Introduction to Small Claims Court

for Magistrates

May 11-13, 2015

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INTRODUCTION TO SMALL CLAIMS COURT

MAY 11-13, 2015

It is the daily; it is the small; it is the cumulative injuries of little people that we are here to protect....if we are able to keep our democracy, there must be one commandment: THOU SHALT NOT RATION JUSTICE.

~Judge Learned Hand

In matters of truth and justice, there is no difference between large and small problems, for issues concerning the treatment of people are all the same.

~Albert Einstein

COURSE SCHEDULE

MONDAY, MAY 11

9:00	Welcome & Introductions
9:15	Bench Skills: What They Are & Why They Matter
9:45	Overview of Small Claims & Judicial Decision-Making
10:30	Break
10:45	Small Claims Procedure
12:15	Lunch at SOG
1:00	Small Claims Procedure
2:30	Break
2:45	Small Claims Procedure, cont'd
4:45	Recess

TUESDAY, MAY 12, 2015

8:30	Revisiting Yesterday
8:45	The Crux of Contracts
10:00	Break
10:15	Continuing with Contracts
11:00	Landlord-Tenant Law
12:00	Lunch at SOG
12:45	Landlord-Tenant Law
3:15	Break
3:30	Small Group Discussion
4:30	Mock Trial
5:00	Recess

WEDNESDAY, MAY 13, 2015

8:30	Revisiting Yesterday
8:45	Torts
9:45	Break
10:00	Actions to Recover Possession
11:00	Mock Trial
12:15	Lunch at SOG
1:00	Understanding & Avoiding Bias
3:00	Evaluations & Adjourn

INTRODUCTION TO SMALL CLAIMS: OBJECTIVES

1. That you will be able to identify appropriate judicial demeanor and the factors important to that appearance.

2. That you will be able to identify the factors most influential in litigant satisfaction.

3. That you will learn to use a job aid in listening for essential elements in witness testimony.

4. That you will develop your own individual policies for:
    a. opening court;
    b. dealing with attorneys
    c. assisting pro se litigants
    d. admitting evidence

5. That you will be able to correctly apply procedural rules applicable to small claims court.

6. That you will be fluent in the procedure for entering judgment and completing forms.

7. That you will be able to correctly decide contract cases and determine damages.

8. That you will be able to correctly determine legal actions involving landlord-tenant law.

9. That rural magistrates will identify ethical challenges unique to conducting court in a small community and share strategies for dealing with those challenges.

10. That urban magistrates will share strategies about how to organize holding court when there are many cases on the docket.

11. That you will be able to correctly determine legal actions involving torts.

12. That you will be able to correctly determine legal actions seeking return of personal property.

13. That you will be aware of the danger bias poses to your ability to make correct judicial decisions and strategies for minimizing that impact.

14. That you will report feeling more confident about holding court.

TAB 1:

DAY 1

Schedule for Today

9:00	Welcome & Introductions
9:15	Bench Skills: What They Are & Why They Matter
10:00	Overview of Small Claims & Judicial Decision-Making
10:30	Break
10:45	Small Claims Procedure
12:15	Lunch at SOG
1:00	Small Claims Procedure
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2:45	Small Claims Procedure, cont'd
4:45	Recess

Objectives for Day 1

We'll jump right in today with a look at what factors make a good judge good. We'll learn a basic analytical approach to deciding cases, and briefly review substantive law related to motor vehicle liens and some specific kinds of money owed cases. We'll become familiar with the basic rules of small claims procedure and practice applying the rules in some frequently-occurring fact situations.

NOTES:

What Are Bench Skills?

Skills directed at achieving the following goals:

Maintaining control of the courtroom

Causing participants to view the judge as ethical and professional, and the process as fair

Articulating and enforcing expectations for the behavior of parties and attorneys

Effectively communicating with participants

Hearing and deciding cases efficiently

Dealing with difficult people effectively

Responding appropriately to unexpected events

. . . And so on.

Observation Checklist for Small Claims Court

Opening Court

___ Does the judge introduce himself/herself?

___ Does the judge make a statement or provide information about procedure before calling the first case?

Calling the Case

___ Does the judge put the parties under oath one at a time, or together?

Missing Parties

___ If the plaintiff is present and the defendant does not, what does the judge do?

___ If the defendant is present and the plaintiff is not, what does the judge do?

___ If neither party is present, what does the judge do?

Presentation of Evidence (both parties present)

___ Who talks first, and how does the judge let them know that?

___ What happens next?

Entering Judgment

___ Is there a clear break between the evidence and the announcement of the judge's decision?

___ Can you tell from listening exactly what the judge has decided?

___ Do the parties have an opportunity to ask questions about the decision, and about what happens next?

___ Does the judge tell the losing party that s/he has a right to appeal?

Judicial Demeanor

___ What steps, if any, does the judge take to help the parties feel more at ease?

___ Does the judge make eye contact with the parties?

___ Does the judge allow ample opportunity for the parties to ask questions?

___ Does the judge's body language indicate that s/he is listening? How so?

___ Do you believe that the parties felt that their testimony had been heard and understood by the end of the trial?

___ Can you identify some ways that the judge maintained control of the proceedings?

NOTES:

Exercise on Bench Skills

At your table, spend 10 minutes discussing how the choices made by the judge you observed either advanced or detracted from the accomplishment of the objectives listed above. Do your best to identify specific behaviors.

Table 1: focus on "Getting Started" behaviors.

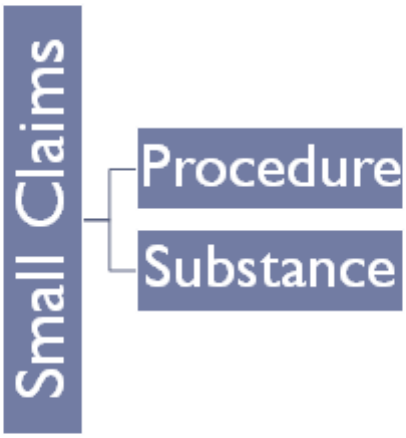
Table 2: focus on "Conducting Trial" behaviors.

Table 3: focus on "Entering Judgment" behaviors.

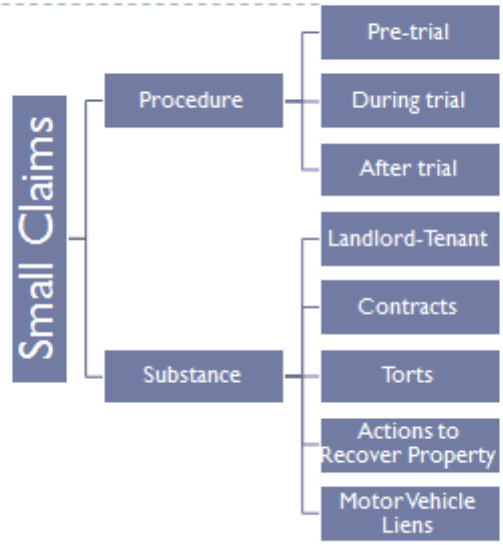
Table 4: focus on "Demeanor" behaviors.

Example, using Table 3: Which objectives are related to the magistrate's making a clear separation between the end of the evidence and the entry of judgment? One answer is #3 on the Bench Skills List, *Articulating and enforcing expectations for the behavior of parties and attorneys*.

Small claims overview



Small claims overview



NOTES:

_____

_____

_____

_____

_____

_____

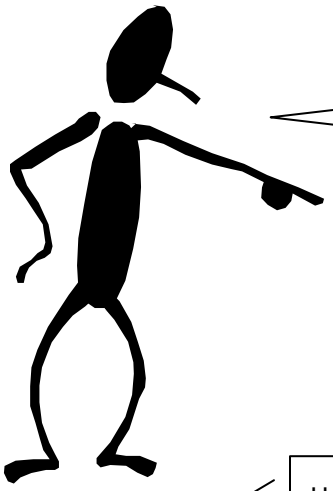
Judicial Decision-Making: How the Law Works

A **cause of action** is _____

_____.

Before we allow a plaintiff to use the force of law to take away property belonging to another, we require every plaintiff to establish specific facts. We call these facts

Every cause of action has its own particular elements. Only after a plaintiff has introduced sufficient evidence to **prove** each individual element do we require a defendant to either rebut the evidence against her, or introduce additional evidence establishing an affirmative defense.



You injured me by

_____

_____

and so I'm suing you for

_____

_____

_____

!!!!

Here are the essential elements of my case:

1. _____
2. _____
3. _____
4. _____

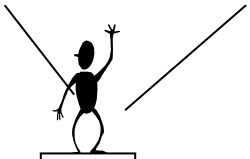
I am not responsible for your injury, because one of your essential elements is not true:

_____

_____

_____

_____



OR

Even if everything you say is true, I'm STILL not responsible for your injury, because

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Exercise: Identifying the Elements in a Motor Vehicle Lien Case

An auto repair shop has filed an action to enforce a motor vehicle lien, using AOC CVM-203. Use Small Claims Law to identify the essential elements of plaintiff's case.

1. _____
   _____.

2. _____
   _____.

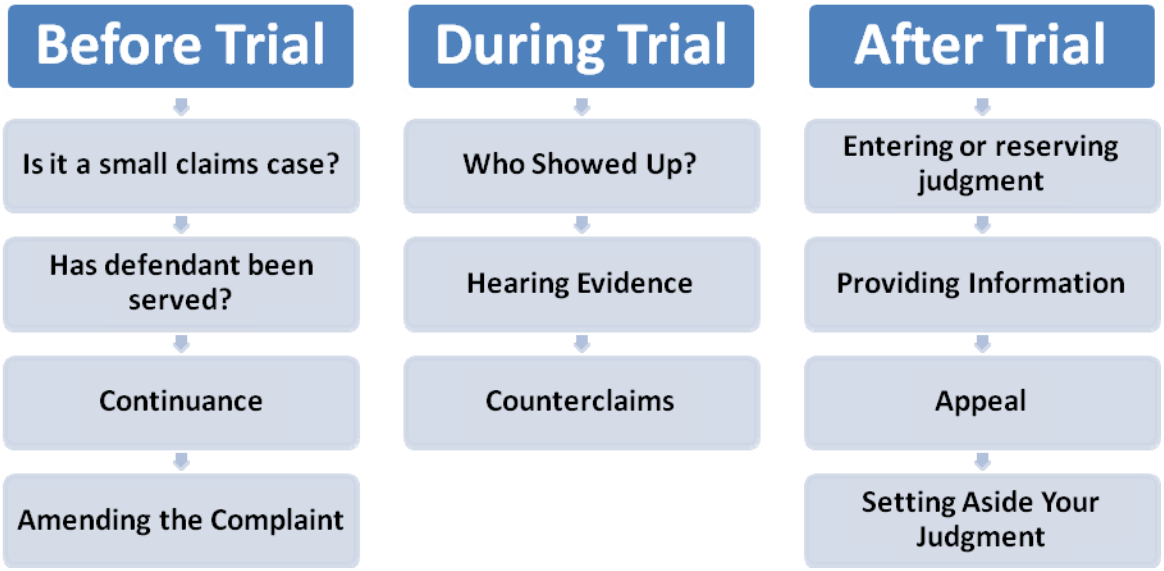
3. _____
   _____.

4. _____
   _____.

5. _____
   _____.

6. _____
   _____.

See also the Appendix for two handouts: *Motor Vehicle Liens: A Quick Reference Guide,* and *Details, Details, Details: Companion to the Quick Reference Guide.*



The law authorizes **you** to decide

SMALL CLAIM CASES

Amount in controversy	Certain kinds of cases only

ASSIGNED BY YOUR DCJ

The law authorizes your chief district court judge to assign a case to small claims court if it otherwise meets the definition of a small claims case and if at least one defendant lives in the county.

SMALL CLAIMS PROCEDURE: BEFORE TRIAL

IS IT A SMALL CLAIMS ACTION?

What is the principal relief sought? Summary Ejectment
Money Owed
Return of Personal Property

Not Coercive Judgment
Not Action to Recover Real Property

In case of a claim for $$ or personal property, what is amount in controversy? Maximum $10,000

Does at least one Δ reside in your county?

Q: What should the magistrate do if a case does not meet one of these requirements?

A: The magistrate should not hear the case.

	LOCAL PRACTICE ALERT: Ask your clerk whether you should fill out an order dismissing the case without prejudice or simply return the file to the clerk.	

Q: Where does a corporation "reside?"

A: Corporations that have authority to do business in NC reside in either the county in which the principal office is located or the county in which the corporation maintains a place of business. If neither of these applies to a particular corporation, it resides in any county in which it is regularly conducting business.

Q: What if π has sued more than one Δ, but only one Δ resides in the county?

A: The law requires only that "at least one Δ" reside in the county.

Amount in Controversy Rules

1. If the plaintiff is asking for money, the amount must be $_____ or less.
2. The amount in controversy is determined as of the time
   _____
   _____
3. The plaintiff must ask for _____ of the amount he's entitled to for this particular claim. In other words, _____.
4. If the plaintiff is asking for return of personal property, the amount in controversy is _____.
5. In summary ejectment actions in which the landlord is seeking only possession, the amount in controversy requirement _____.

EXERCISE: IS IT A SMALL CLAIMS ACTION?

1. Susan paid Website Developers to design a website for her small business, but WD has refused to release the completed design so that Susan may actually put it on the web. Susan asks you to order WD to perform its part of the contract. Small claims action? _____
2. The Credit Union has brought an action alleging that defendant defaulted on a loan agreement and asking that you issue an order authorizing the CU to recover the amount owed from the defendant's other accounts. Small claims action? _____
3. Landlord Larry filed an action for summary ejectment and back rent in the amount of $10,000. By the time the case gets to trial, the amount of unpaid back rent has increased to $10,700. Small claims action? _____
4. Carl Creditor filed an action on a promissory note, which required Danny Debtor to repay a 10,000 loan along with $750 in interest. Carl points out the amount in controversy statute contains language specifying that the amount is to be determined "exclusive of interest." Small claims action? _____
5. Randy Return has filed an action against Kelly Keepit to recover a fence Randy sold Kelly, but which Kelly never paid for. Small claims action? _____
6. Graceful Greta tripped over an out-of-place lawnmower at Sears and has filed an action in your county against the store. Small claims action? _____
7. Nancy Newlywed and her husband Nick signed a contract to buy a lot of furniture from Happy Homes Furniture. Six months later, Nick's moved to Nebraska, and Happy Homes has filed an action against Nancy and Nick for the amount unpaid ($10,000). Small claims action? _____
8. Actually, Happy Homes has filed two claims against Nick and Nancy, each for $10,000, because the total amount due for all that furniture is $20,000. Is action #1 a small claims action? Action #2? _____.

HAS THE Δ BEEN SERVED? (PP. 15-20)

Check the file for one of the following: Completed return of service on back of summons
π's affidavit & postal receipt or receipt from delivery service
Δ's written acceptance of service
Δ has filed motion, answer, or counterclaim
OR
Δ is present in court

Q: What should the magistrate do if the summons and complaint have not been served?

A: Continue the case to allow additional time for service. Use AOC Form G-108.

Q: How is service accomplished on a corporate defendant?

A: By delivering a copy to an officer, director, or managing agent, OR
Leaving a copy in the office of one of these people with a person apparently in charge of the office, OR
Mailing a copy to one of these people by certified mail, return receipt requested, OR
Delivering a copy to the registered agent, OR
Delivery by a designated delivery service.

Q: What if π has sued more than one Δ, but only one has been served?

A: π must choose between (1) continuing case to attempt service on other Δs, or (2) taking a voluntary dismissal against unserved Δs and going ahead against Δ that has been served.

Hint: Be careful not to confuse service of process with the rule about at least one Δ residing in the county**.** They are two separate requirements.

TWO THINGS THAT MIGHT HAPPEN BEFORE TRIAL:

1. Δ might file an answer.
2. Either π or Δ might ask for a continuance.

Answer: Δ's response to complaint. Not required, but may be significant in that it substitutes for S/P.

Continuance: request by either party for delayed trial date.

For pre-trial motion for continuance, remember:

The law favors, but does not require, granting a continuance if both parties join in the request.

If a request for a continuance is made by only one party, the law requires that party to demonstrate good cause.

If the magistrate grants a continuance, s/he must be certain that the other party receives notice of the new trial date and time.

Special rule for summary ejectment actions: limited to 5 business days unless parties agree to a longer period.

LOCAL PRACTICE ALERT: Be sure to find out what your county's policy is about the procedure for pre-trial requests for a continuance.

SMALL CLAIMS PROCEDURE: DURING TRIAL

THINGS THAT MAY HAPPEN BEFORE YOU EVEN GET STARTED, AND WHAT TO DO ABOUT THEM

1. Plaintiff does not appear for trial.

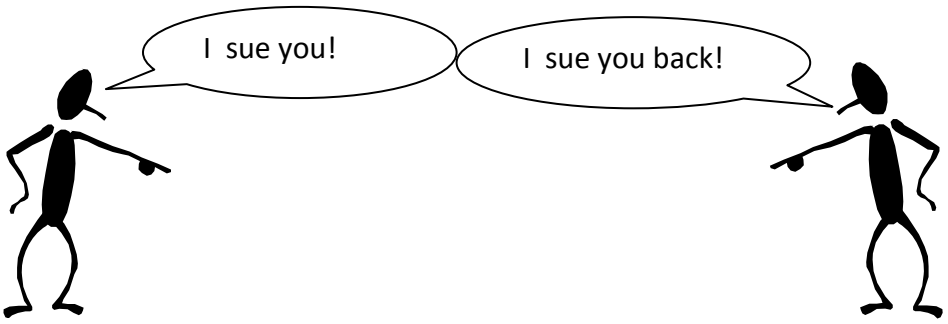
Action: Dismiss case with prejudice for **failure to prosecute**.

	Local Practice Alert: Not all magistrates follow this practice. Some magistrates dismiss with prejudice only if the Δ appears, while others require the Δ to appear AND to request dismissal.	

2. Defendant does not appear for trial.
   Action: Administer the oath to plaintiff and any witnesses and hear testimony just as you would if Δ were present. This situation is handled exactly as though Δ were present, but presented no effective defense.

3. Plaintiff requests a **voluntary dismissal**. (Sometimes this happens before trial as well.)
   Action: π can dismiss the case at any point before s/he has finished presented evidence. G-108.

4. Defendant has filed a **counterclaim**.



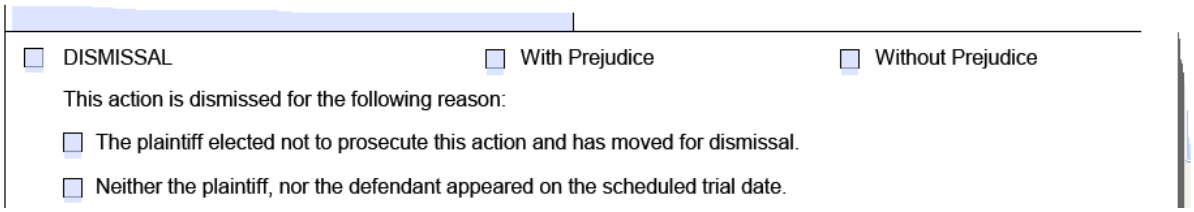
Rules for counterclaims:
a. Must not exceed $10,000.
b. Must be in writing.
c. Must be filed with clerk before the time the trial is scheduled to begin. And Δ must pay court costs.

Action: Assuming **counterclaim meets above conditions**, tell Δ to give π a copy. If π needs time to prepare a defense, grant a continuance.

Action: If counterclaim is **raised after the time case is set for trial,** tell Δ that s/he may file it as a separate action.

Action: If counterclaim is for **more than $10,000**:

- Ask Δ if s/he wants to (1) reduce the amount so that the counterclaim can be heard today, or (2) take a voluntary dismissal and refile in district or superior court.
- Be sure to inform Δ that reducing the amount of the counterclaim is binding--Δ can't reduce a $18,000 counterclaim to $10,000 and then bring another action for the $8,000 excess.
- If Δ chooses to reduce claim, write something like the following in the "Other" section of the judgment, under "Findings": "Defendant filed a counterclaim in this action in the amount of $18,000" but amended his complaint to reduce the amount claimed to $10,000 this day in open court."
- If Δ chooses to take a voluntary dismissal of her counterclaim, attach G-108 to the judgment, filled out as follows:


DISMISSAL With Prejudice Without Prejudice

This action is dismissed for the following reason:

The plaintiff elected not to prosecute this action and has moved for dismissal.

Neither the plaintiff, nor the defendant appeared on the scheduled trial date.

What if π voluntarily dismisses her case after Δ has filed a counterclaim?
Action: Verify that π has received notice of the counterclaim, and then hear the counterclaim just as though it had been filed as a small claims action in the first place.

5. One of the parties requests a **continuance**.
Action: If both parties are present and agree to a continuance, the law favors—but does not compel—allowing it.

☆ Alert: The magistrate should inquire into the reason for the continuance. If the parties are attempting to reach a settlement, a continuance is appropriate. If the case has been continued previously, however, the reason may not be that the parties are actually attempting to reach a settlement, but rather that the court is being used to supervise an installment payment schedule. Most commentators with expertise in small claims law discourage this practice. Their concern is that it encourages an impression of the court as a collection agency, working to assist the creditor in collecting a debt.

☆ Alert: Be wary of a π who appears in court seeking a continuance based on a contention that the absent Δ has agreed to it. In this situation, the best practice is to inquire further into the communication between the parties before court. Remember that it is the court – not the π -- who determines whether a continuance shall be granted.

Plaintiffs who tell Δs before trial that they need not appear "because I'm going to get it continued" should be emphatically informed that this practice is inappropriate.

When one party's request for a continuance is opposed by the other party:
Action: Party seeking continuance must show good cause and, if it is the Δ, must also claim to have a "meritorious defense."
What is **good cause**? "In passing on the motion, the trial court must pass on the grounds urged in support of it, and also on the question whether the moving party has acted with diligence and good faith. . . . The chief consideration to be weighed in passing on [the request] is whether the grant or denial of a continuance will be in furtherance of substantial justice." Shankle v. Shankle, 289 N.C. 473 (1976).

Examples of *Good Cause*
- ☞ Illness or other emergency
- ☞ Surprise at trial (amended complaint or counterclaim)
- ☞ Attorney unavailable b/c required to appear in other court
- ☞ Good reason to believe settlement likely (consider very short continuance)

Borderline
- ☞ Party unprepared for trial because of ignorance of law. Ex: missing witness, missing documents.
- ☞ Party wants to hire lawyer.
- ☞ Frequently-appearing plaintiff surprised by variation among magistrates.

☆ ALERT: New legislation enacted in 2009 (and thus not included in Brannon's Small Claims Law) *requires* the magistrate to grant a continuance in all small claims cases, *other than summary ejectment cases*, in which the Δ was served less than five days before the trial. Applying Rule 6's requirements for calculating time, the result is that a case in which service is accomplished on Monday may be heard no sooner than the following Monday (service on Tuesday, trial no sooner than following Tuesday, etc.). *See* Appendix for a memo discussing this change: *Service of Civil Process: 2009 Legislation.*

In summary ejectment cases, the minimum notice required is 2 days. Also, in 2013, the General Assembly amended the rules for continuances in summary ejectment cases to limit a continuance to 5 days unless both parties agree to more time.

6. There is reason to believe defendant has filed a petition for **bankruptcy.**
Action**:** Use G-108 to halt the small claims action in accordance with the automatic stay mandated by federal law.

TRIAL

WHO'S STANDING IN FRONT OF YOU?

Do the names of the people in front of you match the names on the complaint and summons, and do those match the people involved in the issue being tried?

If one of the parties is a business, the name on the complaint should specify "Inc.", or "LLC", unless the business is merely owned by an individual doing business under a trade name. In that case, the complaint should list the name of the individual.

In small claims court a case may be presented by either a party or an attorney. In the case of a corporation, the case may be presented by an agent of the corporation. Sometimes, in rare cases, a case may be presented by a personal representative (if the party involved has died) or a guardian qualified to represent the party in court.

Persons other than those named above, such as individuals having a power of attorney, or a person in the business of collecting small claims judgments on behalf of medical professionals, are engaged in the unauthorized practice of law. See Small Claims Law p. 33 for a discussion of how to handle this.

Listening to the Evidence

Recommended: Swear both parties and all witnesses. Instruct the parties that they should not speak directly to each other, but should instead direct their comments to you. Ask the plaintiff to tell his side of the story. Ask any clarifying questions needed to elicit the information you need to decide the case.

Imagine that defendant was not present, and you had to decide the case based only the evidence plaintiff has provided. If you would rule against plaintiff in that situation, you should **dismiss the case with prejudice** for failure to prove his case by the greater weight of the evidence without hearing any evidence from defendant.

If plaintiff has introduced enough evidence to prevail at this point, nothing else appearing, ask defendant to tell her side of the story. Ask any clarifying questions necessary to elicit the facts necessary to the defense.

Ask both parties if they have questions for the other party, and have each of them direct their questions to you, as instructed at the beginning.

Note: Your questions should be open-ended and avoid communicating a suggestion as to the answer. Ask, "Did you communicate with the defendant? When? What was said?" rather than, "Did you give the defendant notice?"

Trying a Case With a Counterclaim

Recommended: Conduct the trial in two parts, trying the primary claim first and then separately hearing evidence on the counterclaim. After you've heard and decided both cases, calculate the total amount of the judgment, setting off as necessary. Enter one judgment, making clear how you ruled on both cases and what damages were awarded in each case.

Amending the Complaint

The law says that a judge should freely allow a plaintiff to amend a complaint. The issue comes up most often when information at trial is inconsistent with a statement in the complaint. Often, it is not necessary to amend the complaint at all; the judge may note the change, "made in open court," on the judgment. Typically, the only significant question is whether fairness requires a continuance so that an absent defendant can be given notice of the change.

Amendment to correct name? Allowed, provided that the correct person was served. Not allowed if, for example, plaintiff sued and served John Jones, only to discover at trial that his contract was with John Jones, Inc.

Amendment to substitute remedy? Common in actions to recover property where creditor discovers property is no longer in defendant's possession. Creditor should be allowed to amend complaint to request money owed, but take care that defendant has notice of amendment.

Amendment to amount requested? Allowed, but be sure defendant has notice of increased amount.

Amendment to change theory of recovery (aka, checked the wrong box)? Unnecessary, but allowed. Again, issue is notice to defendant.

ENTERING JUDGMENT AND OTHER POST-TRIAL ISSUES

Entering Judgment: Notice

Announcement of Decision

Explanation of Ruling

Responding to Questions & Informing Parties of Right to Appeal

Reserving Judgment: For up to 10 days. Magistrate is responsible for mailing parties a copy of the judgment. Should explain appeal procedure before adjourning. Remember special rule for summary ejectment actions.

Appealing from a Judgment: A party may give notice of appeal in either of two ways, either by notifying the small claims judge in open court, or by filing a written notice of appeal with the clerk within 10 days. An appealing party must pay costs of appeal within 20 days (10 days in an action for summary ejectment), or else appeal is dismissed. A party who cannot afford to pay the costs of appeal may be excused by qualifying as indigent.

Effect of a Judgment Pending Appeal: A judgment for money is automatically stayed if party gives notice of appeal. An judgment awarding possession of real or personal property is not automatically stayed, but there is a procedure for posting a stay of execution bond in those cases that delays plaintiff's ability to enforce the judgment.

Enforcing a Judgment: A party who wishes to enforce a judgment is required to wait 10 days (the time allowed for giving notice of appeal) before initiating enforcement procedures. After 10 days, the party may begin enforcement by going to the clerk. There is an additional cost to enforce a judgment, which will be added to the costs owed by the losing party. Some magistrates provide a copy of the handout in the Reference Section titled "What Happens After Small Claims Court."

Clerical Errors in Judgment: May be corrected at any time, on the judge's own motion. Judge decides what notice to the parties is needed. See Small Claims Law p. 41 for details of procedure.

Motions to Set Aside Judgment under Rule 60(b): Magistrates who have been authorized by the CDCJ may set aside a judgment upon a finding that the judgment resulted

from a party's excusable neglect, mistake, or surprise. This usually means the party failed to appear. A magistrate who receives a Rule 60(b) motion should determine a time to hear the motion and give notice to all parties. The moving party must show that he gave the case "such attention as a man of ordinary prudence usually gives to important business affairs." If the moving party is the defendant, she must also allege that she has a meritorious defense to plaintiff's claim. At the conclusion of the hearing, the magistrate should enter a written order setting forth her decision. If the magistrate grants the motion, she should set the case once again for trial.

Fees in Summary Ejectment Actions

For Leases Entered Into On or After Oct. 1, 2009

Late Fees

In residential leases, parties may agree to late fee for payments five or more days late. When rent is paid monthly, the maximum fee is $15 or 5%, whichever is greater. In case of weekly rent, maximum is $4 or 5%, whichever is greater.

Complaint Filing Fee

Authorized for written leases not to exceed $15 or 5%, whichever is greater, only if:
---tenant was in default
---LL filed complaint for SE
---tenant cured the default
---LL dismissed the claim.
Fee may be charged as part of amount required to cure default.

Court-Appearance Fee

Authorized for written leases, equal to 10% of monthly rent if
---tenant was in default
---LL won a SE action
---neither party appealed.

Second Trial Fee

Authorized for written leases in event of new trial following appeal from small claims judgment. Not to exceed 12% of monthly rent. Available if
---tenant was in default
---LL prevailed

Additional Rules

LL can charge only one of the last three fees, and that fee may not be deducted from subsequent rent payment or asserted as ground for default in subsequent SE action. Prohibits LL from attempting to charge a larger fee and provides lease provision in violation of law is void.

DGL/SOG/June 2012

TAB 2:

DAY 2

Schedule for Today

8:30 Revisiting Yesterday

8:45 The Crux of Contracts

10:00 Break

10:15 Continuing with Contracts

11:00 Landlord-Tenant Law

12:00 Lunch at SOG

12:45 Landlord-Tenant Law

3:15 Break

3:30 Small Group Discussion

4:30 Mock Trial

5:00 Recess

An Overview of Day 2

Today you'll learn and practice applying a basic analytical approach to cases involving contracts. We'll also briefly introduce basic principles for calculating the amount of judgment in a money-owed case. We'll review basic rules about landlord-tenant law, and practice using a job aid to hear an action in summary ejectment. Magistrates will have an opportunity to discuss and problem-solve common challenges related to conducting court with magistrates from counties of similar size in the afternoon, and we'll end with a mock trial.

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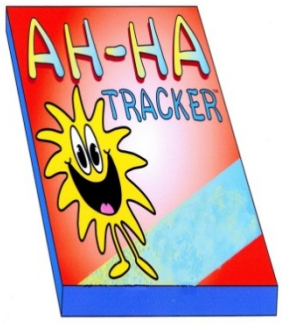
Activity: check-in



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Discuss with your tablemates what struck you most about our time together yesterday. -

_____
_____
_____

_____
_____
_____

_____

Essential Elements in Contract Cases

In an action for breach of contract, the plaintiff must prove each of the following essential elements by the greater weight of the evidence:

___ There was a contract (aka agreement, bargain, bargained-for exchange)

___ The defendant and I were the parties to the contract.

___ The terms of the contract were A, B, C, and D.

___ Defendant breached term A as follows: . . . .

___ The breach by defendant resulted in the my being damaged in this particular way.

___ The monetary amount of my damages is X, and here's how I calculated X.

There are special rules for special kinds of contracts:

Breach of warranty (pp. 61-65)

Installment sales contracts (pp. 81-84)

Loans (pp. 90-91, 96-97)

Worthless check (pp. 87-89)

Actions on security agreement (pp. 125-144)

Residential lease agreements (see numerous special provisions in Ch.VI, Landlord-Tenant Law)

Miscellaneous consumer protection provisions

The most common impact of these special rules is the revision or even removal of contract provisions inconsistent with them. For example, a landlord who contracts for a late fee that exceeds the statutory maximum loses the right to collect the fee at all.

NOTES:

Essential Elements and Common Defenses in Summary Ejectment Actions

Breach of a lease condition

Plaintiff/LL must prove:

___ existence of a landlord-tenant relationship;

___ lease contains a forfeiture clause;

___ tenant breached lease condition for which forfeiture is specified;

___ LL followed procedure set out in lease for declaring a forfeiture and terminating the lease.

Most common defenses: failure to follow proper procedure, waiver

Failure to pay rent

Plaintiff/LL must prove:

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___ terms of the lease related to obligation to pay rent;

___ lease does NOT contain forfeiture clause;

___ LL demanded that tenant pay rent on certain date;

___ LL waited at least 10 days after demand to file this action;

___ tenant has not yet paid the full amount due.

Most common defenses: failure to make proper demand and wait ten days, tender

Holding over

Plaintiff/LL must prove:

___ existence of a landlord-tenant relationship;

___ terms of lease related to duration;

___ if lease is not for a fixed term, that proper notice was given of intent to terminate;

___ tenant has not vacated.

Most common defenses: waiver, improper notice.

Checklist for Summary Ejectment Actions

Service of process? ☐ Personal service ☐ Substitute service ☐ Registered mail ☐ Posting

Was Δ served at least 2 days prior to trial?

If none of the above, has Δ appeared? ☐ by filing an answer ☐ by being present for trial

Check complaint. ☐ Has it been signed by plaintiff or agent?

☐ Is the owner of the property listed as the plaintiff?

☐ Does Δ's address indicate county residence?

☐ Is the rental property adequately identified and described? (Watch out for commercial property.)

☐ If complaint indicates a written lease, ask π for a copy.

☐ Does any information on the complaint suggest that either of the parties is a corporation? If so, remember rules about serving corporations and listing name correctly on complaint.

☐ Does any information on the complaint suggest an issue about existence of landlord-tenant relationship?

☐ Special attention to #'s 5 & 6: Is π seeking a money judgment? Was service by posting? Is the amount requested within your jurisdictional limit? Does π need to amend his complaint?

Judgment on the pleadings? π is entitled to judgment on the pleadings if all of the following are true:

☐ Block #3 is checked on the complaint.

☐ π requests judgment on the pleadings in open court

☐ Δ is not present in court

☐ Δ has not filed an answer.

If π is entitled to judgment on the pleadings, you will not take testimony, but instead will enter judgment based on the facts set out in the complaint.

Remember a continuance without agreement of both parties requires good cause and may not exceed 5 days.

If lease is written: ☐ Does it contain a forfeiture clause?

If lease is oral, listen for testimony about ☐ duration of lease ☐ amount of rent ☐ date due

There are *four possible reasons* a landlord might be entitled to possession. Your next task is to figure out which one applies to this particular case. [Note: The π may not know enough about the law to know the answer to this, and the block checked on the complaint is not binding on the π.] After you identify the reason, turn to the appropriate checklist for that reason.

☐ Reason #1: The tenant has missed a rent payment. This is known as failure to pay rent.

☐ Reason #2: The lease has ended, and the tenant has not moved out. This is known as holding over.

☐ Reason #3: The tenant breached a condition of the lease **that the parties have agreed will allow the landlord to end the lease.** This is known as breach of a lease condition.

☐ Reason #4: The tenant has engaged in criminal activity.

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Listen to the testimony of both parties with the appropriate checklist in front of you. Remember that you may reserve judgment only for up to 5 days, and only in complex cases unless parties agree. When you've decided whether the π or Δ wins, the next step is *filling out your judgment form:*

☐ Be certain to copy the names of the parties and the address of the property correctly, and if you haven't already heard testimony to this effect, verify that the address on the complaint is in fact the rental property.

☐ Under **Findings,** indicate whether π won or lost, whether judgment was on pleadings, whether defendant was present, and whether service was by posting.

☐ New Law makes it important to make a finding about whether Δ raised a defense.

☐ In every case, fill out #3. Remember that your finding about the undisputed amount of rent due may differ from the damages you award.

☐ Under **Order** #1, note that judgment form refers to "premises described in complaint." Amend complaint if necessary to be certain correct premises are identified.

☐ If π did not seek money damages, do not check "☐ 4." Instead, check "☐ 5." and write in "Plaintiff did not seek money damages and so the court did not consider this issue."

☐ Check for local policy on awarding costs in cases in which there is no money judgment.

☐ For record-keeping purposes, always fill out the block titled Rate of Rent.
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☐ If you award rent, determine daily rate and award up to date of judgment.

☐ Briefly explain judgment and right to appeal. Give both parties "What Happens After Small Claims Court" handout.

The Residential Rental Agreements Act (and Other Tenants' Rights Statutes)

The Residential Rental Agreements Act is set out in G.S. Chapter 42, Sections 38 to 44. This law, which was passed in 1977, re-wrote the common law to provide that landlords must maintain residential rental premises to be fit to live in, and to make clear that a tenant's right to such housing cannot be waived. Prior law had followed the rule of *caveat emptor* ("let the buyer beware").

What Does the Law Provide?

The law imposes 8 distinct obligations on a landlord:

1. He must comply with building and housing codes.
2. He must keep premises in a fit and habitable condition.
3. He must keep common areas in safe condition
4. He must maintain and promptly repair electrical, plumbing, heating, and other supplied facilities and appliances.
5. He must install a smoke detector and keep it in good repair.
6. He must install a carbon monoxide detector and keep it in good repair.
7. He must notify the tenant if water the landlord charges to provide exceeds a certain contaminant level.
8. He must repair within a reasonable time any "imminently dangerous condition" listed in the statute:
    a. Unsafe wiring.
    b. Unsafe flooring or steps.
    c. Unsafe ceilings or roofs.
    d. Unsafe chimneys or flues.
    e. Lack of potable water.
    f. Lack of operable locks on all doors leading to the outside.
    g. Broken windows or lack of operable locks on all windows on the ground level.
    h. Lack of operable heating facilities capable of heating living areas to 65 degrees Fahrenheit when it is 20 degrees Fahrenheit outside from November 1 through March 31.
    i. Lack of an operable toilet.
    j. Lack of an operable bathtub or shower.

k. Rat infestation as a result of defects in the structure that make the premises not impervious to rodents.

l. Excessive standing water, sewage, or flooding problems caused by plumbing leaks or inadequate drainage that contribute to mosquito infestation or mold.

There is something a little confusing about this: some of these overlap. Rental premises might, for example, have a broken furnace that violates obligation #4 above, but the fact that it's below-freezing in the house also means the premises are not habitable. The reason it matters is that different rules apply as far as the notice that's required. Let's look at that more closely.

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Notice Requirements

Only one of the obligations has a notice requirement written specifically into the statute: a landlord's obligations with regard to electrical, plumbing, and other "facilities and appliances" arise only if he has written notice that repair or maintenance is necessary. After receiving notice, the landlord is entitled to a "reasonable time" to make repairs. The exception to this requirement is when there is an emergency. If the shower handle breaks off and water is pouring out of the tub onto the floor, the law will not require the tenant to notify the landlord in writing and then wait a few days before imposing an obligation on the landlord to make a repair.

A common-sense rule applies to the other obligations: the tenant must give whatever notice is necessary to reasonably permit the landlord to fulfill his obligations. If there's a leak in the roof, for example, the tenant must notify the landlord before it's reasonable to expect the landlord to repair it. In that case, however, oral notice is acceptable. It may be that in some cases, no notice at all is required, when the evidence demonstrates that the landlord actually knew of the problem (for example, there were holes in the floor before the tenant moved in).

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Waiver

The RRAA is a consumer-protection statute. Like other consumer protection legislation, the rights of the parties are not created by contract—or agreement—in these cases. Instead, the obligations of the landlord are imposed by law—even if the contract says nothing about them, **or even if the lease says the tenant waives those rights.** The statute is clear that a tenant doesn't waive his rights by signing a lease providing for waiver; nor does a tenant waive his rights to fit and habitable housing by agreeing to rent a place with obvious defects, even if the landlord specifically tells him about them. If a tenant rents a house without air conditioning, that's fine. But if a tenant rents a house with air conditioning and then the air conditioning tears up, the landlord has a statutory obligation to repair the air conditioning, even if the lease says otherwise.

Sometimes a landlord will say, "I know the house wasn't up to code, but that's why the rent was so low. I agreed to let him live in the house for low rent, and he agreed that he would do some work on the house for me." The RRAA anticipated this, and sets out the following rule: An agreement between the landlord and tenant that the tenant will work on the house and be paid by the landlord is fine, so long as the agreement is entered into AFTER the lease agreement is complete, and the arrangement for payment by the landlord for the tenant's work is separate from the rent payment.

Sometimes a landlord will say, "The reason the house isn't up to code is that the tenant himself keeps damaging it." This allegation, if true, is a valid defense to the landlord's violation of the Act. The tenant also has obligations under the Act, including refraining from deliberately or negligently damaging any part of the premises.

Procedure:

The Act states that a tenant may enforce his rights under the Act by civil action, including "recoupment, counterclaim, defense, setoff, and any other proceeding, including an action for possession." Thus, a magistrate may be confronted with applying the Act in any of the following circumstances:

1. The landlord brings an action for possession and/or money damages, and the tenant defends by contending that the landlord violated the Act.

2. The landlord brings an action for possession and/or money damages, and the tenant brings a counterclaim for rent abatement based on the landlord's violation of the Act.

3. The landlord brings an action for money damages, and the tenant responds by arguing that the landlord's damages should be reduced ("set-off") because of his violation of the Act.

4. The tenant files an action for rent abatement.

Damages

The tenant is entitled to the difference between the FRV (fair rental value) of the property as warranted and the FRV of the property as it actually is, plus any incidental damages (for example, the tenant had to buy a space heater when the furnace stopped working). NOTE: A tenant may only recover up to the amount of rent he actually paid. If he lived in the property and paid no rent, for example, he is not entitled to also recover money damages.

How are damages proven? No expert testimony is required. Witnesses may offer their opinon about the FRV of property, and the magistrate may also rely on his own experience in determining reasonable damages.

Are punitive damages allowed? No, punitive damages are not authorized in actions for breach of contract. Treble damages under G.S. 75-1.1 (prohibiting unfair or deceptive acts or practices affecting commerce) are available, however, if the tenant is able to demonstrate the essential elements of that claim.

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Retaliatory Eviction

G.S. 42-37.1 to 42-37.3: North Carolina has a strong public policy protecting tenants who exercise their rights to safe housing. When a landlord files an action for summary ejectment, a tenant may *defend* against ejectment by proving by the *greater weight of the evidence* that the landlord's action is *substantially in response* to one of several listed events that has occurred within the last 12 months.

What are those events?

1. Asking landlord to make repairs;
2. Complaining to government agency about violation of law;
3. Formal complaint lodged against landlord by government agency;
4. Attempting to exercise legal rights under law or as provided in lease;
5. Organizing or participating in tenants' rights organization.

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Remedy

If a tenant successfully demonstrates retaliatory eviction, the magistrate must deny the landlord's request for possession (although the landlord is entitled to back rent in any case). Furthermore, a tenant may have an independent action for an unfair or deceptive act or practice (with treble damages) under G.S. 75-1.1.

Note that this law is based on public policy. It won't surprise you, then, to learn that the statute specifically provides that any attempted waiver by the tenant of his rights under this law is void.

What's the obvious concern here? That a tenant will seek the protection of this law without really deserving it—in bad faith. If my lease has a forfeiture clause related to keep pets, and I get caught with my dog when the landlord drops by, I might quickly begin to organize a tenant's rights organization. That way, I think, if the landlord tries to evict me, I'll be able to claim it was because of my organizational efforts, and not the real reason—that I have a dog.

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Rebuttal by the Landlord

When a tenant defends in an action for summary ejectment by asserting that the landlord is actually retaliating against him or her for an action protected under the statute, the landlord may rebut that argument by showing one of the following things:

1. Tenant failed to pay rent or otherwise broke the lease in a manner that allows eviction, and the violation of the lease is the reason for the eviction.
2. Tenant is holding over after termination of lease for definite period with no option to renew.
3. The violations the tenant complained about were caused by willful or negligent act of tenant.
4. Displacement of tenant is required in order to comply with housing code.
5. Landlord had given tenant a good-faith notice of termination before protected conduct occurred
6. Landlord plans in good faith to do one of the following after terminating tenancy:
    1) Live there himself;
    2) Demolish the premises, or make major alterations;
    3) Terminate use of premises as a dwelling for at least 6 months.

Self-Help Eviction

Back in the old days, a landlord who wished to evict a tenant simply changed the locks, or put their property out on the sidewalk. In 1981 the North Carolina General Assembly put G.S. 42-25.6 on the statute books:

> "It is the public policy of the State of North Carolina, in order to maintain the public peace, that a residential tenant shall be evicted, dispossessed, or otherwise constructively or actually removed from his dwelling unit only in accordance with the procedure prescribed in [the remaining provisions of the statute]."

--Note: This rule applies only to *residential tenancies*. Self-help eviction is perfectly permissible in commercial lease situations.

--Note also the reference to "constructively . . . removed." The law applies not only to actual removal of a tenant from rental premises, but also to actions taken by a landlord to make continued occupancy unpleasant: turning off utilities would be the most common example.

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The General Assembly took aim at another common practice in 1981:

> "It is the public policy of the State of North Carolina that distress and distraint are prohibited, and that landlords of residential rental property shall have rights concerning the personal property of their residential tenants only in accordance with [other provisions of the statute]."

This law put an end to the practice of some landlords of either seizing property owned by the tenant to compensate for unpaid rent or refusing to release a tenant's property until that tenant paid past-due rent. As you well know (since you get hundreds of questions a year about it), landlords are now required to comply with specific legal requirements in dealing with property left behind by tenants.

As is typical of laws based on public policy, the statute provides that any attempted waiver of the legal prohibition against self-help eviction is void.

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What remedies does a tenant have when a landlord violates the prohibition against self-help eviction?

The law provides that a tenant in this circumstance is

> "entitled to recover possession or to terminate his lease and the . . . landlord. . . . shall be liable to the tenant for damages caused by the tenant's removal or attempted removal."

Further, if a landlord takes possession of a tenant's personal property, or interferes with a tenant's access to his personal property, the statute provides that a tenant is entitled to recover possession of the property, or compensation for its value (as in an action for conversion). In addition, a landlord is liable for actual damages caused by his wrongful interference.

In addition to the actions authorized by this statute, our courts have held that a tenant may bring an action for unfair or deceptive acts or practices when a landlord violates these provisions.

Other Tenants' Rights Statutes

Security deposit (pp. 189-190): In residential leases, maximum security deposit established by statute (month-to-month maximum is 1 ½ months rent). Specifies permitted uses of security deposit, requires accounting by landlord within 30 (extension to 60 possible) days. Failure to do so, if willful, results in loss of deposit altogether in addition to responsibility for tenant's attorney fees.

Late fees (pp. 169-170): In residential leases, maximum established by statute (GS 42-46). Fee must be contained in written contract, payable only if rent is more than 5 days late. Violation of statute results in loss of fee.

Administrative fees. (Small Claims Law is out-of-date on this point): GS 42-46 provides for specific fees for various stages of litigation, which will be an issue before a magistrate infrequently. Any fees associated with litigation not in compliance with statute are void as against public policy.

CHECKLIST FOR CONTRACT CASES IN SMALL CLAIMS COURT

DOES THIS CASE INVOLVE AN AGREEMENT BETWEEN π AND Δ?

WHO ARE THE PARTIES TO THE CONTRACT?

If parties are not identical to people who entered into contract, why not?

- Agency
- Guarantors
- Joint and Several Liability
- Husbands, Wives, and Kids

WHAT ARE THE TERMS OF THE AGREEMENT?

If the agreement is in writing, ask for a copy. Read it carefully. Are the terms clear?

If the agreement is not in writing, listen to the testimony about the terms.

- ☐ Do the parties agree about the terms of their agreement?
- ☐ If they don't agree, what specifically do they disagree about? What does π contend? What does Δ contend? In the case of a disagreement, the magistrate must determine the terms, remembering that the party seeking to enforce the contract has the B/P on its terms.
- ☐ Are there terms they left out? Assuming the intent to contract is clear, the magistrate "fills in the blanks" based on evidence about what is usual and reasonable, to implement the probable intention of the parties.

What rules of evidence should the magistrate be mindful of in determining the terms?

- ☐ If a contract is written, the *best evidence* of what the parties agreed to is the written contract.
- ☐ If a contract is written, evidence about what the parties said before signing the contract is not relevant unless meaning is unclear (parol *evidence rule).*
- ☐ In an action on an account, a *verified itemized statement of the account* is sufficient to prove that Δ owes that amount of money in the absence of evidence to the contrary.

Are there additional or different terms written into the agreement by the law?

- ☐ *In contracts for the sale of goods*, is π's claim for breach of warranty?
- ☐ *In actions based on a lease,* does the landlord have additional responsibilities under the RRAA?
- ☐ *In actions involving consumer credit sales,* does the Retail Installment Sales Act affect any of the contract terms?

Before moving to the next question, stop and decide what the terms of the agreement are.

Is the agreement one that the law will enforce?

- ☐ Does it involve a bargained-for exchange?
- ☐ Is this particular defendant (rather than someone else) bound by the contract?
  - --Does the contract involve a corporation?
  - --Does the contract involve an agency relationship?
- ☐ Is there any question about Δ's ability to consent?
  - --Was Δ a minor at the time of the contract?
  - -- Is there doubt about Δ's competence to contract?
- ☐ Is there a legal rule that renders this agreement unenforceable?
  - --Is this one of the kinds of contracts the law requires to be written?
  - --Did π wait too long to file the lawsuit?
  - --Are the terms of the agreement so one-sided and unfair as to be *unconscionable*?

DID Δ BREACH THE CONTRACT?

WHAT DAMAGES IS π ENTITLED TO?

Common damage items:

- ☐ Direct damages (difference between value of promised performance and what it will cost now)
- ☐ Incidental damages (costs of preparing to perform, those incurred in response to breach, those involved in minimizing injury)
- ☐ Consequential damages (foreseeable damages resulting from breach)
- ☐ Interest from date of breach

Special cases:

- ☐ Cancelling the contract: damages for putting everything back the way it was
- ☐ Liquidated damages clauses
- ☐ Failure to return property: FMV of property
- ☐ Breach of warranty: difference between FMV of goods as warranted and FMV of goods received
- ☐ Checks NSF: Amount of check + bank charge + processing fee + amount of check x 3 ($100-$500)
- ☐ Attorney fees

Be on the lookout for:

- ☐ Duty to mitigate damages
- ☐ Joint & several liability

Additional Notes on Contracts

There are special rules for special kinds of contracts:

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Installment sales contracts (pp. 81-84)

Loans (pp. 90-91, 96-97)

Worthless check (pp. 87-89)

Actions on security agreement (pp. 125-144)

Residential lease agreements (see numerous special provisions in Ch.VI, Landlord-Tenant Law)

Miscellaneous consumer protection provisions

More information about evidentiary rules:

Best Evidence Rule: When an action by a party is based on a right created by a written contract, and the content of that contract is in dispute, the party must either produce the contract or adequately explain why he is unable to do so.

Parol Evidence Rule: "The parol evidence rule . . . prohibits the admission of parol evidence to vary, add to, or contradict a written instrument. . . . In substantive terms, the rule is stated as follows: 'Any or all parts of a transaction prior to or contemporaneous with a writing intended to record them finally are superseded and made legally ineffective by the writing.'" Van Harris Realty, Inc. v. Coffey, 41 NC App 112.

Verified Statement of Account: G.S. 8-45 provides that in an action on an account for goods sold, rents, services rendered, or labor performed, or any oral contract for money loaned, a verified itemized statement of the account is admissible into evidence and is deemed correct unless disputed by the defendant.

> *Itemized* means that it describes each item with price and item number, if there is one.
>
> *Verified* means that it is accompanied by an affidavit from a person who
>
> - would be competent to testify at trial;
> - has personal knowledge of the particular account, or of the books and records of the business in general; and
> - swears that the account is correct and presently is owed by defendant to plaintiff.

Business records exception to hearsay rule: "Writings or records of acts, events, conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by, a

person with knowledge are admissible if kept in the regular course of business and if it was the regular course of business to make that record, unless the source of information or circumstances of preparation indicate a lack of trustworthiness."

Rules for Determining Interest on Judgments

> *In an action for breach of contract … the amount awarded on the contract bears interest from the date of breach. The fact finder … shall distinguish the principal from the interest in the award, and the judgment shall provide that the principal amount bears interest until the judgment is satisfied. If the parties have agreed in the contract that the contract rate shall apply after judgment, then interest … shall be at the contract rate after judgment; otherwise it shall be at the legal rate. On awards in actions on contracts pursuant to which credit was extended for personal, family, household, or agricultural purposes, however, interest shall be at the lower of the legal rate or the contract rate.*
>
> *G.S. 25-5(a)*

Every AOC form complaint containing a space in which the plaintiff may seek to recover money damages also contains a request for interest on those damages. Even if this were not the case, the appellate courts have said that a party who is awarded money damages is entitled **as a matter of law** to an appropriate amount of interest. In other words, the magistrate is responsible for determining and awarding the correct amount of pre-judgment interest in every breach of contract action in which the plaintiff is awarded money damages.

Interest = Principal x Rate x Time

Principal: This is the amount awarded by the court as damages arising out of breach of contract. Even though the term "principal" may be used to refer to evidence about the original amount of the debt, or to some other amount, remember that G.S. 24-5 deals with interest on judgments.

Rate[1]: If the contract contains an agreed-upon interest rate, that same rate is used in determining pre-judgment interest. Otherwise, the legal rate of 8% established by G.S. 24-1 applies.

Time: Period running from date of breach to date of judgment.

Date of breach: A contract is breached when the plaintiff acquires the right to bring a lawsuit. When a contract calls for performance on a specific day, breach occurs on that day, if the party fails to perform. Often, however, date of performance is not so clearly specified, and the court must determine a reasonable deadline for performance.

[1] Note that interest rates are usually stated as annual rates. For shorter time periods, the rate must be converted accordingly. For example, an annual rate of 8% converts to a daily rate of 0.0021918.

Example

In an action for money owed, the plaintiff proves that defendant failed to pay him the $600 required by a contract for services. Payment was due on September 1st, and you hear the case on Oct. 15th.

- You write "$600" in the judgment form box labeled "Principal Sum of Judgment."
- Because the contract does not contain any provision for interest, the legal rate of 8% will apply. To determine the daily rate, divide .08 by 365 days.

Interest = Principal x Rate x Time

$5.92=$600 x .08/365 x 44 days

Hate math? Use the "Judgment Calculator" on the nccourts.org website, found in the drop-down menu labeled "Quick Links."

Essential Elements and Common Defenses in Summary Ejectment Actions

Breach of a lease condition

Plaintiff/LL must prove:

___ existence of a landlord-tenant relationship;

___ lease contains a forfeiture clause;

___ tenant breached lease condition for which forfeiture is specified;

___ LL followed procedure set out in lease for declaring a forfeiture and terminating the lease.

Most common defenses: failure to follow proper procedure, waiver

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Plaintiff/LL must prove:

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___ terms of the lease related to obligation to pay rent;

___ lease does NOT contain forfeiture clause;

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Plaintiff/LL must prove:

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___ terms of lease related to duration;

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___ tenant has not vacated.

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Checklist for Summary Ejectment Actions

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Check complaint. ☐ Has it been signed by plaintiff or agent?

☐ Is the owner of the property listed as the plaintiff?

☐ Does Δ's address indicate county residence?

☐ Is the rental property adequately identified and described? (Watch out for commercial property.)

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☐ Does any information on the complaint suggest that either of the parties is a corporation? If so, remember rules about serving corporations and listing name correctly on complaint.

☐ Does any information on the complaint suggest an issue about existence of landlord-tenant relationship?

☐ Special attention to #'s 5 & 6: Is π seeking a money judgment? Was service by posting? Is the amount requested within your jurisdictional limit? Does π need to amend his complaint?

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☐ Block #3 is checked on the complaint.

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If lease is oral, listen for testimony about ☐ duration of lease ☐ amount of rent ☐ date due

There are *four possible reasons* a landlord might be entitled to possession. Your next task is to figure out which one applies to this particular case. [Note: The π may not know enough about the law to know the answer to this, and the block checked on the complaint is not binding on the π.] After you identify the reason, turn to the appropriate checklist for that reason.

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☐ Reason #4: The tenant has engaged in criminal activity.

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☐ For record-keeping purposes, always fill out the block titled Rate of Rent.

☐ If you award rent, determine daily rate and award up to date of judgment.

☐ Briefly explain judgment and right to appeal. Give both parties "What Happens After Small Claims Court" handout.

The Residential Rental Agreements Act (and Other Tenants' Rights Statutes)

The Residential Rental Agreements Act is set out in G.S. Chapter 42, Sections 38 to 44. This law, which was passed in 1977, re-wrote the common law to provide that landlords must maintain residential rental premises to be fit to live in, and to make clear that a tenant's right to such housing cannot be waived. Prior law had followed the rule of *caveat emptor* ("let the buyer beware").

What Does the Law Provide?

The law imposes 8 distinct obligations on a landlord:

1. He must comply with building and housing codes.
2. He must keep premises in a fit and habitable condition.
3. He must keep common areas in safe condition
4. He must maintain and promptly repair electrical, plumbing, heating, and other supplied facilities and appliances.
5. He must install a smoke detector and keep it in good repair.
6. He must install a carbon monoxide detector and keep it in good repair.
7. He must notify the tenant if water the landlord charges to provide exceeds a certain contaminant level.
8. He must repair within a reasonable time any "imminently dangerous condition" listed in the statute:
    a. Unsafe wiring.
    b. Unsafe flooring or steps.
    c. Unsafe ceilings or roofs.
    d. Unsafe chimneys or flues.
    e. Lack of potable water.

f. Lack of operable locks on all doors leading to the outside.

g. Broken windows or lack of operable locks on all windows on the ground level.

h. Lack of operable heating facilities capable of heating living areas to 65 degrees Fahrenheit when it is 20 degrees Fahrenheit outside from November 1 through March 31.

i. Lack of an operable toilet.

j. Lack of an operable bathtub or shower.

k. Rat infestation as a result of defects in the structure that make the premises not impervious to rodents.

l. Excessive standing water, sewage, or flooding problems caused by plumbing leaks or inadequate drainage that contribute to mosquito infestation or mold.

There is something a little confusing about this: some of these overlap. Rental premises might, for example, have a broken furnace that violates obligation #4 above, but the fact that it's below-freezing in the house also means the premises are not habitable. The reason it matters is that different rules apply as far as the notice that's required. Let's look at that more closely.

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Notice Requirements

Only one of the obligations has a notice requirement written specifically into the statute: a landlord's obligations with regard to electrical, plumbing, and other "facilities and appliances" arise only if he has written notice that repair or maintenance is necessary. After receiving notice, the landlord is entitled to a "reasonable time" to make repairs. The exception to this requirement is when there is an emergency. If the shower handle breaks off and water is pouring out of the tub onto the floor, the law will not require the tenant to notify the landlord in writing and then wait a few days before imposing an obligation on the landlord to make a repair.

A common-sense rule applies to the other obligations: the tenant must give whatever notice is necessary to reasonably permit the landlord to fulfill his obligations. If there's a leak in the roof, for example, the tenant must notify the landlord before it's reasonable to expect the landlord to repair it. In that case, however, oral notice is acceptable. It may be that in some

cases, no notice at all is required, when the evidence demonstrates that the landlord actually knew of the problem (for example, there were holes in the floor before the tenant moved in).

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Waiver

The RRAA is a consumer-protection statute. Like other consumer protection legislation, the rights of the parties are not created by contract—or agreement—in these cases. Instead, the obligations of the landlord are imposed by law—even if the contract says nothing about them, **or even if the lease says the tenant waives those rights.** The statute is clear that a tenant doesn't waive his rights by signing a lease providing for waiver; nor does a tenant waive his rights to fit and habitable housing by agreeing to rent a place with obvious defects, even if the landlord specifically tells him about them. If a tenant rents a house without air conditioning, that's fine. But if a tenant rents a house with air conditioning and then the air conditioning tears up, the landlord has a statutory obligation to repair the air conditioning, even if the lease says otherwise.

Sometimes a landlord will say, "I know the house wasn't up to code, but that's why the rent was so low. I agreed to let him live in the house for low rent, and he agreed that he would do some work on the house for me." The RRAA anticipated this, and sets out the following rule: An agreement between the landlord and tenant that the tenant will work on the house and be paid by the landlord is fine, so long as the agreement is entered into AFTER the lease agreement is complete, and the arrangement for payment by the landlord for the tenant's work is separate from the rent payment.

Sometimes a landlord will say, "The reason the house isn't up to code is that the tenant himself keeps damaging it." This allegation, if true, is a valid defense to the landlord's violation of the Act. The tenant also has obligations under the Act, including refraining from deliberately or negligently damaging any part of the premises.

Procedure:

The Act states that a tenant may enforce his rights under the Act by civil action, including "recoupment, counterclaim, defense, setoff, and any other proceeding, including an action for possession." Thus, a magistrate may be confronted with applying the Act in any of the following circumstances:

1. The landlord brings an action for possession and/or money damages, and the tenant defends by contending that the landlord violated the Act.

2. The landlord brings an action for possession and/or money damages, and the tenant brings a counterclaim for rent abatement based on the landlord's violation of the Act.

3. The landlord brings an action for money damages, and the tenant responds by arguing that the landlord's damages should be reduced ("set-off") because of his violation of the Act.

4. The tenant files an action for rent abatement.

Damages

The tenant is entitled to the difference between the FRV (fair rental value) of the property as warranted and the FRV of the property as it actually is, plus any incidental damages (for example, the tenant had to buy a space heater when the furnace stopped working). NOTE: A tenant may only recover up to the amount of rent he actually paid. If he lived in the property and paid no rent, for example, he is not entitled to also recover money damages.

How are damages proven? No expert testimony is required. Witnesses may offer their opinion about the FRV of property, and the magistrate may also rely on his own experience in determining reasonable damages.

Are punitive damages allowed? No, punitive damages are not authorized in actions for breach of contract. Treble damages under G.S. 75-1.1 (prohibiting unfair or deceptive acts or practices affecting commerce) are available, however, if the tenant is able to demonstrate the essential elements of that claim.

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Retaliatory Eviction

G.S. 42-37.1 to 42-37.3: North Carolina has a strong public policy protecting tenants who exercise their rights to safe housing. When a landlord files an action for summary ejectment, a tenant may *defend* against ejectment by proving by the *greater weight of the evidence* that the landlord's action is *substantially in response* to one of several listed events that has occurred within the last 12 months.

What are those events?

1. Asking landlord to make repairs;
2. Complaining to government agency about violation of law;
3. Formal complaint lodged against landlord by government agency;
4. Attempting to exercise legal rights under law or as provided in lease;
5. Organizing or participating in tenants' rights organization.

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Remedy

If a tenant successfully demonstrates retaliatory eviction, the magistrate must deny the landlord's request for possession (although the landlord is entitled to back rent in any case). Furthermore, a tenant may have an independent action for an unfair or deceptive act or practice (with treble damages) under G.S. 75-1.1.

Note that this law is based on public policy. It won't surprise you, then, to learn that the statute specifically provides that any attempted waiver by the tenant of his rights under this law is void.

What's the obvious concern here? That a tenant will seek the protection of this law without really deserving it—in bad faith. If my lease has a forfeiture clause related to keep pets, and I get caught with my dog when the landlord drops by, I might quickly begin to organize a tenant's rights organization. That way, I think, if the landlord tries to evict me, I'll be able to claim it was because of my organizational efforts, and not the real reason—that I have a dog.

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Rebuttal by the Landlord

When a tenant defends in an action for summary ejectment by asserting that the landlord is actually retaliating against him or her for an action protected under the statute, the landlord may rebut that argument by showing one of the following things:

1. Tenant failed to pay rent or otherwise broke the lease in a manner that allows eviction, and the violation of the lease is the reason for the eviction.
2. Tenant is holding over after termination of lease for definite period with no option to renew.
3. The violations the tenant complained about were caused by willful or negligent act of tenant.
4. Displacement of tenant is required in order to comply with housing code.
5. Landlord had given tenant a good-faith notice of termination before protected conduct occurred
6. Landlord plans in good faith to do one of the following after terminating tenancy:

    1) Live there himself;

    2) Demolish the premises, or make major alterations;

    3) Terminate use of premises as a dwelling for at least 6 months.

Self-Help Eviction

Back in the old days, a landlord who wished to evict a tenant simply changed the locks, or put their property out on the sidewalk. In 1981 the North Carolina General Assembly put G.S. 42-25.6 on the statute books:

> "It is the public policy of the State of North Carolina, in order to maintain the public peace, that a residential tenant shall be evicted, dispossessed, or otherwise constructively or actually removed from his dwelling unit only in accordance with the procedure prescribed in [the remaining provisions of the statute]."

--Note: This rule applies only to *residential tenancies*. Self-help eviction is perfectly permissible in commercial lease situations.

--Note also the reference to "constructively . . . removed." The law applies not only to actual removal of a tenant from rental premises, but also to actions taken by a landlord to make continued occupancy unpleasant: turning off utilities would be the most common example.

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The General Assembly took aim at another common practice in 1981:

> "It is the public policy of the State of North Carolina that distress and distraint are prohibited, and that landlords of residential rental property shall have rights concerning the personal property of their residential tenants only in accordance with [other provisions of the statute]."

This law put an end to the practice of some landlords of either seizing property owned by the tenant to compensate for unpaid rent or refusing to release a tenant's property until that tenant paid past-due rent. As you well know (since you get hundreds of questions a year about it), landlords are now required to comply with specific legal requirements in dealing with property left behind by tenants.

As is typical of laws based on public policy, the statute provides that any attempted waiver of the legal prohibition against self-help eviction is void.

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Tenant's Remedies

What remedies does a tenant have when a landlord violates the prohibition against self-help eviction?

The law provides that a tenant in this circumstance is

> "entitled to recover possession or to terminate his lease and the . . . landlord. . . . shall be liable to the tenant for damages caused by the tenant's removal or attempted removal."

Further, if a landlord takes possession of a tenant's personal property, or interferes with a tenant's access to his personal property, the statute provides that a tenant is entitled to recover possession of the property, or compensation for its value (as in an action for conversion). In addition, a landlord is liable for actual damages caused by his wrongful interference.

In addition to the actions authorized by this statute, our courts have held that a tenant may bring an action for unfair or deceptive acts or practices when a landlord violates these provisions.

Other Tenants' Rights Statutes

Security deposit (pp. 189-190): In residential leases, maximum security deposit established by statute (month-to-month maximum is 1 ½ months rent). Specifies permitted uses of security deposit, requires accounting by landlord within 30 (extension to 60 possible) days. Failure to do so, if willful, results in loss of deposit altogether in addition to responsibility for tenant's attorney fees.

Late fees (pp. 169-170): In residential leases, maximum established by statute (GS 42-46). Fee must be contained in written contract, payable only if rent is more than 5 days late. Violation of statute results in loss of fee.

Administrative fees .(Small Claims Law is out-of-date on this point): GS 42-46 provides for specific fees for various stages of litigation, which will be an issue before a magistrate infrequently. Any fees associated with litigation not in compliance with statute are void as against public policy.

TAB 3:

DAY 3

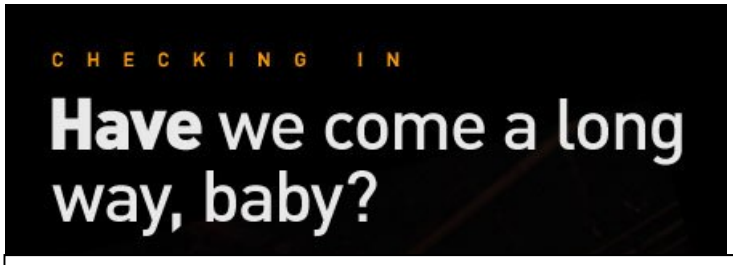
Schedule for Day 3

8:30	Revisiting Yesterday
8:45	Torts
9:45	Break
10:00	Actions to Recover Possession
11:00	Mock Trial
12:15	Lunch at SOG
1:00	Understanding & Avoiding Bias
3:00	Evaluations & Adjourn

Overview

We're concerned with three topics on our final day of the seminar: torts, actions to recover personal property, and finally how to minimize the impact of bias on your decision-making. Finally, we'll run through some mock trials as a way of reviewing and solidifying what we've learned.

Checking In



Tort Law Summary for Small Claims Magistrates

1. A tort is a "civil wrong." It may be intentional or negligent behavior.

   How many intentional torts can you list? _____
   _____
   _____
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   _____
   _____

2. AOC-CVM 200, a *Complaint for Money Owed*, is the appropriate form for a tort action. Unless the action is one for conversion, the specific tort (that is, the wrong complained of) should be listed in the "Other" section.

3. **Conversion** is one of the most frequent intentional torts heard in small claims court. The essential elements of an action for conversion are:
   1) The plaintiff owns the property, or is a lawful possessor entitled to immediate possession;
   2) The defendant either wrongfully took the property, or wrongfully retained the property after a demand for its return; and
   3) The FMV of the property at the time it was wrongfully taken or retained.

4. An intentional tort that you may see more of is **unfair or deceptive practices** (GS 75-1.1). This law prohibits "unfair or deceptive acts or practices in or affecting commerce."

   A. The essential elements of this tort are:
      1) The defendant committed an unfair or deceptive act or practice;[1]
      2) The act or practice was in or affecting commerce; and
      3) The act caused actual injury to the plaintiff.

[1] "A trade practice is "unfair," as required to recover for an unfair and deceptive trade practice, when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. " Walker v. Fleetwood Homes of North Carolina, Inc., 653 S.E.2d 393 (N.C. 2007)." A party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position. Pittmann v. Hyatt Coin & Gun, Inc., 735 S.E.2d 856 (N.C. Ct. App. 2012).

B. A plaintiff who proves liability for this tort is entitled to **triple damages** (which is the amount in controversy). In addition, the plaintiff is entitled to recover a reasonable **attorney fee** if the court finds that the defendant's act was willful and that the defendant had without good reason refused to "fully resolve the matter." GS 75-16.1.

5. The second broad category of torts consists of actions asserting that the defendant was **negligent.** The law says that a person who fails to use reasonable to care to avoid causing foreseeable injury to another is responsible for compensating the injured person for damages caused by his or her conduct. Whether conduct is negligent is determined by whether a reasonable person in the same circumstances would have behaved differently. In making this determination, one doctrine the judge may consider is the **sudden emergency doctrine**: this doctrine simply means that a person suddenly confronted with an emergency not of his own making is not necessarily held to the same level of care as a person under circumstances allowing ample time for thoughtful consideration—the time and circumstances should be taken into consideration.

6. The most common defense to a tort action is **contributory negligence**. If the plaintiff's own negligence contributed to the injury, even in the slightest degree, the defendant is excused from liability. An exception to the rule about contributory negligence is the doctrine of **last clear chance**: this doctrine arises when the defendant could or should have recognized the plaintiff's perilous position, had the opportunity to act to avoid harm, and failed to do so.

7. The measure of damages in a tort action may be of two types: compensatory and punitive.

   A. **Compensatory damages** are an effort to make the plaintiff "whole," or in other words to come as close as possible to putting the plaintiff in the position s/he would have occupied had the injury not occurred.

      1) If the plaintiff has suffered personal injury, the typical damage items are medical expenses, pain and suffering, and lost wages.
      2) If the action involves damage to property, there are two possible measures of damages: diminution in value (difference in FMV of property before and after injury, sometimes indicated by cost of repair) and intrinsic value (for property without market value—defined as value to owner).

   B. **Punitive damages** are awardable only in actions for intentional torts and only if plaintiff proves by clear and convincing evidence that defendant's tortious conduct was willful and wanton, fraudulent, or malicious.

C. **Pre-judgment interest** in a tort action is calculated beginning on the date the action is filed.

8. Miscellaneous

A. **Acts of children**
   1) Negligence: Children under 7 are incapable of negligence. Children 7-14 are presumed incapable, rebuttable by showing child failed to use reasonable care compared to other children of comparable age.
   2) Intentional torts: Parents are responsible for up to $2000 worth of damages under GS 1-538 .1 unless custody has been removed or altered. See Small Claims Law by Brannon, p. 116.
   3) Parents may also be responsible for their own independent tort of negligent supervision.

B. **Acts of animals**
   1) The owner or keeper of a vicious animal is responsible for injury caused by vicious behavior of animal if owner/keeper had knowledge. "Vicious" in this context means dangerous to others, not ill-tempered or malicious. NOTE: Unclear whether this is a strict liability rule in NC.
   2) Negligent failure to control animal.
   3) Violation of a safety statute.
   4) GS 67-4.1 (Dangerous Dog Statute)

C. Negligence actions against **bailee** (e.g., dry cleaner). Plaintiff is not required to demonstrate specific act of negligence, but rather that property was damaged while in possession of bailee. Burden then shifts to defendant to show absence of negligence.

D. **Negligence per se**. Violation of safety statute relieves plaintiff of requirement of showing defendant behaved negligently.

E. **Vicarious liability**. One person is held legally responsible for negligent (and sometimes intentional) acts of another. Examples include parent/child (discussed above), employer/employee, owner of car present when driver behaves negligently, and owner of car pursuant to Family Purpose Doctrine.

F. **Collateral source rule.** The fact that plaintiff has received compensation for damages from some other source (such as his or her own insurance company or employer) may not be used to reduce damages paid by defendant.

Actions to Recover Personal Property

By a non-secured party

Conversion (Forced Sale). Essential elements:

- Plaintiff is owner (or person entitled to possession)
- Defendant wrongfully took or retained
- Wrongful retention requires demand for return, even if due date specified.
- FMV (Plaintiff's opinion testimony sufficient)

Action to Recover. Essential elements:

- Plaintiff is owner (or person entitled to possession)
- Property was wrongfully taken or retained
- Defendant has possession of property. (If not, plaintiff may amend complaint to seek money damages for conversion.)

Damages necessary to return plaintiff to original position: (1) return of property, (2) compensation for injury to property, and (3) costs associated with loss of use.

Claim and delivery: Ancillary remedy sought by plaintiff from CSC to take immediate possession of property pending trial; rare in small claims.

By a secured party

SP is either a lender (L) or a seller of property on credit (S).

Essential Elements:

- Valid security agreement
  - Authenticated by debtor
  - Description of property sufficient to allow identification
  - Writing sufficient to indicate intention to create security interest
  - If *consumer credit*, must be dated.
- Applicable to property sought to be recovered
- Debtor defaulted in manner triggering right to repossess

Consumer credit definition:

- S in ordinary course of business regularly extends credit;
- Buyer is natural person;
- Goods or services are purchased for personal, family, household, or agricultural purposes;

SOG/DGL/2014

- Debt is payable in installments or finance charge imposed;
- Amount does not exceed $75,0000.

Retail Installment Sales Act (GS Ch. 25A)

RISA limits S in consumer credit sales (NOT lenders) to:

- Collateral
- Previous purchases not yet paid off
- Personal property to which goods are installed ($300+)
- MV to which repairs are made ($100 +)
- Property sold for use in agricultural business

SI taken in property other than that above is void.

FIFO rule applies to allocation of payments to collateral purchased from same seller over time. S has burden of proof on proper allocation.

RISA applies only to sellers. For loans, federal regulation provides SI in household goods other than *purchase money security interest* is unfair trade practice. *Purchase money security interest* is interest taken in property purchased with money obtained from loan.

SP's rights on buyer's default

SP can elect to sue for $ or repossession; not required to repossess.

May repossess without court order if no breach of peace.

Effect of breach of peace is to render repossession wrongful. Consequences of wrongful repossession are that SP may be liable for conversion, civil trespass, or even criminal charges.

Factors relevant to whether repossession caused breach of peace:

- Location
- D's express or constructive consent
- Reactions of third parties
- Type of premises entered
- Use of deception by creditor

What happens after repossession

Generally, SP has option of sale or keeping goods in full satisfaction of debt.

Debtor must agree to decision not to sell, either by signing agreement or by failing to object to notice of intent to keep within 20 days

Consumer goods/60% of debt paid: SP must sell property within 90 days.

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Sale of repossessed property

Statute requires notice to debtor of sale, and notice must be given in commercially reasonable manner, in terms of timing, content, and manner in which it is sent.

Consumer goods: GS 25-9-614 spells out required contents of notice.

Debtor has right to redeem property at any point prior to sale.

Amount owed, expenses, and attorney fees (if SA provides) required for redemption.

Effect of acceleration clause: D must pay full amount of debt to redeem property.

Commercially reasonable sales

Sale must be conducted in commercially reasonable manner "in every aspect."

Whether sale meets CRM standard depends on facts; guiding star is reasonable efforts to obtain best price.

Whether sale is CR may include consideration of time, place, price obtained for goods, amount of publicity, other broad range of factors.

May require S to make reasonable efforts to prepare property for sale.

S may elect public sale (auction, with notice to general public) or private sale (all others). S is allowed to purchase property only at public sale unless fair price is capable of objective determination.

Post-sale

Proceeds allocated in order to 1) expenses, 2) debt to S, 3) debt to other SPs, & 4) surplus to D.

Consumer goods: S must provide written accounting to D.

Action for deficiency

If proceeds are insufficient for expenses & debt to S, S may bring action for $ owed ("action for deficiency").

Essential elements:

- S gave D proper written notice of disposition of property
- Sale was conducted in CRM
- Amount of remaining debt

Consequence of failure to conduct CR sale: Rebuttable presumption that value of property was at least equivalent to amount of debt.

D's remedies for creditor's violation of rules

60% Rule: action for conversion

Any actual damages debtor is able to prove

Consumer goods: liquidated damages of not less than total finance charge plus 10% principal

Treble damages if B proves unfair or deceptive practice

$500 penalty for

- Creditor who refuses to provide statement of amount owed or list of collateral securing debt in response to written request, or
- Creditor who fails to account for proceeds of sale and who has a pattern of noncompliance.

Rights of third parties

SP may be able to repossess property from 3rd parties if SP has a *perfected* security interest.

Perfection may occur in four ways:

- By filing financing statement with Secretary of State.
- A purchase money security interest is automatically perfected.
- In the case of motor vehicles, by filing a lien with DMV.
- Creditor retains possession of property (e.g., pawnbroker)

Priority rules for perfected security interests:

- Purchase money security interest prevails over all others.
- First to perfect wins otherwise.
- Perfected interest wins over unperfected interest.
- Special rule for consumer goods: A "good faith purchaser" of consumer goods who purchases from a buyer takes free of a security interest in the goods if
  - The GFP did not know there was a security interest in the goods;
  - The GFP paid for the goods;
  - The goods were for the GFP's personal use;
  - The GFP bought the goods before a financing statement was filed.

This handout contains excerpts from Strategies to Reduce the Influence of Implicit Bias, available online at http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_Strategies_033012.ashx

(and perhaps most easily accessed by doing a Google search for "national center state courts implicit bias").

The National Center for State Courts has a number of other excellent resources related to implicit bias and judicial education.

Strategies to Reduce the Influence of Implicit Bias*

NCSC National Center for State Courts
www.ncsc.org

Race & Ethnic Fairness in the Courts

Compared to the science on the existence of implicit bias and its potential influence on behavior, the science on ways to mitigate implicit bias is relatively young and often does not address specific applied contexts such as judicial decision making. Yet, it is important for strategies to be concrete and applicable to an individual's work to be effective; instructions to simply avoid biased outcomes or respond in an egalitarian manner are too vague to be helpful (Dasgupta, 2009). To address this gap in concrete strategies applicable to court audiences, the authors reviewed the science on general strategies to address implicit bias and considered their potential relevance for judges and court professionals. They also convened a small group discussion with judges and judicial educators (referred to as the Judicial Focus Group) to discuss potential strategies. This document summarizes the results of these efforts. Part 1 identifies and describes conditions that exacerbate the effects of implicit bias on decisions and actions. Part 2 identifies and describes seven general research-based strategies that may help attenuate implicit bias or mitigate the influence of implicit bias on decisions and actions. Part 2 provides a brief summary of empirical findings that support the seven strategies and offers concrete suggestions, both research-based and extrapolated from existing research, to implement each strategy.[1] Some of the suggestions in Part 2 focus on individual actions to minimize the influence of implicit bias, and others focus on organizational efforts to (a) eliminate situational or systemic factors that may engender implicit bias and (b) promote a more egalitarian court culture. The authors provide the tables as a resource for addressing implicit bias with the understanding that the information should be reviewed and revised as new research and lessons from the field expand current knowledge.

*Preparation of this project brief was funded by the Open Society Institute, the State Justice Institute, and the National Center for State Courts. The views expressed are those of the authors and do not necessarily reflect the views of the funding organizations. The document summarizes the National Center for State Courts' project on implicit bias and judicial education. See Casey, Warren, Cheesman, and Elek (2012), available at www.ncsc.org/ibreport for the full report of the project.

Part 1. Combating Implicit Bias in the Courts: Understanding Risk Factors

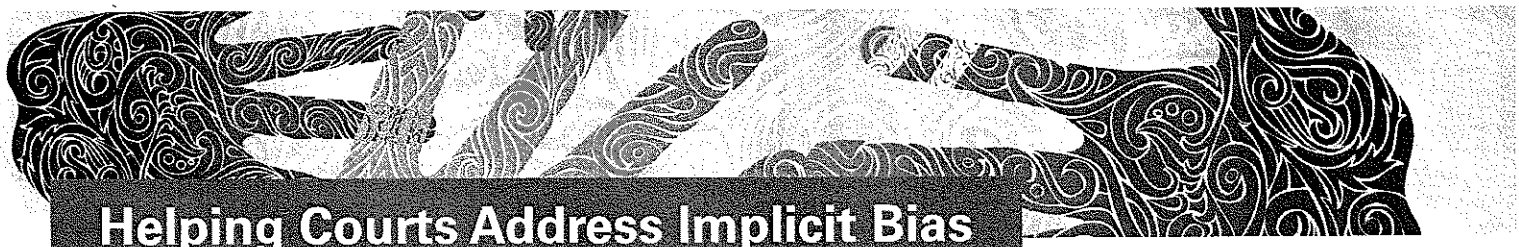
The following conditions increase the likelihood that implicit bias may influence one's thoughts and actions.

Risk factor: Certain emotional states

Certain emotional states (anger, disgust) can exacerbate implicit bias in judgments of stigmatized group members, even if the source of the negative emotion has nothing to do with the current situation or with the issue of social groups or stereotypes more broadly (e.g., DeSteno, Dasgupta, Bartlett, & Cajdric, 2004; Dasgupta, DeSteno, Williams, & Hunsinger, 2009). Happiness may also produce more stereotypic judgments, though this can be consciously controlled if the person is motivated to do so (Bodenhausen, Kramer, & Susser, 1994).

Risk factor: Ambiguity

When the basis for judgment is somewhat vague (e.g., situations that call for discretion; cases that involve the application of new, unfamiliar laws), biased judgments are more likely. Without more explicit, concrete criteria for decision making, individuals tend to disambiguate the situation using whatever information is most easily accessible—including stereotypes (e.g., Dovidio & Gaertner, 2000; Johnson, Whitestone, Jackson, & Gatto, 1995).



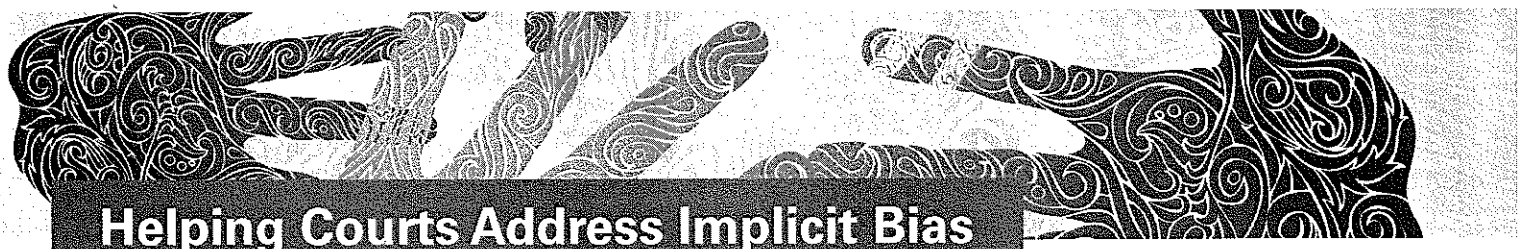
Helping Courts Address Implicit Bias

Risk factor: Salient social categories

A decision maker may be more likely to think in terms of race and use racial stereotypes because race often is a salient, i.e., easily-accessible, attribute (Macrae, Bodenhausen, & Milne, 1995; Mitchell, Nosek, & Banaji, 2003). However, when decision makers become conscious of the potential for prejudice, they often attempt to correct for it; in these cases, judges, court staff, and jurors would be less likely to exhibit bias (Sommers & Ellsworth, 2001).

Risk factor: Low-effort cognitive processing

When individuals engage in low-effort information processing, they rely on stereotypes and produce more stereotype-consistent judgments than when engaged in more deliberative, effortful processing (Bodenhausen, 1990). As a result, low-effort decision makers tend to develop inferences or expectations about a person early on in the information-gathering process. These expectations then guide subsequent information processing: Attention and subsequent recall are biased in favor of stereotype-confirming evidence and produce biased judgment (Bodenhausen & Wyer, 1985; Darley & Gross, 1983). Expectations can also affect social interaction between the decision maker (e.g., judge) and the stereotyped target (e.g., defendant), causing the decision maker to behave in ways that inadvertently elicit stereotype-confirming behavior from the other person (Word, Zanna, & Cooper, 1973).



Helping Courts Address Implicit Bias

Risk factor: Distracted or pressured decision-making circumstances

Tiring (e.g., long hours, fatigue), stressful (e.g., heavy, backlogged, or very diverse caseloads; loud construction noise; threats to physical safety; popular or political pressure about a particular decision; emergency or crisis situations), or otherwise distracting circumstances can adversely affect judicial performance (e.g., Eells & Showalter, 1994; Hartley & Adams, 1974; Keinan, 1987). Specifically, situations that involve time pressure (e.g., van Knippenberg, Dijksterhuis, & Vermeulen, 1999), that force a decision maker to form complex judgments relatively quickly (e.g., Bodenhausen & Lichtenstein, 1987), or in which the decision maker is distracted and cannot fully attend to incoming information (e.g., Gilbert & Hixon, 1991; Sherman, Lee, Bessennof, & Frost, 1998) all limit the ability to fully process case information. Decision makers who are rushed, stressed, distracted, or pressured are more likely to apply stereotypes – recalling facts in ways biased by stereotypes and making more stereotypic judgments – than decision makers whose cognitive abilities are not similarly constrained.

Risk factor: Lack of feedback

When organizations fail to provide feedback that holds decision makers accountable for their judgments and actions, individuals are less likely to remain vigilant for possible bias in their own decision-making processes (Neuberg & Fiske, 1987; Tetlock, 1983).

Part 2. Combating Implicit Bias in the Courts: Seeking Change

The following strategies show promise in reducing the effects of implicit bias on behavior.

Strategy 1: Raise awareness of implicit bias

Individuals can only work to correct for sources of bias that they are aware exist (Wilson & Brekke, 1994). Simply knowing about implicit bias and its potentially harmful effects on judgment and behavior may prompt individuals to pursue corrective action (cf. Green, Carney, Pallin, Ngo, Raymond, Iezzoni, & Banaji, 2007). Although awareness of implicit bias in and of itself is not sufficient to ensure that effective debiasing efforts take place (Kim, 2003), it is a crucial starting point that may prompt individuals to seek out and implement the types of strategies listed throughout this document.

What can the individual do?

1. **Seek out information on implicit bias**. Judges and court staff could attend implicit bias training sessions. Those who choose to participate in these sessions should ensure that they fully understand what implicit bias is and how it manifests in every day decisions and behavior by asking questions, taking the IAT, and/or reading about the scientific literature as a follow-up to the seminar.

Strategy 2: Seek to identify and consciously acknowledge real group and individual differences

The popular "color blind" approach to egalitarianism (i.e., avoiding or ignoring race; lack of awareness of and sensitivity to differences between social groups) fails as an implicit bias intervention strategy. "Color blindness" actually produces greater implicit bias than strategies that acknowledge race (Apfelbaum, Sommers, & Norton, 2008). Cultivating greater awareness of and sensitivity to group and individual differences appears to be a more effective tactic: Training seminars that acknowledge and promote an appreciation of group differences and multi-cultural viewpoints can help reduce implicit bias (Rudman, Ashmore, & Gary, 2001; Richeson & Nussbaum, 2004).

Diversity training seminars can serve as a starting point from which court culture itself can change. When respected court leadership actively supports the multiculturalism approach, those egalitarian goals can influence others (Aarts, Gollwitzer, & Hassin, 2004). Moreover, when an individual (e.g., new employee) discovers that peers in the court community are more egalitarian, the individual's beliefs become less implicitly biased (Sechrist & Stangor, 2001). Thus, a system-wide effort to cultivate a workplace environment that supports egalitarian norms is important in reducing individual-level implicit bias. Note, however, that mandatory training or other imposed pressure to comply with egalitarian standards may elicit hostility and resistance from some types of individuals, failing to reduce implicit bias (Plant & Devine, 2001).

In addition to considering and acknowledging group differences, individuals should purposely compare and individuate stigmatized group members. By defining individuals in multiple ways other than in terms of race, implicit bias may be reduced (e.g., Djikic, Langer, & Stapleton, 2008; Lebrecht, Pierce, Tarr, & Tanaka, 2009; Corcoran, Hundhammer, & Mussweiler, 2009).

What can the individual do?

1. **Seek out and elect to participate in diversity training seminars.** Judges and court staff could seek out and participate in diversity training seminars that promote an appreciation of group differences and multicultural viewpoints. Exposure to the multiculturalism approach, particularly routine exposure, will help individuals develop the greater social awareness needed to overcome implicit biases.

2. **Seek out the company of other professionals who demonstrate egalitarian goals**. Surrounding oneself with others who are committed to greater egalitarianism will help positively influence one's own implicit beliefs and behaviors in the long run.

3. **Invest extra effort into identifying the unique attributes of stigmatized group members**. Judges and court staff could think about how the stigmatized group members they encounter are *different* from others – particularly from other members of the same social/racial group. This type of individuating exercise will help reduce one's reliance on social or racial stereotypes when evaluating or interacting with another person.

may increase implicit bias (Macrae, Bodenhausen, Milne, & Jetten, 1994). Others also perceive individuals instructed to implement the "color blindness" approach as more biased (Apfelbaum, Sommers, & Norton, 2008). For these reasons, decision makers should apply tested intervention techniques that are supported by empirical research rather than relying on intuitive guesses about how to mitigate implicit bias.

What can the individual do?

1. **Use decision-support tools**. Legal scholars have proposed several decision-support tools to promote greater deliberative (as opposed to intuitive) thinking (Guthrie, Rachlinski, & Wistrich, 2007). These tools, while untested, would primarily serve as vehicles for research-based decision-making approaches and self-checking exercises that demonstrably mitigate the impact of implicit bias. The Judicial Focus Group (JFG) also supported the use of such tools, which include:

   a. **Note-taking**. Judges and jurors should take notes as the case progresses so that they are not forced to rely on memory (which is easily biased; see Part 1 and Levinson, 2007) when reviewing the evidence and forming a decision.

   b. **Articulate your reasoning process** (e.g., opinion writing). By prompting decision makers to document the reasoning behind a decision in some way before announcing it, judges and jurors may review their reasoning processes with a critical eye for implicit bias before publicly committing to a decision. Techniques or tools that help decision makers think through their decision more clearly and ensure that it is based on sound reasoning before committing to it publicly will protect them from rationalizing decisions post hoc (also see Strategy 6 on instituting feedback mechanisms). Sharing this reasoning up front with the public can also positively affect public perceptions of fairness.

c. **Checklists or bench cards.** The JFG suggested the use of checklists or bench cards that list some "best practice" questions or exercises (e.g., perspective-taking, cloaking). These tools could prompt decision makers to more systematically reflect on and scrutinize the reasoning behind any decision for traces of possible bias. Note that this strategy should be used only after the decision maker has received implicit bias and diversity training, and should be offered for voluntary use. If untrained judges rely on these tools, their efforts to correct for bias may be sporadic and restricted to isolated cases. If resistant judges are compelled to use these tools, checklists as a forced procedure could backfire and actually increase biases in these types of individuals.

Strategy 4: Identify distractions and sources of stress in the decision-making environment and remove or reduce them

Decision makers need enough time and cognitive resources to thoroughly process case information to avoid relying on intuitive reasoning processes that can result in biased judgments (see Part 1).

What can the individual do?

1. **Allow for more time on cases in which implicit bias may be a concern.** The Judicial Focus Group (JFG) suggested that judges prepare more in advance of hearings in which disadvantaged group members are involved (as attorneys, defendants/litigants, victims, key witnesses). If possible, judges could slow down their decision-making process by spending more time reviewing the facts of the case before committing to a decision. If implicit bias is suspected, judges could reconvene and review case material outside of the court environment to reduce time pressure.

2. **Clear your mind and focus on the task at hand.** Judges should become adept at putting distractions aside and focusing completely on the case and evidence at hand. Meditation courses may help judges develop or refine these skills (Kang & Banaji, 2006; Seamone, 2006).

Strategy 5: Identify sources of ambiguity in the decision-making context and establish more concrete standards before engaging in the decision-making process

Situational ambiguity may arise for cases in which the formal criteria for judgment are somewhat vague (e.g., laws, procedures that involve some degree of discretion on behalf of the decision maker). These especially include (but are not limited to) cases that involve the interpretation of newly established laws or case types that are unfamiliar or less familiar to the decision maker. In these cases, decision makers should preemptively commit to specific decision-making criteria (e.g., the importance of various types of evidence to the decision) *before* hearing a case or reviewing evidence to minimize the opportunity for implicit bias (Uhlmann & Cohen, 2005). Establishing this structure before entering the decision-making context will help prevent constructing criteria after the fact in ways biased by implicit stereotypes but rationalized by specific types of evidence (e.g., placing greater weight on stereotype-consistent evidence in a case against a black defendant than one would in a case against a white defendant).

What can the individual do?

1. **Preemptively commit to more specific decision-making criteria.** Before entering into a decision-making context characterized by ambiguity or that permits greater discretion, judges and jurors could establish their own informal structure or follow suggested protocol (if instituted) to help create more objective structure in the decision-making process. Commit to these decision-making criteria before reviewing case-specific information to minimize the impact of implicit bias on the reasoning process.

Strategy 6: Institute feedback mechanisms

Providing egalitarian consensus information (i.e., information that others in the court hold egalitarian beliefs rather than adhere to stereotypic beliefs) and other feedback mechanisms can be powerful tools in promoting more egalitarian attitudes and behavior in the court community (Sechrist & Stangor, 2001). To encourage individual effort in addressing personal implicit biases, court administration may opt to provide judges and other court professionals with relevant performance feedback. As part of this process, court administration should consider the type of judicial decision-making data currently available or easily obtained that would offer judges meaningful but nonthreatening feedback on demonstrated biases. Transparent feedback from regular or intermittent peer reviews that raise personal awareness of biases could prompt those with egalitarian motives to do more to prevent implicit bias in future decisions and actions (e.g., Son Hing, Li, & Zanna, 2002). This feedback should include concrete suggestions on how to improve performance (cf. Mendoza, Gollwitzer, & Amodio, 2010; Kim, 2003) and could also involve recognition of those individuals

Feedback tends to work best when it (a) comes from a legitimate, respected authority, (b) addresses the person's decision-making process rather than simply the decision *outcome*, and (c) when provided *before* the person commits to a decision rather than *afterwards*, when he or she has already committed to a particular course of action (see Lerner & Tetlock, 1999, for a review). Note, however, that feedback mechanisms which apply coercive pressure to comply with egalitarian standards can elicit hostility from some types of individuals and fail to mitigate implicit bias (e.g., Plant & Devine, 2001). By inciting hostility, these imposed standards may even be counterproductive to egalitarian goals, generating backlash in the form of increased explicit and implicit prejudice (Legault, Gutsell, & Inzlicht, 2011).

What can the individual do?

1. **Actively seek feedback from others**. Judges can seek out their own informal "checks and balances" by organizing or participating in sentencing round tables, or by consulting with a skilled mentor or senior judge for objective feedback on how to handle a challenging case or difficult situation.

2. **Actively seek feedback from others regarding past performance**. With an open mind, judges and court staff could talk to colleagues, supervisors, or others to request performance feedback. This information could be helpful in determining whether a person's current efforts to control or reduce implicit bias are effective or could be improved.

3. **Articulate your reasoning process**. To ensure sound reasoning in every case, judges could choose to document or articulate the underlying logic of their decisions. Not only does this exercise afford judges the opportunity to critically review their decision-making processes in each case, but taking it a step further—making this reasoning transparent in court—can have positive effects on public perceptions of fairness (see *Articulate your reasoning process* in Strategy 3, above).

Strategy 7: Increase exposure to stigmatized group members and counter-stereotypes and reduce exposure to stereotypes

Increased contact with counter-stereotypes—specifically, increased exposure to stigmatized group members that contradict the social stereotype—can help individuals negate stereotypes, affirm counter-stereotypes, and "unlearn" the associations that underlie implicit bias. "Exposure" can include imagining counter-stereotypes (Blair, Ma, & Lenton, 2001), incidentally observing counter-stereotypes in the environment (Dasgupta & Greenwald, 2001; Olson & Fazio, 2006), engaging with counter-stereotypic role models (Dasgupta & Asgari, 2004; Dasgupta & Rivera, 2008) or extensive practice making counter-stereotypic associations (Kawakami, Dovidio, Moll, Hermsen, & Russin, 2000).

For individuals who seek greater contact with counter-stereotypic individuals, such contact is more effective when the counter-stereotype is of at least equal status in the workplace (see Pettigrew & Tropp, 2006). Moreover, positive and meaningful interactions work best: Cooperation is one of the most powerful forms of debiasing contact (e.g., Sherif, Harvey, White, Hood & Sherif, 1961).

In addition to greater contact with counter-stereotypes, this strategy also involves decreased exposure to stereotypes. Certain environmental cues can automatically trigger stereotype activation and implicit bias. Images and language that are a part of any signage, pamphlets, brochures, instructional manuals, background music, or any other verbal or visual communications in the court may inadvertently activate implicit biases because they convey stereotypic information (see Devine, 1989; Rudman & Lee, 2002; Anderson,

Benjamin, & Bartholow, 1998; for examples of how such communications can prime stereotypic actions and judgments; see also Kang & Banaji, 2006). Identifying these communications and removing them or replacing them with non-stereotypic or counter-stereotypic information can help decrease the amount of daily exposure court employees and other legal professionals have with the types of social stereotypes that underlie implicit bias.

What can the individual do?

1. **Imagine counter-stereotypes or seek out images of admired exemplars.** To reduce the impact of implicit bias on judgment, judges and court staff could imagine or view images of admired or counter-stereotypic exemplars of the stereotyped social group (e.g., Martin Luther King, Jr.) before entering a decision-making scenario that could activate these social stereotypes. To accomplish this, researchers on implicit bias have suggested that people hang photos or program screen savers and desktop images of role models or others that challenge traditional racial stereotypes.

2. **Seek greater contact with counter-stereotypic role models.** Individuals who are motivated to become more egalitarian could also spend more time in the presence of people who are counter-stereotypic role models to reinforce counter-stereotypic associations in the brain and make traditional stereotypes less accessible for use.

3. **Practice making counter-stereotypic associations.** Individuals who are motivated to change their automatic reactions should practice making positive associations with minority groups, affirming counter-stereotypes, and negating stereotypes. Implicit biases may be "automatic," but corrective and debiasing strategies can also become automated with motivation and practice.

This handout contains excerpts from Strategies to Reduce the Influence of Implicit Bias, available online at http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_Strategies_033012.ashx

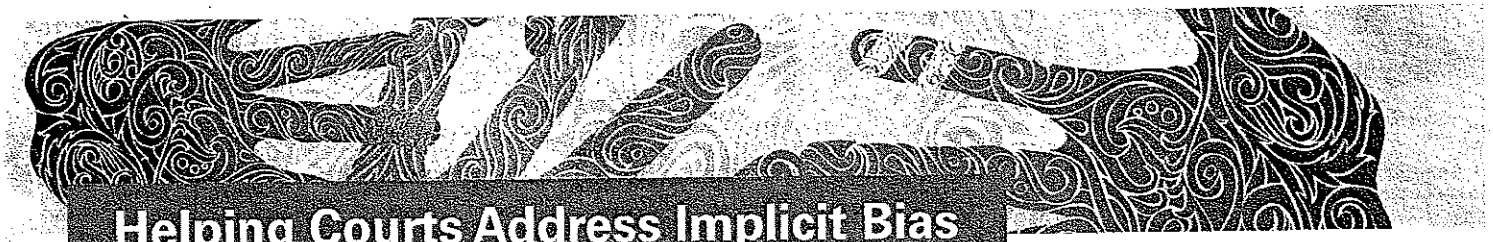
(and perhaps most easily accessed by doing a Google search for "national center state courts implicit bias").

The National Center for State Courts has a number of other excellent resources related to implicit bias and judicial education.

Strategies to Reduce the Influence of Implicit Bias*

Compared to the science on the existence of implicit bias and its potential influence on behavior, the science on ways to mitigate implicit bias is relatively young and often does not address specific applied contexts such as judicial decision making. Yet, it is important for strategies to be concrete and applicable to an individual's work to be effective; instructions to simply avoid biased outcomes or respond in an egalitarian manner are too vague to be helpful (Dasgupta, 2009). To address this gap in concrete strategies applicable to court audiences, the authors reviewed the science on general strategies to address implicit bias and considered their potential relevance for judges and court professionals. They also convened a small group discussion with judges and judicial educators (referred to as the Judicial Focus Group) to discuss potential strategies. This document summarizes the results of these efforts. Part 1 identifies and describes conditions that exacerbate the effects of implicit bias on decisions and actions. Part 2 identifies and describes seven general research-based strategies that may help attenuate implicit bias or mitigate the influence of implicit bias on decisions and actions. Part 2 provides a brief summary of empirical findings that support the seven strategies and offers concrete suggestions, both research-based and extrapolated from existing research, to implement each strategy.[1] Some of the suggestions in Part 2 focus on individual actions to minimize the influence of implicit bias, and others focus on organizational efforts to (a) eliminate situational or systemic factors that may engender implicit bias and (b) promote a more egalitarian court culture. The authors provide the tables as a resource for addressing implicit bias with the understanding that the information should be reviewed and revised as new research and lessons from the field expand current knowledge.

*Preparation of this project brief was funded by the Open Society Institute, the State Justice Institute, and the National Center for State Courts. The views expressed are those of the authors and do not necessarily reflect the views of the funding organizations. The document summarizes the National Center for State Courts' project on implicit bias and judicial education. See Casey, Warren, Cheesman, and Elek (2012), available at www.ncsc.org/ibreport for the full report of the project.



Part 1. Combating Implicit Bias in the Courts: Understanding Risk Factors

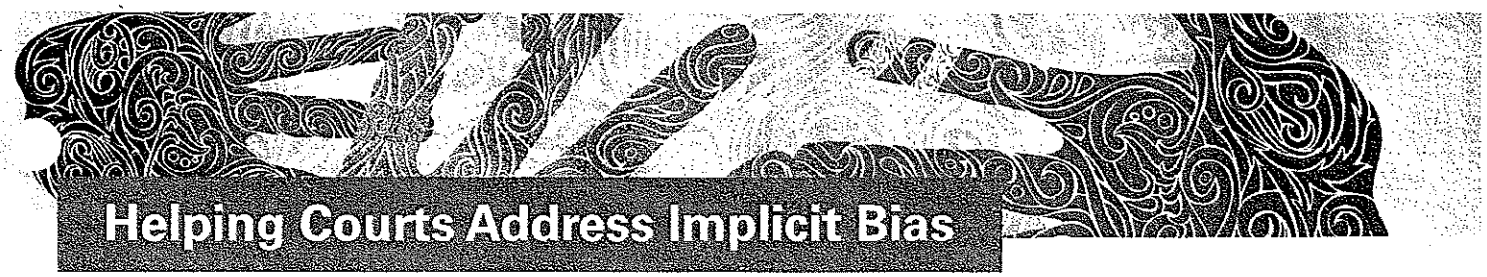
The following conditions increase the likelihood that implicit bias may influence one's thoughts and actions.

Risk factor: Certain emotional states

Certain emotional states (anger, disgust) can exacerbate implicit bias in judgments of stigmatized group members, even if the source of the negative emotion has nothing to do with the current situation or with the issue of social groups or stereotypes more broadly (e.g., DeSteno, Dasgupta, Bartlett, & Cajdric, 2004; Dasgupta, DeSteno, Williams, & Hunsinger, 2009). Happiness may also produce more stereotypic judgments, though this can be consciously controlled if the person is motivated to do so (Bodenhausen, Kramer, & Susser, 1994).

Risk factor: Ambiguity

When the basis for judgment is somewhat vague (e.g., situations that call for discretion; cases that involve the application of new, unfamiliar laws), biased judgments are more likely. Without more explicit, concrete criteria for decision making, individuals tend to disambiguate the situation using whatever information is most easily accessible—including stereotypes (e.g., Dovidio & Gaertner, 2000; Johnson, Whitestone, Jackson, & Gatto, 1995).



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Risk factor: Salient social categories

A decision maker may be more likely to think in terms of race and use racial stereotypes because race often is a salient, i.e., easily-accessible, attribute (Macrae, Bodenhausen, & Milne, 1995; Mitchell, Nosek, & Banaji, 2003). However, when decision makers become conscious of the potential for prejudice, they often attempt to correct for it; in these cases, judges, court staff, and jurors would be less likely to exhibit bias (Sommers & Ellsworth, 2001).

Risk factor: Low-effort cognitive processing

When individuals engage in low-effort information processing, they rely on stereotypes and produce more stereotype-consistent judgments than when engaged in more deliberative, effortful processing (Bodenhausen, 1990). As a result, low-effort decision makers tend to develop inferences or expectations about a person early on in the information-gathering process. These expectations then guide subsequent information processing: Attention and subsequent recall are biased in favor of stereotype-confirming evidence and produce biased judgment (Bodenhausen & Wyer, 1985; Darley & Gross, 1983). Expectations can also affect social interaction between the decision maker (e.g., judge) and the stereotyped target (e.g., defendant), causing the decision maker to behave in ways that inadvertently elicit stereotype-confirming behavior from the other person (Word, Zanna, & Cooper, 1973).

Helping Courts Address Implicit Bias

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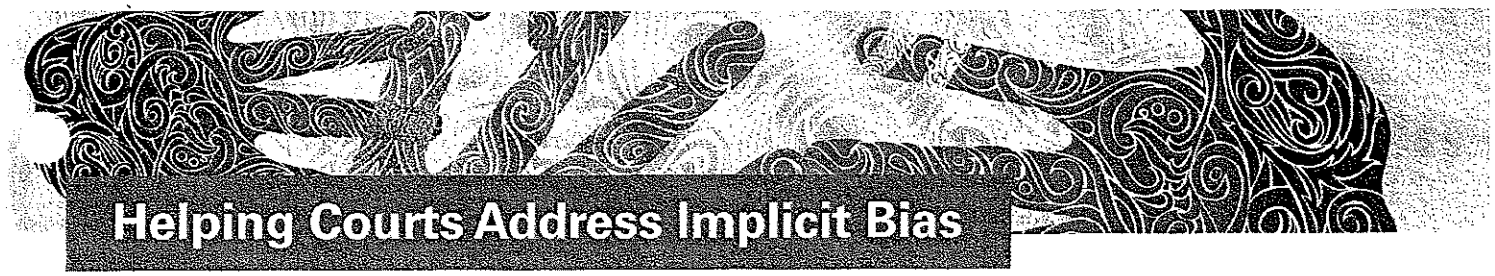

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1. **Actively seek feedback from others**. Judges can seek out their own informal "checks and balances" by organizing or participating in sentencing round tables, or by consulting with a skilled mentor or senior judge for objective feedback on how to handle a challenging case or difficult situation.

2. **Actively seek feedback from others regarding past performance.** With an open mind, judges and court staff could talk to colleagues, supervisors, or others to request performance feedback. This information could be helpful in determining whether a person's current efforts to control or reduce implicit bias are effective or could be improved.

3. **Articulate your reasoning process**. To ensure sound reasoning in every case, judges could choose to document or articulate the underlying logic of their decisions. Not only does this exercise afford judges the opportunity to critically review their decision-making processes in each case, but taking it a step further—making this reasoning transparent in court—can have positive effects on public perceptions of fairness (see *Articulate your reasoning process* in Strategy 3, above).

Helping Courts Address Implicit Bias

Strategy 7: Increase exposure to stigmatized group members and counter-stereotypes and reduce exposure to stereotypes

Increased contact with counter-stereotypes—specifically, increased exposure to stigmatized group members that contradict the social stereotype—can help individuals negate stereotypes, affirm counter-stereotypes, and "unlearn" the associations that underlie implicit bias. "Exposure" can include imagining counter-stereotypes (Blair, Ma, & Lenton, 2001), incidentally observing counter-stereotypes in the environment (Dasgupta & Greenwald, 2001; Olson & Fazio, 2006), engaging with counter-stereotypic role models (Dasgupta & Asgari, 2004; Dasgupta & Rivera, 2008) or extensive practice making counter-stereotypic associations (Kawakami, Dovidio, Moll, Hermsen, & Russin, 2000).

For individuals who seek greater contact with counter-stereotypic individuals, such contact is more effective when the counter-stereotype is of at least equal status in the workplace (see Pettigrew & Tropp, 2006). Moreover, positive and meaningful interactions work best: Cooperation is one of the most powerful forms of debiasing contact (e.g., Sherif, Harvey, White, Hood & Sherif, 1961).

In addition to greater contact with counter-stereotypes, this strategy also involves decreased exposure to stereotypes. Certain environmental cues can automatically trigger stereotype activation and implicit bias. Images and language that are a part of any signage, pamphlets, brochures, instructional manuals, background music, or any other verbal or visual communications in the court may inadvertently activate implicit biases because they convey stereotypic information (see Devine, 1989; Rudman & Lee, 2002; Anderson,

Benjamin, & Bartholow, 1998; for examples of how such communications can prime stereotypic actions and judgments; see also Kang & Banaji, 2006). Identifying these communications and removing them or replacing them with non-stereotypic or counter-stereotypic information can help decrease the amount of daily exposure court employees and other legal professionals have with the types of social stereotypes that underlie implicit bias.

What can the individual do?

1. **Imagine counter-stereotypes or seek out images of admired exemplars.** To reduce the impact of implicit bias on judgment, judges and court staff could imagine or view images of admired or counter-stereotypic exemplars of the stereotyped social group (e.g., Martin Luther King, Jr.) before entering a decision-making scenario that could activate these social stereotypes. To accomplish this, researchers on implicit bias have suggested that people hang photos or program screen savers and desktop images of role models or others that challenge traditional racial stereotypes.

2. **Seek greater contact with counter-stereotypic role models.** Individuals who are motivated to become more egalitarian could also spend more time in the presence of people who are counter-stereotypic role models to reinforce counter-stereotypic associations in the brain and make traditional stereotypes less accessible for use.

3. **Practice making counter-stereotypic associations.** Individuals who are motivated to change their automatic reactions should practice making positive associations with minority groups, affirming counter-stereotypes, and negating stereotypes. Implicit biases may be "automatic," but corrective and debiasing strategies can also become automated with motivation and practice.

More Resources on Bias and Other Cognitive Distortions

To learn more about the Implicit Associations Test and to try a test yourself, go to
https://implicit.harvard.edu

The California Administrative Office of the Courts website contains a superlative three-video series on judicial bias. That website also offers the screensaver we mentioned in class for download.
http://www2.courtinfo.ca.gov/cjer/aoctv/dialogue/neuro/index.htm

The National Center for State Courts website offers several good resources, including a Primer on Implicit Bias and a narrated video on Social Cognition and Decision-Making. Both of these are excellent.
http://www.ncsconline.org/D_Research/ref/implicit.html

Also available at the NCSC website is a summary of that organization's final report on implicit bias and judicial education, including detailed reference material and specific recommendations.

If you'd like to share the "invisible gorilla" clip with others, you can find it at
http://www.youtube.com/watch?v=2pK0BQ9CUHk

A much longer and more detailed exploration of judicial bias, including inquiry into bias as a function of interaction between judge and jury is *Judicial Bias* by Donald C. Nugent at 42 Clev. St. L. Rev. 1 (1994).

Hot off the presses is a law review article, "Implicit Bias in the Courtroom," published by Jerry Kang and 7 other leading authorities in the field in 59 UCLA L. Rev. 1124 (2012).

Hands down, the authoritative book about decision-making in a broad context from the neuro-psychological point of view is the dense-but-fascinating book Thinking, Fast and Slow (2011) by Nobel prizewinner Daniel Kahneman.

Other readable and rewarding books about the brain and behavior are:
The Emotional Life of Your Brain: How Its Unique Patterns Affect the Way You Think, Feel, and Live—and How You Can Change Them, R. Davidson (2012)

Mindsight: The New Science of Personal Transformation, D. Siegel (2010)

The Mind and the Brain: Neuroplasticity and the Power of Mental Force, J. Schwartz (2002)

TAB 4:

FORMS

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
District Court Division - Small Claims

Plaintiff(s)	**MAGISTRATE SUMMONS** ☐ **ALIAS AND PLURIES SUMMONS (ASSESS FEE)**
VERSUS	G.S. 1A-1, Rule 4; 7A-217, -232
Defendant(s)	*Date Original Summons Issued* *Date(s) Subsequent Summons(es) Issued*
TO	**TO**
Name And Address Of Defendant 1	*Name And Address Of Defendant 2*

A Small Claim Action Has Been Commenced Against You!

You are notified to appear before the magistrate at the specified date, time, and location of trial listed below. You will have the opportunity at the trial to defend yourself against the claim stated in the attached complaint.

You may file a written answer, making defense to the claim, in the office of the Clerk of Superior Court at any time before the time set for trial. Whether or not you file an answer, the plaintiff must prove the claim before the magistrate.

If you fail to appear and defend against the proof offered, the magistrate may enter a judgment against you.

Date Of Trial	*Time Of Trial* ☐ AM ☐ PM	*Location Of Court*
Name And Address Of Plaintiff Or Plaintiff's Attorney		*Date Issued* *Signature* ☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*

(Over)

RETURN OF SERVICE

I certify that this summons and a copy of the complaint were received and served as follows:

DEFENDANT 1

Date Served	*Time Served*	*Name Of Defendant*
	☐ AM ☐ PM	

☐ By delivering to the defendant named above a copy of the summons and complaint.

☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.

☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copy Left (if corporation, give title of person copy left with)

☐ Other manner of service *(specify)*

☐ Defendant WAS NOT served for the following reason:

DEFENDANT 2

Date Served	*Time Served*	*Name Of Defendant*
	☐ AM ☐ PM	

☐ By delivering to the defendant named above a copy of the summons and complaint.

☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.

☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copy Left (if corporation, give title of person copy left with)

☐ Other manner of service *(specify)*

☐ Defendant WAS NOT served for the following reason:

FOR USE IN SUMMARY EJECTMENT CASES ONLY:

☐ Service was made by mailing by first class mail a copy of the summons and complaint to the defendant(s) and by posting a copy of the summons and complaint at the following premises:

Date Served	*Name(s) Of The Defendant(s) Served By Posting*

Address Of Premises Where Posted

Service Fee	*Signature Of Deputy Sheriff Making Return*
$	
Date Received	*Name Of Deputy Sheriff Making Return (type or print)*
Date Of Return	*County Of Deputy Sheriff Making Return*

File No.

COMPLAINT FOR MONEY OWED

G.S. 7A-216, 7A-232

Name And Address Of Plaintiff

County | Telephone No.

VERSUS

Name And Address Of Defendant 1 ☐ Individual ☐ Corporation

County | Telephone No.

Name And Address Of Defendant 2 ☐ Individual ☐ Corporation

County | Telephone No.

Name And Address Of Plaintiff's Attorney

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division-Small Claims

1. The defendant is a resident of the county named above.
2. The defendant owes me the amount listed for the following reason:

Principal Amount Owed	$
Interest Owed *(if any)*	$
Total Amount Owed	$

(check one below)

☐ On An Account *(attach a copy of the account)*	Date From Which Interest Due		Interest Rate
☐ For Goods Sold And Delivered Between	Beginning Date	Ending Date	Interest Rate
☐ For Money Lent	Date From Which Interest Due		Interest Rate
☐ On a Promissory Note *(attach copy)*	Date Of Note	Date From Which Interest Due	Interest Rate

☐ For a Worthless Check *(attach a copy of the check)*

☐ For conversion *(describe property)*

Other: *(specify)*

I demand to recover the total amount listed above, plus interest and reimbursement for court costs.

Date	Name Of Plaintiff Or Attorney (Type Or Print)	Signature Of Plaintiff Or Attorney

(Over)

INSTRUCTIONS TO PLAINTIFF OR DEFENDANT

1. The PLAINTIFF must file a small claim action in the county where at least one of the defendants resides.

2. The PLAINTIFF cannot sue in small claims court for more than $10,000.00. This amount may be lower, depending on local judicial order. If the amount is lower, it may be any amount between $5,000.00 and $10,000.00, as determined by the chief district court judge of the judicial district.

3. The PLAINTIFF must show the complete name and address of the defendant to ensure service on the defendant. If there are two defendants and they reside at different addresses, the plaintiff must include both addresses. The plaintiff must determine if the defendant is a corporation and sue in the complete corporate name. If the business is not a corporation, the plaintiff must determine the owner's name and sue the owner.

4. The PLAINTIFF may serve the defendant(s) by mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, addressed to the party to be served or by paying the costs to have the sheriff serve the summons and complaint. If certified or registered mail is used, the plaintiff must prepare and file a sworn statement with the Clerk of Superior Court proving service by certified mail and must attach to that statement the postal receipt showing that the letter was accepted.

5. The PLAINTIFF must pay advance court costs at the time of filing this Complaint. In the event that judgment is entered in favor of the plaintiff, court costs may be charged against the defendant.

6. The DEFENDANT may file a written answer, making defense to the claim, in the office of the Clerk of Superior Court. This answer should be accompanied by a copy for the plaintiff and be filed no later than the time set for trial. The filing of the answer DOES NOT relieve the defendant of the need to appear before the magistrate to assert the defendant's defense.

7. Whether or not an answer is filed, the PLAINTIFF must appear before the magistrate.

8. The PLAINTIFF or the DEFENDANT may appeal the magistrate's decision in this case. To appeal, notice must be given in open court when the judgment is rendered, or notice may be given in writing to the Clerk of Superior Court within ten (10) days after the judgment is rendered. If notice is given in writing, the appealing party must also serve written notice of appeal on all other parties. The appealing party must PAY to the Clerk of Superior Court the costs of court for appeal within twenty (20) days after the judgment is rendered.

9. This form is supplied in order to expedite the handling of small claims. It is designed to cover the most common claims.

10. **The Clerk or magistrate cannot advise you about your case or assist you in completing this form. If you have any questions, you should consult an attorney.**

File No.

COMPLAINT IN SUMMARY EJECTMENT

G.S. 7A-216, 7A-232; Ch. 42, Art. 3 and 7

Name And Address Of Plaintiff

County	Telephone No.

VERSUS

Name And Address Of Defendant 1 ☐ Individual ☐ Corporation

County	Telephone No.

Name And Address Of Defendant 2 ☐ Individual ☐ Corporation

County	Telephone No.

Name And Address Of Plaintiff's Attorney Or Agent

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division-Small Claims

1. The defendant is a resident of the county named above.
2. The defendant entered into possession of premises described below as a lessee of plaintiff.

Description Of Premises (Include Location)			☐ Conventional ☐ Public Housing ☐ Section 8
Rate Of Rent $ per ☐ Month ☐ Week	Date Rent Due	Date Lease Ended	Type Of Lease ☐ Oral ☐ Written

3. ☐ The defendant failed to pay the rent due on the above date and the plaintiff made demand for the rent and waited the 10-day grace period before filing the complaint.
   ☐ The lease period ended on the above date and the defendant is holding over after the end of the lease period.
   ☐ The defendant breached the condition of the lease described below for which re-entry is specified.
   ☐ Criminal activity or other activity has occurred in violation of G.S. 42-63 as specified below.

Description Of Breach/Criminal Activity (give names, dates, places and illegal activity)

4. The plaintiff has demanded possession of the premises from the defendant, who has refused to surrender it, and the plaintiff is entitled to immediate possession.
5. The defendant owes the plaintiff the following:

Description Of Any Property Damage

Amount Of Damage (If Known)	Amount Of Rent Past Due	Total Amount Due
$	$	$

6. I demand to be put in possession of the premises and to recover the total amount listed above and daily rental until entry of judgment plus interest and reimbursement for court costs.

Date	Name Of Plaintiff/Attorney/Agent (Type Or Print)	Signature Of Plaintiff/Attorney/Agent

CERTIFICATION WHEN COMPLAINT SIGNED BY AGENT OF PLAINTIFF

I certify that I am an agent of the plaintiff and have actual knowledge of the facts alleged in this Complaint.

Date	Name Of Agent (Type Or Print)	Signature Of Agent

(Over)

INSTRUCTIONS TO PLAINTIFF OR DEFENDANT

1. The PLAINTIFF must file a small claim action in the county where at least one of the defendants resides.
2. The PLAINTIFF cannot sue in small claims court for more than $10,000.00 excluding interest and costs unless further restricted by court order.
3. The PLAINTIFF must show the complete name and address of the defendant to ensure service on the defendant. If there are two defendants and they reside at different addresses, the plaintiff must include both addresses. The plaintiff must determine if the defendant is a corporation and sue in the complete corporate name. If the business is not a corporation, the plaintiff must determine the owner's name and sue the owner.
4. The PLAINTIFF may serve the defendant(s) by mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, addressed to the party to be served or by paying the costs to have the sheriff serve the summons and complaint. If certified or registered mail is used, the plaintiff must prepare and file a sworn statement with the Clerk of Superior Court proving service by certified mail and must attach to that statement the postal receipt showing that the letter was accepted.
5. In filling out number 3 in the complaint, if the landlord is seeking to remove the tenant for failure to pay rent when there is no written lease, the first block should be checked. (Defendant failed to pay the rent due on the above date and the plaintiff made demand for the rent and waited the ten (10) day grace period before filing the complaint.) If the landlord is seeking to remove the tenant for failure to pay rent when there is a written lease with an automatic forfeiture clause, the third block should be checked. (The defendant breached the condition of the lease described below for which re-entry is specified.) And “failure to pay rent” should be placed in the space for description of the breach. If the landlord is seeking to evict tenant for violating some other condition in the lease, the third block should also be checked. If the landlord is claiming that the term of the lease has ended and the tenant refuses to to leave, the second block should be checked. If the landlord is claiming that criminal activity occurred, the fourth block should be checked and the conduct must be described in space provided.
6. The PLAINTIFF must pay advance court costs at the time of filing this Complaint. In the event that judgment is rendered in favor of the plaintiff, court costs may be charged against the defendant.
7. The PLAINTIFF must appear before the magistrate to prove his/her claim.
8. The DEFENDANT may file a written answer, making defense to the claim, in the office of the Clerk of Superior Court. This answer should be accompanied by a copy for the plaintiff and be filed no later than the time set for trial. The filing of the answer DOES NOT relieve the defendant of the need to appear appear before the magistrate to assert the defendant’s defense.
9. Requests for continuances of cases before the magistrate may be granted for good cause shown and for no more than five (5) days per continuance unless the parties agree otherwise.
10. The magistrate will render judgment on the date of hearing unless the parties agree otherwise, or the case is complex as defined in G.S. 7A-222, in which case the decision is required within five (5) days.
11. The PLAINTIFF or the DEFENDANT may appeal the magistrate's decision in this case. To appeal, notice must be given in open court when the judgment is entered, or notice may be given in writing to the Clerk of Superior Court within ten (10) days after the judgment is entered. If notice is given in in writing, the appealing party must also serve written notice of appeal on all other parties. The appealing party must PAY to the Clerk of Superior Court the costs of court for appeal within ten (10) days after the judgment is entered. If the appealing party applies to appeal as an indigent, and that request is denied, that party has an additional five (5) days to pay the court costs for the appeal.
12. If the defendant appeals and wishes to remain on the premises the defendant must also post a stay of execution bond within ten (10) days after the judgment is entered. In the event of an appeal by the tenant to district court, the landlord may file a motion to dismiss that appeal under G.S. 7A-228(d). The court may decide the motion without a hearing if the tenant fails to file a response within ten (10) days of receipt of the motion.
13. Upon request of the tenant within seven (7) days of the landlord being placed in lawful possession, the landlord shall release any personal property of the tenant. After seven (7) days, the landlord may sell, throw away or dispose of said property. If sold, the landlord must disburse any surplus proceeds to the tenant upon request within seven (7) days of the sale. If the total value of the property is less than $500.00, it is deemed abandoned five (5) days after execution.
14. This form is supplied in order to expedite the handling of small claims. It is designed to cover the most common claims.
15. **The Clerk or magistrate cannot advise you about your case or assist you in completing this form. If you have any questions, you should consult an attorney.**

File No.

COMPLAINT TO RECOVER POSSESSION OF PERSONAL PROPERTY

☐ PLAINTIFF A SECURED PARTY

☐ PLAINTIFF NOT A SECURED PARTY

G.S. 7A-232; 25-9-609

Name And Address Of Plaintiff

Social Security No./Taxpayer ID No.

County | *Telephone No.*

VERSUS

Name And Address Of Defendant 1 ☐ *Individual* ☐ *Corporation*

County | *Telephone No.*

Name And Address Of Defendant 2 ☐ *Individual* ☐ *Corporation*

County | *Telephone No.*

Name And Address Of Plaintiff's Attorney

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division-Small Claims

WHEN PLAINTIFF IS A SECURED PARTY

The defendant is a resident of the county named above. I have a security interest in the personal property described in the attached security agreement. The total current value of this property is as shown below. The defendant has defaulted in the payment of the debt which the property secures or has otherwise breached the terms of the security agreement giving me the right to claim immediate possession of the property described below. I demand recovery of this property and reimbursement for court costs.

Description Of Personal Property In Which You Have a Secured Interest (Attach Copy Of Security Agreement)

Total Value Of Property To Be Recovered

$

Date | *Signature Of Plaintiff Or Attorney*

WHEN PLAINTIFF IS NOT A SECURED PARTY

The defendant is a resident of the county named above. The defendant has in his/her possession the personal property described below which belongs to me. I am entitled to immediate possession of the property, but the defendant has refused on demand to deliver it to me. The defendant has unlawfully kept possession of this property since the date listed below and has therefore deprived me of its use. The damage due me for the loss of use and physical damage to the property is set out below. I demand recovery of this property and damages in the total amount set out below, plus interest and reimbursement for court costs.

Description Of Personal Property You Own Which Is In Possession Of Defendant

Total Value Of Property To Be Recovered

$

Date Defendant Wrongfully Took Or Kept Property

Damage Due For Loss Of Use	$
Physical Damage To Property	$
Total Amount Of Damages	$

Date | *Name Of Plaintiff Or Attorney (Type Or Print)* | *Signature Of Plaintiff Or Attorney*

AOC-CVM-202, Rev. 9/13

Original-File Copy-Each Defendant Copy-Attorney/Plaintiff

(Over)

INSTRUCTIONS TO PLAINTIFF OR DEFENDANT

1. The PLAINTIFF must file a small claim action in the county where at least one of the defendants resides.

2. The PLAINTIFF cannot sue in small claims court to recover property worth more than $10,000.00. This amount may be lower, depending on local judicial order. If the amount is lower, it may be any amount between $5,000.00 and $10,000.00, as determined by the chief district court judge of the judicial district.

3. The PLAINTIFF must show the complete name and address of the defendant to ensure service on the defendant. If there are two defendants and they reside at different addresses, the plaintiff must include both addresses. The plaintiff must determine if the defendant is a corporation and sue in the complete corporate name. If the business is not a corporation, the plaintiff must determine the owner's name and sue the owner.

4. The PLAINTIFF may serve the defendant(s) by mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, addressed to the party to be served or by paying the costs to have the sheriff serve the summons and complaint. If certified or registered mail is used, the plaintiff must prepare and file a sworn statement with the Clerk of Superior Court proving service by certified mail and must attach to that statement the postal receipt showing that the letter was accepted.

5. The PLAINTIFF must pay advance court costs at the time of filing this Complaint. In the event that judgment is rendered in favor of the plaintiff, court costs may be charged against the defendant.

6. The DEFENDANT may file a written answer, making defense to the claim, in the office of the Clerk of Superior Court. This answer should be accompanied by a copy for the plaintiff and be filed no later than the time set for trial. The filing of the answer DOES NOT relieve the defendant of the need to appear before the magistrate to assert the defendant's defense.

7. Whether or not an answer is filed, the PLAINTIFF must appear before the magistrate.

8. The PLAINTIFF or the DEFENDANT may appeal the magistrate's decision in this case. To appeal, notice must be given in open court when the judgment is entered, or notice may be given in writing to the Clerk of Superior Court within ten (10) days after the judgment is entered. If notice is given in writing, the appealing party must also serve written notice of appeal on all other parties. The appealing party must PAY to the Clerk of Superior Court the costs of court for appeal within twenty (20) days after the judgment is entered. A defendant who appeals also must post a bond to stay execution of the judgment within ten (10) days after the judgement is entered.

9. This form is supplied in order to expedite the handling of small claims. It is designed to cover the most common claims.

10. **The Clerk or magistrate cannot advise you about your case or assist you in completing this form. If you have any questions, you should consult an attorney.**

File No.

COMPLAINT TO ENFORCE POSSESSORY LIEN ON MOTOR VEHICLE

G.S. 7A-211.1; 20-77(d), 44A-2(d), 44A-4(b), (e)

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division-Small Claims

Name And Address Of Plaintiff

County	*Telephone No.*

VERSUS

Name And Address Of Defendant 1

County	*Telephone No.*

Name And Address Of Defendant 2

County	*Telephone No.*

Name And Address Of Plaintiff's Attorney

1. The lien claimed arose in the county named above.

2a. ☐ I repair, service, tow or store motor vehicles in the ordinary course of business.

b. ☐ I am an operator of a place of business for garaging or parking motor vehicles for the public and the motor vehicle listed below has remained unclaimed for at least 10 days.

c. ☐ I am a landowner on whose property the motor vehicle listed below has been abandoned for at least 30 days. The property was not left by a tenant. [G.S. 42-25.9(g); 44A-2(e2)]

3. I came into possession of the motor vehicle described on the date shown below, am in possession of the vehicle, and claim a possessory lien on this vehicle for the amounts indicated below plus storage at the rate indicated from this date until the lien is satisfied.

Make/Year Of Vehicle

ID Number	Repairs	$
Date Of Possession	Towing	$
Date Storage Began	Storage Cost to Date	$
Date Notice Of Unclaimed Vehicle Given	Vehicle Rental	$
(Plus Storage @ $ Per Day Until Sold)	**Total Lien Claimed To Date**	$

4. The defendants are the registered owner of the vehicle and the known secured party(ies).

5. I gave notice of an unclaimed vehicle to the Division of Motor Vehicles on the date listed above.

6. I have given notice to the North Carolina Division of Motor Vehicles that a lien is asserted, and sale is proposed for the above described motor vehicle.

I demand that this Court declare the lien valid and enforceable by sale and order that the North Carolina Division of Motor Vehicles transfer title to the person who purchases at the sale upon proof that proper notice of sale has been given.

Date	*Name Of Plaintiff Or Attorney (Type Or Print)*	*Signature Of Plaintiff Or Attorney*

(Over)

INSTRUCTIONS TO PLAINTIFF OR DEFENDANT

1. Before filing this Complaint, you must have filed certain forms with the Division of Motor Vehicles. Contact your local Division of Motor Vehicles office.

2. The PLAINTIFF must file a small claim action in the county where the claim arose (i.e. where the motor vehicle was repaired, towed or stored).

3. The PLAINTIFF cannot sue in small claims court for more than $10,000.00. This amount may be lower, depending on local judicial order. If the amount is lower, it may be any amount between $5,000.00 and $10,000.00, as determined by the chief district court judge of the judicial district.

4. The registered owner of the vehicle and any secured parties listed with the Division of Motor Vehicles must be made defendants in the case. The PLAINTIFF must show the complete name and address of the defendant to ensure service on the defendant. If there are two defendants and they reside at different addresses, the plaintiff must include both addresses. The plaintiff must determine if the defendant is a corporation and sue in the complete corporate name.
   If the business is not a corporation, the plaintiff must determine the owner's name and sue him/her.

5. The PLAINTIFF may serve the defendant(s) by mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, addressed to the party to be served or by paying the costs to have the sheriff serve the summons and complaint. If certified or registered mail is used, the plaintiff must file a sworn statement with the Clerk of Superior Court proving service by certified mail and must attach to that statement the postal receipt showing that the letter was accepted. If the name or address of the vehicle owner cannot be determined, service by publication is authorized. In that case plaintiff may want to consult an attorney.

6. The PLAINTIFF must pay advance court costs at the time of filing this Complaint. In the event that judgment is rendered in favor of the plaintiff, court costs may be charged against the defendant.

7. The DEFENDANT may file a written answer, making defense to the claim, in the office of the Clerk of Superior Court. This answer should be accompanied by a copy for the plaintiff and be filed no later than the time set for trial. The filing of the answer DOES NOT relieve the defendant of the need to appear before the magistrate to assert the defendant's defense.

8. Whether or not an answer is filed, the PLAINTIFF must appear before the magistrate.

9. The PLAINTIFF or the DEFENDANT may appeal the magistrate's decision in this case. To appeal, notice must be given in open court when the judgment is rendered, or notice may be given in writing to the Clerk of Superior Court within ten (10) days after the judgment is rendered. If notice is given in writing, the appealing party must also serve written notice of appeal on all other parties. The appealing party must PAY to the Clerk of Superior Court the costs of court for appeal within twenty (20) days after the judgment is rendered.

10. This form is supplied in order to expedite the handling of small claims. It is designed to cover the most common claims. Questions about the adequacy of this form or whether it is the appropriate form to be used should be addressed to an attorney.

(TYPE OR PRINT IN BLACK INK)

STATE OF NORTH CAROLINA

_____ County

File No.	Abstract No.
Judgment Docket Book And Page No.	
Date Judgment Filed	

In The General Court Of Justice
☐ District ☐ Superior Court Division

Name Of Judgment Creditor (Plaintiff)	**MOTION TO CLAIM EXEMPT PROPERTY (STATUTORY EXEMPTIONS)** *(Use If Judgment Filed On Or After Jan. 1, 2006)* G.S. 1C-1603(c)
VERSUS	
Name Of Judgment Debtor (Defendant)	

NOTE TO JUDGMENT DEBTOR: *The Clerk of Superior Court cannot fill out this form for you. If you need assistance, you should talk with an attorney.* ***THERE ARE CERTAIN EXEMPTIONS UNDER STATE AND FEDERAL LAW THAT YOU ARE ENTITLED TO CLAIM IN ADDITION TO THE EXEMPTIONS LISTED BELOW.*** *These exemptions may include social security, unemployment, and workers' compensation benefits and earnings for your personal services rendered within the last 60 days. There is available to you a prompt procedure for challenging an attachment or levy on your property.*

I, the undersigned, move to set aside the property claimed below as exempt.

1. I am a citizen and resident of _____.
2. ☐ a. I am married to _____.
   ☐ b. I am not married.
3. My current address is _____.
4. The following persons are dependent on me for support:

Name(s) Of Person(s) Dependent On Me	Age	Relationship

5. I wish to claim as exempt *(keep from being taken)* my interest in the following real or personal property, or in a cooperative that owns property, that I use as a residence. I also wish to claim my interest in the following burial plots for myself or my dependents. I understand that my total interest claimed in the residence and burial plots may not exceed $35,000.00, except that if I am unmarried and am 65 years of age or older, I am entitled to claim a total exemption in the residence and burial plots not to exceed $60,000.00 so long as the property was previously owned by me as a tenant by the entireties or as a joint tenant with rights of survivorship, and the former co-owner of the property is deceased.

Street Address Of Residence

County Where Property Located	Township	No. By Which Tax Assessor Identifies Property

Legal Description (Attach a copy of your deed or other instrument of conveyance or describe property in as much detail as possible. Attach additional sheets if necessary.)

☐ I am unmarried and 65 years of age or older and this property was previously owned by me as a tenant by entireties or as a joint tenant with rights of survivorship and the former co-owner of the property is deceased.

Name(s) Of Owner(s) Of Record Of Residence	Estimated Value Of Residence (What You Think You Could Sell It For) $

(Over)

Amount Of Lien(s) And Name(s) And Address(es) Of Lienholder(s): *(How much money is owed on the property and to whom)*	Current Amount Owed
	$
	$
Location Of Burial Plots Claimed	*Value Of Burial Plots Claimed* $

6. I wish to claim the following personal property consisting of household furnishings, household goods, wearing apparel, appliances, books, animals, crops or musical instruments as exempt from the claims of my creditors *(in other words, keep them from being taken from me)*. These items of personal property are held primarily for my personal, family or household use.

   I understand that I am entitled to personal property worth the sum of $5,000.00. I understand I am also entitled to an additional $1,000.00 for each person dependent upon me for support, but not to exceed $4,000.00 for dependents. I further understand that I am entitled to this amount after deducting from the value of the property the amount of any valid lien or security interest. Property purchased within ninety (90) days of this proceeding may not be exempt. *(Some examples of household goods would be TV, appliances, furniture, clothing, radios, record players.)*

Item Of Property	**Fair Market Value** *(What You Could Sell It For)*	**Amount Of Lien Or Security Interest** *(Amount Owed On Property)*	**Name(s) Of Lienholder(s)** *(To Whom Money Is Owed)*	**Value Of Debtor's (Defendant's) Interest** *(Fair Market Value Less Amount Owed)*
	$	$		$
	$	$		$
	$	$		$

7. I wish to claim my interest in the following motor vehicle as exempt from the claims of my creditors. I understand that I am entitled to my interest in one motor vehicle worth the sum of $3,500.00 after deduction of any valid liens or security interests. I understand that a motor vehicle purchased within ninety (90) days of this proceeding may not be exempt.

Make And Model	*Year*	*Name Of Title Owner Of Record*
Fair Market Value (What You Could Sell It For) $		*Name Of Lienholder(s) Of Record (Person(s) To Whom Money Is Owed)*
Amount Of Liens (Amount Owed) $		*Value Of Debtor's (Defendant's) Interest (Fair Market Value Less Amount Owed)* $

8. (This item is to claim any other property you own that you wish to exempt.) I wish to claim the following property as exempt because I claimed residential real or personal property as exempt that is worth less than $35,000.00, or I made no claim for a residential exemption under section (5) above. I understand that I am entitled to an exemption of up to $5,000.00 on any property only if I made no claim under section (5) or a claim that was less than $35,000.00 under Section (5). I understand that I am entitled to claim any unused amount that I was permitted to take under section (5) up to a maximum of $5,000.00 in any property. *(Examples: If you claim $34,000 under section (5), $1,000 allowed here; if you claim $30,000 under section (5), $5,000 allowed here; if you claim $35,000 under section (5), no claim allowed here.)* I further understand that the amount of my claim under this section is after the deduction from the value of this property of the amount of any valid lien or security interests and that tangible personal property purchased within ninety (90) days of this proceeding may not be exempt.

Item Of Personal Property Claimed	**Fair Market Value**	**Amount Of Lien(s)**	**Name(s) Of Lienholder(s)**	**Value Of Debtor's (Defendant's) Interest**
	$	$		$
	$	$		$
	$	$		$
	$	$		$

Real Property Claimed *(I understand that if I wish to claim more than one parcel, I must attach additional pages setting forth the following information for each parcel claimed as exempt.)*

Street Address		*Estimated Value Of Property (What You Could Sell It For)* $
County Where Property Located	*Township*	*No. By Which Tax Assessor Identifies Property*
Description (Attach a copy of your deed or other instrument of conveyance or describe the property in as much detail as possible.)		

VERSUS	File No.	Abstract No.
Name Of Judgment Creditor (Plaintiff)	Judgment Docket Book And Page No.	Date Judgment Filed

Name And Address Of Lienholder	Current Amount Owed
	$
Name And Address Of Lienholder	Current Amount Owed
	$

(Attach additional sheets for more lienholders.)

9. I wish to claim the following items of health care aid *(wheelchairs, hearing aids, etc.)* necessary for ☐ myself ☐ my dependents.

Item	Purpose

10. I wish to claim the following implements, professional books, or tools (not to exceed $2,000.00), of my trade or the trade of my dependent. I understand such property purchased within ninety (90) days of this proceeding may not be exempt.

Item	Estimated Value *(What You Could Sell It For)*	What Business Or Trade Used In
	$	
	$	
	$	

11. I wish to claim the following life insurance policies whose sole beneficiaries are my spouse and/or my children as exempt.

Name Of Insurer	Policy Number	Beneficiary(ies)

12. I wish to claim as exempt the following compensation that I received or to which I am entitled for the personal injury of myself or a person upon whom I was dependent for support, including compensation from a private disability policy or an annuity, or compensation that I received for the death of a person upon whom I was dependent for support. I understand that this compensation is not exempt from claims for funeral, legal, medical, dental, hospital or health care charges related to the accident or injury that resulted in the payment of the compensation to me. *(Add additional sheets if more than one amount of compensation.)*

Amount Of Compensation	Method Of Payment (Lump Sum Or Installments - If Installments, State Amounts, Frequency)
$	
Location/Source Of Compensation	

13. I wish to claim my individual retirement accounts, including Roth accounts, and individual retirement annuities (IRA's) that are listed below.

Name Of Custodian Of IRA Account	Type Of Account	Account Number
Name Of Custodian Of IRA Account	Type Of Account	Account Number

14. I wish to claim the following funds I hold in a college savings plan that is qualified under section 529 of the Internal Revenue Code, not to exceed $25,000.00. I understand that the plan must be for my child and must actually be used for the child's college expenses. I understand that I may not exempt any funds I placed in this account within the preceding 12 months, except to the extent that any contributions were made in the ordinary course of my financial affairs and were consistent with my past pattern of contributions.

College Savings Plan	Account Number	Value	Name(s) Of Child(ren) Beneficiaries
		$	
		$	

(Over)

15. I wish to claim the following retirement benefits to which I am entitled under the retirement plans of other states and governmental units of other states. I understand that these benefits are exempt only to the extent these benefits are exempt under the law of the state or governmental unit under which the benefit plan was established.

State/Governmental Unit	Name of Retirement Plan	Identifying Number

16. I wish to claim as exempt any alimony, support, separate maintenance, or child support payments or funds that I have received or that I am entitled to receive. I understand that these payments are exempt only to the extent that they are reasonably necessary for my support or for the support of a person dependent on me for support.

Type Of Support	Person Paying Support	Amount Of Support	Location Of Funds
		$	
		$	

17. The following is a complete listing of my property which I do **NOT** claim as exempt.

Item	Location	Estimated Value
		$
		$
		$

18. I certify that the above statements are true.

Date	*Signature Of Judgment Debtor/Attorney For Debtor (Defendant)*

19. A copy of this Motion was served on the judgment creditor (plaintiff) by: ☐ delivering a copy to the judgment creditor (plaintiff) personally ☐ delivering a copy to _____, the judgment creditor's attorney. ☐ depositing a copy of this Motion in a post-paid properly addressed envelope in a post office, addressed to the judgment creditor (plaintiff) at the address shown on the notice of rights served on me. ☐ depositing a copy of this motion in a post-paid properly addressed envelope in a post office, addressed to the judgment creditor's (plaintiff's) attorney at the following address: _____

Date	*Address And Phone Number Of Attorney For Debtor (Defendant)*
Signature Of Judgment Debtor/Attorney For Debtor (Defendant)	

TAB 5:

APPENDIX

APPENDIX TABLE OF CONTENTS

Small Claims Overview

I. Procedure
   A. Small Claims Action
      i. Summary Ejectment, $ Owed, or Return of Personal Property
      ii. $10,000 or less
      iii. At least one defendant must reside in county

   B. Service of Process
      i. Personal service by sheriff
      ii. Certified mail, return receipt requested
      iii. Service by delivery service
      iv. Voluntary appearance
      v. (SE cases only: Service by posting)

   C. Counterclaim
      i. Must be filed with clerk prior to time case is set for trial
      ii. Written
      iii. For $10,000 or less

   D. Continuance
      i. Both parties agree: allowed
      ii. Motion by one party: allow only for good cause shown
      iii. Special rule for summary ejectment actions

   E. Failure to appear
      i. By defendant: Take plaintiff's testimony just as usual
      ii. By plaintiff: dismiss

   F. Amendment of complaint
      i. Freely allowed
      ii. Usually only issue is whether defendant has sufficient notice

   G. Voluntary dismissal (without prejudice)
      i. Plaintiff has the right to take a voluntary dismissal at any time before conclusion of plaintiff's evidence

   H. Entering judgment
      i. May reserve judgment for up to 10 days (special rule for summary ejectment actions)
      ii. Party may give notice of appeal in open court, or by seeing clerk

   I. Clerical errors: judge may correct without notice to parites

   J. Rule 60(b) motions to set aside judgment for excusable neglect
      i. Must be authorized by CDCJ to hear these motions

ii. Requires notice to other party and hearing
iii. If motion by defendant, must also show meritorious defense

II. Torts:
A. In negligence cases In North Carolina, contributory negligence is a complete defense.
B. Conversion is an intentional tort, in which the plaintiff proves:
i. Plaintiff is the owner or lawful possessor of property;
ii. Defendant wrongfully took or wrongfully retained that property;
iii. Conversion, sometimes referred to as "forced sale," entitles the plaintiff to recover the fair market value of the property at the time and place of conversion as well as interest on that amount.

III. Contracts
A. Bargained-for exchange

B. Contracts by minors
i. Voidable at the option of the minor
ii. Exception: contracts for necessaries

C. Statutes of limitation
i. Contracts for the sale of goods: 4 years
ii. Other contracts: 3 years
iii. Contracts under seal: 10 years
iv. NOTE: Partial payment on account starts statute running over again. A creditor who accepts partial payment of a debt does not waive the right to bring an action for the remainder of a debt.

D. Contracts that must be in writing
i. Contracts for the sale of goods for $500 or more
ii. Retail installments sales contracts
iii. Security agreements

E. Terms of a contract
i. Parole evidence rule: Evidence of contract terms in the form of conversation between the parties is not allowed to change or contradict a written contract, unless
a. That evidence is offered to clarify a term that is vague or unclear, or
b. The evidence is of a modification of the written contract that occurred after the written contract was completed.
ii. Implied terms: In contracts for the sale of goods, there is an implied term (called an implied warranty of merchantability) that the goods will be fit for the ordinary purpose for which they are used, assuming the seller is someone who sells these goods in the ordinary course of business.

F. Parties to a contract
1. Husband and wife do not have authority to bind each other to contracts, unless one is acting as an agent for the other. Marriage agency.
2. An agent <u>does</u> have authority to enter a contract on behalf of the principal.

3. Under the theory of joint and several liability, a creditor having a contract with two debtors has the option of suing either or both for the entire amount due.

IV. Actions to recover personal property

A. By a non-secured party: Requires evidence identical to conversion claim, plus evidence that defendant is in possession of property, but remedy is return of personal property, along with cost of repairing damage to property and for loss of use.

B. By a secured party:
   i. SP must prove

      a. Security agreement
         i) Written
         ii) Signed
         iii) Dated
         iv) Contains a description of the property.

      b. Default by defendant

      c. Defendant is in possession of property.

      NOTE: Amount of underlying debt is not relevant.

   ii. Retail Installment Sales Act
      a. Applies to consumer credit purchases in which seller finances purchase
      b. Seller allowed to take security interest only in property sold, or in property previously sold by same seller and not yet paid off.
      c. Attempt to take security interest in other property is void.
      d. FIFO rule applies to allocation of payments when several goods bought from same seller.

V. Summary Ejectment
   A. Procedure
      i. Property manager may sign complaint, but owner must be listed as plaintiff
      ii. Service by posting? No money judgment
      iii. Judgment on the pleadings available if all requirements satisfied

   B. Grounds
      i. Breach of lease condition (forfeiture clause?)
      ii. Failure to pay rent (demand/10-day wait/tender)
      iii. Holding over
         a. Lease ends when it says it ends
         b. Month to month: 7 days
         c. Week to week: 2 days
         d. Year to year: 30 days
         e. Special rule for mobile home lots: 60 days

iv. Criminal activity

C. Consumer Protection Laws
   i. Late fees (maximum amount, agreed-to in lease, at least 5 days late)
   ii. Administrative fee
   iii. No self-help eviction
   iv. Security deposit
   v. Residential Rental Agreements Act
      LL has duty to keep premises in safe and habitable condition and make all repairs
   vi. Domestic violence victims
   vii. Special rules for military service members
   viii. Retaliatory eviction prohibited
      LL has duty to keep premises in safe and habitable condition and make all repairs

SMALL CLAIMS GLOSSARY

(INFORMAL, UNOFFICIAL, AND JUST FOR MAGISTRATES NEW TO SMALL CLAIMS)

Action (sometimes **"legal action," "civil action," "lawsuit," "suit," claim" or "case")**
The formal procedure for seeking resolution of a dispute by the court system.
"In this _____, plaintiff seeks to recover damages in the amount of $5,000 from defendant."

Amount in controversy.
The dollar value of the remedy plaintiff seeks. When plaintiff is asking for money, the amount in controversy is the amount of money s/he's seeking. When plaintiff is asking for the return of property, the value of the property is the amount in controversy.

Answer
A written response by defendant to the plaintiff's claims. Required in most courts, but unusual in small claims court.

Complaint
The legal document that begins a lawsuit. It states the facts and explains what action the court is asked to take.
"I see by the complaint that plaintiff is seeking $5000 as damages resulting from the defendant's breach of contract."

Damages (sometimes **"money damages")**
May refer either to the injury plaintiff is complaining about or the monetary sum plaintiff is asking for. Money damages are the most common remedy sought by plaintiffs.
"Plaintiff suffered damages as a result of Def's negligence," or *"Plaintiff seeks $5,000 in damages."*

Defendant
The person being sued.

Ex parte
This term is Latin and means "by one party." Magistrates commonly hear this term in two contexts. *Ex parte communication* refers to the unethical practice of discussing a case outside of court with one party. An *ex parte DVPO* is a temporary emergency protective order issued in domestic violence cases without notice to the other party, having the purpose of protecting the plaintiff from domestic violence during the interval until a full hearing can be scheduled.

Judgment
A final decision made by the judge after hearing and considering all the evidence.

Order
A formal ruling by the judge that is not a final decision on the case based on the evidence. The most important thing to understand about an order is that it is different from a judgment.
"The judge ordered a continuance." "The judge ordered the action discontinued because of bankruptcy." "The judge ordered the case dismissed when plaintiff failed to appear."

Party

Refers to both plaintiff and defendant
"Both parties are present and the court is ready to proceed."

Plaintiff
The person who filed the lawsuit.

Pleadings
The complaint and, if there is one, the answer.
"I see by the pleadings that plaintiff says he was injured by defendant's negligence," means the same thing as *"I see by the complaint that plaintiff says . . . "*

Pro Se
A party is *pro se* when she represents herself, rather than being represented by an attorney.

Process
A term that includes both the complaint and the summons given the Def

Remedy (also **"relief,"** sometimes "**prayer for relief"**)
What the plaintiff is asking for.

Service of process (sometimes just **"service")**
The formal legal procedure for giving a Def notice that s/he is being sued.
"It appears that Def has not yet been served."

Summons
The legal document that notifies a defendant that s/he is being sued and informs the defendant when and where the trial will be held.

You Ain't the Boss of Me!

The (Lack of) Authority of a Small Claims Magistrate to Order a Person to Perform an Act

During the last few weeks, several magistrates have called with questions about widely-varying fact situations that have one thing in common: in each case, the plaintiff wants a court order directing someone to do something. This request is a trap for the unwary magistrate, who may almost immediately be faced with what to do when the order is defied. Imagine, for example, that you direct the tenant in a summary ejectment action to clean the apartment and hand in the keys. The tenant does move out, but he takes the key with him, and leaves the apartment filthy. The landlord asks you what happens now. The fact that you have no satisfactory answer for him reflects one of the reasons you should not award such a remedy. The most significant reason, though, is that you have no legal authority to do so.

At common law, courts were frequently called upon to issue what is sometimes called a *coercive order*: an order directing a party to follow the court's direction or else face the contempt power of the court. District and superior court judges today frequently issue such orders. Whether it is ordering a company to reinstate an employee, a doctor to remove a feeding tube, or a nightclub to turn down the music after midnight, the availability of this remedy is well-established. In the case of actions based on contract, the law even has a special name for the remedy: a party who wishes to force the defendant to carry out her obligations under a contract is said to be seeking an order of "specific performance." Defendants who defy a coercive order may be imprisoned until they comply, under the civil contempt power of the court, or fined and imprisoned as punishment for defying an order of the court, under the criminal contempt power of the court. *See* G.S. Ch. 5A.

The statutes that identify the cases a small claims magistrate is authorized to hear are G.S. 7A-210 and G.S. 7A-211.1. It is interesting to note that the former identifies those cases in terms of the remedy the plaintiff is seeking: A small claims action is an action in which "[t]he only principal relief prayed is monetary, or the recovery of specific personal property, or summary ejectment, or any combination of the foregoing. . . ." G.S. 7A-211.1 authorizes magistrates to hear actions "to enforce motor vehicle mechanic and storage liens." Conspicuously absent from this list are the remedies of specific performance and injunctive relief —orders directing a party to perform, or cease to perform, a particular act.

In some ways, this list of available remedies is very broad indeed. The statute allows a magistrate to hear any civil action in which the plaintiff is seeking monetary damages, so long as the amount is $5000 or less. Theoretically, you may hear cases involving unfair trade practices, medical malpractice, slander, breach of warranty, false imprisonment, complex commercial contract cases—the type of case is not limited, so long as it falls within the allowable monetary limit. The result is that magistrates often hear cases involving an extremely wide range of challenging legal concepts as well as complex fact situations (thus, the name of this publication: *Big Law*). Similarly, a magistrate may hear any case for summary ejectment -- even if the underlying contract is a commercial lease involving millions of dollars -- so long as the remedy sought is possession only (or damages within the $5,000 limit).

I imagine some of you are thinking, "Wait a minute. When we hear some of these cases, we ARE ordering someone to do something. We're ordering the tenant to move out, or the defendant to hand over personal property, or DMV to transfer title." Certainly, the effect of your judgment is often to force a party to do something he'd rather not do. But if you look closely at the language of the judgment you enter, you'll notice that it does not contain such mandatory language. It doesn't say "Defendant, you must pay plaintiff $5,000," or "Defendant, you must give plaintiff the washing machine." There is instead a small, but extremely significant, difference, at least from a legal point of view. The judgment says instead something like, "It is ordered that the plaintiff recover possession," or "It is ordered that the plaintiff recover the following principal sum," or "that the defendant be removed from and the plaintiff be put in possession of the premises at. . . ." Orders containing language such as this require additional proceedings before the defendant is forced to comply. As you know, the usual process is that a clerk issues a writ (either of execution or of possession) based upon the judgment, and that writ actually directs not the defendant, *but the sheriff*, to take certain steps.

Contrast this situation with an order issued by a judge ordering a defendant to sign a particular document. In this case, no writs issue, and no sheriff is involved in implementing the court's order. Instead, a defendant who fails to comply will be ordered to appear and show cause why he or she should not be held in contempt. As you know, a magistrate has no such contempt power, aside from the power to punish direct criminal contempt committed while the court is sitting for business.

This distinction is a relatively subtle one, and it is not surprising that plaintiffs don't always observe it in deciding what remedy to request in a small claims action. One area in which the issue often arises involves motor vehicle sales. Let's look at some examples:

> Example 1: Billie and Sam agree that Billie will buy an old Mazda from Sam, paying $200/month until the total purchase price of $1800 has been paid. After Billie pays the full amount, Sam refuses to hand over the title. Can Billie obtain a judgment in small claims court ordering Sam to hand over the title? Can Billie obtain a judgment in small claims court ordering DMV to transfer title to Billie? The answer is no. While Billie may be able to obtain an order in district court requiring Sam to perform his part of the contract, that remedy is not one that a small claims judge is authorized to grant.
>
> Example 2: First National Bank brings an action against Danny Debtor seeking a money judgment in the amount of $2,000. After proving that Danny owes the money, First National asks that you enter an order authorizing the bank to seize funds in Danny's savings account to satisfy the judgment. Do you have authority to do so? Again, the answer is no. While First National may actually have the right to seize the funds pursuant to its contractual agreement with Danny, a small claims magistrate has no authority to order such seizure. At first glance, this remedy may not appear to be a coercive order—after all, you're not ORDERING First National to seize the funds. By authorizing the seizure, however, you are effectively forcing Danny to satisfy the judgment without the protections offered by the usual procedure First National must use to enforce a judgment.
>
> Example 3: Larry Landowner brings an action for money owed based on the presence of Ernie Encroacher's livestock on his property. Larry contends that Ernie continues to allow two cows and a horse to roam and graze on his property, even after Larry informed Ernie that the animals were wandering on to his land. Larry asks that you

> award him $5000 as rent for Ernie's use of the property and order Ernie to remove the animals. Can you order Ernie to do so? No. Again, you have no authority to enter a coercive order requiring Ernie to remove his livestock. Larry must seek this remedy in district or superior court. [1]

What should you do when you are confronted with a case in which the plaintiff is seeking a coercive order? It is entirely appropriate in this situation to provide the plaintiff not with advice, but rather with information. Explain to the plaintiff that while he or she may be entitled to the requested relief, it is not available in small claims court. If a coercive order is a relatively minor aspect of what the plaintiff wants, the plaintiff may agree to drop that request and proceed with the remainder of the lawsuit. If, on the other hand, what plaintiff really wants is to put an end, once and for all, to Ernie's continual, bothersome trespassing animals for example, it makes more sense for the plaintiff to take a voluntary dismissal without prejudice and re-file his action in a court authorized to grant the relief he wants.

[1] Just for curiosity's sake, what about Larry's claim for back rent? Assuming, as the facts indicate, that there was never any sort of rental agreement between Larry and Ernie, there is no legal basis for Larry to collect rent. Larry's claim is actually a misnamed effort to collect damages for a tort—a civil wrong—called "trespass to property." The law provides that Larry is entitled to nominal damages—say, $1—if Ernie knowingly allows his animals to trespass on Larry's land. In addition, Larry is entitled to any actual damages caused by the trespass. For example, if the animals consume most of Larry's sunflower crop, he would be entitled to recover lost profits as well.

Big Law: Basic Bits of Bankruptcy

As many magistrates know from dealing with federal housing law, things can get especially complicated when federal law intersects with state law. Because bankruptcy law is an extremely complex subject, when I get a question involving that subject the image that comes to mind is the scene from the old movies when the hero shoves a cross in the face of Dracula: "Back! Back, you monster!" But the truth is the portion of bankruptcy law relevant to small claims is not complex at all.

In this first post to the Big Law Listserv, I want to take a look at six frequently asked questions and their answers. If you have follow-up questions, concerns, or comments, send them to me. I'll do another post next week addressing the issues you raise, as well as sharing one interesting telephone call I received recently on the subject.

Here are six Basic Bits for your small claims tool kit:

Basic Bit #1: *What to do when you hear that the defendant may have filed for bankruptcy.*

Bankruptcy is significant in small claims court for one reason only-- the automatic stay provision. This federal law forbids creditors from trying to collect debts from the debtor, whether by calls and letters demanding payment, by filing or persisting in a legal action on the debt, or by seeking to enforce a judgment obtained before the stay went into effect. The stay also applies to secured parties attempting to repossess or sell secured property. A creditor who violates the automatic stay provision may be subject to civil damages, sometimes including attorney fees and punitive damages. The "automatic" part of an automatic stay means that the debtor is entitled to the stay even if it went into effect several hours ago and creditors have not yet received formal notification. A judgment entered by a magistrate in small claims court in violation of the automatic stay provision is void, and a magistrate who knowingly enters judgment when a stay is in effect violates federal law. So, when you hear the word "bankruptcy," the first thing you should do is STOP, and find out some details.
The most important detail is whether the debtor has actually **filed a petition** for bankruptcy. Sometimes a defendant may indicate that he plans to file for bankruptcy. In one case, a defendant presented a letter from his lawyer stating that the attorney represented him in his "bankruptcy case." Closer questioning revealed that the debtor had not yet actually filed a petition. The automatic stay provision is triggered when a petition is filed, so be alert to this particular detail.

Basic Bit #2: *What does the debtor have to do to prove that she is entitled to the stay?*
Nothing. Because the stay is automatic when a petition for bankruptcy is filed, its protections are in force even if the debtor is not prepared to prove that she has actually filed for bankruptcy. The stay clicks into place the moment the petition is filed. A magistrate with reason to suspect that the defendant may have filed for bankruptcy has a couple of options. If the magistrate has doubts about whether the defendant has actually filed for bankruptcy, the magistrate can

determine the facts by consulting the appropriate bankruptcy court. (Details about how to accomplish this will be provided in the next post.) Another option is to continue the case to allow time for the parties to gather documentation for their claims—whether a claim by the plaintiff that the debtor has not actually filed for bankruptcy, or a claim by the defendant that she has.

Basic Bit #3: *If the magistrate has reason to believe that the debtor has filed for bankruptcy, what does the magistrate do with the case?*
The magistrate should use AOC G-108, checking the block near the bottom of the page labeled "BANKRUPTCY." This places the case on inactive status, so that a creditor may reinstate his claim in the future (assuming it is not resolved in the bankruptcy proceeding) without paying another filing fee or risking dismissal due to the statute of limitation. A magistrate should not dismiss a case because of the automatic stay provision.

Basic Bit #4: *If the stay begins when a bankruptcy petition is filed, when does it end?* The purpose of the automatic stay provision is not to forever bar a creditor from securing payment of a debt, but is instead to allow time for a bankruptcy trustee to develop some sort of payment plan that treats all creditors fairly. In what is known as Chapter 7 bankruptcy, the trustee identifies and collects all qualifying property belonging to the debtor and invites creditors with outstanding claims against the debtor to make their claims known. The trustee will sell the qualifying property and distribute the proceeds among the creditors. The debtor is then "discharged" from any further liability on pre-bankruptcy debts. At this point, the stay no longer applies (although the debtor will almost certainly have a compelling defense in that the debt has been discharged in bankruptcy). Other reasons a stay might terminate arise when a case is closed or dismissed. A bankruptcy case is closed when a payment plan has been developed and the debtor has complied with the plan. A case is dismissed when the bankruptcy court finds that the debtor is for some reason not entitled to pursue the claim.

EXAMPLE: Creditor filed an action against Debtor in small claims court seeking to repossess a washer-dryer set. As soon as he is served, Debtor files for Ch. 7 bankruptcy, triggering the automatic stay provision. The small claims judge correctly uses G-108 to place the case on inactive status, pending resolution of the Ch. 7 case. The bankruptcy court dismisses the case based on a provision in the Bankruptcy Code allowing dismissal if (1) the debtor is an individual; (2) the debts are primarily consumer debts; and (3) granting relief would be a substantial abuse of the bankruptcy law. (For example, the debtor has a history of running up consumer debt and then seeking discharge in bankruptcy court.) The plaintiff/creditor returns to small claims court with a copy of the dismissal. The clerk of court now has authority to re-calendar the case for hearing in small claims court.

Basic Bit #5: *What should I do if I entered judgment before I learned that an automatic stay was in place?*
The best course of action is to confer with your supervisor about how to proceed. Because you had no authority to enter judgment in violation of the automatic stay, your judgment is void. A magistrate does not have the power to set aside a void judgment, but a district court judge does. Neither a plaintiff nor a defendant benefits from having a void judgment on the record—the defendant for obvious reasons, and the plaintiff because any attempt to enforce the judgment

would subject him to potential liability at the hands of the bankruptcy court. Ideally, one of the parties will file a motion asking a district court judge to declare the small claims judgment void, but in the absence of a motion by one of the parties, the district court may proceed on its own motion.

Basic Bit #6: *Does the automatic stay apply to actions by a landlord to recover possession of rental property?*
Yes. A leasehold interest in property is a thing of value in the eyes of the law, and an effort to take it from a debtor violates the stay provision. Landlords faced with the prospect of tenants living rent-free for an indefinite period are not without recourse, however. Bankruptcy law provides landlords with a procedure for seeking modification of the stay to allow collection of rent, and sometimes to regain possession of the rental property. Recent changes in federal law have complicated the determination of whether a stay is in effect as far as a summary ejectment action is concerned, but in every small claims case the magistrate should assume the stay applies unless the plaintiff is able to furnish documentation from the bankruptcy court that it does not.

Summing it up:
--If you hear the word bankruptcy mentioned in connection with a small claims case, STOP and inquire whether the debtor has actually filed a petition for bankruptcy.
--Remember that the debtor is not required to prove that a petition has been filed.
--Use AOC-G-108 to place a pending case on inactive status while the stay is in place.
--Read carefully orders from the bankruptcy court to determine whether the stay remains in place, has been modified, or has ended.
--If you enter judgment and discover later that the automatic stay was in place, confer with your supervisor about how to proceed.
--Remember that the automatic stay applies to actions to recover possession, both of personal property and of rental property.

Next post:
--How to tell whether a defendant has filed a petition for bankruptcy;
--A small serving of information about exceptions to the automatic stay provision;
--An interesting case example.
--Your questions, answered.

DGL/SOG/2010

Bankruptcy and Small Claims Court, Part 2

HOW CAN I BE SURE? As mentioned in Part 1, the automatic stay is activated when a person actually files a petition for bankruptcy. Sometimes you may not be sure whether a defendant is exploring the possibility of filing for bankruptcy, or has gone so far as to file a petition. That information is available by calling VCIS (Voice Case Information Systems. That number for the North Carolina Eastern District is 866-222-8029, option 12. The number for the Middle District is 910-333-5532. For the Western District, the number is 800- 884-9868. There is no charge for this service. When I gave it a try, I found it to be fast and simple.

WHAT'S A RESIDENTIAL LANDLORD TO DO? There are times when a landlord is simply stunned to learn that the small claims judge is unable to proceed simply because a tenant has filed a petition for bankruptcy. When they ask, you can tell them, "No, this does NOT mean that he gets to live there forever rent-free." The law provides landlords with a way to regain possession of rental property if the tenant does not pay rent. That's the good news. The bad news is (1) the landlord has to seek this relief directly from the bankruptcy court, (2) most landlords are able to effectively access this relief only by hiring an attorney, and (3) there is a $150 filing fee associated with the motion for modification of a stay.

I contacted the Bankruptcy Court for the Eastern District and asked the clerk what magistrates should say when landlords ask what they should do next. I thought maybe the Court might have some simple procedure (similar to small claims court) that would allow landlords to act for themselves, rather than having to hire an attorney. If not that, I thought there might at least be a brochure answering common questions that magistrates could provide to landlords in this situation. At least for the Eastern District Bankruptcy Court, that is not the case.

According to the clerk, landlords represented by counsel are usually successful in obtaining relief from the Court, but few unrepresented parties are capable of correctly following the required procedure. Also, the purpose of the law allowing a stay to be modified upon request by a landlord is NOT to allow landlords—in preference to other creditors—to obtain a judgment for back rent. Typically, in residential lease cases, the Court orders that tenants make current rent payments as those come due, or else face eviction. Consequently, when that landlord next appears in front of you, it is usually in the context of his effort to secure possession of rental property.

ROUND TWO. Quite often a landlord will reappear in small claims court, once again seeking possession of residential rental property. The question for the magistrate at that point is whether the court has regained jurisdiction to act. If the landlord shows you an order from the Bankruptcy Court dismissing the case, that determination is fairly straightforward. When the order does not dismiss the case, but instead modifies the automatic stay provisions, the small claims court's authority to proceed may not be quite so clear.

The magistrate must closely examine the language of the federal court's order to identify precisely what conditions must be present in order for the small claims judge to act. A typical order might direct that a tenant/debtor make regular rent payments as they come due, and provide that if a tenant defaults, the automatic stay is lifted as to an action to recover possession of the property. The first question a

magistrate must answer in this case is whether the tenant has defaulted in making rent payments. If so, the automatic stay is modified to allow one narrow exception: the small claims judge has authority to hear and decide an action in which the landlord seeks possession of rental property. The magistrate would thus hear the case just as any other action for summary ejectment. A magistrate would not, however, have authority to make any sort of monetary award in this situation.

WHAT WOULD *YOU* DO? (With thanks to the magistrate who sent in this question.) Company A opens an account with Pop's Building Supply, owned by Pop, and they do business for many years. Pop retires and Pop's son begins to run the business. Son believes in The Modern Way of Doing Business and incorporates the business under the name of Pop's Building Supply, Inc. The account that was originally established with the old man continues on without change, just as it has for many years. Unfortunately, the business under Son doesn't do well, and Pop's Inc. files for bankruptcy, owing a large debt to Company A. Company A brings an action for money owed against Pop's, Inc., which immediately produces its petition for bankruptcy, date-stamped yesterday. Company A says "We don't know nothing 'bout no corporation. Our contract was with Pop, and HE hasn't filed for bankruptcy." How do you rule? *See the answer below, following a brief intermission for a discussion of a completely unrelated matter.*

COMPLETELY UNRELATED MATTER: Can a magistrate perform a wedding in a county other than the one in which s/he serves? Yes. In fact, it is entirely appropriate for the license to be obtained in County A, the magistrate to work in County B, and the wedding to be performed in County C. A magistrate has legal authority to perform a wedding anywhere in the State of North Carolina. In the situation above, the license would be returned to the Register of Deeds in County A, and the fee returned to the Clerk's office in County B.

BACK TO THE CASE OF COMPANY A vs. POP'S, INC. You should refuse to hear the case based on the automatic stay provision of the Bankruptcy Code, using AOC Form G-108. The only issue before you is whether the plaintiff can proceed against this defendant, and this defendant has filed for bankruptcy. The question of whether Company A sued the right defendant is an interesting—but irrelevant—question. Company A sued Pop's Inc, and Pop's Inc. has filed for bankruptcy.
But what about that interesting question? What happens if Company A takes a dismissal against Pop's Inc., and files against Pop and Son individually. No bankruptcy problem here. Does the plaintiff win? Probably not. These facts indicate that Pop entered into an agreement with Company A to engage in a series of contracts on the following terms: Pop orders material, Company A delivers, Pop pays over time, rather than immediately. When Son placed his first order, both parties believed and behaved as though the terms of the contract remained the same, but Son had stepped into Pop's place as the contracting party. When Son incorporated, the same rationale applied to Pop's, Inc.—a contract came into existence, with terms unchanged from the original. The result is that Company A had contracts with Pop, Son, and Pop's Inc., all with the same terms. The specific evidence presented might change your opinion, but it seems extremely unlikely that either party understood that Pop would remain personally liable for debts incurred after he retired. It is also unlikely that Son formed a corporation, but wished to remain personally liable for the debts to Company A. Most likely, one of his reasons for incorporating was to avoid exposure to personal liability for business debts. Just because Pop's Inc. has declared bankruptcy doesn't mean that Company A can hold other persons responsible for performing a contract neither of them entered into. (Earlier contracts, yes, but not this one.) What if Company A came forward with a signed document in which Pop agreed to personally guarantee the debts of the corporation? That evidence, of course, would make a big difference in your decision.

Service of Civil Process: 2009 Legislation

The 2009 General Assembly enacted into law two bills governing service of process in small claims cases, each of them in apparent response to the fact that defendants in these cases sometimes have little time to prepare for trial.

Service of Process in Summary Ejectment Actions

The first new law, SL 2009-246, amends GS 42-29, governing service of summons in summary ejectment actions. As many of you know, small claims procedure in these cases is geared toward minimizing the time a landlord must wait for trial on the landlord's claim for possession of rental property. Existing law requires a law enforcement officer who receives a summons for service to mail a copy of the summons and complaint to the tenant "no later than the end of the next business day or as soon as practicable." GS 42-29 goes on to state that the office may attempt to telephone the defendant within five days after summons is issued, to arrange for service. In cases in which tenants are not served in this manner, the law requires the officer—before the end of this five-day period-- to go to the defendant's home to attempt service. S.L. 2009-246 adds to this provision a requirement that the officer's visit occur at least two days prior to trial (excluding legal holidays). If service is not accomplished at the time the officer visits, existing law directs the officer to "affix copies to some conspicuous part of the premises claimed" (service by posting).

This law imposes a requirement on law enforcement officers charged with serving civil process, rather than on magistrates who hear small claims cases. Further, the new law does not address the consequences of non-compliance. As a result, questions have arisen about what *a magistrate* should do when a summary ejectment action appears on the small claims docket and the defendant was served less than two days before trial. The question may come up in any of several contexts. First, the magistrate may call the case and learn that both parties are present in court. Because the General Assembly's intention was to provide tenants with additional time to prepare for trial, it is clear that the magistrate must grant the defendant's request for a continuance, for at least as long as necessary to allow for two days notice. The law provides that in calculating time periods, the first day is not to be counted. Accordingly, if the defendant is served on Monday, the magistrate must grant a defendant's request for a continuance if the trial is held on Tuesday. The case may be heard, however, on Wednesday (two days after service), and a magistrate may choose to grant an even longer continuance if that seems appropriate.

A second question arises on these facts if the tenant does not request a continuance (which is likely to happen in cases in which the tenant is unaware of the new two-day rule). The answer to this question is not specified in the statute. In light of clearly expressed legislative intent, however, the magistrate should, at a minimum, inform the defendant that she or he is entitled to two days notice before being forced to appear in court and defend against the lawsuit. If the tenant expresses a clear affirmative desire to proceed with the hearing, a magistrate may consider that as a valid waiver of the tenant's rights and hear the case that day. In the absence of a knowing waiver, however, I do not believe the magistrate should hear the case, given clear legislative intent to the contrary. If a magistrate hears the case that day after finding waiver by the defendant, the best practice would be to note the waiver in the judgment. By doing this, the magistrate will preserve for the record the fact that the tenant's right to minimum notice was observed.

The next question arises when the plaintiff is present in court, but the defendant is not. If service was made sooner than two days prior to trial, my opinion is that the magistrate should continue

the case on the magistrate's own motion. Given that the purpose of the amendment is to allow adequate time for a defendant to receive notice of an upcoming trial, it is of particular concern that the defendant may not appear for trial *because* of inadequate notice. This is particularly true in cases in which service is accomplished in some substituted manner, such as by handing a copy to defendant's spouse or by posting. In these cases, there is a real possibility that defendant may be completely unaware that a trial is scheduled. Even when service is made directly on defendant, however, the notice may have been inadequate to permit the defendant to arrange to attend court the next morning. Magistrates may want to confer with their clerks about the mechanism for notifying both the clerk's office and the parties when a case is continued for this reason.

A harder question arises when neither party appears for trial. In the typical case, of course, a magistrate dismisses the plaintiff's lawsuit with prejudice for failure to prosecute. But what if the plaintiff has called to inquire about service and has been informed that service was accomplished later than was required by law? A plaintiff might decide that an appearance is unnecessary because the trial is certain to be postponed. One might argue that in this situation the plaintiff had no intention of "failing to prosecute." On the other hand, the justice system has long taken the position that when a case is scheduled for trial, a plaintiff must either appear for trial or seek a continuance. A plaintiff who does neither has no legal right to object if the case is dismissed. (And if a defendant does appear and waives the right to a continuance, a magistrate should strongly consider dismissing the action with prejudice, given the effort the defendant has made to comply with the demands of the summons.) Absent legislative or appellate court guidance, a magistrate is left to consult with colleagues and perhaps the chief district court judge about how such cases should be handled.

Service of Process in Non-Summary Ejectment Small Claims Cases

The second legislative amendment related to service of process in small claims cases also raises questions. S.L. 2009-629 amends GS 7A-214, the statue governing the time within which a small claims action must be heard. That statute provides that small claims actions are to be scheduled for trial no later than 30 days after the complaint is filed. The new law inserts a sentence stating that the magistrate "shall order a continuance" in small claims actions other than summary ejectment actions when service is accomplished less than five days before trial. GS 7A-214 goes on to say that the time set for trial may be changed if all parties agree. The statute concludes with the familiar sentence authorizing a magistrate to grant continuances "for good cause shown."

Again, legislative concern that defendants have adequate time in which to prepare for trial is apparent in this amendment. The law prior to amendment allowed a defendant to be served on Monday afternoon and the trial to be held at 9:00 AM on Tuesday. In this situation, the defendant was left to hope that the plaintiff would agree to a continuance or, failing that, that the magistrate might find such short notice "good cause" for a continuance. In fact, many magistrates might have reasoned that no good cause existed as a matter of law, given that all statutory time limits and procedural rules had been observed. With this background, the General Assembly's desire to guarantee defendants at least five days notice is certainly understandable. The new time limit is consistent with the existing rule applicable to motions filed in district and superior court: GS 1A-1, Rule 6(d) requires that in all such motions, the other party must be given at least 5 days notice before the matter is heard.

The questions that arise with this law relate to the mandatory aspect of the statutory language. When both parties appear for trial and the defendant seeks a continuance, the way is clear: a magistrate is required to grant a continuance. The same is true if the plaintiff appears and the defendant does not; again, the defendant's very absence tends to support the concern that she or he may not have received adequate notice that a trial date was looming. The mandatory language of the statute makes clear that the defendant is not required to ask for a continuance—the "default setting," so to speak, is a continuance whenever the defendant has not received the required notice. The statute does not

indicate how long the continuance should be, but the underlying legislative intent suggests that the continuance should be long enough to allow the defendant at least five days to prepare for trial.

As we discussed in reference to the new law applicable to summary ejectment actions, a more challenging legal question is presented by the situation in which the defendant appears and asks to waive his or her statutory right to a continuance. It is common for parties to a lawsuit to waive various rights in the course of trial, and there is generally no obstacle to them doing so, provided that the waiver is made knowingly. It is easy to imagine that many defendants, aware that they have no defense to the plaintiff's claims, might wish to dispose of the case quickly, rather than be forced to travel twice to the courthouse. Indeed, it is difficult to imagine a good reason for denying defendants the right to make this choice. This question is made difficult only by the mandatory language of the statute: "the magistrate shall order a continuance." When one considers the absurdity of ordering a continuance in the face of objections from--and to the detriment of--both parties, however, it seems reasonable to read this language as requiring a continuance unless waived by the defendant. The same reasoning arguably applies to the situation in which the plaintiff fails to appear and the defendant appears. Because the right to a continuance—and the ability to waive that right—belongs to the defendant, it seems entirely justified to expect plaintiffs to either attend court or risk losing their case in the event the defendant appears and waives continuance.

Once again, the most perplexing aspect of the new law is presented when neither party appears. Should the magistrate dismiss the action with prejudice based on plaintiff's failure to prosecute? On the one hand, it makes little sense to continue a case out of concern for a defendant having adequate time to prepare when the result without the protective amendment would be to dismiss the action entirely—a result likely to be welcomed even more enthusiastically by defendants. On the other hand, the statutory language is mandatory, and the defendant is not present to make a knowing waiver of his or her right to a continuance. It seems likely that different counties—and different magistrates—will adopt different policies about the proper way to handle this situation. Whatever the policy, though, it should be one that is applied consistently, so that all parties are able to make decisions about their actions based on legal consequences that are predictable.

Counting time

A final issue raised by both new laws concerns calculating time. GS 1A-1, Rule 6, sets out the general rule for calculating time in civil matters. That provision states that the first day of the time period is not included, and the last day is included (unless it is a Saturday, Sunday, or legal holiday, in which case the time period runs over to the next day when the courthouse is open and doing business). **In cases in which the time period is less than seven days,** however, Saturdays, Sundays, and legal holidays are not included. The result is that small claims actions, other than those for summary ejectment, may be heard no earlier than one week after service of process (i.e., if service is accomplished on Monday, the case may be heard no sooner than the following Monday). The new law applicable to summary ejectment actions specifically requires that service be accomplished "at least two days prior to the day the defendant is required to appear to answer the complaint, excluding legal holidays." Previous versions of the bill had excluded "weekends and legal holidays", but the reference to "weekends" was deleted from the final bill. The result is an exception to the general rule set out in GS 1A-1, Rule 6, with weekend days counted toward satisfaction of the two-day requirement. Consequently, service on Friday would allow a case to be heard on Monday, since Monday is the third day following service.

Caveat and Summary

As we have seen, the proper application of these two amendments is unclear in some situations and likely to remain so until further guidance is provided by the General Assembly and/or the appellate courts. This memo has attempted to set out a rationale in support of one possible resolution of these issues, but whether the appellate courts will answer the questions addressed in the manner as the author necessarily remains uncertain. For purposes of clarity and ease of reference, the author's recommendations are summarized below, but magistrates are as always reminded that the suggestions herein are just that—suggestions—and should not be regarded as dispositive of the questions addressed.

Obviously, the language of the two amendments is not identical, and thus the legal issues presented are somewhat different. Nevertheless, the author's suggestions about how to dispose of cases in which inadequate notice is present are the same, and are as follows:
If both parties appear, the magistrate should continue the case unless the defendant makes a knowing waiver.
If only the plaintiff appears, the magistrate should continue the case.
If only the defendant appears, the magistrate should continue the case unless the defendant makes a knowing waiver. If the defendant waives the right to a continuance, the case should be dismissed for failure to prosecute.
If neither party appears, the author makes no recommendation other than to suggest that the magistrates in each county discuss the question and adopt a consistent policy for responding to these cases.

If you have questions or concerns or would like to discuss the contents of this memo further, please don't hesitate to call or email me:
Dona Lewandowski
(919)966-7288
lewandowski@sog.unc.edu

Counting Time Under Rule 6

- Don’t count the first day
- Do count the last day
- Do count holidays and weekends
  - UNLESS less than 7 days
- If courthouse is closed on last day, time is extended to end of next day it’s open
- If judgment is mailed, add 3 days.

Appeal: Time

right to appeal (10 days)

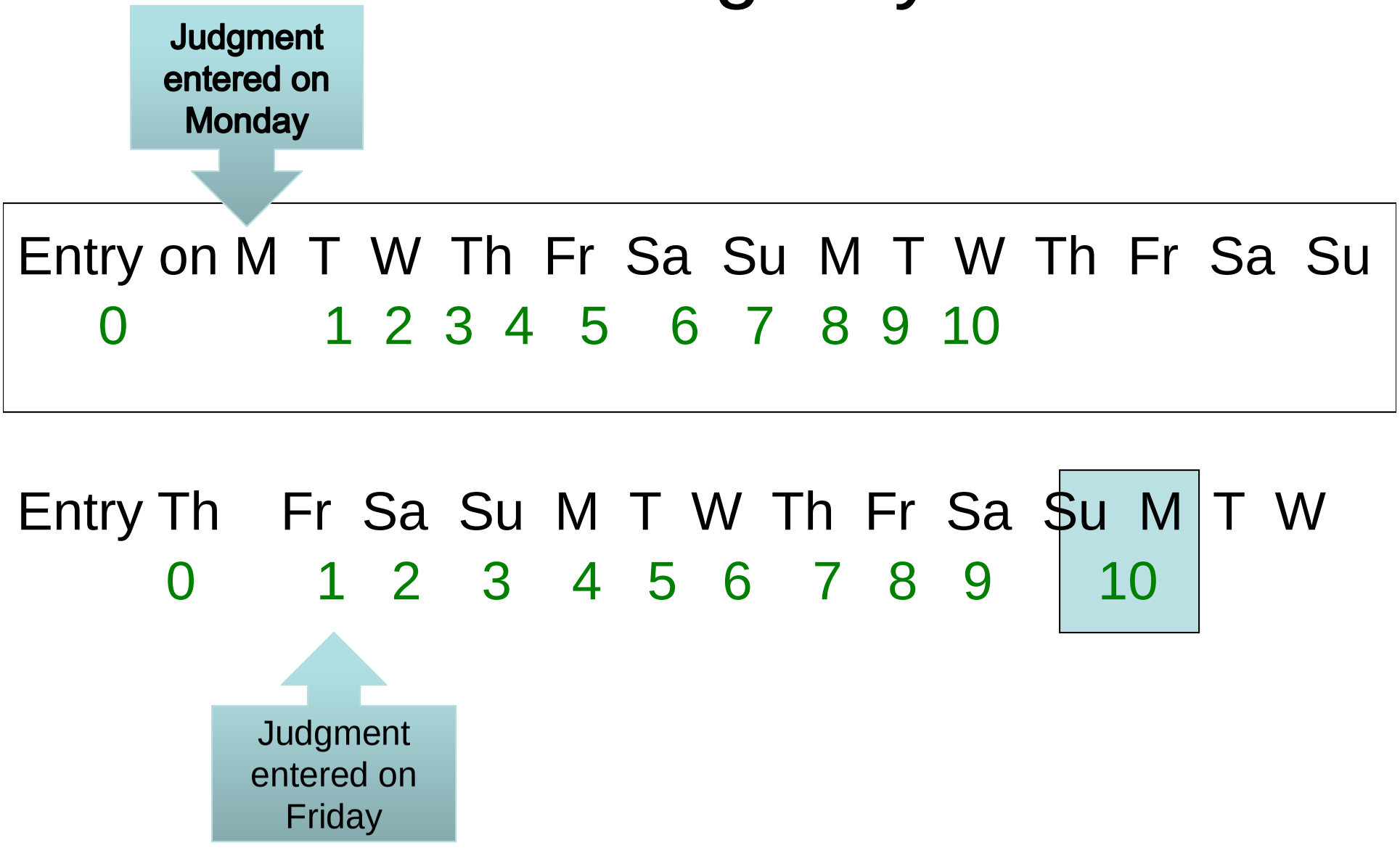
Entry of judgment

- ☑ written
- ☑ signed
- ☑ filed

open court

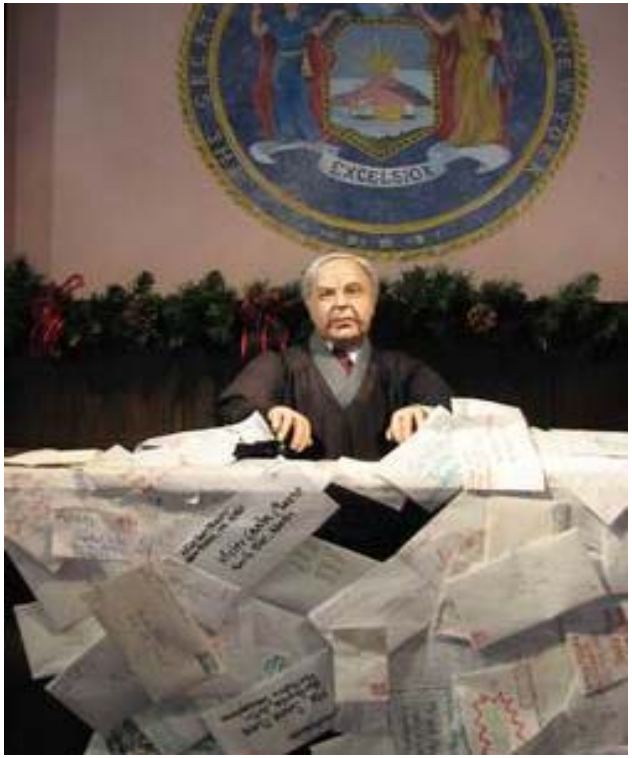
in writing to clerk

Counting Days



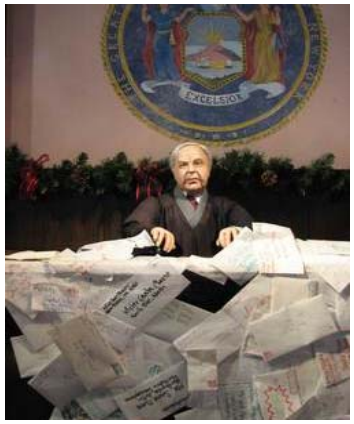
Extended time for appeal when judgment is mailed

Entry	T	W	Th	Fr	Sa	Su	M	T	W	Th	Fr	Sa	Su	M	T
0	1	2	3	4	5	6	7	8	9	10	**11**	**12**	**13**	⬆	



Judgment entered and magistrate mails on T, W, or Th: add 3 days

Extended time for appeal



Busy magistrate forgets to mail until
Day 10: 10-day period is tolled.
Maximum toll is 90 days from entry.

Entry	T	W	Th	Fr	Sa	Su	M	T	W	Th	Fr	Sa	Su	M
0	1	2	3	4	5	6	7	8	9	10	11	12	13	14
time tolled											**1**	**2**	**3**	**4**

T	W	Th	Fr	Sa	Su	M	T	W
15	16	17	18	19	20	21	22	23
5	**6**	**7**	**8**	**9**	**10**	**11**	**12**	**13**

SAMPLE / Opening Statement for Small Claims Court

Good morning. I am Judge _____ and this is _____ County Small Claims Court. I am going to read a list of cases that are scheduled to be tried today. If I call your name, or the name of the case you are here for, please stand, identify yourself, and tell me whether you are prepared for your hearing today. [Depending on how your calendar is designed, you may want to insert some information about the procedure for deciding which cases are tried first.} Be sure that you have turned off your cell phones, and sit quietly while the court is in session.

I want to talk with you a moment about what to expect while you're in court. Some of you may have watched small claims court on television and think that what happens here in this courtroom will be like it is on television. That is certainly not the truth. Some of you may be feeling nervous, or worried that you'll be expected to follow technical legal rules. That is also not true. The purpose of small claims court is to allow citizens who are not lawyers to come to court to tell their side of the story to an impartial judge. Everyone will have an opportunity to talk, and no one will be allowed to interrupt while someone else is talking,

When I call your case, come to front of the courtroom and sit down. The person who brought this lawsuit (the plaintiff) sits here, on my left, and the defendant sits there, on my right. I will begin by asking you to swear or affirm that you will tell the truth, and then the plaintiff has a chance to tell me about your case. I may ask some questions to be certain I understand exactly what your side of the story is. The plaintiff brought the case, and so has the burden of proving it. That means that even if I think the plaintiff MIGHT deserve to win, I would have to rule against him. To win a case in small claims court, the plaintiff has to prove that the facts are PROBABLY as he says. Also, the law must say that when the facts are as plaintiff has proved, plaintiff is legally entitled to win. The plaintiff has to prove his case well enough so that he's PROBABLY entitled to win before the defendant even has to offer a defense. That means that if you are a plaintiff, and the defendant is not here, you still must prove to the court that the facts and the law entitle you to win.

After I've heard testimony from the person who brought the lawsuit, and any witnesses the plaintiff may have, if I believe that the plaintiff appears to be entitled to win so far, the defendant has a turn to begin at the beginning and tell his or her side of the story. At that time, I'll also hear testimony from witnesses for the defendant. Again, I will ask questions if I need to so that I can be certain that I understand defendant's side of the story. Both the plaintiff and the defendant have the right to ask questions too, but I will ask you to direct those questions to me. During the trial no one should speak directly to anyone but the judge.

After I've heard both sides of the story and looked at any evidence you have, I will either tell you my decision right away, or do some research on the case and mail you my decision. Most of the time, I decide right away. If I have to delay for some reason, I am required to decide within ten days. The law gives every person the right to appeal a decision made by a judge, and I will remind you of that at the end of trial. I will write down my decision and the clerk will record it. If my decision is for the plaintiff, after ten days the plaintiff can go to the clerk and begin the procedure for collecting his money. No one has to pay any money today.

The Four Commandments for Dealing with Attorneys

1. Make use of their specialized training -- use them as resources, when that's appropriate.

2. Use caution in relying on a lawyer's representations when he or she is acting as an advocate.

3. Be Assertive! When an attorney claims that his or her argument is supported by a case or statute, insist that you be furnished with a copy. Let the lawyers know that you will rule in their favor only if you fully understand their arguments -- that you won't be "snowed" by complicated technical legal arguments made quickly and with little regard for whether they are understood by the listener.

4. Remember that the rules of evidence are only “generally” observed in small claims court, and that the rules of evidence are often strictly observed only in the presence of a jury. Magistrates, like judges at all levels, prefer to hear the evidence unaccompanied by constant objections based on technical points of law. Make use of your judicial prerogative to require attorneys to minimize objections.

What you could say to an attorney who objects frequently:

"As you know, we are about to conduct a trial before the judge without a jury, and one of the parties is not represented, which is frequently the case in this court. My policy in such situations is to be lenient in allowing evidence to be offered, so that parties may testify without interruption. At the close of the evidence I will hear any argument the parties would like to offer concerning evidence that you think I should not consider. After hearing your argument, I will carefully consider all of the relevant admissible evidence and determine what weight I believe it deserves before arriving at my decision."

What in the World is an LLC? What You Need to Know About Businesses & Law

There are many reasons why people choose to create a corporation, partnership, or other business entity, and one of them is to limit risk of losing personal assets. In North Carolina, as in other states, there are several different kinds of business entities, and knowing what they are is a good place to start.

Corporation	GS Ch. 55	(Inc., Corp., Ltd., Co.)
Professional corporation	GS Ch. 55B	(P.A., P.C.)
Non-profit corporation	GS Ch. 55A	(Inc., Corp., Ltd., Co.)
Limited liability company	GS Ch. 57C	**(LLC)**
Limited liability limited partnership	GS Ch. 59	**(LLLP, RLLLP)**
Limited partnership	GS Ch. 59	**(LP)**

All of these entities are "artificial persons" under the law, meaning that they have the ability to contract, sue, and be sued (through their agents, of course). People who own part or all of these entities are not personally liable for debts incurred by the entity (with one exception, explained below).

All of them are required to register with the Secretary of State's Office, and to maintain a registered agent for the purpose of receiving service.

If service of process is not accomplished by serving the registered agent, it must satisfy the alternative requirements set out in Rule 4(j) (6), (7), or (8). For entities other than partnerships, this means serving one of the following:

1. An officer of the company
2. A director of the company
3. A managing agent of the company

OR by leaving a copy in their office with a person apparently in charge of the office.

NOTE: GS 7A-217, which specifies specific rules for service of process in small claims actions, does not apply to artificial persons. The rules for serving them are set out in GS 1A-1, Rule 4. One significant difference is that service by Fed Ex or a similar delivery service is available as a means of serving these business entities.

Much useful information is available about business entities on the Secretary of State's website, located at www.secretary.state.nc.us.

Three things you need to know about corporations:

- Corporations may represent themselves in small claims court.

  And in Woods v. Billy's Automotive, 174 N.C. App. 808 (2005), the appearance and participation at trial of the primary owner of Billy's Automotive Inc. was held to constitute a general appearance by the corporation and thus cure defects in service of process arising out of serving Billy—the owner—despite the fact that he was neither officer, director, or managing or registered agent!

- Corporations remain liable for their debts and the actions of their agents even if they are dissolved.

  GS Ch. 55 sets out a procedure by which creditors may assert claims against corporations even when the corporation is dissolved (whether voluntarily or administratively).

  In the instance of known creditors, the corporation is required to notify them of the pending dissolution and the procedure and deadline for asserting claims. A creditor who receives notice and fails to assert a claim in a timely manner forfeits the right to collect on the debt. GS 55-14-06.

  What if a creditor does not receive this notice or his properly-filed claim was never acted upon? What if the liability in question arose after the corporation was dissolved? GS 55-14-07 answers these questions; if a corporation publishes notice of its dissolution in accordance with the statute, claims not asserted within five years from date of publication are barred. GS 55-14-08 provides that undistributed corporate assets (including proceeds of insurance coverage relating to such claims) are available to pay claims against the dissolved corporation. In some situations, a claimant may be able to recover some portion of liquidated assets from a shareholder as well.

- It is sometimes possible for a plaintiff in tort to demonstrate that the owner of a corporation should be personally liable for an obligation.

  It is important to remember that "piercing the corporate veil" is an equitable doctrine, similar to unconscionability. The presence of three elements supports application of the doctrine:

  - Control by the defendant of the corporate entity to such an extent as to amount to the entity having no independent will or existence of its own; complete domination of not only finances, but also of policy and business practices;

- This control was used by defendant to commit fraud or wrong, to violate a statutory or positive duty, or a dishonest and unjust act;

- This control and breach of duty proximately caused the injury or unjust loss complained of.

As an equitable doctrine, the decision whether to pierce the corporate veil varies with the circumstances of each case. Significant factors identified by the courts include: 1) undercapitalization of the corporation; 2) non-compliance with corporate formalities; 3) absence of corporate records; 4) non-payment of dividends; 5) siphoning of corporate funds by dominant shareholder; and 6) non-functioning of other officers and directors. Glenn v. Wagner, 313 N.C. 450 (1985).

Procedural Issues Related to Businesses

Service of process

As we have seen already, some special rules govern service of process on artificial persons. For the most part, small claims magistrates are somewhat removed from ruling on whether there were errors in serving the defendant, because of GS 7A-221's provision that objections to jurisdiction over the person (which is the essence of the argument that service of process was improper) be heard by a district court judge. The same statute also provides that the objection is waived if not made by motion or in the defendant's answer prior to date of trial. Nevertheless, there are times when a magistrate, in ruling on another issue, must have some understanding of whether proper service was accomplished. This typically comes up when it appears that plaintiff may not have properly named the defendant in the complaint and summons. See the discussion below, under *Amendments.*

Venue

GS 7A-221 also provides that objections to venue must be made before trial or waived, but magistrates nevertheless must make this determination because of the limited authority of the chief district court judge to assign cases to small claims court under GS 7A-211 (requiring at least one defendant to be a resident of the county). Even if no objection is made by the defendant to venue, a magistrate who hears a case not meeting the residency requirement has no authority to enter judgment.

_____

_____

_____

What is the residency of a corporation?

A corporation either formed in North Carolina or formed elsewhere but maintaining a registered office in NC is a legal resident of the county in which

- its registered or principal office is located; or
- it maintains a place of business.

The "registered office" of a corporation is merely the office of the registered agent.

The "principal office" of a corporation is "the office (in or out of this State) where the principal executive offices of a domestic or foreign corporation are located, as designated in its most recent annual report filed with the Secretary of State." GS 55-1-40(17).

If a corporation has no registered office, no principal office, and no place of business, its residence is any county in which it is regularly engaged in carrying on business.

Motions to amend: the summons

GS 1A-1, Rule 4, provides that the court may allow "any process or proof of service thereof to be amended" . . . "[a]t any time, before or after judgment," on whatever terms or conditions the court finds is just "unless it clearly appears that material prejudice would result to substantial rights of the [defendant]."

The key to solving the puzzle presented by many of these cases is determining whether plaintiff (1) sued and served the correct defendant, using the wrong name, or (2) sued the wrong defendant.

Statutes of Limitation

Most intentional torts:	3 years
Negligence actions:	3 years
Contract for services:	3 years
Contract for sale of goods:	4 years
Contracts under seal:	10 years

Contracts Required to be Written

Contract for the sale of land.

Lease for more than 3 years.

Promise to pay the debt of another.

Retail consumer credit installment contract.

Contract for the sale of goods for $500 or more.

Security agreement.

Attorneys' Fees

Examples of authorizing statutes below. See Small Claims Law, pp. 91-94 for important restrictions.

G.S. 6-21.2: Plaintiff is suing to collect a debt and written agreement between parties contains provision for attorneys' fees. Notes, conditional sales contracts.
G.S. 6-21.3: Action on a check.
G.S. 25A-21: Actions involving consumer credit sales contracts.
G.S. 25-9-615(a)(1): Actions arising out of repossession of collateral.

Sample Judgment for Plaintiff

I have listened carefully to the testimony you've presented and considered all the evidence in the case of Smith v. Jones. I am ready to make my decision (*enter judgment).* Mr. Smith, I am going to rule in your favor on your claim for summary ejectment. Based on the evidence you've presented, I find that you and Mr. Jones entered into a lease agreement which required Mr. Jones to make monthly rental payments, due on the first of each month, in the amount of $500. I find that he paid $250 for August, and has made no payment since that time. And I find that you demanded payment of the rent at least ten days before filing this action, as required by law . Mr. Jones, I listened to your testimony that you wanted and intended to pay Mr. Smith the rent, but were unable to do so because of circumstances beyond your control. I appreciate your coming to court today to explain the reason for your nonpayment, and I have no reason to doubt your word. Nevertheless, the law says that a landlord has the right to take possession of rental property when a tenant stops paying rent, even when the tenant is unable to make the payments. As a result Mr. Smith is entitled to possession of the rental premises at 110 S. Ginsberg Ave, in Colbin, NC, and to past due rent calculated up to this day in the amount of $850, as well as late fees for two months in the amount of $30, with a total judgment of $880. Mr. Jones, this judgment will earn interest at the rate of 8% until you pay what you owe to the clerk of court. The law provides that this judgment will become final after 10 days. Mr. Smith, 10 days from now if you wish to have this judgment carried out, you can go to the clerk's office to begin that procedure.

Mr. Jones, you have the right to appeal my decision to district court. You must give formal notice of appeal, and you may either do that now in open court, or you may file written notice of appeal in the clerk's office, so long as you do that within 10 days. If you do appeal, you must pay the costs of appeal to the clerk's office within 10 days.

Do either of you have any questions?

WHAT HAPPENS AFTER SMALL CLAIMS COURT

Location of Clerk's Office: _____

Notice to Both Parties

If you are either the plaintiff (the person suing) or defendant (the person being sued) and are unhappy with the decision of the magistrate, you may appeal the case to district court. You may appeal either by telling the magistrate at the trial that you want to appeal or by filing a written request with the clerk of court within 10 days after the magistrate ruled in your case. If you want to file a written request, ask the clerk to give you a copy of form AOC-CVM-303, which is the notice of appeal form. If you give written notice of appeal to the clerk, you must also send a copy of the form to the opposing parties in your case.

Whether you appeal in open court or file a written appeal, you MUST PAY $150 court costs to the clerk. These costs must be paid within 20 days of the magistrate's ruling, unless you are a tenant appealing from judgment in a summary ejectment action, in which case the costs must be paid within 10 days of the magistrate's ruling. If you cannot pay the appeal costs, you may be able to qualify to file your appeal as an indigent. If you are a tenant appealing an eviction and you want to continue to live at the premises until the case is heard on appeal, you will be required to pay past due rent to the clerk and to sign an undertaking that you will pay rent into the court as it becomes due to keep the judgment from being carried out. If you meet the requirements for appeal as an indigent, you may be excused from the requirement that you pay past due rent in order to remain on the premises while the appeal is pending.

If one party appeals, there will be a completely new trial before a district court judge. (In some cases, the matter may be assigned first to an arbitrator. If that occurs contact the clerk to have the procedure explained to you.) The clerk will notify both parties of the trial date (usually by mailing the trial calendar), and both must appear at that time. If you are the defendant and don't appear at trial, the plaintiff will probably win the case. Both parties should bring all your evidence and witnesses to the trial. The trial before the district court judge will be more formal than the one before the magistrate; therefore, you may wish to consider hiring an attorney to represent you.

Notice to Plaintiff (Party Suing)

If you won your case, your judgment against the defendant is good for 10 years. Before the end of the 10 years, you may bring another lawsuit to extend the judgment an additional 10 years. If you have won a money judgment, it becomes a lien against any land owned by the defendant, which means the defendant cannot sell that land without paying your judgment. Just because you have a judgment does not mean that you will be able to collect it. The defendant must have enough property to enable the sheriff to sell the property to satisfy the judgment. You may try as many times in the 10-year period as you wish to collect the judgment.

If you have won a judgment that the defendant owes you money, the court cannot try to help you collect that money unless you have given the defendant an opportunity to claim his or her exemptions. "Exemptions" is a legal term referring to a judgment debtor's right to shelter certain property from being seized and sold to satisfy a judgment. After the judgment is rendered, you must get two forms (Notice of Rights and Motion to Claim Exempt Property) from the clerk. You must serve these on the defendant. The back of the Notice of Rights tells you how to serve the forms. If you have not heard anything from the defendant within 20 days after you have served the Notice of Rights and Motion, you may go to the clerk ask to have an execution issued. The back of the Notice of Rights form tells you what you have to bring to the clerk. If the defendant responds to your notice and claims exemptions, you may either (1) agree with the exemptions claimed and ask the clerk to issue an execution for non-exempt property or (2) object to the

claimed exemptions and have the district court judge determine the exempt property. After the district judge determines the defendant's exemptions, you may ask the clerk to issue an execution for all nonexempt property. You will have to pay $55 to have an execution issued--$25 for the court and $30 for the sheriff. Those costs will be added to the judgment to be repaid by the defendant. An execution is an order to the sheriff to seize and sell property of the defendant to satisfy the judgment. If you know of any property that belongs to the defendant, you should attach to the execution a description of the property and where it may be found to help the sheriff. The sheriff will sell any property that can be found and turn the proceeds over to the clerk of court, who will then turn the money over to you.

If the defendant pays all or part of the money owed to you directly, you MUST go to the clerk's office and indicate how much you have been paid.

If you have a judgment ordering the defendant to turn personal property over to you and if the defendant has not turned it over within 10 days after the magistrate enters the judgment, you may ask the clerk to issue a writ of possession to the sheriff. The cost to you for having the writ issued is $25, plus $30 for the sheriff. The sheriff will then try to recover the property from the defendant and turn it over to you. You may be asked to advance the costs of having the sheriff pick up the property.

If you are a landlord and have a judgment for eviction and the tenant fails to leave the premises within 10 days after the judgment was rendered, you may pay $25 and have the clerk issue a writ of possession to the sheriff. The sheriff will then remove the defendant from the premises. You will have to pay the sheriff $30. You may be asked to advance the costs of removing the tenant's property and one month's storage costs or you may request the sheriff, in writing, to lock the premises and you will then be responsible for handling the tenant's property in the manner required by the law.

If the defendant won a judgment against you on a counterclaim, read the section below for defendants.

Notice to Defendant (Party Being Sued)

If a judgment is entered against you stating that you owe the plaintiff money and you want to pay the amount owed, it would be safer to pay the money to the clerk of court rather than to the plaintiff. If you do pay the plaintiff directly, make sure he or she notifies the clerk so the judgment won't continue to be listed against you. If you cannot or do not pay the judgment, the plaintiff will serve a notice of rights on you, telling you that you must claim your exemptions or they will be waived. It is very important that you respond to that notice. Exemptions are property the law allows you to keep from being taken from you to pay off judgments against you. If you fail to claim your exemptions, the sheriff will be able to seize and sell any property you own. If you fail to claim your exemptions when notified, you may ask the clerk to set aside your waiver if you have the grounds. Also, even if you have waived your statutory exemptions, you may go to the clerk any time up until the proceeds of the sale of your property have been distributed to the plaintiff and request your constitutional exemptions. The judgment is good against you for 10 years and may be extended for another 10 years. It becomes a lien against any land you own now or buy later until it is satisfied.

If you have a judgment against you to turn personal property over to the plaintiff, you may not prevent the property from being turned over to the plaintiff unless the plaintiff is a finance company and the judgment against you is to recover household goods that you listed as collateral in a security agreement with the finance company and the finance company did not lend you the money to buy those goods. In that case, the finance company must give you notice of your right to claim exemptions as described in the paragraph above and you may keep the household goods from being repossessed by claiming them as exempt.

If you are a tenant and have an eviction judgment against you, you will have to leave the premises. If you do not leave voluntarily, the sheriff may forcibly evict you and remove and store your belongings for you or may leave them with the landlord who may dispose of them in the manner allowed by the law. You will be held responsible for the costs of moving you out.

If you won a counterclaim against the plaintiff in which you were awarded money, read the section for plaintiffs to see what to do.

Relief from Judgment.

A. Clerical Errors.

1. A judge may correct a judgment containing a clerical error or an error arising from oversight or omission. The judge may act on his own motion or on motion of a party. It is up to the judge to decide what notice should be given to the parties.

2. The rule allowing judges to correct clerical errors is not intended to apply to serious errors, and many appellate cases have reversed the decisions of judges who confused the two. A judge may not amend the judgment to give new or additional relief under the guise of correcting a "clerical" error. A clerical error is different from a mistake about the facts of a situation, or about the relevant law. It is instead a mistake in the way the court's decision is expressed in the judgment, so that the judgment does not accurately reflect the decision the judge actually made.

B. Motions To Set Aside Judgment For Mistake, Inadvertence, Excusable Neglect or Surprise

1. Magistrate is authorized to rule on these motions by G.S. 7A-228, so long as the chief district court judge consents.

2. Magistrate should schedule hearing and notify all parties.

3. Deciding whether a party has demonstrated mistake or excusable neglect requires the judge to inquire into what may be reasonably expected of a party in paying proper attention to his case, when all the circumstances are considered. Examples of cases in which a finding of excusable neglect has been upheld are:

   a) a client relied on erroneous information given to him by his lawyer and so didn't come to court when he should have;

   b) a party was mentally incompetent and so failed to respond in any way to the complaint;

   c) a woman relied on her husband's assurance that he would hire a lawyer and "take care" of a case that had been filed against both of them.

4. When a defendant seeks to set aside a judgment, he must do more than demonstrate excusable neglect; he must also allege a "meritorious defense." In other words, he must allege (he does not have to prove, at this stage) facts sufficient to persuade you that setting aside the judgment would not be a waste of time.

5. Some of the things a judge should keep in mind in deciding how to rule on a motion to set aside a judgment are:

   a) The policy that, generally speaking, judgments are final, so that people feel reasonably safe in relying on them;

b) The policy that it is better to decide a case on its merits, after hearing from all the parties, than it is (1) to decide a case after hearing only from the plaintiff, or (2) to dismiss a case, having heard from neither party;

c) The court's interest in orderly procedure: we want to encourage people to take a lawsuit seriously, to make a special effort to be in court when their case is scheduled to heard, and to have all their evidence ready to present at that time;

d) Fairness to both parties, taking into consideration all the circumstances of the case; and

e) "Intervening equities:" have other people relied on the judgment, so that setting it aside might result in prejudice to them?

6. A motion to set aside a judgment for mistake or excusable neglect must be made within a "reasonable time." If the motion is not made within one year after judgment is entered, it is forever barred. In other words, the motion must be made within a reasonable time, and a period of time exceeding one year is never reasonable. G.S. 1A-1, Rule 60(b).

C. Motions To Set Aside Judgment for Grounds Other Than Mistake or Excusable Neglect.

1. Judge must hear motion to set aside judgment on grounds other than excusable neglect or mistake.

2. Other grounds include void judgment, newly discovered evidence, fraud, or irregular judgment.

NOTES:

Draft Judgment for Rule 60 motions:

This hearing on defendant's motion to set aside the judgment in [name and case number of case] was tried before the undersigned after proper notice was given to both parties of the date, time, and location of the hearing. The Court finds as follows:

1. The undersigned has authority to rule on defendant's motion to set aside the judgment pursuant to Rule 60(b)(1) by virtue of consent of Chief District Court Judge _____ under N.C.G.S. 7A-228.
2. A magistrate has no authority to set aside judgments based on grounds other than those set out in Rule 60(b)(1), i.e., mistake, inadvertence, surprise, or excusable neglect.
3. In addition to demonstrating grounds for setting aside the judgment under Rule 60(b)(1), the law requires that defendant allege a meritorious defense.
4. Having heard and considered the evidence presented by both parties, the Court finds that defendant
   ☐ has demonstrated mistake, inadvertence, surprise, or excusable neglect justifying setting aside the judgment,
   ☐ has not demonstrated mistake, inadvertence, surprise, or excusable neglect justifying setting aside the judgment,
   and the Court further finds that defendant (has has not) alleged the existence of a meritorious defense.

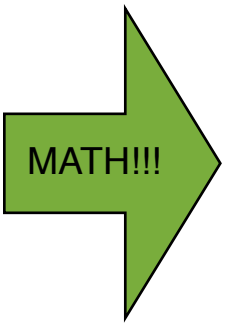
Based on the above findings, it is the order of this Court that the judgment in [name and case number of case]

☐ is set aside and that a new trial before a magistrate should be held.
☐ remains in full force and effect.

Rules for Determining Interest on Judgments

Note that a request for pre-judgment interest is built into the small claims forms, much like costs. Furthermore, NC appellate courts have held on a number of occasions that: " Where the amount of damages for a breach of contract is ascertainable from the contract itself, the prevailing party is entitled *as a matter of law* to interest from the date of the breach."[2] In other words, the judge is responsible for determining and awarding the appropriate amount of pre-judgment interest based on the evidence, including that contained in the contract itself.

So, how do you determine pre-judgment interest in an action based on breach of contract?



Interest = Principal x Rate x Time

Principal: This is the amount awarded by the court as damages arising out of breach of contract. Even though the term "principal" may be used to refer to evidence about the original amount of the debt, or to some other amount, remember that G.S. 24-5 deals with interest on judgments.

Rate: If the contract which is the subject of the action contains an agreed-upon interest rate, that same rate is used to determine pre-judgment interest. Otherwise, the legal rate of 8% per annum established by G.S. 24-1 applies.

Time: Period running from date of breach to date of judgment.

How do you determine the date of breach?

---

[2] Thomas M. McInnis & Associates, Inc. v. Hall, 318 N.C. 421, 431, 349 S.E.2d 552, 558 (1986).

[3] Note that interest rates are frequently stated as annual rates. For shorter time periods, the rate must be converted accordingly. For example, an annual rate of 8% interest converts to a daily rate of 0.00021918.

The general rule is that a contract is breached when the plaintiff acquires the right to bring a lawsuit. In an action for past-due rent, for example, in which the lease contains a 5-day grace period for payment of rent, the date of breach would be on the sixth day; before that time, the landlord had no legal right to bring suit for the past-due amount.

When a contract calls for performance on a particular day, the contract is breached if the party fails to perform on that day. Often, however, date of performance is not so clearly specified. In those instances, the court must determine a reasonable date for performance.

When the evidence supports several possible dates of performance, the court may select the latest date as the date of breach.

Example: *In an action for money owed, a landlord proves that plaintiff failed to pay rent in the amount of $600 on September 1st and again on October 1st. You hear the case on October 15 and award a money judgment in the amount of $900.*

- You write $900 in the judgment form box labeled "Principal Sum of Judgment."

- Because the lease does not contain any reference to interest, the legal rate of 8% will apply. [NOTE: 8% is the annual interest rate. In order to convert that amount to the daily rate, .08 must be divided by 365.]

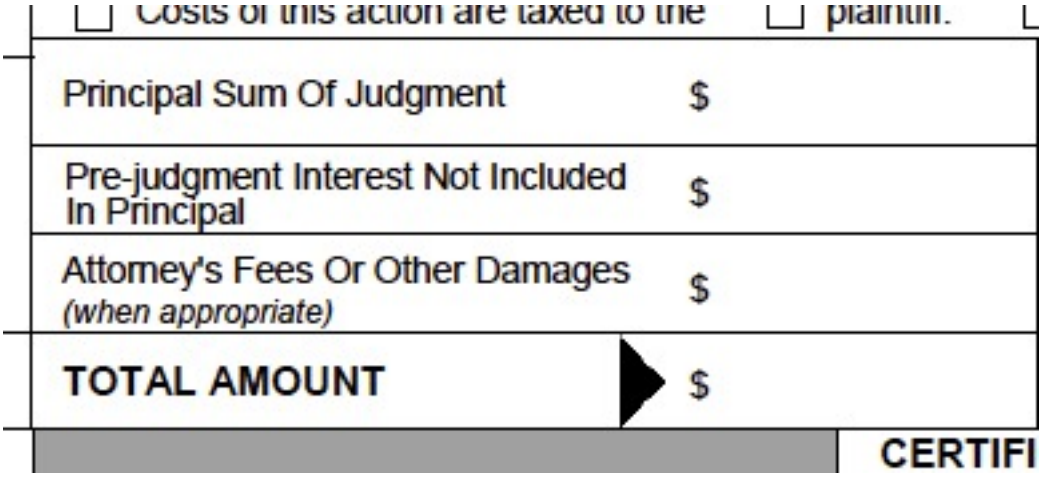
- In this case there are two separate breaches, because the tenant missed two payments:

  September: $600 (principal) x 8%/365 (daily rate) x 44 days = $5.92
  October: $300 (principal) x 8%/365 (daily rate) x 14 days = $.92

Total prejudgment interest: $6.84

Hate math? Use the "Judgment Calculator" on the nccourts.org website, found in the drop-down menu labeled "Quick Links." Or use one of the many free online calculators you'll find if you do a Google search for "simple interest online calculator."

In filling out the judgment, the magistrate must separately list the principal sum and the interest due on that amount up to the date of judgment.



Why does the law require judges to separately identify the principal sum of the judgment and the amount of pre-judgment interest? Because of the interaction of an old rule prohibiting "interest on interest," and what comes next in G.S. 24-5. . . . .

Post-Judgment Interest

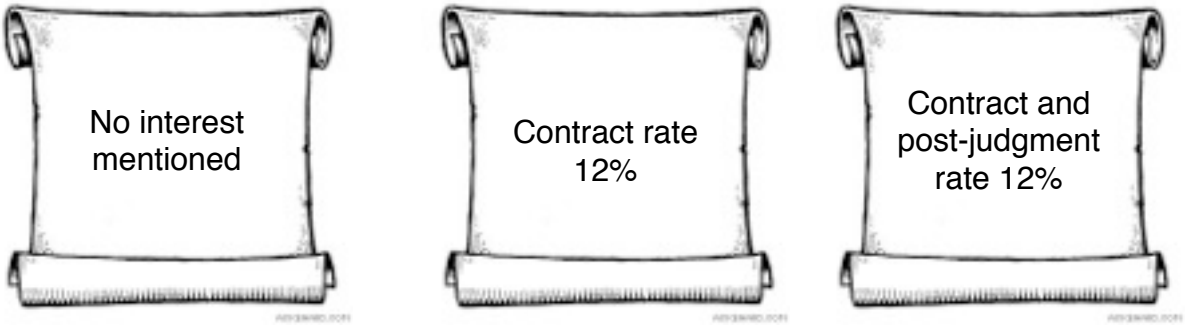
Clerks --not magistrates--are responsible for calculating interest on judgments accumulated between the time the judgment is entered and the time it is paid off ("post-judgment interest"). But magistrates still have an extremely important role to play, arising out of the following statutory provision:

> *If the parties have agreed in the contract that the contract rate shall apply after judgment, then interest on an award in a contract action shall be at the contract rate after judgment; otherwise it shall be at the legal rate.*

Thus a money judgment will gain interest until it is satisfied, subject to two rules:

First, only the "principal sum of the judgment" earns interest. Allowing interest on pre-judgment interest violates the prohibition against "interest on interest." For this reason, AOC-CVM-400, the small claims judgment form used in "money owed" cases, requires the court to break down the amount awarded into principal and interest.

Second, the law has a "default setting" providing for post-judgment interest at the legal rate. For the contract rate to apply to post-judgment interest, the parties must specifically agree to this in writing. Notice the difference between this rule and the rule that applies to pre-judgment interest.



Pre-J Rate	8%	12%	12%
Post-J Rate	8%	8%	12%

These two rules generate two responsibilities for magistrates. First, the magistrate must separately identify the principal amount of judgment and the amount granted as pre-judgment interest, since only the former gains post-judgment interest. Second, the magistrate must indicate whether the contract between the parties contains a specific provision establishing the rate at which a judgment arising out of the contract will draw interest.

Exception for consumer credit contracts[4]: The last sentence in G.S. 24-5(a) sets out an exception for these contracts, limiting post-judgment interest to the lower of the contract rate or the legal rate.

A magistrate can be sure to provide the clerk with all necessary information by completely filling out the AOC-CVM-400 judgment form:

☐ the case involves a breach of contract and the date of breach is: _____.
- ☐ the contract provides for pre-judgment interest on damages for breach at the rate of _____% and/or post-judgment interest at the rate of _____%.
- ☐ the contract does not provide a specific pre-judgment interest rate.
- ☐ the contract does not provide a specific post-judgment interest rate.

[4] ". . . contracts pursuant to which credit was extended for personal, family, household, or agricultural purposes. . . ."

Pre- and Post-Judgment Interest in Cases Not Involving Contracts

The rules about interest on judgments in cases not based on breach of contract are set out in G.S. 24-5(c). Not surprisingly, these rules are simpler, since the statutory 8% rate applies across the board. Briefly summarized, the statute provides that *a judgment for compensatory damages in an action based on tort draws interest at 8% beginning when the case is filed and continuing until the judgment is satisfied.* In all other cases, pre-judgment interest is not allowed. Applying these rules, then, requires only that a magistrate understand the terms *"tort"* and *"compensatory damages."*

A person who suffers injury to person or property at the hands of another may bring an *action in tort* to recover damages for the injury. A tort is frequently defined in terms of what it is not: it is not an action based on breach of contract, in which one party to an agreement is complaining that the other party failed to perform as required. Some scholars have said that a tort always involves three essential elements: a duty owed by defendant to the plaintiff, a breach of that duty (whether negligently or intentionally), and a resulting injury to the plaintiff (whether to person or property). Virtually all small claims cases involve either contract or tort.

Compensatory damages are damages calculated to place the plaintiff in as near as may be to the condition s/he would have occupied had the defendant's tortious action never occurred. Such damages may include compensation for both direct economic loss and less tangible injury such as pain and suffering. Similar to the above discussion concerning the definition of tort, compensatory damages are sometimes defined in terms of what they are not: they are not punitive damages. Furthermore, the general rule is to treat damage awards arising out of statutory penalties as punitive, rather than compensatory, damages. In an action based on unfair or deceptive practices under G.S. 75-1.1, for example, plaintiff's actual damages are compensatory, but the statutory award of treble damages is not, and thus would not generate pre-judgment interest under G.S. 24-5(c)

Putting It All Together: An Example

Larry Landlord brings an action in summary ejectment seeking (1) possession, (2) $900 in past-due rent, and (3) $400 for damage to rental property. The evidence shows the following:

- The parties have an oral lease agreement.
- Tommy Tenant did not pay his monthly rent payment of $600 on September and he missed another payment on October 1.
- Larry Landlord did not demand the rent from Tommy before filing this action on October 5.

- Tommy got drunk and ran into the metal support for the carport, causing $400 worth of damage.

You hear the case on October 15.

Your Judgment:

(1) Possession denied because of failure to make proper demand.

(2) Past due rent granted, in the amount of $906.84. (See p. 3)

(3) Damage to rental property (which is a tort) granted as follows:

> $400 (amount of damage) x 8% (annual legal rate) divided by 365 to determine daily rate x 10 days (beginning when complaint filed and ending when case is heard)
>
> $400 x 0.00021918 x 10 days = $.88

(4) Total money judgment $906.84 + $400.88 = $1308.72

Misdeeds of Animals/Essential Elements

Liability Theory #1: Wrongfully Keeping a Vicious Animal

- ☐ Defendant is the owner or keeper.
- ☐ Animal displayed vicious tendencies before attack. (Dog fights don't count.)
- ☐ Defendant knew or should have known that animal was vicious.
- ☐ The injury was caused by the animal's viciousness.
- ☐ Damages.

Liability Theory #2: General Negligence

- ☐ Defendant owed plaintiff a duty of care.
- ☐ Defendant failed to exert the care that a reasonable person would have taken.
- ☐ As a result, plaintiff was injured, and that injury was foreseeable
- ☐ Damages

Liability Theory #3: Negligence Per Se

- ☐ Defendant violated a statute or ordinance
- ☐ The statute was designed to protect others
- ☐ The plaintiff was among the group sought to be protected
- ☐ Violation of the statute resulted in the plaintiff's injury
- ☐ Damages

Defense: Contributory Negligence

- ☐ The plaintiff was also negligent.
- ☐ Her negligence contributed to her injury.

Liability for Misdeeds of Animals

General rule: A person is not responsible for injuries caused by an animal unless a specific legal principle says he is. There are three legal principles that may result in a person being found responsible for the actions of an animal.

Principle #1: The owner or keeper of an animal with vicious propensities known to the owner or keeper is responsible for injuries resulting from those propensities.

Application of this principle requires a plaintiff to demonstrate four things:

1. The defendant is either the owner or keeper of the animal in question.

    a. A "keeper" of an animal is one who "exercises a substantial number of incidents of ownership," or in other words acts like an owner—feeding, grooming, or otherwise caring for an animal. A pet-sitter would probably be a keeper, as would a member of the household who, although not the legal owner, routinely cares for the animal.

    b. A landlord is not the "keeper" of an animal owned by a tenant merely by virtue of owning rental property.

2. The animal has vicious propensities.

    a. "Vicious" in this case has an unusual meaning. It does not mean that the animal is malicious or cruel; it means instead that the animal is dangerous, in the sense that something about it is likely to result in injury to another.

b. A large dog that jumps up on people or plays in a rough manner may be vicious within this definition. (Sink v. Moore, 267 N.C. 344 (1966).

c. A cat that scratches when it plays is not thereby vicious (Ray v. Young, 154 N.C. App. 492 (2002), nor is a dog that fights with other dogs or chases cars (Sink).

d. The clearest case of "vicious" occurs when an animal has previously behaved in a dangerous way. Evidence that a dog has bitten someone or otherwise behaved aggressively is strong support for a finding that the animal is vicious.

3. The owner or keeper of the animal knew of its vicious propensities.

a. Actual knowledge is not required; it is sufficient if the defendant had information that would have alerted a reasonable person to the potential danger.

b. Notice to the agent of an owner/keeper of an animal's vicious behavior is treated as notice to the agent/keeper himself. Similarly, notice to a household member is generally sufficient basis to find knowledge on the part of the owner/keeper.

4. The injury to plaintiff resulted from the animal's vicious propensity. (Tripping over a vicious dog that bites would not support a finding of liability, at least under this theory.)

NOTE: It is unclear whether under North Carolina law a defendant can escape liability by showing (1) that he took every step possible to avoid injury; or (2) that plaintiff's own negligence contributed to the injury. Many other states follow a rule of "strict liability" in these cases; that rule essentially says that if a person deliberately chooses to possess a vicious animal, he is responsible for any injury that results, even if he is entirely without other fault or if the injured party was partly at fault. It seems likely that North Carolina would follow this rule, but no case has squarely presented the issue as of yet. Even more unclear is whether the court would apply strict liability to a case in which another animal or other property is injured, as opposed to one in which a person is injured.

Principle #2: The owner or other person in control of an animal is responsible if he fails to use due care to prevent injuries that are reasonably foreseeable, given the general propensities of the animal, and the person injured is one to whom he has a duty.

In order to recover based on this principle, the plaintiff must show:

1. That the defendant had a duty to the plaintiff.

    a. The law imposes upon every person a duty to use ordinary care to protect others from injury, and so the required element of duty is generally easily met.

    b. An exception may arise, however, when the plaintiff is a trespasser. In such a case, an animal owner is responsible only for willful or wanton conduct.

    c. A concept connected to duty is the requirement that the defendant is the owner or is otherwise related to the animal in a manner making it reasonable to hold him responsible for the animal's behavior. A mere passerby has no duty to protect a person from injury by an animal he neither owns nor controls, for example.

2. That the animal injured the plaintiff.

3. That the injury was of a type reasonably foreseeable by the defendant.

    Most of the appellate cases have revolved around this issue. A recent case, Thomas v. Weddle, 167 N.C. App. 283 (2004), summarized the rules:

    a. If an animal is wild, an owner is assumed to know that it may behave in a wild (and thus dangerous) way.

    b. If an animal is large, an owner is assumed to be on notice that its size may present a risk of injury in some circumstances. (e.g., a horse may step on a child's foot).

    c. If an animal is of a breed known to be aggressive, an owner is held to notice of that fact. (Hill v. Williams, 144

N.C. App. 45 (2001) (Rottweilers are known to be an aggressive breed of dogs).

d. If an animal has behaved in a particular manner before, an owner is on notice that it may do so again:

"With regard to injuries inflicted by normally gentle or tame domestic animals, the law is clear that the test for liability is whether the owner knew or should have known from the animal's past conduct, including acts evidencing a vicious propensity, that the animal is likely, if not restrained, to do an act from which a reasonable person, in the position of the owner, could foresee that an injury to the person or property of another would be likely to result." Thomas (finding no basis for imposing liability for injuries inflicted by 8-week-old kitten).

NOTE: Contributory negligence on the part of the plaintiff will bar recovery for a claim based on the defendant's negligence.

Principle #3: The defendant violated a "safety statute" and the violation resulted in injury to the plaintiff.

1. Many cities and counties have "leash laws" and other restrictions on the care and keeping of animals enacted in an effort to protect the safety of people and their property. Under the legal principle of "negligence per se", a defendant may be held responsible for injuries resulting from a violation of such an ordinance or statute without any further showing of fault or negligence on the part of the defendant.

2. To establish liability, a plaintiff must show:

   a. That the defendant violated an ordinance or statute.

   b. The law does not require that defendant actually be convicted of violating the statute, but absent a conviction the judge must be careful to closely read the precise language of the law. In Dyson v. Stonestreet, 326 N.C. 798 (1990), the North Carolina Supreme Court held that an ordinance making it illegal for an owner "to permit" an animal to run at large required that the owner either negligently or knowingly did so; it was not enough merely to show that the animal ran loose. In that case, the owner

put on evidence showing that the animal had previously responded obediently to verbal commands. The Court said this evidence prevented a finding that the owner had violated the ordinance.

c. That the statute is a "safety statute", i.e., designed to protect public safety.

d. That the plaintiff was a member of the class sought to be protected. (Example: When plaintiff was injured by defendant shooting at a trespassing dog in violation of a statute prohibiting cruelty to animals, statute sought to protect animals, not people.)

e. That violation of the statute resulted in injury.

f. That plaintiff suffered damages as result.

2. There are a number of state statutes, set out in G.S. Chs. 67 and 68, governing misdeeds of animals, the violation of which will give rise to a claim for damages based on negligence per se. Two of the more commonly violated are:

a. G.S. 67-1, which provides that the owner of a dog is liable for injury to livestock or fowls caused by the dog while off the owner's premises, and

b. G.S. 67-12, providing that a person who allows a dog older than 6 months to roam at large at night is liable for resultant injury to persons or property.

3. A plaintiff who seeks to recover damages based on allegations of violation of a safety statute is responsible for identifying the particular statute providing the basis for his suit.

NOTE: Contributory negligence on the part of the plaintiff will bar recovery for injuries resulting from defendant's negligence based on violation of a statute.

Damages

The damages recoverable in an action based on misdeeds of an animal do not differ from those recoverable in any other action for negligence. A plaintiff is entitled to recover *out-of-pocket costs*, such as medical bills and loss of income, as well as future damages that may be reasonably foreseen (need for ongoing medical care, loss of future income, etc.) An injured party is also entitled to recover for *pain and suffering.*

If the action is one for *damage to property*, the usual measure of damages depends upon the extent of damage. If the property is destroyed, damages would be the value of the item immediately before its destruction. A lesser degree of injury might justify damages based on cost of repair. *Note that emotional distress or mental suffering is not a compensable damage item in cases involving loss of property.*

Punitive damages may be awarded if the defendant's conduct is so outrageous as to be "willful and wanton." An owner who allows a vicious dog to run free, knowing that it is likely to attack someone, may be subject to punitive damages. Hunt v. Hunt, 86, N.C. App. 323 (1987).

Special Rule for Dogs: G.S. 67-4.1 (Dangerous Dog Statute)

If a dog is a "dangerous dog" as defined in G.S. 67-4.1, its owner is liable for any injury it inflicts on people or property, even if the owner did everything he could to avoid injury.*

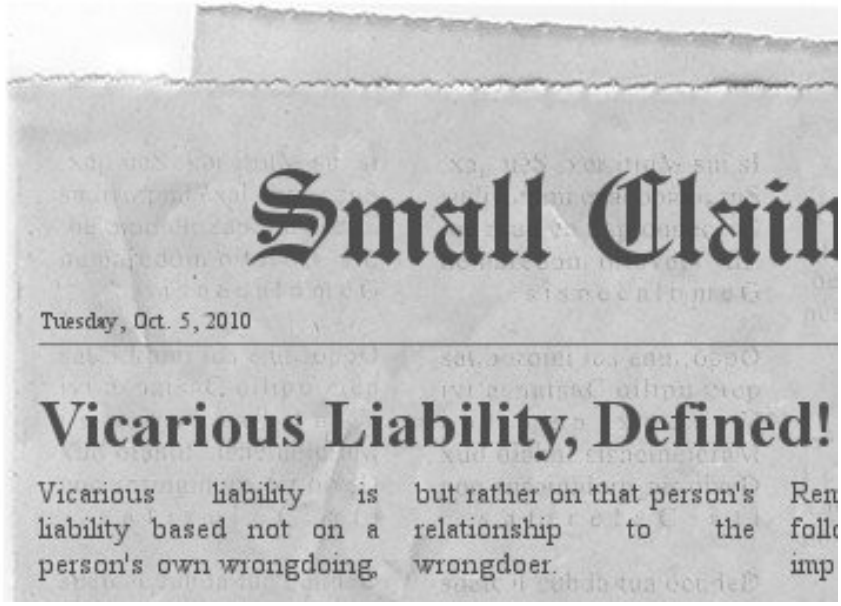
What is a dangerous dog? A dog that has (1) without provocation killed or inflicted severe injury on a person; (2) been declared to be a "potentially dangerous dog" under procedure established by statute; or (3) is owned for purpose of dog fighting, or is trained for dog fighting. "Severe injury" is established by showing broken bones, disfiguring lacerations, cosmetic surgery, or hospitalization as result of injury.

What is the procedure for having a dog declared "potentially dangerous"? The statute requires every city and county to designate a person or Board to handle citizen complaints about dangerous dogs. If a dog (1) has caused severe injury as defined above, or (2) killed or severely injured another animal while not on his owner's property, or (3) approached a person in a "vicious or terrorizing manner in an apparent attitude of attack" while not on his owner's property, it meets the criteria for a "potentially dangerous dog." The responsible person/board who determines a dog to be potentially dangerous gives written notice to the dog's owner, who may appeal to an Appellate Board.

In an action based on this statute, the plaintiff must show:

1. That the dog was a "dangerous dog";
2. That the dog injured plaintiff or plaintiff's property;
3. Amount of damages.

*(This is called "strict liability.")



Small Clain

Tuesday, Oct. 5, 2010

Vicarious Liability, Defined!

Vicarious liability is liability based not on a person's own wrongdoing, but rather on that person's relationship to the wrongdoer. Ren foll imp

SO, WHAT RELATIONSHIPS ARE WE TALKING ABOUT?

--Parent may be responsible for acts of children.

--Employers may be responsible for acts of employees.

--Employers are responsible for acts of independent contractors in case of "non-delegable duties."

--Principals may be responsible for acts of agents.

--One partner may be responsible for acts of another partner.

--One person engaged in a joint enterprise may be responsible for the acts of another.

--The owner of a car may be responsible for the acts of the driver.

NOTE: ALL OF THESE INDIVIDUALS ARE RESPONSIBLE FOR THEIR OWN NEGLIGENT ACTIONS, BUT THAT IS NOT THE SUBJECT OF THIS HANDOUT. IN THESE CASES, WE'RE DISCUSSING HOLDING A PERSON LIABLE FOR ANOTHER'S INJURY, EVEN THOUGH THE PERSON HAS NOT BEHAVED NEGLIGENTLY OR OTHERWISE DONE ANYTHING WRONG.

PARENT MAY BE RESPONSIBLE FOR ACTS OF CHILDREN.

Essential Elements:

1. Defendant's child was under 18.
2. Child maliciously or willfully injured plaintiff or destroyed plaintiff's property.
3. Amount of actual damages.

Limitations: 1. Total recovery may not exceed $2,000.
2. Fact that parent no longer has custody and control (whether by court order or agreement) is complete defense.

EMPLOYER MAY BE RESPONSIBLE FOR ACTS OF EMPLOYEES.

Essential Elements:

1. Negligent person was employed by defendant.
2. Negligent person was acting within scope of employment, *or*
   employer authorized the employee to act tortiously *or*
   employer later ratified employee's tortious acts.
3. Amount of actual damages.

Limitations:

1. Distinguish between employee and independent contractor: An employer is NOT responsible for the acts of an independent contractor. Test is whether defendant maintained the right to control and direct the manner in which the details of the work were to be done. A worker is an independent contractor if that person contracts to perform work based on his own methods and judgment, retained the right to determine how and in what manner the work shall be done, reporting to defendant only in terms of result of work.

2. The courts have said that an employee acts within the scope of his employment if his actions were for the purpose of in some way furthering the business of the employer. The courts have applied this standard in a somewhat mechanical fashion, focusing on WHAT the employee was doing—assigned duties (albeit in a tortious fashion) or something else?

EMPLOYERS ARE RESPONSIBLE FOR ACTS OF INDEPENDENT CONTRACTORS IN CASE OF "NON-DELEGABLE DUTIES."

The courts have identified the following as "inherently dangerous" activities or "non-delegable" duties. This means that these areas are so important that we will hold an employer responsible even for the acts of an independent contractor.

1. Mechanic negligently repaired brakes—owner held responsible.
2. Plumber negligently repairs water heater in inn—innkeeper held responsible based on duty to guests of inn.
3. Operator of ride at fair negligently failed to close safety bar—fair owner held responsible.

ONE PERSON ENGAGED IN A JOINT ENTERPRISE MAY BE RESPONSIBLE FOR THE ACTS OF ANOTHER.

A joint enterprise exists when two or more people join together in pursuit of a common purpose, having an equal right to direct each other's actions. Persons engaged in a joint enterprise are jointly and severally liable for the negligent actions of each other.

A passenger in a vehicle may be responsible for the negligence of the driver if the two are engaged in a joint enterprise.

THE OWNER OF A CAR MAY BE RESPONSIBLE FOR THE ACTS OF THE DRIVER.

An owner of a car who is a passenger is vicariously liable for the negligence of the driver, based on the owner's legal right to control the operation of the vehicle.

Even when the owner of a car is not a passenger at the time of the negligent action, the owner is responsible if

(1) The driver is a member of the owner's family or household and lives in the owner's home;

(2) The vehicle is one used for the general "use, pleasure, and convenience of the family," and
(3) The vehicle was being so used at the time of the accident with the owner's express or implied consent.

This rule applies to motor vehicles of any type (including motorcycles and boats), whether accidents occur on or off a public highway.

This rule does NOT apply to hold one spouse responsible for the negligent acts of the other in a case in which the spouses are co-owners.

Rule of Evidence:

G.S. 20-71.1 (paraphrased): In all actions for injury to person or property by motor vehicle, proof of ownership is prima facie evidence that owner authorized driver's actions. Proof of registration is prima facie evidence of ownership as well as that operator was acting as agent (or legal equivalent) of owner.

Motor Vehicle Liens

A Quick Reference Guide for North Carolina Magistrates

Dona Lewandowski

Institute of Government

University of North Carolina at Chapel Hill

Who is suing, and what does he want?

1. Action by lienor to establish lien.

2. Action by owner to recover MV and establish lien, if any.

3. Action by lienor to recover MV and establish lien.

For each action, consider:

-- Service of process (page 6)

-- Cash bonds (page 7)

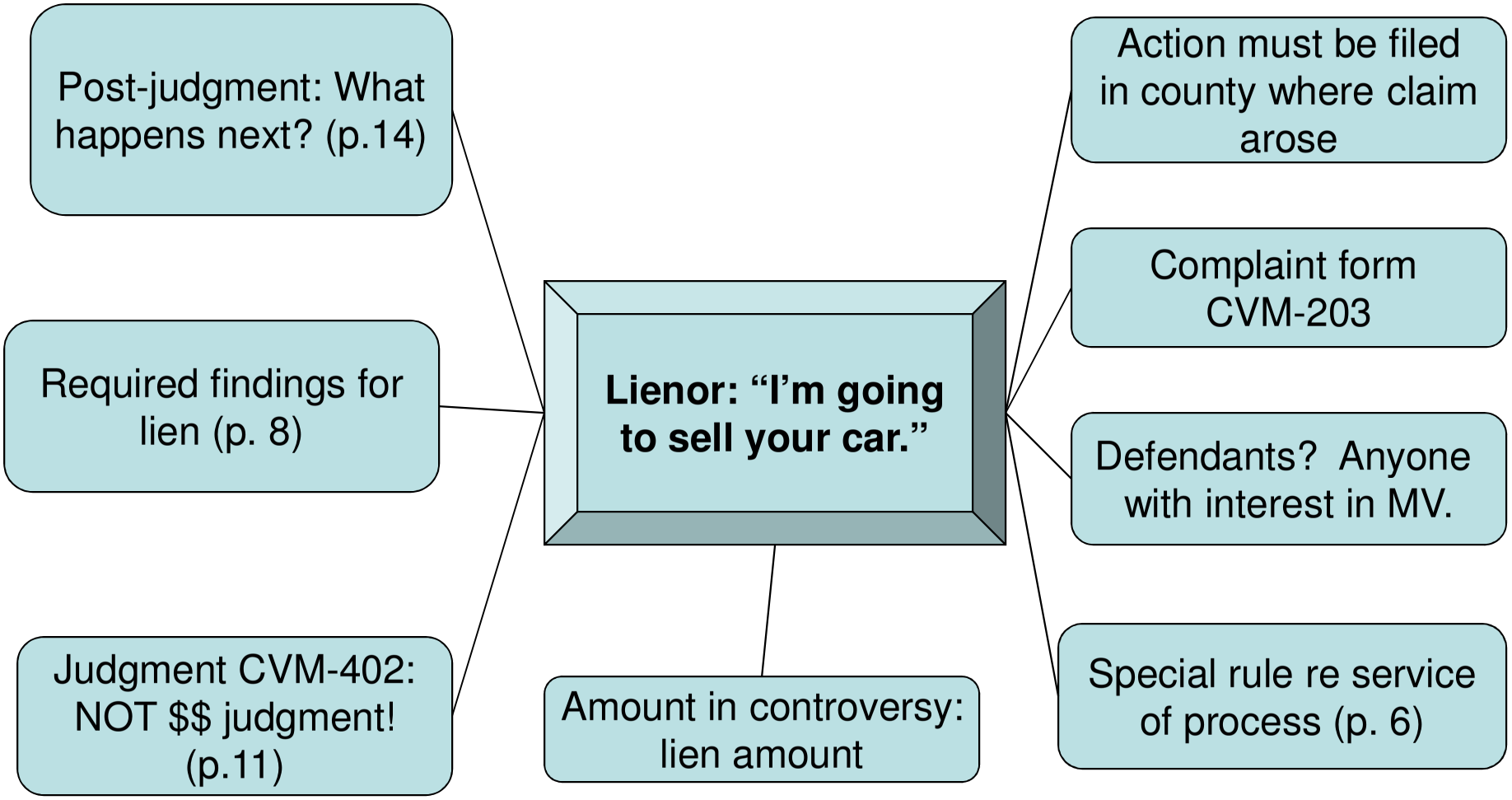
-- Required findings (page 8)

-- Special rules for storage fees (page 10)

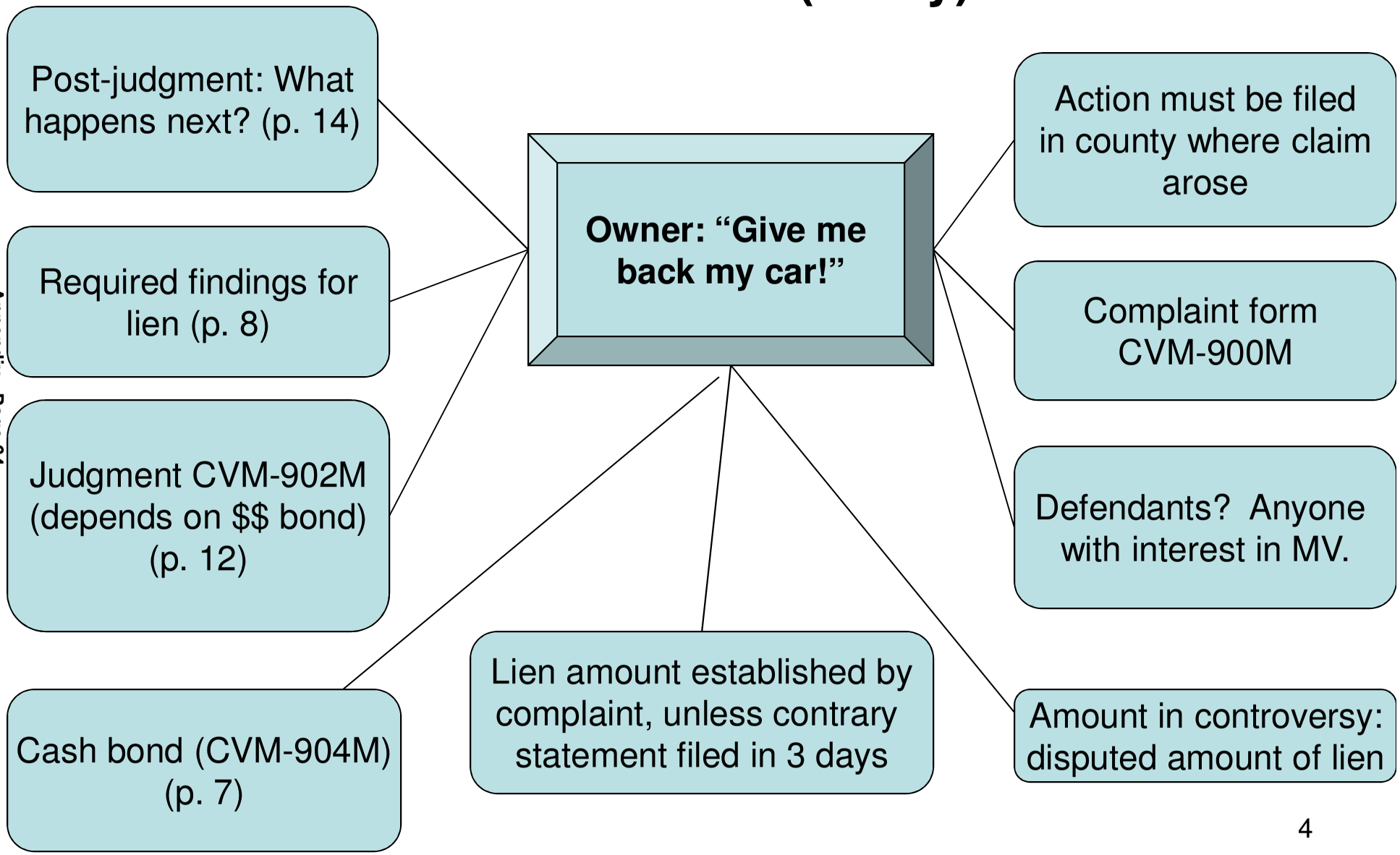
-- Judgment (pages11-13)

-- What happens next (page 14)

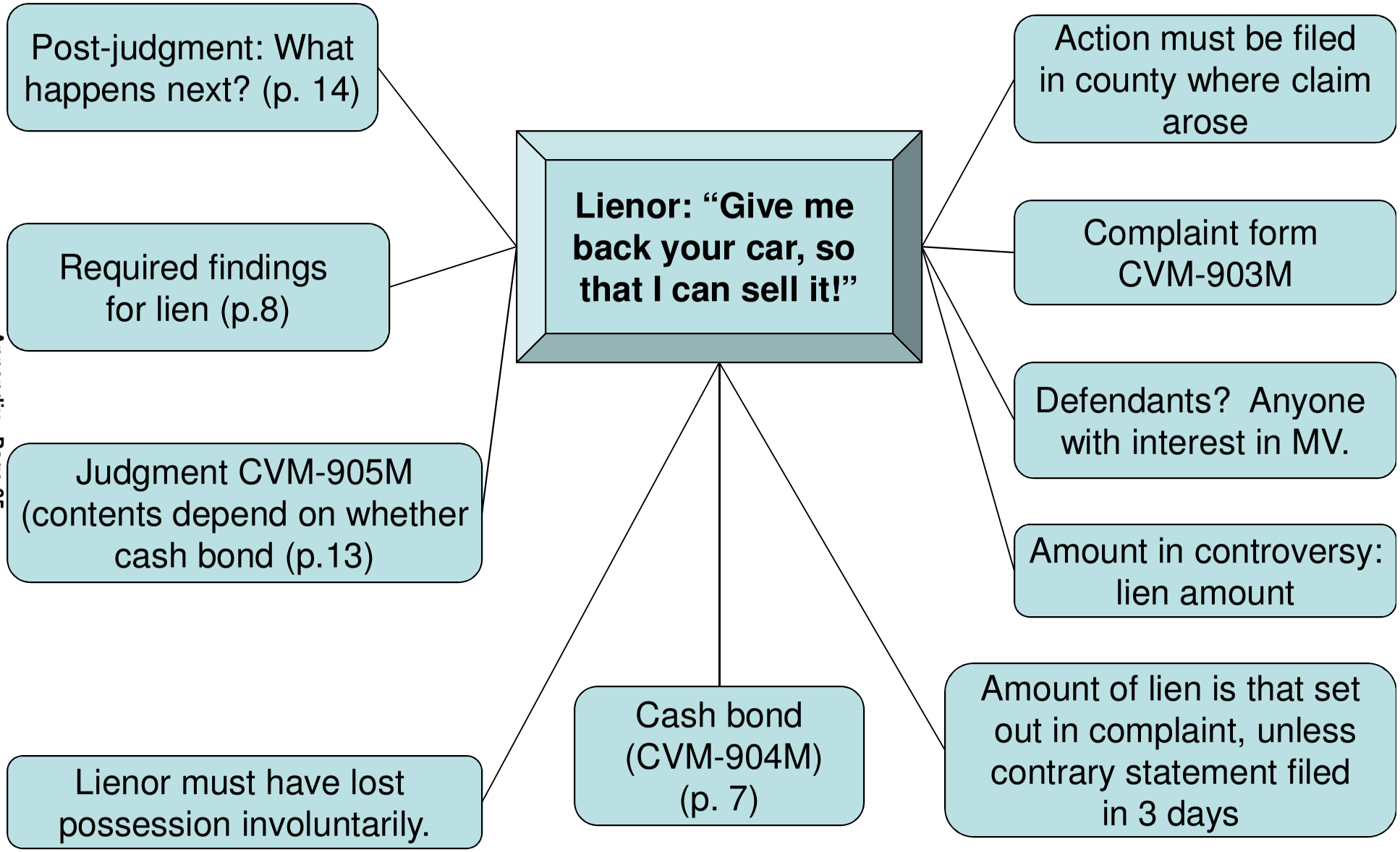
1. Action by lienor to establish lien:



2. Action by owner to recover MV and establish amount of lien (if any):



3. Action by lienor for MV and to establish lien:



Special rule for service of process

If service by usual methods is not possible, lienor may use service by publication.

Must be:

--published once/week for 3 weeks in a row

--in a qualified newspaper commonly sold in county where action pending

--with published notice containing specific contents

Service by publication may be proven by affidavit.

Cash bonds to recover motor vehicle

- Amount determined by complaint, or by contrary statement if filed w/in 3 days of service.
- Owner pays clerk full amount claimed in cash.
- Clerk issues CVM-901M, ordering release of motor vehicle.
- Bond eventually distributed based on judgment.

To establish lien, must show:

5. Charges are reasonable, or if not, amount of reasonable charges.

4. Charges have not been paid.

3. Has possession of motor vehicle.

2. Had contract with owner or legal possessor.

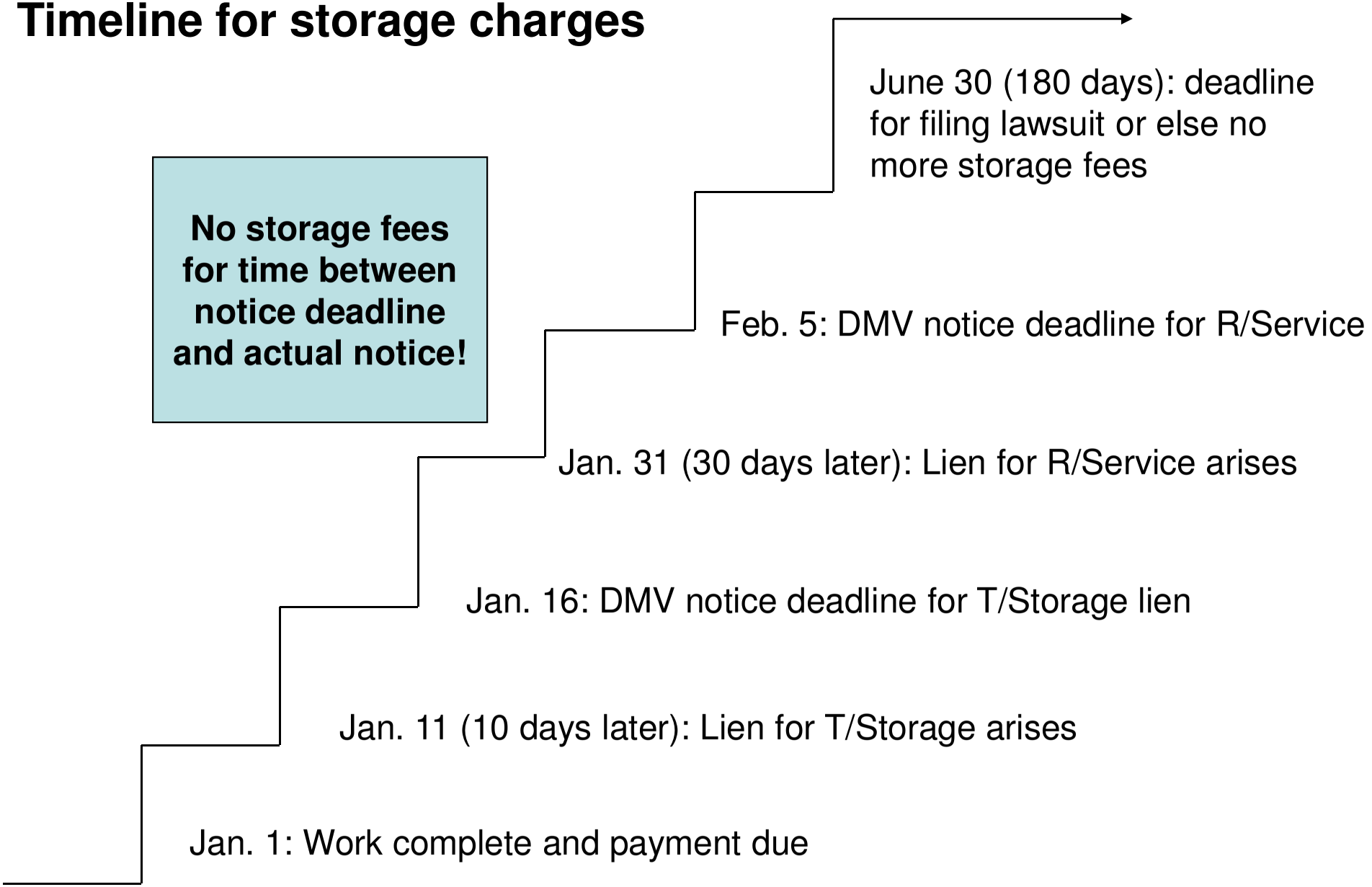
1. Repairs, services, tows, or stores MV in OCB .

Two less common kinds of liens:

- A person in the business of parking or garaging cars for the public has a lien arising when the vehicle has been unclaimed for 10 days; and

- A landowner has a lien arising when a MV has remained abandoned on his land for 30 days. NOTE: this lien is not available to a landlord in connection to property belonging to a tenant.

Timeline for storage charges



Judgment in action by lienor to establish lien (CVM-402)

- Authorizes lien and establishes its amount. NOT a money judgment.
- Lien is for reasonable value of services provided.
- Note special rule for storage charges (see page 10).

Judgment When Owner Seeks Possession of MV: CVM-902M

No Cash Bond

No Lien: Owner gets possession, no lien for lienor

Lien: Lienor gets possession, and can assert lien <u>for amt determined by magistrate</u>

Owner fails to appear: Case dismissed. Lienor keeps possession and asserts lien as law allows

Cash Bond

No Lien: Owner gets possession, and judgment orders clerk to disburse $ to owner

Lien: Owner gets possession; judgment orders clerk to disburse <u>$ to lienor in amount ordered by magistrate.</u> (owner gets anything left over).

Owner fails to appear: Case dismissed. Magistrate directs clerk to disburse $ to lienor. (Owner already has vehicle.)

Judgment When Lienor Wants MV Back and to Assert Lien: CVM-905M

No Cash Bond

Lien: Lienor gets possession, and can assert lien for amt determined by magistrate

No Lien: Owner keeps possession, no lien for lienor.

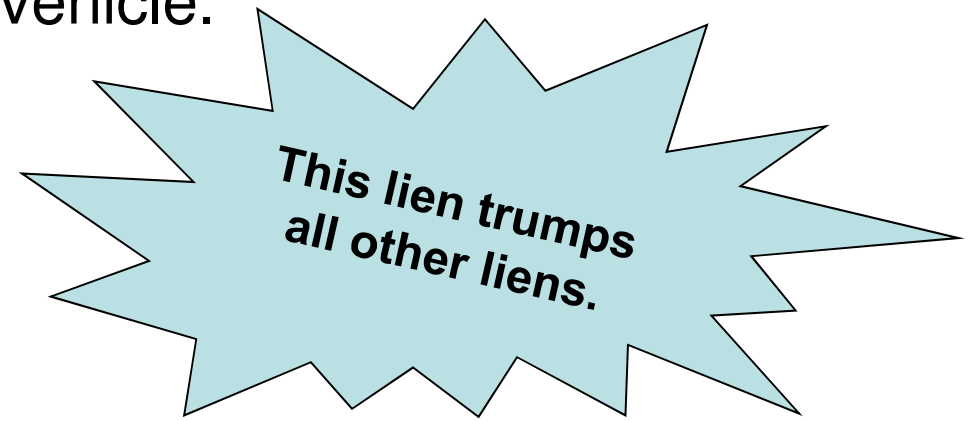
Cash Bond

Lien: Judgment orders clerk to disburse $ to lienor in amount ordered by magistrate. (Owner gets anything left over.)

No Lien: Action is dismissed, and judgment orders clerk to disburse $ to owner (who also keeps vehicle).

What happens next:

1. Lienor sends copy of judgment to DMV.
2. DMV authorizes sale.
3. Sale may be private or public, but must follow rules of statute.
4. Proceeds are distributed in this order: (1) expenses of sale, (2) lienor, (3) other lienors, and (4) owner of vehicle.



Details, Details, Details. . .

Companion to "Motor Vehicle Liens: A Quick Reference Guide for North Carolina Magistrates"

Dona Lewandowski, Institute of Government, UNC-at-Chapel Hill, 2/2007

Stage 1: Before the Hearing

A lien begins when a lienor acquires possession of the vehicle (it's called a possessory lien), and it ends when the lienor voluntarily gives up possession, or when the lienor is paid the full amount owed. No written lien is filed with the Division of Motor Vehicles (DMV) or with the clerk.

A lien terminates if the lienor loses possession. This loss of possession must be with the lienor's consent, however, or because of a judge's order. If the lienor loses possession because the vehicle is taken without his consent, the lien continues to exist. On the other hand, if the lienor lets the debtor take the vehicle because he agrees to pay what he owes, the lien ends. Even if the debtor does not pay, or brings the vehicle back for additional work, the lien is not revived. The former lienholder will have to bring a contract action to recover his charges (although he may assert a new lien if the debtor once again refuses to pay for the new work done).

Payment also ends a lien. Payment may be made by owner, secured party, or legal possessor, and it must be for full amount secured by the lien (NOTE: this is contract amount, not reasonable value) plus reasonable storage fees.

First Steps in Enforcement

The first step a lienor must take to enforce his lien is to file an unclaimed vehicle report with DMV (DMV form ENF-260, Rev. 4/98). When this report may be filed depends upon the location of the vehicle. If the vehicle has been unclaimed in a place of business, the report may be filed after 10 days. If the vehicle has been abandoned on a landowner's property, the report may be filed after 30 days. In either case, failure to file this notice within five days after the appropriate date limits the amount of storage charges the lienor can charge. After the five days have passed, if the lienor hasn't notified DMV that he has the vehicle, he can't charge for storage until he DOES notify DMV.

Example: David Debtor takes his car to Eddie's Garage, but can't pay Eddie's bill. Eddie waits ten days (until March 10), as is required, but gets distracted by ACC basketball and forgets to notify DMV that he has the car for 2 months. He remembers and sends in the form on

May 10. Eddie cannot collect storage for the period between March 15 (5 days after the ten-day period is up) and May 15.

The second step a lienor must take to enforce a lien is to file a notice of intent to sell the vehicle. This notice too is filed with DMV (DMV form ENF-262, Rev. 4/98). There are special rules regulating when notice may be filed: If the only charges are for towing and storage, the lienor may file this notice when the charges have been unpaid for 10 days. The result is that this notice sometimes may be filed simultaneously with the report to DMV that a vehicle is unclaimed. In all other cases, the lienor must wait to file this notice until charges have been unpaid for 30 days.

DMV takes the next step: When DMV receives notice that the lienor plans to sell the vehicle, it sends out a certified letter, return receipt requested, to all interested parties. Interested parties include the owner of the vehicle, any secured parties, and the person with whom the lienholder contracted, if not the owner.

Contents of notice: This notice contains the following information: name of the lienholder, nature of services performed, amount of the lien claimed, and statement of intent to sell the vehicle to satisfy the lien. This notice also informs the recipient of his or her right to request a judicial hearing to determine whether the lien is valid. If one of the recipients wants a hearing, he must ask for one within ten days by notifying DMV.

After DMV sends out this certified letter, one of three things may happen: (1) all parties receive notice and none request a hearing; (2) not all parties receive notice; or (3) one or more parties request a hearing.

(1) If all parties receive notice and none request a hearing, DMV authorizes the lienor to sell the vehicle and no court proceeding is required. This sale must be conducted according to the rules set out in G.S. 44A. (See **Stage 3,** beginning on p. 13)

(2) If one or more of the parties do not receive notice that the lienor intends to sell the vehicle (i.e., the identity of the owner or other party cannot be determined, or a certified letter is returned to DMV as undeliverable), some further proceeding is required.

If the names and addresses for all parties are known but the certified letter is returned as undeliverable, the lienor may file a special proceeding before the clerk or bring an action in small claims or district court.

If the name of the owner is unknown and the vehicle has a fair market value of less than $800, the lienor may file a special proceeding before the clerk or bring an action in small claims or district court.

Any other case involving inadequate notice must be brought in small claims or district court to establish the lien.

(3) **If any person receiving notice requests a hearing**, the lienor must bring an action in small claims or district court.

Stage 2: The Hearing

Procedure for hearings

Magistrates may hear actions to enforce motor vehicle liens if assigned to do so by the chief district court judge.

Note: These actions **must be filed in county in which claim arose**, not county of defendant's residence.

The **amount in controversy** is the amount of the lien, not the value of the motor vehicle.

Any person with an interest in the motor vehicle should be made a party to this action. This always includes the owner and secured parties. An unknown owner may be sued using description of vehicle. For example, the action may be brought against "unknown owner of white Pontiac Grand Prix, VIN #64532339866678."

Secured parties have an interest in these actions because motor vehicle liens "beat" all other liens. As a result, sale of the motor vehicle will destroy the secured party's lien. The secured party is entitled to any surplus after the expenses of sale and the amount of

the motor vehicle lien are subtracted from the sale price. In some cases, however, the secured party may wish to protect its interests by paying off the lien amount.

Service of process

If the defendant is known, the same methods of service apply as usual in small claims cases, with one exception: if the defendant cannot be served by usual methods using "due diligence", service by publication is allowed.

If the defendant is unknown, he is designated by description (see example above, on preceding page) and is served by publication.

There are special rules for service by publication:
-Publication must be in the county where the action is pending.
-Publication must be in a newspaper qualified for legal advertising and circulated in the county where action is pending.
-Publication must occur once a week for 3 successive weeks.

The publication must contain the following information:

- ✓ Court in which action is filed.
- ✓ Must be directed to defendant sought to be served;
- ✓ Must state that a pleading has been filed seeking relief;
- ✓ State the nature of the relief being sought;
- ✓ Require defendant to make defense within 40 days after date stated in notice (i.e., date of first publication);
- ✓ State that failure to respond will result in plaintiff seeking requested relief;
- ✓ Must be subscribed by plaintiff and give his address.

Statutory form for published notice (G.S. 1A-1, Rule 4(j1):
NOTICE OF SERVICE OF PROCESS BY PUBLICATION
STATE OF NORTH CAROLINA _____ COUNTY
In the _____ Court
Title of action
To (Person to Be Served):

Take notice that a pleading seeking relief against you has been filed in the above-entitled action. The nature of the relief being sought in as follows: (State nature.)

You are required to make defense to such pleading not later than (_____ , ____) and upon your failure to do so the party seeking service against you will apply to the court for the relief sought.

This, the _____ day of _____ , _____.

_____(Party)_

_____(Address)

Proof of service by publication: Plaintiff must file two affidavits with the clerk (to be filed in shuck), one explaining why service by publication was required, and the other an affidavit from the publisher of the newspaper showing notice and specifying the first and last dates of publication.

Three kinds of actions (and three kinds of liens)

In the typical case, a lienor appears in small claims court **seeking to establish a motor vehicle lien**. To "win," he must prove two things: that a valid lien exists, and the amount of the lien. The **proof required to demonstrate that a valid lien exists depends on the type of lien involved**, and the first thing a magistrate must do (after checking service of process) is determine what kind of lien is asserted. There are three possibilities:

1) A lien under G.S. 44A-2(d) (sometimes referred to in this material as "**RSTS in OCB**"). This lien is available to persons or businesses who repair, service, tow, or store motor vehicles in the ordinary course of business.

2) A lien under G.S. 20-77(d) (sometimes referred to in this material as "**GRPS for public**"). This lien is available to persons or businesses, who garage, repair, park, or store motor vehicles for the public.

3) A lien asserted by a **landowner** because of an abandoned motor vehicle on his property

Each lien has different elements and requires different evidence. A **lienor who claims to have the lien listed first above ("RSTS in OCB")** must show that he or she repairs, services, tows, or stores motor vehicles in the ordinary course of business. (NOTE: This lien is not available to a person who works on cars as a hobby, or as a favor, for example.) The lienor must also demonstrate that he entered into an express or implied contract for one of these services with the owner or legal possessor of the vehicle. A vehicle's "owner" may be

the person with legal title or his agent, a lessee, a secured party, or a debtor entrusted with possession of the vehicle by a secured party. A legal possessor includes anyone in possession with permission of owner, or entitled to possession by operation of law (for example, a law enforcement officer who acts with statutory authority to have a vehicle towed). The rest of what the lienor must show is simple: that the vehicle is in her possession, that proper notice has been given to DMV, and that the charges for services remain unpaid. Finally, the lienor must introduce evidence in support of the amount of the requested lien: what services were performed, the reasonable cost of these services, and the amount and justification for the additional expense of storage.

What if the lienor claims a lien under G.S. 20-77(d) ("GRPS for public")? The showing he must make is (only slightly) different. This lienor must show that he operates a business garaging, repairing, parking, or storing vehicles "for the public". Additional requirements for the establishment of this sort of lien are that the vehicle has remained unclaimed at the establishment for ten days, that an unclaimed vehicle report was properly filed with DMV, that the lienor has possession, and that the charges have been unpaid. This lien overlaps significantly with that discussed above, and a lienor who has provided repair services will typically use that lien. The G.S. 20-77(d) lien and is most often asserted when the lienor is a parking deck or similar business. Again, the lienor must also support his claim of lien in a particular amount by introducing evidence of reasonable charges for the services provided.

What if the lienor is asserting a landowner's lien? The proof for this lien is very straightforward. The lienor must show only that he is the owner of land on which the motor vehicle in question has been abandoned for at least 30 days, and that a proper report has been made to DMV. The amount of the lien is established by evidence of reasonable storage charges. Note that this lien is improperly used by a landlord seeking to recover damages arising out of a rental agreement; the correct lien in that case is a landlord's lien under G.S. _____.

Speaking of Storage . . .

Storage is a special category of damages because of the danger that unscrupulous plaintiffs might allow a vehicle to remain on their premises for long periods of time in order to pile up charges for storage. To discourage this practice, two special rules apply to this particular item of damages:

Delayed Notice to DMV: Remember that lienors must notify DMV that they are in possession of an unclaimed vehicle after ten days have passed (30 for a landowner lien), and that they have five days to do so. Failure to make timely notification to DMV bars the lienor from asserting storage charges for the period from the fifteenth (or 35th, as the case may be) day of the lien to whenever DMV is properly notified. Note that late notification carries with it the additional requirement that the lienor must use certified mail.

Delay in Filing Action to Enforce the Lien: A lienor must file an action to enforce the lien within 180 days after storage begins or else forfeit the right to collect storage for the period after 180 days.

Note Different Rule in Express Contract for Storage: In a case in which storage is the service contracted for, it makes no sense to start the clock when storage begins. (In a one-year storage contract under this rule, the lienor would lose the right to assert a lien for storage fees halfway through the contract period!) In these cases, the clock begins to run from date of default, and the action must be brought within 120 days thereafter.

If the magistrate determines that a valid lien exists (regardless of which type of lien it is) and determines the reasonable value of the services provided and storage costs, the next step is to enter judgment authorizing the lienor to enforce the lien and specifying the monetary amount of the lien. Note that this is not a money judgment, despite the fact that the magistrate must determine the amount of the lien. This judgment is, instead, a judicial determination that the lienor has a lien. This determination clears the way for DMV to authorize the lienor to go ahead with the sale, so that he may collect the amount of the lien. In this action to establish a lien, the appropriate AOC form for judgment is CVM-402.

The second kind of action occurs when the vehicle's owner wants his car back. These cases, obviously, do not involve abandoned vehicles and unknown owners, at least not by the time they get to small claims court. Instead, these cases arise when a lienor refuses to hand over a vehicle because of unpaid charges, and the vehicle owner (or other person with an interest in the vehicle) responds by suing to recover his vehicle. In doing so, the owner will necessarily be attacking the validity and/or amount of the lien. As a result, the legal issues that the magistrate must determine are all but identical to those discussed above, even though the parties have switched places.

The owner institutes this action by filing a complaint (CVM-900M), and the procedure follows that of any other small claims case. At trial, the owner has the burden of demonstrating by the greater weight of the evidence that (1) the vehicle is not subject to a valid lien, or (2) that the amount of the lien differs from that asserted by the defendant. As to the first, the magistrate must first determine which kind of lien is at issue, so that s/he may identify the essential elements that apply. In order to defeat the defendant's contention that he holds the vehicle by authority of a lien, the plaintiff must offer evidence negating at least one of these essential elements.

Sometimes the plaintiff more or less concedes the fact that a lien exists but challenges the amount asserted by the lienor. In making this determination, there are two important factors for the magistrate to remember: **First, the amount of the lien is for the reasonable value of services provided, combined with storage.** This amount may or may not be the same as the contract amount, although evidence of the amount agreed to by the parties may be relevant in determining what charges are reasonable. **Second, the amount of the lien is established by the amount set out in the complaint,**

unless the lienor files a contrary statement within three days of being served.

The amount of lien eventually ascertained by the magistrate may be affected by several legal principles related to the rules set out above. As to "reasonable expenses" of storage, the limitations discussed on p. 8 may operate to decrease the amount a lienor may eventually recover. Also, the rule giving the lienor only three days after service of summons to file a written contest of the amount of lien set out in the complaint requires an unusually rapid response and may catch defendants by surprise. Note that in applying the three-day rule, G.S.1A-1, Rule 6(a) provides that the day the complaint is served is not counted; neither are intervening Saturdays, Sundays, and holidays.

One issue that arises sometimes in disputes about the cost of servicing or repairing motor vehicles involves the **requirement that providers of these services furnish customers with a written estimate. The Motor Vehicle Repair Act** (G.S. 20-354 – 354.9) contains a number of provisions that at first blush appear to be important in resolving cases involving motor vehicle liens. The Act applies to repair and related services involving charges of $350 or more and establishes a right to sue for damages for violation of its provisions. The Act requires covered businesses to furnish a written estimate in advance of providing services, and it prohibits substantial deviation from the estimate as well as a number of other fraudulent or deceptive practices. In addition, the Act prohibits service providers from retaining possession of a vehicle because of unpaid charges when certain conditions are met.

The scope of the Motor Vehicle Repair Act is not as far-reaching as it first appears, however. First, while the Act addresses the situation in which the final bill is significantly higher than the initial estimate (prohibiting the service provider from retaining possession of the vehicle in these cases), it does not apply to the common situation in which no estimate is provided at all. Second, the right to damages caused by a violation of the Act makes little sense in a motor vehicle lien case, in which the amount of the lien is based on the reasonable value of services actually received. In such a case, the plaintiff will have a difficult time indeed showing actual damages caused by the lack of a written estimate. While a magistrate may well be presented with important cases growing out of violations of the Motor Vehicle Repair Act, particularly those involving allegations of unfair trade

practices, it is more likely to be a red herring in motor vehicle lien cases.

"I want my car back!"

Cash bonds to the rescue

When a car owner wants to regain immediately possession of the vehicle, he may deposit with the clerk cash equal to the full amount of the lien alleged by the lienor. The clerk will then issue an Order for the Release of Property Held for Lien (CVM-901M), directing the lienor to release the vehicle to the owner. This remedy is available in any case in which a lienholder retains possession of a motor vehicle under claim of lien and is enforceable by the contempt power of the court.

One issue sometimes arises when an owner files a complaint and cash bond at the same time, and the clerk immediately issues an order for release after accepting cash in the amount specified in the complaint. Remember that the law provides the lienor with a three-day period in which to challenge the amount set out in the complaint. Often, the complaint will set out the amount allegedly due for repairs or other services but will not include the additional amount the lienor seeks for storage. The better practice would be for the clerk to delay accepting the cash bond until the lienor has had opportunity to specify the amount of the asserted lien.

The presence or absence of a cash bond has significant effect on the magistrate's judgment, as discussed below.

Entering judgment in actions by the owner to recover possession of a motor vehicle: At the conclusion of the hearing, the magistrate enters judgment on form CVM-902M. The details of the judgment depend on whether the plaintiff has deposited a cash bond.

In cases in which plaintiff has not deposited a cash bond, remember that the lienor has the vehicle and wants to sell it in order to get the money he claims to be owed. In these cases, if the owner proves that no lien exists, the judgment will state that the plaintiff is entitled to possession of the vehicle and the defendant is not entitled to a lien. If, on the other hand, the owner fails to prove that no lien exists, the

judgment will indicate that the defendant is entitled to retain possession of the vehicle and to proceed to enforce his lien in the amount determined by the magistrate, unless the plaintiff forestalls sale by paying defendant the amount of the lien. The last possibility, of course, is that the plaintiff fails to appear, in which case the action is dismissed and the lienor is left in the same position he occupied before the action was filed: in possession of the vehicle and with the remedies accordingly available to him.

In cases in which plaintiff has deposited a cash bond: remember that in this case the plaintiff has the vehicle, and the clerk has the money. The fact that the money has been paid to the clerk has significant implications for the judgment. If the plaintiff prevails, proving that there is no lien, the judgment will indicate that he retains possession of the vehicle and direct the clerk to return the money plaintiff paid in. If the defendant prevails, and the magistrate finds that a valid lien exists, then the judgment will direct the clerk to disburse the amount of the bond based on the amount of the lien as set out in the judgment. The plaintiff, of course, is entitled to retain possession of the vehicle, in light of the fact that the lien has been satisfied. Finally, if the plaintiff fails to appear, the case must be dismissed and the magistrate will direct the clerk to disburse to the defendant the amount of the bond

The third kind of action, less common, arises when the lienholder has lost possession of the vehicle and seeks to recover possession and to enforce the lien. The special element in this case is possession. Remember that being in possession of the motor vehicle is an essential element of all three liens. What is a lienholder to do, then, if the owner or someone connected to him removes the vehicle without his permission? If his loss of possession was indeed involuntary, then the lienor must seek to regain possession in order to successfully assert his claim of a lien.

The action begins when the lienor files a complaint (CVM-903M) asking for return of the vehicle and for a determination of the amount of lien. The amount of lien set out in the complaint will be binding on the parties and the magistrate unless the defendant (generally the owner, as well as secured parties) files a contrary statement within three days of service. (See the discussion above, on pp. 9-10, of legal rules relevant to this.) At trial, the lienholder has the burden of proving the existence of one of the three types of liens by the greater weight of the evidence, as well as the amount of the lien, assuming the defendant filed a timely statement challenging the amount.

In this action, as in the others, the owner or secured parties may post a cash bond in the amount of the asserted lien and thus retain possession of the vehicle. The presence or absence of a cash bond will be reflected in the judgment eventually entered by the magistrate.

If no cash bond has been posted: If the lienholder demonstrates a valid lien, including the reasonable amount of the charges, the judgment of the magistrate will indicate his right to regain possession of the vehicle and to proceed to enforce the lien in the amount determined by the magistrate (or, if applicable, in the unchallenged amount set out in the complaint). If, on the other hand, the lienholder fails in his proof, the magistrate will enter an order of dismissal, leaving the defendant in possession of the car and preventing further enforcement of the alleged lien.

If a cash bond has been posted: If the lienholder demonstrates a valid lien, the judgment of the magistrate will direct the clerk to disburse the appropriate amount of the cash to the plaintiff and return any surplus to the defendant. (The same issue as to amount is present in this instance as above; the lien will be in the amount set out in the complaint if defendant did not challenge it, and in the amount determined by the magistrate to be reasonable if the complaint amount was challenged by the defendant). The defendant will of course retain possession of the vehicle. If the lienholder fails in his proof, the magistrate will dismiss the action and direct return of the cash bond to the defendant (who also keeps the vehicle, of course).

Stage 3: After the hearing

After filing notice of intent to sell a vehicle pursuant to a lien, and following any judicial hearing that may be required because it is requested or because of notice problems, the lienholder is ready to pursue his remedy. If no judicial hearing was required, the lienor received authorization to conduct a sale from DMV soon after the certified letters containing notice of intent to sell were sent out. If a hearing was required, the lienor must send a certified copy of the judgment to DMV, which will then authorize the lienor to proceed with sale. In either case, the next hurdle for the lienor is to conduct the sale of the motor vehicle in a lawful manner.

The first decision confronting the lienor at this point is whether to hold a private sale or a public sale. The rules for both are set out in G.S. 44A-4, and won't be set out here in detail. The general provisions are as follows:

Public sale

- ✓ A public sale is required on request of any person with an interest in the property.
- ✓ Notice of sale must be sent to DMV and all interested parties at least 20 days beforehand, posted at courthouse door, and published in newspaper (unless vehicle is worth less than $3,500).
- ✓ Notice must specify a number of things, including the date, time, and location of the sale.
- ✓ The sale must be held between 10:00 AM and 4:00 PM, on a day other than Sunday.
- ✓ The lienor is allowed to purchase the property at a public sale (and only at a public sale).

Private sale

- ✓ Private sale must be conducted in "commercially reasonable" manner.
- ✓ Notice of intended sale must be given to DMV at least 20 days beforehand.
- ✓ Notice of intended sale, containing specified information including date, time, and place of sale, must be provided to owner and other interested parties at least 30 days beforehand. (This notice may be combined with initial notice of intent to sale setting out 10-day period for responding and challenging lien.)
- ✓ Private sale is not allowed if any interested party objects, asks for public sale.
- ✓ Lienor may not purchase "directly or indirectly" at private sale, and any such attempted purchase is voidable.

Damages for violation of statute

If a lienor fails substantially to follow the statutory rules for sale of a motor vehicle subject to lien, he is liable to the owner (or any other injured person) for $100, reasonable attorney fees, and any actual damages (defined as difference between fair market value of vehicle at time and place of sale and actual sale amount).

After the sale

The proceeds of sale are applied first to expenses of sale (including reasonable storage fees for period following notice of sale), and then to satisfaction of the lien, with any surplus going to "the person entitled thereto" (i.e., other lienholders, and finally to the debtor). Any purchaser for value at a properly conducted sale takes the property free and clear of any other claims or liens. The same rule applies to a purchaser who buys at a sale that was not properly conducted, assuming that the purchaser had no knowledge (or reasonable way of knowing) of the defect. These rules apply even if the purchaser is the lienor.

Liquidated Damages as Contract Remedy

Fact Situation #1. John is interested in renting an apartment from Mary, but he wants his wife to take a look at it first. He's worried, though, that someone else will rent the place before he can get back with his wife. John and Mary agree that John will pay Mary $200 to hold the apartment for him, and not rent it to anyone else, for three days. John does not return with his wife and on the fourth day Mary rents the apartment to someone else. John sues to get his $200 back. What do you do?

_____

_____

_____

Fact Situation #2. John is interested in renting an apartment from Mary, but he wants his wife to take a look at it first. He's worried, though, that someone else will rent the place before he can get back with his wife. John tells Mary he wants to go ahead with the deal, and promises to return tomorrow with his wife to sign the written lease. Mary agrees to rent the apartment to John, and tells him that she requires a non-refundable $200 deposit, which will be credited against his first month's rent when John and his wife return. John's wife hates the place, and so the deal falls through. John sues to get his $200 back. How is this different from Fact Situation #1?

_____

_____

_____

Liquidated damages: "a sum which a party to a contract agrees to pay or deposit which he agrees to forfeit if he breaks some promise . . . arrived at by a good-faith effort to estimate in advance the actual damage which would probably ensue from the breach."

Penalty: "a sum which a party similarly agrees to pay or forfeit, . . . but which is fixed, not as a pre-estimate or probable actual damages, but as a punishment, the threat of which is designed to prevent the breach."

McCormick, *Damages* §146 (1935)

A liquidated damages provision is enforceable under North Carolina law when:

1. damages are speculative or difficult to ascertain, and
2. the amount stipulated is a reasonable estimate of probable damages, OR
   the amount stipulated is reasonably proportionate to the damages actually caused by the breach.

The party challenging the validity of the provision has the burden of demonstrating that it does not satisfy the requirements for enforceability.

Big Law: The SE Judgment Form, Part 1

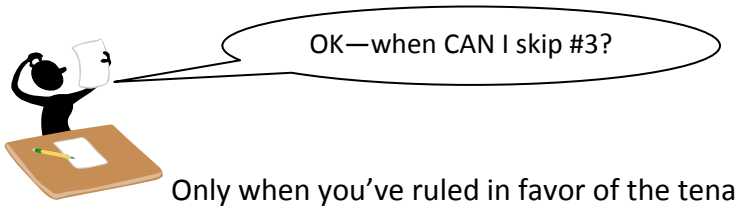
This post is the first in a series responding to questions that sometimes come up about the judgment form in actions for summary ejectment. Today, I'm focusing on #3 under FINDINGS (which I'm going to call "#3" for the rest of this post). [1] It looks like this:

3. ☐ a. there is no dispute as to the amount of rent in arrears, and the amount is $ _____ .
   ☐ b. there is an actual dispute as to the amount of rent in arrears. The defendant(s) claims the amount of rent in arrears is $ _____, and this amount is the undisputed amount of rent in arrears.

Confusion Worse Confounded

Question:	What does #3 have to do with the amount of rent I award?
Answer:	Nothing at all.
Response:	Well, THAT certainly clears things up. . . .

It's important to understand that what you write on the form for #3 is unrelated to the amount of back rent the plaintiff wants or the magistrate awards; these amounts may be the same, or they may be completely different. Because #3 is not actually part of what the court is ordering, some magistrates routinely ignore it as unnecessary surplusage. But that's a mistake. You should fill out #3 in the "regular" case in which the plaintiff seeks possession and a money judgment and you find in plaintiff's favor. And you should also fill out #3 in when plaintiff wins possession in a case served by posting. What if the landlord asks for back rent and possession, and you ruled against him on his claim for money, awarding possession only? Fill out #3. What if the plaintiff isn't even asking for money damages? Fill out #3.



Only when you've ruled in favor of the tenant. As we shall see, when there's no possibility of an appeal by the tenant, #3 is unnecessary surplusage, and you can cruise right on by.

[1] Don't you love the law? Only lawyers could come up with a form that says there's a dispute about the amount followed by a blank labeled "undisputed amount"!

Why It's Important:

The clerk is first on the list of people you'll help by filling out #3, because this information is vital to the performance of the clerk's responsibilities. It's a good idea for you to understand why this is true, so you can do <u>your</u> job of providing citizens with accurate information about small claims procedure.

Citizen-Defendant:	*Do I have to get out right away?*
Mighty Magistrate:	*You have 10 days to decide whether you want to appeal my decision for another trial, next time in district court. After 10 days, the plaintiff has the right to have the sheriff put you out.*
Citizen-Defendant:	*If I appeal, do I still have to get out after 10 days?*
Mighty Magistrate:	*Not necessarily. There's a procedure for "staying"—delaying—the judgment and you can see the clerk for details if you want to do that. Usually, the procedure requires that you* ***pay the clerk the amount of rent you both agree is due . . . .***

There it is: "undisputed rent" is <u>the amount that the landlord claims is due and the tenant does not contest.</u> It is important because this is the amount, for starters, that the tenant must pay in order to remain on the rental property while the appeal is pending. The tenant also must pay future rent, as it comes due, into the clerk's office while the case is on appeal. Requiring the tenant to make these payments is an effort to minimize the harm to the landlord caused by the tenant remaining on the property while the parties wait for the district court trial.

But the law does not require the tenant to come up with just any amount the landlord demands, regardless of how unreasonable it might be. G.S. 42-34(b) directs a magistrate to determine the amount of undisputed rent due. For example, a tenant claiming payment to the landlord, or seeking rent abatement due to violation of the Residential Rental Agreements Act, will be required to pay only that amount s/he agrees is owed in order to stay the judgment (in addition to paying rent as it comes due, of course). The amount actually due will be determined at the de novo trial in district court, and the clerk will disburse the funds being held as directed by the district court judge. If the funds held by the clerk are insufficient, the landlord will of course have the usual option of seeking to execute on his judgment for the balance due.

Determining how to fill out FINDING #3 is usually pretty simple. Most of the questions that come up involve cases in which the defendant, for one reason or another, has not been heard from at all. The General Assembly anticipated that problem, making it clear that an amount becomes "disputed" only when a tenant appears at trial to dispute it. You can test your understanding by considering the following four scenarios. In each case, ask yourself whether you would check Box 3(a), 3(b), or no box at all, as well as the amount you'd write in the blank on this part of the judgment form.

Scenario 1: Larry Landlord files an action for possession of commercial property. He contends that Tammy Tenant Inc. owes $40,000 in back rent, but obviously Larry is asking for only possession in your court. He'll file a Superior Court action for the money. Tammy Tenant Inc. contends that a proper interpretation of the lease reveals that the company owes only $20,000.

☐ 3(a) $_____ ☐3(b) $_____ ___ No box at all.

Scenario 2: Larry Landlord files an action for possession of commercial property. He contends that Tammy Tenant Inc. owes $40,000 in back rent, but Larry is in small claims court seeking possession only. Tammy Tenant Inc. was served, but does not appear at trial.

☐ 3(a) $_____ ☐3(b) $_____ ___ No box at all.

Scenario 3: Luke Landlord files a summary ejectment action seeking possession, back rent of $4,000, and $1,000 damage to property. Tonya Tenant appears and denies that she owes Luke any money at all. You believe Luke's evidence, and rule in his favor.

☐ 3(a) $_____ ☐3(b) $_____ ___ No box at all.

Scenario 4: Luke Landlord files a summary ejectment action seeking possession, back rent of $4,000, and $1,000 damage to property. Service is by posting, and Tonya Tenant does not appear at trial.

☐ 3(a) $_____ ☐3(b) $_____ ___ No box at all.

(See Answers, last page.)

Potential Problem: When a plaintiff is seeking only possession of rental property, plaintiff's testimony sometimes does not include information about the amount of rent in arrears. After all, that is not an issue in the case, and so a plaintiff might understandably omit that information. Absent such testimony, how can a magistrate complete #3? The statute provides two acceptable answers. First, the magistrate can simply ask the plaintiff—and the defendant, if the defendant is present—what rent, if any, is in arrears. Secondly, the law permits a magistrate to rely on allegations made in the complaint (assuming the defendant does not appear and dispute that amount). In either event, it is important to remember that the magistrate is not making a judicial determination of the amount actually owed by the defendant, but is instead merely recording the parties' contentions about the amount.

Back to our small claims case:

Citizen-Defendant: *If I appeal, do I still have to get out after 10 days?*

Mighty Magistrate: *Not necessarily. There's a procedure for "staying"—delaying—the judgment and you can see the clerk for details if you want to do that. Usually, the procedure requires that you pay the clerk the amount of rent you both agree is due . . . .*

Citizen-Defendant: *But I owe $4,000! I can't come up with all of that money right away. I don't HAVE any money—if I did, I would pay my rent!*

Mighty Magistrate: *If you are indigent, you are not required to pay all of the rent in arrears in order to remain on the property while the appeal is pending. You will be required to pay rent into the clerk's office each month as it comes due, however, and you may be required to make a payment for the rent for the rest of this month. If you decide to appeal and want to remain on the property until your appeal is decided, you should talk with the clerk about whether you qualify as an indigent for the purpose of the bond required to stay the judgment of this court.*

A Little Something Extra:

I'm going to close with a different answer to the tenant's question. This answer combines a variety of responses to the tenant's indication that she might be indigent. It might be interesting to ask yourself whether you've ever said any of these things—or all of these things! While I respectfully argue that these comments should be avoided, that's just my opinion, and there are many magistrates who take a contrary position. What's your opinion? I'll include responses—without identifying information—in the next post.

Citizen-Defendant: *But I owe $4,000! I can't come up with all of that money right away. I don't HAVE any money—if I did, I would pay my rent!*

Mighty Magistrate: *Well, if you admit you owe the rent, what are you appealing for? If you're just appealing so that you can stay on the property, you're not supposed to do that anyway. You expect Mr. Landlord here to just let you live there rent-free? He has to make a living too, you know. If you can come up with what you owe, that's one thing, but if you can't pay the bond to stay while you appeal, you'd be better off just going ahead and moving out. If you need more time, maybe Mr. Landlord will work with you here—I don't know. Otherwise, you're going to have to either come up with what you owe, or move.*

Here's my argument for why you should resist the impulse to say something like this, however tempting it may be: Your most important responsibility is to offer citizens a *neutral* and *detached* forum for resolving their disputes. Even though the magistrate has entered judgment and the case is over, a magistrate who abandons the appearance of neutrality at this point and begins to advocate for the landlord leaves everyone in the courtroom with the impression that s/he wasn't really neutral to begin with.

A second argument relates to the important and complex topic of how to respond appropriately to questions from litigants about procedure—including how to appeal. Because that topic could easily be the subject of a Big Law post in its own right, I'm going to save it for another day. Let me just state my opinion, though, that it is improper to respond to questions from either party with non-responsive statements amounting to lecturing about what the magistrate believes is proper or improper behavior. (In other words, a party who asks how to appeal should not receive an answer containing the words "pond scum." ☺) That's my argument. Let me know what you think.

I hope this issue of Big Law is helpful to you in correctly completing FINDINGS #3 on the Summary Ejectment Judgment Form, and in responding appropriately to defendants who ask for information about the procedure. In the next issue, we'll continue our discussion of some of the challenging portions of this judgment form. If you have questions or comments, either about this post or in anticipation of the next, please feel free to send them to me—they are enthusiastically welcomed!

(Answers to Scenarios)

Scenario 1: Larry Landlord files an action for possession of commercial property. He contends that Tammy Tenant Inc. owes $40,000 in back rent, but obviously Larry is asking for only possession in your court. He'll file a Superior Court action for the money. Tammy Tenant Inc. contends that a proper interpretation of the lease reveals that the company owes only $20,000.

☐ 3(a) $_____ ☑3(b) $20,000 ___ No box at all.

Scenario 2: Larry Landlord files an action for possession of commercial property. He contends that Tammy Tenant Inc. owes $40,000 in back rent, but Larry is in small claims court seeking possession only. Tammy Tenant Inc. was served, but does not appear at trial.

☑ 3(a) $40,000 ☐3(b) $_____ ___ No box at all.

Scenario 3: Luke Landlord files a summary ejectment action seeking possession, back rent of $4,000, and $1,000 damage to property. Tonya Tenant appears and denies that she owes Luke any money at all. You believe Luke's evidence.

☐ 3(a) $_____ ☑3(b) $0 ___ No box at all.

Scenario 4: Luke Landlord files a summary ejectment action seeking possession, back rent of $4,000, and $1,000 damage to property. Service is by posting, and Tonya Tenant does not appear at trial.

☑ 3(a) $4,000 ☐3(b) $_____ ___ No box at all.

Summary Ejectment for Criminal Activity

Step 1: What are the grounds?

--Breach of a lease condition (involving criminal activity), or

--G.S. Ch. 42, Article 7: Expedited Eviction of Drug Traffickers and Other Criminals

What the rules are depends on what the grounds are.

Breach of a lease condition:

--Check for forfeiture clause.

Public housing cases will always have written lease with forfeiture clause.

Example:

The Landlord may terminate this lease for. . .

(1) Drug-related criminal activity engaged in, on, or near the premises, by any tenant, household member, or guest, and any such activity engaged in or on the premises by any other person under the tenant's control; . . .

2) Criminal activity by a tenant, any member of the tenant's household, a guest or another person under the tenant's control

--that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents, or -that threatens the health. . . by persons residing in the immediate vicinity of the premises.

Questions to ask:

1. Who? Tenant is clear, and so is household member. A guest is defined by HUD as "a person temporarily staying in the unit with the consent of a tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant." A "person under the tenant's control," on the other hand, is defined as "a person, although

not staying as a guest . . . in the unit, [who] was at the time of the activity in question on the premises because of an invitation from the tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant."
Considerable litigation has focused on what it means to be "under the tenant's control." Consider whether person was on premises as result of invitation, or did she "just drop by"? Under the "One Strike" policy endorsed by HUD, a tenant is strictly liable for a person's conduct while on the premises, if they are there with consent, even if the tenant is not aware of the specifics of the conduct, or could not have reasonably foreseen the conduct.
"Innocent tenant" situation was addressed in cases involving public housing authorities by HUD v. Rucker, 535 U.S. 125 (2002), holding that PHA can elect to evict even if tenant was without fault (overruling a number of cases holding that PHA must demonstrate fault on part of tenant in order to deprive tenant of property interest in leasehold).
Note: Rucker upheld only the PHA's **right** to elect eviction. Immediately after the case was handed down, the Secretary of HUD sent the following letter to all PHA:

"I would like to urge you, as public housing administrators, to be guided by compassion and common sense in responding to cases involving the use of illegal drugs. Consider the seriousness of the offense and how it might impact other family members. Eviction should be the last option explored, after all others have been exhausted."

Note: Rucker applied to public housing authority cases. Whether it also applies to cases brought under Section 8 or other federally-supported housing has been debated, and the answer is not clear. No North Carolina law specifically addresses the issue.

2. What?

In the lease provision quoted above, there are several important things to notice about what activity may result in termination.

HUD's definition of "drug-related criminal activity" is use or possession with intent to sell, distribute or use". Some courts in other states have interpreted this language as excluding simple possession, but there is significant disagreement within the legal community about which interpretation is correct.

The impetus for including this lease provision in public housing leases was concern about those communities becoming overrun with drug traffickers, and leases usually contain several provisions addressing the issue of substance abuse by tenants. The inclusion of "other criminal activity" expresses a more limited concern, and it is accordingly more limited. Other criminal activity is ground for eviction only if the activity threatens the health, safety, or right to peaceful enjoyment of other tenants or neighbors. This wording indicates that the landlord must demonstrate more than criminal behavior—that there

must be in addition some reasonable basis for concluding that the activity itself threatens protected others in one of the specific ways.

The law is clear that a conviction is not required, nor is it even necessary that the person in question be charged. The court's determination of whether the lease provision has been breached is independent of the judicial system's criminal process. If a particular behavior HAS resulted in a conviction, that finding that the person engaged in that behavior is binding on the small claims magistrate. On the other hand, if a person has been acquitted, the magistrate may still find that the activity occurred, due to the lesser burden of proof applicable in civil court.

Some leases have specific provisions concerning "violent" criminal behavior, and there may not be the same requirement that such behavior affect the health, safety, or peaceful enjoyment of the premises. The magistrate must carefully read the specific language to ascertain whether a breach of the lease occurred.

Sometimes a question is raised about whether unlawful behavior is "criminal", either because the behavior in question is an infraction under state law, or because the behavior results in a juvenile proceeding (which is technically distinct from a "criminal" prosecution). Because there is no law deciding this question, a magistrate is left to a careful consideration of the language of the lease and the behavior in question, in light of the underlying policies for de-criminalizing certain behaviors and favoring increased safety in federally-subsidized housing.

3. Where? One of the issues present in many cases involves where the activity occurred. In the above lease provision, note that a different rule applies depending on the status of the wrongdoer: drug-related criminal behavior may occur in, on, <u>or near</u> the premises if the person involved is a tenant, household member, or guest, but must occur in or on the premises if the person is a "other person under the tenant's control." Other lease provisions may contain language such as "on or off" the premises, applicable to certain types of activity. A determination of whether a lease condition is breached will require consideration not only of WHAT the behavior was, but also WHERE it occurred.

   The location of the activity may be important in two other ways. First, behavior that happens away from the rental property may be much less likely to affect the health, safety, and right to peaceful enjoyment of protected persons. Second, as the specific language of the lease provision above indicates, the question of whether an invitee is "under the tenant's control" becomes much more difficult to demonstrate when that person is away from the rental premises.

4. When? Sometimes the timing of the activity is an issue that needs to be considered. Generally, criminal behavior occurring prior to the tenancy will not satisfy the requirement of "threatening the health, etc." In some cases, however, a magistrate might

find that prior criminal behavior DOES support a finding that the health and safety of the other residents and neighbors are threatened. One example might be the case of a chronic sex offender. Often, the lease will contain specific provisions that may also apply, addressing chronic substance abuse, failure to disclose relevant information in the rental application, or violent behavior.

If the magistrate determines that the lease contains a forfeiture clause prohibiting certain behavior, and that that lease condition has been violated, the next inquiry is whether the landlord followed appropriate procedure in terminating the lease. How will the magistrate know what appropriate procedure is?

First, the lease itself will often set out the procedure for terminating a lease. One lease used by HUD-assisted landlords says, for example:

The landlord's termination notice shall be accomplished by (1) sending a letter by first class mail, properly stamped and addressed, to the tenant at his/her address at the project, with a proper return address, and (2) serving a copy of said notice on any adult person answering the door at the leased dwelling unit, or if not adult responds, by placing the notice under or through the door, if possible, or else by affixing the notice to the door. Service shall not be deemed effective until both notices provided for herein have been accomplished

This lease contains other provisions concerning the content of the notice of termination, including a requirement that the tenant be advised of his right to meet with the landlord to discuss the proposed termination upon request during the ten days following the notice. Whatever the lease requires, in terms of procedural protections for tenants threatened with eviction, the landlord must provide in order to satisfy the requirements for obtaining a judgment awarding possession.

The second source of information for the magistrate concerning required procedure are HUD regulations specifying the procedure for termination. While these requirements are often incorporated into the lease, this is not always the case. If an attorney for the tenant attempts to defend on the grounds that proper HUD procedure was not followed, the magistrate should ask to be supplied with a copy of the relevant regulations and should give the landlord an opportunity to respond.

If a landlord successfully demonstrates that a breach of the lease condition resulting in forfeiture has occurred, and that proper procedure has been followed in exercising that right of forfeiture, there are two significant additional considerations for the magistrate before deciding on a judgment.

First, in 2005, Congress passed the Violence Against Women Act (42 USC 1437d), which responded to the troubling situation created when an act of domestic violence is perpetrated against a public housing tenant on the premises. All too often, this criminal activity resulted in

eviction of the tenant/victim, leaving other potential victims forced to choose between submission to domestic violence or eviction from low income housing. The federal law provides that individuals cannot be evicted for domestic violence perpetrated by others unless the landlord demonstrates that continued tenancy would pose "an actual and imminent threat" to other persons on the property. Landlords have the option of a "bifurcated" lease (similar to NC's partial eviction), authorizing landlords to evict only the perpetrator. Landlords may require certain specified documentation of the tenant's status as a domestic violence victim.

The second qualification restricting a landlord's right to evict based on breach of a lease condition was established in a recent Court of Appeals case, Lincoln Terrace Associates v. Kelly, 179 N.C. App. 621 (2006). In Lincoln Terrace, a tenant receiving federally assisted housing was threatened with eviction for criminal behavior by one family member, who damaged property, assaulted another tenant, and disturbed and harassed other tenants, all in violation of a specific lease provision. Faced with these facts, the Court of Appeals said:

In order to evict a tenant in North Carolina, a landlord must prove: (1) That it distinctly reserved in the lease a right to declare a forfeiture for the alleged act or event; (2) that there is clear proof of the happening of an act or event for which the landlord reserved the right to declare a forfeiture; (3) that the landlord promptly exercised its right to declare a forfeiture; and (4) that the result of enforcing the forfeiture is no unconscionable.

The Court also said:

When termination of a lease depends upon notice, the notice must be given in strict compliance with the contract as to both time and contents.

In this case, the property manager testified to having given proper notice, but failed to introduce a copy of the actual notice in support of the landlord's claim. The Court of Appeals found that the landlord was not entitled to a judgment on these facts.

Waiver as a defense?

Most public housing leases provide that a landlord does not waive the right to seek ejectment based on criminal activity by continuing to accept rent. G.S. 157-29(d) goes further and specifies that in North Carolina, whether or not the lease is silent about waiver, no waiver occurs unless the housing authority fails to notify the tenant within 120 days that a violation has occurred or to take steps to seek a remedy for the violation.

G.S. Ch. 42, Art. 7: Expedited Eviction of Drug Traffickers and Other Criminals

North Carolina has its own version of the federal law we've been discussing, set out in G.S. 42-59 through -76 (sometimes referred to Article 7 evictions). Because HUD requires leases to contain a forfeiture provision applicable to criminal activity, landlords participating in HUD housing will generally choose to proceed under breach of a lease condition—federal law is generally more favorable to them. Consequently, Article 7 is more typically relied upon by private landlords --who do not have the protection of a relevant forfeiture clause --confronted with a tenant's criminal activity. While very similar to federal law, Article 7 contains some important differences.

Complete eviction.

Grounds:

The landlord must prove one of the following five things to evict the tenant (which includes everyone taking under the tenant):

(1) Criminal activity occurred on or within the individual rental unit leased to the tenant. Criminal activity is:
   a. conduct that would constitute a drug violation under G.S. 90-95 (except possession of a controlled substance);
   b. any activity that would constitute conspiracy to violate a drug provision;
   c. or any other criminal activity that threatens the health, safety, or right of peaceful enjoyment of premises by other residents or employees of landlord.

   "Individual rental unit" means an apartment or individual dwelling or accommodation that is leased to a particular tenant.

(2) The individual rental unit was used in any way in furtherance of or to promote criminal activity.

(3) The tenant, any member of the tenant's household, or any guest of the tenant engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises.
   a. "Entire premises" means a house, building, mobile home or apartment that is leased and the entire building or complex of which it is a part, including the streets, sidewalks, and common areas.

(4) The tenant gave permission to or invited a person to return to or reenter the property after that person was removed and barred from the entire premises.
   a. The person could have been barred either by a proceeding under Article 7 of General Statutes Chapter 42 or by reasonable rules of a publicly-assisted landlord.

(5) The tenant failed to notify a law enforcement officer or the landlord immediately upon learning that a person who was removed and barred from the tenant's individual unit had returned to the tenant's rental unit.

Affirmative defense. The landlord need not prove that the tenant was at fault. However, the tenant may raise and prove such a claim as an affirmative defense to the eviction.

If the landlord proves one of the five grounds for eviction, the tenant may avoid complete eviction by proving that

he or she was not involved in the criminal activity and

did not know or have reason to know that criminal activity was taking place or would likely occur on or within the individual rental unit, that the individual rental unit was used in any way in furtherance of or to promote criminal activity, or that any member of the tenant's household or any guest engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises; or

had done everything that reasonably could have been expected under the circumstances to prevent the commission of criminal activity, such as requesting the landlord to remove the offending household member's name from the lease, reporting prior criminal activity to appropriate law enforcement authorities, seeking assistance from social service or counseling agencies, denying permission, if feasible, for the offending household member to reside in the unit, or seeking assistance from church or religious organizations.

G.S. 42-64 provides that if tenant establishes affirmative defense court shall refrain from ordering the complete eviction of tenant.

A second time is harder: A tenant may not successfully use one of these affirmative defenses if the eviction is a second or subsequent proceeding brought against the tenant for criminal activity unless the tenant can prove by clear and convincing evidence that no reasonable person could have foreseen the occurrence of the subsequent criminal activity or that the tenant had done everything reasonably expected under the circumstances to prevent the commission of the second instance of criminal activity.

Relief on grounds of injustice. Even if the landlord has proved grounds for eviction, a magistrate may choose not to evict the tenant if, taking into account the circumstances of the criminal activity and the condition of the tenant, the magistrate finds, by clear, cogent, and convincing evidence, that immediate eviction or removal would be a serious injustice, the prevention of which overrides the need to protect the rights, safety, and health of the other tenants and residents of the leased residential premises.

It is not a defense to an eviction that the criminal activity was an isolated incident or otherwise had not reoccurred or that the person who actually engaged in the criminal activity no longer resides in the tenant's individual unit, but such evidence can be considered if offered to support affirmative defenses or as grounds for the magistrate to choose not to evict the tenant.

Connection between eviction and criminal charges. Just as in the case of breach of lease conditions, discussed earlier, a landlord may pursue an eviction for criminal activity even though no criminal charge has been brought. If criminal charges have been brought, the eviction may go forward before the criminal proceeding is concluded or if the defendant was acquitted or the case dismissed. If a criminal prosecution involving the criminal activity results in a final conviction or adjudication of delinquency, conviction or adjudication is conclusive proof in the eviction proceeding that the criminal activity took place.

Defense of waiver of breach does not apply. G.S.. 42-73 specifically provides that landlord is "entitled to collect rent due and owing with knowledge of any illegal acts that constitute criminal activity without such collection constituting waiver of the alleged defaults."

Conditional eviction:

The magistrate may issue against a tenant when the landlord proves that the criminal activity was committed by someone other than the tenant and the magistrate denies eviction of the tenant or the magistrate finds that a member of the tenant's household or the tenant's guest has engaged in criminal activity but that person was not named as a party in the action.

A conditional eviction order does not immediately evict the tenant, but rather provides that as an express condition of the tenancy, the tenant may not give permission to or invite the barred person to return to or reenter any portion of the entire premises. The tenant must acknowledge in writing that he or she understands the terms of the court order and that failure to comply with the court's order will result in the mandatory termination of the tenancy.

A landlord, who believes that a tenant has violated a conditional eviction order, may file a motion in the cause in the original eviction case. That motion shall be heard on an expedited basis and within fifteen days of service of the motion.

At the hearing, the magistrate shall order the immediate eviction of the tenant if the magistrate finds that:

(1) the tenant has given permission to or invited any person removed or barred from the premises to return to or reenter any portion of the entire premises;
(2) the tenant has failed to notify appropriate law enforcement authorities or the landlord immediately upon learning that any person who had been removed and barred has returned to or reentered the tenant's individual rental unit;
(3) or the tenant has otherwise knowingly violated an express term or condition of any order issued by the court under this statute.

Partial eviction.

Magistrate may order removal from a tenant's premises of a person other than the tenant (and not disturb the tenant) when the magistrate finds that person has engaged in criminal activity on or in the immediate vicinity of some portion of the entire premises.

For the magistrate to have jurisdiction to remove a person other than the tenant (and not the tenant), the person to be removed must have been made a party to the action. If name of person is unknown, complaint may name defendant as "John (or Jane) Doe", stating that to be a fictitious name and adding a description to identify him or her.

Any person removed also is barred from returning to or reentering any portion of the entire premises.

Fees in Summary Ejectment Actions

For Leases Entered Into On or After Oct. 1, 2009

Late Fees

In residential leases, parties may agree to late fee for payments five or more days late. When rent is paid monthly, the maximum fee is $15 or 5%, whichever is greater. In case of weekly rent, maximum is $4 or 5%, whichever is greater.

Complaint Filing Fee

Authorized for written leases not to exceed $15 or 5%, whichever is greater, only if:
---tenant was in default
---LL filed complaint for SE
---tenant cured the default
---LL dismissed the claim.
Fee may be charged as part of amount required to cure default.

Court-Appearance Fee

Authorized for written leases, equal to 10% of monthly rent if
---tenant was in default
---LL won a SE action
---neither party appealed.

Second Trial Fee

Authorized for written leases in event of new trial following appeal from small claims judgment. Not to exceed 12% of monthly rent. Available if
---tenant was in default
---LL prevailed

Additional Rules

LL can charge only one of the last three fees, and that fee may not be deducted from subsequent rent payment or asserted as ground for default in subsequent SE action. Prohibits LL from attempting to charge a larger fee and provides lease provision in violation of law is void.

DGL/SOG/June 2012

Selected Issues and Recent Developments in Landlord-Tenant Law

Selected Issues

Administrative fees: In 2009 the General Assembly amended G.S. 42-46 to establish a procedure allowing landlords to assess one of three fees for the expense and inconvenience involved when a landlord is forced to resort to the legal system to enforce his or her contractual rights against a tenant. The amount of the fee increases based on how deeply the case penetrates into the civil justice system before finally terminating. The law provides that a landlord is permitted to charge only one of the three fees, and the case must have come to a definite end before the appropriate fee can be identified and thus assessed. This requirement that the case must have completely terminated before a fee can be assessed has proven to be confusing to many landlords, who sometimes express dissatisfaction with a magistrate's refusal to award an administrative fee at a premature stage of the proceedings.

The Three Situations

In the first situation, a landlord files a complaint for summary ejectment but, upon the tenant's belated compliance with the lease, takes a voluntary dismissal before judgment is entered. The fee connected to this circumstance, called a complaint-filing fee, is limited to $15 or 5% of the monthly rent payment, whichever is greater. Because the case ends prior to entry of judgment of any sort, a magistrate never has an opportunity to award this "complaint-filing fee," subject to the single exception discussed below.

In the second situation an action for summary ejectment actually goes to trial and resolves in a judgment favorable to the landlord. The applicable "court-appearance fee" is limited to 10% of the monthly rent and is authorized only if neither party appeals the judgment of the magistrate. The period for giving notice of appeal ends 10 days after judgment is entered, and thus a magistrate has no way of knowing at the time judgment is entered whether the landlord will be entitled to the court appearance fee or, instead, the larger amount appropriate in the third situation, discussed below.

In the third situation, the original small claims case is ultimately resolved in favor of the landlord by a district court judge following an appeal for trial de novo. The fee authorized in this event, not surprisingly, is termed a "Second Trial Fee and cannot exceed 12% of the monthly rent. In this situation the district court judge is able to include the fee in the judgment because the case has come to an end.

Despite the fact that magistrates are rarely authorized by law to award one of these fees in a summary ejectment judgment, there have been a number of complaints across the state from landlords about a magistrate's refusal to do so. It is important that small claims magistrates are able to recognize those circumstances in which an award of an administrative fee is appropriate. That situation arises when the fee has been incurred in a previous action. For example, a landlord who brings an action ("Action #1") and then takes

a voluntary dismissal when the tenant comes up with the rent is entitled to charge the tenant a "complaint-filing fee," assuming the written lease authorizes such a fee. Imagine that the tenant refuses to pay the fee and furthermore defaults on the rent again six months later. The landlord again files for summary ejectment ("Action #2"), seeking unpaid rent and the unpaid complaint-filing fee associated with Action #1. In this situation the magistrate can award the fee related to Action #1, and could for the same reason award a court-appearance fee if Action #1 had been decided in favor of the landlord with no appeal. Action #1 has, in either situation, finally resolved and the magistrate is able to identify the appropriate fee. Only in such a case will a magistrate have authority to award administrative fees pursuant to GS 42-46.

Continuances: In 2013

Recent Developments

Security deposits: GS 42-55 establishes "four distinct remedies" for violation of the Security Deposit Act:

> "(1) where a landlord 'fails to account for and refund the balance of the tenant's security deposit as required,' tenants can bring a civil action to receive the required accounting and appropriate refunds due them ('the appropriate refund remedy');
>
> (2) where a landlord 'willfully fails to comply with the deposit, bond, or notice requirements of this Article,' a tenant can seek refund of the entire security deposit, even if the landlord would otherwise be entitled to retain some portion thereof ('the full refund remedy');
>
> (3) where a tenant has incurred damages from the landlord's failure to comply with the Act, the tenant may sue to recover those damages ('the damages remedy'); and
>
> (4) where a landlord's noncompliance is willful, the tenant can seek attorney's fees ('the attorney's fees remedy").
>
> While the damages remedy and the attorney's fees remedy could be sought in conjunction with each other or with the other remedies, the appropriate refund remedy and the full refund remedy are mutually exclusive. The first allows only for the required accounting and proper refund of the security deposit, while the second entitles a tenant to a total refund, even if the tenant's actions would otherwise subject his deposit to partial or complete forfeit."

Neil v. Kuester Real Estate Services, Inc., ___ N.C. App. ___ (filed 11/4/2014).

Essential elements for breach of a lease condition:

> "[A] tenant may be summarily ejected from a particular premises when the tenant has 'done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.' In order to evict a tenant in North Carolina, a landlord must prove: (1) That it distinctly reserved in the lease a right to declare a forfeiture for the alleged act or event; (2) that there is clear proof of the happening of an act or event for which the landlord reserved the right to declare a forfeiture; (3) that the landlord promptly exercised its right to declare a forfeiture, and (4) that the result of enforcing the forfeiture is not unconscionable."

"Unconscionable" means "excessive, unreasonable, or shockingly unfair or unjust."

This result is not inconsistent with federal law, including HUD v. Rucker, 535 U.S. 125 (2002). The Rucker case "merely authorizes the eviction of an 'innocent' tenant while the fact that the tenant is unaware of the criminal activity being engaged in in his or her apartment is only one aspect of a broader unconscionability analysis that would not, in each and every instance, preclude the eviction of an 'innocent' tenant."

Facts relied upon by Court:

- T was unaware that babysitter was involved in drug-related criminal activity in T's apartment;
- Police did not charge T with crime despite fact that drugs were found on her premises;
- T consented to search of her home;
- T has never been accused of criminal conduct while residing on the rental premises;
- T has never been accused of violating any provision of the lease;
- T has never been the subject of complaints by the neighbors;
- T has had no further contact with babysitter;
- T lost her job after babysitter was arrested, causing her to have difficulty finding reliable child care;
- T has three small children who live with her and has no alternative housing available.

Eastern Carolina Regional Housing Authority v. Lofton, ___ N.C. App. ___ (filed 12/16/2014)

Liability for rent as between co-tenants: T_1 & T_2 entered into one-year lease agreement with LL, with agreement between themselves that each person would pay half the rent. After 4 months T_1 moved out, and T_2 paid entire amount due under lease for remainder of year. At the end of the year, T_2 brought this lawsuit seeking to recover amount she paid on T_1's behalf. T_1 argued on appeal that T_2 had a duty to mitigate damages by attempting to renegotiate lease with LL to obtain rent reduction. HELD: T_1 waived this argument by failing to raise it in the trial court.

Trial court's judgment in favor of T_2 was supported by the evidence. Provision in judgment ordering T_1 to pay the amount awarded within 60 days was, however,

unauthorized. A trial court has no authority to alter by order the statutory provisions regulating enforcement of a money judgment.

Clark v. Bichsel, ___ N.C. App. ___, 767 S.E.2d 145 (filed 1/6/2015).

Big Law: Summary Ejectment and Mobile Homes

This week I'm going to share some questions I've received from magistrates, involving mobile homes. I'll set out the facts for all three cases first, and then discuss how each might be resolved. For each case, ask yourself what you would do –or what additional information you might need—and then go on and read the discussion. Because I'm using these fact situations as a springboard to discuss various legal principles related to summary ejectment, the discussion for each is longer than would be necessary to decide the particular case. So, if you're a cut-to-the-chase kind of judge, you can flip to the end of this document and simply read the principles listed under Summing Up.
Thanks, as always, to the magistrates who wrote in with these questions!

A Tale of Two Counties (And Too Many Parties!)

A mobile home, owned by Owen, is located on land owned by Larry Landlord. Larry lives in your county, and the mobile home is located in your county, but Owen lives in another county. Owen rents his mobile home to Tammy Tenant. So, Tammy pays rent to Owen for the mobile home, and Owen pays rent to Larry, for the mobile home lot. In February, Tammy made her usual payment to Owen, but Owen just lost his job, so he didn't make his usual payment to Larry. When Owen defaults, Larry wants to bring a summary ejectment action. Can Larry bring an action for summary ejectment? Where, and against whom?

A Piece of Junk

A man named Sam came in today asking for help. About a year ago, Sam agreed to sell a mobile home lot to a man named Bob with the understanding that Bob would pull a brand-new 14x80 mobile home onto the lot. This part of the agreement was not put in writing. Sam just wrote down that he was selling the lot to Bob so that Bob would have something in writing to give to FEMA. Since then, Bob hasn't made any payments to Sam, and instead of a nice new mobile home, Bob has pulled a used "piece of junk" onto the lot. Bob hasn't even hooked the trailer up and is not living in it, but he refuses to move the mobile home.
Could Sam use summary ejectment to recover possession of the lot? How do you answer Sam's question about how he can get this "piece of junk," as he refers to it, off the property?

"I Get Sixty Days!"

Larry Landlord has brought an action for summary ejectment based on failure to pay rent against Tommy Tenant. Larry's evidence shows that Larry rents space in a mobile home park to Tommy. The parties entered into a month-to-month lease, with Tommy responsible for paying $150 on the first of the month. The lease was written, but Larry didn't bring a copy of the lease with him to court. Both parties agree, however, on the essential terms of their agreement. On January 15, 2010, Larry gave Tommy notice that he intended to end the lease on February 28. Tommy saw no reason to pay rent on February 1, since he was being forced out at the end of the month. Larry filed this action on March 1. Tommy argues that he should have received 60 days notice, since it takes quite a long time to make arrangements to move a mobile home. How do you rule?

A Tale of Two Counties . . .

To correctly answer this question, a magistrate must know two legal rules:

Legal Rule #1: **A landlord may bring an action for summary ejectment only against his or her tenant.** This is another way of stating the familiar rule that a landlord-tenant relationship must exist between the parties in an action for summary ejectment. Larry hasn't received rent for the lot, and the only person he can sue is the person who rents the lot from him: Owen. Larry doesn't care who's actually living on the lot, or what Owen's reasons might be for failing to make his lot rent payment on time. For Larry, it's simple: Owen agreed to pay him lot rent, and he hasn't paid.

Legal Rule #2: **An action for summary ejectment must be brought in the county in which the defendant resides.** We've said that Owen is the proper defendant, so Larry must file his action in the county where Owen lives. It makes no difference that the mobile home is actually located in a different county.

You may have noticed that this mechanical application of the rules fails to address an important question: what happens to Tammy? Shouldn't she be a party to this lawsuit? Is she at least entitled to notice that Larry has filed for summary ejectment, so that she could either prepare to leave, or decide to pay the lot rent herself in order to avoid eviction? Is it fair that she be evicted when she's made all rent payments on time and has done nothing wrong? Answers: No, no, and who knows?

Remember that the "rental property" in this case is the lot itself. The mobile home, so far as Larry is concerned, is personal property, just like a tenant's car or washing machine. Consequently, when the deputy goes out to serve the writ of possession, his or her duty is to remove the tenant (Owen) and all those who "take through" the tenant. Usually the people taking through the tenant are members of the tenant's family, but sometimes, as in this case, it's a sublessee--Tammy. The writ also requires the deputy to remove the tenant's property, if the tenant isn't prepared to do so. In this case, then, the deputy will tell Tammy (who "takes through" Owen) that she must leave. The deputy will also remove the mobile home itself, along with all its contents, and place it in storage. In practice, this seldom happens, because the landlord usually opts to have the mobile home padlocked, but left in place. Why do landlords pass up this opportunity to let the deputy worry about removing the mobile home? Because the deputy will remove it only if Larry pays the cost of removal and the first month's storage. The law provides that these costs will be added to court costs in the case, and that Larry is entitled to recover these expenses from Owen. As a practical matter, though, Larry may be doubtful about his ability to do so. Furthermore, Larry may wish to assert a "landlord's lien" under GS Ch. 44A; in this case he may want to hold on to the mobile home in order to sell it. In any event, Tammy, having paid for the right to exclusive possession of the mobile home, will be forced to vacate. In the eyes of the law, Tammy is not a party to the lease agreement between Owen and Larry, and thus she is not a necessary party to the lawsuit, nor is she entitled to notice that a judgment has been entered that will require her to vacate the property.

At first glance, this seems unfair. But remember that the law safeguards the right to freely contract, even when that right is the right to make a bad deal. Tammy either knew or could have discovered before renting the mobile home that Owen did not own the lot. The law assumes that contracting parties ask appropriate questions and make considered decisions before entering into legally binding agreements. The fundamental premise, then, is that Tammy knowingly placed herself in a more vulnerable position in exchange for some benefit—presumably, lower rent.

If you don't find the foregoing observation all that comforting, I think you'll like this one better. Tammy can sue Owen for the damages incurred as a result of his breach of contract with Tammy. By renting the

mobile home to Tammy for one year, Owen implicitly agreed not to do anything that would prevent her from having access to the mobile home. Thus, Owen is likely to be held liable for the damages caused by his failure to do so. (Of course, if Tammy's lease contains a provision saying that Owen is not responsible for paying lot rent, the result would be different.) Tammy might even have an unfair trade practice claim (with the attendant attorney fees and treble damages) against Owen, especially if he accepted rent from Tammy without informing her that the sheriff would be stopping by soon to evict her.

A Piece of Junk . . .

One issue that parties never bring up, but that magistrates nevertheless frequently confront in summary ejectment cases is the issue of whether a landlord-tenant relationship exists between the parties. It helps to think of summary ejectment as a tool developed for a very specific purpose, which may be used ONLY for that purpose: *to provide a mechanism for landlords to quickly regain possession of rental property (provided they have evidence supporting their right to do so), so that they may quickly re-rent property and thus avoid lost rental income.* The key terms in the preceding sentence are *landlords, rental property*, and *rental income*. The law does not allow use of this special tool to remove unwanted relatives, old girlfriends, or buyers who violate their purchase agreements, whether by failing to make payments or, as here, breaching some other provision of the sale contract. The oft-repeated statement that a landlord-tenant relationship is required in these cases is simply another way of saying that **a landlord must have filed the case in order to recover possession of rental property**. In this case, Sam is clearly not a landlord, and the lot is not rental property. Sam has no basis for filing a claim for summary ejectment.

But what about Sam's other question: how can he have the mobile home removed from his property? Many magistrates are asked this question often. It helps to stop and consider what Sam is actually asking. Sam wants advice about how to accomplish three goals: (1) He wants the home removed; (2) he does not want to have to pay to have it removed; and (3) he does not want his removal of the home to result in a lawsuit or a criminal prosecution. Unfortunately, he probably has a fourth goal: Sam doesn't want to have to pay an attorney for advice about how to accomplish the first three goals. What Sam wants—quite understandably—is legal advice about how to accomplish his goals without having to pay for it. Unfortunately, Sam's first three goals are not easily accomplished, even by a competent attorney, and a magistrate should not even consider attempting to advise him. No matter how much you might wish to be helpful to Sam, or how sympathetic you feel toward him, his need in this situation is clearly for legal advice: he's seeking a **recommendation** developed after **applying the precepts of both statutory law and North Carolina appellate case law** to the **particular detailed facts** of this case, accompanied by an **assessment of the risks** associated with each alternative course of action. No doubt, Sam wishes for a clear-cut and easy answer to his dilemma, but no such answer exists, and a magistrate is ill-advised to attempt to come up with one. (I hope it is clear, in light of the above discussion, that telling Sam he can burn down the mobile home is a bad idea.)

"I Get Sixty Days!" . . .

Remember the familiar rule that **in summary ejectment cases the first question that must be answered is "What are the grounds for summary ejectment?"** In this case, with no evidence of criminal activity, there are three possible grounds: (1) *Breach of a lease condition*; (2) *Failure to pay rent*; and (3) *Holding over*. As we've said before, regardless of which block the plaintiff checks on the complaint, or what the plaintiff says in court, summary ejectment is appropriate if plaintiff is entitled to it on <u>any</u> of the three grounds. Let us begin, then, with Ground #1: *Breach of a lease condition*.

The most important thing to remember about *Breach of a lease condition* is that this basis for summary ejectment is contractual—it comes into existence when the parties agree to it in the lease. Regardless of the particular language used, it boils down to one thing: the parties agree that in the event the tenant violates a particular condition of the lease, the landlord has the right to terminate the lease and require the tenant to leave. This is called a *forfeiture clause.* Because it is contractual in nature—in other words, the court is merely enforcing whatever the parties agreed to—the specific terms of the particular lease provision govern. If a certain notice is required by the lease, for example, the landlord must follow that requirement. In this case, the landlord has presented no evidence as to whether the lease contains a forfeiture clause, because he has not included the lease itself as part of his proof. So, what about that? What should a magistrate do when the landlord doesn't have a copy of the lease to show the court?

In North Carolina, a lease may be written or oral, and the terms of an oral lease are of course proven by testimony of the parties. A different rule applies, however, when a lease is written: ***A copy of the written lease must be provided to the court and admitted into evidence.*** This rule, descriptively known as The Best Evidence Rule, simply states that the best evidence of the contents of a written agreement is the agreement itself, and so must be produced by the party seeking to enforce the agreement. Because the Rules of Evidence are typically relaxed in small claims court, many magistrates have traditionally accepted oral testimony in lieu of a written lease in the absence of objection by the tenant. This is a risky practice, however, because a party's testimony about the terms of a lease may be incomplete or inaccurate, whether intentionally or inadvertently. All of us have encountered landlords who use form leases, and tenants who sign them, without actually knowing what the lease says. If you do not presently require landlords to produce a copy of the lease (in District Court, the original document would be required), you should consider changing your practice. Only by examining the lease itself can you be certain that your decision in a case is supported by the lease agreement between the parties.

In the case we're discussing, why would you like to see a copy of the lease? Because the landlord is basing his argument on Ground #2, *Failure to Pay Rent*. This basis for summary ejectment is available, however, only if the lease does NOT contain a forfeiture clause. In plain English, the law is saying that **our first choice is to enforce whatever the parties agreed to in the lease,** so if there's a forfeiture clause in the lease, that's what we go by. ***If and only if* the parties did not agree about what happens if the tenant fails to pay rent, the landlord may seek to recover possession under Ground #2.** In a sense, then, part of what a landlord must prove in order to recover under Ground #2 is that the lease does NOT contain a forfeiture clause.

Aside from his failure to prove the contents of the lease, what do you think about Larry's argument for eviction based on failure to pay rent? The evidence is undisputed that rent was due on February 1, and that Tommy made no payment. Is this enough? No, because Larry hasn't introduced evidence that he made demand and then waited ten days before filing this action. Strike 2 for Larry.

Turning our attention to Ground 3, *Holding over*, we recall that the notice typically required for a month-to-month lease is seven days prior to the end of the rental period. By giving notice on January 15 that he intends to terminate the rental on February 28, Larry was being quite generous by ordinary standards. After all, if the rental property in question had been an apartment, Larry could have terminated the lease on January 31! One and one-half months notice is not sufficient, however, when the rental property is a mobile home, and Tommy is correct in his contention that he is entitled to 60 days notice. Strike 3 for Larry.

We're going to change the facts now to illustrate a frequent error made in connection with the 60-day rule. Imagine that Larry does bring his written lease to court, and low and behold, it contains a forfeiture clause! The lease provides that the landlord has the right to terminate the rental agreement immediately if the tenant is more than 5 days late in paying rent. Larry wins based on Ground #1, *Breach of a lease condition*. "Wait a minute," says Tommy. "This is a mobile home. These things take time. I get sixty days before I have to move." What do you say to Tommy? "WRONG." The sixty-day rule applies only when the basis for summary ejectment is holding over. Tenants are not entitled to sixty days in which to remain on the property rent-free, to engage in criminal activity, or to violate other lease conditions. When a landlord is able to prove a basis for summary ejectment other than holding over, the sixty-day rule does not apply.

Summing Up

As you all know, it's hard for a lawyer to say a simple sentence. We feel compelled to follow any simple statement by saying "but," "unless," "except" or "provided that." There's an exception for every rule. Sometimes, though, it helps just to focus on the rule. So here are the rules—unburdened by exceptions—that will steer you right MOST of the time.

The only person a landlord can sue for summary ejectment is that landlord's tenant.

An action for summary ejectment may be filed only by a landlord seeking to recover possession of *rental property*.

An action for summary ejectment must be brought in the county in which at least one tenant resides.

A judgment for summary ejectment is effective against the tenant/defendant named in the complaint and against all who "take through" that tenant.

A sub-lessee may have a claim for damages against a sub-lessor when the sub-lessor's actions result in the sub-lessee's eviction.

The only words a magistrate should say in response to a question from a property owner about how to remove a mobile home from the owner's property are, "I can't give you advice about that. I suggest that you consult an attorney."

The terms of an oral lease may be proven by testimony of the parties to the lease.

The terms of a written lease may be proven only by the written lease itself.

A magistrate should always check a written lease for a forfeiture clause.

If a lease contains a forfeiture clause, the rights of the parties are governed by whatever the lease says.

Summary ejectment for failure to pay rent is available only if the lease does not contain a forfeiture clause.

Summary ejectment for failure to pay rent requires that a landlord provide evidence that a demand was made for rent, and that the complaint was filed at least 10 days after demand was made.

The law requires the owner of a mobile home lot to provide a tenant having a mobile home on the lot with at least 60 days notice before terminating the lease.

The sixty-day rule used to be a thirty-day rule, but the General Assembly changed the law to allow more time.

The sixty-day rule applies only to summary ejectment actions based on holding over (i.e.," The lease is ended and the tenant's still there.") If ejectment is based on another ground, the sixty-day rule has no application.

Thanks for coming along on this journey through summary ejectment as seen through the window of a mobile home. Three pretty simple questions, three fairly complex legal areas—just another example of Big Law!

Dona Lewandowski
School of Government
3/5/07

Legal Issues Involving Mobile Homes

Summary ejectment from mobile home space:

When summary ejectment is based on holding over,

and the landlord's claim is that he gave the tenant notice that he intended to end the lease of a mobile home space, that notice must be given 60 days before the end of the rental. G.S. 42-14.

Example: Jones rents a space from Smith for his mobile home. Jones pays rent on the first of every month. To end the lease on April 30, Smith must give Jones notice that the lease will end no later than March 1. This is true whether the lease is a week-to-week or month-to-month lease. The special rule is merely a recognition that a tenant needs more time to relocate a mobile home than he does to move his belongings from one house to another.

Note: The 60-day rule does not apply if the eviction is for breach of a lease condition or failure to pay rent. Furthermore, if the lease contains a different provision about how the lease is to be terminated, the terms of the lease control. Finally, the 60-day rule does not apply to the time the tenant has to move out after judgment is entered.

When a landlord intends to convert a mobile home community to another use, 180 days notice is required.

The 60-day rule goes out the window when the owner of a mobile home park decides not to evict a single tenant, but instead to close an entire community of mobile homes. G.S. 42-14.3 deals with the situation in which the owner of a mobile home park (designed for at least five homes) decides to put the land to a different use that will require relocation of the mobile homes. The statute says that the landlord must give owners of the homes at least 180 days notice (not

60) before requiring them to vacate. The statute does not apply if the park is closing due to a governmental order. If the landlord fails to give the required notice, this failure is a defense against any action he may bring seeking possession. The statute provides that the respective rights and obligations of the landlord and tenants under the lease continue during the notice period. Thus if a tenant, upon receiving notice that the park is closing, stops paying rent, the landlord will be able to seek immediate eviction for failure to pay rent, or perhaps breach of a lease condition. The 180-day notice provision limits only the landlord's ability to terminate the lease and then seek ejectment based on holding over.

This statute contains two provisions that are unclear. First, the statute applies only if the landlord intends to convert the land "to another use." If the landlord intends merely to close the park, does this change from being a mobile home park to being land left idle constitute "another use"? No case has discussed the question thus far. Second, the statute does not directly address the question of whether a tenant may sue for damages arising out of a landlord's failure to comply with the notice provision. A North Carolina appellate court may well hold that the statute's statement that this failure may be used as a defense to ejectment, with no mention of the tenant's right to seek damages as well, implies that the statute may be used only defensively, but this remains uncertain.

The tenant is not the owner of the mobile home. When a landlord seeks to evict a tenant from a mobile home lot, questions sometimes arise about the significance of the identity of the owner of the mobile home. As a general rule, it makes little difference, since the law regards the mobile home just like other personal property brought on the lot by the tenant. Nevertheless, the issue may have practical significance.

Possibility #1: The landlord/seller may have sold the mobile home to the tenant pursuant to an installment sales contract and leased him the lot on which it is located. These are two separate agreements, but sometimes they are the subject of one written contract. Regardless of whether there is one contract or two, and no matter what the title of the document is, the analysis is the same: if the landlord/seller seeks summary ejectment, a judgment awarding possession will apply only to the lot, not to the mobile home. This may not be result the landlord/seller hoped for—he may have believed summary ejectment would let him recover both lot and property. In order to do this, however, two actions will be required:

summary ejectment for the lot, and an action to recover property for the mobile home. Finally, note that the usual rules apply to the latter. If the landlord/seller retained a security interest in the mobile home, his remedy is to proceed like any other secured party to recover possession of it. If he did not, his remedy is the same as that of any other unsecured party: he can sue the defaulting buyer for breach of contract, but he has no right to recover possession of the mobile home

Possibility #2: The mobile home is owned by a third party. Sometimes this situation arises when a tenant sells his mobile home to a third party. It may also arise when a tenant leases a mobile home space and then places a mobile home on the lot that is owned by a third party. In either case, the ownership of the mobile home is irrelevant to summary ejectment. In the eyes of the law, this situation is no different than that presented by a tenant who possesses a washing machine owned by his mother-in-law. For summary ejectment purposes, the issues before the magistrate are the same: (1) Is there a landlord-tenant relationship between plaintiff and defendant in reference to the mobile home space; and (2) do grounds for summary ejectment exist?

Possibility #3: The mobile home is owned by the tenant, but a third party has a security interest in it. The analysis in this case is identical to that in Possibility #2. The existence of a security interest is of no significance in determining whether a landlord is entitled to summary ejectment.

Landlord's authority to dispose of mobile home left on rental space. One of the questions magistrates are most frequently asked about relates to what happens after entry of judgment: landlords want to know what to do with mobile homes remaining on their property. Unlike the law discussed above, in which ownership of the mobile home is of little significance to the legal remedy involved, the law governing what happens after judgment is sometimes complex and is very much concerned with who owns the property. This is an area in which magistrates must be extremely careful to distinguish between giving information and giving advice. The appendix to this document contains a summary and discussion of the law in this area, and magistrates may wish to respond to inquiries by providing a copy of this appendix. A landlord who does not comply with the law in disposing of personal property remaining on leased premises risks being held liable under a number of legal theories; he would be well-advised to seek professional legal advice if he is uncertain of how the law applies to his particular situation.

Other issues related to summary ejectment from a mobile home.

Requirement of landlord-tenant relationship. One issue that comes up occasionally concerns the situation in which an alleged landlord seeks summary ejectment of an alleged tenant based on an agreement that is actually not a lease, but rather an installment sales agreement. Because the summary ejectment remedy is fast and inexpensive, sellers of mobile homes sometimes attempt to fashion their installment sales contract in a manner that resembles a lease. They may title it as such, refer to scheduled payments as "rent", or even insert a clause indicating the parties' intention that the document be considered a lease. None of these "cosmetic" features is determinative. The magistrate must look past the labels to the heart of the agreement to determine whether it is an agreement to purchase, in which ownership has passed to the buyer, or a lease, in which ownership of the property remains with the landlord.

Example: Smith shows you a "lease" which provides that Jones will make "rent" payments once a month for ten years, at the end of which time title to the property will be transferred to Jones. The document also says that if Jones misses a payment, the agreement about transfer of title is voided and the agreement is converted to a month-to-month tenancy. Because payment of "rent" in this case will eventually result in a transfer of title, most judges would refuse to treat this as a lease. The result is that Smith may not seek summary ejectment of Jones, but must instead pursue remedies available to him as a seller.

Residential Rental Agreement Act (RRAA)

G.S. 42-40 specifically provides that mobile homes and mobile home spaces are "premises" covered by the RRAA. Lessors of mobile homes have the same obligations as those of houses and apartments: to provide fit, habitable, and safe conditions. A tenant does not waive his right to recover for violations of the Act by taking possession of the premises with knowledge of the defect. G.S. 42-42 makes clear that landlords may not evade their responsibility under the Act by renting premises that are defective with an agreement that the tenant will make necessary repairs. While a landlord and tenant may enter into such an agreement, it must (1)be subsequent to the lease, (2) be written, (3) specify the work the tenant will do, and (4) state the benefit the tenant will receive for doing the work, with that benefit

being something more than what he already receives under the lease agreement.

Issues Arising Out of Security Interests in Mobile Homes

While there are numerous legal issues connected to actions to repossess mobile homes after default in a security agreement, the $5,000 amount in controversy requirement will keep most of these cases out of small claims court. As mentioned above, the existence of a security interest in a mobile home is of no consequence in summary ejectment cases. Because mobile homes are generally worth more than $5,000, actions to recover mobile homes as personal property brought by secured parties are generally district court actions. The same is true in the case of actions to recover deficiencies following sale of repossessed mobile homes. If a magistrate does encounter one of these cases in small claims court, however, he or she should simply remember that a mobile home is no different from any other personal property, even if it is permanently attached to the land.

Competing liens. One common fact situation encountered by magistrates is as follows: Tommy Tenant places a mobile home on Larry's Landlord's lot. Tommy owns the mobile home, but it is subject to a security interest held by Friendly Finance. When Tommy gets behind on his payments to Larry, Larry seeks summary ejectment and obtains a writ of possession. Tommy heads for the hills, leaving his mobile home sitting on Larry's lot. Larry would like to sell the mobile home and recoup some of his money. Can he?

Maybe. G.S. 44A-2(e2) authorizes Larry, as the lessor of a space for a mobile home, to assert a lien against furniture, furnishings, and other personal property, including the mobile home itself, if he (1) has a lawful claim for damages against Tommy, and (2) the mobile home is still there 21 days after the writ of possession has been executed. The statute makes clear, however, that Larry's claim does not have priority over Friendly's. Thus, if Tommy defaults in his payments to Friendly, Friendly has a legal right to come get the mobile home, assuming he is able to do so without causing a breach of the peace. If Friendly does not repossess the mobile home and Larry is able to sell it, Friendly's security interest will continue in it, and Friendly retains the right to repossess the home from the new owner.

Another issue comes up if Friendly "takes possession" of the mobile home by padlocking it. What rights does Larry have in this case? Can he charge Friendly rent, or damages for the continued loss of use of his land due to the presence of the mobile home? Can Larry have the mobile home towed, and then seek reimbursement from Friendly for the cost of removal? While a good case can be made for Larry's right to some compensation for the continued use of his land, no North Carolina case addresses the question.

Abandoned mobile homes. The issues discussed above arise only when Friendly takes possession of the mobile home pursuant to its security interest, as it is likely to do if the mobile home has value. If Friendly takes no action to repossess the home, the law is clear that Larry cannot compel it to do so [NCNB v. Sharpe, 35 N.C. App. 404 (1978)]. This situation arises when a tenant abandons a mobile home that has little remaining value, or that can be moved only with difficulty and probable damage. In this case, Larry has few attractive options, as abandoned mobile homes all over the State attest. While legally entitled to have the mobile home removed from his property, Larry will have to front the cost, which can be quite expensive, and he is likely to have difficulty recovering this expense from an absent tenant who may be judgment-proof.

A few counties have addressed the issue of abandoned mobile homes directly. Scotland County, for example, classifies abandoned mobile homes as solid waste and requires owners to remove them or face accumulating fines and jail time. Buncombe County offers free removal to qualifying property owners. Legislation that would have established a statewide fund to assist counties with removal was introduced in 2005 and may well be revived this session.

Criminal law issues related to mobile homes:

NCGS 15-58.1: Definition of "house" and "building".

Makes clear that mobile homes, manufactured-type housing, and recreational trailers are included in these terms. The result is that these structures are treated no differently from traditional structures for purpose of the laws pertaining to arson.

N.C.G.S. 14-58.2: Burning of mobile home . . .

The law provides that it is a Class D felony to commit the offense of willfully and maliciously burning a mobile home, manufactured-type house, or recreational trailer home that is the dwelling house of another while someone is present inside. While this statute may have been necessary prior to the clarification of law provided by GS 15-58.1 discussed above, this is no longer the case. First degree arson is likely to be the more appropriate charge, covering the same behavior but requiring one less element of proof (i.e., no requirement that the dwelling burned was a mobile home, manufactured-type house, or recreational trailer).

Note that a mobile home is a "building" for purposes of GS 14-59 (Burning of certain public buildings) and a "dwelling" for purposes of second degree arson.

In determining whether to charge "injury to real property" under G.S. 14-127 or "injury to personal property" under G.S. 14-160, be aware that either may be appropriate depending on the specific facts of the case. If the home is on a foundation, it is likely to be considered real property, while a home on wheels may be treated as personal property.

Law Regulating Disposition of Tenant's Property Remaining on Mobile Home Space

Before a landlord has authority to take any action concerning the property of a residential tenant, he must obtain a judgment awarding him the right to possession of the rental property, have the clerk issue a writ of possession, and have the sheriff either lock the premises or place the property in storage. The rules discussed below apply only after this has occurred.

G.S. 42-36.2 applies to personal property, including mobile homes regardless of value. It provides that a tenant must take possession of his personal property when a writ of possession is executed. If the tenant does not do so, the sheriff shall deliver the property to a storage warehouse, unless the landlord agrees to allow the property to remain on the premises. The sheriff may require the landlord to pay for delivering the property to the warehouse as well as one month's storage fee. If the landlord refuses to advance these costs, the sheriff may refuse to remove the property. The costs of delivery and storage are charged to the tenant as court costs and constitute a lien against the property.

If a mobile home has a current value in excess of $500, the landlord's rights and obligations are controlled by G.S. 44A-(e2). That statute allows a landlord to remove and store any property (including a mobile home) remaining on the space after a writ of possession is executed. During the next 21 days, the tenant may take possession of the property at any mutually agreed upon time or during regular business hours. If the tenant does not recover the property he left behind within 21 days, the landlord may proceed to sell the property at a public sale. His right to do so is subject to two conditions:

1. The mobile home must be titled in the name of the tenant, and
2. The landlord must have a lawful claim for damages against the tenant. (Note that if the landlord and tenant have reached a contrary agreement about the landlord's rights in this event, that agreement will prevail.)

The first step in conducting a proper sale is to notify all the people who might be interested in the event. Because a mobile home is a motor vehicle in the eyes of the law (assuming no formal procedure has taken place to change its status from personal property to real property), DMV must be notified at least 20 days before a sale may take place. In addition, the landlord must notify the titleholder (i.e., the former tenant), any secured parties, and any other persons known or reasonably ascertainable who may have an interest in the property. The law states that this notice may be accomplished by taking the following steps:

1. Posting a copy of the notice of sale at the courthouse door in the county where the sale will be held;
2. Advertising the sale in a newspaper of general circulation in the same county once a week for two consecutive weeks, with the last publication date occurring at least 5 days prior to the sale; (Note: the publication requirement does not apply to mobile homes valued at less than $3,500 based on a schedule adopted by DMV.)

The law also specifies the information this notice must contain:

1. The name and address of the landlord.
2. The name of the titleholder and any other person with whom the landlord dealt.
3. A description of the property.
4. Amount of money the landlord is claiming he is entitled to (i.e., the amount of the lien).
5. The place of sale (must be either in the county where the mobile home space is located, or where the lease was entered into).
6. The date and hour of the sale (required to be on a day other than Sunday and between 10:00 AM and 4:00 PM).

The proceeds of sale are distributed in the following order:

1. Payment of reasonable expenses connected with the sale.
2. Payment of the amount owed the landlord (i.e., the amount of the lien.) This amount consists of (a) the amount of rent owed by the tenant at the time he vacated the premises, and (b) the rent due for the time after the tenant left up to the date of sale (60 days maximum), and (c) costs of repairing damages to the premises caused by the tenant not due to normal wear and tear. Any amount left over is paid to the tenant.

The law allows the landlord to purchase the mobile home at the public sale. If the landlord or someone closely connected to him purchases the property for a price significantly less than its fair market, it is of particular importance that the landlord be able to demonstrate substantial compliance with the statutory requirements concerning sale. G.S. 44A-4(g) states that a landlord who does not substantially comply with these rules (regardless of the identity of the purchaser) may be liable for damages in the amount of $100.00 and reasonable attorney's fees, in addition to actual damages resulting from his noncompliance. In addition, he may be vulnerable to an action for unfair trade practices, which entitles a successful plaintiff to treble damages.

The purchaser of a mobile home at a sale conducted under G.S. 44A must notify local tax authorities before moving the home, and he will be required to pay any back taxes owed. The purchaser should also be aware that his possession of the mobile home is subject to termination by a secured party whose interest in the property was properly recorded at the time of purchase. If Friendly Finance had a security interest in the mobile home and that security interest was recorded on the title at the time Paul Purchaser bought it, Friendly still has the right to repossess the home if the debtor defaults in making payments.

If a mobile home has a value under $500 the rules are simpler. The tenant has ten days from the time the landlord is put in possession to request the return of his property. During that ten-day period the landlord may store the property but must otherwise leave it undisturbed. Upon the tenant's request, the property must be returned to him during regular business hours or at a mutually agreed upon time. After ten days, the landlord may throw away, dispose of, or sell the property. Under most circumstances, a landlord is likely to find sale of a mobile home worth less than $500 difficult. In the event he decides to sell the mobile home, however, the statute sets out the required procedure:

1. He must give the tenant written notice by first class mail at the tenant's last known address at least seven days before public or private sale. (Note that this seven day period may overlap with the ten-day period.)
2. This notice shall state the date, time, and place of sale, and identify the allocation of proceeds: first to the landlord for unpaid rent, damages, storage fees, and expenses of sale, and then surplus to the tenant upon request. If the tenant does not

request the surplus within 10 days from sale, the amount will be paid to the county in which the property is located.

The tenant may recover his property upon request at any point up to the date of sale.

If a mobile home has a value under $100 the landlord need wait only five days after being put in possession before deeming it abandoned and disposing of it as he wishes.

OUTLINE ON RIGHTS REGARDING TENANT'S PROPERTY

RESIDENTIAL LEASES: PROPERTY OTHER THAN MOBILE HOME AND CONTENTS.

A landlord has no authority to do anything with a tenant's property until the landlord has brought a summary ejectment action, won a judgment for possession, and had the sheriff execute a writ of possession to enforce the judgment.

- The need for the landlord to deal with property remaining will arise only if the landlord selects the padlocking method of execution.

After the sheriff padlocks the premises under a writ of possession, the landlord has three alternatives for dealing with the tenant's property remaining on the premises. The landlord must hold property for ten days and then may throw away, dispose of, or sell any items of personal property remaining on the premises.

- During the ten-day period the landlord may remove the property and store it or may leave the property on the premises.

- If the tenant requests the property during that ten-day period, the landlord must release the property to the tenant during regular business hours at an agreed upon time.

If the landlord decides to sell the property, the landlord must give written notice to the tenant by first-class mail to the tenant's last known address at least seven days before the date of the sale.

- The notice must indicate when and where the sale will occur and how surplus can be claimed by tenant and what happens to it if not claimed.

- The tenant is entitled to return of the property, upon request, any time before the day of the sale, which means that in this circumstance, the tenant is entitled to recover the property more than ten days after the sheriff has served the writ of possession.

- The statute does not set out any procedure for how the landlord must sell the property or what kind, if any, advertising is required. (It is unclear whether

the court would impose some reasonableness standard on the manner of sale.)

- The landlord may apply the proceeds of sale to unpaid rent, other damages, storage fees, and sale costs.

- Any surplus must be disbursed to the tenant, upon request, within ten days of the sale.

- If not requested by the tenant within ten days of the sale, the landlord must give the surplus proceeds to the county government of the county in which the real property is located.

If the total value all of the personal property left on the premises *is less than $500* (increased from $100 by the General Assembly in 2012), the property is considered abandoned five days after execution of a writ of possession. At that time the landlord may throw away or dispose of the property.

- If the tenant requests the property before the expiration of the five-day period, the landlord must release possession to the tenant during regular business hours or at a time agreed upon.

If a tenant abandons personal property with a total *value of $750 or less* (increased from $500 by the General Assembly in 2012), or fails to remove such property at the time of execution of a writ of possession, the landlord may immediately remove the property and deliver it to a nonprofit organization that regularly provides free or at a nominal cost clothing and household furnishings to people in need.

- The nonprofit organization must agree to identify and separately store the tenant's property for thirty days.

- It must release the property to the tenant at no charge if the tenant requests release during the thirty-day period.

- Landlord must give notice to tenant of name and address of organization to which the tenant's property was delivered by
  - posting notice at the rented premises
  - posting notice at the place where the rent is received, and
  - mailing copy of notice by first-class mail to the tenant's last known address.

If the tenant rents a mobile home space so that the tenant brings a mobile home on the landlord's lot, separate rules apply.

If the mobile home has a fair market value *of $500 or less,* the landlord may dispose of the mobile home and its contents as specified in section I above.

- The landlord determines the value of the mobile home.

Because a mobile home is a motor vehicle, the landlord must notify DMV if the landlord wishes to sell the mobile home.

The landlord must get permission of the local tax collectors before moving the mobile home.

If the mobile home has a fair market value of *more than $500,* the landlord must dispose of the mobile home and contents as provided in G.S. 42-2(e2).

- The mobile home must be titled in the name of the tenant. If owned by someone else, the landlord cannot acquire a landlord's lien in the mobile home.

- The landlord must get a judgment for possession and must have a writ of possession issued to enforce the judgment.

- After the writ has been executed, the landlord may immediately remove the property from the land and store it.

- The landlord must release the mobile home and contents to the tenant during regular business hours or at a time mutually agreed upon for 21 days after the writ has been executed.

- Twenty-one days after writ has been executed, whether the property remains on the premises or whether the landlord has removed and stored it, landlord has a lien on the property for the amount of rent due at the time the tenant vacated the premises; for the time up to 60 days from vacating the premises to the date of sale; for physical damages to the property beyond normal wear and tear; and for reasonable expenses costs and expenses of the sale.

    - The landlord must dispose of the property by selling it at a public auction pursuant to G.S. 44A-4.
    - The statute requires the landlord to post the notice of sale at the courthouse and to advertise in a newspaper in certain instances.
    - The landlord must give notice of the sale to the tenant.
    - Because the mobile home is a motor vehicle, the landlord may not sell the mobile home without notifying DMV and getting permission to sell the vehicle.

- The purchaser may not move the mobile home without first getting permission from the local tax collector.

The old landlord's possessory lien statute, G.S. 44A-2(e), continues to apply to commercial leases.

Landlord may sell property.

- Under G.S. 44A-2(e) if property has been left on premises for at least 21 days after tenant vacated premises and landlord has a lawful claim for damages against tenant, may sell property.

- Lien is for amount of rent due at time tenant vacated and for the time, up to 60 days, from the vacating of the premises to the date of sale; for any sums necessary to repair damages to the premises caused by the tenant, except for normal wear and tear; and for the reasonable costs and expenses of selling the personal property.

- Notice must be given and property must be sold at public sale under provisions of G.S. 44A-4.

- If at any time before the expiration of the 21-day period tenant requests his property, landlord must turn it over to tenant.

- Lien does not have priority over any prior perfected security interests.

Landlord may store property.

- Under G.S. 44A-4(e) landlord may remove tenant's property and store it if left on the premises at least 21 days after the tenant vacates the premises or at least 10 days after the landlord has received a judgment for possession.

- Property placed in storage belongs to the tenant, who is entitled to recover it from storage.

- If property stored with person who in ordinary course of business stores property, that person will have a storage lien under G.S. 44A-2(a) and may require the tenant to pay the storage costs before releasing the property to him. (If property stored in self-storage facility, owner is entitled to a lien under G.S. 44A-41.)

Landlord may donate property to charity.

- Under G.S. 44A-2(e) if the total value of all property remaining is less than $100, then any time more than 5 days after tenant has vacated or sheriff has padlocked the premises, landlord may remove the property and donate it to any charitable organization.