# THE CONSUMER PROTECTION LAWS IMPORTANT TO DISTRICT COURT: A BROAD OVERVIEW.

**Special Topic Seminar for District Court Judges**
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## I. Who is a "consumer"?

**A. No uniform definition across the General Statutes.** Typically, however, statutes that reference a "consumer" define the term either as merely an "individual" (e.g., N.C.G.S. § 75-61, Identity Theft Protection Act) or more specifically as someone who is engaging in a transaction for "personal, family, or household purposes" (e.g., N.C.G.S. § 25-1-201(b)(11), Uniform Commercial Code).[1]

**B. Consumers in District Court:** Consumer parties in District Court may appear as plaintiffs seeking to enforce contractual obligations of a business or to recover damages from a business arising from a consumer transaction. Consumers may also appear as defendants seeking to avoid enforcement of contractual obligations. For example, consumers may seek to avoid payment on a contract or to dispute repossession of alleged collateral.

**i. Contractual or implied contractual debtor**: Has signed or ratified the terms of a contract or has engaged in conduct that may imply liability as a defendant in quantum meruit. Liability in quantum meruit often arises in the context of medical debt, auto repairs and home or real estate maintenance, remodeling, or services.

**ii. Co-signor/joint account holder**: Usually has same liability as the contractual debtor.

A common scenario is a co-signor or joint debtor with a spouse where the spouses have since divorced, and a divorce settlement requires the other spouse to pay the debt. The other spouse fails to do so, however, and the co-signor is left facing liability. The divorce settlement is not a defense to an enforcement action against the co-signor, unfortunately. It means only that the co-signor can move to bring in the other spouse as a

[1] One exception is N.C.G.S. 58-70-90(2), Prohibited Practices by Collection Agencies, which defines a consumer as "an individual, aggregation of individuals, corporation, company, association, or partnership that has incurred a debt or alleged debt." This is an exception, however, in defining a consumer to include non-human entities who would be engaged, presumably, in commercial transactions.

necessary party or third-party defendant, or can seek to move for enforcement of the obligation to pay in the divorce action.

iii. **Identity theft victim**: Some defendants in consumer contract enforcement actions are victims of identity theft or credit card theft. Possible scenarios include forgery of the defendant's signature on a promissory note or retail installment contract, unauthorized charges stemming from credit card theft, and establishment of credit card or loan accounts online with electronic signature only. The Truth in Lending Act at 15 U.S.C. § 1643 limits a cardholder's liability for unauthorized use of a credit card to fifty dollars ($50) or less.

Consumers who are experiencing derogatory credit reporting on a fraudulent account or fraudulent charges may bring a declaratory judgment action or counterclaim for non-liability on the debt. They can then use the resulting order or judgment as proof of non-liability in disputing the derogatory credit information to the credit bureaus. To be effective for the consumer's credit reporting needs, such an order or judgment should include enough information to identify the account(s) at issue.

iv. **Authorized user**: Courts have generally agreed that a consumer who has not entered into a credit agreement, but is merely an authorized user on another person's account, is not liable for charges made by the cardholder. Under the Truth in Lending Act at 15 U.S.C. § 1643(b), the card issuer has the burden of proof to show that a consumer has authorized the card issuer to make him or her liable on all of the charges to a credit card account.

v. **Spouse of person who incurred debt**: The doctrine of necessaries, discussed further below, may make a spouse liable for some debts of the other spouse. A collection suit based on the doctrine of necessaries is most often seen in the medical debt situation.

## II. Consumer Defenses to Contract Enforcement Actions

### A. Procedural Defenses

i. **Personal jurisdiction**: It is not uncommon for lawsuits to be served at a wrong address, such as the home of a parent. Additionally, Plaintiffs are sometimes unable to achieve service before expiration of the summons.

Under N.C. R. Civ. P. 4(e), if the Defendant is not properly served within 90 days of issuance or endorsement of the Summons, and the Plaintiff fails to get an extension or alias and pluries summons within the 90 days, the action is discontinued. A new summons may be issued, but the action will be deemed to have commenced as of the date of the issuance of the new summons.

*Dozier v. Crandall*, 105 N.C. App. 74, 411 S.E.2d 635, *disc. rev. denied as improvidently allowed*, 332 N.C. 480, 420 S.E.2d 826 (1992). In some cases, the statute of limitations will have run before the new summons is issued, and the consumer will thereupon have a complete defense to the action.

ii. **Venue**: Chapter 1, Article 7 of the North Carolina General Statutes details venue provisions. A post-repossession deficiency action must be brought in the county where the debtor resides or where the loan was negotiated. N.C.G.S. § 1‑76.1. If an action is brought in the wrong county, the proper response is to file a Motion for Change of Venue under N.C. R. Civ. P. 12(b)(3).

Furthermore, in consumer debt collection actions, N.C.G.S. § 75-55(4), Prohibited Practices by Debt Collectors, prohibits "Bringing suit against the debtor in a county other than that in which the debt was incurred or in which the debtor resides if the distances and amounts involved would make it impractical for the debtor to defend the claim." If a Plaintiff that is subject to this statute (primarily affecting original creditors), brings suit in an improper district, the consumer may have a counterclaim for unfair debt collection conduct.

Additionally, Plaintiffs subject to the Fair Debt Collection Practices Act (FDCPA), such as debt buyers, can only bring suit in the state judicial district where the consumer lived at the time of the lawsuit, where the consumer signed the contract at issue, or where real property at issue is located. 15 U.S.C. § 1692i. If a Plaintiff that is subject to the FDCPA brings suit in an improper district, the consumer has an automatic FDCPA counterclaim**.**

iii. **Division**: Under N.C.G.S. § 7A‑243, the proper division is generally determined by amount in controversy. Collection attorneys generally file most cases in District Court, regardless of the amount in controversy, to speed the litigation process. Superior Court, however, is the proper division for cases involving amounts greater than $25,000 (not including interest and costs). See id. A consumer can move under N.C. R. Civ. P. 17 and N.C.G.s. § 7A-258 to transfer an appropriate case from District to Superior Court. Such a motion will be heard by a Superior Court judge, not a District Court judge.

iv. **Standing/Real Party in Interest**: Under N.C. R. Civ. P. 17, every claim must be brought in the name of a real party in interest. In consumer contract enforcement matters brought by assignees, consumers may question whether the party bringing the action is truly an assignee of the original party to the contract. Upon the filing of a motion to dismiss under this Rule, N.C. R. Civ. P. 17(a) provides "a reasonable time" for the Plaintiff to rectify the situation, either by getting the ratification of an existing entity that claims to be a real party in interest, or by joining or substituting such, or by providing proof of assignment of the contract or right to bring the action.

Even when a plaintiff is able to prove its status as an assignee, assignment documents should be reviewed closely to determine whether the plaintiff has the right to all of the relief prayed for in its complaint. For example, an assignment of "accounts receivable" (money owed) may not have included contract rights (the right to future accrual of interest).

v. **Statute of limitations**: N.C.G.S. § 1-52(1) provides a three-year statute of limitations for any action "upon a contract, obligation or liability arising out of a contract, express or implied [...]"

There are several exceptions, though. First, the statute of limitations extends to ten years for contracts signed under seal. N.C.G.S. § 1-47(2).

A four-year statute of limitations applies to contracts for the sale of goods (N.C.G.S. § 25-2-725); however, under *North Carolina Nat'l Bank v. Holshouser*, 38 N.C.App. 165, 247 S.E.2d 645 (1978), the four-year statute of limitations is inapplicable in an action to recover a post-repossession deficiency under an installment sale contract. Rather, either the three-year statute of limitations of N.C.G.S. § 1-52(1) or the statute of limitations for a contract under seal would apply. *See id.*

Finally, N.C.G.S. § 1-54(6) provides a one-year statute of limitations to sue on a mortgage foreclosure deficiency.

**B. Standard Contract Defenses**: Keep in mind that many of the standard contract defenses are also affirmative defenses that must be pled in the consumer's answer under N.C. R. Civ. P. 8.

i. **Payment**: Consumer has record of debt payoff, such as a canceled check or a letter confirming payoff. Consumer's credit report may show debt as "Paid in full/zero balance" or the like.

ii. **Accord and Satisfaction**: Consumer has record of debt settlement, such as a settlement offer letter, a canceled check that meets the terms of the settlement offer, and/or a letter confirming settlement payoff. Consumer's credit report may show debt as "Settled in Full/zero balance" or the like.

iii. **Release**: Consumer has documentation of an agreement that is binding on the Plaintiff and releases Consumer from claims related to the account or contract.

iv. **Discharge in Bankruptcy**: Consumer has documentation of a bankruptcy filing which included the debt and of obtaining a discharge. Consumer's credit report may show a bankruptcy, or the debt may be listed as "Charged off/zero balance" or "Included in Bankruptcy."

v. **Fraud**: Fraud in the inducement renders a contract void. See *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 464, 323 S.E.2d 23, 25 (1984). Fraud in the factum also renders a contract void. See *Creasman v. First*

*Federal Savings & Loan Assoc.*, 279 N.C. 361, 369, 183 S.E.2d 115, 120 (1971). Both types of fraud may be in play when the consumer is an elderly person who has allegedly co-signed on a debt for someone else.

vi. **Illegality**: Where a contract cannot be performed without violation of a statute, the contract may be wholly illegal and void. *Cauble v. Trexler*, 227 N.C. 307, 311, 42 S.E.2d 77, 80 (1947). "When a contract contains provisions which are severable from an illegal provision and are in no way dependent upon the enforcement of the illegal provision for their validity, such provisions may be enforced." *Rose v. Materials Co.*, 282 N.C. 643, 658, 194 S.E.2d 521, 532 (1973).

vii. **Res Judicata**: Occasionally, consumers are sued twice over the same debt. If a court previously ruled that the consumer was not liable on the debt, or ruled that the consumer was liable to someone other than the current Plaintiff, the consumer should assert the res judicata defense.

viii. **Statute of Frauds**: Certain types of contracts must be evidenced in writing. These include a promise to pay another person's debts (N.C.G.S. § 22-1); an agreement to convey an interest in land or grant a lease of greater than three years (N.C.G.S. § 22-2); a promise to pay a debt that has already been discharged in bankruptcy (N.C.G.S. § 22-4); a contract for the sale of goods for the price of $500 or more, with some exceptions (N.C.G.S. § 25-2-201); a consumer credit sale contract, as defined by the Retail Installment Sales Act (N.C.G.S. § 25A-28); and a security agreement designating collateral (N.C.G.S. § 25-9-203(b)(3)(A)).

ix. **Usury**: The legal rate of interest in North Carolina is eight percent. N.C.G.S. § 24-1. There are numerous exceptions to this statute, however. For example, North Carolina's usury laws are entirely pre-empted by the National Bank Act, which allows a national bank to charge interest on loans "at the rate allowed by the laws of the State ... where the bank is located…" 12 U.S.C. § 85. See also *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003). Similarly, the state Retail Installment Sales Act at N.C.G.S. § 25A-15(c) sets forth a list of much higher maximum interest rates for consumer credit installment sales of vehicles, based on vehicle age.

x. **Capacity**: Capacity may be an issue a consumer is elderly or has a history of physical/mental health issues or substance abuse. The contracts of a mentally incompetent person are voidable. *Chesson v. Pilot Life Ins. Co.*, 268 N.C. 98, 150 S.E.2d 40 (1966).

The standard mental capacity needed to contract is that a person "knows what he is about ... [T]he measure of capacity is the ability to understand the nature of the act in which he is engaged and its scope and effect, or its nature and consequences ..." *Sprinkle v. Wellborn*, 140 N.C. 163, 181, 52 S.E. 666, ___ (1905). Where a court has not previously adjudicated a person incompetent,

he has the burden of proof as to whether he was mentally ill when he entered into the contract he seeks to avoid. *Ridings v. Ridings*, 55 N.C. App. 630, 286 S.E.2d 614, *disc. rev. denied*, 305 N.C. 586, 292 S.E.2d 571 (1982). The burden then shifts to the Plaintiff to show, among other things, that it had no knowledge of the incapacity and did not take advantage of the consumer. *See Chesson*.

xi. **Amount**: Even where a consumer is liable on a debt and admits default, the amount claimed by the plaintiff should be subject to scrutiny. Has the plaintiff carried its burden of proof as to the charges, the interest rate and fees, and the payment history of the consumer? Does the consumer claim that any charges to a credit card were unauthorized? Does the consumer claim that any charges on a medical bill are for goods or services never received? Etc.

**C. NOT a defense: Charge off.** Consumers sometimes argue believe that, because a creditor has charged off an account, the debt is no longer owed. Such consumers may have received collection communications communicating a charge-off status, or may have seen a charge-off status for an account on a credit report.

Historically, a "charge off" occurs when a loan is determined to be uncollectible. The amount charged off is then carried in the bad debt account and not as a general ledger asset on the creditor's books. *See Rochholz v. Farrar*, 547 F.2d 63, fn2 (8th Cir. 1976). Under current banking regulations, however, in an open-end credit account like a credit card account, the account must be "charged off" 180 days after it becomes delinquent, while a closed-end credit account, such as a car loan, must be charged off 120 days after it becomes delinquent. Office of the Comptroller of the Currency, OCC 2000-20, OCC Bulletin; Fed. Fin. Institutions Examinations Council, Uniform Retail Credit Classification and Account Management Policy, 65 Fed. Reg. 36,903 (June 12, 2000).

A charge off, then is an accounting event that occurs in response to regulatory requirements, and has no effect on a creditor's right to collect on the debt within the applicable statute of limitations, or the consumer's obligation to pay.

**D. NOT a defense: Lack of credit reporting.** Consumers sometimes argue that, because an account does not appear on their credit report(s), the debt is past statute of limitations, is no longer owed, or is not theirs. Lack of credit reporting of an account does not necessarily support such arguments.

Regarding a statute of limitations defense, credit bureaus must delete delinquent accounts seven years after the date of delinquency or charge-off. Therefore, the non-appearance of an account on a credit report *could* indicate that an account has passed statute of limitations if the statute of limitations is less than 7.5 years. Participation in credit bureau reporting is completely voluntary, however, so non-appearance of an account on a particular report could just as easily indicate merely that the creditor is one who does not report accounts to the credit bureaus.

Regarding the "no longer owed" defense, credit bureaus are not required to delete accounts merely due to pay off or closure. Even after a consumer pays a delinquent account, the account will remain on the report as a "paid" or "closed" or "settled" account until the seven year obsolescence period completes.

Finally, again, because participation in credit bureau reporting is completely voluntary, non-appearance of an account on a particular report does not necessarily indicate that the account does not belong to the consumer. It could just mean that the creditor in question does not report to that credit bureau, or does not report accounts at all. Better credit reporting evidence in support of the consumer's argument would be documentation that the account does, in fact, appear on another consumer's report.

**E.** ***Sometimes*** **supports a defense: 1099-C issuance.** Consumers sometimes argue that, because a creditor has issued a 1099-C on an account, the debt is no longer owed.

Any company that "discharges" a debt of $600 or more in a year is required to notify the Internal Revenue Service of this information using the form 1099-C, "Cancellation of Debt." The creditor will send a copy of the notification to the debtor. The IRS "does not view a Form 1099-C as an admission by the creditor that it has discharged the debt and can no longer pursue collection." IRS, Info. Ltr., 2005-0207 (Dec. 30, 2005).

Sometimes, however, the issuance of a 1099-C can indicate or support a discharge in bankruptcy defense; an accord and satisfaction defense; a res judicata defense; or a statute of limitations defense. The creditor's obligation to send the 1099-C is triggered by a "discharge" event. Events that "discharge" a debt are set forth in the Internal Revenue Code at 26 C.F.R. §§ 1.6050P-1(b) and include debt settlement, bankruptcy discharge, various judicial proceedings that extinguish the debt or the right to collect it, or a creditor's decision to abandon collection, typically after period of non-payment.

While the calculation of a non-payment period is complex, Treas. Reg. § 1.6050P-1(b)(2)(iv) (as amended 1996) provides that discharge must occur after thirty-six months of non-payment (excluding months under bankruptcy stay or other collection bar). This means that, under some circumstances, a creditor did not decide voluntarily to abandon collection, but was compelled to do so by Treasury regulations after thirty-six months of non-payment. If so, the issuance of the 1099-C could indicate that the consumer has not paid on the debt in at least thirty-six months, so a statute of limitations defense could be valid for a contract type with a statute of limitations of three years or less.

## III. Consumer Claims

**A. Declaratory Judgment under N.C.G.S. § 1-253 et seq.**: Section 1-254 of the Declaratory Judgment Act provides that "Any person […] whose rights, status or

other legal relations are affected by a […] contract may have determined any question of construction or validity arising under the […] contract […] and obtain a declaration of rights, status, or other legal relations thereunder." In addition, the Court of Appeals has stated that a trial court "certainly may determine the validity and enforceability of a contract under the Declaratory Judgment Act. To interpret this Act otherwise would render it useless." *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C.App. 626, 630, 518 S.E.2d 205, 208, *disc. rev. denied*, 351 N.C. 186, 541 S.E.2d 709 (1999).

Plaintiffs sometimes move to strike declaratory judgment counterclaims or to have them dismissed under Rule 12(b)(6). Under *Elliott v. Ballentine*, however, a declaratory judgment action is appropriate in any case where there are "genuine controversies" between adverse parties as to "rights, status, or other legal relations." 7 N.C.App. 682, 685, 173 S.E.2d 552, 554 (1970).

**B. Unfair/Deceptive trade practices** ("UDTPA") (N.C.G.S. § 75-1.1, *et seq.*). The granddaddy of consumer protection statutes in North Carolina is Chapter 75, which prohibits "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce. N.C.G.S. § 75-1.1(a). The broad language of this statute encompasses bad conduct that could occur in virtually every consumer transaction imaginable, other than those explicitly excepted by the statute. Most of the situations giving rise to other consumer claims described in this manuscript also give rise to UDTPA claims.

Exceptions from the statute include "professional services rendered by a member of a learned profession." N.C.G.S. § 75-1.1(b). Courts have held that "learned professionals" include attorneys (*Sharp v. Gailor*, 132 N.C. App. 213, 510 S.E.2d 702 (1999)), architects (*RCDI Constr. v. Spaceplan-rchitecture, Planning & Interiors, P.A.*, 148 F. Supp. 2d 607 (W.D.N.C. 2001)), and healthcare providers (*Abram v. Charter Medical Corp. of Raleigh*, 100 N.C. App. 718, 398 S.E.2d 331 (1990), cert. denied, 328 N.C. 328, 402 S.E.2d 828 (1991)).

To prevail on a claim under the UDTPA, a plaintiff must prove that "(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp,* 353 N.C. 647, 656 (2001). Injuries may be economic or non-economic, and the amount of damages awarded in a verdict in favor of the plaintiff on a UDTPA claim are automatically trebled. N.C.G.S. § 75-16.

Plaintiffs alleging emotional distress need not meet the "severe" emotional distress tort standard to recover under the UDTPA. They need only show that they suffered "injury." *See Williams v. HomEq Servicing Corp*., 184 N.C. App. 413, 420, 423-24 (in a case involving harassing debt collection telephone calls, affirming grant of summary judgment with respect to plaintiff's claim for negligent infliction of emotional distress where plaintiff's evidence did not meet the standard for severe emotional distress, but reversing summary judgment with

respect to certain of plaintiff's emotional distress claims under the North Carolina Debt Collection Act, N.C.G.S. § 75-50 et seq.).

The UDTPA has a four-year statute of limitations. N.C.G.S. § 75-16.2. The judge has discretion to award a prevailing party a reasonable attorney fee under a finding that "the party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or […] The party instituting the action knew, or should have known, the action was frivolous and malicious. N.C.G.S. § 75-16.1. The second provision is often referred to as the "claw back" provision of the UDTPA.

In addition to its general broad prohibition on unfair and deceptive acts and practices, Chapter 75 also includes several articles which focus on more specific consumer contexts, including consumer debt collection (Article 2), identity theft protection (Article 3), and home foreclosure rescue scams (Article 5A).

C. **State unfair debt collection statutes:** North Carolina has two statutes that provide explicit protections for consumers from bad debt collection conduct. The statutes are very similar, but apply to slightly different collection actors and consumer situations.

   i. **N.C.G.S. § 75-50, *et seq*. (Prohibited Acts by Debt Collectors)** Governs debt collection conduct of *original creditors* and any persons or entities that are NOT with respect to the debt in question a collection agency or a debt buyer.

      a. Applies *only* to collection of debts from consumers, meaning natural persons who have incurred debts or alleged debts for "personal, family, household, or agricultural purposes." (N.C.G.S. § 75-50(1)).

      b. Prohibits the the following debt collection conduct:

         a. False threats or coercion (N.C.G.S. § 75-51).

         b. Profane/obscene speech, repetitive or harassing phone calls, and phone calls to place of employment (N.C.G.S. § 75-52).

         c. Publicizing information about debts to third parties (N.C.G.S. § 75-53).

         d. Deceptive or misleading representations about the character, status, or amount of a debt, or about the collector's identity, rights, or intentions (N.C.G.S. § 75-54).

e. Unconscionable collection means, including seeking affirmations of discharge debts or waivers of statutes of limitation without proper disclosure of the effects of such affirmation or waiver; collection of fees or charges to which there is no legal entitlement; contacting a consumer after notification of attorney representation; and filing suit in an improper venue (N.C.G.S. § 75-54).

c. Does not explicitly provide for a right to ask the collector to cease and desist communication. Nevertheless, a cease and desist request from the consumer regarding phone calls effectively triggers the N.C.G.S. § 75-53 prohibition on telephone calls that "constitute a harassment to the person under the circumstances."

ii. **N.C.G.S. § 58-70-90, et seq. (Prohibited Practices by Collection Agencies)** Governs actions of *collection agencies and debt buyers*.

a. Applies to collection of debts from "consumers," who may be natural persons, entities, or groups of people (N.C.G.S. § 58-70-90(2)). There is no restriction that the debts have arisen from personal, family or household purposes, so business debts are included.

b. Prohibitions largely mirror those of N.C.G.S. § 75-50, et seq., as well as setting forth additional requirements for debt buyers engaging in collection or litigation activities.

iii. **Pleading requirements**. A claim under the either of the state unfair debt collection statutes falls under the umbrella of Chapter 75. As such, a claim alleging improper debt collection under either N.C.G.S. § 75-50, *et seq.* or N.C.G.S. § 58-70-90, *et seq.* must also satisfy the requirements of a more general claim under the UDTPA. *Godfredson v. JBC Legal Group, P.C.*, 387 F. Supp. 2d 543 (E.D.N.C. 2005). Learned professionals are exempt from claims made under these statutes, as they are from regular UDTPA claims.

iv. **Remedies.** The two state unfair debt collection statutes have identical remedies, and both are governed by Chapter 75-1.1's statutes of limitations and attorney fee provisions.

a. Not less than $500, but no more than $4,000 in statutory damages per violation (N.C.G.S. § 58-70-130 or N.C.G.S. § 75-56).

b. Actual damages (N.C.G.S. § 58-70-130 or N.C.G.S. § 75-56).

c. Attorney's fees upon showing that Defendant "has willfully engaged in the act or practice, and there was an unwarranted

refusal by such party to fully resolve the matter" (N.C.G.S. § 75-16.1).

**D. Unfair Debt Collection Practices Act--Federal (FDCPA, 15 U.S.C. § 1692, et seq.).** This federal statute provides similar protections to those of N.C.G.S. 58-70-90, et seq. The FDCPA does explicitly provide consumers to request that a collector cease and desist from all collection communications. (15 U.S.C. § 1692c). It also requires that debt collectors disclose certain information to consumers upon initial contact, and validate disputed debts upon request (15 U.S.C. § 1692g). Because it applies only to "debt collectors," meaning primarily collection agencies, collection attorneys, and debt buyers, counterclaims under this statute are uncommon in state court outside of the debt buyer context. Affirmative suits brought by consumer plaintiffs are typically removed to federal court under federal question jurisdiction.

**E. Fair Credit Reporting Act (15 U.S.C. 1681, et seq.):** Consumer has disputed wrongful credit reporting by a creditor or debt buyer, which has in turn wrongfully verified that the inaccurate information is correct to the credit bureau.

Consumers sometimes bring counterclaims under the FCRA in response to debt collection actions. An FCRA counterclaim is sometimes seen when the consumer has prior to suit disputed on the basis that the account at issue is not theirs, that the account has already been settled or discharged in bankruptcy, or that the amount claimed or payment history is incorrect.

Affirmative suits brought by consumer plaintiffs, however, are typically removed to federal court under federal question jurisdiction.

**F. Fair Credit Billing Act (15 U.S.C. § 1666):** Failure to conduct a reasonable investigation of a consumer's claim of a billing error on a credit card.

**G. Truth in Lending Act (15 U.S.C. § 1643)**: Failure to conduct reasonable investigation of a consumer's claim that there was unauthorized use of a credit card.

**H. Identity Theft Protection Act (N.C.G.S. § 75-60, et seq.)**

**I. Violation of Public Records laws (N.C.G.S. § 132-1.10(d) and (h))**

**J. Breach of settlement agreement**

**K. IIED/NIED/Intrusion into Seclusion**

## IV. Special Topic: Contracts for Deed (a/k/a "Installment Land Contract") N.C.G.S. Chapter 47H.

**A. Definition (N.C.G.S. § 47H-1(1)):** "An agreement […] in which the seller agrees to sell an interest in property to the purchaser and the purchaser agrees to

pay the purchase price in five or more payments exclusive of the down payment, if any, and the seller retains title to the property as security for the purchaser's obligation under the agreement."

In practice, purchaser makes a down payment (typically minimal) and takes possession of the property. Purchaser often takes on responsibility for payment of property taxes, insurance, and maintenance costs.

**B. Applicability (N.C.G.S. § 47H-1(5)):** Applies to (1) real property within the state of North Carolina upon which there is or will be located residential structure(s) to house from one to four families that is or will be occupied by the purchaser as their principal dwelling; and (2) manufactured homes within the state of North Carolina with purchase prices of $5,000.00 or more that is or will be occupied by the purchaser as their principal dwelling.

**C. Prerequisites:**

i. Seller must have title in fee simple to property being conveyed. N.C.G.S. § 47H-6(a).

ii. No liens on property being conveyed! Except… a mortgage in the seller's name where either: (1) purchaser has agreed in writing that seller may take out the loan for purposes of improving the property, or (2) seller took out the loan prior to execution of the contract for deed and continues to make timely payments. N.C.G.S. § 47H-6(a).

iii. Contract for deed must be in writing and signed by both seller and purchaser. (N.C.G.S. § 47H-2(a)) and must contain statutorily defined contents, including notices of rights to accelerate, to prepay, to cure default, and to cancel. N.C.G.S. § 47H-2(b).

iv. Seller must disclose in a separate writing the existence of any lien(s) and the possibility of lender foreclosure if the seller defaults on the lien(s). N.C.G.S. § 47H-6(b).

**D. Default and Forfeiture:** If the purchaser breaches an express obligation in the option contract, and the contract specifies that such a breach triggers forfeiture, the seller, to enforce forfeiture, must give notice containing statutorily defined content. N.C.G.S. § 47H-3 and 47H-4.

**E. Late Fees (N.C.G.S. § 47H-7):** Limited to four percent (4%) of overdue payment; can only be charged for payments more than fifteen (15) days past due.

**F. Purchaser's Remedies:** Purchaser can seek damages, rescission of contract, or declaratory or equitable relief. N.C.G.S. § 47H-8. The statutory remedies are NOT exclusive. This means, for example, that a purchaser who is charged an illegal late fee may additionally bring a claim for unfair debt collection under

N.C.G.S. § 75-50, et seq., which allows for recovery of up to $4,000 in statutory damages per violation.

If the seller fails to disclose existing liens prior to purchase, encumbers the property without the purchaser's permission post-purchase, or defaults on a mortgage, security interest, or other lien secured by the real property, the purchaser may rescind the contract and seek recovery of all amounts previously paid on the contract. The seller is entitled to an offset from this recovery of amounts equal to the fair rental value of the property for the duration of the purchaser's possession, as well as amounts to compensate for damage to the property. N.C.G.S. § 47H-6(c).

**G. Common Litigation Contexts in District Court:**

i. Seller attempts to recover possession of property due to alleged non-payment. Contract for deed seller may have attempted to evict purchaser by bringing an action for summary ejectment action in Small Claims court. The parties to a contract for deed do NOT bear the relationship of landlord and tenant. Therefore, the seller cannot properly bring an action for summary ejectment to regain possession after default, and the magistrate does not have jurisdiction to hear the seller's action to regain possession. The magistrate may dismiss the seller's action, or may grant summary ejectment if the true nature of the parties' relationship is not made clear. Either side may then appeal the magistrate's decision de novo to District Court.

ii. Purchaser attempts to enforce contract after seller fails to convey upon completion of payments. This is especially common in the manufactured home context. In the event that the seller absconds, and the manufactured home is still a titled motor vehicle, the Department of Motor Vehicles may a necessary party to an action to enforce the contract, as a prevailing consumer will need an order compelling issuance of a new title in their name.

## V. Special Topic: Option to Purchase Contracts Executed with Lease Agreements (a/k/a "Rent to Own") N.C.G.S. Chapter 47G.

**A. Applicability:** Covers residential lease agreements that are combined with, or executed concurrently with, option contracts for the purchase of single-family residential real property**.** N.C.G.S. § 47G-1. An "option" is a contract where the owner of property gives the optionee a continuing offer to sell the property for a fixed period of time. Time is generally of the essence in an option contract such that the option expires if not exercised by the agreed upon date. *Wachovia Bank v. Medford*, 258 N.C. 146, 150, 128 S.E.2d 141, 144 (1962).

"In a typical lease/option agreement covered under Chapter 47G, a tenant has the right to purchase the property until the expiration of the option period. If the

tenant otherwise defaults under the agreement during the term, the tenant does not lose his 'equity of redemption' - that is, his option, unless the landlord follows the procedures contained in Chapter 47G." *Lee v. Cooper*, 801 S.E.2d 371, 372 (N.C. Ct. App. 2017).

**B. Requirements:** Option contracts must be in writing and must contain certain statutorily defined content, including disclosure of rights to cure and cancel. N.C.G.S. § 47G-2.

**C. Tenancy:** Until exercising the option to purchase, the would-be purchaser is merely a tenant and is subject to Chapter 42, "Landlord and Tenant." N.C.G.S. § 47G-3.

**D. Default and Forfeiture:** If the purchaser breaches an express obligation in the option contract, and the contract specifies that such a breach triggers forfeiture, the seller, to enforce forfeiture, must give notice containing statutorily defined content. N.C.G.S. § 47G-4 and 47G-5.

If, on the other hand, the seller defaults on a mortgage, security interest, or other lien secured by the real property, the purchaser may rescind the contract and seek recovery of all amounts previously paid on the contract. The seller is entitled to an offset from this recovery of amounts equal to the fair rental value of the property for the duration of the purchaser's possession, as well as amounts to compensate for damage to the property. N.C.G.S. § 47G-6.

**E. Remedies**: The purchaser may sue for damages, to void the contract, or to obtain declaratory or equitable relief. A seller who is a homeowner selling the primary residence is not subject to Chapter 75 claims for violations of Chapter 47G. N.C.G.S. § 47G-7.

In the event of breach of the option contract by the purchaser, after giving notice, the seller can bring a summary ejectment action in Small Claims court. In that event, the purchaser may counterclaim for damages (or bring a separate action for damages if damage amounts exceed Small Claims jurisdiction). N.C.G.S. § 47G-7.

**F. Common Litigation Contexts in District Court:**

i. Seller attempts to recover possession of property due to alleged non-payment: Option contract seller may have attempted to evict purchaser by bringing an action for summary ejectment action in Small Claims court. The parties to an option contract DO bear the relationship of landlord and tenant. Therefore, the seller can properly bring an action for summary ejectment to regain possession after default. Either side may then appeal the magistrate's decision de novo to District Court. While summary ejectment is the proper remedy to regain possession in

the option contract context, the similarities to a contract for deed may initially make the situation confusing.

ii. Purchaser attempts to enforce contract after seller fails to convey upon exercise of option. Parties often undertake to draft option contracts without benefit of counsel, and may not know about or strictly conform to the statute, resulting in ambiguity as to the nature of the contract. *See*, *e.g.*, *Lee v. Cooper*, 801 S.E.2d 371, 372 (N.C. Ct. App. 2017). For example, parties may entitle a contract "Rent to Own," suggesting a residential lease plus option contract, when the actual nature of the transaction is that of a contract for deed. Additionally, many option contracts may have been drafted prior to the enactment of Chapter 47G in 2010, and may thus contain even less of the statutorily defined contents that would help determine the nature of the contract. The trier of fact may need to rely on pre-enactment case law for guidance.

VI. **Special Topic: Automobile repossessions and deficiency actions.** Creditors who repossess a vehicle, and then re-sell it, have the right to bring an action against the consumer for any amount remaining on the debt after the sale. Repossession conduct and post-repossession "deficiency" actions can spark consumer claims and counterclaims.

**A. UCC claims**: Most automobile sales are secured transactions, that is, credit transactions in which payment of debt is guaranteed or "secured" by collateral which the debtor owns or in which the debtor has a legal interest. If the debtor defaults on the payment obligation, the secured party (e.g., a creditor on a car loan) has the right to enforce its security interest by repossessing the collateral. Secured transactions are governed by the Uniform Commercial Code. N.C.G.S. § 25-9-601 et seq. details the repossession process that a creditor must follow, and provides for counterclaims on multiple bases.

In very simplified terms, a valid security interest is evidenced by (1) A security agreement, that is, a record signed by the debtor showing intent to create a security interest in reasonably identified collateral; (2) Consideration (that is, the extension of credit); and (3) a debtor with rights in the collateral or the power to transfer rights in it to the secured party. If the creditor has a valid security agreement, then it has the option to repossess upon default. Default conditions are sometimes defined in the security agreement; if not, default occurs upon failure to perform or pay at the time performance or payment is due.

The secured party may repossess without judicial process, so long as it does not "breach the peace." N.C.G.S. § 25-9-609(b)(2). Disposition of the collateral must be "commercially reasonable." N.C.G.S. § 25-9-610(b). The secured party must provide pre-disposition notice to the debtor (N.C.G.S. § 25-9-611) "within a reasonable time" (N.C.G.S. § 25-9-612) using a statutory form (N.C.G.S. § 25-9-614). Post-disposition, the secured party must provide the debtor with an explanation of the calculation of any surplus or deficiency. N.C.G.S. § 25-9-616.

The UCC does provide for a right to redeem collateral after default at any time up to the secured party's disposition of the collateral. N.C.G.S. § 25-9-623.

A consumer may bring affirmative claims or counterclaims under the UCC for, among other violations, repossession of vehicle without a valid security interest; breach of the peace during repossession; repossession despite lack of default; improper or non-notice of disposition of the repossessed vehicle; failure to sell repossessed vehicle in a commercially reasonable manner; failure to send notice of deficiency or surplus post-sale; and failure to respond to various information requests from the consumer about his or her account. Actual damages may include, but are not limited to, the loss of the value of the vehicle, pursuant to N.C.G.S. § 25-9-625(b) and (c)(1). There are also small statutory damage amounts applicable to some UCC claims. See, e.g., N.C.G.S. § 25-9-625(e)(5).

**B. TILA claims**: The Truth in Lending Act, at 15 U.S.C. §§ 1601 et seq., requires up-front disclosure of various terms of consumer credit transactions. For example, the party financing a closed-end credit transaction, such as a car loan, must disclose, among other terms, the amount financed, the finance charge, the annual percentage rate, the total number of payments, and the payment schedule. Larger dealers have automated the disclosure process, providing some degree of accuracy. Smaller dealers, particularly used vehicle dealers, may provide inaccurate disclosures, or may make no disclosures at all. TILA also regulates the advertising of credit terms.

Consumers bringing claims under TILA can win actual and statutory damages, as well as attorney fee awards. Affirmative suits brought by consumer plaintiffs are typically removed to federal court under federal question jurisdiction. Thus, TILA claims heard in state court are usually those that arise in response to collection actions. TILA has a one-year statute of limitations, but consumers may assert TILA claims "more one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off." 15 U.S.C. § 1640(e).

**C. N.C. Retail Installment Sales Act claims**: Chapter 25A of the North Carolina General Statutes applies to consumer credit sales. This statute requires close reading, as its provisions are very specific as to definition and application of finance charges, default charges, payment deferral charges, and the like. Consumers may have claims against sellers (or assignees) related to, among other things, illegal default charges, improper finance charges, failure to honor payment deferral agreements, etc.. Remedies for improper finance charges can be quite severe, to the point of voiding the contract and allowing the buyer to retain the vehicle with no further payment obligation. Under N.C.G.S. § 25A-44(3), a seller (or assignee) who fails within ten days of a demand to refund rebate improper charges is liable for three times the sum of all improper charges.

Knowing and willful violations of the Retail Installment Sales Act are deemed unfair and deceptive trade practices, meaning that a consumer can bring a claim for treble damages under N.C.G.S. 75-1.1. N.C.G.S. § 25A-44(4).

In addition, if the seller (or assignee) files suit and loses, the court "shall allow a reasonable attorney's fee" to the consumer's attorney. N.C.G.S. § 25A-21. Similarly, the court may allow a prevailing seller "reasonable attorney's fee" to be taxed to the buyer.

**D. State Tort claims**: The circumstances of the repossession itself may give rise to claims for conversion, assault, battery, false imprisonment, and intentional infliction of emotional distress.

For example, if consumer was not in default on the car loan, or if there was not a valid security agreement designating the vehicle as collateral, repossession constitutes conversion. *See*, *e.g.*, *Hicks v. Dunn-Benson Ford, Inc.*, No. COA08-1088, 2009 N.C. App. LEXIS 727 (Ct. App. June 16, 2009) (where consumer plaintiff alleged that defendant dealer repossessed her vehicle due to post-sale financing denial, but retail installment sale contract was not conditioned on successful financing, plaintiff's conversion and N.C.G.S. § 75-1.1 claims presented material issues of fact to be resolved by the trial court).

Particularly common in actions regarding dealer-financed used car purchases, the consumer may have claims for fraud, misrepresentation, unfair/deceptive trade practices, and/or breach of express warranty, as well.

If any of these state tort claims are viable, punitive damages may also be warranted.

**E. Third-party Defendants**: In a post-repossession deficiency action, the plaintiff will be a finance company, a dealer-financer, or a debt buyer who has purchased the right to sue on the deficiency. If the consumer has claims against non-parties, such as the original finance company, the seller, or a repossession company, they may be sued separately or joined in a deficiency as third-party defendants.

**F. Surety bond**: If the consumer has claims or counterclaims against a dealer, the dealer's surety may be a proper co-defendant. N.C.G.S. § 20-288(e) requires that motor vehicle dealers furnish a corporate surety bond of $50,000. A purchaser of a motor vehicle may institute an action against the dealer and its surety if the purchaser has suffered any loss or damage by any act of the dealer that constitutes a violation of Articles 12 or 15 of Chapter 20 of the North Carolina General Statutes. Most of the conduct that gives rise to counterclaims against a seller also constitutes unfair and deceptive trade practices, which violate Article 12 of Chapter 20 at N.C.G.S. § 20-294(6).

VII. **Special Topic: Medical Debt Cases**. Health care providers may bring suit over medical debt.

**A. Quantum Meruit as a Basis for Liability**: Even if there is not a valid contract for medical services, a consumer may be held liable in quantum meruit for the reasonable value of services rendered. *Forsyth County Hosp. Authority, Inc. v. Sales*, 82 N.C. App. 265, 346 S.E.2d 212 (1986), rev. denied, 318 N.C. 415, 349

S.E.2d 594 (1986). A contract may obligate the consumer to pay other than the reasonable value. See *Shelton v. Duke Univ. Health Sys., Inc.*, 179 N.C. App. 120, 633 S.E.2d 113 (2006), *rev. denied*, 643 S.E.2d 591 (N.C. Feb 15, 2007).

**B. Establishing Reasonable Value**: If not challenged on summary judgment, provider's affidavits as to the reasonableness of its charges are sufficient evidence of its right to payment of the amount claimed owed! Charlotte-Mecklenburg Hosp. Auth. v. Talford, 727 S.E.2d 866 (2012). The consumer may counter with evidence of the amount(s) that Medicaid, Medicare, government insurance plans, private insurers, and HMO's reimburse the medical care provider for similar goods/services; evidence regarding price comparison studies for the local area/region; or information on the percentage by which prices for the goods/services at issue have increased from year to year.

**Reduction of Balance Due Amount**: Consumer may seek to strike charges for goods/services that were not medically necessary; charges for goods/services that were necessary only because of medical care provider's own negligence or error; double-billed charges; charges for goods/services not actually provided; and overcharges resulting from incorrect diagnostic coding. Key document evidence would be an itemized accounting of all charges and the consumer's full medical record, as well as explanations of benefits (EOBs) from the consumer's insurer.

Provider or expert testimony may be necessary to make some of these determinations. *See*, *e.g.*, *Duke Univ. Health Sys. v. Sparrow*, 229 N.C. App. 196, 749 S.E.2d 113 (2013). In *Sparrow*, consumer defendant's defense to medical debt collection was that the hospital caused the infection whose treatment gave rise to the debt. The appellate court held that a lay witness's affidavit that he believed the hospital caused defendant's infection was insufficient to raise a genuine issue of material fact as to hospital's liability. The court affirmed summary judgment for the hospital for the full amount of the debt.

**C. Doctrine of Necessaries**: One is liable for the reasonable value of medical care received by his or her spouse. *Forsyth Memorial Hospital v. Chisholm*, 342 N.C. 616, 621, 467 S.E.2d 88, 90-91 (1996); *N.C. Baptist Hospitals v. Harris*, 319 N.C. 347, 353, 354 S.E.2d 471, 474 (1987). Consumer is likely not liable for interest, late charges, attorney fees, or collection costs accruing on unpaid medical debts of the spouse.

**D. Negligence/Malpractice counterclaims**: Particularly if some of the consumer's debt accrued as a result of treatment for illness or injuries that arose due to medical error, the consumer may be pursuing or plan to pursue personal injury claims against the provider seeking payment, and such amounts could offset the collection award (or vice versa).

In addition, where a medical professional terminates an ongoing course of treatment due to nonpayment of medical bills, the conduct may constitute negligence, and the consumer may have filed a complaint with the appropriate

licensing board. See *Watkins v. North Carolina State Bd. of Dental Examiners*, 358 N.C. 190, 593 S.E.2d 764 (2004).

**E. Nursing home debts**: The federal Nursing Home Reform Act at 42 U.S.C. § 1395i-3(c) (5)(A)(ii) and 42 U.S.C. § 1396r(c)(5)(A)(ii) prohibits skilled nursing facilities from requiring a third party, such as a resident's family member, to become financially responsible for expenses as a condition of admission.

If a facility requires such an agreement, that agreement is likely illegal and unenforceable. It should also be subject to a defense of assent under duress, and failure due to lack of consideration.

**F. Medical Debt Payment Plans/Third-Party Financing of Medical Debt**: More and more often, health care providers are connecting consumers with lenders who can provide up-front financing, particularly in the area of elective procedures such as LASIK, plastic surgery, and orthodontics. Such payment arrangements may fall under the Truth In Lending Act. If so, consumer may have defenses and counterclaims for TILA violations, such as failure to make required disclosures.

**G. Insurers**: If part of the consumer's defense is the failure of an insurer to pay, the consumer may bring third-party claims against the insurer for misrepresentation, breach of contract, ERISA violations, Chapter 58 (Insurance) violations, etc.