

## CONFUSION DEMANDS CLARITY: A SHORT, COMPLICATED HISTORY OF CONTRACT- BASED FRAUD CLAIMS IN NORTH CAROLINA\*

### INTRODUCTION

In a contract, an integration clause or waiver of reliance indicates the parties agree that the contract represents their complete agreement.<sup>1</sup> Thus, contradictory information from outside of the contract typically cannot be used to determine the scope of the parties' agreement.<sup>2</sup> In North Carolina, the courts have provided unclear guidance on whether integration clauses can completely preclude fraud claims based on representations made outside of the contract. Even when contracts are fully integrated and the parties explicitly agree that neither of them is relying on representations made outside of that contract, North Carolina courts have differed when deciding whether or not to allow extra-contractual representations to serve as the basis for fraud claims.

This Recent Development is centered on two North Carolina Business Court cases: *Wedderburn Corp. v. Jetcraft Corp.*<sup>3</sup> and *Vestlyn BMP, LLC v. Balsam Mt. Group, LLC*.<sup>4</sup> Both opinions involved a motion to dismiss a fraud claim, but they differed in their treatment of extra-contractual statements. The *Wedderburn* court did not allow extra-contractual representations to serve as the basis for a fraud claim, while the *Vestlyn* court did allow extra-contractual statements to serve as the basis for a fraud claim.

The differing conclusions in *Wedderburn* and *Vestlyn* appear to arise from two seemingly distinct ideologies that the North Carolina Business Court applied in the decisions. In *Wedderburn*, the court followed a lineage of cases that gives integration clauses more power to defend against fraud claims based on statements made outside of

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1. See 14A STRONG'S N.C. INDEX 4th, *Evidence and Witnesses* § 1896 (2017).

2. See *id.*

3. No. 15 CVS 757, 2015 WL 6951549 (N.C. Business Ct. Nov. 6, 2015) (unpublished).

4. No. 15 CVS 386, 2016 WL 3883652 (N.C. Business Ct. June 22, 2016) (unpublished).

the contract. In *Vestlyn*, the court followed a lineage of cases that allows parol evidence, or evidence outside of a contract, to support a fraud claim.

The reason for the North Carolina Business Court's differing conclusions in *Wedderburn* and *Vestlyn* is unclear. In *Vestlyn*, the court explained its decision to choose the standard from one lineage over the other as being based on the procedural stage in which the case was decided.<sup>5</sup> However, because both *Vestlyn* and *Wedderburn* were rulings on motions to dismiss, this reasoning does not fully explain the differing outcomes. Because there is no clear distinction between these cases, it is unclear what the standard is for determining whether an integration clause will be held to preclude extra-contractual evidence. This uncertainty creates significant problems for contract drafters, and the creation of a new standard may be required to remedy the issue.

Analysis proceeds in three parts. Part I introduces the two lineages that led to the North Carolina Business Court's differing rulings in *Wedderburn* and *Vestlyn*. Part II analyzes the problem that the differing opinions in *Wedderburn* and *Vestlyn* present to North Carolina courts. Part III offers potential solutions to this problem, including a factor test for courts to use when evaluating written agreements, as well as actions that can be taken by the legislature to offer drafters more certainty regarding the effectiveness of waivers of reliance on extra-contractual representations.

### I. DIFFERING LINEAGES

The first lineage that will be discussed is the *Wedderburn* lineage. This line of cases illustrates North Carolina courts' enforcement of express waivers of reliance on extra-contractual statements at varying stages of litigation. Within this lineage, the courts have considered written contracts to be the parties' complete agreement and refused to allow fraud claims based on evidence outside of the contract to proceed. The second line of cases, the *Vestlyn* lineage, represents North Carolina courts taking the opposite approach when ruling on motions to dismiss. In this lineage, the courts have held that integration clauses cannot serve as complete defenses to fraud claims, and that evidence outside of the contract can be used as the basis for a fraud claim.

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5. See *id.* at \*8.

A. *The Wedderburn Lineage*

The North Carolina Court of Appeals laid the foundation for the *Wedderburn* decision in 1992 when it decided *Ace Inc. v. Maynard*.<sup>6</sup> In *Ace*, the parties entered into a contract for Plaintiff to purchase an airplane.<sup>7</sup> Prior to the completion of the sale, Defendant required that Plaintiff sign a one-page purchase agreement that contained the following statement:

[p]urchasers [Ace, Incorporated] have been informed and understand that this is a final sale, and that the aircraft, parts and accessories, are being sold **“AS IS” and “WHERE IS,”** and that there are **“NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED AS TO ANY MATTER WHATSOEVER, INCLUDING, WITHOUT [sic] LIMITATION, THE CONDITION OF THE AIRCRAFT, PARTS OR ACCESSORIES, ITS MERCHANTABILITY OR ITS FITNESS FOR ANY PARTICULAR PURPOSE.”**<sup>8</sup>

Shortly after signing the agreement and taking possession of the plane, Plaintiff discovered several defects with the aircraft.<sup>9</sup> Defendants refused to fix the defects, leaving Plaintiff to pay for the repairs himself.<sup>10</sup> As a result, Plaintiff brought a claim for fraud, alleging that Defendants sold the aircraft with knowledge that it possessed these defects.<sup>11</sup> At trial, the court granted Defendants' motion for judgment notwithstanding the verdict (JNOV), and Plaintiff appealed.<sup>12</sup>

The North Carolina Court of Appeals affirmed the trial court's grant of the motion for JNOV.<sup>13</sup> The court's analysis focused on two issues: (1) the express language of the written agreement, and (2) the evidentiary foundation of the fraud claim.<sup>14</sup> The court's opinion contained the following language: “because [Plaintiff] effectively agreed when he signed the Purchase Agreement that [D]efendants made no representations whatsoever with regard to the plane, [P]laintiff is unable to establish the making of a *false*

6. 108 N.C. App. 241, 423 S.E.2d 504 (1992).

7. *Id.* at 242, 423 S.E.2d at 505.

8. *Id.* at 244, 423 S.E.2d at 506 (alterations in original) (bold added).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 245, 423 S.E.2d at 507.

13. *Id.* at 250, 423 S.E.2d at 510.

14. *Id.* at 249–50, 423 S.E.2d at 509–10.

representation.”<sup>15</sup> This language suggests an enforcement of the non-reliance provision that Plaintiff signed prior to taking possession of the plane.<sup>16</sup> Because this was a ruling on a JNOV motion, the court had at its disposal all of the evidence that had been gathered for the case, including statements made outside of the contract. Still, the court enforced the contract’s integration clause and held that the clause prevented Defendant from making a claim based on extra-contractual statements.

The cases following *Ace* were decided at progressively earlier stages of litigation where evidence is less available and thus less impactful in the courts’ decision-making. While each case in this lineage tracks the foundational language of *Ace*, they show a steady procedural shift further away from the trial stage, ultimately to the motion to dismiss stage. Still, the courts consistently applied the ruling from *Ace* that integration clauses preclude parties from bringing fraud claims based on evidence outside of the contract. The first case to begin this progression occurred in 2003 when the North Carolina Court of Appeals decided *Chleborowicz v. Johnson*.<sup>17</sup>

In *Chleborowicz*, Defendant sold his boat to Plaintiff and the parties entered into a written agreement.<sup>18</sup> The agreement contained the following language: “THIS VESSEL IS SOLD AS IS, WHERE IS, FREE AND CLEAR OF ALL LIENS AND INDEBTEDNESS[.]”<sup>19</sup> The agreement also stated, “Hull indicated damage is not structural [and] is repaired to buyer’s satisfaction.”<sup>20</sup> Seven months after the purchase of the boat, Plaintiff discovered “a

15. *Id.* at 249–50, 423 S.E.2d at 510 (emphasis in original). This language has been cited multiple times by other North Carolina courts. *See, e.g.*, *Jackson v. Tim Maguire, Inc.*, 226 N.C. App. 583, 741 S.E.2d 514 (2013) (unpublished table decision), 2013 WL 1616031, at \*5; *Chleborowicz v. Johnson*, 160 N.C. App. 250, 584 S.E.2d 108 (2003) (unpublished table decision), 2003 WL 21961386, at \*3; *Wedderburn Corp. v. Jetcraft Corp.*, No. 15 CVS 757, 2015 WL 6951549, at \*5 (N.C. Business Ct. Nov. 6, 2015) (unpublished).

16. While the court appears to dismiss the fraud claim because the integration clause precludes evidence from outside of the contract, the court also stated that even considering the extra-contractual evidence, Plaintiff did not prove the elements of fraud. *Ace Inc.*, 108 N.C. App. at 249–50, 423 S.E.2d at 510 (“Moreover, plaintiff failed to establish concealment of a material fact on the part of defendants because plaintiff presented no evidence that defendants knew of any defects in the plane.”) As a result, it is unclear from the court’s consideration of both the integration clause and the extra-contractual evidence whether the integration clause was enough to dismiss the fraud claim on its own.

17. 160 N.C. App. 250, 584 S.E.2d 108 (Aug. 18, 2003) (unpublished table decision), 2003 WL 21961386.

18. *Id.* at \*1.

19. *Id.*

20. *Id.* at \*3 (alterations in original).

catastrophic failure of the underwater section of the hull” that ended up costing Plaintiff more than \$18,000.<sup>21</sup> Plaintiff brought a claim for fraud. The trial court granted Defendant’s motion for summary judgment, and Plaintiff appealed.<sup>22</sup> The North Carolina Court of Appeals affirmed the trial court’s dismissal of the fraud claim.<sup>23</sup>

In its opinion, the court extensively discussed *Ace* and noted that the contract language in the two cases was similar.<sup>24</sup> Using *Ace* as a guide, the court viewed the integration clause in the contract along with the lack of extra-contractual evidence that the Defendant made any fraudulent statements.<sup>25</sup> As in *Ace*, the North Carolina Court of Appeals affirmed the trial court’s dismissal of the fraud claims.<sup>26</sup> Thus, this shows the court applying the standards from *Ace*, which was a ruling on a motion for JNOV, to a case on a motion for summary judgment.

In *Wedderburn*, the North Carolina Business Court further expanded this lineage of case law and applied the rule that extra-contractual evidence cannot serve as the basis of a fraud claim to a case in the motion to dismiss stage. *Wedderburn* involved the sale of an aircraft.<sup>27</sup> The parties entered into an Aircraft Purchase Agreement (the “APA”) that contained a disclaimer stating that the aircraft “was being sold ‘as is, where is, with all faults,’ disclaiming any warranties, and waiving Seller’s liability for loss of business, lost profit, or other consequential and special damages.”<sup>28</sup> Upon Defendant’s delivery of the aircraft to Plaintiff, the two parties executed an Aircraft Delivery Receipt (the “Receipt”).<sup>29</sup> The Receipt contained a disclaimer that read:

Purchaser hereby acknowledges that the Aircraft satisfies all of the requirements, terms and conditions of the [APA]. By

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21. *Id.*

22. *Id.* at \*1.

23. *Id.* at \*5.

24. *Id.* at \*3.

25. *See id.* In its analysis, the court both acknowledged the integration clause in the contract and stated that there was no extra-contractual evidence that Defendant committed fraud. *Id.* Even though the court dismissed the fraud claim, its discussion of the extra-contractual evidence proving fraud makes it unclear whether the dismissal of the fraud claim was entirely because of the integration clause. Thus, under *Chleborowicz* it is unclear whether a waiver of reliance clause is enough on its own to dismiss a fraud claim based on extra-contractual statements.

26. *Id.* at \*5.

27. *Wedderburn Corp. v. Jetcraft Corp.*, No. 15 CVS 757, 2015 WL 6951549, at \*1 (N.C. Business Ct. Nov. 6, 2015) (unpublished).

28. *Id.*

29. *Id.*

reason of the execution and delivery by Purchaser of this Aircraft Delivery Receipt, it is conclusively presumed that (i) Purchaser has approved and accepted the Aircraft and the Aircraft Documents . . . **“As Is, Where is”** in its then current technical condition and state of repair, with all faults, limitations and defects (whether hidden or apparent), regardless of cause; and (ii) **except for Seller’s warranty of title to the Aircraft contained in the [APA] and Warranty Bill of Sale, Seller has not made with respect to the condition of the Aircraft any representation, warranty or guaranty of any kind, express or implied, whether arising in, law, in equity, in contract, or in tort, including, without limitation, any implied warranty of merchantability, airworthiness, design, condition, or fitness for a particular use.**<sup>30</sup>

Over the next few months, the corrections to the aircraft took longer than expected.<sup>31</sup> Plaintiff filed a fraud claim, alleging that Defendant had knowingly made false statements as to the status of the aircraft.<sup>32</sup> Defendant moved to dismiss the complaint.<sup>33</sup>

The North Carolina Business Court granted Defendant’s motion to dismiss on Plaintiff’s fraud claim.<sup>34</sup> Citing to *Chleborowicz* and *Jackson v. Tim Maguire, Inc.*,<sup>35</sup> the court applied the analysis from *Ace* and viewed the express language of the written agreement as dispositive of the fraud claim.<sup>36</sup> The following part of the opinion illustrates this analysis:

After Defendant made the representations, Plaintiff signed the Delivery Receipt and took delivery of the Aircraft. These representations, made prior to Plaintiff’s execution of the disclaimer contained in the Delivery Receipt in which Plaintiff expressly acknowledged and agreed that Defendants had ‘not made . . . any representation’, **cannot support claims for fraud or negligent misrepresentation.**<sup>37</sup>

30. *Id.* at \*2 (alterations in original) (emphasis added).

31. *Id.* at \*3.

32. *Id.* at \*9.

33. *Id.* at \*1.

34. *Id.* at \*12.

35. 226 N.C. App. 583, 741 S.E.2d 514 (Apr. 16, 2013) (unpublished table decision), 2013 WL 1616031. *Jackson* also explicitly applies the standard from *Ace* to dismiss a fraud claim at the summary judgment stage. *Id.* at \*5.

36. *Wedderburn Corp.*, 2015 WL 6951549, at \*9.

37. *Id.* (emphasis added) (citing *Jackson*, 2013 WL 1616031, at \*3–5; *Chleborowicz v. Johnson*, 160 N.C. App. 250, 584 S.E.2d 108 (2003) (unpublished table decision), 2003 WL 21961386, at \*3–4).

Based on the court's language, *Wedderburn* appears to extend the *Ace* analysis to cases at the motion to dismiss stage, even though the evidentiary standards at the motion to dismiss stage are significantly different from the JNOV stage under which *Ace* was decided. In North Carolina, a court deciding a motion to dismiss may only consider the evidence of allegations contained within the pleadings.<sup>38</sup> Once a court begins to consider evidence outside of this scope, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56."<sup>39</sup> Under these rules, at the motion to dismiss stage as in *Wedderburn*, the only pieces of evidence that the North Carolina Business Court had to consider were the allegations contained in the pleadings and likely the actual written agreement itself. Had the case proceeded to the summary judgment or JNOV stages, the court would have been able to look outside of the pleadings and consider "depositions, answers to interrogatories, and admissions on file, together with the affidavits."<sup>40</sup> *Wedderburn* occurred at the opposite end of the procedural spectrum as *Ace* and *Chleborowicz*, and therefore the court was not entitled to consider evidence from discovery as the courts could in the earlier cases. Still, the court chose to apply the same standard from *Ace* and hold that waivers of reliance can effectively bar fraud claims based on extra-contractual statements.

#### B. *The Vestlyn Lineage*

The *Vestlyn* lineage illustrates North Carolina courts taking an opposite approach to express disclaimers and refusing to allow these contractual provisions to serve as complete defenses to fraud claims. Adhering to a much different approach than the *Wedderburn* lineage, the following line of case law appears conflicting and irreconcilable with the *Wedderburn* lineage.

The case law supporting *Vestlyn* is based upon the rule that parol evidence will be admitted to form the basis of a fraud claim.<sup>41</sup> In

38. See *Weaver v. St. Joseph of the Pines, Inc.*, 187 N.C. App. 198, 203–04, 652 S.E.2d 701, 707 (2007) (interpreting N.C. R. Civ. P. 12(b)).

39. N.C. R. Civ. P. 12(b).

40. N.C. R. Civ. P. 56. The gap between what is contained in the pleadings and what is ascertainable through discovery raises questions as to whether courts should apply *Ace* at the motion to dismiss stage. As was stated above, the court's discussion of extrinsic evidence of fraud in *Chleborowicz* makes the significance of evidence unclear, thus raising questions as to the applicability of *Ace* at the motion to dismiss stage. See *supra* note 25.

41. See *Fox v. S. Appliances, Inc.*, 264 N.C. 267, 270, 141 S.E.2d 522, 525 (1965) (citing *Anderson Cotton Mills v. Royal Mfg. Co.*, 218 N.C. 560, 11 S.E.2d 550 (1940); *Hardware Co. v. Kinion*, 191 N.C. 218, 131 S.E. 579 (1926); *Miller v. Howell*, 184 N.C. 119, 113 S.E.

*Vestlyn*, the North Carolina Business Court had the following precedent at its disposal:

Where there is a claim for fraud in the inducement, defenses based upon the fraudulently induced contract will not bar the claim. . . . [P]arol evidence could be introduced in contravention of an integration clause in a contract, where there was fraud in the inducement, which ‘vitiates the contract.’<sup>42</sup>

Thus, unlike the *Wedderburn* lineage, the *Vestlyn* line of cases uses a standard that rejects the notion that waivers of reliance can serve as a complete defense to fraud claims. Instead, the rule followed in the *Vestlyn* lineage explicitly states that courts will consider extra-contractual evidence in spite of contractual defenses, such as waivers of reliance.

*Vestlyn* involved the sale of real property between two corporations.<sup>43</sup> The Sales Purchase Agreement (the “SPA”) involved the sale of Plaintiffs’ interest in any land located in Jackson County, North Carolina.<sup>44</sup> The SPA provided Defendants with a due diligence period of 44 days that would allow Defendants to inspect the property as well as terminate the SPA at any point during that period.<sup>45</sup> Defendants also agreed that it “ha[d] examined and underst[ood] the operation and/or condition of the Property” and “ ‘ha[d] made such examination of the operation, income and expenses of the Property, as well as other matters and documents affecting or relating to this transaction’ as it ‘deemed necessary.’ ”<sup>46</sup> The SPA also contained an integration clause that said the parties were only bound by the provisions in the SPA and not by any statements made outside of the contract.<sup>47</sup>

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621 (1922); *White Sewing Mach. Co. v. Bullock*, 161 N.C. 1, 76 S.E. 634 (1912); *Unitype Co. v. Ashcraft Bros.*, 155 N.C. 63, 71 S.E. 61 (1911)); *see also* 37 AM. JUR. 2D *Fraud and Deceit* § 468, Westlaw (database updated May 2017).

42. *Tradewinds Airlines, Inc. v. C-S Aviation Servs.*, 222 N.C. App. 834, 842, 733 S.E.2d 162, 169–70 (2012) (citing *Laundry Mach. Co. v. Skinner*, 225 N.C. 285, 288–89, 34 S.E.2d 190, 192–93 (1945)).

43. *Vestlyn BMP, LLC v. Balsam Mountain Grp., LLC*, No. 15 CVS 386, 2016 WL 3883652, at \*2 (N.C. Super. Ct. June 22, 2016) (unpublished).

44. *Id.*

45. *Id.*

46. *Id.* (citations omitted).

47. *Id.* (“Seller shall not be bound in any manner whatsoever by any guarantees, promises, projections, or other information . . . whether verbally or in writing, except as expressly set forth in this Agreement.”)



Following the transaction, Plaintiffs brought a breach of contract claim against the Defendants.<sup>48</sup> In response, Defendants filed a counter-claim alleging that Plaintiffs made false extra-contractual representations as to their ability to redevelop the land included in the SPA into single or multi-family use.<sup>49</sup> Plaintiffs, instead of arguing that Defendant did not sufficiently allege fraud, simply contented that the integration clause barred any reliance on representations made outside the SPA.<sup>50</sup> Defendants alleged that “circumstances surrounding the transaction ‘induced [Defendant] to forego additional investigation’ of the misrepresentation,” and so they were entitled to rely on Plaintiffs’ representations outside of the SPA.<sup>51</sup>

The court held that the disclaimers in the SPA did not serve as complete defenses to the fraud claim.<sup>52</sup> Instead, the court applied the standard from the *Vestlyn* lineage and allowed evidence outside of the contract to be used as the basis for a fraud claim.<sup>53</sup> The *Vestlyn* court distinguished the case from the *Wedderburn* lineage by arguing that *Ace* and *Chleborowicz* took place at later stages of litigation than the motion to dismiss stage, and that the consideration of evidence at these stages required a different standard to be used for evaluating extra-contractual evidence than in 12(b)(6) proceedings.<sup>54</sup> However, in distinguishing itself from *Ace* and the cases that followed in that lineage, the court did not discuss *Wedderburn*.<sup>55</sup> The failure to discuss *Wedderburn* makes the court’s distinction between the *Wedderburn* and *Vestlyn* lineages unclear. Both cases were decided at the motion to dismiss stage. If, as the court explained in *Vestlyn*, the rule for determining which of the two lineages applies is based on the procedural stage, then *Wedderburn* and *Vestlyn* should have been decided in the same manner. Instead, *Wedderburn* and *Vestlyn* were decided in the same procedural stage, but the court applied different lineages and had opposite findings regarding the effectiveness of waivers of reliance. As a result, the distinction between the two lineages that is drawn by the court in *Vestlyn*, taken in consideration

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48. *Id.* at \*1.

49. *Id.* at \*6.

50. *Id.*

51. *Id.* (alteration in original).

52. *Id.* at \*7–8 (citing *Fox v. S. Appliances, Inc.*, 264 N.C. 267, 270, 141 S.E.2d 522, 525 (1965); *Tradewinds Airlines, Inc. v. C-S Aviation Servs.*, 222 N.C. App. 834, 842–45, 733 S.E.2d 162, 169–71 (2012); *Parker v. Bennett*, 32 N.C. App. 46, 50, 231 S.E.2d 10, 13 (1977)).

53. *Id.*

54. *Id.* at \*8

55. *Id.* (distinguishing the case from cases within the *Wedderburn* lineage but not discussing *Wedderburn*).

with the differing rulings in *Vestlyn* and *Wedderburn*, demonstrates the seeming incompatibility of the two lineages.

## II. THE PROBLEM THESE LINEAGES HAVE CREATED

The North Carolina Business Court was created in part to “establish a body of case law to serve as guidance on business issues to the business community.”<sup>56</sup> This goal allows North Carolina to develop a better business culture,<sup>57</sup> much like what Delaware accomplished through the establishment of its Court of Chancery. The current incompatibility of the *Wedderburn* lineage and the *Vestlyn* lineage does not serve that goal.

The two lines of cases appear irreconcilable for courts that are handling fraud claims at the motion to dismiss stage in cases where there is a written agreement that contains an express waiver of reliance on extra-contractual provisions. Because the *Vestlyn* court distinguishes itself from *Ace* on procedural grounds, whereas *Wedderburn* was decided in the same procedural stage and did apply the standard from *Ace*, it is unclear when each lineage applies. The opposite rulings in these two cases force North Carolina courts deciding cases at the motion to dismiss stage to choose between the two seemingly contradictory standards with no guidance for which standard is correct.<sup>58</sup> Because there is no explanation for the differing rulings, North Carolina courts are left with two incompatible lines of cases.

The conflict between *Vestlyn* and *Wedderburn* presents an obvious issue for businesses and contract drafters in determining how to protect themselves from litigation. On one hand, *Wedderburn* dictates that as long as an agreement contains the proper disclaimer, defendants should not worry about the prospect of discovery or trial because fraud claims will likely be dismissed at the motion to dismiss

56. Carrie A. O'Brien, Note, *The North Carolina Business Court: North Carolina's Special Superior Court for Complex Business Cases*, 6 N.C. BANKING INST. 367, 376 (2002) (citing Interview with Judge Ben Tennille, Special Superior Court Judge for Complex Business Cases, in Greensboro, N.C. (Jan. 14, 2001)).

57. *Id.* at 374–75.

58. Although there are factual differences between the two cases, *Vestlyn* does not explain how a court might interpret an integration clause differently based on the underlying facts of a case. For example, there is nothing to indicate the non-reliance provision was enforced differently in *Vestlyn* because *Vestlyn* involved a real estate transaction while *Wedderburn* involved a personal property transaction. See *Vestlyn*, 2016 WL 3883652, at \*7–8.

stage.<sup>59</sup> However, *Vestlyn* holds the opposite—that no matter what kind of waiver is contained within an agreement, it will be vitiated at the motion to dismiss phase by mere allegations of fraud, and all of the extra-contractual statements that the parties agreed to keep out will be allowed in as evidence, following an expensive discovery process.<sup>60</sup> Rather than attempt to decide which one of these opposing approaches may be better, North Carolina should not follow either line of cases. Instead, the courts and legislature should explore alternative solutions.

### III. WHERE DO WE GO FROM HERE?

The creation and execution of agreements must be a process in which parties have a clear understanding of how they can protect themselves from lawsuits. Without that clarity, businesses in North Carolina will be open to lawsuits they agreed to preclude. There are multiple alternatives to the current standards that could provide this certainty. One potential solution is to allow courts to weigh factors when determining the enforceability of an integration clause. Alternatively, the legislature could develop contractual provisions that—when placed into certain written agreements—could be utilized as complete defenses to fraud claims. A similar alternative would be allowing the legislature to create specific rules or templates for how parties can write enforceable integration clauses into their contracts. Overall, any of these alternatives would be preferable to the current standard, where parties to a contract are forced to guess what lineage of case law a court will choose to apply when interpreting their contract.

#### A. *Factor Tests*

Disclaimers in contracts need to be given force in certain situations. Other jurisdictions have grappled with this contention when handling fraud claims. The Court of Appeals of New York aptly summarized this issue when it stated:

If the language here used is not sufficient to estop a party from claiming that he entered the contract because of fraudulent representations, then no language can accomplish that purpose. To hold otherwise would be to say that it is impossible for two businessmen dealing at arm's length to agree that the buyer is

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59. See *Wedderburn Corp. v. Jetcraft Corp.*, No. 15 CVS 757, 2015 WL 6951549, at \*9 (N.C. Business Ct. Nov. 6, 2015) (unpublished).

60. See *Vestlyn*, 2016 WL 3883652, at \*7–8.

not buying in reliance on any representations of the seller as to a particular fact.<sup>61</sup>

Contractual provisions like integration clauses will be rendered meaningless if they cannot prevent the very thing that they are constructed to protect against. There is also an irony to the idea that disclaimers cannot afford a defense to fraud claims. If a purchaser signs an agreement confirming that he did not rely on representations outside of the agreement, then he is “perpetrating [his] own fraud” by bringing the fraud claim.<sup>62</sup> However, that is not to say that a court must apply the standard from the *Wedderburn* lineage in all scenarios. For example, in basic consumer contracts where the consumer is generally vastly less sophisticated than the seller of the product, it would be against the public’s interest to always bind the consumer to the boilerplate language of a contract’s integration clause if the contract was procured by fraud.<sup>63</sup> In order to avoid these issues, other jurisdictions have held that rather than always enforcing or always ignoring disclaimers, the best approach may be to consider several factors surrounding the agreement before making the decision to enforce or ignore specific terms.<sup>64</sup>

In *Barr v. Dyke*,<sup>65</sup> the Supreme Court of Maine developed a factor test that allows the court to evaluate the circumstances that give rise to the alleged fraudulently induced agreement.<sup>66</sup> The court listed the following factors as necessary considerations when deciding upon the enforceability of disclaimers:

61. *Danann Realty Corp. v. Harris*, 157 N.E.2d 597, 600 (N.Y. 1959).

62. Andrew M. Zeitlin & Alison P. Baker, *At Liberty to Lie? The Viability of Fraud Claims after Disclaiming Reliance*, ABA, BUS. TORTS LITIG. COMM., (Spring 2013), [http://www.shipmangoodwin.com/files/21504\\_BUS\\_Article\\_Reprint.pdf](http://www.shipmangoodwin.com/files/21504_BUS_Article_Reprint.pdf) [https://perma.cc/8XU3-TFNB] (citing *Danann Realty Corp.*, 157 N.E.2d at 600).

63. Delaware courts, for example, have already recognized that there is a need to distinguish between sophisticated and unsophisticated parties when determining whether to enforce a waiver of reliance. *Progressive Int’l Corp. v. E.I. Du Pont de Nemours & Co.*, 2002 WL 1558382, at \*7 (Del. Ch. July 9, 2002) (stating that there is a greater presumption to bind parties by contractual terms if the parties are sophisticated).

64. See *Barr v. Dyke*, 2012 ME 108, ¶ 27, 49 A.3d 1280, 1289–90 (Me. 2012) (establishing six factors to consider when determining the enforceability of disclaimers when allegations of fraud exist); *Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V.*, 952 N.E.2d 995, 1001–02 (N.Y. 2011) (analyzing through a fact-based approach and applying factors such as sophistication of parties); *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 60 (Tex. 2008) (clarifying which factors are to determine whether a disclaimer is enforceable).

65. 2012 ME 108, 49 A.3d 1280 (Me. 2012).

66. 2012 ME 108, ¶ 27, 49 A.3d at 1289.

(1) Whether the complaining party was advised by counsel; (2) Whether the terms of the agreement were negotiated and not boilerplate; (3) Whether the transaction was an arm's-length transaction; (4) Whether the parties were knowledgeable in business matters; (5) Whether the language of the clause was clear; and (6) Whether, if litigation was against a fiduciary, the adversarial relationship of the parties demonstrated an absence of trust between the parties that negated any claim of reasonable reliance.<sup>67</sup>

These factors allow courts to evaluate agreements with a more nuanced approach. For example, the presence of counsel speaks to whether or not the playing field is level. Without counsel, a party may not be operating with a full understanding of the transaction.<sup>68</sup> Whether or not the contractual provisions were negotiated or boilerplate is important to consider because it arguably reflects a clearer intent of the parties.<sup>69</sup> Factors three, four, and five of the *Barr* test all speak to the relationship of the parties and the ability of each to understand the ins and outs of the transaction.<sup>70</sup> While these factors taken together might not be wholly representative of all the considerations that should be made in North Carolina courts, they do demonstrate an efficient list of things to consider when evaluating whether or not to enforce the contract exactly as it appears in writing.

In *Barr*, the Supreme Court of Maine provides an example of the test being used while evaluating the enforceability of a waiver of reliance clause.<sup>71</sup> In *Barr*, Plaintiffs were minority stockholders in a company that brought legal action against Defendants, the company's directors, for breach of fiduciary duty.<sup>72</sup> The parties resolved this dispute by reaching an agreement for Plaintiffs to sell their shares.<sup>73</sup> This agreement contained a provision stating that Plaintiffs had independently conducted a valuation of the company and that Plaintiffs had not relied on any representations made by Defendants when conducting this assessment.<sup>74</sup> Plaintiffs later filed a complaint against Defendants, alleging that they had been fraudulently induced

67. *Id.*

68. *See Centro Empresarial Cempresa S.A.*, 952 N.E.2d at 1001–02.

69. *See Forest Oil Corp.*, 268 S.W.3d at 60 (referring to negotiated terms as something that the parties specifically discussed during negotiations).

70. *See Barr*, 2012 ME 108, ¶ 27, 49 A.3d at 1289–90.

71. *Id.*

72. 2012 ME 108, ¶ 3, 49 A.3d at 1283.

73. 2012 ME 108, ¶ 4, 49 A.3d at 1283.

74. *Id.*, 49 A.3d at 1283–84.

into entering the agreement.<sup>75</sup> The court granted summary judgment in favor of Defendants, and Plaintiffs appealed.<sup>76</sup>

The Supreme Court of Maine affirmed summary judgment for Defendants after evaluating the agreement under the factors test listed above.<sup>77</sup> The court made the following statements regarding each factor:

The summary judgment record demonstrates the following: the language of the disclaimer was clear; there is no pending allegation or proof of fraud that falls outside the scope of that disclaimer; Barr and Warren were businessmen who were familiar with the company and obtained or had the opportunity to obtain their own independent evaluation of the value of the stock; all parties were represented by counsel; the settlement's terms were negotiated at arm's length; and by the time the parties settled the pending lawsuit, there was no relationship of trust between the parties notwithstanding the preexisting fiduciary duties of the officers and directors.<sup>78</sup>

Here the court enforced the integration clause in part based on the status of the parties, noting that the parties were businesspeople with knowledge of the company.<sup>79</sup> Through this, the court showed that this was not a commercial contract of adhesion or an agreement in which “rigid enforcement of disclaimer-of-reliance clauses . . . may be inappropriate.”<sup>80</sup> Instead, the court emphasized that in agreements between more knowledgeable and experienced parties like the businessmen in *Barr*, failing to enforce contracts’ integration clauses will “‘grievously impair[]’ freedom of contract.”<sup>81</sup> This language is a good example of how a Court weighs one of these factors and considers it in the greater context of contracts principles. While none of the factors listed above are dispositive,<sup>82</sup> each of them—like in the above analysis—may provide a court the avenue for considering the effect that enforcement of agreements may have on contracts law.

Other courts have employed similar approaches using factor tests. For example, New York courts use a three factor test to

75. 2012 ME 108, ¶ 6, 49 A.3d at 1284.

76. 2012 ME 108, ¶ 10–11, 49 A.3d. at 1285.

77. 2012 ME 108, ¶ 33, 49 A.3d at 1291.

78. 2012 ME 108, ¶ 29, 49 A.3d at 1290.

79. *Id.*

80. 2012 ME 108, ¶ 18, 49 A.3d at 1287.

81. 2012 ME 108, ¶ 24, 49 A.3d at 1288 (quoting *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 61 (Tex. 2008) (alterations in original)).

82. 2012 ME 108, ¶ 27, 49 A.3d at 1289–90.

determine whether to enforce an integration clause that includes: “(1) whether the complaining party was a corporation and was advised by counsel; (2) whether the complaining party knew that existing information had not been provided as of the time of settlement; and (3) whether fraud separate from the fraud settled through the release can be established.”<sup>83</sup> Similarly, the Texas Supreme Court has also applied a factor test when evaluating the enforceability of contractual disclaimers.<sup>84</sup> While these individual factor tests may not use the exact factors that should be applied in North Carolina, they are good examples of functional approaches employed in other jurisdictions.

Using a factor test gives courts flexibility when making decisions regarding whether or not to enforce an integration clause that prevents a fraud claim. However, a factor test can also have negative consequences by compromising predictability in courts’ decision-making as compared to a bright-line rule. Any factor test will provide a nuanced approach to the enforceability of agreements, which can hamper parties’ ability to predict how a court may rule. Predictability is an important concern for the North Carolina Business Court, as the current problem is the lack of consistency and predictability under *Wedderburn* and *Vestlyn*. Easily identifiable factors could create more predictability compared to other factor tests by allowing for transparency and providing parties to a contract with a road map for how the court will make its decision. Additionally, assigning particular levels of weight to each factor or reducing the number of factors would help to quell concerns that a factor test would create more unpredictability.<sup>85</sup> Ultimately, a factor test, while sacrificing a bit in predictability, would provide a better alternative to the current problems caused by the *Wedderburn* and *Vestlyn* lineages.<sup>86</sup>

### *B. Boilerplate Contractual Provisions*

In addition to a factor test, North Carolina law suggests that there may be a way for the legislature to develop certain contractual

83. 2012 ME 108, ¶ 23, 49 A.3d at 1288 (citing *Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V.*, 952 N.E.2d 995, 1001–03 (N.Y. 2011)).

84. See *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 61 (Tex. 2008) (citing *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997)).

85. See Joseph P. Liu, *Two-Factor Fair Use?*, 31 COLUM. J.L. & ARTS 571, 579 (2008) (arguing that an advantage to using a factor test with only two factors is a greater ability to determine the weight and strength of the factors individually).

86. Sheri P. Adler, Note, *Alternative Litigation Finance and the Usury Challenge: A Multi-Factor Approach*, 34 CARDOZO L. REV. 329, 356–57 (arguing that a factors test is not a “talisman of magical power,” but that it can provide a “source of helpful guidance.” (quoting *Dillin v. United States*, 433 F.2d 1097, 1100 (5th Cir. 1970))).

provisions that can serve as complete defenses to fraud claims. In the context of business contracts, the legislature has taken steps to control the enforceability of attorney's fee claims, including when they are enforceable and exactly how they must be signed.<sup>87</sup> Based on the legislature's existing willingness to control certain parts of contract drafting, the legislature could pass statutes with boilerplate contractual provisions and instruct that they serve as complete defenses to fraud claims. For example, one of the provisions may appear as such: "I hereby waive any reliance on any representation that was made outside of the contract. The entire agreement is contained in the express language of this written agreement. By signing this agreement, I am waiving my right to pursue a fraud claim based on this agreement." While this language may not be what the legislature would adopt, it expresses the general aim of these provisions: to put parties on notice that once the agreement is signed, extra-contractual fraud is no longer a viable legal claim.

However, this approach may give rise to many of the same issues that exist under the current system. One concern is the type of pressure it puts on contract drafters to create provisions that courts will actually enforce. For example, some courts may only enforce non-reliance disclaimers when they are specific enough.<sup>88</sup> The solution to this problem would be, as stated above, to have the legislature adopt exact language that when put into a contract would completely prevent a fraud claim. However, this would lead to another concern regarding how to protect less experienced consumers when these types of provisions are in play. For example, a party with no understanding of contract language may not understand the consequences of signing a contract with this type of provision, and then that party would have no remedy if there was genuine fraud in the transaction. A possible solution to this issue would be to only allow these fraud defense provisions to be effective under certain conditions.<sup>89</sup> This would allow waivers of reliance to be utilized only when the parties are operating in a context appropriate for that level of contract enforcement, such as when the parties are more sophisticated or experienced contract drafters. The definitions of "business contract" and "consumer contract" already contained in North Carolina law may provide helpful guidance for establishing

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87. See N.C. GEN. STAT. § 6-21.6 (2015).

88. See *Caiolo v. Citibank, N.A.*, New York, 295 F.3d 312, 330 (2d Cir. 2002).

89. See N.C. GEN. STAT. § 6-21.6(a)–(e) (2015) (establishing defined categories of contracts and when attorney's fees provisions can be employed in each).



where enforcing waivers of reliance is appropriate.<sup>90</sup> If the legislature were to limit the enforceability of waiver of reliance provisions to “business contracts,” that could ensure less sophisticated parties would not be without recourse if they were defrauded in a consumer transaction.

While both of these solutions are adoptable together, either one would aid North Carolina in taking a positive step from the current problem. Both the factor test and the boilerplate contract provision are alternatives to the current *Wedderburn/Vestlyn* dichotomy that would give contract drafters a clearer understanding of what will be enforced by the courts. Implementing either of these solutions would increase the predictability and consistency in North Carolina courts’ application of integration clauses to fraud claims.

#### CONCLUSION

The differing lineages of *Wedderburn* and *Vestlyn* illustrate an unclear conflict in North Carolina contract law. Businesses and practitioners have little reason to feel confident that their express written agreements will have any force when combating claims for fraud, even when the agreements contain waivers of reliance. However, there may be a way to resolve this conflict and adopt a more comprehensive standard that allows courts to be flexible in how they analyze fraud claims. North Carolina needs a balance between honoring the power of express agreements and protecting inexperienced consumers. Through the adoption of a factor test or statutory boilerplate contractual provisions, North Carolina might be able to chart a more predictable standard for businesses and practitioners.

J. WILLIAM GRAEBE\*\*

90. *Id.* § 6-21.6(a).

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