The Litigator

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The Chair's Comments

L. Cooper Harrell

My first edition of The Chair's Comments included a call to membership, encouraging all Litigation Section members to help recruit new folks to join our group. My second edition was a call to action of sorts, highlighting many exciting opportunities to get involved in Litigation Section events. With these comments, as my term as Section Chair draws to a close, a call of gratitude is in order. Instead of calling others to action, though, I want to take a moment to thank the mentors I've had over the years who encouraged my involvement with the N.C. Bar Association, as well as the council members and committee leaders who have worked so hard to make the Litigation Section great.

I first became involved with the Litigation Section many years ago, as vice-chair of the CLE committee. I was urged to accept the position by my friend and law partner, Allison Mullins. Allison already was involved in the Section's leadership at that time and, thankfully, saw an opportunity to help a young lawyer connect with others through service to the Bar Association. I had been practicing only a few years then, and knew little about how to plan a CLE. Nonetheless, the Section welcomed me with open arms, providing all the guidance, tools, and assistance I needed to plan a successful and well-attended CLE program. I am so grateful that Allison asked me to join the Section's CLE committee, as it opened many other doors to exciting Litigation Section opportunities. Thank you, Allison, for encouraging my involvement as a young lawyer.

I also have been blessed to work with and learn from another friend and law partner, Alan Duncan. Alan has devoted much time, care, and attention to teaching me and many others how to practice law with respect and the highest level of professionalism. At the same time, he has served as an example of tireless Bar Association involvement and leadership. Most of you know that Alan recently completed a term as NCBA President; but

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Winning Quickly: Defeating Contract Claims With a Motion to Dismiss (Part II of II)

By Scott A. Miskimon and Lauren H. Bradley

Part I of this article (published in the February 2016 edition of *The Litigator*) demonstrated that, compared to the last 30 years of the 20th century, in the last 15 years there has been a dramatic increase in the number of appellate decisions affirming Rule 12(b)(6) dismissals of contract claims. Such dismissals have become so routine that they are now being affirmed in unpublished opinions. The increased judicial scrutiny of pleading defects in contract claims—and the courts' receptiveness to motions to dismiss—should encourage defense counsel to consider filing a motion to dismiss if warranted, and should prompt plaintiff's counsel to engage in careful analysis and drafting of complaints.

Rules of the Road: Other Fatal Defects in Contract Claims

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

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The Chair's Comments, *continued from the front page*

you may not know that, earlier in his career, he served as chair of the Litigation Section. Alan truly leads a life of service, and has been a model of how volunteer work with the N.C. Bar Association can be fulfilling and beneficial, both personally and professionally. Thank you, Alan, for providing such a great example of service leadership to me and many other lawyers.

Finally, I want to extend a word of thanks to the many lawyers across North Carolina who have served the Litigation Section during my term as chair. The group is too large to list individual names, but these lawyer-leaders have served as council members, committee chairs and vice-chairs, liaisons to others NCBA divisions, and in a variety of other important roles. They have done many great things for the NCBA and the Litigation Section specifically, and are the reason the Section continues to thrive. Every time our group has been asked to tackle a new project, or provide analysis of some proposed legislation, Litigation Section leaders have stepped up to the plate and done an exemplary job representing our Section and the NC Bar Association. The Litigation Section is blessed to have such a remarkable collection of lawyers, and I am forever grateful that our members are so willing to give of their time and talents. Thank you, Litigation Section leaders, for your dedication and great work.

My experience working with the Litigation Section has been rewarding and fun. I have learned a lot, and have both met and befriended countless terrific lawyers and NCBA leaders who I may not have encountered otherwise. I am truly grateful for the relationships and the opportunities that Bar service has provided. Without the leadership and encouragement of Allison, Alan, and many other mentors, I am sure my path would have been different. So, when you see an opportunity to mentor another lawyer or encourage NCBA service, please do not hesitate. The continued success of our organization is dependent, in large measure, on making sure others are given opportunities for involvement and leadership.

L. Cooper Harrell is a partner with the Turning Point Litigation firm in Greensboro.

Litigation Section Vice-Chair Karen Rabenau presents Chair Cooper Harrell with a plaque in appreciation of his service.

Advocate's Award Honors William F. Womble Jr.

The Litigation Section congratulates the 2016 winner of the Advocate's Award, William ("Bill") F. Womble Jr. The Advocate's Award was established to recognize litigators who have shown great skill as a lawyer, while maintaining the highest ethical standards, demonstrating a true commitment of service to clients, and serving as an example of how to effectively balance outstanding professional performance with life's many other important endeavors. Winners of the Award must be held in the highest regard by both bench and bar, demonstrate a respect for and love of the law, and be dedicated to their communities with a track record of pro bono or volunteer service. The Litigation Section could not be more pleased to confer the Advocate's Award on Bill Womble Jr. He sets a wonderful example to all lawyers, young and not-so-young, of how to represent clients with excellence, while also tirelessly serving the communities in which he lives and works.

Pictured: Bill Womble, Jr. accepts the 2016 Advocate's Award from NCBA Litigation Section Chair Cooper Harrell.

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No Breach

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

Statute of Limitations and Statute of Repose

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

In addition to the numerous dismissals based on the statute of limitations since 2010, many other cases were similarly dismissed in prior decades. **Mills v. Wachovia Bank, N.A.**, 2008 N.C. App. LEXIS 1331, at *10-11, 191 N.C. App. 399, 663 S.E.2d 14 (July 15, 2008) (unpublished), *disc. rev dismissed as moot*, 363 N.C. 129, 675 S.E.2d 657 (2009) (affirming dismissal of time-barred claim); **Harrold v. Dowd**, 149 N.C. App. 777, 781-82, 561 S.E.2d 914, 917-18 (2002); **Liptrap v. City of High Point**, 128 N.C. App. 353, 356, 496 S.E.2d 817, 819, *disc. rev. denied*, 348 N.C. 73, 505 S.E.2d 873 (1998) (affirming dismissal of employment contract lawsuit that current and retired city employees filed after the two-year limitations period applicable to claims against municipalities); **American Multimedia, Inc. v. Freedom Distributing, Inc.**, 95 N.C. App. 750, 752-53, 384 S.E.2d 32, 33-34 (1989), *disc. rev. denied*, 326 N.C. 46, 389 S.E.2d 84 (1990) (affirming dismissal where suit was filed brought more than three years after alleged breach occurred).

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

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

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

Similarly, if the contract claims are barred by the statute of repose, a Rule 12(b)(6) dismissal will be warranted. *See* **Forsyth Mem. Hosp., Inc. v. Armstrong World Indus., Inc.**, 336 N.C. 438, 445, 444 S.E.2d 423, 427 (1994) (affirming dismissal of warranty claims under the improvements to real property statute of repose); **Wood v. BD & A Constr., LLC**, 166 N.C. App. 216, 218-19, 601 S.E.2d 311, 313-14 (2004) (holding that the statute of repose "clearly appl[ied]" and that the complaint failed to allege willful or wanton conduct to bar its application); **Monson v. Paramount Homes, Inc.**, 133 N.C. App. 235, 242, 515 S.E.2d 445, 450 (1999) (affirming dismissal of the breach of contract and claims asserted against third-party defendant).

Statute of Frauds

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

Lack of Standing

Counsel for all parties should be mindful of whether the plaintiff has standing to sue for breach of contract. Where there is no privity of contract, a lack of standing may provide a basis for a Rule 12(b)(6) motion. **Energy Investors Fund, L.P. v. Metric Constructors, Inc.**, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000), *aff'g* 133 N.C. App. 522, 516 S.E.2d 399 (1999) (affirming dismissal of plaintiff's complaint seeking damages for breach of implied warranty; plaintiff was a limited partner in a general partnership, was not in privity of contract with the defendant, and did not have standing to assert a claim); **Coderre**, 224 N.C. App. at 456-57, 736 S.E.2d at 787 (affirming dismissal of claim brought by an individual shareholder who sued to enforce a land purchase contract entered into by his corporation, which had filed for bankruptcy; because plaintiff lacked standing there was no valid complaint and the purported amendment to

add the corporation as a plaintiff could therefore not relate back so as to avoid the statute of limitations); **Woods**, 2008 N.C. App. LEXIS 1773, at *16-17 (affirming dismissal of breach of contract claim where plaintiffs were not in privity of contract with defendant insurance company because plaintiffs failed to prove that defendant's insured was liable to plaintiffs); **Mills**, 2008 N.C. App. LEXIS 1331, at *5-7 (affirming dismissal for lack of standing where the suit on behalf of estate was brought by only one of four executors, and a majority of the executors was required to sue).

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

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

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

Third-Party Beneficiaries

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

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

Failure to Exhaust Administrative Remedies

Related to the concept of standing, counsel should be mindful of whether exhaustion of administrative remedies is required before seeking redress from the courts, particularly in cases involving state agencies or other political subdivisions. A contract claim is most frequently dismissed for failure to exhaust all administrative remedies under Rule 12(b)(1) for lack of subject matter jurisdiction; however, such a claim can also be dismissed under Rule 12(b)(6), as was the case in **Kane v. N.C. Teachers' & State Employees' Comprehensive Major Medical Plan**, 229 N.C. App. 386, 747 S.E.2d 420 (2013).

If administrative remedies exist, the plaintiff must either exhaust those remedies or allege that the remedies are inadequate or futile to survive a Rule 12(b)(6) motion. *Id.* at 390-91, 747 S.E.2d at 423-24. Although the plaintiff "advanced eloquent and compelling arguments that exhaustion would have been futile," she had not exhausted her administrative remedies or alleged that those remedies

were inadequate or futile; thus, the Court of Appeals affirmed the dismissal of her complaint. *Id.* at 392, 747 S.E.2d at 424. Despite affirming the dismissal, this pleading requirement was roundly criticized by the panel as an "illogical" rule defeating judicial economy—the very purpose of the rule—and a "pedantic technicality" where all parties agreed that the plaintiff could not have obtained her requested relief by exhausting her administrative remedies. *Id.* at 392-93, 747 S.E.2d at 424-25.

Damages

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

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

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

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

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

- civil conspiracy, **Dale v. Alcurt Carrboro, LLC**, 2014 N.C. App. LEXIS 354, at *8-9, 233 N.C. App. 238, 758 S.E.2d 707 (April 1, 2014) (unpublished) (affirming dismissal of civil conspiracy claim; trial court had also dismissed contract claim); **New Bar P'ship v. Martin**, 221 N.C. App. 302, 310, 729 S.E.2d 675, 682 (2012) (affirming dismissal of complaint alleging breach of right of first refusal in a lease and a civil conspiracy);

- unfair or deceptive trade practices, **Birtha**, 220 N.C. App. at 298, 727 S.E.2d at 10 (dismissing the UDTP claim where the plaintiffs failed to establish the existence of a contract and the UDTP claim was based on "mere breach of contract" even if a contract existed);

- tortious interference with a contract or prospective contract, **Crowell v. Davis**, 2013 N.C. App. LEXIS 325, at *16-17, 226 N.C. App. 431, 741 S.E.2d 511 (April 2, 2013) (unpublished);
- fraud, **Charlotte Motor Speedway, LLC v. County of Cabarrus**, 230 N.C. App. 1, 10, 748 S.E.2d 171, 178 (2013) (holding that there was no "definite and specific" representation in the fatally indefinite contract);

- negligent misrepresentation, *id.* at 10, 748 S.E.2d at 178 (2013) (ruling that there was no specific representation made in defendants' vague, indefinite letter); and

- breach of the duty of good faith and fair dealing, **Claggett v. Wake Forest Univ.**, 126 N.C. App. 602, 610-11, 486 S.E.2d 443, 447-48 (1997) (affirming dismissal of good faith claim for the same reasons that the breach of contract claim failed and because the defendant's decision was "rational").

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

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

The motion to dismiss need not lay out every detailed reason for dismissal. Under Rule 7(b)(1), the motion must "state with particularity the grounds therefor, and shall set forth the relief or order sought." The motion to dismiss is sufficiently particular if it simply cites to Rule 12(b)(6) and states that the complaint fails to state a claim upon which relief can be granted. **Austin Hatcher Realty, Inc. v. Arnold**, 2008 N.C. App. LEXIS 1080, at *6-8, 190 N.C.

App. 822, 662 S.E.2d 36 (June 3, 2008) (unpublished) (ruling that motion was sufficiently particular but reversing dismissal where plaintiff broker suing to enforce a listing agreement adequately alleged a valid contract existed and that defendants breached it); *see also* **Lane v. Winn-Dixie Charlotte, Inc.**, 169 N.C. App. 180, 182-83, 609 S.E.2d 456, 458 (2005) (holding similarly with respect to a 12(b)(4) and (b)(5) motion).

Under this relaxed pleading standard, counsel for the non-moving party may not be aware of the exact deficiencies in the pleading until the hearing, unless the moving party chooses to submit a brief in support of the motion. If a brief is submitted, although the memorandum of law will educate your opponent as to the defects in the pleading, it will also provide the trial judge with a full explanation of the basis for your motion and may make your oral argument more persuasive. Briefs must be served at least two days before the hearing on the motion. N.C. R. Civ. P. 5(a1), 6(a); **Harrold v. Dowd**, 149 N.C. App. 777, 786-87, 561 S.E.2d 914, 920-21 (2002) (finding that service of a brief on Thursday for a hearing on Monday was timely service).

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

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

The Checkered Flag

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

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