at least two years, he shall, at least once in every six months after having given notice of claim, give to the insurer notice of continuance of said disability, except in the event of legal incapacity. The period of six months following any filing of proof by the insured or any payment by the insurer on account of such claim or any denial of liability in whole or in part by the insurer shall be excluded in applying this provision. Delay in the giving of such notice shall not impair the insured's right to any indemnity which would otherwise have accrued during the period of six months preceding the date on which such notice is actually given.)

(6) A provision in the substance of the following language:

CLAIM FORMS: The insurer, upon receipt of a notice of claim, will furnish to the claimant such forms as are usually furnished by it for

filing proofs of loss. If such forms are not furnished within 15 days after the giving of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting, within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, the character and the extent of the loss for which claim is made.

(7) **(Effective until July 1, 2001)** A provision in the substance of the following language:

PROOFS OF LOSS: Written proof of loss must be furnished to the insurer at its said office in case of claim for loss for which this policy provides any periodic payment contingent upon continuing loss within 90 days after the termination of the period for which the insurer is liable and in case of claim for any other loss within 90 days after the date of such loss. Failure to furnish such proof within the time required shall not invalidate nor reduce any claim if it was not reasonably possible to give proof within such time, provided such proof is furnished as soon as reasonably possible and in no event, except in the absence of legal capacity, later than one year from the time proof is otherwise required.

(7) **(Effective July 1, 2001)** A provision in the substance of the following language:

PROOFS OF LOSS: Written proof of loss must be furnished to the insurer at its said office in the case of a claim for loss for which this policy provides any periodic payment contingent upon continuing loss within 180 days after the termination of the period for which the insurer is liable and in case of a claim for any other loss within 180 days after the date of such loss. Failure to furnish such proof within the time required shall not invalidate nor reduce any claim if it was not reasonably possible to give proof within such time, provided such proof is furnished as soon as reasonably possible and in no event, except in the absence of legal capacity of the insured, later than one year from the time proof is otherwise required.

(8) A provision in the substance of the following language:

TIME OF PAYMENT OF CLAIMS: Indemnities payable under this policy for any loss other than loss for which this policy provides any period payment will be paid immediately upon receipt of due written proof of such loss. Subject to due written proof of loss, all accrued indemnities for loss for which this policy provides periodic payment will be paid _____ (insert period for payment which must not be less frequently than monthly) and any balance remaining unpaid upon the termination of liability will be paid immediately upon receipt of due written proof.

(9) A provision in the substance of the following language:

PAYMENT OF CLAIMS: Indemnity for loss of life will be payable in accordance with the beneficiary designation and the provisions respecting such payment which may be prescribed herein and effective at the time of payment. If no such designation or provision is then effective, such indemnity shall be payable to the estate of the insured. Any other accrued indemnities unpaid at the insured's death may, at the option of the insurer, be paid either to such beneficiary or to such estate. All other indemnities will be payable to the insured.

(The following provisions, or either of them, may be included with the foregoing provision at the option of the insurer:

If any indemnity of this policy shall be payable to the estate of the insured, or to an insured or beneficiary who is a minor or otherwise not competent to give a valid release, the insurer may pay such

indemnity, up to an amount not exceeding $ _____ (insert an amount which shall not exceed three thousand dollars ($3,000)), to any relative by blood or connection by marriage of the insured or beneficiary who is deemed by the insurer to be equitably entitled thereto. Any payment made by the insurer in good faith pursuant to this provision shall fully discharge the insurer to the extent of such payment.

Subject to any written direction of the insured in the application or otherwise all or a portion of any indemnities provided by this policy on account of hospital, nursing, medical, or surgical services, may at the insurer's option and unless the insured requests otherwise in writing not later than the time of filing proofs of such loss, be paid directly to the hospital or person rendering such services; but it is not required that the service be rendered by a particular hospital or person.)

(10) A provision in the substance of the following language:

PHYSICAL EXAMINATIONS AND AUTOPSY: The insurer at its own expense shall have the right and opportunity to examine the person of the insured when and as often as it may reasonably require during the pendency of a claim hereunder and to make an autopsy in case of death where it is not forbidden by law.

(11) A provision in the substance of the following language:

LEGAL ACTIONS: No action at law or in equity shall be brought to recover on this policy prior to the expiration of 60 days after written proof of loss has been furnished in accordance with the requirements of this policy. No such action shall be brought after the expiration of three years after the time written proof of loss is required to be furnished.

(12) A provision in the substance of the following language:

CHANGE OF BENEFICIARY: Unless the insured makes an irrevocable designation of beneficiary, the right to change of beneficiary is reserved to the insured and the consent of the beneficiary or beneficiaries shall not be requisite to surrender or assignment of this policy or to any change of beneficiary or beneficiaries, or to any other changes in this policy.

(The first clause of this provision, relating to the irrevocable designation of beneficiary, may be omitted at the insurer's option.)

(b) Other Provisions. — Except as provided in subsection (c) of this section, no such policy delivered or issued for delivery to any person in this State shall contain provisions respecting the matters set forth below unless such provisions are in the substance of the words that appear in this section. Any such provision contained in the policy shall be preceded individually by the appropriate caption appearing in this subsection or, at the option of the insurer, by such appropriate individual or group captions or subcaptions as the Commissioner may approve.

(1) A provision in the substance of the following language:

CHANGE OF OCCUPATION: If the insured be injured or contract sickness after having changed his occupation to one classified by the insurer as more hazardous than that stated in this policy or while doing for compensation anything pertaining to an occupation so classified, the insurer will pay only such portion of the indemnities provided in this policy as the premium paid would have purchased at the rates and within the limits fixed by the insurer for such more hazardous occupation. If the insured changes his occupation to one classified by the insurer as less hazardous than that stated in this policy, the insurer, upon receipt of proof of such change of occupation, will reduce the premium rate accordingly, and will return the excess

pro rata unearned premium from the date of change of occupation or from the policy anniversary date immediately preceding receipt of such proof, whichever is the more recent. In applying this provision, the classification of occupational risk and the premium rates shall be such as have been last filed by the insurer prior to the occurrence of the loss for which the insurer is liable or prior to date of proof of change in occupation with the state official having supervision of insurance in the state where the insured resided at the time this policy was issued; but if such filing was not required, then the classification of occupational risk and the premium rates shall be those last made effective by the insurer in such state prior to the occurrence of the loss or prior to the date of proof of change in occupation.

(2) A provision in the substance of the following language:

MISSTATEMENT OF AGE: If the age of the insured has been misstated, all amounts payable under this policy shall be such as the premium paid would have purchased at the correct age.

(3) A provision in the substance of the following language:

OTHER INSURANCE IN THIS INSURER: If an accident or health or accident and health policy or policies previously issued by the insurer to the insured be in force concurrently herewith, making the aggregate indemnity for _____ (insert type of coverage or coverages) in excess of $ _____ (insert maximum limit of indemnity or indemnities) the excess insurance shall be void and all premiums paid for such excess shall be returned to the insured or to his estate.

Or, in lieu thereof:

Insurance effective at any one time on the insured under a like policy or policies in this insurer is limited to the one such policy elected by the insured, his beneficiary or his estate, as the case may be, and the insurer will return all premiums paid for all other such policies.

(4) A provision in the substance of the following language:

INSURANCE WITH OTHER INSURERS: If there be other valid coverage, not with this insurer, providing benefits for the same loss on a provision of service basis or on an expense incurred basis and of which this insurer has not been given written notice prior to the occurrence or commencement of loss, the only liability under any expense incurred coverage of this policy shall be for such proportion of the loss as the amount which would otherwise have been payable hereunder plus the total of the like amounts under all such other valid coverages for the same loss of which this insurer had notice bears to the total like amounts under all valid coverages for such loss, and for the return of such portion of the premiums paid as shall exceed the pro rata portion for the amount so determined. For the purpose of applying this provision when other coverage is on a provision of service basis, the "like amount" of such other coverage shall be taken as the amount which the services rendered would have cost in the absence of such coverage.

(If the foregoing policy provision is included in a policy which also contains the next following policy provision there shall be added to the caption of the foregoing provision the phrase "_____ EXPENSE INCURRED BENEFITS." The insurer may, at its option, include in this provision a definition of "other valid coverage," approved as to form by the Commissioner, which definition shall be limited in subject matter to coverage provided by organizations subject to regulation by insurance law or by insurance authorities of this or any other state of

the United States or any province of Canada, and by hospital or medical service organizations, and to any other coverage the inclusion of which may be approved by the Commissioner. In the absence of such definition such term shall not include group insurance, automobile medical payments insurance, or coverage provided by hospital or medical service organizations or by union welfare plans or employer or employee benefit organizations. For the purpose of applying the foregoing policy provision with respect to any insured, any amount of benefit provided for such insured pursuant to any compulsory benefit statute (including any workers' compensation or employer's liability statute) whether provided by a governmental agency or otherwise shall in all cases be deemed to be "other valid coverage" of which the insurer has had notice. In applying the foregoing policy provisions no third-party liability coverage shall be included as "other valid coverage.")

(5) A provision in the substance of the following language:

INSURANCE WITH OTHER INSURERS: If there be other valid coverage, not with this insurer, providing benefits for the same loss on other than an expense incurred basis and of which this insurer has not been given written notice prior to the occurrence or commencement of loss, the only liability for such benefits under this policy shall be for such proportion of the indemnities otherwise provided hereunder for such loss as the like indemnities of which the insurer had notice (including the indemnities under this policy) bear to the total amount of all like indemnities for such loss, and for the return of such portion of the premium paid as shall exceed the pro rata portion for the indemnities thus determined.

(If the foregoing policy provision is included in a policy which also contains the next preceding policy provision there shall be added to the caption of the foregoing provision the phrase "_____ OTHER BENEFITS." The insurer may, at its option, include in this provision a definition of "other valid coverage," approved as to form by the Commissioner, which definition shall be limited in subject matter to coverage provided by organizations subject to regulation by insurance law or by insurance authorities of this or any other state of the United States or any province of Canada, and to any other coverage the inclusion of which may be approved by the Commissioner. In the absence of such definition such term shall not include group insurance, or benefits provided by union welfare plans or by employer or employee benefit organizations. For the purpose of applying the foregoing policy provision with respect to any insured, any amount of benefit provided for such insured pursuant to any compulsory benefit statute (including any workers' compensation or employer's liability statute) whether provided by a governmental agency or otherwise shall in all cases be deemed to be "other valid coverage" of which the insurer has had notice. In applying the foregoing policy provision no third-party liability coverage shall be included as "other valid coverage.")

(6) A provision in the substance of the following language:

RELATION OF EARNINGS TO INSURANCE: If the total monthly amount of loss of time benefits promised for the same loss under all valid loss of time coverage upon the insured, whether payable on a weekly or monthly basis, shall exceed the monthly earnings of the insured at the time disability commenced or his average monthly earnings for the period of two years immediately preceding a disability for which claim is made, whichever is the greater, the insurer will

be liable only for such proportionate amount of such benefits under this policy as the amount of such monthly earnings or such average monthly earnings of the insured bears to the total amount of monthly benefits for the same loss under all such coverage upon the insured at the time such disability commences and for the return of such part of the premiums paid during such two years as shall exceed the pro rata amount of the premiums for the benefits actually paid hereunder; but this shall not operate to reduce the total monthly amount of benefits payable under all such coverage upon the insured below the sum of two hundred dollars ($200.00) or the sum of the monthly benefits specified in such coverages, whichever is the lesser, nor shall it operate to reduce benefits other than those payable for loss of time.

(The foregoing policy provision may be inserted only in a policy which the insured has the right to continue in force subject to its terms by the timely payment of premiums:

a. Until at least age 50 or,

b. In the case of a policy issued after age 44, for at least five years from its date of issue.

The insurer may, at its option, include in this provision a definition of "valid loss of time coverage," approved as to form by the Commissioner, which definition shall be limited in subject matter to coverage provided by governmental agencies or by organizations subject to regulation by insurance law or by insurance authorities of this or any other state of the United States or any province of Canada, or to any other coverage the inclusion of which may be approved by the Commissioner or any combination of such coverages. In the absence of such definition such term shall not include any coverage provided for such insured pursuant to any compulsory benefit statute (including any workers' compensation or employer's liability statute), or benefits provided by union welfare plans or by employer or employee benefit organizations.)

(7) A provision in the substance of the following language:

UNPAID PREMIUM: Upon the payment of a claim under this policy, any premium then due and unpaid or covered by any note or written order may be deducted therefrom.

(8) Repealed by Session Laws 1955, c. 886, s. 1.

(9) A provision in the substance of the following language:

CONFORMITY WITH STATE STATUTES: Any provision of this policy which, on its effective date, is in conflict with the statutes of the state in which the insured resides on such date is hereby amended to conform to the minimum requirements of such statutes.

(10) A provision in the substance of the following language:

ILLEGAL OCCUPATION: The insurer shall not be liable for any loss to which a contributing cause was the insured's commission of or attempt to commit a felony or to which a contributing cause was the insured's being engaged in an illegal occupation.

(11) A provision in the substance of the following language:

INTOXICANTS AND NARCOTICS: Except for the payment of benefits for the necessary care and treatment of chemical dependency as provided by law, the insurer shall not be liable for any loss sustained or contracted in consequence of the insured's being intoxicated or under the influence of any narcotic unless administered on the advice of a physician.

(c) Inapplicable or Inconsistent Provisions. — If any provision of this section is in whole or in part inapplicable to or inconsistent with the coverage provided by a particular form of policy the insurer, with the approval of the Commis-

sioner, shall omit from such policy any inapplicable provision or part of a provision, and shall modify any inconsistent provision or part of the provision in such manner as to make the provision as contained in the policy consistent with the coverage provided by the policy.

(d) Order of Certain Policy Provisions. — The provisions which are the subject of subsections (a) and (b) of this section, or any corresponding provisions which are used in lieu thereof in accordance with such subsections, shall be printed in the consecutive order of the provisions in such subsections or, at the option of the insurer, any such provision may appear as a unit in any part of the policy, with other provisions to which it may be logically related, provided the resulting policy shall not be in whole or in part unintelligible, uncertain, ambiguous, abstruse, or likely to mislead a person to whom the policy is offered, delivered or issued.

(e) Third-Party Ownership. — The word "insured," as used in Articles 50 through 55 of this Chapter shall not be construed as preventing a person other than the insured with a proper insurable interest from making application for and owning a policy covering the insured or from being entitled under such a policy to any indemnities, benefits and rights provided therein.

(f) Requirements of Other Jurisdictions.

(1) Any policy of a foreign or alien insurer, when delivered or issued for delivery to any person in this State, may contain any provision which is not less favorable to the insured or the beneficiary than the provisions of Articles 50 through 55 of this Chapter and which is prescribed or required by the law of the state under which the insurer is organized.

(2) Any policy of a domestic insurer may, when issued for delivery in any other state or country, contain any provision permitted or required by the laws of such other state or country.

(g) Filing Procedure. — The Commissioner may make such reasonable rules and regulations concerning the procedure for the filing or submission of policies subject to Articles 50 through 55 of this Chapter as are necessary, proper or advisable to the administration of Articles 50 through 55 of this Chapter. This provision shall not abridge any other authority granted the Commissioner by law.

(h) Preexisting Condition Exclusion Clarification. — Sub-subdivision (a)(2)b. of this section does not apply to:

(1) Policies issued to eligible individuals under G.S. 58-68-60.

(2) Excepted benefits as described in G.S. 58-68-25(b)(1), (2), and (4). (1953, c. 1095, s. 2; 1955, c. 850, s. 8; c. 886, s. 1; 1961, c. 432; 1979, c. 755, ss. 9-12; 1983 (Reg. Sess., 1984), c. 1110, s. 13; 1987, c. 864, s. 42; 1987 (Reg. Sess., 1988), c. 975, s. 2; 1991, c. 636, s. 3; c. 720, s. 35; 1993, c. 506, s. 4; c. 553, s. 17; 1995, c. 507, s. 23A.1(g); 1995 (Reg. Sess., 1996), c. 742, s. 27; 1997-259, ss. 7, 7.1; 1999-351, s. 1; 2000-162, s. 4(d).)

Subdivision (a)(7) Set Out Twice — The first version of subdivision (a)(7) set out above is effective until July 1, 2001. The second version of subdivision (a)(7) set out above is effective July 1, 2001.

Effect of Amendments. —

Session Laws 2000-162, s. 4(d), effective July 1, 2001, and applicable to claims received on or after that date, in subdivision (a)(7), substituted "180 days" for "90 days" twice, inserted "of the insured" near the end and made two minor wording changes.

CASE NOTES

Anti-subrogation Rule. — Commissioner's promulgation of 11 N.C.A.C. 12.0319, prohibiting subrogation provisions in life or accident and health insurance contracts, supported by

§ 58-2-40 (right to limit practices injurious to the public) and § 58-50-15(a) (prohibiting provisions less favorable to the insured), did not exceed his statutory authority, even though it may have changed state substantive law, and did not amount to an unconstitutional delegation of legislative powers because statutory provisions (§§ 58-2-40 and 58-50-15 and this section) and judicial review (available under Chapter 150B) offer adequate procedural safeguards and support the delegation of power to the Commissioner. In re 11 N.C.A.C 12.0319, 134 N.C. App. 22, 517 S.E.2d 134 (1999), cert. denied, appeal dismissed, 351 N.C. 105, — S.E.2d — (1999).

§ 58-51-80. Group accident and health insurance defined.

(a) Any policy or contract of insurance against death or injury resulting from accident or from accidental means which covers more than one person except blanket accident policies as defined in G.S. 58-51-75, shall be deemed a group accident insurance policy. Any policy or contract which insures against disablement, disease or sickness of the insured (excluding disablement which results from accident or from accidental means) and which covers more than one person, except blanket health insurance policies as defined in G.S. 58-51-75, shall be deemed a group health insurance policy or contract. Any policy or contract of insurance which combines the coverage of group accident insurance and of group health insurance shall be deemed a group accident and health insurance policy. No policy or contract of group accident, group health or group accident and health insurance, and no certificates thereunder, shall be delivered or issued for delivery in this State unless it conforms to the requirements of subsection (b).

(b) No policy or contract of group accident, group health or group accident and health insurance shall be delivered or issued for delivery in this State unless the group of persons thereby insured conforms to the requirements of the following subdivisions:

(1) Under a policy issued to an employer, principal, or to the trustee of a fund established by an employer or two or more employers in the same industry or kind of business, or by a principal or two or more principals in the same industry or kind of business, which employer, principal, or trustee shall be deemed the policyholder, covering, except as hereinafter provided, only employees, or agents, of any class or classes thereof determined by conditions pertaining to employment, or agency, for amounts of insurance based upon some plan which will preclude individual selection. The premium may be paid by the employer, by the employer and the employees jointly, or by the employee; and where the relationship of principal and agent exists, the premium may be paid by the principal, by the principal and agents, jointly, or by the agents. If the premium is paid by the employer and the employees jointly, or by the principal and agents jointly, or by the employees, or by the agents, the group shall be structured on an actuarially sound basis.

(1a) Under a policy issued to an association or to a trust or to the trustee or trustees of a fund established, created, or maintained for the benefit of members of one or more associations. The association or associations shall have at the outset a minimum of 500 persons and shall have been organized and maintained in good faith for purposes other than that of obtaining insurance; shall have been in active existence for at least five years; and shall have a constitution and bylaws that provide that (i) the association or associations hold regular meetings not less than annually to further purposes of the members; (ii) except for credit unions, the association or associations collect dues or solicit contributions from members; and (iii) the members, other than associate members, have voting privileges and

representation on the governing board and committees. The policy is subject to the following requirements:

a. The policy may insure members of the association or associations, employees of the association or associations, or employees of members, or one or more of the preceding or all of any class or classes for the benefit of persons other than the employee's employer.

b. The premium for the policy shall be paid from funds contributed by the association or associations, or by employer members, or by both, or from funds contributed by the covered persons or from both the covered persons and the association, associations, or employer members.

c. Repealed by Session Laws 1997-259, s. 8.

(1b) Under a policy issued to a creditor as defined in G.S. 58-57-5 who shall be deemed the policyholder, to insure debtors as defined in G.S. 58-57-5 of the creditor to provide indemnity for payments becoming due on a specific loan or other credit transaction as defined in G.S. 58-51-100, with or without insurance against death by accident, subject to the following requirements:

a. The debtors eligible for insurance under the policy shall be all of the debtors of the creditor whose indebtedness is repayable in installments, or all of any class or classes thereof determined by conditions pertaining to the indebtedness or to the purchase giving rise to the indebtedness. The policy may provide that the term "debtors" shall include the debtors of one or more subsidiary corporations, and the debtors of one or more affiliated corporations, proprietors or partnerships if the business of the policyholder and of such affiliated corporations, proprietors or partnerships is under common control through stock ownership, contract or otherwise.

b. The premium for the policy shall be paid from the creditor's funds, from charges collected from the insured debtors, or from both. A policy on which part or all of the premium is to be derived from the collection from the insured debtors or identifiable charges not required of uninsured debtors shall not include, in the class or classes of debtors eligible for insurance, debtors under obligations outstanding at its date of issue without evidence of individual insurability unless the group is structured on an actuarially sound basis. A policy on which no part of the premium is to be derived from the collection of such identifiable charges must insure all eligible debtors, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

c. The policy may be issued only if the group of eligible debtors is then receiving new entrants at the rate of at least 100 persons yearly, or may reasonably be expected to receive at least 100 new entrants during the first policy year, and only if the policy reserves to the insurer the right to require evidence of individual insurability if less than seventy-five percent (75%) of the new entrants become insured.

d. Premiums for this coverage shall be actuarially equivalent to the rates authorized under Article 57 of Chapter 58 of the General Statutes for credit accident and health insurance.

(2), (3) Repealed by Session Laws 1997-259, s. 8.

(c) The term "employees" as used in this section shall be deemed to include, for the purposes of insurance hereunder, employees of a single employer, the officers, managers, and employees of the employer and of subsidiary or

affiliated corporations of a corporation employer, and the individual proprietors, partners, and employees of individuals and firms of which the business is controlled by the insured employer through stock ownership, contract or otherwise. Employees shall be added to the group coverage no later than 90 days after their first day of employment. Employment shall be considered continuous and not be considered broken except for unexcused absences from work for reasons other than illness or injury. The term "employee" is defined as a nonseasonal person who works on a full-time basis, with a normal work week of 30 or more hours and who is otherwise eligible for coverage, but does not include a person who works on a part-time, temporary, or substitute basis. The term "employer" as used herein may be deemed to include the State of North Carolina, any county, municipality or corporation, or the proper officers, as such, of any unincorporated municipality or any department or subdivision of the State, county, such corporation, or municipality determined by conditions pertaining to the employment.

(d) The term "agents" as used in this section shall be deemed to include, for the purposes of insurance hereunder, agents of a single principal who are under contract to devote all, or substantially all, of their time in rendering personal services for such principal, for a commission or other fixed or ascertainable compensation.

(e) The benefits payable under any policy or contract of group accident, group health and group accident and health insurance shall be payable to the employees, or agents, or to some beneficiary or beneficiaries designated by the employee or agent, other than the employer or principal, but if there is no designated beneficiary as to all or any part of the insurance at the death of the employee or agent, then the amount of insurance payable for which there is no designated beneficiary shall be payable to the estate of the employee or agent, except that the insurer may in such case, at its option, pay such insurance to any one or more of the following surviving relatives of the employee or agent: wife, husband, mother, father, child, or children, brothers or sisters; and except that payment of benefits for expenses incurred on account of hospitalization or medical or surgical aid, as provided in subsection (f), may be made by the insurer to the hospital or other person or persons furnishing such aid. Payment so made shall discharge the insurer's obligation with respect to the amount of insurance so paid.

(f) Any policy or contract of group accident, group health or group accident and health insurance may include provisions for the payment by the insurer of benefits to the employee or agent of the insured group, on account of hospitalization or medical or surgical aid for himself, his spouse, his child or children, or other persons chiefly dependent upon him for support and maintenance.

(g) Any policy or contract of group accident, group health or group accident and health insurance may provide for readjustment of the rate of premium based on the experience thereunder at the end of the first year, or at any time during any subsequent year based upon at least 12 months of experience: Provided that any such readjustment after the first year shall not be made any more frequently than once every six months. Any rate adjustment must be preceded by a 45-day notice to the contract holder before the effective date of any rate increase or any policy benefit revision. A notice of nonrenewal shall be given to the contract holder 45 days prior to termination. Any refund under any plan for readjustment of the rate of premium based on the experience under group policies and any dividend paid under the policies may be used to reduce the employer's or principal's contribution to group insurance for the employees of the employer, or the agents of the principal, and the excess over the contribution by the employer, or principal, shall be applied by the employer, or principal, for the sole benefit of the employees or agents.

(h) Nothing contained in this section applies to any contract issued by any corporation defined in Article 65 of this Chapter. (1945, c. 385; 1947, c. 721; 1951, c. 282; 1953, c. 1095, ss. 6, 7; 1987, c. 752, s. 19; 1989, c. 485, s. 41; c. 775, ss. 1, 2; 1991, c. 644, s. 11; c. 720, s. 88; 1991 (Reg. Sess., 1992), c. 837, s. 4; 1993, c. 408, ss. 3, 3.1; c. 409, s. 14; 1995, c. 507, ss. 23A.1(c), 23A.1(d); 1997-259, ss. 8, 9; 2000-132, s. 1.)

Effect of Amendments. — Session Laws 2000-132, s. 1, effective on and after July 1, 2000, added subdivision (b)(1b).

§ 58-54-50. Rules for compliance with federal law and regulations.

Editor's Note. — The editor's note under this section in the main volume is in error. Session Laws 1998-211, s. 39, made this section effective November 1, 1998, but did not provide that the section would expire on November 1, 2001. The sunset provided by Session Laws 1998-211, s. 39 applies only to § 58-54-45.

Article 63.

Unfair Trade Practices.

§ 58-63-15. Unfair methods of competition and unfair or deceptive acts or practices defined.

CASE NOTES

Third-Party Action. —

North Carolina does not recognize any cause of action under either this section or § 75-1.1 for unfair or deceptive trade practices by third-party claimants against the insurance company of an adverse party. Lee v. Mutual Community Sav. Bank, — N.C. App. —, 525 S.E.2d 854, 2000 N.C. App. LEXIS 156 (2000).

Failure to Settle Insurance Claim Violates Both § 75-1.1 And This Section. — Defendant/Insurer violated § 75-1.1 by "not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear" as well as the provisions of this section. Gray v. North Carolina Ins. Underwriting Ass'n, — N.C. —, 529 S.E.2d 676, 2000 N.C. LEXIS 437 (2000).

Dismissal of Claim Upheld. —

Plaintiff who sued defendant/insurance company for unfair and deceptive practices and acts, when it raised his insurance premiums after paying a claim which he repeatedly informed the insurer was fraudulent, failed to state facts sufficient to survive summary judgment under this section. Where the defendant's advertising claimed that it did not want to pay false claims, the plaintiff should have alleged that it did want to, not merely that it did, and where the defendant failed to adequately investigate the claim, the plaintiff should have alleged that the defendant did not act promptly in doing so. Cash v. State Farm Mut. Auto. Ins. Co., — N.C. App. —, 528 S.E.2d 372, 2000 N.C. App. LEXIS 312 (2000).

Stated in Westchester Fire Ins. Co. v. Johnson, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 5001 (M.D.N.C. January 6, 2000).

ARTICLE 69.

Motor Clubs and Associations.

§ 58-69-2. Definitions.

As used in this Article:

(1) "Branch or district office" means any physical location, other than a motor club's home office, that is used by the motor club or its representatives as a principal place of business for conducting any type of business authorized under this Article and as a place of business that is used by clients or prospective clients in meeting or dealing with the motor club or its representatives in the normal course of business authorized under this Article.

(2) "Licensee" means a motor club to which a license has been issued under this Article.

(3) "Motor club" means any person, whether or not residing, domiciled, or chartered in this State, that, in consideration of dues, assessments, or periodic payments of money, promises its members to assist them in matters relating to the ownership, operation, use, or maintenance of motor vehicles by rendering three or more of the following services:

a. Automobile theft reward service. — A reward payable to any person, law enforcement agency, or officer for information leading to the recovery of a member's stolen vehicle and to the apprehension and conviction of the person or persons unlawfully taking the vehicle.

b. Bail or cash appearance bond service. — The furnishing of cash or a surety bond for a member accused of a violation of the motor vehicle law, or of any law of this State by reason of an automobile accident to secure the member's release and subsequent appearance in court.

c. Emergency road service. — Roadside adjustment of a motor vehicle so that the vehicle may be operated under its own power.

d. Legal service. — Providing for reimbursement to a member for attorneys" fees if criminal proceedings are instituted against the member as a result of the operation of a motor vehicle.

e. Map service. — The furnishing of road maps to members without cost.

f. Personal travel and accident insurance service. — Making available to members a personal travel and accident insurance policy issued by a duly licensed insurance company in this State.

g. Touring service. — The furnishing of touring information to members without cost.

h. Towing service. — Furnishing means to move a motor vehicle from one place to another under power other than its own. (1963, c. 698; 1983, c. 542; 1985, c. 666, s. 81; 1991, c. 401, s. 1; 1999-132, s. 12.2; 2000-122, s. 7.)

Effect of Amendments. — Session Laws 2000-122, s. 7, effective July 14, 2000, in subdivision (1), substituted "office, that is used by the motor club or its representatives as a principal place of business for conducting" for "office, where the motor club or its representatives conduct," and added the language following "Article."

ARTICLE 70.

Collection Agencies.

Part 3. Prohibited Practices by Collection Agencies Engaged in the Collection of Debts from Consumers.

§ 58-70-95. Threats and coercion.

CASE NOTES

Attorney's fees are available for plaintiffs alleging violations of this section who can satisfy the requirements set forth at § 75-16.1. Llera v. Security Credit Sys., 93 F. Supp. 2d 674 (W.D.N.C. 2000).

§ 58-70-110. Deceptive representation.

CASE NOTES

Attorney's fees are available for plaintiffs alleging violations of this section who can satisfy the requirements set forth at § 75-16.1. Llera v. Security Credit Sys., 93 F. Supp. 2d 674 (W.D.N.C. 2000).

Part 4. Enforcement.

§ 58-70-130. Civil liability.

CASE NOTES

Attorney's fees are available for plaintiffs alleging violations of this section who can satisfy the requirements set forth at § 75-16.1. Llera v. Security Credit Sys., 93 F. Supp. 2d 674 (W.D.N.C. 2000).

No Proof of Actual Injury. — The jury's assessment of the minimum statutory penalty in subsection (b) of this section was insufficient to prove by a preponderance of the evidence that plaintiff suffered an actual injury; therefore, plaintiff was not entitled to recover attorney's fees under 75-16.1. Llera v. Security Credit Sys., 93 F. Supp. 2d 674 (W.D.N.C. 2000).

Construction With Other Laws. — Debtors are protected from unfair debt collection practices under § 58-70-1 et seq. and § 75-1.1 et seq., and although Chapter 58, Article 70 does not set forth provisions for awarding attorney's fees, this section expressly refers to § 75-1.1, which contains an attorney's fee provision at § 75-16.1. Llera v. Security Credit Sys., 93 F. Supp. 2d 674 (W.D.N.C. 2000).

Basis for Recovering Attorney's Fees. — Based on the language set forth in subsection (c), attorney's fees are available for plaintiffs alleging violations of Chapter 58, Article 70 who can satisfy the requirements set forth at § 75-16.1. Llera v. Security Credit Sys., 93 F. Supp. 2d 674 (W.D.N.C. 2000).

Evidence of "Actual Injury" Insufficient. — The assessment of a $100.00 statutory penalty but no actual damages was insufficient to prove that plaintiff suffered an "actual injury." An award of actual damages is contingent on some harm having been suffered by the plaintiff, whereas the statutory penalty is mandatory, and as such, the penalty does not necessarily provide evidence to assist a trial court in determining whether a plaintiff suffered an actual injury. Llera v. Security Credit Sys., 93 F. Supp. 2d 674 (W.D.N.C. 2000).

ARTICLE 71.

Bail Bondsmen and Runners.

§ 58-71-1. Definitions.

The following words when used in this Article shall have the following meanings:

(1) "Accommodation bondsman" is a natural person who has reached the age of 18 years and is a bona fide resident of this State and who, aside from love and affection and release of the person concerned, receives no consideration for action as surety and who endorses the bail bond after providing satisfactory evidences of ownership, value and marketability of real or personal property to the extent necessary to reasonably satisfy the official taking bond that such real or personal property will in all respects be sufficient to assure that the full principal sum of the bond will be realized in the event of breach of the conditions thereof. "Consideration" as used in this subdivision does not include the legal rights of a surety against a principal by reason of breach of the conditions of a bail bond nor does it include collateral furnished to and securing the surety so long as the value of the surety's rights in the collateral do not exceed the principal's liability to the surety by reason of a breach in the conditions of said bail bond.

(2) "Bail bond" shall mean an undertaking by the principal to appear in court as required upon penalty of forfeiting bail to the State in a stated amount; and may include an unsecured appearance bond, a premium-secured appearance bond, an appearance bond secured by a cash deposit of the full amount of the bond, an appearance bond secured by a mortgage pursuant to G.S. 58-74-5, and an appearance bond secured by at least one surety. A bail bond may also include a bond securing the return of a motor vehicle subject to forfeiture in accordance with G.S. 20-28.3(e).

(3) "Bail bondsman" shall mean a surety bondsman, professional bondsman or an accommodation bondsman as hereinafter defined.

(4) "Commissioner" shall mean the Commissioner of Insurance.

(4a) "First-year licensee" means any person who has been licensed as a bail bondsman or runner under this Article and who has held the license for a period of less than 12 months.

(5) "Insurer" shall mean any domestic, foreign, or alien surety company which has qualified generally to transact surety business and specifically to transact bail bond business in this State.

(6) "Obligor" shall mean a principal or a surety on a bail bond.

(7) "Principal" shall mean a defendant or witness obligated to appear in court as required upon penalty of forfeiting bail under a bail bond or a person obligated to return a motor vehicle subject to forfeiture in accordance with G.S. 20-28.3(e).

(8) "Professional bondsman" shall mean any person who is approved and licensed by the Commissioner and who pledges cash or approved securities with the Commissioner as security for bail bonds written in connection with a judicial proceeding and receives or is promised money or other things of value therefor.

(9) "Runner" shall mean a person employed by a bail bondsman for the purpose of assisting the bail bondsman in presenting the defendant in court when required, or to assist in apprehension and surrender of defendant to the court, or keeping defendant under necessary surveillance, or to execute bonds on behalf of the licensed bondsman when

the power of attorney has been duly recorded. "Runner" does not include, however, a duly licensed attorney-at-law or a law-enforcement officer assisting a bondsman.

(9a) "Supervising bail bondsman" means any person licensed by the Commissioner as a professional bondsman or surety bondsman who employs or contracts with any new licensee under this Article.

(10) "Surety" shall mean one who, with the principal, is liable for the amount of the bail bond upon forfeiture of bail.

(11) "Surety bondsman" means any person who is licensed by the Commissioner as a surety bondsman under this Article, is appointed by an insurer by power of attorney to execute or countersign bail bonds for the insurer in connection with judicial proceedings, and receives or is promised consideration for doing so. (1963, c. 1225, s. 1; 1975, c. 619, s. 1; 1995 (Reg. Sess., 1996), c. 726, s. 1; 1998-182, s. 16; 2000-180, ss. 1, 2.)

Effect of Amendments. — Session Laws 2000-180, ss. 1 and 2, effective October 1, 2000, added subdivisions (4a) and (9a).

§ 58-71-20. Surrender of defendant by surety; when premium need not be returned.

CASE NOTES

Punitive Damages Held Not Available in Breach of Contract Action against Bondsman. — A bail bondsman who fails to return the premium after surrendering the defendant may be liable in contract, and where arrestee's cause of action against bail bondsman consisted only of a breach of contract after the trial court decided not to submit to the jury the issues of unfair and deceptive practices and intentional infliction of emotional distress, the trial court could not submit the punitive damages issue to the jury. Shore v. Farmer, 351 N.C. 166, 522 S.E.2d 73 (1999).

§ 58-71-25. Procedure for surrender.

After there has been a breach of the undertaking in a bail bond, the surety may surrender the defendant as provided in G.S. 15A-540. (1963, c. 1225, s. 6; 1975, c. 619, s. 1; 2000-133, s. 7.)

Effect of Amendments. — Session Laws 2000-133, s. 7, effective January 1, 2001, and applicable to all bail bonds executed and all forfeiture proceedings initiated on and after that date, rewrote the section.

§ 58-71-41. First-year licensees; limitations.

(a) Except as provided in this section, a first-year licensee shall have the same authority as other persons licensed as bail bondsmen or runners under this Article. Except as provided in subsection (d) of this section, a first-year licensee shall operate only under the supervision of and from the official business address of a licensed supervising bail bondsman for the first 12 months of licensure. A first-year licensee may only be employed by or contract with one supervising bail bondsman.

(b) When a first-year licensee has completed 12 months of supervision, six of which shall be uninterrupted, the supervising bail bondsman shall give notice of that fact to the Commissioner in writing. If the licensee will continue to be employed by or contract with the supervising bail bondsman beyond the initial

12-month period, the supervising bail bondsman shall continue to supervise and be responsible for the licensee's acts.

(c) If the employment of or contract with a first-year licensee is terminated, the supervising bail bondsman shall notify the Commissioner in writing and shall specify the reason for the termination.

(d) If, after exercising due diligence, a first-year licensed bail bondsman is unable to become employed by or to contract with a supervising bail bondsman, the first-year licensed bail bondsman must submit to the Department a sworn affidavit stating the relevant facts and circumstances regarding the first-year licensed bail bondman's inability to become employed by or contract with a supervising bail bondsman. The Department shall review the affidavit and determine whether the first-year licensed bail bondsman will be allowed to operate as an unsupervised bail bondsman. A first-year licensed bail bondsman is prohibited from becoming a supervising bail bondsman during the first two years of licensure.

(e) Provided all other licensing requirements are met, an applicant for a bail bondsman or runner's license who has previously been licensed with the Commissioner for a period of at least 18 consecutive months and who has been inactive or unlicensed for a period of not more than three consecutive years shall not be deemed a new licensee for purposes of this section. (2000-180, s. 3.)

Editor's Note. — Session Laws 2000-180, s. 10, made this section effective October 1, 2000.

§ 58-71-80. Grounds for denial, suspension, revocation or refusal to renew licenses.

(a) The Commissioner may deny, suspend, revoke, or refuse to renew any license under this Article for any of the following causes:

(1) For any cause sufficient to deny, suspend, or revoke the license under any other provision of this Article.

(2) A conviction of any misdemeanor committed in the course of dealings under the license issued by the Commissioner.

(3) Material misstatement, misrepresentation or fraud in obtaining the license.

(4) Misappropriation, conversion or unlawful withholding of moneys belonging to insurers or others and received in the conduct of business under the license.

(5) Fraudulent or dishonest practices in the conduct of business under the license.

(6) Conviction of a crime involving moral turpitude.

(7) Failure to comply with or violation of the provisions of this Article or of any order, rule or regulation of the Commissioner.

(8) When in the judgment of the Commissioner, the licensee has in the conduct of the licensee's affairs under the license, demonstrated incompetency, financial irresponsibility, or untrustworthiness; or that the licensee is no longer in good faith carrying on the bail bond business; or that the licensee is guilty of rebating, or offering to rebate, or offering to divide the premiums received for the bond.

(9) For failing to pay any judgment or decree rendered on any forfeited undertaking in any court of competent jurisdiction.

(10) For charging or receiving, as premium or compensation for the making of any deposit or bail bond, any sum in excess of that permitted by this Article.

(11) For requiring, as a condition of executing a bail bond, that the principal agree to engage the services of a specified attorney.

(12) For cheating on an examination for a license under this Article.

(13) For entering into any business association or agreement with any person who is at that time found by the Commissioner to be in violation of any of the bail bond laws of this State, or who has been in any manner disqualified under the bail bond laws of this State or any other state, whereby the person has any direct or indirect financial interest in the bail bond business of the licensee or applicant.

(14) For knowingly aiding or abetting others to evade or violate the provisions of this Article.

(15) Any cause for which issuance of the license could have been refused had it then existed and been known to the Commissioner at the time of issuance.

(b) The Commissioner shall deny, revoke, or refuse to renew any license under this Article if the applicant or licensee is or has ever been convicted of a felony.

(c) In the case of a first-year licensee whose employment or contract is terminated prior to the end of the 12-month supervisory period, the Commissioner may consider all information provided in writing by the supervising bail bondsman in determining whether sufficient cause exists to suspend, revoke, or refuse to renew the license or to warrant criminal prosecution of the first-year licensee. If the Commissioner determines there is not sufficient cause for adverse administrative action or criminal prosecution, the termination shall not be deemed an interruption and the period of time the licensee was employed by or contracted with the terminating supervising bail bondsman will be credited toward the licensee's completion of the required 12 months of supervision with a subsequent supervising bail bondsman. (1963, c. 1225, s. 17; 1975, c. 619, s. 1; 1989, c. 485, s. 40; 1991, c. 644, s. 17; 1993, c. 409, s. 16; 1998-211, s. 24; 2000-180, s. 4.)

Effect of Amendments. —
Session Laws 2000-180, s. 4, effective October 1, 2000, added subsection (c).

§ 58-71-95. Prohibited practices.

No bail bondsman or runner shall:

(1) Pay a fee or rebate or give or promise anything of value, directly or indirectly, to a jailer, law-enforcement officer, committing magistrate, or any other person who has power to arrest or hold in custody, or to any public official or public employee in order to secure a settlement, compromise, remission or reduction of the amount of any bail bond or the forfeiture thereof, including the payment to law-enforcement officers, directly or indirectly, for the arrest or apprehension of a principal or principals who have caused or will cause a forfeiture.

(2) Pay a fee or rebate or give anything of value to an attorney in bail bond matters, except in defense of any action on a bond.

(3) Pay a fee or rebate or give or promise anything of value to the principal or anyone in his behalf.

(4) Participate in the capacity of an attorney at a trial or hearing of one on whose bond he is surety, nor suggest or advise the employment of, or name for employment any particular attorney to represent his principal.

(5) Accept anything of value from a principal or from anyone on behalf of a principal except the premium, which shall not exceed fifteen percent (15%) of the face amount of the bond; provided that the bondsman shall be permitted to accept collateral security or other indemnity from a principal or from anyone on behalf of a principal. Such

collateral security or other indemnity required by the bondsman must be reasonable in relation to the amount of the bond and shall be returned within 72 hours after final termination of liability on the bond. Any bail bondsman who knowingly and willfully fails to return any collateral security, the value of which exceeds one thousand five hundred dollars ($1,500), is guilty of a Class I felony. All collateral security, such as personal and real property, subject to be returned must be done so under the same conditions as requested and received by the bail bondsman.

(6) Solicit business in any of the courts or on the premises of any of the courts of this State, in the office of any magistrate and in or about any place where prisoners are confined. Loitering in or about a magistrate's office or any place where prisoners are confined shall be prima facie evidence of soliciting.

(7) Advise or assist the principal for the purpose of forfeiting bond.

(8) Impersonate a law-enforcement officer.

(9) Falsely represent that the bail bondsman or runner is in any way connected with an agency of the federal government or of a state or local government. (1963, c. 1225, s. 20; 1975, c. 619, s. 1; 1993, c. 409, s. 18; 1995 (Reg. Sess., 1996), c. 726, s. 16; 1998-211, s. 31; 2000-180, s. 5.)

Effect of Amendments. — Session Laws 2000-180, s. 5, effective October 1, 2000, added the last two sentences in subdivision (5).

§ 58-71-100. Receipts for collateral; trust accounts.

When a bail bondsman accepts collateral he shall give a written receipt for the collateral. The receipt shall give in detail a full description of the collateral received. Collateral security shall be held and maintained in trust. When collateral security is received in the form of cash or check or other negotiable instrument, the licensee shall deposit the cash or instrument within two banking days after receipt, in an established, separate noninterest-bearing trust account in any bank located in North Carolina. The trust account funds shall not be commingled with other operating funds. (1963, c. 1225, s. 21; 1975, c. 619, s. 1; 2000-180, s. 6.)

Effect of Amendments. — Session Laws 2000-180, s. 6, effective October 1, 2000, added "trust accounts" in the catchline; substituted "for the collateral. The receipt" for "for same, and this receipt"; and added the last three sentences.

§ 58-71-121. Death, incapacitation, or incompetence of a bail bondsman.

In the case of death, incapacitation, or incompetence of a licensed bail bondsman, the spouse or surviving spouse, next of kin, person or persons holding a power of attorney, guardian, executor, or administrator of the licensed bail bondsman may contract with another licensed bail bondsman to perform those duties to have the licensee's outstanding bail bond obligations resolved to the satisfaction of the courts. The contract must be filed with the Commissioner and every clerk of superior court where it can be determined the licensee has pending outstanding bail bond obligations. The licensed bail bondsman who has agreed to perform these duties shall not, at the time of the execution of the contract, have any administrative or criminal actions pending against him or her. (2000-180, s. 7.)

Editor's Note. — Session Laws 2000-180, s. 10, made this section effective October 1, 2000.

§ 58-71-145. Financial responsibility of professional bondsmen.

Each professional bondsman acting as surety on bail bonds in this State shall maintain a deposit of securities with and satisfactory to the Commissioner of a fair market value of at least one-eighth the amount of all bonds or undertakings written in this State on which he is absolutely or conditionally liable as of the first day of the current month. The amount of this deposit must be reconciled with the bondsman's liabilities as of the first day of the month on or before the fifteenth day of said month and the value of said deposit shall in no event be less than fifteen thousand dollars ($15,000). (1963, c. 1225, s. 29; 1975, c. 619, s. 1; 2000-180, s. 8.)

Effect of Amendments. — Session Laws 2000-180, s. 8, effective October 1, 2000, substituted "fifteen thousand dollars ($15,000)" for "five thousand dollars ($5,000)."

§ 58-71-185. Penalties for violations.

Except as otherwise provided in this Article, any person who violates any of the provisions of this Article is guilty of a Class 1 misdemeanor. (1963, c. 1225, s. 33; 1975, c. 619, s. 1; 1991, c. 644, s. 19; 1993, c. 539, s. 473; 1994, Ex. Sess., c. 24, s. 14(c); 2000-180, s. 9.)

Effect of Amendments. — Session Laws 2000-180, s. 9, effective October 1, 2000, substituted "Except as otherwise provided in this Article, any person who violates" for "Any person, firm, association or corporation violating."

ARTICLE 82.

Authority and Liability of Firemen.

§ 58-82-5. Liability limited.

CASE NOTES

Effect of Subsection (b). —

In order for immunity to apply under this section, it is irrelevant whether the fire department's negligent act or omission occurs precisely "at the scene" of the fire as long as it relates to the "suppression of the reported fire." Spruill v. Lake Phelps Volunteer Fire Dep't, Inc., 351 N.C. 318, 523 S.E.2d 672 (2000).

Applied in Forrest Drive Assocs. v. Wal-Mart Stores, Inc., 72 F. Supp. 2d 576 (M.D.N.C. 1999).

ARTICLE 84.

Fund Derived from Insurance Companies.

§ 58-84-1. Fire and lightning insurance report.

Every insurance company doing business in a fire district in this State shall report to the Secretary of Revenue by March 15 of each year a just and true account of all premiums collected and received from all fire and lightning insurance business done within the limits of each fire district during the

preceding calendar year and shall pay the tax levied in G.S. 105-228.5(d)(4). The Secretary of Revenue shall provide the Commissioner the reports filed pursuant to this section and shall credit the net proceeds of the tax to the Department of Insurance for disbursement pursuant to G.S. 58-84-25. (1907, c. 831, s. 1; 1919, c. 180; C.S., s. 6063; 1929, c. 286; 1989, c. 485, s. 63; 1995 (Reg. Sess., 1996), c. 747, s. 4.)

Local Supplemental Firemen's Retirement Fund. — City of Monroe: 2000-35, s. 1; city of Mount Airy: 2000-22, s. 1.

Local Supplemental Firemen's Retirement Fund. — By virtue of Session Laws 2000-21, s. 1, city of Cherryville: 1971, c. 608; 1973, c. 320, should be stricken from the main volume.

Local Modification. — For additional local modifications to this section, see the main volume.

§ 58-84-45: Repealed by Session Laws 2000-67, s. 26.21(a), effective July 1, 2000.

Editor's Note. — Session Laws 2000-67, s. 26.21(c), made the repeal effective July 1, 2000, and applicable retroactively to October 31, 1998.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.4, contains a severability clause.

§ 58-84-46. Certification to Commissioner.

On or before October 31 of each year the clerk of each fire district that has a local board of trustees under G.S. 58-84-30 shall file a certificate of eligibility with the Commissioner. The certificate shall contain information prescribed by administrative rule adopted by the Commissioner. If the certificate is not filed with the Commissioner on or before January 31 in the ensuing year:

(1) The fire district that failed to file the certificate shall forfeit the payment next due to be paid to its board of trustees.
(2) The Commissioner shall pay over that amount to the treasurer of the North Carolina State Firemen's Association.
(3) That amount shall constitute a part of the Firemen's Relief Fund. (2000-67, s. 26.21(b).)

Editor's Note. — Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.4, contains a severability clause.

Session Laws 2000-67, s. 26.21(c), made this section effective July 1, 2000 and applicable retroactively to October 31, 1998.

ARTICLE 85A.

State Fire Protection Grant Fund.

§ 58-85A-1. Creation of Fund; allocation to local fire districts and political subdivisions of the State.

(a) There is created in the Office of State Budget, Planning, and Management the State Fire Protection Grant Fund. The purpose of the Fund is to compensate local fire districts and political subdivisions of the State for providing local fire protection to State-owned buildings and their contents.

(b) The Office of State Budget, Planning, and Management shall develop and implement an equitable and uniform statewide method for distributing any funds to the State's local fire districts and political subdivisions.

Upon the request of the Director of the Budget, the Department of Insurance shall provide the Office of State Budget, Planning, and Management all information necessary to develop and implement the formula.

(c) It is the intent of the General Assembly to appropriate annually to the State Fire Protection Grant Fund at least three million eighty thousand dollars ($3,080,000) from the General Fund, one hundred fifty thousand dollars ($150,000) from the Highway Fund, and nine hundred seventy thousand dollars ($970,000) from University of North Carolina receipts. Funds received from the General Fund shall be allocated only for providing local fire protection for State-owned property supported by the General Fund; funds received from the Highway Fund shall be allocated only for providing local fire protection for State-owned property supported by the Highway Fund; and funds received from University of North Carolina receipts shall be allocated only for providing local fire protection for State-owned property supported by University of North Carolina receipts. (1997-443, s. 23(a); 2000-140, s. 93.1(a).)

Effect of Amendments. — Session Laws 2000-140, s. 93.1(a), effective July 1, 2000, substituted "Office of State Budget, Planning, and Management" for "Office of State Budget and Planning" throughout.

Article 86.

North Carolina Firemen's and Rescue Squad Workers' Pension Fund.

§ 58-86-25. "Eligible firemen" defined; determination and certification of volunteers meeting qualifications.

"Eligible firemen" shall mean all firemen of the State of North Carolina or any political subdivision thereof, including those performing such functions in the protection of life and property through fire fighting within a county or city governmental unit and so certified to the Commissioner of Insurance by the governing body thereof, and who belong to a bona fide fire department which, as determined by the Commissioner, is classified as not less than class "9" or class "A" and "AA" departments in accordance with rating methods, schedules, classifications, underwriting rules, bylaws or regulations effective or applied with respect to the establishment of rates or premiums used or charged pursuant to Articles 36 or 40 of this Chapter or by such other reasonable methods as the Commissioner may determine, and which operates fire apparatus and equipment of the value of five thousand dollars ($5,000) or more, and said fire department holds drills and meetings not less than four hours monthly and said firemen attend at least 36 hours of all drills and meetings in each calendar year. "Eligible firemen" shall also mean an employee of a county whose sole duty is to act as fire marshal of the county, provided the board of county commissioners of that county certifies the fire marshal's attendance at no less than 36 hours of all drills and meetings in each calendar year. "Eligible firemen" shall also mean those persons meeting the other qualifications of this section, not exceeding 25 volunteer firemen plus one additional volunteer fireman per 100 population in the area served by their respective departments. Each department shall annually determine and report the names of those firemen meeting the eligibility qualifications to its

respective governing body, which upon determination of the validity and accuracy of the qualification shall promptly certify the list to the board. For the purposes of the preceding sentence, the governing body of a fire department operated: by a county is the county board of commissioners; by a city is the city council; by a sanitary district is the sanitary district board; by a corporation, whether profit or nonprofit, is the corporation's board of directors; and by any other entity is that group designated by the board. (1957, c. 1420, s. 1; 1959, c. 1212, s. 1; 1981, c. 1029, s. 1; 1983, c. 416, s. 7; 1985, c. 241; 2000-67, s. 26.22.)

Editor's Note. — Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. — Session Laws 2000-67, s. 26.22, effective July 1, 2000, added the second sentence.

§ 58-86-45. Additional retroactive membership.

(a) Any fireman or rescue squad worker who is now eligible and is a member of a fire department or rescue squad chartered by the State of North Carolina and who has not previously elected to become a member may make application through the board of trustees for membership in the fund on or before March 31, 2001. The person shall make a lump sum payment of ten dollars ($10.00) per month retroactively to the time he first became eligible to become a member, plus interest at an annual rate of eight percent (8%), for each year of his retroactive payments. Upon making the lump sum payment, the person shall be given credit for all prior service in the same manner as if he had made application for membership at the time he first became eligible. Any member who made application for membership subsequent to the time he was first eligible and did not receive credit for prior service may receive credit for this prior service upon lump sum payment of ten dollars ($10.00) per month retroactively to the time he first became eligible, plus interest at an annual rate of eight percent (8%), for each year of his retroactive payments. Upon making this lump sum payment, the date of membership shall be the same as if he had made application for membership at the time he was first eligible. Any fireman or rescue squad worker who has applied for prior service under this subsection shall have until June 30, 2001, to pay for this prior service and, if this payment is not made by June 30, 2001, he shall not receive credit for this service, except as provided in subsection (a1) of this section.

(a1) Effective July 1, 1993, any fireman or rescue squad worker who is a current or former member of a fire department or rescue squad chartered by the State of North Carolina may purchase credit for any periods of service to any chartered fire department or rescue squad not otherwise creditable by making a lump sum payment to the Annuity Savings Fund equal to the full liability of the service credits calculated on the basis of the assumptions used for purposes of the actuarial valuation of the system's liabilities, which payment shall take into account the retirement allowance arising on account of the additional service credit commencing at the earliest age at which the member could retire on a retirement allowance, as determined by the board of trustees upon the advice of the consulting actuary, plus an administrative fee to be set by the board of trustees.

(b) An eligible fireman or rescue squad worker who is not yet 35 years old and has not previously elected to become a member may apply to the board of trustees for membership in the fund at any time. Upon becoming a member, the worker must make a lump sum payment of ten dollars ($10.00) per month retroactively to the time the worker first became eligible to become a member, plus interest at an annual rate to be set by the board for each year of

retroactive payments. Upon making this lump sum payment, the worker shall be given credit for all prior service in the same manner as if the worker had applied for membership upon first becoming eligible.

A member who is not yet 35 years old, who applied for membership after first becoming eligible, and who did not receive credit for prior service may receive credit for the prior service upon making a lump sum payment of ten dollars ($10.00) for each month since the worker first became eligible, plus interest at an annual rate to be set by the board for each year of retroactive payments. Upon making this lump sum payment, the date of membership shall be the same as if the worker had applied for membership upon first becoming eligible. (1985 (Reg. Sess., 1986), c. 1014, s. 49.1(a); 1989, c. 693; 1993, c. 429, s. 1; 1995, c. 507, s. 7.21A(f); 2000-67, s. 26.17(a).)

Editor's Note. —

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. — Session Laws 2000-67, s. 26.17.(a), effective October 1, 2000, in subsection (a), substituted "March 31, 2001" for "March 31, 1987" in the first sentence, substituted "ten dollars ($10.00)" for "five dollars ($5.00)" in the second sentence and in the fourth sentence, and substituted "June 30, 2001" for "October 1, 1989" twice in the last sentence.

§ 58-86-55. Monthly pensions upon retirement.

Any member who has served 20 years as an "eligible fireman" or "eligible rescue squad worker" in the State of North Carolina, as provided in G.S. 58-86-25 and G.S. 58-86-30, and who has attained the age of 55 years is entitled to be paid a monthly pension from this fund. The monthly pension shall be in the amount of one hundred fifty-one dollars ($151.00) per month. Any retired fireman receiving a pension shall, effective July 1, 2000, receive a pension of one hundred fifty-one dollars ($151.00) per month.

Members shall pay ten dollars ($10.00) per month as required by G.S. 58-86-35 and G.S. 58-86-40 for a period of no longer than 20 years. No "eligible rescue squad member" shall receive a pension prior to July 1, 1983. No member shall be entitled to a pension hereunder until the member's official duties as a fireman or rescue squad worker for which the member is paid compensation shall have been terminated and the member shall have retired as such according to standards or rules fixed by the board of trustees.

A member who is totally and permanently disabled while in the discharge of the member's official duties as a result of bodily injuries sustained or as a result of extreme exercise or extreme activity experienced in the course and scope of those official duties and who leaves the fire or rescue squad service because of this disability shall be entitled to be paid from the fund a monthly benefit in an amount of one hundred fifty-one dollars ($151.00) per month beginning the first month after the member's fifty-fifth birthday. All applications for disability are subject to the approval of the board who may appoint physicians to examine and evaluate the disabled member prior to approval of the application, and annually thereafter. Any disabled member shall not be required to make the monthly payment of ten dollars ($10.00) as required by G.S. 58-86-35 and G.S. 58-86-40.

A member who is totally and permanently disabled for any cause, other than line of duty, who leaves the fire or rescue squad service because of this disability and who has at least 10 years of service with the pension fund, may be permitted to continue making a monthly contribution of ten dollars ($10.00) to the fund until the member has made contributions for a total of 240 months. The member shall upon attaining the age of 55 years be entitled to receive a pension as provided by this section. All applications for disability are subject to

the approval of the board who may appoint physicians to examine and evaluate the disabled member prior to approval of the application and annually thereafter.

A member who, because his residence is annexed by a city under Part 2 or Part 3 of Article 4 of Chapter 160A of the General Statutes, or whose department is closed because of an annexation by a city under Part 2 or Part 3 of Article 4 of Chapter 160A of the General Statutes, and because of such annexation is unable to perform as a fireman of any status, and if the member has at least 10 years of service with the pension fund, may be permitted to continue making a monthly contribution of ten dollars ($10.00) to the fund until the member has made contributions for a total of 240 months. The member upon attaining the age of 55 years and completion of such contributions shall be entitled to receive a pension as provided by this section. Any application to make monthly contributions under this section shall be subject to a finding of eligibility by the Board of Trustees upon application of the member.

The pensions provided shall be in addition to all other pensions or benefits under any other statutes of the State of North Carolina or the United States, notwithstanding any exclusionary provisions of other pensions or retirement systems provided by law. (1957, c. 1420, s. 1; 1959, c. 1212, s. 1; 1961, c. 980; 1971, c. 336; 1977, c. 926, s. 1; 1981, c. 1029, s. 1; 1983, c. 500, s. 2; c. 636, s. 24; 1985 (Reg. Sess., 1986), c. 1014, s. 49.1(b); 1987 (Reg. Sess., 1988), c. 1099, s. 1; 1991, c. 720, s. 48; 1993 (Reg. Sess., 1994), c. 653, s. 1; 1995, c. 507, s. 7.21A(g); 1997-443, s. 33.25(a); 1998-212, s. 28.21(a); 2000-67, s. 26.18.)

Editor's Note. —

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. —

Session Laws 2000-67, s. 26.18, effective July 1, 2000, substituted "July 1, 2000" for "July 1, 1998" in the first paragraph and substituted "one hundred fifty-one dollars ($151.00)" for "one hundred forty-six dollars ($146.00)" twice in the first paragraph and once in the third paragraph.

Chapter 59.

Partnership.

Article 2.

Uniform Partnership Act.

Part 1. Preliminary Provisions.

§ 59-31. Name of Article.

Articles 2 through 4A, inclusive, of this Chapter shall be known and may be cited as the North Carolina Uniform Partnership Act. (1941, c. 374, s. 1; 2000-140, s. 101(j).)

Effect of Amendments. — Session Laws 2000-140, s. 101(j), effective July 21, 2000, substituted "Articles 2 through 4A, inclusive, of this Chapter shall be known and may be cites ad the North Carolina" for "This Article may be cited as."

§ 59-32. Definition of terms.

As used in this Chapter, except as otherwise defined in Article 5 of this Chapter for purposes of that Article, unless the context otherwise requires:

(01) "Act" means the North Carolina Uniform Partnership Act and refers to all provisions therein.

(1) "Bankrupt" means bankrupt under the Federal Bankruptcy Act or insolvent under any State insolvent act.

(2) "Business" means every trade, occupation, or profession.

(3) "Conveyance" means every assignment, lease, mortgage, or encumbrance.

(4) "Court" means every court and judge having jurisdiction in the case.

(4a) "Foreign limited liability partnership" means a partnership that (i) is formed under laws other than the laws of this State, and (ii) has the status of a limited liability partnership or registered limited liability partnership under those laws.

(5) "Person" means individuals, partnerships, corporations, limited liability companies, and other associations.

(6) "Real property" means land and any interest or estate in land.

(7) "Registered limited liability partnership" means a partnership that is registered under G.S. 59-84.2 and complies with G.S. 59-84.3. (1941, c. 374, s. 2; 1993, c. 354, s. 3; 1999-362, s. 4; 2000-140, s. 101(k).)

Effect of Amendments. — Session Laws 2000-140, s. 101(k), effective July 21, 2000, added subdivision (01).

§ 59-33. Interpretation of knowledge and notice.

(a) A person has "knowledge" of a fact within the meaning of this Act not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances show bad faith.

(b) A person has "notice" of a fact within the meaning of this Act when the person who claims the benefit of the notice:

(1) States the fact to such person, or

(2) Delivers through the mail, or by other means of communication a written statement of the fact to such person or to a proper person at his place of business or residence. (1941, c. 374, s. 3; 2000-140, s. 101(n).)

Editor's Note. — Session Laws 2000-140, s. 101(n), effective July 21, 2000, provided that the Revisor of Statutes should change the term "Article" to "Act" wherever it occurred in G.S. 59-33, 59-41, 59-55, and 59-58. This change was made in subsection (a) and in the introductory language of subsection (b).

§ 59-34. Rules of construction.

(a) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this Act.

(b) The law of estoppel shall apply under this Act.

(c) The law of agency shall apply under this Act.

(d) This Article shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(e) This Article and the other provisions of this Act shall not be construed so as to impair the obligations of any contract existing when the Article or any other provision of this Act, as applicable, goes into effect, nor to affect any action or proceedings begun or right accrued before this Article or any other

provision of this Act, as applicable, takes effect. (1941, c. 374, s. 4; 2000-140, s. 101(l).)

Effect of Amendments. — Session Laws 2000-140, s. 101(*l*), effective July 21, 2000, substituted "Act" for "Article" in subsections (a), (b) and (c), and in subsection (e), inserted "and the other provisions of this Act," inserted "or any other provision of this Act, as applicable," and inserted "or any other provision of this Act, as applicable."

§ 59-35. Rules for cases not provided for in this Act.

In any case not provided for in this Act, the rules of law and equity, including the law merchant, shall govern. (1941, c. 374, s. 5; 2000-140, s. 101(m).)

Effect of Amendments. — Session Laws 2000-140, s. 101(m), effective July 21, 2000, substituted "Act" for "Article" in the catchline and in the section.

Part 3. Relations of Partners to Persons Dealing with the Partnership.

§ 59-41. Partnership bound by admission of partner.

An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this Act is evidence against the partnership. (1941, c. 374, s. 11; 2000-140, s. 101(n).)

Editor's Note. — Session Laws 2000-140, s. 101(n), effective July 21, 2000, provided that the Revisor of Statutes should change the term "Article" to "Act" wherever it occurred in G.S. 59-33, 59-41, 59-55, and 59-58.

Part 5. Property Rights of a Partner.

§ 59-55. Nature of a partner's right in specific partnership property.

(a) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(b) The incidents of this tenancy are such that:

(1) A partner, subject to the provisions of this Act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(2) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.

(3) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(4) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner, or partners, or the

legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(5) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin. (1941, c. 374, s. 25; 2000-140, s. 101(n).)

Editor's Note. — Session Laws 2000-140, s. 101(n), effective July 21, 2000, provided that the Revisor of Statutes should change the term "Article" to "Act" wherever it occurred in G.S. 59-33, 59-41, 59-55, and 59-58. The change was made in subdivision (b)(1).

§ 59-58. Partner's interest subject to charging order.

(a) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

(b) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

(1) With separate property, by any one or more of the partners, or

(2) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(c) Nothing in this Act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership. (1941, c. 374, s. 28; 2000-140, s. 101(n).)

Editor's Note. — Session Laws 2000-140, s. 101(n), effective July 21, 2000, provided that the Revisor of Statutes should change the term "Article" to "Act" wherever it occurred in G.S. 59-33, 59-41, 59-55, and 59-58. The change was made in subsection (c).

Part 7. Conversion and Merger.

§ 59-73.6. Effects of merger.

(a) When a merger takes effect:

(1) Each other merging business entity merges into the surviving business entity, and the separate existence of each merging business entity except the surviving business entity ceases;

(2) The title to all real estate and other property owned by each merging business entity is vested in the surviving business entity without reversion or impairment;

(3) The surviving business entity has all liabilities of each merging business entity;

(4) A proceeding pending by or against any merging business entity may be continued as if the merger did not occur, or the surviving business entity may be substituted in the proceeding for a merging business entity whose separate existence ceases in the merger;

(5) The interests in each merging business entity that are to be converted into interests, obligations, or securities of the surviving business entity or into the right to receive cash or other property are thereupon so converted, and the former holders of the interests in each merging business entity are entitled only to the rights provided to them in the

articles of merger or, in the case of former holders of shares in a domestic corporation (as defined in G.S. 55-1-40), any rights they may have under Article 13 of Chapter 55 of the General Statutes; and

(6) If the surviving business entity is not a domestic corporation, the surviving business entity is deemed to agree that it will promptly pay to the dissenting shareholders of any merging domestic corporation the amount, if any, to which they are entitled under Article 13 of Chapter 55 of the General Statutes and otherwise to comply with the requirements of Article 13 as if it were a surviving domestic corporation in the merger.

The merger shall not affect the liability or absence of liability of any holder of an interest in a merging business entity for any acts, omissions, or obligations of any merging business entity made or incurred prior to the effectiveness of the merger. The cessation of separate existence of a merging business entity shall not constitute a dissolution or termination of the merging business entity.

(b) If the surviving business entity is not a domestic limited liability company, a domestic corporation, a domestic nonprofit corporation, or a domestic limited partnership when the merger takes effect, the surviving business entity is deemed:

(1) To agree that it may be served with process in this State in any proceeding for enforcement of (i) any obligation of any merging domestic limited liability company, domestic corporation, domestic nonprofit corporation, domestic limited partnership, or other partnership as defined in G.S. 59-36 that is formed under the laws of this State, (ii) the rights of dissenting shareholders of any merging domestic corporation under Article 13 of Chapter 55 of the General Statutes, and (iii) any obligation of the surviving business entity arising from the merger; and

(2) To have appointed the Secretary of State as its registered agent for service of process in any such proceeding. Service on the Secretary of State of any such process shall be made by delivering to and leaving with the Secretary of State or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of such process and the fees required by G.S. 59-73.7(c). Upon receipt of service of process on behalf of a surviving business entity in the manner provided for in this section, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the surviving business entity. If the surviving business entity is authorized to transact business or conduct affairs in this State, the address for mailing shall be its principal office designated in the latest document filed with the Secretary of State that is authorized by law to designate the principal office or, if there is no principal office on file, its registered office. If the surviving business is not authorized to transact business or conduct affairs in this State, the address for mailing shall be the mailing address designated pursuant to subdivision (3) of subsection (d) of this section. (1999-369, s. 4.1; 2000-140, s. 52.)

Effect of Amendments. — Session Laws 2000-140, s. 52, effective July 21, 2000, rewrote subdivision (b)(2).

Article 3.

Surviving Partners.

§ 59-77. When personal representative may take inventory; receiver.

If the surviving partner should neglect or refuse to have such inventory made, the personal representative of the deceased partner may have the same made in accordance with the provisions of G.S. 59-76. Should any surviving partner fail to take such an inventory or refuse to allow the personal representative of the deceased partner's estate to do so, such personal representative of the deceased partner's estate may forthwith apply to a court of competent jurisdiction for the appointment of a receiver for such partnership, who shall thereupon proceed to wind up the same and dispose of the assets thereof in accordance with law. (1901, c. 640, s. 2; Rev., s. 2541; C.S., s. 3280; 2000-140, s. 101(o).)

Effect of Amendments. — Session Laws 2000-140, s. 101(o), effective July 21, 2000, inserted "should" following "If the surviving partner" at the beginning of the first sentence.

Article 3B.

Registered Limited Liability Partnerships.

§ 59-84.2. Registered limited liability partnerships.

(a) To become a registered limited liability partnership, a partnership must file with the Secretary of State an application stating:

(1) The name of the partnership.
(2) The street address of its principal office.
(3) The name and street address, and the mailing address if different from the street address, for the partnership's registered agent and registered office for service of process.
(4) The county in which the registered office is located.
(5) A brief statement of the business in which the partnership engages.
(6) A deferred effective date, if any.
(7) The fiscal year end of the partnership.

(a1) The terms and conditions on which a partnership becomes a limited liability partnership must be approved by the vote necessary to amend the partnership agreement except, in the case of a partnership agreement that expressly considers obligations to contribute to the partnership, the vote necessary to amend those provisions.

(b) An application for registration as a registered limited liability partnership must be executed by one or more partners.

(c) An application for registration as a registered limited liability partnership must be accompanied by a fee of one hundred twenty-five dollars ($125.00).

(d) The Secretary of State shall register a partnership that submits a completed application with the required fee.

(e) A registration is effective on the later of the date the registration is filed or the date specified in the application for registration, unless it is voluntarily withdrawn by filing with the Secretary of State a written withdrawal notice executed by one or more of the partners, or is revoked pursuant to G.S. 59-84.4(f).

(f) The Secretary of State may provide forms for applications for registration.

(g) The status of a registered limited liability partnership and the liability of its partners is not affected by errors or later changes in the information required to be contained in the application for registration.

(h) A registration is amended by filing a certificate of amendment thereto in the office of the Secretary of State. The certificate shall set forth the following:

(1) The name of the partnership.

(2) The date of filing of the registration.

(3) The amendment to the registration.

(i) The registered agent of a registered limited liability partnership for service of process must be (i) an individual who is a resident of this State and whose business office is identical with the registered office; (ii) a domestic corporation, nonprofit corporation, or limited liability company whose business office is identical with the registered office; or (iii) a foreign corporation, nonprofit corporation, or limited liability company authorized to transact business or conduct affairs in this State whose business office is identical with the registered office. The sole duty of the registered agent to the registered limited liability partnership is to forward to the registered limited liability partnership at its last known address any notice, process, or demand that is served on the registered agent. (1993, c. 354, s. 5; 1999-362, ss. 6, 7; 2000-140, ss. 53, 101(p).)

Effect of Amendments. — Session Laws 2000-140, ss. 53 and 101(p), effective July 21, 2000, rewrote subsection (h) and added subsection (i).

Article 4A.

Foreign Limited Liability Partnerships.

§ 59-91. Statement of foreign registration.

(a) Before transacting business in this State, a foreign limited liability partnership must file an application for registration as a foreign limited liability partnership. The application must contain:

(1) The name of the foreign limited liability partnership that satisfies the requirements of the State or other jurisdiction under whose law it is formed and ends with the words "registered limited liability partnership" or "limited liability partnership" or the abbreviation "R.L.L.P.", "L.L.P.", "RLLP", or "LLP".

(2) The street address of the partnership's principal office.

(3) The name and street address, and the mailing address if different from the street address, for the partnership's registered agent and registered office for service of process, and the county in which the registered office is located.

(4) A brief statement of the business in which the partnership is engaged.

(5) A deferred effective date, if any.

(6) The fiscal year end of the partnership.

The foreign limited liability partnership shall deliver with the completed application a certificate of existence, or a document with similar import, duly authenticated by the secretary of state or other official having custody of the records of registered limited liability partnerships in the state or country under whose law it is registered.

(b) The registered agent of a foreign limited liability partnership for service of process must be (i) an individual who is a resident of this State and whose business office is identical with the registered office; (ii) a domestic corporation,

nonprofit corporation, or limited liability company whose business office is identical with the registered office; or (iii) a foreign corporation, nonprofit corporation, or limited liability company authorized to transact business in this State whose business office is identical with the registered office. The sole duty of the registered agent to the foreign limited liability partnership is to forward to the foreign limited liability partnership at its last known address any notice, process, or demand that is served on the registered agent.

(c) An application for registration as a foreign limited liability partnership must be accompanied by a fee of one hundred twenty-five dollars ($125.00).

(d) The Secretary of State shall register a partnership that submits a completed application for registration as a foreign limited liability partnership with the required fee.

(e) The status of a partnership as a foreign limited liability partnership is effective on the later of the date the registration is filed or a date specified in the statement. The status remains effective, regardless of changes in the partnership, until it is voluntarily withdrawn by filing with the Secretary of State a written withdrawal notice executed by one or more partners or revoked pursuant to G.S. 59-84.4(f).

(f) A registration is amended by filing a certificate of amendment thereto in the office of the Secretary of State. The certificate shall set forth the following:

(1) The name of the partnership.

(2) The date of filing of the registration.

(3) The amendment to the registration.

(g) An application for registration as a foreign limited liability partnership must be executed by one or more partners.

(h) A foreign limited liability partnership authorized to transact business in this State shall be subject to the provisions of G.S. 59-84.4 regarding annual reports and revocation of registration. (1999-362, s. 10; 2000-140, s. 54.)

Effect of Amendments. — Session Laws 2000-140, s. 54, effective July 21, 2000, rewrote subsection (f).

Article 5.

Revised Uniform Limited Partnership Act.

Part 1. General Provisions.

§ 59-105. Registered office and registered agent.

(a) Each limited partnership shall have and continuously maintain in this State:

(1) A registered office that may be the same as any of its places of business;

(2) A registered agent, who shall be (i) an individual resident of this State whose business office is identical with such registered office; (ii) a domestic corporation, nonprofit corporation, or limited liability company whose business office is identical with such registered office; or (iii) a foreign corporation, nonprofit corporation, or limited liability company authorized to transact business or conduct affairs in this State, whose business office is identical with such registered office.

The sole duty of the registered agent to the limited partnership is to forward to the limited partnership at its last known address any notice, process, or demand that is served on the registered agent.

(b) Limited partnerships formed prior to October 1, 1986, shall file a certificate of limited partnership with the Office of the Secretary of State pursuant to G.S. 59-201(a) designating the address of the registered office of the limited partnership and the identity of the registered agent at such address.

(b1) Any process, notice or demand, which is required or permitted by law to be served upon a limited partnership, may be served upon the duly appointed registered agent of the limited partnership. Such service upon the registered agent is deemed to have been made on the limited partnership itself.

(c) Whenever a limited partnership shall fail to appoint or maintain a registered agent in this State, or whenever its registered agent cannot with due diligence be found at the registered office, then the Secretary of State shall be an agent of such limited partnership upon whom any such process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him, or with any clerk having charge of the limited partnership department of his office, duplicate copies of such process, notice or demand. In the event any such process, notice or demand is served on the Secretary of State, he shall immediately cause one of the copies thereof to be forwarded by registered or certified mail, addressed to the limited partnership at its registered office. Any such limited partnership so served shall be in court for all purposes from and after the date of such service on the Secretary of State.

(d) The Secretary of State shall keep a record of all processes, notices and demands served upon him under this section, and shall record therein the time of such service and his action with reference thereto.

(e) Nothing herein contained shall limit or affect the right to serve any process, notice or demand required or permitted by law to be served upon a limited partnership in any other manner now or hereafter permitted by law. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1987, c. 531, s. 2; 1989, c. 209; 2000-140, s. 101(q).)

Effect of Amendments. — Session Laws 2000-140, s. 101(q), effective July 21, 2000, substituted "office that may be the same as any of its places of business" for "office, which may be, but need not be, its place of business" in subdivision (a)(1), rewrote subdivision (a)(2) and added the second paragraph in subsection (a).

Part 2. Formation; Certificate of Limited Partnership.

§ 59-201. Certificate of limited partnership.

(a) In order to form a limited partnership, a certificate of limited partnership must be executed and filed in the office of the Secretary of State and set forth:

(1) The name of the limited partnership.

(2) The address, including county and city or town, and street and number, if any, of the registered office and the name of the registered agent at such address for service of process required to be maintained by G.S. 59-105.

(3) The latest date upon which the limited partnership is to dissolve.

(4) The name and the address, including county and city or town, and street and number, if any, of each general partner.

(5) The address, including county and city or town, and street and number, if any, of the office at which the records referred to in G.S. 59-106 are kept, if such records are not kept at the registered office.

(b) Unless a delayed effective date is specified in the certificate of limited partnership, a limited partnership is formed at the effective time and date of

the filing of the certificate of limited partnership in the office of the Secretary of State if there has been substantial compliance with the requirements of this section.

(c) Domestic limited partnership filings filed prior to October 1, 1986, with the Office of Register of Deeds pursuant to G.S. 59-2(a)(2) shall evidence the existence of limited partnerships formed prior to October 1, 1986, and shall be public notice of only those matters contained in G.S. 59-201(a) and shall be used for no other purpose.

(d) A limited partnership may also be formed through the conversion of another business entity in accordance with Part 10A of this Article. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1987, c. 531, s. 3; 1987 (Reg. Sess., 1988), c. 1031, s. 3; 1997-485, s. 24; 1999-369, s. 4.3; 2000-140, s. 17.)

Effect of Amendments. — Session Laws 2000-140, s. 17, effective July 21, 2000, substituted periods for semi-colons at the end of subdivisions (a)(1) to (a)(3), and deleted "and" at the end of subdivision (a)(3).

Part 9. Foreign Limited Partnerships.

§ 59-902. Registration.

(a) Before transacting business in this State, a foreign limited partnership shall procure a certificate of authority to transact business in this State from the Secretary of State. No foreign limited partnership shall be entitled to transact in this State any business which a limited partnership organized under this Article is not permitted to transact. In order to register, a foreign limited partnership shall deliver to the Secretary of State an original and one conformed copy of an application for registration as a foreign limited partnership, signed by a general partner and setting forth:

(1) The name of the foreign limited partnership and, if different, the name under which it proposes to register and transact business in this State;

(2) The jurisdiction and date of its formation;

(3) The date of formation and the period of duration;

(4) The address, including county and city or town, and street and number, if any, of the principal office of the foreign limited partnership;

(5) The address, including county and city or town, and street and number, if any, of the proposed registered office of the foreign limited partnership in this State, and the name of its proposed registered agent in this State at such address; the agent must be an individual resident of this State, a domestic corporation, or a foreign corporation having a place of business in, and authorized to do business in this State;

(6) If the certificate of limited partnership filed in the foreign limited partnership's state of organization is not required to include the names and addresses of the partners, a list of the names and addresses or, at the election of the foreign limited partnership, a list of the names and addresses of the general partners and the address, including county and city or town, and street and number, of the office at which is kept a list of the names and addresses of the limited partners and their capital contributions, together with an undertaking by the foreign limited partnership to keep such records until such foreign limited partnership's registration in this State is cancelled;

(7) A statement that in consideration of the issuance of a certificate of authority to transact business in this State, the foreign limited

partnership appoints the Secretary of State of North Carolina as the agent to receive service of process, notice, or demand, whenever the foreign limited partnership fails to appoint or maintain a registered agent in this State or whenever any such registered agent cannot with reasonable diligence be found at the registered office;

(8) The names and addresses including county and city or town, and street and number, if any, of all of the general partners;

(9) The execution of a certificate or amendment by a general partner constitutes an affirmation under the penalties of perjury that the facts stated therein are true.

(b) Without excluding other activities which may not constitute transacting business in this State, a foreign limited partnership shall not be considered to be transacting business in this State, for the purpose of this Article, by reason of carrying on in this State any one or more of the following activities:

(1) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes;

(2) Holding meetings of its partners or carrying on other activities concerning its internal affairs;

(3) Maintaining bank accounts or borrowing money in this State, with or without security, even if such borrowings are repeated and continuous transactions;

(4) Maintaining offices or agencies for the transfer, exchange, and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities;

(5) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this State before becoming binding contracts;

(6) Making or investing in loans with or without security including servicing of mortgages or deeds of trust through independent agencies within the State, the conducting of foreclosure proceedings and sale, the acquiring of property at foreclosure sale and the management and rental of such property for a reasonable time while liquidating its investment, provided no office or agency therefor is maintained in this State;

(7) Taking security for or collecting debts due to it or enforcing any rights in property securing the same;

(8) Transacting business in interstate commerce;

(9) Conducting an isolated transaction completed within a period of six months and not in the course of a number of repeated transactions of like nature.

(c) Whenever a foreign limited partnership shall fail to appoint or maintain a registered agent in this State, or whenever its registered agent cannot with due diligence be found at the registered office, then the Secretary of State shall be an agent of such foreign limited partnership upon whom any such process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him, or with any clerk having charge of the limited partnership department of his office, duplicate copies of such process, notice or demand. In the event any such process, notice or demand is served on the Secretary of State, he shall immediately cause one of the copies thereof to be forwarded by registered or certified mail, addressed to the foreign limited partnership at its registered office. Any such foreign limited partnership so served shall be in court for all purposes from and after the date of such service on the Secretary of State.

(d) The Secretary of State shall keep a record of all processes, notices and demands served upon him under this section, and shall record therein the time of such service and his action with reference thereto.

(e) Nothing herein contained shall limit or affect the right to serve any process notice or demand required or permitted by law to be served upon a foreign limited partnership in any other manner now or hereafter permitted by law. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1987, c. 531, s. 8.1; 2000-140, s. 55.)

Effect of Amendments. — Session Laws 2000-140, s. 55, effective July 21, 2000, deleted "in the jurisdiction under the laws of which it is formed" at the end of subdivision (a)(4).

§ 59-907. Transaction of business without registration.

(a) No foreign limited partnership transacting business in this State without permission obtained through a certificate of authority under this Article shall be permitted to maintain any action or proceeding in any court of this State unless such foreign limited partnership shall have obtained a certificate of authority prior to trial.

(b) The failure of a foreign limited partnership to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of the foreign limited partnership and shall not prevent the foreign limited partnership from defending any action or proceeding in any court of this State.

(c) A foreign limited partnership failing to obtain permission to transact business in this State as required by this Article or by prior statutes then applicable shall be liable to the State for the years or parts thereof during which it transacted business in this State without such permission in an amount equal to all fees and taxes which would have been imposed by law upon such foreign limited partnership had it duly applied for and received such permission plus interest and all penalties imposed by law for failure to pay such fees and taxes, plus five hundred dollars ($500.00) and costs. The Attorney General shall bring actions to recover all amounts due the State under the provisions of this section.

(d) The Secretary of State is hereby directed to require that every foreign limited partnership transacting business in this State comply with the provisions of this Article. The Secretary of State is authorized to employ such assistants as shall be deemed necessary in his office for the purpose of enforcing the provisions of this Article and for making such investigations as shall be necessary to ascertain foreign limited partnerships now transacting business in this State which may have failed to comply with the provisions of this Article.

(e) A limited partner of a foreign limited partnership is not liable as a general partner of the foreign limited partnership solely by reason of the foreign limited partnership's having transacted business in this State without registration.

(f) A foreign limited partnership, by transacting business in this State without registration, appoints the Secretary of State as its agent for service of process with respect to causes of action arising out of the transaction of business in this State. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1999-362, s. 36; 2000-140, s. 101(r).)

Effect of Amendments. — Session Laws 2000-140, s. 101(r), effective July 21, 2000, inserted "or" in the phrase "validity of any contract or act" in subsection (b).

§ 59-1053. Effects of conversion.

When the conversion takes effect:

(1) The converting business entity ceases its prior form of organization and continues in existence as the resulting domestic limited partnership;

(2) The title to all real estate and other property owned by the converting business entity continues vested in the resulting domestic limited partnership without reversion or impairment;

(3) All liabilities of the converting business entity continue as liabilities of the resulting domestic limited partnership;

(4) A proceeding pending by or against the converting business entity may be continued as if the conversion did not occur; and

(5) The interests in the converting business entity that are to be converted into interests, obligations, or securities of the resulting domestic limited partnership or into the right to receive cash or other property are thereupon so converted, and the former holders of interests in the converting business entity are entitled only to the rights provided in the plan of conversion.

The conversion shall not affect the liability or absence of liability of any holder of an interest in the converting business entity for any acts, omissions, or obligations of the converting business entity made or incurred prior to the effectiveness of the conversion. The cessation of the existence of the converting business entity in its prior form of organization in the conversion shall not constitute a dissolution or termination of the converting business entity. (1999-369, s. 4.8; 2000-140, s. 101(s).)

Effect of Amendments. — Session Laws 2000-140, s. 101(s), effective July 21, 2000, inserted "limited" in subdivision (5).

Chapter 61.

Religious Societies.

§ 61-3. Title to lands vested in trustees, or in societies.

CASE NOTES

Effect of Denomination's Failure to Act at Time of Violation. — Court found that local church, which was connectionally related to denomination yet congregational as to property, could keep property because it would be inequitable, if not unconstitutional, for a North Carolina court to enforce the denomination's "Discipline," essentially property rules, against the local church when the denomination made no effort to enforce it at the time of the alleged violations. Fire Baptized Holiness Church of God of Ams., Inc. v. McSwain, 134 N.C. App. 676, 518 S.E.2d 558 (1999).

Chapter 62.

Public Utilities.

Article 3.

Powers and Duties of Utilities Commission.

Article 14.

Fees and Charges.

Article 1.

General Provisions.

§ 62-1. Short title.

Editor's Note. —

Session Laws 1997-40, ss. 1-4, as amended by Session Laws 1999-122, s. 1, Session Laws 2000-53, s. 1, and Session Laws 2000-181, s. 2.1, provide in part that the Study Commission on the Future of Electric Service in North Carolina is created and the Commission shall consist of 30 voting members. The President Pro Tempore of the Senate and the Speaker of the House of Representatives shall each designate a cochair from the General Assembly membership serving on the Commission. The Commission shall examine the cost, adequacy, availability, and pricing of electric rates and service in North Carolina to determine whether legislation is necessary to assure an adequate and reliable source of electricity and economical, fair, and equitable rates for all consumers of electricity in North Carolina. The Commission shall gather data and other information as may be necessary to accomplish the purposes of the Commission, and shall seek input and advice from the Attorney General, the North Carolina Utilities Commission, and the Public Staff of the Utilities Commission and shall also obtain guidance by reviewing electric utility restructuring experiments conducted in other states. The Commission, while in the discharge of official duties, may exercise all the powers provided under the provisions of G.S. 120-19 through G.S. 120-19.4, including the power to request all officers, agents, agencies, and departments of the State to provide any information, data, or documents within their possession, ascertainable from their records, or otherwise available to them, and the power to subpoena witnesses. The Commission shall make a report to the 1998 Regular Session of the 1997 General Assembly, which may contain recommendations, and shall report the results of its study and its recommendations to the 1999 General Assembly. The Commission is to report periodically thereafter and is to terminate June 30, 2006.

CASE NOTES

Findings Concerning Company Debt Ratios. — Conclusion of the Utilities Commission's that a natural gas company's capital structure should include a short-term debt ratio of 4.02%, based on a short-term debt equal to stored gas inventory rather than "the daily average balance amount of short-term debt for the most recent twelve month period," was supported by substantial evidence and satisfied requirements of this chapter. State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 351 N.C. 223, 524 S.E.2d 10 (2000).

Article 3.

Powers and Duties of Utilities Commission.

§ 62-54. Notification of opportunity to object to telephone solicitation.

The Commission shall require each local exchange company to notify all persons who subscribe to residential service from that company of the provisions of G.S. 75-30.1, of the federal laws allowing consumers to object to receiving telephone solicitations, and of programs made available by private industry that allow consumers to have their names removed from telemarketing lists, by enclosing that information, at least annually, in every telephone bill mailed to residential customers. The Commission shall also ensure that this information is printed in a clear, conspicuous manner in the consumer information pages of each telephone directory distributed to residential customers. (2000-161, s. 3.)

Editor's Note. — Session Laws 2000-161, s. 4, made this section effective October 1, 2000, and applicable to telephone calls made and to telephone directories printed on or after that date.

Session Laws 2000-161, s. 3, enacted this section as § 62-53. It was recodified as this section at the direction of the Revisor of Statutes.

§§ 62-55 through 62-59: Reserved for future codification purposes.

Article 4.

Procedure before the Commission.

§ 62-79. Final orders and decisions; findings; service; compliance.

CASE NOTES

Findings Held Sufficient. —

Utilities Commission's decision to accept an expert's recommendation of an 11.4% return on equity, based on the credibility and objectivity of his company-specific "discounted cash flow" analysis, was independently reached and supported by competent, material, and substantial evidence. State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 351 N.C. 223, 524 S.E.2d 10 (2000).

Article 5.

Review and Enforcement of Orders.

§ 62-94. Record on appeal; extent of review.

CASE NOTES

II. Standard of Review.
IV. Prima Facie Just and Reasonable.
C. Findings.

II. STANDARD OF REVIEW.

Standard Deemed Satisfied. — Where witnesses testified according to a private agreement that was not unanimous, the Utilities Commission was not subjected to a heightened standard of review but satisfied the requirements of this chapter by independently considering and analyzing relevant evidence and facts presented by all the parties. State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 351 N.C. 223, 524 S.E.2d 10 (2000).

IV. PRIMA FACIE JUST AND REASONABLE.

C. Findings.

Findings Concerning Company's Debt Ratio. — Conclusion of the Utilities Commission that a natural gas company's capital structure should include a short-term debt ratio of 4.02%, based on a short-term debt equal to stored gas inventory rather than "the daily average balance amount of short-term debt for the most recent twelve month period," was supported by substantial evidence. State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 351 N.C. 223, 524 S.E.2d 10 (2000).

Article 6.

The Utility Franchise.

§ 62-110.1. Certificate for construction of generating facility; analysis of long-range needs for expansion of facilities.

Editor's Note. — Session Laws 1997-40, ss. 1-4, as amended by Session Laws 1999-122, s. 1, Session Laws 2000-53, s. 1, and Session Laws 2000-181, s. 2.1, provide in part that the Study Commission on the Future of Electric Service in North Carolina is created and the Commission shall consist of 30 voting members. The President Pro Tempore of the Senate and the Speaker of the House of Representatives shall each designate a cochair from the General Assembly membership serving on the Commission. The Commission shall examine the cost, adequacy, availability, and pricing of electric rates and service in North Carolina to determine whether legislation is necessary to assure an adequate and reliable source of electricity and economical, fair, and equitable rates for all consumers of electricity in North Carolina. The Commission shall gather data and other information as may be necessary to accomplish the purposes of the Commission, and shall seek input and advice from the Attorney General, the North Carolina Utilities Commission, and the Public Staff of the Utilities Commission and shall also obtain guidance by reviewing electric utility restructuring experiments conducted in other states. The Commission, while in the discharge of official duties, may exercise all the powers provided under the provisions of G.S. 120-19 through G.S. 120-19.4, including the power to request all officers, agents, agencies, and departments of the State to provide any information, data, or documents within their possession, ascertainable from their records, or otherwise available to them, and the power to subpoena witnesses. The Commission shall make a report to the 1998 Regular Session of the 1997 General Assembly, which may contain recommendations, and shall report the results of its study and its recommendations to the 1999 General Assembly. The Commission is to report periodically thereafter and is to terminate June 30, 2006.

ARTICLE 7.

Rates of Public Utilities.

§ 62-133. How rates fixed.

CASE NOTES

V. Operating Expenses and Working Capital.
VI. Rate of Return.

V. OPERATING EXPENSES AND WORKING CAPITAL.

Cost of Service Calculation. — The Utilities Commission's ultimate conclusion that the peak and average cost-of-service methodology more properly allocates fixed costs between annual use and peak day utilization of the facilities than does the peak responsibility method or the imputed load factor method was supported by sufficient findings and competent, material and substantial evidence. State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 351 N.C. 223, 524 S.E.2d 10 (2000).

VI. RATE OF RETURN.

Evidence Held Sufficient to Support Commission's Determination of Rate of Return. —

Decision of Utilities Commission to accept an expert's recommendation of an 11.4% return on equity, based on the credibility and objectivity of his company-specific "discounted cash flow" analysis, was independently reached and supported by competent, material, and substantial evidence. State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 351 N.C. 223, 524 S.E.2d 10 (2000).

§ 62-140. Discrimination prohibited.

CASE NOTES

II. Differences in Rates or Services.
IV. No Discrimination.

II. DIFFERENCES IN RATES OR SERVICES.

Commission's Approval of Bifurcated Full-Margin Pricing Method Upheld. — The record, combined with the Utilities Commission's analysis of prior cases addressing the lawfulness of full-margin transportation rates, was more than adequate to support the Commission's approval of a gas company's bifurcated full-margin pricing mechanism, which essentially resulted in sales customers, rather than transportation customers, paying duplicate charges for interstate transportation. State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 351 N.C. 223, 524 S.E.2d 10 (2000).

IV. NO DISCRIMINATION.

Rate Designs. — The Utilities Commission properly considered factors other than cost-of-service, i.e., value of service, type of service, quantity of use, time of use, manner of service, competitive conditions relating to acquisition of new customers, historical rate design, revenue stability to the utility, and economic and political factors, in adopting a rate design that would be just and not unreasonably discriminatory among the various customer classes. State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 351 N.C. 223, 524 S.E.2d 10 (2000).

ARTICLE 14.

Fees and Charges.

§ 62-302. Regulatory fee.

(a) Fee Imposed. — It is the policy of the State of North Carolina to provide fair regulation of public utilities in the interest of the public, as provided in G.S. 62-2. The cost of regulating public utilities is a burden incident to the privilege of operating as a public utility. Therefore, for the purpose of defraying the cost of regulating public utilities, every public utility subject to the jurisdiction of the Commission shall pay a quarterly regulatory fee, in addition to all other fees and taxes, as provided in this section. The fees collected shall be used only to pay the expenses of the Commission and the Public Staff in regulating public utilities in the interest of the public.

It is also the policy of the State to provide limited oversight of certain electric membership corporations as provided in G.S. 62-53. Therefore, for the purpose of defraying the cost of providing the oversight authorized by G.S. 62-53 and G.S. 117-18.1, each fiscal year each electric membership corporation whose principal purpose is to furnish or cause to be furnished bulk electric supplies at wholesale as provided in G.S. 117-16 shall pay an annual fee as provided in this section.

(b) Public Utility Rate. —

(1) Repealed by Session Laws 2000, c. 140, s. 56, effective July 21, 2000.

(2) The public utility regulatory fee for each fiscal year shall be the greater of (i) a percentage rate, established by the General Assembly, of each public utility's North Carolina jurisdictional revenues for each quarter or (ii) six dollars and twenty-five cents ($6.25) each quarter.

When the Commission prepares its budget request for the upcoming fiscal year, the Commission shall propose a percentage rate of the public utility regulatory fee. For fiscal years beginning in an odd-numbered year, that proposed rate shall be included in the budget message the Governor submits to the General Assembly pursuant to G.S. 143-11. For fiscal years beginning in an even-numbered year, that proposed rate shall be included in a special budget message the Governor shall submit to the General Assembly. The General Assembly shall set the percentage rate of the public utility regulatory fee by law.

The percentage rate may not exceed the amount necessary to generate funds sufficient to defray the estimated cost of the operations of the Commission and the Public Staff for the upcoming fiscal year, including a reasonable margin for a reserve fund. The amount of the reserve may not exceed the estimated cost of operating the Commission and the Public Staff for the upcoming fiscal year. In calculating the amount of the reserve, the General Assembly shall consider all relevant factors that may affect the cost of operating the Commission or the Public Staff or a possible unanticipated increase or decrease in North Carolina jurisdictional revenues.

(3) If the Commission, the Public Staff, or both experience a revenue shortfall, the Commission shall implement a temporary public utility regulatory fee surcharge to avert the deficiency that would otherwise occur. In no event may the total percentage rate of the public utility regulatory fee plus any surcharge established by the Commission exceed twenty-five hundredths percent (0.25%).

(4) As used in this section, the term "North Carolina jurisdictional revenues" means all revenues derived or realized from intrastate

tariffs, rates, and charges approved or allowed by the Commission or collected pursuant to Commission order or rule, but not including tap-on fees or any other form of contributions in aid of construction.

(b1) Electric Membership Corporation Rate. — The electric membership corporation regulatory fee for each fiscal year shall be a dollar amount as established by the General Assembly by law.

When the Commission prepares its budget request for the upcoming fiscal year, the Commission shall propose the amount of the electric membership corporation regulatory fee. For fiscal years beginning in an odd-numbered year, the proposed amount shall be included in the budget message the Governor submits to the General Assembly pursuant to G.S. 143-11. For fiscal years beginning in an even-numbered year, the proposed amount shall be included in a special budget message the Governor shall submit to the General Assembly.

The amount of the electric membership corporation regulatory fee proposed by the Commission may not exceed the amount necessary to defray the estimated cost of the operations of the Commission and the Public Staff for the regulation of the electric membership corporations in the upcoming fiscal year, including a reasonable margin for a reserve fund. The amount of the reserve may not exceed the estimated cost of the Commission and the Public Staff for the regulation of the electric membership corporations for the upcoming fiscal year.

(c) When Due. — The electric membership corporation regulatory fee imposed under this section shall be paid in quarterly installments. The fee is due and payable to the Commission on or before the 15th day of the second month following the end of each quarter.

The public utility regulatory fee imposed under this section is due and payable to the Commission on or before the 15th day of the second month following the end of each quarter. Every public utility subject to the public utility regulatory fee shall, on or before the date the fee is due for each quarter, prepare and render a report on a form prescribed by the Commission. The report shall state the public utility's total North Carolina jurisdictional revenues for the preceding quarter and shall be accompanied by any supporting documentation that the Commission may by rule require. Receipts shall be reported on an accrual basis.

If a public utility's report for the first quarter of any fiscal year shows that application of the percentage rate would yield a quarterly fee of twenty-five dollars ($25.00) or less, the public utility shall pay an estimated fee for the entire fiscal year in the amount of twenty-five dollars ($25.00). If, after payment of the estimated fee, the public utility's subsequent returns show that application of the percentage rate would yield quarterly fees that total more than twenty-five dollars ($25.00) for the entire fiscal year, the public utility shall pay the cumulative amount of the fee resulting from application of the percentage rate, to the extent it exceeds the amount of fees, other than any surcharge, previously paid.

(d) Use of Proceeds. — A special fund in the office of State Treasurer, the Utilities Commission and Public Staff Fund, is created. The fees collected pursuant to this section and all other funds received by the Commission or the Public Staff, except for the clear proceeds of civil penalties collected pursuant to G.S. 62-50(d) and the clear proceeds of funds forfeited pursuant to G.S. 62-310(a), shall be deposited in the Utilities Commission and Public Staff Fund. The Fund shall be placed in an interest bearing account and any interest or other income derived from the Fund shall be credited to the Fund. Moneys in the Fund shall only be spent pursuant to appropriation by the General Assembly.

The Utilities Commission and Public Staff Fund shall be subject to the provisions of the Executive Budget Act except that no unexpended surplus of

the Fund shall revert to the General Fund. All funds credited to the Utilities Commission and Public Staff Fund shall be used only to pay the expenses of the Commission and the Public Staff in regulating public utilities in the interest of the public as provided by this Chapter and in regulating electric membership corporations as provided in G.S. 117-18.1.

The clear proceeds of civil penalties collected pursuant to G.S. 62-50(d) and the clear proceeds of funds forfeited pursuant to G.S. 62-310(a) shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1989, c. 787, s. 1; 1998-215, s. 126; 1999-180, s. 5; 2000-140, s. 56.)

Editor's Note. —

Session Laws 1997-483, s. 10.1, effective July 1, 1997, as amended by 1999-395, s. 6.1, effective retroactively to June 30, 1999, and Session Laws 2000-67, s. 14.10, effective July 1, 2000, provides: "Notwithstanding G.S. 62-302(d), for the Study Commission on the Future of Electric Service in North Carolina, established in S.L. 1997-40, as amended by S.L. 1999-122, all expenses incurred through June 30, 2006, shall be reimbursed from funds in the Utilities Commission and Public Staff Fund. There is allocated initially one hundred thousand dollars ($100,000) from the Utilities Commission and Public Staff Fund to the General Assembly for the purpose of enabling the Study Commission on the Future of Electric Service in North Carolina to organize and begin its work. Upon the certification of the need for additional funds by the cochairs of the Study Commission on the Future of Electric Service in North Carolina for the work of the Commission, the Utilities Commission shall transfer the additional funds from the Utilities Commission and Public Staff Fund to the General Assembly for that purpose."

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Session Laws 2000-109, s. 1, effective July 1, 2000, provides that the percentage rate to be used in calculating the public utility regulatory fee under § 62-302(b)(2) is nine-hundredths percent (0.09%) for each public utility's North Carolina jurisdictional revenues earned during each quarter beginning on or after July 1, 2000.

Session Laws 2000-109, s. 2, effective July 1, 2000, imposes an annual fee on the North Carolina Electric Membership Corporation under § 62-302(b1) for fiscal year 2000-2001 of $200,000.

Effect of Amendments. —

Session Laws 2000-140, s. 56, effective July 21, 2000, added the last sentence in the second paragraph in subsection (a); repealed subdivision (b)(1), pertaining to the regulatory fee for the 1989-90 fiscal year; in subdivision (b)(2), substituted "The public utility regulatory fee for each fiscal year" for "For fiscal years beginning on or after July 1, 1990, the regulatory fee" in the first paragraph and inserted "public utility" twice in the second paragraph; inserted "public utility" twice in subdivision (b)(3); in subsection (b1), rewrote the first paragraph, inserted "electric membership corporation" in the second and third paragraphs, and deleted the former last sentence in the third paragraph, relating to the assessment of the fee; in subsection (c), added the present first paragraph, and in the second paragraph, inserted "public utility" twice and deleted "except the fee imposed by subsection (b1) of this section" following "under this section" in the first sentence.

Chapter 62A.

Public Safety Telephone Service and Wireless Telephone Service.

Article 1.

Public Safety Telephone Service.

§ 62A-2. Legislative purposes.

CASE NOTES

No Private Cause of Action. — This section sets out the legislative purpose for the Public Safety Telephone Act, and contains no provision for a private cause of action. Lovelace v. City of Shelby, 133 N.C. App. 408, 515 S.E.2d 722 (1999).

§ 62A-5. Payment and collection of charges.

(a) The subscriber of an exchange access facility will be billed for the monthly 911 charges, if any, imposed with respect to that facility. Each service supplier shall, on behalf of the local government, collect the charges from those subscribers to whom it provides exchange telephone service in the area served by the 911 service. As part of its normal monthly billing process, the service supplier shall collect the charges for each month or part of the month an exchange access facility is in service, and it may list the charge as a separate entry on each bill. If a service supplier receives a partial payment for a monthly bill from a subscriber, the service supplier shall apply the payment against the amount the subscriber owes the service supplier first.

(b) A service supplier has no obligation to take any legal action to enforce the collection of the 911 charges for which any subscriber is billed. However, a collection action may be initiated by the local government that imposed the charges and reasonable costs and attorneys' fees associated with that collection action may be awarded to the local government collecting the 911 charges.

(c) The local government subscribing to 911 service shall remain ultimately responsible to the service supplier for all 911 installation, service, equipment, operation, and maintenance charges owed to the service supplier. Upon request by the local government, the service supplier shall provide the local government with a list of amounts uncollected along with the names and addresses of telephone subscribers who have not paid the 911 charge.

(d) Any taxes due on 911 service provided by the service supplier will be billed to the local government subscribing to that service. (1989, c. 587, s. 1; 2000-173, s. 19.(a).)

Effect of Amendments. — Session Laws 2000-173, s. 19(a), effective August 2, 2000, deleted the former last sentence of subsection (d), which read: "State and local taxes do not apply to 911 charges billed to subscribers under this Article."

Article 2.

Wireless Telephone Service.

§ 62A-25. Use of funds.

(a) Sixty percent (60%) of the funds in the Wireless Fund established in G.S. 62A-22(c) shall be used to reimburse CMRS providers, in response to sworn invoices submitted to the Board, for the actual costs incurred by the CMRS providers in complying with the wireless 911 requirements established by the FCC Order and any rules and regulations which are or may be adopted by the FCC pursuant to the FCC Order, including costs and expenses incurred for designing, upgrading, purchasing, leasing, programming, installing, testing, or maintaining all necessary data, hardware, and software required in order to provide such service as well as the recurring and nonrecurring costs of operating such service. All costs and expenses must be commercially reasonable.

(b) Forty percent (40%) of the funds in the Wireless Fund established in G.S. 62A-22(c) shall be used to make monthly distributions to eligible PSAPs (the "40% Fund"). Money from the 40% Fund shall be used only to pay for the lease, purchase, or maintenance of emergency telephone equipment for the wireless Enhanced 911 system, including necessary computer hardware, software and database provisioning, and nonrecurring costs of establishing a wireless Enhanced 911 system. Money from the 40% Fund shall also be used to pay the rates associated with the local telephone companies' charges related to the operation of the wireless Enhanced 911 system. The 40% Fund shall be distributed as follows:

(1) Fifty percent (50%) of it shall be divided equally among the total number of PSAPs in North Carolina. However, monthly distribution shall be made only to those PSAPs that have complied with the provisions of this Article. Distribution to each eligible PSAP will begin the month following its compliance with the provisions of this Article. All monies remaining in this portion of the 40% Fund on January 31 of each year will then be evenly distributed to each of the eligible PSAPs.

(2) The other fifty percent (50%) shall be divided pro rata among the eligible PSAPs based on the population served by the PSAP. However, monthly distribution shall be made only to those PSAPs that have complied with the provisions of this Article. Distribution to each eligible PSAP will begin the month following its compliance with the provisions of this Article. The population data to be used shall be the latest certified county and official municipal estimates of population published by the Office of State Budget, Planning, and Management. All monies remaining in this portion of the 40% Fund on January 31 of each year will then be distributed to each of the eligible PSAPs based on the population served by the PSAP.

(c) Sworn invoices shall be presented by CMRS providers in connection with any request for reimbursement under this section. In no event shall any invoice for reimbursement be approved for the payment of costs that are not related to compliance with the wireless Enhanced 911 service requirements established by the FCC Order and any rules and regulations which are or may be adopted by the FCC pursuant to the FCC Order.

(d) In no event shall any invoice for reimbursement be approved for payment of costs of any CMRS provider exceeding one hundred twenty-five percent (125%) of the service charges remitted by such CMRS provider unless prior approval for such expenditures is received from the Board. If the total

amount of invoices submitted to the Board and approved for payment exceeds the amount in the Wireless Fund in any month, CMRS providers that have invoices approved for payment shall receive a pro rata share of the Wireless Fund, based on the relative amount of their approved invoices available that month, and the balance of the payments will be carried over to the following month or months and shall include interest at a rate equal to the rate earned by the Wireless Fund until all of the approved payments are made.

(e) In January of each year every participating PSAP will submit to the Board a copy of its governing agency's approved budget detailing the PSAP's revenues and expenditures associated with the operation of its wireless Enhanced 911 system. PSAPs must comply with all requests by the Board for financial information related to the operation of the wireless Enhanced 911 system.

(f) On February 15, 2000, and every two years thereafter the Board shall report to the Joint Legislative Commission on Governmental Operations and the Revenue Laws Study Committee. The report shall contain complete information regarding receipts and expenditures of all funds received by the Board during the period covered by the report as well as the status of wireless Enhanced 911 systems in North Carolina at the time of the report. The first report shall cover the period from the formation of the Board to December 31, 1999. Each succeeding report shall cover the two-year period of time from the ending date of the previous report. (1998-158, s. 1; 1999-456, s. 18; 2000-140, s. 93.1(b).)

Effect of Amendments. — Session Laws 2000-140, s. 93.1, effective July 1, 2000, substituted "Office of State Budget, Planning, and Management" for "Office of State Planning" in subdivision (b)(2).

Chapter 63A.

North Carolina Global TransPark Authority.

Sec.
63A-4. Powers of the Authority.
63A-11. Special user project bonds or notes.

§ 63A-4. Powers of the Authority.

(a) The Authority shall have all of the powers necessary to execute the provisions of this Chapter, which shall include at least the following powers:

(1) The powers of a corporate body, including the power to sue and be sued, to make contracts, to adopt and use a common seal, and to alter the adopted seal as needed.

(2) To establish, finance, purchase, construct, operate, and regulate cargo airport complexes and to own, finance, lease, sell, or manage real or personal property.

(3) To charge and collect fees and rents for the use of the cargo airport complexes or for services rendered in the operation of the complexes.

(4) To contract and enter into agreements with the State, local governments, other authorities of North Carolina, and other states for the interchange of business and to facilitate the business of cargo airport complexes.

(5) To rent, lease, purchase, acquire, own, encumber, dispose of, or mortgage real or personal property, including the power to acquire property by eminent domain pursuant to G.S. 63A-6.

(6) To establish, construct, purchase, maintain, equip, and operate any structure or facilities to aid commerce associated with a cargo airport complex, including the construction of highways, bridges, shipping facilities, electronic cargo transfer systems, mass transit systems, and other transportation facilities. Before constructing a highway or a bridge, the Authority shall consult with the Department of Transportation.

(7) To create and operate agencies and departments needed to implement this Chapter.

(8) To pay all necessary costs and expenses in the formation, organization, administration, and operation of the Authority.

(9) To apply for, accept, and administer loans and grants of money from any federal agency, from the State or its political subdivisions, or from any other public or private sources available, to expend the money in accordance with the requirements imposed by the lender or donor, and to give any evidences of indebtedness that are required. No indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State or its political subdivisions, and no indebtedness of the Authority shall involve or be secured by the faith, credit, or taxing power of the State or its political subdivisions.

(10) To adopt, alter, or repeal its own bylaws or rules implementing the provisions of this Chapter.

(11) To execute financing agreements, security documents, and other instruments necessary in exercising its power under this Chapter.

(12) To fix, charge, collect, pledge, or assign revenues of the Authority.

(13) To employ consulting engineers, architects, attorneys, real estate counselors, appraisers, and other consultants and employees as may be required in the judgment of the Board and to fix and pay their compensation from funds available to the Authority, and, when

approved by the Local Government Commission under G.S. 159-123(e) and (f) as if the Authority were an issuing unit, to select and retain financial consultants, underwriters, and bond attorneys in connection with the issuance of any bonds and to pay for their services out of the proceeds of any bond issue for which their services were performed.

(14) To issue bonds or notes of the Authority as provided under this Chapter to pay the costs of a project.

(15) To issue revenue refunding bonds of the Authority as provided under this Chapter.

(16) To procure and maintain adequate insurance or otherwise provide for adequate protection to indemnify the Authority and its officers, directors, agents, employees, adjoining property owners, or the general public against loss or liability resulting from any act or omission by or on behalf of the Authority.

(17) To purchase or finance real or personal property in the manner provided for cities and counties under G.S. 160A-20.

(18) To enter into agreements with counties pursuant to G.S. 63A-15.

(19) To exercise the powers granted political subdivisions under Article 4, Chapter 63 of the General Statutes, and to exercise the powers granted to municipalities and counties under Article 6, Chapter 63 of the General Statutes, governing public airports and related facilities.

(20) To act as agent for the United States of America or any agency of the United States in any matter within the purpose of this Chapter. When acting as agent for the United States or one of its agencies, the Authority shall keep the interest of the State paramount.

(21) With the approval of any unit of local government, to use officers, employees, agents, and facilities of the unit of local government for the purposes and upon the terms as may be mutually agreeable.

(22) To issue obligations, without Local Government Commission approval, to finance the purchase or acquisition of land or options on land, or the construction of buildings or facilities. An obligation may be secured by the land purchased or acquired, or by the buildings or facilities constructed, may be unsecured, or may be made payable from revenues, the proceeds of notes, bonds, or the sale of any lands, the proceeds of any bonds of the State or moneys appropriated by the State, or any other available moneys of the Authority. An obligation to finance the purchase or acquisition of land or options on land, or the construction of buildings or facilities, may be sold only to the Escheat Fund as an investment of the Fund pursuant to G.S. 147-69.2(b)(11).

(23) To receive and use appropriations from the State, including an appropriation from the proceeds of State general obligation bonds or notes.

(b) To execute the powers provided in subsection (a) of this section, the Board shall determine the policies of the Authority by majority vote of the members of the Board present and voting, a quorum having been established. Once a policy is determined, the Board shall communicate it to the executive director, who shall have the sole and exclusive authority to execute the policy of the Authority. No member of the Board shall have the responsibility or authority to give operational directives to any employee of the Authority other than the executive director. (1991, c. 749, s. 1; 2000-67, s. 25.3.)

Editor's Note. — Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.4, contains a severability clause.

Effect of Amendments. — Session Laws 2000-67, s. 25.3, effective July 1, 2000, inserted

"or by the buildings or facilities constructed" and substituted "land, or the construction of buildings or facilities" for "land" twice in subdivision (a)(22).

§ 63A-11. Special user project bonds or notes.

(a) The Authority may, subject to the provisions of this section, G.S. 63A-9, and, if applicable, G.S. 63A-10, issue, at one time or from time to time, bonds and notes to finance or refinance special user projects. Bonds and notes to finance or refinance special user projects may be sold irrespective of the interest limitations in G.S. 24-1.1.

(b) Bonds or notes issued by the Authority under this section are special, limited obligations of the Authority payable solely from the following:

(1) The Authority's revenues, income, or assets that it specifically assigns or pledges for payment.

(2) The funds, collateral, and undertakings of a private party that are assigned or pledged by that party.

(c) Bonds and notes issued under this section may be secured by one or more agreements, including foreclosable deeds of trust and other trust instruments. An agreement may pledge and assign to the trustee or the holders of its obligations the assets, revenues, and income provided for the security of the bonds or notes, including proceeds from the sale of any special user project or part thereof, insurance proceeds, condemnation awards, and third-party agreements, and may convey or mortgage the project and other property and collateral to secure a bond issue.

The Authority may subordinate the bonds or notes or its rights, assets, revenues, and income derived from any special user project to any prior, contemporaneous, or future securities or obligations or lien, mortgage, or other security interest.

(d) Notwithstanding any other provision of law, the Authority may agree that all contracts relating to the acquisition, construction, installation, and equipping of the special user project shall be solicited, negotiated, awarded, and executed by the private parties for which the Authority is financing the special user project or any agents of the private parties subject only to approval by the Authority as the Authority may require. The Authority may, out of the proceeds of bonds or notes, make advances to or reimburse the private parties or their agents for all or a portion of the costs incurred in connection with the contracts.

(e) **(Effective until July 1, 2001)** The provisions of G.S. 25-9-104(e) and G.S. 25-9-302(6) to the contrary notwithstanding, the provisions of Article 9 of the North Carolina Uniform Commercial Code, G.S. 25-9-101 to G.S. 25-9-607 inclusive, shall apply to transactions under this section, but not to transactions involving the issuance of bonds for airport projects, to the same extent the provisions of Article 9 would apply were G.S. 25-9-104(e) and G.S. 25-9-302(6) repealed.

(e) **(Effective July 1, 2001)** Article 9 of Chapter 25 of the General Statutes applies to transactions under this section but not to transactions involving the issuance of bonds for airport projects. (1991, c. 749, s. 1; 1993, c. 553, s. 23; 2000-169, s. 37.)

Subsection (e) Set Out Twice — The first version of subsection (e) set out above is effective until July 1, 2001. The second version of subsection (e) set out above is effective July 1, 2001.

Effect of Amendments. — Session Laws 2000-169, s. 37, effective July 1, 2001, rewrote subsection (e).

Chapter 66.

Commerce and Business.

Article 4.

Electrical Materials, Devices, Appliances and Equipment.

§ 66-23. Sale of electrical goods regulated.

OPINIONS OF ATTORNEY GENERAL

Electrical Equipment Purchasers. — This section does not apply to purchasers of electrical equipment. See opinion of Attorney General to The Honorable Constance K. Wilson Representative 57th District, 1998 N.C.A.G. 57 (12/22/98).

Article 11.

Government in Business.

§ 66-58. Sale of merchandise or services by governmental units.

(a) Except as may be provided in this section, it shall be unlawful for any unit, department or agency of the State government, or any division or

subdivision of the unit, department or agency, or any individual employee or employees of the unit, department or agency in his, or her, or their capacity as employee or employees thereof, to engage directly or indirectly in the sale of goods, wares or merchandise in competition with citizens of the State, or to engage in the operation of restaurants, cafeterias or other eating places in any building owned by or leased in the name of the State, or to maintain service establishments for the rendering of services to the public ordinarily and customarily rendered by private enterprises, or to provide transportation services, or to contract with any person, firm or corporation for the operation or rendering of the businesses or services on behalf of the unit, department or agency, or to purchase for or sell to any person, firm or corporation any article of merchandise in competition with private enterprise. The leasing or subleasing of space in any building owned, leased or operated by any unit, department or agency or division or subdivision thereof of the State for the purpose of operating or rendering of any of the businesses or services herein referred to is hereby prohibited.

(b) The provisions of subsection (a) of this section shall not apply to:

(1) Counties and municipalities.

(2) The Department of Health and Human Services or the Department of Agriculture and Consumer Services for the sale of serums, vaccines, and other like products.

(3) The Department of Administration, except that the agency shall not exceed the authority granted in the act creating the agency.

(4) The State hospitals for the mentally ill.

(5) The Department of Health and Human Services.

(6) The North Carolina School for the Blind at Raleigh.

(6a) The Department of Juvenile Justice and Delinquency Prevention.

(7) The North Carolina Schools for the Deaf.

(8) The Greater University of North Carolina with regard to its utilities and other services now operated by it nor to the sale of articles produced incident to the operation of instructional departments, articles incident to educational research, articles of merchandise incident to classroom work, meals, books, or to articles of merchandise not exceeding twenty-five cents (25¢) in value when sold to members of the educational staff or staff auxiliary to education or to duly enrolled students or occasionally to immediate members of the families of members of the educational staff or of duly enrolled students nor to the sale of meals or merchandise to persons attending meetings or conventions as invited guests nor to the operation by the University of North Carolina of an inn or hotel and dining and other facilities usually connected with a hotel or inn, nor to the hospital and Medical School of the University of North Carolina, nor to the Coliseum of North Carolina State University at Raleigh, and the other schools and colleges for higher education maintained or supported by the State, nor to the Centennial Campus of North Carolina State University at Raleigh, nor to the Horace Williams Campus of the University of North Carolina at Chapel Hill, nor to a Millennial Campus of a constituent institution of The University of North Carolina, nor to the comprehensive student health services or the comprehensive student infirmaries maintained by the constituent institutions of the University of North Carolina.

(9) The Department of Environment and Natural Resources, except that the Department shall not construct, maintain, operate or lease a hotel or tourist inn in any park over which it has jurisdiction. The North Carolina Wildlife Resources Commission may sell wildlife memorabilia as a service to members of the public interested in wildlife conservation.

(10) Child-caring institutions or orphanages receiving State aid.
(11) Highlands School in Macon County.
(12) The North Carolina State Fair.
(13) Rural electric memberships corporations.
(13a) State Farm Operations Commission.
(13b) The Department of Agriculture and Consumer Services with regard to its lessees at farmers' markets operated by the Department.
(13c) The Western North Carolina Agricultural Center.
(13d) Agricultural centers or livestock facilities operated by the Department of Agriculture and Consumer Services.
(14) Nothing herein contained shall be construed to prohibit the engagement in any of the activities described in subsection (a) hereof by a firm, corporation or person who or which is a lessee of space only of the State of North Carolina or any of its departments or agencies; provided the leases shall be awarded by the Department of Administration to the highest bidder, as provided by law in the case of State contracts and which lease shall be for a term of not less than one year and not more than five years.
(15) The State Department of Correction is authorized to purchase and install automobile license tag plant equipment for the purpose of manufacturing license tags for the State and local governments and for such other purposes as the Department may direct.

The Commissioner of Motor Vehicles, or such other authority as may exercise the authority to purchase automobile license tags is hereby directed to purchase from, and to contract with, the State Department of Correction for the State automobile license tag requirements from year to year.

The price to be paid to the State Department of Correction for the tags shall be fixed and agreed upon by the Governor, the State Department of Correction, and the Motor Vehicle Commissioner, or such authority as may be authorized to purchase the supplies.
(16) Laundry services performed by the Department of Correction may be provided only for agencies and instrumentalities of the State which are supported by State funds and for county or municipally controlled and supported hospitals presently being served by the Department of Correction, or for which services have been contracted or applied for in writing, as of May 22, 1973. In addition to the prior sentence, laundry services performed by the Department of Correction may be provided for the Governor Morehead School and the North Carolina School for the Deaf.

The services shall be limited to wet-washing, drying and ironing of flatwear or flat goods such as towels, sheets and bedding, linens and those uniforms prescribed for wear by the institutions and further limited to only flat goods or apparel owned, distributed or controlled entirely by the institutions and shall not include processing by any dry-cleaning methods; provided, however, those garments and items presently being serviced by wet-washing, drying and ironing may in the future, at the election of the Department of Correction, be processed by a dry-cleaning method.
(17) The North Carolina Global TransPark Authority or a lessee of the Authority.
(18) The activities and products of private enterprise carried on or manufactured within a State prison facility pursuant to G.S. 148-70.
(19) The North Carolina Justice Academy.
(20) The Department of Transportation, or any nonprofit lessee of the Department, for the sale of books, crafts, gifts, and other tourism-related items at visitor centers owned by the Department.

(21) The North Carolina Rural Redevelopment Authority or a lessee of the Authority.

(c) The provisions of subsection (a) shall not prohibit:

(1) The sale of products of experiment stations or test farms.

(2) The sale of learned journals, works of art, books or publications of the Department of Cultural Resources or other agencies, or the Supreme Court Reports or Session Laws of the General Assembly.

(3) The business operation of endowment funds established for the purpose of producing income for educational purposes; for purposes of this section, the phrase "operation of endowment funds" shall include the operation by public postsecondary educational institutions of campus stores, the profits from which are used exclusively for awarding scholarships to defray the expenses of students attending the institution; provided, that the operation of the stores must be approved by the board of trustees of the institution, and the merchandise sold shall be limited to educational materials and supplies, gift items and miscellaneous personal-use articles. Provided further that sales at campus stores are limited to employees of the institution and members of their immediate families, to duly enrolled students of the campus at which a campus store is located and their immediate families, to duly enrolled students of other campuses of the University of North Carolina other than the campus at which the campus store is located, to other campus stores and to other persons who are on campus other than for the purpose of purchasing merchandise from campus stores. It is the intent of this subdivision that campus stores be established and operated for the purpose of assuring the availability of merchandise described in this Article for sale to persons enumerated herein and not for the purpose of competing with stores operated in the communities surrounding the campuses of the University of North Carolina.

(4) The operation of lunch counters by the Department of Health and Human Services as blind enterprises of the type operated on January 1, 1951, in State buildings in the City of Raleigh.

(5) The operation of a snack bar and cafeteria in the State Legislative Building.

(6) The maintenance by the prison system authorities of eating and sleeping facilities at units of the State prison system for prisoners and for members of the prison staff while on duty, or the maintenance by the highway system authorities of eating and sleeping facilities for working crews on highway construction or maintenance when actually engaged in such work on parts of the highway system.

(7) The operation by penal, correctional or facilities operated by the Department of Health and Human Services, the Department of Juvenile Justice and Delinquency Prevention, or by the Department of Agriculture and Consumer Services, of dining rooms for the inmates or clients or members of the staff while on duty and for the accommodation of persons visiting the inmates or clients, and other bona fide visitors.

(8) The sale by the Department of Agriculture and Consumer Services of livestock, poultry and publications in keeping with its present livestock and farm program.

(9) The operation by the public schools of school cafeterias.

(9a) The use of a public school bus or public school activity bus for a purpose allowed under G.S. 115C-242 or the use of a public school activity bus for a purpose authorized by G.S. 115C-247.

(9b) The use of a public school activity bus by a nonprofit corporation or a unit of local government to provide transportation services for school-

aged and preschool-aged children, their caretakers, and their instructors to or from activities being held on the property of a nonprofit corporation or a unit of local government. The local board of education that owns the bus shall ensure that the person driving the bus is licensed to operate the bus and that the lessee has adequate liability insurance to cover the use and operation of the leased bus.

(10) Sale by any State correctional or other institution of farm, dairy, livestock or poultry products raised or produced by it in its normal operations as authorized by the act creating it.

(11) The sale of textbooks, library books, forms, bulletins, and instructional supplies by the State Board of Education, State Department of Public Instruction, and local school authorities.

(12) The sale of North Carolina flags by or through the auspices of the Department of Administration, to the citizens of North Carolina.

(13) The operation by the Department of Correction of forestry management programs on State-owned lands, including the sale on the open market of timber cut as a part of the management program.

(14) The operation by the Department of Correction of facilities to manufacture and produce traffic and street name signs for use on the public streets and highways of the State.

(15) The operation by the Department of Correction of facilities to manufacture and produce paint for use on the public streets and highways of the State.

(16) The performance by the Department of Transportation of dredging services for a unit of local government.

(17) The sale by the State Board of Elections to political committees and candidate committees of computer software designed by or for the State Board of Elections to provide a uniform system of electronic filing of the campaign finance reports required by Article 22A of Chapter 163 of the General Statutes and to facilitate the State Board's monitoring of compliance with that Article. This computer software for electronic filing of campaign finance reports shall not exceed a cost of one hundred dollars ($100.00) to any political committee or candidate committee without the State Board of Elections first notifying in writing the Joint Legislative Commission on Governmental Operations.

(18) The leasing of no more than 50 acres within the North Carolina Zoological Park by the Department of Environment and Natural Resources to the North Carolina Zoological Society for the maintenance or operation, pursuant to a contract or otherwise, of an exhibition center, theater, conference center, and associated restaurants and lodging facilities.

(d) A department, agency or educational unit named in subsection (b) shall not perform any of the prohibited acts for or on behalf of any other department, agency or educational unit.

(e) Any person, whether employee of the State of North Carolina or not, who shall violate, or participate in the violation of this section, shall be guilty of a Class 1 misdemeanor.

(f) Notwithstanding the provisions of G.S. 66-58(a), the operation by the Department of Correction of facilities for the manufacture of any product or the providing of any service pursuant to G.S. 148-70 not regulated by the provisions of subsection (c) hereof, shall be subject to the prior approval of the Governor, with biennial review by the General Assembly, at the beginning of each fiscal year commencing after October 1, 1975. The Department of Correction shall file with the Director of the Budget quarterly reports detailing prison enterprise operations in such a format as shall be required by the Director of the Budget.

(g) The North Carolina School of Science and Mathematics may engage in any of the activities permitted by G.S. 66-58(b)(8) and (c)(3). (1929, c. 221, s. 1; 1933, c. 172, s. 18; 1939, c. 122; 1941, c. 36; 1951, c. 1090, s. 1; 1957, c. 349, ss. 6, 10; 1967, c. 996, s. 13; 1973, c. 476, ss. 48, 128, 143; c. 671, s. 1; c. 965; c. 1262, s. 86; c. 1294; c. 1457, s. 7; 1975, c. 730, ss. 2-5; c. 840; c. 879, s. 46; 1977, cc. 355, 715; c. 771, s. 4; 1979, c. 830, s. 4; 1981, c. 635, s. 3; 1983, c. 8; c. 476; c. 717, s. 13; c. 761, s. 168; 1985, c. 589, s. 28; c. 757, s. 206(d); 1989, c. 727, s. 218(9); 1989 (Reg. Sess., 1990), c. 1004, s. 1; 1991, c. 749, s. 7; 1991 (Reg. Sess., 1992), c. 902, s. 3; 1993, c. 539, s. 513; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 769, s. 17.15; c. 777, s. 4(e); 1995, c. 247, s. 2; c. 507, s. 13.1(a); 1997-258, s. 1; 1997-261, ss. 4-6; 1997-315, s. 1; 1997-443, s. 11A.21; 1997-456, s. 55.2A; 1997-527, s. 1; 1998-202, s. 4(d), (e); 1998-212, ss. 9.9, 13.3; 1999-234, s. 9; 1999-237, ss. 19.7, 27.23A; 2000-137, ss. 4(f), 4(g); 2000-148, s. 6; 2000-177, s. 10.)

Effect of Amendments. —

Session Laws 2000-137, ss. 4(f) and 4(g), effective July 20, 2000, substituted "Department of Juvenile Justice and Delinquency Prevention" for "Office of Juvenile Justice" in subdivisions (b)(6a) and (c)(7), respectively.

Session Laws 2000-148, s. 6, effective July 1, 2000, added subdivision (b)(21).

Session Laws 2000-177, s. 10, effective August 2, 2000, inserted "nor to a Millennial Campus of a constituent institution of The University of North Carolina" in subdivision (b)(8).

Article 11A.

Electronic Commerce in Government.

§ 66-58.12. Agencies may provide access to services through electronic and digital transactions; fees authorized.

(a) Public agencies are encouraged to maximize citizen and business access to their services through the use of electronic and digital transactions. A public agency may determine, through program and transaction analysis, which of its services may be made available to the public through electronic means, including the Internet. The agency shall identify any inhibitors to electronic transactions between the agency and the public, including legal, policy, financial, or privacy concerns and specific inhibitors unique to the agency or type of transaction. An agency shall not provide a transaction through the Internet that is impractical, unreasonable, or not permitted by laws pertaining to privacy or security.

(b) An agency may charge a fee to cover its costs of permitting a person to complete a transaction through the World Wide Web or other means of electronic access. The fee may be applied on a per transaction basis and may be calculated either as a flat fee or a percentage fee, as determined under an agreement between a person and a public agency. The fee may be collected by the agency or by its third party agent.

(c) The fee imposed under subsection (b) of this section must be approved by the Information Resource Management Commission, in consultation with the Joint Legislative Commission on Governmental Operations. The revenue derived from the fee must be credited to a nonreverting agency reserve account. The funds in the account may be expended only for e-commerce initiatives and projects approved by the Information Resource Management Commission, in consultation with the Joint Select Committee on Information Technology. For purposes of this subsection, the term "public agencies" does not

include a county, unit, special district, or other political subdivision of government.

(d) This section does not apply to the Judicial Department. (2000-109, s. 8.)

Editor's Note. — Session Laws 2000-109, s. 10(h), made this section effective July 13, 2000.

§§ 66-58.13 through 66-58.19: Reserved for future codification purposes.

Article 11B.

Electronic Access to State Services.

§ 66-58.20. Development and implementation of Webportals; public agency links.

(a) The Office of Information Technology Services (ITS) shall develop the architecture, requirements, and standards for the development, implementation and operation of one or more centralized Web portals that will allow persons to access State government services on a 24-hour basis. ITS shall submit its plan for the implementation of the Web portals to the Information Resource Management Commission (IRMC) for its review and approval. When the plan is approved by the IRMC, ITS shall move forward with development and implementation of the statewide WebPortal system.

(b) Each State department, agency, and institution under the review of the IRMC shall functionally link its Internet or electronic services to a centralized Web portal system established pursuant to subsection (a) of this section. (2000-67, s. 7.9.)

Editor's Note. — Session Laws 2000-67, s. 28.5, made this Article effective July 1, 2000.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 7.9, enacted this section as § 66-58.12; it was recodified as this section at the direction of the Revisor of Statutes.

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Article 14.

Business under Assumed Name Regulated.

§ 66-68. Certificate to be filed; contents; exemption of certain partnerships and limited liability companies engaged in rendering professional services; withdrawal or transfer of assumed name.

Editor's Note. —

Session Laws 1999-189, s. 7, which amended this section, as amended by Session Laws 2000-140, s. 101(t), effective July 21, 2000, provides: "This act is effective when it becomes law [June 18, 1999], applies to limited liability companies

in existence or formed on or after the date the act becomes law, and applies to actions commenced on or after October 1, 1999."

Article 20.

Loan Brokers.

§ 66-106. Definitions.

CASE NOTES

Cited in Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, — N.C. App. —, 524 S.E.2d 591, 2000 N.C. App. LEXIS 52 (2000).

Article 24.

Trade Secrets Protection Act.

§ 66-152. Definitions.

Legal Periodicals. —

For comment, "Is the North Carolina Trade Secrets Protection Act Itself a Secret, and Is the Act Worth Protecting?," see 77 N.C.L. Rev. 2149 (1999).

CASE NOTES

The trial court correctly denied plaintiff's motion for a preliminary injunction where plaintiff did not establish a likelihood of success on the merits regarding its claim for trade secret protection because it failed to produce any evidence to show that company took any special precautions to ensure the confidentiality of its customer information. Novacare Orthotics & Prosthetics E., Inc. v. Speelman, — N.C. App. —, 528 S.E.2d 918, 2000 N.C. App. LEXIS 407 (2000).

Quoted in Cook Group, Inc. v. Wilson, 248 Bankr. 745 (M.D.N.C. 2000).

Cited in Marketing Assocs. v. Baker, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 2536 (M.D.N.C. January 21, 2000).

§ 66-154. Remedies.

CASE NOTES

Quoted in Cook Group, Inc. v. Wilson, 248 Bankr. 745 (M.D.N.C. 2000).

§ 66-155. Burden of proof.

CASE NOTES

Defendant's Burden of Proof. — After an initial finding of misappropriation in 1995, the burden should have been placed on the defendant to show that it obtained the processes that it was using in October of 1997, during the plaintiff's surprise inspection, either through independent development or from someone with a right to disclose the processes. Cook Group, Inc. v. Wilson, 248 Bankr. 745 (M.D.N.C. 2000).

Article 27.

Sales Representative Commissions.

§ 66-191. Payment of commissions.

CASE NOTES

Termination and Malfeasance Findings Are Factual Issues. — Summary judgment was improper where a reasonable jury could find that appellant's activities rose to the level of a breach or "termination" of an agreement, and that the agreement was terminated because of the malfeasance of appellant, but whether a jury would so find depended on the resolution of a number of factual issues. GAVCO, Inc. v. Chem-Trend Inc., 81 F. Supp. 2d 633 (W.D.N.C. 1999).

§ 66-192. Civil liability.

CASE NOTES

Quoted in GAVCO, Inc. v. Chem-Trend Inc., 81 F. Supp. 2d 633 (W.D.N.C. 1999).

Article 34.

Certificates of Authentication.

§ 66-273. Prerequisites for authentication.

All of the following conditions must be met before a document can be authenticated:

(1) All seals and signatures must be originals.

(2) All dates must follow in chronological order on all certifications.

(3) All acknowledgments to be authenticated by the Secretary shall be in English or accompanied by a certified or notarized English translation.

(4) Whenever a copy is used, it must include a statement that it is a true and accurate copy.

(5) Whenever a document is to be authenticated by the United States Department of State, it must comply with all applicable statutes, rules, and regulations of that office. (1998-228, s. 14; 2000-140, s. 57.)

Effect of Amendments. — Session Laws 2000-140, s. 57, effective July 21, 2000, added subdivision (5).

§ 66-291. Requirements.

(a) Any tobacco product manufacturer selling cigarettes to consumers within the State (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) after the effective date of this Article shall do one of the following:

(1) Become a participating manufacturer (as that term is defined in section II(jj) of the Master Settlement Agreement) and generally perform its financial obligations under the Master Settlement Agreement; or

(2) Place into a qualified escrow fund by April 15 of the year following the year in question the following amounts (as such amounts are adjusted for inflation):
a. 1999: $.0094241 per unit sold after the effective date of this Article.
b. 2000: $.0104712 per unit sold.
c. For each of 2001 and 2002: $.0136125 per unit sold.
d. For each of 2003 through 2006: $.0167539 per unit sold.
e. For each of 2007 and each year thereafter: $.0188482 per unit sold.

(b) A tobacco product manufacturer that places funds into escrow pursuant to subdivision (2) of subsection (a) of this section shall receive the interest or other appreciation on such funds as earned. Such funds themselves shall be released from escrow only under the following circumstances:

(1) To pay a judgment or settlement on any released claim brought against such tobacco product manufacturer by the State or any releasing party located or residing in the State. Funds shall be released from escrow under this subdivision (i) in the order in which they were placed into escrow and (ii) only to the extent and at the time necessary to make payments required under such judgment or settlement;

(2) To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow in a particular year was greater than the State's allocable share of the total payments that such manufacturer would have been required to make in that year under the Master Settlement Agreement (as determined pursuant to section IX(i)(2) of the Master Settlement Agreement, and before any of the adjustments or offsets described in section IX(i)(3) of that Agreement other than the Inflation Adjustment) had it been a participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer; or

(3) To the extent not released from escrow under subdivisions (1) or (2) of this subsection, funds shall be released from escrow and revert back to such tobacco product manufacturer 25 years after the date on which they were placed into escrow.

(c) Each tobacco product manufacturer that elects to place funds into escrow pursuant to this section shall annually certify to the Attorney General that it is in compliance with this section. The Attorney General may bring a civil action on behalf of the State against any tobacco product manufacturer that fails to place into escrow the funds required under this section. Any tobacco product manufacturer that fails in any year to place into escrow the funds required under this section shall:

(1) Be required within 15 days to place such funds into escrow as shall bring it into compliance with this section. The court, upon a finding of a violation either of subdivision (2) of subsection (a) of this section, of subsection (b) of this section, or of this section, may impose a civil penalty (the clear proceeds of which shall be paid to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2) in an amount not to exceed five percent (5%) of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed one hundred percent (100%) of the original amount improperly withheld from escrow;

(2) In the case of a knowing violation, be required within 15 days to place such funds into escrow as shall bring it into compliance with this section. The court, upon a finding of a knowing violation either of subdivision (2) of subsection (a) of this section, of subsection (b) of this section, or of this section, may impose a civil penalty (the clear proceeds of which shall be paid to the Civil Penalty and Forfeiture

Fund in accordance with G.S. 115C-457.2) in an amount not to exceed fifteen percent (15%) of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed three hundred percent (300%) of the original amount improperly withheld from escrow; and

(3) In the case of a second knowing violation, be prohibited from selling cigarettes to consumers within the State (whether directly or through a distributor, retailer, or similar intermediary) for a period not to exceed two years.

Each failure to make an annual deposit required under this section shall constitute a separate violation. (1999-311, s. 1; 2000-140, s. 58.)

Effect of Amendments. — Session Laws 2000-140, s. 58, effective July 21, 2000, substituted "subsection (a) of this section" for "section (a) of this subsection" in subsection (b); substituted "either of subdivision (2) of subsection (a) of this section, of subsection (b) of this section, or of this section" for "of this subsection" in subdivision (c)(1); and substituted "either of subdivision (2) of subsection (a) of this section, of subsection (b) of this subsection, or of this section" for "of subdivision of subsection (a) of this section" in subdivision (c)(2).

Article 39.

Self-Service Storage Rental Contracts.

§§ 66-308 through 66-310: Reserved for future codification purposes.

Article 40.

Uniform Electronic Transactions Act.

Official Comments in Article —

§ 66-311. Short title.

This Article may be cited as the Uniform Electronic Transactions Act. (2000-152, s. 1.)

Editor's Note. — The numbers of §§ 66-311 to 66-330 were assigned by the Revisor of Statutes, the numbers in Session Laws 2000-152, s. 1 having been §§ 66-308 et seq. Session Laws 2000-152, s. 3, made this Article effective October 1, 2000.

Session Laws 2000-152, s. 2, directs the Revisor of Statutes to cause to printed along with the act all relevant portions of the official comments to the Uniform Electronic Transactions Act, as the Revisor deems appropriate.

§ 66-312. Definitions.

As used in this Article, unless the context clearly requires otherwise, the term:

(1) "Agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction.

(2) "Automated transaction" means a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing

under an existing contract, or fulfilling an obligation required by the transaction.

(3) "Computer program" means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result.

(4) "Consumer transaction" means a transaction involving a natural person with respect to or affecting primarily personal, household, or family purposes.

(5) "Contract" means the total legal obligation resulting from the parties" agreement as affected by this Article and other applicable law.

(6) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(7) "Electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.

(8) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

(9) "Electronic signature" means an electronic sound, symbol, or process attached to, or logically associated with, a record and executed or adopted by a person with the intent to sign the record.

(10) "Governmental agency" means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the federal government or of a state or of a county, municipality, or other political subdivision of a state.

(11) "Information" means data, text, images, sounds, codes, computer programs, software, databases, or the like.

(12) "Information processing system" means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.

(13) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity.

(14) "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.

(15) "Security procedure" means a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

(16) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, which is recognized by federal law or formally acknowledged by a state.

(17) "Transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs. (2000-152, s. 1.)

OFFICIAL COMMENT

1. **"Agreement."** Whether the parties have reached an agreement is determined by their express language and all surrounding circumstances. The Restatement 2d Contracts § 3 provides that, "An agreement is a manifestation of mutual assent on the part of two or more persons." See also Restatement 2d Contracts, Section 2, Comment b. The Uniform Commercial Code specifically includes in the circumstances from which an agreement may be inferred "course of performance, course of dealing and usage of trade..." as defined in the UCC. Although the definition of agreement in this Act does not make specific reference to usage of trade and other party conduct, this definition is not intended to affect the construction of the parties' agreement under the substantive law applicable to a particular transaction. Where that law takes account of usage and conduct in informing the terms of the parties' agreement, the usage or conduct would be relevant as "other circumstances" included in the definition under this Act.

Where the law applicable to a given transaction provides that system rules and the like constitute part of the agreement of the parties, such rules will have the same effect in determining the parties agreement under this Act. For example, UCC Article 4 (Section 4-103(b)) provides that Federal Reserve regulations and operating circulars and clearinghouse rules have the effect of agreements. Such agreements by law properly would be included in the definition of agreement in this Act.

The parties' agreement is relevant in determining whether the provisions of this Act have been varied by agreement. In addition, the parties' agreement may establish the parameters of the parties' use of electronic records and signatures, security procedures and similar aspects of the transaction. See Model Trading Partner Agreement, 45 Business Lawyer Supp. Issue (June 1990). See Section 5(b) [G.S. 66-315(b)] and comments thereto.

2. **"Automated Transaction."** An automated transaction is a transaction performed or conducted by electronic means in which machines are used without human intervention to form contracts and perform obligations under existing contracts. Such broad coverage is necessary because of the diversity of transactions to which this Act may apply.

As with electronic agents, this definition addresses the circumstance where electronic records may result in action or performance by a party although no human review of the electronic records is anticipated. Section 14 [G.S. 66-324] provides specific rules to assure that where one or both parties do not review the electronic records, the resulting agreement will be effective.

The critical element in this definition is the lack of a human actor on one or both sides of a transaction. For example, if one orders books from Bookseller.com through Bookseller's website, the transaction would be an automated transaction because Bookseller took and confirmed the order via its machine. Similarly, if Automaker and supplier do business through Electronic Data Interchange, Automaker's computer, upon receiving information within certain pre-programmed parameters, will send an electronic order to supplier's computer. If Supplier's computer confirms the order and processes the shipment because the order falls within pre-programmed parameters in Supplier's computer, this would be a fully automated transaction. If, instead, the Supplier relies on a human employee to review, accept, and process the Buyer's order, then only the Automaker's side of the transaction would be automated. In either case, the entire transaction falls within this definition.

3. **"Computer program."** This definition refers to the functional and operating aspects of an electronic, digital system. It relates to operating instructions used in an electronic system such as an electronic agent. (See definition of "Electronic Agent").

4. **"Electronic."** The basic nature of most current technologies and the need for a recognized, single term warrants the use of "electronic" as the defined term. The definition is intended to assure that the Act will be applied broadly as new technologies develop. The term must be construed broadly in light of developing technologies in order to fulfill the purpose of this Act to validate commercial transactions regardless of the medium used by the parties. Current legal requirements for "writings" can be satisfied by most any tangible media, whether paper, other fibers, or even stone. The purpose and applicability of this Act covers intangible media which are technologically capable of storing, transmitting and reproducing information in human perceivable form, but which lack the tangible aspect of paper, papyrus or stone.

While not all technologies listed are technically "electronic" in nature (e.g., optical fiber technology), the term "electronic" is the most descriptive term available to describe the majority of current technologies. For example, the development of biological and chemical processes for communication and storage of data, while not specifically mentioned in the definition, are included within the technical definition because such processes operate on electromagnetic impulses. However, whether a particular technology may be characterized as technically "electronic," i.e., operates on electro-

magnetic impulses, should not be determinative of whether records and signatures created, used and stored by means of a particular technology are covered by this Act. This act is intended to apply to all records and signatures created, used and stored by any medium which permits the information to be retrieved in perceivable form.

5. **"Electronic agent."** This definition establishes that an electronic agent is a machine. As the term "electronic agent" has come to be recognized, it is limited to a tool function. The effect on the party using the agent is addressed in the operative provisions of the Act (e.g., Section 14 [G.S. 66-324]).

An electronic agent, such as a computer program or other automated means employed by a person, is a tool of that person. As a general rule, the employer of a tool is responsible for the results obtained by the use of that tool since the tool has no independent volition of its own. However, an electronic agent, by definition, is capable within the parameters of its programming, of initiating, responding or interacting with other parties or their electronic agents once it has been activated by a party, without further attention of that party.

While this Act proceeds on the paradigm that an electronic agent is capable of performing only within the technical strictures of its preset programming, it is conceivable that, within the useful life of this Act, electronic agents may be created with the ability to act autonomously, and not just automatically. That is, through developments in artificial intelligence, a computer may be able to "learn through experience, modify the instructions in their own programs, and even devise new instructions." Allen and Widdison, "Can Computers Make Contracts?" *9 Harv. J.L.&Tech 25* (Winter, 1996). If such developments occur, courts may construe the definition of electronic agent accordingly, in order to recognize such new capabilities.

The examples involving Bookseller.com and Automaker in the comment to the definition of Automated Transaction are equally applicable here. Bookseller acts through an electronic agent in processing an order for books. Automaker and the supplier each act through electronic agents in facilitating and effectuating the just-in-time inventory process through EDI.

6. **"Electronic record."** An electronic record is a subset of the broader defined term "record." It is any record created, used or stored in a medium other than paper (see definition of electronic). The defined term is also used in this Act as a limiting definition in those provisions in which it is used.

Information processing systems, computer equipment and programs, electronic data interchange, electronic mail, voice mail, facsimile, telex, telecopying, scanning, and similar technologies all qualify as electronic under this act. Accordingly information stored on a computer hard drive or floppy disc, facsimiles, voice mail messages, messages on a telephone answering machine, audio and video tape recordings, among other records, all would be electronic records under this Act.

7. **"Electronic signature."** The idea of a signature is broad and not specifically defined. Whether any particular record is "signed" is a question of fact. Proof of that fact must be made under other applicable law. This act simply assures that the signature may be accomplished through an electronic means. No specific technology need be used in order to create a valid signature. One's voice on an answering machine may suffice if the requisite intention is present. Similarly, including one's name as part of an electronic mail communication also may suffice, as may the firm name on a facsimile. It also may be shown that the requisite intent was not present and accordingly the symbol, sound or process did not amount to a signature. One may use a digital signature with the requisite intention, or one may use the private key solely as an access device with no intention to sign, or otherwise accomplish a legally binding act. In any case the critical element is the intention to execute or adopt the sound or symbol or process for the purpose of signing the related record.

The definition requires that the signer execute or adopt the sound, symbol, or process with the intent to sign the record. The act of applying a sound, symbol or process to an electronic record could have differing meanings and effects. The consequence of the act and the effect of the act as a signature are determined under other applicable law. However, the essential attribute of a signature involves applying a sound, symbol or process with an intent to do a legally significant act. It is that intention that is understood in the law as a part of the word "sign", without the need for a definition.

This Act establishes, to the greatest extent possible, the equivalency of electronic signatures and manual signatures. Therefore the term "signature" has been used to connote and convey that equivalency. The purpose is to overcome unwarranted biases against electronic methods of signing and authenticating records. The term "authentication," used in other laws, often has a narrower meaning and purpose than an electronic signature as used in this Act. However, an authentication under any of those other laws constitutes an electronic signature under this Act.

The precise effect of an electronic signature will be determined based on the surrounding circumstances under section 9(b) [G.S. 66-319(b)].

This definition includes as an electronic signature the standard webpage click through process. For example, when a person orders

goods or services through a vendor's website, the person will be required to provide information as part of a process which will result in receipt of the goods or services. When the customer ultimately gets to the last step and clicks "I agree," the person has adopted the process and has done so with the intent to associate the person with the record of that process. The actual effect of the electronic signature will be determined from all the surrounding circumstances, however, the person adopted a process which the circumstances indicate s/he intended to have the effect of getting the goods/services and being bound to pay for them. The adoption of the process carried the intent to do a legally significant act, the hallmark of a signature.

Another important aspect of this definition lies in the necessity that the electronic signature be linked or logically associated with the record. In the paper world, it is assumed that the symbol adopted by a party is attached to or located somewhere in the same paper that is intended to be authenticated, e.g., an allonge firmly attached to a promissory note, or the classic signature at the end of a long contract. These tangible manifestations do not exist in the electronic environment, and accordingly, this definition expressly provides that the symbol must in some way be linked to, or connected with, the electronic record being signed. This linkage is consistent with the regulations promulgated by the Food and Drug Administration. 21 CFR Part 11 (March 20, 1997).

A digital signature using public key encryption technology would qualify as an electronic signature, as would the mere inclusion of one's name as a part of an e-mail message — so long as in each case the signer executed or adopted the symbol with the intent to sign.

8. **"Governmental agency."** This definition is important in the context of optional Sections 17-19.

9. **"Information processing system."** This definition is consistent with the UNCITRAL Model Law on Electronic Commerce. The term includes computers and other information systems. It is principally used in Section 15 [G.S. 66-325] in connection with the sending and receiving of information. In that context, the key aspect is that the information enter a system from which a person can access it.

10. **"Record."** This is a standard definition designed to embrace all means of communicating or storing information except human memory. It includes any method for storing or communicating information, including "writings." A record need not be indestructible or permanent, but the term does not include oral or other communications which are not stored or preserved by some means. Information that has not been retained other than through human memory does not qualify as a record. As in the case of the terms "writing" or "written," the term "record" does not establish the purposes, permitted uses or legal effect which a record may have under any particular provision of substantive law. ABA Report on Use of the Term "Record," October 1, 1996.

11. **"Security procedure."** A security procedure may be applied to verify an electronic signature, verify the identity of the sender, or assure the informational integrity of an electronic record. The definition does not identify any particular technology. This permits the use of procedures which the parties select or which are established by law. It permits the greatest flexibility among the parties and allows for future technological development.

The definition in this Act is broad and is used to illustrate one way of establishing attribution or content integrity of an electronic record or signature. The use of a security procedure is not accorded operative legal effect, through the use of presumptions or otherwise, by this Act. In this Act, the use of security procedures is simply one method for proving the source or content of an electronic record or signature.

A security procedure may be technologically very sophisticated, such as an asymetric cryptographic system. At the other extreme the security procedure may be as simple as a telephone call to confirm the identity of the sender through another channel of communication. It may include the use of a mother's maiden name or a personal identification number (PIN). Each of these examples is a method for confirming the identity of a person or accuracy of a message.

12. **"Transaction."** The definition has been limited to actions between people taken in the context of business, commercial or governmental activities. The term includes all interactions between people for business, commercial, including specifically consumer, or governmental purposes. However, the term does not include unilateral or non-transactional actions. As such it provides a structural limitation on the Scope of the Act as stated in the next section.

It is essential that the term commerce and business be understood and construed broadly to include commercial and business transactions involving individuals who may qualify as "consumers" under other applicable law. If Alice and Bob agree to the sale of Alice's car to Bob for $2000 using an internet auction site, that transaction is fully covered by this Act. Even if Alice and Bob each qualify as typical "consumers," under other applicable law, their interaction is a transaction in commerce. Accordingly their actions would be related to commercial affairs, and fully qualify as a transaction governed by this Act.

Other transaction types include:

1. A single purchase by an individual from a retail merchant, which may be accomplished by

an order from a printed catalog sent by facsimile, or by exchange of electronic mail.

2. Recurring orders on a weekly or monthly basis between large companies which have entered into a master trading partner agreement to govern the methods and manner of their transaction parameters.

3. A purchase by an individual from an online internet retail vendor. Such an arrangement may develop into an ongoing series of individual purchases, with security procedures and the like, as a part of doing ongoing business.

4. The closing of a business purchase transaction via facsimile transmission of documents or even electronic mail. In such a transaction, all parties may participate through electronic conferencing technologies. At the appointed time all electronic records are executed electronically and transmitted to the other party. In such a case, the electronic records and electronic signatures are validated under this Act, obviating the need for "in person" closings.

A transaction must include interaction between two or more persons. Consequently, to the extent that the execution of a will, trust, or a health care power of attorney or similar health care designation does not involve another person and is a unilateral act, it would not be covered by this Act because not occurring as a part of a transaction as defined in this Act. However, this Act *does* apply to all electronic records and signatures *related* to a transaction, and so does cover, for example, internal auditing and accounting records related to a transaction.

§ 66-313. Scope.

(a) Except as otherwise provided in subsections (b) and (c) of this section, this Article applies to electronic records and electronic signatures relating to a transaction.

(b) This Article does not apply to a transaction to the extent it is governed by:

(1) A law governing the creation and execution of wills, codicils, or testamentary trusts.

(2) Chapter 25 of the General Statutes other than G.S. 25-1-107 and G.S. 25-1-206, Article 2, and Article 2A.

(3) Article 11A of Chapter 66 of the General Statutes.

(c) This Article applies to an electronic record or electronic signature otherwise excluded from the application of this Article under subsection (b) of this section to the extent it is governed by a law other than those specified in subsection (b) of this section.

(d) A transaction subject to this Article is also subject to other applicable substantive law. (2000-152, s. 1.)

OFFICIAL COMMENT

1. The Scope of this Act is inherently limited by the fact that it only applies to transactions related to business, commercial (including consumer) and governmental matters. Consequently, transactions with no relation to business, commercial or governmental transactions would not be subject to this Act. Unilaterally generated electronic records and signatures which are not part of a transaction also are not covered by this Act. See Section 2 [G.S. 66-312], Comment 12.

2. This act affects the medium in which information, records and signatures may be presented and retained under current legal requirements. While this Act covers all electronic records and signatures which are used in a business, commercial (including consumer) or governmental transaction, the operative provisions of the act relate to requirements for writings and signatures under other laws. Accordingly, the exclusions in subsection (b) focus on those legal rules imposing certain writing and signature requirements which will **not** be affected by this act.

3. The exclusions listed in subsection (b) provide clarity and certainty regarding the laws which are and are not affected by this Act. This section provides that transactions subject to specific laws are unaffected by this Act and leaves the balance subject to this Act.

4. Paragraph (1) excludes wills, codicils and testamentary trusts. This exclusion is largely salutary given the unilateral context in which such records are generally created and the unlikely use of such records in a transaction as defined in this Act (i.e., actions taken by two or more persons in the context of business, commercial or governmental affairs). Paragraph (2) excludes all of the Uniform Commercial Code other than UCC Sections 1-107 and 1-206, and Articles 2 and 2A. This Act does not apply to the excluded UCC articles, whether in "current" or

"revised" form. The Act does apply to UCC Articles 2 and 2A and to UCC Sections 1-107 and 1-206.

5. Articles 3, 4 and 4A of the UCC impact payment systems and have specifically been removed from the coverage of this Act. The check collection and electronic fund transfer systems governed by Articles 3, 4 and 4A involve systems and relationships involving numerous parties beyond the parties to the underlying contract. The impact of validating electronic media in such systems involves considerations beyond the scope of this Act. Articles 5, 8 and 9 have been excluded because the revision process relating to those Articles included significant consideration of electronic practices. Paragraph 4 provides for exclusion from this Act of the Uniform Computer Information Transactions Act (UCITA) because the drafting process of that Act also included significant consideration of electronic contracting provisions.

6. The very limited application of this Act to Transferable Records in Section 16 [G.S. 66-326] does not affect payment systems, and the Section is designed to apply to a transaction through express agreement of the parties. The exclusion of Articles 3 and 4 will not affect the Act's coverage of Transferable Records. Section 16 [G.S. 66-326] is designed to allow for the development of systems which will provide "control" as defined in Section 16 [G.S. 66-326]. Such control is necessary as a substitute for the idea of possession which undergirds negotiable instrument law. The technology has yet to be developed which will allow for the possession of a unique electronic token embodying the rights associated with a negotiable promissory note. Section 16's [G.S. 66-326's] concept of control is intended as a substitute for possession.

The provisions in Section 16 [G.S. 66-326] operate as free standing rules, establishing the rights of parties using Transferable Records *under this Act.* The references in Section 16 [G.S. 66-326] to UCC Section 3-302, 7-501 and 9-308 (R9-330(d)) are designed to incorporate the substance of those provisions into this act for the limited purposes noted in section 16(c) [G.S. 66-326(c)]. Accordingly, an electronic record which is also a Transferable Record, would not be used for purposes of a transaction governed by Articles 3, 4, or 9, but would be an electronic record used for purposes of a transaction governed by Section 16 [G.S. 66-326]. However, it is important to remember that those UCC Articles will still apply to the transferable record in their own right. Accordingly any other substantive requirements, e.g., method and manner of perfection under Article 9, must be complied with under those other laws. See Comments to Section 16 [G.S. 66-326].

7. This Act does apply, *in toto*, to transactions under unrevised Articles 2 and 2A. There is every reason to validate electronic contracting in these situations. Sale and lease transactions do not implicate broad systems beyond the parties to the underlying transaction, such as are present in check collection and electronic funds transfers. Further sales and leases generally do not have a far reaching effect on the rights of parties beyond the contracting parties, such as exists in the secured transactions system. Finally, it is in the area of sales, licenses and leases that electronic commerce is occurring to its greatest extent today. To exclude these transactions would largely gut the purpose of this Act.

In the event that Articles 2 and 2A are revised and adopted in the future, UETA will only apply to the extent provided in those Acts.

8. An electronic record/signature may be used for purposes of more than one legal requirement, or may be covered by more than one law. Consequently, it is important to make clear, despite any apparent redundancy, in subsection (c) that an electronic record used for purposes of a law which is not affected by this act under subsection (b) may nonetheless be used and validated for purposes of other laws not excluded by subsection (b). For example, this Act does not apply to an electronic record of a check when used for purposes of a transaction governed by Article 4 of the Uniform Commercial Code, i.e., the Act does not validate so-called electronic checks. However, for purposes of check retention statutes, the same electronic record of the check is covered by this Act, so that retention of an electronic image/record of a check will satisfy such retention statutes, so long as the requirements of Section 12 [G.S. 66-322] are fulfilled.

In another context, subsection (c) would operate to allow this Act to apply to what would appear to be an excluded transaction under subsection (b). For example, Article 9 of the Uniform Commercial Code applies generally to any transaction that creates a security interest in personal property. However, Article 9 excludes landlord's liens. Accordingly, although this Act excludes from its application transactions subject to Article 9, this Act would apply to the creation of a landlord lien if the law otherwise applicable to landlord's liens did not provide otherwise, because the landlord's lien transaction is excluded from Article 9.

9. Additional exclusions under subparagraph (b)(4) should be limited to laws which govern electronic records and signatures which may be used in transactions as defined in Section 2(16) [G.S. 66-312(16)]. Records used unilaterally, or which do not relate to business, commercial (including consumer), or governmental affairs are not governed by this Act in any event, and exclusion of laws relating to such records may create unintended inferences about whether

other records and signatures are covered by this Act.

It is also important that additional exclusions, if any, be incorporated under subsection (b)(4). As noted in Comment 8 above, an electronic record used in a transaction excluded under subsection (b), e.g., a check used to pay one's taxes, will nonetheless be validated for purposes of other, non-excluded laws under subsection (c), e.g., the check when used as proof of payment. It is critical that additional exclusions, if any, be incorporated into subsection (b) so that the salutary effect of subsection (c) apply to validate those records in other, non-excluded transactions. While a legislature may determine that a particular notice, such as a utility shutoff notice, be provided to a person in writing on paper, it is difficult to see why the utility should not be entitled to use electronic media for storage and evidentiary purposes.

§ 66-314. Prospective application.

This Article applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after the effective date of this Article. (2000-152, s. 1.)

OFFICIAL COMMENT

This section makes clear that the Act only applies to validate electronic records and signatures which arise subsequent to the effective date of the Act. Whether electronic records and electronic signatures arising before the effective date of this Act are valid is left to other law.

§ 66-315. Use of electronic records and electronic signatures; variation by agreement.

(a) This Article does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(b) This Article applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

(c) A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. The right granted by this subsection may not be waived by agreement.

(d) Except as otherwise provided in this Article, the effect of any of its provisions may be varied by agreement. The presence in certain provisions of this Article of the words "unless otherwise agreed", or words of similar import, does not imply that the effect of other provisions may not be varied by agreement.

(e) Whether an electronic record or electronic signature has legal consequences is determined by this Article and other applicable law. (2000-152, s. 1.)

OFFICIAL COMMENT

This Section limits the applicability of this Act to transactions which parties have agreed to conduct electronically. Broad interpretation of the term agreement is necessary to assure that this Act has the widest possible application consistent with its purpose of removing barriers to electronic commerce.

1. This section makes clear that this Act is intended to facilitate the use of electronic means, but does not require the use of electronic records and signatures. This fundamental principle is set forth in subsection (a) and elaborated by subsections (b) and (c), which require an intention to conduct transactions electronically and preserve the right of a party to refuse to use electronics in any subsequent transaction.

2. The paradigm of this Act is two willing parties doing transactions electronically. It is therefore appropriate that the Act is voluntary and preserves the greatest possible party autonomy to refuse electronic transactions. The requirement that party agreement be found from all the surrounding circumstances is a limitation on the scope of this Act.

3. If this Act is to serve to facilitate electronic transactions, it must be applicable under circumstances not rising to a full fledged contract

to use electronics. While absolute certainty can be accomplished by obtaining an explicit contract before relying on electronic transactions, such an explicit contract should not be necessary before one may feel safe in conducting transactions electronically. Indeed, such a requirement would itself be an unreasonable barrier to electronic commerce, at odds with the fundamental purpose of this Act. Accordingly, the requisite agreement, express or implied, must be determined from all available circumstances and evidence.

4. Subsection (b) provides that the Act applies to transactions in which the parties have agreed to conduct the transaction electronically. In this context it is essential that the parties' actions and words be broadly construed in determining whether the requisite agreement exists. Accordingly, the Act expressly provides that the party's agreement is to be found from all circumstances, including the parties' conduct. The critical element is the intent of a party to conduct a transaction electronically. Once that intent is established, this Act applies. See Restatement 2d Contracts, Sections 2, 3 and 19.

Examples of circumstances from which it may be found that parties have reached an agreement to conduct transactions electronically include the following:

A. Automaker and supplier enter into a Trading Partner Agreement setting forth the terms, conditions and methods for the conduct of business between them electronically.

B. Joe gives out his business card with his business e-mail address. It may be reasonable, under the circumstances, for a recipient of the card to infer that Joe has agreed to communicate electronically for business purposes. However, in the absence of additional facts, it would not necessarily be reasonable to infer Joe's agreement to communicate electronically for purposes outside the scope of the business indicated by use of the business card.

C. Sally may have several e-mail addresses — home, main office, office of a non-profit organization on whose board Sally sits. In each case, it may be reasonable to infer that Sally is willing to communicate electronically with respect to business related to the business/purpose associated with the respective e-mail addresses. However, depending on the circumstances, it may not be reasonable to communicate with Sally for purposes other than those related to the purpose for which she maintained a particular e-mail account.

D. Among the circumstances to be considered in finding an agreement would be the time when the assent occurred relative to the timing of the use of electronic communications. If one order books from an on-line vendor, such as Bookseller.com the intention to conduct that transaction and to receive any correspondence related to the transaction, electronically can be inferred from the conduct. Accordingly, as to information related to that transaction it is reasonable for Bookseller to deal with the individual electronically.

The examples noted above are intended to focus the inquiry on the party's agreement to conduct a transaction electronically. Similarly, if two people are at a meeting and one tells the other to send an e-mail to confirm a transaction — the requisite agreement under subsection (b) would exist. In each case, the use of a business card, statement at a meeting, or other evidence of willingness to conduct a transaction electronically must be viewed in light of all the surrounding circumstances with a view toward broad validation of electronic transactions.

5. Just as circumstances may indicate the existence of agreement, express or implied from surrounding circumstances, circumstances may also demonstrate the absence of true agreement. For example:

A. If Automaker, Inc. were to issue a recall of automobiles via its Internet website, it would not be able to rely on this Act to validate that notice in the case of a person who never logged on to the website, or indeed, had no ability to do so, notwithstanding a clause in a paper purchase contract by which the buyer agreed to receive such notices in such a manner.

B. Buyer executes a standard form contract in which an agreement to receive all notices electronically in [is] set forth on page 3 in the midst of other fine print. Buyer has never communicated with Seller electronically, and has not provided any other information in the contract to suggest a willingness to deal electronically. Not only is it unlikely that any but the most formalistic of agreements may be found, but nothing in this Act prevents courts from policing such form contracts under common law doctrines relating to contract formation, unconscionability and the like.

6. Subsection (c) has been added to make clear the ability of a party to refuse to conduct a transaction electronically, even if the person has conducted transactions electronically in the past. The effectiveness of a party's refusal to conduct a transaction electronically will be determined under other applicable law in light of all surrounding circumstances. Such circumstances must include an assessment of the transaction involved.

A party's right to decline to act electronically under a specific contract, on the ground that each action under that contract amounts to a separate "transaction," must be considered in light of the purpose of the contract and the action to be taken electronically. For example, under a contract for the purchase of goods, the giving and receipt of notices electronically, as provided in the contract, should not be viewed as discreet transactions. Rather such notices

amount to separate actions which are part of the "transaction" of purchase evidenced by the contract. Allowing one party to require a change of medium in the middle of the transaction evidenced by that contract is not the purpose of this subsection. Rather this subsection is intended to preserve the party's right to conduct the next purchase in a non-electronic medium.

7. Subsection (e) is an essential provision in the overall scheme of this Act. While this Act validates and effectuates electronic records and electronic signatures, the legal effect of such records and signatures is left to existing substantive law outside this Act except in very narrow circumstances. See, e.g., Section 16 [G.S. 66-326]. Even when this Act operates to validate records and signatures in an electronic medium, it expressly preserves the substantive rules of other law applicable to such records. See, e.g., Section 11 [G.S. 66-321].

For example, beyond validation of records, signatures and contracts based on the medium used, Sections 7 (a) and (b) [G.S. 66-317(a) and (b)] should not be interpreted as establishing the legal effectiveness of any given record, signature or contract. Where a rule of law requires that the record contain minimum substantive content, the legal effect of such a record will depend on whether the record meets the substantive requirements of other applicable law.

Section 8 [G.S. 66-318] expressly preserves a number of legal requirements in currently existing law relating to the presentation of information in writing. Although this Act now would allow such information to be presented in an electronic record, Section 8 [G.S. 66-318] provides that the other substantive requirements of law must be satisfied in the electronic medium as well.

§ 66-316. Construction and application.

This Article must be construed and applied:

(1) To facilitate electronic transactions consistent with other applicable law;

(2) To be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices; and

(3) To effectuate its general purpose to make uniform the law with respect to the subject of this act among states enacting it. (2000-152, s. 1.)

OFFICIAL COMMENT

1. The purposes and policies of this Act are

a) to facilitate and promote commerce and governmental transactions by validating and authorizing the use of electronic records and electronic signatures;

b) to eliminate barriers to electronic commerce and governmental transactions resulting from uncertainties relating to writing and signature requirements;

c) to simplify, clarify and modernize the law governing commerce and governmental transactions through the use of electronic means;

d) to permit the continued expansion of commercial and governmental electronic practices through custom, usage and agreement of the parties;

e) to promote uniformity of the law among the states (and worldwide) relating to the use of electronic and similar technological means of effecting and performing commercial and governmental transactions;

f) to promote public confidence in the validity, integrity and reliability of electronic commerce and governmental transactions; and

g) to promote the development of the legal and business infrastructure necessary to implement electronic commerce and governmental transactions.

2. This Act has been drafted to permit flexible application consistent with its purpose to validate electronic transactions. The provisions of this Act validating and effectuating the employ of electronic media allow the courts to apply them to new and unforeseen technologies and practices. As time progresses, it is anticipated that what is new and unforeseen today will be commonplace tomorrow. Accordingly, this legislation is intended to set a framework for the validation of media which may be developed in the future and which demonstrate the same qualities as the electronic media contemplated and validated under this Act.

§ 66-317. Legal recognition of electronic records, electronic signatures, and electronic contracts.

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law provided it complies with the provisions of this Article.

(d) If a law requires a signature, an electronic signature satisfies the law provided it complies with the provisions of this Article. (2000-152, s. 1.)

OFFICIAL COMMENT

1. This section sets forth the fundamental premise of this Act: namely, that the medium in which a record, signature, or contract is created, presented or retained does not affect its legal significance. Subsections (a) and (b) are designed to eliminate the single element of medium as a reason to deny effect or enforceability to a record, signature, or contract. The fact that the information is set forth in an electronic, as opposed to paper, record is irrelevant.

2. Under Restatement 2d Contracts Section 8, a contract may have legal effect and yet be unenforceable. Indeed, one circumstance where a record or contract may have effect but be unenforceable is in the context of the Statute of Frauds. Though a contract may be unenforceable, the records may have collateral effects, as in the case of a buyer that insures goods purchased under a contract unenforceable under the Statute of Frauds. The insurance company may not deny a claim on the ground that the buyer is not the owner, though the buyer may have no direct remedy against seller for failure to deliver. See Restatement 2d Contracts, Section 8, Illustration 4.

While this section would validate an electronic record for purposes of a statute of frauds, if an agreement to conduct the transaction electronically cannot reasonably be found (See Section 5(b)) [G.S. 66-315(b)] then a necessary predicate to the applicability of this Act would be absent and this Act would not validate the electronic record. Whether the electronic record might be valid under other law is not addressed by this Act.

3. Subsections (c) and (d) provide the positive assertion that electronic records and signatures satisfy legal requirements for writings and signatures. The provisions are limited to requirements in laws that a record be in writing or be signed. This section does not address requirements imposed by other law in addition to requirements for writings and signatures See, e.g., Section 8 [G.S. 66-318].

Subsections (c and d) are particularized applications of subsection (a). The purpose is to validate and effectuate electronic records and signatures as the equivalent of writings, subject to all of the rules applicable to the efficacy of a writing, except as such other rules are modified by the more specific provisions of this Act.

Illustration 1: A sends the following e-mail to B: "I hereby offer to buy widgets from you, delivery next Tuesday. /s/A." B responds with the following e-mail: "I accept your offer to buy widgets for delivery next Tuesday. /s/B." The e-mails may not be denied effect solely because they are electronic. In addition, the e-mails do qualify as records under the Statute of Frauds. However, because there is no quantity stated in either record, the parties' agreement would be unenforceable under existing UCC Section 2-201(1).

Illustration 2: A sends the following e-mail to B: "I hereby offer to buy 100 widgets for $1000, delivery next Tuesday. /s/A." B responds with the following e-mail: "I accept your offer to purchase 100 widgets for $1000, delivery next Tuesday. /s/B." In this case the analysis is the same as in Illustration 1 except that here the records otherwise satisfy the requirements of UCC Section 2-201(1). The transaction may not be denied legal effect solely because there is not a pen and ink "writing" or "signature".

4. Section 8 [G.S. 66-318] addresses additional requirements imposed by other law which may affect the legal effect or enforceability of an electronic record in a particular case. For example, in section 8(a) [G.S. 66-318(a)] the legal requirement addressed is the *provision of information* in writing. The section then sets forth the standards to be applied in determining whether the provision of information by an electronic record is the equivalent of the provision of information in writing. The requirements in section 8 are in addition to the bare validation that occurs under this section.

5. Under the substantive law applicable to a particular transaction within this Act, the legal effect of an electronic record may be separate from the issue of whether the record contains a signature. For example, where notice must be

given as part of a contractual obligation, the effectiveness of the notice will turn on whether the party provided the notice regardless of whether the notice was signed (See Section 15 [G.S. 66-325]). An electronic record attributed to a party under Section 9 [G.S. 66-319] and complying with the requirements of Section 15 [G.S. 66-325], would suffice in that case, notwithstanding that it may not contain an electronic signature.

§ 66-318. Provision of information in writing; presentation of records.

(a) If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record.

(b) If a law other than this Article requires a record (i) to be posted or displayed in a certain manner, (ii) to be sent, communicated, or transmitted by a specified method, or (iii) to contain information that is formatted in a certain manner, the following rules apply:

(1) The record must be posted or displayed in the manner specified in the other law.

(2) Except as otherwise provided in subdivision (d)(2) of this section, the record must be sent, communicated, or transmitted by the method specified in the other law.

(3) The record must contain the information formatted in the manner specified in the other law.

(c) If a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient.

(d) The requirements of this section may not be varied by agreement, but:

(1) To the extent a law other than this act requires information to be provided, sent, or delivered in writing, but permits that requirement to be varied by agreement, the requirement under subsection (a) of this section that the information be in the form of an electronic record capable of retention may also be varied by agreement; and

(2) A requirement under a law other than this Article to send, communicate, or transmit a record by regular United States mail may be varied by agreement to the extent permitted by the other law. (2000-152, s. 1.)

OFFICIAL COMMENT

1. This section is a savings provision, designed to assure, consistent with the fundamental purpose of this act, that otherwise applicable substantive law will not be overridden by this Act. The section makes clear that while the pen and ink provisions of such other law may be satisfied electronically, nothing in this Act vitiates the other requirements of such laws. The section addresses a number of issues related to disclosures and notice provisions in other laws.

2. This section is independent of the prior section. Section 7 [G.S. 66-317] refers to legal requirements for a writing. This section refers to legal requirements for the provision of information in writing or relating to the method or manner of presentation or delivery of information. The section addresses more specific legal requirements of other laws, provides standards for satisfying the more particular legal requirements, and defers to other law for satisfaction of requirements under those laws.

3. Under subsection (a), to meet a requirement of other law that information be provided in writing, the recipient of an electronic record of the information must be able to get to the electronic record and read it, and must have the ability to get back to the information in some way at a later date. Accordingly, the section requires that the electronic record be capable of retention for later review.

The section specifically provides that any

inhibition on retention imposed by the sender or the sender's system will preclude satisfaction of this section. Use of technological means now existing or later developed which prevents the recipient from retaining a copy the information would result in a determination that information has not been provided under subsection (a). The policies underlying laws requiring the provision of information in writing warrant the imposition of an additional burden on the sender to make the information available in a manner which will permit subsequent reference. A difficulty does exist for senders of information because of the disparate systems of their recipients and the capabilities of those systems. However, in order to satisfy the *legal requirement* of other law to make information available, the sender must assure that the recipient receives an can retain the information. However, it is left for the courts to determine whether the sender has complied with this section if evidence demonstrates that it is the recipient's system which precludes subsequent reference to the information.

4. Subsection (b) is a savings provision for laws which provide for the means of delivering or displaying information and which are not affected by the Act. For example, if a law requires delivery of notice by first class US mail, that means of delivery would not be affected by this Act. The information to be delivered may be provided on a disc, i.e., in electronic form, but the particular means of delivery must still be via the US postal service. Display, delivery and formatting requirements will continue to be applicable to electronic records and signatures. If those legal requirements can be satisfied in an electronic medium, e.g., the information can be presented in the equivalent of 20 point bold type as required by other law, this Act will validate the use of the medium, leaving to the other applicable law the question of whether the particular electronic record meets the other legal requirements. If a law requires that particular records be delivered together, or attached to other records, this Act does not preclude the delivery of the records together in an electronic communication, so long as the records are connected or associated with each other in a way determined to satisfy the other law.

5. Subsection (c) provides incentives for senders of information to use systems which will not inhibit the other party from retaining the information. However, there are circumstances where a party providing certain information may wish to inhibit retention in order to protect intellectual property rights or prevent the other party from retaining confidential information about the sender. In such cases inhibition is understandable, but if the sender wishes to enforce the record in which the information is contained, the sender may not inhibit its retention by the recipient. Unlike subsection (a), subsection (c) applies in all transactions and simply provides for unenforceability against the recipient. Subsection (a) applies only where another law imposes the writing requirement, and subsection (a) imposes a broader responsibility on the sender to assure retention capability by the recipient.

6. The protective purposes of this section justify the non-waivability provided by subsection (d). However, since the requirements for sending and formatting and the like are imposed by other law, to the extent other law permits waiver of such protections, there is no justification for imposing a more severe burden in an electronic environment.

§ 66-319. Attribution and effect of electronic record and electronic signature.

(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under subsection (a) of this section is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law. (2000-152, s. 1.)

OFFICIAL COMMENT

1. Under subsection (a), so long as the electronic record or electronic signature resulted from a person's action it will be attributed to that person — the legal effect of that attribution is addressed in subsection (b). This section does not alter existing rules of law regarding attribution. The section assures that such rules will be applied in the electronic environment. A

person's actions include actions taken by human agents of the person, as well as actions taken by an electronic agent, i.e., the tool, of the person. Although the rule may appear to state the obvious, it assures that the record or signature is not ascribed to a machine, as opposed to the person operating or programing the machine.

In each of the following cases, both the electronic record and electronic signature would be attributable to a person under subsection (a):

A. The person types his/her name as part of an e-mail purchase order;

B. The person's employee, pursuant to authority, types the person's name as part of an e-mail purchase order;

C. The person's computer, programmed to order goods upon receipt of inventory information within particular parameters, issues a purchase order which includes the person's name, or other identifying information, as part of the order.

In each of the above cases, law other than this Act would ascribe both the signature and the action to the person if done in a paper medium. Subsection (a) expressly provides that the same result will occur when an electronic medium is used.

2. Nothing in this section affects the use of a signature as a device for attributing a record to a person. Indeed, a signature is often the primary method for attributing a record to a person. In the foregoing examples, once the electronic signature is attributed to the person, the electronic record would also be attributed to the person, unless the person established fraud, forgery, or other invalidating cause. However, a signature is not the only method for attribution.

3. The use of facsimile transmissions provides a number of examples of attribution using information other than a signature. A facsimile may be attributed to a person because of the information printed across the top of the page that indicates the machine from which it was sent. Similarly, the transmission may contain a letterhead which identifies the sender. Some cases have held that the letterhead actually constituted a signature because it was a symbol adopted by the sender with intent to authenticate the facsimile. However, the signature determination resulted from the necessary finding of intention in that case. Other cases have found facsimile letterheads NOT to be signatures because the requisite intention was not present. The critical point is that with or without a signature, information within the electronic record may well suffice to provide the facts resulting in attribution of an electronic record to a particular party.

In the context of attribution of records, normally the content of the record will provide the necessary information for a finding of attribution. It is also possible that an established course of dealing between parties may result in a finding of attribution. Just as with a paper record, evidence of forgery or counterfeiting may be introduced to rebut the evidence of attribution.

4. Certain information may be present in an electronic environment that does not appear to attribute but which clearly links a person to a particular record. Numerical codes, personal identification numbers, public and private key combinations, all serve to establish the party to whom an electronic record should be attributed. Of course security procedures will be another piece of evidence available to establish attribution.

The inclusion of a specific reference to security procedures as a means of proving attribution is salutary because of the unique importance of security procedures in the electronic environment. In certain processes, a technical and technological security procedure may be the best way to convince a trier of fact that a particular electronic record or signature was that of a particular person. In certain circumstances, the use of a security procedure to establish that the record, and related signature came from the person's business might be necessary to overcome a claim that a hacker intervened. The reference to security procedures is not intended to suggest that other forms of proof of attribution should be accorded less persuasive effect. It is also important to recall that the particular strength of a given procedure does not affect the procedure's status as a security procedure, but only affects the weight to be accorded the evidence of the security procedure as tending to establish attribution.

5. This section does apply in determining the effect of a "click-through" transaction. A "click-through" transaction involves a process which, if executed with an intent to "sign," will be an electronic signature directly covered. See definition of Electronic Signature. In the context of an anonymous "click-through" issues of proof will be paramount. This section will be relevant to establish that the resulting electronic record is attributable to a particular person upon the requisite proof, including security procedures which may track the source of the click-through.

6. Once it is established that a record or signature is attributable to a particular party, the effect of a record or signature must be determined in light of the context and surrounding circumstances, including the parties' agreement, if any. Also informing the effect of any attribution will be other legal requirements considered in light of the context. Subsection (b) addresses the effect of the record or signature once attributed to a person.

§ 66-320. Effect of change or error.

If a change or error in an electronic record occurs in a transmission between parties to a transaction, the following rules apply:

(1) If the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure, but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record.

(2) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if, at the time the individual learns of the error, the individual:

a. Promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person;

b. Takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record; and

c. Has not used or received any benefit or value from the consideration, if any, received from the other person.

(3) If neither subdivision (1) nor subdivision (2) of this section applies, the change or error has the effect provided by other law, including the law of mistake, and the parties' contract, if any.

(4) Subdivisions (2) and (3) of this section may not be varied by agreement. (2000-152, s. 1.)

OFFICIAL COMMENT

1. This section is limited to changes and errors occurring in transmissions between parties — whether person-person (paragraph 1) or in an automated transaction involving an individual and a machine (paragraphs 1 and 2). The section focuses on the effect of changes and errors occurring when records are exchanged between parties. In cases where changes and errors occur in contexts other than transmission, the law of mistake is expressly made applicable to resolve the conflict.

The section covers both changes and errors. For example, if Buyer sends a message to Seller ordering 100 widgets, but Buyer's information processing system changes the order to 1000 widgets, a "change" has occurred between what Buyer transmitted and what Seller received. If on the other hand, Buyer typed in 1000 intending to order only 100, but sent the message before noting the mistake, an error would have occurred which would also be covered by this section.

2. Paragraph (1) deals with any transmission where the parties have agreed to use a security procedure to detect changes and errors. It operates against the non-conforming party, i.e., the party in the best position to have avoided the change or error, regardless of whether that person is the sender or recipient. The source of the error/change is not indicated, and so both human and machine errors/changes would be covered. With respect to errors or changes that would not be detected by the security procedure even if applied, the parties are left to the general law of mistake to resolve the dispute.

3. Paragraph (1) applies only in the situation where a security procedure would detect the error/change but one party fails to use the procedure and does not detect the error/change. In such a case, consistent with the law of mistake generally, the record is made avoidable at the instance of the party who took all available steps to avoid the mistake. See Restatement 2d Contracts Section 152-154.

Making the erroneous record avoidable by the conforming party is consistent with Sections 153 and 154 of the Restatement 2d Contracts because the non-conforming party was in the best position to avoid the problem, and would bear the risk of mistake. Such a case would constitute mistake by one party. The mistaken party (the conforming party) would be entitled to avoid any resulting contract under Section 153 because s/he does not have the risk of mistake and the non-conforming party had reason to know of the mistake.

4. As with paragraph (1), paragraph (2), when applicable, allows the mistaken party to avoid the effect of the erroneous electronic record. However, the subsection is limited to

human error on the part of an individual when dealing with the electronic agent of the other party. In a transaction between individuals there is a greater ability to correct the error before parties have acted on it. However, when an individual makes an error while dealing with the electronic agent of the other party, it may not be possible to correct the error before the other party has shipped or taken other action in reliance on the erroneous record.

Paragraph (2) applies only to errors made by individuals. If the error results from the electronic agent it would constitute a system error. In such a case the effect of that error would be resolved under paragraph (1) if applicable, otherwise under paragraph (3) and the general law of mistake.

5. The party acting through the electronic agent/machine is given incentives by this section to build in safeguards which enable the individual to prevent the sending of an erroneous record, or correct the error once sent. For example, the electronic agent may be programed to provide a "confirmation screen" to the individual setting forth all the information the individual initially approved. This would provide the individual with the ability to prevent the erroneous record from ever being sent. Similarly, the electronic agent might receive the record sent by the individual and then send back a confirmation which the individual must again accept before the transaction is completed. This would allow for correction of an erroneous record. In either case, the electronic agent would "provide an opportunity for prevention or correction of the error," *and the subsection would not apply.* Rather, the effect of any error is governed by other law.

6. Paragraph (2) also places additional requirements on the mistaken individual before the paragraph may be invoked to avoid an erroneous electronic record. The individual must take prompt action to advise the other party of the error and the fact that the individual did not intend the electronic record. Whether the action is prompt must be determined from all the circumstances including the individual's ability to contact the other party. The individual should advise the other party both of the error and of the lack of intention to be bound (i.e., avoidance) by the electronic record received. Since this provision allows avoidance by the mistaken party, that party should also be required to expressly note that it is seeking to avoid the electronic record, i.e., lacked the intention to be bound.

Second, restitution is normally required in order to undo a mistaken transaction. Accordingly, the individual must also return or destroy any consideration received, adhering to instructions from the other party in any case. This is to assure that the other party retains control over the consideration sent in error.

Finally, and most importantly in regard to transactions involving intermediaries which may be harmed because transactions cannot be unwound, the individual cannot have received any benefit from the transaction. This section prevents a party from unwinding a transaction after the delivery of value and consideration which cannot be returned or destroyed. For example, if the consideration received is information, it may not be possible to avoid the benefit conferred. While the information itself could be returned, mere access to the information, or the ability to redistribute the information would constitute a benefit precluding the mistaken party from unwinding the transaction. It may also occur that the mistaken party receives consideration which changes in value between the time of receipt and the first opportunity to return. In such a case restitution cannot be made adequately, and the transaction would not be avoidable. In each of the foregoing cases, under subparagraph (2)(c), the individual would have received the benefit of the consideration and would NOT be able to avoid the erroneous electronic record under this section.

7. In all cases not covered by paragraphs (1) or (2), where error or change to a record occur, the parties contract, or other law, specifically including the law of mistake, applies to resolve any dispute. In the event that the parties' contract and other law would achieve different results, the construction of the parties' contract is left to the other law. If the error occurs in the context of record retention, Section 12 [G.S. 66-322] will apply. In that case the standard is one of accuracy and retrievability of the information.

8. Paragraph (4) makes the error correction provision in paragraph (2) and the application of the law of mistake in paragraph (3) nonvariable. Paragraph (2) provides incentives for parties using electronic agents to establish safeguards for individuals dealing with them. It also avoids unjustified windfalls to the individual by erecting stringent requirements before the individual may exercise the right of avoidance under the paragraph. Therefore, there is no reason to permit parties to avoid the paragraph by agreement. Rather, parties should satisfy the paragraph's requirements.

§ 66-321. Notarization and acknowledgment.

If a law requires a signature or record relating to a transaction to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record. (2000-152, s. 1.)

OFFICIAL COMMENT

This Section permits a notary public and other authorized officers to act electronically, effectively removing the stamp/seal requirements. However, the section does not eliminate any of the other requirements of notarial laws, and consistent with the entire thrust of this Act, simply allows the signing and information to be accomplished in an electronic medium.

For example, Buyer wishes to send a notarized Real Estate Purchase Agreement to Seller via e-mail. The notary must appear in the room with the Buyer, satisfy him/herself as to the identity of the Buyer, and swear to that identification. All that activity must be reflected as part of the electronic Purchase Agreement and the notary's electronic signature must appear as a part of the electronic real estate purchase contract.

As another example, Buyer seeks to send Seller an affidavit averring defects in the products received. A court clerk, authorized under state law to administer oaths, is present with Buyer in a room. The Clerk administers the oath and includes the statement of the oath, together with any other requisite information, in the electronic record to be sent to the Seller. Upon administering the oath and witnessing the application of Buyer's electronic signature to the electronic record, the Clerk also applies his electronic signature to the electronic record. So long as all substantive requirements of other applicable law have been fulfilled and are reflected in the electronic record, the sworn electronic record of Buyer is as effective as if it had been transcribed on paper.

§ 66-322. Retention of electronic records; originals.

(a) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which:

(1) Accurately reflects the information set forth in the record at the time it was first generated in its final form as an electronic record or otherwise; and

(2) Remains accessible for later reference.

(b) A requirement to retain a record in accordance with subsection (a) of this section does not apply to any information the sole purpose of which is to enable the record to be sent, communicated, or received.

(c) A person may satisfy subsection (a) of this section by using the services of another person if the requirements of that subsection are satisfied.

(d) If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with subsection (a) of this section.

(e) If a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with subsection (a) of this section.

(f) A record retained as an electronic record in accordance with subsection (a) of this section satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after the effective date of this Article specifically prohibits the use of an electronic record for the specified purpose.

(g) This section does not preclude a governmental agency of this State from specifying additional requirements for the retention of a record subject to the agency's jurisdiction. (2000-152, s. 1.)

OFFICIAL COMMENT

1. This section deals with the serviceability of electronic records as retained records and originals. So long as there exists reliable assurance that the electronic record accurately reproduces the information, this section continues the theme of establishing the functional equivalence of electronic and paper-based records. This is consistent with Fed.R.Evid. 1001(3) and Unif.R.Evid. 1001(3) (1974). This section assures that information stored electronically will remain effective for all audit, evidentiary, archival and similar purposes.

2. In an electronic medium, the concept of an original document is problematic. For example, as one drafts a document on a computer the "original" is either on a disc or the hard drive to which the document has been initially saved. If one periodically saves the draft, the fact is that at times a document may be first saved to disc then to hard drive, and at others vice versa. In such a case the "original" may change from the information on the disc to the information on the hard drive. Indeed, it may be argued that the "original" exists solely in RAM and, in a sense, the original is destroyed when a "copy" is saved to a disc or to the hard drive. In any event, in the context of record retention, the concern focuses on the integrity of the information, and not with its "originality."

3. Subsection (a) requires accuracy and the ability to access at a later time. The requirement of accuracy is derived from the Uniform and Federal Rules of Evidence. The requirement of continuing accessibility addresses the issue of technology obsolescence and the need to update and migrate information to developing systems. It is not unlikely that within the span of 5-10 years (a period during which retention of much information is required) a corporation may evolve through one or more generations of technology. More to the point, this technology may be incompatible with each other necessitating the reconversion of information from one system to the other.

For example, certain operating systems from the early 1980's, e.g., memory typewriters, became obsolete with the development of personal computers. The information originally stored on the memory typewriter would need to be converted to the personal computer system in a way meeting the standards for accuracy contemplated by this section. It is also possible that the medium on which the information is stored is less stable. For example, information stored on floppy discs is generally less stable, and subject to a greater threat of disintegration, that information stored on a computer hard drive. In either case, the continuing accessibility issue must be satisfied to validate information stored by electronic means under this section.

This section permits parties to convert original written records to electronic records for retention so long as the requirements of subsection (a) are satisfied. Accordingly, in the absence of specific requirements to retain written records, written records may be destroyed once saved as electronic records satisfying the requirements of this section.

The subsection refers to the information contained in an electronic record, rather than relying on the term electronic record, as a matter of clarity that the critical aspect in retention is the information itself. What information must be retained is determined by the purpose for which the information is needed. If the addressing and pathway information regarding an e-mail is relevant, then that information should also be retained. However if it is the substance of the e-mail that is relevant, only that information need be retained. Of course, wise record retention would include all such information since what information will be relevant at a later time will not be known.

4. Subsections (b) and (c) simply make clear that certain ancillary information or the use of third parties, does not affect the serviceability of records and information retained electronically. Again, the relevance of particular information will not be known until that information is required at a subsequent time.

5. Subsection (d) continues the theme of the Act as validating electronic records as originals where the law requires retention of an original. The validation of electronic records and electronic information as originals is consistent with the Uniform Rules of Evidence. See Uniform Rules of Evidence 1001(3), 1002, 1003 and 1004.

6. Subsection (e) specifically addresses particular concerns regarding check retention statutes in many jurisdictions. A Report compiled by the Federal Reserve Bank of Boston identifies hundreds of state laws which require the retention or production of original canceled checks. Such requirements preclude banks and their customers from realizing the benefits and efficiencies related to truncation processes otherwise validated under current law. The benefits to banks and their customers from electronic check retention are effectuated by this provision.

7. Subsections (f) and (g) generally address other record retention statutes. As with check retention, all businesses and individuals may realize significant savings from electronic record retention. So long as the standards in Section 12 [G.S. 66-322] are satisfied, this section permits all parties to obtain those benefits. As always the government may require records in any medium, however, these subsections

require a governmental agency to specifically identify the types of records and requirements that will be imposed.

§ 66-323. Admissibility in evidence.

In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form. (2000-152, s. 1.)

OFFICIAL COMMENT

Like section 7 [G.S. 66-317], this Section prevents the nonrecognition of electronic records and signatures solely on the ground of the media in which information is presented.

Nothing in this section relieves a party from establishing the necessary foundation for the admission of an electronic record. See Uniform Rules of Evidence 1001(3), 1002,1003 and 1004.

§ 66-324. Automated transaction.

In an automated transaction, the following rules apply:

(1) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

(2) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.

(3) The terms of the contract are determined by the substantive law applicable to it. (2000-152, s. 1.)

OFFICIAL COMMENT

1. This section confirms that contracts can be formed by machines functioning as electronic agents for parties to a transaction. It negates any claim that lack of human intent, at the time of contract formation, prevents contract formation. When machines are involved, the requisite intention flows from the programing and use of the machine. As in other cases, these are salutary provisions consistent with the fundamental purpose of the Act to remove barriers to electronic transactions while leaving the substantive law, e.g., law of mistake, law of contract formation, unaffected to the greatest extent possible.

2. The process in paragraph (2) validates an anonymous click-through transaction. It is possible that an anonymous click-through process may simply result in no recognizable legal relationship, e.g., A goes to a person's website and acquires access without in any way identifying herself, or otherwise indicating agreement or assent to any limitation or obligation, and the owner's site grants A access. In such a case no legal relationship has been created.

On the other hand it may be possible that A's actions indicate agreement to a particular term. For example, A goes to a website and is confronted by an initial screen which advises her that the information at this site is proprietary, that A may use the information for her own personal purposes, but that, by clicking below, A agrees that any other use without the site owner's permission is prohibited. If A clicks "agree" and downloads the information and then uses the information for other, prohibited purposes, should not A be bound by the click? It seems the answer properly should be, and would be, yes.

If the owner can show that the only way A could have obtained the information was from his website, and that the process to access the subject information required that A must have clicked the "I agree" button after having the ability to see the conditions on use, A has performed actions which A was free to refuse, which A knew would cause the site to grant her access, i.e., "complete the transaction." The terms of the resulting contract will be determined under general contract principles, but will include the limitation on A's use of the information, as a condition precedent to granting her access to the information.

3. In the transaction set forth in Comment 2, the record of the transaction also will include

an electronic signature. By clicking "I agree" A adopted a process with the intent to "sign," i.e., bind herself to a legal obligation, the resulting record of the transaction. If a "signed writing" were required under otherwise applicable law, this transaction would be enforceable. If a "signed writing" were not required, it may be sufficient to establish that the electronic record is attributable to A under section 9. Attribution may be shown in any manner reasonable including showing that, of necessity, A could only have gotten the information through the process at the website.

§ 66-325. Time and place of sending and receipt.

(a) Unless the sender and the recipient agree to a different method of sending that is reasonable under the circumstances, an electronic record is sent when it:

(1) Is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;

(2) Is in a form capable of being processed by that system; and

(3) Enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.

(b) Unless the sender and the recipient agree to a different method of sending that is reasonable under the circumstances, an electronic record is received when:

(1) It enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and

(2) It is in a form capable of being processed by that system.

(c) Subsection (b) of this section applies even if the place the information processing system is located is different from the place the electronic record is deemed to be received under subsection (d) of this section.

(d) Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business. For purposes of this subsection, the following rules apply:

(1) If the sender or recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction.

(2) If the sender or the recipient does not have a place of business, the place of business is the sender's or recipient's residence, as the case may be.

(e) Notwithstanding any other sections of this Article, in a consumer transaction, a record has not been received unless it is received by the intended recipient in a manner in which the sender has a reasonable basis to believe that the record can be opened and read by the recipient.

(f) Receipt of an electronic acknowledgment from an information processing system described in subsection (b) of this section establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

(g) If a person is aware that an electronic record purportedly sent under subsection (a) of this section, or purportedly received under subsection (b) of this section, was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. Except to the extent permitted by the other law, the requirements of this subsection may not be varied by agreement. (2000-152, s. 1.)

OFFICIAL COMMENT

1. This section provides default rules regarding when and from where an electronic record is sent and when and where an electronic record is received. This section does not address the efficacy of the record that is sent or received. That is, whether a record is unintelligible or unusable by a recipient is a separate issue from whether that record was sent or received. The effectiveness of an illegible record, whether it binds any party, are questions left to other law.

2. Subsection (a) furnishes rules for determining when an electronic record is sent. The effect of the sending and its import are determined by other law once it is determined that a sending has occurred.

In order to have a proper sending, the subsection requires that information be properly addressed or otherwise directed to the recipient. In order to send within the meaning of this section, there must be specific information which will direct the record to the intended recipient. Although mass electronic sending is not precluded, a general broadcast message, sent to systems rather than individuals, would not suffice as a sending.

The record will be considered sent once it leaves the control of the sender, or comes under the control of the recipient. Records sent through e-mail or the internet will pass through many different server systems. Accordingly, the critical element when more than one system is involved is the loss of control by the sender.

However, the structure of many message delivery systems is such that electronic records may actually never leave the control of the sender. For example, within a university or corporate setting, e-mail sent within the system to another faculty member is technically not out of the sender's control since it never leaves the organization's server. Accordingly, to qualify as a sending, the e-mail must arrive at a point where the recipient has control. This section does not address the effect of an electronic record that is thereafter "pulled back," e.g., removed from a mailbox. The analog in the paper world would be removing a letter from a person's mailbox. As in the case of providing information electronically under Section 8, the recipient's ability to receive a message should be judged from the perspective of whether the sender has done any action which would preclude retrieval. This is especially the case in regard to sending, since the sender must direct the record to a system designated or used by the recipient.

3. Subsection (b) provides simply that when a record enters the system which the recipient has designated or uses and to which it has access, in a form capable of being processed by that system, it is received. Keying receipt to a system accessible by the recipient removes the potential for a recipient leaving messages with a server or other service in order to avoid receipt. However, the section does not resolve the issue of how the sender proves the time of receipt.

To assure that the recipient retains control of the place of receipt, subsection (b) requires that the system be specified or used by the recipient, and that the system be used or designated for the type of record being sent. Many people have multiple e-mails for different purposes. Subsection (b) assures that recipients can designate the e-mail address or system to be used in a particular transaction. For example, the recipient retains the ability to designate a home e-mail for personal matters, work e-mail for official business, or a separate organizational e-mail solely for the business purposes of that organization. If A sends B a notice at his home which relates to business, it may not be deemed received if B designated his business address as the sole address for business purposes. Whether actual knowledge upon seeing it at home would qualify as receipt is determined under the otherwise applicable substantive law.

4. Subsections (c) and (d) provide default rules for determining where a record will be considered to have been sent or received. The focus is on the place of business of the recipient and not the physical location of the information processing system, which may bear absolutely no relation to the transaction between the parties. It is not uncommon for users of electronic commerce to communicate from one State to another without knowing the location of information systems through which communication is operated. In addition, the location of certain communication systems may change without either of the parties being aware of the change. Accordingly, where the place of sending or receipt is an issue under other applicable law, e.g., conflict of laws issues, tax issues, the relevant location should be the location of the sender or recipient and not the location of the information processing system.

Subsection (d) assures individual flexibility in designating the place from which a record will be considered sent or at which a record will be considered received. Under subsection (d) a person may designate the place of sending or receipt unilaterally in an electronic record. This ability, as with the ability to designate by agreement, may be limited by otherwise applicable law to places having a reasonable relationship to the transaction.

5. Subsection (e) makes clear that receipt is

not dependent on a person having notice that the record is in the person's system. Receipt occurs when the record reaches the designated system whether or not the recipient ever retrieves the record. The paper analog is the recipient who never reads a mail notice.

6. Subsection (f) provides legal certainty regarding the effect of an electronic acknowledgment. It only addresses the fact of receipt, not the quality of the content, nor whether the electronic record was read or "opened."

7. Subsection (g) limits the parties' ability to vary the method for sending and receipt provided in subsections (a) and (b), when there is a legal requirement for the sending or receipt. As in other circumstances where legal requirements derive from other substantive law, to the extent that the other law permits variation by agreement, this Act does not impose any additional requirements, and provisions of this Act may be varied to the extent provided in the other law.

§ 66-326. Transferable records.

(a) In this section, "transferable record" means an electronic record that:

(1) Would be a note under Article 3 of Chapter 25 of the General Statutes or a document under Article 7 of Chapter 25 of the General Statutes if the electronic record were in writing; and

(2) The issuer of the electronic record expressly has agreed is a transferable record.

(b) A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.

(c) A system satisfies subsection (b) of this section, and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that:

(1) A single authoritative copy of the transferable record exists which is unique, identifiable, and, except as otherwise provided in subdivisions (4), (5), and (6) of this subsection, unalterable;

(2) The authoritative copy identifies the person asserting control as:

a. The person to which the transferable record was issued; or

b. If the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred;

(3) The authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

(4) Copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

(5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) Any revision of the authoritative copy is readily identifiable as authorized or unauthorized.

(d) **(Effective until July 1, 2001)** Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in G.S. 25-1-201(20), of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under Chapter 25 of the General Statutes, including, if the applicable statutory requirements under G.S. 25-3-302(a), 25-7-501, or 25-9-308 are satisfied, the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Delivery, possession, and endorsement are not required to obtain or exercise any of the rights under this subsection.

(d) **(Effective July 1, 2001)** Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in G.S. 25-1-201(20), of the transferable record and has the same rights and defenses as a holder of an

§ 66-326(d) is set out twice. See notes.

equivalent record or writing under Chapter 25 of the General Statutes, including, if the applicable statutory requirements under G.S. 25-3-302(a), 25-7-501, or 25-9-330 are satisfied, the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Delivery, possession, and endorsement are not required to obtain or exercise any of the rights under this subsection.

(e) Except as otherwise agreed, an obligor under a transferable record has the same rights and defenses as an equivalent obligor under equivalent records or writings under Chapter 25 of the General Statutes.

(f) If requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record. Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record. (2000-152, s. 1; 2000-140, s. 97.)

OFFICIAL COMMENT

1. Paper negotiable instruments and documents are unique in the fact that a tangible token — a piece of paper — actually embodies intangible rights and obligations. The extreme difficulty of creating a unique electronic token which embodies the singular attributes of a paper negotiable document or instrument, dictates that the rules relating to negotiable documents and instruments not be simply amended to allow the use of an electronic record for the requisite paper writing. However, the desirability of establishing rules by which business parties might be able to acquire some of the benefits of negotiability in an electronic environment is recognized by the inclusion of this Section on Transferable Records.

This section provides legal support for the creation, transferability and enforceability of electronic note and document equivalents, as against the issuer/obligor. The certainty created by the section provides the requisite incentive for industry to develop the systems and processes, which involve significant expenditures of time and resources, to enable the use of such electronic documents.

The importance of facilitating the development of systems which will permit electronic equivalents is a function of cost, efficiency and safety for the records. The storage cost and space needed for the billions of paper notes and documents is phenomenal. Further, natural disasters can wreak havoc on the ability to meet legal requirements for retaining, retrieving and delivering paper instruments. The development of electronic systems meeting the rigorous standards of this Section will permit retention of copies which reflect the same integrity as the original. As a result storage, transmission and other costs will be reduced, while security and the ability to satisfy legal requirements governing such paper records will be enhanced.

Section 16 [G.S. 66-326] provides for the creation of an electronic record which may be controlled by the holder who in turn may obtain the benefits of holder in due course and good faith purchaser status. If the benefits and efficiencies of electronic media are to be realized in this industry it is essential to establish a mean by which transactions involving paper promissory notes may be accomplished completely electronically. Particularly as other aspects of such transactions are accomplished electronically, the drag on the transaction of requiring a paper note becomes evident. In addition to alleviating the logistical problems of generating and storing and retrieving paper, the mailing and transmission costs associated with such transactions will also be reduced.

2. The definition of transferable record is limited in two significant ways. First, only the equivalent of paper promissory notes and paper documents of title can be created as transferable records. Notes and Documents of Title do not impact the broad systems that relate to the broader payments mechanisms related, for example, to checks. Impacting the check collection system by allowing for "electronic checks" has ramifications well beyond the ability of this Act. Accordingly, this Act excludes from its scope, transactions governed by UCC Articles 3 and 4. The limitation to promissory note equivalents in Section 16 [G.S. 66-326] is quite important in that regard because of the ability to deal with many enforcement issues by contract without affecting such systemic concerns.

Second, not only is Section 16 [G.S. 66-326] limited to electronic records which would qual-

ify as negotiable promissory notes or documents if they were in writing, but the issuer of the electronic record must expressly agree that the electronic record is to be considered a transferable record. The definition of transferable record as "an electronic record that ... the issuer of the electronic record expressly has agreed is a transferable record" indicates that the electronic record itself will likely set forth the issuer's agreement, though it may be argued that a contemporaneous electronic or written record might set forth the issuer's agreement. However, conversion of a paper note issued as such would not be possible because the issuer would not be the issuer, in such a case, of an electronic record. The purpose of such a restriction is to assure that transferable records can only be created at the time of issuance by the obligor. The possibility that a paper note might be converted to an electronic record and then intentionally destroyed, and the effect of such action, was not intended to be covered by Section 16 [G.S. 66-326].

The requirement that the obligor expressly agree in the electronic record to its treatment as a transferable record does not otherwise affect the characterization of a transferable record (i.e., does not affect what would be a paper note) because it is a statutory condition. Further, it does not obligate the issuer to undertake to do any other act than the payment of the obligation evidenced by the transferable record. Therefore, it does not make the transferable record "conditional" within the meaning of Section 104(a)(3) of the Uniform Commercial Code.

3. Under Section 16 [G.S. 66-326] acquisition of "control" over an electronic record serves as a substitute for "possession" in the paper analog. More precisely, "control" under Section 16 [G.S. 66-326] serves as the substitute for delivery, indorsement and possession of a negotiable promissory note or negotiable document of title. Section 16(b) [G.S. 66-326(b)] allows control to be found so long as "a system employed for evidencing the transfer of interests in the transferable record reliably establishes [the person claiming control] as the person to which the transferable record was issued or transferred." The key point is that a system, whether involving third party registry or technological safeguards, must be shown to reliably establish the identity of *the* person entitled to payment. Section 16(c) [G.S. 66-326(c)] then sets forth a safe harbor list of very strict requirements for such a system. The specific provisions listed in Section 16(c) [G.S. 66-326(c)] are derived from Section 105 of Revised Article 9 of the Uniform Commercial Code. Generally, the transferable record must be unique, identifiable, and except as specifically permitted, unalterable. That "authoritative copy" must (i) identify the person claiming control as the person to whom the record was issued or most recently transferred, (ii) be maintained by the person claiming control or its designee, and (iii) be unalterable except with the permission of the person claiming control. In addition any copy of the authoritative copy must be readily identifiable as a copy and all revisions must be readily identifiable as authorized or unauthorized.

The control requirements may be satisfied through the use of a trusted third party registry system. Such systems are currently in place with regard to the transfer of securities entitlements under Article 8 of the UCC, and in the transfer of cotton warehouse receipts under the program sponsored by the United States Department of Agriculture. This Act would recognize the use of such a system so long as the standards of subsection (c) were satisfied. In addition, a technological system which met such exacting standards would also be permitted under Section 16 [G.S. 66-326].

For example, a borrower signs an electronic record which would be a promissory note or document if it were paper. The borrower specifically agrees in the electronic record that it will qualify as a transferable record under this section. The lender implements a newly developed technological system which dates, encrypts, and stores all the electronic information in the transferable record in a manner which lender can demonstrate reliably establishes lender as the person to which the transferable record was issued. In the alternative, the lender may contract with a third party to act as a registry for all such transferable records, retaining records establishing the party to whom the record was issued and all subsequent transfers of the record. An example of this latter method for assuring control is the system established for the issuance and transfer of electronic cotton warehouse receipts under 7 C.F.R. section 735 et seq.

Of greatest importance in the system used is the ability to securely and demonstrably be able to transfer the record to others in a manner which assures that only one "holder" exists. The need for such certainty and security resulted in the very stringent standards for a system outlined in subsection (c). A system relying on a third party registry is likely the most effective way to satisfy the requirements of subsection (c) that the transferable record remain unique, identifiable and unalterable, while also providing the means to assure that the transferee is clearly noted and identified.

It must be remembered that Section 16 [G.S. 66-326] was drafted in order to provide sufficient legal certainty regarding the rights of those in control of such electronic records, that legal incentives would exist to warrant the development of systems which would establish the requisite control. During the drafting of Section 16 [G.S. 66-326], representatives from

the Federal Reserve carefully scrutinized the impact of any electronicization of any aspect of the national payment system. Section 16 [G.S. 66-326] represents a compromise position which, as noted, serves as a bridge pending more detailed study and consideration of what legal changes, if any, are necessary or appropriate in the context of the payment systems impacted. Accordingly, Section 16 [G.S. 66-326] provides limited scope for the attainment of important rights derived from the concept of negotiability, in order to permit the development of systems which will satisfy its strict requirements for control.

4. It is important to note what the Section does not provide. Issues related to enforceability against intermediate transferees and transferors (i.e., indorser liability under a paper note), warranty liability that would attach in a paper note, and issues of the effect of taking a transferable record on the underlying obligation, are NOT addressed by this section. Such matters must be addressed, if at all, by contract between and among the parties in the chain of transmission and transfer of the transferable record. In the event that such matters are not addressed by the contract, the issues would need to be resolved under otherwise applicable law. Other law may include general contract principles of assignment and assumption, or may include rules from Article 3 applied by analogy.

For example, Issuer agrees to pay a debt by means of a transferable record issued to A. Unless there is agreement between issuer and A that the transferable record "suspends" the underlying obligation (see Section 3-310 of the Uniform Commercial Code), A would not be prevented from enforcing the underlying obligation without the transferable record. Similarly, if A transfers the transferable record to B by means granting B control, B may obtain holder in due course rights against the obligor/issuer, but B's recourse against A would not be clear unless A agreed to remain liable under the transferable record. Although the rules of Article 3 may be applied by analogy in an appropriate context, in the absence of an express agreement in the transferable record or included by applicable system rules, the liability of the transferor would not be clear.

5. Current business models exist which rely for their efficacy on the benefits of negotiability. A principal example, and one which informed much of the development of Section 16 [G.S. 66-326], involves the mortgage backed securities industry. Aggregators of commercial paper acquire mortgage secured promissory notes following a chain of transfers beginning with the origination of the mortgage loan by a mortgage broker. In the course of the transfers of this paper, buyers of the notes and lenders/secured parties for these buyers will intervene. For the ultimate purchaser, the ability to rely on holder in due course and a good faith purchaser status creates the legal security necessary to issue its own investment securities which are backed by the obligations evidenced by the notes purchased. Only through their HIDC status can these purchasers be assured that third party claims will be barred. Only through their HIDC status can the end purchaser avoid the incredible burden of requiring and assuring that each person in the chain of transfer has waived any and all defenses to performance which may be created during the chain of transfer.

6. This Section is a stand-alone provision. Although references are made to specific provisions in Article 3, Article 7, and Article 9 of the Uniform Commercial Code, these provisions are incorporated into this Act and made the applicable rules for purposes of this Act. The rights of parties to transferable records are established under subsections (d) and (e). Subsection (d) provides rules for determining the rights of a party in control of a transferable record. The subsection makes clear that the rights are determined under this section, and not under other law, by incorporating the rules on the manner of acquisition into this statute. The last sentence of subsection (d) is intended to assure that requirements related to notions of possession, which are inherently inconsistent with the idea of an electronic record, are not incorporated into this statute.

If a person establishes control, Section 16(d) [G.S. 66-326(d)] provides that that person is the "holder" of the transferable record which is equivalent to a holder of an analogous paper negotiable instrument. More importantly, if the person acquired control in a manner which would make it a holder in due course of an equivalent paper record, the person acquires the rights of a HIDC. The person in control would therefore be able to enforce the transferable record against the obligor regardless of intervening claims and defenses. However, by pulling these rights into Section 16 [G.S. 66-326], this Act does NOT validate the wholesale electrification of promissory notes under Article 3 of the Uniform Commercial Code.

Further, it is important to understand that a transferable record under Section 16 [G.S. 66-326], while having no counterpart under Article 3 of the Uniform Commercial Code, would be an "account," "general intangible," or "payment intangible" under Article 9 of the Uniform Commercial Code. Accordingly, two separate bodies of law would apply to that asset of the obligee. A taker of the transferable record under Section 16 [G.S. 66-326] may acquire purchaser rights under Article 9 of the Uniform Commercial Code, however, those rights may be defeated by a trustee in bankruptcy of a prior person in control unless perfection under Article 9 of the Uniform Commercial Code by filing is achieved.

If the person in control also takes control in a manner granting it holder in due course status, of course that person would take free of any claim by a bankruptcy trustee or lien creditor.

7. Subsection (e) accords to the obligor of the transferable record rights equal to those of an obligor under an equivalent paper record. Accordingly, unless a waiver of defense clause is obtained in the electronic record, or the transferee obtains HDC rights under subsection (d), the obligor has all the rights and defenses available to it under a contract assignment. Additionally, the obligor has the right to have the payment noted or otherwise included as part of the electronic record.

8. Subsection (f) grants the obligor the right to have the transferable record and other information made available for purposes of assuring the correct person to pay. This will allow the obligor to protect its interest and obtain the defense of discharge by payment or performance. This is particularly important because a person receiving subsequent control under the appropriate circumstances may well qualify as a holder in course who can again enforce payment of the transferable record.

9. Section 16 [G.S. 66-326] is a singular exception to the thrust of this Act to simply validate electronic media used in commercial transactions. Section 16 [G.S. 66-326] actually provides a means for expanding electronic commerce. It provides certainty to lenders and investors regarding the enforceability of a new class of financial services. It is hoped that the legal protections afforded by Section 16 [G.S. 66-326] will engender the development of technological and business models which will permit realization of the significant cost savings and efficiencies available through electronic transacting in the financial services industry. Although only a bridge to more detailed consideration of the broad issues related to negotiability in an electronic context, Section 16 [G.S. 66-326] provides the impetus for that broader consideration while allowing continuation of developing technological and business models.

Section Set Out Twice. — The first version of subsection (d) set out above is effective until July 1, 2001. The second version of subsection (d) set out above is effective July 1, 2001.

Effect of Amendments. — Session Laws 2000-140, s. 97, effective July 1, 2001, substituted "25-9-330" for "25-9-308" in subsection (d).

§ 66-327. Consumer transactions; alternative procedures for use or acceptance of electronic records or electronic signatures.

(a) Consistent with the provisions of Section 102(a)2A of the federal Electronic Signatures in Global and National Commerce Act, the use and acceptance of electronic records or electronic signatures in consumer transactions shall be subject to the requirements set out in this section. The requirements of this section may not be varied by agreement of the parties.

(b) Limitation. — This Article shall not apply to:

(1) Any notice of the cancellation or termination of utility services, including water, heat, and power.

(2) Any notice of default, acceleration, repossession, foreclosure or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual.

(3) Any notice of the cancellation or termination of health insurance or benefits, or life insurance or benefits (excluding annuities).

(4) Any notice of the recall of a product, or material failure of a product that risks endangering health or safety.

(5) Any document required to accompany the transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

(c) Consent to Electronic Records. — In a consumer transaction, the consumer's agreement to conduct a transaction by electronic means shall be evidenced as provided in G.S. 66-315, and in compliance with this section. The consumer's agreement to conduct the transaction by electronic means shall be found only when the following apply:

(1) The consumer has affirmatively consented to the use of electronic means, and the consumer has not withdrawn consent.

(2) The consumer, prior to consenting to the use of electronic means, is provided with a clear and conspicuous statement:

a. Informing the consumer of any right or option of the consumer to have the record provided or made available on paper or in nonelectronic form.

b. Informing the consumer of the right to withdraw consent to have the record provided or made available in an electronic form and of any conditions or consequences of such withdrawal. Those consequences may include termination of the parties' relationship but may not include the imposition of fees.

c. Informing the consumer of whether the consent to have the record provided or made available in an electronic form applies only to the particular transaction which gave rise to the obligation to provide the record, or to identified categories of records that may be provided or made available during the course of the parties' relationship.

d. Describing the procedures the consumer must use to withdraw consent as provided in sub-subdivision (2)b. of this subsection or to update information needed to contact the consumer electronically.

e. Informing the consumer how, after the consent to have the record provided or made available in an electronic form, the consumer may request and obtain a paper copy of an electronic record.

(3) The consumer, prior to consenting to the use of electronic means, is provided with a statement of the hardware and software requirements for access to and retention of the electronic records; and the consumer consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent.

(4) After the consent of a consumer in accordance with subdivision (1) of this subsection, if a change in the hardware or software requirements needed to access or retain electronic records creates a material risk that the consumer will not be able to access or retain a subsequent electronic record that was the subject of the consent, the person providing the electronic record provides the consumer with a statement of the revised hardware and software requirements for access to and retention of the electronic records, provides a statement of the right to withdraw consent without the imposition of any condition or consequence that was not disclosed under sub-subdivision (2)b. of this subsection, and again complies with subdivision (3) of this subsection.

(d) Written Copy Required. — Notwithstanding G.S. 66-315(b), in a consumer transaction where the consumer conducts the transaction on electronic equipment provided by or through the seller, the consumer shall be given a written copy of the contract which is not in electronic form. A consumer's consent to receive future notices regarding the transaction in an electronic form is valid only if the consumer confirms electronically, using equipment other than that provided by the seller, that (i) the consumer has the software specified by the seller as necessary to read future notices, and (ii) the consumer agrees to receive the notices in an electronic form. If an individual enters into a consumer transaction that is created or documented by an electronic record, the transaction shall be deemed to have been made or to have occurred at the individual's residence. (2000-152, s. 1.)

§§ 66-328, 66-329: Reserved for future codification purposes.

§ 66-330. Severability clause.

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. (2000-152, s. 1.)

Chapter 69.

Fire Protection.

Article 3A.

Rural Fire Protection Districts.

§ 69-25.11. Changes in area of district.

Local Modification. — Henderson: 2000-4, s. 1. For additional local modifications to this section, see the bound volume.

Chapter 74.

Mines and Quarries.

Article 7.

The Mining Act of 1971.

Article 7.

The Mining Act of 1971.

§ 74-50. Permits — General.

(a) No operator shall engage in mining without having first obtained from the Department an operating permit that covers the affected land and that has not been terminated, revoked, suspended for the period in question, or otherwise become invalid. An operating permit may be modified from time to time to include land neighboring the affected land, in accordance with procedures set forth in G.S. 74-52. A separate permit shall be required for each mining operation that is not on land neighboring a mining operation for which the operator has a valid permit.

(b) As used in subsection (b1) of this section:

(1) "Land adjoining" means any parcel or tract of land that is not owned in whole or in part by, or that is not under the control of, the applicant or operator or any lessor, affiliate, parent, or subsidiary of the applicant or operator and that is contiguous to either: (i) any parcel or tract that includes the permitted area or (ii) any parcels or tracts of land that are owned in whole or in part by or under the control of the applicant or operator or any lessor, affiliate, parent, or subsidiary of the applicant or operator and that, taken together, are contiguous to the permitted area.

(2) "Permit boundaries" means the boundaries of a permitted area.

(3) "Permitted area" means affected land and all other land used for or designated as buffers or reserves, or used for other purposes, as delineated in a mining permit or an application for a mining permit.

(b1) At the time of an application for a new mining permit or for a modification of a mining permit to add land to the permitted area, the applicant or operator shall make a reasonable effort, satisfactory to the Department, to notify:

(1) The chief administrative officer of each county and municipality in which any part of the permitted area is located.

(2) The owners of record of land adjoining that lies within 1,000 feet of the permit boundaries.

(3) The owners of record of land that lies directly across and is contiguous to any highway; creek, stream, river, or other watercourse; railroad track; or utility or other public right-of-way and that lies within 1,000 feet of the permit boundaries. For purposes of this subdivision, "highway" means a highway, as defined in G.S. 20-4.01(13) that has four lanes of travel or less and that has not been designated a part of the Interstate Highway System.

(b2) The notice shall inform the owners of record and chief administrative officers of the opportunity to submit written comments to the Department regarding the proposed mining operation and the opportunity to request a public hearing regarding the proposed mining operation. Requests for public hearing shall be made within 30 days of issuance of the notice.

(b3) When the Department receives an application for a new mining permit or for a modification of a mining permit to add land to the permitted area, the Department shall send a notice of the application to each of the following agencies with a request that each agency review and provide written comment on the application within 30 days of the date on which the request is made:

(1) Division of Air Quality, Department of Environment and Natural Resources.

(2) Division of Parks and Recreation, Department of Environment and Natural Resources.

(3) Division of Water Quality, Department of Environment and Natural Resources.

(4) Division of Water Resources, Department of Environment and Natural Resources.

(5) North Carolina Geological Survey, Division of Land Resources, Department of Environment and Natural Resources.

(6) Wildlife Resources Commission, Department of Environment and Natural Resources.

(7) Division of Archives and History, Department of Cultural Resources.

(8) United States Fish and Wildlife Service, United States Department of the Interior.

(9) Any other federal or State agency that the Department determines to be appropriate, including the Division of Coastal Management, Department of Environment and Natural Resources; the Division of Marine Fisheries, Department of Environment and Natural Resources; the Division of Waste Management, Department of Environment and Natural Resources; and the Department of Transportation.

(c) No permit shall become effective until the operator has deposited with the Department an acceptable performance bond or other security pursuant to G.S. 74-54. If at any time the bond or other security, or any part thereof, shall lapse for any reason other than a release by the Department, and the lapsed bond or security is not replaced by the operator within 30 days after notice of the lapse, the permit to which the lapsed bond or security pertains shall be automatically revoked.

(d) An operating permit shall be granted for a period not exceeding 10 years. If the mining operation terminates and the reclamation required under the approved reclamation plan is completed prior to the end of the period, the permit shall terminate. Termination of a permit shall not have the effect of relieving the operator of any obligations that the operator has incurred under an approved reclamation plan or otherwise. Where the mining operation itself has terminated, no permit shall be required in order to carry out reclamation measures under the reclamation plan. (1971, c. 545, s. 5; 1973, c. 1262, s. 33; 1981, c. 787, s. 1; 1993 (Reg. Sess., 1994), c. 568, s. 2; 2000-116, s. 1.)

Editor's Note. — The definitions in subsection (b) were redesignated at the direction of the Revisor of Statutes to preserve alphabetical order.

Effect of Amendments. — Session Laws 2000-116, s. 1, effective October 1, 2000, added subsection (b), redesignated former subsection (b) as subsections (b1) and (b2), rewrote subsection (b1), and added subsection (b3).

§ 74-51. Permits — Application, granting, conditions.

(a) Any operator desiring to engage in mining shall make written application to the Department for a permit. The application shall be upon a form furnished by the Department and shall fully state the information called for; in addition, the applicant may be required to furnish any other information as may be deemed necessary by the Department in order adequately to enforce this Article. The application shall be accompanied by a reclamation plan that meets the requirements of G.S. 74-53. No permit shall be issued until a reclamation plan has been approved by the Department. The application shall be accompanied by a signed agreement, in a form specified by the Department, that in the event a bond forfeiture is ordered pursuant to G.S. 74-59, the Department and its representatives and contractors shall have the right to make whatever entries on the land and to take whatever actions may be necessary in order to carry out reclamation that the operator has failed to complete.

(b) Before deciding whether to grant a new permit, the Department shall circulate copies of a notice of application for review and comment as it deems advisable. The Department shall grant or deny the permit requested as expeditiously as possible, but in no event later than 60 days after the application form and any relevant and material supplemental information reasonably required shall have been filed with the Department, or if a public hearing is held, within 30 days following the hearing and the filing of any relevant and material supplemental information reasonably required by the Department. Priority consideration shall be given to applicants who submit evidence that the mining proposed will be for the purpose of supplying materials to the Board of Transportation.

(c) If the Department determines, based on public comment relevant to the provisions of this Article, that significant public interest exists, the Department shall conduct a public hearing on any application for a new mining permit or for a modification of a mining permit to add land to the permitted area, as defined in G.S. 74-50(b). The hearing shall be held before the Department reaches a final decision on the application, and in making its determination, the Department shall give full consideration to all comments submitted at the public hearing. The public hearing shall be held within 60 days of the end of the 30-day period within which any requests for the public hearing shall be made.

(d) The Department may deny the permit upon finding:

(1) That any requirement of this Article or any rule promulgated hereunder will be violated by the proposed operation;

(2) That the operation will have unduly adverse effects on potable groundwater supplies, wildlife, or fresh water, estuarine, or marine fisheries;

(3) That the operation will violate standards of air quality, surface water quality, or groundwater quality that have been promulgated by the Department;

(4) That the operation will constitute a direct and substantial physical hazard to public health and safety or to a neighboring dwelling house, school, church, hospital, commercial or industrial building, public road or other public property, excluding matters relating to use of a public road;

(5) That the operation will have a significantly adverse effect on the purposes of a publicly owned park, forest or recreation area;

(6) That previous experience with similar operations indicates a substantial possibility that the operation will result in substantial deposits of sediment in stream beds or lakes, landslides, or acid water pollution; or

(7) That the applicant or any parent, subsidiary, or other affiliate of the applicant or parent has not been in substantial compliance with this Article, rules adopted under this Article, or other laws or rules of this State for the protection of the environment or has not corrected all violations that the applicant or any parent, subsidiary, or other affiliate of the applicant or parent may have committed under this Article or rules adopted under this Article and that resulted in:
a. Revocation of a permit,
b. Forfeiture of part or all of a bond or other security,
c. Conviction of a misdemeanor under G.S. 74-64,
d. Any other court order issued under G.S. 74-64, or
e. Final assessment of a civil penalty under G.S. 74-64.

(e) In the absence of any finding set out in subsection (d) of this section, or if adverse effects are mitigated by the applicant as determined necessary by the Department, a permit shall be granted.

(f) Any permit issued shall be expressly conditioned upon compliance with all requirements of the approved reclamation plan for the operation and with any other reasonable and appropriate requirements and safeguards that the Department determines are necessary to assure that the operation will comply fully with the requirements and objectives of this Article. These conditions may, among others, include a requirement of visual screening, vegetative or otherwise, so as to screen the view of the operation from public highways, public parks, or residential areas, where the Department finds screening to be feasible and desirable. Violation of any conditions of the permit shall be treated as a violation of this Article and shall constitute a basis for suspension or revocation of the permit.

(g) If the Department denies an application for a permit, the Department shall notify the operator in writing, stating the reasons for the denial and any modifications in the application that would make the application acceptable. The operator may thereupon modify and resubmit the application, or file an appeal as provided in G.S. 74-61.

(h) Upon approval of an application, the Department shall set the amount of the performance bond or other security that is to be required pursuant to G.S. 74-54. The operator shall have 60 days after the Department mails a notice of the required bond to the operator in which to deposit the required bond or security with the Department. The operating permit shall not be issued until receipt of this deposit.

(i) When one operator succeeds to the interest of another in any uncompleted mining operation by virtue of a sale, lease, assignment, or otherwise, the Department may release the first operator from the duties imposed upon the operator by this Article with reference to the mining operation and transfer the permit to the successor operator; provided, that both operators have complied with the requirements of this Article and that the successor operator assumes the duties of the first operator with reference to reclamation of the land and posts a suitable bond or other security. (1971, c. 545, s. 6; 1973, c. 507, s. 5; 1977, c. 771, s. 4; c. 845, s. 2; 1981, c. 787, ss. 2, 3; 1987, c. 827, c. 82; 1989, c. 727, s. 11; 1993 (Reg. Sess., 1994), c. 568, s. 3; 2000-116, s. 2.)

Effect of Amendments. — Session Laws 2000-116, s. 2, effective October 1, 2000, substituted "for a modification of a mining permit to add land to the permitted area, as defined in G.S. 74-50(b)" for "for permit modifications that add owners of record of lands adjoining the permit boundaries" in subsection (c).

Chapter 74C.

Private Protective Services.

Article 1.

Private Protective Services Board.

Sec.
74C-4. Private Protective Services Board established; members; terms; vacancies; compensation; meetings.

Article 1.

Private Protective Services Board.

§ 74C-4. Private Protective Services Board established; members; terms; vacancies; compensation; meetings.

(a) The Private Protective Services Board is hereby established in the Department of Justice to administer the licensing and set educational and training requirements for persons, firms, associations, and corporations engaged in a private protective services profession within this State.

(b) The Board shall consist of 14 members: the Attorney General or his designated representative, two persons appointed by the Attorney General, one person appointed by the Governor, five persons appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, and five persons appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives. All appointments by the General Assembly shall be subject to the provisions of G.S. 120-121, and vacancies in the positions filled by those appointments shall be filled pursuant to G.S. 120-122. One of those persons appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate and all five persons appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives shall be licensees under this Chapter; all other appointees may not be licensees of the Board nor licensed by the Board while serving as Board members. All persons appointed shall serve terms of three years. With the exception of the Attorney General or his designated representative, no person shall serve more than eight consecutive years on the Board, including years of service prior and subsequent to July 1, 1983. Board members may continue to serve until their successors have been appointed.

(c) Vacancies on the Board occurring for any reason shall be filled by the authority making the original appointment of the person causing the vacancy.

(d) Each member of the Board, before assuming the duties of his office, shall take an oath for the faithful performance of his duties. A Board member may be removed at the pleasure of the authority making the original appointment or by the Board for misconduct, incompetence, or neglect of duty.

(e) Members of the Board who are State officers or employees shall receive no per diem compensation for serving on the Board, but shall be reimbursed for their expenses in accordance with G.S. 138-6. Members of the Board who are full-time salaried public officers or employees other than State officers or employees shall receive no per diem compensation for serving on the Board, but shall be reimbursed for their expenses in accordance with G.S. 138-6 in the

same manner as State officers or employees. All other Board members shall receive per diem compensation and reimbursement in accordance with G.S. 93B-5.

(f) The Board shall elect a chairman, vice-chairman, and other officers and committee chairmen from among its members as the Board deems necessary and desirable at the first meeting after July 1 of each year. The chairman and vice-chairman shall be selected by the members of the Board for a term of one year and shall be eligible for reelection. The Board shall meet at the call of the chairman or a majority of the members of the Board at such time, date, and location as may be decided upon by a majority of the Board.

(g) All decisions heretofore made by the Private Protective Services Board, established pursuant to Chapter 74B, shall remain in full force and effect unless and until repealed or suspended by action of the Private Protective Services Board established herein. (1973, c. 528, s. 1; 1975, c. 592, ss. 8, 9; 1977, c. 535; 1979, c. 818, s. 2; 1981, c. 148, s. 1; c. 807, s. 7; 1983, c. 794, s. 7; 1985, c. 597, s. 12; 1989, c. 759, s. 4; 1995, c. 490, s. 39; 2000-181, s. 2.3.)

Effect of Amendments. — Session Laws 2000-181, s. 2.3, effective August 2, 2000, in subsection (b), substituted "14 members" for "10 members" and substituted "five persons appointed" for "three persons appointed" three times.

Chapter 75.

Monopolies, Trusts and Consumer Protection.

Article 1.

General Provisions.

Article 1.

General Provisions.

§ 75-1. Combinations in restraint of trade illegal.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 60 F. Supp. 2d 502 (N.D.N.C. 1999); Stephenson v. Warren, — N.C. App. —, 525 S.E.2d 809, 2000 N.C. App. LEXIS 139 (2000); Poor v. Hill, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 540 (May 16, 2000).

III. AGREEMENT NOT TO COMPETE.

Contracts Not to Compete Held Valid. — Where non-competition covenant contained no fixed geographic restriction, but was operative for only six months following resignation or termination of independent contractor relationship and forbade participation only in companies "using a similar matrix marketing structure or handling similar products," it was not unreasonable as a matter of law. Market Am., Inc. v. Christman-Orth, 134 N.C. App. 234, 520 S.E.2d 570 (1999).

Non-competitive clause contained in independent distributor agreement was valid, as a covenant not to compete is enforceable in equity if it is: (1) in writing; (2) entered into at the time and as part of a contract of employment; (3) based on valuable consideration; (4) reasonable both as to time and territory embraced in the restrictions; (5) fair to the parties; and (6) not against public policy; and the court has held that non-competition clauses are applicable to independent contractor relationships. Market Am., Inc. v. Christman-Orth, 134 N.C. App. 234, 520 S.E.2d 570 (1999).

§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.

CASE NOTES

I. GENERAL CONSIDERATION.

Application of Section to Third-party Claimants. — North Carolina does not recognize any cause of action under either § 58-63-15 or under this section for unfair or deceptive trade practices by third-party claimants against the insurance company of an adverse

party. Lee v. Mutual Community Sav. Bank, — N.C. App. —, 525 S.E.2d 854, 2000 N.C. App. LEXIS 156 (2000).

The Unfair and Deceptive Trade Practices Act covers claims arising out of employer-employee relations; therefore, where the plaintiff presented evidence that defendant deceptively used a position of confidence to solicit the plaintiff's customers and to compete with the plaintiff while still in his employment and that he concealed his behavior from the plaintiff, the plaintiff has demonstrated a genuine issue of material fact preventing summary judgment. Dalton v. Camp, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 613 (June 6, 2000).

The private sale of a residence by an individual is not an act "in or affecting commerce," and is beyond the purview of this section; therefore, the trial court properly granted summary judgment as to the unfair and deceptive trade practices claim, as well as to plaintiff's request for treble damages, because plaintiff was not engaged in the business of selling real estate. Stephenson v. Warren, — N.C. App. —, 525 S.E.2d 809, 2000 N.C. App. LEXIS 139 (2000).

Debt Collection Activities by Attorneys — The North Carolina Debt Collection Act (NCDCA) contained within this chapter did not allow for a cause of action against attorneys engaged in collecting debts on behalf of their clients, although the tactics used by defendants in trying to collect delinquent assessments and their refusal to accept any payments less than $1,374 from plaintiffs, two-and-a-half times that which was legally owed, were indefensible, whether done in ignorance of, or disdain for, the law. Reid v. Ayers, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 606 (June 6, 2000).

Applied in Cash v. State Farm Mut. Auto. Ins. Co., — N.C. App. —, 528 S.E.2d 372, 2000 N.C. App. LEXIS 312 (2000); Llera v. Security Credit Sys., 93 F. Supp. 2d 674, 2000 U.S. Dist. LEXIS 3646 (W.D.N.C. 2000); Davis Lake Community Ass'n v. Feldmann, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 598 (2000).

Cited in Llera v. Security Credit Sys., 93 F. Supp. 2d 674 (W.D.N.C. 2000); Marketing Assocs. v. Baker, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 2536 (M.D.N.C. January 21, 2000); Dempsey v. Transouth Mtg. Corp., 88 F. Supp. 2d 482 (W.D.N.C. 1999); Poor v. Hill, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 540 (May 16, 2000).

II. TRADE OR COMMERCE.

"In or Affecting Commerce". —

Based on evidence that the defendant solicited plaintiff's customers and obtained their business while on official business for the plaintiff, the court held that the conduct in question was "in or affecting commerce" and thus fell within the scope of this chapter. Dalton v. Camp, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 613 (June 6, 2000).

III. UNFAIR AND DECEPTIVE ACTS.

A. In General.

"Substantial Aggravating Circumstances" Required. — A mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under this section, and even though unfairness inheres in every breach of contract when one of the contracting parties is denied the advantage for which he contracted, North Carolina law requires a showing of "substantial aggravating circumstances" to support a claim under the Unfair Trade Practices Act. Westchester Fire Ins. Co. v. Johnson, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 5001 (M.D.N.C. January 6, 2000).

Failure to Settle Insurance Claim. — Defendant/insurer violated this section by "not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear," as well as the provisions of § 58-63-15(11). Gray v. North Carolina Ins. Underwriting Ass'n, — N.C. —, 529 S.E.2d 676, 2000 N.C. LEXIS 437 (2000).

B. Illustrative Cases.

Deception by Vacillating Seller. — The trial court properly concluded that aggravating circumstances necessary to sustain a claim under this chapter against the defendant were present, given the deceptive nature of a letter he wrote the plaintiffs, his imposition of an increased price upon the lots they had contracted on, his entry into sales contracts thereon with third parties, and his improper retention of plaintiffs' earnest money deposits. Poor v. Hill, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 540 (May 16, 2000).

Deception by Investigative Reporter. — The UTPA could not be applied to a case in which a reporter misrepresented her employment experience in order to obtain a job with a food store so as to film and obtain undercover information to discredit the food store chain, because the deception did not harm the consuming public. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999).

A libel per se of a type impeaching a party in its business activities is an unfair or deceptive act; however, even if defendant's statements were found to be actionable per se, the law would regard them as privileged. Qualified privilege will prevent liability for a defamatory statement, when the statement is made: (1) on subject matter (a) in which the declarant has an interest, or (b) in reference to which the declarant has a right or duty, (2) to a

person having a corresponding interest, right, or duty, (3) on a privileged occasion, and (4) in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest. Market Am., Inc. v. Christman-Orth, 134 N.C. App. 234, 520 S.E.2d 570 (1999).

Conduct Not Amounting to Unfair Trade Practice. —

Where retail store left plaintiff's mall prior to the expiration of a twenty year contract which provided that lessee could sublet the space at any time, and where the lessor had notice of the defendant's intent to move, the store neither had the tendency to deceive the plaintiff lessor, nor actually did so, and the defendant retail store was entitled to summary judgment on the plaintiff's claim of unfair and deceptive trade practices. Forrest Drive Assocs. v. Wal-Mart Stores, Inc., 72 F. Supp. 2d 576 (M.D.N.C. 1999).

Conduct of Employee. — Although a genuine issue of material fact existed as to whether defendant breached his duty of loyalty, allegations of defendant's unfair and deceptive trade practices did not come within the purview of this section because his conduct primarily occurred during his employment with plaintiff. Dalton v. Camp, 135 N.C. App. 32, 519 S.E.2d 82 (1999), cert. granted, 351 N.C. 353, 525 S.E.2d 470 (1999).

Conduct of Ex-Employee. — The conduct of defendant, who formed a competing business, obtained financing for that business, and began to solicit plaintiff's clients after she left plaintiff's employment, did not amount to unfair and deceptive trade practices under this section. Dalton v. Camp, 135 N.C. App. 32, 519 S.E.2d 82 (1999), cert. granted, 351 N.C. 353, 525 S.E.2d 470 (1999).

Employee Held Liable. — Defendant engaged in self-dealing conduct and "business activities" which fell squarely within the ambit of the statutory prohibition of unfair and deceptive acts or practices, and the Court of Appeals erred in holding that his employee status safeguarded him from liability under this provision. Sara Lee Corp. v. Carter, 351 N.C. 27, 519 S.E.2d 308 (1999).

Structural Defects in Plaintiff's House. — The defendant had engaged in unfair and deceptive trade practices, violating this section, where he concealed material facts relevant to plaintiffs' house from plaintiffs which he knew at the time of purchase that plaintiffs could not discover in the exercise of due diligence, and falsely represented to plaintiffs that plaintiffs' house had been constructed in substantial conformity with plans and specifications approved for the house. Allen v. Roberts Constr. Co., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 783 (July 5, 2000).

Judgment for violation of this section was properly entered against defendant construction company where the trial court based its conclusion of law that defendant had engaged in unfair and deceptive trade practices, in pertinent part, on the judgment for fraud entered against it. Allen v. Roberts Constr. Co., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 783 (July 5, 2000).

Actions Outside Scope of Duties. — Where allegations of fraudulent behavior were supported by evidence that defendant permissibly received information in his public capacity, but then impermissibly used that information to help his girlfriend acquire property while making fraudulent representations to stall plaintiff, the evidence sufficiently established that he was acting outside the scope of his duties and, therefore, was not entitled to immunity under this section. Leftwich v. Gaines, 134 N.C. App. 502, 521 S.E.2d 717 (1999).

Violation Not Found. —

No unfair practices were found and dismissal of the claims under this chapter against the aldermen was upheld where the aldermen complied with the court's judgment by holding "further proceedings," during which additional testimony and newspaper articles about the approved property lease and the construction of the cellular tower not previously considered by the judge were introduced. Stephenson v. Town of Garner, — N.C. App. —, 524 S.E.2d 608, 2000 N.C. App. LEXIS 54 (2000).

Shareholder's Termination of Stock Buying Employees. — The trial court erred in dismissing the plaintiffs' claim for unfair and deceptive trade practices against the defendant's company and manager/controlling shareholder who attempted, in bad faith, to keep the employee group from buying the manager's stock and finally, terminated the plaintiff members of the employee purchasing group. Walker v. Sloan, — N.C. App. —, 529 S.E.2d 236, 2000 N.C. App. LEXIS 414 (2000).

Minority Shareholders Not Liable for Manager's Actions. — The trial court correctly dismissed, as failing to state a claim upon which relief could be granted, the plaintiffs' claim that the defendant minority shareholders violated the prohibition against unfair and deceptive trade practices by ratifying the adverse actions of majority shareholder/manager who had would-be-stock-buyers/employees fired where the defendants continued to try to effectuate the sale, at no time decided not to sell, made no false or misleading statements and caused no injury. Walker v. Sloan, — N.C. App. —, 529 S.E.2d 236, 2000 N.C. App. LEXIS 414 (2000).

IV. PLEADING AND PRACTICE.

Plaintiff's forecast of evidence was insufficient as a matter of law to show that

defendants' actions constituted an unfair trade practice, and was also insufficient to show that plaintiff was actually damaged by defendants' actions. Walker v. Branch Banking & Trust Co., 133 N.C. App. 580, 515 S.E.2d 727 (1999).

Breach of Contract Insufficient to Support Unfair Practices Claim. — The defendants' claim was properly dismissed for failure to state a claim where their contention that the plaintiff did not follow through on an oral agreement to assist in purchasing a condominium, at most, stated a simple breach of contract, because they failed to allege any substantially aggravating circumstances which would give rise to an unfair or deceptive practices claim under this section. Miller v. Rose, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 777 (July 5, 2000).

The trial court correctly allowed the jury to consider contractual damages as an element of unfair and deceptive trade practices claim, where plaintiff elected to recover under this section. Defendant could not prevent that recovery by stipulating to pay damages for the breach of contract claim; otherwise, defendant could simply take its chances with a jury and then avoid treble damages by stipulating to contractual liability should the jury find for the plaintiff. Vazquez v. Allstate Ins. Co., — N.C. App. —, 529 S.E.2d 480, 2000 N.C. App. LEXIS 494 (2000).

§ 75-2. Any restraint in violation of common law included.

CASE NOTES

Cited in R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 60 F. Supp. 2d 502 (N.D.N.C. 1999).

§ 75-4. Contracts to be in writing.

CASE NOTES

This section was not applicable to an oral agreement not to copy furniture designs and, therefore, the district court's holding that the agreement had to be in writing to be enforceable would be reversed. Ashley Furn. Indus., Inc. v. SanGiacomo N.A. Ltd., 187 F.3d 363 (4th Cir. 1999).

But the Party Agreeing Not to Compete Must Sign. — Agreement not to compete did not meet the signature requirements of this section, despite the fact that the form was notarized by the wife of the company president in the presence of the employee, because the employee printed her name at the top of the form, but there was no cursive script or any writing at all on the signature line of the agreement not to compete immediately preceding the notarization. New Hanover Rent-A-Car, Inc. v. Martinez, — N.C. App. —, 525 S.E.2d 487, 2000 N.C. App. LEXIS 116 (2000).

§ 75-16. Civil action by person injured; treble damages.

CASE NOTES

I. In General.
III. Damages.

I. IN GENERAL.

Trebling Damages Before Adding Damages for Another Claim. — Plaintiffs who proved that defendant insurer violated both § 75-1.1 and § 58-63-15(11) were entitled to damages for the § 58-63-15(11) claim plus treble damages for the § 75-1.1 claim, not three times the sum of the two claims. Gray v. North Carolina Ins. Underwriting Ass'n, — N.C. —, 529 S.E.2d 676, 2000 N.C. LEXIS 437 (2000).

Stated in Market Am., Inc. v. Christman-Orth, 134 N.C. App. 234, 520 S.E.2d 570 (1999).

Cited in Jones v. Asheville Radiological Group, P.A., 134 N.C. App. 520, 518 S.E.2d 528 (1999); Stephenson v. Warren, — N.C. App. —, 525 S.E.2d 809, 2000 N.C. App. LEXIS 139 (2000); Wilson v. Jefferson-Green, Inc., — N.C. App. —, 526 S.E.2d 506, 2000 N.C. App. LEXIS 161 (2000).

III. DAMAGES.

Because treble damages are both punitive and remedial, a treble damages award of $180,000, which was $70,000 over and above

plaintiff's compensatory damages ($60,000) and attorney fees ($50,000), was not an abuse of discretion. Leftwich v. Gaines, 134 N.C. App. 502, 521 S.E.2d 717 (1999).

§ 75-16.1. Attorney fee.

CASE NOTES

Construction With Other Laws. — Debtors are protected from unfair debt collection practices under §§ 58-70 et seq., and 75-1.1 et seq., and although Chapter 58, Article 70, does not set forth provisions for awarding attorney's fees, § 58-70-130(c) expressly refers to § 75-1.1, which contains an attorney's fee provision at § 75-16.1. Llera v. Security Credit Sys., 93 F. Supp. 2d 674 (W.D.N.C. 2000).

Based on the language set forth in § 58-70-130(c), attorney's fees are available for plaintiffs alleging violations of Chapter 58, Article 70 who can satisfy the requirements set forth in this section. Llera v. Security Credit Sys., 93 F. Supp. 2d 674 (W.D.N.C. 2000).

When Attorneys' Fees May Be Awarded. —

This section entitled plaintiffs who demonstrated that the defendant insurer had violated both § 75-1.1 and § 58-63-15 to attorneys' fees. Gray v. North Carolina Ins. Underwriting Ass'n, — N.C. —, 529 S.E.2d 676, 2000 N.C. LEXIS 437 (2000).

Attorney's fees are available for plaintiffs alleging violations of Chapter 58, Article 70, who can satisfy the requirements set forth in this section. Llera v. Security Credit Sys., 93 F. Supp. 2d 674 (W.D.N.C. 2000).

Findings Required. —

To recover attorney's fees under this section, a plaintiff must prove by a preponderance of the evidence that the plaintiff is a prevailing party, that the defendant willfully engaged in the prohibited act, and that the defendant's refusal to fully resolve the matter was unwarranted. Llera v. Security Credit Sys., 93 F. Supp. 2d 674 (W.D.N.C. 2000).

"Prevailing Party" Must Have Suffered Actual Injury. —

The jury's assessment of the statutory penalty was insufficient to prove by a preponderance of the evidence that plaintiff suffered an actual injury, and as such, plaintiff was not entitled to recover attorney's fees under this section. Llera v. Security Credit Sys., 93 F. Supp. 2d 674 (W.D.N.C. 2000).

Discretion of Trial Judge. —

An award of attorney's fees under this section is within the sound discretion of the trial judge, so that, even where facts exist to support a finding that plaintiff has satisfied the requirements of this section, a court may deny attorney's fees. Llera v. Security Credit Sys., 93 F. Supp. 2d 674 (W.D.N.C. 2000).

Discretion of Trial Judge. — An award of attorney's fees under this section is within the sound discretion of the trial judge, and even where facts exist to support a finding that a party has satisfied the requirements of this section, a court may deny attorney's fees. Llera v. Security Credit Sys., 93 F. Supp. 2d 674 (W.D.N.C. 2000).

Court Must Make Findings of Fact. —

Where the trial court awarded plaintiff $50,000 in attorney's fees, and where the record indicated that one defendant had offered to settle for $12,000 and another had refused to settle but was silent as to the third defendant, the appellate court remanded the case for further findings as to the award of attorney's fees against the third defendant. Leftwich v. Gaines, 134 N.C. App. 502, 521 S.E.2d 717 (1999).

Attorneys Fees Upheld. — The trial court did not err in awarding plaintiff $87,480 in attorneys fees, under this section, where the plaintiff's recovery on an unfair and deceptive trade practices claim amounted to $87,480, given the attorneys' experience, positions within their respective firms, and the comparable hourly rates for attorneys in the area. Vazquez v. Allstate Ins. Co., — N.C. App. —, 529 S.E.2d 480, 2000 N.C. App. LEXIS 494 (2000).

Findings of Fact Held Insufficient to Support Attorneys' Fees. —

Case was remanded for failure to make necessary findings of facts regarding time, labor expended, skills, customary fees, and the experience and ability of the attorneys to support the amount of the sanctions award. Polygenex Int'l, Inc. v. Polyzen, Inc., 133 N.C. App. 245, 515 S.E.2d 457 (1999).

Quoted in Poor v. Hill, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 540 (May 16, 2000).

Stated in Polygenex Int'l, Inc. v. Polyzen, Inc., 133 N.C. App. 245, 515 S.E.2d 457 (1999).

Cited in Allen v. Roberts Constr. Co., — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 783 (July 5, 2000).

§ 75-16.2. Limitation of actions.

CASE NOTES

Since plaintiff failed to file her claim for unfair and deceptive trade practices within the four-year limitations period, the trial court did not err in granting defendants summary judgment. Jones v. Asheville Radiological Group, P.A., 134 N.C. App. 520, 518 S.E.2d 528 (1999).

§ 75-30.1. Restrictions on telephone solicitations.

(a) For purposes of this section:

(1) "Residential telephone subscriber" means a person who subscribes to residential telephone service from a local exchange company and uses that service primarily for residential purposes, or the persons living or residing with that person.

(2) "Telephone solicitation" means a voice communication over a telephone line to a residential telephone subscriber for the purpose of soliciting or encouraging the purchase or rental of, or investment in, property, goods, or services, or for the purpose of obtaining information that will or may be used for that purpose, but does not include the following communications:

a. To any person with that person's prior express invitation or permission;

b. To any person with whom the telephone solicitor has an established business relationship; or

c. By or on behalf of a tax-exempt nonprofit organization.

(3) "Telephone solicitor" means any business or other legal entity doing business in this State that makes telephone solicitations or causes telephone solicitations to be made.

(b) Any telephone solicitor who makes a telephone solicitation to a residential telephone subscriber shall:

(1) At the beginning of the call, state clearly the identity of the business, individual, or other legal entity initiating the call, and identify the person making the call by that person's name.

(2) Upon request, provide the telephone subscriber with the telephone number or address at which the person or entity may be contacted.

(3) Terminate the call if the person does not consent to the call.

(4) If the person called requests to be taken off the contact list of the telephone solicitor, take all steps necessary to remove that person's name and telephone number from the contact records of the business, individual, or other legal entity initiating the call.

(c) Every telephone solicitor who makes telephone solicitations in this State shall implement in-house systems and procedures designed to prevent further calls to persons who have asked not to be called again. Compliance with 47 C.F.R. § 64.1200(e) of the Federal Communications Commission's Restrictions on Telephone Solicitation constitutes compliance with this subsection.

(d) No telephone solicitor shall initiate a call to a residential telephone subscriber who has communicated to that telephone solicitor a desire to be taken off the contact list of that solicitor.

(e) No telephone solicitor shall initiate a call to a residential telephone subscriber after 9:00 P.M. or before 8:00 A.M. at the called party's location.

(f) No telephone solicitor who makes a telephone solicitation to the telephone line of a residential telephone subscriber in this State shall knowingly use any method to block or otherwise circumvent that subscriber's use of a caller identification service. A telephone solicitor who makes a telephone

solicitation to the telephone line of a residential subscriber through the use of a private branch exchange (PBX) or other call-generating system that is not capable of transmitting caller identification information shall not be in violation of this subsection. No provider of telephone caller identification services shall be held liable for violations of this subsection committed by other persons or entities.

(g) Every telephone solicitor who makes telephone solicitations in this State shall keep a record for a period of 24 months from the date a call is placed of the legal name and any fictitious name used, resident address, telephone number, and job title of each person who places a telephone solicitation for that telephone solicitor. If callers for a telephone solicitor use fictitious names, each fictitious name shall be traceable to only one specific caller.

(h) The Attorney General may investigate any complaints received alleging violations of subsections (b) through (g) of this section. If, after investigating a complaint, the Attorney General finds that there has been a violation of subsections (b) through (g) of this section, the Attorney General may bring an action to impose a civil penalty and to seek any other appropriate relief, including equitable relief to restrain the violation pursuant to G.S. 75-14. Actions for civil penalties under this section shall be consistent with the provisions of G.S. 75-15.2, except that the penalty imposed for a violation of this section shall not exceed five hundred dollars ($500.00) per violation.

(i) A person who has received more than one telephone solicitation within any 12-month period by or on behalf of the same telephone solicitor in violation of subsections (b) through (g) of this section may bring either or both of the following actions in the General Court of Justice:

(1) An action to enjoin further violations.

(2) An action to recover five hundred dollars ($500.00) in damages for each violation.

In an action brought pursuant to this section, a prevailing plaintiff shall be entitled to recover reasonable attorneys' fees, and the court may award reasonable attorneys' fees to a prevailing defendant if the court finds that the plaintiff knew, or should have known, that the action was frivolous and malicious.

(j) A citizen of this State is also entitled to bring an action in the General Court of Justice to enforce the private rights of action established by federal law under 47 U.S.C. § 227(b)(3) and 47 U.S.C. § 227(c)(5).

(k) Actions brought pursuant to subsections (i) and (j) of this section shall be tried in the county where the plaintiff resides at the time of the commencement of the action. (2000-161, s. 2.)

Editor's Note. — Session Laws 2000-161, s. 4, made this section effective October 1, 2000, and applicable to telephone calls made on or after that date.

Session Laws 2000-161, s. 1, provides:

"The General Assembly finds that:

"(1) The use of the telephone to market goods and services to consumers is increasing;

"(2) Some citizens of this State wish to have a means of controlling these calls to their residences;

"(3) The rights to privacy and commercial speech can be balanced in a way that accommodates both the privacy of individuals and legitimate telemarketing practices; and

"(4) The public interest requires the establishment of a mechanism under which the citizens of this State can decide whether or not they wish to receive telemarketing calls in their homes."

ARTICLE 2.

Prohibited Acts by Debt Collectors.

§ 75-50. Definitions.

CASE NOTES

Applied in Davis Lake Community Ass'n v. Feldmann, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 598 (2000).

Quoted in Reid v. Ayers, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 606 (June 6, 2000).

§ 75-51. Threats and coercion.

CASE NOTES

Applied in Davis Lake Community Ass'n v. Feldmann, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 598 (2000).

Stated in Reid v. Ayers, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 606 (June 6, 2000).

§ 75-56. Application.

CASE NOTES

Quoted in Reid v. Ayers, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 606 (June 6, 2000).

Chapter 75A.

Boating and Water Safety.

Article 1.

Boating Safety Act.

§ 75A-13.3. Personal watercraft.

(a) No person shall operate a personal watercraft on the waters of this State at any time between sunset and sunrise. For purposes of this section, "personal watercraft" means a small vessel which uses an outboard or propeller-driven motor, or an inboard motor powering a water jet pump, as its primary source of motive power and which is designed to be operated by a person sitting, standing, or kneeling on, or being towed behind the vessel, rather than in the conventional manner of sitting or standing inside the vessel.

(a1) No person shall operate a personal watercraft on the waters of this State at greater than no-wake speed within 100 feet of an anchored or moored vessel, a dock, pier, swim float, marked swimming area, swimmers, surfers, persons engaged in angling, or any manually operated propelled vessel, unless the personal watercraft is operating in a narrow channel. No person shall operate a personal watercraft in a narrow channel at greater than no-wake speed within 50 feet of an anchored or moored vessel, a dock, pier, swim float, marked swimming area, swimmers, surfers, persons engaged in angling, or any manually operated propelled vessel.

(b) Except as otherwise provided in this subsection, no person under 16 years of age shall operate a personal watercraft on the waters of this State, and it is unlawful for the owner of a personal watercraft or a person who has temporary or permanent responsibility for a person under the age of 16 to knowingly allow that person to operate a personal watercraft. A person of at least 12 years of age but under 16 years of age may operate a personal watercraft on the waters of this State if:

(1) The person is accompanied by a person of at least 18 years of age who physically occupies the watercraft; or

(2) The person (i) possesses on his or her person while operating the watercraft, identification showing proof of age and a boater safety certification card issued by the Wildlife Resources Commission or proof of other satisfactory completion of a boating safety education course approved by the National Association of State Boating Law Administrators (NASBLA); and (ii) produces that identification and certification card upon the request of an officer of the Wildlife Resources Commission or local law enforcement agency.

(c) No livery shall lease, hire, or rent a personal watercraft to or for operation by a person under 16 years of age, except as provided in subsection (b) of this section.

(c1) It shall be unlawful for any person, firm, or corporation to engage in the business of renting personal watercraft to the public for operation by the rentee unless such person, firm, or corporation has secured insurance for his own liability and that of his rentee, in such an amount as is hereinafter provided, from an insurance company duly authorized to sell liability insurance in this State. Each such personal watercraft rented must be covered by a policy of liability insurance insuring the owner and rentee and their agents and employees while in the performance of their duties against loss from any liability imposed by law for damages including damages for care and loss of services because of bodily injury to or death of any person and injury to or destruction of property caused by accident arising out of the operation of such personal watercraft, subject to the following minimum limits: three hundred thousand dollars ($300,000) per occurrence.

(d) No person shall operate a personal watercraft on the waters of this State, nor shall the owner of a personal watercraft knowingly allow another person to operate that personal watercraft on the waters of this State, unless:

(1) Each person riding on or being towed behind such vessel is wearing a type I, type II, type III, or type V personal flotation device approved by the United States Coast Guard. Inflatable personal flotation devices do not satisfy this requirement; and

(2) In the case of a personal watercraft equipped by the manufacturer with a lanyard-type engine cut-off switch, the lanyard is securely attached to the person, clothing, or flotation device of the operator at all times while the personal watercraft is being operated in such a manner to turn off the engine if the operator dismounts while the watercraft is in operation.

(d1) No person shall operate a personal watercraft towing another person on water skis or other devices unless:

(1) The personal watercraft has on board, in addition to the operator, an observer who shall monitor the progress of the person or persons being towed, or the personal watercraft is equipped with a rearview mirror; and

(2) The total number of persons operating, observing, and being towed does not exceed the number of passengers identified by the manufacturer as the maximum safe load for the vessel.

(e) A personal watercraft must at all times be operated in a reasonable and prudent manner. Maneuvers that endanger life, limb, or property shall constitute reckless operation of a vessel as provided in G.S. 75A-10, and include:

(1) Unreasonably or unnecessarily weaving through congested vessel traffic;

(2) Jumping the wake of another vessel within 100 feet of such other vessel or when visibility around such other vessel is obstructed;

(3) Intentionally approaching another vessel in order to swerve at the last possible moment to avoid collision;

(4) Repealed by Session Laws 2000-52, s. 2, effective June 30, 2000.

(5) Operating contrary to the "rules of the road" or following too closely to another vessel, including another personal watercraft. For purposes of this subdivision, "following too closely" means proceeding in the same direction and operating at a speed in excess of 10 miles per hour when approaching within 100 feet to the rear or 50 feet to the side of another vessel that is underway unless that vessel is operating in a narrow channel, in which case a personal watercraft may operate at the speed and flow of other vessel traffic.

(f) The provisions of this section do not apply to a performer engaged in a professional exhibition, a person or persons engaged in an activity authorized under G.S. 75A-14, or a person attempting to rescue another person who is in danger of losing life or limb.

(f1) For purposes of this section, "narrow channel" means a segment of the waters of the State 300 feet or less in width.

(g) Repealed by Session Laws 1999-447, s. 1, effective December 1, 1999.

(h) Nothing in this section prohibits units of local government, marine commissions, or local lake authorities from regulating personal watercraft pursuant to the provisions of G.S. 160A-176.2 or any other law authorizing such regulation, provided that the regulations are more restrictive than the provisions of this section or regulate aspects of personal watercraft operation that are not covered by this section. Whenever a unit of local government, marine commission, or local lake authority regulates personal watercraft pursuant to this subsection, it shall conspicuously post signs that are reasonably calculated to provide notice to personal watercraft users of the stricter regulations. (1997-129, s. 1; 1999-447, s. 1; 2000-52, ss. 1-4.)

Effect of Amendments. —

Session Laws 2000-52, ss. 1-4, effective June 30, 2000, added subsections (a1) and (f1); repealed subdivision (e)(4), for which the subject matter is now contained in the first sentence of subsection (a1); and in subsection (h), twice substituted "lake" for "wake.".

Article 4.

Watercraft Titling Act.

§ 75A-41. (Effective July 1, 2001) Security interests subsequently created.

Except for security interests in watercraft that are inventory held for sale, security interests created in watercraft by the voluntary act of the owner after the original issue of title to the owner must be shown on the certificate of title. In such cases, the owner shall file an application with the Commission on a blank furnished for that purpose, setting forth the security interests and other information as the Commission requires. The Commission, if satisfied that it is proper that the same be recorded and upon surrender of the certificate of title covering the watercraft, shall thereupon issue a new certificate of title showing their security interests in the order of the priority according to the date of the filing of the application. For the purpose of recording the subsequent security interest, the Commission may require any secured party to deliver the certificate of title to the Commission. The newly issued certificate shall be sent or delivered to the secured party from whom the prior certificate was obtained. (1989, c. 739, s. 1; 2000-169, s. 38.)

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 38, effective July 1, 2001, substituted "Except for security interests in watercraft that are inventory held for sale, security interests" for "Security interests, other than a security interest in inventory held for sale to be perfected only as provided in G.S. 25-9-301 to G.S. 25-9-408."

§ 75A-42. (Effective July 1, 2001) Certificate as notice of security interest.

A certificate of title, when issued by the Commission showing a security interest, shall be deemed adequate notice to the State, creditors, and purchasers that a security interest in the watercraft exists and the recording or filing of the creation or reservation of a security interest in the county or city wherein the purchaser or debtor resides or elsewhere is not necessary and shall not be required. Watercraft, other than those that are inventory held for sale, for which a certificate of title is currently in effect shall be exempt from the provisions of G.S. 25-9-309, 25-9-310, 25-9-312, 25-9-320, 25-9-322, 25-9-323, 25-9-324, 25-9-331, 25-9-404, 25-9-405, 25-9-406, and 25-9-501 to 25-9-526 for so long as the certificate of title remains in effect. (1989, c. 739, s.1; 2000-169, s. 39.)

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 39, effective July 1, 2001, substituted "G.S. 25-9-309, 25-9-310, 25-9-312, 25-9-320, 25-9-322, 25-9-323, 25-9-324, 25-9-331, 25-9-404, 25-9-405, 25-9-406, and 25-9-501 to 25-9-526" for "G.S. 25-9-302, 25-9-304, 25-9-307, 25-9-309, 25-9-312, 25-9-318, and 25-9-401 to 25-9-408" and made a minor punctuation change.

§ 75A-44. (Effective July 1, 2001) Priority of security interests shown on certificates.

Except for security interests in watercraft that are inventory held for sale, security interests shown upon the certificates of title issued by the Commission pursuant to applications for certificates shall have priority over any other liens or security interests against the watercraft however created and recorded, except for a mechanics lien for repairs, provided that the mechanic furnishes the holder of any recorded lien who may request it with an itemized sworn statement of the work done and materials supplied for which the lien is claimed. (1989, c. 739, s.1; 2000-169, s. 40.)

For this section as in effect until July 1, 2001, see the main volume.

Effect of Amendments. — Session Laws 2000-169, s. 40, effective July 1, 2001, substituted "Except for security interests in watercraft that are inventory held for sale, security interests" for "The security interests, except security interests in watercraft which are inventory held for sale and which are perfected under G.S. 25-9-301 to 25-9-408."

Chapter 76.
Navigation.

Article 5.
General Provisions.

§ 76-40. Navigable waters; certain practices regulated.

Editor's Note. —

Session Laws 2000-74, effective July 1, 2000, establishes a pilot program for the removal of abandoned vessels in the Neuse River Basin. Specifically, Session Laws 2000-74, s. 1, provides:

"(a) As used in this act:

"(1) 'Abandoned vessel' means a vessel that, for more than 90 consecutive days, is left either unattended or in a wrecked, junked, or substantially dismantled condition in coastal fishing waters, as defined in G.S. 113-129, or upon submerged lands, as defined in G.S. 146-64.

"(2) 'Department' means the Department of Environment and Natural Resources.

"(3) 'Vessel' means any watercraft or structure, including seaplanes, used or capable of being used as a means of transportation or habitation on or under the water. Vessel" does not include any shipwreck, vessel, cargo, tackle, or underwater archaeological artifact that is within the exclusive dominion and control of the State pursuant to G.S. 121-22 or to artificial reefs managed by the Department.

"(b) The Department shall implement a pilot program for the removal of abandoned vessels in the Neuse River Basin, as defined in G.S. 143-215.22G, as provided in this act during the period 1 July 2000 through 1 January 2003.

"(c) The Department shall notify the owner of record of a vessel, as provided in [§ 1A-1] Rule 4 of the Rules of Civil Procedure, that the Department has determined that the vessel is abandoned. The notice shall state that unless the owner submits a plan for the removal of the abandoned vessel and for the restoration of the affected area within 15 days of the date that notice is served on the owner and removes the abandoned vessel and restores the affected area within 45 days of the date that notice is served, the Department may remove the abandoned vessel, restore the affected area, and charge the costs of removal and restoration to the owner. If the owner of the abandoned vessel cannot be determined, the Department shall give notice by publication as provided in Rule 4 of the Rules of Civil Procedure, G.S. 1A-1, except that, if the Department determines that the value of the abandoned vessel is less than two hundred fifty dollars ($250.00), the Department may publish the notice only once.

"(d) If the owner of the abandoned vessel does not remove the abandoned vessel and restore the affected area within 45 days of the date on which notice is served, the Department may remove the abandoned vessel. The Department may use staff, equipment, and material under its control or provided by any cooperating federal, State, or local government or agency; may authorize or contract with any private agent or contractor it deems appropriate; or may authorize or contract with any federal, State, or local government or agency for the removal, storage, or disposal of an abandoned vessel and restoration of the affected area. The method of removal, storage, and disposal of the abandoned vessel, whether by the owner, a third party, or the State, must comply with all applicable federal and State laws, regulations, and rules.

"(e) The owner of an abandoned vessel is liable for all costs incurred by or on behalf of the State to remove,store, and dispose of the abandoned vessel and to restore the affected area. The Department may request the Attorney General to institute a civil action in the superior court of the county where the vessel is located, where the owner of the vessel resides, or where the owner has his or her principal place of business to recover the amount of these costs.

"(f) The Department is authorized to sell or dispose of an abandoned vessel and its cargo, tackle, and equipment as provided in Article 4 of Chapter 116B of the the General Statutes. The net proceeds of the sale shall be used to reimburse the State for costs incurred to remove, store, and dispose of the abandoned vessel and to restore the affected area. Any excess proceeds shall be refunded to the owner or, if the owner cannot be identified or located shall be transferred to the Escheat Fund administered under Article 1 of Chapter 116B of the General Statutes.

"(g) This act shall not be construed to limit any other civil or criminal action or remedy that may be available to the State, any other agency of government, or any person."

Session Laws 2000-74, s. 2, directs the Department to submit an interim report on the

implementation of the act to the Environmental Review Commission no later than January 1, 2002, and a final report, including recommendations as to extending, expanding, or modifying the program, no later than January 1, 2003.

Session Laws 2000-74, s. 3, states that the act does not obligate the General Assembly to appropriate funds to implement the act, and that the act is to be implemented with funds otherwise appropriated or available to the Department.

Session Laws 2000-74, s. 4, provides that the act expires January 1, 2003, except that an action to recover costs incurred pursuant to the act does not abate due to the expiration of the act.

Chapter 84.

Attorneys-at-Law.

Article 1.

Qualifications of Attorney; Unauthorized Practice of Law.

Article 1.

Qualifications of Attorney; Unauthorized Practice of Law.

§ 84-5. Prohibition as to practice of law by corporation.

(a) It shall be unlawful for any corporation to practice law or appear as an attorney for any person in any court in this State, or before any judicial body or the North Carolina Industrial Commission, Utilities Commission, or the Employment Security Commission, or hold itself out to the public or advertise as being entitled to practice law; and no corporation shall organize corporations, or draw agreements, or other legal documents, or draw wills, or practice law, or give legal advice, or hold itself out in any manner as being entitled to do any of the foregoing acts, by or through any person orally or by advertisement, letter or circular. The provisions of this section shall be in addition to and not in lieu of any other provisions of Chapter 84. Provided, that nothing in this section shall be construed to prohibit a banking corporation authorized and licensed to act in a fiduciary capacity from performing any clerical, accounting, financial or business acts required of it in the performance of its duties as a fiduciary or from performing ministerial and clerical acts in the preparation and filing of such tax returns as are so required, or from discussing the business and financial aspects of fiduciary relationships. Provided, however, this section shall not apply to corporations authorized to practice law under the provisions of Chapter 55B of the General Statutes of North Carolina.

To further clarify the foregoing provisions of this section as they apply to corporations which are authorized and licensed to act in a fiduciary capacity:

(1) A corporation authorized and licensed to act in a fiduciary capacity shall not:

a. Draw wills or trust instruments; provided that this shall not be construed to prohibit an employee of such corporation from conferring and cooperating with an attorney who is not a salaried employee of the corporation, at the request of such attorney, in connection with the attorney's performance of services for a client who desires to appoint the corporation executor or trustee or otherwise to utilize the fiduciary services of the corporation.

b. Give legal advice or legal counsel, orally or written, to any customer or prospective customer or to any person who is considering renunciation of the right to qualify as executor or administrator or who proposes to resign as guardian or trustee, or to any other person, firm or corporation.

c. Advertise to perform any of the acts prohibited herein; solicit to perform any of the acts prohibited herein; or offer to perform any of the acts prohibited herein.

(2) Except as provided in subsection (b) of this section, when any of the following acts are to be performed in connection with the fiduciary activities of such a corporation, said acts shall be performed for the corporation by a duly licensed attorney, not a salaried employee of the corporation, retained to perform legal services required in connection with the particular estate, trust or other fiduciary matter:
a. Offering wills for probate.
b. Preparing and publishing notice of administration to creditors.
c. Handling formal court proceedings.
d. Drafting legal papers or giving legal advice to spouses concerning rights to an elective share under Article 1A of Chapter 30 of the General Statutes.
e. Resolving questions of domicile and residence of a decedent.
f. Handling proceedings involving year's allowances of widows and children.
g. Drafting deeds, notes, deeds of trust, leases, options and other contracts.
h. Drafting instruments releasing deeds of trust.
i. Drafting assignments of rent.
j. Drafting any formal legal document to be used in the discharge of the corporate fiduciary's duty.
k. In matters involving estate and inheritance taxes, gift taxes, and federal and State income taxes:
1. Preparing and filing protests or claims for refund, except requests for a refund based on mathematical or clerical errors in tax returns filed by it as a fiduciary.
2. Conferring with tax authorities regarding protests or claims for refund, except those based on mathematical or clerical errors in tax returns filed by it as a fiduciary.
3. Handling petitions to the tax court.
l. Performing legal services in insolvency proceedings or before a referee in bankruptcy or in court.
m. In connection with the administration of an estate or trust:
1. Making application for letters testamentary or letters of administration.
2. Abstracting or passing upon title to property.
3. Handling litigation relating to claims by or against the estate or trust.
4. Handling foreclosure proceedings of deeds of trust or other security instruments which are in default.

(3) When any of the following acts are to be performed in connection with the fiduciary activities of such a corporation, the corporation shall comply with the following:
a. The initial opening and inventorying of safe deposit boxes in connection with the administration of an estate for which the corporation is executor or administrator shall be handled by, or with the advice of, an attorney, not a salaried employee of the corporation, retained by the corporation to perform legal services required in connection with that particular estate.
b. The furnishing of a beneficiary with applicable portions of a testator's will relating to such beneficiary shall, if accompanied by any legal advice or opinion, be handled by, or with the advice of, an attorney, not a salaried employee of the corporation, retained by the corporation to perform legal services required in connection with that particular estate or matter.
c. In matters involving estate and inheritance taxes and federal and State income taxes, the corporation shall not execute waivers of

statutes of limitations without the advice of an attorney, not a salaried employee of the corporation, retained by the corporation to perform legal services in connection with that particular estate or matter.

d. An attorney, not a salaried employee of the corporation, retained by the corporation to perform legal services required in connection with an estate or trust shall be furnished copies of inventories and accounts proposed for filing with any court and proposed federal estate and North Carolina inheritance tax returns and, on request, copies of proposed income and intangibles tax returns, and shall be afforded an opportunity to advise and counsel the corporate fiduciary concerning them prior to filing.

(b) Nothing in this section shall prohibit an attorney retained by a corporation, whether or not the attorney is also a salaried employee of the corporation, from representing the corporation or an affiliate, or from representing an officer, director, or employee of the corporation or an affiliate in any matter arising in connection with the course and scope of the employment of the officer, director, or employee. Notwithstanding the provisions of this subsection, the attorney providing such representation shall be governed by and subject to all of the Rules of Professional Conduct of the North Carolina State Bar to the same extent as all other attorneys licensed by this State. (1931, c. 157, s. 2; 1937, c. 155, s. 2; 1955, c. 526, s. 2; 1969, c. 718, s. 20; 1971, c. 747; 1997-203, s. 1; 2000-178, s. 8.)

Cross References. — As to right of elective share, see § 30-3.1 et seq.

Effect of Amendments. — Session Laws 2000-178, s. 8, effective January 1, 2001, and applicable to estates of decedents dying on or after that date, substituted "rights to an elective share under Article 1A of Chapter 30 of the General Statutes" for "dissent from their spouses' will" in subdivision (a)(2)d.

Article 4.

North Carolina State Bar.

§ 84-28. Discipline and disbarment.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Construction with Fifth Amendment Rights. — The requirements of this section did not cause the defendant to be compelled, in violation of his constitutional rights, by the state bar to provide information which would later be used against him in a perjury case where he, acting of his own volition, made statements to the bar investigator. The record does not indicate that these statements were extracted under the power of a subpoena; and the defendant was not in custody at the time these statements were made. The defendant could have asserted his Fifth Amendment privilege during the bar proceedings, although the protection would not have extended to any records that he was required by law to maintain. State v. Linney, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 538 (May 16, 2000).

§ 84-28.1. Disciplinary hearing commission.

CASE NOTES

Public Duty Doctrine Applied to Claim Against Disciplinary Hearing Commission. — Disbarred attorney's claim against the Disciplinary Hearing Commission for negligent infliction of emotional distress in the performance of its duties came under the public duty doctrine, since the Commission was acting within its statutory authority under this section when it held plaintiff in criminal contempt. Frazier v. Murray, 135 N.C. App. 43, 519 S.E.2d 525 (1999).

§ 84-29. Evidence and witnesses.

CASE NOTES

Construction with Fifth Amendment Rights. — This section did not cause the defendant to be compelled in violation of his constitutional rights by the state bar to provide information which would later be used against him in a perjury case where he, acting of his own volition, made statements to the bar investigator. The record does not indicate that these statements were extracted under the power of a subpoena; and the defendant was not in custody at the time these statements were made. The defendant could have asserted his Fifth Amendment privilege during the bar proceedings although the protection would not have extended to any records that he was required by law to maintain. State v. Linney, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 538 (May 16, 2000).

§ 84-31. Counsel; investigators; powers; compensation.

CASE NOTES

Quoted in North Carolina State Bar v. Harris, — N.C. App. —, 527 S.E.2d 728, 2000 N.C. App. LEXIS 317 (2000).

Chapter 85B.

Auctions and Auctioneers.

Sec.
85B-3.2. Criminal history record checks of applicants for licensure.

§ 85B-3.2. Criminal history record checks of applicants for licensure.

(a) Definitions. — The following definitions shall apply in this section:

(1) Applicant — An applicant for initial licensure as an auctioneer, apprentice auctioneer, or auction firm.

(2) Criminal history — A State or federal history of conviction of a crime, whether a misdemeanor or felony, that bears upon an applicant's fitness to be licensed as an auctioneer, apprentice auctioneer, or auction firm.

(b) The Commission shall ensure that the State criminal history of an applicant is checked. National criminal history checks are authorized for an applicant who has not resided in the State of North Carolina during the past five years. The Commission shall provide to the North Carolina Department of Justice the fingerprints of the applicant to be checked, a form signed by the applicant to be checked consenting to the check of the criminal history and to the use of fingerprints and other identifying information required by the State or National Repositories, and any additional information required by the Department of Justice.

(c) All releases of criminal history information to the Commission 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 Commission receives through the checking of the criminal history is for the exclusive use of the Commission and shall be kept confidential.

(d) If the applicant's verified criminal history record check reveals one or more convictions of a crime that is punishable as a felony offense, or the conviction of any crime involving fraud or moral turptitude, the Commission may deny the applicant's license. However, the conviction shall not automatically prohibit licensure, and the following factors shall be considered by the Commission in determining whether licensure 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 crime.

(4) The circumstances surrounding the commission of the crime, if known.

(5) The nexus between the criminal conduct of the applicant and the applicant's duties as an auctioneer, apprentice auctioneer, or auction firm.

(6) The prison, jail, probation, parole, rehabilitation, and employment records of the applicant since the date the crime was committed.

(7) The subsequent commission by the person of a crime.

(e) The Commission may deny licensure to 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.

(f) The Commission shall notify the applicant of the applicant's right to review the criminal history information, the procedure for challenging the accuracy of the criminal history, and the applicant's right to contest the Commission's denial of licensure. (1999-142, s. 3; 2000-140, ss. 59(a), 59(b).)

Editor's Note. —

Session Laws 2000-140, s. 59(d) provides that the amendment to this section by ss. 59(a) and (b), becomes effective October 1, 2000, and applies to applications for licensure for auctioneers, apprentice auctioneers, and auction firms filed on or after that date.

Effect of Amendments. — Session Laws 2000-140, s. 59(a) and (b), added "apprentice auctioneer, or auction firm" in subdivisions (a)(1) and (2) and subdivision (d)(5). See editor's note for effective date and applicability.