February 2012

Legislative Survey

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The *Campbell Law Review* is pleased to introduce its first Legislative Survey. We hope that this new feature will become a mainstay of our publication, appearing in every Spring issue. The *Campbell Law Review* has added the survey to better inform those persons with an interest in North Carolina law. The survey does this in several ways. First, the survey cites and explains the most important changes to prior law made by the General Assembly. Second, the new survey breaks down new acts and discusses their purposes, how they operate, and those parts of the act about which the practitioner should be careful. Finally, the survey will be a useful map in finding those parts of the General Statutes in which all the new laws appear.

The *Campbell Law Review* hopes that the legislative survey is greatly beneficial to the legal community. We therefore invite comments from our readers on how we can make this service one of the highest caliber. Please send such comments to the attention of the Editor-in-Chief via fax, mail, or e-mail, using the addresses on the copyright page of this issue.

Finally, we wish to thank all those involved in launching this new feature.
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A. Unemployment

The North Carolina General Assembly, with its ratification of "An Act Relating To Severance Pay For The Purposes of Unemployment Insurance Benefits," added an alternative factor for determining whether individuals receiving severance pay should be considered unemployed for purposes of receiving unemployment benefits. This amendment is an addition to the definition of "total and partial unemployment." It provides an exception to the rule that individuals receiving severance pay will not be deemed unemployed for the qualification of unemployment benefit entitlements. It states "that an individual shall be considered to be unemployed as to receipt of severance pay for any week the individual is registered at or attending any institution of higher education as defined in G.S. 96-8(5)j., or secondary school as defined in G.S. 96-8(5)q., or Commission approved vocational, educational, or training programs as defined in G.S. 96-13."

B. Administrative Office of the Courts

The General Assembly, with its enactment of "An Act To Authorize The Director Of The Administrative Office Of The Courts To Contract With Third Parties To Provide Remote Electronic Access To Court Information," has delegated to the Director of the Administrative Office of the Courts the power to "enter into one or more nonexclusive contracts with third parties to provide remote electronic access to the records [of the courts] by the public." The purpose of this delegation is to facilitate access to court records, except where public access is prohibited by law.

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3. § 96-8(10)(c).
6. § 7A-109(d).
C. Revision of the Setoff Debt Collection Act

The Setoff Debt Collection Act⁷ (the Act) was enacted for the dual purposes of identifying those individuals who owe money to the State and who also qualify for refunds from the State Department of Revenue (the Department), and to establish procedures for setting off those debts owed to the State against the refunds.⁸ The General Assembly, with its enactment of “An Act To Revise The Setoff Debt Collection Act,”⁹ made several revisions to the Act.

The first revision was the expansion of the definition “claimant agency” to include “a local agency acting through a clearing house or an organization pursuant to G.S. 105A-3(b1).”¹⁰ Additionally, the definition of “claimant agency” with respect to State agencies was simplified by replacing specifically named agencies with the definition “a State agency.”¹¹ The next revision involved the Act’s expansion of the definition of “debt” to include sums a claimant agency is authorized or required by law to collect, such as child support, sums owed as a result of intentional or inadvertent Food Stamp Program violations, and sums owed as a result of having obtained public assistance through inadvertent errors, intentional false statements, misrepresentations, or failures to disclose material facts.¹²

The second group of revisions concerns the differentiation between State agencies and local government agencies. The Act requires that all state agencies submit debts owed to them for collection under this Chapter, unless the State Comptroller has waived this requirement because collection would be impracticable or ineffective.¹³ Local government agencies have discretion in whether to submit claims for collection. If a local government

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11. § 105A-2(9) (effective date Jan. 1, 2000) defines State agency:
   Any of the following: (a) A unit of the executive, legislative, or judicial branch of the State government. (b) A county, to the extent it administers a program supervised by the Department of Human Resources or it operates a Child Support Enforcement Program, enabled by Chapter 110, Article 9, and Title IV, Part D of the Social Security Act.
12. § 105A-2(2).
13. § 105A-3(b) (effective date Jan. 1, 2000).
agency does opt for this collection remedy, it must submit the debt through a debt clearinghouse established pursuant to an interlocal agreement adopted under Article 20 of Chapter 160A of the General Statutes, the North Carolina League of Municipalities, or the North Carolina Association of County Commissioners. All state agencies and clearinghouses must register with the Department of Revenue. Additionally, the Act sets a minimum value of $50.00 for debts and refunds that are applicable to this chapter.

The third set of revisions concerns procedures for local agency notice, hearings, and decisions. Local agencies, before submitting a debt for collection, are required to give written notice to the debtor of its intention to submit the debt for setoff. They are also required to explain the basis for the agency's claim to the debt, and its intention to apply the debtor's refund against the debt. Additionally, the notice must inform the debtor of the right to contest the matter by filing a hearing request with the local agency, state the time limits and the procedures for requesting the hearing, and state that failure to request a hearing within the time limit will result in the debt setoff. Concerning administrative review, if the debtor complies with the requirements for a hearing request, the local agency or a designated person by the governing agency must hold the hearing. A person who disagrees with a governing body's decision may file a petition for a contested case under Article 3 of Chapter 150B of the General Statutes within thirty days after the debtor receives a copy of the local decision. The local agency's post-hearing decision must determine whether the debt is owed and the debt's amount. A local agency that fails to comply with the notice or hearing procedures of the Act must send the taxpayer the entire amount setoff plus the collection assistance fee retained by the Department of Revenue. Additionally, if the net proceeds collected exceed the amount of the debt, the local agency must send the balance to the

14. § 105A-3(b1).
15. § 105A-3(d).
17. § 105A-5.
18. § 105A-5(b) (effective date Jan. 1, 1999).
19. § 105A-5(b).
20. § 105A-5(b).
21. § 105A-5(c) (effective date Jan. 1, 1999).
22. §105A-5(c).
23. § 105A-5(d) (effective date Jan. 1, 1999).
24. § 105A-5(e).
debtor with interest that accrues from the fifth day after the Department mailed the notice of setoff to the taxpayer.\(^{25}\)

The fourth group of revisions to the Act concerns additional requirements imposed upon the Department of Revenue concerning setoffs. The Department is required to mail written notice to the debtor that setoff has occurred, to credit the net proceeds collected to the claimant agency, and to refund any remaining balance to the debtor.\(^{26}\)

The fifth group of revisions to the Act concerns procedures for state agency hearings, decisions, and refunds of setoffs.\(^ {27}\) Written notice, within ten days after the state agency receives a refund of a debtor, must be sent to the debtor by the state agency explaining that it has received the refund, its basis for the agency's claim to the refund, its intention to apply the refund against the debt, the debtor's right to contest the matter by filing a request for hearing, the time limits and the procedures for requesting a hearing, and that a failure to request a hearing within the required time will result in a setoff of the debt.\(^ {28}\) A state agency that does not comply with the notice requirement within the ten days time limit must refund the amount setoff and the collection assistance fee.\(^ {29}\)

Concerning hearings, a request for a hearing on a contested claim must be mailed within thirty days after the state agency mails the debtor notice of the proposed setoff.\(^ {30}\) Hearings of contested claims must be conducted in accordance with Article 3 Chapter 150B of the General Statutes, with two exceptions.\(^ {31}\) Hearings of contested claims concerning University of North Carolina institutions must be conducted in accordance with administrative procedures approved by the Attorney General, and hearings of contested claims of the Employment Security Commission must be conducted in accordance with rules adopted by the Commission.\(^ {32}\) These hearings must determine if the contested debt is owed and the amount the debt.\(^ {33}\) If a state agency fails to abide by any of these procedures or it is determined that the debt was not owed, the agency must send the taxpayer the entire

\(^{25}\) § 105A-5(e).
\(^{26}\) § 105A-6(b) (effective date Jan. 1, 2000).
\(^{27}\) § 105A-8 (effective date Jan. 1, 2000).
\(^{28}\) § 105A-8(a).
\(^{29}\) § 105A-8(a).
\(^{30}\) § 105A-8(b) (effective date Jan. 1, 2000).
\(^{31}\) § 105A-8(b).
\(^{32}\) § 105A-8(b).
\(^{33}\) § 105A-8(c) (effective date Jan. 1, 2000).
amount setoff plus the collection assistance fee retained by the Department of Revenue.\textsuperscript{34} The returned collection assistance fee must be paid from the state agency's funds.\textsuperscript{35} Additionally, if the net proceeds credited to the state agency by the setoff exceed the amount of the debt, the state agency is required to send the balance to the debtor with interest that accrues from the fifth day after the Department of Revenue mails the notice of setoff to the taxpayer.\textsuperscript{36}

The sixth group of amendments to the act concerns priorities in claims of setoffs.\textsuperscript{37} Basically, state agencies have priority over local agencies, and competing claims between state agencies or between local agencies are prioritized based on the date that they are registered with the Department of Revenue.\textsuperscript{38}

The seventh group of amendments concerns collection assistance fees.\textsuperscript{39} To recover the cost of collecting the debts, the Department of Revenue will impose a collection assistance fee of no more than $15.00 that will be based on the actual cost of collection.\textsuperscript{40} This fee shall have priority over the remainder of a debt, if the Department is able to collect only a portion of the debt.\textsuperscript{41} This fee will not be added to debts related to child support payments.\textsuperscript{42}

The final amendment group grants the Secretary of Revenue and the State Comptroller the authority to adopt rules to implement this Chapter.\textsuperscript{43}

\textit{William Grainger Wright}

\textsuperscript{34} § 105A-8(d).
\textsuperscript{35} § 105A-8(d).
\textsuperscript{36} § 105A-8(d).
\textsuperscript{37} § 105A-12 (effective date Jan. 1, 2000).
\textsuperscript{38} § 105A-12.
\textsuperscript{39} § 105A-13 (effective date Jan. 1, 2000).
\textsuperscript{40} § 105A-13.
\textsuperscript{41} § 105A-13.
\textsuperscript{42} § 105A-13.
\textsuperscript{43} § 105A-16.
BUSINESS LAW

A. North Carolina Business Corporations Act

1. Procedural Changes - Filing Fees, Annual Reports, and Dissolution

Act 475 of 1997 altered many of the procedural filing and fee requirements for corporations governed by the North Carolina Corporations Act, the North Carolina Nonprofit Corporations Act, and the North Carolina Limited Liability Company Act. Under the North Carolina Corporations Act, the filing fee for Articles of Incorporation increased to $125.00 from $100.00; the fee required for application for reinstatement following administrative dissolution increased to $100.00 from $25.00; the annual report fee increased to $20.00 from $10.00, and the application fee for certificate of authority is now $250.00.

Act 475 also modified the manner in which corporate annual reports are to be filed. Most notably, the corporate annual report is no longer to be delivered to the Secretary of State for filing. Instead, the corporate annual report must be delivered to the Secretary of Revenue. The due date for delivering the annual report directly corresponds to the due date for filing the corporation's income and franchise tax returns.

In 1997, the Legislature also extended the time corporations have to apply for reinstatement from administrative dissolution. Act 485 of 1997 allows administratively dissolved corporations to apply to the Secretary of State for reinstatement within five years after the effective date of dissolution. Act 485 also amended the North Carolina Corporations Act to provide for the Secretary of

2. N.C. Gen. Stat. § 55-1-22(a) (Supp. 1997)).
5. § 55-16-22(a).
6. § 55-16-22(c).

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State’s advisory review of documents upon request, and established a fee of $200.00 for doing so.⁸

2. **Dissenters’ Rights**

Act 202 of 1997 limits the right of certain shareholders to dissent from corporate actions.⁹ The Act basically eliminates shareholder dissenters’ rights under the North Carolina Business Corporations Act for corporations that are listed on national exchanges or are held by at least 2,000 record shareholders.¹⁰ However, shareholders dissenters’ rights may be maintained if either the articles of incorporation issuing the shares provides otherwise, or if, in the case of a plan of merger or share exchange, the shareholders under such a plan are required to accept anything except cash or shares in exchange for their shares.¹¹

Act 202 also clarifies the law relating to the shareholders’ procedure for dissenting from corporate actions. As soon as any proposed corporate action is taken, or within thirty days after receiving a payment demand, the corporation must pay each dissenting shareholder the amount the corporation estimates to be fair market value plus interest accrued to the date of payment.¹² The corporation must accompany its payment to dissenting shareholders with a copy of the corporation’s most recent balance sheet, income statement, statement of cash flows, and interim financial statements.¹³ The corporation must also provide a statement of its estimate of the fair value of the shares, an explanation of the calculation of the interest on their payment to the dissenting shareholders, and a statement of the dissenters’ right to demand payment.¹⁴

If a dissenting shareholder is dissatisfied with the corporation’s payment, the dissenter may provide written notification to the corporation of the dissenter’s own estimate of the fair value of the shares and interest due, and the dissenter may demand pay-

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¹¹ § 55-13-02(c).
¹⁴ § 55-13-25(b).
ment of such an amount. If the dissenting shareholder’s demand for payment remains unsettled, the dissenting shareholder may commence a legal proceeding within sixty days after the earlier of either the date of the payment made or the date of the dissenter’s payment demand. However, if the dissenter fails to bring an action within this sixty day period, the dissenter will be deemed to have withdrawn the dissent and demand for payment.

3. Attorneys Representing Corporations

Act 203 of 1997 amended the law governing the practice of law by attorneys representing corporations. Prior legislation prohibited the practice of law by corporations by forbidding specifically enumerated activities such as drafting wills, giving legal advice to any customer, and advertising to perform exclusively legal activities. Act 203 amended the prior legislation by clarifying that a corporation may retain an attorney, whether or not a salaried employee, to represent the corporation and to represent any officer, director, or employee of the corporation in any matter arising within the scope of their employment.

B. North Carolina Nonprofit Corporation Act

1. Fee Increases

Act 475 modified fees under the North Carolina Nonprofit Corporations Act which corresponded to those revised under the North Carolina Corporations Act. The articles of incorporation fee increased to $60.00 from $50.00, and the application fee for certificate of authority rose to $125.00.
2. Advisory Review

In keeping with Act 485's corresponding amendment to the North Carolina Corporations Act, Act 485 also requires that the Secretary of State, upon request, shall provide for advisory review of documents governed by the North Carolina Nonprofit Corporations Act.22

C. North Carolina Limited Liability Company Act

1. Number of Persons Needed to Form Limited Liability Company

One of the more active areas of legislation affecting business law was the North Carolina Limited Liability Company Act. Many of the changes and additions to the Limited Liability Company Act correspond directly to the North Carolina Corporations Act. Perhaps the Legislature's most notable change to the North Carolina Limited Liability Company Act in 1997 was the modification of the number of persons necessary to form a limited liability company. Act 485 of 1997 revoked the requirement of having at least two or more persons to organize a limited liability company.23 With the passing of Act 485, limited liability companies may now be organized in North Carolina by just one or more persons.24

2. Fee Increases and Annual Report Due Date

Act 475 also made changes affecting fee requirements under the North Carolina Limited Liability Company Act.25 The Act raised the filing fee for articles of organization to $125.00 from the previous requirement of $100.00.26 The application fee for reinstatement following administrative dissolution was set at $100.00, and the application fee for certificate of authority rose to $250.00.27

The due date for a limited liability company to deliver its annual report changed to the fifteenth day of the fourth month

27. § 57C-1-22(a).
following the close of the company’s fiscal year.28 However, unlike corporations governed under the North Carolina Corporations Act, the annual report for limited liability companies should still be delivered to the Secretary of State.

3. Administrative Dissolution, Articles of Organization, and Articles of Dissolution

Act 485 altered the Limited Liability Company’s Act in similar fashion to the changes the Act made to the North Carolina Corporations Act.29 Act 485 extended the time limited liability companies have for applying for reinstatement from administrative dissolution to five years.30 Act 485 also provided for the Secretary of State’s advisory review of documents upon request.31 Act 485 also allows limited liability companies to restate its articles of organization at any time without member action.32 The default rule provides that any amendment to the articles of organization must be voted on and unanimously approved by the members.33 However, unanimous approval may not be necessary if otherwise provided in the articles of organization or a written operating agreement.34

Furthermore, Act 485 permits that a limited liability company that was dissolved pursuant to North Carolina General Statute §57C-6-01(4) because of the happening of an event of withdrawal, may cancel the articles of dissolution.35 To cancel the articles of dissolution, the limited liability company must, within ninety days after the event of withdrawal, get all remaining members to agree in writing that the business should be continued.36 In addition, the limited liability company must file articles of can-

34. § 57C-2-22.1(b).
36. N.C. GEN. STAT. § 57C-6-06.1 (Supp. 1997).
cellation with the Secretary of State.\textsuperscript{37} Act 485 also sets forth the requirements that other entities must abide by in order to use the name of the dissolved limited liability company.\textsuperscript{38}

\textbf{D. Revised Uniform Limited Partnership Act}

Act 485 allows for a limited partnership to be filed by facsimile.\textsuperscript{39} In keeping with the newly enacted advisory review provisions under the governing corporate acts, Act 485 also mandates the Secretary of State's advisory review of documents submitted by limited partnerships.\textsuperscript{40}

Act 485 also corrected the 'delayed effective date' statutes under the North Carolina Limited Partnership Act. The Act provides that unless a delayed effective date is provided for in the certificate of limited partnership, the limited partnership is formed as of the date of filing the certificate with the Secretary of State.\textsuperscript{41}

\textbf{E. Professional Corporation Act}

Act 485 specifically enumerates the current definition of a "foreign professional corporation."\textsuperscript{42}

\textbf{F. Statutory Mortality and Annuity Tables Updates}

Act 133 of 1997 updates the statutory mortality (formerly referred to as mortuary tables) and annuity tables used as evidence to establish the continued life expectancy of a person from a certain completed age.\textsuperscript{43} The updated mortality tables can be

\begin{itemize}
  \item 37. § 57C-6-06.1.
\end{itemize}
found at N.C. GEN. STAT. §8-46.\textsuperscript{44} The updated annuity tables are located at N.C. GEN. STAT. §8-47.\textsuperscript{45}

G. The North Carolina Wage and Hour Act

Act 146 of 1997 amended the North Carolina Wage and Hour Act by raising the state’s minimum wage rate and by permitting employers subject to the state minimum wage rate to take the same tip credit as federally covered employers.\textsuperscript{46} The minimum wage rate increased from $4.25 per hour to an amount equal to the minimum wage rate set forth at any given time in the Fair Labor Standards Act.\textsuperscript{47} The prevailing minimum wage rate, as set forth in the Fair Labor Standards Act at 29 U.S.C. § 206 (a)(1)(1996), is $5.15 per hour.\textsuperscript{48}

The Act also altered the amount of tips earned by a tipped employee that may be counted as wages for each hour worked.\textsuperscript{49} Prior to this Act, limit on tips earned that could be counted as wages was fifty percent of the applicable minimum wage for each hour worked.\textsuperscript{50} Under Act 146 the amount of tips earned that may be counted as wages will correspond directly with the amount permitted in the Fair Labor Standards Act.\textsuperscript{51}

Furthermore, the Act rewrote statutory provisions which specifically exempt certain persons from minimum wage limits.\textsuperscript{52} Such exempted individuals include employees of a summer camp or seasonal religious or nonprofit educational conference center; the spouse, child, or parent of the employer qualifying as a dependent of the employer under state income tax laws; and any person employed, as defined in the Fair Labor Standards Act, in a bona fide executive, administrative, professional or outside sales capacity.\textsuperscript{53} One notable addition to the persons exempt from the mini-
mum wage limits was those workers who are employed as a computer systems analyst, computer programmer, or software engineer, as defined in the Fair Labor Standards Act. 54

H. Employer Immunity from Liability for Disclosing Information about an Employee when Providing a Reference

Act 478 of 1997 grants employers immunity from civil liability for disclosing information about a current or former employee's "job history" or "job performance" upon the request of either the prospective employer or the current or former employee. 55 Job performance includes: the suitability of the employee for re-employment; the employee's skills, abilities, and traits as they may relate to future employment; and in the case of a former employee, the reason for the employee's separation. 56 However, this immunity does not apply if the referenced employee can establish that the information disclosed by the employer was false or that the employer providing the information knew or should have known that such information was false. 57

I. Checks and Drafts

1. Increase in Check Processing Fees

Act 334 of 1997 increased the maximum amount a person who accepts a check in payment for goods or services may charge when the accepted check is refused by the payor bank because of insufficient funds or because the drawer did not have an account at that bank. 58 The acceptor of such a check may charge up to $25.00 as a processing fee. 59

2. Race and Gender of Check Passer

In prosecutions of persons who pass bad checks, certain evidence must be present to properly identify the one passing the bad checks. Act 149 of 1997 makes it unlawful to require a check

54. § 95-25.14(b).
57. § 1-539.12 (a).
taker or acceptor to write or print the race or gender of the check passer on the check or draft. 50

J. Telephonic Sellers

Act 482 of 1997 added a new article to Chapter 66 of the North Carolina General Statutes. 61 The added article requires the registration of telephonic sellers in North Carolina. 62 Act 482 defines telephonic sellers as any person who directly, or by virtue of salespersons, causes telephone solicitation to occur. 63 The act excludes numerous persons and entities from coverage. 64

Telephone sellers covered under the act must register filing information with the Secretary of State and pay a filing fee of $100.00 at least ten days before commencing telephone solicitations. 65 The filing information includes the name of the seller, the seller’s principal place of business, corporate formation records, address of each location from which telephone solicitations take place, the name and address of all the banks housing seller’s deposits, and a summary of each civil or criminal proceeding brought against the seller during the preceding five years. 66 Registration by the telephone seller is valid for one year and may be renewed by filing information and paying the annual $100.00 fee to the Secretary of State. 67

Act 482 requires telephone sellers who intend to promote the offering of any gift or prize with actual or represented value of at least $500.00 to notify the Secretary of State of the details of the promotion at least ten days prior to such a promotion. 68 Furthermore, telephone sellers intending to offer a promotion of at least $500.00 must post a bond with the Secretary of State for the greater of the market value or represented value of all gifts or prizes represented as available under the promotion. 69 The bond must be issued by a surety company authorized to do business in

64. § 66-260(11).
65. § 66-261(a).
66. § 66-262.
67. § 66-261(c).
68. § 66-263(a).
69. § 66-263(a).
North Carolina, and shall be made available to any person enti-
tled to receive a gift or prize under the promotion who did not
receive it within thirty days of the award. Upon issuing any gift
or prize valued at $500.00 or more, the seller must provide the
Secretary of State a written proof of such award within forty-five
days after issuing the award.

Act 482 requires telephonic sellers to inquire as to the age of
the prospective purchaser to ensure that the prospective pur-
chaser is at least eighteen years of age. If the prospective pur-
chaser purports to be under eighteen years of age, the telephonic
seller must discontinue the call immediately. In addition, in any
action for violations by telephonic sellers involving prospective
buyers who are 65 years of age or older, the court may impose civil
penalties up to $25,000 for each violation.

Any violation by telephonic sellers of the provisions of the
additional article constitutes unfair and deceptive trade prac-
tices. Finally, Act 482 makes the offering of telephone sales
recovery services a Class 1 misdemeanor in North Carolina.
Any actual collection of money or other consideration of telephone
sales recovery is a Class H felony.

Kevin Scott Joyner

70. § 66-263(a).
71. § 66-263(b).
72. § 66-264.
73. § 66-264.
74. § 66-266(b).
75. § 66-266(a).
CIVIL PROCEDURE

A. Service of Process in Housing Code Cases

The General Assembly amended the service of process statute for municipalities in housing code cases.\(^1\) Prior to the amendment, service of complaints and orders was sufficient only if done personally or by registered or certified mail.\(^2\) Due to problems with unclaimed or refused service, the Legislature has provided an additional option for municipalities. A complaint or order must still be served by registered or certified mail, but a copy of the complaint or order can also be sent by regular mail.\(^3\) Under the new provision, service will be deemed sufficient even if the registered or certified mail is unclaimed or refused if the copy sent by regular mail is not returned by the post office within ten days from when it was sent.\(^4\) However, if regular mail is used, a notice must be conspicuously placed on the premises that is involved in the pending litigation.\(^5\) This section applies to all municipalities and is no longer limited to those with a population in excess of 300,000\(^6\) and is effective for all complaints and orders served on or after June 19, 1997.\(^7\)

B. Service on a Defendant Located Outside the United States

The State Legislature added a provision to allow an extension for service upon a defendant who is located outside of the United States by an endorsement from the Clerk of Court or by filing an alias or pluries summons within two years of the issuance of the original summons.\(^8\)

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C. Medical Assistance Provider False Claims Act

The General Assembly enacted this law to punish and deter healthcare fraud. The statute states it is unlawful for any provider to knowingly make or submit any false or fraudulent claims, statements or records for payment or approval to the Medical Assistance Program. The Attorney General has the authority to enforce, investigate, and institute proceedings for all claims under this provision. A violation of this statute carries a penalty of at least $5000 but not more than $10,000. In addition, the provider will pay treble damages for harm sustained by the Medicaid Assistance Program due to the provider's fraudulent act. However, if the court finds that a provider meets the statutory conditions then the court may assess a lesser penalty of at least two times the amount of damages suffered by the Medical Assistance Program. Furthermore, the provider will be liable for costs of a civil action brought to recover any penalty or damages. Finally, the Act provides remedies for employees who furnish any information regarding false claims violations.

Amanda Paige Little

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11. § 108A-70.13(a).
12. § 108A-70.12(b).
15. § 108A-70.12(b)(3)
COMMERCIAL LAW

A. Revised Article 8

When the original Article 8 was drafted in the 1940's and 50's, a securities transaction required a stock certificate, which was given by the issuer to the beneficial owner. To transfer the stock interest, the owner would necessarily need to deliver the certificate to the new owner. However, increased stock dealings eventually reached “crisis proportions” in the 1960's, because of the burden of processing the tremendous paperwork. The 1978 Amendments to Article 8 sought to remedy this problem, by allowing for the issuance of securities that were not represented by certificates. These uncertificated securities would be traded in a different manner. While the certificated securities would be traded by delivery, the uncertificated ones would be transferred by an instruction to the issuer to make a change in its books. Either way, though, there was a direct line between the beneficial owner of the security and the issuer. The system of certificated and uncertificated securities is called “direct holding.”

This, however, is not the manner by which a great deal of security transfers occurs. Today, the issuer's records do not reflect the names of all the beneficial owners. This is because many beneficial owners of a security perform transactions through a broker, or a securities intermediary. Thus, there exists today a hierarchy of persons in the trading realm. “[A] large portion of the outstanding shares of any given issue are recorded on the issuer’s records as belonging to a depositary. The depositary's records in turn show the identity of the banks or brokers who are its members, and the records of those securities intermediaries show the

2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
8. Id.
9. Id.
10. Id.
identity of their customers.” This manner, deemed “indirect holding,” was not contemplated by the 1978 Amendments.

Thus, the revised Article 8’s Part 5, made into law in North Carolina effective October 1, 1997, seeks to address this form of trading, by defining the rights of a person buying through a broker and defining the broker’s, or intermediary’s, duties. The bundle of rights accorded such a customer is deemed a “security entitlement.” To obtain a security entitlement, a securities intermediary must credit a financial asset to a person’s account. The person to whose account a financial asset is credited is an entitlement holder. Thus, when a customer places an order with a broker, and that broker makes a credit on the customer’s account, the broker must obtain and maintain a financial asset in a quantity corresponding to the account.

A financial asset is defined as a security, an obligation or other interest that is or of a type dealt in or traded on financial markets, or any property held by a securities intermediary for another person in a securities account when the intermediary expressly agreed to treat the property as a financial asset.

When a financial asset is credited to an account, that asset is not the property of the intermediary, and generally it shall not be subject to the claims of the intermediary’s creditors. Furthermore, any action based on an adverse claim to a financial asset may not be asserted against one obtaining a security entitlement for value and without notice of the claim. However, the entitle-

11. Id.
12. Id.
16. A securities intermediary is defined as “a clearing corporation, or a person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.” N.C. GEN. STAT. § 25-8-102(a)(14)(i), (ii) (Supp. 1997).
18. § 25-8-102(a)(7).
19. § 25-8-504(a).
20. § 25-8-102(a)(9)(i)-(iii).
21. § 25-8-503(a).
22. § 25-8-502. This is similar to the old Bona Fide Purchaser provision Article 8. The Bona Fide Purchaser concept was abandoned in Revised Article 8 in favor of the Protected Purchaser. See N.C. GEN. STAT. § 25-8-303. A protected purchaser is a purchaser of a security, whether certificated or uncertificated, or
ement holder may not assert a claim based on his interest in the asset against a person giving value for the asset, not acting in collusion with the intermediary, and obtaining control over the asset.\textsuperscript{23}

Control\textsuperscript{24} is an important aspect of the Revised Article 8, as well as enacted Amendments to Article 9. Control is defined essentially as existing when a security may be sold without any further action by the owner,\textsuperscript{25} and exists in a security entitlement merely by a person's becoming an entitlement holder.\textsuperscript{26} Thus, the entitlement holder's interest in a financial asset will generally trump the claims of the security intermediary's creditors.\textsuperscript{27} However, a creditor having a security interest in the financial asset will prevail over the entitlement holder if the creditor has control over the asset.\textsuperscript{28}

The changes to Article 9, enacted into law along with the Revised Article 8, also reflect the concept of control. Enacted to accompany the indirect manner of securities trading, the amendments to Article 9 govern "investment property." Investment property includes securities, whether certificated or uncertificated, a security entitlement, and a securities account.\textsuperscript{29} A primary way of obtaining a perfected security interest in investment property is through control.\textsuperscript{30}

\textbf{B. Certain Security Interests in Crops Take Priority over Other Security Interests in Same Collateral}

Section 25-9-312 of the General Statutes was amended to provide that certain perfected security interests in crops shall obtain priority over other competing security interests. To obtain the priority, the perfected security interest must be in crops for new

\begin{itemize}
  \item of an interest therein, who gives value, has no notice of any adverse claim to the security, obtains control of the certificated or uncertificated security. § 25-8-303.
  \item 23. § 25-8-503(e).
  \item 24. § 25-8-106.
  \item 26. § 25-8-106(d)(1).
  \item 27. § 25-8-503(a), § 25-8-511(a).
  \item 28. § 25-8-511(b). Comment 2 to Uniform Commercial Code § 8-511 states that the risk an investor runs by the possibility of a wrongful pledge of investment property by the intermediary is best left remedied by other regulatory law. Uniform Commercial Code, § 8-511, cmt. 2 (West 1997).
\end{itemize}
value given to allow a debtor to purchase agricultural supplies\textsuperscript{31} that will be used in the growing of the crops.\textsuperscript{32} Furthermore, the security interest must be given less than three months before the crops become growing.\textsuperscript{33}

The prior law had no such requirement that the interest be given to enable the debtor to purchase agricultural supplies. Also, the old law provided that any interest given to enable a debtor to grow crops did not have priority over competing interests, when such competing interests secured obligations due less than six months before crops became growing crops. The amended law, with its requirement of agricultural supplies, does away with any concern over when the secured obligations are due.\textsuperscript{34}

Also new to the section is a notice requirement.\textsuperscript{35} The new law requires that within five days of perfecting the interest, the holder of the security interest must notify the holder of any competing interest, in writing by certified mail.\textsuperscript{36} This notice is to state that the one giving the notice has or expects to have a security interest in the debtor's crops.\textsuperscript{37} The notice shall also contain an identification of the debtor, a description of the types of crops involved, the year in which the crops are to become growing and the identification of the land involved.\textsuperscript{38}

\section*{C. Act to Regulate Check Cashing Businesses}

The General Assembly also amended Chapter 53 of the General Statutes by enacting Article 22, an act to regulate check cashing businesses.\textsuperscript{39} Cashing under the new act is defined as

\begin{itemize}
\item \textsuperscript{32} N.C. Gen. Stat. § 25-9-312(2)(a).
\item \textsuperscript{33} § 25-9-312(2)(a).
\item \textsuperscript{34} Sub-section (5), unchanged, addresses priority when there is more than one perfected security interest given to enable the purchase of supplies within the three month time before the crops are to become growing. N.C. Gen. Stat § 25-9-312(5) (1995).
\item \textsuperscript{35} N.C. Gen. Stat. § 25-9-312(2)(b) (Supp. 1997).
\item \textsuperscript{36} § 25-9-312(2)(b).
\item \textsuperscript{37} § 25-9-312(2)(b).
\item \textsuperscript{38} § 25-9-312(2)(b).
\end{itemize}
"providing currency for payment instruments" but does not include the bona fide issuance or exchange of travelers checks. 40

The new act provides that no person or entity shall engage in the business of cashing checks, drafts, or money orders for consideration unless the person or entity has first obtained a license from the State Banking Commission. 41 Any person or entity operating a check cashing business without the required license shall be guilty of a Class I felony, with each transaction constituting a separate offense. 42 Exempt from the licensing requirement are banks, 43 savings institutions, 44 credit unions, 45 as well as retail sales and service businesses that cash checks incidentally and charge less than $2.00 for such. 46

As part of the license application, the Commission requires the name and address of the applicant, 47 as well as the names and addresses of all members, if the applicant is a firm or partnership, 48 and the names and addresses of all officers, directors, registered agents, and principals if the applicant is a corporation. 49 Also, a $250.00 application fee is required in addition to a $500.00 investigation fee. 50

The Commission shall only issue a license if it finds that the financial responsibility, character, and general fitness of the applicant and its members, officers, directors, and principals are such as to warrant a belief that the business will be operated efficiently, fairly, legally, and in the public interest. 51 If the license is to be denied, then the Commission must express the denial by written notification to the applicant. 52 The applicant, within thirty days from the date of the mailing of the denial, may request in writing a hearing, which the applicant shall be granted. 53

41. § 53-276.
42. § 53-277.
43. § 53-277(a)(1).
44. § 53-277(a)(1).
45. § 53-277(a)(1).
46. § 53-277(a)(2).
47. § 53-278(a)(1).
48. § 53-278(a)(2).
49. § 53-278(a)(3).
50. § 53-278(c).
51. § 53-279(b).
The regulatory act also sets the maximum fees that a licensee may charge for cashing instruments. For checks issued by the federal or state government, a federal or state agency, or state county or municipality, a licensee may only charge three percent of the face amount, or $5.00, whichever is greater.\(^{54}\) For personal checks, the licensee may charge the greater of ten percent of the face amount or $5.00.\(^{55}\) For all other checks and money orders, a licensee may charge five percent of the face amount of $5.00, whichever is greater.\(^{56}\) Furthermore, the act requires that all licensees conspicuously display a notice stating their rates.\(^{57}\)

The act also allows, within certain limits, a licensee to cash postdated checks and to defer deposit of a personal check cashed for a customer.\(^{58}\) In either case, a written agreement between the licensee and the customer must accompany the check.\(^{59}\)

Finally, the new act provides grounds for suspension or revocation of licenses,\(^{60}\) though suspension or revocation may only occur after notice and opportunity for a hearing.\(^{61}\) Such grounds include: charging excessive fees,\(^{62}\) publishing false, misleading, or deceptive advertising,\(^{63}\) cashing a check payable to an entity without checking for proper documentation of the customer's authority,\(^{64}\) refusing to permit investigations by the Commissioner of Banks,\(^{65}\) demonstrating incompetence in the business of check cashing,\(^{66}\) or a conviction of a felony or misdemeanor involving fraud, misrepresentation, or deceit.\(^{67}\) In addition to suspension or revocation of licenses, the Commissioner of Banks may impose

\begin{enumerate}
\item[54.] § 53-280(a)(1).
\item[55.] § 53-280(a)(2).
\item[56.] § 53-280(a)(3).
\item[57.] § 53-280(c).
\item[58.] § 53-281(a)-(e).
\item[59.] § 53-281(c).
\item[60.] § 53-284(a).
\item[61.] § 53-284(a).
\item[62.] § 53-283(1).
\item[63.] § 53-283(3).
\item[64.] § 53-283(6).
\item[65.] § 53-284(a)(3).
\item[66.] § 53-284(a)(5).
\item[67.] § 53-284(a)(6). The act does not specify, however, whether a felony by itself will suffice or whether the felony must involve fraud, misrepresentation, or deceit. § 53-284(a)(6).
\end{enumerate}
civil penalties not exceeding $1000 for each violation of the act, and such penalties are to be paid into the county school fund.\(^{68}\)

Joshua Blake Durham

\(^{68}\) § 53-286.
CONSTITUTIONAL LAW

A. Gubernatorial Veto

The North Carolina General Assembly altered the procedure for presenting bills to the Governor for his approval or veto with Session Law 1997-1.1 The changes set out that when a bill is required to be sent to the Governor by Article II, Section 22 of the North Carolina Constitution it should not be sent until the next business day after the bill was ratified.2 A business day will be any weekday other than one on which there is a State employee holiday and neither house is in session.3 Once the bill is sent to the Governor or the Enrolling Clerk it cannot be recalled except by joint resolution.4

In addition, the Act requires the Governor to issue a proclamation and notify the appropriate parties in both houses when a majority of the members of each house has returned the appropriate request to the Governor stating that if a bill is returned with a veto message, a reconvened session to reconsider the vetoed legislation is not necessary.5

Finally, the Act addresses the requirements of the Governor when he fails to approve a bill within the required time period.6 It requires the Governor to return the measure to the Enrolling Clerk who will sign the certificate stating that the bill has become law due to the Governor's failure to act within the required time period.7 In calculating the time period in which the Governor has to act, the day the bill is presented to the Governor is excluded and the entire last day of the period is included.8

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3. § 120-33(d2).
4. § 120-33(d2).
8. § 120-29.1.
B. Congressional Redistricting

In response to problems with claims of unfair representation in the Congress due to gerrymandering, the General Assembly divided the state into twelve congressional districts. This Act increases the number of districts from 11 to 12. The Act then lays out each of the 12 new districts. The Act goes on to set out an alternative plan for drawing the districts if a court determines that the districts as drawn violate the one-person one-vote doctrine.

C. Teaching of American History in Public Schools

The General Assembly set forth an act to encourage local school boards to encourage public school teachers to display certain materials to further instruction in American history. The following materials are suggested for display: "(i) the preamble to the North Carolina Constitution, (ii) the Declaration of Independence, (iii) the United States Constitution, (iv) the Mayflower Compact, (v) the national motto, (vi) the National Anthem, (vii) the Pledge of Allegiance, (viii) the writings, speeches, documents, and proclamations of the founding fathers and Presidents of the United States, (ix) decisions of the Supreme Court of the United States, and (x) acts of the Congress of the United States, including the published text of the Congressional Record." The Act prohibits content-based censorship of these documents including religious references that may be in the documents.

11. § 163-201(a).
12. Act of March 31, 1997, § 3, 1997 N.C. SESS. LAWS 11 (codified as amended at N.C. GEN. STAT. § 163-201(a) (Supp. 1997)). In April 1998 a three-judge federal panel declared the 12th district unconstitutional because race was a primary factor in the design. State lawmakers were given until May 22, 1998 to submit new plans for the 12th district. If the lawmakers fail to meet the deadline, the court will redraw the district. Judges Rule Out May Primaries, NEWS & OBSERVER (Raleigh, North Carolina), April 22, 1998, at A3.
15. § 115C-81(g).
D. Campaign Regulations

Act 515 is an attempt by the General Assembly to reform political contribution reporting requirements for all candidates. The Act attempts to get more information about contributions for local as well as statewide elections. The Act also incorporates a requirement that the candidate disclose the principal occupation of those making contributions. In addition, the Act incorporates a "Best Efforts" rule which says that the candidates' report is in compliance with the article if the treasurer can show he used the best efforts available to obtain the information required by the Article.

The Act also tries to collect information on money contributed by groups which benefit a particular candidate. It requires both the group making the contribution to report the amount spent and which candidate they sought to benefit and requires the candidate to report the amount spent on his behalf. Even though the Act made the reporting requirements more stringent, the spending limit for reporting was raised from $1,000.00 to $3000.00. This means the candidate does not have to report if he does not receive or spend more than $3000.00. The Act also requires treasurers to file each report electronically if they show in excess of $5000 in contributions, loans, or expenditures. Failure to comply with the reporting requirements will subject the candidate to fines of $250.00 per day the report is late for statewide elections and $50.00 per day for local elections. Fundraising during the legislative session is also limited by the Act. The Act makes it illegal for a candidate for office or a member of a government body to

18. N.C. Gen. Stat. § 163-278.11(c) (Supp. 1997)).
solicit for contributions either personally or through a third party and makes it illegal for a person or group to make a contribution to a member of the body during the legislative session.  

Additionally, the Act requires any person or group who makes expenditures for printed material or broadcasts, and the printed material or broadcast names a candidate whose candidacy is the principal purpose of the political committee, to report such expenditures.  

Finally, there must be a disclaimer on all printed material which for a particular purpose identifies a candidate the group purchasing the material is opposing. There is a requirement that the name of the group and the name of the candidate the material is intended to benefit appear on the material in no smaller than 12 point type.  

Paul Michael Crenshaw

28. N.C. Gen. Stat. § 163-278.16(g) (Supp. 1997)).
CONSTRUCTION LAW

A. The Standards when Adopting Revisions and Amendments to the North Carolina Building Code.

The 1997 Regular Session of the North Carolina General Assembly amended the North Carolina Building Code to change the requirements and standards for revisions and amendments. Provisions of the Building Code, which were previously to be construed liberally, are now to be construed reasonably to further the ends of the provision. Interpretation of the Building Code by the Building Code Council and local authorities is to be based upon a reasonable construction of the Code.

The 1997 amendment also mandates that requirements of the Code are to conform to good engineering practice without mandating an adoption of standards promoted by such organizations as the National Building Code of the American Insurance Association, Southern Standard Building Code of the Southern Building Code Congress or the Basic Code of the Building Official’s Conference of America or other standards previously required. However, the Building Code Council may use the standards of these requirements for guidance, but it is no longer required to adopt these standards.

The time frame for adoption of amendment to the North Carolina Building Code has been changed as reflected in the following schedule. Revisions or amendments adopted on or after September 1, 1997, and prior to July 1, 1998, shall become effective on January 1, 1999. Revisions and amendments on or after July 1, 1998, and prior to July 1, 2001, shall become effective January 1, 2002. All future revisions and adoptions after July 1, 2001, shall be adopted prior to July 1, and shall become effective on January 1

of the following year. However, if necessary to address an imminent threat to public safety, health or welfare, revisions or amendments may be effective at earlier dates. The Building Code Council will supply handbooks explaining the revisions no later than January 1, 2000.

B. Organization of the Building Code Council

The 1997 Assembly provided the power to the chairman to appoint ad hoc code revision committees to consider revisions and amendments to the Building Code. Each ad hoc committee shall consist of members of the council, licensed contractors, design professionals and members of the public who are affected by the Building Code volume. Each ad hoc committee will consider the volume of the particular Building Code which the chairman assigns to the committee and report its recommendation to the Building Code Council.

C. The Effect of Local Building Codes.

Prior to the 1997 amendments, any political subdivision could adopt building codes or regulations which governed construction within its jurisdiction. Adoption of these local regulations or codes was evidence that the local codes or regulations superseded the State Building Code in the particular jurisdiction. The 1997 amendments removed this authority from political subdivisions. Political subdivisions may still adopt local fire prevention codes within its jurisdiction.

D. Instruction Related to the North Carolina Building Codes.

The 1997 amendments mandate that the State Building Code Council and the Department of Insurance provide for instructional classes for the various trades affected by the Building Code

7. § 143-138(d).
8. § 143-138(d).
9. § 143-138(d).
14. § 143-138(e).
changes.\textsuperscript{15} The Department of Insurance has the task of developing the curriculum for the classes but will consult the various licensing boards. The classes shall include an explanation of the revisions and the rationale for the changes.\textsuperscript{16}

\textit{Douglas William Kim}

\textsuperscript{15} § 143-138.1.
\textsuperscript{16} § 143-138.1.
CRIMINAL LAW

A. Dog Fighting and Baiting

The General Assembly through the addition of § 14-362.2 makes a person "who instigates, promotes, conducts, is employed at, provides a dog for, allows property under his ownership or control to be used for, gambles on or profits from" dog fighting or baiting is guilty of a Class H felony. It is a felony for a person to own and train a dog with the intent to use the dog for fighting and baiting. A spectator of fighting or baiting of a dog is guilty of a Class H felony. Before the enactment of this revision, dog fighting or baiting would have fallen under § 14-362.1, which covered animal fighting in general, making it a Class 2 misdemeanor. The General Assembly amended § 14-362.1 to exclude dog fighting and baiting.

B. Curfews for Persons Under Age of Eighteen

The North Carolina General Assembly added a new section to Article 8 of Chapter 160A of the General Statutes which allows a city to adopt an ordinance imposing a curfew on persons younger than eighteen years old. A similar section was added to Article 6 of Chapter 153A allowing counties to adopt such ordinances. Under these statutes, both cities and counties can set curfews for under age persons where it is necessary.

3. § 14-362.2.
C. Traffic Laws

1. Photographic Images as Prima Facia Evidence of Traffic Violation

The North Carolina General Assembly added a new section to Chapter 160A of the General Statutes applicable only to the City of Charlotte, North Carolina. This Act allows the use of a photographic system which produces a video, photograph or digital image of those vehicles violating traffic control ordinances. The City is authorized to adopt ordinances for civil enforcement with this new system. The Act provides that the owner of "the vehicle shall be responsible for the violation unless he can furnish evidence that the vehicle was, at the time of the violation, in the care, custody, or control of another". Each violation given by this video system is non-criminal, results in no driver's license points, and carries, a civil penalty of $50.00. The violation will be sent to the vehicle owner by first-class mail and shall explain the procedures for appeal. If a driver fails to respond to the violation within the given time, he shall be held to have waived his right to contest and shall be subject to a penalty of no more than $100.00.

2. Drivers License Revocation for Willful Failure to Complete Community Service

The General Assembly revised several statutes dealing with Community Service as an alternative punishment. N.C. GEN. STAT. § 20-179.4 was revised to include the requirement of the chief district court judge's approval for all appointments of coordinators who oversee the community service program. Subsection (e) of this statute was amended to clarify that the revocation of one's limited driving privilege, in an impaired driving case, for

10. § 160A-300.1.
11. § 160A-300.1.
12. § 160A-300.1.
13. § 160A-300.1.
willful failure to complete the court ordered community service, lasts until "the community service requirement has been met."\textsuperscript{16}

N.C. Gen. Stat. § 143B-475.1, which deals with deferred prosecution, community service restitution and volunteer program, was similarly revised.\textsuperscript{17} Appointment of coordinators of the community service program continue to require the chief district court judge's consultation but the requirement for the judge's approval was eliminated.\textsuperscript{18}

Section 20-17(b) of the N.C. General Statutes was amended by adding a provision which authorizes the revocation of a person's drivers license for willful failure to complete court ordered community service.\textsuperscript{19} This decision to revoke is based on information provided by the clerk of court, and continues until the court ordered community service is completed.\textsuperscript{20} A person subject to this revocation is not entitled to any other hearing.\textsuperscript{21}

\section*{D. Notification of Voluntary Dismissal of Charges}

The General Assembly added a new section to the General Statutes in order to assure notification to the defendant when the prosecutor takes a voluntary dismissal of the charges against the defendant.\textsuperscript{22} This applies unless the defendant or the defendant's attorney have been notified otherwise by the prosecutor.\textsuperscript{23} The written dismissal must be served on the defendant and a copy must also be served on the "chief officer of the custodial facility when the record reflects the defendant is in custody."\textsuperscript{24} Before the enactment of this addition, N.C. GEN. STAT. § 15A-931 had allowed the prosecutor to voluntarily dismiss the charges but included no requirement of notification to the defendant.\textsuperscript{25}
E. Crime Victims Compensation Act

The Crime Victims Compensation Act\(^\text{26}\) was amended by the General Assembly in several significant ways. The definition of “criminally injurious conduct” was expanded to include conduct of a hit and run accident when the “victim was a pedestrian or was operating a vehicle moved solely by human power or a mobility impaired device.”\(^\text{27}\) A mobility impaired device is defined as a device designed for transportation of a person who is mobility impaired, with speed capacity not exceeding twelve miles per hour.\(^\text{28}\) Also added to the definition of criminally injurious conduct was an act of terrorism “committed outside of the United States against a citizen of this State.”\(^\text{29}\)

The General Assembly also amended the Crime Victims Compensation Act stating that payment by collateral sources of expenses relating to the funeral services of a victim “shall not constitute grounds for the denial or reduction of an award of compensation.”\(^\text{30}\) The allowable expenses for funerals and things related to a funeral service was increased from $2000 to $3500.\(^\text{31}\)

F. Sentencing

1. Active Sentences for Misdemeanor Convictions

Several recommendations from the North Carolina Sentencing and Policy Advisory Commission were implemented by the General Assembly. A new subsection added to N.C. GEN. STAT. § 15A-1340.20\(^\text{32}\) provides that an active punishment may be imposed for a “class of offense and prior conviction level that does not otherwise authorize” an active punishment if the term of active punishment is equal to or less than the amount of time the person has already spent in an institution as a result of the charge.
leading to the sentence.\textsuperscript{33} Thus, in a misdemeanor offense which would not otherwise, based on the offense and prior conviction, authorize an active punishment, an active punishment can now be implemented if it is not greater than the time served in anticipation of this sentence.\textsuperscript{34}

2. \textit{Structured Sentencing Amendments}

A variety of technical, clarifying, and conforming amendments to structured sentencing were made.\textsuperscript{35} Most of these technical wording changes have little substantive effect.

3. \textit{Intermediate Punishments}

The definitions found in § 15A-1340.11 of the General Statutes were modified by replacing "electronic monitoring" with "house arrest with electronic monitoring."\textsuperscript{36} The new "house arrest" definition states the offender is required to remain at his residence unless a probation officer permits him to leave for one of the stated purposes.\textsuperscript{37} Also in this statute, the definition of "intensive probation" was clarified with the addition of the requirements of multiple contacts with a probation officer each week, a specific period each day where the offender must be at his residence, and continued employment, active course of study or vocational training by the offender.\textsuperscript{38}

The General Assembly also rewrote § 15A-1343.2 dealing with special probation rules.\textsuperscript{39} The revision permits the use of a curfew requiring the offender to remain in a specific place for a certain time, also requiring him to wear an electronic monitoring device.\textsuperscript{40}

The final significant change made in this session law was to N.C. General Statute § 15A-1368.4. The General Assembly added

\begin{itemize}
\item \textsuperscript{33} N.C. GEN. STAT. § 15A-1340.20 (Supp. 1997).
\item \textsuperscript{34} § 15A-1340.20.
\item \textsuperscript{35} Act of May 22, 1997, 1997 N.C. SESS. LAWS 80.
\item \textsuperscript{36} Act of May 16, 1997, § 2, 1997 N.C. SESS. LAWS 57 (codified as amended at N.C. GEN. STAT. § 15A-1340.11 (Supp. 1997)).
\item \textsuperscript{37} N.C. GEN. STAT. § 15A-1340.11 (Supp. 1997).
\item \textsuperscript{38} § 15A-1340.11.
\item \textsuperscript{39} Act of May 16, 1997, § 4, 1997 N.C. SESS. LAWS 57 (codified as amended at N.C. GEN. STAT. § 15A-1343.2 (Supp. 1997)).
\item \textsuperscript{40} N.C. GEN. STAT. § 15A-1343.2 (Supp. 1997).
\end{itemize}
a new sub-section to this statute prohibiting the imposition of community service as a condition of post-release supervision.41

Wendy Caldwell

G. Addition of Drugs to Controlled Substances Lists

The General Assembly added the depressant Gamma Hydroxybutyric Acid to the list of Schedule IV Controlled Substances.42 The legislature also passed a new statute that makes it a criminal offense to knowingly contaminate any food, drink, or any other edible or potable substance with any controlled substance that would render a person mentally incapacitated or physically helpless.43 This law was created to help combat the use of certain controlled substances such as the "date rape drugs." A violation of this statute is a Class H felony; however, if a person violates this statute with an intent to commit rape or a sexual offense, the person is guilty of a Class F felony.44 The statute also makes it a criminal offense to manufacture, sell, deliver, or possess with intent to manufacture, sell, deliver, or possess a controlled substance for the purpose of violating this statute.45

The General Assembly added the drug Remifentanil and salts thereof to the list of Schedule II controlled substances.46 North Carolina added this drug to the list of Schedule II substances in conformity with federal law.47

H. Amending the Stalking Laws

The Legislature amended the stalking laws by relaxing the requirements of the statute. The legislature removed certain elements of the offense and created new grounds upon which the stalking laws could be violated. The offense now requires that a person willfully on more than one occasion follow or be in the presence of another person without legal purpose and have the intent

45. § 14-401.16(b).
to cause death, bodily injury, or reasonable fear of death or bodily injury.\textsuperscript{48} The legislature removed the requirements that the violator have reasonable warnings or requests to desist and that the behavior constitute a pattern over a period of time showing a continuity of purpose.\textsuperscript{49} The General Assembly upgraded a violation of this statute from a Class 2 misdemeanor to a Class 1 misdemeanor.\textsuperscript{50} Furthermore, the legislature increased the penalty for a person who not only violates this statute but also violates a court order prohibiting the same behavior.\textsuperscript{51} The amended statute upgrades this offense from a Class 1 misdemeanor to a Class A1 misdemeanor.\textsuperscript{52}

I. Use of Audio/Video Equipment by Judicial Officials

The General Assembly enacted a statute that allows a magistrate or other judicial official to conduct an initial appearance through the use of audio and video equipment.\textsuperscript{53} The statute applies to noncapital cases and requires the defendant and magistrate/judicial official be able to both hear and see each other.\textsuperscript{54} Furthermore, if the defendant has counsel, the defendant and his counsel will be allowed to communicate fully and confidentially throughout the proceeding.\textsuperscript{55}

The legislature also amended the procedures for obtaining arrest warrants. The statute was amended to allow a judicial official to receive testimony under oath from a law enforcement officer by means of two-way audio and visual equipment.\textsuperscript{56} The statute requires that the officer and the judicial official be able to both hear and see each other during the proceeding.\textsuperscript{57} Therefore, a judicial official can rely on an affidavit, sworn testimony by a law enforcement in the official’s presence, and sworn testimony by a law enforcement officer by means of audio and visual equipment.

\textsuperscript{50} § 14-277.3(b).
\textsuperscript{51} § 14-277.3(b).
\textsuperscript{52} § 14-277.3(b).
\textsuperscript{55} § 15A-511(a1).
in determining the existence of probable cause to issue an arrest warrant. 58

J. Amendments to the Concealed Handgun Statutes and the Company Police Act.

The Company Police Act was amended to allow company police officers to carry concealed weapons if authorized by their superior officer in charge. 59 The amendment treats company officers just as law enforcement officers in regards to authority to carry concealed weapons. 60 Both groups of officers are required to act within the guidelines established in N.C. GEN. STAT. § 14-269(a)(5). 61

The legislature also amended the requirements for concealed handgun permits. 62 In the amendment, the legislature included retired company police officers that met certain requirements in the class of Qualified Former Sworn Law Enforcement Officers. 63 This classification is important because it exempts the officers from having to “successfully complete an approved firearms safety and training course” as required to obtain a concealed handgun permit. 64 To qualify for this status, a retired company officer must: (1) be retired for less than two years from the date of application; (2) before retirement, the officer must have been a qualified law enforcement officer with a company police agency in North Carolina; and (3) have nonforfeitable rights to benefits from the company police agency or have 20 years of law enforcement service from a company that does not have retirement benefits. 65 This statute makes it easier for retired company police officers to obtain a concealed handgun permit.

The legislature also amended the class of Qualified Sworn Law Enforcement Officers to include company police officers. 66 As

58. § 15A-304(d).
60. N.C. GEN. STAT. § 74E-6(c) (Supp. 1997).
61. § 74E-6(c).
64. § 14-415.12A; see also, § 14-415.12 for the criteria to qualify for a concealed handgun permit.
65. § 14-415.10(4).
above, this classification gives current company police officers an easier method of obtaining a concealed weapon permit. 67

Lastly, the legislature amended the criteria required to obtain a permit for a concealed handgun. Under the new criteria a sheriff shall deny any permit from an applicant that has been "adjudicated by a court or administratively determined by a government agency subject to judicial review to be lacking mental capacity or mentally ill." 68 The legislature excluded previous consultative services and outpatient treatment as sole grounds for denial of a permit. 69

K. Driving While Impaired

1. Prior D.W.I. Conviction Included in Felony Record Level Calculation

Under the new statutes, when the court is determining a defendant's prior record level for felony sentencing, the court shall give the defendant one point per conviction of driving while impaired. 70 Furthermore, the court shall also give one point per each conviction of misdemeanor death by vehicle and driving a commercial vehicle while impaired. 71

2. Changes in Civil Revocation of Driver's License for Driving While Impaired.

To help protect the public against repeat offenders, the legislature enacted new policies regarding revocation of driving privileges for persons charged with driving while impaired. Upon a charge of driving while impaired, the offender's driver's license is subject to revocation by the state. 72 If the driver has no other pending offenses in which his or her license has been or is revoked

67. See supra note 65 for criteria to obtain a concealed handgun permit.


for driving while impaired, his or her period of revocation is thirty
days.\textsuperscript{73} If, however, the offender currently has

one or more pending offenses for which his license has 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 thirty
days.\textsuperscript{74}

3. \textit{Seizure of Vehicle Used in D.W.I. Offense}

In an effort to protect drivers on the roads and highways of this
state, the legislature toughened the D.W.I. laws for repeat offend-
ers. If a person is convicted for a D.W.I. offense and his or her
license was already revoked for a previous D.W.I. offense or he or
she qualifies as a habitual offender, the vehicle used in the current
D.W.I. offense is subject to forfeiture.\textsuperscript{75} However, before the
seizure, the judge and prosecutor must notify any innocent parties
that may have an interest in the vehicle.\textsuperscript{76} Under certain condi-
tions, an innocent owner of the vehicle can prevent the court from
forfeiting the vehicle.\textsuperscript{77} Furthermore, any lienholder in the vehi-
cle can also step in to assert his or her rights before the vehicle is
forfeited.\textsuperscript{78} If the vehicle is forfeited, the vehicle is sold or trans-
ferred to the school board of the county where the charges were
filed.\textsuperscript{79}

The legislature also strengthened the D.W.I. laws by empow-
ering a police officer to seize a vehicle which he or she has prob-
able cause to believe is subject to forfeiture under the D.W.I.
statutes.\textsuperscript{80} After the officer seizes the vehicle, he or she must
present an affidavit of impoundment to a magistrate.\textsuperscript{81} If the
magistrate determines the statutory requirements are met, the

\textsuperscript{73} N.C. Gen. Stat. § 20-16.5(e) (Supp. 1997).
\textsuperscript{74} § 20-16.5(e).
\textsuperscript{75} Act of August 7, 1997, § 1.1, N.C. Sess. Laws 379 (codified as amended at
\textsuperscript{77} § 20-28.2(e).
\textsuperscript{78} § 20-28.2(f).
\textsuperscript{79} Act of August 7, 1997, § 1.4, 1997 N.C. Sess. Laws 379 (codified as
\textsuperscript{80} Act of August 7, 1997, § 1.2, 1997 N.C. Sess. Laws 379 (codified as
\textsuperscript{81} N.C. Gen. Stat. § 20-28.3(c) (Supp. 1997).
vehicle is impounded pending trial with the county school board. An innocent owner or lienholder of the vehicle may under certain requirements apply to the magistrate to have the vehicle released pending trial. When the case goes to trial, the judge determines if the vehicle meets the requirements of forfeiture under N.C. Gen. Stat. § 20-28.2. If the requirements are not met, the vehicle is returned to the innocent owner or lienholder. If forfeiture requirements are satisfied, the vehicle is transferred to the school board where the case was filed.

4. Other Penalties for DWI Convictions

The legislature also restricted the rights of the convicted offender. If a person is convicted of a D.W.I. offense while his or her license is revoked for a previous D.W.I. offense, the offender forfeits their right to register a car in his or her name until his or her license is restored. Furthermore, upon conviction, the trial court shall order that the defendant surrender all registrations to all vehicle the defendant possesses.

The legislature also increased the penalties for a conviction for D.W.I. The new punishment for a Level One conviction of D.W.I. carries a minimum of thirty days and a maximum of twenty-four months imprisonment. The defendant's term of imprisonment can only be suspended if a special condition of probation is imposed that requires the defendant to serve thirty days imprisonment. The Level Two conviction punishment was also changed to require that if the defendant's sentence was suspended, the defendant, as a term of special probation, will serve 7 days imprisonment. The legislature also made some small

82. § 20-28.3(c)-(d).
83. § 20-28.3(e).
84. § 20-28.3(f).
changes to the Level Three, Level Four, and Level Five convictions for D.W.I.\textsuperscript{92}

The General Assembly also amended a driver's rights to a limited driving privilege. Under the new rules, an applicant must meet certain criteria as set forth in the statute.\textsuperscript{93} Furthermore, the applicant must obtain a substance abuse assessment and agree to receive treatment if it is deemed necessary.\textsuperscript{94} Once the applicant has met the requirements, a district court judge is authorized to issue a limited privilege.\textsuperscript{95} The limited privilege is only effective for license revocations under the D.W.I. statutes.\textsuperscript{96}

The laws regarding alcohol use and underage drivers were also amended. The new statute states that the odor of alcohol on an underage driver's breath is not sufficient evidence by itself to prove that the driver has alcohol in his or her body.\textsuperscript{97} However, if the driver refuses to provide a sample of blood or breath for analysis, this evidence might be sufficient to prove the presence of alcohol in his or her system.\textsuperscript{98}

The legislature also changed the ways in which an officer can obtain evidence to prove intoxication. Under the amendments, an officer can request that a driver submit to a chemical analysis of his or her blood or other bodily fluid in addition to a breath sample.\textsuperscript{99} A refusal to give blood or other bodily fluid is treated as willful refusal to give a breath sample.\textsuperscript{100}

Finally, the legislature amended the penalty for habitual impaired driving offenders. The new punishment for a violation of


\textsuperscript{94} N.C. GEN. STAT. § 20-16.5(p) (Supp. 1997).

\textsuperscript{95} § 20-16.5(p).

\textsuperscript{96} § 20-16.5(p).


\textsuperscript{98} N.C. GEN. STAT. § 20-138.3 (Supp. 1997)).


\textsuperscript{100} N.C. GEN. STAT. § 20-139.1(b5) (Supp. 1997).
this statute is a Class F felony.\textsuperscript{101} An offender in violation of this statute will be sentenced to a minimum active term of 12 months which cannot be suspended.\textsuperscript{102} Furthermore, this sentence will run consecutively with any another sentence being served.\textsuperscript{103}

L. Sexual Offender Registration Program.

In the interest of protecting its citizens from sex offenders, the legislature amended the sex offender registration programs to be consistent with federal law.\textsuperscript{104} The new registration statutes require sex offenders to register, persons who commit certain offenses against minors to register, and juveniles found to be a threat to society to register.\textsuperscript{105} The amended statutes create three different registries, the Sex Offender and Public Protection Registration Program, the Sexually Violent Predator Registration Program, and the Juvenile Registry.\textsuperscript{106} These registries are to be held by the sheriff in the county in which the registrant lives and by the state in the Division of Criminal Statistics.\textsuperscript{107} The Sex Offender and Sexually Violent Predator registries are both public record and open for access to registration information.\textsuperscript{108}

The first registry is the Sex Offender and Public Protection Registration Program.\textsuperscript{109} Persons convicted of sexual offenses or convicted of an offense against a minor must register in this pro-

\textsuperscript{103} § 20-138.5(b).
\textsuperscript{104} Act of September 17, 1997 § 1, 1997 N.C. Sess. Laws 516 (codified as amended at N.C. Gen. Stat. § 14-208.5 (Supp. 1997) (effective date April 1, 1998). The definition of “penal institution” was revised to include a detention facility operated under the jurisdiction of another state, the federal government, or one operated by a local government of North Carolina or any other state. N.C. Gen. Stat. § 14-208.6(2) (Supp. 1997). It also revised the definition of “reportable conviction” to include a final conviction in a federal jurisdiction for an offense which is substantially similar to the offenses listed as those reportable in (4)(a). § 14-208.6(4).
\textsuperscript{105} § 14-208.6A; § 14-208.7; § 14-208.20; § 14-208.26; § 14-208.5 (these offenses include kidnapping, abduction of children, and felonious restraint).
\textsuperscript{106} § 14-208.7 (the Sex Offender and Public Protection Registry Program); § 14-208.20 (Sexually Violent Predator Registration Program); § 14-208.26 (the juvenile registry).
\textsuperscript{107} §§ 14-208.6A to -208.8 (registry for the local sheriff); § 14-208.14 (registry with the State of North Carolina).
\textsuperscript{108} § 14-208.10; \textit{but see}, § 14-208.29 (The juvenile registry is not a public record.).
\textsuperscript{109} § 14-208.7.
An offender required to register in this program must do so when they are released from a penal institution or if his or her sentence was suspended, upon conviction. The registrant must maintain his or her registry for ten years upon release or conviction and they must timely update the registry upon any changes. Furthermore, the local county sheriff shall verify annually each registrant and report his or her update to the state.

The second registry is the Sexually Violent Predator Registration Program. When a person is convicted of a sexually violent offense, the district attorney must first decide whether to classify the offender as a sexually violent predator. Prior to sentencing for the sexual offense, the offender shall be examined by a board of experts to determine if he or she qualifies as a sexually violent predator. At sentencing, a judge shall review the findings of the board and determine whether or not the offender qualifies as a sexually violent predator. Unlike the sex offender program, a sexually violent predator is required to maintain this registration until he or she is found to no longer qualify. The offender can petition to a superior court after ten years to have his or her case reviewed. Under this program, the local sheriff is required to update each registrant's file every ninety days.

The third registry covers juveniles adjudicated to be a threat to society. If an offender is adjudicated delinquent of first degree rape, second degree rape, first degree sexual offense, second degree sexual offense, or attempted rape or sexual offense and is at least 11 years old at the date of the offense, the court may find the juvenile to be a danger to society. Upon finding that the juvenile is a danger to society, the juvenile will be required to register under this act with the local sheriff and the

110. § 14-208.7.
111. § 14-208.7.
112. § 14-208.7.
113. § 14-208.9A.
114. § 14-208.20.
115. § 14-208.20.
116. § 14-208.20.
117. § 14-208.20.
118. § 14-208.20.
119. § 14-208.25.
120. § 14-208.24.
121. §§ 14-208.26 to -208.32.
122. § 14-208.26(a).
A juvenile is required to register until the juvenile's 18th birthday or until the juvenile court loses jurisdiction. Unlike the above two registries, this registry is not a public record.

Christopher West Brooks
DEBTOR-CREDITOR LAW

*The Uniform Fraudulent Transfer Act*

On July 10, 1997, North Carolina's version of the Uniform Fraudulent Transfer Act was enacted into law. The Act, which repealed the prior Uniform Fraudulent Conveyances Act, was enacted in order "to modernize North Carolina law and harmonize our law on this subject with those states that have adopted this Uniform Act." The new Act sets forth the scenarios in which a transfer by a debtor is fraudulent as against present and future creditors and defines the rights of such creditors. No distinction is made under the Act regarding whether a transfer must be of real or personal property. In fact, a "transfer" is defined as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset and includes payment of money, release, lease, and creation of a lien or other encumbrance." Furthermore, property is defined as "anything that may be the subject of ownership."

A debtor need not be insolvent in order for a transfer to be fraudulent. Rather, if a debtor makes a transfer or incurs an obligation with the intent to hinder or delay or defraud any creditor, such transfer or obligation is considered fraudulent as against present and future creditors. Likewise, a transfer or obligation can be fraudulent when no value was received by the debtor.

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5. See § 39-23.7.
7. § 39-23.1(10).
8. See § 39-23.4.
9. § 39-23.4(a)(1). It does not matter whether the creditor's claim arose before or after the debtor made the transfer or incurred the obligation. § 39-23.4(a)(1). The Act sets forth thirteen factors which are to be examined to determine the intent of the debtor. These factors include whether the debtor retained control of the property after the transfer, whether the debtor had been sued or been threatened to sue before the transfer was made, the amount of the transfer in relation to the debtor's assets, whether the debtor absconded, and whether the transfer of assets was made in the course of legitimate estate or tax planning. See § 39-23.4(b)(1)-(13).
10. § 39-23.4(a)(2)(a), (b).
this situation, the debtor must have been engaged in a business or about to engage in a business or transaction and the remaining assets of debtor were "unreasonably small" compared to the business or transaction.\footnote{11} Furthermore, if no value was received by the debtor for the transfer or obligation and the debtor intended to incur, or believed that he would incur, debts beyond his ability to pay.\footnote{12}

While the above transfers and obligations are considered fraudulent against present and future creditors, the Act defines which transfers and obligations are fraudulent against solely present creditors. Where a creditor has an \textit{existing} claim against the debtor, and the debtor incurs an obligation or makes a transfer without receiving value, there is fraud in one of two ways.\footnote{13} First, if the debtor was insolvent at the time of the transfer or obligation, then the debtor has committed fraud.\footnote{14} Second, if the debtor became insolvent as a result of the transfer or obligation, then the transfer or obligation is fraudulent.\footnote{15} In addition to other remedies given to creditors by the Act, present creditors may treat certain of these transfers as voidable, if the insolvent debtor made the transfer to an insider, and the insider had reasonable cause to know of the insolvency.\footnote{16}

The Act provides several remedies for creditors, remedies which may be asserted against even the transferees of the debtor, subject to certain limitations. When the transfer made or obligation incurred is considered fraudulent, a creditor may avoid "the transfer or obligation to the extent necessary to satisfy the creditor's claim."\footnote{17} Other options of the creditor include attaching the

\begin{itemize}
\item \footnote{11}{§ 39-23.4(a)(2)(a).}
\item \footnote{12}{§ 39-23.4(a)(2)(b). "[A]n unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor" is not value. § 39-23.3(a). Transfers of property or the securing or satisfaction of an antecedent debt is considered value. § 39-23.3(a).}
\item \footnote{13}{§ 39-23.5(a).}
\item \footnote{14}{§ 39-23.5(a). A debtor is "insolvent" if the "sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation." § 39-23.2(a). A debtor is also presumed insolvent if the debtor is "generally not paying the debtor's debts as they become due . . . ." § 39-23.2(b).}
\item \footnote{15}{§ 39-23.5(a).}
\item \footnote{16}{§ 39-23.5(b). The Act defines an "insider" for individual debtors as a relative or general partner, or the partnership where the debtor is a general partner, or a corporation where the debtor is a director, officer, or person in control. § 39-23.1(7)(a)(1)-(4). The Act also sets forth various insiders when the debtor is a corporation or a partnership. § 39-23.1(7)(b), (c).}
\item \footnote{17}{§ 39-23.7(a)(1).}
\end{itemize}
property that was the subject of the transfer. In addition, subject to equity and the rules of civil procedure, the creditor can obtain an injunction against the debtor or the transferee or both. This injunction would prohibit the debtor or transferee from further transferring property. The creditor may also appoint a receiver to take charge of the transferred asset or to take charge of other property of the transferee. The creditor may also obtain "any other relief the circumstances may require." Finally, if the creditor had obtained a judgment against the debtor, the court may order execution on the transferred asset or its proceeds.

The remedies are, as mentioned, subject to certain defenses. Where the transfer was made with the intent to defraud or hinder creditors, the transfer or obligation may not be treated as void as against a person taking in good faith and for reasonably equivalent value. Furthermore, transfers to insiders may not be treated as voidable to the extent the insider gave new value to the debtor, or if the transfer was within the ordinary course of business of financial affairs of the debtor and insider.

Finally, the Act provides statutes of limitations for various fraudulent transfers. When the transfer was made or obligation was incurred with the intent to defraud or hinder creditors, the action by the creditor must be commenced within four years of the transfer or the obligation. Exception is made for late discoveries of the transfer or obligation. In such an event, suit must be filed within one year after the discovery or within one year after the transfer or obligation could reasonably have been discovered by the creditor. In cases where no value was received, the suit must be filed within four years after the transfer was made or the obligation incurred. Finally, for suits involving insiders, the

18. § 39-23.7(a)(2).
22. § 39-23.7(a)(3)(c).
23. § 39-23.7(b).
24. § 39-23.8(a). Nor may the transfer or obligation be treated as void against any subsequent transferee or obligee. § 39-23.8(a).
25. § 39-23.8(f)(1), (2).
26. § 39-23.9(1).
27. § 39-23.9(1).
29. § 39-23.9(2).
30. § 39-23.5(b).
suit must be filed within one year after the transfer was made or
the obligation was incurred.\textsuperscript{31}

\textit{Joshua Blake Durham}

\textsuperscript{31} § 39-23.9(3).
EDUCATION LAW

A. Charter Schools

In the 1997 session, the General Assembly made a number of changes to the provisions covering charter schools. Generally the provisions work in favor of charter schools making them more accessible and giving them more benefits. As to enrollment, charter schools may increase their student body by ten percent beginning in the second year. The General Assembly placed some requirements on buildings and other places that house charter schools. A charter school that rents from a sectarian organization must be completely separate both physically and in name. Further, charter schools must remove all religious iconography and sectarian symbols. Should a charter school wish to rent from the local school board, then that school board must lease available land unless it can demonstrate that it is not economically or practically feasible. The General Assembly placed the responsibility of maintenance and insurance on the charter schools. In regards to other insurance, the State Board of Education shall set the requirements for charter schools.

The Act also affected employees of charter schools. The General Assembly declared that it was the State’s policy that employees of charter schools are public employees for purposes of North Carolina teacher’s retirement and medical plans. Further, if a teacher wishes to obtain leave from a local school administrative unit to go to a charter school, then the school may require the teacher to give notice up to forty-five days prior to when that teacher would report for duty.

Additionally, the General Assembly made some significant changes to enrollment for charter schools. As it now stands, char-

3. § 115C-238.29E(e).
4. § 115C-238.29E(e).
5. § 115C-238.29E(e).
6. § 115C-238.29E(e).
7. § 115C-238.29F(c)(1).
8. § 115C-238.29F(e)(4).
9. § 115C-238.29F(e)(3).
ter schools can give priority enrollment to siblings of currently enrolled members. The new changes also allow the same privilege for children of teachers, principals, and teacher’s assistants of charter schools. A charter school may also give priority to the children of Board of Directors if three conditions are met. First, the school must be in its first year of operation. Second, the children are limited to no more than ten percent of the student body or twenty students. Finally, the charter school cannot be a former public or private school. The charter school must provide transportation to its students except those who live within a mile and a half of the school. The charter school is free to negotiate with the local school board to have them provide this transportation.

The General Assembly also addressed the relationship between charter schools and the local school boards. According to the General Assembly, these entities are to make a good faith attempt to resolve differences. Likewise, they may jointly select a mediator to help work out those differences. This mediator is not to discuss these negotiations with anyone. This Act protects the mediator from testifying in all civil trials related to the testimony or conduct of this mediation save a disciplinary hearing before the State Bar.

The Act makes some changes to funding for charter schools. The State Board of Education now must “allow for annual adjustments to the amount allocated to a charter school based on its enrollment growth in school years subsequent to the initial year of operation.” Further, the charter schools may use state funds to

10. § 115C-238.29F(g)(5).
11. § 115C-238.29F(g)(5).
12. § 115C-238.29F(g)(5).
13. § 115C-238.29F(g)(5).
14. § 115C-238.29F(g)(5).
15. § 115C-238.29F(h).
16. § 115C-238.29F(h).
17. § 115C-238.29G(c).
18. § 115C-238.29G(c).
19. § 115C-238.29G(c).
20. § 115C-238.29G(c).
21. § 115C-238.29G(c).
22. § 115C-238.29H(a).
23. § 115C-238.29H(a).
acquire leases for property or mobile classroom units to use as real property.24

Finally, the new act requires an extensive criminal history check for all school personnel.25 During this check the Board examines whether the person poses a threat to physical safety or that this person "does not have the integrity or honesty to fulfill his or her duties."26 The Board may then use that information when deciding whether to approve a final application and for making employment recommendations.27 If the Board recommends dismissal or nonemployment of any person, then the Board of Directors of the charter school shall not employ that person.28

B. Mediation for Local Funding Disputes

In Act 222, the General Assembly made an effort to revise mediation between Local Boards of Education and County Commissioners over school budgets.29 When the two reach an impasse, the Senior Resident Superior Court Judge is to appoint a mediator.30 However, if the two entities jointly agree to a mediator prior to this appointment, then that mediator shall preside over the proceedings.31 The mediator conducts the proceedings in private. Evidence of statements and conduct during the mediation are inadmissible in any court action.32 Further, no party may compel the mediator to testify or produce evidence of statements made and conduct occurring during the mediation in any civil action.33 The one exception is that the State Bar may compel such testimony in a disciplinary hearing.34 Absent some type of agreement all mediation must end no later than August 1.35 If the parties have not reached an agreement by this time then the mediator shall tell the judge, the chairs of both boards and the public.36

24. § 115C-238.29H(a1).
25. § 115C-238.29K.
26. § 115C-238.29K(d).
27. § 115C-238.29K(d).
28. § 115C-238.29K(d).
31. § 115C-431(b).
32. § 115C-431(b).
33. § 115C-431(b).
34. § 115C-431(b).
35. § 115C-431(b).
36. § 115C-431(b).
The County Commissioners and the Local Board of Education must share in the salary and expenses of the mediator. 37

C. Tuition Waivers for Dependents of Deceased Emergency Workers

In Act 505, the General Assembly paved a new path in providing for tuition waivers for children or spouses of emergency workers killed in the line of duty. 38 It also waived tuition to "[s]tate supported institutions of higher education, community colleges, industrial education centers and technical institutes" for certain classes of people. 39 These included those over 65; a person who is a survivor of a law enforcement officer, firefighter, volunteer firefighter, or rescue squad worker who is killed as a result of a traumatic injury in the line of duty; a spouse of a law enforcement officer, firefighter, volunteer firefighter, or rescue squad worker who is permanently and totally disabled as result of injury sustained in line of duty; any child of a law enforcement officer, firefighter, volunteer firefighter, or rescue squad worker who is permanently and totally disabled as result of injury sustained in line of duty between 17 and 23. 40 However, a child under the last category is only exempt for 48 months if seeking a baccalaureate degree or the amount of time it takes to complete the child's education if seeking another degree. 41 The Act also provides certain procedures for obtaining the waiver. 42

D. Flexibility in Contracts and Capital Improvement Negotiations for UNC

In Act 412, the General Assembly gave the member institutions of the University of North Carolina greater flexibility in negotiating certain contracts and capital projects. The Board of Governors now has the power to negotiate fees and design agreements with respect to the design, construction, or renovation of all

37. § 115C-431(b).
41. § 115B-2.
42. § 115B-2.
buildings, utilities and other developments under $500,000.  

Further, the Board may delegate this authority to its affiliated institutions. This Act exempts capital improvements for the University of North Carolina at a cost under $300,000 from Article 143. This is in opposition to general state improvement exemption of $100,000. Further, the Act exempts the University of North Carolina from various architectural and engineering requirements. However, the University must prepare a preliminary study and cost estimate for all construction or renovation projects.

E. Payroll Deductions for UNC Employees

Additionally, the General Assembly began a new payroll deduction plan for University of North Carolina employees. If the institution and employee so choose they may authorize a periodic deduction from their salary to be applied to discretionary privileges available to the employee. These may include athletic passes, parking privileges, and admission to campus concert series to name a few.

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51. § 143-135.3(k).
ENVIRONMENTAL LAW

A. Water and Sewer Authority Act

In Act 436 of 1997, the North Carolina General Assembly sought to further define the powers residing with local water and sewer authorities created under the North Carolina Water and Sewer Authorities Act.¹ This Act provides these authorities the power to enter into agreements with the political subdivisions they serve for payments designed to cover operation costs.² Such payments are based on services provided or made available, or expected to be provided or made available, without regard to actual provision or availability.³ The subdivisions may agree to budget and appropriate funds, and agree to unconditional, absolute, and irrevocable payments, notwithstanding non-operation or non-completion of the authorities facilities.⁴ The payments made under such agreements are deemed to be in consideration of output or capacity, however, if made in relation to debt services of the authority, the subdivision may not make such payments from any funds derived under its taxing power.⁵ The General Assembly further provides that authorities, with certification issued by the Environmental Management Commission, may acquire property through conveyance or by exercise of eminent domain for limited purposes.⁶

B. Sanitary Waste Management - DEHNR Approval

The Department of Environment, Health, and Natural Resources may now require from an applicant, or any affiliate of the applicant, proof of financial qualification and past substantial compliance with federal and state laws, regulations, and rules for any sanitary waste management activity with which the applicant has been involved.⁷ Compliance with these requirements is a pre-

³. N.C. GEN. STAT. § 162A-6(b) (Supp. 1997).
⁴. § 162A-6(b).
⁵. § 162A-6(b).
requisite to review of the application by the Department, and financial qualification is a condition to the future validity of any permit. 8

C. North Carolina Drinking Water Act

The General Assembly reformed the North Carolina Drinking Water Act 9 to conform with federal law. The revision expands the definition of a public water system to include water provided for human consumption through pipes or other constructed conveyances. 10 The statute uses the number of connections to determine if a water system is a community or non-community system. Connections by “other constructed conveyances” are excluded in the computation if: (1) the water is for non-residential use; (2) the Department of Environment, Health and Natural Resources determines that alternative water is provided for residential use; or (3) the Department finds the water to be treated to meet the level of protection required. 11

D. Inactive Hazardous Waste Sites

The inactive hazardous waste sites identification, inventory, and monitoring statute was amended to clarify the duties of and require information from the owners, operators, or other responsible persons of such facilities, and to simplify inventory of such sites. 12 As amended, the role of the Secretary is clarified in maintaining records of contamination of inventoried sites. 13 The ninety days provided to an owner, operator, or other responsible person to provide the Secretary with all site data available to them begins at the time such person knows or should have known of the existence of an inactive hazardous substance or waste disposal site. 14 The amendment defines what information, documentation, or records the Secretary, upon reasonable notice, can request from any person in relation to sites, releases, and ability of the

14. § 130A-310.1(b).
person to pay for cleanup. Further, it provides the person with the option of allowing inspection and copying of information, documentation, or records by the Secretary or copying and furnishing same to the Secretary at their expense. Subpoena power over persons and documents is granted to the Secretary and provides for Superior Court enforcement of such subpoenas. Finally, the amendment requires owners of an inactive hazardous substance or waste disposal site to allow access to such sites at reasonable times by the Secretary, and affirms the power of the Secretary to obtain administrative search warrants, if the owner refuses.

E. Environmental Management Commission Membership

The membership requirements for one of the positions on the Environmental Management Commission were altered to require either employment or recent retirement from an industrial manufacturing facility and knowledge in the field of industrial air and water pollution control.

F. Dry-cleaning Solvent Clean-up Act

In an effort to regulate and prevent dry-cleaning solvent releases, the North Carolina General Assembly adopted the Dry-cleaning Solvent Clean-up Act of 1997. The Act establishes a dry-cleaning solvent clean-up fund, administered by the Environmental Management Commission. The sources for this fund include a dry-cleaning solvent tax of $5.85 per gallon of chlorine-based solvent and $.80 per gallon of hydro-carbon solvent, recoveries made under the act, and any gift or grant made to the fund. Distributions from this fund are capped at the amount held in the fund, based on priority rankings, for clean-up of sites and a maximum of twenty percent annual administration charge for the pro-

15. § 130A-310.1(f).
16. § 130A-310.1(g).
17. § 130A-310.1(h).
18. § 130A-310.1(i).
gram. The Environmental Management Commission is granted non-delegable rulemaking powers as necessary to implement the act.

Dry-cleaning facility owners or operators and wholesale distribution facilities are required to carry liability insurance, post a bond, or deposit security with the Commission in the amount of $1,000,000.00 to establish financial responsibility. Exempted from this requirement are facilities on state or military owned property. The Commission may also grant a designation of "uninsurable" in satisfaction of this requirement. Such a classification is established by proving to the Commission the applicable insurance rates for any given facility exceed three times the comparable rate at a facility where no know contamination exists.

Any person requesting a certification, an assessment agreement, or a remediation agreement from the Commission, is required to provide information necessary for a priority ranking of the site at issue, information about such person's ability to pay associated clean-up costs at the site, and proof of financial responsibility as described previously. Also, a schedule of costs which the responsible party must pay in addition to any other costs imposed by the Commission was established.

A potentially responsible party may petition the Commission for a certification of property and for an initial priority ranking, if applicable. However, any priority ranking established, except for in a final remediation agreement, is subject to later revision by the Commission. Authorized assessment agreements establish intended remedial plans for the site and costs expected to be paid by the responsible parties, and provide reimbursement schedules, subject to availability of funds. No further action may be

25. § 143-215.104D(a).
27. § 143-215.104E(d).
28. § 143-215.104E(b).
29. § 143-215.104E(c).
30. § 143-215.104F.
31. § 143-215.104F.
32. § 143-215.104G(a).
33. § 143-215.104G(b).
34. § 143-215.104H.
required by the Commission, provided the decision is established in writing.\textsuperscript{35}

Remediation agreements are authorized following the establishment of an assessment agreement.\textsuperscript{36} The remediation agreement must contain, among other things: (1) the terms of the remediation plan; (2) a description of the effected property; (3) the degree to which responsible parties and the fund shall make clean-up payments; (4) any future land-use restrictions; (5) the desired results of remediation; (6) final priority ranking; and (7) the party responsible for conducting remediation.\textsuperscript{37} Under certain circumstances, certification, assessment agreements, and remediation agreements are subject to revocation by the Commission, after notice and an opportunity for hearing.\textsuperscript{38} By entering and fully complying with assessment agreements and remediation agreements, the responsible parties gain limited liability, subject to certain exceptions, for the clean-up, capped at that amount established in the agreements.\textsuperscript{39}

If land-use restrictions are part of a remediation agreement, community involvement is required.\textsuperscript{40} The petitioner must give notice through the North Carolina Register and a general circulation newspaper followed by a sixty day period for comment.\textsuperscript{41} A public meeting may be held if requested within thirty days of publication and found to be of significant public interest.\textsuperscript{42} If land-use restrictions are ultimately imposed, they must be recorded in the Register of Deeds in the county in which the property is located.\textsuperscript{43} Any subsequent transfer of any interest in the land subject to use restrictions must a notation of the restrictions and postcontamination status.\textsuperscript{44} Such restrictions may be canceled by the Commission following a determination that the threat to public health and the environment has ended.\textsuperscript{45}

Violations of the Act carry severe civil penalties which are imposed directly by the Commission and are enforced by the State

\textsuperscript{35} § 143-215.104H(e).
\textsuperscript{36} § 143-215.104I.
\textsuperscript{37} § 143-215.104I.
\textsuperscript{38} § 143-215.104J.
\textsuperscript{39} § 143-215.104K.
\textsuperscript{40} § 143-215.104L.
\textsuperscript{41} § 143-215.104L(b).
\textsuperscript{42} § 143-215.104L(c).
\textsuperscript{43} § 143-215.104M(c).
\textsuperscript{44} § 143-215.104M(d).
\textsuperscript{45} § 143-215.104M(e).
Attorney General. Criminal and injunctive remedies are also authorized by the Act, dependent on the facts and circumstances of each case. The Act establishes a sixty day limitation for appeals from any decision made by the Commission.

G. Fisheries Reform Act

The General Assembly enacted the Fisheries Reform Act to preserve and maintain for both commercial and recreational uses, the fisheries of North Carolina. Violations of the act carry both criminal and civil penalties. This law establishes the Marine Fisheries Commission, as part of the Department of Environment, Health, and Natural Resources. Within the Commission's functions are the management and conservation of resources, the implementation of laws through rules and policies, the implementation of management measures, and advisement of fishery issues to the State. The Commission is granted rulemaking, licensing, quasi-judicial, and contracting powers to aid in fulfilling its duties. The Governor appoints nine members to comprise the Commission who serve staggered three year terms. No compensation is provided for service on the Commission but expenses associated with service are reimbursed. The Governor also appoints and has removal power over the chair of the Commission, with the membership electing the vice-chair for a one year term. Quarterly meetings are required and additional meetings are authorized by the Act. To assist the Commission in its functions and duties, four standing advisory Commissions, comprised of eleven members each, are also established. Any conflict of juris-

46. § 143-215.104P.
47. § 143-215.104Q, § 143-215.104R.
48. § 143-215.104S.
53. § 143B-289.22.
54. § 143B-289.24(a)-(d).
55. § 143B-289.24(j).
56. § 143B-289.25(a).
57. § 143B-289.26(a).
58. § 143B-289.27(a).
diction arising between the Commission and the Wildlife Resources Commission or the Department of Environment, Health, and Natural Resources shall be decided by the Governor, and such decision shall be binding.59

The Act further establishes the Marine Fisheries Endowment Fund solely for conservation programs.60 The fund is established as a special trust fund, the assets of which are derived from gifts, grants, contributions, or any other lawful method.61

Coastal Habitat Protection Plans are required under this Act.62 These plans, which require revision at least once every five years, are the joint result of negotiations between the Coastal Resource Commission, Marine Fisheries Commission, and Environmental Management Commission.63 Once established, these Plans shall be implemented by rules promulgated by each commission.64 Further, Fishery Management Plans are to be established by the Department of Environment, Health, and Natural Resources directing the Marine Fisheries Commission.65 These purpose of these plans is to maximize fishery yields and prevent overfishing.66

Detailed licensing requirements, including qualifications, transferability, assignability, terms, costs, exemptions, presentation, and revocation are contained in the Act.67 Among the activities requiring a license are commercial fishing operations, fish dealers, recreational commercial gear fishing, ocean fishing pier operations, land or sell operations, and spotter plane operations.68

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59. § 143B-289.31.
60. § 143B-289.28(a).
61. § 143B-289.28(c).
64. § 143B-279.8(c).
H. Hog Farm Legislation

1. Moratorium on Construction of Hog Farms

In response to concerns over the growing swine industry, the North Carolina General Assembly enacted legislation to create a balanced program to protect water quality, public health, and the environment. The program includes a temporary moratorium on the construction or expansion of swine farms. Beginning March 1, 1997 until March 1, 1999, the Environmental Management Commission is prohibited from issuing permits for an animal waste management system for a new swine system. The purpose of this moratorium is to allow time for counties to: (1) adopt zoning ordinances; (2) allow completion of studies authorized by the 1995 General Assembly; and (3) allow the 1999 General Assembly to receive and act on the findings and recommendations of those studies.

However, several exceptions to the moratorium were created. These exceptions include: (1) repairing a component part of an existing lagoon; (2) construction to replace a component part of an existing lagoon not resulting in an increase in swine population; (3) construction or expansion to increase the swine population to the number that animal waste system is designed to accommodate; (4) construction to comply with applicable animal waste management rules; (5) construction or expansion, if the person has been issued a permit prior to date act becomes effective; (6) construction or expansion if that person has, prior to March 1, 1997: (a) laid a foundation for a component of the swine farm, (b) contracted (written) for the construction or expansion, or (c) been approved for a loan or line of credit to finance the construction or expansion and has obligated or expended

funds derived from the loan or line of credit.\textsuperscript{80} The applicant is responsible for providing information and documentation to the Department of Environment, Health, and Natural Resources, the entity that establishes eligibility for an exception.\textsuperscript{81}

Despite the enumerated exceptions, the moratorium is not effective in certain counties: (1) that have a population of less than 75,000, according to the most recent decennial federal census; (2) in which there are more than $150,000,000 of expenditures for travel and tourism based on the most recent figures of the Department of Commerce; and (3) that are not in the defined coastal area.\textsuperscript{82} The moratorium in these areas extends from January 1, 1997 through March 1, 1999.\textsuperscript{83} Furthermore, no animal waste management system shall be permitted in such areas except under an individual permit issued under Part 1 of Article 21 of Chapter 143 of the General Statutes.\textsuperscript{84}

2. County Authority to Enact Zoning Ordinances

The Act now allows counties to enact zoning ordinances that will affect “property used for bona fide farm purposes” with certain limitations.\textsuperscript{85} A county may adopt zoning regulations governing swine farms which are served by animal waste management systems having a design capacity of 600,000 pounds steady state live weight (SSLW) or greater provided that the zoning regulations may not have the effect of excluding these swine farms entirely from that zoning jurisdiction.\textsuperscript{86} Furthermore, any zoning ordinance adopted pursuant to this Act shall not, in regards to any swine farm existing at the time it the zoning ordinance is adopted: (1) prohibit the continued existence of a swine farm; (2) require the amortization of the swine farm; or (3) prohibit the repair or replacement of the swine farm so long as said repair or replacement does not increase the swine population beyond that number its waste management system is designed to serve.\textsuperscript{87}

\textsuperscript{80} § 1.1(b)(6)(c), 1997 N.C. Sess. Laws 458.
\textsuperscript{81} § 1.1(c), 1997 N.C. Sess. Laws 458.
\textsuperscript{83} § 1.2(a), 1997 N.C. Sess. Laws 458.
\textsuperscript{84} § 1.2(b), 1997 N.C. Sess. Laws 458.
\textsuperscript{86} § 153A-340(b)(3).
3. Air Quality

Part III of the Act authorizes the Environmental Management Commission (hereinafter “Commission”) to act in accordance with the State’s public policy over air quality. The Commission may “develop and adopt economically feasible standards and plans necessary to implement programs to control the emission of odors from animal operations.”

4. Location Restrictions for Hog Farms

The General Assembly also amended the law dealing with the locations of hog farms to lessen their impact on adjoining land. The amendments enumerate the minimum distance a swine house must be from other areas: (1) 500 feet from any property boundary, (2) 500 feet from any well supplying water to a public water system, (3) 500 feet from any well that supplies water for human consumption, and (4) 2500 feet from an outdoor recreational facility.

Furthermore, the outer perimeter of the land area onto which waste is applied from a lagoon that is a component part of a swine farm must be seventy-five feet from any boundary of property on which an occupied residence is located and from any perennial stream or river, other than an irrigation ditch or canal. Nor shall there be any construction of any component of a liquid animal waste management system for which a permit is required under Chapter 143 of the General Statutes within the 100-year floodplain (excepting land application sites.). These siting

92. § 106-803(a)(4).
93. § 106-803(a)(5). There is an exception for wells located on the same parcel or tract of land on which the swine house or lagoon is located and that supplies water only for use on that parcel or tract or adjacent parcels all of which are under common ownership. § 106-803(a)(5).
94. § 106-803(a)(2). An outdoor recreation facility is defined as any plot or tract of land on which there is located an outdoor swimming pool, tennis court, or golf course that is open to either the general public or to the members and guests of any organization having 50 or more members. § 106-803(a1).
95. § 106-803(a1).
96. § 106-803(a2).
requirements apply to any new liquid animal waste management system constructed on or after the date this act becomes law.\textsuperscript{97}

Any owner of land directly affected by these siting requirements can bring a civil action against the owner or operator of a swine farm.\textsuperscript{98} A person is directly affected by the siting requirements if said person "owns a facility or property located within the siting requirements specified in that section . . . ."\textsuperscript{99}

5. Notice Requirement

Finally, Part 4 of the act mandates that any person intending to construct a swine farm under Chapter 143 of the General Statutes give written notice to all adjoining property owners; property owners owning property located across a public road, street or highway from the swine farm; the county or counties in which the farm site is located; and the local health department or departments having jurisdiction over the farm site of that person's intent to construct the swine farm.\textsuperscript{100}

6. Allowable Surface Water Limits for Nitrogen and Phosphorus

Session Law 458 also involves the amount of nitrogen and phosphorous discharge allowable under permits issued.\textsuperscript{101} The Act limits discharge to surface waters of the State classified as nutrient sensitive waters (NSW) to an average annual mass load of total nitrogen having a total nitrogen concentration of 5.5 milligrams of nitrogen per liter (5.5 mg/l).\textsuperscript{102} However, the concentration limits set by this amendment apply only to: (1) facilities in operation prior to July 1, 1997 or for which authorization to construct was issued prior to July 1, 1997, and that have a design capacity to discharge 500,000 gallons per day or more;\textsuperscript{103} and (2) facilities for which an authorization to construct was issued on or after July 1, 1997.\textsuperscript{104}


\textsuperscript{100} § 106-805.


\textsuperscript{103} § 143-215.1(c1)(1).

\textsuperscript{104} § 143-215.1(c1)(2).
The discharge of phosphorous is also limited under the conditions to 2.0 milligrams of phosphorous per liter (2.0 mg/l). The limits are identical to the nitrogen limits. A person affected by either of these limits, however, may request approval of the Commission for a greater nitrogen and phosphorous concentration at a decreased permitted flow so long as the average annual mass load is equal to or less than that required.

7. Basinwide Water Quality Management Plans

The General Assembly made several findings with regard to river basins in North Carolina. These are: (1) there are 17 major river basins in the State; (2) many activities occur in these basins, varying from one basin to another; (3) the public focuses on swine pollution in this area but in fact many other industries and private citizens are responsible for contributing to the pollution; (4) the best approach to protecting and improving the water quality is a comprehensive, systemwide management approach; (5) seventeen basinwide plans are planned to be prepared by the Department of Environment over the next five years; (6) the best solution to water quality is to accelerate efforts under way by establishing a deadline for the completion of the 17 plans for each major river basin in the State; (7) the public should be informed of the complexity of the problems regarding water quality. Public involvement should be encouraged, and public education should be enhanced.

In addition, the General Assembly promulgated guidelines for the Commission's development and implementation of basinwide water quality management plans for each of the 17 major river basins in the State. Each plan shall: (1) provide that all sources of pollutants jointly share the responsibility of reducing the pollutants in the State's waters fairly and proportionately; and (2) establish a goal to reduce the average annual mass load of nutrients delivered to surface waters within the river basin where any of the waters are designated as nutrient sensitive waters.

105. § 143-215.1(c2).
106. § 143-215.1(c2)(1)-(2).
107. § 143-215.1(c4).
111. § 143-215.8B(b)(2).
The Commission must review each basin plan at least every five years, and report on or before October 1st of each year on the progress of each basin plan to the Environmental Review Commission. The Commission shall also increase its efforts to involve public awareness, involvement and education in regards to the implementation of the river basin plans and progress.

8. Graduated Violation Points System for Swine Operators

The “Violation Points System applicable to Swine Farms” is a creation of Session Law 458. The Commission must develop a Violation Points System applicable to permits for animal waste management systems for swine farms. The Commission retains the authority to revoke a permit. The system must provide greater points for greater harm and a schedule putting forth the number of points for revocation and the duration of the revocation. The Commission must provide for an appeals process.

Furthermore, the Department of Environment, Health, and Natural Resources must develop a recommended system of civil penalties applicable to integrators of swine operators. The Environmental Review Commission must then determine whether to submit a legislative proposal based upon these recommendations to the General Assembly during the 1998 Regular Session.

The Secretary must refer to the S.B.I any discharge of waste by any person or facility in any manner that violates this Article involving the possible commission of a felony. The Commission can also require permit applicants to satisfy the Department that the applicant is financially qualified to carry out the activity for which the permit is required. Finally:

112. § 143-215.8B(c).
113. § 143-215.8B(d).
117. § 143-215.6E(a).
118. § 143-215.6E(b)(1)-(3).
119. § 143-215.6E(c).
120. § 10.2(b), 1997 N.C. Sess. Laws 458.
[n]o permit shall be issued under this section for a privately owned

treatment works that serves 15 or more service connections or

that regularly serves 25 or more individuals, until financial quali-

fication is established and the issuance of the permit shall be con-

tingent on the continuance of the financial qualification for the
duration of the activity for which the permit was issued. 123

I. Various Environmental Amendments

Various environmental permit qualifications were amended. For

instance, the Water Pollution Control System Operators Cer-

tification Commission may promulgate continuing education

requirements that an applicant must meet in order to renew a cer-

ificate. 124 Also, for a permit under the Coastal Area Management

Act, an applicant's compliance history in other states can now be

considered. 125

Several civil penalty provisions were also amended with

regard to air pollution. One amendment, for example, provides

that each governing body shall have the power to assess a penalty

not to $10,000 per day for violations of Air Quality Standards for

so long as the violation continues. 126 Another empowers the Sec-

retary to assess a penalty not to exceed $10,000 per day for so long

as the violation continues. 127

The General Assembly also reestablished the manner in

which the Governor appoints the members of certain commissions.

For the North Carolina Mining Commission, the amendment

mandates the Governor appoint: (1) the Chairman of the N.C.

State University Minerals Research Laboratory Advisory Com-

mittee, ex officio; 128 (2) three members representative of the min-

ing industry; 129 (3) three members representative of

nongovernmental conservation interests; 130 and (4) two members


124. Act of September 11, 1997, § 1, 1997 N.C. SESS. LAWS 496 (codified as

amended at N.C. GEN. STAT. § 90A-46.1 (1997)).

125. Act of September 11, 1997, § 2, 1997 N.C. SESS. LAWS 496 (codified as

amended at N.C. GEN. STAT. § 113A-120(b)(4) (1997)).

126. Act of September 11, 1997, § 6, 1997 N.C. SESS. LAWS 496 (codified as

amended at N.C. GEN. STAT. § 143-215.112(d)(1a) (Supp. 1997)).


amended at N.C. GEN. STAT. § 143-215.114A(b) (Supp. 1997)).

128. Act of September 11, 1997, § 8, 1997 N.C. SESS. LAWS 496 (codified as

amended at N.C. GEN. STAT. 143B-291(a)(1) (1997)).


130. § 143B-291(a)(5)-(7).
who, at the time of appointment to the Mining Commission, are members of the Environmental Management Commission and knowledgeable in principles of water and air resources management.\textsuperscript{131} The members of the Commission serve six year staggered terms,\textsuperscript{132} but the Governor retains the power to remove members for misfeasance, malfeasance, or nonfeasance.\textsuperscript{133}

The North Carolina Parks and Recreation Authority, composed of eleven members, are appointed as follows; (1) three members are appointed by the Governor;\textsuperscript{134} (2) four members are appointed by the General Assembly upon the recommendation of the Speaker of the House;\textsuperscript{135} and (3) four members are appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate.\textsuperscript{136} Furthermore, the Governor: (1) must appoint one member to serve as chair;\textsuperscript{137} (2) vacancies must be filled by appointment;\textsuperscript{138} (3) may remove a member for misfeasance, malfeasance, and nonfeasance;\textsuperscript{139} and (4) the Authority shall meet at least quarterly at a time and place designated by the Chair.\textsuperscript{140} Parks and Recreation Authority members serve on a schedule of two-year staggered terms.\textsuperscript{141}

\textbf{J. Cooperative Water Quality Protection Plans}

The North Carolina General Assembly established a framework for developing and implementing cooperative State-local water quality protection plans for river basins and segments of river basins and to expedite the permanent closure of low risk sites under the Leaking Petroleum Underground Storage Tank Cleanup Act of 1988.\textsuperscript{142}

To improve water quality, the State must adopt plans that are developed and implemented in cooperation and coordination with

\begin{itemize}
  \item \textsuperscript{131} § 143B-291(a)(8)-(9).
  \item \textsuperscript{132} § 143B-291(b).
  \item \textsuperscript{133} § 143B-291(d).
  \item \textsuperscript{134} Act of September 11, 1997, § 10, 1997 N.C. SESS. LAWS 496 (codified as amended at N.C. GEN. STAT. § 143B-313.2(a)(1)-(3) (Supp. 1997)).
  \item \textsuperscript{135} N.C. GEN. STAT. § 143B-313.2(a)(4)-(7) (1997).
  \item \textsuperscript{136} § 143B-313.2(a)(8)-(11).
  \item \textsuperscript{137} § 143B-313.2(c).
  \item \textsuperscript{138} § 143B-313.2(d).
  \item \textsuperscript{139} § 143B-313.2(e).
  \item \textsuperscript{140} § 143B-313.2(g).
  \item \textsuperscript{141} Act of September 11, 1997, § 11(1)-(4), 1997 N.C. SESS. LAWS 496.
  \item \textsuperscript{142} Act of September 11, 1997, § 1, 1997 N.C. SESS. LAWS 493 (codified as amended at N.C. GEN. STAT. § 143-214.14 (Supp. 1997)).
\end{itemize}
local governments. The plan requirements shall be proportional to the relative contributions of pollution from all sources in terms of both loading and proximity. Further, it is the goal of the General Assembly to encourage and financially support State-local partnerships for improved water quality. With regard to approving plans, the Commission can approve a coalition plan proposed by a coalition of local governments whose territory collectively includes the affected basin. The Commission may also approve a coalition plan whose territory does not include all of an affected basin if the Commission determines that the omission of some territory will not adversely affect water quality.

The legislature enumerated several conditions of approval for coalition plans. First, the basin under consideration must be an appropriate unit for planning. Second, the plan must be approved by the governing board of each local government that is a member of the coalition proposing the plan. Third, the plan must provide an alternative method of attaining equivalent compliance with federal and state water quality standards, classifications, and management practices in the affected basin. In addition, the plan must contain an assessment of water quality and related water quantity management in the affected basin, a description of the goals and objectives for water quality and quantity management in the affected basin, a workplan that describes strategies for achieving the specified goals and objectives, an implementation strategy and implementation responsibilities of State and local agencies, and sources of funding where applicable.

Brian Edwin Edes
Joshua Blake Durham

144. § 143-214.14(c).
145. § 143-214.14(c).
146. § 143-214.14(d).
147. § 143-214.14(d).
150. § 143-214.14(f)(5).
151. § 143-214.14(g)(1).
152. § 143-214.14(g)(2).
153. § 143-214.14(g)(3).
154. § 143-214.14(g)(3).
155. § 143-214.14(g)(3).
FAMILY LAW

A. Domestic Violence Protective Orders

Recent legislation expanded the definition of persons allowed to obtain domestic violence protective orders. The former statute allowed only those persons with a familial relationship to the alleged attacker to seek a protective order from the district court or the magistrate. Persons with a familial relationship under prior law included parents, grandparents, those standing in loco parentis to a minor child, current and former spouses, and persons of the opposite sex who were living together or had lived together.

The North Carolina General Assembly substituted the phrase “personal relationship” for “familial relationship,” thus expanding the classification of persons who can seek domestic violence protective orders. The list of persons defined under the statute now includes current or former household members as well as persons of the opposite sex who are dating or were dating when the domestic violence took place. The statute clarifies persons in dating relationships as those couples “romantically involved over time and on a continuous basis during the course of the relationship,” as opposed to mere casual, business or social acquaintances.

While the act has expanded the definition of those who may request protective orders it is clear that an aggrieved party may not seek a protective order against a child or a grandchild who is under the age of sixteen. Additionally, the Act adds a criminal penalty for violations of protective orders. Violation of a protective order is now a Class A1 misdemeanor.

The domestic violence statute also makes a minor change with regard to ex parte domestic violence protective orders entered by the magistrate under authority of the district court. In order to obtain an emergency ex parte order from the magistrate,
the magistrate formerly had to determine that the clerk of superior court was unavailable, that the district court was not in session, and that the district court judge would be unavailable to hear the motion for four or more hours. The new legislation omits reference to the clerk of the superior court in its discussion of ex parte orders entered by a magistrate, so now it need only be shown that the district court was not in session and that the judge would not be available for at least four hours before the emergency ex parte order can be granted under this provision.

B. Public Disclosure of Findings and Information by a Public Agency Regarding Child Fatality or Near Fatality Cases

While records of juvenile cases in North Carolina are generally to be "withheld from public inspection," the release of certain information concerning child fatalities or near fatalities may now be obtained by the public. Upon request by the public, an agency is now required to release certain information regarding a child when that child is killed or put in serious or critical condition and child abuse, neglect or maltreatment is the suspected cause of death or injury. Any written summaries of investigations by a government agency promulgated after receiving information that a child may be in need of protection is open to the public if one of the following criteria is present: (1) someone is criminally charged with the child's death or injury; or (2) the district attorney has certified that, but for the alleged offender's death, a charge would have been pending. Certain records, including general family information and psychological evaluations of the child, are excepted from public inspection unless directly related to the suspected abuse causing serious injury or death. Additionally, information disclosing the identities of persons reporting the child abuse is to be kept confidential.

The agency can reject a request for information pertaining to the abused or deceased child if the agency reasonably believes

9. § 50B-2(c1).
10. § 50B-2(c1).
14. § 7A-675.1(b)(1)-(2).
15. § 7A-675.1(c).
that the information will impede the defendant’s right to a fair trial or the State’s ability to prosecute. Additionally, the act, promulgated “to improve child protection,” authorizes the agency to withhold the information if another child within that household would be potentially subject to physical or mental danger as a consequence of the disclosure. The agency must provide the information, after consulting with the district attorney, within five days of the request, and any person who is denied access to information required to be produced by this act may apply to the superior court for an order compelling disclosure.

C. Equitable Distribution

1. Divisible Property

Divisible property is a new category of property subject to distribution between divorcing parties added to the equitable distribution laws. Prior to the enactment of the new statute, a court could only distribute marital property. Marital property is defined as real and personal property acquired by either spouse during the course of the marriage and before the date of separation. Divisible property is property (including debts) acquired by certain means after the date of separation but before the date of judicial distribution. Divisible property includes four categories, all pertaining to events or acquisitions occurring after the date of separation, and thus not technically marital property: (1) appreciation and diminution in value of marital property not attributable to postseparation activities of a spouse, (2) property or property rights such as commissions or contract rights acquired as a result of efforts of either spouse during the marriage and before separation, (3) passive income from marital property such as dividends or interest; and (4) increases in marital debt, interest on the debt, and financing charges.

Several other changes were made to the equitable distribution statutes. The presumption that an equal division of marital

17. § 7A-675.1(d)(2).
18. § 7A-675.1(d)-(e).
22. § 50-20(b)(4)(a)-(d).
and divisible property is equitable is now codified. The presumption can be rebutted by the greater weight of the evidence or by evidence that the property in question is a closely-held business or other similar property not lending itself to equal division. Additionally, prior legislation required good cause to be shown before an interim distribution of property would be made. The new enactment, however, encourages allocations of property before the final decree. Finally, marital property is still valued at the date of separation, just as in the old statute but now evidence of postseparation value can be used as corroborative evidence of the value of marital property. Divisible property, including debt, is valued as of the date of distribution.

2. Nonvested Pensions Categorized as Marital Property Subject to Equitable Distribution

Prior to the 1997 amendments to the North Carolina Equitable Distribution statutes, nonvested pensions were considered the separate property of the employee spouse even though the spouses were married prior to, or during, the employment of the spouse which created the pension benefit. Recent changes to the equitable distribution laws include nonvested pensions, retirement, and other deferred compensation rights in the definition of marital property subject to distribution by the North Carolina courts upon a filing of divorce. Military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act are also included within the definition of marital property subject to distribution. Pension awards to the non-employee spouse are not to exceed fifty percent of total benefits available under the plan, whether vested or nonvested, unless other property awards are insufficient to constitute an equitable distribution of marital property or other assets between the former spouses are difficult to

23. § 50-20(e).
24. § 50-20(e).
25. § 50-20 (i1).
26. § 50-20 (i1).
29. § 50-21(b).
32. § 50-20(b)(1).
divide between the parties, such as a business or profession.\textsuperscript{33} The portion of nonvested pensions which is marital property is determined by examining the length of employment and comparing it with the length of employment during the marriage, just as was done under the former statute with vested pensions.\textsuperscript{34}

D. Amended Definition of Dependent Juvenile in the North Carolina Juvenile Code

The former definition of dependent juvenile in the North Carolina Juvenile Code was as follows:

a juvenile in need of assistance or placement because he has no parent, guardian, or custodian responsible for the juvenile’s care or supervision or whose parent, guardian, or custodian, due to physical or mental incapacity and the absence of an appropriate alternative child care arrangement, is unable to provide for the care or supervision.\textsuperscript{35}

The statute as amended deletes the portion of the definition that requires that a juvenile’s parent, guardian, or custodian be unable to care for the juvenile due to physical or mental incapacity before the juvenile is considered dependent under the act.\textsuperscript{36} The above language is deleted in favor of the broader statement that a juvenile, while having a parent, guardian or custodian, is still considered dependent if that parent or similar caretaker is unable to provide for care and lacks an appropriate alternative child care arrangement.\textsuperscript{37}

E. Mediated Settlement Conferences

A pilot program of mediated settlement conferences areas was authorized with respect to four domestic law areas: (1) equitable distribution; (2) alimony; (3) child support; and (4) spousal support.\textsuperscript{38} Under the mediation program, to be designed by the Dispute Resolution Commission with assistance from interested groups, the district court judge may order parties, their attorneys, and their agents litigating the above four issues to attend a medi-

\textsuperscript{33} § 50-20.1(e).
\textsuperscript{34} § 50-20.1(d).
\textsuperscript{37} § 7A-517(13).
atation settlement conference while the case is pending.\textsuperscript{39} However, making a settlement offer or demand is not required of the parties to the mediation.\textsuperscript{40} Even though attendance at the mediation conference is mandatory, actions taken or statements made at the mediation conference are inadmissible in the subsequent trial of the case.\textsuperscript{41} Once a mediation conference is ordered by the district court judge, failure to attend the conference absent a showing of good cause is sanctionable by the imposition of attorneys' fees, mediator fees, and expenses occurred by the opposing party attending the conference.\textsuperscript{42}

The cost of the mediation conference is paid in equal shares by the participating parties. A procedure by which indigent parties are afforded an opportunity to participate in the program without cost to either the indigent party or the State must by established according to Supreme Court rules.\textsuperscript{43} The parties to the pending domestic action may choose the mediator, and if none is chosen, the judge is to appoint a mediator.\textsuperscript{44} Mediators are accorded judicial immunity from suit by the parties but are subject to sanctions by the District Court.\textsuperscript{45}

\textbf{F. Substantive Changes to Adoption Laws in North Carolina}

The amendments to the adoption laws provide a new requirement that, in the case of agency adoptions, reports filed in court by agencies participating in the adoption should exclude information that could potentially lead to the identity of the adoptee at birth or former parents of the adoptee.\textsuperscript{46} In addition, the report compiled by the agency must be received by the court within sixty days of the clerk's mailing or delivery of the order for the report to the agency of the pending action, as opposed to sixty days from receipt of the order under prior law.\textsuperscript{47}

With respect to petitions to adopt a minor child, the court has the authority to deny any petition for adoption of a minor at any

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{39} N.C. GEN. STAT. § 7A-38.4 (Supp. 1997).
\item \textsuperscript{40} § 7A-38.4(e).
\item \textsuperscript{41} § 7A-38.4(k).
\item \textsuperscript{42} § 7A-38.4(f).
\item \textsuperscript{43} § 7A-38.4(j).
\item \textsuperscript{44} § 7A-38.4(g).
\item \textsuperscript{45} § 7A-38.4(i).
\item \textsuperscript{46} Act of June 19, 1997, § 4, 1997 N.C. SESS. LAWS 215 (codified as amended at N.C. GEN. STAT. § 48-2-403(b) (Supp. 1997)).
\item \textsuperscript{47} Act of June 19, 1997, § 5, 1997 N.C. SESS. LAWS 215 (codified as amended at N.C. GEN. STAT. § 48-2-503(a) (Supp. 1997)).
\end{enumerate}
\end{footnotesize}
time between the filing of the petition and the final order completing the adoption.\textsuperscript{48} However, under the statute as amended, the court must give five days notice of the motion to dismiss the petition to the parties, any agencies making reports concerning the adoptive parents to the court, and the Department of Human Resources.\textsuperscript{49} Additionally, all who are notified are entitled to a hearing concerning the motion to dismiss.\textsuperscript{50}

Under § 48-3-603(a) of the North Carolina General Statutes, consent to adoptions is not required of certain persons.\textsuperscript{51} Formerly, consent to the adoption was not required from a parent for whose minor child a guardian had been appointed.\textsuperscript{52} However, this classification has been stricken from the list of those parties from whom consent is not required under this section.\textsuperscript{53}

The most notable addition to the adoption statutes in the 1997 amendments is the enactment of a statute which allows the mother, an agency, or the adoptive parents to petition the court before the child is born for its determination of whether consent of the father is required for the adoption.\textsuperscript{54} The person believed to be the father of the child is entitled to notice that the petitioner believes that the father is not entitled to consent under North Carolina General Statute § 48-3-601.\textsuperscript{55} If a response is not received within fifteen days of the notice, the court must enter an order that the father's consent is not required in any adoption proceedings filed within three months of the birth of the child.\textsuperscript{56} If the biological father does respond, he is entitled to a hearing upon the issue of consent.\textsuperscript{57}

G. Amendments to Custody and Placement of Juveniles

The major changes that were made to the North Carolina General Statutes concerning the custody and placement of

\begin{footnotes}
\item[50] § 48-2-604.
\item[53] N.C. Gen. Stat. § 48-3-603(a) (Supp. 1997).
\item[56] § 48-2-206(c).
\item[57] § 48-2-206(d).
\end{footnotes}
juveniles include the provision for state intervention into county child welfare services under certain conditions and the creation of a Legislative Study Commission on Children and Youth, both of which were adopted to “enhance the state’s ability to ensure that juveniles are placed in a safe, permanent home within a reasonable period of time.”58 The Secretary of Human Resources is authorized to intervene, after notice and an opportunity for hearing, in the county’s child welfare service activities if the activities are not being carried out “in accordance with State law and applicable rules” or the county “fails to demonstrate reasonable efforts to do so.”59 The Secretary of the Department of Human Resources is also authorized as part of its intervention program to send its staff to provide technical assistance to the county department of social services, to establish a corrective plan for the county department so that it may thereafter comply with state law, advise the county of appropriate policies and procedures, and finally the Department of Human Resources is authorized to withhold state and federal child welfare services funds if the situation is not corrected within sixty days of the intervention activities.60 In fact, the Secretary can divest the county department of social services of its duties for a period of time and take on provision of the services through its department or hire other contractors to provide the services.61

The newly created Legislative Study Commission on Children and Youth is directly related to the above statute authorizing the state to intervene if child welfare services are not being appropriately handled at the county level.62 This statute’s purpose is to set up a commission “to study and evaluate the system of delivery of services to children and youth and to make recommendations to improve service delivery to meet [the] . . . needs of the children and youth of this state.”63 The Commission’s mandate is broad in that it is to study and recommend solutions not only about child welfare services but about such things as “school dropout, teen

61. § 108A-74(d).
suicide, and adolescent pregnancy."\textsuperscript{64} The Commission includes twenty three members, ten of whom are appointed by the Speaker of the House and ten of whom are appointed by the President Pro Tempore of the Senate. Members for the Commission include licensed physicians, directors of local health departments, attorneys, and general members of the public knowledgeable on the subject.\textsuperscript{65}

H. Child Support Enforcement Statutes to Comply with Federal Welfare Reform

A newly created "State Directory of New Hires" requires employers to report certain information concerning employees who are required to file a federal W-4 form.\textsuperscript{66} The hire directory was established to create a statewide database of those persons owing child support and to facilitate measures to collect child support such as income withholding.\textsuperscript{67} The act also conferred upon the Department of Human Resources additional duties and powers for the purposes of facilitating and enforcing child support orders.\textsuperscript{68}

Other major changes to the child support enforcement statutes as amended include a new provision under paternity establishment for child support purposes.\textsuperscript{69} Rescission of an acknowledgment of paternity is permitted within sixty days of the acknowledgment. Furthermore, the act instituted certain expedited procedures in special paternity cases.\textsuperscript{70} Finally, the act authorizes a lien on the real and personal property of any person delinquent in child support payments by three-months or $3000, whichever occurs first. That section provides the procedures by

\textsuperscript{64} § 120-216(1)(c).
\textsuperscript{65} § 120-217(1)(2).
\textsuperscript{68} § 110-129.2.
which the lien is established. 71 The act by its terms is to expire June 30, 1998. 72

Kelly Falls Miller

HEALTH LAW

A. Changes in Coverage for Reconstructive Breast Surgery Resulting from Mastectomy

The North Carolina Legislature recently amended laws regarding coverage for reconstructive surgery and adopted several new provisions. The amendments require health and accident insurance policies, hospitals or medical service plans, HMO plans, and the teachers' and state employees' comprehensive major medical plan to provide coverage for reconstructive breast surgery resulting from mastectomy.¹

The General Assembly now requires every accident and health insurance policy or contract, and every preferred provider contract, policy, or plan that provides coverage for mastectomies to provide coverage for reconstructive breast surgery resulting from mastectomy.² Another added provision includes identical provisions for every insurance certificate or subscriber contract under any hospital service plan or medical service plan, and every preferred provider contract, policy, or plan defined and regulated under § 58-50-50 and § 58-50-55.³ The third section added by the General Assembly includes identical provisions with regard to every health care plan written by a health maintenance organization.⁴ The amendments require that coverage be given for all stages of the reconstructive breast surgery.⁵ Coverage must also be provided without regard to the amount of time between the mastectomy and the reconstruction, and it must be provided regardless of whether cosmetic reasons are the basis for reconstructive surgery.⁶

². § 58-51-61.
⁶. § 58-67-79.
B. Long-Term Care Benefits

The North Carolina Legislature recently passed an act to provide long-term care benefits for qualified employees, retired employees, and their dependents under the teachers' and state employees' comprehensive major medical plan.

Programs of long-term care benefits are now part of Committee review. Additionally, the General Assembly included provisions to implement and administer a program of long-term benefits. Two funds were established, the Public Employee Long-Term Benefit Fund and the Health Benefit Reserve Fund, for the payment of hospital and medical benefits. The Executive Administrator and Board of Trustees must establish separate premium rates for the long-term care benefits as long as the benefits are administered on a self-insured basis.

More substantial revisions were made in Article 3 of Chapter 135 including a new provision concerning the undertaking of long-term care benefits. Under the new provision, an optional program of long-term care benefits is available by the State of North Carolina, and long-term care benefits are available through the Teachers' and State Employees' Comprehensive Major Medical Plan. The benefits under these plans are only available to qualified employees and retired employees and are subject to elimination periods. The long-term care benefits under the plans include nursing home benefits, custodial benefits, and any other benefits that are more cost-effective alternatives to the benefits already stated. The new provisions also authorize conversion rights upon cessation of group coverage.

C. Reporting and Disclosure

The North Carolina Legislature recently passed an act to require health benefit plans to provide certain information. The new provision, entitled “Managed Care Reporting and Disclosure Requirements,” requires all health benefit plans to file specific information with the Commissioner on March 1st of each year.16 This information includes the number of complaints received from plan participants, the reasons for complaints received from plan participants, the number of participants who terminated coverage, the number of provider contracts that were terminated, utilization data, and aggregate financial compensation data.17 The disclosure requirements include: evidence of coverage, subscriber contract, health insurance policy, or any other type of health benefit plan, explanation of utilization review criteria and treatment protocol, written reasons for the denial of a recommended treatment, the plan’s restrictive formularies or prior approval requirements regarding prescription drugs, and the plan’s criteria for determining whether a treatment is experimental.18

D. Confidentiality of Health Care Contracts

The North Carolina Legislature recently passed an act pertaining to confidentiality of health care contracts. As amended, the financial terms and other competitive health care information that are directly related to financial terms in a health services contract between a hospital or medical school and a payor is confidential.19 The amendment further states that even if the information is disclosed to a public body, the confidentiality of the information will not be affected.20

Angela Marie Easley

E. Physicians and Dentists

The General Assembly of North Carolina made several minor revisions in the health care field. First, physicians must complete 150 hours of continuing education during any three consecutive
calendar years.\textsuperscript{21} If the physician fails to meet this requirement, the board has the power to deny, annul, suspend, or revoke the physician's medical license.\textsuperscript{22} Another change centered on a hospital's ability to suspend a physician for failing to complete medical records in a timely manner. A hospital may suspend a physician only if the failure to complete medical records represents the third such occurrence within the calendar year.\textsuperscript{23}

In addition, a physician must register for his or her license within thirty days of his or her birthday on a yearly basis.\textsuperscript{24} If the physician is not currently engaged in the practice of medicine, he/she can request the medical board to classify the license as inactive.\textsuperscript{25} Inactive physicians are not required to pay the annual registration fee and cannot practice in North Carolina.\textsuperscript{26}

Last, the General Assembly authorized the existence of non-profit health care facilities to employ dentists, dental students, and interns.\textsuperscript{27} This provision will help better serve the dental needs of low-income members of the state.

F. Clinical Addiction Specialists, Clinical Supervisors, and Residential Facility Directors

Act 492 of the 1997 General Assembly covers requirements for certification of clinical addiction specialists, clinical supervisors, and residential facility directors by the North Carolina Substance Abuse Professional Certification Board.\textsuperscript{28} The Board has the authority to determine the qualifications by which organizations may attain deemed status.\textsuperscript{29} Such status is recognition by the Board that the credentials offered by a professional discipline

\textsuperscript{22} N.C. Gen. Stat § 90-14(a) (Supp. 1997).
\textsuperscript{26} § 90-15.1.
meet the requirements. As a result, once individuals are recognized as meeting the standards laid out by professional disciplines they may apply for certification by the Board. The Standards and Credentialing Committee of the Board shall review the standards of each professional discipline, every three years from when the discipline received deemed status, to ensure that the requirements under Act 492 are being fulfilled. Failure to fulfill the requirements under this act may result in revocation of deemed status for any professional discipline in violation. Revocation of deemed status for a professional discipline would make it more difficult for Clinical Addictions Specialists, Clinical Supervisors, and Residential Facility Directors who are members of a particular discipline to become board certified.

G. Southern Dairy Compact

Chapter 106 of the North Carolina General Statutes was amended by Act 494 in order to establish the Southern Dairy Compact. The Act focuses on the viability of dairy farming in North Carolina and other southern states. The Southern Dairy Compact’s purpose is to “recognize the interstate character of the southern dairy industry and prerogative of the states under the United States Constitution to form an interstate commission in the southern region.” The compact helps ensure that consumers in their region have a plentiful supply of affordable milk.

H. Public Health Authorities Act

The General Assembly amended Chapter 130A to authorize the establishment of the Public Health Authorities Act. The North Carolina Public Health Commission recommended the Act to create alternatives for public health services provided to counties in North Carolina. The Act details the creation of a public health authority, the requirements for the membership of the pub-

lic health authority board, and dissolution of a public health authority. The appointment, powers, and duties of the public health director are also outlined. A Medical Review Committee was created to conduct necessary proceedings, including disciplinary proceedings. Confidentiality guidelines were established and attach to specific information of patients, personnel, competition concerning health care activities, and credentialing/peer review.

I. Licensing

1. Physician Assistants

The General Assembly authorized the North Carolina Medical Board to license physician assistants to perform medical acts, tasks, and functions in the state. The Board must issue a limited volunteer’s license if a physician assistant meets specified criteria. Along with physicians delegating medical tasks to qualified physician assistants, the Board shall authorize licensed physician assistants to perform specific tasks during disasters. Furthermore, physician assistants can only dispense drugs if licensed by the Board.

2. Non-Resident Physicians

Non-resident physicians who treat patients in North Carolina through electronic or other mediums must be treated as if they practice medicine in the state. As a result the non-resident physicians are subject to regulation by the North Carolina Medical Board.

Board, which includes the requirement to be licensed in North Carolina.\textsuperscript{45} Any patient being treated by a non-resident physician in such a manner may bring malpractice claims against the physician in the courts of North Carolina.\textsuperscript{46} This Act helps protect North Carolina residents from improper medical care by non-resident physicians.

\section*{J. Health Maintenance Organizations}

\subsection*{1. Health Plan Reporting and Disclosure}

The requirements for health plan reporting and disclosure have been amended.\textsuperscript{47} Likewise, additional information is required in the health maintenance organization (HMO) application process.\textsuperscript{48} These procedures help assure a preferred level of quality health care.

\subsection*{2. Provider Networks and Coverage Standards}

The General Assembly enacted legislation dealing with "miscellaneous insurance and managed care coverage and network provisions."\textsuperscript{49} The Act articulates the standards by which insurers can limit plan coverage to "medically necessary services and supplies."\textsuperscript{50} The Act also addresses coverage determinations by insurers and the necessity not to penalize an insured for services acquired by outside provider networks, unless such services were available through the contracting health care provider without unreasonable delay.\textsuperscript{51} Furthermore, insurers are forbidden to make discriminatory procedural decisions based on geographic location, which would have the effect of excluding certain providers located in highly populated areas just because such areas have more incidents of health concern.\textsuperscript{52}

\textsuperscript{45} N.C. GEN. STAT. § 90-18(b) (Supp. 1997).
\textsuperscript{50} N.C. GEN. STAT. § 58-3-200(b) (Supp. 1997).
\textsuperscript{51} § 58-3-200(c)-(d).
\textsuperscript{52} § 58-3-200(e).
3. Preferred Provider Amendments

Contract provisions between an insurer offering a preferred provider plan and health care providers that restrict the health care provider from entering into preferred contracts with other insurers are now prohibited. This increases an insured's opportunity to receive quality health care with providers of their choice. The Act prohibits intentional misrepresentation by insurers to health care providers concerning discounted services and classifies such misrepresentations as unfair trade practice.

4. Utilization Review and Grievances

All insurers are required to prepare and maintain a utilization review program. The section defines utilization review as "a set of formal techniques designed to monitor the use of or evaluate the clinical necessity, appropriateness, efficacy, or efficiency of health care services, procedures, providers, or facilities." The Act also requires certain procedures to be followed by insurers in order to resolve any grievances of those covered under a health care plan. Last, the Act defines the purpose of medical review committees in an attempt to further assure quality health care.

Daniel Michael Gaylord

INSURANCE LAW

Fire Insurance for Religious Organizations

The Legislature passed an act which prohibits cancellation of some fire insurance policies held by religious organizations.¹ Religious organizations are defined as "any church, ecclesiastical, or denominational organization," or an organization which has an established physical place of worship in North Carolina and regularly meets at that place for worship services.²

Coverage cannot be denied a religious organization under several circumstances.³ An insurer may not cancel or decline to renew a policy solely due to a previous act of arson against the religious organization, unless a member of the organization was responsible for the fire,⁴ or the organization had received a threat of arson prior to the actual act.⁵ In order for this provision to apply, the religious organization must fully cooperate with both the insurer and law enforcement officials in arson investigations.⁶ Further, the organization must report all threats, attempts or acts of arson to the appropriate law enforcement agencies within forty-eight hours, and to their insurer within two business days.⁷

As a further requirement, an insurer may condition renewal upon the religious organization taking steps to ensure reasonable fire safety, mitigate loss, or institute loss control measures.⁸ Fire safety standards may be those of a local fire department or an insurer's own set of requirements.⁹ Failure to comply with the statute may result in the suspension or revocation of the insurer's license by the Insurance Commissioner, or the Commissioner may refuse to renew the license of the offending insurer.¹⁰

F. Marshall Wall

³. § 58-43-40.
⁴. § 58-43-40(a)(1).
⁵. § 58-43-40(a)(2).
⁶. § 58-43-40(a).
⁷. § 58-43-40(a).
⁸. § 58-43-40(b).
⁹. § 58-43-40(b).
¹⁰. § 58-43-40(d).
REAL PROPERTY

Residential Real Property Disclosure Act

The General Assembly of North Carolina amended the Residential Property Disclosure Act. The statute requires a seller of residential property to present a disclosure form to a purchaser of residential property except in certain situations.

Prior to this amendment the form of the residential disclosure statement was set forth in the statute. However, the amendment removed the required form of the disclosure statement from the statute. The amendment requires the North Carolina Real Estate Commission to develop a standard disclosure form which conforms to the requirements of section (b) of the statute. Six categories which must be included in the new form are listed in the statute. These categories closely follow the categories that were set forth in the previous statute.

The amendment also changed what should be disclosed with respect to the categories listed in the statute. Previously, a seller was only required to disclose items “relative to the condition of the property.” The session law changed this language to require a seller to disclose items “relative to the characteristics and conditions of the property.”

John Calvin Chandler

3. § 47E-4(b).
6. § 47E-4(b).
TAXATION LAW

A. Technical and Conforming Changes to the Revenue Laws.

The General Assembly repealed N.C. GEN. STAT. § 14-407.1 The gross value for an estate at which an inheritance tax return would be required was raised from $450,000 to $600,000.2 The General Assembly also repealed N.C. GEN. STAT. § 105-163.1(8).3 Section 8 simply served to clarify the issue of a double penalty by stating that if a penalty was assessed under N.C. GEN. STAT. § 105-236, no additional penalty would be assessed.4 Other sections serve to clarify points concerning the refund that certain individuals and businesses who use motor fuel in particular ways will receive. The refund will be proportionate to the amount of excise tax paid.5 N.C. GEN. STAT. § 117-19(c),(d),and (e) were repealed in section 16.6 Finally, section 17 adds an alternative definition of a kerosene supplier as “a person who supplies both kerosene and motor fuel, and consequently, is required to be licensed under Part 2 of Article 36C of Chapter 105 of the General Statutes.”7

B. Intangible Property Exempt from Property Tax

The General Assembly deleted from the list of property excluded from property taxation an item referring to money in different savings and investing institutions and added to the list “intangible personal property other than leasehold interests in exempted real property.”8 Also section 2 amended N.C. GEN.

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to the extent that the exclusion of intangible personal property would not effect the appraisal of real property and tangible personal property.\(^9\) Items (31a)-(31d) of N.C. GEN. STAT. § 105-275 were all repealed in section 3.\(^{10}\)

In an apparent effort to compile information concerning how much tax had been collected for intangible personal property over the past few years, the General Assembly required each county and municipality to submit to the Secretary of Revenue the amount it collected from such taxation for any year beginning July 1, 1991.\(^{11}\) The Secretary will then reduce the amount allocated to each county or municipality by the amount reported, and if any county or municipality reports none, then their next distribution will be reduced by ten percent.\(^{12}\) Finally, in section 10, a provision was added stating that the provisions of this Act are not severable and that if any provision is found invalid then the whole Act must fail.\(^{13}\)

C. Interest on Overpayment of Property Tax

This Act gives a taxpayer the right to receive interest on any overpayment of tax when, on appeal, it is held by the Property Tax Commission that the valuation of the property should be reduced or the property should be removed from the tax lists.\(^{14}\) The interest rate applicable, N.C. GEN. STAT. § 105-241.1(i), begins to accrue from the latter of the two dates: (1) the date the tax was paid; or (2) the date the tax would have been considered delinquent; and will continue until the refund is paid in full.\(^{15}\) In section 2 the legislature further gives the Legislative Research Commission the right to review the counties' valuation methods for whether they produced unrealistic values on nonresidential real property, "whether the representatives of the Department of Revenue should be given more authority in resolving taxpayer

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appeals and whether the Property Tax Commission should be replaced with a State Tax Court.\textsuperscript{16} An interim report is due in the 1998 Regular Session of the General Assembly and the final report is to be given to the 1999 Session.\textsuperscript{17}

D. Intangible Tax Refunds

This Act is brought about due to the United States Supreme Court's holding as unconstitutional N.C. GEN. STAT. § 105-203 which allowed the Secretary of Revenue to collect tax on intangible personal property.\textsuperscript{18} Pursuant to that holding, this act directs the Secretary of Revenue to pay refunds of intangibles tax to taxpayers who preserved their right to a refund by protesting the payment within the time limits set by N.C. GEN. STAT. § 105-267.\textsuperscript{19} The Secretary of Revenue is also to mail a copy of the notice promulgated in the class action suit \textit{Smith v. State} to all intangible taxpayers that are affected.\textsuperscript{20}

E. Sales Tax Definition of Custom Computer Software.

In redefining the term "tangible personal property" as pertaining to custom computer software, the General Assembly has eliminated: (1) the complex definition that discussed specifically what property pertaining to computer software was tangible personal property; (2) the provisions that defined the terms "basic operational program," "control program," "computer program," "custom computer program," and "storage media."\textsuperscript{21} Apparently in attempt to keep up with the public's increasing technological vocabulary, the General Assembly substituted for all of the above deleted portions simply the definition "computer software delivered on a storage medium, such as a CD rom, a disk, or a tape."\textsuperscript{22} Also a new subdivision was added defining "custom computer software" as software written for a specific customer according to their specifications, including user manuals, but not including

\textsuperscript{16} Act of June 19, 1997, § 2, 1997 N.C. SESS. LAWS 205 (codified as amended at N.C. GEN. STAT. § 105-290(b) (Supp. 1997)).
\textsuperscript{17} N.C. GEN. STAT. § 105-290(b) (Supp. 1997).
\textsuperscript{18} Act of July 22, 1997, § 1, 1997 N.C. SESS. LAWS 318 (not yet codified).
\textsuperscript{20} § 3, 1997 N.C. SESS. LAWS 318.
\textsuperscript{21} Act of August 6, 1997, § 1, 1997 N.C. SESS. LAWS 370 (codified as amended at N.C. GEN. STAT. § 105-164.3(20) (Supp. 1997)). Note: The above deletions that were denoted in the Session Laws were not incorporated into the actual new form of § 105-164.3(20) in 1997. This is probably just an administrative oversight.
\textsuperscript{22} N.C. GEN. STAT. § 105-164.3(20) (Supp. 1997).
prewritten software that can be installed and executed with only changes to the configuration of the software necessary.\textsuperscript{23}

\textbf{F. Corporate Income Tax Clarifications}

A new subsection was added which includes permissible deductions from the federal taxable income when computing State net income: (1) interest on any obligation of the State, its commissions, authorities or agencies; and (2) interest on any obligation of a nonprofit educational institution chartered or organized under the laws of North Carolina.\textsuperscript{24} Regarding the deductible portion of dividends, the General Assembly clarified the definitions of a regulated investment company and subsidiary dividends by separating them and putting them under their own headings.\textsuperscript{25} Additionally, the $15,000 cap on the amount a corporation may deduct in a taxable year from dividends received from a regulated investment company or real estate investment trust was removed.\textsuperscript{26} In section 3, regarding the distribution share cities get back from the Secretary of Revenue from the taxes collected from the power, gas, and telephone companies, a provision was added deducting from each city's share, twenty five percent of the city's proportional share of the annual cost of administering the distribution.\textsuperscript{27}

\textbf{G. Miscellaneous Tax and Fee Revisions}

The first change made in session law 475 was to reduce the food tax from three percent to two percent,\textsuperscript{28} effective as to all sales made on or after July 1, 1998.\textsuperscript{29} The General Assembly set the percentage rate for calculating the insurance regulatory charge under N.C. \textsc{Gen. Stat.} \textsection 58-6-25

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\textsuperscript{24} Act of August 28, 1997, \textsection 1, 1997 N.C. Sess. Laws 439 (codified as amended at N.C. \textsc{Gen. Stat.} \textsection 105-130.5(b) (Supp. 1997)).

\textsuperscript{25} Act of August 28, 1997, \textsection 2, 1997 N.C. Sess. Laws 439 (codified as amended at N.C. \textsc{Gen. Stat.} \textsection 105-130.7 (Supp. 1997)).

\textsuperscript{26} N.C. \textsc{Gen. Stat.} \textsection 105-130.7 (Supp. 1997)


TAXATION LAW

at 8.75% for the 1997 calendar year.\textsuperscript{30} Also, the term "insurance company" was redefined as "a service corporation subject to Article 65 of this Chapter".\textsuperscript{31} The General Assembly exempted HMO's from the regulatory charge.\textsuperscript{32} The General Assembly deleted the clause which previously allowed assessments to "be credited towards the tax paid by the self insurers."\textsuperscript{33}

The percentage rate used to calculate the Public Utility Fee under N.C. GEN. STAT. § 62-302(b)(2) was set at 0.09% of each utility's N.C. jurisdictional revenues that are earned during each quarter beginning on or after July 1, 1997.\textsuperscript{34}

In section 4.1, the fees that a convicted defendant must pay were raised to $61.00 if convicted in District Court, and $68.00 if convicted in Superior Court.\textsuperscript{35} Deleted was the provision that allowed the clerk to accept from defendants, costs to satisfy N.C. GEN. STAT. § 20-7.2 and thus avoid the requirement to pay the costs if found guilty.\textsuperscript{36}

The filing fee for original financing statements or continuation statements was raised from $8.00 to $15.00,\textsuperscript{37} as was the filing fee for financing statements indicating assignments of security interests,\textsuperscript{38} and those showing release of collateral.\textsuperscript{39} The filing fee was likewise raised for obtaining, from a filing officer, a certificate or computer printout showing "any presently effective financing statement naming a particular debtor and any statement of assignment thereof" and giving the date and hour of the filing of


\textsuperscript{31} Act of September 4, 1997, § 2.2, 1997 N.C. SESS. LAWS 475 (codified as amended at N.C. GEN. STAT. § 58-6-25(a) (Supp. 1997)).

\textsuperscript{32} Act of September 4, 1997, § 2.2, 1997 N.C. SESS. LAWS 475 (codified as amended at N.C. GEN. STAT. § 58-6-25(a) (Supp. 1997)).


\textsuperscript{34} Act of September 4, 1997, § 3.1, 1997 N.C. SESS. LAWS 475 (codified as amended at N.C. GEN. STAT. § 62-302 (Supp. 1997)).


\textsuperscript{36} N.C. GEN. STAT. § 7A-304 (Supp. 1997).


such statement and the names and addresses of each secured party.\textsuperscript{40}

Section 6.11 of the Act makes changes regarding state employee's access to tax information.\textsuperscript{41} In addition to previous permitted disclosures,\textsuperscript{42} the amendments now allow an employee to disclose tax information to the Secretary of State concerning a limited liability company liable for a corporate or partnership tax return, its account and identification numbers, and the tax year end.\textsuperscript{43} Regarding the definition of "tax information," the General Assembly has specifically excluded annual reports filed under N.C. GEN. STAT. § 55-16-22.\textsuperscript{44}

\textit{Walter W. Robinson III}
WORKERS’ COMPENSATION

A. Providing Employer Access to Employee’s Medical Information

In 1997, the General Assembly recognized the difficulties employers paying medical compensation have faced in obtaining information concerning compensated employees’ medical treatments. Act 308 amends the Workers’ Compensation Act and allows employers paying medical compensation under the Workers’ Compensation Act greater access to employees’ medical records.1 As amended, this statute permits employers, paying medical compensation to a medical care provider on behalf of an employee, access to records pertaining to the employee’s treatment without the employee’s authorization.2 The revised statute also directs the Industrial Commission to adopt rules to govern communications between employers and the employee’s medical care provider.3 These rules are to facilitate the flow of information, while still protecting the employee’s confidential physician-patient relationship.4

B. Increased Penalties for Misrepresentation and Failure to Secure Compensation

Act 353 increases the criminal penalties for misrepresentation and for failure to secure compensation under the Workers’ Compensation Act.5 The Act replaces the term misrepresentation with the term fraud.6 Now, the penalty for making such false statements or representations of material fact to obtain or deny benefits under the Workers’ Compensation Act in an amount of

3. § 97-25.
4. § 97-25.
less than $1000 is a Class 1 misdemeanor. If the amount at issue is more than or equal to $1000, it is a Class H felony.

The Act also differentiates between an employer's willful failure to secure payment of compensation under the Workers' Compensation Act and an employer's negligent failure to do so. Prior to the amendment an employers' failure to secure payment of compensation, whether willful or through neglect was a Class 1 misdemeanor. Such willful conduct is now a Class H felony, whereas such negligence is a Class 1 misdemeanor.

C. Administrative Rules for Workers' Compensation Self-Insurance

The General Assembly renamed Article 47 of Chapter 58, formerly North Carolina Health Care Excess Liability Fund, to Workers' Compensation Self Insurance. Act 362 repeals N.C. GEN. STAT. § 58-47-1 through § 58-47-50 and adds § 58-47-60 through § 58-47-205. The Act allows two or more employers, who are incorporated in North Carolina and in the same trade or profession, to apply to the Industrial Commission to pool their workers' compensation liabilities. The Commissioner will consider the applicant group's financial strength and liquidity, along with the reliability of that information and the procedures used to review members financial strength. The Commissioner will also consider the members' workers' compensation loss history, underwriting guidelines, claims administration, excess insurance or reinsurance, and access to excess insurance or reinsurance.

15. § 58-47-65(d).
The Act requires groups to maintain minimum surplus available for employee compensation. Groups are given three options. First, if the group was organized and authorized at the time Act 362 went into effect, it must have a minimum surplus percentage as laid out in the statute. Second, a group may meet this requirement by maintaining a minimum surplus equal to ten percent of the group’s total undiscounted outstanding claim liability, along with over $2,000,000 in aggregate excess insurance or reinsurance or twenty percent of the group’s annual earned premium. The final means of maintaining a minimum surplus is to have a surplus of $300,000, along with $2,000,000 in aggregate excess insurance or reinsurance or twenty percent of the group’s annual earned premium.

The groups must also deposit ten percent of the group’s total annual earned premium, but not less than $600,000. Groups already organized and authorized have until January 1, 2001 to comply with the deposit requirement.

Every group must be governed by a board of three or more people elected to office and subject to the Commissioner’s approval. At least two-thirds of the board is to be made up of employees, officers, or directors of the group members. The Board is to ensure all claims are paid promptly and “take all necessary precautions to safeguard the assets of the group.” The Board is directed to maintain minutes of its meetings and make them available to the Commissioner. It should also adopt bylaws to govern the operation of the group and file these with the Commissioner.

The revisions to Article 47 of Chapter 58 allow a self-insurer to contract with a Third-Party Administrator to execute the policies established by the self-insurer and provide day-to-day man-

17. § 58-47-85.
18. § 58-47-85(1).
20. § 58-47-85.
22. § 58-47-90.
23. § 58-47-120.
24. § 58-47-120(a).
25. § 58-47-120(a).
27. § 58-47-120(d).
agement of the self-insurer.28 The agreement between the group or a single employer and the Third-Party Administrator is to be filed with the Commissioner.29 Compensation for the Third-Party Administrator can not be based upon savings affected in the adjustment, settlement, and payment of losses covered by the self-insurer’s obligations.30

Act 362 also adds a new article to Chapter 97 of the General Statutes.31 The new article, Article 5, governs the licensing of an individual employer as a self-insurer.32 An individual employer who wishes to be a self-insurer must have an employee base that is actuarially sufficient in numbers and provides an actuarially appropriate spreading of risk and whose total fixed assets amount to $500,000 or more may apply for a license.33 The Commissioner will also consider the employer’s organizational structure and management, financial strength, workers’ compensation loss history, number of employees, claims administration, excess insurance and access to excess insurance or reinsurance.34 Once licensed, an individual employer self-insurer must submit a certified audited GAAP financial statement for each fiscal year and records pertaining to workers’ compensation liabilities and benefits paid out during the past fiscal year.35

A self-insurer must deposit twenty-five percent of its total undiscounted outstanding claim liability but not less than $500,000, or such other amount as proscribed by the Commissioner.36 It must also maintain specific and aggregate excess loss coverage through an insurance policy.37

Christopher J. Derrenbacher

28. § 58-47-150.
29. § 58-47-150.
30. § 58-47-190.
33. § 97-170(c).
34. § 97-170(c).
35. § 97-180.
36. § 97-185.
37. § 97-190.
MISCELLANEOUS

A. Oath of Office for Entry-Takers

In accordance with the recommendation of the General Statutes Commission, the General Assembly has deleted the oath for Entry-Takers as an antiquated law.¹

B. Graduated Driver's Licenses

To ensure that a person who is less than eighteen years old has both instruction and experience before obtaining a drivers license, driving privileges are now granted first on a limited basis and are then expanded according to a three level process.²

Level 1 - A person who is at least fifteen years old and less than eighteen years old may obtain a limited learner's permit if he passes a course of driver's education and a written test administered by the Division.³ The restrictions on such a permit now limit the permit holder to driving between the hours of 5:00 a.m. to 9:00 p.m. for the first six months after issuance.⁴ A permit holder may only drive when a supervising driver is seated beside the permit holder and no other person can be in the front seat.⁵ After the first six months, the permit holder may drive with supervision at any time. In addition, all passengers must have seatbelts fastened.⁶

Level 2 - A person who is at least sixteen years old may obtain a newly created limited provisional license once he has held a learner's permit for twelve months without having been convicted of a moving violation or seat belt infraction and passes a road test.⁷ However, in the most significant change in the rewritten law, for six months the provisional license holder may only drive without supervision between 5:00 a.m. to 9:00 p.m. unless driving to or from work or a volunteer emergency service.⁸ The

⁴. § 20-11.
⁵. § 20-11.
⁶. § 20-11.
⁷. § 20-11.
⁸. § 20-11.
Level 2 driver may drive with supervision at any time and the supervising driver need not be the only other passenger in the front seat. Any failure to comply with a restriction concerning time of driving or presence of a supervising driver constitutes operating a motor vehicle without a license. Failure to comply with any other restriction is an infraction punishable by monetary penalty.

Level 3 - After having held a limited provisional license for six months without a conviction for a moving violation the limited provisional license holder may obtain a full provisional license. A full provisional license holder is not subject to the driving, supervision or passenger limitations.

C. Motorcycle Licenses

The new law regarding motorcycle licenses and learners permits is substantially similar. A person sixteen to eighteen years old may only obtain a motorcycle learner's permit if he has first obtained a limited or full provisional license. The holder of a limited provisional license may only operate a motorcycle only at the time when the license holder could drive a motor vehicle without supervision.

D. Agriculture.

In 1997, the General Assembly repealed several obsolete statutes concerning North Carolina agriculture. The repealed statutes governed administrative practices, food inspection and the marketing of cotton and other agricultural commodities.

The Board of Agriculture shall no longer elect an executive and finance committee or be required to submit an annual report to the Governor. Moreover, the Act repeals the Commissioner of Agriculture’s duty to appoint a secretary and other officials and to

9. § 20-11.
10. § 20-11.
11. § 20-11.
12. § 20-11.
13. § 20-11.
14. § 20-11.
investigate purchases, sources and manufacture of fertilizer.\textsuperscript{18} Also repealed by the Act is the Department of Agriculture’s authority to purchase or sell land for research as well as the authority to conduct certain specific farm research projects.\textsuperscript{19} In addition, the Act repeals the Department’s duty to employ a State Chemist to analyze fertilizer, ores, minerals, soils and water.\textsuperscript{20}

Article 15 of Chapter 106, which concerned food inspection and shipping, is repealed in its entirety.\textsuperscript{21} This Article governed the inspection of meat and meat products by counties and cities.\textsuperscript{22} In addition, the Act repeals a requirement that a grower’s or shipper’s name be stamped on a shipping receptacle.\textsuperscript{23}

The final repeals delete certain provisions governing the cotton and agriculture commodities industry known as the North Carolina Agriculture Warehouse Act.\textsuperscript{24}

\section*{E. Payment and Security for Special Obligation Bonds.}

The General Assembly clarified what funds may be used to repay special obligation bonds and to make other changes in the laws concerning these bonds. In accordance with prior existing law, local government units have authority to issue special obligation bonds and notes.\textsuperscript{25} However, the Act expressly limits the sources local government may pledge to repay the bonds or notes. After issuance of special obligation bonds or notes, the governing body may identify additional sources of payment for the bonds as long as the pledge of sources does not constitute a pledge of the taxing power of the unit.\textsuperscript{26}

\begin{enumerate}
\item Act of May 22, 1997, §§ 2-3, 1997 N.C. SESS. LAWS 74 (codified as repealed at N.C. GEN. STAT. §§ 106-9, -12 (Supp. 1997)).
\item Act of May 22, 1997, § 6, 1997 N.C. SESS. LAWS 74 (codified as repealed at N.C. GEN. STAT. § 106-19 (Supp. 1997)).
\item Act of May 22, 1997, § 8, 1997 N.C. SESS. LAWS 74 (codified as repealed at N.C. GEN. STAT. § 106 (Supp. 1997)).
\item N.C. GEN. STAT. § 106 to -173 (Supp. 1997).
\item Act of May 22, 1997, § 9, 1997 N.C. SESS. LAWS 74 (codified as repealed at N.C. GEN. STAT. § 106-197 (Supp. 1997)).
\item N.C. GEN. STAT. § 1591-30 (Supp. 1997).
\end{enumerate}
In addition, the Act rewrites the law as it concerns the granting of security interests in the project financed or the property on which the project is located. When such security interests are granted, they are subject to certain statutory conditions. These bond orders may not contain a clause that restricts the local government's right to provide a service or activity. They may require additional approval by the Commission, and before granting a security interest, a unit of local government shall give notice of and hold a public hearing on the proposed security interest. Moreover, the taxing power of local government may not be offered as security. A unit of local government may, in its sole discretion, use tax proceeds to repay the bonds, but may not pledge or agree to do so.

F. Athletic Trainers Licensing Act.

Citing the need to provide the public with safe athletic trainer services and ensure minimum standards of competency the General Assembly has approved an Act to license athletic trainers. The Act is comprehensive and provides for a Board of Athletic Trainer Examiners to oversee the licensure process, the qualifications for certification, certain exemptions from licensure and the penalties for practicing without a license.

The Act requires that no person shall practice as an athletic trainer unless that person is currently licensed under the Act. However, exempt from the license requirement are physicians, those who serve under a licensed trainer, and those employed by out of state organizations participating in an event held in North Carolina.

To obtain a license, a trainer must apply to the Board and submit to the Board evidence that demonstrates good moral character, graduation from a four-year college or university in a course of study approved by the board, and the applicant must pass the examination administered by the National Athletic Trainers'
Association Board of Certification. Trainers who have been actively engaged as athletic trainers since August 1, 1994 are eligible for licenses without examination. Applications are due August 1, 1998 and are valid for one year.

The Act establishes the grounds for disciplinary action against a licensee and the nature of the disciplinary actions that the Board may take. In addition, the Act specifies that persons who engage in the practice of an athletic trainer in violation of the Act are guilty of a Class 1 misdemeanor.

Nathan J. Taylor

34. § 90-528.
35. § 90-530.
36. § 90-528.
37. § 90-536.
38. § 90-538.