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I. Six Month Limitations Period on Mechanics Liens Begins When Lienor Files Notice of Lien

In *Preferred Savings & Loan Association v. Royal Garden Resort, Inc.*[1] the South Carolina Supreme Court clarified the requirements for perfecting and enforcing mechanics liens. A majority of the court held that a lienor must bring suit to foreclose on a mechanics lien within six months of filing notice of the lien regardless of whether the lienor performed additional work on the project after filing notice.[2] Because of the court's rule, title examiners may assume that property is free of mechanics liens if they do not find a petition for foreclosure or *lis pendens* on the property within six months of the date on which the lienor recorded the lien.[3] Title examiners still cannot be certain, however, whether a mechanics lien exists merely by checking the public records.[4]

Preferred Savings involved a dispute between the developer, builder, and mortgagee of a condominium project in Garden City, South Carolina. Cianbro Corporation (Cianbro), the builder, entered into a fixed-price contract with Royal Garden Resort, Inc. (Royal Garden), the developer, to construct the project. Preferred Savings and Loan Association, Inc. (Preferred Savings), the mortgagee, took a note and mortgage from Royal Garden in March 1983.

Cianbro began work on the condominium project in March 1983. By June 1984 the project was substantially completed, thereby entitling Cianbro to the remainder of its fees under the contract with Royal Garden.[5] On August 13, 1984, Cianbro served and filed a notice of mechanics lien for the entire fixed price due under the contract.[6] Cianbro completed the project in November 1984.

Cianbro filed suit to foreclose on its lien on April 2, 1985. Preferred Savings filed suit to foreclose on its mortgage on June 18, 1985. The trial court consolidated the actions, and Preferred Savings challenged the validity of Cianbro's mechanics lien.

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1. 301 S.C. 1, 389 S.E.2d 853 (1990), *aff'g* 295 S.C. 268, 368 S.E.2d 78 (Ct. App. 1988).
2. *Id.* at 4-5, 389 S.E.2d at 855.
3. *Id.* at 5, 389 S.E.2d at 855.
4. *See id.* at 8-9, 389 S.E.2d at 857 (Toal, J., dissenting).
5. *Id.* at 3, 389 S.E.2d at 854.
6. *Id.* at 6, 389 S.E.2d at 855 (Toal, J., dissenting).

The supreme court held that Cianbro's failure to bring suit on its mechanics lien within six months of the date it filed notice dissolved the lien.[7] In reaching its decision, the court focused on two statutes that control the perfection and enforcement of mechanics liens. First, the court referred to South Carolina Code section 29-5-90,[8] which reads in relevant part:

> Such a lien shall be dissolved unless the person desiring to avail himself thereof, within ninety days after he ceases to labor on or furnish labor or materials for such building or structure, serves upon the owner . . . and files in the office of the register of mesne conveyances or clerk of court of the county in which the building or structure is situated a statement of a just and true account of the amount due him, with all just credits given, together with a description of the property intended to be covered by the lien sufficiently accurate for identification . . . which certificate shall be subscribed and sworn to by the person claiming the lien . . . .[9]

Second, the court looked to South Carolina Code section 29-5-120,[10] which reads, "Unless a suit for enforcing the lien is commenced, and notice of pendency of the action is filed, within six months after the person desiring to avail himself thereof ceases to labor on or furnish labor or material for such building or structures, the lien shall be dissolved."[11] The court concluded that because both provisions impose time limitations based on when the lienor ceases to furnish labor or materials on the project, both limitations begin at the same point in time.[12] The court ruled that "[t]he effect of these provisions is that the six month limitations period for enforcing the lien necessarily commences *no later than* the date the certificate of lien is filed."[13]

The court explained that its holding was necessary to avoid "uncertainty and confusion" among title examiners.[14] The court reasoned

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7. *Id.* at 5, 389 S.E.2d at 855.
8. S.C. CODE ANN. § 29-5-90 (Law. Co-op. 1991).
9. *Id.*
10. *Id.* § 29-5-120.
11. *Id.*
12. Preferred Sav. & Loan Ass'n v. Royal Garden Resort, Inc., 301 S.C. 1, 4, 389 S.E.2d 853, 854 (1990).
13. *Id.* at 4-5, 389 S.E.2d at 855. In a footnote the court clarified its ruling:
> If the certificate of lien is filed on the date that labor ceases, suit must be brought within six months thereafter. For each additional day between the date of cessation of labor and the date of filing, the time between filing and commencement of suit is reduced by one day. Thus, if the certificate were filed on the 90th day after cessation of labor, suit must be commenced three months after the filing.

Id. at 5 n.1, 389 S.E.2d at 855 n.1.
14. *Id.* at 5, 389 S.E.2d at 855.

that title examiners should not have to look beyond the public records to determine whether the lienor had furnished labor or materials after the date on which the mechanics lien was filed.[15]

In a strong dissent Justice Toal argued that section 29-5-90 does not require a contractor to have completed a project before filing a notice of mechanics lien, but rather provides an outside time limitation within which notice of the lien must be filed.[16] Justice Toal argued that the key point in time for the beginning of the six month statute of limitations was when the contractor ceased to work on the project, not when the contractor filed notice. Justice Toal stated that section 29-5-120 does not mention the date of filing of the certificate of lien and instead explicitly provides that its six month period begins after cessation of labor or the furnishing of materials.[17] Cianbro ceased work in November 1984 and commenced its foreclosure action within six months thereof. To say that Cianbro did not comply with section 29-5-120 is to read requirements into the section that do not exist.[18]

The *Preferred Savings* court stopped short of expressly holding that the work which entitles a contractor to a mechanics lien must be completed before filing.[19] The court stated that the contractor must assert in its notice that it has completed such work as would entitle it to a lien.[20] By June 1984 Cianbro had substantially completed the condominium project, thereby entitling it to the remainder of its fees under the contract with Royal Garden.[21] The court concluded that Cianbro established a mechanics lien when Cianbro filed its August 13, 1984 notice. Cianbro's foreclosure action, filed on April 2, 1985, therefore, was too late, even though Cianbro had not ceased to labor on the project until November 1984.[22]

It remains unclear whether the court would allow a lienor to toll the six month limitations period if the lienor stated in its notice that

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15. *Id.*

16. *Id.* at 7, 389 S.E.2d at 856.

17. *Id.* at 8, 389 S.E.2d at 856. Justice Toal also found "suspect" the majority's argument that its holding was necessary to prevent confusion among title examiners. *Id.* at 8-9, 389 S.E.2d at 857.

18. In the past the South Carolina Supreme Court tended to liberalize the notice requirements in favor of protecting a lienor's security. *See* Wood v. Hardy, 235 S.C. 131, 110 S.E.2d 157 (1959); Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 93 S.E.2d 855 (1956). In more recent decisions, however, South Carolina courts have enforced the statutory notice requirements strictly. *See* Multiplex Bldg. Corp. v. Lyles, 268 S.C. 577, 235 S.E.2d 133 (1977); Muller v. Myrtle Beach Golf & Yacht Club, 399 S.E.2d 430 (S.C. Ct. App. 1990).

19. *See Preferred Savings*, 301 S.C. at 7, 389 S.E.2d at 856 (Toal, J., dissenting).

20. *Id.* at 4, 389 S.E.2d at 854.

21. *Id.* at 3, 389 S.E.2d at 854.

22. *Id.* at 4-5, 389 S.E.2d at 855.

work on the project had not been completed or would be completed at a later date. Such a notice would alert title examiners that a lien may exist on the property. Title examiners would have to look, however, beyond the public records to discover if the date listed in the notice was erroneous.[23]

Given the supreme court's stated policy in *Preferred Savings* of promoting clarity and certainty in the public records[24] and its strict reading of the mechanics liens statutes,[25] contractors must be extremely careful when perfecting mechanics liens. In any situation in which the date labor ceases is different from the date of notice filing, the lienor must be aware that two time limitations are running, not just one. Waiting to file notice will reduce the time in which lienors can foreclose after the notice is recorded. On the other hand, filing notice before labor actually ceases will start the six month statute of limitations. The supreme court will likely continue to strictly construe the mechanics liens statutes in an effort to promote clarity and certainty in the public records.

Robert E. August

II. Judicial Sale Set Aside Solely Because of an Inadequate Price

In *Investors Savings Bank v. Phelps*[26] the South Carolina Court of Appeals affirmed the set aside of a mortgage foreclosure sale solely because of a grossly inadequate price. For the first time, a South Carolina court affirmed the set aside of a judicial sale in the absence of other circumstances[27] warranting such action. The court also stated that the amount of a note and the purchase money mortgage that secures the note can be competent evidence of the property's current value, but the court did not establish a clear standard for determining whether a

23. As Justice Toal points out in her dissent, the majority's decision does not enable title examiners to rely completely on the public records when checking for mechanics liens. *See id.* at 8-9, 389 S.E.2d at 857 (discussing Willard v. Finch, 121 S.C. 1, 113 S.E.2d 302 (1922)).

24. *See supra* text accompanying notes 14-15.

25. *See* cases cited *supra* note 18.

26. 397 S.E.2d 780 (S.C. Ct. App. 1990).

27. Other circumstances may include a variety of acts and conditions which would impeach the fairness of the transaction such as mistaken or improper action by the officer making the sale or improper conduct of the bidder or other participants. Examples of improper conduct include attempts to stifle competition, chill the bidding, or take any other undue or unfair advantage. *See* Raleigh & C.R. Co. v. Baltimore Nat'l Bank, 41 F. Supp. 599, 601 (E.D.S.C. 1941).

particular price is adequate.[28]

Investors Savings Bank (Investors) instituted an action to foreclose its mortgage on a parcel of residential property and demanded a deficiency judgment. The note had a balance due of $52,369.80 plus interest. At the foreclosure sale Investors submitted a bid of $500, which was the highest bid received.[29] The nominal amount of this bid was the result of a mistaken communication from the mortgagee to its attorney and the absence of other bidders at the sale. But for the mistake, the mortgagee would have bid $45,467.00, which represented the appraised value of the property less the estimated costs of foreclosure and resale.[30]

Because Investors demanded a deficiency judgment, the bidding remained open for thirty days.[31] On the thirtieth day Johnny M. Flynn, a third party who had no relationship to the mortgage transaction, bid $510. Upon a motion made by Investors, the master set aside the sale because the price was grossly inadequate.[32]

In affirming the master's decision, the court of appeals relied on the rule enunciated in *Poole v. Jefferson Standard Life Insurance Co.*,[33] which provides that judicial sales will not be set aside based on " 'inadequacy of price unless it is so gross as to shock the conscience, or accompanied by other circumstances warranting the interference of the court.' "[34] The court emphasized that this rule contemplates two potential applications because the use of the disjunctive term "or" indicates that either of two conditions, gross inadequacy of price or inadequacy of price coupled with "other circumstances," would provide a basis for setting aside a judicial sale.[35] The appellant argued that the court should interpret the rule to mean that other circumstances always should be required because in all prior decisions the courts relied on other circumstances to set aside the sale.[36] The court found this argument unpersuasive.[37]

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28. *Investors*, 397 S.E.2d at 782.

29. *Id.* at 781.

30. Record at 22.

31. *See* S.C. CODE ANN. § 15-39-720 (Law. Co-op. 1976) (preventing the high bidder at the original sale from entering any other bid during the thirty-day period in which the bidding remains open); S.C. R. CIV. P. 71.

32. *Investors*, 397 S.E.2d at 781.

33. 174 S.C. 150, 177 S.E. 24 (1934).

34. *Investors*, 397 S.E.2d at 781 (quoting *Poole*, 174 S.C. at 157, 177 S.E. at 27).

35. *Id.*; *see also* Washburn, *The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales*, 53 S. CAL. L. REV. 843, 859-70 (1980) (discussing majority rule in American jurisdictions).

36. *Investors*, 397 S.E.2d at 781.

37. *Id.* The court noted that several recent decisions clearly stated that the two-prong standard is still good law in South Carolina. *Id.* at 781-82 (citing Hamilton v.

The court further noted that the purchase money mortgage and the amount of the note that it secured is competent evidence of the property's value.[38] The court did not, however, articulate a clear standard for determining when a price is grossly inadequate. The court noted that Flynn's bid represented slightly more than one percent of the original amount of the note and mortgage. The court also noted that in *Poole* the bid represented approximately ten percent of the value of the property sold.[39] In addition, the court looked to other jurisdictions. In *Looper v. Madison Guaranty Savings & Loan Association*[40] the bid set aside by the Arkansas Supreme Court was less than five percent of the property's value.[41] The court also referred to New York precedent in which bids of less than ten percent of value were routinely set aside.[42]

Investors represented the first opportunity for the court to apply only the first prong of the *Poole* standard and was the culmination of a gradual but complete reversal in the judicial attitude toward setting aside judicial sales. The early view was articulated in *Coleman v. Bank of Hamburg*,[43] in which the court stated: "It is settled law, that where unfair means have not been employed to prevent competition at sheriff's sales, inadequacy of price, however great, is no ground for setting them aside. Whether wise or not, this is the law of South Carolina."[44] In the 1915 decision of *Bonham v. Cave*[45] the gross inadequacy ground became a part of the rule.[46] In 1934 the supreme court relied upon the

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Patterson, 236 S.C. 487, 494, 115 S.E.2d 68, 71 (1960); Bonney v. Granger, 300 S.C. 362, 365, 387 S.E.2d 720, 722 (Ct. App. 1990) (per curiam)). The *Investors* court also looked to other jurisdictions and found persuasive an Arkansas Supreme Court decision that reached the same result on similar facts. *Id.* at 781 (citing Looper v. Madison Guar. Sav. & Loan Ass'n, 292 Ark. 225, 729 S.W.2d 156 (1987)).

38. *Id.* at 782. However, the trial judge has discretion to determine whether the prior sale occurred too long ago to allow the court to rely on the note and mortgage as exclusive evidence of the current fair market value of the property. *Id.* (citing South Carolina State Highway Dep't v. Estate of League, 251 S.C. 368, 162 S.E.2d 532 (1968)).

39. In the *Poole* decision, however, the negligence of the master's clerk resulted in the omission of a party's bid and compromised the integrity of the sale. This "other circumstance" invoked the second prong of the *Poole* rule. *Poole*, 174 S.C. at 157-58, 177 S.E. at 27.

40. 292 Ark. 225, 729 S.W.2d 156 (1987).

41. *Id.* at 227, 729 S.W.2d at 157.

42. *Investors*, 397 S.E.2d at 782 (citing Polish Nat'l Alliance v. White Eagle Hall Co., 98 A.D.2d 400, 408, 470 N.Y.S.2d 642, 649 (1983)).

43. 21 S.C. Eq. (2 Strob. Eq.) 285 (1848).

44. *Id.* at 298. In *Coleman* land worth between $5,000 and $6,000 sold for one dollar subject to a mortgage of $1,500; therefore, the bid price represented between 25% and 30% of value.

45. 102 S.C. 308, 86 S.E. 681 (1915).

46. However, in *Bonham* the sale was set aside because of an inadequate price com-

language in *Bonham* in stating the rule of *Poole*.[47] Although the first prong of the *Poole* rule had never been applied and price alone had never served as a basis for setting aside an otherwise bona fide and nonfraudulent judicial sale in South Carolina, the *Investors* court did not hesitate to apply the clear language of the rule because the facts of the case warranted a set aside.

The court's failure to announce a standard for determining the adequacy of the bid can perhaps be attributed to the impracticability of doing so. As the Arkansas Supreme Court observed:

> A price that "shocks the conscience" of a judge can never be reduced to a mathematical formula. It depends on a variety of circumstances: the value of the property, the circumstances surrounding the sale, the price, the rights of the parties participating in the sale, and the harm that may result if the sale is confirmed . . . .[48]

However, at least one bright line standard exists in South Carolina precedent. In *Turner v. Byars*[49] property worth $1,000 was sold to the highest bidder for $450. Potential purchasers were unable to bid at the sale because of automobile problems and sought to set aside the sale on the ground that the bid was inadequate. The sale was bona fide in all respects and there were no other circumstances warranting judicial interference. Applying the *Poole* standard,[50] the court concluded that "the disparity between the sales price and the value of the property . . . does not shock the conscience of the court."[51] Therefore, *Turner* stands for the proposition that a bid representing forty-five percent of the property's value is not so grossly inadequate as to shock the court's conscience and warrant judicial relief from the sale.[52] Based on the court of appeals reference to New York precedent in the *Investors* decision, however, it appears that the court would consider any bid of less than ten percent to be grossly inadequate.[53]

Especially when the creditor is demanding a deficiency judgment, several adverse consequences of inadequate prices at judicial sales ex-

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bined with a mistake of the officer conducting the sale. *Id.* at 311, 86 S.E. at 682.

47. *Poole*, 174 S.C. at 157, 177 S.E. at 27 (citing Bonham v. Cave, 102 S.C. 308, 86 S.E. 681 (1915)).

48. Looper v. Madison Guar. Sav. & Loan Ass'n, 292 Ark. 225, 227, 729 S.W.2d 156, 157 (1987).

49. 230 S.C. 55, 94 S.E.2d 57 (1956).

50. Although it did not mention the *Poole* case, the court stated that "mere inadequacy of price (unless it shock[s] the conscience of the court) will not vitiate a judicial sale." *Id.* at 58, 94 S.E.2d at 58.

51. *Id.*

52. This view is in accord with the holdings in a number of other jurisdictions. Washburn, *supra* note 35, at 866 n.113 and accompanying text.

53. This also appears to be a generally accepted standard. *Id.* at 866 & n.112.

ist. First, if the creditor's bid succeeds at a nominal amount, it will achieve a result tantamount to a double satisfaction of the debt: market value for the property upon resale and a deficiency judgment against the debtor for almost the full amount of the debt.[54] Second, the debtor suffers a loss that perhaps is even greater than the creditor's potential gain: the loss of both the property and any equity that the debtor may have realized in a normal sale.[55] Finally, a third party unrelated to the mortgage transaction may acquire valuable property for a nominal sum to the detriment of both the creditor and the debtor.

Although it is sound judicial policy to protect the sanctity of judicial sales, it should not be the purpose of the law to protect those who seek to procure valuable property with little or no payment. The court of appeals application of the *Poole* rule in *Investors* gives equity courts an important tool to prevent unjust results in judicial sales.

James Y. Becker

III. Subcontractor's Statutory Lien Has Priority over Prior Perfected Security Interest in General Contractor's Accounts

In *Poinsett Construction Co. v. Fischer*[56] the South Carolina Court of Appeals held that a subcontractor's statutory lien in monies received by the general contractor has priority over a previously perfected security interest in the general contractor's accounts receivables.[57] The court based its holding on section 29-7-10 of the South Carolina Code.[58]

In *Poinsett* a general contractor granted South Carolina National Bank (the Bank) a security interest in its accounts receivables as collateral for a loan. The Bank properly created and perfected the secur-

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54. *Id.* at 849.
55. *Id.* at 850.
56. 301 S.C. 343, 391 S.E.2d 875 (Ct. App. 1990).
57. *Id.* at 345, 391 S.E.2d at 876.
58. S.C. Code Ann. § 29-7-10 (Law. Co-op. 1991). Section 29-7-10 provides in part:

> Any contractor in the erection, alteration or repairing of buildings in this State shall pay all laborers, subcontractors and materialmen for their lawful services and material furnished out of the money received for the erection, alteration or repairs of buildings upon which such laborers, subcontractors and materialmen are employed or interested and such laborers, as well as all subcontractors and persons who shall furnish material for any such building, shall have a first lien on the money received by such contractor for the erection, alteration or repair of such building in proportion to the amount of their respective claims.

Id.

ity interest. The Bank then assigned its perfected security interest to Ms. Fischer. Subsequently, the general contractor hired a subcontractor, Poinsett Construction Company (Poinsett), to complete a portion of the construction on one of the general contractor's projects. Poinsett completed the work and the general contractor received full payment for the project on which Poinsett worked. The prime contractor endorsed part of the proceeds over to Fischer[59] and never fully paid Poinsett. After obtaining a judgment against the general contractor for the deficiency, Poinsett sued and sought to satisfy its judgment from the funds in Ms. Fischer's possession. Poinsett claimed a lien on the funds based on section 29-7-10. The issue before the court was "whether Poinsett's statutory lien has priority over the perfected security interest assigned by the bank to Ms. Fischer, or vice versa."[60]

The court of appeals focused on the construction of section 29-7-10 to resolve the priorities. The court relied on *Spires v. Spires*[61] and held that because the statute explicitly grants subcontractors a first lien on the money received by the contractor, "Poinsett's statutory lien is a first lien and, thus, has priority over the security interest which [the general contractor] gave the bank and the bank assigned to Ms. Fischer."[62] Based on another well-settled rule of statutory construction found in *Crescent Manufacturing Co. v. South Carolina Tax Commission*,[63] the court of appeals rejected the circuit court's interpretation of 29-7-10.[64] The court of appeals pointed out that the circuit court's interpretation directly contradicts the explicit language of the statute, which grants subcontractors a "first lien." The *Poinsett* court concluded that the statutory language concerning the borrowing of money merely clarifies that the statute does not preclude consensual liens on a contractor's accounts. A contractor can continue to grant these liens, but the liens would be subordinate to the statutory lien granted to the

59. Brief of Appellant at 2; Brief of Respondent at 3.

60. *Poinsett*, 301 S.C. at 344, 391 S.E.2d at 876.

61. 296 S.C. 422, 373 S.E.2d 698 (Ct. App. 1988). "Where a statute is clear and unambiguous, there is not room for construction, and, the terms of the statute must be given their literal meaning." *Id.* at 423, 373 S.E.2d at 699 (citing Duke Power Co. v. South Carolina Tax Comm'n, 292 S.C. 64, 354 S.E.2d 902 (1987)).

62. *Poinsett*, 301 S.C. at 345, 391 S.E.2d at 876.

63. 129 S.C. 480, 124 S.E. 761 (1924). The *Crescent* court stated that "a statute shall be given effect, and that a statute must receive such construction as will make all of its parts harmonize with each other and render them consistent with its general scope and object." *Id.* at 493-94, 124 S.E. at 765.

64. *Poinsett*, 301 S.C. at 345, 391 S.E.2d at 877. The circuit court predicated its holding in favor of the perfected security interest "on the next-to-last sentence of Section 29-7-10 which provides that 'nothing contained in this section shall be construed to prevent any contractor or subcontractor from borrowing money on any such contract.'" *Id.*

subcontractor under section 29-7-10.[65]

The South Carolina Court of Appeals decision incorporates cogent reasoning supported by settled principles of law. The practitioner should be aware that under section 29-7-10 the statutory lien of a subcontractor or other laborer that has not been paid for work performed has priority over the interest of a secured creditor with respect to funds received by the general contractor regardless of when the secured creditor's security interest was perfected.

C. Dan Wyatt, III

IV. Notice of Breach After Acceptance Requirements Are Still an Open Question Under South Carolina's Commercial Code

Under the Uniform Commercial Code—Sales chapter of the South Carolina Code,[66] when a buyer accepts a seller's tender of goods before discovering a defect, "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."[67] The section does not specify what information the notice must contain, nor does it specify what form the notice must take.[68] In *Southeastern Steel Co. v. W.A. Hunt Construction Co.*[69] the South Carolina Court of Appeals discussed the two prevailing notice requirement tests used in other jurisdictions, but the court declined to adopt either test.

The Hunt Construction Company (Hunt) entered into a contract with Southeastern Steel Company (Southeastern) to purchase steel and steel products for use in two construction projects. Hunt accepted Southeastern's tender of the steel and steel products. Hunt subsequently discovered defects in the steel and orally notified Southeastern of the defects. Southeastern corrected some of the defects, but Hunt corrected others at its own expense. Hunt also incurred costs when the defective steel caused it to be late in finishing one of the construction projects.[70]

Mr. Hunt, the president of Hunt, met with the president of Southeastern to discuss the balance due on Hunt's account. At the meeting the balance was adjusted for an error, but Mr. Hunt did not indicate that he intended to deduct the amount of the repair costs and the late

65. *See id.*
66. S.C. Code Ann. §§ 36-2-101 to -809 (Law. Co-op. 1976).
67. *Id.* § 36-2-607(3)(a).
68. *See id.*
69. 301 S.C. 140, 390 S.E.2d 475 (Ct. App. 1990).
70. *Id.* at 141, 390 S.E.2d at 476-77.

penalties from the bill.[71] In fact, Mr. Hunt made no mention of his intent to setoff these costs, despite being asked by Southeastern's president whether there were " 'any other problems or anything else [which] needed to be taken care of.' "[72]

When Hunt failed to pay its bill, Southeastern brought suit to recover the contract price of the steel. Hunt stipulated as to the amount due, but asserted in its answer that it was entitled to a right of setoff for the costs relating to the defects. The trial court granted summary judgment to Southeastern on the issue of the amount due. At trial the court also entered a directed verdict for Southeastern on the issue of whether Hunt was entitled to a setoff. The lower court based its ruling on the theory that Hunt had complied with neither the form nor the contents of notice as required by section 36-2-607(3)(a).[73] Hunt appealed the trial judge's decision to grant a directed verdict.[74]

The court of appeals held that Hunt had not given adequate notice to Southeastern.[75] The court reasoned that the content of Hunt's statements was not adequate under either of the two major tests used in other jurisdictions. Therefore, the court affirmed the trial judge's ruling that Hunt was barred from asserting a right of setoff.[76]

The court's opinion is troubling for two reasons. First, although it analyzed each of the two major tests used in other jurisdictions, the court declined to adopt a standard for South Carolina, thereby perpetuating the current ambiguity surrounding section 36-2-607(3)(a)'s notice requirements.[77] Second, the court indicated in dictum that it would be favorably inclined toward adopting a requirement that section 36-2-607(3)(a) notices must be in writing.[78]

Much of the confusion surrounding the adequacy of notice under section 36-2-607(3)(a) arises from the statute itself and the appended official comment. The statute does not specify what the notice must contain or what form the notice must take.[79] Official Comment 4 to section 36-2-607 discusses the notice requirement, but contains inherent conflicts and can be used to support either a strict or lenient content requirement.[80] This inherent conflict, among other reasons, led

71. *Id.* at 142, 390 S.E.2d at 477.
72. *Id.* (alteration by court).
73. S.C. CODE ANN. § 36-2-607(3)(a) (Law. Co-op. 1976).
74. *Hunt*, 301 S.C. at 141, 390 S.E.2d at 476.
75. *Id.* at 146-47, 390 S.E.2d at 479-80.
76. *Id.* at 147, 390 S.E.2d at 480.
77. *Id.* at 146, 390 S.E.2d at 479.
78. *Id.* at 142 n.1, 390 S.E.2d at 477 n.1.
79. *See* S.C. CODE ANN. § 36-2-607(3)(a) (Law. Co-op. 1976).
80. *Id.* comment 4; *see Hunt*, 301 S.C. at 145, 390 S.E.2d at 479 (The first sentence of the second paragraph of the comment supports the "lenient" standard; the fourth

one commentator to state that section 36-2-607(3)(a)'s notice requirement is a "complex concept."[81] Leading commentators cannot agree on whether a strict or lenient standard should apply to section 36-2-607(3)(a)'s notice requirements.[82] Other commentators have attempted to draw strained distinctions between the leading strict standard case, *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*,[83] and the leading lenient standard case, *Oregon Lumber Co. v. Dwyer Overseas Timber Products Co.*[84] The interpretation of section 36-2-607(3)(a)'s notice requirements clearly is a difficult task which can be performed only by each state's courts. The *Hunt* court unwisely shied away from this task.

The court of appeals discussed both *Eastern Air Lines* and *Oregon Lumber* and stated that it found the arguments for the adoption of each standard "compelling."[85] The court stated, however, that it found it "unnecessary . . . to decide which standard should be applied because a careful review of the facts reveals that Hunt did not give adequate notice of breach under either standard."[86] The court then applied both standards and held that Hunt had not met the requirements of either standard.[87] The court also noted that a buyer must give the seller some sort of notice; the return of goods for repair is not sufficient.[88] However, this brief statement does not alleviate the confusion surrounding section 36-2-607(3)(a)'s requirements. By refusing to

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sentence of the second paragraph indicates a "strict" standard).

81. Dillsaver, *Notice of Breach After Acceptance of Tender*, 17 U.C.C. L.J. 220, 237 (1985).

82. *Compare* R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-607:43 (3d ed. 1983) (supporting a strict standard) *with* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 11-10, at 484 (3d ed. 1988) (stating that "[q]uite clearly the drafters intended a loose test").

83. 532 F.2d 957 (5th Cir. 1976).

84. 280 Or. 437, 571 P.2d 884 (1977). Dillsaver argues that the crucial difference in cases which apply the two standards can be attributed to the identity of the parties. In merchant-merchant transactions Dillsaver argues that the strict standard is applied. However, in consumer-merchant transactions the lenient standard is applied. Dillsaver, *supra* note 81, at 226-27, 233-34. Dillsaver's argument is specious. Both *Eastern Air Lines* and *Oregon Lumber* involved merchant-merchant transactions.

85. Southeastern Steel Co. v. W.A. Hunt Constr. Co., 301 S.C. 140, 146, 390 S.E.2d 475, 479 (Ct. App. 1990).

86. *Id.*

87. *Id.*

88. *See id.* at 146-47, 390 S.E.2d at 479-80. Hunt argued that Southeastern was on notice because it had either " 'inspected or refabricated . . . each defective material.' " *Id.* at 147, 390 S.E.2d at 479. The court rejected Hunt's argument and distinguished mere notice of facts from notice that the buyer considers these facts to constitute a breach. *Id.* at 147, 390 S.E.2d at 479-80 (citing American Mfg. Co. v. United States Shipping Bd. Emergency Fleet Corp., 7 F.2d 565 (2d Cir. 1925) (L. Hand, J.)).

adopt either standard, the court has provided no guidance to South Carolina merchants that discover a defect in goods that have been tendered and accepted.

The court added to the confusion surrounding adequate notice by noting that the lower court's reasoning for imposing a written notice requirement under section 36-2-607(3)(a) was "compelling."[89] The trial court relied on a rejection of goods case, *Southeastern Steel Co. v. Burton Block & Concrete Co.*,[90] to reach this conclusion.[91] *Burton Block* has been criticized as "only superficially sound" and "unwise."[92] The court should not perpetuate the false wisdom of *Burton Block* by extending its written notice requirements to section 36-2-607(3)(a) cases.[93]

Hunt presented the court with a unique opportunity to relieve the confusion surrounding section 36-2-607(3)(a)'s notice requirements. By refusing to adopt a test for the adequacy of notice, the court has perpetuated the confusion over content. The court's approval in dictum of a written notice requirement will propagate further confusion over the required form of notice. At the next available opportunity, the court should adopt a standard for the content of notices and should reject the notion that section 36-2-607(3)(a) notices must be in writing.

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89. *Id.* at 142 n.1, 390 S.E.2d at 477 n.1.

90. 273 S.C. 634, 258 S.E.2d 888 (1979); *see* S.C. CODE ANN. § 36-2-602 (Law. Co-op. 1976).

91. *Hunt*, 301 S.C. at 142 n.1, 390 S.E.2d 477 n.1.

92. *Annual Survey of South Carolina Law, Form of Notification Under the Uniform Commercial Code*, 32 S.C.L. REV. 69 (1980).

93. *See, e.g.*, J. WHITE & R. SUMMERS, *supra* note 82, at 484; Dillsaver, *supra* note 81, at 224.