APPENDIX

JOB AIDS

RESOURCE MATERIAL

MISCELLANEOUS MATERIAL

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.

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 20 days.

Do either of you have any questions?

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.

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 appeal court costs to the clerk within 20 days after the magistrate ruled. 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 is good against the defendant 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 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. <u>It is very important that you respond to that notice.</u> 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. It is possible that the landlord will let you stay if you pay all the back rent that you owe, but that is between the two of you.

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

Steps in Resolving Summary Ejectment Cases:

Step 1: Check for service.

No service: Is defendant present?

Service by posting: tell LL only judgment available is possession (unless defendant has made voluntary appearance). If complaint contains request for $$, ask if LL prefers to continue case to try for personal service.

Step 2: Ask for copy of lease.

Step 3: Establish existence of LL-T relationship between the parties.

Step 4 (could also reverse, do step 5 next, depending on information obtained thus far):

Is there a forfeiture clause in the lease? If so,

Identify the conduct that allegedly triggered the forfeiture clause (this will often be either failure to pay rent or criminal activity);

Identify any lease provision that controls conduct required by LL (for example, written notice to tenant of intent to enforce forfeiture clause);

Consider possible defenses: Waiver? Unconscionability?

Step 5: Determine what kind of lease it is.

Lease for definite time: determine date it ended. Does the lease contain rules about what should happen when lease ends? Possible defense: new lease created by conduct.

Lease for repeating period (example: month-to-month lease): Terminated by notice of intent to terminate. Questions: What does lease say about how termination must occur? If lease is silent, what evidence is there that LL gave statutory notice of intent to terminate?

Step 6: If termination is not available on above grounds, consider whether LL is entitled to prevail based on failure to pay rent. This is available only in cases in which the lease does not contain an applicable forfeiture clause. What evidence is there that LL demanded rent and waited 10 days before filing complaint? Note defense: tender.

Step 7: If LL is seeking money damages, calculate rent up to date of judgment. Be sure to note undisputed amount of rent on judgment form. Consider other amounts if sought: damage to property, late fees, administrative fees, attorney fees. Remember these have legal restrictions.

Step 8: Hand parties handout describing what happens next. If LL won, give both parties handout about tenant's rights with regard to property. Tell LL no writ of possession is available until 10-day appeal period has expired. Tell tenant that stay of execution is available in case of appeal, and that clerk can supply details about what the requirements are for obtaining a stay.

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.

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

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.

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.

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 $5,000

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 $5000. By the time the case gets to trial, the amount of unpaid back rent has increased to $5700. Small claims action? _____
4. Carl Creditor filed an action on a promissory note, which required Danny Debtor to repay a $5000 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 ($5000). Small claims action? _____
8. Actually, Happy Homes has filed two claims against Nick and Nancy, each for $5000, because the total amount due for all that furniture is $10,000. 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
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.

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

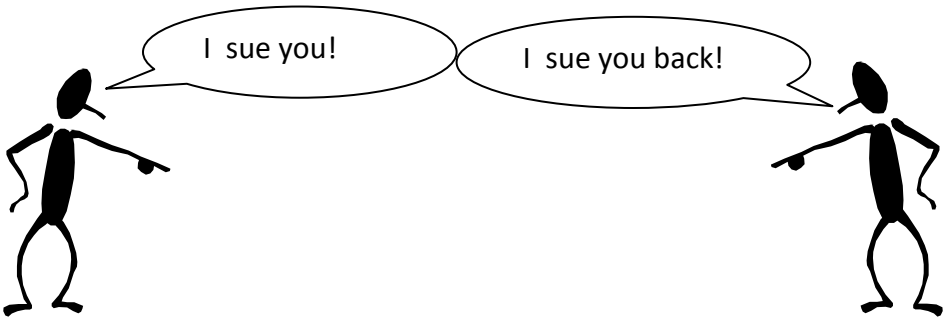
1. Plaintiff does not appear for trial.
   Action: Dismiss case with prejudice for **failure to prosecute**.

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 $5,000.
b. Must be in writing.
c. Must be filed with clerk before the time the trial is scheduled to begin. Recent change in law requires payment of filing fee.

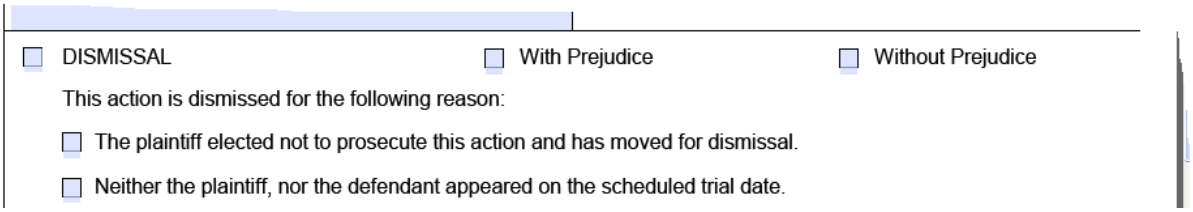
Action: Assuming **counterclaim meets above conditions**, tell Δ to give π a copy. If π needs time to prepare a defense, grant a continuance.

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 $5000**:

- 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 $8,000 counterclaim to $5,000 and then bring another action for the $3,000 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 $8,000" but amended his complaint to reduce the amount claimed to $5000 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:



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.*

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.

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, 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.

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:
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Lewandowski/SOG/2009

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.

Actions Involving Earnest Money

One kind of case heard often in small claims court arises out of disputes over earnest money. These cases may appear straightforward at first, but they differ from a typical case for money owed in ways that can prove quite challenging. Let's look first at a typical situation:

Imagine that Billie-Buyer signs an offer to purchase real estate from Sammy-Seller, and hands over a $3500 deposit to Ronni Realtor. A case involving earnest money is a case based on contract, so the first step is to take a look at the written agreement. A typical form contract in widespread use in North Carolina (translated from legalese into common English) provides as follows:

- *Ronnie will hang on to the earnest money deposit until one of two things happens: (1) the sale becomes final, at which point the deposit will be applied toward the purchase price of the property, or (2) the contract is terminated for some reason.*

- *If Sammy turns down Billie's offer to buy the property, Billie will get his earnest money back.*

- *Billie's offer to buy the property is contingent on certain things occurring, and if any of them don't, Billie is entitled to back out of the deal and get his earnest money back. What are these things that must occur?*
  - ✓ *First, the property must be free of any restriction or easement that would interfere with Billie's reasonable use of the property;*
  - ✓ *Second, the property must be in as good or better condition at closing as it is at the time Billie makes his offer;*
  - ✓ *Third, the property must appraise at a value equal to or greater than the purchase price;*
  - ✓ *Most importantly, Billie must be able to get financing at an agreed-upon rate and term. The contract requires Billie to exert his best efforts to get financing, including filling out a loan application by a certain date and proving that he's done so by giving Sammy a written confirmation of his application obtained from the potential lender. Most contracts provide that if Billie can't get financing as agreed, he gets the earnest money, but if Billie doesn't follow the contract terms as far as trying hard and providing confirmation that he did so, Sammy is entitled to the earnest money "as liquidated damages" for Billie's breach of the agreement.*

- *Provisions related to breach:*
  If the seller breaches, all earnest money shall be refunded to buyer upon request.
  If the buyer breaches, all earnest money shall be forfeited to seller upon request.
  (Billie's failure to use his best efforts to obtain financing is one example of a breach by the buyer.)

Let's take a look at how these provisions might work in practice.

Imagine that when Billie has the property appraised, the appraisal value is far less than the purchase price. Under the terms of the contract, one of the mandatory conditions required for the contract to bind the parties is not present, and Billie is released from his obligation to perform under the contract. In this event, the contract states that Billie is entitled to a return of his earnest money. Note that in this case neither Billie nor Sammy has breached the contract. The possibility that the property might not appraise high enough was considered by the parties, and they agreed on what would happen in that event.

Imagine that Billie applies for a loan, but is turned down. Again, one of the mandatory conditions for the contract to become binding is not present. If Billie did all he could do to obtain financing and notified Sammy as required by the contract, this case is just like the one above—neither party has breached, the contract is terminated, and Billie is entitled to a return of his earnest money.

Imagine a different set of circumstances, though. Sammy asserts that Billie actually breached the contract, because he did not take the necessary steps to obtain financing. Sammy argues that he is entitled to keep the earnest money, even though the sale of the property did not go through, under the liquidated damages provision related to breach.

As these examples illustrate, deciding which party is entitled to the earnest money is generally not especially difficult. The magistrate is required only to determine what happened, what the terms of the agreement are, and then apply the contract to the facts. What makes these cases uniquely challenging is the fact that they involve the parties' claims to an identifiable "pot" of money being held in escrow by a third party. Certainly a magistrate can hear an action for money owed based on a contract for purchase of land, and if the plaintiff is able to demonstrate by the greater weight of the evidence that the other party owes the plaintiff a certain amount of money under the terms of the contract, the magistrate can enter a money judgment accordingly. The fact that the amount of the judgment is a sum equal to the amount being held in escrow is not troublesome. What is troublesome, though, is the difficult question of what relationship, if any, that money judgment bears to the pot of money being held by the third party. Is this money judgment—like money judgments in typical small claims cases-- subject to claimed exemptions and all the other usual procedures and limitations of enforcement and collection? It seems clear that this is so; nothing in the law suggests that this particular type of money judgment should be treated differently. It also seems clear, though, that this is not what the parties have in mind. One of the primary purposes of earnest money, in fact, is to avoid precisely these enforcement issues. The plaintiff in a case involving earnest money is almost certainly asking, at the very least, that the small claims magistrate determine which of the two parties is entitled to this very particular identified fund. Quite likely, the plaintiff seeks more than a simple declaration of rights—the remedy sought is probably a court order directing disbursement of the fund to the prevailing party. But is this a remedy available in small claims court? And what of the third party—should the real estate broker or escrow agent be named as a party in the action? Finally, what is the impact of the statutory provision allowing an escrow agent to hand over the funds to the clerk of court?

We begin our consideration of these questions by returning to the contract, which states as follows:

"In the event of a dispute between Seller and Buyer over the return or forfeiture of earnest money held in escrow, a licensed real estate broker is required by state law to retain said earnest money

in the escrow agent's trust or escrow account until the escrow agent has obtained a written release from the parties consenting to its disposition or until disbursement is ordered by a court of competent jurisdiction." This provision tracks the language of administrative rules adopted by the Real Estate Commission. Taken literally, this language requires an agent in case of dispute to hold on to the earnest money until one of two things happens: either the parties resolve their dispute, or a court orders the agent to disburse the funds in a manner determined by the court. Clearly, a magistrate does not have authority to order disbursement of funds; as we have discussed, coercive orders are not among the listed remedies small claims magistrates are authorized to grant. From what we've said so far, it appears that it would be a rare circumstance indeed in which a magistrate would be confronted with an action involving earnest money. The only authority a magistrate has is to enter a money judgment, which has only a tangential relationship to the money being held in escrow. And yet, magistrates are often asked to determine earnest money cases, suggesting that parties do find small claims court an effective forum for vindicating their rights in these cases. In light of what we've said, how can we make sense of that?

I believe there are several responses to that question. First—and perhaps most significantly—is the interesting phenomenon that occurs when a group of people share a common mistaken belief about the law. Much like the story about the Emperor who wore no clothes, if the magistrate, the seller, the buyer, and the escrow agent all share a belief that a magistrate has authority to hear and decide these cases, the following outcome is likely: the magistrate issues a coercive order (albeit without authority), the escrow agent complies with the order directing the disbursement of funds, and the parties, having received a full and fair hearing on the merits, are as satisfied as any other litigants with the resolution of their dispute.

Second, even if the magistrate does not enter a coercive order, the small claims judgment for money owed may resolve the matter. The practical effect of that judgment may be the same as for a coercive order: either the parties agree to the disbursement of the earnest money in a manner consistent with the judgment, or the escrow agent treats the judgment as a court order and disburses the earnest money accordingly. So long as the magistrate's judgment is given the same effect as a coercive order, there is little reason for dissatisfaction on the part of the parties.

But there are occasions when the Emperor is revealed as wearing no clothes. For example, I recently received a call from a magistrate who had entered a coercive order which was defied by the party ordered to hand over the earnest money. The plaintiff had filed a motion with the magistrate asking that the defendant be ordered to appear and show cause why he should not be held in contempt. The magistrate quite properly asked (1) whether she had authority to find the defendant in contempt, and (2) if not, what procedure is available to the plaintiff to enforce the order. This fact situation presents quite dramatically the potential difficulties of entering an order for which no enforcement mechanism exists.

Even more troubling is the situation that arises when, in the midst of a small claims action, the real estate broker seeks a resolution of the issue by the clerk, under the statutory mechanism involving a special proceeding. G.S. 93A-12 was enacted in 2005 to provide real estate brokers with a mechanism for removing themselves from the middle of earnest money disputes. Under the statute,

Given that a magistrate does not have authority to order disbursement of funds, what might be the effect of a magistrate's ruling in an action seeking a money judgment in an amount equal to the amount of earnest money held in escrow under the terms of a contract such as that above? As we have discussed, the direct effect of the judgment is no different from that of any other money judgment entered in small claims court. The indirect effect, however, is less clear. The magistrate's judicial determination of the parties' rights under the contract is a binding determination, assuming there is no appeal, and an argument might be made that the spirit and intent of the requirement of a court order

for disbursement has been satisfied. It is conceivable that the magistrate's decision might influence the parties to agree to the agent's disbursement of funds in a manner consistent with the judgment. It is also conceivable that an escrow agent might interpret the judgment as being equivalent to a court order and release the funds even in the absence of the parties' agreement. Whether an escrow agent—and the Real Estate Commission—would agree is another matter.
might be to assure an escrow agent that magistrates are not authorized to issue coercive orderssuch an order is enforceable by the contempt power of the court, and magistrates have no such power (aside from the power to punish dir language appears to require a court order directed to the agent requiring him or her to disburse the funds in the manner

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.

Just another example of Big Law!

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:

Big Law: The SE Judgment Form, Part 1

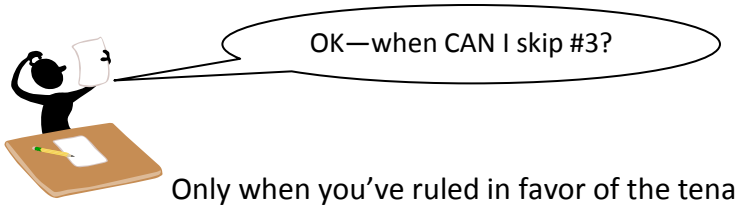
This post is the first in a series responding to questions that sometimes come up about the judgment form in actions for summary ejectment. Today, I'm focusing on #3 under FINDINGS (which I'm going to call "#3" for the rest of this post). [1] It looks like this:

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, or near 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.

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.

Appendix

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.

Legal Issues Involving Mobile Homes:

Problems

1. Larry Landlord owns a mobile home park. He'd like to evict a troublesome tenant from the space he rents on a month-to-month basis. The lease is oral, and the rent is due on the 1st of each month. On March 1st he gives the tenant notice that the lease will end on March 30. The angry tenant refuses to give Larry the rent for March, saying, "I ain't paying, and I ain't leaving neither!" On April 1 Larry files an action for summary ejectment. Troublesome tenant is present and complains that he needs more time to arrange for the removal of his mobile home. Is Larry entitled to a judgment for possession?

2. Larry Landlord decides he's just sick of the whole business—he wants to close the park and open a drag racing track instead. He learned from his last experience and so is careful to give each individual tenant 60 days notice that their lease is ending and they should make arrangments to have their mobile homes off the rental space by the end of the sixty day period. You find yourself facing a lot of angry people, many of them waving receipts, when you come to court to hear Larry's action for summary ejectment against seven of his tenants. Larry asks if you could speed things up by hearing all seven cases at once. All seven are present (along with friends and families). What do you tell Larry?

   Larry testifies to the facts above. He admits that they're good tenants, and no one is behind on rent, but he says their leases have been terminated and he wants them out. How do you rule?

3. Larry's gone, but today Laine is in court seeking summary ejectment of a tenant from his mobile home space. The tenant says he'll be happy to leave, but points out that the mobile home belongs to his mother-in-law. Can you enter

a judgment for Laine, even though the mobile home belongs to someone else?

4. Laine has an idea that this tenant is going to leave without taking his mobile home with him. Since Laine has had problems with that in the past with other tenants, he asks that you enter judgment in his favor for $350 to repay him for the cost he will incur when he has to move the mobile home. He's ready to present expert testimony about the average cost of removing a mobile home if that helps.

5. While you're at it, Laine has a question about another situation. The tenant ran off and left a mobile home just sitting on the lot. Laine's not sure how much it's worth—he says, "Probably not much—you know how those things depreciate." He wants to know if he can give the mobile home to his sister. He hasn't heard from the tenant in 3 months.

6. In a change of pace Laine is in court as a defendant; his tenant has sued for damages under the Residential Rental Agreement Act. Laine admits that the trailer was in pretty bad shape when he rented it out, but explains that the tenant got a lower rate because of it. Also, since mobile homes are known to depreciate quickly, Laine says the RRAA shouldn't apply—that just wouldn't make sense. The tenant says when he walks down the hallway, he can see the grass growing through the floor. The hole makes it cold as well as a favorite place for local rats.

7. Friendly Finance has filed an action to recover personal property based on its security interest in a mobile home located on one of Laine's lots. Laine is in your office complaining about the case; the tenant owes him back rent and he believes he should be able to sell, or at least keep and re-rent, the mobile home. He says you can't hear the case since he's not a defendant.

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.

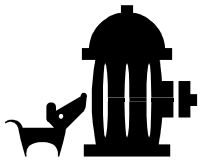
NOTE: Contributory negligence on the part of the plaintiff will bar recovery for injuries resulting from defendant's negligence based on violation of a statute.

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.*

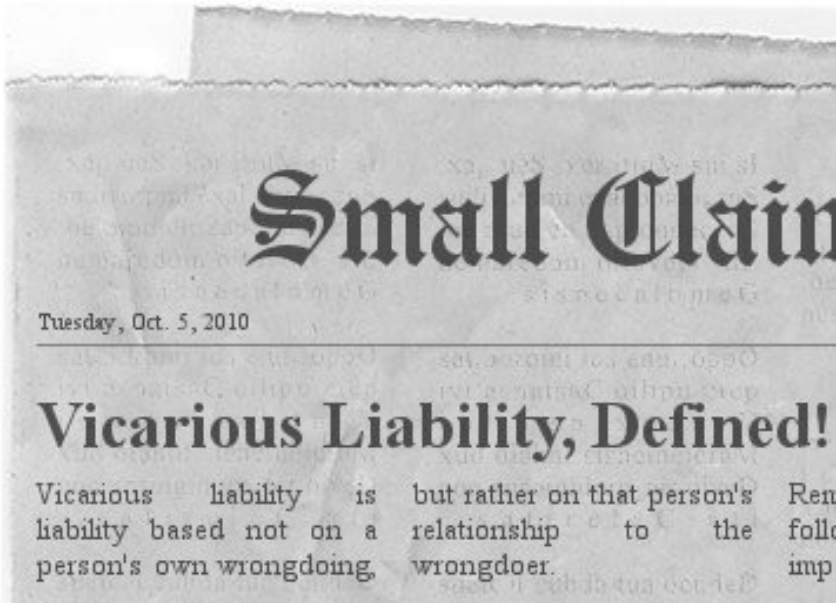
What is a dangerous dog? A dog that has (1) without provocation killed or inflicted severe injury on a person; (2) been declared to be a "potentially dangerous dog" under procedure established by statute; or (3) is owned for purpose of dog fighting, or is trained for dog fighting. "Severe injury" is 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.")



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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

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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.

Lewandowski, 2/07

For each action, consider:

-- Service of process (page 6)

-- Cash bonds (page 7)

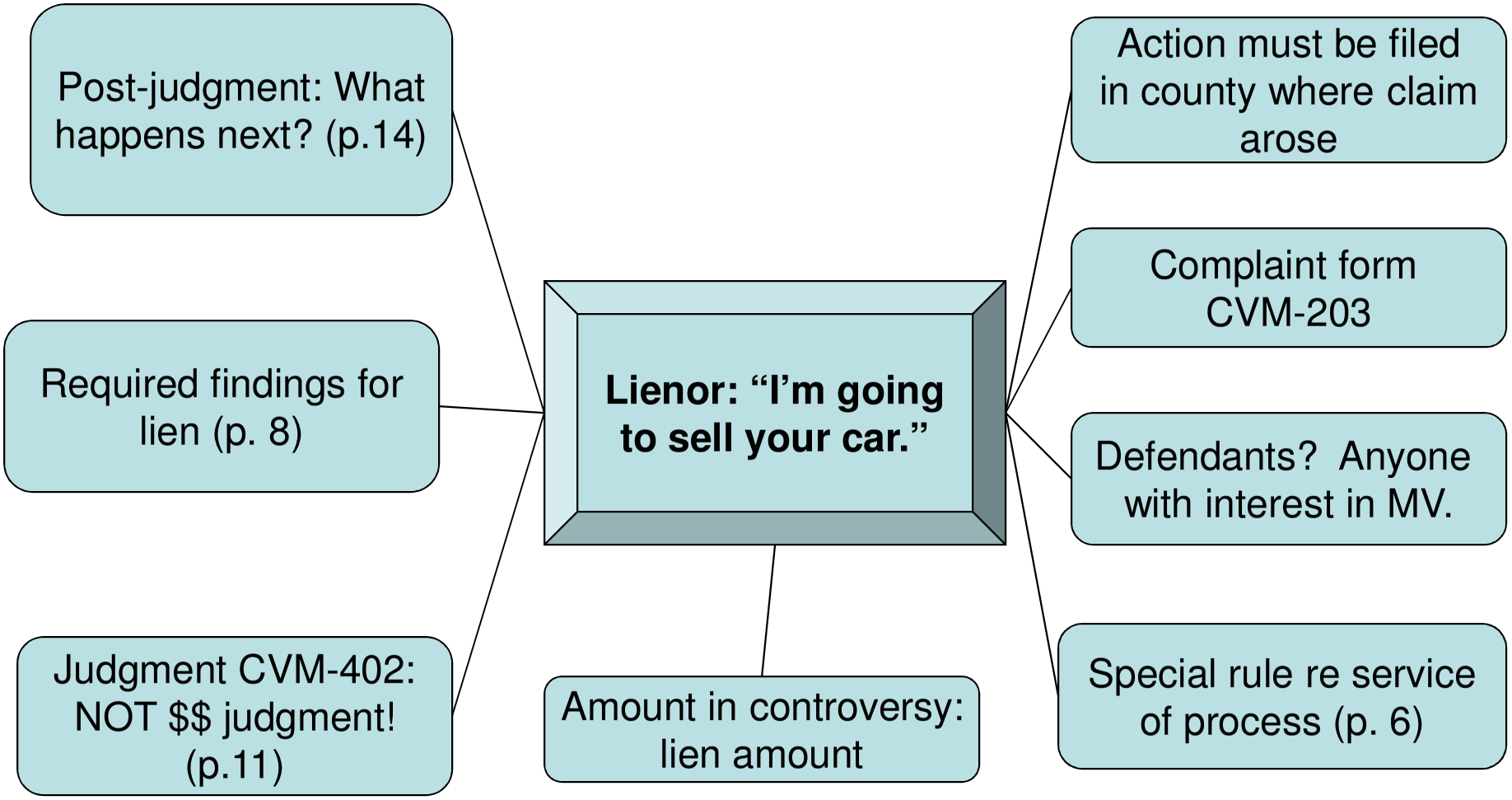
-- Required findings (page 8)

-- Special rules for storage fees (page 10)

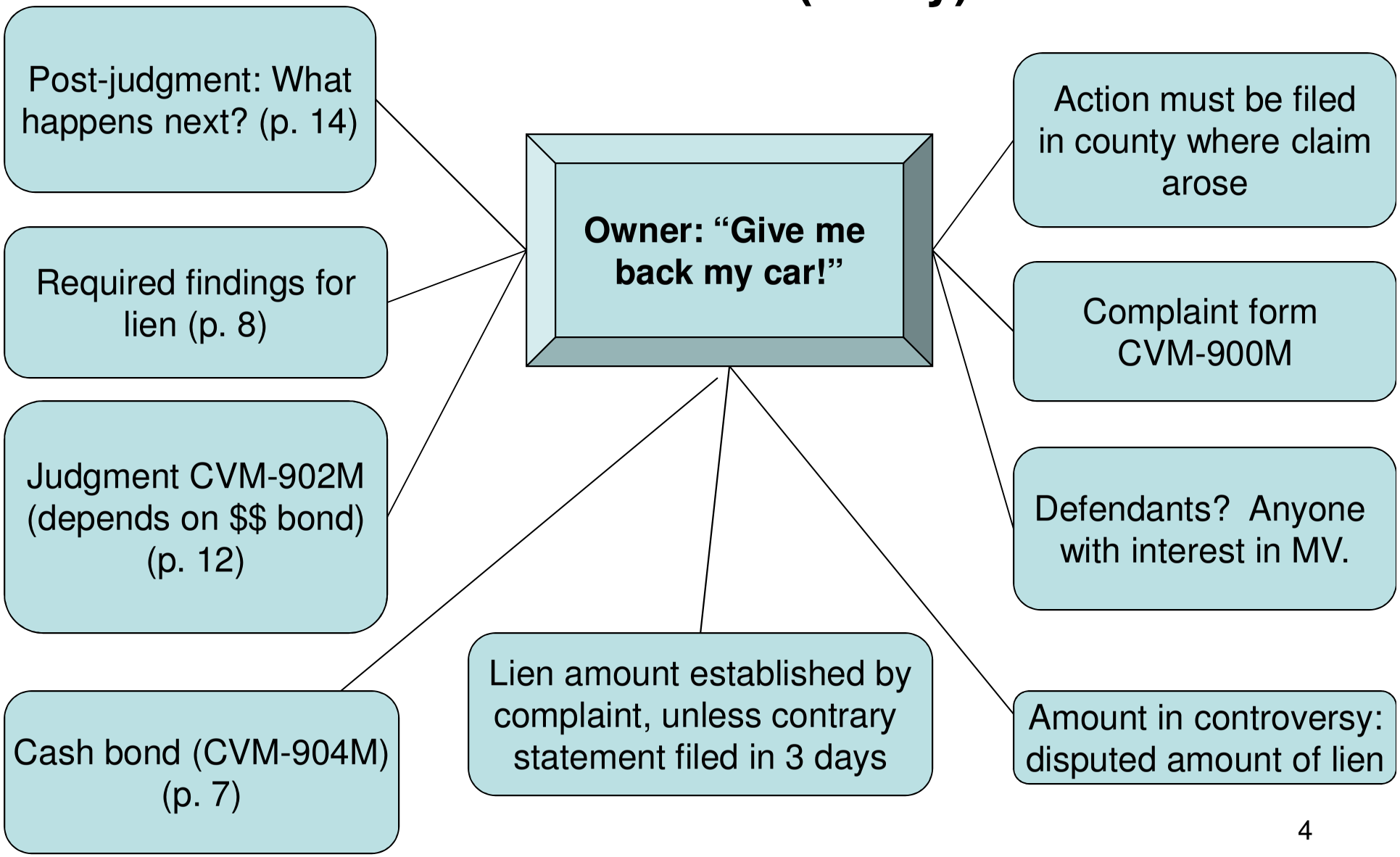
-- Judgment (pages11-13)

-- What happens next (page 14)

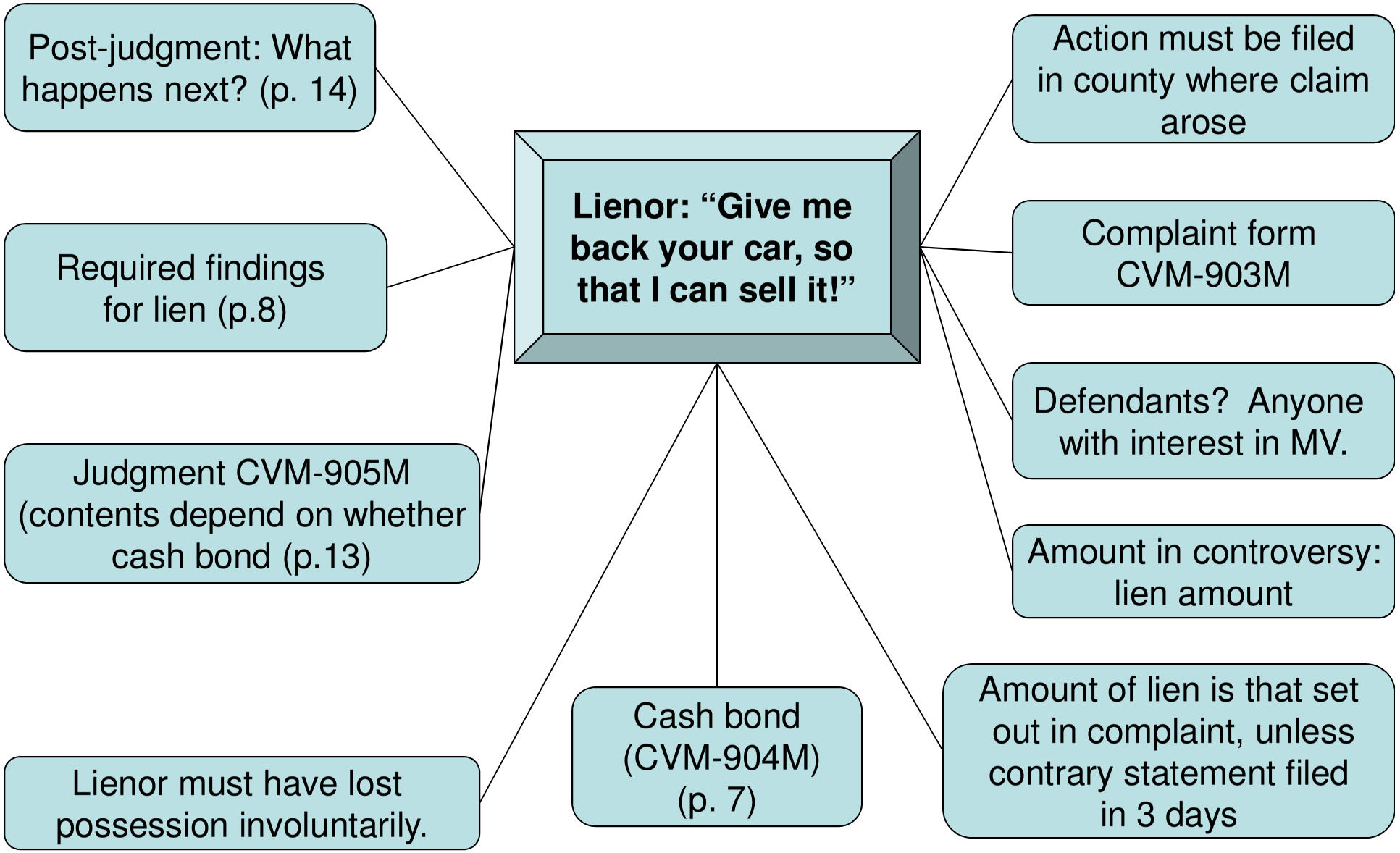
1. Action by lienor to establish lien:



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.

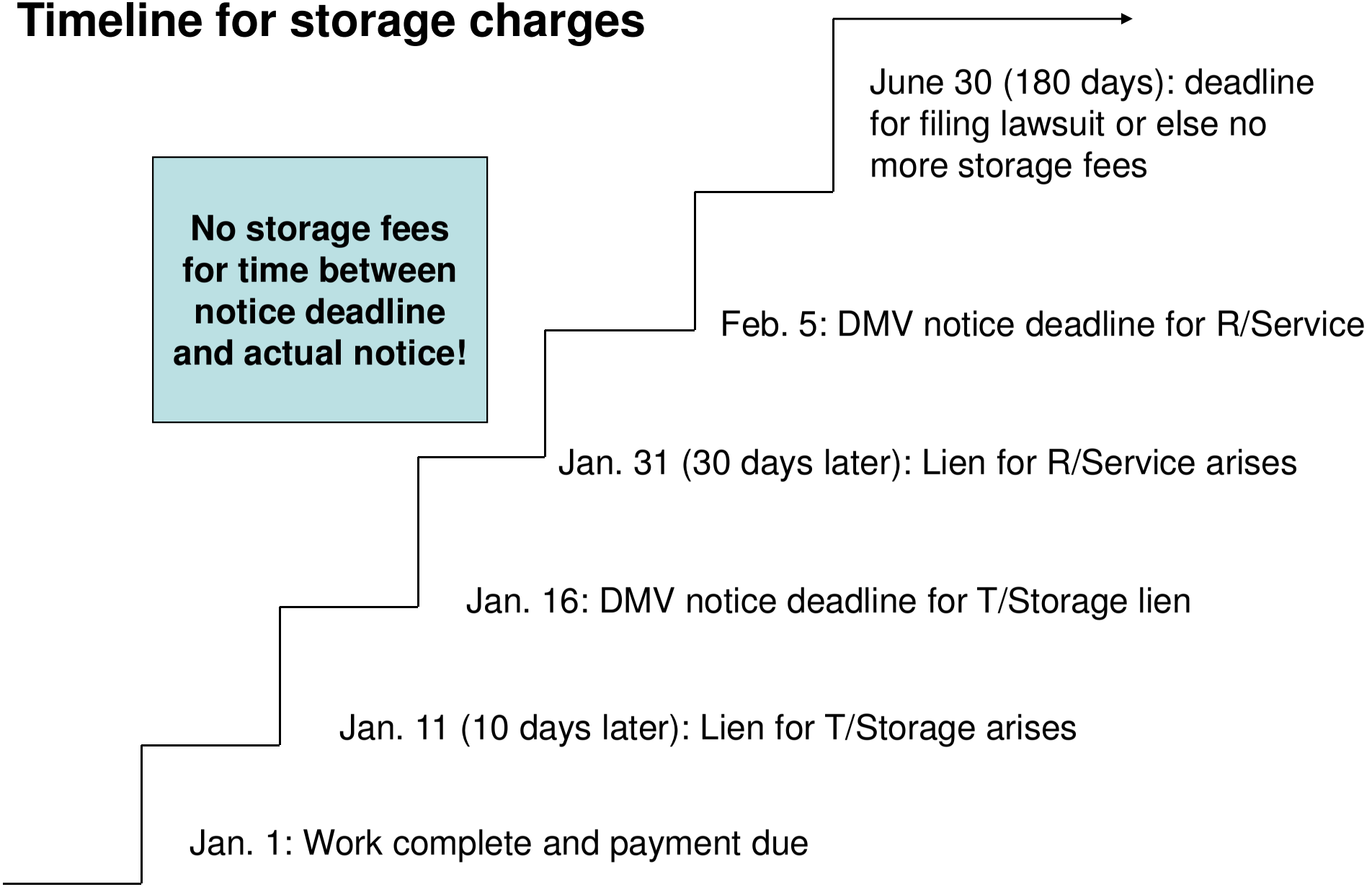
1. Repairs, services, tows, or stores MV in OCB .

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	Cash Bond
No Lien: Owner gets possession, no lien for lienor	**No Lien:** Owner gets possession, and judgment orders clerk to disburse $ to owner
Lien: Lienor gets possession, and can assert lien <u>for amt determined by magistrate</u>	**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. Lienor keeps possession and asserts lien as law allows	**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.

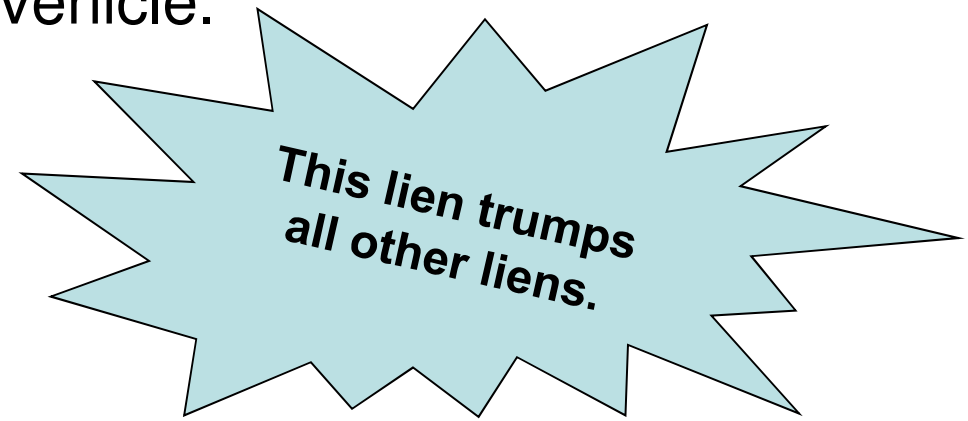
Cash Bond

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 and if when he returns to sign the lease. 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.

Rules for Determining Interest on Judgments

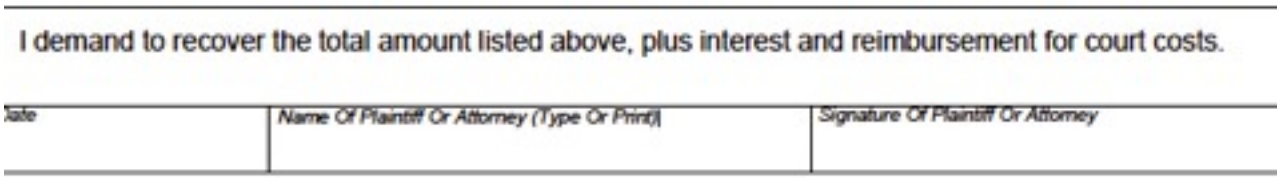
G.S. 24-5

(a) Actions on contracts: 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.

(b) Actions on Penal Bonds:[1] . . .

(c) Other Actions. - In an action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied. Any other portion of a money judgment in an action other than contract, except the costs, bears interest from the date of entry of judgment under G.S. 1A-1, Rule 58, until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

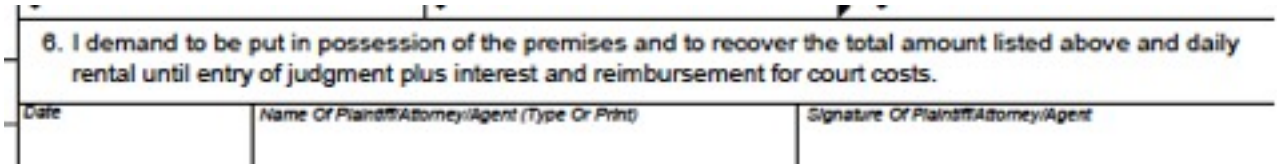
Interest is requested in every small claims case for money damages.



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

AOC-CVM-200 (Complaint for Money Owed)



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

AOC-CVM-201 (Complaint in Summary Ejectment)

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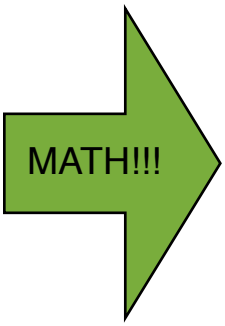
[1] What is a penal bond? A promise to pay a named sum as a penalty if a condition is not met. A bail bond is a common example, but interest on any performance bond is covered by G.S. 24-5(b). Interest on penal bonds is not the subject of this handout.

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.]

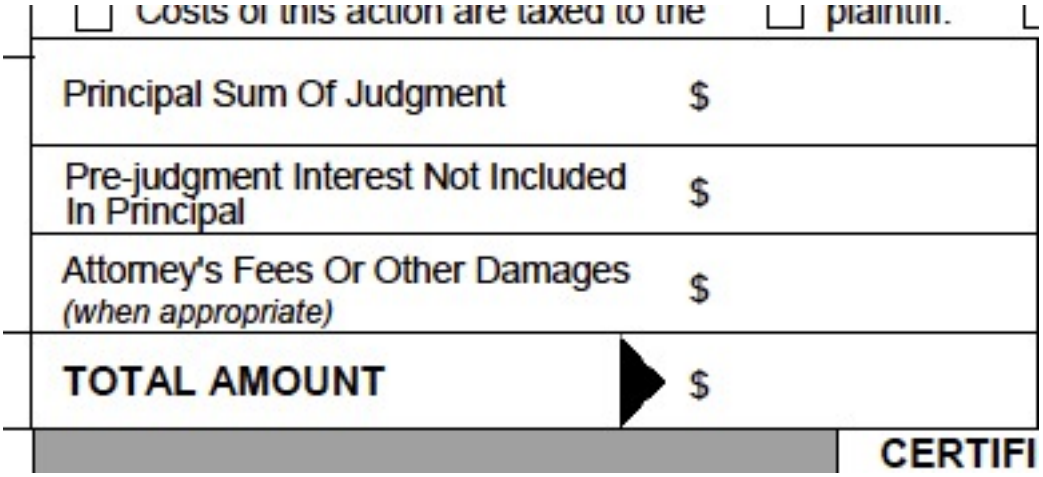
- In this case there are two separate breaches, because the tenant missed two payments:

  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

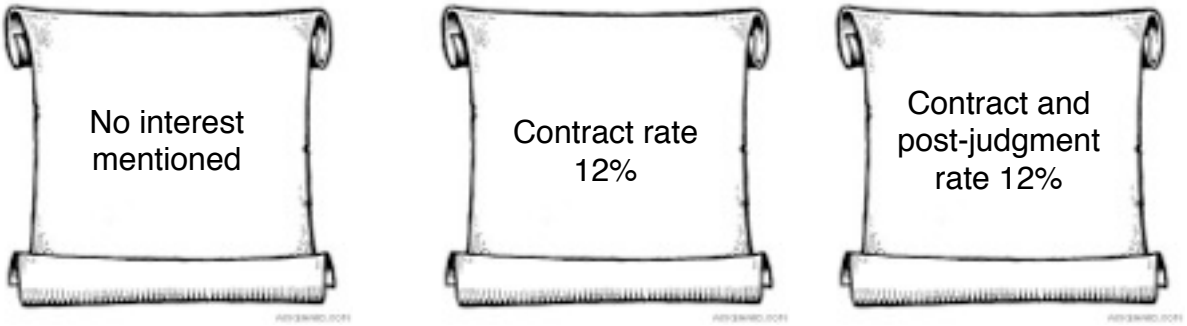
Clerks --not magistrates--are responsible for calculating interest on judgments accumulated between the time the judgment is entered and the time it is paid off ("post-judgment interest"). But magistrates still have an extremely important role to play, arising out of the following statutory provision:

> *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

Basic School: Small Claims Review

I. Procedure
   A. Small Claims Action
      i. Summary Ejectment, $ Owed, or Return of Personal Property
      ii. $5,000 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. Voluntary appearance
      iv. (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 $5000 or less

   D. Continuance
      i. Both parties agree: allowed
      ii. Motion by one party: allow only for good cause shown

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

   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
      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.
         a. 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. No self-help eviction
iii. Security deposit
iv. Residential Rental Agreements Act
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.

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

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right to appeal (10 days)

Entry of judgment

- ☑ written
- ☑ signed
- ☑ filed

open court

in writing to clerk

Counting Days

Judgment entered on Monday

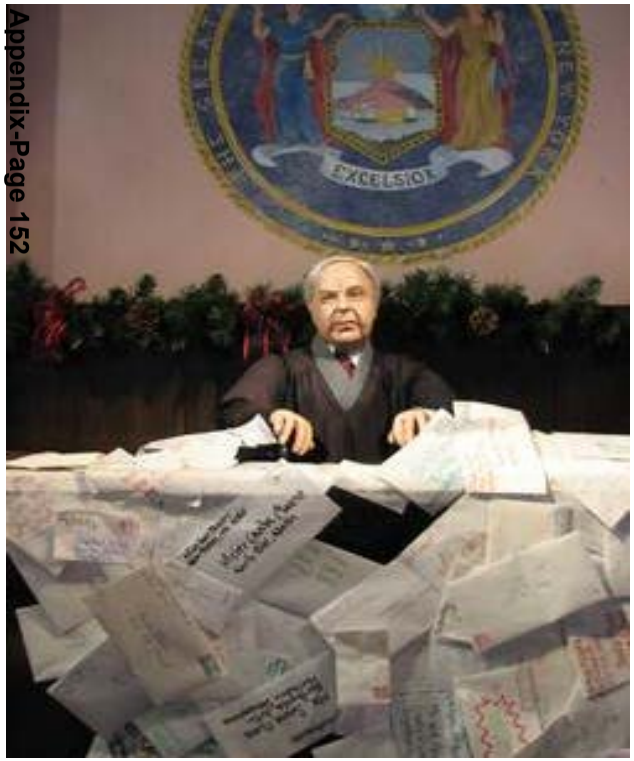
Entry on	M	T	W	Th	Fr	Sa	Su	M	T	W	Th	Fr	Sa	Su
0		1	2	3	4	5	6	7	8	9	10			

Entry	Th	Fr	Sa	Su	M	T	W	Th	Fr	Sa	Su	M	T	W
	0	1	2	3	4	5	6	7	8	9	10			

Judgment entered on Friday

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**	⇧	



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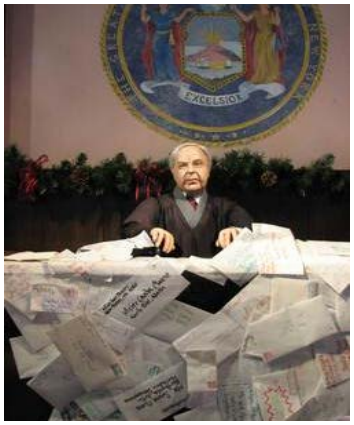
Judgment entered and magistrate mails on T, W, or Th: add 3 days

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**

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."