The Defender

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Towards 2050 and Beyond

A. Todd Brown, *Guest Columnist & President of the Mecklenburg County Bar/26th Judicial District*

Brown

In 2012 the Mecklenburg County Bar turns 100 years old. Both a Centennial Committee and a Bar History Committee are busy planning a celebration befitting the occasion. But as we look back at the past century, we must also look forward at important societal changes that are destined to transform the legal profession in the decades ahead.

Increasingly, we are both an aging and more racially and ethnically diverse population. Consider the changing demographics between the 2008 population of 304 million to the projected 2050 population of 439 million U.S. residents. Regarding age, in 2008 U.S. residents age 65 and over numbered 38.7 million; current projections place that number at 88.5 million in 2050. As to race and ethnicity, in 2008 Hispanics residing in the U.S. numbered 46.7 million; projections are 132.8 million in 2050. For African Americans, the numbers are 41.1 million in 2008 and 65.7 million in 2050. And for Asians, 15.5 million in 2008 and 40.6 million in 2050. The U.S. Census Bureau projects that by 2042, America will be a "majority minority" country in terms of its racial and ethnic populations. The media have dubbed this demographic phenomenon "the browning of America."

America is a racially diverse nation, currently made up by 30% people of color and approximately 51% female. Today, however, the legal profession remains one of the least diverse professions in the country. Statistics show that 90% of the legal community is white, and of that, more than 70% are men. What does a steady demographic shift towards an increasingly diverse population portend for our profession in the coming decades?

A look back reveals that lawyers of color and women still face impediments to full participation in the legal profession. A recent 2010 ABA report entitled *Diversity in the Legal Profession, Next Steps* observed: "Several racial and ethnic groups, sexual and gender minorities, and lawyers with disabilities continue to be vastly underrepresented in the legal profession. From a racial/ethnic perspective, Whites constitute about 70% of working people over the age 16, yet they represent 89% of all lawyers and 90% of all judges, according to 2009 census data." Recessionary pressures and complacency have undermined many past diversity initiatives that successfully sought to promote lawyers of color. A series of reports from the ABA's Commission on Women in the Profession confirm that equally-qualified women lawyers are still paid significantly less than male counterparts; that women have made only incremental progress in terms of higher percentages of law firm partnerships, judicial appointments and tenured faculty positions; that businesses and law firms fail to retain women and people of color in proportion to the numbers graduating from colleges and professional schools; and that work-life balance, professional development, mentoring and lawyer-client relationships for women and lawyers of color continue to suffer.

A look forward offers encouragement. It is beyond serious dispute that a diverse legal profession promotes the public's trust in the rule of law, and that a diversity of perspectives leads to better questions, analyses and solutions. The unfolding demographics mean that change will come. The legal profession of today must comprehend the implications of lawyers of color and women ascending to greater positions of authority and leadership in the fullness of time. The prism through which we view our efforts to improved diversity and inclusion in the legal profession must evolve to reflect these societal changes.

If the empirical evidence on the salutary influences of diversity fails to convince you, perhaps the mathe-

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matical model will tip the scales. Scott E. Page, a University of Michigan Professor and author of *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies*, in a 2008 New York times interview, explained the model thusly: "What the model showed was that diverse groups of problem solvers outperformed the groups of the best individuals at solving problems. The reason: The diverse groups got stuck less often than the smart individuals, who tended to think similarly. The other thing we did was to show in mathematical terms how when making predictions, a group's errors depend in equal parts on the ability of its members to predict and their diversity. This second theorem can be expressed as an equation: collective accuracy = average accuracy + diversity."

The MCB established a Special Committee on Diversity in 2004 to examine and increase the extent to which lawyers from traditionally underrepresented groups – identified by race, ethnicity, religion, gender, sexual orientation, age, marital/parental status and disability – have participated in the Mecklenburg County legal community and have been encouraged to grow professionally. The Committee has been a visible leader in fostering diversity and inclusion, forging new coalitions among disparate segments of our local Bar and educating the public about the value of diversity and inclusion. To learn more about its mission, good work and contributions to diversity in Mecklenburg County, please click on the "Diversity" link on www.MeckBar.org.

Ensuring diversity within the Bar is a cornerstone of the MCB's Strategic Plan. While reasonable people may disagree over whether diversity initiatives add value generally or whether a mandatory bar should promote diversity initiatives specifically, the MCB's leadership moved beyond that discussion long ago. It is a debate I do not intend to revisit. We must stay the course in respect of efforts designed to increase diversity and inclusion within the MCB, in part to address undeniable cultural, racial, ethnic and gender disparities that exist in our profession, including in Mecklenburg County; to adapt to changes stemming from the country's seemingly inexorable demographic transformation as we move towards 2050; and to ensure that members of the legal profession remain in the vanguard of leaders who will shape the new landscape.

It is a mathematical certainty that America will change demographically and become more diverse. One of the key questions we therefore must address, thoughtfully and collaboratively, is: what steps will today's leaders of the legal profession take in anticipation of a constant drumbeat for greater diversity and inclusion in the decades ahead? To quote that familiar expression, it's time to "lead, follow or get out of the way!"

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The *Defender*

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Do the Pleading Standards of *Twombly* and *Iqbal* Apply to Affirmative Defenses?

Dauna Bartley, *Ellis & Winters LLP*

1. Plantiff's claims are barred by the relevant statutes of limitations.
2. Plantiff's claims are barred by the doctrine of accord and satisfaction.
3. Plantiff's claims are barred, in whole or in part, by the doctrine of estoppel.

Bartley

Look familiar? Affirmative defenses have been pled in this barebones manner for years. Defense attorneys faced with a short deadline to draft answers to a plaintiff's complaint might identify affirmative defenses by quickly running through the list in Rule 8(c) of the Federal Rules of Civil Procedure and including any that look promising.

However, federal courts have recently seen a tightening of pleading requirements. Conclusory, formulaic complaints are now more frequently dismissed as insufficient following the U.S. Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2007), and *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Defendants nationwide are benefiting from the "*Twiqbal*" standards, which have become a highly effective weapon against insufficient complaints.

Now the tables are turning amidst a heated debate in federal district courts. In a growing trend, *Twiqbal* pleading standards are being applied to reject boilerplate affirmative defenses as well. The challenge to the affirmative defenses typically arises by way of a plaintiff's motion to strike affirmative defenses as insufficient. Although motions to strike are generally viewed with disfavor, in this case, they are often allowed. A North Carolina district court recently weighed in and sided with the majority of courts to have considered the question: What's good for the goose is good for the gander.

To understand why some federal courts are moving in this direction and how the defense bar might be able to influence this trend, it is useful to start with a brief review of the Supreme Court's decisions in *Twombly* and *Iqbal*.

Twombly represented a watershed moment for federal pleading standards. In *Twombly*, the Supreme Court addressed a complaint sounding in antitrust and took the opportunity to expound on the interpretation and application of Rule 8(a)(2) of the Federal Rules of Civil Procedure governing pleading standards in all civil actions. Rule 8(a)(2) requires a pleading that states a claim for relief to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) (emphasis added).

Based on this language, *Twombly* expressly retired the old "no set of facts" formulation taken from *Conley v. Gibson*, 355 U.S. 41, (1957), and instead articulated a "plausibility" standard. The Court held that Rule 8(a)(2) requires a "showing" that the pleader is entitled to relief. In order to prevail against a motion to dismiss, a complaint must plead sufficient factual matter "to raise a right to relief above the speculative level." A complaint that contains only "labels and conclusions" and that fails to show more than a mere possibility of misconduct does not state a plausible claim for relief.

Two years later, in *Iqbal*, the Court reiterated the *Twombly* standards for pleading under Rule 8(a)(2) and emphasized that this pleading standard applies to all federal civil actions. The Court observed that Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." Rather, Rule 8 requires a pleader to allege sufficient facts to show entitlement to relief in order to survive a motion to dismiss and commence discovery.

Neither *Twombly* nor *Iqbal* addressed the requirements for pleading affirmative defenses found in Rules 8(b) and 8(c). Rule 8(b)(1)(A) requires only that, in responding to a pleading, a party "state in short and plain terms its defenses to each claim asserted against it." Rule 8(c) simply requires the party to "affirmatively state any avoidance or affirmative defense." Neither of these rules requires a party to "show" the plausibility of the defense. Cf. Fed. R. Civ. P. 8(a)(2).

Nonetheless, the plaintiffs' bar is gaining ground with the argument that the plausibility standard for pleadings required by *Twombly* and *Iqbal* should be applied to affirmative defenses. A growing majority of district courts have

agreed and extended *Twiqbal* standards to the pleading of affirmative defenses. *See Francisco v. Verizon South, Inc.*, No. 3:09cv737, 2010 WL 2990159, at *6 & n.3 (E.D. Va. July 29, 2010) (collecting cases nationwide). A minority of district courts, however, have refused to extend the *Twiqbal* standards to affirmative defenses. *See* id. at *6 & n.4 (collecting cases nationwide).

Closer to home, a North Carolina district court recently joined other Fourth Circuit courts in following the majority trend. *See Racick v. Dominion Law Assocs.*, No. 5:10-CV-66-F, 2010 WL 3928702 (E.D.N.C. Oct. 6, 2010) (Fox, J.); *Francisco*, 2010 WL 2990159; *Bradshaw v. Hilco Receivables, LLC*, No. RDB-10-113, 2010 WL 2948181 (D. Md. July 27, 2010); *Palmer v. Oakland Farms, Inc.*, No. 5:10cv00029, 2010 WL 2605179 (W.D. Va. June 24, 2010).

The reasoning cited by these courts for applying *Twiqbal* to the pleading of affirmative defenses is generally based on principles of fairness and litigation efficiency. First, courts find the same reasoning holds true for pleading affirmative defenses as for pleading a complaint: Without factual allegations to support an affirmative defense, a plaintiff cannot prepare adequately to respond to those defenses. These courts determine that it is neither fair nor sensible to require a plaintiff to plead the factual basis of her claims under one pleading standard, but then permit a defendant to plead a canned affirmative defense under a lesser pleading standard.

Second, courts interpret *Twombly* and *Iqbal* as having the underlying rationale of litigation efficiency, particularly with respect to the discovery costs required to explore the factual basis for a vaguely pleaded claim. Courts note that, like threadbare complaints, boilerplate defenses have the same detrimental effects of cluttering the docket and increasing litigation costs. Therefore, these courts conclude that the stricter pleading standards articulated in *Twombly* and *Iqbal* should apply to affirmative defenses as well.

These are seen by some as compelling reasons to require that defendants plead sufficient facts to show how any given affirmative defense might apply to the circumstances at issue. A defense will generally satisfy the plausibility standard simply by including a brief statement of facts giving the plaintiff fair notice of the defense and the grounds upon which it rests so as to plausibly suggest a cognizable defense. In fact, some courts recognize that a defendant's list of affirmative defenses necessarily incorporates the factual allegations of the complaint and answer, and therefore the facts need not be re-alleged for each defense in order to suffice to put the plaintiff on notice. *See, e.g., Piontek v. Serv. Ctrs. Corp.*, No. PJM 10-1202, 2010 WL 4449419 (D. Md. Nov. 5, 2010); *Baum v. Faith Techs., Inc.,* No. 10-CV-0144-CVE-TLW, 2010 WL 2365451 (N.D. Okla. June 9, 2010).

On the other hand, there are strong arguments put forth by district courts nationwide that have rejected and continue to reject arguments to extend *Twiqbal* standards to affirmative defenses. *See, e.g., Jackson v. City of Centreville*, No. 7:09-CV-02115-LSC, 2010 WL 4363995 (N.D. Ala. Nov. 3, 2010); *Ameristar Fence Prods., Inc. v. Phoenix Fence Co.*, No. CV-10-299-PHXDGC, 2010 WL 2803907 (D. Ariz. July 15, 2010); *McLemore v. Regions Bank*, Nos. 3:08-cv-0021, 3:08-cv-1003, 2010 WL 1010092 (M.D. Tenn. Mar. 18, 2010); *Holdbrook v. SAIA Motor Freight Line, LLC*, No. 09-2870, 2010 WL 865380 (D. Colo. Mar. 8, 2010).

First, these courts note that the *Twombly* and *Iqbal* decisions addressed only the requirements of Rule 8(a) of the Federal Rules of Civil Procedure. The Supreme Court did not address Rules 8(b) or 8(c), and neither of those rules contain the same language on which the Court based its interpretation of Rule 8(a)(2). Rule 8(a)(2) requires a pleader to "show" entitlement to relief, whereas Rules 8(b)(1)(A) and 8(c) only require a responder to "state" its defenses. Therefore, there is no legitimate basis for extending the holdings of *Twombly* and *Iqbal* to the pleading of affirmative defenses.

Second, courts declining to impose stricter pleading standards on affirmative defenses also rely on principles of fairness, but they focus on the pragmatic realities facing a defendant served with a lawsuit. Unlike a plaintiff who may have months, or even years, to develop factual support for its claims before filing suit, a defendant typically has only 21 days to retain counsel and respond to a complaint. Courts with a preference for a fast docket may be unwilling to grant extensions of time. Therefore, a stricter pleading requirement for affirmative defenses may force a defendant to serve an answer with fewer affirmative defenses pled and then, after taking discovery, move for permission to amend the answer to add affirmative defenses.

There is a genuine concern among courts that, rather than promoting litigation efficiency, imposing *Twiqbal* standards on affirmative defenses may merely increase litigation costs and the burdens on courts by inviting additional motion practice in the form of motions to strike or subsequent motions to amend.

The latter concern is especially salient when a plaintiff has filed suit under a fee-shifting statute, such as the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* If the plaintiff files a motion to strike the defendant's affirmative defenses early in the case, and then ultimately prevails on her claims, the defendant might find itself defending a fee petition that is several thousand dollars higher because of the plaintiff's additional motions.

As of the date of this writing, no federal Circuit Court of Appeals has yet addressed the issue of whether the *Twiqbal* standards should be applied to the pleading of affirmative

defenses. The Fourth Circuit Court of Appeals passed on the opportunity to do so in *Grunley Walsh U.S., LLC v. RAAP*, No. 09-1613, 2010 WL 2640519 (4th Cir. June 30, 2010).

In *Grunley Walsh*, the Court of Appeals addressed the question of whether the trial court had erred in granting summary judgment based on a release that had been executed, where the release had not been pleaded as an affirmative defense in an answer. In its briefing, the *Grunley Walsh* plaintiff-appellant raised the argument that the district court had applied an incorrect pleading standard for affirmative defenses, and that the *Twombly* and *Iqbal* pleading standard should be applied. *See* Brief of Plaintiff-Appellant at 29-31, *Grunley Walsh* (No. 09-1613). The Court of Appeals, however, did not take up the issue. Instead, it affirmed the lower court on the grounds that the plaintiff was not prejudiced or unfairly surprised by the court's consideration of the defense, and that the defendants' other affirmative defenses pled were sufficient to put the plaintiff on notice of the "release" affirmative defense.

For now, all that is certain is that this debate among district courts continues to rage. The issue even splits courts within the same district. *Compare Wells Fargo & Co. v. United States*, No. 09-CV-2764 PJS AJB, 2010 WL 4530158, at *1-2 (D. Minn. Oct. 27, 2010) (Schiltz, J.) (agreeing with arguments rejecting the application of *Twiqbal* standards to affirmative defenses), *with Ahle v. Veracity Research Co.*, No. 09-0042 ADM/RLE, 2010 WL 3463513, at *24-25 (D. Minn. Aug. 25, 2010) (Montgomery, J.) (agreeing with arguments extending Twiqbal standards to affirmative defenses).

Defendants are well-served to be prepared for this issue. Defense counsel should be alert to the continuing developments in this area and know how specific courts and judges have ruled on the question. When in doubt, the "safe" bet is to plead affirmative defenses with some specificity so as to deter a motion to strike.

This may also present an opportunity to refine how we approach affirmative defenses and to be more selective in the defenses pleaded. When possible, defense counsel should become more proactive in conducting early investigation and evaluation of claims so that we and our clients can develop a strong game plan which includes solid, relevant affirmative defenses.

And, of course, we need to take advantage of Rule 15(a) aggressively and move to amend pleadings whenever discovery reveals the existence of another plausible affirmative defense.

Applying the *Twiqbal* pleading standard to affirmative defenses as well as complaints may prove to be a boon to the clogged federal court system, as some courts believe. It may discourage the "kitchen sink" approach to pleading on both sides, and streamline claims and defenses to allow for targeted discovery. It may lessen the time and expense of litigation for all involved. It may even encourage settlement, where the parties are able to evaluate the strength of the positions on both sides much earlier in the game.

Then again, it might simply invite additional motion practice that runs up litigation costs and only delays resolution of the case. Only time will tell.

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Editor's Note: On July 22, 2009, S. 1504 was introduced in the U.S. Senate during the 111th Congress. The bill was self-described as one "[to] provide that Federal courts shall not dismiss complaints under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in Conley v. Gibson, 355 U.S. 41 (1957)." It was referred to the Committee on the Judiciary. No hearings occurred and no action was taken on the bill. On November 19, 2009, H.R. 4115 was introduced in the U.S. House of Representatives. The bill was self-described as one "[t]o amend title 28, United States Code, to provide a restoration of notice pleading in Federal courts, and for other purposes." The bill sought to add 28 U.S.C. § 2078, which was to provide: '(a) A court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. A court shall not dismiss a complaint under one of those subdivisions on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged." H.R. 4115 was sent to the House Judiciary Subcommittee on Courts and Competition Policy, and hearings were held on December 16, 2009. The bill was not reported out of committee. As of the final edit of this issue of The Defender, neither the above Senate bill nor the House bill had been re-introduced.

N.C. Court of Appeals Interprets Revised Costs Statutes

Christian H. Staples, *Shumaker Loop & Kendrick LLP*

Expert witness fees are generally one of the biggest expenses that may be recovered as costs by the prevailing party at trial. This article discusses two recent appellate decisions that have interpreted the recently revised costs statutes in North Carolina.

Staples

Following a successful outcome at trial, many defense attorneys immediately turn their attention to preparing the motion for costs in an effort to recover some of their trial expenses. However, preparing the motion for costs requires an understanding of those statutes which authorize the trial courts to award costs. In *Jarrell v. The Charlotte-Mecklenburg Hosp. Auth.*, ___ N.C. App. ___, 698 S.E.2d 190 (2010), the North Carolina Court of Appeals issued an important opinion interpreting the recently revised costs statutes for the first time. Even more recently, in *Springs v. City of Charlotte*, ___ N.C. App. ___, 704 S.E.2d 319 (2011), the Court of Appeals further clarified the current status of the law surrounding expert witness fees and other costs in civil actions. Practitioners should be aware of the potential impact of these two cases on future costs hearings.

Effective August 1, 2007, the General Assembly revised § 6-20 and § 7A-305, commonly referred to as "the costs statutes." It is fair to say that these revisions have caused some confusion among practitioners and judges alike.

Revised § 6-20 now provides, in pertinent part, as follows:

> Costs awarded by the court are subject to the limitations on assessable or recoverable costs set forth in G.S. 7A-305(d), unless specifically provided for otherwise in the General Statutes.

N.C. Gen. Stat. § 6-20 (2010). Section 7A-305(d) essentially provides that certain costs enumerated therein constitute a "complete and exclusive limit on the trial court's discretion to tax costs pursuant to G.S. 6-20." N.C. Gen. Stat. § 7A-305(d) (2010). The confusion that has ensued following the revision of these two statutes is understandable, given the use of words like "discretion," "limit," and "complete and exclusive" all in the same sentence. Thankfully, our state's intermediate appellate court has recently provided some much needed clarification.

In *Jarrell v. The Charlotte-Mecklenburg Hosp. Auth.*, ___ N.C. App. ___, 698 S.E.2d 190 (2010), the Defendants had timely filed a motion for costs pursuant to N.C. Gen. Stat. §§ 6-20 and 7A-305(d) following a jury verdict in their favor at trial, seeking reimbursement of their costs for the actual time their expert witnesses spent testifying at trial, the travel expenses of their expert witnesses, and certain other costs not relevant here. The motion was essentially granted in full by the trial court. Plaintiffs only appealed that portion of the award related to the time the Defendants' experts actually spent testifying at trial under § 7A-305(d)(11).

The Plaintiffs argued that because the Defendants' out-of-state expert witnesses testified pursuant to subpoenas issued in North Carolina rather than subpoenas issued in each expert's home state, the subpoenas were ineffective and therefore the award of costs was not statutorily authorized. While § 7A-305 says nothing about subpoenas, § 7A-314(a) and (d) collectively provide that expert witness fees may be taxed as costs only when the expert is "under subpoena, bound over, or recognized." In other words, satisfying the requirements of 7A-305(d)(11) by ensuring that the experts' fees are "reasonable and necessary" does not automatically entitle the prevailing party to recover costs if the experts did not testify pursuant to a subpoena. In fact, the *Jarrell* Court cited several cases for the proposition that an award of expert witness fees as costs is reversible error where no subpoena existed.

Concluding its analysis, the *Jarrell* Court rightly held that the Plaintiffs lacked standing to challenge the validity of the North Carolina subpoenas issued to the Defendants'

out-of-state experts. The court stated that the right to contest the validity of a subpoena "belongs not to Plaintiffs but to the nonparty witnesses whose attendance was sought." As a result, the Plaintiffs could not raise the invalidity of the subpoenas as a bar to that portion of the costs award related to the actual time the Defendants' experts actually spent testifying at trial.

Notably, the Plaintiffs failed to make other arguments that could have been raised in opposition to the award of costs. Most notably, the Plaintiffs failed to contest the Defendants' request for, and the trial court's award of, the travel expenses of the Defendants' experts. When *Jarrell* was argued and decided, it was somewhat unclear whether the trial courts retained any discretionary authority to award certain "common law" costs, such as expert witnesses' travel expenses, that were not specifically enumerated in § 7A-305(d). The "complete and exclusive" language of § 7A-305(d) seemed to foreclose the exercise of any discretionary authority by the trial court. Fortunately, this lingering issue was recently put to rest by the Court of Appeals in the *Springs* case.

Springs v. City of Charlotte, ___ N.C. App. ___, 704 S.E.2d 319 (2011), involved a claim of motor vehicle negligence where the Defendants appealed an award of costs against them following a verdict for the Plaintiff at trial. The Defendants argued on appeal that the trial court erred to the extent that the award of costs included an assessment for the Plaintiff's experts' trial preparation time and time spent waiting to testify. Following a discussion of § 6-20, § 7A-305(d), and § 7A-314, the *Springs* Court held that trial courts are *required* to assess as costs those items specifically enumerated at § 7A-305(d), including, *inter alia*, fees for the time the prevailing party's expert witnesses spent actually testifying at trial, deposition, or other proceeding. The *Springs* Court further held that trial courts have discretionary authority under § 7A-314(b) to award an expert witness' travel expenses, and that trial courts also have discretion under § 7A-314(d) to assess costs for experts' time spent in attendance at trial even when not testifying. Thus, as both *Jarrell* and *Springs* explicitly recognized, § 7A-305(d) must continue to be read in conjunction with § 7A-314 despite the statutory revisions. Notably, the *Springs* Court found no authority permitting trial courts to assess costs for an expert witness' time spent preparing for trial. This would typically include the expert's time reviewing the facts of the case, meeting with counsel, and any other preparation time leading up to trial.

In sum, *Jarrell* eliminates the need for practitioners to incur the additional time and expense of issuing "home state" subpoenas solely for the purpose of preserving the right to recover an out-of-state expert's fees for time spent actually testifying at trial; a subpoena issued in North Carolina will suffice. *Springs* is perhaps the more important decision in that it definitively holds that trial courts are now *required* to award those costs specifically enumerated at § 7A-305(d), provided that all of the statutory requirements are met. Furthermore, trial courts retain their discretionary authority to assess experts' travel expenses and "stand-by" time at trial under § 7A-314(b) and (d), respectively. However, trial courts are not authorized to assess costs for experts' trial preparation time. Finally, it should be noted that the prevailing party may not seek reimbursement for the costs of more than two experts to prove a single material fact. *See* N.C. Gen. Stat. § 7A-314(e) (2010).

Hopefully this article has provided some clarification regarding the current status of the law of costs in civil actions, particularly as it relates to the recovery of expert witness fees. The author would welcome any comments on this topic, and may be reached at *cstaples@slk-law.com*.

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Diversity in the North Carolina Association of Defense Attorneys Statement of Principle

The North Carolina Association of Defense Attorneys (NCADA) is the North Carolina membership organization of lawyers involved in the defense of civil litigation. As such, NCADA expresses its strong commitment to the goal of diversity in its membership. Our member attorneys conduct business throughout North Carolina, the United States, and around the world, and NCADA values highly the perspectives and varied experiences which are found only in a diverse membership. The promotion and retention of a diverse membership is essential to the success of our organization as a whole, as well as our respective professional pursuits. Diversity brings to our organization a broader and richer environment that produces creative thinking and solutions. As such, NCADA embraces and encourages diversity in all aspects of its activities. NCADA is committed to creating and maintaining a culture that supports and promotes diversity in its organization.

Hope on the Horizon: New Cases Challenge Medicare's Established Collection Practices Under the Medicare Secondary Payer Act

Jessica Smythe, *Crowe Paradis Services Corporation*

It is fair to say the identification, negotiation and ultimate reimbursement of Medicare's conditional payments (Medicare "liens") is a challenging and often time consuming process for defendants settling a claim with a Medicare beneficiary. Issues often cited by defense attorneys, carriers, third-party administrators and self-insured companies include the lack of a defined statute of limitation on Medicare's right to sue for collection of its payments, Medicare's refusal to reduce its reimbursement demands based upon the existence of non-medical losses, and Medicare's policy of assessing interest on the unpaid balance of a conditional payment demand prior to a determination of the correct amount actually owed to Medicare. Four recent cases have tackled all of these issues, and the resulting decisions have given new hope to those struggling to balance the competing interests of an efficient and final settlement with complete Medicare Secondary Payer compliance.

Statutory Background

The Medicare Secondary Payer Act (MSP), enacted in 1980, makes Medicare secondary to liability, automobile, workers' compensation, and no fault plans of insurance. In other words, the MSP prohibits Medicare from making payments for covered medical items and services if payment has already been made or can reasonably be expected to be made by another source with primary payer responsibility. 42 U.S.C. §1395y(b)(2)(A)(i). When the responsible party is not expected to pay promptly, for example, in a denied workers' compensation claim or a disputed liability claim, Medicare will step in and make medical payments on the condition that these payments will be reimbursed to Medicare upon settlement of the claim. 42 U.S.C. §1395y(b)(2)(B)(i). This allows the Medicare beneficiary to receive medical treatment and allows the medical care provider to receive payment for the treatment rendered.

In the event Medicare is not reimbursed, Medicare has the right under the MSP to bring an action for twice the amount of its conditional payments. This lawsuit may be brought against all parties to the claim, including the attorneys, the plaintiff Medicare beneficiary, and the defendants, including the carrier and the carrier's insured. 42 U.S.C. §1395y(b)(2)(B)(iii).

These broad powers afforded to Medicare pursuant to the MSP are not limited by time. There is no defined statute of limitation contained in the statute. Medicare, therefore, may assert a demand for reimbursement of conditional payments many years after settlement and after exhaustion of the settlement proceeds. In addition, the MSP allows Medicare to assess interest on any unpaid lien amount beginning 60 days after Medicare sends its final demand for repayment. This is despite the fact that both parties may actively dispute the correct amount due to Medicare and are engaging in administrative review proceedings. Finally, the MSP does not permit the reduction of Medicare's liens based upon the applicable jurisdiction's apportionment of fault principles.

United States v. Stricker, No. 1:09-CV-02423 (N.D. Ala. Sept. 30, 2010)

Facts: On December 1, 2009, Medicare filed an action against insurance carriers, corporations and attorneys to obtain reimbursement of conditional payments arising out of a 2003 class action settlement for $300,000,000. Out of the class of 20,000 plaintiffs involved in the suit,

907 were Medicare beneficiaries. Medicare alleged in its complaint defendants "knew or should have known" that Medicare made conditional payments in the claim, but that defendants still failed to reimburse Medicare prior to the distribution of the settlement proceeds.

Procedural History: On January 28, 2010, Medicare filed a Motion for Partial Summary Judgment on Liability against the corporate defendants and attorneys. Subsequent to the filing of Medicare's summary judgment motion, all defendants, including the insurance carriers, filed objections to the summary judgment motion as well as their own Motions to Dismiss Medicare's lawsuit. The Motions to Dismiss were based primarily on the argument that Medicare's claims were time-barred by the three-year statute of limitation contained in the Federal Claims Collection Act (28 U.S.C. 2415(a)) for tort claims. Medicare argued the correct statute of limitation was actually six years for actions founded in contract (28 U.S.C. 2415(b)).

On September 13, 2010, the court heard oral arguments on defendants' motions to dismiss and Medicare's motion for summary judgment. On September 30, 2010, Judge Karon Owen Bowdre filed her Order *denying* Medicare's summary judgment motion and *granting* defendants' motions to dismiss. Judge Bowdre, in her Opinion Granting Certain Defendants' Motions to Dismiss, found that the three-year statute of limitation controlled and began running against the defendants on September 10, 2003, the date the executed Settlement Agreement was approved by order of the state court. Op. at 24. Therefore, Medicare's claims were time-barred, and the lawsuit was dismissed.

On October 29, Medicare filed a Motion for Reconsideration of the Order of Dismissal based upon theories of continuing accrual and tolling. Since a portion of the settlement was to be paid in installments from 2004-2013, Medicare argued the statute of limitation "accrued," or was revived, at the time of payment of each installment. Medicare also argued the statute of limitation should be tolled until the date Medicare had knowledge of the claims. On November 2, 2010, Judge Bowdre granted the Motion for Reconsideration and allowed defendants until November 16 to respond as to whether or not Medicare had properly pled the theory of continuing accrual and whether the court should reconsider the issue of tolling. On November 16, 2010, defendants filed their responses to Judge Bowdre's order. In their response, the carriers and corporate defendants argued that the theory of continuing accrual was inapplicable based upon the judge's earlier determination that the cause of action accrued at the time defendants' responsibility to pay was demonstrated, or September 10, 2003, when the settlement was approved. Defendants also argued the statute was not "tolled" because Medicare had actual knowledge of the settlement in November 2004, when Medicare filed a proof of claim in the bankruptcy proceeding filed by one of the corporate defendants, Solutia.

Case Significance: *Stricker* is a case of first impression in that it appears this is Medicare's first suit filed against insurance carriers and their insureds for failure to reimburse conditional payments. Even with the granting of Medicare's motion for reconsideration, *Stricker*, as it stands now, defines a three year statute of limitation for Medicare's right of recovery under the MSP. This ruling provides some measure of certainty and peace of mind for primary payers settling claims with Medicare beneficiaries. *Stricker* is important not only for the ruling on the statute of limitation issue but also for the demonstration of Medicare's more aggressive enforcement policy toward the collection of conditional payments in light of the enactment of Mandatory Insurer Reporting in 2007.

Bradley v. Sebelius, 621 F.3d 1330 (11th Cir. 2010)

In a decision some have considered "scathing" in its language critical of Medicare's collection practices, the 11th Circuit has challenged Medicare's right to demand 100% payment of its lien amount out of a wrongful death settlement, when a portion of the settlement represented compensation for non-medical losses.

Facts: This case arises out of a Florida nursing home neglect claim. The decedent, Charles Burke ("Burke"), resided in a Gainesville nursing home for approximately 18 months. He was removed from the nursing home and admitted to a hospital where he later died of multi-organ failure secondary to sepsis and wound infection. While Burke was in the hospital, Medicare paid $38,875.08 for Burke's medical care. Burke's surviving 10 children brought a claim for wrongful death on behalf of the estate based upon the alleged negligence of the nursing home. Their claims later settled for $52,500, the full amount of the nursing home's liability insurance policy limits. Medicare was put on notice of the settlement and subsequently demanded full reimbursement of the amounts paid by Medicare for Burke's hospital stay minus procurement costs, or $22,480.89. This was despite the fact that the settlement represented less than the full value of the case, and portions of the settlement included compensation for non-

medical losses, including recovery for the children's mental pain and suffering and lost parental companionship. Pursuant to Florida law, these non-medical losses are not for the benefit of the estate, but are the property of the survivors as compensation for their loss.

Counsel for the children and the estate applied to the probate court for a determination of each survivor's portion of the settlement. The estate invited Medicare to participate in the hearing, but Medicare declined to appear or participate. Not only did the probate court determine the correct division of the settlement among the survivors, the probate court also reduced Medicare's lien to $787.50. The lien reduction was based primarily on the probate court's finding the total, full value of the settlement, if collectible, was $2,538,875.08.

Procedural History: Medicare, through the Secretary of the Department of Health and Human Services (Secretary), rejected the probate court's allocation of liability payments to non-medical losses until there was a court order following a trial of the claim on its merits. The Secretary's sole authority was the field manual; she could cite no other statutory authority, regulatory authority, or other case law authority in support of her argument. The estate paid Medicare's lien under protest and perfected its appeal to the district court. The district court, also relying on the field manual, found that Medicare was entitled to reimbursement in the amount of $22,480.89, not $787.50, for conditional medical payments. The estate appealed.

On September 29, 2010, the 11th Circuit held the district court erred in upholding the decision of the Secretary and found Medicare was only entitled to reimbursement in the amount of $787.50 (the amount allocated by the probate court). The court based its decision on the lack of authority cited by Medicare for its position and Medicare's refusal to take part in the probate court proceedings. The court also reasoned if every determination of Medicare's conditional payment amounts required a court order following a trial of the claim on the merits, a chilling effect on settlement would result.

Case Significance: Many would agree that since the enactment of the Medicare Secondary Payer Act, Medicare has enjoyed fairly unrestricted authority to assess and collect conditional payments. Opponents of *Bradley* will argue the decision should be severely curtailed since the holding turns on specific provisions of Florida law related to recovery for wrongful death actions. The 11th Circuit, however, has now set the stage for other courts across the country to rely on *Bradley* for persuasive authority in support of the proposition that non-medical compensated losses should not be subject to Medicare's lien claims.

Hadden v. United States, U.S. Dist. Lexis 69383, 2009 WL 2423114 (W.D. Ky. Aug. 6, 2009)

The attorneys arguing *Hadden* did use the September 29, 2010, *Bradley* ruling as persuasive authority for their argument that Medicare's lien should be reduced significantly based upon the fact that Mr. Hadden could ultimately only recover from the tortfeasor who was 10% at fault in his claim.

Facts: On August 24, 2004, a Pennyrile utility truck swerved to avoid an approaching unidentified driver who had run a stop sign. When the Pennyrile truck swerved, it hit a pedestrian, Mr. Hadden. As a result of the accident, Hadden suffered severe injuries which required extensive medical treatment, including hospitalization. Hadden, who was a Medicare beneficiary, settled his case against Pennyrile for $125,000, plus $10,000 in Kentucky basic reparations benefits since the unidentified driver was never located. Hadden also agreed to satisfy all liens out of his settlement proceeds.

Procedural History: When Hadden settled his case, CMS demanded $62,338.07 for reimbursement of conditional payments made toward Hadden's medical treatment. Hadden paid the CMS lien and then requested a waiver based upon Kentucky comparative fault principles which assigned 90% of the fault for the accident to the unidentified driver and 10% to Pennyrile. Hadden argued since the tortfeasor was only 10% at fault, CMS should only be able to recover 10% of its lien. CMS rejected Hadden's argument. Hadden exhausted all of his administrative appeals with CMS and ultimately filed an appeal with the United States District Court on January 22, 2008. The District Court upheld Medicare's determination that its lien should not be reduced by apportionment principles and that it was entitled to recover the full amount of its conditional payment demand. Hadden appealed to the 6th Circuit Court of Appeals.

On October 13, 2010, oral arguments were held before the 6th Circuit. Hadden's counsel argued the court should follow the reasoning adopted by the court in *Bradley*: apportionment of fault principles should apply with respect to the negotiation and settlement of Medicare's conditional payments. A decision on this case is expected early next year.

Case Significance: In the event the 6th Circuit rules in Mr. Hadden's favor and allows for the reduction of conditional payments based upon apportionment of fault, when coupled with the 11th Circuit's ruling in *Bradley*, the stage will be set for a potential exhaustive review by the Supreme Court of Medicare's collection practices. A com-

plete overhaul of Medicare's system related to assessment of conditional payments is possible, which will provide much needed relief, especially to Medicare beneficiaries attempting to settle claims where Medicare asserts a high conditional payment demand.

Haro v. Sebelius, 2009 U.S. Dist. Lexis 111053, 2009 WL 4497456 (D. Ariz. Nov. 30, 2009)

Another important ruling has given hope to those critical of Medicare's policy of assessing interest on lien claims still in dispute by the court in *Haro* granting plaintiffs' motion for discovery of materials beyond the scope of the administrative record.

Facts: The plaintiffs in *Haro* represent a proposed class of Medicare recipients and attorneys for the recipients. They filed suit alleging Medicare violated their Due Process rights by: (1) demanding immediate reimbursement of the full asserted amount of Medicare's conditional payments before their appeal rights were exhausted, and (2) demanding plaintiffs' attorneys withhold from their clients insurance proceeds for disputed conditional payment claims prior to a final decision by Medicare of the correct amount owed.

Procedural History: On June 11, 2009, Medicare moved to dismiss the claim on the grounds of lack of jurisdiction, standing and failure to exhaust administrative remedies. On November 30, 2009, the court denied Medicare's motion because the plaintiffs did have standing to bring the action; the court also found that the statute providing administrative review for conditional payment demands did not provide an administrative procedure for review of the actual process for assessment of the demand, so the jurisdictional requirements for exhaustion of review were waived. On April 12, 2010, following its reasoning set forth in its earlier denial of Medicare's motion to dismiss, the court granted plaintiffs' motion for additional discovery for materials beyond the administrative record of the demand and attempted collection by Medicare of the conditional payments for each plaintiff.

On October 22, 2010, Medicare filed a Motion for Summary Judgment and argued its attempts to recover the conditional payments complied with the Medicare Secondary Payer Act and that plaintiffs were not deprived of any property without due process. Medicare also requested oral arguments in the case.

Case Significance: This case represents a serious, comprehensive challenge to Medicare's often criticized procedures for collection of unreimbursed conditional payments. In the event the court ultimately rules in the plaintiffs' favor and finds Medicare's policy of interest assessment on outstanding conditional payments violates the United States Constitution, this decision may be the impetus for the implementation of a new system whereby the parties could settle conditional payment demands in advance of settlement; or, in the alternative, be permitted to exhaust administrative appeals prior to assessment of an interest penalty. Advocates for these changes to Medicare's collection process argue this would expedite settlement and would eliminate some of the uncertainty associated with the negotiation of Medicare liens.

Conclusion

While much attention and debate has been focused on the advent of Section 111 Mandatory Insurer Reporting, parties to claims involving Medicare beneficiaries should also be mindful of Medicare's far reaching rights to reimbursement of conditional payments. A proper understanding of Medicare's collection practices is necessary to ensure complete compliance. Historically, Medicare's collection practices have remained relatively unchallenged. Now, in the wake of Medicare's recent ramped up collection efforts, new light has been focused by the courts on serious issues related to enforcement of Medicare's reimbursement rights. This new judicial determination of Medicare's rights under the MSP gives hope to all parties involved in future settlement and negotiation of conditional payments that this complex process will be easier to navigate.

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Wage and Hour Law: What Every Defense Attorney Should Know

Jeremy A. Stephenson, *McNair Law Firm, P.A.*

Consider the following fact scenario: A fast food franchisee owns 30 locations. At each location, the store employs an assistant manager paid a salary of $25,000 per year, but no overtime, and does not "clock in" or "clock out." The assistant manager position is the same at each location, and generally works up to 80 hours per week, answering the phones, working the cash register, and performing all of the same duties as hourly workers. The only difference is that the assistant manager has a set of keys to the store to open or close as needed, and has the authority to accept job applications and interview applicants, but not hire or fire independently. One such assistant manager files a class action lawsuit in Federal Court for the failure to pay overtime. The arithmetic, upon the suit being filed, prior to discovery, is as follows:

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$25,000 per year
÷ 50 weeks worked (assuming 2 weeks vacation)
$500 per week
÷ by 40 hours per week
$12.50 per hour (regular rate)
x 1.5 (time and one-half - overtime)
$18.75 per hour (overtime rate)
x 40 hrs/week (overtime worked)
$750/ wk unpaid overtime
x 50 weeks
$37,500/year/assistant manager
x 3 years (assuming willful violation)
$112,500 unpaid overtime/assistant manager
x 2 (liquidated damages)
$225,000/assistant manager
x 30 assistant managers
$6,750,000.00, before interest, or attorneys' fees (plaintiff or defense)

The foregoing scenario vividly illustrates the catastrophic consequences of failing to comply with wage and hour laws. The employer in question does not need a labor and employment defense attorney, they need a bankruptcy attorney. This scenario also shows why wage and hour litigation is one of the fastest growing areas of employment litigation.

Defense attorneys by definition represent employers rather than employees. It is good practice for defense attorneys to be aware of wage and hour laws so as not to give incorrect advice to clients. But far more critically, defense firms are themselves employers, and owner-managed businesses in particular, which may pose similar problems to those suffered by employers in general.

Several recent wage and hour overtime lawsuits against law firms have gathered national publicity. In 2010, the suit of *Koplowitz v. Labaton Sucharow, LLP*, No. 1:10-CV-05176 (S.D.N.Y), alleged that non-partnership track contract attorneys hired to do document review should have been paid overtime. Also last year, *Havrilla v. Drinker Biddle & Reath, LLP*, No. 1:10-CV-00274 (D.D.C.), a legal secretary argued she should have been paid overtime. The same claim was made as a class action in 2009 in *Osolin v. Turocy & Watson, LLP*, No. 1:09-CV-02935 (N.D. Ohio). In *Magnoni v. Smith & Laquercia, LLP*, 661 F. Supp. 2d 412 (S.D.N.Y. 2009), the court denied summary judgment to the employer law firm against a paralegal's argument she should have been paid overtime.

Simultaneously, the United States Department of Labor, with jurisdiction to enforce Federal wage and hour laws, has announced a specific priority to bring more Wage and Hour enforcement actions. In the first half of 2010 alone, the United States Department of Labor issued press releases announcing recovery of over $3,000,000 in back wages in only a hand full of cases.

An examination of lawsuits filed in Federal Courts in North Carolina under the Fair Labor Standards Act ("the FLSA") also shows an increasing trend. In 2008, there were 29 lawsuits filed in Federal Court in North Carolina under the FLSA. In 2009, the number was 59. In 2010, through June 30, there were 46 FLSA lawsuits. There are plaintiff's

law firms springing up around the country specializing in this niche area of the law. A simple "Google" search can reveal startling results.

The Applicable Laws

Two laws principally govern wage and hour compliance in North Carolina. The Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*, and its implementing regulations 29 CFR Parts 510-794, and the North Carolina Wage and Hour Act, N.C. Gen. Stat. § 95-25.1 *et seq.*, and its regulations, 13 N.C. AC 12.0100 *et seq.*

The Fair Labor Standards Act

The Fair Labor Standards Act contains four key components to compliance, regarding overtime, minimum wage, record keeping, and child labor. Most law firms in North Carolina will have no concerns regarding minimum wage or child labor, focusing instead on overtime and record keeping requirements.

The FLSA does not set a maximum number of hours that may be worked per day or per week. Specifically, under the FLSA, non-exempt employees must be paid for every hour they work, and must be paid overtime at time and one half for every hour worked over 40 hours per week. This naturally leads to two critical questions: Who is "exempt"?; and, What is "compensable time"? These two subjects alone occupy entire text books and day-long or week-long classes. They are the subject of constant litigation in courts around the country. The FLSA regulations themselves also change regularly, as with the United States Department of Labor under the Obama Administration reversing a Bush-era opinion letter regarding "donning and doffing" time. A complete analysis of these topics cannot be undertaken in this limited article, but they will be summarized.

As noted, all non-exempt employees must be paid overtime. The FLSA contains statutory exemptions that are fact specific in their application and are narrowly construed. Many employers misunderstand that "salary" basis of pay means that the employee is exempt from overtime. **This is absolutely false.** Such a critical error can potentially expose an employer to considerable liability.

The most straightforward statutory FLSA exemption is the "highly compensated" employee. Employees receiving more than $100,000 a year in salary who perform non-manual labor will be found exempt from overtime.
As pertains to law firms, there are several other potentially applicable exemptions that apply based on the employee's "primary duty." For all of these "primary duty" exemptions, the employee must be paid a salary not subject to deductions for number of hours worked or work production. It is critically important not to take improper deductions from salaried employees less they lose their exempt status retroactively. Generally, for the "executive" exemption, the employee must be involved in the management of two or more subordinates and directly involved in the hiring and firing of employees. The "**administrative**" exemption applies when the primary duty involves discretion and independent judgment in matters of significance in the management of the firm or a unit of the firm. This could apply for example with respect to the director of an accounting department. Finally, the "**professional**" exemption applies to employees where their primary duty requires significant advanced knowledge, discretion, and usually an advanced degree. Licensed attorneys engage in the practice of law will be exempt under the professional exemption, as will doctors and other similar professionals.

There are several other exemptions that generally would not apply to law firms, such as outside salespeople, automobile salesmen, agricultural workers, workers at seasonable amusement parks, etc.

Ultimately, a prudent employer should identify all employees it is not paying overtime, and undertake a thorough FLSA examination.

Under the recordkeeping requirements of the FLSA, all employers are required to keep accurate time records of the hours worked by non-exempt employees. If an employer has improperly categorized an employee as exempt, rather than non-exempt, paying them salary but not overtime, unfortunately it is typical that such employer does not maintain time card records for such employees. This poses one of the particular vulnerabilities of wage and hour litigation where it can be extremely difficult to recreate after the fact the hours of an employee's work.

The United States Department of Labor has enforcement authority under the FLSA. They have the authority to initiate criminal prosecutions. A willful violation of the FLSA can bring a $10,000 fine and second violation can bring prison time. This is separate from the authority to enter civil penalties of up to $1,100 per violation, that can apply to each incorrect paycheck. Obviously, the penalty amount can escalate rapidly in cases involving ongoing errors and multiple employees.

The FLSA also brings with it a private cause of action for an aggrieved employee. The FLSA contains its own opt-in class action provisions and class certification and

class notification are typically critical fights in such litigation. The FLSA provides the employer with a good faith defense, which will shorten the statute of limitation from three years to two years. A prevailing plaintiff also recovers their attorneys' fees as of right, and often the amount of the plaintiff's attorneys' fees becomes its own fight, as can occur in other types of class litigation.

The North Carolina Wage and Hour Act

Employers in North Carolina are also subject to the North Carolina Wage and Hour Act, or NCWHA. This statute incorporates the FLSA overtime rules requiring time and a half for hours work over 40 per work week. Like the FLSA, the NCWHA also does not limit the maximum number of hours work per day or per work week, as other states may do. *See, e.g.*, California Labor Code § 500-558 (overtime required after eight hours worked *per day*).

The NCWHA has key provisions regarding the payment of wages, wages in dispute, and withholding of wages. The Administrative Regulations can be very specific in the requirements placed upon employers in North Carolina.

The NCWHA provides that all wages shall be paid on a regular payday, be that weekly, bi-weekly or monthly. It is up to the employer to set the payday but it cannot be changed easily. *See* N.C. Gen. Stat. § 95-25.6 (wage payment). Upon separation of employment, employees must be paid all wages owed on the next regular payday. See N.C. Gen. Stat. § 95-25.7 (payment to separated employees). The statute provides that whenever any wages are in dispute, the employer must pay all undisputed amounts to the employee on the next regular payday. *See* N.C. Gen. Stat. § 95-25.7A (wages in dispute).

The NCWHA provides only very limited circumstances for when an employer may withhold wages from the paycheck of an employee. *See* N.C. Gen. Stat. § 95-25.8 (withholding of wages). In the experience of the author, this is an issue often misapplied by North Carolina employers. Subject to certain limited exceptions, employers in North Carolina cannot withhold wages from the paycheck of an employee without a specific written authorization from the employee identifying the amount being withheld and the reason. Moreover, the employee may revoke such authorization at any time. Employers in North Carolina should be extremely careful before making any deductions from an employee's paycheck.

The NCWHA creates its own private cause of action, potentially bringing liquidated (doubled) damages and attorneys' fees, just like the FLSA. An aggrieved employee may choose whether to file in Federal Court or State Court for the same violation, and may effectively forum shop.

Finally, North Carolina employers should note that the NCWHA interprets the definition of wages broadly to potentially include certain bonuses and commissions and reimbursement of business expenses. "Wages" under the NCWHA can go far beyond simple "W-2" wages.

The NCWHA was recently addressed by the North Carolina Court of Appeals in *Kornegay v. Aspen Asset Group, LLC*, ___ N.C. App. ___, 693 S.E.2d 723 (2010). In this case, an employee was hired with an understanding that he would be paid a salary plus bonus, but due to the financial performance of the company, he was not paid a bonus. Later, after his sales significantly jumped, and he still was not paid a bonus, he brought suit for breach of contract and the North Carolina Wage and Hour Act. The jury verdict found breach of contract, and the trial court interpreted the amount owed under such contract to also constitute wages under the North Carolina Wage and Hour Act.

The Court then found that the employer acted in good faith, and declined to award either attorneys' fees or liquidated damages under the NCWHA. On appeal, Plaintiff argued that there was a right to a jury trial on the issue of "willfulness." The Court of Appeals, in a case of first impression, held that there is no right to a jury trial regarding the existence of a "willful" violation of the Act, which may only be determined by the court. Attorneys litigating in this area, preparing jury instructions, motions for directed verdict, etc., should certainly be aware of this holding. The *Kornegay* case also provides a good roadmap for employers seeking to prove "good faith" in similar cases.

In *Williams v. New Hope Foundation, Inc.*, 192 N.C. App. 528, 665 S.E.2d 586 (2008), a jury awarded plaintiff $36 in unreimbursed business expenses. The trial court doubled this to $72, and awarded plaintiff $27,500 in attorneys' fees and costs, after reducing plaintiff's attorney fee claim from over $50,000. On appeal, the employer argued that the amount of attorney fees awarded on such a *de minimis* damage award abused the trial court's discretion on attorney fees. The Court of Appeals again recited the well known standard for a trial court's award of attorney fees and found that in this case the trial court considered all of these factors and that the award was appropriate. This case should further highlight the risk to employers that even in a mere technical violation of the law they could be exposed to a significant attorney fee award for plaintiff.

Compliance Strategies and Recommendations

Employers in North Carolina, and law firms in particular, are recommended to perform a wage and hour audit periodically. Any employee who is not being paid overtime must be critically examined to confirm their appropriate exemption. Employers should consider retaining

outside legal counsel to take maximum advantage of the attorney/client confidentiality. Provided that such advice is followed, this could also provide a very strong good faith defense to any subsequent lawsuit.

All non-exempt employees must be made to clock in and out and employers must keep accurate time records. Employees should not be allowed to work in excess of 40 hours per week without prior authorization. If they work more than 40 hours, they must be paid for all hours worked and paid for overtime, but this should be handled as a discipline situation. Culturally, this can often be very difficult to implement in many work places. Many employees, earning salary, may prefer to be viewed as management and may resist clocking in and out as being beneath them. Such rule, however, cannot be compromised.

All employers, and law firms in particular, must be extremely cautious in giving technology to non-exempt employees enabling such non-exempt employees to work outside of normal work ours. If management sends e-mails or calls non-exempt employees outside of the forty-hour workweek, and expects non-exempt employees to respond, or knows that such non-exempt employees do, in fact, respond after hours, this will almost certainly be viewed as "compensable time" that must be counted towards overtime calculations. Unfortunately, even if such employees "clock in and out" while at work, they rarely if ever track the time they spend reading e-mails at home. Once a lawsuit is filed, it is extremely factually cumbersome, tedious, and expensive to attempt to recreate hours worked after the fact.

As briefly discussed above, employers should be very careful making any deductions from the payroll of salaried exempt employees or else risk losing their exempt status.

Managers should be trained regarding the FLSA and the North Carolina Wage and Hour Act. Managers need to understand the critical risk of non-compliance of allowing employees to work overtime, and of failing to apply wage and hour rules. It is often the lowest managers who make the mistakes of authorizing overtime, telling employees to work off the clock, or similar errors.

Every position, exempt and non-exempt, should be accompanied by an accurate job description. Too often job descriptions are created by someone who does not actually perform the job. Ideally, each employee would sign off on their own job description or even write it themselves. Job descriptions should be checked periodically to make sure they are still accurate. If a given position is overtime exempt, the job description should track the language of the specific statutory exemption, and clearly identify that the position is exempt or not.

Every employer should also have an employee handbook received by every employee containing a wage and hour policy. Such policy should require that each employee review their timecard when submitted and paycheck when received to ensure its accuracy. Such policy should contain a clear mandatory reporting and anti-retaliation policy. Employees should be offered multiple avenues to report any discrepancies with their pay with the promise that any such issue will be immediately investigated without retaliation. Such a safe harbor policy makes excellent evidence should the matter later be in litigation, but it could have some practical effect of deterring adverse claims.

Finally, employers should be very careful promising raises in the future, bonuses, or other promises relating to wages. This could potentially result in an unintended contract or Wage and Hour Act violation. This could also be addressed in the employee handbook.

Conclusion

The field of wage and hour compliance can potentially be very complex. At a minimum, employers must be able to confidently identify the qualification for exemption for any employee not being paid overtime. Non-exempt employees must clock in and clock out, and be paid overtime at time and a half for every hour worked over 40 hours per week. Failure to do so could have catastrophic consequences.

Jeremy Stephenson *is an attorney in the Charlotte, N.C., office of the McNair Law Firm, P.A., advising employers on employment law compliance and defends management in employment litigation and related lawsuits. He is the Immediate-Past Chair of the Employment Law Practice Group of the NCADA, and he is a Member of the Board of Directors of the Charlotte Area Society of Human Resource Managers. Jeremy also litigates in the state and federal courts of North Carolina in cases pertaining to professional liability, products liability, and other areas of civil liability. He notes that any opinions expressed in this article are his solely and not of the McNair Law Firm, its shareholders, or its clients.*

Editor's Note: This article is an adaptation of Jeremy Stephenson's seminar paper presented at the NCADA's Fall Seminar on October 1, 2010.

Calendar of Events

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March 24, 2011
Northeast NC Regional Social
New Bern, NC

April 1, 2011
First Friday Brown Bag Lunches
Statewide, Various Locations
Go to www.ncada.org for more info

June 16-19, 2011
34th Annual Meeting & Spring Program
Westin Resort & Conference Center
Hilton Head Island, SC

July 1, 2011
First Friday Brown Bag Lunches
Statewide, Various Locations
Go to www.ncada.org for more info

October 7, 2011
First Friday Brown Bag Lunches
Statewide, Various Locations
Go to www.ncada.org for more info

October 14, 2011
Fall Seminar for Insurance Claims
Representatives & Defense Counsel
Grandover Resort & Conference Center
Greensboro, NC

October 26-30, 2011
DRI Annual Meeting
Washington, D.C.

Join us at the NCADA 34th Annual Spring Program & Meeting!

Westin Resort & Spa
Hilton Head, SC
June 16-19, 2011

We're saving a seat for you!

Accommodations Information

Join us for this year's Annual Meeting in beautiful Hilton Head! The Westin Resort & Spa, our headquarters hotel, is located in Port Royal Plantation on picturesque Hilton Head Island. In the event the block at the Westin is filled, you may contact the resort regarding cancellations or contact Lynette Pitt at 919-239-4463 to be added to a wait list for possible cancellations.

A tiered room rate has been secured at the Westin for your convenience (rate does not include applicable taxes and resort fee). Please make reservations directly with the resort at (843) 681-4000 or toll-free at 1-800-WESTIN-1 and ask for the NCADA room block. The cutoff date for the room block is **May 16, 2011**. Reservations can also be made online at www.westin.com/hiltonhead.

NCADA Room Block Rates for 2011
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Villa Options

Ocean Palms Villas associated with the Westin Resort, Hilton Head has 2 and 3 bedroom villas available June 16-19th from $289 per night for a 2 bedroom to $339 per night for a 3 bedroom. Rates do not include tax or housekeeping services and require a 3 night minimum stay. Contact: www.oceanpalmshiltonhead.com

Goode Vacation Rentals has condos available on Port Royal Plantation for the week of June 11-18th. **These rentals require a 1 week minimum stay**. Some of the villas can be booked from Sunday to Sunday. Weekly rates, including all taxes and excluding housekeeping services, range from approximately $1,003 for a 1 bedroom unit; $1,165 for a 2 bedroom and $1,654 for a 3 bedroom unit. For more information, email Gigi Goode at gigi@goodevacationrentals.com; visit www.goodevacationrentals.com or call 1-800-673-9385.

Trident Villa Rentals has units available for a 3-4 night minimum stay at the following rates (excluding housekeeping, taxes and fees):

1 BR Harbourfront - $150/night
2 BR Lagoon view - $160/night
2 BR Harbourfront - $195/night
3 BR Harbourfront - $205/night

Properties on or near the beach are available for Saturday to Saturday rentals during the season. Call 843-785-3447 or 800-237-8306 or log in to www.resortvacations.com for more information. Contact: Cele Eck, trident.rentals@gmail.com

Resort Quest Vacation Rentals has oceanview and oceanfront units available **requiring a minimum 7 night stay.** Nightly rates (excluding housekeeping, taxes and fees) are: 1 BR to 3 BR Oceanview: $270 - $545; 1 BR to 3 BR Oceanfront: $330 - $575/night. Contact: Shani Harris, szharris@resortquest.com, 1-800-826-1649

Visit **www.hiltonheadisland.org** for other housing alternatives and leisure options.