

## Settlement Agreements are Favored Under North Carolina Law. . .or So We Thought: Problems with the Court of Appeals' New Approach Allowing County Governments to Invalidate an Otherwise Binding Settlement Agreement Using North Carolina General Statute Section 159-28

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### INTRODUCTION

The situation is not difficult to imagine. You, the attorney, represent a corporation seeking to enforce a contract this particular client has made with a municipal or county government. In the course of litigating the matter, the two sides, through their attorneys, orally agree to a settlement. In fact, subsequent to the oral settlement agreement, the county's board of commissioners unanimously votes to approve the agreement, authorizes the county manager to execute the necessary documents, and directs him or her to appropriately amend the county's budget. At this point, as the attorney for the corporation, and for that matter the county, one would assume the matter resolved. Unfortunately, this assumption is wrong.

The North Carolina Court of Appeals has taken a radical, new approach to settlement agreements<sup>1</sup> by allowing a county to invalidate

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1. 15A AM. JUR. 2D *Compromises and Settlements* § 1 (2007) (“A ‘compromise’ or ‘settlement agreement’ is an agreement to terminate, by means of mutual concessions, a claim which is disputed in good faith or unliquidated. It is an amicable method of settling or resolving bona fide differences or uncertainties and is designed to prevent or put an end to litigation.”). An agreement to settle has been defined in various other ways. See BLACK'S LAW DICTIONARY 67, 1377 (7th ed. 1999) (defining a settlement as “an agreement ending a dispute or lawsuit” and an agreement as “a mutual understanding between two or more persons about their relative rights and duties regarding past or future performances”); cf. RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981) (defining an agreement as a “manifestation of mutual assent on the part of two or more persons”).

a settlement agreement if it is not in compliance with North Carolina General Statute section 159-28(a). The first case to articulate this new approach, *Cabarrus County v. Systel Bus. Equip. Co.*,<sup>2</sup> dealt a blow to established North Carolina case law favoring settlement agreements and effectively treats county governments differently than private persons in a settlement context. In the course of normal settlement negotiations, a person or private entity will be bound when an agreement of settlement has been reached; now, however, a county or municipal government may be able to escape liability under the court of appeals ruling despite having an otherwise valid settlement agreement.

*Cabarrus County v. Systel Bus. Equip. Co.* voided a settlement agreement based on the exact scenario as described above. The court's conclusion was based on a technicality; the settlement agreement did not include a signed pre-audit certification under North Carolina General Statute section 159-28(a).<sup>3</sup> This opinion by the North Carolina Court of Appeals goes against established precedent regarding settlement agreements, has major public policy implications, and is likely to have many negative side effects on dispute resolution in North Carolina. After allowing the attorney to orally agree to a contractual settlement, voting to approve the settlement, setting aside the funds to pay the settlement, and instructing its finance agents to execute the proper documents to fund the settlement, a county government can renege on the agreement simply by instructing the finance officer not to sign the pre-audit certification.

This comment first examines the established law of settlement agreements in North Carolina, specifically relating to how such agreements are favored under the law, general enforcement of these agreements, and special rules concerning counties and municipalities. Second, it focuses on the requirements for a pre-audit certification under North Carolina General Statute section 159-28(a), the perplexing judicial interpretation of this statute by the North Carolina Court of Appeals, and the resulting inequitable status of the law that treats settlement agreements with county and municipal governments on a different playing field than those with a private entity. Finally, a proposal is offered to remedy the one-sided state of the law that now allows a county or municipal government to back out of a settlement agreement to which it would otherwise be bound. In light of the decision in *Cabarrus County v. Systel Bus. Equip. Co.*, the North Carolina General Assembly should amend North Carolina General Statute sec-

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2. 614 S.E.2d 596 (N.C. Ct. App. 2005), *cert. denied*, 621 S.E.2d 177 (N.C. 2005).

3. *Id.* See also N.C. GEN. STAT. § 159-28(a) (2005).

tion 159-28(a) to specifically exclude settlement agreements from the statute's purview in order to reflect North Carolina's well-established tradition and long-honored public policy favoring out of court settlement of cases and controversies.

## I. LAW OF SETTLEMENT AGREEMENTS IN NORTH CAROLINA

### A. *Settlement Agreements Are Favored Under North Carolina Law*

It is established public policy in North Carolina that the law favors the settlement of controversies out of court.<sup>4</sup> This policy is articulated in North Carolina's law of evidence, manifesting itself in two specific rules. First under Rule 408, the law declares that evidence of an offer to compromise the controversy involved in litigation is inadmissible at trial.<sup>5</sup> Likewise, conduct or statements made in the course of settlement negotiations is also inadmissible at trial.<sup>6</sup> Second under Rule 410, North Carolina declares that evidence of pleas, plea discussions, and related statements are not admissible against the defendant who made them.<sup>7</sup> The underlying policy of Rule 410 further empha-

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4. *Nationwide Mut. Ins. Co. v. Aetna Cas. & Sur. Co.*, 159 S.E.2d 268, 273 (N.C. Ct. App. 1968) (quoting *Penn Dixie Lines, Inc. v. Grannick*, 78 S.E.2d 410, 413 (N.C. 1953)).

5. N.C. GEN. STAT. § 8C-1, Rule 408 (2005) ("Compromise and [O]ffers to [C]ompromise[:] Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or evidence of statements made in compromise negotiations is likewise not admissible."). *Accord* FED. R. EVID. 408. *See also* *Penn Dixie Lines, Inc. v. Grannick*, 78 S.E.2d 410, 413 (N.C. 1953) ("[T]he law favors the settlement of controversies out of court. . . . [I]f a man could not settle one claim out of court without fear that this would be used in another suit as an admission against him, many settlements would not be made.").

6. *Id.*

7. N.C. GEN. STAT. § 8C-1, Rule 410 (2005) ("Inadmissibility of [P]leas, [P]lea [D]iscussions, and [R]elated [S]tatements[:] Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible for or against the defendant who made the plea or was a participant in the plea discussions: (1) A plea of guilty which was later withdrawn; (2) A plea of no contest; (3) Any statement made in the course of any proceedings under Article 58 of Chapter 15A of the General Statutes or comparable procedure in district court, or proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable procedure in another state, regarding a plea of guilty which was later withdrawn or a plea of no contest; (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn."). *Accord* FED. R. EVID. 410.

sizes the state's strong interest in encouraging settlements of civil, as well as criminal matters without proceeding to trial.

North Carolina's public policy of encouraging settlements is also evident in legislation passed by the North Carolina General Assembly. In 1985, North Carolina General Statute section 150B-22 was enacted as an articulation of the state's public policy relating to settlements with agencies: "It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges . . . should be settled through informal procedures."<sup>8</sup> In 1991, the General Assembly further promoted the public policy of encouraging out of court settlements when it authorized a pre-trial, court-ordered mediation pilot program for superior court civil cases.<sup>9</sup> A statewide expansion of the pilot program was enacted in 1995 as North Carolina General Statute section 7A-38.1.<sup>10</sup> Under this statute, parties to any superior court civil action are required to participate in court-ordered mediation settlement conferences to make civil litigation more economical, efficient, and satisfactory to litigants and the State.<sup>11</sup> This program has a proven track record in North Carolina since the inception of the program in the superior court system; each year over half the cases referred to mediation have settled at conference.<sup>12</sup>

Finally, the state's appellate courts have had influence in promoting the public policy of favoring settlement agreements. In furtherance of this policy, the North Carolina Supreme Court has authorized a mediation program to be undertaken by the North Carolina Court of Appeals.<sup>13</sup> Appellate mediation offers participants an opportunity to voluntarily submit their appeal to the court of appeals for a candid

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8. N.C. GEN. STAT. § 150B-22 (2005).

9. Allison Maluf, Note, *A Mediation Nightmare?: The Effect of North Carolina Supreme Court's Decision in Chappell v. Roth on the Enforceability and Integrity of Mediated Settlement Agreements*, 37 WAKE FOREST L. REV. 643, 649 (2002).

10. See N.C. GEN. STAT. § 7A-38.1 (2005).

11. N.C. GEN. STAT. § 7A-38.1(a) (2005).

12. 2004-2005 N.C. DISPUTE RES. COMM'N REP. 6-7, available at <http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/annualreport2004-2005.pdf> ("During the fiscal year 2003/04, 11,314 cases were referred to mediation. Of that number, 6,410 cases were actually mediated. Of that number, 3,498 or 55% were resolved at the conference. Just as importantly, an additional 3,387 cases referred were settled or otherwise resolved prior to mediation. . . . As such, the Commission believes that in FY 2003/04, nearly 7,000 superior court civil actions were settled either directly or indirectly as a result of mediation. Given such results, it is apparent that mediated settlement works . . .").

13. The North Carolina Court System, <http://www.nccourts.org/Courts/Appellate/Appeal/Mediation/Default.asp> (last visited Oct. 12, 2007).

evaluation by an informed, neutral person in a confidential setting.<sup>14</sup> The focus of the North Carolina Court of Appeals mediation program is to encourage settlement and, thus, reach an agreeable disposition of the appeal.<sup>15</sup> Recognizing the advantages inherent in this out of court settlement process, the North Carolina Bar Association has also established a dispute resolution section, “which acts as a resource for developing and implementing dispute resolution processes in, and related to, courts as well as in the context of business transactional matters.”<sup>16</sup> These settlement procedures, implemented by the North Carolina General Assembly, the North Carolina Supreme Court, the North Carolina Court of Appeals, and the North Carolina Bar Association, all emphasize the importance of allowing parties to settle their cases and then subsequently rely on the enforceability of their settlements.

#### B. *Enforcing Settlement Agreements in North Carolina*

A compromise and settlement agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and tested by established rules relating to contracts.<sup>17</sup> If the existence of a contract is proven, then the settlement agreement should be enforced. Oral contracts are valid in North Carolina and it is well settled that parties may orally enter a binding agreement to settle a case.<sup>18</sup> Additionally, a consent judgment<sup>19</sup> signed by the attorneys for the parties is presumed to be valid and the burden of proof is upon the one who challenges its invalidity.<sup>20</sup> Based on this precedent, it is clear an attorney is presumptively authorized to bind his client either orally or in writing to a settlement agreement.

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14. *Id.*

15. *Id.*

16. The North Carolina Bar Association Dispute Resolution Section, <http://disputeresolution.ncbar.org> (last visited Oct. 12, 2007).

17. *Harris v. Ray Johnson Constr. Co.*, 534 S.E.2d 653, 654 (N.C. Ct. App. 2000) (citing *Casualty Co. v. Teer Co.*, 109 S.E.2d 171, 173 (N.C. 1959)).

18. *Few v. Hammack Enters., Inc.*, 511 S.E.2d 665, 671 (N.C. Ct. App. 1999) (citing 15A AM. JUR. 2D *Compromise and Settlement* § 10, at 782 (1976) (“No particular form of agreement and no writing is ordinarily essential to a valid compromise.”)).

19. A consent judgment is a contract between the parties which is put on the record with the sanction and approval of the court and may be entered and given effect as to any matters of which the court has general jurisdiction. *Yount v. Lowe*, 215 S.E.2d 563, 567 (N.C. Ct. App. 1975). See generally BLACK’S LAW DICTIONARY 846 (7th ed. 1999).

20. *Ex parte Johnson*, 178 S.E.2d 470, 475 (N.C. 1971) (referring to *Howard v. Boyce*, 118 S.E. 2d 897 (N.C. 1961); *Chemical Co. v. Bass*, 95 S.E. 766 (N.C. 1918); *Chavis v. Brown*, 93 S.E. 471 (N.C. 1917); *Gardiner v. May*, 89 S.E. 955 (N.C. 1916)).

### C. Settlement Agreements with County or Municipal Governments

A preliminary question is whether county governments can even enter into valid contracts. According to the North Carolina Court of Appeals, “[m]unicipalities may only exercise that power given to them by the Legislature . . . [and] [a]cts or agreements which are beyond the powers of a municipality are invalid and unenforceable.”<sup>21</sup> By law, municipalities have the power to enter into contracts.<sup>22</sup> Therefore, counties and municipalities can, and do, enter into contractual relationships, including the execution of settlement agreements.

A second question involves the requirements for a county or municipality to form a valid contract. In order to have a valid and binding county contract, the board of commissioners must act in its corporate capacity in a meeting duly held as prescribed by law.<sup>23</sup> Additionally, North Carolina General Statute section 159-28(a) sets forth a separate requirement to have a valid contract with a county or municipal government.<sup>24</sup> The statute makes “a pre-audit certificate a *requirement* when a town will have to satisfy an obligation in the fiscal year in which a contract is formed.”<sup>25</sup> However, a contract that is signed in one year but results in a financial obligation in a later year will not violate the statute, even if it lacks a pre-audit certificate.<sup>26</sup> The requirements of the statute are more fully set forth below.

When enforcing settlement agreements with a county or municipal government, the issue of sovereign immunity arises. Sovereign immunity renders the state, including counties and municipal governments therein, immune from suit absent express consent to be sued or waiver of the right of sovereign immunity.<sup>27</sup> However, where the

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21. *Myers v. Town of Plymouth*, 522 S.E.2d 122, 124 (N.C. Ct. App. 1999). *See also Bowers v. City of High Point*, 451 S.E.2d 284 (N.C. 1994).

22. N.C. GEN. STAT. § 160A-11 (2005) (“The inhabitants of each city heretofore or hereafter incorporated by act of the General Assembly or by the Municipal Board of Control shall be and remain a municipal corporation by the name specified in the city charter. Under that name they shall be vested with all of the property and rights in property belonging to the corporation; shall have perpetual succession; may sue and be sued; may contract and be contracted with . . .”).

23. *Jefferson Standard Life Ins. Co. v. Guilford County*, 34 S.E.2d 430, 435 (N.C. 1945). *See generally* 6A STRONG’S NORTH CAROLINA INDEX *Counties* § 52 (4th ed. 2005) (explaining the powers, functions, and duties of counties in relation to contracts).

24. *See* N.C. GEN. STAT. 159-28(a) (2005) (stating that an obligation violating the statute “is invalid and may not be enforced.”).

25. *Myers*, 522 S.E.2d at 126.

26. *See Id.*

27. *See* *Great American Ins. Co. v. Gold*, 118 S.E.2d 792 (N.C. 1961); *Coastland Corp. v. N.C. Wildlife Resources Comm’n*, 517 S.E.2d 661, 663 (N.C. Ct. App. 1999);

county or municipality enters into a valid contract, the entity “implicitly consents to be sued for damages on the contract in the event it breaches the contract.”<sup>28</sup> Therefore, to hold a county or municipality responsible for breach of contract, a plaintiff must show the existence of a valid contract. If a valid contract is not proven, the county or municipality is immune from suit and may not be subjected to contractual liability.<sup>29</sup>

## II. REQUIREMENTS OF NORTH CAROLINA GENERAL STATUTE SECTION 159-28(A)

North Carolina General Statute section 159-28(a) is part of the Local Government Budget and Fiscal Control Act. In pertinent part, it reads:

No obligation may be incurred in a program, function, or activity accounted for in a fund included in the budget ordinance unless the budget ordinance includes an appropriation authorizing the obligation and an unencumbered balance remains in the appropriation sufficient to pay in the current fiscal year the sums obligated by the transaction for the current fiscal year. No obligation may be incurred for a capital project or a grant project authorized by a project ordinance unless that project ordinance includes an appropriation authorizing the obligation and an unencumbered balance remains in the appropriation sufficient to pay the sums obligated by the transaction. If an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been preaudited to assure compliance with this subsection. The certificate, which shall be signed by the finance officer or any deputy finance officer approved for this purpose by the governing board, shall take substantially the following form:

This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act.

— (Signature of finance officer).<sup>30</sup>

This section sets forth the requirements and obligations that must be met before a county may incur contractual obligations.<sup>31</sup> The main requirement is that no obligation may be incurred without a pre-audit

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EEE-ZZZ Lay Drain Co. v. N.C. Dep’t of Hum. Res., 422 S.E.2d 338 (N.C. Ct. App. 1992).

28. Smith v. State, 222 S.E.2d 412, 424 (N.C. 1976).

29. See *Id.* at 417 (N.C. 1976) (citing 72 AM. JUR. 2D *States, Etc.* § 88 (1974)).

30. N.C. GEN. STAT. § 159-28(a) (2005).

31. Cincinnati Thermal Spray, Inc. v. Pender County, 399 S.E.2d 758, 759 (N.C. Ct. App. 1991).

certificate signed by a finance officer or any board approved deputy finance officer.<sup>32</sup> The purpose of this pre-audit certificate is to insure a municipal or county government has the requisite funds available in its budget to meet a financial obligation it incurs.<sup>33</sup>

### III. JUDICIAL INTERPRETATION OF NORTH CAROLINA GENERAL STATUTE SECTION 159-28(a)

There are three main cases from the North Carolina Court of Appeals interpreting and defining the scope of this statute, two of these cases in the context of settlement agreements.<sup>34</sup> The North Carolina Supreme Court has not yet heard a case involving North Carolina General Statute section 159-28(a), declining review each time it has been presented with the opportunity.<sup>35</sup>

#### A. Data General Corp. v. County of Durham

In 2001, the North Carolina Court of Appeals decided *Data General v. County of Durham*, a case involving Data General's lease of computer hardware and software to Durham County.<sup>36</sup> It is important to note that unlike the other two North Carolina Court of Appeals decisions interpreting North Carolina General Statute section 159-28(a), this case was not interpreting the statute in the context of a settlement agreement.

On June 3, 1993, a lease agreement was executed by representatives of both Data General and Durham County.<sup>37</sup> The lease agreement called for Durham County to make annual lease payments over a term of four years.<sup>38</sup> Durham County had the option of purchasing the leased computer hardware and software from Data General at the expiration of the lease term.<sup>39</sup> Durham County did not exercise the purchase option after making the required annual payments through the course of the lease.<sup>40</sup>

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32. See N.C. GEN. STAT. § 159-28(a) (2005).

33. *Myers v. Town of Plymouth*, 522 S.E.2d 122, 126 (N.C. Ct. App. 1999).

34. See *Cabarrus County v. Systel Bus. Equip. Co.*, 614 S.E.2d 596 (N.C. Ct. App. 2005), *cert. denied*, 621 S.E.2d 177 (N.C. 2005); *Lee v. Wake County*, 598 S.E.2d 427 (N.C. Ct. App. 2004), *cert. denied*, 607 S.E.2d 275 (N.C. 2004); *Data Gen. Corp. v. County of Durham*, 545 S.E.2d 243 (N.C. Ct. App. 2001).

35. See *Systel Bus. Equip. Co.*, 614 S.E.2d at 596; *Lee*, 598 S.E.2d at 427.

36. *Data Gen. Corp.*, 545 S.E.2d at 245.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

On July 29, 1999, Data General filed suit against Durham County alleging breach of contract, *quantum meruit*, estoppel, and negligent misrepresentation.<sup>41</sup> Data General alleged that Durham County, without making any further payments to Data General, kept and used its equipment for close to two years following the expiration of the lease term.<sup>42</sup>

On August 16, 1999, Durham County filed a motion to dismiss the suit asserting a lack of subject matter and personal jurisdiction based upon sovereign immunity.<sup>43</sup> On November 20, 1999, following a hearing, the trial court entered an order denying Durham County's motion to dismiss.<sup>44</sup> Durham County appealed the trial court's ruling to the North Carolina Court of Appeals.<sup>45</sup>

On appeal, the court first addressed Data General's assertion in its complaint that by agreeing to and executing the lease agreement, Durham County waived its right to assert sovereign immunity in the event it breached the lease.<sup>46</sup> On appeal, Durham County asserted the initial agreement, which was reduced to writing and executed on June 3, 1993, was not a valid contract enforceable against Durham County, and that Durham County did not, therefore, waive sovereign immunity and consent to be sued for breach of such contract.<sup>47</sup> The court, after noting the agreement did not include a pre-audit certificate, commented that "as there is insufficient evidence in the record that the requirements of N.C. Gen. Stat. § 159-28(a) have been met, we conclude that no valid contract was formed between Data General and Durham County, and Durham County therefore has not waived its sovereign immunity to be sued for contract damages."<sup>48</sup>

The court also relied upon North Carolina General Statute section 159-28(a) to conclude the trial court was without personal jurisdiction over Durham County as to Data General's estoppel claim.<sup>49</sup> The court stated the requirement that a contract with a county contain a pre-audit certificate pursuant to North Carolina General Statute section 159-28(a) "is a matter of public record . . . and parties contracting with

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41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 247.

47. *Id.*

48. *Id.* at 247-48 (citing *L & S Leasing, Inc. v. City of Winston-Salem*, 471 S.E.2d 118, 121 (N.C. Ct. App. 1996); *Cincinnati Thermal Spray*, 399 S.E.2d 758, 759 (N.C. Ct. App. 1991)). See also N.C. GEN. STAT. § 159-28(a) (2005).

49. *Data Gen. Corp.*, 545 S.E.2d at 248.

a county within this state are presumed to be aware of [this requirement], and may not rely upon estoppel to circumvent, such requirements.”<sup>50</sup>

The court then considered Data General’s tort claim against Durham County for negligent misrepresentation.<sup>51</sup> This aspect of the opinion is important when considering alternative recourse against a county or municipality that tries to back out of a settlement agreement on the basis that it does not comply with North Carolina General Statute section 159-28. As a defense, Durham County asserted it had sovereign immunity with respect to this claim because it did not purchase liability insurance.<sup>52</sup> The court responded that, “counties do not enjoy governmental immunity when they are performing ministerial or proprietary functions.”<sup>53</sup> The court then stated the test for determining whether a particular function is governmental or proprietary: “If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. . . . It is proprietary and ‘private’ when any corporation, individual, or group of individuals could do the same thing.”<sup>54</sup> Based on this test, the court concluded “that this activity [entering into the lease agreement with Data General] is proprietary rather than governmental in nature, as it was ‘commercial or chiefly for the private advantage’ of the county.”<sup>55</sup> Therefore, the county is not immune from tort claims arising out of the performance of this activity.<sup>56</sup>

The *Data General* case established that a pre-audit certification is a prerequisite to a valid contract; however, there may be recourse in the form of negligent misrepresentation against a county or municipality when they fail to execute the certification necessary to comply with North Carolina General Statute section 159-28(a). The interpretation of this statute by the court in *Data General* seems to accomplish the statute’s purpose by ensuring that sufficient funds are available for the county to enter into an ordinary contractual obligation. However, this

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50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 248-249 (citing *Herring ex rel. Marshall v. Winston-Salem/Forsyth County Bd. of Educ.*, 529 S.E.2d 458, 461, *cert. denied*, 545 S.E.2d 424 (N.C. Ct. App. 2000); *Messick v. Catawba County*, 431 S.E.2d 489, 493 *cert. denied*, 435 S.E.2d 336 (N.C. Ct. App. 1993)).

54. *Data Gen. Corp.*, 545 S.E.2d at 249 (citing *Britt v. City of Wilmington*, 73 S.E.2d 289, 293 (N.C. 1952)).

55. *Id.*

56. *Id.*

rule becomes unworkable when applied in the context of settlement agreements.

B. *Lee v. Wake County*

In 2004, the North Carolina Court of Appeals decided *Lee v. Wake County*, a case involving a settlement agreement made in the course of litigating a workers' compensation claim.<sup>57</sup> On November 10, 1996, an employee of Wake County, Melva Lee, was injured during the course of her employment when she was assaulted by an inmate in the Wake County Jail.<sup>58</sup> Ms. Lee brought a workers' compensation claim against Wake County.<sup>59</sup> During the course of litigating the claim, a settlement agreement was reached.<sup>60</sup> Subsequently, a written memorandum of agreement was signed by both Ms. Lee's representatives and representatives of Wake County.<sup>61</sup>

The memorandum of agreement provided Wake County would pay Ms. Lee \$750,000 plus certain medical and disability benefits.<sup>62</sup> Further, Wake County was to "prepare a formal clincher agreement incorporating the terms of the settlement agreement and releasing [Wake County] from all workers' compensation liability."<sup>63</sup> "The memorandum of agreement contained no contingencies or provisional terms such as the approval of its terms by the Wake County Board of County Commissioners."<sup>64</sup> Soon after the memorandum of agreement was signed, Wake County withdrew its approval of the memorandum of agreement and refused to prepare a formal clincher agreement.<sup>65</sup>

On August 9, 2001, Ms. Lee moved to compel enforcement of the memorandum of agreement at a hearing before Deputy Commissioner Stephen T. Gheen.<sup>66</sup> Almost a year later, on June 3, 2002, the deputy commissioner issued an opinion and award that "concluded the memorandum of agreement was valid and enforceable, notwithstanding defendant Wake County's assertion that its representative lacked authority to negotiate a settlement for more than \$100,000."<sup>67</sup>

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57. *Lee v. Wake County*, 598 S.E.2d 427, 429 (N.C. Ct. App. 2004), *cert. denied*, 607 S.E.2d 275 (N.C. 2004).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

Wake County appealed to the Full Commission.<sup>68</sup> The Full Commission reversed the deputy commissioner's opinion and award and held the memorandum of agreement invalid on several grounds, one being that it lacked a pre-audit certificate as required under North Carolina General Statute section 159-28(a).<sup>69</sup> Ms. Lee appealed the Full Commission's findings to the North Carolina Court of Appeals.<sup>70</sup>

On appeal, the court addressed the Commission's conclusion that the memorandum of agreement is unenforceable due to the absence of a pre-audit certificate pursuant to North Carolina General Statute section 159-28(a).<sup>71</sup> The court began its analysis by commenting on the purpose or intent of the statute: "G.S. § 159-28 requires a county government to ensure that, for each obligation incurred, 'an unencumbered balance remains in the appropriation sufficient to pay in the current fiscal year the sums obligated by the transaction.'" <sup>72</sup> Thus, until the county or municipality determines the availability of funds and then documents that availability by having the county finance officer attach a pre-audit certificate, a contract for the payment of money cannot be enforced against it.<sup>73</sup>

The court "conclude[d] that an otherwise valid memorandum of agreement is not rendered void by the fact it does not bear the requisite pre-audit certificate."<sup>74</sup> The court deemed the appeal an action for specific performance because the memorandum of agreement was an agreement to prepare a formalized settlement agreement, and not for the payment of money.<sup>75</sup> As a result, the court reasoned that North Carolina General Statute section 159-28 "does not require that a memorandum of agreement be accompanied by a county finance manager's pre-audit certificate to enable the Commission to direct the submission of a formalized compromise settlement agreement."<sup>76</sup>

In arriving at this conclusion, the court relied heavily on the formalized workers' compensation settlement structure imposed by the Industrial Commission Rules and the Industrial Commission Rules for Mediated Settlement Conferences.<sup>77</sup> The court held "[t]hese rules pro-

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68. *Id.* at 430.

69. *Id.*

70. *Id.*

71. *Id.* at 432 .

72. *Id.* (citing, N.C. GEN. STAT. § 159-28 (2003)).

73. *Lee*, 598 S.E.2d at 432 (citing *Data Gen. Corp. v. County of Durham*, 545 S.E.2d 243, 249 (N.C. Ct. App. 2001)).

74. *Id.* at 433.

75. *Id.*

76. *Id.* See also N.C. GEN. STAT. § 159-28 (2003).

77. *Lee*, 598 S.E.2d at 432-33.

vide a three-stage process” from which “the pre-audit certificate will naturally be executed . . . as part of the general formalizing of the documents for submission to the Industrial Commission” for approval of the settlement.<sup>78</sup> This holding is particularly important in keeping with public policy favoring out of court settlements. The court got it right in this case: an otherwise valid agreement should not be rendered void by the fact that it lacks a pre-audit certification. It was not long, however, before the *Lee* case was distinguished in the context of settlement agreements, rendering an unjust result for innocent third parties doing business with, or damaged by, a county government.

C. Cabarrus County v. Systel Business Equipment Co.

In 2005, the North Carolina Court of Appeals decided *Cabarrus County v. Systel Bus. Equip. Co.*, a case involving the enforceability of a settlement agreement negotiated by Systel and an attorney for Cabarrus County.<sup>79</sup> After receiving bids, the Cabarrus County Board of County Commissioners voted to award Systel a contract for photocopiers and related services.<sup>80</sup> On July 18, 2000, a county manager executed a contract, an Equipment Rental Agreement, with Systel.<sup>81</sup> On April 17, 2001, Cabarrus County informed Systel that it was not going to continue to honor its obligations in their contract with Systel and requested that Systel remove its equipment from all Cabarrus County locations.<sup>82</sup>

Systel did not remove its equipment, asserting Cabarrus County was obligated to continue using Systel’s copiers and services under the Equipment Rental Agreement.<sup>83</sup> Cabarrus County countered “the Equipment Rental Agreement could not be enforced because . . . it did not include a preaudit certificate as required by statute.”<sup>84</sup> On July 26, 2001, Cabarrus County filed an action in superior court to determine whether the Equipment Rental Agreement was an enforceable contract.<sup>85</sup> Systel counterclaimed for breach of contract.<sup>86</sup>

Systel and Cabarrus County participated in informal settlement discussions as well as a formal mediation conference that ended in

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78. *Id.* at 433.

79. *Cabarrus County v. Systel Bus. Equip. Co.*, 614 S.E.2d 596, 597 (N.C. Ct. App. 2005), *cert. denied*, 621 S.E.2d 177 (N.C. 2005).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

impasse.<sup>87</sup> In February 2003, Systel informally presented a proposed settlement agreement to Cabarrus County.<sup>88</sup> In return for Systel dismissing its breach of contract claim, Cabarrus County would pay Systel the sum of \$21,695.00 and sign a new Equipment Lease Agreement that provided Systel would supply photocopier equipment and services to Cabarrus County for a sixty-four month period.<sup>89</sup>

On October 20, 2003, Cabarrus County Attorney, Fletcher L. Hartsell, Jr., presented the terms of the proposed settlement agreement to the Cabarrus County Board of County Commissioners.<sup>90</sup> After reviewing the terms of the proposed agreement, the commissioners voted to approve the settlement.<sup>91</sup> The commissioners then “authorized the County Manager to execute the necessary settlement agreement documents on behalf of Cabarrus County and to prepare a budget amendment.”<sup>92</sup> The next day, Mr. Hartsell informed Systel that the Cabarrus County Board of County Commissioners had voted to accept and approve the proposed settlement agreement.<sup>93</sup> A week later, on October 27, 2003, the commissioners again discussed the settlement agreement and on this occasion voted to rescind its acceptance and approval of the settlement agreement.<sup>94</sup>

Systel filed a motion to enforce the settlement agreement with the trial court.<sup>95</sup> The trial court granted Systel’s motion concluding that “the settlement agreement was valid and binding upon Cabarrus County.”<sup>96</sup> Cabarrus County appealed to the North Carolina Court of Appeals.<sup>97</sup>

On appeal, Cabarrus County argued that the trial court erred in granting Systel’s motion because the settlement agreement did not bear an executed pre-audit certificate under North Carolina General Statute section 159-28(a).<sup>98</sup> Systel cited *Lee v. Wake County* in support of its argument that the lack of a signed pre-audit certificate does not render

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87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

the settlement agreement unenforceable.<sup>99</sup> Systel further argued that the statute does not apply because any payment of money under the settlement agreement was to occur in future years and not in the current year.<sup>100</sup>

The North Carolina Court of Appeals agreed with Cabarrus County's argument.<sup>101</sup> In support of its conclusion, the court relied on its decision in *Data Gen. Corp. v. County of Durham*, holding that "[w]here a plaintiff fails to show that the requirements of N.C. Gen. Stat. § 159-28(a) have been met, there is no valid contract, and any claim by plaintiff based upon such contract must fail."<sup>102</sup> In this case, the settlement agreement did contain a pre-audit certificate but it was never executed by Cabarrus County, meaning the finance officer never actually signed the certificate even though the agreement was reduced to writing and approved by the Cabarrus County Board of Commissioners.<sup>103</sup> Therefore, the court concluded that the requirements of North Carolina General Statute section 159-28(a) were not met and no enforceable contract to settle existed between the parties.<sup>104</sup>

In response to Systel's reliance on *Lee v. Wake County*, holding that the lack of a signed pre-audit certificate does not make the settlement agreement unenforceable, the court stated "the crucial difference between *Lee* and this case is that in *Lee*, 'the subject memorandum of agreement [was] an agreement to prepare a formalized settlement compromise agreement for the [Industrial] Commission's consideration' and therefore, the action on appeal was 'for specific performance, not for the payment of money.'"<sup>105</sup> In this case, the settlement agreement required Cabarrus County to pay Systel \$21,695.00 and payment of this sum "was neither conditional nor contingent but mandatory under the settlement agreement."<sup>106</sup> Therefore, because the settlement agree-

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99. *Id.* at 598 (referring to *Lee v. Wake County*, 598 S.E.2d 427, 429 (N.C. Ct. App. 2004), *cert. denied*, 607 S.E.2d 275 (N.C. 2004)).

100. *Systel Bus. Equip. Co.*, 614 S.E.2d at 598 (noting the statute only applies to contracts that incur an obligation for the current year and does not apply to payments for future years). *See also* N.C. GEN. STAT. § 159-28(a) (2005).

101. *Systel Bus. Equip. Co.*, 614 S.E.2d at 597-598.

102. *Id.* at 598 (quoting *Data Gen. Corp. v. County of Durham*, 545 S.E.2d 243, 247 (N.C. Ct. App. 2001)).

103. *Systel Bus. Equip. Co.*, 614 S.E.2d at 598 (citing *Data Gen. Corp.*, 545 S.E.2d at 247).

104. *Id.* *See also* N.C. GEN. STAT. § 159-28(a) (2005).

105. *Systel Bus. Equip. Co.*, 614 S.E.2d at 598 (citing *Lee v. Wake County*, 598 S.E.2d 427, 433 (N.C. Ct. App. 2004), *cert. denied*, 607 S.E.2d 275 (N.C. 2004)).

106. *Systel Bus. Equip. Co.*, 614 S.E.2d at 598.

ment was for the payment of money and not for specific performance, the court concluded that *Lee* is inapplicable.<sup>107</sup>

Finally, the court addressed Systel's argument that the monetary obligations under the settlement agreement were incurred for future years, subsequent to 2003, and therefore North Carolina General Statute section 159-28(a) does not apply.<sup>108</sup> In dismissing this argument, the court relied on the fact the settlement agreement had set no timeline for payment of the \$21,695.00 due under the settlement agreement.<sup>109</sup> The settlement agreement *did* indicate that obligations under the sixty-four month lease agreement would first come due in July 2004.<sup>110</sup> Regardless, payment of the \$21,695.00 under the settlement agreement appeared to the court to be due immediately and Systel's argument was deemed "unconvincing."<sup>111</sup>

#### IV. CURRENT STATUS OF THE LAW REGARDING SETTLEMENT AGREEMENTS WITH COUNTY AND MUNICIPAL GOVERNMENTS

##### A. *Certainty Regarding Current Law*

When analyzing settlement agreements in which one of the parties is a county or municipal government, the fact that there are two competing public policies in North Carolina is readily apparent. In light of these competing policies, the North Carolina General Assembly should address this matter and exempt settlement agreements from the purview of the statute's pre-audit certification requirement.

On one hand, there is North Carolina's stated policy of favoring and promoting settlement agreements. Decades of case law make it clear that settlement agreements are favored under the law.<sup>112</sup> Additionally, North Carolina policy, as stated in North Carolina General Statute section 7A-38.1, promotes the settlement of disagreements out of court.<sup>113</sup> In fact, the statute "require[s] parties to superior court civil actions and their representatives to attend a pretrial, mediated set-

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107. *Id.* (citing *Lee*, 598 S.E.2d at 433).

108. *Id.* See also N.C. GEN. STAT. § 159-28(a) (2005).

109. *Systel Bus. Equip. Co.*, 614 S.E.2d at 598.

110. *Id.*

111. *Id.*

112. See, e.g. *Penn Dixie Lines, Inc. v. Grannick*, 78 S.E.2d 410 (N.C. 1953); *Nationwide Mut. Ins. Co. v. Aetna Cas. & Sur. Co.*, 159 S.E.2d 268 (N.C. Ct. App. 1968). See also 15A AM. JUR. 2D § 5 (2004) ("Public policy favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. Settlement agreements are encouraged by courts.")

113. See N.C. GEN. STAT. § 7A-38.1 (2005).

tlement conference.”<sup>114</sup> Further, North Carolina has enacted legislation articulating the public policy relating to informal settlements with agencies, as discussed above.<sup>115</sup>

On the other hand is North Carolina General Statute section 159-28, which articulates North Carolina’s policy of insuring a county or municipality has funds available in its budget to pay its yearly obligations.<sup>116</sup> In furtherance of this policy, the statute requires a signed pre-audit certificate when a county or municipality will have to satisfy a monetary obligation in the same year a contract is formed.<sup>117</sup> The signed certification insures that a county purchasing agent, for example, will not obligate the county to contractual obligations in which sufficient funds are not available. However, the underlying policy of the statutory requirement for a pre-audit certification is weakened when considered in the context of settlement agreements. In this respect, if a county does not settle in the course of litigation and subsequently incurs a judgment for monetary damages, the judgment is not rendered void or unenforceable merely because the county has not certified that it has sufficient funds available to pay the judgment.

While North Carolina General Statute section 159-28 adds to the requirements for a valid contract with a governmental entity, it also changes what is required to form an otherwise valid settlement agreement, thus making it more difficult for parties to terminate litigation through settlement agreements or contracts.<sup>118</sup> The policy enunciated in the statute is inherently contrary to the established public policy of enforcing settlement agreements that otherwise meet the general requirements of a valid contract. Exempting settlement agreements from the statute’s requirements is the best way to harmonize these competing policies.

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114. *Id.* Surprisingly, the North Carolina Court of Appeals has yet to address a situation where settlement is reached at a mandatory settlement conference under North Carolina General Statute section 7A-38.1 or one entered pursuant to a consent judgment. Based on the North Carolina Court of Appeals interpretation of North Carolina General Statute section 159-28(a), a party could reach a settlement agreement with a county or municipal government at this conference or entered pursuant to a consent judgment only to have the government renege by not executing all the documentation necessary to meet the pre-audit certification requirement of the statute.

115. *See* N.C. GEN. STAT. § 150B-22 (2005) (“It is the policy of this State that any dispute between an agency and another person that involves the person’s rights, duties, or privileges . . . should be settled through informal procedures.”).

116. *See* N.C. GEN. STAT. § 159-28 (2005); *see also* *Myers v. Town of Plymouth*, 522 S.E.2d 122, 126 (N.C. Ct. App. 1999).

117. *Id.*

118. *See* N.C. GEN. STAT. § 159-28(a) (2005).

The language of both North Carolina General Statute section 159-28(a) and North Carolina Court of Appeals decisions makes clear that any settlement agreement requiring the payment of money in that current fiscal year must meet the requirements of the statute to be enforceable as a valid contract.<sup>119</sup> Attorneys, while negotiating a potential settlement with a county or municipal government, should be aware that any deal they negotiate, whether it be oral or memorialized in a written document, is unenforceable until such time as all the requirements of the statute are met.

*B. Unanswered Questions from the Lee v. Wake County Decision*

The North Carolina Court of Appeals' decision in *Lee*, considered in conjunction with *Data Gen. Corp.* and *Cabarrus County v. Systel Bus. Equip. Co.*, raises more questions than it answers. Based on the court's interpretation in *Cabarrus County*, an action for specific performance can stand even without the requirements of North Carolina General Statute section 159-28(a) being met.<sup>120</sup> In *Lee*, because of the structure set up under the Industrial Commission Rules and the Industrial Commissions Rules on Mediated Settlement Conferences, "the subject memorandum of agreement [was] an agreement to prepare a formalized settlement compromise agreement for the [Industrial] Commission's consideration [and potential approval]." Therefore, the action was for specific performance (submitting the agreement to the Commission) and not for the payment of money.<sup>121</sup> The court further stated that "in this sequence of events the pre-audit certificate will naturally be executed, if at all, after the settlement conference, when the amount of the county's liability is known, and as part of the general formalizing of the documents for submission to the Industrial Commission."<sup>122</sup>

This appears to be a comparable factual situation to the one in *Cabarrus County v. Systel Bus. Equip. Co.*, where the parties reached an agreement. In both cases, the agreements did not comply with the requirements of North Carolina General Statute section 159-28(a) and were subject to a higher commission's approval. In *Lee*, the agreement

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119. *See Id.*; *see also Cabarrus County v. Systel Bus. Equip. Co.*, 614 S.E.2d 596 (N.C. Ct. App. 2005), *cert. denied*, 621 S.E.2d 177 (N.C. 2005); *Lee v. Wake County*, 598 S.E.2d 427 (N.C. Ct. App. 2004), *cert. denied*, 607 S.E.2d 275 (N.C. 2004); *Data Gen. Corp. v. County of Durham*, 545 S.E.2d 243 (N.C. Ct. App. 2001).

120. *Systel Bus. Equip. Co.*, 614 S.E.2d at 598 (citing *Lee*, 598 S.E.2d at 433). *See also* N.C. GEN. STAT. § 159-28 (2005).

121. *Lee*, 598 S.E.2d at 432-3.

122. *Id.* at 433.

was subject to the Industrial Commission's approval. Similarly in *Cabarrus County*, the agreement was subject to the approval of the board of county commissioners.<sup>123</sup> Relying on the reasoning in *Lee*, it should logically follow that in *Cabarrus County* the pre-audit certification would have been executed "naturally" as part of the formalizing of documents after the county commissioners' approval. Consequently, the rule in *Lee* should apply: "An otherwise valid memorandum of agreement is not rendered void by the fact it does not bear the requisite pre-audit certificate."<sup>124</sup> However, the *Lee* rule was not applied in the *Cabarrus County* case and as a result, an inequitable law has developed that allows a county government to invalidate an otherwise binding settlement agreement.

#### PROPOSALS

Because of the uncertainty surrounding the law of pre-audit certifications and settlement agreements with governmental entities, the North Carolina General Assembly should amend North Carolina General Statute section 159-28 to exclude the payment of legal expenses related to settlement agreements. This could be accomplished by adding one sentence to the statute stating: "Settlement contracts or agreements in which legal counsel for a local government incurs an obligation are exempt from the requirements of this statute." Including this sentence would make a settlement agreement with a governmental entity, otherwise incurred in violation of this statute, valid and enforceable under North Carolina law. By amending the statutory language of North Carolina General Statute section 159-28 in this manner, the General Assembly would conform the statute to the stated public policy and law of North Carolina, which favors settlement agreements.<sup>125</sup>

The purpose of the statute, to insure that the governmental entity has enough funds in its budget to pay the obligation, would not be eroded because presumably the attorney, as the agent for the municipality, will not agree to incur any obligation for which he or she is not authorized by the municipality.<sup>126</sup> Thus, the situation is more like the one in *Lee v. Wake County* in which, based on the sequence of events surrounding the settlement of claims against a governmental entity, the extent of the governmental entity's liability is generally known.

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123. *Systel Bus. Equip. Co.*, 614 S.E.2d at 597.

124. *Lee*, 598 S.E.2d at 433.

125. See *Penn Dixie Lines, Inc. v. Grannick*, 78 S.E.2d 410 (N.C. 1953); *Nationwide Mut. Ins. Co. v. Aetna Cas. & Sur. Co.*, 159 S.E.2d 268 (N.C. Ct. App. 1968).

126. See *Myers v. Town of Plymouth*, 522 S.E.2d 122, 126 (N.C. Ct. App. 1999).

Therefore, the requirements of the statute should naturally be met in the flow of negotiating a settlement contract or agreement.<sup>127</sup> When an attorney for the governmental entity negotiates a settlement with the opposing attorney, he or she knows the amount the client has budgeted to pay the claim, thus the attorney is not going to incur an obligation the governmental entity does not have the funds to pay. For that reason, the holding in *Lee v. Wake County*, “an otherwise valid memorandum of agreement is not rendered void by the fact it does not bear the requisite pre-audit certificate [meet the requirements of North Carolina General Statute section 159-28(a)],” should govern the interpretation of this statute relating to settlement agreements.<sup>128</sup>

Based on North Carolina case law, attorneys are left with few options when a county or municipality reneges on a settlement, which has been both communicated by the county attorney and approved by the county commissioners, merely by refusing to execute the necessary pre-audit certification. The first option would be to pursue specific performance in executing the proper documentation that will comply with North Carolina General Statute section 159-28(a) instead of seeking damages and payment of monies in enforcing the settlement agreement. An action for specific performance will arguably fall under the *Lee* case while an action to enforce the agreement and payment of monies would fall under *Cabarrus County*. Second, if an attorney chooses to pursue monetary damages, the time that the money becomes due should be set out in the agreement and clearly state that it is not due in the current fiscal year, thereby avoiding the application of North Carolina General Statute section 159-28(a).

Additionally, despite the fact that a party may not be able to enforce a settlement agreement with a county or municipal government under contract law, a party may still be able to seek recourse against the county or municipality in tort law for negligent misrepresentation. As the decision in *Data Gen. Corp. v. County of Durham* illustrates, county and municipal governments do not have immunity for tort claims arising out of the government’s performance of proprietary rather than governmental functions.<sup>129</sup> A party to a settlement agreement with a county or municipal government could assert a claim for negligent misrepresentation against the government based on

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127. *Lee*, 598 S.E.2d at 433.

128. *Id.*

129. *Data Gen. Corp. v. County of Durham*, 545 S.E.2d 243, 249 (N.C. Ct. App. 2001).

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representations made by, or on behalf of, the government upon entering into the agreement with that party.<sup>130</sup>

#### CONCLUSION

The purpose of North Carolina General Statute section 159-28(a), to insure a governmental entity has funds sufficient to pay an obligation it incurs, is sound, especially when one considers the potential for abusive spending by overzealous county and municipal officials.<sup>131</sup> However, the impact of the statute on settlement agreements must be tempered. Local governmental entities enter into numerous contracts each year with a wide variety of private entities. Naturally, many disputes arise out of these relationships. If the attorneys representing these private entities and the attorneys representing the local governments cannot negotiate for the settlement of these disputes because they know that any agreement they reach is hollow and unenforceable, alternative dispute resolution will be compromised. The best resolution to this problem would be for the North Carolina General Assembly to amend North Carolina General Statute section 159-28(a) to exempt settlement agreements from the statute's pre-audit certification requirement. Regardless, attorneys practicing in North Carolina must take extra care when entering into a settlement agreement when one of the parties is a governmental entity due to the North Carolina Court of Appeals' approach of allowing county or municipal governments to void an otherwise valid settlement agreement under North Carolina General Statute section 159-28.

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130. *Id.*

131. *See Myers*, 522 S.E.2d at 126.

