

Protections for Military Servicemembers in North Carolina Power of Sale Foreclosures

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At a hearing on a power of sale foreclosure before the clerk of superior court, the clerk's authority is limited to six legal findings. Chapter 45, Section 21.16(d) of the North Carolina General Statutes (hereinafter G.S.). The purpose of this publication is to provide guidance to clerks related to one of these legal findings: military service of the respondent. There are both federal and state protections for servicemembers who are respondents in G.S. Chapter 45 foreclosure proceedings. These protections arise out of

1. the federal Servicemembers Civil Relief Act, 50 U.S.C. ch. 50 (SCRA);
2. Section 45-21.12A of the North Carolina General Statutes; and
3. the state North Carolina Servicemembers Civil Relief Act, G.S. Chapter 127B, Article 4 (NC SCRA).

The SCRA is a federal law enacted in 2003. It revised and expanded the Soldiers' and Sailors' Civil Relief Act of 1940. The purpose of the SCRA is (1) to provide for, strengthen, and expedite the national defense by providing protection to servicemembers to enable them to devote their entire energy to defense and (2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service. 50 U.S.C. § 3902. The protections provided by the SCRA extend to servicemembers during and, in some cases, after, a period of federal military service (defined further below).

G.S. 45-21.12A is a state law enacted in 2010. The purpose of this statute is to supplement and complement the provisions of the SCRA and to afford greater peace and security for persons during or within ninety days after a period of federal military service. G.S. 45-21.12A(c).

The NC SCRA was enacted in 2019. It incorporates the rights, benefits, and protections of the federal SCRA into North Carolina law and extends those rights, benefits, and protections to certain servicemembers during or, within certain periods, after, state military service (defined further below) to the extent a servicemember's military service materially affects the servicemember's ability to comply with their obligations. G.S. 127B-26; -28(a).

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Definitions

The federal SCRA and G.S. 45-21.12A provide protections to servicemembers for what is defined in this publication as *federal military service*. Federal military service includes (1) a servicemember on active duty who is a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard; (2) a servicemember who is a member of the National Guard under a call to active service authorized by the President or the Secretary of Defense for a period of more than thirty consecutive days for purposes of responding to a national emergency declared by the President and supported by federal funds; (3) a servicemember on active service who is a commissioned officer of the Public Health Service or the National Oceanic and Atmospheric Administration; and (4) any period during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause. 50 U.S.C. § 3911(2); G.S. 45-21.12A(d).

The NC SCRA provides protections to servicemembers for what is defined in this publication as *state military service* to the extent the servicemember's military service materially affects the servicemember's ability to comply with their obligations. G.S. 127B-26; -28(a). State military service includes (1) in the case of a member of the North Carolina National Guard, state active duty under an order of the North Carolina governor pursuant to G.S. Chapter 127A for a period of more than thirty consecutive days and (2) in the case of a member of the National Guard of another state who resides in North Carolina, service under an order of the governor of that state that is similar to state active duty for a period of more than thirty consecutive days. G.S. 127B-27(3). The requirements in G.S. 45-21.12A do not apply to state military service.

Protections and Procedure

The SCRA and the NC SCRA require the party seeking to foreclose to file in every foreclosure proceeding where the respondent does not make an appearance, an affidavit, declaration, or other sworn statement regarding the respondent's federal and state military service. 50 U.S.C. §§ 3931(a), (b); G.S. 127B-28. In addition, G.S. 45-21.12A requires the mortgagee, trustee, or other creditor to file a certification that the hearing will take place at a time that is not during or within ninety days after a period of federal military service for the mortgagor, trustor, or debtor. This requirement applies regardless of whether the mortgagor, trustor, or debtor makes an appearance at the hearing. The N.C. Administrative Office of the Courts publishes a form Servicemembers Civil Relief Act Declaration, AOC-G-250. This form may be used to fulfill both the SCRA and the NC SCRA affidavit requirements and is styled as a declaration, as allowed by 50 U.S.C. § 3931(b)(4). This form does not meet the requirements of G.S. 45-21.12A. The form must be modified or a separate certification must be provided to the court in addition to the AOC-G-250 to meet the requirements of G.S. 45-21.12A. In lieu of using the AOC-G-250, the party seeking to foreclose may instead draft an instrument that meets the requirements of the SCRA, the NC SCRA, and G.S. 45-21.12A.

The protections set out in the SCRA, the NC SCRA, and G.S. 45-21.12A may be waived by the respondent to the foreclosure proceeding, provided that the waiver is legally sufficient. The waiver must (1) be in writing, (2) be executed during or after the respondent's period of military service, (3) be an instrument separate from the obligation or liability to which the waiver applies, (4) be in at least 12-point type, and (5) specify the legal instrument creating the obligation or liability to which the waiver applies. G.S. 45-21.12A(b); 50 U.S.C. § 3918; G.S. 127B-28.

Relevant Stays

The SCRA provides a variety of protections to servicemembers in **federal** military service. The NC SCRA extends these protections to servicemembers in **state** military service to the extent the servicemember's military service materially affects their ability to comply with their obligations. G.S. 127B-28(a). These protections include the authority to obtain a stay of the foreclosure proceedings pursuant to SCRA Sections 3931, 3932, or 3953. The stay available under Section 3931 is reflected on the "In Military Service" flow chart set out in this publication. The stays available under Sections 3932 and 3953 are not reflected in any of this publication's flow charts but are summarized below. Judicial officials should be aware that the court may grant a stay under Section 3932 or 3953 upon application of the servicemember or upon the court's own motion. In some instances, the court is required to grant a stay.

The 50 U.S.C. Section 3931 Stay

A stay of the foreclosure proceeding may be made under Section 3931 if the respondent did not make an appearance in the proceeding and is in federal or state military service. If the information before the court shows that the respondent is in military service and did not make an appearance, the court must appoint an attorney to represent the respondent. The motion for a stay may be made upon the clerk's own motion or upon the motion of the attorney appointed under the SCRA to represent the respondent. The clerk must grant a minimum ninety-day stay of the proceeding when

1. the respondent is in military service;
2. the respondent did not make an appearance; and
3. the clerk determines that
 - a. there may be a defense, but it cannot be presented without the respondent's presence or
 - b. after due diligence, the SCRA-appointed attorney has been unable to contact the respondent or otherwise determine if a meritorious defense exists. 50 U.S.C. § 3931(d).

The 50 U.S.C. Section 3932 Stay

A stay of the foreclosure proceeding may be entered under Section 3932 by the clerk upon the clerk's own motion or upon the application of a party who is a servicemember who (1) is in military service or has been terminated or released from federal or state military service within the last ninety days or (2) has received notice of the proceeding. A servicemember may apply for a stay of the proceeding by filing an application with the clerk at any stage before a final judgment is entered. Unlike a stay under Section 3931, a stay under Section 3932 is available regardless of whether the servicemember makes an appearance in the proceeding. The clerk must stay the proceeding for at least ninety days when the servicemember files an application for a stay that includes both of the following:

1. a letter or other communication that sets forth the facts as to how the current military duty requirements materially affect the servicemember's ability to appear and states a date when the servicemember will be available to appear and
2. a letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents the servicemember from appearing and that military leave is not authorized for the servicemember at the time of the letter or communication. 50 U.S.C. § 3932(b).

At the time of the initial application or after the first mandatory Section 3932 stay is granted, the servicemember may apply for another stay based on the continuing material effect of military duty on the servicemember's ability to appear. 50 U.S.C. § 3932(d)(1). An additional request for a stay must include the same information that was required for the first stay. 50 U.S.C. § 3932(d)(1). The granting of an additional stay is not mandatory, but if the clerk denies the servicemember's request, the clerk must appoint an attorney to represent the servicemember in the proceeding. 50 U.S.C. § 3932(d)(2).

The 50 U.S.C. Section 3953 Stay

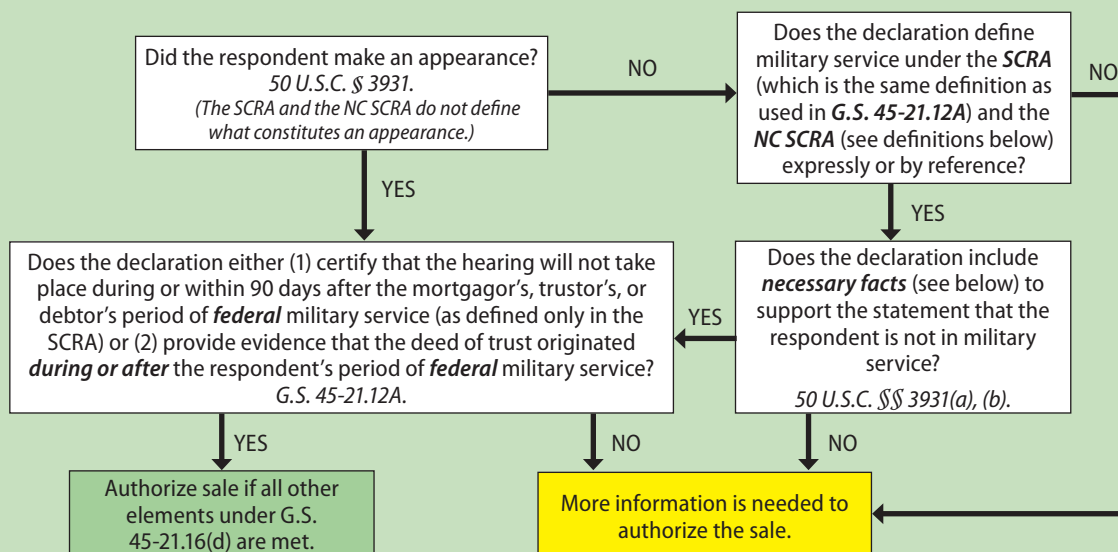
A stay under Section 3953 is only available in proceedings to enforce a mortgage, deed of trust, or other security in the nature of a mortgage, such as a foreclosure proceeding. 50 U.S.C. § 3953(a). In a foreclosure proceeding filed during, or within one year after, a servicemember's period of federal or state military service, the court *may* after a hearing and upon its own motion, and *shall* upon application by a servicemember when the servicemember's ability to comply with the obligation is materially affected by military service,

1. stay the proceedings for a period of time as justice and equity require or
2. adjust the obligation to preserve the interests of all parties. 50 U.S.C. § 3953(b).

This protection does not apply if the obligation secured by a deed of trust originated during or after the servicemember's federal or state military service. 50 U.S.C. § 3953(a).

Not in Military Service

The purpose of this flow chart is to assist the clerk in determining whether to authorize a foreclosure sale and what other steps the clerk should take when the evidence provided to the court in a G.S. Chapter 45 power of sale foreclosure states that the respondent is not in military service.



Necessary Facts

The declarant must provide necessary facts to support the statements as to whether the respondent is or is not in federal and state military service. 30 U.S.C. § 3931(b)(1)(A); G.S. 127B-28.

Under the SCRA, necessary facts may include the results of a Department of Defense (DOD) database search or other facts within the personal knowledge of the declarant as to the respondent's SCRA military service.

Under the NC SCRA, necessary facts may include facts within the personal knowledge of the declarant as to the respondent's state military service. This includes whether the declarant received a copy of a military order from the respondent related to (1) state active duty as a member of the N.C. National Guard or (2) service similar to state active duty as a member of the National Guard of another state. G.S. 127B-28(b). Note that the DOD database does not search the expanded protections under the NC SCRA for state military service; therefore, the declaration should include some statement of fact as to the respondent's state military service and not only a statement as to the results of a DOD search.

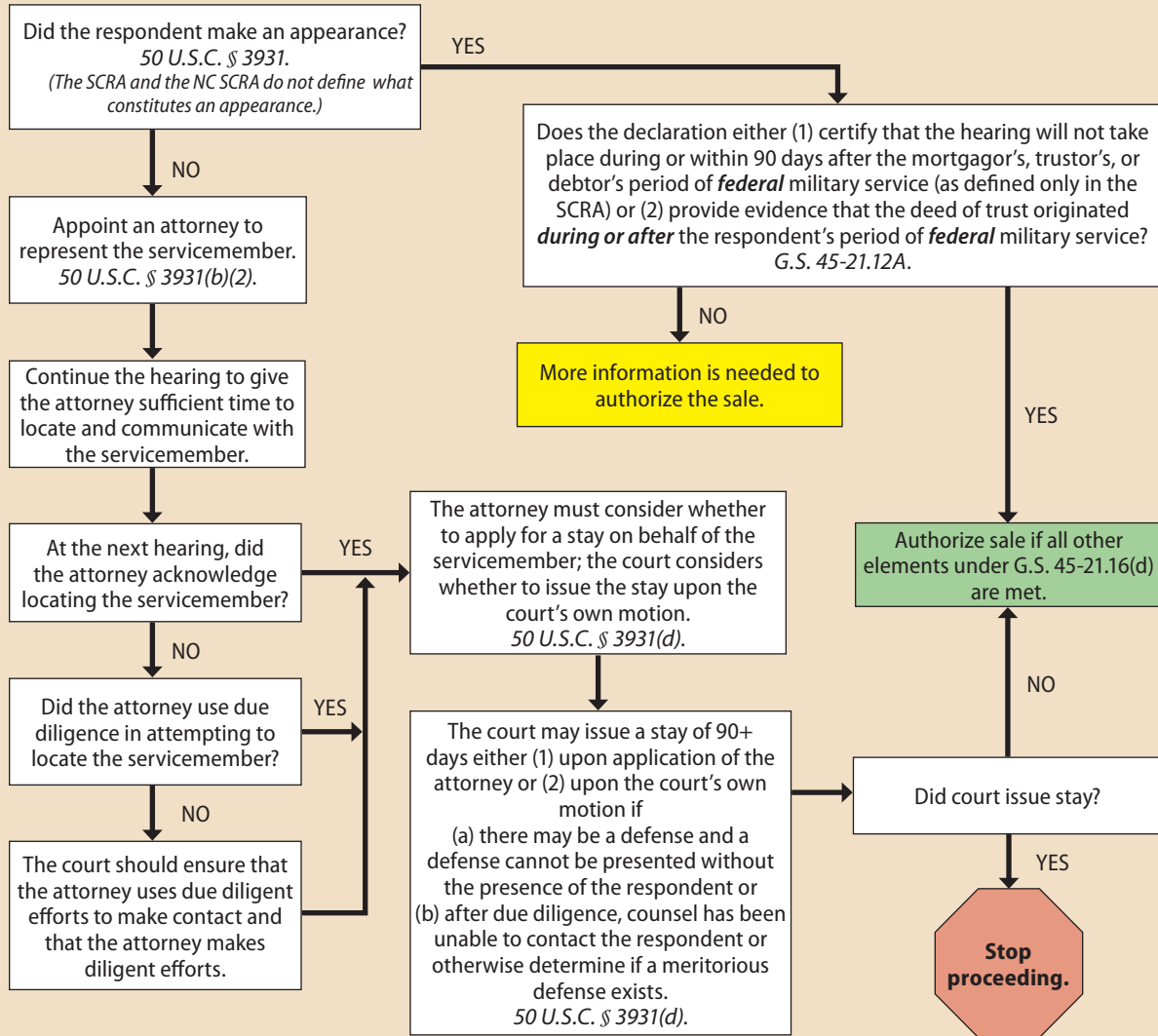
Definitions

The SCRA and G.S. 45-21.12A define "military service" as (1) a servicemember on active duty who is a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard; (2) a servicemember who is a member of the National Guard under a call to active service authorized by the President or the Secretary of Defense for a period of more than thirty consecutive days for purposes of responding to a national emergency declared by the President and supported by federal funds; (3) a servicemember on active service who is a commissioned officer of the Public Health Service or the National Oceanic and Atmospheric Administration; and (4) any period during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause. 50 U.S.C. § 3911(2). This is referred to herein as **federal military service**.

The NC SCRA defines "military service" to include the definition as used in the SCRA and adds to it (1) in the case of a member of the North Carolina National Guard, state active duty under an order of the North Carolina governor pursuant to G.S. Chapter 127A for a period of more than thirty consecutive days and (2) in the case of a member of the National Guard of another state who resides in North Carolina, service under an order of the governor of that state that is similar to state active duty for a period of more than thirty consecutive days. G.S. 127B-27(3). This is referred to herein as **state military service**.

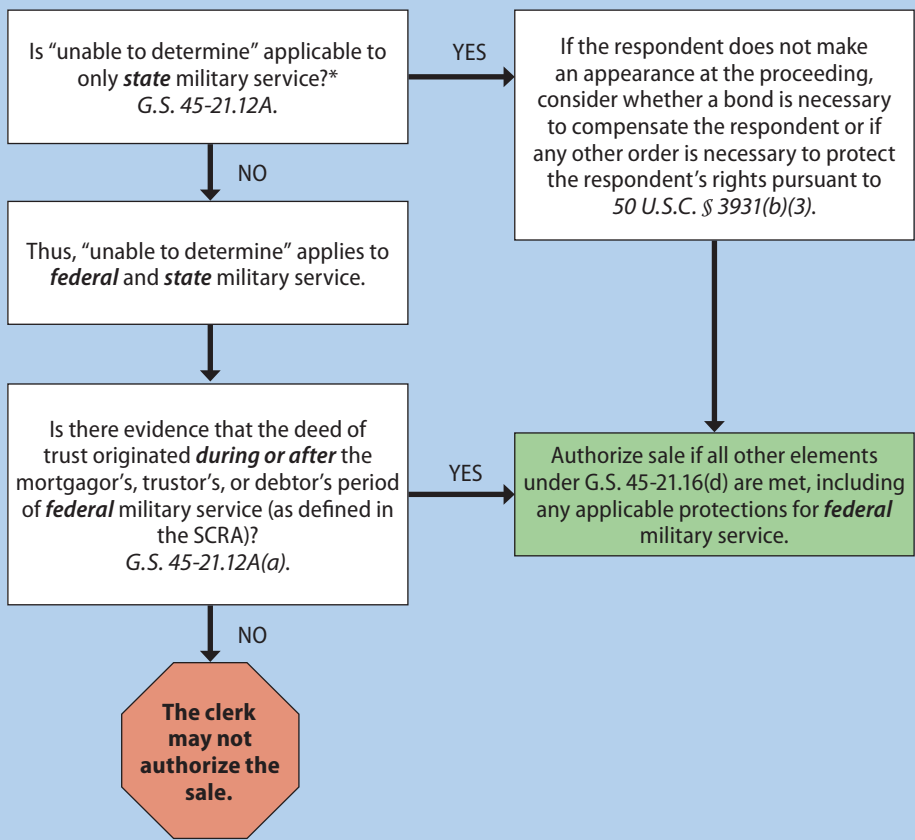
In Military Service

The purpose of this flow chart is to assist the clerk in determining whether to authorize a foreclosure sale and what other steps the clerk should take when the evidence provided to the court in a G.S. Chapter 45 power of sale foreclosure states that a respondent is in military service.



Unable to Determine Military Service

The purpose of this flow chart is to assist the clerk in determining whether to authorize a foreclosure sale and what other steps the clerk should take when the evidence provided to the court in a G.S. Chapter 45 power of sale foreclosure states that the trustee or mortgagor is unable to determine the respondent’s military service status.



***Note**

The NC SCRA incorporated the rights, benefits, and protections under the SCRA and expended those protections to (1) members of the North Carolina National Guard serving on state active duty under the order of the North Carolina governor and (2) members of the National Guard of other states serving on state active duty under the order of another state’s governor who reside in North Carolina. G.S. 127B-26, -27. However, protections under G.S. 45-21.12A, including the bar on exercising a power of sale in the absence of a certification as to the respondent’s military service status, were not incorporated into the NC SCRA, and the definition of military service in G.S. 45-21.12A does not include state military service under the order of a governor pursuant to the NC SCRA.

Quick Reference Chart: Protections for Military Service Applicable to G.S. Chapter 45 Foreclosures

SCRA 50 U.S.C. § 3931	SCRA 50 U.S.C. § 3932	G.S. 45-21.12A	SCRA 50 U.S.C. § 3953	NC SCRA G.S. Ch. 127B, Art. 4
<ul style="list-style-type: none"> • Applies if the respondent does not make an appearance. 50 U.S.C. § 3931(a). • Requires written statement executed under oath or under penalty of perjury (1) that the respondent is or is not in military service or (2) that the plaintiff is unable to determine whether or not the respondent is in military service. 50 U.S.C. § 3931(b) (1). • In military service—If the respondent does not appear, the court must appoint an attorney before entry of judgment or order. 50 U.S.C. § 3931(b)(2). • In military service—The court may issue a stay of 90+ days upon application of an attorney or upon the court's own motion if <ol style="list-style-type: none"> 1. there may be a defense and the defense cannot be presented without the servicemember's presence or 2. after due diligence, the attorney cannot locate the servicemember. 50 U.S.C. § 3931(d). • If the plaintiff's declaration states that the plaintiff is unable to determine whether the respondent is in military service, the court considers requiring a bond. 50 U.S.C. § 3931(b)(3). • The court is authorized to enter orders as the court determines necessary to protect the rights of the respondent. 50 U.S.C. § 3931(b)(3). • After receiving actual notice, the servicemember can request a stay under Section 3932. 50 U.S.C. § 3931(f). 	<ul style="list-style-type: none"> • Applies when <ol style="list-style-type: none"> 1. the respondent is in military service or within ninety days after termination or release and 2. the respondent receives notice of the proceeding. 50 U.S.C. § 3932(a). • The court is authorized to grant a stay of 90+ days upon application of the servicemember or upon court's own motion if it is presented with <ol style="list-style-type: none"> 1. a letter or other communication with facts stating (a) the manner in which current military duty requirements materially affect the servicemember's ability to appear and (b) the date on which the servicemember is available to appear and 2. a letter or other communication from the servicemember's commanding officer stating that current military duty prevents an appearance by the servicemember and that military leave is not authorized at the time of the letter. 50 U.S.C. § 3932(b). • An additional stay is available if the same conditions necessary for the first stay are met. 50 U.S.C. § 3932(d)(1). • The court must appoint counsel if an additional stay is refused. 50 U.S.C. § 3932(d)(2). 	<ul style="list-style-type: none"> • Requires a certification to be filed with the court in all cases. G.S. 45-21.12A(a). • Form AOC-G-250 alone does not satisfy the requirements under G.S. 45-21.12A. • Does not apply to National Guard service under the order of a governor under the NC SCRA. See definition of military service in G.S. 45-21.12A(d)(1). • Power of sale is barred during federal military service plus 90 days for a mortgagor, trustor, or debtor. G.S. 45-21.12A(a). • Applies if the deed of trust originated before the period of military service. G.S. 45-21.12A(a). • Protection under this provision can be waived in writing in compliance with the statute. G.S. 45-21.12A(b). 	<ul style="list-style-type: none"> • Applies to an obligation on real property owned by a servicemember that <ol style="list-style-type: none"> 1. originated before the period of military service and for which the servicemember is still obligated and 2. is secured by a mortgage, deed of trust, or other security in the nature of a mortgage. 50 U.S.C. § 3953(a). • In an action or proceeding filed during or within one year after military service, the court shall upon application of the servicemember or may upon the court's own motion after hearing <ol style="list-style-type: none"> 1. enter a stay for a period of time as justice and equity require or 2. adjust the obligation when the servicemember's ability to comply with the obligation is materially affected by military service. 50 U.S.C. § 3953(b). • A sale or foreclosure is not valid if it is made during or within one year of military service except <ol style="list-style-type: none"> 1. upon court order and return made and approved by the court or 2. under a waiver agreement pursuant to Section 3918. 50 U.S.C. § 3953(c). 	<ul style="list-style-type: none"> • Extends the protections of the SCRA, including the protections in Sections 3931, 3932, and 3953, to the following: <ol style="list-style-type: none"> 1. a member of the North Carolina National Guard who is on state active duty under an order of the North Carolina governor pursuant to G.S. Chapter 127A for a period of more than thirty consecutive days and 2. a member of the National Guard of another state who resides in North Carolina and who is serving under an order of the governor of that other state that is similar to state active duty for a period of more than thirty consecutive days when the servicemember's military service materially affects the servicemember's ability to comply with their obligations. G.S. 127B-27(3), -28(a).