Contracts

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CONTRACTS

I. IMPLIED WARRANTIES IN HOME CONSTRUCTION: SUBSEQUENT PURCHASERS

In *Terlinde v. Neely*, the South Carolina Supreme Court held that a subsequent purchaser of a home could maintain an action against the original builder-vendor for breach of implied warranties due to latent defects in the construction of the home. By extending implied warranty protections to subsequent purchasers, the court provided buyers of used homes with a cause of action for construction defects that closely approximates the remedies available to a buyer of a new house with latent defects.

In September 1972, defendants completed construction of a single-family home that was sold to the Johnsons, the original purchasers who, three years later, sold the house and lot to plaintiffs. Shortly after purchasing the house, plaintiffs noticed evidence of substantial settling of the home's foundation. As a result of the settling, sheetrock walls began to crack, floors sank away from the walls, doors no longer closed properly, mortar separated from the exterior brickwork, and the supporting foundation pillars sank away from the floor beams. Although some


2. The theory of implied warranty used by the South Carolina courts appears to be a combination of warranties of merchantability, fitness, and habitability. See notes 29-40 and accompanying text infra. The implied warranties of merchantability and fitness usually apply to transactions dealing with the sale of goods. Merchantability requires that the goods sold "pass without objection in the trade" and be fit for the ordinary purposes for which they are used. S.C. CODE ANN. § 36-2-314 (1976). Fitness indicates that, at the time of the sale, the seller knows of any particular purpose for which the goods are being purchased and the buyer is relying on the seller's skill in making the purchase. S.C. CODE ANN. § 36-2-315 (1976). Habitability means that the builder has complied with local building codes and that the residence was built in a workmanlike manner and is suitable for habitation. Duncan v. Schuster-Graham Homes, Inc., 39 Colo. App. 92, 563 P.2d 976 (1977).

3. ___ S.C. at ___, 271 S.E.2d at 770.
4. *Id.* at ___, 271 S.E.2d at 768.
5. *Id.*
settling had occurred during the Johnsons' ownership, it was not comparable to that which occurred after plaintiffs purchased the home. Experts hired by plaintiffs determined that the settling was caused by construction of the house on improperly packed fill dirt that lacked sufficient load-bearing capacity. Repair estimates ranged from $6,000 to $23,000.

Plaintiffs instituted an action against the builders to recover damages for breach of implied warranties of merchantability and fitness for intended purpose. Defendants' motion for summary judgment was granted by the trial court on grounds that privity between the parties, a prerequisite to maintaining the action, was lacking. The South Carolina Supreme Court reversed the lower court, holding that "an implied warranty for latent defects extends to subsequent home purchasers for a reasonable amount of time." This decision marked a further step in the expansion of home buyers' remedies for construction defects.

A. Evolution of Home-Buyers' Remedies for Defective Construction

Prior to World War II, the doctrine of caveat emptor governed most sales transactions. Consequently, purchasers of dwellings that subsequently proved to be defective had no redress for their loss other than a suit for breach of contract premised on failure to do the job in a workmanlike manner. After

6. Id. Approximately three months before they sold the house to plaintiffs, the Johnsons contacted the defendant-builders and informed them that they had detected some minor settling of the foundation. The Johnsons agreed to correct the defects and were paid the sum of $230.18 by defendants. In return for this payment, the Johnsons executed a release of all claims against defendants relating to the residence. Id.
7. Id. at —, 271 S.E.2d at 768-69.
8. See note 2 supra.
10. — S.C. at —, 271 S.E.2d at 770.
11. For a thorough discussion of the origin and nature of the doctrine of caveat emptor, see Hamilton, The Ancient Maxim of Caveat Emptor, 40 Yale L.J. 1133 (1931). Although some states recognized that mass production had an adverse effect on the quality of goods produced and attempted to offer consumers some protection, see Uniform Sales Act §§ 13-16 (1966), transactions in realty continued to follow the caveat emptor doctrine.
12. Roberts, The Case of the Unwary Home Buyer: The Housing Merchant Did It,
the war, builders began developing large tracts of land into residential communities, selling homes and lots in single transactions. In an effort to avoid the inequities of the certificate \textit{emptor} doctrine, Ohio became the first state to adopt an implied warranty that a "home will be finished in a workmanlike manner"\textsuperscript{13} but limited application of the warranty to houses still in the course of construction.\textsuperscript{14} In 1967, the Supreme Court of Colorado extended the implied warranty "to include agreements between builder-vendors and purchasers for the sale of newly constructed buildings, completed at the time of contracting."\textsuperscript{15} By 1980, at least thirty-five state courts had adopted some form of implied warranty protection for purchasers of new homes.\textsuperscript{16}

The first signal of the South Carolina Supreme Court’s recognition of the trend toward restricting the application of certificate \textit{emptor} came in 1968. In \textit{Frasher v. Cofer},\textsuperscript{17} the court noted that "this rule has been the subject of much criticism."\textsuperscript{18} In the same year, the court, in \textit{Rogers v. Scyphers},\textsuperscript{19} intimated that certificate \textit{emptor} was inapplicable to real estate transactions in which a builder-vendor conveyed a new home that contained defects.\textsuperscript{20} Although breach of warranty was not at issue, the court noted that the purchaser had a potential cause of action against the

\textsuperscript{52} \textit{Cornell L.Q.} 835, 837 (1967).


\textsuperscript{14} \textit{Id.} at 340, 140 N.E.2d at 819.


\textsuperscript{17} 251 S.C. 112, 160 S.E.2d 560 (1968).

\textsuperscript{18} \textit{Id.} at 115, 160 S.E.2d at 561.

\textsuperscript{19} 251 S.C. 128, 161 S.E.2d 81 (1968).

\textsuperscript{20} \textit{Id.} at 133, 161 S.E.2d at 83. \textit{Rogers} was a home purchaser's negligence action to recover damages for personal injuries suffered when an attic stairway collapsed.
builder-vendor under the theory of implied warranty.21

Relying on the dictum in Rogers, the court held, in Rutledge v. Dodenhoff,22 that "in the sale of a new home by the builder-vendor, there is an implied warranty that the house was built in a reasonably workmanlike manner and is reasonably suitable for habitation."23 In Rutledge, plaintiffs brought an action against a builder-vendor to recover damages caused by a septic tank that repeatedly overflowed because of improper installation.24 Allowing plaintiffs to recover on an implied warranty theory, the court reasoned that the primary purpose of the transaction was the transfer of a habitable dwelling to the purchaser who, being in an unequal bargaining position, was forced to rely on the expert skills of the builder to provide such a dwelling.25 In addition, the court noted that the buyer's lack of construction knowledge and the latent nature of building defects made proper inspection "practically impossible."26 The establishment in Rutledge of builder-vendor liability for construction defects marked South Carolina's initial participation in the movement away from the strictures of caveat emptor in realty transactions.27

21. Id. at 134, 161 S.E.2d at 83.
   In recent years, the efficacy of caveat emptor to accomplish justice, when applied to the sale of new houses by the builder, has been subjected to serious question and rejection by many courts in the light of modern developments in the residential building trade. Distinction has been drawn between the usual, normal sale of lands, and old buildings and a transaction where the vendor is also the builder of a new structure. We have recently recognized such distinction in Rogers v. Scyphers. We there stated that, where the vendor is also the builder, he is, by the weight of modern authority, held liable for damages and injuries occurring after the surrender of title and possession, on one or more of the theories: (1) implied warranty, (2) an imminently dangerous condition caused by negligence in construction, and (3) concealment or failure to disclose to the vendee any condition which involves unreasonable risk to the persons on the land under the conditions set forth in Restatement, Torts (2d), Section 353.

   Id. at 413, 175 S.E.2d at 794-95.
23. 254 S.C. at 414, 175 S.E.2d at 795.
24. Id. at 410-11, 175 S.E.2d at 792-93.
25. Id. at 414, 175 S.E.2d at 795.
26. Id. at 414, 175 S.E.2d at 795.
27. See note 16 and accompanying text supra.
B. Extension of Liability to the Nonbuilder-Vendor

Remaining in dispute after Rutledge was the question whether a nonbuilder-vendor also would be liable for construction defects in an implied warranty action. A nonbuilder-vendor contracts with a third party for the construction of a home and then sells the lot and house to the purchaser. The distinction between the nonbuilder-vendor and the builder-vendor lies in the latter's special knowledge of construction practices and techniques.28 Although a builder-vendor is familiar with every aspect of the construction process, a nonbuilder-vendor of completed homes may have no more knowledge of the intricacies of building a home that the purchaser.

The South Carolina Supreme Court squarely faced this issue in Lane v. Trenholm Building Co.,29 an action against the developer of a subdivision to recover damages resulting from a defective septic tank.30 Finding for plaintiffs, the court determined that an implied warranty flowed from a nonbuilder-vendor of a new home to the purchaser and held that "when a new building is sold there is an implied warranty of fitness for its intended use which springs from the sale itself."31 The court reasoned that in the sale of a new home, as in the sale of a product, both parties contemplate its expected use. In order to "carry out the reasonable expectations of the parties," the court adopted the civil law doctrine of caveat venditor, which is premised on the principle that "a sound price warrants a sound commodity."32

28. 254 S.C. at 414, 175 S.E.2d at 795. Several commentators have argued forcefully that there should be equal treatment of builder-vendors and nonbuilder-vendors, contending that knowledge is not related to the merchantability of a product or a house. See Haskell, The Case for an Implied Warranty of Quality in Sales of Real Property, 53 Geo. L.J. 633, 649 (1965); McNamara, The Implied Warranty in New-House Construction Revisited, 3 REAL EST. L.J. 136, 141-42 (1974).
30. Id. at 497, 229 S.E.2d at 728.
31. Id. at 500, 229 S.E.2d at 729.
32. Id. at 502, 229 S.E.2d at 730. The court compared the remedy in Lane with the protections created for buyers of goods by the UNIFORM COMMERCIAL CODE but recognized that the seller might not be a "merchant" within the meaning of S.C. Code Ann. § 36-2-104 (1976), and that the buyer, therefore, would be without a remedy. To avoid this problem, the court reasoned that considerations of uniformity in laws governing transactions concerning mobile personality were not relevant to laws governing transactions for the sale of buildings, which are of fixed and local concern. 267 S.C. at 504, 229 S.E.2d at 731.
C. Extension of the Implied Warranty to Subsequent Purchasers

Although purchasers of new homes were protected by the implied warranty, the remedy was unavailable to subsequent purchasers because of the traditional contractual requirement of vertical privity. 33 While the privity requirement for liability on implied warranties had been eliminated in cases concerning the sale of personalty, 34 transactions concerning realty were viewed as distinguishable because of the absence of a manufacturing-distribution process separating purchasers from producers. 35

In Terlinde, the South Carolina Supreme Court extended the implied warranty to subsequent purchasers but ruled that a builder-vendor's liability was limited to latent defects and extended for a reasonable amount of time following construction. The court relied on Barnes v. Mac Brown & Co., 36 in which the Indiana Supreme Court balanced various considerations including "the age of the house, its maintenance, [and] the use to which it has been put," 37 and set forth three justifications for its decision. First, the South Carolina court recognized that, because latent construction defects can surface many years after completion of construction, there is no apparent basis for the rationale that only first purchasers need warranty protection. 38 Second, the court reasoned that the builder's "holding out" of his expertise in the marketplace results in reliance on the part of all prospective purchasers. 39 Finally, the court surmised that limited knowledge prevents a purchaser from discovering con-

35. See Brown v. Fowler, —— S.D.——, 279 N.W.2d 907, 910 (1979). In personalty transactions, strict privity requirements would prevent manufacturers from being held liable for their defective products because the buyer deals with a middleman rather than the manufacturer. In reality transactions, however, the buyer has a sales contract with the "manufacturer" of his home and can proceed against him directly on the contract. See id.
37. Id. at 227, 342 N.E.2d at 619.
38. —— S.C. at ——, 271 S.E.2d at 770.
39. Id. at ——, 271 S.E.2d at 769. This rationale, adopted from Rutledge, see notes 25 & 26 and accompanying text supra, is consistent with the premise that a home buyer and builder are in unequal positions in terms of construction knowledge. Because the typical buyer is ignorant of the details of construction work, he is forced to rely on the superior knowledge of the builder-vendor when he purchases a home. ——S.C. at ——, 271 S.E.2d at 769.
struction defects, "especially at a time when he is provided more elaborate furnishings which tend to obscure the structural integrity of the facility."  

D. The Uncertain Scope of Implied Warranties as Applied to Construction Defects

The holding and reasoning of *Terlinde* are sound, and the decision resolves two important issues. First, it is now clear that a subsequent purchaser has a right of action on implied warranty against a builder-vendor. Second, an implied warranty action against a builder-vendor by a subsequent purchaser lies only for latent defects. Patent defects, discoverable upon reasonable inspection, are not actionable.

*Terlinde's* expansion of implied warranties as applied to construction defects nevertheless leaves the exact scope of the remedy undefined. Unless clear limitations are placed on builders' liability, consumers will bear the brunt of builders' increased insurance costs, and small builder-vendors eventually may be driven out of business. Absent action by the state legislature, the South Carolina Supreme Court undoubtedly will be faced with refining and delineating the implications of *Terlinde*.

1. The Time Limit within which a Subsequent Purchaser May Bring an Implied Warranty Action.—Perhaps the most problematic issue left unresolved by *Terlinde* is "what constitutes a reasonable amount of time" during which a subsequent purchaser may bring an action against a builder-vendor. Properly refusing to assume the legislature’s prerogative, the court in *Terlinde* declined an opportunity to establish an arbitrary standard limiting the action.

40. Id. See note 26 and accompanying text supra.
41. Id. at _, 271 S.E.2d at 768.
42. Id. at _, 271 S.E.2d at 770. See Annot., 61 A.L.R.3d 792 (1975).
43. See Annot., 61 A.L.R.3d at 796.
45. Id. at _, 271 S.E.2d at 770.
46. Id. at _, 271 S.E.2d at 769. The court stated: We also disagree with the conclusion of the trial judge that an equal bargaining position existed between the buyer and the builder because three years was sufficient time for latent defects to come to light. The length of time for latent
Development of a suitable limitation period for warranty actions in South Carolina will require the legislature to balance the needs of consumers with those of the building industry. The duration of any limitation period should reflect the relatively long life expectancy of homes and the substantial investment that a home purchase requires. Additionally, consideration should be given to creating a limitation system that not only establishes a reasonable liability ceiling but also recognizes different types of construction defects and applies different limitation periods for each type. A system with varied limitation periods would offer an added element of flexibility, would be more equitable, and would help to strike a balance between the competing needs of builders and consumers. Several states already have enacted implied warranty legislation prescribing a limited period, often one year, during which the remedy is available. Clearly, short warranty periods fail to take into consideration the delayed manifestation problem respecting latent construction defects, but there is little agreement among commentators con-

defects to surface, so as to place subsequent purchasers on equal footing should be controlled by the standard of reasonableness and not an arbitrary time limit created by the Court.

Id. at ___, 271 S.E.2d at 769.

47. See Haskell, supra note 28, at 652-53.


49. 267 S.C. at 503, 229 S.E.2d at 731.

50. Young & Harper, Quaere: Caveat Emptor or Caveat Venditor?, 24 ARK. L. REV. 245, 274 (1970). See N.J. STAT. ANN. §§ 46-313-1 to -12 (West Supp. 1979). This legislative package, entitled The New Home Warranty and Builders Registration Act, is a comprehensive statutory scheme which requires registration of all contractors and financial participation in a defect security fund. The length of warranties under the Act ranges from one year for faulty workmanship to ten years for major construction defects. Major construction defects are defined as:

any actual damage to the load-bearing portion of the home including actual damage due to subsidence, expansion or lateral movement of the soil (excluding movement caused by flood or earthquake) which affects its load-bearing function and which vitally affects or is imminently likely to vitally affect use of the home for residential purposes.

Id. § 46:3B-2(g). For a brief discussion of the New Jersey approach, see Note, Builders' Liability for Latent Defects in Used Homes, 32 STAN. L. REV. 607, 619-20 (1980).


52. See note 38 and accompanying text supra.
cerning a proper demarcation period.\(^53\) Another guide can be found in the uniform legislation packages which govern transactions for the sale of personalty\(^54\) and realty.\(^55\) These model acts agree on a limitation period yet remain flexible because their broad scope encompasses areas beyond implied warranties.

Should the legislature fail to act promptly, the court will be forced to fashion its own standard and is likely to be more concerned with the innocence of the purchaser than with his status as a third, fourth, or fifth owner.\(^56\) The development of a multifactor test similar to that used by the Indiana Supreme Court in Barnes\(^57\) may provide useful short-term guidelines for lower courts to consider. Without action by the legislature or some clarification from the courts, the building industry inevitably will take steps to avoid costly defect litigation.\(^58\)

2. The Degree of Defectiveness Required to Justify a Subsequent Purchaser's Implied Warranty Action.—Another unanswered question is the degree of defectiveness a homeowner must show to recover under an implied warranty theory.\(^59\) A standard requiring perfection is unattainable in the housing industry, because specialized contractors often work in piecemeal fashion to complete the final integrated dwelling.\(^60\) A balancing

\(^{53}\) See note 56 infra.

\(^{54}\) S.C. Code Ann. § 36-2-725 (1976) limits breach of contract actions with respect to transactions for the sale of goods to six years. This includes warranty actions from the time the defect is or should be discovered. Id.

\(^{55}\) Uniform Land Transactions Act § 2-521 also establishes a six-year limitation period. This model legislation was drafted by the National Conference of Commissioners on Uniform State Laws and was adopted in 1975. It comprises four articles and encompasses contracts to convey real estate. For a discussion of this model act, see Note, Builders' Liability, supra note 50, at 618-19.

\(^{56}\) Haskell, supra note 28, at 652 (five years for new construction, one year for used construction; both commencing from the date of conveyance regardless of when discovered); McNamara, supra note 28, at 142 ("a decade of liability should be sufficient" id.); Young & Harper, supra note 50, at 273 (one year is too short, seventeen and a half years is too long); Project, supra note 48, at 1086, 1091 (the authors propose a model statutory scheme including a two-year limitation period which starts to run when the defect is or should be discovered).

\(^{57}\) See note 36 and accompanying text supra.

\(^{58}\) For an excellent discussion of the mechanics and recent expansion of the Home Owner's Warranty Program (HOW), see Nelson, Why Builders Should Know HOW, 8 Real Est. Rev. 46 (1978).


\(^{60}\) See Padula v. J.J. Deb-Cin Homes, Inc., 111 R.I. 29, 298 A.2d 529 (1973), in which the court adopted an evidentiary test which provided that "whether the house is
of builders' interests with consumer protection suggests the need for a requirement that defects be substantial.61

3. Nonbuilder-Vendors' Liability to Subsequent Purchasers.—An issue not before the court in Terlinde is whether a subsequent purchaser can maintain an action against a nonbuilder-vendor.62 Strong arguments exist in favor of extending the subsequent purchaser's right of action in implied warranty to actions against the nonbuilder-vendor. The major distinction between nonbuilder-vendors and builder-vendors is the latters' direct participation in the construction process.63 Nonbuilder-vendors, however, control the selection of the contractors, supervise their work, and retain the right to accept the finished product as satisfactory for habitation.64 If construction work is the source of defects, responsibility can be placed more reasonably on a party who possessed supervisory authority over the work than on an innocent purchaser who merely is the unfortunate discoverer of the defects.

A final justification for extending a subsequent purchaser's implied warranty rights to actions against nonbuilder-vendors is the vendor's ability to maintain an action for subrogation against the contractor. When culpability for latent defects ultimately rests on the contractor, he may be joined as a third-party defendant in an action against a developer.65 Although acceptance of nonconforming work by a developer may operate as a waiver of claims against the contractor,66 this usually is not the case for defects due to work that is not done in accordance with a contract.67 Vendors who are aware of their potential liability for defects can avoid any bar of their subrogation rights by re-

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61. Haskell, supra note 28, at 652.
62. For a discussion of the distinction between a builder-vendor and a nonbuilder-vendor, see notes 28-32 and accompanying text supra.
63. Notes 28-32 and accompanying text supra.
64. _____ S.C. at _____, 271 S.E.2d at 769; 254 S.C. at 414, 175 S.E.2d at 795.
67. See, e.g., City of Midland v. Waller, 430 S.W.2d 473 (Tex. 1968).
fusing to enter into construction contracts with contractors who demand exculpatory clauses in their favor.

E. Conclusion

Terlinde v. Neely is a sound decision by the South Carolina Supreme Court in the area of consumer protection. The court discarded artificial distinctions previously drawn between first and subsequent purchasers and extended protection from building defects on an equal basis. Prompt legislative action consistent with this result will remedy any uncertainties created by the decision and will confirm South Carolina's active leadership in protecting home buyers.

II. Real Estate Listing Agreements Binding After the Owner's Death

In Wilbur Smith & Associates v. National Bank of South Carolina, an exclusive listing agreement, which included a clause purporting to bind the heirs of a property owner, was enforceable against the executor of the owner's estate. The court affirmed the trial court's determination that the listing agreement's language was indicative of an intention on the part of the property owner and the realtor to execute a contract that would survive the death of the owner. In order to ascertain the parties' intent, the court employed a rule of contract construction that sidestepped the operation of the principle that agency relationships terminate on the death of either party.

In 1973, DesChamps, at the age of eighty, executed an exclusive listing agreement authorizing the brokerage firm of


69. An exclusive listing agreement is a brokerage contract between an owner and a realtor under which an owner agrees to pay a realtor a commission if the realtor can interest a buyer in purchasing the land covered by the agreement. See, P. Mechem, OUTLINES OF THE LAW OF AGENCY 366 (4th ed. 1952). By entering into an exclusive listing agreement, an owner relinquishes his own right to sell the property and transfers the right to the realtor. If the owner sells the land during the term of the agreement, he still must pay the realtor his commission. E.g., Dorman Realty & Ins. Co., 264 S.C. 94, 98, 212 S.E.2d 591, 593 (1975). This type of agreement must be distinguished from the exclusive agency contract under which the owner merely is precluded from listing the property with another realtor. Id. at 98, 212 S.E.2d at 593. Under an exclusive agency contract, the owner retains the right to sell his property and need not pay a commission if he
James Cuttino & Sons to sell a 650-acre tract of land. The term of the agreement was fifteen years, and the sales price was to be determined upon completion of a feasibility study. The printed form contract contained a typed addendum: "Above contract binding on heirs and assigns." Upon completion of the feasibility study, the parties executed a second form contract that set forth the sales price and reduced the term of the listing agreement to five years. The second agreement contained no reference to the first agreement and made no mention of heirs and assigns. DesChamps died before the expiration of the five-year term, and his executor, the National Bank of South Carolina, sold the property without Cuttino's assistance but with full knowledge of the listing agreement.

In an action by Wilbur Smith & Associates against DesChamps' executor and Cuttino to recover for development work on the property, Cuttino cross-claimed against the executor for his commission due under the listing agreement. The trial court granted Cuttino's claim, and the South Carolina Supreme Court affirmed, holding that "the contract was valid and binding on DesChamps' heirs and assigns and the executor." In reaching this result, the court, in effect, broadened substantially the circumstances under which it will determine that contemporaneous agreements should be read together and refused to apply a rule of agency without considering the established exceptions of the rule.

A. Construction of Contemporaneous Instruments

Faced with two listing agreements, the first purporting to bind the property owner's heirs and assigns and the second making no similar provision, the court resolved the apparent ambiguity by relying on Klutts Resort Realty, Inc. v. Down'Round

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70. 274 S.C. at 298, 263 S.E.2d at 644. Wilbur Smith & Associates was hired by DesChamps and Cuttino to prepare a development study on the potential uses of the land. The firm prepared an elaborate twenty-four page color brochure that depicted possible uses of the property including a residential area, a golf course, and an equestrian center. The brochure was designed to attract investors interested in purchasing and developing a large tract.

71. Id. at 298, 263 S.E.2d at 644.

72. Id. at 300, 263 S.E.2d at 645.
**Development Corp.** 73 Affirming the trial court’s determination that the contemporaneous listing agreements should be construed as one contract, the court applied the rule established in *Klutts* that effect should be given to provisions in an instrument if they limit, explain, or otherwise affect a second instrument. 74 The court’s reliance on *Klutts* poses several problems.  

First, *Klutts* is factually distinguishable from *Wilbur Smith*. Although each of the listing agreements in *Wilbur Smith* was a separately enforceable contract, *Klutts* concerned the construction of a basic contract in conjunction with a separately executed but incomplete and unenforceable addendum. 75 The court avoided this distinction by finding that language pertinent to future determination of the sales price in the first agreement contemplated the execution of the second agreement. 76 Although this interpretation is tenable, the court failed to note the lack of any specific incorporating language in either agreement and did not consider the possibility that the language merely contemplated the insertion of a price term in the first agreement rather than the execution of a separate contract. 77  

The second problem created by the court’s reliance on *Klutts* becomes evident upon examination of the quoted language used by the court as authority for its holding in *Wilbur Smith*. This language provides: “[I]f there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties . . . .” 78 The court in *Wilbur Smith* failed to take into account the limiting nature of the second listing agreement that arguably restricted the first agreement in three respects: it supplied the omitted sales price of the property; it reduced the duration of the agreement from fifteen years to five years; and it omitted the provision that bound the heirs of DesChamps. 79  

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73. 268 S.C. 80, 232 S.E.2d 20 (1977). In *Klutts*, the court recognized that instruments may be contemporaneous even though not executed simultaneously if they “relate to the same subject matter and have been entered into by the same parties . . . .” Id. at 88, 232 S.E.2d at 24.  
74. 274 S.C. at 299, 263 S.E.2d at 645.  
75. See 268 S.C. at 85, 232 S.E.2d at 23.  
76. 274 S.C. at 299, 263 S.E.2d at 644.  
77. See id. at 299-300, 263 S.E.2d at 644-45.  
78. Id. at 299, 263 S.E.2d at 645 (emphasis added) (citing 268 S.C. at 88-89, 232 S.E.2d at 24)(citing 17 Am. Jur. 2d Contracts § 264 (1964)).  
79. See note 70 and accompanying text supra.
court did not attempt to identify or explain these limitations. By relying on the rule of construction set forth in *Klutts* in its interpretation of the two listing agreements in *Wilbur Smith*, the South Carolina Supreme Court arguably has opened the door to broader application of the rule in transactions based on two or more agreements.

**B. Continued Existence of a Contractual Agreement Beyond the Death of a Party**

Although the two listing agreements in *Wilbur Smith* clearly indicated that the parties intended to enter into a listing arrangement, it was unclear whether the contract was intended to survive DesChamps' death and remain enforceable against his executor. The court reasoned that the language, “[a]bove contract binding on heirs and assigns,” indicated that the parties intended to continue the listing agreement for the entire term regardless of whether DesChamps survived until the expiration of the agreement.80 The court concluded that this interpretation was consistent with the circumstances surrounding the listing agreement.81 The advanced age of DesChamps, the size of the tract of land, and the amount of time and money expended by Cuttino to promote its sale led the court to find that the broker's contract was “not an ordinary listing agreement entered into under ordinary circumstances.”82 The court assumed that because Cuttino wished to avoid any possibility of losing his investment if DesChamps were to die, the parties had contracted away the operation of the normal rule that listing agreements terminate on the death of the property owner.83 Thus, the liability of the executor flowed naturally from the exclusive listing agreement.84

As in other agency relationships, an exclusive listing agreement normally will terminate on the death of the property owner, and the real estate agent will not be entitled to recover any compensation for his services if a sale has not been effectuated

80. 274 S.C. at 300, 263 S.E.2d at 645. See notes 102-06 and accompanying text infra.
81. 274 S.C. at 301, 263 S.E.2d at 645-46.
82. Id. at 301, 263 S.E.2d at 645.
83. Id. See notes 85-88 and accompanying text infra.
84. 274 S.C. at 302, 263 S.E.2d at 646. See 264 S.C. 94, 212 S.E.2d 591.
prior to the owner's death.\textsuperscript{85} The rationale behind this rule is supplied in the comments to \textit{Restatement (Second) of Agency} section 120:

Agency is a personal relation, necessarily ending with the death of the principal; the former principal is no longer a legal person with whom there can be legal relations. One cannot act on behalf of a non-existent person. Further, to the extent that agency is a consensual relation, it cannot exist after the death or incapacity of the principal.\textsuperscript{86}

Although this rule has generated considerable controversy,\textsuperscript{87} it has persisted over the years and rests on a policy that the principal's estate should be protected from liability on contracts entered into by an agent whose existence is unknown to the estate.\textsuperscript{88}

There are, however, several means for avoiding the operation of the general rule that an agency relationship terminates on the death of the principal. First, if the authority of an agent is intertwined with an interest in the subject matter of his power, the agent is said to have a "power coupled with an interest,"\textsuperscript{89} which is irrevocable and will not terminate on the death of the principal.\textsuperscript{90} The interest must be in the subject matter of the agency relationship and not merely in the agency contract.\textsuperscript{91}


\textsuperscript{86} \textit{Restatement (Second) of Agency} § 120, Comment a (1957).

\textsuperscript{87} P. Mechem, supra note 69, at § 288 n.65; \textit{Restatement (Second) of Agency} § 120, Comment a (1957).

\textsuperscript{88} See N.Y. \textit{Law Revision Comm'n Report} 687 (1939).

\textsuperscript{89} See W. Sell, supra note 85, at § 229.


\textsuperscript{91} Cutchliffe v. Chesnut, 126 Ga. App. at 382, 190 S.E.2d at 803.
The typical exclusive listing agreement, therefore, does not come under the "power coupled with an interest" exception and normally will terminate on the death of the property owner. 92

A second device that avoids the normal consequences of the death of a property owner rests on an agent's claim of full performance prior to termination. 93 To reach this result, an override clause, which protects an agent who has performed as agreed but who may be deprived of his commission because of matters beyond his control, must appear in the listing agreement. The override clause entitles a real estate agent to his commission if the property is sold after the expiration of the listing agreement to a buyer procured by the agent during the term of the agreement. 94 The property owner's death thus does not effect termination of the agency relationship because the relationship already has been ended by the expiration of the agreement. 95 This method for avoiding the effects of termination is not applicable to the facts of Wilbur Smith because the term of the listing agreement was still in effect at DesChamps' death. 96 The supreme court, however, placed considerable emphasis on Cuttino's performance under the contract prior to and after the death of DesChamps. 97

The final method for avoiding termination of a listing agreement on the death of the owner was used in Wilbur Smith: the inclusion of an express provision to that effect in the agreement. Because DesChamps and Cuttino included the provision

92. For example, under an exclusive listing agreement similar to the one in Wilbur Smith, a realtor is authorized to find a prospective purchaser for the property, and his interest lies in the commission he will receive upon successful performance. This is not an interest in the subject matter of the agency (the property listed) but rests in the agency itself as a form of compensation. See Kirchof v. Friedman, 10 Ariz. App. 220, 457 P.2d 760 (1969); Maddox v. District Supply, Inc., 222 Md. 31, 158 A.2d 650 (1960); George H. Rucker & Co. v. Glennia, 130 Va. 611, 107 S.E. 725 (1921); W. SELZ, supra note 85, at § 229.


94. See note 93 supra.

95. See In re Estate of Lease, 62 Wis. 2d at 239, 214 N.W.2d at 423.

96. The listing agreement, however, did contain an override clause that provided: "Should the herein listed property be sold within 60 days after the expiration of the contract to anyone to whom said agent has previously offered it, I agree to pay James Cuttino & Sons the above stipulated commission on the sales price." Record at 4-A.

97. 274 S.C. at 302, 263 S.E.2d at 646.
"[a]bove contract binding on heirs and assigns" in their first agreement, the court was willing to circumvent the normal rule of termination and bind the executor of DesChamps' estate. 98 Furthermore, because DesChamps was not required to perform any unique personal services under the agreement, his estate was not prevented by impossibility from completing the contract. 99 Nevertheless, despite the executor's ability to carry out a listing agreement, there is some authority for the proposition that parties are not free to contract away the termination of an agency relationship by death because termination of agency arises by operation of law. 100 The supreme court did not consider this at great length and concluded instead that the issue was controlled by the manifested intent of the parties to bind the estate of DesChamps and his heirs if he were to die before the agreement had expired. 101

Although the use of only seven words to avoid the operation of an established principle of law might be applauded as a triumph of legal draftsmanship and a victory for simplicity in the law, its raises certain problems that were not given full treatment by the court in Wilbur Smith. If the rationale and policy considerations behind the termination rule are sound, 102 it seems only reasonable to conclude that, absent unequivocal language expressly negating its operation, the rule, when applicable, should be given effect.

98. See note 70 and accompanying text supra.
99. An executor contract that calls for the promisor to perform a personal service will not survive his death because of impossibility. 6 A. CORBIN, CONTRACTS § 1335 (1962); L. SIMPSON, CONTRACTS § 177 (2d ed. 1964); RESTATEMENT (SECOND) OF CONTRACTS § 282 (Tent. Draft No. 9, 1974); RESTATEMENT OF CONTRACTS § 459 (1932).
100. See Weaver v. Richards, 144 Mich. 395, 108 N.W. 382 (1906) (stipulation in a power of attorney that the death of the principal will not revoke power is not binding); P. MECHEN, OUTLINES ON AGENCY § 208 (3d ed. 1923); RESTATEMENT (SECOND) OF AGENCY § 120, Comment a (1957)("An agreement that an agency should continue after the death of the principal is a legal impossibility.") Id. Illustrations 2-3; id. § 59, Comment b (authority may be terminated by death, regardless of the original manifestation of the principal).
101. 274 S.C. at 301, 263 S.E.2d at 645. The court stated that it was routine practice to bind one's heirs in dispositions of real estate, yet no authority was cited. Id. at 302, 263 S.E.2d at 646. The defendant admitted in oral argument that it was legally possible to draft a listing agreement that would bind the heirs of a property owner to carry out a sale with a realtor. Id. at 300, 263 S.E.2d at 645. See RESTATEMENT (SECOND) OF AGENCY § 376 (1957) which provides: "The existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties . . . ."
102. See notes 86-88 and accompanying text supra.
Furthermore, the phrase "heirs and assigns" is misplaced in the listing agreement. This phrase traditionally is employed only as a linguistic device in deeds used to convey an estate in fee.\textsuperscript{103} It is unclear whether the words apply to the executor or administrator of the owner's estate or only to a devisee or intestate successor of the owner. The court, however, found no problems with this uncertainty, noting that "[t]he executor took charge of the property subject to its burden and was bound the same as any 'heirs and assigns.'"\textsuperscript{104} Yet, the relationships of an executor to the property of a decedent and that of an heir to the same property differ completely: one manages the property as a fiduciary; the other owns it outright. It is possible, moreover, that this ambiguous phrase could be extended to include other relationships even more remote. For example, if the probate court had been forced to sell the property in order to pay the debts of the estate, the supreme court might have found that "heirs and assigns" included the probate court, which would then be liable to Cuttino for his commission.\textsuperscript{105} The implications of the phrase are enormous. The use of ambiguous phrases susceptible of interpretive extension should not be encouraged by the court, especially when their use may contravene a rational legal principle.\textsuperscript{106}

\textbf{C. Conclusion}

There are no ultimate answers to questions concerning the proper construction given to an ambiguous agreement. Courts must use whatever tools are available in order to ascertain the intentions of the contracting parties. \textit{Wilbur Smith} testifies to the proposition that vague draftsmanship breeds litigation. Nevertheless, enforcement of ambiguous agreements may lend a stamp of approval to their continued existence. Faced with a choice between applying a well-established, rational rule of law

\textsuperscript{103} Brief of Appellant at 5-6. See W. BURBY, REAL PROPERTY 201-03 (3d ed. 1965); C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY § 3 (1962).

\textsuperscript{104} 274 S.C. at 302, 263 S.E.2d at 646.


\textsuperscript{106} See note 84 and accompanying text supra.
and pursuing a haphazard search for intent to avoid that rule, a court is better advised to choose the former and avoid the problematic consequences of the latter.

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