

A JUDICIAL GUIDE TO CREDIT CARD DEBT ACTIONS¹

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District Court Judge
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PART A: THE “WHO, WHAT, WHERE, WHEN AND HOW” OF CREDIT CARD DEBT ACTIONS

I. Causes of Action: The case law references two common causes of actions available in an action to collect a judgment on an overdue credit card account: An **Action on Account Stated**; and an **Action on an Open Account**. Our pattern jury instructions have separate instructions for an “action on an open account”; an action on a verified itemized account (verified pursuant to G.S. 8-45); and an action on an unverified account. Although different elements attach to these claims, all of these are premised on the breach of an agreement to pay and the action is basically a specific type of breach of contract action.

A. What are the terms of the Contract?

1. Does it provide for:
 - a. Mandatory binding arbitration?
 - b. Attorney fees if litigation is pursued?
 - c. Pre-judgment interest, at what rate?
 - d. Post-judgment interest, at what rate?
 - e. Any specific default provisions?
2. Did the terms of the contract change at any time? Throughout the life of a credit card account, the owner of the account may change through assignment, sale of the debt, or legal passage to a successor in interest. In addition, the original credit card agreement may allow for a change in the terms of the agreement.
 - a. Failure to receive notice of these changes (and notice of the right to cancel account or otherwise object to the changes) may require a determination as to what contract applies to this debt.
 - b. In *Citibank, S.D., N.A. v. Graudin*, 216 N.C. App. 416 (2011) (unpublished), the defendant contended that he never received notice of the changed terms in his credit card agreement – which included an increase in the rate of interest. The COA reversed the trial court’s grant of summary judgment holding that there was a genuine issue of material fact as to which credit card agreement applied to this litigation and whether the interest rate charged by plaintiff was proper under the applicable agreement.

II. Breach of Contract. The elements of a claim for breach of contract are (1)

¹ The citations in this paper are not consistent with the Bluebook citation format (and likely not consistent with any other recognized citation style). Parallel citations and pinpoint citations are intentionally omitted. In addition, North Carolina General Statutes section citations will be cited as “G.S.” with no section symbol. ☺☺

existence of a valid contract and (2) breach of the terms of that contract.²

III. Action on Account Stated. An “account stated” arises where a plaintiff submits to a defendant a request for an amount to settle an account, and the defendant agrees to pay that amount.³

A. **Account Stated:** An account becomes stated and binding on the creditor and the debtor, if after receiving the account statement from the creditor, the debtor “unqualifiedly approves of it and expresses his intention to pay it.”⁴

B. **An account stated supersedes an open account.** Once an agreement as to the amount of the balance is reached, the account stated constitutes a new and independent cause of action, superseding and merging the antecedent causes of action.⁵ However, nothing prevents a creditor from asserting both causes of action against a defendant.⁶

C. **Elements:** The plaintiff creditor (other than a debt buyer plaintiff) is required to attach a copy of the cardholder agreement/contract to the Complaint. But the plaintiff must allege and prove four these elements:

1. That the plaintiff/creditor calculated the balance due;
2. That the plaintiff/creditor submitted a statement to the defendant/debtor;
3. That the defendant/debtor acknowledged the correctness of that statement; and
4. That the defendant/debtor made an express or implied promise to pay the balance due or acknowledged receipt of the statement of account and agreed (expressly or implicitly) to pay it.⁷

D. **Acknowledgment of Statement.** It is not necessary for the plaintiff/creditor to show that the debtor expressly acknowledged the correctness of the statement. The plaintiff can simply show that after a reasonable time, the debtor failed to deny liability.⁸ The debtor’s agreement as to the correctness of the account can, under certain facts/circumstances, be implied by the debtor’s silence.⁹ What constitutes a reasonable period is a jury question.¹⁰

1. Consider that most credit card agreements include language providing a timeframe in which a debtor can object to errors contained in a billing statement. If debtor doesn’t object, this may imply acknowledgment of the debt.¹¹ However, if a defendant denies having received that statement, the implication may be

² *Poor v. Hill*, 138 N.C. App. 19 (2000), citing *Jackson v. California Hardwood Co.*, 120 N.C. App. 870 (1995)

³ See *Franklin Grading Co. v. Parham*, 104 N.C. App. 708 (1991); *Citibank, S.D., N.A. v. Graudin*, 216 N.C. 416 (2011) (unpublished)

⁴ *Little v. Shores*, 220 N.C. 429 (1941)

⁵ See *Woodruff v. Shuford*, 82 N.C. App. 260; *Teer Co. v. Dickerson, Inc.*, 257 NC 522 (1962)

⁶ See *Mast, Mast, Johnson, Wells & Trimyer, P.A. v. Lane*, 228 N.C. App. 294, cert. denied, 367 N.C. 243 (2013) (where the COA found that the statute of limitations barred the claim for an open account and that creditor failed to prove all elements of an account stated)

⁷ *Mahaffey v. Sodero*, 38 N.C. App. 349 (1978); see also N.C.P.I -Civil 635.35 (2014)

⁸ *Brooks v. White*, 187 N.C. 656 (1924)

⁹ *Mazda Motors v. Southwestern Motors*, 36 N.C. App. 1 (1978), aff’d in part and rev’d in part, 296 N.C. 357 (1979)

¹⁰ *Teer Co. v. Dickerson, Inc.*, 257 N.C. 522 (1962)

¹¹ See *Mast, Mast, Johnson, Wells & Trimyer, P.A. v. Lane*, 228 N.C. App. 294, cert. denied, 367 N.C. 243 (2013)

rebutted.¹²

- a. In *Brock & Scott Holdings, Inc. v. Bondurant*, 2009 N.C. App. LEXIS (2009) (unpublished), in the defendant's answer, she denied receiving the statement and nothing in the plaintiff's submissions on summary judgment showed that the plaintiff mailed the statement to the defendant or that defendant received the statement. The COA affirmed the trial court's grant of summary judgment to the defendant finding the plaintiff failed to prove defendant's assent.
 - b. *Mast, Mast, Johnson, Wells & Trimyer, P.A. v. Lane*, 228 N.C. App. 294, cert. denied, 367 N.C. 243 (2013), was an action to recover unpaid bills for legal services. The COA found the account was a "stated account" where the defendant made payments on the account from 2005 – 2008, wrote plaintiff a letter apologizing for late payments and telling plaintiff that he would pay as soon as he could, and the defendant did not object to any of the billing statements within the timeframe specified on the statements. While the Court when making an award of attorney fees is to review the "reasonableness" of attorney fees, the COA held that any review "concerning the reasonableness of the fees sought [is] foreclosed once an account is stated."
- E. **Statute of Limitations:** "An account stated is simply a new contract to pay the amount due based on debtor's acceptance of or failure to object to an account rendered."¹³ As with other breach of contract actions, the statute of limitations is **three (3) years**.¹⁴
1. When does the SOL in an action on account stated begin to run?
 - a. When the debtor/defendant makes an express acknowledgment of the correctness of the statement;
 - b. When the debtor/defendant makes an express promise to pay the balance due; or
 - c. If neither of the above occurs, the cause of action does not accrue until a reasonable amount of time has run during which the debtor/defendant could have objected to the statement at issue.
 - i. Unless the credit card agreement specifies the time in which the debtor has to object, determining what is a reasonable time is for the jury.
- F. **Limitations on Judgment:** The trial court has no discretion to enter judgment for an amount less than the full amount of the agreed upon balance.¹⁵

IV. Action on an Open Account. "An open account results where the parties intend

¹²See *Brock & Scott Holdings, Inc. v. Bondurant*, 2009 N.C. App. LEXIS 2212 (2009) (unpublished)

¹³ *Carroll v. McNeill Ind., Inc.*, 296 N.C. 205 (1978)

¹⁴ *N.C. Gen. Stat. § 1-52(1)*

¹⁵ *Franklin Grading v. Parham*, 104 N.C. App. 708 (1991); see also *Mast, Mast, Johnson, Wells & Trimyer, P.A. v. Lane*, 228 N.C. App. 294, cert. denied, 367 N.C. 243 (2013) (see case summary above)

that the individual transactions are to be considered as a connected series rather than as independent of each other, a balance is kept by adjustments of debits and credits, and further dealings between the parties are contemplated."¹⁶ "Such an account is 'running' or 'current' where it continues with no time limitations fixed by express or implied agreement."¹⁷

A. The distinction between an action on an open account and an action for an account stated is that an action for an account stated arises where the parties agree to the amount owed.¹⁸

B. An action on an open account does not require an agreement as to the amount owed; the amount owed remains a determination by the trier of fact.¹⁹

C. **Elements:**

1. **Action on an Unverified Account:** There are two elements to be proved: (1) That the defendant owes the plaintiff money on account; and (2) How much, if any, the defendant owes the plaintiff on the account.²⁰

2. **Action on a Verified Account:** This action is premised on the admission into evidence of a "verified, itemized statement of account" in accordance with G.S. 8-45 (see Part C, Evidentiary Issues below). The only element to be proved is "what amount, if any, the defendant owes on the account". In an action on a verified account (unlike an account stated action), the finder of fact may determine that the amount on the statement of account is not accurate.²¹

D. **Statute of Limitations:** The statute of limitations for an open account claim is three years.²²

1. When does the SOL begin to run? When the last payment occurs.²³ When the plaintiff sues on a current account, a partial payment on the account acknowledging the indebtedness begins the statute running anew as to the entire amount.²⁴

V. **Plaintiff.** A plaintiff is an entity that can establish that it has a right to payment of this debt from the defendant.

A. **Original Creditor**

B. **Assignee or Successor in Interest** (other than a "debt buyer")²⁵

1. **Standing to sue:** There must be sufficient proof of the assignment or succession in interest.

a. The Court must determine whether the evidence presented is

¹⁶ *Hudson v. Game World, Inc.*, 126 N.C. App. 139 (1997)

¹⁷ *Whitley Elec. Service, Inc. v. Sherrad*, 293 N.C. 498 (1977)

¹⁸ *Franklin Grading v. Parham*, 104 N.C. App. 708 (1991)

¹⁹ *Id.*

²⁰ N.C.P.I. -Civil 635.20 (1991); N.C.P.I. -Civil 635.25 (1991)

²¹ N.C.P.I. -Civil 635.30 (1991)

²² G.S. 1-52(1)

²³ *Brock & Scott Holdings, Inc., v. Bondurant*, 2009 N.C. App. Lexis 2212 (N.C. App. 2009) (unpublished)

²⁴ *Whitley Elec. Service, Inc. v. Sherrad*, N.C. 498 (1977)

²⁵ See *Nall v. Kelly*, 169 N.C. 717 (1915); *Brock & Scott Holdings, Inc. v. Bondurant* (N.C. App. 2009) (unpublished)

admissible and sufficient.²⁶ In other words, can the plaintiff show, by the greater weight of the evidence, that the original creditor sold, assigned and conveyed all rights, title and interest in defendant's account to plaintiff?

- b. Things to consider:
 - i. Was any notice of the assignment mailed to debtor?
 - ii. Did the contract anticipate assignment?
 - iii. Did the billing statements after the assignment contain the new creditor's name?
 - iv. Did debtor continue to pay the bill after the assignment was made?
 - v. Did assignee receive the records from the original creditor?

C. Debt Buyer (see Part B below)

VI. Burden of Proof. Whether an action on account stated or an action on an open account, in a breach of contract action the burden is on the plaintiff by the greater weight of the evidence.

VII. Defendant(s). Any individual(s) or legal entity(ies) who/that has a legal obligation to pay the debt to the creditor can be a named defendant.

A. **The "Cardholder"**. The person or legal entity who/that submitted the credit card application.

- 1. Research disclosed no North Carolina case specifically discussing the liability of an "authorized user" on the account of the card holder. Absent a specific agreement between the "authorized user" and the creditor, the mere status of being an "authorized user" on the account does not create legal liability against the "authorized user".

B. **Co-signor**: The person or legal entity who/that executed the credit card application with the Cardholder and has the same obligation to pay the debt as the Cardholder.

C. **Guarantor**. The person or legal entity who/that executed a guarantee stating that they will pay the debt if the cardholder doesn't pay. The guarantee agreement defines the extent of the guarantor's liability.²⁷

D. **Cardholder's Spouse**. Under narrow circumstances, the creditor may be able to prove that the cardholder's spouse has a legal obligation to pay the debt of the cardholder.

- 1. **Agency**. The spousal relationship in and of itself does not create agency as of right. Agency must be proven.²⁸
- 2. **Doctrine of Necessaries**. Under the "Doctrine of Necessaries" the

²⁶ See *United States Leasing Corp. v. Everett, Creech, Hancock & Herzig*, 88 N.C. App. 418 (1987)

²⁷ *EAC Credit Corp. v. Wilson*, 281 N.C. 140 (1972)

²⁸ See *Pitt v. Speight*, 222 N.C. 585 (1943). This case involved an open account in the name of the Defendant Husband, but the action was brought against Defendant Husband and Defendant Wife. Husband admitted the debt and denied that he was acting as agent for his wife in the purchase of the goods. Wife contended that the goods were sold and delivered solely to Husband such that she had no liability on the debt. The COA held that the creditor could not recover against the wife under an implied authority theory. The Court further noted that a husband, by his rights as a husband, is not the agent of his wife; agency must be otherwise proven.

account holder is held liable to merchants or other outside parties who have furnished “necessities or necessities” to the spouse of the account holder. Necessities/necessaries are goods/services that are essential for a spouse or for the spouse’s health and comfort, according to the parties’ standard of living.²⁹ The doctrine of necessities applies equally to both spouses.³⁰

Presumption of “Authority” if Living Together. If the spouses are living together, there is a presumption that the spouse of the account holder has been given the authority by the account holder to purchase suitable household goods on the account holder’s credit. Therefore, the account holder is responsible for charges incurred by the spouse of the account holder on the account holder’s account.³¹ As explained in the paragraph immediately below, this presumption also will apply if the spouses were living separate and apart at the time credit was extended but the merchant did not have actual knowledge that the parties were living separate and apart.

Presumption of “No Authority” if Spouses are Living Apart. Where the spouses are living apart, the presumption is that the spouse of the account holder has in fact no authority to make charges to the account holder’s account. **However, this presumption (also referred to as ‘the separation exception’ to the doctrine of necessities), applies only if the creditor had actual notice that the parties were living separate and apart at the time the debt was incurred. The spouse seeking to take advantage of the ‘separation exception’ to the doctrine of necessities must show that the merchant had actual notice of the separation at the time credit was extended.** *Forsythe Memorial Hospital v. Chisholm*, 342 NC 616 (1996). If the merchant has actual knowledge of the separation and the presumption of no authority applies, the merchant must prove authority in fact or else must prove that the account holder has, without justifiable cause, neglected to provide necessities for the spouse of the account holder. Merchant/tradesmen must prove that the merchandise the spouse of the account holder purchased is a “necessity” and that the account holder hasn’t provided the necessity for the spouse of the account holder.³²

3. Obligation in a Property Settlement and Separation Agreement or an Equitable Distribution Judgment/Order. Whether a non-account holder spouse is court ordered or agreed in a property settlement agreement to pay the account holder’s debt, this does not alter the legal obligation of the account holder to the creditor. A court order or property settlement provision does not create a right of action for the creditor against the non-account holder spouse. However, the account holder can seek indemnity or other legal remedies from the non-contracting spouse for failure to abide by the ED order or property settlement agreement.³³

²⁹ *Cole v. Adams*, 56 N.C. App. 714 (1982) citing 2 *Lee*, *North Carolina Family Law* § 130 - 133 (4th ed. 1980)

³⁰ See *N.C. Baptist Hospitals v. Harris*, 319 N.C. 347 (1987)

³¹ *Cole v. Adams*, 56 N.C. App. 714 (1982)

³² *Id.*

³³ 3 Suzanne Reynolds, *Lee's North Carolina Family Law* 12.102 (5th ed. 2002) ("The allocation of the debt does not affect the rights of creditors against the contracting spouse whether one or both spouses.")

VIII. COMMON DEFENSES

- A. **Statute of Limitations.** The statute of limitations is an affirmative defense and must be pled. Once properly raised by a defendant, then the burden is on the plaintiff to show that the action is not time barred.³⁴
- B. **Payment of Debt.** Defendant must prove the amount of all payments made on the defendant's account.³⁵
- C. **Accord and Satisfaction.** Defendant must prove that the plaintiff and defendant mutually agreed that plaintiff would accept a lesser amount in full satisfaction of that which the plaintiff claimed was owed on the account; and that defendant either paid the amount to plaintiff or tendered the lesser amount in conformity with the agreement with plaintiff but plaintiff refused the payment.³⁶
- D. **Debtor's Filing of Bankruptcy.** When an individual or a legal entity files for bankruptcy, the bankruptcy court issues an "automatic stay" that immediately stops most civil lawsuits filed against a debtor, and most collection actions being taken against a debtor's property by a creditor, collection agency, or government entity must cease.³⁷ The filing of a bankruptcy is not a substantive defense – the filing alone does not discharge the debt. However, all court proceedings must stop when defendant/debtor files for bankruptcy. A legal action to collect a debt should be stayed pending the resolution of the bankruptcy or the lifting of the stay as it relates to the account that is the subject of the collection action.
- E. **Discharge of Debt in Bankruptcy.** If the debt has been discharged in bankruptcy, the debtor should present that documentation from the bankruptcy court to the trial court as this may be an absolute defense.³⁸
- F. **Identity Theft Victim.** Federal law provides some protection for account holders who are the victim of identity theft. When the protection applies, the cardholder's liability for unauthorized use of a credit card may be zero (\$0) but no more than fifty dollars (\$50).
 - 1. Federal law defines certain "conditions" under which the card holder will be liable for the unauthorized use of the credit card. If a card issuer brings an action to enforce liability for the use of a credit card, the burden is on the card issuer to show that the use was authorized or, if the use was unauthorized, then the burden of proof is upon the card issuer to show that the conditions of liability for the unauthorized use of a credit card have been met.³⁹
- G. **Res Judicata.** "Th[is] doctrine prevents the relitigation of all matters . . . that were or should have been adjudicated in the prior action."⁴⁰

IX. Dispositive Motions including Motions to Dismiss

- A. **Failure to State a Claim, G.S. 1A, Rule 12(b)(6):** A motion to dismiss

³⁴ *Solon Lodge Knights of Pythias Co. v. Ionic Lodge Free Ancient & Accepted Masons*, 247 N.C. 310 (1957)

³⁵ N.C.P.I. -Civil 635.40 (1991)

³⁶ N.C.P.I. -Civil 502.60 (1991)

³⁷ 11 U.S.C. 362

³⁸ See G.S. 1A, Rule 8(c)

³⁹ 15 U.S.C. 1643

⁴⁰ *Whitacre P'ship v. BioSignia Inc.*, 358 N.C. 1 (2004)

under Rule 12(b)(6) tests the legal sufficiency of the complaint.⁴¹ On a Rule 12(b)(6) motion, the trial court must determine whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted.⁴²

1. Four Corners of the Complaint Control. Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiffs' claim, (2) the complaint on its face reveals the absence of facts sufficient to make a good claim, or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.⁴³ While documents attached to the complaint and/or referenced therein may be reviewed, the Court cannot consider other documents in determining whether the complaint states a claim.⁴⁴
2. All allegations in the complaint must be accepted as true, and "[a] claim should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief."⁴⁵
3. Time Barred Claim. "A motion to dismiss under Rule 12(b)(6) is an appropriate method of determining whether the statutes of limitation bar plaintiff's claims *if the bar is disclosed in the complaint.*"⁴⁶
 - a. Whether a statute of limitations defense may be determined at the 12(b)(6) stage depends on whether the facts necessary to adjudicate the defense are demonstrated by the complaint itself or whether additional evidence must be considered.⁴⁷
 - b. If the complaint (and the attachments to the complaint and the documents referenced in the complaint) fail to show that the statute of limitations expired before the complaint was filed, then a dismissal for failure to state a claim based on a time barred claim has expired would not be appropriate.
4. Lack of Standing. If the complaint fails to make sufficient allegations regarding the plaintiff's right to sue on this debt, then a motion to dismiss for failure to state a claim should be granted.

B. Summary Judgment, G.S. 1A, Rule 56. A motion for summary judgment asks the court to examine the record and determine whether any material questions exist for a jury to decide. The court "shall" grant a motion for summary judgment if "there is no genuine issue of material fact" as shown by "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. The record must be viewed in the

⁴¹ See *Lynn v. Overlook Dev.*, 328 N.C. 689 (1991) (emphasis added)

⁴² See *Isehour v. Hutto*, 350 N.C. 601 (1999)

⁴³ See *Oates v. JAG, Inc.*, 314 N.C. 276 (1985)

⁴⁴ *Schlieper v. Johnson*, 195 N.C. App. 257 (2009); *Moch v. A.M. Pappas & Assocs., LLC*, N.C. App. ___, 794 S.E.2d 898 (2016) ("When documents are attached to and incorporated into a complaint, they become part of the complaint and may be considered in connection with a Rule 12(b) (6) motion without converting it into a motion for summary judgment.")

⁴⁵ *Harrold v. Dowd*, 149 N.C. App. 777 (2002) (citing *Garvin v. City of Fayetteville*, 102 N.C. App. 121 (1991))

⁴⁶ *Carlisle v. Keith*, 169 N.C. app. 674 (2005) (citing *Horton v. Carolina Medicorp*, 344 N.C. 133 (1996) (emphasis added)

⁴⁷ See e.g., *Long v. Fink*, 80 N.C. App. 482 (1986).

light most favorable to the party against whom judgment is sought.”⁴⁸

1. Time Barred Claim. Summary judgment should be granted in favor of a defendant if the materials reviewed by the Court show that the plaintiff is seeking to recover on a time-barred claim.
2. Lack of Standing. Summary judgment should be granted if the plaintiff fails to allege sufficient facts to allege standing to bring the action.
3. Illegible Contract. Quite often the print on the cardholder agreement is in extremely small print, almost illegible. Even if the agreement is illegible, if plaintiff’s affidavits in support of summary judgment outline the contractual provisions, this is sufficient to state the terms of the agreement unless defendant’s affidavit states different terms.⁴⁹
4. Unverified Open Account. In an action on an unverified open account, at summary judgment Plaintiff (except debt buyer plaintiffs) does not have to produce an accounting of all charges/payments since the beginning of the account since inception; plaintiff can simply state balance due, but defendant can counter with an affidavit as to a different balance due thus creating a genuine issue of material fact.⁵⁰
5. Specific Facts versus General Allegations and Conclusions. In determining whether there is no “genuine issue of material fact”, the Court cannot consider general allegations and conclusions; specific facts are necessary.⁵¹
6. Oral Testimony Permitted. Rule 56 allows the Court to take oral testimony at the summary judgment hearing. However, oral testimony should not be the main source of evidence regarding the merits of the case.⁵²

C. **Judgment on the Pleadings, G.S. 1A, Rule 12(c)**. “A motion for judgment on the pleadings is the proper procedure when all of the material allegations of fact are admitted in the pleadings and only questions of law remain.”⁵³ When the pleadings do not resolve all factual issues, judgment on the pleadings is generally inappropriate.⁵⁴

1. “The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party.”⁵⁵ “All well pleaded factual allegations in the nonmoving party’s pleadings are taken as true and all contravening assertions in the movant’s pleadings are taken as false.”⁵⁶

⁴⁸ G.S. 1A, Rule 56.

⁴⁹ See *Oliphant Fin. Corp. v. Silver*, 2008 N.C. App. LEXIS 2055 (N.C. App. 2008) (unpublished).

⁵⁰ *Id.*

⁵¹ *Lexington State Bank v. Miller, et al*, 137 N.C. App. 748 (2000)

⁵² *Strickland v. Doe*, 156 N.C. App. 292 (2003) (“Oral testimony at a hearing on a motion for summary judgment may be offered; however, the trial court is only to rely on such testimony in a supplementary capacity, to provide a ‘small link’ of required evidence, but not as the main evidentiary body of the hearing.” (citations omitted))

⁵³ *Cheape v. Town of Chapel Hill*, 320 N.C. 549 (1987)

⁵⁴ *Id.*

⁵⁵ *Ragsdale v. Kennedy*, 286 N.C. 130 (1974)

⁵⁶ *Id.*

2. Each motion under Rule 12(c) must be scrutinized carefully lest the nonmoving party be precluded from a full and fair hearing on the merits.⁵⁷

D. Default Judgment, G.S. 1A, Rule 55. Rule 55 allows a plaintiff to obtain judgment for “affirmative relief” against a defaulting defendant – one who has failed to file an answer or a motion pursuant to G.S. 1A, Rule 12 tolling the time to answer – pursuant to a two-step process requiring (1) entry of default and (2) the subsequent entry of a default judgment.⁵⁸

1. Entry of Default. Upon the entry of default, “the substantive allegations contained in plaintiff’s complaint are no longer in issue, and for the purposes of entry of default and default judgment, are deemed admitted.”⁵⁹ The Clerk typically handles the entry of default.

- a. Allegations in Complaint Deemed Admitted; Bars Affirmative Defenses. Entry of default cuts off the defaulting defendant’s standing to defend the case on the merits or contest the plaintiff’s right to recover,⁶⁰ and prohibits the defaulting defendant from asserting affirmative defenses in a motion for summary judgment.⁶¹
- b. Sufficiency of Allegations in Complaint. The Court must assure that the allegations in the complaint are sufficient to state a claim for relief, and the defaulting defendant may challenge the sufficiency of the allegations.⁶²

2. Default Judgment.

- a. The Clerk can enter a default judgment if there is a sum certain and there has been no “appearance” by the defendant.⁶³ In this context, an appearance means the filing of an answer or of a Rule 12 motion, a letter to the Court, or communication with plaintiff’s counsel.⁶⁴
- b. A Judge must consider all other motions for default judgment. The Judge can conduct a hearing on the motion for default judgment or the Judge can enter a default judgment without a hearing if the plaintiff has complied with the requirements of Rule 55(b)(2)b, which requires plaintiff to include in the motion a notice to defendant that that judgment can be entered without a hearing if the defendant fails to respond within thirty days of receiving the motion for default judgment.⁶⁵

3. Damages Trial. If the complaint states a “sum certain” then the

⁵⁷ *Id.*

⁵⁸ G.S. 1A, Rule 55; see also *McIlwaine v. Williams*, 155 N.C. App. 426 (2002)

⁵⁹ See *Luke v. Omega Consulting Grp., LC*, 195 N.C. App. (2009)

⁶⁰ *Id.*

⁶¹ *Hartwell v. Hahan*, 153 N.C. App. 788 (2002)

⁶² See e.g., *Old Salem Foreign Car Serv., Inc. v. Webb*, 159 N.C. App. 93 (2003)

⁶³ G.S. 1A, Rule 55(a)

⁶⁴ See *Roland v. W.L. Motorlines, Inc.*, 32 N.C. App. 288 (1977); *Stanaland v. Stanaland*, 89 N.C. App. 111 (1988)

⁶⁵ G.S. 1A, Rule 55(b)

defaulting defendant has no right to a trial on damages. Otherwise the defendant is entitled to a trial on damages.⁶⁶ And if the plaintiff demanded a jury trial, unless both parties waive the jury trial, then the trial on damages must be a jury trial.⁶⁷

- E. **Post-Judgment Issues.** Refer to Ann Anderson’s 2015 book, “*Relief from Judgment in North Carolina Civil Cases*”
- F. **Improper Venue.** Plaintiffs subject to the Fair Debt Collection Practices Act (FDCPA), such as secondary debt buyers, can only bring suit in the county where the defendant lives at the time of filing of the lawsuit or where the defendant signed the contract at issue. 15 U.S.C. § 1692i. If a plaintiff that is subject to the FDCPA brings suit in an improper district, the consumer may appropriately bring an FDCPA counterclaim.

X. Counterclaims Available against Original Creditors – State Debt Collection Statutes.

- A. The fair debt collection practices law as to original creditors applies only to consumers – natural persons – who have incurred debts or alleged debts for “personal, family, household, or agricultural purposes.”⁶⁸
- B. **Prohibitions.** The prohibitions under North Carolina’s fair debt collection practices law are similar to those in the FDCPA.
- C. **Remedies.**
 - 1. Civil liability of not less than \$500 but no more than \$4,000 in statutory damages per violation.⁶⁹
 - 2. Actual damages⁷⁰
 - 3. Attorney fees upon showing that defendant “has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter.”⁷¹

XI. Counterclaims Available against Collection Agencies or Debt Collectors (including Debt Buyers).

- A. **Violation of North Carolina Law - Prohibited Conduct and Practices.** A collection agency (including a debt buyer) must not engage in prohibited practices defined in Chapter 58, Article 70, Part 3 including use of threats and coercion in the attempt to collect a debt⁷², harassing conduct in the attempt to collect a debt⁷³, unreasonably publicizing information of a consumer’s debt⁷⁴, deceptive representation in communication with the

⁶⁶ G.S. 1A, Rule 55; see also *Luke v. Omega Consulting Grp, LC*, 194 N.C. App. 745 (2009)

⁶⁷ G.S. 1A, Rule 39(b)

⁶⁸ G.S. 75-50(1)

⁶⁹ G.S. 58-70-130 or G.S. 75-56

⁷⁰ *Id.*

⁷¹ G.S. 75-16.1

⁷² G.S. 58-70-95

⁷³ G.S. 58-70-100

⁷⁴ G.S. 58-70-105

debtor in an attempt to collect a debt⁷⁵, and unfair practices⁷⁶. Violation of G.S. 58-70-95 through 58-70-125 subjects the collection agency (including a debt buyer) to civil liability to the debtor in an amount equal to the actual damages sustained by the debtor as a result of the violation⁷⁷, plus liability to the debtor for a monetary penalty determined by the Court (\$500 - \$4000) for each violation⁷⁸, in addition to the possibility of punitive damages and other remedies under law⁷⁹.

1. **Unfair Practices.** Collection agencies are prohibited from collecting or attempting to collect any debt by using “unfair practices” as defined in G.S. 58-70-115. This statute does not provide an exclusive list of prohibited conduct, but expressly includes the following:

- a. **Seeking Debtor Acknowledgement of Debt.** If a collection agency seeks to obtain an acknowledgment from the debtor of a debt when the debtor has been declared bankrupt or when the debt is barred by the SOL engages in an “unfair practice” if the debt buyer fails to disclose the consequences of such acknowledgment.⁸⁰
- b. **Seeking to Collect Fees, Charges, or Interest with No Legal Basis.**⁸¹
- c. **Communicating with Consumer Instead of Consumer’s Attorney.**⁸²

B. Violation of Federal Debt Collection Practices Act (“FDCPA”).⁸³

The FDCPA applies to “debt collectors” collecting on “debts” from “consumers.” A consumer is defined as “any natural person obligated or allegedly obligated to pay on a debt.”⁸⁴ A debt is defined as “[a]ny obligation or alleged obligation of a consumer to pay money related to transactions for personal, family, or household purposes.”⁸⁵ A debt collector is defined as a “collection agency or a debt buyer who purchased an account in default, but not an original creditor.”⁸⁶

1. The FDCPA prohibitions are similar to the North Carolina statutes against unfair debt collection practices, and includes:
 - a. Prohibitions against repetitive phone calls and phone calls to place of employment, prohibitions against publicizing information about debts to third parties, and

⁷⁵ G.S. 58-70-110 (including the failure to disclose in the initial written (and subsequent) communication with the consumer that the debt collector is attempting to collect a debt. However, failure to disclose this information in the complaint to collect the debt is not a violation of this section)

⁷⁶ G.S. 58-70-115

⁷⁷ G.S. 58-70-130(a)

⁷⁸ G.S. 58-70-130(b)

⁷⁹ G.S. 58-70-130(d)

⁸⁰ G.S. 58-70-115(1)

⁸¹ G.S. 58-70-115(2)

⁸² G.S. 58-70-115(3)

⁸³ 15 U.S.C. 1692 *et. seq.*

⁸⁴ 15 U.S.C. 1692a(3)

⁸⁵ 15 U.S.C. 1692a(5)

⁸⁶ 15 U.S.C. 1692a(6).

- the right to ask the collector to cease and desist communication.⁸⁷
- b. Prohibitions against harassment or abuse, false or misleading representations, and unfair practices.⁸⁸ This may include the filing of a time-barred collection lawsuit⁸⁹, and the attempted collection of a debt from someone who is not liable for a debt⁹⁰.
 - c. The law also requires that debt collectors disclose certain information to consumers upon initial contact and validate disputed debts upon request.⁹¹
2. Debt collectors violating this law face up to \$1,000 in statutory damages,⁹² actual damages,⁹³ and attorney fees⁹⁴.

XII. What to Include in the Judgment:

- A. **Compensatory Damages.** Plaintiff is entitled to the amount owed on the account, plus post-judgment interest.
- B. **Bond - Default Judgment with Service by Publication.** If the defendant was served process by publication, then the plaintiff must file a bond to obtain default judgment. The Court approves the amount of the bond, which should be in an amount that is sufficient to protect the defendant in the event the defendant later obtains relief from the default judgment.⁹⁵
- C. **Attorney fees.** Attorney fees may be recoverable by the creditor in credit card litigation pursuant to G.S. 6-21.2,⁹⁶ but this statute “only validates attorney fees obligations in certain carefully defined instances and imposes a ceiling on the amount of attorney fees a party can obtain.”⁹⁷
 1. Section 6-21.2 applies to “other evidence of indebtedness”, which includes a credit card agreement.⁹⁸
 2. The credit card agreement must provide for the recovery of attorney fees and the debt must have been collected through an attorney.⁹⁹
 3. Limitations on the contractual obligation to pay attorney fees.
 - a. **Specific Percentage.** If the agreement provides for recovery of attorney fees in some specific percentage of the “outstanding balance”, the attorney fees provision is

⁸⁷ 15 U.S.C. 1692c(a)-(c)

⁸⁸ 15 U.S.C. 1692d; 15 U.S.C 1692e; 15 U.S.C 1692f

⁸⁹ *Kimber v. Fed. Fin. Corp.*, 668 F.Supp. 1480 (M.D. Ala. 1987)

⁹⁰ *Johnson v. Bullhead Investments, LLC*, 2010 WL 118274 (M.D.N.C. 2010)

⁹¹ 15 U.S.C. 1692k(a)(2)(A)

⁹² 15 U.S.C. 1692k(a)

⁹³ 15 U.S.C. 1692k(a)(1)

⁹⁴ 15 U.S.C. 1692k(a)(3)

⁹⁵ G.S. 1A, Rule 55(c)

⁹⁶ G.S. 6-21.2 (“*Obligations to pay attorney fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to...*” certain limitations and conditions)

⁹⁷ *WholeSale Supply, Inc. v. Allen*, 30 N.C. App. 27 (1976)

⁹⁸ *See id; W.S. Clark & Sons, Inc., v. Ruiz*, 87 N.C. App. 420 (1987)

⁹⁹ G.S. 6-21.2

- enforceable up to but not exceeding 15%.¹⁰⁰
- b. **“Reasonable” Attorney Fees.** If the agreement provides for recovery of “reasonable” attorney fees with no percentage specified, then this provision is construed to mean “15%” of the “outstanding balance”.¹⁰¹
- i. **“Outstanding balance”** means the amount of the damage award.¹⁰²
- c. **Mandatory Advance Notice.** Plaintiff must give written notice to defendant that that plaintiff intends to seek attorney fees if the account is not paid in full within five days of the notice.¹⁰³
- i. If plaintiff does not give notice to defendant that attorney fees can be collected, or the notice does not comply with the statute, then attorney fees are not recoverable.¹⁰⁴
- ii. The notice must be in writing and it must advise the debtor of his right to avoid incurring attorney fees if the debtor pays the outstanding balance.¹⁰⁵
- iii. Service of the Complaint on defendant does not satisfy the notice requirement of G.S. 6-21.2(5).¹⁰⁶
- d. **Where Plaintiff is an Assignee or Debt Buyer.** Pursuant to G.S. 21.2(6), if the plaintiff is an assignee of the debt or a “debt buyer”, the following documents must be provided to the Court before attorney fees may be awarded:
- i. A copy of the contract or other writing evidencing the original debt, which must contain a signature of the defendant. If a claim is based on **credit card** debt and no such signed writing evidencing the original debt ever existed, then copies of documents generated when the **credit card** was actually used must be attached.¹⁰⁷
- ii. A copy of the assignment or other writing establishing that the plaintiff is the owner of the debt.

¹⁰⁰ G.S. 6-21.2(1) (“If such note, conditional sale contract or other evidence of indebtedness provides for attorneys’ fees in some specific percentage of the ‘outstanding balance’ as herein defined, such provision and obligation shall be valid and enforceable up to but not in excess of fifteen percent (15%) of said “outstanding balance” owing on said note, contract or other evidence of indebtedness.”.)

¹⁰¹ G.S. 6-21.2(2) (“If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys’ fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the ‘outstanding balance’ owing on said note, contract or other evidence of indebtedness.”)

¹⁰² *Southland Amusements & Vending, Inc., v. Rouk*, 143 N.C. App. 88 (2001) (“However, once the trial court decided on the amount of the damage award, we believe that amount became the ‘outstanding balance due’ on the agreement (or the ‘amount recoverable on the instrument’) and thus, that amount is what the court was bound by in making the fifteen percent (15%) attorney’s fee award pursuant to § 6-21.2.”)

¹⁰³ G.S. 6-21.2(5)

¹⁰⁴ See *Northwestern Bank v. Barber*, 79 N.C. App. 425, cert. denied, 316 N.C. 733 (1986)

¹⁰⁵ *Blanton v. Sisk*, 70 N.C. App. 70 (1984)

¹⁰⁶ *Id.*

¹⁰⁷ G.S. 6-21.2(6)(a)

If the debt has been assigned more than once, then each assignment or other writing evidencing transfer of ownership must be attached to establish an unbroken chain of ownership. Each assignment or other writing evidencing transfer of ownership must contain the original account number of the debt purchased and must clearly show the debtor's name associated with that account number.¹⁰⁸

4. **Court's Discretion on the amount to be awarded.** Even when an award of attorney fees is appropriate under G.S. 6-21.2, the amount of attorney fees awarded lies within the discretion of the Court.¹⁰⁹
 5. **Guarantor Liability for Attorney Fees.** A guarantee to pay the underlying debt only includes the payment of attorney fees if the guaranty agreement so provides.¹¹⁰
 6. **Findings of Fact.** The Judgment must include appropriate findings of fact supporting the award of attorney fees.¹¹¹
- D. **Interest.** *“In an action for breach of contract, except an action on a penal bond, the amount awarded on the contract bears interest from the date of breach. The fact finder in an action for breach of contract 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 on an award in a contract action 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. For purposes of this section, ‘after judgment’ means after the date of entry of judgment under G.S. 1A-1, Rule 58.”¹¹²*
1. Things to remember about this statutory interest provision:
 - a. In a breach of contract action, the judgment bears interest from the date of the breach.
 - b. The principal amount must be separated from the interest amount in the judgment.

¹⁰⁸ G.S. 6-21.2(6)(b)

¹⁰⁹ *Bombardier Capital, Inc. v. Lake Hickory Watercraft, Inc.*, 178 N.C. App. 535 (2006) (citing *Coastal Prod. Credit Ass'n v. Goodson Farms, Inc.*, 70 N.C. App. 221, *disc. rev. denied*, 312 N.C. 621 (1984)) (In *Bombardier*, the Court of Appeals affirmed the trial court's award of attorney fees in an amount less than fifteen percent noting that the trial court considered testimony from the attorney, affidavits, and billing statements, and based the award on this evidence)

¹¹⁰ See *EAC Credit Corp. v. Wilson*, 281 N.C. 140 (1972) (the document signed by the guarantor did not include an attorney fees provision; cf. *First-Citizens Bank & Trust Co. v. 4325 Park Rd. Assocs.*, 133 N.C. App. 153 (1999) (the debtor's attorney fees obligation was found to extend to the guarantor where there was only one document that was signed by both the debtor and the guarantor)

¹¹¹ See *Porterfield v. Goldkuhle*, 137 N.C. App. 376 (2000) (quotations and citations omitted); see also *Calhoun v. WHA Med. Clinic, PLLS*, 178 N.C. App. 585 (2006) (where the COA remanded the issue of attorney fees to the trial court because it made no findings of fact whether the contract at issue is a printed or written instrument, signed or otherwise executed by the obligor, which evidences on its face a legally enforceable obligation to pay money); *Rink & Robinson, PLLC v. Catawba Valley Enters., LLC*, 220 N.C. App. 360 (2012)

¹¹² G.S. 25-5(a)

- c. The judgment shall provide that the principal amount bears interest until the judgment is satisfied.
 - d. The legal rate of interest applies post-judgment unless the contract provides otherwise.¹¹³
 - e. If credit was extended “for personal, family, household, or agricultural purposes”, then interest shall be at the lower of the legal rate or the contract rate.
2. The “legal rate” of interest is 8% (except in condemnation action) and has been since July 1, 1980.¹¹⁴
 3. If the contract specifies the legal rate of interest is to apply, then the legal rate of interest in effect at the time the contract was executed applies for the period of time until the legal rate change, and at the increased rate thereafter.¹¹⁵
 4. If the credit card agreement does not provide for a specific rate of interest, then post judgment interest is still awarded (unless expressly waived by the plaintiff) as a matter of law.¹¹⁶
- E. **Court Costs.** The awarding of costs in these types of cases is discretionary, and costs may be taxed to either party or apportioned by the court.¹¹⁷
- F. **Refund of Filing Fee for Demand for Trial de Novo from Arbitration.** Pursuant to G.S. 7A-37.1(c), all civil actions filed in district court are subject to court-ordered arbitration under the Rules for Court-Ordered Arbitration in North Carolina (“N.C. Arb. Rules”) subject to certain exceptions.
1. Actions in which the **sole claim** is an “action on an account” are excluded from this requirement. Rule 2(a)(1)(vii). However, if the plaintiff is seeking attorney fees as part of the judgment in an action on an account, then the case is eligible for arbitration unless the parties waive the arbitration hearing, or the case is otherwise exempted from arbitration.¹¹⁸
 2. If a party is dissatisfied with the arbitration award, then the party may demand a trial de novo to district court by timely filing the request and paying the filing fee. If the party who demands trial de novo betters their position at the conclusion of the case, then that party is entitled to a refund of the filing fee associated with the demand for trial de novo; and the Judge should address this in the judgment.¹¹⁹
- G. **Servicemembers Civil Relief Act.** When the Defendant has not made an appearance in the case, before entering judgment, the plaintiff must prepare and file an affidavit in accordance with the Servicemembers Civil Relief Act attesting to the defendant’s military status or stating that the status

¹¹³ See *Barrett Kays & Assocs. v. Colonial Bldg. Co.*, 129 N.C. App. 525 (1998)

¹¹⁴ G.S. 24-1

¹¹⁵ *Merritt v. Knox*, 94 N.C. App. 340 (1989)

¹¹⁶ *Id.*

¹¹⁷ G.S. 6-20

¹¹⁸ N.C. Arb. Rules, Rule 2, Comments

¹¹⁹ N.C. Arb. Rules, Rule 9

cannot be determined.¹²⁰

1. If the defendant's military status cannot be determined, then the Court can require that a bond be posted as part of the judgment.¹²¹

XIII. Miscellaneous Contractual Provisions. It's all about the contract. Look out for the following:

- A. **Forum selection clauses**
- B. **Choice of law provisions**
- C. **Mandatory arbitration provisions.**

¹²⁰ 50 U.S.C. 3901 - 4043

¹²¹ *Id.*

PART B. DEBT BUYERS AND THE COMSUMER ECONOMIC PROTECTION ACT OF 2009 (“CEPA”)

- II. **Purpose/History.** Prior to the passage of the CEPA, debt buyers were not subject to the same laws that govern the conduct of debt collection agencies. As a result, debt buyers could pursue time-barred debts and debts that had already been satisfied. In addition, debt buyers were not prohibited from engaging in harassing conduct in the efforts to collect these debts. With the passage of the CEPA in 2009, North Carolina implemented regulations on the conduct and practices of debt buyers, expanding the scope of the North Carolina Collection Agencies statute to include debt buyers. The CEPA also imposed heightened pleading requirements and evidentiary showings.
- III. **Consumer.** A “consumer” is “an individual, aggregation of individuals, corporation, company, association, or partnership that has incurred a debt or alleged debt.”¹²²
- IV. **Debt Buyer.** A “debt buyer” is a “*person or entity that is engaged in the business of purchasing delinquent or charged-off consumer loans or consumer credit accounts, or other delinquent consumer debt for collection purposes, whether it collects the debt itself or hires a third party for collection or an attorney-at-law for litigation in order to collect such debt.*”¹²³
- A. A charge off occurs when the creditor no longer thinks that the debtor will pay the debt. It does not mean that the debt is forgiven; and the charge off date has nothing to do with the running of the statute of limitations.¹²⁴
 - B. A debt buyer often purchases, sometimes for pennies on the dollar, a portfolio of thousands of delinquent accounts deemed uncollectible, and oftentimes an account may be sold and resold.
- V. **Exclusions from Definition of “Collection agency.”**
- A. **G.S. 58-70-15(a)** defines “collection agency”. **G.S. 58-70-15(b)(4)** states that a “debt buyer” is specifically included in the definition of “debt buyer.”
 - B. **G.S. 58-70-15(c)** defines certain entities excluded from the definition of “collection agency”, including, but not limited to, banks, mortgage banking companies, savings and loan association, and building and loan associations in that excluded categories.
 - C. **Is a bank (or other excluded entity) that otherwise meets the definition of “debt buyer” subject to the heightened pleading**

¹²² G.S. 58-70-90(2)

¹²³ G.S. 58-70-15(b)(4)

¹²⁴ <https://www.occ.gov/publications/publications-by-type/comptrollers-handbook/allowance-loan-lease-losses/pubch-allowance-loan-lease-losses.pdf>

requirements and evidentiary obligations provided for in the CEPA? Maybe not. There is no appellate decision addressing this question.

VI. Standing. As with any plaintiff, a debt buyer must prove standing bring the action, which means that the debt buyer must prove that it has the legal right to pursue judgment on this debt. While there is no specific method of proof to establish standing for non-debt buyer plaintiffs in a credit card debt collection case, the CEPA obligates a debt buyer to show specific evidence of standing at the pleading stage.

A. Additional Pleading Requirements. A debt buyer plaintiff, in addition to pleading the elements of the cause of action, must include in the complaint and/or attach to the complaint the following:

1. A debt buyer plaintiff must allege *as part of the cause of action* that the plaintiff is duly licensed under Article 70 of Chapter 58 of the NCGS and must include the name and number, if any, of their license and the governmental agency that issued it.¹²⁵
2. A debt buyer plaintiff must attach to the Complaint “*a copy of the contract or other writing evidencing the original debt, which must contain a signature of the defendant*” unless the claim is based on a credit card debt and no such writing evidencing the original debt ever existed, then copies of documents generated when the credit card was actually used must be attached”.¹²⁶
 - a. If “no such writing ever existed,” does this need to be specifically alleged in the Complaint to survive a motion pursuant to 12(b)(6) or is it simply sufficient to attach copies of documents generated when the credit card was actually used?
 - b. What constitutes “documents generated when the credit card was actually used?” Is the statute anticipating the receipt generated by the merchant at the point of sale (which contains a signature of the debtor) or will credit card statements showing merchant charges be sufficient?
 - i. What if defendant denies receiving the statements attached to the complaint? Has the debt buyer satisfied the statute?
 - ii. What if the credit card statements do not any show merchant charges but only interest and fees assessed by the original creditor? Has the debt buyer satisfied the statute?
3. A debt buyer plaintiff must attach to the complaint a “*copy of the assignment or other writing establishing that the plaintiff is the owner of the debt. If the debt has been assigned more than once, then each assignment or other writing evidencing transfer of*

¹²⁵ G.S. 58-70-145

¹²⁶ G.S. 58-70-150(1)

ownership must be attached to establish an unbroken chain of ownership. Each assignment or other writing evidencing transfer of ownership must contain the original account number of the debt purchased and must clearly show the debtor's name associated with that account number.”¹²⁷

VII. Heighted Evidentiary Requirements when Seeking Summary Judgment or Default Judgment. Whereas an affidavit from a non-debt buyer creditor stating the amount owed on the account may be sufficient to show all the necessary elements on a motion for summary judgment or default judgment, when the plaintiff is a debt buyer, to show that the plaintiff is entitled to a judgment, the plaintiff must also file with the court specific evidence “*to establish the amount and nature of the debt.*”¹²⁸ And not just any evidence will suffice. The CEPA defines what evidence is sufficient to establish the amount and nature of the debt.

A. **What evidence is sufficient?** “*The only evidence sufficient to establish the amount of nature of the debt shall be properly authenticated business records that satisfy the requirements of Rule 803(6) of the North Carolina Rules of Evidence. The authenticated business records shall include at least all of the following items:*

1. *The original account number.*
2. *The original creditor.*
3. *The amount of the original debt.*
4. *An itemization of charges and fees claimed to be owed.*
5. *The original charge-off balance, or if the balance has not been charged-off, an explanation of how the balance was calculated.*
6. *The date of the last payment.*
7. *The amount of interest claimed and basis for the interest charged.*¹²⁹

B. **What is constitutes “an itemization of charges and fees claimed to be owed?”** Research disclosed no North Carolina case directly interpreting this statute. However, it is unlikely that something less than what is required to meet the “verified, itemized statement of account” in G.S. 8-45 will suffice. See Part C, Section I below.

VIII. Prohibited Conduct and Practices as Counterclaims. A debt buyer is a collection agency and must not engage in any of the prohibited practices that a non-debt buyer collection agency is barred from engaging in (see Part A, Section XI above). Additional prohibitions on debt buyers follow:

A. **Debt-Buyer Only Unfair Practices.**

1. **Suing on Time Barred Claims.** Unlike other creditors, if a debt buyer (or someone acting on behalf of a debt buyer) brings a legal action against a debtor when the debt buyer knows, or

¹²⁷ G.S. 58-70-150(2)

¹²⁸ G.S. 58-70-155(a)

¹²⁹ G.S. 58-70-155(b)

should reasonably know, that such collection is barred by the applicable statute of limitation, then the debt buyer has engaged in an “unfair practice.”¹³⁰

2. **Seeking Interest.** If a debt buyer (or someone acting on behalf of a debt buyer) attempts to collect interest or any other charge for services rendered incidental to the principal debt, then the debt buyer has engaged in an “unfair practice” unless the plaintiff is legally entitled to such fee or charge.¹³¹ Is interest available by law to a debt buyer? Under North Carolina law, “yes,” but please be aware of **Madden v. Midland Funding**.
 - a. **Madden v. Midland Funding.** The Second Circuit’s decision in *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2nd Cir. 2015), *cert denied*, ___ U.S. ___, 136 S.Ct. 2505 (2016), addressed the rate of interest that a debt buyer (among others) could charge. The Second Circuit held that a third-party debt buyer was prohibited from charging the same rate of interest that the seller (a nationally chartered bank) was permitted to charge. SCOTUS refused to weigh in on this issue leading to uncertainties for debt buyers.
 - i. **Waiving Interest.** In Wake County, we are seeing debt buyers waiving pre- and post-judgment interest.
 - ii. **Pending Legislation.** The U.S. House of Representatives passed H.R. 3299 on February 14, 2018. This bill, if it becomes law, would make clear that a third-party debt buyer may charge the same rate of interest as a nationally chartered bank may charge.
3. **Lack of Documentation and Reasonable Verification.** If a debt buyer (or someone acting on behalf of a debt buyer) sues the debtor without “(i) *valid documentation that the debt buyer is the owner of the specific debt instrument or account at issue and (ii) reasonable verification of the amount of the debt allegedly owed by the debtor*”, then the debt buyer has engaged in an “unfair practice”.¹³²
 - a. **Reasonable verification** includes “*documentation in the name of the original creditor, the name and address of the debtor as appearing on the original creditor’s records, the original consumer account number, a copy of the contract or other document evidencing the consumer debt, and an itemized account of the amount claimed to be owed, including all fees and charges.*”¹³³

¹³⁰ G.S. 58-70-115(4)

¹³¹ G.S. 58-70-115(2)

¹³² G.S. 58-70-115(5)

¹³³ *Id.*

4. **Pre-filing Notice.** At least 30 days in advance of initiating legal process against a debtor, the debt buyer must give the debtor written notice of the intent to file a legal action to collect the debt. Failure to do so constitutes an unfair practice.
 - a. This notice “shall include the name, address and telephone number of the debt buyer, the name of the original creditor and the debtor’s original account number, a copy of the contract or other document evidencing the consumer debt, and an itemized account of all amounts claimed to be owed.”¹³⁴
5. **Failure to Comply with Heightened Pleading Requirements and Showings for Dispositive Motion.** If a debt buyer fails to include the required allegations and attachments to a complaint, or if a debt buyer fails to file with the court the required evidence in support of a motion for summary or default judgment, this constitutes an “unfair practice”.¹³⁵

¹³⁴ G.S. 58-70-115(6)

¹³⁵ G.S. 58-70-115(7)

PART C: EVIDENTIARY ISSUES

I. **G.S. 8-45: Affidavit in Action on Verified Open Account.** G.S. 8-45 provides that in any action upon an “*account for goods sold and delivered, for rents, for services rendered, or labor performed, or upon any oral contract for money loaned, a verified itemized statement of such account shall be received in evidence and shall be deemed prima facie evidence of its correctness.*”

A. G.S. 8-45 applies to actions on open accounts,¹³⁶ and requires the Court to receive a “verified itemized statement of account” into evidence.

B. **Itemized Statement of Account.** The itemized statement of account must be just that – an itemized statement of account.

1. Properly Verified, Itemized and Show Indebtedness. “To make out a prima facie case under G.S. 8-45 the account not only must be properly verified and itemized, it must also be stated as to show an indebtedness.”¹³⁷

2. Description of Debits. A statement simply listing a starting balance followed by entries of debits and credits without a description of these debits is insufficient to constitute an itemized statement of account.¹³⁸

3. Individual Entries. Individual entries are necessary for the Court to determine what has been proven by the itemized statement of account.

a. *Kight v. Harris and Wahoo-Sportsman, Inc.*, 33 N.C. App. 200 (1977), involved an open account in the name of the corporate defendant. Defendants denied all allegations including the receipt of the goods. Relying on G.S. 8-45, plaintiff introduced an itemized verified statement of account consisting of two verified pages from a ledger and many verified sales invoices. The trial court granted judgment in plaintiff’s favor, but the amount of the award was limited to the amounts in the invoices that had been signed by the individual defendant or by an officer of the corporate defendant. Other invoices for which there was no evidence as to who made the purchase were excluded from the damage award. Yet another group of invoices where the person making the purchases was neither an officer nor employee of the corporate defendant and there was no evidence proving agency.

¹³⁶ See *Pitt v. Speight*, 222 N.C. 585 (1943); *Endicott-Johnson Corp. v. Schochet*, 198 N.C. 769 (1930); *Bramco Electric Corp. v. Shell*, 31 N.C. App. 717 (1976)

¹³⁷ *Knight v. Taylor*, 131 N.C. 84 (1903)

¹³⁸ *Bramco v. Electric Corp. v. Shell*, 31 N.C. App. 717 (1976) (the record of debits/credits listed only amounts without a description of the debits. The COA didn’t expressly define what is sufficient to constitute an itemized statement as contemplated by G.S. 8-45, but the COA considered other state’s laws on the issue in deciding that this affidavit did not qualify as an itemized statement contemplated by G.S. 8-45).

C. **Verified.** Verification means that the itemized statement of account must be accompanied by an affidavit that the account is a true and accurate statement of the account signed by a person competent to testify about the account (See Section D below).

1. At trial (but not at a hearing on a dispositive motion), a verified statement of account is **not** required to prove an action on an open account. An unverified statement will suffice if the foundation for the business records exception is laid through a witness testifying in court.¹³⁹

D. **Who is competent to testify about the account?**

1. Personal Knowledge or Familiar with Books and Records. G.S. 8-45 is to be strictly construed.¹⁴⁰ Therefore, the verification must be done by someone who would be a competent witness if called at trial to testify with respect to the transactions.¹⁴¹ This doesn't mean that the affiant has to have personal knowledge of the transactions; it is enough if the affiant is "familiar with the books and records of the business."¹⁴²
2. Affidavit Based on Information from Others Not Sufficient. In *Nall v. Kelly*, 169 N.C. 717 (1915), the complaint alleged that the **Nall Company, Inc.** sold goods to defendant C.B. Kelly. Plaintiff, **E.D. Nall**, was the owner and assignee of **E.D. Nall Company**. E.D. Nall, as assignee of E.D. Nall Company, brought an action against the defendant. Plaintiff prepared an affidavit that outlined the account details (sale, amount due, interest to be paid, current balance), but failed to state his personal knowledge of the transaction between Nall Company, Inc. and the defendant. It appeared to the Court that the affidavit was made on information from plaintiff's predecessor in interest. Therefore, the affidavit was not admissible.

E. **Denial of Contract.** If the defendant denies the existence of a contract, this statute is not applicable. In other words, G.S. 8-45 does not establish the

¹³⁹ See *Bond Park Truck Services, Inc. v. Hill*, 53 N.C. App. 443 (1981)

¹⁴⁰ *Endicott-Johnson Corp. v. Schochet*, 198 N.C. 769 (1930)

¹⁴¹ *Id.* The affiant in *Endicott-Johnson* was an officer of the plaintiff and his affidavit stated, among other things, that he was "familiar with the books and business of [the Plaintiff]". The affidavit did not state that he "had personal knowledge of the transaction." The trial court excluded the affidavit, and the appellate court found error; holding that the affiant being familiar with the books and business was a competent witness; compare *Nall v. Kelly*, 169 N.C. 717 (1915) (where the affiant did not attest to having personal knowledge of the transaction nor did he attest that he was "familiar with the books and business of the Plaintiff". The trial court allowed the introduction of the affidavit, and the appellate court reversed holding that the affiant did not have personal knowledge of the account); *Bramco Electric Corp. v. Shell*, 31 N.C. App. 717 (1976) (the trial court did not allow the affidavit of account to be admitted where the affiant was the president of plaintiff corporation, but the affidavit failed to state that she had any personal knowledge of the matters addressed in the affidavit or that she was familiar with the plaintiff's books and records. The appellate court agreed.).

¹⁴² See *Johnson Serv. Co. V. Richard J. Curry & Co.*, 29 N.C. App. 166 (1976); *Van Landingham v. Northeastern Motors, Inc.*, 63 N.C. App. 778 (1983) (where the trial court admitted an affidavit where the affiant did not have personal knowledge of the matters contained in the affidavit, but was familiar with the books and records of the plaintiff, and the records were admissible under the business record exception to the hearsay rule. The COA affirmed)

existence of a contract, which is an essential element in this cause of action; it is simply prima facie evidence of the account's correctness.¹⁴³

II. **Potential Problems with Admissibility:** Every writing sought to be admitted must be *properly authenticated* and must *satisfy the requirements of the "best evidence rule,"* or one of its exceptions. And, if offered for a hearsay purpose, the writing *must fall within one or more of the exceptions to the hearsay rule.*¹⁴⁴ This is true whether in trial or at a hearing on a dispositive motion.

III. **Authentication:** Unless a document is self-authenticating (as provided in Rule 902), a document is authenticated if there is sufficient evidence to support a finding that this document is what the proponent claims it to be.¹⁴⁵ This can be satisfied by a witness with knowledge who testifies that the document is what it is claimed to be.¹⁴⁶

- A. Consider this: while a debt buyer's custodian of records may state that "these are the records for this account that Original Creditor gave DB"; can the DB custodian of records state definitively that these are all the records of the Original Creditor for this account?
- B. Consider also: is it an undue burden to expect the DB to get an affidavit from the Original Creditor?
- C. **Partial Billing Statements.** What if the moving party tenders into evidence (or attaches to an affidavit) only partial billing statements. Is this objectionable? MAYBE
 1. Consider this: If it is not a complete document, can it be authenticated – is it what it purports to be?
 2. Consider also: If it's a duplicate of the original and it is only a partial document, then the this may fall outside the exceptions to the Best Evidence Rule (See Section E below)
 3. Other objections?

¹⁴³ *Durham Life Broadcasting, Inc. v. Int'l Carpet Outlet, Inc.*, 63 N.C. App 787 (1983)

¹⁴⁴ *FCX, Inc. v. Caudill*, 85 N.C. App. 272 (1987)

¹⁴⁵ "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." G.S. 8C-1, Rule 901(a)

¹⁴⁶ G.S. 8C-1, Rule 901(b)(1)

IV. Rule 1002: Best Evidence Rule.¹⁴⁷ The original of a document is required except when it's not.

A. *“To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.”*¹⁴⁸

B. The Commentary to Rule 1002 states that this Rule applies when the contents of a document are sought to be proved. For example, an event can be proven by nondocumentary evidence, even though a written record of it was made, and the Rule would not apply to require an original. However, if the event is sought to be proved by the written record, the rule applies.¹⁴⁹

1. The Best Evidence Rule likely applies to prove the terms of the credit card agreement (for example, interest, attorney fees, choice of law).

2. But what about proving that defendant made charges and payments on the account? To the extent that Plaintiff is using the billing statements to prove that charges were incurred, and payments made, then seemingly this Rule applies.

C. Exceptions to the Rule

1. If not seeking to prove the contents of a document, a duplicate is admissible.

2. A duplicate is also admissible unless *“(1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.”*¹⁵⁰

3. The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

a. **Originals Lost or Destroyed.** -- *All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;*

b. **Original Not Obtainable.** -- *No original can be obtained by any available judicial process or procedure;*¹⁵¹

c. **Original in Possession of Opponent.** -- *At a time when an original was under the control of a party against whom*

¹⁴⁷ **NOTE:** this paper does intentionally does not address the interplay between **Rule 1002 and G.S. 8-44 or G.S. 8-45.1.** **G.S. 8-44** applies to actions on an open account (see *Coxe v. Skeen*, 25 N.C. 445 (1843), and provides that copies from a book of accounts may be admitted into evidence and shall be treated as if the original had been produced unless the party opposing the use of the copy gives notice to the adverse party at least 10 days before trial that he will require the book to be produced at the trial. If such notice is properly given, then no copies shall be admitted into evidence. Even accidental destruction of the original might not be an exception to this rule.¹⁴⁷ **G.S. 8-45.1** allows for original documents to be destroyed if copies/reproductions are have been made and the destruction of the documents is done in the regular course of business. As such reproductions are as admissible in evidence as the original.

¹⁴⁸ G.S. 8C-1, Rule 1002

¹⁴⁹ G.S. 8C-1, Rule 1002, Commentary

¹⁵⁰ G.S. 1-8C, Rule 1003

¹⁵¹ The commentary to Rule 1004 addresses when the original is in the possession of a third person and states that the *“inability to procure it from him by resort to process or other judicial procedure is a sufficient explanation of nonproduction...Judicial procedure includes subpoena duces tecum as an incident to the taking of a deposition in another jurisdiction....Extreme expense and inconvenience in obtaining the document will not constitute unavailability.”* G.S. 8C-1, Rule 1004, Commentary.

- offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing;*
- d. **Collateral Matters.** -- *The writing, recording, or photograph is not closely related to a controlling issue.*¹⁵²

V. Hearsay

- A. **Rule 801(c)** defines “hearsay” as “*a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.*”¹⁵³
- B. **Rule 802** is the “Hearsay Rule”: “*Hearsay is not admissible except as provided by statute or by these rules.*”¹⁵⁴
- C. **Rule 805** is the “Hearsay within hearsay” Rule: “*Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.*”
- D. **Rule 803** defines several exceptions to the hearsay rule that apply even if the declarant is available as a witness.
- E. **Rule 803(6)** is commonly referred to as the “business records exception” and provides as follows: “*A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if (i) kept in the course of a regularly conducted business activity and (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit or by document under seal under Rule 902 of the Rules of Evidence made by the custodian or witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. Authentication of evidence by affidavit shall be confined to the records of nonparties, and the proponent of that evidence shall give advance notice to all other parties of intent to offer the evidence with authentication by affidavit. The term ‘business’ as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.*”¹⁵⁵
1. A witness (or affiant) testifying about “business records” does not have to have personal knowledge of the transactions entered into that record. “However, it must be shown that the record was actually based (or it was the regular practice of the activity to base the record) upon a person with knowledge acting pursuant to a regularly conducted activity.”¹⁵⁶

¹⁵² G.S. 1-8C, Rule 1004

¹⁵³ G.S. 8C-1, Rule 801(c)

¹⁵⁴ G.S. 8C-1, Rule 802

¹⁵⁵ G.S. 8C-1, Rule 803

¹⁵⁶ G.S. 8C-1, Rule 803 Commentary

2. The Commentary to Rule 803(6) highlights the concerns about the motivation of the witness (or affiant) and reminds us that this Rule is based on the assumption **“that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if 'the sources of information or other circumstances indicate lack of trustworthiness.'”**¹⁵⁷
- F. **When the account owner is not the original creditor, what must be shown to prove that the original creditor’s records are admissible under 803(6)?**
1. For every document admitted into evidence, you must make sure that the document has been properly authenticated by a person with knowledge and a proper foundation for a hearsay exception must be laid by an appropriate witness. Hearsay within hearsay requires an exception for each layer of hearsay.
 2. Certainly, an affidavit from the original creditor might suffice if that affidavit lays the 803(6) foundation. Consider the following:
 - a. **“Made at or near the time”**: Can the assignee affiant attest to the fact that the events were recorded “at or near the time”? Wouldn’t the affiant need to attest that s(he) has personal knowledge of the business practices of the original creditor? And how did s(he) acquire the knowledge of these business practices – formerly employed there or did someone tell her?
 - b. **“By, of from information transmitted by, a person with knowledge”**: Can the assignee affiant attest to the fact that the information in the original creditor’s records was made by a person with knowledge? Again, how did the affiant acquire this knowledge?
 - c. **“If (i) kept in the course of a regularly conducted business activity and (ii) it was the regular practice of that business activity to make the memorandum, report, records or data compilation”**: See concern above.
 - d. **“as shown by the testimony of the custodian or other qualified witness.”** A witness who is familiar with the business entries and the system under which they are made qualifies as a “other qualified witness”.¹⁵⁸
 3. North Carolina case law.
 - a. See cases above, Part C, Section I (Rule 8-45) above.
 - b. ***Oliphant Fin. Corp. v. Silver*, 2008 N.C. App. LEXIS 2055 (N.C. App. 2008) (unpublished)**. *Oliphant* involved an original creditor, Household Bank (“HHB”), entering into an installment sales contract with defendants. Defendants quit paying the contract. HHB then sold, assigned and conveyed all rights, title and interest in defendants’ account to plaintiff.

¹⁵⁷ *Id.*

¹⁵⁸ *State v. Miller*, 80 N.C. App. 425 (1986)

As part of that transaction plaintiff acquired all the billing records related to defendants' credit account.

After the lawsuit was filed, plaintiff filed for summary judgment, which was granted by the trial court. Defendants appealed arguing, in part, that the trial court erred in admitting an affidavit prepared by plaintiff's employee. The affidavit referred to HHB's documents that were in plaintiff's file, but about which the affiant had no personal knowledge. The affidavit stated, among other things, that: (1) Oliphant Financial purchased defendant's credit account and all of the billing records for that account from HHB, (2) that these billing records were "kept in the ordinary course of business and were made at or around the time of the transactions described therein," (3) that "[she] has custody" of the records and that "[her] affidavit is based upon Affiant's personal knowledge of those records."

The COA held that HHB's records were admissible under Rule 803(6).

Seemingly, the affiant laid an 803(6) foundation for the HHB records, but it is interesting that the opinion did not question how the affiant could attest to the things she did about HHB's records. There was nothing in the affiant's affidavit indicating that she was familiar with HHB's record-keeping procedures.

- c. **United States Leasing Corp. v. Everette, Creech, Hancock & Herzig, 88 N.C. App. 418 (1988).** This case involved a lease agreement between Lanier Business Products, Inc. ("Lanier") and Everette, Creech, Hancock & Herzig ("ECHH"). Prior to the filing of the lawsuit, Lanier assigned the lease to United States Leasing Corp. ("U.S. Leasing"), and Everette & Hancock ("EH") was formed as a successor partnership of ECHH.

The trial court entered judgment against defendant ECHH and an individual defendant and dismissed the action against EH and the rest of the individual defendants. The losing defendants appealed arguing, in part, that the trial court had erred in allowing an officer of U.S. Leasing, Mr. Hunter, to testify about the written assignment from Lanier.

Mr. Hunter testified that he had reviewed the contents of plaintiff's file, and the COA held that since the records he reviewed were admissible based on the Rule 803(6), Mr.

Hunter could testify about the documents in light of the fact that he was familiar with the system by which the records were made and maintained.

In affirming the trial court on the admissibility of Mr. Hunter's testimony, the COA noted that a portion of his testimony was missing (transcribed as "inaudible"), and that the COA therefore must "presume that Mr. Hunter was qualified to lay a foundation for plaintiff's business records and that, in fact, a proper foundation was laid."

d. *In re C.R.B.*, 245 N.C. App. 65 (2016), was a child protection case. At trial, a social worker was allowed to testify about test results that were in her agency's file - the result of an IQ test as well as the results of a parental capacity evaluation. The COA found that the social worker laid a sufficient foundation for the business records hearsay exception: "While the foundation must be laid by a person familiar with the records and the system under which they are made, there is 'no requirement that the records be authenticated by the person who made them.' *In re S.D.J.*, 192 N.C. App. 478 (2008)."

4. Final thought: remember that 806(6) assumes **"that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if 'the sources of information or other circumstances indicate lack of trustworthiness."**

VI. Settlement Discussions. What if, before or after the lawsuit was filed, debtor made an offer to make payments on the debt? **Is this evidence admissible? Probably.**

A. **Rule 408:** *"Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or evidence of statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."*¹⁵⁹

1. Rule 408 bars the admission of certain statements or offers to compromise a claim if offered to "prove liability for or invalidity of the claim or its amount". However, the Rule does not bar the

¹⁵⁹ G.S. 8C-1, Rule 408 (2017)

admission of such statements/offers unless the claim is disputed as to either validity or amount.¹⁶⁰

2. "The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum. McCormick § 251, p. 540. Hence the rule requires that the claim be disputed as to either validity or amount."¹⁶¹

VII. Who can testify (or prepare an affidavit) on behalf of the plaintiff/creditor?

- A. Generally, a witness must have personal knowledge about which he/she is giving testimony.¹⁶²
 1. **Rule 602:** "*A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.*"¹⁶³
- B. An exception to this general rule is the business records hearsay exception, Rule 803(6).

¹⁶⁰ See *id.*

¹⁶¹ G.S. 8C-1, Rule 408, Commentary

¹⁶² See G.S. 8C-1, Rule 602

¹⁶³ G.S. 8C-1, Rule 602